CAIIA Status Report

OCTOBER 2011

NEW REQUIREMENT UPON RECEIPT OF A NEW CLAIM

Eagled eyed adjuster Steve Anderson of Sams and Associates brought the following to the attention of the Executive Office of the CAIIA. This new law requires that all insureds be advised of Insurance Code Sections 790.03(h) and (i) within 15 days upon receipt of a new claim. If the insured asks for portions of the Fair Claims Settlement Practices Act, we must send a copy to the insured, also, as outlined belowThe text of the bill is quoted below. Please note that the law specifically states that the insurer is required to notify the **insured** and not the claimant. You may wish to change your initial contact letter to the insured to comply with the new law.

SECTION 1. Section 790.034 of the Insurance Code is amended to read:

790.034. (a) Regulations adopted by the commissioner pursuant to this article that relate to the settlement of claims shall take into consideration settlement practices by classes of insurers.

(b) (1) Upon receiving notice of a claim, every insurer shall immediately, but no more than 15 calendar days after receipt of the claim, provide the insured with a legible reproduction of subdivisions (h) and (i) of Section 790.03 along with a written notice containing the following language in at least 10-point type:

"In addition to Section 790.03 of the Insurance Code, Fair Claims Settlement Practices Regulations govern how insurance claims must be processed in this state. These regulations are available at the Department of Insurance Internet Web site, www.insurance.ca.gov. You may also obtain a copy of this law and these regulations free of charge from this insurer."

(2) Every insurer shall provide, when requested orally or in writing by an insured, a legible reproduction of Section 790.03 of the Insurance Code and

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NOTICE!

As of January 1, 2012, this newsletter will be delivered by e-mail only. If up until now you are only receiving the *Status Report* by regular mail, please send your e-mail address to barrettclaims@sbcglobal.net so that we can keep you on our circulation list. Your e-mail address will not be dessiminated or used for any other purpose. We value your readership and welcome any comments you may care to add when sending us your e-mail address.

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California Association of
Independent Insurance Adjusters

An Employer Organization of Independent Insurance Adjusters

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Status Report Now Available by E-mail

If you would like to receive the *Status Report* via e-mail please send your e-mail address to *info@caiia.org.*

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PRESIDENT'S MESSAGE

It's hard to believe, but my term as President is up and somehow the CAIIA still lives and carries forth. A well respected Past President once commented to me that this organization is a well oiled machine; maintenance is the only requirement for successful operation. Retrospect of a completed term, I can vouch for this. And while during this last term, there were a few moments which had us facing crisis, thanks to our distinguished governing board, devoted committees and help from our friends in the industry, this organization now continues into its 65th year of advancing the professionalism of adjusters. Wow! And personally, let me just say what an honor it has been for me to have had this opportunity to serve such a fine organization. You know the feeling you get after you successfully conclude a well handled claim which demands every ounce of your claims handling faculties? For me, that doesn't even come close to the feeling of fulfillment I get when I look back and realize that I actually presided over one of most prestigious, most active and effective claims associations in the country.

Credit for this past year's success in carrying out its mission belongs to a number of devoted members, who year after year, donate their talents and time to our cause. Reverence must be paid to the very special committee of now Past Presidents, (Doug Jackson and Sharon Glenn), that renovated our By-Laws in 2005, adapting this organization from one with a paid Executive Director to a completely volunteer association. They very adeptly foresaw what it took to operate this group and quite skillfully implemented the rules needed to carry on. Time has proven their prophecy and we owe them our gratitude for the CAIIA's present constitution and success. Past President Sterrett Harper continues to man several of our committees and has for several years now done an excellent job as editor for this very circular. Our cordial membership committee of Kearson Strong and Steve Einhaus work selflessly to recruit and qualify new members. Our education committee serves a vital role, carrying out our core mission and we were blessed to have Mr. Tim Waters overtake this relatively work intensive committee for us this year. The directory committee is a time consuming position which is presently headed by Past President Doug Jackson and Director Debbie Buse. We also owe special thanks to Nancy DePasquale and Colrena Johnson who for the past 2 years have served as our volunteer legal counsel. While all of our committees are critical to the CAIIA's continuity, there are simply too many to mention all of them in their entirety. I personally wish to thank every committee member for your time and efforts this year.

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Privette Trumps The Nondelegable Duty Doctrine

By Elizabeth D. Rhodes, Esq., Offices of Willis/DePasquale - San Francisco, CA

Seabright v. US Airways, Inc., (S182508)

On August 22, 2011, the Supreme Court of California issued its latest decision extending the protections afforded under the *Privette* doctrine to companies sued under allegedly nondelegable duties set forth in Cal-OSHA regulations, in its landmark decision *Seabright Insurance Co. v. US Airways, Inc.*, Case No. S182508 ("*Seabright*"). The *Privette* doctrine, based on a 1993 Supreme Court decision, is essentially that one who hires a contractor generally cannot be held liable to a contractor's employee for work-related injuries unless the hirer has concealed a preexisting dangerous condition or engaged in some other form of affirmative misconduct that contributes to the employee's injury. In the 2002, the Supreme Court further clarified the *Privette* doctrine in the multi-employer worksite context, holding that the hirer of an independent contractor is liable for a workplace injury of the contractor's employee only if the hirer retained control over the contractor's work and exercised that control so as to "affirmatively contribute" to the employee's workplace injury. (*Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 210.) With the *Seabright* decision, the Supreme Court has now applied that analysis to circumstances where an injured worker of an independent contractor sues on a nondelegable duty theory. In that context, *Seabright* holds that where a passive hirer retains no control over the work being undertaken by the contractor, the hirer "presumptively delegates any tort law duty of care the hirer had under Cal-OSHA safety regulations to ensure workplace safety of the independent contractor's employees."

The *Seabright* case arises from a work-related injury accident at San Francisco International Airport. The defendant airline US Airways hired an experienced millwright company Lloyd W. Aubry (Aubry) to repair and maintain baggage conveyor belt systems that are so vital to the airlines' operations, because the maintenance and repair of those systems constitute specialty expertise that the airline does not have. The airport is the actual owner of the conveyor, but U.S. Airways uses it under a permit and has responsibility for its maintenance. US Airways neither directed nor had its employees participate in Aubry's work The conveyor lacked a safety guard which was required under the applicable Cal-OSHA regulation. Aubry's employee Verdon caught his arm in the moving parts of the conveyor belt during an inspection. Plaintiff Seabright Insurance Company, Aubry's work-

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PRESIDENT'S MESSAGE

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Although it is the president's job to "pull the strings of the marionette" so to speak, I would be remiss if I didn't let on that there are a number of past presidents who oversee and operate the strings of the President when needed. Not that I am admitting to be a puppet president, but several of our past presidents have made themselves available for advice and given me tips on just what to do and when. Past Presidents Peter Schifrin, Pete Vaughan and Steve Wakefield have been particularly supportive in terms of giving advice, ideas and/or being available to help when help was needed. For that I am very thankful. And to our spirited board of directors and executive officers, thank you all for your support this past year.

The experience of the past year for me has been one of growth, both personally and professionally. My wonderful wife has been there for help and moral support all along. And now, it is with ambivalence that I exit this office and advance to the office of "Immediate Past President". You see, after completing only one annual cycle of all of the CAIIA's activities and events, I now know what to expect and am certain that I could do a better job if I were to repeat with another term. But I am also excited to cede this position to Mr. Jeff Caulkins, who is not only one of the most skilled and knowledgeable adjusters I know, but happens to be one of the kindest, most optimistic and energetic individuals I have ever met in this business. Indeed, I expect Jeff's regime to be one of benevolence and progress for the CAIIA. I am looking forward to working with him and future Presidents to further the CAIIA's mission.

PHIL BARRETT
President - CAIIA 2010-11

Coverage: Pollution Exclusion - Asbestos

Villa Los Alamos Homeowners Association v. State Farm General Insurance Company Court of Appeal, First District (August 25, 2011)

In *MacKinnon v. Truck Insurance Exchange* (WLR September 4, 2003), the California Supreme Court previously held that a standard pollution exclusion clause in a CGL policy was intended to exclude coverage for injuries resulting from events commonly regarded as environmental pollution. This case determined whether the same standard applies in a first party property insurance policy.

The Villa Los Alamos Homeowners Association hired Cal Coast Construction to scrape the acoustical "popcorn" ceilings and stairways in one of its building. The Association was aware that there was some asbestos in the ceiling, and a resident was privy to a report that the material contained less than one percent asbestos. Cal Coast performed its work, and in the process disturbed asbestos contained in the ceilings, releasing asbestos fibers into the air, the common area hallways and stairwells as well as individual units and common areas and public spaces outside the building. The Bay Area Quality Management District cited Cal Coast and removed them from the project, and ordered the Association to perform comprehensive abatement of the building. Ultimately the Association paid $650,000 to fully clean and abate the building.

The Association had a policy of insurance with State Farm General Insurance Company. This provided coverage for first party property losses, as well as third party business losses. It was an "open peril" form of policy, in which the insurer provided coverage for all losses not specifically excluded by the policy. Section I exclusions contained the following pollution exclusion: "2. We do not insure under any coverage for any loss caused by one or more of the items below…1. the presence, release, discharge or dispersal of pollutants, meaning any solid, liquid, gaseous or thermal irritant or contaminant, including vapor, soot fumes, acids, alkalis, chemicals and waste…"

The Association tendered its claim for repairs to the property to State Farm, which denied coverage based on the pollution exclusion. Subsequently, the Association sued Cal Coast, which cross-complained against the Association and its property manager. The property manager tendered its defense to the Association, which tendered both defenses to State Farm. It also asked State Farm to reevaluate its first party coverage for the damages. State Farm denied the tenders, based on the total pollution exclusion.

The Association sued State Farm, asserting causes of action for breach of contract, breach of the covenant of good faith and fair dealing and declaratory relief. State Farm moved for summary adjudication based on the pollution exclusion. The trial court granted the motion, ruling that "the test for whether the pollution exclusion excludes coverage is based upon the type of pollutant and whether it is released in a way that constitutes (environmental) pollution." The court held that it was "common knowledge" that asbestos was a pollutant. The Association appealed.

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Privette Trumps The Nondelegable Duty Doctrine

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ers' compensation insurer, paid Verdon benefits based on the injury and then sued defendant US Airways, claiming the airline caused Verdon's injury by failing to comply with an allegedly nondelegable safety regulation requiring a safety guard. The Supreme Court has now clarified that even where such a safety regulation has been breached, where the evidence demonstrates that the hirer has not retained control of the work or has "retained control so as to affirmatively contribute to the injuries claimed by the worker," no liability attaches. Had the Court ruled in favor of the workers' compensation insurer, the holding would have considerably increased the risks associated with doing business in commercial and industrial business sectors.

New Requirement Upon Receipt of a New Claim

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copies of Sections 2695.5, 2695.7, 2695.8, and 2695.9 of Subchapter 7.5 of Chapter 5 of Title 10 of the California Code of Regulations, unless the regulations are inapplicable to that class of insurer. This law and these regulations shall be provided to the insured within 15 calendar days of request.

(3) The provisions of this subdivision shall apply to all insurers except for those that are licensed pursuant to Chapter 1 (commencing with Section 12340) of Part 6 of Division 2, with respect to policies and endorsements described in Section 790.031.

CAIIA Announces Steven Tiglhman Scholarship Recipient

CAIIA is proud to announce the recipient of this year's Steven Tiglhman Scholarship.

$500 has been awarded to Ms. Farrah Willis of Vacaville, CA.

Farrah is currently enrolled in the Business-Insurance program at Solano Community College in Fairfield, CA where she is working toward Associate Degrees in Business and Business-Insurance. She also interns with a State Farm Agency and has developed a passion for the insurance business.

Congratulations Farrah! We at the CAIIA wish you all the best in your future insurance career.

CAIIA THANKS CPLIC

CAIIA wishes to express its gratitude to Claims Professionals Liability Insurance Company, (CPLIC), for its generous donation of a Power Point projector. The projector will come in handy for our educational programs held several times during the year. Thank you CPLIC!

Weekly Law Resume

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

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The Court of Appeals upheld the trial court's ruling. The Court analyzed this first party case in the context of the Supreme Court's decision in *MacKinnon*, which involved a third party claim over spraying of pesticides at an apartment complex which allegedly caused the death of a tenant. The *MacKinnon* court held that a reasonable policyholder would understand the policy to exclude "injuries arising from events commonly thought of as pollution, i.e., environmental pollution." On the other hand, despite the exclusion, the *MacKinnon* court felt an insured would still have a reasonable expectation that they would have coverage for "ordinary acts of negligence resulting in bodily injury." As applied in *MacKinnon*, this meant that the spraying of pesticides was an "ordinary act of negligence," and was not excluded.

The Court of Appeals noted here that *MacKinnon* involved third party liability claims, which are not analogous to first party property coverage claims. Nevertheless, when the language of the exclusion was the same under both coverages, as it was here, the court concluded that a reasonable insured would expect both exclusions to apply to environmental pollution.

The Court next determined that a reading of the exclusionary language led to the conclusion that asbestos is a "pollutant" within the policy exclusion, noting that courts have previously determined that silica is likewise a "pollutant," even if it is not one of the enumerated definitions of the same. Secondly, the asbestos was "released" as that term is used in the exclusion by the construction and related activities.

The Court was not persuaded by the Association's assertion that a single, unintentional asbestos release was

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Insurance Law News

Submitted by Smith, Smith & Feeley, LLP - Irvine, CA

Deliberate Act Causing Unintended Injury Is Not "Occurrence"

An insured's deliberate act that caused unintended injury to the claimant was not an "occurrence," or "accident," within the meaning of a liability policy. (*State Farm General Insurance Company v. Frake* (2011) WL 2714179)

Facts

John King and Patrick Frake were friends. During high school and continuing thereafter, King, Frake and several other friends frequently engaged in consensual "horseplay" which involved hitting each other in the groin.

King and Frake attended a baseball game together where Frake became intoxicated. After the game, as part of their horseplay tradition, King attempted to hit Frake in the groin, but Frake blocked the attempt. Frake then "retaliated" by throwing his arm out to the side and striking King in the groin. Although Frake did not intend to injure King, King suffered a serious injury to his testicles.

King later filed a personal injury action against Frake alleging negligence, assault and battery and intentional infliction of emotional distress. Frake tendered the defense of the lawsuit to State Farm Insurance General Insurance Company pursuant to a renters policy that provided coverage for damages because of bodily injury caused by an "occurrence." The policy defined the term "occurrence" as "an *accident* ...." Eventually, State Farm agreed to defend Frake against King's lawsuit, under a reservation of rights.

King's lawsuit against Frake proceeded to trial solely on a negligence theory. The jury found that Frake had acted negligently and awarded King over $450,000 in damages. Frake and King then entered into an agreement in which King promised not to execute on Frake's personal assets, and in exchange King received an assignment of Frake's rights against State Farm.

State Farm filed a declaratory relief action seeking a determination that it had no duty to defend or indemnify Frake against King's claims. The trial court concluded that State Farm *did* have a duty to defend and indemnify Frake, and entered judgment against State Farm. State Farm appealed.

Holding

The Court of Appeal reversed. The appellate court acknowledged that an "accident" may exist "when any aspect in the causal series of events leading to the injury or damage was unintended by the insured and a matter of fortuity." However, "where damage is the direct and immediate result of an intended ... event, there is no acci-

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Weekly Law Resume

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

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merely an ordinary act of negligence, as in MacKinnon, for which coverage was reasonably expected by the insured and not excluded. While there were legitimate and legal reasons for spraying with pesticides, in this case there were rules and regulations for how one dealt with asbestos that were ignored here, taking the Association's actions out of "ordinary negligence." Further, although the Association argued that this was a "one time" release, the court noted that the release of asbestos from a product into the air people breathed constituted a health hazard for which no level of exposure was safe. The Court held that the Association's actions constituted a "release" of a "pollutant" which was properly excluded under the policy. The trial court's decision was affirmed.

COMMENT

This case applies the *MacKinnon* standard for determination of release of a pollutant to first party coverage, and holds that the release of asbestos from a property is excluded under the same. Businesses and property owners with this exclusion will have no protection of their own against the same if asbestos is mistakenly released through construction or repair efforts.

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dent." Here, Frake admitted that he intended to strike King in the groin area, and it was undisputed that King suffered injuries as a direct result of the strike. Therefore this was not a case where some "unexpected, independent, and unforeseen happening" in the causal chain produced the resulting harm. Rather, King's injuries were "the direct and immediate result of an intended ... event." The mere fact that Frake did not intend to injure King did not transform Frake's intentional conduct into an accident.

Because King's claims against Frake did not arise from an "occurrence," or "accident," State Farm did not have any duty to defend or indemnify Frake in the underlying action brought by King.

Comment

The *Frake* court acknowledged and discussed a prior case, *State Farm Fire & Casualty Co. v. Superior Court* (2008) 164 Cal.App.4th 317 (*Wright*). In *Wright*, the insured attempted to throw the claimant into a swimming pool, but did not use enough force, with the result that the claimant landed on a step in the shallow end and suffered injuries. The court in *Wright* found that, under those circumstances, where the insured's deliberate conduct produced an unintended injury to the claimant, there was an "occurrence," or "accident." However, the *Frake* court found that *Wright* was not controlling, for at least two reasons.

First, *Wright* was factually distinguishable because in *Wright* the insured's deliberate conduct (i.e., throwing the claimant into the pool) was followed by an "intervening act" (i.e., the claimant landing on a step in the shallow end) which in turn produced the injury to the claimant. By contrast, in *Frake*, there was no "intervening act" between the insured's deliberate conduct and the claimant's injury.

Second, to the extent *Wright* held that an "occurrence" or "accident" includes a deliberate act that directly causes unintended harm, such a holding "is contradictory to well-established California law." Specifically, according to the *Frake* court, an "occurrence" or "accident" is not present where the insured commits a deliberate act that directly results in unintended harm to the claimant.

COMMISSIONER JONES ANNOUNCES ARRESTS AND ARRAIGNMENTS OF CENTRAL VALLEY WOMEN FOR INSURANCE FRAUD

Mother and daughter pair face fines of up to $200,000

Insurance Commissioner Dave Jones today announced the arrest of Henrietta Brice, 53, and her daughter Larrisa Coleen Brice, 24, both from Stockton. Henrietta was booked on four felony counts including two counts of Insurance Fraud, one count of Arson and one count of Grand Theft. Larissa was booked on two counts of Insurance Fraud. Both were arraigned on January 12, 2011 in San Joaquin County Superior Court. They each face fines of up to $200,000 and $100,000 respectively and five years in prison.

According to California Department of Insurance (CDI) Investigators, on December 29, 2009 Henrietta Brice was stopped while driving her 2004 Buick Rendezvous by the San Joaquin County Sheriff's Department. During this enforcement stop, Brice essentially told the deputy that he wouldn't be seeing her driving that car anymore and that she was going to call her insurance company and get herself a new car. On December 30, 2009 an explosion was reported in the area of E. Wyman Road and S. McKinley Avenue in French Camp, CA. Brice's vehicle was found abandoned and burning in the middle of a field. On December 31, 2009, Brice called her insurance company, Unitrin Direct and reported that her 2004 Buick Rendezvous had been stolen and burned on the previous day. On January 5th and 14th, 2010, Henrietta made statements about the date and time that she last drove her vehicle which was impossible due to the fact that the vehicle was on fire prior to that. Brice claimed to have a flat front right tire the night prior to her vehicle being left near Davis Road and Wagner Heights in Stockton. She alleged her cell phone was dead so she was unable to call anyone for assistance.

Larrisa Coleen Brice made a statement to the insurance company that her mother called her and they discussed Larrisa giving her mother a ride to the location where she allegedly left her car. After a check of phone records, this claim was unsubstantiated. Sacramento Fraud Division investigated this case and the San Joaquin County District Attorney is prosecuting the case.

Stuff you didn't know you didn't know!

Everyday more money is printed for Monopoly than the U.S. Treasury. I KNOW THAT'S HARD TO BELIEVE!

Men can read smaller print than women can; women can hear better.

Coca-Cola was originally green.

It is impossible to lick your elbow.

The State with the highest percentage of people who walk to work: Alaska

The percentage of Africa that is wilderness: 28%

Now get this . . .

The percentage of North America that is wilderness: 38%

The cost of raising a medium-sized dog to the age of eleven: $16,400

The average number of people airborne over the U.S. in any given hour: 61,000

Intelligent people have more zinc and copper in their hair

The first novel ever written on a typewriter, Tom Sawyer.

The San Francisco Cable Cars are the only moble National Monuments.

Each king in a deck of playing cards represents a great king from history: Spades - King David; Hearts - Charlemagne; Clubs - Alexander the Great; Diamonds - Julius Caesar.

111,111,111 x 111,111,111 = 12345678987654321

If a statue in the park of a person on a horse has both front legs in the air, the person died in battle. If the horse has one front leg in the air, the person died because of wounds received in battle. If the horse has all four legs on the ground, the person died of natural causes.

Only two people signed the Declaration of Independence on July 4, John Hancock and Charles Thompson. Most of the rest signed on August 2, but the last signature wasn't added until 5 years later.

Q: Half of all Americans live within 50 miles of what?
A: Their birthplace,

Q: Most boat owners name their boats. What is the most popular boat name requested?
A: Obsession.

Q: If you were to spell out numbers, how far would you have to go to get th the letter 'A'?
A: One thousand.

Q: What do bulletproof vests, fire escapes, windshield wipers and laser printers have in common?
A: All were invented by women.

Q: What is the only food that doesn't spoil?
A: Honey.

Q: Which day are there more collect calls than any other day of the year?
A: Father's Day.