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November 2015

## Court Confirms no Duty to Reimburse for Prophylactic repairs

### Haight, Brown and Bonesteel, Los Angeles, CA

In *Grebow v. Mercury Insurance Company* (No. B261172, filed 10/21/15), a California appeals court held that coverage for collapse in a homeowners policy does not extend to prophylactic repairs undertaken to mitigate damage before actual collapse of the structure.

In *Grebow*, the insureds had a general contractor inspect the rear deck of their house because of recurring watermarks. The contractor discovered severe decay in the steel beams and poles supporting the second floor of the house. He opined that they could not support the upper portion of the house, and that a large portion of the house would fall. A structural engineer agreed, blaming decay and corrosion. The insureds were advised not to enter the top part of the house, and they contracted for repairs. They also made a claim to Mercury, which denied coverage. The insureds ultimately spent \$91,000 out of pocket having the home remediated.

The Mercury policy covered collapse as follows: 7. Collapse. We insure for direct physical loss to covered property caused by collapse of a building or any part of a building caused only by one or more of the following perils: a. Perils Insured Against under Coverage C [Personal Property]; b. hidden decay; c. hidden insect or vermin damage; d. weight of contents, equipment, animals or people; e. weight of ice, snow, sleet or rain which collects on a roof; or f. use of defective material or methods in constructions, remodeling, or renovation if the collapse occurs during the course of the constructions, remodeling or renovation. Loss to an awning, fence, patio, pavement, swimming pool, tennis court, underground pipe, flue, drain, cesspool, septic tank, foundation, retaining wall, bulkhead, pier, wharf or dock is not included under items b., c., d., e., and f. unless the loss is a direct result of the collapse of a building. Collapse means sudden and complete breaking down or falling in or crumbling into pieces or into a heap of rubble or into a flattened mass. Collapse does not include settling, cracking, shrinking, bulging, expansion, sagging or bowing, nor a substantial impairment of the structural integrity of a structure or building, nor a condition of imminent danger of collapse of a structure or building.

The Mercury policy excluded coverage for: 4. Neglect, meaning our failure to use all reasonable means to save and preserve property at and after the time of the loss. . . . 13. Corrosion or Electrolysis. . . . 17. Loss caused by: a. wear and tear, marring, scratching, deterioration; b. inherent vice, latent defect, mechanical breakdown; c. rust . . . .

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**CAIIA Newsletter**  
CAIIA Office  
PO Box 168  
Burbank, CA 91503-0168  
Website: [www.caiaa.com](http://www.caiaa.com)  
Email: [info@caiaa.com](mailto:info@caiaa.com)  
Tel: (818) 953-9200

Editor: Sterrett Harper  
Harper Claims Service, Inc.  
(818) 953-9200

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California Association  
of Independent Insurance  
Adjusters, Inc.

**President's Office**

P.O. Box 18444  
South Lake Tahoe, CA 96151  
Email: [mail@missionadjusters.com](mailto:mail@missionadjusters.com)

**President**

Paul Camacho, RPA, ARM, Mission Adjusters, So. Lake  
Tahoe, CA  
[mail@missionadjusters.com](mailto:mail@missionadjusters.com)

**Immediate Past President**

Kim Hickey  
SGD, Inc., Northridge, CA  
[khickey@sgdinc.com](mailto:khickey@sgdinc.com)

**President Elect**

Steve Washington - Washington & Finnegan, Inc.,  
Anaheim, CA  
[steve.washington@sbcglobal.net](mailto:steve.washington@sbcglobal.net)

**Vice President**

Leland Coontz  
James M. Humber Company  
Downey, CA  
[morethan3@aol.com](mailto:morethan3@aol.com)

**Secretary Treasurer**

Chris Harris  
M3K Business Services, Inc., Redlands, CA  
[charris@m3kbusiness.com](mailto:charris@m3kbusiness.com)

**ONE YEAR DIRECTORS**

Vacated

Peter Kofoed  
PKG- Peter Kofoed Group  
Murrieta, CA  
[pwkofoed@gmail.com](mailto:pwkofoed@gmail.com)

Sterrett Harper  
Harper Claims Service, Inc.  
Burbank, CA  
[harperclaims@hotmail.com](mailto:harperclaims@hotmail.com)

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[pat@reviewandconsulting.com](mailto:pat@reviewandconsulting.com)

Keith Hillegas  
Keith A. Hillegas Co., Inc.  
San Leandro, CA  
[khillegas@aol.com](mailto:khillegas@aol.com)

Pete Vaughan  
Vaughan and Associates Adjusting Services,  
Inc.  
Benicia, CA  
[pvaughan@pacbell.com](mailto:pvaughan@pacbell.com)

**OF COUNSEL**

Mark S. Hall Esq., HALL LAW FIRM  
24881 Alicia Parkway, Suite E-500  
Laguna Hills, CA 92653  
T. 949.297.8444  
F. 949.855.6531

**President's Message**

We have had our 2015 Annual meeting for the CAIIA in South Lake Tahoe and I have been elected president. If you have checked the CAIIA website in the past, as I have moved into the various positions, you will note my photograph has had an eerie resemblance to the actor, John Stamos. As you can see by this issue of the Status Report, the webmaster felt that the actor's picture was more pleasing to the eye. Lesson learned, don't give the webmaster grief.



Paul Camacho  
CAIIA President

This organization was formed in 1947. At that time, at least according to an internet search, Wham-O introduced its first product, a slingshot in which the name was derived from the sound of a slingshot hitting a target. One has to wonder, why is it was not named "shatter", or "ouch" or anything else as I believe targets were and still are in the eye of the beholder. It was also the year of the alleged crash landing of extraterrestrials near Roswell, New Mexico. It is interesting to note that Wham-O is still in business and most people still know about the "UFO" incident.

Today, in the year 2015, we are being introduced to Windows 10. The power commands for that operating system are "Sleep", "Shut down" or "Restart". The computer operating systems are always in a state of change to be faster, better and relevant. In order for the CAIIA to be a viable organization, we also have to consider our value to the industry and determine our power commands. It is in our best interest to establish our power command as "Restart". If we do not change and adapt, then we can "sleep", until we "shut down". This likely means video conferencing between the board members and committee chairs to keep ideas and interaction other than e-mails which can be overlooked or ignored

So if you missed our 2015 Annual meeting, here are a couple of highlights. We are proposing a bylaw change to reduce the number of directors and eliminate the President Elect position. We are looking into establishing a CE class for appraisal that will be offered to our members as well as insurance professionals. I am also in the final stages of establishing the committees as per the bylaws.

As I close this first President's Message, fall is in the air and it was 28 degrees this morning in South Lake Tahoe. Does this mean we will get the winter that is being hyped? Or is this just another teaser? Either way, we have to be prepared with the ability to respond and with the education to handle claims properly.

Thanks for taking the time to read; see you next month!

Paul R. Camacho, ARM, RPA  
President - CAIIA 2015-2015  
Mission Adjusters  
[Paul@missionadjusters.com](mailto:Paul@missionadjusters.com)



Happy Thanksgiving to you and yours!

## News of our Members

The executive office has received the notice of passing of two long time friends of the CAIIA.

It is with deep regret that we must advise you of the passing of Sally Riggs. Sally was the wife of long time member, past executive director, honorary member and recipient of the CAIIA Life Time Achievement Award Gene Riggs. Sally died on October 28. As of the date of publication, services are pending.

It is with deep sorrow that we must report the sudden passing of Terry Vandenberg Lightstone on Thursday, October 22, 2015, in Charlotte, NC, as a result of injuries sustained in an automobile accident in that state. Terry was the spouse of Harvey Lightstone, VP of Carter Claim Services where he serves as Director of Claims for CPLIC, RRG. Harvey is an active member of the CAIIA through Carter Claims Service.

Services for Terry are as follows:

Graveside services will be at 10:00 AM on November 7th and will be held at Oakwood Cemetery, 22601 Lassen St., Chatsworth, CA 91311, Ph: 855-562-6757

Memorial service will be held at Valley Park Church, 16514 Nordhoff St., North Hills, CA 91343, Ph: 818 894 9316

A Celebration of Life will be held at the church following the Memorial Service.

For those who have inquired about a charity where a donation can be made in Terry's name, please note the following:

Greater Los Angeles Agency on Deafness, Inc., 2222 Laverne Ave., Los Angeles CA 90041. Donations can be made on Terry's behalf by check to the address above or can be made online at their website.

### *DOI Update- Voluntary agreement by fire insurers to streamline claim process for Valley and Butte fire victims*

**SACRAMENTO, Calif.** - Insurance Commissioner Dave Jones obtained agreements from insurers handling Valley and Butte wildfire damage claims to help fire victims begin their recovery more quickly.

With more than 5,000 homes damaged and destroyed in the Valley and Butte fires, thousands of residents face the long and painful task of recovery, which often includes trying to reconstruct destroyed or missing documents.

In an effort to speed that recovery, insurers representing 90 percent of the claims resulting from the fires have agreed to claims handling reforms requested by Jones that will bring more timely payments and flexibility with some of the deadlines and documentation typically required by insurers.

"Expediting the insurance claim process is the right thing to do," said Insurance Commissioner Dave Jones. "I applaud the effort insurers have made to streamline claim handling and pay consumers quickly, so fire victims may begin to put their lives back together."

After such destructive wildfires, policyholders often find many of the things the insurance company needs to process their claim are missing or were destroyed in the fire, such as home inventories and vehicle ownership papers. Under this agreement, policyholders may receive advance payment for up to four months of additional living expenses, 25 percent of policy limits for personal property, and expedite the process for debris removal-a first step in rebuilding.

In addition to the more than 5,000 property claims, more than 1,000 vehicles were damaged or destroyed in the fires. Insurers have also agreed to speed payment for damaged or destroyed vehicles and provide at least 30 days billing leniency for lost renewal notices or those who do not have the ability to have their mail forwarded.

Immediately following the fires, Commissioner Jones visited the burn areas to survey the damage, meet with residents, make sure insurers were on-site taking claims, and to talk to CDI staff who were on site assisting residents. The commissioner also met with state fire and emergency management and local officials. Jones mobilized the department's resources to make sure consumers had access to the assistance and support the department provides, such as helping consumers navigate the recovery process.

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### **The Case of the Pothole**

#### **Credit to: Garrett Engineering, Long Beach, CA**

The driver hit a pot hole, which broke the vehicle suspension and caused him to swerve into parked cars. The repair bill was almost \$7K. GEI was assigned to review the repair invoice, photographs of the accident scene, and photographs of the vehicle to determine if the suspension was damaged by the pot hole or if the suspension was damaged by the accident. The vehicle sustained major body damage on the right front.

Photographs of the accident scene showed a narrow roadway, with vehicles parked on both sides of the street.

The photographs of the right front tire on the vehicle showed that the tire was still inflated and in good condition. When a vehicle's tire and wheel come in contact with a pothole that would be deep enough to cause suspension damage, the tire and wheel typically are also damaged and the tire would typically become deflated immediately prior to the suspension damage. The photographs of the right front tire and wheel showed no structural damage to the tire, such as a cut or bulge in the tire sidewall, and no warping, bending, or deformation of the rim of the wheel. Several photographs of the suspension, taken from multiple vantage points, showed no evidence of contact between any of the damaged suspension pieces and the edges of the asphalt roadway.

The potholes in question were shallow and would not have caused the damage observed to the lower control arm or the damage to the tie-rod from driving into or over these two shallow areas of the roadway.

What usually happens when a vehicle is driven over an uneven surface, such as shown in the photos of the accident scene, is that the driver feels the bump in the roadway but does not lose control of the vehicle.

If the driver did lose control of the vehicle in this incident, it could possibly have been because of a loose grip on the steering wheel or a lack of focus. Either momentary loss of driver concentration, a quick driver distraction, or a temporary loss of steering control of the vehicle would have resulted in striking the parked vehicles in this narrow roadway.

In summary, the damage to the lower control arm and to the tie-rod on the right side of the vehicle was caused by the accident impact, not from impact with the pot holes.

Continued from page 3

He also directed the department's law enforcement team to meet with residents and educate them on how to avoid scam artists who prey on vulnerable victims. When the local assistance centers opened, the Department's consumer services team was on hand to assist consumers—they are still there today.

Policyholders who need assistance with their claim or have questions, may contact the Department of Insurance Consumer hotline at 800-927-4357 or visit the department's [website](#) for tips and advice.

#### **Media notes:**

The following is a list of Insurers participating so far in the voluntary policy reforms. Other insurers may respond to the department's request. To find out if your insurer is participating, please call Consumer Services at 800-927-4357.

- Allstate Insurance Group
- CSAA Insurance Group (AAA Northern California)
- Farmers Insurance Group (Including Foremost)
- Hartford Fire & Casualty Group
- Liberty Mutual/Safeco
- State Farm Mutual Group
- Travelers Group
- United Services Automobile Association Group (USAA)

Continued from page 1

In the bad faith lawsuit that followed, the court granted summary judgment for Mercury. The court rejected the insureds' argument that collapse had occurred because certain elements of the structure had become detached. The court noted a split of authorities over the scope of collapse coverage when the policies leave the term "collapse" undefined. However, "insurance companies have inserted 'ever more explicit language in attempts to narrow the scope of collapse coverage.'" The *Grebow* court pointed out that the Mercury policy included clauses such as "sudden and complete breaking down or falling in or crumbling into pieces or into a heap of rubble or into a flattened mass" and excluded "substantial impairment of the structure or building" and "a condition of imminent danger of collapse of a structure or building." According to the court, "This language renders the collapse clause unambiguous."

The *Grebow* court noted that in *Rosen v. State Farm General Ins. Co.* (2003) 30 Cal.4th 1070, the California Supreme Court held that under an insurance policy with similar language the policy did not cover an imminent collapse—just an actual collapse—and "[h]ere, no portion of the Grebows' home or deck had collapsed."

The *Grebow* court analyzed extensive authorities to conclude that there was no basis for reimbursement on theories of mitigation and prevention of imminent loss. Although the policy's duties after loss required the insureds to "protect property from further damage, make reasonable and necessary repairs required to protect the property," the court noted that the contractual duty to mitigate only arose "[i]n case of a loss to which this insurance may apply," such that coverage had to attach in the first instance.

The court also found no general duty on the part of insurers to reimburse insureds for preventive measures taken to avoid insurable losses, despite any societal or economic benefits that might offer. The court noted that support for the argument had its historical origins in marine "sue and labor" clauses, but found those distinguishable not only because of the differing factual circumstances, but also because of typical policy wording referring to "imminent" loss.

The *Grebow* court likewise rejected the concept of an "implied" duty to reimburse preventive measures on theories of quasi-contract or unjust enrichment, finding this inconsistent with the express wording of the Mercury policy: "When parties have an actual contract covering a subject, a court cannot—not even under the guise of equity jurisprudence—substitute the court's own concepts of fairness regarding that subject in place of the parties' own contract."

Finally, the *Grebow* court held that Mercury's delay of four months in issuing a denial would not support estoppel, since the work had already been contracted and begun when the claim was made to Mercury, and Mercury did nothing to suggest to the insureds that the claim would be covered if they mitigated prospective damages.

Having found no coverage, the *Grebow* court agreed that the bad faith claim could not stand, and affirmed summary judgment for the insurer.

**The Limits of Wrongful Death: Serious Claims Require  
Serious Consideration of Applicable Policy Limits**  
*Credit to Tyson and Mendes, La Jolla, CA*

Life is precious. When it is lost prematurely, the grief and anger of the decedent's family and loved ones can be immeasurable. They often turn to the legal system to measure their loss by way of a wrongful death lawsuit against the individual or corporate entity believed to be at fault for the unfortunate situation. When those defendants are fortunate enough to be covered by insurance, the handling attorneys and claim professionals must give serious consideration to the policy limits applicable to the situation in order to reach a reasonable and final resolution to the matter.

Liability insurance policies typically set forth limits on the coverage provided for injuries to third persons, including third persons asserting wrongful death claims related to the death of a family member. Oftentimes, the policy makes a distinction between the available limits with respect to a "per person" basis and a "per occurrence" basis. If there are multiple claimants arising from a single occurrence, the amount of policy proceeds available to satisfy all of the claims is determined by the "per occurrence" basis, while each individual claimant is limited on the "per person" basis.

So, which limit applies to the situation in which multiple heirs are making wrongful death claims for the loss of a single individual? Because the "per person" limits are typically much less, and usually half, of the "per occurrence" limits, claimants and their counsel understandingly push for application of "per occurrence" limits to their benefit. There are multiple claimants, so this should bring the matter into the "per occurrence" basis rather than just "per person." Right? Serious claims require serious consideration of this issue and mishandling of the applicable limits can be disastrous for the defense.

Guidance on this issue can be found in the authority of *United Services Automobile Ass'n v. Lilly* (1990) 217 Cal.App.3d 1396. In this wrongful death matter, USAA's insured caused an automobile accident in which a man was injured and his wife was killed. The man filed a personal injury action and the heirs filed a wrongful death action against the at-fault driver. The subject policy provided bodily injury liability limits of \$100,000 per person and \$300,000 per occurrence. As would be expected, the claimants alleged they were entitled to the \$300,000 limits, so USAA filed a declaratory relief action to resolve the dispute.

In considering the matter, the Court noted, "USAA contracted with the insured to 'pay damages for bodily injury...for which any covered person becomes legally responsible because of an auto accident.'" *Id.* at pg. 1399. Although the policy did not "explicitly cover wrongful death," application of standard rules of contract construction led to the conclusion the policy covered wrongful death claims within the meaning of "bodily injury." *Id.* at pg. 1400.

The heirs then argued each of them sustained "bodily injury" from the incident in light of their ability to bring a wrongful death action under Code of Civil Procedure Section 377 based upon their own independent "pecuniary loss" arising from the death of their relative. Accordingly, they believed the greater "per occurrence" limits should apply. *Id.* at pg. 1402.

The Court focused on the policy language limiting coverage to "damages for bodily injury [i.e. death] sustained by any one person in any one auto accident." Because the person injured *in* the accident was the decedent, recovery under the policy for damages resulting from the death is limited to the "per person" basis. *Id.* Accordingly, the heirs were only entitled to recovery within the \$100,000 per person limits, rather than the more substantial \$300,000 per occurrence limits.

When a serious wrongful death claim comes through your door, give serious consideration to the available limits based upon the language of the policy. Read the policy in light of the claims and relevant legal authority. It is the best, and indeed only, way to ensure a just resolution of an unfortunate situation and can help avoid significant overpayment of a claim. Life is precious, and its loss must be dealt with properly and fairly within our legal system to ensure it is protected.

## Auto Coverage: Permissive User Credit to Tyson And Mendes, La Jolla, CA

### Permissive User Liability

In California, the owner of a motor vehicle is vicariously liable for injuries caused by the negligent operation of the vehicle by any person using it with the owner's permission. (Veh. Code § 17150.) This meant historically those who rented vehicles were liable for accidents caused by their customers, even though the rental company was not negligent in any way. (*Mercury Ins. Co. v. Enterprise Rent-A-Car Co. of Los Angeles* (2000) 80 Cal.App.4th 41.)

### The Graves Amendment

In 2005, Congress responded by enacting what is commonly known as the Graves Amendment, codified at 49 U.S.C.A. section 30106. Section 30106 provides:

- (a) In general.--An owner of a motor vehicle that rents or leases the vehicle to a person (or an affiliate of the owner) shall not be liable under the law of any State or political subdivision thereof, by reason of being the owner of the vehicle (or an affiliate of the owner), for harm to persons or property that results or arises out the period of the rental or lease, if--
- (1) the owner (or an affiliate of the owner) is engaged in the trade or business of renting or leasing motor vehicles; and
  - (2) there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner).
- (b) Financial responsibility laws.--Nothing in this section supersedes the law of any State or political subdivision thereof--
- (1) imposing financial responsibility or insurance standards on the owner of a motor vehicle for the privilege of registering and operating a motor vehicle; or
  - (2) imposing liability on business entities engaged in the trade or business of renting or leasing motor vehicles for failure to meet the financial responsibility or liability insurance requirements under State law.
- The Graves Amendment's intent is to preempt conflicting state law provisions such as California's section 17150, and purportedly eliminates vicarious liability for non-negligent vehicle rental companies based solely on ownership.

### Challenges to the Graves Amendment

There has been surprisingly little litigation over the interpretation and applicability of the Graves Amendment in California. However, Courts in other states have considered constitutional challenges, with differing results.

The majority of courts that have considered the issue have concluded the Graves amendment preempts conflicting state law and is constitutional.

However, some courts have reached the opposite conclusion.

### Conclusion

For now, the Graves Amendment is alive and well in California. Vehicle rental companies, and the attorneys and insurance professionals that represent them, can take some comfort that in California the Graves Amendment is not six feet under.

### DOI New Release-Former Palmdale insurance agent sentenced for felony fraud

**LOS ANGELES, Calif.** - Hesham Saleh Ibrahim, 57, of Palmdale, pleaded no contest on September 29 to felony insurance fraud and was sentenced to three year felony probation, 30 days - community labor and ordered to pay nearly \$1,000 in restitution and fines.

Ibrahim was charged in July 2015 with six misdemeanor counts of transacting insurance without a license for issuing 114 auto insurance policies. He was also charged with one count of felony insurance fraud for issuing a fraudulent insurance certificate for a \$2 million commercial liability policy and pocketing the \$350 premium.

"Ibrahim put the business owner at great financial risk when he issued a bogus insurance certificate," said Insurance Commissioner Dave Jones. "The consumer did the right thing by reporting they did not receive a policy from the insurance company, which helped our investigators uncover Ibrahim's illegal business activity."

Consumers should always make sure they receive a copy of the entire policy from the insurance company to confirm their coverage. An insurance certificate is not enough.

The Department of Insurance Investigation Division began an investigation after receiving a complaint from a consumer claiming they paid Ibrahim for liability insurance for their business, but did not receive a policy. Department investigators discovered Ibrahim was transacting business on an expired agent license, operating under Five Star Insurance Agency and Convenience Store. The department contacted Ibrahim and communicated that he was transacting business illegally and should stop immediately. He continued to function as an agent, issuing 15 additional auto insurance policies after receiving the warning from the department.

On the Lighter Side

**Remembering the late, great Yogi Berra...**

The game ain't over 'til it's over.

Baseball is 90% mental, the other half is physical.

I never blame myself when I'm not hitting. I just blame the bat and if it keeps up, I change bats.

The future ain't what it used to be.

Always go to other people's funerals, otherwise they won't come to yours.

This is like deja vu all over again.

A nickel ain't worth a dime anymore.

You can observe a lot just by watching.

When you come to a fork in the road, take it.

Little League baseball is a very good thing because it keeps the parents off the streets.

There are some people who, if they don't already know, you can't tell 'em.

We make too many wrong mistakes.

You're always nervous at the beginning, the first pitch. You get a little tense. When the game starts, then it's all right.

A lot of guys go, 'Hey, Yog, say a Yogi-ism.' I tell 'em, 'I don't know any.' They want me to make one up. I don't make 'em up. I don't even know when I say it. They're the truth.

Think! How the hell are you gonna think and hit at the same time?

In theory there is no difference between theory and practice. In practice there is.

I break up the English a little bit. I don't mean to do it, but it just comes out that way.

If people don't want to come out to the ball park, nobody's gonna stop 'em.

Half the lies they tell about me aren't true.

A good time to hit is with men on base, because the pitcher ain't got no place to put you. He's going to get that ball around there somewhere. He don't want to walk you.

All pitchers are liars or crybabies.

If you can't imitate him, don't copy him.

So I'm ugly. So what? I never saw anyone hit with his face.

The towels were so thick there I could hardly close my suitcase.

It's tough to make predictions, especially about the future.

I looked like this when I was young, and I still do.

Never answer an anonymous letter.

Nobody goes there anymore. It's too crowded.

It gets late early around here...

I didn't really say everything I said.