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COMPLEX LITIGATION LEGAL UPDATE
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REVEALING POLICY LIMITS PRE-LITIGATION

By Dennis B. Kass

Plaintiff's counsel calls you, the claims professional, after she has sent you the medical documentation on this adverse liability traffic collision. Clearly this is a case you need to settle, as the exposure likely exceeds the policy limits. Counsel now tells you that her client is willing to settle for the policy limits. Since liability is clear and counsel's damage analysis seems appropriate, the request for policy limits appears more than reasonable. Counsel then asks THE question: "So, what are the policy limits?"

Can you simply answer the question? After all, settling the case at the pre-litigation stage and avoiding excess exposure to the insured is clearly in his best interest. The answer may surprise you.

In California, policy limits are considered "personal" or private as defined under the Insurance Information and Privacy Protection Act at Insurance Code §791 et seq. (*Griffith et al v. State Farm* (1991) 230 Cal.App.3d 59.) They cannot be revealed absent permission from the insured.

Ideally, you can simply contact your insured and obtain written permission. The problem comes when the insured has disappeared or becomes uncooperative.

This is essentially what occurred in *Griffith*. There, an insurer refused to reveal policy limits prior to litigation. The court made clear that this was perfectly appropriate and mandatory under California law, since policy limits are considered "personal" or private. The court went on to explain that the claimant, not the insurer, has a number of options available to obtain policy limit information, including:

- File a personal injury lawsuit.
- Have the insurer obtain an authorization to release the policy limits;
- Engage in pre-litigation discovery pursuant to Code of Civil Procedure §2035.010, et seq. This allows for the filing of a petition to allow for pre-litigation discovery. (See also *Connecticut Indemnity Co. Et al v. Superior Court of San Joaquin* (2000) 23 Cal.App.4th 807.)

These alternative ways provided by the *Griffith* court have been upheld and reaffirmed. (See i.e. *Madrigal v. Allstate Ins. Co.*, 215 F. Supp. 3d 870 (C.D. Cal. 2016)).

In an attempt to obtain policy limits information, even without the insured's approval, plaintiff attorneys typically turn to *Boicourt v. Amex Ins. Co.* (2000) 78 Cal.App.4th 1390. This authority is typically misinterpreted and actually supports the privacy concerns involving policy limit information. The *Boicourt* court relied on specific facts where an insurer had a blanket rule not to divulge policy limits. The court made clear that an insurer has an obligation to attempt to contact an insured to obtain written permission to divulge policy limits information. The court went on to state:

> "Actually, because California law is quite clear that insurers may not disclose policy limits absent written permission from the insured, the insurer's sin here was a blanket refusal to contact the insured to see if he wanted the policy limits disclosed." (*Id. at 764.*)

In summarizing its ruling, the court provided an interesting perspective:

> "To wit, an insurance company must obtain the insured's written permission before policy limits may be disclosed. [citations] If an insurer has a blanket rule against ever contacting its insureds regarding requests for disclosure, there is a marginal savings in time and paperwork on any given file. An insurer must rouse itself to complete the task of sending a letter to the insured explaining that a request for policy limits has been made and asking if the insured will, in writing, authorize disclosure. But to the degree that such a rule may have **the real world effect of "foreclosing" the possibility of a quick settlement within policy limits, the insured has lost out.**" (Emphasis added) (*Id.* at 767.)

What does this mean for a claims professional? All efforts should be made to find an insured. This should include sending correspondence to the insured. If there is a suspicion that the insured has moved, perform online research to locate an insured's forwarding address. If necessary, in house or private investigators may be necessary to track down an insured.

If the insured cannot be found, then you cannot reveal the policy limits, even if your intentions are pure and it benefits the insured by allowing for a settlement within policy limits. While it can become uncomfortable, especially where settlement is advantageous to the insured, the burden shifts to the claimant's counsel to obtain this information through proper channels.

**About the author: Dennis B. Kass head's the Complex Litigation Team at Manning & Kass. This includes 1st and 3rd party SIU matters, affirmative litigation under California Insurance Code section 1871.7, transportation litigation, GIG economy matters, and high exposure personal injury cases. Dennis has written scores of articles and lectures all over the country on SIU and other issues. Dennis has received a number of awards for his trial skills and is a member of ABOTA. Dennis has also been featured on television, radio and in the written press for his handling of many high profile cases.*

THE NEW CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 664.6 AND ITS IMPACT ON SETTLEMENT PRACTICES

By Daniel J. Sullivan

Most claims professionals and attorneys are familiar with California Code of Civil Procedure section 664.6, which, prior to January 1, 2021, stated that:

> "[i]f parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement."

However, as amended by Stats. 2020, Ch. 290, Sec. 1 (AB 2723) effective January 1, 2021, this section now adds the following

> "(b) For purposes of this section, a writing is signed by a party if it is signed by any of the following: (1) The party. (2) An attorney who represents the party. (3) If the party is an insurer, an agent who is authorized in writing by the insurer to sign on the insurer's behalf. . . . (d) In addition to any available civil remedies, an attorney who signs a writing on behalf of a party pursuant to subdivision (b) without the party's express authorization shall, absent good cause, be subject to professional discipline."

Whereas prior to January 1 the writing memorializing the settlement had to be signed by the parties, now the writing need only be signed by the attorney for the party or an agent who is authorized in writing by the insurer to sign on insurer's behalf if the party is an insurer. These new provisions apply for the vast majority of bodily injury actions. It is important to note that an agent of the insurer's signature is only sufficient if the party is an insurer, not an insurer of a party. Although not changed by the amendment, it is also important to note that the provisions of this section only apply to pending litigation, not pre-litigation settlements. For pre-litigation settlements, the court never had jurisdiction so it cannot maintain jurisdiction to enforce the settlement terms.

The language in section (d) that indicates the attorney shall be subject to professional discipline if they sign the writing without the party's express authorization suggests that an attorney can still bind the client, even without having authority to bind the settlement. Therefore, more than ever, it is best practice for to have the client's express authorization in writing for any settlement contemplated, including any material terms, before any signed communication is sent to the other party regarding acceptance of a settlement. It is also best practice to include, in any written acceptance of a settlement agreement that contemplates additional terms not expressed therein, to include language to the effect that "the settlement will be finalized by means of a formal written settlement agreement and release, the full material terms of which are not included herein."

USING CONSUMER INFORMATION: PRIVACY LAWS' IMPACT ON BUSINESSES

By David R. Ruiz

The struggle to balance consumer privacy and a businesses' use of consumer data for marketing purposes has created a patchwork of laws that are often hard to decipher for consumers and businesses alike.

Consumer advocates and numerous governments became concerned about whether such businesses and their practices respected the privacy rights of their customers. Since 2018, there has been a proliferation of laws governing how a business obtains, manages, and processes the personal data of its customers and potential customers. These laws, despite being enforced locally, have a global impact and reach because of the increasing number of online transactions at a national and international level.

The most impactful privacy laws affecting American companies since 2018 are the European Union's General Data Protection Regulation of 2016 ("GDPR") that became effective in 2018 and the California Consumer Privacy Act of 2018 (Cal. Civ. Code § 1798.100 et seq.) that became effective in 2020. These laws still allow businesses to collect consumer data for marketing and analysis purposes, but subject these practices to severe limitations by empowering the consumer as the ultimate decision-maker regarding their own private information. A company doing business in the European Union or California may be subject to fines or litigation for violations of these laws. Therefore, it is in the best interest of any of these companies to become compliant with these laws to ensure that they can still obtain the data they need to promote their operations while respecting the rights of their consumers.

This article will explore GDPR as the most comprehensive consumer privacy law worldwide and CCPA as the most comprehensive consumer privacy law within the United States.

EUROPEAN UNION'S GDPR

GDPR has a broad reach as it will apply to any individual or entity doing business in the European Union or offering goods or services to European Union residents. GDPR protects Personal Data defined as any information relating to an identified or identifiable resident of the European Union.

GDPR recognizes multiple rights to consumers, including the following:

Right to be informed when their personal data is being collected, the purpose for the collection, and for how long the data will be kept (Right to Information);

- Right to access their personal information and know how it is being processed (Right to Access);
- Right to receive a copy of their data and to transmit it to another business (Right of data portability);
- Right to request businesses to delete the personal data collected (Right to Deletion);
- Right to correct and complete inaccurate or missing data (Right of rectification);
- Right to restrict and object to processing of personal data;
- Right to object to automatic decision-making.

To ensure that these rights are respected, businesses must appoint a data protection officer and set up proper proceedings to obtain the consumer's consent, and to timely manage consumers' requests for information, deletion, rectification, etc. These processes must be memorialized in an accessible and easy to understand privacy notice. Further, businesses are responsible for their vendors compliance with GDPR. These restrictions and obligations are heightened when the private data belongs to a minor.

In addition, businesses must take appropriate technical and organizational measures to protect the consumer's data. If there is a data breach, businesses must notify the consumer and the appropriate national supervisory authority of any data breaches.

Failure to comply with GDPR will be exposed to severe fines by the supervising national authority of the country where the violation was reported, and also litigation.

CALIFORNIA'S CCPA

CCPA applies to companies doing business in California with California residents, but exempts companies with a gross revenue below $25 million, with less than 50,000 customers per year, or that derive less than 50 percent of their income from selling consumer's personal information. The CCPA protects any Personal Information collected online or in a brick-and-mortar store that identifies, relates to, describes, is capable of being associated with, or may reasonably be linked, directly or indirectly, with a particular consumer or household.

- CCPA recognizes the following rights to consumers:
- Right to information;
- Right to access;
- Right of data portability;
- Right to opt-out from third party sale of information;
- Right to deletion;
- Right not to be discriminated.

CCPA requires businesses to maintain a privacy policy to be updated every 12 months memorializing the different consumer rights, the processes followed to comply with requests for information, access, deletion, data portability, and opt-out. In addition, CCPA requires businesses to make available at least two different methods for consumers to trigger these processes. Further, businesses are responsible for their vendors' CCPA violations unless they did not have actual notice or reason to believe that the vendor intended to commit such a violation. These restrictions and obligations are heightened when the private data belongs to a minor.

> These laws still allow businesses to collect consumer data for marketing and analysis purposes, but subject these practices to severe limitations by empowering the consumer as the ultimate decision-maker regarding their own private information.

CCPA does not directly impose data security requirements, but establishes a right of action for data breaches resulting from a failure to implement and maintain reasonable security practices and procedures.

Failure to comply with CCPA may result in civil penalties and litigation.

A WORD TO THE WISE

If you are a business owner get help, especially if you are involved in local and international advertising. As shown, both GDPR and CCPA impose multiple complex and nuanced requirements on businesses. Compliance with these laws is key to successfully maintain a business presence in the European Union and/or California. The requirements imposed by these privacy laws are quite stringent, and at first sight, it may appear as if they substantially limit businesses' ability to gather and use for analytical purposes their consumers' information. However, the requirements imposed by GDPR and CCPA impact the means and methods to obtain the information and use it appropriately more than they impact the ability to obtain the information. A business compliant with these laws should still be able to obtain consumers' data with their consent, and use it for marketing purposes so long as the processes are in place to respect the consumers' privacy rights. More importantly, businesses must make sure that they are up to speed with these laws and that their processes are up to date.

TEAM UPDATES

- The firm is excited to welcome **David R. Ruiz** to the Partnership. In addition to being a key member of the Complex Litigation team, David is also The Assistant Dean and a Professor at Glendale School of Law.
- Come see **Dennis B. Kass** and **Rodrigo J. Bozoghlian** speak at the Anti-Fraud Alliance Conference from April 13-15, 2022. Dennis and Rodrigo's presentation is entitled: Building your Action Plan for Out of Control Jury Verdicts.
- Congratulations to **Lilit Shamiryan** on the birth of her son.
- Congratulations to **Dennis B. Kass** for his presentations this year at IASIU, IFM, The Coalition Against Insurance Fraud and other organizations on a variety of timely topics involving insurance fraud.
- Congratulations to **Dennis B. Kass** who has entered his 9th year on the National, IASIU Board of Directors where he serves as co-counsel to the national organization and board. Dennis also serves as counsel to the Southern California chapter to IASIU, a position he has held for over 10 years.
- Congratulations to **Manning & Kass, Ellrod, Ramirez, Trester LLP** who is one of only 10 law firms nationwide to become members of the Coalition Against Insurance Fraud. **Dennis B. Kass** serves on the Legal Affairs Committee. Dennis assisted in drafting a model qui tam statute which can serve as a model for future legislation for states to adopt.

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The Complex Litigation Team encompasses special investigations unit/insurance fraud litigation, catastrophic liability defense, trucking and transportation, class action and mass tort defense.