Appellate reports

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

By Jeffrey Isaac Ehrlich

Montour v. Hartford Life & Acc. Ins. Co.

(9th Cir.2009) __ F.3d __, 2009 WL 2914516

Who needs to know about this case: Lawyers who represents clients who are making claims against ERISA plans.

Why it's important: Clarifies the application in the Ninth Circuit of the "abuse-of-discretion" standard of review in cases where the plan administrator has a conflict of interest (as where the plan is actually an insurance policy, and the insurer decides eligibility for benefits)

Synopsis: Montour was an employee of Conexant Systems, Inc, and participated in its long-term disability plan ("Plan"). Hartford Life was both the plan administrator and its insurer. In 2003, when he was 55 years old, Montour took a medical leave of absence for acute stress disorder. He became eligible for benefits under the Plan after his disability continued for 180 days. Hartford accepted his application and began to pay benefits. While his initial disability was based on a psychiatric illness, he also consulted with an orthopedic surgeon about back and knee problems. The surgeon certified him as disabled and unable to work because of those physical ailments. After paying benefits for two and one-half years, Hartford determined that Montour was not completely disabled and terminated his benefits. Montour sued in state court, and Hartford removed to federal court under ERISA. The trial court granted summary judgment for Hartford, and the Ninth Circuit reversed.

Montour represents the first case in which the Ninth Circuit explains the proper application of the "abuse of discretion" standard to review of the plan administrator's decision when the administrator has a structural conflict of interest. The court explained that, when such a conflict exists, "Application of the abuse of discretion standard requires a more complex analysis" than under the standard "abuse of discretion" review. Under the latter analysis, the court merely scans the record for medical evidence supporting the plan's decision. When a conflict exists, however, this approach is insufficient. Instead, the reviewing court must consider numerous case-specific factors, including the administrator's conflict of interest, and reach a decision as to whether discretion has been abused. The weight that a court should assign to any particular factor will depend on the facts and circumstances of the particular case.

In its prior decision in *Abatie v. Alta Health & Life Ins. Co.* (9th Cir. 2006) 458 F.3d 955, 968 (en banc), the Ninth Circuit held that the weight to be given the conflict will vary depending on the degree to which it appears that the conflict appears to have improperly affected the administrator's decision. District courts therefore err when they rely on ERISA cases that discuss the abuse-of-discretion review in cases where there is no conflict of interest. Here, the district court found that Hartford's conflict tainted much of its analysis, but it failed to give that finding sufficient weight because it relied on cases applying the abuse-of-discretion review where there was no conflict. The court's decision was therefore reversed.

The Ninth Circuit then decided the summary-judgment motion itself, since it was in as good as a position to do so as the district court, and identified several aspects of the manner in which Hartford handled the claim that reflected bias: Hartford would present the evidence that supported its view that Montour was capable of performing work in the best possible light, "while filing to subject evidence of capability to the same skepticism and rigorous analysis applied to evidence of disability"; Hartford failed to present extrinsic evidence of any attempt on its part to assure accurate claims assessment by using procedures designed to ensure that the review was neutral; Hartford's case manager took an advocacy role in soliciting information from Montour's doctors in support of Hartford's position; Hartford's decision to conduct a pure "paper review" rather than to hire physicians to actually examine Montour; Hartford's reviewers appear to fixate on the lack of further deterioration of Montour's condition. Since Hartford found him disabled in 2004, it was not clear why progressive deterioration would be necessary for him to remain disabled; and Hartford failed to address the fact that the Social Security Administration (SSA) had found Montour disabled. While plans are not bound by an SSA determination, the complete disregard of such a determination raises issues about the fairness of the plan's evaluation. The court ultimately found that when all the factors were weighed, it appeared that Hartford's conflict had improperly motivated its decision to terminate benefits. Accordingly, the court ordered that Montour's benefits be reinstated.

O'Neil v. Crane Co.

(2009) 177 Cal.App.4th 1019 [99 Cal.Rptr.3d 533] (2d Dist. Div. 5)

Who needs to know about this case: The asbestos trial bar

Why it's important: Strongly takes the plaintiff's view in an issue that has split the courts: whether companies that made valves and pumps on WWII-era ships can be held liable to former sailors exposed to asbestos during the routine maintenance of the pumps and valves, which released asbestos fibers. Refuses to follow the anti-plaintiff decision in *Taylor v. Elliot Turbomachinery Co., Inc.* (2009) 171 Cal.App.4th 564 [90 Cal.Rptr.3d 414] (*Taylor*) finding that it was "wrongly" decided.

Synopsis: Patrick O'Neil served on the Essex-Class aircraft carrier Oriskany during the Vietnam War. The Oriskany was a steam-driven ship, and the valves and pumps installed in its propulsion system contained asbestos "packing" inside them to seal them. The valves also contained asbestos "bonnet" gaskets. Some of the larger turbine pumps were delivered with a layer of asbestos insulation attached, which was then covered with a metal cover. And almost all pumps and valves used flange gaskets made of asbestos, and were covered with asbestos-containing insulation. The pump and valve manufacturers did not deliver or install the flange gaskets or the covering insulation. The packing in the pumps and valves, and the gaskets, had to be periodically removed, which released asbestos fibers. O'Neil sued on strict liability claims, alleging that the design was defective, and that the manufacturers failed to warn. He also sued on a negligence theory. The trial court granted nonsuit based on the component-part supplier defense.

While the appeal was pending, the First District, Div. Five decided *Taylor*, which presented virtually identical facts and claims as those raised in *O'Neil*. The manufacturers urged the court to adopt *Taylor*. The court declined. The court held that the component-part supplier defense did not shield the defendants from liability, contrary to the *Taylor* court. It held that the pumps and valves at issue were not generic, off-the-shelf components, and that the pumps and valves were not altered or changed by their purchaser, and that the manufacturers therefore were in a position to warn about the hazards of the product. The court held that the pumps and valves were not the type of components to which the defense applied, and that even if they were, the defense would not apply because they were defective because of the asbestos material they contained and operated with.

The court also rejected the argument, accepted by the *Taylor* court, that because the original asbestos gaskets and packing that had been shipped with the pumps and valves had been replaced many times over before O'Neil served on the Oriskany, that the manufacturers could not be held liable because they had no duty to warn of defects in another manufacturer's product. The court held that because the pumps and valves were subject to predictable and ordinary maintenance and repair, the fact that the particular asbestos containing material they were shipped with had been replaced with identical new material, did not alter the manufacturer's duty to warn.

Merrill v. Leslie Controls, Inc.

2009 WL 3051534 [— Cal.Rptr.3d —] (2d Dist. Div. 3)

Who needs to know about this case: The asbestos trial bar

Why it's important: Adopts and applies the decision in *Taylor v. Elliot Turbomachinery Co., Inc.* (2009) 171 Cal.App.4th 565 (*Taylor*)

Synopsis: *Merrill* presented largely identical facts and claims as those involved in *Taylor* and *O'Neil*. *Merrill* was argued several months before *O'Neil,* but decided several days after the *O'Neil* decision was filed. It essentially adopts *Taylor* wholesale, and makes no mention of the *O'Neil* decision. While the Supreme Court denied review in *Taylor*, it would appear likely that it will have to resolve the split of authority.

Cooper v. State Farm Mut. Auto. Ins. Co.

(2009) 177 Cal.App.4th 876 (4th Dist. Div. 2.)

Who needs to know about this case: Plaintiffs' trial lawyers

Why it's important: Recognizes that if an insurer promises to preserve a critical piece of evidence that is necessary for the insured to prosecute a personal injury action against a tortfeasor, and then fails to preserve it, the insured may proceed against the insurer to recover the damages that might have been recovered if the evidence had been preserved, on a theory of voluntary undertaking or promissory estoppel. The fact that the evidence was not preserved does not necessarily render the plaintiff's claims unduly speculative.

Synopsis: Bryan Cooper was a State Farm insured. He was involved in a single-car accident allegedly caused by a tread separation of the right-rear tire. As part of the collision-damage settlement with Cooper, State Farm had the tire examined by an expert, who opined that the tire had been defectively manufactured. State Farm notified Cooper of the expert's conclusion, and agreed to maintain the tire for him so that he could use it as evidence in his product-liability case against the tire manufacturer. But while that case was proceeding, State Farm sold Cooper's vehicle for salvage, including the tire. As a result, Cooper could not proceed with his products-liability case. Cooper sued State Farm on various theories. The trial court granted State Farm's motion for nonsuit after opening statement, and the Court of Appeal reversed.

State Farm relied on *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1 [74 Cal.Rptr.2d 248], and *Temple Community Hospital v. Superior Court* (1999) 20 Cal.4th 464 [84 Cal.Rptr.2d 852], to argue that Cooper was legally

precluded from recovering damages for the alleged destruction of the tire because he would be unable to show that he would have prevailed in his case against Continental Tire had the tire not been destroyed. In *Cedars Sinai*, the plaintiff sued the hospital and other defendants for birth injuries. During discovery, he sought various hospital records, including fetal-monitoring strips. When the hospital was unable to locate them, he added a claim against it for intentional spoliation of evidence. The Supreme Court held that there was no such tort in California, and one reason was the speculative nature of the claim. In *Temple*, the Supreme Court extended its rule to cases of third-party spoliation, where a non-party destroys evidence, finding that no tort remedy exists. The Court recognized, however, that it was possible that a duty to preserve evidence could arise independently, either from statute or contract.

The *Cooper* court distinguished *Cedars Sinai* and *Temple* on the grounds that in neither of those cases had the defendant agreed to preserve the evidence at issue. The duty that State Farm owed to Cooper arose from its own agreement; not from general tort principles. The court also concluded that, in light of the fact that State Farm had obtained an opinion from an expert that the tire was defectively manufactured, Cooper's claim was not unduly speculative. Since Cooper's opening statement and pleadings referred to claims based on State Farm's promises, and the evidence that a jury could rely on to find in his favor, nonsuit was improper.

Clement v. Alegre

(2009) 2009 WL 3019664 [— Cal.Rptr.3d —] (1st Dist. Div. 2)

Who needs to know about this case: Lawyers who conduct and respond to civil discovery

Why it's important: Clarifies that interrogatories are "complete"

Synopsis: Court finds that it is sanctionable conduct for a party to respond to proper interrogatories with "nitpicking and meritless objections." The case involved a claim for specific performance and damages arising out of the sale of real property. Defendant served two sets of special interrogatories on plaintiff, which sought information about causation, damages and the existence of a loan commitment. Special Interrogatory No. 1 requested a description of "all economic damages you claim to have sustained...." Plaintiff objected that the question was "vague and ambiguous" because the term "economic damages" is vague is based on propounding party's failure to specifically refer to Civil Code of Procedure section 1431.2, subd. (b)(1), which defines that term. Plaintiff then responded based on a definition defining the term differently than the statute, and based on this restrictive definition, answered there were no such damages.

Special Interrogatory No. 2 asked: "Please state the amount of such damages as identified in interrogatory number 1." Plaintiff objected, claiming that the special interrogatory violated Civil Code of Procedure section 2030.060, subd. (d) because it is not full and complete in itself, because it makes reference to the answer to an earlier interrogatory in the same set.

The Court held that these objections were without substantial justification; that the plaintiff deliberately misconstrued the definition of economic damages, and that interrogatories may properly refer to earlier interrogatories in the same set. The award of sanctions was affirmed. In closing, the court noted that the entire matter could have been avoided if the parties had engaged in a meaningful and proper "meet and confer" process, which requires "a serious effort at negotiation and informal resolution," and not simply "to persuade the objector of the error of his ways."


Ehrlich

Jeffrey Isaac Ehrlich is the principal of the Ehrlich Law Firm in Claremont. His practice emphasizes insurance bad-faith and appellate litigation. He is certified by the State Bar of California as an appellate specialist, and is the editor-in-chief of Advocate *magazine in Southern California*.