Into the weeds of Prop 213

Understanding the nuances of establishing financial responsibility to recover non-economic damages in a vehicle-accident case

By Nicholas W. Yoka

We find too often that lawyers assume that if an insurance company has denied coverage for an individual, then Prop 213 must apply and, therefore, their client has no right to recover non-economic damages. This article is meant to caution California lawyers that, despite a denial of coverage, there are circumstances where the plaintiff is entitled to non-economic damages even though their insurance company determines that there is no coverage.

The defense may argue that Prop 213 applies just because the insurance company denied coverage, as if that were the finding of law. But that expansive theory of Prop 213 would gut the court's ability to decide its application. The result would be that courts would simply look to insurance adjusters as the adjudicator for whether Prop 213 applies. This is a reading of the statue that no court has ever recognized. This would both be unfair and unconstitutional. Accordingly, no decisions applying Prop 213 have turned on an insurance company's decision to deny or interpret their own vague contracts.

The insurance company's denial of coverage should not always be taken at face value. This article seeks to address some of the nuances of determining financial responsibility under Prop 213 and the correct procedure for adjudicating its application.

Prop 213 and establishing financial responsibility

In 1996, California voters adopted Proposition 213, a measure that was titled, "The Personal Responsibility Act of 1996." Prop 213's stated purpose was "to restore balance to our justice system by limiting the right to sue of criminals, drunk drivers, and uninsured motorists." (Prop. 213, § 2(c).) "The primary objective of the statute . . . was to limit automobile insurance claims by uninsured motorists so that such persons 'who contribute nothing to the insurance pool,' would be restricted in what they receive from it." (*Garcia v. Superior Court*, *supra*, 137 Cal.App.4th 342, 351-352; quoting *Hodges v. Superior Court* (1999) 21 Cal.4th 109, 115.)

Prop 213 – now codified as California Civil Code section 3333.4 – bars drivers and vehicle owners from recovering their non-economic damages arising out of a motor vehicle collision if they cannot establish their "financial responsibility" as required by California law. Financial responsibility means either having insurance covering the driver/vehicle or one of the substitutes for insurance not

commonly used by individuals (which is outside the scope of this article).

California's financial responsibility laws are set forth in Vehicle Code section 16000, et seq. Under Vehicle Code section 16021, financial responsibility is established if a driver or owner (a) is a self-insurer under Division 7 of the Vehicle Code; (b) an insurer or obligee under a form of insurance or bond that covers the driver for the vehicle involved in the accident; (c) the United States of America, California, any California municipality or subdivision, or lawful agent thereof; (d) a depositor in compliance with Vehicle Code section 16054.2(a); (e) an obligee under a policy issued by a charitable risk pool that complies with Vehicle 16054.2(b); and (f) in compliance with the requirements authorized by the Department of Motor Vehicles by any other manner which effectuates the purpose of the financial responsibility laws.

This article will primarily focus on section 16021, subdivision (b), whether a driver or owner can establish financial responsibility under a form of insurance that covers the driver for the vehicle involved in the accident.

Circumstances where Prop 213 is not applicable

Prop 213 will bar most uninsured motorists from recovering non-economic damages from motor vehicle collisions, but courts have established important exceptions to that general rule. For instance, in *Hodges v. Superior Court*, *supra*, 21 Cal.4th at 109, the California Supreme Court held that Prop 213 does not apply to product-liability actions because the law was not meant to provide a windfall to manufacturers. In *Nakamura v. Superior Court* (2000) 83 Cal.App.4th 825, the court held that Prop 213's prohibition against recovery of non-economic damages does not prohibit seeking punitive damages. In *Horwich v. Superior Court* (1999) 21 Cal.4th 272, it was held that a wrongful-death plaintiff whose decedent was an uninsured motorist was not prevented from recovering damages for loss of care, comfort, and society. In *Montes v. Gibbens* (1999) 71 Cal.App.4th 982, the court held that an employee involved in a collision while driving his or her employer's uninsured vehicle need not establish his or her financial responsibility. And in *Landeros v. Torres* (2012) 206 Cal.App.4th 398, a motorist was injured while driving her father's vehicle and was a permissive user under her father's insurance policy and was therefore able to establish financial responsibility.

Each of these situations provide important exceptions to the general rule, and avenues where your client can obtain non-economic damage recovery, notwithstanding a driver's failure to maintain personal automobile insurance coverage.

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In some circumstances, it may be uncertain whether the financial responsibility laws apply. When I am confronted with an issue of financial responsibility under Prop 213, I am reminded of the quote by Will Rogers: "The minute you read something that you can't understand, you can almost be sure that it was drawn up by a lawyer." The California Supreme Court has similarly recognized that Prop 213 is a "poorly drafted, ambiguous statute." (*Hodges*, *supra*, 21 Cal.4th at 119 (Werdegar, J., concurring).)

There are a number of fringe cases where you may not know for certain whether or not someone is covered by the financial-responsibility laws. Take for instance a situation where someone borrows a car with the reasonable belief that they will be covered by their insurance policy. The person who borrowed the vehicle is then injured in an accident and their insurance company denies coverage. The defense will almost certainly try to piggyback on the insurance company's denial to contend that the plaintiff is not entitled to non-economic damages under Prop 213. The insurance company's denial of coverage, however, should not always be taken at face value. There is enough nuance on some of these insurance coverage issues to reverse the denial of coverage or show the court that – despite the insurance company's denial – the plaintiff has met the standards for establishing financial responsibility.

When an insurance company denies coverage, it is important to obtain a copy of the insurance policy provisions the denial-of-coverage letter cites to understand the justification for the decision.

Recently, we handled a case where our client was involved in a collision while temporarily borrowing his son's uninsured vehicle. Our client was listed as an additional insured on his wife's insurance policy. The insurance company denied coverage, in part, based on a "resident relative" exclusion in the policy. The insurance company reasoned that the vehicle was owned by the son who was a "resident relative" of the named insured on the policy and, therefore, our client was in violation of the financial responsibility laws. The insurance company, however, was unaware of many facts when it made the decision to deny coverage. For instance, the insurance company did not know that our client's son was in prison at the time of the accident and the family had removed all of his belongings from the house. This raised the question: How could the son be a resident of the home if he was in prison? During the deposition of the person most qualified, the insurance company testified that the son would "obviously not be a resident relative" under the policy if he was in prison at the time of the collision.

Q: Is it your testimony that if [the son]was in prison on [the date of the collision], he would obviously not be considered a resident relative?

A: Correct.

With that testimony, we were able to establish that one of the main justifications for the coverage denial was incorrect. We were also able to look beyond the insurance policy to see how case law interpreted a resident relative

exclusion. In *Utley v. Allstate Ins. Co.* (1993) 19 Cal.App.4th 815, 818, the court determined that a "resident relative" exclusion precluded coverage. There, the appellant was an Allstate policyholder. In February of 1989, the appellant's adult son, Darren, was injured while riding the appellant's bicycle. On the day of the collision, Darren was living with his parents. At trial, the parties stipulated that Darren had been in the Marines and moved back in with his parents in December of 1988 and was going to live at the home for at least eight months. The appellant argued that the policy exclusion did not apply because Darren was a visitor and lived in the house on a temporary basis. The appellate court disagreed, holding that the evidence supported the trial court's finding that Darren was a resident of the household since he "ate, slept, and kept his belongings at the house," started receiving mail there, and used the address to establish a new bank account. The appellate court also found that Darren's military discharge and six-month stay at his parents' house constituted a change of residence.

We used *Utley* to distinguish several critical factors in our case to prove the son was not inhabiting the same dwelling as the policyholder at the time of the incident, including (1) he did not have a room at the house, (2) he did not eat there, (3) he did sleep there, (4) he did not keep belongings there, (5) he did not use the address to set up any bank account, and (6) there was no evidence of intent to return to the home in the near or even distant future. Emphasizing these facts as compared to those in *Utley* were part of the grounds for our opposition to the defendants' motion to preclude our client from seeking non-economic damages at trial.

In another situation, an insurance company may deny coverage when the plaintiff was driving a vehicle not listed in the policy, but "available for regular use." The purpose of an "available for regular use" provision "is to cover the occasional use of other cars without payments of an additional premium but to exclude the frequent or habitual use of other cars, which would increase the risk on the insurer without increasing the premium of the insured." (*Highlands Ins. Co. v. Universal Underwriters Ins. Co.* (1979) 92 Cal.App.3d 171, 176.)

Importantly, the insurance policy will likely never define the phrase "available for regular use." More than 80 years ago, however, our Supreme Court held that regular use "means the principal use, as distinguished from a casual or incidental use." (*Kindred v. Pacific Auto Ins. Co.* (1938) 10 Cal.2d 463, 465.) "[A] finding of no regular use would be supported by the facts where the car was used infrequently." (*Highlands Ins. Co. v. Universal Underwriters Ins. Co.*, *supra*, 92 Cal.App.3d at 176, citing *Comunale v. Traders & General Ins. Co.* (1953) 116 Cal.App.2d 198.)

If an insurance company denies coverage on the basis that a non-owned vehicle was available for regular use of the insured, it would be critical to present evidence that the plaintiff's use of the vehicle was an isolated and incidental event. How many times had the plaintiff previously used the vehicle? Where were the keys to the vehicle kept? Had the plaintiff ever repaired the vehicle? These are all facts that go to whether or not the vehicle was available for the plaintiff's regular use.

Most insurance contracts will have a "temporary substitute" clause allowing for a certain limited use of a non-insured vehicle. Many policies define a temporary substitute vehicle as a substitute for a vehicle listed in the policy, when such a vehicle is withdrawn from use because its "breakdown, repair, loss, or destruction." One could imagine a situation, where someone borrows another vehicle because they temporarily don't have access to their own vehicle.

California courts have recognized the value of these temporary-substitute clauses for the insured. "A clause extending coverage to a substitute automobile is for the insured's benefit; if any construction is necessary, it is to be construed liberally in favor of the insured. Its purpose is not to limit narrowly or defeat coverage, but to make the coverage reasonably definite as to the vehicle normally used, while permitting the insured to continue driving should that vehicle be temporarily out of commission." (*State Farm Mut. Automobile Ins. v. Allstate Ins. Co.* (1970) 9 Cal.App.3d 508, 518.)

Insurance companies will sometimes deny coverage based on vague and ambiguous terms or phrases. Given multiple reasonable interpretations of a term or phrase, it is important to remember the well-established rule that the term or phrase should be construed in favor of the policyholder. (*Kibbee v. Blue Ridge Insurance Company* (1999) 69 Cal.App.4th 53, 59.) In our recent case, we asked the insurance-coverage specialist how he defined all the words and phrases that formed the basis for denying our client coverage. The insurance-coverage specialist was forced to admit that these terms and phrases can be subjective. If the insurance company's own coverage specialist concedes certain terms and phrases in the policy can have multiple meanings, can they reasonably expect your client to know which of these multiple meanings apply?

The point of this analysis is not to say that insurance companies will always be wrong in their denial of coverage and that counsel should always fight to reverse the coverage decision. Rather, it is to simply point to ways that insurance companies can deny coverage based on dubious reasoning that must be questioned and examined to determine the validity of the decision.

What is the proper method to adjudicate Prop 213 issues?

Throughout California, we have recently seen defendants try to file motions for summary adjudication to exclude plaintiffs from recovering non-economic damages. A motion for summary adjudication is not the proper

method to adjudicate this matter. Summary adjudication of damages – other than punitive damages – is not permissible. Code of Civil Procedure section 437c, subdivision (f)(1) "does not permit summary adjudication of a single item of compensatory damage which does not dispose of an entire cause of action." (*DeCastro West Chodorow & Burns, Inc. v. Superior Ct.* (1996) 47 Cal.App.4th 410, 422; see also *Hindon v. Rust* (2004) 118 CalApp.4th 1247, 1259-60.) The statue specifically allows for summary adjudication for punitive damages, but not for a part of a compensatory-damages claim.

In *DeCastro West Chodorow & Burns, Inc.*, *supra*, 47 Cal.App.4th at 419, 421, the court held "[t]he reference to 'one or more claims for damages' in the first part of the sentence is thus still qualified by, and limited to, punitive damages" and "*there is no other reasonable interpretation of the sentence which gives effect to all of its words*." (Emphasis added.) Moreover, "it is a waste of court time to attempt to resolve issues if the resolution of those issues will not result in summary adjudication of a cause of action." (*Ibid*.)

The defense will likely attempt to argue that *Chude v. Jack in the Box, Inc.* (2010) 185 Cal.App.4th 37 and *Hodges*, *supra*, 21 Cal.4th at 112, fn. 1, have applied section 437c(f)(1) to allow parties to seek summary adjudication to establish an affirmative defense based on Civil Code section 3333.4. This would be a clear misreading of both cases. The *Chude* court specifically stated that the only matter "at issue in [the] appeal is whether section 3333.4 precludes [the driver] from recovering an award of noneconomic damages." (*Supra*, 185 Cal.App.4th at 39.) The court never considered whether a claim for damages other than punitive damages could be summarily adjudicated.

In *Hodges*, *supra*, at 112-113, the court stated that it was only resolving whether section 3333.4 applied to a products-liability action and explicitly stated it was "not called upon to resolve the question" of damages. In footnote 1 of the opinion, the California Supreme Court mentions that "Ford subsequently amended its answer to assert as a separate affirmative defense that [the plaintiff] is precluded under Civil Code section 3333.4." As the appellate briefing points out, however, "Ford made that amendment" and "clearly stated it will move in [l]imine to preclude any request for general damages." (See the petitioner's briefing in *Hodges*, *supra*, 21 Cal.4th 109.) So too, here. The defense should move in limine on this issue.

In over 25 years since the *Hodges* court issued its ruling and 15 years since the *Chude* court issued its ruling, neither of those cases has ever been cited by any court for the proposition that non-economic damages are subject to summary adjudication. As a result, the application of section 3333.4 to bar a plaintiff's claim for non-economic damages is not a matter that may be summarily adjudicated.

Conclusion

Prop 213 is not intended to punish people for incorrectly interpreting an over 20-page single-spaced contractual agreement with an insurance company. Lawyers must look beyond an insurance company's denial of coverage and not allow a "poorly drafted, ambiguous statute" to unjustly prevent their clients from recovering damages to which they are rightfully entitled.


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