

Appellate Reports

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

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Cotton v. Starcare Medical Group, Inc.

__ Cal.App.4th __, 2010 WL 1213139 (Fourth Dist., Div. 3.)

Who needs to know about this case: Lawyers who bring claims against Medicare Advantage Plans.

Why it's important: Holds that the 2003 "MMA" amendments to the Medicare Act did not preempt all state-law based tort claims against Medicare Advantage Plans, including bad-faith or wrongful-death claims.

Synopsis: T.J. Jackson was a member of PacifiCare's "Secure Horizons" Medicare Advantage plan. PacifiCare contracted with Starcare to provide the medical care he received. Jackson underwent surgery to repair a broken leg and was sent to a skilled-nursing facility for his post-surgical rehabilitation. He was not provided with adequate care at the facility and was re-admitted to the hospital a month later, suffering from dehydration, malnutrition, and suffering from an infection at the surgical site. But a dispute between PacifiCare and Starcare regarding who had financial responsibility for paying for Jackson's medical care resulted in a delay in treatment for an additional week. Jackson suffered an uncontrollable increase in blood pressure, which caused intra-cranial hemorrhaging and irreversible brain injury, resulting in his death.

His heirs sued PacifiCare, Starcare, and other defendants for wrongful death and elder abuse. The complaint alleged claims against PacifiCare for wrongful death and insurance bad-faith. The trial court dismissed the complaint on demurrer as to PacifiCare, finding that the claims were preempted by 42 U.S.C. § 1395w-26(b)(3), which says, that, ". . . except for laws governing licensing and solvency, [t]he standards established under this part shall supersede any State law or regulation ... with respect to M[edicare] A[dvantage] plans which are offered by M[edicare] A[advantage] organizations ...."

Reversed. The statute's use of the term "standards" and the phrases "law or regulation" and "with respect to MA plans" reflects that Congress only intended to preempt positive state enactments, such as regulations and statutes, but not common-law claims. The Centers for Medicare and Medicaid Services' ("CMS") proposed rule implementing the preemption provision reached the same result. The court must also examine whether, even if plaintiffs' claims are not expressly preempted, they are impliedly preempted by the Medicare Act. CMS's final rule concerning the preemption provision states, "[A]ll State standards, including those established through case law, are preempted to the extent that they specifically would regulate MA plans, with exceptions of State licensing and solvency laws. Other State health and safety standards, or generally applicable standards, that do not involve regulation of an MA plan are not pree[mp]ted." The common-law claims asserted against PacifiCare were not limited to actions involving MA plans (except for plaintiffs' claim for constructive fraud).]"

The eighth cause of action for bad faith alleges PacifiCare "acted as an insurer" for Jackson and it breached its "duty of good faith [ ] by unreasonably denying coverage for [his] medical care" "solely ... to save the cost of providing such care." Since the duty to act in good faith and to deal fairly with another contracting party is a generally applicable common law duty, it is not specifically targeted by the Medicare Act's regulations for MA organizations. Accordingly, it is not preempted.

The Court also rejected PacifiCare's defense based on the failure to exhaust administrative remedies under the Medicare Act, since this was not a dispute about Medicare coverage determinations, and plaintiffs did not seek payment or reimbursement of Medicare claims, and the harm they suffered was not remediable through the Medicare administrative-review process.

Melton v. Boustred

__ Cal.App.4th __, 2010 WL 1254830

Who needs to know about this case: Lawyers making premises-liability claims against a party's host where the party is promoted on social-networking sites.

Why it's important: Makes clear that hosting a party that is promoted with an open invitation on MySpace.com does not create a duty of care to attendees to protect against third-party assault.

Synopsis: Melton, Kelly, and Maldonado attended a party held at Boustred's home, which Boustred had promoted using an open invitation on the networking Web site, MySpace.com. When they arrived, the three men were

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attacked, beaten and stabbed by a group of unknown individuals. The three filed suit against Boustred, alleging negligence and premises liability. The trial court sustained Boustred's demurrer without leave to amend. Affirmed.

Plaintiffs alleged that Boustred's use of MySpace.com to promote the party constituted an unlimited, unrestricted party invitation to the general public to converge at his property, and that since the party would include music and alcohol, Boustred knew or should have known that this would expose guests to an unreasonable risk of bodily harm arising from: (1) an unregulated publicly advertised event involving the consumption of alcohol, dancing, live music, and DJ services; (2) without restriction on the number or identity of persons attending; and (3) with no attempt to control admission or provide security or protection for attendees.

Essentially, they alleged that Boustred had a duty of care not to create an "out-of-control and dangerous MySpace party at his residence." The Court rejected this argument, finding that Boustred did not engage in "misfeasance" (where the defendant's acts make the plaintiff's condition worse, and create a foreseeable risk of harm), nor did he have a special relationship with the plaintiffs. As a general rule, an actor is under no duty to control the conduct of third parties, unless the claim is grounded on the defendant's affirmative act that creates an undue risk of harm. The Court concluded that Boustred's conduct did not increase the risk of harm to plaintiffs. Publication of the invitation on MySpace.com did not create the peril that harmed the plaintiffs. The violence that harmed the plaintiffs was not a necessary component of the party, and he took no action to stimulate criminal conduct. "To impose ordinary negligence liability on a property owner who has done nothing more than allow his home to be used for a party ... would expand the concept of duty far beyond any current models."

The court further held that the criminal attack was not foreseeable. No prior similar incidents were alleged, and the risk of a criminal attack given the facts alleged was not foreseeable simply because the party had been promoted widely.

Amerigraphics v. Mercury Ins. Co.

__ Cal.App.4th __, 2010 WL 1038675 (2d Dist., Div. 2.)

Who needs to know about this case: Insurance bad-faith lawyers

Why it's important: (A) First California case to construe a standard "Business Income" protection provision in a commercial policy; (B) Court finds that even though insurer's conduct is despicable, put insured out of business, and warrants award of punitive damages, an award more than 3.8 times actual damages (excluding *Brandt* fees) is constitutional maximum.

Synopsis: Amerigraphics operated a printing business on Ventura Boulevard. The business made money until the September 11, 2001, attacks, and lost money in 2002 as well. In April 2003, its premises were flooded from a broken pipe in the building. The vendor who serviced its equipment determined that Amerigraphics' printer and scanner were irreparably damaged. The company's commercial insurer, Mercury, refused to credit this report, and had the equipment inspected by its own vendor, but took several months to obtain reports. When they were obtained, they were unable to verify that the equipment was operating properly. Mercury nevertheless demanded that Amerigraphics agree to take back the equipment and "try" it. Amerigraphics refused. When it was re-tested by another Mercury vendor a year later, neither piece of equipment functioned correctly.

Mercury did not advise Amerigraphics that its policy offered coverage for loss of tenant improvements or for business-income. When Amerigraphics discovered these coverages and made claims, Mercury denied them immediately. But Amerigraphics persisted. Mercury refused to pay the tenant-improvements claim, but 693 days after the loss, sent a partial payment as "payment in full." On the business-income claim, Mercury took a similar amount of time to process and determined that no payment was due because the business was losing money at the time of the loss. The key language in the business-income coverage provides:

"We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your 'operations' during the 'period of restoration.' … Business Income means the: [¶] (i) Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred if no physical loss or damage had occurred ....; **and** [¶] (ii) Continuing normal operating expenses incurred, including payroll." Mercury claimed that clauses (i) and (ii) should be offset against each other if clause (i) was a net loss. The trial court determined that because the policy said that "business income" meant (i) *and* (ii), they should not be offset, and instructed the jury accordingly.

At trial, the jury awarded compensatory damages of $140,000 for the property-damage claim, the tenant-improvement claim, and business interruption claim. It also awarded $30,000 in pre-judgment interest and $3 million in punitive damages. The trial court remitted this amount to $1.7 million – 10 times the compensatory damages.

On appeal, the appellate court affirmed in almost all respects. It held that the trial court correctly construed the business-income provision, and rejected out-of-state cases that took a different approach. The court found that, at best, the provision was ambiguous. It also found that the award of punitive damages was supported by substantial evidence, and that Mercury's conduct was despicable. But it found that the $1.7 million punitive-damages award was constitutionally excessive, and that the maximum award was $500,000, which was 3.8 times the compensatory damages. The court

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found that *Brandt* fees should not be included in the ratio, because they were awarded by the trial court in post-trial proceedings, not by the jury.

Nazaretyan v. California Physician's Service

__ Cal.App.4th __, 2010 WL 1038685 (2d Dist. Div. 1.)

Who needs to know about this case: Lawyers handling health-care rescission cases.

Why it's important: Reaffirms the *Hailey v. California Physician's Service* interpretation of Health & Safety Code section 1389.3, and declines to find that this approach was modified for health care service plans by the decision in *Nieto v. California Physician's Service* (2010) 181 Cal.App.4th 60.

Synopsis: The Nazaretyans applied for health coverage with Blue Shield through a Blue Shield "producer," Yusop. Yusop visited their home and took the application, completing the application. They signed it, but did not read it. When he submitted the application, Yusop left off certain information, so it was returned. He obtained new signatures from the Nazaretyans, and re-submitted. The application did not indicate that Mrs. Nazaretyan was obtaining fertility treatment. Blue Shield learned of the fertility treatments after Mrs. Nazaretyan gave birth to twins who had a serious illness, and incurred medical-treatment costs approaching $1 million. Blue Shield then rescinded the policy. The Nazaretyans sued, and the trial court granted summary judgment for Blue Shield.

Reversed. The appellate court applied the same construction of Health & Safety Code section 1389.3, which forbids health plans from rescinding based on post-claim underwriting, as in *Hailey*. *Hailey* held that under the statute, a plan can retain its right to rescind for misstatements if it made reasonable efforts to complete medical underwriting and determine that the information submitted was accurate, and if it did not complete underwriting, it could not rescind unless the misstatements on the application were willful.

On the record submitted, the court determined that triable issues of fact were presented on these issues. Specifically, the court could not find as a matter of law that Blue Shield made reasonable efforts to ensure that the application was accurate and complete. Nor did Blue Shield establish as a matter of law that the misstatements on the application were willful. Plaintiffs' position was that because of their limited education and English language skills and Yusop's expertise as an insurance broker, they trusted and relied on him to ask them for any necessary information and to record the information accurately on the application (as well as to copy certain information from a previous application in his files). Their account of the facts "is not patently unbelievable" and is supported by substantial evidence. If their version of the facts is true, then the court cannot conclude as a matter of law that plaintiffs willfully misrepresented or omitted material information on their application. The court rejected Blue Shield's claim that because plaintiffs signed the application without reviewing it, that their misstatements were made recklessly, and therefore willfully.


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