CAIIA Status Report

NOVEMBER 2011

Update on notifying insureds of 790.03 (h) and (i)

Last month the Status Report had a front page article on sending a notice to insureds about Insurance Code Section 790 (h) and (i). Through the diligent work of many people, including Peter O'Hare and Tia McClure of Deans and Homer, Bill Grace of Southland Claims Service and others, it has been determined that the notice to be sent to insureds applies only to first party residential and common interest developments policies of insurance. The major change is that only those two sections need to be sent and not all of 790.03.

Weekly Law Resume

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

Dangerous Condition of Public Property Requires that Physical Condition of the Property Contribute to the Injury

Jose Salas, et al. v. California Department of Transportation, Court of Appeal, Third District (August 29, 2011)

This case examines what a plaintiff must prove when alleging that an intersection or roadway constitutes a dangerous condition.

At approximately 7:00 a.m. on October 21, 2006, pedestrian Paula Salas was hit by a car while crossing State Route 12 at an intersection. At the moment she was hit, Salas was slightly outside the crosswalk. She later died from her injuries.

Salas' family and Estate subsequently filed a wrongful-death and survivor

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NOTICE!

As of January 1, 2012, this newsletter will be delivered by e-mail only. If up until now you are only receiving the *Status Report* by regular mail, please send your e-mail address to barrettclaims@sbcglobal.net so that we can keep you on our circulation list. Your e-mail address will not be dessiminated or used for any other purpose. We value your readership and welcome any comments you may care to add when sending us your e-mail address.

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An Employer Organization of Independent Insurance Adjusters

Inside This Issue

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

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PRESIDENT'S MESSAGE

As I sit down to write my first message as president of the California Association of Independent Adjusters, I am taken back by the wealth of knowledge and expertise of those men and women who have gone before me.

Nevertheless, the weight of the responsibility of a president is always on my mind.

At the time of writing this message, the 65th Installation Dinner Dance has now passed. It would not be a success without the cooperation of the members and sponsors to our organization. Approximately 90 people joined us on the Queen Mary for an installation dinner dance which is a time that we will all remember for some time.

I want to personally thank on behalf of the association each of the following sponsors for their part in making the 65th dinner dance and installation a success. ATI, Belfor Inc., Dynamic Environmental, Tudor Construction, Ward-Tek Inc., Alliance Environmental, Mackintosh and Mackintosh, Restoration Management Company, All County Environmental, Markei Contractors, and Excel Restoration. All of which has joined us in having an exceptional evening. I truly say thank you for all of your efforts and support that made the evening on the Queen Mary such a success.

The continued support of our members and past presidents makes my job as current president a joy and an honor. I want to thank the following people who have continued to encourage me throughout this last year Doug Jackson, Peter Schifrin and not to mention Phil Barrett; I will be completely indebted to them not only for the past several years, but also for this upcoming year as president.

We have also elected our new officers along with the assigning of our committee members, I am confident of the abilities that each one will bring to the association this next year.

As we look forward to this next year of continued education, we reflect in our fair claims classes, SEED classes and possibly some additional combined efforts with other insurance organizations to provide additional continued education for licensed adjusters in the State of California.

We are also looking forward to the spring as we begin to plan our midterm.

We will be looking for additional exposure in presenting our booth at the Combined Claims Conference, Claims Conference of Northern California, the Western Regional PLRB and the CPCU Society, all of which allows our organization and members greater visibility to the carriers for whom we rely.

I am encouraged and look forward to a great year. I am truly honored with being able to serve you as the 2011-2012 President.

JEFF S. CAULKINS, AMIM, AIC, RPA
President - CAIIA 2011-12

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action against the California Department of Transportation (Caltrans), alleging "dangerous condition of public property" pursuant to Government Code Section 835. Plaintiffs premised their dangerous condition argument on improper signage, improper crosswalk placement, lack of traffic signals or safety devices, and lack of traffic enforcement. Caltrans moved for summary judgment on the basis that: (1) no physical aspect of the crosswalk caused the incident; and (2) there were no prior pedestrian/vehicle incidents at the crosswalk. Each side submitted declarations and the trial court sustained most of Caltrans' objections to one of the declarations supporting Plaintiffs' opposition. Ultimately, the trial court granted the motion filed by Caltrans, finding the intersection did not constitute a dangerous condition. Plaintiffs appealed. The Third District affirmed.

On appeal, the Third District addressed two questions: (1) whether Caltrans met its prima facie burden to demonstrate no dangerous condition existed; and (2) whether Plaintiffs created a triable issue of material fact. In deciding the latter issue, the Court examined the trial court's exclusion of Plaintiffs' evidence.

Referring to and relying upon Cerna v. City of Oakland (2008) 161 Cal. App. 4th 1340 (Weekly Law Resume APRIL 24, 2008), the Salas Court reaffirmed that third party conduct (like that of a motorist) is not, in and of itself, a dangerous condition. To qualify as a "dangerous condition" as defined by Government Code Section 830, such third party conduct must relate to a physical condition of the property and this physical condition must have some causal relationship to the third-party conduct that injured plaintiff.

Because Caltrans demonstrated the intersection: (1) was located on a straight and level road with no obstructions for either motorist or pedestrians; and that (2) the road contained appropriate markings and signage, the Court found that Caltrans established that the intersection was a non-dangerous physical condition. Coupled with the fact that Caltrans showed no pedestrian-related accidents at the intersection in the past 10 years, the Court held Caltrans met its prima facie burden to show the intersection was not a Section 830 "dangerous condition." In finding the intersection contained sufficient markings, the Court noted the white parallel lines marking the crosswalk, the three signs notifying cars of the approaching intersection and crosswalk, and the marking on the roadway itself, in large letters.

Turning to the next question—whether or not Plaintiffs created a triable issue of material fact—the Court upheld the trial court's exclusion of Plaintiff's evidence and, after reviewing the remaining evidence, found they did not create any triable issue material fact. Accordingly, the Court affirmed the summary judgment.

COMMENT

Salas affirms a bedrock principle of California public entity law: that public property constitutes a dangerous condition when it creates a substantial risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used. Because the Salas plaintiffs failed to make that showing, the crosswalk and intersection here did not constitute a dangerous condition of public property.

Americans with Disabilities Act—Pleading Barriers—Plaintiffs Must Plead Alleged Architectural Barriers in Complaint

A.J. Oliver v. Ralphs Grocery Company, et al. Ninth Circuit Court of Appeals (August 17, 2011)

Under Title III of the Americans with Disabilities Act, 28 U.S.C. §§ 12181 et seq. ("ADA"), an individual with disabilities can sue a place of "public accommodation"—a business establishment—to force the removal of architectural barriers that prevent that individual's full and equal enjoyment of the premises. In this case, the Ninth Circuit addressed the question of how a plaintiff must notify the defendant establishment of the specific barriers sought to be removed.

Plaintiff A.J. Oliver, a disabled individual who requires the use of a motorized wheelchair, brought suit in federal

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court against Ralphs Grocery Company ("Ralphs") on December 7, 2007, alleging that its Food 4 Less grocery store in Chula Vista, California, did not comply with the ADA. Oliver's complaint stated that he had encountered barriers at the Food 4 Less store and listed 18 architectural features alleged to violate the ADA.

In his ADA claim, Oliver was able to sue only for injunctive relief, i.e., removal of the barriers, not money damages. However, the ADA also provides for the award of the costs and attorney's fees incurred in prosecuting the suit. In addition, Oliver brought related state-law claims that did permit the recovery of money damages.

Shortly after receiving Oliver's complaint, Ralphs began renovations at the store, removing several of the barriers the complaint had identified. Oliver did not file an amended complaint but, as the trial date approached, he filed an expert report identifying approximately 20 architectural barriers at the Food 4 Less store. The expert report listed several additional barriers that had not been listed in the complaint. Oliver's attorney later explained that his delay in identifying the barriers was part of his legal strategy: he purposely forced the defense to wait until expert disclosures before revealing a complete list of barriers, because otherwise the defendant could remove all barriers prior to trial and thus moot the entire case.

The parties filed cross-motions for summary judgment, and the district court granted Ralphs' motion. It found that the architectural features at issue had either been removed or did not actually constitute barriers. In doing so, the court ruled that it would not consider the barriers listed in Oliver's expert report, because they were not properly before the court. The district court also dismissed the state-law claims without prejudice to Oliver's re filing them in state court. Oliver appealed, contending that the district court erred in refusing to consider the allegations in his expert report.

The Ninth Circuit affirmed. It first addressed the issue of standing, a constitutional issue the parties had not raised but was essential to the court's exercise of jurisdiction. Citing U.S. Supreme Court and Ninth Circuit precedent, the court stated that, in the ADA context, standing requires an allegation that the plaintiff encountered a barrier that deprived him of full and equal enjoyment of the premises due to his particular disability. Oliver's complaint did not satisfy this requirement because it stated only that he had encountered barriers and listed various barriers, but did not specify which barrier he encountered personally and how it affected his particular disability so as to deny him access. However, the court found this defect cured by Oliver's summary judgment declaration, which specified the barriers he personally encountered and how they affected his access to the store.

The Ninth Circuit then turned to Oliver's argument that the district court should have considered the barriers identified in his expert report but not in his complaint. It based its analysis on Federal Rule of Civil Procedure 8, which states that a civil complaint "must contain … a short and plain statement of the claim showing that the pleader is entitled to relief." The short and plain statement must provide the defendant with "fair notice" of what the claim is and the "grounds upon which it rests." In the ADA context, the grounds for a claim are the non compliant architectural features. The court thus concluded that, in order for the complaint to provide fair notice to the defendant of the specific barriers for which the plaintiff seeks injunctive relief, each barrier must be alleged in the complaint.

Applying these principles, the court found that Oliver did not give Ralphs fair notice that the barriers listed for the first time in the expert report were grounds for his ADA claim. An expert report would rarely be an adequate substitute for providing fair notice, especially because such reports are usually filed later in the litigation process, after the defendant has taken steps to investigate and defend against the allegations in the complaint. Moreover, in this case Oliver's expert report included an allegation that the store's exterior public telephone lacked an International Symbol of Accessibility, but Oliver did not seek summary judgment regarding this alleged barrier. Ralphs would thus have to guess which of the alleged barriers in the expert report really formed the basis for his ADA claim.

The Ninth Circuit also affirmed the district court's dismissal of Oliver's state-law claims, finding that the balance

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of the factors of judicial economy, convenience, fairness, and comity did not tip in favor of retaining those claims after dismissal of the ADA claim.

COMMENT

Under the rule set forth in *Oliver*, an ADA plaintiff cannot rely on an expert's report to allege ADA violations not alleged in the complaint. Given the federal courts' strict time limitations on amended complaints, plaintiffs will need to move quickly to ensure that they have identified and alleged all relevant violations. Moreover, while the Ninth Circuit does not state as much, it is difficult to escape the conclusion that the gamesmanship exhibited by Oliver's attorney influenced the result in this case, as his conduct served only to protract the litigation, enrich himself and frustrate the purpose of the ADA: full and equal access as expeditiously as possible.

Insurance Coverage: Duty to Defend— Condominium Exclusion

California Traditions, Inc. v. Claremont Liability Insurance Company, Court of Appeal, Fourth District (July 11, 2011)

In an effort to curtail costs, many general liability policies sold in the construction industry contain an exclusion for construction of condominiums or townhomes. This case considers the extent of the exclusion to homes which, although sold as condominiums, had more in common with single family homes.

California Traditions, Inc. ("California Traditions"), the developer of a housing development, hired Ja-Con Systems, Inc. ("Ja-Con") to perform the rough framing work for 30 residential units in a development. Ja-Con was insured under a comprehensive general liability policy issued by Claremont Liability Insurance Company ("Claremont"). Claremont's policy excluded from coverage any work done on condominiums or townhomes, stating "It is agreed that coverage is not provided for property damage or bodily injury that arises out of an insured's operations, work product or products that are incorporated into a condominium . . . or townhouse project."

The project in question consisted of what appeared to be single family homes, with no common walls, and little other physical indication that they were condominiums. However, to avoid more restrictive set-back requirements, and to increase density of construction, the project was submitted as a condominium project, the plans referred to them as condominiums and they were marketed as condominiums. At the time he bid the project, Ja-Con's owner knew his policy did not cover condominiums, and he was concerned that the project might involve condominiums. He asked California Traditions, and was told (falsely) that the project did not involve condominiums.

After the development was completed, one of the owners sued California Traditions, which in turn cross-complained against Ja-Con. Claremont initially defended Ja-Con, but subsequently pulled coverage, based on the condominium exclusion. California Traditions then obtained a $2,000,000 default judgment against Ja-Con, and then brought an action directly against Claremont, seeking to obtain payment under the policy. Claremont brought a motion for summary judgment, based on the condominium exclusion. California Traditions opposed the motion, contending that the policy had no definition for "condominium," and that the policy was thus ambiguous, and must be interpreted most favorably to the insured, and that a reasonable insured would not have expected that the language in the policy would exclude coverage for the homes in question, which did not bear any physical resemblance to typical condominiums. The trial court found that the exclusion was not ambiguous, and that there was no potential for coverage, and granted the motion. California Traditions appealed.

The Court of Appeal was not persuaded that the term "condominium project" was ambiguous, because both the term "condominium" and the term "condominium project" were meticulously defined by statute. In fact, that definition included projects composed of freestanding units. The undisputed facts showed that the units were developed and marketed as condominiums, that the policy excluded coverage for condominiums, and that Ja-Con knew its policy did not cover work on condominiums. The Court also noted that simply because the homes did not look like condominiums did not make the policy language reasonably susceptible to any interpretation other than the clear exclusion of coverage for construction of them.

The Court of Appeal was not persuaded by declarations filed by California Traditions in which it averred that the

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project was composed of single family residences. The Court noted that this did not raise a triable issue of fact, as these were mere "broadly phrased and conclusory assertions."

Finally, the Court did not agree with California Traditions' position that there was a triable issue of fact as to whether Ja-Con had a reasonable expectation of coverage, because at the time it was working on the project, it believed it was working on single family residences. The Court of Appeal first noted that even if Ja-Con had subjectively believed the policy would afford coverage for the project, when the language was unambiguous, as here, the insured's subjective belief would not have been reasonable. The Court also noted that the only reason Ja-Con might have believed there was coverage was the misleading representations by California Traditions at the outset, which led Ja-Con to believe the homes were not condominiums. The Court did not believe California Traditions could mislead Ja-Con into believing it had coverage, and then step into Ja-Con's shoes to take advantage of that belief and profit from its own fraud. The Court affirmed judgment in favor of Claremont.

COMMENT

This case is important in affirming that clear language in the condominium exclusion will overcome subjective belief of the insured. Holders of policies with similar exclusions need to make certain they know what they are building if they want to assure themselves of coverage.

TORTS - INDEPENDENT CONTRACTOR CANNOT USE CAL-OSHA REGULATIONS TO ESTABLISH NEGLIGENCE PER SE

Kurt Iversen v. California Village Homeowners Association, Court of Appeal, Second District (March 23, 2011)

Under the negligence per se rule, a presumption of negligence arises from a defendant's violation of a statute if the violation caused the plaintiff's injury; the injury resulted from the kind of occurrence the statute was designed to prevent; and the plaintiff is a member of a class of persons the statute was intended to protect. In *Elsner v. Uveges* (2004) 34 Cal. 4th 915, the California Supreme Court held that under amendments to Cal. Labor Code section 6304.5, Cal-OSHA provisions may be admitted to establish a duty of care in negligence and personal injury actions. In this case, the issue was whether an injured independent contractor with no employees could invoke Cal-OSHA regulations to establish a claim for negligence per se against a homeowners association that hired him.

Defendant California Village Homeowner's Association (California Village) hired plaintiff Kurt Iversen, an independent contractor, to service air conditioner units on the roofs of several buildings at a condominium complex. Iversen subsequently fell from a ladder attached to one of the buildings. Iversen sued California Village alleging causes of action of negligence and premises liability. Iversen alleged negligence per se because the 26 -foot fixed ladder was not equipped with a safety mechanism provided for by Cal-OSHA. California Village moved for summary judgment contending that Iversen could not rely on Cal-OSHA to support a negligence claim, because he was an independent contractor, not an employee of California Village. The trial court granted California Village's summary judgment motion. Iversen appealed. The Second District Court of Appeal affirmed.

In its decision, the Court of Appeal interpreted *Elsner* to hold that Cal-OSHA regulations may only be introduced by employees in tort actions to establish negligence per se. This is because Labor Code section 6304.5 sets forth that the occupational safety standards and orders promulgated under the code section are applicable to proceedings against employers for the purpose of maintaining employee safety. The Second District therefore held that there was no direct authority for holding that Cal-OSHA and its regulations are applicable to someone like Iversen, who worked as an independent contractor with no employees. The Court of Appeal concluded that Iversen was not a member of the class of persons that Cal-OSHA was created to protect. As such, California Village did not owe Iversen a duty by virtue of Cal-OSHA and could not prevail on a negligence claim. The judgment was therefore affirmed.

COMMENT

This case holds that an independent contractor with no employees may not invoke Cal-OSHA regulations to establish negligence per se. As the Court of Appeal noted, the issue of whether an employee of an independent contractor can claim a violation of Cal-OSHA in a tort action against the hirer of the independent contractor remains unsettled.

Insurance Commissioner Jones Announces Sentencing of Los Angeles Attorney for Insurance Fraud

Lawyer part of "Phantom menace" conspiracy to defraud Auto Insurance Companies

Insurance Commissioner Dave Jones today announced that Susana Ragos Chung, 60, a Los Angeles area based attorney has been sentenced in Alameda Superior Court for Insurance Fraud. Chung entered pleas of no contest on two felony counts for violations of Section 549 of the Penal Code, recklessly submitting fraudulent insurance claims. She was sentenced to five years formal probation and to also pay $117,561 in restitution to insurance companies for 15 separate fraudulent claims. In addition, she was ordered to pay $235,123 to the state restitution fund. Chung agreed to place herself on inactive status with the California State Bar pending its mandatory investigation into her criminal conduct, which may result in her disbarment.

"This attorney's participation in an extensive conspiracy resulted in the California automobile insurance industry being defrauded of hundreds of thousands of dollars," said Insurance Commissioner Dave Jones. "Criminal acts like this cost consumers more money for auto insurance in an already strained economy."

In August 2003, the California Department of Insurance (CDI), Benicia Regional Office, Fraud Division, Urban Auto Fraud Task Force initiated an investigation known as "Phantom Menace" into organized automobile insurance fraud in the Bay Area. The Task Force included Investigators from the California Highway Patrol, and Alameda and San Francisco County District Attorney's Offices. As a result of the information and evidence gathered by the Task Force CDI began an undercover investigation in July 2004, which included contacting numerous auto body shops, medical offices and law offices.

Task force members were able to infiltrate a sophisticated auto fraud organized crime ring operating in the Bay Area. This ring was working with law offices in the Los Angeles area. One of these law offices was owned and operated by Chung. In November 2004, task force members acting in undercover capacities were solicited to participate in staged collisions. Numerous collisions were staged and undercover officers were referred to auto body repair shops, medical offices and law offices in an effort to file false automobile insurance claims and secure substantial bodily injury claim settlements.

Between 2003 and 2007, Chung participated in this fraud ring by submitting insurance claims for suspects who staged these collisions for profit. Chung represented the claimants who were allegedly "injured" in these fake collisions. The majority of the people she represented never met her, and many did not even know they had an attorney.

Nearly 100 people have been convicted in Alameda County over the last several years as part of this conspiracy, including more than 90 staged collision participants, and three chiropractors. The majority of the participants in these staged collisions readily admitted to law enforcement that no accident had ever occurred.

Insurance Commissioner Jones Announces Arrest of West Covina Woman for Insurance Fraud

DMV Employee accused of filing fraudulent workers' compensation claim

Insurance Commissioner Dave Jones announced today that Mia Rachel Brown, 26, was arrested by the California Department of Insurance (CDI), Fraud Division Detectives and Department of Motor Vehicles (DMV) Internal Affairs Investigators on three felony counts of Insurance Fraud.

She was taken into custody at the Compton Office of the DMV. Brown was transported to the Los Angeles County Jail and booked. She is being held in custody on $90,000 bail.

These charges stemmed from a workers' compensation claim filed by Brown with her former employer, Dean Foods. The loss due to Brown's fraudulent activities is $14,831.00. The charges against Brown include one felony count for violating Insurance Code section 1871.4 (a) (1), Insurance Fraud, and one felony count each for violating Penal Code sections 664 and 118(a) Attempted Perjury. If convicted on all counts, Brown faces a maximum of seven years in state prison.

According to Detectives, the CDI Fraud Division received a tip from an anonymous caller that Brown had filed a workers' compensation claim against Dean Foods and had recently showed up at a deposition using a cane. The caller said that while Brown had been off work on workers' compensation disability, she had been employed at the DMV Office in Compton.

The investigation revealed that in October 2009 Brown was an employee at Dean Foods. On October 15, 2009 she slipped on a wet floor in the dairy and injured her left knee and left hand. She reportedly suffered an additional fall on November 16, 2009. In May 2010, Brown started employment with the DMV. At her sworn deposition Brown denied working and further indicated that she had not worked since November 16, 2009. She also told two physicians she had not worked since 2009. Brown collected workers' compensation disability checks from Liberty Mutual Insurance Company for the period of October 2010 through June 2011 while she was employed at the Compton DMV Office.

The case is being prosecuted by the Los Angeles County District Attorney's Office

COMMON WEALTH OF KENTUCKY, KENTON CIRCUIT COURT, FIRST DIVISION
CASE NO. 09-CI-00165

BARBARA KISSEL, PLAINTIFF vs. SCHWARTZ& MAINES & RUBY CO., LPA. et al., Defendants

ORDER

The herein matter having been scheduled for a trial by jury commencing July 13, 2011, and numerous pre-trial moions having yet to be decided and remaining under submission;

And the parties having informed the Court that the herein matter has been settled amicably[1] and that there is no need for a Court ruling on the remaining motions and also that there is no need for a trial;

And such news of an amicable settlement having made this Court happier than a tick on a fat dog because it is otherwise busier than a one legged cat in a sand box and, quite frankly, would have rather jumped naked off of a twelve foot step ladder into a five gallon bucket of porcupines than have presided over a two week trial of the herein dispute, a trial which, no doubt, would have made the jury more confused than a hungry baby in a topless bar and made the parties and their attorneys madder than mosquitoes in a mannequin factory;

IT IS THEREFORE ORDERED AN ADJUDGED by the court as follows:

1. The jury trial scheduled herein for July 13, 2011 is hereby CANCELED.

2. Any and all pending motions will remain under submission pending the filing of an Agreed Judgment, Agreed Entry of Dismissal, or other pleadings consistent with the parties' settlement.

3. The copies of various correspondence submitted for in camera review by the Defendant, SMRS, shall be sealed by the Clerk until further orders of the Court.

4. The Clerk shall engage the services of a structural engineer to ascertain if the return of this file to the Clerk's office will exceed the maximum structural load of the floors of said office.

Dated this 19 day of July, 2011.

MARTIN J. SHEEHAN
Kenton Circuit Judge

[1] The Court uses the word "amicably" loosely.