CAIIA Status Report

OCTOBER 2008

When You Need to Know What Really Happened

Submitted by Garrett Engineers, Inc. - Forensic Division, Long Beach, CA

A Swimming Pool Diving Accident

The case of the month involves a typical back yard swimming pool. It was an in-ground, plastered concrete, free-form shaped pool, measuring about 16 feet wide and 32 feet long. It had the usual hardscape walkways around it, and it was properly fenced, properly maintained and properly cleaned.

And what backyard swimming pool would be complete without a diving board? This pool had a typical springy diving board, mounted at approximately knee height at the deep end of the pool. The "jump board" was installed by the pool contractor when the pool was built a number of years earlier.

True to the stereotype, a pool party was in progress on the hot afternoon of the incident. There were lots of people, lots of food, lots of laughter, lots of adult beverages, and lots of showing off.

One of the stars of the show dived off of the jump board 4-5 times to demonstrate his skills. He then decided to do a back flip into the water. After entering the water, he plunged down to the bottom and hit his head. Instead of his usual quick return to the surface, he remained at the bottom of the pool, unconscious. The startled bystanders quickly pulled him out of the pool and called for the paramedics. The paramedics transported him to the local hospital. After appropriate tests, the doctors diagnosed him as inebriated, accompanied by a concussion and a severe neck injury.

GEI was called in to evaluate the cause of the accident.

While the water was clean and clear at the time of incident, the pool had essentially been locked down and abandoned after the accident. At the time of our inspection, the pool water was green with algae and the bottom could not be seen. Also, the water level was approximately 10 inches below the normal level required for the pool filter to function.

There are controlling standards in pool design and construction. In this case, NSPI-5 2003 (National Spa and Pool Institute) governed. This standard applies to permanently installed residential in-ground swimming pools intended for noncommercial use as a swimming pool by not more than three owner families and their guests and exceeding 24 inches in water depth and having a volume over 3,250 gallons. It covers specifications for new construction and rehabilitation of residential in-ground swimming pools and includes design, equipment (including diving boards), operation and installation.

While the pool bottom contours were not visible, our expert was able to accurately measure the contours using special equipment he designed for this occasion.

What he found was the pool bottom contours did not meet the requirements of NSPI-5 for "Minimum Water Envelopes" for pools using a jump board. Basically, the pool was too shallow to safely permit the kinds of dives that occur from a jump board.

Accordingly, the homeowner's insurance company filed a subrogation claim against the pool contractor. The contractor's insurance company then paid for the medical costs of the injured diver and for the removal of the diving board.

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Inside This Issue

***Status Report* Now Available by E-mail**

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PRESIDENT'S MESSAGE

How time flies when you are having fun!

This is my last President's letter. I thank my loyal readers and invite you to enjoy the skilled writing of our incoming President, Pete Vaughan.

I have thoroughly enjoyed my time as President, and am happy to leave office absent any scandals. (Sterrett, please delete this paragraph if circumstances dictate).

The CAIIA remains in a sound position, with a healthy treasury, and a very talented and diverse Board. I am sure we will continue to be the premier state adjusting association, and look for ways to increase our membership, and the benefits each member receives.

As I write this message, I am working on an Ethics Presentation. As I was reading one text in preparation I stumbled upon the following suggestions:

Join organizations that promote ethical behavior

Associate with others known for their ethical behavior

Those of you who are CAIIA Members can check these two of your list.

You still have time to attend our Annual Convention in Napa, and to play in our Second Annual Golf Tournament. If you haven't yet signed up, please contact Pete Vaughan or Jeff Stone ASAP.

If you work for an insurer, TPA, and/or have any way to give our member firms work, please give us a try. Our Member Directory is on the website. If you need a hard copy Directory just ask me or anyone on the Board.

They tell me CAIIA Board Membership is like the law firm in the movie "The Firm". I plan to stay active in the Association and help in any way I can.

If by some miracle the Dodgers made the playoffs, please root for them on my behalf.

PETER SCHIFRIN
President - CAIIA 2007-2008

Insurance Law News

Prepared by Smith, Smith & Feely, FFP - Irvine, CA

"Flood" Exclusion That Did Not Mention "Wind" Was Not Ambiguous

The Ninth Circuit Court of Appeals has held that, under California law, a "flood" exclusion that did not mention "wind" was not ambiguous in the context of a claim for damage allegedly caused by storm surge. (Northrop Grumman Corporation v. Factory Mutual Insurance Company (2008) 2008 WL 3484877)

Facts

Northrop Grumman Corporation owned a shipbuilding subsidiary that conducted operations throughout several Gulf states. Northrop purchased a blanket primary layer of all risk property coverage that expressly included coverage for damage caused by flood.

Northrop also purchased a blanket excess layer of all risk property coverage that purported to exclude coverage for damage caused by flood.

Factory Mutual Insurance Company was responsible for fifteen percent of any loss covered by the primary layer of insurance and one hundred percent of loss covered by the excess layer of insurance.

The primary policy defined "flood" as "all physical loss or damage caused by or resulting from flood waters, rising waters, waves, tide or tidal water, surface waters, or the rising, overflowing, or breaking of boundaries of lakes, reservoirs, rivers, streams or other bodies of water, *whether driven by wind or not ...*"

The excess policy excluded loss or damage caused by "flood," but the "flood" exclusion did not mention "wind."

During Hurricane Katrina, high winds caused a storm surge, i.e., high winds created a tidal surge that pushed water onto the shore. The storm surge covered Northrop's buildings by as much as ten feet of water.

Factory Mutual paid Northrop for the flood damage covered by the primary policy. However, Factory Mutual informed Northrop that Factory Mutual was planning to examine the damages under the excess policy to determine whether wind (which would be covered) or flood (which would not be covered) was the predominant cause of the loss.

California state court, demanding coverage for the water damage under the excess policy. Factory Mutual removed the case to federal court, and the parties filed cross-motions for partial summary judgment on the issue of whether the flood exclusion in the excess policy barred coverage for the water damage from Hurricane Katrina.

Among other things, Northrop argued that the phrase "whether driven by wind or not" was used in the primary policy's definition of the term "flood," but that the phrase "whether driven by wind or not" did not appear in the excess policy's definition of the term "flood." The trial court agreed with Northrop that the "flood" exclusion in the excess policy was ambiguous because it did not "plainly and clearly reference hurricanes or damage caused by wind." Factory Mutual then appealed.

Holding

The Ninth Circuit Court of Appeals applied California law and reversed, ruling that the flood exclusion in the excess policy was not ambiguous. The Court of Appeals held that the term "flood" is commonly understood to mean "an overflowing or inundation of water over usually dry land," and that Northrop's shipbuilding facilities unquestionably experienced "an inundation of water over normally dry land." In addition, the Court of Appeals declined to find an ambiguity based on differing language in the primary policy and the excess policy.

Comment

Although the Court of Appeals reversed the district court's summary judgment in favor of Northrop, the Court of Appeals remanded the case to the district court for consideration of Northrop's argument that California's efficient proximate cause doctrine required coverage of the water damage notwithstanding the language of the contract. The Court of Appeals refused to address this issue because it involved "factual considerations" that the district court had not yet decided.

Insurer Cannot Enforce Time Limit to Collect Replacement Cost Benefits Where Insurer Fails to Promptly Advise Insured Regarding Estimated Replacement Cost and Engages in Other Delays

The California Court of Appeal has held that an insurer was estopped from enforcing a policy's time limit to collect replacement cost benefits where the insurer engaged in conduct and delays that prevented the insured from satisfying the policy's replacement condition. (City of Hollister v. Monterey Insurance Company (2008) 165 Cal.App.4th 455)

Facts

The City of Hollister (City) owned an old building and insured it under a policy issued by Monterey Insurance Company (MIC). After the building was damaged by fire, the City sought to recover the building's "functional replacement

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Insurance Law News

Prepared by Smith, Smith & Feely, LLP - Irvine, CA

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value." The policy provided that if the City wished to recover such benefits, the City had to enter into a contract to repair or replace the building within 180 days after the fire. The policy also provided that if the City did not enter into a contract to repair or replace the building within 180 days, the most the City could recover was the actual cash value of the building.

The actual cash value of the building was about $150,000. The parties disputed the replacement cost of the building, and had various estimates that ranged from as low as $950,000 to as high as $2,600,000.

During the 180 days after the fire, MIC refused to confirm that it would honor such a claim for replacement cost, apparently because there was some evidence that, before the fire, the City had been considering demolishing the building. In addition, during the 180 days after the fire, MIC delayed in communicating basic determinations affecting coverage, refused to disclose its best estimate of the functional replacement value, permitted the City to labor under misapprehensions concerning its rights under the policy, and ignored communications from the City seeking clarification of these and other matters.

MIC agreed to a brief extension of the 180-day period. Before the expiration of the extension, the City filed suit to obtain a judicial declaration that MIC was estopped from asserting the relevant provision in light of MIC's alleged failure to cooperate in the performance of the condition. The trial court found for the City, ruling that the 180-day time limit would be extended and would run from the date of the judgment. MIC appealed.

Holding

The Court of Appeal followed rulings by courts in several other jurisdictions, and held that an insurer is estopped from requiring actual replacement of the damaged property as a condition to recovery where the insurer's conduct frustrates the insured's ability to satisfy the replacement condition. The Court of Appeal also noted that principle applies whether or not the insurer acted in bad faith. Because of MIC's appeal, the Court held the 180-day time limit would be extended and would run from the date the Court of Appeal's opinion becomes final and the time to seek review from the California Supreme Court expires.

Comment

This case contains an excruciatingly long and detailed discussion of the underlying facts surrounding MIC's investigation and adjustment of this claim. Although the underlying facts were very much in dispute, the Court of Appeal was required to view the facts in the light most favorable to the party (the City) that prevailed in the trial court. Because of the Court of Appeal's characterization of the facts, the Court had no difficulty affirming the trial court's finding of estoppel.

Weekly Law Resume

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

Damages - Proposition 213 - Plaintiff Deemed Not To Be Owner of Vehicle

Ieremia v. Hilmar Unified School District, Court of Appeals, Third District (August 26, 2008)

California Civil Code Section 3333.4 (Proposition 213) bars recovery of non-economic damages if the plaintiff injured in a motor vehicle accident was an owner of the vehicle and the vehicle was not insured. This case focuses on the definition of an owner under section 3333.4.

Plaintiff Puaolele Ieremia was involved in a motor vehicle accident in September 2004. At the time of the accident, Ieremia was a passenger in a Dodge Durango, driven by her husband. Ieremia filed suit against Defendants Dick Wyatt Piersma and Hilmar Unified School District for motor vehicle negligence. Defendants asserted that Ieremia was not entitled to non-economic damages, because Ieremia was a co-owner of the vehicle and the vehicle was uninsured. At trial, the court ruled Ieremia was not an owner for purposes of Proposition 213. A jury subsequently awarded Ieremia $128,145 in economic damages and $1.9 million in non-economic damages. Defendants appealed. The Third District Court of Appeal affirmed.

On appeal, Defendants asked the Court of Appeal to make an independent, de novo review of the trial court ruling concerning ownership. At the trial court level, the parties had stipulated to certain facts. In the months leading up to the accident, Ieremiaís husband made installment payments to his boss to purchase the Dodge Durango. The final payment was made a few weeks before the accident. The funds had

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come from the Ieremiasí community funds as husband and wife. Ieremia was unaware of her husbandís actions. At the time of the accident, the Ieremias had not yet received the pink slip for the vehicle and were not technically on title. Ieremia was riding in the vehicle for the first time at the time of the accident. She understood that the car was a ìloaner.î

Defendants contended Ieremia and her husband were both owners of the vehicle, because the Durango was purchased with community funds, and that Ieremia and her husband had an equal interest in the vehicle, and equal management and control over it. Defendants argued this was true, even if Ieremia was unaware of the purchase. As a result, Defendants argued Ieremia should not have been entitled to non-economic damages. The Court of Appeal disagreed.

The purpose of Proposition 213 is to limit recovery of non-economic damages for those drivers that break the law by purposely failing to purchase insurance. For the Court of Appeal, it was therefore important to know whether Ieremia was aware of the purchase of the vehicle. Without such knowledge, there could be no intent to avoid the law of obtaining insurance. The Third District concluded that Ieremiaís unknowing possession of a community property interest was insufficient to make her an owner for the purposes of Proposition 213. The judgment was therefore affirmed.

COMMENT

For Proposition 213 to apply, a Plaintiff must have actual knowledge that he or she is an owner of a vehicle. If there is such knowledge, and the Plaintiff fails to obtain insurance for the vehicle, Plaintiff is barred from recovering non-economic damages arising out of an accident involving the uninsured vehicle.

Torts- Peculiar Risk - General Contractor Not Liable for Failing to Place Protective Railing on Patio

Madden v. Summit View, Inc., Court of Appeal, First District (August 11, 2008)

We periodically report on cases interpreting *Privette v. Superior Court* (1993) 5 Cal. 4th 689. *Privette* and its progeny have defined and limited the circumstances in which an independent contractor's employee may recover in tort from the party hiring the contractor. In this case, Busch Electric was working as a subcontractor on the construction of a home. Plaintiff David Madden was employed as Busch's electrical foreman for the project. Defendant Summit View was the general contractor.

Madden was injured when he fell from a raised patio while pulling some electrical wire for installation in the home. Madden, who had worked in the area where the fall occurred many times before, was walking backwards in an effort to untangle a knot of wire when the fall occurred. There were no witnesses to the accident. Madden was directing his own work on the project. Madden filed suit against Summit View, alleging that Summit View negligently maintained, managed, and operated the subject premises.

Summit View filed a motion for summary judgment asserting that it was entitled to judgment pursuant to the Privette line of cases. The trial court granted the motion. Madden appealed. The First District Court of Appeal affirmed.

On appeal, Madden contended that his injury was proximately caused by the absence of a guardrail along the open side of the patio. Madden alleged that Summit View retained and exercised control of safety at the job site. Further, Madden argued that Summit View violated Cal-OSHA regulations by not requiring that a railing be placed on the elevated platform. The Court of Appeal rejected these arguments.

Under Privette, and a more recent case, *Hooker v. Dept. of Transportation* (2002) 27 Cal. 4th 198, the California Supreme Court has determined that the hirer of an independent contractor is not liable merely because the hirer retains general control over safety conditions at a job site. The hirer can only be liable if its exercise of retained control affirmatively contributes to the employee's injuries. Here, the Court of Appeal determined that there was no evidence that Summit View directed that a railing not be installed around the raised patio; nor was there evidence that this issue had ever come up. The Court felt that the absence of the railing was an open and obvious condition - so there was no induced reliance.

As to the issue of whether Summit View breached a Cal-OSHA regulation by failing to install a railing, the First District held that while a Cal-OSHA provision may be admitted to establish a duty of care, it does not abrogate the *Privette* doctrine, nor does it expand a general contractor's duty of care to an injured employee of a subcontractor. The Court further held that safety regulations are only admissible where other evidence establishes that the general contractor affirmatively contributed to the employee's injuries. The Court, therefore, affirmed the judgment for Summit View.

COMMENT

This case is instructive and helpful for hirers of subcontractors, who are sued by a subcontractor employee for personal injuries. The Court of Appeal distinguished between general control of safety at a jobsite, and specific control that contributes to a plaintiff's injuries. Only the latter creates liability for the hirer.

CALIFORNIA ASSOCIATION OF INDEPENDENT INSURANCE ADJUSTERS

2nd Annual Golf Tournament

Napa Valley Country Club
3385 Hagen Road
Napa, CA 94558
707-252-1111

October 20, 2008 • 10:00 a.m. Check-in
11:00 a.m. Putting Championship • 12:00 p.m. Shotgun Start

"Join us for our Second Annual Golf Tournament"

Player Participation ~ $175 *per player* **$155** *member price* Includes: Lunch, Green Fees, Cart, and Dinner Buffet

1._____ Company_____
2._____ Company_____
3._____ Company_____
4._____ Company_____

(Player Participation / Foursomes sold on first available basis)

Dinner Buffet Only ~ $50 *per person* **$45** *member price* Includes: Dinner Buffet and post-golf awards presentation

1._____ Company_____
2._____ Company_____

Sponsorship Opportunities

Layered Charitable Sponsorships - American Cancer Society *(check box)*

☐ **Diamond ~ $1,000** ☐ **Platimum ~ $750** ☐ **Gold ~ $500** ☐ **Silver ~ $250** ☐ **Bronze ~ $150**

☐☐☐☐☐☐☐☐☐☐ ***Steve Tilghman - Gene Riggs Memorial Scholarship Fund*** **~ 10 available @ $150 each**

Tournament Sponsorships *(check box)*

☐ **Dinner ~ $1,000** ☐ **Bar ~ $1,000** ☐ **Golf Committee Shirt & Hat ~ $1,000** ☐ **Photo ~ $800**

☐ **Tee ~ $500** ☐ **Hole - in - one ~ $500** ☐ **Driving Range ~ $150** ☐ **Putting Contest ~ $150**

☐ **Beverage Cart ~ $250**

SOLD OUT SOLD OUT SOLD OUT

Players _____ ***@ $175 ea. ($155 members)*** ***= $*** _____
Dinner Buffet Only _____ ***@ $50 ea. ($45 members)*** ***= $*** _____
Sponsorships _____ ***= $*** _____
Total Amount Enclosed ***= $*** _____

Member price dead-line: August 1, 2008 ~ Application subject to verification by CAIIA

Mail completed form and your check payable to CAIIA to:

Phil Barrett
714-B South State Street, Ukiah, CA 95482

Tournament Questions? Contact: Jeff Stone at (951) 371-8845

CAIIA REGISTRATION FORM

California Association of Independent Insurance Adjusters
ANNUAL CONVENTION – October 21, 2008
GOLF TOURNAMENT-October 20, 2008

Silverado Resort in Napa Valley

1600 Atlas Peak Road
Napa, California 94558
(Phone) 707-257-0200
(Fax) 707-257-2867

Mention California Association of Independent Insurance Adjusters for special room rates
Attendees must make their own hotel reservations.

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

- ***Association members must purchase one complete registration package. Additional employees may purchase events.***
- ***Tournament events not included in registration package. Tournament events are an additional charge***
- ***Package includes all events below. CAIIA Member Employees may attend the educational seminars only with a member's purchase of a Registration Package. Alternative spouses' program to take place during meeting time***
- ***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 **	$ 250.00	_____	$_____
Registration Package – members w/o spouse **	$ 200.00	_____	$_____
Golf Tournament Dinner/Reception (10/20/08)	$ 50.00	_____	$_____
President's Dinner/Reception/Awards/Installations (10/21/08)	$ 50.00	_____	$_____
Education Seminars including lunch and parking *(available to member employees or insurance company guests only...*	$ 35.00	_____	$_____
	Grand Total Payable		$_____

Please make your checks payable to CAIIA or pay by credit card.

Mail Registration form and payment to: Vaughan & Associates
836 B Southampton Rd, #301
Benicia, CA 94510
pvaughan@pacbell.net

SCHEDULED EVENTS

		Please Show # Attending Events Below:	*You*	*Mate*	*Guest**
10/20		Golf Tournament – mark and we will send you information**	[ ]	[ ]	[ ]
10/20	6:30 P.M.	Tournament Reception/Dinner**	[ ]	[ ]	[ ]
10/21	9:00 A.M.	Business Meeting	[ ]	[ ]	
10/21	12:00 P.M.	Lunch	[ ]	[ ]	[ ]
10/21	1:00 P.M.	Education Seminars	[ ]	[ ]	[ ]
10/21	6:00 P.M.	Presidents Gala Dinner Event, Awards, & Officer Installations	[ ]	[ ]	[ ]

Credit Card: AMEX ____ VISA ____ M/C
Cardholder Name_____
Card # _____
Auth. Code (on the back)_____
Signature: _____
Card Statement Address_____
_____
_____

Any Questions, please call or email Pete Vaughan @ 707 745-2462
pvaughan@pacbell.net

** The Golf Tournament and post-tournament Reception/Dinner are at the Napa Valley Country Club, 3385 Hagen Road, Napa.

Humor for Lexophiles (Lovers of Words)

- I wondered why the baseball was getting bigger. Then it hit me.
- Police were called to a day care where a three-year-old was resisting a rest.
- Did you hear about the guy whose whole left side was cut off? He's all right now.
- The roundest knight at King Arthur's round table was Sir Cumference.
- The butcher backed up into the meat grinder and got a little behind in his work.
- To write with a broken pencil is pointless.
- When fish are in schools they sometimes take debate.
- The short fortune teller who escaped from prison was described as a small medium at large.
- A thief who stole a calendar got twelve months.
- A thief fell in wet cement. He became a hardened criminal.
- Thieves who steal corn from a garden could be charged with stalking.
- We'll never run out of math teachers because they always multiply.
- When the smog lifts in Los Angeles, U.C.L.A.
- The math professor went crazy with the blackboard. He did a number on it.
- The professor discovered that her theory of earthquakes was on shaky ground.
- The dead batteries where given out free of charge.
- If you take a laptop computer for a run you could jog your memory.
- A dentist and a manicurist fought tooth and nail.
- A backward poet writes inverse.
- If you don't pay your exorcist you can get repossessed.
- With her marriage she got a new name and a dress.
- When a clock is hungry it goes back four seconds.
- A grenade fell onto a kitchen floor in France, resulting in Linoleum Blownapart.
- You are stuck with your debt if you can't budge it.
- He broke into song because he couldn't find the key.
- A calendar's days are numbered.
- A lot of money is tainted: 'Taint yours, and 'taint mine.
- A plateau is a high form of flattery.
- Those who get too big for their britches will be exposed in the end.
- If you jump off a Paris bridge, you are in Seine.
- When she saw her first strands of gray hair, she thought she'd dye.