CAIIA Status Report

JULY 2008

California Adjusters Need to Know About Colorado

The Colorado Legislature has recently passed the "Insurance Accountability Act", which imposes penalties of as much as twice the total claim, plus attorneys' fees, for delay or denial that is "unreasonable." Claims that are not settled "within ninety days after receiving the claim" are subject to a penalty of 20% "of the total amount ultimately due on the claim."

If you are handling any Colorado claims, please be aware of the new laws there. The above is just a tantalizing sample.

Accounting Classes for Adjusters

A long time supporter of the CAIIA RGL, forensic accountants, has two classes available for Adjusters on Friday, September 26, 2008, at the Pechanga Resort and Casino, 45000 Pechanga Parkway, Temecula, CA. Registration is at 8:30 AM and the classes start at 9 and 1:30. They are "Accounting Issues in Business Interruption Losses" and "Interviewing/Deposing An Expert." RSPV by September 12 to Betty Carle at 714 740-2100 or bcarle@us.rgl.com.

CCNC Volunteers

The CAIIA is proudly exhibiting at the
Claims Conference of Northern California
to be held on
July 24 and 25, 2008,
at the
Hyatt in downtown Sacramento.
We need volunteers to be at the booth.
Call or email **Sterrett Harper**
at harperclaims@hotmail.com
or **818 -953-9200** to help at the booth this year.

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An Employer Organization of Independent Insurance Adjusters

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PRESIDENT'S MESSAGE

I was recently telling a friend about some difficulty my company was having in filling an open adjuster position. He asked me what qualities an adjuster needed to possess to do his or her job well. He got me thinking about the many tools needed to be a competent adjuster:

People Skills – Adjusters are regularly thrust into meetings and conversations with people they have never met before, some of whom can be quite confrontational. A good adjuster is able to diffuse problems and create successful working relationships.

Analytical Skills – Adjusters need to be able to gather facts, evaluate damage, interpret information, analyze insurance coverage and perform many other high brain level functions.

Organizational Skills – Adjusters need to find a way to manage their time so they can handle all of their files promptly, get their reports done on time and comply with rules dictated to them by their clients, employers and even an Insurance Commissioner.

Attractiveness – I tend to fall back on this one as often as possible.

In all seriousness I often feel and say that we are an underappreciated group, working in a job that requires a variety of skills to accomplish what we do. The CAIIA works to provide a little something each year to help adjusters do their jobs well.

I got the chance to spend some time in Lake Tahoe in late May at the SEED Seminar jointly put on by the CAIIA and the Northern Nevada Claims Association. Paul and Ellen Camacho were excellent organizers and hosts and I thoroughly enjoyed the visit.

In Tahoe the SEED Program included an excellent and entertaining presentation by Dan Dyce of the California Earthquake Authority. The attendees all were reminded that the next "Big One" is coming "not if but when."

I also want to thank attorney Kevin Hansen from the McCormick Barstow firm and engineer Michael O'Connor for their fine presentations.

The CAIIA Golf Tournament flyer is now on our website. The Tournament is sure to be a great event and I encourage those interested to sign up while space is available. Also, if you want to be involved, but don't golf, there is the option to come just for the after golf dinner, which is a great event on its own.

If you have any suggestions, questions or just want to say hello, please don't hesitate to call or email me.

PETER SCHIFRIN
President - CAIIA 2007-2008

Coverage Alert

Submitted by McCormick Barstow, LLP - Fresno, CA

The court erred in dismissing an action for breach of contract and bad faith for failing to defend where the allegations of the underlying complaint were not specific and thus did not all clearly fall within the scope of a policy exclusion

Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025 (9th Cir. 2008)

BACKGROUND FACTS John Densmore (former drummer for *The Doors*), the parents of Jim Morrison (former vocalist for *The Doors*) and the parents of Pamela Courson (Morrison's late wife) filed lawsuits alleging that Raymond Manzarek (former keyboardist for *The Doors*) and members of his band were liable for infringing on *The Doors* name, trademark and logo in connection with a planned national and international concert tour. It was alleged that Manzarek and the band improperly used *The Doors* logo in connection with the marketing of products and merchandise. In addition, the *Densmore* lawsuit alleged that the breaches by Manzarek and his band caused Densmore to suffer economic damages and damages to his reputation. The jury found against Manzarek and the other defendants but awarded no damages. Manzarek and the band incurred in excess of $3 million in defense fees and costs in defending the lawsui

St. Paul Fire & Marine Insurance Company issued a commercial general liability policy to Manzarek and, subsequently, issued another commercial general liability policy covering Manzarek and the band. Both policies contained a Field of Entertainment Limitation Endorsement ("FELE") which excluded coverage for personal injury or advertising injury resulting from "the content of, or the advertising or publicizing for, any Properties or Programs which are within your Field of Entertainment Business." The policy defined "Field of Entertainment Business" as including the "creation, production, publication, distribution, exploitation, exhibition, advertising and publicizing of product or material in any and all media . . . ." The District Court dismissed the case on the ground that the exclusion applied to preclude coverage.

THE COURT'S RULING In reversing the dismissal, the Ninth Circuit found that the District Court failed to apply the language of the FELE endorsement to the factual allegations in the underlying lawsuits. The court noted that the endorsement would not exclude advertising injury coverage if, for example, Manzarek and the band had begun distributing *The Doors'* own line of salad dressing or would not completely exclude advertising injury if Manzarek and the band began marketing a line of t-shirts and electric guitars with *The Doors logo* or Morrison's likeness. Because the underlying lawsuits did not contain allegations specific enough to determine whether or not the improper conduct fell within the scope of the endorsement, a potential for coverage existed under the policies. The court also concluded that the underlying lawsuits raised a potential for coverage under the "bodily injury" portion of the policies since Densmore alleged damage to reputation which was sufficient to raise a potential for an award of damages for mental anguish or emotional distress.

THE EFFECT OF THE COURT'S RULING An insurer's defense obligations are triggered where the allegations of a complaint leave open the question of whether covered claims could be made under the policy. Notably, the court also found that mere allegations of damage to reputation in a complaint are sufficient to potentially trigger "bodily injury" coverage under the policy.

Weekly Law Resume

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

Arbitration - What is the Scope of An Arbitrator's Jurisdiction In U.M. Action?

Bouton v. USAA Casualty Insurance Company, (June 9, 2008) California Supreme Court

California Insurance Code section 11580.2 requires insurers to provide coverage for injuries caused by uninsured motorists. Subdivision 11580.2(f) sets forth that if an insurer and an insured cannot agree on whether the insured is legally entitled to recover damages from an uninsured motorist and the amount of such damages, those issues are to be decided through arbitration. In this consolidated matter, the California Supreme Court took the opportunity to clarify what issues an arbitrator may consider at arbitration.

Plaintiff Lloyd Bouton was injured in an automobile accident. Bouton settled his claim against Daniels, the adverse driver, for Daniels' automobile insurance policy limits of $15,000. Bouton then made a UM claim to USAA Casualty Insurance Co. (USAA), his sister's insurer. USAA denied coverage, claiming that Bouton was not a resident of his sister's household, a requirement under the USAA policy. Bouton filed a motion to demand arbitration. The trial court denied the motion to compel, finding that the parties were only bound to arbitrate the issues of liability and damages - not coverage. The Court of Appeal reversed, and the Supreme Court granted review.

The claim consolidated with the Bouton case involved Charles O'Hanesian. O'Hanesian was injured when his car was rear-ended by Curtis Thurlow's vehicle. O'Hanesian filed suit against Thurlow, who failed to appear after being served with publication. O'Hanesian submitted evidence regarding his damages at a bench trial and obtained a default judgment of over $3.7 million. O'Hanesian received policy limits of $100,000 from Thurlow's carrier. O'Hanesian then demanded payment of $900,000 from his own carrier, State Farm Mutual Automobile Insurance Co. (State Farm), the maximum benefit available under his underinsured motorist coverage. State Farm contended that it was not bound by the default judgment and O'Hanesian sued State Farm for breach of contact and other claims. State Farm demurred, arguing that O'Hanesian's action was premature, because no arbitration had occurred. The trial court granted State Farm's demurrer, and the Court of appeal affirmed. The Supreme Court then agreed to hear the case.

The Supreme Court, reviewing prior cases that had interpreted section 11580.2(f), held that only issues of liability and damages may be decided by an arbitrator, unless the parties agree to arbitrate additional issues. Applying this rule to the Bouton case, the Court held that a court, not an arbitrator, must determine whether Bouton was insured under his sister's policy. Whether Bouton was a "covered" person under the insurance policy, was not a question regarding the underinsured tortfeasor's liability, or the amount of damages. This was a pure question of coverage that needed to be resolved before the case went to arbitration.

On the other hand, the Supreme Court ruled that it was for an arbitrator, not a court, to decide whether the default judgment O'Hanesian obtained was enforceable against State Farm. The Court held that the default judgment pertained directly to the underinsured tortfeasor's liability to O'Hanesian, and the amount of damages owed. The Supreme Court, therefore, reversed the judgment of the Court of Appeal decision in Bouton, and affirmed the judgment of the Court of Appeal in O'Hanesian.

COMMENT

The California Supreme Court's ruling in this consolidated action provides clarity as to the jurisdiction of an arbitrator in UM actions. Unless the parties stipulate, an arbitrator may only rule on issues pertaining to the liability of the uninsured or underinsured motorist, and the amount of damages claimed.

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Arbitration/Mediation - Carriers With Potential Insurance Coverage Must Attend Appellate Mediation

Campagnone v. Enjoyable Pools & Spas Service & Repairs, Inc., (May 30, 2008) Court of Appeal, Third District

Within the last several years, courts have instituted mediation of cases on appeal. This case deals with the issue of who must attend such mediations.

Plaintiff Robert Campagnone suffered serious injuries when his home swimming pool filter exploded. Mr. Campagnone and his wife sued the manufacturer of the filter, Sta-Rite, and the seller and installer of the filter, Enjoyable Pools & Spas Service & Repairs, Inc. (Enjoyable Pools), alleging negligence and products liability. The matter proceeded to trial and a jury awarded the Campagnones $2,424,000, with interest at the rate of 10% from the date of entry of judgment until it was paid.

The Defendants appealed the judgment. The case was then assigned to court-ordered mediation. During the course of the litigation, Sta-Rite had filed a Certificate of Interested Entities or Persons, listing Sta-Rite's parent company and its excess insurance carrier, National Union Fire Insurance Company (National Union). National Union insured Sta-Rite for amounts over $3 million. Following mediation, the Campagnones filed a motion for sanctions against Sta-Rite, its counsel, and/or National Union, seeking $14,200 in attorney fees and $4,845.25 in mediation fees, because National Union did not send a representative to the mediation and Sta-Rite did not abide by the local rules requiring the insurer to participate in the mediation.

The Third District Court of Appeal took the opportunity to make clear that pursuant to its local rules, all parties and their counsel of record must attend all mediation sessions in person with full settlement authority. Further, if a party has potential insurance coverage applicable to any issues in dispute, a representative of each insurance company whose policy may apply, must also attend with full settlement authority. The Court held that an insurer is considered a party to the mediation, and thus, may be ordered to pay sanctions for failure to comply with the local rules concerning mediation. Monetary sanctions may include payment of the aggrieved party's attorney fees and costs, and a payment to the court to reimburse it for time and expense in the handling of the mediation. The Court held that there is no breach of the confidentiality rules involved in a mediation, if a party is simply advising the court about conduct during mediation that might warrant sanctions.

In the subject action, the Court denied Plaintiffs' request for sanctions, because National Union was not given notice of the mediation and the Local Rules did not explicitly state that a carrier must be notified. However, the Court held that henceforth, a party on appeal, and the party's counsel will be sanctioned for failure to notify a carrier with potential insurance coverage that appellate mediation had been ordered, and that the carrier must have a representative attend all mediation sessions in person, with full settlement authority.

COMMENT

This case makes clear that parties to an appeal and carriers with potential coverage must participate in court-ordered mediation. Even if coverage ap-

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pears remote, this opinion makes clear that carriers must attend all mediation sessions. Given the success of appellate mediation, we expect other courts to follow the lead of the Third District Court of Appeal.

Property Insurance - Enforceability of Appraisal

Devonwood Condominium Owners Association v. Farmers Insurance Condominium Owners Association, (April 30, 2008)Court of Appeal, First District

The issues subject to decision by appraisers under a first party fire policy and the enforceability of their decision were the subject matter of this case.

Farmers Insurance Condominium Owners Association insured Devonwood Condominium Owners Association. In 2004, a fire occurred in one of the Devonwood units. Devonwood submitted a claim to Farmers. When the parties could not agree on the value of the loss, Devonwood demanded appraisal. The appraisal panel issued a decision after hearings and evidence, setting forth two categories of replacement cost values. The first, in the sum of $122,460.65, was for the fire-related structural damage excluding floor coverings, ceiling coverings and wall coverings. The second category, in the sum of $7,479.22, was the replacement cost value of the interior painting of walls and ceilings.

Devonwood filed a petition to confirm the appraisal award. Farmers opposed, contending that coverage first had to be determined. Farmers also requested the award be corrected or vacated on the basis the appraisers exceeded their powers. Farmers contended it was not obligated to pay for painting interior areas. The court concluded it had no authority to change the award and confirmed the appraisal award in the sum of $129,939.87. Judgment was entered thereon. Farmers appealed.

The Court of Appeal reversed. The Court concluded the trial court judgment did not conform to the appraisal award. It was undisputed the award determined the amount of loss. However, it was not the function of the appraisers to resolve questions of coverage or interpret policy provisions. Once an appraisal award was issued, a petition could seek to confirm, vacate or correct it. Once done, judgment could be entered thereon.

In this case, the judgment did not conform to the award. There were two categories of replacement cost values under the appraisal award. The face of the award made clear that coverage was not decided. Rather, the appraisers merely determined the loss resulting from the fire. Thus, a judgment could be entered which brought finality to the dollar amount of the replacement cost values and nothing more. The judgment could not award that sum against Farmers because the award did not determine coverage and liability of Farmers.

The Court therefore ordered the judgment vacated and remanded to the lower court with instructions to enter any judgment that conformed to the appraisal award. The issue of coverage was left open for further determination in this matter.

COMMENT

This opinion sets forth the limited nature of appraisal under fire policies. It further reinforces the rule that appraisers' decisions are limited to determining the amount of the loss, and that a determination of coverage is beyond the scope of their authority.

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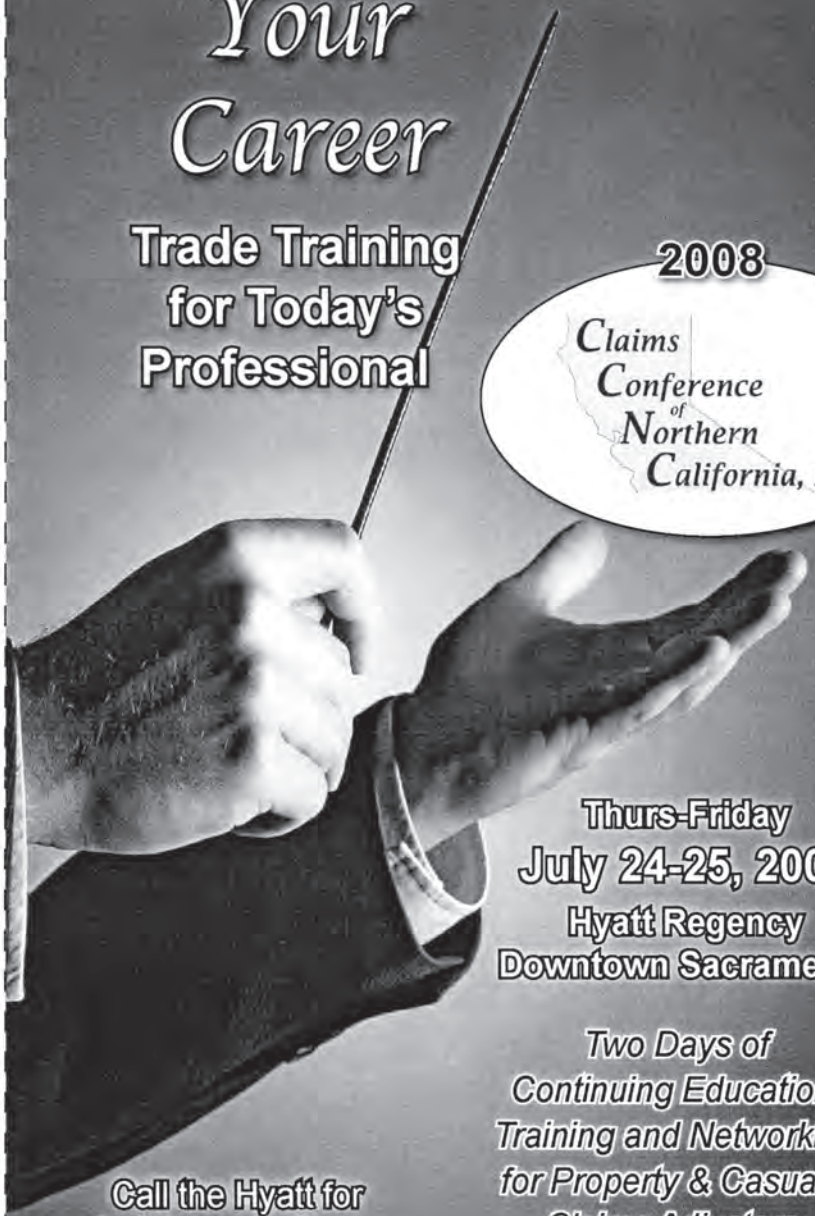

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Questions? Contact Registration Chair Corby Schmautz: 916-361-6616
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- ☐ Both Days $125
- ☐ Thurs 7/24 Only $75
- ☐ Friday 7/25 Only $75
- ☐ All Others - Non-Adjusters one or both days $300

Please Complete and mail with check one form per person, or apply with credit credit online
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Points to Ponder

Can you cry underwater?

How important does a person have to be before they are considered assassinated instead of just murdered?

Why do you have to 'put your two cents in' . . . but it's only a 'penny for your thoughts'? Where's that extra penny going to?

Once you're in heaven, do you get stuck wearing the clothes you were buried in for eternity?

Why does a round pizza come in a square box?

What disease did cured ham actually have?

How is it that we put man on the moon before we figured out it would be a good idea to put wheels on luggage?

Why is it that people say they 'slept like a baby' when babies wake up, like, every two hours?

If a deaf person has to go to court, is it still called a hearing?

Why are you IN a movie, but you're on TV?

Why do people pay to go up tall buildings and then put money in binoculars to look at things on the ground?

Why do doctors leave the room while you change? They're going to see you naked anyway.

Why is 'bra' singular and 'panties' plural?

Why do toasters always have a setting that burns the toast to a horrible crisp, which no decent human being would eat?

If Jimmy cracks corn and no cares, why is there a stupid song about him?

Can a hearse carrying a corpse drive in the carpool lane?

If the professor on Gilligan's Island can make a radio out of a coconut, why can't he fix a hole in a boat?

Why does Goofy stand erect and Pluto remains on all fours? They're both dogs!

If Wile E. Coyote had enough money to buy all that ACME crap, why didn't he just buy dinner?

If corn oil is made from corn, and vegetable oil is made from vegetables, what is baby oil made from?

If electricity comes from electrons, does morality come from morons?

Do the Alphabet song and Twinkle, Twinkle Little Star have the same tune?

Why did you just try singing the two songs above?

Why do they call it an asteroid when it's outside the hemisphere, but call it a hemorrhoid when it's in your butt?

Did you ever notice that when you blow in a dog's face, he gets mad at you, but when you take him for a car ride, he sticks his head out the window?