

DECEMBER 2009

## Weekly Law Resume

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

### Bad Faith - Unfair Claims Act Cause of Action

*Yanting Zhang v. Superior Court*, Court of Appeal, Fourth District (October 29, 2009)

A cause of action based on violation of the insurance regulations is not allowed in a bad faith complaint. This case presented the question whether fraudulent conduct, which also violates the insurance regulations, can give rise to a cause of action under the Unfair Competition Law ("UCL").

Yanting Zhang sued California Capital Insurance Company over a dispute following a fire at a commercial premises. Besides standard causes of action for breach of contract and breach of the covenant of good faith and fair dealing, Zhang alleged California Capital engaged in unfair advertising by promising to pay timely covered losses when it had no intention of doing so. California Capital demurred to the cause of action on the basis that such a cause of action was prohibited. The trial court agreed, and sustained a demurrer to that cause of action. Zhang filed a petition for writ of mandate and the Court of Appeal accepted the writ.

The Court granted the writ and ordered the demurrer overruled. It noted that in *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, the Supreme Court held that the provisions of the insurance regulations do not create a private right of action in both first and third party lawsuits. However, in this case, Zhang was not suing for damages based on a breach of those regulations. He was suing for unfair competition, which prohibits any unfair or fraudulent business practice, but only provides for the remedies of restitution and injunctive relief. In refusing to follow a similar case, which had held such a claim was barred, the Court held a cause of action could be stated under this statute.

The claim was based upon fraudulent misrepresentations and mis-

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## PRESIDENT'S MESSAGE

### Let's Hear From You

Writing this on Veteran's Day, I recall when I served in the United States Marines Corp, it was often stated; ' . . . the leader you are looking for is you . . . '

In an effort to help the CAIIA work for all of us, I encourage our members to write to the Board with your concerns and recommendations. To that end, Sterrett Harper, as chief editor of this publication, has agreed to include a "Letters to the Board" section in future issues. You can begin now. Sterrett tells me that your submissions are due by the 15th of the preceding month of each Status Report issue. Simply email your comments as a "Word" document to Sterrett at harperclaims@hotmail.com

Heading the Internal Management Committee, we can anticipate Kearson Strong and Tanya Gonder carefully communicating and documenting the specific concerns of each member. Along with the feedback from your Status Report comments, their findings will be submitted to the Officers and Directors for careful review at the mid-term and annual conventions.

Have a Happy Holiday Season. I look forward to CAIIA contributing to your success in the New Year!



**SAM HOOPER**

*President - CAIIA 2009-2010*

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leading advertising with respect to paying claims in a timely manner. Such an allegation could qualify as a cause of action for unfair competition under the Unfair Competition Law. The Court felt there was no reason why an insurance company could not be sued under such statute, even though it also violated the insurance regulations. The Court felt this was not an attempt to subvert the Supreme Court holding prohibiting such causes of action because damages were not sought. Further, it did not overlap activities of the insurance commissioner in enforcing the regulations.

The Court felt Zhang's allegations stated a cause of action for violation of the UCL. The trial court therefore erred in sustaining the demurrer. The Court of Appeal ordered the demurrer overruled.

## COMMENT

This case opens insurers in bad faith cases to claims under the Unfair Competition Law. This will allow claimants to attempt to use this cause of action as an avenue to admit evidence of the specific insurance regulations to get that information before a jury.

## Governmental Liability - Design Immunity

*Dane W. Alvis, et al. v. County of Ventura*, Court of Appeal, Second District (October 20, 2009)

Design immunity protects a public entity from liability for damages arising out of an improvement to public property. This case considered the immunity arising out of a massive landslide after heavy rains.

La Conchita sits at the bottom of a 600-foot cliff on the coast in Ventura County. After a 1995 landslide buried several homes, the County of Ventura explored ways to improve the stability of the hill. After years of study in conjunction with both public and private consultants, a wall was constructed in 2000 and 2001 to prevent debris from the hill from landing on homes below. However, it was expressly stated the wall was not intended to increase the overall stability of the hillside or to prevent a future landslide.

On January 10, 2005, a large landslide occurred at La

Conchita which overwhelmed the wall, killed ten people and destroyed sixteen homes. As a result, numerous complaints were filed against the County for liability arising out of the wall. The County moved for summary adjudication. It relied on the defense of design immunity and supported it with a declaration from an expert geologist who set forth the study performed to design the wall and the purposes of the wall. The opposition to the motion submitted a declaration of Awtar Singh, Ph.D., a registered geotechnical and civil engineer, who criticized the design of the wall. In reply, the County submitted a declaration which attached a prior report by Dr. Singh that was contrary to his statements in his declaration. The trial court granted the County's motion for summary adjudication. The plaintiffs appealed.

The Court of Appeal affirmed. The Court first held the Singh declaration did not raise a triable issue of fact preventing the granting of the summary adjudication. The Court stated the trial court could reject the Singh declaration because it was contradicted by a prior statement by Singh in a report. The Court stated that a trial court may reject a declaration of an expert that is contradicted by a prior statement of the expert that is unexplained.

With respect to the design immunity defense, the Court noted a public entity must show a causal relationship between the plan and the accident, discretionary approval of the plan prior to construction, and substantial evidence supporting the reasonableness of the plan or design. The Court stated that the design of the wall did not cause the plaintiffs' injuries. The wall remained standing during the landslide. Rather, the landslide occurred independent of the wall's construction. The County had warned people after construction of the wall that La Conchita could sustain another landslide and the wall would not prevent it.

The County Board of Supervisors exercised their discretion in approving the plans for the project. The approval was based upon the recommendations of a registered civil engineer backed by other professional con-

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sultants. The Board was entitled to rely on these recommendations.

Finally, there was substantial evidence supporting the reasonableness of the plan or design. The plan was approved by a registered civil engineer and the Board was entitled to rely on his opinion.

The Court noted a public entity can lose the design immunity where the plan or design, in its actual operation, becomes dangerous under changed physical conditions. Plaintiffs claimed debris accumulated behind the wall, adding pressure to the back of the wall. How-

ever, here the alleged changed conditions were contemplated by the County when the wall was designed. Those conditions were considered in making the design choices. Thus, this exception did not apply. The judgment was affirmed.

## COMMENT

The design immunity is intended to prevent second-guessing of a public entity's design choices after the fact of an accident or injury. This decision supports the discretion given to public entities in their design considerations.

# Insurance Law Bulletin

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

## “Contractors Warranty Endorsement” Limits Insurer’s Duty to Indemnify General Contractor Who Fails to Obtain Indemnity Agreements and Certificates of Insurance from Subcontractors

The California Court of Appeal has held that a general liability policy's “contractors warranty endorsement” relieved the insurer of any duty to indemnify a general contractor who had failed to obtain indemnity agreements and certificates of insurance from its subcontractors. (*North American Capacity Insurance Company v. Claremont Liability Insurance Company* (2009) 177 Cal.App.4th 272)

### Facts

A property owner hired JDG Group, Inc. (JDG) to act as general contractor for construction of a large home in Los Angeles. JDG in turn hired numerous subcontractors, some of whom did not provide indemnity agreements in favor of JDG and/or evidence of insurance to JDG.

In 1998 construction began, and in April 2001, the City issued a certificate of occupancy for the home. In May 2001, the owner moved into the home, but as of September 2001, construction of the home was still underway. Because the home was not completed in a timely manner, JDG paid the owner liquidated damages from

May 2001 through the end of September 2001. At the end of September 2001, the owner's representative filed a notice of completion.

The owner later sued JDG, alleging that the home suffered from various construction defects causing water intrusion. JDG sought defense and indemnity from both Claremont Liability Insurance Company (Claremont), which provided general liability coverage to JDG from January 2001 to January 2002, and North American Capacity Insurance Company (NAC), which provided general liability coverage to JDG from January 2002 to January 2003. Both Claremont and NAC agreed to defend JDG under a reservation of rights.

The owner eventually settled his claims against JDG for a total of \$1.1 million. Of the \$1.1 million settlement amount, NAC contributed \$800,000 and Claremont contributed the remaining \$300,000. NAC then filed an equitable contribution action against Claremont, claiming that Claremont owed a larger share of the settlement.

The trial court found that of the \$1.1 million settlement

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# Insurance Law Bulletin

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

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amount paid on behalf of JDG, \$909,574 was attributable to subcontractors who had failed to provide indemnity agreements in favor of JDG and/or evidence of insurance to JDG. The trial court ruled that this \$909,574 amount was *not* covered under the Claremont policy. That was because the Claremont policy contained a “contractors warranty endorsement” which barred coverage for work done by JDG’s subcontractors *unless* JDG obtained both (1) an indemnity agreement from the subcontractor and (2) a certificate of insurance showing that the subcontractor was insured. The trial court thus ruled that the \$909,574 amount was *not* covered under the Claremont policy, but *was* covered under the NAC policy.

The trial court found that the remaining \$190,426 of the overall settlement amount was covered under both the NAC policy and the Claremont policy, and that per the insurers’ agreement that amount should be allocated based on “time on the risk.” The trial court determined that the “time on risk” should be calculated from the date the construction project was completed (end of September 2001) through expiration of the NAC policy (January 2003). As such, Claremont’s “time on risk” (beginning with project completion in September 2001 and ending with policy expiration in January 2002) was 21%, and NAC’s “time on risk” (beginning with policy inception in January 2002 and ending with policy expiration in January 2003) was 79%. Thus, of the remaining \$190,426 of the settlement amount, Claremont was responsible for 21%, or \$40,028, and NAC was responsible for 79%, or \$150,398.

The net effect of the trial court’s ruling was that NAC (which had contributed \$800,000 to the settlement) was not entitled to recover anything from Claremont (which had contributed \$300,000 to the settlement). NAC appealed.

## Holding

The Court of Appeal affirmed.

The appellate court agreed that, with regard to the \$909,574 portion of the settlement which was attributable to subcontractors who had failed to provide indemnity

agreements in favor of JDG and/or evidence of insurance to JDG, there was no coverage under the Claremont policy. The Claremont policy’s “contractors warranty endorsement” clearly informed JDG that obtaining indemnity agreements and certificates of insurance from subcontractors was a *condition precedent* to coverage under the Claremont policy. It did not matter that JDG might have hired the subcontractors *before* JDG obtained the policy through Claremont. The Claremont policy simply did not cover any liability JDG might have arising from work done by contractors from whom JDG had failed to secure both an indemnity agreement and a certificate of insurance.

The appellate further agreed that, with regard to the remaining \$190,426 portion of the settlement covered under both policies, the trial court had properly allocated 21% (\$40,028) to Claremont and 79% (\$150,398) to NAC. The insurers had agreed that the trial court could use the “time on the risk” method in allocating damages that were covered under both policies. Further, the insurers apparently agreed that Claremont would not be liable for any property damage occurring prior to “completion” of the home, and the trial court could properly find that the home was “completed” in September 2001 (when the notice of completion was filed) rather than May 2001 (when the owner moved in). Thus, the trial court correctly determined that the \$190,426 portion of settlement which was covered under both policies should be allocated \$40,028 to Claremont and \$150,398 to NAC.

## Comment

This case is consistent with an earlier case, *Scottsdale Ins. Co. v. Essex Ins. Co.* (2002) 98 Cal.App.4th 86, in which the appellate court upheld a similar “contractors warranty endorsement.” This type of endorsement acts as a condition precedent to coverage, i.e., the general contractor does not have coverage for damage caused by a subcontractor unless the general contractor has obtained an indemnity agreement and a certificate of insurance from the subcontractor. In essence, this removes the risk of the subcontractor’s defective performance from the general contractor’s insurer, and places that risk on the subcontractor and its insurer.

## **Commissioner Poizner Announces Arrest of Sacramento Area Family for Alleged Auto Insurance Fraud**

SACRAMENTO - Today Insurance Commission Steve Poizner announced the August 5 arrests of Amjad Javaid, 53, and his wife, Zarina Javaid, 43, both of West Sacramento, as well as their son, Fahad Javaid, 24, and his wife, Fatima Javaid, 23, both of Sacramento. The group was arrested as the result of an investigation conducted by the Sacramento County Urban Auto Insurance Fraud Task Force (Task Force) into alleged auto insurance fraud. All were booked into the Sacramento County Jail.

All suspects have been charged with conspiracy, presenting a false oral or written statement to the insurance company, and knowingly presenting a false claim to the insurance company. All suspects except Zarina Javaid have also been charged with arson.

The Task Force, consisting of investigators from the California Department of Insurance (CDI), the Sacramento County District Attorney's Office, and the California Highway Patrol, has been operating since January, 2001. It targets any form of organized auto insurance fraud including staged theft and vandalism rings, stage auto accidents rings, med-legal fraud mills, and other types of organized auto insurance fraud.

On October 3, 2006, Amjad Javaid filed a claim with The Hartford Insurance Company for the alleged theft of his 2003 Range Rover. The Range Rover was recovered a few hours later in San Jose, California, completely burned. The Javasids all made statements to Hartford that the Range Rover was stolen from in front of their residence, which was in Elk Grove at the time, during the afternoon hours of October 2, 2006, while the entire family was at the mosque.

During the course of the investigation, investigators discovered that the Javasids allegedly made false statements as to their whereabouts on the day of the reported theft. Investigators obtained additional information that suggested the Javaid family may have been experiencing financial difficulties. The insurance company ultimately denied Amjad Javaid's vehicle loss claim; had the company approved the claim, it would have paid approximately \$50,000 for the loss.

Last month, Commissioner Poizner announced an increase in the number of referrals for suspected fraud cases CDI receives from insurance companies, local law enforcement agencies and consumers. CDI saw an alarming 31 percent increase in suspected vehicle arson fraud cases in 2008 as compared with referred cases in 2007. (In 2007, CDI received 344 referrals for suspected automobile arson; in 2008, CDI received 451 referrals for suspected automobile arson.) Overall, the Department received almost 300 additional suspected vehicle theft and vehicle arson cases statewide in 2008 than in 2007. CDI received approximately 200 more suspected vehicle theft fraud case referrals in 2008 than in 2007.

While the total number of suspected fraud case referrals received by CDI for all automobile fraud categories (including inflated damages, vandalism and hit and run,) has remained relatively constant since 2007, suspected vehicle arson and theft referrals have noticeably increased.

## **Insurance Commissioner Poizner Announces Southern California Man Arrested in Connection with Auto Insurance Fraud Charges**

Insurance Commissioner Poizner announced today the arrest of Ronald Velasquez, 25, of Mentone. Velasquez was charged with filing a fraudulent auto insurance claim and booked at the Orange County Jail. Bail was set at \$30,000.

"Defrauding an insurance company is illegal and will get you a one way ticket to jail," said Commissioner Poizner. "CDI fraud detectives work around the clock to stop criminals who defraud insurers and drive up the cost of insurance for everyone."

According to CDI detectives, on June 8, 2008 at approximately 3:15 p.m., Velasquez rear-ended another vehicle while driving uninsured. At approximately 3:56 p.m., Velasquez purchased insurance online from Esurance Property and Casualty Insurance Company. On June 11, 2008, Velasquez filed a claim online that he was involved in a traffic collision on June 11, 2008.

On August 1, 2008, Esurance denied Velasquez's claim after concluding that his purchase of the policy occurred after his traffic collision. The potential loss of this claim would have been \$10,000.00.

The Orange County District Attorney's Office is prosecuting the case.

Commissioner Poizner oversees sixteen CDI Enforcement Branch regional offices throughout the state. Close to 1900 insurance fraud-related arrests have been made by the Department of Insurance's enforcement division since Commissioner Poizner took office in 2007 - more arrests than have been made during any other two year period, under any previous insurance commissioner.

## Happy Holidays (A story for Insurance People)

# Twas the Night Before Christmas – Underwriter's Version

Twas the night before Christmas (12:01a.m. 12/25) and all through the house (single family, joisted masonry, E.C. 3, territory 44, PC5)

Not a creature was stirring, not even a mouse (through pride of ownership and excellent maintenance.)

The (flame retardant) stockings were hung by the (contractor installed) chimney with care

In hope that St. Nicholas would soon be there (in spite of dead-bolt locks and central station alarm system.)

The children (ages 4, 8, 14 & 16) were all nestled snug in their beds (check MVR on 16 year old)

While visions of sugar plums danced in their heads (must check for drug use.)

Mama in her kerchief (schedule heirloom) and I in my cap (no slave to fashion)

Had just settled down for a long winters nap (check employment – is insured sleeping all day?)

When out on the lawn there arose such a clatter (check into condition of premises, housekeeping, etc.),  
I jumped out of bed to see what was the matter.

Away to the window I flew like a flash,  
Threw back the curtains and tore open the sash (intentional destructive act – no coverage. Also, as far as we know, insured only wearing a cap n from of uncovered window.)

What to my wondrous eyes should appear  
But a miniature sleigh and 8 tiny reindeer (note to check if sleigh rated business use and corporate owned.)  
With a little old driver, so lively and quick,  
I knew in a moment it must be St. Nick (order medical on 600 year old driver; notify life underwriter for possible rating.)

More rapid than eagles (check MVR for speeding violations) his coursers they came,  
And he whistled and shouted and called them by name (possible aggressive driver?):

Now Dasher (turbo equip?) now Dancer (classic?) now Prancer (check lifestyle) now Vixen (definitely check lifestyle),

On Comet (possible muscle deer) on Cupid (lifestyle again) on Donner (4x4) and Blitzen (possible drinking problem?)

To the top of the porch to the top of the wall (check for structural damage also look int height exposures),  
Now dash away, dash away, dash away all. (also old man climbing walls either in great shape or overly medicated?)  
So up to the house-top the coursers they flew,  
With the sleigh full of toys and St. Nicholas too (check for possible retail delivery classification of autos.)

And then, in a twinkling, I heard on the roof  
The prancing and pawing of each little hoof (check for shingle damage also classification of operations, roofing is a prohibited class.)

As I drew in my head and was turning around,  
Down the chimney St. Nicholas came with a bound.

He was dressed all in fur (scheduled items) from his head to his foot

And his clothes were all tarnished with ashes and soot (part-time job as firefighter??).

A bundle of toys he had flung on his back (check to see if insured has safety committee, check lifting training)

And he looked like a peddler just opening his pack.

His eyes how they twinkled,

His dimples how merry,

His cheeks were like roses,

His nose like a cherry (order updated medical report, possible drinking abuse).

The stump of a pipe he held tight in his teeth (note – do not give non-smoker discount.)

And the smoke it encircled his head like a wreath (check batteries in smoke alarms to make sure operational).

He was chubby and plump, a right jolly old elf (overweight for height)

And I laughed when I saw him in spite of myself.

A wink of his eye and a twist of his head

Soon gave me to know I had nothing to dread (stranger enters past alarm and insured not worried?? Possible moral problem).

He spoke not a word, but went straight to his work,  
And filled all the stocking; then with a jerk (review workplace for ergonomic compliance).

And laying his finger aside of his nose (obscene gesture?)

And giving a nod, up the chimney he rose (check operations, chimney sweeps are prohibited classification, look into GL PD deductible.)

He sprang to his sleigh, to his team gave a whistle,  
And away they all flew like the down of a thistle (not likely with fat man and sleigh full of toys. Check GVW for proper classification, Light/Service/Local seems unlikely).

But I heard him exclaim as he drove out of sight,  
“Happy Christmas to all, and to all a good night!” (Check hours of operation, 24hr service operations prohibited. Also check into seasonal nature of business).

*Merry Christmas Everyone*

## COMMITTEE ASSIGNMENTS – CAIA 2010 (Revised 10/11/09)

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