CAIIA Status Report

HAPPY Halloween

October 2014

# Fair Claims Settlement Practices Regulations Are Never Boring

## Submitted by Peter Schifrin, RPAS, SGD, Inc.

**Recently two questions were asked by an insurance company relating to compliance with the Regulations:**

**1. Do emails satisfy the sections of the Regulations that call for written correspondence?**

**In speaking with a representative of the DOI, I was informed that this is a bit of a grey area. Technically there is no language in the Regulations that recognizes emails as written correspondence. As such, it was recommended that all correspondence that is required to be in writing not be made solely via email, or that the insurer obtain an acknowledgement from the claimant that their transaction can be handled electronically per Section 1633.1 of the California Civil Code.**

**I believe the message is that while email is recognized as communication, it is not technically compliant to use email for the correspondence that is required to be written, including denial letters and claim determination status letters. That is unless the insurer wants to make the effort to obtain an agreement with the claimant to transact electronically.**

**2. Does the requirement to give notice of any applicable statute of limitations extend to the typical suit provision in a first party property policy?**

**The DOI representative felt that this requirement extended to the suit provision in a first party property policy. The specific language is as follows:**

**"Except where a claim has been settled by payment, every insurer shall provide written notice of any statute of limitation or other time requirement upon which the insurer may rely to deny a claim.**

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Inside this issue…..



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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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by Email and Web Only.

To add other insurance professionals to our e-mail list, please go to CAIIA. com or e-mail a request to statusreport@caiia.com.

## California Association of Independent Insurance Adjusters, Inc.



## *President's Message*

We are approaching Fall. That means pumpkins and trick or treats, beautiful leaves and preparations for the holidays.

The CAIIA is in transition as well. This is the time of year when our new officers take the helm along with new duties and challenges. We are always excited about the new ideas that come with new leadership.

Follow us on our website to stay apprised of our progress! Contact us with your ideas on articles or just to let us know you are out there. Our new directories will be distributed soon. They are your one-stop source for locating an experienced & professional independent adjuster to assist you.

Tanya Gonder

CAIIA President

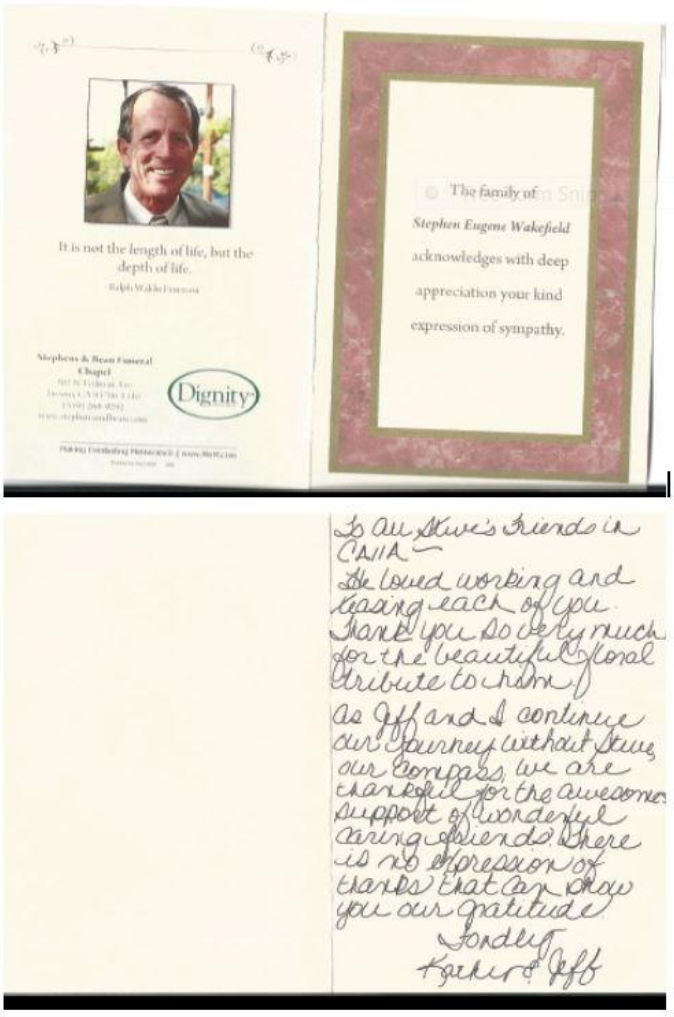
Tanya Gonder

2013/2014 CAIIA President

**Happy Halloween!**

## *News of and from our Members...*

Thank you note from Kathy Wakefield.




***Note from a happy Status Report reader:***

We all receive a lot of industry notifications/newsletters via email. I want to compliment CAIIA on your newsletter/status report. It's Monday morning, I am just getting back from vacation and my email box is full, but I can always find the time to read your newsletter as I know I'll derive something from it. Your content is informative and applicable to many people, and I always thoroughly enjoy your "Lighter Side" articles.

Thank you for consistently providing me with a great read!

**Laura Chapman**
Sales & Marketing Coordinator
Carl Warren & Company

Phoenix, AZ

GO GREEN is on vacation...

Thank you to Steve Einhaus for his contributions to the status report.


## *Unloading Injured Passenger from Motor Vehicle Constitutes "Use" of Motor Vehicle*

*Credit to:Smith, Smith & Feeley, Irvine, CA*

Under California law, a defendant's act of unloading an injured passenger from a motor vehicle constituted a "use" of that motor vehicle. (*Encompass Ins. Co. v. Coast National Ins. Co.* (2014) WL 3930197)

**Facts**

Anthony Watson was driving a car in which Alexandra Van Horn was a passenger. Watson lost control of the car, causing the car to strike a light pole.

Lisa Torti was in a second car which stopped at the scene of the accident to render aid. Torti saw Van Horn trapped inside Watson's wrecked car and allegedly feared that the wrecked car might catch fire. Torti thus grabbed Van Horn and physically removed her from Watson's car. In the process, Torti allegedly caused Van Horn to suffer a severe spinal injury and become a paraplegic.

Van Horn later sued Torti in California state court. Van Horn alleged that Torti's act of removing Van Horn from Watson's car resulted in injuries to Van Horn.

At the time of the accident, Torti was insured under a "Package Policy" (which included auto, homeowners and personal excess liability coverage) issued by Encompass Insurance Company. Torti tendered her defense to Encompass, and Encompass accepted Torti's defense.

Torti also tendered defense of the action to her auto insurer, Mid-Century Insurance Company. The Mid-Century policy covered Torti in connection with her own car (which was not involved in the accident), and also covered Torti for "use" of "any other private passenger car" provided such "use" was "with the permission of the owner." Thus, if Torti "used" Watson's car with Watson's permission when she removed Van Horn from Watson's car, the Mid-Century policy covered Torti.

In addition, Torti tendered defense of the action to Watson's auto insurer, Coast National Insurance Company. The Coast National policy covered not only Watson, but also "any person using '[Watson's] covered auto' with [Watson's] permission." Thus, if Torti "used" Watson's car with Watson's permission when she removed Van Horn from Watson's car, the Coast National policy also covered Torti.

Both Mid-Century and Coast National denied coverage to Torti. Encompass thus bore sole responsibility for Torti's defense, and ultimately paid $4 million in settlement of Torti's alleged liability to Van Horn.

Encompass then sued Mid-Century and Coast National in federal district court, seeking contribution for the costs Encompass had incurred in defending and indemnifying Torti. Encompass alleged that Torti's act of removing Van Horn from Watson's car constituted permissive "use" of Watson's car, and that Mid-Century and Coast National thus had a duty to contribute toward the costs of defending and indemnifying Torti. The district court ruled in favor of Mid-Century and Coast National, reasoning that Torti did not "use" Watson's car when she removed Van Horn from Watson's car. Encompass appealed.

**Holding**

The Ninth Circuit Court of Appeals, applying California law, reversed. The appellate court noted that California Insurance Code section 11580.06(g) specifically defines "use" of a motor vehicle so as to include "unloading" of a motor vehicle. Thus, section 11580.06(g) "unambiguously equates the 'unloading' of a motor vehicle with the 'use' of a motor vehicle." Here, Torti allegedly injured Van Horn while Torti was "unloading" Van Horn from Watson's vehicle. Because Torti's alleged liability arose from a "use" of Watson's vehicle, Mid-Century and Coast National covered Torti, provided Torti had Watson's "permission" to use Watson's vehicle.

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The appellate court rejected Mid-Century's and Coast National's argument that "unloading" a motor vehicle only constitutes "use" of that motor vehicle if the person doing the unloading "gains a benefit" from the vehicle as a means of transportation. According to the appellate court, prior case law does not does not support that conclusion.

The appellate court remanded the case to the district court for further proceedings, which will presumably focus on whether Torti had Watson's "permission" to use Watson's motor vehicle.

**Comment**

One judge dissented, arguing that the unloading of a vehicle constitutes use of the vehicle only when the unloading is part of the user's act of availing himself or herself of the vehicle. Thus, according to the dissent, while loading or unloading a vehicle *may* constitute a use of the vehicle, it must be a component of some broader employment of the vehicle. Here, the dissenting judge argued, Torti's act of unloading Van Horn from Watson's vehicle was not part of some broader act of using Watson's vehicle.

## Torts – Effect of The *Howell* Decision on Liens Brought Under The Hospital Lien Act

*Credit to Low, Ball & Lynch, SanFrancisco, CA*

*Dameron Hospital Association v. AAA Northern California, Nevada, and Utah Insurance Exchange et al.*

In *Howell v. Hamilton Meats* ( 2011) 52 Cal.4th 541, the California Supreme Court ruled that plaintiff's evidence of past medical bills is limited to the amount actually paid, rather than the total amount billed, where the hospital accepts a negotiated amount from a health insurer as payment in full. This case considered whether a hospital could pursue the difference in those two amounts from the health insurer under the Healthcare Lien Act in Civil Code Section 3045.1 et seq. (HLA).

Dameron Hospital Association provided emergency room services to three patients after they were injured in car accidents. All three patients were covered by Kaiser Permanente. Kaiser paid the three patients' hospital bills at a negotiated rate in accordance with its contract with Dameron.

Two patients were injured due to the negligence of drivers insured by Allstate Insurance Company. One of the patients was injured due to the negligence of a driver insured by AAA Northern California, Nevada and Utah Insurance Exchange. Dameron Hospital brought an action against AAA and Allstate to recover its customary billing rates under the Hospital Lien Act (HLA) liens. Dameron sued based on both AAA and Allstate having ignored the hospital lien when paying out settlement to the three patients. The defendants were granted summary judgment relief on the grounds that the liens had already been satisfied by the patients' healthcare service plans. The trial court then dismissed the case. Dameron appealed, arguing that based on the HLA and the language of its contract with Kaiser, it was not prevented from collecting the total amount of its customary billing rates from the insurers of the allegedly negligent third parties.

The issue was previously addressed by the California Supreme Court in *Parnell v. Adventist Health System/West* (2005) 35 Cal.4th 595. *Parnell* held that hospitals may not recover their customary rates for emergency room care when they have contractually agreed to accept negotiated rates as payment in full. *Parnell* explained that by precluding the hospital in that case from asserting a lien under the HLA, it was giving effect to the hospital's own contract. It found that "if hospitals wish to preserve their right to recover the difference between usual and customary charges and the negotiated rate through a lien under the HLA, they are free to contract for this right."

AAA and Allstate argued that *Parnell* was no longer valid authority for the proposition that hospitals can contractually reserve the right to recover their customary rates even after being paid the negotiated rate by injured patients' health plans. In so arguing, they relied primarily on the California Supreme Court's decision in *Howell*. The Court of Appeal noted that *Howell* addressed whether a *patient* could recover the customary billing rate from a tortfeasor, and that the hospital's right to recover the customary rate was not an issue. In fact,

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every instance where the *Howell* court articulated its holding, and in those situations where it specifically addressed the *Parnell* decision, it noted that the hospital had agreed to accept the negotiated rate as payment in full. Consequently, there was nothing in the *Howell* decision which overruled the *Parnell* court's statement that hospitals have the ability to enter into agreements which reserve their right of recovery from third parties.

Turning to the facts of the case, the Court of Appeal here noted that under *Parnell,* Dameron's contract with the health care provider needed to expressly preserve the right to recover the customary billing rate for emergency room serviced from the third party tortfeasors, and that Dameron had failed to clearly and adequately do in this case. Dameron argued that there was a history of voluntary cooperation or "uniform conduct" with the hospital and Kaiser where they cooperated in seeking payment from third party tortfeasors. However, the Court held that this history did not suffice to preserve plaintiff's contractual rights under the HLA.

Without sufficient language in Dameron's contract with the health insurers, the Court held that it was not entitled to assert its liens under the HLA. Judgment in favor of the insurers was affirmed.

COMMENT

The Court held that despite *Howell's* limitation on a plaintiff's right to recover more than the paid amount under a healthcare provider/insurer agreement, the healthcare provider itself may still pursue the full amount from the third party defendant, if it has sufficient contractual language allowing it to do so. When faced with HLA liens, it will be very important to know the relevant contract language used by the healthcare provider and the insurer, and whether the provider has adequately preserved its right to collect on its lien.

## *Insurance - Broker v. Agent Status as Affecting Liability Against Insurer*

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

### *Douglas v. Fidelity National Insurance*

Persons who solicit, sell or negotiate insurance contracts are known generically as "producers," and fall into two categories –"agents," who act on behalf of the insurer, and "brokers," who act as middlemen to the insurer and insured in the transaction. This case analyzed the distinction between the two in determining whether the carrier was warranted in rescinding a policy due to material misrepresentations in the application process.

Betty and Jerry Douglas purchased a home in Hayward, California in 1993 or 1994. Jerry was listed on the deed as the owner. The family moved to Stockton in 2005, but kept the Hayward house and used it as a group home for minors on probation. In December of 2010, the Douglases obtained a homeowner's insurance policy through Fidelity National Insurance. There was no dispute that the Douglases were still operating a business out of the residence at the time they applied for the policy, and at the time a fire broke out at the property in March of 2011.

After the fire, the Douglases submitted a claim for their losses to Fidelity. Fidelity investigated the claim, and on May 31, 2011, sent a letter through an attorney returning the Douglases' premium payments, and rescinding the policy. The rescission was based on what Fidelity claimed were several material misrepresentations on the insurance application received by Fidelity, including the fact that more than one family was occupying the property and that a business was being conducted on the property.

The Douglases sued for bad faith. At trial, Betty testified she initially made an in-store visit to "Cost-U-Less" in Hayward, where first Betty spoke with an agent from "InsZone" by phone, and then a week or so later Jerry spoke with another "InsZone" agent at a Cost-U-Less in Stockton. Betty testified that the only questions she was asked about were the age of the home, when it was built, and whether the electrical panel used fuses or circuit breakers. Both Douglases claimed that the form that Jerry was asked to sign was blank.

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# CAIIA REGISTRATION FORM

**California Association of Independent Insurance Adjusters**

**ANNUAL FALL CONVENTION & DANCE – October 9 & 10, 2014**

## Disneyland Hotel

**1150 W. Magic Way, Anaheim, CA 92802**

**Phone: (714) 520-5005**

Reservations must be made by **Tuesday, September 09, 2014** or before the group rate of $199.00 (plus parking and other fees) rooms are sold out, so do not delay. Prevailing rates may apply after this date or when the group rooms are sold out, whichever occurs first. Rooms are subject to availability.

Your Name _____ Spouse/Guest _____

Company _____

Address _____

Phone _____ Fax _____

E-Mail _____

| EVENT | COST | #TICKETS | TOTAL PRICE |
|---|---|---|---|
| ***MEMBER CONVENTION Package (*)*** (Includes reception, breakfast, CE Class/lunch/dinner) | $150.00 | #_____ | $_____ |
| ***Non-Member (**) Convention Package*** (Includes reception, breakfast, CE Class/lunch/dinner) | $175.00 | #_____ | $_____ |
| ***Spouse/Guest fee (***)*** ***Name***_____ | $100.00 | #_____ | $_____ |
| ***3 Hour CE Class*** (Includes, breakfast, presentation, lunch) | $100.00 | #_____ | $_____ |
| ***President's Gala Dinner/Reception*** | $100.00 | #_____ | $_____ |
| | | ***Grand Total payable*** | $_____ |

## SCHEDULED EVENTS

Please specify which events you and/or your spouse/guest will attend by placing a check mark in the box next to the event. Complete a separate form for each registrant and additional guest.

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

Mail Registration Form & payment to:

**Kimberley Hickey**
**SGD, Inc.**
**5300 Orange Ave., Suite 211**
**Cypress, CA 90630**

| | | You | Spouse/Guest |
|---|---|---|---|
| 10/09 – 6:30 P.M. | Reception, Disneyland Hotel | [ ] | [ ] |
| 10/10 -- 8:00 A.M. | Registration/Breakfast | [ ] | |
| 10/10 – 9:00 A.M. | Seminar | [ ] | |
| 10/10 – 12:00 P.M. | Lunch | [ ] | |
| 10/10 – 1:30 P.M. | Business Meeting | [ ] | |
| 10/10 – 6:30 P.M. | Reception/cocktail Hour | [ ] | [ ] |
| 10/10 – 7:30 P.M. | President's Inaugural Dinner Dance | [ ] | [ ] |

| | | | |
|---|---|---|---|
| Credit Card: | AMEX VISA M/C Circle one | 3 Digit Security # (CV) | |
| Cardholder: | | Signature: | |
| Card No: | | Expiration Date: | |
| Card Address: (City/State/Zip) | | | |

(*) Members only.

(**) 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.

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In contrast, Fidelity offered evidence from the InsZone representative identified on the Douglases' on-line application to Fidelity. InsZone contracted with a number of insurers, including Fidelity, to obtain insurance primarily for referrals from Cost-U-Less. Calls with customers would last from 10 to 30 minutes, and he would work off a questionnaire, later inputting the information into a computer program for the application. He would always ask about home business, because customers who ran home businesses would not be eligible for a homeowner's policy with any of InsZone's carriers. The Fidelity homeowner application had 43 questions, and they all had to be answered for the application to be submitted successfully. InsZone would print up a blank ACORD application, and would also have a print-out of the 43 questions and the applicant's answers. The applicant would sign the blank form, and this would all be transmitted to Fidelity. The policy was not bound until it was accepted by Fidelity.

At trial, Fidelity argued that it should be allowed to have the jury determine whether InsZone was acting as a broker for the Douglases only, or whether it was acting as an agent for Fidelity. If it was only the former, Fidelity wanted an instruction that it was entitled to rescind the policy if the jury found that either the Douglases or InsZone made material misrepresentations in the application process. The trial court refused to allow a determination of InsZone's status as agent vs. broker, and refused to give the instruction requested. Using plaintiff's special verdict form, the jury found that the Douglases' application form did not contain any material misrepresentation of fact, and awarded plaintiffs in excess of $800,000. Fidelity appealed.

The Court of Appeal reversed. The Court noted that as a matter of law, if InsZone were determined to be an insurance broker only, i.e. "the agent of the insured," the application's contents were the insured's responsibility, and the Douglases would be responsible for any misrepresentations in the form. On the other hand, if InsZone were acting as an agent in the employ of Fidelity, its errors could not reasonably be charged to the Douglases as a basis for rescission.

The Court noted that hallmarks of agent (as opposed to broker) status include licensure, notice of appointment as an agent, and the power to bind the insurer. Both brokers and agents must be licensed by the Department of Insurance, but a person may not act as an insurance agent without a notice of the agent's appointment by the insurer to transact business on its behalf. There was no evidence as to whether InsZone was covered by such a notice. Additionally, there was a dispute as to the extent of InsZone's power to bind the insurer. First, the contract between InsZone and Fidelity expressly stated that InsZone "shall never be deemed an agent for the Company" unless required by law, and that it "has no authority to bind Company." The Court pointed out that a jury could have concluded that InsZone could not bind the policy itself, since it was Fidelity's website that generated the policy number.

The Court thus held that there was substantial evidence to support a finding that InsZone was acting as a broker rather than an agent, and that a jury should have been allowed to make this determination, and to further decide (by proper instruction) whether Fidelity had shown that misrepresentations in the application process were materially significant enough that Fidelity should be allowed to rescind the policy. The judgment was reversed and remanded for new trial.

**Comment**

More and more often, policy applications are being done on-line. Whether the person assisting the insured is determined to be an agent or merely a broker will ultimately determine if errors in the application process are sufficient to bind the carrier despite material misrepresentations in the application process.