NORWOOD & ASSOCIATES
This Week in Sacramento

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California Links

State Senate

State Assembly

Department of Insurance

California Supreme Court Sides with Insurance Commissioner, Potentially Leading to Expanded Regulatory Authority

The California Supreme Court dealt property insurers a blow on Monday, reversing lower court rulings that limited the Insurance Commissioner's authority and blocked a rule property insurers' had criticized as burdensome. The lawsuit by two state industry trade associations challenged a 2011 regulation making it illegal for insurers to issue estimates of a home's replacement cost to consumers unless the estimate included specific factors such as cost of labor, building materials, and debris removal.

California Insurance Commissioner Dave Jones issued the rule in response to an outcry from victims of the southern California wildfires in 2007 and 2008, who found that they were underinsured by tens or hundreds of thousands of dollars when faced with actually having to rebuild their homes.

In a unanimous opinion, the state high court ruled that the commissioner "enacted the replacement cost regulation by exercising valid authority" under the Unfair Insurance Practices Act. The Association of California Insurance Companies (ACIC) had argued that because the law did not specifically call out incomplete replacement cost estimates as an "untrue, deceptive or misleading act," the commissioner could not limit how insurers formulate their estimates. "What this enforcement power does not imply is that the commissioner was disabled from addressing the problem posed by such estimates through regulation," said the court. Commissioner Dave Jones called the decision an "important victory."

The challenge to the replacement cost rule is part of a broader fight that the insurance industry has pursued against what it sees as an overly aggressive government regulator. "The significance of the case is that commissioners before Dave Jones and including Dave Jones have sought to expand their authority and control, dictating how insurance companies should conduct their business," according to Gene Livingston, a Greenberg Traurig partner in Sacramento representing the ACIC.

Secretary of State

Official Legislative Information

California Chamber of Commerce Warns 2017 is Expected to Be a Difficult Year for Employers

At the first California Employment Committee meeting of the year, Jennifer Barrerra, Senior Policy Advocate, considered labor legislation that has been introduced to be a sign of what is to come this session, and it is not good. There are five bills, which are all of concern to industry.

Assembly Bill 5 (Gonzalez) – Opportunity to Work Act, requires an employer with 10 or more employees to offer additional hours of work to an existing nonexempt employee before hiring an additional employee. A Chamber coalition letter has been started for companies and organizations to sign on to.

AB 168 (Eggman) – Employer Salary Information prohibits an employer from seeking salary history information about an applicant for employment. This is considered the most egregious of the bills introduced so far. It is retread and will be opposed by the Chamber because it disturbs employer pay scale systems. State and local government agency pay scales would be greatly disrupted, which is the most compelling argument against the bill.

SB 62 (Jackson) – Family Medical Leave and SB 63 (Jackson) – Parental Leave, were vetoed last year. There is no foreseeable resolution to these measures from an industry perspective.

SB 33 (Dodd) – Goods and Services Contract Identity Theft, sponsored by the Consumer Attorneys, prohibits a person from requiring a waiver of a legal right that arises as a result of fraud, identity theft, and any other act related to wrongful use of personal information as a condition of entering into a contract for goods or services. This is among multiple arbitration bills expected this year.

In terms of why Senator Bill Dodd, D-Vacaville, is sponsoring this legislation, he is not a supporter of the arbitration process. In the 1980s, he brought a claim against AT&T for damages to personal property. In arbitration, he was awarded $150,000 but it did not cover his $130,000 in legal fees. In discussion with Dodd, he perceives the bill as narrowly drawn when in fact it is not. The Senate Labor Committee will be taking amendments, but what they accept are not expected to be sufficient. A Chamber coalition letter is being circulated and the Chamber is seeking many cosigners.

With respect to forthcoming bills, Assembly Member Kevin McCarty, D-Sacramento, is expected to introduce a Ban the Box measure to require employers to consider a job candidate's qualifications first, without the stigma of a criminal record at the outset of the job application process. Assembly Member Kansen Chu, D-Milpitas, will be authoring a residential construction prevailing wage bill, sponsored by the Building Trades Council. Lastly, concerning State Budget 2017-2018 trailer bills, those sponsored by the Labor Commissioner are expected to be policy heavy, which the Chamber will point out when opposing as the state's budget is an inappropriate vehicle.

Workers' Compensation Liability for Payment Bill Introduced

This week, Assembly Member Adam Gray, D-Merced, introduced AB 221 – Workers' Compensation Liability for Payment, which provides that for claims of occupational disease or cumulative injury the employee and the employer would have no liability for payment for medical treatment unless the treatment was authorized by the employer.

There would also be no payment liability if the Workers Compensation Appeals Board finds the injury to the body part for which the treatment was provided was compensable; or, the employee has undergone an evaluation by a qualified medical examiner or an agreed medical examiner and the evaluating physician has determined that the claimed occupational disease or cumulative injury was caused by the employment.
In addition, under this bill, for claims of occupational disease or cumulative injury, the employer is not liable for the payment of any lien for medical treatment unless one of the conditions described above is satisfied, or the parties agree to a settlement by compromise and release. The amount of the compromise and release, exclusive of the cost of medical treatment, must be $25,000 or more.

Under Assembly Rules, AB 221 may be heard beginning February 25 by the Assembly Insurance Committee.

Driver's License Suspension Bill Introduced

Senator Bob Hertzberg has introduced SB 185, a bill that seeks to end the policy of automatically suspending a driver's license when someone has failed to pay a fine for minor traffic tickets. The bill would require the courts to determine whether or not a person is able to pay the fee, and to reinstate any previously suspended licenses if the person who has committed the violation begins a payment plan to pay for the fine.

Senator Hertzberg stated that the bill was an effort to end the practice of disproportionately punishing those of lower economic status by removing their ability to drive because they cannot afford to pay a minor fee. "We want all people, regardless of their income level, to be able to pay their debts and move on with their lives." Governor Jerry Brown also supports the measure, stating in his remarks with the proposed budget that "There does not appear to be a strong connection between suspending someone's driver's license and collecting their fine or penalty."

Fire Prevention Fee Accountability Bill Introduced

Assembly Member Frank Bigelow, R-O'Neals, and Senator Tom Berryhill, R-Twain Harte, introduced AB 211 to require an annual report be submitted to the Legislature, which itemizes each expenditure report on the State Responsibility Area (SRA) Fire Prevention Fee.

"The taxpayers in State Responsibility Areas have a right to know where their hard earned money is going. While I continue to oppose this tax on rural residents, these tax dollars are

intended to be spent to mitigate the threat of catastrophic fire throughout California. There is no way to know if these dollars are being spent effectively, and it is the Legislature's duty to ensure accountability," said Bigelow.

The State Responsibility Area Fire Prevention Fee became law in 2011. The fee is a $150 annual charge on each habitable structure on a parcel that is within a SRA.

How California is Reacting to Federal Healthcare Reform Developments

Last Friday, President Donald Trump took the oath of office, becoming the 45th President. Earlier this week, Trump said his team was finishing the draft of a replacement plan that would provide "much simplified and much less expensive…insurance for everybody." Trump said he would unveil his plan after Tom Price was confirmed Secretary of Health and Human Services. Earlier this year, Republicans began the process of dismantling the Affordable Care Act (ACA) by passing a budget resolution, which only lays out the groundwork for repealing the healthcare law. The actual work on the repeal and replacement of the law remains weeks away and includes many unanswered questions.

A week ago today, Trump signed an executive order directing federal agencies to "ease the burden of ObamaCare", as one of his first official acts as president. The order gives broad authority to government agencies to target provisions that impose a "fiscal burden" on a state or a "cost" on individuals and businesses. It is not clear what the impact will be, however it could affect the individual mandate by granting more exemptions to individuals effectively eliminating the requirement to purchase insurance.

Things are moving rapidly in Washington. Back in California, Governor Jerry Brown vowed Tuesday to protect California's healthcare gains under Obamacare. In his annual State of the State address, Brown said "I intend to join with other Governors and legislators to do everything we can to protect the healthcare of our people."

Health coverage for Californians under the ACA "has come with tens of billions of dollars from the federal government," said Brown. "Were any of that taken away, our state budget would be directly affected, possibly even devastated." Leveraging $20 billion in federal money, health coverage has been extended to five million Californians under Obamacare, which includes subsidies for health plans and Medi-Cal.

Healthcare advocates quickly piped up on Twitter and in press releases to support the governor, saying he is rightly alarmed at the threat of losing billions of federal dollars. Assembly Member Rob Bonta, (D-Oakland), the former Assembly Health Committee chair said he was proud Brown "came out swinging in strong defense of healthcare." Even some Republicans responded favorably. Senate Republican Leader Jean Fuller, R-Bakersfield, said reaching across party lines is especially important to build bridges with national policymakers.

California's ACA insurance exchange recently reported strong enrollment numbers despite uncertainty surrounding a possible repeal of the health law.

Judge Blocks Aetna and Humana Merger

This week, U.S. District Judge John Bates in the District of Columbia blocked the proposed $34 billion merger between Aetna Inc. and Humana Inc. on antitrust grounds. The proposed merger would have created one of the largest health insurance companies in the nation, and its blocking not only represents a victory for the Justice Department but also throws into question other larger mergers that are still in court.

The decision issued by Judge Bates noted that the merger of the two companies would have a serious impact on market competition, stating “Federal regulation would likely be insufficient to prevent the merged firm from raising prices or reducing benefits.” The decision also firmly rejected the analysis put forward by both companies that found there would be no impact on either competition or prices, greatly reducing the likelihood of a successful appeal.

Additionally, Judge Bates’s opinion detailed the actions taken by Aetna in regards to the Affordable Care Act exchanges that in turn jeopardized both the success of the merger as well as the health of the exchanges themselves. According to internal documents such as phone calls, emails, and depositions that were referenced in the ruling, Aetna attempted to use its participation in Affordable Care Act exchanges as leverage to pressure the Justice Department to allow the merger. Aetna announced in August of 2016, one month after the Justice Department’s suit against the merger was filed, that it would be pulling out of most of the exchanges that it participated in, citing financial losses and causing nationwide concern and debate on the health of the exchanges. The decision released this week however found that financial concerns were not the only factors that drove that decision.

The findings showed that initially, Aetna’s participation in the exchanges was used as leverage against the Department of Justice in an attempt to convince them to drop the lawsuit. Documents from the case revealed internal conversations in Aetna discussing the company’s intention to revisit their exchange participation in the event of the merger being blocked. This then escalated to conversations with the Justice Department itself, including at one point Aetna’s Chairman and CEO Mark Bertolini sending a letter to the Justice Department stating that they would immediately exit much of the exchange if the merger was not allowed to go through.

When the Justice Department filed suit against the merger in July of 2016, their suit stated that the merger would damage competition and harm consumers in 17 counties across Florida, Georgia, and Missouri. Soon after the suit was announced, Aetna’s leadership team began to discuss exiting those exchanges, and Judge Bates also states that the company went so far as to “conceal from discovery in this litigation the reasoning behind their recommendation to withdraw from the 17 complaint counties.” By withdrawing from the 17 counties that were cited as problematic in the lawsuit without regard for their profitability, Aetna sought to remove the issue of competition altogether. Judge Bates further stated that the court should not allow a company to “thwart judicial review through its own machinations” as it would “create incentives for firms to take similar actions in the future to evade antitrust review.”

US Supreme Court to Hear Class Action Waivers in Arbitration Agreements Case

The United States Supreme Court has agreed to resolve a split among the federal courts regarding whether class action waivers in arbitration agreements are lawful under the Federal Arbitration Act or if, instead such waivers violate the labor law provisions found in the National Labor Relations Act.

In one of the cases consolidated for review, a Fifth Circuit court held that an arbitration agreement that requires an employee to waive the right to bring a class action is enforceable under the Federal Arbitration Act. In two other cases, from the Ninth and Seventh Circuits, the federal courts held that class action waivers in arbitration agreements are unenforceable because they prevent employees from engaging in concerted activity in violation of the National Labor Relations Act.

It is important the US Supreme Court has agreed to resolve this issue so that employers can have certainty regarding the validity of their arbitration agreements at the federal level. This is especially true for employers that operate in more than one state. At the state level, the California Supreme Court has held that class action waivers in employment arbitration agreements can be enforceable but that Private Attorneys General Act representative-action waivers are not enforceable.

Brace and Bolt Program Expanded

California's grant program that offers homeowners funds to retrofit older homes for earthquake safety has been expanded to encompass more high-risk structures in the Bay Area. The Brace + Bolt program, a four year old program which has this year expanded to a $6 million grant program, has enough funding to retrofit approximately 2,000 homes that are at risk of major earthquake damage. Those homeowners in eligible, high-risk homes in the Bay Area can apply for up to $3,000 of grant money to retrofit certain parts of their home that present the greatest danger.

A large number of older homes in the Bay Area still have features that present a great deal of risk in the event of an earthquake similar to the one that caused a great deal of damage in the Napa Valley in 2013. Such features include stud walls that cannot handle strong shaking, and a lack of anchor bolts connecting the homes to their foundations. These weaknesses, along with crawl spaces underneath the homes, make them especially vulnerable to collapse or moving off of their foundation during strong shaking.

There are an estimated 1.2 million homes in the Bay Area that have these vulnerabilities, an issue that the state is working to address before the next major earthquake. In order to get the grants to the homes that need it most, the California Earthquake Authority and the California Office of Emergency Services, which are co-managing the Brace + Bolt program, have designated 141 zip codes in 33 cities that are eligible for the grant. The program is expecting more than the limit of 2,000 homes to apply, and once the application period is

closed the grant recipients will be chosen by a random selection with all others placed on a waiting list. Eligible homeowners have until February 27th to apply.