

## Appeals Court Affirms Finding of Bad Faith But Reverses Awarding of Punitive Damages

SAN FRANCISCO — According to an opinion filed Sept. 3 in California's Ninth Circuit Court of Appeals, a jury's award of compensatory damages for bad faith on the part of an insurance company that refused to either cover or deny a water and mold claim was upheld, although the award of punitive damages was reversed. *Thomas Anderson v. Allstate Insurance Company*, an Illinois Corporation, Nos. 01-15145, 01-15246, 01-15307 & 01-15330 (9th Cir.)

The appeals court agreed with the jury and a district court that sufficient evidence had been presented to support the plaintiff's claim of bad faith and the associated compensatory damages. However, the appeals court found that the insurer's conduct did not reach the level required for an award of punitive damages and so reversed the finding in that regard.

The appeals court reached its decision regarding punitive damages in part because, according to the opinion, the health hazards of mold were not as clear in 1997 when the claim was made as they later became. The court also stated in the opinion that some of Allstate's actions were inconsistent with a finding of malice or extreme indifference to the plaintiff's rights.

However, according to plaintiff's attorney Stan Parrish of Shepard & Haven in Sacramento, Calif., this decision goes against a decision issued by the same court earlier this year regarding punitive damages.

Parrish referred to May 3 decision by the Ninth Circuit supporting the court's obligation to review the amount of punitive damages awarded but not to revisit the question of whether the punitive damages were warranted. *Leatherman Tool Group, Inc., an Oregon Corporation v. Cooper Industries, an Ohio Corporation*, Nos. 98-35147 & 98-35415, D.C. No. CV-96-01346 MA (9th Cir.).

Yet in *Anderson v. Allstate*, Parrish said that the "the court went out of its way to minimize facts that the jury clearly found amounted to malice. In coming to its decision, the appellate panel took the place of the jury. If this is going to happen, what do we have a jury system for?"

Even though this decision is unpublished, Parrish speculates that the message it will send to the insurance industry is that it will not get exposed to punitive damages in the Ninth Circuit.

### Case History

In brief, water and mold damage occurred in the home of the plaintiff, Thomas Anderson, in January 1997 when a water pipe burst. During the course of the investigation by Anderson's insurer, Allstate Insurance Co., the claims adjusters allegedly focused on issues that could potentially prevent coverage of the claims rather than on investigating the actual damage and pursuing repairs.

Over the next two and one-half years, Anderson alleges that Allstate disregarded evidence that he provided regarding necessary repairs, including videotapes of mold damage. In June 1999, Anderson sued Allstate. The jury awarded him \$484,854 in compensatory damages and \$18 million in punitive damages.

In January 2001, upon appeal by Allstate, a district court upheld the compensatory damages but reduced the punitive damages to five times the compensatory damages. In response to the district court's decision, Allstate appealed both awards to the Ninth Circuit Court of Appeals and Anderson cross-appealed the reduction of punitive damages.

## Opinion

### Issues Concerning Bad Faith/Compensatory Damages

The Ninth Circuit highlights four issues in its review of whether Allstate acted in bad faith concerning Anderson's claim: the adequacy of Allstate's investigation of the claim, the consistency and inflexibility of Allstate's position regarding coverage, an evaluation of Allstate's actions in light of the time-period in which they occurred and the existence of a genuine dispute regarding coverage.

According to the opinion, "[o]ne of the most critical factors in determining the unreasonableness of an insurer's conduct is the adequacy of its investigation of the claim." Although the court writes that Allstate "initially responded in a reasonable manner" by sending an emergency response crew and an independent adjuster, a "pattern of investigation" existed that suggested Allstate was "looking for reasons to deny Anderson's claim rather than to find coverage."

The court also states that a failure to consider evidence supporting coverage coupled with a consistent and inflexible position with the insured can amount to bad faith. Such inflexibility is reflected in Allstate's "refusal to discuss the coverage issues, failure to investigate the cause of the loss, refusal to review additional evidence of loss, and its offer to settle the claim with an expensive appraisal."

Allstate argued in the appeal that its failure to respond to the supplemental claims of mold damage were reasonable in light of the fact that less was known about the treatment of mold at that time. However, according to the opinion, "there was sufficient awareness in the insurance industry concerning the problems of mold to inform Allstate of the inadequacy of a remedy of simply applying an anti-mold solution to moldy sheetrock and then sealing it, as Allstate's adjuster had suggested to Anderson."

The court strengthened its position in upholding the bad faith finding by observing that the evidence showed that Allstate's "inflexible position went beyond a genuine dispute over coverage." Instead of trying to resolve the issue of coverage by investigating the nature of the damage and how it occurred, the court stated that Allstate left the coverage issue "hanging over Anderson's head." Therefore, the jury properly found that the coverage dispute was not genuine, the opinion states.

### Issues Concerning Malice/Punitive Damages

In spite of the support of the jury's finding regarding bad faith and affirmation of compensatory damages, the Ninth Circuit stated in its opinion that "a finding of bad faith does not automatically entitle a plaintiff to punitive damages" and, in this case, the punitive damage award was not supported by substantial evidence.

Of the 15 to 20 facts that, according to Parrish, were presented by the plaintiff in support of punitive damages, the Ninth Circuit mentions Allstate's failure to warn Anderson of the presence of asbestos in his home, refusal to address the mold problem and attempts to

coerce a settlement. Nevertheless, the court states that there is "no substantial evidence that Allstate acted with malice, oppression, or fraud in handling Anderson's claim."

According to the opinion, not only was the potential impact of mold on human health not as clear at the time of Anderson's claim as now, but also some of Allstate's actions were inconsistent with a finding of malice, such as advice it gave to Anderson's contractor to raise his original estimate to meet that of Allstate's estimate. Therefore, the Ninth Circuit reversed the punitive damages award.

For more on the history of this case, please see "Ninth Circuit to Mull Remitted Bad Faith Award in Mold Contamination Case" in the November 2001 issue of COLUMNS-Mold.

Thomas Anderson was represented by Marian M. Johnston of Eisen & Johnston and Stanley R. Parrish of Shepard & Haven, both in Sacramento, Calif.

Allstate was represented at trial by Dennis G. Seley and Claudia J. Robinson of Lewis, D'Amato, Brisbois & Bisgaard in Sacramento, Calif., and on appeal by Christina J. Imre and Benjamin G. Shatz of Crosby, Heafey, Roach & May in Los Angeles.

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Anderson Opinion Ref# MOL-0210-07

Leatherman Opinion Ref# MOL-0210-08

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