APPELLATE LAW UPDATE
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SUPREME COURT: There were no new insurance cases accepted for review or decided by the California Supreme Court. However, there have been developments in the following two pending matters:

1. **Minkler v. Safeco Insurance**, review granted Aug. 12, 2009, S174016. In Minkler, the insured's son allegedly sexually molested plaintiff. The federal district court dismissed plaintiff's claims against insurer on grounds that intentional acts exclusion in policy barred coverage regardless of the policy's severability clause.

The Ninth Circuit's certified question of state law asked: Where a contract of liability insurance covering multiple insureds contains a severability-of-interests clause in the "Conditions" section of the policy, does an exclusion barring coverage for injuries arising out of the intentional acts of "an insured" bar coverage for claims that one insured negligently failed to prevent the intentional acts of another insured?

The California Supreme Court's restated the question (Cal. Rules of Court, rule 8.548(f)(5)) to ask: Where a contract of liability insurance covering multiple insureds contains a severability clause, does an exclusion barring coverage for injuries arising out of the intentional acts of "an insured" bar coverage for claims that one insured negligently failed to prevent the intentional acts of another insured?

On May 5, 2010, the Supreme Court heard oral argument. Its opinion will be filed by the end of August, 2010.

2. **Village Northridge Homeowners Association v. State Farm Fire & Casualty Company**, review granted Mar. 26, 2008, S161008. Village Northridge presents the following issue: After settling a first party claim by accepting money from and executing a release of the insurer, may an insured sue the insurer for fraud in inducing the settlement and seek to avoid the release without returning the money the insurer paid?

The Court of Appeal held insured was not required to rescind settlement contract and restore money before pursuing its claim. On March

30, 2010, the Supreme Court ordered supplemental briefing on the issue: Should the court overrule Garcia v. California Truck Co. (1920) 183 Cal. 767, 773, and Taylor v. Hopper (1929) 207 Cal. 102, 105?

Garcia held that, in an action for personal injuries damages, it was necessary for the plaintiff to promptly rescind the [underlying release] agreement alleged to have been entered into by him through the fraud of the defendant, and to restore to the defendant the consideration received there under, before action could be brought on the original cause of action.

Taylor held that a person cannot, after compromising an action for damages for personal injuries sustained by her, affirm the compromise agreement, retain the money received, and sue for damages caused by fraud alleged to have been practiced upon her to execute the compromise agreement.

The Supreme Court has scheduled oral argument for June 1, 2010. The court's opinion will be filed by the end of September, 2010.

COURT OF APPEAL: The California Court of Appeal recently published the following decisions that may be of interest to attorneys practicing insurance law:

1. Umbrella policy insurer owes primary duty to defend insured against potentially covered claims regardless of whether the underlying primary insurance policies or the self-insured retention have been exhausted. (**Legacy Vulcan Corp. v. Superior Court** (Transport Ins. Co.) (Apr. 30, 2010, B215713) __ Cal.App.4th __ [2010 WL 1730788] [Second Dist., Div. Three].)
2. Professional liability coverage barred by exclusion negating insurer's obligation to pay malpractice claim against law firm by entity owned and controlled by law firm's sole equity partner. (**Carolina Cas. Ins. Co. v. L.M. Ross Law Group, LLP** (Apr. 19, 2010, B215668) __ Cal.App.4th __ [2010 WL 1534103] [Second Dist., Div. Seven].)
3. Insured has standing to pursue UCL class allegations against insurer for failing to pay for all body shop repair costs regardless of insurer's subsequent offer to fully compensate the insured for those costs. (**Wallace v. GEICO General Ins. Co.** (2010) 183 Cal.App.4th 1390 [Fourth Dist., Div. One].)

GEICO refused to fully pay an insured's auto repair bill, contending the charges for the repairs exceeded prevailing rates. The insured paid the balance due to the repair shop, and then sued GEICO under the Unfair Competition Law and other theories, alleging to represent a class of similarly situated insureds. Two months later, GEICO tendered the balance amount to the insured to fully reimburse her for the repair costs, and then sought summary judgment and/or adjudication on the ground the insured's personal claims had been completely remedied and she lacked standing to pursue the class claims. GEICO supported its motion with evidence that, before the insured had filed suit, GEICO had entered into a consent order with the Department of Insurance (DOI) requiring GEICO to, inter alia, reimburse insureds for unpaid balances of auto repair bills if the insureds had complained to GEICO or the DOI about those unpaid balances. The trial court denied summary judgment on the ground the plaintiff could still seek to recover Brandt fee damages, but granted summary adjudication of the insured's class allegations, ruling that she had no standing to serve as a class representative since GEICO had tendered to her full payment of her alleged class damages. The court then granted GEICO's motion to strike the class allegations after the insured failed to locate a substitute class representative.

The Court of Appeal reversed, holding the defendant in a class action is not permitted to avoid class litigation by "picking off" representative plaintiffs by remedying their injuries. The court further held that this "pick off doctrine" applied equally to UCL claims, regardless of the requirement under Proposition 64 (Bus. & Prof. Code, § 17204) that the plaintiff must have suffered actual injury. That requirement, the court explained, is satisfied if the plaintiff had actual injury at the time the lawsuit was filed, regardless whether the injury is later remedied by the defendant after the lawsuit is filed. The court also rejected GEICO's claim that it paid the insured pursuant to the consent order, not as a pick off strategy. The court concluded that the consent order did not apply to the insured since she had not complained to either GEICO or the DOI before filing suit.

Readers should compare the following two cases below, Hale and Durell, with Howell v. Hamilton Meats & Provisions, Inc. (2009) 179 Cal.App.4th 686, review granted Mar. 10, 2010, S179115 (Supreme Court to decide whether plaintiffs may recover damages for the full amount of billed medical services or only the lower amounts actually paid by health insurers.). See our Appellate Update, February and March, 2010.

4. Uninsured patient has standing to pursue UCL class allegations against healthcare provider that promised to charge its “regular rates” but in fact charged her and other uninsured patients fees for medical services that substantially exceeded the fees it accepted from Medicare and private health insurers as payment in full for its services. (**Hale v. Sharp Healthcare** (2010) 183 Cal.App.4th 1373 [Fourth Dist., Div. One].)
5. Uninsured patient has no standing to pursue UCL class allegations against healthcare provider that charged him and other uninsured patients fees for medical services that substantially exceeded the fees it accepted from Medicare and private health insurers as payment in full for its services where the patient fails to allege in his complaint that he relied on any representations by the healthcare provider regarding what fees it would charge. (**Durell v. Sharp Healthcare** (2010) 183 Cal.App.4th 1350 [Fourth Dist., Div. One].)