CAIIA Status Report
JULY 2011

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 desseminated 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.

Bad Faith Alert

Submitted by Haight, Brown & Bonesteel, LLP - Southern CA

Insurance Client Alert: Court Of Appeal Purports To Limit *Moradi-Shalal*

In *Hughes v. Progressive Direct Ins.* (No. B224990 filed 6/15/11), a California court of appeal held that the long-standing prohibition on first-party private rights of action for violation of the Unfair Insurance Practices Act (*Ins. Code* §§ 790, et seq.)—expressed by the Supreme Court in *Moradi-Shalal v. Fireman's Fund Ins. Co.* (1988) 46 Cal.3d 287—does not extend to a provision of the *Insurance Code* that requires auto insurance carriers to inform insureds of their right to choose a body shop for repairs.

In the *Hughes* case, the insured had an accident and informed the insurer that he wanted his auto repaired at a particular shop. The insurer told him to have the car repaired at its preferred facility, saying that the repairs would be authorized and completed more quickly. However, the insurer failed to inform the insured that he could choose any body shop he liked, as it was required to do under *Insurance Code* section 785.5, and the insured went ahead and used the preferred facility.

When a dispute arose over the repairs, the insured sued Progressive, bringing a class action based upon violation of California's Unfair Competition Law (*Bus. & Prof. Code* § 17200). He alleged that the insurer's policy and practice of steering insureds to its preferred repair shops, without advising them of the right to choose the facility, was unlawful, unfair and deceptive.

While acknowledging the holding of *Moradi-Shalal*, the appeals court held that case does not bar a cause of action by an insured against its insurer under the Unfair Competition Law based solely on a violation of section 758.5. Rather, the court held that, for section 758.5, the Legislature intended the Insurance Commissioner's authority to use Unfair Insurance Practices Act enforcement powers to be cumulative, not exclusive. Therefore, *Moradi-*

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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*.

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PRESIDENT'S MESSAGE

Every business or organization has its seasonal fluctuations in activity. CAIIA is no exception and is presently winding down what I consider to be the peak season of the year. Peak season, as I define it, begins with preparation for our Midterm Convention which then transitions into our annual recertification/education curriculum which runs concurrent with membership renewal.

If you attended one of our five recertification seminars last month, (Fair Claims Settlement Practices Regulations, SIU Regulations and the Seminar for the Evaluation of Earthquake Damage [SEED]), you probably noticed firsthand how proficient CAIIA and it's all volunteer presenters have become in delivering you the latest with regard to these courses. I will use this opportunity to express our deepest gratitude and appreciation to the following members and Friends of the CAIIA which make these programs possible.

Morgan Griffith, PE, Exponent Failure Analysis Associates

Steve Shekerlian, S.E., Exponent Failure Analysis Associates

Dan Dyce, CPCU, RPA, California Earthquake Authority, Earthquake Response Manager

Kevin Hansen, Esp., McCormick, Barstow Sheppard, Wayte & Caruth, LLP

Ulises Castellon, CPCU, Fie Cause Analysis

Douglas Jackson, RPA, SGD, Inc., CAIIA Past President

Peter Schifrin, RPA, SGD, Inc., CAIIA Past President

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Steve Wakefield, RPA, Ronald Bolt and Associates, Inc., CAIIA Past President

Pete Vaughan, RPA, Vaughan and Associates Adjusting, CAIIA Past President

Jeff Caulkins, AIC, RPA, John S. Rickerby Company, CAIIA In-coming President

Rick Kern, SGC, Inc., CAIIA Director

Kearson Strong, Malmgren & Strong, CAIIA Director

(I hope I have not left anyone out.)

Thank you all for helping enhance the acumen of claims professionals in California. This is the primary purpose of the CAIIA and we are so blessed to have

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Nominations

The nominating committee nominates the following members for the positions shown as your next Board.
President: Jeff Caulkins, John S. Rickerby Company, Glendale, CA
Incoming President: William McKenzie, Walsh Adjusting Company, San Diego, CA
Vice President: Tanya Gonder, Casualty Claims Consultants, Oakland, CA
Secretary/Treasurer: Kearson Strong, Malmgren and Strong, Fresno, CA
Immediate Past President: Phil Barrett, Barrett Claims Service, Ukiah, CA

Two-year Board Members:
Brian Schneider, Schneider & Associates Claim Service, Burbank, CA
Art Stromer, SoCal Adjusters, Chino Hills, CA
John Franklin. Franklin and Associates, Pasadena, CA

Any member in good standing can place the name of any other member (or themselves) in nomination. The close of nominations is 30 days prior to the annual meeting.

PRESIDENT'S MESSAGE

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had all of you pitch in.

If you are an existing member, or are considering membership in the CAIIA, renewal season wrapped up with the end of our fiscal year, June 30, 2011. I REPEAT: RENEWAL SEASON IS OVER. However, if you are a member and are delinquent in submitting your renewal form and dues, don't despair. Just please send your your remittance as soon as possible. Our directory goes to print September 1 and if your membership is suspended or expired, your firm will miss out on directory publication, (at least the printed version), for the entire year. If you have already renewed, CAIIA is very pleased to have you for another year.

While on the topic of our Directory, you may know that your firm's listing in the printed directory is developed directly from the information on the website "Member List". To check the accuracy of your firm's information, go to www.caiia.com and find the drop down list under "member", (center top of the home page). Select "Member Listing" or do a "Member Search" to find your firm's listing. If your information is inaccurate or out of date, you are responsible for updating it yourself. You will need your "User name" and "Password" to sign in and edit your listing. If you have forgotten these, contact our long time Website Chairman, Doug Jackson at djackson@caiia.com. IT IS VERY IMPORTANT THAT ALL MEMBERS ENSURE THAT THEIR LISTING IS ACCURATE BEFORE 8/1/11, (before the directory goes to press), LEST WRONG OR OUTDATED INFORMATION GETS PUBLISHED FOR YOUR FIRM IN THE PRINTED DIRECTORY.

July 1st is the official New Year for CAIIA. Soon you will have a new President, (the ever positive and energetic Jeff Caulkins), who will be configuring his cabinet of committees shortly. These committees get inaugurated at the Annual Convention coming up in September. If you are a member but have not attended our conventions or volunteered to help your organization carry out its mission, please consider making a "New Year's Resolution" to do so. You will be helping your Association while helping yourself grow professionally and I can't think of a more kind and benevolent leader under which to serve than Mr. Caulkins. Jeff can be contacted at jeff.c@johnsrickerby.com or (818) 507-7873.

PHIL BARRETT
President - CAIIA 2010-11

In Memoriam

Long time member and CAIIA Past President Ron Blanquette advised that a strong supporter of the CAIIA Gary Hernandez passed away recently. Gary was the Chief Counsel for the California Department of Insurance (DOI) for many years under several different Commissioners. While he was in that position, Gary always made sure the the interest of the independent insurance adjuster were a top priority of the DOI. The CAIIA send its condolences to the family and friends of Gary.

Volunteers Needed

September 8 and 9 at the Hyatt Regency in Sacramento is this years Claims Conference of Northern California (CCNC).

We need volunteers to help at the booth. This is a great chance to meet new people and obtain continuing education (CE) to maintain your license.

Please email Sterrett Harper at harperclaims@hotmail.com to volunteer.

Bad Faith Alert

Submitted by Haight, Brown & Bonesteel, LLP - Southern CA

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Shalal did not bar an action based solely on a statutory violation and the class action was permitted to proceed.

But the court did not limit itself to just those facts, noting that other statutory violations might support *Business & Profession Code* section 17200 claims as well if they involve conduct that is prohibited separate and apart from the Unfair Insurance Practices Act and absent an express legislative prohibition to the contrary.

Whether this ruling leads to a flood of Unfair Competition Law claims will be seen, but the decision nonetheless highlights the need for vigilance in avoiding even seemingly minor violations of insurance statutes or regulations.

Insurance Law Update

Submitted by Sedwick, LLP

No Coverage for Fired Contractor

By Serena Stark, Associate - San Francisco

California Court of Appeal

In *Clarendon American Ins. Co. v. General Security Indem. Co.*, 2011 WL 1143453 (Cal. App. March 30, 2011), the California Court of Appeal held that an insured's unilateral termination from a construction contract before its work was complete did not satisfy a products-completed operations hazard coverage provision requiring an insured's work be completed or abandoned.

Clarendon American sued General Security for declaratory relief and contribution after settling an action against Hilmor Development, an insured of both insurers. Clarendon contended that the underlying action against Hilmor triggered the General Security policy's "products-completed operations hazard" coverage. The trial court, however, granted summary judgment for General Security, and the Court of Appeal affirmed.

The products-completed operations hazard provision at issue provided coverage for "bodily injury" or "property damage" arising out of Hilmor's work or product, with the exception of "[w]ork that has not yet been completed or abandoned". According to the Court of Appeal, Hilmor had not completed its construction project, as defined in the contract, and the contract had not been abandoned, either expressly (i.e., by mutual release of contractual duties) or impliedly (i.e., by an aggregation of numerous contractual changes). Instead, Hilmor was unilaterally terminated from the job before it completed its work. The other party reserved its rights under the contract, specifically noting that Hilmor's work on the project was not complete, and hired a new contractor to complete the job.

In addition, the court held that the faulty workmanship provisions found in paragraphs j(5) and j(6) excluded coverage for poor workmanship and materials, which formed the basis for the action against Hilmor. The "claims in progress" exclusion also precluded coverage for continuing and progressive property damage beginning prior to the inception of the General Security policy.

Insurance Law News

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

Where Insurer Satisfies *Blue Ridge* Requirements For Seeking Reimbursement Of Uncovered Settlement From Insured, Insurer Need Not Also Give Insured "Sufficient Time" To Respond To Insurer's Notice / Offer

Where a liability insurer satisfied the requirements set forth in *Blue Ridge Ins. Co. v. Jacobsen* (2001) 25 Cal.4th 489 for seeking reimbursement of an uncovered settlement from an insured, the insurer was not also separately required to give the insured a "sufficient time" to respond to the insurer's notice of intent to settle / offer to assume the defense. (*American Modern Home Ins. Co. v. Fahmian* (2011) 194 Cal.App.4th 162)

Facts

Sohail Fahmian owned Provident Housing, Inc., which was in the business of building and selling homes for profit. While Provident was in the process of constructing a home for eventual sale, a construction-site accident occurred in which Rudy Montoya was shot in the eye with a nail gun. As a result, Montoya filed a personal injury action against both Provident and Provident's owner, Fahmian.

Fahmian tendered defense of the personal injury action to his homeowners insurer, American Modern Home Insurance Company. The American Modern homeowners policy had limits of $300,000 each occurrence, but excluded coverage for injury arising out of an insured's "business" activities. American Modern agreed to defend Fahmian in the personal injury action under a reservation of rights, including the right to seek reimbursement of any sums that American Modern might pay on behalf of Fahmian in settlement.

Montoya offered to settle the personal injury action against Fahmian for American Modern's $300,000 policy limit, and left the offer open until July 8, 2005. On July 1, 2005, pursuant to *Blue Ridge Ins. Co. v. Jacobsen* (2001) 25 Cal.4th 489, American Modern sent Fahmian a letter stating that American Modern intended to accept Montoya's policy limits settlement demand unless Fahmian agreed to either (1) undertake his own defense in the personal injury action or (2) waive any potential claims based on American Modern's failure to settle the personal injury action within the policy limits. American Modern's letter further stated that American Modern needed Fahmian's response by July 6, 2005, since Montoya's settlement offer would only remain open until July 8, 2005.

Fahmian did not respond to American Modern's letter. American Modern thus proceeded to accept Montoya's settlement offer by paying its $300,000 policy limit in settlement of Fahmian's alleged liability to Montoya.

Thereafter, American Modern filed a coverage action against Fahmian seeking (1) a declaration that the American Modern homeowners policy did not cover Fahmian's alleged liability to Montoya in the underlying personal injury action and (2) reimbursement of the $300,000 American Modern had paid to settle that action. A jury found that Montoya's claims against Fahmian in the personal injury action were barred from coverage by the "business" activity exclusion in the American Modern homeowners policy. However, the jury also found that Fahmian did not have "sufficient time" to make a reasoned reply to American Modern's notice of intent to settle / offer to assume the defense. Based on this latter finding, the trial court denied American Modern's claim for reimbursement, and entered judgment in favor of Fahmian. American Modern appealed.

Holding

The Court of Appeal reversed. The appellate court noted that under *Blue Ridge*, an insurer may obtain reimbursement from an insured for an uncovered settlement if the insurer has (1) made a timely and express reservation rights, (2) provided express notification to the insured of the insurer's intent to accept the proposed settlement offer, and (3) made an express offer that the insured could assume its own defense. The appellate court noted that in this case, American Modern did all of the foregoing. The appellate court declined to add an additional requirement that the insurer give the insured "sufficient time" to respond to an insurer's settlement advisement letter issued pursuant to *Blue Ridge*.

The appellate court further noted that there was no appreciable difference between the time the insureds had to respond to the insurer's letter in the *Blue Ridge* case, and the time Fahmian had to respond to American Modern's letter in the present case. In both cases, the approximate seven-day time period the insurer gave the insured to respond was tied to the time limits of the third-party claimant's settlement demand.

In short, it was clear that the American Modern homeowners policy did not cover Fahmian's alleged liability to Montoya in the underlying personal injury action, and that pursuant to the *Blue Ridge* case American Modern was entitled to

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Insurance Law News

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

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reimbursement from Fahmian of the uncovered settlement. The appellate court thus directed the trial court to enter judgment in favor of American Modern and against Fahmian for $300,000 plus interest.

Comment

In *Blue Ridge*, the California Supreme Court established specific requirements an insurer must follow in order to obtain reimbursement from an insured of an uncovered settlement. However, *Blue Ridge* did not contain any separate requirement that the insurer give the insured "sufficient time" to consider the insurer's notice of intent to settle / offer to assume the defense. In the present case, the appellate court declined to read such a requirement into *Blue Ridge.* That is not surprising, since a third-party claimant's settlement offer might come at any time, and will usually contain time limits over which the insurer has little or no control. Here, since the insurer had followed the specific requirements of *Blue Ridge*, the insurer was entitled to reimbursement from the insured of the uncovered settlement amount.

Weekly Law Resume

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

Torts - Owner of Injured Pet With Little Market Value Can Recover Reasonable Damages

Kevin Kimes v. Charles Grosser, et al. Court of Appeal, First District (May 31, 2011)

Pets are considered property of their owners. This case deals with the issue of whether damages can be awarded for a wrongful injury to a pet animal with little or no market value.

Plaintiff Kevin Kimes' pet cat Pumkin was shot with a pellet gun, while perched on a fence between Kimes' property and the property of Defendant Charles Grosser. Kimes incurred $6,000 in emergency surgery to save Pumkin's life. However, the surgery left Pumkin partially paralyzed. Kimes then spent an additional $30,000 in expenses caring for Pumkin because of the injury. Kimes filed suit against Grosser, alleging that Grosser's family willfully shot Pumkin. Kimes sought to recover the amounts paid for Pumkin's care as a result of the shooting, and punitive damages.

As the case proceeded to trial, Grosser filed motions in limine to exclude evidence of Kimes' expenses caring for Pumkin on the theory that any liability was limited to the amount by which the shooting reduced Pumkin's fair market value. The trial court granted the motions in limine. As a result, Kimes declined to proceed with the trial and a judgment of dismissal was entered. Kimes then appealed. The First District Court of Appeal reversed.

In granting the motions in limine, the trial court concluded that pursuant to CACI Jury Instruction 3903J, an owner of personal property is entitled to recover the lesser of the diminution in market value caused by the injury, or the reasonable cost of repairing the property. Further, the trial court agreed that Kimes could not be compensated for Pumkin's sentimental or emotional value. The Court of Appeal ruled that Jury Instruction 3903J had no application to this case.

The Court instead determined that in a case where property has no market value (but may have some other value), the general rule limiting recovery to the loss of value may not apply. If that were the case, recovery for property with no market value would invariably be precluded. In such cases, the Court reasoned that the property's value must be ascertained in some other rational way. The Court further held that Civil Code section 3333 applies to this type of case. Section 3333 sets forth that the measure of damages is the amount which will compensate for all detriment proximately caused. Here, Kines sought to present evidence of costs incurred for Pumkin's medical care and treatment. The Court held this was a rational way of demonstrating a measure of damages apart from the cat's market value. While it was for the jury to decide if such an amount was reasonable, the motions in limine should have been denied. The judgment of dismissal was therefore reversed.

COMMENT

In a decision that all pet owners will applaud, the Court of Appeal held that the traditional method of determining the value of personal property does not always apply. In cases where property has a certain value to an owner, but not a market value, evidence may be presented to establish the reasonable value of the property.

Weekly Law Resume

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

Insurance - Bad Faith Damages

Linda Richards, et al. v. Sequoia Insurance Company Court of Appeal, First District (April 28, 2011)

The California Supreme Court has previously ruled that attorneys who bring an action on their own behalf for breach of a contract containing an attorneys' fees provision cannot recover for the value of their own services expended in bringing the action. This case considered whether similar fees by an insured who is also an attorney were recoverable as damages in a bad faith lawsuit.

Linda and Thomas Richards owned the Jack London Lodge, which was insured under a general liability policy that included liquor liability coverage from Sequoia Insurance Company. In December, 2004, a 20-year-old patron was fatally injured in a single car accident after leaving the Lodge's bar. Her estate filed a lawsuit against the Richards and the Lodge claiming that she was negligently served alcohol that contributed to her death.

On February 29, 2006, the Richards tendered the defense of the lawsuit to Sequoia. Sequoia responded by letter on March 8, 2006 indicating that it was referring the matter to coverage counsel for review, that it did not anticipate it would have a response before the time was due for a responsive pleading on the lawsuit, and that the Richards should hire their own attorney. Sequoia also stated that if it subsequently determined that there was coverage for the claim, it would reimburse reasonable defense costs incurred from the date of tender. The Richards retained counsel.

On March 17, 2006, Sequoia accepted the defense of the case pursuant to a written reservation of rights. Sequoia reimbursed the legal fees from the Richards' personal attorney and then paid for defense counsel it retained on behalf of the Richards. Sequoia subsequently paid to settle the lawsuit. After the underlying action was settled, the Richards approached Sequoia and offered to settle their claims for "denial of the defense and indemnity" of the underlying action. The Richards claimed that in the week and a half after receiving the March 8 letter from Sequoia, they spent 60 hours each researching and working on their own case. The Richards demanded $250 per hour for their time, for a total of $30,000. Sequoia rejected this settlement demand, and the Richards filed suit for breach of contract and breach of the covenant of good faith and fair dealing.

The trial court granted summary judgment for Sequoia on the basis that the Richards were not entitled to recover for the time they expended on their own defense, and that Sequoia expeditiously accepted defense and coverage of the lawsuit. The Richards appealed.

The Court of Appeal upheld the trial court decision. The Court of Appeal noted that it need not consider whether the lapse of 9 days between Sequoia's first letter on March 8 and its acceptance of tender on March 17 was an unreasonable denial of coverage. Instead, it focused on the nature of damages being claimed by the Richards and found that the Richards sustained "no legally cognizable damages" for any alleged breach of the insurance contract or the covenant of good faith and fair dealing.

The court noted that the general measure of contract damages owed an insured due to an insurer's breach of the duty to defend are the costs and attorneys' fees expended by the insured defending the underlying action. The Court of Appeal held that compensation for the Richards' self-representation is not the payment of "attorney's fees expended by the insured." Moreover, the insurance policy obligated Sequoia to compensate the Richards for "expenses incurred" at Sequoia's request, but not those voluntarily assumed by them. The Court held that the commonly accepted usage of "incur" means "to become obligated to pay." It therefore follows that an attorney litigating on his or her own behalf cannot be said to "incur" compensation for his time and lost business opportunities. As such, since the work the Richards performed themselves represented neither fees expended nor incurred, they had no damages to support a claim for breach of contract.

Similarly, any claim for breach of the covenant of good faith and fair dealing requires that the insured show proof of economic loss. The Richards' own time spent was not a compensable economic loss claim. The Court of Appeal held that summary judgment was also proper as to the breach of the covenant of good faith and fair dealing claim. Summary judgment was therefore affirmed.

COMMENT

This case is consistent with others that have dealt with the issue of whether an attorney representing himself or herself is entitled to recover fees for their own services in the context of contractual or extra contractual claims. Since such fees are not actually "incurred" or "expended," they are not recoverable and will not support a claim for bad faith regarding the duty to defend.

Just Some Observations

NyQuil, the stuffy, sneezy, why-the-heck-is-the-room-spinning medicine.

God must love stupid people; He made so many.

The gene pool could use a little chlorine.

Consciousness: That annoying time between naps.

Ever stop to think, and forgot to start again?

Being 'over the hill' is much better than being under it!

Wrinkled was not one of the things I wanted to be when I grew up.

Procrastinate now!

I have a degree in Liberal Arts; Do you want fries with that?

A hangover is the wrath of grapes.

A journey of a thousand miles begins with a cash advance.

Stupidity is not a handicap. PARK ELSEWHERE!!

They call it PMS because Mad Cow Disease was already taken.

He who dies with the most toys is nonetheless DEAD!

A picture is worth a thousand words, but it uses up three thousand times the memory.