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TRENDS

First Quarter, 2004

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CASUALTY & COVERAGE

COURT OF APPEALS HOLDS THAT SELF-INSURED COMPANIES CANNOT SEEK REIMBURSEMENT FROM CIGA FOR PAYMENT OF WORKER'S COMPENSATION BENEFITS

FACTS: Plaintiff was injured at work when a door fell on him. Nutrilite Products, plaintiff's employer, sought reimbursement from the California Insurance Guarantee Association (CIGA) after paying worker's compensation benefits out of its self-insured program for its employee. Later, the employee sued the door company and Nutrilite filed a complaint to intervene. Because the door company's insurer was insolvent, Nutrilite sought the same reimbursement directly from the door company, as well as from CIGA.

PROCEDURAL HISTORY: The court ruled against Nutrilite because the claim was not a "covered claim" under Insurance Code 1063.1. Nutrilite was found to be an "insurer" not subject to reimbursement from CIGA. Nutrilite appealed.

ISSUE: 1) Can an employer, who is self-insured and is thus considered to be an "insurer," make a worker's compensation subrogation "covered claim" from CIGA for reimbursement? And if not, 2) can an employer, as an "insurer," recover worker's compensation money from the manufacturer of the product that caused injury to its employee when CIGA reimbursement is unavailable?

HOLDING: No to both.

ANALYSIS: The court ruled the complaint for intervention was barred by Insurance Code section 1063.1(c)(5) because Nutrilite, as a "permissively self-insured employer" was considered an "insurer" under Labor Code section 3211 and because Nutrilite was making a subrogation claim. CIGA was formed to provide insurer insolvency insurance for its members and as such, pays for "covered claims" for the "obligations of an insolvent insurer." (Ins. Code section 1063).

In California Ins. Guarantee Assn. V. Argonaut Ins. Co., 227 Cal.App.3d 624 (1991) the facts were the same as in the present case. Argonaut intervened in its employee's suit for reimbursement against the manufacturer whose product hurt its employee. Manufacturer's insurance company was also insolvent. Argonaut also sought reimbursement from CIGA. The court found that section 1063.1 did not allow CIGA to pay Argonaut because the statute excluded obligations to insurers and claims made for subrogation as "covered claims." The court reasoned that CIGA was not meant to be a pool of funds to protect other insurance companies from insolvent members, but rather, to provide additional protection to the injured public. Moreover, the Legislature did not intend that CIGA was meant to protect employers, as self-insurers, but rather, to protect employees as members of the insured public.

Therefore, the court held that an authorized, self-insurer who provides worker's compensation insurance, is considered an "insurer" providing "other insurance" under section 1063.1(c)(9). Thus, Nutrilite's claim was excluded as a "covered claim" and CIGA was not responsible for reimbursing them for moneys paid to their employee.
John Michael Roth v. L.A. Door Co., and Nutrilite Products (2004) 115 Cal.App.4th 1249

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COURT OF APPEALS HOLDS THAT COSTS INCURRED BY "INDEPENDENT COUNSEL" ARE NOT SUBJECT TO ARBITRATION

FACTS: Plaintiff Gray Cary sued on behalf of a client, whereby the defendant in an earlier action counter-claimed against Gray Cary and one of its investigators. Gray Cary was the named insured in a general liability policy issued by Vigilant, the defendant in this action. Vigilant agreed to defend Gray Cary in the earlier action under a reservation of rights. Since the reservation created a conflict of interest, Gray Cary defended itself as independent counsel under Civil Code 2860 with Vigilant's approval. However, Gray Cary also provided a third party defense to its investigator and sought reimbursement from Vigilant for those attorney's fees and costs. Vigilant refused.

PROCEDURAL HISTORY: Plaintiff requested arbitration under Civil Code section 2860(c); defendant refused to arbitrate. Plaintiff then filed a petition to compel arbitration under 2860(c). The trial court denied the petition. Plaintiff appealed.

ISSUE: When a conflict of interest arises between the insurer and its insured, does Civil Code 2860(c) require arbitrating disputes between an insurer and its independent counsel over defense expenses or costs incurred by independent counsel while representing the insured?

HOLDING: No.

ANALYSIS: Plaintiff argued the language "attorney fees" under the statute should be expanded to encompass defense costs incurred by independent counsel. The court rejected that interpretation because the clear language of the statute regarding "fees" showed that the definition of "fees" is in contrast with "costs." And as such, the meaning of "fees," which is covered under the statute, does not include costs or expenses.

Moreover, the court reasoned that the legislature did not intend parties to arbitrate disputes involving independent defense costs or expenses after reading the plain language of the statute. The court found that if the legislature were to require parties to arbitrate such defense *expenses*, as well as attorney *fees*, it would have said so in the statute. Furthermore, no courts have held that independent counsel defense *costs* are equal to independent counsel attorney *fees* under this section of the statute. Therefore, while parties can agree to arbitrate the issue of paying defense costs or expenses along with attorney fees, the court will not read 2860(c) as requiring arbitration.

Gray Cary Ware & Freidenrich v. Vigilant Ins. Co., (2004) 114 Cal.App.4th 1185

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GENERAL TORTS

COURT OF APPEALS HOLDS THAT THE NEW STATUTE OF LIMITATIONS DOES NOT APPLY TO PERSONAL INJURY CASES RETROACTIVELY

FACTS: Plaintiff suffered a personal injury on defendant's premises on January 26, 2001, but filed his personal injury action on January 8, 2003. At the time of filing, the new statute of limitations, CCP 335.1, extended the old one-year limit on filing personal injury actions. Plaintiff's statute ran out on January 26, 2002 under the old statute of limitations. Plaintiff argued that the new statute applied retroactively to cover his claim.

PROCEDURAL HISTORY: The trial court held plaintiff's claim was time barred by the new statute of limitations and dismissed it with prejudice. Plaintiff appealed.

ISSUE: Does the new statute of limitations extending the one-year time limit for filing personal injury actions apply retroactively?

HOLDING: No.

ANALYSIS: The court reasoned that generally statutes operate in the future, or operate prospectively only. But the plaintiff argued that the legislature intended to apply this statute retroactively to all personal injury victims. The court disagreed, noting that this statute, CCP 335.1, did not expressly provide for retroactive application in its language. But the legislature did specifically single out one class of plaintiffs for special treatment: September 11 terrorist victims. Those victims as a class were expressly entitled to retroactive application of the statute of limitations.

Furthermore, under the rules of statutory construction, exceptions to a general rule are clearly spelled out by statute. But other exceptions are not to be implied or presumed from the statutory language. Here, the only specified exception to the general rule, that statutes operate prospectively, was applied only to 9/11 terrorist victims. Therefore, the Court found that any other exceptions to the general rule were not implied or presumed.

John Krupnick v. Duke Energy Morro Bay, LLC, (2004) 115 Cal.App.4th 1026

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COURT OF APPEAL HOLDS THAT TEMPORARY EMPLOYMENT AGENCIES CAN BE LIABLE FOR THE SEXUAL HARASSMENT OF ITS CLIENT/EMPLOYERS

FACTS: Plaintiff was sent to work for an aerospace company by a temporary employment agency. Plaintiff accepted the position even though her ex-boyfriend, with whom she had very bad relations, also worked there. The ex-boyfriend allegedly harassed her and Plaintiff reported it several months later to her supervisor at the aerospace company. Plaintiff was terminated, allegedly for economic reasons. Plaintiff reported to the temporary employment agency that she believed she was being terminated for complaining about sexual harassment on the job by the ex-boyfriend, but the agency allegedly failed to investigate or do anything about it.

PROCEDURAL HISTORY: The trial court granted the Defendant/temporary employer's MSJ/MSA on the grounds that (1) It was not her "employer" for purposes of FEHA; (2) Plaintiff did not inform it about her claims of sexual harassment until after she had been terminated, and 3) Plaintiff was denied punitive damages. Plaintiff appealed.

ISSUE: Can a temporary employment agency be held liable for retaliation under FEHA where it allegedly failed to investigate allegations of sexual harassment by the hiring employer?

HOLDING: Yes

ANALYSIS: The court held that a temporary employer can be held liable for sexual harassment, discrimination or retaliation under FEHA. In this case, a temporary employer was potentially liable for damages for failing to correct the reported incident of retaliation by the hiring company. However, the court found that the MSA was properly granted on the cause of action for sexual harassment because the harasser was an employee of the hiring company and plaintiff did not report it to the agency until it was too late.

Furthermore, plaintiff failed to file her action within one year from the date of termination. At the time of this claim, the one-year statute of limitations was in effect. But the period was not tolled during the time that her DFEH administrative claim was pending.

Lastly, the court held that the MSA was properly granted on the punitive damage claim. The court found that the fact that the agency failed to investigate her claim and did not have a policy for responding to job harassment did not warrant the recovery of punitive damages.

Manhieu v. Norrell Corp., 115 Cal.App.4th 1174 (2004)

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REVERSAL OF $2 MILLION WRONGFUL DEATH AWARD THAT WAS BASED ONLY ON EMOTIONAL LOSS

FACTS: A man, just released from prison, fired a gun at motorist and was restrained by the Los Angeles County Sheriff. After being restrained he became unconscious and died. His parents/plaintiffs sued for wrongful death for the sadness, grief, and sorrow over the loss of their son even though they had had little contact with their son for the past 20 years.

PROCEDURAL HISTORY: The jury awarded the plaintiffs $2 million, reduced by the decedent's negligence, to $1.3 million. The county motioned for a new trial and judgment notwithstanding the verdict. The motions were denied and the County appealed.

ISSUE: Can a plaintiff in a wrongful death action recover for loss due to grief or sorrow, or sad emotions, or the sentimental value of the loss upon the death of a loved one?

HOLDING: No.

ANALYSIS: A person may recover damages for wrongful death for his own pecuniary loss, which can include 1) loss of financial support, services, training, and 2) the value of the decedent's society and companionship, but *not* for loss due to grief, sorrow, sad emotions, or the sentimental value of the loss of a loved one. (See Overly v. Ingalls Shipbuilding, Inc., 74 Cal.App. 4th 164 (1999)) Furthermore, under CCP 377.60, children and spouses are the usual parties who make a wrongful death claim, but parents may do so, even if they have had very little contact with the decedent, if the former cannot be found to make a claim.

But on that note, it was undisputed that the plaintiffs had not seen their son for 20 years before his death. They did not know where he lived nor knew his phone number. Nor did they know he had been in prison multiple times. So under the first element above, the court found that decedent's future financial prospects at the time of his death were very limited. Under the second element, since plaintiffs had had only occasional contact with their son over 20 years, the value of decedent's society and companionship loss was minimal. Plaintiff testified that they suffered emotional distress, but this was not compensable.

The court found the jury award must have been based on the emotional loss to the parents, and perhaps, an amount to punish the County for its conduct, but also found that no rational person would value their lost "comfort, society and companionship" at $2 million. Thus, the court held that a jury award that is the result of passion of prejudice, or a punitive damages award for wrongful death, couldn't stand. (See Ford Motor Co. v. Superior Court, 120 Cal.App.3d 748, 751 (1981)).

Nelson v. County of Los Angeles (2004) 113 Cal.App.4th 783

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PRODUCTS LIABILITY

COURT OF APPEAL HOLDS THAT CAL OSHA REGS ARE ADMISSIBLE IN PRODUCTS LIABILITY CASES and LOW §998 OFFERS ARE UNREASONABLE WHERE DAMAGES ARE VERY SERIOUS

FACTS: Plaintiff, who was an employee of a ski resort, sustained serious injuries when he fell into the machinery of a ski lift he was working on. He lost his leg in the accident. He sued the defendant/manufacturer of the ski lift alleging it was a defective design and sued for negligence per se on the ground that the lift did not contain certain safety barriers as required by Cal. OSHA regulations.

PROCEDURAL HISTORY: The trial court granted defendant's motion in limine on the OSHA regulations pursuant to Lab. C. §6304.5 (limited admissibility of OSHA standards in civil case) as amended in 1999. Before trial, defendant served a §998 offer of $25,000, which was rejected by plaintiff. The jury returned a defense verdict. Plaintiff appealed.

ISSUE: 1) Are Cal. OSHA regulations admissible against a manufacturer in a product liability case, even where the manufacturer is not plaintiff's employer; and 2) Is a $25,000 §998 offer made by a defendant to a seriously injured plaintiff reasonable even though liability was in dispute, and plaintiff was probably guilty of comparative fault?

HOLDING: Yes to issue #1, and No to issue #2

ANALYSIS: Even though the statute is ambiguous, the Court interpreted the 1999 regulatory amendments to permit the admission of OSHA regulations against third party defendants as part of the intent of the regulation. On the §998 issue, the offer was found unreasonable as a matter of law because there was the possibility that the defendant would be found partially liable given the great potential for damages in the case. The court felt this was nothing more than a "token offer" which could not reasonably be accepted.

[Comment: In light of the fact the California Supreme Court has already accepted a case for review on the admissibility of §6304.5 under the 1999 amendments, there is the possibility that the Court may change the holding in issue # 1.]

Gradle v. Doppelmayr USA Inc., 116 Cal.App.4th 276 (2004)

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PROFESSIONAL LIABILITY

PLAINTIFF'S PROFESSIONAL NEGLIGENCE SUIT AGAINST INSURANCE BROKER IS BARRED BY THE STATUTE OF LIMITATIONS

FACTS: A company/plaintiff negotiates orally with and buys earthquake insurance from a broker/defendant who neglects to obtain the full coverage requested on three company buildings. The broker knew that it had only taken out coverage for one building and falsely represented to the company that full coverage had been obtained. After the 1994 Northridge earthquake, the company made a claim through its broker to the insurance company for all three buildings, but the insurance company informed the company that there was no coverage on two out of three company buildings. Plaintiff sued the broker over two years later for negligence, breach of oral contract, misrepresentation, and breach of fiduciary duty.

PROCEDURAL HISTORY: Plaintiff prevailed in trial court. The broker appealed and re-labeled all the cause of actions to become a claim for professional negligence. The court barred the suit based on the 2-year statute of limitations under C.C.P. 339.

ISSUE: Does the two-year statute of limitations in C.C.P. section 339 apply to professional negligence suits against insurance brokers who make misrepresentations about coverage, which are not in writing, but are made orally?

HOLDING: Yes.

ANALYSIS: The court found that liability on the misrepresentation claim, which was based on the agent's failure to obtain the requested insurance and making false statements that the company had the proper coverage, were the same facts supporting liability for professional negligence. As such, that claim was governed by a two-year statute of limitations under section 339(1). (See Smyth v. USAA Property & Casualty Ins. Co., 5 Cal.App.4th 1470 (1992))

As for the claim of breach of fiduciary duty, it was questionable whether this duty exists between an insurance broker and an insured. Rather, in Kotlar v. Hartford Fire Ins. Co., 83 Cal.App.4th 1116 (2000) the court held that Insurance Code 677.2 imposed a duty on an insurer to notify named insured of its intent to cancel a policy, but there is no duty on a broker to do so. In the same light, the court reasoned that the relationship between a broker and its client is not the kind to which this duty arises. Therefore, the duty of a broker is only to use reasonable care, diligence, and judgment in obtaining insurance requested by a client.

On the other hand, if an insurance agent is the agent for several companies, and acts for those companies in procuring clients, then an agency relationship exists which may give rise to a fiduciary duty as well as an obligation to use due care. (See Eddy v. Sharp, 199 Cal.App.3d 858 (1988)). But the court noted that plaintiff couldn't prolong the statute of limitations by stabbing at a fiduciary liability theory when it all boils down to professional negligence.

In short, because the broker failed to execute his obligations as an insurance broker, the two-year limitations period for professional negligence applied. And since plaintiff filed his claim over two years after the earthquake, he was barred under the statute, which began to run when the wrongful act occurred, or when the wrongful result occurred.

Moreover, the statute of limitations may be tolled. In an action by an insured against an insurer, the statute is tolled, or stopped, from the time the insured files a timely notice, under the policy provisions, to the time the insurer denies the claim, in writing. (See Prudential-LMI Com. Ins. v. Superior Court, 51 Cal.3d 674, 678 (1990)). Here, the statute was tolled until the insurance company filed an answer in the suit, but not tolled for the actions of the broker. The plaintiff knew right after the quake the broker was at fault and the statute began to run at that time. In a suit against a broker, the statute would begin to run when the insured discovered or should have discovered the facts supporting liability. Thus, by the time plaintiff filed over two years later, it was too late. (See Stark v. Pioneer Casualty Co., 139 Cal.App. 577, 582 (1934)).

Lastly, C.C.P. 340.9 revived stale insurance claims from the Northridge earthquake. Specifically, section 340.9 revived an action against an *insurer* based on an insurance policy, *not* a suit against a *broker* for malpractice. Thus, 340.9 did not revive plaintiff's claim against its broker.

Hydro-Mill Co. Inc., v. Hayward, Tilton and Rolapp Ins. Assoc. Inc. (2004) 115 Cal.App.4th 1145

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COURT OF APPEAL HOLDS THAT ATTORNEYS AND THEIR EXPERTS CAN BE DISQUALIFED FOR USING PRIVILEGED INFORMATION BELONGING TO THE OPPOSING SIDE

FACTS: This was a wrongful death product liability case involving the rollover of an SUV. The document in question was prepared by a paralegal and recorded a dialogue between defense attorneys, the paralegal and defense experts. The attorney had edited some of the notes and added his own handwritten thoughts and comments. This document was accidentally left in the deposition room and then (not by accident) was taken by the plaintiff's attorney (Raymond Paul Johnson), who proceeded to share it with his own experts without telling the defense. At trial, he used it to impeach the defense experts. When defense counsel later found out that plaintiff was using privileged information, he moved to disqualify the plaintiff attorney and his experts for using a privileged document.

PROCEDURAL HISTORY: The trial court granted the defendant's motion. Plaintiff appealed.

ISSUE: Can an attorney and his experts be disqualified during trial for their unethical conduct in reading and making use of a privileged document, belonging to opposing counsel, which was given to the attorney by accident?

HOLDING: Yes

ANALYSIS: The court found that the document the plaintiff's attorney discovered in the deposition room, because it contained the attorney's thoughts and impressions about the case, constituted attorney work-product. Such work product covers not only documents created by attorneys but also his agents, including paralegals. The court reasoned that since the document was work-product, the attorney had an ethical duty to immediately disclose inadvertently received and privileged information, and he should have refrained from examining the materials any more than was necessary to determine whether they were privileged.

However, the court stated that even though this particular document was work-product, it was not privileged under the attorney-client privilege because it did not record communications with the client. A document which records an attorney's impression for his own use, or which records conversations with experts, is not within the attorney client privilege.

Rico v. Mitsubishi Motors Corp., 116 Cal.App.4th 51 (2004)