CAIIA Status Report

December 2012

Editor's Corner

A few years ago the State of California changed how insurance carriers can use depreciation in first party claims. As first party adjusters know, the only part that can be depreciated for first party claims is the cost of the actual materials involved.

Liability adjusters should remember, however, that how the fair market value or depreciated value is handled on property damage claims is completely different than how it is handled in first party claims.

If there is some piece of personal property that has been damaged as a result of your insured's negligence, the measure of value is the repair cost of that item, or the fair market value of that item. It is not the depreciated value of that item. To determine the fair market value of, for instance, a desk chair, one needs to go to eBay, Craig's List, a flea market, or perhaps the publication known as The Recycler. You will find that the fair market value of that desk chair is amazingly low, as low as $25.00 or even less, depending on the condition of the chair. Liability adjusters still can depreciate labor and materials when it comes to something such as paint on the wall, etc. It has been my experience that the fair market value of personal property is anywhere in the range of 20% to 35% of the replacement cost. Normally this will be much less than a straight line depreciation method.

Again, this shows how defense oriented the State of California is when it comes to claims.

FRIENDS ARRESTED IN STAGED SACRAMENTO AUTO COLLISION AND INSURANCE FRAUD

Four suspects allegedly deny knowing each other, but were Facebook friends

Insurance Commissioner Dave Jones today announced that, Susan Lee, 24, Angelique Jones, 20, and Angela Medeiros, 40, all of Sacramento have been arrested on three felony counts each of insurance fraud. The bail for the three ranges from $20,000 to $50,000. A fourth suspect, Krystelmaree Marquez, 23, also of Sacramento has an outstanding arrest warrant. Her bail is set at $25,000.

According to detectives, on December 11, 2011, Marquez rented a U-Haul truck and added the extra insurance protection policy. On December 12, 2011, while driving the U-Haul truck, Marquez was involved in a traffic collision with a Toyota Yaris driven by Medeiros with Lee and Jones as passengers. As a result of the accident, Lee, Jones, Marquez, and Medeiros all claimed injuries. During recorded statements with the insurance companies, Marquez denied knowing the three suspects in the car, Medeiros, Jones, and Lee. Medeiros, Jones, and Lee also denied knowing Marquez. It was discovered through records, including Facebook that Lee, Jones, Marquez, and Medeiros did, in fact, know each other and they are all alleged to be friends. Detectives estimated the potential loss to the insurance company at approximately $37,359.

Upon their arrest, Lee, Jones, and Medeiros were booked into the Sacramento County Jail on insurance fraud charges which included providing false statements in support of an insurance claim and participating in a vehicle collision for the purpose of submitting a false insurance claim. The final outstanding suspect, Marquez, recently moved and attempts to locate her have been unsuccessful. If convicted on all felony counts, each suspect could face between two to five years in state prison and/or a fine of $50,000.

This case was investigated by the California Department of Insurance Organized Automobile Fraud Interdiction Program from the Sacramento Regional Office and it is being prosecuted by the Sacramento County District Attorney's office.

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Inside this issue…..

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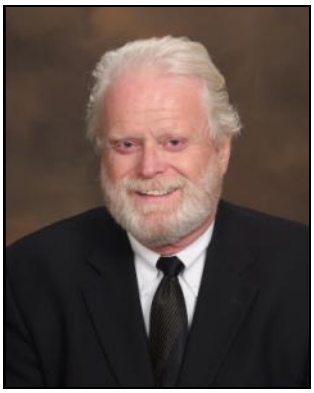
California Association of Independent Insurance Adjusters, Inc.

President's Message



W.L. (BILL) McKenzie
CAIIA President

December 2012

As I sit here on Veterans Day 2012, I find myself remiss in not making some comments in my first Status Report concerning events that were happening in November 2012. Obviously one of the events I could not comment upon at that time was Hurricane Sandy, also known as Super Storm Sandy, that blocked the northeast coast of the United States. While many of our colleagues throughout the United States, and even members of the California Association of Independent Insurance Adjusters, are responding to assist both the insurance companies and the policyholders, it is a daunting task. As we all know, the majority of the policyholders will be paid and will be satisfied with their settlement, and there will be others through the prompting of third parties to express their dissatisfaction with the insurance industry's response. I am aware there are still matters in the Courts in Texas because of the past several years of storms in that area.

After the storm we had a national election that was rife with rancor and has finally been decided. Hopefully we can move forward and resolve the issues facing us as a nation.

For those of us who served in the military, I am personally glad to see the attitude that is expressed today to the veterans of World War II and Korea, and especially the young men and women who came back from Viet Nam and were welcomed with less than open arms. We have members of our Association who served in the military at that time, and we should be thankful for the service given by our members and the other veterans. We have young men and women who are returning from the Iraq and Afghanistan wars who need our gratitude and whatever assistance we can give.

We have a new Board composed of members who are continuing to make the California Association of Independent Insurance Adjusters a better organization. We look forward to the approaching year, and I would ask if any of our Committee Chairmen or Board Members ask for assistance, that everyone becomes involved as that makes us a much better organization. I recently received a Registration Package for the Combined Claims Conference which will be held in Long Beach, and my good friend, Sterrett Harper, will be sending out requests to our members to man the booth, as this is a good opportunity to put forth the mission and ideas of the California Association of Independent Insurance Adjusters. All of the members have an interest in promoting the Association, as it makes our organization more visible and viable.

I have been told the hardest part of the job as President, which is a great honor, is composing the monthly letter for the Status Report. While some thoughts are easy to put on paper, others are more difficult to express. However, I believe this task will make me more humble, and at the same time serve as a challenge to find the appropriate words.

I want to thank everyone who attended our 65th Celebration. We all work toward a common goal to make our organization better and at the same time make each of us a better adjuster. We are constantly learning, which only makes us better in our jobs. I encourage all of our members to use your membership in the California Association of Independent Insurance Adjusters to the fullest. I look forward to the coming year, to the continuing education, and moving forward to more active involvement by our members, which can only make my job and the job of our Board of Directors and Committee Members more rewarding and thankful.

I want to wish all of our members and their families a Happy Holiday Season.

W.L. (Bill) McKenzie, RPA

President – CAIIA 2012-13

CAIIA Annual Convention, 2012

From left to right: Kathy Woodward and Michael Lee of NAL Environmental Testing & Consulting, Ulises Castellon of Fire Cause Analysis, CAIIA President Bill McKenzie, CAIIA Director Tim Waters and CAIIA Immediate Past President Jeff Caulkins. These individuals are responsible for putting together the exceptional Continuing Education seminar held at the 2012 CAIIA Annual convention in Temecula on October 19, 2012.

Appeals Court Extends Notice– Prejudice Rule to First-Party Sworn Statements in Proof of Loss

Credit to Haight, Brown and Bonesteel, Los Angeles, CA

In *Henderson v. Farmers Group* (No. B236259, filed 10/24/12), a multi-plaintiff breach of contract and bad faith case against Fire Insurance Exchange ("FIE") and other Farmers Group entities arising out of the August 2009 Southern California wildfires, the appeals court reversed summary judgments entered in favor of the insurer as against numerous policyholders, ruling that: (1) an insurer is required to show prejudice in order to rely on the insured's failure to file a sworn proof of loss; (2) the insurer had waived the defense of late notice of loss by failing to specifically raise it; and (3) an unfair business practices claim is not barred by the decision in *Moradi-Shalal v. Fireman's Fund* (1988) 46 Cal.3d 287 ("*Moradi-Shalal*").

In *Henderson*, the FIE homeowners policy required prompt notice of claims. The policy conditioned coverage on the insured supplying a signed, sworn proof of loss statement within 60 days of a request by FIE. The policy also had a no-action clause prohibiting action against FIE unless all conditions had been satisfied.

FIE sent one policyholder a written request for submission of the proof of loss, enclosing copies of the required form. FIE then followed up with two subsequent reminders. Sixty-one (61) days after the first notice, FIE denied the claim for failure to comply.

For several other policyholders, FIE sent the request for a sworn statement in proof of loss, but then notified the policyholders that it needed further time to await the results of contamination tests. FIE repeated its request for the proof of loss, but then denied the claims on the ground that there was no evidence of contamination rising to a level requiring remediation. In denying the claims, FIE purported to generally reserve all rights.

Continued on page 4

INSURANCE COMMISSIONER DAVE JONES ANNOUNCES ARREST OF SACRAMENTO WOMAN FOR DISABILITY INSURANCE FRAUD

Woman Allegedly Injured in Automobile Crash; Participates in Zumba Dance Class and Becomes Paid Zumba Dance Instructor

Insurance Commissioner Dave Jones today announced that Adure Renee Velazquez, 35, of Sacramento, has been arrested by detectives from the California Department of Insurance (CDI) Fraud Division. Velazquez has been charged with three felony counts of disability insurance fraud. If convicted on all counts, she could face up to three years in state prison and/or a fine of $20,000.

According to CDI detectives, Velazquez was arrested yesterday at her residence in Sacramento County for the charges above which included providing false statements in support of a disability insurance claim and knowingly failing to disclose a material fact to obtain a benefit from a disability insurance claim. She was booked into the Sacramento County Jail. Bail has been set at $50,000.

The investigation revealed that on September 21, 2011 Velazquez's employer contacted CDI to report an employee they suspected of committing insurance fraud. The investigation also revealed that in early January 2011, Velazquez began participating in Zumba dance exercises through a fitness center located in West Sacramento. On January 21, 2011, Velazquez was involved as a passenger in a vehicle accident. In April 2011, Velazquez notified her employer she had suffered injuries because of the accident and she was receiving medical treatment for her alleged injuries. Detectives learned that in May 2011, Velazquez became a certified Zumba dance instructor.

On June 16, 2011, Velazquez filed a Non-Industrial Disability Insurance (NDI) claim through her employer and began receiving benefits on June 23, 2011. On June 28, 2011, Velazquez allegedly began receiving payments from the fitness center owner for her services as a Zumba dance instructor. Velazquez continued receiving treatment for her injuries while allegedly teaching and participating in Zumba dance exercises.

In addition, Velazquez continued to receive NDI benefits until September 8, 2011. Velazquez continued to receive payments for her services as a Zumba dance instructor through November 2011. The estimated loss to the State of California is $29,788.

This case was investigated by the CDI Sacramento Regional Office and is being prosecuted by the Sacramento County District Attorney's Insurance Fraud Unit.

Continued from page 3

One other policyholder waited until nearly a year after the fires to make a claim. FIE also requested a proof of loss form, but then denied the claim on the ground that there was no evidence of contamination requiring remediation. Again, FIE generally reserved all rights.

The trial court granted summary judgment for FIE, finding that the failure to submit the proof of loss forms within 60 days barred coverage; that one insured's late note of a claim had prejudiced FIE and also barred coverage; and that the insureds' unfair business practices claims were barred by *Moradi-Shalal*.

The appeals court reversed. Citing *Campbell v. Allstate Ins. Co.* (1963) 60 Cal.2d 303, the *Henderson* court said certain breaches of policy conditions require a showing of substantial prejudice. Although the *Campbell* court had only identified policy notice and cooperation clauses as examples of policy conditions that require the insurer to show prejudice, the *Henderson* court stated that: "While the [*Campbell*] court did not expressly name proof of loss conditions, there is nothing in the language or reasoning of the opinion that excludes them."

For support, the *Henderson* court relied on *Hanover Insurance Co. v. Carroll* (1966) 241 Cal.App.2d 558, which had applied the notice-prejudice rule to uninsured motorist claims. The *Henderson* court reasoned that the purpose of the proof of loss condition is to facilitate the insurer's investigation and identify fraudulent claims, but that there is no reason to think that such an investigation would be any more productive based on the difference of a few days. The court also found support in other cases, as well as a difference in opinions whether the notice-prejudice rule was strictly limited to the notice and cooperation clauses.

As to the late notice of claim by one policyholder, the appeals court cited *Insurance Code* section 554, which states that delay in notice or proof of loss is waived in the event of a failure to promptly and specifically object. The *Henderson* court ruled that although FIE had presented evidence of prejudice, in that the insured had remodeled the home in the interim, precluding a full inspection of the alleged damage, a general reservation of rights was insufficient, and FIE's failure to promptly and specifically object had forfeited the defense.

As to the unfair practices claims under *Business and Professions Code* section 17200, the *Henderson* court acknowledged the overlap between the Unfair Claims Law in *Business and Professions Code*

The Obviously Intoxicated Minor: The Narrow Exception of Section 25602.1

Michael Ruiz, et al. v. Safeway, Inc.

Court of Appeal, First District
(October 12, 2012

Credit to Low, Ball & Lynch, San Francisco, CA

In California, when someone is injured by an intoxicated person, the proximate cause is the consumption of alcohol, not the person who sold the alcohol. This case addresses the single exception to that rule, embodied in Business and Professions Code section 25602.1, where a vendor sells alcohol to an obviously intoxicated minor who later causes injury to third parties.

On February 14, 2009, Dylan Morse and Ryne Spitzer entered a Safeway grocery store before 2:00 a.m., shortly after leaving a fraternity party where both men were consuming alcohol. Both Morse and Spitzer entered the store, walked together to grab a 12-pack of beer, and both stood in line to purchase the beer. The check-out clerk asked for identification. Spitzer provided the clerk his driver's license. It showed his age as over twenty-one, it contained a hologram, the photo matched Spitzer's physical appearance, and the license was not expired. The clerk, who had twelve years of experience, proceeded with the transaction and sold the beer to Spitzer. Spitzer's driver's license was fraudulent. Both Spitzer and Morse were under the age of twenty-one. After the purchase, Morse drove the two men away. Spitzer handed Morse a can of beer, which Morse drank while driving. Soon thereafter, Morse allegedly caused a car accident that resulted in the death of the appellants' son.

Appellants filed a complaint against Morse, Spitzer and Safeway for wrongful death. The single cause of action against Safeway was based upon Business and Professions Code section 25602.1, which states in pertinent part "a cause of action may be brought by or on behalf of any person who has suffered injury or death against any person . . . who sells, or causes to be sold, any alcoholic beverage, to any obviously intoxicated minor where the furnishing, sale or giving of that beverage to the minor is the proximate cause of the personal injury or death sustained by that person." Safeway moved for summary judgment, arguing (1) it did not furnish or cause the beer to be furnished to Morse, and (2) that neither individual was "obviously intoxicated" when the purchase occurred. The trial court held that there were triable issues of fact as to whether Spitzer and Morse were "obviously intoxicated;" however, the court granted Safeway's summary judgment motion because there was no triable issue of fact that it sold, furnished, gave, or caused to be sold alcohol to the driver of the car, Morse. Appellants appealed.

The Appellate Court reiterated the California rule that when a person is injured by an individual who is drunk, the proximate cause is deemed the consumption of alcohol by the consumer and not the person who sold the alcohol. At one point, the California Supreme Court attempted to circumvent this rule, but the Legislature specifically abrogated those decisions in Business and Professions Code Section 25602(c). The only exception was codified in Business and Professions Code Section 25602.1, where the vendor "sells, or causes to be sold" alcohol to an "obviously intoxicated minor where the furnishing, sale or giving of that beverage to the minor is the proximate cause of the personal injury or death" of a third party. The court reasoned that the phrase "causes to be sold" requires an affirmative act by the vendor that "necessarily brings about the resultant action to which the statute is directed, i.e., the sale of alcohol to an obviously intoxicated minor." The court held that the nothing in the evidence demonstrated that the Safeway clerk performed an affirmative act related to the sale of alcohol to Morse, or any other act that "necessarily would have resulted in Spitzer furnishing or giving that beer to Morse."

The court rejected the appellants' arguments that a jury could reasonably infer that the Safeway clerk caused the beer to be furnished to Morse based on the fact that both Morse and Spitzer entered the store, grabbed the beer, and stood in line together while purchasing the beer. According to the court, the statute's specific Legislative history dictated that this statute must be construed narrowly. Further, any reliance on what the vendor could infer from the situation was rejected by the Legislature in abrogating past case law and adopting the narrow exception in section 25602.1. Accordingly, the court affirmed the granting of Safeway's motion for summary judgment.

COMMENT

This case firmly reinforces the no-liability rule for vendors who sell alcohol to patrons who later cause injury or death due to their intoxication. Importantly, the court narrowly interpreted the single exception in Business and Professions Code Section 25602.1, even where the circumstances provide a high probability that one minor may share alcohol with another minor. The result is that a vendor of alcohol is shielded from liability where an intoxicated minor causes injury to a third party, so long as the vendor did not "sell, or cause to be sold" the alcohol to the negligent minor.

Court of Appeal Confirms Additional Insured Carrier Burden of Proof for Contribution Claim

Credit to Haight, Brown, Bonesteel, Los Angeles, CA

In *St. Paul Mercury Ins. v. Mountain West Farm Bureau Mut. Ins. Co.* (No. B229345, filed 10/25/12), the Court of Appeal relied on *Safeco Ins. Co. of America v. Superior Court* (2006) 140 Cal.App.4th 874 (Safeco), to uphold an equitable contribution claim by a general contractor's insurer against a framing subcontractor's insurer.

St. Paul had insured the general contractor, who was also named as an additional insured on the framing subcontractor's policy issued by Mountain West. In a lawsuit for construction defects, St. Paul defended the general contractor and based on a list of defects, tendered the general contractor's defense and indemnity to all insurers that had issued additional insured endorsements for subcontractors in the involved trades. Mountain West admitted issuing an additional insured endorsement, but declined to participate in the general contractor's defense, and ultimately contributed to a settlement solely on behalf of its named insured framing subcontractor.

In the ensuing equitable contribution case, Mountain West argued that there was no evidence showing the framing subcontractor was actually negligent; no evidence showing what portion of the damages were caused by the framer; and no occurrence during the policy period. But the appeals court said this was the incorrect burden of proof. Under the *Safeco* case, St. Paul did not have to prove actual coverage, only the potential for coverage, at which point the burden had shifted to Mountain West to affirmatively prove the absence of coverage, which it did not do.

The appeals court also rejected Mountain West's argument that contributing to a settlement on behalf of the framing subcontractor had satisfied its obligation to defend the general contractor, stating that the duties to defend and indemnify are separate obligations, and the duty to defend extends to the entirety of an action until the insurer proves otherwise.

Mountain West then tried to argue that the settlement on behalf of the framing subcontractor had released it from any obligation to contribute, claiming to be a third party beneficiary of the release in the agreement. However, the appeals court read the settlement agreement and found that it had expressly carved out any insurance claims. The court noted that the agreement had only released the named parties, did not release insurers as a class, and had expressly excepted contribution claims relating to additional insureds.

The *St. Paul v. Mountain West* court also rejected a claim that the "arising out of" language in the additional insured endorsement put the burden on St. Paul of proving the framing subcontractor's actual negligence. The court cited *Acceptance Ins. Co. v. Syufy Enterprises* (1999) 69 Cal.App.4th 321, for the principle that only a minimal causal connection is required for the "arising out of" wording. The appeals court noted that the trial court had considered evidence of defects concerned with framing, and said that the mere fact there was some evidence to the contrary would not negate the trial court's findings on appeal.

The appeals court then held that the continuous trigger applicable to Mountain West's policy was not affected by the fact that St. Paul's policy had an endorsement modifying that policy to a manifestation trigger.

Finally, the appeals court upheld application of a time on the risk formula for allocation of the defense and indemnity payments.

AUTOMOBILE LIABILITY INSURANCE
Carson v. Mercury Insurance Company (Sept. 24, 2012)

Credit: Haight, Brown & Bonesteel, Los Angeles, CA

In *Carson v. Mercury Insurance Company* (No. G045795, filed 9/24/12, ord. pub. 10/23/12), the court of appeal held that an insurer providing collision coverage could not be sued for breach of contract or bad faith where the insured contended that her auto had not been repaired to its showroom condition.

The insured was involved in a collision with her Honda, and her insurer prepared an estimate that was approximately 30% of the car's actual cash value. Exercising her right to choose, the insured took the car to her own body shop, which prepared a similar estimate. But the body shop then discovered additional damage during the course of repairs, pushing the cost to 75% of the car's actual cash value.

The insurer nonetheless elected to have the car repaired and paid the full amount, less deductible. However, the insured was never satisfied with the repairs, and ultimately sued for breach of contract and bad faith. She alleged that the damage to her vehicle "was so substantial and major that the vehicle was unrepairable to its preaccident condition with respect to safety, reliability, mechanics and performance, and was in a condition which, for economical and practical reasons, reasonably required the vehicle to be 'totaled.' The vehicle was by any logical financial consideration a 'total loss,' meaning that the costs of repair, plus the post-accident and pre-repair salvage value of the vehicle, and the loss of value of the vehicle, even if repaired, would be greater than the total value of the vehicle after the vehicle was repaired." (Emphasis added).

The collision coverage in the insurance policy gave the insurer the sole right to repair, replace or pay for the vehicle. Further, the policy excluded diminution in value for any repaired vehicle. The policy also authorized the use of non-original parts, and allowed a deduction for depreciation.

The court found that nothing in the policy obligated the insurer to declare the car a total loss, but the term generally means that the cost of repair exceeds the actual cash value, which was not the case. The court also rejected the insured's contention that the vehicle had to be repaired to "factory" or "showroom" condition, pointing out that the insurance policy specifically authorized use of non-original parts. Further, the court held that the insurer's obligation to "repair" simply meant returning the car to its "preaccident safe, mechanical, and cosmetic condition." And the appropriate standard for determining proper vehicle repair is by comparison to industry standards.

The case ultimately came down to expert testimony, but the insured's experts lacked qualifications. Nonetheless, she argued that even a layperson could tell that the car was beyond repair, because it had a unibody and photographs showed the car being cut up and reassembled. However, the insurer offered unrebutted expert testimony that the car could have been repaired to "preaccident safe condition" applying the "manufacturer's repair specifications." And because the insured had selected the body shop, the court held that the insurer was not responsible for guaranteeing that the car was properly repaired to such standards. The court said that the insured's dispute, if any, was with the body shop.

Finally, the court rejected arguments that the insurer's failure to take into account depreciation in deciding a total loss violated public policy, and that the insurer had violated the "made whole" rule by subrogating against the at-fault driver when she was not being compensated for the vehicle's loss in resale value.

As to the "made whole" rule, the court pointed out that the insured had signed a full release of all claims as part of her bodily injury settlement with the other driver's insurer, effectively agreeing that she had been made whole by the other driver, which lifted any limitation on the insurer's subrogation rights.

Regarding the policy's limitation on coverage for depreciation in the vehicle's post-repair value, the court said that an insurer has a right to limit the risks it assumes, including an exclusion in the policy for diminution in value. In a footnote, the court said that any public policy mandate that insurers pay for "stigma damages" is best left to the Legislature or the insurance commissioner.

On the Lighter Side...

WRIGHT SAYINGS

If you're not familiar with the work of Steven Wright, he's the famous erudite scientist who once said:
"I woke up one morning, and all of my stuff had been stolen and replaced by exact duplicates."
His mind sees things differently than most of us do. . .

Here are some of his gems:

1 - I'd kill for a Nobel Peace Prize.
2 - Borrow money from pessimists -- they don't expect it back.
3 - Half the people you know are below average.
4 - 99% of lawyers give the rest a bad name.
5 - 82.7% of all statistics are made up on the spot.
6 - A conscience is what hurts when all your other parts feel so good.
7 - A clear conscience is usually the sign of a bad memory.
8 - If you want the rainbow, you got to put up with the rain.
9 - All those who believe in psychokinesis, raise my hand.
10 - The early bird may get the worm, but the second mouse gets the cheese.
11 - I almost had a psychic girlfriend, ... But she left me before we met.
12 - OK, so what's the speed of dark?
13 - How do you tell when you're out of invisible ink?
14 - If everything seems to be going well, you have obviously overlooked something.
15 - Depression is merely anger without enthusiasm.
16 - When everything is coming your way, you're in the wrong lane.
17 - Ambition is a poor excuse for not having enough sense to be lazy.
18 - Hard work pays off in the future; laziness pays off now.
19 - I intend to live forever.... So far, so good.
20 - If Barbie is so popular, why do you have to buy her friends?
21 - Eagles may soar, but weasels don't get sucked into jet engines.
22 - What happens if you get scared half to death twice?
23 - My mechanic said, "I couldn't repair the brakes, so I made your horn louder."
24 - Why do psychics have to ask you for your name.
25 - If at first you don't succeed, destroy all evidence that you tried.
26 - A conclusion is the place where you got tired of thinking.
27 - Experience is something you don't get until just after you need it.
28 - The hardness of the butter is proportional to the softness of the bread.
29 - To steal ideas from one person is plagiarism; to steal from many is research.
30 - The problem with the gene pool is that there is no lifeguard.
31 - The sooner you fall behind, the more time you'll have to catch up.
32 - The colder the x-ray table, the more of your body is required to be on it.
33 - Everyone has a photographic memory; some just don't have film.
34 - If at first you don't succeed, skydiving is not for you.

And the all-time favorite -

35 - If your car could travel at the speed of light, would your headlights work?