CAIA Status Report

OCTOBER 2009

Insurance Coverage & Litigation Newsletter

Submitted by Tharpe & Howell - California, Nevada, Arizona & Utah

UM / UIM Benefits Not Subject to Hospital Lien Act

Reid v. American Insurance Group, Inc. (June 4, 2009) 2009 WL 1548990.

When funding a settlement or judgment against tortfeasor insureds, third party insurers must honor liens under the Hospital Lien Act (HLA) of which they have been placed on notice. The purpose of the HLA is to secure part of the patient's recovery (up to 50%) from liable third persons to pay the hospital bill.

It has long been unsettled, however, whether a first party insurer paying uninsured motorist or underinsured motorist (UM/UIM) benefits to its injured insured must also honor such liens. After all, UM/UIM coverage is a proxy for the coverage that would have been provided to the tortfeasor if the tortfeasor had obtain insurance or adequate insurance. So, hospitals argued, why should payment under UM/UIM coverage be treated any differently than the moneys actually paid by a third party insurer.

The fourth district Court of Appeal found at least two reasons why UM/UIM coverage should be treated differently than third party coverage and is thus not subject to the HLA.

First, strictly construed, the HLA lien against an insurance carrier, the hospital must give notice to "any insurance carrier known to the hospital which has insured the person, firm or corporation alleged to be liable to the injured person against the liability." There is no similar provision for perfecting a lien against an insurance carrier that has insured the injured person.

Second, the HLA was not intended to apply to first party coverage. This is demonstrated by the fact that under the HLA, hospitals are limited to 50% of the injured person's recovery, even though the hospital is entitled to collect 100% of its bill directly form the patient. If the HLA was intended to apply to patients and their own insurers, the 50% limitation "makes no sense". The lien would also be unnecessary since the patient is already contractually obligated to pay.

Therefore, liens under the HLA do not apply to payment of UM/UIM benefits, and first party insurers, for now at least, may pay Um/UIM benefits without honoring such liens.

continued on page 3

PUBLISHED MONTHLY BY
California Association of Independent Insurance Adjusters

An Employer Organization of Independent Insurance Adjusters

Inside This Issue

Ins. Coverage & Lit. Newsletter .. 1
President's Message 2
Weekly Law Resume 4
Sentencing Announced 6
Annual Convention Form 7
Children's Science Exam 8

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@caiia.org.*

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PRESIDENT'S MESSAGE

Thanks to an Active Membership

There has been a slow revolution in the way your association is managed on a day to day basis. When I was first involved in the work of the association, I found that during the time between the meetings (convention and mid-term) day to day decisions were made by one or two people. To consult with the officers and board by telephone was more time consuming than most issues would justify, so the association tended to be run rather top down.

It is a cliché that the internet has changed much about the way we all communicate. It is not so well known, outside of the board, that there is nearly daily email chatter about every issue that develops. And more often than not, there is a healthy debate with a range of opinions being expressed. Often, I will start the discussion with an opinion that is on one side of a issue, but after hearing other people's point of view, I end up with a 180 degree change in that position. In the end, this debate results in a more rational organization, because more points of view are being considered. This is obviously a more democratic process.

This email chatter also results in a more committed board of directors and officers. Because of the constant conversation, a sense of community develops over time. This may be one of the reasons that the association feels much stronger today than it has in the last 10 years.

If you are a general member, try to find the time to thank our volunteers for the time that they are taking to keep our association strong, active and well managed. All of this conversation takes time after all. Also, remember that the Status Report, the directory, the educational programs and seminars, our annual meetings, the golf tournament, and in fact all of our activities are run entirely by volunteers.

For my part, I'd like to thank Jeff Caulkins who stepped forward when we suddenly needed a treasurer after our convention. Not only has he kept current with the treasurer duties, but at the same time, he increased our revenue from the directory to allow it to nearly break even for the first time. And Doug Jackson has developed our database to the point that the directory almost writes itself.

You have heard about the huge task Helene DalCin has accomplished as chair of the education committee. We now offer sufficient units to maintain your CE requirement with the DOI, without having to go outside of the organization. Qualifying our course work was Helene's doing.

continued on page 3

continued from page 1

In Liability Claims, Whether An Insured's Belief As To When It Received Notice of a Claim Was "Reasonable" May Be a Question of Law Properly Heard On Summary Judgment Motion

In Evanston Ins. Co. v. OEA, Inc. (May 21, 2009) 566 F.3d 915, Evanston Insurance Company sued its insured OEA, Inc., a manufacturer of explosive booster caps for the aerospace industry, pursuant to a general liability policy and excess policy, for breach of contract, intentional misrepresentation, and rescission of insurance contract, regarding defense and settlement costs that Evanston paid on behalf of OEA for underlying suits by employees of OEA's subsidiary.

OEA removed the suit to federal court on grounds of diversity of citizenship and then counterclaimed for breach of contract and breach of covenant of good faith and fair dealing. OEA and Evanston each filed motions for partial summary judgment on the issue of whether Evanston's policy provided coverage for the employee suits which were made before the policy period. After the court granted partial summary judgment for Evanston, Evanston moved for summary judgment for reimbursement of amounts paid for OEA's defense and prejudgment interest. The district court granted summary judgment, and OEA appealed.

The Court of Appeals found that there was no genuine issued of material fact as to the date the employees' claims were made and as to when OEA first received notice of the employees' intent to hold OEA responsible for their injuries. Therefore, the complaints constituted notice to OEA for purposes of the policy's provision regarding coverage for claims first made against the insured during the policy period.

The Court rejected OEA's argument that the Courts finding the OEA's belief that the complaints did not implicate OEA was a finding of fact inappropriate for consideration on summary judgment. The court held that reasonableness is not always a question of fact, and in fact, "becomes a question of law and loses its triable character if the undisputed facts leave no room for reasonable difference of opinion."

Here, because the claims were made prior to the policy period, OEA did not pay premiums to cover the claims. Therefore, Evanston was entitled to reimbursement of defense and settlement costs because the claims were not covered. Furthermore, because the right to reimbursement of prejudgment interest on the damages vested when Evanston made payment to PEA, Evanston was entitled to prejudgment interest from the time the payments were made.

PRESIDENT'S MESSAGE

continued from page 2

She also continues to work with the DOI on a committee dealing with the CE program. Of course many members help every year with class presentations, including Peter Schifrin, Doug Jackson, Jeff Caulkins, Richard Kern, Steve Wakefield and Sterrett Harper.

Phil Barrett and Sam Hooper have been a great tag team working on Membership, and Sam was inspired to run a campaign for new members using the DOI list of licensed adjusters as a mailing list. As a consequence of their work, I have sent 15 welcome letters to new members so far this year. This is better growth than we have seen within my memory.

Our golf chairman Jeff Stone has filled our tournament with both sponsors and golfers. He is a journeyman at running the tournament, and we are grateful for his commitment.

Finally, I have to give recognition to a volunteer that gives hours every month, year after year to the association. Sterrett Harper publishes the Status Report, and volunteers his office to act as the Association's contact point. Most of the rest of us would be overwhelmed with the work that he does for the association, and I am happy that I did not have to find someone to take over these chores during my term.

There are many members that have given their time that I have not had the opportunity to mention. Sterrett wants me to keep this column to one page, and I have once again exceeded that limit, so please accept my thanks to everyone that has contributed to making the CAIIA the great organization that it is today.

It has truly been a pleasure writing these columns monthly. I will miss the opportunity (or excuse) to pontificate. We are looking forward to a great golf tournament and convention starting October 29. We hope to see you there.

PETE VAUGHAN
President - CAIIA 2008-2009

Bad Faith - Necessity for Compensatory Damages

Griffin Dewatering Corporation v .Northern Insurance Company of New York ,Court of Appeal, Fourth District (July 31, 2009)

A bad faith complaint based solely on compensatory damages, which consists of attorneys' fees and costs incurred to sue the insurer, was the subject matter of this action. In this opinion, the Court determined whether or not such damages support a bad faith award.

In early 1995, Griffin Dewatering Corporation agreed to fix a manhole feeding into the main sewer line for the South Coast Water District. In February of 1996, sewage backed up into the Laguna Beach home of Dr. Ron Waters. Waters submitted a claim to the District. The District in turn stated Griffin should handle the claim. In March, 1996, Griffin Dewatering submitted a request to its insurer, Northern Insurance Company of New York, to defend and indemnify it. The insurer denied the claim, citing the pollution exclusion. The District settled the Waters claim.

The District then sued Griffin to recoup its expenditures. Northern denied defense and indemnity. Griffin then sued Northern for bad faith. At that point, Northern agreed to defend the District's suit against the insured. Northern then settled the action brought by the District, reserving a right to reimbursement from Griffin. Griffin objected to the settlement, and insisted that Northern drop any right of reimbursement. Northern refused to do so and the settlement was completed. Northern then filed a motion for summary judgment in the bad faith case, which was denied. At that point, Northern unilaterally withdrew any right to seek reimbursement of any funds expended to defend or settle the District's claim. Griffin insisted on proceeding with the bad faith lawsuit.

Shortly before trial, the court heard in limine motions. The trial court ruled the insurer's initial denial had been unreasonable as a matter of law. This was based on the unsettled scope of the total pollution exclusion at the time of disclaimer. At trial, the jury found Griffin had paid $1 million for fees and costs to pursue benefits under the contract and awarded punitive damages of $10 million. Northern appealed.

The Court of Appeal reversed, and ordered judgment entered for Northern. It first recognized that there was a breach of contract and that Northern was obligated to defend and indemnify the underlying lawsuit. This was based on *MacKinnon v. Truck Ins. Exchange,* (2003) 31 Cal.4th 635, which was decided after the trial court decision. However, there was no tort liability for breach of the covenant because Northern acted reasonably. The Court stated the reasonableness of a legal position taken by an insurance company is a question of law for the Court to decide.

The Court noted that at the time of the denial, the scope of the absolute pollution exclusion was unsettled in California. The insurance company took a position rooted in the literal language of the exclusion. In *MacKinnon v. Truck Ins. Exchange,* (2003) 31 Cal.4th 635, the Supreme Court adopted a common sense approach to the interpretation of the exclusion, refusing to enforce the literal language of the exclusion. In this case, the Court felt the insurer acted reasonably at the time of its denial, even though the Supreme Court decision found their decision to be wrong. Further, there was no damage sustained by the insured. The insured was only entitled to recover contract damages, and none had been incurred as Northern eventually defended the action and settled the case.

While Northern reserved a right of reimbursement, it later waived that right. Thus, the only damages sustained by the insured were fees incurred for prosecuting the bad faith case. The Court explained that those were not contract damages, but were only tort damages recoverable for breach of the covenant of good faith and fair dealing. Since there was no breach of the covenant, these damages could not be recovered. Thus, there was no basis for a bad faith judgment against the insurer. The judgment was therefore reversed.

COMMENT

As the reader will surmise, this was a long and complicated opinion, but is very instructional for its discussion of the law of bad faith. It also includes a long history of the duty to defend in California, which the reader will find helpful now that the Delgado decision has been issued by the Supreme Court.

continued on page 5

continued from page 4

Bad Faith - Right to Intervene

Jonni Hinton v Eldon Beck, Court of Appeal, Third District (August 24, 2009)

An insurer is given the right to intervene in an action involving its policyholder when it has a direct interest in the litigation. This case considered whether an insurer would be allowed intervention where it denied coverage and a defense to its policyholder.

Jonni Hinton sued Eldon Beck for personal injuries. She was injured on property leased by Beck when a cow ran into a gate, taking the gate off of its hinges, and causing it to strike Hinton and injure her. Beck was insured by Grange Insurance Group. Grange denied coverage for Hinton's loss and refused to defend. Hinton entered into an agreement with Beck not to execute any judgment against Beck in exchange for an assignment of Beck's rights against Grange. Hinton filed a request for entry of default. One day later, Grange, pursuant to motion, filed a complaint-in-intervention. Hinton moved to strike the complaint-in-intervention. The trial court granted Hinton's motion. Grange appealed.

The Court of Appeal affirmed the trial court ruling. It noted that intervention is discretionary with the trial court. Intervention is allowed where the intervenor has a direct and immediate interest in the litigation, intervention will not enlarge the issues in the case and the reasons for intervention outweigh opposition by existing parties.

A direct interest in the litigation has been defined as where the judgment in the action of itself adds to or detracts from the intervenor's legal rights without reference to rights and duties not involved in the litigation. Intervention may be denied where the interests of the intervenor are consequential, that is, the action does not directly affect the intervenor, although the results of the action may indirectly benefit or harm it.

Prior court decisions have held an insurer who refused to defend, except upon a reservation of rights, only has a consequential interest, not justifying intervention. The Court noted this conclusion has also been reached where the insurer has denied coverage and refused to defend. The primary reason for this conclusion is that an insurer who disclaims liability on its policy has no interest justifying intervention in the action against its insured. By denial of a defense, the insurer loses its right to control the litigation.

The Court held Grange, by its refusal to defend, waived the chance to contest the liability of its insured. Thus, the trial court was correct in refusing to allow it to inject itself into the litigation. The Court stated the fact that Grange would be sued by Hinton, after obtaining a judgment against Beck, was an insufficient direct interest. By refusing to defend, the Court held the insurer waived the right to litigate fault or damages. Thus, the trial court order denying intervention was affirmed.

COMMENT

This opinion holds that after an insurer denies a defense to its insured, it has no right to participate in the action against the insured. The insurer's remedy at that point is to raise any issues it has when it is sued.

Continued on page 6

Insurance Commissioner Poizner Announces Palmdale Man Sentenced to Serve 14 Years in Prison for Insurance Fraud, Grand Theft and Perjury

Insurance Commissioner Poizner announced today that Larry Butler, 40, of Palmdale, was convicted of insurance fraud, grand theft and perjury. He was sentenced on September 15 to serve 14 years and 4 months in state prison.

The Department of Insurance launched an investigation after receiving a complaint that Larry Butler allegedly filed multiple small claims court claims against several razor manufacturers for the same injury. Butler claimed that razors, manufactured by Phillips, Proctor & Gamble, Eveready/Energizer and Panasonic, during a five-month period, caused him to have ingrown hairs, which scarred his face. In support of his claims, Butler submitted the identical photographs of the alleged injury and the same receipt and price quote for dermatological treatment to all companies. Butler collected $9500 from the companies, who are self-insured, as a result of his fraudulent claims. One company suspected that Butler filed the claim fraudulently, and reported this to the Department of Insurance.

The Los Angeles County District Attorney's Office prosecuted this case.

continued from page 5

Coverage - Notification of Contractual Limitations

Superior Dispatch, Inc. v. Insurance Corporation of New York Court of Appeal, Second District (July 30, 2009)

Insurance policies often have a contractual limitation provision in the policy requiring the filing of a claim within a certain period of time. This case dealt with the duty of an insurer to notify its insured of this provision under the California Department of Insurance Regulations.

Superior Dispatch, Inc., a trucking company, purchased a policy with Insurance Company of New York ("Inscorp"). The policy provided both liability and property coverage under various forms. The Cargo Coverage Form had a condition providing for a one-year contractual limitation provision for suit seeking recovery for any claim under the policy.

Matson Navigation Company hired Superior to carry freight by truck from its terminal at the Port of Los Angeles to another location. Superior was hauling a dump truck on a flat bed trailer when the cab of the dump truck struck an overpass. Matson demanded Superior to pay for the full value of the vehicle. Superior submitted the claim to Inscorp on July 17, 2003. The claim was denied on November 5, 2003. Various reasons were stated for the denial of coverage. The letter did not notify Superior of the one-year contractual limitation provision. Superior sent a letter on January 7, 2004, challenging the denial. Inscorp again rejected the claim on February 11, 2004. Again, there was no reference to the one-year contractual limitation provision.

Superior sued Inscorp on May 20, 2005. Damages were sought for breach of contract, breach of the covenant of good faith and fair dealing and punitive damages. Inscorp moved for summary judgment based on the one-year contractual limitation period. The trial court concluded the action was barred. Superior appealed.

The Court of Appeal reversed. It noted that a defendant may be equitably estopped from asserting a statutory or contractual limitations period as a defense if its act or omission caused the plaintiff to refrain from filing a timely suit and the plaintiff's reliance on the defendant's conduct was reasonable. At the time of the correspondence between the parties, Superior was represented by counsel.

The Court noted that the California Department of Insurance Regulations contain certain rules with regard to disclosure by insurers in connection with claims presented. Section 2695.4(a) requires an insurer to notify its insured claimant of contractual limitation provisions and other policy provisions that may apply to the claim. Section 2695.7(f) requires an insurer to notify a claimant of any statute of limitations and any other time period requirement upon which the insurer may rely to deny a claim. This section requires the notice not less than sixty days prior to the expiration date, but this rule does not apply to a claimant represented by counsel.

The Court stated that § 2695.7(f) was intended to include contractual limitation provisions. The Court noted that § 2695.4(a) applies only to first party claimants. Section 2695.7(f) applies to first party and third party claimants. The Court noted that § 2695.4(a) does not state that the notice requirement is inapplicable if the claimant is represented by counsel. Section 2695.7(f) does so provide. The Court stated an insurer has a duty under § 2695.4(a) to notify its insured claimant of a contractual limitation provision even if represented by counsel. The failure to do that can give rise to equitable estoppel.

In this case, Inscorp failed to provide notice of the contractual limitation provision to Superior, its insured claimant. The Court stated triable issues of fact existed as to whether this gave rise to equitable estoppel. Thus, the summary judgment had to be reversed.

The Court rejected Inscorp's other arguments regarding coverage, holding that a trial was necessary in order to determine those issues. The judgment was therefore reversed with directions to vacate the order granting the summary judgment and enter a new order denying the motion.

COMMENT

This case discusses the interaction of these two regulations that have been issued by the Department of Insurance regarding the providing of notice of contractual limitation provisions. For further discussion of these provisions, we refer the reader to the text of the opinion, which discusses the history and intent of these regulations.

CAIIA REGISTRATION FORM

California Association of Independent Insurance Adjusters
ANNUAL CONVENTION –October 30, 2009
RANCHO LAS PALMAS RESORT & SPA
41-000 Bob Hope Drive
Rancho Mirage, California 92270
Tel: 760-568-2727

Mention California Association of Independent Insurance Adjusters (CAIIA) for special room rates
Attendees must make their own hotel reservations !

For the CAIIA Golf Tournament on 10/29/09 - Contact Jeff Stone at (951) 371-8845
Golf Registration Forms are available at www.caiia.com

Your Name ______________________ Significant Other ______________________
Company ______________________
Address ______________________
Phone ______________________ Fax ______________________
E-Mail ______________________

EVENT	COST	#TICKETS	Total Price
Member Convention Package *(Includes Breakfast, CE Class/Guest Speaker & Luncheon, and Dinner/Reception)*	$ 170.00	______	$______
Spouse/Guest Fee (***)	$ 90.00	______	$______
Non-Member (**) Convention Package	$ 180.00	______	$______
4 Hour CE Class (Includes Breakfast/Speaker/Lunch)	$ 100.00	______	$______
President's Galas Dinner/Reception	$ 85.00	______	$______
		Grand Total Payable	$______

SCHEDULED EVENTS

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

		You	Spouse/Guest
10/29 – 6:00 P.M	Registration/Hosted Reception	[ ]	[ ]
10/30 – 7:00 A.M.	Registration/Breakfast	[ ]	[ ]
10/30 – 8:00 A.M.	Seminar	[ ]	[ ]
10/30 – 12:00 P.M.	Luncheon	[ ]	[ ]
10/30 – 2:00 P.M.	Business Meeting (*)	[ ]	[ ]
10/30 - 10:00 AM	Spouse/Guest lunch (***)	[ ]	[ ]
10/30 – 7:00 P.M.	Reception	[ ]	[ ]
10/30 – 8:00 P.M.	Installation Dinner	[ ]	[ ]

(*) Members Only !

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

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Credit Card:	AMEX ◯ VISA ◯ M/C ◯	3 Digit Security #	
Cardholder:		Signature:	
Card No.		Expiration Date:	
Card Address (City, State/Zip)			

(**) 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 includes alternative activity, lunch and dinner on Friday (does not include CE Classes or Guest Speaker)

Early Registration is Encouraged. Cut-off date is October 2, 2009.

Children's Science Exam

If you need a good laugh, try reading through these children's science exam answers . . . .

Q: Name the four seasons.
A: Salt, pepper, mustard and vinegar.

Q: Explain one of the processes by which water can be made safe to drink.
A: Flirtation makes water safe to drink because it removes large pollutants like grit, sand, dead sheep and canoeists.

Q: How is dew formed?
A: The sun shines down on the leaves and makes them perspire.

Q: How can you delay milk turning sour? (Brilliant, love this!)
A: Keep it in the cow.

Q: What causes the tides in the oceans?
A: The tides are a fight between the Earth and the Moon. All water tends to flow towards the moon, because there is no water on the moon, and nature hates a vacuum. I forget where the sun joins in this fight.

Q: What ate steroids?
A: Things for keeping carpets on the stairs.

Q: What happens to your body as you age?
A: When you get old, so do your bowels and you get intercontinental.

Q: What happens to a boy when he reaches puberty?
A: He says good-bye to his boyhood and looks forward to his adultery. (The kid gets an A+ for this answer!)

Q: Name a major disease associated with cigarettes.
A: Premature death.

Q: How are the main parts of the body categorized? (e.g., abdomen)
A: The body is consisted into three parts – the brainium, the borax and the abdominal cavity. The brainium contains the brain; the borax contains the heart and lungs, and the abdominal cavity contains the five bowels, A, E, I, O, and U.

Q: What is the fibula?
A: A small lie.

Q: What does 'varicose' mean? (I do love this one . . .)
A: Nearby.

Q: Give the meaning of the term 'Caesarian Section'.
A: The Caesarian Section is a district in Rome.

Q: What does the word 'benign' mean?
A: Benign is what you will be after you be eight.