

NOV 22 2004

95  
95A  
95B  
95C

WORKERS' COMPENSATION  
APPEALS BOARD

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

COURT OF APPEAL - SECOND DIST.

**FILED**

DIVISION SEVEN

NOV 18 2004

GENERAL CASUALTY INSURANCE  
and REGENT INSURANCE,

Petitioners,

v.

WORKERS' COMPENSATION  
APPEALS BOARD and THE  
CALIFORNIA INSURANCE  
GUARANTEE ASSOCIATION,

Respondents.

No. B167017

JOSEPH A. LANE

Clerk

Deputy Clerk

(W.C.A.B. No. POM 0248928)

**ORDER**

AMERICAN HOME ASSURANCE  
COMPANY,

Petitioner,

v.

WORKERS' COMPENSATION  
APPEALS BOARD and THE  
CALIFORNIA INSURANCE  
GUARANTEE ASSOCIATION,

Respondents.

No. B167540

(W.C.A.B. No. POM 0248928)

REMEDYTEMP, INC.,

Petitioner,

v.

WORKERS' COMPENSATION  
APPEALS BOARD and THE  
CALIFORNIA INSURANCE  
GUARANTEE ASSOCIATION,

Respondents.

No. B167541

(W.C.A.B. No. POM 0248928)

JACUZZI INCORPORATED,

Petitioner,

v.

WORKERS' COMPENSATION  
APPEALS BOARD and THE  
CALIFORNIA INSURANCE  
GUARANTEE ASSOCIATION,

Respondents.

No. B167542

(W.C.A.B. No. POM 0248928)

**THE COURT:\***

The petitions for rehearing filed by American Home Assurance Company, RemedyTemp, Inc., Jacuzzi, Inc., and joined in by General Casualty Insurance and Regent Insurance, are granted.

This court has taken judicial notice of Exhibits A-D. (See attached.) Exhibit A is a California Endorsement Approved Form No. 11 (Form No. 11), submitted to the Workers Compensation Insurance Rating Bureau (WCIRB) in another matter by American Home Assurance Company (Assurance), a party and special insurer in the case before the court. In a letter dated August 10, 2004, the WCIRB requested Assurance to explain the purpose for Form No. 11. (Exh. B.) In a letter dated August 25, 2004,

Assurance responded that Form No. 11 was submitted to exclude coverage under the Assurance policy for leased and temporary employees covered under the workers' compensation policy of the general employers. (Exh. C.) In a fax from the WCIRB dated September 13, 2004, the WCIRB replied in part, "Please be advised that the CAF-11 endorsement would be used inappropriately for this purpose." (Exh. D.)

It would significantly assist the court and the parties in further briefing and resolution of the matters raised by this case if the WCIRB and the California Commissioner of Insurance would respond to the following questions.

Where general and special employers are insured for workers' compensation under separate policies:

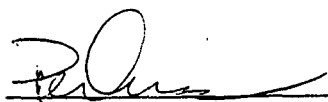
Can special employees be excluded from coverage under the special employer's workers' compensation insurance policy?

If so, can Form No. 11 be used to exclude coverage for special employees?

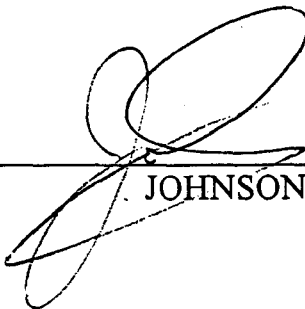
What information should Form No. 11 provide?

Is there another endorsement form that should be used to exclude coverage for special employees, and what information should the form provide?

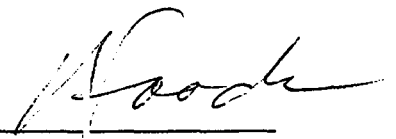
To the extent practicable, the responses of the WCIRB and the California Commissioner of Insurance should be submitted to the court on or before December 17, 2004. The clerk of the court will provide copies of the responses to all parties in this action. Upon receipt of the responses from the WCIRB and the California Commissioner of Insurance, the court will issue a further order requesting supplemental briefing from the parties.



\*PERLUSS, P.J.



JOHNSON, J.



WOODS, J.

**CALIFORNIA APPROVED FORM NO. 11**  
**CALIFORNIA ENDORSEMENT; AGREEMENT LIMITING AND RESTRICTING THIS INSURANCE**

This endorsement changes the policy to which it is attached effective on the inception date of the policy unless a different date is indicated below.

(The following "attaching clause" need be completed only when this endorsement is issued subsequent to preparation of the policy).

This endorsement, effective 12:01 AM 06/07/2004 forms a part of Policy No. WC 083-38-46

Issued to SPECIAL EVENTS SERVICES, INC.

By AMERICAN HOME ASSURANCE COMPANY

The insurance under this policy is limited as follows:

It is AGREED that, anything in this policy to the contrary notwithstanding, this policy DOES NOT INSURE:

ANY EMPLOYEE OF A GENERAL EMPLOYER WHEREBY YOU ARE CONSIDERED SPECIAL  
EMPLOYER IN ACCORDANCE WITH LOCAL LAW

Nothing in this endorsement contained shall be held to vary, alter, waive or extend any of the terms, conditions, agreements, or limitations of this policy other than as above stated. Nothing elsewhere in this policy shall be held to vary, alter, waive or limit the terms, conditions, agreements or limitations of this endorsement.

**FAILURE TO SECURE THE PAYMENT OF FULL COMPENSATION BENEFITS FOR ALL EMPLOYEES AS  
REQUIRED BY LABOR CODE SECTION 3700 IS A VIOLATION OF LAW AND MAY SUBJECT THE EMPLOYER  
TO THE IMPOSITION OF A WORK STOP ORDER, LARGE FINES AND OTHER SUBSTANTIAL PENALTIES**

WC 99 04 12  
(Ed. 09/03)

Countersigned by \_\_\_\_\_

Exhibit A

Authorized Representative

\*\* TOTAL PAGE. 03

# WORKERS' COMPENSATION INSURANCE RATING BUREAU

of California

525 MARKET STREET, SUITE 800 • SAN FRANCISCO, CALIFORNIA 94105-2716

Telephone (415) 777-0777

AUGUST 10, 2004

PLEASE ADDRESS REPLY  
TO: T. BEERY  
FILE NO. 2-35-64-87F

4266582

AMERICAN HOME ASSURNC CO  
AMERICAN INTRNTL GRP#1  
HOME OFFICE

ATTENTION: UNDERWRITING DEPT. (WORKERS COMPENSATION)

REF: SPECIAL EVENTS SERVICES INC (A CORP)  
UNIQUE TABLETOP RENTALS INC (A CORP)  
PARTY CLASSIC RENTALS (DBA)  
8476 STELLER DR, CULVER CITY 90232

POL. NO. WC 833846  
06/07/04 TO 06/07/05

DEAR SIR/MADAM:

*1-15*

WE NOTE THAT YOUR POLICY CONTAINS A CAF-11. THE CALIFORNIA CODE OF REGULATIONS REQUIRES THAT YOU SEND US A WRITTEN STATEMENT, IN TRIPLICATE, EXPLAINING THE PURPOSE OF THIS FORM. PLEASE EITHER SEND US THIS STATEMENT OR ENDORSE TO REMOVE THE CAF-11 FROM THE POLICY.

VERY TRULY YOURS,

TIM BEERY (778-7111) FAX 778-7162  
POLICY EXAMINATION DEPT.

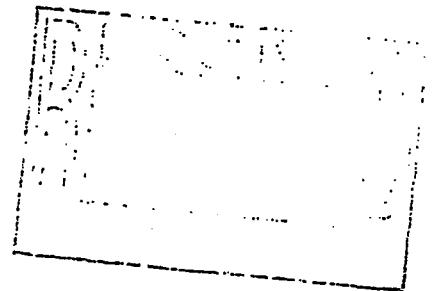


Exhibit B

**AIG RISK  
MANAGEMENT**

Two Rincon Center - 121 Spear Street

San Francisco, CA 94105

Phone #: 415-836-3213

Fax #: 415-836-3140

American Home Assurance Company

---

August 25, 2004

Workers' Compensation Ins. Rating Bureau  
525 Market Street, Suite 800  
San Francisco, CA 94105-2716  
Attn: Tim Beery – Policy Examination Department

Re: Special Events Services, Inc.  
Bureau File # 2-35-64-87F  
Our Policy # WC 083-38-46  
Your Correspondence of: 10/31/2003

Dear Tim,

You have requested we explain the use of the CAF-11 form:

We are using the filed and approved Form 11 to exclude coverage for leased and temporary workers under our policy. These workers are covered under the WC policies of their employers.

Sincerely,

Paul Jordon  
Operations Manager  
RMG Service Center – San Francisco

Exhibit C

# WCIRB California

525 Market Street, Suite 800  
San Francisco, California 94.105  
Phone (415) 777-0777  
Fax (415) 778-7152

## FACSIMILE TRANSMITTAL SHEET

<b>TO:</b> Paul Jordon Operations Manager	<b>FROM:</b> Amy Lee Section Leader (415) 778-7142
<b>COMPANY:</b> AIG Risk Management American Home Assurance Company	<b>DATE:</b> SEPTEMBER 13, 2004
<b>FAX NUMBER:</b> (415) 836-3140	<b>TOTAL NO. OF PAGES INCLUDING COVER:</b> 1
<b>PHONE NUMBER:</b> (415) 836-3213	<b>BUREAU FILE NUMBER:</b> 2-35-64-87F
<b>SUBJECT:</b> Special Events Services, Inc. Use of the CAF-11 endorsement	<b>YOUR REFERENCE NUMBER:</b> WC 083-38-46

URGENT     FOR REVIEW     PLEASE COMMENT     PLEASE REPLY     PLEASE RECYCLE

**NOTES/COMMENTS**

Dear Mr. Jordon,

This is in response to your August 25, 2004 correspondence stating that the use of the California Approved Form 11 is used to exclude coverage for leased and temporary workers under AIG's policy. Please be advised that the CAF-11 endorsement would be used inappropriately for this purpose. Accordingly, the CAF-11 endorsement does not apply to the insured and should be removed from this policy.

Thank you for your assistance and attention to this matter. Should you have any further questions, please contact me.

Sincerely,

Amy Lee

**NOTICE:** The information contained in this transmission may be confidential, proprietary, or d/or legally privileged information. It is intended only for the use of the individual or entity named above. If you are not the intended addressee, the copying, dissemination, or distribution of this communication is strictly prohibited. If you have received this communication in error, please call us at once and destroy the document. Thank you.

inh.7 D

**DEPARTMENT OF INSURANCE**

Legal Division, Office of the Commissioner  
45 Fremont Street, 23rd Floor  
San Francisco, CA 94105

Gary M. Cohen  
General Counsel  
TEL: 415-538-4375  
FAX: 415-904-5889  
E-Mail: coheng@insurance.ca.gov  
www.insurance.ca.gov

DEC 17 2004  
7/08

COURT OF APPEAL - SECOND DIST.

**FILED**

DEC 17 2004



95C

December 16, 2004

JOSEPH A. LANE Clerk

E. McCLINTOCK Deputy Clerk

Honorable Dennis M. Perluss, Presiding Justice and Associate Justices  
Court of Appeal of the State of California  
Second Appellate District—Division Seven  
300 South Spring Street, Second Floor, North Tower  
Los Angeles, California 90013

Subject: General Casualty Insurance, et.al., Petitioners v. Workers' Compensation Appeals Board and the California Insurance Guarantee Association, Respondents, No.B16'017—Request for Insurance Commissioner opinion.

Dear Justice Perluss and Associate Justices:

This is a response to the Court's request for the Insurance Commissioner's opinion respecting limiting and restricting endorsements on workers' compensation insurance policies.

We have reviewed the "Response of the Workers' Compensation Insurance Rating Bureau of California to November 18, 2004 Order" in this matter and have found nothing in it that we would disagree with.

As a matter of public policy, the use of limiting and restricting endorsements should be very carefully monitored. No insurance commissioner has to our knowledge opined on this subject since Commissioner Roddis' Ruling 157 (RH-118) on September 15, 1967, and the public policy concerns have not changed. It is in the interest of both employers and employees that every employer shall fully secure his or her compensation liability. Thus, although it is legally possible for an insurer to restrict or limit coverage, that restriction or limitation should not result in injured workers not being covered by workers' compensation.

The Court posed four questions to both the WCIRB and the insurance commissioner. We agree with answers provided by the WCIRB, but nevertheless have provided our own answers as follows:

1. *Can special employees be excluded from coverage under the special employer's workers' compensation insurance policy?*

RECEIVED  
APPELLATE UNIT

DEC 23 2004



Special employees may be excluded from coverage under the special employer's workers' compensation insurance policy. However any such exclusion must comply with all applicable statutes and regulations. The statutes and regulations are intended to ensure that every employee will be covered by workers' compensation insurance.

*2. If so, can Form 11 be used to exclude coverage for special employees?*

A Form 11 may be used to exclude coverage for special employees, provided that the specified exclusion does not conflict with applicable statutes and regulations and does not result in a lack of workers' compensation coverage for employees of special employers.

*3. What information should Form No. 11 provide?*

In order to be approved, a Form No. 11 must conform to all the requirements of the California Code of Regulations. It must contain the language specified by Section 2269.11 as well as a careful description of the special employees who are excluded. Furthermore, the insurer requesting approval of a Form 11 must obtain and be able to show the WCIRB and the Insurance Commissioner a written statement from the special employer affirming to the insurer that the excluded special employees that will be working for the special employer are covered by the workers' compensation insurance policy of the general employer.

*4. Is there another endorsement form that should be used to exclude coverage for special employees, and what information should the form provide?*

There is currently no approved standard form that specifically allows the exclusion of special employees. However, an insurer may draft its own limiting and restricting endorsement to exclude coverage for special employees. Also, the WCIRB may draft a generic form of such an endorsement and submit it for approval on behalf of all authorized California workers' compensation insurance companies. In order to be approved, the endorsement form must conform to the substantive and formatting requirements of all applicable regulations, including CCR Sections 2257, 2259, and 2262. As with a Form No. 11, the insurer seeking approval of a form excluding coverage for special employees must obtain and be able to show the WCIRB and the Insurance Commissioner a written statement from the special employer affirming to the insurer that the excluded special employees that will be working for the special employer are covered by the workers' compensation insurance policy of the general employer. The affirmation of other insurance must be obtained even if an insurer uses an approved WCIRB form, should one be available.

The insurer may use Form No. 10 when it knows the names of the special employees to be excluded, pursuant to CCR Section 2269.10, and includes those names on the form, pursuant to CCR Section 2264(a).

Honorable Dennis M. Perluss

December 16, 2004

Page 3

We hope that this letter is responsive to the Court's request and are available to provide any further assistance, should the Court wish it.

Sincerely,

A handwritten signature in black ink, appearing to read "Gary M. Cohen", with a long horizontal flourish extending to the right.

Gary M. Cohen  
General Counsel

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA.

SECOND APPELLATE DISTRICT - DIVISION SEVEN

# 95 C

GENERAL CASUALTY  
INSURANCE, et al.,

Petitioners,

v.

WORKERS' COMPENSATION  
APPEALS BOARD and the  
CALIFORNIA INSURANCE  
GUARANTEE ASSOCIATION,

Respondents.

No. B167017

(W.C.A.B. No. POM 248928)

RECEIVED  
State of California  
DEC 17 2004  
Division of  
Workers' Compensation  
District Office  
San Francisco

and CASES B167540, B167541 and  
B167542 (on attached caption sheet)

**RESPONSE OF**

**THE WORKERS' COMPENSATION INSURANCE RATING  
BUREAU OF CALIFORNIA**

**TO NOVEMBER 18, 2004 ORDER**

Thomas E. McDonald (SBN. 109138)  
SONNENSCHN NATH & ROSENTHAL LLP  
685 Market Street, 6<sup>th</sup> Floor  
San Francisco, CA 94105  
Telephone: (415) 882-5000  
Facsimile: (415) 543-5472

Attorneys for  
WORKERS' COMPENSATION INSURANCE RATING BUREAU  
OF CALIFORNIA

AMERICAN HOME ASSURANCE  
COMPANY,

Petitioner,

v.

WORKERS' COMPENSATION  
APPEALS BOARD and the  
CALIFORNIA INSURANCE  
GUARANTEE ASSOCIATION,

Respondents.

No. B167540

(W.C.A.B. No. POM 0248928)

REMEDYTEMP, INC.,

Petitioner,

v.

WORKERS' COMPENSATION  
APPEALS BOARD and the  
CALIFORNIA INSURANCE  
GUARANTEE ASSOCIATION,

Respondents.

No. B167541

(W.C.A.B. No. POM 0249029)

JACUZZI INCORPORATED,

Petitioner,

v.

WORKERS' COMPENSATION  
APPEALS BOARD and the  
CALIFORNIA INSURANCE  
GUARANTEE ASSOCIATION,

Respondents.

No. B167542

(W.C.A.B. No. POM 0248928)

## TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	REGULATIONS GOVERNING LIMITING AND RESTRICTING ENDORSEMENTS.....	2
III.	THE CORRESPONDENCE APPENDED TO THE ORDER.....	4
IV.	RESPONSES TO QUESTIONS PRESENTED BY THE COURT.....	5
V.	CONCLUSION.....	8

# I

## INTRODUCTION

Pursuant to the Order (the "Order") dated November 18, 2004 issued by the Court requesting that the Workers' Compensation Insurance Rating Bureau of California (the "WCIRB") and the California Insurance Commissioner respond to certain questions, the WCIRB hereby submits its responses to the questions presented by the Court. The WCIRB bases its responses on its knowledge of past practices relating to the limiting and restricting endorsements that are the subject of the Court's questions.

The WCIRB is a private not-for-profit association organized in 1915 that operates as a licensed rating organization pursuant to Insurance Code section 11750 *et seq.* The WCIRB has been designated by the Insurance Commissioner to assist him in various regulatory functions related to workers' compensation insurance, including receiving, reviewing and forwarding to the Insurance Commissioner endorsement forms such as those that are the subject of the Order.

In carrying out its functions related to endorsement forms, the WCIRB recently corresponded with American Home Assurance Company ("Assurance") regarding a proposed endorsement to a workers' compensation insurance policy. Appended to the Order were four documents consisting of those communications between the WCIRB and Assurance. To provide a context for those communications, as well as for its responses to the questions presented by the Court, the following discussion briefly addresses: the regulations governing endorsements that limit and restrict coverage under workers' compensation insurance policies (Section II below), the written communications between Assurance and the WCIRB reflected in the four documents appended to the Order (Section III below), and the WCIRB's responses to the Court's questions (Section IV below).

## II

### REGULATIONS GOVERNING LIMITING AND RESTRICTING ENDORSEMENTS

Regulations governing endorsements limiting and restricting coverage under workers' compensation insurance policies are set forth at Cal. Code of Regulations, title 10, sections 2252 to 2269.14 (hereafter "Section \_\_\_\_").

In brief, the regulations authorize insurers to issue endorsements to workers' compensation insurance policies that limit and restrict coverage only in certain circumstances. An insurer may use an approved form endorsement to limit and restrict coverage by complying with the formatting and filing requirements established by the regulations. *See e.g.*, Sections 2256 to 2261. Alternatively, an insurer may draft its own limiting and restricting endorsement, which must be filed with the WCIRB for initial examination and forwarding to the Insurance Commissioner for approval or disapproval. *See* Section 2262.

The seven approved form endorsements (*see* Sections 2269.1, 2269.4, 2269.7, 2269.10, 2269.11, 2269.13 and 2269.14) generally limit and restrict coverage only as to specified subjects, such as an exclusion for additional compensation imposed by reason of serious and willful misconduct (*see* Section 2269.1). However, one approved form endorsement (Form No. 11 (*see* Section 2269.11)) is more indefinite than the other six form endorsements, as it permits the insurer to draft its own limitation and restriction in instances where the other six form endorsements are not applicable. The regulations limit the use of Form No. 11 to certain circumstances (*see* Section 2265) and impose special filing and notice requirements for Form No. 11 (*see* Section 2266).

Historically, Form No. 11 has been used rarely. The fact that Form No. 11 is limited to specified cases and is subject to special procedural requirements has likely caused that form to be invoked very infrequently to limit and restrict coverage. As a result, the WCIRB has had only occasional opportunity to review proposed endorsements using Form No. 11.

The last time the regulations governing the limiting and restricting endorsements relevant here were substantively amended was in 1967, when then-Insurance Commissioner Richard S. L. Roddis issued a decision adopting amendments to certain provisions within the regulations. (*See Ruling 157, In the Matter of Proposed Changes in Rules and Regulations of the Insurance Commissioner Relating to Workmen's Compensation Insurance and the Limitation and Restriction of Coverage Under Workmen's Compensation Insurance Policies*, File No. RH-118, September 15, 1967, attached hereto as Attachment A ("Ruling 157").) Ruling 157 may be of interest to the Court, as it expresses the public policy that:

Although the Insurance Code permits insurers to issue limited policies, the limitations, restrictions and exclusions which are applied should be entirely consistent with the requirements of the California Labor Code that every employer shall fully secure his compensation liability.

Ruling 157 at p. 3.

Ruling 157 -- and the regulations that govern these endorsements -- thus authorizes insurers to restrict workers' compensation insurance coverage so long as the restriction does not contravene the statutory mandate that all employers secure compensation for employees.



### III

#### THE CORRESPONDENCE APPENDED TO THE ORDER

The four documents appended as exhibits to the Order relate to communications between Assurance and the WCIRB regarding a proposed Form No. 11 endorsement to a workers' compensation insurance policy.

Exhibit A is the specimen copy of the proposed endorsement, which proposes to exclude "any employee of a general employer whereby you are considered special employer in accordance with local law."

Exhibit B is a letter from the WCIRB to Assurance asking for an explanation of the purpose of the proposed Form No. 11 in view of the mandate of Section 2265 that Form No. 11 be used only in specified circumstances. Specifically, subdivisions (a) to (d) of Section 2265 identify the limited circumstances under which Form No. 11 may be used. The WCIRB's letter was directed towards understanding which, if any, of those circumstances were applicable to the proposed Form No. 11.

Exhibit C is a letter from Assurance to the WCIRB advising that the purpose of the proposed form is to exclude coverage for leased and temporary workers because those workers are covered by the workers' compensation insurance policies of the employers who are providing them to Assurance's insured.

Exhibit D is a facsimile response from the WCIRB to Assurance advising that the proposed endorsement "would be used inappropriately" for the purpose of excluding coverage for leased and temporary workers. As discussed below, the WCIRB regrets that its response to Assurance's submission did not explain the basis for its conclusion and made a determination that more properly rests with the Insurance Commissioner.

## IV

### RESPONSES TO QUESTIONS PRESENTED BY THE COURT

The Order presents four questions to which the Court invites a response from the WCIRB and the Insurance Commissioner. Those questions -- together with the WCIRB's responses based upon its knowledge of past practices relating to limiting and restricting endorsements -- follow, with the Court's questions in italics.

*Where general and special employers are insured for workers' compensation under separate policies:*

*[1] Can special employees be excluded from coverage under the special employer's workers' compensation insurance policy?*

Based on past practices relating to limiting and restricting endorsements, the WCIRB believes that special employees can be excluded from coverage under the special employer's workers' compensation insurance policy provided that certain requirements (discussed below) are met.

*[2] If so, can Form No. 11 be used to exclude coverage for special employees?*

Based on past practices relating to limiting and restricting endorsements, the WCIRB believes that Form No. 11 can be used to exclude coverage for special employees provided that the use of Form No. 11 for such purpose conforms to the requirements of the regulations summarized above. As noted above, this is a matter that ultimately belongs before the Insurance Commissioner.

The WCIRB recognizes that the correspondence between Assurance and the WCIRB reflected in Exhibits A through D suggests that

Form No. 11 may not be used for this purpose. The WCIRB notes that it was unclear from the WCIRB's letter to Assurance (Exhibit B) that the WCIRB sought an identification of the circumstances that supported the use of the proposed endorsement, and Assurance's response accordingly did not directly identify the basis under Section 2265 for the use of the proposed endorsement. From the response submitted by Assurance (Exhibit C), it can be inferred that the proposed endorsement was intended to be based upon Section 2265(a) as a proposed endorsement in accordance with the guiding standards set forth in Section 2259. Specifically, the reference in Assurance's response to the special employees being covered by other insurance policies suggests that Assurance was relying upon Section 2259(e), which authorizes a limiting and restricting endorsement "[w]here the endorsement seeks to exclude only such liability of the employer for compensation as the latter affirms to the insurer in writing is otherwise secured or is lawfully uninsured . . ."

The WCIRB notes that the proposed endorsement could be deemed deficient under Section 2259(e) because there was no indication that the special employer had affirmed to the insurer in writing that liability of the special employer for compensation had been otherwise secured through the general employer's insurance policy. However, if that rationale had been an appropriate basis for questioning the proposed endorsement, the WCIRB should have explained that concern to Assurance in the correspondence. Ultimately, however, it is for the Insurance Commissioner to make a determination of the propriety of a proposed endorsement.

*[3] What information should Form No. 11 provide?*

Based on past practices relating to limiting and restricting endorsements, the WCIRB believes that if Form No. 11 is to be used to

exclude coverage for special employees under the special employer's workers' compensation insurance policy because the special employee is covered under the general employer's workers' compensation insurance policy, Form No. 11 should contain the language prescribed by Section 2269.11 as well as a careful description of the excluded special employees. Further, consistent with Section 2259(e), the insurer should advise the WCIRB that the endorsement is to be used when the special employer has affirmed to the insurer in writing that compensation has been otherwise secured through the general employer's insurance policy, and the insurer could consider including a recitation to that effect in the proposed endorsement.

In the event that the insurer relies upon a ground other than Section 2259(e) to use Form No. 11 to exclude coverage for special employees, the insurer should explain that basis to the WCIRB in its submission and the Commissioner would then be in a position to determine whether or not to approve the proposed endorsement.

*[4] Is there another endorsement form that should be used to exclude coverage for special employees, and what information should the form provide?*

No existing standard endorsement form was designed for the purpose of excluding coverage for special employees. Based on past practices relating to limiting and restricting endorsements, the WCIRB believes that an insurer may draft its own limiting and restricting endorsement to exclude coverage for special employees so long as such an endorsement conforms with the substantive and formatting requirements of the regulations, including Sections 2257, 2259 and 2262. Thus, such a proposed endorsement should include the prescribed language from

Section 2257, be limited for use to one of the conditions set forth in Section 2259, and be submitted and approved as required by Section 2262.

In addition, if the insurer knows the names of the special employees to be excluded, the insurer could use Form No. 10 (*see* Section 2269.10) and include in the endorsement the names of the special employees to be excluded (*see* Section 2264(a)).

V

CONCLUSION

The WCIRB trusts that the Court finds this response helpful and remains prepared to provide further information as the Court may deem appropriate.

Dated: December 16, 2004

Respectfully submitted,

SONNENSCHN NATH & ROSENTHAL LLP

By Thomas E. McDonald

Thomas E. McDonald

Attorneys for

WORKERS' COMPENSATION  
INSURANCE RATING BUREAU  
OF CALIFORNIA

27187896

STATE OF CALIFORNIA  
DEPARTMENT OF INSURANCE

1407 Market Street  
San Francisco, California 94103

In the Matter of Proposed Changes in )  
Rules and Regulations of the Insurance )  
Commissioner Relating to Workmen's )  
Compensation Insurance and the Limita- )  
tion and Restriction of Coverage Under )  
Workmen's Compensation Insurance )  
Policies. )

Ruling No. 157

File No. RH-118

September 15, 1967

DECISION

In accordance with Notice published and disseminated pursuant to law, the above-entitled matter came on regularly for hearing before the Insurance Commissioner at his office at 1407 Market Street, San Francisco, California, on Tuesday, August 8, 1967, and at Room 1122, Los Angeles State Building, 107 South Broadway, Los Angeles, California, on Thursday, August 10, 1967, at which places and times exhibits were received and statements, arguments and contentions, both written and oral, were adduced. At the conclusion of the hearings on August 10, 1967, the matter was submitted for decision, subject to the record being continued open until the close of business on August 18, 1967, to permit interested parties to file written statements with respect to matters covered by the hearings.

The matter having been duly heard and considered, the following Order, accompanied by a brief explanation and history of the subject, is hereby made.

EXPLANATION AND HISTORY

In accordance with provisions of Sections 11657, 11658, 11659 and 11660 of the Insurance Code, the Insurance Commissioner has heretofore adopted rules and regulations governing the limitation of coverage under workmen's compensation policies and prescribing the forms of limiting and restricting endorsements for use on such policies. These rules and regulations have from time to time been revised to be in harmony with changing conditions in the workmen's compensation insurance business. They are presently set forth in Sections 2252 through 2269.15 of the California Administrative Code.

On February 5, 1965, the Governing Committee of the California Inspection Rating Bureau (hereinafter referred to as the "Bureau"), after discussion with the Insurance Commissioner, appointed a Special Committee to review the entire subject of limiting and restricting provisions which affect workmen's compensation insurance coverage and to formulate recommendations on the matter "in the light of present day thinking". This action recognized that a number of problems had arisen by reason of limitation of coverage. Also giving impetus to the action was the report of the Workmen's Compensation Study Commission (established by 1963 Statutes of California, Chapter 2040) recommending a reexamination of the existing list of authorized restrictive endorsements. This action by the Governing Committee had the full concurrence of the Insurance Commissioner, and members of the Commissioner's staff subsequently attended all meetings of the Special Committee and have actively cooperated with the Committee in its work.

The matter considered in this proceeding consists of the recommendations of the Special Committee. These were submitted to and approved by the Governing Committee of the Bureau early in 1967 and subsequently filed on April 19, 1967, with the Insurance Commissioner for his approval.

In developing its recommendations the Special Committee took cognizance of a nationwide trend toward the writing of unlimited, or less limited workmen's compensation insurance coverage. It also recognized that under provisions of the California Labor Code an employer has a statutory obligation to fully secure his liability for compensation, either by obtaining an insurance policy or by securing a certificate of consent to self-insure, and that the average employer, if issued a policy which excludes a portion of his compensation liability, will find it impracticable either to self-insure the excluded liability or to obtain a supplementary policy. It was the consensus of the Special Committee that as a matter of public policy (a) there should be no exclusion, restriction or limitation of coverage required by administrative regulation, (b) there should be a minimum of limitations, restrictions and exclusions on workmen's compensation policies, and (c) the abridgement of unlimited coverage should require strong justification. At the same time the Special Committee concluded that the continued use of a small number of approved limiting and restricting endorsements should be preserved.

The Special Committee has recommended a reduction in the number of approved restrictive endorsements and options, as well as the establishment of strict standards for the limitation of coverage. These proposals, if adopted, will have a far reaching effect by drastically reducing the limitation of coverage under workmen's compensation policies.

In the proposals under consideration in this proceeding, proposed Section 2259 of the California Administrative Code sets forth the standards for use of limiting and restricting endorsements other than Endorsement Form No. 11. Under these standards it appears that a restrictive endorsement would be intended for use primarily as a means for clearly establishing the identity of the employer and clarifying the scope of the coverage and only secondarily as an exclusion of coverage of the employer's workmen's compensation liability. California Approved Form Endorsement No. 11, which is essentially a shell or blank form, would be retained, but this form would be subject to the strict standards for use set forth in proposed Section 2265. It is further proposed that existing endorsements providing for exclusion of corporate executive officers and exclusion of the pneumoconiosis hazard be eliminated, and that the traditional form for exclusion of relatives of an individual employer or of a man and wife be amended to permit the exclusion by agreement of only those relatives who reside in the household of the employer or are children under the age of 12 years. Use of this limiting endorsement would no longer be mandatory. The proposals also include certain implementing changes in the rules of the Workmen's Compensation Insurance Manual and of the Pneumoconiosis Schedule Rating Plan, one of which would eliminate the existing requirement for a minimum payroll basis for computation of premium on covered relatives residing on property of the insured.

During the hearings the Bureau suggested that the originally proposed effective date of January 1, 1968, be amended to April 1, 1968, in order that insurers may have sufficient time to obtain adequate supplies of amended forms. This appears to be a necessary change, and is approved. The Bureau's staff and legal counsel also agreed that certain clarifying amendments to the Bureau's proposals suggested by representatives of the Insurance Department were in accord with the intent of the original proposals.

Additional suggested amendments to the proposals were submitted in writing by interested persons following the close of the hearings. It was suggested that the endorsement providing for exclusion of partners who are not specifically included for benefits by name be eliminated, apparently with the intent that such elimination would result in the automatic extension of benefits under a workmen's compensation policy to all members of a partnership which is named as the employer. It should be noted, however, that under provisions of the Workmen's Compensation Laws a partner is frequently, if not usually, not an employee, and the elimination of the exclusion of partners would not bring about the result which is apparently sought. It would appear that continued permission to use this exclusion is justified in that its use (in conjunction, where desired, with a provision affirmatively including specified partners for voluntary and statutory workmen's compensation benefits) will permit a clarification of the coverage provided by the policy as respects the insuring of benefits for partners.

Additional suggestions were made for amending the standards for use of limiting endorsements set forth in proposed Sections 2259 and 2265. These apparently would affect the substance of the Bureau's recommendations. The written comments of Bureau management with respect to these suggested amendments point out that the Bureau's original proposals represent the detailed and painstaking analysis and recommendation of the Special Committee, which has spent many hours debating the merits and defects of numerous alternative provisions, that such proposals had the final approval of the Bureau's Governing Committee, and that Bureau management could not encourage any deviation from the formal filing which would alter the expressed intent of the Special Committee.

It is my conclusion that the Bureau's recommendations are in the public interest. They give recognition to the fact that although the Insurance Code permits insurers to issue limited policies, the limitations, restrictions and exclusions which are applied should be entirely consistent with the requirements of the California Labor Code that every employer shall fully secure his compensation liability.

During this proceeding representatives of the Division of Industrial Accidents, the Workmen's Compensation Appeals Board, and other agencies of the Department of Industrial Relations expressed support of the Bureau's recommendations, although they also recommended that further study should be given to the possible future elimination of all limiting and restricting provisions in workmen's compensation policies. In view of the detailed and specific attention which has been given to the affected rule and form by the Special Committee, and the fact that under its recommendations the limitation of coverage will be permitted only where there is strong justification, I have concluded that further changes should not be made in the substance of its recommendations unless and until further experience has demonstrated the need for such changes.

The regulations as proposed by the Bureau are therefore adopted with only certain editorial and clarifying changes.

#### ORDER

WHEREFORE IT IS ORDERED, by virtue of the authority vested in me by Article 2, Chapter 2, and Article 2, Chapter 3 of Part 3, Division 2 of the Insurance Code of the State of California,



- (a) that with respect to all policies and endorsements with an effective date falling on or after April 1, 1968, Article 7, Subchapter 2, Chapter 5, Title 10 of the California Administrative Code relating to Workmen's Compensation Policy Forms be, and the same hereby is, amended and modified in the respects specified in Appendix A attached hereto and hereby made a part hereof,
- (b) that with respect to all policies with an effective date falling on or after April 1, 1968, Section 2350 of Title 10 of the California Administrative Code and the Manual of Rules, Classifications and Basic Rates for Workmen's Compensation Insurance comprising said Section 2350 be, and the same hereby are, amended and modified in the respects specified in Appendix B attached hereto and hereby made a part hereof, and
- (c) that with respect to all policies with an effective date falling on or after April 1, 1968, Section 2351.2 of Title 10 of the California Administrative Code and the Pneumoconiosis Schedule Rating Plan comprising said Section 2351.2 be, and the same hereby are, amended and modified in the respects specified in Appendix C attached hereto and hereby made a part hereof.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my official seal this 15th day of September 1967.

[Signed]

RICHARD S. L. RODDIS  
Insurance Commissioner

(SEAL)

APPENDIX A

The following amendments to Article 7, Subchapter 2, Chapter 5, Title 10 of the California Administrative Code are effective with respect to all policies and endorsements with an effective date falling on or after April 1, 1968.

Paragraph (e) of Section 2257 is amended to read:

(e) If the policy does not by its terms provide that remuneration when used as a premium basis shall not include the remuneration of an employee with respect to whom coverage is not afforded, Endorsement Forms Nos. 3, 4, 10 and 11 shall include the following provision:

"It is further agreed that 'remuneration' when used as a premium basis for such insurance as is afforded by this policy [or "by the policy by reason of the designation of California in Item 3 of the declarations"] shall not include the remuneration of any person excluded from coverage in accordance with the foregoing."

Section 2259 is amended to read:

2259. Grounds for the Use of Limiting and Restricting Endorsements. A limiting and restricting endorsement other than California Approved Form Endorsement No. 11 may be used only under one or more of the following circumstances:

(a) Where the purpose of the endorsement is to limit insurance coverage to the liability for compensation to employees of the specific entity named as the insured in the policy.

(b) Where the insured is a partnership and the endorsement seeks to exclude from workmen's compensation insurance coverage one or more partners as employees.

(c) Where the insured seeks to exclude an individual whose relationship by blood or marriage to the insured suggests family rather than employment ties, particularly if the insured denies the existence of employment.

(d) Where the insured seeks by endorsement to negate an 'election' under Labor Code Section 4151 to bring under the compensation provisions of the Labor Code persons in his employment who are excluded from the definition of "employee" by Section 3352 and other provisions of Article 2 of Chapter 2 of Part 1 of Division 4 of the Labor Code.

(e) Where the endorsement serves as a notice to the employer that any liability for additional compensation payable to his employee by reason of injury caused by the employer's serious and willful misconduct, or liability by reason of the illegal employment of a minor under 16 years of age, is uninsurable (Insurance Code Sections 11661 and 11661.5).

(f) Where the endorsement seeks to exclude only such liability of the employer for compensation as the latter affirms to the insurer in writing is otherwise secured or is lawfully uninsured (e.g., liability of the State and its political subdivisions and institutions).

Section 2260 is amended to read:

2260. California Approved Form Endorsements. Endorsement forms Nos. 10, 3, 4, 7, 10, 11, 13 and 14, copies of which appear in Sections 2269.1 to 2269.14, inclusive, are California Approved Form endorsements.

Section 2261 is amended to read:

2261. Same: Submission Requirements. Each insurer must submit its California Approved Form limiting and restricting endorsement forms to the California Inspection Rating Bureau in triplicate for examination by the Bureau and transmittal to the Insurance Commissioner. Each such form shall be deemed to be approved by the Insurance Commissioner unless, within 30 days from the date of submission by the California Inspection Rating Bureau, the Insurance Commissioner shall in writing notify the insurer submitting the form that same is disapproved. If such notification of disapproval is not given within said 30 days, all such forms shall be deemed to be approved until 10 days after date of written notification of disapproval.

Section 2262 is amended to read:

2262. Other Limiting and Restricting Endorsements: Approval. All other limiting or restricting endorsement forms must be drafted in accordance with and subject to the specifications enumerated in Section 2257, and must be submitted in triplicate to the California Inspection Rating Bureau for its examination and transmittal to the Insurance Commissioner. After consultation with the Division of Industrial Accidents as required by law, the insurer will be notified of approval or disapproval of any such form.

Section 2263 is amended to read:

2263. Limiting and Restricting Provisions in Policy Forms. Each limiting or restricting provision which is incorporated as an integral part of a policy form is subject to the standards stated in Section 2259 (a) through (e) of these rules.

Section 2264 is amended to read:

2264. Options for Form No. 10. California Approved Form Endorsement No. 10 may be completed by the insertion of one of the following options and none other:

(a) (Insert only the names of persons to be specifically excluded.)

(b) "Any employee engaged in any work other than directly in connection with the operations specifically described in the policy schedule [or "declarations"] or amendment of such schedule [or "declarations"] by endorsement."

(c) "Any employees engaged in any work not directly connected with operations conducted at [or "in"]. . ." (Insert here a careful description of the location to be covered.)

(d) "Any employees engaged in any work directly connected with operations conducted at [or "in"]. . ." (Insert here a careful description of the location to be excluded.)

(e) "Any employees engaged in the following operations. . ." (Insert here a careful description of the operations to be excluded and the manual classification and code number applicable to such operations.)

(f) "Any employees engaged in the following operations: . . ." (Insert here a careful description of operations and manual classification and code number applicable thereto) "at or from. . ." (Insert here a careful description of location to be excluded.)

(g) "Any employees other than those engaged in the following operations. . ." (Insert here a careful description of operations and manual classification and code number applicable thereto) "at or from. . ." (Insert here a careful description of the location to be covered.)

Section 2265 is amended to read:

2265. Use of Form No. 11 Restricted. California Approved Form Endorsement No. 11 may be used only in those cases where other California Approved Form endorsements are not applicable or may not be used. It shall accurately and unambiguously state the limitation or restriction and shall bear an appropriate side note descriptive of the limitation or restriction. It may be used only under one or more of the following circumstances:

(a) Where use of the Form No. 11 Endorsement is in accordance with one or more of the guiding standards set forth in Section 2259 of these rules.

(b) Where the employer's business is conducted in such a manner that it is impossible or impracticable to determine the nature, scope and extent of employment covered by the insurer without the use of a limiting and restricting endorsement.

(c) Where the use of the Form No. 11 Endorsement is for the intended purpose of preventing performance of work in such an extremely hazardous manner or under such hazardous conditions as would reflect a reckless disregard by the employer for the welfare of his employees.

(d) Where the issuance of an unrestricted policy would serve to encourage an operation which is illegal, clearly contrary to public interest, or contrary to the rules or practices of a public regulatory body.

Section 2266 is amended to read:

2266. Use of Form No. 11: Notification to Insured. Upon issuance of any completed California Approved Form Endorsement No. 11 the insurer must submit such endorsement in triplicate to the California Inspection Rating Bureau. Upon receipt of such Form No. 11 endorsement, the Bureau shall notify the insured in writing, with duplicate copy to be furnished the Division of Industrial Accidents, of the nature of the

limitation or restriction. Such notification shall also inform the insured that in the event of a claim arising within the scope of the limitations, which the Division of Industrial Accidents should hold to be compensable, the employer would be directly liable under the law and not protected by the policy. Such endorsement shall then be transmitted to the Insurance Commissioner. Each such endorsement shall be deemed to be approved by the Insurance Commissioner unless, within 30 days from the date of submission by the California Inspection Rating Bureau the Insurance Commissioner shall in writing notify the insurer submitting the endorsement that same is disapproved. If such notification of disapproval is not given within said 30 days, all such endorsements shall be deemed to be approved until 10 days after the date of written notification of disapproval.

Section 2267 is amended to read:

2267. Extension of Coverage to New Insured: Not Limiting Endorsement. The extension of the policy by endorsement to cover the liability of anyone in addition to the original named insured, shall, unless otherwise stipulated in the endorsement, extend the same coverage as that provided by the policy to the original named insured. It shall not be necessary to set out in such endorsement the restrictions or limitations, if any, of the policy, nor shall such endorsements be considered limiting or restricting endorsements.

Section 2268 is amended to read:

2268. Collateral Agreements Prohibited Unless Made Part of Policy. No collateral agreements modifying the obligation of either the insured or the insurer shall be made unless attached to and made a part of the policy, provided, however, that if such agreements are attached and in any way restrict or limit the coverage of the policy, they shall conform in all respects with these rules.

Section 2269.2, and California Approved Form Endorsement No. 2 comprising said Section 2269.2, are repealed.

## PROOF OF SERVICE

I, Deborah Waterford, hereby declare:

I am employed in the City and County of San Francisco, California in the office of a member of the bar of this court at whose direction the following service was made. I am over the age of eighteen years and not a party to the within action. My business address is Sonnenschein Nath & Rosenthal LLP, 685 Market Street, 6th Floor, San Francisco, California 94105.

On December 16, 2004, I served

### RESPONSE OF THE WORKERS' COMPENSATION INSURANCE RATING BUREAU OF CALIFORNIA TO NOVEMBER 18, 2004 ORDER

on the interested parties in this action by placing a true copy thereof, on the above date, enclosed in a sealed envelope, following the ordinary business practice of Sonnenschein Nath & Rosenthal, as follows:

ATTN: Legal Division Workers Compensation Appeals Board 455 Golden Gate Avenue, 2 <sup>nd</sup> Floor San Francisco, CA 94102-3660 Telephone: (415) 703-4600 Facsimile: (415) 703-4981 (2 copies)	Supreme Court Clerk State of California 350 McAllister Street San Francisco, CA 94102 (5 copies)
Mark G. Bonino, Esq. Erica L. Hermatz, Esq Ropers, Majeski, Kohn & Bentley 80 North First Street San Jose, CA 95113 Telephone: (408) 287-6262 Facsimile: (408) 918-4501 Attorneys for Defendant and Petitioner American Home Assurance Company	Honorable Robert T. Hjelle Workers' Compensation Appeals Board 6150 Van Nuys Blvd. Van Nuys, CA 91401-3173 WCALJ
Robert Wheatley, Esq. Yvette A. Boehnke, Esq. Law Offices of Robert Wheatley 550 North Golden Circle Drive Santa Ana, CA 92705-3906 Telephone: (714) 560-0199 Facsimile: (714) 560-0188 Attorneys for Defendant and Petitioner American Home Assurance Company	G. Andrew Lundberg, Esq. Stephen J. Newman, Esq. Kay L. Tidwell Esq. Latham & Watkins, LLP 633 West Fifth Street, Suit: 4000 Los Angeles, CA 90071-2007 Telephone: (213) 485-1234 Facsimile: (213) 891-8763 Attorneys for Defendant and Petitioner RemedyTemp, Inc.

<p>Richard E. Guilford, Esq.  Guilford Steiner Sarvas &amp; Carbonara LLP  2099 S. State College Blvd., Suite 400  Anaheim, CA 92806-6149  Telephone: (714) 937-0300  Facsimile: (714) 937-0306  Attorneys for Respondent and Real Party in Interest  California Insurance Guarantee Association</p>	<p>Larry D. Hogarth, Esq.  Hogarth &amp; Associates  222 N. Sepulveda Blvd., #2000  El Segundo, CA 90245  Telephone: (310) 335-20 3  Facsimile: (310) 335-2049  Attorneys for Petitioners  General Casualty Insurance and Regent Insurance</p>
<p>Robert E. Buch, Esq.  Dennis DePalma, Esq.  Seyfarth Shaw  2029 Century Park East, Suite 3300  Los Angeles, CA 90067-3063  Telephone: (310) 277-7200  Facsimile: (310) 201-5219  Attorneys for Defendant  Jacuzzi Inc.</p>	<p>Douglas G. Benedon, Esq.  Gerald M. Serlin, Esq.  Benedon &amp; Serlin  21700 Oxnard Street, Suite 1290  Woodland Hills, CA 92357  Telephone: (818) 340-1950  Facsimile: (818) 340-1990  Attorneys for Petitioners  General Casualty Insurance and Regent Insurance</p>
<p>Pamela Schroeder  Jacuzzi, Inc.  2121 N. California Blvd., Suite 475  Walnut Creek, CA 94596  Telephone:  Facsimile:  Attorneys for Jacuzzi, Inc.</p>	<p>Sharon M. Renzi  Law Offices of Sharon M Renzi  5120 East LaPalma Avenue, Suite 205  Anaheim Hills, CA 92807  Telephone: (714) 777-7253  Facsimile: (714) 777-7254  Attorneys for Petitioner  RemedyTemp, Inc</p>
<p>John C. Holmes  Bryan C. Crawley  Barger &amp; Wolen LLP  633 West Fifth Street, Suite 4600  Los Angeles, CA 90071-2007  Telephone: (213) 680-2800  Facsimile: (213) 614-7399  Attorneys for Petitioner  RemedyTemp, Inc.</p>	<p>Todd William Baxter  McCormick Barstow, et al.  5 River Park Place East  P.O. Box 28912  Fresno, CA 93729-8912  Telephone:  Facsimile:  Attorneys for Amicus Curiae  Pridestaff</p>

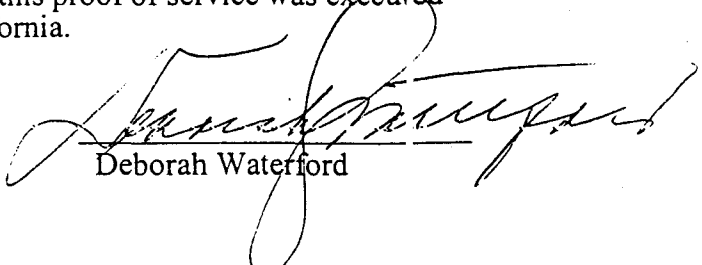
Edward A. Lenz American Staffing Association 277 South Washington Street, Suite 200 Alexandria, VA 2234-3646 Telephone: Facsimile: Attorneys for Amicus Curiae American Staffing Association	Robert Spagat Thelen Reid & Priest LLP 101 Second Street, Suite 1800 San Francisco, CA 94105 Telephone: Facsimile: Attorneys for Amicus Curiae American Staffing Association
Ellen Sims Langille Finnegan, Marks, Hampton & Theofel 1990 Lombard Street, Suite 300 San Francisco, CA 94123 Telephone: Facsimile: Attorneys for Amicus Curiae California Workers' Compensation Institute	John Ellena 750 Terrado Plaza, Suite 105 Covina, CA 91723 Telephone: Facsimile: Attorneys for Mark Micel

U.S. MAIL: I am personally and readily familiar with the business practice of Sonnenschein Nath & Rosenthal LLP, for collection and processing of correspondence for mailing with the United States Postal Service, pursuant to which mail placed for collection at designated stations in the ordinary course of business is deposited the same day, proper postage prepaid, with the United States Postal Service.

FACSIMILE TRANSMISSION: I caused such document to be sent by facsimile transmission at the above-listed fax number for the party.

FEDERAL EXPRESS: I caused such package to be delivered by overnight courier service.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this proof of service was executed on December 16, 2004 at San Francisco, California.

  
Deborah Waterford