Association of Defense Counsel of Northern California and Nevada

VERITAS

Association of Southern California Defense Counsel

January 4, 2024

Presiding Justice James Richman
Justice Marla Miller
Justice Michael Markman (by designation)
California Court of Appeal
First Appellate District
State of California
350 McAllister Street
San Francisco, CA 94102

Re: Request for publication of decision in *Tornai v. CSAA Ins. Exch.* (December 18, 2023, Case No. A167666)

Honorable Justices,

Pursuant to Rules 8.1105 and 8.1120 of the California Rules of Court, the Association of Defense Counsel of Northern California and Nevada ("ADC-NCN") and the Association of Southern California Defense Counsel ("ASCDC") (together, the "Associations") write jointly to urge the Court to publish its decision in this case.

Interest of the Requesting Organizations

ADC-NCN numbers approximately 700 attorneys primarily engaged in the defense of civil actions. Members represent civil defendants of all stripes, including businesses, individuals, HOAs, schools and municipalities and other public entities. Many of these clients are insurers who, with increasing frequency, encounter situations identical or similar to that presented in *Tornai*. Members have a strong interest in the development of substantive and procedural law in California, and extensive experience with civil matters generally, including issues related to insurance bad faith actions and the arbitration requirements in underinsured motorist ("UIM") claims. ADC-NCN's Nevada members are also interested in the development of California

law because Nevada courts often follow the law and rules adopted in California.

ASCDC is the nation's largest and preeminent regional organization of lawyers who specialize in defending civil actions. It has over 1,100 attorneys in Central and Southern California, among whom are some of the leading trial and appellate lawyers of California's civil defense bar. The ASCDC is actively involved in assisting courts on issues of interest to its members. In addition to representation in appellate matters, the ASCDC provides its members with professional fellowship, specialized continuing legal education, representation in legislative matters, and multifaceted support, including a forum for the exchange of information and ideas.

Although ASCDC and ADC-NCN are separate organizations, they have some common members and coordinate from time to time on matters of shared interest, such as this letter. Together and separately, they have appeared as *amicus curiae* in many cases before both the California Supreme Court and Courts of Appeal across the state to express the interests of their members and their members' clients, a broad cross-section of California businesses and organizations.

No party has paid for or drafted this letter.

Why the Court should order publication

In *Tornai* the Court encountered a situation which has become common in recent years: a plaintiff suing his or her auto insurance carrier for allegedly negotiating a UIM (or uninsured motorist) claim in bad faith. What typically happens, as here, is that the plaintiff regards the insurer's offer on the UIM claim as "lowballing," and immediately files a bad faith and breach of contract action without attempting to adjudicate the liability of and damages caused by the other driver – the substantive merits of the UIM claim – through arbitration as required by statute. (Ins. Code, § 11580.2.)

Plaintiffs typically make two arguments in such actions. First, the plaintiff alleges that the bad faith action does not involve a dispute over the benefits due under the UIM coverage, and thus the arbitration requirements

do not apply. Second, the plaintiff alleges that the insurer, by acting in bad faith in adjusting the UIM claim (the "lowballing" argument), has forfeited its right to compel arbitration. These allegations are made as a "backstop" against the insurer's expected petition to compel arbitration of the UIM claim and stay the civil action.

Almost three years ago, this Court held that plaintiffs cannot avoid arbitration with such tactics. In *McIsaac v. Foremost Ins. Co. Grand Rapids, Mich.* (2021) 64 Cal.App.5th 418, a complaint against an insurer for bad faith also alleged breach of the contract for failure to pay the proper UIM benefits. The insurer filed a petition to compel arbitration and stay the action, which the trial court denied. This Court reversed, explaining, at pp. 424-425, that where the civil action turns on a dispute over the amount owed, the dispute is still subject to arbitration.

This case correctly followed *McIsaac*. However, the Court's opinion here merits publication under several factors:

• The decision "[i]nvolves a legal issue of continuing public interest." (Cal. Rules of Court, rule 8.1105(c)(6).) Although this Court's opinion in *McIsaac* was authoritative, it was only one case. Since then, insurance bad faith plaintiffs have continued to ignore its holding, contending that a mere allegation of bad faith in the adjustment of a claim vitiates the UIM arbitration clause in every auto policy and nullifies the requirements of section 11580.2.[1]

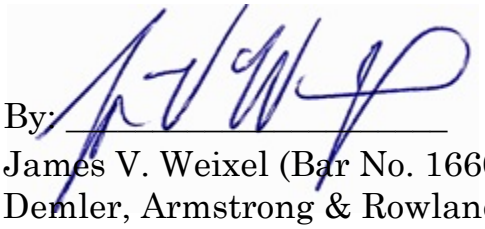
• The decision "[m]akes a significant contribution to legal literature by reviewing ... the development of a common law rule" (Cal. Rules of Court, rule 8.1105(c)(7)), by extending the holding in *McIsaac* to present and future cases in which plaintiffs have challenged the arbitration requirement applicable to UIM claims on the same bases as those found unmeritorious in that decision.

[1] It is worth noting that undersigned counsel and his firm have had several cases involving the same issues – some of which were brought by the same counsel as in *Tornai,* and one of those having been presided over by the same trial judge – in which the same arguments were made. This repeating pattern calls out for the Court's guidance through published case law.

• The decision "reaffirms a principle of law not applied in a recently reported decision." (Cal. Rules of Court, rule 8.1105(c)(8).) It has now been almost three years since *McIsaac* was decided, yet the same issues are surfacing even more frequently. The Court's publication of its opinion in *Tornai* will reaffirm the holding of *McIsaac* and will give litigants, counsel, and judges additional direction in the prosecution of bad faith actions under similar circumstances.

For these reasons, the Associations respectfully request that this Court order publication of its opinion in *Tornai*.

Respectfully submitted,



By: _____

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PROOF OF SERVICE

Tornai v. CSAA Insurance Exchange (No. A167666)

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 101 Montgomery Street, Suite 1800, San Francisco, CA 94104; email *bon@darlaw.com*. On the date below, I served the within document(s):

LETTER REQUESTING PUBLICATION

☒ VIA E-SERVICE (TrueFiling) on the recipients designated on the electronic service list generated by the TrueFiling system.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on January 4, 2024 at San Francisco, California.

/s/ *Michelle Bonilla*
Michelle Bonilla