Mound Cotton Wollan & Greengrass LLP

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California Update

California Appellate Court Holds California's Actual Cash Value Statute Supersedes Policy Language and a "Total Loss" Does not Occur When the Cost to Repair Exceeds the Fair Market Value.

California Fair Plan v. Garnes, 11 Cal. App. 5th 1276 (2017)

The California Appellate Court has ruled that in determining the actual cash value for a structure, the structure is a "total loss" when the actual physical damage is a total loss. The court rejected the insurer's contention based on policy language that there is a total loss when the cost of repair exceeds the fair market value.

In this case the insured owned a home insured by a California Fair Plan property insurance policy with a policy limit of $425,000. A fire occurred in the kitchen of the insured's home and caused substantial damage, but did not destroy the home. The cost to repair the home minus depreciation was $320,000. The fair market value of the home was $75,000.

The policy specifically stated that if the cost to repair the damaged dwelling exceeded its fair market value, which the policy referred to as a "total loss," the insured would be paid the dwelling's fair market value. However, the court held this language was inconsistent with and superseded by California's actual cash value statute. California Insurance Code § 2051.5 establishes the measure of actual cash value for a total and partial loss. In case of a total loss to the structure, the measure is the policy limit or the fair market value of the structure, whichever is less. When there is a partial loss to the structure, or loss to its contents, the measure is the policy limit or the cost to repair, rebuild, or replace the thing lost or damaged less reasonable depreciation.

California Fair Plain also contended that under the Insurance Code "total loss" means damage to a dwelling so extensive that the cost to repair or replace exceeds its fair market value. The insured contended "total loss" meant the total physical destruction of a dwelling. The Court agreed with the insured and held the statutory phrase "loss to the structure" refers to the physical structure itself and cannot connote an economic concept, i.e. that the cost to repair exceeds the fair market value. Since the insured's home was only partially physically damaged, the actual cash value of the damage was held to be the cost of repair, which was less than the policy limit.

MOUND COTTON WOLLAN & GREENGRASS LLP
One New York Plaza - 44th Floor
New York, NY 10004
(212) 804 4200

www.moundcotton.com

MOUND COTTON WOLLAN & GREENGRASS LLP
2200 Powell Street, Suite 1125
Emeryville, CA 94608
(510) 900 9371

California Appellate Court Holds an Insurer Can Be Subrogated to the Insured's Bad Faith Claim for Unreasonable Failure to Settle.

Ace American Ins. Co. v. Fireman's Fund Ins. Co., 2 Cal. App. 5th 159 (2016)

The California Court of Appeal has held that an excess carrier that contributes to a settlement over the primary carrier's limits can recover its settlement from the primary carrier when the primary carrier refused a reasonable settlement offer within the primary carrier's policy limits. Thus, the court also allowed the excess carrier to be subrogated to its insured's breach of the implied covenant of good faith and fair dealing claim. In this case, a film industry worker was seriously injured on a film set. His employer, Warner Brothers, had a primary liability policy with Fireman's Fund and an excess policy with ACE. Fireman's Fund defended Warner Brothers for the worker's lawsuit. During the case, the worker made a demand within the Fireman's Fund's policy limits. Fireman's Fund refused to settle. Prior to trial, a settlement was reached in excess of the Fireman's Fund's policy limits. ACE contributed to the settlement for the amount within its excess policy.

ACE sued Fireman's Fund to recover the amount it paid under a subrogation claim. It sued on the theory that it was subrogated to its insured Warner Brothers breach of the covenant of good faith and fair dealing claim against Fireman's Fund for its failure to settle within the Fireman's Fund's policy limits. ACE further alleged its settlement contribution was caused by Fireman's Fund's unreasonable rejection of the settlement demand. Fireman's Fund sought to dismiss the claim on the basis that an excess insurer can only be subrogated to its insured if there has been a judgment that exceeds policy limits. It further argued that as a result, ACE could not bring a subrogation claim because the underlying lawsuit settled. ACE argued that a judgment was not required as long as the insured, Warner Brothers - and by extension the excess insurer ACE - was liable for any amount beyond the limits of the primary policy due to the primary insurer's refusal to settle within policy limits. The appellate court agreed with ACE and ruled that a judgment against the insured, Warner Brothers, was not necessary to trigger Warner Brothers's cause of action against Fireman's Fund. Thus, the court established an excess insurer can recover settlement amounts from a primary insurer when the primary insurer rejects a reasonable settlement demand.

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California Appellate Court Holds that After a Bad Faith Judgment, the Insured Was Prohibited from Changing and Increasing Its Fee Agreement.

Pulte Home Corporation v. American Safety Indemnity Company, (No. 2013-00050682-CU-IC-CTL2017) 2017 WL 3725045, --- Cal. Rprt. 3d ---- (2017)

Pulte was a general contractor for homes and was an additional insured under an American Safety commercial general liability policy issued to Pulte's subcontractor. Several homeowners brought construction defect lawsuits against Pulte. American Safety did not defend Pulte in the lawsuits on the basis that there was no coverage for the claims. The trial court found that American Safety had a duty to defend Pulte under its policy and that American Safety's failure to defend was a breach of its implied duty of good faith and fair dealing. As a result of the breach of the duty of good faith and fair dealing, Pulte was allowed to receive *Brandt* fees, i.e. the attorneys' fees incurred to recover policy benefits.

After the trial and before the hearing on attorneys' fees, Pulte and its attorney changed their fee agreement from a contingency agreement to an hourly agreement. Under the contingency agreement, the attorneys' fees amounted to $175,000. Under the new hourly fee agreement, the attorneys' fees were $470,000. Plute claimed it decided to change its fee agreement due to all the hard work its attorneys performed to bring the matter to verdict. The trial court ordered that attorneys' fees be awarded based on the new hourly fee agreement.

The appeals court reversed and the trial court was ordered to recalculate the attorneys' fees at a level consistent with Pulte's original contingency fee agreement. The court held that the fee arrangement in effect during trial was controlling.

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