CAIIA Status Report

JANUARY 2006

Re-Cert is Coming

Every year, all adjusters handling California Claims anywhere in the nation are required to be certified or re-certified in the California Fair Claims Settlement Practices Regulations. The CAIIA will have the classes necessary to complete this requirement in March 2006. Please review our web site and the Status Report in the coming months for the date and location nearest to you.

California Court of Appeal Affirms Summary Judgment and Award of Attorneys Fees Based Upon an Attorney Fees Provision in the Release

Submitted by Anthony Ellrod of Manning and Marder, Attorneys at Law

Health clubs are constantly being sued for personal injuries despite the fact that the plaintiff member has signed a release. As a result, health clubs and their insurers are forced to expend large amounts of money defending what are in essence frivolous claims. One option is to do what USA Cycling did – include an attorney fees provision in the release. Such a provision, and the resulting award of over $30,000 in attorney fees, was just upheld by the California Court of Appeal.

Kendall v. USA Cycling, et.al. involved a street bicycle race that took place in Utah. The plaintiff suffered significant injuries, including severe brain damage, as a result of an accident that occurred when she was struck by a male rider. The plaintiff claimed that the defendants were negligent in starting the races in such a manner that the female racers were overtaken by the male racers. She further argued that the court should apply Utah law, as that is where the accident occurred. The defendants denied any negligence, and asserted that even if there was negligence, the plaintiff's action was barred because of two separate releases that plaintiff signed in order to compete in the race. On the choice of law issue, the court applied California law finding that the laws in Utah and California were substantially similar. The court then granted defendants' motion for summary judgment based upon the releases the plaintiff signed, and entered judgment in favor of the defendants.
Following the motion for summary judgment, the defendants brought a mo-

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■ PRESIDENT'S MESSAGE

I am a fire insurance policy. Although I am but a piece of good quality paper, carrying a substantial amount of printing, I bear emblazzened on my top the colorful insignia of an insurance company, below the signature of it's officials. Just a piece of paper, yet I mean many things to many people.

To those who I insure I am at the time of my issuance, just as I appear, a piece of printed matter which cost money, yet even then I effect peace of mind to the householder possessing me, merchants program their purchases, manufacturer plans on production, a builder begins his construction, the banker - I act as a release for money he waits to loan, I free the wheels of commerce.

The sale by the agent, the underwriting, statistics, investment, each step in the formulation of this piece of paper is important, but the real reason for my existence is yet untold. A tiny spirit of flame in the wrong place at the wrong time transforms in one awful flash, a malicious, monstrous, destructive, fire. In any event property is damaged and I immediately come into my own. Prior to this I have just been a piece of paper, now I become a symbol of restitution, a visible evidence of protection, a crystallization of a promise to pay.

Immediately, my insureds first thought is of his broker or agent and a hurried call results to that person. In due course the agent immediately notifies the company and swiftly and smoothly the machinery of loss settlement goes into action.

The adjuster, a specialist who possess a depth of knowledge of the insurance contract, of building costs and construction methods, of furniture machinery and merchandise and of people leaves within a matter of minutes for the scene of the damage. With a tact and consideration born of the anticipation that this insured will probably be in an agitated condition, the adjuster obtains the policy, checks same and to the adjuster, this piece of paper must meet certain just requirements. Soon the facts fall into line, because of the care and knowledge of the broker or agent to arrange for the issuance of this piece of paper and if all is found in order adjustment proceeds.

The adjuster is the middle man, in the business of insurance and believe it or not he or she holds a unique position. He or she must be able to merchandise the proposed adjustment and the company he or she represents, must be able to reach a decision and act upon such decision. To maintain this position as a professional persona, he or she must keep abreast of industry changes which effect their business, and he or she is one of the most important cogs and essential figure in the continuance of this tremendous financial enterprise. A fire loss is the last link in the chain of service offered by an insurance company, and the adjuster, while he or she frequently does not recognize themself enough as a salesman, should be one of the best salesmen in the business. This applies also to anyone in the loss department who contacts the claimant. An insurance company is judged by the manner in which each person performs his or her obligation. Prompt, fair, sound and equitable claims handling must be more than slogan, it must be an actuality for this is the measure of an insurance company.

The above scenario was written by Ronald Bolt on May 6, 1965. Even though it is 40 years old, it is as true today as it was then.

I would personally like to add two fond farewells. The first is to Sheri Dean, my office manager who has been in this business 38 years. She retired on December 31st. Also retiring on December 31st is Shirley Newby who has been mailing and coordinating our Status Report, for many years. Many of you may remember she is married to Don Newby, of the firm of Lovato, Yuhas and Newby, now known as North Coast Adjusting. Best of luck to both of you.

Finally, I hope the Holiday Season was joyous and prosperous for all. Wishing you a fantastic New Years.

STEVE WAKEFIELD
President - CAIIA 2005-2006

California Court of Appeal Affirms Summary Judgment . . . .

Continued from page 1

tion to recover all attorney fees and coats incurred in defending the action based upon the attorney fees provision of the release. The provision read as follows:

"I agree, for myself and my successors, that the above representations are contractually binding, and are not mere recitals, and that should I or my successors assert my claim in contravention of this agreement, the asserting party shall be liable for the expenses (including legal fees) incurred by the other party or parties in defending, unless the other party or parties are finally adjudged liable on such claim for willful and wanton negligence . . ."

Based upon the foregoing, the court granted defendants' motion and awarded defendants in excess of $30,000 in fees and costs. The court of appeal affirmed, finding that the parties were free to contract on the issue of attorney fees, and found that the fees and costs awarded were reasonable and supported by the evidence.

The question then becomes whether or not it is advisable to include an attorney fees provision in a health club waiver and release. The answer appears to be yes. There are, however, some risks.

In California, an attorney fees provision which by its language limits its applicability to one party, is, by operation of law deemed applicable to both. Therefore, in the event that the club does not prevail on the waiver and release it could be held responsible to pay some of the plaintiff's attorney fees. While we are aware of no case on point, it would appear, however, that the plaintiff would only be entitled to those fees necessary to defeat the waiver and release, i.e. oppose the motion for summary judgment. If the club prevails, however, it would be entitled to *all* costs of defense. Furthermore, absent some flaw in the agreement, releases are generally enforced as matter of course in California. Health clubs are constantly being bombarded with lawsuits for personal injuries despite the fact that the members have signed a release. As a result, insurance costs and attorney fees are high even though the vast majority of cases have no merit. It would therefore be wise to at least consider including an attorney fees provision in the release so that some of these costs can be recovered.

Subject: MEN

The room was full of pregnant women, with their partners.

The Lamaze class was in full swing. The instructor was teaching the women how to breathe properly, and was telling the men how to give the necessary assurances to their partners at this stage of the pregnancy.

She said: "Ladies, remember that exercise is GOOD for you. Walking is especiallty beneficial. It strengthens the pelvic muscles and will make delivery that much easier."

She looked at the men in the room. "And gentlemen, remember; you're in this together. So it wouldn't hurt you to go walking with your partner."

The room suddenly got very quiet as the men absorbed this information.

Then a man at the back of the room slowly raised his hand.

"Yes?" asked the teacher.

"I was just wondering," the man said, "is it all right is she carries a golf bag while we walk?'

Insurance Commissioner John Garamendi Announces Major Bust of Workers' Compensation Fraud Ring

Early morning sweep results in arrests of six suspects. Chiropractors and a lawyer allegedly recruited people to claim false injuries, submit fraudulent claims

FRESNO – Insurance Commissioner John Garamendi announced the arrests of six suspects Tuesday following a two-year, multi-agency undercover investigation into an alleged insurance fraud "mill" that reportedly swindled insurance companies with false billings.

The arrests Tuesday came after a Grand Jury handed down indictments related to the investigation, called "Operation Double Helix." Chiropractors and employees at several chiropractic clinics and a law firm are suspected of submitting fraudulent insurance bills, offering excessive treatments, and recruiting others to pose as patients.
"Insurance fraud is anything but a victimless crime," said Commissioner Garamendi. "Cheating the system eventually hurts us all in the form of higher premiums. We will continue our efforts to root out criminals and prosecute them to the fullest extent of the law."

Operation Double Helix began in 2003 as a joint investigation by the California Department of Insurance Fraud Division and the Merced County District Attorney's Office. The Fresno County District Attorney's Office assisted in the investigation, which received cooperation from the California State Automobile Association, GEICO, Liberty Mutual Insurance, and Foster Farms.

This investigation began in response to a large number of complaints from insurance carriers regarding suspicious activity by the suspects. Many of the reported incidents allegedly happened at the chiropractic offices of John Aguilar Jr., 45, a Fresno chiropractor who owned Twin Valley Clinic and other clinics in Sacramento, Merced and Fresno.
Authorities said that in May of 2003 the involved enforcement agencies began using undercover operatives to pose as victims of automobile accidents. The undercover operatives would go to the clinics owned by Aguilar and report that they had suffered either very minor injuries or no injuries at all.

Despite that, they were still given excessive chiropractic treatment and offered payments to recruit other individuals to make additional fraudulent insurance claims, according to investigators. In addition, the undercover operatives were referred to a law firm owned by Ngoan Van Dao, 69, of Westminster. Unlicensed employees would allegedly act as attorneys representing the "victims," helping them gain settlements for their claims.

The law firm's employees also allegedly offered jobs to undercover operatives that would require them to recruit more people for the scam. Fraudulent and exaggerated billings were made to both workers' compensation and automobile insurance carriers.

Others arrested in the case include:

Juan S. DeLaVara, 35, of Riverbank, a chiropractor formerly employed by Twin Valley Chiropractic in Merced; Ngia (aka: Mike) Thao, 24, of Merced, a former assistant manager at Twin Valley; Scott F. Saephanh, 41, of Merced, office manager of the Law Office of N. Van Dao in Merced; and Toua Thomas Vang, 37, of Merced, assistant office manager at the law firm.

The suspects were charged with a variety of offenses, including insurance fraud, conspiracy to commit insurance fraud, grand theft, conspiracy to practice law without a license, and capping. If convicted the maximum sentences are: two to five years in prison on each count of insurance fraud and conspiracy to commit insurance fraud; 16 months to three years in prison for capping; one year in prison for grand theft; and 16 months to three years for conspiracy to practice law without a license.

Each count also carries a maximum fine of $50,000.

Weekly Law Resume

Prepared by Low, Ball & Lynch, Attorneys at Law

Coverage – Homeowner's Policy - Exclusions

Cynthia Davis, et al. v. Farmers Insurance Group
Court of Appeal, Fourth District (November 18, 2005)

Homeowner´s policies typically do not cover claims arising out of the failure to disclose defects that existed in property at the time of sale. This case reaffirms that view, based upon a specific exclusion.

Cynthia and Daniel Davis purchased a course of construction policy from Fire Insurance Exchange for a home they were building. After completion of the home, the policy converted into a homeowner´s policy. The Davises sold the property to Rick and Kristin Engebretsen. Thereafter, the policy was cancelled.

Three years later, the Engebretsens sued the Davises for failing to disclose construction defects in the home, which the Davises knew or should have known at the time of the sale, but failed to inform the Engebretsens. Damage to the property and injury to the Engebretsens was alleged, including personal injuries from high concentration of fungi, which resulted in medical attention.

The Davises tendered the underlying action to Fire Insurance Exchange. Fire Insurance Exchange denied the request for defense or indemnity. The Davises then filed a complaint for breach of contract and breach of the implied covenant of good faith and fair dealing. The Davises filed a motion for summary adjudication, asking the Court to conclude that Fire Insurance Exchange owed a duty to defend the underlying action, and that Fire Insurance Exchange had breached that duty. Fire Insurance Exchange moved for summary judgment, arguing that there was no potential for coverage. The trial court denied the Davises´ motion and granted Fire Insurance Exchange´s motion. The Davises appealed.

The Court of Appeal affirmed. The policy provided coverage for bodily injury or property damage resulting from an occurrence. The policy defined "occurrence" as an accident which resulted in bodily injury or property damage during the policy period. The Court held that, since the complaint alleged injuries that occurred after the policy had been cancelled and after the sale of the property, there was no allegation of bodily injury or property damage during the term of the policy.

In addition, the policy contained an exclusion for bodily injury or property damage arising out of the sale or transfer of real property, including known or unknown property or structural defects. The Davises attempted to argue that the complaint alleged negligent construction, and thus the claim was not excluded. The Court of Appeal rejected that interpretation, and stated that after real property was sold, claims for bodily injury or property damage resulting from known or unknown defects in the property were not covered. Here the claim was for damages that arose after the sale of the property. The exclusion therefore encompassed the very type of claims alleged. Because the exclusion precluded coverage as a matter of law, Fire Insurance Exchange had no duty to defend or indemnify the Davises, and the trial court properly granted the summary judgment. The judgment was, therefore, affirmed.

COMMENT

This case is consistent with prior appellate court decisions in this area. The decision is unique, in that it interprets an exclusion that is not common in most homeowner´s policies.This case is consistent with prior appellate court decisions in this area. The decision is unique, in that it interprets an exclusion that is not common in most homeowner´s policies.

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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

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Torts - Landowner Liability -Third Party Criminal Acts

Rinehart v. Boys & Girls Club of Chula Vista
Court of Appeal, Fourth District - (October 13, 2005)

Landowners are required to maintain land in their possession and control in a reasonably safe condition. This includes taking reasonable steps to secure common areas against foreseeable criminal acts of third parties. In this case, Defendant Boys & Girls Club of Chula Vista (BGCCV) owned and operated an after school program. Plaintiff Colmore Rinehart, age 10, was involved in the after school program. The Club's playground was located at the base of a hill just below a public park. A fence separated the park from the Club.

On an afternoon in April 2002, Rinehart was playing in the playground with some friends. At some point, Rinehart noticed two or three rocks being thrown by older boys up the hill in the park. These boys were not members of BGCCV. While Rinehart had seen BGCCV members throw rocks on the playground before, he had never seen rocks being thrown from the park. Rinehart and his friends began to move. Before they could do so, Rinehart was struck by a rock and injured. A BGCCV employee, who was in the vicinity, rendered assistance. The employee did not see the incident occur. The boy who threw the rock was never apprehended.

Rinehart, through his guardian ad litem, filed suit against BGCCV, alleging causes of action for premises liability and negligence. In essence, Rinehart claimed that BGCCV had a duty to provide adequate supervision of the playground. Rinehart contended that if there had been adequate supervision, the accident could have been prevented.

BGCCV moved for summary judgment. BGCCV argued that the incident was not foreseeable and that Rinehart could not prove a causal connection between the alleged breach of any duty and his injuries. In opposition, Rinehart asserted that BGCCV's policies and procedures set forth that it would provide a safe place for its members. Rinehart claimed that the lack of supervision caused his injuries. In support of his position, Rinehart submitted a declaration from a safety expert, who opined that there should have been increased supervision on the playground and a better barrier between the playground and park.

The trial court granted BGCCV's motion for summary judgment. Rinehart appealed. The Fourth District Court of Appeal affirmed the trial court's decision. In so doing, the Court of Appeal concluded that Rinehart failed to establish BGCCV owed a duty in this case, or had proved causation. The Court held that pursuant to Ann M. v. Pacific Plaza Shopping Center (1993) 6 Cal 4th 666, a duty to take affirmative action to control the wrongful acts of a third party will only be imposed where such conduct can reasonably be anticipated. Unless particular criminal conduct is foreseeable, there is no duty to protect a plaintiff from that particular type of harm. Here, Rinehart could not present any evidence of prior similar incidents, where there had been rock throwing from the park toward the playground below. Further, the Court of Appeal held that prior throwing of rocks on the playground itself did not make the subject incident sufficiently foreseeable to require BGCCV to take additional protective and supervisory measures.

Even if greater supervision was in place, the Fourth District found that it was absolute speculation that the subject incident could have been prevented. The Court held that because the identity of the assailant was unknown, Rinehart's expert's opinion was too tenuous to create a triable issue of fact. The Court felt that Rinehart failed to show a causal link between his injuries and any negligent failure to supervise by BGCCV. The Court therefore held that the trial court properly granted summary judgment.

COMMENT

This case is consistent with cases decided in the past several years, which have held that absent prior similar acts, landowners have no duty to prevent third party criminal activity. Further, this case reiterates that expert opinions on causation must not be based on speculation and conjecture.

Insurance Commissioner John Garamendi Announces Major Bust of Southland "Crash for Cash" Staged Auto Collision Ring

Seven-month probe by the Department of Insurance nets 23 total arrests – suspects allegedly staged more than 60 collisions, causing losses of $2 million to $3 million

CITY OF COMMERCE– Insurance Commissioner John Garamendi on Wednesday announced the arrest of the suspected ringleader of a major operation that has allegedly staged more than 60 auto collisions over the past 18 months, bilking insurers and consumers out of $2 million to $3 million.

Huntington Park attorney Bernard Laufer, 52, was arrested Tuesday morning at his office by California Department of Insurance Fraud investigators, the latest break in a 7-month investigation of the case by the Department. Laufer is suspected of filing false claims for members of the collision ring after they caused dangerous crashes with innocent victims. He faces charges of insurance fraud, grand theft and conspiracy.

Noting that dozens of people are suspected of participating in the scam, Commissioner Garamendi issued a strong warning. "Crashing cars for cash and putting lives in danger is the wrong way to make a living," he said. "Don't be tempted into trying this dead-end scam. It's a one-way highway to state prison."

In April the CDI Fraud Division received a tip that a man named Humberto Carlon, 22, of La Verne, was recruiting people to participate in staged collisions on various Southern California freeways. Carlon was arrested earlier in the course of the investigation and is currently serving a two-year state prison sentence for his involvement.

During the course of the resulting probe, investigators found evidence of as many as 70 "swoop and squat" type staged collisions allegedly caused by the group, most targeting SUVs or commercial trucks. Such an operation typically involves two cars driven by suspects who box in a victim's car on a freeway, causing a collision. The scam participants then file fraudulent insurance claims for alleged injuries.

Although none of the victims was seriously injured, the financial consequences forced at least one victim to close his business after his company truck was totaled in a collision.

Further investigation by the CDI investigators led to Laufer, who allegedly purchased the cases from Carlon and filed the fraudulent insurance claims against the victims' insurance companies. Many of the suspects Carlon recruited included friends and family, who would then allegedly recruit additional suspects and bring them to Carlon. Several suspects were enticed to join the ring at a church bible study group.

To date 23 suspects have been arrested for their alleged roles in the staged collisions. All will face felony charges of insurance fraud, and in addition the alleged drivers in the collisions could also face charges of assault with a deadly weapon.

"It is reprehensible to put people's lives at danger in the greedy pursuit of cash," said Commissioner Garamendi. "Let this be a lesson today: if you commit a scam we will pursue you, catch you, and prosecute you to the fullest extent of the law."

The investigation is being conducted in cooperation with several insurance companies, as well as the National Insurance Crime Bureau. The case is being prosecuted by the Los Angeles County District Attorney's Office, Auto Insurance Fraud Unit.

Other suspects arrested in connection with the case include: Ontario residents Daniel Hernandez, 26, Karinna Valenzuela, 22, Martha Deniz, 19, Veronica Santillan, 26, and Carlos Meza, 34; Chino residents Sonia Alburto Alvarez, 35, Alberto Espinoza, 29, Jorge Covarrubias Jimenez, 31, Angelina Alvarez, 56, Jorge Jimenez, 31, Cesar Salas, 29, and Sofia Hernandez, 34; Riverside residents Juan Cervantez, 24, Maria Gonzalez, 23, Ernesto Navarro, 18, and Armando Gonzalez, 22; South Gate residents Luis Alberto Lopez, 25, and Fernando Ramirez, 30; Lakewood resident Lorena Campos, 21, La Verne resident Humberto Carlon, 22, Santa Monica resident Bernard Laufer, 52, Bell Gardens resident Bertha Villa, 55, and Pomona resident Veronica Contreras, 26.

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