



Appellate reports

Recent cases of interest to members of the plaintiff's bar

JEFFREY ISAAC EHRLICH

Weston Reid, LLC v. American Ins. Group, Inc.

___ Cal.App.4th ___, 94 Cal.Rptr.3d (4th Dist., Div. 2, 2009)

Who needs to know about this case:

Lawyers who handle uninsured or underinsured-motorists ("UM/UIM") claims; and claims for clients who have received emergency medical treatment subject to the Hospital Lien Act ("HLA")

Why it's important: Case of first impression explains that a patient's recovery from her UM/UIM insurer is not subject to an HLA lien

Synopsis: Karen Sheets was injured in an auto accident with William West and received medical treatment at Mercy Hospital, which gave Mercy a lien under the HLA for any recovery Sheets might recover from West. Mercy assigned its lien to Weston Reid, LLC ("Reid") for collection. Reid sent Sheets's UM insurer, AIG, notice of its lien claim under the HLA. When it learned that AIG had paid Sheets \$50,000 in UM/UIM benefits, it sued AIG for negligence, breach of fiduciary duty and unfair business practices. The trial court dismissed the action on demurrer, and the Court of Appeal affirmed.

The HLA (Civ. Code, § 3045.1, et seq.) gives a hospital who provides emergency or ongoing treatment to a patient a lien on the damages recovered by that patient on claims "against another for damages on account of his or her injuries . . ." The lien is not effective unless notice of it is given "to each person, firm, or corporation known to the hospital and alleged to be liable to the injured

person for the injuries sustained prior to the payment of any moneys to the injured person, his attorney, or legal representative as compensation for the injuries [, or to] any insurance carrier known to the hospital which has insured the person, firm, or corporation alleged to be liable to the injured person against the liability." (Civ. Code, § 3045.3.)

AIG claimed that as Sheets's UM/UIM carrier, it was neither the "person, firm, or corporation ... liable to the injured person for the injuries sustained," nor was it the insurer for such person. Hence, the HLA did not give Reid a right of recovery against it or the UM/UIM proceeds it paid to Sheets. The Court of Appeal agreed. It rejected Reid's argument that UM/UIM coverage is essentially a substitute or proxy for the insured's tort recovery against the party who injured them, and therefore should be subject to an HLA lien to the same extent that a recovery from the tortfeasor would be. The Court held that, by its terms, the HLA is not intended to apply to first-party insurance claims. The HLA does not reduce a patient's contractual liability to a hospital for the full value of the services rendered; rather, it merely provides the hospital with one mechanism to recover a portion of its bill from a tortfeasor who injured the patient.

Venoco, Inc. v. Gulf Underwriters Ins. Co., Inc.

___ Cal.App.4th ___, 2009 WL 1875640 (2d Dist. Div. 6 2009)

Who needs to know about this case:

Lawyers who handle insurance cases involving the duty to defend or the pollution exclusion.

Why it's important: Treats a reporting requirement added to an endorsement in an occurrence-based policy as if it was a claims-made and reported policy, and therefore refuses to apply the notice-prejudice rule. Also holds that claims that the insured failed to warn about pollution by third parties is subject to the pollution exclusion, and rejects argument that a promise the policy made to defend false or groundless claims did not create a duty to defend, even if the claims alleged are factually groundless.

Synopsis: Venoco operates a production site that pumps crude oil and natural gas into pipelines adjacent to the Beverly Hills High School. Venoco was one of many defendants named in several class actions brought by former students and staff at the high school, which alleged that the oil production activities at the site caused them personal injury. Venoco tendered the defense of the suits to its insurer, Gulf, which refused to defend. The policy contains an absolute pollution exclusion, but also a "pollution buy-back endorsement" that restores partial coverage for pollution-related claims, provided that certain conditions are met. These include a requirement that the carrier be notified of any release of pollutants within 60 days. Venoco sued Gulf for bad faith. Gulf obtained summary judgment, and the appellate court affirmed.

The court held that the 60-day reporting requirement in the buy-back endorsement was not subject to the notice-prejudice rule, and would be strictly enforced. It also held that the reporting requirement was sufficiently conspicuous to be enforced. Because no



notice was given of any release, there was no coverage under the pollution-buy back endorsement, and all pollution-related claims were barred by the policy's pollution exclusion. This includes claims against Venoco for failing to warn the public about pollution released by third parties. The court also rejected Venoco's contention that because the claims against it were factually meritless, the promise in the policy to defend false or groundless claims did not trigger coverage.

Hughes v. Pair

__ Cal.4th __, 2009 WL 1886877 (Cal. Supreme Court, 2009)

Who needs to know about this case:

Lawyers who bring sexual-harassment claims under California law.

Why it's important: Limits the scope of sexual-harassment actions brought under Civil Code section 51.9, which applies to sexual relationships between providers of professional services and their clients outside the workplace. It holds that the requirement in the statute that the harassment be "pervasive or severe" was intended to incorporate the liability limitations governing workplace sexual harassment under Title VII and the FEHA. Also likely to be read as narrowing the scope of liability for intentional infliction of emotional distress.

Synopsis: Civil Code section 51.9 applies to relationships between a plaintiff and a physician, attorney, teacher, loan officer, social worker, appraisers, landlord, executor, etc. Under Civil Code section 51.9, a plaintiff must establish not only that a qualifying "relationship" exists, but also that the relationship is one that the plaintiff cannot "easily terminate." The plaintiff must also show both that "[t]he defendant has made sexual advances, solicitations, sexual requests, demands for sexual compliance by the plaintiff, or engaged in other verbal, visual, or physical conduct of a sexual nature or of a hostile nature based on gender, that were unwelcome and pervasive or severe," and that such conduct

caused some "economic loss or disadvantage or personal injury."

Mark Hughes died in 2000, leaving \$350 million in trust for his son, Alex, a minor. Alex's mother, Suzan, Hughes's ex-wife, had initiated several lawsuits against the trust and the trustees. In this action, she alleged that Christopher Pair, one of the trustees, had pressured her for sex during a telephone call on June 27, 2005, and later during a face-to-face conversation that same day. The trial court granted summary judgment for Pair, on the ground that the alleged sexual harassment was neither "pervasive" nor "severe." A divided court of appeal affirmed, as did a unanimous Supreme Court. It held that the manner in which courts had construed the terms "pervasive" and "severe" sexual harassment in the context of workplace cases under Title VII and the FEHA should be applied to Civil Code section 51.9, and that the allegations of Hughes's suit against Pair did not meet those criteria. It also held that Hughes's allegations were insufficient to support a claim for intentional infliction of emotional distress.

Martorana v. Marlin & Saltzman

__ Cal.Rptr.3d __, 2009 WL 1875681 (2d Dist. Div. 7 2009)

Who needs to know about this case:

Lawyers who bring class-action cases.

Why it's important: Deals with duties owed by class counsel to class members, and whether that duty extends to contacting class members who fail to file claims against a class settlement before the deadline for doing so expires.

Synopsis: Martorana was a member of a class of former Allstate employees who brought a wage-and-hour class action, which settled. The settlement included a deadline for submitting claims. Martorana failed to submit a claim by the deadline. After his late claim was denied, he filed a lawsuit against Allstate and against class counsel, alleging legal malpractice. His malpractice claim was based on two theories: class counsel should have used a different claims procedure

that would have resulted in them learning which class members failed to file claims before the deadline, so they could be contacted; and class counsel was negligent in not contacting Martorana before the deadline to ensure that he filed a timely claim. The trial court dismissed all claims on demurrer, and the appellate court affirmed. The trial court's award of sanctions to Allstate under Code of Civil Procedure section 128.7 was reversed because Allstate failed to give the required 21-day notice before seeking sanctions.

The Court held that class counsel did owe Martorana a duty of care because he was a member of the class they represented in the class action against Allstate. But to the extent that Martorana sought to challenge the claim-presentation procedure that had been included in the settlement and approved by the court, his claim was barred by the doctrine of collateral estoppel. The court also rejected Martorana's attempt to have the court impose a duty on class counsel to contact class members who failed to file claims.

Zaragoza v. Ibarra

__ Cal.App.4th __ 2009 WL 1579540 (4th Dist. Div. 3 2009)

Who needs to know about this case:

Lawyers who bring or defend personal-injury actions against owners of residential real property.

Why it's important: Clarifies issues of homeowner liability (or non-liability) to workers hired by unlicensed contractors, and addresses limitations on worker's compensation as an exclusive remedy in cases dealing with residential employees.

Synopsis: Homeowner, Ibarra, hired an unlicensed contractor, Quiroz, to remodel her home (add four rooms and two bathrooms.) Ibarra hired Zaragoza, who normally worked at Taco Bell, to assist.

Zaragoza was standing on a ladder, about nine-feet high, and slipped while trying to pry a nail out of the wall, injuring his knee. He sued Ibarra, the trial



court granted her motion for summary judgment, and the appellate court affirmed.

The court held that Zaragoza's claim qualified as "incidental to the ownership, maintenance or use" of a residential dwelling, even though it was a fairly extensive remodel. Hence, Zaragoza was properly classified as a residential employee under Labor Code section 3351(d). Because he had failed to work 52 hours, the statute provided that he was not subject to worker's compensation, and could bring a negligence claim against Ibarra. In reaching this conclusion that court held that the provisions delineating who qualified as a "residential employee" under Labor Code section 3351(d) must be harmonized with the provisions of Insurance Code section 11590, which mandates that all comprehensive personal liability policies provide automatic worker's compensation coverage.

The court further held that Cal-OSHA requirements did not apply to homeowners, and therefore Zaragoza could not rely on the doctrine of negligence per se based on alleged Cal-OSHA violations. Finally, the court concluded

that, as a matter of law, there was no triable issue of fact concerning Ibarra's negligence, since Zaragoza placed, adjusted and then climbed the ladder before he fell. "Short of ordering Zaragoza not to get nine feet up on a ladder and try to pull a nail out of some drywall, there was nothing Ibarra could have done to prevent the accident."

Beninati v. Black Rock City, LLC

___ Cal.App.4th ___, 2009 WL 1857303 (1st Dist. Div. 4, 2009)

Who needs to know about this case: Personal-injury lawyers

Why it's important: Applies the doctrine of primary assumption of the risk to a non-sports-related activity (throwing objects into a bonfire).

Synopsis: Beninati attended the Burning Man festival in Black Rock City, Nevada. During the conclusion of the festival, during the burning of the "Burning Man" effigy, he approached the bonfire to throw objects into the fire "to participate more fully and completely in the Burning Man experience." As he approached the fire to throw a photograph into it, he slipped, fell into the fire and burned his hands. He sued Black

Rock City for negligence for failing to provide safe ingress and egress routes for attendees who were "moved by the event to directly participate in the burning ritual." The court affirmed summary judgment for the City, applying the doctrine of primary assumption of the risk, even though the case did not involve a sports-related activity. The court held that given the size of the bonfire and the manner in which it was constructed, which included cables that had held the effigy in place, and a large platform on which it was constructed, the risk of stumbling on hidden fire debris while approaching the remnants of the fire was inherent, obvious, necessary to the event, and Beninati assumed the risk when he approached the fire.



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