Appellate Reports

Court publishes contempt order after attorney uses rehearing petition to rant about the legal system

By Jeffrey I. Ehrlich

In *re Mahoney* (2021) __ Cal.App.5th __ (Fourth Dist., Div.3.)

Who needs to know about this decision: Attorneys who file documents in court

Why it's important: The Court of Appeal published its contempt order in this case as a "cautionary tale" to illustrate what it takes for an attorney to engage in direct contempt by impugning the integrity of the court in a document filed with the court.

Synopsis: Attorney Mahoney represented Salsbury Engineering Inc. in an appeal involving a construction project. The court ruled against Salsbury in an unpublished opinion. Mahoney filed a rehearing petition, which, in the Court of Appeal's view, impugned the integrity of both the trial and the appellate courts. According to the appellate court, the nine-page rehearing petition "cited not a single statute or opinion and made no attempt to explain, distinguish, or otherwise reply to the cases and statutes relied upon by the trial court and this one. Instead, he filed nine pages of text that more closely resembled a rant than a petition."

In response, the Court of Appeal issued an order to show cause (OSC) giving Mahoney an opportunity to explain why he should not be held in contempt for including language in the rehearing petition that impugned the integrity of the court in a document filed with the court. The OSC specifically pointed to the following statements as the basis for a contempt finding:

- Stating, "Our society has been going down the tubes for a long time, but when you see it in so black and white as in the opinion in this case, it makes you wonder whether or not we have a fair and/or equitable legal system or whether the system is mirrored by [*sic*] ignored by the actions of people like Tom Girardi."
- Insinuating that respondent Consolidated Contracting Services, Inc. (Consolidated) may have prevailed because it had contracts with a third party "who ... wields a lot of legal and political clout in Orange County."
- Stating that "because of a judicial slight [*sic*] of hand with no factual basis, this court has altered the landscape and created a windfall for Consolidated."
- Stating that the appellate court did not "follow the law" and that the court's opinion "ignores the facts."
- Accusing the court of "indiscriminately screw[ing] Salsbury."

In response to the OSC, Mahoney did not express any contrition. Instead, he asserted that he had merely "mentioned the obvious things that go on in Orange County which has a lot to do with The Irvine Company, plain and simple." Nor did Mahoney recant or moderate his stance at the hearing on the OSC. The Court held Mahoney in two counts of contempt, fined him $1,000 for each, and directed the clerk to forward a copy of the judgment to the State Bar. The Court explained:

> If you think the court is wrong, don't hesitate to say so. Explain the error. Analyze the cases the court relied upon and delineate its mistake. Do so forcefully. Do so *con brio*; do so with zeal, with passion. We in the appellate courts will respect your efforts and understand your ardor. Sometimes we will agree with you. That's why you file a petition for rehearing – because they are sometimes granted.
>
> But don't expect to get anywhere – except the reported decisions – with jeremiads about "society going down the tubes" and courts whose decisions are based not on a reading of the law but on their general corruption and openness to political influence.
>
> * * *
>
> We publish this decision as a cautionary tale. The timbre of our time has become unfortunately aggressive and disrespectful. Language addressed to opposing counsel and courts has lurched off the path of discourse and into the ditch of abuse. This isn't who we are. . . . The vast majority of lawyers know that professional speech must always be temperate and respectful and can never undermine confidence in the institution. Cases like this should instruct the few who don't.
>
> Respect for individual judges and specific decisions is a matter of personal opinion. Respect for the institution is not; it is a sine qua non.

Elder financial abuse; insurance companies and lenders

***Williams v. National Western Life Insurance Company* (2021) __ Cal.App.5th __ (3d Dist.)**

Victor Pantaleoni, an independent agent, sold his client, Barney Williams, a $100,000 annuity issued by National Western Life Insurance Company (NWL). When Williams returned the annuity to NWL during a 30-day "free look" period, Pantaleoni wrote a letter over Williams' signature for NWL to reissue a new annuity. In 2017, when Williams cancelled the second annuity, NWL charged a $14,949.91 surrender penalty. Williams sued Pantaleoni for elder financial abuse, negligence, and breach of fiduciary duty. Williams later added NWL to the suit as a Doe defendant. The jury awarded Williams damages against

Copyright © 2021 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**

NWL, including punitive damages, totaling almost $3 million. **Reversed**.

The court first found that Pantaleoni's role with respect to NWL was akin to an insurance broker, not an agent, and therefore he had no ability to bind NWL and NWL had no duty to supervise him. Because NWL owed no duty to Williams with respect to Pantaleoni, it could not be held liable to Williams directly or vicariously on a negligence theory.

The court further held that the evidence of elder financial abuse Williams presented at trial does not fall within the scope of the statute. "To conclude otherwise would transform every dispute between a person over 65 regarding the conduct of an independent agent into an elder abuse action against an insurer."

Elder financial abuse "occurs when a person or entity does any of the following: [¶] (1) Takes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both." (Welf. & Inst. Code, § 15610.30, subd. (a).) The court concluded that there was no evidence of "wrongful use" on the part of NWL within the meaning of elder financial abuse statute, which defines "wrongful use" as taking property of an elder by one who "knew or should have known that this conduct is likely to be harmful to the elder or dependent adult." (Welf. & Inst. Code, § 15610.30, subd. (b).

"It is not wrongful use for an insurance company to accept the premium for an annuity, issue the annuity, and deduct the surrender charge specified in the terms of the annuity policy when the annuitant demands early surrender." There was no evidence that NWL, in accepting a premium and issuing an annuity or processing a surrender request and assessing a surrender charge, knew or should have known of Pantaleoni's fraudulent conduct.

For the same reasons, this evidence did not show wrongful use by NWL within the meaning of the elder abuse statute. The elder abuse statute does not impose a duty to investigate even by a financial institution mandated to report suspected elder financial abuse to local law enforcement or adult protective services. (Welf. & Inst. Code, § 15630.1, subd. (e)(1).) "Much less does an insurance company, which is not a mandated reporter, have duty to investigate under the statute. . . . Mere suspicious circumstances do not show elder abuse."

Remedies; restitution; Unfair Competition Law

Lee v. Luxottica Retail North America, Inc. **(2021) __ Cal.App.5th __ (First Dist., Div. 2.)**

Plaintiff Kim Lee, O.D., is a San Francisco optometrist who has operated his independent practice since 2002. In 2017, he commenced this action against two corporate affiliates operating a chain of optical retail stores in California that offer competing eyeglass products and optometry services: parent company Luxottica Retail North America, Inc., doing business in California under the name LensCrafters, and its wholly owned subsidiary, Eyexam of California, Inc. The action was brought on behalf of a putative class of optometrists consisting of "All California doctors of optometry in practices independent of control by a retail chain optical store in California, and whose practices were located within 20 miles of a LensCrafters location between November 30, 2013 and September 1, 2015."

Lee's second amended complaint alleged that during this period, defendants operated the LensCrafters chain of stores in a manner that violated state laws regulating the practice of optometry and the dispensing of optical products, thereby constituting unfair and/or unlawful business practices in violation of the UCL. The trial court sustained the defendants' demurrer to the second-amended complaint without leave to amend. Affirmed.

Lee alleged that, as a result of defendants' unlawful practices, he and the class members lost market share. He claimed that "during the Class Period there were approximately 150 LensCrafters locations throughout California which serviced customers who would have gone to different optometrist[s] if they had not visited LensCrafters, creating a pool of funds in which every legally operating optometrist in the area had a vested interest," and that "[m]embers of the class are each entitled to their fair share of their cumulative vested interest." The putative class members allegedly "lost their vested interest in the pool of funds that were spent on illegal optometry services and illegal retail sales of optical goods, which would have instead been spent in a legal location."

The Court of Appeal held that these allegations were insufficient to state a claim for restitution under the UCL, the sole relief sought in Lee's complaint. The decision in *Korea Supply Co. v. Lockheed Martin Corp*. (2003) 29 Cal.4th 1134, 1141, 131, makes clear that unearned but anticipated income is not recoverable as restitution under the UCL because the plaintiff has no ownership interest in it. Such expected future income does not represent money the plaintiff ever parted with, nor does the plaintiff have any legally enforceable property interest in it.

The court rejected Lee's contention that a business has a vested property right in the share of the market that it occupies, equivalent (Lee asserted) to an employee's vested property right in wages already earned. "That proposition, for which plaintiff cites no authority, not only would have serious implications far beyond the context of this dispute but is itself astonishingly anticompetitive. It assumes that, at any arbitrary point forever fixed in time, customers have no right to do business wherever and with whomever they please and that competing businesses, including those operating legally, have no right to enter the market. That is the antithesis of free competition."

Copyright © 2021 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**

Federal Arbitration Act (FAA); triable issues of fact about whether party is bound by arbitration agreement; appealability of denial of motion to compel arbitration:

Hansen v. LMB Mortgage Services, Inc. **(9th Cir. 2021) __ F.3d __**

LMB, doing business as LowerMyBills.com, maintained a website for persons interested in refinancing their mortgages. In March 2014, the website collected information from a visitor identified as Willena Hansen. The visitor input a name, a telephone number, an email address, the address of a property that Willena Hansen owned with her son Bill Hansen and his wife, the current value of that property, its mortgage balance, and the interest rate. The telephone number that the visitor input belonged to Bill Hansen.

Directly below this section for inputting visitor information, a visitor could click a button containing the text "Click to See Your Free Results!" (the "submit button"). Below this submit button is text stating: "By clicking the [submit] button, you agree to the Terms of Use and Privacy Policy, to be matched with up to 5 participants [in the lending program], and consent ... for us and/or them to contact you (including through automated or prerecorded means) via telephone, mobile device (including SMS and MMS), and/or e-mail about lending information, even if you are on a corporate, state or national Do Not Call Registry." The Terms of Use included an arbitration agreement.

In November 2018, Bill received a text message stating:

> Willena – Regarding your monthly payment for your Roseville home.
>
> Come back and see your potential savings in 2 minutes.
>
> **[hyperlink]**
>
> LMB Reply STOP to stop

After receiving this message, Bill brought a putative class action against LMB for a violation of the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227, which prohibits companies from transmitting autodialed text messages and calls without the recipient's consent. LMB moved to compel arbitration based on Bill Hansen's assent to the arbitration agreement in the Terms of Use or, in the alternative, holding Bill Hansen to the arbitration agreement if Willena Hansen formed the arbitration agreement.

Bill Hansen opposed LMB's motion to compel arbitration and demanded a jury trial if the court found that the making of the arbitration agreement was in issue. Pursuant to section 4, the district court held a hearing in which the parties presented evidence concerning whether they had formed an arbitration agreement. Hansen declared under penalty of perjury that he never visited the LMB website, that he did not bind himself to the arbitration agreement by clicking the submit button, and that Willena Hansen told him before she passed away that although she may have visited an LMB website, "she did not believe she had ever clicked a button to actually submit any of the information she had entered into such a webpage." LMB submitted evidence to show that, based on LMB records, either Hansen or his mother had clicked the submit button.

After considering this evidence, the district court determined that "the existence of an agreement to arbitrate" was "in issue." It concluded that there was a genuine dispute of material fact as to whether Bill Hansen clicked the submit button and agreed to the Terms of Use. Further, it held that even assuming Willena Hansen had agreed to LMB's Terms of Use, there was a genuine issue of material fact as to whether Bill Hansen was bound to the arbitration agreement with LMB under a third-party beneficiary theory. Having concluded that the question whether Bill Hansen was bound by LMB's arbitration agreement was "in issue," the district court held that a jury trial was required to resolve the factual disputes. But the court also ordered that "[d]efendants' motion to compel arbitration and stay the case ... is DENIED."

LMB appealed, arguing that the district court erred in holding that there were disputed issues of material fact as to whether Hansen was bound to the arbitration agreement. Reversed.

The Ninth Circuit first determined whether it had appellate jurisdiction. The district court's order denying the motion to compel arbitration was nonfinal. Indeed, under section 4 of the Federal Arbitration Act, (9 U.S.C. § 4), a court is not authorized to dispose of a motion to compel arbitration until after factual disputes have been resolved, and so the court was compelled to reserve its ruling on the merits. In other words, in denying the motion to compel, the district court did not conclusively rule on whether Hansen was bound to an arbitration agreement, but merely concluded that it could not resolve the issue as a matter of law.

Although the district court's order was premature and nonfinal, the appellate court concluded that it had jurisdiction over the district court's order. In enacting the FAA, Congress gave courts of appeals jurisdiction over specified interlocutory orders relating to arbitration. Section 16 of the FAA provides that "[a]n appeal may be taken from – (1) an order ... (B) denying a petition under section 4 of this title to order arbitration to proceed." (9 U.S.C. § 16(a)(1)(B).) "On its face, this language gives us jurisdiction over any order denying a motion to compel arbitration; it does not differentiate between final and nonfinal orders. Therefore, denial of a motion to compel arbitration is immediately appealable even if the district court intended to reconsider the question of arbitrability following further fact-finding and possibly a trial."

Next, the court found that the district court contravened section 4 when it issued a nonfinal ruling on the motion to compel arbitration. Section 4 makes clear that "[i]f the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be

Copyright © 2021 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**

in issue, the court shall proceed summarily to the trial thereof." (9 U.S.C. § 4.) Although the statute does not define "summarily," an action is performed summarily when it is "done or occurring without delay or formality: quickly executed." (*Summary*, Webster's Third New International Dictionary 2289 (2002).) To implement this language, once a district court concludes that there are genuine disputes of material fact as to whether the parties formed an arbitration agreement, the court must proceed without delay to a trial on arbitrability and hold any motion to compel arbitration in abeyance until the factual issues have been resolved.

Punitive damages; due process violations; amount of "harm" inflicted by defendant versus amount of "damages": *Rubio v. CIA Wheel Group* (2021) 63 Cal.App.5th 82 (Second Dist., Div. 8.)

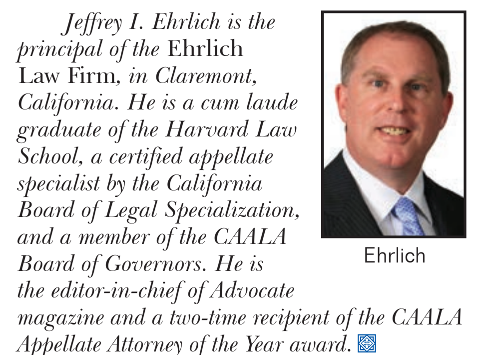
Maria Lopez sued her former employer, CIA Wheel Group (CWG) for wrongful termination, alleging that it terminated her because she had cancer. Lopez died during the first trial, resulting in a mistrial. In a second trial, the trial court found that CWG terminated Lopez due to her medical condition, awarded plaintiffs $15,057 in economic damages, and added Wheel Group Holdings (Holdings) as a judgment debtor as the alter ego of and/or successor in interest to CWG, which had been dissolved. The court determined punitive damages were warranted, found Lopez's noneconomic damages to be in the $100,000 to $150,000 range but not recoverable by plaintiffs after her death due to the provisions of Code of Civil Procedure section 377.34,[1] and awarded punitive damages in the amount of $500,000 against CWG and Holdings.

CWG and Holdings contended on appeal that 1) the punitive damages award is constitutionally excessive because it is 33 times the amount of the economic damages award; 2) the punitive damages award is excessive under California law; 3) the trial court erred in considering Holdings's financial condition in determining the amount of punitive damages; and 4) substantial evidence does not support the trial court's finding that an officer, director or managing agent of CWG acted with fraud, oppression or malice, or that any such conduct was ratified by CWG.

The Court of Appeal affirmed. In S*imon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1174, the U.S. Supreme Court's precedents "appear to contemplate, in some circumstances, the use of measures of harm beyond the compensatory damages. Thus in *State Farm*, discussing the second *BMW* 'guidepost,' the high court spoke repeatedly of a proportionality between punitive damages and the harm or 'potential harm' suffered by the plaintiff. (*State Farm*, 538 U.S. at pp. 418, 424.) At another point the court referred to the relationship between punitive damages and both 'the amount of harm' and 'the general damages recovered,' impliedly recognizing that these two are not always identical. More explicitly, in *State Farm* the high court reiterated its recognition in BMW that in some cases compensatory damages are not the definitive quantification of harm because '"the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine."' (*State Farm*, *supra*, at p. 425, quoting *BMW*, supra, 517 U.S. at p. 582.) State Farm's reference to potential harm echoed the high court's earlier decision in *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443. As the *Simon* Court recognized, "[i]n the wake of *TXO*, *BMW* and *State Farm*, a large number of federal and state courts have, in a variety of factual contexts, considered uncompensated or potential harm as part of the predicate for a punitive damages award." (*Simon*, at p. 1174.)

Simon discussed with apparent approval two California cases which considered unrecoverable damages for emotional distress in assessing the relationship between the plaintiff's compensatory damages award and the amount of punitive damages. The Court cited "*Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, in which a statute barred recovery of damages actually caused by the defendant's tortious acts. In that insurance bad faith case, the plaintiff died before judgment, precluding her estate's recovery of damages for emotional distress. Considering it 'likely that absent this limitation plaintiff would have recovered a substantial additional amount in compensation for emotional distress,' the court held the disparity between the relatively small compensatory damages award and the significant award of punitive damages did not require nullification of the latter under state law. (See also *Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738, 760-761 [reaching similar conclusion under *State Farm*].) Farmers' bad faith conduct had actually caused Mrs. Neal substantial emotional distress; her estate was barred from recovering such damages only by Probate Code former section 573." (*Simon*, *supra*, 35 Cal.4th at pp. 1176-1177.)

That is precisely the situation in this case. The trier of fact found appellants caused Lopez significant noneconomic damages which plaintiffs could not recover due to section 377.34. It was therefore appropriate for the trial court to consider the amount of *harm* that the defendant caused in evaluating the punitive-damage award, even if the plaintiffs could not recover damages for that harm.



Ehrlich

Jeffrey I. Ehrlich is the principal of the Ehrlich Law Firm, *in Claremont, California. He is a cum laude graduate of the Harvard Law School, a certified appellate specialist by the California Board of Legal Specialization, and a member of the CAALA Board of Governors. He is the editor-in-chief of Advocate magazine and a two-time recipient of the CAALA Appellate Attorney of the Year award.*

Copyright © 2021 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**