

### "Rogue Juror" Found to be Prejudicial to Plaintiff Credit to : Tyson and Mendes, La Jolla, CA

I attended law school in Massachusetts and our professors continuously reminded us that California likes to stand alone on many legal issues. No Surprise. This was illustrated again in *Nodal v. Cal-West Rain, Inc.* (2019) 2019 WL 323856). Unlike in Federal Court or most other state courts, California allows juror affidavits to impeach a verdict pursuant to *California Evidence Code* §1150 if the affidavit shows objectively ascertainable conduct or statements that were likely to have improperly influenced other jurors.

In *Nodal*, the plaintiff was working as a foreman at a vineyard when the pump system for the vineyard's irrigation system shut down. Plaintiff was attempting to re-start the pump when the valve system dislodged from the piping and struck plaintiff, causing injury. Plaintiff sued defendant, who had designed the irrigation system, for negligent design and construction. One of the plaintiff's experts opined at trial that the valve assembly may have broken off the pipe because it had been over-tightened.

The jury returned a 9-3 verdict for the defendant. Plaintiff requested a judgment notwithstanding the verdict ("JNOV"). The trial court denied plaintiff's JNOV and found that, upon review of the jurors' affidavits, there had been juror misconduct. However, the conduct of the jury had not been prejudicial to plaintiff. Plaintiff appealed. The Court of Appeal agreed that the JNOV was properly denied, but disagreed on the topic of juror misconduct and the prejudice it created against plaintiff.

The juror in question is only identified as "Reed". The juror affidavit states Reed essentially presented himself as an additional expert based on his personal experience of designing and installing irrigation systems at his almond ranch. He made statements to other jurors that Cal-West "installed the system like everybody in the industry does"; that what Cal-West did was "standard" in the agricultural industry; and that once Cal-West had done its testing, ownership of the irrigation system transferred to the vineyard so anything that happened after that point was the vineyard's responsibility (*Nodal* at page 2). This last assertion was particularly concerning to the Court of Appeal as Reed was presenting expertise on a matters not in evidence at trial. "Reed told the jury about the industry standard, causation, and how the vineyard owner was responsible for anything that happened" (*Nodal* at page 3). The Court of Appeal found that Reed had acted as a "rogue juror", which the Court defined as "someone who, in a mischievous way, wanders apart from fellow jurors, does not follow the court's instructions, and violated the juror's oath (*Nodal, supra*, 2019 WL 323856 at\* 1, citing CACI No. 100). The Court of Appeal found that Reed's statements potentially influenced the votes of as many of four other jurors. Such conduct raised the presumption of prejudice which Cal-West failed to rebut on appeal. Based thereon, the Court of Appeals found that the juror misconduct was prejudicial to plaintiff and therefore reversed the trial court's judgement and remanded for a new trial.

#### Takeaway

Lesson learned – Beware of rogue jurors in California. Specifically, contact your jurors after trial and ask questions about their deliberation process. More specifically have a well prepared line of questioning to identify any potential jurors acting as "unqualified" experts improperly influencing the other jurors. Further, in the event the issue of juror misconduct arises and it is not in favor of your client, have well-prepared rebuttal arguments to present to the court and/or appellate court regarding lack of prejudice to the opposing party.

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#### CAIIA Newsletter

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**President's Message**

Greetings to All,

My dear friend Craig Johnson passed away at the end of August. He was an old school insurance adjuster and a dear friend to my family and me. I raise a toast to Craig!

As usually happens to me after attending a memorial (and they seem to be happening more often as I get older, hmmm), I start to dwell on life and work and family. I am sure many of you have the same struggles, where work often seems to take precedence over life plans and family time. Sometimes I think I could lead a more balanced life if I just had more employees. Fortunately, my present team is great (and a big shout-out to Claire who will have been with us for 5 years in November!). However, some-



**John Ratto**  
CAIIA President

times I feel it would be great to add another adjuster. BUT, then I remember the last times we tried to add to our adjusting team.

As we all know, it is hard to find good employees. I have had a few employees who are memorable for all the wrong reasons. One employee lasted six weeks and the other lasted six months. I would say it took 6 months to clean up each of their messes, not to mention a lot of extra hustling to keep the clients mollified. This is why we have stayed with our core team of adjusters and why we always seem to be so busy all of the time.

My point? –I believe that if the independent adjusting profession hopes to survive or even if we just hope to not be working claims well into our 80's, we will be required to invest in training new adjusters. We can no longer count that our future hires will have been trained by insurance companies, as in days past. No offense to our clients who may be reading this monthly report, but the quality of staff being hired/trained at insurance companies these days leaves much to be desired. I suppose the good ones stay and the untrained move out and give independent adjusting a try. More often than not, I see (and have criticized as an expert witness) the adjusting approach of “find the denial” as opposed to the proper way of adjusting, to “find the coverage”. It is really difficult to retrain an adjuster from this mindset.

Additionally, (and here is where I start to sound like an old man), there are generational differences. ( 1). OMG, where is the common sense in the younger generation? And (2) Where are the up and coming adjusters with “fire in their belly”, a “dive-in and do-it-yourself” or the “don't wait to be asked” attitude? (3) Why do they all think insurance adjusting is boring and unmeaningful!?!?

Let's have a discussion about all this. Let's talk as an association about what we can do to offer better training for potential/new adjusters and how to attract a new generation to this really, really, interesting career option. You have my email ([john@reliantclaims.com](mailto:john@reliantclaims.com)) and I would love to hear your thoughts and ideas about what we could do as an industry and as an organization.

A quick update on the CAIIA fall event in Sacramento – We are a little less than three weeks away from our annual meeting being held at the Kimpton Sawyer Hotel in Sacramento. Come for the welcome gathering on Thursday evening, October 17<sup>th</sup>, stay for the October 18<sup>th</sup> education opportunity, the organization annual meeting and cap it off with an enjoyable dinner on the Delta King riverfront restaurant. Also, feel free to bring a guest. While you are at the meeting, there will be a separate activity and lunch for your guest. While it is too late to get the best rate on the hotel for our members, it is not too late to attend the function and it would be great to see you there!

John Ratto, President



## NEWS OF AND FOR OUR MEMBERS

## SAVE THE DATE

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

**October 17,18 CAIIA Fall Meeting, Kimpton Sawyer Hotel, Sacramento**

**DOI Press Release**

### Huntington Beach former adjuster gets 180-day jail sentence after stealing over \$130,000 from clients

**ORANGE COUNTY, Calif.** — Former licensed public adjuster John Schoon, 54, of Huntington Beach, was sentenced to 180 days in county jail and five years of felony probation after pleading guilty to three felony counts of embezzlement and one felony count of forgery. Schoon stole over \$132,000 in claims proceeds for clients by forging signatures and guarantee stamps.

Schoon has already paid \$12,000 in restitution and was ordered to pay an additional \$52,311 as a condition of his probation. Additionally, Schoon is not to have any contact with his victims and is forbidden from engaging in insurance related activities.

“The Department’s investigation revealed this adjuster went to great lengths to defraud his clients,” said Insurance Commissioner Ricardo Lara. “We are committed to making sure Californians are protected from those who rip off trusting consumers.”

An investigation by the California Department of Insurance (CDI) revealed that Schoon, acting as World Wide Public Adjusters, negotiated checks by forging the signature of at least one of his clients and also forged endorsement guarantee stamps on behalf of that client’s mortgage company.

On January 17, 2015, CDI revoked Schoon's licensing rights and privileges; however, Schoon continued to act as a public adjuster under the license of his wife, Andrea Schoon, which she obtained one month later on February 20, 2015. Interviews with several insureds that were represented by World Wide Public Adjusters, Inc. revealed they entered into contracts with Mr. Schoon and not his wife, although the contracts listed her public adjuster license number.

On September 12, 2016, Andrea Schoon’s public adjuster licensing rights were revoked. Mr. Schoon continued to act as a public adjuster and on at least one occasion, used the public adjuster license number that belonged to a former colleague. He failed to provide clients with the claim proceeds they were owed on multiple occasions. Mr. Schoon lied to clients about the status of their payments and wrote fraudulent checks with no intention of providing them with their funds, while using those claims proceeds for personal expenses or to pay other clients. In some cases, it appears that the clients were not even aware of some of the payments issued with regards to their insurance claims. Mr. Schoon did not provide clients with their claim proceeds and/or outstanding balances until they filed claims against his or his wife’s bonds or threatened legal action.



# Happy Halloween!

## **California's End to the Independent Contractor? Credit to Tyson & Mendes, La Jolla, CA**

### **Businesses on Edge over AB 5**

The battle over the controversial decision in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles* rages on in the California Senate via California Assembly Bill 5 (“AB 5”). AB 5, a sweeping bill backed by California labor unions, would make it much harder for California employers to classify employees as independent contractors, a common practice that has allowed in part certain gig economies to flourish. AB 5, a groundbreaking labor bill making its way through the state Senate, initially passed the California Assembly on May 16, 2019. AB 5 would redefine the definition of “employee” in California, which would require California employers to comply with comprehensive labor code provisions governing wages, overtime, meal and rest breaks, employee benefits, and numerous other aspects to an employment relationship.

### **Dynamex Changed the Definition of “Employee”**

In *Dynamex*, the California Supreme Court moved on from the traditional *Borello* test in favor of the ABC test, specifically for purposes of governance under the California Wage Orders, which provide minimum wage, maximum hour, and working condition requirements for specific industries. The *Dynamex* court analyzed the meaning of the term “employ,” defined in Wage Order 2 as “means to engage, suffer, or permit to work.” In seeking to redefine “employ,” the court adopted the ABC test, which presumes all workers are employees unless three conditions are met:

- (A) The individual is free from control and direction in connection with the performance of the service, both under his or her contract for the performance of service and in fact; and
- (B) The service is performed outside the usual course of the business of the employer; and
- (C) The individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as those involved in the service performed.

The “A” factor regards the “right” of the employer to control the employee, which mimics the language from the *Borello* Test. However, the “B” factor requires an examination of whether the employee performs his or her job distinctly independent from the usual course of business conducted by the employer. A recent Court decision used the following example: If a bakery hires a cake decorator to work on a regular basis, then the cake decorator is likely working within the bakery’s “usual business operation,” and thus would be classified as an employee. Whereas an electrician hired to work at a bakery, would likely be viewed as not working within the bakery’s usual course of business and therefore would not be viewed as an employee. The “B” factor analyzes the comparative nature of roles performed by businesses and workers. The “C” factor looks at what usual steps were taken to establish and promote each independent contractors’ independent business—for example, through incorporation, licensure, advertisements, and/or routine offerings to provide the services of the independent business to the public, or to a number of potential customers.

*Dynamex* places the burden on businesses who utilize independent contractors to establish their own separate and distinct business, providing services to the general public, or face the penalties associated with misclassifying employees, which can be substantial.

### **What does AB 5 Provide for Certain Businesses?**

AB 5 codifies the ABC test in *Labor Code* section 2750.3 by applying its factors across all provisions of the California Labor Code, Wage Orders, and Unemployment Insurance Code. Section 2750’s express language requires satisfaction of the identical factors contained in *Dynamex*’s ABC test. Importantly, the scope of the ABC test exceeds that of *Dynamex* by applying the test to all Labor Code provisions, not just the Wage Orders. Notably, there is a sizable list of occupations—including insurance brokers and agents, doctors, securities brokers, independent hair stylists, and certain professional services providers—which would be excluded. The list of exceptions continues to grow and change, as the bill makes its way through the California Legislature.

### **The 9<sup>th</sup> Circuit Punted “Retroactivity” of *Dynamex* to the California Supreme Court**

While AB 5 has been making its way through the California Legislature, the Ninth Circuit reversed course on its recent decision in *Vasquez v. Jan-Pro Franchising International, Inc.* In *Vasquez* the Ninth Circuit held, California law required retroactive application of the *Dynamex* standard, which would have resulted in the application of the ABC test to misclassify cases going back four years under the statute of limitations under California’s Unfair Competition Law, potentially exposing employers to substantial liability for unpaid benefits, wages, and/or penalties. On July 22, 2019, the Ninth Circuit withdrew the *Vasquez* decision and certified the issue of whether the ABC test promulgated in *Dynamex* would be applied retroactively. While the withdrawal is a win for California employers, it may be a temporary one because *Dynamex* suggested the ABC test was a clarification of existing law rather than a departure. The California Supreme Court denied a petition for rehearing that sought clarification to the issue of retroactivity.

### **What can Business Take Away from AB 5 if it is Passed?**

Though the law has not yet passed in legislature, all businesses which currently utilize independent contracts may be affected by the comprehensive application of the ABC test. The measure could redefine what it means to be an “employee” in California. The law would rewrite the rules of many of California’s gig economies, especially those in the app-based services industries, delivering food or transporting people. With the issue of *Dynamex*’s retroactivity stalled for now, employers should remain cognizant of the uncertainty surrounding both AB 5 and its prospective retroactive application. While continuing to analyze the application of the ABC test to all of their independent contractors on a case-by-case basis, employers should keep any eye toward the changing climate of both the California legislature, and Supreme Court.

**DOI Press Release****Victims of Investment Fraudster Receive Restitution  
Totaling More than \$1.4 Million**

**SAN DIEGO, Calif.** — Insurance Commissioner Ricardo Lara today announced the distribution of over \$320,000 in restitution funds to 14 California victims scammed by former insurance agent Shawn Heffernan. These restitution funds were acquired through the seizure and sale of property owned by the defendant at the time of his arrest in December 2017.

Shawn Heffernan, 43, of San Diego, was sentenced in March 2018 to nine years in state prison after pleading guilty to 29 felony counts of fraud and related charges. Heffernan defrauded 16 victims out of nearly \$1.5 million by soliciting investment funds and spending the money on personal items including jewelry, a Maserati, and a lavish wedding. Eight of the victims were senior citizens at the time they were defrauded by Heffernan.

“Heffernan targeted seniors on fixed incomes and left them financially devastated,” said Commissioner Lara. “Thanks to the joint work of our investigators and the San Diego District Attorney’s Office, these victims will be able to recoup a portion of the money stolen from them.”

Heffernan, a licensed insurance agent at the time operating as the Heffernan Group, initially sold annuity policies issued by legitimate insurance companies. He would often convince clients to surrender existing policies and purchase new annuity policies. This activity -- known as “churning” or “twisting” -- would result in significant commissions for Heffernan and very substantial surrender penalties for clients. One elderly victim defrauded by Heffernan paid over \$490,000 in early surrender fees while Heffernan collected \$280,000 in additional commissions.

The property seized from Heffernan included three rental condos and over \$75,000 held in Heffernan’s bank account. The Department of Insurance suspended Heffernan’s insurance agent license in July 2017 and revoked it after his conviction in 2018.

### **CROWN Act Credit to McCormick Barstow, Fresno, CA**

On July 3, 2019, Governor Gavin Newsom signed the CROWN ACT into law, making California the first state to legally protect natural hairstyles. The new law is based partially on the California Legislature’s finding that the United States has historically been riddled with laws that have equated certain “black traits” with inferiority. (SB 188, Section 1(a).) The Legislature has also found that the idea of “professionalism” in the United States has traditionally been associated with European features and mannerisms. (SB 188, Section 1(b).) As such, the CROWN ACT, according to Governor Newsom’s [press release](#), is intended to prohibit employers from enforcing “purportedly ‘race neutral’ grooming policies that disproportionately impact persons of color.”

The CROWN ACT operates by expanding existing protections against racial discrimination for California employees. Under California’s employment discrimination laws, the definition of “race” now includes “traits historically associated with race” including “hair texture and protective hairstyles.” (Gov. Code section 12926(w).) “Protective Hairstyles” includes hairstyles such as “braids, locks, and twists.” (Gov. Code section 12926(x).) This change limits California employer’s ability to control the appearance of their employees through dress code and grooming policies even when these policies apply universally to all employees. However, employers are still entitled to maintain dress and grooming policies as long as they are “valid and non-discriminatory,” and do not disproportionately impact people of color. (See Governor Newsom’s Press Release.)

Federal law has historically provided similar protection against hair discrimination under Title VII of the Civil Rights Act of 1964. Federal courts have interpreted Title VII as preventing discrimination against afro hairstyles. (SB 188, Section 1(e).) California’s new law takes this protection further by recognizing that “afros are not the only natural presentation of Black hair”. While California is the first state to protect employees from racial discrimination based on hairstyle, the trend has continued in New York where an almost identical bill was recently signed into law. A similar bill protecting natural hairstyles has also been introduced in the New Jersey legislature. Prior to the enactment of the CROWN ACT, the New York City Commission on Human Rights banned hair-based discrimination in New York City.

With the passage of the CROWN ACT, California employers should immediately review their existing dress and grooming policies to ensure they do not run afoul of the new law. Employers should consult with legal counsel with any questions about the CROWN ACT and the potential impact it has on their current employment practices.

**CAIIA REGISTRATION FORM**  
**California Association of Independent Insurance Adjusters**  
**ANNUAL CONVENTION—October 17-18, 2019**



Kimpton Sawyer Hotel, 500 J St., Sacramento, CA 95814

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<b>MEMBER CONVENTION Package (*)</b> (Includes Reception, Continental Breakfast, 4 Hr. CE Class, Lunch, Meeting & Dinner)	\$ 150.00	# _____	\$ _____
<b>Spouse/Guest fee</b> Name _____ (Reception, Continental breakfast, & Dinner)	\$ 100.00	# _____	\$ _____
<b>Non-Member Convention Package</b> (Includes Dinner, Continental Breakfast, CE Class, & Lunch)	\$ 175.00	# _____	\$ _____
<b>4 Hour CE Class Only</b> (Earthquake Certification Basics--4 Hr. Mini SEED) (Includes Continental Breakfast, CE Class(es), & Lunch)	\$ 100.00	# _____	\$ _____
<b>President's Dinner Only</b>	\$ 75.00	# _____	\$ _____
		<b>Grand Total payable</b>	\$ _____

**SCHEDULED EVENTS**

Please specify which events you will attend by placing a check mark in the box next to the event.

	<b>You</b>	<b>Spouse/Guest</b>
10/17 -- 6:00 P.M. Welcome Reception	[ ]	[ ]
10/18 -- 8:00 A.M. Registration/Breakfast	[ ]	[ ]
10/18 -- 8:30 A.M. Seminar (4 CE credits-	[ ]	[ ]
Misc 10/18 -- 12:30 P.M. Lunch	[ ]	[ ]
10/18 -- 1:00 P.M. Business Meeting (*)	[ ]	[ ]
10/18 -- 7:00 P.M Dinner	[ ]	[ ]

John Ratto

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