



## When You Need To Know What Really Happened

Submitted by Garrett Engineers - Long Beach, CA

### President's Message: CDR Summit

Last month I attended the 2011 Bosch CDR Users Summit in Houston. This is the annual get together for Bosch CDR users where we hear presentations on how to more effectively use the technology and what changes are in the pipeline. A dozen or so speakers filled two and a half days with a lot of information. We also witnessed four, fully instrumented, staged crashes in the rear parking lot of the Sheraton. While most of the presentations were specifically useful to Bosch CDR users, some of the information may be of interest to you as well.

As you may already know, 49 CFR 563 requires that, effective 9/1/12 for the 2013 model year, all new cars sold in the US with event data recorders shall have the ability to be imaged or downloaded by a commercially available tool. The single commercially available tool that is already supported by GM, Ford, and Chrysler is made by Bosch. The regulation mandates a minimum number of data parameters that must be reported with certain minimum levels of precision as well.

The current technology offered by Bosch allows us to image the data for a large number of current GM, Ford, and Chrysler models. Generally speaking, the newer the model, the more information is available. The current OEMs far surpass the minimum reporting requirements of Part 563.

The big news from Bosch is that they have made an agreement with Toyota to provide this commercially available download capability. While we are cheering that announcement, the implementation will take a while. The implementation goal is sometime in 2011. When it does come on line, I would guess that we will see most of the Toyota 2012 models supported. As time and budgets allow, they generally expand their model year coverage to earlier models, but based upon the huge amount of work to be done just for the 2012 coverage, I don't expect to see much coverage for pre-2012 models.

An additional piece of news from Bosch is that they are making a read-only version of their software available for free to anyone who wants to download it from their website. This will give our client adjusters and attorneys the ability to open a downloaded CDR file, read the notes, data limitations, charts and graphs in the latest version of the software, instead of the PDF report that earlier versions mandated.

We also heard about changes to the Bosch training program. The former one day Technician course has been split into a two day course. Technician

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An Employer  
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### Status Report Now Available by E-mail

If you would like to receive the *Status Report* via e-mail please send your e-mail address to [info@caiiia.org](mailto:info@caiiia.org).

## CAIIA Newsletter

CAIIA Office  
P.O. Box 168  
Burbank, CA 91503-0168  
Web site - <http://www.caiia.org>

Email: [info@caiiia.org](mailto:info@caiiia.org)  
Tel: (818) 953-9200  
(818) 953-9316 FAX

Editor: Sterrett Harper  
Harper Claims Service, Inc.  
Tel: (818) 953-9200

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**California Association  
of Independent  
Insurance Adjusters, Inc**

**PRESIDENT'S OFFICE**

P.O. Box 282  
Ukiah, CA 95482  
707-462-5647  
Email: info@caiaa.com  
www.caiaa.com

**PRESIDENT**

Phil Barrett  
barrettclaims@sbcglobal.net

**IMMEDIATE PAST PRESIDENT**

Sam Hooper  
hooper@hooperandassociates.com

**PRESIDENT ELECT**

Jeff Caulkins  
jeff.c@johnsrickerby.com

**VICE PRESIDENT**

William "Bill" McKenzie  
walshadj@sbcglobal.net

**SECRETARY TREASURER**

Tanya Gonder  
tanya@casualtyclaimsconsultants.com

**ONE YEAR DIRECTORS**

Kearson Strong  
kearson@claimsconsultantsgroup.com

Richard Kern  
rkern@sgdinc.com

Art Stromer  
artstromer@hotmail.com

**TWO YEAR DIRECTORS**

Debbie Buse  
ncadj@sbcglobal.net

Corby Schmaultz  
csmaultz@jbaia.com

Michael Hale  
cics@carterclaims.com

**OF COUNSEL**

Nancy DePasquale  
WILLIS & DePASQUALE, LLP  
725 W. Town & Country Rd., Ste. 550  
Orange, CA 92868  
714-544-6000 • Fax 714-544-6202  
ndepasquale@wdlegal.net

## PRESIDENT'S MESSAGE

Long before continuing education became a statutory requirement in California, CAIIA was helping its members and the claims industry satisfy the essence of these nascent requirements. For it has always been at the core of our purpose to enhance the professionalism of our members, not only through networking and association with our members, but by hosting and promoting educational events. Spring is soon approaching and with it comes the traditional abundance of educational opportunities for the claims professional in California. As usual, CAIIA is making its contribution.

First, in early March, we are sending two of our worthy past presidents to exhibit at the California Self Insurer's Association at the Disneyland Hotel in early March. Next, we will be staking our traditional exhibitor spot at the Combined Claims Conference Long Beach March 29-30. CAIIA is proud to be able to help finance both of these worthy educational events. And for those Members who often wonder what CAIIA does to help them succeed and develop new business opportunities, just remember that even if you are inactive in the group, you are getting exposure insofar as the splendid representation you will get by being represented by your association. (Members - Although, I can't resist mentioning that as a member, becoming active in the CAIIA provides your most effective opportunities for networking. Contact me if you need specifics on how help your firm by helping your association).

April 28 and 29 will be our Mid-term convention, set to take place in Sacramento. (See the registration form in the back.) The morning of the 29th we will be offering 3 education courses, (continuing education certification pending), from two of our distinguished allies in the industry; Fire Cause Analysis, who will be providing a 2 hour "Ethics Workshop" presentation; and Project Time & Cost, Inc., (PT&C), who will present two 1-hour courses on "Fraud" and "The Engineer's Road to the Courthouse". Whether you are a CAIIA member, non-practicing but licensed Independent Adjuster, or a claims professional working for an insurer, please consider registering for this event. It will be worth your while.

Finally, our very capable Education Committee comprised of Mr. Tim Waters from Buxbaum Loggia and Associates and Mr. Corby Schmaultz of Jim Buckley and Associates are in the process of putting together our Certification programs for The California Fair Claims Practices Regulations, SIU Regulations and the SEED seminars, (Seminar for Earthquake...). This year there will be 2 SEED seminars; one in northern California and one in Southern California and 3 FCSPP/SIU only courses; 1 in central California and 2 in Southern California. (Look for the registration form in next month's Status Report).



**PHIL BARRETT**

*President - CAIIA 2010-11*

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Level 1 is eight hours and may be done online. Technician Level 2 is another eight hours and is a hands on learning experience which includes learning to back power the proper circuit through the fuse box (which can be useful when the ignition key is required but missing). Bosch has emphasized that a Diagnostic Link Connection download is always preferable to a direct-to-module download, (nothing new there) so this training gives the technician another way to do DLC downloads. Technician Level 3 will be the analyst course, which is now expanded from four days to five full days.

We heard more about CDR insurance and legal issues. CDR technology is rapidly becoming more and more accepted by the courts. Courtroom acceptance of "new" technologies has progressed from fingerprints, to ballistics, to DNA, to electronic data, and now to CDR technology. In addition to federal law, there are many states with new proposed laws mandating CDR information be collected and provided (some good law and some bad). CDR evidence has been used successfully in discovering, documenting, and prosecuting fraud in many cases. One of the issues that sometimes arises is, "who owns the data?" We do not perform a download without permission of the owner of the data. Insurance companies have the ability to request that their insured give permission for a download. Failure to comply with this request constitutes a failure to cooperate, which can mean a breach of contract and a cancellation of coverage. Experience has shown that the insured who refuses permission for a download generally withdraws their claim, rather than have the truth come to light. Another useful tool in this area is the Temporary Restraining Order. The TRO can be used to prevent data destruction by delaying the vehicle from being repaired, destroyed, or sold until after the download is completed. Another variation on the data ownership issue is the right of a lien holder to the data. It appears that the current trend is to recognize that the "right to possess" is a better qualification for the permission criteria, rather than who has a lien on the title. Correspondingly, we have never heard of a lien holder yet who refused to allow a download. Getting download permission from all the possible stakeholders early in the game makes life much simpler later.

The final item of general interest was a presentation on using data from GPS units for accident reconstructions. The presentation focused exclusively on research done on Garmin GPS units. When the user enters a destination and hits "go", the Garmin will direct the driver to their destination using both oral and on screen directions. While this happens, the Garmin creates a log file, or a history of that trip. The Garmin records its position each time that it contacts the satellites. These positions may be 20-30 seconds apart if driving straight at a constant speed, or as frequently as every 2-3 seconds if accelerating on a curving freeway onramp. This history includes time, date, elevation, heading, and vehicle speed. Testing a dozen or so different Garmin models-new, old, expensive, and cheap, the researcher concluded that the recorded data was very accurate - very accurate, as in within 9 feet. This reinforces the fact that we need to start asking our clients if their driver was using a GPS unit, and if so, we need to try to download the data that it may contain.

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## Weekly Law Resume

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

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### **Insurance Coverage - Equitable Subrogation and Contribution**

*James Dobbas, et al. v. Fred Vitas, et al., Court of Appeal, Third District (January 7, 2011)*

When an insurer seeks to recover monies it has paid in settlement, it may do so by either a claim for equitable subrogation - seeking to stand in the shoes of its insured to the extent of its payment, or by a claim for equitable contribution, an apportionment of costs among insurers that share the same level of liability on the same risk. This case considered the rights of an insurer for equitable subrogation or contribution against an insurance agent who had allegedly failed to procure an insurance policy.

James Dobbas operated a ranch in Sierra County. On May 27, 2002, a bull escaped from his property, and collided with two vehicles, resulting in the deaths of two occupants of the vehicles and injuries to four others. Dobbas was sued by the victims.

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# Weekly Law Resume

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

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Prior to the incident, Dobbas' insurance broker, Fred Vitas, had obtained a primarily liability policy for him from Cal Farm with \$1,000,000 limits. Vitas had also procured a \$3,000,000 excess policy from Cal Farm, but Vitas had allegedly either cancelled the excess policy or failed to renew it, so that it was not in effect at the time of the accident. The lawsuit was ultimately settled for the \$1,000,000 Cal Farm limits, with a stipulation to binding arbitration to determine Dobbas' liability and to apportion the damages between the plaintiffs. Dobbas also assigned any claims he might have against his agent for failing to secure his excess policy in exchange for an agreement not to execute on any judgment against Dobbas. The arbitration resulted in a \$5,000,000 total judgment, which was entered against Dobbas.

Subsequently, the plaintiffs learned of two additional policies that had insured James Dobbas Inc. which might also have provided coverage to James Dobbas' ranching activities. These included a \$1,000,000 primary liability policy through Steadfast and a \$7,000,000 policy issued by American Guarantee. Both carriers filed suit for declaratory relief that their policies did not provide any coverage, and both filed motions for summary judgment. Steadfast's motion was granted, but the Court found that Dobbas' ranching activities were covered by the American Guarantee excess policy.

American Guarantee thereafter entered into a settlement with the plaintiffs, paying them \$2.8 million, and obtaining from them an assignment of the claims Dobbas had assigned to them against Vitas for failing to procure the excess policy through Cal Farm. American Guarantee then sought to intervene in a lawsuit Dobbas had previously filed against Vitas for failure to procure the excess policy. American Guarantee filed a motion to intervene as an "interested party" under Code of Civil Procedure Section 387. The trial court denied the motion to intervene, holding that American Guarantee was not entitled to equitable subrogation because Mr. Vitas had not caused the accident. American Guarantee appealed.

The Court of Appeal affirmed the denial of the motion to intervene, holding that because Vitas was not the person who had caused the accident, but was instead simply a party who had promised to procure insurance, American Guarantee was not entitled to total reimbursement under an equitable subrogation theory. The Court held that as against a party simply promising to procure insurance, an insurer who paid a settlement is not in a superior equitable situation such that equitable subrogation is appropriate.

The Court also distinguished Vitas' promise to procure insurance from other cases where the defendant had promised to indemnify a particular party or promised to return or maintain particular goods. The Court claimed that situations such as that gave an independent basis for the defendant to be responsible and that a carrier paying a settlement on behalf of its insured was in a superior equitable position in such situations. In contrast, Vitas had not only not caused the injury, he had not promised to indemnify Dobbas. The Court held that this was similar to a line of cases where one insurer accepted the claim and another insuring carrier did not. In those cases, unless the non-settling carrier somehow caused the loss itself, there was no superiority of equities in the settling carrier and no right to equitable subrogation.

Because both American Guarantee and Vitas had obligated themselves to provide insurance for Dobbas, this was parallel to two equally-situated insurers when one fails to pay the claim. In that situation, resolution would come not by way of equitable subrogation, but by equitable contribution. American Guarantee could recover if it showed it had paid more than its fair share. Here, the total judgment against Dobbas was \$5,000,000. After the Cal Farm limits were paid, this left a judgment of \$4,000,000. American Guarantee's policy was for \$7,000,000 and the policy Vitas was to procure had been for \$3,000,000. American Guarantee would thus have been responsible for payment of 70% of the remaining judgment or \$2.8 million, which was the amount it had paid. It was thus not entitled to contribution.

Without a showing of superior equities in its favor, American Guarantee was not entitled to equitable subrogation, and as it paid no more than it would have been paid had Vitas procured the \$3,000,000 excess policy, Ameri-

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# Weekly Law Resume

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

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can Guarantee had no basis for equitable contribution. As such, the Court held that the denial of American Guarantee's motion to intervene in the lawsuit against Vitas was appropriate, and it affirmed the trial court's ruling.

## COMMENT

This case holds that where a party has committed to providing insurance, but has not bound itself to otherwise indemnify or make a party whole, and was not personally responsible for the event that caused the insured's loss, a settling carrier will not be entitled to equitable subrogation. Under such situations, a settling carrier's only remedy remains a claim for equitable contribution if it has paid more than its fair share of any settlement.

### Indemnity - Assignee of Indemnity Rights Entitled to Reimbursement of Defense Costs

*Searles Valley Minerals Operations, Inc. v. Ralph M. Parson Service Co., et al.* Court of Appeal, Fourth District (January 21, 2011)

An indemnitee may contract with an indemnitor for defense and indemnification for liability arising out of the indemnitor's work or actions. In this case, the issue is whether the indemnitee may assign its indemnity rights, including the incurring of defense costs, to a third party.

In 1974, Kerr-McGee Chemical Corporation ("KM") entered into a contract with Parson Service Company ("Parson") for the design and construction of a soda ash processing plant on KM's property. The design and construction included installation of a pneumatic conveyer system. The construction contract contained an indemnity provision, which held that Parson would defend and indemnify KM for personal injury or death arising out of Parson's or its subcontractors' negligence in connection with the job. The contract also permitted KM to assign its rights under the agreement.

Searles Valley Minerals Operations Inc. ("Searles") subsequently purchased the plant from KM. As part of the purchase agreement, Searles agreed to indemnify KM for any accidents or injuries resulting in KM being sued. Under the agreement, KM, in turn, assigned its indemnity rights against Parson under the construction contract. In 2001, Michael Moore, a Searles employee, was killed while working at the plant. Moore was attempting to remove a door of the pneumatic conveyor system when the accident occurred. Moore's heirs filed a wrongful death action against KM, Parson and Parson's subcontractor. KM tendered its defense to Searles and Parson. Searles accepted KM's defense. Parson rejected the tender.

The case proceeded to trial where the jury found Parson's subcontractor 25% at fault and Searles 75% at fault. The jury assigned no fault to KM or Parson. The Moore family was awarded \$6.75 million. Searles incurred over \$800,000 in attorney fees, costs, and expenses from providing KM with a defense in the case.

After judgment was entered for the Moore family, Searles filed a complaint for express indemnity seeking reimbursement from Parson for costs incurred in defending KM. Parson demurred to the complaint, arguing that Searles failed to allege sufficient facts, since there were no allegations that KM suffered any damage. Searles opposed the demurrer, contending that as KM's assignee, it was entitled to recover KM's defense expenses. The trial court sustained the demurrer without leave to amend. Searles appealed. The Fourth District Court of Appeal reversed.

The issue for the Court of Appeal was whether the fact that Searles paid KM's defense expenses, after Parson rejected KM's tender of defense, precluded Searles from recovering KM's defense costs- when KM did not incur any out-of-pocket losses. The Court held that the defense and indemnification provision in the KM-Parson contract was clear and enforceable. Searles then purchased those indemnity rights. The jury found Parson's subcontractor to be 25% responsible for Moore's accident. Searles, as assignee of KM's indemnity rights, had the right to pay for KM's defense after Parson rejected KM's tender, and recover the costs for paying for it. It was not critical to the Fourth District that KM did not directly incur a loss. Searles, as the assignee, "stood in the shoes" of KM. Because it incurred defense costs defending KM, it was entitled to reimbursement. The judgment of dismissal was therefore reversed.

## COMMENT

This case holds that an assignee of contract indemnification rights stands in the shoes of the indemnitee, and can pursue a claim for not only indemnification, but defense costs incurred.

# CAIA MIDTERM CONVENTION REGISTRATION

2011

April 28-29, 2011



**DoubleTree Hotel**  
 2001 Point West Way  
 Sacramento, CA 95815  
 916-929-8855



**Early registration encouraged. Cut-off date for contracted room rate is 4/7/11.**

Mention "California Association of Independent Insurance Adjusters" or reference the reservation code "CAI" for special room rates of \$89/Nt. Plus tax. Attendees must make their own hotel reservation.

**Education Courses:**

"Ethics Workshop" (2 Hrs), Fire Cause Analysis  
 "Fraud" (1 Hr) and "The Engineers's Road to the Courthouse" (1 Hr), PT&C Forensic Consulting Services  
 (DOI Approval for Continuing Education Credits Pending)

Your Name \_\_\_\_\_ Spouse/Guest \_\_\_\_\_  
 Company \_\_\_\_\_  
 Address \_\_\_\_\_  
 Phone \_\_\_\_\_ Fax Number \_\_\_\_\_  
 E-Mail \_\_\_\_\_

EVENT	COST	#Attendees	Total Price
<b>Member Convention Package</b> (Includes Thursday Cocktail Hr/Dinner, complete convention schedule)	\$150.00	_____	\$ _____
<b>Non-Member (**) Convention Package</b> (Includes Dinner Breakfast, CE Class/ lunch)	\$170.00	_____	\$ _____
<b>Non-Member Breakfast, CE, Lunch Only</b>	\$100.00	_____	\$ _____
<b>Spouse/guest fee (***)</b>	\$100.00	_____	\$ _____
<b>Grand Total Payable</b>			\$ _____

Please specify which events you and/or your spouse/guest will by placing a check mark in the box next to the event. Complete a separate form for each registrant and additional guest.

**Please make your checks payable to CAIA or pay by credit card. Mail Registration Form & payment to:**

	You	Spouse/Guest	
4/28 - 6:00 PM	No-Host Cocktail Hr – Double Tree Lounge	[ ] [ ]	Barrett Claims Service P.O. Box 282
4/28 - 7:00 PM	Dinner	[ ] [ ]	
4/29 - 7:00 AM	Continental Breakfast	[ ] [ ]	
4/29 - 8:00 AM	Continuing Education	[ ] [ ]	Ukiah, CA 95482 <a href="mailto:barrettclaims@sbcglobal.net">barrettclaims@sbcglobal.net</a> 707-462-5647
4/29 - 1:30 PM	Board Meeting* (All Members Welcome)	[ ] [ ]	
4/29 - 11:00 - AM	Spouse Lunch	[ ] [ ]	
			FAX 707-467-1578

(\* Members only)

Credit Card:	AMEX <input type="radio"/> VISA <input type="radio"/> M/C <input type="radio"/>	3-4 Digit Security#	
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Card No.		Expiration Date:	
Card Address (City/State/Zip)			

\*\*We welcome the attendance and participation of insurance company and risk management claims personnel and attorneys at the Dinner Event, the Educational Seminars, and Luncheon following seminars.  
 \*\*\*Spouse/guest fee includes Thursday cocktail hour, dinner and Spouse Lunch on Friday.

# Combined Claims Conference Program

## March 29-30, 2011 ■ Long Beach Convention Center

### Tuesday, March 29

- 7:30 am - 4:30 pm Exhibit Hall Open
- 7:30 am - 9:00 am Registration and Breakfast in the Exhibit Hall.
- 9:00 am - 10:15 am **Indemnification, Hold Harmless and Insurance: What's the Difference?**
- 10:15 am - 11:00 am Networking and Refreshments in the Exhibit Hall.
- 11:00 am - Noon
- Track 1 - Liability** Premises Liability: Slips, Trips and Falls
- Track 2 - Property** Contents Restoration and Dry Cleaning - Bridging the Gap Between the Insured, Contractors and Adjusters
- Track 3 - SIU** Combating Insurance Fraud Through Affirmative Litigation: Declaratory Relief, Intervention and Whistleblower Actions
- Noon - 1:00 pm Lunch in the Exhibit Hall with Keynote Speaker Dave Allen, Auto Club Speedway.
- 1:00 pm - 1:30 pm Networking and Dessert in the Exhibit Hall.
- 1:30 pm - 2:30 pm
- Track 1 - Liability** Mock Mediation: Part 1
- Track 2 - Property** Technology and Data for Improved Subrogation Results
- Track 3 - SIU** Forensic Lock Presentation
- 2:30 pm - 3:15 pm Networking and Refreshments in the Exhibit Hall.
- 3:15 pm - 4:15 pm
- Track 1 - Liability** Mock Mediation: Part 2
- Track 2 - Property** Evaluation and Proof of Economic Damages in a Recession
- Track 3 - SIU** Comprehensive Approach to Questionable Slip and Falls: Emphasis on Fraud
- 4:15 pm CCC 1st Prize Drawing and Networking in the Exhibit Hall. Must be present to win.
- 4:30 pm - 7:30 pm **CASINO NIGHT** for all attendees at the Westin Long Beach. Complimentary Hors D'Oeuvres, One Beer/Wine Ticket & Raffle Prizes.

### Wednesday, March 30

- 7:30 am - 4:00 pm Exhibit Hall Open.
- 7:30 am - 9:00 am Registration and Breakfast in the Exhibit Hall.
- 9:00 am - 10:00 am
- Track 1 - Liability** The Bulging Disc
- Track 2 - Property** Public Adjusters: The Good, The Bad and The Ugly
- Track 3 - SIU** Navigating the SIU Mindfield: Strategies for Success
- 10:00 am - 10:45 am Networking and Refreshments in the Exhibit Hall.
- 10:45 am - 11:45 am
- Track 1 - Liability** Coverage Analysis
- Track 2 - Property** Smoke and Soot Damage Restoration
- Track 3 - SIU** Clinical Outliers and Pattern Recognition of Suspect Auto Accidents
- 11:45 am - 1:30 pm Lunch in the Exhibit Hall.
- 1:30 pm - 2:30 pm
- Track 1 - Liability** Recent Developments in California Law: A View from the Claims Perspective
- Track 2 - Property** Negotiating Property Claims
- Track 3 - SIU** Conducting Effective Interviews
- 2:30 pm - 2:45 pm Break
- 2:45 pm - 3:45 pm **Winning Tactics in Defending Small Claims Trials: Mock Small Claims Court Case**
- 3:45 pm CCC 2nd Drawing following Closing Session. Must be present to win.

## Your Speedway to Education

Register by **February 15:** One day rate: \$85 Two day rate: \$150  
 Register by **March 23:** One day rate: \$95 Two day rate: \$175

**After March 23: \$125/day subject to availability**

If you are registering more than five attendees, see website for information on discounts.

Please visit the website for the full program, exhibitor and sponsor details, hotel information and a link to register online.

[www.combinedclaims.com](http://www.combinedclaims.com) ■ [info@combinedclaims.com](mailto:info@combinedclaims.com)

714-321-3847



The Combined Claims Conference is a two-day program offering continuing education credits for CPCU, RPA, MCFE, CPI and the California Department of Insurance for adjusters, attorneys, investigators and brokers. Approval has been received from the California Department of Insurance for nine (9) total CE Credits for Independent Adjusters and Agents/Brokers - five (5) for the Tuesday program and an additional four (4) for the Wednesday program.

## Can you say “I love you” any better?

*What love means to a 4 to 8 year-old. Slow down for three minutes to read this. It is so worth it. Touching words from the mouths of babes.*

A group of professional people posed this question to a group of 4 to 8 year-olds, 'What does love mean?' The answers they got were broader and deeper than anyone could have imagined. See what you think.

'Love is what makes you smile when you're tired.' - Terri, age 4

'Love is when my mommy makes coffee for daddy and she takes a sip before giving it to him, to make sure the taste is OK.' - Danny, age 7

'Love is when you kiss all the time. Then when you get tired of kissing, you still want to be together and you talk more. My mommy and daddy are like that. They look gross when they kiss.' - Emily, age 8

'Love is what's in the room with you at Christmas if you stop opening presents and listen.' - Bobby, age 7 (Wow!)

'If you want to learn to love better, you should start with a friend who you hate.' - Nikka, age 6 (We need a few million more Nikka's on this planet.)

'Love is when you tell a guy you like his shirt, then he wears it everyday.' - Noelle, age 7

'Love is like a little old woman and a little old man who are still friends even after they know each other so well.' - Tommy, age 6

'During my piano recital, I was on a stage and I was scared. I looked at all the people watching me and saw my daddy waving and smiling. He was the only one doing that. I wasn't scared anymore.' - Cindy, age 8

'My mommy loves me more than anybody. You don't see anyone else kissing me to sleep at night.' - Clare, age 6

'Love is when Mommy gives Daddy the best piece of chicken.' - Elaine, age 5

'Love is when Mommy sees Daddy smelly and sweaty and still says he is handsomer than Robert Redford.' - Chris, age 7

'Love is when your puppy licks your face even after you left him alone all day.' - Mary Ann, age 4

'I know my older sister loves me because she gives me all her old clothes and has to go out and buy new ones.' - Lauren, age 4

'When you love somebody, your eyelashes go up and down and little stars come out of you.' (what an image) – Karen, age 7

'Love is when Mommy sees Daddy on the toilet and she doesn't think it's gross.' - Mark, age 6

'You really shouldn't say “I love you” unless you mean it. But if you mean it, you should say it a lot. People forget.' - Jessica, age 8

And the final one

Author and lecturer Leo Buscaglia once talked about a contest he was asked to judge. The purpose of the contest was to find the most caring child. The winner was a four year old child whose next door neighbor was an elderly gentleman who had recently lost his wife. Upon seeing the man cry, the little boy went into the old gentleman's yard, climbed onto his lap, and just sat there. Then his mother asked what he had said to the neighbor, the boy said, “Nothing, I just helped him cry.”