

FILED

APR 12 3 34 PM '02

Shirley B. Pangione
CLERK

1 RPLY
MONA ASBEROM - SBN 3674
2 JAMES LEONARD BROWN - SBN 3686
Law Offices of
3 ASBEROM & BROWN, LLC
2211 Paradise Road
4 Las Vegas, Nevada 89104
(702) 733-8818
5 (702) 733-8366 (Fax)
asbrwnlaw@yahoo.com (email)
6 Attorneys for Plaintiffs
7
8
9

10 **DISTRICT COURT**
11 **CLARK COUNTY NEVADA**

12 LOYAL CROWNOVER; LORA CROWNOVER;)
and MARION PROPERTIES, a)
13 Partnership, LOYAL CROWNOVER and)
JOHN BRONAUGH, Partners,)
14 Plaintiffs,)
15 vs.)
16 TRAVELERS CASUALTY AND SURETY)
17 COMPANY, formerly known as THE)
AETNA CASUALTY AND SURETY COMPANY;)
18 THE AETNA CASUALTY AND SURETY)
COMPANY and DOES 1 through 100,)
19 Inclusive,)
20 Defendants.)
21

Case No.: A410465
Dept. : XIX
PLAINTIFFS' REPLY TO
DEFENDANT TRAVELERS
CASUALTY AND SURETY
COMPANY'S COMBINED
OPPOSITION TO PLAINTIFFS'
MOTIONS FOR: JUDGMENT
NOTWITHSTANDING THE VERDICT;
TO VACATE THE JUDGMENT AND
ENTER A DIFFERENT JUDGMENT;
AND FOR A NEW TRIAL
Date of Hearing: 04/15/02

22
23 Plaintiffs respectfully submit the within arguments and
24 authorities in reply to Defendant's combined opposition to
25 Plaintiffs' motions for judgment notwithstanding the verdict, for a
26 new trial and to vacate the judgment and enter a different judgment.
27

1 II. THE FACTUAL ISSUES THAT COMPELLED THE COURT TO DENY
2 TRAVELERS' TWO MOTIONS FOR SUMMARY JUDGMENT AND A
3 RULE 50(a) MOTION FOR JUDGMENT AS A MATTER OF LAW
4 ESTABLISHED A DUTY TO DEFEND AS A MATTER OF LAW

5 The duty to defend is much broader than the duty to indemnify
6 and can exist when coverage is in doubt and even where the duty to
7 indemnify is ultimately not established. Amato v. Mercury Casualty
8 Co., 53 Cal.App.4th 825, 61 Cal.Rptr.2d 909 (Cal.Ct.Appel 1997).
9 Signal Cos. v. Harbor Ins. Co., 27 Cal.3d 359, 367, 165 Cal.Rptr.
10 799, 612 P.2d 88 19 A.L.R.4th 75 (1980); Saylin v. California Ins.
11 Guarantee Assn., 179 Cal.App.3d 256, 263, 224 Cal.Rptr. 493 (1986).
12 Any doubt as to whether the facts give rise to a duty to defend is
13 resolved in the insured's favor. CNA Casualty of California v.
14 Seaboard Surety Co., 176 Cal.App.3d 598, 607, 222 Cal.Rptr. 276
15 (1986).

16 Under the foregoing well established principles governing the
17 duty to defend, the disputed factual issues that compelled the Court
18 to deny Travelers' 10/9/00 and 02/25/02 summary judgment motions
19 established Travelers' duty to defend as matter of law. Horace Mann
20 Ins. Co. v. Barbara B., 4 Cal.4th 1076, 1080-1081, 17 Cal.Rptr.2d 210
21 (Cal. 1993); Croskey & Kaufman, The Rutter Group, California Practice
22 Guide, Insurance Litigation, 2001 Update, Sec. 15.704.5.

23 Where any potential of coverage exists, the duty to defend
24 continues from the time of the tender of the underlying lawsuit
25 throughout the course of the litigation against the insured. Home
26 Sav. Ass'n v. Aetna Cas. and Sur. Co., 854 P.2d 851, 855 109 Nev.
27 558, 565 (Nev. 1993); Lambert v. Commonwealth Land Title Ins., 53
28 Cal.3d 1072, 282 Cal.Rptr. 445, 447-48, 811 P.2d 737, 739-40 (Cal.

1 Supreme Ct.1991); Prichard v. Liberty Mutual Ins. Co., 84 Cal.Ap.4th
2 890, 903, 101 Cal.Rptr.2d 298, 307 (Cal.Ct.Appel 2000) . The duty
3 continues until the insurer establishes that the underlying complaint
4 "can by no conceivable theory raise a single issue which could bring
5 it within the policy coverage". Montrose Chemical Corp. of Calif.
6 v. Superior Court, 6 Cal.4th 287, 300, 24 Cal.Rptr.2d 467, 471 (Cal.
7 Supreme Ct.1993) ["Any seeming disparity in the respective burdens
8 merely reflects the substantive law"]. In the interim, the duty to
9 defend continues. Id. at 6 Cal.4th 287, p. 301, 24 Cal.Rptr.2d 467,
10 p. 475; Borg v. Transamerica Ins. Co., 47 Cal.App.4th 448, 454-455
11 (1996). The foregoing principles guide concerned and prudent
12 carriers to do what TRAVELERS failed to do in this case: 1) defend
13 under a reservation of rights pending an adequate investigation; or
14 2) seek declaratory relief from the Court. See: Amato v. Mercury
15 Casualty Co., supra, 53 Cal.App.4th 825, 61 Cal.Rptr.2d 909.

16 Travelers' argument, that "even if Plaintiffs established at
17 least a potential for coverage, Travelers presented sufficient
18 evidence that the claims were not covered" [Opposition, p. 11, lines
19 5-9] misses the mark. The duty to defend is triggered by any
20 potential for coverage and once the duty to defend is established, it
21 continues throughout the course of the litigation against the insured
22 unless and until the insurer establishes that the underlying
23 complaint "can by no conceivable theory raise a single issue which
24 could bring it within the policy coverage". Montrose Chemical Corp.
25 of Calif. v. Superior Court, 6 Cal.4th 287, 300, 24 Cal.Rptr.2d 467,
26 471 (Cal. Supreme Ct.1993) ["Any seeming disparity in the respective
27 burdens merely reflects the substantive law"]. Thus, even assuming,

1 arguendo, that the jury determination was proper, based on the
2 foregoing principles, the duty to defend nevertheless existed, during
3 all of the critical junctures prior to that time, including the time
4 of the tender of the underlying suit to Travelers. See: Home Sav.
5 Ass'n v. Aetna Cas. and Sur. Co., supra, 854 P.2d 851, 855 109 Nev.
6 558, 565. This conclusion is buttressed by the fact that during the
7 trial, the Court denied Travelers' Rule 50(a) motion for judgment as
8 a matter of law. At the time of that denial, Plaintiffs again moved
9 the Court to rule that a duty to defend existed as a matter of law.
10 The very fact that the Court submitted to the jury, by Instruction
11 No. 23, the factual issues surrounding the potential for coverage
12 confirms that a duty to defend existed in this case. See: Horace
13 Mann Ins. Co. v. Barbara B., 4 Cal.4th 1076, 1081, 17 Cal.Rptr.2d 210
14 (Cal. 1993); Buss v. Superior Court, 16 Cal.4th 35, 49,
15 65 Cal.Rptr.2d 366, 939 P.2d 766 (1997) [duty to defend was triggered
16 even though only 1 of 27 counts was potentially covered].

17 Travelers' reliance on the cases of Giddings v. Industrial
18 Indemnity Co., 112 Cal.App.3d 213, 220 (1980) and Borg v.
19 Transamerica Ins. Co., 47 Cal.App.4th 448, 454-455 (1996) is
20 misplaced. The Giddings case is factually and legally
21 distinguishable from this case. The trial Court in the Giddings case
22 granted summary judgment in favor of the insurer and concluded that
23 the claim of a potential for coverage was "tenuous and far-fetched"
24 because the economic and financial damages alleged in the underlying
25 suit clearly did not constitute "property damage" within the coverage
26 of the policy. In this case, by contrast the Court denied two
27 motions for summary judgment and a Rule 50(a) motion brought by
28

1 Travelers.

2 In the Borg case, as in this case, the trial Court denied the
3 insurer's motion for summary judgment on the issue of the duty to
4 defend. Based on the denial of the insurer's summary judgment
5 motion, Borg moved for summary judgment and argued, as Plaintiffs in
6 this case did, that the Court's denial of the insurer's summary
7 judgment motion established the insurer's duty to defend as a matter
8 of law. As in this case, the trial Court in the Borg case denied the
9 insured's motion for summary judgment and proceeded to trial on the
10 issue of the duty to defend. As in this case, the trial resulted in
11 a finding of no duty to defend. The Court of Appeal in the Borg case
12 concluded, as Plaintiffs are urging this Court to conclude, that
13 there was at least a potential for coverage, thus establishing a duty
14 to defend as a matter of law. In reversing the judgment, the Court
15 stated:

16 "Borg has established that, at the time he tendered"
17 defense of the underlying third party lawsuit to
18 Transamerica, there was at least a potential for
19 coverage under the policy. (citation omitted) On
20 the other hand, Transamerica has failed to prove
21 that the claims made in the underlying third party
22 lawsuit could not possibly have fallen within the
23 coverage of its policy. Therefore, Transamerica
24 had a duty to defend its insured in the underlying
25 lawsuit. (citations omitted)."

26 Plaintiffs respectfully request that the Court grant their
27 Motions and reach the same result in this case that was properly
28 reached in the analogous Borg case.

29 **III. PLAINTIFFS HAVE NOT WAIVED THEIR OBJECTIONS**
30 **OF ERROR IN SUBMITTING THE DUTY TO DEFEND**
31 **CLAIM TO THE JURY**

32 On 10/9/00 and again on 02/25/02, Plaintiffs presented motions

1 for partial summary judgment on the issue of the duty to defend,
2 requesting a ruling that a duty to defend existed as a matter of law.
3 On each of those dates, Travelers' presented motions for summary
4 contending that there was no potential for coverage. The Court
5 denied all motions. Since the denials of Plaintiffs' motions for
6 partial summary judgment were not final judgments or independently
7 appealable (Beets v. State, 110 Nev. 339, 342, Taylor Constr. Co. v.
8 Hilton Hotels, 100 Nev. 207, 209 (1984)), Plaintiffs clearly
9 preserved the issues raised in their motions for summary judgment on
10 the issue of the duty to defend for appeal.

11 During the trial, on 03/13/02, at time of argument on Travelers'
12 Rule 50(a) Motion, Plaintiffs again renewed their motion for an order
13 that a duty to defend existed as a matter of law. In view of the
14 foregoing, it was not necessary for Plaintiffs to object to Jury
15 Instruction No. 23 to preserve the issues presented in their pending
16 motions. Jury Instruction No. 23 was simply a reiteration of the
17 Court's improper rulings, which at that time was the law of the case.
18 Moreover, a Rule 50(b) motion can be brought after judgment,
19 irrespective of whether a motion for directed verdict was made on the
20 same grounds during trial.

21 IV. CONCLUSION

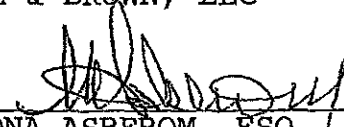
22 The substantive law governing the duty to defend as discussed
23 herein, when applied to the procedural history and facts of this
24 case, should compel a finding that a potential for coverage existed
25 and a finding of a duty to defend as a matter of law. Accordingly,
26 Plaintiffs respectfully request that this Court exercise its lawful
27 discretion to correct a miscarriage of justice by granting

1 Plaintiffs' Motions for judgment notwithstanding the verdict, for a
2 new trial and to vacate the judgment and enter a different judgment.

3 DATED: April 12, 2002

MONA ASBEROM
JAMES LEONARD BROWN
ASBEROM & BROWN, LLC

4
5
6 BY:


MONA ASBEROM, ESQ.
Nevada Bar #3686
2211 Paradise Road
Las Vegas, NV 89104
Attorneys for Plaintiffs

