fore, the insurer sat by and let an uncontested judgment of over $22 million be entered against its insured and then claimed that it was not bound by the judgment. The court held that it doesn't matter that the insurer did not have a duty to defend: As long as an insurer has been duly notified of the claim and has had a full opportunity to protect its interests, it is bound by the underlying judgment, absent fraud or collusion. Contrary to the screams of insurers who find themselves bound by judgments they now want to relitigate, there is nothing unfair about this result. Any other rule would give the insurers a "heads I win, tails you lose" result. As the court explains (171 CA4th at 334):

> The requirement that an insurer protect itself in the original action on the issues of liability and damages makes sense. A contrary holding would encourage an insurer who receives notice of a third party claim against its insured to wait and see whether the outcome will be in its insured's favor while not running the risk of being bound by an adverse judgment.

—*Arnold R. Levinson*

COMMENT: Were one to read Mr. Levinson's comments on the *Executive Risk* case without reading the opinion itself, one might conclude that the California court of appeal has embraced an entirely new rule of law: that even though a carrier has no duty to defend—and, ipso facto, no duty to indemnify—it can nonetheless be liable for an otherwise noncovered judgment based solely on its failure to provide a defense. Happily, the First District has not adopted any such radical notion. Rather, the court announced the much more modest rule that an insurer that issues an indemnity-only policy—and that is therefore contractually obligated only to reimburse defense costs, rather than to provide a defense in the first instance—is bound by factual determinations in the underlying action, so long as it had notice of the action and an opportunity to defend. In other words, assuming no fraud or collusion, the carrier will be precluded in such a circumstance from relitigating the insured's liability to the claimant or the amount of damages awarded. This is not to say, however, that the carrier cannot litigate its *coverage* defenses; to the contrary, the whole point of the rule is to preclude relitigation of the underlying merits in "later coverage litigation on the claim involving its insured." 171 CA4th at 333. The import of the opinion, then, is that the carrier will be bound by the factual determinations made in the underlying action, but will not be obligated to pay the judgment unless and until it is determined that the underlying loss is in fact covered by the policy.—*Susan M. Popik*

CROSS-REFERENCE: On collateral estoppel effect of determinations in claim-related actions, see California Liability Insurance Practice: Claims & Litigation §§19.22–19.31 (Cal CEB 1991).

Tort Litigation

Defamation

Plaintiff does not show probability of prevailing on defamation claim because she cannot show publication or republication to third party; foreseeability of republication in future is not sufficient showing because it is too speculative.

Dible v Haight Ashbury Free Clinics (2008) 170 CA4th 843, 88 CR3d 464

Plaintiff worked for defendant as a psychiatric counselor in the "jail psychiatric services" division. Plaintiff was terminated after a jail inmate committed suicide. Plaintiff took the position that "managerial and institutional problems" caused the suicide, not her conduct, whereas defendant claimed her negligence caused the death. Claiming that defendant made similar statements to the Employment Development Department (EDD) in relation to her unemployment insurance claim, plaintiff sued defendant for wrongful termination and defamation, among other claims. Defendants demurred to all causes of action; the trial court sustained the demurrer, but allowed plaintiff to amend her defamation claim. Plaintiff did not attempt to amend and defendants filed a special motion to strike the defamation claim under the anti-SLAPP statute (CCP §425.16). The trial court granted the motion, and plaintiff appealed.

The First District Court of Appeal affirmed. On an anti-SLAPP motion, the court must engage in a two-step process: (1) determine whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity, *i.e.,* in furtherance of the constitutional rights of petition or free speech in connection with a public issue, including statements made in an "official proceeding," and if so (2) determine whether the plaintiff has demonstrated a probability of prevailing on the claim. CCP §425.16(b)(1); *Equilon Enters. v Consumer Cause, Inc.* (2002) 29 C4th 53, 68, 124 CR2d 507. Plaintiff's declaration regarding defendant's statements to the EDD unequivocally establish[es] that defendant's alleged communication was part of an "official proceeding." Thus, the first prong of the anti-SLAPP process is satisfied. As to the second prong, plaintiff cannot show a probability of prevailing on her defamation claim because publication or republication to a third person is necessary to establish the cause of action of defamation and plaintiff has not shown any such publication. Plaintiff seeks a wider exception for claimants who have not republished when it is foreseeable that they might do so in the future, but such a rule is untenable because it would require courts to speculate as to future conduct and on future damage.

other policies issued by the same insurer under which coverage may be provided. This is really another aspect of the fundamental duties of good faith and fair dealing that require insurers to consider the interests of their insureds equal to their own and to do a thorough investigation, including an investigation of all possible bases to pay a claim. See *Egan v Mutual of Omaha Ins. Co.* (1979) 24 C3d 809, 819, 169 CR 691.—*Arnold R. Levinson*

COMMENT: *Safeco* is a potentially dangerous case for carriers in a couple of respects. Among other problems, it appears to hold that the insurer's "duty to investigate" includes the duty to search for policies other than the policy under which the insured tenders its defense. Thus, according to the court, an insurer might breach its duty under Policy A if it fails, in response to a tender under Policy B, to discover it has issued Policy A. In reaching this result, the court recasts the duty to investigate from one to "'thoroughly investigat[e] the foundation for [the insurer's] *denial*'" of a claim (170 CA4th at 1003 (emphasis added)) to one to "thoroughly investigat[e] 'all of the possible *bases*' of the claim" (170 CA4th at 1006 (emphasis added)). This subtle shift allows the court to find that Safeco breached its duty in rejecting a settlement demand on the basis of a policy it did not even know applied to the loss!

To compound the problem, the court looks to the regulations promulgated under Ins C §790.03 to find a basis for this newfound aspect of the duty to investigate, thus further expanding the basis on which the regulations can be used to establish bad faith. Although the court gives lip service to the rule that the regulations do not support a private right of action, by grounding its holding on them, the *Safeco* court comes perilously close to embracing the rule it purports to reject. Indeed, as more courts fasten on the insurance regulations to provide support for duties not otherwise established in the governing case law, it becomes increasingly difficult to understand how their holdings comport with the *Moradi-Shalal* court's clear rejection of §790.03 as the basis for a cause of action. See *Moradi-Shalal v Fireman's Fund Ins. Cos.* (1988) 46 C3d 287, 250 CR 116. Perhaps the supreme court will take one of these cases sometime soon and tell the courts it meant what it said in *Moradi-Shalal*. Until then, insurance carriers should be worried—very worried—about the further expansion of their actionable "duties" as defined by §790.03 and the related insurance regulations.—*Susan M. Popik*

Coverage

Review granted.

State v Continental Ins. Co. (review granted Mar. 18, 2009, S170560; superseded opinion at 169 CA4th 1114, ___ CR3d ___)

Reported at 31 Civ LR 30 (Feb. 2009). At issue is (1) when continuous property damage occurs during the periods of several successive liability policies, whether each insurer is liable for all damages both during and outside its period up to the amount of the insurer's policy limits, and (2) if so, whether the "stacking" of limits—*i.e.*, obtaining the limits of successive policies—is permitted.

Duty to Indemnify

Trial court erred by failing to apply doctrine of collateral estoppel to preclude insurer from relitigating issues determined in underlying proceeding between its insured and third party.

Executive Risk Indem., Inc. v Jones (2009) 171 CA4th 319, 88 CR3d 747

The insurer issued a $10 million insurance policy to the insured, providing coverage for claims arising from investment advice and financial planning services. A former client of the insured, Reese Jones, brought an arbitration proceeding against the insured to recover damages for the insured's alleged faulty investment and financial planning advice. The insurer was repeatedly requested and encouraged to participate in the proceedings, but refused to do so, despite knowing that the insured was insolvent and unable to mount a defense. Jones ultimately received an arbitration award against the insured for over $22 million following an uncontested hearing, which was judicially confirmed. The insurer refused to pay any portion of the judgment and instead brought a coverage action claiming that it had no obligations under the policy issued to its insured. The insured assigned its right to Jones, who cross-complained against the insurer. The trial court concluded that the award and judgment Jones had obtained against the insured had no collateral estoppel effect on the insurer because the insurer did not participate in the arbitration proceeding and thus, under principles of collateral estoppel, was not bound by the result obtained in the arbitration. Jones appealed.

The First District Court of Appeal reversed. The trial court erred in its application of the collateral estoppel doctrine. When an insurer is notified of the underlying claim against its insured and is given a full opportunity to protect its interests, the resulting judgment, if obtained without fraud or collusion, is binding against the insurer in any later coverage litigation on the claim involving its insured. See *Clemmer v Hartford Ins. Co.* (1978) 22 C3d 865, 885, 151 CR 285. This rule applies regardless of whether the insurer has a contractual duty to defend, or whether its refusal to participate in the underlying proceedings is legally justified. The insurer here had notice of the underlying action against its insured as well as the right to participate in the underlying proceeding; it is thus bound by the results of the underlying proceeding and cannot contest the validity of the insured's liability or the amount of damages.

COMMENT: On a number of prior occasions, we have discussed the consequences to an insurer that wrongfully refuses to defend. That insurer is bound by a judgment against its insured, even when the insured has agreed with the third party claimant that the judgment will be determined in an uncontested trial in which the insured offers no defense. See, *e.g.*, *Samson v Transamerica Ins. Co.* (1981) 30 C3d 220, 228, 178 CR 343; *Pruyn v Agricultural Ins. Co.* (1995) 36 CA4th 500, 516, 42 CR2d 295.

Here, the insurer did not have a duty to defend, but the insured was unable to fund its own defense. There-