

Appellate Reports

Warning labels on generic drugs; also, refusal to pay arbitration fees, and HOAs suing for construction defects

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Proposition 65; warnings on generic drug labels; federal preemption

Center for Environmental Health v. Perrigo Company (2023) _ Cal.App.4th __ (First Dist., Div. 1.)

Appellant Center for Environmental Health (CEH) sued respondents, various manufacturers and retailers of generic over-the-counter (OTC) antacids, claiming they failed to warn consumers that the products contained a known carcinogen under Proposition 65, the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety Code section 25249.5 et sequitur (Proposition 65). The defendant manufacturers demurred, arguing that the federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 et seq., (FDCA), preempted CEH's claim. Affirmed.

Under the FDCA, a generic manufacturer has an ongoing duty to "ensure that its warning label is the same as the brand name's." Thus, a generic manufacturer can list on its labeling only warnings that are identical to the warnings listed on the brand-name manufacturer's labeling.

Because CEH failed to identify a method by which the generic-drug defendants could give a Proposition 65 warning that would not constitute "labeling" under the FDCA, the court concluded that the federal duty of sameness renders it impossible for the generic-drug defendants to comply with both state and federal law. As a result, their state-law claims under Proposition 65 are preempted.

Arbitration; defendant's waiver of right to arbitrate by refusing to pay arbitration fees when plaintiff is indigent

Hang v. RG Legacy I, LLC **(2023) _ Cal.App.5th _ (Fourth Dist., Div. 3.)**

The successor in interest to deceased former resident of skilled-nursing facility brought claims on resident's estate's behalf for elder abuse and negligent hiring and supervision against facility and related defendants. The Superior Court conditionally granted defendants' petition to compel arbitration, holding that an arbitration agreement applied, but that because resident was indigent when he died and his estate had no property or assets, defendants would have to agree to pay all arbitration fees and costs within 15 days of the order on the petition or defendants would waive the right to arbitrate. Rather than agreeing to pay arbitration fees and costs, defendants appealed. Affirmed.

The Court of Appeal held that, (1) the trial court's order conditionally granting facility's petition was an appealable order denying a petition to compel arbitration because, under order's terms, facility's petition was denied when facility did not timely agree to pay arbitration fees and costs; (2) substantial evidence supported trial court's determination that former resident's estate was unable to pay any share of arbitration fees and costs; and (3) trial court's conditional order was proper.

With respect to the last point, the RG Legacy parties argue that, because the arbitration agreements here were voluntary and expressly state the parties shall bear their own arbitration costs as authorized by section 1284.2 of the Code of Civil Procedure, they should not have to shoulder all arbitration fees and costs. That the parties may have voluntarily entered the arbitration agreements does not answer the question of whether Daniel's estate, at the time arbitration proceedings would commence, was able to pay its share of arbitration fees and costs. The rule cannot be that a party who had voluntarily entered an arbitration agreement later loses the right to pursue claims if that party is indigent and without means to pay the agreed share of arbitration fees and costs.

Citing its earlier opinion in *Weiler v. Marcus & Millichap Real Estate Investment Services, Inc.* (2018) 22 Cal.App.5th 970, 973–974, the court stated: "Though the law has great respect for the enforcement of valid arbitration provisions, in some situations those interests must cede to an even greater, unwavering interest on which our country was founded – justice for all. Consistent with [case law] and federal and California arbitration statutes, a party's fundamental right to a forum she or he can afford may outweigh another party's contractual right to arbitrate."

Class actions; homeowner's associations; HOA's rights to sue on behalf of members for defects in residential units

River's Side at Washington Square Homeowners Association v. Superior Court of Yolo County (2023) _ Cal.App.5th _ (Third Dist.)

HOA for common-interest development brought action against vendors of certain of the residential units for construction defects, alleging causes of action for violation of the Right to Repair Act, breach of implied warranty, rights it was assigned from developers, breach of contract, intentional or negligent nondisclosure, intentional or negligent misrepresentation, and breach of fiduciary duty. Vendors demurred except as to assigned-rights cause of action. The Superior Court sustained the demurrer without leave to amend, finding that the HOA lacked standing to bring claims on behalf of members for defects in residential units. HOA petitioned for writ of mandate. Writ granted.

Civil Code section 5980 provides, among other things, that an association has standing to sue for damage to the common area or to a separate interest the association is obligated to maintain or repair. While the HOA did allege some damages to common areas, the heart of its claim was the damage to the member's units. The Court held that section 5980 did not confer standing on the HOA to pursue those claims.

But it held that section 382 of the Code of Civil Procedure did confer standing. That statute authorizes both class actions and representative actions. The Court held that section 382 and section 5980 establish two different ways for an HOA to bring a lawsuit on behalf of its members. Under section 382, an HOA (like any other association) may bring a representative action on behalf of its members (i.e., the ascertainable class) if the members have "a well-defined community of interest in the questions of law and fact involved," and "considerations of necessity, convenience, and justice" support granting an HOA standing in the particular case.



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