California Appellate Tracker Weekly Digest for September 3–9, 2017

Each week, Severson & Werson's appellate practice group tracks, reviews, and analyzes important decisions published by the California state appellate courts, the Ninth Circuit, and the U.S. Supreme Court. We have compiled this weekly newsletter with summaries of those cases, digested in an easy-to-read format for your convenience. For more frequent updates and to view past summaries, please visit our appellate blog at https://californiaappellatetracker.wordpress.com.

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ARBITRATION

In re Henson (Henson v. U.S. District Court)

Ninth Circuit Court of Appeals (per curiam); September 5, 2017; 2017 WL 3862458

Plaintiff's claims against defendant for common law privacy violations through use of zombie "cookies" through which defendant gathered data on plaintiff's internet usage on his Verizon phone without Verizon's knowledge or approval, let alone plaintiff's, were not subject to the arbitration clause in plaintiff's phone contract with Verizon.

The Ninth Circuit issues a writ of mandate reversing a district court's order staying a class action and compelling the named plaintiff to arbitrate his individual claim. The first three *Bauman* factors weigh heavily in favor of granting the writ. An order staying court proceedings and compelling arbitration is not appealable. Plaintiff will suffer harm that can't be remedied by appeal because disposition of his individual claim in arbitration will likely deprive him of standing to represent the class in any later proceedings. The district court was clearly wrong. The defendant (Turn) was not a party to the arbitration agreement between plaintiff and Verizon. Defendant could not successfully compel arbitration under that agreement by estoppel. Plaintiff's claims did not arise from the Verizon contract but were for common law privacy violations through use of zombie "cookies" through which Turn gathered data on plaintiff's Internet usage allegedly without Verizon's knowledge or approval, let alone plaintiff's. Also, plaintiff did not allege that defendant and Verizon were engaged in a single course of wrongful conduct.

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LABOR & EMPLOYMENT—DISCRIMINATION

Nakai v. Friendship House Assn. of American Indians, Inc.

California Court of Appeal (Banke, J.); August 10, 2017 (published September 5, 2017); 2017 WL 3867645

Plaintiff, who was fired when his wife complained to his boss (who was also her mother) that plaintiff was armed, angry and on drugs, failed to state an actionable claim for discrimination based on marital status.

Plaintiff failed to state an actionable claim for discrimination based on marital status. He was fired when his wife complained to the CEO (his mother-in-law) that plaintiff was armed, angry and on drugs. The employer did not discriminate against plaintiff because he was married but based on the identity of his spouse—a so-called conduit theory of marital discrimination which works only if the animus against the spouse is itself illegal, which was not the case here. Also, as plaintiff was an at-will employee, the employer owed him no duty to investigate his wife's charges before firing him. The FEHA requires an investigation when a third party accuses an employee of sexual harassment, but that wasn't the charge here, and anyway the duty to investigate runs in favor of the victim not the perpetrator of harassment.

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LABOR & EMPLOYMENT

Marsh v. J. Alexander's, LLC

Ninth Circuit Court of Appeals (Ikuta, J.; Paez, J., concurring in part & dissenting in part);
September 6, 2017; 2017 WL 3880742

The Ninth Circuit rejects the Department of Labor's informal interpretation of the dual job limitation on tip credit against the Fair Labor Standards Act's minimum wage; "two jobs" is determined by occupation, not individual tasks.

Under the FLSA (29 USC 203(m)), an employer must pay a tipped worker at least $2.13 per hour but may count tips the worker actually receives as a credit against the otherwise payable minimum wage of $7.25 per hour. A Dept. of Labor regulation (29 C.F.R. § 531.56(e)) provides that when a worker performs two distinct jobs for the employer, one tipped, the other not, the employer cannot take the tip credit against hours the employee works at the non-tipped job. This decision refuses to defer to recent Dept. of Labor informal interpretations of the dual job regulation that changed the focus from distinct jobs each with their associated tasks to a time-per-task approach, dividing tasks into three categories (tip-generating, not tip-generating, but related, and not related) and denying a tip credit for not related tasks and to related tasks if they exceed 20% of the worker's time in a week. According to this decision, so long as the tasks are part of the tipped job, the employer can take the tip credit.

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INSURANCE

Global Modular, Inc. v. Kadena Pacific, Inc.

California Court of Appeal, Fourth District, Division 2 (Slough, J.); September 8, 2017; 2017 WL 3948229

A subcontractor's commercial general liability insurance policy did not exclude coverage of water damage to the interiors of modular units it supplied since the damage was not the specific part of the units on which the subcontractor was then working nor the part on which the subcontractor incorrectly performed its work.

A CGL policy's exclusion (j)(5) denies coverage for damage to "[t]hat particular part of real property on which you or [your subcontractors] are performing operations, if the 'property damage' arises out of those operations." This decision holds that "particular part" refers to specific components of a structure, not the whole structure and that "are performing operations" indicates the exclusion applies only to damage caused during physical construction activities. So water damage to modular units' interiors was covered even though the insured's work on the entire project was not yet complete, as it was not physically working on the interiors at the time the damage occurred. Exclusion j(6) applies to "[t]hat particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it." Again, the decision construes the exclusion narrowly to exclude damage only to the portion of the project on which the insured incorrectly performed its work. Here, the insured arguably supplied inadequate waterproofing on the roofs of the units, but the damage was to the interiors which were adequately constructed. Hence, the exclusion did not apply. The policy also covered the general contractor's delay damages suffered while it repaired the interiors of the damaged units. While repair costs are not themselves property damage, they were damages because of property damage to which the CGL applied, and thus were covered under the policy's insuring clause.