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PERSPECTIVE

Commissioner outlines insurers' duties during the pandemic

By Kirk Pasich

On May 14, California Insurance Commissioner Ricardo Lara issued a notice to all insurers, insurance adjusters, insurance brokers and insurance agents. See <http://www.insurance.ca.gov/0250-insurers/0300-insurers/0200-bulletins/bulletin-notices-commiss-opinion/upload/CSE-Insurance-Company-Exam-Report-CDI-Internet.pdf>. The notice followed his earlier April 14 notice. See <http://www.insurance.ca.gov/0250-insurers/0300-insurers/0200-bulletins/bulletin-notices-commiss-opinion/upload/Business-Interruption-Claims-Notice.pdf>.

In his April 14 notice, Commissioner Lara reminded “all agents, brokers, [and] insurance companies ... that they are required to comply with their contractual, statutory, regulatory, and other legal obligations, including ... the obligations set forth in the California Fair Claims Settlement Practices Regulations ... in connection with all California insurance claims including ... Business Interruption insurance claims, event cancellation claims, and other related claims filed by California businesses.”

In his May 14 notice, Commissioner Lara recognized that insureds attempting to resolve claims with their insurers “are facing both economic hardship and lack of access to the California court system.” He also stated that the California Department of Insurance “has been informed that some insurers and other persons engaged in the business of insurance in this state are unfairly taking advantage of the COVID-19 crisis and providing unjustifiably low settlement offers knowing financial need is high and recourse to the civil court system in the state is currently severely limited.” He also noted that the department has been informed that “certain insurers and other persons engaged in the business of insurance in this state are lowering or failing to make settlement offers with full knowledge that, because of the reduced California court schedules, policyholders are unable to obtain prompt redress in the California court system.”

Therefore, in his May 14 notice, Commissioner Lara stated: “Insurers

and other persons engaged in the business of insurance in this state are hereby directed to comply with their various legal obligations under the California Unfair [Insurance] Practices Act (Cal. Ins. Code §790.03 et seq.) to promptly and fairly settle insurance claims.” He further advised that he “intended to exercise the full extent of his authority under the ... Act to pursue all available administrative remedies including substantial civil penalties.”

As the April 14 notice states, “Upon receipt of a notice of claim, subject to certain exceptions, every insurer is required to acknowledge the notice of claim immediately, but in not event more than 15 calendar days after receipt of the notice of claim. See 10 Cal. Code Regs. Section 2695.5(e). If an insured gives notice through an insurance agent, then the agent must tell the insurer. As the April 14 notice states, subject to an exception for certain automobile coverages, “Failure of an insurance agent or claims agent to transmit notice of claim to the insurer promptly will be imputed to the insurer.”

Furthermore, upon receiving notice, and to protect an insured’s interest in “peace of mind and security,” “it is essential that an insurer fully inquire into possible bases that might support the insured’s claim.” *Egan v. Mut. of Omaha Ins. Co.*, 24 Cal. 3d 809, 819 (1979). As the California Supreme Court in *Egan* also held, “an insurer cannot reasonably and in good faith deny payments to its insured without thoroughly investigating the foundation for its denial.” The Supreme Court later noted, “By the same token, denial of a claim on a basis unfounded in the facts known to the insurer, or contradicted by those facts, may be deemed unreasonable. ... ‘The insurer may not just focus on those facts which justify denial of the claim.’” *Wilson v. 21st Century Ins. Co.*, 142 Cal. 4th 713, 721 (2007).

Given Commissioner Lara’s notice, insureds should insist that insurers honor all their duties, including those under California’s Fair Claims Settlement Practice Regulations. The regulations “by their terms, set forth the *minimum* standards for claims resolution.” *Jordan v. Allstate Ins. Co.*, 148 Cal. App. 4th

1062, 1077 (2007). The regulations impose several requirements upon insurers. First, an insurer must “adopt and communicate to all its claims agents written standards for the prompt investigation and processing of claims.” 10 Cal. Code Regs. Section 2695.6(a).

Second, an insurer must “immediately, but in no event more than forty (40) calendar days” after receiving notice or proof of a claim “accept or deny the claim, in whole or in part.” *Id.* Section 2695.7(b). If the insurer needs more time “to determine whether a claim should be accepted and/or denied in whole or in part,” then it must provide written notice of the need for additional time, specifying “any additional information [it] requires in order to make a determination and state any continuing reasons for [its] inability to make a determination.” *Id.* Section 2695.7(c) (1). The insurer thereafter must provide written notice every 30 calendar days “until a determination is made or notice of legal action is served.”

Third, when an insurer denies coverage “in whole or in part” based on “a specific statute, applicable law or policy provision, condition or exclusion,” its written denial must identify and “provide an explanation of the application of the statute, applicable law or provision, condition or exclusion to the claim.” *Id.* Section 2695.7(b)(1).

Fourth, in pursuing the required “thorough, fair and objective investigation, an insurer may not “persist in seeking information not reasonably required for or material to the resolution of a claim dispute.” *Id.* Section 2695.7(d).

Fifth, unless a claim has been settled by payment, an insurer must “provide written notice of any statute of limitation or other time period requirement upon which the insurer may rely to deny a claim.” *Id.* Section 2695.7(f). This notice must be given no less than 60 days before the expiration date.

Sixth, and finally, as the May 14 notice directs, an insurer may not “attempt to settle a claim by making a settlement offer that is unreasonably low.” *Id.* Section 2695.7(g).

While Commissioner Lara has made it clear that he intends to seek penalties from insurers that violate the

regulations, insureds have their own remedy: a claim for tortious breach of the implied covenant of good faith and fair dealing. Violations of the regulations supports a cause of action for bad faith and the recovery of punitive damages. See, e.g., *Jordan*, 148 Cal. App. 4th at 1078, 1080 (insured’s reliance on expert declaration “for the purposes of providing evidence supporting her contention that [insurer] had breached the implied covenant by its actions” was “a proper use of evidence of an insurer’s violations of the statute and the corresponding regulations”; insured could seek punitive damages and would have “opportunity to put on evidence of [insurer’s] malice, oppression or fraud”); *CD Ride, Corp. v. Travelers. Cos.*, 2011 WL 13220709, at *2 (C.D. Cal. July 12, 2011) (an insured “is not barred from asserting language of the [Unfair Insurance Practices Act] as support for her claim of breach of the implied covenant of good faith and fair dealing”); *Yang v. Peoples Benefit Ins. Co.*, CIV F06-458 (E.D. Cal. May 25, 2007) (“Bad faith is also reflected by the many instances where [the insurer] failed to follow the California insurance code and the regulations promulgated thereunder.”).

Therefore, as Commissioner Lara mandated, insurers must comply with the regulations. Their failure to do so may subject them not only to penalties, but also to claims for bad faith. ■

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