CAIIA Status Report

August 2013

Insurance Coverage – Medical Payments Claim Separate From Third Party Claim

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

Barnes v. Western Heritage
Court of Appeal, Third District (June 18, 2013)

Often, a policy of liability insurance (auto or general liability) will have a separate provision providing for medical payments under the policy. This case considered whether settlement of the liability claim absolved the carrier of its responsibilities related to the medical payments claim.

In 2001, when he was 11 years old, plaintiff Justin Barnes was injured by a table falling on his back during a recreational after-school program sponsored by the Shingletown Activities Counsel. Justin made a claim against the Activities Counsel based on the accident. Western Heritage Insurance Company was the carrier for the Activities counsel. After being notified of the claim, Western Heritage informed the school district's superintendent by letter that the policy provided $5,000 in medical payments coverage to Justin for his injury. Western had the superintendent forward this letter to Justin and his family, but it never disclosed to them a provision that medical bills had to be incurred and reported within 1 year to be reimbursable.

Three months after the accident, Western Heritage paid $1,478 to Justin's medical care providers up to that date. There was no evidence Justin ever submitted any other bills to Western Heritage. Twelve months after the accident, suit was filed on Justin's behalf against the Activities Counsel, the School District and others for negligence and premises liability. Western Heritage provided a defense and retained counsel. About a year and a half after the accident, Justin's counsel informed the defense counsel that Justin was having continuing physical problems and needed to see a specialist. Ultimately, Western Heritage denied this request, for the first time informing Justin's family that medical expenses had to be incurred and reported within one year of the date of the accident.

Justin and the Activities Counsel eventually settled the personal injury action. The release did not cover Western Heritage. After he turned 18, Justin filed suit against Western Heritage for breach of the implied covenant of good faith and fair dealing and unfair business practice, based on the failure to pay all his medical expenses under the medical payment provisions. Western Heritage filed a motion for summary judgment. The trial court granted the motion, concluding that the action was barred by collateral estoppel because the settlement in the personal injury action resolved the issue of payments due Justin for medical expenses under the policy. It also held that Justin could not seek to recover more than once for the same injury.

The Court of Appeal reversed. The published portion of the case dealt with whether Justin's medical payments claim amounted to impermissible double recovery. The Court agreed with Justin's argument that Western's obligation to indemnify its insured under the liability portion of the insurance policy was separate and distinct from its obligation to pay for medical expenses under a medical payment provision of the same policy. The California Courts had not

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CAIIA Office
PO Box 168
Burbank, CA 91503-0168
Website: www.caiia.org
Email: info@caiia.com
Tel: (818) 953-9200

Editor: Sterrett Harper
Harper Claims Service, Inc.
(818) 953-9200

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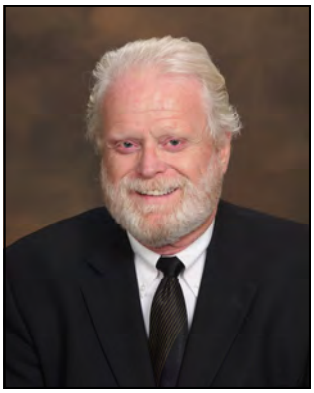
California Association of Independent Insurance Adjusters, Inc.

President's Message

CAIIA



W.L. (BILL) McKenzie
CAIIA President

I started my career in the insurance industry in 1971 as a Travelers adjuster working the Chicago Metropolitan area. I worked every type of claim for which Travelers wrote an insurance policy, with few exceptions. In 1982 I moved to San Diego and went to work for Dick Walsh of Walsh Adjusting Company, subsequently buying the business. As anyone can attest that has been in the business for that many years and longer, we have seen a multitude of changes. I wrote estimates using pencil & paper, and I think I had a better understanding of material and labor costs because I didn't necessarily rely upon an estimating system that told me what the costs were. I understand why the industry has gone to a computer generated estimating system, and probably in most instances it has been beneficial to our industry.

As anyone that know me will agree, I did not welcome the computer. I was one of the last individuals in several groups that I belong, to actually obtain an e-mail address. Once I did so, I used it and actually understood the benefits. Although there are benefits to email, I also think that because of email we have forgotten how to communicate over the phone as we start to rely way too much on e-mails. I understand the purpose of an e-mail, because you have documented evidence that you did work on a file. All changes are not necessarily good, as again I feel we have lost the ability to communicate because of texting (which I don't do) and e-mailing instead of picking up the phone and making that contact with whomever. We now work 24 hours, 7 days a week because we are tied into the smart phones and our computers so that not only can insureds and insurers (our clients) reach us during business hours, but now they can reach us at any time of the day. I even catch myself looking at my IPhone until I go to bed and consistently over the weekend even when I am not in the office.

Recently I attended a luncheon where the speaker was a little critical of our constant dependence and use of our smart phones and tried to emphasize that we needed to be less dependent on them with the hope that the stress in our lives would become less. As an independent adjuster, that is easier said than done, because in today's economy and working with the insurance industry as a whole, we are constantly looking for new customers and making sure that we deliver an excellent product because if we don't our competitors will. We live in an ever changing world where we have to adapt all of the time in order to keep up with those changes. I sometimes think we have computer programmers out there who decide to change a program just to keep themselves in a job. I don't necessarily believe that change for change itself benefits our industry or makes our job easier, nor does it always make us better people or better adjusters.

However, in our efforts to make each of us better adjusters, the California Association of Independent Insurance Adjusters sponsors continuing education classes. We will again be presenting classes at our October/Fall Meeting, which will be held in the Oakland area. The in-coming President, Tanya Gonder, has sent out a memo reminding all of us when the meeting will be held, and I hope to see all of our members at the October Meeting.

One of the benefits of belonging to this organization is not only the educational programs, but the camaraderie that we should all have with our fellow members and the industry itself. Our members are some of the finest and most knowledgeable individuals in the industry, and we all benefit from interacting with each other. I hope to see you all at the October/Fall Meeting.

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The California Association of Independent Insurance Adjusters is one of the sponsors for the Claims Conference of Northern California. They will be having their 20th meeting on the 16th & 17th of September. Mr. Harper will be contacting all of you with the request that you volunteer to participate in this educational function by manning our booth and participating as members.

W.L. (Bill) McKenzie

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

News of and from Members

To all CAIIA Members:

We are looking for volunteers for our booth at the CCNC which will be held September 16 and 17th in Sacramento. As well as volunteers to be at our booth during the conference, we are also looking for people that are available to assist with set up and tear down.

Please contact:

Sterrett Harper

Harperclaimsservice@hotmail.com or 818-953-9200

Brief Case Law Updates
Courtesy of Tyson & Mendes, La Jolla, CA

"A HOA is not required to allow a homeowner's attorney to attend board meetings"
SB Liberty v. Isla Verde Association - (June 24, 2013) 2013 WL 3007145
A homeowner's association (HOA) was not required to allow a homeowner's counsel to participate in the HOA board's open session meetings under the Common Interest Development Open Meeting Act. The homeowner's articles of incorporation did not allow the attorney to manage the homeowner's affairs, and the HOA was a nonprofit mutual benefit corporation with conditions and restrictions (C&R's) prohibiting members from transferring their membership or any corresponding rights.

"Punctures in patient's heart during implantation of pacemaker were not caused by the machine operator"
Smith v. St. Jude Medical Inc. - (June 25, 2013) 2013 WL 3071775
A patient died after the operator of a pacing system analyzer (PSA), a device used to test the status and function of the pacemaker and leads, caused tears in the patient's heart during pacemaker surgery. The decedent's relatives brought a wrongful death action against the PSA's operator.

The operator was dismissed on summary judgment. He worked as a sales representative and testified his role in the surgery was to monitor the PSA and provide information, opinion, and analysis to the surgeon, but NOT to instruct or direct the surgeon regarding where or how to implant the leads. The operator was dismissed because he did not breach any duty to the deceased patient.

"City of Angels and City of Innovation"

Since I.A's live a nomadic lifestyle by driving considerably we will focus our attention once more on green modes of transportation and will shift from cars to mass transit. Today we make two stops: Los Angeles and Oakland.

As many of us know ,Los Angeles has a new mayor. Former mayor Antonio Villaraigosa has left, as a part of his legacy, advancement in mass transit.

In the works are two extensions to the Los Angeles Metro Rail Lines anticipated to be completed in approximately the next 20 years (oh, come on now, twenty years is not that long). This includes a nine mile west side extension of Metro Rail Purple Subway Line with the last stop close to the UCLA campus. This second is an extension of the Expo Light-Rail to the south in a line that will end just a few blocks away from the Pacific Ocean in Santa Monica. They both represent engineering triumphs and political ingenuity and savvy.

I.A's will continue to discover in the years ahead more and more often we will use mass transit to go to appointments and meetings. In S.F. more than half of attendees of the Property Claims Association of the Pacific meetings come in by mass transit including mainly BART. ″

In Oakland AC Transit has been given the Governor's Environmental & Economic Leadership Award, the highest environmental honor in the state of California. They were honored for building the most comprehensive hydrogen fuel cell demonstration program in the country. Their twelve zero- emission fuel cell busses emit only water vapor from their tail pipes and operate quietly and smoothly and achieve nearly double the fuel economy of conventional busses. They have also installed 11 megawatts of solar power on the roof tops of their buildings.

To a considerably lesser extent, a private Indian airline has brainstormed an idea. The airline has decided to recruit only female flight attendants in the future as an aircraft will burn less fuel carrying them than their heavier male counterparts. A good try but they may want to go back to the table on that one.

Your comments, thoughts and innovations are welcome at: steve.einhaus@gmail.com.

" We do not inherit the earth from our ancestors. We borrow it from our children"
Chief Seattle.

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addressed this precise issue before: whether an injured plaintiff who receivs some payment for medical expenses from a tortfeasor's insurer under the medical payments provision and then settles a personal injury lawsuit against the tortfeasor is thereafter precluded from suing the insurer based on the alleged breach of direct duties owed plaintiff under the medical payments provision of the policy. The Court concluded that an insurer's obligation to indemnity its insured under the liability portion of the policy is separate and distinct from its obligation to pay for medical expenses under a medical payments provision of the same policy.

As the Court pointed out, Justin's claim was based on the alleged breach of the obligations Western Heritage owed him under the medical payments provisions of the policy. This provision was divisible from the remainder of the policy and created direct liability on the part of the insurer to an injured person. Here, the record did not show that Justin obtained any recovery for Western Heritage's alleged wrongful denial of medical payments benefits. By satisfying the settlement in the personal injury action, Western Heritage performed its obligations to the Activities Counsel under the liability portion of the policy, but that obligation was separate and divisible from Western Heritage's duties under the medical payments provision.

Moreover, there was no language in the policy evincing an intent that payment under the liability provision extinguished Western Heritage's obligations under the medical payment provision.

Finally, the Court of Appeal held that the collateral source rule was not applicable, because the prior payment by Western was on behalf of its insured, the Activities Counsel, for its alleged wrongdoings, and the claims against Western Heritage were for its own alleged wrongdoings. As such, the prior payment did not inure to the benefit of Western Heritage on the claims against it directly as an offset or bar.

The Court of Appeal reversed the granting of summary judgment.

COMMENT

This case makes clear that the obligations owed on a liability policy to defend and/or indemnify an insured are separate and distinct from those duties owed to someone covered under a medical payments provision of the same policy. Care should be taken to make certain both are handled and resolved properly, or a third party claim has the potential of becoming a first party bad faith claim.

Bad Faith Expansion Looming Before the CA Supreme Court

Credit to Tyson and Mendes, La Jolla, CA

Zhang v. California Insurance Co., S178542, California Supreme Court may limit the scope of Moradi-Shalal v. Fireman's Fund Ins. Companies, 46 Cal.3d 287 (1988), potentially opening insurance companies up to a floodgate of litigation under California's Unfair Competition Law.

In May, the California Supreme Court heard oral arguments in Yanting Zhang v. California Insurance Co., S178542. Zhang is being closely watched by insurance companies and insureds as it may provide an additional avenue for insureds to pursue claims against their insurance companies. If the California Supreme Court sides with the plaintiff, this case will have a substantial impact on insurance litigation in California. The case is expected to resolve a significant issue for insurers doing business in California – whether or not they are potentially subject to a private action under the California Unfair Competition law (Cal. Bus. & Prof. Code §17200 or "UCL") for conduct that also violates California's Unfair Insurance Practices Act (Cal. Ins. Code §790 et seq. or "UIPA"). Specifically, the issues on review by the Supreme Court are: (1) Can an insured bring a cause of action against its insurer under the Unfair Competition Law (Bus. & Prof. Code section 17200) based on allegations that the insurer misrepresents and falsely advertises that it will promptly and properly pay covered claims when it has no intention of doing so? (2) Does Moradi-Shalal v. Fireman's Fund Ins. Companies, 46 Cal.3d 287 (1988) bar such an action? These questions naturally require the parties and the Court to consider the reach of the 1988 California Supreme Court decision in Moradi-Shalal v. Fireman's Fund Ins. Companies, 46 Cal.3d 287 (1988).

Product Liability Alert: Federal Law Preempts State Law Design Defect Claims Against Generic Drug Manufacturers

Credit to Haight, Brown & Bonesteel, Los Angeles, CA

July 8, 2013
On June 24, 2013, the United States Supreme Court issued its decision in Mutual Pharmaceutical Co., Inc. v. Bartlett, deciding the question of whether federal law governing FDA approval of generic drugs preempts state law claims against generic drug manufacturers based on state law design defect. The Supreme Court held that conflict preemption principles prevent a state law design defect claim against manufacturers of generic drugs approved by the FDA, where the design defect claim turns on the adequacy of a drug's warning.

In December 2004, Karen Bartlett began treating shoulder pain with a generic anti-inflammatory medication known as Sulindac. Soon after beginning treatment, Bartlett began to suffer from toxic epidermal necrolysis, which ultimately deteriorated over 60% of her skin and caused permanent injuries, including near-blindness. At the time of the prescription, Sulindac's label did not explicitly refer to toxic epidermal necrolysis, but by 2005, the FDA had recommended changing the label to do so.

Bartlett filed suit against the manufacturer of Sulindac, Mutual Pharmaceutical Company ("Mutual"), alleging, in part, a New Hampshire state law claim for design defect. In New Hampshire, a design defect cause of action imposes an affirmative duty on a manufacturer to design its products reasonably safely for foreseeable uses. New Hampshire courts look to three factors to determine whether a product's design is unreasonably dangerous: (1) the product's usefulness; (2) whether the risk of danger could have been reduced; and (3) the adequacy of the product's warnings.

The Supreme Court explained that, for Mutual to increase Sulindac's usefulness or reduce its risk of danger, Mutual would have had to redesign the drug. The FDCA requires a generic drug to be essentially identical to its brand-name counterpart. Redesign was therefore impossible without violating the FDCA. Therefore, the only way for Mutual to ensure the drug was reasonably safe for users was to change its labeling/warnings.

Mutual defended on the basis of federal preemption, claiming that the FDCA and FDA preempted state law design defect claims dependent on the adequacy of a drug's warnings. Bartlett responded that, despite federal law, a manufacturer of a generic drug should still be liable under a state law design defect claim, where the manufacturer could have simply "stopped selling" the drug alleged to be dangerous.

The Supreme Court disagreed. Explicitly rejecting the "stop selling" argument, the Court clarified that an actor seeking to satisfy both his federal and state law obligations is not required to cease acting, or stop selling, altogether to avoid liability. Grounding its opinion in its 2011 PLIVA, Inc. v. Mensing decision, the Supreme Court held that Bartlett's claims were preempted under the doctrine of "conflict" or "impossibility" preemption.

In Mensing, the Supreme Court held that any claims that a generic drug manufacturer should have included stronger warning labels than those approved for use on the equivalent brand-name drug are preempted by federal law. In Mensing, the Court thereafter made clear that federal law prevents generic drug manufacturers from changing their labels.

Under New Hampshire law, a drug manufacturer was obligated to change its drug's design or labeling to ensure that the drug is not unreasonably dangerous. Federal law, however, prohibits a generic drug manufacturer from changing the drug's label and/or design. Thus, because it was impossible to comply with both federal and state law, the theory of impossibility preemption applied, precluding state law claims such as Bartlett's.

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...

August Birthdays of Note:

Tony Bennett	8/3/1926
Louis Armstrong	8/4/1901
Lucille Ball	8/6/1911
Roger Federer	8/8/1981
Alfred Hitchcock	8/13/1899
Tim Tebow	8/14/1987
Madonna	8/16/1958
Bill Clinton	8/19/1946
Gene Kelly	8/23/1912
Lyndon Johnson	8/27/1908
Douglas Jackson	8/20/2013
Michael Jackson	8/29/1958
Mary Shelley	8/30/1797
Warren Buffet	8/30/1930