Appellate Reports and cases in brief

Recent cases of interest to members of the plaintiffs' bar

By Jeffrey Isaac Ehrlich

Standard Fire Ins. v. Knowles

(2013) __ U.S. __, 133 S.Ct. 1345 (U.S. Supreme)

Who needs to know about this case? Lawyers bringing class-action lawsuits trying to avoid removal to federal court under the Class Action Fairness Act ("CAFA") by limiting the amount in controversy to less than $5 million.

Why it's important: Holds that this tactic is not effective in keeping class actions out of federal court.

Synopsis: CAFA gives federal district courts original jurisdiction over class actions in which, among other things, the matter in controversy exceeds $5 million in sum or value, 28 U.S.C. § 1332(d)(2), (d)(5), and provides that to determine whether a matter exceeds that amount the "claims of the individual class members must be aggregated." (§ 1332(d)(6).) To avoid removal under CAFA, some plaintiffs were agreeing in their complaints that their recovery would not exceed $5 million. Some circuits had expressly held that this approach would preclude removal under CAFA. (*Rolwing v. Nestle Holdings, Inc.* (8th Cir. 2012) 666 F.3d 1069, 1072 ["a binding stipulation limiting damages sought to an amount not exceeding $5 million can be used to defeat CAFA jurisdiction".]) The Ninth Circuit appeared to follow this rule. (See, e.g., *Lowdermilk v. U.S. Bank National Ass'n* (9th Cir. 2007) 479 F.3d 994, 999, n 5.)

In *Standard Fire Ins.*, a unanimous U.S. Supreme Court abrogated *Rolwing* and held that a class plaintiff's stipulation that the amount of the class's damages would not exceed $5 million is binding only on the class representative – and not on the unnamed class members. "[A] plaintiff who files a proposed class action cannot legally bind members of the proposed class before the class is certified." Because the pre-trial stipulation does not bind anyone but the class representative, it is not effective to reduce the value of the putative class's claims, and cannot be used to defeat removal under CAFA.

US Airways v. McCutcheon

(2013) __ U.S.__, 133 S.Ct. 1537 (U.S. Supreme)

Who needs to know about this case? Lawyers handling personal-injury cases for clients who have health insurance.

Why it's important. Holds that if the insurance was subject to ERISA (which most health coverage is), and the plan contains a reimbursement provision, that provision has to be enforced as written, and cannot be modified by equitable defenses. Such defenses can, however, be used as "gap fillers" to interpret ambiguous provisions.

Synopsis: McCutcheon, a U.S. Airways employee, was injured in a car accident with a third party. The U.S. Airways health plan paid $66,866 in medical costs. The plan contained the following reimbursement provision:

"If [US Airways] pays benefits for any claim you incur as the result of negligence, willful misconduct, or other actions of a third party, ... [y]ou will be required to reimburse [US Airways] for amounts paid for claims out of any monies recovered from [the] third party, including, but not limited to, your own insurance company as the result of judgment, settlement, or otherwise."

McCutcheon settled his case against the third party for $110,000, and paid his attorney a 40 percent contingency fee. Hence he netted $66,000. US Airways sought reimbursement of the entire amount of its costs. When McCutcheon refused to pay, the plan filed suit against him under § 502(a)(3) of ERISA, seeking "appropriate equitable relief." McCutcheon defended with two equitable defenses – the "made whole" rule, arguing that the plan had no right to reimbursement before he had been made whole for all his damages; and the common-fund doctrine, arguing that the plan's reimbursement had to be reduced to reflect the amount of the attorney's fees incurred to produce the settlement. The district court ruled in favor of the plan; the Third Circuit reversed based on the equitable defenses, and the U.S. Supreme Court reversed.

The Court held that the equitable made-whole rule could not trump the language of the plan, which conferred a reimbursement right on the plan. But because the plan was silent on about how the costs of recovery would be paid, the common-fund rule would be used as a rule of "interpretation" to fill that interpretive gap. The Court made clear, however, that if plans included language that addressed the way costs of recovery would be addressed, that language would control. It also noted that if plans sought to avoid the common-fund rule, it would lead subscribers to decline to enforce their rights, forcing the plans to attempt to collect.

Corenbaum v. Lampkin

(2013) __ Cal.App.4th __ (2d Distr., Div. 3.)

Who needs to know about this case? Lawyers handling personal-injury claims where the client's medical bills have been paid by insurance.

Why it's important. Addresses several questions left open by *Howell v. Hamilton Meats* concerning the use of the "billed" amount for healthcare expenses when an insurer has paid a lower negotiated amount – including whether experts can rely on such amounts. (Nope.)

Synopsis: Corenbaum and Carter were injured when a vehicle driven by Lampkin collided with the taxi they were riding in. At trial, the jury awarded Corenbaum $1.8 million, and Carter $1.4 million in compensatory damages. Although their medical expenses were paid by health insurance, at trial the jury was presented with the full "billed" amount of the medical bills, not the discounted amount that the providers had agreed to accept from the insurer as full payment. Lampkin filed a post-trial motion to reduce the compensatory damages based on the discounted medical bills, but the trial court did not rule on it before its jurisdiction to deal with post-trial motions expired. *Howell* was decided after the verdict. On appeal, Lampkin raised a number of issues relating to the admission of the full billed amount of the bills. The Court of Appeal ruled on those issues as follows:

1. Evidence of the full billed amount is not relevant to the amount of past medical expenses. The court held that the reasoning of *Howell* ultimately leads to the result that, where medical providers agree to accept a discount from their full billed amount as full payment for their services, evidence of the full amount billed is not relevant for any purpose concerning the plaintiff's past medical expenses. But the evidence of the amount that the providers have agreed to accept is admissible, as long as the source of the payment is not presented to the jury (and satisfies other rules of evidence).

2. Evidence of the full billed amount for past medical services is not relevant to the determination of the damages for future medical expenses. While *Howell* did not reach this issue, and seemed to leave open the possibility that the full amount of billed expenses might be relevant to other issues, including future medical expenses, the reasoning the Supreme Court relied on in *Howell* precludes this type of use. The *Howell* court held that the full billed amount of past medical expenses "is not an accurate measure of the value of medical services" in light of the way the market for medical services functions. Accordingly, the amount billed is not relevant and therefore not admissible.

3. Experts cannot rely on the full billed amount to offer an opinion on future medical expenses. Since the amount of expenses billed has no relevance to the value of those services, it is not information that experts can rely on to formulate opinions that may be presented to the jury. (Ed. note – the opinion does not however, say that experts must assume that a plaintiff will continue to have insurance that will cover future medical expenses at the same discounted rate as the past expenses; only that the undiscounted amount of the past expenses is not relevant to future expenses.)

The court held that the admission of the full billed amount was prejudicial error that could not be cured with a post-judgment reduction. It ordered a new trial on the amount of compensatory damages.

Hernandez v. Amcord, Inc.

(2013) __ Cal.App.4th __ (2d Dist. Div. 1.)

Who needs to know about this case? (1) lawyers who handle asbestos cases; (2) lawyers who rely on medical evidence for causation issues; (3) lawyers in cases where there is evidence that the defendant lobbied a regulator (which shows the defendant's knowledge of the harmfulness of its conduct)

Synopsis: The family of Arnulfo Hernandez filed a wrongful-death action after he died of mesothelioma. At trial, the family introduced the testimony of Richard Lemen, Ph.D., an epidemiologist – a field of medicine that is the study of disease patterns and populations. He testified that an epidemiologist studies what causes disease, and then uses that information to implement disease prevention. He opined that a worker who poured a 94-lb sack of asbestos-containing gun plastic cement would be at risk of developing mesothelioma if the asbestos fibers were respirable and airborne. The family also introduced the testimony of Richard Kradin, M.D., who testified that based on Mr. Hernandez's exposure at work to various asbestos-containing products, including the defendant's plastic gun cement, that it was his opinion to a reasonable degree of medical probability that Mr. Hernandez's mesothelioma was caused by asbestos." The trial court granted the defendant's nonsuit motion, finding that because Dr. Lemen was not an M.D., he could not offer an opinion on causation, and that Dr. Kradin failed to offer an opinion that the defendant's product was a substantial factor in causing the decedent's illness. Reversed.

In asbestos cases, causation is a two-part inquiry. Plaintiff must first set forth sufficient evidence to show some threshold exposure to the defendants' asbestos-containing product. Second, plaintiff must establish to a reasonable medical probability that exposure to the defendant's product was a substantial factor in bringing about the injury. The court held that the plaintiff's evidence met this standard. The evidence showed that Mr. Hernandez used the defendant's product "lots of times" and the product was packaged in 94-lb sacks, which would create substantial dust when they bag was cut open and when the contents were dumped in a mixer. Testimony from Dr. Lemen was admissible to satisfy the

second factor, even though he was not an M.D. "Qualifications other than a license to practice medicine may qualify a witness to offer a medical opinion." Collectively, the testimony of plaintiff's witnesses was sufficient to allow the jury to find that exposure to defendant's product was a substantial factor in causing the decedent's asbestos-related disease. No recitation of specific words or phrases is necessary to establish causation.

At trial, the plaintiffs sought to introduce evidence that defendant had lobbied Cal.OSHA for an exemption to the 1975 statutory provisions banning asbestos-spray construction products. Plaintiffs argued that this evidence was relevant to show that defendant negligently took steps to continue to sell a product that it knew was dangerous. The trial court excluded the evidence of lobbying under the *Noerr-Pennington* doctrine, which shields defendants from liability based on their legitimate right to petition government officials. This was error, because the *Noerr-Pennington* doctrine is not a rule of evidence; it is a liability shield. This means that a corporation's petitioning government officials may not itself form the basis of liability – but that petitioning activity may be admissible if otherwise relevant to show the purpose and character of other actions by the corporation.

Short(er) takes

Sanctions, frivolous appeals: *Kleveland v. Seigel & Wolensky, LLP* (2013) __ Cal.App.4th __ (4th Dist., Div. 1.) Scott Leach challenged the way that Kleveland handled a trust, as trustee. His probate action spawned two prior appeals. In appeal 1, the court affirmed the trial court's ruling that Leach's petition to remove Kleveland as trustee was filed in bad faith, and for an improper purpose. In appeal 2, the court affirmed the trial court's approval of an accounting and plan to distribute trust assets. Kleveland then sued Leach and his attorneys, Seigel & Wolensky, for malicious prosecution arising out of the prior probate litigation. The attorney defendants filed an anti-SLAPP action, which the trial court denied, finding that Kleveland was likely to prevail on the merits. The attorneys appealed the denial. The Court of Appeal affirmed the denial, and sanctioned the attorneys for filing a frivolous appeal. The Court found that opening brief for the attorneys omitted critical facts – such as the prior finding that Leach's probate action had been determined to have been filed in bad faith and for an improper purpose. The court found that the attorney defendants also misrepresented the record, and ignored established case law without explanation or justification. Because the appeal of the denial of the anti-SLAPP motion indisputably had no merit, and any reasonable attorney would agree that the appeal was "totally and completely without merit," the court sanctioned the attorney defendants, ordering them to pay Kleveland's attorney's fees of $52,727, as well as a sanction to the court of $8,500.

Civil Rights, Unruh Act, HIV status, discrimination: *Maureen K v. Tuschka* (2013) __ Cal.App.4th __ (2d Dist., Div. 6.)

Plaintiff was HIV positive. Because she had experienced severe side effects, she had stopped taking her anti-retroviral medication, under the supervision of the doctor treating her for HIV condition. She needed treatment to repair an umbilical hernia. Minutes before surgery, the anesthesiologist noted that she was HIV positive and not taking anti-viral medications. He refused to proceed with the surgery and plaintiff was turned away. She sued him for violating the Unruh Act, which prohibits discrimination against individuals with disabilities, including their HIV status. At trial, the court submitted the issue of whether the plaintiff was disabled for the purposes of the Unruh Act to the jury, which returned a verdict in favor of the anesthesiologist. Reversed. Under the statutory framework, people with HIV are considered disabled as a matter of law. There was no issue in this regard to present to the jury.

The court explained, "No medical doctor should have liability for refusing to perform a procedure that he or she believes will harm the patient. That is not what happened here. Here, an HIV-positive patient was denied medically necessary surgery because an anesthesiologist unreasonably feared for his own safety and that of the operating room staff. That denial was based on her HIV-positive status and was a violation of the Unruh Civil Rights Act."


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