CAIIA Status Report

AUGUST 2004

Policy Limits Disclosure

Submitted by Veatch, Carlson, Grogan and Nelson, Los Angeles, CA

Don Ferguson of Hunt and Ferguson, Salinas, asked that we have one of the attorney friends of the CAIIA discuss Boicourt v. Amex Assurance Company. *The* Status Report *wishes to thank Veatch, Carlson Grogan and Nelson, Los Angeles, for the following article. Also, the* Status Report *thanks Don Ferguson for bringing this to the attention of everyone. It may make a change in how you process requests for the amount of the policy in liability claims.*

Boicourt v. Amex Assurance Co., (2000), 78 Cal. App.4th 1390, 93 Cal.Rptr.2d 763

Although "California law is quite clear that insurers may not disclose policy limits absent written permission from the insured" before suit is filed, this case stands for the proposition that an insurer must at least give its insured the option of disclosing policy limits when that information is requested by a claimant.

Plaintiff was a passenger in a car driven by his friend. They were involved in a wreck with another car, and plaintiff sustained "catastrophic injuries". Before filing suit, plaintiff's attorney contacted the driver's insurer to find out the policy limits. "[A] month after the request, an adjuster wrote to [plaintiff's attorney] to state that the company had a 'policy not to disclose the amount of the policy limits'. [Plaintiff's attorney] would later say, in a declaration filed in opposition to a summary judgment motion [filed by the insurer in the subsequent bad faith action], that he would have accepted the (subsequently revealed) $100,000 policy limits 'on any date up to and including [the date] when I was made aware that the policy limits would not be disclosed absent formal litigation'."

Plaintiff filed suit against the driver and the driver's father, who owned the car. "Five months into the litigation . . . [the insurer] made a settlement [*sic*] limits offer of $100,000, presumably by then having disclosed the limits. That offer was refused. No settlement demand was ever made . . . on behalf of [plaintiff] during the next three and a half years." The case went to trial, "resulting in a stipulated judgment of $2,985,000 against [the driver] and $15,000 against [the driver's fa-

Continued on page 3

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California Association of Independent Insurance Adjusters

An Employer Organization of Independent Insurance Adjusters

Inside This Issue

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■ PRESIDENT'S MESSAGE

I think I mentioned once before that a CAIIA Past President once told me that writing this column each month was one of the more challenging tasks of this position. I shrugged it off at the time, but as we get closer to the end of my term in office, and as I am now writing my 10th President's Message, I see the wisdom of his remarks.

However, another Past President also told me that no one ever reads these messages anyway, so I guess I shouldn't worry about it! I'm sure he had his tongue firmly in his cheek when he made that comment, and since I have heard from several people in response to one column or another, I know at least some of you are reading these messages. In a couple more months, I will pass the baton to President Elect Doug Jackson, and Doug, I promise I'll read all your columns!

Elsewhere in this newsletter, you will find a registration form for our Fall Conference, on October 13-15, 2004, at Disney's Grand Californian Hotel. Doug Jackson has negotiated remarkably low room rates, considering the location (it really is grand!), and the conference registration fees have been kept as low as possible once again this year. I have heard that many registrants are bringing family members, to attend Disneyland and Disney's California Adventure. My wife is also planning to do the very same thing, with as many of our kids and grandkids as possible. She has also convinced me to wear a tuxedo, for the President's Gala Dinner Event, so I can blend in with all the other Past Presidents and our President Elect!

The registration form will also soon be available on our website, www.caiia.org. If you haven't checked out our website lately, it is a source of much valuable information, not only about the CAIIA, but also industry related.

You will find there information about the Insurance Adjuster's Earthquake Training Standards, and our Legislative Analyst's Report on recent legislation, as well as his weekly newsletter, "This Week In Sacramento". The Low, Ball & Lynch Weekly Law Resume is available there, and if you click on "Industry Links", you will see many links to websites which can be very helpful to the claims industry.

CAIIA members are listed, of course, by City, and alphabetically, as are the Owners, Officers, and Managers of CAIIA firms. Near and dear to all of our hearts, you can also read, and re-read, the "Fair Claims Settlement Regulations".

I hope to see as many of you as possible at our fall conference, where we will mix CAIIA business, education for the industry, and – fun!

LEE COLLINS, ARM
President - CAIIA 2003-2004

Policy Limits Disclosure

Continued from page 1

ther], as owner [of the car]. [The insurer] paid its policy limit of $100,000." The driver assigned his rights against the insurer to plaintiff in exchange for a covenant not to execute on the judgment. Plaintiff then sued the insurer for bad faith. The insurer moved for summary judgment, which the trial court granted. The Court of Appeal reversed.

The first two sentences of the Court of Appeal's opinion tell you where the court is going: "No less an authority on insurance law than John Alan Appleman declared 40 years ago that a liability insurer is playing with fire when it refuses to disclose policy limits. Such a refusal cuts off the possibility of receiving an offer within the policy limits by the company's refusal to open the door to reasonable negotiations." While, as noted at the outset, California law is clear that insurers may not disclose policy limits before litigation is commenced without the insured's written consent, in the present case, "the insurer's sin . . . was a *blanket refusal to contact the insured to see if he wanted the policy limits disclosed*." But functionally it was the same thing" as refusing to disclose the policy limits, because by not giving the insured the option of disclosing the policy limits, the insurer "may have foreclosed a possible settlement of the underlying claim within those limits." This, the rule set down by the Court of Appeal:

> "*A blanket rule against pre-complaint disclosure of policy limits creates a conflict of interest between liability insurers and their insureds*. First, the insurer saves some money on administrative costs by never having to contact its policyholders to obtain the necessary authorization for disclosure. Second, the insurer gains a tactical advantage vis-à-vis the claimant by forcing the claimant to make any pre-litigation offers 'in the dark'. Because *the essence of bad faith in the liability insurance context is the insurer's elevation of its own parochial interests over the insured's at the expense of a policy limits settlement – that is, preferring its own interests over the insured's when there is a conflict of interest between them* – we reverse the summary judgment [for the insurer] in this case. That judgment was based on the idea that there could be no conflict of interest absent a formal settlement offer."

The court said that "insurers *do* have a 'selfish' interest (that is, one that is peculiar to themselves) in imposing a blanket rule which effectively precludes disclosure of policy limits and the interest can adversely affect the possibility that an excess claim against a policyholder might be settled within policy limits. Thus, a palpable conflict of interest exists in at least one context where there is no formal settlement offer. We therefore conclude that *a formal settlement offer is not an absolute prerequisite to a bad faith action in the wake of an excess verdict when the claimant makes a request for policy limits and the insurer refuses to contact the policyholder about the request.*

The court clarified that it was not "explor[ing] the degree to which the implied covenant of good faith and fair dealing imposes on a liability insurer a duty to be 'proactive' in settling cases, except to say that an insurer's blanket rule against contact the policyholder to see if the policyholder wants the policy limits disclosed can be a basis for bad faith". In a footnote, the court added: "[I}f we may be permitted some dicta on the point, a simple letter to the insured's last known address, saying that a claimant has requested disclosure of the policy limits and enclosing a form in conformity with Insurance code section 791.13, subdivision (a), should suffice. While an insurer should not put its administrative convenience ahead of the insured's interest in settling within policy limits, we see no reason to require an insurer to do more than is reasonable necessary to give the insured the opportunity to make the disclosure decision".

Weekly Law Resume

Prepared by Low, Ball & Lynch, Attorneys at Law

Duty – Prior Owner of Property

Kevin D. Lewis v. Chevron USA, Inc., Court of Appeal, First District, (June 18, 2004).

Normally, an owner of property is not liable for injuries caused by a defective condition on property after the owner has relinquished ownership and control, even if the prior owner created the condition. This case examined that rule.

Kevin Lewis was injured in April 2000 when a hot water pipe burst while he was working for a subcontractor on an electrical job at Berlex Biosciences Laboratory. He filed a complaint for his injuries against Berlex. He later added Chevron USA. Chevron owned the property and had sold it to Berlex in 1992.

Chevron filed a motion for summary judgment. Lewis opposed the motion contending that Chevron had created the soldering defect in the copper pipe that burst and caused his injury. The trial court granted the Chevron motion for summary judgment. Lewis had argued that because Chevron had soldered the pieces of copper pipe, it remained liable even though it had sold the property.

The Court stated that once Chevron sold the property, it was not liable for any harm caused by a dangerous condition of this property. The Court followed the general rule that an owner of property who allegedly constructed an improvement on the property in a negligent fashion is not liable for injuries sustained on the property after they have relinquished all ownership and control, except under certain limited exceptions. This is because landowner liability is based upon possession and control. In addition, a former landowner has no ability to obtain insurance for has no ability to obtain insurance for property it does not own or control or to take precautions to prevent injuries after it has given up ownership and possession of the property.

The Court stated this rule applies whether the defect claimed is patent or latent. In the absence of a showing that the seller of the property knew of a condition and deliberately concealed it, there simply is no liability. The only other exception is that of a commercial developer of property.

In this case, once Chevron established it sold the property and had no control of it, it was not liable unless proof was brought forth to show it concealed this defect. There was no such proof in this case. Thus, summary judgment was properly granted for chevron. The judgment was affirmed.

COMMENT

The application of the rules of this case makes sense in the commercial setting of insurance. A landowner would have great difficulty in obtaining insurance to cover him for defects on property which he no longer owns.

Indemnity – Right to Recover

Bramalea California, Inc. v. Reliable Interiors, Inc., Court of Appeal, Fourth District, (May 13, 2004)

With the advent of indemnity agreements and additional insured endorsements, it is often thought that they provide a convenient method for the transfer of risk. However, this case points out important procedural considerations that may limit the right of recovery for indemnity.

Bramalea California, Inc. (Bramalea), a residential real estate developer, was sued by homeowners for construction defects. Bramalea cross-complained for indemnity against its subcontractors. Bramalea was in bankruptcy at the time, and the suit against it was limited, pursuant to bankruptcy order, to any insurance proceeds, as well as any indemnity rights. All of the subcontractors had written indemnity agreements, as well as agreements to provide insurance for Bramalea.

Bramalea delayed in making a prompt tender of defense to the subcontractors' insurance carriers. Once the tenders were made, the carriers assumed the cost of defense. When the case was settled by Bramalea and the subcontractors, the issue of reimbursement for defense costs and fees incurred by Bramalea was left open.

Bramalea pursued its cross-complaint against Ram-Mar Painting and All Star Electric, Inc. The Trial court granted a motion to dismiss the cross-complaint because Bramalea failed to prove it had been damaged. Bramalea had paid nothing for its attorneys' fees and costs because they had been paid by its insurer. Bramalea appealed.

The Court of Appeal affirmed the dismissal of this matter. Bramalea first argued that these fees and costs were recoverable costs it was entitled to recover. The Court, however, pointed out that the underlying action had been settled, and there was no prevailing party who was entitled to costs. Bramalea was thus limited to its contract remedy of indemnity.

Bramalea admitted its attorneys' fees were entirely paid

Continued on page 5

Weekly Law Resume

Prepared by Low, Ball & Lynch, Attorneys at Law

Continued from page 4

by its insurer. This, it was not out of pocket any loss. The court stated thus since Bramalea had its attorneys' fees and costs paid, this was an impermissible attempt to obtain double recovery. The collateral source rule did not apply since that rule only applies to tort actions. This was a contract action. A breach of contract action is not actionable without proof of damages.

The court stated Bramalea could pursue this matter if it had assigned the claim to its insurer and the insurer was suing in its own name or if the insurer was seeking to take Bramalea's place to pursue recovery against the subcontractors on an equitable subrogation theory. Bramalea did not assert either position. The Court further questioned whether the insurer could pursue equitable subrogation. The Court pointed out that equitable subrogation is not allowed for breach of the indemnity agreement. Any damages were caused by the lawsuit brought by the homeowners for construction defects. These damages were one of the risks the insurer accepted premiums to cover. Since the lawsuit did not resolve whether the construction defects were caused by the subcontractors, equitable subrogation could not be allowed.

In a footnote, the Court noted that the insurer could have pursued the subcontractors' insurers on its own for equitable contribution. That was not done in this case. The judgment of a dismissal was therefore affirmed.

COMMENT

What this case suggests is that the insurer should sue for equitable subrogation or there should be an assignment of the rights to pursue the indemnity action if it is brought in the insured's name. Absent proof of those facts, the indemnitor may be able to successfully defend against claims of indemnity.

Case of the Month

A Little Maintenance Might Have Helped

Submitted by Garrett Engineering, Long Beach, CA

An adjuster for a major insurance company called Garrett Engineers to inspect a residence for water damage which the insured claimed was due to a faulty re-roofing job, on one hand, and leaking water from a defrosting freezer caused by a power outage on the other. A civil engineer was assigned.

The insured pointed out "mold growth" in several areas due to the "faulty roofing" job. The expert was able to determine that wall paint deterioration and absorbed moisture due to ambient temperature changes were the cause in one bedroom. In another bedroom, old and deteriorating single-pane windows were causing leakage. In a laundry room, a broken window, no less, was the culprit.

Not to easily give up, the insured pointed out linoleum in the kitchen which was buckled. She claimed that the cause was leakage from a freezer shut down due to a power failure in a hailstorm. From power company records, the Garrett expert determined that the time of the outage could not have caused the problem and the particular freezer style would not have shed water anyway!

The de-lamination of the linoleum was also determined to have occurred over a long period of time, not due to a single event. Ultimately, the problem in the kitchen was determined to have been caused by standing water, the result of a blocked drain, which was confirmed by a leak-detection specialist brought into the case by our expert.

Roofing job: not guilty! Not much or a claim after all!

News of Members

Carl Pearson has informed us that his office of M & N Claim Service, Inc. has a new address. The new address is M & N Claim Service, Inc., P.O. Box 1159, Lakewood, CA 90714-1159. The telephone and FAX numbers will remain the same.

Jeneé Child of Premiere Consulting and Adjusting, Inc. asked that we let all of our readers know that her firm name was listed improperly in the last issue of *the Status Report*. The *Status Report* apologizes to Jeneé and her company.

CAIIA *Calendar*

CAIIA Annual Conference

October 13, 14, & 15, 2004
The Disney Grand Californian, Disneyland Resort
Anaheim, CA
Contact: Doug Jackson, 805-584-3494, ext. 11

Claims Conference of Northern California

September 14 & 15, 2004
The Doubletree Hotel, Sacramento, CA
Contact Barbara Prosch, 530-626-1676

HRB Insurance Law Update

Submitted by Hancock, Rothert & Bunshoft, LLP

Friedman Professional Management Co. v. Norcal Mutual Insurance Company, California Court of Appeal, Fourth Appellate District, Division Three, Case No. G030808, filed June 29, 2004.

The California Court of Appeal held that a medical malpractice insurer did not have to continue defending its insured, a surgery center owner, against a second lawsuit alleging a different type of harm from a treatment than did a prior lawsuit, once the limits of the claims-made policy in effect when the first lawsuit was filed had been exhausted.

This case arose from a medical malpractice incident that occurred in 1993. The patient first filed a medical malpractice lawsuit against the insured surgery center and its owner. Norcal Mutual, the surgery center's malpractice insurer, defended the lawsuit under the 1993 medical malpractice claims made policy then in effect, which provided that defense costs were paid from the limits of the policy. In 1996, the patient filed a second lawsuit against the same surgery center and its owner for battery arising out of the fact that the owner of the surgery center had touched her when trying to stop her bleeding during the 1993 operation that went awry. Norcal initially defended this lawsuit under the 1993 malpractice policy, but stopped defending when the 1993 policy limits were exhausted by payment of the eventual judgment in the first lawsuit. The insured asserted that Norcal acted in bad faith by withdrawing its defense and that it should have continue to defend under the 1996 claims made policy in effect when the second lawsuit was filed. The insured claimed that the 1996 policy applied to the second lawsuit. Norcal disagreed and asserted that the 1996 lawsuit was "related" to the claim first made during the period of the 1993 policy, and, under the terms of both the 1993 and 1996 policies, the second claim stemmed from the same occurrence as the 1993 claim, and therefore was covered by the limits of only the 1993 policy. The California court of Appeal agreed with the insurer's position and found that the second lawsuit was not potentially covered under the 1996 insurance policy.

The California Court of Appeal held that both lawsuits were only covered under the 1993 policy, even though under California law the types of injury were distinct and involved different primary rights, because the second lawsuit's allegations of battery and invasion of privacy arising out of the fact that the owner of a surgery center tried to stop a patient's bleeding were "related" to acts that gave rise to the prior allegation of medical malpractice against the center itself for having supplied the wrong pump and fluids which caused the bleeding in the first place. In reaching its decision, the Court of Appeal analyzed the policy language which defined an "occurrence" as a "single act or omission or series of related acts or omissions involving direct patient treatment". The policies were claims made policies which defined "claim" to mean "actual claim or suit" or a "potential claim or suit", and a potential claim as any "occurrence . . . which may result in a . . . lawsuit". In reaching its decision, the California Court of Appeal also relied on *Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.*, 5 Cal.4th 854 (1993), and distinguished *Homestead Ins. Co. v. American Empire Surplus Lines Ins. Co.*, 44 Cal.App.4th 1297 (1996).

THE CONVENTION IS COMING!!!

The annual meeting of the
California Association of Independent Insurance Adjusters
is being held on
October 13, 14 and 15, 2004
at the
Disneyland Resort in Anaheim.
We have very low room rates and a price to attend the convention that hasn't been this low in years. Plan on attending and see what the Association is doing for you.

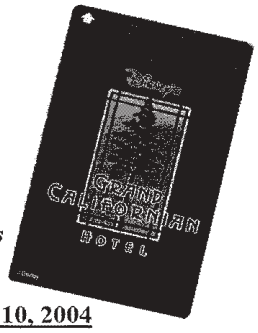
Disneyland RESORT
The Happiest Place on Earth

CAIIA REGISTRATION FORM

California Association of Independent Insurance Adjusters
ANNUAL CONVENTION – October 13, 14, & 15, 2004

Disney's Grand Californian Hotel

1600 South Disneyland Drive, Anaheim, CA 92802
(714) 520-5005 Mention CAIIA
Standard Room Rate $169 (single/double); $184 (triple); $199 (quad)
1 bedroom Artisan Suite $670 (rooms available on first come basis)
(plus taxes, premium views/concierge floors extra; resort fee paid by CAIIA entitles use of gym, self-parking, free local calls, rate good 3 days before or after event)



Attendees must make their own hotel reservations. Hotel Cut-off Date is September 10, 2004

Your Name _____ Significant Other _____
Company _____
Address _____
Phone _____ Fax _____
E-Mail _____

- ***Association members must purchase a complete registration package. Employees of members are welcome to purchase full or partial events.***
- ***Package includes all events below. CAIIA Member Employees may attend the educational seminars only with a member's purchase of a registration package. Insurance personnel guests (*) may purchase President's Gala Dinner Event and Educational Seminar only.***
- ***Please specify which events you and your significant other/mate will actually attend by placing a check mark in the box next to the event. If you are insurance personnel guest (*), please indicate # in Guest Box below.***

EVENT	COST	# of TICKETS	TOTAL
Registration Package – members with spouse/mate **	$ 200.00	_____	$_____
Registration Package – members w/o spouse **	$ 175.00	_____	$_____
President's Dinner/Reception/Awards/Installations (10/14/04)	$ 30.00	_____	$_____
Education Seminar including lunch and parking *(available to member employees or insurance company guests only)**	$ 25.00	_____	$_____
		Grand Total Payable	$_____

Items in blue for Members/Member Employees/Significant others only

SCHEDULED EVENTS

		Please Show # Attending Events Below:	*You*	*Mate*	*Guest**
10/13	6:30 P.M.	Registration/Reception	[ ]	[ ]	[ ]
10/14	9:00 A.M.	Business Meeting	[ ]	[ ]	[ ]
10/14	12:00 P.M.	Lunch	[ ]	[ ]	[ ]
10/14	1:30 P.M.	Advisory Counsel	[ ]	[ ]	[ ]
10/14	6:30 P.M.	Presidents Gala Dinner Event, Awards, & Officer Installations	[ ]	[ ]	[ ]
10/15	8:00 A.M.	Registration/Continental Breakfast	[ ]	[ ]	[ ]
10/15	9:00 A.M.	Education Seminars	[ ]	[ ]	[ ]
10/15	12:00 P.M.	Luncheon w/ Special Guest Speaker	[ ]	[ ]	[ ]
10/15	1:30 P.M.	Conclusion			

Any Questions, please call or email (Doug Jackson):
Lee Collins, Bragg & Associates – (916) 960-0902
Douglas Jackson, Southwest Claims – (805) 584-3494

Please make your checks payable to CAIIA or pay by credit card.
Mail Registration form and payment to:
Douglas Jackson
Southwest Claims Service, Inc.
P.O. Box 1810
Simi Valley, CA 93062-1810
scsdj@southwestclaims.com

Credit Card: AMEX ____ VISA ____ M/C ____
Cardholder _____
Card # _____
Expiration Date: _____
Signature: _____

* **We welcome the attendance and participation of insurance company and risk management claims personnel and attorneys at the President's Gala Dinner Event and the Educational Seminars and Luncheon.**

** **Your Association has drastically reduced the registration this year. Take advantage of these price reductions by attending *your* CAIIA Annual Convention. Exciting spouse program scheduled.**

Cut-off date is September 15, 2004. Any registration after that date is subject to a $35.00 late fee.

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