Supplement to the Los Angeles and San Francisco
Daily Journal
• INSURANCE •
NOVEMBER 12, 2014

Courts are expanding theories of agency liability

By William M. Shernoff
and Samuel Bruchey

Insurance agent liability most often arises when an agent or broker fails to obtain the insurance coverage a consumer specifically requests. The tortious conduct occurs when the policy is sold. Liability arises because the agent owes an independent duty to "exercise good faith and reasonable skill and diligence." 2 Bernard Witkin, Summary of California Law Insurance Section 20, at 52 (10th ed. 2005).

However, courts are expanding theories of agent liability. These theories extend to a broader assortment of agents — even lawyers.

Conspiracy to Defraud

Under a conspiracy to defraud theory, insurer agent liability extends to physicians, accountants, lawyers, as well as independent claim adjusters and the insurance companies that employ them.

The first case to cement the viability of this theory was *Younan v. Equifax*, 111 Cal. App. 3d 498 (1980). In Younan, an insured accused his insurance company of conspiring with a claims investigation services company, and an individual physician hired by the company, to produce a bogus medical examination that would support a denial of disability income benefits. The insured had never met or received treatment from the physician prior to or after the single fraudulent examination. Therefore, the doctor owed him no duty of care. The court held that a physician hired by an insurer to perform a medical examination could be liable for conspiring with the insurer to deny policy benefits.

Younan carves out an exception to the "agent's immunity rule," which insurers and their agents contend relieves them of independent tort liability. See *Keene v. Wiggins*, 69 Cal. App. 3d 308, 313 (1977). A corporation cannot conspire with itself. When it comes to physicians hired by insurers, the general thinking had been that without a physician-patient relationship, the doctor owed no duty. See *Mintz v. Blue Cross of California*, 172 Cal. App. 4th 1594, 1613 (2009).

At least one district court has limited conspiracy to defraud to cases where two or more entities conspire with an insurance company. See *Icasiano v. Allstate Ins. Co.*, 103 F. Supp. 2d 1187 (N.D. Cal. 2000). In *Icasiano*, a policyholder sued her insurer and its adjuster, alleging that the adjuster "knowingly and willfully conspired with [the insurer] to make false statements." The court dismissed the claims against the adjuster, stating that the adjuster was acting solely as a representative of the insurer and within the course and scope of her agency. In other words, there was no second entity with which the adjuster conspired.

Recently, the 1st District Court of Appeal dismissed *Icasiano* as "unpersuasive," and held that an insurance adjuster can be held independently liable. *Bock v. Hansen*, 2014 DJDAR 4280 (Apr. 2, 2014). In *Bock*, the plaintiff homeowners sued their homeowner's insurance carrier and one of its adjusters, alleging that the adjuster had made negligent misrepresentations about the terms of the policy. The court held that because insurers owe a "special" duty to their insureds, it follows that their employees owe the same duty.

To prove that an agent engaged in a conspiracy to defraud, a plaintiff must establish that the agent joined the conspiracy to commit the specific wrongful act. Once the agreement is proven, the law places civil liability on all conspirators. Conspirators are also liable for any tortious conduct that occurred prior to their agreement to participate in the conspiracy. It the conspirator knows what has transpired before he joined the conspiracy, and still joins, he is responsible for everything that occurs. The only conspiracy a defendant cannot join is one that has already been completed.

Financial Elder Abuse

Financial elder abuse under Welfare and Institutions Code Section 15610.30 et seq. extends liability to those who assist in wrongful conduct, and casts liability on agents whether or not they owe an independent duty to an insured.

To establish a claim, plaintiffs must show that the agent assisted in taking, secreting, appropriating, obtaining or retaining the real or personal property of someone 65 years of age or older for a wrongful use, or with intent to defraud.

Physicians, surgeons, psychiatrists, psychologists and dentists can be liable for financial elder abuse. So can administrators of public and private institutions that provide services for elders.

Although the applicability of financial elder abuse to insurance disputes is an unsettled area of the law, several courts have found that the cause of action can lie where an insurance policyholder alleges unreasonable conduct by an insurer and its agent in handling an insurance claim. In *Keshish v. Allstate Insurance Company*, 12-3818 (C.D. Cal. July 30, 2012), the court denied the insurer's motion for judgment on the pleadings on the financial elder abuse claim. There, the plaintiff alleged that the adjuster undervalued a claim submitted on her homeowner's policy. The court considered whether the allegations constituted improper "retention" of an elder's property, and concluded that if the plaintiff could prove that the insurer and its agent withheld policy benefits in bad faith, then liability under the elder abuse statute was possible.

Earlier this year, a federal court held that financial elder abuse applies to long-term care insurance policies that provide benefits on a reimbursement basis. *Rosove v. Continental Casualty Company*, 2014 WL 2766161 (C.D. Cal. June 2, 2014). Although these decisions focus on insurer wrongdoing, the financial elder abuse statute clarifies that insurance agents are also liable if they assist in taking, secreting, appropriating, obtaining or retaining real or personal property of an elder for a wrongful use, with intent to defraud, or both.

Section 1704.5

Insurance Code Section 1704.5 casts broad — perhaps even strict — liability against "life agents" and the insurance companies that appoint them. The section applies only to life insurance. But within that realm, it applies to virtually every scenario. It extends to independent contractors and captive agents. It does not distinguish between agents who have previously sold insurance on behalf of a carrier and those who have not. And if the insurer issues a policy after the agent assists with an application, it holds the carrier responsible for everything the agent does before and after a policy is issued.

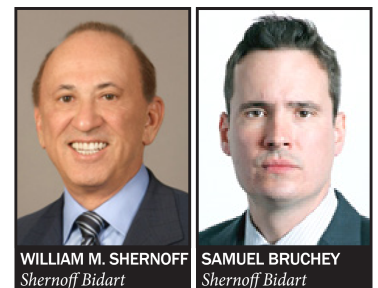
Patrick O'Riordan v. Federal Kemper Life Assurance Company, 36 Cal. 4th 281 (2005), is the seminal case that interprets Section 1704.5. In *O'Riordan*, the insured, bought a life insurance policy from insurance an agent. After the insured's death, the policy beneficiary submitted a claim. The agent denied the claim and rescinded the policy. The beneficiary sued the insurer, its agent and other defendants on various fraud and negligence causes of action. The insurer argued that the agent was not its agent because he was merely a producer, who acted independently, was not an employee, and had never sold life insurance before for the insurer.

The court rejected all these arguments. An insurer is deemed to have knowledge of the facts that its agent knew, whether or not these facts were concealed from the carrier. In *O'Riordan*, the insurer insisted that its rescission was appropriate because information about the insured's history as a smoker was withheld from two separate questions on the insurance application. The court disagreed, concluding that the knowledge of the agent was imputed upon the carrier.

With the broad reach of Section 1704.5, conspiracy to defraud and financial elder abuse more readily accepted by courts, plaintiffs' attorneys have new weaponry to add to their arsenal when considering whether to extend liability to agents of insurance companies.

William M. Shernoff *is the founding partner of Shernoff Bidart Echeverria Bentley LLP, a law firm specializing in insurance bad faith litigation. A longtime consumer advocate, Mr. Shernoff has made a career of representing insurance consumers in their cases against insurance companies.*

Samuel Bruchey *practices insurance bad faith, business litigation and personal injury in the firm's Beverly Hills office. He joined Shernoff Bidart Echeverria Bentley LLP in 2007, and has worked closely with founding partner William Shernoff ever since.*



WILLIAM M. SHERNOFF *Shernoff Bidart* | SAMUEL BRUCHEY *Shernoff Bidart*

Reprinted with permission from the *Daily Journal*. ©2014 Daily Journal Corporation. All rights reserved. Reprinted by ReprintPros 949-702-5390.