CAIIA Status Report

DECEMBER 2007

Golf Tournament A Huge Success

This year the CAIIA held what hopes to be an annual gold tournament. It was held in Anaheim, CA, and was a sellout.

Because of the great success, the CAIIA was able to send a letter to the Juvenile Diabeties Association, a charity near and dear to our President Peter Schifrin. Below is the text of the letter Peter sent to this year's charity.

> *Dear Gentleperson:*
> *It is with great pleasure that I attach a check in the amount of $4,205.00.*
>
> *Our Association raised these funds during our First Annual Golf tournament.*
>
> *As the incoming President, I was able to choose the charity. It was an easy choice, given that my daughter Grace is Type 1 diabetic.*
>
> *Please put the monies to good use!*
>
> *Regards,*
>
> *California Association of Independent Insurance Adjusters*
>
> *Peter H. Schifrin, RPA*

The CAIIA hopes to repeat this each year with the location of the tournament changing from North to South to give all of our members and clients a chance to help worthwhile charities.

Participating in the huge success of the golf tournament are members Don Ferguson of Hunt Ferguson, Salinas, Dave Dawson of AIMS, Los Alamotis, Gene Roberts, Gene Roberts Claims Service, San Clemente and Dean Beyer , AIMS, Sacramento.

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An Employer Organization of Independent Insurance Adjusters

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If you would like to receive the *Status Report* via e-mail please send your e-mail address to *info@caiia.org*.

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PRESIDENT'S MESSAGE

Another typical morning for a CAIIA President: After waking up, going for a two mile run and having a cup of coffee I went to my weekly breakfast meeting with Insurance Commissioner Steve Poizner. Here is a transcript:

PS: These recent Fires are a terrible tragedy. What can the CAIIA do to help?

SP: Lets make sure all of the experienced, well trained, California domiciled CAIIA member firm adjusters work the claims before any out of state CAT adjusters are brought in.

PS: Thanks Steve, breakfast is on me. Each time a tragedy strikes California our members watch with disappointment as insurers call in out of state adjusters to assist with claims before utilizing our members. Several members have recently asked me how we can get the work before it "leaves the state."

I personally don't believe that the Department of Insurance has any interest in telling insurers how to handle their claims. Even when the DOI called for earthquake certifica tion, they left insurers the out of using non-certified adjusters if they choose to. If we want more work, we need to create opportunities in advance of the next event. Let's start by capitalizing on the assignments our member firms already have access to.

Over the next few months I will be speaking with members to determine if we can create a plan to share work during catastrophes. We have mem ber firms that need extra adjusters when a catastrophe strikes in their service area, and they should be able to call on other member firms that have the desire and ability to provide extra staffing. Further, relationships forged during special events can often lead to work during calm times as well.

Each member firm could identify its CAT capabilities and this could be indicated in our Directory and on the Website. A Committee could be formed to oversee the sharing of work and to insure that all members act responsibly. That Committee could make sure guidelines are set in areas including proper qualifications and non-solicitation of the referring firm's clients. If anyone has ideas or thoughts on this subject, please contact me.

We have set the Midterm Convention for February 21-22 at the Sahara Hotel in Las Vegas. I suggest starting to set some spending cash aside now!

If you have any suggestions, questions or just want to say hello, please don't hesitate to call or email me.

PETER SCHIFRIN
President - CAIIA 2007-2008

MEDIATION CONFIDENTIALITY

Submitted by Berman, Berman & Berman, LLP, Los Angeles, CA

From time to time legal issues come to our attention that we believe are unique or yield unexpected results. One such recent issue is mediation confidentiality. As described below, mediation confidentiality as currently legislated in California has been granted substantial weight to the exclusion of otherwise sanctionable conduct or punishable wrongs.

The case which highlights the issues is Wimsatt v. Superior Court, ruled on by the California Court of Appeal at 152 Cal.App. 4th 137 (June 18, 2007). In that matter, Mr. Wimsatt was one of the attorneys representing a plaintiff (Corey Kausch) who was injured in an airplane crash. Through the mediation process, the matter was settled and Mr. Kausch signed a stipulation for settlement and, thereafter, a settlement agreement and mutual release. Mr. Kausch received and endorsed the settlement check.

Subsequently, Mr. Kausch filed a legal malpractice complaint against his attorneys including William H. Wimsatt. In the complaint, Mr. Kausch alleged that his attorney breached his fiduciary duty by "lowering his settlement demand by more than one half, from $3.5 million to $1.5 million, which was done without the knowledge, permission or consent of Kausch."

Mr. Wimsatt maintained that he was aware of only one settlement demand authorized by Mr. Kausch, which was in the amount of $3.5 million dollars. Mr. Wimsatt further stated that he did not at any time submit a demand on behalf of Mr. Kausch to the other side for any other amount than $3.5 million dollars.

The court of Appeal opined in this matter that notwithstanding the impact of mediation confidentiality upon unpunished sanctionable conduct and even conduct that obstructed the mediation process, the California Legislature established the statutory scheme which requires "confidentiality against a policy that might better encourage good faith participation in the (mediation) process." The Court of Appeal stated in its conclusion:

> Our Supreme Court has clearly and unequivocally stated that we may not craft exceptions to mediation confidentiality. The Court has also stated that if an exception is to be made for legal misconduct, it is for the Legislature to do, and not the Courts. We are bound to follow this precedent, even if we might have concluded that other public policies warrant an approach to confidentiality that is not absolute. Thus, the trial court erred in creating an exception to mediation confidentiality.
>
> The stringent result we reach here means that when clients such as Kausch, participate in mediation they are, in effect, relinquishing all claims for new and independent torts arising from mediation, including legal malpractice causes of action against their own counsel. Certainly clients, who have a fiduciary relationship with their lawyers, do not understand that this result is a by-product of an agreement to mediate. We believe that the purpose of mediation is not enhanced by such a result because wrongs will go unpunished and administration of justice is not served. (Citations omitted.)

In closing, the impact of mediation confidentiality may prove at times to be an appropriate strategy for the benefit of clients while on other occasions, such as in the Wimsatt matter, it may prove to defeat the interest of the client. It also creates an issue that may be troubling to all counsel – whether they have a duty to inform their clients prior to agreeing to mediation of the confidentiality rule and the possible consequences resulting therefrom. Simply stated: "What happens in mediation, stays in mediation."

NEWS OF MEMBERS

The Board of the CAIIA announced that it has appointed Don Ferguson of Hunt and Ferguson, Salinas, as an Honorary Member of the CAIIA for his long dedication to the Association. Don's company has been a member since 1961. He was President of the CAIIA 1985 to 1986. He has been on the Board several times over the years and has been to more of our meetings than anyone else. We all owe Don a great deal for his unwavering loyalty to the CAIIA.

Don wrote to Peter Schifrin, our current President:

> *Wow! You guys really do it up in a big way. Again thank you so much. This was an unprecedented award for some one still working and I cannot express my appreciation for this very special award. Thank you again and again.*
>
> *Don Ferguson*

The Status Report and all of the members of the CAIIA congratulate Don on his lofty achievement.

Weekly Law Resume

Prepared by Low, Ball & Lynch, Attorneys at Law, San Francisco, CA

Bad Faith - Privileged Communications

Zurich American Insurance Company v. Superior Court, (October 11, 2007)Court of Appeal, Second District

The scope of the attorney-client privilege with respect to attorney communications to an insurance company are often the subject of debate in bad faith litigation. This case explores those limits.

Zurich American Insurance Company and Watts Industries, Inc. had been involved in coverage litigation for years. The instant case involved claims of bad faith for failure to provide coverage. During discovery, Watts requested production of Zurich documents, including documents from its claims file. Zurich objected, invoking the attorney-client privilege and the attorney-work product doctrine. After meet and confer sessions, Watts moved to compel production, claiming the documents were not protected. The trial court granted a motion to compel in part, ordering Zurich to produce for inspection in court documents withheld on the attorney-client privilege, the work product privilege or litigation privilege. A portion of the documents concerned reserve or reinsurance information. The court referred the matter to a discovery referee for an in camera inspection. The referee rejected a broad privilege and stated all documents had to be produced, except actual letters from outside counsel. The production included internal communications regarding the plans and strategy for the case. The trial court adopted the referee's ruling. Zurich filed a petition for writ of mandate or prohibition to seek to reverse the court's order.

The Court of Appeal issued an order to show cause and conducted a hearing. In reviewing the scope of the attorney-client privilege, the court concluded the trial court had adopted too narrow an approach. The Court stated that under Evidence Code §952, the privilege covers all forms of communication to persons whose involvement is reasonably necessary to further the purpose of the legal consultation. Where a corporation is involved, advice of attorneys must be communicated to others within the corporation. It is neither practical nor efficient that each corporate employee charged with implementing the legal advice meet with the attorney or receive verbatim excerpts of the advice given.

The Court stated that the referee and the trial court should have determined whether any document contained a discussion of legal advice or strategy. If it did, the document was privileged. The Court should then have determined whether there was a waiver of the privilege by the corporation. As long as the documents were distributed only to those reasonably necessary to review the documents, the documents would remain privileged.

The Court remanded the matter to the trial court to determine whether the Zurich employees with whom the advice of counsel was shared needed to be involved with the communication. If so, the document was to be considered privileged. If not, it was subject to discovery.

The Court stated documents dealing with routine matters where corporate counsel is carbon copied are not privileged. Furthermore, facts may not be shielded from discovery by incorporating them into a communication involving an attorney.

A writ of mandate was issued requiring the court to conduct a review of the disputed documents to determine whether the privilege applied.

COMMENT

This decision attempts to provide some ground rules for the application of the attorney-client privilege within a corporation. It should be read when considering the assertion of the privilege in any bad faith litigation.

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Civil Procedure – Statute of Limitations – Construction Defect

Landale-Cameron Court, Inc. v. Petri Ahonen, (October 10, 2007)Court of Appeal, Second District

The statute of limitations in a construction defect case can be complicated to determine. This case concerns the calculation of the statute where a notice to builder of defects has been given.

The complaint filed on January 19, 2001 by the Landale-Cameron Court, Inc. (HOA) sought damages from the builder-developer, Arnold and Helen Kaufman, and Petri Ahonen, dba Riteway Decking & Flooring, a subcontractor, for water leaks during rains. The causes of action were based on negligence and contract.

In June, 2005, Riteway filed a motion for summary judgment based in part on the fact that the complaint was filed more than three years after the leaks were noticed in the property. There was evidence the leaks were first noticed in 1997. The HOA contended the statute of limitations was tolled pursuant to Civil Code §1375 because an effort was made to resolve and repair the defects and there was a letter agreement between the parties tolling the statute until either side notified the other they wished to terminate the tolling agreement. The trial court entered a judgment against the HOA and in favor of Riteway. The HOA appealed.

The Court of Appeal reversed. The Court noted that the parties had stipulated to toll the statute of limitations pursuant to former Civil Code §1375. This section set forth an automatic 150-day tolling period upon the filing of the requisite notice and provides a longer period when the parties agreed in writing to such tolling. The Court held this tolling provision operated not only against the builder, but also subcontractors on the job. The letter between the parties sufficiently established the tolling of the statute of limitations as to the negligence cause of action and summary judgment was erroneously granted as to that cause of action.

The Court held that the cause of action for breach of third-party beneficiary contract was flawed. In this cause of action the HOA tried to rely on the warranty between Riteway and Kaufman as a basis for its suit. The HOA was not in existence at the time of the warranty. It failed to submit evidence that it was an intended third-party beneficiary of the Riteway-Kaufman contract. Thus, the summary judgment was sustained as to that cause of action.

Finally, the Court indicated no one was entitled to an award of attorneys' fees at this point because the case had to be reversed and sent to the trial court for resolution.

COMMENT

The ruling clarifies an application of this Code section and how its current version is likely to be applied. As such, it should be of assistance to parties involved in such litigation in attempting to figure out the applicable statute of limitations.

Insurance Coverage - Excess v. Primary - Indemnity Agreement

California Capital Insurance Company v. Farmers Insurance Group, (October 18, 2000)Court of Appeal, Fifth District

In cases where there are indemnity agreements between the parties as well as insurance, it is not uncommon that questions arise as to how the insurance will be applied to the claim. This case explores that issue.

A 7 year old child fell off the roof of a storage shed located adjacent to an apartment she lived in with her mother. The property was owned by Lin

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Kwock. Kwock employed Edmondson Property Management to manage the complex. Both Kwock and Edmondson were named as defendants in the personal injury action that was filed. Kwock was insured by California Capital Insurance Company. Edmondson was an additional insured under that policy by virtue of its role as property manager. Additionally, Farmers Insurance Group insured Edmonson.

California Capital defended both defendants. The lawsuit eventually settled with California Capital paying the entire sum. Fifty thousand dollars was apportioned as payment on behalf of Kwock and five hundred thousand dollars was allocated as payment from Edmondson.

California Capital filed an action against Farmers seeking contribution for the amount paid to settle the action. There was an indemnity provision in the Property Management Agreement indemnifying Edmondson. The trial court found the indemnity agreement provided indemnification only for Edmondson's passive negligence. The court found Edmondson guilty of active negligence. The court concluded that both policies were primary policies and thus were liable for 50% of the settlement paid. Farmers appealed.

The Court of Appeal affirmed. It focused on whether the indemnity provisions in the Property Management Agreement affected California Capital's right to seek contribution from Farmers. It noted first that, in the absence of any indemnity agreement, where multiple insurance carriers insure the same insured and cover the same risk, each insurer is equally and concurrently liable for the loss. This right is based upon equity and not the insurance contracts or rights of subrogation.

The Farmers policy contained a provision that made it excess if there was any other primary insurance. The court rejected this language, stating the Farmers policy was a primary policy issued to Edmondson and its excess language would not be given effect in a contribution action by another carrier which bore the same risk.

Farmers next argued that, under the indemnity agreement, Kwock assumed the obligation of indemnifying Edmondson, thus making Farmers excess. The Court noted that in some cases the presence of an indemnity clause may render one of two primary insurance policies excess to the other. However, this must be based upon the contractual language and the intent of the insureds. The Court stated that the question is one of contract interpretation, by determining what conduct or claims of the parties intended by their indemnity agreement to protect the indemnitee against and whether the parties intended to make the insurance obtained by the indemnitor primary to that obtained by the indemnitee. If the conduct alleged or claimed falls within the protected categories and the intent was to make the insurance obtained by the indemnitor primary, then the agreement should be enforced and contribution denied. If either prong is missing, then contribution should apply.

In this case, the Court found the indemnity contract did not address whether Kwock would fully indemnify Edmondson against claims generated as a result of Edmondson's own negligence. There was no explicit language covering the active negligence of Edmondson. An insurance company seeking to defeat a claim of equitable contribution must prove the indemnification agreement would bar any recovery between the insureds before it can successfully claim equitable contribution would negate the negotiated contract between the parties. The Court in this case found no such language in the agreement. Thus, since both Farmers and California Capital issued primary insurance policies covering the same risk at the same level of insurance, Farm-

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ers was required to pay its fair share of liability paid by California Capital. It affirmed the apportionment in this case on a 50/50 basis. The judgment was therefore affirmed.

COMMENT

This case gives us some guidance with respect to the inter-relationship of insurance provisions and indemnity agreements. In the absence of explicit language indicating that indemnity is to overrule the insurance provisions, the insurance policy interpretation rules regarding primary and excess coverage will apply.

Uninsured Motorist Coverage - Proration of Policies

Allstate Insurance Company v. Mercury Insurance Company, (August 31, 2005)Court of Appeal, Second District

California Insurance Code §11580.2(d) provides that where more than one insurance policy provides uninsured motorist coverage, the coverage is to be prorated. The issue in this case is whether that Code section overrides a policy provision that provided it was excess to any other available coverage.

Allstate Insurance Company sued Mercury Insurance Company for declaratory relief and equitable contribution arising out of an uninsured motorist claim. Meyan Mendoza was a passenger in a vehicle driven by Ivanrey Capistrano. Mercury insured the Capistrano vehicle. At an intersection, an uninsured motorist drove through a red light and collided with the Capistrano vehicle. Ms. Mendoza suffered personal injuries. Allstate Insurance Company insured the vehicle owned by the Mendoza family. Mercury had uninsured motorist limits of $30,000 per person and Allstate had uninsured motorist limits of $250,000 per person. The Mercury policy provided for proration between the applicable coverages. The Allstate policy provided its policy was excess.

Ms. Mendoza filed a claim that was resolved for $52,000. A dispute arose between the insurers as to contribution to the settlement. Mercury contributed $18,150 and Allstate contributed $34,350. This litigation ensued.

Mercury filed for summary judgment, which was granted by the trial court. Allstate appealed.

The Court of Appeal affirmed. The Court indicated §11580.2 sets forth the minimum requirements for uninsured motorist coverage. It permits uninsured motorist policies to require proration if there is coverage under more than one uninsured motorist policy. It further provides that the damages shall not be deemed to exceed the higher of the applicable limits of the respective coverages with the damages being prorated.

The Court stated this section was created to avoid endless squabbles between insurance carriers over coverage. The Court stated that although an uninsured motorist policy is not required to include a proration method of allocation, if it does so, the provision should be given effect. No language in the section authorized an excess coverage provision to predominate over a proration provision. To conclude so would nullify the proration language. Thus, where a proration provision is included in an uninsured motorist policy, it must be given effect.

The Court therefore concluded that the trial court correctly prorated coverage between the two policies and Mercury was entitled to summary judgment. The judgment was affirmed.

COMMENT

This decision should put to rest any questions regarding the effect of a proration provision in an uninsured motorist policy. According to this decision, the proration provision prevails.

RAILROADS

Does the statement, “We’ve always done it like that” ring any bells??? Read this article to the end; you’ll love it!!

The U.S. standard railroad gauge (distance between the rails) is 4 feet, 8.5 inches. That’s an exceedingly odd number.??? Why was that gauge used?

Because that’s the way they built them in England, and English expatriates built the US Railroads.?

Why did the English build them like that?

Because the first rail lines were built by the same people who built the pre-railroad tramways, and that’s the gauge they used.

Why did “they” use that gauge them?

Because the people who built the tramways used the same jigs and tools that they used for building wagons, which used that wheel spacing.

Okay!?? Why did the wagons have that particular odd wheel spacing?

Well, if they tried to use any other spacing, the wagon wheels would break on some of the old, long distance roads in England, because that’s the spacing of the wheel ruts.

So who built those old rutted roads??

Imperial Rome built the first long distance roads in Europe (and England) for their legions.?? The roads have been used ever since.

And the ruts in the roads?

Roman war chariots formed the initial ruts, which everyone else had to match for fear of destroying their wagon wheels. Since the chariots were made for Imperial Rome, they were all alike in the mater of wheel spacing.?

The United States standard railroad gauge of 4 feet, 8.5 inches is derived from the original specifications for an Imperial Roman war chariot. And bureaucracies live forever.

So the next time you are handed a specification and wonder what horse’s ass came up with it, you may be exactly right, because the Imperial Roman army chariots were made just wide enough to accommodate the back ends of two war horses.

Now, the twist to the story.

When you see a Space shuttle sitting on its launch pad, there are two big booster rockets attached to the sides of the main fuel tank. These are solid rocket boosters, or SRBs. The SRBs are made by Thiokol at their factory in Utah. The engineers who designed the? SRBs would have preferred to make them a bit fatter, but the SRBs had to be shipped by train from the factory to the launch site.

The railroad line from the factory happens to run through a tunnel in the mountains.

The SRBs had to fit through that tunnel.? The tunnel is slightly wider than the railroad track, and the railroad track, as you now know, is about as wide as two horse’s behinds.

So, a major Space Shuttle design feature of what is arguably the world’s most advanced transportation system was determined over two thousand years ago by the width of a horse’s ass.

- And -

You thought being a HORSE’S ASS wasn’t important!