CAIIA Status Report

MAY 2004

Mid-Term a Tremendous Success

The Mid-term meeting held March 24th and 25th at the Marriott Newport Beach Hotel was one of the best ever.

Seventeen firms were represented along with two honorary members The registration fee of $75.00 covered all beverages Wednesday night with a steak and halibut dinner, continental breakfast the next morning followed by an outstanding lunch. The business session gave glowing reports from all committees, which included a very successful Certification and Re-certification Seminar, updating of our website and a continuing outstanding financial position of the Association.

President-elect Doug Jackson is in charge of the annual conference, which will be held October 13, 14 and 15 at the Disney Grand Californian, Disneyland Resort, Anaheim, CA. Watch for upcoming news on our annual conference, President-elect Doug is working on a family package.

Following, of interest to all member firms was the presentation by Mile Hale, Chairman of the Steering committee, of a developing program through the NAIIA for Errors and Omissions coverage, General Liability coverage and at a later time, Directors and Officers Liability coverage.

Evaluating Slip/Trip and Fall Accidents

Submitted by Garrett Engineers, Inc., Long Beach, CA

Injuries caused by pedestrian falls are a major portion of claims and tort litigation. Evaluating the factors that contribute to a specific accident usually calls for an analysis by a qualified expert. So, what does this expert have to consider and evaluate? Here are some of those factors:

• What was the claimant doing just prior to the accident? In what direction was the claimant going? Was the claimant carrying something or talking to somebody? Was the claimant turning or running? Which foot was initially involved?

• Was the claimant visually or physically limited? How about arthritis or color blindness?

• Exactly where did the accident happen? On what step of the stairway and on which side? On which particular surface, if it varies?

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An Employer Organization of Independent Insurance Adjusters

Inside This Issue

***Status Report* Now Available by E-mail**

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■ PRESIDENT'S MESSAGE

I received an e-mail the other day from a former co-employee who asked, "Are you the 'Safeco' Lee Collins I remember from the mid 70's?" (He had checked out the CAIIA website, and read one of my President's messages.) The answer was yes – I began my career with that carrier in its Arcadia office in May of 1972. In the small world department, I had been talking to another former co-employee just a couple of weeks earlier, and had asked about this same individual!

Over the years, I have never ceased to be amazed at all of the former co-employees I have encountered, who are still in this industry, working for carriers and independent adjusting firms. As an Area Claims Manager in the mid 1970's in Southern California, I was in a position to hire quite a number of people into this business, and on several occasions, at conferences and the like, I have been approached by someone saying, "You hired my into this business." I sometimes wondered if they were going to hit me or thank me!

I know many of your can tell similar stories. This is definitely a business of relationships, and those that have lasted for over 30 years are special indeed. In the company in which I am now a partner – Bragg & Associates – I have been kidded on more than one occasion that any former co-employee applying for a position at our company would probably have an edge with me, in the hiring process! That has probably been true at times.

The CAIIA is an organization based on relationships, business, and personal. Many of the valued business and personal relationships I have developed the past few years have come through the CAIIA. We had an opportunity to renew those relationships, and develop new ones, this past month, at our Mid-term meeting in Newport Beach. I personally got to meet some members who I knew only through previous phone conversations. We had a very good turnout, and enjoyed the location overlooking the Pacific Ocean and Balboa Island.

I want to also thank all of the many CAIIA members who volunteered to spend time in the CAIIA booth at the Claims Conference of California, held in Industry Hills just before tour Mid-term meeting. We passed out many Directories, and were able to advertise this organization to all who stopped by our booth.

Representatives of Claims Professional Liability Insurance Company, or CPLIC, an Errors and Omissions organization initiated by members of the National Association of Insurance Adjusters (NAIIA) made a presentation to CAIIA members at the mid-term. Check out their website, www.cplic.org, for more information. I also understand our webmaster, Peter Vaughn, is going to include a link from our own website, www.caiia.org, to the CPLIC site.

Speaking of relationships, one of those I treasure is with CAIIA Past president (1989-90) and Honorary Member Dean Beyer. Dean underwent major knee surgery on April 15. His wife Gretchen tells us the surgery went well, and Dean should be home from the hospital in a few days. We all wish you well, Dean, and we pray for a full and speedy recovery! We were also happy to see CAIIA Past President (1980-81) and Honorary Member Dick Watkins at the Mid-term, since Dick recently spent time in the hospital as well! If any of you would like to write Dean or Dick, contact me, and I'll get an address for you!

I hope to see you all here next month, same time, same place! To all of you who have known me, in whatever capacity, for the past 32 years, keep those cards, letters and e-mails coming!

LEE COLLINS, ARM
President - CAIIA 2003-2004

Insurance Law Update

Prepared by Sedgwick, Detert, Moran & Arnold, LLP

EVIDENCE IN INSURANCE COVERAGE LITIGATION

In *Jordan v. Allstate Ins. Co.*, 2004 WL 528660 (Cal.App. 2004), a California appellate court considered the types of evidence that may be offered in litigation interpreting insurance policies. The court first held that expert testimony is not generally admissible on the question of the meaning of policy language. The opinion of a linguist or other expert as to the meaning of the policy is irrelevant to the court's task of interpreting the policy as read and understood by a reasonable lay person. The court also noted that statements of claims personnel regarding the meaning or ambiguity of policy terms are not relevant. The interpretation of a policy of insurance is a question of law, not a factual determination.

FIRST PARTY EXAMINATION UNDER OATH

In *Brizuela v. Cal Farm Ins. Co.*, 116 Cal.App.4th 578, 10 Cal.Rptr.3d 661 (2004), the California Court of Appeal considered the requirements of an examination under oath for the second time in as many months. The court found that an insured's compliance with a policy's EUO requirement is a prerequisite to the right to receive benefits under the policy. It is incumbent upon the insured to fulfill the requirement of being examined by offering to submit to such an examination.

The court also noted that an EUO and a pre-trial deposition serve vastly different purposes. An EUO is to obtain information as part of the insurer's investigation of the insured's claim, rather than for litigation. The procedures are also different, for an EUO is not subject to the Code of Civil Procedure, and the insured's counsel has no right to examine the insured. Also, unlike a deposition, in an EUO the insured is obligated to volunteer relevant information.

UM/UIM ARBITRATION

In *Weinberg v. Safeco, Ins. Co.*, 114 Cal.App.4th 1075, 8 Cal.Rptr.3d 224 (2004), Weinberg was rear-ended, resulting in minimal damage to his vehicle. He recovered $3,635 from the underinsured motorist. He then demanded UIM arbitration with his insurer, Safeco. The parties submitted the matter to arbitration but did not inform the arbitrator of the policy limits. The arbitrator awarded damaged to Weinberg of $829,266. The insurer paid the policy limits of $250,000 but declined to pay the remainder of the award. Weinberg sued for bad faith and lost. He then moved to enforce the arbitration award. The trial court granted his petition.

The California Court of Appeal affirmed. The courts held that, within 100 days of service of an arbitration award in excess of the policy limits, the insurer must petition the court to have it vacated or corrected. Otherwise, the award may be entered as a judgment and enforced against the insurer for the full amount. In so holding, the court agreed with Safeco that policy limits are a coverage matter not subject to arbitration, but the court felt constrained by the statutory time limits to affirm the award of damages.

AUTOMOBILE INSURANCE LIMITS

In *Mercury Ins. Co. v. Ayala*, 2004 WL 516580 (Cal.App. 2004), a California appellate court sought to determine whether UM limits were $15,000 per person or $30,000 per accident because of the husband's loss of consortium claim. The court found that the 'per person' limits were applicable. A cause of action for loss of consortium does not arise out of bodily injury under general liability policies. It is simply a consequence of the bodily injury to the injured spouse. The court also reiterated longstanding California law that "bodily injury" is limited to physical injury to the body and does not include non-physical, emotional or mental harm.

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Weekly Law Resume

Prepared by Low, Ball & Lynch, Attorneys at Law

Evidence – OSHA Violations

Ronald Michael Gradle v. Doppelmayr USA, Inc., Court of Appeal, Third District, (February 27, 2004), The issue of whether evidence of Cal OSHA standards are admissible to establish negligence per se has received different interpretations by the Courts of Appeal. This case addresses that issue.

Ronald Gradle, an employee of Mammoth Mountain Ski Resort, was injured in lift equipment while working on it and lost a leg. He and his wife sued Doppelmayr USA, Inc., the company that designed and provided the equipment for a retrofit of the ski lift. At trial, the jury returned a verdict for Doppelmayr. The Gradles appealed, contending that the trial court erroneously excluded evidence of the California Occupational Safety and Health Act rules and regulations to establish negligence per se.

The Court of Appeal reversed the trial court. The Court noted that the issue of the admissibility of such regulations is currently pending before the California Supreme Court. The court noted that amendments to Labor Code section 6304.5 allowed the admission of such evidence. Prior to 1999, the section limited application of Cal OSHA standards and safety orders to actions between an employee and his employer. As a result, court opinions consistently held that the regulations were not admissible in an employee's action against a third person.

When the section was amended in 1999, the amendment stated that Cal OSHA standards were applicable to proceedings against employers for the purpose of enforcing employee safety. However, the amendment to the section changed the wording from "shall only be applicable" to "are applicable". The Court felt this change in language was significant because it lifted the restriction previously stated and no longer required the exclusion of such standards in third party cases. In the second paragraph of the amendment, there was language limiting the admissibility of evidence of the issuance of or the failure to issue a citation to personal injury actions between an employee and his employer. The Court suggested that other evidence of Cal OSHA standards would be admissible in a broader array of cases. The next sentence indicated that the sections of the Evidence code relating to judicial notice and presumptions of negligence applied to Cal OSHA standards, as do any other statute, ordinance or regulation. The court indicated this strongly supported the admission of Cal OSHA standards in any case where the requirements of those Evidence Code sections were met. In this case, the Gradles sought to admit these

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Evaluating Slip/Trip Accidents

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• What were the environmental factors? Was the walkway wet? Was there some other contaminant? What was the lighting like (dark, bright, too bright)?

• Are there any discontinuities, or changes in elevation of the walkway surface? Are they significant or trivial? Do they meet the appropriate codes and standards?

• If it's a stairway fall, what is the stairway geometry. What were the code requirements when the stairway was built? Do the handrails meet that code? If a ramp in involved, does it meet that code?

• Are handicapped access requirements applicable?

• Is the claimant's footwear a factor? Did the footwear fit securely? Are they slippery on the walkway surface? How slippery? Are they new or old or worn?

• How slippery was the walkway surface? What is the appropriate method to measure the slipperiness of the walkway?

All of these factors must be considered by an expert qualified to evaluate human factors and bio-mechanics, environmental conditions, and code requirements. He must be capable of properly measuring the properties of the accident site, including physical measurements, light levels, and slipperiness.

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standards to prove negligence per se.

The court therefore concluded that the language of the amended section 6304.5, examined both provision by provision and as a whole, led to the conclusion the Cal OSHA standards were admissible in actions against third parties other than the State of California. The Court, in examining the legislative history, indicated that it supported an interpretation that Cal OSHA regulations were admissible in third party lawsuits, except where used to impose liability on the State for failure to comply with a mandatory duty.

The court of Appeal therefore concluded that the trial court erred in excluding evidence of Cal OSHA standards. The Court further concluded that a miscarriage of justice had occurred and that it was reasonably probable that a more favorable result would have been reached in the absence of this error. The Court therefore reversed the judgment.

COMMENT

The California Supreme Court has this issue before it in *Elsner v. Uveges*, where review was granted on April 30, 2003. We would expect decision within the next year on this issue.

Bad Faith – Anti-SLAPP Motion

Richard Slaney v. Ranger Insurance Company, Court of Apperal, Second District, (January 28, 2004). Normally, litigation tactics do not subject one to liability. However, this case shows that an insurer may not only be liable for bad faith for wrongfully denying a claim, but also possibly malicious prosecution in the way in which it defends the bad faith claim.

Ranger Insurance Company denied a claim by its insureds for damages to aircraft they owned. Slaney was retained by the insureds to prepare a repair estimate. Ranger denied the claim, asserting Slaney had prepared a fraudulently excessive claim. The insureds sued Ranger for bad faith. Ranger cross-complained against its insureds and Slaney alleging fraud. Slaney unsuccessfully moved for summary judgment, but renewed the motion after discovery and was dismissed. After a jury trial, the insureds obtained an award in excess of $1 million for bad faith and punitive damages of $7 million.

Slaney then sued Ranger and its defense firm for malicious prosecution. Ranger moved to dismiss the case under the SLAPP statute. This statute allows for the dismissal of actions based on constitutionally protected activities, such as speech and the right to petition. The trial court concluded that the motion in the underlying action favorably terminated the action.

The probable cause element turned on whether any reasonable attorney would have thought the claim tenable. In support of the motion, Ranger and its attorneys showed that they prevailed on the original summary judgment motion. However, no evidence was offered of an independent investigation to determine whether reasonable cause existed to support the cross-complaint for fraud. The Court stated the original denial of the summary judgment motion in the underlying action did not necessarily establish probable cause. However, the subsequent grant of summary judgment did show that Ranger was unable to support its claim. Further, the fact that the prior action found Ranger denied coverage in bad faith and with malice supported the claim that the cross-complaint had been filed with malice. It was thus reasonable to infer that Ranger's theory of fraud between Slaney and the insureds was itself fraudulent and prosecuted in bad faith. This, along with the grant of summary judgment, was sufficient to support inferences of lack of probable cause and malice. Thus, it was concluded the trial court did not err in denying the SLAPP motion.

The denial of the motion was affirmed

COMMENT

This case shows the dangers of losing a bad faith case in which the insurer also filed a cross-complaint against the insured for fraud. Not only did it lose the bad faith case, but it was potentially liable for malicious prosecution.

Insurance Law Update

Prepared by Sedgwick, Detert, Moran & Arnold, LLP

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FIRST PARTY – WET AND DRY ROT

In *Jordan v. Allstate Ins. Co.*, 2004 WL 528662 (Cal.App. 2004), the insured claimed that there was a 'collapse' at her house due to a fungus. The California Court of Appeal found an ambiguity in the policy. The policy excluded wet or dry rot and collapse. There was an exception to the exclusion for collapse, in that the policy provided coverage for the entire collapse of the building if there was a direct physical loss including wet or dry rot. The court concluded that wet or dry rot would include the fungus in question inasmuch as a lay person would describe decay caused by fungus as dry rot.

Letter to the Editor

Sterrett;
I had to tell you how much I enjoyed this latest *Status Report*. Especially the cases cited and the airline jokes. Also to commend the way it is sent via e-mail. The large print on screen certainly helps us old dogs. Good Job!
Regards,
Don Ferguson,
Hunt & Ferguson – Salinas, CA

To view photos from our tremendously successful Mid-term Meeting visit our web-site at www.caiia.org

Things Found Only in America

1. *Only in America* . . . can a pizza get to your house faster than an ambulance.
2. *Only in America* . . . are there handicap-parking places in front of a skating rink.
3. *Only in America* . . . do drugstores make the sick walk all the way to the back of the store to get their prescriptions while healthy people can buy cigarettes at the front.
4. *Only in America* . . . do people order double cheeseburgers, large fries and a diet coke.
5. *Only in America* . . . do banks leave both doors to the vault open and then chain the pens to the counters.
6. *Only in America* . . . do we leave cars worth thousands of dollars in the driveway and put our useless junk in the garage.
7. *Only in America* . . . do we use answering machines to screen calls and then have call waiting so we won't miss a call from someone we didn't want to talk to in the first place.
8. *Only in America* . . . do we buy hot dogs in packages of ten and buns in packages of eight.
9. *Only in America* . . . do we use the work 'politics' to describe the process so well; 'poli' in Latin meaning 'many' and 'tics' meaning 'bloodsucking creatures'.
10. *Only in America* . . . do they have drive-up ATM machines with Braille lettering.

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

California Undercover Sting Operation Nabs Dozens for Conspiracy to Commit Fraud in Tri-County Region

April 2, 2004

A multi-agency enforcement unit conducted a sweep Thursday in California that has to date resulted in the arrests of 27 suspects following a year-long undercover investigation into auto body insurance fraud. Warrants were issued by the District Attorney's offices in Sacramento, San Joaquin and Yolo counties for the arrests of 43 people suspected of conspiring to commit insurance fraud, with 28 served in Sacramento County, 13 in San Joaquin County and two in Yolo County.

"Operation FX" was conducted by the California Department of Insurance (CDI) Fraud Division and the California Highway Patrol (CHP) with the assistance of the National Insurance Crime Bureau (NICU). Operation FX investigators approached auto body shop personnel in Sacramento, San Joaquin and Yolo Counties, posing as insurance policyholders asking for fraudulent documentation to support fraudulent insurance claims.

Investigators went to approximately 460 auto body shops in the tri-county area, making contact at 278 businesses. Owners and/or employees of 39 auto body shops supplied approximately $137,350 in fraudulent repair estimates to the undercover officers.

"These scams are more than crimes," said Insurance Commissioner John Garamendi. "This criminal activity drives up the cost for everyone who pays auto insurance. Today's successful operation not only removed individuals who wanted to cheat the system, but also sent a clear signal to would-be criminals – we will catch you and you will be prosecuted."

CDI, CHP and NICB received assistance from the following companies and agencies:
Progressive Insurance; USAA Insurance; State Farm Insurance; Sacramento County Auto Theft Task Force; Regional Auto Theft Task Force, Santa Clara County; District Attorney's offices in Sacramento, San Joaquin and Yolo Counties; Lodi Police Department and Sacramento Sheriff's Department.

Operation FX is just one in a continuing series of California auto body sting operations, which commenced in Santa Clara County with Operation Fast and Fraudulent in 2001. Similar efforts included one in San Francisco in 2003 (Operation Body Count) and one in Monterey County this past January (Operation MADCAT). In total, 399 sting operation occurred with 88 auto body shop owners and/or employees suspected of committing insurance fraud.

Thursday's arrestees will be booked into the Sacramento, San Joaquin and Yolo County jails, and the respective district attorney's offices will prosecute the cases. In general, bail will range from $5,000 to $10,000 based on the specific charges filed in the respective jurisdictions. Also generally speaking, insurance fraud (California Penal Code § 550) is punishable by up to five years in prison and/or fines not to exceed $50,000. In addition, CDI Fraud Division investigators made inquiries into the status of the businesses' workers' compensation coverage when they found persons willing to be involved in fraudulent auto body schemes.

Therefore, enforcement agents with the state Department of Industrial Relations accompanied the arrest sweep and issued nine citations to date for failure to have workers' comp insurance that could result in $26,000 in fines. Willfully failing to carry workers' comp coverage is a violation of California Labor code § 3700.5 and carries a $1,000 fine.

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