Appellate Reports and Cases in Brief

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

By Jeffrey Isaac Ehrlich

• **In-depth summaries**

Ruiz v. Podolsky

(Cal. Supreme 2010) __ Cal.4th __, 2010 WL 3292972

Who needs to know about this case: Medical Malpractice Lawyers; lawyers who file wrongful-death claims where the decedent signed an arbitration agreement

Why it's important: Holds that MICRA's arbitration provision allows patients to bind their heirs who pursue a wrongful-death action arising out of a medical-malpractice claim to arbitration agreements.

Synopsis: Rafel Ruiz sought treatment from Dr. Anatol Podolsky, an orthopedic surgeon, for a fractured hip. Ruiz signed an arbitration agreement under Code of Civil Procedure section 1295 for any medical-malpractice claims, wrongful-death claims, or loss-of-consortium claims. The agreement stated that it bound all parties whose claims arise out of, or relate to the treatment or services provided to the patient. It expressly stated that any spouse or heirs of the patient would be bound. Ruiz died, and his heirs filed a wrongful-death claim against Dr. Podolsky, claiming that his negligence caused complications for Ruiz, causing his death. Ruiz's wife agreed that she was bound by the arbitration agreement, but his adult children argued that they were not. The trial court granted the petition as to the wife, and stayed the action as to the children. The Court of Appeal affirmed.

The Supreme Court granted review and reversed, holding that, "all wrongful death claimants are bound by arbitration agreements entered into pursuant to section 1295, at least when, as here, the language of the agreement manifests an intent to bind these claimants. This holding carries out the intent of the Legislature that enacted section 1295 and related statutes." Section 1295, construed in light of its purpose, intends to give patients and health-care providers the option of entering into an agreement that will resolve all medical malpractice claims, including wrongful death claims, by arbitration. Requiring that wrongful death claimants be bound by arbitration agreements only when they themselves have been signatory to them effectively forecloses that option for practical and public policy reasons.

Wolin v. Jaguar Land Rover North America, LLC

(9th Cir., 2010) __ F.3d __, 2010 WL 3222091

Who needs to know about this case: Class-action lawyers; auto-defect lawyers

Why it's important: Rejects manufacturer's claim that auto-defect cases always turn on individual factors that preclude class actions

Synopsis: Gable and Wolin each purchased Land Rover LR3 vehicles, and each filed a class-action claiming that a defect in the LR3's steering geometry caused uneven ride and premature tire wear, that Land Rover improperly failed to cover repairs under the LR3's warranty, and that Land Rover knew of the defect but continued to sell the vehicles in violation of state consumer-protection statutes. The district court denied their motions for class certification, finding that common issues did not predominate because neither plaintiff could estimate the percentage of potential class members whose vehicles manifested the defect, or even that a majority of the class experienced premature tire wear. Reversed.

The court found the plaintiffs easily satisfied the commonality requirement in FRCP 23(a). The claims of all prospective class members involve the same alleged defect, covered by the same warranty, and found in vehicles of the same make and model. Common issues include whether the LR3's alignment geometry was defective, whether Land Rover was aware of the defect, whether Land Rover sought to conceal the defect, and whether its conduct violated state consumer-protection laws. These questions are sufficient to satisfy the core commonality test.

Land Rover could not defeat certification by claiming that the prospective class members' vehicles did not have a common defect, but rather from tire wear due to individual factors, like driving habits and weather. Proof of the manifestation of the defect is not a prerequisite to class certification:

> Although early tire wear cases may be particularly problematic for plaintiffs seeking class certification, we reject Land Rover's suggestion that automobile defect cases can categorically never be certified as a class. Gable and Wolin assert that the defect exists in the alignment geometry, not in the tires, that Land Rover failed to reveal material facts in violation of consumer protection laws, and that Land Rover was unjustly enriched when it sold a defective

vehicle. All of these allegations are susceptible to proof by generalized evidence. Although individual factors may affect premature tire wear, they do not affect whether the vehicles were sold with an alignment defect.

Common issues also predominate in plaintiffs' warranty claims against Land Rover.

The court also rejected Land Rover's argument that Gable's and Wolin's claims are not typical because their tires indicate wear that is not the kind attributable to vehicle alignment. Gable and Wolin alleged that they, like all prospective class members, were injured by a defective alignment geometry in the vehicles. They seek to recover pursuant to the same legal theories: violation of consumer protection laws, breach of warranty, and unjust enrichment. Land Rover identified no defenses that are unique to Gable and Wolin that would make class certification inappropriate or their claims atypical of those of the class as a whole.

The court also found that a class action was the superior means to litigate the issues presented:

> It is far more efficient to litigate this – the basis for their claim – on a classwide basis rather than in thousands of individual and overlapping lawsuits. . . . Proposed class members face the option of participating in this class action, or filing hundreds of individual lawsuits that could involve duplicating discovery and costs that exceed the extent of proposed class members' individual injuries. Thus, classwide adjudication of appellants' claims is superior to other means of adjudicating this case.

• **In brief**

Civil Procedure; Motions to Strike; FRCP 12(f); *Whittlestone, Inc. v. Handi-Craft Co.* (9th Cir.2010) __ F.3d__ 2010 WL 3222417. District court granted defendant's motion to strike plaintiff's claims for lost profits and consequential damages on the ground that they were not available under the parties' contract. The district court granted the motion. Reversed. FRCP Rule 12(f) states that a district court "may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." The function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial. In order to be subject to a Rule 12(f) motion, the matter at issue must be: (1) an insufficient defense; (2) redundant; (3) immaterial; (4) impertinent; or (5) scandalous. A Rule 12(f) motion cannot be used to obtain dismissal of some or all of a complaint in a way that overlaps with Rule 12(b)(6), which tests the legal sufficiency of a complaint.

Torts; Medicare; Federal Preemption, *Uhm v. Humana, Inc.* (9th Cir. 2010) __ F.3d __, 2010 WL 3385546. The Uhms enrolled in Humana's Medicare Part D prescription-drug plan based on the representations made in Humana's marketing materials. The plan deducted the $6.90 premium from their social-security checks, but failed to send them enrollment materials. The Uhms were forced to buy their prescription drugs at costs in excess of those that the plan would have provided. They sued the plan for breach of contract, fraud, violations of Washington's consumer-fraud laws. The district court dismissed their claims as preempted by the Medicare Act. Affirmed.

The Uhms' claims for breach of contract and unjust enrichment are, at bottom, merely claims for benefits under the Medicare Act, and therefore arise under the Medicare Act, and are subject to the Act's administrative-exhaustion requirements. The failure to comply with these requirements is a jurisdictional defect. The Uhms' fraud and Consumer Protection Act claims do not arise under the Act, and are not subject to the exhaustion requirement. The Uhms' Consumer Protection Act claims are, however, expressly preempted by the Act's preemption provision. The Act does not preempt all common-law claims. But the Uhms' claims for fraud and fraud in the inducement are, however, preempted because they are inconsistent with the standards established under the Medicare Act.

UCL actions; res judicata; collateral estoppel, *In re Fireside Bank Cases* (2010) __ Cal.App.4th __, 2010 WL 2933581. Plaintiffs sought to maintain a UCL action against Fireside Bank challenging certain lending practices. The complaint alleged that Fireside had obtained and collected on judgments against borrowers that had been unlawfully obtained, and sought restitution of the amounts obtained in those actions. The trial court struck all references to other lawsuits on the ground that the judgments in other actions were res judicata and could not be collaterally attacked by a third party in a UCL action. Affirmed.

The court rejected plaintiffs' contention that the trial court was empowered by the UCL to grant class-wide relief to judgment debtors without a factual showing of grounds to avoid the judgments against them. Since no other basis for relief on their behalf was ever suggested, the court did not err by concluding that the UCL afforded no basis for the class-wide affirmative relief they sought in this class action. Simply put, the UCL does not trump the doctrines of res judicata and collateral estoppel.

Torts; premises liability; Federal Tort Claims, *Toomer v. United States* (9th Cir. 2010) __ F.3d __, 2010 WL 3239479. Roderick Little was shot and killed by Myron Thomas in the parking lot of a Del Taco restaurant across the street from the 32nd Street Naval Base in San Diego. Before the shooting Little and Thomas, had been fighting at Club Metro, a bar located on the naval base and operated by the U.S. They first fought on the club's dance floor, were ejected by security personnel, and then fought in the parking lot, where they were instructed by the security personnel to leave the base. Security personnel heard someone in a car leaving the base threaten "I'm going to do a 187"– a reference to the California Penal Code section for murder – and intended to report the threat to their dispatcher, who would have notified local

police, but were unable to do so because they were tied up directing traffic.

When one of the guards went to the guard booth to use the phone to make the report, he heard shots ring out. Thomas had gone to a friend's house, taken his AK-47 automatic rifle, and drove to the Del Taco restaurant across from the base, where Club Metro patrons frequently congregated after the club closed. Little was standing in the parking lot when Thomas shot in his direction, killing him.

The district court granted summary judgment in favor of the US in a wrongful-death action filed by Little's family. Affirmed. The U.S. owed Little a duty of care to protect him from foreseeable third-party criminal conduct in areas under its control. But its obligations to protect him ended when he left the base. The U.S. had no duty to protect him when he was in the Del Taco parking lot, over which it had no control. Since it had no duty, there could be no negligence. And even if the U.S. did have a duty that extended beyond the base's boundaries, it could not be held liable for Little's death because his death was not the result of foreseeable criminal activity.

Anti-SLAPP, **Negligence**, *Rivera v. First DataBank, Inc.* (2010) __ Cal.App.4th __, 2010 WL 2883075. First Databank published a monograph concerning the prescription drug Paxil, which was distributed to patrons by Costco pharmacy. Bruce Rivera was prescribed Paxil and filled his prescription at Costo. Shortly after he began to use the medication, he committed suicide. In addition to suing his physician and Costco for negligence, Rivera's family sued First DataBank, claiming it was negligent in preparing the Paxil monograph that was given to Rivera, and claiming that the monograph's discussion of Paxil's risks was confusing and inaccurate. First DataBank filed an anti-SLAPP motion (Code Civ. Proc., § 425.16.), arguing that its monograph was protected speech. The trial court denied the motion. Reversed.

First, the court found that claim arose from the exercise of free speech. The gravamen of the claim was the publication of the monograph. The court next found that the contents of the monograph dealt with an issue of public interest, since treatment of depression was a matter of public interest. Section 425.17, which limits the scope of the anti-SLAPP statute, was found not to apply, because the monograph did not discuss First DataBank's own business, and the statements in it were not made to promote First DataBank's business. Finally, plaintiffs failed to demonstrate a likelihood that they would prevail on the merits. They failed to show that First DataBank owed them any duty, and their critique of the format and structure of the monograph failed because First DataBank did not owe them a duty to present the information in a particular format or order. Plaintiff 's breach-of-contract claim failed because there was no contract between Rivera and First DataBank, or even between Costco and First DataBank. The absence of a duty was also fatal to the contract claim. The order granting the special motion to strike should have been granted.


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