



# Status Report

**SEPTEMBER 2004**

## CAIIA Nominating Committee Announces Nominees

The CAIIA Nominating committee announces that the following people are willing to join the Board of Directors for the upcoming two (2) year terms.

**Thad Eaton** – Eaton and Johnson, Pleasant Hill

**Bill Sheler** – Dunlap Claims Service, San Jose

**Dave Ceresa** – AIMS, Sacramento

**Peter Schifrin** of Schifrin, Gagnon and Dickey, Van Nuys, has been nominated as Secretary/Treasurer.

If anyone wishes to nominate someone for one of the open positions, you must contact Steve Tilghman, Immediate Past President, at (650) 574-6854, to place that name into nomination 30 days or more before the start of the Annual Meeting. The close of nominations is on September 13, 2004.

The Annual Meeting will start on October 13, 2004 at the Disney's Grand Californian Hotel, Anaheim, CA.

## Letter to the Editor

### Very Timely Article in the New CAIIA Letter. (August, 2004)

We all need to take steps to prepare ourselves for the runoff of this decision. (Boicourt v. Amex)

I suggest we take the initiative on all attorney cases. We should ask the attorney in writing if he wants us to contact our insured to obtain permission to disclose the limits of coverage.

This can be done by form letter. The attorney response will always be "yes". A second form letter can then be sent tot he insured asking permission.

As long as we can prove that we asked, the insureds response or lack thereof is irrelevant.

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**California Association of  
Independent Insurance Adjusters**



*An Employer  
Organization of  
Independent  
Insurance Adjusters*

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### 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@caiiia.org](mailto:info@caiiia.org).

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Insurance Adjusters, Inc**

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■ **PRESIDENT'S MESSAGE**

We recently received notice that Immediate Past President Steve Tilghman, after many years with AIMS, is now working with Schifrin, Gagnon and Dickey. Congratulations to both Steve, and Pete Schifrin! I am frequently reminded that we are in a people business, and I marvel at the expertise and experience of our members in all the various fields of claims adjusting. Steve's property adjusting expertise is among the very best, and I seriously believe the skill and knowledge of so many CAIIA members is unmatched in this industry. If there are independent adjusters out there with such expertise, you belong in the California Association of Independent Insurance Adjusters!

Excitement is building in our organization for the fall conference in October – President Elect Doug Jackson's plans for an educational but fun conference are jelling at just the right time. The amount of time and work that goes into putting on one of these conferences is huge, and we hope for a wonderful turnout at Disney's Grand Californian on October 13-15.

As I write this, TV and newspaper images of so much damage and devastation in Florida from Hurricane Charley are fresh, and I have no doubt the population of experienced catastrophe adjusters in Florida is already growing. Such destruction reminds us what in-



sureance is all about - where would our society be in such situations without experienced insurance adjusters?

Status Report Editor Sterrett Harper offered me a "bye" this month on writing this column, since he had heard about my back giving me much difficulty again. I compromised by writing a shorter message. I have found out the hard way about "failed back surgery syndrome". If I can borrow from Charles Schultz' "Peanuts", the years have been good to me, but recently, the months and weeks have been a little rude!

Thanks for the consideration, Sterrett. I probably carry on too long anyway! I hope many of you are registering for the Fall Conference – see you there!

**LEE COLLINS, ARM**

*President - CAIIA 2003-2004*

# ■ Insurance Law Update

Submitted by Bruce C. Clebrezze - Sedgwick San Francisco

## ‘Brandt’ Fees Further Clarified

August 10, 2004

*Cassim v. Allstate Ins. Co.*, California Supreme Court In *Cassim v. Allstate Ins. Co.*, 2004 WL 1687866(2004), the California Supreme Court reiterated and supplemented its Brandt decision regarding the circumstances in which an insured is entitled to recover attorneys’ fees in a lawsuit against its insurer.

The court observed that California adheres to the American Rule “which provides that each party to a law suit must ordinarily pay his own attorneys’ fees”. In *Brandt*, the court made an exception to this rule, holding that, if an insurer fails to act fairly and in good faith when discharging its responsibilities concerning an insurance contract, that breach may result in tort liability for any damages proximately caused by the breach. Those damages can include the fees and costs to hire an attorney to obtain the policy benefits. In *Brandt*, the court stated that, because entitlement to attorneys’ fees as compensatory damages is premised on an insured’s need to hire an attorney to vindicate his or her contractual rights under the insurance policy, the fees recoverable may not exceed the amount attributable to the attorney’s efforts to obtain the rejected payment due on the insurance contract. Fees attributable to obtaining any portion of the insured’s award which exceeds the amount due under the policy are not recoverable.

In *Cassim*, the policyholders were represented by an attorney on a contingent fee basis. The contract benefits recovered totaled \$40,856. The insurer argued that the *Brandt* fees should be limited to 40 percent of that amount. The policyholders argued that the Brandt fees should be awarded on the entire amount of the judgment, including the bad faith and punitive awards. The court rejected both proffered methods of calculation.

The *Cassim* court indicated that, if the policyholders can prove that some portion of the fee was for legal work solely or partially attributable to the with-

held contract benefits, the failure to reimburse the plaintiffs for that out-of-pocket expense would necessarily result in a diminution of their policy benefits. Nothing in *Brandt* limits the amount of fees awarded as damages to a percentage of the contract benefits. Rather, the amount of the fees attributable to the attorney’s efforts to obtain the rejected payment due on the insurance contract is what is recoverable. This amount could conceivably exceed the amount of the contract damages. To the extent that some portion of the attorney’s legal fee represented legal work that was related to both the tort and the contract recoveries, it would be at least partially attributable to the attorney’s efforts to obtain the rejected payment due on the insurance contract. Failure to reimburse the policyholders for that portion of the shared amount would necessarily diminish their contract recovery and violate *Brandt*’s premise that plaintiffs should recover, as tort damages, the legal fees incurred to recover their policy benefits.

The court further held that permitting plaintiffs in a mixed contract/tort case to recover the majority of their attorneys’ fees attributable to the entire compensatory award would be inconsistent with the premise of *Brandt*. *Brandt* is only a limited exception to the American Rule. To the extent that there is overlap in legal work prosecuting the contract and tort claims, the trial court should exercise its discretion to apportion the fees. The trier of fact must determine the percentage of legal fees paid to the attorney attributable to obtaining the contract recovery.

Finally, the court provided instruction as to how the fee determination would be made. Policyholders bear the burden of demonstrating how the fees for legal work attributable to both the contract and the tort recoveries should be apportioned. The trial courts retain discretion to disregard fee agreements that appear designed to manipulate the calculation of *Brandt* fees for the policyholder’s benefit.

# ■ Weekly Law Resume

Prepared by Low, Ball & Lynch, Attorneys at Law

## **Civil Procedure – Offers to Compromise**

*Erika A. Berg v. Ronald L. Darden, D.D.S.*, Court of Appeal, Second District, (June 13, 2004).

California procedure provides for the service of an offer to compromise prior to trial, which allows the defendant to recover costs and expert expenses if a more favorable judgment is obtained than the offer. This case addresses the issue of the form of the offer.

This personal injury action against Erika Berg's former dentist centered around a letter sent by Ms. Berg's attorney to the attorney for Dr. Darden. After discussing discovery-related issues and merits of the litigation, the letter stated it was making a section 998 offer to settle for \$225,000. The letter was faxed and received by Dr. Darden's attorney. No response was made to the letter. A jury returned a verdict of \$524,000.

In post-trial motions to recover expert witness expenses, litigation costs and prejudgment interest, the trial court denied the motion, holding the offer ineffective.

The Court of Appeal reversed. The court noted that Code of Civil Procedure section 998 provides that any party may make an offer in writing to the other side to allow judgment to be taken in accordance with terms and conditions stated. The section goes on to provide how the offer is to be accepted and the consequences of rejection. Such offers must be specific and clear and in writing.

In this case, Darden argued that the letter was not sufficiently clear to serve as a 998 offer. The Court noted it could have been in a more formal document, such as a pleading, but this was not required. As long as the offer was sufficiently precise to allow a judgment to be taken, it was sufficiently clear. Here, it was clear that the offer made, if accepted, was to result in entry of a judgment. Thus, it was a valid 998 offer. The Court felt that endorsing this letter as a valid 998 offer promoted the public policy of encouraging settlement of litigation. The Court stated the offer did not need to contain any "magic

language". As long as it was clear, in writing, made under section 998 and, if accepted, would result in the entry of a judgment, it met the requirements of the section.

The Court also found the offer to have been properly served. The attorney for Darden admitted to receiving the letter by mail. A formal proof of services was not required. The letter was dated and had a place of mailing. It was addressed to Darden's attorney at his business address. It was possible to calculate the date on which service was effected so as to calculate the running of the offer. The Court reversed the order denying the motion to recover costs and remanded the matter to the trial court for hearing on the merits as to whether the offer was reasonable and made in good faith.

## **COMMENT**

This opinion shows that as long as the basic requirements of section 998 are met, an offer is effective. It may include offers made by letter.

## **Attorneys – Disqualification**

*Jason Farris v. Fireman's Fund Insurance Company*, Court of Appeal, Fifth District, (June 17, 2004).

Strict rules govern the representation by an attorney of a client adverse to those of a former client. This case concerns the potential disqualification of an attorney for a bad faith action against an insurance company for whom he had previously provided legal representation.

This case was brought as a bad faith action against Fireman's Fund Insurance Company (FFIC) by a policyholder who claimed he was not defended in a personal injury action. He was represented by James H. Wilkins and his firm Wilkins, Drolshagen & Czesinski, FFIC moved to disqualify Wilkins on the ground that he had formerly worked for the law firm of McCormick, Barstow, Sheppard, Wyte & Carmith, which did substantial coverage and bad faith defense work for FFIC. The trial court denied the motion.

*Continued on page 5*

# ■ Weekly Law Resume

*Prepared by Low, Ball & Lynch, Attorneys at Law*

*Continued from page 4*

The Court of Appeal reversed. The Court noted that the McCormick firm had represented FFIC for 13 years. The work primarily involved coverage disputes and bad faith cases. Wilkins worked at the firm for 13 years. He worked entirely in the firm's insurance coverage department. His work included coverage and claims handling advice to FFIC.

Wilkins indicated he handled fact-specified cases and denied having any knowledge of litigation or discovery strategies or procedures used by FFIC in handling cases of this sort.

The court stated a disqualification motion in a successive representation cases must first identify the attorney's former representation with regard to the prior client. If it is direct and personal, then the question is whether there is a connection between the two successive representations.

Here, Wilkins' representation with FFIC was personal and direct. Thus, the issue was whether there was a substantial relationship between what Wilkins did for FFIC and what he was seeking to do for his current client. This question turned on whether the evaluation, prosecution, settlement and accomplishment of the current representation was material to the same issues in the former representation. This involved a determination of similarities between the legal problems involved in the former representation and the legal problems involved in the current representation. Wilkins did substantial work on coverage matters for FFIC. That was the nature of the representation he was currently providing to his current client. Coverage disputes are substantially related to bad faith actions because they both involve the issue of whether there is coverage under the terms of a policy. In this matter, Wilkins was doing for his current client what he had done previously for FFIC. It was also likely that some of the personnel at FFIC who had worked with Wilkins would be called as witnesses. The court felt that a prima facie case had been made that the subject of the prior representation of FFIC by Wilkins, and the subject of Wilkins' current repre-

sentation, were substantially related. The court felt that disqualification was in order given Wilkins' pervasive participation and role in shaping FFIC's practices and procedures in handling California coverage claims. Further, given the short time span between his departure from McCormick and his representation of Farris, a further need for disqualification was raised.

The court therefore concluded that the trial court abused its discretion in denying the motion to disqualify. The court felt not only Wilkins, but his firm, should be disqualified because no showing had been made that the rest of the members of his firm had been shielded from any information he had obtained while working at McCormick.

## COMMENT

This decision should aid both insurers and attorneys in evaluating whether a conflict exists which disqualifies the attorney from representing clients who are suing the insurer. By adopting strict standards for the applications of these rules, the courts prevent an appearance of impropriety from being raised by reason of the representation.

## ■ CAIIA Calendar

### ■ CAIIA Annual Conference

October 13, 14, & 15, 2004

The Disney Grand Californian, Disneyland Resort  
Anaheim, CA

Contact: Doug Jackson, 805-584-3494, ext. 11

### ■ Claims Conference of Northern California

September 14 & 15, 2004

The Doubletree Hotel, Sacramento, CA

Contact Barbara Prosch, 530-626-1676

## Trio Nabbed in Multi-State Fraud Operation

August 4, 2004

Investigators arrested three people Tuesday on numerous felony charges after a 3-year California Department of Insurance investigation into a chiropractic office, which reportedly uncovered numerous auto insurance and workers' compensation insurance violations, including fraudulent treatment of a Jack Russell terrier.

Todd Daniel Baldini, 41, El Dorado Hills, his office manager Kathy Diane Thomas, 38, of Rocklin, and Jeffrey Scott Bartlett, 34, of Las Vegas, Nev., were arrested on various felony charges. Baldini's partner, Reginald Martin "Marty" DePaoli, 41, of Carlsbad, was still at large, but charges have been filed against him as well.

Baldini was arrested and booked into the El Dorado county jail on one felony count of conspiracy to commit illegal referrals, five felony counts of illegal referrals, one felony count of conspiracy to commit grand theft, one felony count of conspiracy to prepare false claims and four felony counts of preparing false claims.

DePaoli was being sought on one felony count of conspiracy to commit illegal referrals, four felony counts of illegal referrals, one felony count of conspiracy to commit grand theft, one felony count of conspiracy to prepare false claims and four felony counts of preparing false claims.

Thomas was arrested and booked into the Sacramento county jail on one felony count of conspiracy to commit illegal referrals and nine felony counts of illegal referrals. Bartlett was arrested in Las Vegas and booked into Clark County jail on one felony count of conspiracy to commit illegal referrals and nine felony counts of illegal referrals. If convicted, each could face up to five years in prison and/or a fine of \$50,000. Bail was set at \$10,000 each for Baldini and Bartlett; bail was set at \$5,000 for Thomas. The Sacramento District Attorney's office is prosecuting the case.

The arrests follow an investigation of reports of suspected fraudulent claims from numerous insurance companies and private citizens. Investigators from the California Department of Insurance's (CDI's) Organized Auto Fraud Interdiction Task Force were the lead enforcement agency on the case. Other task force members include the California Highway Patrol and the Sacramento County District Attorney's Office. The National Insurance Crime Bureau, the California State Automobile Association and Allied Insurance all provided pretext insurance policies, which are used by undercover investigators for billing by the suspects.

Based on observations from undercover officers posing as patients as well as obtaining employment inside the clinic, Baldini and DePaoli Chiropractic allegedly engaged in insurance fraud. During the investigation, one undercover officer even brought in a dog for chiropractic treatment.

The dog was indeed treated and the undercover officer's pretext insurance policy was billed as if the officer received the treatment.

In January 2003, search warrants were served at Baldini and DePaoli Chiropractic offices and the arrestees' residences in Sacramento, Folsom, Roseville and Rocklin. At that time, computers and file cabinets as well as approximately 2,700 patient files and x-rays were seized. Evidence seized at that time indicated that a law firm associated with 1-800-A-LAWYER referred patients to Baldini and DePaoli Chiropractic. Evidence also indicated that 37.5 percent of the referred-patient's total chiropractic billings would be paid to Dormie Management.

In June 2003, search warrants were served at 1-800-A-LAWYER in Los Angeles. With the assistance of the Nevada Attorney General's Office, search warrants were also served at Dormie Management, which doubles as Bartlett's residence in Las Vegas. Bank search warrants were subsequently served on the accounts of Baldini and DePaoli Chiropractic, Jeff Bartlett and Dormie Management.

Evidence seized reportedly indicated that Baldini and DePaoli Chiropractic billed insurance companies for treatments of patients referred by 1-800-A-LAWYER. Once payments were received from those insurance companies, Baldini and DePaoli Chiropractic indeed paid 73.6 percent to Dormie Management. Bartlett is a part owner of both Dormie Management and 1-800-A-LAWYER.

From March 2002 to February 2003, Baldini and DePaoli Chiropractic received in excess of \$85,000 in income and paid approximately \$32,000 pursuant to this illegal referral arrangement. Baldini and DePaoli chiropractic's billings in 2002 totaled approximately \$700,000.

Bob, a 70 year-old extremely wealthy widower, shows up at the Country Club with a breathtakingly beautiful and very sexy 25 year-old blonde who knocks everyone's socks off with her youthful sex appeal and charm who hangs over Bob's arm and listens intently to his every word.

His buddies at the club are all aghast. They corner him and ask, "Bob, how'd you get the trophy girlfriend?"

Bob replies, "Girlfriend? She's my wife!"

They're knocked over, but continue to ask, "So, how'd you persuade her to marry you?"

Bob says, "I lied about my age."

His friends respond, "What do you mean? Did you tell her you were 50?"

Bob smiles and says, "No. I told her I was 90."



**CAIIA REGISTRATION FORM**  
**California Association of Independent Insurance Adjusters**  
**ANNUAL CONVENTION – October 13, 14, & 15, 2004**

*Disney's Grand Californian Hotel*  
 1600 South Disneyland Drive, Anaheim, CA 92802  
 (714) 520-5005 Mention CAIIA

Standard Room Rate \$169 (single/double); \$184 (triple); \$199 (quad)  
 1 bedroom Artisan Suite \$670 (rooms available on first come basis)  
*(plus taxes, premium views/concierge floors extra; resort fee paid by CAIIA entitles use of gym, self-parking, free local calls, rate good 3 days before or after event)*



Attendees must make their own hotel reservations. Hotel Cut-off Date is September 10, 2004

Your Name \_\_\_\_\_ Significant Other \_\_\_\_\_  
 Company \_\_\_\_\_  
 Address \_\_\_\_\_  
 Phone \_\_\_\_\_ Fax \_\_\_\_\_  
 E-Mail \_\_\_\_\_

- *Association members must purchase a complete registration package. Employees of members are welcome to purchase full or partial events.*
- *Package includes all events below. CAIIA Member Employees may attend the educational seminars only with a member's purchase of a registration package. Insurance personnel guests (\*) may purchase President's Gala Dinner Event and Educational Seminar only.*
- *Please specify which events you and your significant other/mate will actually attend by placing a check mark in the box next to the event. If you are insurance personnel guest (\*), please indicate # in Guest Box below.*

EVENT	COST	# of TICKETS	TOTAL
Registration Package – members with spouse/mate **	\$ 200.00	_____	\$ _____
Registration Package – members w/o spouse **	\$ 175.00	_____	\$ _____
President's Dinner/Reception/Awards/Installations (10/14/04)	\$ 30.00	_____	\$ _____
Education Seminar including lunch and parking (available to member employees or insurance company guests only)*	\$ 25.00	_____	\$ _____
		<b>Grand Total Payable</b>	<b>\$ _____</b>

☞ Items in blue for Members/Member Employees/Significant others only ☞

Please make your checks payable to CAIIA or pay by credit card.

Mail Registration form and payment to:

Douglas Jackson  
 Southwest Claims Service, Inc.  
 P.O. Box 1810  
 Simi Valley, CA 93062-1810  
[scsdj@southwestclaims.com](mailto:scsdj@southwestclaims.com)

**SCHEDULED EVENTS**

*Please Show # Attending Events Below:*

			You	Mate	Guest*
10/13	6:30 P.M.	Registration/Reception	[ ]	[ ]	[ ]
10/14	9:00 A.M.	Business Meeting	[ ]	[ ]	[ ]
10/14	12:00 P.M.	Lunch	[ ]	[ ]	[ ]
10/14	1:30 P.M.	Advisory Counsel	[ ]	[ ]	[ ]
10/14	6:30 P.M.	Presidents Gala Dinner Event, Awards, & Officer Installations	[ ]	[ ]	[ ]
10/15	8:00 A.M.	Registration/Continental Breakfast	[ ]	[ ]	[ ]
10/15	9:00 A.M.	Education Seminars	[ ]	[ ]	[ ]
10/15	12:00 P.M.	Luncheon w/ Special Guest Speaker	[ ]	[ ]	[ ]
10/15	1:30 P.M.	Conclusion	[ ]	[ ]	[ ]

Credit Card: AMEX \_\_\_\_\_ VISA \_\_\_\_\_ M/C \_\_\_\_\_

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Expiration Date: \_\_\_\_\_

Signature: \_\_\_\_\_

Any Questions, please call or email (Doug Jackson):  
 Lee Collins, Bragg & Associates – (916) 960-0902  
 Douglas Jackson, Southwest Claims – (805) 584-3494

- \* We welcome the attendance and participation of insurance company and risk management claims personnel and attorneys at the President's Gala Dinner Event and the Educational Seminars and Luncheon.
- \*\* Your Association has drastically reduced the registration this year. Take advantage of these price reductions by attending your CAIIA Annual Convention. Exciting spouse program scheduled.

Cut-off date is September 15, 2004. Any registration after that date is subject to a \$35.00 late fee.

## EXECUTIVE OFFICE DUTY DISTRIBUTION AND COMMITTEES

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