NOTES ON ORAL ARGUMENTS BEFORE THE CALIFORNIA SUPREME COURT ON APPLICABILITY OF THE CLRA TO "INSURANCE"

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This past Monday, the California Supreme Court heard oral argument on the issue of whether California's Consumer Legal Remedies Act (CLRA) applies to "insurance." As discussed in previous posts, the Fairbanks decision, when it was decided by the Second Appellate District in the fall of 2007, was a significant decision to the insurance industry in that it definitively settled the question of whether lawsuits could be brought against insurance companies under this body of statutory law.

Since the passage of Proposition 64, CLRA claims appear to have become used more aggressively by the plaintiff's bar due to the passage of Proposition 64 that imposed a new injury-in-fact standing requirement to bring unfair business practice challenges under the Unfair Competition Act (the "UCL"), Cal. Bus. & Prof. Code sections 17200. Given a plaintiff bringing such a challenge against a company must now be injured under either the UCL or the CLRA, plaintiffs are now tacking on CLRA claims as well to take advantage of the broader remedies provided under that statute.

At the core of the case is the issue of whether "insurance" is a "good" or "service," which are regulated by the CLRA. For notes from the oral argument, the UCL Practitioner has what appears to be a fairly comprehensive (if not, somewhat plaintiff-biased) notes from Harvey Rosenfield at the Consumer Watchdog. The link is here.

Because the notes include some commentary that are pro-plaintiff, I include a couple of defense-oriented counter-comments

First, Harvey notes that "it seemed to [him] that the legislative history and the 'liberal construction' mandate together would dictate that the CLRA applies."

As the California Supreme Court noted, however, the CLRA appeared to have been based upon a proposed model act, which specifically included "insurance" within its definition of "service." Its exclusion from the meaning of "service" under the CLRA would appear to be demonstrable legislative intent of excluding "insurance" from the reach of the CLRA.

Having had to litigate this issue numerous times, what has always troubled me about this argument is the definitions of "goods" and 'services" under the CLRA. They do not readily lend themselves to an interpretation to include "insurance." Those definitions are as follows:

(a) "Goods" means tangible chattels bought or leased for use primarily for personal, family or household purposes, including certificates or coupons exchangeable for these goods, and including goods which, at the time of the sale or subsequently, are to be so affixed to real property as to become a real property, whether or not severable therefrom.

(b) "Services" means work, labor, and services for other than a commercial or business use, including services furnished in connection with the sale or repair of goods.

Cal. Civ. Code § 1761

"Insurance" does not easily fit within the definitions of either "goods" or "services." In light of the model act, which specifically included "insurance", it would have seemed incumbent upon the legislature to make its intent clearer under the CLRA if it truly intended to include "insurance" as a regulated "service." The absence of that clear statement is a strong indication that it had no such intent.

Second, Harvey posits the question, "[D]on't insurance companies and their agents and brokers provide a variety of services in connection with the sale of insurance policies?" Therefore, since services are provided in connection with the sale of insurance, should it not be regulated by the CLRA?

This is an interesting question, but I think is best answered with another question. By giving the meaning of "service" as expansive a meaning as suggested by Harvey, it would seem that the sale of any kind of item (that would not typically be considered a good or service) could come within the ambit of the CLRA, which begs the question, "Why is the CLRA limited to 'goods' or 'services' in the first place?" The legislature obviously intended to mean something by using these words.

Finally, Harvey notes that "the Court of Appeal's hostility toward dual, private and public enforcement mechanisms – got almost no notice" in oral argument. (At least, I think that is what he meant to say. If I am wrong, I am sure that I will hear about it.)

This argument is also interesting since insurers are one of the most heavily regulated entities in California. In addition to this regulatory oversight (and the penalties and other disciplinary actions that the Commissioner can (and, because he is an elected offical, often) impose), the last time I checked, insurers are still subject to the not so insubstantial protection provided by California's Unfair Competition Act, as well as common law contract and tort claims. As such, the court of appeal, when it dispensed with this argument, likley felt that there did exist both "private and public enforcement mechanisms."

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