CAIIA Status Report

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October 2018

DOI Press Release

Commissioner approves new program to streamline licensing process for independent insurance adjusters

Program should also aid natural disaster response

Insurance Commissioner Dave Jones announced today he has approved a Universal Claims Certification (UCC) program from Claims and Litigation Management Alliance (CLM) designed to streamline the licensing process for independent insurance adjusters.

The UCC makes the process of licensing independent insurance adjusters who wish to acquire and manage their independent insurance adjuster licenses in multiple states more efficient. The UCC does not replace an independent insurance adjuster license, but makes the process of securing a license more efficient. Both licensed and unlicensed individuals can acquire a UCC. However, unlicensed individuals must first go through an intensive training by completing a 40-hour online pre-certification education program and successfully pass an examination to earn the UCC.

"As Insurance Commissioner, one of my top priorities is making sure California's insurance market is healthy and vibrant," said Insurance Commissioner Dave Jones. "The Universal Claims Certification process is designed to streamline the independent insurance adjuster licensing process and reduce costs. Also, the UCC program sets requirements for licensees that exceed the requirements under current California law, meaning it requires licensees to complete more continuing education, which greatly benefits the independent insurance adjusters and consumers. When this program was filed, my department worked to expedite approval so independent insurance adjusters would benefit from the efficiency the UCC is designed to provide. I encourage more organizations to develop innovative programs and business models, like this one, to better serve the needs of the California insurance market."

Currently, independent insurance adjuster applicants are not required to complete any prelicensing education. California's applicants are only required to take and pass the independent insurance adjuster license examination and meet the license requirements to receive an independent insurance adjuster license. For a licensee to maintain the UCC, the independent insurance adjusters must complete 24 hours of continuing education every two years including five hours of insurance law and ethics. The UCC program's insurance law and ethics requirement exceeds California's required three hours of law and ethics that is a part of and not in addition to the 24-hour continuing education requirement.

Once independent insurance adjusters acquire the UCC, they will be able to more quickly obtain a license in the states where the UCC is currently approved, including Alabama, Florida, Georgia, Mississippi, Texas, and now California. This will allow out-of-state adjusters to be more readily available when a natural disaster occurs.

"For years, the CLM membership has complained of the tedious state-by-state adjuster licensing process. We first worked to tackle the process of managing multiple licenses with our Tracker product, then we started to work with various states to actually change the licensing process," says CLM Founder and former CEO Adam Potter. "It's exciting to see this work come to life as we launch the UCC."

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Inside this issue…..

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President's Message

To start, I would like to reach out and thank the organization for allowing me to serve as president for the 2018-2019 term.

There is nothing like stepping right into it! We just concluded our annual conference on September 21st and I am tasked with the assignment of preparing my greeting to all of you on Monday the 24th. A special thanks to Sterrett Harper for the "reminders" (even before I took the office!) to get my comments in as soon as possible. Keep up the great work, Sterrett!

John Ratto

CAIIA President

I would like to acknowledge our new board members. We welcome Phil Barrett (Past Pres.) and Lee Ann Junge as our new two-year directors. Bill McKenzie and Jeff Caulkins (both Past Presidents of the organization) have moved to the one-year director positions on the Board.

Gene Campbell has moved up to Vice President and a special thanks to Richard "Rick" Kern who has accepted the position of Secretary/ Treasurer. Rick was instrumental as a committee member charged with handling our education and the tough job of coordinating classes in Northern and Southern California.

The CAIIA owes a huge debt of gratitude to Kevin Hansen, a partner with McCormick Barstow LLP in Fresno, for accepting another term as our "Of Counsel". Kevin has been very active with the CAIIA during the 2017-2018 calendar year. He has been instrumental in assisting with a bylaw revision regarding our membership.

We just had our annual meeting in Berkeley, which was well run by our immediate past president, Mr. Paul Camacho. A special thanks to my wife, Catherine "Kay" Naumann, who assisted in selecting and coordinating the venue in Berkeley and also arranged a lovely gala dinner at the Lake Chalet restaurant in Oakland.

As part of my platform this year I would like to see our organization grow not only in membership but also in visibility. To make that happen, I welcome participation in our organization. If you have not participated in the past, I urge you to get involved. Thanks to Peter Schifrin, we have a strong connection to the Department of Insurance in Sacramento. Peter Schifrin was our CAIIA representative on the Curriculum Board of the DOI.

As past president Paul Camacho mentioned in his previous comments we are working diligently to a proposed change to allow any licensed CA adjuster to join our organization. We thoroughly reviewed that bylaw change in our meeting and hope to have a vote regarding same before the end of the new year.

Here's to a successful new year!

John Ratto

CAIIAPresident

NEWS FROM AND FOR OUR MEMBERS

SAVE THE DATE

The CAIIA is proud to be exhibiting at or sponsoring the following upcoming events:

March 5 & 6, 2019 Combined Claims Conference, Hyatt Regency, Orange County

NEW LICENSING OPTION FOR CALIFORNIA INDEPENDENT INSURANCE ADJUSTERS

The California Department of Insurance has approved the Universal Claims Certification (UCC) program created by the Claims and Litigation Management Alliance (CLM) which will be a new process to obtain an independent adjuster license in California.

Both licensed adjusters and those without a license can acquire a UCC. Unlicensed adjusters must complete a 40-hour course and exam to acquire the UCC. Once an adjuster has the UCC, they can quickly obtain a license in states where the UCC is approved, including California.

Adjusters who handle claims in multiple states will be able to use the UCC to obtain licenses in those states as they come on line, Currently the UCC is also approved in Alabama, Florida, Georgia, Mississippi and Texas.

For a licensee to maintain the UCC, he or she must complete 24 hours of continuing education every two years, including five hours of insurance law and ethics. The UCC program's insurance law and ethics requirement exceeds California's required three hours of ethics that is a part of and not in addition to the 24-hour continuing education requirement.

It is anticipated by the CLM that registration for the UCC will be open in a few weeks.

Peter Schifrin CAIIA – Past President

Dinner at the Lake Chalet Restaurant in Oakland. On 9.21.18 after the CAIIA Annual meeting .

From left: Jeff Caulkins, Pete Vaughn, Kim Hickey, John Ratto, Paul Camacho, Phil Barrett, Bill McKenzie, Tanya Gonder.

Press Release from the DOI

Court upholds Fair Claims Settlement Practices Regulations after decade-long legal challenge to insurance commissioner's authority

The decision paves the way to affirming $91 million in fines against PacifiCare for unlawful claims-handling practices

After a decade of legal wrangling over the regulations that implement the Unfair Insurance Practices Act (UIPA), a three-justice panel of the California Court of Appeal, 4th Appellate District, upheld the Insurance Commissioner's Fair Claims Settlement Practices Regulations, which prescribe how insurance companies must process insurance claims and are the foundation in determining the number of violations committed when assessing fines against insurers that have committed unfair claims practices.

Department of Insurance examinations of PacifiCare's claims-handling uncovered evidence of numerous unfair claims practices-which included wrongful denials for life-saving treatment for people battling serious illness and claim payment denials for providers and hospitals-all because the insurer was focused on maximizing profits through what it called "efficiencies" measures after the 2015 botched $7 billion acquisition of PacifiCare by UnitedHealthcare. The Department examinations also uncovered evidence the company was well aware of the egregious issues.

Under the Insurance Code, these unfair acts or practices include misrepresenting what medications or treatments an insurance policy covers, failing to promptly pay claims where liability is reasonably clear, and forcing claimants to file lawsuits to get full payment, and other acts. The Insurance Code allows the commissioner to impose fines of up to $5,000 each time an insurer commits an unfair act or practice on a consumer, or up to $10,000 each time if the insurer did so willfully.

"UnitedHealthcare purchased PacifiCare and imposed cost-cutting measures that destroyed PacifiCare's claims-handling processes and its arguments in litigation that insurance companies should be allowed to willfully harm consumers as long as they don't do it too often, reflect a gross disregard of the lives and well-being of the consumers who paid for the promise of coverage," Commissioner Jones said. "Customers have no choice but to rely on the integrity of their health insurance companies. PacifiCare breached that trust. By any measure, 908,000 violations reflect a general business practice of violating consumer protection laws. I am delighted the court of appeal has affirmed the authority of the insurance commissioner to punish insurance companies for knowingly harming even one consumer."

Based on departmental examination results and following an administrative hearing that took three years, Insurance Commissioner Dave Jones found PacifiCare committed 908,547 separate violations of the UIPA, and he imposed fines aggregating $173,603,750 in penalties. On behalf of PacifiCare, UnitedHealthcare sued the commissioner, arguing that none of its harmful conduct violated the Insurance Code.

PacifiCare argued that insurers are immune from fines for committing these unfair acts, even if the insurer did so intentionally, unless the commissioner is also able to show that the insurer knew it had committed the acts frequently enough to constitute a "general business practice." The court of appeal rejected the argument, stating: "PacifiCare's interpretation of section 790.03(h) is not only internally problematic, it stands in contrast to virtually every other statute the Legislature has enacted in connection with (1) enforcement of the Insurance Code against insurers generally; (2) enforcement of the UIPA in particular; and (3) the imposition of administrative penalties against insurers in other contexts."

The court also rejected PacifiCare's argument that the commissioner must prove an insurer had "actual knowledge" of its illegal conduct and held that it was within the commissioner's authority to hold the insurer responsible if its agents or employees were aware of facts that would cause a reasonable person to know of the violations. The court also found the commissioner's reasoning was sensible in that restricting the definition of "knowingly" to one particular individual's actual knowledge would fail to take into account that many people handle a claim, and an unfair practice can be committed by cumulative acts, not simply the intentional act of one person."

Further, the court of appeal also upheld the commissioner's interpretation that an insurer's "willful" violation of the act may be established by showing a purpose or willingness to commit the act and agreed that penalties for willful violations do not need to require a showing that the insurer intended to violate the law or injure someone. The court held, "As the Commissioner points out, he engaged in an extensive, formal rulemaking process in the course of promulgating these regulations. That careful consideration, combined with the Commissioner's expertise in the area, weighs in favor of according significant deference to the Commissioner's interpretation of the terms, and we do so."

Express Release and Assumption of the Risk Doesn't Bar Gross Negligence Death Claim

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

Court of Appeal of the State of California, First Appellate District, Division Four

Peter Hass collapsed and died of cardiac arrest after crossing the finish line at the 2011 Kaiser Permanente San Francisco Half Marathon. Hass' wife and two minor children filed a wrongful death action against the race organizer, RhodyCo Productions, for negligent organization and management of the race with respect to provision of emergency services.

RhodyCo moved for summary judgment on the grounds that the claims were barred by the release signed by Hass and the primary assumption of risk doctrine. The trial court initially granted the motion, but after the plaintiffs filed a motion for new trial, the trial court reversed itself and found that primary assumption of the risk was inapplicable on these facts and that plaintiffs should have been allowed to amend the complaint to plead gross negligence. The Appellate Court agreed with the trial court that summary judgment was not warranted based on primary assumption of the risk and found that there was a triable issue of material fact as to RhodyCo's gross negligence. Applying longstanding rules regarding express waivers and citing to Coates v. Newhall Land & Farming, Inc. (1987) 191 Cal.App.3d1, the Court explained that while a release or waiver of liability by a decedent does not bar a wrongful death claim, the heirs are bound by the decedent's agreement to waive a defendant's negligence and assume all risk. In construing the release signed by Hass, the Court found that Hass intended to assume the risks associated with the race, including any risk related to RhodyCo's negligence. The Court recognized that to allow released claims arising from hazardous recreational pursuits defeats the purpose for which releases are requested and given. The Court agreed with the trial court that the release constituted a complete defense based on ordinary negligence.

As a matter of public policy, however, a release does not preclude liability for gross negligence. Based on the factual questions raised as to whether RhodyCo failed to implement the approved emergency medical services plan, the Court determined that plaintiffs had met their burden to show a triable issue of fact as to gross negligence, making summary judgment inappropriate.

Next, the Court held that the primary assumption of risk doctrine does not act as a complete bar to plaintiffs' negligence action. Citing Knight v. Jewett (1992) 3 Cal.4th 296 and Nalwa v. Cedar Fair, L.P. (2012) 55 Cal.4th 1148, the Court recognized that, in sport settings, conditions which may otherwise be viewed as dangerous are often an integral part of the sport, and imposing a duty to mitigate the inherent dangers could alter the nature of the activity. The Court found that, while an operator or organizer of a recreational activity has no duty to decrease risks inherent to the sport, it does have a duty to reasonably minimize the extrinsic risks so as to not unreasonably expose the participants to increased risk of harm. While there were no facts to suggest that RhodyCo did anything to increase the inherent risk of cardiac arrest in long distance running, the provision of emergency medical care was a risk extrinsic to running and could have been provided by RhodyCo without altering the nature of the race. The Court found there was a triable issue of fact as to whether RhodyCo acted grossly negligent in this regard, and that the primary assumption of the risk doctrine did not act as a complete bar to the negligence claim.

Medicare Made Clear: Part A,B,C,D

Credit to: Tyson & Mendes, La Jolla, CA

Medicare Federal Health Insurance is an entitlement program based on earning withholdings taken from your paycheck. In personal injury lawsuits where plaintiff received Medicare benefits related to their injury, Medicare has a statutory right to recover from a third-party for medical services provided to the beneficiary. Further, Section 111 of the Medicare, Medicaid SCHIP Extension Act, includes mandatory reporting requirements for liability insurers at the time of settlement. For each unreported claim, a responsible reporting entity, is subject to a $1,000 civil money penalty for each day of noncompliance with respect to each claimant. It is critical for defense attorneys to understand who is eligible for Medicare and Medicare's statutory scheme, including Part A, Part B, Part C, and Part D.

Eligibility

A common misconception is Medicare is only available to individuals 65 or older. *Any* age group is eligible for Medicare under various qualifications as listed below:

Age 65 or older.
People who have received social security disability for 24 consecutive months become Medicare eligible in the 25th
Young adults can qualify by using a parent's work history if they are disabled prior to age 22 and meet other requirements.
People with End-Stage Renal Disease (permanent kidney failure requiring dialysis or a transplant, sometimes called ESRD).

Part A and Part B "Traditional Medicare"

Medicare Part A and B, also commonly known as traditional Medicare or original Medicare was created in the 1960s by the government. In California, the Benefits Coordination and Recovery Center ("BCRC") handles conditional payment recovery efforts for liability claims and any other claims where CMS designates the Medicare beneficiary as the debtor of record, also called the primary debtor. The BCRC will only work with the Medicare beneficiary or their appointed agent. **It is important to remember that the BCRC can only see Medicare payments made by Medicare Parts A and B.** They cannot see any Medicare Part C and Part D payments.

It is plaintiff's counsel's responsibility to obtain a final demand letter from the BCRC as part of the settlement process, but defense attorneys should still be monitoring this process to accelerate finalization of the settlement. To exchange information with the BCRC, defense attorneys can obtain CMS and HIPAA authorizations from plaintiff. Even if a defense attorney is unable to obtain an authorization from plaintiff, they can still call the BCRC to find out general information such as if a Medicare Parts A and B lien exists and the current total lien amount.

Part C and Part D: Medicare Advantage Plans

In the 1980s, Part C, known as the Medicare Advantage Plan, was added to the statutory scheme to provide additional coverage and other benefits like vision or dental. Additionally, Part D was just added in 2005-2006 to cover prescription drug costs.

A plaintiff may have a Part C Medicare Advantage Plan and Part D plan in addition to traditional Medicare Parts A and B. Notably, Medicare Advantage Plans and Part D plans are not administered by CMS, but by private health insurance companies. In order to obtain conditional payment information, you must contact the private health insurance company providing these plans directly. For example, if a plaintiff has an HMO Medicare Advantage Plan (most common) you must go to the HMO health group for conditional payment information.

Frequently, Medicare Advantage Plans bundle Part C and Part D together so you may only need to contact one health insurance company for conditional payment information. While a plaintiff may not be enrolled in Part C or Part D when a claim begins, they may enroll at some point later during the life of the claim. Moreover, if a claim has gone on for several years, a plaintiff may have had multiple different Medicare Advantage Plans as they have the opportunity to change plans yearly. It is important to always be on the lookout for this so you do not miss any liens.

Plaintiff can opt in/out of Part C or Part D plans during open enrollment once a year.
In California, if plaintiff is on Medi-Cal (Medicaid) or Extra Help (Low Income Assistance) they can enroll in Part C or Part D at any time.
*Do not forget about Medi-Cal. Plaintiffs can be "Medi-Medi," both a Medi-Cal and Medicare beneficiary.

Takeaway

Navigating the Medicare bureaucracy can be time consuming and frustrating. Do not wait until you have reached a settlement to begin identifying and ruling out Medicare liens. Individuals of all ages may be Medicare beneficiaries and have multiple types of Medicare coverage.

Press Release from the DOI

Carr and Mendocino Complex fire insurance claims top $845 million

Insurance Commissioner releases new report that examines climate change impact on wildfires

Insurance Commissioner Dave Jones today announced that insured residential and commercial losses from the Carr and Mendocino Complex fires top $845 million and are now counted among the most destructive wildfires in the state's history. The insurance commissioner also provided an update on the insured losses from the 2017 wildfires and 2018 Montecito mudslides and announced a new report that details how climate change contributes to wildfire losses.

"Our wildfire history tells the story of how our fire season has changed over the years from a four-month season to a year-round threat," said Commissioner Jones. "Over the past two decades, the frequency and severity of wildfires has increased and caused significant property damage and the tragic loss of life in the wildland-urban interface areas of the state. Even more troubling is that areas once considered not to be high risk are now being scorched by wildfires."

Data collected by the department shows that the widespread destruction from the Carr and Mendocino Complex fires resulted in damaging or destroying more than 8,800 homes, 329 businesses, and more than 800 private autos, commercials vehicles, and other types of property. More than 10,000 claims have been filed, totaling $845 million in insured losses.

According to CALFIRE, of the Top 20 Most Destructive California Wildfires, in terms of structures destroyed, 17 occurred after September 1st. Fire officials and experts warn that potentially the worst is yet to come.

"The Carr and Mendocino Complex fires not only caused staggering losses to thousands of Californians, they devastated entire communities and tragically cost many people their lives, and were among the most destructive fires in our state's history," added Commissioner Jones. "We should remember that the vast majority of California's most destructive fires occurred after September 1st, and fire experts tell us that the worst fires for 2018 may still be ahead of us."

The commissioner also released a new report, *Trial by Fire: Managing Climate Risks Facing Insurers in the Golden State*, which examines the challenges and opportunities associated with climate risk, climate change, and insurance. The report further shows how climate change is a contributor to wildfire losses in California and discusses Commissioner Jones' efforts to get insurers to consider climate risk and the role insurance can play in addressing the three types of climate risks facing insurance companies: physical, transition and litigation risks.

"Our *Trial by Fire* report is an important contribution to a better understanding of how climate risk and climate change impact the insurance industry and Californians," said Jones. "As Insurance Commissioner, one of my responsibilities is making sure insurance companies take into account and address climate-related physical, transition and liability risks, which can have consequences for insurers' underwriting and the investing of their reserves. I'd like to thank our partners who joined us to author this report, which provides critical information about the climate-related risks for the insurance sector and Californians and what is and should be done to address those risks."

The report was authored by Dr. Evan Mills, Principal of Energy Associates, a California-based energy and environmental consultancy, the climate policy experts at UC Berkeley School of Law's Center for Law, Energy & the Environment, and the California Department of Insurance.

"The *Trial by Fire* report is unique in its simultaneous focus on insurance and climate change in the California context, and it is the first of its kind to emanate from the offices of a forward-looking state insurance regulator," said Dr. Evan Mills. "Regulators are the natural entities to look into this, as their role is to safeguard the financial viability of insurers while maintaining availability, affordability, and adequacy of insurance for consumers. As we see in the wildfire data released today, regulators are also important compilers and distributors of raw data on loss costs."