CAIIA Status Report

APRIL 2005

CAIIA at the CCC

Your Association was at the Combined Claims Conference on March 16 and 17. We were able to pass out almost 200 directories. Thanks to Maribeth Danko, Seacliff Claims, Huntington Beach, we had business card holders and compass key rings, also. We handed out about 100 of each of these items. As usual, the Association made luggage tags for anyone who had a business card and wanted one.

The CAIIA wishes to thank all of the following people who gave time at the booth to make this such a successful event for your Association.

Jeff Caulkins, John S. Rickerby Company, Pasadena
Eric Sieber, E. J. Sieber & Company, Rancho Cucamonga
Frank Ziegon, M & Z Claims Service, Yorba Linda
Bill McKenzie, Walsh Adjusting Company, San Diego
Maribeth Danko, Seacliff Claims, Huntington Beach
Sterrett Harper, Harper Claims Service, Burbank

The Status Report Gets Kudos

The Status Report heard from Carol McDonald recently. Carol is a vice president at 21st Century Insurance Company.

She advised that they get several copies of the Status Report. It is passed around to many of the employees at 21st Century and is highly regarded and well received. Carol advised that this is one of the best publications for the California Insurance Claims Industry.

The Status Report thanks Carol for her kind remarks.

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An Employer Organization of Independent Insurance Adjusters

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■ PRESIDENT'S MESSAGE

To say that it has been a busy year already seems to be an understatement. Besides running my own company, as President of the CAIIA, I have been overseeing my committees and Board of Directors who have been busy certifying CAIIA members and many from the insurance industry for the Fair Claims Settlement Practices Regulations and the CAIIA's newly created SEED Program (Seminar for the Evaluation of Earthquake Damage)…in compliance with the requirements of the Insurance Code Section 10089.3 and CCR 2695 dealing with Insurance Adjuster Training for Evaluating Earthquake Damage. If that wasn't enough, we just had our Mid-Term Convention while out to sea at our first Cruise venue for a business meeting. To those members who made the trip to Mexico aboard the Royal Caribbean Monarch of the Seas, it was a meeting to remember. For those of you who missed it, you really missed it!

For those of you who attended CAIIA's First Annual SEED program at one of the 3 California locations, you know that you received probably the best certification program for the Insurance Adjuster Training for Evaluation Earthquake Damage. It was so successful, that we look forward to doing the program again next year. We are proud of the efforts of the SEED team including yours truly, Douglas Jackson and Steve Tilghman (both of Southwest Claims Service, Inc.), the FCSPR instructors consisting of Bill Scheler (Dunlap Claims), Sterrett Harper (Harper Claims Service), and Steve Wakefield (Ronald Bolt & Associates). Joining us were the engineering component from Exponent Failure Analysis Associates, Dr. Jon Wren and Dr. Akshay Gupta. Forming the legal component was our of Counsel, Mr. Kevin Hansen from McCormick, Barstow, Sheppard, Wayte & Carruth, LLP. The package of presenters created what was certainly a program we believe that our legislators intended when they drafted the "2695" Regulations. Included with the program, attendees also received our SEED binder that included 2 CD's from Exponent and the CAIIA which contained a wealth of additional information and research material. We heard from many of you already that you enjoyed the full day seminar and felt you received more than your money's worth. To help us in planning for future seminars, drop me an email at scsdj@southwestclaims.com as to what you thought about the program and anything you think would enhance our program next year.

The CAIIA was also pleased to be an exhibitor at the Combined Claims Conference in Southern California on March 15 & 16. Thank you to Sterrett Harper and his team of volunteers for maintaining a presence on behalf of the CAIIA. If you were there, we hope you picked up a copy of our newest membership directory. If not, let Steve Wakefield (our President Elect) know and he will get you a copy sent to you. He can be reached at (559) 485-0441. Steve also announced his choice for the Annual Convention location which will be held in October at the Hotel Valencia, San Jose. Look in the Status Report for further notice of the convention to be held in Northern California.

The CAIIA continues to demonstrate its commitment to its members and the insurance claims industry that promoting education and professionalism is the core of what we believe. Thank you to those of you who continue to utilize CAIIA members when deciding on assigning claims adjusters and investigators to represent your Company. We appreciate your business and honor the commitment to give you the best value for your claims adjusting budget.

DOUG JACKSON, RPA
President - CAIIA 2004-2005

HRB Insurance Law Update

Submitted by Hancock, Rothert & Bunshoft, LLP

Mitchell v. United National Insurance Company, California Court of Appeal, Second District, Division Five, Case No. B170364, files March 8, 2005.

The California Court of Appeal held that an insurer may rescind a fire insurance policy under California Insurance Code sections 331 and 359, based on an insured's negligent or unintentional misrepresentation of a material fact in an insurance application, notwithstanding the willful misrepresentation clause included in the required standard form fire insurance policy under Insurance Code sections 2070 and 2071.

This case arose when a commercial building insured under a standard form fire insurance policy was destroyed by arson. In the ensuing investigation, the insurer discovered several misrepresentations in the application for insurance, and the insurer rescinded the policy. The misrepresentations included statements regarding the size of the building, uncorrected fire code violations, the use of the property, and the fact that the property was also insured by the California FAIR Plan, an insurance plan for property owners that have been rejected by traditional insurance companies. The Court of Appeal held that the trial court properly granted summary judgment in favor of the insurer on the grounds that the undisputed evidence showed that these were material misrepresentations in the insured's application for insurance and that the insurer had the right to rescind the policy based on these misrepresentations.

In making its determination, the Court of Appeal held that the fraud and concealment provision in the standard policy, as prescribed by Insurance Code section 2071, which requires the insurer to prove a willful misrepresentation, does not affect the application of Insurance Code sections 331 and 359, allowing the insurer to rescind the policy based on a negligent or unintentional misrepresentation.

Weekly Law Resume

Prepared by Low, Ball & Lynch, Attorneys at Law

Negligence: Defendant's Act or Omission Must Be Substantial Factor in Causing Injury

Dixon v. City of Livermore, Court of Appeal, First District, (February 23, 2005).

In order to prevail in a negligence action in California, the plaintiff must prove not only that the defendant was negligent, but that there is a causal connection between the negligence and the accident or incident that resulted in injury to the plaintiff. In this case, Plaintiff Ellen Dixon and her husband David Dixon attended an air show at Defendant City of Livermore's Municipal Airport in 1995. The air show was managed by Wings For Charity, Inc. (Wings).

While at the air show, the Dixon's purchased a five-minute scenic helicopter ride. The helicopter ride vent at the air show was operated by a tenant at the airport, Defendant Tri-Valley Helicopters (Tri-Valley). Tri-Valley hired the pilot for the helicopter. Defendant James Crist. Mr. Crist was a FAA-certified commercial pilot. During the ride, the helicopter ran out of fuel. Crist, who was flying over inhospitable terrain, could not land safely and the helicopter crashed. David Dixon was killed and Ellen Dixon was seriously injured. Ellen Dixon and her children sued the City, Wings, Tri-Valley, Crist and others under a number of theories, including negligence. At trial, a jury found Crist and Tri-Valley negligent, and deadlocked on whether the City and Wings were negligent. The jury awarded $11,009,000 in damages, and assigned 60 percent of fault to Crist, and 40 percent to Tri-Valley.

Plaintiffs and Defendants filed post-trial motions. The trial court ordered a re-trial as to the tissues of the liability of the City and Winds and apportionment

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of fault. Plaintiffs settled their claims with Wings, Tri-Valley, Crist and other defendants. The City was the sole defendant at the second trial, which was a court trial. After re-trial, the trial court issued a statement of decision concluding that Wings was an independent contractor of the City; the City and wings were engaged in a joint enterprise; Wings was negligent in its management of the helicopter ride operation; and the City was vicariously liable for Wings negligence. The Court found Crist 40 percent at fault, Tri-Valley 30 percent; and Wings 30 percent. The City and Wings were found jointly and severally liable for 30 percent of plaintiff's non-economic damages and for all economic damages. The trial court entered judgement against the City in the amount of $6,172,000. The City appealed.

In finding against Winds and the City, the trial court had determined that Wings had not met requirements for fueling practices; failed to inspect the landing site; failed to evaluate the pilot's qualifications and failed to ensure that the ride was at a sufficient altitude and flown over more hospitable terrain. In general, the trial court decision, the Court of Appeal initially noted that it could not affirm the judgement unless there was substantial evidence of a causal connection between Wings negligent acts or omissions and plaintiffs injuries. The Court of Appeal determined that the omissions relating to fueling practices; and failure to inspect the landing site had no causal connection whatsoever. There were examples of abstract negligence.

The trial court had concluded that the accident occurred because the helicopter ran out of fuel; was flying over inhospitable terrain, and Crist was not experienced. In reviewing the trial court record, the Court of Appeal found no evidence that Wings (and therefore the City) was responsible for making sure the helicopter was adequately fueled. That was the pilot's responsibility. Next, there was no evidence that there was a better route for Crist to have flown. Finally, Crist had been accepted by the FAA. Therefore, there was no evidence that Wings was negligent for failing to second-guess the FAA's judgment on whether Crist was qualified. The Court of Appeal determined that none of the supposed omissions of Wings was a substantial factor I bringing abut the accident. The Court held it was speculative on the part of the trial court to have concluded that the accident would not have occurred had Wings acted differently in managing the air show. The judgement against the City was therefore reversed. The trial court was directed to enter judgement in favor of the City.

COMMENT

This case is an excellent example of abstract negligence. A Plaintiff must not only prove a negligent act or omission on the part of a Defendant, but also that the act or omission is a substantial factor in bringing about plaintiff's injuries.

Bad Faith: Assignability of Attorneys Fees

Essex Insurance Company v. Five Star Dye House, Inc., Court of Appeal, Second District, (January 27, 2005)

California case law is clear that an insured may assign to the third party claimant his right to sue an insurance company for policy benefits and for bad faith. California case law is unclear as to the right to assign the claim for attorney's fees incurred in obtaining that coverage. This case attempts to resolve that issue.

The underlying case arose over a lawsuit by Five Star Dye House, Inc., against L.A. Machinery Moving over a damaged commercial dryer L.A. Machinery was transporting. L.A. Machinery tendered the claim to its insurer, Essex Insurance Company, and Essex denied coverage and defense. Essex filed an action for declaratory relief against Five Star and L.A. Machinery, and L.A. Machinery assigned its claims against

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Weekly Law Resume

Prepared by Low, Ball & Lynch, Attorneys at Law

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Essex to Five Star. Five Star, on behalf of L.A. machinery, cross-complained for breach of the insurance contract and bad faith. In the trial on the matter, it was found that there was coverage, and Essex had acted in bad faith by denying the claim and refusing to defend. However, the trial court found that Five Star was not entitled to recover attorneys' fees incurred in securing coverage because that claim was not assignable. Essex appealed from the judgment and Five Star cross-appealed to the extent the trial court ruled it was not entitled to Brandt fees.

The Court of Appeal reversed the judgment to the extent it did not include damages for attorneys' fees. The remainder of the opinion affirming coverage and bad faith was not published. As to the attorney fees claims, the Court noted that in Brandt v. Superior Court (1995) 37 Cal.3d 813, an insured was granted the right to recover attorneys' fees incurred in bringing the claim for breach of the insurance contract. These fees are recoverable if it is found the insurer acted in bad faith. The issue was whether this claim was assignable by the insured to the claimant. The trial court held that the insured did not incur the fees, and therefore, the assignee could not recover them as damages. The reasoning was that these fees were not incurred by the insured and could not be deemed tort damages to the assignee.

The Court noted that assignability is now the rule in California except for wrongs done to the person, reputation or feelings of the injured party. Thus, an insured may transfer an action against an insurer for breach of the implied covenant of good faith and fair dealing. However, the insured may not assign claims for emotional distress or punitive damages. The question was therefore whether Brandt fees are founded upon a wrong of a purely personal nature.

The Court concluded that they were not. Instead, the Court held such damages are economic loss caused by an insurer's bad faith denial of coverage. The purpose of such damages is to allow the insured to be made whole by recovering attorneys' fees involved in bringing an action to enforce the contract. The assignment in this case included the right to recover attorneys' fees incurred in bringing the action to recover the benefits. This was not a personal right. Thus, the trial court erred when it found that Five Star was not entitled to Brandt fees. The judgment was remanded to the trial court to determine the amount of attorneys' fees to which Five Star was entitled.

COMMENT

The opinion cites one prior opinion which held that this claim is not assignable. This issue may have to be resolved by the California Supreme Court.

RULES TO LIVE BY

1. Never slap a man who is chewing tobacco.
2. Never kick a cow chip on a hot day.
3. There are 2 theories to arguing with a woman . . . neither works.
4. Never miss a good chance to shut up.
5. Always drink upstream from the herd.
6. If you find yourself in a hole, stop digging.
7. The quickest way to double our money is to fold it and put it back in your pocket.
8. There are three kinds of men:
   The ones that learn by reading;
   The few who learn by observation; and
   The rest of them have to pee on the electric fence to find out for themselves.
9. Good judgment comes from experience, and a lot of that comes from bad judgment.
10. If you're riding ahead of the herd, take a look back every now and then to make sure it's still there.
11. Letting the cat out the bag is a whole lot easier than putting it back.
12. After eating an entire bull, a mountain lion felt so good he started roaring. He kept it up until a hunter came along and shot him. The moral: when you're full of bull, keep your mouth shut.

California Fire Insurance Provision Changes

Submitted by Barry Zalma, Esq., CFE

If you write fire insurance in California or insurance against the risk of loss of real or personal property by fire, new California Insurance code Section 2051.5 requires that all of your policies be amended to comply with its provisions for any policy issued after July 1, 2005.

The policy must reflect that if the policy requires actual replacement before the payment of full replacement cost:

1. That Actual Cash Value is paid first.
2. That no time limit for actual replacement be less that 12 months from the date that first payment toward the actual cash value is made.
3. That additional extensions of six months shall be provided to policyholders for good cause.
4. In the event of a loss relating to a "state of emergency", as defined in Section 8558 of the Government Code, no time limit of less than 24 from the date that the first payment toward the actual cash value if made shall be placed upon the insured to collect full replacement cost.
5. In the event of a total loss no policy may contain a provision that limits or denies payment of the replacement cost in the event the insured decides to rebuild or replace the property at a location other than the insured premises.
    A. The measure of indemnity shall be based upon the replacement cost of the insured property and shall not be based upon the cost to repair, rebuild or replace at a location other than the insured premises.

If you have not modified your forms or issued endorsements you should work to generate such endorsements so that your policies are in compliance no later than July 1, 2005.
Regardless – whether present policies reflect the requirements of the statute or not adjustments must be conducted as if the changes had been made.
Although most insurers have done exactly what the statute requires it has now been codified as the Legislature continues in its attempt to micromanage the business of insurance.

Directory Correction

Due to a printing error, Franklin and Associates was omitted from some of the directories. John Franklin and Frank Yamamoto have been members since 1997. We apologize for this error. A majority of the directories will have their listing, but some were handed out at the Combined Claims Conference.

For your information Franklin and Associates are at:

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johnbfranklin@att.net

They handle jewelry, fine arts, property, business interruption, fidelity and cargo claims.

When You Need to Know What Really Happened

Submitted by Garrett Engineers, Inc. – Forensic Division

Case of the Month - *A new kind of pool slide?*

The case of the month relates to a geotechnical issue. An adjuster called us with a case where a slipping hillside brought a wall of muddy debris into the backyard of the downhill neighbor The uphill neighbor represented by our client had an in-ground swimming pool. The accusation was that the pool owner was negligent in maintaining his pool, which had caused the slipping hillside.

Specifically, the complaint was that during heavy rains, the pool owner allowed his pool to overfill and then overflow. This theoretical overflowing supersaturated the downhill soils, which then slid down into the rear neighbor's back yard.

Our expert inspected the site. The insured's property was located approximately 30 vertical feet above the claimant's property. The slope failure occurred in a cut slope adjacent to the downhill neighbor's carport. The debris from the slide rested on the toe of the slope covering the retaining wall. The area was partially covered by plastic at the time of the inspection but enough of the slope was exposed to view the size of the failure and scarp (top) area. The failure area was approximately 15 feet wide along the slope and the scarp of the slide was just at the property line. Adjacent slope areas were landscaped with a thick growth of ivy. The right half of the slide area was only one or two fee deep. The root zone had pulled away and moved downslope with the ground cover. The left half of the slide was deeper at the top being approximately four to five feet deep at the scarp. The scarp area had the appearance of also being eroded as though seepage may have come out of the top of the slide in the scarp area. There was no sign of the slope failure or erosion on the uphill side of the property line chain link fence.

The primary source of the water which saturated the slope was rainfall from the heavy storms which preceded the slope failure and possibly an underground spring, or other seepage, in the hillside that was increased over normal levels by infiltration of rainfall over a larger uphill area. Our expert also noted one other contributing factor was that at the bottom of the retaining wall on the claimant's property, a block planter had been built in front of the retaining wall. Planter soil covered the open head joints in the bottom of the wall that were for relief of the hydrostatic pressure that would build up during rainy periods.

Our expert inspected the path that any pool overflow would take toward the downhill property if the pool were to overflow. He found that any overflow of the pool would cross the concrete perimeter deck and enters perimeter drains that were routed into the gutter of the street. Therefore, our expert concluded that overfilling of the pool from heavy rains, even if it did occur, did not contribute to the slope saturation.

Slope failures on steep soil slopes are common occurrences during periods of heavy rains especially when other rains have preceded the heavy rains. In this case, the soil materials that made up the downhill slope were normally dense and quite stable when dry and laterally supported. Weathering processes of gravity, heat and cold, rain and vegetative root growth all conspire to weaken the near surface soil materials on slopes over time. Under the correct conditions of antecedent rainfall and a particularly heavy storm event, the level of saturation in the slope can be enough to cause the slope to give way and slide downslope.

This common type of slope failure is routinely remedially repaired by compacting soil, usually mixed with 3% to 6% cement, in horizontal layers (lifts) in a key and on benches cut into the slope as the slope repair proceeds up from bottom to top. Sub-drainage should be added through horizontal pipe sub-drains and/or "chimney" drains to remove any underground seepage that may develop behind the repair in the future. A geotechnical engineer should be consulted for the precise repair specifications and to observe and test the work for compliance during grading.

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