

# SCAA

December 2008

Vol. 36 No. 4

## Seattle Claims Adjusters Association

**Celebrating over 75 years of service to the claims community — Founded in 1930**

*“A professional organization dedicated to the ongoing education of the claims community.*

*Providing an arena for member interaction and the sharing of resources.”*



### James' Headlines

— by James K. Gomez, SCAA President

On behalf of the SCAA Officers, Merry Christmas and a Happy New Year. We wish all of our members and vendors a safe and happy holiday and a bright new 2009!

For those who were not able to attend the November meeting, our guest speaker, **Shelley Butler**, with CRDN of Seattle & Western, Washington, did a fabulous job providing a presentation on the latest techniques used in the Textile Restoration industry. Additionally, Shelley provided information on the services

provided by her firm. If you have any questions, or require additional information on the presentation, please contact Shelley Butler or contact me and I will provide her contact information if you don't already have it.

Also at the November meeting, a case update and presentation was provided by **Paul Rosner** with the law firm of Soha and Lang, P.S. The presentation was on a recent case, Allstate Insurance Company, Respondent v. John Petty, Et Al., Appellant.

As usual we had our \$25 Gift Drawings. The winner for the Adjuster Drawing was **Jim Peterson** (our treasurer) with Grange Insurance. Likewise, the winner for the Vendor Drawing was **Marc Olds** with Nordic Services, Inc. Congratulations are in order for all the winners! Remember, to participate in the drawing, please place your business card in the appropriate bowl labeled either for vendors or adjusters.

We did not have a winner for the Blue Bucket Drawing therefore

(See **Headlines...** continued on page 3)



#### Next Meeting of the SCAA

**January 16, 2009**

The Swedish Club, 1920 Dexter Ave North, Seattle, WA

#### Program

**“Dancing with Bailón”**

**Keo Capestany, AIC, SCAA Past President**

#### Cost

**\$15 Members \$20 Non-Members**

#### Time

**11:30 a.m.**

It is important for you to RSVP if you are going to attend our luncheon meetings. Do so through our website or contact James Gomez at [jgomez@frontieradjusters.com](mailto:jgomez@frontieradjusters.com). Thank you!



#### **DON'T FORGET TO RSVP!**

Please let us know you will be attending our next meeting by submitting an RSVP at our website: [www.seattleadjuster.org](http://www.seattleadjuster.org)



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## ON THE DOCKET FOR 2008-09

Date	Speaker/Topic
Jan 16	SCAA Meeting "Dancing with Bailón" Adjusting Across Linguistic Gaps Keo Capestany, AIC, SCAA Past President
Feb 20	SCAA Meeting & Annual Bowling Tournament
March 20	SCAA Meeting

### Meeting Information

Please keep in mind that we'd like to start and end promptly during our monthly meetings. Here is the timeline for each meeting:

11:30 a.m. Registration  
 11:45 a.m. Buffet  
 12:00 p.m. Meeting Called to Order  
 1:00 p.m. End of Meeting

Please arrive on time and have your cash or check (payable to SCAA) ready. We appreciate your cooperation and assistance.



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### The Seattle Adjuster

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## Headlines... *(Continued from front page)*

the prize will roll over into next month's drawing. You must be present to win.

A special thanks to **David Omli** with Nordic Services, Inc. for providing four football tickets to the weekend game that involved the Seahawks and the Redskins. The tickets were raffled off and we had two winners: **Jim McCune** with North American Claim Solutions; and **Sue Dahlin**, SCAA Past President; each won two tickets. Thanks again Nordic Service, Inc.

Please note the Spring Seminar and Vendor Fair is still in the discussion and planning phase. More information will be available after the holidays.

Our next meeting is scheduled for January 16, 2009 and our guest speaker is SCAA Past President, **Keo Capestany**. Keo will be speaking on the topic entitled, "Dancing with Bailón, Adjusting Across Linguistic Gaps". Please see this page for a brief biography on Keo Capestany and a brief outline on his presentation.

Please remember to RSVP for our meetings and preferably a few days prior to the day of the meeting. RSVP's will be accepted up to the last day of the meeting. With a proper headcount the Swedish Club and the caterer's can plan for the proper seating and correct amount of food. For the last meeting we ran low on Turkey and perhaps we saved a few Turkeys.

Thanks again for coming to our meetings and please remember to invite adjusters that you work with or are associated with! **See everyone at our Next Meeting, January 16, 2009!** ❖



### **DON'T FORGET TO RSVP!**

Please let us know you will be attending our next meeting by submitting an RSVP at our website: [www.seattleadjuster.org](http://www.seattleadjuster.org)

## SCAA Luncheon Presentation

January 16, 2009

Dancing with Bailón

Adjusting Across Linguistic Gaps

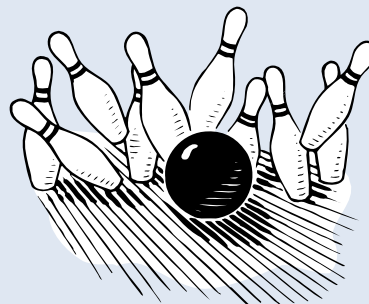
Keo Capestany, AIC, SCAA Past President

- While not knowing languages as a claims adjuster is not negligence per se, not knowing about interpreters could possibly be. Imagine being involved in an accident while visiting Lower Slobbovia.
- Everybody is capable of playing piano but very few could do it as well as Beethoven did who, nevertheless, could not dance.
- Two cases of insured's wealth in jeopardy because of the cavalier handling of the linguistic aspect of claims under their policies.
- How a convicted drug dealer could impact some of your files: The significance of United States v. Gilberto Bailón 429F.3<sup>rd</sup> 1258.
- How to show due diligence in the selection of interpreters and avoid allegations of having improperly handled these kinds of cases.

Keo Capestany, AIC, a past president of SCAA, has the equivalent of a Bachelor in Administrative Law from the University of Havana and an AA from Seattle Community College. He was a claims representative and later a claims supervisor for the Hartford Insurance Group and then independent adjuster. His claims career totals 25 years.

He has written hundreds of columns for our newsletter and has had articles published in Claims and other periodicals. He has lectured about negotiations, human relations and communications to insurance groups in four states and has made over 60 presentations on language issues to colleges, business groups and others all over the state of Washington.

After retiring in 1998 he started a successful career as a court certified interpreter. Since 2000 he has been one of a handful of Federal interpreters active in the Seattle area.



## Get Ready for **BOWLING!**

SCAA Bowling  
Tournament  
happening in  
February 2009

Watch your newsletter or our website for details!

## Cause & Origin: The Basics

— by **Jesse Binford, PE** and **Don Clapp**, of  
BC Investigative Engineers

*Editor's Note: Jesse Binford and Don Clapp were speakers at a Tacoma Claims Adjusters Association meeting and this article highlights their presentation and is reprinted with permission.*

An accurate C&O determination is the result of both research and a thorough site investigation. The following article is a summary of basic information that needs to be researched and investigated to determine the most probable C&O.

Information necessary for an outside consultant to provide an accurate C&O includes a complete and thorough description of the loss. A claims representative should provide specific questions to the consultants in order for the engineer to provide an opinion for each question. This information should be included in the initial contact with the consultant. The consultant needs to thoroughly understand the specific issues the claims representative wishes to have addressed. If this information is not provided initially, additional site visits and costs may result.

Initial research for a specific site, depending upon the details regarding the loss, includes when the structure was built, when the structure was last modified, and permit history of the structure. Building department permit files will often provide important information applicable to the current loss. Initial research should also include topography for the site as well as the surrounding area. Topography plays an important role for claims related to landslides, erosion, and wind damage as well as water intrusion into basements and crawlspaces. Research into known surface and subsurface water conditions will often provide background information critical in determining C&O related to water loss.

An important step in the C&O investigation is the initial interview with the owner and/or tenant of a site. If possible, it is recommended the interview be conducted before commencement of the site investigation. The interview should include a detailed description of the current occupancy use of the building as well as previous use of the building. For residential sites, the number and age of full-time residents is important. This includes the number of part-time residents (i.e., residential daycare). Any action taken by the occupants upon initial discovery of the loss is a critical component of all interviews.

## Membership Application for 2008-2009



### SCAA Annual Membership Application

Membership Dues for the year September 1, 2008 to August 31, 2009

**DUES ARE NOT PRO-RATED**

Please print neatly, one application per person

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Many times, a complete description of actions by the occupants preceding the loss discovery can provide important C&O information.

The importance of a thorough site examination of the building, and surrounding area, cannot be over-emphasized in determining C&O. Is the building constructed with combustible or non-combustible materials? It is important to remember that a non-combustible building is not immune to fire damage and damage resulting from water intrusion. The initial site investigation should include determining the specific foundation design and type of materials used. Is the foundation constructed with poured-in-place concrete, CMU, or other? The “other” would include a wood foundation, which is still allowed by the model building code. Is the foundation supported on conventional spread footings or piles? If supported on piles, what type of piles? Depending upon the type of loss, it is important to understand if the foundation is supported on an auger cast pile, pin pile, or pneumatically driven wood piles. The presence of piles is also an indication of questionable soil.

Determining framing design and type of materials used should be included in all site investigations. Is the framing conventional light timber or light gauge steel? Envelope design for exterior walls, as well as the materials used, is a critical component of any C&O investigation. The envelope investigation should include determining window frame type. Aluminum frames, as compared to vinyl and wood frames, respond differently to high relative humidity (RH) inside the building and differential air temperatures between the interior environment and the exterior. Determining the “normal” RH and temperature for the interior environment is a critical component in water intrusion and mold-related investigations. Depending upon the number of occupants, nationalities, and personal habits, the interior RH and air temperatures will vary widely between individual dwellings, apartments, or condominiums. Investigation of the structure should also include the location of all vapor barriers within floors, walls, ceilings, and roofs. It is not uncommon to find multiple vapor barriers within an individual wall or floor/ceiling assembly. Once the location of a vapor barrier has been determined, it is important to remember that condensation will always form on the warm side of the vapor barrier. Condensation will cause water damage and promote mold.

Determining roof design is an important part of any water intrusion investigation. Is the roof a gable, hip, dutch, or flat design? Is the roof framed with pre-engineered (PE) trusses, site-built trusses, rafters, PE I-joists or bar joists? The site investigation should include determining roofing materials and general condition of the roofing. Determining the installation method of the roofing materials is a critical component of any water intrusion investigation. Determining the type and, more importantly, the efficiency of roof venting is an important part of all water intrusion investigations. The presence of elevated RH in an attic is just as important as elevated RH within the interior environment. Elevated RH in an attic space is an indication of either a lack of venting or the inefficiency of the venting provided. It is important to remember that the minimum code required roof venting is based on an average and may or may not be sufficient for structures in western Washington. Clearly understanding the difference between the minimum code required ventilation as compared to the efficiency level of

*(See Cause & Origin... continued on page 6)*

## The President's Cup 2009 SCAA Tennis Tournament

This coming year, we are dedicating the tennis tournament to our association's president. Coincidentally, he and our vice president will be participating.

Please consider joining James Gomez, Dean West and others on SATURDAY, JUNE 6, 2009 at the EDGEBROOK SWIM AND TENNIS CLUB in Bellevue for 3 hours of indoor afternoon tennis, with an emphasis on fun, food, beverage, prizes in a doubles round robin format for 16 people. Yes, this is before the golf tournament and it is on a Saturday.

You will see a registration form in January and that will provide all the details of our event. Since there are already several individuals very interested in participating, we would like to hear from you before you see the registration materials. Let us know your interest by calling Bob Jeans (Tournament Chairman) at 425/396-4344 or send an email to bob.jeans@jmwsettlements.com. ❖

## Cause & Origin... *(Continued from page 5)*

the venting provided is a critical component of the water intrusion investigation.

Many times, the building's mechanical and plumbing systems will have an effect on water intrusion and mold investigations. The C&O site investigation should include determining the primary heat source and type of controls provided. The location and condition of all exhaust fans, as well as air transmission ducts and the termination point for exhaust ducts, is extremely important. Residents with natural gas and LP gas-fired furnaces must be provided with combustion air openings of sufficient size and location for a clean burn. The only exception is direct vent furnaces, which draw combustion air in directly from the exterior of the building. The location of the vent, which provides exhaust for the by-products of combustion, may result in the discharge of CO<sub>2</sub> and elevated RH back inside the residence. The as-built design and location of all exhaust terminations serving gas furnaces should be verified during the initial site investigation. Examination of the mechanical system should also include determining if a fresh air supply is provided to the return air plenum. If so, the investigation should include determining the size and type of controls provided. Lack of adequate fresh air supply can have an adverse effect on the indoor environment.

The building's plumbing should also be inspected during the initial investigation. The investigation should include determining the potable water source (i.e., public, private well, or common well). If the potable water supply is public or common, the average static pressure on the service pipe should be checked. The investigation should include determining if a pressure relief valve (PRV) is installed. If so, what is the pressure setting? The type of pipe used for the potable water system is an important factor in any investigation. Examination of the plumbing system should include determining the location and type of water meter. Most water meters are equipped with a leak detector indicator. The meter's leak indicator can be used as an initial determination if on-going water loss is occurring downstream of the meter. Isolating the water supply pipe with a shut-off valve at the foundation, and examination of the leak detector, can provide an indication of water loss in the pipe between the meter and shut-off valve.

Examination of the plumbing system should include the sanitary sewer waste piping for both the building and the exterior. Depending upon the type of loss, it is important to confirm if the residence or commercial building is connected to a public, common, or private on-site septic system. It is important to remember that the location and condition of an on-site septic tank, or an on-site sanitary sewer holding tank, can cause soil instability. Saturation of soils supporting the foundation, or saturation of soils on a steep slope, can result in a sudden catastrophic soil movement. An example of this recently occurred in the city of Portland.

The site investigation should also include examination and analysis of the on-site and off-site storm water systems. An important item to confirm related to storm water is to determine outfall location of the roof and foundation drains. It is also important to determine if the roof and foundation drains are constructed with solid or perforated pipe. If the on-site roof drains are connected into an on-site infiltration system, the type, location, and condition of the system should be assessed. Location of storm water infiltration systems can have a significant effect to slope stability. Location of storm water infiltration systems can also have a detrimental effect on property's downslope of the site.

Landscaping also plays a part in water damage claims. Thick mature landscaping, or native foliage immediately adjacent to the building, can affect the extent of water damage. A fully landscaped yard may include a subsurface irrigation system. The location and type of irrigation heads may also be a source or contributor to water damage. ❖

*— BC Investigative Engineers hopes that the information provided above assists the claims representative in completing their own evaluation of a loss as well as assist in determining the type of information which should be relayed to an engineer or investigator.*



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**Soha & Lang Coverage Alert**  
**WA Supreme Court: No Presumption of Harm and No Coverage by Estoppel for Violation of Claim-Handling Regulations**  
 — by Paul M. Rosner, J.D., CPCU

In *St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, \_\_\_ Wn.2d \_\_\_ (November 26, 2008), the Washington Supreme Court recognized both a tort cause of action and a statutory action for an insurer's *procedural* errors in responding to tender of a third-party liability claim though the insurer had no duty to defend or indemnify. However, extending the rationale of *Coventry Associates v. Amer. States Ins. Co.*, 136 Wn.2d 269 (1998), the court *declined to apply either a presumption of harm or coverage by estoppel*. Rather, in order to recover damages, the insured must prove that the procedural violations proximately caused actual harm to the insured. While still imposing a high standard of conduct on Washington insurers, this case rebuffed attempts to extend the punitive remedy of coverage by estoppel to cases where there is neither coverage nor a duty to defend.

This case arose out of a class action suit against Onvia, Inc. for "fax blasting". Onvia's broker claimed to have tendered defense of the suit to St. Paul via fax (and had a fax transmission report), but St. Paul had no record of receiving the tender and did not respond. Months later St. Paul became aware of the claim and, over eight months after the alleged original tender, denied defense and indemnity. Onvia entered into a covenant judgment for over \$17 million and assigned its rights against St. Paul to the plaintiff.

St. Paul sued for declaratory relief. The federal trial court granted summary judgment that St. Paul had no duty to defend, indemnify, or settle the underlying action and further held that St. Paul's refusal to defend was not bad faith. However, the court declined to rule on whether the eight-month delay in responding to the tender would support a claim for *procedural* bad faith. The federal court certified two questions to the Washington Supreme Court: first, whether there is a cause of action for *procedural* bad faith when an insurer has correctly denied defense and coverage, and, if there is such an ac-

tion, what is the remedy. The class action plaintiff, in its role as assignee, sought a presumption of harm and coverage by estoppel.

The Washington Supreme Court held that there is both a tort cause of action for procedural bad faith and a potential statutory remedy through the Washington Consumer Protection Act (CPA) even in the absence of coverage. However, consistent with *Coventry*, the Court *refused to presume harm or impose coverage by estoppel*: "the insured in this circumstance is not entitled to a presumption of harm or coverage by estoppel, but *must prove all elements of the claim, including actual damages.*"

This case affirms that insurers must comply with the stringent procedural regulatory requirements set forth in the Washington Administrative Code, chapter WAC 284-30. However, an insured who seeks damages for procedural errors must prove what actual harm those errors caused before either tort or statutory remedies will apply.

— If you have any questions concerning this article please contact Paul Rosner of Soha & Lang at 206/654-6601.

**SCAA  
 Holiday  
 Party  
 2008 at  
 Sazerac  
 Hotel  
 Monaco**



For more pics visit our website at  
[www.seattleadjuster.org](http://www.seattleadjuster.org)



What do  
 you  
 suppose  
 was on  
 Roger's  
 wish list?  
 Only Santa  
 knows for  
 sure!



Case Study

## When Non-Economic Damages Must Be Awarded

— by Jeffrey D. Eberhard

**Claims Pointer:** *If a jury concludes that a plaintiff's injuries were caused by an accident and the economic award is more than "minimal," the jury cannot refuse to award non-economic damages based on a belief that the plaintiff has not suffered any pain.*

When a person receives a substantial amount of economic damages as a result of an automobile accident, there is a presumption that the person also suffered non-economic damages. In *Fahndrich v. Williams*, Division II of the Washington Court of Appeals held that if it is found that a person's injuries were caused by an automobile accident, then noneconomic damages must be awarded with some limited exceptions. This is true even if a jury does not believe there was any pain or suffering.

In April of 2000, Fahndrich was struck by Williams' car causing her head to whip back and forth and hit the headrest. Fahndrich sought chiropractic treatment the next day for head, neck and back pain. After being treated for five months without resolution of the pain, Fahndrich was referred to a neurologist who diagnosed her with myofascial pain syndrome.

In November of 2000, Fahndrich was in a car that was rear-ended by Mullins. Fahndrich's head was once again jolted. Although there was no damage to either vehicle, Fahndrich's neck and back pain increased and she began having pain in her jaw. Fahndrich sued both Williams and Mullins alleging she suffered from debilitating headaches one to five days a week.

At trial, the main dispute was whether Fahndrich suffered from temporomandibular joint disorder (TMJ) or myofascial pain syndrome. Neither of the defendants presented any evidence disputing that Fahndrich suffered pain. The jury returned a verdict of \$22,500 in economic damages against Williams and \$2,500 in economic damages against Mullins. The jury form had a line labeled "non-economic

damages" and each was filled in as zero.

On appeal, Fahndrich claimed that she was entitled to a new trial because there was no evidence or reasonable inference from the evidence that she was not entitled to damages for pain and suffering. The Court of Appeals reluctantly agreed and stated that a plaintiff who substantiates pain and suffering with evidence is entitled to non-economic damages. The Court also stated that in certain cases a jury may be justified in declining to award non-economic damages in situations where the economic damage award is minimal and the plaintiff required little or no medical care.

The Court reviewed the record and determined that Fahndrich presented extensive evidence of her pain. Further, the defendants did not seriously challenge Fahndrich's pain or that the accidents had caused the pain. Finally, the court held that an award of \$25,000 eliminated the possibility that her injuries were "minimal." The court held that she was entitled to a new trial because the jury could not have found that the accident caused her injuries but believed that the plaintiff did not suffer any pain. ❖

— Full Case Available at: [www.courts.wa.gov/opinions/pdf/36089-6.08.doc.pdf](http://www.courts.wa.gov/opinions/pdf/36089-6.08.doc.pdf)

— If you would like to be notified of these new cases, please send an email to [caseupdate@smithfreed.com](mailto:caseupdate@smithfreed.com).

This article is intended to inform our clients and others about legal matters of current interest. It is not intended as legal advice. Readers should not act upon the information contained in this article without seeking professional counsel.



**Tacoma Claims Adjusters**  
— Upcoming Meeting —

**January 9, 2009**

11:30 am - 2:00 pm

LaQuinta Inn

1425 East 27th Street, Tacoma, WA

For more information visit:

[www.tacomaadjusters.org](http://www.tacomaadjusters.org)