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Status Report

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December 2019

## DOH! An Eminent Domain Decision Homer Simpson Would Love

### Credit to : Tyson and Mendes, La Jolla, CA

In the recent case entitled, *Los Angeles County Metropolitan Transportation Authority v. Yum Yum Donut Shops, Inc.,* (2019) 32 Cal. App.5th 662, the California Court of Appeal, Second District, in a decision which would have pleased even the donut master himself, Homer Simpson, clarified that a property owner facing eminent domain is only required to prove partial loss of goodwill, not total loss of goodwill, in order to be entitled to a trial on the amount of goodwill lost.

**Facts of the Case**

Yum Yum Donuts operated a shop in Los Angeles that was subject to eminent domain by the Los Angeles County Metropolitan Transportation Authority (MTA) to make way for light railway track. At time of trial, Yum Yum sought loss of goodwill as part of its condemnation damages, under *Code of Civil Procedure* section 1263.510. At trial the MTA's expert testified that Yum Yum could have reduced its goodwill loss if it relocated to one of three alternative locations rather than simply closing the shop. But the expert conceded that even if Yum Yum had relocated, it would have lost some goodwill. Yum Yum refused to relocate, arguing that its relocation costs would render the move unprofitable.

The trial court found that Yum Yum's failure to mitigate its damages by reopening in a nearby location and barred Yum Yum from having a jury determine whether it was entitle to loss of goodwill damages and, if so, the amount. Yum Yum appealed.

**Ruling**

The Court of Appeal reversed, finding that a condemnee (Yum Yum) is entitled to a jury trial on the amount of lost goodwill if it can establish that it will lose some, but not all, of its business goodwill if it relocates. Reviewing the legislative history, the Court found that section *Code of Civil Procedure* section 1263.510 was intended to displace "judicial stinginess" in the compensation of condemnees.

The Court of Appeal concluded the statute provided a two-step process; the trial court first determines if the condemnee meets its burden of establishing that the condemnation will cause loss of goodwill, that the loss is unavoidable and that the condemnee will not be obtaining double recovery. If the condemnee meets this burden, then it is entitled to a jury trial on the amount of lost goodwill.

The Court of Appeal remanded the matter for a jury trial as to the amount of goodwill lost by Yum Yum, but given that Yum Yum failed to mitigate its goodwill loss by reopening nearby, the matter of its recovery was hardly a slam dunk.

**Takeway**

This case in noteworthy for the proposition that in an Eminent Domain action (1) if a condemnee would lose goodwill even if it relocated its business or otherwise reasonably mitigated the loss, the condemnee satisfies its threshold burden to show it cannot prevent the loss and is entitled to a jury trial on the amount of compensation, and (2) expert testimony that the donut shop would have lost some goodwill even if it relocated to one of transit authority's three proposed relocation sites was sufficient to establish donut shop's entitlement to goodwill damages. Undoubtedly, Homer is now looking for a new place to satisfy his donut cravings.

Published Monthly by
California Association of
Independent Insurance Adjusters

An Employer Organization of Independent Insurance Adjusters

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## *President's Message*

Prior to preparing my final president's message of the year, I went back and looked at last year's December message and recalled that many people who had read that message called or emailed me saying how much they enjoyed reading same. So I thought perhaps it wouldn't be such a bad idea to send essentially the same message again as a good reminder and no, I'm not just being lazy, I really thought about this!

Whatever holiday you might celebrate during these months, I believe it is a season of reflection.

**John Ratto**

**CAIIA President**

As I am preparing this message, California is burning! The Kincaid Fire has just devastated what didn't already burn in 2017 and Southern California dealt with Sandalwood, Saddleridge, Tick, Getty and many others. Once again, the circumstances of the job provide inspiration for my monthly message, as I take time to reflect about the importance of what we do as adjusters.

Of course, it is easy to get caught up in the adrenaline pumping pace of huge loss events such as the current fires. It is also easy to get caught in the daily juggling of multiple files, legislated time lines and carrier's expectations of information and answers as soon as possible. Through all of this, we adjusters often forget how deeply people's lives are affected by loss events and by our actions.

I think many of us get desensitized to the people and events of our lives. Admittedly, it can be very hard to focus on the events of the day and how people are affected by them when there is so much negativity and violence on television, in politics, and frankly, in our everyday working world. Find me a loss adjuster who has been handling claims for over ten years who is not jaded about people and events.

However, in this season of reflection, I would like to suggest we take some time to think about what we are grateful for and also to remember that as adjusters, our business is to help people.

WE HELP PEOPLE …

We adjust all kinds of losses, some more catastrophic than others. We handle residential property losses for families and we help commercial businesses get back on their feet. Do not forget those businesses employ people and those people have families who count on those checks. Liability adjusters help to fairly assess and adjust valid claims (yes, some claimants really do count on those checks to help them get their lives back in order and their families depend on them to get back on their feet). It is hard to be there for every insured/claimant and it can be taxing to deal with their claims. Believe me when I tell you that *you really are helping to change someone's life*, Sometimes nothing means more to me during the holiday season than getting that Christmas card from an insured whose claim I handled 10 years ago. Just by doing my job, I made a difference in someone's life.

On a lighter note, in last month's letter I said, "I have been doing my best to clear my desk so that I can be prepared for the winter season". When I made that comment I was thinking of rain and certainly not fire. I've already received a number of new losses in Windsor (Kincaide) and that should give me lots of windshield time to remember what's important and how being an adjuster does help bring some goodwill into the world !

Season's Greetings to all of you! (yeah, yeah, I know I didn't say Merry Christmas! What? Am I trying to be "politically correct"? Naw.) I'm just trying to relate to and help all people, like a good insurance adjuster does.

Warmest regards,

John Ratto, President

**NEWS OF AND FOR OUR MEMBERS**

## *DOI Announcement*

Senate Bill (SB) 240 authored by Senator Bill Dodd is an urgency bill signed by Governor Gavin Newsom on October 3, 2019 and effective immediately.

SB 240 adds a new California Insurance Code (Cal. Ins. Code) Section 14046(a)(1), which codifies the practice of the California Department of Insurance (CDI) of preparing a notice describing the most significant California laws pertaining to property insurance policies, including those related to a declared state of emergency, as defined in Section 8558 of the Government Code, or other emergency declared by a public official.

Going forward, CDI intends to issue this notice in January of each year. However, given the recent and current wildfires that resulted in declared states of emergency across the state, CDI is issuing this year's notice now. CDI may issue interim updates if significant legal changes occur during a particular year. This year's notice is attached.

**Newly added Cal. Ins. Code section 14046 (b) require insurers to provide claimants a copy of CDI's annual notice:**

"(b) For a claim under a policy of residential property insurance arising as a result of a declared state of emergency, as defined in Section 8558 of the Government Code, or other emergency declared by a public official, an insurer shall provide the claimant with a copy of the most recent notice described in paragraph (1) of subdivision (a) no later than 15 calendar days from the date on which the insurer received notice of the claim."

**Newly added section 14046 (c) requires supervising licensed adjusters to require its registered nonlicensed adjusters to read and understand CDI's most recent annual notice and the most recent adjusting handbook promulgated by CDI within specified timeframes:**

"(c) After a declared state of emergency, as defined in Section 8558 of the Government Code, or other emergency declared by a public official, a supervising licensed adjuster shall require any nonlicensed adjuster it has registered with the department pursuant to subdivision (b) of Section 14022.5 and any nonlicensed adjuster exempted from this chapter pursuant to subdivision (a) of Section 14022 to read and understand the most recent notice described in paragraph (1) of subdivision (a) and the most recent handbook described in paragraph (2) of subdivision (a) no later than 15 calendar days from the date on which the nonlicensed adjuster began claims adjusting activity in California."

Since the October 3, 2019 effective date of SB 240, the Governor issued two emergency declarations for the fires listed below.

A State of Emergency was declared on October 11, 2019 in Riverside and Los Angeles Counties due to the following fires:

- Saddleridge
- Eagle
- Sandalwood
- Reche
- Wolf

A State of Emergency was declared on October 25, 2019 in Sonoma and Los Angeles Counties due to the following fires:

- Kincade
- Tick

In addition, a State of Emergency was declared on October 27, 2019 across the state due to the effects of unprecedented high-wind events which have resulted in additional fires and evacuations.

**Therefore, it is expected that all residential property insurers and insurance adjusters comply with these new laws for any residential property insurance claims arising from these fires and any subsequent claims arising from future states of emergency.**

## *A Major Blow to the Practice of "Chalking" Tires to Support Issuance of Parking Tickets*
## *Credit to Tyson & Mendes, La Jolla, CA*

For decades across the country, parking enforcement officers have driven past unmetered parking, such as two-hour parking zones, and chalked car tires. If the parking enforcement officer came back, in this instance, over two hours later, and any cars with chalked tires remained, the officer would issue parking tickets. Cities generate a substantial amount of revenue from this practice.
In the first case of its kind, one court recently ruled that this practice constitutes an "unreasonable search" prohibited by the Fourth Amendment to the United States Constitution. The Fourth Amendment reads:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

A law enforcement officer must have "probable cause" in order to conduct a search. Essentially, a law enforcement officer must have reasonable grounds to suspect unlawful activity is taking place before a warrant can be issued to conduct a search. A "search," as discussed in the United States Supreme Court case of *United States v. Jones*, 565 U.S. 400 (2012), is a physical trespass for purposes of gaining information. *Jones* held that putting a GPS tracking device on a car constituted a search.

With respect to chalking tires, two questions are raised: First, does the practice of chalking tires constitute a trespass made to gain information, similar to the installation of a GPS device? Second, if a car is legally parked in a two-hour zone when it is chalked, what is the parking enforcement officer's reasonable basis for suspecting unlawful activity?

Earlier this year, in the case of *Taylor v. City of Saginaw*, No. 17-2126 (6th Cir. 2019), the United States Court of Appeals for the Sixth Circuit addressed these questions. The court determined that intentionally making contact with a person's car to mark a tire was a trespass, albeit a slight one, but one done to gain information regarding how long the vehicle was parked. This falls squarely within the definition of search.

The court then asked whether there was a reasonable basis for the search. While there is an "automobile exception," which allows an officer to search a vehicle without a warrant if he or she has probable cause (for example, searching a car after a drug detection dog reacts), there is no probable cause here, since the car tire is marked when it is legally parked. In other words, there is no reasonable ground to suspect unlawful activity when the search occurs.

**Takeaway**
This court's ruling is binding in Michigan, Ohio, Kentucky and Tennessee. However, it is expected to have nationwide implications, including in the state of California. Challenges to the practice of chalking tires are expected to be brought across the country.

**Happy Holidays to you and your family!**

## *"Business Pursuits / Rental" Exclusion Relieves Insurer of Duty to Defend Insured*

*Credit to Smith, Smith & Feeley, Newport Beach, CA*

A homeowners policy's "business pursuits / rental" exclusion relieved an insurer of any duty to defend its insured against a personal injury lawsuit brought by a long-term tenant. (*Terrell v. State Farm General Ins. Co.* (2019) — Cal.App.5th —)

**Facts**

In 2000, Paul Terrell purchased a home in San Francisco. Initially, Terrell himself lived in the home. He obtained a homeowners policy through State Farm General Insurance Company.

In 2003, Terrell moved out of the property and began renting it to tenants. In January 2004, after conferring with his State Farm agent, Terrell cancelled the homeowners policy and replaced it with a rental dwelling policy. However, later, Terrell told State Farm that he was moving back to the property, and thus he asked State Farm to change his coverage. Accordingly, in January 2005, State Farm cancelled Terrell's rental dwelling policy and replaced it with another homeowners policy. However, Terrell never moved back to the property. Instead, his existing tenants remained at the property until May 2006.
In June 2006, Terrell rented the property to a new tenant, Pamela Fitzgerald. The lease identified Fitzgerald and her minor daughter, Mary Fitzgerald, as the occupants.

Eight years later, Fitzgerald's daughter Mary was injured when the front porch of the property collapsed. The Fitzgeralds thus sued Terrell for premises liability. Terrell, in turn, sought a defense under the homeowners policy issued by State Farm. However, State Farm declined to defend Terrell because the homeowners policy excluded coverage for injuries arising out of an insured's "business pursuits" or "rental" activities.

Terrell sued State Farm for breach of contract and bad faith, alleging that State Farm had incorrectly and unreasonably refused to defend Terrell against the Fitzgeralds' lawsuit. State Farm moved for summary judgment based on the policy's business pursuits / rental exclusion. The trial court granted State Farm's motion. Terrell appealed.

**Holding**

The Court of Appeal affirmed. The State Farm policy's business pursuits / rental exclusion barred coverage for bodily injury "arising out of business pursuits of any insured or the rental or holding for rental of any part of any premises by any insured." The State Farm policy defined a "business" as "a trade, profession or occupation," and courts generally hold that a "business pursuit" is any regular activity engaged in for profit. Further, while the State Farm policy did not separately define "rental," the appellate court held that a "rental" simply means "something that is let out for rent." Here, Terrell's rental of the property to the Fitzgeralds was both an excluded "business pursuit" and an excluded "rental" of premises.
The appellate court acknowledged that the business pursuits / rental exclusion was subject to an exception for "activities which are ordinarily incident to non-business pursuits." However, according to the court, the "ordinarily incident" exception applies where the insured's alleged acts or omissions did not further the interests of the insured's business and were not directly related to that business. Here, any maintenance activities undertaken by Terrell would have furthered the interests of his rental business or enhanced the value of his rental property. Thus, the "ordinarily incident" exception did not restore coverage.
The appellate court also briefly noted that the business pursuits / rental exclusion contained a separate exception for "the rental or holding for rental of a residence of yours … on an occasional basis for the exclusive use of a residence." Here, however, Terrell's rental activities could not be deemed "occasional." Rather, Terrell had leased the property to the initial tenants from 2003 to 2006, and then had leased the property to the Fitzgeralds from 2006 through 2014. Those were not "occasional" rentals.
Because the Fitzgeralds' claims against Terrell in the underlying lawsuit were not potentially covered under the State Farm policy, Terrell could not recover against State Farm for either breach of contract or bad faith.

**Comment**

In this case, the appellate court had little difficulty finding that the claims against the insured fell within the general exclusionary language of the business pursuits / rental exclusion. The court spent most of its time focusing on the exclusion's exception for "activities which are ordinarily incident to non-business pursuits." Note that most homeowners insurers have previously deleted the "ordinarily incident" exception from their policies in order to eliminate disputes about the exception's meaning and application. Here, although the exclusion still contained the exception, the appellate court ultimately held that the exception did not apply.

## *DOI Announcement*

### Santa Barbara insurance agent arrested after allegedly leaving client uninsured during 2018 mudslides

*Allegedly stole over $70,000 from five clients*

**SANTA BARBARA, Calif.** — California Department of Insurance detectives today arrested insurance agent Mark Lynch, 40, on 13 felony counts of grand theft, embezzlement, and money laundering after allegedly collecting over $72,425 in insurance premium payments from five clients while leaving one client uninsured during the Montecito mudslides in January 2018.

While that client did not suffer damage in the devastating slides that killed 20 people, the agent allegedly pocketed premium payments from five clients and used those funds for his personal benefit. Three clients were Santa Barbara homeowners and two clients were small business owners left uninsured against potential liability claims.

The Department of Insurance launched an investigation after receiving complaints from Lynch's clients. The alleged misappropriation of premium payments took place between January 2016 and January 2017.

"Leaving homeowners without insurance during the Montecito Mudslides could have been devastating for these families and businesses," said Insurance Commissioner Ricardo Lara. "The arrest of this agent should be a warning to anyone who puts consumers at risk to seek personal benefit. The Department of Insurance will continue to use every resource available to stop unscrupulous agents from preying on customers."

The Department of Insurance has filed an accusation against Lynch and is seeking to revoke his insurance license.

Lynch's was booked into Santa Barbara County jail and his bail has been set at $100,000. The Santa Barbara County District Attorney's Office is prosecuting the case.

### Commissioner Lara issues emergency notice to help expedite insurance claims from California fires

**SACRAMENTO, Calif.** – Insurance Commissioner Ricardo Lara today issued an emergency notice to all property and casualty insurance companies doing business in California, requesting they expedite claims handling for California wildfire survivors in order to help them begin the recovery and rebuilding process more quickly.

Survivors of the recent fires in Northern and Southern California face the long and painful task of recovery, which often includes trying to inventory lost possessions and reconstruct destroyed or missing documents.

"I have met with many wildfire survivors since taking office, and they need immediate help to start the rebuilding process, not red tape and unnecessary paperwork that adds to their problems," said Commissioner Lara. "These expedited claims handling procedures will give policyholders the help they need, and I urge insurers to do the right thing for these survivors."

Commissioner Lara is asking insurance companies to provide greater flexibility to survivors affected by wildfires across the state with some deadlines and documentation typically required to pay claims, including:

- **Minimum four-month advance payment of Loss of Use, Fair Rental Value or Additional Living Expenses**
- **Minimum 60-day billing grace period** to allow for lost or destroyed renewal notices
- **Advance payment of at least 25% of policy limits for personal property** — without the completion of an inventory
- **Accepting any inventory form** that contains substantially the same information as a company-specific form
- **Accepting an inventory that includes groupings of personal property**, such as clothing, shoes, books, or food items rather than listing individual item
- **Expediting payment of vehicle damage claims** covered under comprehensive loss coverage
- **Cooperating with consolidated debris removal efforts** coordinated through city, county, and state agencies, unless the insurer can provide more rapid debris removal outside of this effort

The Department of Insurance has issued similar notices after other devastating fires, including the Camp, Woolsey, and Hill fires in 2018. Virtually all insurers heeded the Commissioner's call during previous fires when similar Notices were sent out. This notice is also in recognition of Governor Gavin Newsom's declared states of emergencies related to the wildfires.

This notice builds on the Department's recent actions to help California consumers facing wildfire risk.

Last week, Commissioner Lara ordered the FAIR Plan — California's insurer of last resort — to help homeowners find adequate coverage by offering a comprehensive policy in addition to its current dwelling fire-only coverage by June 1, 2020, and taking other steps to modernize its options.

Commissioner Lara has met with more than 2,000 Californians at community roundtables in nine counties across the state to discuss wildfire insurance issues, and he mobilized the Department's staff to help consumers at local assistance centers following the recent fires this year in Sonoma, Los Angeles, Ventura, and San Bernardino counties.

## On the Lighter Side (On Aging):