Filed 8/15/12 Van Slyke v. California Physicians' Service CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

AL VAN SLYKE, Plaintiff and Appellant, v. CALIFORNIA PHYSICIANS' SERVICE, Defendant and Respondent.	B234708 (Los Angeles County Super. Ct. No. BC443344)

APPEAL from a judgment of the Superior Court of Los Angeles County, Rex Heeseman, Judge. Affirmed.

Kabateck Brown Kellner, Richard L. Kellner, Karen Liao; McKennon Law Group, Robert J. McKennon and Scott Calvert for Plaintiff and Appellant.

Manatt, Phelps & Phillips, Gregory N. Pimstone, Brad W. Seiling, Joanna S. McCallum and Tara Church for Defendant and Respondent.

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Al Van Slyke filed a lawsuit on behalf of himself and all others similarly situated against California Physicians' Service doing business as Blue Shield of California (Blue Shield of California) and Blue Shield of California Life and Health Insurance Company (Blue Shield Life) (collectively Blue Shield) alleging the companies improperly sold health care coverage without informing him and other members of his putative class that maternity benefits were included and that health coverage without those benefits, and thus for less cost, was available from other carriers. The trial court sustained Blue Shield's demurrer to the operative second amended complaint without leave to amend and dismissed the action. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Complaint*

Van Slyke initially filed this lawsuit in August 2010 against Blue Shield of California alleging causes of action for negligence and violation of California's unfair competition law (UCL) (Bus. & Prof. Code, § 17200 et seq.). After filing a first amended complaint, which added Blue Shield Life as a defendant, on April 7, 2011, Van Slyke filed the operative second amended complaint against both Blue Shield of California and Blue Shield Life on behalf of himself and a class defined as "[a]ll male residents of California who purchased individual health insurance policies from Blue Shield of California and/or Blue Shield of California Life and Health Insurance Company that included coverage for maternity care."[1] The pleading alleged from 1999 through 2007 Blue Shield charged certain subscribers to its health insurance policies, specifically single adult males including Van Slyke himself, premiums for unnecessary maternity coverage without proper disclosures.

Van Slyke alleged he had applied for health care coverage from Blue Shield of California in 1999. Van Slyke specified on his application he was a "single adult male" and desired coverage that would be appropriate for a single adult male. Van Slyke further alleged an agent of Blue Shield of California (not otherwise identified) assured

[1] The trial court had sustained a demurrer to the first amended complaint with leave to amend.

him he was receiving a policy providing coverage for a single adult male. Blue Shield of California then issued Van Slyke a policy including maternity coverage and began collecting premiums for that coverage. Van Slyke was never directly informed his policy included maternity coverage or that health care coverage was available that did not include it.

Van Slyke maintained this policy from 1999 until February 1, 2007 when he asked a Blue Shield agent about his increasing policy rates. Upon being informed by the agent his policy included maternity coverage, Van Slyke purchased a new policy from Blue Shield Life that did not include maternity coverage. This change resulted in a $123 decrease in Van Slyke's monthly premium.

Van Slyke alleges, because he indicated on his application he was a single adult male, Blue Shield had a duty to inform him his policy included maternity coverage and other policies without maternity coverage were available. The complaint alleges Blue Shield breached this duty of disclosure and was, therefore, negligent and also violated California's unfair competition law by engaging in unlawful, unfair or fraudulent conduct.

2. *Blue Shield's Demurrer and the Trial Court's Ruling*

On May 11, 2011 Blue Shield demurred to the second amended complaint, contending all of Van Slyke's claims failed because it had no duty to recommend the most affordable health plan available. Blue Shield also argued Van Slyke had not alleged facts sufficient to constitute a cause of action under the UCL.

The trial court sustained the demurrer without leave to amend on June 22, 2011. Relying in large part on *Levine v. Blue Shield of California* (2010) 189 Cal.App.4th 1117 (*Levine*), the trial court ruled Blue Shield did not owe Van Slyke any fiduciary duties and Van Slyke had otherwise failed to demonstrate "Blue Shield had a duty to disclose that the premiums of his off-the-shelf policy would have been lower (assuming arguendo that point) if he had 'structured [his] health coverage' to exclude maternity benefits." The court also found Blue Shield did not have a statutory duty under Insurance Code section 332 (section 332) to disclose that omitting maternity benefits would have lowered Van

Slyke's premiums because he had failed to allege he had no means of ascertaining the specific benefits his plan included. Finally, the court ruled Van Slyke had failed to adequately allege either a violation of Business and Professions Code section 17200 or a breach of Blue Shield's duty of good faith and fair dealing.

The court's order of dismissal was signed and filed on August 26, 2011. We treat Van Slyke's premature notice of appeal, filed July 22, 2011, as filed immediately after entry of judgment. (Cal. Rules of Court, rule 8.104(d)(2).)

DISCUSSION

1. *Standard of Review*

On appeal from an order dismissing an action after the sustaining of a demurrer, we independently review the pleading to determine whether the facts alleged state a cause of action under any possible legal theory. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415; *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.) We may also consider matters that have been judicially noticed. (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42; see *Serrano v. Priest* (1971) 5 Cal.3d 584, 591.) We give the complaint a reasonable interpretation, "treat[ing] the demurrer as admitting all material facts properly pleaded," but do not "assume the truth of contentions, deductions or conclusions of law." (*Aubry*, at p. 967; accord, *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126; see *Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 20 [demurrer tests sufficiency of complaint based on facts included in the complaint, those subject to judicial notice and those conceded by plaintiffs].) We liberally construe the pleading with a view to substantial justice between the parties. (Code Civ. Proc., § 452; *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

2. *The Trial Court Properly Sustained the Demurrer to Van Slyke's Negligence Cause of Action Because Blue Shield Owed Him No Duty of Disclosure*

The gravamen of Van Slyke's complaint is that, based on his request for coverage for a single adult male, Blue Shield owed him (and other similarly situated health plan participants) a duty to disclose his plan had maternity coverage for which additional premium was being charged and other plans were available without such coverage. Like the trial court, we find the holding and analysis of *Levine, supra*, 189 Cal.App.4th 1117, which rejected recognition of any such duty, both indistinguishable and persuasive.

The plaintiffs in *Levine, supra*, 189 Cal.App.4th 1117, a husband and wife, alleged their monthly health care premiums would have been lower if they had designated the wife, rather than the husband, as the primary insured and had added two minor dependents to a single-family plan rather than having one dependent covered under a separate health care plan and the second covered under a separate health insurance policy. (*Id*. at p. 1121.) Attempting to state causes of action for fraudulent concealment, negligent misrepresentation, breach of the implied covenant of good faith and fair dealing, unjust enrichment and unfair competition, the Levines contended Blue Shield had a duty to disclose information concerning how they could have structured their health coverage to lower their monthly premiums. (*Ibid*.)

After reviewing earlier case law, the *Levine* court explained, "'There is no duty of ordinary care to disclose pricing information during arm's-length contract negotiations. . . . There is also no special duty in the relationship between an insurer and a potential insured. The relationship between an insurer and a prospective insured is not a fiduciary relationship.'" (*Levine, supra*, 189 Cal.App.4th at p. 1128.) The court then held traditional standards of freedom of contract should govern the initial decision to obtain insurance and the subsequent decision to offer coverage. (*Id.* at p. 1129.)

Blue Shield's decision to include maternity coverage in the health care plan offered to Van Slyke, like the pricing decisions in *Levine*, was an element of the parties' negotiations governed by ordinary principles of contract law. Just as the Levines were free to reject Blue Shield's offer of coverage, so too Van Slyke could have rejected the

coverage offered to him in favor of a plan from another provider that may have been more specifically tailored to his perceived needs. Blue Shield had no more of a special duty to create a special health care program for Van Slyke to reduce his health care premiums than it did to structure the Levines' health coverage to lower theirs. (See *Jonathan Neil & Assoc., Inc. v. Jones* (2004) 33 Cal.4th 917, 939 [generally speaking, the insurer's ability to charge excessive premiums will be disciplined by competition among insurers"].)

Van Slyke's distinction of *Levine* as involving the structure of coverage rather than terms of the health care plan itself is illusory. Van Slyke's sole objection to inclusion of maternity coverage he assertedly would never need was its impact on the premiums he paid. The structure and cost of health protection were at issue in both cases.

Similarly unpersuasive is Van Slyke's insistence his second amended complaint stated a cause of action because he made a specific request for coverage and Blue Shield, in response, misrepresented the coverage being offered. As Van Slyke suggests, the court in *Fitzpartrick v. Hayes* (1997) 57 Cal.App.4th 916, 927, recognized an exception to the general rule an insurance agent has no affirmative duty to advise the insured concerning additional or different coverage when "the agent misrepresents the nature, extent or scope of the coverage being offered or provided [or] there is a request or inquiry by the insured for a particular type or extent of coverage." However, Van Slyke failed to allege facts that would trigger either exception.

Although Van Slyke alleged a Blue Shield agent assured him he was receiving coverage for a single adult male, he did not—and could not—allege his coverage was in any way inadequate for his needs. That is, Van Slyke's coverage may have been more extensive than he had intended, but Blue Shield's agent did not misrepresent the scope of the coverage in assuring him it provided protection for a single adult male. Because Van Slyke did not specify a minimum or maximum level of coverage, the agent accurately assured him the plan provided the coverage about which he had inquired. Blue Shield did not disregard his instructions (even assuming we were to liberally construe his request in that manner) by also including maternity benefits in his health plan.

Similarly, Van Slyke's allegation he requested coverage for a "single adult male' is insufficient to impose any additional or special duties on Blue Shield. Coverage for a "single adult male" is not a standard type of health plan or policy, and a generalized request for it is not enough to entirely and exactly refer to a specific policy or plan. An insurer or health service plan has no duty to ensure the insured or plan participant receives even the minimum coverage allegedly wanted if the request for coverage is overly vague or general. (See *Wallman v. Suddock* (2011) 200 Cal.App.4th 1288, 1310-1312; *Ahern v. Dillenback* (1991) 1 Cal.App.4th 36, 40-43.) Necessarily, no duty was breached here, where Van Slyke received *more* coverage than he believes he requested.

Desai v. Farmers Ins. Exch. (1996) 47 Cal.App.4th 1110 and *Paper Savers, Inc. v. Nacsa* (1996) 51 Cal.App.4th 1090, upon which Van Slyke relies, do not require a contrary result. In *Desai* an insured had requested a policy that would cover his entire home but received one that only covered a portion of it. (*Desai*, at p. 1120.) The court held the insurer had failed to provide the bargained-for coverage. (*Ibid.*) Similarly, in *Paper Savers, Inc.* the insured had requested a policy that would cover all its property. (*Paper Savers, Inc*, at pp. 1092-94.) The court held this specific request for coverage imposed a duty on the insurance agent to provide the coverage specified. (*Id.* at pp. 1096-1097.) In contrast to the case at bar, in both cases the insured had made a specific request for insurance protection that expressly identified the nature and extent of the coverage desired. Moreover, in each of these cases the insured received *less* coverage than they had sought—a far different situation from Van Slyke's, whose only complaint is that his premium was higher than it might have been because he received *additional* coverage not specifically requested.

Finally, as Blue Shield argues, Van Slyke alleged no basis for his purported ignorance of the actual terms of his health care plan. Van Slyke was responsible for reading the provisions of his agreement with Blue Shield. (*See Hadland v. NN Investors Life Ins. Co.* (1994) 24 Cal.App.4th 1578, 1586.)

3. *Section 332 Did Not Require Blue Shield To Direct Van Slyke to the Maternity Benefits Included in His Health Care Plan*

In addition to alleging Blue Shield had a common law duty of disclosure, Van Slyke asserts Blue Shield was subject to the statutory duty of disclosure set forth in section 332, which provides, "Each party to a contract of insurance shall communicate to the other, in good faith, all facts within his knowledge which are or which he believes to be material to the contract and as to which he makes no warranty, and which the other has not the means of ascertaining." He contends that provision obligated Blue Shield to specifically identify the maternity benefits included in its health care plan.[2]

We agree with the trial court that Blue Shield had no such obligation. As discussed, Van Slyke did not allege (nor could he) that he had no means of learning his plan benefits included maternity coverage. Accordingly, Blue Shield cannot be held accountable for any failure to expressly disclose that fact.

Van Slyke's principal contention, however, is that Blue Shield failed to disclose his premiums would be lower without the inclusion of maternity coverage, a disclosure he argues is required by *Pastoria v. Nationwide Ins.* (2003) 112 Cal.App.4th 1490 (*Pastoria*). In *Pastoria* plaintiffs alleged their insurers amended their insurance policies shortly after they had been purchased. (*Id.* at p. 1496.) Citing section 332, the court found that the insurers "had a duty to disclose to plaintiffs that there were impending amendments to the policies changing premiums and benefits, even before the plaintiffs purchased policies." (*Pastoria*, at p. 1496.)

The *Pastoria* decision does not support Van Slyke's broad interpretation of the reach of section 332. Van Slyke does not suggest Blue Shield materially altered the

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[2] Blue Shield of California is a health care service plan regulated by the Department of Managed Health Care and subject to the provisions of the Health and Safety Code. (See *Nieto v. Blue Shield of California Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 84-85.) Blue Shield Life, a separate, albeit related, entity, is a health insurance provider, regulated by the Department of Insurance and subject to the Insurance Code. Blue Shield contends section 332 does not apply to a health care service plan. Because we hold Van Slyke has failed to allege facts that implicate section 332 in any event, we do not address that issue.

terms of the health plan; rather, he alleges it withheld internal pricing information. Yet case law does not require an insurer to "inform a purchaser of insurance that the insurer would be willing to provide the coverage in question at a lower premium than the premium initially quoted, if the purchaser were to structure the coverage differently" (*Levine, supra,* 189 Cal.App.4th at pp. 1133-1134) or "to inform a purchaser of insurance of the availability of other potential insurance contracts that would afford the same coverage at a lower cost." (*Id.* at p. 1135.)

4. *The Trial Court Properly Sustained the Demurrer to Van Slyke's UCL Claim*

In attempting to allege a UCL cause of action, Van Slyke contends Blue Shield's practices in marketing its health care plan to single adult males were both fraudulent and unfair. The allegations of the second amended complaint are insufficient under both of these prongs of the UCL cause of action.[3]

a. *No actionable fraudulent conduct has been alleged*

Van Slyke asserts Blue Shield fraudulently concealed the inclusion of maternity benefits in his health care plan. Absent a duty to disclose, however, "the failure to do so does not support a claim under the fraudulent prong of the UCL." (*Buller v. Sutter Health* (2008) 160 Cal.App.4th 981, 986-987.) Moreover, there simply was no concealment in this case because the maternity benefits were expressly set forth in the text of the plan itself.

b. *No "unfair" conduct has been alleged*

"In consumer cases arising under the UCL, a business practice is 'unfair' if (1) the consumer injury is substantial; (2) the injury is not outweighed by any countervailing benefits to consumers or competition; and (3) the injury could not reasonably have been avoided by consumers themselves." (*Klein v. Chevron U.S.A., Inc.* (2012) 202

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[3] Unfair competition under the UCL means "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising. . . ." Written in the disjunctive, Business and Professions Code section 17200 establishes "three varieties of unfair competition—acts or practices which are unlawful, unfair, or fraudulent." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180; accord, *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 949.)

Cal.App.4th 1342, 1376.)[4] Even under this expansive definition of "unfair," and notwithstanding that whether a challenged practice is unfair generally cannot be determined on demurrer (*ibid.*), Van Slyke's allegations fall well short of a pleading viable claim.

Van Slyke's purported injury could have easily been avoided had he only read the terms of his health care plan, something a reasonable person is obligated to do. (See *Hadland v. NN Investors Life Ins. Co., supra*, 24 Cal.App.4th at p. 1586.) Although a misrepresentation by Blue Shield or its agent would have relieved Van Slyke of that obligation, he failed to allege any such misrepresentation or false assurance occurred. As with his other claims, Van Slyke's UCL cause of action rests on the erroneous premise Blue Shield stood in a fiduciary relationship to him and, as a result, was required to make disclosures and provide advice not generally required when health care plans are sold. The trial court properly rejected Van Slyke's effort to plead a UCL cause of action.

5. *The Trial Court Properly Sustained the Demurrer To Van Slyke's Bad Faith Claim*

Finally, Van Slyke alleged Blue Shield breached its duty of good faith and fair dealing. This bad faith claim rests on the assertion Blue Shield failed to disclose information material to the parties' contract. As discussed, however, Blue Shield had no affirmative duty of disclosure because there were no misrepresentations, and the actual terms of the health care plan were readily discoverable from the plain text of the plan itself. There is simply no basis for a claim Blue Shield acted in bad faith toward Van Slyke.

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[4] As we recently explained in *Klein v. Chevron U.S.A., Inc., supra*, 202 Cal.App.4th at page 1376 and footnote 14, although there is currently a split of authority with respect to the proper definition of the term "unfair" in the context of consumer cases arising under the UCL, the Second District has consistently followed the definition enunciated by our colleagues in Division Eight in *Camacho v. Automobile Club of Southern California* (2006) 142 Cal.App.4th 1394, 1403. As we did in *Klein*, we apply that definition here.

DISPOSITION

The order of dismissal is affirmed. Blue Shield is to recover its costs on appeal.

PERLUSS, P. J.

We concur:

WOODS, J.

JACKSON, J.