CAIIA Status Report

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November 2016

How a $30K Settlement Turned into a $3M Judgment Credit to Tyson and Mendes, La Jolla, CA

Underlying Claim/Personal Injury Action

Barickman v. Mercury Casualty Company (2016) 2 Cal.App.5th 508 started out as a straightforward automobile versus pedestrian accident and was like many pre-litigation files an insurance carrier and insurance defense attorneys handle on a regular basis. Mercury's insured, Timory McDaniel, struck the pedestrian plaintiffs while driving under the influence. Mercury's insured had minimum $15,000 per person/$30,000 per accident bodily injury policy limits.

Ms. McDaniel reported the accident to Mercury the following day but did not provide any further details. Within two months of the accident, Mercury tendered its insured policy limits of $15,000 per person to plaintiffs. While the offer was pending, Mercury's insured was sentenced to prison and ordered to pay approximately $165,000 in restitution. Within five months of the accident, plaintiffs accepted the policy limits offer,
but Mercury refused to settle because it would not agree to additional language inserted by plaintiffs' counsel saying the release "does not include courtordered restitution."

For several weeks, Mercury considered whether it would agree to the additional language and requested multiple extensions to respond. Mercury and plaintiffs' counsel exchanged multiple correspondence and conversations regarding whether the new language precluded an offset of the policy limits payment against the restitution order. During this time, Mercury consulted with Ms. McDaniel's mother as well as her criminal attorney regarding the additional language. While waiting for input from Ms. McDaniel's criminal lawyer, the final deadline imposed by plaintiffs' counsel expired. Mercury requested a further extension, which was denied by plaintiffs' counsel. Plaintiffs' counsel informed Mercury there was no settlement and would file suit. Ms. McDaniel's criminal attorney instructed Mercury not to accept the revised releases.

Plaintiffs filed suit and the dispute between plaintiffs' counsel and Mercury regarding the impasse over the additional language went on for several more months. Later, Ms. McDaniel's mother, acting as attorney in fact, changed her tune and instructed Mercury to pay the policy limits. The action was settled with a stipulated judgment
in favor of plaintiffs for $3,000,000. Ms. McDaniel assigned her rights against Mercury to plaintiffs' counsel in exchange for their agreement not to attempt to collect the judgment against her. Mercury paid the policy limits.

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Published Monthly by
California Association of
Independent Insurance Adjusters

An Employer Organization of Independent Insurance Adjusters

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Status Report Available

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California Association of Independent Insurance Adjusters, Inc.

President's Message

This being my first newsletter, I should take the time to introduce myself. I am Steve Washington...the new CAIIA President. I was proud to receive this honor recently at the big gala event at the Queen Mary in Long Beach. I began as an independent adjuster in 1988 as a trainee with GAB. I have been to countless schools, been a supervisor, manager and mentored by many outstanding General Adjusters. I have been a part of Washington & Finnegan for the last 10 years and after 28 total years, I remain an independent adjuster. And like most of you, have been doing claims a long time. At some point in these ongoing newsletters, I may give you a good claims story.

Steve Washington
CAIIA President

I want to thank everyone for attending the Fall Event at the Queen Mary. It was a lot of fun with food and drink and dancing and music. As part of the event, we recognized our outgoing President, Paul Camacho of Mission Adjusters. Paul has worked hard this past year and is a fine example of the people we have in this Association. Paul, the CAIIA thanks you.

The California Association of Independent Insurance Adjusters motto is "Dedication to Excellence". The organization promotes excellence through education and meetings. This includes classes on ethics, Fair Claims Regulations for continuing education credits, to conventions where group discussions can break out and the members can discuss items of common concerns. This is valuable whether you come from a larger company or are a solo adjuster. The experience and knowledge the members have is absolutely amazing and they are willing to share.

That being said, I encourage all our members to actively partake in the Association. I truly believe you will only get out of it what you put in to it.

Later this month will be Thanksgiving. Which means more food and drink and frivolity. All is good…..as long as we get claims.

I do want to wish everyone a VERY HAPPY THANKSGIVING!

Lastly, as the Holiday approaches, I am reminded of a joke I heard some time ago, To wit:

Steve: Why did the turkey cross the road?

Paul: I don't know

Steve: It was Thanksgiving Day and he wanted people to think he was a chicken.

Steve Washington
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NEWS OF AND FOR MEMBERS

Update on AB2588- Proposed bill changing the licensing requirement of independent adjusters

Peter Schifirin advised us that Governor Brown vetoed bill on 9/29 stating "I am not convinced that an overhaul of the current licensing system is warranted. If a need can be demonstrated that individual licensure of these individuals is necessary, I would be willing to consider such an approach."

He was told the veto will not be overturned.

AB488, the Public Adjuster bill did pass.

Editor's note: This new bill may have a significant financial impact to small business owners.

DOI Announcement:

New law impacts existing work comp policies effective January 1, 2017 changes definitions of excluded employees

SACRAMENTO, Calif. - Today, Insurance Commissioner Dave Jones notified all workers' compensation insurers writing policies in California of the changes to definitions of and procedures related to excluded employees due to the Legislature's enactment of Assembly Bill 2883 (Assembly Insurance Committee). Beginning January 1, 2017 all business workers' compensation insurance policies, including in-force policies, will be required to cover, among others, certain officers and directors of private corporations and working members of partnerships and limited liability companies that may have been previously excluded from coverage.

The Commissioner met with the American Insurance Association (AIA) and Association of California Insurance Companies (ACIC), who supported AB 2883, and the Department of Industrial Relations (DIR) to discuss its implementation.

"AB 2883 is going to cause significant disruption for workers' compensation insurers and employers. We have issued a notice today to workers' compensation insurers so that they know what the new law requires of them and we directed insurers to provide notice to employers so they are made aware of the new law," said Commissioner Dave Jones. "Unfortunately, AB 2883 did not include any language exempting in-force policies or delaying its effective date so as not to impact in-force policies. The DIR, AIA and ACIC agree that this change in law applies to in-force policies."

Prior to AB 2883 being signed into law, officers, directors and working partners were generally not required to be covered under the business's workers' compensation policy unless they opted to be covered and were not listed on a limiting and restricting endorsement. AB 2883 changes this presumption so that officers, directors and partners are generally required to be covered under the employer's workers' compensation policy unless they meet a narrower definition of excluded employee, and even this narrower set of officers, directors, and partners, as defined, can only opt out of coverage by signing a waiver under penalty of perjury and filing the waiver with their employer's insurer.

Insurance companies are required to identify and provide notice to each employer that may have employees that were previously excluded from coverage and are affected by the new law. Insurers are also required to determine and report the premium and loss experience associated of those who have not chosen to opt of the coverage. Employers who believe they may be affected by this change in law are encouraged to contact their workers' compensation insurer or their workers' compensation agent or broker.

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Bad Faith Action

Plaintiffs then filed a bad faith action against Mercury based on the grounds Mercury's failure to make an offer without unacceptable terms and conditions, its refusal to settle the case at policy limits when it had the opportunity to do so, and its unwillingness to make efforts to reach a reasonable settlement constituted a breach of its obligation of good faith and fair dealing, exposing Ms. McDaniel to excess damages. The parties submitted the case to a referee to determine all issues of law and fact.

By now you should know where this is going. The referee ruled Mercury acted in bad faith by refusing to accept the releases with the additional language inserted by plaintiffs. The referee ruled the additional language did not constitute a nonacceptance of the policy limits was essentially superfluous, as California law is clear a release in a civil case does not release a defendant from a criminal court's restitution order. The additional language did not refer to Ms. McDaniel's right to offset the money paid by Mercury against the restitution order.

The Court of Appeals affirmed, finding Mercury breached its duty of good faith and fair dealing.

Takeaway

Barickman makes clear the offering of policy limits in a timely fashion is not always enough in and of itself to defeat a bad faith claim. Under California law, the ultimate test for a bad faith claim is whether the insurer's conduct was unreasonable under all of the circumstances. The issue was not the timeliness of tendering the policy limits, rather it was Mercury's handling of the slightly modified version of the release. The Court of Appeals stated there were significant issues of credibility as to whether Mercury did all within its power to effect a settlement once plaintiffs accepted the policy limits offer but proposed a modified version of the release. The Court of Appeal agreed with the referee's conclusion that Mercury's refusal to accept the release as amended by plaintiffs was unreasonable. The $3,000,000 judgment could have easily been avoided had Mercury simply presented a revised release clarifying the mutual intent of the parties.

Barickman also teaches us it is imperative to memorialize all settlement negotiations in writing. The referee heard conflicting testimony from plaintiffs' counsel and Mercury claim handler regarding the dispute over the additional language, much of which was based on oral conversations between the
parties. While the proposed language was vague and ambiguous as to its intent, the parties could have exchanged amended or modified versions of the release to clarify plaintiffs' position regarding the restitution rights. As the Court of Appeals pointed out, the parties could have simply added "and does not affect the insured's right to offset," which would have eliminated all doubt as to intent of the added language.

Tendering the policy limits early is not the end of the story for insurers. In a bad faith action, the court will weigh the totality of the insurer's conduct under the circumstances. In this case, Mercury paid $3,000,000 instead of $30,000 because it could not agree with plaintiffs' counsel over seven (ultimately unnecessary) additional words in the release.

Happy Thanksgiving to you and yours!

Insurance Fraud Prevention Act

Credit to: Low, Ball & Lynch, San Francisco, CA

The People ex rel. Allstate Insurance Company, et al. v. Daniel H. Dahan, et al.

Court of Appeal, Second District (September 15, 2016)

Under Section 1871.7 of the California Insurance Frauds Prevention Act ("IFPA"), members of the public are given authority to file private "qui tam" suits (on behalf of the State as well as themselves) against anyone who commits insurance fraud in the state. This case considered whether the defendant in a qui tam suit had standing to appeal allocation of the proceeds of the suit between the State of California ("State") and the party bringing suit.

Allstate Insurance Company ("Allstate") brought a qui tam action on behalf of itself and the State of California against Daniel H. Dahan and his affiliated corporation Progressive Diagnostic Imaging, Inc. pursuant to the IFPA. Neither the district attorney nor the insurance commissioner opted to take over the lawsuit. The trial court entered judgment against defendants, finding that plaintiffs had proven 487 claims for violation of Penal Code § 550 (knowingly submitting a false or fraudulent claim to an insurer), and awarded a total of $7,010,668.40 against the defendants, comprised of $5,788,516.78 in civil penalties and assessments and $1,222,151.62 in attorneys' fees, costs and expenses of investigation.

Following entry of the qui tam judgment, Allstate began efforts to collect it. During its investigation, Allstate learned of a series of real estate transactions conducted by defendants designed to transfer away their assets. Allstate, on behalf of the State, filed an action to set aside the fraudulent transfers of real and personal property. Defendants demurred, pointing out that the judgment in the qui tam action had not been allocated pursuant to section 1871.7(g)(2)(A), and that without such allocation, Allstate had no stake in the judgment or authority to pursue collection. Allstate obtained a stay in the fraudulent conveyance action to allow it to return to the qui tam court, where it then filed a motion for an order allocating the qui tam judgment proceeds. This was based on a stipulation between the State and Allstate, splitting the penalties at $2,894,258.39 each and awarding the fees and costs ($1,222,151.62) to Allstate.

Defendants opposed the allocation motion, arguing that the court lacked jurisdiction to enter the order because the qui tam judgment had by this time become final and the court had no power to "materially vary" it. Allstate argued that the allocation order simply apportioned the judgment proceeds between judgment creditors and thus had no impact on either the rights of the People and Allstate as plaintiffs and judgment creditors on the one hand, or the obligations of defendants as judgment debtors, on the other hand. Regardless of the outcome of the allocation motion, Allstate argued, defendants remain obligated to pay the $7,010,668.40 judgment. The trial court agreed with Allstate, and granted the allocation motion, entering the stipulation as judgment. Defendants appealed.

The Court of Appeal affirmed the judgment, holding that the defendants had no standing to oppose the allocation order.

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DOI ANNOUNCEMENT:
$34.9 million awarded statewide to fight workers' compensation fraud

44 counties receive grants to support Law enforcement and DAs

SACRAMENTO, Calif. -Insurance Commissioner Dave Jones today announced he has awarded $34.9 million in grants to 37 district attorney offices representing 44 counties across California to combat workers' compensation insurance fraud.

The grants, funded through employer assessments, support law enforcement efforts in investigating and prosecuting workers' compensation insurance fraud.

"Ultimately California consumers and businesses pay the price for insurance fraud through higher premiums and increased costs for good and services," said Commissioner Jones. "These grants will assist district attorneys across the state in uncovering workers' compensation fraud schemes and prosecuting those who take advantage of the system. Workers' compensation insurance fraud includes medical provider fraud, employer premium fraud, employer defrauding employee, insider fraud, claimant fraud, and the willfully uninsured operating in the underground economy. These cases, when successfully prosecuted, help level the playing field for honest businesses and discourage future fraudulent activity.

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The court first noted that section 1871.7 authorizes "any interested persons, including an insurer" to bring a qui tam civil action "for the person and for the State of California" to recover penalties and equitable relief for fraudulent insurance claims. Procedurally, the interested person files the complaint and serves it on the district attorney and the insurance commissioner. The complaint is sealed *in camera* for at least 60 days, during which time either the D.A. or the insurance commissioner may elect to intervene. Where the State intervenes, section 1871.7(g)(1) provides that the private party is entitled to a "bounty" of between 30 and 40% of the proceeds, depending upon the extent to which they participated. If the State declines to intervene, section 1871.7(g)(2) provides for a "bounty" of between 40 and 50% plus reasonable attorneys' fees and costs imposed from the defendant.

Here, the State did not intervene, and stipulated that Allstate could receive 50% of the proceeds, plus all the costs. This amount was within the statutory limits of the section.

Defendants argued that an allocation was a prerequisite or condition precedent to enforcement of a qui tam judgment by an insurer when the State has not intervened. Disagreeing with defendants, the Court noted that a plain reading of section 1871.7, the "bounty" in cases where the State does not intervene is for trying and collecting the judgment. Thus, after collecting on the judgment, Allstate would pay the excess over its allocation to the State.

According to the Court, the right to levy on the entire $7 million qui tam judgment was Allstate's, and not the State's. Consequently, the allocation order was not a prerequisite to Allstate's ability to levy on the judgment against defendants. Since the defendants acknowledged that their appeal had no effect on the qui tam judgment, and did not alter their obligations to pay the $7 million, defendants themselves were not aggrieved by the allocation order and had no standing to appeal from it.

The appeal was dismissed.

Premises Liability

Credit to: Low, Ball & Lynch, San Francisco, CA

Court of Appeal, Fourth Appellate District (September 22, 2016) *Victor M. Regalado v. Jeffrey M. Callaghan*

Generally, when employees of independent contractors are injured in the workplace, they cannot sue the party that hired the contractor to do the work, but are instead limited to workers' compensation as their sole remedy. An exception is when the hiring party retains control of workplace safety and "affirmatively contributes to the employee's injuries." See Hooker v. Department of Transportation (2002) 27 Cal.4th 198. This case considered whether the hiring party's failure to act was sufficient "affirmative contribution" for the imposition of liability.

Jeffrey Callaghan ("Callaghan"), a licensed concrete subcontractor, acted as an owner-builder for a home he built in the Coachella Valley. Callaghan hired licensed subcontractors to complete the work but was responsible himself for obtaining all permits and keeping track of the progress daily. Callaghan purchased a pre-engineered underground vault where the pool equipment would be located and connected to a propane line. Callaghan obtained permits for the pool and the site plan submitted depicted the underground vault. Callaghan did not obtain separate permits for the vault and propane line and did not have the County inspect the vault. The vault was installed by Callaghan with the help of another contractor, and he hired someone else to run a propane line to the back yard.

Callaghan hired Dunn's Designer Pools ("Dunn's") to build the pool and spa. Dunn's designed the layout of the equipment in the vault including where the propane line would enter the vault. Dunn's employee, Victor Regalado ("Regalado"), installed the pool equipment in the vault. Neither Regalado nor his supervisor read the instruction manuals for the spa heater or the propane conversion kit which warned of a risk of explosion if a propane heater is installed in a pit or low spot where propane gas can collect. After the work was completed, Regalado turned on the propane line, the filter pump, and the heater in preparation for the County's inspection. An explosion occurred while Regalado was exiting the vault. Regalado was severely burned, injured his back and suffered other substantial injuries.

Regalado sued Callaghan for negligence and premises liability, arguing that Callaghan was liable because he retained control over the project by submitting plans, pulling permits and calling for inspections, furnishing the vault and propane line, asking Dunn's to install the pool equipment in the vault, and for his failure to obtain separate permits for the vault and propane line.

At trial, all parties had agreed to use the approved jury instruction CACI 1009B, which required a showing that (1) Callaghan owned the property; (2) he retained control over safety conditions; (3) he negligently exercised control over safety conditions; (4) plaintiff was harmed; and (5) Callaghan's negligent exercise of control was a substantial factor in causing plaintiff's harm. Callaghan agreed that this was the law, but had argued unsuccessfully that there should be additional instructions given to show that he "affirmatively contributed" to Regalado's injury. Callaghan sought to amplify CACI 1009B with a special instruction that an owner-builder can only be held liable if they "affirmatively contributed" to the injuries by "direction, induced reliance, or other affirmative conduct." He had also sought to instruct the jury that "passively permitting an unsafe condition to occur rather than directing it to occur" did not constitute "affirmative contribution."

The jury found Callaghan was 40 % at fault, compared to 5% for Regalado and 55% for Dunn's, and judgment was entered against Callaghan in the amount of approximately $3 million. Callaghan appealed.

The Appellate Court upheld the trial court's ruling and found that CACI 1009B adequately instructed on the applicable law set forth in Hooker, and properly refused Callaghan's requested special instructions. The Appellate Court found that while drawn directly from case law, Callaghan's proposed special instructions were misleading in that they suggested that in order for the hirer to "affirmatively contribute" to the plaintiff's injuries, the hirer must have engaged in some form of active direction or conduct. The Appellate Court found that the instructions had the potential of misleading the jury and did not provide a clear statement of the law. Furthermore, the use notes for CACI 1009B showed that "affirmative contribution" may be found by omission or failure to act.

Here, there was testimony at trial that the vault and propane line installations required a permit, and the reason for the permit was to ensure that the work was done safely. Callaghan was responsible for obtaining permits and calling for inspections, so he clearly retained control over safety conditions. There was testimony that if Callaghan had gone through the appropriate permitting and inspection process, he would not have had a design that included an underground vault with propane piped into it without a proper ventilation system. Based on this evidence, a reasonable trier of fact could conclude that Callaghan negligently exercised his retained control over safety conditions in a manner that affirmatively contributed to Regalado's injuries.

On a side note, the Appellate Court also upheld the trial court's finding that payments made to Regalado by his employer were intended to be gifts as his employer was not obligated to make the payments and they were properly excluded from evidence under the collateral source rule.

On the Lighter Side...

So who thinks English is easy?!?

I think a retired English teacher was bored...THIS IS GREAT!

Read all the way to the end.....
This took a lot of work to put together!

1) The bandage was **wound** around the **wound.**

2) The farm was used to **produce produce**.

3) The dump was so full that it had to **refuse** more **refuse**.

4) We must **polish** the **Polish** furniture..

5) He could **lead** if he would get the **lead** out.

6) The soldier decided to **desert** his dessert in the **desert..**

7) Since there is no time like the **present**, he thought it was time to **present** the **present.**

8) A **bass** was painted on the head of the **bass** drum.

9) When shot at, the **dove dove** into the bushes.

10) I did not **object** to the **object.**

11) The insurance was **invalid** for the **invalid.**

12) There was a **row** among the oarsmen about how to **row**.

13) They were too **close** to the door to **close** it.

14) The buck **does** funny things when the **does** are present.

15) A seamstress and a **sewer** fell down into a **sewer** line.

16) To help with planting, the farmer taught his **sow** to **sow.**

17) The **wind** was too strong to **wind** the sail.

18) Upon seeing the **tear** in the painting, I shed a **tear..**

19) I had to **subject** the **subject** to a series of tests.

20) How can I **intimate** this to my most **intimate** friend?