CAIIA Status Report

JUNE 2009

# Weekly Law Resume

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

## Bad Faith – Failure to Defend

*Earline Harris v. Jessica Harris, et al.*, Court of Appeal, Third District (April 20, 2009)

The duty to defend an action may extend to the estate of an insured. This case deals with that issue in the context of a bad faith claim.

Darrel Prindle entered the home of Angela Prindle and shot and killed her. He also shot her sister, Jessica Harris, and Jessica's daughter. Earline Harris, Angela's mother, filed a Petition for Probate of Angela's estate. Earline was appointed administrator. Notice was given to Angela's creditors, who filed claims against the estate.

Jessica Harris sued Prindle and the administrator of the estate after the time for filing creditors' claims against the estate had expired. It was alleged that Angela was negligent in failing to warn Harris that Prindle would return to the residence. The administrator tendered the action to Travelers Property Casualty Insurance Company for defense. Travelers was the homeowners carrier for Angela. Harris then demanded the policy limits of $100,000 from Travelers. Travelers denied coverage and refused to defend the estate. The administrator answered the complaint and a court trial was held. A judgment was entered against the estate for negligence in the amount of $7 million. The administrator assigned the claim against Travelers to Harris.

Harris and the administrator then sued Travelers for breach of contract and breach of the covenant of good faith and fair dealing. Harris then filed a late creditor's claim for $7 million plus interest. Travelers filed a motion for summary judgment in the bad faith action, which was denied by the trial court. Travelers also filed in the probate proceeding a motion to determine that the Harris creditor's claim was invalid. The probate court ruled Travelers was estopped to assert the claim was late. Travelers appealed.

The Court of Appeal affirmed the probate court. The Court noted Travelers had standing to appear in the probate court, since it was affected financially by the claim being made. However, the Court de-

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An Employer Organization of Independent Insurance Adjusters

## Inside This Issue



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# PRESIDENT'S MESSAGE

## Power and Authority

In general, independent adjuster's reports must stand alone and be self explanatory. We have no formal authority or power, so the only way that we can resolve a claim is with facts and documentation. Our reports must be written as though a stranger or an auditor were reading them. The company examiner judges our reports on how well we support conclusions and recommendations with documentation, explanation, and insight.

By contrast, a company adjuster, who has probably been trained in the company approach, is under more direct managerial control than an independent adjuster. The company adjuster probably has the authority to settle the claim without the need to convince anyone else of the accuracy of the adjustment. Consequently, many fundamentals are never stated in reports written inside the company. Within the company captioned reports may be used only on major losses, or on files open for some set period. Independents always write captioned reports when given the option. Company reports often state basic facts, provide estimates, and then go straight to payment documents, with no global discussion. The reader may be left to infer the logical route from point A to point B when reviewing the company file.

I believe that the insurance company often gets more for it's money with an independent's report, exactly because we must document the file, and explain our findings more rigorously. Think about this: when do you do your best work; when you think nobody is looking, or when you know that there is an intelligent examiner reading and judging your work? Do you think that the lightly supervised company adjuster is working as hard as the independent to find and investigate issues? Remember that the independent is always nervous about getting that next assignment. We feel that we must show our value with every loss, and that the primary vehicle for demonstrating that value is the written report. The company man by contrast feels some security. His primary motivation is to stay ahead of incoming workloads rather than to spend a bit of extra time making every report stand out.

Then there is the case of the general adjuster, and the executive general adjuster. These professionals often have as much authority and experience as those few people to whom they report. They have accumulated authority and respect from years of company seniority and reputation. They frequently have the authority to settle claims they are handling with no need for a third party review. Add to this environment crushing work loads, and the temptation to settle the claim based on surface inspection and review is powerful.

I maintain that everything else being equal, the independent adjuster's reports will be better expressed, with a

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# Weekly Law Resume

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

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termined that the probate court correctly determined Travelers was estopped from asserting the failure to file a timely probate claim barred the lawsuit. This was because the administrator was estopped and thus, Travelers was likewise estopped. The administrator was estopped because no objection was filed to the presentation of the negligence action.

The Court concluded that since Travelers refused to defend the estate in the negligence action, it could not attack that judgment unless it proved it was the product of collusion. In the negligence action, the lawsuit was brought against the administrator as a common law negligence action against the decedent, Angela, that survived her death. The suit could be pursued without regard to policy limits.

The Court further agreed that Travelers was estopped to assert the failure to file a timely claim against the estate. Since the administrator allowed the negligence action to proceed to final judgment without raising the issue of the failure to file a timely claim, estoppel applied against the administrator. Given Travelers' voluntary decision to not defend, it likewise was estopped because of the final judgment in the negligence action.

Furthermore, the suit against Travelers could proceed to attempt to recover in excess of the insurance coverage. This was an action against the personal representative of the estate. An action in excess of coverage limits is allowed if a plaintiff sues the personal representative of the estate as a party to the action and files a probate claim. The Court therefore affirmed the order of the probate court.

**COMMENT**

This Court decision reaffirms that the rules regarding the duty to defend and the ramifications for failing to defend can apply even though the insured has died. Insurers must, therefore, monitor probate proceedings in such instances to make sure that all of their rights are protected in this situation.

## Coverage – Lease of Commercial Motor Vehicles – Priority of Coverage

*Sentry Select Insurance Company v. Fidelity & Guaranty Insurance Company* Supreme Court of California (May 4, 2009)

California Insurance Code §11580.9 provides for the priority of coverage for various motor vehicles involved in an accident. This case determines the appropriate test for determining whether an insured is engaged in the business of renting or leasing motor vehicles without operators.

Richard Justice, an independent trucker, was involved in a collision with a vehicle driven by April Russo, in which her mother, Patricia Nila, was a passenger. Justice was driving his Peterbilt tractor while pulling two semi-trailers owned by JTI, pursuant to a subhaul agreement. Russo and Nila sued Justice and JTI. JTI obtained a summary judgment.

John Deere Insurance Company insured Justice. Sentry Select Insurance Company was John Deere's successor-in-interest. The claim was settled by Deere for $600,000, less than the policy limits. Sentry brought this action against Fidelity

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# PRESIDENT'S MESSAGE

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fuller explanation, and more follow up investigation than the inside adjuster's report, exactly because of the climate in which we independents work. The end result will be that the company gets more bang for the buck with the independent, day after day, year after year.

Of course there is nothing automatic about any of this. The company must be careful in selecting their independent, just as they are careful in selecting their general adjuster. Get to know the individual that you are dealing with. Written communication is more informative when you understand the person who wrote it. As an adjuster, I love the feeling of team work that develops when working in a good relationship with the examiner.

In summary, especially on larger losses where there is much complexity to be revealed, auditors will be much happier when the report comes from someone apart from the company. This organizational model is built in when you rely on a familiar, reliable independent adjuster. I mentioned the following once before, but it bears repeating here. We learned during our October CAIIA convention from an internal survey that member firms have adjusters with 7 to 61 years in the business. We also learned that 81% of those adjusters have over 20 years experience. When looking for experience, look to CAIIA member firms.

**PETE VAUGHAN**

*President - CAIIA 2008-2009*

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& Guaranty Insurance Company, JTI's insurer, seeking contribution. Sentry claimed the Fidelity policy was primary and Sentry's coverage was excess. This question turned on the issue of Insurance Code §11580.9(b), which provided that if the vehicle involved in the accident was a leased commercial vehicle and the owner was engaged in the business of renting or leasing motor vehicles without operators, then the policy providing coverage to that vehicle was excess to any other insurance covering the loss.

JTI was in the business of hauling by use of subcontractors. It routinely leased trailers to independent contractors pursuant to standard lease agreements. Fidelity insured JTI and described and rated the two trailers used by Justice. Justice insured his Peterbilt tractor under the John Deere policy.

The trial court held JTI was not engaged in the business of renting or leasing motor vehicles without operators. It thus ruled that the insurers for the tractor and trailer shared the loss.

On appeal to the Ninth Circuit, the Court asked the Supreme Court to clarify the statutory interpretation of Insurance Code §11580.9(b).

The California Supreme Court held Fidelity's policy of insurance issued to JTI for the semi-trailers leased to Justice was excess to the John Deere/Sentry policy of insurance issued to Justice. This was based upon the Court's interpretation of subdivision (b). The Court held the conclusive presumption of this section applies to commercial vehicles, designed for the transportation of property, and leased for a term of six months or longer. The Court also stated that the renting or leasing activities had to be a regular part of the insured's business. A leasing activity merely incidental to the insured's business would not qualify.

The Court stated that in this case, JTI routinely leased its trailers to independent contractors. The leasing operations were unquestionably a regular part of its trucking business. The operation was thus not merely incidental to the main business of hauling. Thus, the conclusive presumption applied. The Ninth Circuit was so instructed.

**COMMENT**

In 2006, the Legislature amended the language of this section to delete the language in question and replace it with "who in the course of his or her business rents or leases motor vehicles without operators." This amendment eliminates any ambiguity as to whether the leasing of commercial vehicles must be a regular part of the insured's business for the conclusive presumption to apply.

## Damages - Proposition 51 Does Not Apply Where Defendant Has Nondelegable Duty

*Koepnick v. Kashiwa Fudosan America, Inc.*, Court of Appeal, First District (April 17, 2009)

Proposition 51 (codified under California Civil Code section 1431.2) modified the doctrine of joint and several liability in tort cases in California. A key component of Prop. 51 is that in an action for personal injury or wrongful death, each defendant is jointly liable for economic damages; but only severally liable for non-economic damages. This means that each defendant shall be liable for only its' percentage of non-economic damages. The case addresses whether Prop 51 applies to a defendant that is found to have a nondelegable duty.

Plaintiff Dennis Koepnick, employed by a commercial air conditioning company, delivered air conditioning parts to the second floor of a building owned by Defendant Kashiwa Fudosan America Inc. (Kashiwa). Koepnick made numerous trips to and from the second floor using a building elevator. During his final descent, the elevator malfunctioned, causing Koepnick to fall. As a result of the incident, Koepnick suffered back injuries which required spinal surgery.

Koepnick filed a personal injury action against Kashiwa, elevator repair company Otis Elevator Company (Otis) and others. Prior to trial, Koepnick settled with Otis and all other defendants except Kashiwa. Koepnick's suit proceeded to trial against Kashiwa. The jury found in favor of Koepnick, and determined that Kashiwa was 75% at fault; and Otis was $25% at fault. The jury awarded Koepnick slightly more than $1 million in economic damages and $4.25 million in non-economic damages. Thereafter, Kashiwa argued that Prop. 51 applied and that it was only responsible for its' percentage of non-economic damages. The trial court disagreed and held that Kashiwa was responsible for 100% of the non-economic damages, because Kashiwa owed Koepnick a nondelegable duty. Kashiwa appealed. The First District Court of Appeal affirmed.

Under California common law, a person who hired an independent contractor was generally not liable for injuries suffered by third parties caused by the contractor's negligence in performing the work. An exception to this rule applies, however, where the hirer (a possessor of land) is found to

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have a non-delegable duty to maintain property in a reasonably safe condition. Prior to this case, at least one court had held that where a defendant had been found to have a non-delegable duty, Prop. 51 did not apply.

On appeal, Kashiwa contended that even if it had a non-delegable duty, Cal. Labor Code section 7300 et. seq., a statutory scheme regarding elevator ownership, maintenance, and repair, rendered the nondelegable duty rule inapplicable. Kashiwa argued that the Labor Code provisions placed restrictions on who could maintain elevators, limiting repairs to certified companies. Kashiwa, as a non-certified elevator repair company, alleged that because it did not have the right to repair, it should not be held to have a non-delegable duty. The Court of Appeal rejected this creative argument. The Court held that no provision in the Labor Code relieved Kashiwa from keeping its building safe for users. Prop 51, therefore, did not apply. The judgment was affirmed.

**COMMENT**

This cases reaffirms the holding in Srithong v. Total Investment Co. (1994) 23 Cal. App 4th 721, that Proposition 51 does not apply in cases where a defendant is held to have a non-delegable duty.

## Commissioner Poizner Announces San Diego Husband, Wife and Additional Suspect Arraigned on Insurance Fraud, Conspiracy Charges

Insurance Commissioner Steve Poizner announced today that three Southern California fraud suspects were arraigned in San Diego County this week. San Diego residents Adam Duvanich, 25; his wife, Lindsey Duvanich, 24; and John Fuller, Jr., 37, were charged on May 5 with three felony insurance fraud and conspiracy. Joseph Malcuit, 26, of Lakeside, was also charged with felony insurance fraud and conspiracy. Adam and Lindsay Duvanich and Malcuit were arraigned Tuesday.

In the summer of 2008, Lindsey and Adam Duvanich allegedly decided to get rid of their 2004 Honda Accord in order to collect on the potential insurance payout. In July 2008, John Fuller allegedly agreed to help Lindsey Duvanich abandon the Accord. Fuller introduced Lindsey to Malcuit, who would allegedly help her abandon the vehicle.

Lindsey Duvanich gave her car key to Malcuit, who allegedly hid the vehicle. On July 8, 2008, Lindsey reported her 2004 Honda Accord stolen to the San Diego Police Department. She also filed a vehicle theft claim with her insurance company, providing a recorded statement regarding the circumstances surrounding the theft.

Lindsey and Adam Duvanich signed the Affidavit of Vehicle Theft, attesting to the circumstances surrounding the supposed theft. The affidavit was notarized and returned to the insurance company.

In October 2008, CDI was notified of a suspected fraudulent claim referral in regards to this case. The CDI San Diego Regional Office Auto Insurance Fraud Task Force opened an investigation into the suspected fraud. During the course of the investigation, Adam Duvanich admitted that he and his wife discussed getting rid of the vehicle in order to collect a payout from their insurance company. Fuller and Malcuit admitted to having involvement in the scheme. Lindsey Duvanich confessed to filing a false claim with her insurance company.

This case is being prosecuted by the San Diego District Attorney's Office.

# When You Need to Know What Really Happened

*Submitted by Garrett Engineers, Inc. - Forensic Division, Long Beach, CA*

## Case of the Month: A Van Rollover

A group of friends rented a new passenger van from a national rental company. They started in Seattle and drove 800 miles to Idaho Falls. When it was time to return, they then drove those 800 miles back home. As they approached the end of their journey, per the driver, a tire blew out and the van rolled. The vehicle was totaled.

One troubling fact was that when the van was initially brought out to them at the rental site, one of the tires was flat. It was "repaired" just prior to their departure. GEI was assigned to inspect and photograph the van to identify any manufacturing, mechanical, or service defects or failures which could have caused or contributed to the accident.

The date of loss was almost New Year's Day. We were engaged in February, but the vehicle was not available for inspection. By mid-March it was still unavailable for inspection, so we closed the case. Occasionally when we are hired to investigate an incident, we find that the case settles prior to us performing any work. Usually, settlement terms are kept confidential, and the assignment just quietly goes away. This appeared to be such an engagement.

Then in October, the client called again to ask for us to inspect the vehicle, which had been located. A date was scheduled. Unfortunately, our expert was in an accident of his own, and had to undergo back surgery. A replacement expert was assigned to the case. The new inspection date was scheduled for the beginning of December.

The new expert inspected the van in the parking lot of an auto shop. When the expert arrived at the inspection location, the van was covered with a tattered tarp, indicating that the vehicle had been sitting outside for a long period of time. After the tarp was removed, it was apparent that the van had been involved in a rollover accident. The driver's door was detached from the vehicle and was located in the middle seats of the van. The right sliding door was also detached and was located in the rear passenger compartment of the van.

The odometer reported about 12,000 miles. The brakes at inspection were normal (no leaks, firm pedal feel, and the pedal was at the proper height), and would have been fully functional at the time of the accident. The air bags were not deployed. All four tires were flat. All were the same size, all were made by the same manufacturer, all were the same model tire, and all were of comparable tread depth. The right-side tires were broken loose from the rims at the bead. The left front tire valve stem was broken and missing. The left front tire tread had a spot where some of the tread appeared to have been cut away by contact with bent body parts. The left rear tire had a cut in the outside wall that did not go all the way through.

This cut appeared to be caused by the weight of the van sitting on the flat tire for an extended period of time, allowing the rim to cut the tire. The right rear tire had some scraping on the outside wall that appeared to be caused by the bent sheet metal of the wheel well contacting the tire.

It was reported that the left front tire had blown out. During the inspection, the left front tire was removed from the rim for inspection of the interior walls. The interior sidewalls showed no signs of damage. There was no evidence that the tire had been run with low air pressure. There was no evidence of a failed repair or patch and no evidence of a tread separation. There was no evidence of impact damage to the tire or of a manufacturing defect.

A mechanical inspection of the van found some bent components that appeared to have been caused by the accident. No failed mechanical components were observed that would have caused the accident. On the same day the vehicle was inspected, the expert visited the accident scene. No conclusions could be determined from the accident scene due to the time elapsed between the date of loss and the inspection.The expert also reviewed the State Police incident report and photographs supplied by the client.

The conclusion: based on the inspection of the vehicle and tires, there was no evidence of any failure of the tires or mechanical defects to the van that would have caused the accident. All damage to the tires and van appeared to be a result of the accident, rather than the cause. The flat tire, at the time that they picked up the van, was unrelated to the accident. Black ice, road debris, and/or driver fatigue would be viable candidates for the cause of the accident, but not the tires.

## CAIIA 2009 Educational Events

As an authorized California DOI education provider (CDI# 198351), the CAIIA will be presenting its annual Fair Claim Settlement Practices Regulations (**FCSPR**) seminars 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, Section 2695.40 through Section 2695.45. Those regulations set forth the requirements of Insurance Adjuster Training for Evaluating Earthquake Damage. We will also be providing SIU Regulations certification at the SEED and **FCSPR** locations.

At locations in Fresno (6/5/09), Glendale (6/9/09), and San Diego (6/9/09), we will be offering only the FCSPR and SIU seminars.

In Pomona (6/16/09) and Pleasanton (6/23/09) we will be offering both the **FCSPR** and SIU seminars plus the SEED program seminar.

**THE CAIIA has secured 8 CA 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_____

Co._____

Address_____

City_____ Zip_____

Phone_____

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 - $_____

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9255 Corbin Avenue, Suite 200
Northridge, CA 91324

Questions? Call Peter Schifrin @ (818) 734-0215

Schedule for all locations:

| | |
|---|---|
| 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 16, 2009**
***Pomona:*** Shilo Inn
3101 Temple Avenue
Pomona

_____**June 23, 2009**
***Pleasanton:*** Four Points Hotel
5115 Hopyard Road
Pomona

**FCSPR/SIU ONLY SEMINARS:**

_____**June 5, 2009**
***Fresno:*** Ramada Inn
324 E. Shaw Ave.
Fresno

_____**June 9, 2009**
***Glendale:*** Carl Warren
500 N. Central, 4th Fl.
Glendale

_____**June 9, 2009**
***San Diego:*** Belfor
11545 Sorrento Valley Rd.
San Diego

Please visit **www.caiia.com** for more nformation.

**CAIIA will agree 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.*

# **Hello Operator -** *Actual call center conversations . . . (con't.)*

*This has to be one of the funniest things in a long time. I think this guy should have been promoted, not fired. This is a true story from the WordPerfect Help Desk which was transcribed from a recording monitoring the customer care department. Needless to say the Help Desk employee was fired; however, he/she is currently suing the WorkPerfect organization for 'Termination Without Cause'.*

*Actual dialogue of a former WordPerfect Customer Support employee. (Now I know hwy they record these conversations!):*

Operator: "Ridge Hall, computer assistance; may I help you?
Caller: Yes, well, I'm having trouble with WordPerfect.
Operator: What sort of trouble?
Caller: Well, I was just typing along, and all of a sudden the words went away.
Operator: Went away?
Caller: They disappeared.
Operator: Hmm. So what does your screen look like now?
Caller: Nothing.
Operator: Nothing??
Caller: It's blank, it won't accept anything when I type.
Operator: Are you still in WordPerfect, or did you get out?
Caller: How do I tell?
Operator: Can you see the 'C: prompt' on the screen?
Caller: What's a sea-prompt?
Operator: Never mind, can you move your cursor around the screen?
Caller: There isn't any cursor; I told you, it won't accept anything I type.
Operator: Does your monitor have a power indicator??
Caller: What's a monitor?
Operator: It's the thing with the screen on it that looks like a TV. Does it have a little light that tells you when it's on?
Caller: I don't know.
Operator: Well, then look on the back of the monitor and find where the power cord goes into it. . . Can you see that??
Caller: Yes, I think so.
Operator: Great! Follow the cord to the plug, and tell me it it's plugged into the wall.
Caller: Yes, it is.
Operator: When you were behind the monitor, did you notice that there were two cables plugged into the back of it, not just one?
Caller: No.
Operator: Well, there are. I need you to look back there again and find the other cable.
Caller: Okay, here it is.
Operator: Follow it for me, and tell me it it'f plugged securely into the back of your computer.
Caller: I can't reach.
Operator: OK. Well, can you see if it is?
Caller: No,
Operator: even if you maybe put your knee on something and lean way over?
Caller: Well, it's not because I don't have the right angle – it's because it's dark.
Operator: Dark?
Caller: Yes, the office light is off, and the only light I have is coming in from the window.
Operator: Well, turn on the office light then.
Caller: I can't.
Operator: No? Why not?
Caller: Because there's a power failure.
Operator: A power . . . A power failure? Aha! Okay, we've got it licked now. Do you still have the boxes and manuals and packing stuff that your computer came in?
Caller: Well, yes, I keep them in the closet.
Operator: Good,. Go get them, and unplug your system, and pack it up just like it was when you go it. Then take it back to the store you brought it from.
Caller: Really? Is it that bad?
Operator: Yes, I'm afraid it is.
Caller: Well, all right then, I suppose. What do I tell them?
Operator: Tell them you're too stupid to own a computer!