CAIIA Status Report

March 2014

Torts-Defamation & Anti– Slapp statute

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

Anthony K. Hui v. Beth Sturbaum

Court of Appeal, First Appellate District
(January 9, 2014)

California's anti-SLAPP statute (Code of Civil Procedure §425.16) was passed in 1992 because of the legislature's concerns about "a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." The purpose of the statute was to allow a special motion to dismiss an action involving issues of protected free speech. This case considered the extent to which an insurance investigator's discussions with a personal injury attorney about the treating chiropractor were the proper subject of a motion to strike the chiropractor's defamation claims.

In November, 2010, chiropractor Anthony K. Hui ("Dr. Hui") sued Beth Sturbaum ("Sturbaum") for defamation, trade libel, libel per se and slander. Sturbaum was an insurance company claims investigator for Federated Mutual Insurance Company. She handled liability claims submitted to Federated and often read alerts posted by the National Insurance Crime Bureau ("NICB") regarding potential fraudulent claims practices. While investigating a claim, Sturbaum reviewed billing invoices for chiropractic services by Dr. Hui provided to two claimants who had been in an automobile accident. She noted that services described on the invoices violated the Business and Professions Code and California regulations governing chiropractors. She also learned that the claimants' attorney was being investigated by the NICB, and that Dr. Hui had prior chiropractic licenses suspensions and a revocation.

Sturbaum called Dr. Hui and expressed concern that the automobile collision in which the claimants had been injured was relatively minor, and that Dr. Hui's services may be excessive. Sturbaum also called an assistant to the claimants' attorney, Winnie Yu, and stated that the billings were "excessive because of the type of impact" in the car accident and that the billings "could be fraudulent." Sturbaum mentioned that she made, or was going to make, a complaint about Dr. Hui. In 2010, the California Department of Insurance ("DOI") informed Sturbaum that it was investigating Dr. Hui "for potential fraudulent activity" and asked her to provide information. She cooperated with the investigation and provided the requested information. Dr. Hui soon after learned about the DOI investigation.

Dr. Hui filed suit against Sturbaum and claimed that Sturbaum submitted false reports to the DOI and told personal injury attorneys not to send their clients to him. Sturbaum moved to strike the complaint and argued that it arose out of protected speech. The trial court granted Sturbaum's motion and found that her communications with the DOI were absolutely privileged, and Sturbaum's communications to Ms. Yu were not made with malice such as to defeat a qualified privilege.

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California Association of Independent Insurance Adjusters, Inc.

President's Message

Tanya Gonder
CAIIA President

This column is written the prior month so I wanted you to know I'm not really a month behind! The events and holidays during the month of February this year remind us how important it is to consistently bring our A-game and celebrate our relationships.

The stellar athletes who represent their respective countries in the Olympics have worked hard since childhood to excel. The All-Stars representing the East & West Conferences of the NBA prove themselves to their fans in 82 games during the season. These individuals are obviously talented but it is discipline and commitment that sets them apart.

President's Day now not only honors two distinguished Presidents but is a day to celebrate and remember all the former leaders of our country. Despite the legacy of a president, having held office signifies you've reached the top.

Valentine's Day traditionally celebrates love relationships. Since relationships are an integral part of anyone's success I view February 14th as a day to remember we have to nurture existing relationships and be open to receive new ones.

The members of the CAIIA know the importance of bringing your A-game. Every task we perform for a client stands alone. Sometimes we are only as good as our last assignment which is why consistently exceeding expectations is our goal. Relationships are the foundation of our businesses. A relationship built on trust and mutual respect usually means a long-term client. We aren't Leaders of the Free World but we strive to be among the top-tier in our field. Our members have various specialties and service the entire State.

Tanya Gonder
2013/2014 CAIIA President

News from our Members:

Note from Pete Vaughn:

Pete Vaughan of Vaughan and Associates, Benica, CA is proud to announce that he and his wife Gail are first time Grandparents of a baby girl, Maryland Aileen Lee, born on February 18, 2014 at 11:09 PM.

Congratulations to Pete and Gail, their daughter and her family!

Report from Peter Schifrin on DOI Curriculum Board:

I represented the CAIIA at the California Insurance Department Curriculum Board Meeting in Sacramento on February 13th.

It came as a surprise to me, that a while back, due to declining pass rates, the DOI lowered the examination pass rate to 60%. For those who might have failed the test long ago at just below 70%, and were forced to take it again to pass, that might be a bit annoying.

The pass rate for first time takers of the independent adjuster exam in 2013 was 47%. Those repeating the test had a pass rate of only 36%. Worse, in January 2014, only 7 of 27 or 26% passed the test on their first try. Perhaps the holidays interfered with studying.

I am currently on the Committee assisting with creation of the Public Adjuster Examination Objectives. It is interesting to see how the other half lives.

Peter H. Schifrin, RPA

CAIIA Past-President

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The Court of Appeal affirmed after reviewing the case *de novo*. Dr. Hui only appealed the trial court's finding with regard to Sturbaum's communications with Ms. Yu. In an unpublished section of its opinion, the Court agreed that Sturbaum's statements to the DOI were absolutely privileged under Civil Code § 47. In the published opinion, the Court held that Sturbaum's statements to Ms. Yu were protected under Civil Code § 47(c), which provides a conditional privilege for "communications to interested persons" made without malice. As such, the Court found that Sturbaum's statements to Ms. Yu were made "in connection with a public issue or an issue of public interest." It noted that the business of insurance, and the issue of insurance fraud, impacts most consumers of insurance and are a concern to a substantial number of people. The Court thus concluded that there was a sufficient "degree of closeness between the challenged statements and the asserted public interest" of preventing insurance fraud. On the other hand, Dr. Hui had not established a probability of prevailing pursuant to the Anti-SLAPP statute because he did not rebut the Court's finding of a privilege, and did not meet his burden of showing that the statements were made with malice, hatred, ill will or in reckless disregard of Dr. Hui's rights.

COMMENT

This chiropractor's defamation lawsuit against an insurance investigator failed and was subject to an Anti-SLAPP motion because the investigator's statements regarding fraud investigation were protected. The investigator's speech was privileged because she complied with the duty to report suspected fraud to the DOI under Insurance Code § 1872.4, and alerted an interested third party that the chiropractor may have been engaging in excessive or fraudulent billing.

Stayed tuned for more “go green” ideas and thoughts!

Insurance Law Client Alert: California FAIR Plan Limited to Coverage Provided by Statutory Fire Insurance Policy

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

In *St. Cyr v. California Fair Plan Association* (No. B243159, filed 1/31/14), a California appeals court held that the state's high risk property insurance plan is not obligated to provide any greater coverage than that mandated for the state's statutory fire insurance policy.

The plaintiff-policyholders lived in high fire risk areas and were insured under the California FAIR Plan, which provides property insurance to the otherwise uninsurable. Following loss of their homes and other property in wildfires, the policyholders were paid the full amount of their policy limits, but contended that they were entitled to additional payments. Specifically, the policyholders alleged that the FAIR plan provided less protection than statutorily mandated by Insurance Code sections 10090 through 10100.2, which spells out the "Basic Property Insurance Inspection and Placement Plan" of the FAIR program.

The policyholders contended that FAIR was required to issue a policy not only in accordance with the standard form fire insurance policy set forth in Insurance Code section 2071, but also the "'Basic Property Insurance' written in the normal market . . . known as the 'HO-3'," referring to the copywrited homeowners policy form promulgated by the Insurance Services Office (ISO).

Based on that contention, the policyholders alleged that FAIR's policy improperly excluded coverage available in the "insurance industry standard 'Basic Property Insurance' policy," including coverage for "'Other Structures,'" "'Additional Living Expenses,'" "trees and shrubs," "debris removal," "'fair rental value,'" and "building code upgrades." Those purportedly improper exclusions effectively reduced the promised coverage for total losses by 35 percent.

Under the FAIR Plan "Basic property insurance" is defined as:

"[I]nsurance against direct loss to real or tangible personal property at a fixed location in those geographic or urban areas designated by the commissioner, from perils insured under the standard fire policy and extended coverage endorsement and vandalism and malicious mischief and such other insurance coverages as may be added with respect to such property by the industry placement facility with the approval of the commissioner or by the commissioner, but shall not include insurance on automobile or farm risks." (Insurance Code § 10091(c).)

Under the statutory scheme, the FAIR Plan is an involuntary joint reinsurance association of all property insurers. (Insurance Code §§ 10094, 10098.) It is the insurer of last resort, and statutorily mandated to make available basic property insurance to any "persons having an interest in real or tangible personal property who, after diligent effort ... are unable to procure such insurance through normal channels from an admitted insurer." (Insurance Code § 10094.)
The appeals court rejected an argument that the FAIR policy failed to conform with the statutory fire policy requirements of Insurance Code section 2071, pointing out that under Insurance Code section 2070, a fire policy need not follow the statutory form word-for-word as long as, when viewed in its entirety, it is "substantially equivalent to or more favorable to the insured than that contained in such standard form fire insurance policy."

The court then examined Insurance Code section 2071 and concluded that "[t]he standard form does not mention coverage for loss of trees and shrubs, for debris removal, or for additional living expenses." "Under the plain language of the standard form fire policy, an insurer must insure ... the insured's property at the location of the property from all loss caused by fire or lightning and any other covered perils, to the extent of the [Actual Cash Value] of the property at the time of loss, but not exceeding the cost to repair or replace the property, without including an allowance for increased costs due to building ordinances, and without compensation for loss from interruption of business; nor, in any event, for more than the interest of the insured."

As a result, the court ruled that the FAIR Plan had fulfilled its contractual and statutory obligations to the policyholders by timely paying them the full amount of the limits, which set forth the maximum amount due under the policy.

Damages - Discovery as to Sale of Medical Lien

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

Barry Dodd v. Maria Francesca Cruz

Court Of Appeal, Second Appellate District
(February 5, 2014)

In *Howell v Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541 the California Supreme Court held that a plaintiff's recovery for past medical expenses is limited to the amount paid for the medical expenses after any contracted-for discounts, rather than the larger amount billed to the plaintiff. This case considered the defendant's rights to discovery against a third party medical financing company concerning its purchase price of liens and accounts receivable pertaining to plaintiff's treatment.

The case arose from an automobile accident between plaintiff Dodd and defendant Cruz. Dodd was treated for a shoulder injury at Coast Surgery Center of South Bay ("Coast"). On the same day as Dodd's surgery, Coast sold to Medical Finance LLC ("MedFi") its account receivable and lien against Dodd for payment of its charges. After litigation commenced, Cruz's attorney served MedFi with a deposition subpoena for production of business records. The dispute was narrowed to three documents identified in MedFi's log of withheld documents: (1) a contract between MedFi and Coast dated about four years before Dodd's surgery, (2) a redacted "Creditor's Assignment of Claim," and (3) "MedFi's Open Lien Detail." MedFi conceded that these documents related to its "lien contracts" with Coast and included evidence of the amount MedFi paid for its lien on Dodd's recovery, if any, against Cruz. MedFi objected to the production of these documents, however, on the grounds that they were confidential and irrelevant. MedFi moved to quash Cruz's subpoena. The trial court granted the motion to quash and imposed monetary sanctions on Cruz.

The Court of Appeal reversed, holding that the trial court abused its discretion in granting the motion and awarding sanctions. The Court held that the subpoena was reasonably calculated to lead to the discovery of admissible evidence relating to the reasonable value of Coast's services. The court noted the general rule that "a plaintiff may recover as economic damages *no more* than the reasonable value of the medical services rendered and is not entitled to recover the reasonable value if his or her actual loss was less." (quoting *Howell).* According to the court, the subpoenaed documents could reveal what Coast believed was the reasonable value of its services, apart from its calculation of the expense and risk of collection. This would be at least some evidence of the reasonable value of Coast's services.

Further, an expert retained by Cruz could base his or her opinion about the reasonable value of Coast's medical services, at least in part, on the amount Coast accepted from MedFi as full payment for its services. In addition, the subpoena was also reasonably calculated to lead to the discovery of admissible evidence relating to the amount of medical expenses Dodd actually incurred. Cruz was entitled to obtain documents relating to MedFi's collection activity and policies and procedures because they may support Cruz's position that Dodd is not actually responsible for the full amount billed.

Comment

This decision provides defendants with another tool to assist in the determination of the "reasonable value" of medical treatment. While the admissibility of such evidence will be determined on a case-by-case basis, it will provide defendants and their experts a better insight into the reasonable value of plaintiff's treatment.

COMBINED CLAIMS CONFERENCE

"LIFT OFF FOR EDUCATION"
MARCH 4-5, 2014
HYATT REGENCY ORANGE COUNTY

The Combined Claims Conference (CCC) is a two-day program offering continuing education for CPCU, RPA, MCLE, CIPI, CALI, WCCP and the California and Texas Departments of Insurance for independent adjusters, attorneys, investigators and brokers.

The conference includes four separate educational tracks: Property, Liability, Special Investigations Unit (SIU) and Workers' Compensation. Our quality speakers address the most pressing topics during the sessions. Included in your registration fee is admittance to all conference sessions, two continental breakfasts, breaks, two luncheons and Tuesday's Casino Night.

REGISTRATION FEES: Register early to take advantage of the lowest registration fee.

Qualified Rate:
Register By January 10:
One-day: $75.00 (either Tuesday or Wednesday)
Two-day: $125.00
Register after January 10 – February 21
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Two-day: $175.00
After February 21 or On-site registration:
One-day: $125/day (subject to availability)

All-Others:
One-day: $200 (either Tuesday or Wednesday)
Two-day: $400

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On the Lighter Side:

March Holidays:

March 4 Mardi Gras

March 9 Daylight Savings Begins (USA)

March 17 St. Patrick's Day

March 20 Spring begins

*March 30 Summer Time Begins (Europe)**

**Summer Time marks the end of school, warmer temperatures and longer days, and an atmosphere of relaxation for many Europeans. An English builder named William Willet, wrote a pamphlet called "The Waste of Daylight" in 1905. Mr. Willet saw a need for workers to capitalize on the longer summer days and campaigned in the House of Commons until his death in 1915. In 1916, the UK officially recognized DST, having waited until the first World War had ended, not wanting to add confusion to military strategies.*

TOP THINGS TO DO WHEN DAYLIGHT SAVINGS TIME BEGINS:

- Move your clocks forward 1 hour before bed on Saturday night.
- Go to bed an hour earlier Saturday night.
- Get outside and enjoy the extra hour of daylight.
- Replace the batteries in the smoke alarm and carbon dioxide monitors.
- Clean out the medicine cabinet. Dispose of all medicines properly.

Spring Forward, Fall back!