CAIIA Status Report

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December2017

Drug Company Marketing Scheme is Not a Covered Accident
Credit to: Haight, Brown and Bonesteel, Los Angeles, CA

In *The Traveler's Property Casualty Company of America v. Actavis, Inc*. (No. G053749, filed 11/6/17), a California appeals court held that there was no duty to defend or indemnify lawsuits by the State of California and the City of Chicago against pharmaceutical manufacturers allegedly engaged in a scheme to increase sales of opioid products by marketing them for unsuitable uses, because there was no allegation of an occurrence or accident and the policies' products exclusions barred coverage.

In *Actavis,* California and Chicago alleged that the insured manufacturers engaged in a fraudulent scheme to promote the use of opioids for long term pain in order to increase corporate profits, knowing that opioids were "too addictive and too debilitating for long term use." Further, they allegedly knew that prolonged use "markedly increas[es] the risk of significant side effects and addiction." Notwithstanding, "through a ... sophisticated, and highly deceptive marketing campaign ... [the manufacturers] set out to, and did, reverse the popular and medical understanding of opioids." The manufacturers spent millions of dollars developing seemingly scientific materials, studies and guidelines that misrepresented the risks and benefits, and distributed those materials, studies, and guidelines to physicians to encourage them to prescribe opioids to treat chronic, noncancer pain.

The lawsuits alleged that the efforts were "wildly successful" so that "[t]he United States is now awash in opioids." The result, the complaints alleged, "has been 'catastrophic' and a nationwide 'opioid-induced public health epidemic.'" In addition, the complaints alleged that the epidemic of opioid use has led to a resurgence in heroin use. The allegations supported claims for consumer fraud; deceptive practices; unfair practices; misrepresentations; insurance fraud; civil conspiracy, etc.

The manufacturers' tenders of defense and indemnity were denied, and the insurers filed an action for declaratory relief, drawing cross-complaints for breach of contract and bad faith. The subject policies insured against damages for bodily injury or property damage caused by an "event" or "occurrence," defined as an "accident, including continuous or repeated exposure to substantially the same general harmful conditions." In addition, the policies had similar versions of exclusions for bodily injury or property damage resulting from "your product." In a trial on stipulated facts, the trial court ruled that the lawsuits did not allege accidents or occurrences, and the products exclusions barred coverage.

The appeals court agreed. The court quoted *Delgado v. Interinsurance Exchange of Automobile Club of Southern California* (2009) 47 Cal.4th 302 and *Navigators Specialty Ins. Co. v. Moorefield Construction, Inc.* (2016) 6 Cal.App.5th 1258, stating: "An accident does not occur when the insured performs a deliberate act unless some additional, unexpected, independent, and unforeseen happening occurs that produces the damage. An accident may exist if any aspect in the causal series of events leading to the injury or damage was unintended by the insured and a matter of fortuity. However, where the insured intended all of the acts that resulted in the victim's injury, the event may not be deemed an 'accident' merely because the insured did not intend to cause injury."

The *Actavis* court went on saying that "[t]he claims of the California Complaint and the Chicago Complaint are based on allegations that [the manufacturers] engaged in deliberate conduct. The allegations that Watson and the other defendants engaged in 'a common, sophisticated, and highly deceptive marketing campaign' aimed at increasing sales of opioids and enhancing corporate profits can only describe deliberate, intentional acts."
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President's Message

Happy Holiday's to all of you best wishes for a safe New Year.

Paul Camacho
CAIIA President

As I indicated in the last Status Report, I am reaching out to our past CAIIA presidents to write the President's Message. It is important to recognize these people who have stepped up to lead our organization and find out where they are today.

I contacted Kim Hickey, who was the CAIIA president in 2014-2015, and asked her to write this month's President's Message. Kim remains active in the CAIIA today and all her work and efforts are greatly appreciated. I remember when I took my first position as the Secretary Treasurer. I was handed a box of documents and just about fell over with the uncertainty of what I was supposed to do. Kim saw the deer in the headlights look and told me not to worry, and she took the time to set me on my way to 2 terms as Secretary Treasurer. Thanks Kim!

Paul Camacho

CAIIA President 2017-2018

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President's (Past) Message

I would like to start by saying Thank You to Paul for taking a second term to run this great organization. With your leadership we will keep moving forward. It was just September 29, 2017 that we had our Fall Convention and I am already looking forward to the Spring meeting. The people in this organization are dedicated to the insurance industry, and are filled with knowledge. Sharing that knowledge helps us all thrive. Not to mention, we are a fun group!

Time is going quickly and three years ago I was preparing my second President's Message. I really love this idea of reaching back to Past Presidents to share the stage. Fortunately, you do not have to listen to me sing!

Since we are including current photographs with each President's Message – I am proud to bring to you my October 2017 King Salmon catch in Washington. We are having the entire fish smoked. Oh, and yes, my fish was bigger than my husbands! Continued on page 3

NEWS FROM AND FOR OUR MEMBERS

SAVE THE DATE

The CAIIA is proud to be exhibiting at or sponsoring the following upcoming events:

March 6-7, 2018 **Combined Claims Conference, Garden Grove, CA**

Kim Hickey, CAIIA Past President (2014-2015)

Happy Holidays to all of you from the CAIIA !

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As mentioned by Paul in the previous months President's Message, we are working to update the CAIIA bylaws to allow anyone with an independent adjuster's license to become involved in the CAIIA. This will apply to me directly. In 2016 I obtained my Independent Adjuster's license, however, I do not have a business and do not qualify under the current CAIIA memberships available. Fortunately for me, I have been active in the CAIIA as an employee of Schifrin, Gagnon and Dickey (SGD). Having a broader membership will bring in new members, and new ideas. For me, the CAIIA has always been a place to belong and if we can share that with new adjusters, it is a "win" for us all.

While I will be working during this holiday season, I will be spending time with family and friends, and helping others in my community. Community service is good for our city, and to be honest, it makes me feel good. I am thankful that I can help the kids, serve the seniors, and support our city leaders. Moments come and go, and we need to enjoy them when we can.

Be safe – enjoy – Happy New Year, and join us in 2018!

Kimberley Hickey, *CAIIA Past President 2014-2015*

Qualified Privilege for DMV Records
Credit : Haight, Brown & Bonesteel, Los Angeles, CA

In *Klem v. Access Insurance Co.* (No. 17D070623, filed 11/20/17), a California appeals court analyzed the admissibility of claim file documents as evidence, and held that an insurer's reporting of a vehicle total loss determination to the California DMV resulting in a branded salvage title is subject to qualified privilege.

In *Klem*, the Plaintiff had an accident with an Access insured. Access determined that his vehicle was a total loss based on an inspection of the vehicle and comparable vehicles. Access sent Klem a check and advised that he could keep the car for salvage. Further, Access notified the California DMV, via the standard form for notice of total loss under California Vehicle Code section 11515(b) (form REG 481 "Salvage Vehicle Retention by Owner"), and told Klem that he would be issued a salvage certificate.

Klem did not cash the check and wrote to Access arguing that the vehicle was worth more. Also, he advised Access that he was repairing the vehicle, and instructed Access not to report it as salvaged. He said that he would agree to reporting the vehicle as salvage in exchange for payment of the "full value" of the vehicle.

When Access would not withdraw the DMV notification, Klem sued for slander of title and unfair business practices under the Unfair Competition Law (UCL). He claimed that because he had repaired the vehicle it was not a total loss subject to DMV reporting. Access responded by filing an anti-SLAPP motion, supported by a declaration from an Access compliance officer attaching claims logs and documents, which Klem opposed with his own declaration. The trial court denied the motion, concluding that although the DMV report constituted a protected activity for purposes of an anti-SLAPP motion, it was not a privileged communication and Klem had established a probability of prevailing on the merits.

The appeals court reversed, dealing first with evidentiary issues. The trial court had sustained Klem's objections to the Access claims person's declaration and the claim file documents based on lack of personal knowledge, hearsay, multiple hearsay, and lack of foundation. But the appeals court explained that such materials fall within the business records exception to the hearsay rule under Evidence Code section 1271, which states that a writing made as a record of an act, condition, or event is not hearsay if it (a) was made in the regular course of a business; (b) was made at or near the time of the act; (c) the custodian or other qualified witness testifies to its identity and the mode of its preparation; and (d) the source's method of preparation indicate its trustworthiness. The appeals court stated:

"Meadows's declaration was sufficient to establish these requirements. He explained it is the 'general business practice' of Access Adjusters to 'regularly make entries into the claims log,' and to prepare and send letters. Claims log entries are made 'at the time of the conversation or action ... or shortly thereafter,' and logs and letter copies are maintained in the regular course of business. Meadows was a qualified witness (evidenced by his role as a senior compliance officer and familiarity 'with the procedures, records, and record-keeping'), and he verified the documents were accurate copies. Lastly, the source of the information and time of preparation provide trustworthiness; the materials were prepared by claims personnel, during the claims process."

The *Access* court did note possible "multiple hearsay" in claim log notes reflecting others' conversations, but said that to the extent those served as proof that the communications took place, they were not hearsay at all. (Citing *Stewart v. Estate of Bohnert* (1980) 101 Cal.App.3d 978, 990.) The *Access* court also rejected personal knowledge and foundation objections to the claims person's declaration, saying that "So long as the person who originally feeds the information into the process has firsthand knowledge, the evidence can qualify as a business record."

The *Access* court then turned to the substantive issue of DMV reporting and anti-SLAPP law. The *Access* court agreed that submission of a DMV total loss salvage notice was protected speech, not because issuing a salvage title constitutes an official proceeding, but because it relates to an issue of public interest: "[A]nyone who sells, purchases, or drives cars in California is impacted by these communications." Conversely, the *Access* court rejected Klem's argument that his case came within the public interest exception to the anti-SLAPP law, saying that his slander of title claim concerned only himself, not the public. Further, because Klem's UCL claim sought treble damages "on his own behalf," the court found he was seeking relief "different from the relief sought for the general public," and therefore the public interest exception did not apply.

The appeals court did disagree, however, that Klem had any probability of success on the merits. The *Access* court said that to establish slander of title, a plaintiff must show: "(1) a publication, (2) which is without privilege or justification, (3) which is false, and (4) which causes direct and immediate pecuniary loss." (Citing *Manhattan Loft, LLC v. Mercury Liquors, Inc.* (2009) 173 Cal.App.4th 1040, 1051.)

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The *Access* court concluded that submission of the standard DMV total loss form was not absolutely privileged. The court said that the absolute privilege of Civil Code section 47(b) applies to "communications made as part of a 'judicial or quasi-judicial proceeding,' defined to include any sort of 'truth-seeking' 'or other official proceeding.'" But nothing in Vehicle Code section 11515 (insurer reporting of total loss determination) or in the REG 481 notice, suggests that submission of the form results in an investigation. "Indeed, the DMV 'has no discretion to reconsider the total loss salvage vehicle determination.'"

But the court found that the report does carry qualified privilege under Civil Code section 47(c), which applies to "a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information." The *Access* court said that "Access and the DMV have a common interest in reporting of total loss salvage vehicles and Access's submission of the REG 481 notice was reasonably calculated to advance that interest."

Since Access had established that there was a qualified privilege, the burden had shifted to Klem to show malice or falsity. He did neither: "Klem's apparent premise—that a salvage title causes a reduction in vehicle value—is flawed. A total loss salvage determination follows an accident. It is the accident that causes the vehicle's damage.... Klem identifies no evidence a salvage title even necessarily correlates with a lower value. But to the extent it does, this correlation simply reflects that a vehicle with damage history may have reduced value." Further, "Klem's evidence does not reflect any ill will on Access's part. There was nothing nefarious about accurately informing Klem regarding his options as to his claim.... Ultimately, Klem provides no evidence Access sent the REG 481 notice to reduce the Vehicle's value or induce settlement, rather than to comply with what Access believed to be its statutory obligations in light of its total loss evaluation."

As to falsity, Klem likewise failed to carry his burden. The *Access* court read the definition of "Total Loss Salvage Vehicle" in Vehicle Code section 544 and noted that while it might be semantically possible to read it to mean that a vehicle can only be a total loss salvage when there is no repair, by any party, that would frustrate the purpose of the statue: "Reading section 544, subdivision (a), as a whole, we conclude the only reasonable interpretation is that repair following an uneconomical-to-repair determination does not preclude total loss salvage status." The "main objective" of the salvage law was to "identify total loss salvage vehicles apart from operable vehicles," while also addressing concerns regarding safety, fraud, theft, and "vehicles that were improperly repaired." Also, "interpreting section 544, subdivision (a), to focus on whether a vehicle is uneconomical to repair (not whether someone wants to repair it, regardless) promotes the effective operation of the salvage laws."

Having concluded that intent to repair or actual repair was not determinative of total loss salvage status, the *Access* court held that Klem had provided no other objective evidence of falsity. His own declaration that he did not consider it uneconomical to repair was insufficient, and even "if Klem did rely on value, his evidentiary showing likewise would be deficient. His only evidence is his $4,500 estimate (again, in his declaration), with no indication this was based on the Kelley Blue Book or some other objective source. Indeed, he indicates the Vehicle had 'unique value,' suggesting the estimate was based on subjective factors. Klem also provided no evidence of the cost of repair. This evidence also would not call into question Access's assessment that the Vehicle was uneconomical to repair, or, in turn, show its REG 481 notice to be false." Nor did he supply any evidence of actual pecuniary loss, beyond his own subjective opinions.

Having disposed of slander of title, the *Access* court also disposed of the UCL claim, saying that "Klem cannot establish his UCL claim because, among other reasons, he did not establish actual injury." The court noted the UCL requirement that a person "has suffered injury in fact and has lost money or property as a result of the unfair competition," and stated that "[e]ven if we consider the allegations and evidence provided in support of the slander of title claim, they do not reflect economic injury due to Access's communication. Thus, Klem has not demonstrated the standing necessary to pursue his UCL claim."

Continued from page 1

In dismissing the manufacturers' claim that any injuries were "indirect unintended results" caused by "mere negligence or fortuities outside [their] control," the *Actavis* court stated that "In resolving this question, we emphasize that whether Watson intended to cause injury or mistakenly believed its deliberate conduct would not or could not produce injury is irrelevant to determining whether an insurable accident occurred."

The *Actavis* court found that "It is not unexpected or unforeseen that a massive marketing campaign to promote the use of opioids for purposes for which they are not suited would lead to a nation awash in opioids.... It is not unexpected or unforeseen that this marketing campaign would lead to increased opioid addiction and overdoses. Watson allegedly knew that opioids were highly addictive and prone to overdose, but trivialized or obscured those risks.... It also is not unexpected or unforeseen that promoting the use of opioids would lead to a resurgence in heroin use."

The fact that doctors had to prescribe the drugs was also irrelevant: "The test, however, is not whether the consequences are normal; the test is whether an additional, unexpected, independent, and unforeseen happening produced the consequences. The role of doctors in prescribing, or misprescribing, opioids is not an independent or unforeseen happening. The California Complaint and the Chicago Complaint allege: 'Nor is Defendants' causal role broken by the involvement of doctors, professionals with the training and responsibility to make individualized medical judgments for their patients. Defendants' marketing efforts were ubiquitous and highly persuasive. Their deceptive messages tainted virtually every source doctors could rely on for information and prevented them from making informed treatment decisions.'"

The *Actavis* court also dismissed the argument that the complaints' nuisance claims could result in liability based upon negligent conduct, saying that the facts alleged sounded only in intentional conduct and distinguishing cases from West Virginia, Kentucky and South Carolina finding coverage for identical lawsuits, on the ground that those states do not distinguish, as does California, between the intent to act and the intent to cause the harm, for purposes of the accident/occurrence requirement.

The *Actavis* court further dismissed the possibility of negligence liability saying that in any case the policies' products exclusions barred coverage. In that regard, the *Actavis* court noted that California requires only a minimal causal connection to meet the test for injuries or damage "arising out of" an insureds' work or products, and found that the allegations of the California and Chicago complaints satisfied the requirement. Further, the court said that the limitation of proximate causation applicable to tort liability is not determinative for insurance coverage purposes. Instead, the terms "arising out of" and "arising from" "identif[y] a core factual nucleus, i.e., products manufactured, sold or distributed by the insured, and links that nucleus to the bodily injury or property damage covered under the policy. This link is not made in terms of tort causation."

DOI Press Release

Central coast father and son sentenced in $400,000 workers' comp scheme

SALINAS, Calif. - Jaime Rosario Del Real, 61, and son Israel Del Real, 37, both pleaded guilty to four felony counts for their role in a $400,000 insurance fraud scheme denying workers' compensation insurance and medical care for injured workers.

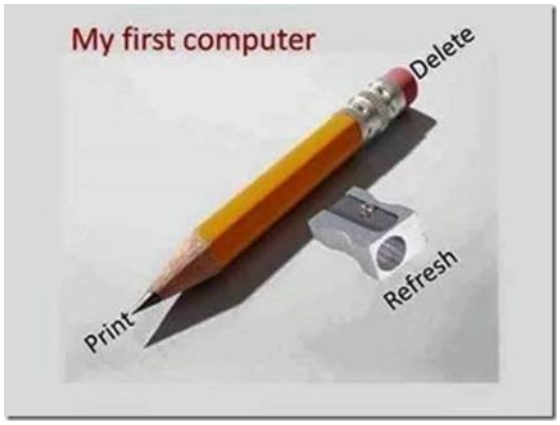
The father and son duo were sentenced to 250 days in jail, 10 years felony probation, and ordered to pay $382,951 in restitution. This case was prosecuted by the Monterey County District Attorney's Office.

"Business owners are responsible for the safety and care of their employees," said Insurance Commissioner Dave Jones. "Employers who fail to carry workers' compensation insurance or pay for the medical care for injured workers violate the law and put their employees at risk. Our detectives and the Monterey County District Attorney's team succeeded in taking another dishonest employer out of the underground marketplace."

Doing business as Del Real Produce and Packing and Del Real Packing, LLC, the Del Reals worked as farm labor contractors providing laborers for picking and packing lettuce for growers in Monterey County and Yuma Arizona. After receiving information from an insurer, Department of Insurance detectives found the Del Reals had concealed injuries their workers sustained and refused to pay for medical treatment or provide other benefits the injured workers were entitled to.

The investigation also revealed that over a five year period, the Del Reals lied more than 20 times in order to obtain reduced insurance premiums. As part of their premium theft the Del Reals kept two sets of Employment Development Division (EDD) forms, with different employees and a different number of employees listed, which allowed the Del Reals to evade paying payroll taxes.

On the Lighter Side…..



God Bless the old things like us!