Appellate Reports and cases in brief

DuBeck v. California Physician's Service *holds that an insurer who chooses to cancel a policy prospectively based on the insured's misstatements on the application cannot thereafter rescind based on the same statements*

By Jeffrey I. Ehrlich

DuBeck v. California Physician's Service

(2015) _ Cal.App.4th _ (2d District, Div. 4.)

Who needs to know about this case: Lawyers handling insurance-rescission cases.

Why it's important: Holds that an insurer who chooses to cancel a policy prospectively based on the insured's misstatements on the application cannot thereafter rescind based on the same statements. Also confirms the ways that insurers can waive the right to rescind, which include failing to investigate inconsistent information known when the policy is issued.

Synopsis: DuBeck visited the UCLA breast-treatment center on February 11, 2005, concerning a lump in her breast. The lump was subjected to a fine-needle aspiration, and she was given appointments later in the month for a mammogram, ultrasound and consultation with a breast surgeon. Five days later, DuBeck applied to Blue Shield for health coverage, and failed to disclose this visit despite clear questions on the application about potential breast disorders and medical evaluations. The policy only covered preexisting conditions after a six-month waiting period. The lump proved to be malignant, and in the course of her treatment for breast cancer she was also diagnosed with leukemia.

In September 2006, 17 months after issuing the policy, Blue Shield notified DuBeck that it was canceling her policy because it had discovered that she had failed to make complete disclosure of her medical condition on the application. The letter went on to state: "*[A]t this time[,] Blue Shield has determined that, rather than rescind the coverage completely, your coverage was terminated prospectively and ended effective today, September 8, 2006*." It advised appellant that "*[a]ny claims for covered services incurred before this date will be covered,*" and that "*at this time Blue Shield will not seek refund of any claims payments made on your behalf*." (Italics added.) It further stated that Blue Shield was "not waiving any right it may have under the Health Services Agreement or the terms of the application."

DuBeck sued Blue Shield in September 2008, alleging that it knew by August 2005 that she was being seen for breast treatment, but it waited another year to perform that investigation that culminated in the September 2006 cancelation. The SAC contended that by delaying and canceling the policy, Blue Shield was able to collect and retain $19,600 in premiums, $5,450 more than it had paid to medical providers on her behalf. Blue Shield's answer included the affirmative defense of rescission, and it obtained summary judgment on that defense. DuBeck appealed. Reversed.

An insurer has the right to rescind a policy when the insured has misrepresented or concealed material information in seeking to obtain insurance. But that right, like any other, can be waived. If Blue Shield had rescinded the policy instead of canceling it prospectively, it would have had to refund her premiums, which at the time exceeded the sum it had paid out on claims.

> In waiting over two years to assert a right to rescind, while assuring appellant of her right to coverage during the period the policy was in effect and retaining her premiums for such coverage, Blue Shield engaged in conduct so inconsistent with the intent to enforce the right as to induce a reasonable belief that it had been relinquished.

Court also noted that Blue Shield's receipt of the claim for DuBeck's April 6, 2005, breast-cancer surgery, for which it suspended payment due to its suspicion that the condition pre-dated appellant's enrollment, should have triggered an earlier investigation and resolution of her right to remain insured. "The rule is well established that the means of knowledge is equivalent to knowledge, and that a party who has the opportunity of knowing the facts constituting the fraud of which he complains cannot be supine and inactive, and afterwards allege a want of knowledge that arose by reason of his own laches or negligence." By ignoring information that would have resolved the truthfulness of the representations in DuBeck's application at an early stage and determining at that time

whether to continue as her insurer, Blue Shield allowed her to incur substantial medical expenses and dissuaded her from investigating the availability of government assistance. Blue Shield's lack of diligence in the early months of the policy and the apparent prejudice to DuBeck provide a second and independent basis for rejecting its claimed right to rescind.

Gonzalez v. Fire Insurance Exchange

(2015) __ Cal.App.4th __ (6th Dist.)

Who needs to know about this case: Lawyers handling cases involving alleged sexual assaults and related torts where insurance-coverage issues are involved

Why it's important: (1) Holds that the Farmers primary policy, which limits coverage (including coverage for personal injury) to "accidents" does not cover any alleged claims against the insured, including negligence claims; (2) holds that the Farmers umbrella policy did potentially cover the claims against the insured, even though a sexual assault was alleged, because the policy's coverage does not require an "accident" and its sexual-assault exclusion was limited to conduct by the insured, and the complaint alleged potential liability against the insured for an assault committed by third parties.

Synopsis: In 2007, plaintiff Jessica Gonzalez alleged she was sexually assaulted by Stephen Rebagliati and nine other members of the De Anza College baseball team. A year later, Gonzalez filed a civil lawsuit against her purported assailants. Rebagliati sought insurance coverage for his defense against Gonzalez's claims through his parents' homeowner's and personal umbrella policies, issued by Farmers companies. Both companies denied coverage. Eventually, Rebagliati settled with Gonzalez, assigning Gonzalez his rights against Farmers. Gonzalez subsequently sued the insurers for breach of the duty of good faith and fair dealing and breach of contract. She also sought recovery of judgment pursuant to Insurance Code section 11580. Farmers filed for summary judgment, arguing it had not owed Rebagliati a duty to defend. The trial court granted their motion for summary judgment. Reversed.

A. No coverage under the primary policy

The court affirmed the summary judgment under the primary policy. It found that all coverage offered by the policy – including policy for "personal injury"– was subject to the requirement that liability result from an "occurrence," which is defined as an accident. Gonzalez contended that in her underlying complaint, it was possible that "the *only thing* Rebagliati did was enter the room, or the *only thing* he did was witness conduct of others, or that the *only thing* he did was create a dangerous condition." Similarly, she argued that in her cause of action for false imprisonment, her complaint "raised the potential that Rebagliati engaged in conduct amounting to false imprisonment, a personal injury peril specifically covered by the [Farmers] policy." Gonzalez additionally maintains that her causes of action for invasion of privacy and slander per se should have come within the Fire policy's personal injury coverage. The court rejected all these arguments.

The court noted that "negligent" and "accidental" are not synonyms, and therefore a complaint can allege that the insured acted negligently, and yet that conduct will not trigger coverage that requires accidental conduct. If Rebagliati had been found liable for negligently failing to rescue Gonzalez from the situation where she was assaulted, that would be an intentional act; not an accident that results in an unexpected or unforeseen happening. Gonzalez's attempt to parse out the complaint for accidental conduct that may give rise to coverage is unavailing; the entirety of her allegations involved intentional conduct.

Similarly, with respect to the claims for slander or invasion of privacy, Gonzalez's complaint alleged the men in the room jeered, cheered, and took pictures of the assault. She also alleged they slandered her in the days and months following the incident. Any utterance by Rebagliati, or any action taken in furtherance of invading Gonzalez's privacy, would have been an intentional act and not an accidental occurrence that would be potentially covered by the Farmers policy.

B. Potential coverage under the umbrella policy

The personal injury coverage in the Farmers umbrella policy did not include an "occurrence" trigger; only the coverage for bodily injury or property damage did. The personal-injury coverage, instead, arose out of the personal-injury offenses, which are intentional torts, such as false arrest, slander, etc.

The exclusions in the umbrella policy did not conclusively negate coverage. While the policy had a sexual-molestation exclusion, it only barred coverage for acts committed "by the insured." And Gonzalez's complaint was pleaded in the disjunctive, alleging that Rebagliati "and/or each" of the defendants caused her injury. Hence, her complaint raised the possibility that the other defendants – and perhaps not Rebagliati – committed the physical act of assaulting Gonzalez. Similarly, her complaint suggests the possibility that Rebagliati may not have engaged in the sexual assault, but was present in the room while the assault took place and may have thereafter disparaged Gonzalez's reputation by slandering her after the incident.

The policy's exclusion for "expected and intended" damages did not conclusively negate coverage either. Since Rebagliati denied any wrongdoing at the time of tender and because Farmers did not submit any evidence to the contrary, the court found that Farmers had not met its burden on that exclusion. Based on the complaint, Rebagliati could have been found liable for damages incurred by Gonzalez due to his negligence in creating the conditions that led to her

false imprisonment in the room. A tort such as false imprisonment may result from intentional conduct and is therefore nonaccidental, but a subjective intent or expectation that harm would occur on the part of the insured is not required for liability. The same reasoning applies to the claim for slander per se.

Farmers also failed to carry its burden concerning the policy's exclusion for willful violation of penal statute. There was no extrinsic evidence at the time of tender that conclusively demonstrated Rebagliati assaulted Gonzalez and therefore violated the law. Nor was there an admission on Rebagliati's behalf that he committed a crime. Furthermore, the complaint raised the possibility that the other individuals named in the complaint were the ones who perpetrated the sexual assault against Gonzalez. There was no evidence that Rebagliati somehow consented to these acts or ratified these acts in any way. As a result, Farmers failed to conclusively demonstrate this exclusion would eliminate coverage for all of Gonzalez's claims.

Finally, the court rejected Farmers' contention that all of the causes of action in the complaint were "inseparably intertwined with the underlying sexual assault and should therefore be excluded from coverage on that basis." Gonzalez's complaint did not necessarily set forth allegations that were inseparably intertwined with Rebagliati's purported sexual assault. The aforementioned cases involved only one defendant, with causes of actions based upon the one defendant's alleged acts. Here, Gonzalez's complaint raised the possibility that *other individuals* – and not Rebagliati – perpetrated the assault.


Ehrlich

Jeffrey I. Ehrlich is the principal of the Ehrlich Law Firm*, with offices in Encino and Claremont, California. He is a cum laude graduate of the Harvard Law School, a certified appellate specialist by the California Board of Legal Specialization, and a member of the CAALA Board of Governors. He is the editor-in-chief of* Advocate *magazine.*