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May 2016

## Sophisticated User Defense Does Not Extend to Salesman

Credit to: Low, Ball & Lynch, San Francisco, CA

### Richard Moran III v. Foster Wheeler Energy Corporation

Court of Appeal, Second Appellate District  
(April 13, 2016)

In 2008, the California Supreme Court unanimously held that the "sophisticated user" defense applies in California to both negligence and strict liability causes of action. Under the sophisticated user defense, "a manufacturer is not liable to a sophisticated user of its product for failure to warn of a risk, harm, or danger, if the sophisticated user knew or should have known of that risk, harm, or danger." (*Johnson v. American Standard*, (2008) 43 Cal.4th 56) Because sophisticated users are charged with knowing the particular product's dangers, the failure to warn about those dangers is not the legal cause of any harm that product may cause. Since 2008, significant aspects of the sophisticated user defense have evolved based on the varying fact situation. This case considered whether the plaintiff, a salesman of asbestos-containing products, was a sophisticated user, as alleged by the defendant manufacturer.

Richard Moran worked as a salesman for Kaiser Refractories from 1968 to 1980. His job involved sales of asbestos-containing insulation, including refractory materials which are designed to insulate metal surfaces of industrial boilers and heaters. His clients owned or operated very large industrial facilities, such as oil refineries, foundries, cement plants and steel mills. Mr. Moran spent 75% of his time overseeing the installation and removal of refractory from boilers at his clients' facilities from either inside the boiler or fewer than ten feet away. About half of the boilers were manufactured by defendant Foster Wheeler. The boilers were massive. A complete removal of the insulating material took a crew three days; and installation of new material took five days. Both processes created huge amounts of asbestos - containing dust that Mr. Moran inhaled on almost a daily basis.

Mr. Moran was diagnosed with mesothelioma in 2011. He filed suit in Los Angeles County Superior Court against manufacturers and suppliers of asbestos-containing products, including Foster Wheeler, alleging causes of action for strict liability and negligence/failure to warn. Foster Wheeler was the sole remaining defendant at trial.

Mr. Moran testified that he considered himself "somewhat of an expert" in the processes of installing and removing refractory product in boilers and heaters. But he was "certainly not" an expert regarding the components of refractory products or the health hazards of asbestos. Kaiser did not reveal proprietary information about their products' specific composition. Therefore, Mr. Moran did not know which of the Kaiser refractory products he sold contained asbestos. While he saw the word "asbestos" on Foster Wheeler's manufacturing specifications and catalog, the word did not register a health concern in his mind. Mr. Moran never observed any warnings on the new refractory products because the products were removed from their boxes prior to his involvement with any installation. Any warnings that did exist would have been placed on the packaging materials.

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### CAIIA Newsletter

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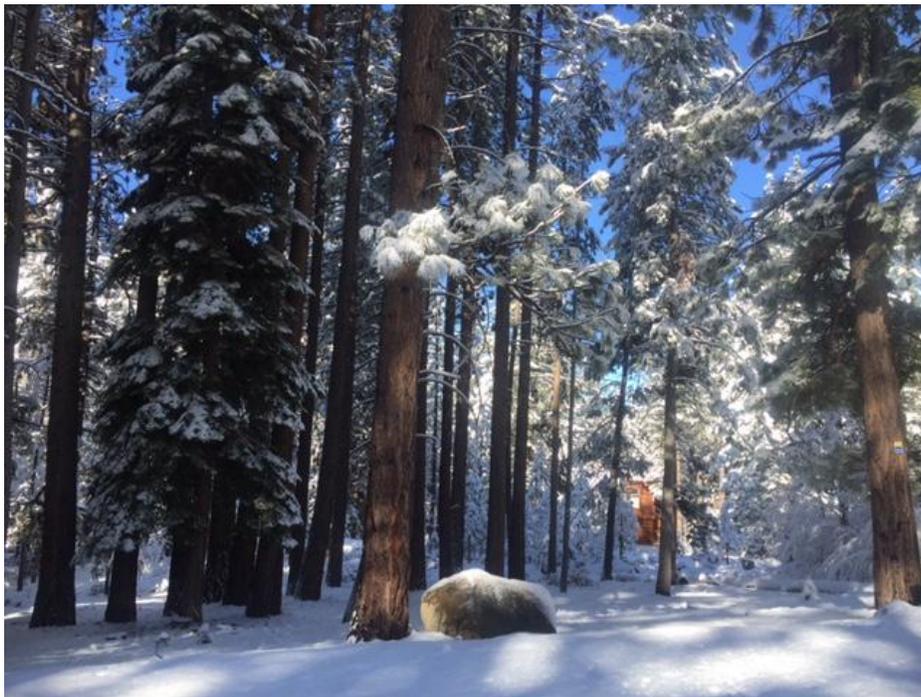
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**President's Message**

Happy Spring to all of you. I cleaned the garage, put away my snow thrower, took out the bicycle and then it snowed 8 inches! So much for timing.



We have discussed first impressions, (the camouflaged claims person) but how about building or changing a reputation? A customer went into a national store to make a purchase. The key to savings in this store is bulk purchase. The customer observed a table of bagels advertised as 2 for 1 purchase savings. Sounds good so far...

This customer, who resides alone, wanted the bagels, but not two sleeves as they would go to waste. One sleeve was purchased and the customer got in line for check out. As the conveyer belt brought the items forward, the clerk questioned the customer whether they knew this was a 2 for one savings. The customer responded acknowledging the offer, but declined stating they did not want the bagels to go to waste.

The clerk, being an ever so efficient employee, offered suggestions that the extra sleeve of bagels could be frozen and used later. The customer politely declined, noting the bagels were for some expected company and he would normally not make this purchase. Again the clerk stated this is a 2 for 1 deal and the person next in line offered advice that the extra sleeve could be frozen for later use. Exasperated, the customer asked the person next in line whether they would like the extra sleeve of bagels. The offer was accepted as another clerk arrived with the additional bagels.

The customer, relieved that this was over, headed for the exit. Now at this store, your receipt is checked to verify your purchases. The exit clerk looking over the receipt points out the customer only has 1 sleeve of bagels. The customer, starts to explain the event at the cash register, when the exit clerk interrupts, "oh you're the bagel guy" and lets him out the door.

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**NEWS FOR OUR MEMBERS**

*Editor's Note: Your Board of Directors has updated the Code of Ethics for all members of the Association. All members are urged to review the new standards and apply them to your business.*

**CAIIA CODE OF ETHICS**

1. To conduct ourselves, at all times, so as to command respect within the insurance industry and the general public.
2. To be unbiased and open-minded when conducting insurance investigations, so as to be fair with the insured and/or claimant, and the insurer.
3. To make accurate, truthful, and impartial reports based on the facts obtained.
4. To treat all individuals with fairness, competence, integrity and respect when investigating, or interacting, with individuals, so as to promote good will toward the business of insurance.
5. To avoid any undue influence, or acting in such a way as to influence the resolution of insurance claims in an unjust manner.
6. To avoid improper, or the appearance of improper, relationships and alliances so as not to call into question the integrity and honesty of the insurance industry.
7. To refrain from improper and unprofessional solicitation of business.
8. To be vigilant in respect to changes in insurance industry forms, methods, practices and procedures in order to provide the public with the highest quality of service.
9. To work in an economically efficient manner in order to promote respect within the insurance industry.
10. To serve the insurance industry and the general public with fairness and to cooperate with industry representatives, insurers and the general public in the proper handling of insurance claims.
11. To work in cooperation and good will with other insurance industry representatives, clients and the public in order to foster kinship amongst ourselves and with the insurance industry.

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It doesn't take much to earn a reputation and in our industry, it is not uncommon to arrive on a loss scene and be greeted with "oh, you must be the insurance" and not in a positive manner. That is not where we want to start, because for the most part, the person we are assisting has never had a claim. We, because of our claim handling experience, know the process and can provide the explanation address their concerns.

They key to good communication is based upon knowledge and experience. We all have to remember there is something new to learn every day. Take advantage of continuing education where it is offered and make sure it is a credited course approved by the Department of Insurance.

The CAIIA is offering courses in several parts of the State of California in May, June and possible July in the Sacramento area. SEED, **Seminar for the Evaluation of Earthquake Damage**, which includes the **California Fair Claims Settlement Practices Regulations**, is an 8-hour CE approved course by the California Department of Insurance. If you did not receive our invitation, please go to [www.caiaa.com](http://www.caiaa.com) and click on the link for the SEED and FCPSR Seminar. We have also included an application in this issue on page 7.

We had our Mid-Term Meeting on April 8 in San Diego. Thanks to Mark Hall of the Hall Law Firm for teaching a 3 hour DOI approved class on ethics. We were also able to update the CAIIA Code of Ethics, which will soon be uploaded to our website. I am also proud to state that the CAIIA voted to award two \$1,000 scholarships to California State University, Fullerton, applicable to the Center for Insurance Studies. The scholarship will be administered by the school and the CAIIA will be represented at the awards ceremony.

**Save the date.** We are tentatively scheduling our CAIIA Annual Meeting on October 6 and 7, 2016 on the Queen Mary in Long Beach, California. More details to follow, but please mark your calendars as time seems to pass way too fast.

Thanks for taking the time to read, see you next month.

**Paul R. Camacho, ARM, RPA**  
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Paul Camacho  
CAIIA President

## DOI Announcement

### **Organized crime ring busted for auto collision fraud**

*Nine charged for submitting fraudulent claims for crashes that never occurred*

**SAN JOSE, Calif.** - Juan Ortiz Velazquez, 27, of San Jose and owner of Carlos Auto Body, was arrested with seven other suspects and charged with multiple counts of felony insurance fraud for allegedly filing 20 fraudulent claims to four insurance companies for crashes that never occurred-leading to more than \$140,000 in losses.The ninth suspect remains at large and is being sought.

"California is ground zero for staged auto collisions," said Insurance Commissioner Dave Jones. "Organized crime rings are responsible for the majority of staged collisions, which are costly to insurers and consumers. The multi-agency Urban Grant Task Force is one of our most effective weapons in eradicating these crimes."

After receiving an anonymous tip and a suspected fraud referral from a victim insurer in 2012, the Department of Insurance launched an investigation. Evidence revealed the alleged crimes, which led to today's arrests and the discovery that a second body shop, Filo's Auto Body, owned by Filomeno Arreguin Lucatero, was also involved in the fraud scheme.

Detectives uncovered evidence that Velazquez paid his co-conspirators \$500 each to allow him to damage their vehicles, submit claims to the insurance company, and collect payment from the insurers. Detectives also found evidence that Velazquez and Lucatero did not complete some work as it was ordered on damage estimates.

This case is being prosecuted by the Santa Clara County District Attorney's Office.

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Plaintiff's industrial hygienist, John Templin, presented evidence of the pertinent industry standards, including those from OSHA, relating to the occurrence of asbestos-related illness. He testified that by 1968, Foster Wheeler knew of the health hazards of inhaling asbestos dust and should have warned Mr. Moran. Yet Foster Wheeler failed to provide any warnings in its specifications until several years after acquiring such knowledge, as evidenced by their own corporate representative's testimony. Mr. Templin also testified that many of the facilities where Mr. Moran worked on boilers did not comply with OSHA warnings and monitoring, or the facilities were so large that the required air sampling was not taken in the vicinity where Mr. Moran was working.

Foster Wheeler cross-examined Mr. Moran's witnesses, but did not put on any witnesses of its own. It argued that Mr. Moran must have known of the dangers of asbestos because his large industrial clients must have instituted warnings and safety precautions as required by various regulations. Foster Wheeler was granted a modified sophisticated-user jury instruction. The jury found in favor of Foster Wheeler, concluding Mr. Moran was a sophisticated user of refractory materials and that Foster Wheeler had no duty to warn him of the danger associated with his exposure to the asbestos. Mr. Moran appealed, asserting that the evidence was insufficient to support a finding of his sophisticated user status.

The Court of Appeal reasoned that Foster Wheeler knew or should have known of the risks of asbestos exposure as early as 1968 and did nothing to warn individuals such as Mr. Moran. The general state of knowledge regarding asbestos at the time could not be imputed to Mr. Moran without some evidence regarding how he obtained that information. Foster Wheeler's argument that Mr. Moran must have known of these dangers because his industrial clients must have instituted warnings and safety precautions "falls under its own weight." Foster Wheeler presented no evidence regarding the knowledge of salesmen like Mr. Moran. Thus, the only evidence of Mr. Moran's knowledge was his own testimony. While he could recommend products, he did not hold himself out to be an expert in those products and had no training or knowledge regarding asbestos. Although federal regulations took effect in 1972 and Mr. Moran's clients likely complied with them, the Court found this implication was very weak evidence of his knowledge.

John Templin's testimony that not all of Mr. Moran's clients could have failed to implement the federal regulations was not enough to establish the kind of specific, industry-wide knowledge sufficient to infer that those involved in the industry knew or should have known about the dangers of asbestos. The Court found that the absence of expert testimony regarding peer group knowledge was notable even though it may not always be required to prove the sophisticated user defense.

The Court held that Foster Wheeler relied largely on negative inferences from disbelief of Mr. Moran's testimony to prove that he was a sophisticated user, and it presented no affirmative evidence that the cancer risk from exposure to asbestos dust was so generally known in Mr. Moran's peer group that he knew or should have known that risk. Thus, the evidence was insufficient to support the sophisticated user defense. The case was remanded for a new trial.

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#### **Suspects in Custody - Eight of the nine suspects charged are in custody**

- Jose Caro Curiel, 46, Santa Clara, CA
- Melissa Duarte, 27, Hollister, CA
- Filomeno Arreguin Lucatero, 45, Milpitas, CA
- Angel Resendiz, 39, Gilroy, CA
- Manuel Resendiz, 40, Los Banos, CA
- Deisy Ramirez Robles, 27, San Jose, CA
- Lorenzo Robles Ramirez, 25, San Jose, CA
- Juan Ortiz Valezquez, 27, San Jose, CA

***Childhood Sexual Abuse - Delayed Accrual of Plaintiff's  
Credit to Low, Ball & Lynch, San Francisco, CA***

*Latrice Rubenstein v. Doe No. 1, et al.*

Court of Appeal, Fourth Appellate District

(March 22, 2016)

Generally, a civil cause of action for child molestation accrues at the time of the molestation, but delayed discovery principles may apply to a cause of action arising out of childhood sexual abuse. Code of Civil Procedure section 340.1 provides that an action for damages suffered as a result of childhood sexual abuse must be filed "within eight years of the date the plaintiff attains the age of majority or within three years of the date the plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by the sexual abuse, whichever period expires later." (§ 340.1 (a).) Where the action is against an entity that employed or supervised the individual perpetrating the abuse, the action cannot be filed after the plaintiff's 26th birthday (§ 340.1 (b)(1)) unless the entity "knew or had reason to know, or was otherwise on notice, of any unlawful sexual conduct by an employee, volunteer, representative, or agent, and failed to take reasonable steps, and to implement reasonable safeguards, to avoid acts of unlawful sexual conduct in the future by that person . . ." (§ 340.1 (b)(2).) In this case, the Appellate Court addressed the question of whether the delayed accrual rule applies to public entities and the six-month period for filing a government claim.

In 1993, Latrice Rubenstein, a high school student, was sexually molested by her cross-country and track coach. The coach was an employee of defendant Doe 1, a public entity. In early 2012, when Rubenstein was about 34 years old, the latent memories of the sexual abuse resurfaced. She filed a claim under the Government Claims Act (Gov. Code § 810 et. seq.) with the defendant public entity, but defendant denied the claim as late filed. Later that year, she filed a complaint against defendant in Imperial County without the required certificates of merit from a licensed mental health practitioner showing there is a reason to believe that plaintiff suffered childhood sexual abuse. (§ 340.1(h)). She ultimately dismissed the action. She then filed a complaint in San Diego County that included certificates of merit as to Doe 1 and an individual not named in the complaint. She also filed a petition for relief under Government Code section 946.6. The trial court granted Rubenstein's petition.

The trial court later granted defendant's motion to change venue to Imperial County. After the case returned to Imperial County, defendant demurred to the complaint. In lieu of opposing the demurrer, Rubenstein filed a first amended complaint. Attached to the complaint were the previously-filed certificates of merit from her attorney and a psychiatrist.

Defendant again demurred. The trial court sustained the demurrer without leave to amend on several grounds, including its finding that Rubenstein's failure to comply with the procedural hurdles of section 340.1 within 30 days of the order granting her Government Code section 946.6 petition rendered her claim against defendant fatally time barred. The trial court dismissed the action. Rubenstein appealed.

On appeal, defendant argued that the trial court lacked jurisdiction to grant Rubenstein's petition because she filed the petition more than a year after her cause of action accrued in 1994 when the last molestation occurred, and that she had six months from the date of accrual to file a claim. The Appellate Court disagreed. In its view, the question presented was whether Rubenstein alleged facts invoking the statutory delayed discovery rule for a non-abuser entity as described in section 340.1(b)(2). The Court found that the allegations in the complaint were adequate for pleading purposes: Rubenstein alleged that defendant and its employees owed her a duty of care and defendant was vicariously liable for the negligence of its employees who knew or should have known about the coach's unlawful sexual conduct. Defendant's employees knew or should have known that the coach had previously engaged in unlawful sexual conduct with minors, but defendant hired him to work directly with minors while failing to protect Rubenstein from his foreseeable danger.

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Defendant also argued that the trial court properly sustained the demurrer without leave to amend because Rubenstein failed to file the required certificates of merit within 30 days after the trial court granted the petition. Rubenstein argued that she filed timely certificates of merit when she filed the complaint in March, 2013, and thus she did not have to re-file the certificates or a new complaint within 30 days after the trial court's ruling. The Appellate Court agreed with Rubenstein, noting that when she filed the petition for relief, she simultaneously filed her complaint alleging compliance with the claims statutes and attaching the required certificates. It was not necessary for her to undertake the "idle act" of re-filing the complaint and certificates again after the order.

The Appellate Court also addressed the trial court's ruling sustaining the demurrer without leave to amend on the grounds that the certificates of merit contained no facts, and the mental health practitioner did not sign the certificate under penalty of perjury. The Appellate Court concluded that the certificates were not required to be filed under penalty of perjury, but they were required to contain sufficient factual support to allow the trial court to determine whether there was a meritorious cause for filing the action. Because Rubenstein's certificates were deficient, the trial court should have allowed her leave to amend to correct the deficiencies. Thus, the Court reversed the judgment of dismissal and remanded the case to the trial court with directions to enter an order sustaining the demurrer with leave to amend.

### ***Witness Preparation***

#### ***Credit to : Tyson and Mendes, La Jolla, CA***

Last month two Arizona District Percipient witness depositions are part and parcel of the discovery process. Witness deposition preparation is a crucial element of that process. If your client is a corporate entity, it may have some say in the witnesses it chooses to defend and prepare for deposition. To follow are some pointers on the timing of deposition preparation, representing former employees, and witness education.

#### **Timing of Deposition Preparation**

The deposition process can be an anxiety-provoking and frustrating experience for a percipient witness – especially if that person is tackling his or her first deposition. One of the most important aspects of deposition preparation is eliminating the witness' fear of the unknown. For this reason, the attorney defending a deposition should not wait until the last minute to prepare his or her witness. The witness should be provided ample opportunity to process information provided by counsel, which will increase the witness' ability to remain calm, cool, and collected in a deposition setting.

#### **Former Employees**

Former employees are commonly subpoenaed for deposition in lawsuits involving business entities. No business entity has an obligation to provide legal counsel to defend the deposition of a former employee. Nevertheless, there are a number of reasons why it may make sense to provide a former employee with legal counsel.

Without question, the provision of legal counsel reinforces a business' ability to keep a friendly witness friendly. It also enhances a business' ability to transform a questionable witness into a friendly one. Unsurprisingly, people appreciate being provided free legal services. Absent such provision they would (a) likely have to pay for an attorney out of their own pockets, or (b) be deposed without legal representation.

The provision of legal representation also enables a business' attorneys to ensure a witness is appropriately prepared for deposition. Importantly, those attorneys will also be able to control the defense of the deposition.

A business might find itself in a position where only former employees have knowledge of an incident or incident-related events at issue in the litigation. In providing an attorney to prepare such persons for their depositions, the business would gain access to important information bearing on issues of liability and damages. Furthermore, depending on the circumstances, a business may want to designate a knowledgeable former employee to testify on its behalf. This would, of course, depend on that person's willingness to accept such designation.

#### **Witness Education**

Whether your case is governed by California law, Arizona law, or Nevada law, witness education requirements are essentially the same across-the-board when it comes to corporate witness designees. At the very least, the witness must be capable of testifying as to matters known or reasonably available to the company. That said, if a designee does not know anything about that subject matter, the designating business nevertheless has an obligation to make sure that person educates himself or herself within the aforementioned confines. Failure to do so not makes for a useless deposition, it could also lead to discovery sanctions and otherwise negatively impact the credibility of the business' witnesses, as well as its defense. Waiting until the time of trial to educate a corporate witness designee is not acceptable. As for non-designated witnesses, there are no education requirements. Strategic considerations should, however, inform whether a party may want its witnesses to review documents or otherwise educate themselves for deposition purposes.

## CAIIA 2016 Educational Events

As an authorized California DOI education provider (CDI# 198351), the CAIIA will be presenting its annual education series including:

- 1) Certifications for the CA Fair Claim Settlement Practices (**FCSPR**) and Seminar on Special Investigation Unit Regulations (**SIU**) (CDI# 279573 for 2 CE hours). Recertification required every year.
- 2) Seminar for the Evaluation of Earthquake Damage (**SEED**). (CDI# 279570 for 8 CE hours). Recertification for EQ required every 3 years.
  - a) Included in the **SEED** program is the training and certification required by CCR, Title 10, Chapter 5, Subchapter 7.5.1, Article 1, §2695.40 through 2695.45 and Insurance Code 10089.3. Those regulations set forth the requirements of Insurance Adjuster Training for Evaluating Earthquake Damage as required for all adjusters who evaluate earthquake claims.
  - b) Includes the **FCSPR** and **SIU** certifications at the **SEED** locations.

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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 or via email at : [rkern@sgdinc.com](mailto:rkern@sgdinc.com)

### Schedule for SEED locations:

Registration	7:30 a.m.	to	8:00 a.m.
<b>FCSPR &amp; SIU Seminar</b>	8:00 a.m.	to	10:00 a.m.
<b>SEED Seminar</b>	10:00 a.m.	to	5:00 p.m.

### Schedule for Reg's Only locations:

Registration	8:30 a.m.	to	9:00 a.m.
<b>FCSPR &amp; SIU Seminar</b>	9:00 a.m.	to	11:00 a.m.

*(Anyone wishing to come to the SEED locations for only the Reg's recertification program should note the earlier start time)*

## FCSPR, SIU & SEED SEMINAR (check one)

\_\_\_\_\_ **May 17, 2016**  
**Brea:** Embassy Suites  
 900 E. Birch St.  
 Brea, CA 92821 [map link](#)

### FCSPR/SIU ONLY SEMINARS:

\_\_\_\_\_ **May 17, 2016**  
**Brea:** Embassy Suites  
 900 E. Birch St.  
 Brea, CA 92821 [map link](#)

\_\_\_\_\_ **June 7, 2016**  
**Chatsworth:** SGD, Inc.  
 9171 Gazette Ave.  
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 Fresno, CA 93720

\_\_\_\_\_ **June 16, 2016**  
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 10815 Wheatlands Ave [map link](#)  
 Santee, CA 92071

\_\_\_\_\_ **June 29, 2016**  
**Emeryville:** HSNO Conference Center  
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 Suite 400 (4th Floor)  
 Oakland, CA [map link](#)

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\*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.

**ON THE LIGHTER SIDE...****To all the Moms...**

*When it comes to love, Mom's the word.*

*Unknown*

God could not be everywhere, so he created mothers.

Jewish Proverb

*A mother is a person who seeing there are only four pieces of pie for five people, promptly announces she never did care for pie.*

*Tenneva Jordan*

A mother is not a person to lean on but a person to make leaning unnecessary.

Dorothy Canfield Fisher

*To a child's ear, "mother" is magic in any language.*

*Arlene Benedict*

A mother's arms are made of tenderness and children sleep soundly in them.

Victor Hugo

*A suburban mother's role is to deliver children obstetrically once, and by car forever after.*

*Peter De Vries*

When you are a mother, you are never really alone in your thoughts. A mother always has to think twice, once for herself and once for her child.

Sophia Loren

*All that I am or ever hope to be, I owe to my angel Mother.*

*Abraham Lincoln*

*The heart of a mother is a deep abyss at the bottom of which you will always find forgiveness.*

*Honor' de Balzac*

A mother loves her children even when they least deserve to be loved.

Kate Samperi

*My mother had a slender, small body, but a large heart - a heart so large that everybody's joys found welcome in it, and hospitable accommodation.*

*Mark Twain*

The phrase "working mother" is redundant.

Jane Sellman

*Mother love is the fuel that enables a normal human being to do the impossible.*

*Marion C. Garretty*

A mother is one to whom you hurry when you are troubled.

Emily Dickinson

*A mother is the truest friend we have, when trials heavy and sudden, fall upon us; when adversity takes the place of prosperity; when friends who rejoice with us in our sunshine desert us; when trouble thickens around us, still will she cling to us, and endeavor by her kind precepts and counsels to dissipate the clouds of darkness, and cause peace to return to our hearts.*

*Washington Irving*

Life began with waking up and loving my mother's face

George Elliot

*A mother is she who can take the place of all others but whose place no one else can take.*

*Cardinal Mermillod*

All women become like their mothers. That is their tragedy. No man does. That's his.

Oscar Wilde

*Being a full-time mother is one of the highest salaried jobs in my field, since the payment is pure love.*

*Mildred B. Vermont*