

Law In Brief

by

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Recent Insurance Cases

TRB Investments, Inc. v. Fireman's Fund Ins. Co. (2005) 20005 DJDAR 8579

In this case, the Fifth Appellate District, Court of Appeal, considered whether a renovation to an existing commercial building falls under the “under construction” exception to the vacancy exclusion of a property insurance policy. Plaintiff TRG, a commercial real estate developer, acquired a former bank building for renovation and added it to an existing policy with Fireman’s Fund. The policy contained a clause excluding from coverage certain losses that occur while the building is vacant, unless the building is under construction. After a tenant moved out, plaintiffs found another tenant who agreed to move in if certain renovations were made. While the renovations were under way, the building suffered extensive water damage. Fireman’s Fund denied TRB’s claim. TRB sued for breach of insurance contract and for bad faith.. Fireman’s Fund moved for summary judgment, arguing that a building renovation cannot be considered “construction” pursuant to the vacancy exception for buildings “under construction.” The trial court granted the insurer’s motion.

The appellate court affirmed, holding that the term “under construction” in the policy was not intended to include steps taken to renovate an existing building. In so holding, the court reasoned: 1) that the plain meaning of the word “construction” in its ordinary and popular sense does not include renovation of an existing building; 2) that there was no evidence that the parties gave or intended a meaning different from the plain meaning of the word “construction”; 3) if it were intended that renovations were to be included as an exception to the vacancy exclusion, the policy would have so stated; 4) the court’s interpretation of the term “construction” is consistent with the purpose of the vacancy clause, which is to prevent vandalism and ensure the prompt discovery of damage.

Boghos v. Certain Underwriters at Lloyd's of London (2005) 2005 DJDAR 8556

In this case, the California Supreme Court considered whether the insurer was entitled to arbitration under an arbitration clause in a policy of disability insurance. The plaintiff, Boghos, sued Lloyds for breach of contract and bad faith after Lloyds stopped paying on Boghos’s claim for disability benefits. Lloyds moved to compel arbitration of the claims pursuant to the arbitration clause in the policy. The trial court denied the petition for arbitration, holding that the policy’s service of suit clause conflicted with the arbitration clause and that any ambiguity between the two clauses should be resolved in

Bohhos's favor. The appellate court affirmed, adding its own conclusion that the arbitration clause was unenforceable.

The California Supreme Court reversed, holding that insurance policies that contain both an arbitration clause and a service of suit clause do not create an ambiguity and that, further, the language of the arbitration clause itself ("notwithstanding any other items set forth herein") made clear that it took priority over the service of suit clause. The Court rejected Bohhos's arguments that enforcement of the arbitration clause rendered the service of suit clause surplusage, explaining that the service of suit clause continued to have real effect, requiring the parties to submit to the jurisdiction of the courts in actions to compel arbitration or to enforce arbitration awards.

Hodge v. Kirkpatrick Development, Inc. (2005) 2005 DJDAR 7399

In this case, the Fourth District, Court of Appeal considered whether the trial court erred in denying State Farm's motions for leave to intervene in a construction defect lawsuit brought by its insured, Hodge. State Farm issued to Hodge a homeowners policy which contained a paragraph granting State Farm subrogation rights against third parties who cause losses for which the policy provides benefits. Hodge submitted a claim to State Farm for water and mold damage. State Farm accepted and paid the water damage portion of the claim. Hodge then filed a construction defect lawsuit against the former owner, the developer and the general contractor who constructed the house. State Farm moved for leave to intervene to file a subrogation complaint in the construction defect lawsuit. The trial court denied the motion on the grounds that the complication of adding State Farm to the lawsuit would outweigh any prejudice to State Farm.

The appellate court reversed, holding that, under Civil Code, Section 387, subdivision (b), the insurer had a right to intervene. In so holding, the court found that State Farm had an interest related to the transaction of the construction defect lawsuit, that disposition of the action, in the absence of State Farm's intervention, would impair State Farm's ability to protect that interest, and that State Farm's interest was not adequately represented by Hodge.

Scottsdale Ins. Co. v. State Farm Mut. Auto. Ins. Co. (2005) 2005 DJDAR 7829

In this case, the court of appeal, Second Appellate District, considered whether an insurance policy's exclusion for bodily injury barred coverage for the insured's employee's injury. Llamas, an employee of VCP Cable Construction, Inc., was injured when the bucket of a "cherry picker" in which he was riding fell. Llamas filed suit against JMDS, owner of the cherry picker. JMDS was insured by Scottsdale under a commercial general liability policy, by State Farm under an automobile liability policy, and by Commercial Underwriters, Ins. Co. under an excess automobile liability policy. Llamas settled his action for \$1.375 million. Of this, Scottsdale paid \$620,000 and State Farm paid \$655,000. Commercial Underwriters paid nothing. Scottsdale filed an action

for declaratory relief and indemnification against State Farm and Commercial Underwriters for its costs of defense. Scottsdale filed a motion for summary judgment against both State Farm and Commercial Underwriters on the grounds that their policies were primary and covered the accident. State Farm and Commercial Underwriters filed their own motions for summary judgment and/or summary adjudication. The trial court granted State Farm's and Commercial Underwriter's motions, ruling that the Scottsdale policy covered the accident and was primary and that the State Farm policy, while primary, did not cover the accident. The court explained that Llamas was an insured under the State Farm policy and, therefore, fell within the policy exclusion for bodily injury to an insured. The court found that the Commercial Underwriter's policy was excess over the State Farm policy, but inasmuch as there was no coverage under the State Farm policy, there was no excess coverage under the Commercial Underwriters policy. The court ordered that Scottsdale take nothing on its complaint and that State Farm recover \$655,000 from Scottsdale on its cross-complaint.

The appellate court reversed, holding that under Insurance Code, Section 11580.06, subdivisions (f) and (g), Llamas was not an insured under the State Farm policy and thus the exclusion for bodily injury to an insured did not apply. In so holding, the court examined the language of Insurance Code, Section 11580.06, subdivisions (f) and (g), which define the terms "operating" and "use" of a motor vehicle in terms of the conduct of the person sitting immediately behind the steering controls. The court found that, on the undisputed facts, Llamas was in the cherry picker, not behind the steering controls of the truck.. Thus, he was not operating or using the truck within the meaning of Section 11580.06, subdivisions (f) and (g), and, therefore, he was not an insured under the State Farm policy so that the exclusion for bodily injury to an insured was not applicable.