CAIIA Status Report

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May 2015

Fire Insurance Exclusion for Unoccupied Properties

Credit to Low, Ball & Lynch, San Francisco, CA

California's standard form for fire insurance policies (Insurance Code section 2071) requires coverage for all loss by fire but allows exclusion for liability for a loss occurring while a covered property is vacant or unoccupied beyond a period of 60 days. This case considered whether a fire caused by a "warming fire" started by a transient was excluded from coverage under a vandalism exclusion.

Plaintiff Hung Van Ong ("Ong") bought a residential rental property from his brother, Eugene Ong, in 2007. The last tenants moved out in February of 2010, and gas and electric utilities were turned off. On December 20, 2011, a fire broke out in the building causing significant damage. Eugene submitted a claim to plaintiff's carrier, Fire Insurance Exchange ("FIE"). FIE hired an experienced fire investigator, who determined that there were signs of possible habitation by a transient in the property, including the presence of firewood in a room adjacent to where the fire had been burning, and a mattress next to a large hole in the floor where there had been a fire. The investigator concluded that this may have been a warming fire started by a transient that got out of control. He met on site with the adjuster on the claim, whose file notes reflected "Multiple points of origin. Bed in kitchen. Unintentional incendiary. Likely transient in house and warming fire got out of hand. Firewood found inside house."

Two months later, FIE sent a letter to Ong disclaiming coverage. FIE noted that it appeared that the fire had been started by a trespasser intentionally setting a fire on the kitchen floor. Coverage was denied based on an exclusion for "*Vandalism or Malicious Mischief, breakage of glass and safety glazing materials if the dwelling has been vacant for more than 30 consecutive days just before the loss.*" Vandalism was not defined in the policy. Ong filed suit for breach of contract and bad faith. FIE filed a motion for summary adjudication based on the vacancy exclusion, citing to cases where courts in criminal arson cases had found intentionally setting a fire was "malice in law." Ong appealed, arguing that the necessary intent for vandalism or mischief had not been shown.

The Court of Appeal reversed. First, the Court noted that a term is not ambiguous merely because the policies do not define it. Rather, it is only ambiguous depending upon the plain meaning of the word. Here, the Court reviewed the dictionary definition of "Vandalism," which was "willful or malicious destruction or defacement of public or private property." "Malicious" in turn was defined as "having or showing a desire to cause harm to someone." Using those definitions, the Court held that vandalism "in the ordinary and popular sense" meant the willful destruction of property or the destruction of property with a "desire to cause harm."

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California Association of Independent Insurance Adjusters, Inc.

President's Message

Kim Hickey
CAIIA President

Spring has arrived and our winter is over. What winter you ask? With the limited rain, we should all be careful on our water usage. At our house, we stopped watering the lawn and absent the rain, it turned brown pretty quickly. So, it has been removed, a walking path is drawn, and we are going with a draught resistant landscape. I am looking forward to the final product!

By the time this Status Report is published, our 2015 Spring meeting will over. I will report on the event next month. Now it is time to plan the Fall 2015 Annual CAIIA meeting. The event will be held in South Lake Tahoe and I am looking forward to helping Paul plan the event for his new term as President.

Since 1994, the CAIIA has held annual DOI seminars all over California, certifying or recertifying thousands of insurance claims adjusters. Currently we have classes set for May 14th in Brea, June 4th in Fresno, June 5th in Oakland, June 9th in Chatsworth, and June 11th in San Diego. The Earthquake SEED seminar will be at the Brea location this year. Please check the Status Report for the registration form, or contact me directly if you are unable to locate it.

Thank you Rick Kern for making arrangements for the classes, and thanks to the returning SEED presenters, Kevin Hansen, Dan Dyce, Morgan Griffith, Doug Jackson, Steve Washington, and Jeff Caulkins. These events are always a great success.

On another note, in a few months we will be looking for a new Treasurer, a new Vice President, and new directors. If you are already active in the CAIIA, we appreciate your commitment to making this a great place to belong. We welcome all members! There are always committees to help with, and events to plan.

Thank you for your interest in the CAIIA.

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News from our Members

IA and PA Adjuster Licensing Tabled

The Public Adjusters (PA) have a fairly strong lobby. They pulled out all of the stops on the bill to bring the Independent Adjusters (IA) and PA's in line with the National Association of Insurance Commissioners (NAIC) model act for both the IA's and PA'S. The Senate has put a hold on the bill to at least the next session. The Department of Insurance is to rework the legislation and submit the revisions to the state legislature,

This gives either a reprieve or outright clemency to all IA's working under someone's else's license.

The Status Report thanks **Peter Schifrin of SGD, Inc.** for keeping us apprised of the latest shenanigans in Sacramento.

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The Court disagreed with the trial court's finding of "malice in law," from the arson cases, where the mere criminal act of the defendant was enough to establish malice, even if the defendant did not intend to cause a fire or other harm. For example, in *In re V.V.* (2011) 51 Cal.4th 1020, the minor defendant's act of intentionally igniting and throwing a firecracker into dry brush was sufficient to establish the requisite malice for Arson. The Court of Appeal pointed out that the Supreme Court in *In re V.V.* itself noted that "in common acceptance" malice meant "ill-will against a person." The Court of Appeal then concluded that the "ordinary and popular sense" of malice, meaning ill-will against a person, would be appropriate when interpreting the plain meaning of a policy.

The Court of Appeal then concluded that although the transient may have been on the property illegally, all the evidence developed by FIE had shown that the fire had not been set with any intent to harm or with any ill will. Hence, it did not fit the language of the Vandalism or Malicious Mischief exclusion in the vacancy provision.

The Court also pointed out that had it wished to do so, FIE could have added language to the vacancy provision listing fire as a risk excluded, but it did not do so.

Ong had also argued that the transient's occupancy of the property took it out of the vacancy exclusion altogether, an argument rejected by the trial court. Because the Court of Appeal held that the exclusion was otherwise not applicable, it did not address this argument.

The Court of Appeal reversed summary judgment in favor of the carrier and remanded the case to the trial court.

Comment

Courts will always narrowly interpret exclusions, and will resolve any ambiguities in favor of the insured for coverage. The carrier in this case could have further clarified the vacancy provision to exclude other losses not intended to be covered, but did not provide sufficient language.

Editor's Note: This an important case for the insurance industry because it affects how we word our future releases. SDH

Settlement Agreement bars a Later Suit for Latent Defect

Credit to Low, Ball & Lynch, San Francisco, CA

In 2004, David Belasco ("Belasco") bought a home from general contractor/builder Gary Wells ("Wells"). After closing escrow, he immediately filed a Contractors State License Board ("CSLB") complaint against Wells alleging roughly 150 construction defects, but no roofing defects. The dispute was submitted to binding arbitration. Before the arbitration concluded, the parties entered into a settlement agreement requiring a payment of $25,000 to Belasco in exchange for a release of all known and unknown claims and a waiver of all rights under Civil Code § 1542. Six years later, Belasco sued Wells, alleging latent roofing defects which were not known at the time of the CSLB complaint. Wells moved for summary judgment on the grounds that the prior settlement agreement released all present and future claims. Summary judgment was granted and Belasco appealed.

The settlement agreement stated that it was a release of "any and all claims" which included past, present, and/or future claims. It also included a waiver of C.C.P. § 1542 that states that a general release does not apply to unknown claims.

On appeal, Belasco argued that: (1) the 2006 release was for patent defects only and would not be a "reasonable release" under Civil Code §929 if it included latent defects; (2) that a §1542 waiver for latent defects is against public policy; and (3) that Belasco's fraud and negligence claims raised triable issues of fact that, if found in his favor, would have voided the settlement.

The Court of Appeal held that "none of Belasco's arguments had any merit." The Court focused on Belasco's arguments that the release was not "reasonable" under §929 and that Wells committed fraud by not telling Belasco that he installed the roof rather than the roofer who had originally bid the project. The court rejected both claims.

The Court also rejected Belasco's argument that the money paid in settlement was for performing repairs, not a cash settlement, and the release was therefore barred by Civil Code §926, which prohibits a release or waiver in exchange for repair work. The court stated that § 926 did not apply here because it was undisputed that the 2006 dispute was resolved by a cash settlement without repair. According to the Court, § 926 simply did not apply.

The Court also rejected Belasco's argument that the release was barred by § 929 because the release was not "reasonable" even in exchange for a cash payment. The Court noted that Belasco was an attorney who was himself represented by counsel, that he had signed an agreement expressly providing that he had read and understood its terms, and he admitted this during his deposition.

The Court found that Belasco's argument of fraud was meritless. According to the Court, Belasco presented no evidence that any misrepresentations were made to him by Wells. Specifically, Wells never represented the names of subcontractors to Belasco. The Court agreed with the trial court that the name of the roofing contractor was not a material issue, because Belasco did not suggest he purchased the residence in reliance on the information in the permit. The Court also found that Belasco could not establish the element of intent. The record contained no evidence that Wells knew at the time of sale or in 2006 that the roof was defective.

Finally, Belasco failed to present any evidence that he bought the house in reliance on a false representation that a roofing contractor had installed the roof. Belasco admitted that his decision to enter into the 2006 settlement was a product of his own judgment and not influenced by any statement by Wells.

Comment

This decision emphasizes the importance of requiring a settlement agreement that releases "any and all" claims "known and unknown," with a waiver of rights under C.C.P. § 1542. You must also ensure that the release includes language that each party has "read and understood" the agreement, that the agreement is a product of both parties, and that each party has had the opportunity to have it reviewed by counsel. Since this was a pre-litigation settlement agreement, it would also be prudent to include a provision that the settlement is deemed by the parties to be "reasonable" pursuant to §§ 926, 929, and 945.5(f).

Claims Made Barred Due to Facts Disclosed on Application

Credit to Haight, Brown & Bonesteel, LosAngeles, CA

In *Crown Capital Securities v. Endurance Amer. Specialty Ins. Co.* (No. B256241, filed 4/10/15), a California appeals court affirmed summary judgment for a professional liability insurer on a finding that coverage was barred for claims that had not yet been made against the insured when the policy incepted, based on an exclusion contained in the application for claims arising from the same facts underlying a prior claim that was reported in the application.

The insured was a securities firm that recommended investments in various business entities. One such entity filed for bankruptcy, and the bankruptcy examiner issued a detailed report that the bankrupt entity had been engaged in a Ponzi scheme. A disgruntled investor complained to the securities firm attaching a copy of the bankruptcy examiner's report, and initiated securities arbitration.

Meanwhile, the securities firm was in the process of applying for professional liability insurance. In response to a question whether any claims, suits or proceedings had been made against the firm during the past five years, the firm's representative answered "yes." He then answered "no" to a question whether the firm was aware of any facts or circumstances that might result in a claim. The application was accompanied by a loss run from the previous insurer identifying the disgruntled investor's claim.

The application also contained an exclusion stating that: "It is agreed that any claim or lawsuit against the Applicant, or any principal, partner, managing member, director, officer or employee of the Applicant, or any other proposed insured, arising from any fact, circumstance, act, error or omission disclosed or required to be disclosed in response to Questions 9, 10 and/or 11, is hereby expressly excluded from coverage under the proposed insurance policy." The application was stated to become part of the policy as though physically attached.

After the policy was issued and became effective, three more disgruntled investors came forward and commenced arbitration against the firm based on the same Ponzi scheme investment. Coverage was denied, and the securities firm sued for bad faith, contending that the three subsequent claims should have been covered. But the court granted summary judgment for the insurer, which was upheld on appeal.

The appeals court said that the securities firm was aware of the bankruptcy, aware of the examiner's report of a Ponzi scheme, and aware of the fact that one investor had already made a claim when the application was submitted. The court found that the firm was, therefore, aware of facts that might give rise to additional claims, and that should have been admitted in the application.

The court rejected an argument that the three subsequent claims did not "arise out of" the same facts as the first claim, which was required to be, and had been, disclosed in the application. Citing *Davis v. Farmers Ins. Group* (2005) 134 Cal. App. 4th 100, and *Acceptance Ins. Co. v. Syufy Enterprises* (1999) 69 Cal. App. 4th 321, the *Crown Capital Securities* court stated: "California courts have consistently given a broad interpretation to the terms 'arising out of' or 'arising from' in various kinds of insurance provisions. It is settled that this language does not import any particular standard of causation or theory of liability into an insurance policy. Rather, it broadly links a factual situation with the event creating liability, and connotes only a minimal causal connection or incidental relationship."

The *Crown Capital Securities* court also declined to find coverage on an argument that the latter three claims involved different causes of action than the first, saying that although the investors were advancing different theories of liability, all three concerned purchase of the same investments, and the securities firm was aware of facts that might lead to claims being made based on those investments. Thus, the later claims were still barred from coverage by the application's exclusion, which had become part of the policy.

Motor Carriers Liability for Independent Consultants

Credit to Low, Ball & Lynch, San Francisco, CA

In *Vargas*, California's Second Appellate District held that the *Privette* doctrine does not shield a motor carrier operating under a federal franchise from liability for tort injuries to employees of its independent contractors.

FMI, Inc. ("FMI") is a federally licensed motor carrier. FMI transports goods by hiring contractors called "owner/operators" who lease their tractors and drivers to FMI. In this case, FMI selected Eves Express Inc. and its drivers, Jose Vargas ("Vargas") and Luis Villalobos ("Villalobos"), to transport goods from California to New Jersey. At the start of the trip, Villalobos drove while Vargas slept in a berth. A few hours into the trip Villalobos fell asleep and lost control of the tractor-trailer. The tractor-trailer rolled over, injuring Vargas.

Vargas filed a complaint alleging negligence against FMI (the motor carrier and trailer owner), Eves Express, Inc. ("Eves") (the tractor owner), Eswin Suchite (Eves' principal) and Villalobos. FMI and Eves filed a motion for summary judgment, asserting that Vargas was an independent contractor and that neither FMI nor Eves owed Vargas a duty to provide a safe workplace. Rather, FMI and Eves contended that they "implicitly delegated" all work-place safety responsibilities and tort liability to Vargas citing the *Privette* line of cases.

In *Privette v. Superior Court*, (1993) 5 Cal.4th 689, the California Supreme Court held that employees of independent contractors who are injured on the job cannot sue the entity that hired the independent contractor. Under *Privette*, the hirer may delegate workplace safety to independent contractors such that the hirer is not liable for the injuries of employees of independent contractors. The hirer's duty is presumptively delegated to the independent contractor. The rationale is that workplace injuries are covered by worker's compensation insurance. In *SeaBright v. US Airways* 52 Cal.4th 590 (2011), the California Supreme Court extended the *Privette* doctrine, holding that a hirer cannot be liable for injuries to an independent contractor's employee resulting from the hirer's failure to comply with Cal-OSHA safety regulations.

In opposition to defendants' motions for summary judgment, Vargas contended that FMI is subject to the Federal Motor Carrier Act ("the Act") and Federal Motor Carrier Safety Regulations ("FMCSR") which create a non-delegable duty for safe motor carrier operations. Therefore, FMI could not delegate its responsibility to the public by characterizing Vargas as an independent contractor.

The FMCSR provide that a motor carrier "shall provide safe and adequate services, equipment, and facilities." There are a number of FMCSR provisions that establish the motor carrier control over safety operations and prohibit full delegation to independent contractors. The FMCSR requires that the motor carrier supply public liability insurance and proof of financial responsibility. The FMCSR insurance endorsement excludes employees but not independent contractors from the scope of coverage. The purpose of the Act is to create incentives for motor carriers to maintain and operate their vehicles in a safe manner and to assure that motor carriers maintain the appropriate level of financial responsibility for public highway operations.

The trial court ruled in favor of FMI and Eves based on the *Privette* doctrine and held that defendants did not owe a legal duty to Vargas. The trial court cited to *Privette* and *SeaBright* concluding that the duty to provide a safe working environment is implicitly and presumptively delegated to the independent contractor in all independent contractor arrangements.

On appeal, Vargas asserted that FMI was operating as a federal motor carrier and, therefore, had a non-delegable duty to safely operate the trucks driven for its benefit.

The Court of Appeal reversed the trial court's ruling, reasoning that there were exceptions to the common law rule of hirer non-liability for negligent acts of independent contractors. The non-delegable duties doctrine "prevents a party that owes a duty to others from evading responsibility by claiming to have delegated that duty to an independent contractor hired to do the necessary work." A non-delegable duty can be created by statute, regulation or under a franchise granted by a public authority. A person or entity lawfully operating under a franchise granted by public authority that involves an unreasonable risk of harm to others is subject to non-delegable liability for physical harm caused by the negligence of an independent contractor.

The weight of Federal and California authority holds that motor carriers are liable for injuries to drivers classified as independent contractors. The *Vargas* Court followed *AmeriGas Propane, L.P. v. Landstar, Inc.* (2010) 184 Cal.App.4th 981 in holding that FMI Inc.'s non-delegable duty under the FMCSR governs injuries by members of the public as well as drivers/independent contractors of leased vehicles who are injured due to the negligence of their co-drivers. The Court of Appeal specifically noted that the safety of the operators of the vehicles, such as Vargas, was an express purpose of the Act, making FMI's non-delegable duty equally applicable to the public and Vargas irrespective of his independent contractor status.

COMMENT

Federally licensed motor carriers will be liable in California for injuries by drivers of leased vehicles arising from negligent operations in violation of the FMCSR. The rule of delegation set forth in *Privette* and its progeny does not shield motor carriers from liability to injured drivers based solely on their status as independent contractors.

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CAIIA 2015 Educational Events

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

1) Certifications for the CA Fair Claim Settlement Practices (**FCSPR**) and Seminar on Special Investigation Unit Regulations (**SIU**) (CDI# 279573 for 2 CE hours). Recertification required every year.

2) Seminar for the Evaluation of Earthquake Damage (**SEED**). (CDI# 279570 for 8 CE hours). Recertification for EQ required every 3 years.

   a) Included in the **SEED** program is the training and certification required by CCR, Title 10, Chapter 5, Subchapter 7.5.1, Article 1, §2695.40 through 2695.45 and Insurance Code 10089.3. Those regulations set forth the requirements of Insurance Adjuster Training for Evaluating Earthquake Damage as required for all adjusters who evaluate earthquake claims.

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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.

(Anyone wishing to come to the SEED locations for only the Reg's recertification program should note the earlier start time)

FCSPR, SIU & SEED SEMINARS (check one)

_____**May 14, 2015**
Brea: Embassy Suites
900 E. Birch St.
Brea, CA 92821 *map link*

FCSPR/SIU ONLY SEMINARS:

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Brea: Embassy Suites
900 E. Birch St.
Brea, CA 92821 *map link*

_____**June 4, 2015**
Fresno: Law Offices of McCormick Barstow
7647 N. Fresno Street *map link*
Fresno, CA 93720

_____**June 5, 2015**
Emeryville: HSNO Conference Center
1330 Broadway
Suite 400 (4th Floor)
Oakland, CA *map link*

_____**June 9, 2015**
Chatsworth: *(Los Angeles)* SGD, Inc.
9171 Gazette Ave.
Chatsworth, CA 91311 *map link*

_____**June 11, 2015**
San Diego: American Technologies
8444 Miralani Dr. *map link*
San Diego, CA 92126

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On the Lighter Side:

A SHOT OF WHISKEY
In the old west a .45 cartridge for a six-gun cost 12 cents, so did a glass of whiskey. If a cowhand was low on cash he would often give the bartender a cartridge in exchange for a drink. This became known as a "shot" of whiskey.

THE WHOLE NINE YARDS
American fighter planes in WW2 had machine guns that were fed by a belt of cartridges. The average plane held belts that were 27 feet (9 yards) long. If the pilot used up all his ammo he was said to have given it "the whole nine yards."

BUYING THE FARM
This is synonymous with dying. During WW1 soldiers were given life insurance policies worth $5,000. This was about the price of an average farm so if you died you "bought the farm" for your survivors.

IRON CLAD CONTRACT
This came about from the ironclad ships of the Civil War. It meant something so strong it could not be broken.

PASSING THE BUCK / THE BUCK STOPS HERE
Most men in the early west carried a jack knife made by the Buck knife company. When playing poker it as common to place one of these Buck knives in front of the dealer so that everyone knew who he was. When it was time for a new dealer the deck of cards and the knife were given to the new dealer. If this person didn't want to deal he would "pass the buck" to the next player. If that player accepted then "the buck stopped there."

RIFF RAFF
The Mississippi River was the main way of traveling from north to south. Riverboats carried passengers and freight but they were expensive so most people used rafts. Everything had the right of way over rafts which were considered cheap. The steering oar on the rafts was called a riff and this transposed into "riff-raff", meaning low class.

COBWEB
The Old English word for spider was "cob".

A SHIP'S STATE ROOMS
Traveling by steamboat was considered the height of comfort. Passenger cabins on the boats were not numbered. Instead they were named after states. To this day cabins on ships are called staterooms.

SLEEP TIGHT
Early beds were made with a wooden frame. Ropes were tied across the frame in a criss-cross pattern. A straw mattress was then put on top of the ropes. Over time the ropes stretched, causing the bed to sag. The owner would then tighten the ropes to get a better night's sleep.

SHOWBOAT
These were floating theaters built on a barge that was pushed by a steamboat. These played small towns along the Mississippi River. Unlike the boat shown in the movie "Showboat," these did not have an engine. They were gaudy and attention-grabbing, which is why we say someone who is being the life of the party is "showboating".

OVER A BARREL
In the days before CPR a drowning victim would be placed face down over a barrel and the barrel would be rolled back and forth in a effort to empty the lungs of water. It was rarely effective. If you are "over a barrel," you are in deep trouble.

BARGE IN
Heavy freight was moved along the Mississippi in large barges pushed by steamboats. These were hard to control and would sometimes swing into piers or other boats. People would say they "barged in".

HOGWASH
Steamboats carried both people and animals. Since pigs smelled so bad they would be washed before being put on board. The mud and other filth that was washed off was considered useless "hog wash".

CURFEW
The word "curfew" comes from the French phrase "couvre-feu", which means "cover the fire". It was used to describe the time of blowing out all lamps and candles. It was later adopted into Middle English as "curfeu", which later became the modern "curfew". In the early American colonies homes had no real fireplaces so a fire was built in the center of the room. In order to make sure a fire did not get out of control during the night, it was required that, by an agreed upon time, all fires would be covered with a clay pot called a "curfew".

BARRELS OF OIL
When the first oil wells were drilled they had made no provision for storing the liquid so they used water barrels. That is why, to this day, we speak of "barrels of oil," rather than gallons.

HOT OFF THE PRESS
As the paper goes through the rotary printing press, friction causes it to heat up. Therefore, if you grab the paper right off the press, it's hot. The expression means to get immediate information.