

Published By  
The Law Offices of  
Borton Petrini LLP  
1600 Truxtun Avenue  
Bakersfield, CA 93301  
bpcbak@bortonpetrini.com

## INSIDE

**SUMMARY OF INSURER-  
RELATED NEW CASES  
JANUARY 2007 -  
JUNE 2007**

Page 2

If you are interested in receiving the **Insurance Defense Tips Quarterly Report**, or have someone to whom you would like it sent, call (661) 322-3051, ext. 170 or e-mail [publish@bortonpetrini.com](mailto:publish@bortonpetrini.com) and leave your name, e-mail and/or mailing address to request a free copy.

**EDITOR:  
MATTHEW J. TROSTLER  
(213) 624-2869**

### ***REINSURANCE AGREEMENTS NOT DISCOVERABLE BY THIRD PARTIES IN PRE-JUDGMENT TORT LITIGATION***

**By Matthew J. Trostler, Esq.**

Borton Petrini San Diego Partner Jonathan Geen successfully argued a case for Catholic Relief Insurance Company of America (“CRIC”) and its related affiliate, Catholic Mutual Relief Society (“CMRS”), before the California Supreme Court, in a landmark case holding that reinsurance agreements are treated differently in terms of their discoverability under the California Code of Civil Procedure, than traditional liability insurance agreements.

The Supreme Court was asked to decide whether California Code of Civil Procedure § 2017, which allows a plaintiff to discover limited insurance information as to the existence and extent of insurance coverage that may be available to satisfy or indemnify a judgment, includes reinsurance, as it refers to “any insurer” without expressly mentioning or excluding reinsurers from its coverage.

The dispute arose during a series of mediation hearings with regard to the over 150 child molestation cases that were filed against the Dioceses

continued on page 3

### ***Matthew J. Trostler***



Matthew J. Trostler is a Partner in the Los Angeles office of Borton Petrini, LLP. He received his undergraduate degree from the University of Southern California earning a major in psychology and a minor in English, with an emphasis in expository writing. He earned his Juris Doctorate from California Western School of Law in 1991 where he was a contributing editor for the law school newspaper.

Matthew’s primary area of emphasis at Borton Petrini, LLP is insurance defense. His wide-ranging experience in the field of insurance has provided additional insight to insurance carriers through seminars defining and discussing insurer regulations in California.

Matthew has significant experience in arbitrations, mediations and jury trials. Some of his verdicts have been published statewide and nationally. His aggressive applicational style is tempered by his sense of fairness and compassion.

**SUMMARY OF INSURER-RELATED NEW CASES JANUARY 2007 - JUNE 2007**

**By Matthew J. Trostler**

*Bostick vs. Flexequipment* (January 2007): Proposition 51, which made liability for non-economic damages several rather than joint and several, does not apply in a strict products liability action involving a single indivisible injury because liability is imposed under strict products liability irrespective of fault.

*Golden Eagle Insurance vs. Sen-Fed Ltd.* (March 2007): Commercial general liability insurer owed neither a defense nor an obligation to indemnify insured in underlying action for breach of lease for commercial premises.

*Simon Marketing v. Gulf Insurance* (March 2007): Acts of dishonest employee do not equate to damage to “property” and therefore not a covered loss.

*Zenith Insurance Company vs. Cozen* (March 2007): Law firm owed no duty of care to reinsurer; no attorney-client relationship exists independent of express agreement.

*Jordan vs. Allstate* (March 2007): Before an insurer can be found to have acted in bad faith for its delay or denial in the payment of policy benefits, it must be shown that the insurer acted unreasonably or without proper cause. Where there is a genuine issue as to the insurer’s liability under the policy as to a claim asserted by the insured, there can be no bad faith liability imposed on the insurer for advancing its side of that dispute.

*Safeco Insurance vs. Firemen’s Fund* (March 2007): Primary insurer issued four successive policies that covered an “occurrence of property damage,” including continuous exposure to the same conditions resulting in a claimed loss of use during the policy period. Each policy had limits of \$500,000 per occurrence. Excess insurer argued that because both property damage and personal injury occurred

in all four policy periods, the primary insurer was liable for up to \$4 million. The Court of Appeals held that there was only one occurrence; further, under policy language, the continuation of any damage into subsequent policy periods (i.e., loss of use) did not give rise to multiple occurrences. The Court held that primary insurer was liable for only one occurrence or \$500,000.

*City of Watsonville vs. Corrigan* (April 2007): Tender of defense not a prerequisite for reimbursement under indemnity agreement as Civil Code section 2778 did not require a tender.



*Pacific Business Connections vs. St. Paul Surplus Lines Insurance Co.* (April 2007): Insurer required to rely upon the instruction by premium finance company to cancel insurance policy and return the unearned premium.

*Delgado vs. Inter-Insurance Exchange of the Automobile Club of Southern California (ACSC)* (May 2007): Insured Reid assaulted and battered Delgado; ACSC denied a defense under a homeowners policy; Reid and Delgado entered into a stipulated judgment and assignment of all of Reid’s rights against ACSC, Delgado sued ACSC for bad faith. Court of Appeals held that the underlying complaint contained allegations demonstrating a potential for coverage under the ACSC policy and ACSC’s refusal to provide its insured with a defense was without justification and constituted bad faith as a matter of law.

*Padilla Construction vs. Transportation Insurance Co.* (May 2007): An excess insurer does not have a duty to defend an insured until all primary insurance and the self insured retention is exhausted, including cases of continuing loss, unless the excess insurance describes the underlying insurance and promises to cover a claim when the specific underlying *insurance is exhausted*.

*Burns vs. California Fair Plan* (June 2007): Summary judgment for insurer affirmed when insureds' home burned and insurer paid benefits on a pro-rata basis, rather than full insured value of the property on insurance policies.

*Katiuzhinsky vs. Perry* (June 2007): Intervention of a third party in purchasing a medical lien does not prevent a plaintiff from recovering the amounts billed by the medical provider for care and treatment, as long as the plaintiff legitimately incurs those expenses and remains liable for their payment.



---

## REINSURANCE AGREEMENTS

*continued from Page 1*

---

of San Diego and San Bernardino in a coordinated action known as Clergy II. CRIC is the insurer for the Diocese of San Diego. The mediation judge, at plaintiffs' request, had ordered CRIC and CMRS to produce a detailed list of their financial records, including individual case reserves and reinsurance information, to assist the parties in their settlement negotiations. Borton Petrini, on behalf of CRIC and CMRS, filed a peremptory writ of mandate in the Court of Appeals for the Second District, which the Court of Appeal granted, and after full briefing, eventually issued an opinion holding that plaintiffs were not entitled to any of the financial records they were seeking, and plaintiffs' desire to obtain this financial information to assist them with settlement was an insufficient reason to make such information discoverable. The Court of Appeal further held that reinsurance information was not discoverable under the California Code of Civil Procedure. The plaintiffs asked the Supreme Court to review solely that portion of the Court of Appeal's decision.

The California Supreme Court, in a 4-3 decision, held that § 2017 does not apply to reinsurance policies as a general rule, because such policies do not change the amount of insurance coverage available to plaintiff

if successful in obtaining a judgment. Moreover, such policies are not an asset of the insured, but rather of the insurer. The majority noted that §350 of the Insurance Code expressly provides that an insured has no interest in his insurer's reinsurance, and that the legislative history of § 2017 suggests that it was enacted to make liability policies discoverable, not reinsurance. The majority further noted that, while the legislature's language of "any insurer" was ambiguous, construing such language to include reinsurers would end in absurd results, including placing very heavy burdens on reinsurers with regard to the production of such information, despite the rule that third parties are to be somewhat more protected than litigants from the demands of discovery.

The majority noted that there may be exceptions to this general rule, when for example, a reinsurer actively defends an underlying case and effectively steps into the shoes of an insurer, such as in the unusual case where an insurer and reinsurer have some kind of "fronting agreement." The majority declined to allow these relatively rare exceptions to engulf the general rule.

The majority noted, and CRIC and CMRS agreed, that the only prior California cases that had expressly allowed a plaintiff to discover reinsurance agreements were cases of insurance bad faith by an insured against their own insurance company, not attempts by plaintiffs in underlying cases to obtain information as to what reinsurance the defendants' insurers chose to purchase to spread their risk.

The dissenting opinion criticized the majority for ignoring what the dissent viewed as the clear language of § 2017 that did not exclude reinsurers, and because the dissent discounted the burden that reinsurance discovery would place on the insurers such as Catholic Mutual.

Borton Petrini, as well as our client and their reinsurers are pleased with the decision, and appreciates the opportunity to be involved in this case resolving an important and previously undetermined issue. ❖

---

**DISCLAIMER: THE INFORMATION PROVIDED IN THIS UPDATE IS NOT A SUBSTITUTE FOR LEGAL ADVICE. READERS SHOULD BE ADVISED THAT IF THEY HAVE QUESTIONS ABOUT THIS OR ANY OTHER AREA OF INSURANCE DEFENSE, THEY SHOULD SEEK THE ADVICE OF COMPETENT COUNSEL SPECIALIZING IN INSURANCE DEFENSE.**

---