CAIIA Status Report

SEPTEMBER 2003

New Officers and Directors Nominated

The Nominating Committee has nominated the following people to serve on your Board of Directors for the upcoming year.

President	**Lee Collins;** G.B. Bragg and Associates - Roseville, CA
President Elect	**Doug Jackson;** Southwest Claims Service - Simi Valley, CA
Vice President	**Steve Wakefield;** Ronald Bolt and Associates - Fresno, CA
Secretary-Treasurer	**Sharon Glenn;** John Glenn Adjusters and Administrators Walnut Creek, CA
Immediate Past President	**Steve Tilghman;** AIMS - Sacramento, CA
One Year Directors	**Sam Hooper;** Sam Hooper and Associates - Cerritos, CA **Michael Kielty;** George Hills Company - Sacramento, CA **Robert Lobato;** Pioneer Claims Service – Temecula, CA
Two Year Directors	**Pete Vaughn;** Vaughn and Associates – Benicia, CA **Jeff Queen;** County Line Claims Service Thousands Oaks, CA **Stu Ryland;** Malmgren Group – Sacramento, CA

If any member wishes to nominate someone for any position on the Board of Directors you must notify Sterrett Harper, 818-953-9200 by September 8, 2003, in order to comply with the Bylaws of the CAIIA.

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California Association of Independent Insurance Adjusters

An Employer Organization of Independent Insurance Adjusters

Inside This Issue

CAIIA Newsletter
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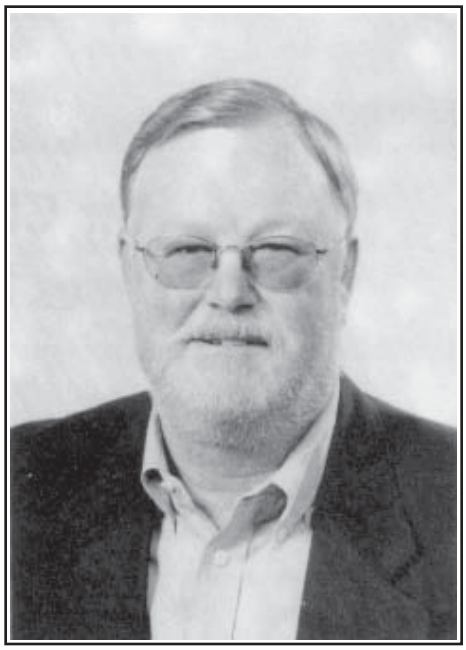
■ PRESIDENT'S MESSAGE



It is hard to believe that my term as your president is coming to an end. Our election of new officers and directors will be made next month at our 2003 Conference in Sacramento. Although there have been similar years in the past that can compare to this past year in the way of industry changes, I can't think of many. Think of these:

• Garamendi's Homeowners Bill of Rights. He was able to get emergency legislation through to stop underwriters from sharing claim history. The ability by the industry to do so has had a chilling affect on the consumers and has had some effect on submission of new claims.

• The volume of claims has slowed substantially over the past year (see above). The nature and structure of our claims services provided to the insurance industry has also changed and will continue to do so.

• The long anticipated changes in the Department of Insurance Fair Claims regulations finally were scheduled to come into effect on July 23, 2003. The CAIIA geared up and was prepared and scheduled certification seminars throughout California. But this is California, and nothing seems to be locked in stone here (even being Governor doesn't seem to be a lock). One July 22, 2003, an industry group filed suit against Garamendi, requesting a stay of the regulations. The stay was granted. So, we are back to the existing Regulations until otherwise notified.

The Earthquake Training Regulations are still making their rounds through hearings. The results of the last such hearing was reported to you in our last Status Report. I can only say that there is still much work to be done to bring them into some kind of workable regulation.

The CAIIA has stayed in front of all of these changes and we will continue to do so. Please utilize our Web Site for up to date news. The articles by legislative annalist John Norwood are extremely informative and I believe important.

Finally, everything has been set for our Conference in Sacramento for October 8th, 9th and 10th. If you have not already done so, please send in your registration soon. We have reduced the costs for this year. The All Industry Day Seminar promises to be the best ever. The law firm of Low, Ball, and Lynch will give an industry update on past and up-coming case law to ponder. See you at the Conference.

STEVE TILGHMAN, RPA
President - CAIIA 2002-2003

HRB Insurance Law Update

Submitted by Hancock, Rothert & Bunshoft, LLP

Low v. Golden Eagle Insurance Company, California Court of Appeal, First District, Division Two, Case No. A097703, Opinion filed July 2, 2003; Ordered Publ. August 1, 2003.

The Court of Appeal held that the insureds' post-tender breach of a "no-voluntary payments" provision in a general commercial liability policy barred recovery of both pre-tender and post-tender expenses.

This case arose when the insured breached the "no voluntary payment" clause by settling a claim with the claimant — without the insurer's consent — after the insured had tendered the claim to its insurer. The trial court ruled that the "no voluntary payment" provision barred claimants recovery of pre-tendered expenses. The Court of Appeal extended the trial court's ruling and held that the insured's breach of the "no voluntary payment" provision also barred recovery of post-tender expenses. The Court of Appeal held that the "no voluntary payment" provision applies to preclude coverage when the insured settles a claim without the insurer's consent, absent an antecedent breach by the insurer of its obligations under the policy.

This case is unique because it involves a post-tender breach of the "no voluntary payment" provision. The Court of Appeal observed that the breach of the clause typically occurs, "if at all, before the insured has tendered the defense to the insurer"; the court thus added that "most case authority concerns reimbursement for pre-tender expenses.

CAIIA *Calendar*

Claims Conference of Northern California (CCNC)

September 9 - 10, 2003 - Radisson Hotel, Sacramento, CA
Contact: Barbara Prosch, 800-626-1677

CAIIA Annual Conference

October 8-10, 2003 - EMBASSY SUITES, Sacramento, CA
Contact: Steve Tilghman, 916-563-1900

Combined Claims Conference (CCC)

March 23-24, 2004 - Pacific Palms Conference Center, Industry Hills, CA
Contact: Brenda Reisimger, 888-811-6933

CAIIA Midterm Meeting

Wednesday, March 24, 2004 to Thursday, March 25, 2004
The Marriott Newport Beach and Tennis Club, Newport Beach, CA
Contact: Lee Collins, 916-783-0100

Insurance Law Update

Prepared by Sedgwick, Detert, Moran & Arnold, LLP

ADVERTISING INJURY COVERAGE

In *Hameid v. National Fire Ins. Of Hartford*, 1 Cal.Rptr.3d 401 (2003), the California Supreme Court defined the term "advertising injury" as requiring widespread promotion to the public. One-on-one solicitations of a few customers does not give rise to coverage or a duty to defend under the "advertising injury" provisions of a CGL policy.

The state Supreme Court found that its interpretation of the term "advertising" to mean widespread promotional activities usually directed to the public a large reflected the commonly understood meaning of the word. The court distinguished between solicitation – such as making telephone calls or sending mailers to customers – and advertising. The court reserved the question of whether widespread promotional activities directed to specific market segments would constitute "advertising" under a CGL policy.

CONSTRUCTION DEFECT LITIGATION

In *Hartford Cas. Ins. Co. v. Travelers Indem. Co.*, 2003 WL 21660335 (Cal.App. 2003), the California Court of Appeal discussed the breadth of coverage afforded under additional insured endorsement, finding that the phrases "arising out of" and "but only with respect to" are expansive, requiring in order for coverage to apply to the additional insured merely some incidental relationship or a minimal causal connection between the work of the named insured and the claims brought against the additional insured. Accord: *Vitton Construction Co., Inc. v. Pacific Ins. Co.*, 2003 WL 21710238 (Cal.App.2003).

POLLUTION EXCLUSIONS

In *Westoil Terminals Co., Inc. v. Industrial Indem. Co.*, 1 Cal.Rptr.3d 516 (2003), the pollution exclusion at issue was qualified, as it excluded coverage for any pollution unless the damage was caused by a sudden, unexpected, or unintended discharge during the policy period which also caused property damage or bodily injury during the policy period. The California Court of Appeal found that this exclusion limited coverage to those sudden and accidental discharges which took place during the policy period. Under the facts, the court found that the insurer had no duty to defend.

WORKER'S COMPENSATION

In *Simi Corp. v. Garamendi*, 107 Cal.App.4th 1496, 1 Cal.Rptr.3d 207 (2003), the California Court of Appeal indicated that it would give deference to the Insurance Commissioner's interpretation of regulations relating to the Workers' Compensation Insurance Rating Bureau, the rating organization to which all workers' compensation insurers must report data. In order to achieve a uniform system for accurately recording and analyzing data regarding workers' compensation claims, the Insurance Code authorizes the Insurance Commissioner to adopt rules and statistical plans for reporting loss and expense information. To this end, the Insurance Commissioner adopted the California Workers' Compensation Unit Statistical Plan, which requires each insurer to report detailed information about incurred losses. This information provides the raw data by which the experience modification factor is developed for qualified employers; that factor plays a part in calculating the employer's workers' compensation insurance premium.

The court considered two issues relevant to its assessment of an administrative agency's interpretation of the regulations so as to determine whether to show deference to the agency's determination. First, there must be evidence indicating that

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EMBASSY SUITES HOTELS®

Sacramento Riverfront Promenade

CAIIA REGISTRATION FORM

California Association of Independent Insurance Adjusters
ANNUAL CONVENTION – October 8, 9, 10, 2003
Embassy Suites – Old Sacramento
100 Capitol Mall, Sacramento, CA 95814
(916) 326-5000 · 1-800-EMBASSY · www.embassysuites.com
CAIIA Room Rate $159

Attendees must make their own hotel reservations. Hotel Cut-off Date is September 17, 2003

Your Name _____ Significant Other _____

Company _____

Address _____

Phone _____ Fax _____

E-Mail _____

- *Association members must purchase a complete registration package.*
- *Package includes all events below. Employees and guests of members may attend the educational seminar with a member's purchase of a registration package.*
- *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. Complete a separate form for employees/guests.*

EVENT	COST	# of TICKETS	TOTAL
Registration Package – members with spouse/mate **	$ 195.00	_____	$_____
Registration Package – members w/o spouse **	$ 165.00	_____	$_____
Education Seminar ONLY*	$ 20.00	_____	$_____
		Grand Total Payable	$_____

SCHEDULED EVENTS	You	Mate
10/8 – 6:30 P.M.-Registration/Reception	[ ]	[ ]
10/9 – 9:00 A.M. – Advisory Council	[ ]	[ ]
10/9 – 12:00 P.M. – Lunch	[ ]	[ ]
10/9 – 1:30 P.M. – Business Meeting	[ ]	[ ]
10/9 – 6:30 P.M. – Reception/Presidents Dinner	[ ]	[ ]
10/10 – 8:00 A.M. – Registration/ Continental Breakfast	[ ]	[ ]
10/10 – 9:00 A.M. – Education Seminar *"Low Ball & Lynch – Legal Liability Update"	[ ]	[ ]
10/10 – 12:00 P.M. – Lunch	[ ]	[ ]

Any Questions, call:
Lee Collins, Bragg & Associates – (916) 960-0902
Steve Tilghman, AIMS – (916) 563-1900

Please make your checks payable to CAIIA or pay by credit card. Mail or E-Mail Registration form and payment to:

Lee Collins
Gregory B. Bragg & Associates, Inc.
P.O. Box 619058
Roseville, CA 95661-9058
lee.collins@gbbragg.com

Credit Card: AMEX ____ VISA ____ M/C ____

Cardholder _____

Card No. _____

Expiration Date: _____

Signature: _____

* **We welcome the attendance and participation of insurance company and risk management claims personnel and Attorneys at the Educational Seminar and Lunch.**

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

Cut-off date is September 22, 2003. Any registration after that date is subject to a $35.00 late fee.

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the agency has a comparative advantage over the courts in interpreting the regulations. Second, the agency's interpretation in question must appear to be probably correct.

In *Rail Services of America v. State Compensation Ins. Fund*, 1 Cal.Rptr.3d 700 (2003), the California Court of Appeal discussed and considered the surcharges, refunds, and the uniform classification of risks and premium rates promulgated by the Insurance Commissioner.

DUTY TO DEFEND

In a series of recent cases, the California courts have noted that the duty to defend, while broad, is not unlimited. *Hameid v. National Fire Ins. of Hartford*, 1 Cal.Rptr.3d 401 (2003) (no duty to defend where no claim is even potentially covered); *Westoil Terminals Co., Ins. v. Industrial Indem. Co.*, 1 Cal.Rptr.3d 516 (2003) ("All that matters of purpose of determining whether where is a duty to defend is the facts known to the insurer." Speculative claims do not five rise to a duty to defend.); *Baroco West, Inc. v. General Star Indem. Co.*, 2003 WL 21694551 (Cal.App. 2003) (where an insurer breaches a duty to defend, where the insurer is not otherwise guilty of tortious bad faith, and where the insured retains its own counsel to defend the claim, the proper measure of damages is the reasonable attorneys' fees and costs incurred by the insured in the defense of the claim, and no other damages).

COLLAPSE

In *Rosen v. State Farm General Ins. Co.*, 30 Cal.4th 1070 (2003), the California Supreme Court held that a policy which defined "collapse" as "actually fallen down or fallen to pieces" cannot, regardless of public policy, be interpreted to provide coverage for imminent collapse. California's high court stated: "In rewriting the coverage position to conform to their notions of sound public policy, the trial court and the Court of Appeal exceeded their authority, disregarding the clear language of the policy and the equally clear holdings of this court."

OTHER INSURANCE CLAUSES

The California Court of Appeal continued to show its disdain for "other insurance" clauses in *Century Surety Co. v. United Pacific Ins. Co.*, 2003 WL 21404674 (Cal.App. 2003). Three of four insurers provided a defense in a construction defect claim. The fourth insurer declined in light of the "other insurance" provisions. The court refused to enforce "other insurance" provisions when they could not be reconciled.

INSURANCE POLICIES – MODIFICATION OF TERMS

In *Diamond Woodworks, Inc. v. Argonaut Ins. Co.*, 109 Cal.App.4th 1020 (2003), the California Court of Appeals discussed that insurance contracts could be modified by subsequent conduct or oral representations. Here, the court found that the conduct of the parties was totally contrary to what was stated in the written agreement, and the court enforced the conduct rather than the written language.

ACCIDENTAL VS. INTENTIONAL CONDUCT

In *Uhrich v. State Farm Fire & Cas. Co.*, 131 Cal.App.4th 598 (2003), the underlying lawsuit was a complex matter involving an alleged campaign by one individual to seriously harm another in her business. The court found no duty to defend or indemnity. In so concluding, the court observed that, under California law, a result which is expected or intended is not an accident. An accident is never present when the insured performs a deliberate act unless some additional, unexpected, independent and unforeseen happening occurs that produces the damage. The court found that simply calling something negligent did not mean it was necessarily accidental. A party may not re-label intentional conduct as negligent in order to secure insurance coverage.

CONSENT TO SETTLEMENT

In *Hurvitz v. St. Paul Fire & Marine Ins. Co.*, 109 Cal.App.4th 918 (2003), St. Paul settled a third-party claim over the objections of the insureds. The insureds claimed that the settlement would injure their reputation, impact their future insurability, and prevent them from subsequently filing a malicious prosecution action against the parties who sued them.

The California Court of Appeal found that there was no duty on the part of the insurer not to settle to preserve a malicious prosecution case for the insureds. The policy gives the insurer the right to control settlement decisions, absent a consent clause (which, as the court observed, would have to be paid for). Liability insurance exists primarily to protect the insured's finances. The covenant of good faith and fair dealing requires the insurer to minimize the possibility of an award that exceeds the policy's limits – it does not require the insurer to fight a legal action until the bitter end

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Insurance Law Update

Prepared by Sedgwick, Detert, Moran & Arnold, LLP

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when the costs of defense exceed the benefits to be achieved.

BAD FAITH

In *Morris v. The Paul Revere Life Ins. Co.*, 109 Cal.App.4th 966 (2003), the insured argued that his disability insurer had acted in bad faith in denying his claim for benefits under his disability policy. The insurer had acted under an interpretation of the incontestability clause that subsequently was determined to be incorrect n an unrelated decision issued by the California Supreme Court. Once that decision was released, the insurer reversed its position. Nonetheless, the insured continued to claim that the insurer had acted in bad faith in denying his benefits in the first instance.

The California appellate court declined to find bad faith, finding that the ultimate test of bad faith liability in first-party cases is whether the refusal to pay policy benefits was unreasonable. Before an insurer can be found to have acted tortiously (i.e., in bad faith) in refusing to bestow policy benefits, it must have done so without proper cause. If the insurer's conduct is objectively reasonable, its subjective intent is irrelevant.

IDIOTS!!!

IDIOT SIGHTING: This week our phones went dead and I had to contact the telephone repair people. They promised to be out between 8:00 a.m. and 7:00 p.m. When I asked if they could give me a smaller time window, the pleasant gentleman asked, "Would you like us to call you before we come?" I replied that I didn't see how he would be able to do that since our phones weren't working. He also requested that we report future outages by email. (Does YOUR email work without a telephone line?).

IDIOTS AT WORK: I was signing the receipt for my credit card purchase when the clerk noticed I had never signed my name on the back of the credit card. She informed me that she could not complete the transaction unless the card was singed. When I asked why, she explained that it was necessary to compare the signature I had just signed on the receipt. So I signed the credit card in front of hr. She carefully compared the signature to the one I had just signed on the receipt. As luck would have it, they matched.

IDIOTS IN THE NEIGHBORHOOD: I live in a semi-rural area. We recently had a new neighbor call the local township administrative office to request the removal of the 'Deer Crossing' sign on our road. The reason: too many deer were being hit by cars and she didn't want them to cross there anymore.

I could swear I've recently been with some of *these* people…

IDIOTS IN FOOD SERVICE: My daughter went to a local Taco Bell and ordered a taco. She asked the person behind the counter for "minimal lettuce". He said he was sorry, but they only had iceberg.

IDIOT SIGHTING #1: I was at the airport, checking in at the gate, when an airport employee asked, "Has anyone put anything in your baggage without your knowledge?" To which I replied, "If it was without my knowledge, how would I know?" She smiled knowingly and nodded, "That's why we ask."

IDIOT SIGHTING #2: The stoplight on the corner buzzes when it's safe to cross the street. I was crossing with a co-worker of mine when she asked if I knew what the buzzer was for. I explained that it signals blind people when the light is red. Appalled, she responded, "What on earth are blind people doing driving?"

IDIOT SIGHTING #3: At a good-bye luncheon for an old and dear co-worker who is leaving the company due to "downsizing", our manager commented cheerfully, "This is fun. We should do this more often". Not a word was spoken. We all just looked at each other with that deer-in-the-headlights stare.

IDIOT SIGHTING #4: I work with an individual who plugged her power strip back into itself and for the life of her couldn't understand why her system would not turn on.

IDIOT SIGHTING #5: When my husband and I arrived at an automobile dealership to pick up our car, we were told the keys had been locked in it. We went to the service department and found a mechanic working feverishly to unlock the driver's side door. As I watched from the passenger side, I instinctively tried the door handle and discovered that it was unlocked. "Hey", I announced to the technician, "it's open!" To which he replied, "I know, I already got that side."

Now don't you feel better?

EXECUTIVE OFFICE DUTY DISTRIBUTION AND COMMITTEES

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