

ATTORNEY'S MISREPRESENTATIONS OF THE POLICY LIMITS TO INDUCE SETTLEMENT WERE ABSOLUTELY PRIVILEGED AND DID NOT CONSTITUTE EXTRINSIC FRAUD

In *Home Insurance Company v. Zurek Insurance Company* (2002) 96 Cal. App. 4th 17; 116 Cal. Rptr. 2d 583, the Appellate Court affirmed the trial court's sustaining of a demurrer on a fraud claim finding that an attorney's misrepresentations of the policy limits were absolutely privileged and did not constitute extrinsic fraud. The representations were made during litigation in an attempt to induce settlement and plaintiffs failed to conduct proper discovery which would have revealed the policy limits. Generally, all statements made in the course of litigation are immune from lawsuits for libel, fraud, etc., under the "litigation privilege."

Luana Pinasco and Norman Main, husband and wife, sued defendant, Michelle Canfield, for negligence when she rear ended their car. Defendant Michelle Canfield was the daughter of Patricia and Norman Fahrner, the vehicle owners who gave their daughter permission to drive. Maryland Casualty Company (Maryland Casualty) assumed the defense and the lawsuit settled for \$15,000, for which plaintiffs executed a full release. Plaintiffs then made a claim under the provisions of their underinsured motorist coverage with Home Insurance Company (Home), in which they had limits of \$500,000 per accident. The claim was arbitrated and resulted in a net award of \$222,465.82, which Home paid.

Then, Home sued Zurek Insurance Company, the successor of Maryland Casualty. Home alleged that the release of \$15,000 should be set aside due to the fraud of Maryland Casualty. In addition, they sought declaratory relief, indemnity and subrogation. In its complaint, Home alleged that during the course of the earlier lawsuit, Maryland Casualty misrepresented to plaintiffs's counsel that defendant Canfield was a permissive user only and that the financial responsibility limits of Vehicle Code section 17151 applied to restrict the policy limits to \$15,000. Home further alleged that Canfield was an insured under her parent's policy and Maryland Casualty knew the applicable policy limits were \$500,000.

Home alleged the misrepresentation of the policy limit was made to induce plaintiffs to settle their suit for less than the actual value of the claims. Relying on these representations, plaintiffs settled the case for \$15,000, although their damages were greater.

Zurek demurred and the court ultimately sustained the demurrer without leave to amend. It found that Home failed to allege justifiable reliance on the fraud claim and there was no cause of action available for indemnity or subrogation. Home appealed the judgment which had dismissed its complaint.

In *Home Insurance Company*, the Appellate Court found that reliance on the representation of available policy limits by counsel for Maryland Casualty was unreasonable as a matter of law because such representation was absolutely privileged under the litigation privilege. Relying primarily on California and federal Ninth Circuit cases and Civil Code section 47, subd.(b)(3), the court reiterated that the litigation privilege applies to any communication (1) made in judicial or quasi judicial proceedings, (2) by litigants or other participants authorized by law, (3) to achieve the

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AN EXCESS INSURER IS NOT ENTITLED TO INDEMNIFICATION FROM A PRIMARY INSURER FOR PAYMENTS MADE BY THE EXCESS INSURER TO SETTLE A BAD FAITH ACTION

In *United Services Automobile Association v. Alaska Insurance Company* (2001) 94 Cal App.4th 638, the Fourth District Court of Appeal held as a matter of law that an excess carrier is not entitled to indemnity or subrogation from a primary carrier for payments made by the excess carrier to settle an action for bad faith. The Fourth District Court reversed the trial court's judgment awarding indemnity and attorneys' fees and directed entry of judgment in favor of the primary carrier.

In the underlying matter, Dr. Claudewell Thomas ("Dr. Thomas") and his wife, Carolyn Thomas ("Mrs. Thomas") (collectively "the Thomases"), were involved in an automobile accident while driving a rental car. When they rented the automobile, they purchased insurance under a policy issued by New Hampshire Insurance Company ("New Hampshire"). They also had insurance through United Services Automobile Association ("USAA") under their personal automobile policy. The USAA policy contained a family member exclusion.

Dr. Thomas sustained serious injuries in the accident and filed a negligence action against Mrs. Thomas, the driver at the time of the accident. Mrs. Thomas tendered defense of the claim to both carriers. New Hampshire admitted its policy was primary and assumed Mrs. Thomas' defense. USAA denied coverage based upon the family member exclusion. The Thomases entered into a written settlement agreement which included a stipulated judgment, an assignment of all rights Mrs. Thomas had against USAA as a result of its refusal to defend and indemnify, and an agreement not to execute. New Hampshire agreed to pay \$200,000 in partial satisfaction of the stipulated judgment in exchange for a release and an agreement to defend and indemnify against any claims by USAA.

Dr. Thomas then sued USAA for breach of contract and bad faith. While the bad faith action was pending, a Texas court held the USAA family member exclusion was partially invalid. USAA settled the bad faith action.

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**WESIERSKI & ZUREK LLP
IN TRIAL**

Mark Giannamore recently tried a case in Santa Monica, *Catalano v. Govind*, which involved an auto versus bicycle incident. Plaintiff alleged that defendant Govind failed to stop at the stop sign, and struck her and her bike with the front of his vehicle, and while she was in the crosswalk. Defendant alleged that it was plaintiff who ran into the right front quarter panel of his vehicle causing the incident. In addition to soft tissue injuries, plaintiff sustained a fracture to her left foot. Plaintiff had received approximately \$45,000 in worker's compensation benefits as a census taker for the federal government.

The defense utilized accident reconstructionist Kenneth Pearl and orthopedist Dr. Robert Wilson. After deliberating less than 14 minutes, the jury returned a 12-0 defense verdict finding no negligence on the defendant.

Mark Giannamore also recently tried a case in Department H in Pomona, *Galindo v. Webb*. This was a three-car collision wherein plaintiff allegedly came to a stop after entering an intersection upon hearing an ambulance approaching. Defendant Lara, driving a large pickup truck, admitted that he ran into the back of plaintiff's vehicle. Defendant Webb, represented by Mr. Giannamore, thereafter came in contact with the back of the pickup truck but denied that the truck was pushed into plaintiff's vehicle for a second impact. Both defendant Lara and plaintiff Galindo testified that there were two separate and distinct impacts with plaintiff's vehicle.

The defense utilized biomechanical expert Dr. Rick Robertson, accident reconstructionist Dan Trudell, and orthopedist Dr. Thomas Fell. Plaintiff likewise called an accident reconstructionist, and plaintiff's treating physicians. As of the time of trial, plaintiff had undergone back surgery. The defense argued that this was for a preexisting condition.

After nearly a 10-day trial, with 2-1/2 days of deliberation, the jury returned a verdict of \$18,000 finding defendant Lara 70% responsible and defendant Webb 30% responsible. Thus defendant Webb's exposure was \$5,400. A 998 Offer to Compromise on behalf of defendant Webb was made in the amount of \$12,500. The defense on behalf of Ms. Webb filed a memorandum of costs in excess of \$18,000.

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USAA then filed an indemnity action against New Hampshire which filed a cross-complaint against Dr. Thomas. The trial court found in favor of USAA and awarded damages, including the sums USAA paid Dr. Thomas in the bad faith action and the attorneys' fees and costs USAA incurred in defending the bad faith action and in prosecuting the indemnity action. The trial court rendered judgment for New Hampshire on its cross-complaint against Dr. Thomas, including an award of attorneys fees incurred by New Hampshire in defending the USAA action. The judgment was reversed.

When USAA denied coverage, it waived any right it had to challenge the settlement of the personal injury action. When an insurer denies coverage and refuses to defend the insured, the insured is free to make the best good faith settlement possible, including a stipulated judgment with a covenant not to execute. An insurer that refuses to join in a coinsurer's defense of a covered claim also waives the right to challenge the reasonableness of the coinsurer's settlement of the claim. A contrary rule would render the insured's right to settle meaningless.

USAA was not entitled to indemnity. Equitable indemnity only applies where a party pays a debt for which another is primarily liable and which in equity and good conscience should have been paid by that other party. USAA's settlement of the bad faith action could not be considered a debt for which New Hampshire was liable. The payment was made to settle claims made against USAA.

USAA was not entitled to equitable subrogation because its settlement of the bad faith action was made as a result of its own alleged wrongful conduct. Equitable subrogation is only applicable to allow a party who was required to satisfy a loss created by another party's wrongful conduct to "step into the shoes" of the loser and pursue recovery from the responsible wrongdoer. Ordinarily, an excess insurer's damages in an equitable subrogation action is to recover sums paid to settle a third party claim against the insured due to the primary carriers' wrongful refusal to settle. The sums USAA was required to pay to Dr. Thomas was not the result of conduct engaged in by New Hampshire, but as a result of USAA's alleged wrongful conduct in denying coverage.

USAA had two potentially meritorious defenses to the bad faith action: (1) coverage was excluded under the

family member exclusion and (2) it had no liability as an excess insurer because New Hampshire's policy limits had not been exhausted. Instead of litigating these defenses, USAA chose to settle. An insurer may not deny coverage, settle a subsequent bad faith claim based on its denial of coverage and then obtain reimbursement for the bad faith settlement from another insurer that provided coverage to the insured and settled the underlying case.

- Laura J. Barns

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objects of the litigation, and (4) that have some connection or logical relation to the action. The litigation privilege attaches outside a courtroom and during settlement negotiations. The litigation privilege does not apply where one knowingly conceals the existence of an insurance policy (Civ. Code sec. 47, subd. (b)(3)). However, based on the facts of each case, if only the terms of the policy may be concealed, the litigation privilege may be absolute.

Analyzing the facts, the court found that the alleged misrepresentation as set forth in the complaint did not conceal the existence of any insurance policy. It actually concealed only the terms of the policy. Applying the litigation privilege standard to the facts of the case, the court found that the existence of the Maryland Casualty policy was revealed. It was only the true extent of coverage which was concealed.

The court also relied on the fact that plaintiffs failed to conduct discovery to learn the terms of the policy in their action and also in the underinsured motorist claim. A reasonable investigation and use of discovery by plaintiffs would have disclosed the true extent of insurance coverage. Since the litigation privilege is intended to force litigants to utilize discovery to uncover the truth, it places the obligation on the parties to "ferret out the truth while they have the opportunity to do so during litigation." For public policy reasons, the privilege enhances the finality of judgments.

- Mary E. Bevins

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PLAINTIFFS' CLAIMS CAN BE DISALLOWED IF NOT SCHEDULED IN BANKRUPTCY

The Bankruptcy Appellate Panel of the Ninth Circuit has addressed an increasingly common problem where a former debtor/plaintiff received a discharge in a subsequent Chapter 7 bankruptcy case but did not schedule a cause of action against the insured in a bankruptcy proceeding. Unfortunately, some plaintiffs' attorneys engage in a practice where they file a lawsuit against an insured and then subsequently file a bankruptcy. In the bankruptcy the plaintiff/debtor discharges all medical debts involved in the alleged injuries, but either does not place the lawsuit on the bankruptcy schedule forms or lists the lawsuit as contingent with little or no value and, therefore, an exempt asset under bankruptcy law. The result is that the plaintiff/debtor receives a discharge in the Chapter 7 bankruptcy proceeding, avoids all medical debt and yet proceeds with the lawsuit. To add insult to injury, plaintiff/debtor lists as damages in the lawsuit the very medical claims that were just discharged in the bankruptcy proceeding. The recent case of *In Re: Lopez*, 2002 DJDAR 1055, discusses this increasingly common problem.

The Bankruptcy Appellate Panel noted in Judge Klein's concurring opinion that the usual remedy to this problem has been for defense lawyers to interpose judicial estoppel as a defense to any lawsuit by a former debtor who did not schedule the cause of action in the bankruptcy case. The theory of judicial estoppel is that the debtor has taken an inconsistent position. The debtor, by not scheduling the cause of action in the bankruptcy basically contended that it did not exist or was valueless. This position was accepted by the bankruptcy court when the case was closed without the unscheduled assets being administered. Thereafter, inconsistently, the debtor sues on the cause of action. Defendants correctly object to such litigation tactics and non-bankruptcy courts are often reluctant to allow such lawsuits to continue.

However, the *Lopez* court noted that the judicial estoppel defense is potentially inexpedient. The unscheduled or scheduled but exempt cause of action is still property of the bankruptcy estate, even though the Chapter 7 bankruptcy proceeding has been closed. Thus, the cause of action or a lawsuit is not property of the

debtor, regardless of whether the case is re-opened and regardless of whether the bankruptcy schedules are amended after re-opening. Property that was not correctly scheduled remains property of the estate forever, until administered or formally abandoned by the trustee, regardless of whether it is scheduled after the case is re-opened. Therefore, in the case of an omitted or improperly scheduled cause of action, the trustee in the bankruptcy proceeding is the real party in interest and the more correct defense is that the action is not being prosecuted by the real party and interest in that the debtor lacks standing. *Haley v. Dow Lewis Motors, Inc.* (1999) 72 Cal.App.4 497, 511.

In this situation, the purpose of re-opening the bankruptcy case is to promote the appointment of a trustee to deal with the property of the estate. The *Lopez* court held that if the purpose of re-opening the bankruptcy proceeding is to deal with an unscheduled asset as property of the estate then it is *per se* an abuse of discretion not to order appointment of a trustee. This procedure is useful to defendants in that even if the case is re-opened the trustee may be more interested in settlement than the plaintiff/debtor. More importantly, any funds paid over by the defendant/insured will go to the plaintiff/debtor's creditors, including medical debts rather than to the debtor. Moreover, a motion brought in the state court to dismiss for lack of standing disposes of the case unless the plaintiff/debtor seeks to re-open the bankruptcy proceeding - which plaintiff might not do unless the damage claims clearly exceed the amounts owed to the creditors.

- Jerome A. Busch

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