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Foreword

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Symposium: California Insurance Law

Foreword

With profound pleasure I introduce the *Pacific Law Journal's* Insurance Law Symposium. Over the past twenty years, as a Justice on the California Supreme Court, I have witnessed the swelling volume of insurance litigation, which has been the product of the increasing complexities of a society that creates the risks that insurance must cover. At this point I believe the insurance industry faces a dual obligation and opportunity. Its first obligation is to undertake the simplification of policies and thereby avoid the confusion of the insured and the heavy burden of interpretation placed upon the courts; its second obligation is to avoid the inequity caused to the insured by unconscionable policy provisions which inevitably invite nullification by the courts.

To understand this current confrontation we must briefly glance backward to recognize the present trend in the law of insurance. Insurance law has developed roughly in tandem with the growth of the law of products liability.

*Greenman v. Yuba Power Products, Inc.*¹ established the principle that a manufacturer's liability for injuries caused by a defective power tool rested on strict liability in tort rather than on an implied warranty. Thus the purchaser would be protected against the defective product, even if the manufacturer was not negligent and even if he violated no warranty. The ruling fundamentally evolved from the kind of society in which we live—a society in which the individual is dependent for

1. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

safety and even survival upon institutions over which he has no control. In the mass market the consumer must purchase a standardized product; he has no opportunity to bargain with the manufacturer as to the kind or quality of the product.

Thus the courts developed the doctrine of strict products liability; the manufacturer who distributed an unsafe product that caused injury was liable to the injured victim even though the manufacturer was not negligent.²

With the growth of the products liability doctrine we have seen the development of a parallel concept that has extended the liability of insurance carriers. The standardized insurance contract is but a twin to the standardized product; both can regard as their matrix a standardized society. The consumer can no more strike an individual bargain with General Motors as to the price tag it will put upon its newest Chevrolet model than he can write a special individualized contract of insurance with the State Farm Automobile Insurance Company. In the place of the individual contract we now discern the standardized contract. Although the tailor-made contract may still play its role in transactions involving individual entrepreneurs, it assumes a minor role in the mass market.

And so we note the development of a new kind of standardized or "adhesion" contract, particularly in the field of insurance. That kind of contract bears the same characteristics as the machine-made product; neither contract of insurance nor the purchase of the machine emanates from an individual bargain; both the seller of the product and the insurance carrier is better able to sustain a loss than the purchaser, because, of course, the party that sells a standard product or policy of insurance to a mass of buyers can better distribute the loss among them; the consumer is utterly dependent for the safety of the product upon the manufacturer, and the insured depends upon the insurer for the viability of the policy; the producer completely controls the nature of the product and the insurer drafts the policy.

The liabilities that flow from the mass product and the mass policy also exhibit common characteristics. For one thing, the insured is entitled to such coverage of the policy as its language leads him reasonably to expect, just as the purchaser of the product, in rough analogy, is entitled to that safe performance of the product that its presence on the market leads him reasonably to expect. Indeed, the California

2. We have developed the theme in the text more fully in *Tobriner, Retrospect: Ten Years on the California Supreme Court*, 20 U.C.L.A. L. REV. 5 (1972).

Supreme Court has been insistent upon the application of this reasonable expectancy doctrine in the insurance field.

In *Steven v. Fidelity & Casualty Co.*,³ probably the first case in the United States to use the term "adhesion contract," the court held it would not enforce an exclusionary clause in an insurance contract which was unclear, saying: "If [the insurer] deals with the public upon a mass basis, the notice of noncoverage of the policy, in a situation in which the public may reasonably expect coverage, must be conspicuous, plain and clear."⁴

Following the holding of *Steven* as to the need for clarity in the policies, a unanimous court in 1967 urged the industry to take steps in that direction in these words:

The instant case presents yet another illustration of the dangers of the present complex structuring of insurance policies. Unfortunately the insurance industry has become addicted to the practice of building into policies one condition or exception upon another in the shape of a linguistic Tower of Babel. We join other courts in decrying a trend which both plunges the insured into a state of uncertainty and burdens the judiciary with the task of resolving it. We reiterate our plea for clarity and simplicity in policies that fulfill so important a public service.⁵

Finally, let me note one caveat. Courts may find a provision of a policy so oppressive to the insured, and so antithetical to the purpose and function of insurance itself, that the provision is unenforceable. Thus one commentator has written:

A court may find that one party to a purported contract is subject, by virtue of his 'status,' to a certain irreducible duty or fundamental obligation which he cannot disclaim, notwithstanding the express terms of the contract. Within the frame work of the doctrine of reasonable expectations, this holding could be based upon the court's finding that any disclaimer would be so 'fundamentally unconscionable' as to defeat the expectations of the vast majority of adhesion contract offerees.⁶

Hopefully, the carriers will avoid such provisions.

In conclusion, notwithstanding the decisions that propose to protect

3. 58 Cal. 2d 862, 377 P.2d 284, 27 Cal. Rptr. 172 (1972).

4. *Id.* at 878, 377 P.2d at 294, 27 Cal. Rptr. at 182. See generally *State Farm Mut. Auto. Ins. Co. v. Jacober*, 10 Cal. 3d 193, 514 P.2d 953, 110 Cal. Rptr. 1 (1973); *Paramount Properties Co. v. Transamerica Title Ins. Co.*, 1 Cal. 3d 562, 463 P.2d 746, 83 Cal. Rptr. 394 (1970); *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966), as examples of subsequent cases following the *Steven* rationale.

5. *Insurance Co. of N. Am. v. Electronic Purification Co.*, 67 Cal. 2d 679, 691-92, 433 P.2d 174, 182, 63 Cal. Rptr. 382, 390 (1967).

6. Kamarch, *Opening the Gate: The Steven Case and the Doctrine of Reasonable Expectations*, 29 HASTINGS L.J. 153, 165 (1977).

the expectations of the ordinary person against the superficial hypertechnical language of insurance contracts, insurance carriers have continued to propagate lengthy policies strewn with complex legal terms that may very well challenge the interpretive skills of the most competent attorney. Ambiguities continue to plague the courts. The obligation and opportunity of the insurance industry is to write clear and concise insurance policies which are intelligible to the ordinary person. In addition, the industry should establish, in case of controversy among carriers as to coverage, particularly concerning liability as to excess coverage, some method of arbitration of disputes. Carriers should set up through the internal administrative channels of the insurance companies themselves procedures for adjustment. Over-burdened courts should not be forced to adjudicate such issues.

Because the courts are required to interpret insurance contracts with increasing frequency, new interpretations as well as new factual situations constantly give rise to new rules of insurance law. Inevitably, due to the constant changes most published texts in the field of insurance law become dated and of little value. The *Pacific Law Journal's* efforts in publishing a symposium on the current trends in insurance law should be of great value to the judiciary, the practicing bar and the insurance industry.

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