

2011 Sacramento Legal Seminar and Webinar

Thursday, November 10, 2011
Hosted by Low, Ball and Lynch



Insurance Coverage Update

Significant cases by Low, Ball & Lynch
Partner David Blinn

SIGNIFICANT INSURANCE COVERAGE CASES OUTLINE

I.	SIGNIFICANT DECISIONS-SUPREME COURT	1
II.	SIGNIFICANT PENDING SUPREME COURT CASES	1
III.	LIABILITY INSURANCE	2
	A. MISCELLANEOUS	2
	B. AUTOMOBILE INSURANCE	4
	C. DUTY TO DEFEND	5
	D. BAD FAITH	7
	E. PROCEDURAL ISSUES	7
IV.	PROPERTY INSURANCE	9

SIGNIFICANT INSURANCE COVERAGE CASES
2010-2011

I. **SIGNIFICANT DECISIONS—SUPREME COURT**

- A. Minkler v. Safeco Ins. Co. of America
(2010) 49 Cal.4th 315

Intentional act exclusive for “an” insured applies separately for each insured if policy has a severability of interest provision.

- B. Village Northridge HOA v. State Farm Fire & Casualty Co.
(2010) 50 Cal.4th 913

Insured may not sue insurer for fraud for inducing release of claim unless rescission of release accomplished.

- C. Ameron Int’l Corp. v. ICSOP
(2010) 50 Cal.4th 1370

Duty to indemnify insured for settlement of dispute with Department of Interior Contract Board depends on language of insuring agreement and whether it is limited to “suits.”

- D. Century-National Ins. Co. v Garcia
(2011) 51 Cal.4th 564

Under Insurance Code Section 533, fire insurance policy could not exclude coverage for innocent insureds based on wrongful act of other insured despite language in policy to the contrary.

II. **SIGNIFICANT PENDING SUPREME COURT CASES**

- A. State of California v. Continental Ins. Co.
(2009) 169 Cal.App.4th 1114 (Rev. granted 3/18/09)

In case involving clean-up of hazardous waste site, state may recover beyond limits of any one liability insurance policy period.

- B. Kaiser Cement and Gypsum Corp. v Ins. Co. of State of Pennsylvania
(2011) 196 Cal.App.4th 140 (Rev. granted 8/24/11)

Exception to horizontal exhaustion of limits rule. Where one carrier has successive per occurrence policies, not all need be exhausted before excess carrier's duty to defend arises. Currently before Supreme Court on anti-stacking issues per State of California v. Continental Ins.

- C. Zhang v. Superior Court
(2009) 178 Cal.App.4th 1081 (Rev. granted 2/10/10)

While alleged violations of the insurance regulations will not support a cause of action for bad faith, these allegations may be grounds for a bad faith claim if they also violate the Unfair Competition Law.

III. LIABILITY INSURANCE

A. MISCELLANEOUS

1. Baker v. National Interstate Ins. Co.
(2010) 180 Cal.App.4th 1319

Products-Completed Operations Exclusion applied to claim arising from insured's inspection services independent of sale of product.

2. Total Call International v. Peerless Ins. Co.
(2010) 181 Cal.App.4th 161

Policy advertising coverage did not obligate defense of case where advertising allegedly exaggerated insured's product quality and did not disparage another's product.

3. State Farm General Ins. Co. v. JT's Frames, Inc.
(2010) 181 Cal.App.4th 429

Fax blasting claims against insured not covered as advertising injury or property damage.

4. Forecast Homes, Inc. v. Steadfast Ins. Co.
(2010) 181 Cal.App.4th 1466

Insurance company had no duty to indemnify additional insured where policies' self-insured retention provisions could only be triggered by named insureds.

5. Hyundai Motors America v. National Union Fire Ins. Co.
600 F.3d 1092 (9th Cir. 2010)

Insurer has duty to defend insured against third-party patent infringement claims alleging that insured's web-based advertisement violated patent.

6. Carolina Casualty Ins. Co. v. L.M. Ross Law Group, LLP
(2010) 184 Cal.App.4th 196

Insurance policy term excluding coverage for claim in connection with business enterprise controlled by insured validly precludes coverage.

7. Pennsylvania General Ins. Co. v. American Safety Indemnity Co.
(2010) 185 Cal.App.4th 1515

Policy issued to subcontractor with Montrose exclusion did not eliminate potential coverage for damage during policy period.

8. SBBC Inc. v. St. Paul Fire & Marine
(2010) 186 Cal.App.4th 383

Insurer had no duty to defend lawsuit alleging insured hired employee of competitor to obtain information to solicit customers of competitor under either Advertising or Personal Injury Coverage of policy.

9. Clarendon America Ins. Co. v. North America Capacity Ins. Co.
(2010) 186 Cal.App.4th 556

Insurer did not establish self-insured retention applied to each home involved in construction defect lawsuit, as opposed to action as a whole, so as to eliminate the duty to defend.

10. L.A. Checker Cab Corporation, Inc. v. First Specialty Insurance Co.
(2010) 186 Cal.App.4th 767

Insurer had no duty to defend or indemnify insured in assault and battery case, despite claims of self-defense or negligent training or supervision.

11. Howard v. American National Fire Ins. Co.
(2010) 187 Cal.App.4th 498

Insurer had duty to indemnify third party claim against insured's employee for molestation occurring during policy period.

12. HCM Healthcare v. CIGA
(2010) 187 Cal.App.4th 1317

CIGA cannot cover claim of policyholder where insurer became insolvent if claim not covered under Insurance Code § 1063.1 because filed too late.

13. Mackay v. Superior Court
(2010) 188 Cal.App.4th 1427

Once an insurance rate has been approved by the DOI, it may be challenged through administrative process (and judicial review thereof), but it is not subject to a civil action to challenge the rate.

14. Villa Los Alamos HOA v State Farm General Ins. Co.
(2011) ___ Cal.App.4th ____

The release of asbestos from a property is excluded under the pollution exclusion in a first party property insurance policy.

B. AUTOMOBILE INSURANCE

1. Dominguez v. Financial Indemnity Co.
(2010) 183 Cal.App.4th 388

Provision in automobile policy limiting liability coverage for permissive users sufficiently conspicuous, plain and clear to be enforceable.

2. Hervey v. Mercury Ins. Co.
(2010) 185 Cal.App.4th 954

Deletion of medical payment offset or reimbursement applied only to liability coverage, not uninsured motorist coverage.

3. Blankenship v. Allstate Ins. Co.
(2010) 186 Cal.App.4th 87

Insured's minority does not excuse compliance with two-year limitation period of § 11580.2(i).

4. Sprinkles v. Associated Indemnity Corp.
(2010) 188 Cal.App.4th 69

Automobile exclusion in Comprehensive General Liability policy applied to eliminate coverage for employee of insured for accident that occurred in course of employment.

C. DUTY TO DEFEND

1. Fire Ins. Exchange v. Superior Court
(2010) 181 Cal.App.4th 388

Insurer had no duty to defend homeowner in action by adjoining landowners for structural encroachment under homeowner policy that did not cover non-accidental occurrences.

2. Intergulf Development v. Superior Court
(2010) 183 Cal.App.4th 16

Insurer is not entitled to arbitrate fee dispute when determination of whether insurer had duty to defend had not yet been made.

3. Risely v. Inter-Insurance Exchange of the Automobile Club
(2010) 183 Cal.App.4th 196

Defense provided under one policy does not insulate insurer from liability for alleged breach of duty to defend under second policy.

4. Legacy Vulcan Corp. v. Superior Court
(2010) 184 Cal.App.4th 285

Policy that provides both excess and umbrella coverage has duty to defend action potentially covered and insured not required to pay self-insured retention to trigger that duty.

5. Clarendon America Ins. Co. v. StarNet Ins. Co.
(2010) 186 Cal.App.4th 1397

Duty to defend includes duty to defend proceedings under Calderon Act.

6. Colony Ins. Co. v. Crusader Ins. Co.
(2010) 188 Cal.App.4th 743

Insurer had no duty to defend litigation where insured made material misrepresentations in application for insurance.

7. Advantage Network, Inc. v. Peerless Ins. Co.
(2010) 190 Cal.App. 4th 1054

A conversion claim does not give rise to coverage under a CGL policy under the "loss of use" definition of property damage in the policy.

8. Shanahan v. State Farm Ins. Co.
(2011) 193 Cal.App 4th 780

On a sexual harassment claim, there is no coverage for "potential" covered claims not specifically plead in the complaint or reasonably inferred from the facts as plead in the complaint.

9. Clarendon America Ins. Co. v. General Security Ind. Co. of Az.
(2011) 193 Cal.App.4th 1311

There is no coverage under a products completed operations hazard provision in policy issued to contractor after owner terminated construction contract where home was not completed at the time work stopped.

10. State Farm General Ins. Co. v. Frakes
(2011) 197 Cal.App.4th 568

Focal determination for the duty to defend is not the result of the insured's action, but whether the action itself was intended. An accident does not occur when the insured performs a deliberate act unless some additional, unexpected, independent and unforeseen happening occurs that produces the damage.

11. California Traditions v. Claremont Liability Ins. Co.
(2011) 197 Cal.App.4th 410

Although homes constructed by sub-contractor had all the appearance of single family homes, where they were marketed as condominiums, exclusion for condominiums and/or townhomes was applicable to deny coverage.

12. Ulta Salon v. Travelers Property & Casualty Co. of America
(2011) 197 Cal.App.4th 424

Where plaintiff plead one cause of action for violation of Proposition 65 regarding alleged failure to warn of toxic product, there was no duty to defend absent any allegation of bodily injury to the plaintiff.

D. BAD FAITH

1. Amerigraphics, Inc. v. Mercury Casualty Co.
(2010) 182 Cal.App.4th 1538

Award of punitive damages against insurer for bad faith, which is ten times the amount of compensatory damages, is constitutionally excessive.

2. Blue Shield of California Life & Health Ins. Co. v. Sup. Ct.
(2011) 192 Cal.App.4th 727

Two year bad faith statute of limitations held not applicable due to Insurance Code requirement that health insurance policies contain language providing for three years from proof of loss.

3. Richards v. Sequoia Ins. Co.
(2011) 195 Cal.App.4th 431

A plaintiff on a bad faith claim who is also an attorney is not entitled to recover as damages their own fees for their time spent on their claim.

4. Hughes v. Progressive Direct Ins. Co.
(2011) 196 Cal.App.4th 754

A private right of action for violation of Insurance Code Section 758.5 (involving disclosures about auto repair shops) may be stated under Unfair Competition Laws.

E. PROCEDURAL ISSUES

1. Interstate Fire & Casualty Ins. Co. v. Cleveland Wrecking Co.
(2010) 182 Cal.App.4th 23

Insurer's claim for equitable subrogation not undermined by insured's lack of out-of-pocket damages.

2. Scottsdale Ins. Co. v. Century Surety Co.
(2010) 182 Cal.App.4th 1023

Insurer seeking contribution for defense and indemnity payments involving multiple insurers not entitled to half of its payments, but rather entitled to fair share of costs.

3. Gray v. Begley
(2010) 182 Cal.App.4th 1509

Defending insured under reservation allows insurer right to intervene to obtain credit for settlement made by co-defendant.

4. United Enterprises, Inc. v. Superior Court
(2010) 183 Cal.App.4th 1004

Stay of declaratory relief action is proper remedy for coverage action while underlying action is pending, not sealing of court records.

5. Essex Ins. Co. v. Richard Heck, M.D.
(2010) 186 Cal.App.4th 1513

Insurer barred from equitable subrogation claim because it impliedly waived right when it settled prior action without allocating settlement amounts.

6. Mallard v. Progressive Choice Ins. Co.
(2010) 188 Cal.App.4th 531

Use of subpoena to conduct discovery in contractual arbitration of uninsured motorist claim is act arising from protected activity for Anti-SLAPP purposes.

7. Arrowood Indemnity Co. v. Travelers Indemnity Co.
(2010) 188 Cal.App.4th 1452

Equitable contribution claim between defending and non-defending carrier. Once defending carrier shows duty to defend, burden shifts to non-defending carrier to show no actual coverage.

8. Dobbas v Vitas
(2011) 191 Cal. App.4th 1442

Equitable subrogation is not available against a party that has committed to providing insurance, but has not bound itself to otherwise indemnify or make a party whole. Only equitable contribution is available in such a situation.

9. Housing Group v. PMA Capital Ins. Co.
(2011) 193 Cal.App.4th 1150

Where evidence supported finding that carrier had not actually accepted defense, it was not entitled to arbitrate issue of Cumis fees just because it had not expressly denied defense.

10. American Modern Home Ins. Co. v Fahmian
(2011) 194 Cal.App.4th 162

Carrier who timely issues reservations of rights for uncovered claim may recover indemnity and defense costs if advises insured of intent to settle unless insured assumes its own defense.

11. Kirkwood v. California State Automobile Association
(2011) 193 Cal.App.4th 49

Carrier's right to proceed with appraisal on fire loss stayed pending insured's litigation of appropriate methods of same, including determination of depreciation.

IV. PROPERTY INSURANCE

- A. Abdelhamid v. Fire Insurance Exchange
(2010) 182 Cal.App.4th 990

Insured's failure to provide information requested in insurer's investigation of fire loss materially breached her contract, justifying denial of coverage.

- B. Barnett v. First National Ins. Co. of America
(2010) 184 Cal.App.4th 1454

Water damage to home from storm was caused by surface water and thus not covered.

- C. MRI Healthcare Center of Glendale, Inc. v. State Farm General Ins. Co.
(2010) 187 Cal.App.4th 766

Loss of MRI machine shut down to repair a roof not covered under property policy since there was no physical loss due to an accident.

- D. Chicago Title Ins. Co. v. AMZ Insurance Services, Inc.
(2010) 188 Cal.App.4th 401

Evidence of insurance issued by agent was lawful binder obligating carrier to pay for fire loss.



DAVID L. BLINN

DAVID L. BLINN joined Low, Ball & Lynch as a trial attorney in 1986. Mr. Blinn specializes in insurance coverage, construction defect litigation, premises liability and personal injury defense. He is also active in handling SIU work. He is admitted to the California Bar and the U.S. Court of Appeals, Ninth Circuit.

Mr. Blinn is a native Californian, born in Santa Barbara and living most of his life in the San Francisco Bay Area. He graduated from the University of California at Los Angeles (B.A., 1983) and from the Santa Clara University School of Law (J.D., 1986), where he was the recipient of the American Jurisprudence Award for Contracts.

Mr. Blinn is a member of The State Bar of California, as well as the San Mateo County Bar Association, the Association of Defense Counsel of Northern California and Nevada, and the Northern California Fraud Investigators Association.

E-Mail: DBlinn@Lowball.com