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NO COVERAGE OWED BY INSURER FOR \$5M VERDICT BECAUSE INSURED BREACHED THE COOPERATION CLAUSE

In Township of Irvington v. Coregis Insurance Company, A-2434-08T3, 2010 N.J. Super. Unpub. LEXIS 725 (April 7, 2010), the New Jersey appellate court affirmed the finding that a municipality’s liability insurance policy afforded it no coverage for a \$5M verdict because the insurer was kept in the dark about settlement demands made against the municipality and the precarious status of the underlying bodily injury case filed against the municipality until much too late in the litigation.

Although the insured provided late notice of the underlying bodily injury suit against the municipality to its insurer, albeit a full year before the matter was tried, the insured municipality breached the cooperation clause. It not only failed to keep the insurer apprised of the status of the suit, but such failure included entry of an order granting summary judgment against the municipality on liability and failure to convey settlement demands made upon the municipality. After the trial of the underlying case resulted in a \$5M verdict, the municipality advised the insurer of facts previously unreported. The insurer, Coregis Insurance Company (“Coregis”), denied coverage owed and pursued arbitration before a three judge panel pursuant to an arbitration clause in the Coregis policy. The panel found that the municipality breached the cooperation clause and that the insurer, Coregis, was appreciably prejudiced by the breach.

Plaintiff, Township of Irvington (“Township”), appealed from a judgment

of the Chancery Division, confirming the arbitration award in favor of defendant, Coregis, and granting defendant’s motion to dismiss the complaint. The arbitration panel considered whether coverage was owed under a \$1 million primary policy and a \$5 million excess policy issued by Coregis. At arbitration, Coregis successfully established a breach of the cooperation clause by the Township, as well as appreciable prejudice resulting from said breach. The Township filed suit in the Chancery Division seeking to vacate the arbitration award in favor of Coregis. Coregis moved to dismiss the complaint and confirm the award.

Applying the limited standard of review prescribed under the New Jersey Arbitration Act, N.J.S.A. 2A:23B-1 to -32, the Chancery judge confirmed the arbitration award. The judge found that none of the narrow grounds for vacating an arbitration award under the statute had been established by the Township. The New Jersey Arbitration Act,

See Breach of Cooperation Clause page 2 for conclusion

N.J.S.A. 2A:23B-23, provides that a reviewing court shall vacate an arbitration award only where:

- (1) the award was procured by corruption, fraud, or other undue means;
- (2) the court finds evident partiality by an arbitrator; corruption by an arbitrator; or misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;
- (3) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to section 15 of this act, so as to substantially prejudice the rights of a party to the arbitration proceeding;
- (4) an arbitrator exceeded the arbitrator's powers;
- (5) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection pursuant to subsection c. of section 15 of this act not later than the beginning of the arbitration hearing; or
- (6) the arbitration was conducted without proper notice of the initiation of an arbitration as required in section 9 of this act so as to substantially prejudice

the rights of a party to the arbitration proceeding.

On appeal, the Township argued the court should apply a "heightened level of judicial scrutiny" in cases such as this where the arbitration involves a public entity and where tax payers will have to shoulder the consequences of an adverse outcome. In support of its argument, the Township cited to the heightened scrutiny standard applied in a "public sector" arbitration. Coregis opposed the appeal, maintaining that the Chancery judge applied the correct standard of review, that the arbitration award was supported by law and facts and that the Township had failed to raise, prior to its appeal, fiscal concerns about the public coffers if responsible for the judgment. The Appellate Division affirmed the judgment of the Chancery Division. The appellate court found no reason to apply a more heightened standard simply because one of the participants in the arbitration is a public entity. The court noted that the arbitration was triggered by a clause in a standard liability policy issued by a private insurance company. In conclusion, the court noted that "[i]f the Township believes that a more stringent review standard should be adopted because of its status as a public entity, the remedy lies with the Legislature."

TRESSLER COMMENT

This matter illustrates that the enforcement of a policy's arbitration clause can be a significant strategic decision. Despite the

sympathetic figure painted by a municipality faced with satisfying a \$5M verdict and accruing interest out of the public funds and the impact such a result would have upon the municipalities already strained budget and services, the arbitration mechanism prevented the matter from becoming a politically charged issue before a local judge or jury. Moreover, since vacating an arbitration award is extremely difficult, Tressler and its insurer client were able to minimize the nature and form of potential arguments for reversal.



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FEDERAL JUDGE HOLDS THAT PRE-SUIT PAYMENTS TO REMEDIATE DEFECTIVE CHINESE DRYWALL WERE MADE VOLUNTARILY AND HENCE ARE NOT COVERED

In *Builders Mutual Insurance Co. v. Dragas Management Corp.*, 2010 U.S. Dist. LEXIS 36746 (E.D. Va. March 24, 2010), a federal judge, sitting in the Eastern District of Virginia, held that the costs incurred by a homebuilder to remediate property damage caused by the installation of defective Chinese drywall were not covered because the costs were not paid pursuant to "a legal obligation to pay sums as damages."

In early 2009, Dragas Management Corporation, a homebuilder, learned that one of its subcontractors had installed defective Chinese drywall that may have resulted in property damage and personal injury. Rather than wait until the homeowners filed suit, Dragas notified the homeowners that it would perform inspections and remediate any damage in their homes. Dragas concurrently sought coverage from its commercial general liability insurers. Builders Mutual Insurance Company filed a declaratory judgment action and sought a ruling that it had no duty to defend or indemnify Dragas for any potential homeowner lawsuits. Nearly two months later, four complaints were filed against Dragas for damages resulting from the installation of the Chinese drywall, but these

lawsuits were voluntarily dismissed because of the remediation work that Dragas had performed.

In the declaratory judgment action, Dragas asserted a breach of contract counterclaim against the insurers, contending that they breached their duty to indemnify by failing to reimburse Dragas for the costs incurred to remediate the defective Chinese drywall. In response, the insurers filed a motion to dismiss the breach of contract claim. They argued that Dragas failed to allege facts to support the conclusion that the insurers had become "legally obligated to pay sums as damages" because the cost of the remediation was incurred voluntarily and without any legal obligation.

The court noted that jurisdictions around the country were split over the issue of whether a "legal obligation" to pay "damages" can arise prior to the filing of a lawsuit against an insured. However, applying Virginia law, which had not considered the issue directly, the court held that Dragas had voluntarily incurred the remediation expenses before a lawsuit had been filed against it. The court therefore ruled that Dragas did not have any "legal obligation" to incur the expenses. The court noted that no facts had been alleged in Dragas' counterclaim showing that it had been sued or had been threatened with a suit. Although the court noted that Dragas had made an appropriate and reasonable decision to pay the remediation expenses prior to being sued, those expenses were

See Chinese Drywall on page 3 for conclusion

"THOMAS & FRIENDS" ARE DERAILED IN THEIR QUEST FOR COVERAGE

In [Ace American Insurance Company v. RC2 Corporation, Inc.](#), No. 09-3032, 2010 U.S. App. LEXIS (7th Cir. April 5, 2010), a case involving lead exposure to toys, the Seventh Circuit held that the "occurrence" happened at the location of the lead exposure (United States), and not where the negligent manufacture took place (China).

This case stems from a coverage dispute arising from lawsuits filed over the negligent manufacturing and testing of the popular "Thomas & Friends" railway toys after it was discovered the toys contained lead. Briefly, RC2 Corporation, Inc. ("RC2") designs, produces and markets the "Thomas & Friends" toys. These toys are manufactured in China. After it was discovered that the toys contained lead, RC2 initiated a recall of the toys which spurred the filing of multiple class actions lawsuits based on products sold and used exclusively in the United States.

RC2 maintained two separate lines of insurance policies. The first line of policies applied to occurrences within the United States. The second line, issued by ACE American Insurance Company ("ACE"), applied internationally but excluded occurrences that took place in the United States. After the domestic insurers denied any obligation to defend based on the application of the lead paint exclusions, RC2 looked solely to ACE and the international policies for coverage. The insuring agreement of the ACE policies provided that an "occurrence" must take place in the "coverage territory." "Coverage territory" included anywhere in the world, but excluded the United States. In interpreting the ACE policies, the district court ruled that because the negligent manufacture of the products took place in China, which was within the "coverage territory", the policies potentially covered the damages and ACE owed an obligation to defend.

On appeal, the Seventh Circuit rejected the district court's interpretation of Illinois law

and found that ACE did not have a duty to defend RC2 in the underlying lawsuits. The Seventh Circuit first found that, it was undisputed that the underlying damages involved exposure to lead paint that occurred in the United States – outside the coverage territory. It was also undisputed that the manufacture of the toys took place in China – within the coverage territory. In order to resolve this case, the Seventh Circuit looked at whether, under Illinois law, the "occurrence" took place at the location of the negligent act or at the location where the harm is actually inflicted. An "occurrence" under the policies is defined as an "accident, including continuous or repeated exposure to substantially the same general harmful conditions." Relying on the legal meaning of the term "accident," the Seventh Circuit reasoned that an accident occurs where the actual event that inflicts the harm takes place. Based on the undisputed facts, the "occurrence" happened at the location of the lead exposure which was within the United States.

RC2 argued that Illinois courts would support the application of the "cause-test" to determine the location of an "occurrence." The "cause-test" is used by Illinois courts to determine whether a series of harms constitute a single or multiple occurrences for purposes of calculating per-occurrence deductibles or coverage limits. See [Nicor, Inc. v. Associated Elec. & Gas. Ins. Servs.](#), 233 Ill. 2d 407 (Ill. 2006). According to RC2, because Illinois adopted the "cause-theory", and the relevant negligent cause took place in China, the "occurrence" also took place

in China. The Seventh Circuit rejected the application of the "cause-theory" because it did not address the location where the occurrence or occurrences took place. The Seventh Circuit also noted that the construction urged by RC2 would render the territorial limitations contained in domestic and international policies irrelevant in product liability situations.

TRESSLER COMMENTS

The Seventh Circuit interestingly refused to expand the application of the "cause-theory" to situations where the location of an "occurrence" is in dispute. The Seventh Circuit continued to follow Illinois precedent and limited the application of the "cause-theory" to determine the number of occurrences for the purpose of calculating per-occurrence deductibles or coverage limits. The Seventh Circuit also raised a well-founded public policy concern that the application of the "cause-theory" in product liability cases would eviscerate the coverage territory requirement.



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Chinese Drywall continued from page 2

simply not made pursuant to a "legal obligation" and thus were not covered by the explicit terms of the policies. Specifically, the court stated:

[W]hile this court may agree that Dragas made an appropriate and well-conceived decision to remediate from a business, public relations, and moral standpoint, this court is not free to rewrite the . . . policies to further those ends.

Accordingly, the court dismissed Dragas' breach of contract counterclaims.

TRESSLER COMMENTS

This decision is believed to be the first reported decision on insurance coverage for a policyholder facing claims arising out of defective Chinese drywall. Although a number of important coverage issues were raised in this case, such as whether the installation of defective drywall can constitute an occurrence, the decision was decided on a more narrow ground. Moreover, the court granted Dragas 14 days to amend the counterclaim to allege facts that might demonstrate that suits or threats of suits

had been made before the remediation costs had been incurred, so it is entirely possible that this issue may be reconsidered.



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CUTTING BOTH WAYS: STATE STATUTE VOIDS COMMERCIAL LEASE PROVISION REQUIRING A TENANT TO INDEMNIFY A LANDLORD'S NEGLIGENCE BUT NOT A PROVISION REQUIRING A TENANT TO PROVIDE INSURANCE FOR LANDLORD'S NEGLIGENCE

In Norfolk & Dedham Mutual Fire Insurance Company v. Morrison, 2010 Mass. LEXIS 187 (April 8, 2010), the Supreme Judicial Court of Massachusetts (highest court) held that G. L. c. 186, § 15 voids a commercial lease provision allocating responsibility onto the tenant for all injuries arising out of the condition of the leased premises, except those resulting from the landlord's sole negligence, but does not void a neighboring provision that requires the tenant to purchase liability insurance for the benefit of the landlord concerning injuries arising out of the condition of the leased premises.

Ellen Morrison was on a routine doctor's visit. When she arrived at Cummings Properties LLC's ("landlord") building complex that housed the medical office, and common areas, leased to Dr. Shafer ("tenant"), Morrison claims she tripped and fell on a newly-constructed cement curb in the complex's parking lot. Morrison sued the landlord, tenant, and their respective liability insurers. Because the landlord demanded that the tenant, and her insurer, defend and indemnify the landlord pursuant to certain provisions in the parties' commercial lease, tenant's insurer sought declaratory relief that those provisions were void and that no defense and indemnity duties were owed to the landlord.

The landlord's two-prong demand was based on the commercial lease. The lease contained a liability provision which provided that "as between [landlord] and [tenant], [tenant] shall be solely responsible for personal injuries and property damage occurring on the leased premises except for those resulting from the sole negligence of [landlord]." The lease also contained an insurance provision which required the tenant to purchase general liability insurance for the benefit of the landlord with respect to injuries arising out of the condition of the leased premises or their use by the tenant.

The crux of the trial court's inquiry was whether G. L. c. 186, § 15 barred the two provisions. Essentially, the statute "voids lease provisions that require tenants to indemnify landlords or exonerate them from liability for their own negligence." Put another way, it precludes "a landlord from shifting responsibility for its own negligence to tenants." The court, in awarding summary judgment in favor of the tenant's insurer, determined that the insurance provision was void under the statute; it held that requiring a tenant to provide insurance covering a landlord's negligence amounted to the type of indemnification barred by the statute. As to the liability provision, the court concluded that it need not rule on the clause's validity since the landlord was solely responsible for the common area where the injury occurred,

and any negligence would therefore be the sole negligence of the landlord.

On direct appellate review, the Supreme Judicial Court disagreed. Beginning with the liability provision, the court concluded that its language was inconsistent with the statutory prohibition against shifting any or all liability for the landlord's negligence to the tenant. G. L. c. 186, § 15. According to the Supreme Judicial Court, "[o]n its face, [the liability provision's] language appears to shift to the tenant responsibility for injuries and damage that might arise from negligent acts for which [landlord] may be partially, but not solely, responsible," in contrast to the statute's preclusion. The court further disagreed with the lower court's conclusion that the landlord was solely negligent. Acknowledging that although the landlord was in control of the remote parking area, recent courts have "deemphasized control as the all-decisive determinant and have focused in the inquiry on whether the defendant owed a duty of care to the plaintiff." Because the leased premises included an undivided portion of the common areas, the court vacated the finding that tenant could not have conceivably been negligent.

The insurance provision, in contrast, did not suffer the same fate; the commercial lease's requirement that the tenant provide liability insurance for the landlord was held to be in compliance with the statute. Because no Massachusetts appellate court has precisely addressed the issue, the Supreme Judicial Court of Massachusetts drew guidance from Great Northern Insurance Co. v. Paino Associates, 364 F. Supp. 2d 7 (D. Mass. 2005), a decision interpreting Massachusetts law, and emphasized the academic distinctions between contractual promises to indemnify (a violation of G. L. c. 186, § 15) and contractual promises to procure insurance (not a violation of G. L. c. 186, § 15). According to the court, the statute "seeks to protect a tenant from overreaching by the landlord with respect to maintaining safety of the leased premises." It does not "seek to limit commercial landlords and tenants from negotiating the apportionment

of risk through the acquisition of insurance for their mutual protection and the benefit of third parties." Simply, the court determined that "the statute does not apply to insurance provisions, where the duty of indemnification resides, where it should – with the insurer," and not the tenant.

TRESSLER COMMENTS

Massachusetts joins the majority position recognizing the critical distinction between a contract to procure insurance coverage from an agreement to indemnify. Although the viability of an indemnity provision – under G.L. c. 186, § 15 – will turn on the specific language of the provision, the Supreme Judicial Court of Massachusetts expresses that insurance provisions encompassing another parties' own negligence are enforceable. Thus, carriers, in Massachusetts, should no longer look to be absolved of duties and obligations to additional insureds on this basis.



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NINTH CIRCUIT HOLDS PATENT INFRINGEMENT CLAIM AGAINST AUTOMAKER'S INTERACTIVE WEBSITE FEATURE CONSTITUTES ADVERTISING INJURY

In *Hyundai Motor America v. National Union Fire Ins. Co.*, No. 08-56527, 2010 U.S. App. LEXIS 6978 (9th Cir. April 5, 2010), the Ninth Circuit held that in the context of the facts of this case, the third party patent infringement claims constituted allegations of "misappropriation of advertising ideas" sufficient to give rise to the duty to defend.

After Hyundai Motor American ("Hyundai") placed certain features on its website, a third party sued Hyundai for patent infringement based on two patents. Hyundai contended the suit alleged "advertising injury" because the alleged patent infringement concerned Hyundai's advertising methods and as such sought a defense from its liability insurers, National Union Fire Insurance Company and American Home Assurance Company. The insurers disagreed and declined to defend. Hyundai defended itself through verdict and then brought the present suit against its insurers seeking declaratory relief and to recover reasonable defense fees.

At issue in this case are two features of Hyundai's website, a build your own vehicle ("BYO") feature and a parts catalogue feature. The website features are interactive and allow users to input information which the website utilizes and then generates customized responses based on the information provided. The third party's patents involve a method of generating customized product proposals, such as a custom tailored automobile, for potential customers of an automobile dealer as well as a similar method for generating parts proposals. Based on these patents, the third party filed suit against Hyundai and other car companies for patent infringement. The underlying suit ultimately resulted in an adverse judgment against Hyundai.

Hyundai contended that the insurers had a duty to defend because the third party's claims constituted allegations of "misappropriation of advertising ideas" falling within the policies' definition of advertising injury and therefore within the scope of coverage for personal and advertising injury. The insurers disagreed, asserting that the website was more akin to one-on-one solicitation, rather than widespread promotional activities. The district court agreed with the insurers such that the alleged patent infringement did not constitute an "advertising injury" under the policies and granted summary judgment in the insurers' favor. The district court also held that Hyundai was "unable to demonstrate a casual connection between its advertising [] and [the patent holder's] alleged injury." The district court did not reach the question whether the two interactive features constituted "advertising" as defined by California authority. Hyundai filed a timely appeal. On appeal, the Ninth

Circuit reversed.

The Ninth Circuit began its analysis by noting that the California Supreme Court had previously specified three required elements to establish a duty to defend for advertising injury: (1) that the insured was engaged in "advertising" during the policy period; (2) the third party's allegations created a potential for liability under one of the covered offenses such as misappropriation of advertising ideas; and (3) a causal connection existed between the alleged injury and the "advertising." In turn, the court addressed each of these elements.

First, the court stated the term "advertising" means "widespread promotional activities usually directed to the public at large," but does not include "solicitation." Hyundai argued that the BYO feature on its website promotes products; that a website is directed to the public at large; and thus it constituted "advertising." The insurers contended that because the BYO feature creates customized proposals specific to an individual user, the feature was in effect a one-on-one solicitation. The Ninth Circuit agreed with Hyundai.

In reaching that conclusion, the Ninth Circuit compared the allegations of the underlying complaint with the terms of the policies at issue. That complaint alleged that Hyundai's feature constituted "making and using supply chains methods, sales methods, sales systems, marketing methods, marketing systems and inventory systems." The court noted that because the complaint described the BYO feature as "marketing methods" or "marketing systems," those descriptions fall within the definition of "advertising." Namely, widespread promotional activities directed to the public at large. Despite the insurers' arguments that the BYO feature constituted a solicitation, the Ninth Circuit concluded that the patent holder's complaint alleged "advertising" activities.

Next, Ninth Circuit addressed whether the BYO patent infringement claim constituted a "misappropriation of advertising ideas." That is, whether the patent at issue "involve[s] any process or invention which could reasonably be considered an 'advertising idea.'" (citations omitted). In this case, the Ninth Circuit held the underlying action

complaint alleged "violation of a method patent involving advertising." The third party patented "a method of displaying information to the public at large for the purpose of facilitating sales, *i.e.*, a method of advertising." Further, the complaint alleged that Hyundai violated that patent by using patented techniques in its own "marketing method" or "marketing system." Thus, the third party patented a "process . . . which could reasonably be considered advertising" and alleged violation of a patent involving advertising ideas. Accordingly, the court held the patent infringement claim alleged "misappropriation of advertising ideas."

Finally, the Ninth Circuit addressed the casual connection requirement. In other words, "a casual connection must link the advertisement and the alleged advertising injury." The court noted that when the advertisement itself infringes on the patent, the casual connection is met. Namely, it must be determined "whether the advertising itself constituted the (injurious) use of the patented method." The court reasoned that the use of BYO feature in Hyundai's website is itself an infringement of the patent because it is the use of the feature that violates the method patent. The court highlighted it is that use that caused the alleged injuries. Hence, the Ninth Circuit found a casual connection between the advertisement and the advertising injury. That is, the casual connection between the use of the BYO feature on the website and the patent infringement.

The Ninth Circuit thus held that the third party patent infringement claims constituted allegations of "misappropriation of advertising ideas" for the purposes of the insurance policies at issue. The court reversed the district court's grant of summary judgment to the insurers on all claims. It further remanded with instructions to grant summary judgment to Hyundai on its first claim for declaratory relief on the duty to defend and with instructions to conduct further proceedings, if necessary, on the other claims.

TRESSLER COMMENTS

This case is significant because it illustrates a very narrow exception to the general rule that

ADDITIONAL INSURED ENTITLED TO A DETERMINATION OF WHETHER INSURER BREACHED ITS DUTY TO DEFEND BEFORE INSURER IS ENTITLED TO ARBITRATE A RATE DISPUTE UNDER CAL. CIVIL CODE §2860

In Intergulf Development, LLC v. Superior Court (Interstate Fire & Cas. Co.), 183 Cal. App. 4th 16 (2010), the California Court of Appeal for the Fourth Appellate District held that an insurer was not entitled to compel arbitration of a fee dispute with independent counsel for an additional insured under California Civil Code Section 2860 before a determination was made as to whether the insurer had breached its obligations to the additional insured.

Intergulf Development (Kettner) LLC (“Developer”) tendered its defense and indemnity as an additional insured under policies issued by Interstate Fire & Casualty Company (“Interstate”) to a named insured subcontractor. The Developer tendered its defense and indemnity in a lawsuit alleging defects in the construction of a condominium complex. Several months after the initial notice of the claims and tender of the lawsuit, Interstate agreed to defend Developer through appointed counsel subject to a full reservation of rights.

In response to Interstate’s reservation of rights, Developer demanded a defense in the underlying action with independent counsel pursuant to California Civil Code Section 2860 (“Section 2860”). Developer eventually sued Interstate for breach of contract and bad faith, asserting that Interstate delayed in responding to its initial tender, responding to its demand for independent counsel, and in making payments toward its defense in the Defect Action. Interstate subsequently made substantial payments toward the defense of Developer in the underlying action at rates it ordinarily paid counsel retained in the defense of similar actions in the community, as required under Section 2860(c). Developer maintained that Interstate’s failure to respond to the demand for independent counsel and its delays in payment amounted to a “total breach” of its obligations to Developer as additional insured, entitling Developer to damages for breach of contract that would not be subject to the limitations of Section 2860(c).

Five weeks prior to trial, Interstate filed a petition to compel arbitration pursuant to Section 2860(c), which provides that

“[a]ny dispute concerning attorney’s fees not resolved by these methods shall be resolved by final and binding arbitration by a single neutral arbitrator selected by the parties to the dispute.” The trial court granted the petition to compel and Developer proceeded with a petition for writ of mandate.

The Court of Appeal identified the following as the “question presented” in the writ of mandate: “whether an insurer is entitled to binding arbitration of an alleged Cumis fee dispute pursuant to Civil Code section 2860, subdivision (c) in an action by the insured against the insurer for breach of contract and bad faith where there has been no determination that the insurer had a duty to defend and the parties dispute whether the insurer satisfied that duty and its obligations under Civil Code section 2860.”

The Court of Appeal agreed with Developer that the “gravamen of the complaint is bad faith and breach of contract, not a dispute over the amount Interstate should pay independent counsel under section 2860, section (c).” The Court of Appeal also agreed with Developer’s assertion that an insurer’s breach of the duty to defend “results in the forfeiture of the right to control defense of the action or settlement, including the ability to take advantage of the protections and limitations set forth in section 2860.” According to the Court of Appeal, by filing the action, Developer “gave Interstate notice” that it was treating Interstate’s failure to acknowledge Developer’s right to independent counsel or to pay for the defense of Developer before the Developer sued for breach of contract as a “total breach of the duty to defend.”

According to the Court of Appeal, a determination of whether Interstate breached the duty to defend is necessary before it can be determined whether Interstate is entitled to arbitration under Section 2860(c). The Court of Appeal reasoned that in the event of a determination of breach of the insurance policies or of the implied covenant of good faith and fair dealing as alleged in the complaint, “at minimum, the trier of fact applies the contract measure of damages in the trial court.” The Court of Appeal noted that Developer might be prejudiced by a premature determination that Interstate is entitled to arbitration under Section 2860, because Section 2860 would not apply in the event of a breach. Although it determined that the breach issues must be decided first, the Court of Appeal noted that “[o]ur decision does not prevent Interstate from pursuing its remedies under section 2860(c) at a later time, if appropriate.”

TRESSLER COMMENTS

This decision may potentially have a significant impact on the ability of insurers in California to avail themselves of the protections provided in Section 2860(c). Arguably, this decision may allow an insured delay arbitration of a fee dispute under Section 2860(c) by filing an action against the insurer alleging breach of contract and/or bad faith.



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patent infringement is typically not covered under general liability policies. As discussed in Hyundai, the specific facts alleged in the lawsuit were significant in reaching the Ninth Circuit’s decision. The Ninth Circuit focused on the allegation that the patent specifically related to a marketing method and therefore the patent infringement claims qualified within the enumerated offense of “misappropriation of advertising ideas.”



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