CAIIA Status Report
FEBRUARY 2011

Insurance Law Newsletter

Submitted by McElfish Law Firm, West Hollywood, CA

MEDICARE COMPLIANCE ALERT December 2010

Medicare and Medicaid Services (CMS) have again postponed the deadline for implementation of the Mandatory Insurer Reporting Program, which creates a requirement that all insurers and self insurers report the settlement of all claims involving a Medicare-eligible claimant to the federal government. **The new reporting deadline is now 1st Quarter 2012**. A full copy of the alert PDF is available below.

This continuance appears to be the result of ongoing confusion within the government itself relative to enforcement. Judges and attorneys are under pressure to speed up and clarify the process of determining what amount Medicare is entitled to in reimbursement, yet, in our recent experience with attempting to comply with these rules, the courts want nothing to do with enforcement or any issues presented by this legislation

Naturally, this has created additional uncertainty among all parties involved. Because the new reporting requirements have an impact on how discovery is conducted in personal injury cases, how settlements are negotiated, how the language of a release is constructed, and invites the possibility of having closed files re-opened - in addition to the costs of determining whether a claimant is a Medicare beneficiary - it is not surprising that another extension has been enacted.

The new deadline for reporting on all legal settlements, judgments and, arbitration awards resolved by October 1, 2011 is now **First Quarter 2012**, having been postponed from the previous deadline of First Quarter 2011.

The minimum dollar amount threshold has also been extended one year:
All claims under $5000 are exempt for reporting until January 1, 2013
All claims under $2000 are exempt for reporting until January 1, 2014
All claims under $600 are exempt for reporting until January 1, 2015

This change only applies to liability insurers and self insured entities where claims are resolved in a single payment and does not apply to Workers Compensation or no-fault insurance carriers.
http://www.cms.gov/MandatoryInsRep/Downloads/RevTimelineTPOC110910.pdf

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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*.

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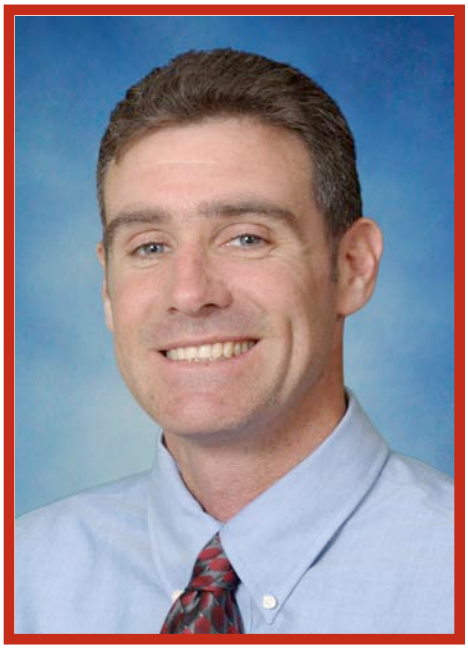
PRESIDENT'S MESSAGE

I was raised by an Insurance Adjuster. As I was growing up and contemplating what my father did for a living, the word adjuster had always perplexed me. Who do we call this occupation adjusting? Here is what the Merriam Webster Dictionary gives for a definition:

adjuster: one that adjusts; especially: an INSURANCE AGENT who investigates personal or property damage and makes estimates for effecting settlements.



Okay – that's the definition you would expect the industry outsider to give if asked. But it really doesn't give you much of a clue as to why the terms "adjuster" or "adjusting" came to be involved in settling insurance claims. Indeed, it actually took me a few years in practice to dispel the mystique surrounding this nebulous term.

But over the years, I've learned that in order to perform this job proficiently, we adjusters must be flexible. As flexible adjusters, we have to be open and receptive to all information given to us by our policy holders, claimants, witnesses, etc., whether that information is solicited by us or not. This requisite flexibility is so that we can "adjust" our preconceived, or still developing comprehension of the facts for a given claim, as ultimately, the resolution of the claim needs to be based on the truth. Thus, allowing our position and outlook to equivocate, or "adjust", based on the information we acquire as our investigations develop might be one example of how the term adjuster or adjusting applies to what we do.

We also deal with personalities of all types in order to accomplish our assignments. Sometimes the personalities can be downright hostile. As much as we would like to "adjust" the obnoxious attitudes which are projected our way, for the sake of maintaining civility and rapport, we often have to "adjust" our interpretation of the profanity and insults lobbed in our direction, lest we lose sight of our ultimate goal; the proper resolution of the claim.

At times, we have to "adjust" the policyholder or claimant's perception as to what the insurance contract can do for them.

It seems like we are constantly "adjusting" to improvements in technology in order to stay competitive and efficient.

And I don't know about you, but if there is anything that gets "adjusted" the most in my office, it is my schedule. Unexpected things constantly creep up and get in the way of meeting this appointment or that deadline.

How about the constant need to "adjust" and adapt to the myriad of policy forms and endorsements, especially the enhancement packages commer-

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Weekly Law Resume

Submitted by Low, Ball & Lynch, Attorneys at Law - San Francisco, CA

Insurance Coverage - "Loss of Use"

Advanced Network, Inc. v. Peerless Insurance Company, Court of Appeal, Fourth District (December 10, 2010)

The term "property damage" is defined by most CGL policies to include the "loss of use" of physical or tangible property. This case considered whether an underlying action for conversion of monies qualified as "property damage" for the loss of use of the monies taken.

Advanced Network, Inc. (ANI) contracted with Mission Federal Credit Union (Mission) to service cash distribution machines in Mission's stores. In October of 2004, it was discovered that an ANI employee had been stealing cash from Mission's machines, which he concealed by filing false records. Ultimately, the employee pled guilty in a federal criminal case to misappropriating almost $2,000,000 between 2000 and 2004. Mission made a demand against its fidelity bond holder, Cumis Insurance Company (Cumis), which reimbursed the entire amount, less Mission's deductible. Thereafter, in August of 2005, Cumis filed suit against ANI in federal court for equitable subrogation, negligence, breach of contract and respondeat superior.

ANI had a CGL policy with Peerless Insurance Company, with $1,000,000 limits per occurrence, along with a $250,000 crime policy with Chubb Group of Insurance, and a $3,000,000 commercial umbrella policy with Golden Eagle Insurance. The CGL policy issued by Peerless defined "property damage" as (1) "Physical injury to tangible property, including all resulting loss of use of that property," and (2) "Loss of use of tangible property that is not physically injured." ANI tendered to all three carriers. Peerless denied coverage on the basis that money is not considered "tangible property" and the theft of money is not considered an occurrence because it is not an "accident." In late 2006, ANI settled with Cumis for $1,000,000, including the $250,000 of Chubb's policy, but with no contribution from Peerless.

In September of 2007, ANI sued Peerless for breach of contract and breach of the duty of good faith and fair dealing. Both parties brought summary judgment motions. The trial court denied Peerless' motion, explaining that cash was tangible property and that the theft was an "occurrence" because ANI's employee's theft was "unforeseen and unintended." The matter proceeded to trial, and Peerless argued that the "loss of use" prong of the property damage definition was inapplicable because Cumis' lawsuit had been for the loss of and replacement of the cash, not for the loss of use of the cash. The trial court rejected this argument, and ultimately ANI prevailed. Peerless appealed.

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PRESIDENT'S MESSAGE

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cial underwriters tend to use to differentiate themselves in the marketplace?

Finally, at the end of the workday, I usually need about 20 minutes or so to transition or "adjust" my mind and attitude from the focus and intensity of processing claims and tending to the needs of claimants, to those of my family.

In actuality, "adjusting" is only a small part of what we adjusters actually do. Fact is, the broader definition of what we do is "whatever is necessary", (within the parameters of statutory regulations and sound ethics), to fulfill the obligations of an insurance contract after having investigated the facts of the claim, evaluated the damages and reconciled both of the foregoing with the terms of the insurance policy. After reaching this point, we then proceed to negotiate, (or adjust), to a mutually acceptable resolution. Find me a better team which comprehends this job function.

PHIL BARRETT

President - CAIIA 2010-11

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The Court of Appeal reversed the judgment for ANI and ordered that judgment be ordered in Peerless' defense. First, the court noted that the law clearly holds that conversion is not itself property damage, but "rather the taking or deprivation of property." As such, the taking of the money by ANI's employee was not "property damage" under a CGL policy's definition of the same. The only question was whether the "loss of use" of the money could be considered property damage. The Court first looked at the definition of loss of use damages. The measure of damages for the loss of use of personal property may be determined with reference to the rental value of similar property that the plaintiff can hire for use during the period when he is deprived of the use of his own property. The Court pointed out that "loss of use" is thus different than the permanent deprivation or loss of that property, and that the two phrases are not interchangeable for insurance law purposes.

Here, the lawsuit brought by Cumis against ANI did not seek recovery for the loss of use of the funds. Rather, Cumis sought recovery for the costs it paid to its insured to replace the permanently lost funds. Because neither the underlying action nor any extrinsic facts showed any claim being made for loss of use, there was no coverage under Peerless' policy and it owed neither a defense nor indemnity to ANI on the action. Hence, the judgment in ANI's favor was reversed.

COMMENT

The Court of Appeal made clear that a conversion claim does not give rise to coverage under a CGL policy under the "loss of use" definition of property damage in the policy. To hold otherwise would render the distinction between "loss" and "loss of use" meaningless.

Torts - Commercial Driver Has Duty to Park Truck Safely

Connie B. Lawson, et al. v. Safeway, Inc., et al., Court of Appeal, First District, Division One (December 30, 2010)

Ordinarily, drivers have no exposure to liability if they are legally parked. However, in this case, which involved an extremely large commercial truck and a professional truck driver, the Court concluded that, under the circumstances presented in this case, a duty to park safely, as well as legally, was required.

The plaintiffs, Charles Lawson and Connie Lawson, suffered personal injuries when the motorcycle that Mr. Lawson was operating struck the driver's side of a pick-up truck operated by defendant Shawn Kite. Mr. Kite was attempting to cross Highway 101 at the intersection of Highway 101 and Anchor Way near Crescent City, California. At that point, Highway 101 has a speed limit of 50 miles per hour, and is a three-lane road with southbound and northbound lanes, and a center lane for left turns. There is a stop sign on Anchor Way where it intersects Highway 101 from the west and forms a T-shaped intersection. The Anchor Beach Inn is located just north of the intersection on the west side of Highway 101 next to the southbound lane.

Mr. Kite was driving a pick-up truck east on Anchor Way and wanted to make a left-hand turn onto Highway 101 going north, which required crossing Highway 101's southbound lanes. When Mr. Kite reached the stop sign on Anchor Way at the intersection with Highway 101 and looked toward the southbound Highway 101 lane to his left, his view was obstructed by a large (13-1/2 feet tall, 8-1/2 feet wide, 65 feet long) Safeway tractor/trailer truck. The front of the truck, which was parked parallel to Highway 101 in front of the Anchor Beach Inn, was approximately 80 feet to Mr. Kite's north. Mr. Kite testified that he did not see the Lawsons' motorcycle approaching until his pick-up was about halfway into the southbound Highway 101 lane. Mr. Kite accelerated across the lane, trying to avoid the Lawsons, but they collided with the left side of his pick-up. Mrs. Lawson was thrown from the motorcycle and was seriously injured in the collision.

It was undisputed that the Safeway truck was legally parked. The driver of the Safeway truck testified that he had been parking the truck in front of the Anchor Beach Inn since 2004, and had parked there without incident twenty to forty times before the day of the accident.

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A jury awarded substantial damages to the plaintiffs and apportioned 35% fault to Safeway, 35% to the State of California, and 30% to Mr. Kite. The primary issue on appeal was whether the driver of the Safeway truck owed a duty of care to those injured in the accident when he parked in an area that was not prohibited by the Vehicle Code or any other statute or ordinance.

The Court agreed that drivers should ordinarily have no exposure to liability if they are legally parked. The Court noted that parked vehicles often obstruct views in ways that increase the risk of nearby collisions, and that liability would not be appropriate in the great majority of such situations. Obscured sight lines caused by parked vehicles are an unavoidable risk with which drivers must generally be expected to cope. However, the Court found that the facts presented in this case were "different," and involved a situation where the risk of foreseeable harm was unreasonable.

The Court reached its conclusion for four reasons. The first was that the case involved an "extremely" large commercial truck. Such trucks create a greater than normal risk because by sheer size they obstruct more of the view than smaller vehicles. Second, expert testimony was presented that the drivers of such trucks receive professional training that includes, or should include, the need to take other drivers' sight lines into account when parking. Thus, while Safeway was correct in stating that "most drivers would not expect they owe a duty other than to ensure they pick a lawful parking spot and pull fully into it," commercial truck drivers should be aware of the need to take extra precautions. Third, while the intersection may be lower volume compared to other portions of Highway 101, Highway 101 is a major highway thoroughfare with a high posted speed limit. The risk of serious injury is greater than normal at the intersection because of the speed of the traffic and the nature of the traffic traveling down Highway 101. Finally, the Court found that the Safeway driver had other places to park without creating a hazard. Alternatively, the driver could have un-hitched the trailer at a Safeway facility, a process that would have taken only a few minutes. Taking all of these circumstances into account, the Court found that the Safeway truck driver was *not*, as a matter of law, excepted from the duty he would ordinarily bear to exercise due care in the operation of his vehicle simply because he was parked legally, and the issue of his negligence in choosing where to park was properly submitted to a jury.

COMMENT

This case imposes a new duty, never before recognized in California, that subjects truck drivers alone to "negligent parking" liability for accidents that occur in the vicinity of a *legally* parked vehicle on the ground that the vehicle impacted the sight of the negligent driver who caused the accident. Generally, a driver of a vehicle does not have exposure to liability if he or she is legally parked. However, given the circumstances presented in this case (a large commercial truck, a professional truck driver, a particularly dangerous intersection, and other options for parking), the Court found that the Safeway truck driver needed to consider the obstruction of vision that his truck created, although his truck was legally parked. It is anticipated that a petition for review to the California Supreme Court will be filed.

Government Liability - Taser Considered Intermediate Level of Force

Bryan v. MacPherson, et al. 9th Circuit Court of Appeals (November 30, 2010)

Electronic Control Devices, otherwise known as "Tasers," have become one of the most important less than lethal weapon options for police officers. In this case, the 9th Circuit Court of Appeals has now characterized the use of a taser as an intermediate level of force, and has set forth guidelines to weigh when considering a claim of excessive force under the Fourth Amendment.

On the early Sunday morning of July 25, 2005, plaintiff Carl Bryan was stopped by defendant Bryan MacPherson, a Coronado police officer, at a seatbelt check point, as he crossed the Coronado bridge onto Coronado Island. Bryan had already been given a speeding ticket that morning by the California Highway Patrol and apparently

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Weekly Law Resume

Submitted by Low, Ball & Lynch, Attorneys at Law - San Francisco, CA

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had forgotten to put his seatbelt back on. When Officer MacPherson indicated he was going to give Bryan another ticket, Bryan, dressed only in boxer shorts and tennis shoes, became extremely agitated. He began banging his hands on his dashboard, cursing to himself. He then got out of his car and began cursing again and pounding his fists on his thighs.

Officer MacPherson, who was alone, ordered Bryan to get back into his vehicle. At the time, Officer MacPherson was 20 feet from Bryan. When Bryan did not get back in his car as ordered, and turned toward Officer MacPherson, Officer MacPherson deployed his taser, striking Bryan on his side. Plaintiff fell forward, knocking out four teeth.

Plaintiff filed suit against the Coronado Police Department, the City of Coronado and Officer MacPherson, alleging that the use of the taser was excessive. He argued that under the standards of *Graham v. Connor* 490 U.S. 386 (1989), no reasonable police officer would have believed that the level of force used against an unarmed man in his boxer shorts and tennis shoes, and standing approximately 20 feet away, posed a threat to a police officer, necessitating the use of a taser in dart mode that delivers a 1,200-volt shock into the body of the suspect.

Officer MacPherson brought a motion for summary judgment on the grounds of qualified immunity. Qualified immunity holds that a reasonable police officer would have concluded that Bryan presented an immediate danger to Officer MacPherson and that he was entitled to use the taser to protect himself. The court found triable issues of fact that Bryan presented no immediate danger to Officer MacPherson and that no use of force was necessary. Furthermore, even if Officer MacPherson perceived Bryan as a threat because of his cursing and agitation, Bryan was not facing him or advancing toward him at the time, and the use of the taser would be expected to cause a great deal of pain and cause Bryan to fall, which ultimately caused his injuries.

Officer MacPherson appealed, and on first review, the 9th Circuit rejected the appeal. Subsequent to the holding, two other taser cases were heard by other panels of the 9th Circuit, upholding qualified immunity. The matter was re-submitted and the court again held that there was excessive force, but now granted Officer MacPherson qualified immunity on the grounds that a reasonable police officer confronting the circumstances faced by Officer MacPherson on July 24, 2005 could have made a reasonable mistake of law in believing the use of the taser was reasonable. As such, Officer MacPherson, in making a mistake of law, was granted absolute immunity.

On November 30, 2010, the 9th Circuit, *en banc*, upheld the ruling, and set forth factors establishing that if a taser is used in dart mode, it would be considered an intermediate use of force requiring a higher level of scrutiny to justify the use of a taser in dart mode under *Graham v. Connor*.

The court first reiterated that Connor requires that the totality of the circumstances must be examined, including the crime; the threat posed by the suspect; and the resistance of the suspect. The most important factor is whether the plaintiff posed an immediate threat to the safety of the officer. Here, the court noted that Bryan was dressed in tennis shoes and boxer shorts, and clearly unarmed. Bryan was shouting profanities and gibberish, but it was self-directed. The evidence showed that Bryan never physically advanced toward Officer MacPherson, but turned toward him. At the time, Officer MacPherson was approximately 20 feet away.

The court then looked at the severity of the offense: a seatbelt violation, punishable by a fine. The court did not consider Bryan's refusal to immediately comply and get back into the car as active resistance elevating Bryan into a dangerous person. The court highlighted that even if Officer MacPherson concluded that Bryan was mentally disturbed, it was not enough under all the circumstances to use the level of force posed by a taser in the absence of an actual immediate threat to the officer.

Lastly, the court found that it was undisputed that Officer MacPherson failed to warn Bryan he would be shot with the taser if he did not comply with the order to remain in the car. The 9th Circuit has held that a warning, when feasible, even in a lethal force case, must be given, and that factor must be considered. Officer MacPherson admitted he never gave a warning.

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COMMENT

Two other cases are currently pending before the 9th Circuit en banc. In *Mattos v. Agarano* 590 F.3d 1082 (2010) [the use of a taser with darts in a domestic violence situation], it was found that the officers did not use excessive force on an unarmed woman who was agitating her husband in a dispute. In *Brooks v. City of Seattle* 599 F.3d 1018 (2010) [use of a taser in stun mode on a woman who was seven months pregnant and refused to sign a traffic ticket], the lower court found it was an appropriate use of force; i.e., a pain compliance technique appropriate to an active resister. The current state of law in the 9th Circuit is that the justifiable use of a taser in dart mode will be analyzed primarily on the threat posed by the suspect that the officer confronts. To a lesser extent, the crime and type of resistance is also going to be considered. The court strongly suggests that a warning be used to further justify the use of the taser. One final note from this case: Until this ruling, issued *en banc* on November 30, 2010, officers using tasers did not have guidelines under law as to the justifiable use of a taser. Thus, any pending claims involving the use of a taser would appear to have available the absolute defense of qualified immunity, assuming the officer was using the taser in accordance with training and procedures adopted by the department on use of force.

COMMISSIONER JONES ANNOUNCES ARREST OF CENTRAL VALLEY MAN FOR INSURANCE FRAUD AND GRAND THEFT

Charges include 13 Felony counts

Today, Insurance Commissioner Dave Jones announced that Rob Cavazos, 38, has been arrested on 12 separate counts of Insurance fraud including one count of Grand Theft for filing false claims with the State Compensation Insurance Fund (SCIF). Cavazos was booked into the Fresno County Jail. His bail has been set at $75,000.

In March 2008, SCIF reported receiving a workers' compensation insurance claim from Robert Cavazos while he worked for PPS Packaging in Fowler, California. Cavazos filed a workers' compensation insurance claim for a left shoulder injury. During treatment of his left shoulder injury, Cavazos complained of limited range of motion and mobility of his shoulder.

A year later, Cavazos treating physician found Cavazos had been misrepresenting his left shoulder's range of motion and notified the insurance carrier. Later, three days of sub-rosa video was taken of Cavazos and the video showed him carrying items with no left shoulder range of motion problems. After the sub-rosa video was reviewed by two medical doctors, they opined that Robert Cavazos' misrepresented the pain and mobility level of his injury to them and he was making a choice not to show full range of motion.

SCIF has paid out $23,818 in benefits to Cavazos and estimates that $11,272 was paid because of the misrepresentation of the injury presented by Cavazos during the course of treatment. The investigation was submitted to the Fresno County District Attorney's Office and an arrest warrant for workers' compensation insurance fraud and grand theft were issued for Cavazos. DOI Fraud Detectives and Selma Police Department officers arrested Cavazos and during the arrest determined he was also in possession of forged government documents. The District Attorney's Office will review to determine if additional charges will be brought against Cavazos for possession of forged government documents. This case was investigated by the Fresno Fraud Division of the Department of Insurance and the Selma Police Department.

GO TO THE HEAD OF THE CLASS

Students in an advanced Biology class were taking their mid-term exam. The last question was, ‘Name seven advantages of Mother’s Milk,’ worth 70 Points or none at all. One student, in particular, was hard put to think of seven advantages.

He wrote:

1.) It is perfect formula for the child.
2.) It provides immunity against several diseases.
3.) It is always the right temperature.
4.) It is inexpensive.
5.) It bonds the child to mother, and vice versa.
6.) It is always available as needed.

And then, the student was stuck. Finally, in desperation, just before the bell indicating the end of the test rang, he wrote...

7.) It comes in 2 cute containers.

He got an A.