California Supreme Court Says "No" to Insureds Trying to Recover Under California's Consumer Legal Remedies Act

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Fairbanks v. Superior Court, __ Cal. 4th __, 2009 WL 1035264 (April 20, 2009).

California has long been known to insurance bad faith practitioners for its consumer-friendly insurance bad faith laws. But seemingly not content with their common law bad faith remedies, bad faith plaintiffs' lawyers have periodically attempted to sue insurers for claims based on California's Consumers Legal Remedies Act (Cal. Civ. Code sections 1750 *et seq*.) (the "CLRA"). The advantages in doing so arguably include a slightly different definition of wrongful conduct and an independent basis on which to seek an award of attorneys' fees. Regardless, the issue is now moot: On April 20, 2009, the California Supreme Court issued its decision in *Fairbanks v. Superior Court*, __ Cal. 4th __, 2009 WL 1035264 (April 20, 2009). There, the Court definitively ruled that the sale of life insurance is not a service that is subject to the CLRA's remedial provisions.

This was not the first time the issue had been discussed. In *Civil Service Employees Insurance Co. v. Superior Court*, 22 Cal. 3d 362, 376 (1978), the California Supreme Court essentially said the same thing, but did so in *dicta*. Now the California Supreme Court has made the prior *dicta* its holding. The Court's analysis was fairly simple. It noted that the CLRA's definition of "services" was sufficiently specific and unambiguous so as to exclude life insurance: "An insurer's contractual obligation to pay money under a life insurance policy is not work or labor, nor is it related to the sale of repair of any tangible chattel. Accordingly, . . . the life insurance policies at issue here are not services as defined in the Consumers Legal Remedies Act." Although the Court stated that its conclusion was based on its interpretation of the words of the statute, it nonetheless then proceeded to analyze the issue by way of the CLRA's statutory history, and a comparison of the CRLA with other states' similar laws, and came to the same conclusion.

Where does this leave plaintiffs pursuing recoveries under the CRLA? First, it is technically possible that plaintiffs could argue that while insurance is not a "service," it is a "good." (The CLRA applies to both goods and services.) However, at least in *dicta*, the California Supreme Court seemed to close that door: "Because life insurance is not a 'tangible chattel,' it is not a 'good' as that term is defined in the Consumers Legal Remedies Act." Second, the Court made clear that its holding only applies to *life* insurance, and not necessarily to other lines of insurance. (Note that under the California Insurance Code, disability insurance is not life insurance. *See* Cal. Ins. Code section 106.) However, the reasoning of the Court would seem to apply at least to all life, health and disability insurance-type policies, if not to all insurance in general. Certainly it seems very unlikely that California trial courts (or federal district courts) would reach a contrary conclusion on their own, absent further guidance on the issue from a California Court of Appeal. Thus, in this author's opinion, for all practical purposes, the California Supreme Court has shut the door on the "alternative bad faith" theory of statutory recovery under California's Consumer Legal Remedies Act.