As to the alleged demise of the genuine dispute doctrine, one need look no further than the *McCoy* court's discussion of the issue to realize that the doctrine is alive and kicking. Were that not so, the court need not have discussed the doctrine at all. Instead, it could have affirmed the trial court's refusal to instruct on the issue on the ground that the supreme court annihilated the doctrine in *Wilson*. Instead, the *McCoy* court devotes several pages to explaining why, under the facts before it, the trial court did not err in refusing the carrier's requested instructions based on the doctrine.

The opinion is not so clear with respect to whether an instruction based on the genuine dispute doctrine is ever appropriate. I admit it is possible to read the opinion as concluding that the doctrine applies only in the context of summary judgment motions and that, as a consequence, it is not the stuff of which jury instructions are made. That said, however, the court does not explicitly reject the propriety of such an instruction in all cases; rather, having observed that the governing cases did not involve jury trials, the court concludes that these authorities did not "compel" such an instruction. However, given that a court cannot reverse on the basis of instruction error unless the appellant can show actual prejudice resulting from the failure to give the requested instruction (among other things), the court's failure to do so is hardly tantamount to a hard-and-fast ruling that a genuine dispute instruction is *improper*. Thus, although I personally believe the genuine dispute doctrine is most effectively used as a means of obtaining a pretrial adjudication that the carrier did not act in bad faith—thus avoiding a trial altogether—I do not think *McCoy* forecloses the possibility of a genuine dispute instruction in all cases. In other words, although the CACI instructions may provide the general framework by which a jury can determine what constitutes bad faith, the existence of those instructions should not preclude a more specific instruction based on the genuine dispute doctrine when the facts warrant it.—*Susan M. Popik*

Reasonable trier of fact could find that insurer breached its duty of good faith and fair dealing when it failed to investigate whether it had issued any other policy that might cover her claim.

Safeco Ins. Co. v Parks (2009) 170 CA4th 992, 88 CR3d 730

Parks was struck by a passing motorist and seriously injured while walking on the side of the freeway. Parks was on the side of the freeway because his then girlfriend, 16-year-old Michelle Miller, and her friends forced him out of their car because he was acting violently. Parks sued Miller, who tendered defense to the insurer as an additional insured under the homeowners policy it had issued to Miller's mother's boyfriend. At the time, Miller lived with her father and grandmother in her grandmother's rented condominium, but sometimes stayed with her mother at her mother's boyfriend's house. The insurer concluded Miller was not an additional insured under the mother's boyfriend's policy and declined coverage. Miller settled with Parks by assigning to him any claims she might have against the insurer. Parks then sued the insurer for bad faith. After testifying at trial, Miller's father discovered that the insurer had issued Miller's grandmother a renter's insurance policy on her condominium. Parks made a demand under the grandmother's policy, which the insurer promptly paid. Parks then amended his complaint to allege bad faith in refusing to defend or indemnify under the grandmother's policy. The trial court denied the insurer's motions for summary adjudication and the jury found for Parks. The insurer appealed.

The Second District Court of Appeal affirmed. The duty of good faith and fair dealing implied in every insurance contract includes the insurer's duty to investigate claims submitted by its insured. An insured's failure to comply with a policy's notice or claims provisions will not excuse the insurer's obligations under the policy unless the insurer proves it was substantially prejudiced by the late notice. *Clemmer v Hartford Ins. Co.* (1978) 22 C3d 865, 881, 151 CR 285. The trial court properly denied summary adjudication because it concluded that the facts were in dispute concerning the adequacy of the insurer's claims investigation. There was evidence from which a reasonable trier of fact could find that the insurer breached its duties under the grandmother's policy when it failed, in response to Miller's claim under her mother's boyfriend's policy, to investigate whether it had issued any other policy that might cover her claim. It was unreasonable for the insurer not to search for other policies it had issued after concluding that there was no coverage under the mother's boyfriend's policy. The insurer did not establish that it was prejudiced by the delayed notice.

COMMENT: This is yet another case in which an insurer is bound by a judgment in an action in which it refused to defend. As in *Executive Risk Indem., Inc. v Jones* (2009) 171 CA4th 319, 89 CR3d 747, discussed on p 65, an insurer does not get two bites at the apple. It cannot wrongfully deny a duty to defend and then, when a judgment is entered against its insured, claim that it is entitled to relitigate the case. Although the facts here are somewhat unusual in that the insured was unaware of the policy that provided a defense, the insurer should have known about it and so advised the insured.

In finding that the insurer was obligated to investigate the possibility of a second policy, the court said that (170 CA4th at 1007):

> [a]n insurer's duty to conduct a reasonable investigation is not narrowly confined to the facts or theories of coverage relied on by its insured . . . [T]he insurer's duty to investigate may extend beyond the facts and coverage theories advanced in an insured's claim.

The insurer knew that there was a possibility of other applicable coverage; all it needed to do was check its records of the parties involved and the other coverage would have popped up.

It is common for insurers whose insureds have been sued to look for other applicable policies, but the reason for doing this is often the desire to secure other coverage so as to reduce its own exposure. Here, the court finds that an insurer has a similar duty to protect its insured. It may not simply look at the one policy under which a claim is tendered and deny coverage because the claim has technically not been submitted under another policy. It must do a reasonable investigation to determine whether it has a duty to defend the insured. That duty includes

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-