

Editor's Corner

I have been working with the California Fair Claims Settlement Practices Regulations (Regs) since their inception in about 1994. Over the years I have heard many people complain about them and how onerous they are. Whereas, I realize that there are many items we as adjusters must remember, the one thing about the Regs I tell each of the classes I teach on the Regs and all of my clients is that the Regs have their place. Most of us have a lot of files and we feel overwhelmed with the work. The majority of insureds and claimants (all known as claimants under the Regs) have never had a claim or maybe one other claim involving insurance. The claims process is tough and complicated. The job of an adjuster among other duties is to teach claimants how the process works. If you had never had a claim, how would you like to be treated? Adjusters handle claims on a daily basis. My theory about the Regs is that they are reflective of the Golden Rule, i.e. treat others as you would like to be treated.

The basic difference from the Golden Rule is that the Regs set some time limits. If you wrote to the insurance carrier, would you expect a response? Of course, you would. The Regs tell you to respond within 15 days. If you turn in a claim, would you want your insurance company to start handling the claim as soon as possible? The Regs tell us that we are to start the claims process immediately, but in no event later than 15 days from when we receive the claim.

I could advise you of many other sections of the Regs, but I believe the above examples are enough. I try to look at the Regs as a way to help resolve claims, not as a hindrance.

Insurance Adjusters Not Exempt From OT Compensation Credit to: Haight, Brown & Bonesteel, Los Angeles, CA

Harris v. Superior Court, Case No. B195121

On July 23, 2012, the California Court of Appeal held in *Harris* that non-management claims adjusters employed by insurance companies do not fall within the administrative exemption (*Cal. Code Regs.*, Title 8, § 11040) to the overtime compensation requirements.

The court analyzed Wage Orders 4-1998 and 4-2001 to ascertain whether the job duties of the plaintiff claims adjusters fall within the administrative exemption. The court affirmed the general rule that persons are employed in an exempt administrative capacity if their duties and responsibilities involve office or manual work "directly related to management policies or general business operations." It further acknowledged that the "directly related" requirement has both qualitative and quantitative components. Focusing its inquiry on whether the qualitative component was satisfied, the court looked to analogous federal case law and the Fair Labor Standards Act of 1938 for guidance. Relying on such authorities, the court endorsed a distinction between "work duties that merely carry out the particular day-to-day operations of the business," which will not satisfy the component, and those that include "running the business itself or determining its overall course or policies." Using this framework, the court concluded the duties of the insurance adjusters at issue do not satisfy the qualitative component.

The court acknowledged the difficulty in defining the "directly related" requirement. Thus, it circumscribed its holding to the facts presented, and refused to acknowledge a generally applicable rule for insurance adjusters. The court emphatically stated that job titles alone are non-determinative.

Harris demonstrates the potentially difficult decisions which confront employers when determining whether an employee qualifies for the administrative exemption for wage purposes. By seeking guidance about such issues, employers can reduce the risk of adverse consequences when faced with such circumstances.

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CAIIA Newsletter

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President's Message

September 2012

As I write this message the Northern California Claims Conference has just concluded. I have been attending conferences for over 18 years. Over the years there have been good conferences and some not so good.

What makes a good conference? For the most part it can be summed up in two areas, participation and sessions. This year both received an A+. Although the number of attendees was not disclosed, it was clear that the attendance exceeded last year. We also saw a number of sessions that addressed many of the issues that adjusters wanted to hear.



Jeff Caulkins
CAIAA President

At the CAIAA booth we spoke with a large number of industry individuals inquiring about our organization. As with the overall conference, participation plays a large part in the success of our organization. As he has done for many years, Sterrett Harper coordinated the volunteer schedule for the booth. Due to the number of individuals who volunteered, the amount of time each person spent in the booth went very quickly. As it is said, "many hands make light work".

I want to personally thank all of the members who pulled together to make this conference a success. The success of our organization is measured by the number of members who participate and continue to give above and beyond.



Status Report Available

by Email and Web Only.

To add other insurance professionals to our e-mail list, please e-mail a request to

statusreport@caiaa.com

CAIIA Representation on California DOI Curriculum Board

I had the honor of representing the CAIIA at the California DOI Curriculum Board Meeting on June 14th. I had the task of filling the shoes of Helene Dalcin, who completed her three-year term. Please thank Helene next time you see or speak to her for her tremendous service, including making the CAIIA relevant to the Board.

At the meeting I was appointed to the Insurance Adjuster Sub-Committee and will have the chance to assist in reviewing and updating the independent adjuster licensing test and study materials.

The Curriculum Board is concerned about the low pass rates for persons taking the IA test. The pass rate in 2012 thru May for first time takers was only 38%. The Board laughed when I said I was happy that less licensees meant less competition! There will be a review of the test, which will include determining if it is too difficult.

Soon, you should expect to see a separate Crop Insurance Adjuster License, which will allow adjusters, who only handle this specialized line, to do so without having to obtain an all-lines license. The Federal Crop Insurance Corporation is looking for all states to insure that adjusters who only handle crop losses are being suitably tested in that area.

I will continue to report after meetings and as significant developments occur.

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INSURANCE COMMISSIONER DAVE JONES ANNOUNCES ARREST OF BAY AREA; CENTRAL VALLEY SUSPECTS FOR INSURANCE FRAUD *Suspects Charged with Over 90 Felony Counts*

Insurance Commissioner Dave Jones today announced that Louis Houston, 48, Richmond and Cedric Berdell Jackson Jr, 28, of Fresno have been arrested on multiple felony counts for allegedly operating an organized insurance fraud ring. Bail for Houston has been set at \$1,865,000 and \$620,000 for Jackson.

On July 26, 2012, the California Department of Insurance (CDI) and the Contra Costa County District Attorney's Office served multiple search and arrest warrants in Contra Costa and Fresno Counties for alleged Insurance Fraud, Burglary and Conspiracy. The warrants were a result of a year-long investigation by CDI's Fraud Division.

"Detectives from CDI along with Investigators and the Prosecutors from the District Attorney's office worked arduously to bring these suspects to justice," said Commissioner Jones. "Their tireless efforts have stopped these suspects from allegedly stealing from additional consumers and ripping off insurers, which often leads to higher premiums for Californians."

Contra Costa County District Attorney Mark A. Peterson stated, "Insurance fraud affects more than insurance companies. Honest consumers and businesses end up paying the price; the cost of that fraud is passed on to the community through higher insurance premiums, longer response times for legitimate claims, and ultimately the increased costs of goods and services. The Contra Costa County District Attorney's Office is committed to prosecuting insurance fraud cases."

According to Detectives, in August 2011, CDI opened an investigation into a suspected organized insurance fraud ring. The investigation alleged that the suspects submitted fraudulent insurance claims. The suspected fraudulent claims included: reported vehicle thefts; theft of personal property from vehicles and residences; traffic collisions; personal injury claims; wage loss claims; vandalism claims; fire claims; and water damage claims. The suspects filed police reports and submitted documents to various insurance companies in support of the claims. Detectives obtained and reviewed thousands of documents, interviewed dozens of witnesses, and served search warrants for records. The investigation revealed that the suspects appeared to be involved in several insurance fraud schemes.

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One alleged scheme involved the purchase of merchandise, both in person, and on-line. Once purchased, the suspect(s) returned the items to the retailer and retained the sales receipts which were later used in suspected fraudulent insurance claims. The suspects also shared the receipts of the returned items and presented them as evidence of property ownership in numerous insurance claims. It is alleged the suspects filed identical loss claims with several different insurance companies in an effort to receive insurance proceeds to which they were not entitled. The suspects also claimed losses in at least 16 fire claims (vehicle and structure) and much of the same property was reported to be destroyed in all of the insurance claims.

The suspects filed insurance loss claims for alleged traffic collisions, stolen vehicles, vehicle vandalisms, vehicle fires, residential fires, and water damage. Investigators learned that the suspects filed over 50 insurance claims since 2007 and in excess of 165 loss claims since 2000.

Investigators are attempting to determine the amount of loss to the insurance industry as a result of these alleged fraud schemes. The estimated loss, which contains both real and potential amounts, is believed to be between \$400,000 and \$600,000 and may even be higher.

Investigators have received assistance from the following insurance carriers: Geico, Allstate, Balboa, Homesite, Farmers, 21st Century, Travelers, RepWest, Nationwide, AAA Insurance Exchange, Assurant, MetLife and Safeco; as well as the National Insurance Crime Bureau.

This case is being prosecuted by the Contra County District Attorney's Office.

***Woman Sues Dallas Cowboys, Claims Bench Burned Buttocks
Credit to: Insurance Journal, August 2012***

A Texas woman is suing the Dallas Cowboys and owner Jerry Jones, saying her buttocks was severely burned when she sat on a bench outside Cowboys Stadium. The plaintiff alleges the black marble bench was in direct sunlight on a hot August day. For complete article: <http://www.insurancejournal.com/news/southcentral/2012/08/23/260503.htm#UDuQBTpWqew.mailto>



*Have a Happy and Safe
Labor Day!*

*Disneyland Unable to Prevent ADA Plaintiff from Using Segway Unless it Proves Segway
Cannot be Operated Safely in Its Parks*

Tina Baughman v. Walt Disney World

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

Plaintiff Tina Baughman suffers from limb girdle muscular dystrophy, which makes it difficult for her to walk or stand from a seated position. In association with her daughter's eighth birthday, she wanted to visit Disneyland. She contacted Disney and requested permission to use a Segway due to her physical limitations. Disney's policy is to allow wheelchairs and motorized scooters, but not two-wheeled vehicles or devices, like Segways. Disney refused to make an exception for the plaintiff. Plaintiff sued Disney under the Americans with Disabilities Act ("ADA"), claiming Disney denied her full and equal access to Disneyland.

The Central District Court of the United States District Court held that plaintiff was judicially estopped from claiming she could not use a wheelchair. As a result, there was no genuine issue of material fact as to whether it was "necessary" for plaintiff to use a Segway to visit Disneyland. The District Court granted summary judgment for Disney.

On appeal, the Ninth Circuit noted that in three prior lawsuits, plaintiff had claimed that she had "a physical impairment which causes her to rely upon a power scooter or wheelchair for her mobility." In the current lawsuit, plaintiff was claiming she must use a Segway because using a wheelchair was "impractical, painful, and difficult." The Court referred to the doctrine of judicial estoppel which states that where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, she may not thereafter, simply because her interests have changed, assume a contrary position. The purpose of the doctrine is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment. The Ninth Circuit agreed that plaintiff was estopped from claiming she could not use a wheelchair. It then analyzed plaintiff's ADA claim based on the presumption she could use a wheelchair.

Title II of the ADA defines discrimination as "a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are *necessary* to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities. . ." The District Court held that Disney was not required to modify its policy because it permits wheelchairs and the plaintiff was able to access the park by using a wheelchair. Therefore, a Segway was not "necessary" for her to use the park. The Ninth Circuit disagreed and held that the ADA guarantees the disabled more than mere access to public facilities; it guarantees them "full and equal enjoyment." While facilities are not required to make any and all possible accommodations that would provide full and equal access to disabled patrons; they are required to make accommodations that are reasonable. In deciding what is reasonable, facilities may consider the costs of such accommodations, disruption of their business and safety. They must also take into account evolving technology that might make it cheaper and easier to ameliorate the plight of the disabled. The Court noted that its decision was supported by regulations promulgated by the Department of Justice, which is charged with administering the ADA. The applicable regulation concludes "that in the vast majority of circumstances" public accommodations will have to admit Segways.

The Court did not hold that Disney must permit Segways in its theme parks. It stated that Disney might be able to exclude Segways if it could prove that Segways could not be operated safely in its parks. The decision of the district court was reversed and the case remanded.

COMMENT

Pursuant to the Court's ruling, public accommodations are required to consider how their facilities are used by non-disabled guests and must then take reasonable steps to provide disabled guests with a like experience

California Supreme Court Approves "All Sums with Stacking" Allocation Rule For Continuous Losses

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

In *State of California v. Continental Insurance Company* (filed 8/9/12, No. S170560), the California Supreme Court resolved a decades-long conflict over insurance coverage for continuous and progressive property damage that spans several policy periods. The dispute involved two issues: (1) When continuous property damage occurs during the periods of several successive liability policies, is each insurer liable for all damage both during and outside its period up to the amount of the insurer's policy limits; and (2) if so, is the "stacking" of limits -- i.e., obtaining the multiple limits of successive policies -- permitted?

The State of California was seeking liability insurance coverage for damages awarded against it in a separate federal court action for continuous and progressive environmental contamination emanating from the Stringfellow Hazardous Waste containment facility in Riverside County. The State's insurers had issued successive liability policies over a span of many years. The policies were triggered by an "occurrence" during the policy period, and promised to pay "all sums" for damages because of property damage, up to the policies' stated limits.

Following trial, the court of appeal had ruled against the insurers, holding that each policy separately promised to indemnify "all sums" of the policyholder's liability, with each required to pay up to the full limit for which the insurer had calculated and collected a separate premium. The appeals court also held that the State was entitled to stack the policies' limits.

In petitioning the Supreme Court, the insurers argued that the appeals court had effectively rewritten their contracts, by holding that there could be indemnity coverage for the State's liability for property damage that occurred before and after a given policy period, even though the policy wording limits the basic scope of coverage to property damage that occurs during the policy period.

The State said this was confusing the trigger of coverage -- the event that activates the insurer's defense and/or indemnity obligations -- with the ultimate scope of coverage. The State said trigger was more properly addressed to defense, while scope applied to indemnity. In addition, the State found the "all sums" position consistent with recognized principles of equitable allocation and concurrent causation. The State also invoked "fairness and justice," arguing each successive policy constituted a separately negotiated contract, and that the insurers were attempting to engage in post-claim underwriting.

Regarding "stacking," the insurers argued that the State was not entitled to indemnity up to the combined limits of all policies in effect during the periods of continuous and progressive damage but, instead, was limited to the coverage purchased during a single policy period. They found support for this position in the "occurrence" definition, the limits of liability, and the policy period provisions. Essentially, the insurers argued that the fundamental limitation of coverage to a sum certain "per occurrence," for property damage during the policy period, precluded stacking of multiple policies' limits for the same occurrence.

The Supreme Court came down squarely on the side of the policyholder, adopting an "all sums with stacking" allocation rule. The Court stated that it is often "virtually impossible" for an insured to prove what specific damage occurred during each of the multiple consecutive policy periods in a progressive property damage case. Citing *Aerojet-General Corp. v. Transport Indemnity Co.* (1997) 17 Ca1.4th 38, the Court stated that as long as the property is insured at some point during the continuing damage period, the insurers' indemnity obligations persist until the loss is complete, or terminates. The Court concluded that the insurers were obligated to pay all sums for property damage attributable to the Stringfellow site, up to their policy limits, as long as some of the continuous property damage occurred while each policy was "on the loss."

The Court also approved stacking, meaning that when more than one policy is triggered by an occurrence, each policy can be called upon to respond to the claim up to the full limits of the policy. The Court stated that: "The all-sums-with-stacking indemnity principle properly incorporates the *Montrose* continuous injury trigger of coverage rule [*Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Ca1.4th 645] and the *Aerojet* all sums rule, and effectively stacks the insurance coverage from different policy periods to form one giant 'uber-policy' with a coverage limit equal to the sum of all purchased insurance policies. Instead of treating a long-tail injury as though it occurred in one policy period, this approach treats all the triggered insurance as though it were purchased in one policy period. [Thus,] [t]he insured has access to far more insurance than it would ever be entitled to within anyone period."

*Clothes Dryer Fires Cost \$35 Million Per Year
Credit to: Insurance Journal, August 2012*

An estimated 2,900 clothes dryer fires in residential buildings are reported to U.S. fire departments each year and cause an estimated \$35 million in property losses, according to a new government report. For complete article: <http://www.insurancejournal.com/news/national/2012/08/20/260075.htm#.UDuPKnpJvkQ.mailto>

*'Hole-in-Won' Golf Tourney Insurer Charged With Not Paying Up
Credit: Insurance Journal, August 2012*

A Connecticut businessman who specializes in insurance for golf tournament hole-in-one prizes has been charged in Washington with multiple felonies after repeatedly failing to pay up. Similar allegations have been made against Kevin Kolenda and his business in numerous other states, including Montana, Ohio, Georgia, California, New York, Hawaii, Alabama, Massachusetts, Florida, Connecticut and North Carolina. For complete article: <http://www.insurancejournal.com/news/west/2012/08/24/260670.htm#.UDuPIQ3CERo.mailto>

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According to the Court, "[the all-sums-with-stacking rule means that the insured has immediate access to the insurance it purchased." Further, "[all-sums-with-stacking coverage allocation ascertains each insurer's liability with a comparatively uncomplicated calculation that looks at the long-tail injury as a whole rather than artificially breaking it into distinct periods of injury. As the Court of Appeal recognized, if an occurrence is continuous across two or more policy periods, the insured has paid two or more premiums and can recover up to the combined total of the policy limits. There is nothing unfair or unexpected in allowing stacking in a continuous long-tail loss." Having sided with the policyholder, the State of California Court nonetheless left open the possibility for contracting around its rule, stating that "[the most significant caveat to all-sums-with-stacking indemnity allocation is that it contemplates that an insurer may avoid stacking by specifically including an "anti-stacking" provision in its policy. Of course, in the future, contracting parties can write into their policies whatever language they agree upon, including limitations on indemnity, equitable pro rata coverage allocation rules, and prohibitions on stacking."

On the Lighter Side...

Here are the top nine comments made by NBC sports commentators so far during the Summer Olympics that they would like to take back:

1. **Weightlifting commentator:** This is Gregoriava from Bulgaria . I saw her snatch this morning during her warm up and it was amazing.
2. **Dressage commentator:** This is really a lovely horse and I speak from personal experience since I once mounted her mother.
3. **Gymnast:** I owe a lot to my parents, especially my mother and father.
4. **Boxing Analyst:** Sure there have been injuries, and even some deaths in boxing, but none of them really that serious.
5. **Softball announcer:** If history repeats itself, I should think we can expect the same thing again.
6. **Basketball analyst:** He dribbles a lot and the opposition doesn't like it. In fact you can see it all over their faces.
7. **At the rowing medal ceremony:** Ah, isn't that nice, the wife of the IOC president is hugging the cox of the British crew.
8. **Soccer commentator:** Julian Dicks is everywhere. It's like they've got eleven Dicks on the field.
9. **Tennis commentator:** One of the reasons Andy is playing so well is that, before the final round, his wife takes out his balls and kisses them... Oh my God, what have I just said?

CAIIA REGISTRATION FORM
 California Association of Independent Insurance Adjusters
ANNUAL FALL CONVENTION & DANCE – October 18 & 19, 2012
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Non-Member (**) (Includes reception, breakfast, CE Class/lunch/dinner)	\$ 175.00	# _____	\$ _____
Spouse/Guest fee (***) Name _____	\$ 100.00	# _____	\$ _____
4 Hour CE Class (Includes, breakfast, presentation, lunch)	\$ 100.00	# _____	\$ _____
President's Gala Dinner/Reception	\$ 100.00	# _____	\$ _____
<i>Grand Total payable</i>			\$ _____

SCHEDULED EVENTS

Please specify which events you and/or your spouse/guest will attend by placing a check mark in the box next to the event.
 Complete a separate form for each registrant and additional guest.

Please make your checks payable to CAIIA or pay by credit card.
 Mail Registration Form & payment to:

	You	Spouse/Guest
10/18 - 6:30 P.M. Reception, Temecula Creek Inn	[]	[]
10/19 - 7:00 A.M. Registration/ Breakfast	[]	
10/19 - 8:00 A.M. Seminar	[]	
10/19 - 12:00 P.M. Lunch	[]	
10/19 - 1:30 P.M. Business Meeting (*)	[]	
10/19 - 6:30 P.M. Reception/ cocktail Hour	[]	[]
10/19 - 7:30 P.M. President's Inaugural Dinner Dance	[]	[]

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- (*) Members only.
- (**) We welcome the attendance and participation of insurance company and risk management claims personnel and attorneys at the President's Gala Dinner Event, the Educational Seminars, and Luncheon following seminars.
- (***) Spouse/Guest fee includes alternative activity, breakfast and dinner on Friday.
 For details on Spouse/Guest activity, e-mail: walshadi@sbcglobal.net

Early registration is encouraged. Cut-off date for contracted room rate is September 24, 2012