

Appellate reports

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

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United Steel, Paper & Forestry, Rubber, Manufacturing Energy, et al. v. ConocoPhillips Co.

__ F.3d __, 2010 WL 22701 (9th Cir. 2010.)

Who needs to know about this case: Class-action attorneys

Why it's important: Holds that district court abuses discretion in refusing to certify class action based on concern about practical obstacles that might develop if the plaintiff's legal theory is ultimately rejected.

Synopsis: California law requires employers to provide employees with a 30-minute meal period, during which the employee is totally relieved of all duties, for every five hours worked. ConocoPhillips was sued by a labor union and individual employees in a class action seeking relief for failure to comply with this requirement. Plaintiffs alleged that employees within the class were not permitted to leave their units during meal breaks, and were subject to interruptions to which they were required to respond, and hence were "on duty" within the meaning of California law.

The district court denied plaintiffs' class-certification motion, holding that the plaintiffs did not satisfy F.R.C.P. 23(b)(3)'s "predominance" requirement. Specifically, the court stated that it appeared that "the existence of a uniform policy as to the availability of a meal period could be proved on a classwide basis...." However, in the district court's view, "there c[ould] be no assurances that [plaintiffs] w[ould] prevail on[their 'on duty'] theory." And if plaintiffs did *not* prevail on this theory, the district court reasoned, the inquiry would then shift to whether plaintiffs *actually* missed meal breaks, and "the Court w[ould] be faced with a case ... requiring individualized trials on each class member's meal period claims," thus making "a class action ... not ... the superior method of resolving this suit."

The Ninth Circuit reversed. It noted that the district court did not hold that the plaintiffs' actual legal theory (the "on duty" theory) was one in which common issues of law or fact did not predominate over individual questions. Instead, it treated the plaintiffs' theory as "all but beside the point," because there were no "assurances" that the plaintiffs would prevail on their theory. This was an abuse of discretion. The question on class certification is not whether the plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met. Rule 23 does not give courts the authority to conduct an evaluation of the merits of the plaintiffs' claims. The fact that the plaintiff might not be successful in proving the claims alleged does not form a proper basis to deny class certification. A district court retains the flexibility to address problems with a certified class as they arise, including the ability to decertify if necessary. But a district court may not assume *arguendo* that problems will arise, and then decline to certify the class on the basis of "of a mere potentiality" that may or may not be realized.

In re Cellphone Termination Fee Cases

__ Cal.App.4th __, 2009 WL 5174374 (First Dist., Div. 5.)

Who needs to know about this case: Class-action lawyers

Why it's important: Holds the trial court cannot refuse to approve class-action settlement term that is reasonable on the ground that the process used to determine the provision was not sufficiently "transparent." The critical issue is the fairness of the provision; not the transparency of the settlement process.

Synopsis: Sprint was sued under the CRLA by a class of its cell-phone customers, who complained that Sprint included secret programming locks in the telephone handsets that improperly prevented customers from changing service providers. The class settled, with the only relief to the class to be an agreement by Sprint to inform its customers about the handset locks, and to unlock handsets for customers who satisfied their contractual obligations to Sprint. The parties could not reach a settlement on an attorney-fee award for class counsel. The parties ultimately agreed to have the amount of fees determined in an arbitration, in which the minimum award would be $500,000, and the maximum would be $2,950,000. The minimum amount was roughly equal to counsel's claimed expenses, and the maximum was slightly less than the claimed expenses and a lodestar fee award.

The trial court found that the range of fees was reasonable, but it refused to approve the arbitration provision because objectors were not permitted to participate in the arbitration. Instead of having the fees arbitrated, the trial court resolved the issue itself, ultimately finding that the award should be $2.5 million in total fees and expenses. Sprint objected, arguing that the matter should have been decided in arbitration, and had that occurred, it was likely that the arbitrator would have issued a lower award than the one reached by the trial court.

The Court of Appeal found that the trial court abused its discretion in not ap-

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proving the arbitration provision. Having found that the range of fees provided in the provision was reasonable, there was no basis to refuse to approve it. There was little chance of collusion because the settlement was structured so that the fee award would not affect the relief awarded to the class, and there was no need for the objectors to participate beyond having their objections to the range of fees considered. The court explained that class actions were structured so that the rights of absent class members would be protected by the trial court when scrutinizing the fairness of the settlement and other proceedings, but that, "The very purpose of the class action is to relieve the absent members of the burden of participating in the action."

The court held that this error was harmless, however. Sprint was able to show that an arbitrator could have reached a different conclusion than the one reached by the trial court. But it could not show that a different decision-maker, considering the *same* evidence and argument, would have reached a different result.

Biscaro v. Stern

__ Cal.App.4th __, 2009 WL 4233154 (Second Dist, Div. 8.)

Who needs to know about this case: Attorneys whose clients require reasonable accommodation to participate in judicial proceedings

Why it's important: Makes clear that trial judges are required to grant accommodation requests that "may include ... furnishing, at no charge, ... auxiliary aids and services, equipment, devices ... readers, or certified interpreters for persons with hearing impairments." (Cal. Rules of Ct., rule 1.100.) The failure to grant a proper request is "structural error" that requires automatic reversal.

Synopsis: Daniele Biscaro filed a divorce action against Marc Stern. She then filed an application for a TRO arising from a fight between Stern and his adult son. When he appeared at the hearing to oppose the TRO, Stern requested courtroom accommodation of his neuropsychiatric disabilities that interfered with his ability to communicate and remember. He requested a neuropsychologist "facilitator." He gave the court a copy of a written request for accommodation that he had filed with court administrators in another proceeding. The court incorporated appellant's written request into the court's files. The court denied the request that the TRO issue ex parte and set the matter for a hearing. It promised Stern that it would rule on his accommodation request before the hearing. The record does not show that any ruling was made. Stern did not appear at the hearing, and the court granted the TRO. More than two months later, Stern moved for reconsideration, noting that he had made the accommodation request. The motion was denied as untimely.

The Court of Appeal reversed.

Stern suffers from permanent cognitive disabilities arising from multiple traumatic injuries to his frontal lobes and is permanently disabled. These injuries have resulted in neuropsychiatric impairment including short-term memory, organization, executive functioning, and concentration. Requesting accommodation of his disability, appellant asked the court for a "facilitator" who understands "traumatic brain injuries – a neuropsychologist." Rule 1.100 sets forth the requirements for accommodation requests, and the grounds a court may rely on to deny such requests. Stern's request was proper under the rule, and there is no indication in the record that granting Stern's request would have been undue burden on the court. The purpose of rule 1.100 is to allow meaningful involvement by all participants in a legal proceeding to the fullest extent practicable. Subdivision (b) declares: "It is the policy of the courts of this state to ensure that persons with disabilities have equal and full access to the judicial system. Rule 1.100 obligates a court to rule on every properly-presented request for accommodation that the court receives, and ordinarily the ruling must be in writing. The failure to rule on the request was tantamount to a denial, which the record did not support. The improper denial of an accommodation request is structural error, which requires per se reversal, with no showing of prejudice necessary.

Mahnke v. Superior Court

___Cal.Rptr.3d___ 2009 WL 4894601 (Second Dist., Div. 7.)

Who needs to know about this case: Lawyers who handle property-insurance cases involving an appraisal

Why it's important: Confirms that appraisers are treated like arbitrators, and bias in a party arbitrator is expected, and not a ground for disqualification. Party-selected arbitrators and appraisers are not subject to the disclosure requirements in the Arbitration Act, only the proposed neutral arbitrator or umpire is. The fact that appraiser was also an expert witness for the insured's counsel in a different case did not provide a basis for disqualification, but disqualification can be proper when the appraiser has a substantial business relationship between the appraiser and a party.

Synopsis: When an insurer and its insured fail to agree on the amount of loss following a fire, the Insurance Code requires each of them to select a "competent and disinterested appraiser," who are in turn required to agree on a "competent and disinterested umpire" (or request appointment of one by the court) to form a three-member panel to adjudge the amount of loss. (Ins.Code, § 2071.) California courts have concluded this adjudication must be conducted pursuant to the provisions of the California Arbitration Act, Code of Civil Procedure section 1280 et seq.

The Mahnkes' home was severely damaged in the Sylmar wildfires in November 2008. Their insurer, California Fair Plan Ass'n. ("Fair Plan"), adjusted their claim and offered payment, but the Mahnkes did not agree with Fair Plan's evaluation, and elected to proceed under the appraisal provisions of the policy. [Ed. note: Appraisal is mandatory to re-

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solve valuation disputes in fire (homeowner's policies), but if the loss results from an event that is a "government declared disaster," the insured is not required to rely on appraisal. (Ins. Code, § 2071.)] In 2001, the Legislature added the following language to the appraisal paragraph of section 2071: the following language was inserted into the Appraisal paragraph: "Appraisal proceedings are informal unless the insured and this company mutually agree otherwise. For purposes of this section, 'informal' means that no formal discovery shall be conducted, including depositions, interrogatories, requests for admission, or other forms of formal civil discovery, no formal rules of evidence shall be applied, and no court reporter shall be used for the proceedings."

Party-selected arbitrators are rarely neutral, and "bias is expected" and does not form a basis to vacate an arbitration award, unless it amounts to "corruption." But because Insurance Code section 2071 provides that the parties will select "a competent and disinterested" appraiser, who will select a "competent and disinterested umpire," the parties have, in effect, made a contractual agreement to select neutral appraisers. The disclosure provisions in the Arbitration Act, however, only apply to a proposed "neutral" arbitrator – not to party arbitrators. Subjecting party-selected appraisers to the same disclosure obligations as the proposed neutral umpire/arbitrator would be inconsistent with the Arbitration Act, and with the provision making appraisals "informal."

The court did recognize that party-selected appraisers may be disqualified when "a substantial business relationship" exists between the appraiser and a party, or the party's counsel. But the court held that the fact that the appraiser was also an expert witness for the insured's attorney in a different proceeding was not sufficient to compel disqualification.


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