

Appellate reports and cases in brief

Recent cases of interest to members of the plaintiffs' bar

By Jeffrey Isaac Ehrlich

Short takes

Unfair competition law (UCL), False Advertising Law (FAL); perpetual "sales": *Hinojos v. Kohl's Corp.* (2013) __ F.3d __ (9th Cir.)

Hinojos purchased several items of apparel and luggage at a Kohl's store that were advertised as having been substantially marked down in price during a "sale" from the items' "regular" prices. In reality, the items were routinely sold by Kohl's at the advertised "sale" price. The FAL, Bus. & Prof. Code, § 17501 bars merchants from advertising a former price for an item unless the former price was the "prevailing market price" within three months of the advertisement. Hence, the FAL, which is incorporated into the UCL, expressly bars the type of conduct that Kohl's was alleged to have engaged in. The district court nevertheless dismissed Hinojos's UCL claim on the ground that he could not meet the UCL's standing requirement, of having lost money or property as a result of the alleged unfair business practice. Reversed.

Overtime pay; Executive exemption: *Heyen v. Safeway, Inc.* (2013) __ Cal.App.__ (2d Dist., Div. 4.)

Heyen worked as an assistant supermarket manager for Safeway. After Safeway terminated her employment, she sued to recover unpaid overtime pay. She claimed that she should have been classified as "nonexempt" because she regularly spent more than 50 percent of her time doing nonexempt tasks like stocking shelves or bagging groceries. She prevailed, and recovered $26,184. Safeway appealed, arguing that the court should have determined whether she was simultaneously performing exempt and nonexempt work – such as actively managing the store while also bagging groceries. The court rejected this approach as inconsistent with California law. The federal regulations that are incorporated into the California Wage Order, on which Safeway relied, acknowledge that nonexempt work can be considered exempt when performed by a manager to contribute to the smooth functioning of the department for which the manager is responsible. Hence, the proper test is the purpose of the manager's actions. The regulations do not adopt the "multi-tasking" approach proposed by Safeway.

Dramshop liability; furnishing alcohol to minors; Civil Code section 1714, subd. (c) and (d): *Rybicki v. Carlson* (2013) __ Cal.App.3d __ (2d Dist., Div. 4.)

Rybicki was riding his bicycle at 7:15 a.m. on a Sunday morning, when he was struck by a car being driven by Jacyln Garcia, a minor. Garcia was coming home from a party at the home of Garette Shoemaker, an adult. She was driving the wrong way on the road when she struck Rybicki, and was intoxicated. Rybicki sued Shoemaker, Garcia, and the passengers in Garcia's car, alleging that they were adults who had supplied her with alcohol, or had conspired to do so. The trial court dismissed the case under Civil Code section 1714, subd. (c) and (d). Affirmed. Civil Code section 1714, subd. (c) eliminates liability to a social host for furnishing alcohol to a person who causes injury to or the death of a third person, except as provided in section 1714, subd. (d). That subsection, in turn, does permit liability against a parent, guardian, or other adult who *at his or her residence* furnished alcohol to a minor. Rybicki could therefore state a claim against Shoemaker, but not the other passengers in Garcia's car. Although they were adults who had furnished her with alcohol, they had not done so in their residence, and therefore a claim against them did not satisfy the requirements of section 1714, subd. (d).

Class-action certification; wage-and-hour claims; individual damage calculations: *Leyva v. Medline Industries, Inc.*, __ F.3d __ (9th Cir. 2013).

Leyva filed a class action against her employer, Medline, seeking to represent 538 current and former employees, alleging violations of California labor laws. The district court denied class certification on the ground that each class member's claim would require individualized inquiries into the amount of damages. Reversed. "Damage calculations alone cannot defeat class certification." Damage calculations are almost always individualized

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in wage-and-hour cases, and courts routinely certify classes more complex than the ones proposed by Leyva.

Elder abuse: *Winn v. Pioneer Medical Group* (2013) __ Cal.App.4th __ (2d Dist. Div. 8)

Elizabeth Cox began receiving medical treatment from the defendant physicians in 2000. By 2004, they knew she had impaired blood flow in her leg, but deliberately failed to treat her for that condition. In 2007, one of the defendants diagnosed her with peripheral vascular disease, but failed to refer her to a specialist. The last day that defendants saw Mrs. Cox they noted in her chart that she had lost an abnormal amount of weight, but made no referral for a vascular consult. The next day she was hospitalized with gangrene, and her right foot was black because of tissue death caused by long-term vascular insufficiency. Mrs. Cox required progressively higher amputations of portions of her right leg, and was finally hospitalized for blood poisoning, from which she died. Her daughter sued the defendants for elder abuse. The defendants demurred, arguing that they could not be held liable under the Elder Abuse Act because they did not have custodial obligations toward Mrs. Cox, and that their conduct may have been negligent, but not the type of "reckless neglect" necessary for liability under the Elder Abuse Act. The trial court sustained the demurrer. Reversed. After a lengthy analysis, the court majority concluded that there is "no support in the statute or the cases for the claim that a health care provider without custodial obligations is exempt from the Elder Abuse Act." The majority also found that whether the defendants' conduct constituted "reckless neglect" constituted a factual inquiry for the jury. Bigelow, J., dissented.

Debt collection; Fair Debt Collection Practices Act: *Heritage Financial LLC. v. Monroy* (2013) __ Cal.App.4th __ (1st Dist., Div. 2.)

Monroy purchased real property in Richmond, and executed two promissory notes secured by a trust deed. She defaulted, resulting in a foreclosure of the senior trust deed. Heritage Financial acquired the junior trust deed and then sued Monroy for fraud based on alleged misstatements she made in her application to the original lender. The court dismissed the fraud claims on demurrer, finding that the original lender had assigned only its contract rights, not any tort claims. The trial court granted Monroy's motion for summary judgment on her cross-complaint for violations of the Fair Debt Collections Practices Act ("FDCPA"), awarding her a dollar in nominal damages, and attorney's fees. Heritage Financial appealed. Reversed. The FDCPA forbids a debt collector from using "any false, deceptive, misleading representation or means in connection with the collection of any debt." A violation of the Act includes "the threat to take any action that cannot legally be taken." Heritage Financial's fraud claim against Monroy violated this provision. It not only had no merit, as the trial court found, but as the junior creditor, Heritage Financial had been foreclosed out by the foreclosure of the senior trust deed before it acquired the junior trust deed and note. It therefore had no valid interest to pursue against Monroy under the California antideficiency statutes.

Arbitration agreements; unconscionability: *Vargas v. SAI Monrovia B.* (2013) __ Cal.App.4th __ (2d Dist. Div. 1.) Vargas purchased a Mini automobile from SAI, doing business as Assael BMW/Mini, and financed the transaction through the dealership. The purchase contract and financing agreement, titled "Retail Installment Sale Contract" was printed on both sides of a single document, which was 8.5 inches wide and 26 inches long. Plaintiffs were required to sign and initial the front of the contract in 12 separate places, but no signatures or initials of the contract required on the back. On the back, at the bottom of the page, the last provision was an arbitration clause. That clause included a provision barring class arbitrations. When the auto developed problems which the dealer did not or could not resolve, Vargas filed a class action, alleging nine causes of action, including violations of the Consumer Legal Remedies Act, Beverly-Song Consumer Warranty Act, and UCL. SAI moved to compel arbitration and strike the class-action allegations. The court granted the motions and Vargas appealed. Reversed. The court found that the elements of both procedural and substantive unconscionability were met, which rendered the arbitration clause unenforceable. The court noted that Vargas was not given the contract to read and to initial as he did so, but was instead told to "sign here" at the various spots where a signature or initial was required. This established procedural unconscionability. The substantive element was satisfied by the agreement's asymmetric terms, including one that allows a party to appeal any award over $100,000 to a three-arbitrator panel; a provision allowing an appeal if an award includes injunctive relief; a provision forcing the appealing party to bear the costs associated with the appeal; and a provision exempting self-help remedies from arbitration.

Attorney's fees; Civil Code section 1717, Civil Code section 1021: *Maynard v. BTI Group, Inc.* (2013) __ Cal.App.4th __ (1st Dist., Div. 3.)

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Maynard hired BTI as the broker to sell her retail business. The business was sold, but the buyer ultimately filed for bankruptcy, and the full purchase price for the business was not paid. Plaintiff sued BTI for the balance, alleging several causes of action. In a bench trial, the court found BTI liable on a negligence theory, awarding Maynard damages of $24,000. But it found against Maynard on all the other causes of action, including breach of contract. The listing agreement included a provision awarding attorney's fees to the prevailing party in any litigation or arbitration. The trial court found that Maynard was the prevailing party and awarded her fees. Affirmed. The attorney's fees provision allowed an award of fees to the prevailing party, and did not limit or specify that fees were only recoverable for a claim brought on the contract. Accordingly, Maynard was the prevailing party and entitled to an award of fees.

Timing of memorandum of costs; extension of time to file for service by mail; Code of Civil Procedure section 1013; *Nevis Homes, LLC v. CW Roofing, Inc.* (2013) __ Cal.App.4th __ (2d Dist. Div. 1.)

Nevis filed a cross-complaint against CW in a construction-defect lawsuit brought by a homeowner's association. The case settled and Nevis dismissed its cross-complaint against CW and mailed a notice of dismissal. CW filed its cost bill 19 days later. Nevis moved to strike the cost bill as untimely. The trial court granted Nevis's motion to tax costs. Affirmed as modified. The court held that CW's cost bill was timely filed. Rule 3.1700 (a)(1) of the California Rules of Court requires a party seeking costs to file its memorandum of costs within 15 days after service of written notice of entry of judgment or dismissal. But where that notice is served by mail, the provisions of Code of Civil Procedure section 1013 apply, and provide an additional five days for the party served to file the memorandum of costs.

Clear and convincing evidence; CACI 201; punitive damages: *Nevarrez v. San Marino Skilled Nursing and Wellness Centre* (2013) __ Cal.App.4th __ (2d Dist., Div.4.)

CACI 201 defines "clear and convincing evidence. It says, "[c]ertain facts must be proved by clear and convincing evidence which is a higher burden of proof. This means that the party must persuade you that it is highly probable that the fact is true." The defense argued that this definition is too weak, and that the trial court erred in refusing to supplement the instruction that said, "Clear and convincing evidence requires a finding of high probability that the evidence be so clear as to leave no substantial doubt; sufficiently strong as to command the unhesitating assent of every reasonable mind." The appellate court held that it was not error for the trial court to reject the instruction, noting that the cases do not require augmentation of the "highly probable" standard, and noting that "the proposed additional language is dangerously similar to that describing the burden of proof in criminal cases."


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