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PERSPECTIVE

Small, but notable, updates to insurance law in 2014

By Michael A.S. Newman

Change in California insurance law tends to oscillate between two extremes, incremental and dramatic — incremental being the rule, dramatic the exception. Like earthquakes, dramatic changes are memorable, their years sticking in the memory (or at least in the collective memory of the insurance bar).

For example, 1988 saw the advent of Proposition 103, which changed the face of insurance law, making the California insurance commissioner an elected position, and requiring prior approval for insurers' changes to property and casualty insurance rates.

Like Sherlock Holmes' dog that didn't bark, the biggest news for California insurance law in 2014 was the law that didn't pass — Proposition 45. Prop. 45 would have worked changes to health insurance similar to those Prop. 103 wrought for property and casualty. To a lesser extent, Proposition 46, an initiative to increase the cap on noneconomic damages in medical malpractice cases, would have had repercussions in the insurance world, putting upward pressure on medical malpractice insurance rates. But it too did not pass.

In short, the year 2014 might have been a dramatic year, especially in areas of insurance touching on medical care. But in the end, we had an incremental year, one whose legal developments were dominated by case law.

Certain themes emerge from the published decisions. As always, the primary focus of insurance case law was on the duties insurers have towards their insureds. In *Maslo v. Ameriprise Auto & Home Insurance*, 227 Cal. App. 4th 626 (2014), for example, the court ruled, among other things, that an auto insurer has the same duty to act in good faith where an insured is seeking uninsured motorist benefits as in any other insurance context. The court also addressed the respective duties of concurrent insurers; in *Scottsdale Indemnity Company v. National Continental Insurance Company*, 229 Cal. App. 4th 1166 (2014), the court determined that, where two different insurers afforded liability insurance to the same motor vehicle, the policy that specifically describes the vehicle was primary, and the other secondary.

California courts clarified that the insurer is only bound by what is in the unambiguous insurance policy. Thus, in *Elliot v. Geico Indemnity Co.*, 2014 DJDAR 15495 (Nov. 19, 2014), where the insurer provided additional forms to the insured that, would, if endorsed, have modified the coverage of the policy, the insured who failed to endorse the additional form could not invoke its terms.

In 2014, we learned that insurers are not the only ones with duties towards insureds. The Department of Insurance also owes duties. In *Ellena v. Department of Insurance*, 230 Cal. App. 4th 198 (2014), the Court of Appeal determined that the Department of Insurance itself is duty-bound to review group disability policy forms submitted by insurers, and can be called to account for failing to do so.

Insurance law is fundamentally about insurance contracts, and much of the case law of 2014 focused on interpreting policy language. For example, under a commercial general liability policy, a food truck is considered "mobile equipment" (i.e., a vehicle used for a primary purpose other than transporting persons or goods), triggering coverage under a policy that otherwise excludes autos. *American States Insurance Company v. Travelers Property Casualty Company of America*, 223 Cal. App. 4th 495 (2014). By contrast, the 9th U.S. Circuit Court of Appeals told us that a good Samaritan's act of pulling an injured passenger out of a wrecked vehicle constituted "use" of that vehicle, triggering coverage under the good Samaritan's own auto policy. *Encompass Insurance Company v. Coast National Insurance Company*, 764 F.3d 981 (9th Cir. 2014).

In *Hartford Casualty Insurance v. Swift Distribution Inc.*, 59 Cal. 4th 277 (2014), the state Supreme Court dealt with the question of what constitutes "disparagement" such as to trigger coverage under a commercial general liability policy. The court held that a claim for disparagement requires a plaintiff to allege "a false or misleading statement that (1) specifically refers to the plaintiff's product or business and (2) clearly derogates that product or business."

Another important theme explored by 2014 cases was the insurer's duty to defend. In *Upasani v. State Farm General Insurance Company*, 227 Cal. App. 4th 509 (2014), the court addressed the question of what constitutes an "accident" under a homeowners policy, ruling that the act of conspiring to commit kidnapping did not constitute accidental conduct, and thus did not trigger the insurer's duty to defend the insured who had been accused of such conduct. In another case, the Court of Appeal held that where an insurer made its coverage determination based on the wrong year's policy declaration, and later admitted it had a duty to defend, the jury could find the insurer to have a duty to defend, and a directed verdict absolving the insurer was improper. *North Counties Engineering Inc. v. State Farm General Insurance Company*, 224 Cal. App. 4th 902 (2014).

The Court of Appeal also addressed how to interpret ambiguous policy terms. Under California law, if a court determines that a policy term is ambiguous, its meaning is resolved in favor of the objectively reasonable expectations of the insured. In *Transport Insurance Company v. Superior Court of Los Angeles County*, 222 Cal. App. 4th 1216 (2014), the court dealt with an ancillary question: Are the objectively reasonable expectations of an additional insured always identical to those of the named insured? The Court of Appeal ruled that they are not; the reasonable expectations of an additional insured under the policy may sometimes differ from the reasonable expectations of the named insured, requiring separate analysis.

Also arising in 2014 was the perennial topic of rescission — i.e., where an insurance company declares a policy void because of material misstatements made in the insurance application. In *Douglas v. Fidelity National Insurance Co.*, 229 Cal. App. 4th 392 (2014), the court affirmed that if an insurance application is prepared by an agent of the insured, misstatements on the application are imputed to the insured, permitting rescission of the insurance by the insurer where the applicant makes a material misrepresentation.

Consistent with the increasing number of employment cases being filed in California, the extent and nature of coverage for employment-related insurance claims was the topic of several cases. In *Jon Davler Inc. v. Arch Insurance Company*, 229 Cal. App. 4th 1025 (2014), female employees sued their employer, alleging that their supervisor had forced them to submit to a humiliating body search. The employer tendered the claim to its commercial general liability carrier. The Court of Appeal affirmed that the claim was not covered because it fell under the commercial general liability policy's exclusion for "[e]mployment-related practices, polices, acts or omissions." However terrible the acts of the supervisor were, the court determined, they were "employment-related," and therefore the insurer was not required to provide a defense.

By contrast, where an employee massage therapist allegedly sexually assaulted clients, the Court of Appeal ruled this did not constitute acts "within the course and scope of employment," and therefore the carrier was under no obligation to provide a defense. *Baek v. Continental Casualty Company,* 230 Cal. App. 4th 356 (2014).

Finally, in one case, ambiguity over employment status itself prevented quick resolution of the question of coverage. In *Global Hawk Insurance Company v. Le*, 225 Cal. App. 4th 593 (2014), an insurer refused to defend a trucking company in a lawsuit brought by a driver because, the insurer maintained, the driver was an employee, and thus triggered an exclusion from coverage — but the Court of Appeal noted that the worker could well be an independent contractor under California's common law standard, and thus sent the issue to the jury for determination.

Had the electorate so decided, 2014 might have seen sudden and dramatic changes to California's insurance laws, particularly in areas touching medical care. But the voters resisted such change, perhaps fatigued from the other seismic changes to health care law over the last several years. Instead, the year in California insurance law witnessed the millennia-old method of common law evolution, a process that carries the ball of jurisprudence down the field a few inches at a time.

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