Mound Cotton Wins Appeal Holding That a Property Insurer Is Only Obligated to Make One Payment to the First Named Insured and Did Not Act in Bad Faith.

DGP Associates, LP v. American Guarantee and Liability Ins. Co., (No. A145034) 2016 WL 7242533 (Cal. Ct. App. 2016)

Mound Cotton recently won an appeal in favor of American Guarantee and Liability Insurance Company holding that an insurer is only obligated to make one payment to the "First Named Insured" for building damage according to the terms of the insurance policy. American Guarantee issued an insurance policy that named Columbus Foods, a purveyor of quality meats, as the "First Named Insured." As the First Named Insured, Columbus Foods was entitled to have losses adjusted and payable to it. DGP was also a named insured.

Columbus Foods rented a building from DGP in which it processed meat. After a fire destroyed DGP's building, both Columbus Foods and DGP made claims for building damage. American Guarantee, Columbus Foods and DGP agreed the value of the building damage was $15.5 million. Columbus Foods instructed American Guarantee to pay Columbus Foods $12 million and DGP $3.5 million and American Guarantee followed that instruction. DGP sued American Guarantee to be paid an additional $12 million for the building damage. Mound Cotton won summary judgment for American Guarantee in the trial court.

On appeal, DGP contended American Guarantee's building payment to Columbus Foods did not discharge its obligation to pay DGP the full value of damage to the building because DGP was the building owner and, therefore, only it had an insurable interest. Accordingly, DGP argued that American Guarantee should not have paid Columbus Foods for building damage. American Guarantee contended it was only obligated to make one payment for building damage as instructed by Columbus Foods, the First Named Insured, and that Columbus Foods' use of the building gave it an insurable interest.

The appellate court agreed with American Guarantee. It held the nature of insurance does not allow there to be a total recovery in excess of the value of property when there is one loss. It further found that both Columbus Foods and DGP had an insurable interest in the building and American Guarantee's payment to Columbus Foods was proper because it followed the direction of Columbus Foods, the First Named Insured. Finally, the court found that American Guarantee appropriately investigated and handled the claim by requesting information from DGP and that DGP was not forthcoming in responding to American Guarantee's requests.

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California Court Holds That a Contractor's Decision to Build in Spite of a Known Construction Defect Is not an Occurrence.

Navigators Specialty Ins. Co. v. Moorefield Construction, Inc., – Cal. App. – , (No. G050759) 2016 WL 7439032 (2016)

The California Appellate Court has held that damage to a floor, that resulted from a contractor's decision to install flooring when it knew of a defective condition with the concrete slab, was not caused by an accident and therefore was not an "occurrence" under a commercial general liability policy. Moorefield was insured by Navigators and was the general contractor for a building to be leased to Best Buy. During construction, Moorefield became aware of testing showing there was excess moisture vapor in the building's concrete slab. However, based on prior experience, Moorefield did not believe the excess moisture from the slab would damage installed flooring. Accordingly, Moorefield directed the flooring to be installed in spite of the defective condition, rather than delaying construction to allow the moisture to dry. Subsequent to the building's completion, the flooring was damaged by moisture and Best Buy sued Moorefield for its repair costs.

The Navigator's policy provided coverage for an "occurrence" which was defined as "an accident." Navigators denied liability coverage for Best Buy's claims against Moorefield because the floor damage was not caused by an accident. The California Appellate Court agreed. It reasoned that under California law, an accident does not occur when an insured performs a deliberate act unless some additional, unexpected, independent, and unforeseen happening occurs that produces damage. However, "the insured's mistake of fact or law does not transform an intentional act into an accident." The court, thus, concluded that the damage to the flooring was not an occurrence, but was caused by the deliberate decision to the install flooring when the contractor knew the excess water vapor in the concrete slab could damage the flooring.

Although this case involved a liability policy, its holding can be applied to a property policy, particularly when coverage is tied to "accidental loss or damage." Applying the *Moorefield* court's reasoning to a first party property claim, it can be said that once an insured decides to continue a building's construction with knowledge of a construction defect, loss or damage resulting from the construction defect is not a covered loss.

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Attorneys' Fees Awarded for Bad Faith Claim Must Be Included in Evaluation of Whether a Punitive Damage Award Is Excessive, Even When Awarded by the Court Post-Trial.

Nickerson v. Stonebridge Life Ins. Co., 63 Cal. 4th 363 (2016)

The California Supreme Court has ruled that when determining whether a punitive damages award is unconstitutionally excessive, attorneys' fees awarded for a bad faith claim should be included in the calculation of the ratio of punitive to compensatory damages. In this matter, Stonebridge insured Nickerson with an indemnity policy that provided insurance payments for each day spent in a hospital for necessary care and treatment for a covered injury. Nickerson was a paraplegic veteran who broke his leg when he fell from his wheel chair. Nickerson had a 109 day hospital stay. Stonebridge found that only 18 days were necessary for Nickerson's care and issued a payment for those days only. Nickerson sued seeking a payment for the remaining 91 days. The jury found for Nickerson and awarded $35,000 in policy benefits and $19 million in punitive damages. Subsequent to the jury's decision, the trial judge found that Nickerson was entitled to $12,500 in *Brandt* fees, i.e. the insured's attorneys' fees to recovery policy benefits.

The trial court subsequently found the punitive damages award was unconstitutionally excessive and reduced the punitive damages to $350,000 applying a ten to one ratio of punitive to compensatory damages based on the $35,000 in policy benefits awarded to Nickerson. Nickerson appealed and contended his $12,500 *Brandt* fees award should be included in the ten to one ratio for a punitive damages award of $470,500.

Stonebridge contended that when a court determines *Brandt* fees after a jury awards punitive damages, the fees should not be considered in determining the punitive-compensatory damage ratio because review of a punitive damages award should only be based on the evidence presented to the jury. Nickerson argued that *Brandt* fees are an award of compensatory damages and therefore should always be considered in the punitive-compensatory damage ratio. The California Supreme Court agreed with Nickerson and found that excluding attorneys' fees from consideration was error because it would overlook a component of an insured's harm.

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