



Appellate reports

Recent cases of interest to members of the plaintiff's bar

By JEFFREY ISAAC EHRLICH

Delgado v. Interinsurance Exchange of the Automobile Club of S.C.A

(2009) 47 Cal.4th 302 [97 Cal.Rptr.3d 298]

Who needs to know about this case: Lawyers representing insurance policyholders

Why it's important: Analyzes the term "accident," which is the predicate to trigger coverage in most liability policies; holds that an assault and battery is not an accident, and therefore the carrier owed no duty to defend its insured from a suit based on an assault and battery.

Synopsis: The Interinsurance Exchange of the Auto Club of So. California ("Exchange") issued a homeowner's policy to Craig Reid. The policy afforded liability coverage for bodily injury caused by an "occurrence," which the policy defined as an "accident . . . which results in bodily injury." Reid punched and kicked Jonathan Delgado, who sued him. Delgado's suit alleged two causes of action: (1) that Reid intentionally struck, battered and kicked Delgado without justification or provocation; and (2) that Reid negligently and unreasonably believed that he was engaging in self-defense when he negligently and unreasonably struck and kicked Delgado repeatedly.

Reid tendered the defense to the Exchange, which declined coverage and re-

fused to defend on the ground that the assault was not an "accident," and that the suit was based on intentional acts, within the scope of the policy's intentional-acts' exclusion. The trial court, at Reid's request, dismissed his intentional-tort claim, and Reid and Delgado settled the remaining claim by stipulating that Reid's use of force occurred because he negligently believed he was acting in self defense, and stipulating to a judgment against Reid for \$150,000. Reid agreed to pay Delgado \$25,000 of this amount, and assigned his claims against the Exchange to Delgado for a covenant not to execute.

Delgado then sued the Exchange for breach of contract and bad faith. His first-amended complaint alleged that Reid acted without intent to injure Delgado, but with intent to defend himself and his family from what he perceived was an imminent threat of harm. This perception was alleged to be an over-reaction, but not willful or malicious, and therefore an "accident" within the meaning of the policy. When the Exchange demurred to the first-amended complaint, the trial court asked Delgado's counsel what facts were alleged regarding Reid's belief he was acting in self defense. Counsel responded "We can't allege facts leading up to what happened when my client was ultimately struck. We can't allege those facts." [Ed. Note: Delgado argues in his rehearing petition, which is pending, that the court reporter misheard counsel's comments, and he actually said "can"

instead of "can't."] The trial court sustained the demurrer without leave to amend. The Court of Appeal reversed, finding that the allegations of the first-amended complaint were sufficient to raise the possibility of coverage. The Supreme Court reversed, affirming the trial court.

The Court explained that the common-law definition of an "accident," which is part of policy and is not ambiguous, is "an unexpected, unforeseen, or undesigned happening or consequence from either a known or unknown cause." The Court characterized Delgado's argument as that because Reid's assault was motivated by an unreasonable belief in the need for self defense, his acts were an accident because, from the standpoint of Delgado, the assault was unexpected, unforeseen, and undesigned." The Court spent the bulk of the opinion explaining why, despite dicta in earlier cases to the contrary, the determination of whether conduct is an accident is judged from the standpoint of the insured – not the insured's victim. The contrary rule would allow almost any event – including intentional wrongful acts – to be considered "accidents" because the victim did not expect them.

The Court also rejected Delgado's claim that Reid's unreasonable subjective belief in the need for self defense converted his purposeful assault on Delgado into an accident. An injury-producing event is not an accident when all the acts,



the manner in which they were done, and the objective accomplished occurred as intended by the actor.

The Court found that Reid's assault was intended to cause injury, and there was no allegation in the complaint that the acts were merely shielding or the result of a reflex action. Generally, the insured's mistake of law or fact will not convert a knowingly and purposely inflicted harm into an accidental injury (relying on cases dealing with rape, forced oral copulation, and child molestation.)

The Court also rejected Delgado's reliance on *Gray v. Zurich Ins. Co.* (1966) 65 Cal.2d 263, 267 [419 P.2d 168], which held that an insurer breached the duty to defend its insured who had been sued for an intentional assault, because the facts pleaded suggested the possibility that the insured could show that even if he exceeded the reasonable bounds of self defense, his conduct was not intentional and willful. The Court distinguished *Gray* on the ground that it involved the interpretation of an intentional-acts' exclusion, not the insuring language in the policy. While *Gray* said that an unreasonable belief in the need for self defense might remove the acts from the scope of the exclusion, it did not say that such a belief would make the conduct accidental. A purposeful and intentional act remains purposeful and intentional regardless of the reason or motivation for the act.

Finally, the Court rejected Delgado's reliance on language in cases saying that an accident occurs "when any aspect in the causal series of events leading to the injury was unintended by the insured and a matter of fortuity." Delgado argued that his provocative acts were unexpected and unforeseen from Reid's standpoint, and therefore Reid's acts in response were accidental. The Court explained that the statement Delgado relies on refers to events in the causal chain occurring after the insured's acts, not to acts that precede the insured's acts.

Griffin Dewatering Corp. v. Northern Ins. Co. of New York

(2009) 176 Cal.App.4th 172 (4th Dist., Div. 2) [97 Cal.Rptr.3d 228]

Who needs to know about this case:

Lawyers representing insurance policyholders

Why it's important: Lengthy decision explores many aspects of bad-faith law, including the interplay between the "potential for coverage" standard for the duty to defend and bad faith when the insurer refuses to defend and how to determine whether the insurer's conduct was reasonable.

Synopsis: Griffin, a groundwater pumping company, fixed a 75-foot manhole feeding into the main sewer line for the South Coast Water District. After sewage from the line backed up into a private home in Laguna Beach, the homeowner filed a claim with the District for damages. The insurer received notice of the claim and denied it based on the policy's total pollution exclusion. Months later there was a meeting between the insurer and Griffin regarding renewal of its policy. The parties dispute whether the company agreed to change its coverage position and agree to pay similar claims in the future.

The District settles the claim for \$417,000, and then sues Griffin for reimbursement. Griffin tenders the claim to the insurer, which declines to defend or indemnify. (Griffin's excess insurer paid for the defense costs, however.) Griffin filed a bad-faith claim against the insurer; several months later the insurer settles the suit by the District, and tries to give up its reimbursement rights against the insured in exchange for a dismissal of the bad-faith claim. Griffin refuses. The litigation proceeds, and then the Supreme Court decides *MacKinnon v. Truck Ins. Exch.* (2003) 31 Cal.4th 635 [3 Cal.Rptr.3d 228], which construes the pollution exclusion narrowly, undermining the insurer's initial coverage denial. The trial court ruled on a motion in lim-

ine that the insurer's denial was unreasonable as a matter of law, because the scope of the pollution exclusion had been "unsettled" when the insurer denied the claim. The case went to trial and the jury awarded \$1 million (all for fees and costs) in compensatory damages, and \$10 million in punitive damages.

The Court of Appeal reversed. It first noted that breach of an insurance policy is not automatically bad faith; it must be unreasonable. The issue to decide is whether the insurer's refusal to defend was reasonable. Here, the insurer's refusal was based on its legal conclusion that the pollution exclusion in its policy eliminated any potential for coverage for the claim. The reasonableness of this decision must be judged on an objective basis. The issue of whether a coverage position is reasonable is a legal issue for the court. Here, the insurer's legal analysis was consistent with prior cases construing the pollution exclusion based on its literal terms.

The court rejected the argument that the standard for whether an insurer's conduct was reasonable differs in first-party and third-party cases. The court held that an insurer facing a third-party claim is allowed to make a reasonable coverage decision, even if it benefits its own interests. The court stressed that the insurer must take a reasonable position under the rules of insurance-contract interpretation. Hence, if there is an ambiguity in the contract, it must be construed in favor of the insured. But, the issue of whether an ambiguity exists is treated differently; an insurer is allowed to claim that there is no ambiguity.

Ultimately, the court concluded that the trial court erred in finding that the insurer's denial was unreasonable. Rather, the court found that it was reasonable, given the unsettled state of the law and the language of the policy. Since the insured never actually paid any defense costs, because the excess carrier paid, and then the insurer changed its mind. The court rejected the argument that the in-



surer wrongfully asserted a right to reimbursement because it never reserved its right. Under *Buss v. Superior Court* (1997) 16 Cal.4th 35 [65 Cal.Rptr.2d 366], that right is created by law, not contract, and need not be reserved. Since the insurer acted reasonably, there are no tort damages, and therefore no *Brandt* fees. Accordingly, there was no right to punitive damages, because there was no tort.

Sanchez v. County of San Bernardino

(2009) 176 Cal.App.4th 516 (4th Dist., Div. 2.) [98 Cal.Rptr.3d 96]

Who needs to know about this case:

Lawyers who agreed to confidentiality clauses in settlement agreements, particularly with public entities.

Why it's important: Affirms judgment against former County employee for County's breach of a confidentiality agreement within her severance agreement. Lawyers enter into confidentiality agreements frequently, and there is little law concerning their enforcement.

Synopsis: Elizabeth Sanchez was a high-ranking employee in San Bernardino County, the chief of the employee-relations division. She negotiated a contract on behalf of the County with the union representing its sheriff deputies. Thereafter, she and the union president began a romantic relationship. When her supervisor discovered the relationship, he demanded she resign. The County and Sanchez entered into a severance agreement that included a confidentiality clause. Despite this clause, newspaper articles appeared quoting a County Supervisor stating that she resigned due to a conflict of interest arising

out of an "improper" relationship with the union president. The County later retained outside counsel to review whether Sanchez's relationship had violated County policy. The report concluded that it had, but that there had been no adverse financial impact on the County. After the report was prepared, the County issued a press release that detailed its basic conclusions. Sanchez sued the County and the supervisor. The trial court granted summary adjudication of her breach of contract claim, holding that the confidentiality clause was void as against public policy. The Court of Appeal reversed.

The court held that the confidentiality agreement was valid and not void as against public policy. The Public Records Act (Gov. Code, § 6250) contains exceptions for personnel files when their disclosure would constitute an unwarranted invasion of personal privacy. Here, there was no request for any document covered by the Public Records Act, and when the County made its disclosures, they were not contained in a particular document that could have been requested under the Act. The County therefore had no duty to disclose, and its agreement not to disclose was not against public policy. While the County might have had to disclose the severance agreement itself if there had been a Public Records Request, that disclosure would not have revealed the details and circumstances surrounding Sanchez's resignation, and therefore would not have violated the confidentiality provision.

While there is a broad public interest in open government, and the circumstances of Sanchez's resignation were a

matter of legitimate public concern, these considerations must be balanced against the broad public policy in favor of privacy. (Cal. Const., art. I, § 1.) The confidentiality agreement was not void. While the County's statements were within the scope of the First Amendment, it can still be held liable for breach of the confidentiality agreement, because that agreement operated as a voluntary waiver of the County's First-Amendment rights. Nor did Sanchez waive the protection of the provision when she notified certain people close to her after the newspaper articles appeared, in an attempt to do "damage control." Because she disclosed the information to only a handful of people in her immediate circle, a jury could find that she had not waived the provision. Moreover, she did not make the disclosures until after the County had breached the provision, which could be found to excuse her compliance.

Finally, the court held that Sanchez presented sufficient evidence of her difficulty in finding new employment to support her claim. In particular, the testimony of a representative of Riverside County, who testified that he considered hiring her, but did not because of the negative newspaper articles, would allow a jury to rule in her favor.



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