

**THE STATE BAR OF CALIFORNIA
INSURANCE LAW COMMITTEE of the BUSINESS LAW SECTION**

**APPELLATE LAW UPDATE
January 8, 2016**

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SUPREME COURT: The California Supreme Court did not publish any recent insurance law opinions.

COURT OF APPEAL: The California Court of Appeal recently published the following decisions that may be of interest to attorneys practicing insurance law:

1. **Court of Appeal rejected plaintiff's efforts to pursue a bad faith action against insurer as assignee of the insured.** (*21st Century Insurance Company v. Superior Court (Tapia)* (2015) 240 Cal.App.4th 322.)

A passenger who suffered severe and eventually fatal injuries in a car accident brought a bad faith action against the driver's insurer. The trial court denied summary judgment for the insurer, and the insurer filed a petition for writ of mandate with the Court of Appeal. The Court of Appeal granted the petition, holding that because the insurer defended the driver under a larger policy, the insurer's refusal to provide a defense for the driver under two smaller policies was not a proper basis for a bad faith claim. The court also held that the insurer owed no duty to defend the driver under the two smaller policies. Finally, the court held that the pretrial settlement, including the assignment of the bad faith claim from the defendant driver to the injured-passenger-plaintiff in the underlying suit, could not be used to prove the damages element of the assignee's bad faith claim.

2. **Insurer not liable for reimbursement costs to homeowners because there was not a collapse as defined under the homeowner's insurance policy.** (*Grebow v. Mercury Ins. Co.* (2015) 241 Cal.App.4th 564.)

The plaintiff homeowners spent over \$91,000 on repairs to the rear deck and supporting structure of their residence, which was in the

process of falling to the ground. They then made a claim for reimbursement of that amount against Mercury Insurance Company, their homeowner's insurer, because at least a portion of the house had collapsed and because the expenditure was to avoid imminent insurable damage and to mitigate damages. Mercury contended that the plaintiffs' claim under their homeowner's insurance policy was not covered because the damage to the property did not constitute a "collapse," which was defined by the policy as a "sudden and complete breaking down or falling in or crumbling into pieces or into a heap of rubble or into a flattened mess." Mercury also argued that it had no obligation to reimburse for expenditures to avoid an insurable loss and there was no mitigation as that term is used in the policy. The trial court granted summary judgment for Mercury, and plaintiffs appealed. The Court of Appeal affirmed, holding that Mercury was not liable for the reimbursement costs because there was not a collapse as defined in the policy, the duty to mitigate arises only after a loss from a collapse, and Mercury had no duty, express or implied, to reimburse the plaintiffs for costs to prevent imminent insurable damage.

3. **"Other insurance" clause purporting to eliminate an insurer's duty to defend if another insurer covered the defense was unenforceable.** (*Underwriters of Interest Subscribing to Policy Number A15274001 v. ProBuilders Specialty Ins. Co.* (2015) 241 Cal.App.4th 721.)

Plaintiff Underwriters of Interest Subscribing to Policy Number A15274001 and defendant ProBuilders Specialty Insurance Company both insured Pacific Trades Construction & Development, Inc. Underwriters undertook Pacific Trades' defense in a construction defects lawsuit, but ProBuilders declined to participate in funding the defense, claiming that a clause in its policy relieved it of any duty to defend Pacific Trades when another insurer was doing so. Underwriters then sought equitable contribution from ProBuilders for a portion of the defense costs. The trial court granted summary judgment for ProBuilders based on the "other insurance" clause in its policy, and Underwriters appealed. The Court of Appeal reversed, holding that the "other insurance" clause in the ProBuilders policy was unenforceable. The court observed that the "other insurance" clause in the Probuilders' policy was an "escape" clause, because if enforced, it permitted a primary insurer to escape the defense obligation it otherwise agreed to assume. The court explained these escape clauses

are disfavored in California, and there is a “modern trend [of requiring] equitable contributions on a pro rata basis from all primary insurers regardless of the type of ‘other insurance’ clause in their policies.”

4. **No coverage under a non-owned vehicle provision for teen driver with unlimited use of her father’s car.** (*Nationwide Mutual Insurance Company v. Shimon* (Dec. 3, 2015, C071776) __ Cal.App.4th __ [2015 WL 9275518].)

Aweia and Flora Shimon were injured in a car accident caused by a 17-year-old driver, Simone Lionudakis. Lionudakis was driving a truck owned by and registered to her father, but he had excluded Lionudakis from his insurance policy to save money, even though Lionudakis was the only one who drove the truck. Lionudakis’s mother had insurance through plaintiff Nationwide Mutual Insurance Company for her own and her current husband’s vehicles, but not for the truck. The Nationwide policy provided coverage for a household family member’s use of a “non-owned” vehicle, but not if the non-owned vehicle was “furnished or available” for her “regular use.” The Shimons settled their personal injury lawsuit against Lionudakis and her parents, with an agreement that the trial court would determine whether there was insurance coverage for Lionudakis under her mother’s Nationwide policy. The trial court entered declaratory judgment in favor of Nationwide, concluding the truck was furnished or available for Lionudakis’s regular use and therefore coverage was excluded.

The Court of Appeal affirmed, explaining that there was no coverage under the Nationwide policy because there were no limits on Lionudakis’s exclusive use of the truck, and the situation fell “squarely” within the purpose of the exclusion to prevent abuse by allowing habitual use of non-owned cars without paying insurance premiums.

5. **Trial court erred by refusing to give CACI No. 2306 in a case involving multiple causes of damage to an insured property.** (*Vardanyan v. AMCO Insurance Company* (Dec. 11, 2015, F069953) __ Cal.App.4th __ [2015 WL 9654037].)

Plaintiff owned a rental house covered by an insurance policy issued by defendant, AMCO Insurance Company. Plaintiff submitted a claim for

water damage and mold, and AMCO denied coverage of plaintiff's loss citing multiple policy exclusions for the causes of the damage. Plaintiff sued AMCO alleging breach of the insurance contract and bad faith denial of coverage. At trial, the evidence presented by both parties indicated there were multiple causes of the damage to plaintiff's house. Plaintiff argued that the policy coverage provision for collapse due to hidden decay or hidden insect damage applied, if either of those perils was the predominant cause of the collapse of the structure. Plaintiff requested that the trial court give a standard jury instruction (CACI No. 2306) explaining that when a loss is caused by a combination of covered and excluded risks, the loss is covered if the most important or predominant cause is a covered risk. The trial court instead expressed its intention to give part of AMCO's proposed special jury instruction that plaintiff's property damage loss was covered by the policy only if it was caused by the perils specifically listed in the collapse coverage provision and no others. Plaintiff conceded he could not prevail if the jury was so instructed, and the trial court granted AMCO's motion for a directed verdict.

The Court of Appeal reversed and remanded. The court explained that under California's efficient proximate cause doctrine, "[a] policy cannot extend coverage for a specified peril, then exclude coverage for a loss caused by a combination of the covered peril and an excluded peril, without regard to whether the covered peril was the predominant or efficient proximate cause of the loss. . . . To the extent the term 'caused only by one or more' of the listed perils [in the collapse coverage provision] can be construed to mean the contribution of any unlisted peril, in any way and to any degree, would result in the loss being excluded from coverage, the provision is an unenforceable attempt to contract around the efficient proximate cause doctrine." Accordingly, the court held that CACI No. 2306, rather than AMCO's proposed special instruction was the correct instruction to give to the jury.

NINTH CIRCUIT: The Ninth Circuit Court of Appeals did not publish any recent insurance law opinions.