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What Depublishing a Decision Means

By Philip H. Thompson

Recently, I had occasion to wrestle with the issues raised by depublication of a court of appeal decision.

Late last year, the California Supreme Court granted a request to depublish L.A. Checker Cab Cooperative Inc. v. First Specialty Ins. Corp. (2010) 186 Cal. App. 4th 767, an insurance coverage case construing the meaning of "occurrence" in the context of alleged negligent supervision that caused bodily injury. My firm had relied on L.A. Checker Cab in a coverage dispute. We now had to determine the legal effect of the depublication, if any.

Our opponent argued that depublication means the original holding was in error, and that a contrary or opposite holding is correct; that the Supreme Court tacitly approved, and adopted, the arguments raised in support of the request for depublication. Could this be right?

To answer the question, place these issues in context, and understand what it all means, a discussion of the depublished decision is essential. In L.A. Checker Cab, a cab driver ordered a drunken passenger out of his cab. A melee followed, during which the passenger made threats, the driver pulled a gun and the passenger grabbed him. The driver then fired a shot, and the bleeding passenger fled.

The passenger survived and sued L.A. Checker Cab for negligent supervision of the trigger-happy driver. L.A. Checker Cab's liability insurer declined coverage claiming that the passenger's alleged injuries were not caused by an "occurrence," which the policy defined, in relevant part, as an "accident."

L.A. Checker Cab disagreed and sued the insurer for coverage. The trial court granted the insurer's motion for summary judgment, and the Court of Appeal affirmed, holding that only a direct cause of damage can qualify as an accident; a remote cause cannot. For example, the driver's intentional firing of the gun was the direct cause of the passenger's injury and L.A. Checker Cab's alleged negligence in supervising the driver was at most a remote cause of the injury.

Accordingly, L.A. Checker Cab's alleged negligent supervision of the driver was not an "accident" and coverage was properly denied. Thus, under L.A. Checker Cab, negligent supervision, and presumably negligent entrustment, negligent hiring and any other tort that requires an additional act to be tortious, is not a direct cause of injury for the purposes of the "accident" analysis, and, therefore, is not an accident.

Some coverage lawyers, including our opponent, disliked this decision and sent letters to the Supreme Court requesting that it be depublished. These letters argued that negligent supervision was an accident and the decision was, therefore, in error.

When the Supreme Court ordered that L.A. Checker Cab be depublished, our opponent asserted that this meant the Supreme Court adopted his argument and implicitly held that negligent supervision (and presumably negligent entrustment and negligent hiring) are accidents and meet the definition of "occurrence."

This argument has some facial appeal. It seems logical that an argument rejected is approval of its opposite. Otherwise, why would the Supreme Court grant a request for depublication in the first place?

But upon closer scrutiny, unless the Supreme Court was in the business of delivering injustice rather than justice, this could not possibly be the rule, for the simple reason that depublication does not disturb the underlying judgment, and this would mean in the case of L.A. Checker Cab that it would remain without coverage when the Supreme Court believed it was entitled to precisely that.

And it is not the rule. Former Chief Justice of California Donald R. Wright has said: "'[With] few exceptions, the only opinions which are ordered to be nonpublished are those in which the correct result has been reached by the court of appeal but the opinion contains language which is an erroneous statement of the law and if left on the books would not only disturb the pattern of the law but would be likely to mislead judges, attorneys and other interested individuals.'" (Note (1977) 50 So.Cal.L.Rev. 1181, 1185, fn. 20.)

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Associate Justice Joseph R. Grodin of the California Supreme Court has written: "[the] only consequence of a depublication order is that the opinion is not published in the Official Reports, and is therefore not citable as precedent." (Grodin, The Depublication Practice in the California Supreme Court (1984) 72 Cal.L.Rev. 514, 522-523.)

California Rules of Court, Rule 8.1125(d), establishes that such an order is not an expression of the court's opinion of the correctness of any law stated in the depublished opinion. Mangini v. J.G. Durand International (1994) 31 Cal. App. 4th 214, 219 provides: "Recent Supreme Court cases suggest that [the rule] means just what it says. (See Cynthia D. v. Superior Court (1993) 5 Cal. 4th 242, 254, fn. 9; see also People v. Saunders (1993) 5 Cal. 4th 580, 607-608 (dis. opn. of Kennard, J.)

Consistent therewith, Cal Rules of Court, Rule 8.1115 Citation of opinions, provides: "An opinion of a California Court of Appeal or superior court appellate division that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action."

Ultimately, the Supreme Court's decision to depublish gives absolutely no meaning to the points raised in requests to depublish. As emphasized by the various courts that have discussed the issue, and Rule 8.1125 (d) itself, the act of depublishing means only that the case was depublished, nothing more and nothing less.