CAIIA Status Report
JULY 2010

Cracks in the Wall of the Mediation Privilege?

By E. Forrest Shryock, Jr., of Willis | DePasquale, LLP

It is generally well understood that all communications, negotiations or settlement discussions by and between participants during a mediation are confidential. However several recent cases have held that conversations between counsel and client are not confidential. This issue is now before the California Supreme Court, and if it agrees with the holdings of these cases this exception may also apply to conversations between insurance representatives and an insured.

The general rule of mediation confidentiality is found in Evidence Code section 1115 et seq., and specifically section 1119, which "prohibits any person, mediator and participants alike, from revealing any written or oral communication made during mediation." The primary exception to this rule is within the parties own control: they may, and usually do, expressly waive the confidentiality provision by agreeing that any settlement reached in the mediation may be disclosed to enforce any settlement reached by the parties. Indeed few parties would participate in a mediation that could not be enforced.

There has been much litigation over the scope of mediation confidentiality over the last few years. Most recently, the California Supreme Court, in the case of Simmons v. Ghaderi (2008) 44 Cal.4th 570, 578, issued a broad opinion that appeared to clarify the law in this area. The Supreme Court in Simmons stated that the privilege could not be waived by implication, and that the only exceptions to the mediation confidentiality provisions of the Evidence Code were (1) express waiver (generally where the parties provide exceptions to confidentiality in the mediation agreement), and (2) where due process rights of the parties may be violated, but for a required disclosure. Cases decided since Simmons have generally indicated that the courts will bar any claims arising out of communications between the parties at mediation. However, two recent cases have created a significant exception, that, unless overturned by the California Supreme Court, will create substantial concerns for attorneys and insurance professionals.

In the recent case of Cassel v. Superior Court (2009) 179 Cal.App.4th 152, the Court of Appeal determined that conversations solely between a client and his attorneys during meetings in which they were the sole participants, and which were held outside the presence of any opposing party or mediator, were not protected by confidentiality. Among the reasons for this rul-

continued on page 3

PUBLISHED MONTHLY BY
California Association of
Independent Insurance Adjusters

An Employer Organization of Independent Insurance Adjusters

Inside This Issue

***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@caiia.org*.

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

Editor: Sterrett Harper
Harper Claims Service, Inc.
Tel: (818) 953-9200

California Association of Independent Insurance Adjusters, Inc

PRESIDENT'S OFFICE
P.O. Box 5154
Cerritos, CA 90703
562-802-7822
Email: info@caiia.org
www.caiia.org

PRESIDENT
Sam Hooper
hooper@hooperandassociates.com

IMMEDIATE PAST PRESIDENT
Pete Vaughan
pvaughan@pacbell.net

PRESIDENT ELECT
Phil Barrett
barrettclaims@sbcglobal.net

VICE PRESIDENT
Jeff Caulkins
jeff.c@johnsrickerby.com

SECRETARY TREASURER
William "Bill" McKenzie
walshadj@sbcglobal.net

ONE YEAR DIRECTORS
Kearson Strong
kearson@claimsconsultantsgroup.com

Rick Kern
rkern@sgdinc.com

Rick Beers
NCI63@sbcglobal.net

TWO YEAR DIRECTORS
Tanya Gonder
Tanya@casualtyclaimsconsultants.com

Scott Hannaford
Hannaford@comcast.net

Art Stromer
artstromer@hotmail.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

VOLUNTEERS TO A VOLUNTEER ORGANIZATION

It's remarkable that CAIIA has so many volunteers committed to an organization whose member income is basically generated by "time".

Our volunteers' efforts ultimately benefit each member, sponsors and the organization as a whole. The volunteer does not bill for their time. While certain expenses may be reimbursed; no income is received by the individual volunteer. Any income generated from seminars, conventions, golf tournaments etc. goes back into the organization.

While most of the volunteers are officers, board members, counsel, committee members, and often their staff, any of us can volunteer.

Because I have been there and done that, I know that Phil Barrett dedicates a significant amount of time currently organizing the fall convention. Moreover, this year he is also chairing the 4th Annual golf tournament committee. While the previous three golf tournaments were successfully chaired by Jeff Stone, we are fortunate Phil has taken on this responsibility. The tournament has proven to be a fantastic networking opportunity for our member participants, their clients and sponsors.

Through Tanya Gonder's efforts, she has identified schools of higher education worthy of receiving CAIIA scholarships.

Through CAIIA's Internal Management evaluation system, Kearson Strong and Tanya Gonder have taken on the responsibility of monitoring the performance of the organization, as it strives to meet the expected needs of all members. The new on-line questionnaire is a great step forward.

To date Nancy DePasquale's counsel has been a critical in assuring that our actions comply with our By-Laws.

While a number of organizations have an Executive Officer, we don't. Sterrett Harper has proactively acted as our "DeFacto Executive Officer". Absent his volunteering for this role, our day-to-day operations, like insurance, taxes might be overlooked. He, also, edits and puts together the Status Report each month.

Jeff Caulkins along with Phil Barrett, both have taken on member development and retention.

This year Jeff Caulkins and Scott Hannaford coordinate production of the Membership Director.

Of course, the mission of CAIIA is education. As we know, Helene DalCin, Peter Schifrin, Doug Jackson and the presenters have taken the lead in organizing educational events for years.

Thanks to these, and all of the CAIIA volunteers.

SAM HOOPER
President - CAIIA 2009-2010

Cracks in the Wall. . .

continued from page 1

ing was that the court determined that a client and his/her counsel were not within the class of persons to be protected by the statutes since they were not "disputants" within the meaning of Evidence Code section 1115. The California Supreme Court has now granted review in the Cassel case, but another recent case, Porter v. Wyner (2010) 183 Cal.App.4th 949, reached a similar conclusion.

Porter involved a suit by plaintiffs against their former attorneys who allegedly promised at mediation to pay the Porters certain proceeds from the monies allocated as attorneys' fees. The Court of Appeal in Porter also held that communications between attorneys and clients were not subject to mediation confidentiality, and noted that among other things, if statements between counsel and client during mediation were confidential, "clients would be precluded from pursuing any remedy against their own counsel for professional deficiencies occurring during the mediation process as well as representations made to the client to induce settlement. . . [and] a client who embarks upon the mediation process would face losing any recourse against his attorney for any breached side agreements, representations and deficiencies that might take place or come to light during the mediation."

While most lawsuits relating to such communications likely involve a "buyer's remorse" case where a plaintiff is suing his/her counsel for malpractice, there are also significant implications for defense counsel, insurers, and insurance adjusters. Unless the California Supreme Court reverses Porter and Cassel, any communications made privately between or among defense counsel, the adjuster, and the insured at mediation may not be confidential.

Insurance Law News

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

Liability Policy's Self-Insured Retention Can Only Be Satisfied By Named Insured, Not Additional Insured

A general liability policy unambiguously provided that the policy's self-insured retention could only be satisfied by the named insured, and not by someone else such as an additional insured. (*Forecast Homes, Inc. v. Steadfast Ins. Co (2010)* 181 Cal.App.4th 1466)

Facts

Forecast Homes, Inc. (Forecast) is a residential home developer which typically hires subcontractors to build the homes. The subcontracts give Forecast express indemnity rights against the subcontractors and require that Forecast be listed as an additional insured on the subcontractors' policies.

Between 2001 and 2003, Forecast was served with five different construction defect lawsuits. Forecast was the only named defendant in the lawsuits; the subcontractors were not named.

After being served with the lawsuits, Forecast tendered its defense to various subcontractors' insurers which had issued additional insured endorsements in favor of Forecast. Over a dozen of the subcontractors had policies through Steadfast Insurance Company (Steadfast), and each Steadfast policy had self-insured retention (SIR). Some of the Steadfast policies provided that "*you* [i.e., the named insured subcontractor] shall be responsible for payment of all damages and defense costs for each occurrence or offense, until *you* have paid self-insured retention amounts and defense costs equal to the per occurrence amount shown in the Schedule." Other Steadfast policies contained similar language and further stated that "[p]ayments by others, including but not limited to additional insureds or insurers, do not serve to satisfy the self-insured retention."

Steadfast denied Forecast's tenders on the ground that the only the named insured subcontractor could satisfy the SIR requirement, and none of the subcontractors had satisfied the SIRs.

Continued on page 4

Insurance Law News

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

continued from page 3

Forecast sued Steadfast for breach of contract and bad faith. The trial court ruled that only the named insured subcontractors (not an additional insured such as Forecast) could satisfy the SIR requirement. The trial court thus ruled that Steadfast's duty to defend Forecast had not been triggered. Forecast appealed.

Holding

The Court of Appeal affirmed. The appellate court held that under both versions of the Steadfast policies, only the named insured subcontractor could pay the SIR and thereby trigger the duty to defend. The appellate court further held that this was not counter to public policy, noting that Forecast could have (1) required its subcontractors to list Forecast as a named insured on the policies or (2) insisted on policy language permitting an additional insured to satisfy the SIR. Because the named insured subcontractors had not satisfied the SIRs, Forecast was not entitled to a defense from Steadfast.

Comment

In this case, the appellate court confirmed that payment of an SIR is a condition precedent to triggering coverage under a policy. Further, if the SIR language clearly provides, only the named insured – not an additional insured – can satisfy this condition precedent.

The court specifically distinguished some prior cases in which courts had held that someone other than a named insured might be able to satisfy an SIR. According to the appellate court, those prior cases involved different, arguably ambiguous, policy language.

Weekly Law Resume

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

Civil Procedure - Intervention

Steven W. Gray v. Dameon L. Begley ,Court of Appeal, Second District, Division Three, (March 22, 2010)

This case considered the issue of whether an insurer, who provides an insured a defense under a reservation of rights, where the insured subsequently reaches a private settlement with a third party claimant without the participation of the insurer, may intervene in the underlying action brought by the claimant to protect its own interests.

Steven Gray was injured in an automobile accident when Dameon L. Begley, employed by Granite Construction Company, struck him. Gray sued Granite and Begley. Granite was insured by Continental Casualty Company and Valley Forge Insurance Company ("CNA"). Granite's excess carrier was Westchester Insurance Company. CNA and Westchester settled on behalf of Granite, but not Begley, for an amount in excess of $8 million. Gray proceeded to trial against Begley, and obtained a jury verdict against Begley for $4.5 million. Begley moved to vacate the judgment in order to offset the judgment by the amount of the settlement under Civil Code § 877. Before the motion was heard, Gray and Begley entered into a private agreement whereby Begley assigned to Gray his rights against CNA. CNA moved to intervene in order to prosecute the motion to vacate the judgment and apply the setoff. The trial court granted the motion to intervene, but denied the motion to vacate the judgment to allow for setoff. CNA filed a notice of appeal.

The Court of Appeal reversed the refusal of the trial court to hear the motion for setoff. The Court first noted that CNA had standing to appeal. CNA had been granted leave to intervene. Thus, it was a party for purposes of filing

Continued on page 5

News of Members

Long time member Gene Roberts, Gene C. Roberts Claim Service, San Clemente, CA, recently went through heart bypass surgery. He is doing very well at home and is working from his home. Gene expects to be working at his full level in a few weeks. The CAIIA wishes him well.

Weekly Law Resume

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

continued from page 4

an appeal. The trial court's denial of CNA's motion to vacate, which prevented the hearing on the setoff motion, affected CNA's interests and thus it was an aggrieved party, entitled to appeal.

The Court next considered whether an insurer which is providing a defense under a reservation of rights may intervene in an action to protect its own interests. The Court stated no case authority had decided this issue. The Court noted that an insurer may intervene where it has provided coverage and provided a defense. Intervention is only denied where a carrier denies coverage and refuses to provide a defense. The Court held that an insurer providing a defense, even though subject to a reservation of rights, may intervene in the action where the insured attempts to settle the case to the potential detriment of the insurer. Such an insurer has a sufficient interest in the litigation to intervene when the insured reaches a settlement without the participation of the defending insurer. CNA was properly allowed to intervene to pursue its attempt to reduce the judgment.

Finally, CNA had a right to a hearing on the motion for setoff. The court should have vacated the judgment to permit CNA's setoff motion to be heard. The Court therefore directed the trial court to vacate the judgment, to hear the CNA motion for setoff, and, thereafter, to enter a new judgment in accordance with its ruling.

COMMENT

The plaintiff and the insured in this case were trying to set up CNA so that it would not be able to claim the benefit of the prior settlement with Granite. This decision allows for a full and fair hearing on those issues in order to allow CNA to attempt to claim a credit for the settlement.

Damages- Proposition 213 Bars Claim For Non-Economic Damages

Chude v. Jack In The Box Inc., Court of Appeal, Second District, (May 27, 2010)

Proposition 213 (codified under Civil Code section 3333.4) restricts the ability of uninsured motorists, convicted drunk drivers and convicted felons to sue for damages suffered in accidents. In particular, uninsured motorists are prohibited from collecting non-economic damages in any action arising out of the operation or use of a motor vehicle. This case addresses the issue of what constitutes "operation" of a motor vehicle.

Plaintiff Teckla Chude drove to a Jack In The Box (JIB) restaurant in Southern California. Chude used the "drive-thru" option to order her meal, which included a cup of hot coffee. After Chude paid for her order, a JIB employee handed her the food and cup of coffee. Chude took the coffee from the employee and brought it into her car. The cup dropped into Chude's lap. Coffee pooled on the seat below her. Chude's vehicle rolled forward. She put the vehicle in park as she scrambled to unfasten her seatbelt and get out of the car. Chude, who was an uninsured motorist at the time, sustained second degree burns as a result of the incident.

Chude filed suit against JIB alleging negligence and seeking both economic and non-economic damages. JIB, in turn, filed a motion for summary adjudication contending that Civil Code section 3333.4 precluded Chude from

continued on page 6

continued from page 5

recovering non-economic damages, because she was injured while operating her motor vehicle, which was not insured. The trial court granted the motion. Chude appealed. The Second District Court of Appeal affirmed.

On appeal, Chude did not deny that she owned the vehicle and that it was not insured. Chude argued, however, that there was no nexus between her injury and the operation or use of the vehicle. Chude asserted that the accident was the result of JIB not fastening the lid to the coffee cup correctly. It had nothing to do with her vehicle. The Court of Appeal disagreed. The Court held that the spill arose out of Chude's use of the vehicle. Chude used her car to approach the "drive-thru" window. Further, Chude was seated inside her car, with her seatbelt on, and with the motor running when the accident occurred. Chude would not have been at the "drive-thru" window purchasing coffee but for her vehicle. For the Court, the vehicle was an "indispensible condition precedent" to the accident.

Chude further argued that section 3333.4 only applies to actions involving accidents between motorists. Again, the Court of Appeal disagreed. Citing prior cases interpreting section 3333.4, the Court held that Proposition 213 can apply when the injury is caused by something outside the uninsured vehicle. The test is whether the "damages" arose out of operation or use of the car.

In this case, the court concluded that there was a direct causal relationship between Chude's operation of her vehicle and the accident for which she claimed JIB was responsible. The judgment was therefore affirmed.

COMMENT

The Court of Appeal in this case broadly interpreted Civil Code section 3333.4 in holding that Plaintiff's accident arose out of her operation of her vehicle and that her claim for non-economic damages was barred

· Commissioner Poizner Announces Arrest of Solano County Deputy Sheriff for Alleged Workers' Compensation Insurance Fraud

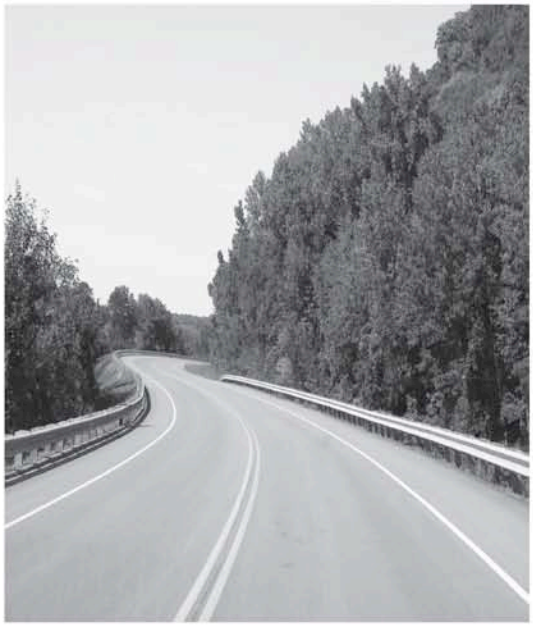
Insurance Commissioner Steve Poizner announced today the arrest of a Solano County deputy sheriff for alleged workers' compensation insurance fraud. Michael Oster, 48, of Elk Grove, was arrested this morning and booked into the Sacramento County Jail on $10,000 bail. He was charged with concealing an event affecting an insurance benefit [Insurance Code Section 550(b)(3)], a felony. If convicted, the suspect faces between one and five years in prison and/or $20,000 to $150,000 in fines.

On November 30, 2007, Oster filed a workers' compensation claim with Solano County, alleging an injury to his left knee. Oster received his full paycheck pursuant to Labor Code Section 4850 during the first year he was off work, as he was deemed to be Temporarily Totally Disabled (TTD). After receiving one year of 4850 benefits, Oster began to receive TTD payments from the County of Solano. Oster later received Long Term Disability (LTD) payments from the California Law Enforcement Association (CLEA), a private, non-political, non-profit benefit association that offers benefits California peace officers.

A joint investigation conducted by the California Department of Insurance and the Solano County Sheriff's Office revealed that Oster allegedly concealed the fact he was working for another employer while collecting Labor Code 4850 benefits, TTD and LTD benefits.

Oster purportedly earned $67,242.43 from Western Career College and received $19,481 from CLEA. He failed to disclose these earnings to the county and CLEA, resulting in an overpayment of benefits.

Commissioner Poizner oversees sixteen CDI Enforcement Branch regional offices throughout the state. Nearly 2,800 insurance fraud-related arrests have been made by CDI since Commissioner Poizner took office in 2007 - more arrests than have been made during any other three year period, under any previous insurance commissioner.



Announcing the 17th Annual

Claims Conference of Northern California

Going the Extra Mile

Education • Professionalism • Customer Service

Claims Conference of Northern California, Inc.

Thursday & Friday

September 9-10, 2010

Hyatt Regency
Downtown Sacramento

Two days of accredited continuing education seminars, trade-show, and networking events for insurance carrier-side claims professionals.

Approved CE Credits for:

DOI-IAs • DOI-Agents • RPA • MCLE • CPCU

Thank you to our
2010 CCNC
GRAND SPONSOR

SACRAMENTO CLAIMS ASSOCIATION SCA

– Liability & Property Track Courses Include –

- What Does Your Medical Bill Really Mean?
- Damage Assessment, Repair v. Replacement Decision Process
- Managing Stress and Safety in the Claims Profession
- What's it Worth?
- Water and Fire Damage - Remediation & Restoration
- Forensic Cause of Loss Evaluation & Spoliation of Evidence
- Medical Records and Malingering: You Can't Always Get What You Want
- Technology in Collision Reconstruction
- Electronic Discovery - Privilege Issues, Work Product
- Ethics and the Adjuster - A Crime Scene Investigation
- Slip, Trip & Fall
- The Mortgage Crisis and It's Impact On Property Claims
- Motor Cargo Theft
- What You Should Know About Detecting and Fighting Fraudulent Claims

Early-Bird Registration Now Open

www.ClaimsConference.org

EMBARRASSING MEDICAL EXAMS

A man comes into th e ER and yells,"My wife's going to have her baby in the cab!"
I grabbed my stuff, rushed out to the cab, lifted the lady's dress and began to take off her underwear. Suddenly I noticed that there were several cabs . . . and I was in the wrong one. - *Submitted by Dr. Mark Mac Donald, San Francisco, CA*

At the beginning of my shift I placed a stethoscope on an elderly and slightly deaf female patient's anterior chest wall. "Big breaths," I instructed.
"Yes, they used to be," relied the patient. - *Submitted by Dr. Richard Byrnes, Seattle, WA*

One day I had to be the bearer pf bad news when I told a wife that her husband had died of a massive myocardial infarct.
Not more than five minutes later, I heard her reporting to the rest of the family that he had died of a 'massive internal fart'. - *Submitted by Dr. Susan Steinberg*

During a patient's two week follow-up appointment with his cardiologist, he informed me, his doctor, that he was having trouble with one of his medications. "Which one?", I asked. "The patch . . . The nurse told me to put on a new one every six hours and now I'm running out of places to put it!"
I had him quickly undress and discovered what I hoped I wouldn't see. Yes, the man had over fifty patches on his body! Now the instructions include removal of the old patch before applying a new one. - *Submitted by Dr. Rebecca St. Clair, Norfolk, VA*

While acquainting myself with a new elderly patient, I asked, "how long have you been bedridden?" After a look of complete confusion she answered, "Why, not for about twenty years – when my husband was alive." - *Submitted by Dr. Steven Swanson, Corvallis, OR*

I was performing rounds at the hospital one morning and while checking up on a man I asked, "So how's your breakfast this morning?"Bob replied,"It's very good except for the Kentucky Jelly. I can't seem to get used to the taste." I then asked to see the jelly and Bob produced a foil packet labeled 'KY Jelly'. - *Submitted by Dr. Leonard Kransdorf, Detroit, MI*

A nurse was on duty in the Emergency Room when a young woman with purple hair styled into a punk rocker Mohawk, sporting a variety of tattoos, and wearing strange clothing entered. It was quickly determined that the patient had acute appendicitis, so she was scheduled for immediate surgery. When she was completely disrobed on the operating table, the staff noticed that her public hair had been dyed green and above it there was a tattoo that read, "Keep off the grass". Once the surgery was completed, the surgeon wrote a short note on the patients dressing which read, "Sorry, had to mow the lawn". - *Submitted by an unnamed Registered Nurse*

AND FINALLY . . .

As a new, young MD doing his residency in OB, I was quite embarrassed when performing female pelvic exams. To cover my embarrassment I had unconsciously formed a habit of whistling softly.
The middle-aged lady upon who I was performing this exam suddenly burst out laughing and further embarrassing me. I looked up from my work and sheepishly said, "I'm sorry, was I tickling you?" She replied, with tears running down her cheeks from laughing so hard, "No doctor, but the song you were whistling was 'I wish I were an Oscar Meyer Weiner'." - *Dr. wouldn't submit his name*