California Confirms Insurer's Right to Intervene in Underlying Action to Protect Its Own Interests

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In *Gray v. Begley,* (filed March 22, 2010), the Second Appellate District, Division Three (Justice Croskey), confirmed that an insurer defending its insured may intervene in the underlying action to protect its interests against a private settlement between the insured and the injured party. This right exists even if the insurer has reserved its rights to deny coverage later.

Dicta in prior case law suggested that, in reservation of rights situations, insurers did not have a sufficient interest to justify intervention. The *Begley* decision, however, confirms that the right to intervene is no different in a situation where the insurer has admitted coverage than a situation where the insurer defends under a reservation of rights.

[T]he key factor in determining whether an insurer is bound by a settlement reached without the insurer's participation is whether the insurer provided the insured with a defense, not whether the insurer denied coverage.' It therefore follows that an insurer providing a defense, even though subject to a reservation of rights, may intervene in the action when the insured attempts to settle the case to the potential detriment of the insurer." *Begley* at pp. *20-22, citing *Safeco Ins. Co. v. Superior Court*, 71 Cal. App. 4th 782, 785, 787 (1999).

The necessity for such a rule was evident from the facts of the particular case.

In a personal injury auto accident, CNA and the excess carrier settled the case against their insured corporate defendant for $8 million. However, with respect to its insured driver who was not part of the settlement, CNA defended him under a reservation of rights. The driver had been intoxicated at the time of the accident. After trial, judgment was entered against the driver for $4,500,000.

Although the driver initially filed a motion to vacate the judgment on the basis that the $8 million settlement could be used as a set-off, he subsequently withdrew that motion, released his defense counsel and entered into a private settlement with the plaintiff in exchange for a covenant not to execute against the judgment with an assignment of his rights under the CNA policy to plaintiff. CNA moved to intervene on its own motion to vacate the judgment and apply the set-off. The Court of Appeal agreed:

"CNA should be permitted to intervene to pursue its attempt to reduce that judgment." *Begley,* at *23. CNA provided . . . a defense, and had the right to control that defense. Its request for intervention was simply an attempt to pursue its defense—including a motion for setoff—after [the insured] chose to no longer comply with CNA's chosen strategy. *Begley,* at *23, n. 19.

Although the facts in *Begley* implicated the insurer's right to control the defense after judgment was rendered against the insured, the same principles apply and frequently occur in situations involving private settlements between the insured and third party claimant prior to judgment. As long as the insurer is defending the insured, it has the right to control settlement and defense of the injured party's action against the insured.

This means any settlement between the insured and injured party without the insurer's consent cannot establish the insured's liability or the amount thereof in a subsequent action against the

insurer. *Hamilton v. Maryland Cas. Co.*, 27 Cal. 4th 718, 732 (2002); *Safeco Ins. Co. v. Superior Court*, 71 Cal. App. 4th 782, 785, 787 (1999). Significantly, *Begley* confirms that a defending insurer may intervene in a good faith settlement motion hearing that seeks judicial approval of a private settlement between the insured and injured party in the underlying action. How far an insurer may go in protecting its interests in such a hearing or otherwise in the underlying action will depend on the particular circumstances of each case.

In addition, certain policy provisions in liability policies may bar such private settlements with the injured party. Defending insurers should rely on these provisions in conjunction with the settled principles articulated in the case law. These policy provisions include:

- *Cooperation clause*: "You and any other involved insured must ... *cooperate with us* in the investigation or settlement of the claim or defense against the 'suit' ... " [ISO Commercial General Liability Coverage Form, CG 00 01 12 04, § IV, ¶ 2.c. (emphasis added)]

- *"No voluntary payments" clause*: "No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent." [ISO Commercial General Liability Coverage Form, CG 00 01 12 04, § IV, ¶ 2.d.]

- *"No action" clause*: "A person or organization may sue us to recover on an agreed settlement ... An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative." [ISO Commercial General Liability Coverage Form, CG 00 01 12 04, § IV, ¶ 3.

Of course the rule is different where the insurer refuses to defend. If the contractual duty to defend is breached, the insurer *forfeits* its right to control the defense *and settlement*. The insured may enter into a non-collusive settlement with the injured party without the insurer's consent. See *Pruyn v. Agricultural Ins. Co.,* 36 Cal. App. 4th 500, 515 (1995). Likewise, the insurer would have no right to intervene in the underlying action. *Begley,* at *19.