CAIIA Status Report

MARCH 2005

CAIIA Needs Volunteers

Your Association is exhibiting at the
Combined Claims Conference on March 16 & 17.
This event is being held at the
Palms Resort in the City of Industry.
If you spend some time at the booth, the Association
will pay for your attendance for the day or
days you are at the booth.
Let Sterrett Harper know if you want to do this at
(818) 953-9200 or **harperclaims@hotmail.com**.

Weekly Law Resume

Prepared by Low, Ball & Lynch, Attorneys at Law

Editor's Note
The following case may well change how first party property claims are handled when it comes to sewer backups. You may wish to check with your client or supervisors when handling a sewer backup in the future.
As of press time, this case is still "good law" in California.

Property Coverage – Exclusions – Sewer Backup

Penn-America Insurance Company v. Mike's Tailoring, Court of Appeal, Third District, (January 11, 2005)
No California case has construed the standard exclusion in property insurance for water that backs up through a sewer or drain. This case decided whether the exclusion applied to damage caused by pollutants.
Penn-America Insurance Company insured Mike's Tailoring under a property policy. It excluded loss caused by water that backs up from a sewer or drain.
A sewer pipe serviced Mike's premises and an adjacent property and ran beneath the concrete floor of Mike's basement. The pipe was connected to a cleanout pipe. They were joined beneath Mike's basement floor, and the cleanout pipe ascended vertically at an angle until it

Continued on page 3

PUBLISHED MONTHLY BY
California Association of Independent Insurance Adjusters

An Employer Organization of Independent Insurance Adjusters

Inside This Issue

CAIIA Needs Volunteers 1
Weekly Law Resume 1
President's Message 2
HRB Insurance Law Update 4
CAIIA Calendar 4
Employers Must Post Injuries 6
Tort Reform 'Wacky' List 6
Exec. Off. Duty Dist. ..... Back Page

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■ PRESIDENT'S MESSAGE

When I think back to the days when my wife Elaine and I decided to leave the ranks of being "staff adjusters" to form "our own" independent insurance adjusting company, I suspect that we were faced with the same sense of shock as the rest of our brethren when struck with the sudden realization that we were actually "on our own". Suddenly, the security of that insurance company's paycheck, benefits, vacation time and the multitude of other things we took for granted as "staff adjusters"…were no longer guaranteed. As a staff adjuster, I remember sitting at a desk and overseeing independent adjusters thinking they actually were paid the hourly rate they charged. Was I ever naive! Who knew that from the amount independent adjusters charged that they actually had to deduct expenses for office overhead, clerical, medical insurance, auto insurance, E&O insurance, workers compensation insurance (hey, were in the business…shouldn't we be given insurance for free?), automobiles…taxes, more taxes…the list just never seems to end! Although there are benefits to working for an insurance carrier, there is something to say for producing a product yourself…in our case, a service whose value is the years of knowledge and experience we bring to our clients and the insuring public. Most Independent Adjusting (I/A) companies are small businesses comprised of mostly one-office operations. Being a small business doesn't mean acting small or being anything but professional. The CAIIA acts to assist our members by giving the tools and opportunities a small office may not be able to afford alone. Thus, we are able to give our clients better service and a better product. As reported previously, a contingent from the CAIIA was asked to be part of a group to re-write the license test for independent adjusters. We recently received word from the Department of Insurance that they will start utilizing the new tests in the next few months. They also wanted to thank the CAIIA for being a partner with them in improving the quality and professionalism of this industry. We were happy to help! The DOI has, on numerous other occasions, sought out the CAIIA for feedback and input on other matters. We are pleased to be members of an association that the DOI recognizes what we already knew…that we are members of the best "go to" claims professional organization around!

By the time you receive this, we will be in the midst of the CAIIA SEED program (Seminar for the Evaluation of Earthquake Damage) in compliance with the requirements of the Insurance Code Section 10089.3 and CCR 2695 dealing with Insurance Adjuster Training for Evaluating Earthquake Damage. When we formed this joint effort between the CAIIA, Exponent Failure Analysis Associates, and McCormick, Barstow, Sheppard, Wayte & Carruth, LLP, our plan was intended that the SEED program be the model for what the legislators intended and what we expect our industry should be providing to our insuring public, professional handling of earthquake claims. I am proud of the efforts of all those who have put forth numerous hours to prepare for this information packed seminar. I foresee this program to be conducted each year in conjunction with the Fair Claims Settlement Practice Regulations Recertification Seminars which has been a CAIIA success. If you are an insurance company claims person or independent claims adjuster who has not been certified yet, take advantage of this program from the people who spearheaded the CUREE project (the group whose standards will now guide earthquake repairs). If you have any questions or want more information, contact me at scsdj@southwestclaims.com or visit us online at www.caiia.org.

DOUG JACKSON, RPA
President - CAIIA 2004-2005

Continued from page 1

entered the basement floor of Mike's premises. Approximately 25 feet from the entrance, the pipe broke. This allowed solid matter in the wastewater to collect at that point, resulting in a blockage. Water and waste accumulated and came out of the pipe at the cleanout. This flooded Mike's basement and damaged his property.

A trial court concluded the loss was covered because the sewer backup exclusion applied to damage caused by water, not damage caused by pollutants carried by the water. Penn-America appealed.

The Court of Appeal reversed. The Court of Appeal found the exclusion to be unambiguous. A lay person reading the policy would assume that the backup of water from a sewer would contain both water and contaminants. The exclusion thus would apply to this loss. The Court found no published California case on this point. However, it noted that out-of-state cases supported their conclusion.

The Court found the efficient proximate cause analysis did not apply in this case. That analysis only applies where a loss is caused by a combination of covered and excluded risks. It does not apply where there is a loss resulting from a single cause. In this case, the loss was caused by the backup of the sewer pipe.

The Court rejected arguments that the term "backup" was ambiguous. It further rejected the argument that the exclusion did not apply if the blockage was within the insured premises. This was based upon an argument that "sewer" refers to a public line and "plumbing" refers to a private line. However, the Court noted that there was no language in the policy to support this argument. There was no coverage provision in the policy that included damage from the discharge of water from a plumbing system. Thus, this argument had no relevance.

The Court concluded the sewer backup exclusion excluded loss or damage caused by sewage and pollutants contained in the sewer water, and the loss was excluded from coverage. The judgment was reversed.

COMMENT

This is a common exclusion which has received different treatment by various insurers. This opinion should help clarify the approach to handling these claims.

Duty of Care – Sidewalks – Abutting Landowner

Joanne D. Gonzales v. City of San Jose, Court of Appeal, Sixth District, (January 11, 1005)

The rule in California has long been that an abutting landowner has a duty to pay for repairs to a public sidewalk, but has no liability for injuries that occur on a sidewalk, absent other circumstances. This case concerns a City of San Jose ordinance that created an abutting landowner's duty of care to pedestrians for injuries that occurred on public sidewalks.

Joanne D. Gonzales tripped and fell over a rise in a public sidewalk in front of a commercial building in San Jose, California. Charles Huang owned the commercial building. Gonzales sued Huang and the City of San Jose for her injuries. Huang moved for summary judgment, asserting he had no liability because the injury occurred on property owned by the City of San Jose, and thus, he did not owe a duty to Gonzales. In addition, he claimed that San Jose Municipal Code section 14.16.2205, which made an adjacent landowner liable to third persons who were injured as a result on a condition on a city-owned sidewalk, was unconstitutional. The trial court granted the motion, holding the ordinance unconstitutional. Judgment was entered in favor of Huang, and Gonzales and San Jose filed an appeal.

The Court of Appeal reversed. The Court upheld the ordinance as constitutional. The Court noted that California state law and San Jose municipal ordinances prior to 1990, imposed an obligation on an abutting landowner to pay for repairs to a sidewalk, but did not impose a duty of care on abutting landowners for injuries that occurred on the sidewalk. In 1990, San Jose passed an ordinance to impose this duty on adjacent landowners.

There was no showing that the State had manifested

Continued fon page 4

Weekly Law Resume

Prepared by Low, Ball & Lynch, Attorneys at Law

Continued from page 3

an intent to occupy the area of liability of private parties for injuries occurring on public property. Thus, there was no showing of preemption of the area of tort liability for private property owners by the State. In sum, the Court found no constitutional prohibition for a city such as San Jose to impose a duty of care on abutting landowners to third parties for injuries that occur on city-owned sidewalks.

The Court noted that San Jose was not absolved of responsibility for the condition of the public sidewalk. The ordinance served an important public purpose of having abutting landowners assume responsibility for the maintenance of safe sidewalks adjacent to their property. The Court thus found the ordinance to be constitutional. It was within the powers of the City of San Jose, state law did not preempt it, and there was no conflict between state law and the ordinance. Because of the important public policy incentives encouraged by the ordinance, the Court felt it should be upheld.

The judgment of the trial court was reversed.

COMMENT

Very few cities have enacted the ordinance discussed in this case. As a result, in those cities where this ordinance does not exist, the abutting landowner will not be liable for sidewalk injuries unless some conduct on his part helped create or worsened the condition.

Continued on page 7

HRB Insurance Law Update

Prepared by Hancock, Rothert & Bunshoft, LLP

Fiege v. Cooke, California Court of Appeal, Second District, Division One, Case No B172918, filed December 23, 2004; Published January 24, 2005

The California Court of Appeal held that a settlement agreement was enforceable as to insured defendants who did not attend the settlement conference.

This case arose when the plaintiff sued several defendants over a traffic accident. The defendants were all insured under policies that gave the insurers the right to settle without the defendants' consent, and the right to bind the defendants to the settlement. The matter went to a mandatory settlement conference at which the insurers agreed to pay to settle the plaintiff's claims. The trial court secured the plaintiff's oral consent to the settlement. The defendants were not present at the settlement conference, nor did they stipulate in writing to the settlement. The plaintiff later sought to avoid the settlement. In response, the defendants successfully moved under Code of Civil Procedure section 664.6 to enforce the settlement. The trial court entered a judgment consistent with the settlement terms. The plaintiff appealed, alleging that the trial court erred in enforcing the settlement.

The Court of Appeal noted that Code of Civil Procedure Section 664.6 provides, in part, that "[I]f parties to pending litigation stipulate, in a writing singed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the

Continued on page 5

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.

Continued from page 4

settlement." The California Supreme Court held in Levy v. Superior Court, 10 Cal.4th 578, 586 (1995), "that the term 'parties' as used in section 664.6 . . . means the litigants themselves, and does not include their attorneys of record." The plaintiff in this case argued that his authority made the settlement invalid because only the insurers were present at the settlement conference, not the defendants themselves. The Court of Appeal rejected the plaintiff's argument and found that the settlement was enforceable. The Court of Appeal distinguished the situation in this case, where the insurers covered the settlement under a policy that gives them right to settle without the insureds' consent, and held that this settlement was enforceable because the insurer had attended the conference. In reaching this decision, the Court followed Robertson v. Chen, 44 Cal.App.4th 1290 (1996).

Essex Insurance C. v. Five Star Dye House, Inc., California Court of Appeal, Second District, Division Five, Case No. B167295; Filed January 27, 2005

The California Court of Appeal held that an insured may assign its right to recover attorney fees incurred in obtaining the benefits of an insurance policy, where the insurer acted in bad faith in denying its obligations owned under the policy.

This case arose when, Five Star, as assignee of the insured's claims against the insurer Essex, sought to recover the attorney fees it incurred in bringing its claim for breach of the insurance contract. Although the trial court in this case found that the insurer had acted in bad faith, it denied Five Star's request, holding that the right to recover such attorneys fees is not assignable, citing Xebec Development Partners v. National Union Fire Ins. Co., 12 Cal.App.4th (1993). The California Court of Appeal reversed the trial court's decision on this issued, stating that it disagreed with the result reached in Xebec. Rather, contrary to the Xebec decision, the Court of Appeal in this case held that an award of attorneys' fees for insurer bad faith is not a purely personal loss to the insured and therefore is assignable.

American Casualty Company of Reading, PA v. General Star Indemnity Co., California Court of Appeal, Second District, Division Three, Case No. B172017; Filed January 27, 2005

The California Court of Appeal held that limitations in an indemnification agreement did not preclude enforcement of an "additional insured" endorsement provided by the indemnitor's liability insurer.

This case arose from a dispute between liability insurers regarding the scope and extent of coverage under an "additional insured" endorsement to a general liability policy that had been issued to an independent motion picture company. The endorsement purported to provide coverage to a movie studio in connection with the filming of a movie. The principal issues on appeal were (1) whether Civil Code section 2782 may be applied to limit coverage, not otherwise disputed, under an "additional insured" endorsement, and (2) the effect on that coverage by the provisions of an indemnity agreement executed between the insured motion picture company and the movie studio. Civil Code section 2782 declares that any provision purporting to indemnify a promisee for any injury or loss "arising from the sole negligence or willful misconduct" of the promisee is unenforceable as contrary to public policy.

The California Court of Appeal held that while section 2782 may preclude enforcement of a indemnification agreement, it does not limit the enforcement of an "additional insured" endorsement provided to the indemnitee by the indemnitor's liability insurer. The Court also held that the provisions of the contract of indemnity will not preclude enforcement by the indemnitee of its claim for coverage under the additional insured endorsement. Finally, the Court held that where a claim has been resolved and satisfied by applicable primary coverage, an excess insurer may not be required to drop down and contribute to the cost of such resolution.

In making its determination, the Court of Appeal relied on Acceptance Ins. Co. v. Syufy Enterprises, 69 Cal.App.4th 321 (1999), Fireman's Fund Ins. Co. v. Atlantic Richfield Co., 94 Cal.App.4th 842 (2001), and Vitton Construction Co., Inc. v. Pacific Ins. Co., 110 Cal.App.4th 762 (2003).

Employers Must Post Injuries Starting Feb. 1

January 17, 2005

Beginning Feb. 1, employers must post a summary of the total number of job-related injuries and illnesses that occurred last year, the Occupational Safety and Health Administration recently noted.

Employers are only required to post the Summary (OSHA Form 300A) – not the OSHA 300 Log – from Feb. 1 to Apr. 30, 2005.

The summary must list the total numbers of job-related injuries and illnesses that occurred in 2004 and were logged on the OSHA 300 form. Employment information about annual average number of employees and total hours worked during the calendar year is also required to assist in calculating incidence rates. Companies with no recordable injuries or illnesses in 2004 must post the form with zeros on the total line. All establishment summaries must be certified by a company executive.

The form is to be displayed in a common area wherever notices to employees are usually posted. Employers must make a copy of the summary available to employees who move from worksite to worksite, such as construction workers, and employees who do not report to any fixed establishment on a regular basis.

Employers with 10 or fewer employees and employers in certain industry groups are normally exempt from federal OSHA injury and illness recordkeeping and posting requirements. A complete list of exempt industries in the retail, services, finance and real estate sectors is posted on OSHA's Web site.

Exempted employers may still be selected by the Labor Department's Bureau of Labor Statistics to participate in an annual statistical survey. All employers covered by OSHA need to comply with safety and health standards and must report verbally within eight hours to the nearest OSHA office all accidents that result in one or more fatalities or in the hospitalization of three or more employees.

Copies of the OSHA Forms 300, 300A and 301 are available on the OSHA Recordkeeping Web page in either Adobe PDF or Microsoft Excel Spreadsheet format.

Toilet Brush Warning Tops Michigan Tort Reform Group's 'Wacky' List

January 10, 2005

A flushable toilet brush that warns users, "Do not use for personal hygiene" has been identified as the nation's wackiest warning label in an annual contest sponsored by Michigan Lawsuit Abuse Watch.

The wacky warning label contest, now in its eighth year, is conducted to reveal how lawsuits, and concern about lawsuits, have created a need for common sense warnings on products, the group said in a statement.

Over the past twelve months, MLAW has received hundreds of labels – all from products made by American manufacturers – from people living in many different countries. The winning labels were selected by listeners of the Dick Purtan morning show on Detroit radio station WOMC-FM from a list of finalists selected by MLAW.

The toilet brush label was found by Ed Gyetvai, of Oldcastle, Ontario. He received $500 and a copy of the national best-selling book, The Death of Common Sense, by Philip K. Howard.

The $250 second place award went to Matt Johnson of Naperville, Ill., for a label on a popular scooter for children that warns: "This product moves when used".

Third place and $100 went to Ann Marie Taylor of Camden, S.C., who found the following warning on a digital thermometer that can be used to take a person's temperature several different ways: "Once used rectally, the thermometer should not be used orally".

Fourth place was a label on an electric hand blender promoted for use in "blending, whipping, chopping and dicing", that warns: "Never remove food or other items from the blades while the product is operating". The item was sent in by Ken Stein of Berkeley, Calif.

In fifth place was a label on a nine-by-three-inch bag of air used as packing material. It carried this warning: "Do not use this product as a toy, pillow or floatation device". Sent in by Chrisen Millard of Westerville, Ohio.

The group hopes the list will motivate "judges to get tougher on frivolous lawsuits".

Weekly Law Resume

Prepared by Low, Ball & Lynch, Attorneys at Law

Continued from page 4

Duty of Care – Criminal Acts

Aaron Wiener v. South Coast Care Centers, Inc., California Supreme Court, (May 4, 2004)

The liability of landowners for injuries inflicted by criminal conduct of others continues to receive examination by the courts. This Supreme Court decision examines the requirements to impose liability on landowners for the criminal acts of third parties.

South Coast Child Care Centers, Inc. (South Coast), leased child care property from First Baptist Church of Coast Mesa (Church). The center was located on a busy street corner. It was enclosed by a chain link fence. Steven Abrams intentionally drove a large automobile through the fence onto the playground and into a group of children. Two children died, and several were injured. Their parents sued South Coast and the Church alleging negligence.

The claim against the Church and South Coast was that the fence was inadequate to prevent this type of act. It was undisputed that there had been no previous acts of a similar nature on the property. The trial court granted summary judgment for the defendants. A Court of Appeal reversed the judgment, holding that the possibility of a motorist careening through the fence was a foreseeable event so that the defendants had a duty to build a stronger fence. On petition to the Supreme Court, review was granted.

The Supreme Court, in a unanimous decision, reversed the Court of Appeal and affirmed the trial court. The basis of the Supreme Court decision was that the property owners and childcare center should not be liable because the criminal act involved was totally unforeseeable. The Court reiterated its prior rule that landowners are required to maintain their land in a reasonable safe condition. This includes taking reasonable steps to secure common areas against foreseeable criminal acts of third parties that are likely to occur in the absence of precautionary measures. Such a duty is imposed only where the criminal conduct can be reasonably anticipated. In the case of a criminal assault, liability will rarely be imposed in the absence of prior similar incidents.

The Court stated that cases involving third party criminal acts are to be analyzed differently from cases involving ordinary negligence. Before Liability can be imposed, a heightened sense of foreseeability is required. This is because it is impossible to predict when criminal acts may strike. Further, if a criminal decides on a particular goal or victim, it is extremely difficult to remove every means for achieving that goal.

In this case, the Court found no duty to plaintiffs because Abrams' criminal act was unforeseeable. There was no evidence of prior acts of violence at the site in the past and no evidence that the defendants had been the target of any prior criminal acts. Because Abrams' act was impossible to anticipate and the particular criminal conduct was so outrageous and bizarre, it could not have been anticipated under any circumstances. Because the plaintiffs had not shown that Abrams' act was foreseeable, a duty could not be imposed on the landowners to create a fortress to protect the children or even to take further steps to deter or hinder a vicious murderer, unconcerned about the safety of innocent children. The Court of Appeal decision was reversed, with directions to affirm the award of summary judgment in the defendants' favor.

Two concurring justices indicated that they agreed with the decision, but did not feel it was necessary to focus on the intent of the driver.

COMMENT

This decision is helpful in distinguishing between criminal acts of third parties and acts of ordinary negligence of third parties. By placing a heightened burden on plaintiffs to prove liability, it is more difficult to hold landowners liable for the criminal acts of third parties.

True Facts About Growing Older

1. *Eventually you will reach a point when you stop lying about your age and start bragging about it.*
2. *The older we get, the fewer things seem worth waiting in line for.*
3. *Some people try to turn back their odometers. Not me – I want people to know why I look this way. I've traveled a long way and some of the roads were not paved.*
4. *When you are dissatisfied and would like to go back to youth, just think of Algebra.*
5. *You know you are getting old when everything withers, dries up, or leaks.*
6. *I don't know how I got over the hill without getting to the top.*
7. *One of the many things no one tells you about aging is that it is such a nice change from being young.*
8. *One must wait until evening to see how splendid the day has been.*
9. *Being young is beautiful, but being old is comfortable.*
10. *Long ago when men cursed and beat the ground with sticks, it was called witchcraft. Today it is called golf.*
11. *If you don't learn to laugh at trouble, you won't have anything to laugh at when you are old.*

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