

Appellate Reports and cases in brief

Several recent opinions issued by The California Supreme Court of interest to Plaintiff *readers*

By Jeffrey Isaac Ehrlich

Arbitration; Federal Arbitration Act preemption; class-action waivers; **Private Attorneys General Act of 2004 (PAGA)**: *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) __ Cal.4th __ (Cal Supreme).

Plaintiff Iskanian worked as a driver for CLS Transportation. He signed a written agreement that provided that "any and all claims" arising out of his employment would be submitted to binding arbitration. The agreement included a class-action waiver. In 2006, Iskanian filed a class action against CLS alleging that it failed to pay overtime, provide meal and rest breaks, etc. CLS moved to compel arbitration, and its petition was granted. Shortly thereafter, the Supreme Court issued its opinion in *Gentry v. Superior Court* (2007) 42 Cal.4th 443, which held that class-action waivers were unenforceable when class arbitration was likely to be a significantly more practical way of vindicating the rights of affected employees. Relying on *Gentry*, the Court of Appeal issued a writ, directing the trial court to reconsider its decision in light of *Gentry*. On remand, CLS voluntarily withdrew its petition to compel arbitration. In 2011, the U.S. Supreme Court issued its opinion in *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. __ [131 S.Ct. 1740]. Based on *Concepcion*, CLS renewed its petition. Held:

- The U.S. Supreme Court's decision in *Concepcion* abrogated *Gentry*. *Concepcion* held that requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the Federal Arbitration Act ("FAA"). *Gentry's* rule against class-action waivers falls within the rule adopted in *Concepcion*, and is therefore preempted by the FAA. States cannot require a procedure that interferes with fundamental attributes of arbitration — even if it is desirable for unrelated reasons.

Concepcion held that the FAA prevents states from mandating or promoting procedures that were incompatible with arbitration. The rule adopted in *Gentry* ran afoul of that principle, and therefore was preempted by the FAA.

- CLS did not waive the right to compel arbitration by withdrawing its petition after the matter was remanded in light of the then-new decision in *Gentry*. Both parties concede that the class-action waiver in the agreement would not have survived under *Gentry*. It was therefore futile for CLS to press its arbitration demand while *Gentry* remained the controlling law. Even though Iskanaian expended resources on discovery and to press the case forward in the trial court, CLS had not acted unreasonably in withdrawing its petition. "Where, as here, a party promptly initiates arbitration and then abandons arbitration because it is resisted by the opposing party and foreclosed by existing law, the mere fact that the parties then proceed to engage in various forms of pretrial litigation does not compel the conclusion that the party has waived its right to arbitrate when a later change in the law permits arbitration."
- The agreement provides for not only class actions, but also of "representative actions." These would include representative actions under PAGA. Under that statute, an "aggrieved employee" may bring a civil action personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations. (Lab. Code, § 2699, subd. (a).) Of the civil penalties recovered, 75 percent goes to the Labor and Workforce Development Agency, leaving the remaining 25 percent for the "aggrieved employees." (*Id.*, § 2699, subd. (i).) The civil penalties recovered on behalf of the state under the PAGA are distinct from the statutory damages to which employees may be entitled in their individual capacities. A PAGA representative action is therefore a type of *qui tam* action. Under Civil Code sections 1668 and 3513, an employee's right to bring a PAGA action is unwaivable.
- The rule against PAGA waivers does not frustrate the FAA's objectives because the FAA aims to ensure an efficient forum for the resolution of private disputes, and a PAGA action is not a private dispute. "Simply put, a PAGA claim lies outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship. It is a dispute between an employer and the state, which alleges directly or through its agents – either the Labor and Workforce Development Agency or aggrieved employees – that the employer has violated the Labor Code.

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Attorney's fees on appeal; Enforcement of Judgments Law; time limits: *Conservatorship of McQueen* (2014) __ Cal.4th __ (Cal. Supreme).

Under Code of Civil Procedure section 685.040, a judgment creditor is entitled to the reasonable and necessary costs of enforcing the judgment, including statutory attorney fees "otherwise provided by law." But a motion to claim enforcement costs must be made "before the judgment is satisfied in full." (§ 685.080, subd. (a).) McQueen's conservator obtained an award on behalf of McQueen for elder abuse. Welfare and Institutions Code section 15657.5, subdivision (a) provides an award of attorney fees to a prevailing plaintiff.

Defendant Reed appealed, but the judgment was affirmed. The parties settled a separate action plaintiff brought after judgment seeking to prevent or reverse Reed's transfer of real property to third persons. The question presented was whether plaintiff's motion to recover attorney fees incurred both on appeal from the elder abuse judgment and in the separate action over real property assets was subject to the time limitation of section 685.080, namely that it be made before the judgment was fully satisfied. Held:

As to attorney fees on appeal from the elder abuse judgment, the motion was not subject to section 685.080, because plaintiff's efforts in opposing defendant's appeal of the judgment were not undertaken to enforce the judgment but to defend it against reversal or modification. Where a statute provides for attorney fees, they are generally available both at trial and on appeal, and the procedure for their recovery is set out by court rule rather than by section 685.080.

Plaintiff's separate action to prevent transfer of assets was, however, brought in aid of the judgment's enforcement, and fees incurred in that action could only be recovered under section 685.040, making them subject to the time limits of section 685.080, subdivision (a).

Architects; construction defects; duty of care: *Beacon Residential Community Ass'n v. Skidmore, Owings & Merrill, LLP* (2014) __ Cal.4th __ (Cal. Supreme).

A homeowners association sued a condominium developer and various other parties over construction-design defects that allegedly make the homes unsafe and uninhabitable for significant portions of the year. Two defendants were architectural firms, which allegedly designed the homes in a negligent manner but did not make the final decisions regarding how the homes would be built. The trial court sustained the architect's demurrers without leave to amend, reasoning that an architect who makes recommendations but not final decisions on construction owes no duty of care to future homeowners with whom it has no contractual relationship. The Court of Appeal reversed. Held: Affirmed. "An architect owes a duty of care to future homeowners in the design of a residential building where, as here, the architect is a principal architect on the project – that is, the architect, in providing professional design services, is not subordinate to other design professionals. The duty of care extends to such architects even when they do not actually build the project or exercise ultimate control over construction."

After-acquired evidence; FEHA claims; disability discrimination; remedies; federal preemption: *Salas v. Sierra Chemical Co*. (2014) __ Cal.4th __ (Cal. Supreme).

Salas sued his former employer, Sierra, alleging that it had failed to reasonably accommodate his physical disability and refused to rehire him in retaliation for his filing a workers' compensation claim. Thereafter, Sierra learned of information suggesting that Salas had used another man's Social Security number to gain employment with Sierra.

The trial court denied Sierra's motion for summary judgment. When Sierra sought a writ of mandate in the Court of Appeal, that court issued an alternative writ. In response, the trial court vacated its order denying the motion for summary judgment and entered an order granting the motion.

Salas appealed from the ensuing judgment, which the Court of Appeal affirmed. It held that plaintiff's action was barred by the doctrines of after-acquired evidence and unclean hands (based on information defendant acquired during discovery showing wrongdoing by plaintiff). It further held that application of those doctrines was not foreclosed by Senate Bill No. 1818, enacted in 2002, which states that, "All protections, rights and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment, or who are or who have been employed, in this state." Reversed.

The federal Immigration Reform and Control Act of 1986 (8 U.S.C. § 1101 et seq.), also known as IRCA, does not generally preempt application of the antidiscrimination provisions of California's FEHA to workers who are unauthorized aliens. But it does bar an award of lost-pay damages under the FEHA for any period of time after an employer's discovery of the employee's ineligibility under federal law to work in the United States.

Generally, the employee's remedies should not afford compensation for loss of employment during the period after the employer's discovery of the evidence relating to the employee's wrongdoing. When the employer shows that information acquired after the employee's claim has been made would have led to a lawful discharge or other employment action, remedies such as reinstatement, promotion, and pay for periods after the employer learned of such information would be "inequitable and pointless," as they grant remedial relief for a period during which the plaintiff employee was no longer in the defendant's employment and had no right to such employment.

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The doctrine of "unclean hands" can be a complete defense to both legal and equitable claims. But equitable defenses such as unclean hands may not be used to wholly defeat a claim based on a public policy expressed by the Legislature in a statute. Accordingly, the Court of Appeal erred in treating the doctrine of unclean hands as a complete defense to plaintiff's lawsuit, an action founded upon public policies established by the Legislature in the FEHA.

Negligence; duty of businesses to provide external defibrillators: *Verdugo v. Target Corp.* (2014) __ Cal.4th __ (Cal. Supreme).

On August 31, 2008, Mary Ann Verdugo was shopping at a large Target department store in Pico Rivera, California, with her mother and brother when she suffered a sudden cardiac arrest and collapsed. In response to a 911 call, paramedics were dispatched from a nearby fire station. It took the paramedics several minutes to reach the store and a few additional minutes to reach Verdugo inside the store. The paramedics attempted to revive Verdugo but were unable to do so; Verdugo was 49 years of age at the time of her death. Target did not have an Automatic External Defibrillator ("AED") in its store.

Verdugo's mother and brother filed the underlying lawsuit against Target, maintaining that Target breached the duty of care that it owed to Verdugo, a business customer, by failing to have on hand within its store an AED for use in a medical emergency. The complaint contended that in view of the large number of persons (300,000) in this country who suffer an unanticipated sudden cardiac arrest each year, and the large number of customers who shop in Target's department stores, it was reasonably foreseeable that a patron might suffer such an attack in its store, and that because of the size of the store Target should have known that it would take emergency medical personnel many minutes to reach a sudden cardiac arrest victim, making an onsite AED a medical necessity. Further, the complaint noted that AEDs are relatively inexpensive and that, in fact, Target itself sold AEDs over the Internet for approximately $1,200. The district court granted summary judgment for Target. The Ninth Circuit certified the issue of Target's duty to provide AEDs to the Supreme Court. Held:

The various California statutes concerning the use of AEDs do not indicate that the Legislature intended the statutes to totally supersede and preclude any operation of general common law tort principles with regard to the acquisition and provision of AEDs. Accordingly, the California AED statutes do not fully "occupy the field" and thereby implicitly preclude California courts from determining whether, under California common law, Target's common-law duty of reasonable care to its patrons includes an obligation to acquire and make available an AED for use in a medical emergency.

Under California law, Target has a common-law duty to provide at least some assistance to a patron who suffers a sudden cardiac arrest while shopping at a Target store. But, regardless of what the scope of that duty may be, it does not include a duty to acquire and make available to customers an AED for use in a medical emergency.

Advertising-injury coverage; disparagement; trade libel: *Hartford Cas. Ins. Co. v. Swift Distribution Co.* (2014) __ Cal.4th __ (Cal. Supreme).

Hartford issued a commercial general liability (CGL) policy to Swift Distribution, Inc., doing business as Ultimate Support Systems (Ultimate), which covered "personal and advertising injury." This term included claims arising from "[o]ral, written, or electronic publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services." Ultimate sells a product called the Ulti-Cart, a multi-use cart marketed to help musicians load and transport their equipment. Ultimate was sued by Dahl, the manufacturer of a similar convertible transport cart called the Multi-Cart, a collapsible cart capable of being manipulated into multiple configurations and typically used to transport music, sound, and video equipment. Dahl holds several patents on the Multi-Cart.

Dahl asserted that Ultimate's false and misleading advertisements and use of a "nearly identical mark" were likely to cause consumer confusion or mistake, or to deceive the public "as to the affiliation, connection, or association" of the two parties. He also alleged unfair competition, misleading advertising, breach of contract, and claims based on the violation of two nondisclosure agreements. The complaint attached Ultimate's advertisements, which did not name the Multi-Cart or any other product. Ultimate tendered the suit to Hartford for a defense. Ultimate argued that the Dahl action involved a claim of disparagement covered by the Hartford policy's definition of "personal and advertising injury." But Hartford found no potential claim of disparagement and denied any duty to defend or indemnify Ultimate in the underlying litigation. Hartford filed a declaratory-relief action against Ultimate, and obtained summary judgment. The Court of Appeal affirmed. Held: Affirmed.

The tort of 'commercial disparagement' has received various labels, such as 'commercial disparagement,' 'injurious falsehood,' 'product disparagement,' 'trade libel,' 'disparagement of property,' and 'slander of goods.' These shifting names have led counsel and the courts into confusion, thinking that they were dealing with different bodies of law. In fact, all these labels denominate the same basic legal claim. California courts have understood disparagement, for purposes of CGL coverage, to mean a knowingly false or misleading publication that derogates another's property or business and results in special damages. Disparagement

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involves two distinct but related specificity requirements. A false or misleading statement (1) must specifically refer to the plaintiff's product or business, and (2) must clearly derogate that product or business. Each requirement must be satisfied by express mention or by clear implication.

The related requirements of derogation and specific reference may be satisfied by implication where the suit alleges that the insured's false or misleading statement necessarily refers to and derogates a competitor's product. A publication that claims a superior feature of a business or product as distinct from all competitors, such as a claim to be the "only" producer of a certain kind of software or the "only" owner of a trademark, may be found to clearly or necessarily disparage another party even without express mention.

The Court expressly disapproved the reasoning in *Travelers Property Casualty Company of America v. Charlotte Russe Holding, Inc.* (2012) 207 Cal.App.4th 969, which had held that a disparagement claim could be based on a claim that a retailer had simply sold a product at a deep discount, thereby suggesting that the product was not a "high end" product or was somehow defective.

The Court rejected Ultimate's contention that the *Dahl* action had alleged that Ultimate had disparaged the Multi-Cart. Consumer confusion resulting from the similarity of the Ulti-Cart to the Multi-Cart may support a claim of patent or trademark infringement or unfair competition in certain circumstances, but it does not by itself support a claim of disparagement. Even if the Ulti-Cart was named and designed to mimic the Multi-Cart, that fact does not derogate or malign the Multi-Cart in any way. There is no coverage for disparagement simply because one party tries to sell another's goods or products as its own. Similarly, a party's attempt to copy or infringe on the intellectual property of another's product does not, without more, constitute disparagement.


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