Class Action Appellate Digest

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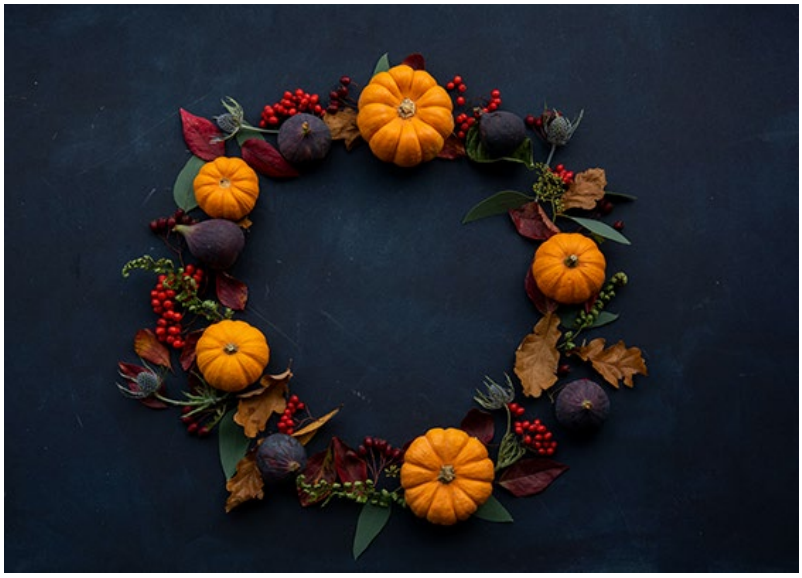

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Summary

September was another busy month for state and federal appellate courts. They issued a number of rulings of great practical importance to plaintiff-side advocates, including decisions shedding light on what class action lawyers can say in the media without running the risk of defamation litigation against them, limiting the reach of delegation clauses in arbitration agreements, expanding the scope of university liability under Title IX for student-on-student violence, warning counsel against falling into Rule 41's procedural pitfalls, and others.

State Opinions

Peterson v. Devita, --- N.E.3d ----, 2023 IL App (1st) 230356 (Ill. Ct. App. Sept. 22, 2023)

Background: The plaintiff was staying at a property his friend rented on Airbnb. He fell from an elevated porch and suffered severe leg injuries that resulted in a below-the-knee amputation. He sued Airbnb and other defendants for negligence, *res ipsa loquitur*, and construction negligence. Airbnb moved to compel arbitration on the ground that the plaintiff had created an Airbnb account years earlier and at that time signed an arbitration agreement providing that "any dispute, claim or controversy arising out of or relating to" Airbnb's terms of service "or to the use of the Airbnb platform" must be arbitrated (again, he didn't rent the at-issue property from Airbnb, his friend did, and he had never used his account to rent a property from Airbnb). The agreement also had a delegation clause. The trial court denied the motion to compel arbitration, and Airbnb filed an interlocutory appeal.

Holding: The Appellate Court affirmed on a 2-1 vote. The court reasoned, "Because Peterson had nothing to do with booking the property on Airbnb, his injuries did not arise from his use of the Airbnb platform, so the arbitration provision does not apply to him."

Because the FAA applied to the case, Airbnb relied on the United States Supreme Court's decision in *Henry Schein*, which holds that courts must enforce a clause delegating gateway issues of arbitrability to an arbitrator. But the court reasoned that "*Henry Schein* can be harmonized with common sense only where a dispute has its real source in the contract." Thus, held the court, "[t]he arbitration provision should apply only when the claims arise from a plaintiff's use of the Airbnb platform and not on the fortuity of a plaintiff having created an account." The court explained the absurd consequences that would result if it decided the case the other way: "Were the law as the dissent would have it, a member of a hotel chain's internet site with an arbitration clause like Airbnb's could attend a wedding at one of its hotels years later, sustain an injury from a falling chandelier, and have to arbitrate[.]" Because the plaintiff was not a party or participant in booking the property where the accident occurred, he could not be compelled to arbitrate his case *or* arbitrate the threshold issue of arbitrability. There was "no binding arbitration agreement" applicable to the dispute at issue.

Impact: Courts generally interpret arbitration agreements broadly, and they generally interpret delegation clauses *even more* expansively, but *Peterson* shows that even delegation clauses have limits on their reach. This was an issue of first impression in Illinois, and plaintiff-side practitioners can cite *Peterson*'s reasoning as persuasive authority wherever they are litigating. The Supreme

Court's decision in *Henry Schein* is broad, but *Peterson* recognizes that it is not broad enough to wipe away a plaintiff's right to ever litigate any case against a defendant in perpetuity just because the plaintiff signed an arbitration agreement (and delegation clause) covering an unrelated topic years before.

Killmer, Lane & Newman, LLP v. BKP, Inc., 2023 CO 47, ¶ 1, 535 P.3d 91, 93 (Colo. Sept. 11, 2023)

Background: In 2018, a plaintiff filed a class action suit under the federal Fair Labor Standards Act and state wage law against the operator of three Colorado beauty bars. On the same day the suit was filed, counsel for the plaintiff held a press conference and issued a press release repeating some of the allegations from the complaint. The defendant sued the attorney, a prominent civil rights lawyer, for defamation and interference with contractual relations. The attorney moved to dismiss in part on the ground that the statements were protected by the litigation privilege, an exception to the law of defamation. The trial court denied the motion to dismiss on other grounds, and on appeal, the appeals court reversed, holding in part that the litigation privilege did not apply. The appeals court focused its analysis on the fact that this was a class action case where the complaint alleged the class would be easily ascertainable. According to the appeals court, this allegation undermined the need to use the press to reach potential class members, and thus the rationale for the litigation privilege did not apply. The Colorado Supreme Court granted certiorari to decide the issue.

Holding: The Colorado Supreme Court reversed, holding that the litigation privilege applied to the statements, which merely repeated the allegations in the class action complaint. The Court agreed with the attorney defendant that there is no "ascertainability" exception to the litigation privilege in Colorado. The Court observed that such an exception "conditioning the applicability of the litigation privilege on whether class counsel has alleged that the class is ascertainable is unworkable in practice and would unduly limit the litigation privilege in class action cases." The Court further explained that "when a class action complaint is, or is about to be, filed, reaching potential litigants through the press is consistent with the purpose of the litigation privilege." Thus, alleging that a class is ascertainable does not affect the scope of the litigation privilege and does not create an exception to it.

Turning to application of the privilege to the case before it, the Court established a permissive test for application of the privilege in Colorado, holding that attorney statements to the media qualify for the privilege as long as they have some relation to and are made in furtherance of the objective of the class action litigation. Further, the court explained that "attorney press statements that merely repeat and explain a class action complaint serve to

notify the public, absent class members, and witnesses about the litigation, thereby furthering the object of the litigation." Because the statements in the case merely repeated allegations in the complaint, they were privileged.

Impact: *Killmer, Lane & Newman* is an important decision in Colorado and elsewhere because it preserves counsel's right in a class action case to reach potential class members through the media. Although the decision makes clear that counsel do not have an unlimited license to say whatever they want about a defendant, they are empowered to advocate for their clients (and putative class members) in the press without fear of defamation litigation designed to stifle such advocacy as long as their comments are related to and further the litigation. Further, *Killmer, Lane & Newman*'s thorough discussion of the issue and rationale are citable as persuasive in any jurisdiction, and the decision will undoubtedly make it into defamation treatises.

Federal Opinions

Brown v. Arizona, 82 F.4th 863 (9th Cir. Sept. 25, 2023)

Background: A former student of the University of Arizona brought an action under Title IX against the university arising from a former football player's repeated sexual assault of her and another student in 2016. The at-issue assaults occurred at the defendant's off-campus residence, where the university's coaches permitted him and other football players to live on condition of good behavior. She alleged that at the time of the assaults, university officials knew the man had repeatedly and violently assaulted two other female undergraduates during his freshman year, yet they took no action to ensure he would not be a danger to the plaintiff and other students. Undisputed evidence showed that if the man's coaches had known of the assaults, he would have been kicked off the football team and likely expelled before his assaults on the plaintiff.

The district court granted summary judgment to the university, holding as a matter of law that the university did not exercise control over the "context" in which Bradford's abuse of Brown occurred because the housing was not on campus. A divided Ninth Circuit panel affirmed. The plaintiff then sought rehearing *en banc*, and the full Ninth Circuit took the case.

Holding: On an 8-3 vote, the full Ninth Circuit reversed. The court noted that under the applicable Title IX test in deliberate-indifference cases involving student-on-student physical harassment, the first thing a plaintiff must show is that the educational institution had substantial control over both the harasser and the context in which the known harassment occurs. Rejecting the rationale employed by the district court and Ninth Circuit panel, which

found the off-campus location of the assaults determinative, the full court explained that "while the physical location of the harassment can be an important indicator of the school's control over the 'context' of the alleged harassment, a key consideration is whether the school has some form of disciplinary authority over the harasser in the setting in which the harassment takes place." Thus, the court held that "liability attaches under Title IX when harassment occurs off campus, so long as the educational institution has sufficient control over both the 'harasser' and the 'context' in which the harassment takes place."

Applying that standard to the case before it, the court found it clear that the university had substantial disciplinary control over the abuser, so the only disputed question was whether the university had control over the "context" as well. In that regard, the court found that undisputed evidence showed that the university had control over the off-campus housing where the assaults occurred. He only lived there by permission from his coaches and on condition of good behavior, and permission to live off campus could be revoked by even minor infractions of various requirements placed on football players. The university's code of conduct applied both on campus and off campus, and it authorized the university to discipline the abuser for off-campus misconduct. The abuser was subject to heightened supervision through additional conduct rules applicable to football players and governed where he could live while enrolled. And the football team had a zero-tolerance policy for violence against women, which would have led to his removal from the team if the coaches had been informed of his past assaults (and thereby making impossible his off-campus living arrangement).

Thus, the Ninth Circuit held that a reasonable factfinder could conclude that the university had substantial control over the "context" in which the man assaulted the plaintiff.

Impact: *Brown* is a victory for sexual assault survivors. Under this *en banc* decision's rationale, the focus for Title IX is on the university's control over the situation, not on the physical location of the assault.

Hartstein v. Hyatt Corp., 82 F.4th 825 (9th Cir. Sept. 22, 2023)

Background: The California Labor Code's prompt payment provisions require that all wages, including accrued vacation, be paid immediately when an employee is discharged from a job and establish timing requirements for such payments. There is no statutory definition for the term "discharge," and California courts have not interpreted it. In March 2020, during the COVID-19 pandemic, Hyatt "furloughed" some of its employees indefinitely, and then terminated them permanently in June 2020. Some of those former employees brought a class action for statutory penalties under the California Private Attorneys' General Act, alleging that, in relevant part, the prompt payment provisions required Hyatt to pay the employees for accrued vacation when it laid them off in March 2020 and that Hyatt was required to compensate them for the value of free hotel rooms they received each year. The district court granted summary judgment in favor of Hyatt, reasoning that the March 2020 furlough was not a "discharge" under the prompt payment provisions because it was not yet a complete severance of the employer-employee relationship.

Holding: The Ninth Circuit reversed in part and affirmed in part. As for the vacation pay, the court held that the prompt payment provisions required Hyatt to pay the plaintiffs their accrued vacation pay in March 2020. The appeals court observed that no California appellate courts had interpreted the term "discharge," but guidance from the California Division of Labor Standards Enforcement ("DLSE") established that if an employee is laid off without a specific return date within the same pay period, then the prompt payment provisions apply. The court explained that while DLSE guidance is not controlling on courts, it is still "a body of experience and informed judgment to which courts and litigants may properly resort for guidance." And the court concluded that the DLSE's guidance is "consistent with the purpose of the statute to protect workers."

As for the employees' claim for compensation for the complimentary hotel rooms, the court held that Hyatt did not owe the employees compensation for those rooms because they were excludable from their regular rate of pay under the Fair Labor Standards Act, which California law incorporated. The appeals court therefore affirmed the district court's grant of summary judgment as to the claim for hotel rooms.

Impact: *Hartstein* is an important decision for California employees. It expands the prompt payment provisions' applicability to temporary layoffs, not just permanent separations, and it removes the incentive for employers to initially characterize a separation intended to be long-term or permanent as a temporary "furlough" to delay the payment of accrued vacation and other wages. And while the decision is not binding on California courts, employees can cite it as highly persuasive authority there as well.

Martinez v. ZoomInfo Technologies, Inc., 82 F.4th 785 (9th Cir. Sept. 21, 2023)

Background: The plaintiff brought a class action against arising from the defendant's alleged misuse of a database of individuals' information and employment data. The defendant moved to dismiss for lack of standing and filed a motion to strike pursuant to California's anti-SLAPP statute. The district court denied both motions, ruling that the plaintiff had standing and that the defendant was not entitled to relief under the anti-SLAPP statute. The defendant sought an interlocutory appeal of the anti-SLAPP ruling. The plaintiff argued that Ninth Circuit lacked jurisdiction to entertain the appeal.

Holding: The Ninth Circuit affirmed the district court's ruling. Most interestingly for present purposes, the appeals court ruled that it had jurisdiction to hear the anti-SLAPP appeal under the collateral order doctrine. The court's analysis was short, as it was based on prior controlling Ninth Circuit precedent. Two of the three judges on the panel wrote in separate concurrences to urge the Ninth Circuit to reconsider *en banc* its prior precedent holding that the denial of anti-SLAPP motions is reviewable on an interlocutory appeal under the collateral order doctrine. They noted, among other things, that this precedent puts the Ninth Circuit in the minority of a circuit split, and that judges in the court have pushed back on this precedent in numerous concurrences and dissents.

Impact: *Martinez* is the latest addition to an entrenched and well-developed circuit split as to whether the denial of anti-SLAPP motions falls within the narrow set of non-final rulings reviewable under the collateral order doctrine. This issue is ripe for Supreme Court review. The split is well-established, and the issue is important because allowing such appeals can significantly impact the course and length of litigation. Allowing automatic appeals of anti-SLAPP rulings also creates an incentive for defendants to file such appeals as a matter of course, as the appeal can slow down or halt litigation in the district court.

City of Jacksonville v. Jacksonville Hospital Holdings, L.P., 82 F.4th 1031 (11th Cir. Sept. 13, 2023)

Background: The City of Jacksonville, Florida sued to recover damages relating to soil and groundwater contamination. Over eight years of litigation, ten parties became involved in the sprawling litigation. One filed a third-party complaint against six third-party defendants; some of those later filed their own counterclaims, and an original defendant also filed counterclaims against Jacksonville. Over time, various combinations of parties filed seven voluntary dismissals under Federal Rule of Civil Procedure 41(a)(1)(A)(ii), which provides for the voluntary dismissal of an action without a court order when a plaintiff files "a stipulation of dismissal signed by all parties who have

appeared." But none of the seven voluntary dismissals were signed by all ten parties. Instead, they typically were signed only by the parties involved in a given claim or counterclaim when the subject of that dismissal was that claim. After relevant claims were voluntarily dismissed, one defendant appealed an unrelated district court order.

Holding: The Eleventh Circuit found that it lacked appellate jurisdiction over the appeal because the voluntary dismissals were ineffective and thus final judgment had not been rendered below. It held that the voluntary dismissals were deficient because the Rule requires "all parties who have appeared" to sign a voluntary dismissal stipulation. The panel concluded that the Rule's plain language required the signatures of all ten parties on each stipulation. Although the Rule provides for dismissal of only "an action" (and not a claim), the Eleventh Circuit previously held that a dismissal of all claims against a given defendant is within the meaning of "an action" even if other claims continue against other defendants. But it did not read in a similar party-by-party breakdown into Rule 41(a)(1)(A)(ii)'s "signed by all parties who have appeared" language, reasoning that the Rule is meant to prevent collusion and provide notice to all parties and that the Rule allows for a party to seek a court-ordered dismissal if any party withholds their signature. This holds true even for a party that already has been dismissed from an action; if that party has "appeared," its signature must be on a voluntary dismissal stipulation for it to be effective.

Impact: *Continental Holdings* creates a circuit split on this issue. In the Fifth Circuit, only the dismissed defendant must sign the stipulation for it to be effective; the other parties do not have to. But in the Eleventh Circuit, counsel should take care to obtain the signature of every party who has appeared—regardless of whether the stipulation affects them, and even regardless of whether that party is still in the case at all—to effectuate a voluntary dismissal under Rule 41(a)(1)(A)(ii). Everywhere else, in the absence of controlling precedent, counsel should be mindful of this trap for the unwary. A single missing signature on a voluntary dismissal in a multi-defendant case could set the stage for an appellate court to wipe out the parties' hard work years down the line.

Rose v. PSA Airlines, Inc., 80 F.4th 488 (4th Cir. Sept. 12, 2023)

Background: Rose sued her deceased son's former employer to recover benefits allegedly due to him under the Employee Retirement Income Security Act (ERISA). ERISA allows recovery of (among other things) benefits due to an employee under the terms of the employer's health insurance plan as well as "other appropriate equitable relief." Rose alleged that her son's plan should have paid for a medically necessary heart transplant, but the plan denied coverage, the transplant didn't take place, and her son died as a result. The

District Court dismissed her claims.

Holding: In a split decision, the Fourth Circuit opened a narrow path to recover for Rose under ERISA's "other appropriate equitable relief" standard. It first held that Rose could not bring a claim for benefits due to her son because the money she sought was not such a benefit due under his health plan; the only avenue for her to recover that would have been to pay out of pocket for the heart transplant and sue for reimbursement. But the Fourth Circuit closely examined Supreme Court precedent interpreting ERISA's "equitable relief" catch-all provision and determined that a claim can be brought under that section if it seeks relief that was typically available at equity, *i.e.* not compensatory damages, and if the plaintiff points to specific funds that she rightfully owned but that the defendant possessed as a result of unjust enrichment.

The panel majority emphasized that this traceability requirement is inherent in the equitable claim of unjust enrichment. It held that an unjust enrichment claim (at least under ERISA, though the reasoning is broader) cannot seek funds out of a defendant's general assets, but instead must clearly trace to specific certain funds or property possessed by the defendant that it gained through unjust enrichment at the plaintiff's expense. Thus, the Fourth Circuit remanded for the district court to analyze whether Rose had pleaded facts to state such a claim.

Impact: *Rose* adds new hurdles to ERISA plaintiffs, requiring plaintiffs who seek restitution under ERISA's catch-all "equitable relief" provision to allege the traceability of specific funds or property from their loss to the defendant's unjust gain. ERISA counsel should take care not to seek unjust enrichment from a defendant's general fund without alleging some traceability facts. A make-whole "surcharge" claim under the catch-all provision is no longer available in the Fourth Circuit.

While *Rose* likely will have a broad impact on ERISA litigation, it may also carry over to unjust enrichment claims in the Fourth Circuit generally. The *Rose* Court confirmed that plaintiffs may simultaneously plead legal and equitable claims in the alternative, which is the subject of ongoing debate elsewhere including the Ninth Circuit, but it also added new hurdles to plaintiffs bringing unjust enrichment claims. Defendants in the Fourth Circuit may soon argue that *Rose* requires plaintiffs to allege traceability in every complaint involving unjust enrichment claims, and they may seek to dismiss those claims when plaintiffs simply tack on unjust enrichment claims without sufficient allegations of traceability or identification of specific funds or property at issue.

Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC, 80 F.4th 466 (4th Cir. Sept. 6, 2023)

Background: The TCPA generally prohibits the use of a fax machine to send an "unsolicited advertisement." The plaintiff, a chiropractic office, sued under the TCPA after it received an unsolicited fax offering the *Physicians' Desk Reference*, a free ebook with information about prescription drugs. The district court dismissed the case, ruling that the plaintiff had not alleged that the fax, which tendered a product for free rather than for sale, was sufficiently commercial to bring it within the statutory prohibition on unsolicited advertisements.

Holding: The Fourth Circuit reversed, holding that the plaintiff adequately alleged that the fax had "the necessary commercial character to make it an 'unsolicited advertisement'" under the TCPA. While the appeals court agreed with the district court that the statute covers only faxes of a commercial nature, it held that the fact the ebook was free was not dispositive in determining whether the fax was commercial in nature. That was because the defendant's "business is distribution of the *Physicians' Desk Reference*"—pharmaceutical providers pay the defendant to list their drugs in the book, so distribution of the book to providers increases the defendant's revenues. There was thus "a straightforward 'commercial nexus' between the fax in question" and the defendant's "'business.'" And while the Fourth Circuit reiterated that "a purely informational fax" would not qualify as an "unsolicited advertisement" under the TCPA, even if sent with a profit motive, the information in the at-issue fax also included a "pitch" for the ebook.

Impact: As with a similar Seventh Circuit case in August, *Carlton & Harris* is unlikely to have widespread impact in terms of its directly controlling precedential effect. After all, how many people use fax machines these days? But the decision's rationale potentially has broader application. Numerous provisions of the TCPA govern "telemarketing" calls or telephone "solicitations." The Fourth Circuit's rationale applies with equal force to such terms. Thus, *Carlton & Harris* is an important reminder that function is more important than form when it comes to determining whether a covered communication violates the TCPA's provisions on unsolicited advertisements.