

tive; it was plaintiff's decision to pull nails out of walls on a nine-foot ladder and he therefore assumed the significant risk involved in that activity.

Insurance Litigation

Disability Insurance

Genuine dispute existed as to whether insured was entitled to extended disability payments.

Bosetti v United States Life Ins. Co. (July 17, 2009, B206896) 2009 Cal App Lexis 1166

The insured was employed by defendant school district; her employment benefits included coverage under a group long-term disability insurance policy. Shortly after learning that her employment would be terminated for economic reasons, the insured saw a doctor for depression and was placed on temporary disability. Her disability would ultimately extend for 2 years, and had both physical and emotional components. Under the policy, the insured could obtain disability benefits for 2 years if she was disabled from her own occupation. After that time, she could only obtain disability benefits if she was disabled from any occupation. At the end of 2 years, plaintiff was found to be able to perform sedentary or light physical work, and thus she was not disabled from any occupation. When the insurer terminated her disability benefits, she sued the insurer, seeking additional disability benefits. During the litigation, the insurer raised another defense, namely that the policy limited benefits for disabilities due to "mental, nervous or emotional disorder[s]" to only 2 years and, because the insured did not suffer a physical disability before termination of her employment (when her coverage ceased), she had received all policy benefits. The trial court granted the insurer summary judgment on this basis. The insured appealed.

The Second District Court of Appeal reversed. Triable issues exist as to two material facts: whether the insured was totally disabled from "any employment" when her benefits were terminated, and whether such disability had a physical component. Given these triable issues, the insured's breach of contract and declaratory relief causes of action should proceed. The insured's tort claims, however, lack merit as a matter of law; there was a genuine dispute as to whether the insured was entitled to extended disability payments, thus precluding a finding that the insurer acted in bad faith. See *Wilson v 21st Century Ins. Co.* (2007) 42 C4th 713, 723, 68 CR3d 746.

COMMENT: Mental disorder exclusions are commonly inserted into disability policies to limit or eliminate a source of disabling conditions. *Bosetti's* discussion of these mental disorder provisions reflects the difficulty of trying to separate mental and physical conditions. As so-called "mental" conditions are increasingly identified with physical causes, it becomes more and more difficult to separate mental from physical disabilities. The court concludes that, absent explicit language, such exclusions cannot apply to defeat a disability claim when the

physical problems "contributed to the disability or were a cause or symptom."

The court also confirms that the essence of bad faith is the unreasonable delay or denial of benefits. It then says that this is an objective test, not a subjective test. The court discusses the genuine dispute doctrine and confirms that it is now only a shorthand way of saying that the delay or denial of benefits was "reasonable under all the circumstances."

Unfortunately, the conclusion of the court's opinion is published under circumstances in which all the facts are unclear. It holds that there was conflicting evidence as to whether the insured was disabled. It then references a so-called "independent physician" who reviewed the file "in great detail" and concluded the insured could work consistent with a vocational report, a Functional Capacity Evaluation, and plaintiff's own recent physician. It concluded that there was no evidence of bad faith. Critical to the court's analysis was its conclusion that "[t]here is nothing in this record to suggest that U.S. Lifes' investigation into Bosetti's claim was in any way biased, inadequate, superficial or otherwise unworthy of reliance by an objectively reasonable insurer." We can't tell from the facts discussed in the opinion how the court arrived at this opinion. There is no discussion of the report itself. The reasons for the "independent" physician's conclusions, whether the report was provided to the insured or her physician for response, whether any responses were provided, whether the physician could actually be called "independent," the extent to which the report was inconsistent with the opinions of the treating physicians, the scope of the investigation, and the extent to which the insured's own doctors conceded that plaintiff could, in fact, work are not set out in the opinion, thus leaving its conclusion highly questionable. Certainly, it is no defense to bad faith to simply obtain an "independent physician" report, which is in conflict with a treating physician's report, and then claim that there is no bad faith because there is a genuine dispute.—*Arnold R. Levinson*

Duty to Indemnify

Insurer has no obligation to pay costs arising solely from claims that were not potentially covered, and it also has no duty to indemnify for damages awarded for insureds' willful acts relating to false imprisonment of domestic servant.

State Farm Gen. Ins. Co. v Mintarsih (2009) 175 CA4th 274, ___ CR3d ___

Mimin Mintarsih sued the insureds for false imprisonment and negligence arising from her employment as a domestic servant. The insureds tended their defense to the insurer under a homeowners policy and an umbrella policy. The insurer agreed to defend the insureds under a reservation of rights. The jury found the insureds liable on each count and awarded noneconomic and economic damages, statutory penalties for the wage and hour violations, and punitive damages. The trial court later granted Mintarsih's motion for attorney fees as the prevailing party on the wage and hour claims. The insurer then filed this complaint for declaratory relief, seeking a determination of the parties' rights and duties under the two policies. The trial court determined that the policies

