



Appellate Reports and Cases in Brief

Recent cases of interest to members of the plaintiffs' bar

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State of California v. Continental Ins. Co

(2012) __ Cal.4th __ (Cal. Supreme)

Who needs to know about this case:

Lawyers litigating environmental and other types of “long tail” insurance claims.

Why it’s important: This is a long-awaited “blockbuster” insurance decision by the Supreme Court that has been pending for three years. It makes every insurer on the risk responsible for the loss up to its own policy limits if any part of the loss occurred during its policy period, and allows the policyholder to “stack” its insurance coverage, greatly increasing the amount of available coverage. Also bars allocation of part of the risk to the policyholder for periods where it had no coverage.

Synopsis: The State designed and operated an industrial-waste disposal facility in Riverside County, the Stringfellow Acid Pits, from 1956 to 1972. The site leaked toxins into the groundwater while it was in operation, and afterward. In 1998, a federal court found that the State was negligent in the design, construction, and operation of the site, and held it liable for all past and future cleanup costs. The State had primary and excess CGL coverage for the period between 1964 and 1976, but no insurance before 1963 or after 1978. The site leached toxins into the groundwater; heavy rains caused the site to overflow, spreading toxins downstream; and at least twice the State had

to conduct “controlled releases” to avoid complete failure of the site.

The type of property damage associated with the Stringfellow site is often referred to as a “long tail” injury, which is characterized as a series of indivisible injuries, producing progressive damage over a long period, and occurring without a single unambiguous cause. It is virtually impossible for an insured to prove what specific damage occurred during each of the successive policy periods in this type of case. If this kind of proof was required, an insured who had obtained insurance coverage for each year that a long-tail injury occurred would likely be unable to recover.

In *Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, 655, the Court held that property damage that is continuous or progressively deteriorating throughout several policy periods is potentially covered by all policies in effect during those periods. In *Aerojet-General Corp. v. Transport Indemnity Co.* (1997) 17 Cal.4th 38, 55-57, the Court held that an insurer on the risk when the damage first manifests itself remains obligated to indemnify the insured for the entirety of the ensuing damage or injury up to its own policy limits. Similar reasoning controls the result here – “The fact that all policies were covering the risk at some point in time during the property loss is enough to trigger the insurers’ indemnity obligation.” The Court rejected the insurers’ proposed pro rata allocation scheme, which allocates to each insured a pro rata portion of the liability based on its time on the risk. Pro rata allocation assigns liability to the insured for the years of the continuous injury that there was no

coverage in place. The Court held that the promise in the CGL policies that the insurer would pay “all sums” which the insured shall become obligated to pay for damage prevents it from adopting a pro rata allocation system, because the policies do not say they will pay “all sums of the policyholder’s liability solely to sums or damage during the policy period.”

The Court also allowed the policyholder to “stack” policy limits. “Stacking policy limits means that when more than one policy is triggered by an occurrence, each policy can be called upon to respond to the claim up to the full limits of the policy.” The Court cites a law review article that explained the continuous injury trigger of coverage rule and the “all sums” rule: “The all-sums-with-stacking indemnity principle properly incorporates the *Montrose* continuous injury trigger of coverage rule and the *Aerojet* all sums rule, and ‘effectively stacks the insurance coverage from different policy periods to form one giant “uber-policy” with a coverage limit equal to the sum of all purchased insurance policies. Instead of treating a long-tail injury as though it occurred in one policy period, this approach treats all the triggered insurance as though it were purchased in one policy period. The [insured] has access to far more insurance than it would ever be entitled to within any one period.’”

In allowing stacking, the Court disapproved the decision in *FMC Corp. v. Plaisted & Companies* (1998) 61 Cal.App.4th 1132, 1142, which prevented an insured from stacking multiple policies in consecutive years to cover toxic contamination caused by the insured over many years. Absent anti-stacking



provisions in the policy, or statutes that forbid stacking, or judicial intervention, standard policy language permits stacking.

Chavez v. Glock, Inc.

(2012) __ Cal.App.4th __ (2d Dist. Div. 7)

Who needs to know about this case:

Lawyers litigating products-liability actions generally, as well as lawyers who handle product-liability claims involving firearms.

Why it's important: It examines a host of issues that frequently come up in products-liability cases and on summary-judgment in those cases – including issues of causation, application of the various tests for product defect, duty to warn, and use of experts. Also interprets the Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7901, et seq (“PLCAA”), a federal statute that limits products-liability actions involving firearms.

Synopsis: Los Angeles Police officer Enrique Chavez left his service weapon, a Glock 21, in his truck while he was transporting his three-year old son to school in the truck's rear jump seat. The boy somehow picked up the gun and shot his father in the back as they were stopped at a red light, rendering Chavez a paraplegic. Chavez brought a products liability suit against Glock and the retailer who sold the gun, Revolver Club. He also sued the maker of the holster he was using, Turner's. The trial court granted summary judgment against Chavez on all claims. Reversed in part, and affirmed in part.

The appellate court held that summary judgment against Chavez on the failure-to-warn claim against Glock and Revolver Club was proper, but reversed on the design-defect claim. Chavez claimed that the pistol was defective because it lacked a manual or a grip safety, and because the trigger pull was too light. The court rejected defendants' causation argument, because they failed to present evidence that Chavez did not have, and

could not obtain, expert opinion that it is unlikely that a three-year old could discharge a pistol with a grip safety. In fact, Chavez's expert did express this opinion, and it was sufficient to create a triable issue of fact.

The court also found that whether Chavez's failure to safely store the pistol was a superseding cause was a factual issue that precluded summary judgment.

On the issue of defect, the parties offered conflicting expert testimony about the risks and benefits of Glock's design, creating a triable issue of fact. But this was one of the few cases where the alternative consumer-expectation test could not be used, because no reasonable juror could conclude that the product failed to perform as safely under the circumstances as an ordinary consumer would expect. That is, no reasonable consumer would expect that an unlockable and loaded weapon, left in ready-to-fire condition in a location accessible to a child would not accidentally discharge. Chavez's failure-to-warn claim fails, because he was a sophisticated user.

The court rejected Glock's argument that it owed no duty to Chavez to design a firearm that an unsupervised three-year old could play with safely when left loaded and unsecured by a trained police officer who ignored all safety warnings he had read about firearm storage safety. The court explained that under *Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 772, the issue of whether an exception to the general duty of due care should be made must be decided at a high level of generality, to distinguish it from the fact-specific issue of whether the duty had been breached.

The court rejected Glock's attack on Chavez's breach-of-warranty claim, which was based on the fact that Chavez and his partner had inadvertently switched their identical guns, meaning that there was no privity with Chavez with respect to the gun that injured him. The court held that in view of the fact that the weapons were identical and the alleged breach of warranty was not spe-

cific to a particular model number, but instead went to the overall design of the weapon, Chavez could assert a breach-of-warranty claim.

With respect to the PLCAA, the court held that there were triable issues of fact about the qualified civil immunity created by the statute. Glock argued that because Chavez committed a criminal act in failing to secure the weapon in the presence of a child, the statute's immunity provision for “a volitional criminal act” did not apply. The court rejected the view that the provision is triggered whenever there is an unlawful act in the causal chain leading to the shooting, however remote from the actual firing of the weapon. Moreover, defendants did not establish that Chavez committed a crime concerning the storage of the weapon.

Finally, the court held that the trial court properly granted summary judgment for the holster manufacturer, Turner's. The court held that the trial court abused its discretion in excluding the declaration of Chavez's expert that the gun was in the holster when it discharged. The expert had sufficient experience and training to render an opinion. The court also held that there were triable issues of fact on whether the holster caused Chavez's injuries. The court rejected the claim that because the holster itself was not dangerous and did not fire the bullet necessarily defeats causation. A product manufacturer can be held liable for harm caused by another manufacturer's product when its own product contributed substantially to the harm. Chavez's claim against Turner's is that the holster made a substantial contribution to the harm because it failed to adequately protect the trigger.

But Chavez's defect claim nevertheless failed under both the risk/benefit and consumer expectation test. Chavez's expert's declaration about the design of the holster failed to adequately address the key design features of the holster. Chavez's showing also failed to show that the user of a concealable holster expects it will protect against accidental discharge.



Short(er) takes

Arbitration, class-actions, wage-and-hour claims: *Truly Nolen of America v. Superior Court* (2012) __ Cal.App.4th __ (4th Dist. Div.).

In *Gentry v. Superior Court* (2007) 42 Cal.4th 443, the California Supreme Court invalidated a provision in an employer's arbitration agreement barring class-wide arbitration of wage-and-hour claims, finding that in many cases, such waiver operated as de facto waivers of unwaivable statutory rights. California appellate courts have disagreed about whether *Gentry* survives the U.S. Supreme Court's decisions in *AT&T Mobility LLC v. Concepcion* (2011) __ U.S. __, 131 S.Ct. 1740. *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, found that *Gentry* survived *Concepcion*. *Kinecta Alternative Financial Solutions, Inc. v. Superior Court* (2012) 205 Cal.App.4th 506, followed *Brown*. But *Iskanian v. CLS Transportation*

Los Angeles, LLC (2012) 206 Cal.App.4th 949 disagreed, finding that *Gentry* had been implicitly overruled. The *Truly Nolen* decision provides a primer on the current state of the law in this area. The court holds that the courts that have found that *Gentry* did not survive *Concepcion* have the better view, but that until the California Supreme Court reviews the issue in light of the new U.S. Supreme Court authority, *Gentry* remains binding on intermediate appellate courts in California. The court held, however, that the trial court erred in applying *Gentry* on the factual record before it, and remanded.

Wage-and-hour claims; overtime; administrative exemption: *Harris v. Superior Court* (2012) __ Cal.App.4th __ (2d Dist. Div. 1.)

On remand from the California Supreme Court after its decision in *Harris v. Superior Court* (2011) 53 Cal.4th 170, which found that the Court of Appeal had misapplied the law in finding that

the plaintiff insurance adjusters were not performing administrative work, and were therefore not exempt from California's overtime pay statutes. The Court of Appeal re-analyzed the case in light of the Supreme Court's decision, and concluded that the adjusters were not performing "administrative" work because their primary work duties were the day-to-day tasks of adjusting individual claims not directly relating to management policies or general business operations.



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