CAIIA Status Report

MAY 2009

RWB Legal Reflections

Submitted by Rudolff, Wood & Barrows, LLP, Emeryville, CA

Brehm v. 21st Century Ins. Co., Cal. App.4th 1225 (2008)

In *Brehm v. 21st Century Insurance Co.*, the Court of appeal reversed a demurrer to a bad faith action. The appellate court held that the trial court misapplied the "genuine dispute" rule, which holds that where reasonable minds could have differed, an insurer's coverage position, even if ultimately deemed to have been wrong, does not constitute bad faith.

The parties disputed the extent of the plaintiff's injuries and thus the amount to which he was entitled under the policy. The matter was scheduled for arbitration, but prior to that date the plaintiff made a settlement demand for $85,000. 21st Century rejected this offer and countered with $5,000 based on an evaluation conducted by its medical expert, who concluded there was no objective evidence of an injury and that surgery was unnecessary. In response, the plaintiff submitted the opinion of an independent medical expert, who concluded that the plaintiff did indeed suffer objective injuries and it was "more likely than not" surgery would be required. Further negotiations were unsuccessful, and at arbitration the plaintiff was awarded $90,000. the insured then sued 21st Century for bad faith.

The insurer demurred arguing that its coverage position was supported by an expert medical opinion, and thus not made in bad faith under the "genuine dispute" doctrine. The trial court granted 21st Centruy's demurrer without leave to amend. The appellate court reversed the trail court's holding. The court held that the "genuine dispute" doctrine could not be invoked to protect an insurer's denial or delay in payments of benefits unless the insurer's position was both reasonable and reached in good faith. Further, the court stated an expert's testimony will not automatically insulate an insurer from a bad faith claim based on a biased investigation. The court found that the plaintiff's allegations that the evaluation performed

continued on page 3

The Status Report Retracts

As many of our readers know, the back page of the Status Report is reserved to give our readers a little laugh or thought for the month. In the March, 2009, issue we printed an article from the internet titled the "Stella Awards." Dave Dolnick of the Brady Companies is a sharp eyed reader. He checked with www.snopes.com regarding the list of "court cases." Dave advised that none of the cases are actual or true cases. We at the Status Report apologize for misleading our readers into thinking that those cases are real. Notwithstanding our apology to Dave and all of our readers, did you not get laugh out of them anyway? Dave, please be sure to keep us on the straight and narrow in the future. The editor needs all the help he can get.

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Inside This Issue

RWB Legal Reflections 1
Status Report Retraction 1
President's Message 2
Isurance Coverage & Litigation ... 5
Weekly Law Resume 6
News of members 6
2009 Educations Events 7
Funny 8

Status Report Now Available by E-mail

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PRESIDENT'S MESSAGE

Mid-Term Meeting

I think San Francisco is a wonderful city for a party. The food and entertainment can not be beat. This may be one of the reasons that we had a record turnout for our mid-term meeting April 16 and 17. We started our event out with cocktails in a suite on the 23rd floor, with a magnificent view of the Bay, Coit Tower, and St. Peter's and Paul's Cathedral. It was a small room for the group, and the sound of thirty people having a good time could not be missed. From the party, it was off to a local Italian bistro for fine food where I was personally serenaded by Shelley Barrett and her lovely back up singers. While we all had enjoyed ourselves, Don Ferguson, who is somewhere in his 80s, and still working claims, managed to "party hardy" late into the evening with no apparent ill effects. That man is my role model for aging.

Because I anticipated a full agenda, I moved the next morning's meeting start time up a half hour. We had several important issues to discuss Our primary mission this year is education. As you know, we independent adjusters are now required to complete 24 units of continuing education with each two year licensing cycle. Because of the timing of the effective date of this edict, the first cycle is only about 14 months, not two years.

Helene DalCin, our education chairperson, has rammed through the DOI 16 units of approved continuing education. I understand that the DOI is not necessarily user friendly, so this accomplishment is evidence of Helene's dexterity in dancing the bureaucratic waltz. Everything we now offer in coursework has now been approved. She is now turning her attention to partnering with other approved presenters to expand our offering. Stay tuned for the latest developments. We are supplying what independent adjusters need to stay out of trouble with the regulators.

During the October, 2008 convention, it appeared that we had a deficit budget. We have now made several adjustments, and we expect a balanced budget with a likely reserve, and with no change in dues. We have stopped sending spending money to our lobbyist, and we increased the fee for the mid-term. Thanks to Jeff Caulkins, we have about $7,000 more than recent years in sponsorship for our directory, and

continued on page 3

RWB Legal Reflections

Submitted by Rudolff, Wood & Barrows, LLP, Emeryville, CA

continued from page 1

by 21st Century's expert was used for the sole purpose of providing 21st Century with a "genuine dispute" defense, if true, were sufficient to support a cause of action for bad faith.

City of Hollister v. Monterey Insurance Company, 165 Cal.App.4th 455 (2008)

In *City of Hollister v. Monterey Insurance Company*, the appellate court affirmed a declaratory judgment allowing an insured additional time to contract for the replacement of a building and make a replacement cost claim.

Monterey Insurance company's ("MIC's") policy allowed the City of Hollister to recover "the cost to replace [a] damaged building" with a "functionally equivalent" building, but only if the City "contract[ed] for replacement" within 180 days of the loss. The City suffered the total loss of one if its building in a fire and gave MIC notice of the loss, but the City did not contract for the replacement of the building within 180 days.

The trial court found that MIC's conduct in handling the claim had "prevented [the City] from entering into a contract". On that basis, the trial court found MIC temporarily "estopped from enforcing or otherwise relying on the 180-day provision". The insurer appealed.

The Court of Appeal affirmed. The court criticized MIC for not "communicat[ing] constructively" with the City regarding the benefits available under the policy and the time limits for perfecting a claim for those benefits. As long as MIC refused to say whether it would honor a claim for functional replacement benefits, the City could not comply with the condition.

The court did not, however, wholly relieve the City of the conditions to the replacement cost coverage. The court affirmed the declaratory judgment, thus requiring the City to comply with the contracting condition when the litigation was over.

Qualcomm, Inc. v. Certain Underwriters at Lloyd's, London, 161 Cal.App.4th 184 (2008)

continued on page 4

PRESIDENT'S MESSAGE

continued from page 2

we are putting out the directory with cost cutting measures that add up to something over $1,000 saved. Sterrett Harper plans to save money on layout of the Status Report by doing it in-house, and will save more by mailing the directory via bulk mail instead of first class.

Sam Hooper has negotiated a big gun guest speaker for our convention in October, 2009, namely the insurance commissioner. He expects to leverage this into larger attendance numbers, more sponsorship, and a balance budget for the convention, not including the surplus that we have learned to expect from our golf tournament.

We had a lively discussion about possible inclusion of public adjusters at our continuing education events, but still managed to finish the program at noon, just in time for the finest salmon I have had in a while. Meanwhile, the Adjustamates enjoyed the wonderful weather shopping their way through Chinatown and enjoying a tasty lunch at the Empress of China.

The afternoon was spent earning 2 DOI approved continuing education credits while learning how to work in good faith. That evening some of the members finished the convention by attending dinner, and then Beach Blanket Babylon, a live musical comedy. The dinner was a great experience, but the show was high octane. I thought the music was inspired. We all left feeling more energy than we walked in with.

In summary, it was great to connect with all of our attending members. I feel sad for those of you who missed it. You missed both a good time and an educational experience. See you at the October convention for sure!

PETE VAUGHAN

President - CAIIA 2008-2009

RWB Legal Reflections

Submitted by Rudolff, Wood & Barrows, LLP, Emeryville, CA

continued from page 1

The insured, Qualcomm, sought a judicial declaration that Certain Underwriters, the insured's excess carrier, was required to indemnify it for unreimbursed litigation costs and defense fees. The court found that Certain Underwriters had no duty to reimburse the insured where the primary insurer had not paid the full amount of its limits.

The primary carrier had paid $16 million of its $20 million in limits to Qualcomm and in exchange had received a complete release. The excess policy, however, stated that Certain Underwriters' obligations to Qualcomm were not triggered until the primary insurer had "paid" or been "held liable to pay" the "full amount" of the underlying limits. The trial court found the language of this condition precedent to be plain and unambiguous, and sustained Certain Underwriters' demurrer without leave to amend, and the appellate court affirmed. The appellate court also rejected Qualcomm's argument that as a matter of public policy, the court should compel Certain Underwriters to pay in order to further the goals of promoting settlement and risk-spreading between carriers. Social and economic consideration, the court held, "have nothing whatsoever to do with our interpretation of the unambiguous contractual terms".

Compulink Management Center, Inc. v. St. Paul Fire & Marine Ins. Co., 169 Cal.App.4th 289 (2008)

In *Compulink Management Center v. St. Paul*, the Court of Appeal held that Civil Code section 2860, which codifies an insured's right to independent counsel in certain circumstances, (referred to as *Cumis* counsel), mandates arbitration for any and all *Cumis* fee disputes when an action is filed in California state court, unless other procedures are provided for in the insurance policy at issue.

The insured, Compulink, tendered a cross complaint against it to its insurer, St. Paul. St. Paul accepted the defense under a reservation of rights, and permitted Compulink to select *Cumis* counsel. The case eventually settled, and thereafter, Compulink sued St. Paul in state court for breach of contract and bad faith as well as for underpayment and delayed payment of *Cumis* counsel fees. St. Paul moved to compel arbitration of the *Cumis* issue under section 2860. the Court of Appeal found the mandatory arbitration language of section 2860 clear and held that where an action is filed in state court, section 2860 mandates arbitration of "any and all *Cumis* fee disputes". The appellate court declined to follow *Gray Cary Ware & Freidenrich v. Vigilant Ins. Co.*, 114 Cal.App.4th 1186 (2004), stating that the *Gray Cary* decision that fee disputes intermingled with other claims removed that action beyond the scope of section 2860's arbitration requirement was based on a misunderstanding of prior cases.

Bruyn v. The Superior Court of Los Angeles County, 158 Cal.App.4th 1213 (2008)

In *Bruyn v. The Superior Court of Los Angeles County*, the court held that even though "sudden and accidental" water damage – a covered peril – was the predominant cause of mold, a policy's "absolute" mold exclusion was enforceable because the exclusion clearly communicated that mold "however caused" was never covered.

The dispute arose out of water damage sustained by the plaintiff's home as a result of various water leaks. In addition, the plaintiff discovered mold. Although the policy covered losses caused by a "sudden and accidental discharge" of water from a plumbing system or household appliance, the policy also included an "absolute" exclusion for mold.

The plaintiff sued Farmers based upon Farmers' denial of coverage for the mold-related damage resulting from the water leaks. The plaintiff alleged that the "absolute" mold exclusion was invalid pursuant to California's predominant cause doctrine as set forth in Insurance Code section 530.

The appellate court held that the "absolute" mold exclusion was valid. The court stated that the purpose of predominant cause doctrine is to bring about "a fair result within the reasonable expectations of both the insured and the insurer". The court also stated that as long as "[a] reasonable insured would readily understand from the policy language which perils are not covered and which are not", an insurer may limit coverage to some, but not all, manifestations of a given peril. The court found that the policy "plainly and precisely communicate[d] an excluded risk" to a reasonable insured.

Failure to Disclose Gives Insurer Basis to Rescind

In an unpublished decision, the California Court of Appeal recently affirmed an EPLI carrier's right to rescind consecutive insurance policies where the insured failed to disclose previous employment related claims when specifically asked on the underlying application for insurance.

In *Admiral Insurance Co. v. Debber*, et al, defendant Data Control Corporation had completed its first EPLI application for insurance on behalf of itself and others in 2002. Based on the information provided, a policy was issued by Admiral and then later renewed. Both the original applications asked the corporation whether any claims had been made against it within the previous five years. In response to these questions, Data Control responded "no".

In May of 2004, an employment related lawsuit was filed against Date Control and others – which was then tendered to Admiral for indemnity and defense. The lawsuit alleged that Data Control had defended at least three other employment related lawsuits since 1996 – and that the allegations in those actions were similar to the ones at hand.

In response to the tender, Admiral accepted the defense subject to a reservation o rights. Subsequently, it sought rescission of the policies on the grounds that the information provided by the insured in the underlying applications for insurance had been false. Date Control opposed the motion, arguing that the information omitted was not "material" to the EPLI policies.

The Court found Date Control had failed to disclose the prior lawsuits on the applications and that the original policy would not have been issued by Admiral had it been made aware of the previous employment claims. Therefore, the questions on the applications were material and the insured's failure to disclose the previous suits merited rescission of the insurance contract.

Court May Properly Refuse to Give Bad Faith Jury Instructions

In *McCoy v. Progressive West Ins. Co.*, the Appellate Court upheld a jury finding of bad faith and punitive damages against an auto insurer that denied the insured's claim of car theft and vandalism damage to the insured vehicle.

In this case, plaintiff McCoy alleged that his car had been stolen in Las Vegas, then burned and destroyed. He alleged that the theft was a covered loss under his policy, and that he had promptly reported the loss to his insurer, Progressive West. McCoy claimed that Progressive West breached the insurance contract and violated the covenant of good faith by, among other things, failing to promptly, fairly and fully investigate the claim; and by withholding policy benefits unreasonably and without proper cause. In its defense, Progressive West argued that its investigation was reasonable and within the standards for good claims handling.

In the first phase of the bifurcated trial, the jury returned a unanimous verdict in favor of McCoy on all the special verdict questions, including whether Progressive West had acted in bad faith and whether it acted with malice or oppression. In the second phase, which involved the sole issue of the amount of punitive damages, nine jurors agreed to an award of $100,000.

Progressive West filed a motion for a new trial and for judgment not withstanding the verdict, which the Trial Court denied. In reaching its decision, the Trial Court reasoned that ample evidence supported the jury's verdicts that "in the colloquial sense . . . McCoy got a raw deal" and that, under clear and convincing evidence standard, the award of punitive damages was justified. In its Appeal, Progressive West contended that the Trial Court committed prejudicial error by refusing to give its proposed jury instructions of the "genuine dispute" doctrine. However, the Court of Appeal found the Trial Court was not in error, and upheld the Trial Court's ruling which found that since there was no evidence that the insurer engaged in a genuine dispute over the validity of the claim, no special jury instruction on the "genuine dispute" defense was proper. The Court ruled such an instruction is subsumed by the standard CACI 2331 and 2332 bad faith instructions where there is no evidence of a "genuine dispute". The Court held a "genuine dispute" exists only where the insurer's position is maintained in good faith and on reasonable grounds – which did not exist here.

Weekly Law Resume

Prepared by Low, Ball & Lynch, Attorneys at Law, San Francisco, CA

Civil Procedure – Settlement Conference Sanctions

Vidrio v. Hernandez Court of Appeal, Second District (April 13, 2009)

The power of the trial court to impose sanctions for conduct at a settlement conference has been debated for years. This case concerned the imposition of sanctions on an insurer for allegedly failing to negotiate in good faith at a settlement conference.

Miguel Vidrio and Patricia Salinas sued Maria Hernandez for injuries sustained in a rear-end accident. Hernandez denied liability and contended the plaintiffs were not injured in the accident. Prior to a mandatory settlement conference, Vidrio and Salinas demanded $15,000 each pursuant to a 998 offer. Hernandez served a 998 offer of $1,000 each on plaintiffs.

At the mandatory settlement conference, Mercury Insurance Company and the attorney representing Hernandez refused to increase her offer above $1,000 each. The settlement conference judge issued an order to show cause why sanctions should not be opposed. At a hearing, the Court imposed sanctions of $1,500 payable to the Court and $357.50 payable to plaintiff's counsel against Mercury Insurance Company only for allegedly negotiating in bad faith at the settlement conference. Mercury filed an appeal.

The Court of Appeal reversed. The Court reviewed the rules concerning settlement conferences. Among the various rules is that a defendant must submit a good-faith offer of settlement. It further requires persons whose consent is necessary to effect a settlement to be present. This includes an insurer for a defendant. Sanctions of $1,500 are authorized by court rules for the violation of any lawful court order. However, the section authorizing sanctions is limited to a witness, a party, a party's attorney or both.

With respect to settlement conferences, court rules require the attendance of a representative from an insurer. The Court stated Mercury correctly asserted there was no statutory basis for the imposition of sanctions against a non-party insurer for its purported failure to participate in good faith at a mandatory settlement conference. Mercury was not a party to the case. The sanctions awarded exceeded the statutory limit of $1,500. The settlement conference rules were directed to parties and their attorney.

Thus, there was no basis for the sanctions. The only possible basis was Rule of Court 2.30 which require the attendance of insurers at settlement conferences. While sanctions are permissible for violation of that Rule, the Court stated it only requires an insurer to be present at the settlement conference. It does not require good-faith negotiation by the participants at the settlement conference. Thus, sanctions were not warranted.

The alleged failure of defense counsel and Mercury to increase the settlement offer or otherwise meaningfully participate in the settlement negotiations violated no rule of court and was not a basis for an award of sanctions. Mercury and its lawyer had filed a settlement conference statement, had attended the conference, and had participated in it. Their failure to increase their offer was not a basis for an award of sanctions. The order imposing sanctions was reversed.

COMMENT

While the Court expressed frustration with the lack of authority for the imposition of sanctions, it recognized there was no basis for the award. It remains to be seen whether any statutory authority will be enacted in light of the rather nebulous standard for determining what is good-faith negotiation.

NEWS OF MEMBERS

Carl Warren and Company is celebrating 65 years in business this year. The Status Report sends its regards to Carl Warren and Company and hope that they continue to be a valued member of the CAIIA.

CAIIA 2009 Educational Events

As an authorized California DOI education provider (CDI# 198351), the CAIIA will be presenting its annual Fair Claim Settlement Practices Regulations (**FCSPR**) seminars and, at two of the locations, we will also be offering SEED (Seminar for the Evaluation of Earthquake Damage) program seminars. The SEED program addresses the training and certification required by CCR, Title 10, Chapter 5, Subchapter 7.5.1, Article 1, Section 2695.40 through Section 2695.45. Those regulations set forth the requirements of Insurance Adjuster Training for Evaluating Earthquake Damage. We will also be providing SIU Regulations certification at the SEED and **FCSPR** locations.

At locations in Fresno (6/5/09), Glendale (6/9/09), and San Diego (6/9/09), we will be offering only the FCSPR and SIU seminars.

In Pomona (6/16/09) and Pleasanton (6/23/09) we will be offering both the **FCSPR** and SIU seminars plus the SEED program seminar.

THE CAIIA has secured 8 CA 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.

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 - $_____

Payment must accompany registration.

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 Peter Schifrin
Schifrin, Gagnon & Dickey, Inc.
9255 Corbin Avenue, Suite 200
Northridge, CA 91324

Questions? Call Peter Schifrin @ (818) 734-0215

Schedule for all 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.

FCSPR, SIU & SEED SEMINARS

_____**June 16, 2009**
Pomona: Shilo Inn
3101 Temple Avenue
Pomona

_____**June 23, 2009**
Pleasanton: Four Points Hotel
5115 Hopyard Road
Pomona

FCSPR/SIU ONLY SEMINARS:

_____**June 5, 2009**
Fresno: Ramada Inn
324 E. Shaw Ave.
Fresno

_____**June 9, 2009**
Glendale: Carl Warren
500 N. Central, 4th Fl.
Glendale

_____**June 9, 2009**
San Diego: Belfor
11545 Sorrento Valley Rd.
San Diego

Please visit www.caiia.com for more nformation.

**CAIIA will agree 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.*

Hello Operator

Actual call center conversations

Customer: I've been calling 700-1000 for two days and can't get through. Can you help me?
Operator: Where did you get that number, sir?
Customer: It's on the door of your business.
Operator: Sir, those are the hours that we are open.

Samsung Electronics
Caller: Can you give me the telephone number for Jack?
Operator: I'm sorry, sir, I don't understand who you are talking about.
Caller: On page 1, section 5, of the user guide it clearly states that I need to unplug the fax machine from the AC wall unit and Telephone Jack before cleaning. Now, can you give me the number for Jack?
Operator: I think it means the telephone plug on the wall.

RAC Motoring Services
Caller: Does your European Breakdown Policy cover me when I am traveling in Australia?
Operator: Does the product name give you a clue?

Caller (inquiring about legal requirements while traveling in Europe): If I register my car in France, and then take it to England, do I have to change the steering wheel to the other side of the car?

Directory Inquiries
Caller: I'd like the number of the Argo Fish Bar please.
Operator: I'm sorry, there's no listing. Are you sure that the spelling is correct?
Caller: Well, it used to be called the Bargo Fish Bar but the 'B' fell off.

Then there was the caller who asked for a knitwear company in Woven.
Operator: Woven? Are you sure?
Caller: Yes. That's what it says on the label – "Woven in Scotland".

On another occasion, a man making heavy breathing sounds from a phone booth told a worried operator: "I haven't got a pen, so I'm steaming up the window to write the number on."

Tech Support: I need you to right-click on the Open Desktop.
Customer: Okay.
Tech Support: Did you get a pop-up menu?
Customer: No.
Tech Support: Okay. Right-click again. Do you see a pop-up menu?
Customer: No.
Tech Support: Okay, sir. Can you tell me what you have done up until this point?
Customer: Sure. You told me to write 'click' and I wrote 'click'.

Tech Support: Okay. At the bottom left hand side of your screen, can you see the 'OK' button displayed?
Customer: Wow! How can you see my screen from there?

Caller: I deleted a file from my PC last week and I just realized that I need it. If I turn my system clock back two weeks will I get my file back again?