

Appellate Reports and Cases in Brief

Recent cases of interest to members of the plaintiffs' bar

By Jeffrey Isaac Ehrlich

Du v. Allstate Ins. Co.

(9th Cir. 2012)__ F.3d __

Who needs to know about this case: Lawyers who handle insurance bad-faith cases

Why it's important: This is the amended opinion in *Du*, following the issuance in June 2012 of a very policyholder-friendly opinion. The new amended opinion essentially omits the policyholder-friendly dictum, but reaches the same holding – that the trial court correctly declined to give the requested instruction at issue.

Synopsis: Joon Kim's car collided with a second car with four occupants, which included Yang Du. Kim had an automobile liability policy with Allstate, with limits of $100,000 per claim, $300,000 aggregate. Du's lawyer submitted a $300,000 global demand for all four occupants of the car. The demand documented Du's medical costs at $108,000, and the costs of the other three occupants at roughly $10,000 each. Allstate said it had insufficient information to access the demand as to the other three passengers, and suggested that Du's claim be settled individually. Du ultimately rejected a $100,000 offer from Allstate. Du eventually filed a personal-injury lawsuit against Kim, and obtained a judgment in excess of $4 million. Allstate paid the $100,000 to partially satisfy the judgment, and Kim assigned his bad-faith claim to Du for a covenant not to execute.

Du's bad-faith claim against Allstate went to trial in federal district court. Du proposed an instruction based on CACI 2337, which stated that in determining whether Allstate breached the implied covenant of good faith and fair dealing, the jury could consider whether Allstate "did not attempt in good faith to reach a prompt, fair, and equitable settlement of Yan Fang Du's claim after liability [of its insured Kim] had become reasonably clear." The district court rejected this instruction, concluding that an insurer has no duty to initiate settlement discussions in the absence of a settlement demand from the third-party claimant. It also ruled that there was no factual foundation for the instruction because the issue of settlement was broached sufficiently early in the process.

Affirmed. In its original opinion, the panel affirmed the district court's refusal to give the instruction on the ground that the insurer's conduct showed that it raised the issue of settlement in a timely fashion, considering the information it had. But the original decision also contained an extended legal analysis (all of it dicta), explaining that under California law, the duty to settle under the implied covenant includes the duty to effectuate settlement even in the absence of a demand. It also contained a discussion stating that the genuine-dispute doctrine did not apply in third-party liability cases. This discussion prompted a fair amount of discussion in insurance-law circles, with plaintiffs generally applauding it and defendants contending that it misapplied California law.

In the amended opinion, the panel essentially eliminated this controversial dicta. The amended opinion notes that the authorities on whether an insurer has a duty to settle even if no demand has been made are in conflict, and notes cases suggesting that the genuine-dispute doctrine does not apply to the decision not to settle a case, but concludes that it need not resolve those issues because the factual record in the case did not support the requested instruction.

Short(er) takes

Statute of Limitations, tolling agreements, Code of Civil Procedure section 360.5 *Don Johnson Productions v. Rysher Entertainment, Inc.* (2012) __ Cal.App.4th __ (2d Dist. Div. 5)

In 1994, plaintiff Don Johnson Productions, Inc. ("DJP") and Rysher Entertainment entered into a contract for the services of actor Don Johnson for the production of the *Nash Bridges* television show. In May 2002, DJP and Rysher entered into a written tolling agreement that tolled the limitations period for a dispute between them about compensation owed to DJP. That agreement was never rescinded. DJP filed suit against Rysher in February 2009, winning a judgment in excess of $15 million.

On appeal, Rysher argues that DJP's suit was untimely by virtue of Code of Civil Procedure section 360.5. That provision states that no "waiver" of the statute of limitations shall be effective for more than four years, and that such waiver can be renewed once, in writing. Rysher argued that the tolling agreement expired by operation of law in May 2006, and was never renewed, making DJP's suit untimely. The Court of Appeal, in a split decision authored by Presiding Justice Turner, held that a tolling agreement did

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not constitute a "waiver" of the statute of limitations, and therefore was not within the scope of section 360.5. In dissent, Justice Mosk argued that a tolling agreement fell within the scope of section 360.5, because its purpose was to waive the statute of limitations. [Editors' note: Be aware of section 360.5.]

Summary judgment; separate statements; trial court discretion to grant motion based on insufficient separate statement, *Batarse v. SEIU, Local 100* (2012) __ Cal.App.4th __ (5th Dist.)

Batarse was a former attorney who resigned from the state bar, who was hired by SEIU as a Union Resource Center Representative. He was terminated during his one-year probation period, and sued, alleging, inter alia, discrimination based on race and gender. SEIU moved for summary judgment. The trial court found that Batarse's opposition to the motion failed to include a separate statement of disputed and undisputed facts that conformed to the requirements of Code of Civil Procedure section 437c, subd. (b)(3) and rule 3.1350 of the California Rules of Court, and granted the motion on that basis. Affirmed. The appellate court held that the defects in Batarse's separate statement were sufficient to justify granting the motion. His failure to include disputed or undisputed facts to rebut the SEIU's showing was not simply a procedural defect that could have been cured by a continuance. And there was no prejudice to the ruling, because the record failed to contain any facts to rebut the SEIU's showing that it terminated Batarse based on misrepresentations he made about the basis for his resignation from the bar.

Arbitration; renewal of motion to compel arbitration, *Phillips v. Sprint PCS* (2012) __ Cal.App.4th __ (1st Dist., Div. 3.)

In 2003 Sprint customers filed a lawsuit against Sprint alleging the misrepresentation of cell-phone rates. In 2006 the trial court denied Sprint's motion to compel arbitration, finding that the provisions in the Sprint contracts waiving the right to class actions were unconscionable. After the US Supreme Court's decision in *AT&T Mobility LLC v. Concepcion* (2011) 131 S.Ct. 1740, Sprint renewed its motion to compel arguing that the law had changed. The trial court granted the motion. Phillips appealed, arguing that the initial order denying arbitration was res judicata, and precluded a renewed motion and reconsideration. Treating the non-appealable order granting the motion to compel arbitration as a writ petition, the appellate court affirmed. The ten-day limit to bring a motion for reconsideration under Code of Civil Procedure section 1008 does not apply to reconsideration based on a change in the law. *Concepcion* indisputably changed the legal landscape and undermined the foundation of the trial court's order denying arbitration. The decision to grant reconsideration was not an abuse of discretion. The court also held that the principles of res judicata (claim preclusion) did not apply to bar the trial court from reconsidering its earlier ruling, because there had been no prior judgment. The court also rejected plaintiff's claim that Sprint's failure to appeal the earlier denial of the motion to compel arbitration resulted in a waiver of the right to compel arbitration, accepting Sprint's argument that an appeal would have been futile given the prior state of the law.



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