

BAD FAITH BLOG

# To Repair or Not Repair – That Is the Question

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**SUMMARY:** California appeals court finds insurer breached its duty of good faith and fair dealing when it pursued a subrogation action against a tortfeasor to recover the cost of repairs after the insured had not authorized repairs or pursuit of the subrogation action.

Hibbs v. Allstate Insurance Company. 2011 WL 1485623 (Cal.App. 2 Dist.)

The Hibbs' vehicle, which was insured by Allstate, was damaged when it was struck by Brooks. Hibbs towed the vehicle to a body shop and contacted Allstate. The Hibbs informed Allstate's claims adjuster that they believed the vehicle was a total loss. The Hibbs also told the adjuster that if the vehicle was repaired they would refuse to pick it up from the body shop. When the adjuster contacted the body shop, she was informed by the body shop that Ms. Hibbs had previously authorized the repairs, which were now substantially complete. The total for the repairs was \$6,200. Allstate paid \$5,700 directly to the body shop, which took into account the \$500 deductible, Allstate then eventually recovered \$6,200 from Brook's insurer in a subrogation action. Allstate sent a \$500 check to the Hibbs for the deductible, which they never cashed.

The Hibbs filed a lawsuit against Allstate alleging breach of contract and breach of covenant of good faith and fair dealing. Allstate moved for summary judgment, which was granted.

On appeal, the court found there was a triable issue of fact on the question of whether the Hibbs actually authorized the repairs. There were conflicting facts as to whether Ms. Hibbs knew when she signed an authorization at the body shop that it was an authorization for repair or just an authorization to tear down the front of the vehicle in order to prepare an estimate. Allstate argued that by submitting a claim under the policy the Hibbs impliedly authorized it to proceed with repairs. However, the court found that the Hibbs submitted a claim under the policy in the expectation that the vehicle would be declared a total loss. Even though Allstate elected to repair instead, that did not give it the power to proceed with the repairs without the Hibbs' consent. The Hibbs owned the vehicle, not Allstate.

The appeals court did find, however, that once Allstate elected to repair, the insureds' refusal to authorize repairs relieved Allstate of further obligation under the policy. The policy stated in part: "Allstate will pay for the loss in money, or may repair or replace the damaged . . . property at our option." The policy clearly and unequivocally provided that Allstate had the option to repair. When the insurer chooses the option to repair, the insureds' prevention of the insurer's performance excuses the insurer's obligation under the policy. Therefore, Allstate did not breach the contract. This is true even though the adjuster told Mr. Hibbs he had the "unconditional right" to the repair costs instead of the repaired vehicle. The court found that the adjuster lacked the authority to change the terms of the policy.

However, the Court found there was a triable issue of fact concerning Allstate's good faith in prosecuting its subrogation claim. If the Hibbs did not consent to the repairs, then the body shop was not due any compensation. Thus, payment Allstate made to the body shop was voluntary. To have a right to subrogation the subrogee must not have acted as a volunteer. Therefore, Allstate had no right to subrogation. Prior to settling with Brooks' insurer, Allstate knew the Hibbs were claiming they had not consented to repairs and had warned Allstate not to proceed with subrogation.

The court discounted Allstate's claim that the Hibbs were not prejudiced by a subrogation action because they recovered their deductible. The court determined Brooks would have a set off for any amounts paid to Allstate in subrogation which would be a detriment to the Hibbs in any cause of action they might bring against Brooks. Therefore, the Hibbs were indeed prejudiced by Allstate's subrogation action. The court reversed and remanded for trial on the issue of bad faith.

The lesson in this case is that an insurer, even if given the right under the policy, should proceed with caution in authorizing repairs without the consent of the insured. An insurer should understand that if it plans to pursue a subrogation claim against the tortfeasor for the cost of repair it may expose itself to a bad faith claim from an insured who did not consent to those repairs.