Appellate reports

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

By Jeffrey Isaac Ehrlich

Superior Dispatch, Inc. v. Ins. Corp. of New York

__ Cal.App.4th __, 2009 WL 2315764 (2d Dist., Div. 3. 2009)

Who needs to know about this case: Lawyers handling insurance matters

Why it's important: Reaffirms that insurers in California are required to advise their insureds of applicable statutes of limitations that may apply to their claim, even if the insured is represented by counsel. Failure to advise can estop the insurer from relying on the limitations period to deny coverage. Also, refused to affirm summary judgment based on defense not pleaded by insurer in its answer.

Synopsis: Superior is a trucking company that purchased a policy from Ins. Corp. of NY ("Inscorp"). The application submitted to Inscorp states that Superior hauls produce, food, food goods, textiles and paper products. A policy is issued that provides coverage for "containerized freight" but does not define this term. The cargo coverage contains an exclusion for "autos," but did not define that term. Superior was hired to haul freight from a terminal at the Port of Los Angeles to another location. The freight was a dump truck on a flat-rack trailer. The cab of the dump truck hit an overpass while the truck was passing underneath the bridge. The customer refused the shipment, and the shipper looked to Superior for the loss. Superior filed a claim with Inscorp that was denied. There was an exchange of letters between counsel for Superior and Inscorp. Inscorp's letters did not advise Superior about the applicable limitations period in the policy.

Superior filed suit, and Inscorp moved for summary judgment, arguing that the suit was time-barred and that the policy contained misrepresentations about the nature of the cargo that Superior hauled. The trial court granted the motion, and the Court of Appeal reversed. The court held that section 2695.4, subd.(a) of Title 10 of the California Code of Regulations, dealing with Fair Claims Practices, required Inscorp to advise Superior of any applicable time limits that might apply to the claim. The court rejected the argument that section 2695.7, subd.(f), which requires an insurer to advise insureds of any statute of limitations and other time requirements upon which the insurer may deny coverage (but which contains an exemption if the insured is represented by counsel), did not negate the broader requirement in section 2695.4, subd.(a). The insurer was required to comply with both regulations, and there was no inconsistency between them.

The court also held that the undefined term "containerized freight" could conceivably apply to the dump truck on a flat-rack, as Superior alleged in its complaint. Since Inscorp provided no factual evidence to the contrary in its motion, it failed to carry its initial summary-judgment burden on the issue. Also, because Inscorp failed to plead misrepresentations on the application as an affirmative defense, it could not rely on that issue to obtain summary judgment. "The pleadings determine the scope of relevant issues on a summary judgment motion . . . . [and] we cannot affirm a summary judgment based on a matter that is not alleged in the pleadings."

Munson v. Del Taco, Inc.

46 Cal.4th 661 [208 P.3d 623] (Cal. Supreme 2009)

Who needs to know about this case: Lawyers handling ADA claims and Unruh Act claims

Why it's important: Holds that a plaintiff seeking damages for ADA violations under the Unruh Civil Rights Act is not required to prove intentional discrimination, overruling *Gunther v. Lin* (2006) 144 Cal.App.4th 223 [50 Cal.Rptr.3d 317], and *Coronado v. Cobblestone Village Community Rentals* (2008) 163 Cal.App.4th 831 [77 Cal.Rptr.3d 883.]

Synopsis: In *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1175, the Court held that proof of intentional discrimination was necessary to establish a violation of the Unruh Civil Rights Act. The following year, the Legislature added subdivision (f) to Civil Code section 51, specifying that "[a] violation of the right of any individual under the Americans with Disabilities Act of 1990 shall also constitute a violation of this section." The ADA does not require a showing of intentional discrimination. In *Lentini v. California Center for the Arts* (9th Cir.2004) 370 F.3d 837, 846-847, the Ninth Circuit held that unintentional discrimination that violated the ADA was included in the class of discriminatory acts

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for which the Unruh Civil Rights Act provides a remedy in damages. In *Gunther v. Lin* (2006) 144 Cal.App.4th 223, however, the Court of Appeal, expressly disagreeing with *Lentini*, held that while an unintentional ADA violation was by virtue of section 51, subdivision (f) a violation of that section, no damages remedy under section 52 is available for such a violation.

The Ninth Circuit certified these questions to the Supreme Court, "(1) 'Must a plaintiff who seeks damages under California Civil Code section 52, claiming the denial of full and equal treatment on the basis of disability in violation of the Unruh Civil Rights Act (Civ.Code, § 51) and the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.), prove 'intentional discrimination'"? (2) 'If the answer to Question 1 is "yes," what does "intentional discrimination" mean in this context?'"

Based on the statutory language and context, the court concluded that the answer to the first question was "No." That is, plaintiff proceeding under section 51, subdivision (f) may obtain statutory damages on proof of an ADA access violation without the need to demonstrate additionally that the discrimination was intentional. The *Gunther* court had construed the remedies section of the Unruh Act, section 52, as operating independently of the list of violations in section 51. The Court rejected this approach, holding that section 52 authorizes a remedy against anyone who violates section 51. By adding ADA violations to section 51, it made them subject to the remedy available in section 52.

Melkonians v. Los Angeles Civil Service Comm'n

174 Cal.App.4th 1159 [95 Cal.Rptr.3d 415] (Second Dist. Div. 3 2009)

Who needs to know about this case: Lawyers who need to be familiar with hearsay and hearsay exceptions

Why it's important: Defines and clarifies the "spontaneous statement" exception to the hearsay rule (Evid. Code, § 1240).

Synopsis: Melkonians, an LA County deputy sheriff, sought to overturn his dismissal for violating the department's policies regarding conduct toward others. Melkonians had dated Yajera Morales for several months. She tried to end the relationship, and he resisted. He crawled through a window into her apartment, and he refused to leave when she asked him to, grabbed her face, and threatened her when she said she would get a restraining order. After he left, she phoned the business line of the West Hollywood sheriff's station and asked questions about how to obtain a restraining order. When a deputy got on the line and asked how he could help, she asked him how to get a restraining order. When he asked her why she needed a restraining order, she replied that it was because her boyfriend was a deputy sheriff, he had broken into her house through a window, hit her in the face, and told her that if she called the cops she would be sorry.

A deputy was dispatched to Morales' house, and saw that she had bruises on her face, appeared to have been crying, and was upset. He noticed Melkonians' car parked at the rear of the building. He videotaped an interview with her, in which she recounted the events and told him that Melkonians was outside the apartment when she called the West Hollywood station, and was outside as recently as 10 minutes ago. After the interview, the deputy arrested Melkonians, who was still outside the apartment.

Melkonians was terminated in an administrative hearing, in which the recording of Morales' call was admitted as evidence. Melkonians sought to overturn the dismissal in an administrative-mandate proceeding in the trial court. The court held that Morales' statement was admissible under the spontaneous-statement exception to the hearsay rule. On appeal, Melkonians challenged that ruling. The court affirmed. The court rejected his argument that the call was a non-emergency call made on the department's business line to ask a question about restraining orders. He argued that she was contemplating a future course of action, which undermined the basis for the spontaneous-statement exception – that the speaker had not had time to reflect on the event in question.

The law is settled that to render statements admissible under the spontaneous-declaration exception, three requirements must be met: (1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it. The trial court properly applied the exception here because Morales was still distraught when she made the call; none of her statements were self-serving; and she broke down and cried openly at the end of the conversation. The event at issue was held to be serious enough to trigger the applicability of the exception, and all requirements were met.

Le v. Astrue

558 F.3d 1019 (9th Cir. 2009)

Who needs to know about this case: Lawyers who file notices of appeal in federal court

Why it's important: Holds that failure to list order granting summary judgment in notice of appeal was not fatal to appeal; court would construe notice of appeal as encompassing the entire disposition of the case below.

Synopsis: Le's application for Social Security disability benefits was denied, and he sought judicial review. Le and the government filed cross-motions for summary judgment. The district court granted the government's motion and

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denied Le's motion. Le filed a notice of appeal stating he was appealing from the order denying his motion for summary judgment. Le's opening brief argued that the district court had erred in granting the government's motion, and neither party argued that the court lacked jurisdiction to review the order granting summary judgment by virtue of Le's failure to mention it in the notice of appeal. Rule 3 of the Federal Rules of Appellate Procedure specifies the requirements for a valid notice of appeal. It states that a notice of appeal must (A) specify the appealing party, (B) designate the judgment, order or part thereof being appealed; and (C) name the court to which the appeal is taken. Rule 3 must be liberally construed to determine whether it has been complied with, but noncompliance is fatal to the appeal.

The Supreme Court has distinguished the requirement that the parties taking the appeal be specifically identified, from the requirement of specifying the order or judgment appealed from. The failure to name the party taking the appeal is not an excusable formality; it constitutes the failure of that party to appeal. By contrast, the Court has rejected a literal application of the requirement that the order appealed from be specifically designated.

In applying the Supreme Court's rules on this issue, the Ninth Circuit has focused on whether the errors in the designation of the order have prejudiced the other party. It considers whether the intent to appeal from a specific order can be fairly inferred, and whether the appellee was prejudiced by the mistake. In applying this framework, the court has held that a notice of appeal is sufficient even if it completely fails to indicate the order being appealed from. Applying these principles, the court held that the appeal from the grant of summary judgment can be fairly inferred because the order appealed from was not independent of the non-referenced order, since both dealt with the same benefits question. Overall, the notice gave the government notice of what was at issue. And since the government had a full opportunity to address the issue in its brief, there was no prejudice. Accordingly, the error in failing to designate the order granting the government's motion did not deprive the appellate court of jurisdiction. (In a separately-filed memorandum disposition, the court affirmed the district court's order.)

Walker v. Geico Ins. Co.

558 F.3d 1025 (9th Cir. 2009)

Who needs to know about this case: Lawyers who litigate cases under Business & Professions Code section 17200 (the unfair competition law, or "UCL")

Why it's important: Holds that unless a UCL plaintiff can allege a claim sufficient to obtain an order for restitution, the plaintiff cannot allege a viable UCL claim for injunctive relief.

Synopsis: Walker, who owns an automobile body shop, filed suit under the UCL against Geico, arguing that its volume-discount arrangements with body shops violates various provisions of California law. Under the amendments to the standing requirement of the UCL made by Proposition 64, private UCL plaintiffs must show that they have lost money or property as a result of the unfair business practice at issue in their lawsuit. Walker conceded that he had not lost money or property as a result of Geico's arrangements with other body shops. He was, in effect, arguing that Geico was not paying those shops enough. Because Walker could not claim that he had lost money or property as a result of the volume-discount arrangements, he had no standing under the UCL, regardless of whether he sought injunctive relief or restitution. The district court therefore properly dismissed his case.

Tanoh v. Dow Chemical Co.

561 F.3d 945 (9th Cir. 2009)

Who needs to know about this case: Lawyers who litigate class or "mass" actions in federal court

Why it's important: Holds that multiple lawsuits seeking to adjudicate claims of fewer than 100 plaintiffs each cannot be aggregated and considered a removable "mass action" under the Class Action Fairness Act ("CAFA").

Synopsis: CAFA extends federal removal jurisdiction to civil actions "in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." (28 U.S.C. § 1332(d)(11)(B)(i).) Dow removed seven state-court actions, each filed on behalf of fewer than 100 plaintiffs. Each suit alleged the plaintiffs were exposed to a Dow pesticide (DBCP) and injured. It argued that, taken together, the seven actions qualified as a "mass action" that was removable under CAFA. The district court remanded sua sponte, and Dow appealed. Affirmed. The plain language of CAFA shows that the actions at issue were not "mass actions" because each action sought to adjudicate the claims of fewer than 100 plaintiffs, and neither the parties nor the trial court had proposed consolidating the cases for trial. The court rejected Dow's arguments that the seven actions needed to be considered together to determine whether they constituted a mass action. CAFA expressly provides that a "mass action" shall not include any civil action in which the claims are joined on the motion of the defendant. Hence, Congress appears to have foreseen that defendants might try to consolidate several smaller actions into a single "mass action," and specifically directed that such an action was not a mass action under CAFA. CAFA also provides that claims consolidated or coordinated solely for pretrial proceedings are not mass actions. The authorities relied on by Dow involved attempts by plaintiffs to evade the $5 million amount-in-controversy provision in CAFA by dividing their claims into suits involving discrete time periods. These cases did not apply where different groups of plaintiffs sought to litigate their own claims to-

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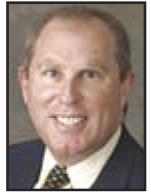
gether, but not to represent other plaintiffs in a class.

The court noted that the claims might become removable if the plaintiffs at some later time seek to join the claims for trial. The court did not express any opinion on whether a state court's sua sponte joinder of the claims might allow the defendants to remove as a single "mass action" under CAFA.

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*.



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