CAIIA Status Report

JULY 2005

Weekly Law Resume

Prepared by Low, Ball & Lynch, Attorneys at Law

Insurance - Two-Year Statute of Limitations for Uninsured Motorist Claims Not Retroactive

Bullard v. California State Automobile Association, Court of Appeal, Third District (May 10, 2005)

In 2003, the California Legislature amended California Insurance Code section 11580.2, subdivision (I), changing the statute of limitations period for an uninsured motorist claim from one year to two years. The amendment became effective on January 1, 2004. The question in this case was whether the amendment to section 11580.2 (I) applies retroactively.

Plaintiffs Lee and Nina Bullard were injured in a motor vehicle collision on June 16, 2002, when a pick-up driven by Michael Hall rear-ended the Bullard vehicle. Hall was uninsured at the time of the collision. The Bullards had motor vehicle insurance coverage with Defendant California State Automobile Association (CSAA). The Bullards' policy included uninsured motorist coverage.

Under section 11580.2(I), a U.M. cause of action does not accrue to an insured unless one of the following actions takes place: 1) the insured files suit against the uninsured motorist; 2) there is agreement as to the amount due under the policy; or 3) the insured formally institutes arbitration proceedings by notifying the insurer in writing. Prior to the amendment of section 11580.2(I), one of these actions had to take place within one year of the accident. The amendment extended the accrual period from one to two years. After discovering that Hall was uninsured, the Bullards notified CSAA by letter in February 2003 that they intended to pursue an uninsured motorist claim. The letter did not mention arbitration. In April 2003, the CSAA claims adjuster spoke with the Bullards' attorneys' paralegal. The adjuster later claimed that she advised the paralegal that there was a one-year, not a two year statute of limitations. The adjuster and the paralegal disputed whether the issue of arbitration came up in the conversation. One year and three days after the accident, the Bullards filed their personal injury action against Hall.

In September 2003, CSAA denied the Bullards uninsured motorist claim on the ground that the Bullards had failed to preserve their rights to arbitrate under Section 11580.2(I). The Bullards then filed a motion to compel arbitration, arguing that the amendment to section 11580.2(I) should be deemed

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CAIIA Newsletter
CAIIA Office
P.O. Box 168
Burbank, CA 91503-0168
Web site - http:\\www.caiia.org
Email: info@caiia.org
Tel: (818) 953-9200
(818) 953-9316 FAX

■ PRESIDENT'S MESSAGE

My wife and I just returned from a week vacation along the southeast coast of the United States. Although the start of the hurricane season had already started, once again, I am thankful that good weather seems to follow us wherever and whenever we go on vacation. We seem to be blessed that way and whether it is luck or the Man upstairs, we appreciate having these special getaways with minimal travel and weather problems. After all, it is problems of others that each of us deal with every day…constantly trying to make people whole from their losses and weeding out those who seek to cheat the system at the expense of others. That stressful environment requires each and every one of us to unwind and decompress from the efforts we take to make the world a better place. Although I suspect many don't realize what we do, what would the public's losses be like without their claims adjuster's assistance? Enjoy your vacation time this year…you have earned it!

Trying to get everything done in a volunteer organization is sometimes a problem. Membership renewal notices went out late this year and we appreciate your understanding and request you help us out by getting the renewals back at your first opportunity. As related earlier, the CAIIA…thanks to members like Frank Zeigon of M & Z Claims Service (Yorba Linda) and others…have secured a special CAIIA rate for the Simsol property estimating software. The flyer is enclosed with your membership renewal information. As you know, the membership was looking for a quality estimating program at a good value. Simsol fits the bill perfectly and is designed for adjusters by adjusters. The CAIIA is proud to have Simsol as a partner in assisting CAIIA members in preparing professional property estimates!

Look for registration and further information about the CAIIA Annual Convention (October 13-15th in San Jose) on our website and in the Status Report future editions. Steve Wakefield, RPA (Ronald Bolt & Associates, Fresno) is our incoming President and is preparing for the meeting facility and programs. Steve advises that his long-time partner, Dave Rueland, RPA, has retired but promises to stick around and help out when needed. Good luck Dave and congratulations on your years of service!

For any of you who are involved in fire claims or related investigations, membership in the California Conference of Arson Investigators (www.arson.org) is recommended. The CCAI "…is the oldest and most active fire/arson investigators association in the country. CCAI is the only organization that transcends the gap between the public (fire service, law enforcement) and private (i.e. insurance adjusters, private investigators, etc.) sectors." Go to their website for details of their July annual conference being held in San Luis Obispo.

DOUG JACKSON, RPA
President - CAIIA 2004-2005

When You Need to Know What Really Happened

Submitted by Garrett Engineers, Inc. - Forensic Division

The case of the month is a residential HVAC fire. The fire department attributed the fire to a poorly maintained furnace. Our client was not content to stop there. GEI was called in to answer the question, "What *Really* Happened?"

Our expert found that the fire had started in the fuse type electrical circuit disconnect box, mounted on an exterior wall. The HVAC unit was installed about three years before the fire, along with other general remodeling. The general quality of the electrical installation was poor. A large twist of ground wires was positioned above and on the right side power wires. An abandoned power wire remnant had a cut off, loose end uncapped, in near proximity to the right side power supply wire, and to the ground or neutral clamp. There was clear evidence of an installed direct short to ground. A wire exited the ground wire bundle, passed in contact with and under the feed power wire to the right side fuse, that connected to the right side fuse clamp. The wire was secured under the neutral/ground clamp completing a direct short.

Our expert concluded that the direct short was formed at the time of remodeling and caused the enclosure and ground wires to become part of the right-hand fuse power circuit. The fact that the disconnect box was mounted on an exterior wall acted as an insulator from ground. Hence the HVAC unit serviced by the subject disconnect had operated in a floating neutral condition for three years. The disconnect box also was not properly weather sealed. Rain and sprinkler water dripped behind the enclosure and eventually entered the enclosure. The improperly wired disconnect then shorted from phase to phase. The fire had been caused by the faulty electrical installation – it just took three years to finally start.

The World's Easiest Quiz

(Passing requires 4 correct answers)

1) How long did the Hundred Years War last?
2) Which country makes Panama hats?
3) From which animal do we get catgut?
4) In which month do Russians celebrate October Revolution?
5) What is a camel's hair brush made of?
6) The Canary Islands in the Pacific are named after what animal?
7) What was King George VI's first name?
8) What color is a purple finch?
9) Where are Chinese gooseberries from?
10) What is the color of the black box in a commercial airplane?

All done? Check your answers below!

Answers to the Quiz, below:

1) How long did the Hundred Years War Last? - *116 years
2) Which country makes Panama hats? - *Ecuador
3) From which animal do we get cat gut? - *Sheep and Horses
4) In which month do Russians celebrate the October Revolution? - *November
5) What is a camel's hair brush made of? - *Squirrel fur
6) The Canary Islands in the Pacific are named after what animal? - *Dogs
7) What was King George VI's first name? - *Albert
8) What color is a purple finch? - *Crimson
9) Where are Chinese gooseberries from? - *New Zealand
10) What is the color of the black box in a commercial airplane? - *Orange, of course.

What do you mean, you failed?

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retroactive and the CSAA should be estopped from denying the demand for arbitration. The trial court rejected the Bullards' motion.

On appeal, the Third Appellate District considered the Bullards' claim that the amendment to section 11580.2(I) should be applied retroactively. Agreeing with the trial court, the Court of Appeal found compelling that the plain language of the statute made no mention of retroactivity. The Court held that it is a basic canon of statutory interpretation that statutes do not apply retroactively unless the Legislature plainly intends them to do so. The Third District also found nothing in the Legislative history supporting a claim for retroactive application.

Plaintiffs also argued that because the personal injury statute of limitations (CCP section 335.1) changed from one year to two years, effective January 1, 2003, the U.M. statute should be deemed to have changed at the same time. The Court of Appeal held there was no such intent on the part of the Legislature.

Finally, the Third District rejected the Bullards' claim of estoppel. Plaintiffs conceded that CSAA was not under a duty to inform them of any stature of limitations issues, because they were represented by counsel. The Court held there was no false representation or concealment of a material fact that Bullards' counsel relied upon. Rather, to their detriment, Bullards' counsel relied on their own erroneous belief that the statute of limitations for a U.M. claim in 2003 was two years. The trial court's order was therefore affirmed.

COMMENT

This decision makes clear that the amendment extending the statute of limitation for U.M. claims from one year to two years shall not applied retroactively. Therefore, U.M. claims which accrue on or after January 1, 2004 shall have a two-year statute of limitations.

Statute of Limitations – Tolling – Discovery of Defect

Brandi Fox v. Ethicon Endo-Surgery, Inc., California Supreme Court, (May 9, 2005)

Under the delay discovery rule, a statute of limitations is tolled until a plaintiff has reason to suspect an injury is due to some wrongful cause. In this Supreme Court case, the question was whether the statute begins to run as to all potential defendants when the plaintiff has a suspicion of negligence.

Brandi Fox filed a medical malpractice action after gastric bypass surgery and she developed severe complications. During the course of discovery, she received information that a medical device used during the surgery may have malfunctioned, contributing to her injury. She amended her complaint to add a products liability cause of action against the manufacturer of the device, Ethicon Endo-Surgery, Inc. Ethicon filed a demurrer raising the statute of limitation as a defense. The Superior Court sustained the demurrer without leave to amend. The Court of Appeal reversed with directions to grant Fox leave to amend to allege facts explaining why she did not have reason to discover earlier the factual basis of her product liability claim. Ethicon petitioned for a review in the Supreme Court, and the Court granted review.

A unanimous Supreme Court affirmed the Court of Appeal. The Court noted that a stature of limitations can be postponed until a point the discoverer has reason to discover the cause of action. This usually runs from the time the plaintiff learns or should have learned the facts essential to their claim. This rule applies even if the plaintiff does not have reason to suspect the defendant's identity. A potential plaintiff must conduct a reasonable investigation of all potential causes of injury. A statute begins to run when the investigation would have revealed those causes.

In this case, Fox alleged that she could not discover the existence of a claim against Ethicon until after the deposition of the doctor. The Supreme Court held that was sufficient to allege delayed discovery so as to delay the running of the statute of limitations. The Supreme Court stated that ignorance of the identity of a defendant does not delay accrual of a cause of action. However, ignorance of a generic element of the cause of action does. Thus, the plaintiff's ignorance of wrongdoing involving a product's defect will delay accrual of a cause of action because such wrongdoing is essential to the cause of action. The delayed discovery rule can delay accrual of the products liability cause of action even when a related medical malpractice claim has already accrued. Simply stated, the Court said if a plaintiff's reasonable and diligent investigation discloses only one kind of wrongdoing when the injury was actually caused by tortious conduct of a wholly different sort, the delayed discovery rule postpones accrual of the statute of limitations on the newly discovered claim. The Court therefore ruled that the judgment of the court of Appeal was correct.

COMMENT

The Supreme Court rejected the bright line rule that would hold that when a plaintiff has cause to sue based upon suspicion of negligence, the statute begins to run as to all

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Weekly Law Resume

Prepared by Low, Ball & Lynch, Attorneys at Law

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potential defendants. Instead, the Court held that there can be postponed accrual as to causes of action where the essential facts of that cause of action are not known.

Negligence – Superseding Cause Can Break Chain of Causation

Allison C. v. Advanced Education Services, Court of Appeal, Fourth District, (May 18, 2005)

In any negligence action, a plaintiff must not only establish that the defendant breached a duty, but must also establish a causal link between the negligent act and plaintiff's damages. Even if a chain of causation is established, there are limited circumstances under California law where the chain of causation can be broken by an intervening, superseding cause.

In this tragic case, Plaintiff Allison C. was the mother of Dylan, a severely emotionally disturbed 13-year-old boy. Over the course of five years, Dylan was placed in a number of special education schools and homes to deal with his emotional difficulties. When Dylan was 10, he was raped at knifepoint by a 14-year-old boy. This event worsened his condition and he attempted suicide on more than one occasion. Dylan was diagnosed as Bipolar (manic-depressive), a condition that was aggravated by post traumatic stress disorder.

In September 2000, Dylan was placed at a non-public school owned by Defendant Advanced Education Services (AES). AES provided school instruction and round-trip transportation between hone and school each day. AES's staff included two teachers, plus two classroom aides, a program manager and therapist.

Dylan's behavior did not improve at AES. He had a number of incidents with other students and went AWOL from school on several occasions. AES met with Allison to discuss how to keep Dylan from leaving campus. AES's policy was to shadow kids at school, and attempt to persuade students to remain. Physical restraint was not permitted unless the student posed an immediate threat to himself or others. If the student went AWOL, a parent would be contacted, police would be notified.

One morning, after the meeting, Dylan used a needle and thread to sew his fingers together, and reported that he had not taken his medication. The thread was removed and he calmly turned the needle over to the teacher. Allison was not contacted about this incident. An hour later, Dylan left campus despite staff attempts to persuade him to return to class. Allison and police were contacted. Dylan was missing for three days. During that time he was sexually assaulted by an adult male, who subsequently pled guilty to the assault. Dylan never returned to AES. Three months later, Plaintiff dropped her son off at his grandparents home, where he got hold of a rifle and killed himself.

Subsequently, Allison filed suit against AES, in which she pled a cause of action for negligence resulting in Dylan's death and injury to herself in the form of emotional distress. Plaintiff claimed that AES negligently allowed Dylan to leave campus, resulting in his being sexually assaulted, which caused him to take his own life. At trial, a jury returned a verdict finding that AES was negligent. Allison was awarded $3,600,000, plus costs. AES filed a motion for a new trial on the grounds of jury misconduct, excessive damages and insufficiency of the evidence. AES also filed a motion for judgement notwithstanding the verdict. The trial court granted the motion for new trial, but denied the motion for judgement notwithstanding the verdict. Appeals by both sides followed.

The Fourth Appellate District focused on AES's motion for judgement notwithstanding the verdict. AES contended that even if it breached a duty to Dylan, any such negligence did not cause Dylan's death. AES argued that the sexual assault was an intervening, superseding cause of the death, which was not foreseeable as a matter of law.

Under California Law, an intervening force is one which produces harm to a plaintiff after a defendant's negligent act has been committed. Whether the intervening act prevents the original defendant's negligence from

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CAIIA *Calendar*

CAIIA Annual Convention

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Hotel Valencia, Santana Row
San Jose, CA
Contact Steve Wakefield
559-485-4441
boltadj@msn.com

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being a legal cause of harm, depends on whether the intervening act is a superseding cause. If the risk of the intervening act is deemed foreseeable to the original tortfeasor, the original tortfeasor is normally negligent. If the intervening act is highly unusual or extraordinary, it is a superseding cause, and the original defendant is not liable. Here, the Court of Appeal determined that while the risk of falling victim to a child molester during truancy is conceivable, it is not foreseeable – absent some prior knowledge that such a crime is likely to occur. Based on the evidence, AES did not have notice of prior sexual assaults in the area. The Court was not swayed by Plaintiff's argument that Dylan was more susceptible to attack. Therefore, the sexual assault was deemed to be a superseding cause of Dylan's death. The Court of Appeal, reversing the trial court, granted AES's motion for judgement notwithstanding the verdict.

COMMENT
This case provides a good example of when an intervening, superseding cause can relieve a defendant of liability for an earlier negligent act.

Four Men Arrested in a Santa Clara County "Staged" Auto Theft Insurance Fraud Ring

SAN JOSE – An investigation conducted by the California Department of Insurance (CDI) Santa Clara County Urban Organized Auto Fraud Task Force (SCC Auto Fraud Task Force) has resulted in the arrest of four men for insurance fraud. One of the four suspects, Jeffrey McCallion, 22, self-surrendered at the Santa Clara County Sheriff's Office in San Jose last Tuesday afternoon. Brian Gutierrez, 22, Arnoldo Chavez Jr., 18, and Jayme Rivera, 18, were arrested at the California Highway Patrol (CHP) Office in Modesto on May 13, 2005. Each suspect faces one count of automobile insurance fraud and bail was set at $10,000 each. If convicted, the suspects could each face up to five years in prison and/or a $50,000.00 in fines.

"Staging an auto theft of your own vehicle is strictly a crime of greed, pure and simple," said Insurance Commissioner Garamendi. "The Auto Fraud Task Force is committed to uncovering and stopping these scams. Our investigators will continue to examine every scrap of evidence in each case and work with local District Attorneys to put fraudsters behind bars."

This CDI Auto Task Force is comprised of investigators from the Santa Clara County District Attorney's Office, CHP and the CDI Fraud Division. The case is being prosecuted by the Santa Clara County District Attorney's Office.

Investigators found that on September 5, 2004, McCallion reported to the Sunnyvale Police Department that his 1997 Honda Prelude had been stolen from the front of his residence. The vehicle was recovered in an irrigation canal by Modesto CHP on September 9, 2005. On September 10, 2004, an insurance claim for the reported theft was filed with 21st Century Insurance. As a result of the claim for the reported theft, 21st Century Insurance paid approximately $10,000.

The SCC Auto Task Force received information that the reported theft of McCallion's vehicle was a staged auto theft, and that McCallion was involved. Based on this information The Auto Fraud Task Force initiated an investigation into the alleged insurance fraud and the investigation revealed that McCallion allegedly conspired with Gutierrez, Chavez and Rivera to orchestrate the theft of his vehicle in order to obtain payment for the loss. On September 4, 2004, Gutierrez, Chavez and Rivera traveled from Modesto to McCallions' residence in the City of Sunnyvale, and as part of a prearranged plan with McCallion, allegedly staged the auto theft of McCallion's 1997 Honda Prelude. The vehicle was driven back to Modesto where it was subsequently stripped and dumped into an irrigation canal and recovered later by the CHP.

Survey Says One-Fifth of Americans Unhappy with Claims Customer Service

May 23, 2005

One-fifth (20 percent) of Americans who have filed property or casualty claims during the past three years are not satisfied with the way their insurance companies handle their claims, according to results or a survey released by Accenture and SAP.

In addition, two-thirds (67 percent) of respondents said they think it is important for their insurance companies to provide the ability to check the status of claims online.

Consumers' dissatisfaction regarding claims service significantly increased with the number of claims representatives they had to speak with during the course of their claims settlements. Survey respondents who spoke to three or more people at their insurance companies during the course of claims were nearly five times as likely to be dissatisfied with their claims experience as those who spoke to only one or two claims personnel – 49 percent versus 10 percent. Three-fourths (75 percent) of respondents said they would prefer to speak to only one person from their insurance companies about their claims.

Respondents with more complex claims experiences were more likely to negatively rate their claims experiences. Negative claims experience ratings were highest for claims that took more than 20 days to be resolved (40 percent compared with 20 percent overall); claims that resulted in recovery of less than half of their losses (28 percent); and claims that involved auto-related injuries (39 percent).

"Insurers need to continue to implement new automated claims technology to help further expedite the process and improve the customer experience," said Michael Lucarini, a partner in Accenture's Insurance practice. "The most significant opportunities to improve claims customer satisfaction are reducing the carrier-to-customer interactions required to handle high-frequency, low-severity claims and keeping the customer more informed on longer, more-complex claims."

"Consumers are demanding easier and more efficient methods for filing their claims," added Peter MacPherson, vice president, Insurance business unit SAP America Inc. "Innovative technology is crucial to help insurers meet growing customer demands for simpler claims filing processes. Insurers who leverage the Internet as a tool for consumers to manage their claims will gain a competitive advantage as well as reduce their operational expenses.

Additional survey findings:

- Respondents based their claims satisfaction levels on several elements, giving top priority to the perceived fairness of the settlement (selected as the top priority by 45 percent of respondents), followed by responsiveness of claim representatives (19 percent) and speed of the settlement (19 percent).
- Eighty-one percent of consumers polled said they would file claims online if it would expedite the claims settlement process.
- Nearly one in five (17 percent) respondents said their claims experiences would keep them from referring their insurance companies to friends.
- The two most important concerns of respondents when settling property/casualty claims were that premiums would increase because of the claims (42 percent) and that they would not receive the full value of the claims (26 percent).

Accenture and SAP announced the results of the survey at the 2005 ACORD LOMA Insurance Systems Forum I Orlando.

EXECUTIVE OFFICE DUTY DISTRIBUTION AND COMMITTEES

Status Report	Sterrett Harper, RPA	818-953-9200	harperclaims@hotmail.com
Grievance	Lee Collins	916-783-0100	lee.collins@gbbragg.com
Directory	Steve Wakefield	559-485-0441	boltadj@msn.com
Education	Sharon Glenn	925-280-9320	sglenn@johnglennadjusters.com
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Exhibit Booth	Doug Jackson	805-584-3494	scsdj@southwestclaims.com
By-Laws	Doug Jackson	805-584-3494	scsdj@southwestclaims.com
	Sharon Glenn	925-280-9320	sglenn@johnglennadjusters.com
Meeting Minutes	Sharon Glenn	925-280-9320	sglenn@johnglennadjusters.com
Legislation	Steve Wakefield	559-485-0441	boltadj@msn.com
Web-site Master	Pete Vaughan, RPA	707-745-2462	pvaughan@pacbell.net
New Membership	Pete Schifrin	818-909-9090	pschifrin@sgdinc.com
	Sam Hooper	562-802-7822	repooh@msn.com
Membership/Renewals	Pete Schifrin	818-909-9090	pschifrin@sgdinc.com
	Doug Jackson	805-584-3494	scsdj@soughwestclaims.com
Public Relations	Marybeth Danko	714-374-0240	mdanko@seacliffclaims.com
Mid-term Convention, 2005	Doug/Elaine Jackson	805-584-3494	scsdj@southwestclaims.com
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