

PROFESSIONAL LIABILITY UPDATE

Jennifer A. Becker
David P. Borovsky
Shoshana Y. Chazan
Edward F. Donohue, III
Kathleen M. Ewins
Kathleen A. Foley
Bruce N. Furukawa
Howard M. Garfield
Jason A. Geller
J. Michael Higginbotham
John B. Hook
William L. Jacobson
Farand C. Kan
Anna Kapetanakos
Joseph P. McMonigle
Douglas J. Melton
Robin M. Pearson
Jessica B. Rudin
Richard J. Sciaroni
Steven Sharafian
Jennifer W. Suzuki
Jeanette Traverso
Karen L. Uno
Seth E. Watkins
Gerald G. Weisbach
Irene K. Yesowitch

May 14, 2002

Issue No. 121

LITIGATION PRIVILEGE

California Law

By Jessica Rudin

The Third District holds that an attorney’s misrepresentation of his client’s insurance policy limits is privileged under California Civil Code §47(b).

Home Insurance Company v. Zurich Insurance Company
02 C.D.O.S. 1318

Luana Pinasco and her husband Norman Main, Home Insurance Company (“Home”) insureds, were injured in an automobile accident caused by Michelle Canfield, the daughter of two Maryland Insurance Company (“Maryland”) insureds. Pinasco and Main maintained a \$500,000 policy on their automobile, as did Canfield.

When Pinasco and Main sued Canfield, Maryland assumed Canfield’s defense. Her attorney falsely told Pinasco and Main that because Canfield was only a permissive user of the car she was driving, the available policy limits were \$15,000. Pinasco and Main relied on Maryland’s representation, settled their lawsuit with Canfield for \$15,000, and pursued an under-insurance claim against Home. They received over \$200,000. Home did not pursue subrogation against Maryland, relying on the false representation of policy limits.

When Home discovered the fraud, Home

sued Zurich, which had acquired Maryland, for fraud, a declaration of rights, indemnity and subrogation. Zurich successfully demurred on theories other than the litigation privilege of C.C. § 47(b).

The Court of Appeal found that Maryland’s attorney’s misrepresentation of policy limits was privileged under C.C §47(b). The court observed the misrepresentation was a statement made in a judicial proceeding by an insurer who is authorized to achieve an object of the litigation, settlement.

The Court narrowly read C.C. §47(b)(3), the exclusion from the privilege of the knowing concealment of the existence of insurance. Here, Maryland acknowledged the existence of the policy but misrepresented its limits. The plain language of C.C. §47(b)(3) does not extend the exclusion to misrepresentations of policy limits.

Finally, the Court considered whether

601 Montgomery Street, Suite 900
San Francisco, California 94111
Telephone (415) 397-2222
Facsimile (415) 397-6392
www.longlevit.com

3130 Wilshire Boulevard, 2nd Floor
Santa Monica, California 90403-2300
Telephone (310) 829-0977
Facsimile (310) 829-0991
www.longlevit.com

the exception to the litigation privilege applicable in equitable actions to set aside a settlement for extrinsic fraud applied. Maryland's misrepresentation occurred within the context of a lawsuit. Home, through Pinasco and Main, could have determined the true limits of Maryland's policy through discovery. Thus, Maryland's fraud was intrinsic and could not support an equitable action to set aside the settlement.

Comment: This case illustrates the need to conduct formal discovery regarding available policy limits.