CAIIA Status Report

NOVEMBER 2007

RWB Legal Reflections

Submitted by Rudolff, Wood & Barrows, LLP, Emeryville, CA

Vehicle Is Not "Uninsured" And Uninsured Motorist Benefits Are Not Owed If Driver And Vehicle Owner Have Bodily Injury Coverage Under Personal Liability Umbrella

California Capital Insurance Company v. Nielsen, 07 C.O.D.S. 9132, is a recent decision that has been certified for publication by the Court of Appeal of the State of California, Third Appellate District. The opinion concludes that when the owner and the operator of an otherwise uninsured vehicle have liability insurance coverage for bodily injury damages through a personal liability umbrella policy, that vehicle is not an "uninsured" motor vehicle.

Douglas Nielsen was a passenger in an Acura driven by Bryan Jones. Jones was inebriated and driving with a suspended license when he lost control of the Acura and crashed into a pole. Nielsen was thrown from the car, rendering him a quadriplegic.

The Acura was owned by the driver's mother, Carla Brown, and was not covered by any auto liability insurance policy. However, she did have a $1 million personal liability umbrella policy with State Farm. State Farm provided coverage for both Jones and Brown under this policy and paid Nielsen $1 million in a good faith settlement of Nielsen's action against them.

Nielsen then made a further claim against his father's California Capital Insurance Company (CCIC) auto liability policy for its per-person limits of $100,000 in uninsured motorist benefits to Nielsen, concluding that the Acura was not an uninsured motor vehicle in light of the State Farm personal liability umbrella policy. CCIC successfully asserted its position in a declaratory relief action, and Nielsen appealed.

In affirming the decision on appeal, the court relied on Insurance Code § 11580.2, which governs uninsured motorist coverage in California. Unless the insured chooses to decline the coverage, § 11580.2 requires that automobile liability policies shall provide coverage for damages that the insured would be legally entitled to recover as damages for bodily injury or wrongful death form the owner or operator of an uninsured motor vehicle. The stature provides that "uninsured motor vehicle" means "a motor vehicle with respect to the ownership, maintenance or use of which there is no bodily injury liability insurance or bond applicable at the time of the accident."

continued on page 7

PUBLISHED MONTHLY BY
California Association of
Independent Insurance Adjusters

An Employer Organization of Independent Insurance Adjusters

Inside This Issue

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PRESIDENT'S MESSAGE

It is my great pleasure to become the 61st President of the CAIIA. I am thankful for the opportunity and hope to fill the big shoes left by my predecessors.

As many of you know, I am a second generation adjuster. My father Leslie was a long time independent adjuster and I am able to answer the question that many of you are asked by saying, "I had no choice, I was told 'you are going to be a claims adjuster!'."

During my time working with the CAIIA I have learned that we are a group of not just exceptional adjusters but also exceptional individuals. I have been regularly surprised by the kindness and generosity of many of our members. In the coming months I plan to thank many of them for their contributions.

By the time you read this, we will have held our First Annual Golf Tournament and our Annual Convention. I am sure they were big successes.

I welcome Phil Barrett to the Executive Board in the position of Secretary / Treasurer and apologize to Phil if I spent too much of the CAIIA funds at Disneyland. Phil has great ideas, and one of the items he and I will be working on this year is how to enhance member benefits. Please contact Phil or me if you have any ideas.

Moving up on the Executive Board are Pete Vaughan and Sam Hooper. Both fine men will surely be excellent Presidents in the years to come. Sharon Glenn ascends to the coveted position of Immediate Past President. I promised Sharon that I wouldn't say that I am the youngest President of the CAIIA to date.

Our four new board members are Paul Camacho, Helene Dalcin, Kim Hickey and John Ratto. Each of them will be great additions. Remaining on the board are Jeff Stone and Bob Fox. Jeff deserves special thanks for his tremendous work on the golf tournament. There would have been no tournament if not for him.

I have enjoyed contributing to the efforts of the CAIIA in providing education to our members and the insurance community. Many members tell me that this should be our primary focus and we will be looking for ways to enhance our educational opportunities in 2008.

One part of our continued commitment to education is the Steve Tilghman Scholarship fund, which we connected to our Golf Tournament. The CAIIA raised $1,650 for the Fund in our first year. Thank you to all of you that contributed. The Fund will be used to provide scholarships to worthy California insurance professionals to assist in their career advancement.

We also raised over $4,200 for our designated charity, the Juvenile Diabetes Research Foundation, which is especially significant for my family. Thank you to all who contributed. It is our plan to annually adopt a charity to assist as part of our Golf Tournament.

The CAIIA can also increase its visibility and assist members in developing new client relationships. I'll have some suggestions on this issue next month.

If you have any suggestions, questions or just want to say hello, please don't hesitate to call or email me.

PETER SCHIFRIN
President - CAIIA 2007-2008

When You Need to Know What Really Happened

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

President's Message: SAE Conference

Last month, I had the opportunity to attend an SAE conference in Ashburn, Virginia at the NTSB Training Center. The conference was titled "Highway Vehicle Event Data Recorder Symposium: 2007 Update". There were approximately 170 registered attendees.

There were numerous presentations including: EDR and Legal Issues, EDR Standards, EDR Data Validity, Global Initiatives and Perspectives, Insurance Industry Perspectives, Passenger Car EDR Data Case Studies and Commercial Vehicle EDR Applications.

While our company tends to focus on the crash data that is available to be downloaded using Vetronix equipment, it was instructive to see the broader definition of EDR used by the wider parts of the industry and even outside our industry.

Dr. Joseph N. Kanianthra, Associate Administrator for Vehicle Safety Research, National Highway Traffic Safety Administration, U.S. Department of Transportation, gave a presentation that discussed US highway deaths-both the absolute number (which for the past few years has pretty well been stable in the range of the low forty thousands per year) and the fatality rates per million miles driven (which continues to drop).

He also discussed causes and had a nice pie chart which described the usual suspects-drunk driving, drowsy, bad surface conditions, distractions, erratic driving and so on. What surprised me was the figure given for vehicle defects. That was listed as 2%, which was much higher than I would have guessed.

We heard a good presentation on a program that Safeco Insurance is sponsoring in the Midwest for teen drivers. The program installs a "Drive Cam" that records two views-one of the road ahead (essentially what the driver sees) and a second view of the driver. The recordings are downloaded and reviewed by both the teen driver and their parents on a weekly basis. We watched three actual driving experience videos.

The first video showed a young lady driving down a boring straight two-lane country road. Up ahead, on the right, was a car stopped at a stop sign on an intersecting road. As she drew close to the stopped car, it suddenly pulled out in front of her. The camera that showed her face recorded her surprise and the expletive that immediately followed. She quickly swerved to the left, missing the other car by inches. Now that she was in the wrong lane, she was looking forward at the grill of an oncoming car, closing in on her at over 100 mph. Quickly she swerved back into the right hand lane, averting a crash by a fraction of a second. She had escaped disaster by the thinnest of margins. The presenter pointed out that everyone in the room, in an identical situation, would have crashed with our slower reaction times-it was her teenaged reaction times that saved her (and the grace of God). The post incident review with her parents reinforced her correct actions and the necessity of being ever vigilant.

The second video showed two teen-aged sisters driving down a similar country road. The driver kept looking down for two and three seconds at a time. She was text messaging a friend. Each time she spent more time looking down and each time she veered closer to the edge of the road, missing mailboxes and poles by inches. Her sister was daydreaming-none of the near misses registered with her. Finally, her right wheels wandered into the gravel on the edge of the road and she looked up in time to swerve back onto the highway before hitting a fence. The driver and her sister laughed about the chastisement that they knew they would receive from their parents at the weekly review. When the review came, no one was laughing. The driver then saw the telephone pole that preceded the fence. She never saw it while driving, and how it missed her sister by inches. After the review she permanently gave up the practice of "IMing" while driving.

The third video was similar, this time the driver was simply going too fast for a curve and drove across the road into a field. She put the car in reverse and backed back to the road and continued without further incident. The weekly review and feedback with her parents was fruitful. The presenter reported a **40% decrease in teen crashes**

continued on page 8

When You Need to Know What Really Happened

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

continued from page 3

by participants in the program compared to non-participants.

Similarly, Frito Lay has installed drive cams in their over the road trucks, to give immediate feedback to their drivers. These drive cams begin recording when the vehicle experiences a sudden turn or heavy braking, and record for a minute or so until they turn off again. They document the driver and roadway to show what happened. The program has been extremely effective in reducing costly unsafe driver behaviors.

In Las Vegas, Veolia Transportation, the largest private transportation provider in the US, has installed video recording devices on the bus lines that cover the road ahead, the driver, the doorways and in some cases, the passenger aisles. This has greatly reduced prohibited driver actions (such as cell phone use) and has documented the actions of other vehicles when crashes occur, proving who caused the accident. Additionally, claims involving rider injuries have dramatically decreased, now that passenger actions are recorded.

We had several speakers report on international developments. This highlighted the fact that there is no single body that has jurisdiction over industry standards. In Europe, ISO standards are used. In the US, SAE has several committees working on the development of standards. The NTSB has areas of jurisdiction, as does USDOT and NHTSA. As technology improves, new standards adoption becomes a moving target. Of course, each manufacturer has its own idea of what is best, and in the area of safety, they will not share information because safety is an area of competitive advantage.

Aside from making life easier on accident reconstructionists, let me give you another reason why common, universal standards are important. Dr. Richard Hunt gave a talk on his perspective as an emergency room physician. When a crash occurs and an ambulance is dispatched, timely treatment is imperative. The emergency response personnel arrive, evaluate, treat and then transport. They have to choose which hospital to take the crash victims. The closest community hospital will not have the same facilities as a Level 1 Trauma Center. Dr. Hunt talked about losing many patients because they went to a community hospital. If you are severely injured, care at a Level I trauma center lowers the risk of death by **25%. This is a really big deal.** Severe internal injuries are not always apparent in a triage situation. What if the EMT could download the EDR from the crashed cars to determine the G forces the occupants experienced? This would greatly improve their on-scene diagnosis and save many lives. But there is no standard interface, nor software, nor data format for this to happen.

My final observation is that if you are under 40, your grandchildren will never learn to drive a car like you did. Lane departure monitoring, GPS real time tracking, onboard recording cameras, forward looking radar for cruise control, and cars that parallel park themselves are already here. The time is coming when the driver will become redundant.

NEWS OF MEMBERS

Gene Roberts of Gene C. Roberts Claims Service announces that he has moved his business. The CAIIA wishes him all the best in his new location. You can now contact Gene at:
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Weekly Law Resume

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

Disabled Parking Space

Dianne Urhausen v. Longs Drug Stores California, Inc., (September 18, 2007), Court of Appeal, First District

Statutes passed for the benefit of the disabled protect them in the event of injury while using a facility in an intended manner. This case concerned a handicap access that was being used in a manner different than contemplated.

Dianne Urhausen, disabled by a neuromuscular condition, drove to a Longs Drug Store and parked in an ordinary parking stall. There was an unoccupied parking space reserved for the use of disabled persons located adjacent to the parking space she selected. Using her crutches, she walked across the empty disabled access parking space and ascended the sidewalk curb in front of that space in order to enter the store. Within inches of the curb, she fell and was injured. Later measurements determined the surface of the parking space violated State and Federal regulations because it sloped too steeply as it approached the curb. Ms. Urhausen sued Longs for common law negligence, negligence per se and under the California Disabled Person's Act. She later dismissed the common law negligence claim and the trial court granted judgment for Longs on claims of negligence per se and denial of access claim. Ms. Urhausen appealed.

The Court of Appeal affirmed. Ms. Urhausen contended the parking stall denied her full and equal access because it did not comply with slope regulations under the California Disabled Person's Act. The Court stated that the plaintiff had the burden of establishing the failure of the access aisle to comply with applicable regulations denied her equal access to Longs. However, here, the evidence showed that she could have reached the entrance to the store by traversing the normal parking lanes of the parking lot. Thus, the failure of the access aisle to satisfy the California Disabled Person's Act did not prevent her equal access.

She also argued that the violation of these regulations was negligence per se, allowing her to recover for her injuries. However, the Court noted that recovery under this theory required Ms. Urhausen to establish that she was one of the class of persons protected by the regulation and that the injury resulted from an injury the regulation was designed to prevent. The Court noted the regulation was designed to permit transit by disabled persons from their vehicles to the sidewalk. It was not designed to prevent the type of accident that occurred in this case. It was not designed to prevent injury to persons crossing the parking space or curb on foot. These regulations were designed so that disabled persons, in particular those who use wheelchairs, would have a convenient parking space which was configured to permit safe entry into and from the vehicle and into the store. Thus, the negligence per se claim failed because the injury did not result from the occurrence of an accident which the statute was designed to prevent. The judgment was therefore affirmed.

COMMENT

This case shows a rather clever way to try to prove liability for a personal injury case. The Court rejected that approach in this opinion.

Coverage - Act of Self-Defense Raises Possibility of Duty To Defend

Jafari v. EMC Insurance Companies, (August 31, 2007) Court of Appeal, Second District

This case deals with the issue of whether intentional conduct in self-defense can be deemed an "accident" for purposes of insurance coverage. Plaintiff Davar Jafari ran a business named Glendora Tire & Brake Center (Glendora). In 2003, Farhad Nazemzadeh came to pick up his car at Glendora. Mark Mitchell, the manager of Glendora, told Nazemzadeh that his car was not ready for pickup.

continued on page 6

continued from page 5

Nazemzadeh became verbally abusive. An argument ensued, and Nazemzadeh allegedly threatened to kill Mitchell. Mitchell then punched Nazemzedah twice in the face causing personal injury.

Nazemzadeh filed suit against Jafari, Glendora and Mitchell, alleging numerous causes of action, including assault, battery, and negligence. At the time of the incident, Jafari had a garage liability policy with Defendant EMC Insurance Companies and Employers Mutual Casualty Company (EMC). Jafari tendered defense of the lawsuit to EMC. EMC rejected the tender. Jafari then filed a coverage action against EMC alleging breach of contract and breach of the covenant of good faith and fair dealing. EMC filed a motion for summary judgment asserting that the triggering act - punching someone in the face - could not be deemed unintentional, and therefore did not result from an accident, as called for in the policy. Thus, EMC argued there could be no coverage. The trial court granted the summary judgment. Defendants appealed. The Second District Court of Appeal reversed.

It is a fundamental rule of coverage law in California that an insurer has a duty to defend an insured if it becomes aware of facts giving rise to the potential for coverage. This is because the duty may not be entirely clear until after trial of the underlying matter. However, where there is no possibility of coverage, there is no duty to defend. The insured need only show that the underlying claim may fall within policy coverage; the insurer must prove it cannot.

Here, the issue for the Court of Appeal was whether Mitchell's intentional conduct in self-defense could be deemed an accident, because he was provoked by unexpected and unintended acts of Nazemzadeh. The term "accident" was not defined in the EMC policy. The Second District, therefore, found it proper to look to common law interpretations of the term "accident." In looking to prior California decisions, the Second District held that acts of self-defense could be deemed an accident where an insured's actions were provoked by unforeseen and unexpected events in the chain of causation. Thus, even if an insured was alleged to have committed an assault and battery, the act could be determined to be an accident, if the insured's acts were in self-defense and were prompted by something sudden and unplanned — such as Nazemzadeh's threats. For the Second District, the actions of claimed self-defense by Mitchell, in light of acts by Nazemzadeh, gave rise to the potential for coverage. Whether Mitchell actually acted in self-defense was a disputed factual question, which could not be resolved by a summary judgment motion. The judgment was therefore reversed and the case remanded for further proceedings.

COMMENT

The case reminds insurers that they must take a broad view of an incident raising the question of self-defense when determining whether there has been an "accident" for purposes of coverage.

Torts - Release in Health Club Membership Agreement Not Sufficient To Preclude Liability

Zipusch v. LA Workout, Inc., (October 3, 2007), Court of Appeal, Second District

California courts have permitted sponsors of recreational sports to include releases in participation/membership agreements, because the release provisions do not implicate the public interest and are not void as against public policy. However, release provisions must be unambiguous.

In this case, Plaintiff Yoko Zipusch joined Defendant LA Workout, a health club. Zipusch signed a membership agreement. The membership agreement contained an assumption of risk provision setting forth that the member agreed to accept risks of working out at the club and would not hold LA

continued on page 7

Weekly Law Resume

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

continued from page 6

Workout liable for injuries resulting from "the negligence or other acts of anyone else using LA Workout." Thereafter, Zipusch allegedly sustained injuries when her foot became stuck on a sticky substance on a treadmill at the health club, causing her to lose her balance.

Zipusch filed suit against LA Workout for negligence and premises liability. LA Workout filed a motion for summary judgment, arguing the release provision of the membership agreement exculpated the health club from claims arising from Zipusch's use of the facilities. The club argued that the sticky substance had to have originated from a third person. The trial court granted the summary judgment, holding that while the release agreement did not bar all claims arising during use of the health club, it did bar claims involving third party conduct. The trial court found Zipusch had presented no evidence establishing the sticky substance materialized on the treadmill by non-third party conduct. Zipusch appealed. The Second District Court of Appeal reversed.

In its' decision, the Court of Appeal restated that release must be clear and explicit. If it is ambiguous, the contractual ambiguity will be construed against the drafter, voiding the purported release. Here, the Court of Appeal interpreted LA Workout's release to include injuries to the member, caused by the member or caused by third persons. The assumption of the risk provision did not release LA Workout from its own negligence. The Second District held that while it was not clear who had created the sticky substance, there was evidence presented by Zipusch that the treadmill had not been inspected for at least 85 minutes. For the Court, this raised a triable issue of fact as to whether LA Workout caused or contributed to the accident.

LA Workout also contended that Zipusch's accident was precluded by the primary assumption of the risk doctrine. The Court of Appeal rejected this argument, holding that negligent inspection and maintenance of exercise equipment is not an inherent risk of exercising at a health club. The judgment in favor of LA Workout was therefore reversed and the case was remanded for further proceedings.

COMMENT

While upholding the use of release provisions in membership/participation agreements for recreational sports, this case makes clear that the release provisions must be clear, explicit, and unambiguous to be effective

RWB Legal Reflections

Submitted by Rudolff, Wood & Barrows, LLP, Emeryville, CA

continued from page 1

The court found that the Acura was not an uninsured vehicle, because it could not be said that there was no applicable bodily injury liability insurance coverage. The court determined that it was irrelevant that there was no applicable automobile liability policy, and additionally found that it was irrelevant that the Acura was not specifically named in the personal liability insurance coverage that applied to the ownership and use of the vehicle, the vehicle could not be considered uninsured, and no benefits were owed under uninsured motorist coverage.

The clear import of this decision is that, where a claim is made under uninsured motorist coverage, requests for information concerning insurance of the drive and the vehicle owner should not be restricted solely to automotive policies.

The language of the opinion restricts itself to the situation where there is applicable insurance covering both the vehicle owner and the driver. There is no discussion of what the effect would be if the insurance applied solely to one, and not the other.

Gotta Love the South

Tennessee
The owner of a golf course was confused about paying an invoice, so he decided to ask his secretary for some mathematical help. He called her into his office and said, "You graduated from the University of Tennessee and I need some help. If I were to give you $20,000, minus 14%, how much would you take off? The secretary thought for a moment, and the replied, "Everything but my earrings."

Alabama
A group of Alabama friends went deer hunting and pared off in twos for the day. That night one of the hunters returned alone, staggering under the weight of an eight-point buck. "Where's Henry?" the others asked. "Henry had a stroke of some kind He's a couple of miles back up the trail," the successful hunter replied. "You left Henry out there and carried the deer back?" they inquired. "A tough call," nodded the hunter. "But I figured no one is going to steal Henry!"

Louisiana
A senior at Louisiana was overheard saying, "When the end of the world comes, I hope to be in Louisiana." When asked why, he replied, he'd rather be in Louisiana because everything happens in Louisiana 20 years later than in the rest of the civilized world.

Mississippi
The young man from Mississippi came running into the store and said to his buddy, "Bubba, somebody just stole your pickup truck from the parking lot!" Bubba replied, "Did you see who it was?" The young man answered, "I couldn't tell, but I got the license number."

Georgia
A Georgia State Trooper pulled over a pickup on I-65. The trooper asked, "Got any ID?" "….'bout whut?"

North Carolina
A man in North Carolina had a flat tire, pulled off on the side of the road, and proceeded to put a bouquet of flowers in front of the car and one behind it. Then he got back in the car to wait. A passerby studied the scene as he drove by and was so curious he turned around and went back. He asked the fellow what the problem was. The man replied, "I have a flat tire." The man responded, "When you break down they tell you to put flares in the front and flares in the back. I never did understand it neither."

And my favorite:
You can say what you want about the South, but you never hear of anyone retiring and moving north!