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TRENDS

Second Quarter, 2004

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CASUALTY & COVERAGE

COURT OF APPEAL HOLDS THAT USE OF DEFECTIVE PRODUCT IN CONSTRUCTION PROJECT WAS NOT "PROPERTY DAMAGE"

FACTS: F&H was the general contractor for the construction of a water facility pumping plant. It subcontracted with the insured, O'Reilly, for the manufacture of steel pile caps. After the caps were delivered and welded to piles, F&H discovered that they were of a different grade than that called for under the subcontract. The inadequate caps resulted in structural units which were not damaged but were inadequate for the intended purpose of supporting the pumping facility. F&H modified the pile caps to meet the design requirements. The project was completed on time. F&H then sued O'Reilly for the modification costs and secured a judgment in excess of $200,000.

PROCEDURAL HISTORY: F&H sued Hartford to collect the judgment under the policy, arguing that it was for "property damage". The parties filed cross-motions for summary judgment. The trial court granted Hartford's motion and entered judgment in its favor. F&H appealed.

ISSUE: Does welding inadequate pile caps onto driven piles constitute "property damage" under a CGL policy where there is no physical injury to the piles or to other property and the defective piles are ultimately used as modified.

HOLDING: No.

ANALYSIS: The court held that the fact that the inadequate caps resulted in the welded unit being inadequate to meet contractual design specifications was not "property damage" under the policy. The court examined both the "physical injury" and "loss of use" prongs of the "property damage" definition. As to the first, the prevailing view is that the incorporation of a defective component into a larger structure does not constitute property damage unless and until the defective component causes physical injury to tangible property in at least some other part of the system. Property damage is not established by the mere failure of a defective product to perform as intended, since liability policies are not intended to serve as performance bonds. Here, the only damages alleged by F&H were the costs of modifying the pile caps and the lost bonus for early completion of the project. With respect to loss of use, the court held that F&H was not seeking damages for the rental value of project during the time that modifications were being made to the pile caps, especially since the project was completed on time.

F&H Construction v. ITT Hartford, 118 Cal. App. 4th 364 (2004)

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SUPREME COURT HOLDS THAT IMPORTANT ENDORSEMENTS IN INSURANCE POLICIES MUST BE CONSPICUOUS

FACTS: Farmers Ins. Co. had an "E-Z Reader Car Policy" which included the policy's endorsement S9064, entitled "PART I--LIABILITY--PERMISSIVE USER LIMITATION". The policy itself was 39 pages long. The first page, the declarations page, clearly lists the coverages as $250,000 per person, $500,000 per occurrence of bodily injury, and $100,000 for property damage. The endorsement S9064 decreased the limits to $15,000/$30,000/$5,000 in the event that a permissive user was driving the insured vehicle. However, these limits were not listed on the declarations page. The endorsement was simply listed by number with various other endorsements. The actual endorsement did not appear until the policy's 24th page. A permissive user who was in an accident and the named insured sued Farmers and argued that the endorsement S9064 should not be enforced.

PROCEDURAL HISTORY: The trial court granted Farmers' motion for summary judgment. The Court of Appeal reversed.

ISSUE: Does a limitation on coverage have to be placed clearly and conspicuously so as to attract the reader's attention?

HOLDING: Yes

ANALYSIS: Any provision that takes away or limits coverage reasonably expected by an insured must be "conspicuous, plain and clear." The California Supreme Court held that the endorsement must be placed in a clear and conspicuous place within the policy and the endorsement's very language with respect to the reduction of limits must be clear and conspicuous. Endorsement S9064 was only noted on the declarations page by its alphanumeric designation without any description. The declarations page did not state what the limits would be or even that endorsements constituted part of the policy or amended the policy. With regards to the endorsement's description in the policy, the language of the limitation is not bolded, italicized, or differentiated in any way. The title simply states "Permissive User," a term which is never even defined in the policy. Overall, the policy did not adequately bring the reader's attention to the policy's limitations.

Haynes v. Farmers Ins. Co., 32 Cal. 4th 1198 (2004)

COURT OF APPEAL HOLDS THAT STIPULATED JUDGMENT DOES NOT APPLY TO INSURANCE BROKER

FACTS: An insured, a nightclub owner, was issued a CGL insurance policy through its broker. The policy contained an exclusion for damages arising out of assault and battery. A patron was insured as a result of an altercation and sued the insured, which tendered the suit to its insurer. The insurer denied coverage based on the assault and battery exclusion. The insured and the underlying plaintiff ultimately entered into a stipulated judgment with a covenant not to execute in the amount of $6,000,000, with the insured assigning its rights against its insurer and its broker to the underlying plaintiff. The insured and the underlying plaintiff then sued the insurer and the broker. The insurer settled, leaving the broker as the only defendant. A bench trial was held, at which the plaintiffs argued that the stipulated judgment for $6,000,000 established the amount of damages owed by the broker.

PROCEDURAL HISTORY: At trial, the court agreed with the plaintiffs that the broker was negligent in procuring a policy that had an assault and battery exclusion in it. It further held that the broker's liability was limited to the $1,000,000 policy limits. Plaintiffs appealed.

ISSUE: Is a stipulated judgment between an insured and its insurer binding on the insurance broker which negligently procured the policy?

HOLDING: No

ANALYSIS: At trial, there was no evidence submitted as to the nature and extent of the underlying plaintiff's damages and the defenses thereto, as plaintiffs took the position that the stipulated judgment established the amount of damages. The court of appeal disagreed. Although, as a general proposition, a stipulated judgment represents the measure of damages in a bad faith refusal to defend action, unless it is established that it was reached through fraudulent or collusive means, that rule does not apply to a suit against an insurance broker for negligence in procuring insurance. It has been generally stated that the liability of one who breaches a contract to procure insurance is not that of an insurer. As a non-party to the insurance contract, the broker is not subject to the implied covenant of good faith and fair dealing. Courts have previously rejected attempts to use settlements as binding or presumptive evidence of damages outside the context of an insurer/insured relationship. Here, there having been no evidence presented to establish plaintiff's actual damages, the recoverable damages were limited to the $16,000 in defense costs incurred.

Valentine v. Membrila Insurance Services, 118 Cal. App. 4th 462 (2004)

GENERAL TORTS

COURT OF APPEAL ENFORCES PROVISION IN HOME SALES CONTRACT REQUIRING CONSTRUCTION DEFECT CLAIMS TO BE DETERMINED BY JUDICIAL REFERENCE

FACTS: Plaintiffs were owners of homes who sued the developer of the homes in a construction defect action. A total of 69 homes were involved, 43 of which were owned by those who had contract directly with the developer (the original purchasers). The purchase agreement required all disputes to be determined by a judicial referee, who was to decide all issues of law and fact and issue a final judgment. Plaintiffs argued that the reference provision was unconscionable and that enforcing it would result in a multiplicity of suits since the non-original purchasers were litigating their actions in court.

PROCEDURAL HISTORY: Defendant filed a motion to compel the suit to be heard by a referee. The trial court denied the motion and the defendant filed a writ petition challenging that order.

ISSUE: Was the reference provision in question binding on the parties?

HOLDING: Yes

ANALYSIS: The court first held that the provision was neither procedurally nor substantively unconscionable. As to the first of these, there was no evidence that the purchasers were forced into accepting this provision or that it was buried in the purchase agreement. As to the second, the provision was not harsh or oppressive – it did not limit the relief available to the plaintiffs. Moreover, the trial court abused its discretion in refusing to enforce the provision based on the possibility of multiple lawsuits. Plaintiffs could not cite a case holding that the potential for multiple actions invalidates the parties' otherwise enforceable agreement to submit disputes to a referee.

Greenbriar Homes Communities Inc. v. Superior Court, 117 Cal. App. 4th 337 (2004)

COURT OF APPEAL HOLDS THAT SUCCESSIVE HOMEOWNERS HAVE STANDING TO SUE FOR CONSTRUCTION DEFECTS THAT EXISTED PRIOR TO PURCHASE

FACTS: The subsequent owners of homes sued the builder of the homes, alleging that the homes contained numerous preexisting defects and structural damage, discovered only after they had purchased the homes. The builder moved to exclude such evidence, arguing that only the original purchasers could seek these damages.

PROCEDURAL HISTORY: The trial court granted the motion and dismissed the complaint. Plaintiffs appealed.

ISSUE: Does a cause of action for damages from construction defects accrue when the structure suffers physical damages, or when the owner suffers a compensable economic injury as a result – has the owner suffered an injury when he or she is unaware of a hidden, progressive condition? To whom does a cause of action belong – to the person who owns the home when the structure first sustains some appreciable but undetected harm, or to the subsequent owner who first discovers the harm?

HOLDING: The cause of action accrues at the time of discovery, thus entitling the then-current homeowner to bring a cause of action.

ANALYSIS: It was agreed that damage to the structures began to occur well before the current plaintiffs owned the homes. The damage was cumulative and progressive and was not outwardly apparent or reasonably discoverable except by an intrusive inspection of the roof and walls. The prior owners were unaware of the damage – it was the current plaintiffs who first discovered it. The trial court ruled that a cause of action for construction defects accrues when that defect starts to cause property damage and thus belongs to whoever owns the property at that time. Absent an assignment to a subsequent purchaser, the cause of action cannot be passed on. The court of appeal disagreed, holding that the cause of action belongs to the owner who first discovered the property damage. It is only then that some entity capable of maintaining a legal claim will have suffered a compensable injury. It would be manifestly unjust to deprive plaintiffs of a cause of action before they are aware that they have been injured.

Siegel v. Anderson Homes, 118 Cal. App. 4th 994 (2004)

COURT OF APPEAL HOLDS THAT ASSUMPTION OF RISK DEFENSE DID NOT APPLY TO INJURY FROM DEFECTIVE BLEACHERS

FACTS: Plaintiff attended an automobile race and signed a release which allowed him to enter into the pit area. The release absolved the track owner from liability while the releasor was either in the restricted area or observing the event. While plaintiff was watching the race from the bleachers, the bleachers collapsed, causing him to sustain injury.

PROCEDURAL HISTORY: The trial court held a bifurcated trial to establish the validity of the release as a defense. It ruled in favor of defendant, holding that the release was reasonably related to the purpose of the release agreement. Plaintiff appealed, arguing that the negligence in the case was not reasonably related to the purpose of the release.

ISSUE: Should the defense of express assumption of the risk have been applied?

HOLDING: No

ANALYSIS: Express assumption of the risk is a defense to a negligence action where the plaintiff has signed an agreement before the injury, in which he takes upon himself the chance of a "known risk" arising from what the other party does or leaves undone. The act of negligence must be reasonably related to the object or purpose for which the release is given. Plaintiff argued that the act of negligence involved the collapse of the bleachers, whereas the purpose of the release was for a racing event. Defendant argued that the purpose of the release was merely to gain entry into the pit area. The release itself was confusing because only those participants gaining entry into the pit area were required to sign the release, yet the release arguably applied to all claims irrespective of where the injury occurred. Thus, the court looked at extrinsic evidence. Because only those fans who wanted to enter the pit area were required to sign the release, the inference was that it applied only to injuries in that area, rather than in the general grandstands. There was no causal connection between the collapse of the bleachers and the dangers posed by being in the pit area.

Sweat v. Big Time Auto Racing Inc., 117 Cal. App. 4th 1301 (2004)

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COURT OF APPEAL HOLDS THAT PROPERTY ASSOCIATION MAY NOT BE HELD LIABLE FOR DEATH CAUSED BY RESIDENT OF COMMUNITY

FACTS: Plaintiffs were the survivors of a passenger in a car being driven by a resident of the Canyon Lake community. The driver, while intoxicated and driving the car within the community, struck a tree and killed the decedent. Plaintiffs sued the property owner's association for premises liability. Plaintiffs argued that the community had a history of alcohol and drug use by minors, leading to reckless and erratic driving, yet took no action. The driver of this car in particular had been previously ticketed for speeding and had been arrested or convicted of various drug and alcohol driving offenses. On the night of this accident, he had attended various parties within the community.

PROCEDURAL HISTORY: The HOA demurred to the complaint. The court sustained the demurrer, concluding that the complaint failed to allege facts showing that the HOA had any knowledge of the events on the night of the accident or the ability to stop the driver from driving. Seeing no duty on the part of the HOA, the court sustained the demurrer without leave to amend. Plaintiffs appealed.

ISSUE: Did the HOA have a duty to affirmatively act to protect the decedent from the risks created by allowing the resident to drive within the community?

HOLDING: No

ANALYSIS: As a general rule, a defendant is not liable for the failure to control the conduct of third parties. Plaintiff argued, however, that there was a "special relationship" between the HOA and its residents which created a duty. The court rejected this argument, holding that the relationship here was minimal. The HOA was simply the homeowners association. It did not create the peril or act to increase it. There was no evidence of any prior incidents involving this driver. The court further held that the HOA did not have a duty to eject the driver from the community based on his past conduct, holding that it would involve a substantial burden.

Titus v. Canyon Lake Property Owners Association, 118 Cal. App. 4th 906 (2004)

COURT OF APPEAL HOLDS THAT PARENT CORPORATION IS NOT LIABLE FOR WRONGFUL DEATH OF SUBSIDIARY'S EMPLOYEE

FACTS: The decedent was working for WMCI at the time of his work-related death. His survivors filed a workers compensation claim. They included the parent company of WMCI, "WMI", as a defendant. Plaintiffs argued that WMI controlled the budget of WMCI, its subsidiary, thus preventing WMCI from replacing or repairing dangerous equipment. It alleged that WMI, motivated by greed and the desire to place its own profits over the safety of others, had a policy of requiring WMCI to reduce its overhead and operating expenses.

PROCEDURAL HISTORY: WMI demurred to the complaint on various grounds. The trial court overruled the demurrer. WMI filed the present writ petition.

ISSUE: Can a parent corporation be held liable for the death of an employee of a subsidiary in the absence of evidence establishing a duty owed by the parent corporation to the employee?

HOLDING: No

ANALYSIS: Although an employee's remedies for work-related injuries are limited to workers compensation, he or she can sue the parent company in tort. However, there must be evidence of a duty owed by that corporation – the mere relationship of parent and subsidiary does not by itself create a duty on the part of the parent corporation to employees of the subsidiary. To impose liability based solely on the parent-subsidiary relationship would result in treating the parent as an employer without providing it with the shield of immunity under workers compensation laws. There must be a showing of an independent tort to prevent the plaintiff from obtaining a double recovery. Here, there was no showing of an independent tort. WMI did not own, operate, maintain or sell the truck which caused the death. It did not direct WMCI's safety operations. The responsibility for workers safety rested solely with WMCI. A parent company which is accused of mismanaging a subsidiary's budget cannot be held liable on the theory proposed by plaintiffs here.

Waste Management Inc. v. Superior Court, 2004 Cal. App. LEXIS 834 (2004)

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CALIFORNIA SUPREME COURT HOLDS THAT CHILDCARE CENTER IS NOT LIABLE FOR DEATHS CAUSED BY DRIVER WHO INTENTIONALLY DROVE CAR INTO PLAYGROUND

FACTS: Defendants were the operators of a child care center and the property owners. The center was located on a busy street corner in Costa Mesa. A four foot high fence enclosed the property. A driver intentionally drove his car through the fence and onto the playground, killing and injuring several people. Defendants were sued for wrongful death, negligence and premises liability. Plaintiffs alleged that the fence provided inadequate security against intrusions into the playground. There was evidence of traffic accidents at this intersection, but other than a freak accident, no car had ever gone through the fence. Nevertheless, plaintiffs argued that a sturdier barrier should have been in place. Defendants moved for summary judgment, arguing that the rampage was unforeseeable and that they had not been aware of any similar prior incidents. They also argued that the fence was in compliance with the relevant codes.

PROCEDURAL HISTORY: The trial court granted defendants' motion for summary judgment. Plaintiffs appealed. The court of appeal reversed. The California Supreme Court accepted the case.

ISSUE: Should defendants have been held liable for failing to take stronger security measures in advance of the criminal rampage?

HOLDING: No

ANALYSIS: Under the Ann M. case, a landowner's liability for injuries caused by criminal activities of third persons requires a showing of foreseeability, which usually requires a showing of prior similar incidents. The California Supreme Court held that the court of appeal erred in its analysis by looking to whether the playground was generally vulnerable to "errant traffic", rather than looking at whether it was vulnerable to the criminal act itself. By not giving consideration to the criminal nature of the driver's conduct, the court of appeal created a duty test that was far too broad. The driver's brutal criminal act was unforeseeable and thus defendants owed no duty to protect its occupants from such harm. Although some types of crime might be foreseeable without prior similar incidents, so that a simple security measure might deter a particular act, this was not such a case.

Wiener v. Southcoast Childcare Centers, 32 Cal. 4th 1138 (2004)

PRODUCTS LIABILITY

COURT OF APPEAL HOLDS THAT SUPPLIER OF CONCRETE CAN BE HELD LIABLE FOR SUBMICROSCOPIC DAMAGE

FACTS: A HOA filed a construction defect action against a number of defendants, including California Portland Cement Company, the supplier of the concrete for the project. It supplied improperly-mixed concrete, rendering it susceptible to damage from sulfate attack. The court found that although the damage was submicroscopic at that time, it would eventually disintegrate unless prevented.

PROCEDURAL HISTORY: The case proceeded to trial against California Portland only. Defendant moved for judgment on the strict liability claim, which the court granted. Plaintiff prevailed on its claims for negligence. Defendant appealed.

ISSUE: Does the "economic loss rule" bar recovery for damage to the defective concrete?

HOLDING: No

ANALYSIS: Defendant first argued that it should not have been held liable because the concrete was not inherently defective – it would have been suitable in different soil conditions. The court rejected this argument, holding that defendant played the sole role in developing and designing the concrete mix. It therefore substantially participated in the integration of the concrete into the design of the foundations. Defendant next argued that the economic loss rule prevents an award of damages with respect to the damaged concrete itself. Under this rule, in an action for negligence, a manufacturer's liability for negligence is limited to damages for physical injury – there is no recovery for economic losses only (e.g., inadequate value, costs of repair and replacement, lost profits, etc.). Here, the court found that the concrete had sustained submicroscopic damage only and awarded damages for the repair of that concrete. Thus, on its face, the economic loss rule should apply. Plaintiff, however, argued that the rule should require only appreciable physical damage apart from the defect itself and that the rule should not require that a defective component cause damage to a different, non-defective component in order to allow recovery. Under the facts of this case, the court agreed with plaintiff. The product in this case caused appreciable damage, a decaying foundation. It was undisputed that the foundation will decay over time. There is present, nonspeculative harm, in the form of current submicroscopic damage to the concrete and continued degradation of the foundations.

Mesa Vista South Townhome Association v. California Portland Cement Co., 118 Cal. App. 4th 308 (2004)

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PROFESSIONAL LIABILITY

COURT OF APPEAL HOLDS THAT STATUTE OF LIMITATIONS IN MEDICAL MALPRACTICE CASE IS TRIGGERED WHEN MEDICAL NEGLIGENCE WAS FIRST SUSPECTED

FACTS: Plaintiffs were the survivors of a patient who died while hospitalized for a medical procedure. Within a year, they filed suit against the hospitals and various other people involved in the procedure. While the case was pending, they consulted with another doctor, who advised them that Dr. Knowles may have also done something during the procedure meriting his involvement in the suit. Thus, well after a year had expired from the death, the complaint was amended to include Dr. Knowles.

PROCEDURAL HISTORY: Knowles moved for summary judgment on the grounds that the action was barred by the statute of limitations. The court denied the motion. Defendant sought the present writ.

ISSUE: Is the one year statute of limitations for medical negligence triggered by the suspicion of negligence or is actual knowledge required?

HOLDING: The statute is triggered by mere suspicion of negligence.

ANALYSIS: Code of Civil Procedure section 340.5 requires that an action against a health care provider be filed within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury. The term "injury" means both a person's physical condition and its negligent cause. However, a person need not know of the actual negligent cause of an injury – mere suspicion of negligence suffices to trigger the limitation period. A plaintiff need not know the precise manner in which a wrongdoer was negligent in order to discover his or her injury. Here, the plaintiffs suspected medical negligence immediately after the death. They argued, however, that the statute should not begin to run until they specifically suspected Knowles's negligence. The court rejected this argument, holding that under the statute, it is the discovery of the injury, rather than the discovery of a particular defendant's negligence, that triggers the limitation period. In this case, plaintiffs knew, or should have known, that Knowles had performed the initial surgery – this, combined with their suspicion of medical negligence, was sufficient to trigger the statute as to Knowles.

Knowles v. Superior Court, 118 Cal. App. 4th 1290 (2004)