

Appellate reports

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Insurance/pollution exclusion/ causation/apportionment

State of California v. Allstate Ins. Co. (2009) 45 Cal.4th 1008 [90 Cal.Rptr.3d 1]

This is a landmark California insurance decision, which addresses a number of important issues. It will therefore be discussed at greater length than usual. But the reader should be aware that even this expanded summary necessarily omits additional important facets of the decision.

The State of California was held liable in a federal-court action for the discharge of hazardous wastes from the Stringfellow Acid Pits. It sought insurance coverage for its liability under four excess-insurance policies, under the coverage provided for property damage. The policies contained a pollution exclusion that barred coverage for property damage arising from pollution, but which contained an exception for "sudden and accidental" discharges of pollutants. The Supreme Court decided the following issues relating to coverage:

(1) In determining whether a discharge is subject to the exception for sudden and accidental discharges, is the proper focus on the initial deposit of the chemical wastes into storage on the site (which was a deliberate act), or, instead, on the escape of the pollutants from the site into the environment? [Held: the proper focus is on the escape of pollutants into the environment.]

(2) Does the emergency release by the State of polluted runoff to prevent a larger uncontrolled release constitute an "accidental" release? [Held: the emergency release qualified as "accidental".]

(3) If some, but not all, of the discharges from the site were sudden and accidental, were the insurers entitled to summary judgment because the State could not prove which part of its liability for property damage was the result of the sudden and accidental discharges? [Held: The State was not required to prove, in order to obtain coverage for the loss, which portion of the liability was the result of sudden and accidental discharges.]

The State had selected the location for, designed, and directed the construction of a hazardous-waste disposal site capable of receiving all types of liquid wastes, in the 1950s in Riverside County. The site was known as the Stringfellow Acid Pits. Between the time the site opened in 1956 and its closure in 1972, 30 million gallons of industrial waste was deposited into the unlined evaporation ponds at the site. By 1960, a report showed that chemical pollution was seeping into groundwater below the site, creating a plume of contaminated groundwater as the water moved downgradient from the site. In addition, two major rain-related overflow episodes occurred at the site – one in 1969 and one in 1978. The 1978 event occurred when the State made a series of controlled releases from the ponds in order to prevent the failure of a retention dam.

With respect to the first issue, the Court held that the coverage issue turned on whether the discharges *for which the State was held liable* was sudden and accidental. As a result, the insurers could not escape liability by arguing that because the initial deposit of waste into the ponds on the site was deliberate, the "sudden and accidental" exception to the pollution exclusion did not apply. The State was not held liable for the initial deposit of waste at the site. The initial deposit of waste, although imperfect, did not itself spread chemical wastes widely through the environment. "A reasonable insured would not understand an exclusion for 'release' of pollutants to apply where, as here, the wastes are deposited into intended containment ponds and do not behave as environmental pollutants until they are later released or discharged *from* the ponds." (*Id*., 90 Cal.Rptr.3d at 12.) Even assuming that the initial deposit of chemical waste into the evaporation ponds was a discharge or release of pollutants, the subsequent escape of those chemicals from the ponds into the surrounding soils was a second release or discharge, and it was this second event for which the State was held liable.

With respect to the second issue, the parties agreed that an "accidental" discharge is one the insured neither expected nor intended to happen. While the 1978 discharge was intentional, its purpose was to avoid a larger, uncontrolled discharge that would have occurred if the dam had broken. Liability policies have been held to cover damages resulting from an act undertaken to *prevent* a covered source of injury from coming into action, even if that act would otherwise not be covered. This rule makes sense as a matter of causation, because the threat of property damage leads naturally to acts, whether by the insured or by third parties, to prevent or mitigate the damage. The rule also fits under the principle that insurance policies are to be read in accord with the parties' reasonable expectations. It would be incongruous to hold that the policy would have covered the property damage caused by the uncontrolled discharge following the dam failure, but not the controlled discharge made in an attempt to prevent the larger catastrophe. Finding coverage in this situation encourages the most salutary course of conduct, and does not harm the insurers, who would have been larger for the greater loss if the preventative measures had not been taken.

Finally, with respect to the third issue, the State was not required to prove

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the amount of property damage caused by the sudden-and-accidental discharges. To the extent the State can show "sudden and accidental" releases proximately caused the damage for which it was held liable, it is contractually entitled to indemnity for that liability. Although it arose on very different facts, the rule of *State Farm Mut. Auto. Ins. Co. v. Partridge* (1973) 10 Cal.3d 94, 105 [109 Cal.Rptr. 811] applies: liability coverage exists whenever an insured risk constitutes a proximate cause of an accident, even if an excluded risk is a concurrent proximate cause. To the extent that *Golden Eagle Refinery Co. v. Associated Internat. Ins. Co*. (2001) 85 Cal.App.4th 1300, 1304 [102 Cal.Rptr.2d 834], holds that an insured must be able to allocate between covered and excluded losses in order to obtain coverage, it is disapproved as inconsistent with *Partridge*.

Golden Eagle Refinery had held that because an insurance policy was a contract, it would be improper to use principles of tort liability to trigger coverage. But this approach is flawed in a third-party liability context, because the policy itself promises coverage for damages that the insured is held liable for under tort law. Thus, the right to coverage in the third-party liability insurance context draws on traditional tort concepts of fault, proximate cause and duty. Because, under tort law, causation is determined under the "substantial factor" test, this test is the appropriate one to apply to determine whether there is coverage for the insured's liability.

> [I]f the insured proves that multiple acts or events have concurred in causing a single injury (as in *Partridge*) or an indivisible amount of property damage (as may be shown at trial here), such that one or more of the covered causes would have rendered the insured liable in tort for the entirety of the damages, the insured's inability to allocate the damages by cause does not excuse the insurer from its duty to indemnify.

(*State v. Allstate Ins. Co*., 90 Cal.Rptr.3d at 25.)

Federal Civil Procedure/Post-trial motions/motions for judgment as a matter of law/FRCP 50(b)

Tortu v. Las Vegas Metropolitan Police Dept. (9th Cir. 2009) 556 F.3d 1075.

Tortu brought a civil-rights action against Las Vegas Police Department officers for using excessive force while arresting him at the airport. He had been waiting to board a Southwest Airlines flight and realized he'd misplaced his ticket. The ticket was found by an airport employee, and Tortu's friend went to retrieve it. The flight boarded before his friend returned, and Tortu asked the gate agent to board. He was refused permission because he had no ticket but followed the agent onto the plane. When the airline personnel on the plane asked him to leave, he refused, and the police were called. Accounts of what occurred once they arrived varied. Tortu claimed that he was repeatedly beaten; the police said that he was combative, attacked them, and they fought back. Tortu claimed that once he'd been subdued and placed in a police SUV with officers on either side of him, another officer in the front seat (Engle) reached back, grabbed Tortu's testicles, and squeezed them hard for about 10 seconds. Tortu produced evidence at trial that showed that the day after his arrest, he was treated for severely bruised and swollen testicles.

The officers did not file a Rule 50(a) motion for judgment as a matter of law before the case was submitted to the jury. The jury found two officers not liable, but found that Engle was liable and awarded $175,000 in compensatory damages and $5,000 in punitive damages. After the verdict, Engle filed a Rule 50(b) motion for judgment as a matter of law, and in the alternative a Rule 59 motion for a new trial. The district court granted the Rule 50(b) motion, finding that Engle was entitled to qualified immunity because his actions were reasonable as a matter of law, and that the jury had reached an unreasonable decision. Similarly, the court granted the new-trial motion on the ground that the jury's verdict was unreasonable because Engle was protected by qualified immunity and because the damages were excessive as a matter of law.

The Ninth Circuit reversed and ordered judgment for Tortu on the jury's verdict. The Court held that, as explicitly stated in the Rule, a Rule 50(b) motion may be considered only if a Rule 50(a) motion for judgment as a matter of law has been previously made. Since no motion under Rule 50(a) had been made, the district court was without power to consider Engle's Rule 50(b) motion. The Court rejected Engle's arguments that his pre-trial motions should be considered the equivalent of a Rule 50(a) motion, and that the district court's decision to rule on the qualified-immunity defense post-verdict induced him not to file a Rule 50(a) motion.

The Court held that the district court abused its discretion when it granted the new-trial motion. While the officers denied that anyone had squeezed Tortu's testicles while effecting the arrest, the medical evidence clearly showed otherwise, and the officers offered no explanation for the medical evidence showing the injury to Tortu's testicles. In finding the jury's decision mistaken and ungrounded, the district court substituted its view of the evidence for the jury's view, which is impermissible. Since the jury's conclusion was not against the clear weight of evidence, the district court abused its discretion when it granted a new trial.

With respect to the finding by the district court that the damages awarded to Tortu were excessive, the court's finding omitted any mention of the personal humiliation and emotional suffering that Tortu experienced. Since the jury's verdict properly included this element of damages, and was not against the clear

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weight of evidence, it could not be disturbed by the district court.

Civil Procedure/Class Actions/ Notice costs

Hunt v. Imperial Merchant Services, Inc. (9th Cir. 2009) __ F.3d __, 2009 WL 819486

Imperial Merchant Services ("IMS") was sued in a class action for alleged violations of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, et seq. The suit alleged that IMS violated the FDCPA by attempting to collect both an interest charge and a statutory service charge on dishonored checks. The district court granted the plaintiffs' partial summary judgment on liability, finding that IMS's practices violated the FDCPA. The district court also certified two subclasses under FRCP, Rule 23(b)(2) and 23(b)(3). The court then ordered IMS to pay the cost of mailing the notice to the 23(b)(3) subclass members. IMS timely appealed the order requiring it to pay the notice costs. While the appeal was pending, the plaintiffs notified class members at their own expense.

The Ninth Circuit held that it had jurisdiction to review the order shifting notice costs to the defendants. In *Eisen v. Carlisle & Jacquelin* (1974) 417 U.S. 156, 171-72 [94 S.Ct. 2140], the Supreme Court held that a district court's order imposing most of the class notice costs on the defendants was immediately appealable under the collateral order doctrine. The court could not meaningfully distinguish *Eisen*. While an adverse ruling on the merits decision (which was pending on a certified appeal to the California Supreme Court) might moot the issue, that prospect did not require the court to dismiss a live controversy that was not currently moot because it might be rendered moot in the future. In addition, the issue of whether a district court can shift the cost of class notice to the defendants based on a finding of liability has not previously been addressed in a published appellate decision.

> The usual rule is that a plaintiff must initially bear the cost of notice to the class. (*Eisen*, 417 U.S. at 178.) [C]ourts must not stray too far from the principle underlying [Eisen] that the representative plaintiff should bear all costs relating to the sending of notice because it is he who seeks to maintain the suit as a class action.

(*Oppenheimer Fund, Inc. v. Sanders* (1978) 437 U.S. 340, 359 [98 S.Ct. 2380].)

However, occasionally "the district court has some discretion" in allocating the cost of complying with an order concerning class notification. (*Id.* at 350.) This issue on appeal is the scope of that discretion. Many district courts have placed notice costs on the class-action defendant once the defendant's liability has been established. IMS sought to distinguish those cases by noting that in none of them did a district court shift the cost of notice while liability was still contested on appeal. This, however, does not mean that the district court lacked discretion to make an interim order shifting costs, similar to an interim attorney-fee award, which might later be recovered if the merits issue was resolved adversely to the plaintiffs. The district court's order shifting costs was within its discretion. In essence, the court merely decided that rather than impose on plaintiffs the initial cost of providing notice, and then obtaining reimbursement from IMS after the action concluded through a cost award. Since there was no solution that did not require one side or the other to bear the risk of being unable to be reimbursed, the district court had discretion to shift costs to the defense.


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