CAIIA *Status Report*

APRIL 2008

In Memory of Our Dear Friend Eugene Riggs

President of the CAIIA (1989-1990)

The passing of Gene is especially difficult for those of us who knew him. A true giant in heart and spirit, Gene was not only a past president of the CAIIA, but was our longtime Executive Director for many years after his presidency. Gene and his very special wife Sally were true supporters of everything the CAIIA represented. Gene was instrumental in starting the Society of Registered Professional Adjusters (RPA). He was, also, the RPA's first Executive Director. After many years living in the Napa , CA, area, Gene and Sally moved to Modesto , CA . Gene passed on March 2, 2008, after being admitted for anemia. He had a cardiac arrest the following morning. Surviving him are his wife Sally, his daughter Kim, and grandson Dylan. Gene left specific instructions that he did not want a funeral service. He didn't like funerals and did not want people to grieve over his death. Instead, miss him and think of him as his own words say:

I have a cigar in one hand,
a drink in the other,
sliding into heaven sideways,
and what a hell of a ride !

And what a ride it was. Gene was a kind and generous man who will be remembered by us all. Condolences can be sent directly to the family at their home, 556 Phoenix Ave. Modesto, CA 95354-1752 .

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PRESIDENT'S MESSAGE

As I write this month's message, I am flying home from a marketing trip back east. The pain in my back is telling me that marketing is a young man's game. Worse than that, the owner of the company I visited is younger than me!

Today I met an adjuster who worked with my father in the 1950's and 1960's. When I occasionally run into a crusty old adjuster (he was actually very pleasant) I hear stories of the good old days of adjusting, how the job has changed, etc. This time was different and enlightening.

I was told a story of how the company where my father started his career - a Mutual - was one of the few that would hire a "certain type of people".

Now I know that various types of people face prejudice and adversity, and certainly more so 40 to 50 years ago, but it never occurred to me that the insurance industry was a place where jobs were hard to come by for certain people.

Looking at our member list it is obvious that "anyone" can be an independent adjuster, and I am proud and thankful for that.

By the time this is published we will have held our Midterm meeting in Las Vegas. I hope a

good time was had by all and that no one lost their fortune at the tables.

We are in full educational mode, having held our first SEED seminar, and having both SEED and Fair Claims Regulations Seminars scheduled in May and June. Please see the flyer in this month's Status Report for dates and locations.

Our Second Golf Tournament and Annual Convention will be held October 20th and 21st in Napa. Save the dates and look for more information in the coming months.

If you have any suggestions, questions or just want to say hello, please don't hesitate to call or email me.

PETER SCHIFRIN
President - CAIIA 2007-2008

Coverage Alert

Submitted by McCormick Barstow, LLP - Fresno, CA

In an equitable contribution action between insurers insuring a mutual insured, one insurer is not bound by the terms of an arbitration provision contained in the other insurer's policy

Crowley Maritime Corp. v. Boston Old Colony Ins. Co., 158 Cal.App.4th 1061 (2008)

BACKGROUND FACTS Crowley Maritime Corporation is a tugboat company operating out of Oakland, California. Crowley was sued in two separate actions alleging that two of its captains had contracted mesothelioma from exposure to asbestos on board Crowley tugboats. Crowley settled the claims for an amount exceeding $6 million. Crowley then sought indemnity from one of its insurers, Boston Old Colony Insurance Company, which initially indemnified Crowley for only a portion of the settlements. Crowley then sued Boston to recover the balance of the settlements. Boston thereafter filed a cross-complaint for declaratory relief and equitable contribution against Crowley and several third party insurers that had issued policies to Crowley, including West of England Ship Owners Mutual Insurance Association and The United Kingdom Mutual Steam Ship Assurance Association Limited. The third party insurers, which are organized in Luxembourg and Bermuda, respectively, and managed out of London, petitioned the trial court to stay the action and compel arbitration in London based upon the arbitration agreements contained in their insurance contracts with Crowley. The trial court denied the motion and the insurers appealed.

THE COURT'S RULING The Court of Appeal affirmed the trial court's ruling denying the insurers' motion to compel arbitration. In doing so, the court detailed the differences between a claim for equitable contribution and a claim for equitable subrogation. The court noted that in a claim for equitable subrogation, the insurer is placed in the position of its insured in order to seek reimbursement from responsible third parties for the loss paid the insured by the insurer. It also noted that the right of subrogation is a purely derivative right such that an insurer entitled to subrogation is in the same position as an assignee of the insured's claim, and succeeds only to the rights of the insured.

In contrast to a claim for equitable subrogation, the court explained that equitable contribution is the right to recover from a co-obligor who shares liability with the party seeking contribution, as when multiple insurers insure the same loss and one insurer has paid more than its share to the insured. The court noted that a claim for equitable contribution does not arise from contract because the multiple insurers who may share responsibility for the same loss have not contracted with each other – only with their respective insureds. The court further noted that by seeking equitable contribution, as opposed to any right of equitable subrogation, the insurers did not "stand in the shoes" of their insured. Rather, they were merely seeking contribution from other insurers who may be liable to Crowley through their own independent contracts of insurance in order to more equitably share the financial responsibility for the loss. The court noted that nothing in the doctrine of equitable contribution would force Boston into "Crowley's footwear" and render it bound by arbitration agreements that it did not sign.

The court thus concluded that since Boston was not a party to the arbitration agreement, the trial court correctly denied the motion to compel arbitration. The court went on to note that under California law, a nonsignatory can be compelled to arbitrate under two sets of circumstances: (1) where the nonsignatory is a third party beneficiary of the contract containing the arbitration agreement; and (2) where a preexisting relationship existed between the nonsignatory and one of the parties to the arbitration agreement, making it equitable to compel the nonsignatory to also be bound to arbitrate his or her claim. The court found that neither of those exceptions applied under the facts of this case.

EFFECT OF THE COURT'S RULING In an equitable contribution action between insurers, one insurer will not, absent the applicability of one of the two exceptions discussed above, be bound by an arbitration agreement contained in an insurance contract entered into between the other insurer and the mutual insured.

Weekly Law Resume

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

Duty of Care - Duty to Supervise Other's Child

Leslie Padilla v. Ismael Ruano Rodas, et al., (February 9, 2008)Court of Appeal, Second District

The duty of a homeowner to supervise another's child who is visiting the property when left unattended by his parents was considered in this case of first impression.

Leslie Padilla visited the property of defendant Ismael Rodas and Ms. Padilla's sister, Vilma Lopez, with her two-year old child. The property had a backyard pool. She and her son stayed overnight. While Mr. Rodas and Ms. Padilla were standing in the front yard watching the child, Mr. Rodas received a cell phone call and walked to a side yard. At that point, the child asked for a glass of water. Ms. Padilla went into the house to get the glass of water. When she returned, she could not find the child. When she searched for him, she found him in the backyard pool, drowned.

Ms. Padilla sued Mr. Rodas for wrongful death. Mr. Rodas moved for summary judgment. The trial court granted the motion. Ms. Padilla appealed.

The Court of Appeal affirmed. Ms. Padilla sued Mr. Rodas for negligent supervision. The Court decided as a matter of law there was no negligent supervision in this case. When Ms. Padilla went in the house, Mr. Rodas was on the side of the house engaged in a telephone conversation. There was no indication that Mr. Rodas knew Ms. Padilla had gone into the house and was no longer supervising the child. Thus, Mr. Rodas could not be liable for failing to supervise the child. The Court stated to impose a duty in this case would require a homeowner to provide babysitting services for his guests' children when their parents were also present. It would make him an insurer of their guests' childrens' safety, even when the parents were also present. The Court refused to impose that type of burden on homeowners.

The Court reviewed cases from other states and determined that the majority have determined a homeowner has no duty to supervise a child in the vicinity of a residential swimming pool when the child's parent is also present. In this case, Mr. Rodas did not engage in any conduct indicating he had undertaken the responsibility to supervise the child when Ms. Padilla was in the house. Policy considerations militated against imposition of such a duty. Thus, summary judgment was properly granted. The judgment was therefore affirmed.

COMMENT

The determination of whether there is a duty to the plaintiff is an important issue in any negligence case. If it can be shown as a matter of law no such duty exists, summary judgment can be granted for the defendant, such as occurred in this case.

Torts - Signed Release Deemed Insufficient in Trail Ride Accident

Cohen v. Five Brooks Stable, (February 14, 2008)Court of Appeal, First District

The sufficiency of a release signed by a participant in a recreational activity has received a great deal of attention from courts in recent years. This case focuses on a release/waiver signed for a guided horse trail ride. Plaintiff Susan Cohen went on a horseback ride on the Olema Trail in the Golden Gate National Recreational Area in Marin County on horses rented from Defendant Five Brooks Stable.

Before going out on the trail, Cohen signed a release, which stated in part: "all horses ... may and will run and bolt uncontrollably ... without warning and without apparent cause... and this may be in response to external stimuli ... which may (lead) to some degree of reflex action on the part of the horse." During the trial ride, the trail guide's horse took off from a walk to a cantor or gallop. The other horses in the group followed. Unable to control her bolting horse, Cohen fell from the saddle and was injured.

Cohen sued Five Brooks Stable contending that the trail guide, knowing the horses behind him would follow and adjust to the gait of his horse, negligently caused his horse to gallop without warning to the other riders; thereby causing Cohen's horse also to gallop. Five Brooks Stable filed a motion for summary judgment arguing: 1) the release signed by Cohen barred her claim; and 2) falling off the horse was an inherent risk of riding, and therefore, Cohen's claim was barred by the primary

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assumption of the risk doctrine. The trial court granted the motion for summary judgment, ruling that the release was clear, unambiguous and explicit. Cohen appealed. The First District Court of Appeal reversed.

The Court of Appeal held that while a release does not need to be perfect, it must be clear and explicit in expressing the intent of the parties. The court acknowledged that the release in question spelled out inherent risks of horseback riding. However, the release was arguably silent as to whether Cohen was releasing Five Brooks Stable for negligence of its' employees. The Court held that a high degree of clarity and specificity is required to relieve a party from liability for its own negligence. Because it was not spelled out that Cohen was releasing any claim arising out of Five Brooks Stable's negligence, the First District held that the document was ambiguous and could not be relied upon.

From there, the Court went on to address whether Cohen's claim was barred by the primary assumption of the risk doctrine. Sponsors of recreational activities have no duty to prevent injuries caused by risks inherent in the activity. Sponsors, however, may not increase the inherent risks. Here, the court held there was a triable issue as to whether the trail guide increased the inherent risk of horseback riding by bringing his horse to a gallop. The First District, therefore, reversed judgment in favor of Five Brooks Stable and remanded the case back to the trial court.

COMMENT

In a lengthy dissent, Justice Haerle strongly argued that the majority had failed to take a common sense approach in analyzing the release in question. For Justice Haerle, the release specifically covered the accident that took place, and Cohen understood what could occur before she got on the horse. It does seem that the First District held Five Brooks Stable to a very high standard. We'll wait and see if the California Supreme Court weighs in on this one and decides if the majority exercised good "horse sense."

Civil Procedure - Allocation - Joint and Several Liability

Paulette Bayer-Bel v. Anna Litovsky, (January 25, 2008)Court of Appeal, Second District

The allocation of liability between three defendants, one negligently driving the car, and two others negligently entrusting the car presents questions in California with respect to noneconomic damages. This case analyzes that issue.Anna Litovsky cut class and met with Anthony Mosley and Eugene Green. They left school in Mosley's Chevrolet Tahoe along with a friend, Liana. When the others began to drink and use drugs, Litovsky asked Mosley to take her back to school. Instead, he gave the keys to Liana, who had a learner's permit. When they got to school, Liana got out. Green asked Litovsky, who did not have a driver's license or learner's permit, to drive him back to the party and she complied. On the way while driving on the wrong side of the street, she crashed head-on into a Toyota driven by Paulette Bayer-Bel.Bayer-Bel sued Litovsky, Mosley and Green. The theory against Mosley and Green was negligent entrustment.The jury allocated fault as follows: 60% to Bayer-Bel for not wearing a seatbelt, and of the remaining 40%, 40% to Litovsky, 20% to Mosley and 40% to Green. The trial court refused to apply Prop. 51 and found that all defendants were jointly and severally liable for the entire amount of the judgment. Litovsky appealed.The Court of Appeal reversed. The Court noted that in California, pursuant to Civil Code ' 1431.2, subd. (a), each defendant is liable only for the amount of noneconomic damages allocated to that defendant as their percentage of fault. When a defendant is liable only by reason of derivative nondelegable duty arising from his status as an employer, landlord, vehicle owner, or co-conspirator, liability is secondary to that of the actor and he is not entitled to the benefits of this section. But, where there are two independently acting defendants whose liability is primary, this section applies. In this case, Litovsky was a primary defendant because she was driving the vehicle. Green and Mosley were primary defendants because they negligently entrusted the car to the unlicensed Litovsky. Thus, Litovsky's liability for Bayer-Bel's noneconomic damage was several, not joint and she was only liable for the amount of noneconomic damages allocated to her by the jury. The judgment against her was reversed and remanded for a new judgment consistent with this opinion.

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COMMENT
This case holds that primary defendants who were actively negligent are entitled to the benefits of several liability for noneconomic damages, but are jointly and severally liable for the economic damages. A tortfeasor who is only secondarily liable is not entitled to the benefits of this section.

Duty - Dangerous Condition of Public Property

Thomas Metcalf v. County of San Joaquin, (February 21, 2008)California Supreme Court

Under California law, a governmental entity may be sued for an injury caused by a dangerous condition of its property. The statute creating that liability sets forth certain requirements. This case explores those requirements.Thomas Metcalf, a minor, was seriously injured in an automobile accident that occurred at an intersection in the County of San Joaquin. He was involved in a head-on accident at that intersection. He sued the County for damages alleging the County owned and controlled the intersection and that it constituted a dangerous condition. At issue was whether the intersection was in a dangerous condition, whether sign placement at the intersection was properly placed, and whether the County had notice of any problem at the intersection. Conflicting testimony was presented at trial, and the jury returned with a special verdict indicating the property was in a dangerous condition at the time of the incident. It further indicated the County was not negligent in creating the condition, and that the County did not have notice of the condition for a long enough time to have corrected it. After the verdict, the court entered a judgment in favor of the County. Mr. Metcalf appealed.

The Court of Appeal affirmed. The Supreme Court granted a petition for review.

The Supreme Court affirmed. The Court stated that in California, public entity liability is statutory. In order to establish public entity liability for injuries caused by a dangerous condition of its property, under the statute, the plaintiff has to prove either a negligent or wrongful act of an employee of the public entity within the scope of his employment created the condition or the public entity had actual or constructive notice of the dangerous condition a sufficient time before the injury to have taken measures to protect it against that condition.

On appeal, Mr. Metcalf argued that he did not have to establish negligence or that the negligence he had to establish was different from common law negligence. The Court rejected this argument. The Court stated it was not enough to show any act by a public entity employee created the condition. Instead, under the statute, it must be shown that the employee acted negligently or wrongfully when he created the condition. Merely creating the condition itself is not, per se, culpability.

The Court also noted that an affirmative defense is available to the public entity under a separate Government Code section. This section allows a public entity to show that even if there was negligence or notice, it can avoid liability by showing it acted reasonably in light of the practicability and cost of pursuing alternative courses of action available to it. The Court said this meant that the public entity may show that due to limited manpower and budgets, they were unable to correct the condition. This reasonableness standard is different from the reasonableness standard under the liability section. Under this standard, the public entity may defend on the basis that, because of financial or political constraints, the public entity is not able to accomplish what reasonably it should accomplish.

The Court concluded that negligence under the dangerous condition statute requires the plaintiff to establish the public entity's conduct was unreasonable or that they had notice. If the plaintiff carries that burden, the public entity may defend by showing it acted reasonably in light of the practicability and cost of pursuing of alternative courses of action.

Because the jury found the County was neither negligent nor had notice of the dangerous condition, the County was not liable for plaintiff's injuries. The judgment was affirmed.

COMMENT
This case clarifies the standards for proving a dangerous condition of public property and the facts that a public entity must show to establish a defense. Under these standards, it will be much more difficult for plaintiffs to establish such a case.