CAIIA Status Report

July 2013

Insurer Not Liable for Fire Loss Where Insured Fails to Maintain Automatic Sprinkler System

Credit to Smith, Smith, Feeley, Irvine, CA

An insurer was not liable for a fire loss where the insured failed to maintain an automatic sprinkler system, and the insurer was entitled to reimbursement of an advance payment the insurer made during its investigation of the claim.. (*American Way Cellular, Inc. v. Travelers Property Casualty Company of America* (2013) 216 Cal.App.4th 1040)

Facts

American Way Cellular, Inc. applied, through a broker, to Travelers Property Casualty Company of America for a property insurance policy. The broker indicated on the application that American Way's premises were equipped with an automatic fire sprinkler system, even though the premises in fact had no such system.

The policy that Travelers issued included an endorsement that stated: "As a condition of this insurance, you are required to maintain the protective devices or services listed ...." The protective devices were listed as "Automatic Sprinkler System, including related supervisory services." An exclusion section provided as follows: "We will not pay for loss or damage caused by or resulting from fire if, prior to the fire, you: a. Knew of any suspension or impairment in any protective safeguard listed in the Schedule above and failed to notify us of that fact; or b. Failed to maintain any protective safeguard listed in the Schedule above, and over which you had control, in complete working order."

A fire damaged the premises at which American Way operated. Shortly after the fire, Travelers issued an advance payment of $250,000. However, after Travelers issued the advance, Travelers discovered that the premises had not been protected by a fire sprinkler system at any time, and issued a reservation of rights letter. Ultimately, Travelers denied coverage for the claim and announced its intention to seek recovery of the advance.

American Way filed suit against Travelers and the broker through whom American Way purchased the policy. Travelers, in turn, filed a cross-complaint against American Way for reimbursement of the $250,000 advance.

The trial court determined that Travelers had no obligation to pay benefits to American Way, because the policy required that the insured premises contain an automatic sprinkler system and because it was undisputed that the premises did not have such a system. The trial court thus found in favor of Travelers on its cross-complaint for declaratory relief and reimbursement of the $250,000 advance. American Way appealed.

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Status Report Available

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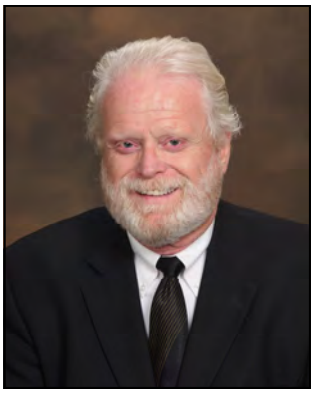
President's Message

CAIIA



W.L. (BILL) McKenzie
CAIIA President

What makes an organization great? Particularly a volunteer organization. Obviously it is the members who volunteer and give their time to help make the CAIIA the great organization that it is known as. Recently we completed the Fair Claims Practice and Earthquake Seminars and without those volunteers and the speakers who volunteer their time, it would be difficult to succeed. I want to thank all of the volunteers and the guest speakers who assisted our members in presentation of the Seminars.

Dan Dyce (California Earthquake Authority), Jeff Caulkins, (John S. Rickerby Company), Kevin Hansen (Law Office of McCormick, Barstow, Sheppard, Wayte & Carruth, LLP), Tim Waters (TPW Claims Services), Sterrett Harper (Harper Claims Service, Inc.), Morgan Griffith, P.E., Lisa Shusto, P.E., Steve Jirsa, P.E. (Exponent Failure Analysis Associates), Pete Vaughan (Vaughan & Associates), Doug Jackson, RPA (SGD, Inc.), Peter Schifrin, RPA (SGD, Inc.), Richard Kern (SGD, Inc.) and Steve Wakefield (Ronald Bolt & Associates).

We had participants from the State of California and some surrounding states. The Seminars were held at Pomona, Sacramento, Chatsworth, Emeryville, Fresno and San Diego. Tim Waters has spent a lot of time in helping the volunteers set up these Seminar sites and make sure that we get the proper educational credits with the California Department of Insurance and I want to specifically thank him for all of his efforts over the past 2 years.

As a note, we will be having our 66th Convention soon, where Tanya Gonder will be installed as the new President 2013-14, and she will be calling for volunteers from our membership to sit on the Board. Anyone that has an interest in participating on the Board or on any of the various Committees, please contact me or Tonya or any of the present Board Members and let us know of your interest.

I have spoken to Tonya Gonder, the President Elect, and she is preparing for an outrageous celebration in Northern California for our 66th Anniversary. She will be sending out notices reminding members to save the dates of 17 & 18 October 2013 for that meeting.

Shortly after this letter is published, we will be celebrating Independence Day, the 4th of July. Surprisingly, the 4th of July had only been a Federal Holiday since 1931, but the tradition of Independence Day celebrations goes back to the 18th Century and obviously the American Revolution 1775-1783. From 1776 until the present day, the 4th of July has been celebrated as the birth of American Independence, with typical festivities ranging from fireworks, parades and concerts to more casual family gatherings and barbeques. I know for a variety of reasons I am looking forward to it, because my youngest daughter and my grandson will be with us over the 4th of July.

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I have done some research on the 4th of July or Independence Day and found some interesting facts. Massachusetts became the first state to mark the 4th of July as an official State Holiday. That was after the Revolutionary War, and Americans continue to commemorate Independence Day every year. John Adams believed that July 2nd was the correct day to celebrate the birth of American independence and in protest reportedly turned down invitations to appear at July 4th events. John Adams and Thomas Jefferson both died July 4, 1826, the 50th Anniversary of the Adoption of Independence. The number of people living in the newly independent nation in July 1976 was 2.5 million, and today it is 316.2 million.

As I am from Nebraska, the following interested me. Since 1816 the town of Seward, Nebraska, a town of 6,000 people, has held a celebration on the same town square. In 1979 Seward was designated "America's Official 4th of July City – Small Town USA" by a Resolution of Congress. On the 4th of July Celebration, this town swells to 40,000+ people.

However great as the 4th of July is, the day I honor more is Memorial Day, or as it was formerly known as Decoration Day. It originated after the American Civil War to commemorate the Union and Confedrate Soldiers who died in that war. By the 20th Century, Memorial Day had been extended to honor all Americans who have died while in the military service. I am sure each and every one of us knows of some member of the military service who has given his life for the freedoms we all enjoy. Given the current involvement of our military forces in Afghanistan and Iraq, we should remember those fallen individuals every day of the year, not just on one day.

Have a great July 4th celebration and remember our fallen veterans.

W.L. (Bill) McKenzie

W.L. (BILL) MCKENZIE, RPA
President – CAIIA 2012-13

Notes and News from Members

Peter Schifrin at the DOI

I represented the CAIIA at the California Insurance Department Curriculum Board Meeting in Sacramento on June 13th. As always, I will summarize the items that came up which are of interest to our members:

Assembly bill 1391 remains active. The bill in part proposes to modify California Insurance Code 14090.1. As most of you know, California requires an individual holding an insurance adjuster license, not otherwise exempt, to complete a minimum of 24 hours of continuing education courses. The modification would authorize an exemption from the continuing education requirements for an individual licensed as both an insurance adjuster and as a property or casualty broker-agent who has met other specified continuing education requirements. In other words, they wouldn't have to do double the continuing education. I know of at least one CAIIA member who will directly benefit from this.

I continue to serve on the Committee working on the Independent Adjuster Test Outline. It is nearly complete. The outline will let applicants know what areas to study, and what percentage of the test questions will come from each area. The next task will be to review test questions for appropriateness and accuracy. The DOI really does want to make it easier for adjusters to prepare for and pass the test.

The pass rates for first time takers of the independent adjuster exam during the first five months of 2013 was 47%. That is actually an improvement.

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JULES VERNE WAS RIGHT

Jules Verne in his 1874 novel *The Mysterious Island*, envisioned splitting apart hydrogen and oxygen and thereby furnishing a fuel for transportation. His vision soon will be a reality.

The National Resources Defense Counsel (NRDC) in their recent magazine *On Earth* state that Hyundai announced a fuel cell version of an SUV that will become the first hydrogen-powered vehicle to be mass produced.

Hyundai has plans to manufacture 1000 of the fuel celled vehicles (FCV) between now and 2015. Interestingly, Daimlar, Ford and Nissan announced that they would work together in producing 100,000 FCV's as soon at 2017, plus Toyota and Honda stated they will mass product FCV's in 2015.

The least expensive way to obtain pure hydrogen is through a process called steam reforming. This uses natural gas as a feed stock, and generates nominal carbon dioxide as a bi-product. According to a professor at University of California Davis, the green-house gas emissions attributed to FCV's are "about half of what you would get with a Toyota Prius."

Many independent adjusters, while driving around as we so often do, are just beginning to think about owning hybrids and electric cars in the next several years. Now with hydrogen cars our vision of being better stewarts of our planet is yet again propelled outside the box.

Thank you Mr. Verne for the idea (and perhaps Leonardo DaVinci has an idea about a change in airplane travel)?

Human use, population, and technology have reached that certain stage whre Mother Earth no longer accepts our presence with silence.

Dalai Lama XIV

Steve Enihaus, Einhaus Adjusting Services

San Rafael, CA

Duty of Care – Vendor's Duty to Third Parties

Anthony Pedeferri, et. al. v. Seidner Enterprises, et. al.

Court of Appeal, Second District(May 15, 2013)

Credit to Low, Ball & Lynch, San Francisco CA

Does a commercial vendor owe a duty of care to persons on or near the roadway who are injured as a result of the vendor's negligence in loading and securing cargo in a vehicle in a way that distracts the vehicle's driver?

This case arises from an accident that paralyzed plaintiff Anthony Pedeferri, a California Highway Patrol officer, and took the life of Andres Parra, the man on the side of the highway with him. Defendant Jeremy White (White) careened off the northbound 101 Freeway and slammed into White's car on the shoulder. At the time of the accident, White had "quite high" levels of marijuana in his blood. Just 90 minutes before the accident, White left Bert's Mega Mall, where Bert's employees had loaded and strapped down two dirt bikes in the bed of White's truck. As White drove on a bumpy portion of the 101 freeway, he felt and saw the bikes "hopping around a little bit in the bed of the truck." The bikes moved from side to side, as well as back and forth. White then heard a popping sound. White took his eyes off the road to glance back over his shoulder and slammed into Parra's vehicle on the side of the freeway. The jury unanimously found White to be negligent and, by a 9-to-3 vote, also found Bert's to be negligent.

Bert's moved for judgment notwithstanding the verdict (JNOV) in part on the ground that Bert's sole duty was to load and secure cargo so it would not fall out—not to load and secure cargo so it would not distract a driver. The trial court found Bert's articulation of its duty too narrow. The court ruled that "there's a duty on a commercial vendor that loads the goods in the back of [a] truck to use care so that those on or near the roadways are not harmed."

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The Appellate Court found Bert's did owe a duty of care to persons on or near the roadway who are injured. The Court had to evaluate whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party. The inquiry into foreseeability entails three considerations: "[1] the [general] foreseeability of harm to the plaintiff, [2] the degree of certainty that the plaintiff suffered injury, [and] [3] the closeness of the connection between the defendant's conduct and the injury suffered. . . ." *Cabral v. Ralph's Grocery Co.* (2011) 51 Cal.4th 764, 775. Here, the chain of foreseeability was both short and direct. It is foreseeable that cargo negligently loaded or secured in a vehicle could distract the vehicle's driver in a variety of ways—by making noise, blocking the driver's view, interfering with his or her control of the vehicle, or falling out. It is further foreseeable that a driver so distracted could injure others on or near the roadway.

The Court then had to assess whether other public policies militate against a duty notwithstanding the general foreseeability of the harm. The pertinent public policy considerations are: "'[1] the moral blame attached to the defendant's conduct, [2] the policy of preventing future harm, [3] the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and [4] the availability, cost, and prevalence of insurance for the risk involved.'" (*Cabral*, *supra*, 51 Cal.4th at p. 781. Bert's argued that White's marijuana use was more morally blameworthy, but the Court was dealing with the vendor's duty, which focuses on the vendor's culpability. Imposing a duty to carefully load and secure cargo, with resulting liability for the negligent discharge of that duty, would be effective in discouraging negligence and thereby preventing future harm.

The Court found that public policy does not provide a justification for a "categorical no duty rule." Bert's argued that imposing a duty would discourage vendors from voluntarily agreeing to load and secure their customers' purchases, leaving the less-experienced customers to do it themselves and risking more accidents. The Court was not persuaded by this argument. The Court agreed that jurors will have to confront, on the facts of each case, whether a vendor's particular conduct was negligent and distracted the driver. It also noted that an injured plaintiff must also prove that the vendor breached the duty of care and proximately caused his or her injury. The Court cited multiple cases where California courts have given controlling weight to considerations of public policy only where the potential for tort liability directly leads to undesirable incentives or policy outcomes.

The Court noted that Bert's was unable to cite applicable case law supporting its position that it was unable to control the driver or that it is immune because the duty to control one's vehicle rests exclusively with the driver. It further held that White's intervening negligence did not sever the causal link between Bert's negligence and plaintiffs' injuries. The evidence established that Bert's negligence in loading and securing the dirt bikes was a substantial factor in distracting White. Further, while deplorable, White's intervening negligence was neither "highly unusual" nor "extraordinary." The reason for holding vendors liable for negligently loading and securing cargo in a vehicle is precisely because a poorly done job can distract the vehicle's driver.

COMMENT

This case extends the duty of care to vendors for their negligence in loading and securing cargo in a vehicle in a way that distracts the vehicle's driver. While their actions may appear far removed from the accident, this Court believed that the foreseeability was both short and direct.

Have a Happy and Safe 4th of July!!

Strict Interpretation: Declining To Extend Liability Under Civil Code Section 1714

Adam Rybicki, et al. v. Ashley Carlson, et al.

Court of Appeal, Second Appellate District (May 22, 2013)

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

California Civil Code section 1714 immunizes from civil liability an individual who provides alcohol to another who, due to intoxication, subsequently is injured or injures a third party. However, there is one specific exception to this immunity: for an adult who knowingly furnishes alcohol at his or her residence to an individual who is known to be, or should have been known to be, under 21 years old. This case considers the applicability of this statute to individuals who allegedly conspired with, or aided and abetted, an adult who knowingly furnished alcohol to someone under the age of 21.

Civil Code section 1714 was enacted in 1978 to reinstate a common law rule in California that had existed until 1971. In 1971, the California Supreme Court held that a commercial vendor who sold alcohol to an obviously intoxicated person could be held liable for injuries caused by that person. *See Veseley v. Sager* (1971) 5 Cal.3d 153. Subsequent decisions by the California Supreme Court extended this doctrine to include non-commercial providers of alcohol such as social hosts. *See Coulter v. Superior Court* (1978) 21 Cal.3d 144, 149. Section 1714 explicitly abrogates these cases, with the exception mentioned above, on the theory that it is the consumption of alcohol, and not the furnishing of that alcohol, that is the proximate cause of such injuries.

On April 2, 2011, five young women, all under the age of 21 and each of whom had been drinking, got into a car after partying all night at the house of a friend, Garrett Shoemaker. At 7:15 a.m., one of the women, Jaclyn Garcia, was driving on the wrong side of the road when she struck plaintiff/appellant Adam Rybicki, who was riding his bicycle. Mr. Rybicki suffered serious injuries and brought suit, along with his wife, against Ms. Garcia, the other four women in the car (hereinafter "respondents"), and Mr. Shoemaker.
In the complaint, Mr. Rybicki and his wife alleged that Mr. Shoemaker knowingly furnished alcohol to the under aged Ms. Garcia at his residence, and that respondents conspired with Mr. Shoemaker and/or aided, abetted, and assisted him in providing her with alcohol. Indeed, it was alleged that the respondents went to a retail establishment, solicited adults to purchase alcohol for them, and brought that alcohol to Mr. Shoemaker's residence, where he then furnished it to Ms. Garcia.

Three of the respondents filed demurrers, while the fourth filed a motion for judgment on the pleadings, each arguing that they were immune from liability under section 1714. The trial court sustained each of the demurrers without leave to amend and granted the motion for judgment on the pleadings. Plaintiffs filed a notice of appeal from these judgments. The question on appeal was whether the four women who were not driving, but were present in the car and alleged to have supplied some of the alcohol consumed, could be held liable for Mr. Rybicki's injuries.
Taking up this question, the Court of Appeal, Second Appellate District affirmed the judgments of the trial court, and held that section 1714(d) cannot be used to "bootstrap" respondents into liability. Looking closely at the language of the statute, the Court determined the key fact was that respondents were not alleged to have furnished alcohol to Ms. Garcia at their residences. Although respondents may have obtained the alcohol and provided it to Mr. Shoemaker, it was only furnished at his residence. Thus, respondents did not fit the exception outlined in section 1714(d) and the consumption of the alcohol by Ms. Garcia acted as an intervening cause to plaintiffs' injuries.

COMMENT

This case narrowly construes the exception to Civil Code section 1714, restricting liability to an adult who, at his or her residence, knowingly furnishes alcohol to someone under the age of 21. Those who conspire with, or aid and abet that individual are immune to civil liability if the alcohol was not furnished at their residence.

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Holding

On appeal, American Way argued that the policy did not require American way to "maintain" a sprinkler system that never existed. However, the Court of Appeal rejected this argument. Relying on various appellate holdings from other jurisdictions, the Court concluded that American Way was not entitled to coverage because American Way failed to maintain an automatic sprinkler system as required under the terms of the endorsement. The Court ruled that the sprinkler requirement was a "condition precedent" to coverage, and that this condition required American Way to have a "functioning, operational sprinkler system during the period of coverage."
American Way also argued that Travelers had failed, before issuing the policy, to investigate whether the building had an automatic sprinkler system. The Court of Appeal rejected this argument, too, holding that Travelers was entitled to rely on the information on American Way's application, and that Travelers had no duty to determine whether American Way's premises had a sprinkler system before Travelers issued the policy.

Comment

The provision at issue in this case was neither an insuring agreement nor an exclusion. Instead, it was a "condition precedent." A condition neither confers nor excludes coverage for a particular risk but, rather, imposes certain duties on the insured in order to obtain the coverage provided by the policy. A "condition precedent" refers to an act, condition or event that must occur *before* the insurance contract becomes effective or binding on the parties.

Claremont Hotel & Spa, 41 Tunnel Road, Berkeley, CA., 94705
www.claremontresort.com

Save the Date!

CAIIA Fall Convention, October 17-18, 2013 at the Claremont Hotel & Spa in Berkeley, CA.

Make hotel reservations by calling 1-800-551-7266. CAIIA's special rate until August 15, 2013 is $179/night (this may be extended). Ask for the CAIIA rate when booking!

Reduced self-parking rate: $15/day
Reduced facilities rate: $15/day (includes in-room internet, access to the Club/Fitness Center and all fitness classes, local calls, newspaper & in-room coffee)

Agenda details to follow..... Plan on a fabulous stay!!

On the Lighter Side...

Did I read that sign correctly?
TOILET OUT OF ORDER. PLEASE USE FLOOR BELOW

In a Laundromat:
AUTOMATIC WASHING MACHINES: PLEASE REMOVE ALL YOUR CLOTHES WHEN THE LIGHT GOES OUT

In a London department store:
BARGAIN BASEMENT UPSTAIRS

In an office:
WOULD THE PERSON WHO TOOK THE STEP LADDER YESTERDAY PLEASE BRING IT BACK OR FURTHER STEPS WILL BE TAKEN

In an office:
AFTER TEA BREAK STAFF SHOULD EMPTY THE TEAPOT AND STAND UPSIDE DOWN ON THE DRAINING BOARD

Outside a secondhand shop:
WE EXCHANGE ANYTHING - BICYCLES, WASHING MACHINES, ETC. WHY NOT BRING YOUR WIFE ALONG AND GET A WONDERFUL BARGAIN?

Notice in health food shop window:
CLOSED DUE TO ILLNESS

Spotted in a safari park:(I sure hope so)
ELEPHANTS PLEASE STAY IN YOUR CAR

Seen during a conference:
FOR ANYONE WHO HAS CHILDREN AND DOESN'T KNOW IT, THERE IS A DAY CARE ON THE 1ST FLOOR

Notice in a farmer's field:
THE FARMER ALLOWS WALKERS TO CROSS THE FIELD FOR FREE, BUT THE BULL CHARGES

Message on a leaflet:
IF YOU CANNOT READ, THIS LEAFLET WILL TELL YOU HOW TO GET LESSONS

On a repair shop door:
WE CAN REPAIR ANYTHING. (PLEASE KNOCK HARD ON THE DOOR - THE BELL DOESN'T WORK)
****
Proofreading is a dying art, wouldn't you say?

Something Went Wrong in Jet Crash, Expert Says
Really? Ya think?

Police Begin Campaign to Run Down Jaywalkers
Now that's taking things a bit far!

Miners Refuse to Work after Death
No-good-for-nothing' lazy so-and-so's!

Juvenile Court to Try Shooting Defendant
See if that works any better than a fair trial!

If Strike Isn't Settled Quickly, It May Last Awhile
Ya think?!

Cold Wave Linked to Temperatures
Who would have thought!

Man Struck By Lightning: Faces Battery Charge
He probably IS the battery charge!

New Study of Obesity Looks for Larger Test Group
Weren't they fat enough?!

Astronaut Takes Blame for Gas in Spacecraft
That's what he gets for eating those beans!

Local High School Dropouts Cut in Half
Chainsaw Massacre all over again!

Hospitals are Sued by 7 Foot Doctors
Boy, are they tall!

And the winner is....

Typhoon Rips Through Cemetery; Hundreds Dead
Did I read that right?