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Insurance

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Insurance

Insurance; medical malpractice and reciprocal insurers

Corporations Code §25100 (amended); Insurance Code §1280.7 (amended).

AB 168 (Chel); STATS 1977, Ch 56

(*Effective May 16, 1977*)

Support: California Department of Corrections; California Medical Association

In 1976 the legislature set forth certain requirements for specified unincorporated interindemnity, reciprocal, or interinsurance contracts between members of cooperative corporations consisting solely of licensed physicians and surgeons, and enumerated acts by such reciprocal insurers that would constitute unfair methods of competition and deceptive practices [*See* CAL. INS. CODE §1280.7. *See generally* CAL. CORP. CODE §12201]. Further provisions enacted in 1976 exempted these reciprocal contracts from the issuance restrictions accompanying the sale of securities as provided in the Corporate Security Law of 1968 [CAL. CORP. CODE §§25000-25804] [CAL. STATS. 1976, c. 1462, §§1, 2, at —].

Due to an inadvertent error in these 1976 changes, specific discretionary powers of the Commissioner of Corporations with respect to the aforementioned reciprocal insurance contracts were omitted from the final version of the law as enacted [*See* CAL. STATS. 1977, c. 56, §3, at —]. Chapter 56 is intended to correct this error by providing a list of discretionary powers that appear to provide a means of enforcing the provisions of Insurance Code Section 1280.7 [CAL. STATS. 1977, c. 56, §3, at —. *Compare* CAL. CORP. CODE §25100(q) *with* CAL. INS. CODE §1280.7].

In the event that any deceptive procedure prohibited by Section 1280.7 of the Insurance Code is reported to the Commissioner of Corporations, the commissioner may bring an action in the superior court to enjoin the acts or practices, or otherwise to enforce compliance with the provisions of this section [CAL. CORP. CODE §25100(q)(1)]. Upon a proper showing, a restraining order, a permanent or preliminary injunction, or a writ of mandate *must* be granted by the court [*Compare* CAL. CORP. CODE §25100(q)(1) *with* CAL. CORP. CODE §15], and a receiver or conservator *may* be appointed to guard the assets of the program until the issue is resolved and the restraints are lifted [*Compare* CAL. CORP. CODE §25100 (q)(1) *with* CAL. CORP. CODE §1803]. In addition, the commissioner is authorized to investigate and hold hearings on whether the provisions of Section 1280.7 of the

Insurance Code are being violated or are about to be violated, and to publish his or her findings [CAL. CORP. CODE §25100(q)(2)]. For the purpose of this investigation or proceeding, the commissioner, or any officer designated by him or her, may administer oaths or affirmations, subpoena witnesses, compel a witness' attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, agreements, or other documents or records that the commissioner deems relevant or material to the inquiry [CAL. CORP. CODE §25100(q)(3)]. In the event of a failure by any person to cooperate with such an investigation, a court order may be obtained from the superior court requiring that person to appear before the commissioner and give the desired information, and failure to obey the order of the superior court *may* be punished by the court as contempt [CAL. CORP. CODE §25100(q)(4)]. Additionally, Chapter 56 expressly provides that a person is not excused from testifying or producing documents on the basis of constitutional guarantees against self-incrimination [CAL. CORP. CODE §25100(q)(5)]. Chapter 56 states, however, that no individual may be prosecuted or penalized for any matter that he or she is compelled to disclose after validly claiming his or her privilege against self-incrimination, except that the individual testifying is not exempt from prosecution and punishment for perjury or contempt committed while testifying [CAL. CORP. CODE §25100(q)(5)]. Thus, Chapter 56 appears to establish a set of discretionary powers allowing the Commissioner of Corporations actively to investigate and, if necessary, seek to enjoin any unfair competition or deceptive practices by certain reciprocal insurers as proscribed by Section 1280.7 of the Insurance Code [*See* CAL. CORP. CODE §25100(q)].

See Generally:

- 1) 8 PAC. L.J., REVIEW OF SELECTED 1976 CALIFORNIA LEGISLATION 400 (medical malpractice reserve requirement exceptions) (1977).

Insurance; physician and surgeon immunity—underwriting committees

Civil Code §§43.7, 43.8 (amended).

SB 1095 (Song); STATS 1977, Ch 934

Support: Insurance Agents and Brokers Legislative Council; Physicians and Surgeons Insurance Exchange; Underwriters for the Professions

Section 43.7 of the Civil Code extends a qualified immunity from monetary liability to members of certain medical review committees, composed chiefly of physicians and surgeons, or dentists, whose function is to review the quality of medical services rendered by their peers. [CAL. CIV. CODE §43.7, *as amended*, CAL. STATS. 1977, c. 241, §1, at —]. Chapter 934 has

amended Section 43.7 to extend this qualified immunity to actions taken by physician and surgeon members of an underwriting committee of an interindemnity, reciprocal, or interinsurance exchange or mutual company for acts or proceedings undertaken in evaluating the insurability of their peers. This grant of immunity extends only to those acts and proceedings in which the evaluating physician or surgeon has acted without malice, has made reasonable efforts to obtain necessary facts upon which to act, and has acted in the reasonable belief that his or her actions are warranted by such facts [CAL. CIV. CODE §43.7].

Section 43.8 of the Civil Code previously extended a qualified grant of immunity only to persons who communicated information to the medical committees formerly described in Section 43.7 to aid in the evaluation of the qualifications, fitness, or character of a practitioner under review [CAL. STATS. 1976, c. 532, §2, at —]. Chapter 934 has amended Section 43.8 to include within its provisions those underwriting committees now described in Section 43.7 and that information used by such committees to evaluate the insurability of a particular practitioner. Thus, a person supplying information to one of the specified underwriting committees concerning the insurability of a medical practitioner is now immune from monetary liability incurred for any statement, provided that statement does not represent as true any matter not reasonably believed by the declarant to be true [CAL. CIV. CODE §43.8].

The basic function of the underwriting committee of an interinsurance exchange is to interview each applicant for insurance to determine his or her insurability [See Comment, *The Medical Malpractice Crisis: Is the Medical Review Committee a Viable and Legal Alternative*, 15 SANTA CLARA LAW. 405, 407-08 (1975)]. Doctor operated interinsurance exchanges have been proposed as one possible solution to the problem of making reasonably priced malpractice coverage available to the practitioner [See Linster, *Malpractice: Striking the Reasonable Balance*, 43 INS. COUNSEL J. 101, 103 (1976)]. Thus, by granting qualified immunity to members of the underwriting committees of these insurance exchanges and to persons who supply them with information concerning the insurability of practitioners, it would appear that Chapter 934 may encourage the use of this alternative form of supplying medical malpractice insurance.

See Generally:

- 1) 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §165 (proceedings of professional committees) (8th ed. 1974).

Insurance; assessment for willfully false statement of employer

Unemployment Insurance Code §1030.5 (repealed); §142 (new); §§803, 821, 1133 (amended).

AB 818 (Bates); STATS 1977, Ch 511

Support: California Department of Employment Development

When an unemployed worker files a new of additional claim for unemployment compensation benefits, extended duration benefits, or federal-state extended benefits, the Department of Employment Development is required to notify the claimant's last employer of the application, whereupon the employer must notify the department of any facts known to him or her that may affect the claimant's eligibility for benefits [CAL. UNEMP. INS. CODE §§1327, 3654, 4654]. Whether the former worker left that employer's service voluntarily and without good cause, was discharged for misconduct connected with his or her work, or whether the claimant was a student working during his or her vacation, are reportable facts pertaining to the former worker's eligibility for benefits [*Compare* CAL. UNEMP. INS. CODE §§1030, 3701 and 4701 with CAL. UNEMP. INS. CODE §§1253.8, 1256, 3552(d) and 4552(d)]. The employer would appear to have an economic self-interest in providing accurate information to the Department of Employment Development since any unemployment insurance benefits paid to the unemployed worker are charged to the employer's reserve account [*Compare* CAL. UNEMP. INS. CODE §1026 with CAL. UNEMP. INS. CODE §1032]. Nevertheless, under the prior law a sanction was provided in the form of a penalty against the employer's reserve account for an employer who willfully provided false information concerning the termination of a former employee's employment [*See* CAL. STATS. 1973, c. 1212, §150, at 2777]. The theory underlying the old law apparently was that by adding a penalty to the employer's reserve account, the expenditures from that account would be increased, resulting in a higher experience rate and thus a higher tax rate for the employer's contributions to the reserve account, and arguably in the long run would tend to deter the employer from making false statements to the department [EMPLOYMENT DEVELOPMENT DEPARTMENT, HEALTH AND WELFARE AGENCY, REQUEST FOR APPROVAL OF PROPOSED LEGISLATION 1 (October 15, 1976) (copy on file at *Pacific Law Journal*). *See generally* CAL. UNEMP. INS. CODE §§977, 978].

Several shortcomings, however, have become apparent with this theory. For example, for those employers who already pay the maximum contribution rate pursuant to Section 977 of the Unemployment Insurance Code, any additional charges to their accounts would not increase their contribution rate [*Compare* EMPLOYMENT DEVELOPMENT DEPARTMENT, HEALTH AND WELFARE AGENCY, REQUEST FOR APPROVAL OF PROPOSED LEGISLATION 1

(Oct. 15, 1976) (copy on file at *Pacific Law Journal*) with CAL. UNEMP. INS. CODE §977]. In addition, some employers do not have reserve accounts since they are permitted to pay the cost of benefits directly into the unemployment fund in lieu of the contributions otherwise required of employers [*Compare* EMPLOYMENT DEVELOPMENT, HEALTH AND WELFARE AGENCY, REQUEST FOR APPROVAL OF PROPOSED LEGISLATION 1 (Oct. 15, 1976) (copy on file at *Pacific Law Journal*) with CAL. UNEMP. INS. CODE §803]. As a result, the only employers who would appear to have been affected by the old penalty system were those whose experience rates were not at a maximum, and then only when the charges to their accounts were substantial enough to reduce the account balance, thereby increasing the experience rate and thus the contribution rate paid into the account [*Compare* EMPLOYMENT DEVELOPMENT DEPARTMENT, HEALTH AND WELFARE AGENCY, REQUEST FOR APPROVAL OF PROPOSED LEGISLATION 1-2 (Oct. 15, 1976) (copy on file at *Pacific Law Journal*) with CAL. UNEMP. INS. CODE §977].

In an apparent effort to establish a penalty system that would affect all employers equally and thus deter false statements, Chapter 511 repeals the old law under Section 1030.5 of the Unemployment Insurance Code and adds Section 1142 to provide that a *cash payment* will be made by the employer rather than a charge against his or her reserve account. Thus, if the Director of Employment Development finds that any employer or any employee, officer, or agent of any employer willfully makes a false statement or representation or willfully fails to report a material fact when submitting facts concerning the termination of a former employee who is now claiming unemployment compensation benefits, extended duration benefits, or federal-state extended benefits, then the director must assess a penalty against the employer in an amount not less than two nor more than ten times the weekly benefit amount of the claimant [*See* CAL. UNEMP. INS. CODE §1142. *See generally* CAL. UNEMP. INS. CODE §§1030, 1327, 3654 3701, 4654, 4701]. These penalties must be deposited in the Contingent Fund, which is a fund used by the department for, among other purposes, the deposit of penalties and interest on contributions collected pursuant to the unemployment and disability compensation laws [CAL. UNEMP. INS. CODE §1142. *See generally* CAL. UNEMP. INS. CODE §§130, 1585].

Procedurally, an employer against whom an assessment has been made pursuant to this new law, or any person directly interested in such assessment, may file with a referee a petition for reassessment within 30 days after service of notice of the assessment, which may be extended an additional 30 days for good cause [CAL. UNEMP. INS. CODE §1133]. In the event such a petition is not filed within the prescribed time, the assessment becomes final at the expiration of this 30-day period [CAL. UNEMP. INS. CODE §1133].

In summary, Chapter 511 will penalize employers *directly* for willfully

making false statements concerning the nature of the termination of a former worker's employment [CAL. UNEMP. INS. CODE §1142]. With this direct approach, Chapter 511 would appear to provide an effective deterrent to employers making such false representations by exposing all such employers to the same potential liability [See CAL. UNEMP. INS. CODE §1142].

See Generally:

- 1) I B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Agency and Employment* §§66-73 (disqualifications for unemployment benefits) (8th ed. 1973), §§66-72 (disqualifications) (Supp. 1976).

Insurance; disability insurance and social security offsets

Insurance Code §10127.15 (new).

AB 113 (Gualco); STATS 1977, Ch 272

(Effective July 8, 1977)

In 1976 the legislature added Section 10127.1 to the Insurance Code to prohibit the reduction of loss of time benefits received under any disability insurance policy or self-insured employee welfare benefit plan due to any increases in benefits payable under the Federal Social Security Act, as amended [See CAL. STATS. 1976. c. 68, §1, at —]. Further, Section 10127.1(c) provided that such offsetting provisions were prohibited from any disability insurance policy issued, delivered, amended or renewed on or after January 1, 1977, and were prohibited from any group disability insurance policy or self-insured employee welfare benefit plan that was entered into, amended, or renewed on or after that date or upon the expiration of any applicable collective bargaining agreement, *whichever occurred later*. For those disability insurance policies and self-insured employee welfare benefit plans that are renewed annually, the elimination of social security benefit offsets should have been complete by January 1, 1978 [See CAL. INS. CODE §10127.1(c)]. For those policies or plans operating under a collective bargaining agreement, however, the terminal date would appear to be uncertain if such agreements are for longer than one year [See CAL. INS. CODE §10127.1(c)].

In an apparent response to this problem, and in an effort to protect the July 1, 1977, increase in social security benefits [See CAL. STATS. 1977, c. 272, §2, at —], Chapter 272 adds Section 10127.15 to the Insurance Code to provide that any provision contained in a policy of disability insurance or in a self-insured employee welfare benefit plan for a reduction of loss of time benefits during a benefit period because of an increase in benefits payable under the Federal Social Security Act, as amended, is *null and void* with respect to any such increase that occurs on or after July 8, 1977 [CAL. INS. CODE §10127.15]. For the purpose of definition, it should be noted that

disability insurance and self-insured employee welfare benefit plans include health or accident insurance as well as disability income replacement insurance [*Compare* CAL. INS. CODE §10127.15 *with* CAL. INS. CODE §§106, 10121(d) *and* 10124(b)]. Thus, Chapter 272 would appear to remove from such contracts any provision offsetting social security benefit increases against insurance benefits received under the contract [*See* CAL. INS. CODE §10127.15].

COMMENT

Chapter 272, which has the effect of preventing the enforcement of offset provisions in contracts entered into prior to January 1, 1977, for disability insurance or self-insured welfare benefit plans [*Compare* CAL. INS. CODE §10127.15 *with* CAL. INS. CODE §10127.1, *as added*, CAL. STATS. 1976, c. 68, §1, at —], raises two potential constitutional problems: (1) rewriting existing contracts in violation of both the federal and state constitutional prohibitions against states enacting laws that impair the obligations of contracts [*Compare* CAL. INS. CODE §10127.15 *with* U.S. CONST. art. I, §10, cl. 1 *and* CAL. CONST. art. 1, §9]; and (2) depriving insurers of property without due process of law [*Compare* CAL. INS. CODE §10127.15 *with* U.S. CONST. amend. XIV, §1 *and* CAL. CONST. art. 1, §7]. With respect to the impairment of contracts question, case law has uniformly indicated that contracts are made in contemplation of the state's potential exercise of the police power as an implied term [*E.g.*, *Mott v. Cline*, 200 Cal. 434, 446, 253 P. 718, 723-24 (1927); *Scrutton v. County of Sacramento*, 275 Cal. App. 2d 412, 419, 79 Cal. Rptr. 872, 878 (1969); *Phelps v. Prussia*, 60 Cal. App. 2d 732, 741, 141 P.2d 440, 445 (1943)]. It would appear that the enactment of Chapter 272 governing the business of insurance is a legitimate exercise of such police power since insurance is a business affected with a public interest [OP. CAL. LEGIS. COUNSEL No. 8816 (May 10, 1977) *Coordination of Benefits*, *reprinted in* JOURNAL OF THE CALIFORNIA SENATE 3900, 3901 (1977-78 Reg. Sess.); *see* *Carpenter v. Pacific Mutual Life Ins. Co.*, 10 Cal. 2d 307, 329, 74 P.2d 761, 774-75 (1937), *aff'd sub nom. Neblett v. Carpenter*, 305 U.S. 297, 305 (1938)]. Moreover, the courts are generally reluctant to invalidate an exercise of the state's police power unless such exercise is palpably unreasonable, arbitrary, or capricious [*See, e.g.*, *Max Factor & Co. v. Kunsman*, 5 Cal. 2d 446, 456, 55 P.2d 177, 181 (1936); *Ballarini v. Schlage Lock Co.*, 100 Cal. App. 2d Supp. 859, 861-62, 226 P.2d 771, 773 (1950); *State Bonded Audit Bureau, Inc. v. Pomona Mutual Bldg. & Loan Ass'n*, 37 Cal. App. 2d Supp. 765, 769-70, 98 P.2d 829, 832 (1940)]. Since there appears to be a reasonable basis for the state's regulation of insurance pursuant to Chapter 272, it would seem, therefore, that this new law will not be found to violate

the impairment of contracts provisions of the state and federal constitutions [See OP. CAL. LEGIS. COUNSEL No. 8816 (May 10, 1977) *Coordination of Benefits reprinted in JOURNAL OF THE CALIFORNIA SENATE* 3900, 3902 (1977-78 Reg. Sess.)].

The second constitutional issue raised by Chapter 272 is that the new law would appear to deprive insurers of property without due process insofar as it has the effect of causing the insurer or insurance plan to sustain a loss on policies or plans in effect on July 8, 1977, by prohibiting the reduction of benefits by the amount of the subsequent social security increases [Compare CAL. INS. CODE §10127.15 with U.S. CONST. amend. XIV, §1 and CAL. CONST. art. 1, §7]. The prohibition in the new law against reducing benefits, without making allowance for concomitantly increasing charges, would appear to be analogous to the regulation of commissions paid insurance agents, which is permissible under the police power and when enacted had the effect of reducing the agents' *contractual* commission without a finding of unconstitutional deprivation of property [See *O'Gorman & Young v. Hartford Fire Ins. Co.*, 282 U.S. 251, 255, 257 (1931)]. As previously mentioned, the increase in charges to the insurer or plan would exist only until the expiration of the current policy or collective bargaining agreement, after which the insurer or plan could increase its premiums to cover any loss incurred. With an apparently reasonable solution available and in light of the public interest in eliminating offsetting procedures from the subject policies, it would seem that Chapter 272 would *not* have the practical effect of depriving insurers of property without due process [Compare CAL. INS. CODE §10127.15 with *O'Gorman & Young v. Hartford Fire Ins. Co.*, 282 U.S. 251, 255, 257 (1931)].

In summary, Chapter 272 provides that as of July 8, 1977, no disability insurance policy or self-insured welfare benefit plan may offset federal social security benefit increases against the loss of time benefits payable under that policy or plan [CAL. INS. CODE §10127.15]. Although Chapter 272 may be challenged on the constitutional grounds of impairment of obligation of contract and deprivation of property without due process, it appears that such attacks will be unsuccessful.

See Generally:

- 1) 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law*, §§619-630 (obligation of contracts), §§283, 285-88 (due process) (8th ed. 1974); §625 (valid modifications) (Supp. 1976).
- 2) R. KEETON, BASIC TEXT ON INSURANCE LAW, 101-03 (impairing freedom of contracts) (1971).

Insurance; unlawful practices—enforcement

Insurance Code §1858.2 (repealed); §1858.2 (new); §§700, 1858.1, 1858.3, 12389 (amended).

AB 123 (McAlister); STATS 1977, Ch 994

Support: Association of California Insurance Companies; California Department of Insurance

Chapter 994 makes a number of changes in the insurance law to enhance the Insurance Commissioner's ability to punish violations of the Insurance Code. Existing law prohibits any person from transacting any class of insurance business without first procuring a certificate of authority from the Insurance Commissioner [CAL. INS. CODE §700(a)]. Prior to the enactment of Chapter 994 there apparently were no adequate penalty provisions for the unlawful transaction of insurance business [*See* CAL. STATS. 1945, c. 901, §2, at 1671]. Chapter 994 has amended Section 700 of the Insurance Code to permit the Insurance Commissioner to punish any insurer who engages in an unlawful transaction of insurance business. Section 700 now provides that willful violations of the requirements for a certificate of authority is punishable by imprisonment in the state prison or in a county jail for not more than one year and/or a fine not in excess of \$100,000, and that any willful unlawful transaction of insurance business must be enjoined by a court of proper jurisdiction upon petition of the Commissioner [CAL. INS. CODE §700(b)]. Furthermore, under the new law the Commissioner may, after proper notice and a hearing, impose a fine or suspend for up to one year the certificate of authority for a holder who has violated the financial statement requirements of the Insurance Code [CAL. INS. CODE §700(c). *See generally* CAL. INS. CODE §§704.7, 900-924].

The Insurance Code allows any person aggrieved by the rating or underwriting rule followed or adopted by an insurer or rating organization, after certain preconditions have been satisfied, to make requests before the Commissioner for specified actions [CAL. INS. CODE §1858]. If the Commissioner determines that the insurer or rating organization has not complied with the requirements and standards of the Insurance Code relating to rates and rating, a notice of noncompliance may be issued [CAL. INS. CODE §1858.1. *See generally* CAL. INS. CODE §§1850-1860.3]. Prior to the enactment of Chapter 994, such notice was to be confidential between the Commissioner and the parties to the complaint unless such a violation was willful, which warranted a public hearing [CAL. STATS. 1947, c. 805, §1, at 1904-05]. Chapter 994 has amended Section 1858.1 of the Insurance Code to delete the requirement of confidentiality. Section 1858.1 has been amended further to provide a person or business served with a notice of noncompliance the options of: (1) establishing to the satisfaction of the Commissioner that there has been no noncompliance; (2) requesting a public hearing on the issue; or

(3) entering into a consent order with the Commissioner to correct, within a specified time, the charged noncompliance. The consent order, however, must provide that in the event the noncompliance is not corrected within the specified time, a money penalty not to exceed \$1000 shall attach and be collected for each day of violation of the order, which in the aggregate may not exceed \$30,000 [CAL. INS. CODE §1858.1]. Prior Section 1858.2 of the Insurance Code provided for a public hearing only in the event of willful noncompliance by rating or underwriting organizations [CAL. STATS. 1947, c. 805, §1, at 1905]. Chapter 994 has deleted this “willful” requirement and will allow for such public hearings regardless of whether the noncompliance was nonwillful [CAL. INS. CODE §1858.2]. Section 1858.3 of the Insurance Code has also been amended to allow the Commissioner, upon finding a violation of these rating provisions, to direct the insurer or rating organization to take such corrective action as he or she deems necessary and proper, which may be taken in addition to the already available order to prohibit further use of such rate or rating systems [*Compare* CAL. INS. CODE §1858.3(a) *with* CAL. STATS. 1947, c. 805, §1, at 1905]. Violation of any order issued pursuant to Section 1858.3 is now punishable by a fine not to exceed \$1000 for each day of noncompliance beyond the specified period of compliance stated in the order, provided that sum does not exceed, in aggregate, \$30,000 [CAL. INS. CODE §1858.3(c)].

Finally, existing law allows an underwriting company to engage in the escrow business if, *inter alia*, it maintains a fidelity bond in an amount not to exceed \$200,000 [CAL. INS. CODE §12389]. Chapter 994 has amended Section 12389 of the Insurance Code to allow the Commissioner, in his or her sole discretion, to accept a cash deposit not to exceed \$200,000 in lieu of the fidelity bond [CAL. INS. CODE §12389(b)(4)]. Thus, it appears that Chapter 994 has provided the Insurance Commissioner with greater flexibility and some additional powers to enforce and administer various provisions of the Insurance Code.

Insurance; discrimination by insurers

Insurance Code §657 (new); §11628 (amended).

AB 857 (Agnos); STATS 1977, Ch 914

Support: California Rural Legal Assistance

In late 1976, the Assembly Committee on Finance, Insurance, and Commerce conducted an interim study on the subject of discrimination in insurance [ASSEMBLY COMMITTEE ON FINANCE, INSURANCE, AND COMMERCE, REPORT OF THE CHAIRMAN ON THE 1976 INTERIM STUDY ON DISCRIMINATION IN INSURANCE (1976) (copy on file at *Pacific Law*

Journal’)]. Among its findings, the committee found ethnic discrimination in auto insurance insofar as some insurers classified those who could not read and write the English language as substandard risks [*Id.* at 3]. In the absence of any data to demonstrate that those not proficient in the English language posed a greater risk, the committee felt this practice should be prohibited [*Id.*]. Chapter 914 apparently was drafted to accomplish this objective [*Compare* CAL. INS. CODE §11628 with ASSEMBLY COMMITTEE ON FINANCE, INSURANCE, AND COMMERCE, REPORT OF THE CHAIRMAN ON THE 1976 INTERIM STUDY ON DISCRIMINATION IN INSURANCE 3 (1976)].

Chapter 914 adds the factor of “language” to the list of classifications by which it is unlawful for an auto liability insurer to discriminate against its customers [*See* CAL. INS. CODE §11628]. The term “language” is defined in Section 11628 to mean the inability to speak, read, write, or comprehend the English language. Thus, Chapter 914 amends Section 11628 of the Insurance Code to now provide that no licensed motor vehicle liability insurer may use race, color, religion, national origin, ancestry, location within a geographic area, *or language*, as defined, as the basis for: (1) failing to accept an application for liability insurance; (2) refusing to issue such insurance; (3) issuing or cancelling liability insurance under conditions less favorable to the insured than in other comparable cases; or (4) requiring a higher rate or premium for such insurance.

Although Chapter 914 does not extend liability for any violation of Section 11628 of the Insurance Code, Section 11629 allows damages of \$100 for each violation of Section 11628 by the insurer, plus allowance for attorney’s fees. Furthermore, an insurer who has refused to issue an insurance policy to an applicant in violation of Section 11628, and who has been required to pay damages for such a violation pursuant to Section 11629, must additionally pay compensatory damages [*See* CAL. INS. CODE §11629.5].

In an apparent attempt to force insurers to justify their decisions concerning the rejection of applications, Chapter 914 has added Section 657 to the Insurance Code to provide that a licensed motor vehicle liability insurer or any licensed insurance agent who, upon receipt of a written application, refuses to accept the application or to issue a policy, must furnish the applicant with a written explanation, provided the applicant submits a request in writing for such a written explanation within 30 days of the insurer’s refusal. The insurer or agent must furnish his or her explanation within 30 days of receipt of the request [CAL. INS. CODE §657(a)]. Section 657 also creates limited criminal liability by providing that any insurer or agent who willfully violates any provision of this section is guilty of a misdemeanor, which is punishable by a fine not exceeding \$500 for each violation [CAL. INS. CODE §657(b)]. The new law, however, expressly

precludes any liability on the part of the State Insurance Commissioner, the insurer or its representative, or persons or corporations supplying information to the insurer concerning the reasons for refusal, for any statement made by such parties in any communication specifying the reasons for refusing to accept an application for insurance or for statements made or evidence submitted in any hearing on the subject of such a refusal [CAL. INS. CODE §657(c)]. The new law further indicates that any communication, written or oral, between an insurer or agent and the insured specifying the reasons for refusal of insurance, may not be considered when determining any criminal or civil liability [See CAL. INS. CODE §657(c)].

In summary, Chapter 914 has apparently eliminated another basis of discrimination in auto insurance by adding "language" to the list of prohibited classifications by which policies may be issued or denied, or by which premiums may be determined [See CAL. INS. CODE §11628]. In addition, Chapter 914 requires an insurer, after denying liability insurance to an applicant, to respond in writing to the applicant's written request for an explanation [CAL. INS. CODE §657(a)].

See Generally:

- 1) R. KFFTON, BASIC TEXT ON INSURANCE LAW 557-67 (insurance rating) (1971).

Insurance; genetic traits—discriminatory insurance practices

Health and Safety Code §1374.7 (new); Insurance Code §§10123.3, 10143, 11512.9 (new).

SB 240 (Holden); STATS 1977, Ch 732

Chapter 732 has been enacted to prevent specific discriminatory insurance practices affecting persons with certain genetic traits, but who do not have manifest adverse hereditary disorders [See CAL. HEALTH & SAFETY CODE §1374.7; CAL. INS. CODE §§10123.3, 10143, 11512.9]. Prior to the enactment of Chapter 732, there apparently was no law prohibiting health and life insurance programs from discriminating against persons carrying a gene that, under some circumstances, may have been associated with a disability in that person's offspring, but that had no adverse effects on the carrier. Chapter 732 establishes such a prohibition for health care service plans and specialized health care service plans [CAL. HEALTH & SAFETY CODE §1374.7(a). *See generally* CAL. HEALTH & SAFETY CODE §1345(f), (m), (q) (definitions of terms)], self-insured employee welfare benefit plans [CAL. INS. CODE §10123.3(a). *See generally* CAL. INS. CODE §§10121(d), 10123.4, 10124(b) (definitions of terms)], insurance companies licensed in the state [CAL. INS. CODE §10143(a)], and nonprofit hospital service plans [CAL. INS. CODE §11512.9(a). *Compare* CAL. INS. CODE §11491 *with* CAL. INS. CODE §11493 (definition of terms)]. These plans may neither refuse to enroll nor accept any person as a subscriber, nor refuse to issue, sell, or

Selected 1977 California Legislation

renew any life or disability insurance policy after appropriate application, *solely* on the grounds that the person to be enrolled or insured carries a gene that may, under some circumstances, be associated with a disability in that person's offspring, but that *causes no adverse effects on the carrier* [CAL. HEALTH & SAFETY CODE §13747(a); CAL. INS. CODE §§10123.3(a), 10143(a), 11512.9(a)]. Such genes include, but expressly are not limited to, the Tay-Sachs trait, sickle cell trait, thalassemia trait, and X-linked hemophilia A [CAL. HEALTH & SAFETY CODE §1374.7(a); CAL. INS. CODE §§10123.3(a), 10143(a), 11512.9(a)]. Chapter 732 further provides that no individual or group insurance policy issued and delivered in the state, nor any of the specified health plans, may require a higher premium or charge from persons carrying such genetic traits and that no group insurance policy holder or any of the specified health plans may make or require any rebate, discrimination, or discount upon the amount to be paid or the service to be rendered on the basis that the person to be covered carries such genetic traits [CAL. HEALTH & SAFETY CODE §1374.7(a); CAL. INS. CODE §§10123.3(a), 10143(a), 11512.9(a)]. Furthermore, no insurance company licensed in the state, or administrator of any of these health plans, may fix any lower rate or otherwise discriminate in the fees or commissions of agents or brokers for writing or renewing a life or disability insurance policy, or similarly reduce the fees or commissions of a solicitor or solicitor firm for an enrollment subscription or renewal based *solely* on the fact that the person carries one of the specified genes [CAL. HEALTH & SAFETY CODE §1374.7(b); CAL. INS. CODE §§10123.3(b), 10143(c), 11512.9(b)].

Section 10143(b) of the Insurance Code additionally prevents the use of any conditions or stipulations in life or disability insurance policies that would have the effect of reducing the recovery of the insured, his or her heirs, executors, administrators, or assignees based on the presence of these genes. This section further states that any such stipulation or condition so made or inserted is void [CAL. INS. CODE §10143(b)]. Thus, Chapter 732 initiates a program to eliminate discrimination by health care service plans, self-insured employee welfare benefit plans, life and disability insurance plans, and nonprofit hospital service plans against those people who carry genes that may be associated with a hereditary disability, but which causes no adverse effects on the carrier [See CAL. HEALTH & SAFETY CODE §1374.7; CAL. INS. CODE §§10123.3, 10143, 11512.9].

See Generally:

- 1) W. MEYER, LIFE AND HEALTH INSURANCE LAW §§17.1-.12 (pre-existing health conditions and exclusions in accident and health policies) (1971).

Insurance; exemption from fair trade practices for disability insurance issued through newspapers

Insurance Code §10291.5 (amended).

AB 744 (Cordova); STATS 1977, Ch 618

Support: California Department of Consumer Affairs; California Department of Insurance; Insurance Agents and Brokers Association

Section 10291.5 of the Insurance Code, which governs fraudulent or unsound disability insurance, was enacted for the purpose of preventing fraud, unfair trade practices, and the sale of economically unsound disability insurance policies and ensuring that the language of all insurance policies is readily understandable [CAL. INS. CODE §10291.5(a)]. The Insurance Commissioner is granted power under the provisions of Section 10291.5 to disapprove the issuance of disability policies if, *inter alia*, he or she finds a policy to be unintelligible or misleading, or the provisions in a policy not to be of real economic value to the insured.

Prior to the enactment of Chapter 618, these antifraud provisions of the Insurance Code did not apply to “accident policies including those providing hospitalization benefits on account of sickness, which [were] issued through newspapers or other publications of general circulation” [CAL. STATS. 1949, c. 1486, §2, at 2602]. This exemption apparently resulted from the belief that competition in the insurance industry forced policies issued through newspapers and other publications to be comparable in quality to those issued by insurance companies [Letter from Brian Walkup, California Department of Insurance to Pacific Law Journal, Aug. 23, 1977 (copy on file at the *Pacific Law Journal*)]. Chapter 618 has deleted the exception to such policies. Supporters of this change argue that the quality and quantity of benefits offered by such policies have not kept pace with either inflation or the benefits offered by other disability policies [*Id.*]. Therefore, Chapter 618, by deleting the exemption previously extended to disability policies issued through newspapers or other publications of general circulation, has subjected these policies to the antifraud provisions by Section 10291.5.

Insurance; settlement of claims

Insurance Code §560 (amended).

SB 74 (Garcia); STATS 1977, Ch 52

Support: California Department of Insurance

Prior to the enactment of Chapter 52, an insurer could elect to either make payments for repairs directly to the repairer or jointly to the repairer and the insured *only* if the payment was made for damages covered in an automobile

collision policy [*See* CAL. STATS. 1971, c. 798, §1, at 1552-53]. Chapter 52 amends Section 560 of the Insurance Code to also allow insurers to elect to pay repairers directly for damage covered by a comprehensive automobile insurance policy. Thus, the election provision of Section 560 would appear to extend coverage to those damages resulting from causes other than collision or upset [*See* CAL. INS. CODE §560]. Pursuant to Section 560 payments are due not later than ten days after receipt of an itemized bill covering satisfactorily completed repairs authorized by the insurer. Thus, Chapter 52 appears to give repairers of collision *and* noncollision-related damages a timely method to collect monies due for repairs.

Insurance; unemployment insurance payments—liability of corporate officers

Unemployment Insurance Code §1735 (repealed); §1735 (new).

SB 581 (Beverly); STATS 1977, Ch 838

Support: Department of Benefit Payments; Franchise Tax Board; Board of Equalization

Prior to the enactment of Chapter 838, Section 1735 of the Unemployment Compensation Insurance Code provided that any corporate officer of a domestic or foreign corporation whose duty was to prepare or supervise the preparation of unemployment compensation contribution returns and who willfully failed to file such returns was held personally liable for all amounts due, owing, and unpaid by the corporation at the time of termination of business, dissolution, or withdrawal [CAL. STATS. 1961, c. 2158, §8, at 4468]. Chapter 838 has rewritten Section 1735 to provide that any officer, major stockholder, or other person having charge of a "corporate or association employing unit" who willfully fails to pay employer contributions for state unemployment or disability benefits or for withholdings required by California Personal Income Tax Law [CAL. REV. & TAX CODE §§17001-19452] shall be held personally liable for the amount of the contributions and interest from the date the payment became delinquent, plus certain penalties equal to a minimum amount of ten percent of the amount of the contribution payment may be assessed against such a person [CAL. UNEMP. INS. CODE §1735. *See generally* CAL. REV. & TAX. CODE §18806; CAL. UNEMP. INS. CODE §1126]. The new law also extends the period for which a corporate person may be held liable for nonpayment to include periods prior to the time of the filing of the final return or when the final return is filed [*Compare* CAL. UNEMP. INS. CODE §1735 *with* CAL. STATS. 1961, c. 2158, §8, at 4468]. "Corporate or association employing unit" is defined by Section 135 of the California Unemployment Compensation Insurance Code

to include partnerships, joint ventures, corporations, associations, trusts, estates, joint stock companies, certain governmental bodies, the receiver or trustee in bankruptcy, and the legal representative of a deceased person, who have had in their employ, subsequent to January 1, 1936, one or more individuals. Due to the requirement that the failure to pay employer contributions be "willful," Chapter 838 apparently will not apply if failure to pay employer contributions was involuntary; for example, cases in which failure to pay was due to insolvency [*Cf.* *Ferguson v. Warren*, 63-2 U.S.T.C. 90,095, 90,096 (CCH 1963) (conscious and deliberate disregard of payment required under federal income tax law)].

Under federal law corporate officers are liable for their willful failure to withhold, collect or account for any internal revenue tax, in an amount equal to the tax that is not withheld or uncollected [26 U.S.C. §§6672, 7202 (1970)]. The apparent purpose of this federal law was to prevent the comingling of such employee tax funds with corporate assets [*See, e.g.* *Kalb v. United States*, 505 F.2d 506, 509 (2d Cir. 1974); *In re Allied Elect. Prod., Inc.*, 194 F. Supp. 26, 30-31 (D.N.J. 1961)]. It would appear that the intent of Chapter 838 is to establish a similar provision for both the payment of contributions for state unemployment or disability benefits and the payment of withholdings under the California Personal Income Tax Law [Memorandum from Philip J. Mariquez, Assistant Director, Legislation and Communications, Department of Employment Benefits to Opal Gulley, Health and Welfare Agency, Feb. 3, 1977 (copy on file at the *Pacific Law Journal*)]. Supporters of Chapter 838 argue that this new law will afford the state a measure of parity with existing federal law in the collection of corporate tax liability [*Id.*]. As a result of these changes, the Department of Employment Benefits anticipates that an additional \$500,000 may be recovered annually to offset the average annual loss of \$600,000 attributed to defaulting corporations [*Id.*]. Thus, while under prior law corporate officials were liable only for the willful failure to make unemployment compensation and disability contributions and to report wages, Chapter 838 has extended this liability to the willful failure to pay withholdings required by the Personal Income Tax Law.

Insurance; unemployment and disability insurance fraud

Unemployment Insurance Code §§2101, 2102 (amended).

SB 444 (Wilson); STATS 1977, Ch 820

Support: Employment Development Department of the California Taxpayers' Association

Prior to the enactment of Chapter 820, it was a misdemeanor to willfully make a false statement or representation or to knowingly fail to disclose a

material fact in order to obtain, defeat, increase or reduce any state unemployment or disability compensation benefit [CAL. STATS. 1953, c. 308, §2101, at 1528]. Furthermore, it was also a misdemeanor to make false statements or representations or fail to disclose material facts for the purpose of increasing benefits under the unemployment insurance law of other states [CAL. STATS. 1953, c. 308, §2102, at 1528]. Chapter 820 provides that prosecution under Sections 2101 and 2102 does not preclude prosecution under the forgery provisions of Section 470 of the Penal Code [CAL. UNEMP. INS. CODE §§2101(b), 2102(b)].

Chapter 820 has apparently been enacted in response to the recent California Supreme Court decision in *People v. Ruster* [16 Cal. 3d 690, 548 P.2d 353, 129 Cal. Rptr. 153 (1976)], in which the court held that unemployment insurance fraud could not be prosecuted under the general theft provisions of Penal Code Section 484 [*Id.* at 696, 549 P.2d at 356, 129 Cal. Rptr. at 156]; or under the forgery provisions of Penal Code Section 470 [*Id.* at 699, 548 P.2d at 358, 129 Cal. Rptr. at 158]. The court reasoned that if a general statute such as Penal Code Section 470 or 484 is in conflict with a special statute such as Section 2101 or 2102 of the Unemployment Insurance Code, the special statute would prevail for the purposes of prosecution [*Id.* at 694, 458 P.2d at 355, 129 Cal. Rptr. at 155]. As a result of this decision, even the most serious, fraudulent acts could be prosecuted only as misdemeanors [Senator Bob Wilson, Press Release, March 2, 1977]. Thus, in an apparent effort to reverse the effects of *Ruster*, Chapter 820 would seem to give the state the ability to prosecute unemployment insurance fraud cases in a manner that is commensurate with the seriousness of the crime allowing this crime to be prosecuted as a misdemeanor under Sections 2101 and 2102 of the Unemployment Insurance Code or, if appropriate, as a felony pursuant to the forgery provisions of Section 470 of the Penal Code.

Insurance; unemployment compensation—prison inmates

Unemployment Insurance Code §§135.8, 633.4, 1480, 1481, 1482, 1483, 1484, 1485 (repealed); §§135.8, 633.4, 1480, 1481, 1482, 1483, 1484, 1485 (new).

SB 224 (Behr); STATS 1977, Ch 1149

(Effective July 1, 1978)

Support: California Attorneys for Criminal Justice; California Federation of Labor, AFL-CIO; California Trial Lawyers' Association

Prior to the enactment of Chapter 1149, inmates of a state prison or institution were precluded from receiving unemployment compensation and disability benefits for work performed during their confinement in the prison or institution [See CAL. STATS. 1975, c. 870, §2, at 1943]. Section 1480, as

added by Chapter 1149, provides that an inmate who performs productive work or participates in an approved vocational training program during his or her incarceration is now entitled to receive unemployment compensation or disability benefits upon being released on parole or discharged from the prison or institution. Section 1480 of the Unemployment Insurance Code, however, limits to 26 weeks the maximum period during which an inmate may receive unemployment compensation benefits, extended duration benefits, federal-state extended benefits or disability benefits, separately or in combination. Chapter 1149 further provides that the State of California is now included in the definition of "employing unit" and work performed by inmates is now included in the definition of "employment" for the purpose of extending these benefits to recently released inmates [CAL. UNEMP. INS. CODE §§135.8, 633.4].

In order to establish a valid claim for unemployment compensation or disability benefits upon release from prison, an inmate must have earned wages of not less than \$1,500 during his or her base period [CAL. UNEMP. INS. CODE §1482]. "Base period" as used in Chapter 1149 is generally defined as the four calendar quarters ending five to seven months prior to the filing of a claim for unemployment compensation and disability benefits [CAL. UNEMP. INS. CODE §1275]. The term "wages," as referred to in Chapter 1149, is defined as an amount computed at \$2.30 per hour regardless of any actual compensation received by the inmate [CAL. UNEMP. INS. CODE §1481]. Thus, for example, if an inmate is released on parole in January, 1979, he or she must have completed a minimum of 653 hours of productive work or participation in an approved vocational training program during the "base period" of June, 1977, through May, 1978, in order to qualify for unemployment compensation under Chapter 1149. If, however, a former inmate has a valid claim for unemployment compensation or disability benefits pursuant to other sections of the Unemployment Insurance Code, the provisions of Chapter 1149 are not applicable [CAL. UNEMP. INS. CODE §1480].

The new law further indicates that the program of providing unemployment compensation and disability benefits for recently released inmates is to be funded under the same method the state uses to pay for state employees [CAL. UNEMP. INS. CODE §§1456, 1483]. The state is required to pay into the Unemployment Fund an amount equal to the additional costs to the Unemployment Fund and Disability Fund for benefits paid to former inmates [CAL. UNEMP. INS. CODE §1483(a)]. Notwithstanding other provisions of Chapter 1149, in the event that a nonprofit organization or a governmental entity has elected to provide unemployment compensation and disability benefits for inmates, those benefits remain payable and remain the liability of the nonprofit organization or governmental entity

[CAL. UNEMP. INS. CODE §1483(a); *see* CAL. UNEMP. INS. CODE §803]. The state, however, has expressly assumed the sole responsibility for benefits extended to inmates under this new law [CAL. UNEMP. INS. CODE §1483(a)]. Nevertheless, the state does not assume liability for any portion of extended duration benefits or federal-state extended benefits that are reimbursed or reimbursable by the federal government [CAL. UNEMP. INS. CODE §1483(f)].

Chapter 1149, also requires the Director of Employment Development to *estimate* each calendar quarter the amount of money to be paid or credited to the Unemployment Fund and Disability Fund and to reduce or increase the amount paid if the Director finds that the amount contributed during the previous calendar quarter differs from that which should have been paid [CAL. UNEMP. INS. CODE §1483(b)]. The Director may make these estimates based upon statistical sampling or by any other method he or she may deem appropriate and additionally, may require the Department of Corrections to provide any information or reports that he or she deems necessary to fulfill his or her duties [CAL. UNEMP. INS. CODE §1483(b)-(c)]. Furthermore, the Director of Employment Development is allowed to tabulate and publish in statistical form the information used for the purpose of determining these benefits and may divulge the name of the employing unit [CAL. UNEMP. INS. CODE §1483(d)]. After determining the amount of benefits to be paid by the State of California to the Unemployment Fund and the Disability Fund, the Director is to certify that amount to the State Controller who subsequently deposits the appropriate sums in these two funds [CAL. UNEMP. INS. CODE §1483(b)]. Finally, in order to facilitate the determination of the cost estimates the Department of Corrections is required to keep any work records the Director may need to properly administer this new legislation [CAL. UNEMP. INS. CODE §1483(e)].

To ensure effective utilization of this program, the Department of Corrections is required, at the time of release from the prison or institution, to give written notice to every inmate of his or her right to benefits [CAL. UNEMP. INS. CODE §1483(g)]. In addition, the Department of Corrections in cooperation with the Department of Employment Development is required to report to the legislature on the effectiveness of Chapter 1149 by July 1, 1981, including, but not limited to a comprehensive analysis that indicates what percentage of new convictions are former inmates receiving unemployment compensation or disability benefits pursuant to Chapter 1149 [CAL. UNEMP. INS. CODE §1484]. This report must also evaluate the extent to which the payments were beneficial in returning former inmates to productive employment and in reducing the rate of recidivism [CAL. UNEMP. INS. CODE §1484]. Finally, Chapter 1149 remains effective only until November 1, 1983, unless a later statute is enacted to extend or delete that date and

although no new claims may be filed on or after October 31, 1983, inmates may continue to receive benefits after November 1, 1983, as long as their claims are not based on wages earned after July 1, 1982 [CAL. STATS. 1977, c. 1149, §4, at —]. Thus, it appears that by providing former inmates who have performed productive work or have participated in vocational training programs while incarcerated with unemployment compensation and disability benefits, the legislature is hopeful of returning more inmates to productive employment and to reduce the rate of recidivism.

See Generally:

- 1) WASH. REV. CODE ANN. §72.02.110 (weekly payments to certain released prisoners).
- 2) 1 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Agency and Employment* §60 (unemployment compensation, object and nature of legislation) (8th ed. 1973).
- 3) 8 PAC. L.J., REVIEW OF SELECTED 1976 CALIFORNIA LEGISLATION 502 (workers' compensation for prisoners) (1977).

Insurance; right of spouse to file unemployment disability claim

Unemployment Insurance Code §2705.1 (new).

SB 278 (Holmdahl); STATS 1977, Ch 849

Under prior law, an otherwise eligible person who, due to mental inability, was unable to personally file a claim for unemployment compensation disability benefits, could receive such benefits only if the claim was filed by his or her authorized legal representative [See 22 CAL. ADM. CODE §2706-1]. Chapter 849 gives the spouse of such a person the right to file a claim "in the absence of any other legally authorized representative of the individual" [CAL. UNEMP. INS. CODE §2705.1]. For the purpose of Chapter 849 a person is "mentally unable to make a claim" only if he or she is so certified by a specified healing arts practitioner [CAL. UNEMP. INS. CODE §2705.1. See generally CAL. UNEMP. INS. CODE §§2708, 2709]. Payment of benefits under Chapter 849 may be made only upon execution of an affidavit by the spouse or person claiming such benefit and the receipt of this affidavit relieves the Director of Employment Development from further liability for such payments without regard to the truth of any facts stated in such an affidavit [CAL. UNEMP. INS. CODE §2705.1]. Thus, the new provisions added by Chapter 849 will allow the spouse of a person who is mentally unable to file and who has no other legally authorized representative, to file for disability benefits, to make a claim on behalf of the mentally incapable individual, and apparently to avoid the necessity of guardianship or conservatorship proceedings.