

## CONSTRUCTION LAW UPDATE

### PLAINTIFF CANNOT ENFORCE AN AWARD OF COSTS AND INTEREST IN 11580 ACTION

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By: Renée M. Botham

California Insurance Code Section 11580 allows an injured third party claimant to recover a judgment obtained against a defendant from the defendant's insurer. A third party claimant is essentially a plaintiff in a lawsuit who is not an insured under the defendant's insurance policy. Once that plaintiff has secured a judgment against the insured defendant, the plaintiff becomes a judgment creditor of the insured defendant and can bring a legal action against the defendant's insurer to obtain payment of the judgment by the insurer. In essence, Section 11580 makes the judgment creditor a third party beneficiary of the insurance contract between the insurer and the insured defendant. However, as a third party beneficiary, the judgment creditor can only enforce those promises made directly for his or her benefit. (*San Diego Housing Com. v. Industrial Indemnity Co.*, (2002) 95 Cal. App. 4<sup>th</sup> 669, 691-692)

In a recent California Court of Appeal decision in a case entitled *Clark v. California Insurance Guarantee Association*, (2011) 200 Cal. App. 4<sup>th</sup> 391, the Court decided that costs and interest awarded as part of the judgment against the insured defendant are not recoverable from the insurance carrier in a Section 11850 action. The Court reasoned that the insurer's obligation to pay costs and interest, as expressed in the "supplementary payments" provision of the insurance policy, is linked to the insurer's obligation to defend its insured and the obligation to defend is a covenant in the policy that runs only to the insured. Thus, the supplemental payments provision of the policy gives the right to recover costs taxed against the insured only to the insured who was directly owed the defense duty. The court found that a third party judgment creditor is merely an incidental beneficiary of obligations, like the supplemental payments provision, that rise under the duty to defend. Therefore, unless the judgment creditor obtains an assignment by the insured of its rights under the insurance contract, the judgment creditor has no right to bring a claim upon a duty owed only to the insured. (*Id.* at p. 399)

It is also worth noting that the *Clark* case involved a judgment creditor who had been injured on a construction site and obtained a judgment in the ensuing lawsuit against one of the contractors on the project. The contractor's insurer was declared insolvent before judgment was entered and, therefore, the judgment creditor was seeking to recover its judgment from the California Insurance Guarantee Association, also known as CIGA. CIGA is an entity created by statute which pays claims covered by an insolvent insurer. When pursuing recovery from CIGA, the option of obtaining an assignment from the insured is not available. (*Id.*)