

## NOTICE!

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PUBLISHED MONTHLY BY  
California Association of  
Independent Insurance Adjusters



An Employer  
Organization of  
Independent  
Insurance Adjusters

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## Coverage Alert

*Submitted by McCormick Barstow*

### Question of Statutory Construction and Policy Coverage Are Not To Be Determined By Insurance Code § 2071 Appraisal

*Kirkwood v. California State Auto Assn. Inter-Ins. Bureau, (2011) Cal.App. 4Th 49.*

#### Background Facts

Kirkwood was insured by CSAA under a home owner's policy. Under the policy's terms, CSAA agreed to pay actual cash value or replacement cost of lost or damaged personal property. Kirkwood's home and personal property were destroyed by a fire. He submitted a personal property claim to CSAA setting forth a depreciation amount. CSAA applied a blanket depreciation schedule to certain categories of property and as such, many items were depreciated at 50-80%. The depreciation was often tied to the age of the item without regard to condition. Kirkwood challenged the settlement offer and what he alleged was excessive depreciation. He accused CSAA of violating § 2051(b) of the Insurance Code. CSAA disagreed and Kirkwood files suit alleging declaratory relief, breach of contract, bad faith and violation of the unfair competition law. CSAA demanded that the lawsuit be dismissed and that Kirkwood proceed with the appraisal. Kirkwood rejected this demand, claiming that the appraisers would have no authority to resolve the issues raised in his lawsuit. CSAA demurred and moved to strike and also moved to compel an appraisal. The trial court denied the motion to compel appraisal, without prejudice, so that CSAA could raise the issue after the court resolved the question of whether § 2051(b) had been violated by CSAA. CSAA appealed.

#### The Court's Ruling

In agreeing with the trial court, the court noted that § 2071 restricts the role of an appraiser to that of appraising the loss and stating separately actual

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## PRESIDENT'S MESSAGE

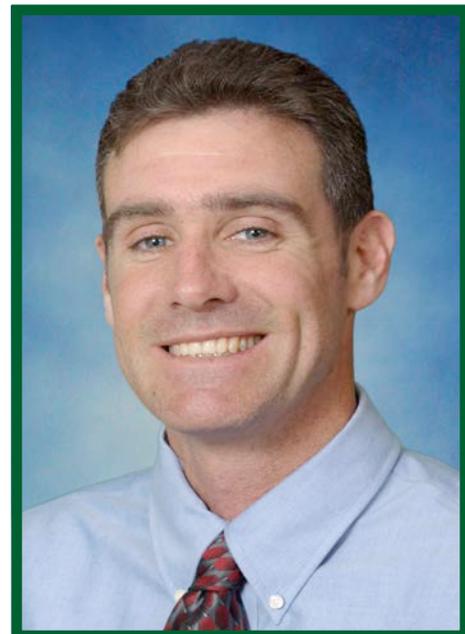
We in claims are blessed to have such a unique profession. This is especially true for Independent Adjusters. I am often reminded of this when I get overly stressed by what seems like an insurmountable batch of overly demanding claims and have to imagine where I would be if forced to seek another way of making a living. Recently I was reminded by one of the readers of this circular who was kind enough to offer us involved with the Status Report the following comment:

" . . . I think the independent adjusters are the last bastion of claims adjusting as we like to recall it. The carrier claims folks perform "segmentized" work where one no longer has a "feel" of the claim if you know what I mean. Work is just processed and that is a pity for us and the poor old policy holder. I am grateful to be working, however . . . " I thought this remark was very well stated and so true!

One of the perquisites of this job is the plethora of intrigue that we stumble upon; so stimulating in fact, it can be overwhelming at times. I have often thought that just one year on this job could satiate the most inquiring of minds with enough drama to cure them of their voyeuristic penchants for tabloids or reality TV. Truthfully, all of the details can sometimes inundate us with unnecessary information, forcing us into the time consuming process of weeding out the relevant facts from the superfluous fluff. At last, with the new Claim Crazy circular that makes a contest out of who can submit the wildest claim stories, we now have an outlet and incentive to express our more outlandish stories. If I could just find the time to submit a few stories, bet I could win. I digress.

Yet for all of the unsolicited entertainment we get, whether we appreciate it or not, there are a lot of life lessons to be learned, vicarious, (thank God), as they are. You just can't do this job and not gain something from the unfortunate circumstances that bring about the claims we investigate. Some of these disasters could easily have been avoided, caused by negligence and, in instances, downright stupidity. Others are not so predicable, reminding us that no matter how careful and prudent our approach to life may be, we are not in control. When I think about my colleagues in the claims business, there is a noticeable contrast in their character (in general) when compared to my friends and relatives on the outside of the profession. Specifically in many respects claims professionals are more conservative and careful than the average person. I believe our day to day experiences and exposures while on the job might have something to do with this, (or is it just fatigue?).

So, the next time you find yourself overwhelmed by too many claims of intrigue, remind yourself of this bright side of the burden: all of life's lessons we can learn if we pay attention, process and reflect upon the disasters which we are charged to help mitigate and the circumstances which bring them about. If you don't find this gratification enough, you can always remember that in addition to all of the wisdom you can gain from the unfortunate events that get us hired, your sharp listening skills and attention to the details, solicited or not, will help you process your



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# Coverage Alert

*Submitted by McCormick Barstow*

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cash value and loss to each item. Appraisers were given no power to interpret the insurance contract or statutes. The court concluded that “the contractual and statutory interpretation issues presented in the complaint are not encompassed within the appraisal process articulated in § 2071 or the insurance contract, and therefore appraisal was properly deferred in this case”.

## **The Impact of the Court's Ruling**

Appraisal pursuant to Insurance Code § 2071, and policy terms based on that section, does not encompass questions or statutory construction or policy interpretation and appraisers would lack the authority to determine such questions.

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## **PRESIDENT'S MESSAGE**

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claims fairly and accurately. Good investigation, after all is the essence of our job. And without it, our capitalist system might fail to operate as it should.

I think our anonymous reader, in his lamenting comment, was on to something bigger than just the sad fact that for many Claims Representative working for the “machine” type claims departments, the full sense of the claim is lost to “segmentation” of specialization. After all, if a claim cannot be investigated comprehensively by a single, “omniscient”, over viewing mind, decisions that are at odds with the veracity of the claim will be made. This means that the facts of the claim cannot be processed properly to be considered within the context of the insurance contract. When that happens, we experience the adverse effects of bad faith litigation and the corruption of the actuarial model on which underwriters rely to ensure solvency for the industry, not to mention the promise made by the agent to his/her customer. Taken to the extreme, incompetent claim investigation will ultimately collapse the insurance industry. And without insurance, (the P&C sector that is), who would make loans for real estate and how many entrepreneurs would dare indulge their ventures with the risk of ruination from just one, unmeritorious lawsuit?

I guess the point I am trying to make is that sound claim investigations are profoundly important to the health of our capitalist economy. This concept may be getting lost on some of the carriers attempting to operate their claims departments with the belief that the sum of the parts is equal to and more cost efficient than the whole, sacrificing accuracy to the appearance of efficiency, (and if you think about it, the latter is dependent on the former). So, my fellow IAs, the next time you get impatient with the claimant or witness who has diarrhea of the mouth and can't seem to stick to the subject, or feel overwhelmed by too many demanding claims, remember that good claims investigations depend on comprehensive cognizance of all details. Also, remember that you are blessed to be able to administer all aspects of your claims, (as wild and complicated as they may be), and are not relegated to the monotony of specialization.

**PHIL BARRETT**

*President - CAIIA 2010-11*

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## **Insurance Law News**

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

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### **Court Has Discretion to Grant Declaratory Relief Before Requiring Insured to Submit Valuation Dispute to Appraisal**

Where an insured seeks declaratory relief regarding the interpretation of policy provisions, statutes and regulations pertaining to depreciation, a court has discretion to allow the declaratory relief action to proceed before requiring the insured to submit the issue of valuation to appraisal. (*Doan v. State Farm General Ins. Co.* (2011) 195 Cal.App.4th 1082)

#### **Facts**

The Doan filed a suit in which he alleged that he and other similarly-situated plaintiffs were insured under property insurance policies issued by State Farm General Insurance Company. The policies provided that State Farm would pay the costs

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# Insurance Law News

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

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to repair or replace personal property less depreciation, but the policies did not define “depreciation.”

Doan alleged that a fire destroyed his house and personal property. He further alleged that, after the fire, he submitted an inventory which set forth a physical depreciation amount for his personal property based on the actual condition of each item at the time of loss. By Doan’s calculations, the actual cash value (i.e., replacement cost less depreciation) of his personal property was about \$174,000. However, State Farm asserted that the actual cash value of the property was only about \$130,000.

Doan alleged that State Farm uses a standard estimating system known as the “Depreciation Guide” that “arbitrarily calculates a depreciation percentage based on age and type of item, rather than the actual condition of a particular item.” He also alleged that State Farm’s depreciation figures “could not have been based on the condition of the item because the only information regarding the condition of [each] item” came from Doan’s claim, and “State Farm never inspected any of the items or took any steps to determine the true amount of physical depreciation.” Doan alleged that he challenged State Farm’s “excessive depreciation” but that State Farm refused to re-open the claim for a determination of the true amount of physical depreciation of the personal property and that State Farm likewise refused to alter its method of calculating depreciation.

Doan did not demand appraisal but, instead, filed suit against State Farm and sought, among other things, (1) damages for breach of contract, (2) damages for bad faith and (3) declaratory relief. However, the trial court eventually dismissed Doan’s complaint, largely on the grounds that Doan had failed to submit to the valuation issue to appraisal.

## Holding

The Court of Appeal reversed, holding that the trial court has discretion to defer an appraisal pending a judicial declaration of the parties’ rights under the insurance policies and relevant statutes. Insurance Code section 2051 provides that, when an open policy “requires payment of actual cash value” for a structure’s contents, “the measure of the actual cash value recovery” is “the amount it would cost the insured to repair, rebuild, or replace the thing lost or injured less a fair and reasonable deduction for physical depreciation based upon its condition at the time of the injury or the policy limit, whichever is less.” Further, section 2695.9 (f) of the Fair Claims Settlement Practices Regulations provides that any depreciation applied “shall reflect a measurable difference in market value attributable to the condition and age of the property and apply only to property normally subject to repair and replacement during the useful life of the property.”

In addition, the Court of Appeal noted that, when there is a controversy relating to the legal rights and duties of parties in connection with a statute, contract or written instrument, any interested party may seek declaratory relief pursuant to Code of Civil Procedure section 1060. The Court also noted that Fair Claims Settlement Practices Regulations section 2695.9 (e) provides as follows: “Once the appraisal provision under an insurance policy is invoked, the appraisal process shall not include any legal proceeding or procedure not specified under California Insurance Code Section 2071. *Nothing herein is intended to preclude separate legal proceedings on issues unrelated to the appraisal process.*”

## Comment

Under California law, appraisal is a limited form of arbitration in which the appraisers decide only the issue of the *amount* of the loss, not issues of coverage, policy interpretation or claim handling. Insurance appraisals – like other arbitration proceedings – may be stayed pending the resolution of legal issues that lie outside the appraiser’s jurisdiction.

Note that this case does not stand for the proposition that an insured can circumvent the appraisal process simply by filing a suit that includes a cause of action for declaratory relief. Instead, this case stands for the proposition that, if the insured seeks declaratory relief, the trial judge has discretion to allow the claim for declaratory relief to proceed before requiring the insured to submit to the appraisal process.

Last month the Status Report reported on the passing of Gary Hernandez. The Status Report issues the following correction:

Long time member and CAIIA Past President Daniel Blanquie advised that Gary Hernandez, a strong supporter of the CAIIA and independent adjusters, passed away recently. Gary served as counsel for the CAIIA. In addition to his significant public service and legal contributions, he also served as California Deputy Insurance Commissioner and Chief of Enforcement, overseeing market conduct, fraud investigation and all failed insurers in the state. The CAIIA sends it condolences to the family and friends of Gary.

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# Weekly Law Resume

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

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## Torts—Claim For Negligent Hiring Cannot Be Pursued Where Employer Has Already Admitted Vicarious Liability

*Dawn Renae Diaz v. Jose Carcamo, et al.*, California Supreme Court, (June 23, 2011)

If an employee is involved in a motor vehicle accident and injures someone while in the course and scope of employment, the injured person may sue not only the employee, but also the employer. The injured person can pursue tort claims against the employer for respondeat superior, a form of vicarious liability, and negligent entrustment or negligent hiring. The issue in this case was whether a plaintiff could still pursue multiple theories, when the employer admitted vicarious liability for negligent driving by the employee.

Plaintiff Dawn Diaz was driving southbound on Highway 101. Defendant Jose Carcamo, a truck driver for defendant Sugar Transport of the Northwest, LLC. ("Sugar Transport"), was driving northbound in the center of three lanes. Defendant Karen Tagliaferri was traveling directly behind Carcamo. Immediately prior to the accident, Tagliaferri passed Carcamo on the left and then, without signaling, attempted to merge back into the center lane. While merging back into the center lane, Tagliaferri's vehicle struck Carcamo's truck. Tagliaferri's vehicle went out of control and flipped over into the southbound lanes where it struck Diaz's vehicle. Diaz sustained severe injuries. Diaz subsequently filed suit against Tagliaferri, Carcamo, and Sugar Transport. Diaz alleged that Sugar Transport was both vicariously liable for Carcamo's negligent driving and directly liable for its own negligence in hiring Carcamo.

At trial, evidence was offered that both Carcamo and Tagliaferri were negligent. Sugar Transport offered to admit vicarious liability if Carcamo was found negligent. Over Sugar Transport's objections, the trial court would not dismiss the negligent hiring claim and admitted evidence of Carcamo's prior accident history; illegal residence in the country; and terminations from prior trucking jobs. The jury found for Diaz. The jury allocated fault as follows: Tagliaferri - 45%; Sugar Transport- 35%; and Carcamo- 20%. Diaz was awarded \$17.5 million in economic damages and \$5 million in noneconomic damages. As a result of the verdict, Sugar Transport was responsible for 55% of Diaz's damages (its 35% plus Carcamo's 20%).

Sugar Transport appealed arguing that the negligent entrustment claim should have been dismissed after Sugar Transport admitted liability for Carcamo's driving. The Court of Appeal affirmed the judgment. The California Supreme Court then granted review and reversed the Court of Appeal.

In reversing the judgment, the Supreme Court relied in part on its earlier decision in *Armenta v. Churchill* (1954) 42 Cal.2d 448. *Armenta* held that an employer's admission of vicarious liability made a negligent entrustment claim irrelevant. The Court of Appeal in this case distinguished *Armenta* because it involved a claim of negligent entrustment rather than negligent hiring. The Supreme Court held that whether the additional claim was for negligent hiring or entrustment- the difference was immaterial. An admission of vicarious liability removed the legal issue of liability from the case.

Diaz contended that *Armenta* was decided prior to California's decision to use a comparative fault system and the passage of Proposition 51, which defines the scope of joint and several liability. Diaz argued that in cases like this where Proposition 51 requires an allocation of fault among multiple tortfeasors, *Armenta* is inconsistent with principles of comparative fault. The Supreme Court again disagreed, citing *Jeld-Wen, Inc. v. Superior Court* (2005) 131 Cal.App.4th 853. In *Jeld-Wen*, a Court of Appeal rejected a similar argument holding that negligent entrustment may establish an employer's own fault, but should not impose additional liability. An employer's liability should not exceed that of the employee. The Supreme Court in this case agreed with that holding, reasoning that to assign an additional share of fault to the employer would be inequitable. The Supreme Court, therefore, determined that the Court of Appeal erred in not relying on *Armenta* and found that Sugar Transport had been prejudiced. The trial court judgment was reversed and the case was remanded for a complete retrial.

### Comment

This is an important case for employers. The Supreme Court re-affirmed its earlier holding that a vicariously liable employer's fault cannot exceed that of its employee. In cases such as this, employers should consider admission of vicarious liability where it may be important to keep out inflammatory evidence relating to hiring or retention of an employee.



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9/30 – 12:00 P.M.	Lunch	[ ]	[ ]
9/30 – 1:30 P.M.	Business Meeting (*)	[ ]	[ ]
9/30 – 6:30 P.M.	Reception/Cocktail Hour	[ ]	[ ]
9/30 – 7:30 P.M.	President's Inaugural Dinner Dance	[ ]	[ ]

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

(\*\*\*) Spouse/guest fee includes alternative activity, breakfast and dinner on Friday.  
 For details on spouse/guest activity: email at wifeandmamma@sbcglobal.net

**Early registration is encouraged. Cut-off date for contracted room rate is August 29, 2011.**

## These glorious insults are from an era before the English language got boiled down to 4-letter words

"He had delusion of adequacy." - *Walter Kerr*

"He has all the virtues I dislike and none of the vices I admire." - *Winston Churchill*

"I have never killed a man, but I have read many obituaries with great pleasure." - *Clarence Darrow*

"He has never been known to use a word that might send a reader to the dictionary." - *William Faulkner (about Ernest Hemingway)*

"Poor Faulkner. Does he really think big emotions come from big words?" - *Ernest Hemingway (about William Faulkner)*

"Thank you for sending me a copy of your book; I'll waste no time reading it." - *Moses Hadas*

"I didn't attend the funeral, but I sent a nice letter saying I approved of it." - *Mark Twain*

"He has no enemies, but is intensely disliked by his friends." - *Oscar Wilde*

"I am enclosing two tickets to the first night of my new play; bring a friend . . . if you have one." - *George Bernard Shaw to Winston Churchill*

"Cannot possible attend first night, will attend second . . . if there is one." - *Winston Churchill, in response*

"I feel so miserable without you; it's almost like having you here." - *Stephen Bishop*

"He is a self-made man and worships his creator." - *John Bright*

"I've just learned about his illness. Let's hope it's nothing trivial." - *Irvin S. Cobb*

"He is not only dull himself; he is the cause of dullness in others." - *Samuel Johnson*

"He is simply a shiver looking for a spine to run up." - *Paul Keating*

"In order to avoid being called a flirt, she always yielded easily." - *Charles, Count Talleyrand*

"He loves nature in spite of what it did to him." - *Forrest Tucker*

"Why do you sit there looking like an envelope without any address on it?" - *Mark Twain*

"His mother should have thrown him away and kept the stork." - *Mae West*

"Some cause happiness wherever they go; others whenever they go." - *Oscar Wilde*

"He uses statistics as a drunken man uses lamp posts . . . for support rather than illumination." - *Andrew Lang (1844-1912)*

"I've had a perfectly wonderful evening. But this wasn't it." - *Groucho Marx*

"There's nothing wrong with you that reincarnation won't cure." - *Jack E. Leonard*

"He has the attention span of a lightning rod." - *Robert Redford*

"They never open their mouths without subtracting from the sum of human knowledge." - *Thomas Brackett Reed*

"He has Van Gogh's ear for music." - *Billy Wilder*

"He can compress the most words into the smallest idea of any man I know." - *Abraham Lincoln*

"A modest little person, with much to modest about." - *Winston Churchill*

*The exchange between Churchill & Lady Astor:*

She said, "If you were my husband I'd give you poison."

He said, "I you were my wife, I'd drink it."

*A member of Parliament to Disraeli:*

"Sir, you will either die on the gallows or of some unspeakable disease."

"That depends, Sir," said Disraeli, "whether I embrace your policies or your mistress."