Discovery Law

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In August 1999, several hundred tenants filed an action against the contractors and Coffin, among other entities. When the tenants began depositions, they sought each deponents "entire files" relating to the original action between Coffin and the contractors. Coffin moved to quash with another party and sought a protective order. The court ordered the subpoenas withdrawn so tenants countered by filing a motion to compel requesting photographs and expert opinions, among other things. Coffin opposed the motion, arguing the requested documents were undiscoverable under Section 1119 because they were prepared for the mediation in the original action.

The first trial judge ruled the documents were not admissible if made for mediation after the case management order. The case was reassigned to a second trial judge, and when a new discovery dispute arose, tenants filed another motion to compel. The second trial judge ruled the mediation compilations were not discoverable, but the photographs contained in the compilations were discoverable. Tenants made a motion to compel the photographs, and Coffin argued the prior judge had ruled they were not discoverable. The second judge changed his ruling and found the photographs were protected by the mediation privilege.

Tenant sought a writ of mandate in the Court of Appeal. In a split decision, the Court of Appeal granted relief, concluding Section 1119 does not protect "pure evidence" but only the substance of mediation (i.e., negotiations, admissions and discussions). The Appellate Court held Section 1119 protected mediation materials "in the same manner as the work product doctrine", so that "raw test data, photographs and witness statements" were not protected and were discoverable, while materials reflecting an attorney's impressions, conclusions, opinions or theories were absolutely protected. Finally, the Appellate Court held materials which combined factual information and attorney's thoughts, impressions or conclusions, such as charts or compilations and reports of experts, would be "qualifiedly protected" and discoverable only upon a showing of good cause.

The Supreme Court rejected the compromising standards set by the Appellate Court, indicating one of the fundamental ways Legislature sought to encourage mediation was by enacting several mediation confidentiality provisions. Finding the Appellate Court's ruling directly contradicted the plain language of Evidence Code § 1119, the Court held photographs and witness statements were both a "writing" under Evidence Code § 250 and therefore fall under Evidence Code § 1119. The Court rejected the argument that Section 1120, which provides that evidence otherwise admissible or subject to discovery outside of mediation does not become inadmissible solely by its use in mediation, required discovery of the items at issue. Rather, the Court found Section 1119 simply clarifies that only those writings prepared for the purpose of, in the course of, or pursuant to, a mediation are undiscoverable.

The Court further opined the Appellate Court's interpretation that photographs and videotapes taken for purposes of mediation were not protected under Evidence Code § 1119 was inconsistent with recent legislative history, and was inconsistent with the overall purpose of the mediation confidentiality provisions. The Court found the Appellate Court's ruling that compilations would be qualifiedly protected was incorrect as the Legislature never enacted a "good cause" exception to Section 1119 and other mediation confidentiality provisions. The Court noted Section 1122(a)(2) permits discovery of protected communications and writings prepared by or on behalf of fewer than all mediation participants if those participants expressly agree to the disclosure, which was designed to give the participant control over whether something prepared for mediation is used in subsequent litigation. In confirming its reversal, the Court quoted the second trial judge, who had observed "the mediation privilege is an important one, and if courts start dispensing with it ... you may have people less willing to mediate."

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Insurance Law

James M. Roth, The Roth Law Firm

Following are some recent California decisions which will impact the insurance industry.

"OTHER INSURANCE" CLAUSE APPLIED AMONG PARTICIPATING CARRIERS ON PRO-RATA BASIS DESPITE DIFFERING POLICY PROVISIONS: Between July 1988 and 1993, Travelers Casualty and Surety Co. issued successive CGL policies to Standard Wood Structures, Inc. The policies had a "pro rata" "other insurance" clause. Century Surety Company issued a primary CGL policy to Standard from September 1996 through September 1997. The policy contained an "excess" other insurance clause. Travelers and Century defended Standard against a construction defect action, but Century later withdrew based on its "excess" "other insurance" clause. In Travelers Casualty and Surety Co. v. Century Surety Co., (2004) 118 Cal.App.4th 1156, 13 Cal.Rptr.3d 526, the Fourth Appellate District of the California Court of Appeal affirmed the trial court's judgment finding defendant insurer had a duty to contribute on a pro-rata basis to defense and indemnity expenses incurred by plaintiff insurer in defending a common insured in a construction defect lawsuit despite an "excess" "other insurance" clause. Century contended its "excess" "other insurance" clause made its policy excess to Travelers' policy with the "pro rata" provision. The appellate court disagreed, finding that where primary polices of

two or more insurers of a common insured contain conflicting other insurance clauses, they are disregarded and the policies pro rate among each other. The appellate court distinguished the decision in Hartford Casualty Ins. Co. v. Travelers Indemnity Co., (2003) 110 Cal.App.4th 710, 2 Cal.Rptr.3d 18, which gave effect to an "other insurance" clause in a landlord's policy which declared the policy excess "over other" "valid and collectible insurance…if [the landlord was] added as an additional insured under any other policy."

ATTORNEY DISQUALIFIED FROM REPRESENTING PLAINTIFF AGAINST FORMER INSURER CLIENT: An attorney and his law firm were disqualified from representing an insured of Fireman's Fund Insurance Company (FFIC) in a lawsuit against FFIC alleging "bad faith" and breach of insurance contract because the attorney had previously represented FFIC. Surprisingly, a previous relationship with the defendant insurer does not automatically result in disqualification; rather a "substantial relationship" must exist between the subject of the former representation of the defendant and the subject of the current plaintiff's litigation. In granting the motion to disqualify, the Fifth District Court of Appeal in the case styled Farris V. Fireman's Fund Insurance Company, (2004) 119 Cal.App.4th 671, 14 Cal.Rptr.3d 618, found the required "substantial relationship" because during the 13 year relationship with FFIC and while a member of a different law firm, the attorney (and his previous firm) provided coverage and claims handling advice to senior employees and decision makers at FFIC, including settlement, litigation and claims handling strategies in connection with coverage matters, and participated in confidential communications with top-level FFIC employees. The attorney, while with his previous firm, had also been a presenter in educational seminars given to FFIC employees on issues related to coverage disputes and bad faith actions. The Court concluded that given the factual and legal issues in the present case, the information material to the evaluation, prosecution, settlement, or accomplishment through the attorney's earlier representation of FFIC was also material to the evaluation, prosecution, settlement, or accomplishment of the current representation.

INFERIOR WORK PERFORMED OR DEFECTIVE IN WORKMANSHIP IS NOT COVERED "PROPERTY DAMAGE": F&H had contracted with Contra Costa Water District in September 1994, to build a water facility pumping plant. F&H entered into a subcontract with O' Reilly for the manufacture and delivery of A-50 grade steel pile caps. O' Reilly instead delivered A-36 steel, which was a lesser grade of steel that had a lesser load capacity. F&H did not discover that the steel caps were of a lesser grade until it had already welded the majority of the caps into place. As a consequence F&H was required to perform modifications to reinforce the steel caps so as to provide the needed reinforcement to meet design requirements. The project was completed on time and no liquidated damages were assessed against F&H for the change in design. F&H filed suit against O' Reilly seeking recovery of damages in excess of $200,000 for the costs of modifying the pile caps and the lost bonus for early completion of the project. After suit was filed O' Reilly filed a petition for bankruptcy which automatically stayed F&H's suit. The bankruptcy court granted F&H's petition to lift the stay for the limited purpose of pursuing the civil action to obtain O' Reilly's insurance assets. F&H then filed suit against Hartford, F&H's insurer, for damages and breach of contract seeking $243,064.37 for "property damage" under the CGL policy. In F&H Const. v. ITT Hartford Ins. Co. of the Midwest, (2004) 118 Cal.App.4th 364, 12 Cal.Rptr.3d 896, the Third District Court of Appeal held that a third party failed to establish it suffered covered "property damage" within the meaning of the insured's comprehensive general liability insurance policy ("CGL policy") when the loss arose from inferior work performed for the third party or defective in workmanship. In analyzing California law regarding the interpretation of "property damage" under the CGL policy, the appellate court determined that the damages claimed by F&H – "the costs of modifying the pile caps and the lost bonus for early completion of the project" – were not recoverable as property damage because they were intangible economic damages rather than damages "to tangible property." The court also noted that a liability insurance policy is not designed to serve as a performance bond or warranty of a contractor's product.

INSURER'S RIGHT TO REIMBURSEMENT OF DEFENSE COSTS: The California Supreme Court has granted a petition for review of an unpublished decision styled Scottsdale Ins. Co. v. MV Transportation, Inc., et al., (2004) 2004 WL 726816, which precluded an insurer from recovering defense costs incurred in an underlying action. In the underlying action, plaintiff alleged the insured misappropriated trade secrets. Scottsdale sought to protect its right to seek reimbursement of defense fees and therefore agreed to defend under a reservation of rights. The underlying suit settled with the insured agreeing to return materials containing plaintiff's alleged trade secrets. Neither Scottsdale nor the insured were required to pay any money to the plaintiff. Scottsdale then sought recovery of its defense fees in a declaratory action. The trial court denied Scottsdale's motion for summary judgment, concluding it owed a duty to defend under its policies' advertising injury coverage. The Court of Appeals agreed, concluding "advertising injury" coverage was not limited to injury from widespread promotional activities directed to the public at large, but instead included the insured's one-on-one business solicitations. The California Supreme Court granted review, however, and remanded the matter to the Court of Appeals for reconsideration in light of Hameid v. National Fire Insurance of Hartford, (2003) 31 Cal.4th 16. On reconsideration, the Court of Appeals concluded that the claims made against the insured in the underlying suit were not covered under the policies' advertising injury coverage and, therefore, no duty to defend was owed. However, the Court nevertheless found Scottsdale could not recover its defense fees because Scottsdale had elected to

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defend the insured and failed to "exercise its exit option" of withdrawal from the defense. The California Supreme Court has granted Scottsdale's petition for review of this ruling.

INSURED'S RIGHT TO ATTORNEYS' FEES IN DEFENDING APPEAL FROM BAD FAITH JUDGMENT: Applying its interpretation of California law, the Ninth Circuit Court of Appeals held that an insured may recover attorneys' fees incurred in successfully defending an appeal from a bad faith judgment against an insurer. In McGregor v. Paul Revere Life Ins. Co., (2004) ___ 9th Cir. ___, 04 C.D.O.S. 4485, after a jury found that Paul Revere Life Insurance Company breached its insurance contract with McGregor and therefore committed "bad faith," Paul Revere unsuccessfully appealed. McGregor then moved for attorneys' fees incurred while defending against the appeal. In deciding this issue, the Ninth Circuit looked to Brandt v. Superior Court, (1985) 37 Cal.3d 813, 210 Cal.Rptr. 211. In Brandt, the California Supreme Court held that if an insured proves "bad faith" the insured may collect attorneys' fees reasonably incurred to compel payment of insurance policy benefits. The Brandt case was silent as to whether an insured may collect attorneys' fees incurred in successfully defending against an appeal. Treatment of that question is mixed throughout California. In predicting how the California Supreme Court would rule, however, the Ninth Circuit held that McGregor was able to collect the fees. Because McGregor proved Paul Revere's "bad faith" at trial and McGregor would have been unable to collect her policy benefits unless she successfully defended against the appeal, the Ninth Circuit reasoned that allowing McGregor to collect attorneys' fees was consistent with the logic in Brandt.

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