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FEATURED ARTICLE

California Court of Appeal Clarifies Law on a Carrier's Duty to Settle

On October 7, 2013, the California Court of Appeal made its most recent pronouncement regarding California law on a carrier's duty to settle in *Reid v. Mercury Insurance Co.*, 2013 Cal. App. LEXIS 798 (Oct. 7, 2013). The *Reid* court held that, as a general matter, even if the insured's liability in excess of the policy limits is reasonably certain, a carrier cannot be held liable for bad faith failure to settle in the absence of a within-limits demand from the claimant.

In *Reid*, the claimant was involved in a car accident with the insured. The claimant's attorney wrote a letter to the insured inquiring as to the applicable policy limits, but never issued a demand to the insured for an amount within those limits. The carrier refused to immediately accept liability on behalf of the insured, and instead repeatedly requested the claimant's medical records and other relevant documentation. The carrier ultimately offered the claimant the $100,000 per-person limit approximately 10 months after the accident, but the offer was rejected. After obtaining a $6.9 million verdict, the claimant settled with the insured and was assigned all rights the insured had against the carrier. In a subsequent bad faith action, the claimant argued that the carrier breached its duty to settle by, among other things, failing to make a settlement offer when liability in excess of the policy limits became reasonably clear, failing to offer to settle immediately in response to claimant's request that the carrier inform him of the applicable policy limits, and "discouraging" claimant's settlement efforts. The trial court granted the carrier summary judgment, and the claimant appealed.

On appeal, the *Reid* court held that bad faith liability for failing to settle a case within the policy limits cannot be assessed against a carrier in the absence of a within-limits demand from the claimant or some "other manifestation the injured party is interested in settlement . . . ." 2013 Cal. App. Lexis 798, at *2. In applying that rule, the *Reid* court held that a claimant's simple request for the amount of the applicable policy limit was not sufficient to establish the claimant's interest in settlement. As such, without a policy limits demand by the claimant or any facts suggesting that the carrier affirmatively discouraged settlement efforts on the part of the claimant, the *Reid* court affirmed the trial court's summary judgment ruling in favor of the carrier.

Reid is a significant decision and a significant victory for the insurance industry. Prior to *Reid*, claimants and insureds often took the position that a carrier could be held liable for bad faith based solely on the subjective position that the carrier did not "try hard enough" to settle a case that ultimately resulted in exposure in excess of the policy limits. To foster this argument, claimants who had settled with an insured after judgment and obtained an assignment often offered testimony along the lines of "we would have settled within the limits if only somebody had asked." Certainly, the veracity of such testimony could be questioned, but the reality was that it was difficult for a carrier to challenge evidence to this effect, especially at the summary judgment stage of a bad faith action. For a very brief period of time such an argument was also supported by the issuance of *Du v. Allstate Ins. Co.*, 681 F.3d 1118 (9th Cir. 2012), in

which the Ninth Circuit initially held that carriers *do* have a duty to attempt to settle cases where the insured's liability in excess of the policy limits is reasonably clear. However, the Ninth Circuit reversed course and amended *Du* – 697 F.3d 753 – to omit the holding regarding a carrier's affirmative duty to settle, and the *Reid* decision is another large step toward a reasonable and practical application of the duty to settle rule. By requiring the claimant to have clearly manifested an intent to settle within limits before judgment, *Reid* eliminates any viability that this argument may have once had. Indeed, in the absence of very specific circumstances discussed in *Reid* – such as a carrier's failure to inform the insured of an offer in excess of policy limits, a carrier's failure to inform an insured about an inquiry regarding the applicable policy limits, or the carrier's outright rejection of a demand in excess of its limits but within the limits of all potentially applicable policies – *Reid* forecloses any possibility of bad faith liability for an insurer's failure to settle without a within-limits demand or some other clear indication that the claimant is interested in settlement. The ruling should result in lower settlement values for bad faith cases and a higher rate of success on carrier summary judgment motions.

A question remaining after *Reid* is what actions by a claimant will qualify as a "manifestation [that] the injured party is interested in settlement" so as to trigger the carrier's duty to settle in the absence of a within-limits demand. *Reid* holds that asking the carrier to disclose the relevant policy limits is not a sufficient manifestation of interest to trigger the carrier's duty to settle, while the Ninth Circuit held in *Gibbs v. State Farm Mutual Insurance Co.*, 544 F.2d 423, 427 (9th Cir. 1976) – and the *Reid* court acknowledged – that a statement by the claimant that "he wanted coverage only to the limits of the insurance policy" may be sufficient to trigger that duty. No bright-line rule has been set on this issue, and a formulation for such a rule may prove challenging. Accordingly, other communications and actions by claimants will likely form the basis for future litigation on the carrier's duty to attempt to settle a case in the absence of a within-limits demand.

California Insurance Case Summaries, July - September 2013

No Coverage for Policyholder for a Plaintiff's Attorneys' Fees Where the Lawsuit Did Not Allege a "Wrongful Act"

Screen Actors Guild Inc. v. Federal Ins. Co., 2013 U.S. Dist. LEXIS 100638 (C.D. Cal. July 11, 2013)

In *Screen Actors Guild v. Federal Insurance Co.*, the district court held that the D&O insurer for the Screen Actors Guild ("SAG") was not obligated to reimburse an attorneys' fee award and class plaintiff's enhancement award because the amounts owed by SAG in the underlying litigation resulted from SAG's preexisting duty to pay the class plaintiffs and not from a "Wrongful Act" as defined in the policy.

The suit against SAG was brought by Ken Osmond, on behalf of himself and other SAG members, and alleged that SAG had collected over $8 million in foreign royalties that should have been distributed to SAG members. The suit sought restitution, compensatory and punitive damages, an accounting, a constructive trust, attorneys' fees and costs, prejudgment interest, and injunctive relief. The insurer agreed to reimburse SAG's defense costs in the suit, but denied indemnity coverage.

SAG entered into a settlement agreement that required it to use reasonable efforts to allocate and pay 90% of the royalties to the class participants. The court approved the settlement, and awarded a $15,000 enhancement payment to Osmond, and a $315,000 award for plaintiffs' counsel's fees and costs. Although SAG acknowledged it had a preexisting duty to distribute the royalties, it sought indemnity coverage for the attorneys' fees award and enhancement payment, but the carrier denied coverage. SAG sued the insurer for breach of contract and bad faith.

On summary judgment, the district court, relying heavily on *Health Net, Inc. v. RLI Insurance Co.*, 206 Cal. App. 4th 232 (2012), ruled in the carrier's favor and found that because the underlying action did not allege a "Wrongful Act," coverage could not be bootstrapped for the lawsuit based solely on a claim for attorneys' fees.

Bad Faith Liability Cannot Be Premised On Breach of a Reformed Contractual Term When the Alleged Breach Occurs Prior to the Reformation

O'Keefe v. Allstate Indem. Co., 2013 U.S. Dist. LEXIS 99581 (C.D. Cal. July 15, 2013)

O'Keefe v. Allstate Indemnity Co. involved an automobile policy that explicitly excluded coverage for one driver based on his suspended license. When the license was reinstated, the driver contacted the insurance agent and asked to be added to the policy. The agent told the driver that he was "good to go." The driver was involved in an accident approximately one week later. He tendered the claim to his carrier, but the carrier denied coverage based on the driver's excluded status. When the carrier refused to change its position based on the statements of the insurance agent, the driver sued the carrier for breach of contract, breach of the implied covenant of good faith and fair dealing and negligent misrepresentation. The carrier moved to dismiss the cause of action for breach of the implied covenant based on the argument that, as drafted, the policy did not provide coverage for the driver, which precluded any potential bad faith liability.

The *O'Keefe* court granted the carrier's motion. In so ruling, the court held that an insured cannot recover under a cause of action for breach of the implied covenant of good faith and fair dealing unless he can first establish coverage under the written terms of the policy. While the court acknowledged that the policy may ultimately be reformed based on the statements of the insurance agent, that did not change the fact that the carrier's coverage denial was proper based on the terms of the policy at the time that the denial was issued.

California Supreme Court Finds that Violations of the Unfair Insurance Practices Act Can Form the Basis of a UCL Claim

Zhang v. Superior Court, 57 Cal. 4th 364 (Aug. 1, 2013)

In *Zhang v. Superior Court*, the California Supreme Court held that although only the Insurance Commissioner has the authority to prosecute direct claims against an insurer for violations of California's Unfair Insurance Practices Act ("UIPA") (Ins. Code § 790.03(h)), a private cause of action under California's Unfair Competition Law ("UCL") (Bus. & Prof. Code §§ 17200 *et. seq.*) against an insurer can still be based on conduct proscribed by the UIPA if that conduct also is independently actionable under another statute or the common law.

In *Zhang*, the insured filed a lawsuit alleging that the insurer violated the UCL by falsely advertising and fraudulently misrepresenting that it would provide coverage in the event that the insured suffered a loss. The insurer argued that the UCL claim was subject to dismissal because it was an impermissible attempt to plead around *Moradi-Shalal v. Fireman's Fund Insurance Cos.*, 46 Cal. 3d 287 (1988) ("*Moradi-Shalal*"), and its bar against private actions for unfair insurance practices under Section 790.03, which proscribed practices such as false advertising, failing to promptly respond to a claim, and not attempting to settle a claim in good faith.

While the *Zhang* court agreed that a plaintiff may not use the UCL to plead around an absolute bar to relief, the court noted that UIPA does not immunize insurers from UCL liability for conduct that violates other laws in addition to the UIPA. The court further held that the UCL claim was not precluded by the rule in *Moradi-Shalal* because the UCL claim was adequately supported by allegations of common law bad faith and false advertising, which are actionable independent of the UIPA. Notably, however, the Court confined its ruling to the first party insurance context, and stated that "[t]hird party claims raise distinct analytical and policy issues, which are not involved in this case."

Extended Reporting Period Held to Apply Only to Claims First Made During That Period and Not Claims Made During the Original Policy Period

PCCP, LLC v. Endurance Am. Specialty Ins. Co., 2013 U.S. Dist. LEXIS 114400 (N.D. Cal. Aug. 13, 2013)

PCCP, LLC v. Endurance American Specialty Insurance Co. concerned the interpretation of an Automatic Extended Reporting Provision ("AERP") which, by its terms, provided coverage only for "[c]laims first made against the Insured during the" AERP itself, and not for claims first made during the original policy period. In *PCCP*, an underlying claim was first made against the insured during the original policy period, but that claim was not reported to the carrier

until approximately one month after the policy period expired. The policy's AERP provided coverage for claims reported to the carrier within 60 days after the policy period expired, but only if the claim was first made during the AERP. The carrier denied coverage for the claim on the basis that it was not timely reported, and the policyholder sued. The parties filed cross-motions for summary judgment, and the *PCCP* court ruled in favor of the carrier.

In reaching its ruling, the *PCCP* court stated that the "legal community" generally understands AERPs to provide an extended reporting period for claims first made during the policy period. Based on this understanding, the court held that the carrier's labeling of the above-cited provision as an AERP created "some appeal" for the policyholder's position that the claim against it should be covered. However, the *PCCP* court went on to hold that "it is hornbook law that 'how parties label their contract is not determinative of its nature'" and that the language of the AERP in the subject policy was clear and unambiguous. Accordingly, the court found that the AERP provided coverage only for claims first made during the 60-day period following the original policy period, and granted the carrier's motion for summary judgment.

Insurer's Reservation of Rights Does Not Entitle Insured to Independent Counsel Absent an Actual Conflict of Interest

Federal Ins. Co. v. MBL, Inc., 219 Cal. App. 4th 29 (Aug. 26, 2013)

In *Federal Insurance Co. v. MBL, Inc.*, the Sixth Appellate District held that a third-party defendant-insured in an environmental contamination action was not entitled to independent counsel because the insured failed to establish any conflict of interest as a result of its liability insurers' agreement to defend subject to a reservation of rights on various issues. The insurers denied that their reservation of rights created an actual conflict of interest and filed an action seeking a declaration that they were not obligated to provide independent counsel to the insured. The trial court ruled in favor of the insurers on summary judgment.

On appeal, the *MBL* court affirmed the trial court's decision and rejected the insured's argument that the qualified (*i.e.*, "sudden and accidental") pollution exclusions and the existence of "per occurrence" limits in some of the subject policies entitled it to independent counsel. The court found that there was no actual conflict of interest because the insurers did not specifically reserve on the exclusion or on the policy limits. The court explained that the "general" reservations of rights asserted by the insurers did not entitle the insured to independent counsel because, at most, they only created a "theoretical, potential" conflict of interest.

The *MLB* court also held that the insurers' specific reservations based on property damage occurring outside the respective policy periods and the "absolute" pollution exclusion (*i.e.*, barring loss arising out of a government's claim to remediate pollution) did not trigger the insured's right to independent counsel. The court found that the issue of when the alleged damages occurred was irrelevant to a defense counsel that was jointly retained by multiple insurers, all of whom had an interest in defeating liability, and the insured provided no evidence to establish how defense counsel could have controlled the issue. Further, the court found that the defense counsel had no control over whether the absolute pollution exclusion barred coverage since that was strictly a contract interpretation issue.

Finally, the *MBL* court rejected the insured's argument that the right to independent counsel was triggered as a result of the insurers agreeing to defend other third-party defendants in the underlying environmental contamination action. The court found that this did not create an actual conflict of interest since the insurers did not "defend both sides of the litigation" and the insured did not otherwise provide evidence of any adversarial litigation between it and the third-party defendants. The court also noted that the insurers had taken steps to avoid an actual conflict with the insured by using different claims adjusters and different law firms to defend the other insureds.

Insurer Has No Duty to Pay for Independent Counsel and May Reassert Its Right to Control the Defense When the Insurer Withdraws the Reservation of Rights Triggering the Insured's Right to Independent Counsel

Swanson v. State Farm General Ins. Co., 2013 Cal. App. LEXIS 759 (Sept. 23, 2013)

Swanson v. State Farm General Insurance Co. presented an issue of first impression regarding whether an insurer has a duty to provide an insured with independent counsel, pursuant to California Civil Code section 2860 ("Section 2860"), after the insurer withdraws its reservation of rights that triggered the right to independent counsel in the first instance. The *Swanson* court ruled in favor of the carrier on this issue.

In *Swanson*, an insured tendered to its liability insurer an underlying action brought against the insured seeking covered damages for "bodily injury" and "property damage" caused by an occurrence. The insurer accepted the defense subject to a reservation of rights and allowed the insured to retain independent counsel at the insurer's expense, pursuant to Section 2860. Several months later, the insurer amended its original reservation of rights and withdrew several policy defenses, eliminating the conflict of interest that gave rise to the insured's right to independent counsel. The insurer proceeded to appoint a panel attorney to represent the insured and allowed her previously retained independent counsel to participate as co-counsel, but refused to make further payments to independent counsel. The insured then sued the insurer, alleging breach of contract and breach of the implied covenant of good faith and fair dealing.

The insurer moved for summary judgment, which the trial court granted. The trial court held that the insurer was relieved of its duty to pay for the insured's independent counsel when it withdrew its reservation of rights that triggered the right to independent counsel. The trial court found that absent a statutory right to independent counsel, the terms of the policy explicitly gave the insurer the right to "provide a defense at its own expense by counsel of [its] choice." The trial court rejected the insured's argument that the insurer entered into a modified insurance agreement by previously agreeing on the independent counsel's rate of reimbursement because, in doing so, the insurer was only satisfying a statutory obligation.

In affirming the trial court's entry of summary judgment, the Second Appellate District held the insurer had no duty to pay for and provide independent counsel since it was undisputed that a disqualifying conflict no longer existed after the insurer withdrew its reservation of rights. In so holding, the court rejected the insured's argument that the insurer relinquished the right to cease paying independent counsel because it modified its insurance agreement in its exchange of letters with the insured and her independent counsel. The court found that the letters were the means by which the insurer preserved its rights and fulfilled its duties under the policy and applicable law.

Carrier Held to Have No Duty to Defend Lawsuit Involving a Negligence Claim Because That Count Was "Inseparably Intertwined" With a Claim for Non-Covered, Intentional Conduct

Rizzo v. Ins. Co. of the State of Penn., 2013 U.S. Dist. LEXIS 126255 (C.D. Cal. Aug. 30, 2013)

Rizzo v. Insurance Co. of the State of Pennsylvania involved several underlying lawsuits against Richard Rizzo based on his allegedly fraudulent and self-interested acts while serving as an administrator for the City of Bell, California. During his time in office, Rizzo was alleged to have, among other things, siphoned off millions of taxpayer dollars to personal accounts and to have drafted intentionally self-serving contracts for city officials. As a result of these alleged actions, Rizzo was named as a defendant in an action filed by the California Attorney General and was also named in a cross-complaint filed by the City of Bell. In addition, Rizzo was named in multiple criminal actions which sought, among other things, fines and penalties.

Bell's cross-complaint contained causes of action for: (1) intentional misrepresentation; (2) breach of the covenant of good faith and fair dealing; (3) violation of California Government Code section 1090; (4) rescission and restitution; and (5) declaratory relief. Rizzo tendered the cross-complaint to his carrier, which denied coverage. The carrier argued that the policy's exclusions for claims "[a]rising out of an alleged willful commission of a crime . . . or other dishonest, fraudulent or malicious act" and for claims "[a]rising out of [the insured's] wrongful act for gain, profit, or advantage to which [the insured] is not legally entitled" eliminated any potential

coverage for Rizzo. Rizzo sued and the parties filed cross-motions for summary judgment. The court ruled in favor of the carrier and against Rizzo.

In reaching its ruling, the court conceded that several of the counts against Rizzo "theoretically need not arise out of dishonesty, fraud, malice or [a] wrongful act for gain, profit or advantage" but held that those claims were "inseparably intertwined" with the non-covered intentional and fraudulent conduct. The court went on to hold that the "gravamen of [Bell's cross-complaint] is that Rizzo and his cohorts knowingly and deceptively received and authorized excessive and wasteful salaries and benefits." The *Rizzo* court also noted that each of the counts in Bell's cross-complaint incorporated these allegations. Accordingly, the court held that none of the claims in Bell's cross-complaint were independent from the claims falling within the ambit of the policy's exclusions, and that the carrier had no duty to defend or indemnify Rizzo against Bell's cross-complaint.

Rizzo also involved the carrier's duty to defend Rizzo in the criminal actions pending against him. Citing *Aerojet-General Corp. v. Transportation Indemnity Co.*, 17 Cal. 4th 38, 61 (1997), Rizzo argued that the carrier should defend him in the criminal actions "to avoid or at least minimize liability" in the civil matters pending against him. The *Rizzo* court rejected that position for two reasons. First, because the carrier had no duty to defend the civil actions, it also had no ancillary duty to defend the criminal actions. Second, the court held that even if the carrier had a duty to defend Rizzo in the civil actions, California Insurance Code section 533.5 specifically prohibits a carrier from defending an insured against a criminal action "by the Attorney General, any district attorney, city prosecutor or any county counsel. . . ." Accordingly, the court held that *Aerojet* does not apply to criminal actions brought by state, county or city officials.

Commercial Building Owner's Policy Did Not Clearly Limit Loss of Rents Coverage to Instances Where a Signed Lease Was Already in Effect at the Time of Physical Damage

Ventura Kester, LLC v. Folksamerica Reinsurance Co., 219 Cal. App. 4th 633 (Sept. 11, 2013)

Ventura Kester owned a commercial building that was vandalized. Folksamerica Reinsurance Company issued a commercial building owner's policy that was in effect at the time of the vandalism. There was a tenant leasing the property when the policy was issued but the property was vacant when it was vandalized. The insurer paid for the property damage but denied coverage for any claimed loss of rents because there was no signed lease at the time of the loss. Ventura Kester filed suit, arguing that the policy covered loss of rents regardless of whether there was a signed lease in effect, and claimed that it, in fact, lost rents as a result of the vandalism. The carrier prevailed in the trial court on the parties' cross-motions for summary judgment.

The Court of Appeal reversed. Among other things, the policy insured against financial loss resulting from "rents including accrued rents which become uncollectible, and extra expense incurred to prevent loss of rents, because of damage to or destruction of covered structures caused by an accident." With respect to how such amounts were calculated, the policy said: "We will pay: a. your loss of rental income; and b. rents accrued but rendered uncollectible by reason of a covered loss at a location described on the Declarations Page; and c. your extra expenses necessarily incurred to minimize your rental income loss, but only to the extent that the rental income loss we would otherwise pay is reduced." The court held that the policy was ambiguous about whether there had to be a signed lease in effect at the time of the loss and that it should be resolved in the insured's favor. The court also found that triable issues of material fact existed in the record, including: whether the insured would have rented the property in the absence of the property damage; the fair market rental value; and mitigation of damages.

Insurer Could Not Move Forward with a Declaratory Relief Action Against Its Insured When The Same Issues Would be Adjudicated in the Underlying Action

Allied Prop. & Cas. Ins. Co. v. Roberts, 2013 U.S. Dist. LEXIS 132239 (E.D. Cal. Sept. 12, 2013)

Allied Property & Casualty Insurance Co. v. Roberts considered the issue of whether an insurer may move forward with a declaratory relief action against its insured when the same issues will be adjudicated in the underlying action. The coverage dispute in *Roberts* arose from an underlying tort action brought against the insureds due to a fire that took place in a warehouse located on the insureds' property, in which two individuals working at the warehouse were killed and property was destroyed. The claimants in the underlying action alleged, among other things, that the insureds were liable because they knew or should have known that the warehouse was being used for business purposes. The insureds, on the other hand, defended the underlying action by claiming that they had no knowledge of the business activities in the warehouse.

The insureds tendered the defense of the underlying tort action to their liability insurer under a Rental Dwelling Policy ("Allied Policy"), which covered the home located on the property but did not cover the warehouse. The liability insurer provided a defense subject to a reservation of rights and brought an action against the insureds for declaratory relief and rescission on the basis that the insureds did not disclose that business activities were taking place on the property. The insureds moved to stay the declaratory action pending resolution of the underlying tort action. The district court granted the insureds' motion based in part on the fact that its determination of certain issues—namely, whether the insureds had knowledge of the business operations in the warehouse—could prejudice the insureds in the underlying action.

The insurer then filed a motion seeking to lift the stay for the limited purpose of filing a motion for summary adjudication of two coverage issues: (1) whether the warehouse where the fire took place was the "insured premises" under the subject insurance policy, and (2) whether the exclusion for "bodily injury" or "property damages" "that arises out of the business activity conducted on the insured premises" applies to bar insurance coverage. The insurer argued that the district court's adjudication of these two issues would not result in prejudice to the insureds because these issues did not require the court to determine the insureds' knowledge of the business activities.

The insureds, on the other hand, argued that the Allied Policy needed to be reformed because of alleged representations made by the insurer's agent that coverage under the Allied Policy would be the same or better than their previous homeowners insurance policy. The insureds contended that their prior policy only excluded damages arising out of business activities if the insureds had knowledge of those business activities.

The district court denied the insurer's motion seeking to lift the stay because the insureds' reformation claim raised the same concerns that necessitated the stay in the action in the first place. The court found that if the insureds prevailed on their reformation claim, then the insureds' knowledge of the business activities on the property would need to be determined, and since this was an issue in the underlying action, the coverage action could not proceed.

Excess Carrier Could Not Seek Reimbursement from the Primary Insurer Based On Its Rejection of a Claimant's Settlement Offer Within Its Primary Limits Because There Was Not a Final Excess Judgment

RSUI Indem. Co. v. Discover P&C Ins. Co., 2013 U.S. Dist. LEXIS 136997 (E.D. Cal. Sept. 23, 2013)

In *RSUI Indemnity Co. v. Discover P&C Insurance Co*, the primary insurer issued the insured a commercial automobile liability policy with a $1 million limit per-occurrence and in the aggregate, while an excess insurer issued the insured a policy with an additional $4 million in coverage. The insured tendered an underlying action involving an automobile accident to the primary insurer, who agreed to defend. The third-party claimant offered to settle her claim for an amount within the primary insurer's policy limits, but the primary insurer rejected the offer. The case ultimately settled, requiring the excess insurer to pay more than $3.5 million under its policy.

The excess insurer then brought suit against the primary insurer,

contending that the primary insurer breached its duty to settle owed to the insured by exposing the insured to the risk of liability in excess of the primary limits. The excess insurer further argued that the primary insurer was liable to it under the doctrines of equitable subrogation, equitable contribution, equitable indemnification and "tort of another." In response, the primary carrier filed a motion to dismiss.

The district court ruled in favor of the primary insurer, holding that all of the excess insurer's claims against the primary insurer failed as a matter of law. In addressing the excess insurer's subrogation claim, the court noted that an excess carrier may maintain an action against a primary carrier for wrongful refusal to settle within the primary policy limits through equitable subrogation, but only where the wrongful refusal resulted in a final excess judgment. Since the court found that there was no final excess judgment, the equitable subrogation claim failed as a matter of law. The court held that the equitable contribution claim lacked merit because the primary insurer and the excess insurer did not share the same level of obligation on the same risk. The court held the equitable indemnification claim failed as a matter of law since the excess insurer's claim for reimbursement was limited to equitable subrogation. Finally, the court held that the excess insurer's "tort of another" claim failed because a "tort of another" claim is only viable when a party is required to bring or defend an action against an individual or entity based on the tortious conduct of a third party, and the primary insurer did not commit a tort by rejecting the settlement offer within its limits.

Carrier Limited to "Modest" Attorney's Fees Awards in Federal Interpleader Action

State Farm Life Ins. Co. v. Cai, 2013 U.S. Dist. LEXIS 127594 (N.D. Cal. Sept. 6, 2013)

State Farm Life Ins. Co. v. Cai involved a $250,000 life insurance policy issued to Ying Deng that named Jason Cai as the beneficiary. Deng died in May 2003, and Deng's estate claimed Cai intentionally caused that death to obtain the policy proceeds. If these allegations were true, Cai's actions would invalidate him as a proper beneficiary. Based on the dispute between Cai and Deng's estate, State Farm filed the *Cai* interpleader action. In so filing, State Farm deposited approximately $304,000 with the court—the policy limits plus interest—and asked the court to adjudicate the proper beneficiary. Subsequently, State Farm filed a motion to be dismissed from the *Cai* action, and for $25,000 in attorney's fees incurred in bringing the *Cai* action.

The *Cai* court granted State Farm's motion to dismiss, but granted State Farm only $15,000 in attorneys' fees. In reaching its conclusion on attorneys' fees, the *Cai* court noted that a disinterested stakeholder is entitled to the attorneys' fees incurred in bringing a federal interpleader action, but that there is an "important policy interest in seeing that the fee award does not deplete the fund at the expense of the party who is ultimately deemed entitled to it." In surveying Ninth Circuit authority, the *Cai* court explained that the courts within the circuit have held awards of 10% of the relevant fund to be excessive, but awards of less than 2% of the fund to be permissible. Based on this precedent, and upon the allegedly excessive nature of some of the fees incurred by State Farm's attorneys, the court awarded State Farm $15,000 in fees—an amount equating to approximately 5% of the deposited funds.