CAIIA Status Report

To find the best independent adjusters, visit www.CAIIA.com.

September 2019

Dangers of Failing to Accept Reasonable Policy Limits Demands
Credit to : Tyson and Mendes, La Jolla, CA

In *Potter v. Alliance United Insurance Company (AUIC)*, the California Court of Appeal looked at a case involving a California legal minimum auto insurance policy, $15,000. Plaintiff, Christopher Potter was driving and was struck by Jesus Tovar's car. Tovar was insured by AUIC with a maximum policy limit of $15,000. Potter offered to settle the claims against Tovar for the policy limit, but AUIC failed to respond to the offer.

Plaintiff tried the case to a jury and obtained a judgment against Tovar for almost $1,000,000. AUIC moved for and was granted a new trial. Before the retrial, AUIC paid Tovar $75,000 to release any bad faith claim he had against AUIC (for AUIC's failure to accept the early settlement offer.) Plaintiff again prevailed in the second trial, this time obtaining a judgment in the amount of $1,523,887.16.

Unable to collect the judgment from the insolvent Tovar, Plaintiff sued AUIC and alleged the release it procured from Tovar was a fraudulent conveyance. AUIC demurred, won the demurrer, and Plaintiff appealed.

Plaintiff's Complaint

Plaintiff alleged that AUIC's release in exchange for $75,000 was a fraudulent conveyance because it was intended to prevent plaintiff from reaching that interest (a bad faith action against AUIC) to satisfy its judgment against Tovar. Plaintiff cited the Uniform Voidable Transfer Act in support of its Complaint. Plaintiff alleged that AUIC intended to prevent him from obtaining the full amount of the judgment against Tovar and that AUIC did not give Tovar reasonable equivalent value for the claim released.

Trial Court Sustains AUIC's Demurrer

AUIC's demurrer argued plaintiff's allegations predicated on the Uniform Voidable Transfer Act and common law failed to state facts sufficient to constitute a proper fraudulent conveyance for several reasons. First, AUIC argued that the statute of limitations had run on the action. Second, AUIC argued the complaint was a sham pleading because its amendments contradicted allegations made in the underlying case against Tovar. Third, AUIC argued that plaintiff lacked standing under the Act because AUIC was not a debtor, a transferee, or a person for whose benefit a transfer was made. Fourth, AUIC argued a bad faith claim was not an asset. Finally, AUIC argued that plaintiff was not injured by the transfer. The trial court sustained the demurrer without articulating precisely why it did so.

The Court of Appeal Reverses the Trial Court's Ruling

On appeal, the Court looked first to the statute of limitations defense. It indicated the statute began to run, not at the time of the conveyance, but at the time the underlying action confirmed that Plaintiff was a creditor of

Continued on page 5

Published Monthly by
California Association of
Independent Insurance Adjusters

An Employer Organization of Independent Insurance Adjusters

Inside this issue…..

Uniform Voidable Transfer Act	Pg. 1
President's Message	Pg. 2
Save the Date	Pg. 3
Insurance Scam Alert	Pg. 3
Rental Car Liability Insurnce	Pg. 4
Security Guards not Always Required	Pg.5
DOI wins 20 year court battle	Pg. 7

CAIIA Newsletter
CAIIA Executive Office
9171 Gazette Ave.
Chatsworth, CA 91311-5918
Website: www.caiia.com
Email: info@caiia.com
Tel: (818) 721 4720

Editor: Kim Hickey
(818) 721 4720
khickey@caiia.com

Permission to reprint is always extended with appropriate credit to CAIIA Newsletter.
© Copyright 2019

Status Report Available

by Email and Web Only.

To add other insurance professionals to our e-mail list, please go to CAIIA. com or e-mail a request to statusreport@caiia.com.

California Association of Independent Insurance Adjusters, Inc.

President's Office:
Reliant Claims Service
P.O. Box 11200
Oakland, CA 94611
510 420-

President
John Ratto
Reliant Claims Services, Inc.
Oakland, CA
mail@reliantclaims.com

Vice President
Gene Campbell
Carter Insurance Claims Services, Inc.
Tustin, CA
gcampbell@carterclaims.com

Secretary/Treasurer
Richard Kern
SGD, Inc., San Diego
rkern@sgdinc.com

Two Year Directors
LeeAnn Junge – Thornhill & Associates – Chatsworth
leeann@thornhillandassociates.com

Phil Barrett
Barrett Claims Service, Ukiah,
phil@barrettclaims.com

One Year Directors
W.L McKenzie – Walsh Adjusting Company, San Diego
bill@walshadjusting.com

One Year Director

Jeff Caulkins
John S. Rickerby Company, Glendale
jeff.c@johnsrickerby.com

OF COUNSEL
Kevin Hansen, Attorney, McCormick Barstow,LLP
7647 N. Fresno St.
Fresno CA 93729-8912
T. 559.433.1300
F. 559.433.2300
kevin.hansen@mccormickbarstow.com

President's Message

Ba de ya, say do you remember
Ba de ya, dancing in September
Ba de ya, never was a cloudy day

Earth Wind & Fire 1978

No, I swear that's really the lyrics - I looked them up …!

John Ratto
CAIIA President

August has been a bit of a weird month and I'm hoping September is more calm. Normally I have time to come back from vacation, settle in with a "few" new assignments, and really dig into the ones I left nicely stabilized before I left. Well, that didn't happen this month. Instead, I saw almost a claim a day, for which I will tell you for a small IA shop, is just a little too busy. I have heard from many of you that you have had a similar August. As many in this field have said before, claims can be a real "feast or famine" business. You either "sink or swim" (which I never really got - does that mean your sinking because you don't have enough work, or are you sinking because you have too much work?).

It has also been a bit of a difficult time for me personally. An old family friend is not long for this world (that being said, today's update was good!). Craig Johnson, now 88 years old, was one of my father's best friends and a long- time liability adjuster. Craig started his career with my father (and all of his other friends) at Continental Casualty in 1958. Craig always worked for a company never wanting to "make the leap" to becoming an Independent Adjuster. He wrapped up his adjusting career at Transamerica Insurance back in the mid-90s. As you can imagine, Craig had volumes of claims stories from over four decades of claims handling. Craig was one of those characters that you would see in Mad Men (except the setting was the world of insurance, not advertising) – a crisp smart suit, iced drink in hand and an entertaining story to share and the times they changed to include wider ties and poly-suits, but still included drinks at Gino's or Schroeders. But for Craig, it wasn't only a life of martini dinners or socializing with other insurance people. Craig was a trained artist who regularly visited and lived in Paris for a while, a classic San Francisco Bohemian and consummate bachelor who has lived (and I swear this is absolutely true) in the same 400 SF studio apartment since 1960. He spoke French and Japanese fluently and had probably dated every woman in San Francisco currently age 70 and up (married or not). He will always be Uncle Craig to us kids of insurance dads in Craig's circle of friends. Many of us hadn't seen or caught up with each other for years until we all ended up this week in an ICU together with hugs and tears, and stories of a life well lived. While he may have a few more good days in him, Craig's December is here and we wish him the best on his journey.

A quick update on the CAIIA fall event - We have date and location! All these months I've been saying that were going to have our annual meeting in "Southern California" Well, a change of plans, our annual get-together will be held on October 17-18 at the Kimpton Sawyer Hotel in Sacramento. Please look for more details soon…

John Ratto, President

To find the best independent adjusters, visit www.CAIIA.com.

NEWS OF AND FOR OUR MEMBERS

SAVE THE DATE

The CAIIA is proud to be exhibiting at or sponsoring the following upcoming event:

August 27-29, 2019 **Claims Conference of Northern California, Lake Tahoe, CA**

October 17,18 **CAIIA Fall Meeting, Kimpton Sawyer Hotel, Sacramento**

DOI Press Release

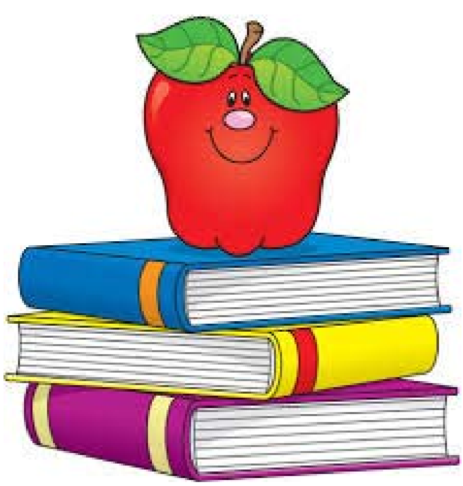
Three victims out $100K in nationwide online loan scam—more victims likely

Scammers use state seal and fraudulent Department of Insurance documents to dupe victims

LOS ANGELES, Calif. — California Department of Insurance Enforcement Investigators have identified a national insurance scam targeting consumers shopping for privately funded loans. The alleged scammers contact consumers who have inquired online about securing a loan, using the name Taylor Investments or a version of this name *(this person is also a victim)*. The borrower is told they qualify, but must first purchase a Loan Payment Protection Insurance policy to pay the loan, in the event the borrower is unable to make payments and avoid default. The victim is instructed to wire the premium payment to an out-of-state checking account.

To appear legitimate, the scammers provide the borrower with a certificate of insurance from the California Department of Insurance that includes the Great Seal of the State of California. The certificate is fraudulent. The California Department of Insurance does not issue insurance certificates.

If you have been contacted by anyone offering to loan you money and require you to purchase a loan guarantee policy **DO NOT SEND THEM MONEY OR PROVIDE ANY PERSONAL INFORMATION**. If you suspect you are the victim of these scammers or have information about the case, please contact the California Department of Insurance Consumer Services Division toll-free at **800-927-4357**.



Would you believe?

In 2019, total planned back-to-school expenditure in the United States amounted to 26.2 billion U.S. dollars.

https://www.statista.com/statistics/592813/total-back-to-school-spending-us/

To find the best independent adjusters, visit www.CAIIA.com.

Fees on Optional Rental Car Liability Insurance Are Not Premiums in Excess of Approved Rates

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

In *Adhav v. Midway Rent A Car, Inc.* (No. B285586; filed 7/24/19), a California appeals court held that fees charged by a car rental agency for the purchase of supplemental liability insurance were not premiums in excess of approved rates.

In *Adhav v. Midway*, the rental agency was the named insured under master policies issued by licensed insurers. The premium charged to the rental agency was based on the number of renters actually purchasing the coverage, and was approved by the Department of Insurance (DOI). The insurance was also subject to a significant self-insured retention. Plaintiffs were renters who had purchased the coverage, suing under the Unfair Competition Law (UCL), Business and Professions Code sections 17200, et seq. They sued the rental agency and its insurers asserting that various Insurance Code provisions required the rental agency to disclose to them what rate it was paying the insurers and, further, to charge them that same rate. And Plaintiffs contended that the insurers were liable because the extra fees charged by the rental agency were imputed to the insurers on an agency theory, and therefore the insurers constructively "received" a premium in excess of that authorized by the DOI.

Finding that the rates approved by the DOI were for the commercial policies issued to the rental agency, the court concluded the DOI-approved rates did not govern charges imposed by the agency on rental car customers. The court found that the agency did not charge plaintiffs insurance premiums in excess of the DOI authorized rate, and that the "amounts received by the agency for the sale of rental insurance are not imputed to any defendant insurer because the agency was not acting with the powers of a general agent or with substantial oversight and control by any insurance carrier." The court further found the fees charged by the agency should not be imputed to the insurer defendants because the rental agency was the policyholder, and the insurance coverage it provided was ancillary to its primary business of renting vehicles. In addition, the agency operated under a $25,000 self-insured retention and was solely responsible for claims up to that amount, as well as administering claims.

Accordingly, the court concluded Insurance Code sections 1861.01 (concerning approved rates) and 381, subdivision (f) (concerning disclosure of premium) did not apply to the rental agency's interaction with its customers and there was nothing unlawful or fraudulent about the agency's conduct that created UCL liability. The court also found plaintiffs had not suffered any actual economic injury, because the fees the rental agency charged were fully disclosed, plaintiffs obtained the bargained for insurance at the bargained for price, and plaintiffs failed to establish that the rental agency's optional insurance charges were in excess of the charges for such insurance by other rental car companies.

Having conducted an exhaustive analysis of the various statutes, the *Adhav v. Midway* court closed by also citing the doctrine of judicial abstention, saying that: "The self-insured retentions and markups of the commercial policy rate to rental car customers may be good, bad, or indifferent—that is a regulatory judgment we do not make and leave to the special competence of the DOI. To the extent the DOI may seek in a future filing review to disapprove of a self-insured retention or other arrangement that results in a rental car company charging more than the premium it pays under a commercial policy, or may seek to regulate the end charge to the rental car customer, nothing in our decision should be read to delimit the scope of the DOI's authority in that regard one way or the other."

Continued from page 1

Tovar's citing *Cortez v. Vogt* (1997) 52 Cal.App.4th 917, 929 and *Adams v. Bell* (1936) 5 Cal.2d 697, 703. Because Plaintiff's suit against Tovar ended on December 20, 2013 and this action was filed on June 24, 2016, this action was filed within the four-year statute of limitations for fraud and was therefore timely.

The Court then found that the UVTA claim against AUIC was valid, because a bad faith claim is a valid lien owned by a debtor against his insurer. Moreover, all property of a judgment debtor is subject to enforcement of a money judgment. A bad faith claim is a "chose in action" which is considered a form of personal property. (*Vick v. DaCorsi* (2003) 110 Cal.App.4th 206, 212, fn. 35; Code Civ. Proc. § 17, subd. (b)(8)(A).) Next, the Court analyzed whether a bad faith claim can be assigned and concluded, based upon a wealth of case law, that it can. The Court held Plaintiff did allege sufficient facts to show he had a claim against Tovar, that he was injured because he cannot collect the entirety of the $1,523,887.16 verdict he was awarded from either Tovar or AUIC. AUIC was a proper defendant and Tovar was insolvent. Therefore, the Court ruled, the demurrer should not have been granted.

Takeaway

The Court's actions in this case should be taken as a warning for those insurers thinking about obtaining bad faith action releases from its insureds after failing to accept reasonable policy limits demands. The release may be ruled void if and when the underlying plaintiff obtains a more favorable judgment than the policy limits demands. In today's legal climate, many car crash cases will result in a damages award at trial greater than the state minimum $15,000 auto policy liability coverages. A wise insurer may wish to avoid any situation wherein a policy limits demand goes ignored.

Security Guards Not Always Required
Credit to Tyson & Mendes, La Jolla, CA

The California Court of Appeal has made a recent ruling in a premises liability case that amounts to a victory for landowners: the Court ruled generalized knowledge of potential future crime does not meet the "heightened foreseeability" requirement for premises liability. In layman's terms, just because a parking lot owner has some general idea that a random crime has the possibility of occurring at some random point in the future, does not mean that the owner is required to hire a security guard for the parking lot. The public policy – and common sense – of not making all landowners the insurers of everyone's safety at all times has been positively affirmed by the Court.

In the recent case of *Tayler L. Williams v. Fremont Corners, Inc.* ("Fremont Corners,") (*Williams v. Fremont Corners, Inc.*, No. H043218, 2019 WL 3231089, Cal. Ct. App. June 24, 2019) plaintiff Williams confronts the issue of whether a landowner liable for injuries to an invitee from criminal acts of a third party, where the landowner has a general knowledge of the possibility of future violent criminal conduct.

Plaintiff Williams argued that a parking lot owner is liable for his injuries caused by a third party because the parking lot did not have "adequate security on the premises." In brief, Fremont Corners argued their security measures were appropriate at the time, which included security cameras and adequate lighting. Additionally, Fremont Corners argued they had insufficient knowledge of any prior similar incidents. After litigation, and a motion to dismiss via summary judgment by Fremont Corners, the California Court of Appeal affirmed the State's public policy that generally, landowners are not insurers of public safety. Essentially, although every business and parking lot might be safer with a security guard present at all times, imposing this requirement on all business would be an unfair burden, considering the high cost of additional security, unless that business had notice of prior similar criminal violence.

The current authority as to liability between landowners and guests is intertwined between several Court decisions. With regard to liability of business proprietors, such as shopping centers, and their patrons or invitees, California courts hold that there is a "special relationship" such that a proprietor must "take reasonable measures to protect such persons against foreseeable criminal attack." (*Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224 (*Delgado*).) With regard to third party crimes, California courts follow the holding that "the scope of a landlord's duty to provide protection from foreseeable third party crime . . . is determined in part by balancing the foreseeability of the harm against the burden of the duty to be imposed." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 678 (*Ann M.*)) "[D]uty in such circumstances is determined by a balancing of 'foreseeability' of the criminal acts against the 'burdensomeness, vagueness, and efficacy' of the proposed security measures." (*Id.* at p. 679.) Simply, the standard is that "imposition of a high burden requires heightened foreseeability, but a minimal burden may be imposed upon a showing of a lesser degree of foreseeability." (*Ibid.*; accord *Morris*, *supra*, 36 Cal.4th at p. 271.)

Continued on page 6

To find the best independent adjusters, visit www.CAIIA.com.

Continued from page 5

Of significance, a proprieter has a "duty to take preventative measures to guard against possible *future* criminal conduct" (*Morris v. De La Torre*, *supra*, 36 Cal.4th at p. 271) however, such duty is not triggered unless there a showing of a *heightened* degree of foreseeability. (Italics added.) (*Ann M.*, *supra*, 6 Cal.4th at p. 679.) Such foreseeability is rarely proven "in the absence of prior similar incidents of violent crime on the landowner's premises." (*Sharon P.*, *supra*, 21 Cal.4th at p. 1190.)

Here, specifically, plaintiff Williams was physically assaulted by a third party at around 1:30 a.m. in a shopping center parking lot, after leaving a bar, Peacock Lounge, in the shopping center, owned by defendant Fremont Corners, Inc. At the time of the assault, plaintiff contends no security guards were present. Williams brought suit against Fremont Corners for failing to protect him from what he claimed to be a reasonably foreseeable criminal act in light of the nature of the bar business and "prior similar occurrences" on the premises. In support, plaintiff Williams notably argued that Fremont Corners had a legal duty to uncover incidents of criminal acts on the premises.

Fremont Corners moved for summary judgment on the grounds that there was insufficient support for the allegation that the assault was reasonably foreseeable. Specifically, Fremont Corners argued that Fremont Corners had did not have sufficient knowledge of "prior similar incidents" and further, plaintiff failed to show such knowledge.

In response to Fremont Corners, plaintiff Williams supported his claims of foreseeability of potential future criminal conduct and knowledge or "prior similar incidents" by offering evidence of five service calls from the Sunnyvale Department of Public Safety to Fremont Corners and Peacock Lounge, including reports of simple assault, battery with serious bodily injury, and a physical alteration resulting in a broken right jaw, all in 2011. Plaintiff further argued that Fremont Corners had a legal duty to discover the possibility of harm from third party criminal acts. The Court of Appeal was not persuaded.

Ultimately, the Court sustained the Motion for Summary Judgment in favor of Fremont Corners, ruling that Fremont Corners did not owe the duty to provide the additional security measures plaintiff claims would have prevented his injury. Specifically, the Court found that plaintiff did not provide sufficient evidence of prior similar incidents to support the heightened level of foreseeability required to justify the additional security measures. The Court noted plaintiff's provision of records regarding reports of injuries from Sunnyvale Department of Public Safety did not constitute record evidence of previous assaults, however indicted that "[e]ven assuming that there is record evidence of previous assaults occurring" at the shopping center, plaintiff failed to offer any evidence that Fremont Corners had notice of these incidents. Moreover, the Court noted that plaintiff failed to "fully identify specific measures" Fremont Corners should have taken to prevent the harm. The Court accepted that although Fremont Corners may have had a "general knowledge of the possibility of violent criminal conduct," that general knowledge was not in itself enough to create a raised duty under California law on the part of Fremont Corners.

In summary, the Court held that although Fremont Corners may have known that there was a possibility of future criminal conduct, plaintiff Williams did not establish notice of prior similar incidents of criminal conduct, such that Fremont Corners may have had a legal duty to provide security guards at the time of plaintiff Williams' injury. Without the establishment of this legal duty, plaintiff lacked an essential element of Negligence, and Fremont Corners was entitled to summary judgment.

Of significance to defense practitioners in premises liability, the Court here further clarifies the meaning of ***"heightened foreseeability"*** in denying the imposition of additional duty on the part of a landowner to take additional steps of security in the parking lot- such as the provision of security guards- where there is no notice of prior similar incidents. Additionally, the Court clarifies that ***a landowner must have more than a general knowledge of the potential violent criminal conduct***, and that ***a landowner does not necessarily have an affirmative duty to inquire about criminal activity***, and specifically not beyond Fremont Corners' activities, as reflected in the record of this case[1].

[1] To determine whether criminal conduct was occurring on the property, Fremont Corner's manager, Jay Murray, stated he would listen to the tenants if they had anything to report, conducted onsite visits once or twice a week when he would stroll around and ask if everything was okay, without specifically asking about violence or criminal activity, check the lighting system every two to three months, replace broken bulbs or fixtures, provide video surveillance to police when requested.

To find the best independent adjusters, visit www.CAIIA.com.

Department of Insurance wins 20-year court battle against Mercury Insurance as Supreme Court Denies Insurer's Petition, upholding historic $27.6 million fine

SACRAMENTO, Calif. — The California Supreme Court denied a petition for review by Mercury Insurance Company thereby letting stand a $27.6 million fine the Department of Insurance imposed on Mercury for charging illegal fees in violation of Proposition 103. The fine is the largest in the Department's history against a property and casualty insurer.

In 2015, the Commissioner fined Mercury $27.6 million for charging consumers unapproved and unfairly discriminatory rates. Despite being advised for years by the Department of Insurance not to do so, Mercury continued to allow its auto insurance agents to charge consumers $50 to $150 in illegal fees on top of the premium the Department approved. Proposition 103, passed by the voters in 1988, prevents auto insurers from charging excessive rates and requires that rates be approved by the Commissioner.

"Since Proposition 103 was enacted, Mercury has looked for ways to evade the Insurance Commissioner's regulation of its rates," said Insurance Commissioner Ricardo Lara. "The Department repeatedly told Mercury to stop this scheme, where Mercury implied its agents were brokers working for the consumers, but Mercury refused to do so. This is a victory for consumers that sends a message to insurers that they cannot circumvent Proposition 103's consumer protection laws in an effort to increase their profits and that the Department will stay the course -- even if it takes twenty years -- to penalize insurers for illegal conduct."

Under the scheme, Mercury illegally labeled its "agents" as "brokers," implying that they worked for the consumers rather than Mercury, and allowed them to charge and collect unapproved fees on more than 180,000 transactions from 1999 to 2004, improperly collecting at least $27,593,562 from consumers. The scheme created a major incentive for Auto Insurance Specialists (AIS), Mercury's largest independent agent, to place virtually all of its policies with Mercury to the exclusion of other insurers, and resulted in different Mercury customers paying different amounts for the same policy, depending on what the agent charged in fees.

During this time, AIS placed approximately 90 of its California automobile business with Mercury, nearly doubling the placed premium from $225 million in 1999 to $400 million in 2003 and 2004, premium that other insurers might have received if Mercury had complied with the law.

"Part of my responsibility as Insurance Commissioner is to ensure a vibrant insurance marketplace which requires all companies to obey the rating laws so no company gets an unfair advantage over the others. And here that advantage came at the expense of consumers who were charged unfairly discriminatory rates for their insurance," added Commissioner Lara.