Filing an Insurance Claim can be Protected Conduct Under Anti-SLAPP Law

You have been probably wondering whether the filing of an insurance claim constitutes prelitigation activity that is protected under the anti-SLAPP statute, right? Well, if you were, you now have an answer: it is a resounding "maybe."

In *People ex rel. Fire Insurance Exchange v. Anapol*, 211 Cal. App. 4th 809 (2012), the California Court of Appeals confirmed that, in certain circumstances, the filing of an insurance claim constitutes prelitigation activity that is protected under the anti-SLAPP statute. While such circumstances are described as the exception, not the rule, they are designed to protect insureds whose legitimate claims for insurance benefits are improperly denied by an insurance company.

The issue ended up before the Court of Appeals after Fire Insurance Exchange and Mid-Century Insurance Company (collectively, "Farmers") filed a *qui tam* action after allegedly uncovering an insurance fraud ring engaged in filing false and inflated claims for smoke and ash damages following several Southern California wildfires. Two attorneys were accused of filing false insurance claims on behalf of Farmers' insureds as part of their role in the fraud ring. The attorneys filed anti-SLAPP motions to strike, asserting that their pursuit of the insurance claims constitute prelitigation conduct protected by their First Amendment right to petition. The trial court denied those motions, and the attorneys sought review of the orders.

In denying the attorneys' anti-SLAPP motions, the trial court specifically relied upon *People ex rel. 20th Century Insurance Co. v. Building Permit Consultants, Inc.*, 86 Cal. App. 4th 280 (2000) (hereinafter "*BPC*") which held that submission of an insurance claim does not constitute protected conduct under the anti-SLAPP law. On appeal, the Court of Appeals addressed "whether *BPC* completely bars all insurance claims from ever constituting prelitigation conduct." While the Court held that *BPC* did not preclude the possibility that the filing of an insurance claim could be protected prelitigation conduct, the alleged acts of the two attorneys were not within the realm of protection.

The acts that the attorneys claimed as protected speech included the filing of allegedly false and fraudulent damage reports and repair estimates on behalf of clients. With their motions to strike, the attorneys filed declarations asserting that the majority of the damage reports were prepared in anticipation of litigation. The Court noted that while the filing of a claim is a necessary prerequisite to litigation, it is also a necessary prerequisite to obtaining performance under an insurance contact. The Court then explained that to grant the filing of a claim anti-SLAPP protection, would require granting anti-SLAPP protection to almost every communication that takes place in a commercial transaction "because human experience alerts us to the possibility that there may be [litigation from] otherwise routine business activity."

However, while warning that such circumstances are the exception, rather than the rule, the Court explained that in certain circumstances, the filing of an insurance claim would constitute protected speech under anti-SLAPP law.

> We can certainly envision circumstances in which an insurance claim is submitted in anticipation of litigation contemplated in good faith and under serious consideration. For example, a claim may be submitted after *informal* negotiations with the insurance company have proven unfruitful, and the insured has already

> decided to bring suit on the policy. In those circumstances, submission of the claim would be nothing more than the satisfaction of the statutory prerequisite for a suit. Similarly, an insured that has already been informed that its claim will be denied may submit the claim in the language of a demand letter, threatening suit if the claim is not paid in full. There, too, submission of the claim would qualify as a protected prelitigation statement in furtherance of the right of petition.

Unfortunately for the attorneys who filed the motions to strike under the anti-SLAPP statute, the Court of Appeals ruled that their alleged conduct did not fall within these exceptions, and their declarations were not sufficient to make a *prima facie* showing that the insurance claims were filed in anticipation of litigation contemplated by the insureds in good faith. Accordingly, while the orders of the trial court were upheld, the door for anti-SLAPP protection for insurance claims was left open by the Court of Appeals.