American Educational Institute, Inc.

CLAIMS LAW UPDATE

A SUPPLEMENT TO CLAIMS LAW COURSES IN CASUALTY, PROPERTY, WORKERS COMPENSATION, FRAUD INVESTIGATION AND AUTOMOBILE

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PERSONAL LIABILITY OF THE CLAIMS ADJUSTER

[Ref. Good Faith Claims Handling, Para. 2.02]

When an insured is not satisfied with the adjustment of a claim, the remedy for breach of contract or bad faith usually must be pursued against the insurer and not the claims adjuster who handled the claim. The reason is that these causes of action flow from the insurance policy, which is a contract between the insured and the insurer, not the insured and the claims adjuster. As a result, it is the insurer that is liable to an insured for breaching the terms of the policy or for bad faith. In a recent California decision, while the court followed this general rule, it did allow other causes of action to be pursued against an adjuster for mishandling the insured's claim.

In *Bock v. Hansen*, 170 Cal. Rptr. 3d 293 (Cal. App. 2014), there was nothing unusual or overly complex about the Bocks' homeowners claim – a falling tree limb damaged their home during a storm. But during the handling of the claim things took a turn for the worse and the Bocks filed a lawsuit for damages they alleged resulted from the mishandling of the claim. While many of the allegations against their insurer were commonplace, the Bocks took the additional step of suing the claims adjuster personally for damages. The Bocks argued they were harmed when the adjuster misrepresented the terms of their homeowners policy. They also claimed that his conduct was so extreme and outrageous that it caused severe emotional distress.

An allegation that an adjuster negligently mishandled a claim is not necessarily an allegation of breach of contract or bad faith. Rather, the claim could be that the adjuster breached an independent duty that the adjuster owed to the insured. Most courts that have addressed this issue have ruled that an adjuster does not owe an independent legal duty to an insured. The primary reason they have taken this position is that the relationship between an insured and an insurer is governed by the insurance contract and the implied covenant of good faith and fair dealing that is implicit in the contract. In addition, these courts have noted that an adjuster is an employee of the insurer and, therefore, owes a duty to the insurer. If he was held to have an independent duty to an insured he would be put in a position of conflicting loyalties.

While most courts have not recognized an action against an adjuster for negligent mishandling of an insurance claim, a few courts have allowed actions to proceed based on various tort theories.

THE CALIFORNIA CASE

On December 21, 2001, a tree limb fell on a house owned by the Bocks. The limb was 41 feet long, 2 feet wide, and weighed 7,300 pounds. The resulting damage was significant. There was damage to the interior of the Bocks' home, windows, and the chimney that was necessary for their primary heating source. A car and fence were also damaged. The Bocks reported the incident to their homeowners insurer, Travelers Property and Casualty Insurance Company (Travelers). An adjuster, Hansen, visited the next day. After characterizing the adjuster's behavior as "appalling," the California appellate court explained what occurred:

> Upon arrival, Hansen told Mrs. Bock that he only had a few minutes to review the damage, and in fact spent no more than 10-15 minutes at their home. Before Hansen took any pictures of the damage, he pushed several branches out of the living room window. When Mrs. Bock asked Hansen why he had not taken the pictures first, he ignored her, telling her to "clean up the mess," and demanding she clean up the living room. Moving outside, Hansen also removed the limbs leaning against the chimney and the fence before taking any pictures, all the while making derogatory comments about PG&E, Mr. Bock's employer, which Mrs. Bock found rude and upsetting.

Hansen left a check for $675.69. When Mrs. Bock complained that it was insufficient because it would not even cover the cleanup let alone repairs, Hansen told her that the policy did not cover cleanup. This was inaccurate. He also recommended that she contact friends and family with chain saws to cut up the limbs. After Hansen left, Mrs. Bock attempted to remove some of the debris but she cut her hand on broken glass. She also discovered that the chimney damage was significant.

Mrs. Bock sent an e-mail reporting the chimney damage to the insurer's property field manager, Blaha. She also requested that a different adjuster be assigned to the claim because Hansen was "rude, disinterested, and rushed during his initial visit." The insurer did not honor this request. Instead, Hansen sent what the court described as "an unreasonably low" repair estimate of $3,479.54. The next day, Hansen returned to the property with Blaha. The court described his behavior:

> On September 15, Hansen again came to the house, this time accompanied by Blaha. The Bocks were present, as was Ron Priest, a licensed general contractor who was there at the Bocks' request. Hansen and Blaha were shown the significant cracks in the chimney, as well as gouges where the limbs had hit it, and Hansen took pictures of the damage to the chimney. Again, Hansen falsely told the Bocks that their policy did not cover the costs of cleanup, explaining "If a car had hit the tree causing it to fall, then the cleanup would be covered but since the wind caused the limb to fall, the cost to clean up the limbs was not covered." Hansen told Mr. Bock to get his chain saw and remove the limbs himself, and as he did so, Hansen yelled, "Atta boy! See you can do it! Now go get a few friends to finish it up."

Two days later the insurer raised its estimate to $3,655.23 but wrongfully failed to include damage to the Bocks' hardwood floor and fence, which was part of the earlier estimate. The insurer also requested Vertex Construction Services (Vertex) to inspect the damage to the Bocks' house even though neither Vertex nor its employee, Anderson, had a valid California contractor's license. The court explained what occurred:

> Because the limbs and debris had already been removed, Mrs. Bock provided Anderson a disk containing digital images that showed the fallen limbs and damage on the morning of the accident. Anderson sent Hansen a report dated September 29,

> detailing the results of his inspection and which concluded falsely, the Bocks alleged, that "no scarring, gouging, or scuff marks were noted on the siding or trim materials on the northeast corner of the residence." Anderson's report also falsely stated that "there was no visual evidence that the fallen tree branch impacted the chimney, or that the fallen tree branch ... propagated any damage to the natural rock chimney," instead concluding that the "fireplace appeared to be in good and serviceable condition." Finally, Anderson's report concluded that the observed cracks in the chimney were minor and were "due to the age of the chimney and the residence," and that inspection of the interior and exterior of the house revealed that "the only damage ... due to the fallen tree branch was the broken window and frame."

No tests were run to support Anderson's conclusions and no statements from the Bocks or their licensed contractor, Priest, were included in the report. Nevertheless, on October 1, the Bocks were informed by Hansen that the insurer was denying their claim for the chimney damage based on the Vertex report. Priest reviewed the Vertex report and disputed its accuracy, relying on his own observations after inspecting the property three separate times.

The Bocks filed a six count complaint against Travelers, Hansen, and Vertex. The claims against Travelers included breach of contract, bad faith, violation of the California Business and Professions Code and two counts of intentional misrepresentation. They also filed claims of intentional interference with contract and violation of the Business and Professions Code against Vertex.

The claims against Hansen were for negligent misrepresentation and intentional infliction of emotional distress. Regarding negligent misrepresentation, the Bocks asserted that when Hansen told them that their policy didn't cover cleanup costs, he either knew that his representations were false or made his statements with a reckless disregard for the truth. Hansen countered that he could not be liable for negligent misrepresentation because he owed no legal duty to the Bocks. He argued that adjusters are not liable for their conduct while working in the course and scope of their employment as long as their agency relationship with the insurer is disclosed to the insured. In fact, his defense was the same as in other cases in which courts ruled that adjusters owed no legal duty to insureds. The *Bock* court, however, distinguished the other cases by pointing out that the Bocks did not allege negligence. They alleged negligent misrepresentation.

The court went on to quote a California Supreme Court decision that distinguished negligence from negligent misrepresentation based on the fact that they have different elements and are supported by different underlying policies. The court seemed particularly influenced by the idea that negligent misrepresentation involves a form of deceit that is lacking in a typical negligence lawsuit. The court found that it was "beyond dispute" that various tort theories are available to an insured and that California courts have held in "point blank terms" that adjusters can be held personally liable for their independent torts even though not a party to an insurance contract. The court concluded that adjusters can be held personally liable for damages they cause when handling a claim if they commit some independent tort, such as invasion of privacy, negligent misrepresentation, or intentional infliction of emotional distress.

The court, however, acknowledged that negligent misrepresentation, like a general negligence action, requires proof that the defendant owed the plaintiff a legal duty. To hold an adjuster like Hansen liable for negligent misrepresentation the insured still must prove the existence of a legal duty and breach of that duty. The court held that it could "easily" find that Hansen owed a duty to the Bocks and, citing an earlier California Supreme Court decision, ruled that Hansen owed the Bocks a legal duty based on the special relationship that is shared by an insured and his insurance company:

> Under this special relationship, an insurer's obligations are greater than those of a party to an ordinary commercial contract. In particular, an insurer is required to "give

> at least as much consideration to the welfare of its insured as it gives its own interests." Cases have referred to the relationship between insurer and insured as a limited fiduciary relationship; akin to a fiduciary relationship; or as one involving the "qualities of decency and humanity inherent in the responsibility of a fiduciary." The insurer-insured relationship, however, is not a true fiduciary relationship in the same sense as the relationship between trustee and beneficiary, or attorney and client. It is, rather, a relationship often characterized by unequal bargaining power in which the insured must depend on the good faith and performance of the insurer. This characteristic has led the courts to impose special and heightened duties, but while these special duties are akin to, and often resemble, duties which are also owed by fiduciaries, the fiduciary-like duties arise because of the unique nature of the insurance contract, not because the insurer is a fiduciary.

Based on this legal analysis the *Bock* court said:

> Such a special relationship leads to the conclusion that Hansen, the employee of the party in the special relationship, had a duty to the Bocks. Likewise, the general law of negligent misrepresentation applies.

According to the court, negligent misrepresentation includes providing false information that creates a risk of physical harm to others or their property or when false information is conveyed in a commercial setting for a business purpose. The court found that Hansen's misrepresentation involved both. Hansen shared a business relationship with the Bocks and he misrepresented that the insurance policy did not cover cleanup costs, causing Mrs. Bock to undertake cleanup on her own and injure her hand. The court found all of the elements of negligent misrepresentation present:

> The elements of negligent misrepresentation are (1) misrepresentation of a past or existing material fact, (2) made without reasonable ground for believing it to be true, (3) made with the intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage.
>
> The Bocks adequately alleged such a claim here, that Hansen falsely told the Bocks that their policy did not cover the cost of cleanup; Hansen either knew the representation was false when he made it, or he made it with reckless disregard of its truth; and the Bocks relied on Hansen's false statements to their detriment.

The court was unpersuaded by Hansen's argument that he could not be personally liable because he was working for Travelers at the time of the misrepresentation, noting that under agency law an employee can almost always be held personally liable for any independent tort he commits.

The court also rejected Hansen's argument that the Bocks could not have justifiably relied on Hansen's misrepresentations about coverage because they could have read the policy themselves and determined that it covered cleanup. The court said:

> We are nonplussed: not only does Hansen acknowledge his "clearly" erroneous statement to the Bocks, but he faults them for believing him. In any event, the argument has no merit. Over 100 years ago our Supreme Court observed that "It is a matter almost of common knowledge that a very small percentage of policy-holders are actually cognizant of the provisions of their policies. The policies are prepared by the experts of the companies, they are highly technical in their phraseology, they are complicated and voluminous ... and in their numerous conditions and stipulations furnishing what sometimes may be veritable traps for the unwary. The courts, while

> zealous to uphold legal contracts, should not sacrifice the spirit to the letter nor should they be slow to aid the confiding and innocent."

With respect to the theory of intentional infliction of emotional distress, the court ruled that the Bocks failed to sufficiently plead all of its elements. The court, however, granted the Bocks an opportunity to amend their complaint to include additional facts.

The primary issue in the claim for emotional distress was whether Hansen's actions were extreme and outrageous and whether the Bocks's resulting emotional distress was severe. The court recognized that a defendant's conduct must be so "extreme as to exceed all bounds of that usually tolerated in a civilized community" and that "severe" emotional distress means "emotional distress of such substantial quality or enduring quality that no reasonable person in civilized society should be expected to endure it."

In support of their claim, the Bocks cited two California cases, *Younan v. Equifax* and *Little v. Stuyvesant Life Ins. Co.* The *Younan* case involved a disability insurer that required an insured to take a medical exam, but instead sent him to psychological clinicians, one of whom omitted test results from his report. The insurer subsequently denied the insured's claim based on the false report at a time when the insured was unable to earn a living and support his family. In *Little* a disability insurer terminated an insured's benefits after ignoring "overwhelming evidence" that the insured was totally disabled. As a result, the insured was forced to sell her home and attempted suicide.

The *Bock* court held that the situation created by Hansen's behavior, as egregious as it was, did not rise to the level of what was faced by the insureds in *Younan and Little.* While the insured in *Younan* was unable to provide for his family and the insured in *Little* was forced to sell her house as a result of the defendant's conduct, the Bocks were not disabled and were not facing a situation in which they would be unable to pay for their daily living expenses. Although the chimney was needed for their primary heating source, there was no evidence that the Bocks would go without heat for the winter, did not have the means to repair the chimney, or would be unable to use an alternate heating source.

The Bocks, however, contended that there were additional facts that would support their claim and the court decided to give them a chance to amend their pleadings. The court's opinion listed the additional facts:

> The additional facts include that "Hansen deliberately withheld information from Vertex and Roy Anderson in order to ensure that the Vertex report would support Hansen's pre-determined decision to deny the Bocks' claim"; that Hansen sent Anderson his own conclusions as to why the chimney damage was not caused by the tree limbs before Anderson wrote his report; that Hansen subsequently edited Anderson's report before it was finalized; and that Hansen's supervisor took notes that acknowledged damage to the Bocks' home, which were never put into the claim file and have since been destroyed. The Bocks also claim that they could state facts that show Hansen abused a relationship of power over them and that he knew they were susceptible to injuries through mental distress, although they failed to actually name those facts. In light of the Bocks' contention, and the fact that the trial court did not even address their request, we reverse, to allow the Bocks to amend their claim.

It's important to emphasize that the *Bock* court did not rule that an adjuster could be personally liable for breach of contract or bad faith. Rather it recognized that in certain situations other independent tort theories of liability may be available to an insured who is damaged by an adjuster's wrongful conduct.

While most courts have refused to impose personal liability on a claims adjuster, at least one other court has reached a conclusion similar to *Bock* and a few have gone even further by allowing a cause of action against an adjuster based on negligence or bad faith.

OTHER CASES

In *Ryan v. Preferred Mutual Insurance Company*, 38 AD3d 1148 (NY. App. 2007), the insureds filed a lawsuit that included an allegation of negligent misrepresentation against the adjuster who handled their claim. The suit arose out of a homeowners claim for damages caused by a radiant heating system that malfunctioned. The insurer, Preferred Mutual, sent an adjuster from Talmon Claim Associates to investigate the claim. The adjuster told the insureds that they would be fully compensated by Preferred if they replaced their defective heating system with a similarly priced system. After the insureds complied, however, the insurer denied their claim based on a policy exclusion. The appeals court acknowledged that usually an adjuster cannot be held personally liable to an insured for negligence, but the court recognized an exception when there was actual contractual privity between the insured and the adjuster "or a relationship so close as to approach that of privity." The court ruled that because the insureds relied on the adjuster's expertise and it was reasonable to infer that the adjuster was aware that the insureds would follow his recommendations, their relationship was close enough to approach privity.

In *Wiseman v. Universal Underwriters Insurance Company* 412 F.Supp. 2d 801 (S.D. Ohio 2005), a sporting goods store and its employee, Wiseman, were sued after a customer was injured by a defective motorcycle sold by the store. The store's insurer, Universal Underwriters, assigned counsel under the terms of a liability policy that required it to defend the store and its employees. A judgment of more than 6.5 million dollars was entered in favor of the customer and her children, which was in excess of the Universal policy limit. Facing personal exposure, Wiseman filed suit against Universal and the adjuster who handled the personal injury claim because neither party advised him of three settlement offers, including one that was at or below the Universal policy limit. It was also alleged that Universal and the adjuster failed to advise Wiseman of the results of an investigation into his liability and damages. In addition, Wiseman argued that they failed to inform him of the potential conflict of interest between the store and its employees and that he had a separate right of counsel under both the policy and Ohio law. The adjuster countered that he could not be personally liable because he owed no duty to Wiseman. In response, Wiseman asserted that under Ohio law an insurance adjuster has an independent duty to evaluate risks and potential liability for assigned claims. The Ohio district court ruled that Ohio courts might recognize a claim based on negligence or recklessness against an adjuster. The court said:

> It has been noted generally that an insurance agent is liable for his or her own tortious conduct to the same extent as though the agent has been acting on his or her own behalf and not as an agent. ... In Ohio, courts have held that individual insurance agents may be held personally liable for tortious conduct including misrepresentation, negligence in failing to obtain coverage, and negligence in failing to exercise reasonable care in advising customers about the terms of coverage. ... In light of the above authorities, resolving all ambiguities in the controlling state law in favor of the plaintiff, this court cannot say that plaintiff's claims ... are frivolous or unfounded. There is a reasonable basis in Ohio law for concluding that Ohio courts may recognize a claim based on negligence or wanton and reckless conduct on the part of ... the claims adjuster in this case.

A South Carolina district court recognized a potential claim of bad faith against an insurance adjuster for alleged wrongful conduct while handling an auto accident claim. In *Pohto v. Allstate Insurance Company*, 2011 U.S. Dist. LEXIS 73460 (D.S.C. 2011), the South Carolina district court

held that an insured "could possibly establish a cause of action" against an insurance adjuster "for acting in bad faith and/or negligence." The court acknowledged that no other South Carolina court had addressed this precise issue, but was persuaded by the fact that employees in other types of businesses could be liable for torts committed within the scope of employment. The court rejected Allstate's argument that the adjuster could not be legally liable because the insurance contract involved only Allstate and the insured. It also rejected the argument that *respondeat superior* dictated that Allstate alone should be liable for the wrongful conduct of its employees arising in the scope of their employment. The court concluded that "given the desire expressed by courts in South Carolina and other states to hold employees individually liable for torts they commit within the scope of their employment, the court believes that Boggs could possibly be held liable if Pohto could show she adjusted his claims in bad faith."

STATUTORY LIABILITY

A state's unfair claims practices act might support an insured's private cause of action against an insurance claims adjuster for the adjuster's wrongful conduct. While most unfair claims practices acts do not provide for a private cause of action, a few courts have recognized a private cause of action based on express statutory language or the court's interpretation of the statute. One of those states is West Virginia.

In *Taylor v. Nationwide Mutual Insurance Company and Scarlett Tarley*, 589 SE2d 55 (W. Va. 2003), the insured, Taylor, was injured in an auto accident and made an underinsured motorist claim with his insurer, Nationwide. He eventually sued Nationwide and a claims adjuster for Nationwide, arguing that his underinsured motorist liability limits were inadequate because he was never given an opportunity to purchase optional levels of coverage as required by state law. Taylor argued that the insurer and its adjuster violated West Virginia's Unfair Trade Practices Act because they wrongfully refused to reform the policy to provide the increased limits and, in addition, did not provide a reasonable explanation for their refusal to do so. One of the issues before the West Virginia Supreme Court of Appeals was whether an adjuster could be held personally liable under the state's Unfair Trade Practices Act, which was enacted to regulate unfair and deceptive practices in the insurance industry. Ruling in favor of the insured, the court recognized that the act prohibited any "person" from engaging in unfair competition or a deceptive act in the business of insurance. It concluded that the definition of "person" included "individuals," an insurance adjuster is an individual, and is, therefore, a person within the scope of the act.

CONCLUSION

Insurance adjusters are not personally liable for breach of the insurance contract, and are not usually liable for bad faith. Likewise, most courts that have considered the issue have held that insurance adjusters are not liable in negligence because they owe no duty to an insured. A few courts, however, have permitted an action against an adjuster by finding that the adjuster breached a duty owed to the insured or committed an independent tort, such as negligent misrepresentation or intentional infliction of emotional distress. In addition, it's important to check the relevant state's unfair claims practices act because adjuster liability could be based on that type of statute.