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California Insurers Owe No Duty to Disclose Alternate Pricing Options to Insureds

Author: Joanna S. McCallum

In *Levine v. Blue Shield of California*, No. D056578, __ Cal. App. 4th __, 2010 Cal. App. LEXIS 1893 (Nov. 5, 2010), the Fourth District Court of Appeal, Division One, issued an important published decision that limits the scope of an insurer's duties to inform an insured of various ways that coverage could be structured to obtain a lower rate. The court held that "Blue Shield did not owe the Levines a common law duty to disclose how they could have structured their health coverage so as to lower their health care premiums." *Levine*, 2010 Cal. App. LEXIS 1893, at *28.

Levine was a putative class action against Blue Shield of California, which was represented by Manatt, Phelps & Phillips, LLP. Mr. Levine had obtained health care coverage for himself and his two minor sons, which Blue Shield issued as separate plans. When Mr. Levine got married, Mrs. Levine applied to be added to his plan, and Blue Shield issued the coverage. Later, Mr. Levine called the company to inquire about a rate increase, and he learned during the course of his inquiry that his monthly rates could have been lower had his younger wife been designated as the primary insured and had his minor sons been included on a family policy, rather than having their own individual plans. The Levines sued, claiming that Blue Shield engaged in fraudulent concealment, unfair competition and negligent misrepresentation in not disclosing facts regarding the lower premiums that Blue Shield was willing to accept for the coverage.

The plaintiffs alleged that Blue Shield owed them a duty to disclose the possibility of lower rates under both the implied covenant of good faith and fair dealing and under Insurance Code Section 332, a statutory provision that requires parties to an insurance contract to disclose to each other all facts material to the contract.

The Court of Appeal affirmed the trial court's sustaining of Blue Shield's demurrers to the complaint. The court held that Blue Shield owed no duty to its members – either prospective members or current members – to disclose pricing options for health care coverage. First, the court confirmed that California law does not impose on insurers any common-law duty of disclosure of pricing, as this information does not impact the terms of the insurance contract or the scope of the coverage provided. As the court put it, "the Levines claim that Blue Shield was required to

Practice Area Links

- Insurance

disclose to them the lowest price that Blue Shield was willing to accept for the particular health care coverage that the Levines requested." *Levine*, 2010 Cal. App. LEXIS 1893, at *14. The court rejected the Levines' argument that the implied covenant of good faith and fair dealing required such disclosure. (The Levines had initially alleged a separate cause of action for breach of the implied covenant of good faith and fair dealing, but had informed the trial court that they did not oppose Blue Shield's demurrer to that claim.) The court recognized that "the California law that is most on point is to the contrary," *id.* at *15, relying on *California Service Station & Auto. Repair Ass'n v. American Home Assurance Co.*, 62 Cal. App. 4th 1166 (1998), a case involving similar allegations that a workers' compensation insurer owed its insured a duty to disclose the factors on which it based its dividend calculations. That court had noted that the pricing of the policies had nothing to do with the coverage provided under the policies. The *Levine* court quoted the following passage from *California Service Station*:

There is no duty of ordinary care to disclose pricing information during arm's-length contract negotiations. If a purchaser wishes to go forward without final agreement on pricing structure, the purchaser takes the risk that the final negotiated price may be higher than expected. There is also no special duty in the relationship between an insurer and a potential insured. The relationship between an insurer and a prospective insured is not a fiduciary relationship. [A]n insured person's initial decision to obtain insurance and the corresponding decision of an insurer to offer coverage remain, at the inception of the contract at least, an arm's[-]length transaction to be governed by traditional standards of freedom to contract.

Levine, 2010 Cal. App. LEXIS 1893, at *18 (citation and internal quotation marks omitted). The *Levine* court acknowledged an insurer's obligations of disclosure regarding coverage, but held that this duty did not extend to information about prices. Thus, the court echoed the *California Service Station* decision, holding that "a person's initial decision to obtain insurance and an insurer's decision to offer coverage generally should be governed by traditional standards of freedom to contract." *Id.* at *19-*20. Further, the court stated that it was aware of no authority "that would support the proposition that a court may order an insurer to disclose the lowest price that the insurer is willing to accept in exchange for providing coverage." *Id.* at *20.

The court rejected the Levines' argument that since Mr. Levine already had Blue Shield coverage at the time of his wife's application, the negotiations were not truly "arm's-length" and Blue Shield owed him a special duty inherent in the existing relationship between insurer and insured. Again, the court held that such duties related only to coverage under the plan, not to pricing. *See Levine*, 2010 Cal. App. LEXIS 1893, at *24-*25 ("'an insurer does not stand in a true fiduciary relationship with an insured, and . . . courts have imposed "special obligations" on insurers only where those obligations foster the unique purposes of an insurance contract, namely, bringing an insured peace of mind and security from loss'") (quoting *Love v. Fire Insurance Exchange*, 221 Cal. App. 3d 1136, 1147-48 (1990)). Thus, "[t]he amount of money that an insurer is willing to accept in exchange for coverage is not information

that implicates the special relationship between an insurer and its insured, because it does not relate to coverage or the processing of claims." *Id.* at *25.

The court also refused to find a statutory duty of disclosure of potentially lower rates under Insurance Code Section 332, which requires parties to an insurance contract to disclose to each other "all facts within his knowledge which are or which he believes to be material to the contract." The court assumed, only for the purposes of its opinion, that the Insurance Code section could apply to Blue Shield, which is not an insurer but rather a health care service plan regulated under a different statutory scheme. The court observed that Section 332 had been in existence for over 135 years, yet it had never been interpreted to require an insurer to disclose to an insured that the insurer would be willing to accept less money than initially quoted for the coverage sought. The statute only required disclosure of information material to the contract, which the court interpreted to mean material to the coverage under the contract; it "does not require the parties to an insurance contract to make available all information that may be material to the other *party*." *Levine*, 2010 Cal. App. LEXIS 1893, at *32 (emphasis in original).

Based on its underlying finding that Blue Shield did not owe the plaintiffs the duty they alleged, the court held that all of plaintiffs' claims were precluded.

Levine is an important case for insurers and health plans. Nothing in the opinion is limited to the health care context, and in fact the case law the court relied upon and Insurance Code Section 332 clearly apply to other types of coverage. Thus, *Levine* should protect insurers and health plans against suits based on alleged nondisclosure of information about alternative pricing structures or rate options – both as to prospective insureds or members, as well as to those with whom the insurer or plan has a preexisting relationship.