LOS ANGELES
Daily Journal
www.dailyjournal.com
TUESDAY, DECEMBER 29, 2015

The top insurance decisions of 2015

By Kirk A. Pasich

In 2015, California courts issued a number of interesting, and sometimes provocative, decisions on insurance-related issues. Three stand out.

In *Gonzalez v. Fire Insurance Exchange*, 234 Cal. App. 4th 1220 (2015), an individual filed a lawsuit against an insured and nine other individuals, claiming that she was assaulted by an unknown number of men as she lay unconscious in a room after being given multiple shots of hard liquor. The complaint included causes of action for assault, negligence, false imprisonment and sexual battery. The insured had two policies, one a homeowners policy and the other an umbrella policy. Both insurers denied coverage. The court upheld the denial of coverage under the homeowners policy, pointing out that while the policy covered claims for false imprisonment, the injury had to result from an "occurrence," which was defined to mean an accident. It held that the complaint did "not allege a possibility that [the insured] 'accidentally' falsely imprisoned her." It emphasized that "the entirety of [the plaintiff's] allegations involved intentional conduct."

However, the court reached a different conclusion with respect to the umbrella policy. That policy covered offenses committed during the policy period, without any requirement that the alleged injury arise out of an accident. The court held that coverage was triggered, concluding that the policy "sets forth no requirement that a personal injury arise out of an 'accident' in order for there to be coverage."

The court then turned to the exclusions. It noted that the insurer had to meet the burden of establishing that "all of [the plaintiff's] claims were excluded from coverage." The court held that the policy's sexual molestation exclusion did not bar coverage because the complaint "raised the possibility that *the other defendants* — and perhaps not [the insured] — committed the physical act." The court also rejected the argument that the damage was "expected or intended," finding that the insured "could have been found liable for damages incurred by [the plaintiff] due to his negligence in creating the conditions that led to her false imprisonment in the room." The court also rejected the argument that the allegations were "inseparably intertwined with the underlying sexual assault." It stated: "We disagree with the insurers that [there is] a blanket rule that if a cause of action is related to sexual molestation it must be excluded from insurance coverage. This interpretation would gloss over the finer nuances of the law governing an insurer's duty to defend."

In *Hartford Casualty Insurance Co. v. J.R. Marketing, L.L.C.*, 61 Cal. 4th 988 (2015), the California Supreme Court addressed the question of an insurer's right to seek reimbursement of fees from independent counsel representing an insured in litigation. The court held that on the facts before it, the insurer could seek reimbursement.

However, the court was careful to repeatedly state how narrow its holding was, and to link its holding to the peculiar facts before it. As it phrased the issue and its holding: "May an insurer seek reimbursement directly from counsel when, in satisfaction of its duty to fund its insureds' defense in a third party action against them, the insurer paid bills submitted by the insureds' independent counsel for the fees and costs of mounting this defense, and has done so in compliance with a court order expressly preserving the insurer's post-litigation right to recover 'unreasonable and unnecessary' amounts billed by counsel? We conclude that, given the facts of this case and within the limits discussed below, such a right of reimbursement should run directly against *Cumis* counsel."

The court emphasized that it was not deciding: (1) "whether, absent such an order [that an insurer could seek reimbursement for excessive fees], an insurer that breaches its defense obligations has *any* right to recover excessive fees it paid *Cumis* counsel"; (2) "whether, in general, a dispute over allegedly excessive fees is more appropriately decided through a court action or an arbitration"; and (3) "when such fee disputes generally ought to be decided relative to the underlying litigation."

The court then emphasized some key rights for an insured. It stated that "when the third party suit includes some claims that are potentially covered, and some that are clearly outside the policy's coverage, the law nonetheless implies the insurer's duty to defend the entire action."

The court also reaffirmed an insurer's duty when there is a conflict of interest: "[U]nless the insured agrees otherwise, in a case where — because of the insurer's reservation of rights based on possible non-coverage under the policy — the interests of the insurer and the insured diverge, the insurer must pay reasonable costs for retaining independent counsel by the insured."

The court then addressed an insurer's challenges to the reasonableness of defense fees and costs. It noted that "under the ethical rules that govern attorney conduct generally," an insurer's "obligation to finance its insureds' defense" does not "ultimately extend beyond the duty to pay the reasonable costs of the defense." The court said the "proper test" for resolving an insurer's "claim of excessive billing" is "whether the charges were *objectively reasonable at the time they were incurred* under the circumstances then known to counsel." It held that the burden of proving that defense fees "were in fact unreasonable and unnecessary falls entirely on the insurer."

The court also addressed whether an insured must produce unredacted copies of its defense bills to an insurer in order to obtain payment of those bills. It held: "[A]n objective assessment of the litigation as a whole to determine whether counsel's bills appear fundamentally reasonable is unlikely to involve an examination of individual attorney-client communications or the minute details of every litigation decision. If privileged information on these subjects is included in counsel's billing records, it can be redacted for purposes of assessing whether counsel's bills are reasonable."

In *Fluor Corp. v. Superior Court*, 61 Cal. 4th 1175 (2015), the California Supreme Court considered whether an assignment of rights under an insurance policy is effective without the insurer's consent when the loss took place before the assignment. The court concluded that assignments are not necessarily invalid, even under policies with clauses prohibiting policy assignments without insurer consent. In doing so, it reversed course from its earlier decision in *Henkel Corp. v. Hartford Accident & Indemnity Co.*, 29 Cal. 4th 934 (2003), where it held that an insurer could refuse to honor an insured's assignment of the right to seek coverage under the policy for losses that had incurred before the assignment.

In discussing "no assignment" clauses, the court relied on Insurance Code Section 520. Section 520 states: "An agreement not to transfer the claim of the insured against the insurer after a loss has happened, is void if made before the loss."

The court then pointed out that the rationale for "no assignment" clauses "is to protect an insurer from bearing a risk or burden relating to a loss that is greater than what it agreed to undertake when issuing the policy." The court turned to the realities of the world: "But the 'postloss exception' to the general rule restricting assignability, recognized in the many cases ... and codified in section 520, is itself a venerable rule that arose from experience in the world of commerce. The rule has been acknowledged as contributing to the efficiency of business by minimizing transaction costs and facilitating economic activity and wealth enhancement."

The court concluded that by adopting this interpretation of Section 520, it was protecting "the ability of an insured, in the course of transferring assets and liabilities to another business entity in connection with a corporate sale or reorganization, to assign rights to claim defense and indemnification coverage provided by prior and existing insurance policies concerning the business's previous conduct."

KIRK A. PASICH
Liner LLP

Kirk A. Pasich *is a partner with Liner LLP.*