CAIIA Status Report

DECEMBER 2005

Insurance Commissioner John Garamendi and Industry Members Announce New Anti-Fraud Insurance Industry Guidelines

New special investigative unit regulations provide tougher guidelines for anti-fraud efforts.

SACRAMENTO – Insurance Commissioner John Garamendi announced on Thursday, October 20, 2005 new Special Investigative Unit (SIU) regulations for insurance carriers licensed to conduct business in California. The new regulations are a result of an intensive, collaborative effort with the Department of Insurance, members of the insurance industry and other key stakeholders. Insurance company SIU's review and refer incidences of suspected insurance fraud to the Department's Fraud Division, which receives approximately 24,000 suspected referrals each year.

"I applaud the hard work and combined efforts between CDI, the insurance industry and stakeholders to form these new regulations", said Insurance Commissioner John Garamendi. "The new more stringent guidelines will be a huge advantage in our efforts to stop insurance fraud."

The new regulations include revised definitions, continuous SIU operation requirements, additional training procedures, stricter communications requirements, and clarification of when to refer suspected insurance fraud. Additionally, these regulations include language that implements penalty statutes contained in California Insurance Code sections 1875.24, which became effective earlier this year.

The full text of the new regulations, effective as of October 7, 2005, can be found on the CDI website. These regulations, Title 10, California Code of Regulations, Chapter 5, subchapter 9, article 2, sections 2698.30 to 2698.43, implement California Insurance code sections 1875.20-24.

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An Employer Organization of Independent Insurance Adjusters

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■ PRESIDENT'S MESSAGE

Recently I realized I was an insured. However, I was an insured without a claim. Let me explain.

In May 2005, my partner retired. He still comes in occasionally and does handle the cotton claims, but all of a sudden I had to learn all the inner workings of my office, something that Dave always handled. Now I'm faced with my office manager leaving at the end of the year, retiring to enjoy the pleasures of gardening, travel, etc. For the first time in over 20 years, I have to hire someone.

This is much like the homeowner or business owner who, at a blink of a moment, has a claim. They are not certain what's going to happen or how its going to come out and they call their agent. Shortly thereafter an adjuster calls, introduces himself or herself, makes an appointment and helps the insured with their problem.

Many times the insured is wary of this person that they never knew, who is now going to help them with their claim. Sometimes they seek the advice of experts, you know, that neighbor next door, that brother or sister who had a claim ten years ago and knows exactly what is going to happen.

But as you walk through the claim, step by step, you can soon gain the confidence of the insured and ninety-nine times out of a hundred, everything is handled routinely and professionally.

Ah, it is that one in one hundred claims that defines you as a professional. You know the ones I'm talking about. The small kitchen fire and the insured wants the entire house repainted. That dent in the fender and the insured wants the fender replaced, the car aligned, tuned, etc. Water damage "where all carpeting must be replaced", demands the insured.

It is this point that the professionalism of the adjuster is necessary. Reporting the facts promptly and with due respect to the insured's wishes, to the carrier.

I firmly believe that an adjustment is 50% product knowledge and 50% public relations. An adjuster can know what the policy says and how it can be applied, but it is how it is explained to the insured, that will sell the adjustment.

Membership in the CAIIA is a process that requires an application be filled out and submitted. References are checked and the main requirement is that an office be established for at least two years before they can join. The CAIIA is present at the two most valuable conferences that are offered in the State of California. The first is the annual Combined Claims Conference held in March in the City of Industry. The second is the Claims Conference of Northern California, which is held in September in Northern California.

There are approximately nine hundred Status Reports that are mailed out monthly. Status Reports are mailed not only to the CAIIA membership, but to company claims handling personnel, JPA's, TPA's, agents, etc. At our recently concluded and successful annual convention, a company representative made it a point to tell us that many times he reads about changes in law, proposed regulation changes, etc., through the Status Report.

The point being is the CAIIA is continually educating its readership. Therefore, where an insured is aided by professionalism and knowledge, feeling like an insured, has made me seek out professionals, to keep our business smoothly. While I feel like an insured without a claim, I know that my file will be closed out within the next few weeks.

I would like to congratulate Carl Warren & Company for being named California/Western States ESOP, Company of the Year. This was reported in the November Status Report, but is quite an honor for not only one of our member firms, but also a Charter Member.

Hope your Thanksgiving holidays were pleasant and wishing all the merriest of holidays.

STEVE WAKEFIELD
President - CAIIA 2005-2006

California Court Rules Illegal Immigrants Can Get Workers' Compensation

October 20, 2005

Illegal immigrants injured on the job are entitled to workers' compensation benefits despite their legal status, a California state appeals court ruled.

The 2nd District Court of Appeal ruled in a case involving Torrance-based coffee roaster Farmers Brothers Company, which had tried to deny workers' compensation benefits to an employee who was in the country illegally.

Farmer Brothers argued that federal immigration laws superseded the states workers' comp system, which provides medical care and disability benefits to injured employees. The court disagreed, upholding an earlier decision against Farmer Brothers by the state Workers' Compensation Appeals Board.

"California law has expressly declared immigration status irrelevant to the issue of liability to pay compensation to an injured worker", the three-judge panel said in a unanimous ruling issued late Monday.

The plaintiff, Rafael Ruiz, 35, claimed he injured his shoulders, back, neck and hands by repeatedly lifting heavy sacks of coffee beans, according to his attorney's case file.

Attorney Kari Krogseng of San Leandro, who filed a brief on behalf of the California Applicants' Attorneys Association, which represents injured workers, told the Los Angeles Times that the decision affirms "both the common sense application of California law and what every other court in the country has routinely found: that federal immigration law does not pre-empt state workers' compensation laws."

There was no immediate comment from Farmers Brothers; a spokesman did not immediately respond to a message left after hours at corporate headquarters.

Some advocates for tougher immigration control criticized the ruling.

"We can't reward people for breaking the law", said Andy Ramirez, a spokesman for Friends of the Border Patrol, a Covina-based group that sends members to patrol the U.S. border with Mexico.

The state Department of Finance estimated that 2.6 million illegal immigrants live in California.

Word Tumble

DORMITORY
When you rearrange the letters: DIRTY ROOM

PRESBYTERIAN
When you rearrange the letters: BEST IN PRAYER

ASTROMONER
When you rearrange the letters: MOON STARER

DESPERATION
When you rearrange the letters; A ROPE ENDS IT

THE EYES
When you rearrange the letters: THEY SEE

GEORGE BUSH
When you rearrange the letters: HE BUGS GORE

THE MORSE CODE
When you rearrange the letters: HERE COME DOTS

SLOT MACHINES
When you rearrange the letters: CASH LOST IN ME

ANIMOSITY
When you rearrange the letters: IS NO AMITY

ELECTION RESULTS
When you rearrange the letters: LIES – LET'S RECOUNT

MOTHER-IN-LAW
When you rearrange the letters: WOMAN HITLER

SNOOZE ALARMS
When you rearrange the letters: ALAS! NO MORE Z'S

A DECIMAL POINT
When you rearrange the letters: I'M A DOT IN PLACE

THE EARTHQUAKES
When you rearrange the letters: THAT QUEER SHAKE

ELEVEN PLUS TWO
When you rearrange the letters: TWELVE PLUS ONE

AND FOR THE GRAND FINALE:

PRESIENT CLINTON OF THE USA:
When you rearrange the letters (With no letters left over and using each letter only once):
TO COPULATE HE FINDS INTERNS

Weekly Law Resume

Prepared by Low, Ball & Lynch, Attorneys at Law

Coverage – Interpretation of Insurance Policy Language

Mirpad v. California Insurance Guarantee Association, Court of Appeal, Second District, (September 19, 2005)

Insurance policies are, in essence, contracts. While insurance policies have special features, they are still contracts to which the ordinary rules of contractual interpretation apply. Thus, the mutual intent of the parties at the time of the contract is formed governs interpretation, If possible, intent is determined from the written provisions of the policy. This case analyzes whether intent may be established by considering language in the context of the entire policy, even though, in other contexts, it could have a different meaning.

In 1999, Mirpad purchased a commercial office building in Phoenix, AZ. One of the tenants in the office building was POS Systems, Inc. In April 2000, Mirpad, through its' property manager notified POS that it was in default under the terms of its lease. Later that month, the property manager locked POS out of the premises. At the same time POS declared bankruptcy. Subsequently, POS filed two lawsuits against Mirpad, and others that included claims for wrongful eviction.

At the time of POS's alleged eviction, Mirpad was a named insured in a CGL policy issued by United Pacific Insurance Company. The policy included coverage for claims of "Personal Injury", which included "wrongful eviction . . . from a premises . . . that a person occupies . . . " Defense of the POS actions was tendered to United pacific. Prior to responding to the tender, United Pacific was declared insolvent. The tender of defense was then referred to the California Insurance Guarantee Association (CIGA). In July 2002, CIGA denied coverage and rejected the tender. Mirpad defended the underlying actions at its own expense, incurring defense costs in excess of $500,000.

In July 2003, Mirpad filed the subject action against CIGA for declaratory relief and for violation of California Insurance code, section 1063.2. The parties stipulated to the facts of the case. The pure legal question for the trial court was whether POS could be considered a "person" for purposes of a wrongful eviction claim.

CIGA's position was that POS's claim was not covered, because POS as a tenant, was an organization, as opposed to a person. POS, on the other hand, contended that coverage did extend to an organization, and that CIGA was obligated to pay its defense costs of over $500,000. In support of their positions, the parties filed competing motions for judgment on the pleadings. The trial court ruled in favor of Mirpad. Without attempting to interpret the relevant language of the policy, the trial court solely looked to California Insurance Code, section 19, which defines the word person as: "any person, association, organization, partnership, . . ." Thereafter, the trial court entered judgment in plaintiffs' favor and awarded $500,000 in damages.

CIGA appealed. The Court of Appeal reversed. The court noted that an insurer owes a duty to defend any claim for which there is a potential for coverage under the policy. If coverage depends on an unresolved dispute over a factual question, the very existence of that dispute would establish a possibility of coverage and thus a duty to defend. However, where the only potential for coverage turns on resolution of a question of law, there is no duty to defend.

CIGA argued that clear and explicit language of the insurance policy indicated that POS could not be deemed a "person", and therefore, there could be no covered claim. The Second district agreed. The Court held that is was bound to read the policy language not in isolation, but in the context of the entire policy. Analyzing how the word "person" was used throughout the policy demonstrated that it consistently was used to refer only to natural persons. Further, the words "person" and "organization" were repeatedly used separately and distinctly. Therefore, the Court held that they must be given separate and distinct meanings.

The court of Appeal also disagreed with the trial court's reliance on Insurance Code, section 19. The court held that section 19 was intended to govern the construction and interpretation of the Insurance code. Section 19 provided no authority for the trial court to ignore an obligation to determine the intent of the parties and the plain meaning of the policy language. The Second District found that the clear meaning of the policy language revealed that a covered claim for wrongful eviction could not include a claim brought by an organization such as POS.

The judgment in favor of Mirpad was reversed and the matter remanded to the trial court with directions to vacate its' order; and to enter a new order granting CIGA's motion; and to thereafter enter judgment in CIGA's favor.

COMMENT

This case reiterates that a court in determining the plain meaning of policy language, must not only interpret that language in its "ordinary and popular sense", but also in the context of its usage in the policy itself.

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Weekly Law Resume

Prepared by Low, Ball & Lynch, Attorneys at Law

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Torts – Federal Standard Requires Commercial Driver To Use Extreme Caution

Weaver v. Chavez, Court of Appeal, Second District (November 7, 2005)

The commercial Motor Vehicle Safety Act was passed by Congress to promote the safe operation of commercial vehicles and to ensure compliance with safety regulations promulgated under the Act. Pursuant to 49 code of Federal Regulations, part 392.14, the driver of a commercial vehicle is to use extreme caution and to reduce speed when hazardous conditions exist. In this case, the question was whether this particular Federal regulation preempts California law.

On December 21, 2001, Plaintiff Linda Weaver was driving her automobile eastbound on the 210 Freeway in Los Angeles. Traffic conditions were moderate to heavy and it was raining. As Weaver passed an on-ramp, a car driven by Gomez entered the freeway at a high rate of speed. Gomez lost control, and spun into Weaver's car, knocking it into the third lane of traffic, where it came to rest.

Defendant Frank Chavez, a commercial truck driver working for Defendant Villa Park Trucking, Inc., was also driving eastbound on the 210 Freeway. When Weaver's car spun out and came to rest, it stopped approximately 120 feet ahead of Chavez. Chavez applied his brakes, but could not stop before striking Weaver's vehicle. Weaver sustained severe injuries.

Weaver filed suit against Gomez, Chavez and Villa Park. Gomez was dismissed prior to trial. At trial, Chavez admitted that he was traveling at 56 miles per hour and was going too fast for conditions. Weaver requested that the jury be instructed that Chavez had a duty to use "extreme caution", pursuant to 49 C.F.R. 392.14. Chavez and Villa Park objected to the proposed jury instruction on several grounds. The trial court refused Weaver's request. Instead, the trial court instructed the jury utilizing standard California negligence and negligence per se instructions. In particular, the jury was instructed that negligence is the failure to 'use reasonable care". Further, the jury was instructed that the basic speed law of California (Vehicle Code section 22350) provides that "no person shall drive upon a highway at a speed greater than is reasonable or prudent having due regard for weather . . ."

The jury returned a verdict in favor of Chavez and Villa Park. Weaver appealed, arguing that the jury was wrongly instructed on the duty of Chavez to operate a commercial motor vehicle. The Second Appellate District reversed the trial court, concluding that the instructions given to the jury constituted prejudicial error.

The court of Appeal acknowledged that the Commercial Motor Vehicle Safety Act does not generally preempt state laws and regulations. However, the Act does state "if a Federal regulation . . .imposes a higher standard of care than the state law . . . the regulation must be complied with". In comparing the standard of diligence between the Federal and California instructions, the Court concluded that the state's basic speed law required only that a driver not drive at a speed "greater than is reasonable or prudent having due regard for weather". The Federal standard requires the commercial driver to use "extreme caution" and to reduce speed when hazardous conditions exist. While reasonable care equates to "ordinary prudence", extreme has been defined as "greatest, highest, strongest". The court of appeal found that the Federal regulation imposes a higher standard of care.

The court further determined that there was substantial evidence that hazardous conditions existed at the time of the accident, and that Weaver was prejudiced by the trial judge not giving the Federal instruction to the jury. The Court ruled that if the jury had measured the actions of Chavez under the heightened standard of care, there might well have been a different verdict. The court of Appeal reversed the judgment and the case was remanded for e new trial.

COMMENT

49 C.F.R. 392.14 requires "extreme Caution" in the operation of a commercial motor vehicle during inclement weather. This case significantly holds that if hazardous conditions exist, it is reversible error for a court not to give a negligence per se instruction based on 49 C.F.R. 392.14, California's basic speed law under Vehicle Code section 22350 is insufficient.

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CAIIA *Calendar*

Combines Claims Conference

March 14-15, 2006
Contact Brenda at 888-811-6933

Mid-Winter Meeting

To Be Announced

Weekly Law Resume

Prepared by Low, Ball & Lynch, Attorneys at Law

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Torts - Primary Assumption of Risk Defense

Saville v. Sierra College , Court of Appeal, Third District

(October 26, 2005)

As a general rule, persons have a duty to use due care to avoid injuries to others, and can be held liable if their careless conduct injures another person. The doctrine of primary assumption of the risk is an exception to the general rule. This complete defense arises where, by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect a plaintiff from the risk of harm that caused injury.

The California Supreme Court established the primary assumption of the risk defense in 1992. Since that time, primary assumption of the risk has traditionally been applied to sports activities. In this case, Plaintiff Robin Saville enrolled in a class at Defendant Sierra College entitled Administration of Justice, also referred to as PC 832 - Arrest, Communications and Firearms. Mr. Saville took the police training course because he felt it would help him with his goal of becoming a helicopter search and rescue pilot. The course included arrest techniques.

The classes involved lectures and role-playing, wherein students played the role of officer and suspect. During a particular class, police instructors demonstrated various maneuvers for controlling a suspect. The students then paired up and practiced the techniques. Saville understood the role-playing was part of the course and did not object at any time. During a lunch break, Saville and his partner practiced the techniques they had learned that morning. Saville, playing the role of the suspect, was injured while being taken down. He sustained a herniated cervical disc that required surgery.

Saville filed suit against Sierra College alleging that the College negligently failed to: 1) inform Saville when he registered for the class of the risk of injury; and 2) supervise and properly train students to perform the takedown maneuvers correctly. Specifically, Saville claimed that his neck had struck his partners knee during the takedown. Saville contended that the students had not received instructions on where to place their feet when performing the maneuvers, and that his partner was positioned in the wrong way. At deposition, police instructors acknowledged that Saville's partner had performed the maneuver incorrectly.

Sierra College filed a motion for summary judgment arguing Saville claims were barred by the primary assumption of the risk doctrine. The trial court granted the motion. Saville appealed, claiming that the primary assumption of the risk doctrine did not apply to the activity that Saville was engaged in; that the instructors increased the risks inherent in the maneuvers being taught; and the College negligently structured the class.

The Third Appellate District affirmed the trial court decision. In doing so, the Court of Appeal reiterated that primary assumption of the risk does not depend on a particular plaintiff's subjective knowledge or appreciation of the potential for risk. Rather, the court looks to the nature of the activity and the relationship of the defendant and plaintiff to that activity. A defendant has no duty to prevent risks that are inherent in the activity. While it is true that primary assumption of the risk has traditionally been applied to sports, the takedown maneuvers in the police training course were similar to the risks of injury inherent in sports. The maneuvers were inherently dangerous. The maneuvers were also a necessary part of the curriculum. The Court of Appeal reasoned that imposing a duty to eliminate the risk of injury from this activity would defeat the very purpose of the class. The Court concluded that there was no reason that the primary assumption of the risk doctrine should not apply to this type of activity.

In his complaint, Saville contended that Sierra College was negligent as the instructor and sponsor of the course. The primary assumption of the risk doctrine applies to instructors and sponsors, except where the instructor increases the risks inherent in the learning process. In order to prevail, a plaintiff must show the instructor acted with intent to cause injury or was reckless. Here, Sierra College acknowledged that while instructors did demonstrate proper techniques, they did not verbally teach students how to position their feet. The Court of Appeal held that these facts did not rise to the level of intentional or reckless harm. Therefore, primary assumption of the risk applied and Sierra College had no duty to prevent the risk of harm.

COMMENT

This case is a good indication that the full scope of the defense of primary assumption of the risk has yet to be established. Primary assumption of the risk can be applied to non-sports activities.

When You Need to Know What Really Happened

Submitted by Garrett Engineers, Inc. - Forensic Division

Motorized Scooter Accident

This month's case relates to a motorized scooter accident. Scooters can be gas or electric powered and can reach speeds of 20 mph. Unfortunately they often compete with cars for the roadway and they always lose.

In this case, a young man on his scooter was sideswiped by V #1 and then struck by V #2. He died of massive head injuries. The question was, what caused his death?

The possibilities were:

1) head contact with the ground
2) head contact with the scooter
3) head contact with vehicle #1
4) head contact with vehicle #2

The task was to discern which caused his death. First came an evaluation of the autopsy. The report stated that he died of blunt traumatic injuries to the head. Specific head injuries were noted. It was also noted that there was an absence of any major injury to the neck, abdomen, thorax or extremities. Now it was time to evaluate the four possibilities.

- *Head-to-ground contact due to falling*

Significant force can be produced in a simple fall to the ground (a hard surface). It is important to understand, however, that the magnitude of the force from a fall in dependent on the height of the fall and independent of horizontal velocity. In his case, his maximum fall height was 64 inches. Calculation of the approximate force produced by an unbroken free fall from a height of 64 inches (an absolute "worst case" scenario.), demonstrated that such a fall could not result in a head contact force of sufficient magnitude to produce the observed skull fracture and the underlying brain injury in this case even under the 'worst case" fall scenario. Further, the skull fracture patterns observed were absolutely inconsistent with a fall to the ground, which was a flat surface. His head injuries were not the result of a fall to the pavement.

- *Head contact with the scooter*

Significant force producing contact between the decedent's head and the scooter upon which he was riding was not a supportable possibility. They were traveling at the same direction and at the same speed. Further, the scooter represented a minor mass structure. The application of basic Newtonian physics precluded the scooter as the source of his head injury.

- *Head contact with Vehicle #1*

There was no evidence to support the notion of significant head contact with V. #1. Statements by witnesses indicated that the decedent was upright during his passing interaction with V. #1. Further, it was noted that he was 61 inches tall and standing on the scooter platform (+3 inches), this would place the impact point on his head at approximately 60 inches above the ground. The roofline of V. #1 was 56 inches above the ground or 4 inches lower than the strike point on his head. Finally, the contact evidence on V. #1 was on the rear quarter panel at a height of less than 26 inches above the ground. Therefore his head injuries were not the result of contact with V. #1.

- *Head contact the Vehicle #2*

Contact between the decedent's head and V. #2 represented the only possible source of the head trauma that was noted in the autopsy. It was noted that V. #2 was traveling at approximately 28-30 mph at the instant of impact. Further, the bumper as well as numerous undercarriage structures on V. #2 presented the required stiff structures that produced the linear depressed skull fractures observed during the autopsy. V. #2 represented the only viable source of energy and structure for generating the massive head trauma experienced by the decedent.

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