CAIIA

Status Report

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January 2020

DOI Announcement

Southland bride tied up in fraud scheme against The Knot

LOS ANGELES, Calif. — Vermyttya Miller, 37, of Santa Clarita, was sentenced to five years in county jail and ordered to pay $22,500 in restitution after pleading no contest to one count of felony insurance fraud for a wedding fraud scheme she concocted to rip off The Knot—not once but twice.

In October 2016, Miller booked a wedding reception through The Knot website for the Galleria Ballroom in Glendale, CA, which came with a $10,000 event cancellation/ postponement insurance policy. Soon after booking the reception, Miller claimed she tripped on her wedding dress and was injured so severely that she had to cancel the wedding reception and filed an insurance claim under the $10,000 policy.

To support her cancellation claim, Miller provided medical reports documenting her injuries. On October 31, 2016, the insurer delivered a $10,000 check to Miller. Then, in an interesting twist, Miller e-mailed The Knot's insurer on December 4, 2016, to report her $10,000 check was stolen and provided a copy of a police report she allegedly filed with the Vallejo Police Department in Northern California. Evidence revealed Miller actually doctored a previously submitted police report for a different incident that occurred years earlier.

"Miller's trail of fraudulent claims led straight to a five-year jail sentence after department detectives unraveled her scheme," said Insurance Commissioner Ricardo Lara. "Insurance fraud is a felony with serious penalties and consequences. We are committed to uncovering fraud and working with prosecutors to bring criminals to justice."

Miller reported to the insurer that her $10,000 claim check was stolen and the Vallejo Police Department was investigating the theft. Miller provided the insurer with investigative details she said the Vallejo Police Department reported to her.

The insurer, Tokio Marine, referred the claim to the Department of Insurance for investigation. Detectives uncovered evidence that Miller falsified the medical reports of her injury, which she used to file the original claim. Detectives also found Miller doctored the Vallejo Police report she used to substantiate her claim that the $10,000 check was stolen.

The Los Angeles County District Attorney's Office prosecuted the case and Miller pleaded no contest to one count of felony insurance fraud and was ordered to pay restitution for the $10,000 she received and an additional $12,500 for investigative costs.

Miller was remanded to the custody of the Century Regional Detention Facility in Lynwood where she is serving her five-year sentence.

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Inside this issue…..

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President's Message

Presidents Message – January 2020

First, my sincerest apologies about the delay in getting this first president's message of the year out to all. Not a good start, Mr. Ratto!

John Ratto

CAIIA President

That being said, it's not like I've been sitting on the couch with a family size bag of Doritos (although over the holidays our family did rediscover the pleasures of this crunchy decadent ambrosia- Nacho Cheese!!!) We just went through the whirlwind of the holidays and managed to keep up with several large new claims- the eternal balancing act of an independent adjuster.

The holidays always bring on emotional moments and events and this year was no exception, from the joy of dancing with an 80 year old family friend in celebration of her big birthday (happy heart), to mourning the unexpected passing of a 'young' friend in top mental/physical health (sad, heavy heart), to the graceful happiness of listening to my daughter sing Silent Night with her choir in Davies Symphony Hall (grateful, loving heart).

As I am writing this message to you, I have made it through the "season" and celebrated my 55th birthday on January 3rd. Now it is time to reflect on the new year and a few "work" resolutions:

1. Maintain a reasonable case load! I resolve to remember, just because I can handle more doesn't mean I should handle more. That elusive life-work balance will only get further away with every "extra" claim I take and my clients and their insureds will be better served if I am more focused.
2. Update our claims practice! I resolve to re-examine the same old forms and programs I've been using for years and, where appropriate, move into the 21st century. Even though I can prepare an Xactimate estimate in my sleep, I might actually take a class and see what else the program can offer that I am not using. I resolve to also explore some of these programs described in the numerous pamphlets I receive at various conferences throughout the year.
3. Clean out my office and keep it clean! I resolve NOT to keep every paper scrap, business card and old carpet remnant. They are not all essential to that big subrogation claim and even if I am called to produce them, I won't be able to find anything important in a messy office.

I figure that three resolutions are enough if I hope to actually keep them. What are your resolutions? To get more involved in the CAIIA? Mark your calendars, the midterm is coming! April 23 and 24th at the Hilton Garden Inn in Burbank. Does that sound familiar? We held our midterm there last year and found the venue to be very convenient.

Happy New Year to all and good luck with the resolutions!

John Ratto, President

NEWS OF AND FOR OUR MEMBERS

SAVE THE DATE

The CAIIA is proud to be exhibiting at or sponsoring the following upcoming event:

March 3 & 4, 2019 Combined Claims Conference, Hyatt Regency, Orange County

April 23 & 24 CAIIA Midterm Meeting, Hilton Garden Inn, Burbank

Important Amendment to the Insurance Code:

Assembly Bill No. 188
CHAPTER 59

An act to amend Section 2051 of the Insurance Code, relating to insurance.

[Approved by Governor July 09, 2019. Filed with Secretary of State July 09, 2019.]

LEGISLATIVE COUNSEL'S DIGEST

AB 188, Daly. Fire insurance: valuation of loss.

Existing law generally regulates classes of insurance, including fire insurance. Existing law provides that the measure of indemnity in fire insurance under an open policy is the expense to replace the thing lost or injured in its condition at the time of the injury, with the expense computed as of the start of the fire. Existing law also provides that under an open policy that requires payment of actual cash value, the measure of the actual cash value recovery is the policy limit or the fair market value of the structure, whichever is less, in the case of a total loss to the structure. In the case of a partial loss to the structure or loss to its contents, the actual cash value recovery under existing law is the amount it would cost the insured to repair, rebuild, or replace the thing lost or injured less a fair and reasonable deduction for physical depreciation based upon its condition at the time of the injury or the policy limit, whichever is less. Under existing law, in the case of a partial loss to the structure, a deduction for physical depreciation applies only to components of a structure that are normally subject to repair and replacement during the useful life of that structure.

This bill would delete the provisions regarding the actual cash value of the claim of total loss to the structure and would instead require that the actual cash value of the claim, for either a total or partial loss to the structure or its contents, be the amount it would cost the insured to repair, rebuild, or replace the thing lost or injured less a fair and reasonable deduction for physical depreciation based upon its condition at the time of the injury or the policy limit, whichever is less. The bill would extend the restrictions that apply to a deduction for physical depreciation to a total loss to a structure.

DIGEST KEY
Vote: MAJORITY Appropriation: NO Fiscal Committee: NO Local Program: NO

BILL TEXT

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1.
Section 2051 of the Insurance Code is amended to read:

2051.
(a) Under an open policy, the measure of indemnity in fire insurance is the expense to the insured of replacing the thing lost or injured in its condition at the time of the injury, the expense being computed as of the time of the commencement of the fire.

(b) Under an open policy that requires payment of actual cash value, the measure of the actual cash value recovery, in whole or partial settlement of the claim, for either a total or partial loss to the structure or its contents, shall be the amount it would cost the insured to repair, rebuild, or replace the thing lost or injured less a fair and reasonable deduction for physical depreciation based upon its condition at the time of the injury or the policy limit, whichever is less. A deduction for physical depreciation shall apply only to components of a structure that are normally subject to repair and replacement during the useful life of that structure.

California Tort Report
Credit to Tyson & Mendes, La Jolla, CA

Special Needs Student Hit by Car to Receive $28.5M from California School District

A Southern California school district will pay $28.5 million to a special needs student who suffered catastrophic injuries when hit by a car after an employee of the Puesta Del Sol Elementary School violated the mandatory "curb-to-curb transportation" requirement for the special needs program. The employee only walked the 11-year-old boy across the street in front of the school and allowed him to walk home alone. As the student attempted to traverse a four-lane road a few blocks away, the boy was struck by a car traveling 50 miles per hour.

Up until the trial, the school district made no offers to settle and "rigorously fought liability" for two years. A bench trial was conducted for the liability phase. The student's claimed injuries included a severe traumatic brain injury, several broken bones, and around the clock care including needing to be tube fed. Despite its efforts to fight same, the School District was found liable for the student's injuries. Prior to the damages portion of the trial, the School District agreed to settle the case.

The case is *Fabian Luciano Sanchez et al. v. Victor Elementary School District et al.*, case number CIVDS1719667, in the Superior Court of the State of California, County of San Bernardino.

Tesla Sued by Apple Engineer's Family Following Death Related to Alleged Driver-Assistance Failure

Apple engineer, Wei Lun "Walter" Huang's,Tesla Model X SUV crashed into a highway concrete barrier after the vehicle's computerized driver-assistance system failed, causing the crash. Tesla is being sued in California state court. The complaint alleges the company failed to implement safety features available to it that would have prevented the crash, in particular, a system that can prevent its electric vehicles from straying out of their lanes and running into stationary objects. The family alleges Tesla neglected to put these features in the Model X SUVs despite their availability on other models.

The complaint states Huang was misled when he purchased the Model X relying on the purported safety features of the Model X that ultimately lead to his death in March 2018,

"We want to ensure the technology behind semi-autonomous cars is safe before it is released on the roads, and its risks are not withheld or misrepresented to the public," Doris Cheng of Walkup Melodia Kelly & Schoenberger, representing the family, said in a statement in April 2019.

The family alleges that Huang was driving on U.S. Highway 101 as he approached an interchange with another state highway and was using the Model X's "Autopilot" feature. The autopilot caused the vehicle to suddenly turn left into a concrete median. Huang succumbed to his injuries several hours after the incident.

The family claims Tesla's safety systems on the car were negligently designed, pointing out that Tesla upgraded later models with additional safety features to prevent cars from drifting out of lanes shortly after Huang's death in March 2018.

The lawsuit also names the California Department of Transportation ("Caltrans") for its negligence in failing to repair/replace a "crash attenuator guard" on the barrier that was damaged in another crash more than a week before. According to the complaint, the crash attenuator guard would have dissipated the force of the crash and protected Huang during the crash.

The case is *Huang et al. v. Tesla Inc. dba Tesla Motors Inc. et al.*, case number 19CV346663, in the Santa Clara Superior Court.

Case Law Update

Credit to Tyson & Mendes, La Jolla, CA

Presbyterian Camp and Conference Centers, Inc. v. Superior Court

Factual Analysis

A fire was accidentally caused by an employee of the Presbyterian Camp and Conference Centers, Inc. ("PCCC") when smoke in a cabin chimney caused a camp counselor to remove a burning log from the fireplace and carry it outside. Embers from that log fell onto dry vegetation, leading to the "Sherpa Fire." CalFire spent over $12 million to fight the fire and investigate its cause. This investigation led to the conclusion PCCC had caused the fire by failing to clear dry vegetation near the cabins, failing to maintain the chimney that ended up filling the cabin with smoke, and failing to inspect and maintain appropriate fire safety devices. As a result, CalFire sued the counselor and PCCC to recover the costs of the fire suppression and investigation under *Health and Safety Code* Sections 13009 & 13009.1.

PCCC demurred under the argument it could not be liable for its employee's actions under a prior case, *Department of Forestry & Fire Protection v. Howell* (2017) 18 Cal.App.5th 154.) In the *Howell* case, a fire was started by a timber harvester employee, leading to a suit against the employee, timber harvester, company that purchased the timber, the company that managed the property on which the timber was harvested, and the property owners. In *Howell*, the company that purchased the timber, the company that managed the property on which the timber was harvested, and the property owners were dismissed on the grounds they could not be vicariously liable for the actions of the timber harvester's employee. The Trial Court rejected PCCC's demurrer on the grounds the *Howell* case did not actually bar vicarious liability for the employer of an individual who purportedly started a fire. PCCC filed a write for review.

Holding and Reasoning

Health and Safety Code Section 13009, subdivision (a)(1) permits recovery of fire suppression costs from "[a]ny person . . . who negligently, or in violation of the law, sets a fire, allows a fire to be set, or allows a fire kindled or attended by [them] to escape onto any public or private property." *Health and Safety Code* Section permits recovery of costs to investigate a fire from the same "persons." As outlined by the Court of Appeals, a "person" includes "any person, firm, association, organization, partnership, business trust, corporation, limited liability company, or company."

The Court of Appeals confirmed the Trial Court's Demurrer and concluded CalFire could pursue PCCC for the actions of its employees *Health and Safety Code* Sections 13009 & 13009.1 and based on a theory of vicarious liability, understanding a corporation technically fits the definition of a person. The Court of Appeals reasoned, based on the definition of "person," PCCC could be liable for fire suppressant and investigation costs and because a corporation "necessarily act[s] through agents," the corporation can be vicariously liable if the actions of one of its agents within the scope of employment" causes a fire. (*Snukal v. Flightways Manufacturing, Inc.* (2000) 23 Cal.4th 754, 782.)

The Court of Appeals similarly relied on the common law of torts, which was codified in *Civil Code* §2338 for the rule an employer is vicariously liable for torts committed by an employee within the scope of employment. As PCCC's counselor was employed and operating within the scope of his employment when he accidentally set the Sherpa Fire, PCCC is vicariously liable for his negligent conduct.

Takeaway

The Court of Appeals clarified the language of *Howell* and *Haverstick v. Southern Pac. Co.* (1934) 1 Cal.App.2d 605 to conclude common law, statutory law, the plain interpretation of *Health and Safety Code* Sections 13009 & 13009.1, and an interpretation of the legislative intent for these statutes all weigh in favor of finding the "principles of vicarious corporate liability" apply to cases of California firefighting agency recovery for fire suppression and investigation. This will permit a broader recovery against corporations for the acts of their employees within the scope of employment related to fire-fighting efforts.

Sarun v. Dignity Health

Factual and Procedural History

After he was involved in a car accident, Tony Sarun was taken to Dignity Health for emergency medical treatment. He did not have insurance. As a result, when he was admitted, he was required to sign an agreement to pay the hospital's full charges unless discounts were found to apply. "Full charges" was defined as "the Hospital's published rates (called the chargemaster), prior to any discounts or reductions." (*Sarun v. Dignity Health* (Cal. Ct. App., Nov. 12, 2019, No. B288062) 2019 WL 5883550, at *1.) Following his emergency treatment, he received an invoice to pay $23,487.90, which was the cost of the chargemaster rate of $31,359 minus a $7,871.10 "uninsured discount." He later received a request for payment which showed, if he paid promptly, his bill would be further reduced to $15,648.15, less than half of the original billed amount.

Mr. Sarun sued Dignity Health primarily on the grounds it had participated in unfair and deceptive business practices when it had charged him for medical care with charges, which were "unduly excessive, were not disclosed or readily available to Dignity's patients, and the parties had unequal bargaining powers." Due to this unequal bargaining power, patients like Mr. Sarun were forced to enter into agreements with Dignity Health in which they agreed to be responsible to pay far more than the reasonable value of the treatment they received from the hospital.

Without yet considering the merits of Mr. Sarun's claim, the procedural issue of this appeal is whether Mr. Sarun's subsequent Motion for class certification should be granted. The Trial Court denied the request for class certification and Mr. Sarun appealed.

Continued on page 6

Continued from page 5

Holding and Reasoning

The Court of Appeals reviewed to determine whether Mr. Sarun's arguments that he represented a class of uninsured individuals who were forced to pay more for the reasonable value of their medical care could in fact satisfy class certification. The Court of Appeals held class actions are authorized "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court …." (*Code Civ. Proc.* § 382.)

In order to establish class certification, the party making the petition must show "(1) "the existence of an ascertainable and sufficiently numerous class"; (2) "a well-defined community of interest"; and (3) "substantial benefits from certification that render proceeding as a class superior to the alternatives." (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021.) Further, the "community of interest" requirement requires satisfaction of three additional factors: "(1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." (*Sarun v. Dignity Health* (Cal. Ct. App., Nov. 12, 2019, No. B288062) 2019 WL 5883550, at *6.) If the common "defendant's" liability can be found from facts common to all members of a class, class certification will be permitted even if the members will then need to independently prove damages.

The Court of Appeals determined that, based on the newly articulated standards for class certifications pursuant to *Noel v. Thrifty Payless, Inc.*, the Trial Court's denial of class certification was based on a now disproved stringent approach. (*Noel v. Thrifty Payless, Inc.* (2019) 7 Cal.5th 955, 986.) The Court of Appeals found the new case disapproved the stringent approach to ascertainability utilized by the trial court . . . 'insofar as it could be perceived as exclusive.'" (*Sarun v. Dignity Health* (Cal. Ct. App., Nov. 12, 2019, No. B288062) 2019 WL 5883550, at *8.) As explained by *Sarun*, under *Noel*, the threshold requirement of ascertainability for class certification is satisfied when the class "is defined 'in terms of objective characteristics and common transactional facts' that make 'the ultimate identification of class members possible when that identification becomes necessary.' [Citation.] We regard this standard as including class definitions that are 'sufficient to allow a member of [the class] to identify himself or herself as having a right to recover based on the [class] description.'" (*Ibid.*)

In the *Sarun* case, the class definition articulated by Mr. Sarun was straightforward and easily defined as any patients "who received treatment at Northridge Hospital Medical Center and were billed for such treatment at chargemaster rates or chargemaster rates less an uninsured discount." (*Ibid.*) As explained by *Noel*, this would make it straightforward for class members to self-identify, satisfying the basic requirements for the initial determination of class certification.

The Court of Appeals concluded the Trial Court correctly determined the common issues for class certification did not permit Mr. Sarun to pursue declaratory relief on behalf of the class because the specific nature of the hospital bill charges prevented a finding that the chargemaster rates "always exceed the reasonable value of the services provided." However, the Court of Appeals found sufficient information under the *Noel* standards for class certification in order to find a limited "issue class" to address the common issue of to interpret whether the contract with Dignity Health constituted an unconscionable and unenforceable contract.

Takeaway

The Court of Appeals provided further analysis of the broader scope of class certification as introduced by *Noel* to loosen the requirements for class certification. The *Sarun* analysis permitted the trial courts broader leeway to redefine a class to reduce or eliminate an acertainability or manageability problem as long as the class can be defined in a way to make it readily self-identifiable in a coherent, perceived exclusive class. For the purposes of the *Sarun* matter, the limited common interest of the resolution of the specific issue involving the potential unenforceability of the contract shared by the class members was an easily distinguished class. The Court's loosening of the requirements to determine class certification under *Noel* was insufficient to overcome the more significant declaratory relief request relating to the billed versus reasonable value of medical bills, for which the individual issues predominated.

Wishing you and yours a happy and healthy 2020

California's AB 5: An End to the "Gig Economy" in California?
Credit to Tyson & Mendes, La Jolla, CA

On January 1, 2020, California's sweeping employment legislation, Assembly Bill 5 ("AB 5"), which codifies the much reviled 2018 California Supreme Court decision in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles* takes effect. The *Dynamex* decision turned California's longstanding analysis of worker's relationships with companies on its head. Since 1989, the State of California applied the "right to control" test proscribed in *Borello & Sons, Inc. v. Dept. of Industrial Relations*, wherein the question of "employee" versus "independent contractor" was answered primarily by evaluating the degree of control a worker maintained in determining the time and manner in which he or she performed the work. Various secondary factors were also taken into account to determine whether the worker was more likely than not to be able to control the manner and means of their work. Beginning January 1, 2020, following the lead of the *Dynamex* court, AB 5 now requires application of the "ABC" test for determining the nature of the relationship between workers and companies. Under the "ABC" test, a hiring party must establish *all* of the following conditions for a worker to be considered an independent contractor rather than an employee:

A. The individual is free from control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; and

B. The service performed is outside the usual course of the hiring entity's business; and

The worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed.

The legislation was originally intended as a protective measure to avoid misclassification of employees as independent contractors by employers seeking to game the system to avoid paying employer taxes and providing state and federally mandated benefits such as health and unemployment insurance. However, as is often the case, despite the best of intentions, California's plans may well go awry.

Various industries rely on independent contractors throughout the nation and now risk complete upending with the implementation of the new law. By way of example, California's salon and gym industries are heavily reliant on independent contractor models. Hairstylists and personal trainers often prefer independent contractor relationships because it affords them flexibility and the ability to move facilities and maintain their client base. California's thriving indie music scene is also at risk. Prior to implementation of AB 5, bars, restaurants, coffee houses, and clubs could enlist varying musicians to perform in their establishments and pay the performers on a contract basis. With the January 1, 2020 implementation of AB 5, however, any establishment regularly enlisting live entertainers as part of their business model will have to hire such performers as employees. As a result, these venues will likely hire in-house performers as their standard entertainers rather than contracting varying bands or artists to perform from week-to-week. New musicians will thereby likely struggle to gain exposure or book shows to perform. The interstate trucking industry will also feel the impact of AB 5. Currently, over 70,000 out-of-state truckers, acting as independent contractors, are deployed to the ports in California to pick up and transport goods throughout the country. Under the new law, these truckers will not be allowed to operate as independent contractors and the likely result will be refusal by many trucking companies to dispatch their drivers into California for fear of running afoul of California's new law. The ensuing shortage of drivers will have reverberating effects throughout the country.

Takeaway

AB 5 will likely have ramifications on a variety of different industries reliant on independent contractors. As is always the case, employers will eventually update their business models to accommodate the new law, but there are bound to be some growing pains in the meantime. One thing is certain: 2020 is poised to be a rocky year while industries adjust to AB 5's implementation.

Combined Claims Conference

To Register: https://www.combinedclaims.com/registration

The "Roaring 20's Prohibition Party" is the Premier Event of the Combined Claims Conference that can't be missed!

Join us as we travel back to the 1920's to celebrate the 32nd anniversary of the Combined Claims Conference with the Roaring 20's.

Charleston Music - Underground Casino Games - Food & Drinks - Networking and Lots of PRIZES!

Tuesday, March 3rd, 2020
4:45 p.m. – 7:00 p.m.
Hyatt Regency Orange County – Royal Ballroom

The Roaring 20's Prohibition Party is included for ALL conference registrants (including Wednesday only passes). "Roaring 20's Prohibition Party only passes" are not available except for sponsors.

On the Lighter Side :

Oxymorons

Is it good if a vacuum really sucks?

Why is the third hand on a watch called the second hand?

If Webster wrote the first dictionary, where did he find the words?

Why do we say something is out of whack? What is a whack?

Why does "slow down" and "slow up" mean the same thing?

Why does "fat chance" and "slim chance" mean the same thing?

Why do "tug" boats push their barges?

Why do we sing "Take me out to the ball game" when we are already there?

Why are they called "stands" when they are made for sitting?

Why is it called "after dark" when it is really "after light"?

Doesn't "expecting the unexpected" make the unexpected expected?

Why are a "wise man" and a "wise guy" opposites?

Why is "phonics" not spelled the way it sounds?

If work is so terrific, why do they have to pay you to do it?

If love is blind, why is lingerie so popular?

Why do you press harder on the buttons of a remote control when you know the batteries are dead?

Why do we put suits in garment bags and garments in a suitcase?

How come abbreviated is such a long word?

Why do we wash bath towels? Aren't we clean when we use them?

Why doesn't glue stick to the inside of the bottle?

Why do they call it a TV set when you only have one?

Christmas - What other time of year do you sit in front of a dead tree and eat candy out of your socks?

Why do we drive on a parkway and park on a driveway?