CAIIA

Status Report

February 2012

Editor's Corner

All of the readers of the Status Report should be interested in the fact that the jurisdictional limit of California Small Claims Court has risen to $10,000.00, except for a few reasons. If the claim involves an auto accident with a bodily injury, and if the defendant has liability insurance, which requires the insurance carrier to defend its insured, the limit is still $7,500.00.

Corporations, LLC, partnerships and the like still have a limit of $5,000.00 to be a plaintiff.

Finally, no individual can bring more than two small claims court actions in one year that exceeds $2,500.00.

The effective date of the new law for Small Claims Court is January 1, 2012.

Police Seizure and Destruction of Marijuana Does Not Constitute "Theft" Within Meaning of Homeowners Policy

Credit: Smith, Smith & Feeley, Irvine, CA

No "theft" occurred where the police obtained a search warrant, seized and later destroyed the insured's marijuana. (*Barnett v. State Farm General Ins. Co.* (2011) 200 Cal.App.4th 536)

Facts

Greg Barnett grew numerous marijuana plants in the backyard of his residence, and kept dried marijuana inside his house. Barnett maintained that he was permitted to possess the marijuana for medicinal purposes in accordance with California law.

The local police obtained a warrant authorizing them to search Barnett's residence and to seize any marijuana found there. The officers searched Barnett's property, dug up and seized the marijuana plants from Barnett's backyard, and seized the dried marijuana (and related paraphernalia) from the house.

Shortly after the police raid, Barnett submitted a claim to his homeowner's insurer, State Farm General Insurance Company. Barnett claimed that the value of the seized marijuana was $98,000.

The State Farm policy covered personal property against various named perils, including "theft." The policy also covered "trees, shrubs and other plants" against various named perils, including "theft."

The district attorney did not immediately file charges against Barnett, so Barnett filed a petition in court in an effort to regain possession of his property. The court denied Barnett's petition on the grounds that the quantity he possessed exceeded the quantity that was permitted under California law. Shortly thereafter, the police destroyed some of Barnett's marijuana in a bulk narcotics burn.

Eventually, the district attorney filed criminal charges against Barnett for cultivation and possession of marijuana. While the criminal charges were pending, the police destroyed the rest of Barnett's marijuana in another bulk narcotics burn.

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An Employer Organization of Independent Insurance Adjusters

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CAIIA Newsletter

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California Association of Independent Insurance Adjusters, Inc.

President's Message

The New Year has come and gone. With each new year, many of us make New Year's resolutions. Sometimes they are personal...lose five pounds, walk more, etc.

Jeff Caulkins
CAIIA President

As we start this year, I would suggest another kind of resolution...become more involved in the insurance industry.

I am personally associated with some of the finest insurance adjusters in California. Most of them are continually active, not only in claims, but in helping to give back to the industry. There is a bond within the insurance industry.

I attended a wedding this past Saturday. This was a special time for me, since I have known the family all my life. As I was able to sit down with the grandfather of the groom, I was quickly reminded that he worked as a commercial underwriter for Farmers insurance for 35 years and is now retired. As we talked, I realized that we had more of a bond than just as neighbors. We had a bond because of the industry that we've been in.

The experience and education that comes with seasoned adjusters can only come to fruition when we all get involved. There can be a million excuses, but just do it. My challenge: get involved, help with education, go to a conference, volunteer at the CAIIA Booth. You can never begin unless you start.

As this New Year begins, I am looking forward to working with all of you again.

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

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Barnett asserted that the police had intentionally provided incomplete information to the judge when they obtained the search warrant, and that the judge would not have issued the warrant if the police had provided complete information. Later, on a motion by the district attorney, the court dismissed the charges against Barnett.

State Farm concluded that no "theft" occurred, and State Farm therefore denied Barnett's claim. Barnett then filed suit against State Farm, alleging causes of action for breach of contract and bad faith. The trial court agreed that no "theft" had occurred and entered summary judgment in favor of State Farm. Barnett then appealed.

Holding

The Court of Appeal affirmed, holding that no "theft" occurred because the police seized the marijuana pursuant to a facially-valid search warrant. The appellate court ruled that, although the policy did not define the term "theft," the term is commonly understood to refer to a criminal taking, i.e., a taking "without a good faith claim of right." The court also noted that, per California Penal Code section 484, a "theft" occurs when someone "feloniously" steals, takes, carries, leads, or drives away the personal property of another with the intent to permanently deprive the owner of the property.

Here, the police department's seizure of Barnett's marijuana at his home pursuant to a search warrant did not constitute a "theft" because the claim of right dispelled the criminal character necessary to constitute a theft within the common meaning of the word.

Comment

Insurance carriers generally do not face many first-party claims arising out of taking of property by law enforcement authorities. However, insurers often face first-party claims arising out of taking of property by civil disputants (e.g., spouses or business partners) who claim ownership of the property.

This case supports the notion that taking property based on a claimed right generally is not a "theft," even if the claimed right later is proved to be invalid. If the claimed right later is proved to be invalid, the true owner of the property might be able to establish that the taker committed some kind of civil conversion, but the owner will have difficulty proving that the taker committed a criminal "theft."

PREMISES LIABILITY-INDEPENDENT CONTRACTORS & PREXISTING CONDITION

Credit: Low Ball and Lynch, San Francisco, CA

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 negligence under Evidence Code Section 669.

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. *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. *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

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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.

INSURANCE CONTRIBUTION AND SUBROGATION

Credit: Low Ball and Lynch, San Francisco, CA

Equitable contribution by a carrier is generally subject to a two-year statute of limitation. In this case, the carrier sought to extend the statute by sounding a claim in subrogation.

American States Insurance Company (ASIC) and National Fire Insurance Company of Hartford (National) had both issued successive liabilities to the same insureds, Vision Systems, Inc. and S.D. Interstate Glass. Both insureds were named as defendants in an action brought by a homeowners association. The underlying action settled, and the action was dismissed in April of 2007. ASIC contributed $965,666 on behalf of S.D. Interstate Glass and $353,071.65 on behalf of Vision Systems, Inc. National did not contribute to fund the settlement on behalf of either insured. The insureds assigned to ASIC their rights against National for failing to defend or indemnify them.

ASIC filed suit against National in May of 2009, alleging it was entitled to equitable contribution for a portion of the amounts paid by ASIC. National demurred to the complaint on the grounds that the action commenced more than two years after accrual of ASIC's cause of action, and thus the matter was time barred under CCP Section 339(1). Before the scheduled hearing on the demurrer, ASIC filed a first amended complaint, this time pleading that the contribution action was subject to the four-year statute of limitations for written instruments under CCP Section 337 because (1) both carriers had issued written policies of insurance, and (2) the insureds had assigned their rights against National to ASIC in writing. National again demurred, noting that the action was still one for contribution, and was still subject to the two-year statute of limitations. The trial court agreed and sustained the demurrer, but granted ASIC the opportunity to amend the complaint to plead equitable subrogation.

ASIC filed a second amended complaint purporting to plead a subrogation claim. National demurred, contending that despite the claim of subrogation, this was still just a claim for equitable contribution (barred by the two-year statute). National claimed that ASIC had not pleaded (and could not plead) the essential elements of a subrogation claim. The trial court sustained the demurrer without leave to amend and ASIC appealed.

The Court of Appeal upheld the sustaining of the demurrer, first agreeing with earlier case law that equitable contribution claims, since they were not "founded on an instrument in writing," were subject to the two-year and not the four-year statute of limitations.

The Court disagreed with ASIC's contention that the "principal thrust" of its complaint was for subrogation rather than contribution. The Court noted that the difference between the two was that in subrogation, one was attempting to recover from the party primarily liable for the loss, whereas a contribution action sought to recover from a co-obligor. Hence, the action here was clearly one for contribution not subrogation.

An insurer seeking subrogation must show that the insured suffered a loss for which the defendant was liable, either as the wrongdoer, or because the defendant was legally responsible to the insured for the loss caused by the wrongdoer. Secondly, they must show that the claimed loss was one for which the insurer seeking subrogation was not primarily liable. Thirdly, the insurer must have compensated the

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insured in whole or in part. Next, it must have done so to protect its own interests, rather than as a volunteer. The insured must then have an existing, assignable claim against the defendant, which it could assert had it not been compensated by the insurer. The insurer must have suffered damages because of the acts or omissions on which the liability of the defendant depends. Finally, justice must require that the cost of the loss be shifted entirely from the insurer to the defendant, and the insurer's damages are in a liquidated sum, generally the amount paid to the insured.

According to the Court of Appeal, ASIC could not plead that it was not primarily liable for the loss. The defects alleged here were of a continuing nature, and thus the amounts paid by ASIC were sums for which ASIC was primarily liable itself (even though National may have been primarily liable as well). Thus, while the facts would support a claim for contribution (if timely) they would not support a claim for subrogation.

Lastly, the Court also noted that ASIC could not assert a subrogation claim on assignment from its insured, because its settlement on behalf of the insured left the insured fully defended and indemnified. Citing *Howard v. American National Fire. Ins. Co.* (Weekly Law Resume August 26, 2010), the Court pointed out that once the insureds were fully defended and indemnified by ASIC, they had no remaining claim for damages against any nonparticipating insurers including National.

The Court of Appeal affirmed the judgment in favor of National following the sustaining of the demurrer without leave to amend.

COMMENT

This case provides a nice explanation of the differences between equitable subrogation and equitable contribution. Where two carriers have the same obligations, and one has defended and indemnified and the other has not, one will always have the right to file a claim for contribution, but not typically for subrogation.

Commissioner Dave Jones Announces Fraud Actions

Credit: California Department of Insurance Web Site

Rooting Out Fraud

From January through December 2011, CDI's Enforcement Branch racked up more than 784 arrests for crimes that included auto insurance fraud, fiduciary theft, embezzlement and workers' compensation fraud. As a result, the courts ordered $13.2 million in restitution due to the investigative actions the DOI took against brokers, agents and producers.

CDI also filed lawsuits against pharmaceutical company Bristol-Myers Squibb for showering doctors with illegal kickbacks to get them to write more prescriptions and against Sutter Hospitals for bogus anesthesia billings. Both of these proceedings show CDI's deep commitment to go after fraud that causes undue financial strain on California's health care delivery system.

Plans are underway for the

CAIIA Spring Conference!

March 22nd-23rd, 2012

Location:

The Jamaica Bay Inn

4175 Admiralty Way
Marina del Rey, California 90292
Phone: (310) 823-5333

Toll Free: (888) 823-5333

For online reservations: www.jamaicabayinn.com

Accommodations:

City View King bed Guestroom: $169
City View 2 Queen beds: $169
Marina View King bed Guestroom: $189
Marina View 2 Queen beds: $189

Book early! Space is limited: rates subject to change after February 21st.
Please use the group name "**CAIIA**" to receive the above rates.
If booking online, please use the "promo" code: 31421**

Overnight self parking: $9/day
Day-only/event parking: $7/day
Valet parking: $22/day (with in & out privileges)

The Jamaica Bay Inn

4175 Admiralty Way
Marina Del Rey California 90292
Phone (310) 823-5333
Toll Free (888) 823-5333
For online reservations:
www.jamaicabayinn.com

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Company _____
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EVENT	COST	#TICKETS	Total Price
Member Convention Package (*) *(Includes Dinner, breakfast, CE Class/ lunch)*	$ 150.00	#_____	$_____
Non-Member Convention Package *(Includes Dinner, breakfast, CE Class/ lunch)*	$ 175.00	#_____	$_____
Spouse/guest fee ***Name***_____	$ 100.00	#_____	$_____
3 Hour CE Ethics Class (Includes breakfast, presentation, lunch)	$100.00	#_____	$_____
		Grand Total Payable	$_____

Dinner Choice: **Chicken [ ]** **Salmon [ ]**

SCHEDULED EVENTS

Please specify which events you and/or your spouse/guest will attend by placing a check mark in the box next to the event.

Complete a separate form for each registrant and additional guest.

Please make your checks payable to CAIIA or pay by credit card. Mail Registration Form & payment to:

		You	Spouse/Guest
3/22 – 6:30 P.M	Reception and Dinner	[ ]	[ ]
3/23 – 7:00 A.M.	Registration/Breakfast	[ ]	
3/23 – 8:00 A.M.	Seminar	[ ]	
3/23 –12:00 P.M.	Lunch	[ ]	
3/23 – 1:30 P.M.	Business Meeting (*)	[ ]	
3/23	Spouse event		[ ]

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GREAT QUOTES ABOUT POLITICS

*** The problem with political jokes is they get elected. ~Henry Cate, VII**

*** We hang the petty thieves and appoint the great ones to public office. ~Aesop**

*** If we got one-tenth of what was promised to us in these acceptance speeches there wouldn't be any inducement to go to heaven. ~Will Rogers**

*** Those who are too smart to engage in politics are punished by being governed by those who are dumber. ~Plato**

*** Politicians are the same all over. They promise to build a bridge even where there is no river. ~Nikita Khrushchev**

*** When I was a boy I was told that anybody could become President; I'm beginning to believe it. ~Clarence Darrow**

*** Why pay money to have your family tree traced; go into politics and your opponents will do it for you. ~Author Unknown**

*** If God wanted us to vote, he would have given us candidates. ~Jay Leno**

*** Politicians are people who, when they see light at the end of the tunnel, go out and buy some more tunnel. ~John Quinton**

*** Politics is the gentle art of getting votes from the poor and campaign funds from the rich, by promising to protect each from the other. ~Oscar Ameringer**

*** The Democrats are the party that says government will make you smarter, taller, richer, and remove the crabgrass on your lawn. The Republicans are the party that says government doesn't work and then they get elected and prove it. ~P.J. O'Rourke**

*** I offer my opponents a bargain: if they will stop telling lies about us, I will stop telling the truth about them. ~Adlai Stevenson, campaign speech, 1952**

*** A politician is a fellow who will lay down your life for his country. ~Texas Guinan**

*** Any American who is prepared to run for president should automatically, by definition, be disqualified from ever doing so. ~Gore Vidal**

*** I have come to the conclusion that politics is too serious a matter to be left to the politicians. ~Charles de Gaulle**

*** Instead of giving a politician the keys to the city, it might be better to change the locks. ~Doug Larson**

*** Don't vote, it only encourages them. ~Author Unknown**

*** There ought to be one day - just one - when there is open season on senators. ~Will Rogers**