CAIIA Status Report

January 2014

Assigning Value Where there is no Market

Credit to Klinedinst PC, San Diego, CA

Editor's note: Many adjusters are faced with how to evaluate certain types of property damage, both in first and third party claims. Molly Zohn of the Klinedinst Law firm addresses this vis a vis third party claims. If a first party adjuster makes an error in handling a first party claim, the damages to the property of the insured outside of the policy may create a problem for the carrier. Hence, Ms. Zohn's comments below may help in the evaluation of that type of property damage. The Status Report thanks Ms. Zohn for this informative article.

Wedding photos, pets, and family heirlooms are priceless. Nonetheless, when water, fire, or other causes destroy these goods, insurance adjusters and courts are asked to put dollar values on them. California allows recovery for such items when there is some rational basis for the award. This rational basis can include the cost of repair, the amount of money spent to create or acquire the chattel, or the amount that will be spent to maintain the chattel in its damaged condition (i.e., a disabled pet). However, California courts rarely award damages for pure mental distress arising from the loss of or damage to a chattel.

Peculiar Economic Value

Peculiar value exists when the item has value only to the owner. Willard v. Valley Gas & Fuel Co., 171 Cal.9, 15 (1915). While there is no comprehensive formula for peculiar value, courts allow plaintiffs to present evidence of repairs, cost to acquire or create the chattel, and cost to maintain the chattel in its damaged condition, provided that the amount is not unconscionable or grossly oppressive. For example, in cases of injured pets, courts have allowed plaintiffs to present veterinary bills for tens of thousands of dollars, and estimates for future care. See Kimes v. Grosser, 195 Cal.App.4th 1556, 1561 (2011); Martinez v. Robledo, 210 Cal.App.4th 384, 392 (2012). In addition, for developmental-stage goods, courts allow plaintiffs to present evidence of the cost of research inputs. Zvolanek v. Bodger Seeds, Ltd., 5 Cal.App.2d 106, 109-110 (1935).

Sentimental Value

Emotional distress damages are not recoverable for breach of an ordinary commercial contract in California, except where the breach also causes bodily harm, the contract is directed to the plaintiff's emotional well-being, or there is a special or fiduciary relationship between the parties. Erlich v. Menezes, 21 Cal.4th 543, 558-559 (1999); Branch v. Homefed Bank, 6 Cal.App.4th 793, 800 (1992). For example, in Erlich v. Menezes, the plaintiffs purchased a newly constructed home that suffered severe leaks and caused them to fear for their safety. Although the stress of having a house laden with construction defects aggravated the heart condition of the owner, his injuries flowed from the emotional distress; the emotional distress was not caused by a physical injury. Thus, the court denied recovery. In Windeler v. Scheers Jewelers, the owner of a family heirloom contracted with a jeweler to make a keepsake for her daughter. When the jeweler lost the rings, the plaintiff was allowed to testify regarding her mental anguish at the loss because the purpose of the contract was sentimental value. Windeler v. Scheers Jewelers, 8 Cal.App.3d 844, 851-852 (1970.)

If the emotional distress arises from negligence, a plaintiff can only recover if the plaintiff suffers physical injury, is a bystander and witnesses the injury of another person, or there is a special relationship between the defendant and the plaintiff. McMahon v. Craig, 176 Cal.App.4th 1502, 1509-1510 (2009). In Robinson v. United States, the court denied

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President's Message

Tanya Gonder
CAIIA President

Happy 2014 from the CAIIA! A new year brings new possibilities. It's a time to look forward and brainstorm. Maybe it's time to introduce yourself to that prospective client you've been eyeing or enjoy a new activity. Too many "resolutions" means being disappointed in ourselves for failing to "place a check mark" by each resolution.

I prefer a resolution at a time. I convince myself I have a much better chance of success without the checklist. A step at a time. I will borrow from a successful brokerage company "Slow and Steady Wins the Race".

So as we embark on 2014 let's be grateful and open for new opportunities. The CAIIA is excited about the possibility of new members, new business opportunities, nurturing existing relationships and developing new ones.

We wish you a Healthy and Prosperous 2014!

Tanya Gonder
2013/2014 CAIIA President

Happy New Year!

News for our Members:

In Memoriam
William "Bill" J. Scheler III, March 3, 1938 – December 8, 2013

Bill was a long time member of the CAIIA. He bought George Dunlap Claims Service many years ago. Bill was on the Board of Directors several times over the years and attended many of the Association's meetings. Bill was always willing to give a hand to the Association. His company was a member of the CAIIA from the time the CAIIA was formed in 1948 to the time he closed his business in 2012.

Bill handled all lines of property and casualty claims. He had many stories about the years he handled the Greyhound bus claims. Bill did property claims and appraisals, as well.

Bill died as a result of complications from kidney failure, diabetes, heart and neurology problems.

The CAIIA sends its heartfelt condolences to Bill's wife Deanna, his family and friends. We will all miss Bill.

Notification of Fee Increase

From the Ca. DOI

In accordance with Insurance Code Section 12978, we are providing notification that the California Department of Insurance is increasing fees by 10 percent for all insurance producers, bail agents, insurance adjusters, and insurers operating in the State of California effective March 17, 2014. As an example, an insurance agent or broker will see an increase of only $14 for each biennial license or renewal, which amounts to just $7 per year.

Pursuant to Insurance Code Section 12978, the Department has the responsibility to set fees that provide sufficient revenue to support the Department's budget and meet critical workload demands to protect California's insurance consumers as well as ensure the solvency of the Insurance Fund. The Department works diligently to create operational efficiencies and control costs while improving service levels; however, Fees and License revenue has not kept pace with the cost of doing business. Expenditures in recent years, most outside of the Department's control, continue to outpace revenue growth. For example, employee compensation and statewide administrative costs have increased. Additionally, several newly enacted legislative mandates have increased the Department's workload and required additional resources. Therefore, this increase, only the second in a decade, is necessary to ensure revenues are sufficient to support expenditures.

As always, the Department will continue to monitor the Insurance Fund in order to ensure its financial integrity.
Attached is the new fee schedule for your reference. If you have any questions, please contact our Producer Licensing Bureau at (800) 967-9331.

PLEASE BE SURE THIS INFORMATION IS DISSEMINATED TO ALL YOUR APPOINTED AGENTS IN CALIFORNIA.

ERIKA SPERBECK
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Happy New Year!

This is traditionally the time to make resolutions. Have you thought about yours? I urge you (ok, CHALLENGE you) to make at least one change in 2014 that is more "green".

Here are some suggestions:

Stop using disposable bags, use your reusable shopping bags (and not just at the grocery store)

Dine by candle light with cloth napkins- (ok, maybe not all the time but more often than you do now and you might just be surprised that it can turn an otherwise ordinary meal into a culinary adventure).

Plant an herb garden. Your herbs will be fresher and tastier too!

Buy an inexpensive reusable water bottle, and stop buying plastic disposable bottles.

Wash laundry in cold water instead of hot.

Turn off lights when you leave the room.

Don't turn on lights at all for as long as you can—open your curtains and enjoy natural light.

Walk or ride a bike to your errands that are two miles or closer- you will also get some exercise as an added bonus!

Research whether you can sign up for green power from your utility company.

Pay your bills online. (Not only is it greener, it's a time saver)

Put a stop to unsolicited mail — sign up to opt out of pre-screened credit card offers (and telemarketers too).
*To opt out for five years: Call toll-free 1-888-5-OPT-OUT (1-888-567-8688) or visit www.optoutprescreen.com. The phone number and website are operated by the major consumer reporting companies.
*To opt out permanently: You may begin the permanent Opt-Out process online at www.optoutprescreen.com. To complete your request, you must return the signed Permanent Opt-Out Election form, which will be provided after you initiate your online request.

Reuse scrap paper. Print on two sides, or let your kids color on the back side of used paper.

Before buying anything new, first check your local Craigslist or Freecycle.

Also, shop your local thrift stores. You can save money plus support a local charity.

Support local restaurants that use food derived less than 100 miles away. To find them, just Google "farm to table restaurants".

Fix leaky faucets.

Lower the temperature on your hot water heater.

Unplug unused chargers and appliances.

Collect rainwater, and use it to water your houseplants.

Switch to shade-grown coffee with the "Fair Trade" label.

Use cloth instead of paper towels to clean your kitchen. Make these rags out of old towels and t-shirts.

Which of these do you already do? Which ones are you going to commit to do this year?

Marla Hofstee
Contributing Writer for "Go Green"

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recovery based on sentimental value of chattels burned in a fire because there was no physical injury and the government had started the fire in order to control noxious weeds on neighboring land; the action was not directed at the plaintiffs. Robinson v. United States, 175 F.Supp.2d 1215, 1230-1232 (2001). In Cooper v. Superior Court, the defendant negligently parked his tractor, which subsequently rolled into the plaintiff's home while she was away. Cooper v. Superior Court, 153 Cal.App.3d 1008 (1984). The court denied mental distress damages because the plaintiff was not a direct victim or a bystander and her physical symptoms were caused by her emotional distress, not the event itself. In Christiansen, the court found that statute created a special relationship and a duty on the part of mortuaries to avoid causing emotional distress to decedents' family members, even those not party to any contract with the mortuary. Christiansen v. Superior Court, 54 Cal. 3d 868 (1991).

Notwithstanding the foregoing rules, there are public policy exceptions. For example, although by definition, a pet is a chattel whose sole purpose is the emotional well-being of the owner, California courts have held: "Regardless of how foreseeable a pet owner's emotional distress may be in losing a beloved animal, we discern no basis in policy or reason to impose a duty on a veterinarian to avoid causing emotional distress to the owner of the animal being treated..." McMahon v. Craig, 176 Cal.App.4th 1502, 1514 (2009). Courts have noted that allowing such damages could make veterinary services prohibitively expensive.

Conclusion

California courts seek to compensate plaintiffs for lost or damaged personal property. However, where there is no market for the property, plaintiffs bear the burden of presenting rationally-based evidence of its value. While there is no comprehensive formula to calculate damages in every scenario, courts have allowed evidence of the cost of repair and maintenance, and the dollar value of inputs in creating the good. A plaintiff generally can recover for mental distress due to the damage or destruction of personal property if the defendant assumed a duty in contract or law, pertaining to the mental tranquility or happiness of the plaintiff in connection with that property. Otherwise, recovery for mental distress damages is exceedingly rare.

The Hokey Gokey

Credit to Dan Lewis "Now I Know"

On December 31, 2007, Curtis Gokey of Lodi, California, ran into a little bit of bad luck. A municipal worker was reversing a city-owned dump truck but found himself distracted by the dispatchers. The driver stopped a moment too late, crunching Gokey's 1994 Chevy 4x4. It was the driver's first accident in 20 years, but as far as Gokey was concerned, that didn't undo the problem. Gokey's car suffered over $3,600 in damages -- damages which were clearly the fault of the city employee. But when Gokey went to the city to ask for reimbursement -- something which, in every other case with similar facts happened as a matter of course -- the city said no.

Why?

Because Gokey was the city employee driving the dump truck. He hit his own automobile.

The city argued that Gokey wasn't entitled to collect because he actually caused the damage to his own car. The city's attorney called Gokey's claim "ridiculous," telling the local press that "this is just one of those things where you go, no, the citizens of Lodi are not going to pay for his error. If we're going to pay him, a judge is going to have to tell us to pay him." Gokey argued that the fact that he hit his own car was immaterial: "I'm a city employee on city time, on city property. What does it matter what vehicle I hit? An accident's an accident. If it had been my co-worker, they would have paid." Neither side alleged that Gokey hit his truck intentionally, either.

Nevertheless, the judge agreed with the city, dismissing Gokey's claim. But the driver wasn't done yet. His wife, Rhonda, filed suit, asking for $4,800 -- 33% more than what her husband demanded. (She jokingly told the Associated Press that she's "not as nice as [her] husband is" but, in reality, was also trying to recoup the money spent on acquiring a replacement vehicle while the Chevy was in the shop.) It's not as outlandish as you'd think -- spouses often can sue each other to recoup money from their (often jointly-held) insurance companies -- but it was still pretty far out there.

The city attorney asserted that her claim was also without merit, and according to one legal blog which followed the case, the city, again, prevailed.

NOW I KNOW is a free email newsletter of incredible things; you'll learn something new every day. www.NowIKnow.com

Construction Defect– 10 year Latent Defect

Credit to Manning, Kass, Ellrod, Ramirez, Trester, Los Angeles, CA

As we all know and as contractors and their general liability insurers are painfully aware, in the State of California, the statute of limitations for latent construction defects is extended to ten years from the date of completion of the construction project. Over the years, this has led to mass filings of multi-home plaintiff litigation arising from claims in residential subdivisions just shy of that ten year deadline. These cases have been the bane of insurers and have led to bankruptcy or closings for other reasons of countless construction related businesses in the State of California.

On June 3, 2013, the Court of Appeal for the First Appellate District filed its decision in the case of Brisbane Lodging, LP v. Webcor Builders, Inc., (2013) 216 Cal.App.4th 1249.
This case arises from the construction of a 210 room, eight story hotel known as the Sierra Point Radisson Hotel.

In its opinion, the Court held that based on the written contract between what the Court considered to be "...parties represented by legal counsel engaged in a sophisticated commercial construction project" the parties had knowingly waived the "delayed discovery rule".
In making its ruling, the Court specifically found that the parties had extensively negotiated the construction contract and both parties had knowingly agreed to the clear provisions of that contract.
The contract in question included the 1997 American Institute of Architects' (AIA) Standard Form of Agreement Between Owner and Contractor, AIA document 201, general conditions.
Included in this AIA document is a clause as cited by the Court which states as follows:

13.7 Commencement of Statutory Limitation Period
"13.7.1 As between the Owner and Contractor:
.1 Before Substantial Completion. As to acts or failures to act occurring prior to the relevant date of Substantial Completion, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than such date of Substantial Completion...."(AIA A201, Article 13.7.1.1)".

To state the facts simply, a plumbing issue arose regarding a sewer pipe. The Brisbane group filed suit in May of 2008 despite the fact work was substantially completed on May 31, 2000. The filing was approximately four years too late under the contract language.
On appeal, Brisbane made a number of arguments to the effect that the 1997 AIA standard contract language was unenforceable. They also made a number of other arguments which will not be addressed here.

The trial Court upheld the contract language and granted summary judgment on behalf of the contractor. The District Court then affirmed.
Apparently, this was a case of first impression.

In a lengthy opinion, the Court discussed a number of issues including the concept that "[b] y tying the running of the applicable statute of limitations to a date certain, the parties here negotiated to avoid the uncertainty surrounding the discovery rule for the security of knowing the date beyond which they would no longer be exposed to potential liability." The Court went on to "...conclude that sophisticated parties should be allowed to strike their own bargains and knowingly and voluntarily contract in a manner in which certain risks are eliminated and, concomitantly, rights are relinquished."

Interestingly, in coming to this opinion, the Court relied on a 1894 case and a 1909 case, In re Garcelon, 104 Cal.570 (1894) and Tebbets the Fidelity and Casualty Co., 155 Cal.137 (1909). Both cases involved interpretation of public policy.

According to the opinion, Brisbane is the first time the appellate Court has interpreted the AIA language limiting California's latent defect statute. This is obviously a very good opinion for developers and contractors. On the other hand, owner's should read AIA contracts carefully and exclude article 13.7.1.1 from their contracts as well as any non-AIA similar language.

COMBINED CLAIMS CONFERENCE

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The Combined Claims Conference (CCC) is a two-day program offering continuing education for CPCU, RPA, MCLE, CIPI, CALI, WCCP and the California and Texas Departments of Insurance for independent adjusters, attorneys, investigators and brokers.

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On the Lighter Side:

When Grandma Goes To Court

Humor; Posted on: 2008-01-17 20:06:02 [Print / Instant Flyer]

Lawyers should never ask a Mississippi grandma a question if they aren't prepared for the answer.

In a trial, a Southern small-town prosecuting attorney called his first witness, a grandmotherly, elderly woman to the stand. He approached her and asked, 'Mrs. Jones, do you know me?' She responded, 'Why, yes, I do know you, Mr. Williams. I've known you since you were a boy, and frankly, you've been a big disappointment to me. You lie, you cheat on your wife, and you manipulate people and talk about them behind their backs. You think you're a big shot when you haven't the brains to realize you'll never amount to anything more than a two-bit paper pusher. Yes, I know you.'

The lawyer was stunned. Not knowing what else to do, he pointed across the room and asked, 'Mrs. Jones, do you know the defense attorney?'

She again replied, 'Why yes, I do. I've known Mr. Bradley since he was a youngster, too. He's lazy, bigoted, and he has a drinking problem. He can't build a normal relationship with anyone, and his law practice is one of the worst in the entire state. Not to mention he cheated on his wife with three different women. One of them was your wife. Yes, I know him.'

The defense attorney nearly died.

The judge asked both counselors to approach the bench and, in a very quiet voice, said,

'If either of you idiots asks her if she knows me, I'll send you both to the electric chair.'