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Status Report

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June 2019

Policy's Promise to Advance Claims Expense for Claims Does Not Create a Duty to Defend
Credit to : Haight, Brown and Bonesteel, Los Angeles, CA

In *United Farm Workers of America v. Hudson Insurance Company*, (E.D. Cal.) 2019 WL 1517568, the United Farm Workers of America union (UFW) sued Hudson Insurance Company for breach of contract and bad faith arising out of a former employee's wrongful termination and wage and hour lawsuit.

Hudson provided UFW with Labor Professional Liability Insurance that included employment practices liability coverage. Hudson reserved its rights and agreed to pay an allocated share of the defense costs, citing the terms of its policy. UFW and Hudson agreed to a 50-50 allocation and, defending itself, UFW moved to compel arbitration of the employee lawsuit pursuant to its collective bargaining agreement. However, the trial court found that the only claim subject to arbitration was the employee's wrongful termination claim, which Hudson contended eliminated the sole covered cause of action.

The employee's complaint was amended to include class action allegations for the statutory wage and hour claims and the case proceeded to trial, resulting in an adverse judgment of $1.2 million. Hudson paid UFW for the allocated share of the defense costs incurred through the dismissal of the sole covered claim, and disclaimed any obligation for the wage and hour award.

Hudson retained Haight, Brown & Bonesteel to defend the company against the subsequent bad faith lawsuit brought by the UFW, which alleged that Hudson wrongfully failed to defend or indemnify the union for the employees' lawsuit. Besides the $1.2 million wage and hour award, UFW claimed in excess of $800,000 incurred defending itself as damages.

UFW and Hudson brought cross-motions for summary judgment, with UFW seeking summary adjudication on the duty to defend. UFW argued that Hudson had a duty to defend the entirety of the employee lawsuit based on the mere potential for coverage, which was not extinguished by the partial grant of UFW's motion to compel arbitration. (Citing *Gray v. Zurich Ins. Co.* (1966) 65 Cal.2d 263; *Montrose Chem. Corp. v. Super. Ct.* (1993) 6 Cal. 4th 287; and *Buss v. Super. Ct.* (1997) 16 Cal.4th 35.) UFW argued that Hudson's failure to do so amounted to a bad faith breach of contract, exposing Hudson to the full amount of the defense costs, the resulting judgment, UFW's own attorney's fees for suing Hudson under *Brandt v. Super. Ct.* (1985) 37 Cal.3d 813, and other damages.

Hudson's cross-motion for summary judgment asserted that there was no duty to defend under the terms of its policy, which expressly stated that UFW had the duty to defend. Under the policy, Hudson was only obligated to advance defense expenses for covered claims, subject to an allocation based on the respective liabilities and further subject to reimbursement in the event of an uncovered result, none of which translated into a duty to defend. (Citing *Jeff Tracy, Inc. v. United States Spec. Ins. Co.* (C.D. Cal. 2009) 636 F.Supp.2d. 995; and *Petersen v. Columbia Casualty Company* (C.D. Cal.) 2012 WL 5316352.) Further, although the employee's original claim for wrongful termination was a covered claim under the Hudson policy's definition of Wrongful Employment Practices, Hudson argued that none of the statutory wage and hour claims that remained after wrongful termination was ordered to arbitration came within the policy's Wrongful Acts, Wrongful Offenses or Wrongful Employment Practices coverages. (Citing *California Dairies v. RSUI Indem. Co.* (E.D. Cal. 2009) 617 F.Supp.2d 1023.)

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President's Message

I figured I would take a month off from my usual didactic President's messages, … "you should do this as an IA and you should do that"…." Oh, and let me tell you something…." (good grief!) ...

Vacation is coming!!! Every year for the last four years my family and I have taken the same vacation. The three of us hop on a plane and head to Copenhagen to visit my aunt and uncle (mother's side of the family). Sadly, my uncle passed away the day after Christmas, so my visit to see my 81-year-old aunt this summer is somewhat bittersweet. That being said, she is very much looking forward to our visit and each time I call, her first question in her thick Danish accent is, "Are you still coming to Danmark?" We are! It is such a lovely country. I highly recommend a visit and a dip in the Baltic Sea. Fortunately, we are very blessed to have a place to stay which certainly reduces the cost of an overseas vacation. As you can imagine, my aunt very rarely lets us pay for food and, as such, we need to almost harshly insist on buying groceries every once in a while. This year, as she is getting older, we are looking forward to cooking for her and hopefully to learning her secret recipe for Frikadeller (delicious Danish meatballs).

John Ratto

CAIIA President

From Denmark we fly to Rome to visit my cousin/godmother (father's side of the family). What can I say; I am so fortunate to have relatives in two of the most beautiful cities in Europe! After staying with my cousin in Rome for a few days, we usually head up to her place in the country. It is located in the Sabine Mountains , in the village of Montebueno about 30 or 40 miles north of Rome as the crow flies. While it is hot in late June and early July, it is still Italy! We easily adjust to the local schedule which means starting your day not too early, getting back home by 1:00 to 2:00 p.m. to take a long nap, then a little afternoon activity until cocktails around 5:00 and a late dinner at about 9:00… ahh, the life of the Italians. After about a week of this relaxing schedule, I head home to Oakland while my wife and daughter stay for another couple of weeks with family and friends…

I mention this because I never took a vacation for the first 13 years of our business, thinking that there was nothing more important than being here and available for my clients. I remember always saying to Kay , "What will my clients do without me?" I started to reevaluate what was important to me in life when my mother got sick and passed away in 2015 (after a courageous five-year fight with cancer)and with my dad having passed away about six years before that. Crazily, the answers were right in front of me each time I came home from work (much love to Kay and Wilhelmina). Even more crazy was the fact that my family and relatives had been asking us for years to come stay with them for free in Europe! I thought the work and the business were more important than anything else. While of course our clients are important and appreciated, I am starting to really understand that it is important to "work to live" rather than the other way around.

Wishing you all a wonderful and relaxing summer! We will have more details about the fall event in the next newsletter.

John Ratto, President

CAIIA President

NEWS OF AND FOR OUR MEMBERS

SAVE THE DATE

The CAIIA is proud to be exhibiting at or sponsoring the following upcoming event:

August 27-29,2019 Claims Conference of Northern California, Lake Tahoe, CA

Senate Bill 240 – Insurance Adjuster Act is moving through Legislature

Proposed Law in its updated wording would:

Require California Department of Insurance to produce a notice describing the most significant California laws pertaining to property insurance policies, including those related to a declared state of emergency. It would require firm employees and registered emergency adjusters to certify, under penalty of perjury, that they have read the Department's notice prior to adjusting claims in California;

Require California Department of Insurance, by January 1, 2021, to adopt regulations establishing training standards governing the training of non-licensed adjusters in evaluating damage caused by a catastrophe. It would require registered emergency adjusters to comply with the proposed training standards prior to adjusting claims in California;

Require an insurer, if the insurer assigns a third or subsequent adjuster to a claim within a six-month period, to provide the claimant with a single point of contact regarding the claim, along with the written status report already required by law.

We will keep you updated as to the progress of the bill and any changes to the text.

This notice was shared with us by Tom Moss of the International Institute of Loss Adjusters:

Hello IILA Members and Associates –

We are very saddened to advise that **Richard J. Polacek**, of California, USA, has passed away. Dick was retired and had been very involved in the early years of our Institute. He became our IILA President from 1995 to 1996 and was installed at our AGM and Conference in San Rafael, California. We know he has one son living in Florida, but we have not been able to secure further details. May he Rest in Peace.

Claims Conference of Northern California, August 27-29, 2019

Come join us in Lake Tahoe, CA for the Claims Conference of Northern California, August 27-29, 2019. CCNC is one of the largest and most diverse educational conferences in our industry. You'll network with top claim professionals from insurance companies, brokerages and agencies along with service providers from all over the western region of the United States.

Choose from a variety of educational courses covering a wide array of claim challenges and opportunities. Earn free adjuster continuing education credits from a number of key states. Visit with over 75 exhibitors/service leaders providing an array of claims products and services. For professional results and improvements, the Claims Conference of Northern California is the place to be, we continue to create a path to claims success.

Our 2018-19 President, Jennifer Pinney, is working along with a planning committee to update our technology, our education, our innovation in getting claims initiatives to the forefront; in an industry that is always moving, changing and growing. We look forward to sharing in this exceptional event with you this year. Make sure to save the dates on your calendar and prepare to be inspired!

Click this link to sign-up online: http://claimsconference.org/attendee-registration/

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Consequently, Hudson contended that its payment after the entry of judgment, limited to an allocated share of the defense expense, and its disclaimer of coverage for the wage and hour award, were entirely proper and not in breach of the contract. In addition, Hudson uncovered the existence of misrepresentations in UFW's application for the insurance during discovery, which Hudson argued voided the policy. (Citing *Imperial Cas. Co. v. Sogomonian* (1988) 198 Cal.App.3d 169; and *Thompson v. Occidental Life* (1973) 9 Cal.3d 904.) Without coverage or a breach of contract, Hudson argued that there could be no bad faith.

The district court agreed with Hudson, denying UFW's motion for summary adjudication on the duty to defend and granting Hudson's cross-motion for summary judgment. The court found that there was no duty to defend under the terms of the policy, which imposed the duty to defend on the insured and not the insurer. The court agreed that Hudson's obligation was limited to payment for the cost of defending claims actually covered by the policy, and the award for wage and hour violations did not come within any of the policy's coverages. Additionally, the court found that UFW made material misrepresentations in its application for insurance, holding that the contract was void. Because there was no coverage there was no breach of contract, and the cause of action for breach of the implied covenant of good faith and fair dealing had to fail as well, entitling Hudson to summary judgment.

DOI Announcement

Southern California insurance agent's license revoked for illegal action targeting seniors

Agent also faces nearly $50,000 in fines

SAN DIEGO, Calif. — The Department of Insurance has revoked the license of insurance agent Alan Lucien Cerf, 69, who faces more than $49,600 in fines for defrauding seniors. Officials allege Cerf repeatedly convinced clients to surrender existing annuity policies and purchase new ones—a practice known as "churning"— which earned him additional commissions, but cost his clients huge surrender fees. These fees consumed much of the new annuity's principal.

"Agents have a fiduciary responsibility to their clients, and a moral obligation to help those who come to them for assistance, not take advantage of them," said Insurance Commissioner Ricardo Lara. "It's always a good idea for clients to check the status of their agent's license and look out for any warning signs that their agent may not be acting in their best financial interest."

Each new annuity issued to Cerf's clients had a lower value than the previous one. This practice also extended the maturity date of the annuities, sometimes past the client's life expectancy. Additionally, each time Cerf's clients surrendered their prior annuities and purchased new ones, Cerf would earn a sizeable commission.

An Administrative Law Judge found that Cerf violated the California Insurance Code by recommending that at least three of his clients, who were all over 65 years of age, purchase unnecessary replacement annuities in nine separate transactions. The department also revoked Cerf's license due to his unlawful actions.

HOOKER OR KINSMAN EXCEPTION TO PRIVETTE

Credit to Low, Ball & Lynch, San Francisco, CA

Johnson v. Raytheon
COURT OF APPEAL, SECOND DISTRICT, DIVISION 8, CALIFORNIA (MARCH 8, 2019)

In *Johnson v. Raytheon Co., Inc.*, a subcontractor brought action an against a contractor and the hirer of the contractor for negligence and premises liability. The Superior Court of Los Angeles County granted summary judgment in defendants' favor. Subcontractor appealed. The Second District Court of California affirmed, holding that the hirer was not liable under tort liability or premises liability, and the contractor owed no duty to the subcontractor because the injured employee failed to meet either the Hooker or the Kinsman exceptions.

Generally speaking, *Privette v. Superior Court (1993) 5 Cal.4th 689*, (Privette) held that when an employee of an independent contractor is hired to do dangerous work and suffers a work related injury, the employee cannot recover against the individual who retained the independent contractor. Id. at p. 692. This is subject to certain exceptions. Specifically, the Privette doctrine allows for liability when the hirer of the independent contractor retained control over safety conditions at the worksite, and negligently exercised that retained control in a manner which affirmatively contributed to the employee's injuries. *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 202 (Hooker). The second Privette exception was discussed in *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, (Kinsman). A landowner who hires an independent contractor may be liable to the contractor's employee if that landowner knew, or should have known, of a latent or concealed preexisting hazardous condition on its property, the contractor did not know and could not have reasonably discovered this hazardous condition, and the landowner failed to warn the contractor about this condition. Id. at p. 664, fn.

In this case, plaintiff and appellant Laurence Johnson was seriously injured when he fell from a ladder at work. At the time, Johnson was employed by an independent contractor which provided maintenance engineering staff for defendant and respondent, the Raytheon Company, Inc. Raytheon was undergoing a renovation project of a water cooling tower on its premises. The prime contractor for the water cooling tower project was defendant and respondent Systems XT, Inc., with whom Raytheon had a contractual relationship. Two of Systems XT's subcontractors were also defendants in the underlying action.

The first is Browncо Construction Company, Inc. which was the concrete subcontractor, it left the unsafe partial extension ladder at the cooling tower wall. The second is Power Edge Solutions, Inc. The water cooling tower required constant electronic monitoring of its water level. Power Edge Solutions was the subcontractor which installed electronic monitors as the water cooling tower renovation project progressed. This is relevant because Johnson alleges the alarm to which he was responding was a false alarm, which only occurred due to Power Edge Solutions' alleged faulty wiring of the water level monitor. Despite the fact that the appellant alleged the hirer's liability was contractual, based on the terms of the contract between Raytheon and Systems XT, the Court found no liability for failure to meet one of the only two exceptions set forth under Hooker or Kinsman. Because Plaintiff could not show either exception applied, summary judgment was proper.

COMMENT

Johnson v. Raytheon Co. Inc., Makes clear and explicit that absent one of the narrow exceptions pursuant to the Kinsman or Hooker cases, there can be no liability for the hiring of an independent contractor when an employee of that independent contractor is injured, even where there is an express contractual relationship between the two. Contractors and their counsel will need to be wary of contract provisions which may seem to raise liability of hirers given this explicitly narrow construction of the Privette doctrine.

Expert's Reliance on Medicare Rates Does Not Violate Collateral Source Rule

Credit to Tyson & Mendes, La Jolla, CA

Summary of the Ruling

In a decision filed on March 14, 2019, a California appellate court held there was no violation of the collateral source rule where expert testimony referencing a plaintiff's collateral source payments was made to provide a reasonable value of damages and helps the jury with context and background of the issues. (*Stokes v. Muschinske* (Mar. 14, 2019, No. B280116) Cal.App.5th [2019 WL 1513208].)

Factual Background and Trial Court Proceedings

On March 28, 2013, Martin Muschinske rear-ended plaintiff James Stokes' car with his pickup truck while towing a horse trailer loaded with equipment. Stokes and his wife Patricia sued Muschinske and the case proceeded to a jury trial. The defendants stipulated to liability for the accident but disputed causation and the nature and extent of plaintiffs' damages. Plaintiffs sought over $20 million in damages. The defense contended a little over $500,000 more appropriately compensated plaintiffs for their harms. The jury delivered a verdict very much in line with the defendants' recommended award. Plaintiffs appealed, arguing the court allowed Muschinske to violate the collateral source rule as it related to his past and future medical expenses by allowing his experts to testify regarding plaintiff James Stokes' hospital-insurer (Kaiser Permanente) and Medicare reimbursement rates.

Relevant Issues on Appeal

On appeal, plaintiffs argued the trial court erred by allowing Muschinske to violate the collateral source rule a number of times during trial. They claimed a defense expert's references to plaintiff's treatment at Kaiser Permanente, plaintiff's Kaiser medical insurance, and additional references to Medicare and Social Security disability benefits as they relate to future medical care costs were improper violations of the collateral source rule. Plaintiffs contended, by making such references, the court allowed the jury to conclude Stokes had received third collateral source payments and/or would receive such payments in the future. Plaintiffs argued this resulted in an inappropriate reduction of Stokes' damages by the jury.

Appellate Court's Ruling

On appeal, the court disagreed with plaintiffs' contentions. It believed the references provided context and background information on Stokes' past medical treatment as well as portions of Muschinske's experts' calculations of Stokes' reasonable medical expenses. The court also found that such references actually assisted the jury in better understanding Medicare and Social Security disability benefits. The court conceded the expert's references to Kaiser may have allowed lay jurors in Southern California to infer Stokes had Kaiser insurance to cover his past treatment. However, it also noted no evidence was presented on any specific insurance payments, and the record contained no indication the jury actually reduced Stokes' damages award by some unidentified amount because of his insurance coverage.

The court explained plaintiff was not arguing the trial court erred by admitting evidence of any specific past collateral payment by Kaiser or anticipated future collateral payments from Medicare or Social Security. Likewise, plaintiffs did not contend any of defendant's experts deducted past or future collateral payments to calculate damages, or that the defense argued the jury should make specific deductions. Plaintiffs presented a more generalized argument. They claimed the mere reference to these entities led the jury to reduce Stokes' damages.

The court held there was no violation of the collateral source rule where testimony is made to provide a reasonable value of damages and helps the jury with context and background of the issues. Further, the court ruled it found no evidence that the Medicare references were attributable to deductions for specific future Medicare payments, and nothing suggesting the jury subtracted any amount for Medicare payments in making a determination of Stokes' future medical expenses. With respect to Social Security payments, a single reference by Muschinske's expert could not have affected the jury's verdict. Such reference could not cause the jury to infer Stokes would receive Social Security payments in the future. Even if the jury did draw such an inference, there was no basis upon which it could quantify those payments.

On the issues raised by plaintiffs on appeal supporting their contention that the trial court erred by allowing evidence of collateral source payments, the appellate court held: (1) references to hospital and insurer and Medicare, as well as a single reference to Social Security, generally did not violate collateral source rule; and (2) plaintiffs' claim of prejudice from certain references to collateral sources was entirely speculative. It affirmed the jury verdict entered by the trial court.

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On the Lighter Side… HOW TO POSE WITH A STATUE