CAIIA

Status Report

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November 2020

A Two-Tiered Approach to Ensure Diverse Juries
Credit to Tyson & Mendes, La Jolla, CA

In a year where the social inequalities faced by people of color have been brought to the forefront of American life, California lawmakers recently passed a set of bills (SB592 and AB3070), representing a two-tiered approach aimed to diversify jury pools throughout the state.

The first tier in this two-part approach is SB592. SB592, authored by California State Senator Scott Weiner, D-San Francisco, is an effort to diversify jury pools by broadening the database of potential jurors to include state taxpayer information. Currently, juror pools within the state include registered voters and Californians with state-issued driver licenses and identification cards. However, proponents of the bill claim the current source of information is not enough to ensure that jury pools are a fair representation of the areas they serve. A recent study conducted by the Public Policy Institute of California found that while California's current adult population is 42% white, and 58% comprises other minorities, voter registration among the minority-majority is low. Contrastingly, voter registration among Californians who identify as white is 57%, which means that the pool of potential jurors less diverse than the community itself.

In a recent videoconference interview, Weiner stated by including taxpayer information, "the idea is to broaden and diversify jury pools amid public calls to reshape the criminal justice system." The current expectation is that jurors summoned under the new system will increase in urban areas where there is a smaller percentage of car ownership and a more racially diverse population.

The second tier, AB3070, is authored by Assembly Member Shirley Weber, D-San Diego, which prohibits the use of peremptory challenges of jurors motivated by a potential juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation. Under the current system, the California Code of Civil Procedure section 231(c) allows six (6) peremptory challenges without cause or further explanation. Moreover, while peremptory challenges based on race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation are currently prohibited, AB3070 takes the current prohibition one step further.

Under AB3070, if the court or an opposing party objects to the use of a peremptory challenge because it is motivated by one of the criteria mentioned above, the burden of proof then shifts to the party making the challenge to prove otherwise or else the challenge is considered invalid. If the court finds the peremptory challenge was motivated to exclude a juror based on any of the above; AB3070 provides the court with the option to either seat the challenged juror, declare a mistrial, or provide an appropriate and alternative remedy acceptable to the objecting party. Further, the denial of an objection by the court will be subject to appellate review. If the court of appeal finds that the denial was made incorrectly, then under AB3070, a new trial must be granted.

In response, the California District Attorneys Association has criticized the bill as "an upheaval of California's jury selection process, [which] is being advanced without the benefit of extensive debate." On the other hand, in a statement, Weber maintains the bill is an effort to combat a decades old jury selection procedure, which has been "especially detrimental to African Americans, Latinos, and other people of color."
The practical application and effect of these bills remains unseen; however, they both currently rest on Governor Newsom's desk awaiting his signature.

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Inside this issue…..

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November 2020

Richard Kern
CAIIA President

Some say there is a first for everything so here is my first message as the new President of the CAIIA. First, a little bit about myself. I am a native Californian and I have been an independent adjuster for over 34 year. When I began, I did not know anything about insurance and was lucky to have two mentors to help me. I still remember my first day as an adjuster when Mike Orber handed me a book called "Principals of Insurance" and said, "read this!" And I did. Lucky for me, Mike was always willing to spend time with me, answering all of my endless questions. My 2nd mentor was Les Schifrin, the founder of our company. He taught me many things, but what stands out is how to handle claims involving jewelry/fine arts and how to service the London market. Plus, Les had a great enjoyment for claims and always told very entertaining claims stories. To this day I am grateful for Mike and Les for giving me the solid foundation on which to base a career in claims.

My current work primarily consists of managing liability claims for the London Market along with managing a team of adjusters and staff completing a wide variety of claims. Back in the day I might have been considered a "multi-line" adjuster, but once computers became essential, specialization became more the norm. While I take the position that an experienced adjuster can handle almost any claim, it is now more important than ever that the correct adjuster be assigned to a claim which, in my opinion, has led to more specialization.

So, no one thinks that all I do are claims. Music is and has always been a huge part of my life. I play bass and keyboards in rock bands here in San Diego. Besides the thrill of getting to play the "rock star" once in a while (as if the bass player is ever the star), it is also fun to be on stage observing the workings of the bar/restaurant/facility while noticing all the little bits that could give rise to a liability claim. Unfortunately, the pandemic put a halt to much live music but someday it will be back.

So as I start my tenure as President, I have to honor all of the past presidents of the organization. Without their guidance and friendship, I could not have attained this position. The CAIIA is nothing without its members and leaders and my goal for the next year is to look forward with the organization in order to meet the needs of our members and all adjusters in California, especially as things have changed since the pandemic.

I want to mention my wife who has supported me my entire career and after all these years can speak claims without ever handling a file.

Lastly, please Vote November 3rd and in all elections afterwards.

That's all until next month.

Richard Kern

NEWS OF AND FOR OUR CAIIA MEMBERS:

New Bylaws to be voted on soon!

Your CAIIA Board and counsel are in the process of finalizing revisions to the CAIIA Bylaws. They will soon be available for your review and approval.

Key changes include:

Addition of an "Adjunct Member" category to allow membership by individuals holding a California IA license and employed by an entity that is not a Regular Member.

Addition of an "Associate Member" category to allow membership by individuals who are employed by an insurance company, self-insured entity, governmental agency, or quasi-governmental agency in the business of adjusting insurance claims.

These new member categories are intended to grow membership by including a broader group of adjusters in our association.

A change in the CAIIA Board structure which creates a four-member Board of Directors with each Director serving for three years.

This new Board composition will make it easier to maintain a strong CAIIA Board in the years to come.

DOI Announcement

Oxnard insurance agent and unlicensed employee arraigned for alleged fraud

Duo put consumers at risk by using fraudulent logins and unlicensed agents

VENTURA, Calif. — Insurance agent Brenda Cervantes, 31, of Oxnard, and unlicensed employee Edith "Emely" Arellano-Quinones, 39, of Ojai, were arraigned today on misdemeanor counts of insurance fraud after allegedly selling auto insurance without proper licensing and putting their customers' coverage and information at risk. The case is a reminder to consumers to always check the license status of their agent on the California Department of Insurance's website or by calling its hotline number.

Investigators from the Department conducted undercover visits to a number of Victoria's Auto Insurance Services in Ventura County in order to obtain quotes for insurance services.

Investigator visits, along with interviews with employees and customers, revealed Arellano-Quinones was operating and supervising a branch of Victoria's Auto Insurance Services in Oxnard without being properly licensed as an insurance agent. Arellano-Quinones was previously licensed by the Department, but surrendered her license in 2008.

Arellano-Quinones illegally used login credentials from various insurance companies provided by Cervantes, a licensed insurance agent who also worked for Victoria's Auto Insurance Services. Cervantes provided these login credentials to several employees who were not licensed to provide quotes to customers.

The investigation also determined Arellano-Quinones was knowingly, and at the direction of Cervantes, providing insurance advice and recommendations without a license. Their actions put consumers in financial risk and by using an unlicensed agent and false credentials it could have potentially invalidated their purchased insurance coverage.

Cervantes and Arellano-Quinones pleaded not guilty and will return to court on November 2, 2020. The Department is taking action against Cervantes' license. The Ventura County District Attorney's Office is prosecuting this case.

Consumers can check the license status of their agent or contact the Department at 800-927-4357 if they suspect they are victims of insurance fraud or have any questions.

Do's and Don'ts of Telemarketing

Credit to Manning, Kass, Los Angeles, CA

The Do's and Don'ts below should give real estate licensees a general understanding of what is required in connection to telemarketing. Violation of the rules could result in significant losses. Citations or fines by the government can be up to $100,000 for each violation or each day of a continuing violation (not to exceed $1,000,000 for any single act). When using auto-dialers, the monetary penalty shall not be less than $10,000 nor more than $100,000 per call. In addition, an injured consumer may file a civil lawsuit in state court for a violation of the rules. A consumer may seek to recover actual monetary loss of $500 in damages for each violation, and an injunction prohibiting further violations. For violations of auto-dialers rules, the court may also award treble damages if the violator willfully or knowingly violated these rules. The statute of limitation for the violations is 4 years and the consumer may also recover his/her attorney's fees. Lastly, often violations are pursued in civil court as class actions, because the volume of calls made by the licensee is high.

Do-Not-Call List Rules

Do: Make sure that the phone number you are calling from is not on the do-not-call registry. The database registry can be accessed at https://telemarketing.donotcall.gov. There is a cost for this access. A licensee must also cross check the do not call registry with his/her list of numbers at least once every 31 days and maintain records documenting this process.

Don't: The prohibition is from making sales calls to telephones registered on the do-not-call list. If the purpose of the call is to discuss with a FSBO a potential sale of the property to a buyer the agent represents, then the call is not a telephone solicitation, because the licensee is not encouraging the called party to purchase, rent or invest in property.

Do: Calls to registered numbers are allowed when they involve: • Political calls. • Charitable calls. • Debt collection calls. • Informational calls. • Telephone survey calls.

Do: Calls from a business that had a contact with the consumer for up to 18 months following the last transaction are allowed. The licensee cannot argue however, that as long as the buyer keeps the house or holds the loan, the relationship continues.

Don't: An established business relationship with a particular company does not extend to affiliated companies unless the consumer would reasonably expect them to be included. There is also no established business relationship if either party previously terminated the relationship. The business relation ends when the transaction ends.

Do: Calls from a business where the consumer made an inquiry or submitted an application are permitted up to 3 months from the day of the inquiry. Don't: Do not call the seller of an expired or cancelled listing at their home or cell phone number to solicit real estate business if that number is listed on the do-not call registry.

Do: Calls made within a 50 mile radius by either individual business persons or small businesses with no more than five full time or part time employees are permitted. Independent contractors who are real estate licensees are not included in this count.

Do: A telephone call made to a place of business is allowed. The do-not-call rules only apply to calls made to residential and wireless telephone numbers. Beware of calling a business which is located within a residence, as that may not be exempt.

Don't: Do not make prohibited calls without a signed written permission. The written agreement must state that a specific caller can contact the specified telephone number. See "Consent For Communications" (C.A.R. Form CFC).

Do: Calls made to people with personal relationship, which means any family member, friend, or acquaintance are allowed. Personal visits to the home, flyers and letters are also allowed.

Do: Brokers should have established and implemented written procedures for complying with the do-not-call rules and must train their licensee how to comply with such rules.

Do: Brokers should maintain and record a list of telephone numbers that cannot be contacted, and use a process to prevent telephone solicitations to any telephone number on your do-not-call list. If the brokers can show these precautions, then the licensee will not be held liable for calling someone on the do not-call registry by mistake.

Rules Regarding Calls In General

Don't: Do not disconnect an unanswered telemarketing call before at least 15 seconds or four rings.

Do: When the licensee calls, the licensee must give: (1) his/her name; (2) the company's name; and (3) the telephone number or address where the licensee may be contacted. The telephone number cannot be a 900 number or any other number for which charges exceed local or long-distance charges.

Don't: Do not block caller I.D. The caller I.D. information must include the name and number.

Do: For any residential telephone number who is not on the do-not-call registry but the person requests not to be called, that person's name, if provided, and his/ her telephone number must be placed on a company's do not call list. Distribute the list every 30 days and maintain it for 5 years. Continued on page 7

Amazon Found Liable for Defective Products Sold by Third-party

Credit to Tyson & Mendes. La Jolla, CA

The Fourth Appellate District Court of Appeal recently published its decision in the *Bolger v. Amazon.com, LLC* case (2020 DJDAR 8836 (Aug. 13, 2020)) holding that Amazon is liable under a theory of strict product liability for a defective product sold on its online marketplace by a third-party seller.

Plaintiff Angela Bolger purchased a replacement laptop battery through Amazon.com that was sold by third-party seller Lenoge Technology (HK) Ltd. Several months after receiving the battery from Amazon, the battery exploded causing Bolger to suffer severe burns. She sued Amazon.com and Lenoge, among others, including a defendant in China (on whom she was told it would take 2-3 years to effect service of process). Lenoge was served but did not appear and was defaulted by the court, as was one other defendant not located in the United States. After two years of litigation Amazon filed a motion for summary judgment claiming that the doctrine of strict products liability, as well as any similar tort theory, did not apply to it because it did not distribute, manufacture, or sell the product in question. It claimed its website was merely an "online marketplace" and Lenoge was the product seller, not Amazon. The trial court agreed and entered summary judgment for Amazon.

Upon appeal, Bolger argued that Amazon is strictly liable for defective products sold on its website by third-party sellers. In agreement, the appellate court weighed several factors in its 47-page opinion. The facts that persuaded the appellate Court to hold Amazon strictly liable included:

1. Amazon placed itself between Lenoge and Bolger in the chain of distribution of the product;
2. Amazon accepted possession of the product from Lenoge;
3. stored it in an Amazon warehouse;
4. attracted Bolger to the Amazon website;
5. provided Bolger with a product listing for Lenoge's product;
6. received her payment for the product; and

shipped the product in Amazon packaging to her.

After a lengthy review of the case law and evolution of the tort of strict products liability, the holding focused on the following factors regarding the relationship between Amazon and Lenoge:

1. Amazon set the terms of its relationship with Lenoge;
2. controlled the conditions of Lenoge's offer for sale on Amazon;
3. limited Lenoge's access to Amazon's customer information;
4. forced Lenoge to communicate with customers through Amazon; and

demanded indemnification from Lenoge as well as substantial fees from them on each purchase.

Also relevant to its evaluation was the fact that "[t]hroughout the process, Bolger had no contact with Lenoge or anyone other than Amazon. She believed Amazon sold her the battery." The Court found these factors sufficient to hold Amazon liable under the tort of strict products liability, explaining: "Whatever term we use to describe Amazon's role, be it "retailer," "distributor," or merely "facilitator," it was pivotal in bringing the product here to the consumer."

The court specifically found the case law supports its holding because Amazon was a "direct link in the chain of distribution, acting as a powerful intermediary between the third-party seller and the consumer." Further, because "Amazon is the only member of the enterprise reasonably available to an injured consumer in some cases, it plays a substantial part in ensuring the products listed on its website are safe, it can and does exert pressure on upstream distributors (like Lenoge) to enhance safety, and it has the ability to adjust the cost of liability between itself and its third-party sellers." (See *Vandermark v. Ford Motor Co.* (1964) 61 Cal.2d 256, 262.) Strict liability here "affords maximum protection to the injured plaintiff and works no injustice to the defendants, for they can adjust the costs of such protection between them in the course of their continuing business relationship." (*Id.* at pp. 262-263.)

In response to Amazon's argument that it was protected by a federal law preventing liability of internet service providers for third-party content, the court then further concluded that "Amazon is not shielded from liability by title 47 United States Code section 230. That section generally prevents internet service providers from being held liable as a speaker or publisher of third-party content. It does not apply here because Bolger's strict liability claims depend on Amazon's own activities, not its status as a speaker or publisher of content provided by Lenoge for its product listing."

Although the appellate court reversed the trial court's grant of summary judgment and remanded the matter, it did instruct the trial court to enter an order granting Amazon's motion in part.

Takeaway

It is not clear whether the Supreme Court of California will take this matter up on appeal. The decision is based on the basic principle that a company in the distribution chain that places a product in the stream of commerce should be held liable for defective products. This, however, fails to account for Amazon's inability to modify, manufacture or make alterations to the products placed for sale through its market place. Nonetheless, the Appellate Court and likely a Supreme Court may find that Amazon, given its size and marketplace power, has the ability to hold the companies selling products on its website to the highest standard and accountable for defective products. In either event, this case opens the door for potential liability for companies who provide a market place for products and those that re-sell products under their own name and who may not be an economic behemoth like Amazon.

Principles of Waiver Used to Establish Existence of an Effective Insurance Contract
Credit to Haight, Brown and Bonesteel,Los Angeles, CA

In *Dones v. Life Ins. Co. of North America* (No. A157662, filed 10/7/20), a California appeals court held that whether an insurer had waived or was estopped to assert that an "active service" requirement prevented inception of coverage for an employee under a group life insurance policy provided by her employer presented triable issues of fact not subject to demurrer.

In *Dones*, Life Insurance Company of North America (LINA) issued a group life insurance policy to the Alameda County Sheriff's Department. The deceased was a civilian employee who enrolled for the coverage online. She was on medical leave, remained on leave through the purported effective date of coverage, and died six months later. The premiums were paid out of her paycheck, and out-of-pocket when that became insufficient.

The insurance was provided under a master policy that was not distributed to enrolled employees, who were supposed to be given a certificate describing the coverage. The master policy stated: "If an Employee is not actively at work due to Injury or Sickness. . . . Coverage will become effective on the date the Employee returns to Active Service." "Active Service" was defined as: "An Employee will be considered in Active Service with the Employer on a day which is one of the Employer's scheduled work days if. . . 1. He or she is actively at work . . . . performing his or her regular occupation for the Employer on a full-time basis. . . ."

The limitation was referred to in various paper notices and places online, but not clearly spelled out. When the employee died, her beneficiary was advised that the coverage never took effect because she had not returned to active service, and her premiums would be refunded. In the ensuing breach of contract and bad faith lawsuit, the beneficiary alleged that the County was acting as agent for LINA in administering the policy; that she detrimentally relied on a confirmation she received that the insurance was in effect; and that by repeatedly deducting the premiums from her paycheck without notifying her of any deficiency in her application, the County, for itself and as agent for LINA, knowingly and voluntarily waived any requirement that the insured be actively at work for coverage to take effect.

The trial court sustained the County's and LINA's demurrers without leave to amend, holding that since it was admitted in the complaint's allegations that the life insurance benefits would not go into effect until the employee returned to active service, and she did not do so, any failure to provide life insurance benefits was not a breach of contract. The court also rejected the argument that LINA and County waived or were estopped from enforcing the active service requirement based on case law holding that waiver and estoppel cannot be used to create insurance coverage that does not exist in the first instance.

The appeals court reversed, distinguishing a number of cases cited for the rule that the doctrines of waiver and estoppel are not available, based upon the conduct of the insurer, to bring within coverage risks not covered by a policy's terms, or expressly excluded (as distinguished from the waiver of, or estoppel to assert, grounds of forfeiture). The *Dones* court said that *Aetna Casualty & Surety Co. v. Richmond* (1977) 76 Cal.App.3d 645; *Manneck v. Lawyers Title Ins. Corp.* (1994) 28 Cal.App.4th 1294; *Komorsky v. Farmers Ins. Exchange* (2019) 33 Cal.App.5th 960; and *R & B Auto Center, Inc. v. Farmers Group, Inc.* (2006) 140 Cal.App.4th 327, were all distinguishable because they "involve plaintiffs' attempts to obtain coverage under existing insurance policies for claims not covered by the terms of their policies." Instead, according to the *Dones* court, "the present case does not involve the scope of coverage under an existing insurance policy but rather the question whether the policy ever went into effect. None of LINA's cases involve waiver or estoppel in the context of a condition precedent to operative policy coverage."

The *Dones* court cited *Salyers v. Metropolitan Life Insurance Company* (9th Cir. 2017) 871 F.3d 934, 941, for the proposition that "where, as here, premium payments have been accepted despite the plan participant's alleged noncompliance with policy terms, 'giving effect to the waiver . . . does not expand the scope of the [coverage]; rather it provides the plaintiff with an available benefit for which he paid." (Quoting *Gaines v. Sargent Fletcher, Inc. Grp. Life Ins. Plan* (C.D.Cal. 2004) 329 F.Supp.2d 1198, 1222.)

The *Dones* court cited numerous other cases supporting its conclusion, stating: "One thing is clear from all these cases: At least in the context of determining the effect of preconditions to effective coverage, waiver and estoppel are questions of fact. . . . and LINA's cases do not support a conclusion that these doctrines are inapplicable in the present case. We decline to hold that principles of waiver and estoppel cannot establish the existence of an effective contract of insurance as a matter of law."

Having concluded that waiver and estoppel were potentially applicable, the *Dones* court then held that despite a paucity of facts, the mere allegation that the County was acting as an agent of LINA raised factual questions sufficient to overcome a demurrer. The court also rejected a "sham pleading" argument – that amendments made to the complaint by the plaintiff were fatally contradictory.

Although the court found that the County could be deemed an agent of the insurer, the *Dones* court nonetheless sustained the demurrer without leave as to the County itself. The court duly acknowledged that there was evidence that the deceased did not know LINA's actual identity, and that an agent can be directly liable if the principal is not disclosed (citing *Unlimited v. Commercial Standard Title Ins. Co.* (1983) 149 Cal.App.3d 792), but the *Dones* court stated that: "Application of these principles in the present case would make no sense. As an employee purchasing life insurance through a group plan offered by her employer, [the deceased] was not in the same position as an individual negotiating a commercial transaction with the agent for a seller of goods, lessor of property or the like. . . . She could not plausibly have viewed her selection of the life insurance benefit as a contract for the County itself to provide the actual insurance: The County is not an insurer."

Continued from page 4

Rules Regarding Automated Calls

Don't: When using auto-dialers do not use prerecorded messages to 'mobile' phones without consent. Prerecorded messages must be introduced by a live person and the person called must give their consent to hear the message.

Don't: Do not use auto-dialed 'text' messages to 'mobile' phones without consent.

Do: Auto-dialed calls to land lines are permitted. But note that land line numbers can be routed to mobile phones and also some consumers might provide cell numbers as home numbers.

Do: A consent form must be signed by the person called, it must clearly authorize prerecorded or autodialed calls to that person and it must include the authorized telephone numbers. It must also include a clear and conspicuous disclosure that: "(A) By executing the agreement, such person authorizes the seller to deliver or cause to be delivered to the signatory telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice; and (B) The person is not required to sign the agreement (directly or indirectly), or agree to enter into such an agreement as a condition of purchasing any property, goods, or services." Written consent can be through paper or electronic means, including website forms, a telephone keypress, or a recording of oral consent. Written consent to make prerecorded telephone calls is always required, even for clients with whom the licensee already has an established business relationship.

Do: Auto-dialed pre-recorded calls must also have an "opt-out" mechanism that allows the person receiving the calls to opt out of receiving additional calls immediately. The opt-out mechanism must be announced at the outset of the message and be available through the duration of the call.

Don't: Under the rules, telemarketers using autodialers must ensure that they do not abandon more than 3% of all calls made over a 30-day period. A call is considered "abandoned" if it is not connected to a live sales representative within two seconds of the called person's completed greeting.

On the Lighter Side: