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April 19, 2000

Re: Chan, Claim of
Insured :
Date of Loss :
Claim No. :
Our File No. : 6002.166

COVERAGE OPINION

Dear :

Please recall that _____ denied this claim on the ground that the policy was terminated before the December 5, 1999 auto accident. The insured has retained an attorney who has disputed the denial. This letter sets forth our coverage opinion.

As discussed below, I recommend that _____ interview the agent before responding to the insured's attorney's letter. However, based on the facts as we know them, there appears to be no coverage.

FACTS

_____ issued an auto policy to Claudia Ann Chan. Ms. Chan apparently had the policy for several years. I understand that the policy was on an AIU104 form. _____ apparently sent Ms. Chan monthly notices stating in effect that, if the payment was not received by a particular date, the policy would be non-renewed. _____ sent such a notice with a premium due date of October 28, 1999. Although the file does not include a copy of the notice itself (just a computer recreation of it), Ms. Chan does not dispute receiving it. Ms. Chan was out of the country and did not see the notice until November 19, 1999, when she returned from her trip.

_____ did not receive any payment from Ms. Chan as of the December 5, 1999 accident. Ms. Chan's son, Jonathan Lee, got into an accident while driving his 1996 Toyota, allegedly injuring the other driver, Yin Ying Yue. Mr. Lee's Toyota was listed on the _____

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policy.

Unbeknown to _____ at the time, Ms. Chan mailed a November 19, 1999 \$361.21 premium payment check to her _____ agent, Lincole Lin. The check did not get to the _____ agent's office until January 10, 2000. A January 6, 2000 letter from the United States Postal Service to Ms. Lin explained that, upon Ms. Lin's request to investigate the delay in the delivery of Ms. Chan's check, it was determined that the envelope was originally postmarked in November 1999. However, according to the post office's letter, another postmark dated December 30, 1999 was also printed on the envelope.

In the meantime, when the claim was reported to _____, _____, not having received any premium payment from Ms. Chan since before October 28, 1999, investigated and determined that there was no coverage. On December 13, 1999, you sent letters to Ms. Chan and to the attorney for the third party claimant stating that the policy terminated on October 28, 1999. (The letters do not say that the Department of Insurance could be contacted.) The letter to Ms. Chan invited her to provide any information she had that showed that _____ provided coverage.

The _____ agent's office became involved, and you explained _____'s position to them.

_____ reinstated the policy with a lapse, effective the day after the accident. On January 21, 2000, _____ responded to a Management Exception, recommending that the denial should stand. On January 24, 2000, _____ agreed. The agent's office was informed on January 26, 2000 that the denial stood.

There was no further activity until April 12, 2000, when an attorney for the insured, _____, faxed an April 12, 2000 letter to _____, _____ CEO, in _____. The letter states that, when she returned from an overseas trip on November 19, 1999, Ms. Chan received her notice to pay that was due on October 28, 1999. According to the letter, on November 19, 1999, Ms. Chan called the agent _____, who informed Ms. Chan that she "should send a check right away." According to the letter, on that date Ms. Chan wrote and mailed a check to _____. The letter states that the envelope in which the insured mailed the check included two postmarks, in November 1999 and December 30, 1999. (Apparently the insured got the envelope from _____ office.). The attorney requested that _____ provide coverage because the check was mailed before the accident. He contended that under California law "all presumptions are in favor of the policyholder."

You then contacted me for our advice.

COVERAGE ANALYSIS

_____ Terminated the Policy Before the Accident

With respect to termination, the policy provides as follows:

“Termination

If **we** offer to renew **your** policy and **your** required premium payment isn't received on or before the end of the then current policy period, **your** policy will terminate on the expiration date of the then current policy period.” (page 5)

Insurance Code section 663 provides:

“(a) Before policy expiration, an insurer shall deliver to or mail to the named insured, at the address shown on the policy, one of the following:

(1) At least 20 days before expiration, a written or verbal offer of renewal of the policy, contingent upon payment of premium as stated in the offer.

...

(c) In the event that an insurer fails to give the named insured either an offer of renewal or notice of non-renewal as required by this section, the existing policy, with no change in its terms and conditions, shall remain in effect for 30 days from the date that either the offer to renew or the notice of non-renewal is delivered or mailed to the named insured. A notice to this effect shall be provided by the insurer to the named insured with the policy or the notice of renewal or non-renewal....

(d) The insurer shall not be required to notify the named insured, or any other insured, of non-renewal of the policy if the insurer has mailed or delivered a notice of expiration or cancellation, on or prior to the 30th day preceding expiration of the policy period.”

If _____ complied with Insurance Code section 663 by mailing, at least 20 days before October 28, 1999, a notice stating that the policy would terminate if payment was not received by October 28, 1999, the policy was validly terminated as of October 28, 1999. Courts have upheld terminations of auto policies when an insured failed to make a payment before the termination date set forth in the notice, due to circumstances in the insured's life. Fujimoto v. Western Pioneer Ins. Co. (1978) 86 Cal.App.3d 305, 310-313; Kates v. Workmen's Auto Ins. Co. (1996) 45 Cal.App.4th 494.

In our claim, it is not clear when _____ mailed the notice that a premium was due on October 28, 1999. However, the insured does not dispute receiving the notice and apparently concedes that she was out of the country from sometime before October 28, 1999 until her return on November 19, 1999. Even if _____ sent the notice sometime after October 8, 1999 (20 days before October 28, 1999), under section 663, the termination would be effective 30 days after the notice was mailed. The insured apparently does not contend that _____ mailed the notice after November 5, 1999 (30 days before the accident) or even that _____ mailed it after October 8, 1999. Thus, I conclude that the policy was validly terminated before the December

5,1999 accident. However, because, on November 19, 1999, the _____ agent encouraged the insured to pay her premium, that encouragement might be deemed to be an offer to reinstate the policy.

Apart From the Effect of the Agent's Comment to the Insured,
the Insured's Mailing of Her Premium Check on November 19, 1999
Did Not Serve to Reinstate Coverage

The next issue is whether the policy was reinstated upon the insured's mailing of her premium check on November 19, 1999, or whether it was reinstated only after _____ received the check in January 2000, after the accident. The insured's attorney contends in his April 12, 2000 letter that coverage should be provided based upon the insured mailing the check on November 19, 1999, before the accident.

There appear to be no insurance cases that discuss the issue of whether payment by mail is deemed effective upon the insured's mailing or on the insurance company's receipt (except for an unpublished opinion, Moore v. Security-Connecticut Life Ins. Co., 1998 U.S.App.LEXIS 2809 (9th Cir.)). We must look to the statutes and cases outside the insurance area to answer this question.

In Cornwell v. Bank of America (1990) 224 Cal.App.3d 995, a property owner mailed his mortgage payment to his lender, but the lender never received the payment. The lender eventually foreclosed on the property based on the non-payment of the one monthly payment of \$174.46. The property owner argued that his obligation was complete once he mailed the check and that the lender bore the risk that the check might be lost in the mail. The court of appeal disagreed. It discussed Civil Code section 1476, which states:

“If a creditor...at any time directs the debtor to perform his obligation in a particular manner, the obligation is extinguished by performance in that manner, even though the creditor does not receive the benefit of such performance.”

The Cornwell court pointed out that the lender did not require the borrower to pay by mail and that the borrower's decision to mail his mortgage payment meant that the borrower bore the risk of loss in the mail. (See also Hale v. Bohannon (1952) 38 Cal.2d 458, 467.)

Cornwell was cited with approval in Mora v. Mora, 218 B.R.71 (9TH Cir. 1998), where the court stated: “A rule making transfer of a cashier's check effective merely by mailing it would thus ignore common business practice and common sense.” Id. at 76.

In the unpublished opinion of Moore v. Security-Connecticut Life Ins. Co., the insured argued that Civil Code section 1583 states that consent to an offer is effective upon transmission to the proposer, so that mailing a premium check in response to an offer to renew amounted to an acceptance, creating a contract at the moment of mailing. However, the court pointed to Civil

Code section 1582, which states:

“If a proposal prescribes any conditions concerning the communication of its acceptance, the proposer is not bound unless they are conformed to; but in other cases any reasonable and usual mode may be adopted.”

The court stated that, when the two sections are read together, the effect is that the mailing of a premium payment is deemed acceptance only when the offer does not state the conditions concerning the communication of its acceptance.

In our claim, the key fact is that the “termination” portion of the _____ policy quoted above specifically states that the premium payment must be “received.” Because of the policy language and the case and statutory law, it is clear that, in order for _____ to have had an obligation to reinstate the policy, _____ would have had to have received the check before the accident. Thus, putting aside the effect of the agent’s comment to the insured, the insured bore the risk of the check being lost or delayed in the mail. Because the check was not received until after the accident, there is no coverage.

Reinstatement of the Policy Does Not Create Coverage for the Accident

When _____ reinstated the policy, it did so effective December 6, 1999, more than a month before it received the premium check. _____ probably should have made the reinstatement effective when it received the check or when it decided to allow reinstatement. By making the reinstatement effective at an earlier date, _____ arguably was charging a premium for a period of time in which it was not exposed to a risk, arguably in violation of Insurance Code sections 480, et seq. Still, the law is clear that an insurance carrier’s actions taken after the loss do not affect coverage where the policy was validly terminated as of the loss date. Monteleone v. Allstate Ins. Co. (1996) 51 Cal.App.4th 509 (a case in which our office represented _____).

The Effect of the Agent’s Statement to the Insured that the Insured Should Send a Check Right Away

As mentioned above, the insured’s attorney contends that on, November 19, 1999, the insured, upon returning from her trip, discovered the notice that her policy had terminated October 28, 1999 and called her agent, who said to send the check in right away. The issue is whether the agent’s statement that the insured should send a check right away amounted to an oral offer to renew and, if so, whether the acceptance was effective upon mailing the check, not on _____ receiving it. As mentioned above, Civil Code section 1476 states that if a debtor pays in the manner directed by a creditor, payment is effective upon compliance with the creditor’s request. I recommend that _____ interview the agent to determine the agent’s contentions as to exactly what was said.

Still, when coverage depends on an unresolved factual dispute, a carrier must defend unless it has evidence sufficient to establish in a judicial proceeding that there is no coverage. Montrose Chemical Corp. v. Superior Court (1993) 6 Cal.4th 287, 295; Haskell, Inc. v. Superior Court (1995) 33 Cal.App.4th 963, 976-977. In other words, if there is a dispute as to the facts, for purposes of determining coverage on a liability claim, the insurance carrier must accept the insured's version as true, unless it can conclusively prove otherwise. This concept has been extended to questions of whether the policy was in effect, not just as to whether an insuring clause or exclusions apply to defeat coverage. Old Republic v. Superior Court (1998) 66 Cal.App.4th 128; Maryland Casualty Co. v. Nationwide Ins. Co. (1998) 65 Cal.App.4th 21; Maryland Casualty Co. v. National American Ins. Co. (1996) 48 Cal.App.4th 1822.

This is the only portion of this opinion for which there is some doubt. The problem is in interpreting the legal effect of the agent's apparent off-the-cuff statement.

In my opinion, a reasonable construction of this statement is that the agent was inviting the insured to send in a check so that _____ could consider whether or not to reinstate the policy. At best for the insured, the statement could be construed to mean that, if the insured sent in the check, _____ would reinstate the policy when _____ received the check. It seems to me that it would be a stretch for the insured to argue that the agent's oral statements amounted to a modification of a written term of the policy requiring that _____ actually receive the payment. More likely, the statement was an encouragement to the insured to hurry up and pay because she had no coverage as of the phone call. It would be unreasonable to read more into the agent's statement than that.

I tentatively conclude that the agent's statement did not constitute an oral modification of the policy so that _____ was bound upon the insured mailing the premium check. This opinion depends on what the agent contends was said in that conversation.

The Insured has the Burden of Proving that the Policy was in Effect

The insured's attorney's April 12, 2000 letter states that, under California law, "all presumptions are in favor of the policyholder." This is not correct. Although ambiguities are construed in favor of the insured (AIU v. Superior Court (1990) 51 Cal.3d 807, 821-22), it is an overstatement to say that all factual disputes must be resolved in favor of the insured. Rather, the insured has the burden of establishing that a policy was in effect at the time of the loss and that the loss is within the insuring clause. Masonite Corp. v. Surplus Lines Ins. Co. (1990) 224 Cal.App.3d 912; Clemmer v. Hartford Ins. Co. (1978) 22 Cal.3d 865.

CONCLUSION

I recommend that you interview the _____ agent to determine what was said in her conversation with the insured on November 19, 1999. Unless that conversation reasonably can

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be construed to amount to an oral modification of the contract allowing the insured to have coverage when her check was mailed, I recommend that the claim again be denied, because the insured bore the risk that the check would be delayed in the mail. I will prepare a response to the insured's attorney's letter after you have contacted the _____ agent.

Please call if you have any questions.

Very truly yours,

POLLAK, VIDA & FISHER

MICHAEL M. POLLAK

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