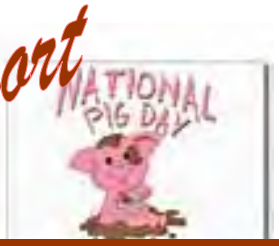
CAIIA Status Report



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March 2017

Is Regular Use of Company Van Covered by Employee's or Employer's Insurance?
Credit to Haight, Brown & Bonesteel, Los Angeles, CA

In *Medina v. GEICO Indemnity* (No. F072548, filed 2/8/17), a California appeals court ruled that a work van admittedly furnished to an employee for both business and personal purposes, being used for personal purposes at the time of an accident, which was customary, was available for regular use and therefore not covered under the employee's own personal auto policy.

In *Medina*, GEICO's insured was employed by Pacific Bell. Her job required her to transport company equipment and tools, and she was not allowed to use her personal vehicle to do so. She was assigned a van owned by Pacific Bell, had her own set of keys and it was permanently assigned to her for her exclusive, regular use. The employee left the van at her Fresno office every night, but did keep it overnight for out-of-town assignments.

Pacific Bell did not place any restrictions on use of the van during the work day. When in Fresno, the employee used the van to drive home for lunch and to run errands. She was never told she could not do so and her supervisor knew that employees used the vans for personal purposes. On out-of-town assignments, employees were specifically authorized to use the company vans for coming, going and meals, but there was no express limitation on other usage.

While on an assignment in Bakersfield, the employee arranged to meet her daughter part way to Fresno to provide money for a personal emergency. The employee had been drinking wine at lunch, and was involved in an accident on the way.

In the ensuing lawsuit, Pacific Bell, which was self-insured, conceded that the employee was operating the van with permission, but asserted that she was not in the course and scope of employment, so there was no liability under respondeat superior. The court agreed, limiting Pacific Bell's liability to the statutory $15,000 limit for ownership liability based on permissive use of a vehicle.

Meanwhile, the employee tendered the claim to GEICO, her personal auto insurer. The GEICO policy did not identify the van as an insured auto, but did provide coverage for bodily injury or property damage arising out of the use of a "non-owned auto" which the policy defined as "an automobile... not owned by or furnished for the regular use of either you or a *relative*...." GEICO denied coverage and the employee stipulated to liability in exchange for an assignment of rights, a covenant not to execute and an agreement to arbitrate damages. The arbitrator assessed damages of a half million dollars and judgment was entered on the award.

When GEICO refused to pay the judgment, the driver sued for bad faith. GEICO moved for summary judgment on the grounds that: (1) the van was furnished to the employee for her "regular use," and (2) a business use exclusion applied, as the accident arose out of her occupation.

The plaintiff argued that the term "regular use" encompassed only the vehicle's primary use not some incidental use, and the van's primary use was for business purposes, while a family emergency was an incidental use. He further argued that because the employee did not have the vehicle on weekends or evenings, except when out-of-town, she did not have unrestricted access to the vehicle at all times and for all purposes. The plaintiff also argued that the business use exclusion did not apply since the court in the underlying action found that the employee was not in the course and scope of employment at the time of the accident.

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Inside this issue…..

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President's Message

Weird stuff about animals not including humans

Steve Washington

CAIIA President

I always thought interesting facts or weird information about animals was fascinating, so I thought I would write about it. Therefore, did you know?

Crocodiles swallow large rocks that stay permanently in their bellies, possibly for ballast. The largest croc ever found was 20.24 feet long.

The only dog that doesn't have a pink tongue is a chow.

The bat is the only mammal that can fly. During World War II, Americans tried to train bats to drop bombs.

If you keep a goldfish in a dark room, it will become pale.

A group of owls is called a parliament. (The Brits must have come up with that one.)

The record long jump at the Calaveras County (Angels Camp) Frog Jumping contest is held by Rosie the Ribeter at 21 feet 5 ¾ inches in 1986. If your frog is the winner you receive $750.00, if you beat Rosie's record you receive $5,000.00.

And as you know, when animals hibernate their heart rate slows down considerably. But frogs can actually be completely frozen, their heart rate can stop and their breathing cease – and they still survive.

A cheetah can go from zero to 60 miles per hour in three seconds. Grizzly bears can weigh up to 1,700 pounds and run 30 miles an hour.

The largest bald eagle nest on record was 20 feet in height and weighed 4,000 pounds.

Did you know there are more chickens in the world than people?

Of course, I could go on and on…. When I was growing up we had a lot of animals, including dogs, snakes, ducks, tortoises, birds, bunnies and even a small alligator. And, they all did some weird things. And, I'm sure most of you have some great stories. I remember one time when for some weird reason our duck (Harry) was riding/standing on top of our Golden Retriever's (Partner) back, as the dog walked around the back yard, as if it was the most natural of things. We also had a dog that could jump clear over a seven-foot fence (he bit the Mailman) and one that ran full speed into glass doors, repeatedly, thinking the door was open. If any of you had an Irish Setter, well, maybe you understand that one.

By the way, and to bring this article into the adjusting world; generally speaking, a standard HO3 policy will cover damage to your home by a wild animal so long as the animal is not a rodent. Rats, mice and squirrels are rodents, but raccoons, opossums and skunks are not.

I am out. Oh, and Happy National Pig Day!

Steve Washington
CAIIA President 2016-2017
Washington & Finnagan, Inc.
Steve.washington@sbcglobal.net

NEWS OF AND FOR MEMBERS

The Status Report received this email from Dean Beyer:

It is with great sadness I now inform you of the death of a very good, personal friend. **Dick Watkins** died on 2-17-17 after a long battle with various physical concerns including respiratory illness. He lived in Long Beach, CA, until his death. He was 84 years old, an avid sailor and had been married to his wife, Pat for 62 years.

He was a long time member of both the NAIIA and the CAIIA achieving an Honorary designation in both associations. He was a past president of the CAIIA ('80-'81) and a regional VP of the NAIIA. Gretchen and I spent many happy times with he and Pat at dozens of the conventions held by these organizations. Dick was a highly valued and well known claims adjuster in the Entertainment Industry. There will be no services, but there is a wake planned in the future.

Rental Vehicles and Cell phone data
Credit to Garrett Engineering, Long Beach, CA

It is common to fly to another city, rent a car at the airport, attend an event, maybe stay overnight, return the car, and then fly home. It is also common to connect a cell phone to the rental car to make phone calls, use the GPS, check emails, and recharge the battery. What most people are not aware of is that when the cell phone is connected (by cable or by Bluetooth) to the vehicle infotainment and telematics systems of the rental car, the cell phone's information is frequently copied into the vehicle unit's memory, so it can more quickly respond to the user commands. This data remains there until it is actively removed. There are forensic hardware/software packages that can access this information. This also means that the bad guys have ways to retrieve it. At a conference, I heard one forensic investigator say that his particular late-model airport rental had the stored data of 30+ different previous rental car customers. Address books, SMS messages, emails, social media feeds, and GPS histories are all potentially left behind when the customer turns in the rental car.

So what to do if you don't want to leave this potential treasure trove behind? Either take the time to find out how to erase your usage from a particular vehicle or do not connect the vehicle's infotainment and telematics system to your phone. What if you just want to charge and not connect your phone? Buy and use a power-only, no-data transfer, USB adapter to recharge your phone in your rental car, available for under $10 on Amazon.

Continued from page 6

alleging [property damage] arising out of, in whole or in part, the ... alleged ... existence of any mold," the exclusion was "unenforceable."

The court also noted that under California's "concurrent causation" doctrine, coverage can exist when an insured commits two negligent acts – one covered and one uncovered – that combine to cause one loss. Here, Saarman's alleged conduct potentially involved a "single negligent act" that resulted in "two categories of damages – one category that is covered [i.e., water intrusion damage] and one category that is not covered [i.e., mold damage]." According to the court, California law prevents an insurer from escaping a duty to defend a mixed action simply because the insured's negligent act happens to result in both covered and uncovered damage. Thus, Ironshore had a duty to defend Saarman in the underlying lawsuit "for both the covered water damage claims and the non-covered mold damage claims."

Continued from page 1

The trial court granted summary judgment for GEICO, and the appeals court affirmed. The appeals court did agree that "'regular and frequent use' is 'the principal use, as distinguished from a casual or incidental use, in the regular course of the assured's business.'" (Citing *Kindred v. Pacific Auto. Ins. Co.* (1938) 10 Cal.2d 463 and *Pacific Auto. Ins. Co. v. Lewis* (1943) 56 Cal.App.2d 597.) The *Medina* court stated that "As shown in *Lewis*, the elements to consider in determining whether a car was furnished for regular use 'include time, place and manner of use, purpose or type of use, and restrictions on use. Primarily, the issue presents a question of fact which requires an interpretation of the language of the policy to the facts involved.'" (Quoting *Highlands Ins. Co. v. Universal Underwriters Ins. Co.* (1979) 92 Cal.App.3d 171.)

After citing numerous decisions both pro and con, the *Medina* court stated: "We agree with GEICO. The undisputed facts show Flores had the keys to the van, which was assigned to her exclusively, and she was authorized to use it for both business and personal purposes. While Pacific Bell furnished the van to Flores because she needed it to perform her job, it did not place any restrictions on her use of it. Even if, as Medina contends, she did not have unrestricted access to the van at all times because she was required to return the van to the Fresno office at the end of her work day while working in the local area and when she returned from out-of-town business trips, Flores had unlimited use of the van when it was in her possession and the van was assigned to her for her exclusive use. When she was out of town on business, the van was her only means of transportation since Pacific Bell refused to allow her to use any other vehicle. Since she could use the van while on out-of-town trips for business and personal use, at the time of the accident she was using the van in a manner permitted by Pacific Bell and within the scope of the purposes for which the van was furnished. These facts establish that the van was furnished to Flores for both business and personal reasons, and her use of the van at the time of the accident was a regular one.

We reject Medina's assertion that because Flores was provided the van primarily for business purposes, her use of the van for personal purposes at the time of the accident was not a regular one. As *Lewis* instructs, whether a vehicle is furnished to an insured for regular use depends on the time, place and purpose for which it is to be used, and whether its use at the time of the accident was 'a departure from the customary use for which the car is furnished.' [] Here, the van was given to Flores for both business and personal use during her work days and while on out-of-town business trips, and her personal use of the van at the time of the accident was not a departure from the customary use, namely business and personal use while on out-of-town trips, for which the van was furnished. That business use was the reason she was given the van does not render her use at the time of the accident irregular when she was authorized to use the van for both business and personal purposes."

The *Medina* court pointed out that the purpose of the policy limitation was to avoid exposing the insurer to a risk for which it receives no premium. The court also found no compelling public policy argument for coverage. While sympathizing with the employee, the court agreed with GEICO that the correct remedy would have been for Pacific Bell to obtain coverage for its employees' personal use, or for the employees to obtain such coverage themselves.

No Duty to Pay Because Insured's Deliberate Acts Were Not an "Occurrence"
Credit to: Morris, Purdy & Polich, Los Angeles, CA

The United States District Court for the Central District of California held that an insurer did not owe a duty to pay a judgment against its insured because the insured's intentional acts caused the plaintiff's injuries and therefore did not constitute an "occurrence."

Gorzela v. State Farm General Insurance Company et al.

Salling's State Farm renter's policy provided coverage for damages due to bodily injury caused by an "occurrence" defined as an accident. Gorzela filed a personal injury action against Salling alleging that she was injured during an altercation at his home, but State Farm refused to defend him on the ground that there was no "occurrence" because his actions were intentional. After obtaining a judgment against Salling and an assignment of his rights under the policy, Gorzela filed suit against State Farm seeking enforcement of Salling's rights under the policy and damages stemming from State Farm's alleged bad faith denial of the claim. The court granted State Farm's motion for summary judgment, holding that the complaint allegations and extrinsic evidence established that Salling's physical contact with Gorzela was the result of his deliberate acts and therefore not an "occurrence" under the policy. The court rejected Gorzela's argument that an intentional act may still be accidental if the resulting injury was unintentional and unexpected, stating that only the nature of the injury-causing event determines whether an accident has occurred; whether the insured intended the result is irrelevant. The court further held that because State Farm did not breach the contract in refusing to defend Salling, it did not breach the implied covenant of good faith and fair dealing.

Homeowner's Under-Insurance Highlighted by Large Wildfires
Credit to: McCormick& Barstow, Bakersfield, CA

Association of California Ins. Companies v. Jones **(Cal. Sup. Ct. 2017) ___ Cal. 4th ___, 2017 DJDAR 628, Case No. S226529**

Underlying Claim

The 1991 Oakland Hills and 2003 Southern California wildfires highlighted a problem with homeowners insurance, namely underinsurance. The California Legislature learned through public hearings that homeowners who believed they had sufficient coverage to rebuild their homes were falling well short, sometimes by hundreds of thousands of dollars. Although steps were taken by the California legislature to resolve the problem, it realized the underinsurance problem persisted when large wildfires struck Southern California in 2007 and 2008. A California Department of Insurance investigation revealed that many wildfire victims were underinsured and a significant number of those had relied on their insurer's replacement cost estimate tool when they purchased insurance. The Insurance Commissioner found that estimates would be more accurate if they reflected the size of the home, materials used, square footage, wall height, slope, property location, type of frame, roof and siding the number of stories in the home, and the home's age. Consistent with the Administrative Procedure Act, the Commissioner proposed new regulations and amendments to existing regulations to standardize replacement cost estimates and providing that estimates not comporting with proper calculation requirements would constitute misleading statements under the Unfair Insurance Practices Act ("UIPA"), Insurance Code section 790.03. In response to public comments, the regulations were modified, a final statement of reasons was filed, the specific statutes authorizing the adoption of the regulations were identified, and the statutory provisions "being implemented, interpreted, or made specific" by each section of the regulations were listed. The new regulations became effective June 27, 2011 ("Regulation").

The Regulation at issue was codified at California Code of Regulations, Title10, Section 2695.183. The Regulation did not require an insurer to recommend a policy limit or to provide a replacement cost estimate. However, if the insurer chose to do so, the Regulation specified how that estimate was to be calculated and communicated. "In particular, it bars the insurer from communicating a replacement cost estimate in connection with an application for or renewal of a homeowners' insurance policy 'unless the requirements and standards set forth in subdivisions (a) through (e) below are met.'" (Cal. Code Regs., section 2695.183.)

Before the Regulation went into effect, the plaintiffs filed a complaint challenging its validity claiming (1)it exceeded the Commissioner's authority by defining a new unfair insurance practice; (2) it restricted underwriting of insurance which the Commissioner is not authorized to regulate; and (3) it violated insurers' right to free speech. The trial court invalidated the Regulation on the first ground, reasoning that an estimate is always inherently inaccurate and thus cannot be deemed misleading. The Court of Appeal affirmed finding that the Legislature had specifically defined advertising of insurance an insurer does not sell as an unfair practice, but failed to so define incomplete replacement cost estimates as an unfair practice. The Court of Appeal determined that this inferred a deliberate choice by the Legislature and, therefore, the Commissioner did not have authority to add requirements for replacement cost estimates to the list of unfair practices "'under the guise of deeming nonconforming estimates misleading under section 790.03, subdivision (b).'" The California Supreme Court granted review "to consider the Commissioner's authority to promulgate regulations implementing, interpreting, or making specific the prohibitions in section 790.03, subdivision (b)."

California Supreme Court Ruling

The Supreme Court first noted that, although regulations that alter or amend a statute or enlarge or impair its scope are invalid, the Legislature in this case had conferred broad authority on the Commissioner to "craft regulations as necessary to administer the statutory ban on untrue, deceptive, or misleading statements." The Supreme Court concluded that the Regulation fit within the authority conferred by the Legislature.

The Supreme Court then considered whether the Regulation was consistent with the UIPA and reasonably necessary to effectuate its purpose. In deciding this issue, the court noted the difference between quasi-legislative rules, where the Legislature has delegated to the agency a portion of its lawmaking power and where the review by the court is narrow, versus an interpretive rule, devoid of any quasi-legislative authority, where the court must consider whether the interpretation of the statute by the administrative agency is proper. The court decided that it did not need to decide under which category the Regulation fell because even if it were purely interpretive, the Commissioner "reasonably and properly interpreted the statutory mandate." The court found that the Regulation did no more than identify a specific class of statements within the prohibition against misleading statements. The Legislature decided that, rather than specifying the types of statements deemed misleading, it would entrust that determination to the Commissioner. And the Commissioner "could reasonably conclude that replacement cost estimates are likely to mislead the public about the actual cost of repair or replacement when they willfully omit cost components essential to repairing or rebuilding a dwelling."

Since section 790.10 of the UIPA specifically vested authority in the Commissioner to issue reasonable rules and regulations to administer the UIPA, and since that is what the Commissioner had done here, the Commissioner's enactment of replacement cost regulation was valid. However, because the lower courts invalidated the Regulation solely under the Administrative Procedure Act, and the remaining challenges had not been considered, the judgment was reversed and remanded for further proceedings.

Editor's note: Who will have the responsibility of determining if the replacement cost was done according to the regulations? This may become part of the claims process and ultimately be done by the adjuster.

Mold Exclusion doesn't Relieve Duty to Defend
Credit to: Smith, Smith & Feeley, Newport Beach, CA

A commercial general liability policy's "mold" exclusion did not relieve an insurer of a duty to defend its insured, a general contractor, against a lawsuit alleging property damage resulting from both water intrusion and mold. (*Saarman Construction, Inc. v. Ironshore Specialty Insurance Company* (2016) --- F.Supp.3d ---- 2016 WL 4411814)

Facts

The Westborough Court Condominiums is a condominium project that was built in the late 1990's. Following completion, the project experienced significant problems with water intrusion. The Westborough Court Condominiums Homeowners Association thus hired Saarman Construction, Inc. to perform repairs at the project.

John and Stella Lee owned a unit in the condominium development, and the Lees leased their unit to Tiffany Molock. Later, Molock filed a state court lawsuit against the Lees and the HOA. In her complaint, Molock alleged that the Lees and the HOA were responsible for various problems with the unit, including mold, plumbing leaks, and water intrusion.

The Lees and the HOA in turn filed cross-complaints for indemnity against Saarman. The Lees and the HOA both alleged that Saarman had negligently performed repair work at the condominium project, resulting in water intrusion and water damage that contributed to mold growth.

Saarman was the named insured on a commercial general liability policy issued by Ironshore Specialty Insurance Company. The policy provided in relevant part that Ironshore would indemnify Saarman against damages because of bodily injury and property damage not otherwise excluded, and that Ironshore would defend Saarman against any suit seeking covered damages. Ironshore declined to defend Saarman in the lawsuit, based in part on a "Mold, Fungi or Bacteria Exclusion" endorsement in the policy. That endorsement provided that the policy did not apply to "to any claim, demand, or *'suit' alleging*" bodily injury or property damage "arising out of, *in whole or in part*, the actual, alleged, or threatened discharge, inhalation, ingestion, dispersal, seepage, migration, release, escape or *existence of any mold*, mildew, bacteria or fungus, or any materials containing them, at any time." Italics added.

Following Ironshore's refusal to defend Saarman, Saarman filed a federal court lawsuit against Ironshore for breach contract and bad faith. Saarman then moved for partial summary judgment that Ironshore had a duty to defend Saarman in the underlying state court lawsuit.

Holding

The federal district court, applying California law, held that Saarman was entitled to a defense from Ironshore in the underlying lawsuit. The court thus entered partial summary judgment in favor of Saarman and against Ironshore on the duty to defend issue.

The district court reasoned that in the underlying lawsuit, there were allegations that Saarman had caused water intrusion damage (and hence "property damage") to the condominium unit occupied by Molock. Because those allegations fell within the scope of the policy's basic insuring agreement, Ironshore had the burden of establishing that the policy's "mold" exclusion conclusively eliminated any potential for coverage.

Ironshore argued that the policy's mold exclusion barred coverage not just for "claims" that include mold allegations "in whole or in part," but also for "suits" that include mold allegations "in whole or in part." Ironshore argued that the underlying action was such a "suit," and that the mold exclusion thus relieved Ironshore of any duty to defend Saarman as to the entire underlying "suit."

The federal district court rejected Ironshore's argument. The court acknowledged the seeming conflict between the mold exclusion (which relieves the insurer of any duty to defend a "suit" that includes both mold allegations and non-mold allegations) and California case law (which requires an insurer to defend any "mixed action" that includes both covered claims and uncovered claims). Ultimately, the district court held that Ironshore "cannot contract around California law that requires insurers to defend the entire action if there is any potentially covered claim." The court concluded that, to the extent the mold exclusion purported to bar a defense for "any … 'suit'

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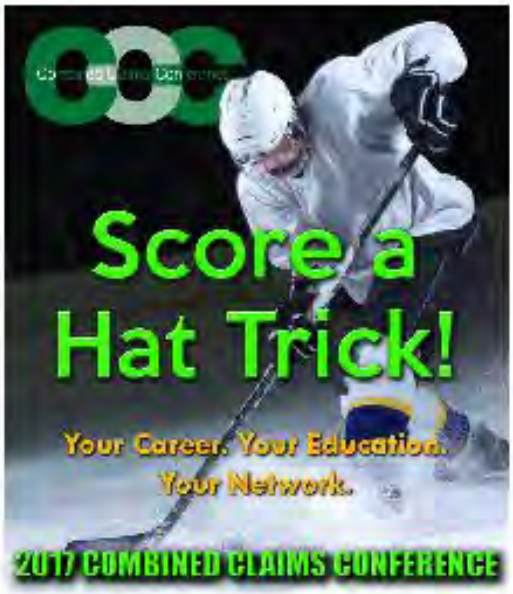

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California Association of Independent Insurance Adjusters

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Complete a separate form for each registrant and additional guest.

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03/31 -- 8:00 A.M.	Registration/Breakfast	[ ]	
03/31 – 9:00 A.M.	Seminar (3 ce credits – TBA)	[ ]	
03/31 – 12:00 P.M.	Lunch	[ ]	
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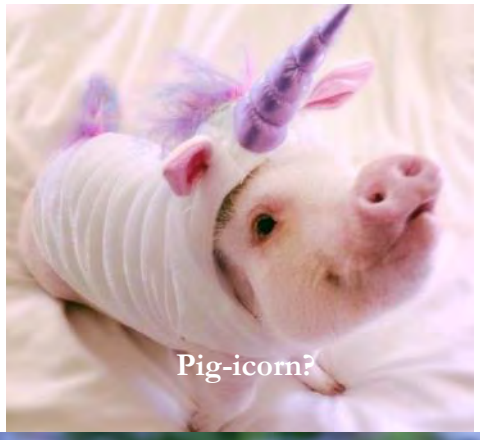
On the Lighter Side… Happy National Pig Day

National Pig Day is an event held annually on March 1 in the United States to celebrate the pig. The holiday celebration was started in 1972 by sisters Ellen Stanley, a teacher in Lubbock, Texas, and Mary Lynne Rave of Beaufort, North Carolina. According to Rave the purpose of National Pig Day is "to accord the pig its rightful, though generally unrecognized, place as one of man's most intellectual and domesticated animals." The holiday is most often celebrated in the Midwest.[4]
National Pig Day includes events at zoos, schools, nursing homes, and sporting events around the United States. It is also recognized at "pig parties" where pink pig punch and pork delicacies are served, and pink ribbon pigtails are tied around trees in the pigs' honor. According to Chase's Calendar of Events, National Pig Day is on the same day as pseudo-holidays Share a Smile day and Peanut Butter Lover's day. It is an open question whether the holiday is a time to honor pigs by "giving them a break" or to appreciate their offerings (spare ribs, bacon and ham).



Photos courtesy Viralnova.com

of