CAIIA Status Report

April 2012

Editor's Corner

As a reminder to all California licensed Independent Adjusters, you must have at least 24 hours of continuing education. You must have at least 3 hours of ethics out of the 24 total hours. Most of the licenses for Independent Adjusters expire on May 31 of even numbered years. The most recently issued licenses will expire at various times throughout the year. You can check with the California Department of Insurance (DOI) website to see what they have listed for your hours. You will need your license number to access the information.

Issues Regarding Bad Faith Must Be Resolved Before Insurer Can Compel Arbitration of Independent Counsel Fees

CREDIT: Smith, Smith & Feeley, Irvine, CA.

Issues regarding an insurer's alleged bad faith delay in defending must be resolved in the trial court before the insurer can compel arbitration of independent counsel fees pursuant to Civil Code section 2860(c). (*Janopaul + Block Companies, LLC v. Superior Court* (2011) 200 Cal.App.4th 1239)

Facts: Janopaul + Block Companies, LLC (Janopaul) owned a hotel and undertook to restore it. Janopaul hired The Sundt Companies, Inc. (Sundt) to serve as general contractor for the project.

Following completion of the project, various parties filed suit against Janopaul for construction defects at the project. Janopaul initially tendered its defense to Sundt, apparently pursuant to an indemnity agreement in the general contract. Janopaul later tendered its defense to Sundt's general liability insurer, St. Paul Fire and Marine Insurance Company (St. Paul), apparently on the ground that Janopaul was an additional insured on the St. Paul policy.

Over two years after Janopaul's original tender to St. Paul, and after Janopaul threatened to sue St. Paul for failure to defend, St. Paul finally agreed to defend Janopaul subject to a reservation of rights. St. Paul further agreed that Janopaul's personal counsel could serve as Janopaul's "independent counsel. Over the next year, a dispute arose between St. Paul and Janopaul's independent counsel regarding independent counsel's billing rates and practices. St. Paul filed a petition to compel arbitration of the fee dispute under California Civil Code section 2860(c), which provides that disputes involving fees charged by independent counsel "shall be resolved by final and binding arbitration by a single neutral arbitrator selected by the parties to the dispute." In response, Janopaul filed a motion to dismiss the petition. Before briefing had been completed on the petition to compel arbitration and the competing motion to dismiss the petition, Janopaul filed a bad faith action against St. Paul. The trial court granted St. Paul's petition to compel arbitration, denied Janopaul's motion to dismiss the petition, and stayed the bad faith case. Janopaul then sought relief in the appellate court.

Holding: The Court of Appeal reversed, holding that when an insured files a bad faith action alleging an insurer's unreasonable delay in defending, that issue must be resolved in the trial court before any arbitration of independent counsel fees under Civil Code section 2860(c). The appellate court reasoned that if Janopaul establishes an unreasonable delay by St. Paul in providing a defense to Janopaul, then St. Paul will have forfeited and/or be estopped from asserting all rights under the policies of insurance, including any rights under section 2860. Since Janopaul's complaint for bad faith raised claims "substantially broader than merely a dispute over the amount of attorney fees" which is subject to mandatory arbitration, and since those claims had not been resolved before the trial court granted St. Paul's petition under section 2860, the trial court erred in staying the bad faith case and in ordering the parties to arbitration.

Comment: The appellate court's decision requires a preliminary determination in the trial court whether the insurer had a duty to defend the insured and if so, whether the insurer breached that duty and engaged in bad faith conduct. If those issues are resolved in favor of the insurer and the dispute between the insurer and the insured ultimately boils down to the amount of attorney fees the owes for the insured's defense in the underlying action, then at that time the insurer can move to arbitrate that dispute pursuant to Civil Code section 2860(c).

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An Employer Organization of Independent Insurance Adjusters

Inside this issue:

Status Report Available

by Email and Web Only.

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CAIIA Newsletter

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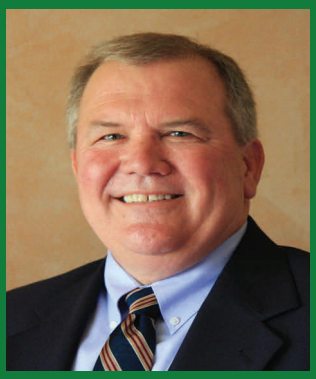
President's Message

April 2012



Jeff Caulkins
CAIIA President

As of the writing of this message, the Combined Claims Conference has passed. From the feedback that I have received, this conference exceeded the previous years. Many thanks to Sterrett Harper of Harper Claim Services for coordinating the set-up of the CAIIA booth as well as insuring the booth was well-manned with member volunteers. I would also like to personally thank all those who took the time from classes to represent the CAIIA in the booth. It has always been my experience that you will be able to meet more people at the convention by being in one place.

We have also just finished up the spring Mid-term Business Meeting in Marina Del Rey. Tim Waters of Buxbaum, Loggia & Associates, Inc. was able to secure three continuing education units for ethics from the Department of Insurance.

Stephen H. Huchting, Esq. of Morris Polich & Purdy LLP provided us with what has been stated as the best educational class on ethics that we have seen.

The California Association of Independent Insurance Adjuster's motto is "There is no substitute for excellence"; we saw this in the many hours that it took to put together the continuing education at our meeting.

This summer we are also again providing two seed courses and three FCSPR-SIU courses. As many are aware earthquake certification is required every three years and FCSPR-SIU is required every year. I would recommend that you consider the earthquake class each year; it will better prepare you to address earthquake damage.

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

Imputed Notice of Dangerous Conditions in the Atypical "Slip and Fall" Case

Credit: Low Ball and Lynch, San Francisco, CA

Tom Getchell et al. v. Rogers Jewelry
Court of Appeal, First District February 7, 2012

This is not the typical "slip and fall" case. Plaintiff Tom Getchell ("Getchell") was a business invitee of defendant Rogers Jewelry Store ("RJS"). He worked at RJS as an independent contractor repairing jewelry. At times he worked in the back break room, which was only accessible to Getchell and RJS employees. On the date of the incident, he was setting up his tools in the break room when he slipped on jewelry cleaning solution and fell, sustaining injuries. Getchell filed a personal injury complaint against RJS alleging negligence and premises liability. He alleged that: 1) he slipped in jewelry cleaning solution in the break room of RJS's store and; 2) the solution leaked on the floor from its container or was poured on the floor by an RJS employee. Getchell's wife sued for loss of consortium.

The trial court entered summary judgment in favor of RJS after finding that Getchell failed to establish that RJS had actual or constructive notice of the dangerous condition. Getchell appealed, contending that he was not required to show that RJS had notice because RJS employees created the dangerous condition that caused his injury.

The First District Court of Appeal agreed and reversed the trial court ruling granting summary judgment in favor of RJS. The Court of Appeal noted that in a typical slip and fall case, the cause of the accident is not linked to a premises owner's employee. This case was atypical because the dangerous condition was created by the negligence of an RJS employee over whom RJS had control. Therefore, the notice doctrine for imposition of premises liability was governed by the doctrine of respondeat superior. The Court of Appeal ruled that the "dispositive question" was whether the facts create a reasonable inference that the dangerous condition was caused by the negligence of one of RJS's employees, such that RJS could be charged with notice of the dangerous condition.

The Court of Appeal reviewed the evidentiary record and determined that Getchell produced sufficient evidence from which a reasonable inference could be drawn that the dangerous condition was created by RJS and/or its employees. The cleaning solution was stored in a five-gallon bucket in the employee break area, which could only be accessed by Getchell and RJS employees. The bucket had a rotating spigot pump, which had to be rotated over the side of a bucket when used. When not in use, the spigot was to be positioned over the bucket lid to prevent cleaning solution from spilling to the floor. Whenever Getchell used the spigot, he always returned it to a position above the lid. However, on several occasions, he observed RJS employees leave the spigot positioned over the side of the bucket, causing cleaning solution to leak to the floor. On the day of the incident, Getchell had not utilized the spigot pump. On these facts, Getchell argued that RJS and its employees had exclusive control over the premises, including the break room and cleaning solution dispenser, and created the dangerous condition. Therefore, RJS could be charged with constructive notice of the dangerous condition resulting in Getchell's slip and fall.

The Court of Appeal rejected the trial court's argument that there was no evidence of how the cleaning fluid got onto the floor or that the cleaning fluid on the floor was an open and obvious condition. Absent evidence of a defect in the spigot, it could not reasonably be inferred that the cleaning solution leaked onto the floor outside of the actions of RJS employees. The Court of Appeal referred to prior case precedent holding that when the premises owner or its employee create the dangerous condition, the owner may not assert that he has no notice or knowledge of the dangerous condition.

COMMENT
This case illustrates that the relationship between the premises owner and the person(s) who create the dangerous condition can determine whether knowledge of the dangerous condition will be imputed to the premises owner. In cases where the premises owner or its employees create the dangerous condition, the premises owner may be charged with knowledge of the dangerous condition based on respondeat superior. The determinative issue is whether the premises owner created the dangerous condition or controlled the employee acting in the scope of employment who created the dangerous condition. In typical slip and fall cases, the dangerous condition is created by third parties or conditions outside the direct control of the premises owner, requiring the plaintiff to prove facts establishing actual and/or constructive notice of the dangerous condition to establish liability.

CALIFORNIA DEPARTMENT OF INSURANCE LAUNCHES ENFORCEMENT ACTION AGAINST INSURERS OVER CLAIMS HANDLING PRACTICES

The California Department of Insurance (CDI) announced today it served an Order to Show Cause, a Statement of Charges/Accusation and a Notice of Monetary Penalty against the New Hampshire Insurance Company and its authorized agent for claims processing, York Risk Services Group, Inc. regarding their handling of claims related to the 2008 Sayre Fire in Sylmar, California. New Hampshire Insurance Company is a subsidiary of AIG.

"The Department is committed to ensuring that insurers and administrators processing claims on consumers' behalf adhere to the requirements of the California Insurance Code," said Adam M. Cole, General Counsel at CDI. "We expect insurers and their agents to be thoroughly diligent in handling claims, especially at times of devastation such as the Sayre fire. The allegations in this case reflect a troubling lack of attention to consumer needs by New Hampshire Insurance Company."

The Sayre Fire, which occurred on November 14, 2008, led to the loss of 489 residences, including 480 mobile homes, and the destruction of more than 600 structures overall. During the course of the fire, more than 11,000 acres were burned. In response, both the Mayor of Los Angeles and the Governor of the California issued state of emergency declarations. The 480 mobile homes destroyed in the fire were located in the Oakridge Mobile Home Park, which, before the fire, housed 600 mobile homes. The New Hampshire Insurance Company issued Mobile Homeowners Policies to approximately 370 policyholders whose homes suffered total losses as a result of the firestorm.

In the ensuing months, CDI's Claims Services Bureau received a number of complaints from New Hampshire Insurance Company policyholders. Consequently, CDI investigated the complaints and cited New Hampshire Insurance Company and York Risk Services Group, Inc. for 125 violations of the California Insurance Code, with each violation representing an alleged unfair or deceptive act.

Under the California Insurance Code, any person who engages in any unfair or deceptive act is liable to the state for a civil penalty not to exceed five thousand dollars ($5,000) for each act, or, if the act or practice was willful, a civil penalty not to exceed ten thousand dollars ($10,000) for each act.

The California Insurance Code permits New Hampshire Insurance Company and York Risk Services Group, Inc. the opportunity to respond to the allegations in an administrative hearing.

In 2009, CDI acted on complaints from Sayre Fire survivors relating to disputes over how much extended replacement cost coverage was available under the New Hampshire Insurance Company policy. CDI was able to secure an additional 110 percent or 125 percent of fire insurance coverage for most policyholders. This action resulted in approximately $10.8 million in increased payments to the Sylmar fire victims.

Mobile Home Owners Not a Class in Drainage Lawsuit

CREDIT: Construction Defects Journal Staff

Comparing it to a "complex construction defect action," the California Court of Appeals for Orange County has rejected the claims of a group of mobile home owners that they should be certified as a class in their lawsuit against Huntington Shorecliffs Mobilehome Park. The Appeals court sustained the judgment of the lower court. The court issued a decision in the case of *Criswell v. MMR Family LLC* on January 17, 2012.

The claims made by the group were that the owners and operators of the mobile home park had known of an "ongoing and potentially worsening shallow groundwater condition on the property" and had "exacerbated the problem by changing 'the configuration and drainage related to the hillside that abuts' the park." The homeowners claimed that the class should consist of "any past or current homeowner during the same time frame" who had experienced "the accumulation of mold, fungus, and/or other toxins," "property damage to his/her mobilehome and/or other property resulting from drainage problems, water seepage, water accumulation, moisture build-up, mold, fungus, and/or other toxins," emotional distress related to drainage problems or mold, and finally health problems "resulting from exposure to drainage problems, water seepage, water accumulation, moisture build-up, mold, fungus, and/or other toxins, in or around one's home, lot, or common areas of the park."

The lower court concluded that while the limits of the class were identifiable, they failed to constitute a class in other ways. First, the people affected were small enough in number that they could be brought together. They "are not so numerous that it would be impracticable to bring them all before the Court."

The court noted that while many of the homeowners would have issues in common, they did not find "a well-defined community of interest among the class members." The Appeals Court wrote that "the individual issues affecting each mobile home and homeowner will predominate over the common issue of the presence of standing or pooling water in and around the park." The court noted that each home would be affected differently by water and "the 'accumulation of mold, fungus, and/or other toxins.'"

While the court conceded that there would be common issues, such as the "defendants' alleged concealment of excess moisture conditions and their allegedly negligent roadwork and landscaping," they noted that "these common issues would be swamped by the swarm of individual determinations of property damage, emotional distress, and personal injury." The Appeals Court cited an earlier case that ruled against certification "if a class action 'will splinter into individual trials.'" The court affirmed the judgment of the lower court that they could not proceed as a class.

Real Quotes from Auto Insurance Claims

Credit to Collection © Alan Chapman www.businessballs.com

"The indirect cause of the accident was a little guy in a small car with a big mouth."

"I had been learning to drive with power steering. I turned the wheel to what I thought was enough and found myself in a different direction going the opposite way."

"No one was to blame for the accident but it would never have happened if the other driver had been alert."

"The accident occurred when I was attempting to bring my car out of a skid by steering it into the other vehicle."

Insurance Law Case Alert: Availability of Victim's Uninsured Motorist Coverage Does Not Negate Coverage Under MCS-90 Motor Carrier Endorsement

CREDIT: Haight, Brown & Bonesteel, Los Angeles, CA.

In *Global Hawk Insurance Company v. Century-National Insurance Company* (filed 2/29/12), the Court of Appeal held that uninsured motorist coverage available to an injured driver does not constitute "other insurance" relieving the at-fault driver's insurer from its obligation to pay under a federally-mandated MCS-90 motor carrier endorsement.

Global Hawk insured Shamamyan, doing business as E&Z Trucking. The policy did not list a truck driven by Shamamyan's employee, but attached a federally-mandated MCS-90 motor carrier endorsement, as required for interstate motor carriers. The MCS-90 (like its California intrastate counterpart DMV 67 MCP) covers all vehicles used in the insured's business regardless of whether or not each motor vehicle is specifically described in the policy.

Notwithstanding its MCS-90, Global Hawk denied coverage when Shamamyan's employee caused an accident in the unlisted truck. As a result the other driver, Padilla, made a claim for uninsured motorist benefits to his employer's own insurer, Century-National. Century-National confirmed Global Hawk's denial and then paid Padilla its UM coverage limits.

Global Hawk subsequently filed a complaint seeking to rescind the policy issued to Shamamyan, on the ground that Shamamyan had concealed the use of unlisted trucks. The complaint listed all involved parties to bind them to the rescission and Century-National cross-complained, seeking reimbursement from Global Hawk. Century-National also sued Shamamyan in subrogation to Padilla's damages under *Insurance Code* section 11580.2(g).

Citing federal case law, Global Hawk argued that there is no obligation to reimburse another insurer under an MCS-90 motor carrier endorsement. Global Hawk argued that MCS-90 liability is not triggered when the dispute is between two or more insurance companies about apportioning the cost of compensating the injured plaintiff, but that it only applies when the injured plaintiff directly sues the insurance company, and the underlying insurance policy would not have covered the loss but for the MCS-90 endorsement.

The court disagreed, stating that the availability of uninsured motorist benefits under the victim's own insurance does not constitute "other insurance" relieving the MCS-90 insurer of its obligation to pay. The court said that the MCS-90 is only secondary to other liability insurance covering the at-fault driver. To hold otherwise the court said would be putting the onus of insuring against accidents on the accident victims.

In addition, the court noted that Century-National had also obtained default judgments against Shamamyan and the driver, in uninsured motorist subrogation under *Insurance Code* section 11580.2(g). Thus, Century-National was effectively a direct judgment holder against Global Hawk's insureds, putting it squarely within the coverage provided by the MCS-90 endorsement.

As a result, Global Hawk was obligated to reimburse Century-National for the uninsured motorist benefits it had paid to Padilla when Global Hawk erroneously denied coverage for the loss.

The court's holding means that coverage under an MCS-90 motor carrier endorsement remains primary to a victim's own uninsured motorist coverage, which is not "other insurance" relieving the motor carrier insurer of its obligation to pay judgments against the motor carrier. As a practical matter, the court's decision also stands for the proposition that no cause of action could be stated for post-loss rescission of an MCS-90 motor carrier endorsement based on application fraud in concealing the use of unlisted vehicles.

Global Hawk Insurance Company v. Century-National Insurance Company (A131656 __ Cal.App.4th __, filed 2/29/12

Upcoming Courses:

Earthquake Damage (SEED): Southern California (Pomona)- June 7: Northern California (Pleasanton)- June 14

FCSPR & Siu Certification: San Diego– June 6; Pomona– June 7; Pleasanton– June 14; Burbank– June 21; Fresno– June 22

Please see the registration form for more information.

CAIIA 2012 Educational Events

As an authorized California DOI education provider (CDI# 198351), the CAIIA will be presenting its annual education series including:

1) Seminar on the CA Fair Claim Settlement Practices (**FCSPR**) and Seminar on Special Investigation Unit Regulations (**SIU**).

2) Seminar for the Evaluation of Earthquake Damage (**SEED**). The **SEED** program addresses the training and certification required by CCR, Title 10, Chapter 5, Subchapter 7.5.1, Article 1, Sections 2695.40 through 2695.45. Those regulations set forth the requirements of Insurance Adjuster Training for Evaluating Earthquake Damage. We will be providing **FCSPR** and SIU certification at the **SEED** locations. *(Anyone wishing to come to the SEED locations for only the Reg's recertification program should note the earlier start time)*

"The CAIIA has secured 8 CDI Independent Adjuster CE Hours for the SEED Program and 2 CE Hours for the **FCSPR/SIU** Program!"

Register now for the seminar you wish to attend. Be sure and mark the appropriate location in the box to the right.

ATTENDEE NAME

Name_____

Co._____

Address_____

City _____Zip _____

Phone_____

E-mail Address:_____

Fees (circle one): **FCSPR/SIU** **SEED**

CAIIA Member fee	$40.00	$100.00
Ins. Co. Employee fee	$50.00	$120.00
Non-Member I/A fee	$60.00	$199.00*

Amount Enclosed - $ _____

Credit Card Payment:

Amex___Visa___M/C___Ex. Date:____

Cardholder:_____

Card No:_____

Card Verification Code:_____

Billing Address:_____

_____

Signature:_____

Make checks payable to CAIIA, mail registration and payment to:

CAIIA c/o Tim Waters, AIC
Buxbaum, Loggia &Associates, Inc.
101 E. Commonwealth Ave., Ste A
Fullerton, CA 92832

~Questions? Call Tim Waters @ 714-449-2899~

Schedule for SEED locations:

Registration	7:30 a.m.	to	8:00 a.m.
FCSPR & SIU Seminar	8:00 a.m.	to	10:00 a.m.
SEED Seminar	10:00 a.m.	to	5:00 p.m.

Schedule for Reg's Only locations:

Registration	8:30 a.m.	to	9:00 a.m.
FCSPR & SIU Seminar	9:00 a.m.	to	11:00 a.m.

FCSPR, SIU & SEED SEMINARS

_____**June 7, 2012**
Pomona: Shilo Inn
3101 W Temple Ave
Pomona, CA 91768

_____**June 14, 2012**
Pleasanton: Four Points Sheraton
5115 Hopyard Road
Pleasanton, CA 94588

FCSPR/SIU ONLY SEMINARS:

_____**June 6, 2012**
San Diego: American Technologies
8444 Miralani Dr.
San Diego, CA 92126

_____**June 7, 2012**
Pomona: Shilo Inn
3101 W Temple Ave
Pomona, CA 91768

_____**June 14, 2012**
Pleasanton: Four Points Sheraton
5115 Hopyard Road
Pleasanton, CA 94588

_____**June 21, 2012**
Burbank: Holiday Inn
150 E. Angeleno Ave.
Burbank, CA

_____**June 22, 2012**
Fresno: Ramada Inn
324 E Shaw Ave
Fresno, CA 93710-7690

Please visit www.caiia.com for more information.

**CAIIA agrees to offset any membership dues for Non-CAIIA Independent Adjusting Firms joining the CAIIA within 30 days, up to $80.00 total for each adjuster attending with a cap of $160.00 per firm.*

On the Lighter Side...

Reasons to Keep an Open Mind!!!

"Man will never reach the moon regardless of all future scientific advances."
-Dr. Lee DeForest, "Father of Radio & Grandfather of Television."

"There is no likelihood man can ever tap the power of the atom."
-Robert Millikan, Nobel Prize in Physics, 1923

"Computers in the future may weigh no more than 1.5 tons."
-Popular Mechanics, forecasting the relentless march of science, 1949

"I think there is a world market for maybe five computers."
-Thomas Watson, chairman of IBM, 1943

"I have traveled the length and breadth of this country and talked with the best people, and I can assure you that data processing is a fad that won't last out the year."
-The editor in charge of business books for Prentice Hall, 1957

"640K ought to be enough for anybody."
-Bill Gates, 1981

The *'telephone'* has too many shortcomings to be seriously considered as a means of communication. The device is inherently of no value to us."
-Western Union internal memo, 1876.

"The wireless music box has no imaginable commercial value. Who would pay for a message sent to nobody in particular?"
-David Sarnoff's associates in response to his urgings for investment in the radio in the 1920's.

"I'm just glad it'll be Clark Gable who's falling on his face and not Gary Cooper."
-Gary Cooper on his decision ***not*** to take the leading role in "Gone With The Wind."

"A cookie store is a bad idea. Besides, the market research reports say America likes crispy cookies, not soft and chewy cookies like you make."
-Response to Debbi Field's idea of starting Mrs. Fields' Cookies.

"We don't like their sound, and guitar music is on the way out."
-Decca Recording Co. rejecting the Beatles, 1962.

"Stocks have reached what looks like a permanently high plateau."
-Irving Fisher, Professor of Economics, Yale University, 1929.

"Airplanes are interesting toys but of no military value."
-Marechal Ferdinand Foch, Professor to Strategy, Ecole Superieure de Guerre, France.

"Everything that can be invented has been invented."
-Charles H. Duell, Commissioner, US Office of Patents, 1899

"Louis Pasteur's theory of germs is ridiculous fiction."
-Pierre Pachet, Professor of Physiology at Toulouse, 1872

And last but not least…
"There is no reason anyone would want a computer in their home."
-Ken Olson, President, Chairman and Founder of Digital Equipment Corp., 1977