Donald M. de Camara
LAW OFFICE OF DONALD M. DE CAMARA

Kaiser's new lien grab for UIM dollars

CHALLENGING KAISER'S ATTEMPT TO CLAIM REIMBURSEMENT RIGHTS AGAINST FIRST-PARTY UM/UIM RECOVERIES

After decades of not asserting liens against first-party coverage, Kaiser changed its policy effective January 1, 2025 to expressly reach UM/UIM recoveries in its reimbursement provision. This change is questionable from both a substantive and procedural standpoint. Having multiple clients with this problem and knowing several other attorneys facing the same issue, I have been informed that Rawlings/Machinify may have prompted the change and the requisite statutory notice may not have been given. I was recently informed by another attorney with this same type of case that the Rawlings/Machinify adjuster told him that they had not given prior notice to the plans but just slipped it into the fine print in the policy. A second attorney advised that he had been told by a senior Rawlings attorney that the change was Rawlings's idea and that no statutory notice was given.

Substantive defense – Insurance Code § 10270.98

Insurance Code section 10170.98 provides, in pertinent part, that group disability policies "may provide…that the benefits payable thereunder are subject to reduction if the individual insured has any other coverage (*other than individual policies or contracts*) providing hospital, surgical or medical benefits…" (emphasis supplied). Health policies are considered disability policies under California law. (Ins. Code, § 106; Civ. Code, § 3040.) Obviously, nearly all UM/UIM policies are individual policies.

The title of section 10270.98 in Lexis is "Reduction of Benefits." When Kaiser made this change to its policy, it continued to list its reimbursement provision under the "Reductions" section of the policy. Consequently, it would be hard pressed to somehow claim that the reimbursement provision is not a reduction. Additionally, Kaiser is the only major health plan in California that never lists its reimbursement provision in its Table of Contents. Thus, an insured would have to know to look under the "Reductions" section of the policy to even find the provision. This defense would not apply on its face to individual Kaiser policies, but it appears that most of Kaiser's business is through group plans.

Procedural defense – Health & Safety Code § 1374.21

California Health & Safety Code section1374.21, subdivision (a) requires that, "A change in premium rates *or changes in coverage* in a small group health care service plan contract shall not become effective unless the plan has delivered in writing a notice" of the changes at least 60 days prior to the contract renewal date (emphasis supplied). An AI request indicated that the premium increase in Northern California for the 2025 plan year was 8.2%. Section 1374.21(b) sets forth the same provision for large group plans but requires 120 days prior notice. Again, this section applies only to group plans, but most of Kaiser's business appears to be group plans.

Exemplar case

I was retained about six months ago to handle the Kaiser lien in a case where the client was injured by a motorist with a $30,000 policy. Fortunately, the client had a $250,000 UIM policy. Unfortunately, the accident happened after the January 2025 change to the Kaiser policy purporting to reach UM/UIM. The Kaiser plan in question was a group plan covering employees of the San Francisco public school system, so it was a group plan, subject to section 10270.98. The case settled for the combined policy limits of $250,000. Kaiser had paid or provided $108,000 of medical benefits and asserted a lien in that amount. The initial demand from Rawlings was for about $72,000, which was 100% of the Civil Code section 3040 calculation after reducing for common fund. I asserted section 10270.98 as a complete defense to the lien against the UIM recovery and refused to pay anything on that recovery. When the Rawlings adjuster refused to budge, I asked that the case be transferred to their house counsel for legal review. That was done, but the result was the same, with a continuing demand for $72,000 and no rebuttal of my argument that section 10270.98 was controlling.

Next, I asked Rawlings's house counsel to send the case to California counsel, which was finally done several months ago. I then had several discussions with that counsel without ever hearing any effective rejoinder to my position that section 10270.98 was fatal to their claim against the client's individual UIM coverage. In my multiple conversations with Rawlings counsel, he raised a number of his perceived defenses to our section 10270.98 argument.

First, he indicated that there was federal authority for doing so. I distinguished these as being limited to self-funded ERISA plans, where state law does not apply.

Then, he began citing other provisions in Chapter 4 of the Insurance Code for examples excluding liability policies. I responded that the title of the chapter was "Standard Provisions in

Disability Policies" and all of the cites he mentioned were basically providing that liability policies were not disability policies.

He then argued that Insurance Code section 10270.99 provided an exception that allowed the claim. My response was that said code section merely confirmed that individual policies do not include group disability policies, which is a given and has no bearing on our case.

Finally, he argued that insurance companies are free to change coverages any way they want to and gave as an example the common waivers of Civil Code section 1542 in releases. My response was that insurance companies could change terms of coverage with proper notice, but that they cannot violate provisions of the Insurance Code. Plus, waivers of section 1542 are subject to mutual consent of the parties and are not required by law. I provided him with the following holding in *Garnes* addressing the controlling issue:

> In view of this dispute, a few words about the intersection of insurance policies and the Insurance Code are in order. As Witkin points out, "All insurance policies issued in California are governed by the provisions of the Insurance Code. [Citation.] When insurance coverage is required by law, the statutory provisions are incorporated into the insurance contract. The obligations under an insurance policy are measured and defined by the pertinent statute, and the statute and the policy together form the insurance contract. [Citation.] …. (2 Witkin, Summary of Cal. Law (10th ed. 2005) Insurance, § 8, p. 30, italics omitted.)
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> …. *Any provision in an insurance policy that fails to conform to law or violates public policy is unenforceable*." (2 Witkin, Summary of Cal. Law, *supra*, § 8, p. 30.) Finally, "[p]olicies may be required to include certain provisions." (*Ibid.* [citing as example § 11580].
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> Consistent with these principles, courts have long held that "an insurer has the right to limit policy coverage in plain and understandable language and … may limit the nature of the risk it undertakes to assume. [Citations.] Nevertheless, an insurance [***46] *company's limitation of coverage must conform to the law and public policy.* [Citation.] …. (*Carson v. Mercury Ins. Co.* (2012) 210 Cal. App.4th 409, 425–426.) (emphasis supplied).

(*California Fair Plan Assn. v. Garnes* (2017) 11 Cal.App.5th 1276, 1305.)

Immediately after my first telephone discussion about section 10270.98 with Rawlings's local counsel, I sent him a letter rebutting all of the arguments he had made and requesting four documents; 1) the signed Group Enrollment form signed by the client prior to 1/1/25, 2) Kaiser's Notice of Plan Changes for its HMO Plan for the San Francisco Health Service System effective 1/1/25, 3) Notice of premium changes for that same plan year, 4) Kaiser's full Evidence of Coverage for the prior plan year.

After waiting a month, I sent an e-mail to Kaiser's counsel again requesting the same four plan documents. The next day, I received a response from him stating that he had authority to settle the $108,000 lien claim for $10,000. This was the exact amount of the section 3040 calculation on the tortfeasor's $30,000 of coverage, thereby effectively waiving any claim against the client's $220,000 UIM recovery. The requested documents were never produced.

Conclusion

The conclusion that I drew from all of this is that it is very likely that Kaiser failed to provide the statutory notice of this very significant change to the group health plan. It is unlikely coincidental that the reduction from a $72,000 demand to a $10,000 demand was not related to the Request for Documents that I had just reiterated. Therefore, it would seem important to request these documents at the earliest possible date.

Another avenue to consider would be a Government Records Act request to the Dept. of Managed Health Care to see if Kaiser advised the DMHC of the change. It also appears to me that even if Kaiser were to give the requisite statutory notice of this radical change in coverage in the future, there is still a better-than-even chance of defeating Kaiser's attempt to reach UM/UIM coverage, where the Kaiser plan is a group disability policy.

Donald de Camara is a sole practitioner in San Marcos, specializing in lien litigation and resolution. He has lectured at well over 120 trial lawyers' seminars throughout California about liens and has presented four nationwide webinars on ERISA liens.