

Appellate Reports and Cases in Brief

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

By Jeffrey Isaac Ehrlich

• **In-depth summaries**

Ameron Intern. Corp. v. Ins. Co. of the State of Pennsylvania

(2010) __ Cal.4th __, 2010 WL 4643779 (Cal. Supreme)

Who needs to know about this case: Lawyers whose clients are sued in administrative proceedings, who wish to have an insurer provide a defense

Why it's important: Appears to substantially erode the bright-line "plain meaning" construction of the term "suit" adopted in *Foster-Gardner, Inc. v. National Union Fire Ins. Co*. (1998) 18 Cal.4th 857, 887 [77 Cal.Rptr.2d 107], where the court held that a "suit" was a court proceeding initiated by filing a complaint. *Ameron* holds that the insurer must provide a defense in the administrative proceedings at issue because they are like a suit.

Synopsis: In *Foster-Gardner*, the Court held that the promise in a comprehensive general liability (CGL) insurance policy to defend a "suit" referred to a lawsuit, or more particularly "a court proceeding initiated by the filing of a complaint." Based on this plain-meaning approach, the Court held that administrative "remedial action order" that required the insured to monitor and remediate environmental contamination on its property was not a "suit" and therefore the insured's carriers did not owe a defense of the administrative proceedings.

Ameron involved a claim by a subcontractor under a government contract against its insurers for their refusal to defend or indemnify based on *Foster-Gardner* in connection with administrative proceeding before Department of Interior Board of Contract Appeals (IBCA). The Supreme Court held that because the proceedings in the IBCA closely paralleled an actual civil lawsuit in the superior court, a reasonable insured would expect a defense. Accordingly, the Court held that *Foster-Gardner* did not apply. The Court distinguished *Foster-Gardner*, but did not criticize or overrule it. Nevertheless, it is no longer possible for carriers to point to *Foster-Gardner* and deny coverage for any administrative proceeding. Now, it appears that insurers and courts must engage in case-by-case inquiry to determine whether the administrative proceeding at issue closely resembles a lawsuit. If so, then CGL carriers will be required to defend.

Grobeson v. City of Los Angeles

(2010) __ Cal.App.4th __ 2010 WL 4888251 (Second Dist. Div. 8)

Who needs to know about this case: Trial lawyers making or opposing a new-trial motion based on one juror's report of another juror's statement.

Why it's important: Affirms grant of new trial based on juror misconduct based on affidavit of one juror, who claimed that second juror told her that she had made up her mind in the middle of the trial. Holds that the second juror's statement was a "statement of bias" that showed she had prejudged the case. The rule disallowing juror affidavits showing juror's mental processes did not apply.

Synopsis: Grobeson, an LAPD Sergeant, filed a lawsuit against the City of Los Angeles for unlawful discrimination, harassment, and retaliation under the FEHA, and for constructive discharge. The jury ruled against him. The trial court granted Grobeson's motion for a new trial on the ground of juror misconduct as to the discrimination, retaliation and constructive discharge claims.

The motion was based on the affidavit of juror Wu, which stated that during a break in the trial, juror Kishiyama

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told him that she had made up her mind already, and was not going to listen to the rest of the stupid argument. In addition, one of Grobeson's lawyers submitted a declaration stating that she had spoken with Kishiayama by telephone after the trial, asking if she had any thoughts about the trial she was willing to share – and that one of Kishiyama's first statements was, "I made up my own opinion in the second week [of a five week] trial." Faer's declaration further stated that Kishiyama made it clear that the opinion that she had reached was that the plaintiff should lose.

Kishiyama executed a declaration in which she denied making the statements attributed to her by Wu. Kishiyama's declaration stated that she made up her mind only during jury deliberations, after the case was submitted to the jury. The trial court found that Kishiyama made the statement to Wu, and it rejected Kishiyama's declaration because it consisted largely of statements as to her mental processes and state of mind about how she reached her decision.

Evidence Code section 1150 allows a court to consider a challenge to a jury verdict based upon admissible evidence of "statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly." It makes inadmissible any evidence "to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined." Under section 1150, the only improper influences that may be proved to impeach a verdict "are those open to sight, hearing, and the other senses and thus subject to corroboration." Prior cases hold that a statement relating what a juror said can be admitted under section 1150 when "the very making of the statement sought to be admitted would itself constitute misconduct."

The *Grobeson* court explained that, "The phrase 'the very making of the statement sought to be admitted would itself constitute misconduct" has two aspects to it. First, it is a statement about the juror's state of mind. Second, the juror's state of mind is revealed as biased. "Kishiyama's statement that she had made up her mind during the case was a statement of bias, showing that she had prejudged the case.

The court held that Kishiyama's conduct improperly influenced the verdict, and that her statements were not hearsay because they were not admitted to prove the truth of the matter asserted, but rather as circumstantial evidence of her state of mind. The court further held that the trial court properly refused to consider Kishiyama's affidavit, because it chronicled her mental impressions and processes – which is precisely what section 1150 forbids.

Stewart v. Union Carbide Corp.

(2010) 190 Cal.App.4th 23 (Second Dist., Div. 5)

Who needs to know about this case: Lawyers litigating products-liability cases

Why it's important: Rejects defendant's attempt to shield itself from liability based on what the defendant called the "sophisticated purchaser" defense; and affirms award of punitive damages against Union Carbide for its failure to warn about the dangers of asbestos in its joint compound.

Synopsis: Plumber and plumber's wife brought action against asbestos supplier, Union Carbide, for negligence, strict products liability, and loss of consortium. Union Carbide supplied joint compound containing asbestos that was used by drywallers. When sanded, the compound released asbestos fibers into the air. As a plumber, plaintiff worked near drywallers on virtually every job, because the drywallers followed the plumbers, putting up walls as soon as the plumbers were finished.

Plaintiff testified that although he saw many boxes of joint compound during his career, he never saw a box with any warning about the hazards of asbestos, or even a warning that the compound contained asbestos, something he did not know. He never received any OSHA warning, or any other warning, on that subject. Safety meetings were dedicated to such things as the hazards of extension cords and falling objects.

Union Carbide asked the court to instruct the jury on what it called a "sophisticated purchaser" defense, and argued on appeal that the court wrongly refused the instruction. The instruction stated, "where the risk of using a hazardous product is already known, or should be known, by the purchaser of that product, the product supplier has no duty to warn of the product's potential hazards," that a bulk supplier's or raw materials supplier's duty to warn "is measured by what is generally known or should be known to purchasers of the raw product, rather than by the individual plaintiff's subjective knowledge," and that "the sale of a raw material to a sophisticated intermediary purchaser who knew or should have known of the risks of that raw material cannot be the legal cause of any harm the raw material may cause."

Union Carbide argued that its instruction falls under the rationale of Johnson v. American Standard, Inc.

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(2008) 43 Cal.4th 56, in which the California Supreme Court adopted the "sophisticated user" defense in California. *Johnson* recognized the rule that manufacturers have a duty to warn consumers about the hazards inherent in their products, but recognized an exception to that rule, holding that "sophisticated users need not be warned about dangers of which they are already aware or should be aware." In such circumstances the failure to warn was not the legal cause of the harm.

In rejecting Union Carbide's argument, the court held that *Johnson* did not impute an intermediary's knowledge to the plaintiff, or charge him with any knowledge except that which had been made available to him through his training and which, by reason of his profession and certification, he should have had. In contrast, Union Carbide's proposed instruction is not based on the theory that plaintiff had the opportunity to acquire any knowledge of the dangers of asbestos, let alone the obligation to do so. Instead, it contends that its customers knew or should have known (from public sources) of the dangers of asbestos, and that its duty to warn plaintiff is measured by the knowledge that its customers should have had. The Court stated that, "It is apparent that such a theory has nothing to do with *Johnson*."

•In Brief:

Wage & Hour Claims; Statute of Limitations; Unfair competition (Bus. & Prof. Code, § 17200). *Pineda v. Bank of America, N.A.* (2010) __ Cal.4th __ [117 Cal.Rptr.3d 377] (Cal.Supreme). Labor Code section 203(a) provides that, if an employer willfully fails to timely pay final wages of a terminated employee, "the wages of the employee shall continue as a penalty from the date they are due until paid or an action is filed to recover them, up to a maximum of 30 days. Section 203, subd.(b) provides that an employee may sue for "these penalties at any time before the expiration of the statute of limitations on an action for the wages from which the penalties arise." The issue before the Court was whether a claim for penalties alone (but not unpaid wages) was subject to the ordinary one-year limitation period for actions to recover penalties, or the three-year period for liabilities created by statute? The Court held that all claims under section 203 were subject to a single statute of limitations – the three-year statute. The Court also held that a claim for penalties under section 203 was not recoverable as restitution under Business & Professions Code section 17200 (the "UCL"), because employees have no ownership interest in the funds.

Mandatory duty; statutory interpretation; private right of action. *Doe v. Albany Unified School Dist.* (__ Cal.App.4th __) 2010 WL 4851088 (3rd Dist.) Education Code section 51210 requires that the adopted course of study for grades 1-6 "shall" include physical education for not less than 200 minutes each 10 school days. Plaintiffs, a third-grade student and his father, brought suit against the district and the California Department of Education (CDE) claiming that the district was not complying with the law and the CDE facilitates the noncompliance. The trial court dismissed the suit on demurrer, finding that the statute did not create a mandatory duty, and that there was no private right of action allowing the plaintiffs to enforce the statute. Reversed. "We conclude section 51210, subdivision (g), means what it says and that, while individual school districts may have discretion as to how to administer their physical education programs, those programs must satisfy the 200-minute-per-10-schoolday minimum. We further conclude the trial court abused its discretion in refusing to grant plaintiffs leave to amend their complaint to state a claim for a writ of mandate to compel compliance with section 51210, subdivision (g)." The opinion explores at length the concepts of "mandatory duty" created by statute, and when such a duty may be enforced by a private party, even in the absence of a provision creating a remedy for the statute's violation.

Contingency fee contracts; Business & Professsions Code, section 6147 *Arnall v. Superior Court of Los Angeles County* (2010) __ Cal.App.4th __, 2010 WL 4705515 (Second Dist., Div. 4.) Attorney who specialized in taxation matters and complex business transactions brought action to recover fees under service contracts with clients. The contracts provided that the clients would pay a $20,000 monthly retainer, plus a "success" fee amounting to two percent of specified economic savings based on the attorney's work. The written fee agreement did not contain a statement required by section 6147 in contingency-fee contracts that the fee was not set by law, but was negotiable between the attorney and client. The clients sought summary judgment on the attorney's claims, arguing that the failure to comply with section 6147 voided the agreements. The trial court denied the motion, and the Court of Appeal issued a writ. The court held that section 6147 applied outside the litigation

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context to any "contingency fee," and that the hybrid fee agreement that contained a contingent portion was a "contingency fee" and therefore subject to section 6147. Failure to comply with the statute on all respects therefore made the fee agreement void.


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