Insurance Law Update

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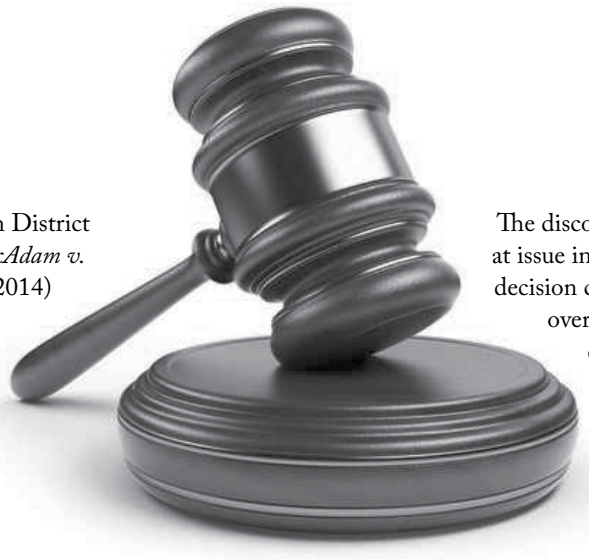

Since the last SDDL publication, the state and federal courts have handed down a variety of insurance related opinions traveling the spectrum of policy types and coverage related issues. Among those diverse opinions are two which merit substantive discussion below.

DOCUMENTS BY AND AMONG A LAW FIRM WITH AN INSURER, THE INSURER'S INDEPENDENT CLAIMS ADJUSTER AND THE INSURER'S INDEPENDENT CLAIMS ADMINISTRATOR MAY BE PROTECTED FROM DISCOVERY BY THE ATTORNEY-CLIENT PRIVILEGE IF THE DOMINANT PURPOSE OF THE INSURER'S RELATIONSHIP WITH THE LAW FIRM WAS ATTORNEY-CLIENT, RATHER THAN CLAIMS ADJUSTMENT, AND THAT THE COMMUNICATIONS AT ISSUE WERE REASONABLY NECESSARY FOR THE TRANSMISSION OF THE INFORMATION OR THE ACCOMPLISHMENT OF THE PURPOSE FOR WHICH THE LAW FIRM WAS CONSULTED.

On March 21, 2014, the United States District Court, Southern District of California, held in *McAdam v. State Nat. Ins. Co., Inc.* (2014) --- F.Supp.2d ----, 2014 WL 1614515, that in determining whether a communication is subject to the attorney-client privilege under California law, the court looks to the dominant purpose of the attorney's work; thus, the attorney-client privilege does not apply when the attorney was merely acting as a negotiator for the client, merely gave business advice, or was merely acting as a trustee for the client.

The motion to compel discovery dispute giving rise to the litigation arises from a "Hull and Machinery/Protection and Indemnity" policy issued by State National Insurance Company, Inc. to Robert McAdam. Following a coverage dispute, McAdam filed his lawsuit in the federal court located in San Diego. Discovery proceeded thereafter under the charge of Magistrate Judge Mitchell D. Dembin.

The discovery dispute at issue in the published decision centered upon over 560 pages of documents previously withheld by the defense, along with an amended privilege log.

State National asserted the attorney-client privilege as to communications between itself and it's outside counsel, Gordon & Rees, LLP ("G&R"), as well as communications between G&R and State National's independent claims adjuster and its independent claims administrator. Over 650 pages remained in dispute. State National submitted the disputed documents for review *in camera*, and the parties filed supplemental briefs. Magistrate Judge Dembin thereafter ruled that, among the issues before him, State National had failed to establish a *prima facie* case of privilege as to documents that predated the lawsuit.

Chief Judge Barry Ted Moskowitz vacated the magistrate judge's discovery order and remanded the discovery dispute back to Magistrate Judge Dembin. Applying California law, C.J. Moskowitz found that State National failed to establish that the dominant purpose of its relationship with G&R was an attorney-client relationship rather than claims adjustment. C.J. Moskowitz noted that State National failed to provide promised declarations regarding the relationship. The magistrate judge undertook *in camera* review of the documents, although he was not required to, but according to C.J. Moskowitz, the disposition did not include sufficient explanatory findings and conclusions demonstrating why the documents were not covered by the privilege. The magistrate judge made only a summary conclusion on his reading of hundreds of pages of documents. The court stated that the best course of action was to a have a full hearing as to the applicability of the privilege, and to decide the matter on very specific findings of fact and conclusions of law.

C.J. Moskowitz also determined that it was unclear from the records that there was no evidence that the independent claims administrator was covered by any attorney-client relationship between G&R and State National. The facts of the relationship between and among G&R, State National, and the independent claims administrator were not sufficiently established or revealed by the magistrate judge's analysis. If the magistrate judge found on remand that there was a primarily attorney-client relationship between G&R and State National prior to the lawsuit, he should also consider whether the relationship between State National and the independent claims administrator was such that attorney communications with the independent claims administrator were privileged as confidential disclosures reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer was consulted.

Finally, C.J. Moskowitz determined that, with respect to the independent claims adjuster hired by State National but apparently acted at the direction of the independent claims administrator rather than State National, only confidential communications necessary to facilitate or effectuate legal counsel, as opposed to claims adjustment, were privileged, and the magistrate judge was to decide on remand whether any of the independent claims adjuster's documents met that test.

INSURANCE ADJUSTERS, AS NON-PARTIES TO THE INSURANCE CONTRACT, ARE NOT IMMUNE FROM PERSONAL LIABILITY FOR INDEPENDENT TORTS THEY COMMIT WHILE ACTING ON BEHALF OF THE INSURER.

On April 2, 2014, the Court of Appeal, First District, Division 2, held in *Bock v. Hansen* (2014) 225 Cal.App.4th, 170 Cal. Rptr.3d 293, that an insured may assert claims for negligent misrepresentation and intentional infliction of emotional distress against their property insurer's adjuster separate and apart from claims against their property insurer.

Factually, in December 2001, Michael and Lorie Bock purchased from Travelers Property and Casualty Insurance Company, a homeowner's policy. The policy covered certain risks of physical loss to their home and provided additional coverage for debris removal. Early on the morning of September 9, 2010, a large limb — 41 feet long, some two feet in diameter, and weighing 7,300 pounds — broke off from an oak tree in the Bocks' front yard, "crashing into the chimney, the front of the house, and through the living room window." The giant limb caused three other large limbs to fall, which came to rest on a portion of the Bocks' chimney. The limbs "caused significant damage to the Bocks' chimney, which had been in working condition prior to the incident and was used as the Bocks' primary heating source for their home." The limbs also broke three windows and caused damage to the interior of the home, the Bocks' fence, and Mrs. Bock's car. The Bocks reported the incident to Travelers that same day. Travelers did not send an adjuster to the scene until the following day, when adjuster Craig Hansen arrived. Upon arrival, Hansen told Mrs. Bock that he only had a few minutes to review the damage, and in fact spent no more than ten to fifteen 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. Before leaving, Hansen wrote a check for $675.69. When Mrs. Bock said that the amount would not be enough to even clean up, let alone repair the damage, Hansen told her that cleanup was not covered under the policy and that she should contact "friends and family members with chainsaws" to clean up the limbs and the mess in the house and backyard. Relying on these statements, Mrs. Bock attempted to clean up the broken glass, sustaining a cut on her hand. After Hansen left, Mr. Bock discovered that the fallen limbs had caused significant damage to the chimney. The next day, September 11, Mrs. Bock sent an email to Travelers Property Field Manager, Frank Blaha, reporting the chimney damage. She also requested that another adjuster be assigned to their claim because Hansen was "rude, disinterested, and rushed during his initial visit." Travelers ignored the request, and Hansen prepared an estimate, which Blaha sent to the Bocks on September 13. The estimate, which totaled $3,479.54, reflected minimal amounts for each category of repairs needed, and was unreasonably low, as the Bocks had obtained an estimate the same day in the amount of $2,065 for cut up and removal of the tree limbs alone. 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

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Bottom Line

Case Title: Tim Dupree, et al. v. Sajahtera, Inc., et al.

Case Number: BC463162

Judge: Hon. J Stephen Czuleger (Los Angeles County Superior Court)

Plaintiff's Counsel: Rob Hennig and Brandon Ruiz

Defendant's Counsel: Peter B. Maretz, Arch Y. Stokes, Diana Lerma, Hayden Pace

Type of Incident/Causes of Action: Sexual Harassment, Race Discrimination, Sexual Battery

Settlement Demand: Confidential (Plaintiff's counsel asked the jury for $12.5M)

Settlement Offer: Confidential

Trial Type: Jury

Trial Length: 19 days

Verdict: Defense ◆

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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 cost of clean up, explaining "If a car had hit the tree causing it to fall, then the clean-up 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 chainsaw 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." On September 17, Travelers provided the Bocks with a revised estimate for the loss. While the revised estimate increased the amount payable to $3,655.23, it eliminated amounts previously included for damage to the hardwood floor and fence, based on the false statement that the Bocks had confirmed during the re-inspection that there was no damage to those items, despite obvious physical evidence to the contrary. That same day, acting at the request of Travelers, Roy Anderson of Vertex Construction Services inspected the Bocks' house. Neither Vertex nor Anderson had a valid California contractor's license. 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 "[n]o 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 "[t]here 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 appear[ed] 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 "[t]he only damage ... due to the fallen tree branch [was] the broken window and frame." Hansen did not perform any tests to support his conclusion. By letter dated October 1, Hansen informed the Bocks that based on the Vertex report Travelers was denying coverage for the chimney damage. The Bocks asked Priest (a licensed contractor) to review the Vertex report and provide a response. He did, preparing a report disputing the false statements contained in the Vertex report and describing how the tree limb damaged the chimney, a conclusion he reached having inspected the property three times. On January 14, 2011, the Bocks, through their attorney, submitted additional information to Travelers, including Priest's report, and requested that Travelers reconsider its coverage determination. Travelers never responded.

The Bocks sued both Travelers and Hansen, alleging negligent misrepresentation and intentional infliction of emotional distress against Hansen. The trial court sustained Hansen's demurrer without leave to amend, concluding that the Bocks "have presented no convincing argument for allowing these claims to stand against defendant Hansen in what is a contract based action."

In reversing the trial court, the appellate court rejected the trial court's rationale that adjusters, as non-parties to the insurance contract, are immune from liability for independent torts they commit while acting on behalf of the insurer. The issue, in the appellate court's view, was not whether employees of an insurer such as Hansen could be liable for their own torts, whether the insurer is liable or not, but whether the Bocks had adequately alleged the elements of causes of action for negligent misrepresentation and intentional infliction of emotional distress.

The appellate court acknowledged that Hansen's responsibility for negligent misrepresentation depended on the existence of a legal duty and that no California case authority has held that an adjuster acting on behalf of an insurer owes an independent duty to the insureds whose claim he is adjusting. The appellate court based its imposition of that independent duty on the California Supreme Court's characterization of the relationship between a first-party insurer and its insured as a "special relationship" with "heightened duties" as articulated in *Vu v. Prudential Property & Casualty Insurance Co.* (2001) 26 Cal.4th 1142. Such special relationship, reasoned the appellate court, leads to the conclusion that Hansen, the employee of the party in the special relationship, had a duty to the Bocks. In so ruling, the appellate court either distinguished or dismissed contrary authority. Having imposed a duty of care on Hansen, the appellate court turned to the elements of a cause of action for negligent misrepresentation and concluded that the Bocks adequately alleged each element. In response to Hansen's argument that the Bocks' reliance was unjustified because the misrepresentation contradicted the express terms of the policy, the appellate court stated that "We are nonplussed: not only does Hansen acknowledge his 'clearly' erroneous statement to the Bocks, but he then faults them for believing him."

Moving onward, the appellate court agreed with the trial court that while the Bocks' complaint did not sufficiently allege a cause of action for intentional infliction of emotional distress, it found that the trial court committed an abuse of discretion when it refused, "without explanation, indeed probably without reflection," to allow the Bocks to amend their complaint to allege that Hansen knew they were susceptible to mental distress. The appellate court therefore ordered the trial court to allow the Bocks to file an amended complaint. ◆