CAIIA Status Report

NOVEMBER 2009

Insurance Commissioner Poizner Announces Alarming Increase in Suspected Auto Insurance Fraud as Economy Worsens

Commissioner Poizner today announced in Los Angeles that recently compiled Department of Insurance statistics show that financially desperate residents and scam artists may be committing more automobile insurance fraud to cash in on insurance money. The Department of Insurance has seen an increase in suspected auto arson and auto theft fraud referrals last year.

"Many Californians are facing a host of financial challenges in today's economy, but I want to remind everybody that you will only compound your problems if you break the law and commit fraud in search of a quick fix," said Commissioner Poizner. "Department of Insurance investigators have seen an increase in suspected automobile arson and theft fraud cases recently, and our enforcement experts are working hard to crack down on anyone attempting to skirt the law for financial gain."

CDI saw an alarming 31 percent increase in suspected vehicle arson fraud cases in 2008 as compared with referred cases in 2007. (In 2007, CDI received 344 referrals for suspected automobile arson; in 2008, CDI received 451 referrals for suspected automobile arson.) Overall, the Department received almost 300 additional suspected vehicle theft and vehicle arson cases statewide in 2008 than in 2007. CDI received approximately 200 more suspected vehicle theft fraud case referrals in 2008 than in 2007.

While the total number of suspected fraud case referrals received by CDI for all automobile fraud categories (including inflated damages, vandalism and hit and run,) has remained relatively constant since 2007, suspected vehicle arson and theft referrals have noticeably increased.

PUBLISHED MONTHLY BY
California Association of
Independent Insurance Adjusters

An Employer Organization of Independent Insurance Adjusters

Inside This Issue

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CAIIA Newsletter
CAIIA Office
P.O. Box 168
Burbank, CA 91503-0168
Web site - http:\\www.caiia.org
Email: info@caiia.org
Tel: (818) 953-9200
(818) 953-9316 FAX
Editor: Sterrett Harper
Harper Claims Service, Inc.
Tel: (818) 953-9200

California Association of Independent Insurance Adjusters, Inc

PRESIDENT'S OFFICE
P.O. Box 514
Cerritos, CA 90703
562-802-7822
Email: info@caiia.org
www.caiia.org

PRESIDENT
Sam Hooper
hooper@hooperandassociates.com

IMMEDIATE PAST PRESIDENT
Pete Vaughan
pvaughan@pacbell.net

PRESIDENT ELECT
Phil Barrett
barrettclaims@sbcglobal.net

VICE PRESIDENT
Jeff Caulkins
jeff@johnrickerby.com

SECRETARY TREASURER
William "Bill" McKenzie
walshadj@sbcglobal.net

ONE YEAR DIRECTORS
Kearson Strong
kearson@claimssonsultinggroup.com

Jenee Child
info@sequioapros.com

Rick Beers
NCI63@sbcglobal.net

TWO YEAR DIRECTORS
Tanya Gonder
Tanya@casualtyclaimsconsultants.com

Scott Hannaford
Hannaford@comcast.net

Art Stromer
artstromer@hotmail.com

OF COUNSEL
Nancy DePasquale
WILLIS & DePASQUALE, LLP
725 W. Town & Country Rd., Ste. 550
Orange, CA 92868
714-544-6000 • Fax 714-544-6202
ndepasquale@wdlegal.net

PRESIDENT'S MESSAGE

Relationship Building: Serving Our Members - Educating the Industry

It is certainly a lot easier to move into a position in any organization where members and leaders have established a tradition of excellence.

It's often stated that helping to make others successful, leads to your own success. Terms like relationship building, networking , mentoring, etc., capture this CAIIA concept. We have witnessed many of our members engaged in a variety of these principles: Sterrett Harper actively promoting CAIIA's participation with the Combined Claims Conference (CCC); various firms subcontracting work to other members, Jeff Stone engaging and partnering with sponsors and related vendors for the golf tournament.

We have also witnessed members provide actual employment to others in transition. While others have positioned their organization to mutually merge with other member organizations. These types of transaction are certainly built upon relationships resulting from the trust and confidence of all parties. The industry perceives CAIIA as that type of organization. It's part of our culture, which extends to our non-member sponsors and business partners.

This ongoing principle of maintaining relationships manifest in CAIIA's ongoing commitment to providing educational opportunities to our members and the industry at large. In our recent history CAIIA's focus on education has been lead by Peter Schifrin, Doug Jackson, Helene DalCin, Steve Tilghman and all of our education presenters. The continued focus on education gained momentum during Pete Vaughan's recent presidency. Highlighted by current CE requirements, the DOI and the State Legislature has recognized CAIIA as a leader in regulatory education. Helene DalCin's selection to the DOI's board for education curriculum is indicative of the positive reputation the organization has built over the years.

Recently, the Chief of Staff of California Senator Ron Calderon discussed with me his interest in using the RPA program as an educational model which could be used as a concept applying to subse-

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Insurance Law Bulletin

Submitted by Smith, Smith & Feeley, LLP - Irvine CA

Restitution Order in Criminal Case Does Not Prevent Victim (or Insurer) From Obtaining Separate Civil Judgment

The California Court of Appeal has held that a restitution order in a criminal case does not prevent the victim (or the victim's insurer) from obtaining a separate civil judgment based on the same facts, but any payments made against the restitution order will reduce the amount owed on the civil judgment. (*Vigilant Insurance Company v. Chiu* (2009) 96 Cal.Rptr.3d 54)

Facts

Over a period of time, Robert Chiu stole $397,085.31 worth of merchandise from his employer, ViewSonic. Ultimately, he was convicted of the crime of grand theft.

As a part of his sentence, Chiu was ordered to pay ViewSonic restitution in the amount of $615,000.00 pursuant to Penal Code section 1202.4. This included the value of the stolen property, as well as lost profits and opportunity costs, and preorder interest.

Vigilant Insurance Company issued a policy of crime insurance that covered ViewSonic's losses. After applying the policy's $50,000.00 deductible, Vigilant paid $347,085.31 to ViewSonic. In turn, ViewSonic provided Vigilant with a written assignment of all rights against Chiu.

Vigilant filed suit against Chiu for fraud, conversion and embezzlement. It sought recovery of the $347,085.31 paid to ViewSonic, plus the deductible of $50,000.00. After a bench trial, the court awarded judgment in favor of Vigilant totaling $504,306.89 which consisted of $397,085.31 in actual damages, interest of $105,853.15 and costs in the amount of $1,368.43.

On appeal, Chiu argued that, by virtue of the restitution order and assignment, ViewSonic, already had what amounted to a judgment against Chiu in the sum of $615,000.00, and that the civil judgment would make Chiu liable for the same loss twice.

Holding

The Court of Appeal held that a restitution order is not a civil judgment. The Court also held that a restitution order does not preclude the victim (or the victim's insurer) from pursuing a separate civil action based on the same facts from which the criminal conviction arose. However, the Court also noted that Penal Code section 1202.4 (j) provides that "[r]estitution collected pursuant to this subdivision shall be credited to any other judgments for the same losses obtained against the defendant arising out of the crime for which the defendant was convicted."

The Court held that the statutory provisions, read together, demonstrate legislative recognition of the distinct and separate right of a victim to pursue a civil remedy irrespective of the restitution order, subject only to the requirement that the any amounts paid under the restitution order be credited against the civil judgment.

Comment

It is well established under California law that a victim's insurance company can bring civil actions for reimbursement against the wrongdoer (or against the victim to the extent the wrongdoer already has made restitution). In fact, insurer reimbursement claims are encouraged, since equitable principles would place the loss on the wrongdoing defendant, preclude a windfall recovery by the victim, and reimburse the insurer that honored a claim against a policy.

PRESIDENT'S MESSAGE

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quent insurance legislation.

Pete Vaughan, in his October, 2009 message thanked an active membership; and recognized a "…more democratic process…". I see no reason why more participation of all of our members can't continue to increase. Let's hear from our members with ideas as to how the organization can better serve the interests of their firm.

Building on the contribution of our members and the programs initiated by our previous leaders, and current officers, board and committee members, I believe CAIIA will continue to be the model for excellence for claims adjusting and management.

SAM HOOPER

President - CAIIA 2009-2010

Weekly Law Resume

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

Torts - Bailee Owes Duty to Prevent Theft of Tow Truck

Carrera v. Sopp & Son, Court of Appeal, Second District (September 3, 2009)

Absent special circumstances, California courts have refused to impose a duty on owners or bailees of motor vehicles who leave the key in the ignition of an unattended vehicle to prevent harm to third parties caused by a thief. This case addresses the difficult issue of what constitutes "special circumstances."

Defendant Maurice J. Sopp & Son (Sopp) owned and operated a commercial vehicle repair facility in Huntington Park, a high crime area of Southern California. The commercial vehicles kept at the yard were stored with the keys in the ignition so as to allow easy movement- as necessary for repairs.

Late one afternoon, Raymond Bermudez entered the Sopp repair facility. Bermudez had been released from prison earlier in the day. He had taken a bus to Los Angeles, and had become intoxicated en route. Bermundez walked into the Sopp facility through an open gate. He got into a tow truck; found the key; and started the ignition. He then drove out of the repair facility, striking vehicles in his path. Bermudez then drove the tow truck approximately a mile, where he struck numerous people waiting at a bus stop. One of the people killed was a relative of Plaintiff Carla Carrera. Carrera and other family members filed a wrongful death suit against Sopp, alleging that Sopp negligently operated the truck service center so as to allow a thief access to the tow truck.

Sopp filed a motion for summary judgment on the issues of duty and causation. The trial court granted summary judgment, finding that the case fell within the general rule of nonliability. Carrera appealed. The Second District Court of Appeal reversed, finding that special circumstances existed.

On appeal, Carrera contended that the tow truck was specialized equipment that required proper training to operate. Carrera also introduced evidence that the City of Huntington Park had the highest rate of car thefts in the nation in the year before the incident. Police had been called to Sopp's facility 25 times in the prior five years, because of criminal activity in the area. As such, Carrera argued that Bermudez' act was foreseeable and that special circumstances existed to place a duty on Sopp to prevent people from entering the facility or to remove keys from the tow truck.

Sopp countered that no vehicles had been stolen from the yard in 31 years. Sopp furthered pointed out that the random act took place with Sopp employees on the premises, and that Bermudez had to smash other vehicles to get the tow truck out of the lot.

The court of Appeal sided with Carrera. The Court held that the tow truck was a sizable, powerful vehicle, capable of inflicting harm. It is this type of vehicle that prior courts have ruled required greater care to prevent theft. In addition, the Second District found it significant that the gate had been left open with keys in the ignition in such a high crime area. Sopp's security measures were either not in place or not followed. While Sopp had argued that vehicles had been stacked to prefvent an easy exit, video of the incident showed that Bermudez was able to get the tow truck out of the yard in approximately a minute.

COMMENT

This case clarifies the special circumstances where a bailee may owe a duty to a third person for damages arising out of the theft of a vehicle on its premises.

Duty of Care - Duty to Preserve Evidence

Bryan Cooper v. State Farm Mutual Automobile Insurance Company, Court of Appeal, Fourth District (September 17, 2009

While the tort of spoliation of evidence no longer exists, the question arises whether an insurer can be sued for failing to preserve evidence that benefits its insured's case. This case addresses that issue.

Bryan Cooper was insured by State Farm. He was involved in a single-car accident, allegedly by reason of tread separation of the right rear tire. State Farm took possession of the vehicle, including the tire, as part of its adjustment of the loss. State Farm had the tire examined by an expert, who opined that it was defectively manufactured. State Farm notified plaintiff's expert of that opinion. Thereafter, Bryan Cooper sued the tire manufacturer, Continental Tire North America, Inc. Af-

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ter filing suit, Cooper's counsel notified State Farm that the tire was crucial to the case against Continental Tire and State Farm informed Cooper's attorney it would retain the tire. State Farm later disposed of the car and the tire.

Cooper then sued State Farm for damages caused by the destruction of the tire. He alleged he was unable to prove his product defect case against Continental Tire because of the loss of the evidence. In the trial of the action, State Farm was granted a non-suit on opening statement. Cooper appealed.

The Court of Appeal reversed. The Court noted that the dismissal followed opening statement, at which point the trial court was required to assume that all relevant evidence offered by the plaintiff was true and all reasonable inferences were to be resolved in the plaintiff's favor. Based upon the evidence presented, the Court held that a duty to preserve the tire was owed by State Farm, based either on a contract principle of promissory estoppel or a tort theory of a voluntary assumption of a duty. The Court found the cases that had eliminated the spoliation of evidence tort were not applicable. Those cases concerned a duty in the first instance to preserve evidence absent any promise or reliance. In this case, the claim was based upon State Farm's promise and Cooper's reliance thereon, an independent basis for liability.

The Court stated it was not too speculative to find proximate causation. In this case, based on the opening statement, plaintiff had evidence to prove the tire was defectively manufactured and that the defect caused the single-car accident that injured him. The damages were the sums Cooper would have been entitled to recover in the underlying personal injury action against Continental Tire. State Farm was fully aware of the nature and general amount of damages that it was exposed to by failing to preserve the tire. The Court held these allegations were legally sufficient to support recovery based upon promissory estoppel or a voluntary undertaking. The judgment was therefore reversed.

COMMENT

This case was based solely on plaintiff's version of the case. Although the tort of spoliation of evidence has been eliminated in California, this case shows that liability may exist if an insurer independently promises to preserve evidence.

Duty of Care - Assumption of the Risk

Ellyn Levinson, et al. v. Bert Owens, et al. Court of Appeal, Third District (August 26, 2009)

There have been a number of recent cases dealing with the doctrine of assumption of the risk. This case explored the issue of whether the defense was overcome because the risk of danger had been increased by the defendant.

Bert and Anne Owens hosted a barbeque at their cattle ranch to celebrate a recent victory by attorney Ellyn Levinson arising out of a lot line adjustment case. Levinson brought her daughter, Rachel, to the barbeque. Levinson inquired whether she could do some horseback riding while at the barbeque. When questioned, she indicated she was experienced in riding horses. Levinson was given a horse named "Pistol" to ride. After mounting the horse and exiting the stable, Pistol began to gallop and Levinson was thrown from the horse when Pistol abruptly cut to the left. Levinson hit a fence and shattered her hip and cut her face.

Levinson sued Owens for her injuries. Owens moved for summary judgment based on the primary assumption of the risk doctrine. Levinson opposed the motion by stating the defendants increased the risk of horseback riding by placing Levinson, an inexperienced rider, on a highly trained cattle horse, and failing to properly train her. The trial court granted the motion for summary judgment. Levinson appealed.

The Court of Appeal affirmed. It noted that horseback riding is a dangerous sporting activity. The risk of being thrown off a horse is an inherent risk of horseback riding. There is no duty to protect riders from the risk of injury inherent in riding a horse.

In this case, the Owens were not commercial renters of horses for riding. They did not invite Levinson to come to their house to ride the horse. Rather, they granted her request to ride one of the horses while at the barbeque. Thus, the primary assumption of the risk doctrine applied.

There was no evidence that Owens increased the risk of such activity. No evidence was shown that the horse

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was anything but gentle and comfortable around people. Levinson was riding the horse at her request. It was not during an instruction, and it was only after she stated she was an experienced rider. There was no evidence that the horse was unduly dangerous. The horse was precisely the type of horse one would expect to find at a ranch. Levinson did not warn the Owens about her skill level, and in fact assured them she had the experience to ride horses. Having accepted her word, the Owens did nothing to increase the risk of harm.

The Court stated that when a person who provides a horse is a social host, not a commercial operator, not an organizer of horseback riding events, but is simply consenting to a guest's request to ride a horse while at the host's home for a gathering for another purpose, and the guest professes to have experience, it would be contrary to existing policy to impose a duty on the host for the injury. Further, there was no duty to warn of any risk involved in riding the horse. This incident appeared simply to be the result of a horse unexpectedly behaving as a horse and galloping off for no apparent reason. For all these reasons, the Court concluded that summary judgment was correctly granted for the defendants. The judgment was therefore affirmed.

COMMENT

This opinion reaffirms the applicability of the assumption of the risk doctrine to activities such as horseback riding. This case details all of the cases dealing with injuries from horseback riding and discusses them in detail.

Commissioner Poizner Announces Arrest of Milpitas Man for Alleged Workers' Comp Fraud Against City of Menlo Park

Insurance Commissioner Steve Poizner announced the arrest of a Milpitas man for alleged workers' compensation insurance fraud. Antone Costa Rita, Jr., 58, was apprehended on July 31 at his residence as the result of an investigation conducted by the California Department of Insurance (CDI). He was charged with presenting a false or fraudulent insurance claim and making false or fraudulent statements to his employer and to his treating physicians.

The case is being prosecuted by the San Mateo County District Attorney's Office. If convicted, Rita could face up to five years in prison and/or $10,000 in fines for each count.

On November 19, 2002, Rita filed a workers' compensation insurance claim with his employer, the City of Menlo Park, alleging that on October 24, 2002 he "rolled" his left ankle while painting lines at a tennis court in a city-owned park. Over a five-year period ending October 24, 2007, Rita told his treating and evaluating doctors that he was unemployed, that his injury continued to worsen, and that he either could not walk or walked with great difficulty, pain and limping, even after having surgery to repair the injury. Rita also made similar statements while under oath to an attorney representing Menlo Park during a November 16, 2005, deposition.

However, undercover surveillance videotape taken on various dates throughout 2006 by a private investigation firm for Menlo Park captured Rita walking normally and bearing weight on his left ankle with no indications of pain. The private investigation firm also videoed Rita involved in activities that appeared to be work-related at a San Jose auto repair shop.

CDI's investigation revealed that Rita made inconsistent statements and material misrepresentations regarding the severity of his industrial injury and his employment status during appointments with physicians treating and/or evaluating him. CDI also found these inconsistencies in Rita's sworn testimony while under oath in a deposition for the purpose of filing a false workers' compensation insurance claim with, and receiving reparation from, Menlo Park via the city's third party administrator (TPA), Innovative Claims Solutions (ICS).

The alleged fraud cost Menlo Pard, via its TPA, nearly $131,000. As a result of Rita's material misrepresentations, ICS paid out more than $23,300 in temporary total disability benefits, $14,800 in permanent disability benefits, $38,500 in medical treatment, $3,600 in vocational rehabilitation benefits, and $50,400 in legal expenses, including defense costs and surveillance/investigation.

RWB Legal Reflections

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

Waiver of Subrogation Clause Upheld Despite a Partial Breach of a Lease Agreement

In *Fireman's Fund Ins. Co. v. Sizzler, USA*, (Dec. 18, 2008), 169 Cal.App 4th 415, the Court of Appeal, Second district affirmed the trial court's judgment dismissing a subrogation action brought by a landlord's insurer against a tenant. The court ruled that, despite partial breaches by the tenant, a subrogation waiver provision in the lease barred the insurer's claim.

Sizzler USA Real Property, Inc. ("Sizzler") entered into a lease with Santa Monica Collection LLP ("SMC") for a space in a shopping center in West Hollywood. Sizzler was authorized under its lease to sublet the premises, provide it remained liable for its obligations under the lease. The lease between SMC and Sizzler also required Sizzler to maintain liability insurance with a minimum limit of $1 million, and to name SMC as an additional insured under the policy. The lease also contained a release and waiver of subrogation rights against either party for any claims or damages arising from incidents covered by either party's insurance. The waiver applied to SMC and Sizzler, their authorized representatives, and their insurance companies.

Sizzler sublet the property to Sky Sushi, a nightclub. In September of 2002, a patron of Sky Sushi was attacked and stabbed in the parking area by men who had previously threatened him inside the club. Ten months after the stabbing, the City of West Hollywood found that Sky Sushi obtained its conditional use permit fraudulently and that the club's operation created a nuisance.

Because of his injuries, the patron sued, among others, Sky Sushi and SMC. Per the provision of its lease agreement, SMC sought indemnification and defense from Sizzler. Sizzler tendered SMC's claim to its insurer, Federal Insurance Company ("Federal"). Federal declined SMC's defense because SMC was not named as an additional insured under the policy. Federal also informed SMC that Sizzler's policy provided for $750,000 coverage with a $250,000 self-retention.

SMC then tendered the claim to its own insurer, Fireman's Insurance Company ("Fireman's Fund"), which in turn tendered it back to Federal. Federal later agreed to defend SMC under a full reservation of rights, but only after its own defense costs exceeded the $250,000 self-retention.

Fireman's Fund proceeded to defend SMC and later settled with the patron, incurring $300,000 for the settlement and more that $84,000 in defense costs. Fireman's Fund then proceeded to sue Sizzler to recover its defense costs, as well as attorney's fees under a provision of the lease allowing a prevailing party to recover such costs in an action to enforce the lease agreement. Sizzler asserted the waiver of subrogation provision and the trial court ruled for Sizzler, awarding Sizzler more than $76,000 in attorney's fees.

On appeal, Fireman's Fund asserted that: (1) Sizzler's failure to obtain $1 million liability insurance precluded the enforcement of the subrogation waiver; (2) the provision requiring Sizzler to obtain a $1 million liability policy was a condition precedent to the subrogation provision; (3) Sizzler's failure to carry the $1 million policy constituted a failure of consideration for th subrogation waiver; and (4) the subrogation waiver should not be enforced because its enforcement would defeat the parties' intent and expectations that Sizzler should be responsible and indemnify SMC for Sky Sushi's nuisance and its consequences.

The appellate court rejected all of Fireman's Fund's arguments and upheld the trial court's disposition. The court held that absent plain language requiring such construction, nothing in the lease agreement could be construed as a condition precedent, and thus the existence of Fireman's Fund's policy was sufficient to engage the subrogation waiver. The court further held that the partial breach of the lease agreement by Sizzler did not constitute a failure of consideration for the entire agreement and that the Sky Sushi patron's claim did not arise out of Sizzler's breach of any lease provisions. Even assuming that the claim arose out of Sizzler's breach of a policy provision, the court noted that the indemnity and waiver of subrogation clauses served different purposes, and thus enforcing the subrogation waiver followed the intention of the parties.

FOR THOSE WHO LOVE THE PHILOSOPHY OF AMBIGUITY, AS WELL AS THE IDIOSYNCRASIES OF ENGLISH:

1. Don't sweat the petty things and don't pet the sweaty things.

2. One Tequila, two Tequila, three Tequila, floor.

3. Atheism is a non-prophet organization.

4. If man evolved from monkey and apes, why do we still have monkeys and apes.

5. The main reason that Santa is so jolly is because he knows where all the bad girls live.

6. I went to a bookstore and asked the saleswoman, “Where's the Self-help section?” She said that if she told me it would defeat the purpose.

7. What if there were no hypothetical questions?

8. If a deaf child signs swear words, does his mother wash his hands with soap?

9. If someone with multiple personalities threatens to kill himself, is it considered a hostage situation?

10. Is there another word for synonym?

11. Where do Forest Rangers go to “get away from it all”?

12. What do you do when you see an endangered animal eating an endangered plant?

13. If a parsley farmer is sued, can they garnish his wages?

14. Would a fly without wings be called a walk?

15. Why do they lock gas station bathrooms? Are they afraid someone will clean them?

16. If a turtle doesn't have a shell, is he homeless or naked?

17. Can vegetarians eat animal crackers?

18. If the police arrest a mime, do they tell him he has the right to remain silent?

19. Why do they put braille on the drive-through bank machines?

20. How do they get deer to cross the road only at those yellow road signs?

21. What was the best thing before sliced bread?

22. One nice thing about egotists: they don't talk about other people.

23. Does the Little Mermaid wear an algebra? . . . Get it? . . . Algae Bra. (That one took me a minute.)

24. Do infants enjoy infancy as much as adults enjoy adultery?

25. How is it possible to have a Civil War?

26. If one synchronized swimmer drowns, do the rest drown too?

27. If you ate both past and antipasto, would you still be hungry?

28. If you try to fail, and succeed, which have you done?

29. Whose cruel idea was it for the word 'lisp' to have an 's' in it?

30. Why are hemorrhoids called “hemorrhoids” instead of “assteroids”.

31. Why is it called Tourist Season if we can't shoot at them?

32. Why is there an expiration date on sour cream?

33. If you spin an Oriental person in a circle three times, do they become disoriented?

34. Can an Atheist get insurance against acts of God?