

# CAIIA *Status Report*

SEPTEMBER 2008

## RWB Legal Reflections

Submitted by Rudloff, Wood & Barrows, LLP, Emeryville, CA

### Court Upholds Denial of Third Party Claimant's Motion to Intervene in Insurance Coverage Action

by Susan K. Farber

In *Royal Indemnity Company v. United Enterprises Inc.* (2008) 162 Cal. App. 4th 194, the California Court of Appeal, Fourth District, held that a third party claimant could not intervene in an insurance coverage action. The insurer, Royal Indemnity Company, ("Royal"), sued its former insured, United Enterprises, Inc., ("United"), for declaratory relief to establish that Royal should not be obligated to provide liability insurance coverage under its policy purchased by United for its business that was operated on certain real property that United formerly owned, ("the Property"). During the time royal provided liability insurance for the Property, United owned a trap and skeet shooting range on the Property and environmental contaminants remained there due to these activities. Other named defendants in the action were numerous other insurers that also provided liability policies at various times to United.

In separate federal and state actions, Flat Rock Land Company, ("Flat Rock"), sued United and several other parties seeking recovery of environmental clean-up costs for the property. Flat Rock sought to intervene in the insurance coverage action between Royal and United under the permissive intervention standard, section 387(a) of the California Code of Civil Procedure. Flat Rock argued that it was interested in obtaining a settlement among all the insurers because many of the issues involved centered around who had coverage and what coverage was available. Flat rock argued that without intervention, rulings could be made in its absence regarding coverage that would affect its rights to pursue Royal as a "potential" judgment creditor of United. In response, Royal and all the other insurer defendants opposed the motion essentially arguing that this intervention request amounted to an end run around the "no direct action" rule established by Insurance Code section 11580(b)(2).

The trial court denied Flat Rock's motion to intervene, as it found that Flat Rock did not have a legally protectable interest in participating in the action, nor any such interest in the success of the insured. Flat Rock appealed this decision.

The appellate court affirmed the trial court's decision to deny the motion to intervene. The court found that Flat Rock had not shown that it met the "direct and immediate interest in the litigation" standard justifying permissive intervention under section 387(a). Flat Rock was not in privity of contract with Royal, and as such had no standing to sue Royal to resolve coverage questions. Further, Flat Rock did not fall under any of the recognized exceptions to this rule. Flat Rock was not a judgment creditor, or a "potential" beneficiary under the insurance policy, as this interest was purely speculative. Likewise, Flat Rock did not qualify as an assignee of the insured's rights. The court found that although a liability insurer is allowed to affirmatively join an injured third party as a co-defendant in a declaratory relief action to determine coverage, it is not required to do so. As the environmental suit against United had nothing to do with interpreting the insurance policy, Flat Rock could not intervene because there were no common questions of law or facts between the coverage dispute and the action to determine liability for the clean-up of the environmental contaminants.

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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).

## CAIIA Newsletter

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## PRESIDENT'S MESSAGE

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I was having dinner recently with one of my fellow executive board members. I was trying to convince him that there is a book (like in the recent National Treasure movie) that contains secrets only divulged to CAIIA Presidents. He didn't fall for it.

As I near the end of my term, it is clearer than ever that the continued success of the CAIIA is tied directly to the participation and hard work of the membership.

A great example of this is the energetic volunteers who manned the booth at the CCNC. The CCNC again gave us a great spot for our booth. We had lots of traffic, and gave away a ton of directories.

I learned recently that the CAIIA is afforded two spots on the CCNC board. We look forward to a more active participation in planning next year's event. I send congratulations to the incoming CCNC President, Bryan Harrison, who has been supportive of the CAIIA for many years.

If you are a member, and have not worked the booth at an event, you should try to do so. It is a rewarding experience.

As I write this message, Convention and Golf Tournament Registration is well underway. If you have not yet signed up, please go to the website, [www.caiaa.com](http://www.caiaa.com), and do so.

Pete Vaughan has designed an excellent educational event at the



Convention, focused on marketing our businesses. There is also live entertainment planned for the installation dinner. Not to mention Pete's great sense of humor that is sure to be heard in his speech.

Jeff Stone tells me that we are on pace for another exceptional Golf Tournament. Even if you aren't a golfer, come to the post round cocktail hour and dinner.

The dinner includes a raffle that raises money for charity. This year our charity is the American Cancer Society. If you can't attend, but want to give, information is available on how to do so on the CAIIA website.

If you have any suggestions, questions or just want to say hello, please don't hesitate to call or email me.

**PETER SCHIFRIN**

*President - CAIIA 2007-2008*

## Board Nominees Selected

The nominating committee has nominated the following people to serve on the CAIA Board for the next year.

**President:** Peter Vaughn

**Incoming President:** Sam Hooper

**Vice President:** Phil Barrett

**Treasurer:** Jeff Stone

**Immediate Past President:** Peter Schifrin

**One Year Directors:**

Paul Camacho

Kimberly Hickey

Helene DalCin

**Two Year Directors:**

**Director:** Jeff Caulkins

**Director:** Rick Beers

**Director:** Janee' Childs

If any member in good standing wishes to nominate someone for any position on the board, the nomination must be given to the Executive Office no later than September 21, 2008. You can fax or email the nomination to the Executive Office at [harperclaims@hotmail.com](mailto:harperclaims@hotmail.com) or fax the name to 818-953-9316.

## Weekly Law Resume

*Prepared by Low, Ball & Lynch, Attorneys at Law, San Francisco, CA*

### **Underinsured Coverage - Trigger of Coverage**

*Explorer Insurance Company v. Dwaine Gonzalez*, (July 16, 2008) Court of Appeal, Third District

Underinsured motorist coverage is a rather technical area of law. In California, coverage strictly follows the provisions of the statute. This case analyzes whether such coverage exists when the tortfeasor has a combined single limit.

Dwaine Gonzalez was injured in an automobile accident with Benjamin Fernandez. Fernandez was insured by Fireman's Fund Insurance Company, with a combined single limit of \$100,000 for bodily injury and property damage. Gonzalez was insured by Explorer Insurance Company, having uninsured and underinsured motorist coverage of \$100,000. Fireman's Fund paid Gonzalez \$21,584.11 for property damage and \$78,415.89 for bodily injury, thus exhausting their limit of \$100,000.

Gonzalez made claim against Explorer for underinsured motorist coverage, contending he was entitled to an additional \$21,584.11, the difference between the amount he received from Fireman's Fund for his bodily injury and his limit with Explorer. Explorer denied the claim. Explorer brought a declaratory relief action. Judgment was entered in favor of

Explorer following a bench trial. Gonzalez appealed.

The Court of Appeal affirmed. It noted that underinsured motorist coverage was a creature of statute. The statute defines such coverage as existing when an insured motor vehicle that causes an accident is insured for an amount that is less than the uninsured motorist limits carried on the motor vehicle of the injured party.

The Court stated that since each policy contained the same coverage limit, the Explorer coverage was not triggered. The fact that the Fireman's Fund policy had a combined limit of \$100,000 for both bodily injury and property damage was not determinative. The Court noted that underinsured motorist coverage is not triggered by the amount of the injured person's damages or by the proceeds available. Rather, it is triggered by a comparison of the tortfeasor's bodily injury liability limits with the injured person's underinsured limits.

The Fireman's Fund policy provided \$100,000 for both bodily injury and property damage caused by a single accident. Since the Explorer policy carried \$100,000 for uninsured motorist coverage, the limits were equal. Thus, the Fernandez vehicle was not an underinsured vehicle within the meaning of the

*continued on page 4*

# Weekly Law Resume

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

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statute, Insurance Code §11580.2. The judgment was therefore affirmed.

## COMMENT

This decision makes clear that an underinsured motorist policy is triggered by comparison of limits, not the amount recovered from the tortfeasor

## Duty to Defend - Indemnity Contract

*Kirk Crawford v. Weather Shield Mfg., Inc.*, (June 30, 2008) California Supreme Court

California law has long held that an insurer's duty to defend extends to claims potentially covered by the insurance policy. This case addressed the issue whether a contractual indemnity agreement, which includes an agreement to indemnify against defense costs, must similarly be construed. J.M. Peters Co. developed a large residential project. Weather Shield Mfg. Co., Inc. manufactured and supplied wood-framed windows for the project. The contract between J.M. Peters and Weather Shield included a promise to indemnify J.M. Peters for losses growing out of the execution of Weather Shield's work and to defend J.M. Peters for any action or suit founded upon a claim of damage from their work.

Homeowners sued J.M. Peters, Weather Shield and others for construction defects. J.M. Peters cross-complained against Weather Shield. The cross-complaint contended Weather Shield and other subcontractors owed duties of indemnity and defense against the complaint. J.M. Peters and all subcontractors except Weather Shield and one other settled before trial. Trial went forward against Weather Shield and the other defendant, and the jury returned a verdict in favor of Weather Shield.

J.M. Peters then sought indemnity from Weather Shield for the amount paid in settlement and its attorneys' fees and costs incurred in defending itself against the lawsuit. The trial court found Weather Shield was not liable for indemnity because it had been exonerated from liability. However, it did conclude that Weather Shield was responsible for J.M. Peters' legal defense insofar as those claims concerned the windows supplied by Weather Shield. The court allocated defense fees to the window claims and apportioned them equally between the defendants responsible for the window claims. The court also awarded to J.M. Peters attorneys' fees incurred to prosecute the cross-action. Weather Shield appealed.

The Court of Appeal affirmed. Weather Shield sought review

in the Supreme Court, which was granted. The Supreme Court, in a unanimous decision, affirmed the judgment of the Court of Appeal.

The Supreme Court noted that indemnity agreements, while similar to insurance policies, differ significantly. The Court relied upon Civil Code §2778, which sets forth general rules for the interpretation of indemnity contracts, as the basis for its decision. Subdivision 4 provides that an indemnitor is bound on the request of the indemnitee to defend actions or proceedings brought against the indemnitee with respect to matters embraced by the indemnity contract. In this case, based upon the language of the contract, the Court felt Weather Shield was obligated to defend, from the outset, any suit against J.M. Peters insofar as the suit was founded upon a claim alleging damages or loss from Weather Shield's negligent role in the project. This duty to defend existed even if it was later determined that Weather Shield was not negligent.

The Court stated a contractual promise to defend provides for an obligation from the outset to provide a defense against such claims. The failure to assume the duty to defend upon request gives rise to damages in the form of reimbursement of defense costs thereby incurred. This duty is not dependent upon the outcome of the litigation or an obligation to indemnify J.M. Peters for the settlement.

The Court stated the parties were free to provide by contract a more limited form of defense, such as a defense dependent on a finding of liability on the part of Weather Shield. Further, they could have provided for a duty to reimburse defense costs after the liability had been determined. The Court rejected public policy reasons for reaching a different decision. The Court further rejected arguments that recent amendments enacted in 2006 and 2008 that restrict indemnity agreements in residential construction contracts should be considered. The Court further rejected the argument that its holding was unconscionable.

The Court affirmed the judgment of the Court of Appeal, holding Weather Shield was obligated, as soon as suit was filed against J.M. Peters concerning the work performed by Weather Shield, to defend J.M. Peters against such claims, whether Weather Shield was actually negligent.

## COMMENT

This is a monumental decision interpreting indemnity agreements and the responsibility for defense. Although its holding may be limited due to recent legislation, it will have a profound effect in how indemnity agreements are interpreted.

# When You Need to Know What Really Happened

*Submitted by Garrett Engineers, Inc. - Forensic Division, Long Beach, CA*

## Case of the Month: A Coverup?

This case involves a night-time bicycle rider, who while crossing a street, was struck and killed by a vehicle driven by the wife of a police officer. It was later alleged that there were improprieties in the way the collision was investigated, that a conspiracy existed between the investigating departments, and that there were attempts to cover up the fact that she had been drinking. GEI was assigned to review the case.

We examined the police reports and drawings, the skid patterns, and several color photographs of the scene, the vehicle, and the rider. We visited the scene, and noted landmarks and other roadway features indicated the roadway surface had not been replaced since the accident date. We used an electronic accelerometer to determine the friction value of the roadway. We then calculated the speed of the vehicle based upon measured skid marks and the roadway surface friction value. The calculated speed at the beginning of the skid marks was 50 mph.

We then researched published vehicle data so as to obtain weights, and dimensions of the vehicle. These data were combined with the measurements as recorded by the police, and were placed into a mathematical modeling matrix used by Texas A & M University in their Auto/Pedestrian courses of study. These math models use nine matrices to determine vehicle speed in auto/pedestrian/cyclist accidents. The model showed a speed at the start of skids of about 50 mph, and an impact speed of 30 to 32 mph, confirming our calculations.

While at the scene, we conducted a radar speed survey. We sampled 130+ vehicles in the direction the driver was going at the time of the incident. The slowest vehicle we recorded was 30 mph, the fastest was 55 mph. We found the 85th percentile to be 50 mph; that is 85 % were at 50 mph or less. We also found the "Pace", a 10 mph range consisting of the greatest number of vehicles, to be 40 to 50 mph, and we found 79.3% of the traffic to be in the "Pace". The calculated average was 44.22 mph. This indicated that her speed was not unusual for conditions.

Trajectory data showed the bike was traveling at an angle to the vehicle, from its right to its left, and had a velocity of about 4 mph. This was confirmed by the statement of a witness.

We looked at the natural lighting of the scene. Adverse parties said that there was some sunlight at the time of the crash. We researched the sun's position, and found that it was 9 degrees below the horizon at the time of the incident, and twilight had ended several minutes before the incident. It was officially "Dark" when the accident occurred.

The investigating officer performed a Horizontal Gaze Nystagmus (HGN) test upon the driver, while in the field. This is one of the Standardized Field Sobriety Tests given by police. Essentially HGN addresses the way the human eye is affected by central nervous system depressants, inhalants, and Phencyclidine. Alcohol (ETOH) is a central nervous system depressant, and the extent of one's blood alcohol content can be closely estimated by taking the angle at which the "Twitching" of the eyeball begins relative to the eye looking straight ahead. Drug Recognition Expert (DRE) trainees are regularly taught to use this test to evaluate blood alcohol content of suspects within .02%. The officer administering the HGN did not detect any impairment of the driver using this test.

Another claim was the driver was offered "caffeinated beverages". The inference was that the caffeine would "sober her up". Actually, she was given water, and as all policeman know, caffeine will serve to only keep a drunk, wide-awake. Time, and the liver alone will get rid of alcohol in the system.

We concluded that the vehicle was moving with the flow of traffic at about 50 mph at the start of braking, the bicycle was crossing at an angle, and traveling at about 4 to 5 mph. The bike was not equipped with lights or reflectors. The rider was struggling in the dark to pump the bike up a hill, and crossed into the path of the vehicle, violating the vehicle's right of way. The driver was not impaired by alcohol. Our inspection of the materials did not show where one officer asked, or ordered another officer to alter, or conceal evidence, nor could we find proof anywhere that if such an order or request were given, anyone acceded to the order or request. We found no improprieties in the police investigation, nor in its conclusions.





**CAIIA REGISTRATION FORM**  
**California Association of Independent Insurance Adjusters**  
**ANNUAL CONVENTION – October 21, 2008**  
**GOLF TOURNAMENT-October 20, 2008**  
*Silverado Resort in Napa Valley*

**1600 Atlas Peak Road**  
**Napa, California 94558**  
**(Phone) 707-257-0200**  
**(Fax) 707-257-2867**

**Mention California Association of Independent Insurance Adjusters for special room rates**  
**Attendees must make their own hotel reservations.**

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

- Association members must purchase one complete registration package. Additional employees may purchase events.
- **Tournament events not included in registration package. Tournament events are an additional charge**
- Package includes all events below. CAIIA Member Employees may attend the educational seminars only with a member's purchase of a Registration Package. Alternative spouses' program to take place during meeting time
- 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 **	\$ 250.00	_____	\$ _____
Registration Package – members w/o spouse **	\$ 200.00	_____	\$ _____
Golf Tournament Dinner/Reception (10/20/08)	\$ 50.00	_____	\$ _____
President's Dinner/Reception/Awards/Installations (10/21/08)	\$ 50.00	_____	\$ _____
Education Seminars including lunch and parking (available to member employees or insurance company guests only...	\$ 35.00	_____	\$ _____
<b>Grand Total Payable</b>			<b>\$ _____</b>

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

**Mail Registration form and payment to:** Vaughan & Associates  
 836 B Southampton Rd, #301  
 Benicia, CA 94510  
[pvaughan@pacbell.net](mailto:pvaughan@pacbell.net)

**SCHEDULED EVENTS**

Please Show # Attending Events Below: You Mate Guest\*

10/20	Golf Tournament – mark and we will send you information**	[ ]	[ ]	[ ]
10/20	6:30 P.M. Tournament Reception/Dinner**	[ ]	[ ]	[ ]
10/21	9:00 A.M. Business Meeting	[ ]	[ ]	[ ]
10/21	12:00 P.M. Lunch	[ ]	[ ]	[ ]
10/21	1:00 P.M. Education Seminars	[ ]	[ ]	[ ]
10/21	6:00 P.M. Presidents Gala Dinner Event, Awards, & Officer Installations	[ ]	[ ]	[ ]

Credit Card: AMEX \_\_\_ VISA \_\_\_ M/C  
 Cardholder Name \_\_\_\_\_  
 Card # \_\_\_\_\_  
 Auth. Code (on the back) \_\_\_\_\_  
 Signature: \_\_\_\_\_  
 Card Statement Address \_\_\_\_\_

Any Questions, please call or email [Pete Vaughan @ 707 745-2462](mailto:Pete.Vaughan@707.745.2462)  
[pvaughan@pacbell.net](mailto:pvaughan@pacbell.net)

\*\* The Golf Tournament and post-tournament Reception/Dinner are at the Napa Valley Country Club, 3385 Hagen Road, Napa.

## Excerpts from the book “Disorder in the American Courts”.

*Things people actually said in court, word for word, taken down and now published by court reporters who had the torment of keeping a straight face while these exchanges were actually taking place.*

ATTORNEY: Are you sexually active?

WITNESS: No, I just lie there.

ATTORNEY: What gear were you in at the moment of the impact?

WITNESS: Gucci, sweats and Reeboks.

ATTORNEY: This myasthenia gravis, does it affect your memory at all?

WITNESS: Yes.

ATTORNEY: And in what ways does it affect your memory?

WITNESS: I forget.

ATTORNEY: You forget? Can you give us an example of something you forgot?

ATTORNEY: What was the first thing your husband said to you that morning?

WITNESS: He said, 'Where am I, Cathy?'

ATTORNEY: And why did that upset you?

WITNESS: My name is Susan!

ATTORNEY: Do you know if your daughter has ever been involved in voodoo?

WITNESS: We both do.

ATTORNEY: Voodoo

WITNESS: We do.

ATTORNEY: You do?

WITNESS: Yes, voodoo.

ATTORNEY: Now doctor, isn't it true that when a person dies in his sleep he doesn't know about it until the next morning?

WITNESS: Did you actually pass the bar exam?

ATTORNEY: The youngest son, the twenty-one-year-old, how old is he?

WITNESS: Uh, he's twenty-one.

ATTORNEY: Were you present when your picture was taken?

WITNESS: Are you shittin' me?

ATTORNEY: So the date of conception (of the baby) was August 8th?

WITNESS: Yes.

ATTORNEY: And what were you doing at the time?

WITNESS: Uh . . . I was getting' laid!

ATTORNEY: She had three children, right?

WITNESS: Yes.

ATTORNEY: How many were boys?

WITNESS: None.

ATTORNEY: Were there any girls?

WITNESS: Your Honour, I think I need a different attorney. Can I get a new attorney?

ATTORNEY: ALL your responses MUST be oral, OK? What school did you go to?

WITNESS: Oral

### **AND THE BEST FOR LAST**

ATTORNEY: Doctor, before you performed the autopsy, did you check for a pulse?

WITNESS: No.

ATTORNEY: Did you check for blood pressure?

WITNESS: No

ATTORNEY: Did you check for breathing?

WITNESS: No.

ATTORNEY: So, then it is possible that the patient was alive when you began the autopsy.

WITNESS: No.

ATTORNEY: How can you be so sure, Doctor?

WITNESS: Because the brain was sitting on my desk in a jar.

ATTORNEY: I see, but could the patient have still been alive, nevertheless?

WITNESS: Yes it is possible that he could have been alive and practicing law.