b. Claims Under Pacific Indemnity Personal Injury Endorsement

Mr. Cuddeback's concern about obtaining personal injury coverage for the peculiar risks of WSBA's business turned out to be well founded. There were a number of claims made under the endorsement. (D.R.T. 56:7-8.) In fact, Mr. Cuddeback was personally involved in handling at least one such claim -- the claim of one Frank Camodeca. (Pac. Ind. Exh. M -- letter to Mr. Cuddeback dated 9/8/70 re Camodeca claim.)

Frank Camodeca filed a lawsuit in August 1970 against a merchant ("Tower of Sports"), WSBA, and others for a false arrest and malicious prosecution occurring on June 29, 1969.[6] (Exh. 17.) Both "false arrest" and "malicious prosecution", of course, were expressly covered by Pacific Indemnity's personal injury endorsement. Shortly after suit was filed, Marsh & McLennan forwarded the unserved suit papers to Pacific Indemnity on August 25, 1970. (Pac. Ind. Exh. M.) After the suit was served on WSBA, WSBA's attorneys forwarded these papers to Mr. Cuddeback on September 8, 1970 who, in turn, had them forwarded to Pacific Indemnity on September 11, 1970. (Pac. Ind. Exh. M.)

In analyzing this claim and determining whether it would cover WSBA, Pacific Indemnity internally identified the claim as one for "false arrest". (Exh. 17; Pac. Ind. Exh. N.) On this basis, Pacific Indemnity agreed to defend WSBA and established an "indemnity reserve" of $2500 for this false arrest and malicious prosecution claim. (Exh. 17; Pac. Ind. Exh. N.) Upon assuming the defense, Pacific Indemnity sent a reservation of rights letter

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6 Mr. Camodeca alleged that the defendants, including WSBA, did "falsely arrest, imprison, maliciously prosecute" and "did falsely imprison, or did cause the false imprisonment, and restrained and violated the personal liberty of plaintiff FRANK CAMODECA." (Exh. 17 -- "Complaint for Damages", paras. II and IV.)

advising WSBA that Pacific Indemnity would not cover any judgment for punitive damages. (Exh. 17.)[7]

c. Pacific Indemnity's Refusal to Renew its Policy Because of "Personal Injury" Claims

After receiving a number of claims under the personal injury endorsement similar to the Camodeca claim, Pacific Indemnity declined to renew its policy upon its expiration in November 1969. (D.R.T. 52:21-28; 53:1-7.) Marsh & McLennan then arranged for INA to pick up the same coverage. (Exhs. 1, 2; D.R.T. 52-53.)

2. Tender of Defense of the Salveson Lawsuit to Pacific Indemnity

On April 12, 1978, WSBA's attorneys sent a letter to Marsh & McLennan requesting the insurance broker to tender the defense of the Salveson action to the appropriate insurers.[8] (Exh. 6.) After receipt of this letter, Marsh & McLennan forwarded the April 12 letter and an "Insurer's Receipt for Summons and Complaint" to Pacific Indemnity on July 10, 1978. (Exh. 8.) Pacific Indemnity received this packet of documents on July 12, 1978. (Exh. 8.)

3. Pacific Indemnity's Denial of the Tender

On August 8, 1978, Pacific Indemnity denied the tender on the sole ground that the statute of limitations for antitrust violations had expired after Pacific Indemnity's policy period.[9] (Exh. 12.) Pacific Indemnity did not disclose in this letter that

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7 Very significantly, this reservation of rights letter did not advise WSBA that Pacific Indemnity did not cover the false arrest, malicious prosecution, or false imprisonment claims set forth in the complaint. (Exh. 17.)

8 This letter listed the carriers of whom Bronson, Bronson & McKinnon had knowledge but did not list Pacific Indemnity because Bronson was unaware that Pacific Indemnity had issued the first policy to WSBA. (Exh. 6; I R.T. 112:21-23, 28; 113:1-3.)

9 Pacific Indemnity now concedes that the stated ground for denying the tender was no reason at all. (Pac. Ind. Opening Brief, p. 5.)

it had lost its policy. Indeed, the letter implied that Pacific Indemnity had reviewed its policy. Nor did Pacific Indemnity set forth any other grounds for denying the tender.

II. ISSUES PRESENTED

The three major issues Pacific Indemnity raises in common with the other appellants are set forth on page 12 of "CNA's Seaboard/INA Reply Brief." The additional cases and points raised by Pacific Indemnity will be discussed briefly. Pacific Indemnity raises the following individual subsidiary issues on its own behalf:

1. Did the Trial Court Correctly Rule that Pacific Indemnity's Technical Defenses of Lack of Tender and Notice Were Invalid?
   a. Is Pacific Indemnity entitled to rely on the "Notice" provisions in its policy where it has denied liability under its policy?
   b. Was the defense of the Salveson action properly "tendered" to Pacific Indemnity where Pacific Indemnity received notice that it was being called upon to defend the action and, in fact, explicitly refused the invitation to defend?
   c. Did Pacific Indemnity suffer "substantial and actual" prejudice with respect to the above?
2. Was the Trial Court's Factual Finding that Pacific Indemnity Issued a "Personal Injury Endorsement" Clearly Erroneous?
3. Can Pacific Indemnity Raise the Issue of CNA's Recovery of Post-Trial Costs for the First Time on Appeal and Is This Argument Sound?

III. LIKE THE OTHER APPELLANTS, PACIFIC INDEMNITY MISCONSTRUES THE DUTY TO DEFEND

A. Pacific Indemnity Has Also Altered Its Arguments On the Duty to Defend

Like the other appellants, Pacific Indemnity here seeks to equate the duty to defend with the duty to indemnify. Pacific

Indemnity argues that the duty to defend is "coextensive with the duty to indemnify" and that if Salveson had sought recovery specifically for defamation that Pacific Indemnity would have defended and indemnified. (Pac. Ind. Opening Brief, p. 24.) Since Salveson was "not attempting to plead defamation", Pacific Indemnity claims that the inclusion of the word "misrepresentation" "in the antitrust complaint" could not raise Pacific Indemnity's duty to defend. (Pac. Ind. Opening Brief, p. 26.)

Pacific Indemnity has drastically altered its stance after the trial court judge made a factual determination that it, too, issued a personal injury endorsement. In a motion for summary judgment filed on the eve of trial, Pacific Indemnity described the Salveson complaint as "based solely on alleged misrepresentations by the insured and on alleged interference with contractual relationships." (C.T. 596.) Later in this motion, Pacific Indemnity urged that

> the various misrepresentations, filings of false claims, and interference with contractual relationships on the part of the insured ... [C.T. 602]

were not covered under Pacific Indemnity's policy.

In arguing in the summary judgment motion that its "property damage"[10] coverage did not provide a duty to defend since Salveson only alleged "intangible" financial loss, Pacific Indemnity correctly cited Giddings v. Industrial Indemnity Co., 112 Cal.App.3d 213 (1980) for the proposition that its "property damage" coverage only provides coverage for damage to "tangible" property. (C.T. 599-601.)[11] Giddings is inapplicable, though,

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10 Pacific Indemnity filed its motion on the basis that it provided only "bodily injury" and "property damage" coverage and had no "personal injury" coverage for "business losses, or intentional torts." (C.T. 598.) (The Clerk's Transcript reveals the discussions between counsel prior to this summary judgment motion regarding whether Pacific Indemnity had also issued a "personal injury" endorsement.) (C.T. 611-613, 635-637.)

11 See page 33, footnote 41 of CNA's Seaboard/INA Reply Brief for a more extended discussion of Giddings.

once the trial court made a factual determination that Pacific Indemnity issued not only "property damage" coverage but also the "personal injury" endorsement which covered business wrongs of the nature and kind alleged by Salveson.[12] We proceed to discuss the additional points raised by Pacific Indemnity in this area.

B. The Salveson Complaint Contained Facts Demonstrating the Potentiality of Liability Under Pacific Indemnity's Personal Injury Endorsement

CNA has already extensively analysed the Salveson complaint, the appellants' policies, and the potential for indemnity coverage under the policies at issue. (CNA's Seaboard/INA Reply Brief, pages 15-39.) This discussion is adopted in this brief and will not be repeated here except insofar as Pacific Indemnity has raised additional points.

1. Pacific Indemnity's Cases Do Not Establish That the Duty to Defend Is Equivalent to the Duty to Indemnify

As noted in CNA's Seaboard/INA Reply Brief, the duty to defend is substantially broader than the duty to pay or the duty to indemnify and exists where the complaint by any "conceivable theory [could] raise a single issue" bringing it within the policy coverage. (CNA's Seaboard/INA Reply Brief, pages 15-17, 22-25.) Pacific Indemnity is very wide of the mark in arguing that the duty to defend is "coextensive" with the duty to indemnify and that the test should be what Salveson was "attempting to plead".[13] (Pac. Ind. Opening Brief, pp. 24, 26.)

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12 Pacific Indemnity asserted in its summary judgment motion that the Salveson action was based on "unlawful business practices" and "business losses." (C.T. 598-599.)

13 Pacific Indemnity is also guilty of overstatement in urging that "plaintiff [CNA] has conceded that these policies do not elicit a duty to indemnify or to defend antitrust claims" and that "plaintiff [CNA] recognizes that the policy cannot be stretched to cover this antitrust action." (Pac. Ind. Opening Brief, pp. 9, 12.) In making these assertions, Pacific Indemnity reveals that it, too, mistakenly identifies the coverage issues by focusing on

[footnote continued on following page]

Pacific Indemnity's heavy reliance on Blackfield v. Underwriters at Lloyd's, London, 245 Cal.App.2d 271 (1966) is misplaced. The context of Pacific Indemnity's Blackfield quotation demonstrates that the Blackfield court was stating that it need look only at one of a number of causes of action in the underlying complaint to determine the duty to defend since coverage found in any portion of the complaint requires the insurer to defend it en toto. Blackfield's citation of Ritchie v. Anchor Casualty Co., 135 Cal.App.2d 245 (1955) and Firco, Inc. v. Fireman's Fund Insurance Co., 173 Cal.App.2d 524 (1959) on this point demonstrates that the Blackfield court did not intend to state that a "cause of action" covered by the policy must be alleged. Both Ritchie[14] and

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[footnote 13 continued]

the "title" of the cause of action. CNA contends that this court should look at the facts alleged in the complaint rather than the title of the cause of action. Even where, as here, the title is antitrust, the facts alleged may demonstrate that there is nonetheless an obligation to defend the "antitrust" claim.

14 The defendant insurer in Ritchie "refused to defend upon the ground that the causes of action in the said cross-complaint were not within the coverage of the policy." (135 Cal.App.2d at 249.) In reversing the trial court's decision upholding the insurer's position, the appellate court noted:

> Examination of the pleading reveals that it does factually allege an accident though it does not use that word. The draftsman of a complaint against the insured is not interested in the question of coverage which later arises between insurer and insured. He chooses such theory as best serves his purpose ... And the ultimate question is whether the facts alleged do fairly apprise the insurer that plaintiff is suing the insured upon an occurrence which, if his allegations are true, gives rise to liability of insurer to insured under the terms of the policy. [135 Cal.App.3d at 251 (emphasis added).]

Firco[15] emphasized that one must look to the "facts alleged" rather than the "theory" of liability or the "cause of action". Moreover, even if Blackfield were to state the rule of law which Pacific Indemnity urges, it would conflict with the later-decided decision in Gray v. Zurich Insurance Co., 65 Cal.2d 263 (1966).

Pacific Indemnity travels to the Lone Star State in placing secondary reliance on C.O. Morgan Lincoln-Mercury, Inc. v. Vigilant Insurance Co., 521 S.W.2d 318 (Tex. Civ. App. 1975). This decision, of course, is not binding on this court -- particularly since it is inconsistent with the line of California cases holding that it is just such "facts alleged" that an insurer is required to defend. Moreover, the underlying dispute in the Texas case was dissimilar to Salveson's claims. The Texas court noted that the claim there was really for the theft or conversion of a car. As the trial court judge aptly noted here, Salveson's claims were really for misappropriation of his ideas and system, for disparagement of his rights to that system, and for trade libel in misrepresenting his rights to that system. Salveson's attorney, Joseph Alioto, chose to sue for the treble damages which an antitrust theory would allow. Under these circumstances, it is likely that even the Texas court would have ruled that Salveson really was suing on claims not arising from antitrust violations.

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15 The trial court in Firco held that the insurer was not obligated to defend because the "cause of action" was for an uncovered "malicious" and "wanton" act. In reversing this judgment, the appellate court noted that

> if the facts alleged in a complaint entitle the plaintiff [in the underlying action] to any relief such relief will be accorded notwithstanding it may appear from the pleading or during the course of the action that the plaintiff cannot receive relief under his theory of the action ... It must be remembered that the attorney who drafted the complaint in the [underlying] action is not concerned with the relations between the defendant and any insurer ... He drafts his complaint as broadly as he desires. [173 Cal.App.2d at 529 (emphasis added).]

2. The Dismissal of Salveson's Second Cause of Action Was of No Moment and, By Failing to Conduct Any Investigation into the Facts Underlying the Salveson Complaint, Pacific Indemnity Has Waived or Is Estopped to Rely Upon the Dismissal of Salveson's Second Cause of Action

Pacific Indemnity sees some special significance in the dismissal of the second cause of action. But it makes no difference whether this cause of action was dismissed since the facts alleged which trigger the duty to defend are also in the first cause of action (entitled "antitrust"). Ruder & Finn, Inc. v. Seaboard Surety Co., 52 N.Y.2d 653, 439 N.Y.S.2d 858 (1981)[16] confirmed that an "antitrust" cause of action must be defended where the "facts alleged" are sufficient:

> While in [the underlying Federal] case the complaint's first cause of action was couched in terms of restraint of trade, it went on to allege that those whom it had joined as defendants were engaged in "false disparagement" ... These facts, though found deficient to sustain the Federal antitrust claim, painted a picture which, had it been established, conceivably could have subjected defendant's insured ... to liability for commercial disparagement ... ... [N]either did the fact that there was no colorable basis for Federal jurisdiction relieve Seaboard of its obligation. [439 N.Y.S.2d at 862-63 (emphasis added).]

Pacific Indemnity's citation of Stolte, Inc. v. Seaboard Surety Co., 250 Cal.App.2d 169 (1967) for the proposition that a dismissed cause of action need not be defended is inapplicable to this case. (Pac. Ind. Opening Brief, p. 15.) Unlike Stolte, the facts alleged in the Salveson complaint raising the duty to defend were present in both the first and the second causes of action. The appellants had a duty to defend WSBA under either cause of

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16 See C.T. 1661 for a copy of this opinion.

action. On the other hand, the insurer in Stolte was faced only with one covered cause of action and the appellate court, in dicta, stated that the insurer would be relieved of this obligation if the only covered cause of action were dismissed. Since the Salveson first cause of action did contain the allegations triggering coverage, the dismissal of the second cause of action is of no moment.[17]

Even if the dismissal of the second cause of action were significant, Pacific Indemnity is estopped to rely upon this dismissal. Neither Pacific Indemnity nor any of the other appellants conducted any investigation whatsoever upon receipt of the tender of defense.[18] Even though the complaint contained facts alleging liability under their policies, the appellants simply denied coverage without making any independent investigation. Pacific Indemnity argues that the appellants had no duty to conduct any investigation into the facts behind the allegations of misrepresentations and misappropriations in the Salveson complaint. California law, however, is to the contrary.

The court in Mullen v. Glens Falls Insurance Co., 73 Cal.App.3d 163 (1977) specifically distinguished an insurer's denial of defense where an in-depth investigation had been undertaken with a denial of defense where no investigation had been made. In Mullen, the non-investigating carrier attempted to rely on the opinion in Dillon v. Hartford Accident & Indemnity Co., 38 Cal.App.3d 335 (1974). The court rejoined:

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17 Had these triggering allegations been found only in Salveson's second cause of action, the significance of the dismissal of the second cause of action would be enhanced. In Ruder & Finn, a second complaint was filed in state court essentially the same as the federal complaint. The state court complaint, however, did not contain the "falsely disparaged" allegation, and the Court of Appeals accordingly ruled that it need not be defended. Unfortunately for all of WSBA's insurers, however, the triggering allegations in the Salveson complaint were in both the second and the remaining first cause of action.

18 See CNA's Seaboard/INA Reply Brief at pages 5-7.

> [The insurer's] reliance upon the Dillon opinion is misplaced. In that case, the insurance carrier, before refusing to defend the insured, made a thorough investigation of all the facts and correctly determined from that investigation that as of the time it denied the request for a defense there was no potential liability under its policy. It was in this context that we said the insurer could refuse to defend the lawsuit without subjecting itself to liability.... [73 Cal.App.3d at 173.]

The court in Fresno Economy Import v. United States Fidelity, 76 Cal.App.3d 272 (1977) also discussed the insurer's affirmative obligation to investigate even the implied facts in a complaint:

> [B]efore an insurer may rightfully reject a tender of defense, it must investigate and evaluate the facts expressed or implied in the third party complaint as well as those which it learns from its insured and any other sources.... [76 Cal.App.3d at 278-79.]

Accord Milliken v. Fidelity and Casualty Company of New York, 338 F.2d 35, 40 (10th Cir. 1964); INA v. Insurance Company of the State of Pennsylvania, 17 Wash.App.336 (1977); 7C Insurance Law and Practice, Appleman Section 4684.01 (1981 Pocket Part).

Pacific Indemnity argues that it was not obligated to make an investigation since it was unaware "of facts indicating potential liability." (Pac. Ind. Opening Brief, p. 20.) Pacific Indemnity failed upon tender, however, even to review the facts alleged in the Salveson complaint which did indicate this potential liability.[19] It did not need to go outside the complaint to look

19 Pacific Indemnity's letter refusing the tender was apparently written in haste without reviewing the policy coverage. Pacific Indemnity now concedes that its stated reason for denying coverage (expiration of the statute of limitations) was erroneous. (Pac. Ind. Opening Brief, p. 5.) In addition, even though it did not so advise WSBA, Pacific Indemnity apparently had not kept its policy and was therefore unable to review the policy coverage in declining the tender.

for facts of potential liability since such facts were alleged right in the complaint.[20]

Because of this failure to investigate, Pacific Indemnity is, at a minimum, estopped to argue that the dismissal of Salveson's second cause of action for interference with contractual relations had any effect on the appellants' liability. What Pacific Indemnity seeks to do is to resort to the "hindsight" forbidden by Mullen,[21] supra, in arguing that the dismissal[22]

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20 Upon reviewing the allegations of misrepresentation, for example, Pacific Indemnity could have inquired of the relevant individuals what the facts behind this bare allegation were.

21 For a more extended discussion of this point, see CNA's Seaboard/INA Reply Brief, pages 21, 37.

22 Pacific Indemnity's cited case of California Union Insurance Co. v. Club Aquarius, 113 Cal.App.3d 243 (1980) is easily distinguishable. First, the findings of fact in the Club Aquarius case arose at a much later stage in the litigation than in the Salveson matter. The dismissal of the second cause of action in Salveson occurred at the very outset while the findings of fact in Club Aquarius were entered at the very conclusion of the case. A case obviously becomes drastically less malleable regarding the issues one can raise after witnesses have testified and evidence presented in a full-blown trial. The court in United States Fidelity & Guaranty Co. v. American Employers' Insurance Co., 84 Daily Journal 3005 (1984) (petition for hearing filed) was faced with just such a case where the declaratory action was filed after a full-blown trial, and the declaratory action was decided on the basis of the reporter's transcript and exhibits introduced in the preceding trial. Second, the insurer in Club Aquarius acted according to the dictates of California law in assuming the defense and seeking an advisory judgment from the court on its further responsibilities. Fireman's Fund Insurance Co. v. Chasson, 207 Cal.App.2d 801 (1962) set forth that the proper procedure for an insurer to undertake when faced with a question of whether to defend is to seek a declaratory judgment on this issue. Even when receiving a declaratory judgment in its favor, the insurer is not retroactively relieved of its defense obligations. 207 Cal.App.2d at 807. Here, the appellants did not act responsibly in pursuing a declaratory relief action but merely denied the defense out of hand. Third, the two publications in Club Aquarius were essentially the "insureds". There apparently was not even a defense obligation at the outset since no factual allegations were

[footnote continued on following page]

demonstrates that the Salveson complaint was set in stone and could never be amended. (Pac. Ind. Opening Brief, p. 22.) CNA, of course, was already providing a defense to WSBA when it learned of the dismissal. Recognizing that the dismissal did not forge the complaint into an immutable document, CNA did not seize on this event as a means of shirking its defense obligation.[23]

As a fundamental matter, Pacific Indemnity's implicit conclusion that only Salveson's first "cause of action" for "antitrust" need by analyzed in assessing the duty to defend is highly suspect. This cause of action was dismissed pursuant to Federal Rule of Civil Procedure 54(b) without entry of a final judgment. Thus, under Rule 54(b), "the order ... is subject to revision at any time before the entry of judgment, adjudicating all the claims and the rights and liabilities of all the parties." F.R.Civ.P. 54(b). Thus, the tentative order of dismissal was explicitly subject to amendment at any time. Moreover, when WSBA's attorneys sent the tender of defense to Marsh & McLennan,[24] the

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[footnote 22 continued]

made even remotely involving these insureds. An analogous situation would have been CNA mistakenly providing a defense to VISA when WSBA was its actual insured. The Club Aquarius court elected to relieve the carrier from a mistake it made at the outset of the case in assuming the defense.

[23] With considerable adversarial dash, Pacific Indemnity seeks to tarnish CNA's actions by claiming that WSBA breached its "duty of good faith and fair dealing" and was guilty of "unexemplary conduct" in "deceiving" Pacific Indemnity by failing to apprise it of the dismissal of the second cause of action. Like any good Monday morning quarterback, Pacific Indemnity realizes that a good offense is the best defense. But even Pacific Indemnity's repeated use of hindsight does not hide the fact that Pacific Indemnity's decision would not have been otherwise even had it known of the dismissal. There was no prejudice here.

[24] It was not established at trial whose agent Marsh & McLennan was when it received the tender of defense from WSBA's attorneys. Pacific Indemnity merely assumes, without supporting evidence, that Marsh & McLennan was acting for WSBA in this regard.

second cause of action had not yet been dismissed. For decades, the concept of the duty to defend has not been the restrictive one which the appellants so urge upon this court. It must be viewed broadly -- not narrowly.[25]

IV. THE TRIAL COURT'S FINDING OF FACT THAT THERE WAS NO PREJUDICIAL CONCEALMENT OR MISREPRESENTATION BY WSBA IN THE ACQUISITION OF THE PACIFIC INDEMNITY POLICY SHOULD NOT BE DISTURBED ON APPEAL

In CNA's Seaboard/INA Reply Brief, CNA demonstrated (1) that the issue of concealment and misrepresentation is a factual one decided by the trial court in favor of CNA, (2) that the defense may not be available against CNA, (3) that the evidence supported the trial court's decision that WSBA made no material misrepresentation or concealment, and (4) that the appellants had waived this defense. (CNA's Seaboard/INA Reply Brief, pages

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[25] Pacific Indemnity argues that the policy of liberal construction in favor of coverage does not apply in suits between insurers. (Pac. Ind. Opening Brief at p. 43 n. 20.) Both the Third Division and the Second Division of this court disagree. Employers Reinsurance Corp. v. Mission Equities Corp., 74 Cal.App.3d 826, 829 (1st Dt., Div. 3, 1977); Chamberlin v. Smith, 72 Cal.App.3d 835, 844-45 (1st Dt., Div. 2, 1977). The decertification by the Supreme Court of Whittaker Corp. v. Pacific Indemnity Co., 115 Cal.App.3d 651 (1981) (which held that the normal rules of construction do not apply with a "sophisticated" insured) lends support to the view that insurance policies should be construed in a consistent manner to provide coverage. In Garcia v. Truck Insurance Exchange, 36 Cal.3d 426 (1984), the Supreme Court specified the circumstances under which the liberal rule of construction would not apply. In Garcia, the language of the policy was heavily "negotiated paragraph by paragraph". (36 Cal.3d at 434.) The insured's attorney was engaged heavily in negotiating and drafting the policy. The court stated that "it is typically the carrier who drafts the insurance contract, unilaterally, and for policy reasons is thus held responsible for any ambiguity in language." (36 Cal.3d at 438.)

45-53.) These points are applicable also to Pacific Indemnity, are adopted herein by reference, and will not be repeated. This section will demonstrate, however, as a factual matter that, like the other appellants, Pacific Indemnity did not prove at trial the necessary element of "prejudice" to itself.

The trial court found as a factual matter that Pacific Indemnity was not prejudiced by any nondisclosure by WSBA. (C.T. 1832:13-25.) It specifically found that knowledge of Salveson did not have "any effect on any of the defendants in their decisions to insure WSBA." (C.T. 1832:24-25.) The evidence relating to Pacific Indemnity supports the trial court's conclusion.

Pacific Indemnity's sole witness on this issue, Mr. Culhane, was extremely equivocal whether Pacific Indemnity would have issued the policy regardless of knowledge of Salveson. Mr. Culhane testified as an expert witness as to what a hypothetical underwriter would have done in a hypothetical situation. (II R.T. 123:12-26; 124:1-26; 125:1-26; 126:1; 129:19-22; 131:3-22.) Significant facts in the hypothetical were never proven at trial.[26] Moreover, Mr. Culhane's bottom line was that the underwriter would have had discretion to issue the personal injury endorsement and that it was an "iffy" proposition.[27] (II R.T. 131:25; 132:7.) He did not testify that the hypothetical

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[26] For example, Mr. Culhane was asked to assume that an application for insurance was submitted by WSBA to Pacific Indemnity. (II R.T. 125:3-6.) There was no evidence that such an application was ever prepared, submitted, or requested. Where the insurer shows a lack of interest by not requesting information, the insured need not disclose such matters. See Olson v. Standard Marine Insurance Co., 109 Cal.App.2d 130, 137-139 (1952).

[27] THE COURT: ... Would it require the exercise of any discretion on your part whether or not to issue personal injury liability endorsements based upon that hypothetical?

THE WITNESS: Active discretion?

THE COURT: Yes, could you or couldn't you?

[footnote continued on following page]

underwriter would not have issued the endorsement. At most, this hypothetical underwriter would have asked for additional information. (II R.T. 15-16.) However, the nebulous nature of this testimony was elicited by the court:

> THE COURT: How do you know you [the hypothetical underwriter] didn't ask for more information?
>
> THE WITNESS: I don't, your Honor. [II R.T. 135:22-24 (emphasis added).]

Accordingly, Pacific Indemnity did not introduce any evidence that the actual underwriter (as opposed to Mr. Culhane's hypothetical one) did not in fact request more information from WSBA and get it!

Against the backdrop of this testimony, Pacific Indemnity has not proven the "actual prejudice" required for this disfavored defense. Northwestern Title Security Co. v. Flack, 6 Cal.App.3d 134, 143 (1970). There was no evidence that a full disclosure was not in fact made to Pacific Indemnity and the actual underwriter exercised his discretion to issue the endorsement nonetheless. All Pacific Indemnity provided at trial were hypotheticals based on speculation.[28]

[footnote 27 continued]

> THE WITNESS: Yes. I could issue one.
>
> ...
>
> THE COURT: ... Is it an iffy situation you might or might not issue such an endorsement?
>
> THE WITNESS: Yes, it is iffy.
>
> [II R.T. 131:20-25; 132:5-7 (emphasis added).]

28 An extreme example of this speculation is Mr. Culhane's testimony that the hypothetical underwriter "might" have limited coverage to one of the subgroups under the personal injury endorsement. (Pac. Ind. Opening Brief, p. 31.) Mr. Culhane, however, did not even know whether or not Pacific Indemnity issued the endorsement in the first place. (II R.T. 135:25-26; 136:1-2, 19-22.) His admitted ignorance on the subject stands in stark contrast to Mr. Cuddeback's first-hand testimony that he was "certain" that Pacific Indemnity in fact issued the personal injury endorsement.

V. PACIFIC INDEMNITY'S ARGUMENTS REGARDING THE NECESSITY OF A "FORMAL" TENDER OF DEFENSE AND NOTICE OF CLAIM ARE INSUFFICIENT

Pacific Indemnity raises two hypertechnical arguments that it is absolved from its responsibility to defend because (1) no "formal tender of defense" was made to Pacific Indemnity and (2) no notice was given to it after the Salveson claim arose. (Pac. Ind. Opening Brief, points VI and VII.) These technical defenses are similar and will be analyzed together.

A. Pacific Indemnity Has Waived These Defenses As A Matter of Law

California law provides that an insurer who denies liability under its policy has waived, as a matter of law, these two defenses. Lagomarsino v. San Jose Abstract & Title Insurance Co., 178 Cal.App.2d 455 (1960).[29] In Clemmer v. Hartford Insurance Co., 22 Cal.3d 865, 881 (1978) the California Supreme Court affirmed the trial court's conclusion that the insurer "could not claim the defense of lack of notice, of tender of defense ... because by denying coverage it, as a matter of law, had waived any claim based thereon...." Moreover, these defenses were raised for the very first time at the trial of this case. (I R.T. 25.) In a summary judgment motion made on the eve of trial, Pacific Indemnity

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29 The law is established that where an insurance company denies liability under a policy which it has issued, it waives any claim that the notice provisions of the policy have not been complied with. [178 Cal.App.2d at 460.]

See also D. Melnick, CEB California Automobile Insurance Law Guide, Section 10.6 at p. 138 (1973) ("The notice and cooperation requirements will also be excused if the insurer denies liability under the policy.")

said nothing about these two defenses.[30] (C.T. 595-603.) The Clemmer court identified this lackadaisical attitude toward these defenses as significant. Clemmer, supra, at 883.

B. The Trial Court's Factual Finding That Pacific Indemnity Received Sufficient Notice Should Not Be Disturbed

The trial court entered a factual finding as follows:

> This court finds that Pacific had adequate notice of potential liability to prevent any substantial prejudice to its interests, and that CNA should not be estopped from seeking reimbursement. [C.T. 1833.]

"It is a question of fact whether an insured has failed to comply with the notice provisions of his policy and whether such failure has resulted in prejudice to the insurer. Findings, supported by the evidence, that no prejudice is shown, will be upheld on appeal." Hanover Insurance Co. v. Carroll, 241 Cal.App.2d 558, 566 (1st Dist. 1966).

The trial court's finding was supported by substantial evidence. WSBA's attorneys sent a letter to Marsh & McLennan requesting that the action be tendered to WSBA's carriers. (Exh. 6.)[31] In accordance with this request, Marsh & McLennan forwarded the letter with a copy of the Summons and Complaint and an "Insurer's Receipt for Summons and Complaint" to Pacific Indemnity. (Exhibit 8.) On this document, Marsh & McLennan noted:

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30 Pacific Indemnity cannot say that it was unaware of these defenses until trial since (1) the Salveson complaint itself identified when the claimed wrongful acts occurred and (2) Pacific Indemnity took no further discovery after it made its motion for summary judgment. At the time for its summary judgment motion, then, Pacific Indemnity had all the facts available to it but simply elected, for some reason, to wait until trial to raise these defenses.

31 Pacific Indemnity was not identified in this letter as one of WSBA's insurers simply because the attorneys were unaware that Pacific Indemnity was WSBA's original insurer. (I R.T. 112:21-23, 28; 113:1-3.)

> Date of Loss: 1966 to date
> ...
>
> THE EARLIEST POLICY WE HAVE ON RECORD IS #LAC182597 (1968). Our records indicate you were the insurance carrier until 1970. [Exh. 8.]

Obviously realizing that it was being called on to defend the Salveson action, Pacific Indemnity replied on August 8, 1978 that it was refusing the tender of defense on the grounds that its policy provided no coverage.[32]

Pacific Indemnity argues that Cravens, Dargan & Co. v. Pacific Indemnity Co., 29 Cal.App.3d 594 (1972) requires that a "formal tender" be sent. The case does not so hold. The court merely notes that "no one called on Pacific Indemnity to defend" in the Cravens case. Here, Pacific Indemnity was called on to defend, knew that such a request was made, and refused the request.

The trial court judge aptly cited the decision in Meritplan Insurance Co. v. Universal Underwriters Insurance Co., 247 Cal.App.2d 452 (1966) that contribution may be recovered even from an insurer who, unlike here, receives no notice whatsoever of the lawsuit. (C.T. 1834.) Meritplan cited Continental Casualty Co. v. Zurich Insurance Co., 57 Cal.2d 27 (1961)[33] in basing its decision on the theory of unjust enrichment:

> Of the cases referred to, substantially all involve situations where the defense was tendered to the coinsurer and it denied liability. This fact should not be determinative. Failure to grant contribution unjustly enriches the unknown

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32 Pacific Indemnity did not take this opportunity to deny a defense on the grounds now being urged. Had Pacific Indemnity raised the issue of a failure of a "formal tender", WSBA could easily have cured this matter by sending a letter in whatever format Pacific Indemnity required. By failing to do so, Pacific Indemnity potentially prejudiced WSBA and its subrogee.

33 See CNA's Seaboard/INA Reply Brief at page 59 for a discussion of this case.

> as well as the recalcitrant insurer. [citations] It is recognized that failure to grant contributions [sic] would encourage a coinsurer to deny liability. ... failure to grant contribution would encourage a coinsurer to conceal and evade its coverage -- a result to be avoided equally as much as an unwarranted denial of coverage. [247 Cal.App.2d at 467.]

No request at all was made in Meritplan to the "unknown" insurer. Here, since Pacific Indemnity was notified of the claim, received the Summons and Complaint and a letter requesting that it defend the action, and, in turn, refused to defend it, a fortiori sufficient request was made to Pacific Indemnity to defend.

C. The Trial Court's Finding That Pacific Indemnity Has Not Shown the "Substantial and Actual Prejudice" Required for These Defenses Should Not Be Disturbed

The California Supreme Court in Clemmer v. Hartford Insurance Co., 22 Cal.3d 865 (1978) held that the insurer must show "substantial prejudice" from the lack of notice or tender.

> The fundamental defect in [the insurer's] position here is that it has at no time suggested that, in the event that a timely tender of the defense ... had been made, it would have undertaken the defense. The record clearly suggests to the contrary. In these circumstances ... we must conclude that [the insurer] has failed to show that it sustained substantial prejudice as a result of the insured's failure to provide it with notice and tender. [12 Cal.3d at 883.]

Addressing specifically the notice clause contained in the policy, the court in Moe v. Transamerica Title Insurance Co., 21 Cal.App.3d 289, 302 (1971) held that (1) there must be "substantial prejudice" to the insurer; (2) prejudice is not presumed merely by the breach; (3) "the insurer has the burden of proving actual prejudice and not just a mere possibility of prejudice."

What prejudice has Pacific Indemnity proven here? None. With respect to the claimed tender of defense, Pacific Indemnity

did not even intimate that "it would have undertaken the defense" as required by Clemmer, supra. Indeed, as in Clemmer, "the record clearly suggests to the contrary."[34] With respect to the claimed failure to give notice of the claim, Pacific Indemnity failed even to produce a shred of evidence that such notice was not in fact given. Moreover, the "prejudice" which Pacific Indemnity argues is illusory. It argues (inferentially) that it would not have destroyed its policy had it known of Salveson's unhappiness.[35] Is this truly prejudice? Would Pacific Indemnity have jumped on the bandwagon to defend WSBA had it known that it truly issued the personal injury endorsement? Would Pacific Indemnity then be joining CNA in suing the other appellants for contribution? Pacific Indemnity seeks to utilize "end results" in arguing prejudice. It is just this type of argument that the Supreme Court has determined is not actual prejudice. Clemmer, supra.[36]

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34 Pacific Indemnity does argue that a formal "notification" would give it "an opportunity to participate in the litigation". (Pac. Ind. Opening Brief, p. 42.) [illegible] was clearly given this opportunity but [illegible]

35 As set forth at p[illegible] Brief, there was a real question [illegible] s "unhappiness" with WSBA surfaced at any time prior to 1977.

36 Hartford's sole suggestion before the trial court -- and before this court -- concerning the manner in which it had suffered prejudice by the failure of notice and tender was couched in ipso facto terms. "Surely there is prejudice if all of a sudden somebody is going to come after you for two million-plus dollars, in a situation where you have never been notified by anybody about the matter until after a default was taken." [illegible] argument fails to recogni[illegible] is that prejudice is not [illegible] displayin[illegible] that such results could or would have been avoided absent the claimed default or error must also be explored. [Clemmer, 22 Cal.3d 865, 883 n.12.]

VI. THE TRIAL COURT'S FACTUAL FINDING THAT PACIFIC INDEMNITY ISSUED THE STANDARDIZED PERSONAL INJURY ENDORSEMENT SHOULD NOT BE OVERTURNED ON APPEAL

Pacific Indemnity failed to produce its entire policy during the course of this litigation, admitting that Pacific Indemnity had destroyed the policy in a document destruction program. In the absence of this documentary evidence, CNA introduced testimony from the insurance broker directly responsible for obtaining the Pacific Indemnity policy, David Cuddeback, that the endorsement had in fact been issued. Mr. Cuddeback's testimony was the only testimony by any witness with first-hand, personal knowledge of the issuance of this endorsement. (This testimony will be discussed in greater detail in a following section.) On the basis of the evidence presented, the trial court made the following finding regarding Pacific Indemnity's policy:

> The court finds that evidence admitted at trial was sufficient to establish the issuance of a standardized policy to WSBA, including a standard personal injury endorsement essentially identical to that issued by defendant INA. [C.T. 1829.]

A. This Issue Is A Pure Question of Fact

Whether or not Pacific Indemnity issued the personal injury endorsement, and the form that it took, is a question of fact. Guipre v. Kurt Hitke & Co., 109 Cal.App.2d 7, 17 (1952). On conflicting evidence,[37] the trial court decided this issue in CNA's favor.

B. Even If the Burden of Proof Issue Were Not Moot, the Burden is on Pacific Indemnity to Produce Its Own Policy

Despite the fact that conflicting evidence on the issue was submitted by both sides and despite the trial court's finding of fact in CNA's favor, Pacific Indemnity continues to argue that

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[37] Pacific Indemnity concedes, "The evidence of whether Pacific Indemnity had issued a "personal-injury" endorsement comparable to INA's policy was conflicting." (Pac. Ind. Opening Brief, p. 36.)

the burden of proof is an issue. As set forth in the following section, the trial court judge weighed the conflicting evidence and decided the issue (with substantial supporting evidence) in CNA's favor. Under these circumstances, even if the burden of proof rested on CNA, CNA has satisfied the burden with substantial evidence.

Moreover, Pacific Indemnity's argument on the allocation of this burden is not persuasive. Pacific Indemnity admits that it (1) issued a "comprehensive general liability" policy (2) to WSBA (3) for the years 1966 to 1969. Under these circumstances, the burden of proof is on Pacific Indemnity to demonstrate that its "comprehensive general liability" policy does not contain the "personal injury endorsement" which, according to Mr. Culhane, is the most common endorsement for this policy. (II C.T. 121:1-5.)

The question of shifting the burden of proof is heavily laden with policy considerations. Fisher v. Superior Court, 103 Cal.App.434 (1980). A number of courts agree that the burden of proof should shift where public policy so dictates or when one party has greater control over the facts or evidence. United States v. Hayes, 369 F.2d 671, 676 (9th Cir. 1966) ("... the burden ... may shift ... when the true facts relating to the disputed issue lie peculiarly within the knowledge of the [adversary]."); Brownin v. Catholic University of America, 527 F.2d 843, 849 (D.C. Cir. 1975) ("Ordinarily a litigant does not have the burden of establishing facts peculiarly within the knowledge of the opposing party.")

The Law Revision Comment to Evidence Code Section 500 was relied upon by the Fisher, supra, court in shifting the burden of proof. These factors are applicable here to demonstrate that the burden of proof properly belongs on Pacific Indemnity.

(1) Knowledge of the parties concerning the particular fact. Pacific Indemnity not only issued the actual policy but kept records relating to the policy in the ordinary course of business (see the following section regarding Camodeca).

(2) Availability of the evidence to the parties. Pacific Indemnity had much greater access to the policy than CNA since Pacific Indemnity itself issued the policy. When it could not locate its own policy, Pacific Indemnity turned to its insured, WSBA, and sought to obtain the policy from its insured who also could not locate the policy. (C.T. 113:4-20.)

(3) Most desirable result in terms of public policy. California courts have repeatedly demonstrated that public policy favors coverage and, particularly, the duty to defend. Public policy would certainly dictate that an insurer maintain policies of insurance for a lengthy period of time. The insurer, since it is in the business of issuing policies, can readily create a system for maintaining the file or, in the absence of keeping actual policies, maintain records as to what forms were in use during certain time periods and which forms were issued to its insured. Inasmuch as liability may be sought to be imposed upon the insured decades after the policy has been issued (such as in medical malpractice, asbestosis, DES and minor's cases), public policy would dictate a result that would require the insurer to maintain records regarding the policies issued by it. An insurer is in the business of providing insurance -- unlike its insured which purchases an occasional policy and hopes never to use it. Since the insurer's only business is "insurance", it should have the burden of maintaining the policies. To do otherwise would open the door for mischief each time an insured cannot locate its own copy of the policy.

(4) The probability of the existence or non-existence of the fact. The probabilities are great in this case that Pacific Indemnity issued the personal injury

endorsement. Indeed, the trial court's finding is that such was the case.

Pacific Indemnity's cited case of Combined American Insurance Co. v. Gilmore, 428 S.W. 2nd 857 (Tex. App. 1968) is inapplicable since the insured in that case could not even prove that an insurance policy had been issued to it.[38] Here, it is admitted that an insurance policy, a "comprehensive" one, was issued to WSBA and substantial additional evidence regarding the personal injury endorsement was admitted.

This case is most analogous to Rosen v. Penn Mutual Life Insurance Co., 43 Cal.2d 420 (1954) where the insured demonstrated that a policy had been issued but did not introduce the actual policy into evidence. The Supreme Court shifted the burden of proof on this issue to the insurer on the ground that the basic fact of insurance had been proven and therefore the insurer must demonstrate that its particular policy form would bar recovery. In the case at bar, CNA has proven that Pacific Indemnity issued a self-described "comprehensive general liability policy", that the standardized "personal injury endorsement" was the one most commonly issued with a comprehensive general liability policy, that WSBA's greatest exposure was under this endorsement, and that Pacific Indemnity defended a claim (Camodeca) arising under the endorsement. Under these circumstances, the burden of proof, at the very least, shifts to Pacific Indemnity to prove that its particular endorsement form did not provide coverage to WSBA.[39]

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[38] Turner v. Ewing, 232 So.2d 468 (La. 1970), cited by Pacific Indemnity, distinguishes cases in which the issue of coverage for the insured was admitted.

[39] Pacific Indemnity's argument regarding the Best Evidence Rule is confusing. The Best Evidence Rule is a rule of admissibility rather than a rule relating to the burden of proof. Pacific Indemnity argues that CNA failed to lay a proper foundation for the introduction of secondary evidence. Even if this were so,

[footnote continued on following page]

C. The Evidence Convincingly Demonstrated that Pacific Indemnity Issued the Standardized Personal Injury Endorsement

The real argument which Pacific Indemnity makes before this court is the one which it argued to the trial court -- that the trier of fact should have tipped the weight of the evidence scale in favor of Pacific Indemnity. This argument is a factual one which was for the trial court.

The evidence introduced at trial provided very substantial support for the trial court judge's weighing of the facts.

1. WSBA's Insurance Needs Required a Personal Injury Endorsement

As set forth in footnote 3, the greatest risk to WSBA was in the false arrest and malicious prosecution area. Since Marsh & McLennan took great pains to obtain "the broadest coverage possible",[40] it would seem more than incongruous that coverage for its largest risk would not be obtained. The only claims which were made under the WSBA policies, other than automobile claims, were under the personal injury coverage. (D.R.T. 46:1-9.)

[footnote 39 continued]

no objection was made to the introduction of such evidence. (Pacific Indemnity withdrew its initial objection and agreed to the introduction of Mr. Cuddeback's deposition "without reservation and without objection.") (III R.T. 514:18-28; 515:1-17.)

Furthermore, even if the Best Evidence Rule had been properly raised, numerous exceptions are applicable. See, e.g., Evidence Code sections 1501, 1502, 1503, 1505, and 1508.

[40] D.R.T. 45:14-22. WSBA had such broad insurance coverage that it even obtained such esoteric insurance as "boiler insurance" and "pension trust liability insurance". (See. Exhs. A and D.)

2. Direct Testimony, from the Only Witness With First-Hand Knowledge, Established that Pacific Indemnity Issued the Endorsement[41]

Mr. David Cuddeback, who had been with Marsh & McLennan for 33 years, was the account executive who obtained the insurance for WSBA in 1966. (D.R.T. 5:1; 7:25-28; 8:1-18.) He set up a "complete" program for WSBA and was "certain" that it contained a personal injury endorsement.[42] Both Mr. Cuddeback and Pacific Indemnity's "expert" witness, Mr. Culhane, agreed that the personal injury endorsement used by Pacific Indemnity was a standardized form in use in the industry like INA's form.[43] Unlike Mr. Prue's testimony, who was the only other witness to testify on the question of whether Pacific Indemnity had issued the personal injury endorsement, Mr. Cuddeback's testimony was first hand -- not only did he personally participate in obtaining the Pacific Indemnity policy, he also handled claims arising under the Pacific Indemnity personal injury endorsement.[44]

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[41] Pacific Indemnity's argument regarding Mr. Cuddeback's testimony being inadmissible as based on "custom and practice" is not persuasive. First, as set forth at pages 1-5, unlike Pacific Indemnity's Mr. Prue, Mr. Cuddeback testified from personal knowledge of these events. His use of the words "normal procedure" and "standard practice" (cited by Pacific Indemnity) were merely his indication that his actions were in accord with office procedure -- not that his only memory stemmed from this procedure. Second, Pacific Indemnity withdrew its objection to the introduction of Mr. Cuddeback's deposition testimony and agreed to its admission into evidence "without reservation and without objection." (III. R.T. 514:22-23.) Third, Pacific Indemnity's authority that "custom and practice" cannot be used to create a contract is inapposite since a contract clearly was in existence here. The only question is whether Pacific Indemnity did a certain act -- issue the personal injury endorsement. Evidence of such habit or custom is admissible. Cobin v. Midland Mutual Life Insurance Co., 260 F.2d 92 (9th Cir. 1958) (relying on Shearer v. Pacific Gas & Electric Co., 43 Cal.App.2d 306 (1941)). In each of Pacific Indemnity's cited cases, the appellant was seeking to create a contract where none existed in the first place.

[42] See pages 1-2 for a complete factual description of this testimony. The evidence will only be summarized at this point.

[43] See pages 3-4.

[44] See pages 5-6.

3. The Camodeca Claim Provides Strong Circumstantial Evidence that Pacific Indemnity Issued A Personal Injury Endorsement

Mr. Cuddeback was personally involved in handling the claim of Frank Camodeca who filed a lawsuit in August 1970 against WSBA for false arrest and malicious prosecution.[45] These allegations of "false arrest" and "malicious prosecution" were, of course, specifically covered by the personal injury endorsement obtained by Mr. Cuddeback. When Pacific Indemnity received the suit papers from Mr. Cuddeback, it identified the claim as one for "false arrest" and agreed to defend WSBA.[46] Upon agreeing to defend WSBA, Pacific Indemnity sent WSBA a "reservation of rights letter" in which it stated that its policy did not cover a judgment for punitive damages.[47] Most significantly, this letter said nothing about not covering a judgment for the very basis of the suit -- false arrest and malicious prosecution.

Pacific Indemnity sought at trial to use the testimony of Mr. Prue, who had nothing to do with the Camodeca claim, to demonstrate that the claim was not defended under the false arrest coverage.[48] The trial court judge correctly gave little weight to Mr. Prue's testimony since Mr. Prue did not even work in the San Francisco Pacific Indemnity office when the coverage request was received. (Pac. Ind. Exh. N.) He only saw these documents prior to the trial in this case and was testifying only from what he thought the Pacific Indemnity employees who handled the matter

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45 See pages 5-6.

46 See pages 5-6.

47 See pages 5-6.

48 Mr. Prue testified on the subject of whether the personal injury endorsement had been issued even though he was never identified in answers to interrogatories requesting such information. (I R.T. 50:23-28, 51:1-4; 9-10.)

would have done (ten years prior to trial).[49] (III R.T. 424:15-18.)

In sum, the evidence is uncontroverted that:

(1) Pacific Indemnity issued a "comprehensive general liability policy"

(2) to WSBA

(3) for the years 1966 to 1969

(4) with $300,000 limits of liability;

(5) the "personal injury" endorsement is the endorsement most commonly issued with the comprehensive policy;

(6) Pacific Indemnity used the standardized industry form of endorsement; and

(7) Pacific Indemnity in fact defended a complaint alleging claims falling under the personal injury endorsement.

When this uncontroverted evidence is coupled with Mr. Cuddeback's strong personal recollection that Pacific Indemnity in fact issued this endorsement, the trial court's factual finding was unquestionably correct.

VII. PACIFIC INDEMNITY'S ARGUMENT REGARDING POST-TRIAL DEFENSE COSTS IS INVALID SINCE THIS ISSUE (1) IS BEYOND THE PLEADINGS, (2) IS RAISED FOR THE FIRST TIME ON APPEAL, AND (3) IS INCORRECT ON THE MERITS

Pacific Indemnity seeks to raise a new issue on appeal that it is not obligated to pay defense costs incurred after the trial of this matter.[50] (Pac. Ind. Opening Brief, pp. 48-49.) This issue was never raised by Pacific Indemnity in its Answer to

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[49] A thorough analysis of Mr. Prue's testimony and the Camodeca claim is set forth in CNA's trial briefs. (C.T. 1243-1244, 1643-1646.)

[50] Inconsistently, Pacific Indemnity also seeks modification of the judgment for payments made before the trial. (Pac. Ind. Opening Brief, p. 49.)

the Complaint (C.T. 25-26), at the trial of this matter, in the extensive post-trial briefing of the issues, nor in Pacific Indemnity's objection to the intended statement of decision. (C.T. 1436-1521, 1565-1574.) It cannot raise this issue now for the first time. A party may not raise new issues or argue new theories which were not presented to the trial court. Zito v. Fireman's Insurance Co., 36 Cal.App.3d 277 91973).51

Moreover, the "finality" of the summary judgment order (particularly in light of an appellate court's attitude towards summary judgments) was open to question. This point has been extensively discussed and will not be repeated here. Suffice it to say that the appeal of the Salveson summary judgment order certainly created enough question in CNA's mind regarding the possibility of reversal and amendment that it continued to defend WSBA.

VIII. CONCLUSION

The basic issue before this court is whether it should reward Pacific Indemnity's unexemplary conduct. It claims to have "lost" its policy to a shredding machine -- a practice it calls its "document destruction program". Yet, in denying its insured a defense here, Pacific Indemnity failed to disclose that its policy had been shredded and, instead, refused the defense on a basis it now concedes was spurious. It conducted absolutely no investigation into the facts underlying the complaint even though the complaint alleged facts indicating potential liability.

The trial court judge correctly determined that Pacific Indemnity should join CNA in providing a defense to WSBA. CNA respectfully submits that the trial court's determination should be upheld.

Date: October 5, 1984

[redacted] C. Gleason
Attorney for Plaintiff,
Respondent, and Cross-Appellant
CNA CASUALTY OF CALIFORNIA

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51 This issue is not purely a question of law since -- as posed by Pacific Indemnity -- it hinges on when the insurers discovered the dismissal of the second cause of action.

Jay R. Mayhall
P.O. Box 13188
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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on October 5, 1984 at San Francisco, California.

Ronald Proschan

PROOF OF SERVICE BY MAIL

I declare that:

I am employed in the City and County of San Francisco, California.

I am over the age of eighteen years and not a party to the within cause; my business address is Law Offices of Raymond C. Oleson, 500 Sansome Street, Suite 800, San Francisco, California 94111.

On October 5, 1984, I served the within REPLY BRIEF OF RESPONDENT CNA CASUALTY OF CALIFORNIA IN REPLY TO APPELLANT PACIFIC INDEMNITY COMPANY on the interested parties in said cause, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as follows:

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