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Adjuster May Be Personally Liable for Negligent Misrepresentation

By Burke Coleman (https://www.claimsjournal.com/author/bcoleman/) | June 4, 2014

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A California appellate court recently held that a homeowner may sue an insurance adjuster individually for negligent misrepresentation. While agents and employees of insurance companies are not parties to the insurance contract and generally cannot be held personally liable for their actions in the scope of their employment, the court in *Bock v. Hansen*, 225 Cal. App. 4th 215 (2014) ruled that adjusters may be personally liable for independent torts committed in the course of handling claims. The decision appears to challenge precedent on the issue and represents an important development for adjuster liability, expanding exposure for adjusters and other agents of insurers.

The case arose after a tree fell onto a home and the homeowners' insurer sent a claims adjuster to adjust the loss. The adjuster improperly altered the scene before taking pictures and misrepresented the available coverage under the policy by telling the homeowners that cleanup was not covered by the policy. Relying on this false statement, one of the homeowners proceeded to clean

up the debris and cut her hand on a piece of glass. Despite significant damage to the home, the adjuster wrote a check for only $675.69 and submitted a false report to the insurer. When the insurance company did not respond to the homeowners' request for additional coverage, the homeowners sued the insurance company for breach of contract and breach of the implied covenant of good faith and fair dealing, and also sued the adjuster individually for negligent misrepresentation.

With limited analysis, the trial court determined that in the context of the insurance relationship and the "contract based action," the adjuster could not be held personally liable for negligent misrepresentation. The court of appeals disagreed and held that the homeowners could maintain such an action against the adjuster.

The case turned on the adjuster's agency relationship with the insurer and whether the adjuster owed a legal duty to the insured. "Responsibility for negligent misrepresentation rests upon the existence of a legal duty, imposed by contract, statute or otherwise, owed by a defendant to the injured person."

The adjuster argued that he owed no individual duty of care to the homeowners because the insurance contract existed only between the insurer and the homeowners. According to the adjuster, "agents and employees of insurance companies do not owe a duty to the insured; instead, any liability for their actions lies on the insurer so long as the agency was disclosed to the insured and the conduct took place within the course and scope of such agency."

Although claims for breach of contract and bad faith can only be brought against a party to the contract, i.e. the insurer, the appellate court stated that adjusters may be personally liable for independent torts committed in the course of handling claims, even though they are not individually parties to the insurance contract. Citing precedent from the California Supreme Court, the court said that a "special relationship" with "heightened duties" exists between an insurer and insured, and "such special relationship leads to the conclusion that [the adjuster], the employee of the party in the special relationship, had a duty to the [homeowners]."

The court further dismissed the adjuster's arguments that he could not be personally liable to the homeowners because he was acting in the course and scope of his employment as an agent of the insurer. The court stated that "An agent or employee is always liable for his or her own torts, whether the principal is liable or not, and in spite of the fact that the agent acts in accordance with the principal's directions…" The homeowners could therefore properly maintain their negligent misrepresentation claim against the adjuster.

The decision appears to depart from other rulings on the issue, which the court summarily dismissed as "unpersuasive." As argued by the adjuster, in *Icasiano v. Allstate Ins. Co*., 5 F.Supp.2d 804 (N.D. Cal. 2000) a federal court applying California law held that "An agent of an insurance company is generally immune from suits brought by claimants for actions taken while the agent was acting within the scope of its agency… As long as the duty is owed by the insurance company only, and regardless of whether it derives from contract or tort, the insurance company's agents cannot be held liable for conspiring to violate that duty."

The California Supreme Court came to a similar conclusion in *Gruenberg v. Aetna Ins. Co.*, 510 P.2d 1032 (Cal. 1973), holding that non-insurer defendants were not parties to the insurance contract and not subject to the duty of good faith and fair dealing, but considering instead whether "they may have committed another tort in their respective capacities as total strangers to the contracts of insurance." In both cases the courts focused on the source of the duty and refused to impose liability on non-parties to the insurance contract unless they breached an independent duty, apart from the insurance contract.

In Bock, however, the court said the insurer's special relationship with the insured extended personally to the adjuster to create a duty. With the court's reliance on legal treatises, apparent departure from precedent, and limited analysis to support this conclusion, it remains to be seen whether California's Supreme Court will weigh in on the issue and whether future decisions will agree that the "special relationship" of the insurer and the distinct nature of the tort of negligent misrepresentation support personal liability for adjusters. Additional explanation from the court may have helped to connect the dots; but the court is not necessarily alone in its conclusion.

Most notably, in *Ryan v. Preferred Mut. Ins. Co*., 834 N.Y.S.2d 338, (N.Y. App. Div. 2007), a New York appellate court facing the same issue decided that an insurance adjuster may be held personally liable for negligent misrepresentation if there was actual privity of contract or a relationship so close so as to approach that of privity. The court found that where the insureds relied upon the expertise and recommendations of the adjuster and the adjuster was aware that they would use his representations for a particular purpose, the relationship approached that of privity and created a legal duty of care. The decision and reasoning is consistent with the ruling here in Bock.

Courts in other states have also held adjusters personally liable for their tortious conduct. In *Taylor v. Nationwide Mut. Ins. Co*., 589 S.E.2d 55 (W. Va. 2003), the West Virginia Supreme Court found that a claims adjuster could be held personally liable even though not a party to the insurance contract because the state's Unfair Trade Practices Act created a positive duty for the adjuster independent of the insurance contract. And in *Continental Ins. Co. v. Bayless & Roberts, Inc.,* 608 P.2d 281 (Alaska 1980), the Alaska Supreme Court held that an adjuster could be personally liable for his negligence arising out of his breach of a duty of cared owed to the plaintiff. But both decisions considered whether the agent had a duty to the insured independent of the principal.

As it stands, adjusters should be cautious in their dealings with insureds and, given their role in the claims handling process, should be aware of the agency principles applicable in their state. Although the adjuster in this case clearly acted inappropriately, the case is an important reminder to adjusters to undertake their duties diligently and honestly, understanding that their actions and representations have significant consequences, including potential exposure to personal liability.

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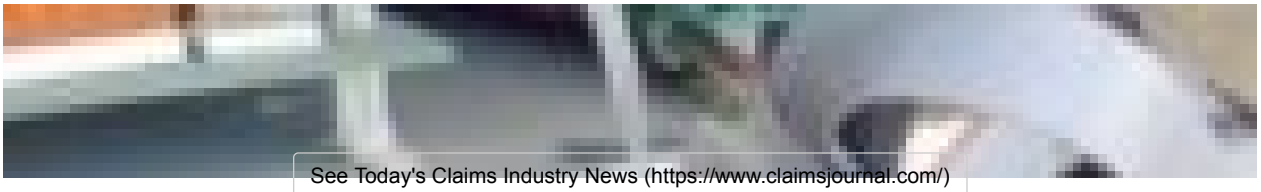

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