CAIIA Status Report
APRIL 2011

Cabral v. Ralph's Grocery Company, California Supreme Court, filed February 28, 2011

Submitted by Willis DePasquale, LLP – Orange, CA

A truck driver working for defendant Ralphs Grocery Co. (Ralphs) parked his tractor-trailer on the freeway shoulder to have a snack. Adelelmo Cabral (Cabral), plaintiff's husband, was driving home from work when he veered off the freeway and collided at high speed with the rear of the stopped trailer, resulting in his death. At trial the jury found both parties to have been substantial factors in Cabral's death but allocated fault 10% to Ralphs and 90% to Cabral. At the conclusion of the trial Ralphs moved for a judgment notwithstanding the verdict. The motion was denied.

Ralphs appealed and the California Court of Appeal reversed, holding that a JNOV was proper because the accident was too remote to be foreseeable. Cabral appealed. The primary issue before the California Supreme Court was whether a freeway driver owes other freeway drivers a duty of ordinary care in choosing whether, where and how to stop on the side of the road. The court held such duty exists and declined to create an exception for drivers such as Ralphs.

Per *Rowland v. Christian*, the general rule in California is that "each person has a duty to use ordinary care and is liable for injuries caused by his failure to exerciser reasonable care under the circumstances".However, there are several factors that when balanced together may justify a deviation from this principal, including the foreseeability of harm to the plaintiff, the closeness of the connection between defendant's conduct and the injury suffered, and the overall policy of preventing future harm. But the court noted an exception to the general rule should be made only if "clearly supported by public policy".

Before beginning its analysis the court noted two important principles. First, the *Rowland* factors "must be evaluated at a relatively broad level of factual generality", i.e. not on the *particular* facts at hand but more generally whether the type of harm should have liability imposed. Second, an exception should be carved only if "justified by clear considerations of policy". This is important because the determination a plaintiff owed no duty is for the *court* to make, whereas a determination of whether the plaintiff breached its duty is for the *jury* to decide.

The court then turned to the most pertinent Rowland factors: 1) foreseeability of plaintiff's harm, 2) closeness of the connection between defendant's conduct and plaintiff's injury, and 3) the overall policy of preventing future harm. Looking at the first factor of foreseeability in the generalized sense required, the court held it is clearly foreseeable that a vehicle parked by the side of a freeway may be struck by another vehicle leaving the freeway. Sufficient evidence is offered at trial to show that safety standards have been formulated with the goal of avoiding collisions between vehicles leaving the freeway and obstacles alongside the freeway. Even though the area was marked "Emergency Parking Only" that did not mean the area was an inherently safe place to stop, thus rendering the collision unforeseeable, because many acts prudent in an emergency situation would be negligent but for the emergency.

Regarding the second factor, the closeness of the connection between Ralphs' conduct and Cabral's injury, the conduct at issue is unforeseeable only if the injury suffered is distantly and indirectly related to defendant's act. The cases cited by Ralphs on this issue al involved an intervening third party between the defendant's conduct and plaintiff's injury, a situation distinguishable from

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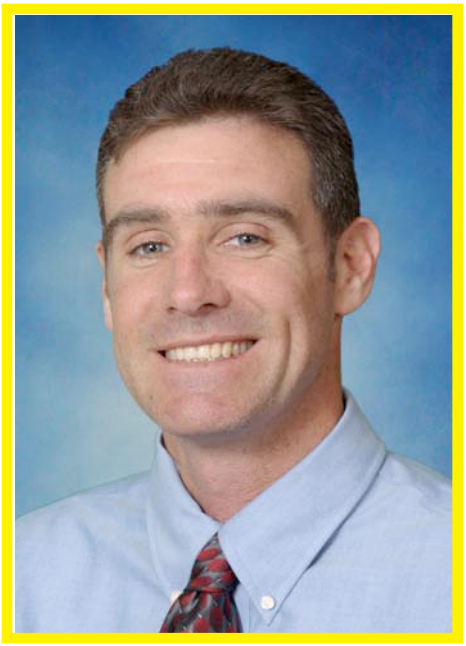
PRESIDENT'S MESSAGE

Every now and then, usually when I'm traveling to/from a claim and have gotten sick of the radio chatter, I stop and question how the business of property and casualty insurance would operate if not for field adjusters. After all, there are a number of claims that get processed these days without an adjuster physically reaching the location of the loss. Yet, while I can't always quantify it, I know that I have been able to make more than a worthwhile difference on nearly every claim I have handled. In some cases, it has made the difference between accepting liability and/or rejecting it. Sometimes, an alert, conscientious investigation will reveal details that, without the experienced sensory perceptions and interpretations of the seasoned field adjuster, would have obviated the opportunity for successful subrogation. In nearly every field investigation, I conclude the claim knowing that I have helped enhance the administration of good faith, created proof of such and thus minimized the prospect of a lawsuit for breach of contract. And isn't that what we are ultimately her for? To serve the customers of the insurer by resolving claims in a casual and friendly way, while minimizing the frustratingly slow, expensive prospect of litigation?



By intervening face to face with the policy holder and/or claimant, we have an opportunity to supplant the all too common perception that insurance companies are only interested in collecting premiums and only honor a claim when forced. It's all in the attitude. If the policy holder or claimant can be impressed that we arrive with the objective of completing a thorough, exhaustive investigation for the sake of determining how the policy can respond to their benefit (even though sometimes it doesn't) we are well on our way to establishing a productive rapport, which is facilitative of the honesty and candor that is likely to product the resolution preordained when the insurance contract was first written and agreed to by its signatories.

The chance of a resolution that is understood and appreciated by all parties can often be enhanced simply by sending the most local, qualified adjuster out on the claim. In my territory, the population is relatively small in relation to the geographic territory and in many cases I may already know the insured or claimant I am working with before receiving the assignment. When it is understood by both parties that they may be dealing with each other again sometime, they are more likely to be forthright and fair with one another. At least that's been my experience.

Sometimes, as in the case of loss and damage to a building, the defacto negotiator for the insured is their contractor. If the local competent and qualified adjuster is placed on the claim, chances are that he/she is already familiar with that contractor who know a little bit about what to expect from the process from past dealings. Conversely, the uncertainty of dealing with an unfamiliar adjuster can make contractors wary and unsure and thus less likely to engage in the free flow of communication that helps us strike our target; a unanimously satisfactory resolution between the contractor, policy holder and insurer. In my experience and for similar reasons, liability claims and property claims where a Public Adjuster represents the policy holder tend to settle more efficiently and amicable when there is famil-

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Cabral v. Ralphs Grocery Company . . .

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the facts at hand.

Finally, the third factor, the overall policy of preventing future harm, asks whether the cost of imposing liability is outweighed by laws or custom indicating an approval of the conduct or by the undesirable consequences of allowing potential liability. The court noted that Ralphs conceded its driver may be ticketed for stopping in an emergency area for non-emergency reasons. Simply put, the Ralphs driver had other options for places to stop including rest areas, truck stops, and other parking areas near freeway exits where he could engage in non-emergency activities.
The court thus held that drivers such as the defendant owed other drivers a duty of ordinary care not to park on the freeway shoulder in a non-negligent manner and declined to create an exception. What is at issue in such cases is whether there was a *breach* of that duty, which is question of fact for the jury. Therefore Ralphs was not entitled to a JNOV on the basis of a lack of legal duty and the court of appeal judgment was reversed.

Coverage Alert

Submitted by McCormick Barstow

Conversion of cash does not constitute "loss of use of tangible property" under CGL policy.

Advanced Network, Inc. v. Peerless Ins. Co., 190 Cal.App.4th 1054 (2010)

BACKGROUND FACTS

ANI contracted with Mission Federal Credit Union to service its cash distribution machines. It was subsequently discovered that an ANI employee had stolen approximately $2 million in cash from Mission Federal. Mission Federal made a claim against its fidelity bond holder, Cumis Insurance Society, which paid the claim and then sued ANI. ANI tendered the defense of the lawsuit to its CGL carrier, Peerless. Peerless denied the claim on the ground that there was no "property damage" as money is not tangible property and because theft would not be an "occurrence." ANI subsequently settled with Cumis and commenced an action against Peerless for breach of contract and bad faith. Both parties moved for summary judgment and/or summary adjudication. The trial court granted ANI's motion for summary adjudication as to Peerless's duty to defend on the ground that Mission Federal sustained a "loss of use" of the cash. The court further found that the theft, from the standpoint of ANI, was accidental. The matter proceeded to trial and Peerless was found to have breached the duty to indemnify as well as the duty of good faith and fair dealing. Punitive damages and Brandt fees were also awarded. Peerless appealed.

THE COURT'S RULING

In reversing the trial court, the Court of Appeal relied heavily on *Collin v. American Empire Ins. Co.* (1994) 21 Cal.App.4th 787. In Collin, the court held that conversion of property did not amount to "loss of use." Although the Collin court recognized that the plaintiffs had lost the use of their property, the damages they recovered were not "loss of use" damages, but instead the value of the property itself.

Applying this reasoning, the Court of Appeal in the present case determined that the phrase "loss of use" is not synonymous with the term "loss" for insurance purposes. Coverage for "loss of use" is not triggered when the only damages sought represent the replacement value of converted property.

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PRESIDENT'S MESSAGE

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iarity and past experience between the capable field adjuster, attorney and PA.
The CAIIA is a marvelous resource for insurers, self insured entities and TPAs with a need for claim assistance in California. Our directory and website can help you zero in on the closest and most qualified claims professionals who are able to deliver the best results possible for your claim. If you would like a directory, (PDF or Printed), please feel free to contact me, or, navigate to our website, www.caiia.com. At the top center of the home page you will find the "Members" tab which has a drop down menu. On the drop down menu, select "Member Search". Here you can enter the name of the city/town or zip code and a range in miles which will provide you a list of all of our members within that range, including a complete profile of each firm and the types of claims for which they are capable. With a dedication to professionalism in the business, our capable members will provide your organization the best chance possible to make your claim resolve the way the insurance contract intended.

PHIL BARRETT
President - CAIIA 2010-11

Coverage Alert

Submitted by McCormick Barstow

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THE EFFECT OF THE COURT'S RULING

The court's holding follows prior California appellate decisions to the effect that damages for replacement of converted property do not qualify as "loss of use." However, of significance is footnote 2 in the court's opinion. In that footnote, the court points out that ANI argued that the term "loss of use" should be interpreted as including actual loss of cash since there is no rental value for cash. The court noted that rental value is not the only measure of damages for loss of use of property. Since financial institutions make money through use of money, temporary deprivation of large sums of cash could cause damages such as lost interest or lost profits on investments. It is unclear whether this court would have found that a complaint containing such allegations would have been sufficient to trigger an obligation to defend.

Insurance Law Flash

Submitted bySedgwick, Detert, Moran & Arnold, LLP

California Supreme Court Holds That Innocent Insured Is Not Subject to Intentional Act or Criminal Conduct Exclusion in Fire Insurance Policy

By: Laura Goodman

On February 17, 2011, the California Supreme Court held in *Century-National Insurance Co. v. Jesus Garcia, et al.*, Case No. S179252, that an exclusion in a fire insurance policy excluding coverage for losses caused by the intentional act or criminal conduct of "any insured" impermissibly reduced coverage statutorily mandated by the Insurance Code provisions regulating fire insurance policies.

Plaintiffs Jesus Garcia Sr., and his wife, Theodora Garcia, (the "Garcias") suffered substantial damage to their home when their adult son set fire to his bedroom. Jesus Garcia Sr. was a named insured in an insurance policy issued by Century-National Insurance Company under which both his wife and his son also qualified as insureds. Century-National denied the Garcias' claim for fire damage on the ground that its policy contained an intentional acts exclusion, excluding coverage for the intentional acts or criminal conduct of "any insured". The trial court sustained Century-National's demurrer to the Garcias' complaint without leave to amend and the appellate court affirmed. The Supreme Court reversed.

The Supreme Court began its analysis by noting that all fire insurance policies in California are regulated by the Insurance Code. Pursuant to Insurance Code section 2070, "[a]ll fire policies. . . shall be on the standard form, and except as provided by this article shall not contain additions thereto. No part of the standard form shall be omitted therefrom except that any policy providing coverage against the peril of fire only, or in combination with coverage against other perils, need not comply with the provisions of the standard form of fire insurance policy . . . ; *provided, that coverage with respect to the peril of fire, when viewed in its entirety, is substantially equivalent to or more favorable to the insured than that contained in such standard form fire insurance policy".* Thus, the fire insurance coverage must be at least "substantially equivalent" to that provided by the standard form prescribed in Insurance Code section 2071.

The court acknowledged that the statutory standard form contains no express exclusion for losses caused by intentional acts or criminal conduct but recognized that Insurance Code section 533 represents an "implied exclusionary clause which by statute is to be read into all insurance policies ("[a]n insurer is not liable for a loss caused by the willful act of *the* insured")". The court noted that the term "*the* insured" as used in section 533 is construed as not barring coverage for innocent coinsureds. It thus held that the standard form fire policy must be construed as including a willful acts exclusion that is protective of innocent insureds. The court also discussed additional language in the standard fire insurance policy form that uses the term "*the* insured" as opposed to "*any* insured" and found that the language "evinces the Legislature's intent to ensure coverage on a several basis and protect the ability of innocent insureds to recover for fire losses despite the acts of a coinsured". The Supreme Court noted that courts in other jurisdictions with identical or very similar standard form fire policies have reached the same conclusion, "i.e., that an insurance clause purporting to exclude coverage for an innocent insured based on the intentional acts of a coinsured impermissibly reduces statutorily mandated coverage and is unenforceable to that extent". In a footnote, the court expressly acknowledged that its analysis and decision was limited to insurance fire policies subject to the requirements of Insurance Code sections 2070 and 2071 and "should not be read as necessarily affecting the validity of clauses that deny coverage for the intentional acts of 'any' insured in other contexts."

Weekly Law Resume

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

Statute of Limitations Bars a Viable Sexual Harassment Claim

Irene Trovato v. Beckman Coulter, Inc., et al. Court of Appeal, Fourth District, Division Three (January 27, 2011)

In this case, the Court of Appeal upheld the trial court's decision granting summary judgment in favor of an employer and an employee-supervisor on the ground that the one-year statute of limitations had run against a former employee's claim of sexual harassment and retaliation. While it was clear to the Appellate Court that there was a triable issue of material fact as to whether the former employee was sexually harassed, the Court concluded that the statute of limitations had run on her claims. The last act of harassment or retaliation occurred in January, 2007, and the administrative complaint was not filed until May, 2008, three months after the applicable statute ran.

The plaintiff, Irene Trovato ("Trovato"), began working for Beckman Coulter, Inc. ("Beckman") as a sales representative in January, 2006. Michael Allyn ("Allyn") was Trovato's direct supervisor for part of her employment at Beckman. Trovato submitted a letter of resignation on May 14, 2007 with an effective date of May 25, 2007.

On May 8, 2008, Trovato filed an administrative complaint against Beckman with California's Department of Fair Employment and Housing ("DFEH"). Trovato sued Beckman and Allyn on May 22, 2008. Trovato's complaint asserted causes of action for harassment in violation of Government Code § 12940(j), and retaliation in violation of Government Code § 12940(h).

Before filing a lawsuit for harassment or retaliation, a party must file an administrative complaint with the DFEH. The administrative complaint must be filed within one year of the date on which the unlawful practice occurred pursuant to Government Code § 12960(d). The statute of limitations starts to run from the time of the conduct constituting sexual harassment. According to the undisputed evidence, the last act of harassment by Allyn against Trovato, and the last act of retaliation by Beckman and Allyn against Trovato, occurred on or about January 31, 2007, when Allyn gave Trovato her 2006 performance review. Therefore, Trovato's administrative complaint had to be filed within one year from January 31, 2007. However, Trovato's administrative complaint was filed with the DFEH on May 8, 2008, more than three months too late.

To establish the triggering of the statute of limitations on January 31, 2007, Beckman and Allyn offered into evidence Trovato's deposition testimony that there was not "any subsequent incident of alleged sexual harassment involving Mr. Allyn" after the performance review on that date. They also offered Trovato's deposition testimony that she could not recall any incidents of retaliation after November, 2006. In support of her opposition to the motion for summary judgment, Trovato submitted a declaration, dated July 30, 2009, in which she stated: "From January 2007 through May 22, 2007, Allyn is not my manager at Beckman, but he is still harassing me." However, Trovato did not identify any acts of harassment or retaliation occurring after January 31, 2007.

The Court found that the conclusory statements in Trovato's declaration were not sufficient to raise a triable issue of material fact on the statute of limitations issue, and she could not defeat the granting of summary judgment by contradicting her sworn deposition testimony on material points in a later-filed declaration. The Court found that Trovato did not offer any admissible evidence that, after January 31, 2007, Allyn harassed her or that she suffered any adverse employment actions, much less that such conduct was causally linked to her reporting of Allyn's sexual harassment in the Summer of 2006.

Trovato also argued that the "continuing violation doctrine" applied and saved her case. The continuing violation doctrine "allows liability for unlawful employer conduct occurring outside the statute of limitations if it is sufficiently connected to unlawful conduct within the limitations period."

Beckman and Allyn argued that the continuing violation doctrine did not apply because no act of harassment or retaliation occurred during the limitations period, i.e., between February 1, 2007 and January 31, 2008. The Court agreed, indicating that Trovato had not identified any conduct occurring within the limitations period that was similar in kind to the conduct that fell outside the period.

COMMENT

While a party may be able to show triable issues of material fact with regard to sexual harassment and retaliation, the party must file an administrative complaint with the DFEH within one year of the date on which the unlawful practice occurred or their case will not go forward. The statute of limitations starts to run from the time of the conduct constituting the harassing conduct. A party cannot contradict sworn deposition testimony on material points in a later-filed declaration in an effort to raise a triable issue of material fact on the statute of limitations issue. Further, the "continuing violation doctrine" only applies if the conduct occurring within the limitations period is similar in kind to the conduct that falls outside the period.

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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.

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EVENT	COST	#Attendees	Total Price
Member Convention Package (Includes Thursday Cocktail Hr/Dinner, complete convention schedule)	$150.00	_____	$_____
Non-Member (**) Convention Package (Includes Dinner Breakfast, CE Class/ lunch)	$170.00	_____	$_____
Non-Member Breakfast, CE, Lunch Only	$100.00	_____	$_____
Spouse/guest fee (***)	$100.00	_____	$_____
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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 CAIIA or pay by credit card. Mail Registration Form & payment to:

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4/29 – 7:00 AM	Continental Breakfast	[ ]	
4/29 - 8:00 AM	Continuing Education	[ ]	
4/29 – 1:30 PM	Board Meeting*(All Members Welcome)	[ ]	
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**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.

CAIIA 2011 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 (6/24/11), Burbank (6/13/11) and San Diego (6/23/11), we will be offering only the FCSPR and SIU seminars.

In Pomona (6/7/11) and Sacramento (6/16/11) 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.

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Schedule for all locations 8:00 am:

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 7, 2011
Pomona: Shilo Inn
3101 W Temple Ave
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_____June 16, 2011
Sacramento: DoubleTree Hotel
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Sacramento, CA 95815

FCSPR/SIU ONLY SEMINARS:

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324 E Shaw Ave
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_____June 13, 2011
Burbank: Holiday Inn Media Center
150 E. Angeleno Ave.
Burbank, CA 91502

_____June 23, 2011
San Diego: American Technologies
444 Miralani Dr.
San Diego, CA 92126

Please visit www.caiia.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.*

WAL-MART SENIOR GREETER

You just have to appreciate this one.

Charley, a new retiree-greeter at Wal-Mart, just couldn't seem to get to work on time.

Every day he was 5, 10, 15 minutes late. But he was a good worker, really tidy, clean-shaven, sharp-minded and a real credit to the company and obviously demonstrating their "Older Person Friendly" policies.

One day the boss called Charley into the office for a talk. "Charley, I have to tell you, I like your work ethic, you do a bang-up job, but your being late so often is quite bothersome."

"Yes, I know boss, and I am working on it," said Charley.

"Well good, you are a team player. That's what I like to hear. It's odd though" said the boss, "your coming in late. I know you're retired from the Armed Forces. What did they say if you came in late there?"

Charley replied, "They said, 'Good morning Admiral, can I get you coffee, Sir?' ".