

SCAA

February 2011

Vol. 38 No. 6

Seattle Claims Adjusters Association

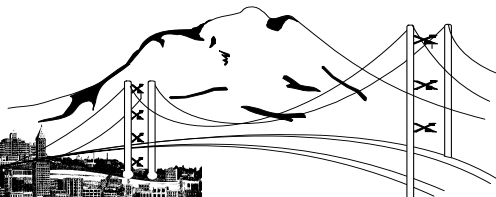
Celebrating over 75 years of service to the claims community — Founded in 1930

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

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

SCAA

Friday, March 18, 2011



2011

SPRING SYMPOSIUM

& VENDOR FAIR

TCAA

Bell Harbor Int'l Conference Center
Pier 66 ~ 2211 Alaskan Way, Seattle, WA

~ For highlights & registration see our websites ~

Next Meeting of the SCAA

February 18, 2011

ACME Bowl in Tukwila with TCAA

Program

**Trevor Newberry of CASE Forensics on
“Forensic Investigation of
Stolen-Recovered Vehicles”**

Followed by lunch & bowling!



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



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ON THE DOCKET FOR 2010

SCAA OFFICERS

Jim Peterson..... President
Grange Insurance Office: 800/826-3197 x2448
 Email: jim.peterson@grange.com

Lynn Perry..... Vice President
Grange Insurance Office: 206/448-4911 x2458
 Email: lynn.perry@grange.com

Deborah Jette..... Secretary
Grange Insurance Office: 206/448-4911 x2282
 Email: deborah.jette@grange.com

Tanya Padur..... Treasurer
SAFECO Office: 253/307-8365
 Email: tanya.padur@safeco.com

Dean West..... Immediate Past President
West Adjusters Office: 425/522-4625
 Email: deanwest@pacnorthwest.net

SCAA Liaisons

Deborah Jette..... Membership Liaison
Grange Insurance Office: 206/448-4911 x2282
 Email: deborah.jette@grange.com

Barb Tyler..... Membership List
Alquemie Publishing Publisher/Advertising
 Website Coordinator
 Office: 541/937-2611
 Fax: 541/937-4286
 Email: npassist@msn.com

Lizzy Adkins..... Bowling Tournament Chair
Alliance Restoration Office: 866/882-7930
 Email: lizzya@alliancerestoration.com

Timothy Reid..... Case Review
Attorney at Law Office: 425/313-9414

Roger Howson..... Education Chair
Claims Dispute Resolution Office: 206/676-3851
 Email: rogerhowson@claimsdispute.com

Carol Seepersad-Green.... Golf Tournament Chair
Liberty Mutual Office: 206/459-2345
 Email: carol.seepersadgreen@libertymutual.com

Deborah Jette..... Holiday Event Chair
Grange Insurance Office: 206/448-4911 x2282
 Email: deborah.jette@grange.com

Lizzy Adkins..... Job Finder
Alliance Restoration Office: 866/882-7930
 Email: lizzya@alliancerestoration.com

Lynn Perry..... Spring Seminar Chair
Grange Insurance Office: 206/448-4911 x2458
 Email: lynn.perry@grange.com

Bob Jeans..... Tennis Tournament Chair
JMW Settlements Inc. Office: 425/396-4344
 Email: bob.jeans@jmwsettlements.com

Date	Speaker/Topic
Feb 18	SCAA & TCAA Joint Meeting & Bowling Event See opposite page for more info ⇨
March 18	SCAA-TCAA Spring Symposium & Vendor Fair See pages 14-17 for highlights & registration!
April 15	SCAA Meeting & Vendor Appreciation Day Topic/Speaker TBA
May 20	SCAA Meeting & Past President's Luncheon Topic/Speaker TBA



Now accepting credit cards!

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

Published monthly September—June for the Seattle Claims Adjusters Association
 By **Alquemie Publishing Ink**
 541/937-2611 Fax: 541/937-4286
 Email: npassist@msn.com

Stuff

By Jim Peterson, SCLA, SCAA President

Hello and welcome to February! I hope everyone had a smooth transition in to 2011.

Our meeting this month again is a joint SCAA/TCAA gathering at ACME Bowl in Tukwila. Our speaker will be Trevor Newberry from CASE Forensics and the topic is 'Forensic Investigation of Stolen-Recovered Vehicles'. It promises to be a very engaging presentation. The time line is a little different from our normal meetings so check the flyer on page 3. Remember, you can come just for the presentation and lunch, there is no requirement that you bowl, but if you're interested there is still time to sign up!

In March we will be having our Spring Symposium at Bell Harbor. The date is March 18, 2011 and the fun starts at 7:00am and wraps up at 5:00pm. Check the flyer in this issue for more information.

A big thank you to Keo Capestany for his presentation at our last meeting. ❖



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SCAA

Friday, March 18, 2011



TCAA

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~ See website for registration ~

Expert Witness Salvages Clients Claim for Loss of Net Business Income

— by C. Donald Smith, Financial Forensics, LLC

Buffman, Inc. v. Lafayette Insurance Co., 2010 WL 1509363 (La. App. 4 Cir.) (April 14, 2010)

In one of the first business interruption/lost income cases to come in the wake of Hurricane Katrina, an expert's careful, credible opinion proves critical to swaying a jury's opinion and the court's ultimate award.

Nursing home loses numerous residents to tragedy. The facts and local impact may have also played a part in the outcome of this Louisiana case. Hurricane Katrina struck the Gulf Coast early on August 29, 2005 and continued for several hours. As the storm winds subsided, the floodwaters rose, trapping the residents of a nursing home in St. Bernard Parish, about five miles from downtown New Orleans. The owners hacked holes in the roof with an axe and pulled several residents to safety, but many others drowned in the calamity.

The nursing home's insurance policy covered losses due to wind but not flood or water damage. Within a week of the storm, the owners notified their insurance company (Lafayette). Over the next several months, the insurer's engineers and adjusters found some wind damage to the roof but attributed more damage to the owners' rescue efforts. Its experts estimated that repairs would take no more than eight weeks, during which most of the facility could remain open.

By contrast, the nursing home's roofer concluded most of the damage was due to hurricane winds and estimated repairs at \$609,000, without subtracting any amounts caused by the rescue efforts. He also repairs would take four to five months while the building was empty. The parties disputed coverage and finally, two years after the storm, the insurance company sent a check for a mere \$1,150.00 to cover the facility's repairs.

The nursing home sued its insurer for breach of contract plus statutory penalties for unjustified de-

(See **Expert Witness...** continued on page 4)

Expert Witness... *(Continued from page 3)*

lay. It presented evidence of roof damage along with a CPA specialist in business interruption claims to estimate these losses. The expert's firm had produced cost reports for the nursing home for over a decade and was familiar with its operations. The insurance policy limited recovery of net business income losses (before taxes) to \$600,000 for a maximum of 120 days. It also obligated the insurance company to pay only when covered damages directly caused the suspension of the business.

The nursing home provided 100 patient beds and a spectrum of care payable from four primary sources: Medicare, Medicaid, private insurers, and individual payors. The payment sources fluctuated from day to day, and the accounting protocols to effect reimbursement—especially from government agencies—were "fraught with intricate, byzantine requirements," according to the court.

Facility flourished before the storm. The nursing home's expert reviewed the facility's monthly revenue and expense statements for 2004 through early 2006 (six months after the storm). He looked at the general ledger for 2005 up to August 31, 2005, and examined statistical data related to skilled nursing facilities for the years 2004 and 2005. The nursing home's revenue streams had been rising right up until the storm, due to improved collectability and/or better patient populations. Overall, revenues grew by approximately 12.58% in between 2004 and the first eight months of 2005; however, between January and July of 2005, revenues rose by 32%.

To calculate the covered business income losses, the nursing home's expert analyzed the revenues and growth rate, concluding he could not compare the second half of 2004 with the second half of 2005 because the hurricane had shut down the facility. Applying "accepted accounting principles," he projected income losses of \$775,616 for the six months following the storm and losses of \$649,612 for five months post-Katrina. Mindful of the policy limits, he estimated the four-month net business income losses at \$529,473.

The jury also heard from an expert for the insurance company, but ultimately awarded business

interruption damages in the precise amount determined by the nursing home's expert, and the insurer appealed. Because the appellate opinion examines only the evidence necessary to support the jury award, it does not discuss the calculations by the insurance company and its expert. However, the court did find the insurer's expert "had only a brief opportunity to review the insurance policy and business records and to prepare a report shortly before trial." She also admitted to calculation errors in her report and conceded the insurance company was liable for net business income losses.

"The jury chose the methodology and analysis offered by [the nursing home's expert]," the court said. After examining the entire record, it concluded the jury had a reasonable factual basis awarding the nursing home \$529,573 in business interruption losses. ❖

— If you have questions you may contact Don by email at don@forensic-accountant.org.



Case Study
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The Independent Duty Doctrine

by Jeffrey D. Eberhard

Claims Pointer: The Supreme Court of Washington has issued two significant opinions limiting the application of the long-standing "economic loss rule," which precludes tort claims arising under a contract, and introducing a new framework for analyzing tort claims arising within contractual relationships: the "independent duty doctrine."

For years, the Washington courts have strictly adhered to the "economic loss rule," which essentially precludes recovery for tort (negligence) claims that arise within a contractual relationship. The logic behind the economic loss rule is that parties in a contractual relationship could have, or should have, negotiated the allocation of risk of loss within the contract. However, two recent Washington Supreme Court opinions have essentially abandoned the application of this longstanding rule. These two recent opinions not only have effectively lifted the

bar on negligence claims brought within contractual relationships, but they also have opened the door to third party claims. For many business and construction defect litigants, this has very important implications.

In Eastwood v. Horse Harbor Foundation, Inc., 241 P3d 1256 (Nov. 4, 2010), the Washington Supreme Court considered whether a tenant who breaches a lease provision requiring it to repair and maintain the property could also be liable for the tort of waste. And, in Affiliated FM Ins. Co. v. LTK Consulting Services, Inc., 243 P3d 521 (Nov. 4, 2010), the Court addressed whether an engineering company under a monorail maintenance contract with the city of Seattle could be liable to a party outside the contract (a monorail concession contractor) in negligence for a fire that caused millions of dollars in losses. Though the plaintiffs in these cases were seeking tort damages in addition to contractual remedies – something that would be disallowed under the economic loss rule – the Court, applying a new doctrine dubbed the “independent duty doctrine,” permitted these claims.

In adopting the independent duty doctrine, the Supreme Court did not outright reject the economic loss rule, but severely limited its application. The Court acknowledged that while “[i]n some circumstances, a plaintiff’s alleged harm is nothing more than a contractual breach or a difference in the profits, revenue or costs that the plaintiff had expected from a business enterprise,” the Court went on to hold that “[i]n other circumstances, however, the harm is simultaneously the result of the defendant breaching an independent and concurrent tort duty. Thus, while the harm can be described as an economic loss, it is more than that: it is an injury remediable in tort.” Accordingly, the Court introduced the independent duty doctrine, under which the courts can determine, on a case-by-case basis, whether an alleged injury can be traced back to the breach of a tort duty arising *independently* of the terms of the contract.

Applying this new doctrine, the Affiliated FM Court held that since monorail trains carry thousands of people every year in Seattle, in consideration of safety concerns, an engineering firm assumes a tort law duty of reasonable care independent of its contractual obligations. And, in Eastwood,

the Court applied the test and held that because the duty to not cause waste is a tort duty independent from a lease’s contract, plaintiff had a claim for waste.

Other recent Washington cases also reflect this trend towards the independent duty approach. For example, in Putz v. Golden, 2010 WL 5071270 (W.D. Wash. 2010), the Federal District Court in Seattle allowed tort based claims to go through in connection with a dispute involving a contract to convey shares in a vacation bungalow, noting that “[w]hile this court does not believe that this means that such tort claims will always survive in the context of a contractual relationship between the parties, the court can find no reason under the Washington Supreme Court’s revised guidance on this issue to bar Plaintiffs’ tort claims here.” The Federal District Court took the same approach in a real estate loan modification dispute in Wells v. Chase Home Finance, LLC, 2010 WL 4858252 (W.D. Wash. 2010). There the Court held that plaintiffs made a showing that “the process of loan modification involves a duty independent from the underlying mortgage contract,” and therefore declined to bar their tort claims solely on the basis of the economic loss rule.

Other cases will surely follow, injecting independent duty-based claims into the contract arena, a practice which was previously proscribed. The independent duty doctrine has already opened the door to non-privity claims for design defects in Affiliated FM, and this theory will likely see continued play in the areas of business litigation and construction defects. Stay tuned. ❖

NOTE: This opinion has not been published. It is provided to demonstrate how the court approaches the issues involved in the case. It cannot be cited as authority to a court of law.

— *If you would like to be notified of these new cases, please send an email to 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.