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July 2020

Genuine Dispute Summary Judgment Reversed for Abuse of Discretion and Trial of Fact Questions About Expert Opinions

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

In *Fadeeff v. State Farm General Ins. Co.* (No. A155691, filed 5/22/20 ord. pub. 6/8/20), a California appeals court held that triable issues of fact and the trial court's failure to address a request for a continuance precluded summary judgment for an insurer under the genuine dispute doctrine.

In *Fadeeff*, the policyholders made a claim to State Farm for smoke damage to their home from the 2015 Valley Fire in Hidden Valley Lake, California. With State Farm's approval, the insureds retained the restoration company, ServPro, to assist with smoke and soot mitigation. State Farm documented smoke and soot on the interior walls, ceilings and carpeting, and on all exterior elevations, including on the deck and handrail. State Farm made a series of payments on the claim totaling about $50,000.

The insureds then hired a public adjuster and submitted supplemental claims for further dwelling repairs and additional contents replacement, totaling approximately $75,000. State Farm responded by using its own independent adjuster to investigate, who was neither licensed as an adjuster, nor as a contractor. State Farm also retained forensic consultants for the structure and the HVAC system, but neither the independent adjuster nor the consultants were aware that State Farm had an internal operation guide for the use of third-party experts in handling first party claims, which guidelines were therefore not followed. In addition, the consultants made allegedly superficial inspections, with one attributing smoke and soot damage to other sources of combustion, including the insureds' exterior propane barbecue, an internal wood fireplace and wood stove and candles that had been burned in the living room. None of the consultants asked the insureds when they had last used any of the sources of combustion.

State Farm denied the supplemental claim and in the subsequent bad faith lawsuit, State Farm, relying on its use of experts, moved for summary judgment on the ground that the "genuine dispute" doctrine defeats the bad faith claim where an insurer reasonably relies upon expert opinions in reaching a claim decision. The insureds' opposition was based on declarations from their own adjuster and expert, who opined that the work performed to date had not completely removed soot throughout the structure, or the HVAC system. The declaration from the insureds' expert also refuted the opinions of State Farm's expert. Plus, the insureds made a request for a continuance under Code of Civil Procedure section 437c (h), which authorizes a court to order a continuance for additional discovery, on affidavits of necessity.

At the hearing on the summary judgment motion, the trial court did not address the request for continuance. The court sustained State Farm's objections to portions of the insureds' declarations and reports, which gutted the insureds' evidence contradicting State Farm's expert, and granted State Farm's motion. On appeal, however, the appeals court found both factual questions and an abuse of discretion by the trial court, mandating reversal.

Regarding the former, the *Fadeeff* court said that the use of experts does not automatically insulate an insurer from bad faith liability under the genuine dispute doctrine. (Citing *Guebara v. Allstate Ins. Co.* (9th Cir. 2001) 237 F.3d 987, 994.) In particular, the *Fadeeff* court said that where the dispute is purely factual, such as differing opinions of experts, whether there

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Presidents Message – July 2020

John Ratto
CAIIA President

Since I have been poolless (I just made that up and not sure if it's one L or two?) – BTW, it's an adjective meaning no access to a swimming pool - including but not limited to lap swimming, floating, or quick dipping, I have taken up the road bike. If any of you know Oakland, there are very limited areas to ride flat (without getting hit by a car) so your primarily restricted with some type of hill. Additionally, if any of you cycle in Oakland you also know that there are several "beasts" who regularly ride, including 60 and 70-year-olds who fly past me as if they are on the current race circuit.

When I started riding, one of my swim/cycle buddies reminded me of the saying – "it's not **if** you crash it's **when** you crash". I don't like those odds- which made me think over the weekend about risk management. Typically, underwriters and actuaries would be tasked with calculating a risk analysis. However, I also seem to quickly run these analyses in my head as well (especially when hammering down Claremont Avenue at over 40 miles an hour).

It's not to say that we as claims people don't take risks, I just think that we think about them a lot more than others before we "dive in".

Without going into a tremendous amount of detail to embarrass her, my daughter had done something pretty dumb the other day (I will chalk it up to sleepy headed teenage hormones…) which could have potentially caused a fire. While her mother freaked out and lectured her on what could happen, I simply said, "do you want to hear the one about the fire loss I had which was caused by the same bonehead move and burned down the house and killed their pets "? "I can show you pictures as well? That one seemed to have sunk in.

We've all seen a lot. We all have a lot of stories - most of them bad. However, these stories usually have happy endings in that most of these people were able to put their lives back together with our assistance. I think we have a unique ability to assess risk in our daily lives whereas others don't have that same experience (good God have you driven on the freeways lately! I'm sorry but I'm doing 72 in a 65 in the second or third lane of a 4 lane freeway, but you felt it was necessary to pass me and others at 90+ in the far right lane and then swerve all the way over to the fast lane…?).

Probably safer just to ride Claremont…

Stay safe, stay disciplined, eat healthy and exercise.

And most of all, count your blessings.

Our committee has wrapped up our bylaw changes and have forwarded over to our counsel for review. Hope to get back to you soon with further updates.

-John

CAIIA Membership Special!!

ATTN: New Members and Existing Member

The CAIIA is offering **50% off** all new or renewal memberships for this year. Now is the time to join or renew your membership!

Press Release from the Insurance Commissioner:

Commissioner Lara issues Order resulting in workers' compensation premium savings for California businesses affected by COVID-19

Commissioner's action mandates workers' compensation carriers reflect reduced risk of loss in premiums due to "stay-at-home" orders

LOS ANGELES, Calif. — Insurance Commissioner Ricardo Lara today issued an Order adopting emergency workers' compensation regulations in response to the COVID-19 pandemic. These new regulations will mandate insurance companies to recompute premium charges for policyholders to reflect reduced risk of loss consistent with Commissioner Lara's April 13 and May 15, 2020 Bulletins, and will result in savings for many policyholders as businesses continue to struggle financially during the COVID-19 pandemic.

"California's business owners have been hit hard by COVID-19," said Commissioner Lara. "Workers' compensation premiums should reflect that many employees are performing less risky duties, and my Order will provide some financial relief for employers when they need it most."

Under these emergency regulations, employers are permitted to reclassify an employee if the employee's duties have changed to a clerical classification that has reduced risk than the employee's previous classification. This reclassification will reduce the employer's premiums for employees who are a lower risk because they are now working from home even though they may not have previously done so. This change would be retroactive to March 19, 2020, the first day of the Governor's statewide stay-at-home order, and conclude 60 days after the order is lifted.

"We applaud Commissioner Lara's efforts to meet the needs of California's small businesses as they continue to navigate the COVID-19 crisis," said Mark Herbert, Vice President, California for Small Business Majority. "These new rules will allow small business owners to correctly reclassify their workforce if their duties have changed, helping businesses keep more money in their pockets as they respond to a decline in revenue and adapt their business models. These rules will also ensure small businesses are better positioned for the long-term by protecting them from future increases in workers' compensation premiums due to COVID-19. This kind of smart action will ensure our state's job creators and innovators have the tools they need to succeed after this crisis."

These emergency regulations also exclude from premium calculations the payments made to an employee, including sick or family leave, while the employee is not performing duties of any kind for the employer. Typically, these payments would be used as a basis for the employer's workers' compensation premium. This change will lower the employer's rate by reducing the amount of payroll assessed, and the employer will not pay premium for paid workers who are otherwise being furloughed.

"These changes provide clarity to employers while helping to share any financial costs of work-related COVID-19 cases among all employers—not just those who found themselves at the center of the epidemic," said Mitch Steiger, Legislative Advocate for the California Labor Federation, who is also a member of the Workers' Compensation Insurance Rating Bureau (WCIRB) Governing Board. "In doing so, both workers and employers most affected by this crisis can more quickly begin the process of recovery."

This new regulation will also exclude claims related to a COVID-19 diagnosis from being included in future rate calculations so that employers are not penalized with higher rates due to COVID-19 claims.

Insurers will also be required to report injuries involving a diagnosis of COVID-19 which will allow the Commissioner's statistical agent—the WCIRB—to keep track of COVID-19 injuries, and will aid in the WCIRB's future analyses of the workplace and market impacts.
The new regulations will go into effect on July 1, 2020.

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was a genuine dispute can only be decided on a case-by-case basis. (Citing *Chateau Chamberay Homeowners Assn. v. Associated International Ins. Co.* (2001) 90 Cal.App.4th 335, 348.) The *Fadeeff* court quoted Chateau Chamberay's list of circumstances where a biased investigation claim should go to jury: (1) the insurer was guilty of misrepresenting the nature of the investigatory proceedings; (2) the insurer's employee's lied during the depositions or to the insured; (3) the insurer dishonestly selected

its experts; (4) the insurer's experts were unreasonable; and (5) the insurer failed to conduct a thorough investigation. (Quoting *Chateau Chamberay, supra*, at 348-349.)

The *Fadeeff* court pointed out that the insureds had presented evidence that part of their claim had been denied by State Farm in violation of the California fair claim handling regulations, based on ServPro's work power washing the outside of the structure, which had caused the paint to peel. State Farm had denied that part of the claim on the ground that it, as well as damage to carpets and wall coverings, was not smoke or fire damage, and excluded as wear, tear or deterioration. But the insureds argued that the damage to the exterior caused by power washing was required to be covered under California Code of Regulations, title 10, section 2695.9(a)(1), as "consequential physical damage incurred in making the repair or replacement not otherwise excluded by the policy [which should] be included in the loss." The court also noted the problem of the internal operation guide, and the State Farm independent adjuster's failure to follow it. That and several other inconsistencies lead the *Fadeeff* court to conclude that there were triable issues regarding whether State Farm could have reasonably relied on its experts in denying the supplemental claims.

The *Fadeeff* court also reversed the summary adjudication on punitive damages, finding that State Farm failed to carry its burden to show that the Fadeeffs could not prove that State Farm acted with an absence of malice, oppression or fraud. (Civ. Code, § 3294, subd. (a); § 437c, subd. (f)(1); *Basich v. Allstate Ins. Co.* (2001) 87 Cal.App.4th 1112, 1118.) The *Fadeeff* court found that "The fact that an individual plaintiff may not believe that the people at State Farm 'wanted to harm you or hurt you intentionally' does not conclusively answer the question whether State Farm intentionally misrepresented or concealed a material fact, or acted with knowing disregard of the rights of others." (Citing CACI No. 3946—Punitive Damages.)

More fundamentally, the *Fadeeff* court found that reversal was required in any case, because of the trial court's failure to address the request for a continuance, either at the hearing or in its ruling. The court stated that whether or not to grant a continuance under section 437c(f) is a matter within the court's discretion, and is reviewed for abuse of discretion. But the *Fadeeff* court stated that reversal was mandated because a trial court's failure to exercise discretion is itself an abuse of discretion. (Citing *Kim v. Euromotors West/The Auto Galley* (2007) 149 Cal.App.4th 170, 176.)

Contractor's Claiming Workers Compensation Exemption Can Lose Much More

Credit to Tyson & Mendes, La Jolla, CA

Contractors who have filed workers compensation exemption status with the Contractors State Licensing Board (CSLB) have significant exposure should circumstances arise during a project where such exemption no longer applies. It can result in automatic suspension of the contractors' license during a construction project. (Business & Professions § 7125.2.) Further, the contractor may have exposure for personal injuries, face misdemeanor charges and fines, and be required to reimburse the owner for all money it received in the performance of the contract as the result of a disgorgement claim. (Business & Professions §§ 7028, 7031.)

Plaintiffs' construction defect bar has become more cognizant of alleging disgorgement claims against contractors in single-family home construction defect cases. In a disgorgement claim, the homeowner seeks the *return of all money paid* to the contractor including additional costs and fees because the contractor was unlicensed *at any time* during the course of the project. (Business & Professions § 7031 (b), *See Also, CACI 4561.*)

Business & Professions Code § 7031 states[1], in part:

(b) Except as provided in subdivision (e), a person who utilizes the services of an unlicensed contractor may bring an action in any court of competent jurisdiction in this state to *recover all compensation paid to the unlicensed contractor for performance of any act or contract.*

(e) The judicial doctrine of substantial compliance shall not apply under this section where the person who engaged in the business or acted in the capacity of a contractor has never been a duly licensed contractor in this state. However, notwithstanding subdivision (b) of Section 143, the court may determine that there has been substantial compliance with licensure requirements under this section if it is shown at an evidentiary hearing that the person who engaged in the business or acted in the capacity of a contractor (1) had been duly licensed as a contractor in this state prior to the performance of the act or contract, (2) acted reasonably and in good faith to maintain proper licensure, and (3) acted promptly and in good faith to remedy the failure to comply with the licensure requirements upon learning of the failure.

(Emphasis added.)

Courts have acknowledged the punitive nature this statute imposes on a contractor. In *Hydrotech Systems LTD v. Oasis Water Park* (1991) 52 Cal. 3d 988, 995, the California Supreme Court set forth the legislative intent behind Business & Professions Code section 7031:

. . . to protect the public from incompetence and dishonesty in those who provide building and construction services . . . The licensing requirement provide minimal assurance that all persona offering such services in California have the requisite skill and character,

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understand applicable local laws and codes. . . The obvious statutory intent is to discourage persons who have failed to comply with the licensing law from offering or providing their unlicensed services for pay. Because of the strength and clarity of this policy, it is well settled that section 7031 applies despite injustice to the unlicensed contractor. Section 7031 represents a legislative determination that the importance of deterring unlicensed personal from engaging in contracting business outweighs any harshness between the parties . . .

Attempts to allocate moneys paid by the owner based upon relevance to the unlicensed work performed is not allowed. (*See, e.g. Jeff Tracey, Inc. v Pico* (2015) 240 Cal.App.4th 510.) Even when the owner knows the contractor is unlicensed during the construction for part of the project, the owner is still entitled to recover all the money the owner paid to the contractor for the entire project. (*Alatriste v. Cesar's Exterior Designs, Inc.* (2010) 183 Cal. App.4th 656.)

Similarly, Business & Professions Code section 7031(b), a substantial compliance provision, is strictly construed. All four elements *must* be met. (*Oceguera v. Cohen* (2009) 172 Cal.App.4th 783.)

There are many ways a contractor may become unlicensed. In *Wright v. Issak* (2007) 149 Cal.App.4th 1116, although the contractor held a California contractor's license, he grossly underreported his payroll to the State Compensation Insurance Fund, and never obtained workers compensation for his crew working on the home remodeling project. Both the trial court and court of appeal agreed with the homeowners that, under California Business & Professions Code section 7125.2, the contractor's license was automatically suspended for his failure to obtain workers compensation insurance for his employees.

Over 50% of contractors licensed with the California Contractors State Licensing Board have certified they are exempt from the workers compensation requirements because they have no workers. In 2016, as part of the CSLB 2016 enforcement campaign, the CSLB in partnership with Employment Development Department and Department of Industrial Relation started sending informational letters to contractors claiming workers compensation exemption status advising them of the exemption requirements. CSLB, has been partnering with investigators from district attorneys' offices to inspect active construction sites, work with counties to battle workers compensation fraud, and expand its own construction site sweeps. Such efforts are indicative that Business & Professions Code section 7031 will continue to be enforced regardless of the punitive and inequitable impact it has on the contractor absent legislative intervention.

As defense counsel for such contractors, thorough investigation is required to that end at the outset of the case or matter. Defense counsel will find it beneficial to investigate the contractor's workers compensation status, if the contractor hired any workers on the project, the scope of such work, licensing requirements for such work, and the licensing status of those workers. If the investigation leads to a possible disgorgement claim, the client should be promptly advised.

This is only a thumbnail sketch of the application of Business & Professions Code section 7031(b), and further independent research is recommended on a case by case basis.

[1] Business & Professions Code § 7031 : (a) Except as provided in subdivision (e), no person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action, or recover in law or equity in any action, in any court of this state for the collection of compensation for the performance of any act or contract where a license is required by this chapter without alleging that he or she was a duly licensed contractor at all times during the performance of that act or contract regardless of the merits of the cause of action brought by the person, except that this prohibition shall not apply to contractors who are each individually licensed under this chapter but who fail to comply with Section 7029.

Be safe!

Send us pictures of your "new normal" 4th of July celebrations!

What Employers Should Be on the Lookout for While Adapting to the "New Normal" of Working From Home

Credit to Tyson & Mendes, La Jolla, CA

Many of us are adapting to what is being called the new normal, which for many means working from home. With this change comes a variety of potential issues employers should tune into to avoid issues and potential lawsuits in the future.

Labor Code § 2802

Many employers who have the option available to them have pushed for all employees to work from home to prevent the spread of the virus and to avoid the potential legal ramifications of pushing employees to return to the office. However, while working from home provides a safety net with respect to interoffice spread of the virus, it opens the door to other issues.

For instance, California Labor Code § 2802 requires employers to reimburse employees for "all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer."

This obligation is not likely triggered if the employer is providing its employees with the option to work from home. However, if employees who are normally in the office are required to work from home every day, said employer likely needs to be reimbursing its employees for reasonable business expenditures. What are considered "reasonable" business expenditures? Certainly cell phone costs if the employee is using their personal cell phone for work purposes. Also very likely a percentage or part of the home internet service costs if required for use on the job while the employee is working from home.

The law, however, clearly states that the only reimbursable expenses are those which are "in direct consequence of the discharge of [an employee's] duties." Seeing as we are dealing with employees who are temporarily required to work from home due to entirely unforeseen circumstances, it is unlikely costs for home office furniture, electricity, water etc. meet the criteria under this Code.

Finally, to reimburse employees for said work at home expenses an employer can have employees submit individual expense reports, or some companies prefer to opt for a one-time bonus to cover expenses.

Rest and Meal Break Tracking

For those hourly employees, the work from home situation makes it particularly difficult to assure their time is tracked properly. So how does an employer assure that its employees are abiding by all applicable rules?

First and foremost, an employer should provide its specific work and meal break policies to assure all employees have the information readily available to them in writing to reference.

Second, for those companies that do not have expensive time tracking software on their systems, instead implement a policy requiring that employees send an e-mail at the beginning and end of the day. Then again at the beginning and end of all meal breaks. This ensures the employer can monitor that the meal break pertaining to a specific employee has gone uninterrupted by work and that any overtime is clearly documented.

Workers' Compensation

While requiring employees to work from home, various newly developing workers' compensation orders (such as N-62-20 in California) specific to COVID-19 will not apply. However, what about non-COVID-19 workers' compensation claims? In sum, while these are not at all common, they have occurred.

As such, similar to the meal and rest break policies, an employer should also assure that it provides any office safety policies, assure its employees confirm they are working in a safe location and advise immediately if that is no longer the case.

The above are just a few items employers should be cognizant of as we wade through this new work from home normal.

Takeaway

In sum, employers should take the steps and precautions necessary to assure their employees are well informed and constantly updated with any changes and their time and safety is properly accounted for. This will assist the employer in avoiding wage and hour and other potential labor and employment lawsuits from matriculating down the road.

On the Lighter Side :

If you keep a glass of wine in each hand, you won't be able to touch your face!

So in retrospect, in 2015, not a single person got the answer right to "Where do you see yourself 5 years from now?"

Everything For Summer Has Been Canceled... Let's Just Put Up Our Christmas Tree And Call It A Year...!!!