Appellate Reports and Cases in Brief

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

By Jeffrey Isaac Ehrlich

• **In-depth summaries**

Village Northridge Homeowners Ass'n v. State Farm Fire & Cas. Co.

50 Cal.4th 913 (Cal. Supreme 2010)

Who needs to know about this case: Lawyers handling cases where the plaintiffs claim to have been defrauded into releasing their claims, and who seek to sue for fraud without rescinding the release

Why it's important: Holds that plaintiffs cannot affirm the release, keep the consideration, and then sue for fraud damages. Rather, they must first rescind the release, then pursue their damages. Rejects the "affirm [the contract] and sue" approach. Clarifies law concerning rescission.

Synopsis: Homeowners' association's condominium complex suffered substantial damage in the 1994 Northridge Earthquake. State Farm paid the Association approximately $2 million in benefits. When the Association sought further benefits, which State Farm disputed, they agreed to a compromise: State Farm would pay an additional $1.5 million, and the Association would release its claims. The Association later filed suit against State Farm for breach of contract and bad faith. It claimed that State Farm undervalued the earthquake loss and induced the Association to forego needed repairs. It also claims that State Farm required it to sign a release in order to obtain the benefits necessary to perform repairs. The Association made clear that it was not seeking to rescind the settlement; rather, it was affirming the agreement and suing for additional damages. The trial court dismissed the case, the Court of Appeal reversed. The Supreme Court granted review, and reversed the Court of Appeal.

The general rule is that if a party believes it has been fraudulently induced to enter into a contract, it must rescind the contract to escape its obligations. If the party contends the fraud was in the execution of the contract (that is, the promisor did not know what they were signing), the contract is void for lack of mutual assent, and need not be rescinded. But if the fraud is fraud in the inducement, mutual assent is present, and the contract is formed, but is voidable. Rescission requires the aggrieved party to provide prompt notice and an offer to restore the consideration received, if any.

Early cases required rescinding parties to restore everything of value that they received as a condition of rescinding. Civil Code section 1691, as originally enacted, followed this rule. Over time, the court recognized certain exceptions to the rule requiring restoration of the consideration as a strict condition to pursue rescission. In 1961, the Legislature enacted Civil Code section 1693, which codified (with some modifications) the earlier common-law rules that had shown some flexibility concerning the restoration requirement. Section 1693 says that a party seeking rescission shall not be denied relief if they have not restored the benefits they received, unless the delay in restoration was prejudicial to the other party, and allowed the court to make restoration a condition of its final judgment in the action.

Civil Code section 1691 forbids the "affirm and sue" strategy pursued by the Association. The fact that State Farm is an insurer, and the contract involved is an insurance contract does not alter this result. The Association's remedy was to seek rescission of the settlement before pursuing its claim for fraud.

Bateman v. American Multi-Cinema, Inc.

__ F.3d __ [2010 WL 3733555 (9th Cir.2010)]

Who needs to know about this case: Lawyers handling class actions

Why it's important: Holds that district court abused its discretion in refusing to certify class seeking statutory damages under federal Fair and Accurate Credit Transactions Act ("FACTA"), based on its conclusion that potential damages were disproportionate to harm suffered by class members.

Synopsis: Bateman brought action against AMC theater chain alleging that AMC's automated kiosks were in violation of FACTA because they printed receipts containing more than the last five

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digits of the consumer's credit or debit cards. Bateman sought statutory damages of $100 to $1000 per violation, creating a potential recovery of $29 to $290 million. The district court refused to certify the class, finding that a class action would not be superior because the enormity of the potential liability was out of proportion to any harm suffered by the class members. Reversed. Under Federal Rule of Civil Procedure 23, "[a] class action may be maintained if two conditions are met: The suit must satisfy the criteria set forth in subdivision (a) (i.e., numerosity, commonality, typicality, and adequacy of representation), and it also must fit into one of the three categories described in subdivision (b)." Subdivision (b)(3), at issue in the appeal, is satisfied if the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

To determine whether the denial of class certification on that basis is consistent with Congressional intent, the court examined FACTA. The court held that FACTA's damages provision was compensatory, and also effectuated the Act's deterrent purposes. The court held that Congress expressly created a statutory damages scheme that intended to compensate individuals for actual or potential damages resulting from FACTA violations, without requiring individuals to prove actual harm. Thus, irrespective of whether Bateman and all the potential class members can demonstrate actual harm resulting from a willful violation, they are entitled to statutory damages.

There is no language in the statute, nor any indication in the legislative history, that Congress provided for judicial discretion to depart from the $100 to $1000 range where a district judge finds that damages are disproportionate to harm. Nor could the court surmise a principled basis for determining when damages are and are not "proportionate" to actual harm. "Indeed, one might plausibly argue that a $1000 award, or even a $100 award, for a single violation of FACTA, without any allegation of harm, is not proportionate. But the plain text of the statute makes absolutely clear that, in Congress's judgment, the $100 to $1000 range *is* proportionate and appropriately compensates the consumer. That proportionality does not change as more plaintiffs seek relief; indeed, the size of AMC's potential liability expands at exactly the same rate as the class size." Hence, in the absence of any showing that courts have the discretion to modify the statute's remedial scheme, "it is not appropriate to use procedural devices to undermine laws of which a judge disapproves."

• In brief

Business & Professions Code section 17200; Treble Damages; Civil Code section 3345. (*Clark v. Superior Court (National Western Life Ins. Co.*, 50 Cal.4th 605 (Cal. Supreme 2010)) Senior citizens filed lawsuit against seller of annuities under the unfair competition law, Business & Professions Code section 17200, et seq., ("UCL") seeking remedy of treble-damages recovery under Civil Code section 3345. Section 3345, subd. (b) allows, in actions brought by senior citizens, up to three times the amount of a fine, civil penalty, or "any other remedy the purpose or effect of which is to punish or deter." The court held that section 3345 is not limited to actions under the Consumer Legal Remedies Act. But it further held that section 3345, by its terms, allows a trebled recovery only if the statute under which recovery is sought permits a remedy that is in the nature of a penalty. Since the UCL allows only restitution, and not damages, and since the purpose of restitution is not punitive, even though it may have some incidental punitive or deterrent effect, treble damages under section 3345 are not available in UCL actions.

Attorney's fees; CEQA; appellate work; billing rates (*Center for Biological Diversity v. County of San Bernardino* (2010) 188 Cal.App.4th 603.) Appeal by successful petitioners in CEQA action, where trial court cut lodestar hourly rate for CEQA expert based in Santa Monica to hourly rates for local counsel in Inland Empire, and cut lodestar hours for appellate work by 56 percent based on its finding that the difficult work in the case had been done in the trial. Reversed. Trial court abused discretion by basing fees on rates charged in the Inland Empire instead of on trial counsel's "home market" rates; petitioners showed that it was impractical to hire qualified counsel locally. The fact that trial counsel did discounted work in some cases did not justify a reduction in hourly rates, because she produced evidence that the market value of her rates were what she sought in the trial court. "The reasonable market value of the attorney's services is the measure of a reasonable hourly rate. This standard applies regardless of whether the attorneys claiming fees charge nothing for their services, charge at below-market or discounted rates, represent the client on a straight contingent fee basis, or are in-house counsel." The court also abused its discretion in cutting hours devoted to the appeal as duplicative, because it appeared that the trial court "dramatically undervalues the type and quantity of work normally done during the appellate process."

Products liability; erroneous jury instructions; burden of proof; harmless error (*Perez v. VAS S.p.A.* (2010) 188 Cal.App.4th 658.) Perez brought a products-liability action against VAS, which manufactured a paper-winding machine that injured him. The action was tried in a bench trial. At trial, Perez met his burden of showing that the design of the machine was the proximate cause of his injury. This should have shifted the burden of proof to VAS to show that its design was not defective, and to prove that

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Perez's injury resulted from a misuse of the machine. But the trial court instead allocated the burden to Perez to show that machine was used or misused in a way that was foreseeable to VAS. While this was error, it was not reversible error per se; Perez had to show that the error was prejudicial. The court held that there was no prejudice, because the evidence showed that the manner in which Perez used the machine was unforeseeable to VAS.

Insurance; post-claims underwriting; denial of coverage based on misrepresentation in application *(Colony Ins. Co. v. Crusader Ins. Co.* (2010) 188 Cal.App.4th 743.) 721 Westlake Ave. LLP owned an apartment building in LA. It was sued by its tenants. Both Colony Insurance and Crusader Insurance insured the building in successive policies. Colony defended the action, but Crusader refused, claiming the application for coverage contained misrepresentations. Crusader sued Colony, seeking for force Colony to pay an equitable share of defense costs. Crusader prevailed in a bench trial, and Colony appealed. Affirmed. First, Colony argued on appeal that Crusader was estopped to deny coverage, or had waived its right to deny coverage. Because it failed to plead either waiver or estoppel, and did not base its liability theory at trial on these issues, it was forfeited on appeal. Its post-trial objections to the trial court's statement of decision, which raised waiver and estoppel for the first time, were not sufficient to preserve the issue. Second, Crusader could not base an estoppel argument based on Colony's failure to follow its own internal underwriting guidelines. These guidelines created no enforceable rights for Crusader. Similarly, Colony's failure to follow its internal guidelines did not operate to waive its right to obtain correct information on the policy application. Third, cases in other contexts that prohibit post-claims underwriting did not apply broadly to all insurance. In the absence of a statute prohibiting the practice, as in the health-care context, or the public-policy arguments that prevent it in the third-party liability context, Crusader was unable to show that Colony's conduct amounted to improper post-claims underwriting.

Trial counsel misconduct; "Golden Rule" argument (*People v. Vance* (2010) __ Cal.App.4th __ [2010 WL 3770627].) Court of Appeal reverses first-degree murder conviction based on prosecutor's misconduct in making "Golden Rule" argument to jury. Prosecutor repeatedly told the jury that they needed to "walk in the victim's shoes" and "relive what the victim experienced." Defense counsel objected, the trial court admonished the prosecutor, who continued to make similar comments. Golden Rule arguments, in which counsel asks the jury to put itself in the victim's position when deciding the case, have been "universally" condemned in state and federal courts, in both civil and criminal cases. The court rejected the state's claim that the prosecutor had not made a Golden Rule argument: The prosecutor told the jurors "you have to walk in Dipak Prasad's shoes. You have to literally relive in your mind's eye and in your feelings what Dipak experienced the night he was murdered. You have to do that. You have to do that in order to get a sense of what he went through." The court held, "We literally cannot see how this is not a blatant argument for the jury 'to view the crime through the eyes of the victim' and 'to imagine the suffering of the victim.' If this is not a Golden Rule argument, we cannot imagine what one would sound like."

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