CAIIA Status Report
MAY 2011

Insurance Law News

Submitted by Smith, Smith & Feeley, LLP - Irvine, CA

Auto Insurer May Be Liable in Bad Faith For Paying For Repairs That Insured Did Not Authorize and Then Prosecuting Subrogation Claim Against Tortfeasor

Although an auto insurer has a contractual right to elect to repair a damaged vehicle rather than pay the insured the cost of repairs, the insurer may nevertheless be liable for bad faith if it pays for repairs that were not authorized by the insured and then pursues a subrogation claim against the responsible tortfeasor, thereby prejudicing the insured's rights against that tortfeasor. (*Hibbs v. Allstate Ins. Co.* (2011) 192 Cal.App.4th 1339)

Facts

Harry and Jessica Hibbs owned a van that they insured through Allstate Insurance Company. Jerome Brooks crashed into the van while it was parked, causing substantial damage to the van.

The van was towed to a repair shop known as Body Tech. Although the exact facts were disputed, it was generally agreed that Mrs. Hibbs visited Body Tech and signed a "tear down" authorization and a general repair authorization. The following day, after assessing the damage, Body Tech created a detailed estimate regarding the repairs. Body Tech contends that it then discussed the details of the estimate with Mrs. Hibbs over the phone, although Mrs. Hibbs denied any such discussion. Mrs. Hibbs never signed the detailed written estimate.

The parties disputed who instructed Body Tech to proceed with the repairs. Either way, Body Tech ultimately repaired the van for a total cost of $6,200.40. Allstate paid $5,700.40 to Body Tech (subtracting $500 for the Hibbses' deductible). Allstate then pursued a subrogation action against Brooks and recovered $6,200.40, of which it paid $500 to the Hibbses.

The Hibbses filed suit against Allstate, alleging causes of action for breach of contract and bad faith. The trial court granted summary adjudication for Allstate on the Hibbses' claims but denied Allstate's section 998 motion for costs. Both parties appealed.

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CAIIA Newsletter
CAIIA Office
P.O. Box 168
Burbank, CA 91503-0168
Web site - http:\\www.caiia.org
Email: info@caiia.org
Tel: (818) 953-9200
(818) 953-9316 FAX

Editor: Sterrett Harper
Harper Claims Service, Inc.
Tel: (818) 953-9200

California Association of Independent Insurance Adjusters, Inc

PRESIDENT'S OFFICE
P.O. Box 282
Ukiah, CA 95482
707-462-5647
Email: info@caiia.com
www.caiia.com

PRESIDENT
Phil Barrett
barrettclaims@sbcglobal.net

IMMEDIATE PAST PRESIDENT
Sam Hooper
hooper@hooperandassociates.com

PRESIDENT ELECT
Jeff Caulkins
jeff.c@johnsrickerby.com

VICE PRESIDENT
William "Bill" McKenzie
walshadj@sbcglobal.net

SECRETARY TREASURER
Tanya Gonder
tanya@casualtyclaimsconsultants.com

ONE YEAR DIRECTORS
Kearson Strong
kearson@claimsconsultantsgroup.com

Richard Kern
rkern@sgdinc.com

Art Stromer
artstromer@hotmail.com

TWO YEAR DIRECTORS
Debbie Buse
ncadj@sbcglobal.net

Corby Schmaultz
cschmaultz@jbaia.com

Michael Hale
cics@carterclaims.com

OF COUNSEL
Nancy DePasquale
WILLIS & DePASQUALE, LLP
725 W. Town & Country Rd., Ste. 550
Orange, CA 92868
714-544-6000 • Fax 714-544-6202
ndepasquale@wdlegal.net

PRESIDENT'S MESSAGE

As I begin this month's message, I am in the air, flying to Oakland. I'm returning from the 2011 Combined Claims Conference which took place in beautiful downtown Long Beach. The weather was perfect and the conference was sold out. Once again, I am leaving a claims conference recharged and refreshed, ready to tackle the claims waiting for me when I get home. Part of the reason for my renewed morale is the reunion with my CAIIA colleagues. Getting to spend time with these devoted souls always inspires me.

We had no less than 9 (perhaps more) of our members represent us at our exhibit booth. I cannot think of a better way to network. These individuals understand the true value of belonging to and participating in this group. If you are a member of the CAIIA and have not taken advantage of this opportunity, you are not getting the full value of your membership dues. Remember this the next time the CCC committee propositions you to take a shift at one of the 2 major claims conferences at which we regularly exhibit. It will be worth your while.

One thing that always amazes me about our members is our high regard for education. Most of the members I have met cannot get enough, and this was the case even before continuing education became a statutory requirement. Tim Waters, CPCU, AIC, co-chairs our education committee. Tim doesn't just talk the talk. Those of us at the CCC got to see Tim proudly displaying his CPCU ribbon for which the CCC rightfully gives its registrants recognition. (Congratulations Tim!)

But for all of the effort that the CCC and CAIIA put into education, perhaps the most inspirational aspect of this conference is the bast amount of experience held by our members and others in attendance. Education, whether it be in a seminar setting or from accredited coursework such as the programs offered through the Insurance Institute, are wonderful ways to broaden and deepen your professional perspective. We in claims know "There is no substitute for Experience". This is what awes me the most about our members. Some of these crusty creatures have literally been in the claims business for as long as I have been alive. No wonder I leave these events so inspired!

Well, the plane has now begun its descent into Oakland and I know the flight attendant will ask me to turn off my laptop any second now. As I fall through the clouds, I pray for a safe landing and look forward to returning to work where I can resume my craft with a renewed morale for having shared the last few days with many of our distinguished members and other top notch professionals in the claims business.

PHIL BARRETT
President - CAIIA 2010-11

Insurance Law News

Submitted bySmith, Smith & Feeley, LLP - Irvine, CA

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Holding

The Court of Appeal reversed and remanded the case for trial on the Hibbses' bad faith cause of action, finding that a triable issue of fact existed as to whether Allstate acted in bad faith by prosecuting its subrogation claim against Brooks.

As a preliminary matter, the Court concluded that Allstate did have a right to decide whether to repair the van or instead pay the Hibbses the cost to repair. Allstate's policy expressly provided, "Allstate will pay for the loss in money, or may repair or replace the damaged … property at our option." Additionally, nothing in Allstate's policy gave the Hibbses a right to object to Allstate repairing the van rather than paying the cost to repair.

That being said, the Court found that Allstate's election to repair the van did not give it the power to proceed with the repairs without the Hibbses' consent. Further, the Court found there was a triable issue of fact as to whether the Hibbses in fact authorized the repairs. California Business and Professions Code section 9884.9 requires auto repair dealers to obtain the customer's signature on an itemized written estimate prior to beginning labor. Because Mrs. Hibbs never signed an itemized written estimate, any "authorization" she may have purportedly given was void. Accordingly, because it failed to comply with section 9884.9, Body Tech was not entitled to payment.

The Court next found that a question of fact existed as to whether Allstate acted in bad faith by prosecuting its subrogation claim against Brooks. As already noted, if the repairs were not properly authorized by the Hibbses under section 9884.9, Body Tech was not entitled to payment. Accordingly, by paying Body Tech for its repair work, Allstate acted as a volunteer, thus cutting off its right to subrogation. Moreover, by prosecuting its subrogation action against Brooks, Allstate prejudiced the Hibbses' rights against Brooks, who was entitled to a set-off for the amount paid to Allstate in subrogation. The Court ultimately remanded the case for trial on whether such conduct by Allstate constituted bad faith.

Comment

The Court noted that if an insurer chooses to repair a damaged vehicle rather than pay the insured the cost to repair, the insured's prevention of the insurer's performance (i.e., his refusal to consent to the repairs) excuses the insurer's obligations under the policy. Thus, Allstate might have been better off had it never paid Body Tech for the repair work.

Insurance Law Alert

Submitted by Haight, Brown & Bonesteel, LLP - Los Angeles, CA

Court Affirms Proof of Repair Requirement Before Payment of Replacement Cost Benefits

In *Minich v. Allstate Ins. Co.* (filed 3/11/11), the Court of Appeal rejected a claim by policyholders that Allstate acted in bad faith when it withheld replacement cost benefits pending proof of actual repair or replacement.

The Allstate homeowners policy had a Building Structure Reimbursement Extended Limits ("BSREL") Endorsement stating "We will make additional payment to reimburse you for cost in excess of actual cash value if you repair, rebuild or replace damaged, destroyed or stolen covered property within 180 days of the actual cash value payment. . . . [up to] 150% of the limit of liability applicable to the building structure(s) as shown on the Policy Declarations for Coverage A-Dwelling Protection."

Insurance Code section 2051 provides that "(b) Under an open policy that requires payment of actual cash value, the measure of the actual cash value recovery, in whole or partial settlement of the claim, shall be determined as follows. . . .(1) In case of total loss to the structure, the policy limit or the fair market value of the structure,

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whichever is less." Relying on the statute, the policyholders claimed that Allstate was required to pay them the full replacement cost benefits available under the policy without regard to whether they rebuilt their house. They argued that because the statute referred only to "policy limit," it must necessarily encompass all possible benefits.

The Appeals Court disagreed, pointing out that *Insurance Code* section 2051.5 specifically contemplates a requirement for proof of repair or replacement. The code section states that "If the policy requires the insured to repair, rebuild, or replace the damaged property in order to collect the full replacement cost, the insurer shall pay the actual cash value of the damaged property, as defined in Section 2051, until the damaged property is repaired, rebuilt, or replaced. Once the property is repaired, rebuilt, or replaced, the insurer shall pay the difference between the actual cash value payment made and the full replacement cost reasonably paid to replace the damaged property, up to the limits stated in the policy."

The court stated: "We disagree that the parties intended that the BSREL Endorsement would increase the 'policy limit.' Rather, the BSREL Endorsement modifies the manner by which Allstate will pay pursuant to the Building Structure Reimbursement provision of the Policy. . . . The BSREL Endorsement thus makes it clear that any payment pursuant to that endorsement would be an amount in excess of the limit of liability or 'policy limit.'"

The court was further persuaded by *Insurance Code* section 10102, which mandates specific disclosures for replacement cost coverage of residential structures. Section 10102 refers to payment of amounts "above the policy limit" or "over the policy's limits," demonstrating that the term "policy limit" as used in section 2051 refers only to a policy's basic limit of liability, and not the additional benefit for replacement cost. According to the court, "It would not be reasonable to interpret the term 'policy limit' in section 10102 to mean the 'maximum policy benefit potentially owed under the policy,' because such an interpretation would read the provision as describing an insurance policy that provides for the payment of an additional percentage, over the maximum benefit payable under the policy. By definition, it would not be possible to pay an amount that is more than the greatest amount payable."

Finally, the court held that, because Allstate did not breach its contract, the policyholders' bad faith claim failed as a matter of law.

Insurance Adjusters – Exempt or Non-Exempt – It Depends

Submitted by Bill McKenzie - Walsh Adjusting Company, San Diego, CA

The FLSA status of insurance adjusters has made its way to court again. In a prior case, it was determined they were non-exempt, as they were involved in the "production" work of the insurance company for whom they worked. However, different facts produce different results, and the California Court of Appeal has ruled that insurance adjusters may, in certain circumstances, fall under the administrative exemption. In the case, *Hodge v. AON Insurance Services*, the adjusters worked for a third-party administrator, not the insurance company. They worked with a variety of self-insured businesses and government agencies. The nature of work involved handling workers' compensation claims. The adjusters investigated, reviewed evidence including medical records, and determined the appropriate amount of reserves the client should set aside and account for across the claims' lifespan which ranged from $20,000 - $100,000. Due to high claim volume, their decisions could tie up millions of dollars of clients' money. The court analyzed whether the adjusters were engaged in administrative work of "substantial importance directly related to management policies or general business operations." The court rejected the analysis that these adjusters were involved in production work because they were "setting aside millions of dollars" in reserves, and influencing the outcome of workers' compensation litigation, which was important to clients' business operations. The court therefore found they were exempt administrative employees. This case emphasizes the importance of not relying on job titles to determine exempt status, but rather carefully analyzing the duties of the position.

The Erosion of the Sanchez Decision

Submitted by Harvey Lightstone, VP of Claims - Claims Professional Liability Insurance Company – Tustin, California

California IAs have been fairly immune to litigation for a number of years because of the ruling in the "Sanchez v. Lindsey Morden Claims Service, Inc." (1999) 72 Cal.App.4th 249 case where the appellant sued the appellee, in its capacity as a claims adjuster, based on its alleged negligence in handling the appellant's claim on a "cargo insurance" policy.

The court found the relationship between the adjuster and the insurer similar to that of independent auditors to investors. It held, that "like auditors, the insurer retained independent adjuster is subject to the control of its clients, and must make discretionary judgment calls. It is the insurer, however, not the adjuster, that has the ultimate power to grant or deny coverage, and to pay the claim, delay paying it or to deny it". Since the adjuster has no contractual relationship with the claimant, "the adjuster's role in the claims process is "secondary", yet imposing a duty of care could expose him to liability greater than faced by his principal insurer."

Additionally, the court agreed that imposing a duty on the adjuster would also "subject the adjuster to conflicting loyalties." The Court also noted that imposing duty on the adjuster would significantly depart from existing law in that "No California case has held insurers' adjusters liable to insureds for negligence, and moreover, California courts have refused to extend liability for bad faith, the predominant insurer tort, to agents and employees of the insurer."

In summary, the Court found that in California, no duty of care is owed by insurer-retained adjusters to insureds, which is consistent with the general law of agency. An adjuster is an agent hired by a principal (the insurer) to investigate a claim. Agents are not liable to third parties for economic loss, except where a duty is created by statute.

All of that being said, we are (in California) seeing an increase in frequency where IAs are being sued individually where the principal refuses to defend them based upon cleverly crafted causes of action alleging intentional acts of an agent. No court has ever extended the principals embodied in the Sanchez case to cover intentional acts, and worse, the Courts have generally narrowed the Sanchez holding, not expanded it. It is not uncommon to see causes of action plead including, but not limited to, aiding and abetting unfair and fraudulent business practices, intentional (or negligent) interference with contractual relations, unfair and unlawful business practices. California IAs need only look to the events of the last two years in Texas to envision where all of this is likely headed.

Technology and Its Hidden Effects

Submitted by Michael Nardulli, RPA – Claims Professional Liability Insurance Company – Tustin, California

Do you utilize the Internet for receiving our home based adjusters reports? Well then you have to look at two items which you probably don't think of.

1.Do they have a paper file? Yup, they do. Do you get it when they "close" the file. You probably should and make it part of your retained file especially to include the "scope notes".

2.Do your adjusters save their emails to "your" file. Another thing you may not have thought of. Some of us use web based management systems, some use in-house proprietary software, but does the software save the emails?

3.Photos. We all take digital photos (I think). Do your field adjusters mount all the photos they take? Probably not. What happens to the photos they do not "mount"? More food for thought.

4.Once we jotted notes on activity sheets. Now we have to log into a system to do so. A reminder to stay on your adjusters to maintain their field notes. A sudden departure for what ever reason will leave you in a bind with your clients.

Weekly Law Resume

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

DUTY TO DEFEND - POTENTIAL FOR COVERAGE

John M. Shanahan v. State Farm General Insurance Company Court of Appeal, Fourth District (March 17, 2011)

When looking at whether it has a duty to defend, an insurer must determine if any of the facts alleged in the complaint or otherwise known may suggest a claim potentially covered by the policy. This case considered whether a claim for sexual battery might provide for coverage under alternate theories not pled by the plaintiff.

Cheryl Skigin sued her employer, John Shanahan, and companies owned by him for various employment claims. Included in her complaint was a cause of action against Shanahan alone, for sexual battery. The complaint alleged that at a Christmas party in 2003, Shanahan "grabbed" her by the buttocks, made comments about her body, and lewdly suggested she engage in sexual intercourse with him. She also alleged that in 2005, while they were on a business trip, he attempted to get her to leave her husband and share an apartment with him, and that he again groped her buttocks, and that upon her return, he sent flowers and a card to her home suggesting their relationship was more personal than professional.

Shanahan was insured at the time with both a renter's policy and an umbrella policy through State Farm General Insurance Company. The renter's policy insured against personal liability "[i]f a claim is made or a suit is brought...because of bodily injury...to which this coverage applies, caused by an occurrence..." The policy specifically excluded emotional distress or mental anguish or similar injury unless it arose out of an actual physical injury. It also defined occurrence as "an accident...which results in...bodily injury." On the other hand, the umbrella policy, while still requiring "an accident," specifically included "emotional distress or mental injury" in its definition of bodily injury.

Shanahan tendered the defense of the claims against him to State Farm, which denied coverage and refused to defend, claiming that it did not cover business pursuits under either policy, and that the sexual battery was not the result of an accident. Shanahan thereafter settled Skigin's claims for $700,000 and brought suit against State Farm for breach of contract and breach of the covenant of good faith for failing to defend him in the Skigin lawsuit. State Farm filed a motion for summary judgment, contending that there was no duty to defend, as the policies excluded coverage for business pursuits, as sexual battery is an intentional tort, and there was no possibility of coverage under Shanahan's policies. The superior court granted State Farm's motion, and Shanahan appealed.

The Court of Appeal affirmed the trial court, holding there was no potential for coverage under either policy, and thus no duty to defend. The Court initially noted that there could be no coverage under either policy for intentional acts, and that each policy excluded coverage for business pursuits. It then focused on Shanahan's theories that there was a potential for coverage because, although not pled, the facts might support a finding of negligence, defamation or invasion of privacy.

As to negligence, the Court pointed out that there could be no coverage under the renter's policy, because it did not cover "bodily injury" claims that did not result in an actual physical injury. As to the umbrella policy, it did cover emotional distress or mental anguish claims without physical injury, but required an "accident." The Court pointed out that whether or not Shanahan admitted to the facts which alleged he groped and propositioned Skigin, courts have held that the conduct involved in sexual misconduct claims is intentional in nature, and is excluded from coverage. There was nothing in the facts pled that could be construed as negligent rather than intentional in nature.

Shanahan next argued that his umbrella policy covered slander and invasion of privacy, along with other activities. Although these were not pled, he argued that the facts alleged supported possible claims for those torts. He pointed to the allegation that he groped Skigin in the presence of others, made comments about her body and propositioned her. Skigin had testified in deposition that when he made those comments, no one was present on the first occasion, and the only person present the second time did not hear the comments. One of the necessary elements of slander is publication to a third party, and that had not been alleged. Without it, there could be no covered claim for slander.

Finally, Shanahan argued that the facts alleging he pressured Skigin to leave her husband, or sent flowers and a card to her home implying a personal relationship, constituted an invasion of privacy. However, the Court noted that while these facts had been alleged, Shanahan had not cited any authority as to how either of these allegations fit a claim of invasion of privacy, which requires public disclosure of private facts which are offensive and objectionable to a reasonable person of ordinary sensibilities. Hence, not only was invasion of privacy not pled by the plaintiff, it could not reasonably be inferred under the facts pled and there was no duty to defend.

The Court of Appeal affirmed the ruling that under the facts as pled, there was no duty to defend.

COMMENT

Although a carrier must look at the facts to determine whether there is a potential for coverage, this case confirmed that an insurer has no duty to defend where the potential for liability is "tenuous and farfetched." Ultimately, the question is whether the facts "fairly apprise" the carrier that the suit is on a covered claim.

CAIIA 2011 Educational Events

As an authorized California DOI education provider (CDI# 198351), the CAIIA will be presenting its annual Seminar on the CA Fair Claim Settlement Practices (**FCSPR**) and Seminar on S pecial Investigation Unit Regulations (**SIU**) and, at two of the locations, we will also be of fering **SEED** (Seminar for the Evaluation of Earthquake Damage) program seminars. The **SEED** program addresses the training and certification required by CCR, Title 10, Chapter 5, Subchapter 7.5.1, Article 1, Sections 2695.40 through 2695.45. Those regulations set forth the requirements of Insurance Adjuster Training for Evaluating Earthquake Damage. We will also be providing **FCSPR** and SIU certification at the **SEED** locations.

At locations in Fresno (6/24/11), Burbank (6/13/11) and San Diego (6/23/11), we will be of fering only the FCSPR and SIU seminars.

In Pomona (6/7/11) and Sacramento (6/16/11) we will be offering both the **FCSPR** and **SIU** seminars plus the **SEED** program seminar.

The CAIIA has secured 8 C DI Independent Adjuster CE Hours for the SEED Program and 2 CE Hours for the **FCSPR/**SIU** Program!**

Register now for the seminar you wish to attend. Be sure and mark the appropriate location in the box to the right.

Name_____

Co._____

Address_____

City_____ Zip_____

Phone_____

E-mail Address: _____

Fees (circle one): **FCSPR**/**SIU** SEED

CAIIA Member fee	$40.00	$100.00
Ins. Co. Employee fee	$50.00	$120.00
Non-Member I/A fee	$60.00	$199.00*

Amount Enclosed - $_____

Credit Card Payment: Amex___Visa___ M/C ____

Ex. Date:_____ Cardholder:_____

Card No:_____

Card Verification Code:_____

Billing Address:_____

_____

Signature:_____

Make checks payable to CAIIA, mail registration and payment to:

CAIIA c/o Tim Waters, AIC
Buxbaum,Loggia &Associates, Inc.
101 E. Commonwealth Ave., Ste A
Fullerton, CA 92832

Questions? Call Tim Waters @ (714) 449-2899

Schedule for all locations 8:00 am:

Registration	7:30 a.m. to 8:00 a.m.
FCSPR & **SIU** Seminar	8:00 a.m. to 10:00 a.m.
SEED Seminar	10:00 a.m. to 5:00 p.m.

FCSPR, SIU & SEED SEMINARS

_____June 7, 2011
Pomona: Shilo Inn
3101 W Temple Ave
Pomona, CA 91768

_____June 16, 2011
Sacramento: DoubleTree Hotel
2001 Point West Way
Sacramento, CA 95815

FCSPR/SIU ONLY SEMINARS:

_____June 24, 2011
Fresno: Ramada Inn
324 E Shaw Ave
Fresno, CA 93710-7690

_____June 13, 2011
Burbank: Holiday Inn Media Center
150 E. Angeleno Ave.
Burbank, CA 91502

_____June 23, 2011
San Diego: American Technologies
8444 Miralani Dr.
San Diego, CA 92126

Please visit **www.caiia.com** for more information.

**CAIIA agrees to offset any membership dues for Non-CAIIA Independent Adjusting Firms joining the CAIIA within 30 days, up to $80.00 total for each adjuster attending with a cap of $160.00 per firm.*

Blessed are the cracked, for they let in the light!

(Ten lines to make you smile.)

1. My husband and I divorced over religious differences. He thought he was God and I didn't.
2. I don't suffer from insanity; I enjoy every minute of it.
3. Some people are alive only because it's illegal to kill them.
4. I used to have a handle on life, but it broke.
5. Don't take life too seriously; No gets out alive.
6. You're just jealous because the voices only talk to me.
7. Beauty is in the eye of the beer holder.
8. Earth is the insane asylum for the universe.
9. I'm not a complete idiot – Some parts are just missing.
10. Out of my mind. Back in five minutes.