CAIIA Status Report

JUNE 2005

Weekly Law Resume

Prepared by Low, Ball & Lynch, Attorneys at Law

Property Coverage – Efficient Proximate Cause

Frank Julian v. Hartford Underwriters Insurance Company, California Supreme Court, (May 5,2005)

Under the efficient proximate cause doctrine, causation for a loss in a first party property context is determined by ascertaining the most important cause of the loss, even though other losses may have contributed to the damage. In this case, the Supreme Court considered whether this doctrine prohibited invoking an exclusion for a rain-caused landslide.

Following heavy rains, a slope failed above the home of Frank and Carol Julian. This led to a landslide. A claim was presented to Hartford Underwriters Insurance Company, their property insurer. Hartford insured them under a standard form homeowners' policy and excluded earth movement, water damage and weather conditions. However, under the weather conditions exclusion, it stated the exclusion applied only if the weather conditions contributed with another cause excluded by the policy.

After investigation, Hartford denied the claim. The denial was based upon negligent construction and design of the home, earth movement and weather conditions. The Julians sued Hartford for breach of contract and breach of the covenant of good faith and fair dealing. Hartford moved for summary judgment. The trial court granted the motion. The Julians appealed to the Court of Appeal, which affirmed the trial court. The Julians petitioned the Supreme Court, which granted review.

The California Supreme Court affirmed the trial court. The Court noted that the rule in California for determining causation in first party property cases is the efficient proximate cause doctrine. This doctrine requires the trier of fact to determine the most important reason the loss occurred and then to determine whether that cause is covered or excluded. Other causes of the loss are not considered in determining coverage.

With respect to the weather conditions clause, the Court observed the exclusion excluded losses caused buy weather conditions, but only when they contributed in any way with another excluded peril. The Court stated this did not violate the efficient proximate cause rationale.

The Court stated an insurer is free to insure against some manifestations of weather conditions, but not others. This does not violate the efficient proximate cause doctrine. The court felt the application of the weather conditions clause to a loss occasioned by rain-induced landslide did not violate the efficient proximate cause rationale.

Here, that clause clearly excluded the peril of rain inducing a landslide.

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■ PRESIDENT'S MESSAGE

Each month, I attempt to write to you with words of wisdom or information that you may need. It is communication that is the core of what we do in this organization. It has never been one that I see as a one way street. Often times, we get a member that is stuck on a claim and needs a gentle reminder of where to find information to get them back on track. When any of our members are at a loss as to finding the path to the answer, remember, we have all been there at one time or another and there is likely another member that has the key to your problem. Call or email other members. Next time it may be them needing your help.

As we enter the month of June, the CAIIA is busy planning the annual convention to be held October 12-14, 2005 at the beautiful Hotel Valencia in San Jose. Be sure to mark your calendars accordingly. Details and registration forms will be in the Status Report starting in July.

The CAIIA membership year is from July 1 to June 30. Please keep your eyes open for your CAIIA membership renewal documents. Your membership in the CAIIA assures continued representation in the industry, access to educational programs, and most important…a voice and ear to others in your field. We have had a wonderful program of events this year and more is on the horizon. Return your renewal documents promptly (that means do it when you get them). Membership is on the rise due to outstanding programs offered and the best state adjuster association around! Don't be left behind.

Look for the CAIIA at the CCNC (Claims Conference Northern California) on September 13-14, 2005.

Check their website www.claimsconference.org for more information.

The CAIIA is now represented on the board of the Society of Registered Professional Adjusters (RPA), since my appointment to that board. The RPA was started in 1996 by the CAIIA. At that time, Gil Malmgren (past CAIIA President) was Chairman of the RPA and Gene Riggs (past CAIIA President, CAIIA Honorary Member, and CAIIA Lifetime Achievement Award holder) was Executive Director of the RPA. As I told you all, it was my goal to not let the hard work of all involved from then until now to be forgotten. It was a great idea then and it is today. The CAIIA's history with the RPA is deep-rooted and I remind you all to appreciate the importance of the designation…the only true professional designation designed for claims professionals by claims professionals! The next RPA board meeting will be held in early September. Please call me with your thoughts and concerns

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When You Need to Know What Really Happened

Submitted by Garrett Engineers, Inc. - Forensic Division

Case of the Month

The Leaning Ladder

The case of the month related to a residential ladder accident. A Saturday morning impromptu soccer game with more enthusiasm than skill sent the ball soaring onto a neighbor's roof. Instead of bouncing down, it was trapped behind the chimney and a small child was dispatched to ask the owner for permission to retrieve it. The owner decided to get it himself, so he pulled his ladder from out of the garage and set it up against the house. He started up the ladder but was interrupted by his telephone ringing inside the house. He descended the ladder and went inside to answer the phone.

In the meantime, the soccer players' impatience got the best of them and one of them went up after the ball. When the owner returned to retrieve the ball he found a soccer player laying injured on the ground and the ladder which previously led to the roof was now horizontal, next to her.

GEI was assigned to examine the site and ladder in question and to determine the cause of the accident.

Our expert examined the site of the accident, the ladder in question, and interviewed the homeowner. The height of the edge of the roof was 10 feet, and length of the extension ladder was 14 feet for each flight. The ladder was manufactured by the Werner Ladder Company, and while most of the caution labels and direction labels were still on the ladder, they were tattered and splashed with paint. The label indicated that the total length was 28 feet, with a maximum length of 25 feet.

The locks for holding the extension flight in place were functional. The caution label which would indicate the proper angle for using the ladder was obliterated. The ladder did not have proper feet on the bottom of the legs; one foot was defective, and the other foot was simply missing.

Our expert was advised that the ladder slid out from under the climber (i.e., the feet on the concrete driveway slid away from the garage) while she was on the ladder.

Prior to his arrival, in an effort to be helpful, the owner had placed the ladder on the roof of the building in the same manner it was installed just prior to the accident. Our expert noted immediately that the ladder was installed at an excessive angle. The ladder was placed against the edge of the roof at an excessive angle of approximately 60 degrees, rather than the recommended 75 2 degrees from horizontal.

Most telling, the ladder was installed upside down (i.e., the top of the ladder was resting on the concrete driveway), and also backwards (i.e., the extension flight was underneath). Examination of the top of the ladder indicated that the top had been used on the ground before. The installation indicated that the owner was unfamiliar with the proper methods for using an extension ladder.

Our expert then installed the ladder against the edge of the roof properly, but the owner insisted that he was installing the ladder upside down, indicating that he did not recognize the missing foot at the bottom, and was assuming that the top ends of the legs were actually the bottom of the ladder.

The cause of the accident was now clear, with no liability for the ladder manufacturer.

PRESIDENT'S MESSAGE

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about the RPA, so that I may share them with the RPA and to promote the furtherance of the RPA. Please be advised that the RPA currently has in place an amnesty program for allowing members who have not submitted dues or CE's timely. Please visit www.rpa-adjuster.com for additional information.

I would like to give special thanks to Maribeth Danko of SeaCliff Claims Group (Huntington Beach) and Frank Zeigon of M & Z Claims (Yorba Linda) for their hard work in promoting the CAIIA and the wonderful work on behalf of the association. Frank has done a lot of work for members on getting better rates for estimating software. A separate email will be sent to member firms detailing programs we are working on for the CAIIA. Once again, members helping members creates a better industry for all of us.

DOUG JACKSON, RPA
President - CAIIA 2004-2005

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Given the particularly well-known relationship between rain and a landslide, the Court felt the exclusion corresponded with the reasonable expectation of an insured. The Court therefore agreed with the Court of Appeal that the trial court did not err in granting Hartford's summary judgment motion.

Justice Brown, in a concurring opinion, felt the majority opinion was too narrow, being limited to the facts of this case. She would have supported a holding that gave insurers the right to exclude any loss if done so unambiguously, absent a violation of fundamental public policy.

COMMENT

This Supreme Court decision left open the door to arguments that exclusions eliminating coverage where a covered peril and an uncovered peril concur, without an analysis of the efficient proximate cause, would probably not withstand scrutiny by the Court. Many current property policies attempt to do this, and their validity is questionable given this opinion.

Discovery – Insurer's Financial Records

Catholic Mutual Relief Society v. Superior Court, Court of Appeal, Second District, (April 25, 2005)

California case law limits what information is discoverable from a defendant's insurer. In this case, the court ruled upon an attempt to obtain information regarding the defendant's insurer's financial condition, including its reserves and any reinsurance agreements.

The Roman Catholic Archdiocese of San Diego was sued by numerous persons claiming they were victims of childhood sexual abuse by various church priests. In that action, the plaintiffs sought, by way of deposition subpoenas, information concerning the Church's insurer's financial condition, including its reserves and any financial reinsurance agreements. The Church's insurers sought a written order to vacate an order by the settlement judge denying the motion to quash the deposition subpoena. The Court of Appeal granted the petition and set the matter for oral argument.

The Court of Appeal granted the petition and ordered the settlement judge's order denying the motion to quash reversed and directed the trial court to enter a new and different order. The Court noted that under code of Civil Procedure section 2017, a party may obtain relevant discovery information. Under section 2017(b), that discovery may include the identity of any insurance carrier and the nature and limits of any coverage. Discovery may also be obtained concerning whether there is any dispute regarding that coverage. However, the Code section states that the plaintiff is not entitled to information regarding the nature and substance of that dispute.

In this case, the plaintiffs sought to obtain information regarding reserves, reinsurance agreements, available funds for these claims, the number of sex abuse claims made, the costs of defense incurred for other sexual abuse claims. The purpose of this information was to determine the financial health of the defendant's insurer in order to determine whether or not there would be enough funds to cover either a judgment or a settlement.

The Court stated that nothing in section 2017(b) authorizes discovery by an injured plaintiff into the financial health of the defendant's insurers. The discoverability of the defendant's insurer evolved from Insurance Code section 11580, which allowed a plaintiff who obtained a judgment against an insured defendant to them sue the defendant's insurer to recover the policy benefits. Because of this statute, it was held that in injured party had a discoverable interest in the existence and terms of the defendant's insurance policy.

The Court held that case law prior to the stature allowed discovery of no more than the coverage limits of a defendant's policy. It did not authorize discovery into the financial condition of the defendant's non-party insurer. There is nothing in California case law or the statute that authorizes the discoverability of reinsurance agreements. Further, this information was not discoverable as an aid to assist settlement. The Court held that the information was too remote from the subject matter of the action to be considered relevant. Even if the information was relevant for settlement, it would not be relevant to the production of admissible evidence, nor reasonably calculated to lead to the discovery of admissible evidence. Thus, the Court felt it would simply open more doors to further discovery. Creating a rule that would permit discovery on a showing that it would facilitate settlement would be ill-advised. Rather, the Court felt that if such a rule change was warranted, it should come from the Legislature and not from the courts.

For that reason, the Court entered a peremptory writ directing the trial court to vacate its earlier order denying

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Prepared by Low, Ball & Lynch, Attorneys at Law

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the motion to quash and entering a new order granting the motion.

COMMENT

The argument of the plaintiffs to discover the financial health of a defendant's insurer would evolve into an endless quagmire concerning how much discovery was warranted. This Court wisely shut down that avenue of discovery, finding it was not authorized by the discovery statutes.

Torts – Negligent Infliction of Emotional Distress Claims Limited to Blood or Marital Relative

Rodriguez v. Kirchhoefel, Court of Appeal, Second District, (April 13, 2005)

In *Dillon v. Legg* (1972) 68 Cal.2d 728, the California Supreme Court for the first time held that in some circumstances a plaintiff could recover damages for Negligent Infliction of Emotional Distress (NIED), as the result of witnessing an accident in which a third party is injured by a defendant's negligence. In trying to limit the potential universe of bystanders, the Supreme Court suggested that the plaintiff and the victim be "closely related".

In this case, Plaintiff Martha Rodriguez sued Defendant Troy Kirchhoefel for NIED alleging that Ms. Rodriguez suffered emotional distress when she observed a car, negligently driven by Defendant, strike and kill 15-year-old Catalina Macias. Plaintiff, who was 14-years-old at the time, was a few feet away from Macias at the time of the collision. Plaintiff claimed that she shared a close relationship with Macias – similar to that of sisters.

Defendant moved for summary judgement on the ground that Plaintiff could not recover for NIED because she was not related to Macias. During discovery, Plaintiff acknowledged that she was not a blood relative. However, Plaintiff contended that she and her mother had lived with Macias and her family for several years; the girls had known each other since they were six years old; and that they shared a bedroom together. The trial court granted the motion for summary judgement, and Plaintiff appealed.

The Second Appellate District looked not only at the Supreme Court's decision in Dillon, but also subsequent Supreme Curt decisions in *Elden v. Sheldon* (1988) 46 Cal.3d 267 and *Thing v. La Chusa* (1989) 48 Cal.3d 644. In *Eldon*, Plaintiff was an unmarried co-habitant of a person killed in an automobile accident. The Supreme Court in Eldon denied Plaintiff's NIED claim, explaining that in order to prevent an unreasonable extension of the scope of liability of a negligent actor, a bright line needed to be drawn. The Court rejected the NIED claim of the unmarried co-habitant, who claimed a defacto marriage relationship.

The Supreme Court reiterated the need for a "bright line" in *Thing*. In a footnote, however, the Court ambiguously stated that absent exceptional circumstances, recovery should be limited to relatives residing in the same household, or parents, siblings, children, and grandparents of the victim. Ms. Rodriguez argued that, by this language in *Thing*, the Supreme Court acknowledged that persons who have relationships other than blood or marital relationships could recover under exceptional circumstances. The Second Appellate District disagreed, directing Plaintiff to another part of the *Thing* opinion, where the Supreme Court stated that recovery should be limited to persons "closely related by blood or marriage". Because Rodriguez was not related to Macias, the summary judgement was affirmed.

COMMENT

This decision upholds prior rulings limiting Negligent Infliction of Emotional Distress claims to blood or martial relatives.

CAIIA *Calendar*

CAIIA Annual Convention

October 12-14, 2005
Hotel Valencia, Santana Row
San Jose, CA
Contact Steve Wakefield
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A Partial List of California's New Laws for 2005

Compiled by Bradley & Gmelich

Hundreds of new laws are now on the California books. Here is a small sampling:

Mandatory Training for Supervisors to Prevent Sexual Harassment

(Assembly Bill 1825)

Employers with 50 or more workers, including temporary service employees and independent contractors, must provide two hours of sexual harassment training and education to all supervisory employees every two years. Since the law does not specify that the 50 employees must be within this state, the law applies to California employers with 50 total employees, irrespective of where those employees are located. The training must include information and practical guidance regarding federal and state laws, including harassment prevention and correction, and remedies available to victims. The training must be "interactive"; meaning that video training is insufficient without discussion, role-playing and/or a question and answer session.

Training must be provided to all employees who have "supervisory authority", a broadly defined term under California law, which generally includes anyone having authority to exercise independent judgment to direct the work of other employees, to hire, transfer, suspend, reward or discipline other employees, or to recommend these types of actions.

Meeting these requirements does not provide a defense to a sexual harassment claim. Similarly, a failure to meet these requirements does not establish liability for a claim under the Fair Employment and Housing Act. However, failure to meet these training obligations may be looked upon by a court as grounds for punitive damages in a sexual harassment lawsuit. Further, the Department of Fair Employment and Housing may order a non-complaint employer to provide the training.

Unemployment Insurance

(Assembly Bill 2412)

This bill authorizes the Employment Development Department (EDD) Director to assess a penalty against an employer who makes a false statement or representation regarding an employee's insurance eligibility, willfully fails to report a material fact concerning the termination. The penalty must be between two and ten times the weekly benefit of the claimant's compensation.

Private Attorney General Act (PAGA)

(Senate Bill 1809)

PAGA was the draconian employment bill signed by ousted formers Governor Davis that was commonly referred to as the "Sue Your Boss" law and allowed for potentially huge penalties to be recovered from a California employer for any violation of California's encyclopedic Labor Code, no matter how trivial or obscure. Recognizing the destructive power of the PAGA, Governor Schwarzenegger held up the California budget until revisions were enacted. SB 1809 provides some limits on the types of claims employees may bring against employers for posting, notice, agency reporting or filing requirements of the Labor Code, requires court review and approval of all PAGA settlements and provides courts with discretion to reduce PAGA penalties, and establishes specific procedures an aggrieved employee must follow prior to filing a PAGA lawsuit.

Direct Marketing Disclosure Statute

(Senate Bill 27)

This statute requires a company, upon request, to provide individual California customers with certain information concerning disclosure of "personal information" to third parties during the prior calendar year. "Personal information" is defined to include any information that identifies, describes or can be associated with an individual, and includes categories ranging from name, address, or e-mail address to product purchases. This statute applies to

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A Partial List of California's New Laws for 2005

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information conducted both online and offline. The information must be provided to the requesting consumer within 30 days of his or her request.

Consumer Protection Against Spyware Act

(Senate Bill 1436)

The Consumer Protection Against Computer Spyware Act (CPACSA) represents California's first regulation of spyware, and one of the first such spyware laws in the country. The CPACSA makes it illegal for anyone to install software on another person's computer and willfully or in a deliberately deceptive way to use it for wrongful purposes such as modifying settings, collecting personal information or taking control over a computer to send commercial e-mails or viruses.

Headlights

(Assembly Bill 1854)

Drivers must use headlights in weather that makes it difficult to see another person or car at 1,000 feet or when the windshield wipers must be used.

Words To Live By

Those who jump off a bridge in Paris are in Seine.

A backward poet writes inverse.

A man's home is his castle, in a manor of speaking.

Dijon vu – the same mustard as before.

Practice safe eating – always use condiments.

Shot gun wedding: A case of wife or death.

A man needs a mistress just to break up the monogamy.

A hangover is the wrath of grapes.

Dancing cheek-to-cheek is really a form of floor play.

Does the name Pavlov ring a bell?

Condoms should be used on every conceivable occasion.

Reading while sunbathing makes you well red.

When two egotists meet, it's an I for an I.

A bicycle can't stand on its own because it is too tired.

What's the definition of a will? (It's a dead giveaway.)

In democracy your vote counts. In feudalism your count votes.

She was engaged to a boyfriend with a wooden leg but broke it off.

A chicken crossing the road is poultry in motion.

If you don't pay y our exorcist, you get repossessed.

When a clock is hungry, it goes back four seconds.

The man who fell into an upholstery machine is fully recovered.

You feel stuck with your debt if you can't budge it.

Local Area Network in Australia: the LAN down under.

He often broke into song because he couldn't find the key.

Every calendar's days are numbered.

A lot of money is tainted – It 'taint yours and it 'taint mine.

A boiled egg in the morning is hard to beat.

A plateau is a high form of flattery.

A midget fortune-teller who escapes from prison is a small medium at large.

Those who get too big for their breeches will be exposed in the end.

Bakers trade bread recipes on a knead-to-know basis.

Acupuncture is a jab well done.

Once you've seen one shopping center, you've seen a mall.

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