CAIIA Status Report

February 2014

Sophisticated User Defense

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

In *Johnson v American Standard* (2008) 43 Cal.4th 56, the California Supreme Court first recognized the "sophisticated user" affirmative defense in both negligence and strict liability products liability claims. Since then, the boundaries of the court's ruling have been tested with many products. This case considered the defense in the context of a handyman using a power drill that kicked back on him.

Kevin Buckner was employed by Central California Tristeza Eradication Agency (Tristeza) to do maintenance work. On October 7, 2009, while using a power drill to drill a hole in a piece of angle iron, the drill bit bound and the drill counter rotated, twisting his arm and causing serious injuries. The drill belonged to his employer, and it was a Milwaukee Magnum one-half inch pistol grip drill manufactured by Milwaukee Electric Tool Corporation 17 years earlier.

Plaintiff sued Milwaukee for negligence and strict liability, alleging that the drill could not be used safely without a side handle, also known as an anti-torque bar. He also asserted defendant failed to adequately warn of the dangers of using the drill because there was no label on the drill advising that the side handle had to be used to avoid serious injury; and the warnings in the operator's manual were insufficient to advise of the need to use the side handle and the potential for serious injury if it was not used. The drill originally came with a side handle, which could be screwed into either side of the drill, and the operator's manual advised the user to "[a]lways use a side handle for best control." A label on the drill itself read: "WARNING / HIGH ROTATING FORCE / HOLD OR BRACE SECURELY TO PREVENT PERSONAL INJURY OR DAMAGE TO TOOL / READ SAFETY INSTRUCTIONS BEFORE OPERATING." By the time of plaintiff's accident, Tristeza no longer possessed the owner's manual or the handle.

At trial, evidence was presented of plaintiff's employment history. Although he was not a licensed contractor, he had decades of work as a "handyman" and he had experience in maintenance and all kinds of construction work. He told his supervisor at Tristeza that he was a certified electrician and plumber. There was conflicting evidence regarding whether plaintiff had used the subject drill or one like it prior to the accident. There was evidence that plaintiff, like his co-employees, knew drills can bind and counter-rotate when not used properly, or when they hit obstacles. There was conflicting evidence regarding whether plaintiff knew about using a side handle in such situations. There was conflicting expert testimony on the dangers of using such a drill without a handle, and whether plaintiff should have known of this.

The jury found in favor of the defense. The jury found the drill was not negligent or defective in its design. They did not determine if there was a failure to warn, as they determined that plaintiff was a sophisticated user, and was thus on notice of the risk. Plaintiff moved for a new trial on the grounds of insufficiency of evidence on this issue. The trial court granted the motion, and defendant appealed.

Continued on page 5

Published Monthly by
California Association of
Independent Insurance Adjusters

An Employer Organization of Independent Insurance Adjusters

Inside this issue.....

Sophisticated User	Pg. 1
President's Message	Pg. 2
News from Members	Pg. 3
Defamation	Pg. 4
Duty to Defend	Pg. 6
March CCC Info	Pg. 7
On the Lighter Side	Pg. 8

CAIIA Newsletter
CAIIA Office
PO Box 168
Burbank, CA 91503-0168
Website: www.caiia.org
Email: info@caiia.com
Tel: (818) 953-9200

Editor: Sterrett Harper
Harper Claims Service, Inc.
(818) 953-9200

Status Report Available

by Email and Web Only.

To add other insurance professionals to our e-mail list, please go to CAIIA. com or e-mail a request to statusreport@caiia.com.

California Association of Independent Insurance Adjusters, Inc.

President's Office
6114 La Salle Ave #266
Oakland, CA 94611
Email: info@caiia.com

President
Tanya Gonder
Casualty Claims Consultants, Oakland, CA
tanya@casualtyclaimsconsultants.com

Immediate Past President
William "Bill" McKenzie
Walsh Adjusting Company, San Diego, CA
walshadj@sbcglobal.net

President Elect
Kim Hickey
SGD, Inc., Northridge. CA
khickey@sgdinc.com

Vice President
Tim Waters
TPW Claims Service, Orange, CA
Tim@TPWClaims.com

Secretary Treasurer
***Paul Camacho, RPA, ARM**, Mission Adjusters, So Lake Tahoe, CA*

mail@missionadjusters.com

ONE YEAR DIRECTORS
Doug Steig
DKS Claims Service, Lake Elsinore, CA
info@dksclaims.com

Charles Deen
CD Claims, Inc., Carlsbad, CA
chuck@cdclaims.net

Steve Weitzner
Buxbaum Loggia & Associates, Inc., Fullerton, CA
sweitzner@buxbaumloggia.com

TWO YEAR DIRECTORS

Steve Einhaus
Einhaus Adjusting Services, San Rafael,Ca
steveeinhaus@gmail.com

Chris Harris
M3K Business Services, Inc., Redlands, CA
charris@m3kbusiness.com

Harry Kazakian
USA Express Claims,Inc., Encio,CA
harry@usaexpressinc.com

OF COUNSEL
Gary Selvin
Selvin Wraith Halman LLP
505 14th Street Suite 1200
Oakland CA 94612
510-874-1811

President's Message

Tanya Gonder

CAIIA President

The holidays are behind us. The celebratory atmosphere and giving spirit is a wonderful way to begin a new year, but.....now it's time to get down to business! Just what does that mean for the CAIIA?

As president it means planning the Mid-Term meeting that is held in April. The location changes between northern and southern California depending on the location of the president or how accommodating the president feels at the time! Actually the CAIIA By-laws state how we should rotate the location. Yes we have By-laws! Regardless, we end up traveling quite a bit to attend the biannual meetings and support our Association. Now is as good as time as any to thank those members who repeatedly give their time and resources to make the CAIIA what it is. Our meetings provide educational opportunities, networking and most importantly a time to check-in with fellow members.

Speaking of By-laws, as president getting down to business means monitoring the various committees of the CAIIA. Nine committees are classified as "standing" and mandated by the By-laws. The "standing" committees are Membership, Legislative, Public Relations, Grievance, By-laws, Nominating, Executive, Internal Management and Education. The By-laws state how these committees are staffed and chaired.

Since we like to really keep our volunteer members busy we have the following "special" committees: CCC/CNCC (we need people to orchestrate our attendance at these annual conventions); Directory (we need to know who we are, where we are located and the public needs to know); Fall Convention (our biggest celebration and officer induction); Finances & Budget (no explanation needed); Midterm Convention (smaller party and update on what we've accomplished the prior six months); Social Networks (broaden our audience); Scholarship Fund (yes we give back); Status Report (you are reading it now); and Website/IT Support (please visit it often).

Since I have to monitor these committees I need to stop typing and get down to the business of the CAIIA!

Tanya Gonder

2013/2014 CAIIA President

News from our Members:

The CPCU and the CAIIA

Those CAIIA members who are Chartered Property Casualty Underwriters (CPCU) have benefited from many educational and career development opportunities offered by attaining the designation through The Institutes in Malvern, PA. As a member of the Society of CPCU, I am provided the opportunity to join a variety of special interest groups. One such group that I belong to is the CPCU Claims Interest Group, which provides a discussion forum and quarterly newsletter, *Claims Quorum*, to disseminate current insurance claims information, research and case law.

On behalf of the CAIIA Education Committee, I recently submitted an application to the CPCU Society for our June 2013 Seminars on Evaluation of Earthquake Damages (SEED) and Seminars on The Fair Claims Settlement Practices & The SIU Regulations (FCSPR), along with our exhibitor participation at the three Los Angeles chapters CPCU All Industry Day in November. These are to be included in the Circle of Excellence Recognition for the CPCU Claims Interest Group. Through the Circle of Excellence Recognition Program, the CPCU Society provides chapter leaders and committee and task force chairmen with structure and guidance to achieve strategic, chapter and member goals.

In that the CAIIA provides licensed California adjusters and claim professionals with continuing education (CE) for credit opportunities, those programs fit nicely with the strategic goals for the CPCU Circle of Excellence. The Circle of Excellence is based upon the Society's Strategic Plan and is divided into four Areas of Emphasis – Access to technical insurance knowledge, promoting the professional qualifications of CPCUs, promoting risk management and insurance as a career, and chapter best practices.

The CAIIA Education Committee works to further the CAIIA mission to provide claims professionals with insurance continuing education. We are always looking for education topics and presenters for our Annual and Midterm Conventions from members and insurance industry professionals.

Tim P. Waters, CPCU, AIC
TPW Claims Services
P.O. Box 5642
Orange, CA 92863-5642
Ph: (714) 402-8756
Email: tim@tpwclaims.com

Stayed tuned for more "go green" ideas and thoughts!

Defamation – Plaintiffs Limited To Recovery of Special Damages Based on Failure To Demand a Retraction Before Filing Suit

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

Deepak Kalpoe, et al. v. The Superior Court of Los Angeles County

Court Of Appeal, Second Appellate District
(December 17, 2013)

In lawsuits for libel or defamation against certain publications and broadcasters, a plaintiff cannot recover general or punitive damages unless a correction is first demanded. Under Civil Code §48a, a plaintiff's failure to serve the publisher with a notice specifying the so-called libelous statements and demanding a correction will limit the plaintiff's recovery to special damages only. This case concerned the television broadcast of an interview with an Aruban resident, Deepak Kalpoe, in connection with the 2005 disappearance of Natalee Holloway, an American teenager on a high school trip to Aruba. The question for the Appellate Court was whether §48a only applies to broadcasts which engage in the immediate dissemination of news.

In 2005, a private investigator was hired by the producers of a television show to travel to Aruba and investigate the Holloway disappearance. The investigator, Jamie Skeeters, met with Deepak Kalpoe and videotaped an interview with him that was later broadcast in the first episode of the 2005 fall television season. The videotape showed that when asked by Skeeters, Deepak Kalpoe indicated that Holloway had sex with him and his brother Satish Kalpoe. After the episode aired, Deepak Kalpoe claimed he had not consented to the videotaping, and had not known that Skeeters was recording it. He also claimed that when Skeeters asked if Holloway had sex with him and his brother, he responded "No," shaking his head; and that the videotape played on the broadcast had been manipulated.

The Kalpoes subsequently filed a complaint against the television show and its producers for defamation, invasion of privacy, negligent and intentional infliction of emotional distress, fraudulent misrepresentation and deceit, among other claims. Before trial, the defendants filed a motion in limine to bar the Kalpoes from introducing any evidence at trial regarding general or punitive damages for defamation, defamation per se, false light, negligent and intentional infliction of emotional distress, based on §48a. The defendants argued that because the Kalpoes had not demanded a correction, they could not introduce evidence of general or punitive damages. The Kalpoes did not dispute that they did not demand a correction. The trial court granted the motion in limine, and the Kalpoes filed a motion for reconsideration. It was denied.

In January 2013, the Kalpoes filed a petition for writ of mandate with the Court of Appeal, arguing that §48a was only meant to apply to media which are engaged in the business of immediate dissemination of news. The Court of Appeal examined the statute, the case law and the facts to determine whether the Kalpoes were subject to the retraction requirements of §48a. With respect to interpretation of the statute, the court concluded that nothing in the legislative history showed any intent to limit the types of broadcasts to those engaged in the dissemination of breaking news. Several cases addressing §48a were also analyzed, and the court concluded that none of them soundly addressed the question of whether only those media which cover news events are within the purview of §48a. More specifically, as to television broadcasts, none of them limited the type of television programs to which §48a applies. Indeed, the court noted that its close examination of the cases revealed that the scope of §48a is determined by the type of media involved, and not upon specific

Continued on page 5

Continued from page 4

content. One federal case (which may have formed the basis for plaintiffs' argument) had noted that the legislative history behind §48 indicated that the statute was enacted to protect "purveyors of breaking news," but even in that case it was ultimately concluded that the plain statutory language of §48a made it applicable to all television broadcasts.

The court agreed that nothing in the language of the statute limited its application to broadcasts of "breaking news." It denied the Kalpoes' petition, holding that until the Legislature chooses to amend the statute, the court is bound to follow its unambiguous terms. Thus, because the Kalpoes did not send a request for a correction, the trial court correctly granted the defendants' motion in limine to bar evidence at trial of general or punitive damages.

COMMENT

This case states unequivocally that the retraction requirement of Civil Code §48a does not distinguish between types of content in visual and sound broadcasting. According to the Second District Court of Appeal, the plain statutory language of §48a makes the retraction requirement applicable to all television broadcasts.

Continued from page 1

The Court of Appeal affirmed the trial court's granting of a new trial, holding that there was insufficient evidence presented at trial of plaintiff being a sophisticated user. The Court looked at what the Supreme Court said in the *Johnson* case about the sophisticated user defense. The defense is considered an exception to the manufacturer's general duty to warn consumers, because a "sophisticated user" need not be warned about dangers of which they are already aware or should be aware. This is because the user's knowledge of the dangers is the equivalent of prior notice. This is a natural outgrowth of California's obvious danger rule – the rule that "there is no duty to warn of known risks or obvious dangers."

In order to establish the defense, a manufacturer must demonstrate that sophisticated users of the product know what the risks are, including the degree of danger involved (i.e., the severity of the potential injury), and how to use the product to reduce or avoid the risks, to the extent that information is known to the manufacturer. Thus, in this case, defendant was required to prove sophisticated users know there is a danger the drill may bind and counter rotate, this may cause serious injury to the user, and the risk may be reduced or eliminated by proper use of a side handle.

The jury instruction used at trial stated that to succeed on the defense, Milwaukee had to show that Buckner, because of his "particular position, training, experience, knowledge, or skill knew or should have known of the [drill's] risk, harm, or danger." Unfortunately, the instructions did not define the relevant "risk, harm, or danger." The defense argued that they only had to show Buckner was aware of the risk of the drill binding and counter-rotating, but the Court of Appeal affirmed that the proper test should have been that the sophisticated user "must also know that drills like the one in issue pose a danger of serious injury that may be mitigated by the use of a side handle." With that test in mind, there was insufficient evidence to show that plaintiff was a sophisticated user. Not only was his own knowledge of whether a handle was necessary or could be used in question, but even the defense experts had testified that the drill could be operated safely without one.

The Court of Appeal affirmed the trial court's ruling, sending the case back for re-trial on the issue of failure to warn.

COMMENT

In order to establish the sophisticated user defense, a defendant must identify the relevant risk, show that sophisticated users are already aware of the risk, and demonstrate that the plaintiff is a member of the group of sophisticated users. Unless all three of these criteria are met, the defense will not be allowed.

Insurance Law Client Alert: Reasonable Expectations of Additional Insureds Deemed Relevant to Duty to Defend

Credit to Haight, Brown and Bonesteel, Los Angeles, CA

In Transport Insurance Company v. Superior Court (B249470, filed 1/13/14), a California appeals court held that when a liability policy is deemed ambiguous, the reasonable expectations of the named insured and an additional insured are evaluated separately for purposes of determining the insurer's respective defense obligations.

Transport issued a policy with both excess and umbrella coverage to named insured Vulcan Materials Corp. Vulcan was in the business of manufacturing the dry cleaning fluid perchloroethylene (PCE). A PCE distributor, R.R. Street & Co., was named as an additional insured by endorsement. Both were sued in various actions alleging property damage as a result of the release of PCE into groundwater.

In an earlier decision, Legacy Vulcan Corp. v. Superior Court (2010) 185 Cal.App.4th 677, the court resolved a dispute between named insured Vulcan and Transport regarding whether the term "underlying insurance" applied only to policies specifically scheduled as underlying to the Transport policy or to all collectible primary insurance available to Vulcan. The Legacy Vulcan court held that the term was ambiguous because it was used inconsistently in the excess and umbrella parts of the Transport policy. Therefore, the Legacy Vulcan court gave effect to the reasonable expectations of Vulcan, which had argued that Transport's duty to defend Vulcan hinged solely upon the specifically scheduled primary policies.

In the current action, additional insured R.R. Street brought a summary adjudication motion arguing that Transport's duty to defend Street had likewise been determined by way of the earlier Legacy Vulcan decision. That is, Street argued that Transport was collaterally estopped to deny a defense to Street because the earlier Legacy Vulcan decision found that "underlying insurance" was limited to the specifically scheduled primary policies as a result of Vulcan's reasonable expectations. Street argued that because it was not an insured and therefore not covered under any of the specifically scheduled underlying insurance issued to Vulcan, but was an additional insured under the Transport policy, it must necessarily be entitled to a defense under the umbrella part of the Transport policy.

The trial court agreed that Transport was collaterally estopped to deny that the reasonable expectation of all insureds was that "underlying insurance" referred solely to the specifically scheduled primary policies and ruled in favor of Street. Accordingly, the appeals court reversed, saying that "[w]hen the party claiming coverage is an additional insured, it is the additional insured's objectively reasonable expectations of coverage that are relevant, and not the objectively reasonable expectations of the named insured."

The Transport court said that the named insured's intent to benefit the additional insured may be relevant for cases involving unnamed additional insureds, who would qualify as third party beneficiaries to the agreement between the contracting parties. However, where the additional insured is named in the policy, it is presumed to be made for his benefit and any contractual agreement between the named and additional insureds actually provides evidence of intentions and purposes outside the named insured's agreement with the insurer.

Significantly, the Transport court said that evidence of the insureds' intent may be found in the separate agreement between the named insured and the additional insured: "[t]he intent of the insureds is reflected by the language of, and the circumstances surrounding, the agreement to procure. Despite the fact that the additional named insured is not a party to the insurance contract, his intent is relevant to the construction of that contract because the intent of the named insured in requesting the added coverage is directly dependent on the bargain that the additional named insured made with the named insured."

In reversing the order for summary adjudication in favor of Street, the Transport court stated that "[i]t is arguable that Street would not expect the Transport excess and umbrella policy to move into first position ahead of Street's own commercial liability policies. . . . Thus, the trial court erred when it failed to consider Street's objectively reasonable expectations of coverage and, instead, relied on Vulcan's objectively reasonable expectations of coverage." The case was returned to the trial court for a determination of Street's objectively reasonable expectation.

Happy Valentines Day!

COMBINED CLAIMS CONFERENCE

"LIFT OFF FOR EDUCATION"
MARCH 4-5, 2014
HYATT REGENCY ORANGE COUNTY

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

The conference includes four separate educational tracks: Property, Liability, Special Investigations Unit (SIU) and Workers' Compensation. Our quality speakers address the most pressing topics during the sessions. Included in your registration fee is admittance to all conference sessions, two continental breakfasts, breaks, two luncheons and Tuesday's Casino Night.

REGISTRATION FEES: Register early to take advantage of the lowest registration fee.

Qualified Rate:
Register By January 10:
One-day: $75.00 (either Tuesday or Wednesday)
Two-day: $125.00
Register after January 10 – February 21
One-day: $95.00 (either Tuesday or Wednesday)
Two-day: $175.00
After February 21 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.

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.

Combined Claims Conference
P.O. Box 255431
Sacramento, CA 95865-5431
www.combinedclaims.com
info@combinedclaims.com
(714) 321-3847

Visit our website at www.combinedclaims.com or find us on Facebook.

On the Lighter Side:

Valentine's Trivia

- February 15th was the date of the Roman festival of Lupercalia - where young men held a lottery to decide which girl would be theirs.

- During Medieval times, girls ate unusual foods on St. Valentine's Day to have a dream of their future husband.

- In the middle Ages, people believed that the first unmarried person of the opposite sex you met on the morning of St. Valentine's Day would become your spouse.

- In the middle of the 17th century even married people took a Valentine - not always their legal other half!

- Alexander Graham Bell applied for his patent on the telephone, on the Valentine's Day, 1876.

- In Wales, love spoons of wood were carved and given as gifts on February 14th. Hearts, keys and keyholes formed the favorite theme of decorations on the spoons, which together symbolized- "You unlock my heart!"

- It wasn't until 1537 that St. Valentine's Day was declared an official holiday. England's King Henry VIII declared February 14th a holiday in 1537 for the first time.

- Some people believed that if a woman saw a robin-flying overhead on Valentine's Day, it meant she would marry a sailor and if she saw a sparrow, she would marry a poor man and be very happy. If she saw a goldfinch, she would marry a very rich person.

- The Taj Mahal at Agra, India is perhaps the most splendid gift of love. It was built by the Mughal Emperor Shah Jahan in memory of his beautiful wife, Mumtaz Mahal. Work on the Taj began in 1634 and continued for almost 22 years. It took the labor of 20,000 workers from all over India and Central Asia.

- In England, the Romans, who had taken over the country, had introduced a pagan fertility festival held every February 14. After the Romans left England, Pope Gelsius, who established St. Valentine's Day as a celebration of love in 496 A.D abolished the pagan ritual.

- Americans began exchanging hand-made valentines in the early 1700s. In the 1840s, Esther A. Howland began selling the first mass-produced valentines in America. Howland, known as the "Mother of the Valentine," made elaborate creations with real lace, ribbons and colorful pictures known as "scrap."

- Today, according to the Greeting Card Association, an estimated 1 billion Valentine's Day cards are sent each year, making Valentine's Day the second largest card-sending holiday of the year. (An estimated 2.6 billion cards are sent for Christmas.) Women purchase approximately 85 percent of all valentines.