

CAIIA *Status Report*

JULY 2009

Weekly Law Resume

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

Torts - Implied Contractual Indemnity Claim Requires a Joint Legal Obligation To Injured Party

Prince v. Pacific Gas & Electric Company, California Supreme Court (March 19, 2009)

Historically, California courts have recognized three forms of indemnity: 1) indemnity expressly provided for by contract; 2) indemnity implied from a contract not specifically mentioning indemnity; and 3) equitable indemnity - indemnity arising from the equities of particular circumstances. In more recent years, courts have recognized only two basic types of indemnity, express indemnity and equitable indemnity. While equitable indemnity is premised on a joint legal obligation to another for damages; express contractual indemnity requires no such obligation. The question presented in this case is whether a claim for implied contractual indemnity also requires a joint legal obligation between the indemnitee and the indemnitor. Ten-year old Joshua Jackson was flying a kite in his friend's backyard. The kite became stuck in an electrical power line that hung low over an adjacent property owned by Joshua's friend's grandmother, Defendant Eve Prince. Joshua grabbed an aluminum pole that Prince used to shake nut trees on her property and tried to dislodge the kite. In the process, Joshua

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Steve Tilghman Remembered

As adjusters, we sometimes wonder if we make difference. Phil Barrett, Barrett Claims Service, Ukiah, CA, our current Vice President submitted the following to the Status Report. Editor

I got a water damage claim today with a homeowner who had a total loss fire about 4 years ago. She said that an IA from out of the area was first assigned to the loss, was underhanded in their tactics and shortly after the assignment was given the ax by the company. The new IA, she said, was very pleasant, competent and helpful. She was very disappointed when he died suddenly and unexpectedly before the claim was finalized. I probed a little further and learned that it was Steve who had been reassigned and it was nice to know that his presence on the claim made a positive impact, at least gratifying enough for this homeowner to have remembered him personally and feel strongly enough to mention the difference he was able to make in this case. I was proud to inform her that I had known Steve and am now involved in an organization in which he contributed significantly.

PUBLISHED MONTHLY BY
California Association of
Independent Insurance Adjusters



An Employer
Organization of
Independent
Insurance Adjusters

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Status Report Now Available by E-mail

If you would like to receive the *Status Report* via e-mail please send your e-mail address to info@caiiia.org.

CAIIA Newsletter

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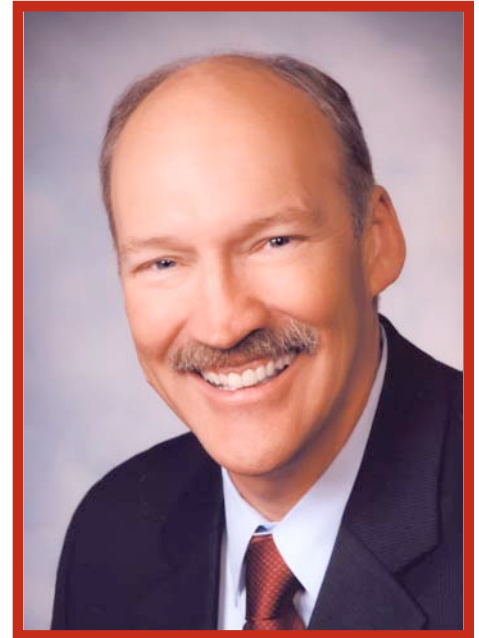
PRESIDENT'S MESSAGE

The Budget

Just like the rest of the economic community, we at the CAIIA have had to adjust our budget to stay out of the red this year. We have done so by increasing revenue through sponsorships and decreasing some expenses for items that were not perceived as good values by our membership. We have not had to change our dues structure, or compromise our core activities. Our last change in dues was a decrease in our fees several years ago. We have held that line ever since.

It is important to stay in the black. However, unlike a profit making organization, money is not, and must not become our primary organizing principle. Our charter, and our focus, must be on the issues that concern both street level independent adjusters and their management. Some of our functions which serve that goal are, or are close to being, self-supporting. Specifically, educational events are supported by attendees and sponsors; the directory just about paid for itself this year; and the golf tournament put income into the coffers. Other functions, like the newsletter, web site, and annual meetings, require an annual subsidy.

Since we are a not-for-profit organization, it is appropriate that some functions do not generate a surplus. The function of the newsletter is to communicate to our membership and clientele. We want to put our best foot forward. Maintaining a professional image does not include publishing an ad for a restoration service or a body shop, for example. We should keep fund raising in perspective. We must not be seen as having a hand out at every turn. If



a small, discreet sponsorship keeps our overall budget in the black, we do not need to sell billboards that may distract from our core message.

The more we promote our functions to vendors and sponsors, the more our mission to serve adjusters is diluted by the need to cater to sponsors and advertisers needs. I was once a member of the now defunct Diablo Property Adjusters Association. When I joined, it was a great forum in which to discuss property adjusting issues, and we had a sizable monthly turn out. It was decided that in order to increase revenue and attendance, the rules would be revised to allow vendors to attend the meetings. From then on, the majority of attendees were vendors, and on average only one to three adjusters turned out. Soon, the organization was no longer viable, and was merged with the East Bay Adjusters Association to become the East Bay Claims. I believe that this is a lesson in what happens when an organization loses site of its core

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sustained serious injuries when the pole came into contact with the power lines. Jackson's guardian ad litem sued both Prince and PG&E, which owned an easement to erect and maintain electrical power lines across the Prince property.

In the trial court action, PG&E was determined to have immunity from liability to Joshua under Civil Code section 846, the recreational use immunity statute. Joshua's claim against PG&E was therefore dismissed. Joshua's claim against Prince continued because the court determined there was a triable issue as to whether section 846 applied to Prince. Prince then cross-complained against PG&E under the theory of implied contractual indemnity. PG&E filed a motion for summary judgment contending that Prince was barred from recovery, because immunity under section 846 provided a complete defense. The trial court granted the motion. A Court of Appeal reversed and the California Supreme Court agreed to hear the case.

On appeal, Prince acknowledged that PG&E did not expressly contract to indemnify her for the types of damages claimed by Joshua. Prince also acknowledged that she could not recover under a traditional equitable indemnity claim, because under section 846, PG&E owed no duty of care to Joshua to keep its easement safe for his recreational use. Prince, however, claimed that PG&E should be held responsible for not properly maintaining the power lines. Prince contended that implied contractual indemnity was available even when the alleged indemnitor (PG&E) was immune from direct liability to the injured party.

The Supreme Court disagreed, holding that an implied contractual indemnity claim should not be equated with an express indemnity claim. On the contrary, the Court held that a claim for implied contractual indemnity is a form of equitable indemnity, which makes it subject to the rules govern-

ing equitable indemnity claims. In particular, the Court reasoned that an implied contractual indemnity claim, like a traditional equitable indemnity claim, is subject to the rule that a party's liability for equitable indemnity must be based on its proportional share of responsibility for the damages to the injured party. Applying the rule to this case, the Court held that section 846 barred Prince from recovering on an implied contractual indemnity theory. The judgment of the Court of Appeal was therefore reversed and judgment was entered in favor of PG&E.

COMMENT

This case holds that absent a showing that an indemnitor can be held legally responsible for damages to an injured party, a defendant may not pursue a claim for implied contractual indemnity.

Property Insurance – Contractor Negligence

Bernard Freedman v. State Farm Insurance Company, Court of Appeal, Second District (May 5, 2009)

The interaction of exclusions with the coverage grant in a standard homeowners policy continues to confront the courts. This case dealt with an issue of contractor negligence leading to further damage years later.

Bernard and Gail Freedman were insured by State Farm under an all-risk policy. The policy excluded loss resulting from deterioration, corrosion or rust. It also excluded water damage resulting from a continuous or repeated seepage or leakage of water from a plumbing system. The policy also excluded negligent workmanship by a contractor if it interacted with one of these perils.

In 2000, the Freedmans' home was repiped and an upstairs bathroom was remodeled. Extensive water leakage was discovered in the upstairs bathroom in 2005. When the drywall was removed, it was discovered a nail had penetrated through the pipe. The pipe was corroded around the point of entry of the nail and water was released through that area of corrosion. The Freedmans submitted a claim to State Farm for the claim, which was denied.

The Freedmans sued State Farm, alleging breach of contract and breach of the covenant of good faith and fair dealing. The parties filed cross-motions for summary judgment. The trial court granted State Farm's motion and denied the Freedmans' motion. The Freedmans appealed.

The Court of Appeal affirmed. The Freedmans contended third-party negligence was the efficient proximate cause of their loss. The Court noted the Freedman policy excluded third-party negligent conduct whenever it interacted with an excluded peril. Corrosion and continuous or repeated seep-

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PRESIDENT'S MESSAGE

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purpose for the sake of increased revenue.

I feel that at this point, we have a very healthy mix. The role of our sponsors and advertisers is in balance with our members' needs. Even though there is a temptation to keep increasing our revenue by relying more on third party funding, and less on our own self support, I believe we must resist that temptation in order to avoid a dilution of our focus. We must remember our key purpose which is to promote the interests of the independent adjuster.

PETE VAUGHAN

President - CAIA 2008-2009

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age or leakage of water were excluded under the Freedman policy. Thus, the Freedman policy excluded contractor negligence – induced corrosion and contractor negligence – induced continuous or repeated seepage or leakage of water. The loss was therefore not covered.

The Freedmans tried to argue the provisions were ambiguous, which the Court rejected. There thus was no coverage for third-party negligence in this case.

As to the continuous or repeated seepage water exclusion, the Court concluded the leak lasted a sufficiently long time to count as a continuous or repeated leakage. The court further held that the exclusion applied to continuous or repeated seepage or leakage of water from a plumbing system regardless of whether the event occurred suddenly or arose from an outside source, such as a contractor driving a nail. A final argument related to mold coverage. However, this was for their personal property, which was covered only for specified perils. No identified specified covered peril was identified. Thus, there was no coverage.

The judgment was therefore affirmed.

COMMENT

The Court used the analysis of the California Supreme Court in *Julian v. Hartford Underwriters Insurance Company* (2005) 35 Cal.4th 747. Under this analysis, an insurer is allowed to draft a policy that leaves coverage available for some, but not all, manifestations of a particular peril.

Uninsured Motorist Coverage - Medical Lien

Weston Reid, LLC v. American Insurance Group, Inc., Court of Appeal, Fourth District (June 4, 2009)

Medical providers are becoming more aggressive in asserting their lien. In this case, a hospital attempted to assert a lien for emergency medical care on uninsured motorist benefits.

Karen Sheets was injured in an automobile accident. She suffered severe injuries and was treated at Mercy General Hospital. Mercy assigned to Weston Reid, LLC its claims under the Hospital Lien Act on any recovery Sheets might obtain from the tortfeasor. The tortfeasor was uninsured. Sheets sought recovery of uninsured motorist benefits from American Insurance Group, her insurer. Weston Reid filed a notice of statutory lien with AIG. AIG settled with Sheets, without notifying Weston Reid of the payment.

Weston Reid sued AIG, alleging it was entitled to recovery of 50% of the funds disbursed to Sheets under the Hospital Lien Act. AIG demurred to the complaint, which was sustained without leave to amend. Weston Reid appealed.

The Court of Appeal affirmed the granting of the demurrer.

The Court noted this was a case of first impression concerning the proper interpretation of the Hospital Lien Act. The statute, which is set forth in Civil Code §3045.1, grants a hospital a lien for emergency and ongoing medical services provided to a person who was injured in an accident, against the claim of that person for damages on account of those injuries. Recovery is allowed for the reasonable and necessary charges up to a maximum of 50% of the sums paid under any judgment, compromise or settlement.

The Court noted in this case AIG was not the insurer for the tortfeasor. AIG was the insurer of the injured party, Sheets. The Court held that the Hospital Lien Act did not apply to AIG. Weston Reid attempted to argue that uninsured motorist coverage was akin to third-party liability insurance coverage. The Court rejected that contention, stating it is strictly first-party coverage. The Hospital Lien Act was not intended, according to the Court, to apply to first-party insurance coverage. The hospital's lien attaches to a settlement or judgment paid by a third party liable for the patient's injuries. The Court thus held the Hospital Lien Act is inapplicable to first-party insurance claims. As a result, AIG was not contractually obligated to honor or respond to the notice of lien. The Court held the trial court did not abuse its discretion in sustaining the demurrer without leave to amend. The judgment was affirmed.

COMMENT

The Court decision makes clear that the Hospital Lien Act does not apply to first-party insurance benefits paid to the injured party. This is consistent with the intent of the Hospital Lien Act, as well as uninsured motorist coverage.

News of Members

After 42 years of serving the insurance industry Carl Pearson has dissolved M & N Claim Service, Inc. He will still be adjusting losses under the name of Carl W Pearson Adjusting. All of my contact information remains the same as before the name change.

If you have any questions, please contact Carl at 562-602-2002.

CAIIA Apologizes

The most recent CAIIA Directory, which many of you have received already, has an error in it. The CAIIA wishes all to know that Mr. Ed Burtette is not affiliated in any way with Palm Springs Claims Service. Currently he is Vice President of Liability Service at CorVel Corporation, 8787 Complex Dr, 3rd Floor, San Diego, CA 92123.

When You Need to Know What Really Happened

Submitted by Garrett Engineers, Inc. - Forensic Division, Long Beach, CA

An Unwanted Air Bag Deployment

The owner of a Volkswagen Passat decided that he would buy a cool new GPS navigation unit to spruce up his ride. He went to the local professional grade aftermarket specialty stereo dealer, selected an appropriate model, and then paid for the Navigation Head Unit and the installation.

After the installation, he turned in a parking lot, and BANG!!! the driver's side air bag deployed. He was slightly injured. The allegation was that the stereo store had negligently installed the GPS Nav Unit, which caused the air bag to deploy. GEI was assigned to answer the question, "Why did the air bag deploy?"

The first items we examined were the bumpers and chassis. There was no impact damage to either the front bumper or the underside of the frame. The deployment was caused by an errant electrical signal, not by any vehicle impact.

Next, we extensively examined the wiring under the hood, under the dash, and behind the dashboard. Overall, the interior wiring was in horrible condition. Many wires behind the dashboard were cut and roughly spliced, tapped into with aftermarket quick connectors, or crudely taped together. Several pieces of wire were missing their insulation in various lengths and section along the wires.

At first glance, we suspected that the issues with the wiring behind the dashboard were the cause of the errant electrical signal. Upon further detailed inspection, we determined that none of the wires that had been cut or exposed had anything to do with the driver's air bag deployment.

The center console was in equally bad shape. Someone had installed a mobile phone on it and the level of fit and finish matched the wiring under the dash, which was to say, very unprofessional. Additionally, there was evidence that someone had installed and then removed an aftermarket alarm system. We examined that wiring as well and determined that none of the center console wiring could have produced the unwanted air bag deployment either.

We then turned our attention to the steering wheel area. The steering wheel was disassembled and the air bag container assembly was examined. No evidence was found of any failure with the air bag assembly itself. We then focused on the wiring assembly behind the air bag that was contained in the air bag clock spring behind the steering wheel. It's called that because it looks like a clock spring that winds and unwinds. This is how an unbroken electrical connection to the air bag is maintained, while still permitting the steering wheel to turn back and forth. It contains an outer ring that rotates around an inner ring. The two rings are connected by a flat ribbon cable. The ribbon cable has four wires inside, two for the horn circuit and two for the air bag deployment circuit. As the inner ring of the clock spring rotates inside the outer, the cable is wound tighter and looser, thus allowing the steering wheel to rotate and maintain a constant electrical connection with the steering wheel mounted horn button and the air bag.

At this point, we removed the clock spring assembly for closer examination. When we opened the clock spring casing to expose the ribbon cable, we found that the cable had a non-original, non factory, very unusual fold in it, located very near to the inner connector. The cable's fold brought the horn's positive wire into very close proximity to the air bag deployment wire. When the driver turned the steering wheel in just the right way, at just the right time, the two wires touched. When the driver accidentally beeped the horn, it provided power to the air bag deployment circuit and the energized air bag then deployed.

The opposition contended that the stereo installation employee had opened the clock spring and damaged the cable. We proved at trial, to the jury's satisfaction, that this did not occur. First, the startling difference between the professional level installation of the Nav Head Unit, and the junior-high level cell phone and alarm installations, made it easy to distinguish who did what. In a high volume, professional quality shop, as was the case in this instance, technicians do not waste time removing anything they do not have to. With a typical flat rate installation charge by the company, there is strong pressure on technicians to finish the current job and move on to the next job.

There were no Navigation Unit circuits anywhere on the steering column. This meant there was absolutely no reason for the Navigation Unit installer to waste the considerable time it took to remove the steering wheel, remove the clock spring assembly, open it, remove the ribbon cable (for an unknown reason), stuff the cable back in (incorrectly), replace the clock spring assembly, and then reinstall the steering wheel. And if, for the wildest of reasons, he had removed the ribbon, he certainly would have obtained the proper tools to correctly repack the ribbon, as was befitting a professional who would be cognizant of the dangers associated with handling delicate wires of an air bag detonation circuit.

So, post trial, what do we think happened? Our best guess is a previous owner tried to install a steering-wheel-controlled anti-theft alarm system by himself. He got it all disassembled, couldn't make it work, and abandoned the project, removing all the parts he had previously installed. What he didn't know was that he had created a time bomb. The right amount of steering wheel turns in the right direction, coupled with an accidental beep on the horn at just the right time, equaled a very loud BANG !!!

Commissioner Poizner Announces Fresno Husband and Wife Arrested on Felony Insurance Fraud Charges

Insurance Commissioner Steve Poizner announced today that Parmjit Kaur, 41, and her husband, Amarjit Singh, 52, both from Fresno, were arrested on June 5 and charged with felony insurance fraud.

On December 23, 2008, Singh and Kaur reported their big rig stolen to the Fresno Police Department. After receiving a tip from the police department, the Auto Insurance Fraud Task Force opened an investigation and discovered that the vehicle was never parked at the location where Kaur and Singh allege it was stolen. Kaur allegedly provided false statements to police about the "theft" of the vehicle and its location. The couple filed a claim with their insurance company, which paid out approximately \$40,000.

The Fresno County District Attorney's Office is prosecuting this case.

The Urban Organized Auto Insurance Fraud Task Force is comprised of detectives from the California Department of Insurance and the Fresno County District Attorney's Office. The task force targets any form of auto insurance fraud, including staged theft and vandalism, staged auto accidents and other types of organized insurance fraud.

Notification of Fee Reduction and Paperless License

Effective July 1, 2009 the California Department of Insurance (CDI) will implement two significant changes that will affect both individuals and business entities who are licensed through its Producer Licensing Bureau. First, as reported in CDI's 2009-3 Bulletin, issued on March 26, 2009, CDI will be decreasing fees by six-percent for all insurers and insurance producers. The bulletin, including the new fee schedule may be accessed through the following webpage: <http://www.insurance.ca.gov/0250-insurers/0300-insurers/0200-bulletins/bulletin-notices-commiss-opinion/index.cfm>

Secondly, in keeping with Commissioner Poizner's strategic initiative to have 100 percent paperless interaction with agents, brokers and insurers by 2010, also effective on July 1, 2009 CDI will no longer print and mail hard copies of its licenses. Instead, individuals and business entities will receive an email with instructions and a website link to download their license from the CDI's website. To successfully download the license, individuals and business entities must complete the following steps:

Step 1

It is very important that individuals and business entities provide CDI with a current and valid email address so that they will be able to receive the email notification letting them know that the license has been issued and may be downloaded. Please confirm that your email address is accurate by reviewing your information located through the following webpage: <https://interactive.web.insurance.ca.gov/flrs/addressChange/Welcome.jsp>

To ensure that you do not experience difficulty receiving emails from CDI, please confirm that your personal or network email spam filter accepts emails from @insurance.ca.gov. Individuals and business entities

who do not receive the email notification will still be able to download their licenses but will need to repeatedly check CDI's website to determine whether their new license is ready to be downloaded.

Step 2

Beginning July 1, 2009 a webpage entitled "Obtain Your License Online" will appear on CDI's website under "Quick Links," "Online Services." On this webpage is where you will be able to download and print the license. To begin the downloading process, individuals will be required to provide the last four digits of their social security number and either their birthdate or license number. Business entities will be required to provide their entire FEIN number and either an approved name or license number. There will be step-by-step instructions to guide the users through the process.

The license, which will be in the PDF format, will be encrypted to prevent any edits to be made.

The license will also include a statement instructing consumers to check with CDI's website to validate the current status of a license. As a PDF attachment, the license maybe also emailed to others such as employers, potential employers, insurers, insurance agencies and managing general agents.

Please note that Section 1725 of the California Insurance Code, which requires Fire and Casualty Broker-Agents to prominently display the license in their office, will still apply.

Should you have any questions, please either email Producer Licensing Bureau or call the Producer Licensing Hotline at (800) 967-9331 or (916) 322-3555. For emails, please be sure to include your name, telephone number, license number and current e-mail address.



**CALIFORNIA ASSOCIATION
OF
INDEPENDENT INSURANCE ADJUSTERS**

Third Annual Golf Tournament

**Rancho Las Palmas Resort
42000 Bob Hope Drive
Rancho Mirage, CA 92270
760-862-4551**

**October 29, 2009 • 10:00 a.m. Check-in
11:00 a.m. Putting Championship • 12:00 p.m. Shotgun Start**

“Join us for our Third Annual Golf Tournament”

Player Participation ~ \$150 per player \$135 member price Includes: Lunch, Green Fees, Cart, and Dinner Buffet
 1. _____ Company _____
 2. _____ Company _____
 3. _____ Company _____
 4. _____ Company _____

(Player Participation / Foursomes sold on first available basis)

Dinner Buffet Only ~ \$50 per person \$45 member price Includes: Dinner Buffet and post-golf awards presentation
 1. _____ Company _____
 2. _____ Company _____

Tournament Sponsorship Opportunities

(check box)

- Dinner ~ \$1,000 Bar ~ \$1,000 Golf Committee Shirt & Hat ~ \$1,000 Photo ~ \$800
 Tee ~ \$500 Hole-in-one ~ \$500 Driving Range ~ \$150 Putting Contest ~ \$150
 Beverage Cart ~ \$250 (+ inventory consumed)

Players _____ @ \$150 ea. (\$135 members) = \$ _____
Dinner Buffet Only _____ @ \$50 ea. (\$45 members) = \$ _____
Sponsorships _____ = \$ _____
Total Amount Enclosed = \$ _____

Member price dead-line: July 31, 2009 ~ Application subject to verification by CAIIA

Mail your completed form and check payable to CAIIA to:

**Jeff Caulkins
300 East Glenoaks Boulevard, 2nd Floor, Glendale, CA 91207
Tournament Questions? Contact: Jeff Stone at (951) 371-8845**



Golf Quips

These greens are so fast I have to hold my putter over the ball and hit it with the shadow. ~ *Sam Snead*

A hungry dog hunts best. ~ *Lee Trevino*

You can talk to a fade but a hook won't listen. ~ *Lee Trevino*

I was three over. One over a house, one over a patio, and one over a swimming pool. ~ *George Brett*

Actually, the only time I ever took out a one-iron was to kill a tarantula. And I took a 7 to do that. ~ *Jim Murray*

The only sure rule in golf is - he who has the fastest cart never has to play the bad lie. ~ *Mickey Mantle*

Sex and golf are the two things you can enjoy even if you're not good at them. ~ *Kevin Costner*

I don't fear death, but I sure don't like those three-footers for par. ~ *Chi Chi Rodriguez*

After all these years, it's still embarrassing for me to play on the American golf tour. Like the time I asked my caddie for a sand wedge and he came back ten minutes later with a ham on rye. ~ *Chi Chi Rodriguez*

The ball retriever is not long enough to get my putter out of the tree. ~ *Brian Weis*

Swing hard in case you hit it. ~ *Dan Marino*

My favorite shots are the practice swing and the conceded putt. The rest can never be mastered. ~ *Lord Robertson*

Give me golf clubs, fresh air and a beautiful partner, and you can keep the clubs and the fresh air. ~ *Jack Benny*

There is no similarity between golf and putting; they are two different games, one played in the air, and the other on the ground. ~ *Ben Hogan*

Professional golf is the only sport where, if you win 20% of the time, you're the best. ~ *Jack Nicklaus*

The uglier a man's legs are, the better he plays golf. It's almost a law. ~ *H G Wells*

I never pray on a golf course. Actually, the Lord answers my prayers everywhere except on the course. ~ *Billy Graham*

If you watch a game, it's fun. If you play at it, it's recreation. If you work at it, it's golf. ~ *Bob Hope*

While playing golf today I hit two good balls. I stepped on a rake. ~ *Henry Youngman*

If you think it's hard to meet new people, try picking up the wrong golf ball. ~ *Jack Lemmon*

You can make a lot of money in this game. Just ask my ex-wives. Both of them are so rich that neither of their husbands work. ~ *Lee Trevino*

I'm not saying my golf game went bad, but if I grew tomatoes, they'd come up sliced. ~ *Lee Trevino*