CAIIA Status Report

August 2014

Challenge to the Fair Claims Settlement Practices Regulations

Credit: Zalma's Insurance Fraud Letter, July 14, 2014

As my e-book on the California Fair Claims Practices Regulations commented, going back to 2012:

California Administrative Law Judge Stephen J. Smith recently issued a 51 -page ruling finding the CDOI's Fair Claims Practices Regulations (FCPR) might not be brought as unfair claims acts. The ruling affects how the CDOI has imposed, and will impose in the future, penalties against insurers for claims since the inception of the FCPR in 1992.
Only two cases have gone to adjudication challenging the procedure and fines because most insurance companies have chosen to settle. In both cases, the insurance companies — an auto insurer and a life and health insurer – retained Barger & Wolen to represent them.

In the most recent decision, Judge Smith's ruling was based on the CDOI's Order to Show Cause action alleging 697 violations against the five Torchmark groups of life and health insurers. The first case, according to counsel involved an examination performed by the department two years ago n an auto insurer. The CDOI found 450 violations of the regulations. In both exams the violations were considered to be more technical than substantive.

The ruling also covers all Insurance Code § 790.03 unfair practices. However, the administrative law ruling limits state penalties to events prohibited by California Insurance Code § 790.03. The litigation, now in the superior court, may force the Department of Insurance to apply the law as written not as modified by the Regulations. As I stated, even before the ruling, in my Fair Claims Settlement Practices Regulations E-Book:

The Insurance Code, contrary to the statement in the Regulations, does not hold that a single act is a violation of Insurance Code Section 790.03
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In memory of our friend
Stephen Eugene Wakefield
April 14, 1948 - July 27, 2014

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President's Message

Tanya Gonder
CAIIA President

Hello Faithful Readers. I, as any president, wants something significant to occur during their term. Therefore, I am pleased to announce the CAIIA Board of Directors approved awarding two scholarships per year through the Insurance Education Association (IEA). The applicant must be from California and the courses must be related to the claim field especially those working toward AIC, AINS, and CPCU designation. Complete eligibility requirements and additional Information can be found on the IEA website in the near future.

The CAIIA wasted no time developing its education program to comply with the DOI's requirements for insurance professionals. It was no easy task and there are several past and present members to thank. With that in mind, I would like to extend a heartfelt thank you to Tim Waters. He has worked tirelessly to move our education program forward and has done a superb job.

Tim, the CAIIA thanks you and wishes you the best as you embark on another chapter in your life! You will be missed.

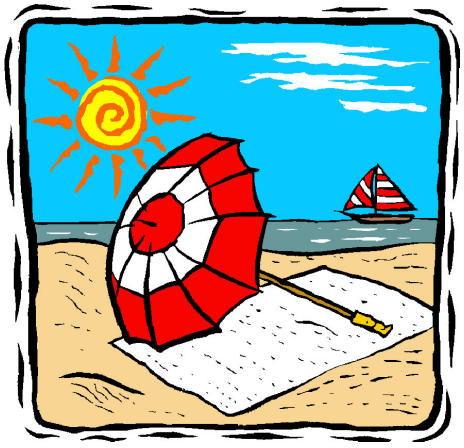
Please visit the CAIIA's website often to stay on top of the time and location of our course offerings.

It is with a heavy heart that I announce the passing of a long-time active member & past-president (2005-06), Stephen E. Wakefield of Ronald Bolt and Associates, Inc. in Fresno, CA. He was a stable part of our association and will leave a void. Our thoughts and prayers are with Mrs. Kathy Wakefield and her family.

Tanya Gonder

2013/2014 CAIIA President

Enjoy the lazy days of Summertime, if you can or at least dream of those times!



News of and from our Members...

It is with heavy heart that we must report that Steve Wakefield passed away on Sunday, July 27th after losing his battle with cancer. Steve was the President of the CAIIA in 2005-2006. His company, Ronald Bolt & Associates, was a charter member of the CAIIA. Steve was a longtime supporter of the CAIIA both before and after his run on the executive board. His kindness and wit will be missed by us all.

He was recently honored as a life member of the Central California Adjuster's Association, for which he was president in 2000. Steve was an avid Giants fan. He is survived by his wife Kathy and son Jeff.

The funeral will be held at St. Anthony's of Padua Catholic Church in Fresno CA on Monday August 4th 2014 at 11am. St. Anthony's is located at the corner of Bullard Ave and Maroa Ave just West of Blackstone Ave. Maroa is between Palm and Blackstone. The internment will follow at St. Peters Cemetery at 264 N. Blythe Ave Fresno, CA 93706.

He was a true professional, a friend and a mentor and I will miss him dearly. -Scott Hannaford

He will be missed. -Jeff Caulkins

I am speechless. Please pass my sympathies to his family for me should you see them. He will be missed. -Kearson M. Strong

We considered him a friend first and a competitor second. We will miss your tux and tennis shoe dress code..—Doug Jackson/Peter Schifrin

Thank you for the notification of Steve Wakefield's passing. Good guy - loved the CAIIA. -Dean Beyer

I remember that Steve was a great crop claims adjuster. He knew what the policies covered. Steve was always happy and had great comments about the insurance industry. I will miss him at the CAIIA meetings.. -Sterrett Harper

Update from Peter Schifrin on DOI Curriculum Board

I represented the CAIIA at the California Insurance Department Curriculum Board Meeting in Sacramento on July 17th.

The pass rate for people taking the independent adjusting exam remains quite low. During the first 6 months of 2014, first time test takers passed 30% of the time, repeat takers passed 35% of the time. I like to think this means our licensed CAIIA members are well above average.

There was some discussion that the DOI might look at the subject of individual independent adjuster licensing in 2015, with the thought that California should strive to be consistent with other states regarding non-resident licensing and reciprocity.

The DOI is also looking at training for agents selling commercial insurance on the subject of earthquake risk and coverage. The buy rate for commercial earthquake is about 8.3% and the State is rightfully worried about the impact of a large earthquake on businesses. There is a Senate Bill that would call for continuing education for agents on the topic.

If anyone has any questions or thoughts on these or other related topics, please don't hesitate to give me a call.

Peter H. Schifrin, RPA

CAIIA Past-President

Let's go fishing!

This is the time of year when independent adjusters renew their licenses with the California Department of Insurance. This, like other professions within the insurance industry, requires taking an Ethics class. Ethics, defined as moral conduct, involves conducting ourselves at the highest standard whereby we command respect within the industry (as well as self respect).

But shouldn't ethics also spill into our personal lives? And don't ethics involve being stewards of where we live? Questions such as these, and how we can make a difference, are being addressed in the "Great Turning."

So collectively and individually we ask, "Aside from electricity and transportation, which account for 33 and 27 percent of emissions respectively, what other major sources of emissions can we minimize?"

Surprisingly, beef is a big one with methane accounting for over 15 percent of greenhouse emissions. However this is rapidly changing with fish and seafood having overtaken meat as a popular main dish. Fish, which is increasingly being safely factory and ocean farmed, put much less demand on natural resources. Whole Foods supports this planet healthy trend, and they have partnered with a Norwegian family to sustainably ocean farm salmon.

There is also considerable impact from manufacturing and selling goods, which generates a long chain of factors that account for emissions. For example, in buying a t-shirt there is farm machinery involved where the cotton is grown, the plant where the cotton was processed, the facility where the shirt was sewn, the trucks and ships that brought the shirt to the store where it is sold, then the drive home after purchase. Perhaps the simple solution is just to buy less stuff.

Or, as one reader offered, just spend more time naked!

All comments and ideas welcome at SteveEinhaus@gmail.com and #415-238-87867.

Continued from page 1

h). Rather, the Code requires that the wrongful acts be committed with such frequency as to indicate a general business practice.

This Preamble is a statement by the CDOI to broaden the effect of the Insurance Code, to give the CDOI power to enforce the mandate, and to allow it to punish insurers for single wrongful acts. The Regulations, by changing the meaning of the California Insurance Code for the purposes of enforcement, was designed to force insurers to be more careful than the Legislature mandated. Under the Regulations, therefore, a single violation is enough to require punishment of the insurer or the licensee by the CDOI. Whether an insurer is willing to challenge enforcement of this requirement that is more stringent than the Insurance Code requirement is yet to be seen. None has done so yet. Finally, this administrative law decision challenged the requirement and ruled in favor of the insurer.

The question raised by the refusal of the Department of Insurance to abide by a ruling of the Administrative Law Judge called upon to deal with the issue may establish that insurers have been paying fines for violation of the Regulations that they did not owe and that the actions of the Department of Insurance are fraudulent. Perhaps every insurer that has paid fines to the Department of Insurance in California should consider filing suit to get back the fines that were improperly assessed and claim that the state has fraudulently been applying the Regulations.

Excess Award Not Required for Uninsured Motorist Bad Faith

Credit to Haight, Brown & Bonesteel, Los Angeles, CA

In *Maslo v. Ameriprise Auto & Home Insurance Co.* (No. B249271, filed 7/22/14), a California appeals court held that even if damages do not plainly exceed uninsured motorist policy limits, an insurer may nonetheless be liable for bad faith in failing to investigate and attempt to settle reasonably clear damages within the limits.

In *Maslo*, the insured was rear-ended by an uninsured motorist and absolved of liability in the police report. He suffered severe injury and underwent orthopedic surgery. He tendered all medical records, bills and police reports to his insurer and demanded the policy's $250,000 uninsured motorist limit. Five months went by with no response. After six months the insured retained counsel and demanded arbitration. In addition, the insured offered to mediate the claim, but the insurer refused.

Discovery ensued, with the insured supplying all documents. According to the insured, the insurer never sought to depose any treating physicians, never sought to conduct an independent medical examination or even obtain a defense medical record review. The parties stipulated that the medical special damages totaled $64,120.91. The arbitrator awarded a further $100,000 in general damages for a total award of $164,120.91.

In the subsequent bad faith lawsuit, the insured alleged that the failure to make any offer of settlement before arbitration violated Insurance Code section 790.03(h)(5), which requires an "attempt in good faith to effectuate a prompt, fair, and equitable settlement of claims in which liability has become reasonably clear." The insured claimed that he was forced to go to arbitration and to incur costs as well as attorney's fees. He prayed for compensatory and consequential damages for the delay and withholding of benefits, for reimbursement of all costs and attorney fees, for general damages, punitive damages, all costs of suit, and for interest.

The insurer responded by arguing that a genuine dispute existed, precluding any bad faith. Specifically, the insurer argued that bad faith required showing: (1) a claim for which liability was clear, (2) damages plainly exceeding the uninsured motorist coverage limits, and (3) an unreasonable refusal to pay. As the damages did not plainly exceed $250,000, there was no bad faith. The trial court agreed, sustaining the insurer's demurrer on the ground that the arbitration award did not establish that damages had exceeded the policy limit and, therefore, there was no causation.

The appeals court reversed, finding that the insured had adequately pled bad faith. Citing *Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, the *Maslo* court said that the genuine dispute rule does not relieve an insurer from its obligation to thoroughly and fairly investigate, process and evaluate a claim. The court said that the insurer could not rely upon the genuine dispute rule because the insured alleged the failure to comply with common law and statutory obligations to thoroughly and fairly investigate, process, and evaluate the claim.

Specifically, the insured alleged that the insurer was promptly apprised of the claim, provided with the police report showing the uninsured motorist solely responsible, and provided with medical documentation of the injuries sustained by appellant and the nature and cost of his medical treatment. Further, the insured alleged that the insurer neither interviewed treating physicians, nor conducted a medical examination or review. In addition, the insured alleged that the insurer failed to respond to the settlement demand, made no settlement offer, failed to provide a reason for withholding payment, refused to participate in mediation, and provided no opportunity to negotiate a settlement. Thus, the appeals court found the genuine dispute rule inapplicable.

While acknowledging some authority for the proposition that damages must exceed the policy limit to demonstrate bad faith, the court held it is not an absolute rule. The court agreed that a leading treatise listed excess damages as an element of uninsured motorist bad faith, but pointed out the treatise, in relying on *Hightower v. Farmers Insurance Exchange* (1995) 38 Cal.App.4th 853, was only summarizing the decision. The *Maslo* court pointed out that *Hightower* also said "an insurer cannot shield other dilatory conduct, such as failing to investigate a claim, by the mere act of requesting uninsured motorist arbitration." Thus, beside the three points cited in the treatise:

"[A]n insurer may be liable for bad faith in failing to attempt to effectuate a prompt and fair settlement (1) where it unreasonably demands arbitration, or (2) where it commits other wrongful conduct, such as failing to investigate a claim. An insurer's statutory duty to attempt to effectuate a prompt and fair settlement is not abrogated simply because the insured's damages do not plainly exceed the policy limits. Nor is the insurer's duty to investigate a claim excused by the arbitrator's finding that the amount of damages was lower than the insured's initial demand. Even where the amount of damages is lower than the policy limits, an insurer may act unreasonably by failing to pay damages that are certain and demanding arbitration on those damages."

Torts – Duty of Care to Known Intoxicated Persons

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

Jason Carlsen v. Sarah Koivumaki and Zachary Gudelunas

Courts are often called upon to struggle with the issue of responsibility of others for the actions of intoxicated persons. This case dealt with whether one person could be held responsible for going to the precipice of a cliff with an intoxicated person, and with failing to assist that person once he fell over the cliff.

Defendants Sarah Koivumaki and Zachary Gudelunas were at a party and agreed to give a ride home to plaintiff Jason Carlsen, who was "clearly intoxicated" at the time. Zach asked Jason if he wanted to go to "The Bluffs," a cliff overlooking the Sacramento River, and Jason said "no." The three then left the party and drove to a store where Jason stole a 5th of rum. They proceeded to a second party where Jason had shots of rum; then they drove to The Bluffs to watch the sunrise. They sat on a blanket at the cliff's edge, drinking the rum Jason had stolen. According to Sarah, Jason fell within thirty minutes of their arrival. He tried to hang on to the edge of the cliff before losing his grip and falling. Sarah heard him fall down the cliff side and land on the rocks below.

Sarah and Zach ran to the car but did not call 911 because they were afraid they would get into trouble for being intoxicated or causing Jason's fall. They spent about an hour trying to locate Jason, and then drove away from the scene discussing Jason's "suicide". At about 8:30 a.m. the next morning, Sarah told her mother about Jason committing suicide and her mother told her to call 911. Instead, defendants drove to the police station and reported the incident at 9:20 a.m. Jason was found about a half an hour later. He had no recollection of even being on The Bluffs.

Jason sued Sarah and Zach for assault and battery, negligence, willful misconduct, and intentional inflection of emotional distress. He claimed that defendants put him in peril by bringing him to the edge of the cliff when he was highly intoxicated, leading to his fall, and that they aggravated his injuries by waiting several hours to inform the authorities of the fall. Sarah brought a motion for summary judgment, claiming there was no evidence she touched or threatened Jason or breached any duty of care to him. The trial court ruled that Jason failed to meet his burden because he had no recollection of being at The Bluffs, much less falling, and it could not be reasonably inferred from the evidence that Sarah pushed or otherwise caused him to fall. The trial court said there was no special relationship between Jason and Sarah such that Sarah owed Jason a duty of care, and that there was no evidence that Sarah engaged in any outrageous conduct.

Jason appealed. As to the assault and battery, the Court of Appeal agreed that there was no evidence to support a claim of assault and battery. However, the Court of Appeal held that the evidence was sufficient to state causes of action for negligence and willful misconduct.

The Court noted that a person who has not created a peril is not liable in tort merely for failure to take affirmative action to assist or protect another unless there is some special relationship between them which gives rise to a duty to act. The typical special relationship is a situation where the plaintiff is particularly vulnerable and dependent upon the defendant, who has some control over the plaintiff's welfare. A defendant found to have a special relationship with another may owe an affirmative duty to protect the other person from foreseeable harm, or come to the aid of another, in the face of ongoing harm or medical emergency. (Citing *Rotolo v. San Jose Sports & Entertainment, LLC*. (2007) Cal.App.4th 327, 325).

Here, Jason alleged that defendants were negligent because they were directly involved in creating the conditions that placed him in peril, and their affirmative acts were a substantial factor in his initial fall. The complaint also alleges that defendants owed Jason a duty to call 911 or otherwise summon aid due to the nature of the special relationship among the parties because defendant's conduct caused or contributed to placing Jason in peril. Jason said defendants breached that duty by waiting several hours before reporting the incident. Jason said his presence at the edge of the cliff was closely connected with defendant's conduct in inviting him and driving him to a remote location.

The court concluded that, from these facts and supporting evidence, a jury reasonably could infer that Sarah breached her duty of ordinary care owed to Jason, and as a direct and proximate result of her breach, Jason fell from the cliff. Sarah played an active role in placing Jason in a position of peril. She and Zach were close friends and were together at the party. She was present when Zach agreed to drive Jason home, and she knew he was highly intoxicated. She and Zach walked with Jason from the roadside to The Bluffs and sat on the blanket with him drinking the rum he had stolen. Sarah was not a passive participant. The only thing she did not do was drive the car.

The court held that the complaint made out a legally cognizable claim that Sarah breached her duty to use ordinary care by participating and bringing Jason to the edge of the cliff, knowing he was highly intoxicated.

As to the willful misconduct cause of action, the court held that, if a jury found that Sarah owed a duty of care, and breached it, Jason could pursue his cause of action for willful conduct.

COMMENT

This case expands the availability of damages for negligence and willful misconduct by enlarging the definition of a "special relationship" giving rise to a duty of care. The court decided that companions of a highly intoxicated person had a duty to get him home safely because he was in a particularly vulnerable state and depended on them.

Construction Contracts – Limitation on Recovery For Unlicensed Contractor

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

E.J. Franks Construction, Inc. v Bhupinder K. Sahota, et al.

The purpose of the Contractors' State License Law (Business & Professions Code sections 7000 et seq.) is to "protect the public from incompetent or dishonest providers of building and construction services," and to prohibit a contractor who has violated the statue from recovering "for the fruits of his labor." This case considered whether a contractor who was licensed at all times while performing work, albeit through two different named companies, was prevented from suing to collect for work performed.

Edward Franks became licensed as a general building contractor in 1995, and did business as E.J. Franks Construction. He contracted with Bhupinder K. Sahota ("Sahota") to build a custom home for the Sahotas on their property in Livingston. During the course of construction, he incorporated his business as E.J. Franks Construction, Inc. ("EJFCI") and his license was re-issued to the corporation. He continued to work on the project until it was approximately 90% completed. By that time, in the spring of 2006, issues over construction led the Sahotas to refuse to allow Franks to continue or complete the work. They hired another contractor to finish the home. EJFCI then filed suit for foreclosure of a mechanic's lien, breach of contract and quantum meruit. The Sahotas answered and filed a cross-complaint against EJFCI and Franks for breach of contract and fraud. Prior to trial, the court ruled that EJFCI was limited to recovery on claims of "quantum meruit or unjust enrichment" from the time the license was re-issued in the name of the corporation. Trial commenced, and the jury found in favor of EJFCI on its complaint, awarding it $66,000 for various change orders, and the jury found against the Sahotas on their cross-complaint. The Sahotas appealed.

The Court of Appeal affirmed the judgment, and held that EJFCI was entitled to recover on a theory of quantum meruit for the value of the work performed by the corporation on the change orders performed after the corporation took over Mr. Frank's personal license. In doing so, the Court rejected the Sahotas' arguments that EJFCI was prohibited from recovery as an unlicensed subcontractor, and held that Business and Professions Code section 7031 did not apply in this case.

Section 7031 precludes an unlicensed contractor from maintaining a lawsuit to recover compensation for its work, while at the same time allowing that the contractor may be sued for disgorgement of any monies paid for work performed for which a license was necessary. In arguing that this section barred the plaintiff from any recovery, the Sahotas had referenced various cases citing section 7031 where a contractor was not allowed to receive payment in quantum meruit.

The Court noted that in each and every case cited by the Sahotas, there was a period of time (at the time of contract, or when work started, or at the conclusion of the work) where the contractor was not licensed. In contrast, the Court held that at no time was the work on the Sahotas' home being performed by an unlicensed contractor. Rather, the work commenced pursuant to a contract by E.J. Franks Construction as a sole proprietor, under Mr. Franks' license. Subsequently, when he incorporated and the license was reissued to the corporation, all work was being performed pursuant to that license.

The Court noted that the *purpose* of the statute was to deter *unlicensed* contractors from recovering, and that the statue was not intended to deter *licensed* contractors from changing a business entity's status, and obtaining reissuance of the license to the new entity during a contract period. Where, as here, the licensed contractor was a corporation which had actually performed work at the homeowner's request, it could still recover the reasonable value of those services on a quantum meruit basis, even if the corporation never had a contract with the homeowners.

The Court of Appeal upheld the judgment in favor of the plaintiff contractor.

COMMENT

The terms of section 7031 are very harsh and unforgiving to a contractor who performs work without a license for the same. However, courts will not apply the bar to recovery by (or enforce disgorgement against) a contractor who was at all times relevant in possession of the correct license. Mere changes in business structure will not bar the contractor's right to recovery.

CCNC

Monday Afternoon Session opens three-game series

August 18-20, 2014

Hyatt Regency
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Hitting A Home Run covering all the bases!

Claims Conference Northern California, Inc.

Register Now for the 21st Annual Claims Conference of Northern California

www.ClaimsConference.org

Keynote Address from former major-leaguer

Adam Greenberg

One Last At Bat

We don't always get a second chance to do what we love in life.

In the long-standing tradition of the CCNC, the 21st annual event will focus on continuing education for P&C Insurance Claims Professionals.

A new agreement with the Hyatt Regency Downtown Sacramento keeps CCNC at its home playing field, bringing smiles to many fans.

A twilight opener Monday afternoon, August 18th, from 4-6pm, will precede the main event. Day games will be held Tuesday, August 19th and Wednesday August 20th, including CE classes raising players to Allstar status.

An evening double-header features a fine dinner banquet, and new wrinkle on evening fun, to be announced very soon.

With Exhibit booths now all but sold out for the season, vendor focus has turned to securing the best sponsorship opportunities at this time.

Attendee Registration is now open, with special preferred seating for carrier claims professionals and indepedent adjusters.

PLAY BALL!!!

On the Lighter Side...

Summary of Life

GREAT TRUTHS THAT LITTLE CHILDREN HAVE LEARNED:
1) No matter how hard you try, you can't baptize cats..
2) When your Mom is mad at your Dad, don't let her brush your hair.
3) If your sister hits you, don't hit her back. They always catch the second person.
4) Never ask your 3-year old brother to hold a tomato.
5) You can't trust dogs to watch your food..
6) Don't sneeze when someone is cutting your hair..
7) Never hold a Dust-Buster and a cat at the same time.
8) You can't hide a piece of broccoli in a glass of milk.
9) Don't wear polka-dot underwear under white shorts.
10) The best place to be when you're sad is Grandma's lap.

GREAT TRUTHS THAT ADULTS HAVE LEARNED:
1) Raising teenagers is like nailing jelly to a tree.
2) Wrinkles don't hurt.
3) Families are like fudge...mostly sweet, with a few nuts
4) Today's mighty oak is just yesterday's nut that held its ground...
5) Laughing is good exercise. It's like jogging on the inside.
6) Middle age is when you choose your cereal for the fiber, not the toy..

GREAT TRUTHS ABOUT GROWING OLD
1) Growing old is mandatory; growing up is optional...
2) Forget the health food. I need all the preservatives I can get.
3) When you fall down, you wonder what else you can do while you're down there.
4) You're getting old when you get the same sensation from a rocking chair that you once got from a roller coaster.
5) It's frustrating when you know all the answers but nobody bothers to ask you the questions...
6) Time may be a great healer, but it's a lousy beautician
7) Wisdom comes with age, but sometimes age comes alone.

THE FOUR STAGES OF LIFE:
1) You believe in Santa Claus.
2) You don't believe in Santa Claus.
3) You are Santa Claus..
4) You look like Santa Claus.

SUCCESS:
At age 4 success is .. . . . Not piddling in your pants.
At age 12 success is . .. . Having friends.
At age 17 success is . . Having a driver's license.
At age 35 success is . . . ..having money.
At age 50 success is . . . Having money..
At age 70 success is . .. . Having a drivers license.
At age 75 success is . ... . Having friends.
At age 80 success is . . .. Not piddling in your pants.

Always remember to forget the troubles that pass your way;
BUT NEVER forget the blessings that come each day.

Have a wonderful day with many *smiles*

Take the time to live!!!
Life is too short.