CAIIA Status Report

JULY 2007

Carl Warren & Company Honored

May 15, 2007 (Washington, DC) – Carl Warren & Company has been selected by The ESOP Association as the winner of a 2007 Annual Award for Communications Excellence (AACE). The AACE Awards are sponsored each year by the Association to recognize the outstanding communications and educational programs of its members. The awards are presented each May at the Association's Annual Conference in Washington, DC to companies who have excelled in communicating the ESOP (employee stock ownership plan) and its meaning to the company's employees.

Carl Warren & Company is an employee-owned company based in Orange County, California operating on a national basis. The firm is a leading third party claims administrator and service provider to insurers, public agencies and corporate clients throughout the country. Providing litigation management and claims expertise, the company has been in business since 1944 and was named the 2006 Western Chapter ESOP Company of the Year.

"The AACE is a great motivator for our employee-owners to take time from their busy days to communicate and participate in company encouraged activities while always delivering the highest in quality to our customers," commented Mark Bernstein, ESOP Committee Chair.

AACE Award winners are chosen by a panel of five judges made up of both management and non-management employee owners, each of whom has demonstrated active experience and interest in the field of ESOPs and employee ownership communications.

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Volunteers Needed

The annual CCNC is being held on September 13-14. The CAIIA is again exhibiting at this great conference. We need volunteers to populate the booth for the two days. Also, we will need a volunteer to set and another volunteer to take down the booth. Please contact Sterrett Harper at 818 953-9200 or harperclaims@hotmail.com to help us. All volunteers have their fee to attend the conference paid for the day they volunteer.

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California Association of Independent Insurance Adjusters

An Employer Organization of Independent Insurance Adjusters

Inside This Issue

***Status Report* Now Available by E-mail**

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

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■ PRESIDENT'S MESSAGE

Lately I have been thinking more and more about the fragility of life. In fact my husband and I just bought some additional life insurance. I wonder if it because I am getting older or because I have been a claims adjuster for too long and have seen so many tragic accidents. Maybe it is because my son has just obtained his driving permit and I have been relegated to the front passenger seat and no longer have control of the steering wheel or my own life for that matter. I find some comfort in knowing that I have a lot of metal surrounding me.

However, my back hurts. Is that due to age or the fact that while my son is driving I find myself leaning inward toward the center of the vehicle thereby throwing my back out of balance. What about that constant cramp in my leg? Is my circulation poor or is it from constantly applying pressure to the brake that does not exist on the passenger side?

There is a name for those handlebars installed inside the vehicle, one which I cannot repeat here, but one in which I must now admit is appropriately named. And if he is driving anywhere other than the driveway, I find myself contemplating the use of that 5-point harness strap on my daughter's car seat. I hear you laughing, but for those of you who have been there you know what I am talking about. Where our conversations used to revolve around questions like, "How was school today? Did you finish your homework? What are your plans this weekend?" We now discuss or should I say, I quiz him on defensive driving techniques and vehicle codes like, unsafe starting or opening your car door into the side of traffic.

And my favorite one so far is speeding or tailgating (a popular one with young men I have discovered). This one I seem to blurt (or scream) out on a regular basis. It usually begins with a controlled comment such as "Slowing would be good here ", followed by a little louder, but more forceful, "I Think you should start SLOWING NOW!" shortly trailed by a panicked cry, "BRAKE NOW!!!" By this time both of my legs have cramped and I have wretched my back because I have slammed on the invisible brakes with both legs.

What I am trying to say is that we are never too old or too young to drive defensively and therefore we can never hear it enough. Here are some safe driving tips to keep in mind; Buckle up-always wear your seatbelt, Pay attention and aim high, Do not insist on the right of way. Signal your intentions. Know your blind spots. Leave yourself an out. Don't tailgate. Don't speed. Maintain your vehicle and chill out!

SHARON GLENN
President - CAIIA 2006-2007

Carl Warren & Company Honored . . .

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Caryn Siebert, CEO of Carl Warren & Company, was also named the 2007 Outstanding Board of Governors Member by the ESOP Association. Ms. Siebert has been a member of The ESOP Association for several years and is a leader in the California/Western States Chapter. Under her leadership at Carl Warren, she has advocated strongly to make ESOP important to the company and employee owners. She is actively involved in the chapter's meetings and as a presenter. In her first year as a member of the Association's Board of Governors, she was elected to serve on the Association's Nominating Committee. "Caryn has gone above and beyond the normal activities expected for a Board of Governors member," said Michael Keeling, President of The ESOP Association, "as evidenced by her work for the Association's California/Western States Chapter, our members and the Association."

"We are fortunate to live in a country which allows employee ownership. For Carl Warren as an ESOP, that opportunity results in superior customer service by employee owners with a vested interest in client satisfaction and company performance," stated Siebert upon receiving the Award.

Founded in 1978, The ESOP Association represents over 1,400 ESOP companies and 750,000 employee owners who believe that employee ownership will improve American competitiveness, increase productivity through greater employee participation and strengthen our free enterprise economy.

Weekly Law Resume

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

Coverage – Horizontal Exhaustion – Excess Coverage

Padilla Construction Company, Inc. v. Transportation Insurance Co. , (May 14, 2007), Court of Appeal, Fourth District

California requires all primary insurance to be exhausted before an excess insurer drops down to defend an insured, including cases of continuous loss. This case presented the issue of whether an excess insurer had a duty to drop down and defend the underlying action where the only primary policy defending the insured incepted after the damage began. The other issue presented was whether there was other available insurance within the meaning of an excess insurer's policy where the lone defending primary insurer contained a self-insured retention.

This case involved a continuous damage construction defect suit filed by two homeowners against the developer of the property. Padilla Construction was brought into the lawsuit by way of cross-complaint. Padilla had done stucco work, which allegedly blocked foundation vents in 1995. Padilla had four successive primary liability policies from January, 1995 until May 1, 2003. Also, from 1995 through 1997, Padilla had two years of commercial umbrella policies issued by Transportation Insurance Company. Of the four primary insurers, two became insolvent. The insured elected only to tender to one of the two remaining primary carriers. As the litigation ensued, that carrier notified the insured that because of numerous other claims against the insured, the policy was nearing exhaustion. The insured requested the carrier to tender to the excess carrier. The excess carrier refused the tender on the ground that a primary insurance policy had not yet been exhausted. The insured assumed its own defense and reached a settlement with the developer. The primary insurer who was not exhausted did not contribute.

The insured then sued the excess carrier on a theory it had a duty to drop down and defend the insured once the primary policy below it was exhausted. The trial court ruled that because there was still primary coverage available to the insured, the umbrella carrier was not required to drop down and provide a defense.

The insured appealed.

The Court of Appeal affirmed the trial court. The primary policy that provided coverage but never received a tender provided coverage from 2001 to 2003. It was not liable for indemnity for property damage that occurred prior to its inception date. However, if there was any property damage within its policy period, it had a duty to defend the entire lawsuit, including that portion of the lawsuit asserting damages for claims that occurred before its inception date. This is because an insurer must defend an entire action where there is at least one claim potentially covered by its policy. This includes actions where continuous property damage starts before a policy period. The solution for a primary carrier in this situation is to seek reimbursement for money spent on claims not potentially covered. Thus, no defense obligation was triggered by the umbrella car-

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Deductibles and Subrogation Claims Under the California Fair Claims Settlement Practices Regulations and Recent California Case Law

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

Pacific Gas and Electric v. American Guarantee and Liability Insurance Company

In this matter, the court concluded that section 2695.7(q) of the California Fair Claims Settlement Practices Regulations governs the conduct of insurers in the settlement of claims and not in the litigation of claims. As stated in the opinion, "A subrogation demand in a settlement contest was not the same as standing to sue in litigation. Under the general law of subrogation, the insurer had a right to sue only for the subrogated loss that it had paid to its insured; the insurer was not a proper party under Code of Civil procedure Section 367, as to the deductible.

Section 2695.7 (q) of the California Fair Claims Settlement Practices Regulations reads as follows:

> "Every insurer that makes a subrogation demand shall include in every demand the first party claimant's deductible. Every insurer shall share subrogation recoveries on a proportionate basis with the first party claimant, unless the first party claimant has otherwise recovered the whole deductible amount. No insurer shall deduct legal or other expenses from the recovery of the deductible unless the insurer has retained an outside attorney or collection agency to collect that recovery. The deduction may only be for a pro rata share of the allocated loss adjustment expense. This subsection shall not apply when multiple policies have been issued to the insured(s) covering the same loss and the language of these contracts prescribe alternative subrogation rights. Further, this subsection shall not apply to disability and health insurance as defined in California Insurance Code Section 106."

The Court of Appeal concluded that Section 2695.7 (q) of the California Fair Claims Settlement Practices Regulations, relied on by American Guarantee and Liability Insurance Company to seek recovery of their loss and the insured's deductible in litigation, was not an authorized act under the subject Claims Settlement Practices Regulations section. The Court further opined:

> "A 'subrogation demand' does not authorize substitution of one party for the lawful party in a lawsuit."
>
> *****
>
> "Standing in a lawsuit is governed by Code of Civil Procedure Section 367, which provides: "Every action must be presented in the name of the real party in interest except as otherwise provided by statute.'"

The court appears to have decided to initiate a change in favor of complexity over simplicity. Hopefully, the Department of Insurance or the legislature will create a remedy to restore this longstanding benefit to the insured when an insurer takes control of recovering for both instead of being denied standing to effectively share the recovery with its policyholder. Otherwise, to accomplish the same goal, joining with the insured as co-party plaintiffs appears to be necessary.

Also, is this a precursor of things to come — The court's requiring that insurers name their reinsurers when seeking to recover a paid loss based upon alleged negligence of defense counsel or in a subrogation case?

Weekly Law Resume

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

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rier because other primary insurance existed to provide a defense.

The primary insurer, which was not exhausted, had a $25,000 self-insured retention. The insured argued that self-insurance was not considered insurance and that the umbrella's "other insurance" clause operated only where there was other "insurance." Thus, the primary insurer was not responsible until the retention had been exhausted. However, the court refused to agree. The self-insured retention was part of the primary policy. The court held that an excess insurer did not have a duty to defend an insured until the primary insurance with the self-insured retention was exhausted. The excess insurer's "other insurance" clause did not require it to defend where other primary insurance existed, even with a self-insured retention.

COMMENT

This is the first case to consider this issue. It is a detailed opinion with many footnotes and we expect that it will be quoted in many forthcoming opinions.

Governmental Liability - City Has Immunity For Injuries Occurring On Bike Trail

Prokop v. City of Los Angeles , (May 21, 2007), Court of Appeal, Second District

California Government Code section 831.4 sets forth that public entities are not liable for injuries caused by a condition on trails that are used for or provide access to recreational activities. Section 831.4 has been interpreted to include bike paths. This case deals with the issue of whether a City, designing and constructing a bike path, has a mandatory duty to design the path consistently with certain design standards or face tort liability.

Plaintiff David Prokop was injured while bicycling along a bike way designed by Defendant City of Los Angeles. Prokop filed suit against the City alleging a dangerous condition of public property, pursuant to Government Code section 835. Prokop claimed that as he was bicycling along the bike path, he tried to exit the path at its end through an opening provided to bicyclists. When he attempted to cycle through the opening, he collided with a chain link fence. Prokop claimed that bicyclists had to curve sharply several times in order to avoid the fence, which he contended was too close to the path.

The City filed a motion for summary judgment asserting, among other defenses, that it was immune pursuant to section 831.4. The trial court granted the motion and Prokop appealed. The Second District Court of Appeal affirmed.

On appeal, Prokop contended that the City, in designing a bike path, had a mandatory duty under the California Bicycle Transportation Act (Street and Highway Code section 891) to utilize minimum safety design criteria. Prokop introduced expert testimony that the City failed to provide proper widths and proper clearances in its bike trail design. The Court of Appeal held that the immunity provided by section 831.4 is absolute. While public entities may have mandatory duties imposed by statute, Government Code section 815(b) makes clear that any such liability is subject to statutory immunity.

The Second District also reaffirmed that a paved bike trail is a "trail" within the meaning of section 831.4, rejecting Prokop's argument that the trail needed to be unpaved. Finally, Prokop argued that trail immunity did not apply because his accident occurred outside the confines of the bikeway. Rather, Prokop claimed that the design problem was the gateway. The Court of Appeal held that the gateway to or from the bike path was an integral part of the bike path. Judgment in favor of the City was therefore affirmed.

COMMENT

This case reaffirms that public entities have immunity for injuries occurring on trails or paths used for or providing access to

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News of Members

James Nephew (CPCU, ARM, RPA) to Bragg & Associates

Lee Collins is pleased to announce that former CAIIA member James Nephew is joining Bragg & Associates as Liability/ Property Claims Manager in our new Bakersfield office, effective July 1, 2007. Jim has owned Golden Empire Adjusting Service for many years, and was a CAIIA member from 1988 through 2005.

Also joining Jim at Bragg & Associates will be Golden Empire employees Tom Brown and Kay Hammer. The Bragg office will provide liability and property adjusting, Workers Compensation AOE/COE investigations, and self insured claims administration services, in Kern, Tulare, Kings, and Fresno counties.

The "new" address of the Bragg office is the same as that of the former Golden Empire office; 1224 Chester Ave, Bakersfield, CA 93301 (661) 325-1346 and fax, (661) 323-2417.

Editor's note: The CAIIA wishes Jim well in his new endeavor. We will miss him as an individual member and look forward to seeing him at our meetings as part of Bragg and Associates.

Weekly Law Resume

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

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recreational activities, pursuant to Government Code section 831.4. The trails may be paved or unpaved. This statute may be used in conjunction with Government Code section 831.7, which provides immunity to public entities for injuries involving hazardous recreational activities.

Insurance Coverage – Cancellation of Policy by Finance Company

Pacific Business Connections, Inc. v. St. Paul Surplus Lines Insurance Co. , (April 14, 2007), Court of Appeal, Second District

This case deals with the liabilities of an insurance company where a finance company orders cancellation of the policy.

Pacific Business Connections, Inc. ("PBC") obtained an insurance policy from St. Paul Surplus Lines Insurance Company ("St. Paul") for its fleet of trucks. Payment of the insurance premium was partially financed by Premium Financing Specialists of California, Inc. ("Premium"). Premium was appointed PBC's attorney-in-fact with full authority to cancel the policy upon default. When PBC failed to make the first payment, Premium mailed PBC a notice of intent to cancel on September 4, 2003. It provided a 10-day period within which the pay the premium. On September 25, 2003, Premium mailed PBC a notice of cancellation with an effective date of September 28, 2003. On November 4, 2003, St. Paul mailed PBC a notice it was canceling the policy for non-payment effective November 20, 2003. However, when St. Paul received a copy of Premium's notice of cancellation, it processed a policy change endorsement canceling the policy effective September 28, 2003 and reimbursed unearned premiums to Premium. On November 15, 2003, one of PBC's trucks was involved in an accident and was damaged. A claim was submitted to St. Paul, which denied it on the grounds the policy had been cancelled at the time of the accident.

PBC sued St. Paul. The trial court granted St. Paul summary judgment. PBC appealed.

The Court of Appeal affirmed the trial court. The Court of Appeal noted that Insurance Code §673 governs cancellation of financed insurance policies. Where a lender instructs the insurer to cancel the policy, those instructions are conclusive. Pursuant to contract, PBC transferred to Premium the authority to cancel the policy. Premium cancelled the policy effective September 28, 2003, and St. Paul properly relied upon the notice of cancellation it received from Premium to issue its cancellation endorsement.

PBC complained it never received the notice of cancellation from Premium. However, St. Paul did receive the notice and it was required to honor the cancellation even if the notice to the insured was defective. The fact that St. Paul had initiated its own cancellation procedures did not affect this conclusion. Its attempt to cancel the policy was irrelevant. After St. Paul initiated its cancellation procedure, it received a notice that Premium had already instructed St. Paul to cancel the policy. This pre-empted St. Paul's attempt. Once St. Paul received the notice from Premium, St. Paul was required to honor the date on which Premium specified the policy was cancelled. Further, once Premium notified St. Paul, St. Paul was relieved of any duty of notification of cancellation. There was no waiver by St. Paul of these rights. Given that St. Paul was merely following Premium's instructions, the court concluded that St. Paul did not waive its right to terminate coverage.

Therefore, it was concluded that St. Paul properly cancelled the policy and the trial court properly granted St. Paul's motion for summary judgment. The judgment was affirmed.

COMMENT

This case reaffirms the procedure for cancellation to be followed where a premium has been financed. The procedures set forth by §673 must be strictly complied with in order to effectuate the cancellation.

CAIIA *Calendar*

Claims Conference of Northern California

September 13 & 14, 2007
Hyatt Regency, Sacramento, CA
Hotel Reservations (916) 443-1234
Contact www.claimsconference.org or
Corby Schmautz at (916) 361-6616

CAIIA Annual Convention

October 18, 2007
Disney Grand California Resort
Anaheim, California
Contact Peter Schifrin at 818-909-9090
pschifrin@sgdinc.com

Dozens Arrested Across Five Counties in Regional Insurance Fraud Busts

Schemes Employed By Rings Included Setting Vehicles Ablaze, Falsifying Stereo and Rim Receipts, and $1.7 Million in Workers' Compensation Insurance Premium Fraud

FRESNO - Today California Insurance Commissioner Steve Poizner, with Fresno County District Attorney Elizabeth A. Egan, Kern County District Attorney Ed Jagels, Kings County District Attorney Ron Calhoun, Merced County District Attorney Larry Morse II, and Tulare County District Attorney Phil Cline, unveiled the results of concerted, multiple investigations into alleged auto insurance and workers' compensation insurance fraud over the past year.

Over the past few days, law enforcement officers fanned out over five counties to serve 58 arrest warrants for insurance fraud and related charges, such as grand theft, receiving stolen property and perjury. Four suspects were already arrested and charged late last year. Another suspect is in federal custody; a hold has been placed on him to answer for the local charges.
Insurance fraud costs California consumers and businesses an estimated $15 billion per year.

A total of 66 suspects will be charged (three persons were already in custody on unrelated charges and were re-arrested) with insurance fraud. Each count of insurance fraud is a felony and carries a maximum sentence of up to five years in state prison and/or a fine of $50,000, as well as the possibility of being ordered to pay an undetermined amount of fines and restitution.

Operation Scratch n' Play (Fresno, Kings, Madera, San Luis Obispo and Tulare Counties)

The culmination of a year-long investigation by the California Department of Insurance, Fraud Division (CDI), the above district attorney offices and the California Bureau of Automotive Repair, this operation netted 38 suspects. (Please see attached list for names.) The California Highway Patrol (CHP), National Insurance Crime Bureau (NICB), and the special investigations unit from Geico Insurance Company and the California State Automobile Association (CSAA) also assisted in this investigation.

The suspects arrested either provided, assisted, or verified false receipts which were to be used to obtain insurance monies through fraudulent insurance claims for aftermarket stereo equipment, custom wheels and tires, and performance parts. Scams of this type cost insurance carriers, and ultimately consumers, in the southern San Joaquin Valley an estimated $200,000 per year.

Operation Scratch n' Play investigators visited most of the aftermarket stereo, custom wheel and tire, and performance parts stores in Fresno, Kings, Madera, San Luis Obispo, and Tulare Counties. An undercover investigator discussed an item he or she wished to purchase with the store's personnel or owner, telling the store's representative that he or she did not have enough money to purchase the item at this time, but that an insurance claim was going to be filed that the vehicle had been stolen or burglarized. The store's representative then produced a backdated receipt showing that cash was used to purchase the selected item, which would indicate to the insurance carrier that the item was purchased and subsequently stolen during the supposed theft. The fraudulent receipts provided to the undercover investigators ranged from $800 to $5,000.

Operation Back Draft (Fresno County)

This year-long investigation by the Fresno County Urban Organized Auto Insurance Fraud Task Force (AIFTF), comprised of investigators from the CDI and the Fresno County District Attorney's Office, began with a tip from the CHP about potential insurance fraud within the city of Parlier. The AIFTF investigates organized automobile insurance fraud rings, which is defined as two or more suspects who conspire to commit automobile insurance fraud.

The original case quickly developed into five associated cases and extended from Parlier to the cities of Sanger, Del Rey and Kerman. Twelve suspects allegedly conspired in the disposal of five vehicles to collect insurance benefits to which they were not entitled.

The common ploy was to report a vehicle stolen then report the loss to the insurance carrier for compensation when, in fact, the vehicles had been taken out and set ablaze by either the registered owner(s) or associate(s) in an attempt to destroy the vehicle beyond repair and dispose of any evidence.

Assisting in the investigation was the CHP, special investigation units for Western United, Viking, Progressive, and the CSAA insurance companies, in addition to Finance and Thrift of Reedley, Call Gap, LTD. in Carlsbad, and Wells Fargo Bank in Phoenix, Arizona.

Operation Round-Up (Fresno County)

Also an AIFTF operation, 13 suspects spanned six cases and involved family members or close friends who conspired to dispose of their vehicles to collect insurance benefits to which they were not entitled, or conceal the identity of an excluded driver to obtain insurance benefits.

Workers' Compensation Insurance Premium Fraud (Fresno and Kern Counties)

Workers' compensation insurance premium fraud is a major cost driver in the workers compensation system and creates an unfair marketplace amongst competing businesses. To fight this problem, the San Joaquin Valley Premium Fraud Task Force (Task Force), comprised of the CDI; the Fresno, Kern, Kings, Merced, and Tulare District Attorney's Offices; and the state Employment Development Department's (EDD's) Investigations Division was formed.

Today, the Task Force concluded two separate six-month investigations in Fresno and Kern Counties with the arrest of two suspects.

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Dozens Arrested Across Five Counties . . .

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The following two cases resulted in net losses totaling approximately $2.2 million, including $1.7 million to the State Compensation Insurance Fund (SCIF) and $500,000 to EDD.

Armando Rios, 26, of Reedley was arrested on four counts of workers' compensation insurance premium fraud and nine felony counts of failure to remit withheld payroll taxes. Rios, the owner and president of a farm labor service company, allegedly failed to report and/or misclassified approximately $4 million in employee payroll to SCIF and EDD. This resulted in losses of $900,000 to SCIF and approximately $500,000 to EDD.

Larry Gonzalez, 56, of Bakersfield was arrested on one felony count of workers' compensation insurance premium fraud and one felony count of insurance fraud. Gonzalez, a farm labor services contractor, underreported and/or misclassified employee payroll in an amount in excess of $2 million, which resulted in a loss of approximately $810,000 to SCIF.

Lawyers and Grandmas

Lawyers should never ask grandma a question if they aren't prepared for the answer.

In a trial, a Southern small-town prosecuting attorney called his first witness, a grandmotherly, elderly woman to the stand.

He approached her and asked, "Mrs. Jones, do you know me?" She responded, "Why, yes, I do know you, Mr. Williams. I've known you since you were a young boy, and frankly, you've been a big disappointment to me. You lie, you cheat on your wife, and you manipulate people and talk about them behind their backs. You think you're a big shot when you haven't the brains to realize you will never amount to anything more than a two-bit paper pusher. Yes, I know you."

The lawyer was stunned! Not knowing what else to do, he pointed across the room and asked, "Mrs. Jones, do you know the defense attorney?" She again replied, "Why, yes, I do. I've known Mr. Bradley since he was a youngster, too. He's lazy, bigoted, and he has a drinking problem. He can't build a normal relationship with anyone and his law practice is one of the worst in the entire state, not to mention he cheated on his wife with three different women. One of them was your wife. Yes, I know him." The defense attorney almost died.

The judge asked both counselors to approach the bench and in a very quiet voice said, "If either of you idiots asks her if she knows me, I'll send you both to the electric chair."