CAIIA Status Report

DECEMBER 2004

President Douglas Jackson Announces Marybeth Danko as New Board of Director for CAIIA

As many of you may have already heard, AIMS has acquired Countyline Claims Services. With this merger, Jeff Queen has stepped down as a Board of Director for the CAIIA to allow Dave Ceresa from AIMS, recently installed as a Director, to serve as a Director (CAIIA by-laws prohibit more than one Director from a single member firm).

To feel the vacancy, I nominate, and the Board of Directors unanimously approved, Marybeth Danko of SeaCliff Claims Group LLC (Huntington Beach). Marybeth Danko has graciously agreed to serve on the Board of Directors as well as chair the Public Relations Committee this term. She may be reached at her email address: mdanko@seacliffclaims.com or by telephone at (714) 374-0240.

Original Denial of Coverage Undisturbed by New Facts

Submitted by Stacy Goldscher – Sedgwick Los Angeles

In *Safeco v. Parks* (2004) Slip Cal.App. 4th 2004/b170730 ("*Parks*"), the California Court of Appeal addressed the issue of whether an insurance carrier has a duty to review and revise a denial of coverage after additional facts are disclosed. In Parks, Michelle Miller sought coverage under a homeowners' policy issued by Safeco for a $2.1 million judgment stemming from a bodily injury claim. Based on information provided during its investigation of the claim as well as during the binding arbitration of the underlying bodily injury action, Safeco determined that Miller did not qualify as an insured under the policy and that there was no potential for coverage. Safeco accordingly denied coverage for the claim.

Miller initiated litigation against Safeco, alleging that Safeco acted in bad faith by refusing to settle the underlying bodily injury claim. In response, Safeco sought a declaration that it had no duty to defend or

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■ PRESIDENT'S MESSAGE

If you missed the CAIIA Annual Convention, I'm sorry to tell you that you missed one of the best meetings ever. When we started planning the location of the convention over one year ago, our short list included Disney's Grand Californian Hotel, the newest and best hotel at the Disneyland Resort. When I announced that it was my choice for the convention site, the excitement of that venue reverberated through the State. And we are pleased to say that the Disney "Cast Members" outdid themselves in making our event better than we could have imagined. You could sense how special things were going to be from the opening reception…with music by Kim from the Lost Bar…to the wonderful hotel and catering staff that made every effort to make us feel special and welcome. And were they ever Great! The hotel was beautiful and I am told that our families who attended had a wonderful time, too.

We had a great business meeting followed by one of the best Industry Advisory Panel discussions I can recall. Thanks again to our distinguished panel that included Ms. Lola Hogan, VP of Claims for Sequoia Insurance; Mr. Kelly Taylor, Claims Manager for CSE Insurance Group; Mr. Steve Koep, VP of Claims for Western/Residence Mutual; Ms. Lynn Miller, VP of Claims for WNC First Insurance Services; and Mr. Earl Williams, Claims Administrator for Mercury Insurance Group. We can see why each of their respective companies is fortunate to have such talented and professional claims persons in their employ. The competence that those professionals demonstrated is what our industry should strive to attain. Thank you all!

Having great meetings is one thing, but having a President's Dinner and Inauguration that we had was truly amazing. I cannot remember having a convention meal that was as outstanding as what we were served…I don't believe the resort's high-end restaurant even touched the quality of our meal and the wonderful presentation that the Grand Californian Hotel staff accomplished. That evening, we honored our outgoing Board of Directors which included Sam Hooper of Sam Hooper & Associates (Cerritos); Robert Lobato of Pioneer Claims Services (Temecula); and Michael Kielty of George Hills Company (Rancho Cordova). We also recognized our outgoing Counsel, Richard H. Caulfield of Caulfield, Davies & Donahue (Sacramento). Thank you all for your service to the CAIIA. I was honored to have my friend Don "Fergie" Ferguson swear me in as the 58th President of the CAIIA. Thank you again…you are a special person!

The final day's event culminated with our Annual All Industry Day program and the Fair Claims Settlement Regulations Recertification. As you all know, recent changes to the FCSPR required a recertification of the Regulations…to which your CAIIA responded to by including the recertification program to our education presentations. Thank you to all of the presenters, including our new Of Counsel, Mr. Kevin Hansen of McCormick, Barstow, Sheppard, Wayte & Carruth LLP; Mr. Thad Eaton of Eaton & Johnson; Mr. Steve Tilghman and Mr. Peter Schifrin of Schifrin, Gagnon & Dickey; Steve Wakefield of Ronald Bolt & Associates; and Sharon Glenn of John Glenn Adjusters & Administrators. Yours truly lost his voice the final day and Steve Tilghman came to my rescue. What a great friend he is!

CAIIA membership is a wonderful opportunity…to do for others, to receive educational benefits, develop alliances, make friends, and to become better as a group than the sum of the individuals. If you are an Independent Adjuster licensed in California, please consider joining the CAIIA. If you hire Independent Adjusters in the state of California and they are not a CAIIA member, ask yourself why they are not a member of this country's most prestigious state adjuster association comprised of the most qualified claims people in the business.

DOUG JACKSON, RPA
President - CAIIA 2004-2005

Denial of Coverage Undisturbed . . .

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indemnify Miller in connection with the underlying claim. During the bench trial on the bad faith actions, Miller testified that she had been pressured by the policyholder to lie in her previous testimony. She then testified to additional facts that established that she may qualify as an insured under the policy, and thus established a potential for coverage for the bodily injury claim. The trial court ruled that, in light of the newly disclosed evidence, Safeco had a duty to defend and indemnify the entire amount of the underlying judgment.

The Court of Appeal reversed. Relying on established California case law, the court found that the duty to defend is determined at the time of the inception of the third party lawsuit. (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 295.) Extrinsic facts that would trigger a duty to defend must be known by the insurer at the inception of the third party lawsuit, and the duty to defend ceases as soon as it has been shown that there is no potential for coverage. (*Gunderson v. Fire Ins. Exchange* (1995) 37 Cal.App.4th 1106.) Based on the rationale of these decisions, the appellate court held that an insurer that conducts a complete investigation and has support for its coverage position is under no obligation to review and revise that decision even if additional facts are subsequently disclosed by the insured that would lead to a different conclusion.

HRB Insurance Law Update

Submitted by Hancock, Rothert & Bunshoft, LLP

Hartford Casualty Insurance Co. v. Mt. Hawley Insurance Company, California Court of Appeal, Second District, Division One, case No. B172449, filed October 21, 2004.

The California Court of Appeal held that a general contractor's insurer was not liable for contribution to a subcontractor's insurer because the general contractor was not liable to the subcontractor pursuant to an indemnity provision in the construction contract.

This case arose when a subcontractor agreed to indemnify the general contractor for claims and liabilities arising out of the subcontractor's performance, and agreed to obtain a commercial general liability (CGL) policy listing the subcontractor as the named insured and the general contractor as an additional insured. The general contractor also had its own separate CGL policy, designating it as the named insured. While the construction was in progress, an employee of the subcontractor was injured and filled suit against the general contractor. The subcontractor's insurer provided a defense and settled the case, using its own funds. The subcontractor's insurer then filed this action against the general contractor's insurer, seeking payment of one-half of the defense and settlement expenses. The general contractor's insurer asserted it was not liable for contribution because, under the indemnity provision in the construction contract, the general contractor was not liable to the subcontractor in any amount. The Court of Appeal agreed with the general contractor and held that "just as the general contractor is not liable to the subcontractor under the indemnity provision, so the general contractor's own insurer is not liable to the subcontractor's insurer."

In reaching its decision, the court relied on *Rossmoor Sanitation, Inc. v. Pylon, Inc.*, 13 Cal.3d 622 (1975). The court also distinguished *Travelers Casualty & Surety Co. v. American Equity Ins. Co.,* 93 Cal.App.4th 1142 (2001).

Weekly Law Resume

Prepared by Low, Ball & Lynch, Attorneys at Law

Duty of Care – Sidewalk Crack Causing Fall

Josephine Caloroso v. Larry Hathaway, Court of Appeal, Second District, (September 28, 2004)

It is well established under California law that a public or private landowner is not liable for damages caused by a minor, trivial or insignificant defect in property. Quite often, this issue of a "trivial defect" arises when a person trips on a crack in a walkway or sidewalk, and is injured.

Josephine Caloroso tripped over a slight crack in a walkway on a clear, sunny day in front of Defendant Larry Hathaway's home. The crack measured between 0.4 and seven-sixteenth of an inch. Mrs. Caloroso sued Mr. Hathaway for negligence and premises liability, alleging that individual concrete slabs of walkway were cracked, jagged, and depressed, and therefore constituted a dangerous condition. Mrs. Caloroso, and her husband, who asserted a loss of consortium claim, claimed that Hathaway's failure to repair the crack and failure to warn about the dangerous condition caused the accident.

Homeowner Hathaway moved for summary judgment on the grounds that he had no notice of a problem, and that he owed no duty to plaintiffs, because the risk of injury was trivial. Indeed, there had been no prior accidents involving the walkway. In opposition to the summary judgment motion, the Calorosos argued that the court should look at the totality of the circumstances, not just the size of the crack in determining whether there is a dangerous condition. Specifically, plaintiff pointed out that the presence of cracks was foreseeable, because of the presence of an adjacent large tree. Further, plaintiffs relied on an expert witness declaration from a civil engineer, who testified that the elevation difference at its greatest was seven sixteenth of an inch. According to the engineer, the size of the crack violated the Uniform Building Code and the ASTM Standard Practice for Safe Walking Surfaces. The engineer also felt other factors contributed to the dangerous condition, including the irregular shape of the crack, and the interplay of shadows and sunlight.

The trial court granted summary judgment. In doing so, the court sustained Hathaway's objection to the expert declaration, holding that it was unnecessary to have an expert witness opine on whether a crack in a walkway was trivial.

On appeal, the Calorosos contended that they had submitted sufficient evidence of a dangerous condition to support a triable issue. The Second Appellate District agreed with plaintiffs that a court should decide whether a defect is dangerous only after considering all of the circumstances surrounding the accident. This analysis should include looking at whether there is something besides the size of the crack that causes a fall, such as whether a view of the condition was obstructed, or if the walkway had broken or jagged pieces. Here, the appellate court noted that several prior California courts had ruled that sidewalk cracks one-half inch or more had been determined to be trivial as a matter of law. Therefore, the court reasoned that the defect in question should also be deemed trivial, unless there was admissible evidence that other conditions made the walkway dangerous.

The appellate court then turned its attention to the expert declaration of the civil engineer. Photographs of the crack convinced the court that the defect was not overly irregular in shape or jagged. Further, the court found no foundation for the proposition that the UBC or the ASTM standards applied to the sidewalks, let alone private walkways. The court also found notable evidence that the accident had occurred in bright sunlight and that Mrs. Caloroso's vision of the defect was not obstructed.

The appellate court affirmed the summary judgment. In so doing, the court set forth that it is impossible for landowners to maintain heavily traveled surfaces in a perfect condition. Minor defects, such as cracks, are inevitable. The defect on Defendant Hathaway's walkway was trivial, and therefore Hathaway had no duty to repair or prevent the accident.

COMMENT

This decision reinforces the "Trivial Defect Defense", and is therefore significant for public and private landowners. Equally important was the court's rejection of expert testimony by Plaintiffs' retained civil engineer. This decision will be helpful for defendants attempting to bar expert opinion on matters that are not beyond common experience.

California Jury Returns Defense Verdict in Mold Bodily Injury Trial; Plaintiff Viewing Cost Bill Following Loss

November 1, 2004

A Riverside County, California jury has returned a defense verdict in a closely watched case involving claims of bodily injury from exposure to mold in a single family home located in Menifee, California. Jury deliberations were less than 25 minutes according to trial lawyers Victoria Ersoff and Gregory Amundson with the law firm of Wood, Smith, Henning & Berman, which represented the defendant developer and homebuilder.

Only the second case nationally to proceed to verdict against a homebuilder involving claims that t mold in the home resulted in bodily injury, industry observers are reportedly buoyed by the verdict and what many believe is a developing trend of defeating this genre of claim.

Jurors during the 12 day trial of Bonnici v. Forecast, et al. (Riverside Superior Court case No. RIC361721) heard testimony from a family of four which complained of various bodily injuries allegedly stemming from exposure to mold in their tract home. Plaintiffs alleged injuries included epileptic seizures, tumor growth, endometriosis, depression, migraine headaches, Meniere's Disease, gastrointestinal disorders, rhinitis, sinusitis together with a host of allergic symptomology.

Blaming the mold growth on water intrusion resulting from a failed pipe buried in the slab, in addition to chimney cap, window and roof leaks, the family of four relocated from the home during which time it went through extensive remediation and remodeling.

The defendant builder successfully argued that the plumbing, chimney, window and roof leaks were unrelated to the original construction of the home. Although the jury found that there were some construction issues in the house, they decided that they were not the cause of plaintiffs' injuries and damages. They also reportedly found no evidence that the pipe was defective at the time it was installed by the builder.

Moreover, despite findings of elevated levels of stachybotrys, penicillium and aspergillus, the defense successfully excluded and otherwise limited testimony of plaintiff experts including the allergist, architectural/general contractor, industrial hygienist and neuropsychologist. Breaking the link in terms of causation between the alleged defect and microbial growth, on one hand, and the microbial growth and alleged injuries, on the other hand, were reportedly key in the jury analysis of the plaintiff claims.

Alternative causation for the health injuries alleged in Bonnici was also aggressively pursued by the defense. For example, the defense was reportedly able to establish by both treating physicians and testifying experts that one of the plaintiff's excessive use of prescription drugs could cause all of the symptoms complained of in the litigation.

Plaintiffs' settlement demand decreased with the passage of time, dropping eventually from $250,000 to $80,000 during trial. The nuisance cause of action was dismissed prior to the trial by the court, as well as the claims of the two minor children for inconvenience, loss of use and enjoyment of their property. Judge Tranbarger biforcated the trial by severing the builder's cross-complaint for indemnity against its concrete, framing and roofing subcontractors.

Prior to trial, Forecast made a statutory offer to compromise which was rejected by plaintiffs. In closing arguments, plaintiff attorney Andrew Weiss asked the jury to award plaintiffs $295,000 in damages. By virtue of the defense verdict, the builder is entitled to recover from plaintiffs its court costs and expert witness fees.

In terms of a national scorecard on mold bodily injury trials, this case is believed to be the 30th such case nationally to proceed to trial and verdict.

Of this number, 17 have been defense verdicts. Only two cases have proceeded to trial and verdict against homebuilders, both with victories for the defense.

CAIIA *Calendar*

CAIIA Mid-Term

March 11th thru 14th, 2005
~ CRUISE ~ from Los Angeles to Ensanada & back.
Contact: Doug Jackson, 805-584-3494, ext. 11

17th Annual Combined Claims Conference

March 15th & 16th, 2005
Contact Brenda at 888-811-6933.

Actual Statements Found on Patients' Hospital Charts

1. She has no rigors or shaking chills, but her husband states she was very hot in bed last night.
2. Patient has chest pain if she lies on her left side for over a year.
3. On the second day the knee was better, and on the third day it disappeared.
4. The patient is tearful and crying constantly. She also appears to be depressed.
5. The patient has been depressed since she began seeing me in 1993.
6. Discharge status: Alive but without my permission.
7. Healthy appearing decrepit 69-year-old male, mentally alert but forgetful.
8. The patient refused autopsy.
9. The patient has no previous history of suicides.
10. Patient has left white blood cells at another hospital.
11. Patient's medical history has been remarkably with only a 40-pound weight gain in the past three days.
12. Patient had waffles for breakfast and anorexia for lunch.
13. Between you and me, we ought to be able to get this lady pregnant.
14. Since she can't get pregnant with her husband, I thought you might like to work her up.
15. She is numb from her toes down.
16. While in ER, she was examined, X-rated, and sent home.
17. The skin was moist and dry.
18. Occasional, constant, infrequent headaches.
19. Patient was alert and unresponsive.
20. Rectal examination revealed a normal size thyroid.
21. She stated that she had been constipated for most of her life, until she got a divorce.
22. I saw your patient today, who is still under our car for physical therapy.
23. Both breasts are equal and reactive to light and accommodation.
24. Examination of genitalia reveals that he is circus sized.
25. The lab test indicated abnormal lover function.
26. The patient was to have a bowel resection. However, he took a job as a stockbroker instead.
27. Skin: somewhat pale but present.
28. The pelvic exam will be done later on the floor.
29. Patient was seen in consultation be Dr. Blank, who felt we should sit on the abdomen and I agree.
30. Large brown stool ambulating in the hall.
31. Patient has two teenage children, but no other abnormalities.

Progressive Outlines Extremes People Visit in Undertaking Insurance Fraud

November 15, 2004

People may think they're being clever when they try to cheat insurance companies, but often they end up making mistakes that get them caught, injured and sometimes even killed.

The Progressive group of insurance companies said while the escapades of people who commit fraud can be amusing, insurance fraud is a serous crime that costs consumers a lot of money. The National Insurance Crime Bureau estimates that property and casualty insurers pay more than $30 billion a year in bogus claims – costs which are generally passed on to consumers in the form of higher premiums.

"People think of insurance fraud as a victimless crime when, in fact, honest policyholders end up being victimized", said Ray Albertini, Progressive's national director of special investigations. "Most insurance companies base their rates on the cost of doing business. When costs go up because of fraudulent claims, other customers end up paying the price. People need to be aware of fraud and be willing to report it when they suspect it.

Albertini says it can be tough to catch the offenders, but sometimes they make it very easy, such as in these cases:

- ***You never know who might be listening***. One fairly common type of fraud people commit is buying coverage after their car's been damaged. What's less common is when they but it from the scene of the accident. Take the case of the motorcyclist who wiped out and, while reportedly lying on the side of the road with a ruptured spleen, had the presence of mind to call 1-800-PROGRESSIVE to buy coverage. What he didn't know was that a witness who saw the accident also heard him make the call. In another case, a couple's car caught on fire. While the husband was on the phone with Progressive buying a policy, his wife was reportedly overheard yelling in the background that the car was about to explode.
- ***When you play with fire, expect to get burned.*** Some people figure the easiest and quickest way to collect insurance money is to destroy their car by setting it on fire. Not necessarily. Consider the case of two brothers who were hired to set a car on fire. They reportedly doused it with gasoline, and to make sure the vehicle would be completely destroyed, they decided to throw in a pipe bomb. The bomb exploded, setting one of the men on fire. He was likely killed instantly from the explosion, but his brother, not realizing that, rushed to extinguish the flames and ended up catching on fire. He ran toward a nearby highway for help and flagged down a state trooper who had come to investigate the black cloud of smoke. The man told the trooper what he and his brother had done and then, like his brother, passed away from his injuries.
- ***What's wrong with this picture?*** A customer said some parts were stolen from his car, and to support his claim, he reportedly submitted what appeared to be phony invoices along with Polaroid photos. At first blush the photos looked pretty good, but something seemed a little odd about them. On closer inspection, investigators realized the guy had taken extreme close-ups of a toy car that was the same color and make of his actual car. The customer eventually admitted he took photos of the toy car in an attempt to get his claim paid.
- ***Miracle cure?*** A passenger riding in a customer's car was injured in a crash and needed chiropractic treatment. No problem. The customer's insurance covered it. However, sometime before completing the prescribed series of doctor visits, the passenger died of unrelated, natural causes. Now, you'd think that a person who is deceased would no longer benefit from a doctor's care, but evidently, the chiropractor thought otherwise. He reportedly continued to bill for treatment for a full month after the patient's death.
- ***That's gonna leave a mark.*** A woman decided to take her boyfriend's motorcycle for a ride. Unfortunately, she didn't know how to drive and crashed it. Luckily, she wasn't injured. The man, however – afraid his insurance wouldn't cover the damage to his motorcycle because his girlfriend wasn't listed as a driver on his policy – decided to pretend that he had crashed the motorcycle. He figured he needed some injuries to make his story credible, so h e reportedly tied himself to the back of a truck and asked a friend to drag him around a little bit to produce the road rash he would have gotten from the wreck. Well, he got the injuries he wanted, but they didn't do him any good. His girlfriend told investigators that in fact it was she who crashed the motorcycle.

"People may laugh at some of these incidents, but what they need to realize is that people who commit fraud are taking money out of everyone else's pockets", said Albertini.

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