

Breach of Consent Clause Turns on Facts Where Insurer Had No Duty to Defend and Reserved Rights

July 2011

A California Court of Appeal has reversed a trial court's grant of summary judgment for a subscribing primary insurer that had denied coverage under a consent clause. The court based its decision on the existence of factual issues regarding the insurer's opportunity to participate in settlement discussions and the reasonableness of the insurer's refusal to consent to settlement. *Safeco Ins. Co. of Am. v. Certain Underwriters at Lloyd's, London*, 2011 WL 1796529 (Cal. Ct. App. May 11, 2011). The court affirmed summary judgment for a second subscribing primary insurer that was not afforded a reasonable opportunity to participate in settlement discussions.

In the underlying action, the policyholder, another insurance company, settled a bad faith and third party claim against it for legal malpractice for \$10 million, after its motion for summary judgment was denied. Ultimately, the policyholder settled without the consent of its two subscribing primary insurers, assertedly in violation of a consent clause. The first subscribing insurer's attorney had been in contact with the policyholder and was aware of the mediation but made no attempt to attend the mediation. The insurer's attorney communicated with the policyholder and its representatives throughout the course of the mediation. However, the attorney made it clear that the first subscribing insurer was reserving its rights and did not consent to the settlement. She was informed of the settlement following the mediation. The policyholder had no contact with the second subscribing insurer prior to settling the plaintiff's claim. After the insurers denied coverage, the policyholder sued for breach of contract.

The court held that the trial court improperly granted summary judgment for the first insurer, due to a narrow exception to the application of consent clauses for insurers that neither acknowledge coverage nor provide a defense. The court held that if the insurer was afforded a reasonable opportunity to participate in the settlement negotiations but refused to do so, and then unreasonably withheld consent to a settlement, the insurer could not avoid coverage under the consent clause without first showing that the settlement was unfair or unreasonable. The court found that there were genuine issues of material fact as to the first insurer's opportunities to participate in settlement discussions and the reasonableness of its withheld consent, so the court remanded the policyholder's claims against the first subscribing insurer.

The court held that the second insurer, which had no contact with the policyholder prior to the settlement, had not been given a reasonable opportunity to attend the mediation or otherwise participate in the settlement of the case. Nor had it been consulted at all prior to the settlement. The court, therefore, affirmed summary judgment for the second insurer based on the policyholder's breach of the consent clause.