

## Millions Awarded in Insurance Case

*Daily Journal*, February 29, 2008, p 3.

**By Courtney Fielding**

Daily Journal Staff Writer

LOS ANGELES - A Superior Court jury has returned a special verdict of fraud against Mercury Insurance, awarding more than \$3 million in damages to a pair of Russian immigrants denied payout after their print shop was flooded by a burst pipe.

Mark Volper and Boris Smorodinski claimed their Sherman Oaks business suffered a slow "death by asphyxiation" while Mercury repeatedly denied their claims and ignored pleading letters for help.

The unanimous decision came last week after jurors were shown internal training guides instructing Mercury adjustors to low-ball customers, drag out their claims and remind them they could be found at fault in a trial. *Amerigraphics Inc. v. Mercury Casulty Company* BC331524 (L.A. Super. Ct., Feb. 21, 2008).

Potential jurors who said they had problems with any insurance agency were removed by the judge. But in an unusual twist, five people who were selected for the jury had policies with Mercury.

Despite potential hazards for both sides, neither objected to the their placement on the panel.

"Other plaintiffs' lawyers thought I was insane. Everybody that I've talked to told me, 'Jim, you are going to get sued for malpractice,'" said the plaintiffs' lawyer James Osborne, of Osborne and Associates.

Osborne acknowledged that including on the jury five seemingly satisfied Mercury customers capable of realizing their rates could rise as a result of a fat payout amounted to a big gamble.

"But I didn't have a concern in the world," he said. "I believed when these people [the jurors] saw how other insureds were treated, they would be blown away."

The more than four-year dispute between the 1980s-era Russian immigrants and their insurance company began in 2003, when a water pipe from an upstairs business burst and flooded their downstairs shop, Amerigraphics.

The flood wreaked havoc on the upscale printing and design store. All electrical equipment was rendered unusable, the floors and walls were soaked, and the business had to close temporarily after mold damage was found, Volper said.

Volper and Smorodinski received \$73,000 over the course of a year but wrote pleading letters stating that the actual damages would require at least twice that amount. And their printing equipment had not been returned by the company Mercury sent it to for repair, they said.

Within a year, the shop closed down. The men didn't receive any more money.

Frustrated, Volper and Smorodinski consulted the independent broker who sold them their policy. He gave them some unexpected news: In addition to the money they were still owed, their policy held a clause for a year's worth of normal operating expenses, which would have paid for salaries, utilities and rent. It might have been enough to keep their business afloat.

After another year of unreturned letters to the CEO, the men filed suit for bad faith.

"It was like fighting with a wall. Sooner or later, you have to stop banging your head," Volper said.

Although Osborne said proving bad faith was rather cut and dry, he believes getting a special-fraud verdict was sealed by one document, which he and co-counsel Todd Stevenson nicknamed "Evidence M." It was an internal training document instructing adjusters to "never use your top dollar to begin negotiations," to "use time as your ally" and to "remind claimants that a judge or jury would find them at comparative fault" if they sued.

Osborne has not publicly released the document, which was shown to the jurors. He said it is currently the source of dispute with defense counsel.

Mercury attorney Thomas Dowling, of Hager & Dowling, did not return repeated calls for comment on the document and the jury selection process.

Marina Del Ray-based jury consultant Kathy Kellerman said insurance companies always run the risk of jurors placing themselves in the shoes of a customer who was allegedly wronged or harbors secret hostility toward the auto and property insurance company.

"Anti-corporate sentiment is stronger when it comes to insurance companies," Kellerman said. "What you find is a definite group of jurors that dislike insurance companies more than any other companies."

Still, she said, "There is more to a person than who their insurance carrier is."

But Kellerman questioned why the judge didn't automatically dismiss the jurors insured by Mercury.

"It's highly unusual," she said. "I'm just really surprised the judge didn't excuse them outright for having a direct relationship with one of the parties."

Osborne said Judge Mary Ann Murphy "bent over backwards" for Mercury by allowing them to keep their own clients on the jury.

But in the end, he said, the decision actually worked in his favor.

"She's bulletproofed the case for appeal," he said.