Appellate reports

Recent cases of interest to members of the plaintiff's bar

JEFFREY ISAAC EHRLICH

Nazir v. United Airlines Inc.

(2009) 178 Cal.App.4th 243 (1st Dist, Div. 2)

Who needs to know about this case: Lawyers who make and oppose summary-judgment motions

Why it's important: Skewers both parties and the trial court for the manner in which the summary judgment was handled, putting most blame on the moving party's counsel (Littler Mendelson), for filing "what may well be the most oppressive motion ever presented to a superior court."

Synopsis: In employment-discrimination action, the employer filed a summary-judgment motion, or motion for summary adjudication of issues, seeking adjudication of 44 issues. Defendants' separate statement was 196 pages long, setting forth hundreds of facts, many of them not material – as defendants' own papers conceded. And the moving papers concluded with a request for judicial notice of 174 pages. All told, defendants' moving papers were 1056 pages.

Plaintiff's opposition was almost three times as long, including an 1894-page separate statement, which the trial court would later disparage as "mostly verbiage," a description with which the appellate court disagreed. The court noted, "Curiously, no such criticism was leveled at defendants' papers, not even those in reply, papers that defy description."

Defendants' reply included, and properly, their response to plaintiff's additional disputed facts. Defendants' reply also included an improper 297-page "Reply Separate Statement" and 153 pages of "Exhibits and Evidence in Support of Defendants' Reply." And the reply culminated with 324 pages of evidentiary objections, consisting of 764 specific objections, 325 of which were directed to portions of plaintiff's declaration, many of which objections were frivolous. In all, defendants filed 1150 pages of reply.

The trial court overruled the defendant's evidentiary objection No. 27, and sustained the remaining 763 without any specific ruling. The appellate court held that the court erred in overruling the objection to No. 27, and erred in sustaining the balance without making individual rulings, holding that sustaining all 763 objections was an abuse of discretion.

The court reviewed the evidence in the opposing papers and concluded that it created triable issues of fact, requiring that the motion be denied. It held that many of the "issues" on which summary adjudication was sought were not proper issues at all. And the court held that trial courts have inherent power to control the proceedings before them, including the power to force the parties to file motions and oppositions that fully comply with the letter and spirit of the rules.

The opinion is lengthy, but should be required reading for all lawyers who handle summary-judgment motions.

Burlage v. Superior Court

(2009) 178 Cal.App.4th 524, 2d Dist. Div. 6

Who needs to know about this case: Lawyers who are looking for ways to attack or defend an arbitration award

Why it's important: One of the very few cases to refuse to confirm an arbitration award based on the arbitrator's legal analysis, based on the arbitrator's refusal to consider certain evidence.

Synopsis: In *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1 [10 Cal.Rptr.2d 183], the Supreme Court held that even though an error of law appears on the face of an arbitration award, and causes substantial injustice, the award is not subject to judicial review in the absence of a limiting clause in the arbitration agreement, or an express statutory provision. But section 1286.2, subd. (a)(5) of the Code of Civil Procedure requires a trial court to vacate an arbitration award when a party's rights are substantially prejudiced by the arbitrator's refusal to hear "evidence material to the controversy."

Here, Burlage purchased a house from Spenser, which was adjacent to a country club. After escrow closed, Burlage learned that the pool and a fence on the property encroached on land owned by the country club. Burlage's claims against Spenser for fraud and breach of the purchase agreement were arbitrated. Before the arbitration was held, the title insurer paid the country club $10,950 in exchange for a lot-line adjustment that gave Burlage clear title to the encroaching land.

At the arbitration, Burlage moved in limine to exclude all evidence of the lot-line adjustment. Evidently, in the belief that the claims had to be determined based on the facts as they existed when escrow closed, the arbitrator granted the motion. As a result, at the arbitration Burlage was allowed to introduce evi-

dence of the cost of moving the fence and pool, and of the diminution in value of the property resulting from the encroachment, even though it no longer existed and Burlage had suffered no harm. The arbitrator awarded Burlage damages of $552,750 in compensatory damages; $250,000 in punitive damages; and $732,570 in attorney's fees.

When Burlage moved to confirm the award in the trial court, it refused under section 1286.2, subd. (a)(5), and vacated the award. Burlage took a writ, and the appellate court concluded that the trial court had not erred.

Section 1286.2 has been interpreted as a "safety valve in private arbitration that permits a court to intercede when an arbitration has prevented a party from fairly presenting its case." The court held that this is what happened here. It further held that the arbitrator's knowledge of the lot-line adjustment defense did not mean that it had actually considered and rejected that defense. Rather, "One cannot consider what one has refused to hear. Legally speaking the admission of evidence is to hear it, and the weighing of it is to give it consideration."

The dissent argued that because the arbitrator had ruled on the motion in limine, which had been fully briefed, it was aware of the issue, and it had decided that the lot-line adjustment was not relevant because it took place two years after the alleged fraudulent conduct. In the dissent's view, this was a legal ruling, whose correctness could not be subject to judicial review under *Moncharsh*.

Gorman v. Tassajara Development Corp.

(2009) 178 Cal.App.4th 44 [100 Cal.Rptr.3d 152] (6th Dist.)

Who needs to know about this case: Lawyers who seek attorney's fee awards from courts

Why it's important: Makes it clear that even though a trial court is not required to issue a statement of decision concerning an award of attorneys' fees, it must make a sufficiently clear ruling to allow an appellate court to determine that there was a reasonable basis for the award.

Synopsis: Tassajara Development Corp. agreed by written contract to serve as general contractor for the construction of a home for John Gorman. The contract stated that, in the event of litigation between the parties, the prevailing party would be entitled to attorney's fees. Gorman later sued Tassajara for construction defects. In 2006, the parties entered into a settlement in which Gorman was deemed to be the prevailing party. Later, Gorman sought $1,350,538 in attorney fees and over $266,561 in costs. In a 27-word order, the trial court awarded Gorman $416,581.37 in attorney fees and costs of $142,432.46. The trial court denied the plaintiffs' request for a statement of decision and reconsideration of the order.

The Court of Appeal reversed. It held that a trial court is not required to issue a statement of decision concerning an award of attorney's fees. But to be affirmed on appeal, an award of fees must be able to be rationalized. Thus, there must exist a reasonable basis for the award in the record and if no such basis exists, then the award itself is evidence that it resulted from an arbitrary determination. Given the lack of information in the order, the appellate court was unable to deduce any logical explanation for the trial court's award of $416,581.37. The award could not be justified by the plaintiffs' request, supporting bills, or Tassajara's opposition. Thus, the award was reversed and remanded for a new determination of fees.

Toal v. Tardif

__ Cal.App.4th __, 2009 WL 3491065, Fourth Dist., Div. 3

Who needs to know about this case: Lawyers who represent clients in arbitration proceedings

Why it's important: Shows that an arbitration award can be vacated if the record does not show that the parties actually agreed to arbitration. It is not sufficient that the parties' attorneys signed an arbitration agreement, and the arbitration then proceeded.

Synopsis: The Toals purchased a house from the Tardifs. The Toals sued the Tardifs for claims arising from the purchase. The parties' attorneys signed an agreement to resolve the dispute through arbitration, but the parties themselves did not sign. The arbitrator entered an award for the Toals who then moved for confirmation of the award. Their petition to confirm attached a copy of the agreement, and no other evidence of an arbitration agreement was provided. The trial court confirmed the award.

The Court of Appeal reversed. A party seeking to enforce an arbitration award must prove that a valid arbitration agreement exists. A valid agreement requires party signatures, and the signatures of their attorneys are not sufficient if consent is not given. An exception to this rule exists when a client ratifies its attorney's signatures, but simply allowing the arbitration to proceed to an award is not sufficient ratification. Since the Toals provided no evidence that the Tardifs consented to arbitrate the dispute or ratify the arbitration agreement, it was error to confirm the award without the trial court determining whether the Tardifs consented to or ratified the arbitration agreement.

Schachter v. Citigroup Inc.

(2009) __ Cal.4th __, 2009 WL 3522454

Who needs to know about this case: Labor lawyers

Why it's important: Holds that employee who had elected to receive part of his compensation as stock options, and who resigned before options vested, could not recover the value of the options as unpaid wages under the Labor Code.

Synopsis: In 1994, David Schacter enrolled in a voluntary incentive-compensation plan offered by Citigroup, in which he would receive five percent of his total compensation in 1995 in the form of restricted stock. In July 1995, he received

44 shares of stock, which would vest in 1997. In 1996, he received 38 shares of stock, which would vest in 1998. Under the plan, Schachter agreed that if he resigned before the stock vested, he would forfeit the stock and the cash compensation to be paid as restricted stock. In 1996, he resigned.

In 1998, he filed a class action against Citigroup, alleging that it failed to pay him earned wages in violation of the Labor Code. Ultimately, the trial court granted Citigroup summary judgment and the appeals court affirmed. The Supreme Court granted review, and affirmed.

Labor Code section 202 states that an employer must pay an employee his earned wages after he quits his employment. Schachter claimed that the percentage of compensation he chose to receive as shares of stock was an earned wage that remained unpaid when he resigned and that he should have been paid cash upon resignation. The Supreme Court disagreed, noting that employers and employees are free to alter the terms of employment.

Schachter agreed to be paid in the form of restricted stock instead of cash and agreed that the stock would be earned only if it had vested. Accordingly, his failure to remain employed through the vesting period meant that he did not actually earn the stock or the funds used to buy it.

Harris v. City of Santa Monica

(2009) __ Cal.App.4th __, 2009 WL 3466352

Who needs to know about this case: Employment lawyers

Why it's important: Holds that in employment-discrimination case, if employer presents evidence of legitimate non-discriminatory motives, it is entitled to a jury instruction on mixed-motive affirmative defense.

Synopsis: Harris, a bus driver employed by the City of Santa Monica, was fired after she disclosed that she was pregnant. She then sued the City for pregnancy discrimination. At trial, the City sought jury instructions on its mixed-motive affirmative defense. The trial court refused and instructed the jury that the City was liable for discrimination if Harris' pregnancy was a motivating factor for the discharge even if other matters may have contributed. The jury returned a verdict for Harris.

Reversed. Under the mixed-motive defense, an employer is not liable for actions that were motivated by both discriminatory and non-discriminatory reasons if it can establish that the legitimate reason, on its own, would have induced it to make the same decision. The mixed-motive defense is available to an employer accused of employment discrimination under both federal and state law. The trial court's instructions were erroneous because the jury could not have found that Harris's pregnancy factored into the City's decision to terminate her without also finding that the City was liable for discrimination. Because the court's failure to instruct the jury on the mixed-motive affirmative defense deprived the City of a legitimate defense, the judgment was reversed and the case was remanded for retrial.

Zhang v. Superior Court [California Capital Insurance Co.]

(2009) __ Cal.App.4th __, 2009 WL 3466041, 4th Dist. Div. 2

Who needs to know about this case: Insurance lawyers

Why it's important: Confirms that a common-law claim based on an insurer's false statements in its advertising can be a predicate for a claim under the unfair competition law ("UCL") (Bus. & Prof. Code, § 17200, et seq.). The court expressly refused to follow *Textron Financial Corp. v. National Union Fire Ins. Co. of Pittsburgh* (2004) 118 Cal.App.4th 1061 [13 Cal.Rptr.3d 586], which held that common-law claims could not support a UCL claim.

Synopsis: Zhang sued her insurer, California Capital Insurance Co. (CCI), alleging that, after a fire, CCI improperly refused to pay for the repair and restoration of her commercial premises. She alleged violations of the UCL, arguing that CCI "engaged in unfair, deceptive, untrue, or misleading advertising" by promising insureds that it would timely pay for a covered loss, while having no intention of honoring such promises. CCI demurred to the UCL claim, contending that it was based on a violation of the Unfair Insurance Practices Act, Insurance Code section 790.03, and under *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287 [250 Cal.Rptr. 116], the Supreme Court had held that no private right of action could be maintained based on section 790.03. The trial court sustained the demurer. Zhang petitioned for a writ of mandate, and the petition was granted.

Section 790.03 prohibits insurers from misrepresenting terms of insurance policies and its obligations under them. The UCL bars "unfair competition," which includes unfair business acts and misleading advertising. A violation of section 790.3 does not create a private cause of action, but the UCL does provide such a remedy. The court held that just because the conduct alleged would violate section 790.03, *in addition to* the UCL, that no claim will lie under the UCL. Zhang's complaint plainly alleged conduct that violated the UCL when it alleged that CCI engaged in misleading advertising. The court expressly refused to follow *Textron's* holding that common-law claims could not support an action under the UCL.

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