The Fifth District Court of Appeal affirmed. Contrary to defendant's contention, plaintiff had standing to assert a FEHA claim. She was an employee within the meaning of the FEHA, and is thus entitled to its protections, even though she was not an official state employee for civil service and benefits purposes. See Govt C §12940(j). Plaintiff's lack of control over her work at the prison defeats the contention that she was an independent contractor or a person providing services under a contract. See Govt C §12940(j)(5); Lab C §3353. Rather, given defendant's control over her work, plaintiff was a "special" employee of defendant for FEHA purposes. An employer under the FEHA must "take immediate and appropriate corrective action" in response to a sexual harassment complaint. Govt C §12940(j)(1). The jury found that defendant did not fulfill this duty. Referring the matter to an investigative process and warning plaintiff to protect herself was insufficient to comply with FEHA's requirements.

Insurance Litigation

Claim Settlement

Review granted.

Village Northridge Homeowners Ass'n v State Farm Fire & Cas. Co. (review granted Mar. 26, 2008, S161008; superseded opinion at 157 CA4th 1416, 69 CR3d 551)

Reported at 30 Civ LR 24 (Feb. 2008). At issue is whether, after settling a first party claim by accepting money from and executing a release of the insurer, an insured can sue the insurer for fraud in inducing the settlement and seek to avoid the release without returning the money the insurer paid.

Homeowners

Mold damage resulting from water discharge was not covered by homeowners' policy; policy covered damage due to water discharge, but expressly excluded damage from mold, even if mold was caused by water discharge.

De Bruyn v Superior Court (2008) 158 CA4th 1213, 70 CR3d 652

The insured returned home from a 6-day vacation to discover that his toilet had overflowed, causing water damage and mold contamination to his house. He had an "all-risk" homeowners policy that covered losses from sudden and accidental water discharge from the plumbing system, but also excluded any loss resulting from mold, "however caused." He sought coverage for all damage, including that caused by mold. His insurer denied the claim and the insured brought suit. The trial court sustained the insurer's demurrer, and he sought a writ.

The Second District Court of Appeal denied the writ. Under Ins C §530 (efficient proximate cause rule), if a loss is caused by a combination of a covered and a specifically excluded risk, it is covered if the covered risk was the efficient proximate cause of the loss. A loss is not covered if the covered risk was only a remote cause of the loss or if the excluded risk was the efficient proximate cause. See *Julian v Hartford Underwriters Ins. Co.* (2005) 35 C4th 747, 750, 27 CR3d 648. Here, two distinct perils are at issue: the sudden discharge of water and the mold. Nevertheless, the doctrine does not apply because the policy expressly provides that there is no coverage for damage caused by mold, even if it results from a sudden and accidental discharge of water. *Julian* makes clear that an insurer may limit coverage to some, but not all, manifestations of a given risk, so long as a "reasonable insured would readily understand from the policy language which perils are covered and which are not." 35 C4th at 759. Because the policy clearly and precisely provided that mold damage was not covered, even if it resulted from a covered sudden and accidental water discharge, the insurer's denial of coverage did not violate Ins C §530 or the efficient proximate cause doctrine.

COMMENT: If we harken back to the landmark cases of *Steven v Fidelity & Cas. Co.* (1962) 58 C2d 862, 27 CR 172, and *Gray v Zurich Ins. Co.* (1966) 65 C2d 263, 54 CR 104, we remember that ambiguities in insurance policies were to be construed against insurers and in favor of coverage. Exactly how forceful those cases remain today is unclear in light of the more modern rules of construction adopted by the supreme court in *AIU Ins. Co. v Superior Court* (1990) 51 C3d 807, 274 CR 820. In *De Bruyn,* the facts and the law are so confusing that one sometimes wonders how one is supposed to navigate an insurance coverage question. Certainly the rules in *Steven* and *Gray* would lend some simplicity to the task.

As best I can surmise, the rule explained in *De Bruyn* is as follows: When there are two distinct independent perils that combine to cause a loss, the efficient proximate cause of the loss determines coverage. Two "independent" perils are such that "'they could each, under some circumstances, have occurred independently of the other and caused damage.' But it is not necessary that those two or more perils did in fact occur independently to cause the loss for which coverage is sought." 158 CA4th at 1223 (emphasis in original). Having deciphered this definition, the rule applies even if the policy states that there is no coverage for certain perils that contribute to the loss.

This rule is based on Ins C §530, which provides that there is coverage if a loss is the "proximate cause" of a covered peril. Thus, when a covered peril is the efficient proximate cause of the loss, there is coverage even if an excluded peril contributed to the loss. A classic example is when fire (a covered peril) destroys vegetation, which leads to earth movement (an excluded peril), which causes property damage. If the fire is the efficient proximate cause of the loss, there is coverage. And this is despite a policy provision that says that there is no coverage for earth movement even if another cause contributes.

But now insurers have devised new ways to address this situation. An insurer can now define a peril as a combination of two other perils (*e.g.,* earth movement caused by fire). Perhaps this could be called the "earth/fire" peril. This "peril" is then excluded as long as it does not effectively eliminate all consequences of at least one of the two perils.

Got that? Now go out and try to apply it. Better yet, imagine the policies of the future.

I submit that there should be a new rule of insurance construction in light of the computer era. Policies today continue to be a combined sheaf of one form after another, with each form revising something from another form. And then as time goes on, more forms are sent periodically, which modify the forms, which modify the basic forms. All this can easily be done by the insurers on computer, without the necessity of an insured trying to play "crossword insurance policy." Certainly insurers have software that would allow them to cut and paste. We have been doing that in our offices for, oh, a couple of decades. Policies would then be much more plain and readable. To require an insured to piece together disparate parts of confusing forms that are incomprehensible to the average person, when insurers could do that with a push of a button, seems to me to be letting insurers place the burden of interpreting documents written in the era of typewriters on the insured or the court while the rest of the world operates on computers. Insurance policies are supposed to set forth their terms clearly, plainly, and unambiguously. By now, that should require clearly written policies rather than virtually incomprehensible looseleaf binders.

Ms. Popik acknowledges that *De Bruyn* essentially overrules *Howell v State Farm Fire & Cas. Co.* (1990) 218 CA3d 1446, 267 CR 708, while giving lip service to it. That is precisely the problem. *Howell* explains that the Insurance Code does not permit insurers to exclude losses proximately caused by covered perils. But *De Bruyn* advises insurers that they can simply redefine what a "peril" is, thereby bypassing the requirements of the statute. And Ms. Popik asks, what's wrong with that? After all, the policy then plainly explains what is and what is not covered. What is wrong? Let me know when you find an ordinary insured who could understand any of this.—*Arnold R. Levinson*

COMMENT: Despite Mr. Levinson's efforts to downplay it, *De Bruyn,* 158 CA4th at 1218, is a very important case for two reasons: First, it is the first California case to address in any detail the "absolute" mold exclusion; second, it effectively undermines the holding in *Howell.*

As anyone who has been paying attention to insurance coverage developments knows, the proliferation of claims and lawsuits seeking coverage for mold damage has been one of the most vexing problems for insurers over the last decade or so. "Toxic mold" has been blamed for everything from sick buildings to sick insureds to sick pets—and carriers have been asked to pay for all of it.

On the first party side, both homeowners and commercial property policies have historically excluded loss caused by "mold," along with "wet" or "dry" rot. Despite this language, many courts around the country found coverage for mold losses, typically on the grounds that some peril other than mold was the efficient proximate cause of the loss; that the loss was a nonexcluded "ensuing loss" from, *e.g.,* leaking water; or that the mold in question was not the cause of the loss (and therefore excluded) but was the loss itself. The floodgates opened in June 2001, when a Texas jury awarded the Ballard family $32 million in their mold/bad faith lawsuit (later reduced on appeal to $4 million and subsequently settled; see *Allison v Fire Ins. Exch.* (Tex App 2002) 98 SW3d 227). The result was an ever-increasing number of lawsuits seeking coverage for toxic mold, including, in many cases, demands that the insurer essentially rebuild the allegedly damaged dwelling as the only means of remediating the mold exposure. Carriers feared that "mold" was the new "pollution," and a cottage industry of mold lawyers, remediation experts, and consumer advocates sprang up almost overnight.

In response, and taking a cue from the "pollution coverage wars," carriers began inserting "absolute" mold exclusions into their policies. Like the absolute pollution exclusion of the mid-1980s, the new mold exclusions seek to make clear that the policy provides no coverage for mold under any circumstances, no matter how caused or manifested and regardless of the scope or extent of damage or necessary remediation. As evidenced by the policy at issue in *De Bruyn,* some carriers have applied a "belt and suspenders" approach to the problem—not only excluding mold in all its forms via the absolute mold exclusion, but also adding essentially duplicative language to the water damage exclusion to underscore that even when nonexcluded water causes mold, the loss is not covered.

That brings us to *De Bruyn.* As the court states, the California Supreme Court has held that first party property insurance coverage disputes involving losses caused by multiple risks or perils are to be resolved by reference to the "efficient proximate cause" rule—*i.e.,* if the predominant or most important cause of the loss is covered, the loss is covered, even though an excluded cause of loss may have contributed; if the predominant cause is excluded, the loss is excluded, even though a covered cause of loss may have contributed. *De Bruyn,* 158 CA4th at 1218. See also *Garvey v State Farm Fire & Cas. Co.* (1989) 48 C3d 395, 403, 257 CR 292, 770 P2d 704. So important is this rule, which is codified in Ins C §530, that it applies even when the policy purports to "contract around" the doctrine. See *Julian v Hartford Underwriters Ins. Co.* (2005) 35 C4th 747, 755, 27 CR3d 648 (recognizing but not applying rule); *Howell v State Farm Fire & Cas. Co.* (1990) 218 CA3d 1446, 1456, 267 CR 708. Based on this principle, De Bruyn argued that the policy's mold exclusion was illegal, and that the insurer violated Bus & P C §17200 by applying it, because the effect was to exclude mold even when the efficient proximate cause of the mold was a covered peril. (In *De Bruyn,* the covered peril was the sudden and accidental discharge of water from the plumbing system.)

The Second District properly rejected this argument. As the supreme court held in *Julian,* the efficient proximate cause doctrine merely mandates how a loss caused by a combination of covered and excluded perils will be analyzed; it says nothing about what perils an insurer can and cannot exclude, as long as a policy exclusion does not violate the public policy of the state. Here, the effect of the absolute mold exclusion was to exclude the peril of mold resulting from a release of water. Because no public policy precludes excluding some manifestations of water damage but not others, the policy language did not violate the efficient proximate cause rule. In words that will no doubt be repeated frequently by carriers' counsel:

> [The efficient proximate cause rule] is not intended to be used in a game of "gotcha." The question we must ask is whether the policy "plainly and precisely communicate[s] an excluded risk" to a reasonable insured.

De Bruyn, 158 CA4th at 1224. Because the policy language in *De Bruyn* met that test, it was both legal and enforceable.

The other notable feature of *De Bruyn* is that, like *Julian,* it effectively undermines the holding in *Howell v State Farm Fire & Cas. Co., supra,* albeit while giving lip service to the opinion. Although it is true that, unlike the majority of states, California will not allow insurers to draft around the efficient proximate cause language, the reality is that insurers can achieve substantially the same effect through the careful drafting of their exclusionary language. And there is nothing untoward about this result: As *De Bruyn* and *Julian* make clear, the whole point of the exercise is to ensure that the insured knows what is and is not covered under his or her policy. Thus, so long as the exclusions are communicated clearly, they should be enforced as written, without even implicating the efficient proximate cause doctrine.

One final point bears mentioning. The court's analysis here was devoted to determining whether the policy language was violative of Ins C §530 and thus whether applying the language was illegal under Bus & P C §17200. The court did not find that the absolute mold exclusion itself was sufficient to foreclose coverage. To the contrary, the court rejected the insurer's argument to this effect, stating that it "overstates the holding of *Julian.*" *De Bruyn,* 158 CA4th at 1222. This statement does not, in my view, foreclose the argument, and we should expect carriers to continue to raise the "absoluteness" of the absolute mold exclusion in future litigation.—*Susan M. Popik*

Tort Litigation

Causation

In claim by bank for intentional interference of contract against insurance company, insurance company's request to bank to withdraw funds, when such withdrawal was subject to approval by government agency, was substantial factor in damages suffered by bank.

Bank of New York v Fremont Gen. Corp. (9th Cir 2008) 514 F3d 1008

Plaintiff bank sued defendant corporate parent of Fremont Indemnity, a California insurance company that provided workers' compensation policies to employers in California and New York. The complaint alleged intentional interference with contract and conversion. Plaintiff and Fremont Indemnity had entered into a custodian agreement, as required by New York insurance law, which prohibited the release by plaintiff, as the custodian, of principal from Fremont Indemnity's account without the written approval of the trustee, the Superintendent of Insurance of the State of New York. Plaintiff released funds totaling about $14 million from the account at defendant's request, without the written approval of the superintendent. Fremont Indemnity had financial difficulties and went into conservatorship and then into liquidation. The New York Insurance Department requested that plaintiff replace the $14 million, and plaintiff agreed to a slightly smaller sum in a settlement in which the superintendent assigned its claims against defendant to plaintiff. Plaintiff claimed damages against defendant as a result of the withdrawal, but the district court entered judgment in favor of defendant. Plaintiff appealed.

The U.S. Court of Appeals for the Ninth Circuit reversed. The district court erroneously granted partial summary judgment in defendant's favor with respect to the intentional interference with contract claim. The lower court applied the wrong legal standard for causation. The correct standard is the "substantial factor" test. Here, defendant requested the transfer of funds. But for defendant's conduct, the funds never would have been transferred. Plaintiff's failure to secure written permission did not break the factual chain of causation. As a matter of law, plaintiff met the causation element of its claim, and the district court's judgment is reversed. Regarding the element of intention, a reasonable finder of fact could conclude that defendant intended to disrupt the contract. A jury could find that general counsel to defendant knew the transfer of principal violated the agreement, yet failed to stop the transfer, effectively sanctioning it.

Damages

Proposition 51 requires several, not joint, liability for noneconomic damages among three defendants with primary liability in car collision.

Bayer-Bel v Litovsky (2008) 159 CA4th 396, 71 CR3d 518

Appellant-defendant was a 16-year old student without a driver's license who borrowed a car from a second defendant and crashed head-on into respondent's vehicle. The third defendant was a passenger in appellant's vehicle who had refused to drive because he had been drinking. A jury found appellant liable for negligence and the other two defendants liable for negligent entrustment or negligence as an owner. The jury allocated fault among the three, and the trial court made appellant jointly and severally liable for the entire judgment. Appellant appealed.

The Second District Court of Appeal reversed and remanded with directions to enter a new judgment in which appellant was jointly and severally liable for respondent's economic damages, but only severally liable for respondent's noneconomic damages. The lower court failed to apply Proposition 51 (CC §1431.2(a)), which provides that the liability of each defendant for noneconomic damages shall be several only, and that each defendant shall be liable only for the amount of noneconomic damages allocated to that defendant in direct proportion to that defendant's percentage of fault. The trial court erroneously relied on an exception for defendants with vicarious liability, such as vehicle owners, who are not entitled to the benefits of Proposition 51, to justify the imposition of joint liability against appellant. The exception did not apply, because appellant's liability was primary, as was the third defendant's.