Appellate Reports

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

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In re Tobacco II Cases

__ Cal.4th __, 2009 WL 1362556 (Cal. Supreme 2009)

Who needs to know about this case: Lawyers who bring UCL (Bus. & Prof. Code, § 17200) claims

Why it's important: Defines the post-Prop 64 standing requirements for consumer-class actions, holding that only the named class representative must meet the statute's standing requirements; addresses the causation requirements for UCL claims added by Prop. 64.

Synopsis: The complaint alleged that the tobacco industry defendants violated the UCL by conducting a decades-long campaign of deceptive advertising and misleading statements about the addictive nature of nicotine and the relationship between tobacco use and disease. The trial court certified a class consisting of "those people who are residents of California and who, while residents of California, smoked one or more cigarettes during the applicable class period." After Proposition 64 was enacted, the defendants moved to de-certify the class, and the trial court granted their motion. The Court of Appeal affirmed, agreeing with the trial court that, post-Proposition 64, individual issues of exposure to the allegedly deceptive statements and reliance upon them, predominated over class issues.

On review, the Supreme Court addressed two questions: First, who in a UCL class action must comply with Proposition 64's standing requirements, the class representatives or all unnamed class members, in order for the class action to proceed? The majority concluded that the standing requirements are applicable only to the class representatives, and not all absent class members. Second, what is the causation requirement for purposes of establishing standing under the UCL, and in particular what is the meaning of the phrase "as a result of" in Section 17204? The Court held that a class representative proceeding on a claim of misrepresentation as the basis of his or her UCL action must demonstrate actual reliance on the allegedly deceptive or misleading statements, in accordance with principles regarding the element of reliance in ordinary fraud actions. But those same principles do not require the class representative to plead or prove an unrealistic degree of specificity that the plaintiff relied on particular advertisements or statements when the unfair practice is a fraudulent advertising campaign. The Court accordingly reversed for further proceedings to determine whether the class representatives had standing and could satisfy the reliance requirement.

Troyk v. Farmers Group, Inc.

(2009) 171 Cal.App.4th 1305 [90 Cal.Rptr.2d 589]

Who needs to know about this case: Lawyers who sue Farmers Insurance; lawyers who bring UCL claims

Why it's important: holds that the "attorney in fact" for a reciprocal insurance exchange (often Farmers Group, Inc. for Farmers' policies) can be liable on a UCL claim as an exchange's managing agent; attorney-in-fact and exchange could be liable for restitution under UCL even if payments at issue were made to a Farmers-related third-party; discusses "injury-in-fact" and causation standards in UCL.

Synopsis: Section 381 of the Insurance Code requires that the policy's "premium" be stated in the policy. Farmers offers auto policies with either a six-month or one-month term. An insured who selects the one-month term is required to enter into an agreement with a different Farmers' entity, Prematic, which includes a service charge. Insureds cannot pay the stated premium for the one-month premium directly to Farmers; they must pay through Prematic and pay the service charge. Plaintiffs obtained class certification and summary judgment against defendants in the amount of $115,556,827. The appellate court held that Farmers did violate Section 381 by failing to disclose the service charge as a

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premium, but reversed the summary judgment because there were triable issues of fact concerning the causation element of plaintiff's standing.

The appellate court declined to follow the definition of "premium" followed by the Department of Insurance, finding that an agency's administrative construction of statutory language did not bind the court in construing an issue of law. The court also rejected Farmers' arguments that it actually complied with Section 381, and that if it did not, it substantially complied with it. The court held that as the attorney-in-fact for the various reciprocal exchanges, Farmers Group, Inc. was a managing agent for the exchanges, and could be held liable under the UCL. It also held that because Farmers Group, Inc. presumably drafted, managed, and approved the policy documents sent to class members, it was directly regulated by Section 381. The court rejected Farmers' argument that because the service charges were paid to a third party, Prematic, Farmers could not be held liable for restitution. The court held that Prematic was a Farmers-related entity, and that the other Farmers entities received a benefit from the payment of the charges, even if they did not collect them directly. The court held that the trial court did not abuse its discretion in finding that all the Farmers entities were engaged in a single business enterprise, and could be treated in that fashion for the purposes of imposing liability. Because the complaint did not allege and plaintiffs did not demonstrate on summary judgment that they would not have paid the service charges if they had been disclosed as premiums in the policy, the court reversed the judgment and remanded.

Mintz v. Blue Cross of California

(2009) 172 Cal.App.4th 1594 [92 Cal.Rptr.3d 422]

Who needs to know about this case: State employees (like judges) who get their health insurance through a CalPERS self-funded plan, administered by a third-party administrator, and lawyers who represent them

Why it's important: Holds that the third-party administrator of a self-funded plan can be held directly liable on a negligence theory to plan members who are injured by the manner in which the plan is administered. Until this case was decided, third-party administrators argued that they could not be held liable for the manner in which they administered the plan.

Synopsis: David Mintz was a judge of the LA Superior Court. He was diagnosed with lung cancer, and received treatment. When the cancer recurred, his doctors recommended a new treatment called RFA. Blue Cross administered the plan for CalPERS. The plan gave Blue Cross exclusive authority to determine what treatment was experimental or investigational. Blue Cross denied the RFA treatment, and failed to advise Mintz that under the Friedman-Knowles Act, the plan would cover the treatment even though it was experimental if the majority of doctors on an independent review panel determined that the RFA treatment would be more beneficial to him than conventional treatment. The court held that Mintz's case against Blue Cross should not have been dismissed on demurrer, because Mintz (or his estate) could state a viable cause of action against the administrator for negligence. The court rejected Mintz's claims that he could sue the administrator on an "interference with contract" theory, however, because of the agent's immunity rule.

Tan v. Arnel Management Co.

(2009) 170 Cal.App.4th 1087 [88 Cal.Rptr.3d 754]

Who needs to know about this case: Lawyers who bring premises-liability cases arising from the criminal acts of third parties

Why it's important: Proving liability in premises-liability cases arising from third-party criminal acts has proven very difficult in light of the high causation standard adopted by the cases. This case shows that the burden can be met, and reverses a nonsuit on causation.

Synopsis: Tenant in a 620-unit multi-building apartment complex was shot and rendered quadriplegic when he parked in the complex's leasing-office lot, which was not within the security perimeter of the complex. Plaintiff's expert testified that if the landlord had installed certain relatively minor changes in the fencing of that lot, and added a security gate, the incident would not have occurred. The trial court granted nonsuit on causation, and the Court of Appeal reversed. The record showed that there were a sufficient number of prior criminal acts that were similar to the attack on the plaintiff (three) to provide the substantial evidence that the attack was foreseeable by the landlord, and that the minimal physical security measures urged by the plaintiffs – fencing off the parking lot and installing a security gate – would support a finding of causation.

Gordon v. Nissan Motor Co., Ltd.

(2009) 170 Cal.App.4th 1103 [88 Cal.Rptr.3d 778]

Who needs to know about this case: trial lawyers

Why it's important: Clarifies that after a new trial is granted, the case is at large, and the parties are in the same position as if the case had never been tried. Hence, a plaintiff who failed to raise certain issues in the first trial is not foreclosed from raising them in the second trial.

Synopsis: Plaintiff suffered severe injuries in a rollover accident involving his Nissan Pathfinder. Before the case went to trial, plaintiff elected not to pursue a claim based on a roof defect, and to limit his theory to lack of vehicle stability. The case was tried, but the jury deadlocked and the trial court declared a mistrial. In the second trial, plaintiff sought to pursue a claim based on a roof defect, but the trial court refused to let him proceed on that theory and struck his expert

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designation relating to that claim, finding he had waived it in the first trial. The jury in the second trial returned a defense verdict. Reversed. The trial court abused its discretion in striking the expert designation. Plaintiff was entitled to present new evidence in the second trial on the roof-defect theory, even though he had not proceeded on that theory in the first trial. The statements by plaintiff's counsel that he had elected not to proceed in the first trial on the roof-defect theory were not a judicial admission that the roof was not a cause of injury to the plaintiff. The trial court's order excluding plaintiff's expert and all evidence concerning the roof-defect theory was reversible error per se.

Evanston Ins. Co. v. OEA, Inc.

(9th Cir. 2009) __ F.3d __

Who needs to know about this case: Insurance lawyers

Why it's important: First case to hold that if an insurer obtains a finding that it is entitled to reimbursement of the amounts paid to defend its insured because there was no coverage as a matter of law, the insurer is entitled to recover prejudgment interest against the insured under Civil Code section 3287, subd. (a).

Synopsis: OEA was sued by employees of one of its subsidiaries for injuries sustained in an on-the-job accident. OEA tendered the defense to Evanston, which initially provided a defense and partially funded a settlement, subject to a reservation of rights to contest coverage. Evanston later won a summary judgment that there was no coverage under its policy, obtaining an award of reimbursement of $1,544,924. The district court also awarded pre-judgment interest. On appeal OEA argued that this was error because Evanston's right to reimbursement was not vested when it provided a defense. The Ninth Circuit held that the right to reimbursement vested when the damages were certain or capable of being made certain, not when Evanston's right to recover them accrued. Several district-court decisions that had been summarily affirmed by the Ninth Circuit, which declined to award prejudgment interest because the insurer's right had not vested when the payments were made, were not followed (and were implicitly overruled.)

Spanair S.A. v. McDonnell Douglas Corp.

(2009)172 Cal.App.4th 348 [90 Cal.Rptr.3d 864]

Who needs to know about this case: Lawyers whose cases are remanded to state court from federal court

Why it's important: Holds that until the clerk of the federal court sends the state court clerk a certified copy of the remand order, jurisdiction is not transferred from the federal court to the state court. Accordingly, any delay between entry of the remand order and the time the clerk sends the certified order is necessarily excluded from the calculation of the statutes allowing dismissal for lack of prosecution (Code Civ. Proc., §§ 538.410 and 538.420).

Synopsis: Products liability suit filed in state court in 2004 was removed by defendants. In December 2004 the district court granted a motion to remand. But the clerk of the district court did not mail a certified copy of the remand order to the clerk of the Superior Court until September 2007. Defendants then moved for dismissal for lack of prosecution. The trial court granted the motion. Reversed. Under 28 U.S.C. § 1447(c), jurisdiction of a remanded case is not transferred to the state court until the clerk of the federal court mails a certified copy of the remand order to the clerk of the state court. Under Section 583.340, subd. (c), the time between the issuance of the remand order in 2004 and the mailing of the certified order was time where the plaintiff was not able to bring the case to trial, and had to be excluded from the calculation of the three-year dismissal statute. The fact that the plaintiffs could have brought the delay to the clerk's attention and caused the order to be issued faster was not relevant.

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