

California Insurance Law Coverage Newsletter for Attorneys

Bruce Cornblum - Insurance Coverage Scholar-Attorney-Litigator
11665 Avena Place, Suite 202A, San Diego CA 92128
858-485-8770 email cornblum@pacbell.net

March 28, 2011

website: brucecornblum.com

DISABILITY POLICIES; OBTAINING DISABILITY BENEFITS FOR INSUREDS SUFFERING ORTHOPEDIC DEGENERATIVE CONDITION; PLEADING AND PROOF

Breach of contract; disability policies

Under California law, a claim for breach of contract (disability policy) includes four elements:

1. that a contract exists between the parties;
2. that the plaintiff performed his contractual duties or was excused from non-performance;

ILLUSTRATION: If the policy requires that the insured be under the regular care of a physician to obtain benefits, plaintiff must be in compliance with this provision or be excused from this requirement. [*Bravo v. United States Life Insurance Co.* (2010 E.D. Cal.) 701 F.Supp.2d 1145, 1157-1158]

3. that the defendant breached those contractual duties, and;

ILLUSTRATION: If the insured is unable to perform functions of her former job, defendant/insurer has an obligation to pay benefits and termination is a breach. [*Bravo v. United States Life Insurance Co.* (2010 E.D. Cal.) 701 F.Supp.2d 1145, 1155]

4. plaintiff's damages were a result of the breach. [*Bravo v. United States Life Insurance Co.* (2010, E. D. Cal.) 701 F.Supp.2d 1145, 1155]

See **§ B20 BREACH OF CONTRACT [§ B20:1]**.

Disability policy's two (2) definitions of 'disability'

A disability policy defines disability, for

purposes of the first *two years of a disability claim*, as the complete inability of the employee to perform the material duties of a plaintiff's former position. This is an occupational definition of disability, in that it concerns the ability to perform one's own job. [*Erreca v. Western States Life Ins. Co.* (1942) 19 Cal.2d 388, 393, 121 P.2d 689, cited in *Bravo v. United States Life Insurance Co.* (2010) 701 F.Supp.2d 1145, 1155]

'Complete inability' to perform the functions of the insured's job exists when the insured cannot 'reliably' perform job duties daily. It is plain English that an essential function of the job is reliable daily performance of the job duties. [*Bravo v. United States Life Insurance Co.* (2010) 701 F.Supp.2d 1145, 1156] For purposes of determining whether an insured's benefits are properly terminated, 'disability' requires a showing that the insured is unable to *consistently* perform the material duties of her former job. [*Bravo v. United States Life Insurance Co.* (2010) 701 F.Supp.2d 1145, 1156]

Orthopedic degenerative condition

The definition of disability in a disability policy relates to a distinction between temporary disability and permanent disability. Temporary disability or 'occupational' disability looks to the ability of the insured to perform the individual's specific prior position. [*Erreca v. Western States Life Ins.* (1942) 19 Cal.2d 388, 393, 121 P.2d 689, cited in *Bravo v. United States Life Insurance Co.* (2010, E.D. Cal.) 701 F.Supp.2d 1145, 1155, fn. 12] Total disability refers to the inability to perform any job. [*Bravo v. United States Life Insurance Co.* supra]

Disability may arise from degenerative disease. This disease may be in one or both of the cervical spine and lumbar area of the spine, involving disc protrusions with varying degrees of encroachment, from moderate to severe. Degenerative disc disease may lead to chronic pain. As discs degenerate, bone spurs may grow and the spinal canal may narrow, compressing the nerves that run through it, which may cause pain of varying duration and intensity. The pain may be relieved by lying down. The effect of this on daily activities may resemble that which was described in *Bravo v. United States Life Insurance Co.* (2010, E.D. Cal.) 701 F.Supp.2d 1145, 1149-1150.

Insurers' modus operandi in defending such cases

Because a person with the above condition may have good days and bad days with medication, insurers will defend such cases by noting fluctuating symptoms and arguing that such individual is not totally disabled from performing the functions of his or her job. The defense is built upon several factors:

1. *Reviewing the records defense:* The insurer may retain a nurse to review records. the conclusion of the review of the records may set forth the following two reasons to support an absence of disability. The nurse may conclude that the MRI findings are consistent with the ability to perform at least at sedentary to light physical demand levels. The nurse may review the pain management reports and conclude while some pain reasonably exists, the symptoms seem to be *in excess* of examination findings. [*Bravo v. United States Life Insurance Co.* (2010, E.D. Cal.) 701 F.Supp.2d 1145, 1151-1152]
2. *The functional capacities evaluation:* The insurer may have the plaintiff undergo a multi-hour 'functional capacities evaluation'. The administrator of this test will note after requiring the insured to perform various tasks, that the insured could sit for certain periods of time, perform repetitive hand use for certain

periods of time and conclude that the insured is able to perform sedentary and light work. [*Bravo v. United States Life Insurance Co.* (2010, E.D. Cal.) 701 F.Supp.2d 1145, 1152]

3. *Medical review of records by a physician:*
If the plaintiff appeals a denial internally within the insurance company's claims process, the insurer will retain a doctor to perform a record review concluding that the plaintiff is able to perform functions of a prior job. Usually this reviewer does not personally review films, does not speak to treating physicians, and does not speak to the insured. [*Bravo v. United States Life Insurance Co.* (2010, E.D. Cal.) 701 F.Supp.2d 1145, 1152-1153]

The best response by an insured's attorney to such evidence is to point out that such experts either have a financial incentive to provide opinions favorable to the insurer, or to point to selective omission of important evidence to support an argument that the insurer acted unreasonable. [*Bravo v. United States Life Insurance Co.* (2010, E.D. Cal.) 701 F.Supp.2d 1145, 1161-1162] Compare **§ M32.03 MENTAL DISORDER; DISABILITY POLICY BENEFIT LIMITATION; § D50:1.1.1 Illustration; failure to have insured examined**].

Thoroughness of the investigation; disability policy

Thoroughness of the investigation refers to an allegation that the insurer did not investigate all of the plaintiff's health records. When this contention is made the plaintiff must identify particular records defendant should have, but did not, consider. [*Bravo v. United States Life Insurance Co.* (2010, E.D. Cal.) 701 F.Supp.2d 1145, 1159] Thoroughness of the investigation may also have reference to the contention that the insurer should have conducted a medical examination. There exists no authority per se requiring such an examination as a prerequisite to a thorough investigation though an absence of such an investigation may bear on the ultimate finding of bad faith. [*Bravo v. United States Life Insurance Co.* (2010, E.D. Cal.) 701 F.Supp.2d 1145, 1159-1160] See **§ B2 BAD FAITH**

LAWSUIT – FIRST PARTY [§ B2:3.5.7 Failure of insured to order a medical examination]

987]

Fairness of the investigation

Where there is evidence that the insured dishonestly selected its experts or that the experts weren't reasonable, it is for the jury to decide whether the insurer's investigation was reasonable and fair. [*Bravo v. United States Life Insurance Co.* (2010, E.D. Cal.) 701 F.Supp.2d 1145, 1160] Whether 'fairness' exists may well depend upon proof of the 'bias' of the examiner. [*Bravo v. United States Life Insurance Co.* (2010, E.D. Cal.) 701 F.Supp.2d 1145, 1161-1162] Where the plaintiff's evidence couples its argument of bias of the expert's opinion with evidence that the insurer chose to ignore informative aspects of the reports in the medical records, a jury could conclude that the insurer acted *unreasonably*. Opinions of experts retained by the insurer must not unreasonably interpret available evidence. [*Bravo v. United States Life Insurance Co.* (2010, E.D. Cal.) 701 F.Supp.2d 1145, 1162] See **§ G11 GENUINE ISSUE DOCTRINE [§ G11:2 Non-genuine dispute by insurer]**.

"Thorough" investigation by insurer

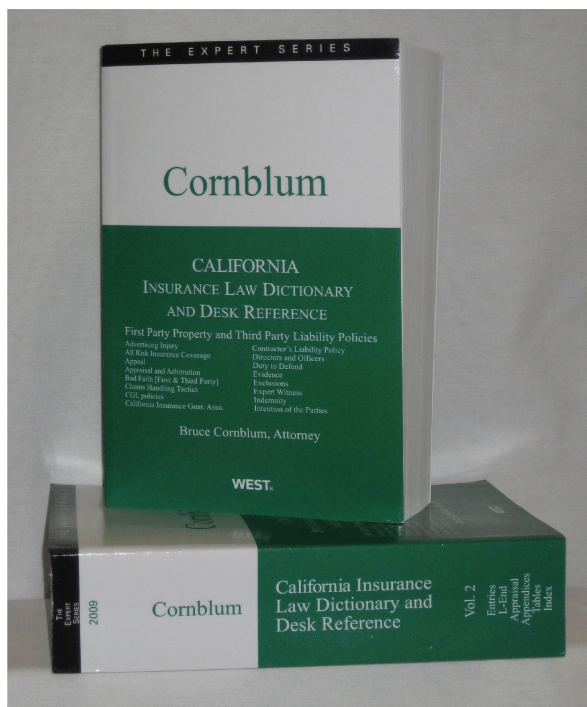
In *Ayala v. Infinite Ins.* (2010, C.D. Cal.) 713 F.Supp.2d 984, the court granted a motion for partial summary judgment on the second cause of action in plaintiff's complaint alleging 'bad faith' claims adjusting. In finding that no genuine issue of material fact existed as to this cause of action, the court noted that plaintiff's opposition failed to dispute any fact upon which defendant's investigation was based. The evidence established that the insurer performed an extensive investigation into plaintiff's claim for coverage. In addition, the insurer retained outside counsel to provide a coverage opinion. [*Ayala v. Infinite Ins.* (2010, C.D. Cal.) 713 F.Supp.2d 984,

◆ **OBSERVATION: [Importance of disputing facts contained in insurer's investigation]**

In *Ayala v. Infinite Ins.*, supra, the plaintiff did not dispute any facts contained in the insurer's investigation. In order to prevail when an insurer is relying upon the GENUINE ISSUE DOCTRINE [§ G11 GENUINE ISSUE DOCTRINE [§ G11:2 - § G11:3]], plaintiff must show either that the claim is based upon a basis *unfounded* in the facts known to the insurer [*Wilson v. 21st Century* (2007) 42 Cal.4th 713, 721, 68 Cal.Rptr.3d 764; **§ I81 INVESTIGATE: DUTY OF INSURER – FIRST PARTY POLICY [§ I81:2.2 Unfounded basis for denial of claim]** or the insurer 'ignored facts' [§ I81:2.4]. Thus in determining whether to rely upon a 'lack' of a thorough investigation as a reason why the insurer owes a duty to defend, or that a claim is covered under a first party property policy, the insurer's investigation reports must be reviewed to determine whether important facts have been omitted, which if considered would change the result to granting coverage from a previous denial of coverage. See **§ C62 CONCURRENT CAUSE [§ C62.01 In general]; § C32 CLAIMS HANDLING AND TACTICS [§ C32.03:3 Claims handling; wrongful withholding of benefits, discussing *Jordan v. Allstate Ins.*]; § D50 DISABILITY BENEFITS [§ 50:1.2]**

Bolds references are to sections in Volumes 1 and 2 of CALIFORNIA INSURANCE LAW DICTIONARY AND DESK REFERENCE, 2010 Edition.

If there are subjects you'd like discussed in future *California Insurance Law Coverage Newsletter for Attorneys* please contact Chris at 858-485-8770 to submit those subjects or email Mr. Cornblum at cornblum@pacbell.net We would like to make this newsletter relevant to your practice and current cases.



The 2010 Two-Volume Edition of CALIFORNIA INSURANCE LAW DICTIONARY AND DESK REFERENCE (16th Edition – 4400 pages) authored by Attorney Cornblum is available through Thomson West.

To order this 2-Volume text call West (a Thomson Reuters business) at:

1-800-344-5008

2011 Three-Volume Edition (17th Ed.) will be available mid-2011 from Thomson West

Author **BRUCE CORNBUM, Attorney at Law**

Bruce Cornblum is an acknowledged expert in the field of insurance law. For 45 years Mr. Cornblum has specialized in proving to California courts that insurance companies do not understand the meaning of their own policies.

To obtain coverage opinions, preparation of pleadings, supervision of discovery, pre-trial conference, preparation of motions in liminae, preparation of appellate briefs contact Bruce Cornblum at **858-485-8770** or E-mail: cornblum@pacbell.net

Mr. Cornblum also offers a **FREE 45 minute** consultation to discuss any existing or new insurance case issue.

WESTLAW RESEARCH – Subscribers to WestLaw can research all volumes of *California Insurance Law Dictionary and Desk Reference* on WestLaw by referencing **CAINLAWDDR**.

Mr. Cornblum has been appellate counsel in the Courts of Appeal and Supreme Court in over 100 litigated matters. Our website contains additional information regarding Mr. Cornblum and his law practice.

BRUCE CORNBUM
11665 Avena Place, Suite 202A
San Diego (Rancho Bernardo), California 92128
858-485-8770

Website: www.brucecornblum.com