Property-loss litigation

A practical guide to representing homeowners against their insurers

By Tonna K. Farrar and Evangeline Fisher Grossman

Homeowners who suffer a loss due to fire, water or theft may be entitled to damages under California law against their insurer if the insurer fails to restore the property to its pre-loss condition. Policyholders pay premiums, giving rise to the duty of insurers to provide coverage in the event of an insured loss. When an insurer improperly denies coverage, thereby failing to cover all insured losses, the policyholder has a claim for breach of contract.

In addition, we routinely uncover insurers' bad faith with respect to claims-handling practices, resulting in a claim for breach of the implied covenant of good faith and fair dealing. Moreover, when the insured is over the age of 65, there are damages for financial elder abuse, an under-utilized protection for senior citizens who suffer financial detriment at the hands of insurers.

To prove a cause of action for breach of contract, the plaintiff must prove a breach of the terms of the insurance policy by the insurer and the amount of damages caused by the breach. (*Reichert v. Gen. Ins. Co*. (1968) 68 Cal.2d 822, 830; CACI No. 300 et seq.) The various breach-of-contract categories of damages are discussed below and may include dwelling loss and repair, personal-property loss, and loss of use.

Dwelling loss and repair

Generally, an insured is entitled to the difference in market value of the home immediately before and immediately following the loss, or the reasonable cost of repair if that cost is less than the diminution in value. Establishing contractual damages for real property loss involves appraisals, contractor estimates, scopes of repair and extensive negotiation with the insurer, who typically utilizes the services of preferred or captive vendors to establish below-market valuation for policy benefits.

In trial, the insured must provide evidence proving the repairs were necessitated by the insured loss, and it is notable that the insured is not entitled to be

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placed in a better position as a result of the loss, sometimes called "betterment" by the insurance industry. (*Keller v. Chowchilla Water District* (2000) 80 Cal.App.4th 1006.) However, in the instance of an older structure, code upgrades are often required by local or state authorities. The insurer's obligation to fund code upgrades is governed by the terms of the homeowner's policy and is often limited by policy language.

Personal property

The limit for personal property coverage is usually a fixed percentage of the property-insurance coverage, with the industry standard typically being 40-70% of the dwelling coverage. Personal property covers the contents of an insured's home and typically includes such things as furniture, linens, drapes, clothing, consumer electronics, appliances, jewelry and other non-affixed contents in the home.

Generally, the insured is entitled to the difference in the market value of the personal property immediately before the loss, or the reasonable cost of repair if that cost is less. (See, CACI 3903J and CACI 3903K.) Insureds are entitled to actual cash value of their covered personal property, which is typically interpreted by California courts as fair market value, less a fair deduction for depreciation. (Ins. Code, § 2051, subd.(b).) Depreciation adjustments vary based on the condition and age of the property, which often requires detailed proof, testimony and expert evaluation.

If the policy provides for replacement cost coverage, then the insured is reimbursed for the cost to buy the personal property again in a new condition (without deduction for depreciation). (Ins. Code, § 2051.5, subd. (a).)

Loss of use

Loss of use refers to the necessary increase in living expenses incurred by an insured while the insured's home was uninhabitable due to a covered loss. It is available under Coverage D of most homeowners' policies. Loss of use is only available for as long as the insured's home is uninhabitable, and the length of time loss-of-use benefits are available to an insured are typically governed by the terms of the insurance contract unless the insured can establish the insurer unreasonably delayed the claim process, thereby increasing the amount of time the home was uninhabitable.

Bad faith

Insurers have a duty, implied by law, to refrain from doing anything to injure the right of an insured to receive benefits under the policy. To meet this obligation, an insurer must consider the interests of the insured at least as much as it considers its own interests. (*Jordan v. Allstate* (2007) 148 Cal.App.4th 1062, 1071-1072.) "The covenant of good faith can be breached for objectively unreasonable conduct, regardless of the actor's motive." (*Bosetti v. U.S. Life Ins., et al*. (2009) 175 Cal.App.4th 1208, 1236.)

"The ultimate test of bad faith liability in first-party insurance cases is whether the refusal to pay policy benefits was unreasonable." (*Ibid.*)

Ordinarily, whether an insurer's actions are unreasonable is an issue of fact for a jury to decide, and therefore summary adjudication is improper. (*Chateau Chamberay Homeowner's Ass'n v. Assoc. Intern. Ins. Co.* (2001) 90 Cal.App.4th 335, 346 ["[i]n the context of the insurance contract, it has been held that the insurer's responsibility to act fairly and in good faith with respect to the handling of the insured's claim is not the requirement mandated by the terms of the policy itself – to defend, settle, or pay. It is the obligation ... under which the insurer must act fairly and in good faith in discharging its contractual responsibilities"].)

Importantly, "[w]hen investigating a claim, an insurance company has a duty to diligently search for evidence which supports its insured's claim. If it seeks to discover only the evidence that defeats the claim it holds its own interest above that of the insured." (*Mariscal v. Old Repub. Life Ins. Co.* (1996) 42 Cal.App.4th 1617, 1620.) Section 790.03, subdivision (h) provides a clear roadmap for establishing the acts and conduct that can qualify as bad faith, including:

- Unreasonable denial of policy benefits;
- Misrepresenting facts or policy provisions to claimants;
- Failing to respond or act reasonably promptly upon communications with respect to a claim;
- Failing to adopt and implement reasonable standards for the prompt investigation and processing of claims;
- Failing to either approve or deny claims within a reasonable time period after the insured has submitted adequate proof of loss;
- Refusing to make a good faith effort to fairly settle claims when liability is reasonably clear or failing to settle one part of a claim in order to influence other parts of the claim;
- Compelling the insured to litigate the claim because the insurance company has refused to make an adequate settlement offer;
- Attempting to settle for an amount that appears unreasonable when compared to the statements made in written or printed advertising material that accompanied the application for insurance;
- Attempting to settle claims using an application that was altered without the knowledge and consent of the insured or his agent;
- Threatening to appeal an arbitration award in an attempt to compel the insured to accept a settlement less than what was awarded in arbitration;
- Failing to provide prompt justification for the denial of a claim;
- Advising a claimant not to hire an attorney; and
- Misleading a claimant as to the legal deadline for filing a claim or initiating a lawsuit.

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There is no private cause of action for a violation of section 790.03, but an insurer's breach of the duties specified in the statute is indicative of a breach of the obligations imposed by the implied covenant of good faith and fair dealing and is actionable on that basis. (*Jordan v. Allstate Ins. Co.*, 148 Cal.App.4th at p. 1078.) In addition to contract damages, if an insured proves that the insurance company unreasonably handled the claim, tort damages (including emotional distress, reasonable attorneys' fees and punitive damages) may be recovered through the bad faith claim.

Emotional distress

Following a fire or water loss, many insureds are left without a home or personal belongings, catapulting them into extreme financial distress if they aren't provided with an immediate financial harbor by their insurer. During this time, the impact an insurer's bad faith can have on the mental and emotional well-being of an insured can be significant. An insured may recover for "all detriment caused whether it could have been anticipated or not. In accordance with the general rule, it is settled in this state that mental suffering constitutes an aggravation of damages when it naturally ensues from the act complained of, and in this connection mental suffering includes nervousness, grief, anxiety, worry, shock, humiliation and indignity as well as physical pain." (*Crisci v. The Security Ins. Co. of New Haven, Conn.* (1967) 66 Cal.2d 425, 433.)

As the California Civil Jury Instructions recognize, no fixed standard exists for deciding the amount of noneconomic damages for emotional distress. (CACI 3905A.) "There is no fixed or absolute standard by which to compute the monetary value of emotional distress" and thus the "jury is entrusted with vast discretion in determining the amount of damages to be awarded." (*Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1602.)

Reasonable attorney's fees and time keeping

In *Brandt v. Superior Court* (1985) 37 Cal.3d 813, the California Supreme Court permitted policyholders to recover their attorneys' fees for obtaining policy benefits as a component of their bad faith damages, limiting those fees "reasonably incurred to compel payment of the policy benefits." Notably, in *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, the California Supreme Court changed the way *Brandt* fees are calculated in contingency cases. *Cassim* held that a proper calculation of *Brandt* fees requires the trier of fact to determine the percentage of all fees attributable to obtaining the contract recovery. This formula is based on the percentage of the attorney's overall efforts devoted to the contractual recovery portion of the case. *Cassim* mandates that hours spent on the case are divided into three categories: contract claim only, bad faith claim only, and both claims, and then established a formula so the fee award would equal the ratio of the contract hours plus the hours allocable to both contract and bad-faith claims divided by the hours devoted to the prosecution of the case. Accordingly, it is highly recommended that plaintiff's counsel keep track of their time contemporaneously to facilitate the *Cassim* apportionment.

Punitive damages

Punitive-damages awards under Civil Code section 3294 in bad-faith cases have been sustained where an insurer was shown to have established policies or practices in claims handling that are harmful to insureds. (*Moore v. Amer. United Life Ins. Co.* (1984) 150 Cal.App.3d 610, 640 [upholding $5 million punitive damages award against an insurer based on evidence that it denied a claim on grounds it knew to be untrue, focused its investigation on attempts to defeat the claim and instructed its claims personnel to keep its defenses at the forefront]; *Downey Sav. & Loan Assoc. v. Ohio Cas. Ins. Co.* (1987) 189 Cal.App.3d 1072, 1098-1099 [insurer was guilty of company-wide misconduct by instructing its claims adjusters to focus on ways to defeat claims] *disapproved on other grounds by Adams v. Murakami* (1991) 54 Cal.3d 105; *Hughes v. Blue Cross of N. Cal*. (1989) 215 Cal.App.3d 832, 847 [insurer's objectionable claims handling practices were rooted in established company practice]; *Liberty Transp. Inc. v. Harry W. Gorst Co*. (1991) 229 Cal.App.3d 417, 436-437 [insurer had a company policy of never communicating directly with insureds and despite knowing insured was ignorant of decision to deny claim, it did nothing to correct the error].)

Punitive damages ultimately require a showing of either malice, oppression or fraud on the part of an insurer. (*Fleming v. Safeco Ins. Co*. (1984) 160 Cal.App.3d 31, 43-44; *Major v. W. Home* (2009) 169 Cal.App.4th 1197, 1225-1226; Civ. Code, § 3294, subd. (a).) It is not necessary for plaintiffs to plead or prove a fraud cause of action to sustain punitive damages based upon the fraud prong. (*Pistorius v. Prudential Ins. Co*. (1981) 123 Cal.App.3d 541, 556.) All that is required is that the fraud relate to the conduct giving rise to bad faith liability; i.e., that in breaching the implied covenant, the insurer acted fraudulently (misrepresenting or concealing essential facts, etc. (*Notrica v. State Comp. Ins. Fund* (1999) 70 Cal.App.4th 911, 948.)

Beware punitive damages and taxes on them

However, we are careful to advise our clients that the decision to forgo a reasonable settlement in hopes of trying the case to receive a large punitive-damage award may be ultimately a poor one given the de minimus benefit that is actually afforded to the plaintiff from a punitive-damage award. The government considers punitive damages a windfall to the taxpayer and any award is deemed taxable income. Section 104 of the IRS code deals with the treatment of punitive damages. In addition, President Trump's tax bill, passed in

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late 2017, caused even greater restrictions by no longer allowing a possible deduction for attorney fees. Hence, the plaintiff will be taxed on the *entire amount* of the award, even if a substantial percentage of the award is paid as attorney's fees.

Financial elder abuse

Section 15610.27 of the Welfare and Institutions Code (the Elder Abuse Act), defines an "elder" as a person beyond the age of 65 years. The Elder Abuse Act is intended "to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33.) The original focus of the Act was on reporting abuse and neglect. But later amendments shifted the focus to private, civil enforcement. (*Ibid*.) Abuse of an elder or a dependent adult is defined under the Act as "[p]hysical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering" (§ 15610.07, subd. (a) or "[t]he deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering" (*Id*., at subd. (b).)

"Financial abuse" occurs when a person or entity "takes, secretes, appropriates, or retains real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both." (Welf. & Inst. Code, § 15610.30.) A "wrongful use" is deemed to have occurred when, "among other things," any of the above actions is taken "in bad faith." (*Ibid.*) "Bad faith," in turn, is shown where "the person or entity should have known that the elder or dependent adult had the right to have the property transferred or made readily available to the elder or dependent adult or to his or her representative." (*Ibid.*)

Thus, a party engages in elder abuse by misappropriating funds to which an elder is entitled under a contract. (*Paslay v. State Farm Gen. Ins. Co.* (2016) 248 Cal.App.4th 639, 658-659 [recognizing that summary adjudication of an elder-abuse claim is improper when triable issues regarding bad faith or unreasonable conduct by an insurer exist]; *Bonfigli v. Strachan* (2011) 192 Cal.App.4th 1302, 1307, 1315-1316 [plaintiffs stated elder-abuse claim based on defendant's failure to pay funds owed under contract]; *Wood v. Jamison* (2008) 167 Cal.App.4th 156, 164-165 [elder's attorney engaged in financial abuse by improperly accepting funds to which elder was entitled through loan]; *Negrete v. Fidelity and Guar. Life Ins. Co*. (C.D. Cal. 2006) 444 F.Supp.2d 998 [claims of deceptive sales practices by insurer selling annuities to senior citizens were sufficient to state an elder-abuse claim].)

In addition to the damages recoverable for breach of contract and bad faith, damages for financial elder abuse may be trebled. (Civ. Code, § 3345.)

Conclusion

Homeowners who have experienced a water, fire or theft loss are often unknowledgeable as to their rights and obligations under their homeowner's policy, making them highly vulnerable to the expertise of insurers who may be inclined to deny coverage altogether or underpay benefits under the policy. Analyzing and determining the extent of property loss, rights under the policy and the value of policy benefits and damages available to the homeowner is crucial to protecting the insureds' rights.

Farrar

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