CAIIA Status Report

To find the best independent adjusters, visit www.CAIIA.com.

February 2016

Collapse Coverage

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

In *Vardanyan v. Amco Ins. Co.* (No. F069953, filed 12/11/15) a California appeals court held that policy wording that the collapse coverage for damage "caused only by" certain specified perils did not mean "solely" by those specified perils, but that coverage may nonetheless apply even if excluded causes contributed to the loss, under the Insurance Code section 530 and the efficient proximate cause rule.

In *Vardanyan*, the insured made a claim for water damage from unknown origin to a rental house. An engineer concluded that the various sources of moisture—roof leaks, gutters and downspouts that did not channel the water away from the house, a faucet spraying water on the exterior of the house, leaking toilet and bathtub, and humidity—contributed to the damage to the house, along with poor construction, termite damage and decay.

The insurer denied coverage citing multiple policy exclusions, including damage caused by seepage or leakage of water from a plumbing system; deterioration; mold, wet or dry rot; settling of foundations, walls or floors; earth movement; water damage; neglect; weather conditions; acts or decisions of any person; and faulty or defective design, workmanship, repair, construction, or maintenance. The insured retained a public adjuster who disagreed, in particular citing the policy's "Other Coverage 9" coverage for collapse of a building or part of a building "caused only by one or more" of a list of perils, including hidden decay, hidden insect damage, and weight of contents, equipment, or people.

In the subsequent bad faith lawsuit, evidence presented by both sides showed multiple causes of the damage. The insured's theory was that the coverage for collapse due to hidden decay or hidden insect damage applied if either of those perils was the predominant cause of the collapse of the structure.

The case came down to jury instructions. The insured requested that the trial court give a standard jury instruction explaining that, when a loss is caused by a combination of covered and excluded risks, the loss is covered if the most important or predominant cause is a covered risk. (California Civil Jury Instruction "CACI" No. 2306.) The insurer instead proposed a special jury instruction placing the burden on the insured of proving that the collapse of the house was "caused only by one or more" of the perils listed in the collapse coverage. The special jury instruction specified that there was no coverage if the cause of the collapse involved any peril other than those listed. Over the insured's objection, the trial court used the insurer's special instruction, on a theory that it was mandated by the wording of the insurance policy. The result was a verdict for the insurer.

The appeals court agreed that was error. The *Vardanyan* court began by noting the difficulty courts have had in reconciling Insurance Code section 530, which states that a loss is covered notwithstanding policy exclusions if the proximate cause of the loss is a covered peril, and Insurance Code section 532, which states that a loss is excluded if it would not have occurred "but for" an excluded peril, even if a covered peril was the "immediate" cause. The *Vardanyan*

Continued on page 4

Published Monthly by
California Association of
Independent Insurance Adjusters

An Employer Organization of Independent Insurance Adjusters

Inside this issue…..

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

Editor: Sterrett Harper
Harper Claims Service, Inc.
(818) 953-9200
harperclaims@hotmail.com

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 Message

Paul Camacho
CAIIA President

You only have one chance to make a first impression, and usually, it is before you have a chance to say a word. It is pretty judgmental and really unfair, but it is what we deal with on a daily basis.

Insurance is the cost for a policy that you hope you never needs use. When a claim is filed, there is a perception that the process is going to be difficult. As claims professionals, we have the ability to change that perception from our initial contact or our first meeting, and determine the course of the claim handling. Most people that have filed a claim know nothing of the process, yet we have handled many claims as part of our job. We are the resource to provide the information needed and the ear to respond to concerns raised.

Recently while I was on an assignment, another claims person arrived representing one of the insured interests in the loss. The claims person entered the location dressed in camouflage clothing and provided verbal identification. When asked for a business card, the response was that none were available, and that due to multiple business affiliates, none were printed.

Now I am not criticizing camouflage; I think it is great if you are hunting or possibly handling a claim in a hunting lodge. I did not see any wildlife in the area, so I imagine the air movers in the room had frightened them off. In certain situations, we do have to be cognizant of worker safety laws that apply to us or others involved with entering a potentially hazardous area. Certainly, if I am entering a hazardous area, it is prudent to wear personal protective equipment.

I guess the most disturbing part was the lack of business cards, not because of running out (as I have experienced), but due to the perceived lack of need. As claims professionals, we represent the industry and should be dressed appropriately with proper identification to make the right first impression. It is hard to get a second chance for lack of preparation.

As you may have noticed in our previous CAIIA Status reports, I have discussed the importance of continuing education. The CAIIA Mid-term meeting is on track for being held in San Diego, California. I am hopeful we will have a good response from our membership. We will offer a three hour DOI approved Ethics class that you are welcome to attend on April 8, 2016. Our flyer will be out soon with details for registration.

Thanks for taking the time to read, see you next month.

Paul R. Camacho, ARM, RPA
President – CAIIA 2015-2016
Mission Adjusters
Paul@missionadjusters.com

Happy Valentines to you and yours!

DOI Press Releases

Los Angeles nightclub owner arrested for felony insurance fraud

Allegedly operated in the underground economy-cheating on insurance premiums and taxes

LOS ANGELES, Calif. - Los Angeles nightclub owner Jonathan DeVeaux, 44, of Cerritos surrendered himself to Los Angeles Superior Court yesterday and was booked on multiple counts of insurance and tax fraud totaling more than $1.1 million.

DeVeaux part-owner and operator of Los Angeles Entertainment Inc. DBA: Savoy Entertainment Center a nightclub in Inglewood allegedly underreported the number of employees working for him to reduce his reportable payroll, so he could illegally reduce his workers' compensation premium. As a result, he cheated his workers' compensation insurer, the State Compensation Insurance Fund out of more than $143,000 in premium between 2009 and 2014.

During the same period, DeVeaux allegedly paid many employees in cash, which allowed him to cheat the California Employment Development Department out of more than half a million dollars in payroll taxes.

"DeVeaux's alleged underground economy operation cheated his patrons, other businesses, the state and his insurer," said Insurance Commissioner Dave Jones. "These are not victimless crimes. Everyone involved paid for DeVeaux's crimes, including California taxpayers."

DeVeaux was also charged with sales tax evasion by underreporting his sales to the California Board of Equalization between 2006 and 2014. An audit of the nightclub's sales records revealed the business actually underreported sales by $5.4 million. While DeVeaux collected sales tax from nightclub patrons, he allegedly kept the more than half a million dollars and did not remit it to the state.

Detectives from the Department of Insurance worked in tandem with investigators from the Employment Development Department and the Board of Equalization to unravel DeVeaux's scheme to cheat the system and operate in the underground economy.

If convicted on all counts, DeVeaux faces up to 18 years in prison.

Sacramento construction company owner arrested for insurance fraud

Employees and clients put at financial risk

SACRAMENTO, Calif. - William Huffman, 47, of Sacramento, owner of Capitol City Contractors was arrested yesterday on nine felony counts of workers' compensation insurance fraud and tax evasion totaling $187,707 in losses.

Huffman allegedly underreported $755,899 in payroll to avoid paying workers' compensation premiums for dozens of employees.

An insurer notified the Department of Insurance of suspected fraud. A forensic audit of the company's bank records revealed the alleged fraud. Detectives discovered evidence that Huffman was paying employees under the table and classifying some payroll checks as expenses for supplies and materials.

"Employers who commit workers' compensation insurance fraud cheat the system leaving their employees at risk and their clients vulnerable to financial disaster." said Insurance Commissioner Dave Jones.

Huffman was booked into Sacramento County Jail. He will be arraigned today at 1:30 PM at Sacramento Superior Court, Room 63. Bail is set at $100,000. The Sacramento County District Attorney's Office is prosecuting this case.

CALLING ALL CAIIA MEMBERS:

We are looking for volunteers for our booth at the CCC to be held in Garden Grove at the Hyatt Regency on March 8th & 9th. It is a great way to network with industry people and fellow CAIIA members. If you are interested, please contact Sterrett Harper at harper-claims@hotmail.com or 818-414-2675.

Continued from page 1
court said that the issue had been decided by the California Supreme Court in *Sabella v. Wisler* (1963) 59 Cal.2d 21, which established the general "efficient proximate cause" rule: "'[I]n determining whether a loss is within an exception in a policy, where there is a concurrence of different causes, the efficient cause—the one that sets others in motion—is the cause to which the loss should be attributed, though the other causes may follow it, and operate more immediately in producing the disaster.'" The *Vardanyan* court then engaged in an extensive analysis of the case law applying the rule to different policy provisions and different losses to conclude that the special jury instruction adopted by the trial court had violated that rule:

"The combination of a listed, covered peril or perils, with a host of potential unspecified, unlisted perils is in itself problematic. A reasonable insured would not anticipate that a listed, covered peril, if combined with some completely unrelated, unspecified peril, would result in an exclusion of coverage. This is particularly true when the provision is a coverage provision, not an exclusion; a reasonable insured would understand that, if one of the specified perils was the predominant or most important cause of the collapse, the loss would be covered....

We conclude [that the insured's] interpretation of the [the policy] is the correct interpretation, consistent with the efficient proximate cause doctrine. A policy cannot extend coverage for a specified peril, then exclude coverage for a loss caused by a combination of the covered peril and an excluded peril, without regard to whether the covered peril was the predominant or efficient proximate cause of the loss. Other Coverage 9 identifies the perils that are covered when the loss involves collapse. If any other peril contributes to the loss, whether the loss is covered or excluded depends upon which peril is the predominant cause of the loss. To the extent the term 'caused only by one or more' of the listed perils can be construed to mean the contribution of any unlisted peril, in any way and to any degree, would result in the loss being excluded from coverage, the provision is an unenforceable attempt to contract around the efficient proximate cause doctrine."

The *Vardanyan* court also pointed out that the special jury instruction had improperly shifted the burden of proof to the insured, despite the fact that the policy was an "all risk" policy, placing the burden on the insurer to establish that coverage was excluded: "Thus, the burden was on [the insurer] to prove not just collapse, but collapse other than as provided in Other Coverage 9."

While finding against the insurer on coverage, the appeals court handed the insurer a victory on the trial court's directed verdict on punitive damages, ruling out punitive damages on retrial. The insurer's claim representatives admitted denying coverage without ever considering whether collapse coverage might apply, nor did they advise the insured of potential coverage for lost rents, hidden decay damage, or hidden termite damage, in violation of the regulations requiring disclosure of all benefits, coverages, time limits, or other provisions of the insurance policy that may apply to the claim presented. (10 Cal. Code Reg., § 2695.4(a).) In addition, the insured's request for claims documents and a copy of the policy had been ignored. (10 Cal. Code Reg., § 2695.5(b).) Nor did the claim representatives seek a legal opinion, despite the claim by the insured's public adjuster that collapse coverage applied.

The *Vardanyan* court did find that the claim representatives were "managing agents" sufficient to attach punitive damages to the corporation. The court said that "managing agents" include those corporate employees who exercise substantial independent authority and judgment in their corporate decision-making so that their decisions ultimately determine corporate policy. Quoting *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, the *Vardanyan* court said that "The determination whether employees act in a managerial capacity, however, does not necessarily hinge on their 'level' in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy. When employees dispose of insureds' claims with little if any supervision, they possess sufficient discretion for the law to impute their actions concerning those claims to the corporation."

The claim handler testified she was employed by the insurer, and was assigned to handle the insured's claim. Her title was senior property claims representative, and later master property claims representative. When she needed authorization for certain actions, such as hiring an independent adjustor or sending out a letter, she obtained it from her manager, who was the claims manager responsible for the insured's claim. Seven other claims representatives also reported to the manager. The claim representative had prepared the letter to plaintiff denying coverage, and her manager approved it before it went out. Those two were the only employees involved in the decision to deny the claim. That evidence was sufficient to raise an issue of fact for the jury regarding whether they were "managing agents" for purposes of an award of punitive damages.

However, the violations of the regulations and apparent "intentional" conduct of the claims personnel were insufficient to support punitive damages: "Punitive damages are appropriate if the defendant's acts are reprehensible, fraudulent or in blatant violation of law or policy. The mere carelessness or ignorance of the defendant does not justify the imposition of punitive damages. Punitive damages are proper only when the tortious conduct rises to levels of extreme indifference to the plaintiff's rights, a level which decent citizens should not have to tolerate." Thus, "we conclude, as the trial court did, that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff on his claim for punitive damages. [] The evidence may be consistent with some improprieties in claims handling, but it does not rise to the level of reprehensibility necessary to support an award of punitive damages."

Case of the Damaged Elevators
Credit to Garrett Engineers. Inc., Long Beach, CA

During an office remodel on the 14th floor, a forklift hit a fire sprinkler pipe. It took a while to shut off the water, so several hundred gallons of water flowed into the elevator shafts. The elevator repair cost was estimated to be approximately $600,000. Our client asked GEI to review the damages and evaluate if the repair costs were reasonable.

The building had two banks of elevators; one bank of five elevators to service the lower 14 floors and a second bank (which was not affected by the water) to service the upper floors. The cars were standard 3,500 lb. capacity, produced by a major manufacturer in 1988. They were now serviced by a different company, the original manufacturer's warrantee having expired several years ago.

The adjuster, building representative, and our expert visited the site in a joint inspection. Our expert took over a hundred photos. At the time of the inspection, four cars were operating. One was non-operational. The original repair estimate said that the following items were damaged for all five elevators and required replacement:

· elevator ropes
· hoistway equipment
· car top equipment
· door equipment
· car jambs
· car station
· pit equipment

Our expert reviewed the claim and observed that the proposed repairs were essentially replacing the entire system for all five cars. This was unnecessary.

What was necessary were repairs (not a full replacement), in only one car. These were primarily composed of circuit boards, electric motors, and electronic sensors. Some components had shorted from the water, some showed current evidence of corrosion, and some would need to be replaced because of the potential for future corrosion.

The required repairs represented only a small fraction of what was originally claimed as water damaged equipment.

In conclusion, based upon the advice of our expert, the original claim of $600,000 was settled for less than $100,000.

Expert of the Month: Thomas Hawkins

Civil Rights– Unruh Civil Rights Act

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

Daniel Javorsky v. Western Athletic Clubs, Inc.
Court of Appeal, First Appellate District
(December 11, 2015)

The Unruh Civil Rights Act ("Act") provides that all persons are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever. In *Javorsky*, the First District clarified the appropriate analytical standard to be applied in determining whether a differential pricing program violates the Act.

The Western Athletic Club ("WAC") owns and operates ten luxury health and fitness clubs in the San Francisco Bay Area. Members have access to services and activities designed to promote physical fitness and general well-being. Plaintiff Daniel Javorsky ("Javorsky") joined the Club in 2008 by purchasing a standard individual membership. He terminated his membership in June, 2011 due to cost. Javorsky learned that WAC offered a reduced-cost membership for individuals ages 18 to 29, i.e., the Young Professional Program. Individuals between the ages of 18 and 29 paid significantly lower initiation fees and monthly dues. According to WAC's Chief Executive Officer, the program reflects the reduced financial resources of the under-30 age group and promotes WAC's membership to younger individuals who might not otherwise be able to afford to join WAC's clubs.

In January, 2013, Javorsky filed a complaint against WAC, asserting the Young Professional discount constituted illegal age discrimination and violated the Unruh Civil Rights Act, the Consumer Legal Remedies Act, and the unfair competition law. The trial court granted summary judgment in favor of WAC. The court ruled WAC had made the required showing that its Young Professional discount was reasonable and not arbitrary, and Javorsky had not established a triable issue of material fact. An appeal followed.

The Appellate Court noted that the Act's language and history compelled the conclusion that the Legislature intended to prohibit all arbitrary discrimination by business establishments, whether or not the ground of discrimination was expressly set forth in the Act. There was no dispute that California courts have applied the Act to discrimination based on age. The Act does not just target the practice of outright exclusion, but includes pricing differentials. The Act does not absolutely preclude a business establishment from disparate treatment of patrons in all circumstances. Only arbitrary, invidious or unreasonable discrimination is considered unlawful under the Act. Discrimination may be considered reasonable, and not arbitrary, in light of the nature of the enterprise or its facilities, legitimate business interests, and public policy supporting the disparate treatment.

In regard to the analytical standard to be applied, Javorsky argued that a practice that discriminates on the basis of age is unlawful unless supported by a "compelling societal interest" or at least a strong public policy reflected in legislative enactments. The Court determined that the Act's objective of prohibiting discrimination is fulfilled by examining whether a price differential reflects an "arbitrary, class-based generalization." A policy treating age groups differently may be upheld if the pricing policy (1) ostensibly provides a social benefit to the recipient group; (2) the recipient group is disadvantaged economically when compared to other groups paying full price; and (3) there is no invidious discrimination. The Court defined invidious discrimination as the treatment of individuals in a manner that is malicious, hostile, or damaging. Under such circumstances, public policy justifies the discrimination. Legislative enactments are sufficient, but unnecessary, to evince public policy.

The Court concluded that WAC established that its Young Professional program provided 18- to 29-year-olds with lower-cost access to the healthful benefits of health club membership, 18- to 29-year-olds have lower median incomes than persons over 30 in the relevant geographical areas, and charging 18- to 29-year-olds less than persons over 30 did not perpetuate irrational stereotypes. Therefore, WAC had met its burden to demonstrate that its pricing program did not constitute arbitrary, unreasonable or invidious discrimination, the program did not reflect an arbitrary, class-based generalization, and public policy supported the disparate pricing. Javorsky had failed to establish a triable issue of fact. As a result, the trial court was correct in ruling that WAC was entitled to judgment under the Act..

Surveillance vs. Right of Privacy

Credit to Pearlman,Borska and Wax, Encino, CA, Newport Beach, CA

SMITH: SURVEILLANCE VERSUS THE RIGHT OF PRIVACY

By: Antwoin D. Wall, Esq.

The question often arises whether surveillance film taken outside of applicant's knowledge in a public place violates her right of privacy if viewed by a medical-legal evaluator. The gold standard to determine such a question is whether there will be substantial prejudice or irreparable harm to the applicant if the surveillance is viewed by the physician.

In the November 2015 case of *Smith v. WCAB*, applicant sustained an admitted specific injury to her right shoulder, along with bilateral thoracic outlet syndrome and psyche. Defendant's investigator filmed applicant exercising inside a gym.

The case proceeded to an Agreed Medical Evaluator (AME). Applicant objected to defendant sending the surveillance film to the AME, contending in pertinent part, the investigator violated applicant's right to privacy in violation of the gym's "Facility Rules and Club Etiquette," which precludes members and guests from taking photographs or videos.

The Workers' Compensation Judge (WCJ) issued a decision finding the surveillance could be provided to any medical evaluator for review and comment. Applicant filed a Petition for Reconsideration/Removal.

The WCJ recommended denial of the petition because applicant failed to show she would suffer any substantial prejudice or irreparable harm if a physician was shown the surveillance. In addition, the WCJ stated there could be no reasonable expectation of privacy while exercising in an open workout area.

The WCAB affirmed the WCJ's decision. Applicant's Writ of Review was denied by the Court of Appeal.

New ride-hailing coverage approved by Insurance Commissioner for Mercury Insurance

SACRAMENTO, Calif. - Insurance Commissioner Dave Jones announced today that he has approved a new insurance product that provides increased access to insurance coverage for drivers driving for Transportation Network Companies (TNCs). The product, offered by Mercury Insurance, is available to drivers for all ride-hailing companies, such as Uber and Lyft.

"As demand for ride-hailing services continue to increase, making sure drivers are able to obtain insurance to protect themselves, their passengers and pedestrians is a top priority," said Commissioner Jones. "We are pleased to see Mercury Insurance, one of the state's largest insurers, offer this type of coverage."

Commissioner Jones has encouraged insurers to develop auto insurance products for TNC drivers. In the past, ride-hailing drivers have been left without coverage by their insurance companies if they got into an accident during Period 1 while their ride-hailing app was on. Mercury's new coverage will close that gap and provide drivers with access to coverage throughout the entire ride cycle. Previously, drivers were only covered by TNC commercial insurance once they accepted a ride.

"Mercury has been protecting drivers for more than 50 years. It's what we do. So, we're very excited to be one of the first companies to extend the coverage to ride-hailing drivers and protect not only them, but the drivers and families with which they come in contact on the road," said Jim Reeves, Mercury's research and development group manager.

Mercury policyholders may purchase this new endorsement for an additional 13 percent of premium for bodily injury, 17 percent for property damage, 5 percent to medical payments premium if medical payment coverage is chosen and 5 percent to collision premium if collision coverage is chosen.

Jones has been a leader in encouraging innovation in the insurance marketplace, most recently in response to the emerging sharing economy and the growing popularity of TNCs in California. Jones identified insurance coverage issues associated with the ride-hailing model, and issued a set of strong recommendations which were included in rules issued by the Public Utilities Commission and in AB 2293.

Commissioner Jones encouraged insurers to develop auto insurance products for TNC drivers and directed the Department of Insurance to begin accepting ridesharing insurance product filings from insurers nine months before the new law went into effect. To date the department has approved eight insurance products covering TNCs.

Currently, Mercury's ride-hailing insurance is only available to California, Arizona and Nevada ride-hail drivers.

COMBINED CLAIMS CONFERENCE
"Going for Gold"
MARCH 8-9, 2016
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 12:
One-day: $75.00 (either Tuesday or Wednesday)
Two-day: $125.00
Register after January 13 – February 25
One-day: $95.00 (either Tuesday or Wednesday)
Two-day: $175.00
After February 25 or On-site registration:
One-day: $125/day (subject to availability)

All-Others:
One-day: $275 (either Tuesday or Wednesday)
Two-day: $500

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.

SCHOLARSHIPS:
The Combined Claims Conference Committee is pleased to offer Conference Scholarships to the Insurance Professional. We are offering a limited number of one day and two day scholarships which cover the registration fee to attend the 2016 Combined Claims Conference in Garden Grove, California. Conference registration includes breakfast, breaks and lunch on the day(s) you are attending as well as admission to all sessions, handouts, continuing education credits and the conference program manual.

Eligibility: You must be employed by an insurance company, TPA, broker or public entity to qualify for the Scholarship Program: Managers, Supervisors, Adjusters, Appraisers, Risk Managers and Underwriters are welcome to submit applications.

For more information, visit the "Scholarship" page on the CCC website (www.combinedclaims.com) or contact John Ruiz (john@claimseducationpanel.com). Scholarship recipients are chosen by the Combined Claims Conference Committee members.

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.