

THARPE & HOWELL

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ABSENT PROVISION TO THE CONTRARY, AMOUNT COVERED UNDER SURETY BOND IS NOT “PER CLAIM”

In *RLI Insurance Company v. All Star Transportation, Inc.*, a Federal Appeals Court recently found that, in the absence of a provision to the contrary, an insurance company’s liability under a \$10,000 surety bond is **capped** at \$10,000 - and not \$10,000 **per claim**.

This case involves Sam’s Transportation Services (“Sams”), a broker that went into bankruptcy. When Sam’s failed to make certain payments because of its insolvency, 68 truckers filed claims with RLI to recover under the surety bond. Most of their claims ranged from \$350 to \$7,800 but, altogether, added up to over \$160,000 (far exceeding the \$10,000 face value of the bond).

In response to the claims, RLI refused to pay more than a **total** of \$10,000 and instituted an interpleader action in which it deposited the \$10,000 with the court and asked the court to distribute the funds among the truckers who had presented valid claims.

Only seven of the 68 truckers that had filed claims with RLI bothered to file claims with the court. Those seven claims totaled \$15,060. Six of the seven truckers then moved to dismiss the interpleader action, arguing that RLI’s duty under the surety bond was to pay up to \$10,000 **on each trucker’s claim**, not \$10,000 for all claims combined. The District Court denied the motion and ordered the clerk to pay specified pro rata shares of the \$10,000 to the seven truckers who had submitted valid claims to the court. Five of the truckers appealed.

One of the complications in the case was that none of the parties had an actual copy of the bond agreement. However, the Court of Appeal cited numerous other court decisions that concluded federal broker regulations impose a total surety bond liability of \$10,000. Also, the court noted the standardized federal form governing surety bonds removed any lingering doubt. It indicated that Form BMC 84 provides standard terms and conditions which quite plainly say that the face value of the bond is \$10,000; and that the liability is discharged when payments under the bond amount in the aggregate to that value. Accordingly, the Appellate Court ruled in favor of the surety company with regard to the \$10,000 cap on pay-outs in this case.

**CONTRACTOR'S LICENSE MUST BE VALID DURING
ENTIRE CONTRACT OR NO AMOUNTS ARE DUE**

California *Business and Professions Code* Section 7031(b) essentially holds that a contractor without a valid license cannot collect any amounts for work performed. The California Court of Appeal recently clarified this law by opining a contractor cannot collect for **any** labor or materials if it did not have a valid license **at any time** during the contract period.

In *Esaul Alatraste v. Cesar's Exterior Designs, Inc.*, Alatraste retained Cesar's Designs to perform landscape construction services at his newly constructed home. At the time, Cesar's Designs did not have a California contractor's license (although the son of the President of Cesar's was studying for and scheduled the take the contractor's license exam).

After working for about five months, Cesar's terminated its services when Alatraste refused to continue to pay for work performed. By that time, Alatraste had paid Cesar's Designs \$57,500.

Alatraste then sued Cesar's seeking **reimbursement** of the \$57,500 it had previously paid - arguing that California *Business and Professions Code* Section 7031(b) allows a party to recover "all compensation paid to [an] unlicensed contractor." The Trial Court entered Judgment in Alatraste's favor for the \$57,500 plus interest and costs.

Although Cesar's Designs conceded no one in the company was licensed when it began the landscape work, it noted that a valid license was in effect during a portion of the project. It contended Alatraste was not entitled to recover the portion of the payment for work performed while Cesar's Designs was licensed. It also argued that it should receive full payment for materials (as opposed to labor).

The President of Cesar's Designs also argued he had known Alatraste for 12 years and that Alatraste was fully aware of the company's original, unlicensed status. Cesar's Designs testified that Alatraste never expressed dissatisfaction with its work - and stated the sole reason Alatraste stopped paying for the work was because he was having financial problems.

Alatraste responded by denying he knew Cesar's Designs was not licensed at the beginning of the contract period and argued that, even if he did know, knowledge by the consumer is not a bar to recovery under section 7031(b). Alatraste also claimed he experienced serious problems with the quality of Cesar's work.

In the end, the Court of Appeal agreed with the Trial Court and found that Alatraste was entitled to full reimbursement of all amounts paid. Specifically, it ruled that California *Business and Professions Code* Section 7031 does not permit a contractor to assert legal or equitable defenses - even if the facts show the hiring party knew the company was unlicensed and substantially benefitted from the work.

UMBRELLA CARRIER MAY SOMETIMES OWE IMMEDIATE DUTY TO DEFEND

In *Legacy Vulcan Corp. v. The Superior Court of Los Angeles County*, a California Appellate Court recently held that an umbrella policy of insurance can sometimes be primary - obligating the carrier to immediately defend.

In this case, Legacy Vulcan Corp. (“Vulcan”) manufactured and sold perchloroethylene. Transport Insurance Company (“Transport”) had issued policies to Vulcan for several years, including an excess policy effective from January 1, 1981 to January 1, 1982.

The City of Modesto and others sued Vulcan in three actions, alleging that use of perchloroethylene by the dry cleaning industry had resulted in environmental contamination. Vulcan tendered its defense to several insurers including Transport, but none provided a defense. Accordingly, Vulcan paid for its own defense and settled the actions.

Transport then filed a complaint against Vulcan for declaratory relief as to the parties’ rights and obligations, alleging that it had agreed to defend Vulcan only as to losses that were *actually* covered under the policy and only if and after Vulcan established a right of indemnity. Other insurers commenced a separate action by filing another complaint against Vulcan for declaratory relief. The Trial Court consolidated the two actions and designated them as complex. Vulcan filed a cross-complaint against Transport and other insurers for breach of contract and declaratory relief.

The Trial Court held that the Transport policy provided excess and umbrella coverage but, with regard to the duty to defend, its obligations were limited to those of an excess carrier. Further, the Trial Court ruled any such duty to defend only occurred upon exhaustion of all underlying insurance and only when the claims were actually covered by the terms of the insurance policy. In reaching its decision, the Trial Court reasoned that absent an express provision in the policy to the contrary, an excess insurer has no duty to indemnify or defend until all of the underlying policies in effect at any time during the period of a continuous loss are exhausted. The Trial Court further opined that if any self-insured retention “provided primary coverage for continuous losses,” the self-insured retention must be exhausted before any duty to defend could arise. Vulcan appealed.

The California Court of Appeal disagreed with the Trial Court’s decision and found that the umbrella carrier must defend when the claim **may not be covered** under the primary policy and potentially falls under the coverage afforded by the terms of the umbrella policy itself. Accordingly, the case was remanded back to the Trial Court. This ruling is significant, essentially holding that, dependent on the language of the umbrella policy provisions, the obligation to defend may arise **regardless** of exhaustion or any self-insured retention. Moreover, the subject claim may not even have to be one actually covered under the policy in order to trigger the duty to defend. Instead, the **potential** for coverage may cause the defense duty to arise.

**NEW CASE RULING MAY ALLOW INCREASED
RECOVERY ON MEDICAL BILLS**

On June 24, 2010, *Yanez v. SOMA Environmental Engineering, Inc.*, was decided by the First Appellate District in San Francisco. [This is the same appellate district that produced *Nishihama* - the case that approved and extended the *Hanif* analysis to private insurance by way of the Hospital Lien Act.] Unfortunately, the Court in *Yanez* rejected its prior reasoning in *Nishihama*, and held that it is an error to make a post-trial verdict **reduction** in past medical expenses when private insurance has provided plaintiff with the collateral benefit.

In this case, plaintiff had health insurance through her employer. Although the total past medical bills were \$44,519.01, the amount actually paid by insurance was \$18,368.24. The plaintiff's attorney got into evidence the **full price** of the past medical expenses (\$44,519.01), and there was testimony from the treating surgeon as to the reasonable value of the surgery performed.

The verdict in plaintiff's favor was for the **full amount** of the past medical bills (prior to insurance reduction). The defense filed a post-trial motion to reduce the past medical expenses to the \$18,368.24 **actually paid** by insurance, and presented evidence of such amount to the Trial Court. The Trial Court then reduced the verdict for past medical expenses from \$44,519.01 to \$18,368.24 and entered Judgment in that amount. Plaintiff appealed.

Again, the (same) court in *Nishihama* previously expanded the *Hanif* analysis to the private insurance arena. The more current *Yanez* court then directly addressed this earlier decision, whose reasoning was at odds with its holding. In relying on the collateral source rule for its decision, the *Yanez* court reasoned that "because [the] court's decision in *Nishihama* relied on *Hanif* [which involved Medi-Cal] to reduce a plaintiff's jury award to the reduced rates paid by her private insurance, we must now reject that aspect of *Nishihama's* reasoning."

The Supreme Court could grant review of *Yanez*, which would probably be a good sign that the Court is not pleased with the reasoning and decision. However, for now, plaintiffs will likely seek recovery of the full **value** of their medical bills.

**LANDLORD'S FAILURE TO PARTICIPATE IN SECTION 8
HOUSING PROGRAM DOES NOT VIOLATE
CALIFORNIA LAW**

In *Sabi v. Sterling*, the California Court of Appeal recently held that a landlord's failure to participate in the Section 8 Federal housing program does not violate California's housing and anti-discrimination laws. In this case, plaintiff Elisheba Sabi rented an apartment from defendant Donald Sterling beginning in 1987. When she became eligible for housing assistance from HUD in 2003, she asked Mr. Sterling to accept Section 8 funds toward the monthly rent due. At the time, Ms. Sabi was an elderly widow, disabled, and on a fixed income.

When Mr. Sterling refused to participate in the Section 8 housing program, the Legal Aid Foundation of Los Angeles (LAFLA) intervened on her behalf. Although the LAFLA wrote numerous letters to Mr. Sterling asking that he accept the Section 8 assistance as a reasonable accommodation to Ms. Sabi in light of her disabilities and low-income status, he still refused to do so. Ms. Sabi's family attempted to find other suitable living quarters for her, but concluded it would be best if she did not move. Accordingly, Ms. Sabi continued to pay rent to Mr. Sterling, but decided to sue.

Ms. Sabi argued Mr. Sterling's failure to participate in the Section 8 housing program violated California's state disability and "source of income" anti-discrimination laws. She requested that the Court compel Mr. Sterling to participate in the program, and to accept Section 8 funds toward the rent due. After a full Trial by Jury, a Judgment was entered in favor of Mr. Sterling. Ms. Sabi appealed.

Because the Jury's decision would have wide-spread implications on California landlords and tenants alike, amicus briefs were filed with the Appellate Court by various advocacy groups. Pro-tenant groups argued it was discriminatory, on the basis of source of income, for a landlord to not participate in the Federal Housing Program when a disabled and low-income tenant was involved; while property owners and management firms argued participation in the program was strictly "voluntary" and could not be forced.

After conducting an exhaustive review of California and Federal law on the subject and relative legislative intent, the Court of Appeal found that the Fair Employment and Housing Act, by its plain language, did not compel a property owner (such as Mr. Sterling) to participate in the otherwise voluntary Federal housing program and that refusal to accept such funds did not amount to discrimination based on source of income. Although Ms. Sabi continues to live in the unit, it would appear she pays her monthly rent to Mr. Sterling without Federal support.

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