UP Weighs in for policyholders in CA Supreme Court

Briefing Begins in Fairbanks

Can a consumer sue an insurance company under the Consumer Legal Remedies Act? The court of appeals says no, but the California Supreme Court will deliver the final word. The plaintiffs have filed their opening brief, and amicus briefs will be filed, likely on both sides, within the next few months.
The Supreme Court agreed to hear Fairbanks v. Superior Ct. late last year. It's one of the most anticipated cases before the Supreme Court and, legal experts say, the fact that the Supreme Court agreed to hear it is a testament to its importance. If the ruling is upheld, consumer groups say that it eliminates a significant legal remedy for consumers, especially class actions. Insurance carriers, a frequent target of class action suits, clearly agree with the appellate court's reasoning Insurance Telegraph, August 27, 2007). But while the issue is before the Supreme Court, the appellate ruling is not citable.
As it goes, 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.
In its decision backing up Farmers, the Second Appellate District Court outlined the provisions of the CLRA and discussed the definitions 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." In their opening brie, petitioners Pauline Fairbanks and Michael Cobb argue that the California Supreme Court has identified insurance as a service in prior decisions. Likewise, the Legislature, the dictionary, and even Farmers itself in communications have identified insurance as a service. In addition, just because a product is regulated by a particular agency, does not mean that product is exempt from consumer protection laws, the plaintiffs contend.

Fairbanks also makes the argument that an insurance policy is not an instrument that provides mere indemnity or payment in the event of a loss. Insurance policies tend to include more services, much in the same that way that credit cards and banks do. The plaintiffs cite case law to substantiate these findings. The brief reads in pertinent part:

"[I]nsurance policies offer consumers many services beyond the contracts of indemnity that are the defining elements of those policies. The bundles of services that are insurance policies and specifically Farmers universal life insurance policies) fall within the ambit of services under the CLRA, therefore, not only because the provision of insurance as such is a service but also because they provide a whole range of other related services to the policyholder."

The brief gives examples of these services including annual reports, guidance on how to adjust policies to meet changing needs, advice on when policy holders should change premium payments, and continued guidance from their insurance agents over the life of the policy.

The Foundation for Taxpayer and Consumer Rights is still deciding whether it's going to file an amicus brief, but considers the issue to be of paramount importance.

Amy Bach, executive director for United Policy holders, says her group is filing an amicus brief in support of the plaintiffs in the case. A letter has already been filed in support of the petitions brief.

"There's been a lot of uncertainty in the law as to whether the CLRA covers insurance practices. Some courts will apply it and others won't. What we need is some guidance from the Supreme Court," says Kim Card, a pro-bono attorney preparing the brief on behalf of United Policyholders. Card points out that it has become more prevalent for insurance products to be included when consumers purchase other goods and services. This includes the rental of facilities or the purchase of an appliance.

"If you rent a facility for a birthday party, they are either required to provide insurance or you are offered insurance. The kinder gym is covered by the CLRA, but the insurance transaction is not," Card says.

Peter Mason, an attorney with Fulbright & Jaworski LLP and representing Farmers, says he will not speculate on the impact should the court overturn the appellate court ruling. "We don't really look at this in terms of being favorable to the industry. It's a question of whether it's the right application of the law, which obviously we think it is," Mason says.