



### Adjuster Beware:

### Failure to notify an insured claimant of an applicable contractual limitations clause may prevent the insurer from relying on the clause to defeat a claimant's lawsuit.

By Brent R. Avery, Esq. - Willis & DePasquale LLP

In Superior Dispatch, Inc. v. Insurance Corporation of New York (2010) 181 Cal. App. 4th 175, the court penalized insurers by preventing them from relying on a powerful defense to lawsuits filed by an insured claimant for the recovery of a claim where the insurer fails to notify the insured claimant of any contractual limitations provisions applicable to the claim.

Insurance Corporation of New York ("Inscorp") issued a cargo liability insurance policy to Superior Dispatch, Inc. ("Superior"), a trucking company. The policy contained a contractual limitations provision which required that any lawsuit for the recovery of a claim under the policy be commenced within 12 months after the insured discovered an event that gives rise to a claim.

Superior was hired to carry a dump truck on a flat rack trailer from the Port of Los Angeles to another location. The top of the dump truck struck an overpass while the trailer was passing under a bridge on July 10, 2003.

Superior submitted a claim to Inscorp on July 17, 2003. Inscorp's claims adjuster sent letters to Superior and its legal counsel denying the claims as there was no coverage under the terms of the policy. Inscorp's claims adjuster never notified Superior or its legal counsel that there was a one-year contractual limitations provision applicable to the claim.

Superior filed a lawsuit against Inscorp after the expiration of the contractual limitations period on May 20, 2005, alleging, among other things, that the denial of the claim was in bad faith and that Inscorp failed to provide notice of the one-year contractual limitations provision.

The court concluded that California Code of Regulations section 2695.4(a) requires an insurer to notify its insured claimant of any contractual limitations provisions that may apply to the claim regardless of whether the insured is represented by counsel. The court further concluded that an insured's failure to notify its insured of a contractual limitations provision prohibits the insurer from later relying on the provision.

A contractual limitations provision could be a very powerful tool for the insurer's legal counsel. If the insured claimant brings a lawsuit for recovery of a claim after the expiration of the contractual limitation period, the insurer's legal counsel can rely on the contractual limitations provision to potentially defeat the insured claimant's lawsuit at an early stage in the litigation thereby saving the insurer the cost of having to engage in protracted litigation.

The lesson for claims adjusters is that whenever they are presented with a claim, adjusters should check if there is a contractual limitations provision applicable to the claim. If such a provision applies, or even if the provision only marginally applies, the adjuster should notify the insured claimant of the provision in their first written correspondence to the insured claimant so as to not waive the insurer's ability to later rely on the provision in court.

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### Status Report Now Available by E-mail

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### 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 5154  
Cerritos, CA 90703  
562-802-7822  
Email: info@caiaa.org  
www.caiaa.org

**PRESIDENT**

Sam Hooper  
hooper@hooperandassociates.com

**IMMEDIATE PAST PRESIDENT**

Pete Vaughan  
pvaughan@pacbell.net

**PRESIDENT ELECT**

Phil Barrett  
barrettclaims@sbcglobal.net

**VICE PRESIDENT**

Jeff Caulkins  
jeff.c@johnsrickerby.com

**SECRETARY TREASURER**

William "Bill" McKenzie  
walshadj@sbcglobal.net

**ONE YEAR DIRECTORS**

Kearson Strong  
kearson@claimsconsultantsgroup.com

Rick Kern  
rkern@sgdinc.com

Rick Beers  
NCI63@sbcglobal.net

**TWO YEAR DIRECTORS**

Tanya Gonder  
Tanya@casualtyclaimsconsultants.com

Scott Hannaford  
Hannaford@comcast.net

Art Stromer  
artstromer@hotmail.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

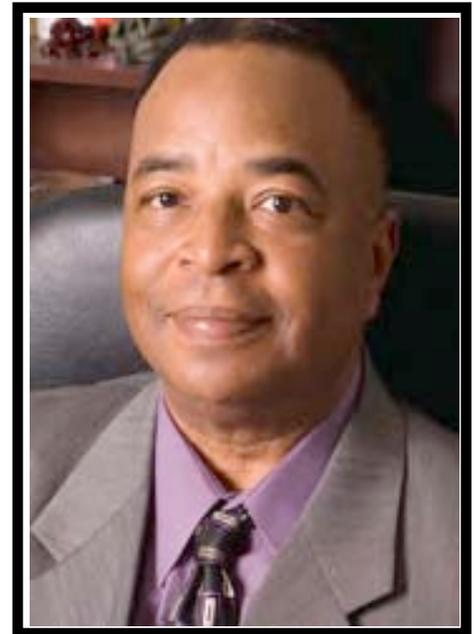
### MID TERM CONTEST WINNER!

Congratulations to Steven Ebner, AIC, AMIM, Claims Specialist with the Insurance Company of The West Group in San Diego. Steve submitted the first correct answer to our March, 2010 Status Report claims question. Using the common ISO policy form, Steve correctly applied the coinsurance calculation resulting in the answer of \$28,072.00. Steve also provided an answer using the AAIS policy form. This form applies the deductible to the entire loss; resulting in a claim payment of \$28,214.85.

Steve has won complimentary attendance at our educational presentations at the upcoming April 30, 2010 mid term meeting at the Universal City Hilton Hotel. This includes breakfast and lunch. We look forward to seeing Steve at the mid term.

It should be noted that we received several other correct responses subsequent to Steve's submission. We certainly hope all individuals seeking to take advantage of the educational program at the mid term (also expected to provide continuing education credits) will attend the Mid Term. The application is contained in this Status Report and is available on our website, www.caiaa.org. While some hotel rooms may still be available, we have extended registration for the event to April 10, 2010.

Focusing on the importance of



comprehensive investigations, our presenters are coordinating with Helene DalCin to finalize the 4-Hour mid term educational presentation. We are proud of these presenters, which include Denis Moriarty and Michael Leahy of the law firm of Haight, Brown & Bonesteel; and accomplished private investigator, David Bunch. As of this writing, DOI approval is pending.

The schedule for our statewide presentation of SEED, FCSPR and SIU seminars was distributed last month by Doug Jackson of Schiffrin, Gagnon & Dickey. If you have yet to receive the schedule, please contact Doug at djackson@sgdinc.com.

We look forward to seeing our members, non members, staff claims professionals, and all seeking professional development at upcoming events.

**SAM HOOPER**

*President - CAIAA 2009-2010*

## New Development Regarding Hanif - Medical Specials Reduction

Submitted by Tony Ellrod - Law offices of Manning & Marder, Los Angeles, CA

Just a quick note impacting California litigation.

Ever since the 1988 decision in *Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635, we have generally been successful in arguing that the amount of special damages recoverable by plaintiff is not the amount of the plaintiff's medical bills, but instead the amount actually paid for the treatment, i.e. getting the benefit of insurance or medicaid write downs.

On November 23, 2009, the court issued its opinion in *Howell v. Hamilton Meats & Provisions, Inc.* (2009) 179 CalApp. 4th 686, holding that the Hanif reduction only applied in medicaid cases, and not to cases involving private insurance, expressly disapproving of the Hanif decision to the extent it could be read to the contrary. This decision was devastating.

I am delighted to inform you that the Supreme Court granted review of Hamilton today. Thus, for the moment Hamilton is no longer good law, and Hanif controls. Let's hope we get a better decision out of the Supreme Court than we did out of the Fourth District!

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## Weekly Law Resume

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

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### Torts- Employer May Be Liable For Damages Caused By Accident Involving Employee Driving Home In Personal Vehicle

*Lobo v. Tamco*, Court of Appeal, Fourth District (February 24, 2010)

Under the theory of "respondeat superior", employers are vicariously liable for tortious acts committed by employees during the course and scope of their employment. A general exception applies where the employee is going or coming from work. Under the "going and coming" rule, employees are generally deemed to be outside of the course and scope of employment during their daily commute. California courts have recognized a limitation on the going and coming rule where the use of the employee's car gives some incidental benefit to the employer. This limitation is tested in this case.

Defendant Luis Duay Del Rosario left the premises of his employer, Defendant Tamco, in his personal motor vehicle. As Del Rosario left the Tamco driveway and turned onto a highway, he collided with a motorcycle driven by Daniel Lobo, a San Bernardino County Sheriff. Lobo was killed in the accident.

Lobo's widow and minor children filed two separate wrongful death actions, which were consolidated. Plaintiffs alleged that Del Rosario was acting within the course and scope of his employment by Tamco at the time of the accident. Tamco filed a motion for summary judgment contending that Del Rosario was not acting within the course and scope when he left work in his personal vehicle. As such, Tamco contended that it could not be held vicariously liable. The trial court granted the summary judgment and Plaintiffs appealed. The Fourth District Court of Appeal reversed.

On appeal, Plaintiffs focused on the limitation to the going and coming rule, where an employer gains some incidental benefit by the employee using his personal vehicle. Plaintiffs presented evidence that Tamco manufactured steel bars used in construction. Del Rosario, a metallurgist, was the manager of quality control. On occasion, Del Rosario would visit a client to go over quality control issues. Del Rosario testified at deposition that he had used his personal vehicle approximately 10 times over 16 years to visit client sites. On those occasions, Del Rosario was reimbursed his driving expenses by the company. Del Rosario did keep work equipment in his vehicle in case he was called upon to visit a client site. Based on this evidence, Lobo argued that Tamco received an incidental benefit from Del Rosario's use of his personal vehicle, thereby negating the going and coming rule.

Tamco contended that in all cases where the limitation to the going and coming rule was applied, driving was an "integral" part of the employee's job. Here, Tamco argued that Del Rosario's occasional use of his own car to visit client sites was insufficient to be deemed an integral part of the job. The Court of Appeal disagreed and held what was important was that Tamco relied on Del Rosario to make his personal vehicle available for the employer's benefit. The Court held that Tamco benefited when Del Rosario could promptly respond to customer complaints- even if this was rare. The Court, therefore, reversed the judgment in favor of the Defendants.

#### COMMENT

This is a harsh decision for employers and could prove to substantially negate the "going and coming" rule in California.

### Damages- Plaintiff Not Prevailing Party Because of Failure to Obtain Net Monetary Recovery

*Goodman v. Lozano*, California Supreme Court (February 4, 2010)

A prevailing party at trial may be entitled to costs and fees. Under C.C.P. section 1032(a)(4), a prevailing party includes "the party with a net monetary recovery." In this case, Plaintiffs Randall Goodman and Linda Guinther contracted with Defen-

*Continued on page 4*

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# Weekly Law Resume

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

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*continued from page 3*

dants Jesus and Natalia Lozano to purchase a newly constructed home. Subsequently, Plaintiffs sued the Lozanos and other defendants, alleging construction defects. Before trial, Plaintiffs settled with all Defendants, except the Lozanos, for the total sum of \$200,000. The case against the Lozanos proceeded to a court trial. The trial judge found in favor of Plaintiffs and calculated a total damage award of approximately \$146,000.

Under CCP section 877(a), an award in a Plaintiff's favor against a non-settling defendant is to be offset by the amount the plaintiff has received from the settling defendants. If the settlement amount is greater than the damage award, the award is totally offset. In this case, the trial judge determined that the Lozanos should receive credit for the pre-trial settlements. Because the settlements were greater than the award at trial, the trial judge ruled that Plaintiffs should receive nothing. The trial judge then determined that the Lozanos were the prevailing parties because they paid nothing, and awarded the Lozanos attorneys fees and costs.

On appeal, Plaintiffs pointed to the case of *Wakefield v. Bohlin* (2006) 145 Cal. App. 4th 963. *Wakefield* held that a party who receives a damage award against a defendant, but whose judgment is offset to zero, still qualifies as a prevailing party with a net monetary recovery. The Court of Appeal disagreed with the holding in *Wakefield* and affirmed the trial court decision. The California Supreme Court then granted review.

The Supreme Court agreed with the Court of Appeal rationale. The Court held that the plain meaning of "net monetary recovery" is to "gain" some amount. The Court reasoned that a Plaintiff that gains nothing after an offset for pre-trial settlements cannot be deemed a prevailing plaintiff. Further, in looking to the Legislative history of section 1032, the Court concluded that a court must factor in the offset issue before making a prevailing party determination. The Court therefore disapproved of the holding in *Wakefield* and affirmed the judgment of the Court of Appeal. In so doing, the Court also held that the trial judge did not abuse his discretion by awarding fees and costs to the Lozanos.

## COMMENT

Over the past month, the California Supreme Court has taken the opportunity to clarify what damages are available to prevailing parties. We earlier reported on the case of *Chavez v. City of Los Angeles* (Weekly Law Resume - JANUARY 21, 2010), in which the Court held that a trial court has discretion to deny a motion for attorney fees in a case that could have been filed as a limited jurisdiction action. Here, the Court has now ruled that a Plaintiff may not to be a prevailing party where there is no net monetary recovery.

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## Coverage Alert

*Submitted by McCormick Barstow*

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### **Federal Court has jurisdiction over declaratory relief action where insurer is seeking reimbursement of amounts exceeding the amount in controversy and action is for money damages and not just for declaratory relief**

*The Burlington Ins. Co. v. Devdharma*, 2009 U.S. DIST LEXIS 79613 (N.D.Cal. 2009).

#### **BACKGROUND FACTS**

Defendants owned and operated a hotel in San Francisco which became the subject of a class action lawsuit for uninhabitable conditions. Burlington and First Financial, defendants' insurers, provided a defense pursuant to various general liability policies issued to defendants. Burlington and First Financial claimed to have incurred defense costs in excess of \$75,000, and settlement obligations on behalf of defendants in the amount of \$700,000. The insurers filed suit in Federal District Court, seeking recovery from defendants for some or all of these costs and obligations, as well as seeking declaratory judgment to the extent necessary to grant the monetary relief requested in connection with the reimbursement claim. Defendants sought dismissal, claiming that the insurers' action did not meet the amount in controversy required to give the District Court jurisdiction and, further, that the District Court should abstain because the action involved a request for declaratory relief.

#### **THE COURT'S RULING**

First, the court found that the amount in controversy clearly exceeded the \$75,000 requirement. With respect to abstention, the court noted that the insurers' action was one for money damages, and the declaratory relief cause of action was not only secondary to, but likely to be dismissed as not necessary for the resolution of the damages claims.

#### **THE EFFECT OF THE COURT'S RULING**

Where an insurer is seeking in a declaratory relief action to also recover amounts expended on behalf of the insured and such amounts exceed \$75,000, jurisdiction is proper in Federal Court.



**CAIIA REGISTRATION FORM**  
**California Association of Independent Insurance Adjusters**  
**MID-TERM MEETING –April 30, 2010**  
*HILTON LOS ANGELES/UNIVERSAL CITY*  
*555 Universal Hollywood Drive*  
*Universal City, California 91608*  
*Tel: 818-506-2500*



**Mention California Association of Independent Insurance Adjusters for special room rates**  
**Attendees must make their own hotel reservation!**

FOR THE MAGIC CASTLE DINNER & SHOW ON 04/30/10 - CONTACT ART STROMER  
 E-mail: [ArtStromer@hotmail.com](mailto:ArtStromer@hotmail.com)

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 Company \_\_\_\_\_  
 Address \_\_\_\_\_  
 Phone \_\_\_\_\_ Fax \_\_\_\_\_  
 E-Mail \_\_\_\_\_

EVENT	COST	#TICKETS	Total Price
<b>Member Meeting Package (**)</b>	\$ 180.00	_____	\$ _____
(Includes Dinner/Reception, Breakfast, CE Class, luncheon, and Business Meeting)			
<b>Non-Member Meeting Package</b>	\$ 190.00	_____	\$ _____
(Includes Dinner/Reception, Breakfast, CE Class, and luncheon)			
<b>Spouse/guest fee (***)</b>	\$ 100.00	_____	\$ _____
<b>4 Hour CE Class (Includes breakfast &amp; lunch (**))</b>	\$ 100.00	_____	\$ _____
<b>Grand Total Payable</b>			\$ _____

**SCHEDULED EVENTS**

Please specify which events you and/or your spouse/guest will actually attend 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 CAIIA or pay by credit card. Mail Registration Fm & payment to:

	You	Spouse/Guest	
04/29 - 6:30 P.M. Cocktails (No Host bar)			
04/29 - 7:30 P.M. Dinner	[ ]	[ ]	
04/30 - 7:00 A.M. Registration/Breakfast	[ ]		
04/30 - 8:00 A.M. Seminar	[ ]		
04/30 - 12:00 P.M. Luncheon	[ ]		
04/30 - 2:00 P.M. Business Meeting (*)	[ ]		
04/30 - 10:00 AM Spouse/Guest lunch (***)	[ ]	[ ]	
04/30 - 6:30 P.M. Magic Castle Dinner/Show Event	[ ]	[ ]	

**Sam Hooper & Associates**  
**17316 Edwards Road, Ste 100**  
**Cerritos, CA 90703**  
**[Sam@hooperandassociates.com](mailto:Sam@hooperandassociates.com)**  
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(\*) **Members only**

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Card Address (City/State/Zip)			

(\*\*) AN ATTENDING MEMBER ORGANIZATION IS REQUIRED TO PURCHASE AT LEAST ONE PACKAGE  
 (\*\*\*) Spouse/guest fee includes dinner on Thursday and lunch on Friday.

**Early registration is encouraged. Cut-off date is March 21, 2010.**



## A NIGHT AT THE MAGIC CASTLE

In coordination with our 2010 Mid-term meeting, the California Association of Independent Insurance Adjusters is offering a night at the Magic Castle to include dinner and one or more shows... all-inclusive in the price of \$85.00 per person. Valet, beverages, and shuttle charges are extra.

Dinner will begin at 6:00 p.m. and consists of a three-course meal with the choice of one entrée from a prefixed menu, including beef, fish, chicken or a vegetarian dish. Salads and scrumptious deserts included.

With dinner you are guaranteed to see the Palace of Mystery Show that starts after your meal. There are also other shows that are an option. The **Close-Up Gallery**, the **Parlour of Prestidigitation**, and...on our night...they will offer extra magic in the **Hat N Hare Pub** and **The Inner Circle**.

There is a dress code. Coat and tie for men. Cocktail dress, pant suit, or pants with a blazer for women. Any questions on attire should be directed to The Magic Castle @ 323 851-3313.

As I have arranged for a member of the Magic Castle to join us, he may perform for some of our members.

Let us know the number of people who will attend. Please respond no later than 2-15-2010. We are working on shuttle arrangements. Send no money now, we will collect funds later.

<u>CAIIA Member/Guest</u>	<u>No. of Attendees</u>	<u>Approx. Unit cost</u>	<u>Total</u>
_____	_____	@ 85.00 ea	\$ <u>0.00</u>

If you have any questions, please email Art Stromer at [artstromer@hotmail.com](mailto:artstromer@hotmail.com)

## CAIIA 2010 Educational Events

As an authorized California DOI education provider (CDI# 198351), the CAIIA will be presenting its annual Seminar on the CA Fair Claim Settlement Practices (**FCSPR**) and Seminar on Special Investigation Unit Regulations (**SIU**) and, at two of the locations, we will also be offering **SEED** (Seminar for the Evaluation of Earthquake Damage) program seminars. The **SEED** program addresses the training and certification required by CCR, Title 10, Chapter 5, Subchapter 7.5.1, Article 1, Sections 2695.40 through 2695.45. Those regulations set forth the requirements of Insurance Adjuster Training for Evaluating Earthquake Damage. We will also be providing **FCSPR** and **SIU** certification at the **SEED** locations.

At locations in Fresno (6/25/10), Glendale (6/17/10), San Ramon (6/3/10), and San Diego (6/16/10), we will be offering only the **FCSPR** and **SIU** seminars.

In Pomona (6/15/10) and Tahoe (6/11/10) we will be offering both the **FCSPR** and **SIU** seminars plus the **SEED** program seminar.

**\*\*The CAIIA has secured 8 CDI Independent Adjuster CE Hours for the SEED Program and 2 CE Hours for the FCSPR/SIU Program!\*\***

Register now for the seminar you wish to attend. Be sure and mark the appropriate location in the box to the right.

Name \_\_\_\_\_  
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 City \_\_\_\_\_ Zip \_\_\_\_\_  
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 E-mail Address: \_\_\_\_\_

Fees (circle one): **FCSPR/SIU** **SEED**  
 CAIIA Member fee \$40.00 \$100.00  
 Ins. Co. Employee fee \$50.00 \$120.00  
 Non-Member I/A fee \$60.00 \$199.00\*

Amount Enclosed - \$ \_\_\_\_\_

Credit Card Payment: Amex \_\_\_\_\_ Visa \_\_\_\_\_ M/C \_\_\_\_\_

Ex. Date: \_\_\_\_\_ Cardholder: \_\_\_\_\_

Card No: \_\_\_\_\_

Card Verification Code: \_\_\_\_\_

Billing Address: \_\_\_\_\_

Signature: \_\_\_\_\_

**Make checks payable to CAIIA**, mail registration and payment to:

CAIIA c/o Peter Schifrin  
 Schifrin, Gagnon & Dickey, Inc.  
 9255 Corbin Avenue, Suite 200  
 Northridge, CA 91324

Questions? Call Peter Schifrin @ (818) 721-4713

Schedule for all locations except San Ramon.  
 San Ramon starts at 9:00 a.m.

Registration 7:30 a.m. to 8:00 a.m.  
**FCSPR & SIU Seminar** 8:00 a.m. to 10:00 a.m.  
**SEED Seminar** 10:00 a.m. to 5:00 p.m.



## FCSPR, SIU & SEED SEMINARS

**June 15, 2010**  
**Pomona:** Shilo Inn  
 3101 W Temple Ave  
 Pomona, CA 91768

**June 11, 2010**  
**Tahoe:** Inn at the Lake  
 3300 Lake Tahoe Blvd.  
 South Lake Tahoe, CA 96150

### FCSPR/SIU ONLY SEMINARS:

**June 25, 2010**  
**Fresno:** Ramada Inn  
 324 E Shaw Ave  
 Fresno, CA 93710-7690

**June 17, 2010**  
**Glendale:** Carl Warren Company  
 500 N Central Ave Ste 400  
 Glendale, CA 91203-3963

**June 16, 2010**  
**San Diego:** American Technologies  
 8444 Miralani Dr  
 San Diego, CA 92126

**June 3, 2010**  
**San Ramon:** San Ramon Community Ctr  
 12501 Alcosta Rd  
 San Ramon, CA 94583

Please visit [www.caiaa.com](http://www.caiaa.com) for more information.

\*CAIIA agrees to offset any membership dues for Non-CAIIA Independent Adjusting Firms joining the CAIIA within 30 days, up to \$80.00 total for each adjuster attending with a cap of \$160.00 per firm.

## For Those of Us Who Remember . . . HOLLYWOOD SQUARES

*These great questions and answers are from the days when Hollywood Squares game show responses were spontaneous, not scripted, as they are now.*

Peter Marshall was the host asking the questions, of course.

Continued from last issue . . .

Q: As you grow older, do you tend to gesture more or less with your hands while talking?

A: Rose Marie: You ask me one more growing old question Peter, and I'll give you a gesture you'll never forget.

Q: Paul, why do Hell's Angels wear leather?

A: Paul Lynde: Because chiffon wrinkles too easily.

Q: Charley, you've just decided to grow strawberries. Are you going to get any during the first year?

A: Charley Weaver: Of course not, I'm too busy growing strawberries.

Q: In bowling, what's a perfect score?

A: Rose Marie: Ralph, the pin boy.

Q: It is considered in bad taste to discuss two subjects at nudist camps. One is politics, what is the other?

A: Paul Lynde: Tape measures.

Q: During a tornado, are you safer in the bedroom or in the closet?

A: Rose Marie: Unfortunately Peter, I'm always safe in the bedroom.

Q: Can boys join the Camp Fire Girls?

A: Marty Allen: Only after lights out.

Q: When you pat a dog on its head he will wag his tail. What will a goose do?

A: Paul Lynde: Make him bark?

Q: If you were pregnant for two years, what would your give birth to?

A: Paul Lynde: Whatever it is, it would never be afraid of the dark.

To be continued . . .