SECOND APPELLATE DISTRICT CONFIRMS THAT "SAFE HARBOR" DEFENSE MAY BE BASED UPON ADMINISTRATIVE REGULATION

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On August 19, 2009, the Second Appellate District (Div. 7) issued its decision (again, but in slightly augmented form) in *Yabsley v. Cingular Wireless, LLC*. This decision was originally issued in August 2008, but the court of appeal, on its own motion, ordered a rehearing to allow the Attorney General of California and District Attorney of Santa Barbara County (who had not received notice of the appeal) to weigh in.

While most of the decision is largely irrelevant to insurers, one portion is relevant as it relates to the scope of the "safe harbor" defense to actions brought against insurers under California's Unfair Competition Law.

Though there had been dicta in caselaw indicating that "safe harbor" could only be based upon statutes, the court in Yabsley held that the basis of such a defense was not so limited. Specifically, it held:

Relying on *Krumme v. Mercury Ins. Co.* (2004) 123 Cal.App.4th 924, Yabsley contends that statutes can provide a safe harbor, but administrative regulations cannot. In *Krumme*, the appellate court rejected an insurance company's argument that regulations adopted by the Insurance Commissioner provided a safe harbor. Citing *Cel Tech* as authority, the i court said in a footnote: "These materials are not germane to our analysis because our Supreme Court has held that only statutes can create a safe harbor." (Id. at p. 940, fn. 5.) *Cel-Tech*, however, dealt with statutes enacted by the Legislature and the safe harbor they created. There was no reference to regulations. Like the trial court here, we conclude that there is nothing in the *Cel-Tech* decision purporting to limit the safe harbor doctrine to statutes enacted by the Legislature.

...

The status of regulations promulgated by the Board was described by our Supreme Court[] "[R]egulations adopted by an agency to which the Legislature has confided the power to 'make law,' and which, if authorized by the enabling legislation, bind this and other courts as firmly as statutes themselves . . . ." The rule that valid administrative regulations have the force and effect of law has been reiterated in dozens of California cases. [].

As the *Yabsley* court noted, "[b]ecause agencies granted such substantive rulemaking power are truly 'making law,' their quasi-legislative rules have the dignity of statutes..." They have the "'force and effect' and the 'dignity' of a statute" and, therefore, may provide a basis for safe harbor.

Why is this important for insurance litigation? Well, insurers are one of the most heavily regulated industries in the State of California. Many of the actions taken by insurers are pursuant to command or permission by way of regulation. To the extent that the industry can now rely upon regulations, as well as statutes, to demonstrate that they have been engaged in lawfully permitted conduct, the industry has a greater base upon which it can set forth a "safe-harbor" doctrine defense.

A copy of the opinion can be found here.

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