CAIIA Status Report

NOVEMBER 2005

Carl Warren Named California/Western States ESOP Company of the Year

October 13, 2005

Third-party claims administrator Carl Warren & Co., Orange County, Calif., has been named as California/Western Chapter 2006 Employee Stock Ownership Plan (ESOP) Company of the Year, during the Annual California/Western Chapter ESOP Conference in Indian Wells, Calif.

Conference attendees included more than 200 employee-owners from more than 50 ESOP companies from the chapter states of California, Arizona, Colorado, Utah and Nevada. Carl Warren was one of six companies selected by the ESOPs Conference Committee as having the best practices of sharing ESOP awareness.

The ESOP award acknowledged Carl Warren for: holding its first ever ESOP event; establishing a non-management committee where employees can discuss issues; refocusing the intranet site toward employee-owner issues, monthly communication from the leadership team and weekly updates from around the country; promoting its Rewards & Recognitions program where colleagues nominate one another and employee-owners decide on the recipients; and producing all new marketing materials, which included a letter from employee-owners to current and potential customers

As the 2006 ESOP chapter winner, Carl Warren also received an invitation to the National ESOP Conference, including automatic nomination for National ESOP Company of the Year. That event will be held in Washington D.C. May 17-19, 2006.

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California Association of Independent Insurance Adjusters

An Employer Organization of Independent Insurance Adjusters

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■ PRESIDENT'S MESSAGE

Our recently completed convention October 12th through the 14th, at the Hotel Valencia in San Jose, CA, reminded me of a story.

There was an adjuster driving to an appointment down a country road. A deer jumped in front of him and he swerved off the road. His tires became stuck in the mud. Looking ahead, he saw a farm house and walked toward it. He approached the farmer and told him what had happened. The farmer said "Don't worry old Roscoe will get you out", and with that the adjuster looked at a haggardly old mule and knew that old mule could not get him out of the mud. But the farmer persisted, he kept saying "Yep, old Roscoe can get you out". Finally the adjuster relented and they walked over to the car. The farmer hitched Roscoe to the car and then said "Pull, Fred! Pull, Jack !, Pull, Ted!, Pull, Roscoe" and the mule pulled the car to the road with very little effort. The adjuster was amazed, thanked the farmer and petted Roscoe. But he had to ask the question "Why did you call all of those names before you said Roscoe". The farmer kind of laughed, looked at the adjuster and said "Old Roscoe is just about blind, but as long as he believes he is part of a team, he doesn't mind pulling".

Not inferring that anyone now representing your Board of Directors is blind, we have in the past and will continue to pull forward as a team. I've been amazed since November of 2000, when we became an all volunteer organization without the leadership of an Executive Director, of our accomplishments.

On page 8 of the Status Report, you will note an Executive Officer Duty Distribution and Committee list. If you have any information that you believe should be placed in this Status Report, just contact Sterrett Harper. If you have questions regarding the web-site, don't hesitate to contact Thad Eaton, our Web-Site Master. And so on.

Certainly, if at any time there are any questions, you can contact any member of the Board of Directors or myself. We are there to help.

The recently completed Convention was an outstanding success. The Association held its Board of Directors meeting followed by an advisory panel discussion, with key issues being presented. This was followed by the Gala President's Dinner and Awards and a tribute to the outstanding dedication and hard work of now Past President, Doug Jackson.

All Industry Day on Friday, was very informational, with legal issues being discussed as well as other items. Of course, we again offer as part of the registration package, our Re-Certification Seminar.

STEVE WAKEFIELD
President - CAIIA 2005-2006

HRB Insurance Law Update

Submitted by Hancock, Rothert & Bunshoft, LLP

Doheny Park Terrace Homeowners Assoc. v. Truck Insurance Exchange, California Court of Appeal, Second District, Division Three, Case No. B174036, filed September 19, 2005.

The California Court of Appeal held that the insured plead sufficient facts to raise the bar of equitable estoppel to the insurer's statute of limitations.

This case arose from a claim for property damage caused by the Northridge earthquake in 1994. Before the end of 1994, the insured, a condominium association, submitted claims for damage to its insurer, Truck. After conducting an inspection of the damage to the property, Truck concluded that such damage was less than the deductible in Truck's policy, so the claim was denied. The insured took no further actions with respect to its claim until February 2003. At that time, it met with its counsel who recommended the retention of an expert. Following the expert's inspection of the property, the insured learned that the damage caused by the earthquake as more extensive and, in fact, exceeded the amount of the policy deductible. In April 2003, the insured instituted this action against Truck. Truck filed a demurrer to the complaint arguing that the applicable limitations had run and that the insured had not plead sufficient facts to justify equitable estoppel. The trial court sustained the demurrer without leave to amend.

The Court of Appeal held that while both the original statute of limitations and the revived limitations period established by Code of Civil Procedure section 340.9 had expired, the insured had alleged sufficient facts for application of the doctrine of equitable estoppel and to survive demurer on this issue.

Eaton Hydraulics Inc. v. Continental Casualty Company, California Court of Appeal, Second District, Division Eight, Case No. B172881, filed September 15, 2005.
The California Court of Appeal held that the statute of limitations of a claim against an excess insurer for refusing to defend was tolled until the underlying action was terminated by final judgment.

This case arose from a lawsuit filed by the insured against its excess insurers in 2001. The complaint alleged that the insured's primary and umbrella insurers refused to defend and indemnify the insured in connection with underlying environmental claims and a resulting lawsuit brought against the insured by federal and state governmental entities. The environmental claims arose in the early 1990's, and culminated in a lawsuit filed against the insured and others in 1999, followed by a global settlement embodied in a consent decree in August 2000. CNA demurred to the insured's complaint, contending it was barred by the four-year statute of limitations. CNA asserted the statute began to run no later than April 11, 1996, when the insured sued its primary insurers and sued its excess insurers as Doe defendants. The Court of Appeal found that the trial court erred in concluding that the insured's suit against an excess insurer was barred by the four-year statute of limitations. The court noted that "under settled principles, the statute of limitations in a general liability insurance coverage case accrues when the insurer refused to defend the insured in the underlying litigation. Since the duty to defend is continuing, the statute is tolled until the underlying action is terminated by final judgment – in this case, August 2, 2000." The court held that the fact that the insured sued its primary insurers in 1996, designating "excess insurers" as Doe defendants, has no bearing on the accrual or tolling of the statute of limitations applicable to an excess insurer who was never identified or served in the 1996 lawsuit.

CAIIA *Calendar*

Combines Claims Conference

March 14-15, 2006
Contact Brenda at 888-811-6933

Mid-Winter Meeting

To Be Announced

Weekly Law Resume

Prepared by Low, Ball & Lynch, Attorneys at Law

Arbitration - Language of Arbitration Provision Must Be Clear

Villacreses v. Molinari, Court of Appeal, Fourth District (September 26, 2005)

California has a strong public policy favoring arbitration as a method of dispute resolution. Therefore, any reasonable doubt as to whether a claim falls within an arbitration clause in a contract is normally resolved in favor of arbitration.

In this case, Plaintiffs Nicholas and Clare Villacreses entered into a written agreement to purchase a home in Southern California from Defendants Arthur and Jane Molinari. The agreement, consisting of one page and apparently drafted by the parties themselves, provided among other terms: "Seller shall disclose known material facts and defects and make other disclosures required by law.' This agreement contained no reference to arbitration.

The parties then executed another agreement in connection with opening escrow. The escrow agreement included a provision stating: "Arbitration of Disputes: Notice: By initialing in the space below, you are agreeing to have neutral arbitration of all disputes to which it applies and you are giving up any rights you might possess to have the dispute litigated in a court or jury trial.'

Escrow subsequently closed and the Villacreses moved into the home. Thereafter, they noticed a number of drainage and geotechnical problems. The Villacreses filed suit against the Molinaris, stating causes of action for breach of contract and misrepresentation relating to a failure to disclose. They also sought rescission of the property sale agreement. In response, the Molinaris requested arbitration of the dispute, based on the arbitration language contained in the escrow agreement. When the Villacreses refused, the Molinaris filed a petition to compel arbitration.

The trial court granted the motion to compel and stayed litigation pending completion of arbitration. Arbitration was then conducted. The arbitrator concluded that the Molinaris breached their obligation to disclose, but ruled that the Villacreses had failed to prove any damages. He declined to order rescission and awarded costs to the Molinaris. The Molinaris then filed a petition to confirm the arbitration award. The Villacreses opposed the confirmation, and sought an order vacating the award. The trial court granted the petition to confirm and the Villacreses appealed.

The Court of Appeal reversed the trial court decision. The Fourth District initially noted that even though there is a strong public policy in favor of arbitration; arbitration is a matter of contract and a party cannot be required to arbitrate a dispute he or she has not agreed to submit. In determining whether an enforceable arbitration agreement exists, the initial burden is on the party petitioning to compel arbitration. Once the petitioner has met the burden, the burden shifts to the party opposing arbitration, to produce evidence necessary to the defense.

In this case, the Court of Appeal held that the arbitration language in the escrow agreement suggested that there was some limitation on arbitration. Specifically, the subject provision stated that the parties were: "agreeing to have neutral arbitration of all disputes to which it applies.' This language was not consistent with the conclusion that the parties agreed to arbitrate any and all disputes. Further, nothing in the purchase agreement or the escrow agreement explained what "it' meant. The Molinaris also offered no extrinsic evidence suggesting the parties intended to arbitrate. Therefore, the Court held that there was insufficient evidence of an agreement to arbitrate the subject claim.

The Court reversed the judgment in favor of the Molinaris and the Villacreses were awarded their costs on appeal.

COMMENT

This case is instructive in showing that parties to a contract must be clear in their intent to arbitrate. Arbitration provisions should be thoroughly reviewed for any ambiguities.

Indemnity - Construction Contracts

AMENDMENTS TO CIVIL CODE SECTION 2782

By: Ray Coates

Existing law allows indemnity agreements in construction contracts so long as indemnity is not provided for the sole negligence or willful misconduct of a promisee. There has been a proliferation of indemnity agreements in construction contracts. Owners and general contractors have insisted on Type I indemnification agreements. A Type I indemnity agreement is defined as "one which requires the promisor to assume liability for the promisee's negligence." Developers and general contractors required subcontractors to assume liability for the developers and general contractor's negligence and to be liable for all expenses they incur in the defense of such actions, including attorneys fees. Because subcontractors perceived this requirement to obtain the contract to be unfair, and because they believed it was unnecessarily driving up their costs, a lobbying effort began in the Legislature to outlaw Type I indemnity agreements. Only one bill

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made it out of the Legislature to the Governor's desk. That was AB 758 authored by Assembly Member Ronald Calderon. It was signed by Governor Schwarzenegger on September 29, 2005 This bill provides the following features:

1. It applies to residential construction contracts entered into after January 1, 2006.

2. It prohibits Type I indemnity agreements, which are defined as "indemnity agreements by a subcontractor to indemnify a builder against liability for claims that arise out of, pertain to, or relate to the negligence of the builder or the builder's other agents, other servants, or other independent contractors who were directly responsible to the builder." It further outlaws such agreements related to defects in design furnished by those persons, and claims that do not arise out of, pertain to, or relate to the scope of work in the written agreement between the parties.

3. It provides that this prohibition cannot be waived by the parties.

4. The bill does not prohibit a subcontractor and builder from agreeing to the timing or immediacy of the defense and provisions for reimbursement of defense fees and costs, so long as that agreement does not modify the provisions of this statute. Presumably, this relates to Type II indemnity agreements.

5. It does not alter the obligations of an insurance carrier under the holding of Presley Homes, Inc. v. American States Insurance Company (2001) 90 Cal. App. 4th 971. This case holds that an insurer providing additional insurance to another has a duty to defend the entire action, even if some claims are potentially not covered. The duty to indemnify will be controlled by the additional insured endorsement. However, the duty to defend the entire action rests with each insurer providing coverage to the additional insured. This duty is allocated among these carriers on the basis of equitable considerations.

COMMENT:

The purported effect of this bill is to limit the burden placed on subcontractors by general contractors and developers in construction defect lawsuits and also to reduce their insurance costs. One of the stated arguments in favor of the bill was that subcontractor insurance rates have skyrocketed. While prohibiting Type I indemnity agreements, the bill does not prohibit additional insured endorsements. Presumably, a developer or general contractor could insist upon an additional insured endorsement similar in scope to a Type I indemnity agreement. However, whether such endorsements will be available to subcontractors in California remains to be seen. Furthermore, there will still be costs associated with providing a defense to the general contractor and developer where an additional insured endorsement has been issued. Thus, how much savings in insurance costs will result remains to be seen.

Finally, any big change in the law, such as this, generates litigation. We expect developers and general contractors to attack the constitutionality of these provisions, the meaning of the code section, and its application to various factual situations. It will become Civil Code Section 2782(c)and(d) effective January 1, 2006. It reads as follows:

"(c) For all construction contracts, and amendments thereto, entered into after January 1, 2006, for residential construction, as used in Title 7 (commencing with Section 895) of Part 2 of Division 2, all provisions, clauses, covenants, and agreements contained in, collateral to, or affecting any such construction contract, and amendments thereto, that purport to indemnify, including the cost to defend, the builder, as defined in Section 911, by a subcontractor against liability for claims of construction defects are unenforceable to the extent the claims arise out of, pertain to, or relate to the negligence of the builder or the builder's other agents, other servants, or other independent contractors who are directly responsible to the builder, or for defects in design furnished by those persons, or to the extent the claims do not arise out of, pertain to, or relate to the scope of work in the written agreement between the parties. This section shall not be waived or modified by contractual agreement, act, or omission of the parties. Contractual provisions, clauses, covenants, or agreements not expressly prohibited herein are reserved to the agreement of the parties.

(d) Subdivision (c) does not prohibit a subcontractor and builder from mutually agreeing to the timing or immediacy of the defense and provisions for reimbursement of defense fees and costs, so long as that agreement, upon final resolution of the claims, does not waive or modify the provisions of subdivision(c). Subdivision (c) shall not affect the obligations of an insurance carrier under the holding of Presley Homes v. American States Insurance Company (2001) 90 Cal. App.4th 571. Subdivision (c) shall not affect the builder's or subcontractor's obligations pursuant to Chapter 4 (commencing with Section 910) of Title 7 of Part 2 of Division 2."

When You Need to Know What Really Happened

Submitted by Garrett Engineers, Inc. - Forensic Division

President's Message:

Does antifreeze burn? How about brake fluid? The following abbreviated article was written by Bill Hagerty and Steve Peranteau for the July 2005 issue of the Fire & Arson Investigator. The full text of the article, as well as footnotes and a table of test results can be found on our GEI website.

VEHICLE FLUID FLAMMABILITY TESTS

By Bill Hagerty and Steve Peranteau

Throughout the vehicle repair and fire investigation communities, there had been considerable discussion and disagreement about which under-hood fluids will ignite and under what conditions. During one such discussion, a service manager of a California Chevrolet dealership stated, "Transmission fluid will not start a fire".

However, real world experience from well over 750 vehicle fire investigations and attendance at 23 fire schools have shown that nearly all fluids found in engine compartments today will start a fire under the right conditions. Engine fluids can leak for days, weeks, or months and not ignite. That's quite possible. Garage floors of the world are covered with fluids that have leaked from engines and transmissions and have never caught fire. On the other hand, there have been thousands of actual automotive fires where an engine compartment fluid was the material first ignited.

Investigators' analyses and conclusions have often been complicated by a lack of information and total misinformation about the flammability of the various fluids found under the hoods of motor vehicles. NFPA 921 also introduces some uncertainty regarding this issue by stating that "Flash point is of little or no significance when a fuel is released in spray form. Ignition on hot external surfaces may require temperatures of 200°C (360°F) above published ignition temperatures[2]."

Training and personal experience have brought about an awareness that nearly all vehicle fluids can cause fires under the right conditions. Under test conditions described below, we were able to validate this hypothesis.

TEST PROCEDURE

The tests were conducted using new household-type plastic spray bottles to simulate escaping liquid spraying from the pinholes or small cracks in the fluid systems that are the source of most fluid leaks. These tests were not specifically designed to precisely replicate a leaking hose or fitting, but to answer the question of whether the fluids found in a typical engine compartment would ignite on a representative hot surface. The pressures and temperatures of the fluids would be significantly higher under actual engine operating conditions.

The tested fluids included No. 2 diesel fuel, 89 octane unleaded gasoline, automatic transmission fluid, conventional and synthetic motor oils, brake fluid, power steering fluid, standard green and pink long-life ethylene glycol coolants (both full strength and 50/50), and R134a refrigerant, as well as the various compressor lubricating oils used with R134a.

Because hot exhaust components are the primary heat source in engine compartments, a four-inch diameter piece of steel exhaust tubing was preheated with a welding torch for each fluid tested. This simulated engine exhaust system operating temperatures, which can be as low as 600-700°F and as high as 1,000-1,200°F for a vehicle that is heavily loaded, climbing a steep grade, or towing a trailer. Temperatures of the heated pipe were monitored during the tests with a Raytek infrared remote sensor and a Craftsman multimeter with a thermocouple attached to the heated exhaust tubing. Each fluid was then sprayed onto the preheated tubing.

The 1,000-1,200°F exhaust system temperature was selected after a review of numerous Society of Automotive Engineers papers.

Although there is some variation in the temperatures measured by the authors of those reference papers, thermocouples attached to the exhaust system/catalytic converter measured temperatures ranging from a low of 689°F under no load and no throttle to 1,533°F under 100% throttle on a 4% simulated road grade. This scientific research was consistent with the authors' personal experience using a Raytek Raynger.

TEST RESULTS

The first fluid tested was brake fluid, specifically DOT 3, used in both ABS and non-ABS systems. Spraying the brake fluid on the tubing heated to 1,000°F caused instant flame.

For our next test, the most controversial "burn-or-not-burn" fluid, coolant-specifically ethylene glycol-was used. The standard green variant is found in many engine cooling systems, but since 1996 General Motors has installed a long-life pink coolant. The primary component of the pink colored coolant is also ethylene glycol.

When sprayed onto the steel tubing heated to 1,000°F (a temperature that can occur quite readily in an engine compartment), both the green and pink coolant flashed into flame. This occurred not only at full strength, but also when mixed 50/50 with water, the ratio specified for most vehicle cooling systems. The diluted coolant burns because water evaporates faster than ethylene glycol. Once the water has evaporated, the remaining ethylene glycol ignites.

Next tested was automatic transmission fluid. In the early 1990s General Motors experienced numerous fires in its full-sized trucks. Fires usually did not occur in normal usage, but under heavy loads, such as pulling trailers up hills, some transmissions expelled their fluid out onto hot exhaust components and

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When You Need to Know What Really Happened

Submitted by Garrett Engineers, Inc. - Forensic Division

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caused fires. As a result, General Motors mailed new dipsticks to owners of these trucks. The new dipsticks had a plastic locking device designed to prevent the internal transmission fluid pressure from ejecting fluid up the dipstick tube and onto the right hand exhaust manifold directly below. Flammability of automatic transmission fluid was demonstrated in the tests by spraying transmission fluid onto the steel tubing, heated to approximately 1,000°F. The transmission fluid immediately flashed.

The fourth fluid flammability test was conducted using power steering fluid. A power steering pump can generate internal pressures that exceed 300 psi, creating tremendous potential for a vaporized spray. If a comparatively very low pressure spray of fluid from our test bottle caused a fire, fluid from a leaking power steering hose can also start a fire. Power steering fluid sprayed onto the hot exhaust tubing preheated to 1,000°F flashed immediately. Motor oil was the next test fluid. Conventional and synthetic oils were individually tested. Both oils ignited easily on the 1,000°F tubing.

R134a air conditioning refrigerant, which replaced R12 (a Freon-based fluid) in the early 1990s, was tested next. It was determined that undiluted R134a (both in gaseous form and liquid form) would not ignite on the test surface heated to 1,100°F.

All vehicle manufacturers require the addition of compressor lubricating oil to R134a refrigerant in order to lubricate the air conditioning compressor bearings. There are four common viscosities of compressor lubricant oil. Domestic manufactures generally specify higher viscosity oils while foreign manufacturers usually specify a lower viscosity. The least viscous, PAG 46 (PAG = polyalkylene glycol) ignited at 800°F, while PAG 100 and 150 both ignited at about 900°F. Ester oil, which is used in the conversion of older R12 systems to R134a (due to its compatibility with the mineral oil in that refrigerant), did not flash until approximately 1,100°F.

Finally, two engine fuels were tested: No 2 diesel fuel and 89 octane unleaded California gasoline. The diesel fuel ignited on the heated tubing at a temperature between 950 and 1,000°F. We have left the controversial subject of gasoline igniting on a hot surface for last. The tests that we performed repetitively confirmed that unleaded 89 octane fuel will flash on a heated surface with a temperature of approximately 1,100°F.

The only common under hood fluid not tested was windshield washer fluid. This fluid typically consists of 33-45 percent methanol and 55-67 percent water. The evaporation rate of methanol is approximately 16 times that of water. As a result, the methanol in leaking windshield washer fluid is likely to evaporate before the water does, leaving no methanol to ignite. Because methanol burns with a colorless flame, the practical difficulty in determining whether the methanol ignited was also a factor in omitting this fluid from the test.

One final note: These test fluids were conducted at an ambient temperature between 75 and 80°F. In a real under-hood environment all of these fluids exist at temperatures of at least 200°F. Thus any leaking fluid in effect has a "head start" because of the much higher operating temperature.

Why, Why, Why?

Why do we press harder on a remote control when we know the batteries are getting weak?

Why do banks charge a fee on "insufficient funds" when they know there is not enough?

Why does someone believe you when you say there are four billion stars, but check when you say the paint is wet?

Why doesn't glue stick to the bottle?

Why do they use sterilized needles for death by lethal injection?

Why doesn't Tarzan have a beard?

Why does Superman stop bullets with his chest, but ducks when you throw a revolver at him?

Why do Kamikaze pilots wear helmets?

Whose idea was it to put an "s" in the word "lisp"?

If people evolved from apes, why are there still apes?

Why is it that no matter what color bubble bath you use the bubbles are always white?

Is there ever a day that mattresses are not on sale?

Who do people constantly return to the refrigerator with hopes that something new to eat will have materialized?

Why do people keep running over a string a dozen times with their vacuum cleaner, then reach down, pick it up, examine it, then put it down to give the vacuum one more chance?

Why is it that no plastic bag will open from the end on your first try?

How do those dead bugs get into those enclosed light fixtures?

When we are in the supermarket and someone rams our ankle with a shopping cart then apologizes for doing so, why do we say, "It's all right"? Well, it isn't all right, so why don't we say, "That hurt, you stupid idiot!"?

Why is it that whenever you attempt to catch something that's falling off the table you always manage to knock something else over?

In winter why do we try to keep the house as warm as it was in summer when we complained about the heat?

How come you never hear father-in-law jokes?

And my FAVORITE . . . . .

The statistics on sanity are that one out of every four persons is suffering from some sort of mental illness. Think of your three best friends – if they're okay, then it's you.

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