

June 5, 2020

Presiding J. Anthony Kline
Associate Justice James A. Richman
Associate Justice Marla J. Miller
First District Court of Appeal
Division 2
350 McAllister St.
San Francisco, CA 94102

Re: *Fadeeff v. State Farm General Insurance Co.*, A155691 (May 22, 2020) – Request for Publication

Dear Honorable Justices:

We write to urge publication of the above-referenced decision because it upholds the well-established legal principle that insurers must fairly investigate claims submitted by their customers and cannot design or implement strategies that aim to avoid paying covered losses. That principle is expressed in decades of decisional law, California statutes and regulations, and comports with sound logic.

United Policyholders (“UP”) is a longstanding non-profit, charitable organization dedicated to protecting the reasonable expectation of individuals and businesses that their insurer will not be adversarial to them in the event they sustain a loss and file a claim. Claim adjusting is similar to the practice of law in that grey areas in coverage, or the extent of damages, often exist. Insurers can err in their assessment of a claim without automatically being subject to bad faith liability. However, insurers do not have the right to unfairly tamper with the claim investigation process.

As wildfires and other disasters continue to ravage our state, insurance companies are naturally seeking to control and limit claim payouts by streamlining their claim adjustment practices in ways that reduce attention to detail. This is leading to underpayments, improper

Our Mission

United Policyholders is a non-profit 501(c)(3) organization whose mission is to be a trustworthy and useful information resource and an effective voice for consumers of all types of insurance in all 50 states.

Programs

Advocacy and Action
Roadmap to Preparedness
Roadmap to Recovery™

denials, and bad faith lawsuits. Their strategy to defeat those bad faith lawsuits is to exploit and oversimplify the “genuine dispute” doctrine in order to convince overworked trial court judges to dismiss them. The jurisprudence of that doctrine requires a careful factual analysis of how the claim at issue was adjusted and investigated and whether the insurer strategically created a dispute where not warranted.

Publication of *Fadeeff*, which correctly applies genuine dispute jurisprudence through a meticulous factual analysis, will have an actual, material, and immediate positive impact on adjusting practices. Therefore, because publication of the *Fadeeff* opinion will advance the public interest significantly, we urge publication pursuant to CRC 8.1105 and 8.1120.

Nature of Interest

Since 1991, UP has improved the pace of disaster recovery by educating impacted households on navigating the post-loss and insurance claim process and helping them reach fair and prompt settlements. Policyholders throughout California communicate on a regular basis with UP, which allows us to provide important and topical information to our state's appellate courts via the submission of amicus curiae briefs in cases involving insurance principles that are likely to impact large segments of the public and business community.

The Fadeeff Opinion Warrants Publication Because It Involves Issues of Continuing Public Interest

Pursuant to CRC 8.1105(c)(6), the *Fadeeff* opinion warrants publication because it involves multiple legal issues of continuing public interest. The significant issue this Court addressed involved application of the “genuine dispute” rule in granting a motion for summary judgment in an insurance bad faith claim.

This Court’s opinion provides a clear, thorough, and comprehensive framework for application of the “genuine dispute” rule. The opinion provides a clear roadmap for trial courts to analyze the facts of a claim, including an insurance company’s use of consultants and “experts.” The opinion will properly guide trial courts in determining whether there was actually a “genuine dispute” over coverage, or if the insurance company simply “checked the boxes” they contend the rule requires

The *Fadeeff* opinion will better protect future policyholders from premature grants of summary judgment and the injustices that often follow from (1) insurers ability to rely on bias insurance consultants' opinions to dispose of bad faith claims; and (2) policyholders' inability to be made whole with no possibility to recover attorney's fees.

I. The *Fadeeff* opinion emphasizes that an insurer who has obtained an expert opinion is not automatically insulated from a bad faith claim.

In *Fadeeff*, the Court recognized the importance of not hastily determining a “genuine dispute” exists, removing all bad faith liability, simply because an insurer cited the opinion of its retained engineer, contractor, or other vendor. As the Court reiterated, an insurer may not “insulate itself from liability for bad faith conduct by the simple expedient of hiring an expert for the purpose of manufacturing a ‘genuine dispute.’”¹ This instruction and this Court’s careful analysis of the facts surrounding the insurer’s use of a vendor will guide trial courts in identifying and analyzing the issue.

The relationship between insurers and outside experts is a financial one, not always an objective exercise in the pursuit of justice for a policyholder. When experts seek continued employment by insurers, there is an incentive to produce reports and opinions that help the insurer underpay or deny claims. Biased expert reports were exposed following two of the nation’s largest natural disasters of the century; Hurricane Katrina in 2005 and Superstorm Sandy in 2012.² The opportunity to seek evidence of this practice is integral in identifying and preserving policyholders’ bad faith claims.

California Claim Handling Vulnerabilities

In the wake of devastating and widespread wildfires becoming the norm in California, policyholders have recently been at a higher risk of exposure to unfair claim

¹ Opinion at p. 9 citing (*Chateau Chamberay v. Associated Int’l Ins.*, 90 Cal.App.4th 335 (2000)).

² See generally Amy Bach, *Bach Talk – Biased expert reports plague policyholder, United Policyholders*, <https://www.uphelp.org/blog/bach-talk-biased-expert-reports-plague-policyholders> (last visited May 31, 2020); See Also Scott Gurian, *Tampered Engineering Reports Only the Beginning for Sandy Victims*, United Policyholders, <https://www.uphelp.org/tampered-engineering-reports-only-beginning-sandy-victims> (last visited May 31, 2020).

handling due in part to the sheer number of claims. Unfair claim handling includes the use of biased experts by insurers looking to shield themselves from bad faith liability. Through testimonials and survey data, UP has observed common occurrences in wildfire litigation. Namely, the use of repeat vendors and an overreliance on boilerplate reports that seek to diminish losses payable to policyholders.

In the years California policyholders experienced the state's most devastating wildfires, 2017 and 2018, the California Department of Insurance published a study of fifty large homeowners insurers licensed to conduct business in California. The number of complaints deemed "justified" in 2017 for exclusively homeowners insurance was 305; that number jumped to 368 justified complaints in 2018.³ Further, court records, media coverage, and consumer responses to surveys conducted by UP indicate that policyholders are frequently compelled to file suit to collect policy benefits owed and to secure full and fair compensation for losses caused by insurer misconduct.⁴

The *Fadeeff* opinion provides emphasis on investigating bias evidence that will help ensure policyholders with justified complaints and bad faith claims do not get overlooked. Expert opinions are valuable and necessary in claim handling, but the fact that a report exists is not enough to insulate insurers from those claims; this Court highlights that appropriately.

II. The comprehensive framework for applying the "genuine dispute" rule in *Fadeeff* will help preserve policyholders' ability to be properly indemnified.

A policyholder's ability to hold an insurance company legally and financially accountable for failing to pay what it owes is a critically important safeguard in the profit-driven but essential modern insurance system. The *Fadeeff* opinion lays out a comprehensive framework that will lessen the chance of summary judgment due to an errant finding of a "genuine dispute," preserving policyholders' ability to be made whole.

³California Department of Insurance, *Homeowners Complaint Composite Report*, <http://www.insurance.ca.gov/01-consumers/120-company/03-concmlpt/homecomposite.cfm> (last visited on May 31, 2020).

⁴ See *Data Collection Surveys*, United Policyholders, <https://www.uphelp.org/data-collection-surveys> (last visited on May 31, 2020).

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In *Brandt*, the California Supreme Court held that where an insurer acts in bad faith and, as a result, the policyholder is required to retain the services of an attorney to secure policy benefits, the insurer is liable for the attorney's fees to the extent they were necessary to secure the contract benefits.⁵ The California Supreme Court reasoned that:

“When an insurer's tortious conduct reasonably compels the insured to retain an attorney to obtain the benefits due under a policy, it follows that the insurer should be liable in a tort action for that expense. The attorney's fees are an economic loss -- damages -- proximately caused by the tort.”⁶

Without the possibility for recovery of attorney's fees, policyholders are forced to pay out a portion of the benefits previously owed to them. The framework set out in *Fadeeff* will help eradicate the incentive for insurers to take a calculated risk and underpay claims using bias experts as a shield to financial liability.

Conclusion

The *Fadeeff* opinion adds to the existing body of law by more appropriately balancing recent lower court authorities regarding application of the “genuine dispute” rule. Accordingly, because the *Fadeeff* opinion involves the issues of continuing public interest stated above, the undersigned respectfully requests that this court order *Fadeeff* to be published.

Sincerely,



Amy Bach, Esq. (SBN 142029)
Mark Dillman, Esq. (SBN 327965)
United Policyholders

Service via Truefiling; POS attached

⁵ *Brandt v. Superior Court* (1985) 37 Cal.3d 813, 817.

⁶ *Id.*