

## 2007 CALIFORNIA CASE LAW

### Rappaport-Scott v. Interinsurance Exchange of the Automobile Club

146 Cal.App.4th 831; January 11, 2007.

Insurance- Withholding benefits due under the policy is not unreasonable if there was a genuine dispute between the insured and insured as to coverage or the amount due

Rappaport-Scott had an automobile insurance policy with Interinsurance. Her policy included coverage for bodily injury caused by uninsured and underinsured motorists, and her coverage limit for bodily injury was \$100,000. She was rear ended by an underinsured motorist, and suffered bodily injuries as a result of the collision. She settled her claim against the underinsured motorist for policy limits of \$25,000. Rappaport-Scott then submitted a claim to Interinsurance under her underinsured motorist coverage and made a demand for arbitration. She claimed her damages totaled \$346,732.34. Rappaport-Scott made a settlement demand of \$75,000. Interinsurance offered her \$7,000 on the claim. The parties submitted to arbitration, and the arbitrator determined \$33,000 was payable to Ms. Rappaport-Scott.

Ms. Rappaport-Scott then filed a complaint against Interinsurance alleging a breach of the implied covenant of good faith and fair dealing. She alleged Interinsurance was unwilling to settle plaintiff's claims for a reasonable amount, resulting in an unreasonable delay. She also alleged she was entitled to recover the full \$100,000 policy limit from Interinsurance. The trial court sustained two demurrers to the complaint with leave to amend. Plaintiff's second amended complaint also alleged Interinsurance failed to negotiate with her in good faith to resolve her claim. Interinsurance demurred for a second time, arguing plaintiff failed to allege facts sufficient to establish a breach of contract or unreasonable withholding of benefits. The court sustained the demurrer without leave to amend. The court also granted a motion to strike punitive damages and attorney fees from plaintiff's complaint. Plaintiff appealed.

The issue on appeal was whether the complaint alleged facts sufficient to constitute a breach of the implied covenant of good faith and fair dealing. Appellant argued Interinsurance failed to act in good faith in attempting to negotiate a settlement due to the difference between the amount awarded in arbitration and the \$7,000 previously offered. She also argued the trial court erred in granting the motion to strike.

The appellate court reasoned an insurer's obligation under the implied covenant of good faith and fair dealing with respect to *first party* coverage is the duty not to unreasonably withhold benefits due under the policy. The court noted appellant erroneously cited law concerning an insurer's obligation with respect to an offer to settle an action brought *by a third party* against the insured. An insurer's tort liability

for failure to accept a reasonable settlement offer can arise only with respect to a third party, or liability, coverage. Withholding benefits due under the policy is not unreasonable if there was a genuine dispute between the insured and insured as to coverage or the amount of payment due. The court reasoned the significant difference between the arbitrator's award and losses claimed demonstrated, as a matter of law, that a genuine dispute existed as to the amount payable on the claim. The judgment was affirmed, and Interinsurance was entitled to recover its costs on appeal.

**Nicole Taus v. Elizabeth Loftus**

(February 2007) 40 Cal.4<sup>th</sup> 683, 151 P.3d 1185

**Anti-SLAPP Statute**

Plaintiff was an anonymous subject of a case study, previously only indentified as "Jane Doe." The case study became the subject of a prominent scholarly article which described plaintiff's apparent recovery of a long-repressed memory of childhood abuse. Plaintiff brought a tort action against authors and publishers of two subsequent articles which questioned the basic premise advanced by the initial article. Plaintiff alleged defendants disclosed various aspects of her family background and personal life but did not disclose her identity. Defendants brought a motion to strike under anti-SLAPP (strategic lawsuit against public participation) statute. The Superior Court of Solano County denied defendant's motion. Defendants appealed.

The Court of Appeal determined most of plaintiff's claims should be dismissed under the anti-SLAPP statute. However, four causes of action remained. The Supreme Court granted defendant's petition for review. Three of the four remaining causes of action were dismissed. The only cause of action on which plaintiff could proceed was improper intrusion into private matters. The Court determined this cause of action could proceed based upon the claim that Loftus obtained personal and sensitive information about plaintiff from her former foster mother by misrepresenting herself as an associate of the psychiatrist with whom plaintiff had a close professional relationship and who performed the initial case study.

**Stone v. Hartford Cas. Co. ,(C.D.Cal.)**

**Insurance - "Professional services" exclusion to liability policy applied to homeowners' underlying claims against insured.**

A "professional services" exclusion to a liability policy applied to the homeowners' underlying claims against the insured based on the insured's professional undertaking to draft plans for room additions, construct and/or supervise construction of the additions, and install a driveway, and therefore the insurer's duty to defend the underlying claims was not triggered. The drafting and construction required specialized intellectual knowledge, labor, and skill, and thus were non-covered "professional services," and the

mere allegation that the insured's services were "non-professional" did not obligate the insurer to defend the insured.

**Levitz v. The Warlocks (2d Dist., Ct. of App.)--March 15, 2007**

Involuntary dismissal of civil action was improper after parties failed to reach settlement on all material terms.

California Rule of Court 225(c) (since renumbered to Rule of Court 3.1385) provides that when parties settle an entire case, the plaintiff must either (1) notify the court of the settlement and file a motion to dismiss the action, or (2) show good cause why the case should not be dismissed. In this case, the trial court's involuntary dismissal of a breach of contract action pursuant to this Rule, requiring dismissal following settlement, was improper after the parties stated that they had agreed "in principal" to a settlement but were unable to reach final agreement. The parties' settlement "in principal" was not a settlement at all because the parties had not yet agreed on all material terms. Thus, this Rule of Court requiring dismissal after the settlement did not apply.

**Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants (2d Dist., Ct. of App.)--March 8, 2007**

Civil defendants' untimely interrogatory responses did not divest trial court of authority to compel responses.

Under the California Civil Discovery Act, the trial court has the authority to hear a motion to compel responses to written interrogatories under Section 2030.290 when the party on whom the interrogatories were served fails to serve any response within the required time, thereby waiving all objections, but after the motion is served, provides an untimely response that the propounding party deems inadequate. The Court held that the mere service of an untimely interrogatory response, which may or may not reflect a "good faith" effort to comply with the party's discovery obligations, does not divest the trial court of authority to hear and grant a motion to compel responses. Whether the trial court should proceed with a motion to compel responses when there has been an untimely interrogatory response is within the sound discretion of the trial court. Thus, defendants' untimely interrogatory responses did not divest the trial court of authority to compel responses rather than being restricted to compelling "further" responses. Under the Civil Discovery Act provisions, the court had discretion to rule on the propounding plaintiff's motion to compel responses to ensure that the plaintiff received the responses it was entitled to.

**Transcontinental Ins. Co. v. Insurance Co. of State of Pennsylvania (Cal.App. 4 Dist.) April 10, 1997**

Insurance – Excess insurance carrier required to pay developer's defense costs under principles of equitable subrogation.

In the underlying construction defect case, developer's defense costs were paid by primary insurers of subcontractors under additional insured endorsements which named developer as an additional insured on subcontractors' policies. These payments by the primary insurers were under reservations of rights rather than an admission of liability and some of the underlying claims were not potential covered claims of the primary insurer's policies. As a result, developer's excess insurer was obligated to pay the insured developer's defense costs under principles of equitable subrogation.

**Marcey v. Romero** (Cal.App. 4 Dist.)

**Litigation - Personal injury plaintiff's revoked settlement offer did not trigger statutory cost-shifting provisions.**

A personal injury plaintiff's unilaterally revoked settlement offer (prior to offer expiration) deprived the defendant of the principal benefit and protection afforded by the statute (C.C.P sec. 998), e.g., such as the legislatively prescribed period to weigh the risks of accepting the offer. As such, the revoked settlement offer did not trigger the cost-shifting provisions of the statute withholding or augmenting costs following rejection or acceptance of an offer to allow judgment. Thus she was not entitled to recover expert witness fees after prevailing at trial.

**Padilla Const. Co., Inc. v. Transportation Ins. Co.,** (150 Cal.App.4th 984)

**Umbrella Policy**

Umbrella liability insurer was not required to defend insured's underlying suit after first primary policy became exhausted, insurers for next two periods became insolvent, and one primary insurer remained providing coverage for subsequent period. The umbrella policy provided excess coverage over primary policy with self-insured retention.

**DePalma v. Rodriguez,** (151 Cal.App.4th 159)

**Discovery**

Trial court did not abuse its discretion in allowing defendant's biomechanic expert to testify at trial because his testimony did not exceed the scope of his deposition testimony. The general substance of the expert witness's deposition was the nature of the low speed accident was such that one would not expect a person to suffer any injury from the accident in question. The expert's testimony at trial did not go beyond his deposition when he testified at trial the accident would not result in the specific knee and shoulder injuries complained of.

**Allstate Ins. Co. v. Superior Court**, (151 Cal.App.4th 1512)

Insurance

Insured brought class action against auto insurer, alleging it was not entitled to reimbursement of medical payment benefits since attorneys fees and costs prevent insured from being made whole by tort recovery and insurance benefits. Court held as a matter of first impression that attorney fees and expenses incurred to obtain recovery from third party tortfeasor are not deducted to determine whether insured has been made whole.

**Wimsatt v. Superior Court**, 152 Cal.App.4th 137

Discovery

Law firm in legal malpractice case petitioned for a writ of mandate compelling court to vacate order denying law firm's application for a protective order related to certain communications in client's personal injury action, which formed basis of malpractice claim. The court held law firm was entitled to a protective order with regard to the mediation briefs produced in underlying personal injury action and e-mails from law firm regarding mediation of personal injury action. Statements between client's attorney and defendants in personal injury action purportedly lowering client's settlement demand were not protected from discovery.

**Katiuzhinsky v. Perry**, (Cal.App. 3 Dist.)

Torts

Personal injury plaintiffs' recovery of medical expenses was not limited to the discounted amounts a collection company paid health care providers. Although the tortfeasor was answerable only to the discounted amount paid by the liens purchaser, the providers were not obligated to sell their bills to the company. The total amount of charges reflected the reasonable value of services. The plaintiffs had no contractual relationship with the company and were still fully liable for the amount of the providers' charges.

**Butler v. Clarendon America Ins. Co.**, (N.D.Cal.)

Insurance

An insurer did not breach the covenant of good faith and fair dealing for failing to investigate a claim for which there was no potential coverage under its commercial general liability policy. The insurer takes a risk when it denies coverage without investigation and the insured may later be able to prove a reasonable investigation would have established coverage. In that case, insurer will be liable for costs of defense already incurred by the insured and could also be exposed to tort liability.

**Corder v. Corder**, (Cal.)

Torts

Trial court did not violate wrongful death damages statute when it apportioned the settlement between two plaintiffs. Providing the court determines the respective rights in “an award” of the person entitled to assert the cause of action, the statute’s language, legislative history and decisional law provided no compelling basis for distinguishing between awards and settlements as far as judicial apportionment was concerned.

**Jafari v. EMC Ins. Cos.**, 155 Cal.App.4th 885, (September 26, 2007)

Insurance

The California Court of Appeal, Second Appellate District held that intentional self defense could be an "accident" within a third party liability coverage clause if the insured is responding to a third party's unexpected and unintended acts. The insurer denied indemnity and a defense to an insured sued for injuries inflicted on the claimant at the insured’s business. The insured’s policy covered “accidents” and excluded intentional or expected injury, except resulting from the use of reasonable force to protect persons or property. The Court found that even intentional acts of self-defense are accidents that give rise to a potential liability when in response to unforeseen and unexpected events initiated by a third party.

**Aerojet-General Corp. v. Commercial Union Ins. Co.**, 155 Cal.App.4th 132, (September 13, 2007)

Insurance

When settlement costs are outside the scope of excess coverage policies, the insurers need not indemnify insured. The insured corporation sued their excess liability carrier for breach of contract and declaratory relief for their refusal to indemnify insured for costs incurred pursuant to a settlement agreement from an underlying suit. The costs of the settlement agreement were not damages subject to indemnification under excess liability insurance policies because they did not involve a court order or judgment.

**Zurich Am. Ins. Co. v. Superior Court**, \_\_\_ Cal. App. 4th \_\_\_ (October 11, 2007)

Attorney-Client Privilege

The Second Appellate District of California held that a corporation’s attorney-client privilege extends to confidential communications between corporate agents regarding legal advice and strategy.

Zurich American Insurance Company (“Zurich”) claimed the trial court and discovery referee used the wrong standard in overruling its claim of attorney client privilege in a discovery dispute with Watts Industries, Inc. (“Watts”). Zurich objected to the

production of documents from its claims files and reserve or reinsurance documents. The trial court rejected Zurich's attorney-client privilege argument for all internal documents concerning reserves and reinsurance matters. The discovery referee decided the attorney-client privilege was "limited to communications by counsel to a client and by a client to counsel."

The Appellate Court found the "first relevant inquiry is whether the document contains a discussion of legal advice or strategy of counsel for Zurich[.] A confidential communication "includes a legal opinion formed and the advice given by the lawyer in the course of that relationship." The Court further held the privilege is extended to "those who are present to further the interests of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purposes for which the lawyer is consulted." Therefore, a "document is privileged if there is a showing it that was treated as confidential."

The Appellate Court then directed the trial court to conduct a new review to determine whether the documents were protected by the attorney-client privilege.