CAIIA Status Report

HAPPY NEW YEAR 2013

January 2013

Editor's Corner

Subrogation and indemnity or contribution claims are sometimes given less credence in the claims handling process than trying to close the claims file. These methods, however, can help out the bottom line of an insurance company by collecting monies from appropriate parties.

Most property adjusters do not have a lot of experience handling liability claims. It should be remembered that virtually all property claims have a subrogation potential. Whether or not the subrogation potential is viable, of course, is another "kettle of fish."

When it comes to subrogation it should be remembered that California has no Statute of Repose. Several other states have specific time limits of how long a particular product should last. California does not have this law. Therefore, any time a property adjuster has a broken water pipe or a roof that has failed or a refrigerator leaks should consider the subrogation potential against the product involved. With the permission of the insured, the property adjuster should take possession of the product that failed. Depending on the amount of the indemnity payment to the insured, the carrier may wish to hire an appropriate expert to review the failed parts. Most experts in their field will be able to tell you the manufacturer of the part. For instance, frequently plumbing parts have special markings on them which identify who manufactured the subject part.

The fact that California has no Statute of Repose is a double edged sword for the insurance industry as a whole. If you are a liability adjuster defending a manufacturer, this can be problematic. However, if you are a first party adjuster wishing to pursue subrogation against a particular manufacturer of a part, this can be a help to you.

Construction Defect - The "Completed and Accepted" Doctrine and Architects' Liability"

Credit to Low, Ball & Lynch, San Francisco, CA

Neiman v. Leo A. Daly Co.

COURT OF APPEAL, SECOND DISTRICT (October 30, 2012)

The "completed and accepted" doctrine prevents contractors from being held liable for injuries to third parties resulting from a condition of the contractor's work when: (1) the work was accepted by the property owner; and (2) the condition that caused the injury was not latent or concealed. This case considered the applicability of the doctrine to the duties of an architect overseeing construction for the owner.

Plaintiff Ellen Neiman filed a personal injury action after falling down the stairs at a theater belonging to Santa Monica Community College (SMCC). The trial court granted the summary judgment motion of defendant architect Leo A. Daly Company (LAD) based on the affirmative defense of the "completed and accepted" doctrine. Ms. Neiman appealed the grant of summary judgment, arguing that she had raised a triable issue of material fact as to whether the lack of contrast marking stripes on the stairs where she fell was a latent defect.

Continued on page 4

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Inside this issue…..

CAIIA Newsletter

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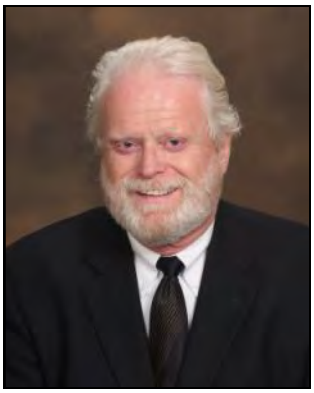
President's Message

January 2013



W.L. (BILL) McKenzie
CAIIA President

Out with the old 2012 and in with the new 2013. I hope all of the readers had a Happy and Joyous Holiday, and are looking forward to a wonderful 2013.

On January 1st it is customary that we start with a New Year's Resolution. The New Year is a great opportunity for us to resolve old issues and move forward with new ideas and goals that we have been meaning to do something about. We all know it is quite easy to make a New Year's Resolution, but not so easy to fulfill those resolutions even though we have good intentions to do so.

I have been told rather than list a variety of New Year's Resolutions that we should start with only one or two, as it makes it easier to accomplish those resolutions and we are not disappointed as we proceed into the New Year with resolutions that we have not been able to keep. With each New Year, I suspect we all intend on achieving certain goals. When I was younger I never had a great belief in goals, and in fact I always looked upon that as one of the most difficult tasks mandated by my employers. However, over the past years I have apparently become somewhat smarter (or more temperate) and realized we must all have goals, and try as best as we can to fulfill them, otherwise we become stagnant and don't learn from our mistakes or from the goals not achieved.

Obviously, with the coming of the New Year there are certain goals for the California Association of Independent Insurance Adjusters. One of our goals is always to provide the best education to our members and to the insurance industry as a whole, and to participate in those events. Along those lines, I encourage all members and insurance personnel to participate in the 2013 Combined Claims Conference being held on March 12-13, 2013 at the Long Beach Convention Center. This educational conference, along with the Combined Claims of Northern California, go a long way toward providing all insurance personnel with a wide variety of educational seminars to achieve a goal of always learning, and hopefully making ourselves better claims people. (Mr. Jeff Caulkins, our Past President, is working with several members hopefully to be able to secure a new booth for both Southern and Northern California.

Once we conclude the Long Beach Claims Conference, we will be having our Spring Meeting. At the present time we are looking at the possibility of having that meeting in the South Lake Tahoe area. When everything has been finalized I will provide more detailed information and I look forward to all of the members and guests in attendance. We will also be providing Continuing Education credits.

We no sooner complete that meeting when volunteer members who have been working over the past several months will be putting on the seminar for evaluating earthquake damages (SEED), along with the Re-Certification in the California Fair Claims Settlement Practices Regulations and the Fraud Regulations. Once those dates and sites have been confirmed the information will be provided in the Status Report.

The 2013 Directory is now at the printer and copies should be mailed in January. As always, our goal is 100% accuracy in the listing of member firms. The time lag between membership renewals and the production of the Directory adds a challenge to the already time consuming task of proof reading each Post Office Box, fax number, phone number, e-mail address, etc.

I can't emphasize enough that this is a volunteer organization, and I have had a great response from our members in volunteering for Chairs and for various Committees. I look forward to my year as the President in working with all of our volunteer members to achieve a goal of making the CAIIA a better organization. If you are a California Independent Adjuster and not yet a member, please contact our Membership Committee – Kim Hickey, Phil Barrett, Gil Malmgren, and let all of them tell you why you should become a member, the

(continued on page 3)

(President's Message) continued from page 2

benefits, etc. If anyone who reads this knows of anyone who might want to become a member, please tell them to contact me or the Membership Committee members.

I personally want to thank Sterrett Harper of Harper Claims for the outstanding job that he does in physically putting together the Status Report. I want to thank all of our members for contributing articles, comments, etc. to Mr. Harper for inclusion in our Status Report.

Again I want to thank all the volunteers who make this a successful organization. I hope the resolutions we have made are all successfully completed, and we all have a joyous 2013.

W.L. (Bill) McKenzie, RPA

Notes and News from Members

Hello Men:

I really enjoyed this edition of the report. Bill, you write just as you speak! Recognizing your Veteran brothers and sisters was also much appreciated. Sterrett, a fine job of content and organization.

Best to both,

Michael Hale
Carter Claims Service

Bill Scheler, George R. Dunlap Claims Service, San Jose, CA, is recovering from an illness. He is in good spirits. However, he is closing his business. Bill's company has been a member of the CAIIA since 1969. Bill has been very active in the Association over the years. He has attended many of the CAIIA functions and has been a strong supporter. We wish him well.

* MEDICARE SECONDARY PAYER ALERT *

The U.S. Congress just passed HR 1845. It contains major revisions to the rules for reimbursement payments to Medicare. The President is expected to sign the law in January, 2013. Standby to revise your procedures for Medicare liens.

(Construction Defect) Continued from page 1

The Court of Appeal affirmed the summary judgment. It first noted the policies behind the "completed and accepted" doctrine. The reasoning underlying the doctrine is that an owner's acceptance of a contractor's work functions as an intervening cause, which precludes privity between the contractor and the injured third party. It is, in essence, a public policy rationale that it is beneficial to have property owners inspecting accepted work for patent or obvious defects in order to ascertain the safety of that work. The doctrine is applicable even when the contractor was negligent in performing the work, as long as it has in fact been both completed and accepted. It is applicable only as to "patent" or obvious defects, and not those that are "latent" or hidden in nature.

The Court determined that evidence had been presented in SMCC's discovery responses that the work was completed and accepted. Next, the Court looked to whether the condition causing the injury was latent by examining the very nature of the condition itself. The Court found that the purpose of contrast striping on steps "is to ensure that the location of each tread is readily apparent when viewed in descent". Thus, because contrast striping is designed to be noticed, any reasonable inspection would disclose that the striping was absent and its absence was a patent defect.

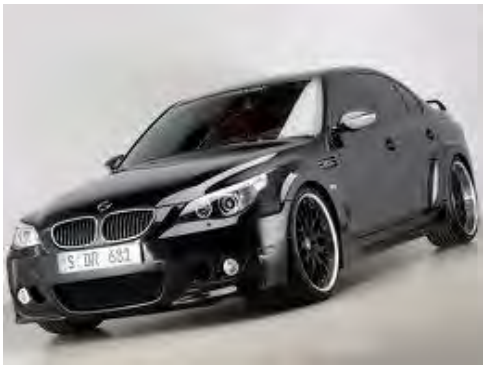
The Court determined that, regardless of any potential negligence on the part of LAD, since the work had been accepted by SMCC and the defect was patent, the "completed and accepted" doctrine shielded LAD from liability. As both the conditions of the "completed and accepted" doctrine had been met, the Court affirmed the trial court's granting of LAD's motion for summary judgment.

COMMENT

This case affirms and expands the "completed and accepted" doctrine in a twofold manner. First, it expands the definition of a patent or obvious defect to include missing items that were called for in the plans and specifications, but would have been obvious on inspection. Second, it expands the scope of the doctrine to include design professionals. Both of these changes increasingly shift the burden of liability away from those responsible for building or designing the structure and onto the property owner.

For a copy of the complete decision see: HTTP://WWW.COURTS.CA.GOV/OPINIONS/DOCUMENTS/B234537.PDF

Insured's Numerous Misrepresentations About Alleged Theft Justify Denial of Claim
Credit to Smith, Smith & Feeley, Irvine, CA



An insurer was justified in denying coverage for the alleged theft of an automobile where the insured made numerous misrepresentations about the price he paid for the car, pre-existing damage, repair of the damage and when he last saw the car prior to the alleged theft. (*Hodjat v. State Farm Mutual Automobile Insurance Company* (2012) WL 5077907)

Facts

Allen Hodjat owned a used car business. He and his wife purchased a damaged BMW, which they intended to repair and sell.

The Hodjats purchased an automobile insurance policy from State Farm Mutual Automobile Insurance Company. The policy required that they cooperate with State Farm in any claim and provided that "[t]here is no coverage under this policy if you or any other person insured under this policy has made false statements with the intent to conceal or misrepresent any material fact or circumstance in connection with any claim under this policy."

Mr. Hodjat reported the car stolen, and State Farm conducted an investigation into the alleged theft. Mr. Hodjat and his wife submitted several statements regarding the theft and condition of the car. For example, when he first reported the theft, Mr. Hodjat told State Farm that he purchased the car for $65,000. Later, however, in an affidavit of loss, the Hodjats stated they purchased the car for $28,000. Still later, in a recorded statement, Mr. Hodjat claimed they paid between $26,000 and $27,000. Meanwhile, the title documents for the car showed a sale price of $25,000 to $25,199.

During the course of the investigation, Mr. Hodjat's description of the condition of the car also changed dramatically. In the recorded statement, he told State Farm that the car was drivable at the time he purchased it, but later he stated that it was not drivable and had to be towed to his business. In addition, during the course of the investigation, Mr. Hodjat made inconsistent statements regarding how much it cost to repair the car, providing estimates ranging from $1,800 to $5,040 to $8,000.

Mr. Hodjat's description of when he last saw the car and when he discovered the theft also changed each time he spoke with State Farm and the police.

State Farm requested that the Hodjats submit various records. The Hodjats submitted some, but not all, of the requested records.

State Farm retained an attorney to examine the Hodjats under oath and to provide a legal opinion regarding coverage. The attorney ultimately recommended that State Farm deny the claim on the grounds the Hodjats had failed to cooperate in the investigation and had made material misrepresentations regarding their claim.

State Farm denied the claim and the Hodjats filed suit. State Farm moved for summary judgment on the grounds that the Hodjats had misrepresented numerous facts in connection with the claim. The Hodjats opposed the motion, asserting that State Farm had manipulated the facts, hired dishonest investigators and had relied on unreasonable legal advice to deny the claim. However, the Hodjats failed to provide any actual evidence to support their assertions. Thus, the trial court entered summary judgment in favor of State Farm. The Hodjats appealed.

Continued on page 7

Workers' Compensation Appointments: Not a Detour Around the "Going-and-Coming Rule"
Credit to Low, Ball & Lynch, San Francisco, CA

Kenneth Fields v. State of California

Court of Appeal, Fifth District (September 20, 2012)

Under the "going-and-coming" rule, employers are not generally liable under respondeat superior for torts committed by their employees when traveling to and from work. This case addresses whether an exception exists when an employee commits a tort while traveling to work from a medical appointment required pursuant to a workers' compensation claim.

Linda Gadbois ("Gadbois") worked at Avenal State Prison as a cook. She was injured on the job and received treatment through the prison's workers' compensation network. Gadbois informed her employer that she would need to take time off to attend a follow-up appointment on May 28, 2008, a day that she normally worked. After the appointment, Gadbois called the prison notifying her supervisor that she was on her way to work. Shortly thereafter, Gadbois was involved in a fatal vehicle accident involving Kenneth Fields ("Fields"), who was also injured. Pursuant to a death benefit policy at the prison, Gadbois was compensated her normal pay on the day of the accident. Fields filed suit against the estate of Gadbois and the State of California as Gadbois' employer. At trial, after presentation of Fields' case, the court entered a nonsuit in favor of the State. Fields appealed.

Fields contended that the State was liable under respondeat superior and that Gadbois was acting within the scope of her employment when she was driving back from her medical appointment related to her workers' compensation claim. For an employer to be held liable under respondeat superior, an employee's torts must be committed within the scope of their employment. Under the "going-and-coming" rule, an employee is not within the scope of their employment when driving to and from work.

The Appellate Court rejected Fields' first argument that the "incidental benefits" rule applied when the State paid for Gadbois' day of work. An exception exists to the "going-and-coming" rule when an employee's commuting involves an incidental benefit to the employer. The court noted that payment for mileage or travel benefits can evidence that the employee's actions benefited the employer. Fields attempted to analogize Gadbois' receiving payment for the day of the accident to mileage and travel expenses. Here, however, the Court held that the death benefit policy was unrelated to Gadbois' travel or work duties. In fact, the State's death benefit policy would have paid Gadbois for the day even if she was on leave or vacation. Therefore, the court held that Fields failed to demonstrate a benefit to the State in Gadbois' actions.

Next, Fields argued that Gadbois was running a special errand when attending her medical appointment related to her workers' compensation claim. The special errand exception to the "going-and-coming" rule states that an "employee is within the scope of his employment while coming from home or returning to it while on a special errand either as part of his regular duties or at a specific order or request of his employer." The Court rejected this argument, stating that the medical appointment was not a condition of Gadbois' employment. Gadbois needed to attend her workers' compensation appointments as a statutory requirement of receiving compensation for her work-related injury, but not as a condition of performing her duties as a cook for the prison.

The Court also disagreed with Fields' reference to a similar workers' compensation decision in which an employee was found to be within the scope of his employment for an injury sustained while traveling to a doctor's appointment for an earlier workers' compensation injury. The court pointed out that public policy went in a different direction for workers' compensation law on going-and-coming cases than it did in respondeat superior cases. In the former, public policy favored a finding that an employee was in the course and scope, as "social insurance" to protect the employee from occupational hazards, while in the latter, public policy was to limit an employer's responsibility for the negligent acts of its employees.

The Court held that the prison did not require Gadbois to go to the workers' compensation appointment on May 28, 2008; it did not require her to drive to the appointment; and driving was not part of Gadbois' regular duties. Thus, it was not foreseeable that Gadbois would injure a third party in a vehicle accident as part of her work as a cook. Accordingly, the Appellate Court affirmed the trial court's entry of a non-suit in favor of the state.

COMMENT

The Appellate Court was unwilling to apply any known exceptions to the "going-and-coming" rule in the context of workers' compensation appointments. Though this case presented facts that created the perception that the employee was attending a work-mandated appointment, the Court properly recognized that compliance with workers' compensation rules are statutorily mandated and not a requirement arising from the employer.

For a copy of the complete decision see: HTTP://WWW.COURTS.CA.GOV/OPINIONS/DOCUMENTS/F063128.PDF

YOU CAN BE COMPELLED TO ARBITRATE YOUR CONSTRUCTION DISPUTE

Credit to Manning & Kass, Ellrod , Ramirez , Trester, Los Angeles, CA

The California Supreme Court recently held that a developer of a common interest development can enforce a mandatory arbitration clause contained in the recorded declaration of covenants, conditions, and restrictions ("CC&Rs") in construction disputes brought against it by the association of the development. The court in the case of Pinnacle Museum *Tower Association v. Pinnacle Market Development* (US), LLC (2012) 55 Cal.4th 223, relied heavily on the legislative intent behind the Davis-Sterling Common Interest Development Act (the "Act") to conclude that the association, and subsequent homeowners, have an expectation of consistency and stability, and to not enforce the CC&Rs would lead to a disruption in the community interest as a whole. The ruling cleared up what was previously a grey area in the law regarding the enforceability of these types of provisions.

The case arose when the association of a mixed-use common interest development brought a construction defect action against the developer. The developer then filed a motion to compel arbitration pursuant to an arbitration provision contained in the recorded CC&Rs. The association argued that it did not participate in the creation of the CC&Rs and therefore did not have notice of nor consent to arbitrate its construction dispute against the developer. The court held that the fact the CC&Rs were recorded was sufficient notice, and the association was deemed by law to have consented to it.

The Act governs the creation and operation of common interest developments. When a developer creates a common interest development, the Act requires the developer to file a declaration that sets forth a legal description of the development, the would-be owners' association, and the covenants and use restrictions intended to be equitable servitudes. It leaves open for the developer to include any other matters it deems appropriate; in this instance, an arbitration provision.

The recorded CC&Rs, whether expressly read and accepted by the association or individual homeowners, provided sufficient notice - actual notice is not required under the Act. Acceptance to reasonable, recorded CC&Rs is either expressly accepted, or deemed by law to have been expressly accepted. The thrust behind this decision was the Act's ability to promote stability, protect the expectations of homeowners and the community as a whole, and to continue on for the benefit of subsequent owners. The court was concerned with inconsistencies that might disrupt the success of community interest developments.

In short, the court in Pinnacle believed the enforcement of an arbitration provision would benefit the developer and the association by promoting an efficient form of alternative dispute resolution rather than a lengthy trial. The majority made clear that stability, expectations, and the common interest were promoted, and not harmed, by the enforcement of the arbitration clause.

(Misrepresentations) continued from page 5

Holding

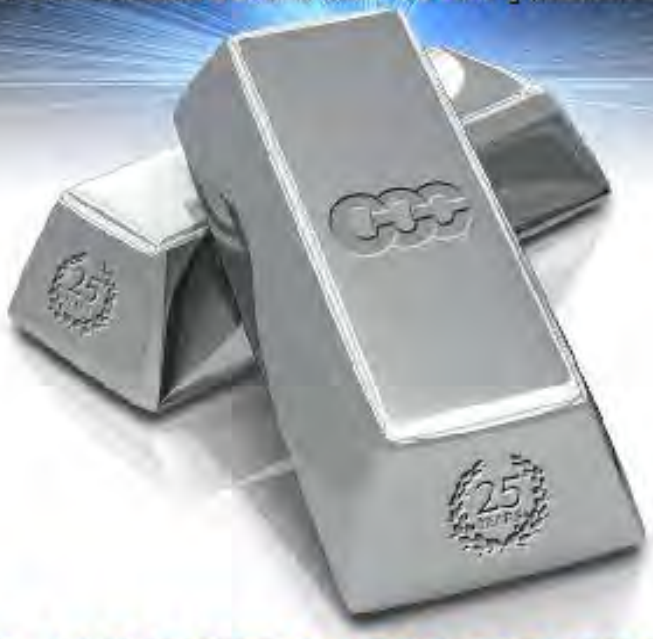
The Court of Appeal affirmed, finding that, pursuant to the terms of the policy, there was no coverage for the Hodjats' claim. The Court noted that Mr. Hodjat misrepresented the purchase price of the car, the extent of the prior damage to the car, where he had the car fixed, the amount of money he paid to have it fixed, and the last time he saw the car before it was stolen. In summary, the Court stated: "Every detail of the Hodjats' claim – from the condition of the car to the cost of the repairs to the discovery of the theft – was riddled with inconsistencies." Thus, per the express terms of the policy, there was no coverage.

Comment

This case contains a very detailed discussion of the numerous inconsistent statements the insureds made at different points in time. Seemingly, it was the sheer volume of inconsistencies which ultimately led the both the trial court and Court of Appeal to conclude that, as a matter of law, the insureds had intentionally concealed and misrepresented material facts.

COMBINED CLAIMS CONFERENCE

LONG BEACH CONVENTION CENTER | MARCH 12-13, 2013



SILVER ANNIVERSARY CELEBRATION
MINING FOR KNOWLEDGE

The Combined Claims Conference (CCC) is a two-day program offering continuing education for CPCU, RPA, MCLE, CIPI, CALI, WCCP and the California Department of Insurance for independent adjusters, attorneys, investigators and brokers.

You must be employed in the following fields in the insurance and claims industry to qualify for the CCC "qualified" rate: Independent Adjuster, Insurance Carrier, Risk Management, Appraiser, Private Investigator, Workers' Compensation Claims Professional, Attorney or Agent/Broker. All others register at the "all others" rate.

CCC QUALIFIED RATES:

Register By December 31:
One-day: $75.00 (either Tuesday or Wednesday)
Two-day: $125.00

Register by February 28:
One-day: $95.00 (either Tuesday or Wednesday)
Two-day: $175.00

After February 28 or On-site registration:
One-day: $125/day (subject to availability)

All-others:
One-day: $200 (either Tuesday or Wednesday)
Two-day: $400

Discount Pricing Available:
Pay for five registrations and get one free.
Pay for 10 registrations and get three free.
Pay for 15 registrations and get five free.

EXHIBITOR AND SPONSORSHIP OPPORTUNITIES ARE AVAILABLE NOW!
Please visit the website for details on the program, exhibitor, sponsor and golf tournament details, hotel information and a link to register online. All registration will be online for the 2013 conference.

Combined Claims Conference
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Sacramento, CA 95865-5431
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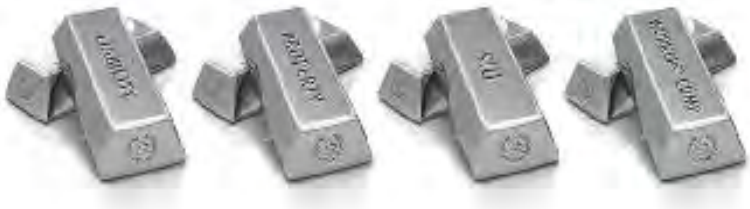

On the Lighter Side...

Author and lecturer Leo Buscaglia once talked about a contest he was asked to judge. The purpose of the contest was to find the most caring child.
The winners were:

A four-year-old child, whose next door neighbor was an elderly gentleman, who had recently lost his wife. Upon seeing the man cry, the little boy went into the old Gentleman's' yard, climbed onto his lap, and just sat there. When his mother asked him what he had
said to the neighbor, the little boy just said, 'Nothing, I just helped him cry.'

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Teacher Debbie Moon's first graders were discussing a picture of a family. One little boy in the picture had a different hair color than the other members. One of her students suggested that he was adopted. A little girl said, 'I know all about adoption, I was adopted..'
'What does it mean to be adopted?', asked another child. 'It means', said the girl, 'that you grew in your mommy's heart instead of her tummy!'

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An eye witness account from New York City , on a cold day in December, some years ago: A little boy, about 10-years-old, was standing before a shoe store on the roadway, barefooted, peering through the window, and shivering with cold. A lady approached the young boy and said, My, but you're in such deep thought staring in that window!' 'I was asking God to give me a pair of shoes,' was the boy's reply. The lady took him by the hand, went into the store, and asked the clerk to get half a dozen pairs of socks for the boy. She then asked if he could give her a basin of water and a towel. He quickly brought them to her. She took the little fellow to the back part of the store and, removing her gloves, knelt down, washed his little feet, and dried them with the towel. By this time, the clerk had returned with
the socks.. Placing a pair upon the boy's feet, she purchased him a pair of shoes.. She tied up the remaining pairs of socks and gave them to him.. She patted him on the head and said, 'No doubt, you will be more comfortable now..' As she turned to go, the astonished kid
caught her by the hand, and looking up into her face, with tears in his eyes, asked her: 'Are you God's wife?'

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Cartoon Contributed by Peter Schifrin