CAIIA

Status Report

July 2012

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An Employer Organization of Independent Insurance Adjusters

Inside this issue…..

Status Report Available

by Email and Web Only.

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CAIIA Newsletter

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Editor's Corner

This month we continue in our series of thinking about how claims handling in California may not be as onerous as in other states. This series gives you a slightly different look at the idea that California is a difficult place to do insurance business.

If you go skiing or do many other recreational sports at a venue, such as a roller rink, paint ball or a race track, you may be asked to sign certain documents. Included in the documents may be a form know as a Release and Waiver (R&W). These R&W agreements are seen in recreational sports leagues. This document may, also, have an indemnity agreement. This document attempts to absolve the venue or league of liability for accidents that may occur to you while participating in the subject sport.

Last month we discussed the issues of wording in insurance policies. Well, guess what? The same principal applies to the R&W. If your insured has a clear and unambiguous R&W you can rely on it. Your insured cannot increase the risk of the sport, but normal risks inherent in the sport generally are not transferable to the operator of the venue or league. This is known as assumption of the risk. The assumption of the risk doctrine can be applied to many liability claims. If someone injures themself, keep in mind what happened. Investigate the facts. If the facts show that the insured did nothing to increase the risk, (e.g. -put up snow stakes that subsequently fell down because the stakes were not place in the snow deep enough or did not repair holes in the football, baseball or soccer field) you can rely on the R&W and, perhaps, deny the claim.

INSURANCE COMMISSIONER DAVE JONES ANNOUNCES BILL TO HELP FIGHT INSURANCE FRAUD PASSES CALIFORNIA ASSEMBLY

Insurance Commissioner Dave Jones today announced the California Assembly passed AB 2138, authored by Assembly Member Bob Blumenfield (D-San Fernando Valley). The bill is sponsored by Commissioner Jones and the California Department of Insurance (CDI). It would increase the current annual assessment of 10 cents per insured paid by health and disability insurers to up to 20 cents in order to increase funding to local district attorneys so that they can investigate and prosecute health and disability insurance fraud throughout the state.

"Health and disability insurance fraud seriously hurts policyholders, providers, insurers, and ultimately California's economy," said Commissioner Jones. "Unfortunately, this type of fraud is increasing in sophistication, complexity, and volume. This higher assessment will provide much needed resources to fight this growing problem, especially in light of federal health care reform."

In May 2008, CDI's Advisory Task Force on Insurance Fraud, which included law enforcement officials, insurance industry representatives, and consumer advocates, completed a comprehensive report of the anti-fraud insurance programs in California. The report found, among other things, that the health and disability insurance lines had insufficient policy assessments to support a statewide anti-fraud effort. This led to the recommendation to increase funding that is called for in AB 2138.

From 2007 to 2010, CDI received more than 6,000 health and disability suspected fraudulent claims statewide, with a fraction of those claims referred to the local district attorneys. The local district attorneys were only able to conduct 656 investigations from these suspected fraudulent claims, resulting in 221 arrests and 184 convictions with an annual average of $223 million in chargeable fraud.

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President's Message

July 2012

Years ago when we estimated insurance property claims, we wrote the estimate by hand and the office typed the estimate on NCR paper. Then, the estimate was mailed out but not until several calls had been made to the insured. One of the key points was that we kept in close contact with the insured. We had time to discuss the claim with the insured and involve them in the process.

Jeff Caulkins
CAIIA President

With the dawn of the computer age, it appears that we have lost touch with the personal aspect of claim handling. Instead of calling or meeting with the insured, we send an email or a text message. We appear to have become disconnected from the insured.

Last week at the S.E.E.D. earthquake certification class we were discussing the importance of involving the insured in the claim process. We also discussed identifying what is most important to the insured. The process of claim handling is not about how fast you walk a building or how fast you can enter an estimate into the software. Claims handling is about people. You cannot know what is important to them or involve an insured in the claim process unless you spend some time with them.

Many factors are involved in the process of the claim, but the one single important factor is personal contact. So the next time that you are sending an email or text to someone about a claim, stop, pick up the phone and give them a call first.

Jeff S Caulkins AMIM AIC RPA
President
California Association of Independent Insurance Adjusters.

ATTENTION CAIIA Members: Volunteers are needed to man the CAIIA booth at the CCNC on August 16 & 17. Please email Sterrett (harperclaims@hotmail.com) to volunteer.

Defendant in a Personal Injury Action Must Prove Each of the Elements of a Claim for Medical Malpractice to Apportion Fault to a Non-Party Physician

Credit to Low, Ball & Lynch, San Francisco, CA

In *Wylson v. Rittl* (2003) 105 Cal.App.4th 361, the court held that a non-party medical doctor cannot be found comparatively at fault in a personal injury action unless the defendant uses expert testimony to prove the doctor failed to meet the applicable standard of care. The *Chakalis* decision expands the *Wylson* holding. The *Chakalis* court concluded that a non-party medical doctor cannot be found comparatively at fault unless the defendant proves all of the elements of medical malpractice and the jury is instructed concerning the requirements of a medical malpractice claim.

Plaintiff Katerina Chakalis sustained personal injuries after the elevator in an apartment building malfunctioned and fell six floors. Plaintiff sued the elevator maintenance company, the owner of the apartment building, the property manager and the property manager's agent. Among her physical injuries, plaintiff claimed that she had been poisoned by the hydraulic oil which leaked from the damaged elevator. Plaintiff sought treatment from Dr. James Dahlgren, who diagnosed plaintiff with hydraulic oil poisoning. He placed her on a detoxification treatment plan and prescribed Provigil. Plaintiff contracted Stevens-Johnson syndrome, which causes a severe rash on the skin. Defendant's expert physicians opined that Dr. Dahlgren's diagnosis was incorrect and indicated that the prescription of Provigil had probably caused plaintiff to contract the Stevens-Johnson syndrome. Dr. Dahlgren was never a party in this lawsuit.

At trial, defendants' medical experts were critical of Dr. Dahlgren's treatment of plaintiff, but plaintiff's attorney successfully objected to defense counsel's question which would have elicited testimony from a defense expert that he believed Dr. Dahlgren's treatment of plaintiff did not meet the standard of care for a treating toxicologist. Defendants argued that Dr. Dahlgren's unnecessary treatment and incorrect diagnosis had caused much of plaintiff's physical pain and mental suffering. Defendants did not request jury instructions regarding medical malpractice.

The jury found most of the defendants liable. The jury allocated 52% of fault to Dr. Dahlgren, which reduced plaintiff's recovery of non-economic damages against defendants pursuant to Civil Code § 1431.2 (Proposition 51). Plaintiff's motion for a new trial was denied, and plaintiff appealed the judgment. Plaintiff challenged the apportionment of fault to Dr. Dahlgren.

The Court of Appeal reversed the trial court judgment because the jury should not have been permitted to allocate fault to Dr. Dahlgren. While the Court of Appeal recognized that a jury can allocate fault to a non-party treating physician who is found to have committed medical malpractice, the defendants in this case had failed to prove each of the elements to establish a claim of medical malpractice against Dr. Dahlgren. The Court of Appeal recognized that defendants had not been given the opportunity to prove that Dr. Dahlgren had breached the standard of care, because the trial court had not allowed defendant to obtain the opinion testimony from a defense doctor. The Court of Appeal held that the trial court should have allowed the defense to receive the doctor's liability opinion. Without this opinion, defendants had not been allowed to present the necessary expert testimony to show that Dr. Dahlgren committed malpractice and that Dr. Dahlgren's treatment was a substantial factor in causing plaintiff's injuries within a reasonable medical probability. Also, the jury should have been instructed on the requirements of a medical malpractice claim. The Court of Appeal held that the trial court should have granted plaintiff's motion for new trial.

COMMENT

In order to receive a reduction in damages awarded to a personal injury plaintiff, a defendant can claim that one of plaintiff's treating physicians has committed medical malpractice, without filing a cross-complaint against the doctor. The defendant has the burden of proving that the non-party physician committed medical malpractice and that the physician's negligence was a substantial factor in causing plaintiff's injuries. Also, the jury must be instructed on the requirements of a medical malpractice claim.

For a copy of the complete decision see:
http://www.courtinfo.ca.gov/opinions/documents/B221531.PDF

Absent Actual Coverage, Liability Insurer Cannot Be Liable to Insured for Failing to Accept Third Party's Settlement Offer

Credit to Smith, Smith & Feeley LLP, Irvine, CA

In the absence of actual coverage, a liability insurer cannot be liable to an insured for failing to accept a third-party claimant's reasonable settlement offer within the policy limits. (*DeWitt v. Monterey Insurance Company* (2012) 204 Cal.App.4th 233)

Facts

Lisa Cappelletti owned an apartment complex. She allegedly employed Donald DeWitt to live at the complex as "onsite property manager." DeWitt held a party at the apartment complex, during which DeWitt served alcohol to a minor. Following the party, the minor became involved in an auto accident in which Erica Howard was severely injured.

At the time of the accident, Cappelletti, the owner of the apartment complex, was the named insured on a $1 million general liability policy issued by Monterey Insurance Company. The Monterey policy also included as "insureds" any of Cappelletti's "employees" and "real estate managers" while acting as such.

Following the accident, Howard filed a personal injury action against various parties including Cappelletti and DeWitt. Cappelletti and DeWitt in turn tendered the defense of the lawsuit to Cappelletti's insurer, Monterey. Monterey agreed to defend Cappelletti, but after investigating concluded that DeWitt was not in fact an "insured" and thus declined to defend DeWitt. Howard subsequently obtained a default judgment of $4.7 million against DeWitt.

Thereafter, Howard offered to settle her claims against Cappelletti and DeWitt for Monterey's policy limit of $1 million. Monterey declined. However, Monterey later paid $50,000 in settlement of Cappelletti's alleged liability to Howard. Also, after Monterey unsuccessfully tried to set aside the default judgment against DeWitt, Monterey eventually paid $3.5 million in full satisfaction of the default judgment against DeWitt.

DeWitt then sued Monterey for bad faith. In the bad faith suit, DeWitt alleged that Monterey had unreasonably failed to defend and indemnify DeWitt against Howard's claims despite knowing that DeWitt potentially or actually qualified as an "insured" under the Monterey policy.

The trial court ruled that Monterey had in fact breached a contractual duty to defend DeWitt against Howard's lawsuit, because during the pendency of Howard's lawsuit available information suggested the "possibility" that DeWitt qualified as an "insured" under the Monterey policy. The trial court then conducted a jury trial on the issue of whether Monterey had acted in "bad faith" (i.e., unreasonably) toward DeWitt. At the conclusion of the evidence, the trial court refused DeWitt's request to instruct the jury concerning an insurer's duty to accept reasonable settlement offers. The jury subsequently returned a special verdict finding that Monterey did *not* act in bad faith in failing to defend DeWitt against Howard's lawsuit. The trial court entered judgment in favor of Monterey and Dewitt appealed.

Holding

The Court of Appeal affirmed the judgment in favor of Monterey. The appellate court rejected DeWitt's argument that the trial court should have instructed the jury regarding an insurer's duty to accept a reasonable settlement offer. The appellate court reasoned that a liability insurer "has a duty to accept a reasonable settlement offer only with respect to a *covered* claim." Here, Monterey never assumed DeWitt's defense in the underlying action (and thus DeWitt could not show that Monterey had "waived" its right to contest that DeWitt was an "insured"). Moreover, DeWitt never established as a matter of law that DeWitt was actually (as opposed to only potentially) an "insured." Last, DeWitt never asked the jury in the bad faith case to decide whether DeWitt actually was an "insured." (continued on page 5)

Central Valley Residents Allegedly Defrauded Insurer, Washed Auto Titles

Insurance Commissioner Dave Jones today announced that Dmitriy Kochkin, 36, Yuliya Kochkina, 33, and Aleksandr Boklach, 29, have been arrested on felony charges related to loan fraud, a staged auto theft, title washing, perjury, and insurance fraud. A fourth suspect, Leonid Dubinskiy, 45, was cited for his involvement.

According to detectives from the Urban Organized Auto Insurance Fraud Taskforce, on May 25, 2009 Kochkin reported to the Fresno Police Department that his 2002 Mercedes had been stolen from his Fresno apartment sometime between the evening of May 22, 2009 and the morning of May 25, 2009. On this same date, he made a claim to his insurance company for the theft of the vehicle. Kochkin's wife, Kochkina, gave a recorded statement to the insurance company confirming the facts of loss as stated by Dmitriy. On May 24, 2009 the vehicle was recovered at the Mendota Wildlife Area and was completely stripped.

During the initial investigation this vehicle was also found to have a salvaged title from the State of Florida, however, it had a clear title in California. In the course of the investigation it was found that the vehicle was purchased through an online auction, entered California as a lien sale and was issued a clear title by the Department of Motor Vehicles. The lien sale was later determined to be fraudulent. A straw buyer, Boklach, then purchased the vehicle and sold it to Kochkin for significantly more than it was worth. Kochkin then obtained a loan through Union Bank of California for an inflated value, as if the vehicle had a clear title. The investigation revealed that he had knowledge of the salvaged title and that he had used Boklach as a straw buyer for the purpose of inflating the vehicle's value. The insurance claim was subsequently withdrawn by Kochkin and his wife and the vehicle was later repossessed.

Detectives also determined that Kochkin and Dubinskiy were involved in the title washing of two additional out of state vehicles, a 2003 Mitsubishi Montero and a 2007 Honda Civic, both with salvaged titles, that were later issued clear titles in California through this fraudulent lien sale process.

The Fresno County District Attorney's Office has charged Dmitriy Kochkin with felony counts for violating Penal Code Sections 550(a)(1), Insurance Fraud, 532(a), Loan Fraud, 118(a), Perjury, and one count for violating Vehicle Code Section 4463(a), Title Fraud. Yuliya Kochkina has been charged with one felony count for violating Penal Code Section 550(a) (1). Boklach has been charged with one felony count for violating Penal Code Section 532(a), and Dubinskiy has been charged with one felony count for violating Penal Code Section 118(a). If convicted, all suspects could be sentenced to between three and five years in State Prison and fined by the court.

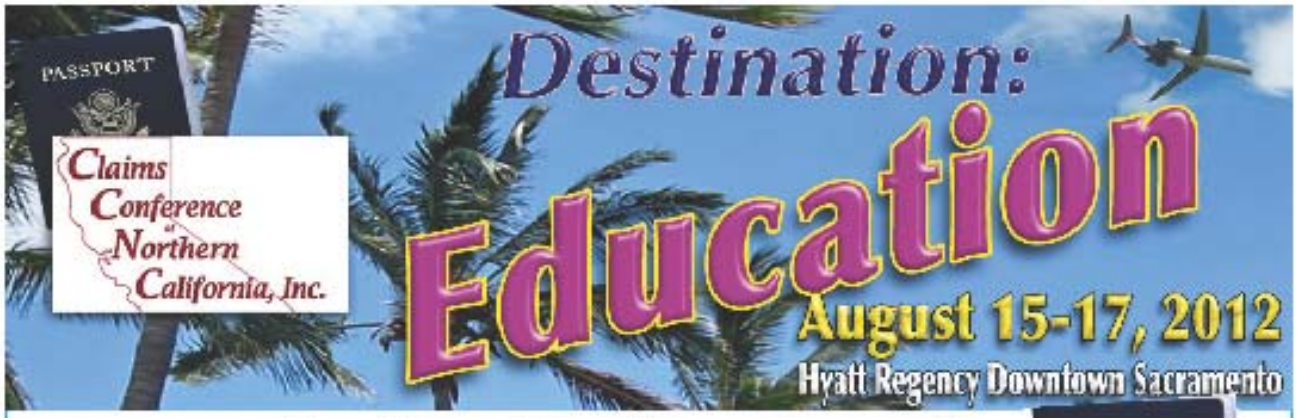
The Fresno County District Attorney's Office is prosecuting this case. The Special Investigations Unit from California State Automobile Association (CSAA) assisted in the investigation by providing claim information to CDI Fraud Division Detectives.

(continued from page 4)

In short, DeWitt neither conclusively established, nor ever asked the jury to decide, that DeWitt actually was an "insured" (i.e., actually was "covered") under the Monterey policy. Thus, DeWitt was not entitled to a jury instruction regarding an insurer's duty to accept a reasonable settlement offer. That instruction only applies when the third-party's claim against the insured is actually covered under the policy.

Comment

An insurer's reasonable belief that the policy does not provide coverage is not a defense to a claim for bad faith failure to settle. However, in an action based on the insurer's failure to settle, the insured must still prove that the third-party's claim against the insured was in fact covered by the policy. Here, DeWitt never established as a matter of law, and never asked the jury to decide, that DeWitt actually was an "employee" of or "real estate manager" for Cappelletti, such that DeWitt would qualify as an "insured" who was "covered" under the Monterey policy.



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Afternoon Session kicks it off

Wednesday, August 15, 2012 - 4:00-6:00 p.m.: Advanced Structural Drying

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Keynote Speaker

Scott Friedman

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In Memoriam...

Joanne Elizabeth Sargeant

March 5, 1934-May 14, 2012

Joanne Elizabeth (Brink) (Harrison) Sargeant passed into God's loving arms on May 14, 2012. Joanne was born on March 5, 1934 to Clarence and Lenore (Washburn) Brink in Glendale, California, where she resided most of her life.

Joanne was married to George Harrison and they had three children, Gregory, Victoria, and George Jr. They later divorced and Joanne married John Sargeant in August 1976. Joanne and John worked side-by-side building the John Sargeant Insurance Agency in Glendale.

Joanne was a proud citizen of Glendale. During her lifetime, Joanne served as president of Oakmont League, she was a member of Days of the Verdugos and the Glendale Rose Parade Float Committees, and a board member of the Glendale Association For the Retarded.

Joanne and John traveled as often as they could to the islands of Hawaii where they made many friends whom they considered family.

Joanne was preceded in death by her parents, her husbands, and her son George, Jr. She is survived by her brother Robert Brink, his wife Cecelia and their family, and children Anne (Steve) Yon, Catherine (John) Murphy, Gregory (Lori) Harrison, Linda (Michael) Lawlor, Victoria Medlen, Melissa (Day Slout) Sargeant, Wesley Sargeant, 10 grandchildren and 8 great-grandchildren.

A private memorial will be held to release Joanne's and John's ashes together as was their desire. Please visit http://www.forevermissed.com/joanne-sargeant/ to share your memories.

On the Lighter Side...

A woman writes to the IT Technical support Guy

Dear Tech Support,

Last year I upgraded from Boyfriend 5.0 to Husband 1.0 and I noticed a distinct slowdown in the overall system performance, particularly in the flower and jewellery applications, which operated flawlessly under Boyfriend 5.0.

In addition, Husband 1.0 uninstalled many other valuable programs, such as
Romance 9.5 and Personal Attention 6.5, and then installed undesirable programs such as NEWS 5.0, MONEY 3.0 and CRICKET 4.1.

Conversation 8.0 no longer runs, and Housecleaning 2.6 simply crashes the system.

Please note that I have tried running Nagging 5.3 to fix these problems, but to no avail..

What can I do?

Signed,

_____ _____ _____ _____ _____ _____ _____ _____ _____ _____

Reply

DEAR Madam,
First, keep in mind, Boyfriend 5.0 is an Entertainment Package, while Husband 1.0 is an operating system.

Please enter command: ithoughtyoulovedme. Html and try to download Tears 6.2 and do not forget to install the Guilt 3.0 update.

If that application works as designed, Husband1.0 should then automatically run the applications Jewelery 2.0 and Flowers 3.5 .

However, remember, overuse of the above application can cause Husband 1.0 to default to Silence 2.5 or Beer 6.1.

Please note that Beer 6.1 is a very bad program that will download the Snoring Loudly Beta.

Whatever you do, DO NOT under any circumstances install Mother-In-Law 1.0 (it runs a virus in the background that will eventually seize control of all your system resources.)

In addition, please do not attempt to reinstall the Boyfriend 5.0 program. These are unsupported applications and will crash Husband 1.0.

In summary, Husband 1.0 is a great program, but it does have limited memory and cannot learn new applications quickly.

You might consider buying additional software to improve memory and performance.
We recommend: Cooking 3.0 and Good Looks 7.7.

Good Luck Madam!