Appellate Court: Consumers Have No Standing to Challenge Coverage Under CLRA

Posted: August 27, 2007, Bess Shapiro, Insurance Telegraph

In an interesting, and certain to be controversial ruling, the Second Appellate District Court ruled that an insurance product does not qualify as either a good or a service under the Consumer Legal Remedies Act. The decision hands a victory to the insurance industry by cutting off at least one avenue of litigation favored by consumers.

The decision, if it stands, has far reaching implications for consumers and the insurance industry. It also dovetails with an initiative effort by businesses, including insurance companies, to reform the practice of class action lawsuits.

How many consumers might have sued under the CLRA is unknown. But consumer groups say that policy holders have one less tool to use in the courts if the agency responsible for enforcing carrier conduct falls down on the job. The industry argues that a policy dispute has no place within the context of the CLRA, and sees itself as a frequent target of class action suits under consumer protection laws.

According to *Fairbanks v. Superior Ct*., Pauline Fairbanks purchased a product called a Farmers Flexible Premium Universal Life Policy from Farmers New World Life Insurance Company. Fairbanks said she was told that the policy would last indefinitely if she paid a stated premium amount. In reality, the premium was not sufficient to maintain the policy. Fairbanks, in a class action, sued Farmers in superior court for causes of action for unfair and deceptive business practices under the CLRA. Farmers moved for dismissal of the action arguing that an insurance product is not a good or service. The trial court accepted the argument and Fairbanks appealed.

In its decision backing up Farmers, the appellate court outlined the provisions of the CLRA and discussed the definition of a good and a service under CLRA. The decision considered whether the generally applicable provisions of the CLRA override the insurance specific provisions of the Unfair Insurance Practices Act. The CLRA allows for a private right of action while the UIPA only allows for administrative enforcement.

The court opined that insurance could not be reasonably construed as either a good or a service. The insurance code defines insurance as a contract where one undertakes to indemnify another against loss, damage, or liability. The decision reads in pertinent part:

“An insurance contract is not something akin to a haircut, a plumbing repair, or a two-year warranty on a microwave oven—it is simply an agreement to pay if an identifiable event occurs.”

Farmers attorneys declined to comment on the specifics of the case because it is still pending in the courts. Peter Mason, attorney with Fulbright and Jaworski, attorney for Farmers, says that from a general perspective the decision was the correct one.

“We believe there are limits to the Consumer Legal Remedies Act, and the court correctly applied those limits in determining that the CLRA does not apply to insurance,” Mason says.

Mason adds that the other side is planning to petition the California Supreme Court for review. Attorneys for the plaintiffs did not return calls for comment.

The industry was still absorbing the ramifications of the decision. Sam Sorich, president of the Association of California Insurance Companies, says insurance could be considered a good or a service in some contexts, but the Fairbanks case looks at the issue within the limited context of the California Legal Remedies Act.

“In that context, it is clear from the language of the CLRA and the Act's legislative history that the Legislature did not intend for insurance to be within the scope of the CLRA. The decision is very well reasoned,” Sorich says.

Consumer groups who have been watching the case carefully say the decision is a travesty and should not be let go without a challenge. Doug Heller, executive director of the Foundation for Taxpayer and Consumer Rights, says the convoluted legal reasoning behind the decision is just part and parcel of the industry’s attempt to deprive consumers of their rights.

“If insurance isn’t a good or a service, what is it?” Heller says. “If it has no standing as a consumer product then consumers have no standing to hold companies accountable. The court is using semantics to create a legal fiction.”

It’s not known whether the plaintiff attempted to remedy the situation under the insurance code, but according to Heller, the CLRA can only be invoked after the company has been given a chance to fix the problem.

Heller says there has been a vicious attempt by the insurance industry to deprive consumers of class action tools. Besides challenging in court the right of consumers to sue under consumer protection laws, the industry has, over the years, tried to weaken the ability of consumers to file class action lawsuits.

The Civil Justice Association of California is considering putting an initiative on the June 2008 ballot that would reform the class action process, says John Sullivan, president of CJAC. The initiative is only at the first stage, awaiting a title and summary from the attorney general.

The CJAC has several large insurance companies on its board including State Farm Insurance Company and AIG. But other companies also sit on the board such as Intel. Sullivan says all businesses are victimized by the abuse of class action lawsuits.

“We’re looking for some clarity and reasonableness. There is no one place where judges can go for clarity of the process and rules,” Sullivan says, adding that the CJAC is not trying to rid the system of class action lawsuits or even weaken them.

“There is a confusion and imbalance that favors consumers,” Sullivan says. “We think it should be equal,”

He points out that the certification process is one-sided. If a judge won’t certify a class action suit, the plaintiff can challenge the decision. If a class action is certified the defendant does not have the opportunity to challenge it.