CAIIA Status Report

DECEMBER 2008

California Required CE for IA's

On September 25, 2008, the Governor signed AB 2044, which has been added to the California Insurance Code as SEC. 18. Section 14090.1. This legislation is effective on January 1, 2009. The new law reads as follows:

14090.1. (a) An individual who holds an insurance adjuster license and who is not exempt under subdivision (b) of this section shall satisfactorily complete a minimum of 24 hours, including ethics, of continuing education courses pertinent to the duties and responsibilities of an insurance adjuster license reported to the insurance commissioner on a biennial basis in conjunction with his or her license renewal cycle. (b) This section does not apply to either of the following: (1) A licensee not licensed for one full year prior to the end of the applicable continuing education biennium. (2) A licensee holding a nonresident insurance adjuster license who has met the continuing education requirements of his or her designated resident state.

The Department of Insurance has approved the Course Guidelines for Independent Adjusters, which also includes the topics to be included in Continuing Education (CE) Courses. The legislation specifically

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John Glenn Dies

John Glenn was founder of John Glen Adjusters and Administrators. Sharon Glenn, John's daughter, the current president of John Glenn Adjusters and Administrators and past President of the CAIIA, made the following sad announcement about her father.

John Glenn had been diagnosed with cancer of the tongue earlier this year. It was treated and it was cured, but the radiation took its toll and it was difficult for him to eat. He was getting weaker and weaker and on Oct. 30 he had surgery to insert a feeding tube. During the procedure, something caused a heart attack which sent a blood clot to the brain and he had a massive stroke. He never regained consciousness and passed way quietly Nov. 6. His family was at his side. He was buried in his hometown of Puxico, Missouri, on Sat. Nov. 15. He leaves behind his wife Betty Jo of 57 years, 3 children and 8 grandchildren.

John Glenn Adjusters and Administrators has been an active member of the CAIIA since 1968. John Glenn was President of the CAIIA, 1979-1980. All of us at the CAIIA and all of those within the insurance community send our condolences to Sharon and the rest of her family and John's friends.

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An Employer Organization of Independent Insurance Adjusters

Inside This Issue

***Status Report* Now Available by E-mail**

If you would like to receive the *Status Report* via e-mail please send your e-mail address to *info@caiia.org*.

CAIIA Newsletter
CAIIA Office
P.O. Box 168
Burbank, CA 91503-0168
Web site - http:\\www.caiia.org
Email: info@caiia.org
Tel: (818) 953-9200
(818) 953-9316 FAX

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

California Association of Independent Insurance Adjusters, Inc

PRESIDENT'S OFFICE
836-B Southhampton Rd., #301
Benicia, CA 94510
707-745-2462
Email: info@caiia.org
www.caiia.org

PRESIDENT
Pete Vaughan
pvaughan@pac bell.net

IMMEDIATE PAST PRESIDENT
Pete Schifrin
pschifrin@sgdinc.com

PRESIDENT ELECT
Sam Hooper
sam@hooperandssociates

VICE PRESIDENT
Phil Barrett
barrettclaims@sbcglobal.net

SECRETARY TREASURER
Jeff Stone
jeffstone@stoneadjusting.com

ONE YEAR DIRECTORS
Paul Camacho
paul@missionadjusters.com

Helene Dalcin
hdalcin@earthlink.com

Kim Hickey
khickey@aims4claims.com

TWO YEAR DIRECTORS
Jeff Caulkins
jeff@johnricherby.com

Jenee Child
info@sequioapros.com

Rick Beers
NCI63@sbcglobal.net

OF COUNSEL
Bruce Bybee
500 Ygnacio Valley Rd., Ste. 300
Walnut Creek, CA 94596
925-977-9600 • Fax 925-977-9687
rbybee@sbcglobal.net

PRESIDENT'S MESSAGE

How should we compete, price or quality?

At our convention this October in Napa we held a panel discussion on the topics of client relations and on how our independent adjuster profession is fairing. One thing that came out loud and clear is that, we are on the defensive with our clients, who seem to be focusing on us as an expense, rather than useful assets. As a result, many of us are concerned for the health and future of our profession. We have all been aware of the now well established fee schedules. I am becoming worried about the effect these schedules and their enforcers, billing review services, are having on our strength and numbers.

Twenty years ago, adjusting firms established the billing rates and procedures. Today, the insurers have largely taken away that prerogative. We are no longer in control of our rates. Further, any negotiations seem to have faded into the past as well. Instead, insurance companies are dictating our billing standards as if we were direct employees. Then and now, salaried company adjusters are and were expected to work well over eight hours per day with no direct compensation for the extra work. By contrast independent adjusters have always been paid for all of the work that they performed, on an hourly or task basis. This has given independent adjusters the opportunity to make what they wanted of the job. The hungry young family person could work hard and increase income. Older adjusters could take less work, but keep a hand in it.

As independents, our focus has always been on the adjuster as a career position. This is why I was drawn to becoming an IA. I found that as a person that desired to stay in the field as a career path, I could maximize my income and respect in the industry by working as an IA. But in exchange for a little more than a company adjuster could make, I took an offsetting risk. There was always the danger that there would not be enough work to keep me busy and pay the bills. There are always slow times in this industry that company people are insulated against by their salary. However, today's fee structures are threatening the viability of the IA option.

First, companies are finding ways to make us give free time, such as refusing to pay for our time to travel, not paying for the first 30 or 50 miles of travel, only allowing some standard amount of time for tasks, and just generally knocking down our billing time during the review process.

Second, companies are setting rates that make it difficult or impossible to pay our adjusters as much as company adjusters can make on salary.

Today, it is difficult to recruit young adjusters to IA work when they do not get paid for all their time, do not make more than they would with a company, and take the risk that there will not be work at all times.

I believe that our numbers and our market share are both shrinking. Today, insurers are less likely to rely on IA services, and I hear them say that it is because they do not find the talent available. I worry that by squeezing our profession economically; insurers are running the risk of drying up the resource.

The third party administrators who are now often reviewing and cutting our bills have no interest in our economic viability. Their only apparent motive is to chart how much they are saving our mutual client. They have no work product of their own. They are dependent on our work to sustain them, but the danger is that their parasitic growth and power may destroy their host, just as mistletoe chokes the tree it infests.

One of our members, Kearson Strong, points out that there is an alternate track to this gloomy economic model. She focuses on the insurers' need for experts with knowledge and experience. Many individual examiners have learned that when they have what they consider a dangerous or complex claim, they can refer that claim to a well known, well experienced, independent adjuster (probably a member of our association) and that that adjuster will guide the claim through the difficulties with a minimum of surprises and pain, giving the examiner the confidence to move on to the next issue. There are a number of stars in our industry that have developed a following. They are paid well above the going rate, and earn ever bit of it through excel-

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California Required CE for IA's

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requires the completion of an ethics course every two years before license renewal, however the Course Guidelines have included a broad range of topics under this category.

All providers of CE courses must be certified by the Department of Insurance (DOI). In addition, all course curriculums must be pre-approved by the DOI.

I have been working closely with Charlene Ferguson, the Chief of the Producer Licensing Bureau for the California Department of Insurance, and she has proven to be an invaluable resource as we navigate our way through this new legislation.

Ms. Ferguson advised that excess classroom hours accumulated during any one-year period may be carried forward to the next year. This allows an independent adjuster to complete excess CE in the second year of a license period and then carry those hours forward. Continuing education hours can carry over into the next cycle from the second year of a previous licensing term only, and can not exceed the next renewal education requirement.

Ms. Ferguson also stated that individuals who receive their independent insurance adjuster license during the second year of the fixed two-year license term will be required to complete only 12 hours of continuing education. Once the license is renewed, those individuals must then complete the required 24 hours of continuing education.

By January 1, 2009, the DOI will have modified its website to include a section for Independent Insurance Adjusters. From a "Select Approved Course Menu," adjusters will be able to locate approved classes in their area.

The "Check Your License Status" page will enable adjusters to determine how many approved CE units they've completed in a given term. The web address for the California Department of Insurance is www.insurance.ca.gov.

The CAIIA has submitted an application to the DOI for certification as an Approved Provider of CE courses. Our new president, Pete Vaughan, has taken a proactive approach to assist our members in the fulfillment of their CE requirements by forming an "Educational Committee." Members of this committee and other board members are already working with CAIIA sponsors and others to develop courses that we will present to all independent adjusters on a regular basis throughout the state.

In addition, we will be submitting for CE course approval our existing seminar on the Fair Claims Settlement Practices and our Seminar for the Evaluation of Earthquake Damage.

We will likely receive updated information as this legislation is implemented, and we will pass this information on to our readers in future issues of the CAIIA Newsletter.

Helene DalCin
DalCin Claims Consulting

PRESIDENT'S MESSAGE

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lence, competence, and a steady hand. Every company that has a fee schedule that I am aware of has a provision for going around the standard rate for complex, technical, or very large losses. Using the economic model of providing high quality service instead of high volume may prove more useful for many of us.

There is less and less room in the market for the volume retail level adjuster. There just are not the numerous large IA firms that we had in the industry 30 years ago, with five offices with four or five adjusters each. Where large firms do exist, we learned during our panel discussion, they are not relying on insurers for the bulk of their work. They have gone outside of the property and casualty insurer market. The market is not there any more.

There are a few insurers that seem to prey on the hungry adjuster in the current market. To keep our profession alive, we must remember that we have the right to decline to take the work if it does not pay enough to sustain our business. If you decline low paying assignments, you will have more time to do a good job on the work that pays, and your work product and perceived value will only improve.

Therefore for any member firm that is in danger of withering on the vine because insurer standard rates for services are declining, the goal should be obvious. There is less and less reward for competition based on price. You will end up working long hours and yet you will not have enough the time to polish your final product. You will be turning in work with gaps in the investigation. You will not develop a reputation for excellence. And I have noticed that if you charge less than the going rate, your clients value your work accordingly. They will continue to think of you as a discount adjuster, who may not be reliable enough to handle difficult or complex claims.

In summary, my advice is to do only your best work, and concentrate on accounts that value your work product. The parties to the claim, the insurer and your bottom line will all benefit in the long term. The only losers will be the attorneys, because your claims will settle fairly as a result of a complete investigation and excellent communications.

PETE VAUGHAN
President - CAIIA 2008-2009

CAIIA COMMITTEES FORMED

The CAIIA is always evolving. This year all of the people listed below are hard at work to move the CAIIA forward. If you have any suggestions or wish to become involved, don't hesitate to call someone to help out your Association.

Look at all the members who are very busy this year to help you and the CAIIA succeed.

Bylaws
Pete Vaughan, RPA
707-745-2462

CCC/CCNC OUR EXHIBIT
Sterrett Harper
818-953-9200

Directory
Jeff Caulkins
818-507-7873
Doug Jackson, RPA
805-584-3494

Education
Helene DalCin
818-726-7252
Peter Schifrin, RPA
818-909-9090
John Ratto
510-420-1053
Kim Hickey
562-493-2461

Fall Convention
Sam Hooper
562-802-7822
Bill Grace
714-772-1933

Finances & Budget
Jeff Stone
951-371-8845

Financial Audit
Phil Barrett
707-462-5647

Golf Tournament
Jeff Stone
951-371-8845

Grievance
Pete Vaughan, RPA
707-745-2462

Internal Management
Kearson Strong
(916) 804-7221
Janee Child
909-393-8806

Legislation & Government Relations
Helene DalCin
818-726-7252
John Ratto
510-420-1053

Meeting Minutes
Jeff A. Stone
951-371-8845

Mid-Term Convention
Pete Vaughan, RPA
707-745-2462

New Membership / Membership Benefits
Phil Barrett
707-462-5647
Sam Hooper
562-802-7822

Nominating Committee
Peter Schifrin, RPA
818-909-9090
Sterrett Harper
818-953-9200
Doug Jackson, RPA
805-584-3494

Public Relations
Kim Hickey
562-493-2461

Scholarship Fund
Kim Hickey
562-493-2461

Status Report
Sterrett Harper
818-953-9200

Website & IT
Douglas Jackson, RPA
805-584-3494

CCNC GOVERNANCE
Corby Schmautz
(888) 522-2103
Kearson Strong
(916) 804-7221

MAKE THE WORLD A LITTLE SAFER!

The Executive Office received the following email from a Structural Engineer, who does engineering reports for failures, many of which are covered by insurance. He has asked for the input of our members. Take a look at your claims and please make suggestions to Jeff Coronado to have the building code changed for safety purposes. The editor of the Status Report made three suggestions to Jeff already. Contact Jeff through his email of jeff@jcseconsultants.com

The Building Code Committee will shortly begin discussions on proposed modifications for the new code cycle. If there are any specific concerns you have such as a provision that leads to a substantive modification of a design in comparison to similar designs based on previous codes, conflictive provisions or poorly worded provisions, please let me know. I will do what I can to flag out the issue for consideration.

Jeff Coronado, S.E.
Jeff Coronado Structural Engineering Consultants
553 St Malo Street
West Covina, CA 91790
626-472-0070
626-472-0071 Fax
jeff@jcseconsultants.com
Website: www.jcseconsultants.com

RWB Legal Reflections

Submitted by Rudolff, Wood & Barrows, LLP, Emeryville, CA

Dealing with CCP §998 Offers Received at the Start of Litigation

by Stephen R. Barry

Barba v. Perez, a published decision of California's Third Appellate District, 166 Cal.App. 4th 444 (2008), holds that a Code of Civil Procedure §998 demand/offer may be served on the defendant at the same as the summons and complaint. The decision is likely to increase the number of CCP §998 demands received at the beginning of litigation.

The purpose of CCP §998 is to encourage settlement by financially penalizing those who fail to achieve a better result than they could have achieved by accepting their opponent's settlement offer. With respect to plaintiff's demands, CCP §998 provides that a plaintiff may serve a demand/offer to settle the lawsuit for a specific sum of money, and that the defendant (and his insurance carrier) then have 30 days in which to accept the offer, or risk suffering penalties if the amount awarded at trial is greater than the amount of the CCP §998 offer. If a defendant turns down the plaintiff's CCP §998 demand and fails to obtain a better result at trial: (1) the plaintiff is entitled to statutory costs and fees as the prevailing party under CCP §1032; (2) the court is given the discretion to order the defendant to pay the (post-offer) fees charged by plaintiff's expert witnesses; and (3) in personal injury actions, the plaintiff is entitled to 10 percent interest on the judgment from the date of the offer, under Civil Code §3291. (A defendant may also make a CCP §998 offer. The penalties for failure to accept are analogous.)

Clearly, therefore, a problem arises when the defendant must decide whether to accept a CCP §998 offer within 30 days after the complaint has been filed. Very little is likely to be known regarding the true extent and validity of plaintiff's injuries at that point. As the dissent in Barba notes, this time pressure is particularly oppressive where insurers are involved. "As a practical matter, here is what typically has to happen within 30 days following service of a personal injury complaint upon a defendant: (1) The defendant has to deliver the summons and complaint to his insurance carrier. (2) A claims adjuster for the insurer has to review the allegations of the complaint with the insured; (3) The claims adjuster has to line up counsel for the defendant; (4) Defense counsel has to discuss the allegation of the complaint with the insured and prepare an answer. Imagine, if you will, the litigation frenzy that will be produced if defense counsel must also take the plaintiff's deposition and obtain medical specials during this 30-day period. Not to mention the retention of experts and obtaining opinions from them. Why on earth do we want to do this?"

Despite the foregoing objections by the dissent, the majority in *Barba* nevertheless hold that early CCP §998 offers – even those served at the time of the complaint – are permissible. However, the language of the decision suggests an approach that can be used to attempt to combat the unfairness of the situation.

The plaintiff in *Barba* was injured when the defendant's employee allowed a refrigerator to drop on the plaintiff's foot.

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RWB Legal Reflections

Submitted by Rudolff, Wood & Barrows, LLP, Emeryville, CA

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The plaintiff sent a letter requesting payment of his $70,000 in medical fees. After no response was received, he filed suit, listing the medical expenses, and served a CCP §998 offer with the complaint, in the amount of $99,999.00 At trial, he was awarded $117,053.42. The court, therefore, awarded the plaintiff expert witness fees pursuant to CCP §998, along with prejudgment interest. On appeal, the defendant argued that he did not have enough information to evaluate the claim at that early juncture. The court's majority opinion rejected the argument.

In doing so, however, the majority noted that trial courts may properly consider whether the offer was made in good faith and was reasonable under the existing circumstances. Where a CCP §998 demand is served at a time when the defendant has little information about the plaintiff's damages, "defense counsel may request that plaintiff provide informal discovery on the damage issue and/or allow an extension of time to respond to the demand. If plaintiff's counsel refused to accord the defendant these courtesies and unyieldingly insisted that defendant respond without information, such conduct could then be presented to the trial court when it considered whether to award special fees and costs. Undoubtedly, such obstinacy would be viewed as potent evidence that plaintiff's offer was neither reasonable nor made in good faith."

Thus, as a result of the Barba case, the defendant and his insurer should ask that the plaintiff provide formal or informal discovery before the defendant is required to respond to a CCP §998 offer, and should ask for an extension of time in which to do so. The dissent in Barba argues that the defendant should not have to make a decision on the basis of information provided in an unsworn letter. So, the defendant should argue that the "informal" discovery referenced by the *Barba* majority should be interpreted to mean statements signed by the plaintiff under penalty of perjury. Consideration should also be given to requesting time for an appropriate expert to look at the reports and information received.

The detail and extent of discovery that can be required will no doubt remain an area of contention between the parties, but the defendant and any insurance carrier should at least attempt to engage in the process if they wish to retain any right to contest a subsequent claim for expert witness fees based on the CCP §998 offer.

Insurance Coverage & Litigation Newsletter

Submitted by Tharpe & Howell - California, Nevada, Arizona & Utah

Claims Counseling Billing Dispute Must Be Submitted to Arbitrator

In *Long v. Century Indemnity Company*, the California Court of Appeal held that a dispute about the hourly rate owed by a defending insurer to defense counsel retained by the insured due to a conflict of interest created by a reservation of rights issued by the insurer must be determined by **arbitration** under Civil code Section 2860c. In this case, the insured attempted to sue the insurer over its refusal to pay the hourly rated demanded by "Cumis" counsel retained by the insured. After argument, the Court of Appeal dismissed the action and held the insurer's refusal to pay the higher rate demanded by "Cumis" counsel did not confer jurisdiction over the dispute to the Courts.

First Party Offer to Compromise Determined to be Invalid

In *Po-Jen Chen v. Auto Club*, the California Court of Appeal held that a statutory CCP §998 Offer to Compromise served by the defendant insurer in a bad faith case was **invalid** because it was conditioned upon the plaintiff executing a general release of **all claims** against the insurer. While the Court acknowledged the case of Goodstein v. Bank of San Pedro, 27 CA 4th 899, held that a defendant's 998 Offer could require a general release by a plaintiff in favor of the defendant, under the facts of this particular case an ambiguity was created by the language "all claims". The court noted the insured/plaintiff had three claims for water damage to his home, two of which were involved in the litigation, but the third was not. The Court felt the "all claims" language contained in the Offer could include the third claim not involved in the case, thus making the 998 Offer invalid.

Inability of Products to Read or Play CDs Does Not Constitute Property Damage Under Liability Policy

In *Sony v. American Home Assurance Company,* the 9th Circuit for the Northern District of California held allegations that PlayStation 2 products manufactured by Sony were unable to read or play CDs, DVDs or PlayStation games, and that discs skipped and froze and made noises were not covered under a CGL policy as loss of use or property damage.

In this case, there was no evidence that the discs inserted into the PlayStation 2 product caused the discs to be unusable in other disc players, and there was no allegation in the Complaint against Sony that discs inserted into the product were

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actually damaged in any manner. While the Court did not directly state that without some damage to the discs there could be no loss of use claimed, its discussion regarding the lack of evidence showing the product made the discs unusable implied this.

Of importance were California cases cited by the Court which hold that even though an insurer may be supplied with evidence of complaints of physical damage in a re-tender letter from the insured's counsel, this does not trigger a duty to defend because these complaints were never incorporated into the lawsuit tendered by the insured for defense. The Court stated the insurer need not rely on the assertions of insured's counsel about potentially covered property damage claims. The Court characterized this evidence as speculation about claims the plaintiffs might have made but never did.

This holding is of particular importance in a claim where an insured's counsel attempts to re-tender the insured's defense based on later discovered evidence or discovery responses that may show a covered claim for property damage or bodily injury. According to the authorities cited by this Court, an insurer need not consider such information if the Complaint does not allege such theories against the insured.

The class action complaints filed against Sony did not allege any cause of action under which the plaintiffs alleged negligence by Sony causing property damage to the discs owned by the plaintiffs. Instead, the only causes of action were for breach of warranties,fraud, negligent misrepresentation, bad faith, violations of consumer Legal Remedies Act, false advertising, and unfair business practices.

Subcontractor Has Immediate Duty to Defend Irrespective of Negligence

In *Crawford v. Weather Shield Manufacturing, Inc.*, the California Supreme Court opined that a subcontractor must immediately defend the project's developer-builder in a construction defect lawsuit **regardless** of subcontractor's negligence.

In this case, Weather Shield entered int a contract with J.M. Peters Co. to supply windows for a residential project. The contract's express indemnity provision provided that Weather Shield would both defend and indemnify **any claim** brought against Peters. Claims for construction defects were asserted against Peters, and Peters demanded Weather Shield to immediately defend it.

The jury found Weather Shield was not negligent and thus owned no indemnity to Peters. However, the court, in interpreting the sub-contract, concluded that under the express indemnity provision, Weather Shield's obligation to provide an immediate defense to Peters **was not** contingent on a finding of liability. Thus, Weather Shield was found contractually liable to reimburse Peters defense costs and attorneys' fees.

The California Supreme Court affirmed the Court of Appeals decision finding that the duty to defend an indemnitee against all claims "embraced by the indemnity" arises immediately upon a proper tender of defense and that a determination of negligence was not necessary before Weather Shield was required to mount and finance a defense on Peters behalf.

Special Comments:

- The contract's express indemnity provision must reflect an intent to defend, as well as to indemnity.
- The immediate defense obligation likens the subcontract to an insurance policy despite its disclaimers.
- The opinion does not require the subcontractor to defend the entire matter like an insurance policy does.
- You can expect declaratory relief actions by developers/general contractors to force subcontractors to defend them.

Signs of the Times

At a Towing company: 'We don't charge an arm and a leg. We want tows.'
On an Electrician's truck: 'Let us remove your shorts.'
In a Non-smoking Area: 'If we see smoke, we will assume you are on fire and take appropriate action.'
On a Maternity Room door: "Push. Push. Push.'
At an Optometrist's office: 'If you don't see what you're looking for, you've come to the right place.'
On a Taxidermist's window: 'We really know our stuff.'
On a fence: 'Salesmen welcome! Dog food is expensive!'
Outside a Muffler shop: 'No appointment necessary. We hear you coming.'
In a Veterinarian's waiting room: 'Be back in 5 minutes. Sit! Stay!'
At the Electric Company: 'We would be delighted if you send in your payment. However, if you don't, you will be.'
In a Restaurant window: 'Don't stand there and be hungry; come on in and get fed up.'
In the front yard of a Funeral Home: 'Drive carefully. We'll wait.'
At a local Bar: 'If your wife drives you to drink, make sure she drives you here.'

San Diego-Area Couple Arrested for Insurance Fraud Related to 2007 Southern California Wildfires

More Than $60,000 in Allegedly Fraudulent Bills Submitted for Personal Property, Lodging and Boarding

SAN DIEGO -Today Insurance Commissioner Steve Poizner announced the arrests of two individuals for allegedly fraudulent insurance claims made in the aftermath of the 2007 Southern California wildfires. Iraj Bassir, 58, of Excondido and his companion, Maria Lourdes Solis Castillo, 49, of Encinitas were arrested this morning on felony insurance fraud charges and attempted grand theft, also a felony. Search warrants related to the case were executed as well.

The case, which is being prosecuted by the San Diego County District Attorney's Office, is the result of a joint investigation by California Department of Insurance's Fraud Division (CDI) and the San Diego County District Attorney's Office.

"Rebuilding after a disaster can be a difficult process, and allegations like these only slow the claims process for legitimate victims," said Commissioner Poizner. "I thank our local partners for their collaborative efforts to fight insurance fraud, which costs consumers higher premiums."

"Insurance fraud simply cannot be tolerated," added San Diego County District Attorney Bonnie Dumanis. "We will continue partnering with other agencies to aggressively pursue those people attempting to cheat the system.

"Bassir claimed loss of personal property, and expenses for lodging and pet boarding stemming from damage done to his Escondido home in October 2007. Bassir submitted more than $17,000 in damage to his shed and landscaping, as well as expenses for ash and soot clean-up.

Bassir also claimed more than $46,000 in losses from property loaded into a 1990 Ford Bronco, which burned. He and Castillo told Liberty Mutual these losses included a $10,000 Persian rug, a $15,000 Rolex watch, two computers, a 46-inch plasma TV, a Vitamex blender, and camcorder. It was further stated by Bassir that he incurred $10,800 in lodging at the Sunburst Guest Home, a residential care facility in Encinitas. In addition, he also alleged that his German shepherd and Persian cat incurred more than $3,770 in boarding costs.

Further investigation, evidence and witness statements revealed numerous inconsistencies with claims made by Bassir and Castillo, who have had a long-term relationship. For example, items allegedly lost in the fire appear not to have been purchased by Bassir or Castillo, and the pet center listed for boarding did not exist.

Bassir also said he did not know who owned the Sunburst Guest Home, although he was listed as the property owner and Castillo presented a rental agreement for the premises signed by herself and Bassir when the facility applied for its license with the state's Department of Social Services. Bassir stated to Liberty Mutual that he was neither disabled nor in need of assistance when he resided at the residential care home; Castillo claimed that Bassir was ill and in need of care. Furthermore, California did not license the facility to have any residents until 10 days after Bassir claimed he began his lodging.

Assisting in the investigation were the Sycuan Reservation Police Department, the U.S. Postal Inspection Service, Liberty Mutual Insurance Company's (Liberty Mutual's) Special Investigations Unit, and the state Department of Social Services, Community Care Licensing Division.