CAIIA Status Report

December 2014

Defective Policy Limit Demand Precludes Bad Faith
Credit to Haight, Brown and Bonesteel, Los Angeles, CA

In *Graciano v. Mercury General Corp.* (No. D061956, filed 10/17/14), a California appeals court reversed a jury's verdict, ruling that a defective demand letter from the claimant's attorney precluded a finding of bad faith failure to settle as a matter of law.

In *Graciano*, the insured called to report he'd been in an accident and the insurer opened a claim file based on a policy that was in force on the date of loss. Three days later, counsel for the claimant called the insurer's Texas call center to report the loss, but gave the number for a canceled policy that had been issued to the driver's father, which had also insured the vehicle and which was listed in the police report. She also misstated the driver's name, all of which resulted in a second claim file being opened in a different claim unit.

This was shortly followed by a very time-limited demand letter, again listing the number of the canceled policy. The demand letter also identified the driver's father as the named insured and demanded the policy limit to settle all claims for injuries "arising out of an event in which your above-referenced insured and/or their vehicle struck [the claimant]."

On receiving the police report, the claim representatives were able to figure out the errors and attempted to settle for the limit on the policy that was in force at the time of the loss. Specifically, they called the claimant's counsel, but she refused to extend the deadline. Then, when they tried to call to offer a settlement, they only got her voicemail. On the date the demand was set to expire, they attempted to send her faxes but the fax machine was switched off (contrary to the attorney's office practice). Finally, they sent her a letter offering to pay the policy limits, conditioned on releases of all claims and satisfaction of any emergency healthcare liens. That offer was rejected.

The claimant obtained a $2 million judgment, an assignment of rights and sued the insurer for breach of contract and bad faith. Although a jury returned a verdict of bad faith for failure to accept a policy limit demand, the appeals court reversed, finding no bad faith as a matter of law.

The appeals court listed the principles governing the duty to settle, saying that there must be proof of an offer from the claimant in the first instance. (Citing *Merritt v. Reserve Ins. Co.* (1973) 34 Cal.App.3d 858.) The offer has to be sufficiently certain to form an enforceable contract. (Citing *Coe v. State Farm* (1977) 66 Cal.App.3d 981.) All claimants must join the demand and it must provide for a complete release of all insureds. (Citing *Strauss v. Farmers* (1994) 26 Cal.App.4th 1017.) Any time limit imposed on the demand must not deprive the insurer of an adequate opportunity to investigate. (Citing *Critz v. Farmers* (1964) 230 Cal.App.2d 788.) And when a liability insurer timely tenders its full policy limits in an attempt to effectuate a reasonable settlement, the insurer has acted in good faith as a matter of law. (Citing *Boicourt v. Amex Assurance Co.* (2000) 78 Cal.App.4th 1390.)

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Published Monthly by
California Association of
Independent Insurance Adjusters

An Employer Organization of Independent Insurance Adjusters

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President's Message

Kim Hickey

CAIIA President

As I am writing this final 2014 President's Message, Thanksgiving is just a few days away, and Christmas is just around the corner. Once the holidays are behind us, we have work to do at the CAIIA.

Most of the chairs have been named for the 2015 CAIIA Committees which will be posted. We will be taking a look at our bylaws which need to be updated.

We continue to look for new members, so if you know an independent adjuster that is not a member, send them our way! Remember, the CAIIA is a place to belong and a place to learn.

In addition to our usual DOI Recertification seminars and the classes offered at our midterm and annual meetings, we are looking into additional opportunities to offer (CE approved) classes to our members. The CAIIA is a place to educate and this is the area that we need to shine.

We have a Midterm and an Annual meeting to plan and conferences to attend. Lots to do!

But for now, it is time to wrap up 2014. For me, this has been a good year. Our office continues to be busy..claims in, reports out. That is what we do as independent adjusters. We have great clients, and very experienced adjusters to provide the service that they are looking for.

On a personal note, I am thankful that my family remains healthy. And we are growing…my oldest son, and his wife, have a new baby girl. I am a grandma! Who said growing older is not okay? It is.

While there is unrest all over this world, I am most thankful that I live in a place that I can freely speak, worship and walk outside without fear of confrontation. I would like to thank all the men and women that have protected our nation. No matter when you are reading this, and how many times you read it, they are standing guard right now. Many lives have been taken from families. We will not forget.

Say hello to a neighbor you do not get to visit with, check in with an old friend to see how they are doing, help someone in need. Enjoy the lights, the happy bustling, family, food, friends, and send off 2014 with a bang!

Thank you for your interest in the CAIIA. Cheers!

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Applying those principles, the *Graciano* court ruled that there was no bad faith. The court first pointed out that the demand was itself defective, since it only referenced the named insured under the cancelled policy, who was actually the father of the driver involved in the accident. The court then stated that the insurer had, in fact, timely attempted to settle for the driver under the policy that was in force, but had been rebuffed in phone calls, the fax machine was turned off and the insurer was ultimately reduced to sending a letter.

The *Graciano* court also engaged in a lengthy discussion regarding the delay engendered by confusion over policy numbers, distinguishing *Safeco v. Parks* (2009) 170 Cal.App.4th 992, which found bad faith for a failure to defend an insured when a claim was tendered under the wrong policy. The *Graciano* court said that *Safeco* was a notice/prejudice case involving no prejudice to the insurer from the erroneous tender. By contrast, the instant case did establish prejudice to the insurer because the tender by the claimant's counsel using the wrong policy number had delayed the insurer's investigation to the point where it could not accept the policy limit demand within the time provided. Consequently, the adequacy of the investigation could not serve as a basis for finding bad faith.

DOI Press Release

Bogus coffee burn photos lead to arrest of McDonald's customer for fraud

SAN BERNARDINO, Calif. - Selena Edwards, 38, of Victorville, was arrested and faces 21 felony counts of insurance and workers' compensation fraud, including submitting a fraudulent insurance claim, false statements, and false evidence associated with an alleged fraudulent claim against McDonald's for second-degree burns to her hand from spilled coffee.

"By copying legitimate burn photos from the internet, Edwards attempted to make a profit from another person's pain and suffering and for this she will be prosecuted to the full extent of the law," said Insurance Commissioner Dave Jones.

Edwards claimed that when she was handed a cup of coffee at a McDonald's drive-thru, the lid was not secured and the coffee spilled on her right hand. Edwards submitted an injury claim with photos of a hand with second-degree burns, but detectives discovered that some of the photos had been copied from a hospital website. In an attempt to exaggerate her injury, Edwards also submitted counterfeit documentation for treatment that she claimed to have received from a local hospital.

Edwards was released on her own recognizance and is scheduled Monday, November 10, 2014 to return to court for a preliminary hearing.

Nearly 200 arrested in statewide auto insurance fraud sweep

$1 million of potential losses uncovered statewide in most common type of auto insurance fraud

SACRAMENTO, Calif. -Detectives from the Department of Insurance, assisted by local district attorneys and local law enforcement spent the last week serving arrest warrants in 22 counties where district attorneys have filed more than 200 felony counts and multiple misdemeanor charges against 195 people for alleged auto insurance fraud committed against 40 insurance companies.

"Unfortunately, this type of insurance crime is surprisingly common," said Insurance Commissioner Dave Jones. "Insurance fraud is an expensive drain on the state's economy that totals into the billions of dollars annually in California. This is not a victimless crime. The cost of these scams is passed along to consumers through higher rates and premiums-everyone pays for insurance fraud."

In nearly all of the cases the drivers were uninsured or underinsured and allegedly purchased or added coverage after a collision or damage was sustained. Suspects then filed a fraudulent claim in an attempt to get the insurer to cover the damage to the uninsured vehicle. Two suspects are insurance professionals, including a claims adjuster, another case involved a pedestrian fatality, one included a vehicle allegedly used to transport drugs from Mexico, and one investigation uncovered a staged collision, which is under further investigation.

In some cases the fraud was uncovered before the insurer paid on the claim, in others it was discovered after the claims were paid. Detectives suspect that the actual and potential losses to insurers totaled more than $1 million.

"The lesson here is simple-don't drive without insurance," said Jones. "California's financial responsibility law requires drivers to be insured. It is simply not worth risking arrest and serving jail time. There are affordable options to help drivers meet the obligation to have insurance." Local district attorneys, insurance company special investigation units and the National Insurance Crime Bureau assisted with the investigations. Local district attorneys are prosecuting these cases.

Premises Liability– Hotel Owner's Duty to Children in Multiple Story Structures

Credit to Low, Ball & Lynch, San Francisco, CA

In most premises liability actions, duty of the property owner is determined by analyzing the foreseeability of harm to persons such as the plaintiff. This case considered a hotel owner's liability for a minor's fall from a second story hotel room window.

When he was five years old, plaintiff Michael Lawrence fell from a window in his family's second story hotel room at the La Jolla Beach and Tennis Club (the "Club"). Michael's mother had requested a room on the first floor of the hotel, but there were no rooms available on the first floor when they checked in, so they accepted a second floor room. The room had a window with a sill at least four to six inches deep and twenty-five inches above the floor. Michael's mother opened the window because she wanted to hear the ocean. The parents sat at the kitchen table just to the left of the window, and they were not paying attention to the children. Michael put his foot on the window sill and fell through the window screen and out the window when he leaned forward. Michael suffered serious head and brain injuries.

Michael's parents filed a complaint against the Club alleging negligence causes of action. Plaintiffs claimed that the Club was negligent for failing to have a fall prevention device on the window. The Club filed a motion for summary judgment, contending that it had no duty to install a fall prevention device on the window. In support of the motion for summary judgment, defendants submitted a declaration of a certified building inspector who stated that the subject window had complied with all applicable Building Codes. This expert opined that the window did not have to have any further fall prevention devices and that the window screen was not intended to keep people from falling. Defendants contended that the parents' negligence had caused Michael's fall.

Plaintiffs submitted deposition testimony of the hotel's former Director of Operations that he had placed bars on the hotel's ocean front bay windows because guests were leaning against the windows and pushing the screens out. There were no safety bars or fall protection devices on the window from which Michael fell, but there were safety bars on two of the windows in the room and on windows in other ocean-facing rooms. Plaintiffs also submitted a declaration of an expert mechanical engineer who opined that the hotel room was in a dangerous condition on the day of the accident because it lacked safety bars or other safety measures to keep children from falling out of the window. Because children frequently fall from windows, the American Society for Testing and Materials ("ASTM") developed standards for devices that protect children from falling out of windows. In response, defendants filed an expert's declaration that the ASTM standards did not apply to the hotel.

The trial court granted defendants' motion for summary judgment. The Court of Appeal reversed and held that defendants had failed to carry their burden on summary judgment to establish they owed no duty to take measures to prevent the type of accident that occurred in this case.

The Court of Appeal found that it was reasonably foreseeable that guests in the ocean front hotel rooms would open windows to let in ocean breezes and that a five-year-old child would stand on the sill of a window that is twenty-five inches above the floor. The Court of Appeal found that it was also reasonably foreseeable that the five-year-old child would not appreciate that a screen was not designed to keep the child from falling. Because the hotel had placed protective bars on other windows, the Court of Appeal held that the burden and cost to hotel owners of providing such protective devices to prevent children from falling out of windows is minimal compared to the risk of small children suffering serious injury or death from such falls. Therefore, the Court of Appeal held that defendants had not shown that the scope of their duty did not extend to taking measures to prevent small children from falling from second story windows like the one at issue in this case. Also, the Court held that the parents' negligence would not eliminate the duty of care owed by the hotel owners.

The Court of Appeal distinguished the case of *Pineda v. Ennabe* (1998) 61 Cal.App.4th 1403, in which the Court of Appeal held that a landlord did not owe a duty of care to prevent a small child from falling from a window which lacked any fall prevention when the adult tenants had placed a bed next to the window and carelessly left their small children unattended and exposed to danger. The Court distinguished the *Pineda* decision on the grounds that the condition or design of the window in the *Pineda* case did not increase the risk to small children of falling from the window. The *Lawrence* court found that the facts of the case were similar to the case of *Amos v. Alpha Property Management* (1999) 73 Cal.App.4th 895, when a defendant
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landlord was held to owe a duty of care to prevent a child from falling from a window in a common area when the window was only twenty-eight inches from the floor.

Comment

The *Amos* decision and this case will probably cause apartment and hotel owners to take measures to prevent young children from falling out of windows. This case indicates that a landowner's compliance with Building Codes and the parents' carelessness are essentially irrelevant in determining whether a landowner owes a duty to a child to take protective measures to keep the child from falling from a window.

Absence of a Court Reporter May Preclude Appellate Review

Credit to Haight, Brown and Bonesteel, Los Angeles, CA

A California Court of Appeal expressed its concern over the due process implications of reviewing a trial court's decision that incorporated reasons that were not documented due to the absence of a court reporter. In *Maxwell v. Dolezal* (No. B254893, filed 11/4/14), the court cautioned that although the lack of a transcript did not preclude its review of an order sustaining a demurrer, the case was an exception because the operative complaint and demurrer were sufficient to permit effective appellate review.

The plaintiff in *Maxwell*, acting in pro per, had filed an action for invasion of privacy and breach of contract. The plaintiff alleged that the defendant had used his photograph and website without his consent and that he did not receive the money, food and housing in exchange for the intellectual property rights per their agreement. The defendant demurred on the grounds that the complaint was uncertain and it could not be ascertained from the pleading whether the contract was written, oral, or implied. At the hearing on the demurrer, no court reporter was present. Nonetheless, the trial court's minute order explicitly sustained the demurrer "[f]or the reasons stated in open court," without further elaborating. The trial court also denied the plaintiff further leave to amend on the ground that he was unable to articulate in open court a reasonable basis for any additional allegations that would remedy the deficiencies. The court of appeal noted that it was "profoundly concerned about the due process implications of a proceeding in which the court, aware that no record will be made, incorporates within its ruling reasons that are not documented for the litigants or the reviewing court."

Maxwell is not the first California decision where a reviewing court had to determine whether the lack of a hearing transcript prevented review. In *Chodos v. Cole* (2012) 210 Cal.App.4th 692, the court held that the plaintiff-appellant did not need to supply a transcript of the subject motion hearing. In his dissent, Justice Paul Turner disagreed, noting that there was no agreement between the parties as to what occurred at the hearing: "[w]e have no idea as to whether evidentiary issues arose or there were concessions by either side."

The *Maxwell* and *Chodos* decisions bring to the forefront the legal ramifications of the deep funding cuts that have affected California courts. With the persistence of California's budget crisis and reduction of trial court funding, most civil courts have terminated their court reporting service to achieve cost reductions. Ironically, the elimination of reporting in court proceedings may increase the workload of the trial courts because without an official record, the trial court may be required to produce a settled statement, a time consuming and imprecise process. Additionally, from an individual litigant perspective, the elimination of reporting has simply shifted the cost to the parties and their counsel, who have resorted to bringing their own reporters in order to obtain a record of the proceedings. For example, in the Los Angeles Superior Court a Stipulation and Order to Use Certified Shorthand Reporter must be executed in advance of the hearing. The appointment of the reporter is pursuant to the Government Code and the California Rules of Court in addition to the stipulation of the parties.

Indeed, *Maxwell* highlights the importance for counsel to obtain client approval for the additional expense of court reporting at motion hearings. Many appellate courts have refused to reach the merits of an appellant's claim because no reporter's transcripts or suitable substitute was provided. Thus, the burden of securing a reporter's transcript is de minimus, especially considering the importance of having an adequate record. Although the *Maxwell* and *Chodos* courts had sufficient records without the hearing testimony, reliance upon courts to issue comprehensive orders or rulings is not recommended, and counsel should work with clients to reach an agreement on the use of retained reporting services.

Case of the Month: A Viper Rental

Credit to Garrett Engineers, Long Beach, CA

In Las Vegas for a fun weekend, the defendant rented a Dodge Viper. The short version: it broke. Three years later, he was in court facing a $33K lawsuit for repairs. What really happened?

The story starts with three brothers and a family friend deciding to fly to Las Vegas for a reunion. One of the brothers thought it would be fun to drive around in an exotic sports car, so he found a local rental company and rented a 6-speed manual transmission Dodge Viper. After he filled out the required paper work (which included the usual "you break it, you bought it" warnings) and arranged for payment, he drove it off the lot. A few blocks later, he pulled over to the side of the road and called the rental company on his cell phone. He told them that the clutch felt soft, with the pedal too close to the floor, and that something was wrong with the car. The rental company representative replied that all of their cars were thoroughly checked out when the vehicles were returned by their clients and, again, before they were given to new renters. Therefore there was nothing to be concerned about and go ahead and enjoy the ride. He reluctantly accepted the assurances and drove in stop-and-go traffic back to the hotel to enjoy the rest of the evening.

The next day, the defendant and one of his brothers climbed into the Viper and headed out for a drive. There was a nearby, particular scenic twisting canyon road that they wanted to check out, so off they went. Traffic was heavy. Not stop-and-go, but not unrestricted either. The traffic flow was at the speed limit or less. After a few minutes, they pulled off the road, turned off the Viper, got out, and took photos. Photo op completed, they got back in, and the driver prepared to pull out into traffic. He pulled out in first gear and then shifted to second. As he let out the clutch in second, there was a grinding sound and no engagement. Repeated attempts to shift into second were fruitless, and now it would not shift into first either. They pulled over to the side of the road and called the rental company for help. A couple of hours later, a private tow company showed up with a trailer, winched the Viper on board, and they returned to the rental company.

At the rental company, the driver was asked to sign a damage report, accepting responsibility for repairs that they thought would be needed. He refused because he felt that it was not his fault. The conversation did not end amicably. In the week following, the renter attempted to get a refund of his money. That did not happen. The guys finished their vacation and went home.

In the months that followed, the vehicle was repaired and returned to service. The rental company sent a bill to the renter for the repair costs. He forwarded it to his insurance company. His insurance company reviewed the repair bill and their policy

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coverage provisions and decided that the repairs were not covered under his insurance policy. They declined coverage. Fast forward the story three years, as litigation began. The insurance company declined coverage of the loss, but decided that their insured was not at fault, so they took up his legal defense. At this point, GEI was engaged by the insurance company to review the case and provide advice to the defense counsel. More fast forwarding: the plaintiffs lost in arbitration, but appealed, so the case went to trial.

Our expert reviewed the depositions of the various parties, as well as various exhibits including maintenance histories, a Carfax report, and the repair invoices. He concluded, and testified before the jury, that there was no evidence presented that the defendant abused the Viper or otherwise caused or contributed to the damages.

High points from his analysis, report, and testimony were as follows:

· The defendant had driven Vipers previously and knew what a normal clutch felt like.

· Carfax showed two previous transmission repairs.

· A careful inspection of the tires and wheels by the plaintiff when the Viper was returned showed zero abuse by the defendant. Tires and wheels are the first place to look when abuse is suspected.

· The defendant drove a total of 68 miles. When he turned it in, it was not drivable. When it arrived at the shop for repairs, it had an additional 5 more miles on the odometer. How was that possible, and who added those miles?

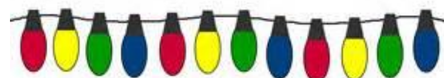
· The repair invoice had no clutch related items.

· The damage was to 5th and 6th gear. These would not have been used in city traffic. Third gear was the highest gear used by the defendant.

· The loss-of-use fee was unreasonable at $495 per day for 49 days (when it took 8 hours of labor to repair it).

What was the jury verdict?

The jury found for the defense. The defendant was found not liable for the transmission damages to the Viper or for the 49 days of loss of use.



Happy Holidays!

Insurer Delay Extends Time to Repair or Replace Damaged Property

Credit to Haight, Brown and Bonesteel, Los Angeles, CA

In *Stephens & Stephens XII v. Fireman's Fund Ins.* (No. A135938, filed November 24, 2014), the plaintiffs obtained property insurance on a warehouse. Within a month, it was discovered to be stripped of all wiring and metal. Fireman's Fund paid for emergency repairs but nothing more, concerned that the damage had occurred outside the policy period.

The policy provided for valuation of either "replacement cost," meaning the expenditure required to replace the damaged property with "new property of comparable material and quality," or "actual cash value," defined as the actual, depreciated value of the damaged property. For replacement cost, Fireman's Fund was not required to pay "until the lost or damaged property is actually repaired ... as soon as reasonably possible after the loss or damage," and only "[t]he amount [the insured] actually spend[s]...."

In the subsequent bad faith lawsuit, the jury awarded the full cost of repair, despite there being no repairs. The appeals court reversed, holding that there was no right to an immediate award for the costs of repairing the damage; however, the court nonetheless held that the insured was entitled to a "conditional judgment," awarding those costs if repairs were actually made.

The insured had argued that it was excused from performing repairs because Fireman's Fund had prevented it from doing so, and the appeals court had agreed: "We are persuaded by this reasoning and adopt it. When an insurer's decision to decline coverage materially hinders an insured from repairing damaged property, procedural obstacles to obtaining the replacement-cost value should be excused."

But that did not also eliminate the repair condition: "The policy, however, limits Fireman's Fund's obligation to '[t]he amount [the insured] actually spend[s] that is necessary to repair or replace the lost or damaged property.' Just as we find no basis for excusing [the] obligation to repair, we find no basis for awarding [] a specific amount of replacement cost before [] the actual repairs. Instead, [the insured] is entitled to a judgment declaring its right to receive reimbursement for repair costs, if and when the repairs have actually been performed in a timely manner, and in an amount equal to [] actual expenditures for them."

Besides approving a "conditional" declaratory judgment pending future repairs, the *Stephens* court went on to find coverage for a seemingly uncovered portion of the jury's special verdict. An endorsement to the policy covered the insured's lost business income and rental value resulting from a suspension of operations due to direct physical loss to the property. The jury found no loss of rental value but awarded lost income from a failed real estate deal to sell the property, which the court agreed would not be covered as a loss from suspension of the insured's operations. But despite declaring the special verdict unambiguous, the court proceeded to find "latent ambiguity" and interpret the verdict as awarding covered damages.

The appeals court said that "[w]here the trial judge does not interpret the verdict or interprets it erroneously, an appellate court will interpret the verdict if it is possible to give a correct interpretation." In particular, the court noted that the amount in dispute bore no relation to the evidence on the lost real estate sale, but corresponded exactly to the amount claimed for lost rental value. Although lost rental value had been crossed out by the jury, the court chalked it up to confusion and said that "[i]t does not matter whether these lost rents could also have qualified as lost business income. The special verdict must be interpreted as awarding [the insured] damages ... for lost rent on the breach of contract cause of action. This interpretation is consistent with our obligation to uphold the verdict if possible."

We wish all of you a joyous holiday season and a happy new year!