CAIIA Status Report
January 2012

EDITOR'S NOTE

You may note a change in the appearance of this month's Status Report. We are now composing the Status Report "in-house" with Harper Claims Service, Inc. composing the new look of the Status Report. We wish to acknowledge Mr. Douglas Jackson, RPA of SGD, Inc., for his help in setting up the program to compose the Status Report.

This is the first month that the Status Report is available only by email. The CAIIA is converting to an email-only delivery to help us join the 21st Century, save costs and streamline the process. If you know of someone who would like to receive the Status Report, please send their email to info@caiia.com.

WEEKLY LAW RESUME– HOMEOWNER LIABILITY

Credit: Low, Ball & Lynch, Attorneys at Law—San Francisco, California

This case considered whether homeowners are liable for the injuries of an independent contractor sustained on the homeowners' property, when the independent contractor received workers compensation, there was no pre-existing hazardous condition, and no presumptive negligence.

Homeowners Raymond and Charlotte Coolidge contracted with DISH Network to replace the existing satellite dish on their home in Mendocino County. On April 26, 2006, DISH outsourced the job to Linkus Enterprises, Inc., which sent plaintiff Gary Gravelin, an independent contractor, to perform the installation job. Plaintiff brought an eight-foot ladder to the worksite that was too short, so he decided to access the roof using a lower, small roof extension, or "awning" as he referred to it. The roof extension was no more than four feet square, constructed of plywood and supported by two by fours. Plaintiff weighed 225 pounds and was carrying tools and equipment weighing about 46 pounds. As he stepped off the ladder onto the roof extension, it collapsed and he crashed to the ground. He was in the hospital for four days with a vertebral compression fracture. He resumed full-time employment around August 2008.

After plaintiff filed suit, the homeowners filed a summary judgment motion, and the Court granted the motion. The Appellate Court affirmed the ruling on three grounds: that Plaintiff was an independent contractor, the roof extension was not a pre-existing hazardous condition, and plaintiff did not establish presumptive The Court ruled that the hirer of an independent contractor will not be held vicariously liable for injuries resulting from the contractor's negligence in failing to perform its task safely.

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Privette v. Superior Court (1993) 5 Cal.4th 689, 695. The independent contractor "has authority to determine the manner in which inherently dangerous…work is to be performed, and thus assumes legal responsibility for carrying out the contracted work, including the taking of workplace safety precautions" to protect himself and his employees.

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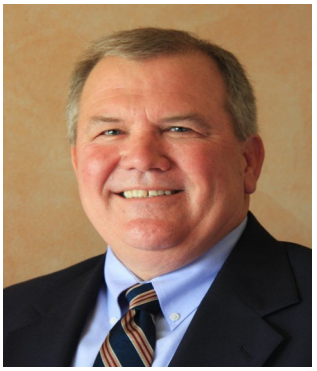
President's Message

As this year comes to a close, I am reminded of the events of this last year. The CAIIA sponsored booths at the Combined Claim Conference, Northern California Claim Conference, the CPCU Society and the PLRB.



Jeff Caulkins
CAIIA President

We held Classes in Fair Claims Practices as required by the Department of Insurance and SEED Classes to train and certify adjusters and claims personnel on Earthquake Claims handling.

Under the leadership of our past president, we held a successful mid-term meeting in Sacramento. This year we returned to the Queen Mary for our fall convention. Our bi-annual meetings allow us to meet, socialize with each other and learn from each other. There is not a meeting that I attend that I do not learn something from one of our members.

The purpose of continuing education (CE Credits) not only satisfies education requirements by the Department of Insurance but it also provides us with a better understanding of the business of insurance.

This week I was reading an article in the 1981 edition of Claims Magazine. The article discussed "How to Get Along with Difficult People"; it was written by John Rickerby over thirty years ago. The part that struck me was that the information could have been written yesterday.

The claim process has changed: we use computers, not pencils, and we report online. But the interaction with public adjusters, insureds, attorneys and other adjusters has not changed.

The next claim you investigate remember, the process changes but the communication and interaction between people does not.

Jeff S Caulkins AMIM AIC RPA
President
California Association of Independent Insurance Adjusters.

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Tverberg v. Fillner Construction, Inc. (2010) 49 Cal.4th 518, 522 and *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 671. The remedy for the contractor's injured employee is workers' compensation, and plaintiff Gravelin received a workers' compensation settlement from Linkus in December 2008.

The Court also ruled that as to pre-existing hazardous conditions, the homeowner could not be held liable. The Court referred to the California Supreme Court holding in *Kinsman* which held that as a general principle, a hirer of an independent contractor may be liable if (1) the hirer "knows or reasonably should know of a concealed, pre-existing hazardous condition on its premises; (2) the contractor does not know and could not reasonably ascertain the condition; and (3) the landowner fails to warn the contractor." *See*, *Kinsman*, *supra*, 37 Cal.4th at 674-675. The *Kinsman* Court also noted exceptions to this holding where the independent contractor may be held liable: a hazard created by the independent contractor, an apparent hazard, and where an independent contractor has failed to engage in inspections of the premises. None of those conditions existed here, where the Plaintiff was responsible for choosing a poor roof access point and for his poor choice to use a small ladder. In addition, Plaintiff admitted that he was trained to conduct site surveys and conducted a site survey at the home.

Lastly, the Court noted that although Plaintiff's argument is correct that Evidence Code Section 669 allows proof of a statutory violation to create a presumption of negligence in specified circumstances, Plaintiff failed to cite to building code provisions setting forth specific structural requirements alleged to be violated by defendants.

COMMENT

This case clarifies and reinforces California law regarding liability to independent contractors. The Court reaffirmed the general principle in *Kinsman* that a hirer of an independent contractor may be held liable for the contractor's injuries when there is a pre-existing hazardous condition, but only after a three-part test is met.

Gratuitous Write-Offs and Medicare Reductions After *Howell*

Rosa Elia Sanchez, et al. v. Randall Alan Strickland, et al.
Court of Appeal, Fifth District
(November 4, 2011)

This is one of the first cases after *Howell*[1] to address gratuitous medical write-offs and medical expenses paid by Medicare. In *Howell,* the California Supreme Court ruled that a plaintiff may only recover medical expenses actually paid by a private insurer, as opposed to the amounts billed before insurance write-offs and reductions.

This case arose from an automobile collision in October 2005. Pedro Hueso was driving a sedan along State Route 120, with his wife and a friend as passengers. Hueso's sedan collided with a tractor-trailer, killing the two passengers. Hueso, a Medicare beneficiary, spent four months recovering in a hospital, but died of heart failure six weeks after he was released. The three decedents' relatives and representatives (Sanchez, et al.) sued the owner of the tractor-trailer and its driver.

The jury returned a verdict for plaintiffs and awarded $3,115,569 in damages, of which $1,339,569 represented past medical expenses. The jury also found that Hueso was 30% responsible for the accident. Defendants filed a motion to reduce the verdict for past medical damages to the amounts actually paid, and then to reduce that amount for the comparative fault finding. The trial court granted Defendants' motion, but neglected to reduce damages according to Hueso's comparative fault. An amended judgment was entered to correct the omission, and Plaintiffs thereafter appealed. Defendants moved to dismiss the appeal as untimely, arguing that the time for filing an appeal began running when the initial judgment, not the amended judgment, was entered.

As a threshold matter, the appellate court ruled that because the amended order was a substantial modification, the appeal was timely. Therefore, the time to file an appeal ran from the entry of the amended judgment. In adopting the "substantial modification" test, the court rejected the distinction between judicial and clerical errors. Instead, two lines of cases defining the substantial modification test were examined.

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One line of cases focused on whether the change resulted in a separately appealable order, while the second defined "substantial modification" as a modification materially affecting the rights of the parties. The *Sanchez* court held that the amended order was a substantial modification under either interpretation. The amended order was not separately appealable, and a 30% damages reduction materially affected the rights of the parties as a matter of law.

With the procedural issue resolved, the court then addressed the merits of the appeal. One of Hueso's medical providers declared that $7,020 billed to Medi-Cal was later written off because the provider was not actually contracted with Medi-Cal. The issue before the court was whether the collateral source rule applied to gratuitous write-offs by a medical provider. The court ruled that *Howell's* limitation on recovery to amounts actually paid does not apply to gratuitous medical care reductions. Although the court noted that *Howell* did not expressly decide whether the collateral source rule applied to gratuitous write-offs, the *Howell* opinion did state that the rationale behind the rule—an incentive to charitable aid—is not implicated in commercial agreements between a provider and an insurer.

The court then examined two pre-*Howell* appellate decisions that found the collateral source rule applied to gratuitous payments and their recovery was permitted (*Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635 and *Arambula v. Wells* (1999) 72 Cal.App.4th 1006). Following these decisions, the *Sanchez* court adopted a rule of law holding that where a medical provider rendered and billed for medical services, then gratuitously wrote off a portion of those services, those amounts are recoverable under the collateral source rule. Thus, the *Sanchez* court distinguishes gratuitous discounts from negotiated discounts.

The *Sanchez* opinion is only partially certified for publication. In the unpublished portion of the decision, the court held that *Howell's* limitation on recovery to amounts actually paid—as opposed to amounts billed—applies with equal force to payments made by a private insurer and payments made by Medicare. The court opined that if the difference between medical expenses billed and the negotiated rate actually paid by a private insurer was not recoverable under *Howell*, then similar reductions for Medicare were not recoverable either. Without providing analysis on the issue, the court merely noted that "[n]one of the policy considerations or rationale contained in the *Howell* decision justify treating negotiated rate differentials obtained under private insurance differently from reductions obtained under Medicare."

COMMENT

This case is interesting for the court's choice of which portions it certified for publication. Although *Howell* finds the collateral source rule's rationale has no bearing on commercial agreements between an insurer and medical provider, the *Sanchez* court held the collateral source rule applied in these circumstances, relying on pre-*Howell* precedent. Though seemingly at odds with dicta in *Howell,* this portion was certified for publication. Conversely, the *Sanchez* court did not certify the portion of the opinion that appears to follow *Howell,* wherein the court ruled *Howell's* limitation on recovery to amounts actually paid applies to both private insurance and Medicare. At least in the Fifth District, defendants and insurers may expect to see an increase in write-offs being characterized as gratuitous, rather than contractual, to maximize recoverable damages.

Insurance-Bad Faith-Theft Claim

Greg Barnett v. State Farm General Ins. Co.
Court of Appeal, Fourth District
(October 31, 2011)

This case considered the definition of "theft" in a homeowners policy as it relates to a search and seizure by the police pursuant to a search warrant.

Greg Barnett obtained a homeowners insurance policy from State Farm. The policy included coverage for personal property on a named perils basis. Specifically, the policy covered "direct physical loss to property" caused by enumerated hazards, including theft. The theft provision in the policy extended coverage to "Theft, including attempted theft and loss of property from a known location when it is probable that the property has been stolen."

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On August 10, 2007, officers from the Costa Mesa Police Department executed a search warrant at Barnett's residence. A magistrate had issued a search warrant directing the police to search the premises for marijuana and to seize any if found. As a result of the search, the police found and seized 12 seven-foot-tall marijuana plants, a tray of loose marijuana and rolling paper, which Barnett used for medicinal purposes.

Barnett alleged that the warrant improperly referred to "prior police documentation" confirming marijuana was found on the premises when they pursued another suspect onto his property. Because he produced a statement from his physician recommending the use of marijuana for certain medical conditions, the police took no action at that time. Barnett alleged that this made it misleading to have the affidavit in support of the 2007 search warrant based in part on this information. He questioned the validity of the search warrant.

A month after the search, in September of 2007, Barnett filed a claim with State Farm for the items taken by the police. State Farm initially denied the claim in November of 2007, but re-opened the claim for reconsideration in February of 2008. Meanwhile, in February of 2008, Barnett filed a petition with the superior court for return of his marijuana, noting that he had not yet been charged with a crime. On March 18, 2008, the superior court denied his petition, noting that the amount of marijuana Barnett was growing exceeded the amount allowed under California's medical marijuana laws. Two days later, the police department destroyed Barnett's marijuana plants, the loose marijuana and the rolling papers.

In April of 2008, the district attorney charged Barnett with unlawful cultivation and possession of marijuana. The charges were dismissed in October of 2008, based on Barnett's new petition including documentation from his physician that he required more than the allowed maximum for medical marijuana. In December of 2008, Barnett filed a new petition to have his marijuana and plants returned to him. No mention was made of the denial of the earlier petition. Ultimately, the court in June of 2009 ordered return of the plants.

Meanwhile, in February of 2009, Barnett filed a lawsuit against State Farm for breach of contract and breach of the covenant of good faith and fair dealing. State Farm filed a motion for summary judgment. The trial court granted the motion, holding that even under the broadest definition of "theft," the actions of the officers here did not meet that definition. The court held that whether or not the warrant should have been issued (based on reference to the 2001 possession) was not dispositive. The court held that once the warrant existed, the officers possessed facially valid authority to search for and seize the marijuana. Plaintiff appealed.

The Court of Appeal held that although the policy did not define the words "theft" or "stolen," these words should be given their common meanings. According to the Court, this meant that "theft" required "the intent, without a good faith claim of right, to permanently deprive the owner of possession." There must be criminal intent.

Here, the officers' seizure of the marijuana pursuant to a search warrant could not constitute a "theft" because it was not criminal, because a claim of right under the warrant dispelled any criminal intent. Further, it was clear that by carting away the items in an evidence locker, the officers did not intend to deprive Mr. Barnett of his property permanently. Likewise, even if Barnett could prove that the officer swearing out the affidavit had malicious intent, the warrant was taken out by the magistrate, and the search was carried out by the police together. Hence, one officer's subjective mental state was irrelevant.

Finally, the Court held that there was no criminal intent at the time the police department burned the impounded marijuana, as it was acting pursuant to the superior court's initial denial of Barnett's petition for return of the marijuana. There was nothing in the property-return statutes which specifies that failure to return the petitioner's property constitutes theft or is otherwise criminal.

The Court of Appeal affirmed the granting of summary judgment in favor of State Farm.

COMMENT

Where the police seize items pursuant to a warrant (whether ultimately valid or not), it cannot be presumed that this is theft, even if the items are destroyed by the police, unless it is shown that there was a clear and specific intent to deprive plaintiff of items permanently.

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Tuesday, March 13

7:30 a.m. - 4:15 p.m. Registration, continental breakfast, lunch, exhibit hall open and educational sessions
4:30 p.m. - 7:30 p.m. Casino Night at the Hyatt Long Beach

Wednesday, March 14

7:30 a.m. - 3:45 p.m. Registration, continental breakfast, lunch, exhibit hall open and educational sessions

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Re-Adjusted: Taking your claims organization from ordinary to extraordinary
Risk Management at Amusement Parks – presented by Knott's Berry Farm
Accelerant Detection Canines

Liability Track:

Medicare and the MSPRC Statutes
Catastrophic Injury Defense, including mild traumatic brain injury claims
Expedited Jury Trials in California
Subrogation Issues for First Party Adjusters
Damage Control and the Effect of the *Hamilton Meats* Decision
Comparative Liability

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Asbestos, Lead and the RRP Rule
Fire Investigation for the Adjuster
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Using S500 Standards to Manage Problem Vendors
Ethics and the Claims Adjuster
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After Insured Defaults, Liability Insurer Can Intervene In Action to Contest Both Liability and Damages

CREDIT TO: Smith, Smith & Feeley, LLP, Irvine, CA

After a default is entered against an insured, a liability insurer can intervene in the lawsuit in order to contest both liability and damages, even though the insured itself is procedurally barred from litigating those issues. (*Western Heritage Ins. Co. v. Superior Court* (2011) WL 4791027)

Facts: George Parks (Parks) was an elderly man who hired Gratefull Home Care, Inc. (GHC) to provide Parks with home healthcare services. Later, one of GHC's employees, Julia Reyes (Reyes), was driving a vehicle with Parks as a passenger when Reyes was involved in an accident in which Parks suffered fatal injuries. Parks' heirs subsequently filed a wrongful death action against GHC and Reyes, alleging that Reyes had negligently operated the vehicle and that GHC was vicariously liable.

At the time of the accident, GHC was the named insured, and Reyes qualified as an additional insured, on a general liability policy issued by Western Heritage Insurance Company (Western Heritage). Western Heritage agreed to defend both GHC and Reyes against the wrongful death lawsuit filed by Parks' heirs, subject to a reservation of rights. After defense counsel entered an appearance for GHC and Reyes, Reyes apparently left the country, and thus she did not respond to discovery requests or appear for her deposition. As a result, the trial court struck Reyes' answer and entered a default against her.

At that point, Western Heritage filed a motion to intervene in the lawsuit in order to protect its own interests. Western Heritage claimed that it had a direct and immediate interest in the outcome of the lawsuit, since in the event Parks' heirs obtained a judgment against Reyes, Western Heritage could potentially be liable for the judgment under Insurance Code section 11580(b)(2). The trial court granted Western Heritage's motion and allowed Western Heritage to intervene. However, later, the trial ruled that Western Heritage could not dispute whether Reyes was *liable*, but rather could only dispute the amount of *damages* allegedly suffered by Parks' heirs. Western Heritage then sought appellate review of the trial court's order preventing Western Heritage from contesting the issue of Reyes' *liability*.

Holding: The Court of Appeal held that the trial court had erred in ruling that Western Heritage could not contest the issue of Reyes' *liability*. Since Western was potentially liable under Insurance Code section 11580 for any judgment against Reyes, Western Heritage clearly had a stake in the outcome of the litigation. Further, although Western Heritage was aligned with Reyes, Reyes' procedural default did not bar Western Heritage from raising defenses to protect Western Heritage's *own interests*. Indeed, the entire purpose of intervention is to permit the insurer to pursue its own interests, which necessarily include the litigation of defenses its insured is procedurally barred from pursuing. Accordingly, Western Heritage was entitled to litigate both liability and damages issues.

Comment: In numerous prior cases, California appellate courts have held that a liability insurer may intervene in a third party action brought against the insured in order to protect the insurer's own interests when the insured is unable to defend. However, none of those appellate courts had expressly considered whether the intervening insurer is then entitled to litigate liability and damages issues that the insured is barred from litigating. According to the *Western Heritage* case, the intervening insurer is in fact entitled to litigate those issues. Indeed, there would be no purpose in allowing an insurer to intervene in order to protect its *own* interests, but then limiting the insurer's defense to issues that the defaulting *insured* is limited to pursuing.

The Washington Post's Mensa invitational once again asked readers to take any word from the dictionary, alter it by adding, subtracting, or changing one letter, and supply a new definition. Here are the 2009 winners:

1. Cashtration (n.): The act of buying a house, which renders the subject financially impotent for an indefinite period of time.

2. Intaxication : Euphoria at getting a tax refund, which lasts until you realize it was your money to start with.

3. Reintarnation : Coming back to life as a hillbilly.

4. Bozone (n.): The substance surrounding stupid people that stops bright ideas from penetrating. The bozone layer, unfortunately, shows little sign of breaking down in the near future.

5. Foreploy : Any misrepresentation about yourself for the purpose of getting laid.

6. Giraffiti : Vandalism spray-painted very, very high.

7. Sarchasm : The gulf between the author of sarcastic wit and the person who doesn't get it.

8. Inoculatte : To take coffee intravenously when you are running late.

9. Osteopornosis : A degenerate disease. (This one got extra credit.)

10. Karmageddon : It's like, when everybody is sending off all these really bad vibes, right? And then, like, the Earth explodes and it's like, a serious bummer.

11. Decafalon (n.): The gruelling event of getting through the day consuming only things that are good for you.

12. Glibido : All talk and no action.

13. Dopeler Effect: The tendency of stupid ideas to seem smarter when they come at you rapidly.

14. Arachnoleptic Fit (n.): The frantic dance performed just after you've accidentally walked through a spider web.

15. Beelzebug (n.) : Satan in the form of a mosquito, that gets into your bedroom at three in the morning and cannot be cast out.

16. Caterpallor (n.): The color you turn after finding half a worm in the fruit you're eating.