

Appellate Reports

By Jeffrey Isaac Ehrlich

Products liability/warning labels/federal preemption

Broberg v. Guardian Life Ins. Co. of America __ Cal.App.4th ___, 2009 WL 501898 (2009) (2d Dist. Div. 7)

Guardian is alleged to have sold Dr. David Powell a whole-life insurance policy in 1993, by falsely promising through its agent that the earnings from the policy would be sufficient to pay the premium costs on the policy after the 11th year, and by providing misleading marketing materials that represented that out-of-pocket premium costs would be eliminated in the 12th year of the policy's life – a so-called "vanishing premium" policy. Guardian was alleged to have known that the sales materials it was using were misleading. After Guardian billed Powell and his irrevocable trust that held the policy for premiums in the 12th year, Powell and the trustees sued Guardian for fraud, negligent misrepresentation, and various statutory violations. Guardian demurred, arguing that the claim accrued in 1993 and was therefore time-barred, and that Powell could not establish justifiable reliance on the alleged misrepresentations because of inconsistent language in the policy itself. The trial court sustained Guardian's demurrer without leave to amend. Reversed.

The court first held that the claims for fraud and negligent misrepresentation were subject to the delayed-discovery rule, under which a fraud claim accrues only when the aggrieved party discovers the facts constituting the fraud. While the appellate courts have disagreed on whether the delayed-discovery rule applies to claims under the unfair competition law ("UCL"), Business & Professions Code section 17200, et seq., the court held that the better view was that it did.

Next, the court held that the disclaimers in the policy illustrations were so clear and obvious that, as a matter of law, Powell's claims of delayed discovery and reasonable reliance must be rejected. The placement of the disclaimers, which the court characterized as "buried in a sea of same-sized capitalized print," and the absence of cautionary language on the first page of the policy illustration, which contained deceptive language and figures indicating that Powell's out-of-pocket premiums would "vanish" precluded resolution of the issue at the pleading stage. The court applied the standards applicable to exclusions in insurance policies, and concluded that the placement and format of the disclaimer was not conspicuous as that term was used in the policy-construction context.

The court also rejected Guardian's argument that Powell was on inquiry notice in 1994 that premiums would be payable "for life." The court noted that Powell did not allege that he was told that premiums would stop; only that after the 11th year they would be paid by the policy's earnings and therefore no further out-of-pocket costs would be incurred.

The court further held that the trial court had properly sustained the demurrer without leave to amend with respect to the claims under the Consumer Legal Remedies Act ("CLRA"), because the Supreme Court had indicated in dictum in that insurance was neither a "good" nor a "service" and therefore outside the scope of the CLRA. While the Supreme Court was currently considering this issue, until it ruled, the court would rely on the views it had previously expressed.

Civil Procedure/motions in limine/experts

Easterby v. Clark ___ Cal.Rptr.3d ____, 2009 WL 266143 (2009) (2d Dist. Div. 1.)

Denise Easterby claimed she was injured during a visit to her dentist in March 2004. As X-rays were taken, the technician tried to jump over a cord attached to the X-ray sensor in her mouth, causing her head to jerk to one side, and injuring her neck. She claimed that after the incident, her neck pain grew worse and worse, and conservative treatment did not provide relief. She ultimately was referred by her internist to a surgeon, Dr. Regan, who performed surgery on her to reduce nerve compression. After the surgery, she claimed she was much improved. She sued the dental office, the dentist and the technician.

Easterby disclosed Dr. Regan as a non-retained expert. During his deposition by the defense, he was asked whether he could state to a reasonable medical probability that the dental-chair incident was the reason Easterby needed surgery. He testified that he could not. Roughly three months before trial, Easterby sent the defense a letter stating that, after his deposition, Dr. Regan had received a letter from the referring internist, who had explained that there had been an error in her medical records for Easterby. The records stated that Easterby had injured her neck in an automobile accident occurring in March 2004. This was an error, and should have referred to an incident in a dental chair. In light of the correction in the records, Dr. Regan would testify at trial that, to a reasonable degree of medical probability, the dental-chair incident led to Easterby's surgery. The defense opted not to re-depose Dr. Regan.

Before trial began the defense made a motion in limine under *Kennemur v. State of California* (1982) 133 Cal.App.3d 907 [184 Cal.Rptr. 393], seeking to limit the trial testimony of plaintiff's experts to those expressed in deposition, and precluding plaintiff from providing the ex-

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perts with information that was available at the time of the deposition, but not provided to the expert. The motion was unopposed, and granted.

During trial, Dr. Regan testified, and offered an opinion that the dental-chair incident had caused Easterby to need surgery. The next day, the defense moved to strike the testimony on causation, citing *Kennemur* and the order granting the motion in limine. The trial court granted the motion, and indicated that it would instruct the jury to disregard Dr. Regan's testimony on causation. Based on this ruling, the defense moved for nonsuit, which was granted. Reversed.

The overarching principle of *Kennemur* and its progeny is that a party's expert may not offer testimony at trial that exceeds the scope of his or her deposition testimony, *if* the opposing party has no notice or expectation that the expert will offer the new testimony, or *if* notice of the new testimony comes at a time when deposing the expert will be unreasonably difficult. Since the defense had been given three-months notice of the new testimony, *Kennemur* did not bar Dr. Regan's testimony.

In addition, when the defense asked Dr. Regan on cross-examination whether he believed the dental incident necessitated Easterby's surgery, he was required to answer truthfully under penalty of perjury, even if that testimony contradicted his deposition testimony. The court also rejected the defense's claims that by offering the causation testimony, Dr. Regan had "morphed" from a non-retained expert to a retained expert.

Insurance bad-faith/genuine-dispute doctrine

McCoy v. Progressive West Ins. Co.
___ Cal.Rptr.3d ____, 2009 WL 251127 (2009) (2d Dist. Div. 1)

Progressive insured McCoy's automobile for theft. The auto was stolen in 2004, and was recovered burned and damaged, leaving it a total loss. Progressive denied the claim, believing that McCoy was somehow involved in the theft. The case was tried to a jury, which returned a verdict in favor of McCoy on breach of contract, bad faith, and awarded $100,000 in punitive damages. Affirmed.

Progressive contended on appeal that the trial court erred in refusing its special instructions on the genuine-dispute doctrine. The court held that there was no error. The cases on which Progressive relied, *Chateau Chamberay Homeowners' Association v. Associated International Insurance Company* (2001) 90 Cal.App.4th 335 [108 Cal.Rptr.2d 776], and *Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1072 [56 Cal.Rptr.3d 312], applied the genuine-dispute doctrine in the summary-judgment context, and did not constitute authority for the use of a genuine-dispute jury instruction. Since the trial court correctly instructed the jury that the issue of bad faith turned on whether or not the insurer's denial of the claim was reasonable, no further instruction was necessary.

Legal malpractice/UCL

Blanks v. Seyfarth Shaw
__ Cal.App.4th __, 2009 WL 417261 (2009) (2d Dist. Div. 3.)

Billy Blanks won a legal malpractice and fraud verdict against his former counsel, Seyfarth Shaw, of $10.5 million in compensatory damages, $15 million in punitive damages, plus $5.6 million in interest, attorney's fees and costs. Reversed.

Blanks, a celebrity karate champion developed the Tae Bo fitness routine, which he taught in his studio, and which he developed into fitness video tapes. In 1991 or 1992, Blanks hired Jeffrey Greenfield, a CPA, as his accountant. In 1997, Greenfield convinced Blanks to change their relationship and allow him to manage Blanks's business affairs, negotiate business deals and media appearances, and schedule Blanks's personal appearances, for 10 percent of Blanks's revenues. Greenfield also became his agent, and proposed a deal in which he would manage every aspect of Blanks's business affairs, for a fee that began at one-third of Blanks's income, and rose to 49 percent. The deal was never reduced to writing, but Greenfield did receive periodic checks. In 1998 through 1999, Greenfield received $10.6 million.

In September 1999, Blanks retained Seyfarth, Shaw to pursue a claim against Greenfield. Seyfarth knew that Greenfield was not licensed as a talent agent, and therefore under the Talent Agent Act ("TAA"), the Labor Commissioner can void all contracts between the parties made by an unlicensed agent, and force the unlicensed agent to disgorge all funds earned for his or her services. The Labor Commissioner has exclusive jurisdiction under the TAA, and the statute of limitations to seek to void the unlicensed agent's contracts and obtain disgorgement is one year. Seyfarth filed suit against Greenfield for a number of claims, including a violation of the TAA. While the suit was pending, the one-year statute of limitations passed on the $10.6 million paid by Greenfield. Ultimately, in writ proceedings, it was determined that the TAA claim was time-barred. Greenfield later settled with Blanks for payment of $225,000 plus a $25,000 charitable contribution. Blanks then filed suit against Seyfarth, Shaw for malpractice.

On appeal, the court rejected Seyfarth's contention that its failure to meet the one-year deadline in the TAA did not cause Blanks any damage because it could sue Greenfield under the unfair competition law ("UCL"), Business & Professions Code section 17200, et seq., for his "illegal" conduct, which was subject to a four-year limitations period. The court held that because the TAA gave the Labor Commissioner exclusive jurisdiction to implement the TAA, that a party could not circumvent that jurisdictional grant by relying instead on the UCL.

The court further held, however, that the trial court committed prejudicial error when it refused to instruct the jury that that agreement between Greenfield

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and Blanks was subject to the doctrine of severability. Under that doctrine, Seyfarth was entitled to have the jury separate the services that Greenfield rendered into agent and non-agent services, with the latter not being subject to the TAA. In the "trial within the trial" aspect of the case, the jury would have been required to determine how a reasonable Labor Commissioner would have applied the doctrine had Seyfarth filed a timely petition under the TAA. This error infected the entire judgment and required reversal.

The court also held that the trial court erred in ruling on a motion in limine concerning applicability of the discovery rule concerning the statute of limitations that Seyfarth had been negligent as a matter of law by failing to file a timely petition with the Labor Commissioner under the TAA. The court held that the issue of whether Seyfarth had breached its duty of care was not presented in the motion in limine concerning the statute of limitations. The ruling exceeded that trial court's authority, and had the effect of severely curtailing Seyfarth's presentation of evidence during trial, effectively depriving Seyfarth of the chance to prove that it had not breached the standard of care, and had made an informed assessment of the best course of conduct in the litigation.

Finally, the court held that, on remand, the so-called "judgmental immunity doctrine" would be at issue. The judgmental immunity doctrine relieves an attorney from a finding of liability even where there was an unfavorable result if there was an "honest error in judgment concerning a doubtful or debatable point of law. . . ." On remand, Seyfarth's burden in asserting the judgmental immunity doctrine would be "to explain why its choice to delay filing a TAA petition was based upon a rational, professional judgment, that would have been made by other reputable attorneys in the community under the same or substantially similar circumstances."

[Ed. Note: Please turn to Leslie Brueckner's analysis of *Wyeth v. Levine*, __ U.S.__, 2009 WL 529172 on page 7.]


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