

APRIL 2004

New Cases Provide Immunity to Persons/Entities Reporting Criminal Conduct

Submitted by Bradley & Gmelich

Can a person be liable for reporting suspected criminal conduct to the police, even if the report was erroneous and the criminal conduct did not occur?

In two recent companion cases, the California Supreme Court has now made clear that a person reporting criminal conduct to the police has an absolute privilege, and is thus immune from civil liability, even if the report is erroneous. The only exception to this privilege is for malicious prosecution.

Reporting Criminal Conduct Is Absolutely Privileged

In *Hagberg v. California Federal Bank* (2004) 32 Cal.4th 39, plaintiff, Lydia Ortiz Hagberg, a Hispanic woman went to a California Federal Bank to cash a check from Smith Barney. She presented her California driver's license, Cal Fed ATM card, the Smith Barney check, and her Smith Barney account summary to the teller, who was also a Hispanic woman. The teller suspected that the check was counterfeit and reported it to her supervisor, who immediately telephoned both Smith Barney and the Cal Fed Security manager. The supervisor was instructed to call the police.

The supervisor then telephoned the police, and when asked about the identity of the plaintiff, the supervisor responded that she appeared "white – maybe Hispanic". The police immediately arrived, took the plaintiff away from the teller window, had the plaintiff spread her legs

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Oops! The Status Report Apologizes

Last month in our lead article, the *Status Report* thanked all of the people involved in the Seminars. Unfortunately, we noted the "Bill Grand, Jr." was an instructor. Those of us in the CAIIA know full well that it is *Bill Grace* of Southland Claims Service who has taught the Certification Seminars for ten years now. We apologize to Bill. He is a "Grand" man, but his last name is Grace. Sorry Bill.

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CAIIA Newsletter

CAIIA Office
P.O. Box 168
Burbank, CA 91503-0168

Web site - <http://www.caiia.org>

Email: info@caiiia.org

Tel: (818) 953-9200

(818) 953-9316 FAX

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■ **California Association
of Independent
Insurance Adjusters, Inc**

PRESIDENT'S OFFICE

P.O. Box 619058
Roseville, CA 95661-9058
Email: info@caiiia.org
www.caiia.org

PRESIDENT

Lee Collins
lee.collins@gbbragg.com

IMMEDIATE PAST PRESIDENT

Steve Tilghman
stilghman@aims4claims.com

PRESIDENT ELECT

Doug Jackson
scsdj@southwestclaims.com

VICE PRESIDENT

Steve Wakefield
boltadj@msn.com

SECRETARY TREASURER

Sharon Glenn
sglenn@john-glenn-adjusters.com

COUNSEL

Richard H. Caulfield
rcaulfield@cddlaw.com

ONE YEAR DIRECTORS

Sam Hooper
repooh@msn.com

Michael Kielty
michael.kielty@georgehills.com

Robert Lobato
rlobato.pioneer@verizon.com

TWO YEAR DIRECTORS

Pete Vaughan
pvaughan@pacbell.com

Jeff Queen
jeff@countylineclaims.com

Stu Ryland
s_ryland@malmgrengroup.com

■ **PRESIDENT'S MESSAGE**

A CAIIA Past President once told me that writing this column each month was one of the more challenging duties of his term in office. I am now halfway through my term in office as President (!), and I am beginning to see the wisdom of his comment. It seems no sooner have I completed my column for one month, that I am being "re-minded" by our Status Report Editor, Sterrett Harper, for the next month. Something like an alarm clock that goes off once a month. If you may have guessed that on occasion I have begun writing this column with no firm idea as to its content, you would be pretty close. I have received several compliments on the personal tone of my columns – although perhaps those who would prefer the more traditional President's column are just being tactful, and haven't contacted me to complain!

The other side of that coin would be the Editor, who must put together several articles, news about the organization's goings on, and the President's Column each month, all year long. A former Status Report Editor, long time Executive Director Gene Riggs, now retired (and one of only two in the 54 year history of this organization to receive a Lifetime Achievement Award), told me once that with certain Presidents, he had to push pretty hard each month to get the column sent to him on time. In any event, thanks Sterrett for reminding me! And thanks to you, Gene, for the legacy you left with those of us now participating in the CAIIA!

By the time you read this column, we will have completed our Mid Term conference, at the Marriott Newport Beach and Tennis Club. No, we won't be lounging on the beach, or playing tennis, we have a full schedule, and a good turnout for this conference. The Mid Term this year will last less than 24 hours, in deference to our busy members, who need to get back to work! Beginning with dinner on Wednesday evening, we will proceed with a business meeting on Thursday morning, and a Fair Claims Act Re-certification Seminar following lunch that day.

Representatives of the NAIIA will make a presentation during the business meeting on a plan to put together an E&O/GL/D&O program for adjusters. Although the plan is in its early stages, we understand much interest has been generated among adjusting



firms, and an impressive amount of capital has already been raised. For those of you who can't make the Mid Term, we will report on this interesting development in the next Status Report. The intent is fairly obvious – to provide protection for adjusting firms with great savings over the increasingly high premiums many of us are paying now. On the subject of Insurance, we are also in the midst of conducting a survey of members relating to a worker's compensation Self Insurance Group (SIG). The intent here again would be to put together a fully legal, fully funded program that would provide workers' compensation insurance to California adjusting firms at a much lower premium. Whether the current total premiums being paid by CAIIA members is high enough to warrant a full exploration of a SIG (which would entail some cost) remains to be seen. A notice was e-mailed or faxed to all members recently – if you didn't see yours, please contact me, and I will get information to you, so you can respond to the survey, which is being handled in total confidence by Risk Management consulting firm.

For those of you attending the Mid Term, I know we will have a rewarding time, socializing with our peers, learning, and participating in this fine organization. For those or you who can't make it, see you here next month, same time, same place!

LEE COLLINS, ARM

President - CAIIA 2003-2004

New Cases Provide Immunity . . .

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for a pat down search, handcuffed her, and placed her under arrest. It was only then learned from Smith Barney that the check was not counterfeit. Plaintiff was released after being detained 20 minutes. Plaintiff sued Cal Fed of false imprisonment, false arrest, slander, invasion of privacy, intentional infliction of emotional distress, negligence, and race discrimination in violation of the Unruh Civil Rights Act (Civil Code section 51). Cal Fed filed a summary judgment motion arguing that Civil Code section 47 (b) provides persons who report suspected criminal activity to law enforcement with absolute immunity from tort liability. (Cal Fed also argued a Federal Statute provided it with immunity, but the court did not address this issue.) The trial court granted summary judgment in favor of Cal Fed, holding that the statutory privilege applied. The plaintiff appealed.

The Court of Appeal affirmed, holding that the reporting of criminal conduct to the police constitutes an official proceeding and Section 47(b) serves the important public policy of assuring free access to the courts.

Because of a conflict between this ruling and other Court of Appeal rulings, the California Supreme Court stated that Section 47(b) is intended to “assure utmost freedom of communication between citizens and public authorities whose responsibility is to investigate and remedy wrongdoing”. Otherwise, there would be a “chilling effect” on such communication, which would not be in the public’s best interest.

The California Supreme Court reasoned that because the absolute privilege protects individuals from liability for reporting criminal conduct, plaintiff could not pursue his claims since they all flowed from the communication to law enforcement.

No Liability for False Imprisonment Resulting From Report of Criminal Conduct

In the other case, *Mulder vs. Pilot Air Freight* (2004) 32 Cal.4th 34, plaintiff, Robert Mulder, a commercial dealer in salvage material, claimed that he was arrested by the LAPD after defendant, Steve Covert, an employee of Pilot Air Freight mistakenly reported to the LAPD that plaintiff was in possession of a flight recorder that had been stolen from Pilot Air Freight. Plaintiff was arrested and had to appear in criminal court numerous times until the case was dismissed.

Plaintiff filed a lawsuit against Pilot Air Freight for false imprisonment and intentional infliction of emotional distress, claiming that defendants had been motivated by malice when they provided the information to the police.

The trial court dismissed the plaintiff’s case based on motions by the defendants, and the trial court ruling was then affirmed by the Court of Appeal. The California Supreme Court then decided it would also hear this case.

The California Supreme Court affirmed the lower courts’ rulings finding that Civil Code section 47(b) provides an absolute privilege to a communication “concerning possible wrongdoing, made to an official governmental agency, such as a local police department, ...if the communication is designed to prompt action by that entity”. In this case, the Supreme court reasoned that plaintiff’s cause of action for false imprisonment failed because it was based on defendants’ privileged communications with the police, and not on any noncommunicative conduct on defendants’ part (i.e., defendants did not physically detain or falsely imprison plaintiff).

Lesson

Both the Cal Fed and Pilot Air Freight cases demonstrate that the communication of suspected criminal activity by citizens to authorities is of paramount importance and should not be discouraged by the prospect of potential civil liability which would otherwise chill the reporting of such conduct. (The privilege, however, only applies when the police are actually contacted.)

■ Weekly Law Resume

Prepared by Low, Ball & Lynch, Attorneys at Law

Property Insurance – Replacement Cost Policy – Earthquake Damage

Fire Insurance Exchange v. Superior Court, Court of Appeal, Second District, (March 2, 2004).

Replacement cost coverage broadens the benefits available to an insured. In this case, the issue was whether it covered the cost for land stabilization and construction upgrades made necessary by changes to the building codes as a result of an earthquake.

A group of homeowners whose homes were damaged or destroyed in the 1994 Northridge earthquake sued Fire Insurance Exchange (FIE) to recover damages for alleged breach of contract, insurance bad faith, fraud and negligence. They alleged they had homeowner policies with guaranteed replacement coverage. They incurred costs in repairing or rebuilding their homes for land stabilization and construction upgrades necessary due to building code changes. The trial court found the policy to be ambiguous and determined there was coverage for damage to the land and the building code upgrades. FIE filed a petition for writ of mandate. The Court of Appeal issued an order to show cause.

The Court of Appeal granted the writ in part and denied it in part. As to the issue of coverage for damage to land, the Court disagreed with the trial court. It felt the absence of insurance coverage for damage or injury to the land was clear in the policy and should be enforced. The policy provided coverage for the dwelling, structures and personal property. While there is California case law holding that an insurer must repair the soil to a property so long as it is required in order to repair the structure, the decisions so holding did not have similar policy language to the policy in this case. The FIE policy specifically stated it did not cover the land on which the dwelling was located or the cost to restore, replace or rebuild it.

This language was repeated throughout the policy. Even though replacement of the home required repair of the land, the language of the policy was not susceptible to an interpretation including coverage for repair of the land. The Court therefore held the trial court erred in rejecting the plain, unambiguous language of the policy.

However, with regard to the increased cost of repair or replacement of damaged or destroyed buildings, when the increased cost was caused by the need to conform to changes in the building code, the Court felt the trial court decision was correct. The policy contained a specific exclusion for loss caused by enforcement of an ordinance or law regulating construction, repair or demolition of a building. The Court noted the guaranteed replacement cost coverage provision guaranteed 100% replacement of a structure with “equivalent construction” and use on the same premises or the amount actually spent to repair or replace the building intended for the same occupancy and use, whichever was smaller. The court felt that “equivalent construction”, without any modifying phrase indicating that there would be no allowance for the increased cost caused by ordinance or law, rendered the phrase ambiguous.

In reviewing the policy, the court noted that the ordinance or law exclusion was listed in a section of the policy enumerating exclusions. It thus was reasonable to interpret it as describing a peril, not a type of damage or loss. The court noted that some courts have agreed with this interpretation, and other have

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■ Weekly Law Resume

Prepared by Low, Ball & Lynch, Attorneys at Law

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disagreed, finding the language of the exclusion to refer unambiguously to increased cost made necessary by changed building codes.

However, because the exclusion was susceptible to more than one meaning, the Court found it to be ambiguous. The Court felt that the location of the exclusion in a long list of excluded perils, combined with the words "caused directly or indirectly by", indicated that its intended function was to exclude a peril, not to place a limitation on replacement cost. An insured might reasonably construe the exclusion as referring to perils such as forced demolition or repair of dilapidated, encroaching or nonconforming buildings or parts of buildings by civil authorities.

The Court felt that the replacement cost was intended to cover the cost to construct, at current prices, a building with utility equivalent to building insured, using modern materials and current standards, designs and layouts. A reasonable insured would expect coverage for a home of substantially similar construction that was the functional equivalent of the home lost.

Finally, the court noted that the policy contained a value protection clause, which provided annual increases in policy limits to reflect changes in costs of construction. The Court said this also led to its conclusion that one would expect increased costs of construction due to building code enforcement to be covered as a result. The court therefore concluded that the policy was ambiguous because an insured might reasonably expect coverage of the cost of a replacement home of substantially similar construction that was the functional equivalent of the home lost or destroyed even if changes in the building code resulted in higher loss settlement than the cost to repair or replace the home with material of like kind and quality. The petition for writ of mandate was granted with respect to the finding of coverage for the cost to restore or replace or rebuild the land. The petition was denied with regard to the issue of increased cost due to changes in building codes.

COMMENT

This case is worth reading because of its analysis of guaranteed replacement cost policies. The section of the opinion dealing with exclusions should be read by those who draft policies, since the language of the opinion discusses how to construe such exclusions.

Airline Quotes

Most of you have read or are familiar with the following. But, there is still humor in the quotes.

Some airlines try to make the in-flight "safety lecture" and announcements a bit more entertaining. Here are some real examples that have been heard or reported:

On a Continental Flight with a very "senior" flight attendant crew, the pilot said, "Ladies and gentlemen, we've reached cruising altitude and will be turning down the cabin lights. This is for your comfort and to enhance the appearance of your flight attendants."

On landing, the stewardess said, "Please be sure to take all of your belongings. If you're going to leave anything, please make sure it's something we'd like to have."

"There may be 50 ways to leave your lover, but there are only 4 ways out of this airplane."

"Thank you for flying Delta Business Express. We hope you enjoyed giving us the business as much as we enjoyed taking you for a ride."

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California Attorney Sentenced in Alleged Auto Fraud Ring

March 8, 2004

A five-year undercover investigation into a staged auto collision ring came to a conclusion last Friday with the sentencing of the final attorney implicated by the joint efforts of the California Department of Insurance (CDI) Fraud Division and the Federal Bureau of Investigation.

Attorney Inna Gofman was sentenced in Los Angeles County Superior Court, the last of the 52 people indicted in the case, dubbed Operation Twisted Metal. Gofman was sentenced to three years formal probation, a \$500 fine and six days in county jail credit. In February, Gofman's paralegal, Irma Palacios was sentenced to one-year probation and a \$200 fine. Gofman and Palacios' restitution payments will be determined in a hearing held April 30.

The investigation began in 1995, when an undercover operative from CDI infiltrated a crime ring that ultimately staged 11 "accidents" and faked two auto thefts. In Gofman's case, an insurance company was reportedly bilked of more than \$107,000 in the scheme. During the course of the investigation more than \$219,000 in fraudulent claims were submitted.

Investigators said that had the crime ring not been discovered, the defendants were on pace to accumulate more than \$624,000 in fraudulent claims annually.

The multiple undercover operations by the Fraud Division of CDI resulted in the arrests and convictions of two attorneys, three chiropractors, a law office administrator, a law office paralegal, a physical therapist, two cappers (those who recruit participants), and 42 additional participants, including "passengers" in the wrecked automobiles.

Some of the subjects were tape-recorded describing the manner in which they staged the collisions, how the scheme was conducted with the participating attorneys and doctors, and how the participants divided the proceeds.

The case was prosecuted by the United States Attorney General's Office and the Los Angeles county District Attorney's Office. The Department of Insurance received assistance during the investigation from a number of insurance companies, including Farmers Insurance Group, GEICO, 21st Century, Wawanesa, Prudential, Liberty Mutual and State Farm.

■ CAIIA *Calendar*

■ CAIIA Annual Conference

October 13, 14, & 15, 2004

The Disney Grand Californian, Disneyland Resort,
Anaheim, CA

Contact: Doug Jackson, 805-584-3494, ext. 11

■ Claims Conference of Northern California

September 14 & 15, 2004

The Doubletree Hotel, Sacramento, CA

Contact Barbara Prosch, 530-626-1676

Airline Quotes

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After a particularly rough landing during thunderstorms in Memphis, a flight attendant on a Northwest flight announced, "Please take care when opening the overhead compartments because, after a landing like that, sure as hell everything has shifted."

From a Southwest Airlines employee: "Welcome aboard Southwest Flight 245 to Tampa. To operate your seat belt, insert the metal tab into the buckle, and pull tight. It works just like every other seat belt' and, if you don't know how to operate one, you probably shouldn't be out in public unsupervised."

"In the event of a sudden loss of cabin pressure, masks will descend from the ceiling. Stop screaming, grab the mask, and pull it over your face. If you have a small child traveling with you, secure your mask before assisting with theirs. If you are traveling with more than one small child, pick you favorite."

"Weather at our destination is 50 degrees with some broken clouds, but we'll try to have them fixed before we arrive. Thank you, and remember, nobody loves you, or your money, more than Southwest Airlines."

"Your seat cushions can be used for flotation; and, in the event of an emergency water landing, please paddle to shore and take them with our compliments."

"As you exit the plane, make sure to gather all of your belongings. Anything left behind will be distributed evenly among the flight attendants. Please do not leave children or spouses."

And from the pilot during his welcome message: "Delta Airlines is pleased to have some of the best flight attendants in the industry. Unfortunately, none of them are on this flight!"

Heard on Southwest Airlines just after a very hard landing in Salt Lake City; The flight attendant came on the intercom and said, "That was quite a bump, and I know what y'all are thinking. I'm here to tell you it wasn't the airline's fault, it wasn't the pilots fault, it wasn't the flight attendant's fault. It was the asphalt!"

Overheard on an American Airlines flight into Amarillo, Texas, on a particularly windy and bumpy day: During the final approach, the Captain was really having to fight it. After an extremely hard landing, the Flight Attendant said, "Ladies and Gentlemen, welcome to Amarillo. Please remain in your seats with your seat belt's fastened while the Captain taxis what's left of our airplane to the gate!"

Another flight attendant's comment on a less than perfect landing: "We ask you to please remain seated as Captain Kangaroo bounces us to the terminal."

An airline pilot wrote that on this particular flight he had hammered his ship into the runway really hard. The airline had a policy, which required the first officer to stand at the door while the Passengers exited, smile, and give them a "Thanks for flying our airline." He said that, in light of his bad landing, he had a hard time looking the passengers in the eye, thinking that someone would have a smart comment. Finally everyone had gotten off except for a little old lady walking with a cane. She said, "Sir do you mind if I ask you a question?" "Why, no, Ma'am," said the pilot, "What is it?" The little old lady said, "Did we land, or were we shot down?"

After a real crusher of a landing in Phoenix, the attendant came on with, "Ladies and Gentlemen, please remain in your seats until Capt. Crash ad the Crew have brought the aircraft to a screeching halt against the gate. And, once the tire smoke has cleared and the warning bells are silenced, we'll open the door and you can pick your way through the wreckage to the terminal."

Part of a flight attendant's arrival announcement: "We'd like to thank you folks for flying with us today. And, the next time you get the insane urge to go blasting through the skies in a pressurized metal tube, we hope you'll think of US Airways."

A plane was taking off from Kennedy Airport. After it reached a comfortable cruising altitude, the captain make an announcement over the intercom, "Ladies and Gentlemen, this is your captain speaking. Welcome to Flight Number 293, nonstop from New York to Los Angeles. The weather ahead is good and, therefore, we should have a smooth and uneventful flight. Now sit back and relax . . . OH, MY GOD!" Silence followed, and after a few minutes, the captain came back on the intercom and said, "Ladies and Gentlemen, I am so sorry if I scared you earlier. While I was talking to you, the flight attendant accidentally spilled a cut of hot coffee in my lap. You should see the front of my pants!" A passenger in Coach yelled, "That's nothing, you should see the back of mine!"

Heard on a Southwest Airline flight. "Ladies and Gentlemen, if you wish to smoke, the smoking section on tis airplane is on the wing and if you can light 'em, you can smoke 'em.

EXECUTIVE OFFICE DUTY DISTRIBUTION AND COMMITTEES

Status Report	Sterrett Harper, RPA	818-953-9200	harperclaims@hotmail.com
Grievance	Steve Tilghman, RPA	916-563-1900	stilghman@aims4claims.com
Directory	Lee Collins	916-783-0100	lee.collins@gbbragg.com
Education	Steve Wakefield, RPA	559-485-0441	boltadj@msn.com
	Steve Tilghman	916-563-1900	stilghman@aims4claims.com
Finances/Budget	Sharon Glenn	925-280-9320	sglenn@johnglennadjusters.com
Exhibit Booth	Doug Jackson	805-584-3494	scsdj@southwestclaims.com
By-Laws	Steve Wakefield	559-485-0441	boltadj@msn.com
Meeting Minutes	Sharon Glenn	925-280-9320	sglenn@johnglennadjusters.com
Legislation	Sam Hooper	562-802-7822	repooh@msn.com
	Pete Schifrin	818-909-9090	pschifrin@sgdinc.com
Status Report Sponsorship	Jeff Queen	818-707-1770	jeff@countylineclaims.com
Web-site Master	Pete Vaughan, RPA	707-745-2462	pvaughan@pacbell.net
New Membership	Sam Hooper	562-802-7822	repooh@msn.com
Membership/Renewals	Doug Jackson	805-584-3494	scsdj@southwestclaims.com
Public Relations	Stu Ryland	916-641-5452	s_ryland@malmgrengroup.com
Mid-term Convention, 2004	Lee Collins	916-783-0100	lee.collins@gbbragg.com
	Doug Jackson	805-584-3494	scsdj@southwestclaims.com
Fall Convention, 2004	Doug Jackson	805-584-3493	scsdj@southwestclaims.com
	Lee Collins	916-783-0100	lee.collins@gbbragg.com
Fall Convention Sponsors	Mike Kielty	510-465-1314	michael.kielty@georgehills.com
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Re-Certification Seminar	Pete Schifrin	818-909-9090	pschifrin@sgdinc.com