

AB 1552, a Proposal to Cure the Pandemic Faced by Businesses

Credit to Tyson & Mendes, La Jolla, CA

Proposed by California Assemblymembers James C. Ramos (D-Highland) and Monique Limón (D-Santa Barbara), Assembly Bill 1552 (“AB 1552”) aims to provide financial relief to California businesses impacted by the COVID-19 pandemic. After issuing a shelter-in-place order, on March 17, 2020, Governor Gavin Newsom forced many companies to scramble and find new ways of generating revenue to stay afloat during this unprecedented time. Many of these companies sought relief from their insurance carriers by filing claims under business interruption insurance policies.

Under these policies, insurance carriers may cover financial losses resulting from interruptions in a business’s day-to-day operations. However, these policies typically require direct physical loss of or damage to covered property trigger coverage and extend benefits to the insured. What makes AB 1552 so unique is that coverage, and the associated financial benefits, would now be made available without the requisite direct physical loss of or damage to covered property. By creating a rebuttable presumption that COVID-19 was not only present at a business’s property, but that its presence resulted in direct physical damage to or loss of the property, AB 1552 essentially provides automatic financial assistance to companies with an applicable business interruption policy.

Critics call the latest effort by California lawmakers unconstitutional. Further, they claim that its application would re-write existing insurance policies to cover events not previously contemplated by insurers or their insureds. They argue that the move could overwhelm their financial resources by extending coverage to claims where premiums were not previously collected. At the same time, proponents argue that the current pandemic has caused an interruption to the day-to-day operations of many businesses, and despite the absence of property damage, coverage should be extended to companies who purchased one of these policies. Additionally, proponents also point to the costs of these policies, which can range from a few thousand dollars to several hundred thousand dollars per year.

With over 271,000 confirmed cases of COVID-19 in California, which quickly seems to be spiraling out of control, insurance carriers will seemingly have an uphill battle to challenging the rebuttable presumption in AB 1552, as currently contemplated. Although it seems highly unlikely that AB 1552 will garner the requisite votes needed to become law, this proposal is just another bold step by lawmakers to provide relief to Californians during these unprecedented times. At Tyson & Mendes, we will continue to monitor this and other developments in this ever-changing landscape. Please, stay tuned.

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Inside this issue.....

Proposal for COVID effected businesses	Pg. 1
President’s Message	Pg. 2
Press Releases from DOI	Pg. 3
Wrongful Death	Pg. 4
Fire Claim	Pg.5
On the Lighter Side	Pg. 6

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Presidents Message – August 2020

“Change is the law of life, and those who look only to the past and present are certain to miss the future” -John F. Kennedy

For this month's President's Message I decided to look back at what past presidents have written about change. Change is inevitable and while we can't predict the future, I can say that some of the technology that we currently have has made it easier to live in these COVID times.

-John



John Ratto
CAIIA President



August 2013

As anyone that know me will agree, I did not welcome the computer. I was one of the last individuals in several groups that I belong, to actually obtain an e-mail address. Once I did so, I used it and actually understood the benefits. Although there are benefits to email, I also think that because of email we have forgotten how to communicate over the phone as we start to rely way too much on e-mails. I understand the purpose of an e-mail, because you have documented evidence that you did work on a file. All changes are not necessarily good, again I feel we have lost the ability to communicate because of texting (which I don't do) and e-mailing instead of picking up the phone and making that contact with whomever. We now work 24 hours, 7 days a week because we are tied into the smart phones and our computers so that not only can insureds and insurers (our clients) reach us during business hours, but now they can reach us at any time of the day. I even catch myself looking at my iPhone until I go to bed and consistently over the weekend even when I am not in the office.

Recently I attended a luncheon where the speaker was a little critical of our constant dependence and use of our smart phones and tried to emphasize that we needed to be less dependent on them with the hope that the stress in our lives would become less. As an independent adjuster, that is easier said than done, because in today's economy and working with the insurance industry as a whole, we are constantly looking for new customers and making sure that we deliver an excellent product because if we don't our competitors will. We live in an ever changing world where we have to adapt all of the time in order to keep up with those changes. I sometimes think we have computer programmers out there who decide to change a program just to keep themselves in a job. I don't necessarily believe that change for change itself benefits our industry or makes our job easier, nor does it always make us better people or better adjusters.

WL McKenzie

August 2018

Not so long ago, it used to be that when you were scheduled for field work, you would prepare a route list and would call the office periodically. That is how our boss kept track of you. Now, there is GPS that may be in your car or certainly on your “smart” phone to track you. If you had to get a rush document somewhere, you might have to get into the car and deliver it. Now, files are in digital formats and can be sent in secure formats.

It seems we are now on task for 24 hours a day with all our “smart” objects. People walk with their phones in their hands, mostly looking down. Even as you watch people that are running or hiking, you see ear buds or headphones. There is a drive to automate all the claims process from reporting to a resolution. Will claims jobs be phased out to automation?

I am an X-Files fan and one of my favorite episodes last season was based upon total automation from the car ride to the restaurant. All the transactions were by an app, menu and credit card. What I got out of it is that machines and artificial intelligence are programs created by humans. I do not see that the human element will ever be taken out of claims. Humans have the ability to reason and negotiate and face to face contact in itself resolves a lot of issues. Besides, have you ever tried to argue with the GPS in your car? It will keep rerouting you even if you know where you are going and is always recalculating! The only way you win is to turn it off.

On the claims side of the phone call, we just get the phone hung up. So how do we keep our perspective amid all the “smart” technology?
Paul Camacho

January 2012

The claim process has changed: we use computers, not pencils, and we report online. But the interaction with public adjusters, insureds, attorneys and other adjusters has not changed.

The next claim you investigate remember, the process changes but the communication and interaction between people does not.

Jeff S Caulkins AMIM AIC RPA

President

July 2014

Summer is here! School is out. Vacations are underway. It's the time of year for transition. Although school is in the distant past for most of us, summer brings back memories of long fun-filled days. That was a time when work didn't seem like work and happy hour got the night started.

Have a safe and fun-filled summer!

Tanya Gonder

2013/2014 CAIIA President

Press Release from the Insurance Commissioner:

Commissioner Lara launches first-ever database of green insurance products

Climate Smart Insurance Products Database is part of comprehensive insurance strategy to reduce greenhouse gas emissions and build climate resilience

LOS ANGELES, Calif. — Insurance Commissioner Ricardo Lara formally launched the [Climate Smart Insurance Products Database](#), the first-ever consumer-oriented list of green insurance policies. With hundreds of climate-related insurance products already available to consumers and businesses, the California Department of Insurance has developed this database to help the public understand and access these products and encourage further insurance policy innovation in commercial, homeowners, and auto lines, among other lines. Recognizing the potential for specific insurance products to address climate risks and contribute to a sustainable future will encourage consumers and insurance companies to explore products that harness new technologies and promote resilience.

“Understanding, preventing, and reducing climate risk is of paramount importance, and we need innovative insurance solutions to accelerate the transition to sustainable and resilient communities and economies,” **said Commissioner Lara**. “When disaster strikes, insurance can help damaged homes, buildings, and vehicles be built back better, stronger, and greener and springboard into the cleanest technologies.”

The Climate Smart database lists more than 400 products currently available to consumers and businesses that address climate risks, harness new technologies, and build resilience. They include insurance products and solutions that, among other products:

- Provide green-rebuild coverage, providing a pathway to building back stronger, more energy efficient, and lower-emission buildings and vehicles
- Promote fuel-efficiency by offering lower premiums for low-emission vehicles
- Provide discounts for green energy use and energy efficiency certification
- Provide discounts for businesses who operate hydrogen and hybrid electric buses
- Protect low-income communities and natural ecosystems

The database is another element in Commissioner Lara's strategy to combat climate change. Last year, Commissioner Lara announced an agenda-setting effort with the United Nations to create a [Sustainable Insurance Roadmap](#), a comprehensive climate change strategy and action plan that is envisioned to pave the way for innovative risk management, insurance, and investment solutions that reduce climate risks and protect natural ecosystems.

Commissioner Lara previewed the database on July 8, 2020 at an [international virtual event](#) convened by the UN PSI and Swiss Re on sustainability leadership in insurance, which attracted more than 700 participants from over 60 countries. In addition to working with the UN, California will be collaborating with Washington State Insurance Commissioner Mike Kreidler to build on this innovative database. California and Washington State have been working together with the UN Environment Programme as members of the PSI as well as the Sustainable Insurance Forum (SIF) for regulators.

“I applaud Commissioner Lara and the California Insurance Department's thoughtful initiative to make the full range of existing climate-related insurance products available to consumers and businesses,” **said Commissioner Kreidler**. “Providing this innovative access to these products encourages communication between policyholders and their insurers, and will no doubt lead to new ideas and more refined climate-related insurance products going forward.”

Wrongful Death Claims

Credit to Tyson & Mendes, La Jolla, CA

Where a decedent's death was caused by third party misconduct, there may be tort causes of action for damages. Namely, a wrongful death cause of action- which is an independent claim on behalf of decedent's heirs for damages *they personally suffered*; and a personal injury action which "survives" to decedent's estate for the purposes of recovering damages *the decedent* would have been awarded had the decedent lived. This is governed by *California Code of Civil Procedure* ("C.C.P") § 377.20. This article will focus on survival actions.

A survival cause of action is a separate and distinct cause of action that belonged to the decedent before death, but by statute survives the event. The survival statute provides for the post-death enforcement of a cause of action on a decedent's behalf. As such, the damages for a survival cause of action are *limited* to those sustained by the decedent or incurred before the decedent's death.

Since Decedent is Deceased, Who Brings a Claim?

C.C.P § 377.30 provides: A cause of action that survives the death of the person entitled to commence an action or proceedings passes to the decedent's successor in interest...and an action may be commenced by the decedent's personal representation, or if none, by the decedent's successor in interest. The person who seeks to commence an action as the decedent's successor in interest must execute and file an affidavit or a declaration under penalty of perjury stating, among other things, that no other person has a superior right to commence the action. *C.C.P*. § 377.32. Specifically, the representative must file a copy of a death certificate together with an affidavit or declaration stating all of the following:

- The decedent's *name*. (*C.C.P*. § 377.32(a)(1))
 - The *date* and *place* of death. (*C.C.P*. § 377.32(a)(2))
 - "No proceeding is now pending in California for administration of the decedent's estate." (*C.C.P*. § 377.32(a)(3).)
 - If the decedent's estate was administered, a copy of the *final order* showing distribution of the cause of action to the successor in interest. (*C.C.P* § 377.32(a)(4).)
 - *Either* of the following, as appropriate, *with supporting facts*:
 - "The affiant or declarant is the decedent's successor in interest... and succeeds to the decedent's interest in the action or proceeding." (*C.C.P*. § 377.32(a)(5)(A).)
 -
- OR
- "The affiant or declarant is authorized to act on behalf of the decedent's successor in interest...with respect to the decedent's interest in the action or proceeding." (*C.C.P*. § 377.32(a)(5)(B).)
 -
 - "No other person has a superior right to commence the action or proceeding or to be substituted for the decedent in the pending action or proceeding." (*C.C.P*. § 377.32(a)(6).)
 - "The affiant or declarant affirms or declares under penalty of perjury under the laws of the State of California that the foregoing is true and correct." (*C.C.P*. § 377.32(a)(7).)

Damages Recoverable in a Survival Action

A personal injury claim "surviving" to the estate does not have the same value it would have had if decedent had lived. All decedent's *special damages* incurred prior to death (such as medical expenses and lost earnings), as well as *punitive damages*, are recoverable by the estate; but the estate is *not* entitled to an award for decedent's *pain and suffering or disfigurement*. It is common for one to allege a survival cause of action, without meeting all of its elements, just for the sake of alleging punitive damages.

Conclusion

A survival action may be an appropriate cause of action when faced with a lawsuit alleging the death of a person. However, there are strict requirements that must be followed for one to assert a survival cause of action on behalf of a person. Additionally, it is important analyze whether one is alleging punitive damages, and if so, if they have a valid survival cause of action.

Does Exclusionary Language barr Fire Claim? Credit to McCormick– Barstow, Fresno, CA

UNDERLYING FACTS

The Mosley's rented their property to Pedro Lopez. The property was subsequently damaged by fire and it was determined that the fire resulted when Lopez "bootlegged" a main power line into the attic to power his energy-intensive marijuana growing operation. Pacific Specialty Insurance Company ("PSIC") insured the property under a policy that excluded loss resulting from "the growing of plants" or "the manufacture, production, operation or processing of chemical, biological, animal or plant materials." PSIC denied the claim and the Mosley's filed suit alleging breach of contract and bad faith. The parties filed cross-motions for summary judgment. The Mosley's argued that the policy exclusion violated Insurance Code section 2070 because it provided less coverage than required under Insurance Code section 2071. PSIC argued that the exclusion applied to preclude coverage and complied with Insurance Code section 2071 because that section allows exclusions for hazards "'increased by any means within the control or knowledge of the insured.'" It argued that Lopez's conduct was within the Mosleys' control or knowledge and that, therefore, the policy did provide substantially equivalent coverage to that required by section 2071. The trial court agreed and granted PSIC's motion and denied the Mosleys' motion. Judgment was entered in favor of PSIC and the Mosley's appealed.

APPELLATE COURT'S RULING

The Court of Appeal first addressed the question of whether the exclusion, as worded, applied to the loss in question. The appellate court concluded that the undisputed evidence showed that the fire was caused by the altering of the electrical system in such a way as to power the marijuana growing operation. Since there was a minimal causal connection between the growing of marijuana, the fire and the loss, the exclusion applied.

The appellate court next addressed whether the exclusion could be applied to exclude coverage or whether the exclusion was void because its application would result in the policy providing coverage which was "not substantially equivalent" to that contained in the standard form fire policy. Section 2071 provides that insurers shall not be liable where the hazard is increased by means within the control or knowledge of the insured. Neither the parties nor the appellate court located any binding California authorities interpreting what is meant by a "'hazard...increased by any means within the control...of the insured'" under section 2071. After discussing various out-of-state cases, the appellate court concluded that those authorities "stand for the proposition that an insured increased a hazard 'within its control' *only* if the insured is aware of the hazard or reasonably could have discovered it through exercising ordinary care or diligence." However, it was undisputed that the Mosley's were unaware of the operation or the fact that Lopez had altered the electrical system. There was no evidence in the record that the operation could have been discovered by the Mosley's by the exercise of ordinary care or diligence. The appellate court determined that this was a question of fact because the record was silent as to this issue.

The appellate court went on to note that "to the extent PSIC's interpretation of the Policy renders the Mosley's strictly liable for Lopez's conduct, the Policy is void under section 2071." The appellate court concluded that "a fact issue remains as to whether Lopez's hazard-increasing conduct was within their control. If it was, then PSIC properly denied coverage. But by denying the Mosley's coverage for Lopez's conduct, regardless of the Mosleys' control over or knowledge of it, the Policy did not provide 'substantially equivalent' coverage to that required under section 2071." The appellate court therefore reversed the trial court order granting summary judgment to PSIC on the breach of contract cause of action and affirmed its order denying summary judgment to the Mosley's.

The appellate court next addressed the trial court's order granting summary judgment to PSIC on the bad faith cause of action, holding that this order was correct. In concluding that PSIC acted reasonably as a matter of law, the appellate court stated "there is no clear, controlling California law that established whether PSIC properly denied coverage, an issue that turns on whether Lopez's conduct was within the Mosleys' control, which remains to be determined. Under the unique circumstances presented and the lack of guiding California precedent, we think PSIC reasonably interpreted [the exclusion] as permissibly excluding coverage for the damage Lopez caused." As such, the Court concluded that summary judgment in favor of PSIC on this cause of action was proper.

EFFECTS OF THE COURT'S RULING

As noted by the Court of Appeal in this ruling, it could not locate any California cases dealing with the issue of what constitutes a hazard increased by any means within the control of the insured under section 2071. Therefore, the Court of Court relied on out-of-state cases interpreting this language. What is interesting is that those out-of-state cases involved policies which included such language. In the present case, PSIC had not included such an exclusion in its policy, but instead had included an exclusion for the growing of plants. The Court of Appeal accepted the validity of the exclusion, one not contained in a standard form policy, as long as the exclusion was not interpreted by the insurer as rendering the Mosley's strictly liable for the conduct of Lopez. In other words, if the exclusion is interpreted by the insurer in such a way as would be acceptable under section 2071, then the insurer is free to rely on the exclusion even if the exclusion is not on its face so limited. Here, the exclusion applied to loss resulting from an operation engaged in the growing of plants, with no requirement that the insured have knowledge or control of the operation. The Court of Appeal effectively simply read that requirement into the exclusion so that it would be enforceable, assuming PSIC is able establish that this requirement was met.

On the Lighter Side :

If I had a dollar for every girl who found me unattractive, they'd eventually find me very attractive.

I find it ironic that the colors red, white, and blue stand for freedom, until they're flashing behind you.

Today a man knocked on my door and asked for a small donation towards the local swimming pool, so I gave him a glass of water.

Artificial intelligence is no match for natural stupidity.

I'm great at multi-tasking: I can waste time, be unproductive, and procrastinate all at once.

If you can smile when things go wrong, you have someone in mind to blame.

Take my advice, I'm not using it.

Hospitality is the art of making guests feel like they're at home when you wish they were.

Behind every great man is a woman rolling her eyes.

Ever stop to think and forget to start again?

Women spend more time wondering what men are thinking than men spend thinking.

He who laughs last thinks slowest.

Is it wrong that only one company makes the game Monopoly?

Women sometimes make fools of men, but most guys are the do-it-yourself type.

Men say women should come with an instruction manual; but since when has any man stopped to read the instructions.

I was going to give him a nasty look, but he already had one.

Change is inevitable, except from a vending machine.

I was going to wear my camouflage shirt today, but I couldn't find it.

If at first you don't succeed, skydiving is not for you.