Appellate Reports

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

JEFFREY ISAAC EHRLICH

Keener v. Jeld-Wen, Inc.

__ Cal.4th __ (2009), 2009 WL 1230531 (Cal. Supreme Court)

Who should know about this case:

Lawyers who try cases in California

Why it's important:

Shows the need to be absolutely certain after a jury verdict that there is no defect in the form of the verdict, or in the jury polling; re-emphasizes the rule that matters that can be cured before the jury is discharged must be, or the objection is forfeited. Notes that jurors are permitted to change their vote after the verdict, and that the ultimate vote is the one that occurs when they are polled post-verdict. A juror's silence during polling is construed as acceptance of the verdict.

Synopsis:

This is a wrongful-death case brought by the surviving relatives of a motorcyclist killed in a collision with a truck. The defendants are the truck driver, his employer, and the company that leased the truck to the employer. The jury's verdict apportioned fault between the driver and motorcyclist as 80 percent-20 percent, respectively. The trial judge then polled the jury concerning their answers to the three-page verdict form. The polling showed that there was a clear three-quarters (9-3 vote) majority for questions 1-8. But on question 9, dealing with apportionment, only 8 jurors stated that the verdict form represented their allocation. Three stated that it was not, and one juror, (No. 7.) was not polled. The parties evidently did not notice the failure to poll juror No. 7, and the jury was discharged. The defense later noticed the discrepancy and sought a new trial, which was denied. The Court of Appeal reversed, finding that juror 7's silence should be deemed to express disagreement with the verdict. The Supreme Court reversed. It held that a juror's silence during polling will be deemed assent to the verdict, and that defects in the form of the verdict must be raised before the jury is discharged, or are forfeited.

Safeco Ins. Co. of America v. Superior Court

__ Cal.App.4th __ (2009), 2009 WL 1153433 (Ct. App. 2d Dist, Div. 3.)

Who should know about this case:

Lawyers who bring class actions in California; lawyers who bring UCL cases

Why it's important:

Affirms trial court order in UCL action allowing plaintiffs to conduct pre-certification discovery to identify substitute class representative. Contains an excellent summary of the law concerning pre-certification discovery.

Synopsis:

The Proposition 103 Enforcement Project ("Project") brought a UCL claim against Safeco and First National Insurance Companies alleging that they charged higher premiums to drivers with no prior auto insurance or no continuous coverage, in violation of Proposition 103. While the action was pending, Proposition 64 was enacted, which changed the UCL's standing requirements. Karnan was named as the class representative in a first-amended complaint. The defendants sought summary judgment, showing that she had not suffered injury-in-fact, and therefore lacked standing. Karnan then sought pre-class-certification discovery for the purpose of identifying potential class representatives. The trial court granted limited discovery for this purpose. The insurers brought a writ, which the Court of Appeal agreed to hear. In ruling on such a motion, the trial court must "expressly identify any potential abuses of the class-action procedure that may be created if the discovery is permitted, and weigh the danger of such abuses against the rights of the parties under the circumstances." (*Parris v. Superior Court* (2003) 109 Cal.App.4th 285, 300-301.) Here, the trial court's order weighed these factors, and did not constitute an abuse of its discretion.

Maatuk v. Guttman

__ Cal.App.4th __ (2009), 2009 WL 795031 (Ct. App. 2d Dist, Div. 5.)

Who should know about this case:

Litigators and trial lawyers dealing with expert-witness testimony

Why it's important:

Provides guidance on when expert testimony is inadmissible because it is founded on improper assumptions

Synopsis:

Maatuk sued his former attorney, Guttman, for legal malpractice in a patent-litigation matter, which resulted in the invalidation of Maatuk's patents for a liquid-level sensor. The jury found

that Guttman had been negligent and had breached his fiduciary duty, but awarded no damages. Maatuk appealed, arguing that the trial court had improperly struck the testimony of his damages' expert. The expert was a CPA, who based her testimony on information about the sensor's performance and the potential market for it, on information provided by Maatuk. The trial court granted Guttman's motion to strike her testimony, finding that there was no basis for her underlying assumptions about the market penetration the sensor would have obtained, or any other assumptions about the cost to manufacture the sensor, or the market for it. In essence, the trial court found that Maatuk had an idea; not a product. Affirmed. The expert's calculations were all irrelevant because they all assumed that Maatuk had a working product to sell at the time the patents were invalidated. There was no evidence in the record to support such an assumption. In addition, striking the expert's testimony did not leave the jury without evidence from the plaintiff on which to base a damage award, were it inclined to award damages. Its refusal to award damages can only mean that it accepted the defense theory that Maatuk did not have a marketable product.

Ojo v. Farmers Group, Inc.

__ F.3d __ (9th Cir. 2009), 2009 WL 1298168

Who should know about this case:

Insurance lawyers; Civil Rights lawyers

Why it's important:

Explains concept of "reverse preemption" under the McCarran-Ferguson Act. This is good to understand because it can be the basis in some cases to avoid federal preemption of state insurance laws.

Synopsis:

Ojo, an African-American resident of Houston, Texas, sued his homeowner's insurance carrier, Farmers, arguing that Farmers was using a credit-scoring system to determine homeowner's premiums to identify and target minority homeowners, and to charge them higher premiums – conduct that violated the federal Fair Housing Act, 42 U.S.C. § 3604(b) ("FHA"). Farmers argued that its use of credit scoring was expressly authorized by, and consistent with, Texas insurance law, and that under the McCarran-Ferguson Act, the Texas laws "reverse preempted" the FHA. The McCarran-Ferguson Act allows states to regulate the business of insurance, and provides that ""[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance." (15 U.S.C. § 1012(b).)

Three requirements must be met before a state insurance law preempts a federal statute: (1) the federal law in question must not be specifically directed at insurance regulation; (2) there must exist a particular state law (or declared regulatory policy) enacted for the purposes of regulating insurance; and (3) application of federal law to the controversy in question must invalidate, impair or supersede that state law. Here, the majority held that reverse preemption does not occur when the regulatory goals of the federal act and the state insurance law are in harmony, because in that event, the federal law does not invalidate, impair, or supersede state law. The majority held that, while Texas law allows the use of credit scoring, it also prohibits the use of unfair discrimination. Accordingly, there was no conflict between state and federal law.

Freedman v. State Farm Ins. Co.

__ Cal.App.4th __ (2009), 2009 WL 1202559 (Ct. App. 2d Dist, Div. 1)

Who should know about this case:

Insurance lawyers who handle casualty claims

Why it's important:

Latest word on the efficient-proximate cause doctrine under *Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747 *(Julian).* States [erroneously in the editor's view] that the standard formulation of the efficient-proximate cause analysis was "superseded" by *Julian*.

Synopsis:

During a bathroom remodel, a contractor drove a nail through a pipe while hanging new drywall. The nail evidently caused no leak at the time and went unnoticed for years, until corrosion around the nail caused a major water leak. Freedman argued that the contractor's negligence was the efficient proximate cause of the loss, and was a covered peril, resulting in coverage. State Farm argued that there were no covered causes. The trial court granted summary judgment for State Farm, and the Court of Appeal affirmed.

State Farm's policy excluded losses caused by the following perils:

- Wear, tear, deterioration
- Corrosion or rust
- Water damage, meaning continuous or repeated leakage from a plumbing system

Losses described above if caused directly or indirectly by the conduct, acts, omissions, or decisions of a person or group of persons, whether negligent, intentional or without fault; defects, weakness, faulty design, faulty construction or workmanship.

Under the efficient proximate cause doctrine as ordinarily formulated, "[w]hen a loss is caused by a combination of a covered and specifically excluded risks, the loss is covered if the covered risk was the efficient proximate cause of the loss," but "the loss is not covered if the covered risk was only a remote cause of the loss, or the excluded risk was the efficient proximate, or predominate cause." (*State Farm Fire & Casualty Co. v. Von Der Lieth* (1991) 54 Cal.3d 1123, 1131-1132.) The efficient proximate cause of a loss is the "pre-

dominant" or "most important" cause of the loss. (*Julian*, 35 Cal.4th at p. 754.) Freedman argued that under this standard, the contractor's negligence was a covered peril, and was the efficient proximate cause of the loss, resulting in coverage.

The appellate court disagreed, stating, "that form of coverage analysis has been superseded by *Julian*." *Julian* allowed insurers to expressly exclude losses caused by the interaction of specified perils, such weather and earth movement. The court held that the State Farm policy excluded coverage for third-party negligence when that negligence interacted with another excluded peril, and that the record showed that this is what occurred to cause Freedman's loss.


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