

June 11, 2020

Genuine Dispute Summary Judgment Reversed for Abuse of Discretion and Trial of Fact Questions About Expert Opinions

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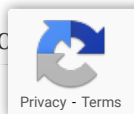
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In *Fadeeff v. State Farm General Ins. Co.* (No. A155691, filed 5/22/20 ord. pub. 6/8/20), a California appeals court held that triable issues of fact and the trial court's failure to address a request for a continuance precluded summary judgment for an insurer under the genuine dispute doctrine.

In *Fadeeff*, the policyholders made a claim to State Farm for smoke damage to their home from the 2015 Valley Fire in Hidden Valley Lake, California. With State Farm's approval, the insureds retained the restoration company, ServPro, to assist with smoke and soot mitigation. State Farm documented smoke and soot on the interior walls, ceilings and carpeting, and on all exterior elevations, including on the deck and handrail. State Farm made a series of payments on the claim totaling about \$50,000.

The insureds then hired a public adjuster and submitted supplemental claims for further dwelling repairs and additional contents replacement, totaling approximately \$75,000. State Farm responded by using its own independent adjuster to investigate, who was neither licensed as an adjuster, nor as a contractor. State Farm also retained forensic consultants for the structure and the HVAC system, but neither the independent adjuster nor the consultants were aware that State Farm had an internal operation guide for the use of third-party experts in handling first party claims, which guidelines were therefore not followed. In addition, the consultants made allegedly superficial inspections, with one attributing smoke and soot damage to other sources of combustion, including the insureds' exterior propane barbecue, an internal wood fireplace and wood stove and candles that had been burned in the living room. None of the consultants asked the insureds when they had last used any of the sources of combustion.

State Farm denied the supplemental claim and in the subsequent bad faith lawsuit, State Farm, relying on its use of experts, moved for summary judgment on the ground that the "genuine dispute" doctrine defeats the bad faith claim where an insurer reasonably relies upon expert opinions in reaching a claim decision. The insureds' opposition was based on declarations from their own adjuster and expert, who opined that the work performed to date had not completely removed soot throughout the structure, or the HVAC system. The



declaration from the insureds' expert also refuted the opinions of State Farm's expert. Plus, the insureds made a request for a continuance under Code of Civil Procedure section 437c(h), which authorizes a court to order a continuance for additional discovery, on affidavits of necessity.

At the hearing on the summary judgment motion, the trial court did not address the request for continuance. The court sustained State Farm's objections to portions of the insureds' declarations and reports, which gutted the insureds' evidence contradicting State Farm's expert, and granted State Farm's motion. On appeal, however, the appeals court found both factual questions and an abuse of discretion by the trial court, mandating reversal.

Regarding the former, the *Fadeeff* court said that the use of experts does not automatically insulate an insurer from bad faith liability under the genuine dispute doctrine. (Citing *Guebara v. Allstate Ins. Co.* (9th Cir. 2001) 237 F.3d 987, 994.) In particular, the *Fadeeff* court said that where the dispute is purely factual, such as differing opinions of experts, whether there was a genuine dispute can only be decided on a case-by-case basis. (Citing *Chateau Chamberay Homeowners Assn. v. Associated International Ins. Co.* (2001) 90 Cal.App.4th 335, 348.) The *Fadeeff* court quoted Chateau Chamberay's list of circumstances where a biased investigation claim should go to jury: (1) the insurer was guilty of misrepresenting the nature of the investigatory proceedings; (2) the insurer's employee's lied during the depositions or to the insured; (3) the insurer dishonestly selected its experts; (4) the insurer's experts were unreasonable; and (5) the insurer failed to conduct a thorough investigation. (Quoting *Chateau Chamberay, supra*, at 348-349.)

The *Fadeeff* court pointed out that the insureds had presented evidence that part of their claim had been denied by State Farm in violation of the California fair claim handling regulations, based on ServPro's work power washing the outside of the structure, which had caused the paint to peel. State Farm had denied that part of the claim on the ground that it, as well as damage to carpets and wall coverings, was not smoke or fire damage, and excluded as wear, tear or deterioration. But the insureds argued that the damage to the exterior caused by power washing was required to be covered under California Code of Regulations, title 10, section 2695.9(a)(1), as "consequential physical damage incurred in making the repair or replacement not otherwise excluded by the policy [which should] be included in the loss." The court also noted the problem of the internal operation guide, and the State Farm independent adjuster's failure to follow it. That and several other inconsistencies lead the *Fadeeff* court to conclude that there were triable issues regarding whether State Farm could have reasonably relied on its experts in denying the supplemental claims.

The *Fadeeff* court also reversed the summary adjudication on punitive damages, finding that State Farm failed to carry its burden to show that the Fadeeffs could not prove that State Farm acted with an absence of malice, oppression or fraud. (Civ. Code, § 3294, subd. (a); § 437c, subd. (f)(1); *Basich v. Allstate Ins. Co.* (2001) 87 Cal.App.4th 1112, 1118.) The *Fadeeff* court found that “The fact that an individual plaintiff may not believe that the people at State Farm ‘wanted to harm you or hurt you intentionally’ does not conclusively answer the question whether State Farm intentionally misrepresented or concealed a material fact, or acted with knowing disregard of the rights of others.” (Citing CACI No. 3946—Punitive Damages.)

More fundamentally, the *Fadeeff* court found that reversal was required in any case, because of the trial court’s failure to address the request for a continuance, either at the hearing or in its ruling. The court stated that whether or not to grant a continuance under section 437c(f) is a matter within the court’s discretion, and is reviewed for abuse of discretion. But the *Fadeeff* court stated that reversal was mandated because a trial court’s failure to exercise discretion is itself an abuse of discretion. (Citing *Kim v. Euromotors West/The Auto Galley* (2007) 149 Cal.App.4th 170, 176.)

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