

**SUPERIOR COURT OF CALIFORNIA  
COUNTY OF PLUMAS**

Date: **April 25, 2011**

**Cunningham, John & Taschenberg,  
Sharon**

Plaintiff,

vs.

**Union Pacific R.R**

Defendant.

Case Number: **GN CV10-00309**  
Consolidated with CV10-00324

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**MINUTE ORDER – Tentative Ruling on Defendant’s Demurrer**

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The demurrer of Defendant Union Pacific Railroad Company (“UP”) to the first three causes of action of the First Amended Complaint (“FAC”) of Plaintiff California State Automobile Association Inter-Insurance Bureau (“CSAA”) is overruled.

**Summary of the Case.** This case involves a fire that resulted in property damages to Plaintiffs John Cunningham and Sharon Taschenberg (the “Insureds”). The fire is alleged to have been started by UP. CSAA is the insurer for the Insureds and paid out \$80,326.81 (which included a \$2,500.00 deductible) based upon the property damage caused by the fire.

The Insureds filed a lawsuit against UP claiming damages for negligence, an intentional tort and punitive damages. CSAA filed a separate lawsuit based upon the same injury a month later. UP filed a demurrer in CSAA’s separate lawsuit and upon CSAA’s request, the Court consolidated the two suits, as well as sustained the demurrer with leave to amend as to the subrogation cause of action. UP now brings this demurrer as to the first three causes of action of CSAA’s FAC.

**Legal Standard.** A demurrer admits the truth of all material facts alleged in the pleading, but not the contentions, deductions or conclusions of law or fact. *Adelman v. Associated Int’l Ins. Co.* (2001) 90 Cal. App. 4th 352, 359; *Cross v. Bonded Adjustment Bureau* (1996) 48 Cal. App. 4th 266. When the allegations of a pleading establish that there is no legal theory upon which liability may be imposed, the Court should sustain the

demurrer. *Carroll v. Puritan Leasing Co.* (1978) 77 Cal. App. 3d 481, 485. If the circumstances show that the pleading deficiencies cannot be cured, the demurrer should be sustained without leave to amend. *Droz v. Pacific Nat'l Ins. Co.* (1982) 138 Cal. App. 3d 181.

**Demurrer Pursuant to Section 430.10(c).** “Under the doctrine of equitable subrogation, an insurer that has paid its insured for a loss caused by a third party succeeds to the insured’s rights against the third party in the amount paid to the insured.” *Dobbas v. Vitas* (2001) 191 Cal. App. 4<sup>th</sup> 1442, 1449. Typically, when an insured has filed a suit against the alleged third party wrongdoer, the insurer intervenes. *See, e.g., Id.* In this case, CSAA filed a separate suit against UP and the court consolidated the lawsuits. The result is the same. Where, as here, there is a complete consolidation for all purposes, the actions are merged into a single proceeding under one case number and results in only one verdict or set of findings and judgment. *Hamilton v. Asbestos Corp., Ltd.* (2000) 22 Cal. 4<sup>th</sup> 1127, 1147. “When separate actions are fully consolidated, “the allegations of the various complaints may be taken together and treated as one pleading.”” *Syngenta Crop Protection, Inc. v. Helliker* (2006) 138 Cal. App. 4<sup>th</sup> 1135, 1150, fn. 3. Thus, UP’s demurrer based on C.C.P. section 430.10(c) is overruled, as this single action does not fall within the language of section 430.10(c)(demurrer permissible if “[t]here is another action pending between the same parties on the same cause of action.”).

**Failure to State Facts Sufficient to State a Claim.** UP argues that CSAA is barred from bringing the first three causes of action because as pled, it appears that CSAA seeks to recover damages over and above the \$80,326.81 it paid to the Insureds. CSAA attempted to clarify through stipulation, so as to avoid bringing the matter before this Court, that it was not seeking amounts (other than attorney fees under California Code of Civil Procedure (“C.C.P.”) section 1021.9) in excess of the amounts paid to the Insureds pursuant to these causes of action. For reasons unclear to the Court, UP refused to so stipulate.

A fundamental principle in equitable subrogation matters is that the insurer stands in the shoes of the insured and should be permitted to assert all claims against the alleged wrongdoer that the insured could have asserted. *Fireman’s Fund Ins. Co. v. Maryland Casualty Co.* (1994) 21 Cal. App. 4<sup>th</sup> 1586, 1600-01. While the causes of action brought

by CSAA are somewhat ambiguous as to what damages it seeks, CSAA's pleading does not fail to state facts sufficient to state a cause of action.

The gravamen of UP's arguments in its demurrer is that CSAA seeks damages and attorney fees that belong to the Insureds. CSAA concedes that it is not entitled to damages that exceed the amount it paid to the Insureds. It argues that it is entitled to attorney fees. UP's arguments, however, do not support its claim that CSAA fails to state a cause of action. Rather, UP should have brought a motion to strike to remove the allegations from the FAC that it believed were irrelevant, false or improper pursuant to C.C.P. section 436.

Therefore, UP's demurrer is overruled.

Dated: April 25, 2011

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Ersel L. Edwards, Assigned  
Judge of the Superior Court

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