



## California Insurance Law Alert

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### **Failure of Injured Party to Timely File Claim in Conservation Proceeding of Insolvent Insurer Precludes Co-Carriers from Obtaining Contribution to Defense Costs of Insured that had Itself Filed Bankruptcy.**

In *Jones v. Golden Eagle Insurance Corporation*, \_\_ Cal.App.4th \_\_ [11 C.D.O.S. 14278] (November 28, 2011), the plaintiffs in several personal injury actions failed to assert timely claims in the conservation proceeding of a bankrupt insured's insolvent insurer. The court of appeal held that the plaintiffs lost their right to recover from the insolvent insurer and the insured's other insurers' equitable contribution claims for defense costs were also barred.

Between 1987 and 1998, the insured, Calsol, provided mineral solvents used in mechanical repairs. Plaintiffs sued Calsol and other defendants for alleged injuries resulting from exposure to the solvents. Calsol filed bankruptcy, and plaintiffs were granted relief from the automatic stay to pursue Calsol's insurance carriers for any judgment they obtained. The claimants in this case were Calsol's other insurers from 1975 to 2002.

Between 1986 and 1995, Calsol was insured by Golden Eagle, which itself was put into conservatorship by the California Insurance Commissioner in 1997. The Commissioner established an administrative procedure to handle claims for coverage under Golden Eagle policies, pursuant to which he sent a letter to counsel for the plaintiffs informing them of the requirement that they submit Sworn Statements of Proof of Loss for each plaintiff within 30 days. Two-and-a-half months later, the Commissioner sent a second letter stating that although he had granted extensions of time to the plaintiffs, no Sworn Statements had been submitted. Thus, the letter stated that the plaintiffs' claims were denied.

The Commissioner's office had previously shared the costs of providing a defense to Calsol against other claims with Calsol's other insurers. However, after this group of plaintiffs failed to file Sworn Statements, the Commissioner denied the plaintiffs' claims. As a result of that denial, the Commissioner took the position there was no coverage owed under the Golden Eagle policies, and therefore refused to participate any further in Calsol's defense. The other insurers sought an OSC from the court ordering the Commissioner to continue to defend the suits against Calsol. The court denied the OSC stating that under the Legislative framework, once the claims were denied by the Commissioner there was no potential for coverage under the Golden Eagle policies, and thus, no duty to defend.

The other insurers appealed, arguing that the plaintiffs' failures to submit the Sworn Statements did not extinguish Golden Eagle's duty to defend Calsol, or the other insurers' rights to equitable contribution. However, the Court of Appeals disagreed.

The court noted the "special circumstances" created by Calsol's bankruptcy, which eliminated its potential liability to the plaintiffs. The bankruptcy stay was lifted to allow plaintiffs to pursue Calsol, but only to the extent their claims were covered by insurance. As a result, Calsol was not at risk, but was named as a defendant only as a means of getting to its insurance. Because Calsol was no longer threatened with loss by the plaintiffs' lawsuits, the lawsuits did not create a potential for coverage and Golden Eagle had no duty to defend.

The court noted that as a practical matter, the reason the insurers defended was to protect their own assets from the plaintiffs' claims and potential judgments covered by the policies they issued to Calsol. But once the plaintiffs forfeited their claims against Golden Eagle by failing to participate in the conservatorship proceedings, Golden Eagle no longer had any assets at risk either, and therefore no need or duty to defend.

Nor did the other insurers have any remaining right to equitable contribution from Golden Eagle because Golden Eagle was no longer a co-obligor who shared liability with the other insurers. The primary right to recover from Golden Eagle ceased to exist when the Commissioner denied the plaintiffs' claims against it. Thus, the plaintiffs' failure to file the Sworn Statements relieved Golden Eagle from any potential liability to the plaintiffs under the Calsol policies, and because Golden Eagle could not be liable to the plaintiffs, it no longer shared the same risk as the other insurers. The court noted "it would be anomalous to require Golden Eagle to share the cost of defense against claims that present no risk of loss either to Golden Eagle or its insured."

In effect, the Commissioner's denial of the plaintiffs' claims against Golden Eagle constituted a determination that there were no claims covered by the Golden Eagle policies. As a result, the plaintiffs forfeited their right to recover in their lawsuits to the extent their claims would have otherwise been covered by the Golden Eagle policies, and consequently extinguished the other insurers' rights to contribution.

Comment: This decision has some very interesting discussions of the rights of insurers when dealing with the insolvency of insureds and other insurers and raises several interesting issues. For example, could have or should have the other insurers have presented either their own claims, or the plaintiffs' claims, to the Commissioner to preserve them when the plaintiffs themselves failed to do so?

The lesson is that whenever dealing with other insolvent entities, be prepared to take the necessary procedural steps to protect your rights regarding coverage and equitable obligations. The Burnham Brown insurance coverage group can guide you through these steps.

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