

NOTICE!

As of January 1, 2012, this newsletter will be delivered by e-mail only. If up until now you are only receiving the *Status Report* by regular mail, please send your e-mail address to barrettclaims@sbcglobal.net so that we can keep you on our circulation list. Your e-mail address will not be disseminated or used for any other purpose. We value your readership and welcome any comments you may care to add when sending us your e-mail address.

PUBLISHED MONTHLY BY
California Association of
Independent Insurance Adjusters



An Employer
Organization of
Independent
Insurance Adjusters

Inside This Issue

Law Insurance News	1
President's Message	2
When You Need To Know	3
Weekly Law Resume	5
Educational Events	7
Funny	8

Insurance Law News

Submitted by Smith, Smith & Feeley, LLP - Irvine, CA

When Liability Insurer Never Expressly Agrees to Defend Insured and Does Not Pay Defense Fees During Underlying Litigation, Insurer Cannot Later Invoke Civil Code Section 2860's Arbitration Remedy In Dispute Over Attorneys' Fees

Where a liability insurer issues a preliminary "reservation of rights" letter, but never actually agrees to defend its insured and never actually pays any defense fees during the underlying litigation, the insurer is precluded from invoking Civil Code section 2860's arbitration remedy in a subsequent dispute over attorneys' fees. (*The Housing Group v. PMA Capital Ins. Co.* (2011) 193 Cal.App.4th 1150)

Facts

The Housing Group ("THG") was sued in three separate lawsuits. THG tendered the defense of those lawsuits to its insurer, Caliber One Indemnity Company ("Caliber One").

In response to one of the three tenders, Caliber One sent two letters to THG indicating that Caliber One would investigate the action under a reservation of rights, and explaining that *if* coverage were confirmed, Caliber One would pay partner rates of \$165 per hour and associate rates of \$125 per hour. Caliber One never responded to the tenders of the other two actions, never expressly agreed to defend THG against any of the three underlying actions, and never retained defense counsel for THG or contributed to THG's defense costs during the course of the three underlying actions.

On the eve of trial in one of the three underlying actions, Caliber One apparently admitted coverage for that particular action. Accordingly, Caliber One funded a settlement for THG in the amount of \$193,000 in that action

continued on page 3

Status Report Now Available by E-mail

If you would like to receive the *Status Report* via e-mail please send your e-mail address to info@caiiia.org.

CAIIA Newsletter

CAIIA Office
P.O. Box 168
Burbank, CA 91503-0168
Web site - <http://www.caiia.org>
Email: info@caiiia.org
Tel: (818) 953-9200
(818) 953-9316 FAX
Editor: Sterrett Harper
Harper Claims Service, Inc.
Tel: (818) 953-9200

Permission to reprint is always extended, with appropriate credit to CAIIA Newsletter

© Copyright 2011

**California Association
of Independent
Insurance Adjusters, Inc**

PRESIDENT'S OFFICE

P.O. Box 282
Ukiah, CA 95482
707-462-5647
Email: info@caiaa.com
www.caiaa.com

PRESIDENT

Phil Barrett
barrettclaims@sbcglobal.net

IMMEDIATE PAST PRESIDENT

Sam Hooper
hooper@hooperandassociates.com

PRESIDENT ELECT

Jeff Caulkins
jeff.c@johnsrickerby.com

VICE PRESIDENT

William "Bill" McKenzie
walshadj@sbcglobal.net

SECRETARY TREASURER

Tanya Gonder
tanya@casualtyclaimsconsultants.com

ONE YEAR DIRECTORS

Kearson Strong
kearson@claimsconsultantsgroup.com

Richard Kern
rkern@sgdinc.com

Art Stromer
artstromer@hotmail.com

TWO YEAR DIRECTORS

Debbie Buse
ncadj@sbcglobal.net

Corby Schmaultz
csmaultz@jbaia.com

Michael Hale
cics@carterclaims.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

Friday, April 29th, CAIIA held its 63rd Midterm Convention in Sacramento. We were treated to 4 hours education from 2 presenters; Ulises Castellon, CPCU, from Fire Cause Analysis, who engaged us in a thought provoking discussion on ethics and Lori Cox, PE, a Civil Engineer and Regional Manager of PT&C Forensics Consulting who delivered enlightening sessions on steps engineers take to prepare for litigation and building codes. Unfortunately, Lori's colleague, Charlie Shotwell, who had originally planned on providing a seminar on fraud, was unable to get a flight from Tampa due to the severe weather that devastated parts of the southeast on late April. Yet Lori did a fine job with the substituted session on building codes. Thank you Ulises and Lori! CAIIA is blessed to have friends like you.

Having completed the education sessions, we reconvened after lunch for our traditional business meeting where an important resolution was reached that affects this very circular; The Status Report is 'Going Green!' So in case you skipped right past the announcement on the cover page, (eager, I'm sure, to get to my monthly message that you could hardly wait another 30 days to read), in 6 months, starting January 1, 2012, this newsletter will only be circulated electronically. If up until now you have been receiving the Status Report by mailed hardcopy, you will need to provide us your e-mail address. So please help us to keep you on our circulation list. Cliché, I realize, but you will be making the planet a better place in the process.

Switching from paper to digital will not be a major change for us. Most of our recipients, including all of our membership, have been receiving this Newsletter by e-mail for some time. Now that we no longer need to worry about the space and weight restriction which for only a little while longer will be dictated by the mailed hardcopy version, I am looking forward to our augmented editorial freedom. This could turn out to be a revolutionary innovation to our superb little Status Report.

While on the topic of the Status Report, I would like to take this opportunity to acknowledge the man who has been responsible for its circulation, as least as long as I have been a member of the CAIIA. Sterrett Harper, Status Report editor, CAIIA Past President and steadfast multi-committee chairperson, is the reason this newsletter comes to you with such substantive articles, in the polished, well laid out fashion we are all used to. Without Sterrett and his superior editorship, the very countenance of the CAIIA would be much different. Combining the increased freedoms of publishing that electronic delivery offers with Sterrett's editorial talents, I am predicting even better things ahead and increased readership for the Status Report. Oh, and did I mention that the savings on printing and mailing will free up the budget for more CAIIA participation in industry events? In my mind, this decision was truly a win for both the CAIIA and the greater property casualty insurance industry. I'm excited!

Finally, I want our readers to be reminded that June is the month when CAIIA does what it does best; education. In the back of this issue you will find the registration form for our certification/ recertification programs offered for the Seminar for the Evaluation of Earthquake Damage, Fair Claims Settlement Practices Regulations and Special Investigations Unit regulations. These courses are also approved for continuing education credits. If you haven't registered yet, the clock is ticking down fast.



PHIL BARRETT

President - CAIIA 2010-11

Insurance Law News

Submitted by Smith, Smith & Feeley, LLP - Irvine, CA

continued from page 1

and also contributed \$35,287.45 toward past-incurred defense fees and costs. Caliber One did not make any defense or indemnity payments in connection with the other two underlying actions.

THG later sued Caliber One for breach of contract and bad faith, seeking to recover the full hourly billable rate of THG's personal counsel. Caliber One, in turn, petitioned to compel arbitration of the purported fee dispute pursuant to Civil Code section 2860(c). That statute provides that when an insurer is defending an insured under a reservation of rights that triggers a conflict of interest requiring independent counsel (i.e., *Cumis* counsel), any dispute regarding attorneys' fees owed to such counsel shall be resolved by binding arbitration.

The trial court denied Caliber One's petition to compel arbitration, noting that Caliber One's failure to provide a defense left THG in the same position as if Caliber One had denied THG's tenders altogether. The trial court thus held that because Caliber One had not defended THG in the underlying actions, Caliber One could not avail itself of the protections of section 2860.

Holding

The Court of Appeal affirmed, holding that because Caliber One had failed to provide a defense, it was precluded from invoking section 2860's arbitration remedy.

The Court first explained that the duty to defend arises when the tender is made. The defense obligation is immediate so as to relieve the insured from the burden of financing its own defense and then having to sue for reimbursement.

The Court rejected Caliber One's arguments that its reservation of rights letters reflected an agreement to defend. Although the letters did not disclaim or deny coverage, the letters also did not accept the tender. Instead, they merely expressed Caliber One's future intent to comply with its duty to defend.

The Court further noted that Caliber One did not participate in THG's defense during the course of the underlying actions. Caliber One paid no defense fees or costs during the course of those actions, and its post-settlement payment of defense costs was in the Court's eyes "the equivalent of a defense denial."

Therefore, because Caliber One did not defend THG, Caliber One could not take advantage of section 2860. The Court noted that to hold otherwise would encourage insurers to reject their *Cumis* obligations for as long as possible, knowing they could invoke section 2860's remedies at any time.

Comment

This holding is consistent with at least one earlier federal court decision in which the court held that to take advantage of the provisions of section 2860, an insurer must actually defend the insured subject to a reservation of rights. (See *Atmel Corp. v. St. Paul Fire & Marine* (N.D. Cal. 2005) 426 F.Supp.2d 1039, 1047.) The holdings in these cases will likely give insurers an added incentive to respond to tenders quickly, especially in cases where the insured's personal counsel charges high hourly rates.

When You Need To Know What Really Happened

Submitted by Garrett Engineers - Long Beach, CA

Guest Article: Transponders Bypassed?

by Thomas G. Seroogy, Certified Forensic Locksmith

A 2005 VW Passat was reported stolen and was soon recovered. The steering column had been attacked, and the wiring on the back of the ignition switch was pulled off. The insured stated that law enforcement had told him the wires were pulled off of the ignition lock and hotwired to start and steal the vehicle. A forensic examination of

continued on page 4

When You Need To Know What Really Happened

Submitted by Garrett Engineers - Long Beach, CA

continued from page 3

the ignition lock and immobilizer system proved otherwise, and it was determined that the damaged wiring could not have been used to start the vehicle and was cosmetic in nature.

Every year this author conducts hundreds of forensic examinations on stolen-recovered vehicles that contain transponder-based immobilizer systems. Each of these examinations begs the question, "Was the immobilizer system bypassed and, if so, how?"

Before this question is answered, it must be stated that a transponder system is not impervious to attack and can, in fact, be bypassed.

In theory, the transponder-based immobilizer system is fairly simple. The system is comprised of a transponder key, a transceiver module/antenna, and the security module (usually located in the Engine Control Module, Powertrain Control Module, or Body Control Module).

The registered transponder key is inserted into the ignition and rotated to the ON position. Then the transceiver antenna, usually attached to the front of the lock, sends an inductive pulse to the transponder chip located in the head of the key. This pulse excites the transponder, which in turn sends the key's unique digital ID back to the transceiver antenna. Upon receiving the key's ID, the transceiver may confirm whether it is a registered key, or send it to the security module for interrogation. If the key's ID is recognized, the vehicle is allowed to start and operate. If it is not recognized, the engine will not start.

This is a very simplified explanation of how the transponder system operates. The actual operations and characteristics of a given system are dependent on the year, make, and manufacturer of the vehicle.

There are two main categories of methods for defeating a transponder system: hard bypass methods and soft bypass methods.

Hard bypass methods circumvent the immobilizer by physically altering the system. Relay jumping and module swapping are examples of hard bypass techniques commonly used to steal early Ford, Toyota, Lexus, Acura, and Honda vehicles. In other words, the transponder hardware is physically replaced by the thief.

Soft bypass methods electronically circumvent the immobilizer system. These techniques either turn off the immobilizer system, create unauthorized programmed keys, or introduce information into the system that disarms the immobilizer function.

Due to advancements in immobilizer technology, relay jumping and module swapping are not efficient methods for stealing today's vehicles. However, where advancements in immobilizer technology have made hard bypass techniques difficult to use, corresponding advancements in electronics have made soft bypass techniques more efficient and effective, even for the car thief.

Currently, there are four basic genres of soft bypass techniques: key programming, key cloning, factory bypass, and code stealing.

Recent research indicates that code stealing is especially effective on keyless entry cars. This technique uses an antenna to read the signal from the key fob when it is out of the car (say in a pocket while the driver is at a restaurant). The captured signal is then relayed back to the car, just as if the key fob was within disarming distance. The car is then started and driven away without the key fob.

Factory bypass is a method built into some models by the manufacturers as a way to rescue vehicles stranded by failed transponder systems, or lost keys. A bypass procedure, that includes entering a PIN, is performed to start the car, using just a mechanical key. As you can imagine, thieves can use various methods to obtain the PINs, and then steal the cars. Honda, Acura, Mitsubishi, and Ferrari are among those that include PIN bypass procedures.

Cloning a key is the electronic equivalent of duplicating a key. During the process of making a cloned key, both

continued on page 5

When You Need To Know What Really Happened

Submitted by Garrett Engineers - Long Beach, CA

continued from page 4

the mechanical cuts and the electronic ID of a working key are transferred to a new key. Being a direct duplicate or clone of the original working key, the cloned key is capable of starting and operating the vehicle without further programming.

Because cloning a key requires possession of a working key, the proper clone key blank, a cloning device, key cutting equipment, and, in some cases, the vehicle, its use to steal a vehicle might be limited. However, using a cloned key to steal vehicles is not unheard of, and should not be ignored or ruled out without cause by the auto theft investigator.

Of the soft bypass techniques available, the one presenting the most potential for quickly stealing an automobile is that of programming a new key into the vehicle using a transponder key programming tool and then either picking, force rotating, or extracting (such as with a slide hammer) the lock cylinder of the ignition assembly.

The most common aftermarket key programming tools sold in North America are Ilco's TKO and Advanced Diagnostics' T-Code Pro. More recently, there has been a surge of Asian-produced key programming tools on the market. These tools offer similar capabilities as the TKO and T-Code Pro, but are less expensive (from \$300 to \$800) and can be purchased over the Internet.

One of the interesting, and dangerous, characteristics of these tools is that they are capable of circumventing the key programming security features of most North American transponder systems. In essence, in the hands of a trained and experienced technician, these tools render the transponder system impotent, allowing the vehicle to be stolen in little more time than it takes to steal a vehicle without an immobilizer. Bypassed vehicles include Acura/Honda, Chrysler, Ford, GM, Mazda, Mitsubishi, Nissan/Infiniti, Subaru, Toyota/Lexus, and VW/Audi.

In light of the potential these tools have in stealing vehicles, it becomes extremely important that the auto theft investigator closely follow immobilizer and transponder key programming tool trends. Whether an investigation is focused on a chop shop, organized crime ring, or an individual, tool identity is an invaluable asset.

Finally, the good news is that despite the ability these tools have in bypassing the immobilizer system, their use is not invisible to a qualified forensic locksmith or security technician. Their use often leaves evidence behind for investigators to detect. In many cases, a properly trained examiner will be able to identify whether such programming tools were used in the theft of a stolen-recovered car.

Weekly Law Resume

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

Interstate Transport- Carmack Amendment In Absence Of Declared Value, Carrier Liability for Lost Goods Limited to Regulated Rate

Pacific Indemnity Company v. Pickens Kane Moving & Storage, Ninth Circuit Court of Appeals (April 20, 2011)

The Carmack Amendment, 49 U.S.C. § 14706, regulates the liability of shippers and carriers for household goods lost or damaged in interstate transport. In this case, the Ninth Circuit Court of Appeals addressed an issue of first impression in the circuit: the respective liability of shipper and carrier for lost or damaged goods where the shipper neglected to declare a value of the goods.

Ina and Murray Manaster desired to move their household goods, consisting mainly of fine arts and antiques, from Chicago to Phoenix. They requested a quote from Pickens Kane Moving & Storage ("Pickens") which, through the freight broker TCI, contracted with Atlas Van Lines, Inc., to transport the goods. The Manasters

continued on page 6

Weekly Law Resume

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

continued from page 5

requested \$1 million in insurance coverage, and Pickens adjusted its rate accordingly. However, Pickens never informed TCI or Atlas of the \$1 million valuation.

On November 2, 2006, Atlas picked up the Manasters' goods from the Pickens warehouse. The Atlas bill of lading was signed by Pickens' representative as shipper and by Atlas' driver as carrier. The bill of lading included a valuation section with a space for Pickens to declare the value of the property. Pickens' representative left this section blank.

A fire destroyed the Manasters' goods while in Atlas' possession en route from Chicago to Phoenix. Pacific Indemnity Co. paid the Manasters' claim in full for \$1 million, and filed a subrogation suit in federal court against both Pickens and Atlas for carrier liability under the Carmack Amendment. Pickens and Atlas cross-claimed against each other, also for carrier liability. The parties filed cross-motions for summary judgment, and the district court held that Atlas was liable to both Pacific and Pickens for \$52,500, or \$5.00 per pound, and that Pickens was liable to Pacific for \$1 million. Pickens appealed.

The Ninth Circuit affirmed the district court's decision. Crucial to its reasoning was the language of 49 U.S.C. §14706(f)(2), which Congress added in 2005. That section provides that a carrier's maximum liability for lost or damaged household goods is "an amount equal to the replacement value of such goods, subject to a maximum amount equal to the declared value of the shipment and to rules issued by the Surface Transportation Board and applicable tariffs."

Based on this language, Pickens argued that Atlas, as the carrier, was liable for the full "replacement value" of the goods, or \$1 million. The court rejected this argument, noting that the replacement value is subject to a maximum amount equal to the declared value of the shipment and rules issued by the Surface Transportation Board. Because Pickens failed to declare a value of the shipment, the court looked to the Board's rules. The relevant Board rule provided that, where a shipper "neglects to write a valuation figure on the bill of lading or contract," the carrier is liable for an assumed valuation based on an adjusted rate of \$5.00 per pound. The Ninth Circuit concluded that the Board's rule was a reasonable implementation of the Carmack Amendment and thus entitled to the court's deference. Accordingly, Pickens was liable to Pacific for the full \$1 million, but Atlas' liability was limited to the assumed valuation of \$5.00 per pound, or \$52,500.

In a twist that can provide little comfort for Pickens, Atlas was required to pay Pickens' litigation costs of \$74,402.35. The Ninth Circuit noted that the Carmack Amendment imposes strict liability on carriers: if the loss or damage occurred while in the carrier's possession, the carrier is liable for the loss, regardless of fault. In addition, under § 14706(b), the carrier in possession is required to pay the reasonable litigation expenses of the shipper in a civil action. Atlas argued that, given the court's apportionment of damages for the loss, Pickens cannot be considered the prevailing party and thus should not be awarded expenses. The court rejected this argument, noting that the Carmack Amendment does not speak of a "prevailing party." Instead, it speaks of the carrier over whose line or route the goods were damaged. Because that carrier was Atlas, Atlas must pay Pickens' litigation expenses.

In sum, Atlas was the party liable for Pacific's loss and would have been responsible for the full \$1 million if Pickens had declared a value for the goods. But because Pickens failed to declare that value, Atlas' liability was limited to the rate set by the Surface Transportation Board, and Pickens must pay the rest.

COMMENT

This case demonstrates that the advantages of the Carmack Amendment, such as limited liability and streamlined litigation, are only available if carriers know and meticulously follow the statute and the Surface Transportation Board's rules. The case also illustrates the supreme importance of ongoing employee training and effective communication within an organization. One employee's failure to declare a value on a bill of lading—whether through inattentiveness, lack of training or lack of communication—was a mistake costing Pickens nearly \$950,000.

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.

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 - \$ _____

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 Tim Waters, AIC
 Buxbaum, Loggia & Associates, Inc.
 101 E. Commonwealth Ave., Ste A
 Fullerton, CA 92832

Questions? Call Tim Waters @ (714) 449-2899

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
 Pomona, CA 91768

June 16, 2011

Sacramento: DoubleTree Hotel
 2001 Point West Way
 Sacramento, CA 95815

FCSPR/SIU ONLY SEMINARS:

June 24, 2011

Fresno: Ramada Inn
 324 E Shaw Ave
 Fresno, CA 93710-7690

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.

Gate 14 in the Denver Airport

It happened at the Denver Airport. This is hilarious. I wish I had the guts and smarts of this girl.

An award should go to the United Airlines Gate Agent in Denver for being smart and funny, while making her point, when confronted with a passenger who probably deserved to fly as cargo. For all of you out there who have had to deal with an irate customer, this one is for you!

A crowded United Airlines flight was canceled. A single agent was re-booking a long line of inconvenienced travelers.

Suddenly, an angry passenger pushed his way to the desk. He slapped his ticket on the counter and said, "I HAVE to be on this flight and it has to be FIRST CLASS."

The agent replied, "I'm sorry, sir. I'll be happy to try to help you, but I've got to help these folks first; and then I'm sure we'll be able to work something out."

The passenger was unimpressed. He asked loudly, so that the passengers behind him could hear, "DO YOU HAVE ANY IDEA WHO I AM?"

Without hesitating, the agent smiled and grabbed her public address microphone. "May I have your attention, please?", she began, her voice heard clearly throughout the terminal. "We have a passenger here at Gate 14 WHO DOES NOT KNOW WHO HE IS. If anyone can help him find his identity, please come to Gate 14."

With the folks behind him in line laughing hysterically, the man glared at the United agent, gritted his teeth, and said "F*** You!"

Without flinching, she smiled and said, "I'm sorry sir, you'll have to get in line for that, too."