

FEBRUARY 2007

Weekly Law Resume

Prepared by Low, Ball & Lynch, Attorneys at Law

Uninsured Motorist Coverage - Arbitration

Charles M. O'Hanesian v. State Farm Mutual Automobile Insurance Co.

Court of Appeal - Fourth District - December 19, 2006

Claims for uninsured and underinsured motorist coverage are normally resolved through arbitration. In this case, the claimant contended he could proceed directly to a lawsuit for breach of contract and breach of the implied covenant of good faith and fair dealing without proceeding to arbitration.

Charles Michael O'Hanesian was injured in a rear end automobile accident by a vehicle driven by Curtis Thurlow. Mr. O'Hanesian filed a lawsuit against Thurlow. When Thurlow failed to appear, after having been served, a default judgment was obtained against Thurlow in the amount of \$3,751,000. Thurlow was insured by Farmers Insurance Company. Following entry of judgment against Thurlow, Farmers paid the policy limit of \$100,000.

O'Hanesian had a State Farm policy of insurance with underinsured motorist coverage of \$100,000, and a policy with personal liability umbrella coverage in the amount of \$1 million, with coverage for underinsured motorist claims. After obtaining payment from Farmers, O'Hanesian provided State Farm with a copy of the judgment and demanded that he be paid the total insurance available under the primary and umbrella policies. State Farm refused and requested an opportunity to evaluate the nature and extent of the injuries, and also requested a medical evaluation. O'Hanesian refused, contending the default judgment established the nature and extent of the injuries and the amount of damages to which he was entitled.

O'Hanesian filed a complaint against State Farm for declaratory relief, breach of contract, and breach of the implied covenant of good faith and fair dealing. State Farm demurred to the complaint and argued they were not bound by the judgment and, further, that O'Hanesian was required to complete arbitration before a lawsuit could be brought for breach of contract or breach of the implied covenant of good faith and fair dealing. The trial court entered an order sustaining the demurrer without leave to amend and the action was dismissed. O'Hanesian appealed.

The Court of Appeal affirmed. On appeal, O'Hanesian argued that the arbitration provisions of Insurance Code Section 11580.2 did not apply to underinsured motorist claims. The Court of Appeal disagreed, holding that the arbitration provisions applied to both uninsured and underinsured motorist claims. The language in the State Farm policy conformed to the statutory

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Organization of
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Status Report Now Available by E-mail

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CAIIA Newsletter

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■ **PRESIDENT'S MESSAGE**

As 2007 gets underway, we have several things planned this year. Our mid-term conference will be held at the Hotel Healdsburg in Healdsburg, CA on February 22 – 23 2007. Hotel Healdsburg is located on Healdsburg's historic Town Plaza in the heart of North Sonoma Wine Country. A resort unto itself, the Hotel offers a full service spa, pool, and country gardens. The website is www.hotelhealdsburg.com for more information

Starting at 5 pm on Thursday Feb 22, 2007, Asepsis Technology will host a hospitality hour. Asepsis is a trauma scene, biohazard and medical waste transportation company. Please refer to their website at www.asepsistechnology.com for further information regarding their services.

At 6:00 pm dinner will be held in the Carriage House room. Friday, February 23 we will have breakfast in the lobby followed by our business meeting from 9 – 12. Lunch will conclude our mid-term and is served from 12-1. Please see the Reservation form in this month's Status Report or obtain one from our website at www.caiia.org

We are also in the process of scheduling the dates for 2007 Education Events including the Annual Re-certification and SEED seminars. Please watch for dates and locations.



Lastly, we are planning the 2007 conference to be held in October 2007 in Anaheim. Please keep an eye out for more information to come.

With the Directory having been updated and mailed, we are also in the process of making sure the website is as current as the information we have on file. Please note the members also have direct access to their own information on the website. Should you need to make corrections to the existing information, please go to the website directly. Go to the Member Sign In screen and from there you will be able to contact Thad Eaton for your user name and password.

SHARON GLENN

President - CAIIA 2006-2007

■ Weekly Law Resume

Prepared by Low, Ball & Lynch, Attorneys at Law

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language. As to the default judgment, the Court held that the effect of such a judgment was a decision for the arbitrator to determine. The Court therefore concluded that arbitration was the proper forum to determine the rights of the claimant against State Farm and the amount of benefits to which he was entitled. The judgment dismissing the complaint was therefore affirmed.

COMMENT

The Court noted that some cases in other states had held that consenting to a default judgment against a tortfeasor and not requesting arbitration until after a judgment has been entered may constitute a waiver of the right to arbitration. The Court in this case refused to reach that conclusion.

Civil Procedure - Trial Courts May Not Order Complex Case To Mediation

Jeld-Wen, Inc. v. Superior Court of San Diego County

Court of Appeal - Fourth District - January 4, 2007

In California civil courts, cases are uniformly assigned to some form of alternative dispute resolution. The question arising in this case is whether a court may order a party to mediation. Jeld-Wen, Inc. was an uninsured cross-defendant in a multi-party construction defect action involving over \$500,000 in alleged costs of repair.

The trial court deemed the matter complex, and appointed a mediator to conduct mediation for a maximum of 100 hours at an hourly rate of \$500 per hour. The court ordered that all parties were to attend mediation, accompanied by someone with settlement authority. Jeld-Wen timely objected to the mediation order. The trial court overruled the objection. Jeld-Wen, a minor party in the case, then received a written settlement demand in the amount of \$2,799, and a notice of two mediation dates. Jeld-Wen rejected the settlement demand and refused to attend the mediation sessions. Plaintiffs in the case then moved for an order imposing sanctions against Jeld-Wen and sought an order compelling Jeld-Wen to attend the next mediation. The trial court granted the motion and imposed sanctions of \$200. Jeld-Wen sought a writ of mandate requesting that the trial court set aside its ruling. The Fourth District Court of Appeal agreed with Jeld-Wen and directed the trial court to set aside its ruling.

In issuing its decision, the Court of Appeal emphasized that the process of mediation is supposed to be voluntary. Under California's Civil Action Mediation Program, cases with an amount in controversy of \$50,000 or less may be ordered to mediation. Cases with an amount in controversy over \$50,000

may also be assigned to mediation - if the parties stipulate. Even if a case is assigned to mediation, a party can decide the extent of its participation, and can withdraw from the dispute resolution process.

Plaintiffs in this matter argued that trial courts have the inherent authority to order parties in complex actions to participate in private mediation. The Court of Appeal disagreed. While a trial court may appoint a referee to handle discovery issues and conduct settlement conferences, California law does not permit a court to order the parties to attend and pay for private mediation. Such an order would conflict with the voluntary nature of mediation. While a court may cajole parties in complex actions to stipulate to mediation, it cannot force or coerce a party to agree to mediation over the threat of sanctions. This was especially true in this case for Jen-Weld, a peripheral, uninsured party being ordered to participate in a series of mediations. As such, the Court of Appeal issued a writ of mandate, directing the trial court to set aside its order.

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One of the goals of the CAlIA is education. The Status Report received information about a unique educational event.

Vector Scientific, Inc. (VSI) is conducting a Crash Test and Open House on Friday, February 9, 2007. As part of their ongoing research efforts, they will be conducting a three vehicle impact test with an instrumented crash test dummy in the middle car at their test facility in Torrance, CA. Following the test, they will be serving Cocktails and Hors d'oeuvres in their new offices now located across the street from their test facility.

The crash test will be held at 3 PM. Please arrive before 3:00 PM. 4:00 – 6:00 pm: Cocktails and Hors d'oeuvres

The crash test is being held at Vector Scientific, Inc., 2790 Skypark Drive, Suite 115

Torrance, CA 90505, 310-643-1110

Space is limited so please reserve your spot ASAP by calling or emailing to ewalker@vectorscientific.com

MECHANICAL ENGINEER'S COMMENTS ON MANUFACTURERS

by Thomas L. Liston, P.E., of Thomas L. Liston, Incorporated, Los Altos, California

When things go wrong in the HVAC (heating, ventilating & air conditioning) &/or plumbing industry, I am often the engineer who is asked to figure out why. On those projects on which I am the engineer-of-record I sometimes have to point the finger at myself. However, being a senior consulting mechanical engineer, I am more often asked to opine on the work of others. The usual categories of parties include: engineer, contractor, manufacturer, owner. I can say with some professional pride that the Registered Professional Engineer is rarely the villain.

The manufacturers' published literature, advertisements, and in-person or on-the-phone representations are absolutely vital to the design engineer. The consulting engineer has to accept the manufacturers' information as being correct. The design engineer decides what needs to be done and then selects components which can do what needs to be done. An engineer has no choice but to rely upon the manufacturers' literature and representations. For the most part, manufacturers deliver what they claim. They should. They are the ones who design, test, build, describe their products, and issue installation manuals. The manufacturer's word is held in high regard by all. Thus, when something goes wrong in the field, few expect it to be the manufacturer's fault. But often it is. A few examples:

_ I was asked to check out a residential furnace which had caused the plywood platform on which it was sitting to smolder. It came to light that the same furnace was setting fires all across California. An autopsy of the furnace found red-hot NOx rods were destroying both the heat exchanger and the burners. The decision as to how to install these NOx rods at the factory was made by a non-engineer who simply didn't understand the consequences of what he was doing.

_ An owner-contractor was building his own house. A new propane tank was installed. Upon trying to light his gas range and having trouble, he bled what he thought was air. It was odorless propane. He blew up himself and the house. The tank had a label on it requiring the addition of odorant as a consequence of the propensity of new steel to absorb odorant until saturated. The owner and the general manager of the propane sales company claimed in deposition that they had no knowledge of the need for supplemental odorant. These men were the manufacturer's representatives.

_ A residential furnace created carbon monoxide which ended up in the house in which it was installed. A five-year old boy was brain-damaged as a result. The furnace's combustion air discharge had been routed right through the blower's suction plenum, an obviously dangerous thing to do. Although there may have been a professional engineer at the factory responsible for such a dangerous design decision, it's doubtful. The "industrial exemption" allows engineering decisions to be made by anyone, including the janitor, so long as those decisions are used by the company for its own products.

_ In three different cases which I've investigated, the lid of a swimming pool filter has blown off causing one death and two major injuries. These cases involved three different manufacturers. The danger was so well understood that all three put labels on their filter tanks illustrating the exact accidents which happened! None of the three companies offered an engineer as the "person most knowledgeable". Subsequent investigation revealed numerous proper designs on the market. It wasn't rocket science.

_ In three different fires caused by three different furnaces built by three different manufacturers I've found the same cause: The high limit thermostat measured temperature on only one side of the furnace. To avoid fires, the high limit thermostat needs to sense temperature across the entire width of the furnace.

_ An under-sink water filter ruptured causing hundreds of thousands of dollars of flood damage to an up-scale residence. My attorney-client was defending the British manufacturer. I bought an exemplar and found it to be built much stronger than the ruptured filter. The ruptured filter was not designed to handle 80 psig, which is US-legal, and the manufacturer knew it. They had beefed up their product, but had failed to tell their own defense attorney!

_ A gas-fired self-cleaning oven was built to discharge the hot products of combustion toward a shelf located between the left and right range-top burners. A wooden knife holder sitting there caught fire which, in turn, ignited the cabinets above. The manufacturer's instructions recommended leaving the home during the self-clean operation, which the home-owner did. She came home to a kitchen on fire!

Conclusion: We love manufacturers, but they are not perfect.

■ Weekly Law Resume

Prepared by Low, Ball & Lynch, Attorneys at Law - San Francisco, CA

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COMMENT

This case reminds trial courts pushing cases into ADR, that mediation is supposed to be voluntary. If a party in a complex civil action does not wish to participate and pay for private mediation, it cannot be compelled to do so.

Employment - Supervisor May Be Personally Liable For Retaliation

Taylor v. City of Los Angeles Department of Water and Power

Court of Appeal, Second District - November 20, 2006

The Fair Employment and Housing Act (FEHA) prohibits an employer from retaliating against employees who oppose or complain of discrimination in the workplace. This case analyzes a plaintiff's burden of proof in such a claim, and whether supervisors can be personally liable for retaliation.

Plaintiff Eric Taylor was employed as an electrical engineer by Defendant City of Los Angeles Department of Water and Power (DWP). His supervisor was Defendant Bruce Hamer. Between 1988 and 2002, Taylor received a number of promotions. Ultimately, in 2002, Taylor was named a supervising lead engineer. One of the employees that Taylor supervised was Donald Coleman. In 2003, Hamer terminated Coleman for cause without first notifying Taylor. Coleman then filed internal complaints with DWP, alleging that he was fired because of his race. Coleman listed Taylor as a supporting witness, and over the following months, Taylor provided information and testimony supportive of Coleman's position. Coleman was ultimately reinstated.

In the meantime, Hamer stripped Taylor of his supervisory position and responsibilities. Taylor was allegedly passed over for promotion. Hamer also allegedly did not keep Taylor in the loop on certain projects, causing jobs to be delayed, and branded Taylor as a "troublemaker" in front of other employees. Taylor eventually sued DWP and Hamer, alleging retaliation because he opposed race discrimination against Coleman in violation of FEHA (Cal. Government Code section 12900 et seq). The trial court dismissed the action after sustaining Defendants' demurrer. Taylor appealed. The Second District Court of Appeal reversed.

On appeal, Taylor claimed that his complaint alleged sufficient facts to constitute a claim for employment retaliation; that FEHA imposes liability on supervisors who personally commit retaliation; and that public employer supervisors are not permitted discretionary immunity pursuant to Government Code section 820.2. The Court of Appeal set forth that in order for Taylor to establish a prima facie case of retaliation under FEHA, he had to show: 1) he was engaged in a protected activity; 2) that DWP subjected him to an adverse employment action; and 3) that

there was a causal link between the protected activity and DWP's action.

The Second District determined that Taylor's actions of opposing discrimination, providing information, and testifying for Coleman all constituted protected activity. The Court of Appeal further concluded that under State or Federal standards, Hamer and DWP's actions constituted adverse employment actions. Given the close proximity in time of Taylor's actions in support of Coleman to the alleged adverse actions by DWP and Hamer against Taylor, the Second District also found that Taylor had properly pled a causal nexus between the protected activity and the adverse actions.

Finally, the Second District ruled that the clear language and legislative intent of section 12940 allowed for supervisors to be held liable for personal retaliation. The Court also rejected Defendants' claim that Hamer was entitled to discretionary immunity under section 820.2. The Second District held that for discretionary immunity to apply, the Defendants must show that the decisions in question constitute planning decisions at the department level, as opposed to routine decisions made on a day-to-day basis in an employee's office. Hamer's adverse decisions against Taylor were deemed routine, and not subject to protection. The Second District, therefore, reversed the judgment in favor of DWP and Hamer.

COMMENT

This case clarifies that not only can employers be held responsible for acts of retaliation in the workplace, but supervisors can be held personally liable. This case serves as a reminder to employers to thoroughly train employees on how to handle claims of discrimination and harassment.

■ CAIIA Calendar

■ CAIIA 2007 Mid-Term

February 22-23, 2007

Hotel Healdsburg - Healdsburg, California

Call (925) 277-9320

for information or e-mail

sglenn@johnglennadjusters.com

■ Combined Claims Conference

March 13 - 14, 2007

Pacific Palms Conference Center

Industry Hills, California

Call 1-888-811-6933

for information or

e-mail: info@combinedclaims.com



CAIIA REGISTRATION FORM

**California Association of Independent Insurance Adjusters
2007 Midterm, February 22-23, 2007**

Hotel Healdsburg

**25 Matheson Street, Healdsburg, California, 95448
(800) 889-7188 Mention California Assoc. of Ind. Ins. Adj. for special rate
Standard Room Rate \$195
Rooms available on first come basis**

Attendees must make their own hotel reservations. Hotel Cut-off Date is January 22, 2007

Your Name _____ Significant Other _____
 Company _____
 Address _____
 Phone _____ Fax _____
 E-Mail _____

➤ ***Please specify which events you and your significant other/mate will actually attend by placing a check mark in the box next to the event.***

EVENT	COST	# of TICKETS	TOTAL
Dinner Thursday, February 22, 2007	\$65.00 each	_____	\$ _____
Lunch Friday, February 23, 2007	\$25.00 each	_____	\$ _____
		TOTAL	\$ _____

SCHEDULED EVENTS

Please Show # Attending Events Below:

		You	Mate	Guest
2/22	Registration/Dinner 7 p.m.	[]	[]	[]
2/23	Breakfast 6 am – 10 am	[]	[]	[]
2/23	Business Meeting 9 am – 12 pm*	[]	[]	[]
2/23	Lunch 12 pm – 1 pm	[]	[]	[]

* Members only

Any Questions please call or email Sharon Glenn,
(925) 277-9320, sglenn@johnglennadjusters.com

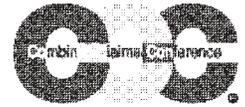
Please make your checks payable to CAIIA or pay by credit card.

Mail Registration form and payment to:

Sharon Glenn
 John Glenn Adjusters & Administrators, Inc.
 2440 Camino Ramon, Ste. 295
 San Ramon, CA 94583
sglenn@johnglennadjusters.com

Credit Card: AMEX ___ VISA ___ M/C ___
 Cardholder Name _____
 Card Number _____
 Expiration Date: _____
 Signature: _____

2007 Combined Claims Conference * Teaming Up For Education



Conference Registration and Session Sign-Up

March 13 - 14, 2007 * Pacific Palms Conference Center * Industry Hills, California

Questions, please call: 888.811.6933 or email: info@combinedclaims.com

Please fill out this registration form completely. One registration form per person. Photocopies accepted

Name: _____
 Company: _____
 Address: _____
 City, State, Zip: _____
 Email: _____
 Phone: _____ Fax: _____

Tuesday, March 13, 2007

- 9:00 - 10:15 AM
 General Session Fraud Comes in Many Ways
- 11:00 AM - Noon
 Track 1 - Liability Anatomy of a Claim
 Track 2 - Property Catastrophe- Psychological Trauma
 Track 3 - WC How Long Before Malingering?
- Noon - 1:30 PM
 Lunch/Speaker John Cappelletti
- 1:30 - 2:30 PM
 Track 1 - Liability Mastering Mediations
 Track 2 - Property Negotiating Business Interruption
 Track 3 - WC Subrosa - For Negotiating
- 3:13 - 4:15 PM
 Track 1 - Liability Construction Defect/Multiple Party Suits
 Track 2 - Property When Small Property Claims Run Amuck
 Track 3 - WC WC Apportionment Rules

Wednesday, March 14, 2007

- 9:00 - 10:15 AM
 General Session Street Level Ethics
- 11:00 AM - Noon
 Track 1 - Liability CGL's Top 10 Coverage Issues List
 Track 2 - Property Property Law Updates
 Track 3 - WC Burns in the Work Place
- Noon - 1:30 PM
 Lunch Recognition of new designees
- 2:00 - 3:00 PM
 Track 1 - Liability Settling Liability Claims
 Track 2 - Property Mitigating Claims After Water Damage
 Track 3 - WC Workers' Compensation Subrogation
- 3:15 - 4:30 PM
 General Session Animal Liberation and Environmental
 Extremism - Trends in Domestic Terrorism

Conference registrations include parking at the conference center, continental breakfast, breaks and lunch on the day(s) you are attending as well as admission to all sessions, any handouts provided, and a conference program.

Conference registration is discounted for certain fields in the insurance and claims industry. The nature of my work is:

- Claims Insurance Carrier Risk Management Attorney Private Investigation

Yes, I work in the fields checked above. Please register me for the following rate:

- Two Day Conference Registration \$160.00
 One Day (Tuesday, March 13, 2007) \$85.00
 One Day (Wednesday, March 14, 2007) \$85.00

No, I do not work in the fields listed above. Please register me for the following rate:

- Two Day Conference Registration \$400.00
 One Day (Tuesday, March 13, 2007) \$200.00
 One Day (Wednesday, March 14, 2007) \$200.00

Payment - Checks, American Express, Discover, Master Card and Visa accepted.

Mail form and check or credit card information to: CCC- PO Box 7204- San Jose, CA 95150 or by fax to 888.969.6922 if paying by credit card.

By Credit Card Authorization for payment in the amount of \$ _____

Credit Card Number: _____ Exp Date: _____ Security Code: _____

Billing Address: _____

Name on Card: _____ Signature: _____

By Check Check Number: _____ in the amount of \$ _____



How to Call the Police When You're Old and Don't Move Fast Anymore

George Phillips of Meridian, Mississippi was going up to bed when his wife told him that he'd left the light on in the garden shed, which she could see from the bedroom window.

George opened the back door to go turn off the light but saw that there were people in the shed stealing things.

He phoned the police, who asked "Is someone in your house?" and he said "no". Then they said that all patrols were busy, and that he should simply lock his door and an officer would be along when available.

George said, "Okay," and hung up, counted to 30, and phoned the police again.

"Hello, I just called you a few seconds ago because there were people in my shed. Well, you don't have to worry about them now cause I've shot them all." Then he hung up.

Within five minutes three police cars an Armed Response Unit and an ambulance showed up at the Phillips residence and caught the burglars red-handed.

One of the policemen said to George: "I thought you said that you'd shot them all!"

George said, "I thought you said there was nobody available!"

(True Story) I LOVE IT!!