CAIIA Status Report

AUGUST 2009

MAKE SURE YOUR CE IS APPROVED

The Education Committee and the Executive Office have received several complaints from members that there are organizations who state that they are providing California Department of Insurance approved Continuing Education (CE) for the independent adjusters (IA) license. After taking the class, the IA is finding the class has not been approved by the DOI.

The Status Report encourages all IA's to check with the DOI web site to make sure that your class is approved BEFORE you take the class.

We thank Helene DalCin of DalCin Claims Consulting, Burbank, for the following information so that any IA is able to check for any particular class.

1. Go to www.insurance.ca.gov.
2. From the red banner at the top of the DOI home page, select "Agents & Brokers."
3. From the drop down menu, select "Seeking Pre-Licensing/ Continuing Education."
4. A drop down menu will appear to the right of "Seeking Pre-Licensing/Continuing Education." From that side menu, select "Locating Courses."
5. The next page provides one sentence on the right field; from that sentence, click on "education courses." (it is blue).
6. On the next page, select the following parameters:

   License type: Adjuster

   Education type: Continuing Education

   Instruction Method: Contact (if you are verifying a course of fered by a vendor)

   Start Date: Use date provided by vendor

   Enter the appropriate City, County, and State where the course is being offered.

If the course does not appear as an approved course on the DOI website, then you will not receive continuing education credit for your hours of attendance.

The California Department of Insurance (DOI) announced today that Helene DalCin, DalCin Consulting Service, Burbank, CA, has been appointed as a member of Curriculum Board for the DOI. Helene has been instrumental in establishing the Continuing Education classes offered through the CAIIA. Helene is representing the CAIIA on this Board. All of us at the CAIIA thank Helene for her perseverance in gaining the approval of our courses through the DOI maze. We congratulate Helene on this appointment and everything else she has done for the Association.

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An Employer Organization of Independent Insurance Adjusters

Inside This Issue

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@caiia.org*.

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PRESIDENT'S MESSAGE

The Power of Positive Thinking

Almost daily someone tells me how lucky it was that something happened, or it was bad luck that something else happened. Lately, I have been consistently insisting that luck likely has little to do with how well things work out for us. The reality is that we make our own luck. For example, if there is something you want to do in your business, and you believe that it could happen then you are always looking for a way to encourage that development. If you do not believe that it could happen, you will not notice small opportunities, and you will not make those small opportunities into larger ones.

Many years ago, I handled almost nothing but homeowners claims. I wanted to get into commercial losses. I told my wife that was what I wanted. Within about two years, that was all that I was doing. My wife pointed out that I had set a goal, and made it happen. Upon reflection, I was a bit surprised at myself that I succeeded at making it happen.

I really did not plan how to make it happen on a map. I think that I was just motivated in that direction, so I did a good job on commercial losses, provided the best service that I could, polished my apple, smiled at the nice people and made it work. This would not have happened had my attitude been "I can't; it won't work. Nobody will let me." I would not have seen the opportunities, and with that attitude, nobody would have made those opportunities for me.

We also make our own luck with people. The song says "Everybody loves a lover". Did you ever notice that when you really feel good, and walk down the street, people just naturally smile back at you? It is amazing how friendly people are to friendly people. An excellent example of that is Bruce Bogart. Many of you know him. He has been in our industry for about 45 years, and he worked in my office for several years. He is charismatic. Everyone loves him. We had several secretaries while he was here, and they clearly liked him better than they liked me. How did he do that? For starters, he smiled at everyone. He always had something good to say. After a while I learned his secret. He did not really love everybody. He just acted like he did, and he received a lot of positive feelings from everyone in return. I could see that this approach truly made his life easier. People went out of their way for him, everywhere he turned.

There are obvious examples of how pleasantries and facial expressions work in our business. Try to get a witness statement from someone when you are feeling grouchy. Does it work? Not on your life. Some attorney will have to depose that witness to see what he knows. Instead

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Insurance Law Bulletin

Submitted by Smith, Smith & Feeley, LLP - Irvine CA

In Accident Involving Tractor-Trailer Rig, Statute Makes Trailer Lessor's Policy "Excess" To Tractor Owner's Policy

The California Supreme Court has held that, with respect to an accident involving a tractor-trailer rig, California Insurance Code section 11580.9(b) made the trailer lessor's commercial auto policy "excess" to the tractor's owner's commercial auto policy. (*Sentry Select Ins. Co. v. Fidelity & Guaranty Ins. Co.* (2009) 46 Cal.4th 204)

Facts

John's Trucking, Inc. (JTI) was a trucking company that routinely leased nearly three quarters of its commercial fleet of trailers to independent truckers with whom it contracted for hauling jobs. In 1999, JTI entered into a standard "trailer lease agreement" with independent trucker Richard Justice (Justice), whereby JTI leased two trailers to Justice.

In May 1999, Justice was driving his own tractor while pulling the two trailers leased from JTI. The tractor-trailer rig collided with another vehicle, resulting in injuries to April Russo (Russo) and Patricia Nila (Nila). At the time of the accident, Justice had a commercial auto policy listing his tractor through Sentry Select Insurance Company (Sentry), and JTI had a commercial auto policy listing the two trailers through Fidelity & Guaranty Insurance Company (Fidelity).

Russo and Nila brought personal injury actions against both Justice and JTI, but JTI obtained a dismissal. Justice's insurer, Sentry, then settled Justice's alleged liability to Russo and Nila for $600,000 (an amount within Sentry's policy limit).

Sentry (insurer of Justice and his tractor) subsequently filed a federal court equitable contribution action against Fidelity (insurer of JTI and the leased trailers). (Apparently Sentry's theory was that since Justice was a "permissive user" of the trailers leased from JTI, Justice qualified as an "insured" under the Fidelity policy.) Fidelity defended the federal court action by arguing that under California Insurance Code section 11580.9(b), the Fidelity policy was conclusively presumed to be "excess" to the Sentry policy, and therefore Fidelity owed nothing to Sentry. However, the United States District Court held that Insurance Code section 11580.9(b) did not apply, and that Sentry and Fidelity thus provided concurrent "primary" coverage for Justice's liability in the underlying personal injury case

Fidelity appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit, in turn, asked that the California Supreme Court issue an opinion regarding the proper interpretation of Insurance Code section 11580.9(b).

Holding

The California Supreme Court ruled that under section 11580.9(b), the policy Fidelity had issued to JTI for the leased trailers was conclusively presumed to be "excess" to the policy Sentry had issued to Justice for the tractor. At the time of the accident, section 11580.9(b) provided that if a leased commercial vehicle is involved in an accident, and the lessor of that vehicle is *"engaged in the business of renting or leasing motor*

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PRESIDENT'S MESSAGE

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when you smile and, more importantly, treat everyone with respect claimants, attorneys, contractors, or everyone else, are predisposed to accept your proposed settlement, estimate, or policy interpretation. You have already telegraphed to them your willingness to give them what they deserve with that friendly and respectful approach.

So, by smiling, being respectful, and acting positive, we can make our own luck. Remember that it can happen if you believe it can, and look for ways to make it happen every day. Try it and see. Smile at people. Say nice things. It sounds corny and trite, but boy does it work.

PETE VAUGHAN
President - CAIIA 2008-2009

Status Report Receives Kudos

The CAIIA membership chairperson and our current Vice President Phil Barrett of Barrett Claims Services, Ukiah, CA, received the following kind words about The Status Rpeort.

"I thought you and everyone else would be gratified to hear that Maryanne Kehoe of Admiral Insurance Company in Connecticut receives, reads and relies on the info. published in the Status Report to stay current on CA case law. I had the pleasure of speaking with her today while conducting a background check for a new applicant and she went out of her way to praise our circular. Of course, I touted you personally for your superior editorship."

Phil is referring to your Editor, who is blushing, and is proud and thankful to receive the complient. A personal "Thank you" goes out the Maryanne from him.

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vehicles without operators," then the lessor's policy is conclusively presumed to be excess to any other insurance covering the loss.

The Supreme Court acknowledged that California Courts of Appeal had rendered conflicting decisions as to the meaning of the phrase "engaged in the business of renting or leasing motor vehicles without operators," with some courts focusing on the nature of the insured's primary business, and other courts focusing on the factual circumstances surrounding the lease of the particular commercial vehicle involved in the accident. However, the Supreme Court concluded that it was not necessary to resolve the conflicting appellate court decisions, because under either test, JTI was "engaged in the business of renting or leasing motor vehicles [i.e., the two trailers] without operators." As such, under section 11580.9(b), the policy Fidelity had issued to JTI for the leased trailers was conclusively presumed to be "excess" to the policy Sentry had issued to Justice for the tractor. Therefore, Sentry was not entitled to contribution from Fidelity.

Comment

Note that at the time of the accident in this case, section 11580.9(b) applied to an insured who was "engaged in the business of renting or leasing motor vehicles without operators." Effective January 2007, the Legislature amended the statute, deleting the above phrase and replacing it with the phrase "who in the course of his or her business rents or leases motor vehicles without operators." This amendment of the statutory language eliminates any ambiguity as to whether the leasing of commercial vehicles must be a regular part of the insured's business in order for the conclusive presumption to apply. As amended, section 11580.9(b) now clearly provides that the renting or leasing of commercial vehicles without operators in the course of *any business* can qualify for the conclusive presumption that the insured's coverage is excess, where all the statutory requirements are otherwise met.

Insurer's Duty of Equitable Contribution for Defense Costs Arises Where, After Notice of Litigation, Diligent Inquiry Would Reveal Equitable Contribution Exposure

The California Court of Appeal held that an insurer's obligation of equitable contribution for defense costs arises where, after receiving actual or constructive notice of the lawsuit, a diligent inquiry by the insurer would reveal the potential exposure to a claim for equitable contribution. (*OneBeacon*

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Dan Price

Daniel Glen Price, Past President of the CAIIA, died on Sunday, July 5, 2009, from complications due to Parkinson's Disease at home at 299 Prospect Place, Coronado.

He graduated from Coronado High School in 1967 where he directed the marching band, lettered in tennis, played excellent piano and in general, relished his high school career. He received a BA in Physical Anthropology from UC Davis in 1972 and married Cheryl Winslow (CHS 1968) the following year.

He began his career in the insurance claims with Pacific Claims in 1977. By 1980 he was a partner and by 1992 an owner. In 1990 he assisted the US Department of Commerce by preparing materials and speaking in Paris and Cairo to promote excellence in claim handling in emerging economies. Dan was involved at the board and presidential level in a number of professional organizations and rose to the presidency of the National Association of Independent Insurance Adjusters. He gave his time generously to these commitments and was always highly respected and admired for his service. Claims Magazine, January 2004, awarded him the honor of Claims Professional of the Year: "Dan Price's fortitude and perseverance [are] the qualities that...elevated him to the lofty heights of recognition within the insurance claim industry...Dan raised the bar of professionalism...and all those [he] mentored through the years owe him debts of gratitude."

There will be no memorial but ashes will be scattered in a family ceremony at some later date. Donations to the The Michael J. Fox Foundation for Parkinson's Research would be greatly appreciated. Details are on the website.

Insurance Law Bulletin

Submitted by Smith, Smith & Feeley, LLP - Irvine CA

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America Insurance Co. v. Fireman's Fund Insurance Co., (2009)2009 WL 1782979)

Facts

OneBeacon America Insurance Company ("OneBeacon"), Insurance Company of the West ("ICW"), and Fireman's Fund Insurance Company ("FFIC") were primary coinsurers under liability insurance policies of common insureds. These common insureds — the Mouren-Laurens Oil Company, along with its owners, directors, and officers (collectively "MLOC") — were sued in 1998 for allegedly contaminating real property with petroleum products from the 1950s onward.

In 1999, OneBeacon agreed to defend MLOC in the underlying action. MLOC also tendered its defense to ICW and FFIC in 1999 under the belief that ICW and FFIC had insured MLOC during the period in question. As of 1999, however, MLOC did not have any physical evidence of the primary policies issued by FFIC and ICW. Thus, in their tender letters and supplementary correspondence, MLOC asked that ICW and FFIC locate and provide all policies they issued to MLOC. Both insurers denied coverage on the grounds that they did not issue any primary policies to MLOC.

Three years later, in 2002, MLOC provided ICW with copies of a number of ICW primary policies that MLOC was able to obtain through an ICW agent. MLOC also sent ICW a declaration from another ICW agent who attested that he sold a primary policy to MLOC in 1978. In 2002, MLOC also provided FFIC with a declaration from one of FFIC's agents, who attested that he handled MLOC's purchase of primary FFIC policies for the 1948-1962 policy years. Using the information from the declaration, FFIC was able to locate evidence of an FFIC primary policy within a matter of weeks. At that point, both ICW and FFIC agreed to defend MLOC under a reservation of rights.

OneBeacon demanded contribution from ICW and FFIC for the costs of defense from 1999 to 2002. ICW and FFIC refused payment, citing defects as to notice and tender. OneBeacon then filed the subject action for equitable contribution against FFIC and ICW. The trial court ruled against OneBeacon, and OneBeacon appealed.

Holding

The Court of Appeal found that OneBeacon was entitled to equitable contribution from 1999 forward. The Court first observed that under California law, tenders can be accomplished through constructive notice, which might be as simple as sending a copy of the complaint to the insurer without any tender letter. The Court then cited a number of public policy reasons for allowing constructive notice (as opposed to requiring formal notice by an insured): constructive notice clarifies the duties of the parties; it takes into account the greater knowledge and sophistication of the insurer; and although it places a burden on the insurer to ask the insured whether it is seeking a defense, that burden is not onerous.

Based on California's recognition of constructive notice and the foregoing public policy considerations, the Court held that an insurer's duty of equitable contribution for defense costs arises where, after receiving notice of the litigation, a diligent inquiry by the insurer would reveal the potential exposure to a claim for equitable contribution. The Court further observed that insurers are charged with knowledge of all information that a diligent inquiry would have revealed.

Applying this rule to ICW and FFIC, the Court then concluded that ICW and FFIC both had an equitable obligation to contribute to the costs of MLOC's defense from 1999 forward. The Court held that neither ICW nor FFIC demonstrated that their search was diligent. In fact, there was no showing that the information available to ICW or FFIC in 2002 was any different from the information that would have been available to them upon a diligent inquiry in 1999. Rather, the record showed that ICW did not conduct any search whatsoever and instead placed the burden of discovering the policies on MLOC. Also, FFIC's search was clearly inadequate, as there was no sufficient explanation for why FFIC was able to locate the policy in 2002 but not in 1999.

Thus, since ICW and FFIC received constructive notice of the lawsuit in 1999, and since a diligent inquiry would have revealed that they had in fact issued primary policies to MLOC exposing them to a claim for equitable contribution, both ICW and FFIC were equitably obligated to contribute to the defense from 1999 onward.

Comment

One of the reasons that the trial court ruled against OneBeacon was that it held that ICW and FFIC had no affirmative obligation to conduct a diligent inquiry into the existence of the policies. The Court of Appeal quickly dispelled with this notion and unequivocally imposed the burden on the insurer to locate policies. Insurers should be mindful of this burden whenever they receive correspondence from insureds or fellow insurers regarding missing policies.

Santa Paula Man Arrested in Connection with Workers' Comp Insurance Fraud Charges

Insurance Commissioner Steve Poizner today announced that Armando Jaramillo Landa, 41, of Santa Paula, was arrested on Monday and charged with one felony count of insurance fraud. Landa was booked at the Oxnard Police Department.

CDI investigators determined that Landa claimed he was injured on the job while working for Chicago for Ribs in Ventura. Landa was placed on total temporary disability by his doctor, and collected more than $30,000 in disability payments from May 2007 through August 2008. While collecting total temporary disability payments, he allegedly applied for and obtained a position at Teppan Steak House in Oxnard from December 2007 through August 2008. Landa allegedly used a fictitious name, Armando De Anda, and social security number when he applied for the job. He was specifically asked if he was employed while collecting total temporary disability payments at his deposition, and allegedly denied that he had employment.

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

Close to 1900 insurance fraud-related arrests have been made by the Department of Insurance's enforcement division since Commissioner Poizner took office in 2007 - more arrests than have been made during any other two year period, under any previous insurance commissioner.

Weekly Law Resume

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

Duty of Care - Homeowner - Unlicensed Contractor

Eliazar Zaragoza v. Maria Ibarra, Court of Appeal, Fourth District (June 8, 2009)

When a homeowner hires an unlicensed contractor for a home remodeling project, potential liability arises under both the workers' compensation laws and tort laws. This case discusses the interaction of those two remedies.

Maria Ibarra hired Claudio Quiroz to construct four rooms and two bathrooms on her premises. Quiroz was an unlicensed contractor. Quiroz hired Eliazar Zaragoza to assist in the construction. On the second day of the job, Zaragoza was injured when he fell from a ladder trying to pry a nail from drywall. Zaragoza filed a civil suit for his injuries. The trial court granted summary judgment on the ground Zaragoza had assumed the risk of injury.

Zaragoza appealed. His first argument was that the injury was outside the scope of the workers' compensation laws. Normally, one who hires an unlicensed contractor becomes his employer, pursuant to Labor Code §2750.5. However, when a worker has not worked 52 hours or earned $100 within 90 days prior to the date of injury, this rule does not apply. Under Labor Code §3352(h), he does not come within the workers' compensation system.

Ibarra argued Zaragoza was within the exclusive remedy of the workers' compensation system. This was based on Labor Code §3351(d). This section provides that any person employed by the owner or occupant of a residential building, whose duties are incidental to the ownership, maintenance or use of the dwelling, and whose duties are personal, and not in the course of a trade, business, profession or occupation of the owner of the home, is considered an employee for purposes of workers' compensation.

In this case, it appeared that Zaragoza fell into that category. He was employed by one who was hired by the owner of a residence to do work incidental to the maintenance of the residence, and this was not the trade or business of the owner.

However, the Court held that the provisions of this section only applied if the worker had worked 52 hours or earned $100 within 90 days prior to the injury. The workers' compensation law did not apply to Zaragoza because he had not worked the requisite number of hours. However, Ibarra could still be sued for ordinary negligence. The Court held that OSHA regulations did not apply to a homeowner. Thus, there was no basis for a claim of negligence per se. Furthermore, there was no issue of ordinary negligence on the part of Ibarra. Zaragoza was the sole person who placed, adjusted and climbed the ladder before he fell. There were no allegations the ladder was defective. He engaged in a maneuver which an ordinary adult person would know posed a significant risk. Thus, the accident was due to the assumption of risk by Zaragoza, and there was nothing Ibarra could have done to have prevented the accident. The judgment in favor of Ibarra was thus affirmed.

COMMENT

The case is interesting for its discussion of the interaction of Labor Code §§3352(h) and 3351(d). Those who deal with homeowner claims involving workers' compensation claims should read this case for its discussion of those issues.

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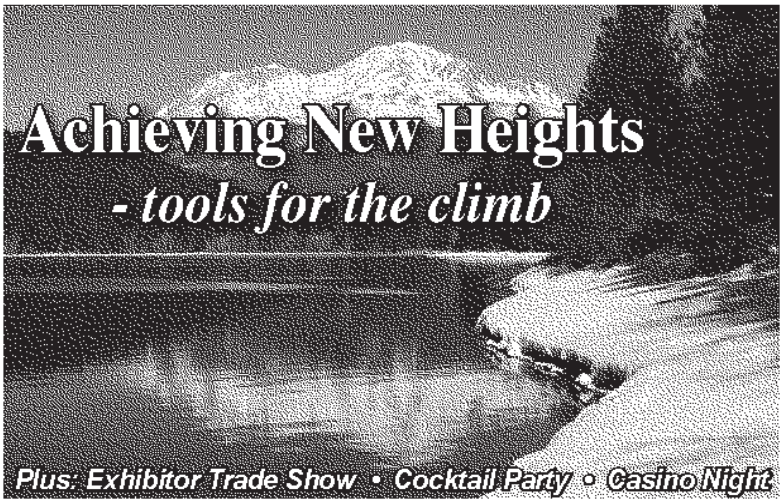

Keynote Address by

Nancy Feagin

The Power of Commitment: Rising Above Overwhelming Adversity on the Ascent of Mt. Everest

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Headlines to Remember

Proofreading is a dying art, would you say?

Man Kills Self Before Shooting Wife and Daughter

Something Went Wrong in Jet Crash, Expert Says

Police Begin Campaign to Run Down Jaywalkers

Panda Mating Fails; Veterinarian Takes Over

Miners Refuse to Work After Death

Juvenile Court to Try Shooting Defendant

War Dims Hope for Peace

If Strike Isn't Settled Quickly, It May Last Awhile

Cold Wave Linked to Temperatures

Enfield (London) Couple Slain; Police Suspect Homicide

Red Tape Holds Up New Bridges

Man Struck By Lightning: Faces Battery Charge

New Study of Obesity Looks for Larger Test Group

Astronaut Takes Blame for Gas in Spacecraft

Kids Make Nutritious Snacks

Local High School Dropouts Cut in Half

Hospitals are Sued by 7 Foot Doctors

Typhoon Rips Through Cemetery; Hundreds Dead