

OCTOBER 2006

## Weekly Law Resume

Prepared by Low, Ball & Lynch, Attorneys at Law

### Coverage - Automobile Exclusion - Concurrent Cause

*Twila Prince v. United National Insurance Company*, Court of Appeal, Second District - August 24, 2006

General liability policies commonly contain an exclusion for injuries arising out of an automobile owned, operated, rented, or loaned to any insured. This case discusses the application of such an exclusion to the death of two young children negligently left in a vehicle on a hot day.

The parents of two young children sued the County of Los Angeles, Trinity Children and Family Services, Leslie Smoot, and A Child's Place Preschool. Leslie Smoot had been awarded foster care of two children by Los Angeles County. She was licensed by Trinity to act as a foster parent and owned the preschool. Ms. Smoot left the children in her car outside the preschool, and both children died. The automobile carrier for the Smoots settled with the parents. United National Insurance Company insured Trinity for acts of foster parents licensed or certified under their authority. Trinity tendered its defense to United National, and United National refused to defend and indemnify. United relied on an exclusion for bodily injury arising out the ownership, maintenance, use, or entrustment to others of any automobile owned, operated, rented, or loaned to any insured.

The parents filed suit against United National based upon an assignment for Smoot and the other insurers. United demurred to the complaint, and the trial court sustained the demurrer, concluding that the accident arose out the use of the vehicle. The parents appealed.

The Court of Appeal affirmed. The parents argued that the automobile exclusion did not apply because Smoot's negligence was unrelated to her use of the vehicle. The Court noted that California has held that where there are concurrent causes of injury, one auto-related and the other non-auto related, the automobile exclusion will not apply. However, this rationale only applies where there are two negligent acts or omissions of an insured, one of which, independent of the excluded cause, renders the insured liable for the resulting injuries.

The Court noted that no prior cases had resolved the coverage issue specific to this set of facts. The Court observed that the test used by California cases to determine if the automobile exclusion applies is whether the automobile was a predominating cause or substantial factor in the injury that is claimed. In this case, the Court found that the relationship between the vehicle and the injuries sufficient to trigger the exclusion. Both children died when left in an overheated vehicle. This type of injury occurs almost exclusively in a motor vehicle. The combination of a small, confined glass and metal space and a sunny day created a unique environment in which heat was trapped and hazardous temperatures developed within a brief period of time. The vehicle thus became the instrumentality for the injury.

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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).

## CAIIA Newsletter

CAIIA Office  
P.O. Box 168  
Burbank, CA 91503-0168

Web site - <http://www.caiia.org>

Email: [info@caiiia.org](mailto:info@caiiia.org)

Tel: (818) 953-9200

(818) 953-9316 FAX

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■ **California Association  
of Independent  
Insurance Adjusters, Inc**

**PRESIDENT'S OFFICE**

414 N. Broadway  
Fresno, CA 93701  
Email: info@caiia.org  
www.caiia.org

**PRESIDENT**

Steve Wakefield  
boltadj@msn.com

**IMMEDIATE PAST PRESIDENT**

Doug Jackson  
scsdj@southwestclaims.com

**PRESIDENT ELECT**

Sharon Glenn  
sglenn@johnglennadjusters.com

**VICE PRESIDENT**

Peter Schifrin  
pschifrin@sgdinc.com

**SECRETARY TREASURER**

Peter Vaughan  
pvaughan@pacbell.net

**ONE YEAR DIRECTORS**

Thad Eaton  
thade@ejclamis.com

Bill Scheler  
dunlapclaims@comcast.net

Dave Ceresa  
dceresa@aims4claims.com

**TWO YEAR DIRECTORS**

Maribeth Danko  
mdanko@seaclifclaims.com

Sam Hooper  
sam@hooperandassociates.com

Frank Zeigon  
mandz@pacbel.net

**OF COUNSEL**

Kevin Hansen,  
McCormick, Barstow, Sheppard,  
Wayte & Carruth, LLP

■ **PRESIDENT'S MESSAGE**

As the term for this year's Board of Directors comes to an end, there are many, many thank yous to be given.

The first thank you is to all of the claims handling personnel that used the services of the skilled and trained adjusters belonging to the CAIIA. The Status Report contains a mailing list of over 1000 individuals and companies. We have received many compliments regarding the content of the Status Report including case law review, reports on fraud, and announcements by the Department of Insurance and, of course, the sometimes terrible jokes. Many thanks to Sterrett Harper, Harper Claims Service, for the tremendous effort he puts into every issue.

Sharon Glenn, John Adjusters, will take over as President. She, along with Peter Schifrin, Schrifrin, Gagnon & Dickey, as well as Pete Vaughan, Vaughan & Associates, coupled with the wisdom of immediate Past President, Doug Jackson, Southwest Claims Service, have indeed provided true stimulus to the Executive Board.

We started the year off with six Directors. Dave Ceresa from AIMS had to leave his position because of reorganization. His contribution was great and, likewise, the input provided by Bill Scheler, Dunlap Claims Service; Maribeth Danko, SeaCliff Claims Group; Thad Eaton, Eaton & Johnson; Sam Hooper, Sam Hooper & Associates; and Frank Zeigon, M & Z Claims has truly been an inspiration.

Education is an integral part of success. The outstanding presentations at the Claims Conference of Northern California have not gone unnoticed. Like the CAIIA, the CCNC is an all-volunteer organization. The efforts of the Board, Committee, and volunteers were evident. If you missed the CCNC, be sure to attend next year, you missed a good one.

The CAIIA will be holding their annual



convention October 11 – 13 at the Sheraton Grand Sacramento. There is a flyer with this Status Report. The Advisory Council, on Thursday, October 12, will give insight and answers to key questions asked by claims handling personnel.

Likewise, the educational seminars on Friday, October 13 will prove beneficial to all attending. Finally, there will be a Re-certification for the Fair Claims Practice Regulations.

If you have any questions regarding content, please call President-Elect Sharon Glenn at (925) 277-9320.

Our final thank you goes to our Legal Counsel, Kevin Hansen, McCormick, Barstow, Sheppard, Wayte & Carruth LLC. I have known Kevin for over 25 years and he has been our Counsel for the past 2 years. He also gave an excellent presentation at the CCNC.

Please give President-Elect, Sharon Glenn, your full support and have fun doing your job!

**STEVE WAKEFIELD**

*President - CAIIA 2005-2006*

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Furthermore, there were no separate or independent acts of negligence, unrelated to the use of the vehicle. Smoot's conduct was integrally connected to the use of the vehicle. She left the children unattended and strapped in their car seats in the hot vehicle for more than six hours. Thus, her negligence was not disassociated from the use of the vehicle. Her abandonment of the children in the vehicle subjected them to the conditions that caused their deaths. Therefore, the automobile exclusion applied. The judgment was affirmed.

## COMMENT

This opinion reiterates the rule that, where a vehicle is a predominant cause of injury and no negligence exists independent of the use of the vehicle, an automobile exclusion will apply.

## Coverage - Contribution

*Employers Ins. Co. of Wausau v. Travelers Indemnity Co.*, Court of Appeal, First District - June 16, 2006

The principle that an insurer who has defended an action may pursue a non-defending insurer for contribution is well established. This case concerns whether such an action can be brought where the insured has released the non-defending insurer.

The insurers to this action sequentially insured a succession of companies that had allegedly released hazardous contaminants from a manufacturing plant. In 1997 and 1998, the insured settled with a number of insurers, including the defendants to this action, to resolve disputed coverage claims as part of the litigation known as the "Jensen-Kelly" action. The settlement included a release from defense or indemnification of any past, present, or future environmental actions, and an indemnification agreement by the insured to the carriers against any claims under their policies, including claims for contribution.

The present action was triggered by two additional cases filed against the insured for different plaintiffs for bodily injury and property damage due to environmental contamination. Wausau defended and indemnified. It then filed an action against the insurers who had previously settled the "Jensen-Kelly" action in order to obtain contribution. The trial court found that Wausau was entitled to contribution despite the settlement. An appeal was filed.

The Court of Appeal affirmed. The Court rejected the notion that an insurer could avoid contribution to other insurers by settling with the policyholder. This is because contribution rights are based on equitable principles, which exist independent of the rights of the insured. This duty to share in the cost of defense and indemnification does not depend on whether the prior actions were settled or not. This is because the rights are grounded in equity, not contract. Further, since there was no

evidence that the settlements exhausted coverage, there was no bar to seeking contribution.

The Court also refused to give the settling insurers an offset for the amount that they had paid. There was no showing that anything paid to settle the prior action had any effect on the amount owing under the current action.

As to the amount of liability, the Court agreed with the trial court that defense costs should be apportioned based on the "time on the risk" approach. The Court concluded that the trial court's method of allocation was within its broad discretion. The judgment was therefore affirmed.

## COMMENT

In trying to analyze ways in which the settling insurers could have been protected against future contribution actions, the Court hints at various ways, including exhaustion of policies, rescission of policies, or perhaps, a buy-back of coverage. However, the Court indicated that the actual effect of the agreements will be looked at, rather than their characterization, as exhausting, rescinding, or cancelling the policy.

## Duty of Care - Assumption of the Risk - Dog Bite

*Marta Priebe v. Russell Nelson*, California Supreme Court - August 28, 2006

This case concerned the question of whether a kennel worker can sue either for negligence or strict liability a dog owner for injuries sustained by a dog bite or attack while the worker was caring for the owner's dog. It involved the application of the assumption of the risk doctrine.

Russell Nelson boarded his pit bull "Mugsey" at a kennel while away. Mugsey had a known aggressive behavior problem. Nelson claimed he told the kennel of this problem when he boarded Mugsey. While being taken for a walk, Mugsey became agitated by another dog and knocked Marta Priebe, a kennel worker, down, and mauled her foot and ankle.

Priebe sued Nelson for statutory and common law liability. At trial, the Court refused instructions on strict liability and submitted the case to the jury on negligence. A defense verdict was returned. However, the trial court granted a new trial motion. Nelson appealed.

The Court of Appeal affirmed the trial court ruling and the Supreme Court granted Priebe's petition for review.

The Supreme Court affirmed the trial court and the Court of Appeal. Civil Code Section 3342 provides strict liability for the owner of any dog which bites another person. The Supreme Court decided the question of whether the doctrine of primary assumption of the risk relieves the owner from liability under the statute.

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The Court noted that, in California, the veterinarian's rule holds that an owner is not liable for dog bites to a veterinarian who is taking care of a dog. The Supreme Court decided that rule should be applied here. This is based upon the principle that a veterinarian or a veterinarian assistant who accepts employment for the medical treatment of a dog, should be aware that any dog, regardless of its previous nature, might bite while being treated. This risk is assumed as part of the risk of the occupation. This rule has also been applied to veterinary assistants or others such as kennel workers.

However, the Court noted that Priebe could still pursue a common law strict liability claim based upon Nelson knowingly placing a vicious dog with the kennel and failing to disclose that fact to any of the kennel personnel. Such evidence would

prove that the kennel workers were exposed to a unknown risk of injury beyond that normally associated with work in a dog kennel.

The Court felt that barring a statutory strict liability cause of action was supported by several reasons. First, kennel workers are in the best position to take safety precautions to avoid people being bitten. Secondly, the professional has assumed control of the dog and cannot maintain a cause of action for failing to control the dog. Third, the risk of being bitten is an inherent danger in the occupation. Finally, this policy would encourage dog owners to avail themselves of dog kennels without the threat of liability in lawsuits hanging over their heads.

The Court concluded therefore that Priebe, by virtue of her occupation, assumed the risk of being bitten, and thus, a strict liability cause of action against Nelson was unavailable. However, she could pursue a common law strict liability claim against Nelson for knowingly keeping a domestic animal with vicious propensities. The judgment was therefore affirmed.

## COMMENT

This Supreme Court decision will establish immunity for dog owners who turn their dogs over to a kennel for care as long as they fully disclose to the kennel the propensities of their animal. This is another step in the development of the primary assumption of the risk doctrine which has been developed and expanded by this Supreme Court.

## DON'T MESS WITH SENIORS!!!

This is a true account recorded in the Police Log of Sarasota, Florida.

An elderly Florida lady did her shopping and upon returning to her car, found four males in the act of leaving with her vehicle. She dropped her shopping bags and drew her handgun, proceeding to scream at the top of her voice, "I have a gun, and I know how to use it! Get out of the car!" The four men didn't wait for a second invitation. They got out and ran like mad. The lady, somewhat shaken, then proceeded to load her shopping bags into the back of the car and got into the driver's seat. She was so shaken that she could not get her key into the ignition. She tried and tried, and then it dawned on her why. For the same reason she did not understand why there was a football, a Frisbee and two 12 packs in the front seat.

A few minutes later, she found her own car parked four or five spaces farther down. She loaded her bags into the car and drove to the police station to report her mistake. The sergeant to whom she told the story couldn't stop laughing. He pointed to the other end of the counter, where four pale men were reporting a car jacking by a mad, elderly woman described as white, less than five feet tall, glasses, curly white hair, and carrying a large handgun. No charges were filed.

### Moral of the story?

If you're going to have a 'senior moment', make it a memorable one.

## ■ CAIIA Calendar

### ■ CAIIA Annual Convention

October 11-13, 2006  
Sheraton Grand Hotel, Sacramento  
Contact Sharon Glenn at 925-277-9320

### ■ RPA Designation Examination

Friday, October 13th  
Annual All Industry Day Conference  
Sacramento, CA  
Contact Douglas Jackson, RPA at  
scdj@outhwestclaims.com  
or go to [www.caiaa.org](http://www.caiaa.org)

### ■ CAIIA Keynote Speaker Luncheon

Friday, November 10th  
1500 S. Raymond Avenue  
Fullerton, CA (off the 91 Fwy)  
Contact Frank Zeigon at (714) 777-4462

# California Association of Independent Insurance Adjusters

## CAIIA Keynote Speaker Luncheon

November 10, 2006



### Four Points Sheraton

1500 S. Raymond Avenue ♦ Fullerton, CA 92831 (off the 91 Fwy.)  
(714) 635-9000

**Keynote Speaker Luncheon:** 11:30 a.m. - 1:30 p.m.

**Meet & Greet / Registration:** 11:30 - 12 Noon

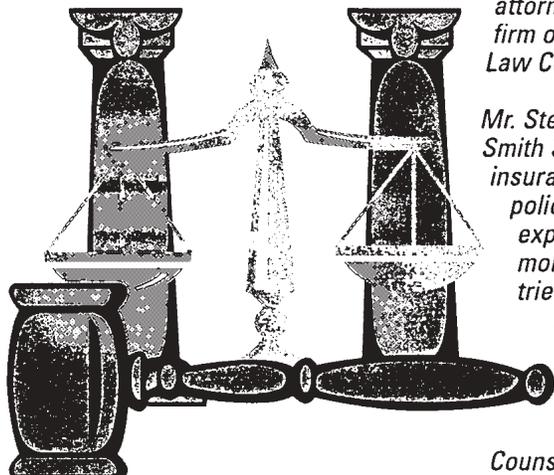
**Lunch / Presentation:** 12 Noon - 1:30 p.m.

**Cost:** \$25.00 Members      \$30.00 Non-members

### Topic: "How to Avoid Bad Faith When Handling a Potentially Fraudulent Claim"

**Keynote Speakers: Herbert Dodell and Stephen E. Smith**

*Mr. Herbert Dodell practices in commercial business, property insurance matters, bad faith, errors and omissions among other specialties. He has represented Insured's in regards to appraisal proceedings under the insurance policy. Mr. Dodell is a member of the New York and California State Bar and has served as a deputy district attorney (LA) and Judge Pro Tempore. He was a Sr. Partner in the law firm of Dodell, Senfor & Brown and is presently principal in the Dodell Law Corporation.*



*Mr. Stephen E. Smith is a property insurance lawyer. He is a partner of Smith Smith & Feeley LLP, an Irvine firm that specializes in handling insurance coverage disputes and litigation arising out of personal lines policies and commercial lines policies. Mr. Smith has extensive experience in claims and litigation involving fire, theft, water damage, mold, earth movement, earthquake and employee dishonesty. He has tried cases involving a wide variety of coverage and "bad faith" issues, and has represented insurers in numerous arbitrations and appraisal proceedings. Mr. Smith is a member of the California State Bar, American Bar Association (Tort, Trial and Insurance Practice Section), Orange County Bar Association (Insurance Law Section), Association of Southern California Defense Counsel and California Conference of Arson Investigators.*

**Register by November 1, 2006 by contacting Frank Zeigon at 714.777.4462, e-mail [mandz@pacbell.net](mailto:mandz@pacbell.net) or fax 714.777.4507.**

Name: \_\_\_\_\_ Company: \_\_\_\_\_

Telephone: \_\_\_\_\_ E-mail address: \_\_\_\_\_

Make checks payable to California Association of Insurance Adjusters (CAIIA) and mail to:  
M & Z Claims Service, 18032-C Lemon Drive, PMB 164, Yorba Linda, CA 92886

Checks must be received by Nov. 1st. There are no refunds for cancellations or no-shows. Registrants may send a replacement to the luncheon.

THE CALIFORNIA ASSOCIATION OF INDEPENDENT INSURANCE ADJUSTERS  
ANNUAL ALL INDUSTRY DAY CONFERENCE

October 13, 2006



*DISTINGUISH YOURSELF*

NOW IS YOUR CHANCE TO BECOME A  
**REGISTERED PROFESSIONAL ADJUSTER**

The RPA designation is the first and premier designation designed for and by claims professionals. The CAIIA is pleased to announce that it will host the *Society of the Registered Professional Adjuster's* designation examination at this year's CAIIA Annual All Industry Day Conference being held on October 13, 2006 in Sacramento. The designation is not available to just anyone. According to the Society, the qualification criteria for attaining the RPA Designation are:

1. Meet all requirements for membership listed in the Society's bylaws.
2. Have a minimum of 5 years' experience in one of the occupational categories acceptable for membership (i.e. Claims Adjuster, Supervisor/Manager/Educator of Adjusters) and an AIC, CPCU, SCLA, or similar designation; OR have a minimum of 10 years' experience in one of the occupational categories acceptable for membership.
3. Complete an application and pass the RPA Designation Exam.

The Society is the organization that the CAIIA started 10 years ago. With recent changes, the RPA is better than ever! The RPA designation means that you are dedicated to professionalism and have made a commitment to 15 hours of continuing education each year. It means that you have passed a collection of insurance questions covering an overview of our industry along with ethics testing required for any professional organization. It means that you have worked in the field of adjusting for a significant period of time. It means that you are a member of a select group of adjusters who meet the competency and character requirements of the RPA. When seeking to hire an adjuster to handle your claims or act as an expert on one of your cases, make sure they have the mark of the claims expert, the RPA designation!

Douglas Jackson, RPA, who is a Board of Director for the Society and Immediate Past President of the CAIIA, will be proctoring the test. The test will take approximately 1-2 hours. As an additional incentive to become an RPA designee, your \$150 examination/application fee will also satisfy membership dues through the end of 2007 for all successful exam participants. For more information on the RPA, including new easier online CE Submissions and online Membership Renewals, go to [www.rpa-adjuster.com](http://www.rpa-adjuster.com) . You may also email Mr. Jackson at [scsdj@southwestclaims.com](mailto:scsdj@southwestclaims.com) . For more information on the conference, go to [www.caiia.org](http://www.caiia.org) .



## CAIIA REGISTRATION FORM

**California Association of Independent Insurance Adjusters  
60<sup>th</sup> ANNUAL CONVENTION — October 11, 12, & 13, 2006**

### ***SHERATON GRAND SACRAMENTO***

1230 J Street, Sacramento California, 95814  
(800) 325-3535 Mention CAIIA for special rates shown below  
Standard Room Rate \$149, Suite \$249 plus taxes  
Rooms available on first come basis

Attendees must make their own hotel reservations. Hotel Cut-off Date is Friday, September 15, 2006

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. 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	\$ 245.00	_____	\$ _____
Registration Package — members w/o spouse	\$ 195.00	_____	\$ _____
President s Dinner/Reception/Awards/Installations	\$ 60.00	_____	\$ _____
Education Seminar including lunch (available to member employees or insurance company guests only)*	\$ 25.00	_____	\$ _____
Fair Claims Settlement Practices Regulations Recertification	\$ 10.00	<i>Grand Total</i>	\$ _____

☞ Items with \*\* 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:

#### SCHEDULED EVENTS

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

10/11	6:30 P.M.	Registration/Reception **	[ ]	[ ]	[ ]	Sharon Glenn
10/12	9:00 A.M.	Business Meeting **	[ ]	[ ]	[ ]	John Glenn Adjusters & Administrators, Inc.
10/12	12:00 P.M.	Lunch **	[ ]	[ ]	[ ]	2440 Camino Ramon, Ste. 295
10/12	1:30 P.M.	Advisory Counsel **	[ ]	[ ]	[ ]	San Ramon, CA 94583
10/12	6:30 P.M.	Presidents Gala Dinner Event, Awards, & Officer Installations	[ ]	[ ]	[ ]	<a href="mailto:sglenn@johnglennadjusters.com">sglenn@johnglennadjusters.com</a>
10/13	8:00 A.M.	Registration/Continental Breakfast	[ ]	[ ]	[ ]	Credit Card: AMEX ____ VISA ____ M/C ____
10/13	9:00 A.M.	Education Seminars	[ ]	[ ]	[ ]	Cardholder Name _____
10/13	12:00 P.M.	Luncheon	[ ]	[ ]	[ ]	Card # _____
10/13	1:30 P.M.	Fair Claims Recertification Conclusion	[ ]	[ ]	[ ]	Expiration Date: _____

Any Questions, please call or email Sharon Glenn, (925) 277-9320, [sglenn@johnglennadjusters.com](mailto:sglenn@johnglennadjusters.com)

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

\* 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.

Cut-off date is September 15, 2006. Any registration after that date is subject to a \$35.00 late fee.



# 19 Suspects Arrested for Auto Body Insurance Fraud

*September 7, 2006*

Nineteen suspects were arrested for various felony counts of insurance fraud, all resulting from an extensive sting operation in Butte and Shasta counties. Of the 20 suspects, seven individuals were arrested this morning in Butte County and 12 individuals in Shasta County self-surrendered to the Shasta County Jail and were released on their own recognizance.

During April and May 2006 in Shasta, and during May 2006 in Butte, the California Department of Insurance (CDI)'s Fraud Division, with assistance from the Butte and Shasta County District Attorney's offices, began an undercover investigation into automobile body shop-related insurance fraud. They unearthed numerous instances of suspected insurance fraud that could have bilked consumers out of tens of thousands of dollars.

"I commend the investigative work of our units and the Butte and Shasta County DA's offices," said Commissioner Garamendi. "Insurance fraud is an economic burden upon our entire state and we will continue to work to bring perpetrators to justice."

Using information from various sources, including the National Insurance Crime Bureau (NICB), the Bureau of Automotive Repair (BAR), the Butte County District Attorney's office, and licensing data and public business directories, officers visited the shops in Butte and Shasta Counties.

In Butte County, as part of this investigation, an undercover officer visited 38 body shops and spoke with owners and estimators at each shop, saying she had been involved in a car accident. The undercover officer further explained that her car had damage to the left side as a result of the "legitimate" accident and that this damage would be covered under her existing auto insurance policy.

Furthermore, the undercover officer informed the owners and estimators that there was also existing damage on the right front fender which was already present when she purchased the vehicle. The undercover officer asked if it would be possible to combine the insured damage with the uninsured damage as one claim.

The investigation for Butte County resulted in eight body shops providing the undercover officer with a fraudulent repair estimate.

The fraudulent estimates included the damage the undercover officer said was not part of the collision and took place before insurance coverage was in place. The estimates ranged from \$2,000 to \$3,500. In one case, the owner of E&D's Auto Body and Paint in Chico allegedly told the undercover officer that he would repair the unrelated insurance damage under the current insurance claim and give her \$300 cash to have her car repaired at his shop.

The Butte County District Attorney's Office will likely charge eight suspects with felony counts of insurance fraud. Of the eight, five are owners and three are employees.

The NICB, BAR and Esurance Insurance Company assisted the CDI's Fraud Division and the Butte County District Attorney's office in this investigation.