2025 WL 2803332 (Cal.App. 2 Dist.) (Appellate Brief)
Court of Appeal, Second District, California

Baywa R.E. Wind, LLC, Plaintiff and Appellant,

v.

RSG Underwriting Managers, LLC; Lloyd's Syndicate CSL 1084; Lloyd's Syndicate 1458 Renaissancere Management Limited; QBE Insurance UK Limited; Lloyd's Syndicate Atrium 609; Convex Insurance UK Limited; Scottsdale Insurance Company; Everest Indemnity Insurance Company; Accident Fund General Insurance Company; HDI Global Specialty SE; and AGCS Marine Insurance Company, Defendants and Respondents.

No. B337522
September 24, 2025

On Appeal from the Superior Court of Santa Barbara County
The Honorable Jed Beebe, Judge Presiding Case No. 24CV00202

Appellant's Reply Brief

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I. INTRODUCTION

The Insurers' brief narrowly focuses on one portion of the 2022-2023 Policy's "Choice of Law and Jurisdiction" provision, disregarding other portions of the 2022-2023 Policy—including within the provision itself—that illustrate the permissive nature of the provision. However, as a matter of law, the 2022-2023 Policy's "Choice of Law and Jurisdiction" provision is permissive or, at minimum, ambiguous to this distinction. Moreover, the Insurers' brief references a series of inapposite cases interpreting distinct contractual language lacking the permissive language included in the 2022-2023 Policy.

Despite the permissive nature of the 2022-2023 Policy's "Choice of Law and Jurisdiction" provision, the Insurers' brief fails to demonstrate that, under the controlling *forum non conveniens* analysis, the balance of private and public interests tilts in favor of New York. This is the Insurers' burden, and the Insurers' failure to meet or even address that burden is an apparent concession that, under the traditional *forum non conveniens* analysis, the trial court would likely have retained jurisdiction over this matter.

Moreover, and notwithstanding that the 2022-2023 Policy's "Choice of Law and Jurisdiction" provision is permissive, enforcement of the provision is unreasonable because it undermines the Insureds' ability, which they would have in California, to either bring a bad faith claim against the Insurers or to enforce the efficient proximate cause doctrine. Although the Insurers argue that neither of these rights are fundamental public policies of California, the case law they cite does not support their position.

Accordingly, for the reasons set forth in the Insureds' opening brief and below, the trial court's order must be reversed. The stay should be removed, and this insurance coverage dispute should proceed in California.

II. ARGUMENT

a. The Insurers' Constrained Interpretation of the 2022-2023 Policy's "Choice of Law and Jurisdiction" Provision Fails to Recognize its Permissive Nature

The Insurers' brief correctly acknowledges black-letter law, that "language in a contract must be interpreted as a whole . . .." (Respondents' Brief ("RB")-37 (quoting Waller v. Truck Ins. Exch., Inc. (1995) 11 Cal.4th 1, 18-19); see also Cal. Civ. Code § 1641 ("The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."). Yet, on one hand the Insurers' brief posits that the 2022-2023 Policy's "Choice of Law and Jurisdiction" provision taken as a whole renders it mandatory, while on the other hand the Insurers' brief reads out the permissive "submit to" language along with the provision's express reference to the 2022-2023 Policy's "Service of Suit Clause." (Compare RB 28-34, 36-38, with CT-81). This strained interpretation, which was adopted by the trial court, is in error (1 RT 5:2-5, 14:7-13; CT-260-61).

The 2022-23 Policy's "Choice of Law and Jurisdiction" provision states the following:

Choice of Law And Jurisdiction:

Law: The insurance shall be governed by and construed in accordance with the law of New York.

Jurisdiction: Each party agrees to submit to New York jurisdiction subject to LMA5020 (14/09/2005) Service of Suit Clause naming: Mendes & Mount, 750 Seventh Avenue, New York, NY 10019-6829, USA.

The interpretation, performance and enforcement of this agreement shall be governed by the laws of the state of New York without regard to principles of conflicts of law and any disputes between the insured and underwriters arising under or in connection with this insurance policy shall be subject to the exclusive jurisdiction of the courts of the state of New York and to the extent permitted by law the parties expressly waive all rights to challenge or otherwise limit such jurisdiction.

(CT-81-82). The provision's "Jurisdiction" section clearly contains hallmark permissive "submit to" language, which is further underscored by its express reference to the 2022-2023 Policy's "Service of Suit Clause" that provides, in pertinent part, the following:

It is agreed that in the event of the failure of the Underwriters hereon to pay any amount claimed to be due hereunder, the Underwriters hereon, at the request of the Insured (or Reinsured), will submit to the jurisdiction of a Court of competent jurisdiction within the United States . . ..

(CT-62); see, e.g., Animal Film, LLC, 193 Cal.App.4th at 470 ("[T]he parties hereto *submit and consent to* the jurisdiction of the courts present in the State of Texas . . .") (emphasis added); Berg v. MTC Elecs. Techs. (1998) 61 Cal.App.4th 349, 357) ("The company . . .has expressly *submitted to* the jurisdiction of the State of California . . .." (emphasis added). Despite this language appearing within the Insurers' own policy terms, they narrowly focus on the later part of the provision, which states, in pertinent part, "any disputes between the insured and underwriters arising under or in connection with this insurance policy shall be subject to the exclusive jurisdiction of the courts of the state of New York . . .." (CT-81-82). This limited interpretation fails to give effect to the 2022-23 Policy as a whole and is not supported by the cases relied upon by the Insurers in their brief.

i. When Construed as a Whole, the 2022-2023 Policy's "Choice of Law and Jurisdiction" Provision is Permissive or, at Minimum, Ambiguous on That Point

As noted in Appellants' opening brief and above, the "Jurisdiction" section of the 2022-2023 Policy's "Choice of Law and Jurisdiction" provision demonstrates its permissive structure. *Supra* § II.a; (Appellants' Brief ("AB")-23-28). Thus, interpreting the 2022-2023 Policy's "Choice of Law and Jurisdiction" provision as permissive is reasonable or, at minimum, at least a reasonable interpretation of the provision. (Id.)

Notwithstanding the foregoing, the Insurers' brief asks the Court to disregard the plain language of the "Jurisdiction" section of the 2022-2023 Policy's "Choice of Law and Jurisdiction" provision, which would be in error. (See RB-28-33, 36-38); Cal. Civ. Code § 1641.

First, the Insurers' brief does not reconcile the implications of the "submit to New York jurisdiction" language within the 2022-2023 Policy's "Choice of Law and Jurisdiction" provision, instead effectively reading this language out of the provision by narrowly focusing solely on a single paragraph. (See id.) But see Carson v. Mercury Ins. Co. (2012) 210 Cal.App.4th 409, 420 ("An interpretation which gives effect to all provisions of the contract is preferred to one which renders part of the writing superfluous, useless or inexplicable.") (citing 11 Williston on Contracts § 32:5, p. 704 (4th ed. 2012).

Likewise, the Insurers' brief disregards the express language of the 2022-2023 Policy's "Service of Suit Clause," which provides, in pertinent part, that the Insurers "will submit to the jurisdiction of a Court of competent jurisdiction within the United States . . .." (CT-92).

Instead, the Insurers seek to narrowly confine the analysis to separate paragraphs within the 2022-2023 Policy's "Service of Suit Clause" that permit the Insureds to effectuate service of process on a specified agent. (Compare RB-33-34, with CT-92).

The Insurers' brief provides no legal basis for this constrained interpretation of the 2022-2023 Policy's "Service of Suit Clause" other than Pulte Homes Corp. v. Williams Mech., Inc. (2016) 2 Cal.App.5th 267. (RB-34). However, Pulte Homes Corp. is completely inapposite. Indeed, the portion of the opinion relied on by the Insurers simply provides a general explanation of the authority that is conferred to an agent for service of process. (Id. (citing Pulte Homes Cor. 2 Cal.App.5th at 274)).

California law is clear that "[t]he fundamental goal of contractual interpretation is to give effect of the mutual intention of the parties," which "is to be determined by objective manifestations of the parties' intent" – i.e., "the words used in the agreement." City of Atascadero v. Merril Lynch, Pierce, Fenner & Smith, Inc. (1998) 68 Cal.App.4th 445. 473-44; Cal. Civ. Code § 1636).

Courts "look first to the language of the contract in order to ascertain its plain meaning or the meaning a lay person would ordinarily attach to it. Waller v. Truck Ins. Exch., Inc. (1995) 11 Cal.4th 1, 18. "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." Cal. Civ. Code § 1641. "A policy provision will be considered ambiguous when it is capable of two or more constructions, both of which are reasonable." Foster-Gardner, Inc. v. Nat'l Union Fire Ins. Co. (1998) 18 Cal.4th 857, 868 (quotation omitted).

Under these standard rules, the plain language of the 2022-2023 Policy's "Choice of Law or Jurisdiction" provision, when interpreted as a whole, is permissive.

ii. The Cases Relied Upon by the Insurers Contain Different Contractual Terms than Those Contained Within the 2022-2023 Policy

The Insurers' brief draws the Court's attention to a series of cases finding a contractual forum selection clause to be mandatory. (RB-30-33). However, closer scrutiny of those cases reveals that none involve a forum selection clause with permissive language, as is the case with the 2022-23 Policy's "Choice of Law and Jurisdiction" provision.

The contractual language in those cases provide the following:

Olinick v. BMG Entm't (2006) 138 Cal.App.4th 1286, 1294

The parties agree to the exclusive jurisdiction and venue of the Supreme Court of the State of New York for New York County and/or the United States District Court for the Southern District of New York for the resolution of all disputes arising under this Agreement.

Lu v. Dryclean-U.S.A. of Cal., Inc. (1992) 11 Cal.App.4th 1490, 1492

Any and all litigation that may arise as a result of this Agreement shall be litigated in Dade County, Florida.

CQL Original Prods., Inc. v. Nat'l Hockey League Players' Ass'n (1995) 39 Cal.App.4th 1347, 1352

This Agreement shall be governed by the law of Ontario, Canada and any claims arising hereunder shall, at the Licensor's election, be prosecuted in the appropriate court of Ontario. The Licensee hereby attorns to the jurisdiction and judgment of the courts of the Province of Ontario, Canada, and agrees that a judgment of an Ontario court shall be enforceable in the jurisdiction in which the Licensee is located.

Cal-State Bus. Prods. & Servs., Inc. V. Ricoh (1993) 12 Cal.App.4th 1666, 1672-73, nn. 4, 6.

Dealer and Ricoh agree that this Agreement[,] and all documents issued in connection therewith, shall be governed by and interpreted in accordance with the laws of the State of New York . . . [A]ny appropriate state or federal district court located in the Borough of Manhattan, New York City[,] New York shall have exclusive jurisdiction over any case or controversy arising under or in connection with th[is] Agreement . . .."

Intershop Commc'ns v. Superior Court (2002) 104 Cal.App.4th 191, 196

The conclusion and performance of this Agreement is governed by and has to be construed in accordance with the laws of the Federal Republic of Germany. To the extent permitted by the applicable laws the parties elect Hamburg to be the place of jurisdiction."

Missing from each of these cases are (1) the permissive "[e]ach party agrees to submit to New York jurisdiction . . ." language and (2) reference to a "Service of Suit" clause. Both are present in the provision at issue here. (CT-81-82). [1]

Instead, each of the Insurers' cases deals with a standalone mandatory forum selection clause. Accordingly, these cases are inapposite as to whether the 2022-2023 Policy's "Choice of Law and Jurisdiction" provision is mandatory or permissive.

b. The Insurers Cannot Demonstrate that the Balance of Private and Public Interests Tilts in Favor of a New York Forum Under the Forum Non Conveniens Analysis

The Insurers' brief fails to demonstrate that, under the controlling *forum non conveniens* analysis, the balance of private and public interests tilts in favor of New York. See Animal Film, LLC 193 Cal.App.4th at 472 ("In applying the traditional forum non conveniens analysis, the trial court must engage in a two-step process, on which the defendants bears the burden of proof." (citing Stangvik v. Shiley Inc. (1991) 54 Cal.3d 744, 751).

"The private interest factors are those that make trial and the enforceability of the ensuing judgment expeditious and relatively inexpensive . . .[,]" whereas "[t]he public interest factors include avoidance of overburdening local courts with congested calendars, protecting the interests of potential jurors so that they are called upon to decide cases in which the local community has little concern, and weighing the competing interests of California and the alternate jurisdiction in the litigation." Stangvik 54 Cal.3d at, 751.

Here, despite bearing the burden of proof, the Insurers' brief fails to even mention why the balance of private and public interests tilts in favor of New York. (RB-34-35); See Animal Film, LLC 193 Cal.App.4th at 472. Rather, the Insurers' brief only echoes their position that the 2022-2023 Policy's "Choice of Law and Jurisdiction" provision should be enforced. (Id.).

As set forth in the Insureds' opening brief, both the private and public interests tilt in favor of California retaining jurisdiction over this matter. (OB-28-31).

Accordingly, by failing to address the issue in the Insurers' brief, there is seemingly an agreement between the parties that, had the trial court found the 2022-2023 Policy's "Choice of Law and Jurisdiction" provision to be permissive, under the traditional *forum non conveniens* analysis, the trial court would likely have retained jurisdiction over this matter.

c. The Insurers' Brief Fails to Demonstrate that Enforcement of the 2022-2023 Policy's "Choice of Law and Jurisdiction" Provision is Reasonable

i. Boghos Does Not Support a Finding that an Insured's Right to Bring a Tort Bad Faith Claim Against its Insurer is Waivable Through the Enforcement of a Contractual Forum Selection Clause

The Insurers' brief heavily relies on Boghos v. Certain Underwriters at Lloyd's of London (2005) 36 Cal.4th 495 for the proposition that an insured's right to bring forth a first-party tort bad faith claim against its insurer is not a fundamental public policy of California. (RB-39-41; RT 5:12-13). However, *Boghos,* does not support this position. (See id.); Boghos 36 Cal.4th at 501-08. As the Insureds explained in their opening brief:

In Boghos, the issue before the Court was whether the disability insurance policy's arbitration clause was enforceable against the insured. 36 Cal.4th at 499. In relevant part, the insured asked the Court to extend its precedent in Armendariz and Little to find the arbitration clause unenforceable because it would require the insured to pay costs the insured would not otherwise incur if the dispute proceeded in court. Id. at 505 (citing Armendariz v. Found. Health Psychcare Servs., Inc. (2000) 24 Cal.3d 83, 100-02 (setting forth conditions by which an employer could lawfully compel an employee to arbitrate claims arising under the California Fair Employment and Housing Act without forfeiting the employee's statutory rights); Little v. Auto Stiegler, Inc. (2003) 29 Cal.4th 1064 (extending Armendariz requirements to apply to tort claims for wrongful discharge). The Court rejected this argument because, unlike the employment-related claims in Armendariz and Little which were either "based on or tethered to statutes," the insured's bad faith claim was not. Id. at 507. This was the key of the Court's holding. See id. The Court did not hold the insured's bad faith claim was *not* a fundamental public policy of California, and its decision was based on the application of an arbitration clause rather than a state-specific choice of law and jurisdiction clause. See id. . . ..

The Insurers' brief nevertheless focuses on the court's finding that "insurance bad faith claims also cannot properly be described as tethered to statute, in the sense that Tameny claims subject to arbitration under Little are necessarily 'based on policies "carefully tethered to fundamental policies . . . delineated in constitutional or statutory provisions . . .."' Bogus 36 Cal.4th at 507 (quoting Little 29 Cal.4th at 892). However, the Court's decision was in the context of the enforcement of an arbitration provision. Id. This decision, addressing whether an insured's bad faith claim was based on or tethered to statutes for the purpose of cost-splitting, is not relevant here. See id.

Indeed, post-Boghos, at least one court has expressly rejected the argument that the California Supreme Court's holding extends to instances, such as here, where the enforcement of a forum selection clause would nullify the insured's ability to pursue a bad faith claim. Specifically, in Master Pipe Distrib. Co. v. Fairbridge Inc., No. 2:23-cv-02745-AB-AGR, 2025 WL 1122377, at *3 (C.D. Cal. Mar. 11, 2025), the insurer argued that Boghos "controls and establishes that the right to bring a tort claim for insurer bad faith is not fundamental public policy." Id. (citing Boghos, 36 Cal.4th at 507). The district court rejected this argument, succinctly explaining the following:

Boghos stands for the rule that, where the legislature has established cost-splitting as the presumption in an arbitration agreement, it would be inappropriate for the judiciary to invalidate a cost-splitting arbitration clause based on the theory that California's public policy interest to bring bad faith insurance claims "entails an unwaivable statutory right" not to split the costs of arbitration. This holding does not establish that California lacks a fundamental policy interest in preserving the right to bring bad faith insurance claims, only that a contract can properly require the parties to split costs in arbitrating those claims.

Id.; see also Parada v. Superior Court (2009) 176 Cal.App.4th at 1579 (explaining that in Boghos, "the California Supreme Court held the cost-shifting rule for arbitration of certain statutory claims set forth in Armendariz . . . and Little . . ., did not extend to common law claims.") (internal citations omitted).

Accordingly, contrary to the assertion by the Insurers in their brief, the trial court erred in relying on Boghos to find the Insured's bad faith claim was not a matter of fundamental public policy to preclude the enforcement of the 2022-2023 Policy's "Choice of Law and Jurisdiction" provision. (See RT 5:12-13).

ii. Application of the Efficient Proximate Cause Doctrine is a Fundamental Public Policy in California

The plain language of California Insurance Code sections 530 and 530.5 indicates the efficient proximate cause doctrine's place as a fundamental public policy of California. However, the Insurers' brief focuses on distinguishable case law and the lack of an express legislative declaration in the California Insurance Code promulgating the efficient proximate cause doctrine as a public policy of California. (RB-41-45). But see MacIsaac v. Waste Mgmt. Collection & Recycling, Inc. (2005) 134 Cal.App.4th 1076, 1083 ("If the statutory language is clear and unambiguous, our task is at an end, for there is no need for judicial construction.") (citations omitted). As the Insureds explain below, the Insurers' reliance on these principles is misplaced.

1. The 2022-2023 Policy Lacks Specific Policy Language Indicating the Insurers' Intent to Limit Coverage "In Respect of Earth Movement" Where a Loss is Precipitated by Rain

The Insurers' brief relies on Julian v. Hartford Underwriters Ins. Co. (2005) 35 Cal.4th 747, and De Bruyn v. Superior Court (2008) 158 Cal.App.4th 1213. The specific policy language in those cases was deemed compliant with California Insurance Code section 530. See id. However, the Insurers' reliance on those cases is misplaced because the 2022-2023 Policy lacks such specific language making clear the Earth Movement limit of liability and deductible applies in instances were a loss is precipitated by rainfall. (CT-72-130).

In Julian, the California Supreme Court recognized the efficient proximate cause doctrine does not prohibit an insurer from limiting coverage for certain perils, as long as the policy is clear as to which perils are covered and excluded. 35 Cal.4th at 759.

This holding was aligned with the purpose of the efficient proximate cause doctrine, which the California Supreme Court has expressed to bring about "a fair result within the reasonable expectations of both the insured and the insurer whenever there exists a cause or dependent relationship between covered and excluded perils." Garvey v. State Farm Fire & Cas. Co. (1989) 48 Cal.3d 395, 404.

Consistent with the California Supreme Court's holding in Julian, the court in De Bruyn held that an insurance policy's mold exclusion did not run afoul of California Insurance Code section 530. 158 Cal.App.4th 1224. Although that policy's water damage exclusion had an exception for sudden and accidental discharge, the policy made expressly clear that it "never, under any circumstances, cover[s] . . . mold, . . . *even if resulting from'* that specific peril." Id. (emphasis in original).

Here, however, the 2022-2023 Policy does not contain specific language that clearly expresses the Insurers' intent to limit coverage when Earth Movement, as the 2022-2023 Policy defines that term, results from another peril such as rain. (See CT-74). Instead, the Policy's "Limits of Liability" and "Deductibles" sections provide, respectively, that a lesser limit of liability and specific deductible applies "in respect of Earth Movement" without expressly stating in those sections or elsewhere within the 2022-2023 Policy that the lesser limit of liability and specific deductible apply to a loss precipitated by rain. (Id.; see also CT-72-130). The Insurers' brief does not address the 2022-2023 Policy's language, assumingly because doing so would necessitate a concession by the Insurers that the 2022-2023 Policy lacks the specific language that was pertinent to the holdings in Julian and De Bruyn. (See RB-41-45).

2. A Fundamental Public Policy of California Does Require an Express Legislative Mandate

Rather than focusing on the language of California Insurance Code sections 530 and 530.5, the Insurers' brief focuses on the lack of an express legislative mandate promulgating the efficient proximate cause doctrine as public policy within those statutory sections. (RB-44-45).

While it is true that an express legislative mandate is sufficient to deem a matter public policy, it is not necessary. See Jie v. Liang Tai Knitwear Co. (2001) 89 Cal.App.4th 654, 689; Thome v. Macken (1943) 58 Cal.App.2d 76, 81. Indeed, the California Supreme Court has stated that "[p]olicy exclusions are unenforceable to the extent that they conflict with section 530 and the efficient proximate cause doctrine." Julian 35 Cal.4th at 653 (citing, *inter alia,* Cal. Civ. Code § 1667(2) (defining "unlawfulness" as including "[c]ontrary to the policy of express law, though not expressly prohibited . . .").

Accordingly, the lack of express legislative mandate within California Insurance Code sections 530 and 530.5 does not render long-standing law that supports the position that the efficient proximate case doctrine is a fundamental public policy of California.

III. CONCLUSION

For the reasons set forth in Appellant's Opening Brief and above, the trial court's order staying the California proceeding pursuant to California Civil Procedure Code sections 410.30 and 418.10 should be **REVERSED** and the case should be remanded.
Dated: September 24, 2025

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Footnotes

1 The Insurers' brief also draws the Court's attention to Nelloyds Lines B.V. v. Superior Court (1992) 3 Cal.4th 459. However, the issue in that case was the enforcement of a choice of law clause rather than a choice of forum clause. Id. at 462. Moreover, just like the other cases relied upon in the Insurers' brief, the pertinent contractual language at issue in Nelloyds Lines B.V. did not contain the permissive language that appears within the Policy's 2022-2023 “Choice of Law and Jurisdiction” provision. Id. at 468-69 ("This agreement shall be *governed by* and construed in accordance with Hong Kong law . . .") (emphasis in original) (footnote omitted).

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