// THARPE & HOWELL

GENERAL LITIGATION NEWSLETTER

RECENT DEVELOPMENTS JANUARY 2010 EDITION

IN THIS ISSUE...

Insured's Failure To Abide By "Cooperation Clause" Can Lead To Claim Denial 1

Full Medical Billings May Be Recovered Despite Downward Adjustment By Insurance Provider 2

Intentional Acts Of Insureds' Resident Relative May Preclude Coverage 3

Nevada Casinos Not Responsible For Safety of Intoxicated Patrons After Eviction From Casino 4

Insured's Failure To Abide By "Cooperation" Clause Can Lead To Claim Denial

In *Rajwinder Kaur v. Fire Insurance Exchange*, the Fifth District Court of Appeal recently upheld a Jury's finding that an insured's failure to cooperate under terms of an insurance contract justifiably caused claim denial.

In this case, insured Kaur's home was destroyed by fire which was believed to have been caused by arson. One of the significant issues in the claim investigation was whether the appellant/ insured had intentionally caused the fire - or had intentionally arranged for the destruction of the home and its contents.

This newsletter is provided for informational purposes only, and the contents are not intended and should not be construed as legal advice.
© 2009 - Tharpe & Howell. This material may not be published, broadcast, rewritten, or redistributed.

On September 29, 2005, Fire Insurance Exchange "FIE" sent the insured a letter requesting various items, including documentation about her financial status and personal and business telephone bills. However the documents were not provided and FIE renewed its request for the items on several more occasions over a seven month period. The requested documents were still not produced and FIE subsequently denied the claim.

One of the grounds stated for the denial was that the policy contained express provisions requiring the insured to produce documents - but that she had not submitted the requested materials. The denial letter also quoted language from the policy which stated FIE could not be sued unless there had been full compliance with the policy terms. The denial letter also stated if the insured believed the decision was incorrect, or wished FIE to consider additional information or documentation, the insured could forward a written statement outlining the basis for her position and any additional information or documentation she wished FIE to consider. The insured did not contact FIE or submit any additional documentation, and instead filed suit against FIE shortly thereafter.

After a month long trial, a Jury ruled in favor of FIE and expressly found the insured had failed to comply with the "cooperation" clause of the policy which required the insured to provide FIE with the records and documents requested. The Jury also made a special finding that the insured's failure to provide such information and documentation had caused prejudice to FIE's handling of the claim. The insured timely appealed.

During the appeal, counsel for the insured argued that, with regard to the "cooperation" clause, the insured *had* satisfied the clause by providing the documents sought during the discovery phase of the case against FIE. He also argued that, even if the insured had breached the cooperation clause by failing to provide the requested documents *before* filing suit against FIE, the breach was not prejudicial because the insured did eventually provide the documents to FIE during the discovery phase of the case, and before trial.

The Court of Appeal noted the purpose of the cooperation clause is to enable the insurer to obtain the information it needs to decide whether to pay the claim. By suing FIE for non-payment of the claim **before** providing it with the documentation requested (which the insured was contractually obligated to provide), the insured frustrated the purpose of the cooperation clause itself. The Court also found the insured's failure to provide the documents when requested, and FIE's having to pay counsel, in litigation, to obtain documents through civil discovery, was prejudicial to FIE. The Court opined if it were to conclude otherwise, it would essentially be eviscerating the cooperation clause from the policy, since there would be no adverse consequence to the insured for non-compliance. The Jury's verdict was affirmed.

Full Medical Billings May Be Recovered Despite Downward Adjustment By Insurance Provider

In *Howell v. Hamilton Meats & Provisions, Inc.,* the Court of Appeal for the Fourth District, Division 1, located in San Diego, ruled a personal injury plaintiff with private healthcare insurance is entitled, under the collateral source rule, to recover the full reasonable amount of past medical expenses incurred*, regardless* of whether such amounts were ever paid. In short, it concluded such a plaintiff can recover the full amount *billed* by the health care provider (provided those billings are reasonable), even if that amount is never paid, and even if the healthcare provider will never seek to recover it.

It has accordingly issued a decision which appears to be at odds with the ruling of the court in *Hanif v. Housing Authority,* 200 Cal.App.3d 635 (1988), or at least how it has been routinely

© 2009 - Tharpe & Howell. This material may not be published, broadcast, rewritten, or redistributed.

interpreted by other courts, namely to require the trial court to limit the amount of the plaintiff's special damages for medical expenses to the amount *actually paid* instead of the amount billed.

More importantly, the Fourth District Court of Appeal has decided to publish the *Howell* decision. Because published appellate decisions are binding authority on every Trial Court in the state, and with rare exception apply retroactively, this decision may affect the rulings California Trial Courts make in pending personal injury cases.

A petition for review of the *Howell* decision will probably be filed in the Supreme Court, so there is chance that *Howell* may eventually be overturned. However, it must be borne in mind that such petitions are rarely granted and, even if the high court were to grant review, it could nonetheless decide to affirm the decision - causing insurers and counsel for their insureds to re-evaluate exposure value and address the risk that **all** medical specials will be recoverable at Trial.

Intentional Acts of Insureds' Resident Relative May Preclude Coverage

In *Century National Insurance Company v. Jesus Garcia*, the California Court of Appeal has opined the intentional acts of an insured's resident relative can preclude coverage.

In this case, Jesus Garcia, Sr. and his wife Theodora were Century National's named insureds under a fire insurance policy on their home. On May 2, 2007, a fire occurred at the home, and on May 3, 2007, they filed a claim with Century National.

The insurance adjuster inspected the home and suspected arson. Century National retained a qualified fire investigator who determined the fire had started in the bedroom of the Garcia's son, Jesus, Jr., shortly after he had been in the bedroom. The investigator ascertained the fire was intentionally set with the use of a small amount of accelerate applied to the floor and bed that was ignited with a small open flame, such as would be found on a cigarette or a match. Century National concluded the fire was a result of arson. Jesus, Jr., subsequently pleaded no contest to the charges and was sentenced to five years.

At the time of the fire, the Garcias were insured by Century National under a policy which excluded coverage for "Intentional Loss, meaning any loss arising out of an act committed by or at the direction of any insured having the intent to cause a loss" and also excluded coverage for losses caused by "Dishonesty, Fraud, or Criminal Conduct of any insured." An "insured" was defined as "you and the following persons if permanent residents of the residence premises . . . Your relatives. . ."

Century National filed a Complaint for Declaratory Relief, seeking a declaration that it had no duty to pay the claim because the loss resulted from the intentional or criminal act of an insured. Shortly thereafter, the Garcias filed a Cross-Complaint for breach of contract and bad faith. The Garcias alleged Jesus Jr. was not a named insured on the policy and did not have an insurable interest in the property, although they acknowledged he was their son and lived at the property at the time of the loss. The Garcias further alleged Century National's definition of intentional loss violated Insurance Code Section 2071 because the policy used the words "any insured" rather than "the insured," and thereby denied the Garcias insurance coverage.

The Trial Court determined the policy defined "any insured" to include relatives of the insured; and that courts generally interpret policies which exclude coverage for criminal or intentional acts to exclude coverage of innocent co-insureds. The Court of appeal affirmed, finding that Century

This newsletter is provided for informational purposes only, and the contents are not intended and should not be construed as legal advice.
© 2009 - Tharpe & Howell. This material may not be published, broadcast, rewritten, or redistributed.

National's policy language precluded recovery for the subject fire; and that the relevant policy language was not prohibited by the Insurance Code.

Nevada Casinos Not Responsible For Safety Of Intoxicated Patrons After Eviction From Premises

In *Rodriguez v. Primadonna Company*, the Nevada Supreme Court recently held a proprietor does not, as a matter of law, have an affirmative duty to prevent injury to intoxicated patrons after eviction from the premises.

In this case, Marlene Garibay, her 17-year-old son, Fabian Santiago, and Fabian's adult step-uncles, Manuel and Daniel Garibay, checked into the Primadonna Company LLC's hotel in Primm, Nevada ("the hotel"). Fabian, Manuel and Daniel spent the evening gambling and drinking alcoholic beverages on the premises. Daniel, who purchased alcohol from the hotel's liquor store, shared it with Manuel and Fabian, who became intoxicated.

Fabian, Manuel, and Daniel admit to engaging in disruptive behavior on the premises. In particular, the three were involved in at least two altercations with other hotel guests, and otherwise disturbed guests by kicking and knocking on hotel room doors. During one of the altercations, Manuel punched another hotel guest in the face. Hotel security personnel intervened and, at the security officer's request, the three agreed to leave the hotel property.

Hotel security officers accompanied the young men to their room to gather their belongings. While waiting outside of the hotel room while the men gathered their personal belongings, a security officer overhead one of the men tell a woman inside the room that they had been asked to leave the hotel for fighting. Manuel testified that he told the woman, Marlene Garibay, that the three were going to sleep in the car in the parking lot. Manuel also testified that Marlene had expressed her concern about his level of intoxication. She then exited the hotel room and spoke with the hotel security officers, telling them that Fabian, Manuel, and Daniel could not leave, and that they would stay in the room and "sleep it off." Nevertheless, the hotel security officers escorted the three men to their vehicle, which was located in the hotel's parking lot.

According to Fabian, the three men were going to leave the hotel premises and "sleep it off" in the car. Similarly, the appellate record indicates Manuel, who did not have a valid driver's license, did not intend to drive because he believed his blood-alcohol level was above the legal limit. Once at their vehicle, however, Manuel told Daniel he was sober enough to drive and sat in the driver's seat. After they were seated in the vehicle, hotel security officers approached, knocked on the window, and advised the young men they had to leave the hotel's parking lot.

Consequently, Manuel drove the vehicle out of the parking lot. Mistaking a frontage road for the freeway entrance, Manuel rolled the vehicle while driving approximately 80 miles per hour. Fabian was seriously injured in the accident, suffering extreme spinal injuries and rendering him a quadriplegic.

Fabian's grandfather and guardian ad litem, Martin Rodriguez, filed a negligence action against the hotel in both his individual capacity and on Fabian's behalf, seeking damages for Fabian's injuries, based on allegations that the hotel's staff acted unreasonably in evicting Fabian from the hotel premises that night.

Eventually, the District Court granted Motions for Summary Judgment in favor of the hotel - effectively dismissing Martin Rodriguez's negligence claims. On appeal, Rodriguez argued the hotel owed Fabian a duty to evict him from the premises in a manner reasonable under the circumstances. He argued that the District Court had erred in entering Summary Judgment on his negligence causes of action because a genuine

This newsletter is provided for informational purposes only, and the contents are not intended and should not be construed as legal advice.
© 2009 - Tharpe & Howell. This material may not be published, broadcast, rewritten, or redistributed.

issue of material fact existed as to whether the hotel had evicted Fabian in a manner that was reasonable in light of his intoxication and his step-uncle's intent to drive while intoxicated. In response, the hotel contended it was entitled to evict the three guests because of their disruptive behavior and that the method of eviction was reasonable. Therefore, the question on appeal as reviewed herein was whether the hotel owed an affirmative duty to ensure Fabian's safety after the eviction process concluded.

The Nevada Supreme Court found the hotel had the statutory right to evict Fabian and the other young men from the premises based on their disorderly conduct; and that because Nevada commercial alcohol vendors are not liable for injuries sustained by intoxicated patrons, the hotel did not have a duty to ensure safe transportation for the young men, keep Fabian on the premises, or otherwise prevent injuries subsequent to their eviction. The Nevada Supreme Court noted that when the security officers asked the three men to leave the premises, the men agreed and, in ensuring that the men complied, the security officers did not act forcefully or personally cause injury to the men during the eviction process. And that although the hotel security had asked the men to leave while sitting in their vehicle, Manuel drove the car at his own election and, likewise, Fabian chose to drive with Manuel. The Supreme Court determined that at the moment the men left the parking lot, the eviction had been effectuated, and the hotel had no further duty to ensure Fabian's safety. Therefore, although the hotel may have known that Fabian's step-uncle was intoxicated and could not safely drive, the hotel did not have a duty to arrange safer transportation, prevent an intoxicated driver from driving, or prevent Fabian, a passenger, from riding with a drunk driver.

Tharpe & Howell has been part of the California, Arizona, Nevada and Utah Business Communities for more than 31 years, providing clients with experience, judgment, and technical skills. We are committed to delivering and maintaining excellent client service to give each client and case personalized attention, and to be an integral member of each client's team.

For further inquiry, please contact the Firm's Managing Partner Todd R. Howell:

Telephone Number: (805) 962-4000

E-mail: thowell@tharpe-howell.com

FOR MORE INFORMATION VISIT US AT
WWW.THARPE-HOWELL.COM
OR CONTACT US AT ONE OF OUR LOCATIONS

- 15250 VENTURA BOULEVARD, 9TH FLOOR
SHERMAN OAKS, CALIFORNIA 91403
(818) 205-9955
- 1226 STATE STREET, 2ND FLOOR
SANTA BARBARA, CALIFORNIA 93101
(805) 962-4000
- 600 W. SANTA ANA BLVD., SUITE 705
SANTA ANA, CALIFORNIA 92705
(714) 437-4900
- 516 WEST SHAW AVENUE
FRESNO, CALIFORNIA 93704
(559) 221-2670
- 2555 3RD STREET, SUITE 110
SACRAMENTO, CALIFORNIA 95818
(916) 475-1600
- 1001 BAYHILL DRIVE
SAN BRUNO, CALIFORNIA 94066
(650) 616-4402
- 11622 EL CAMINO REAL
SAN DIEGO, CALIFORNIA 92130
(858) 764-2577
- 3425 CLIFF SHADOW PARKWAY
LAS VEGAS, NEVADA 89129
(702) 562-3301
- 955 S. VIRGINIA STREET, SUITE 116
RENO, NEVADA 89502
(775) 786-6200
- 2198 EAST CAMELBACK ROAD, SUITE 325
PHOENIX, ARIZONA 85016
(602) 340-1234
- 2150 SOUTH 1300 EAST, SUITE 500
SALT LAKE CITY, UTAH 84106
(801) 337-3997

Please contact us for more information or copies of the cases, statutes, or regulations discussed in this newsletter.

This newsletter is provided for informational purposes only, and the contents are not intended and should not be construed as legal advice.
© 2009 - Tharpe & Howell. This material may not be published, broadcast, rewritten, or redistributed.