California Appellate Tracker Weekly Digest for September 10–16, 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.

Vol. IV, No. 142, p. 1

FINANCIAL SERVICES—BREACH OF CONTRACT; HOME OWNERS LOAN ACT; CIVIL PROCEDURE—PRE-EMPTION

Campidoglio v. Wells Fargo Bank, N.A.

Ninth Circuit Court of Appeals (Callahan, J.); September 12, 2017; 2017 WL 3996793

The Home Owners Loan Act does not preempt a state law breach of contract claim that the bank miscalculated adjusted interest rates on loans, since common law breach of contract claims impose no requirements other than those the bank voluntarily assumed in its own agreements.

The Home Owners Loan Act does not preempt a state law breach of contract claim that the bank (successor to a federal savings bank) miscalculated adjusted interest rates on loans by failing to apply the index it said it would or by confining the index to interest rates on certificates of deposit rather than all savings accounts. Common law breach of contract claims impose no requirements other than those the bank voluntarily assumed in its agreements. However, HOLA did preempt the claim that the bank chose the wrong substitute index when the index initially specified in the promissory note ceased to exist. The bank sufficiently obtained its primary federal regulator's approval of the new index.

California Appellate Tracker Weekly Digest for September 10–16, 2017

Vol. IV, No. 142, p. 2

FINANCIAL SERVICES—FORECLOSURE, DEEDS OF TRUST, ANTI-DEFICIENCY; CIVIL PROCEDURE—PRE-EMPTION

Branch Banking & Trust Co. v. D.M.S.I., L.L.C.

Ninth Circuit Court of Appeals (Tashima, J.); September 11, 2017; 2017 WL 3976309

The Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA") preempts a Nevada law that limited deficiency judgments on foreclosure to the amount by which the price the owner paid to acquire the loan exceeded the foreclosure sale price.

BB&T acquired three loans from the same group of defendants when it bought Colonial Bank's assets from the FDIC. The Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA") preempts a since-repealed provision of Nevada law that limited deficiency judgments on foreclosure to the amount by which the price the owner paid to acquire the loan exceeded the foreclosure sale price—thereby, disallowing the purchaser from buying at a discount and reaping a gain from foreclosure and an ensuing deficiency. The decision holds that the law would frustrate the purpose of FIRREA by making it more difficult for the FDIC to dispose of the assets of failed banks. The borrowers' and guarantor's attempted defenses based on an alleged oral promise to give them more time to implement a plan to resolve their defaulted loans failed because the loan agreements could be amended only by a writing and because there was no consideration given for the oral promise. Laches and failure to mitigate damages failed as defenses since the lender was under no obligation to exercise its default remedies in a manner so as to reduce the borrowers' and guarantors' liability. The suit for a deficiency following non-judicial foreclosure was equitable in nature so the borrowers and guarantors were not entitled to trial by jury.

California Appellate Tracker Weekly Digest for September 10–16, 2017

Vol. IV, No. 142, p. 3

CLASS ACTIONS

Lambert v. Nutraceutical Corp.

Ninth Circuit Court of Appeals (Paez, J.); September 15, 2017; 2017 WL 4081089

Uncertainty regarding class members' damages does not prevent certification of a class as long as a valid method has been proposed for calculating those damages such as, here, a full refund of the purchase price based on defendant's suggested retail price and the price the individual plaintiff paid.

Federal Rule of Civil Procedure 23(f)'s 14-day limit on petitioning for leave to appeal from a class certification or here, decertification, order is not jurisdiction since it is set by a rule rather than a statute. As it is not jurisdictional, the deadline may be equitably tolled. A reconsideration motion filed before the end of the 14-day deadline will toll the petition deadline until after the motion is denied. Also, the deadline can be tolled by a reconsideration motion that is filed outside the 14-day period if, during that period, the would-be appellant told the district court he wished to move for reconsideration and stated, even if briefly, the ground for doing so, and the district court then set a deadline for filing the reconsideration motion which was beyond the 14-day time limit. This decision reverses an order decertifying a class action under the unfair competition law and false advertising law seeking a full refund of the purchase price of an aphrodisiac that had been marketed without adequate testing to back its sexual enhancement claims. Uncertainty regarding class members' damages does not prevent certification of a class as long as a valid method has been proposed for calculating those damages. In particular, under the UCL and FAL only some reasonable basis for computation of restitution is required, and even an approximation will suffice. Here, the full refund method was consistent with plaintiff's theory of liability. Plaintiff showed evidence of the defendant's suggested retail price as well as the retail prices plaintiff individually paid for the product. That was enough to show plaintiff had a workable method for assessing damages. He was not required to present proof of an average retail price for the product.

California Appellate Tracker Weekly Digest for September 10–16, 2017

Vol. IV, No. 142, p. 4

TORTS—NEGLIGENCE

Johnson v. Open Door Community Health Centers

California Court of Appeal, First District, Division 4 (Reardon, J.); September 11, 2017; 2017 WL 3976813

Plaintiff's suit for physical injuries suffered when she tripped over a scale as she left a community health facility is governed by the two-year limitations period for ordinary negligence, not the shorter limitations period for claims against a health care provider's negligent delivery of professional services.

Plaintiff was a patient at the defendant medical center. After her consultation with a nurse practitioner ended, with positive test results and no further treatment required, plaintiff tripped on a scale that had been moved during the consultation so as to partly obstruct plaintiff's path to the hallway to leave. This decision holds that plaintiff's negligence claim arising from this incident is not subject to CCP 340.5's limitations period for liability caused by a health care provider in rendering professional services, but rather is a general negligence claim governed by CCP 340's two-year limitations period.

ARBITRATION

United States ex rel. Welch v. My Left Foot Children's Therapy, LLC

Ninth Circuit Court of Appeals (Fisher, J.); September 11, 2017; 2017 WL 3976314

False Claims Act lawsuit was not subject to defendant employer's arbitration clause in its contract with employee claimant, since it had no substantial connection to the employment relationship, and it was a claim by the United States, not the employee, against the employer.

An employer's arbitration clause was not phrased broadly enough to encompass a False Claims Act suit brought by a former employee based on facts she observed during her employment. Although the clause defined "disputes" in a separate section very broadly, the clause's actual agreements to arbitrate disputes were more narrowly drawn either to encompass only disputes arising out of or related to the employment relationship or to claims the employee had against the employer or vice versa. The False Claims Act suit fit within neither of these categories. It had no substantial connection to the employment relationship, and it was a claim by the United States, not the employee, against the employer.

California Appellate Tracker Weekly Digest for September 10–16, 2017

Vol. IV, No. 142, p. 5

DISABILITY DISCRIMINATION

Miller v. Fortune Commercial Corp.

California Court of Appeal, Second District, Division 1 (Johnson, J.); September 12, 2017; 2017 WL 4003420

A fully trained service dog must be accommodated under federal law and Civil Code § 51; a service dog in training must also be accommodated under Civil Code §§ 54, 54.1, but only if accompanied by the disabled person, or a person licensed or otherwise qualified to train the dog.

For purposes of the Unruh Act, Civ. Code 51(f), incorporating the federal ADA, service animals means only dogs and only dogs that have already been trained to do work or perform tasks for a disabled person, not dogs still in training to do so. Under the Disabled Persons Act, Civ. Code 54, 54.1, service dogs must be accommodated when present for the purpose of training the dogs but only if accompanied by the disabled person or someone licensed or otherwise credentialed as experience in training service dogs. Plaintiff's claim for intentional infliction of emotional distress also failed as defendant had no general policy against accommodating service dogs.

California Appellate Tracker Weekly Digest for September 10–16, 2017

Vol. IV, No. 142, p. 6

LABOR & EMPLOYMENT; DISCRIMINATION

Diego v. City of Los Angeles

California Court of Appeal, Second District, Division 1 (Lui, J.); September 14, 2017; 2017 WL 4053873

While a police department could not legally discriminate against its employee police officers based on their ethnicity, it could legally take adverse employment action against them based on the race of the man they shot.

This decision reverses a $4 million jury verdict in favor of two policemen who complained that they were discriminated against because they were of Mexican-American descent and have been involved in an incident in which they mistakenly shot and killed an unarmed, autistic African-American man. The court holds that while the employer police department could not legally take adverse action against the policemen based on their own ethnicity, the police department was free to consider the victim's race and the political problems which the shooting of an unarmed African-American male might cause in the community if the plaintiff policemen were allowed to return to patrol duty. Since the jury was not instructed to disregard the victim's race and since the plaintiffs had not established that the police department discriminated against them based on their own ethnicity rather than based on its assessment of the political difficulties their shooting caused, the evidence was insufficient to support the verdict, and judgment had to be entered for the defendant city.

California Appellate Tracker Weekly Digest for September 10–16, 2017

Vol. IV, No. 142, p. 7

CONSUMER PROTECTION; CIVIL PROCEDURE—PREEMPTION

Association des Eleveurs de Canards et d'Oies du Quebec v. Becerra

Ninth Circuit Court of Appeals (Nguyen, J.); September 15, 2017; 2017 WL 4080472

California's law banning foie gras and other products made from force-fed birds is not pre-empted by the federal Poultry Products Inspection Act, since that act only prohibits states from imposing ingredient requirements, as opposed to restrictions on animal husbandry practices.

The Poultry Products Inspection Act (21 U.S.C. § 467e) prohibits states from imposing "ingredient requirements" that were "in addition to, or different than," the federal law and its regulations. This statute does not expressly preempt California Health & Safety Code 25982 which forbids sale of products made from force-fed birds, such as foie gras, since "ingredients" refers to physical components of the product, not animal husbandry or feeding practices. Also, the federal act does not preempt the field of poultry raising. Nor does California's law stand as an obstacle to accomplishing any purpose of the federal act. So California law is not preempted.

CIVIL PROCEDURE—INCORPORATION BY REFERENCE

Roth v. Plikaytis

California Court of Appeal, Fourth District, Division 1 (Dato, J.)
September 13, 2017 (partial publication); 2017 WL 4020418

Trial court abused its discretion in declining to consider time records that had been filed with a previous attorney fee motion in the case and were incorporated by reference in a later attorney fee motion in the same case, since parties are permitted to incorporate by reference any paper previously filed in the action.

Under Cal. Rules of Court, rule 3.1110(d), a motion may incorporate by reference any paper previously filed in the action. To incorporate the document, the motion should refer to the document by date of execution and title. If the file is large, the motion should attach a copy of the incorporated paper for the judge's convenience. Here, the trial court abused its discretion in declining to consider time records that had been filed with a previous attorney fee motion in the case and were incorporated by reference in a later attorney fee motion in the same case.