MISCELLANEOUS

CONSUMER COULD NOT SUE TELEPHONE COMPANY FOR ALLEGEDLY FRAUDULENTLY CHARGING LONG DISTANCE ACCESS FEES -- THE SUIT WAS BARRED BY FEDERAL LAW GOVERNING THE RATES CHARGED BY TELECOMMUNICATIONS CARRIERS

*Gallivan v. AT&T***,** 124 Cal.App.4th 1377 (Cal. Ct. App. 2004).

FACTS: Jennifer Gallivan brought a suit against AT&T and alleged that the company deceived their customers by charging a monthly subscriber line charge (SLC) that was not disclosed in an advertised monthly service rate. When the SLC charge appeared on her monthly bill, Galllivan argued that AT&T had fraudulently imposed this fee on its customers and was in breach of contract. She also claimed that AT&T falsely indicated that the SLC charge was imposed and collected by the Federal Communications Commission (FCC) when in fact the fee was never transferred to the FCC. Based on that allegation, Gallivan contended that the SLC collected by AT&T was in violation of California's Business and Professions Code § 17200 and she sought to represent a class of California customers affected by this charge. She requested monetary damages for recovery of all funds paid for the SLC, plus costs and interest.

AT&T demurred to the complaint and claimed that the SLC, while not imposed by the FCC, was still a valid charge. They reasoned that because the charge was filed with the FCC as an allowed tariff, it was protected by the federal filed rate doctrine. Since AT&T believed that the filed rate doctrine applied, they asserted that the claim was time barred and preempted by federal law. The trial court determined that the claim was barred by the filed rate doctrine because Gallivan sought monetary damages and that her claims of fraud and breach of contract were insufficiently pled. The trial court sustained the demurrer.

HOLDING: Affirmed.

REASONING: Under the Federal Communications Act of 1934, a carrier is required to file scheduled charges with the FCC and allow those records to be available to the public. Once the charge, or tariff, is approved, the carrier can not change the rate nor can a customer bring a claim against a carrier that would alter the terms of that charge. The filed rate doctrine is a court-created rule that was derived from this FCC requirement. The *Gallivan* court looked to *Marcus v. AT&T Corp*., 138 F. 3d 46, (2d Cir. 1998) and stated that the purpose of the doctrine is two fold. First, the doctrine prevents price discrimination and second, it upholds federal agencies' rights to approve telecommunication services rates. Gallivan argued that the doctrine should not apply to her case because AT&T filed the non-mandatory tariff voluntarily. The court determined that the underlying action of the defendant who filed the tariff does not determine whether or not the doctrine applies. Instead, the court focused on how the application of the doctrine would affect agency procedures and modification of the filed tariff. For example, if the doctrine was not applied and Gallivan's claim for monetary damages was permitted, such an award would effectively allow a discounted rate for her phone service and imply a discriminatory result. Gallivan's allegations of fraud and breach of contract were, therefore, barred by the filed rate doctrine and the judgment of dismissal was affirmed.

LOUISIANA WAGE EXEMPTION DOES NOT PROTECT WAGES ONCE THEY HAVE BEEN DEPOSITED INTO A BANK ACCOUNT

In re Sinclair, 417 F.3d 527 (5th Cir. 2005).

FACTS: Sinclair filed for Chapter 7 bankruptcy. Pursuant to Louisiana "disposable earnings" exemption (La.Rev.Stat.Ann §13:3881), Sinclair sought to exempt 75% of the wages which were direct deposited into his bank account eight days prior to his petition. The bankruptcy court agreed, but, upon appeal by the trustee, the district court reversed the bankruptcy court's order. The district court ruled that the exemption only applied to wages which were still in the employer's control and not to wages that have been deposited into the employee's bank account. Otherwise, debtors could abuse the exemption by sheltering their wages in a separate account to qualify for the exemption.

HOLDING: Affirmed

REASONING: In bankruptcy cases, Louisiana allows exemption under its state statutes as opposed to the federal exemptions. La.Rev.Stat.Ann §13:3881 allows exemption for 75% of the petitioner's "disposable earnings" for any week. The opening phrase of the statute was worded broadly. However, the statutory language provided a more narrow definition of "disposable earnings." The definition included the phrase "at the time the garnishment is served upon the employer."

Focusing on the plain language of the statute, the Fifth Circuit held that there is no protection for wages once they have been deposited into the employee's bank account.

The Fifth Circuit held that the Louisiana wage exemption does not protect wages once they have been deposited into a bank account. The only two appellate decisions interpreting this statute provide conflicting conclusions. Thus, the Fifth Circuit looked to interpretations of similar exemption statutes in Louisiana and other jurisdictions.

First, the Louisiana exemption for worker's compensation benefits have been interpreted as applicable only to benefits due, not benefits already received. In contrast, Louisiana statutes which do allow exemptions of paid funds or benefits have included the word "paid" in the provisions. Second, the Supreme Court has held that, under the federal Consumer Credit Protection Act, earnings exemptions do not extend to assets that are traceable to compensation. The Ninth Circuit held that the same federal exemption only apply to earnings until such earnings were deposited into the employee's bank account. Lastly, in *Guidry v. Sheet Metal Workers National Pension Fund*, the Colorado exemption statute was interpreted to include paid benefits based on the statute's non-limiting language and the use of the term "compensation paid".

Unlike these statutes, the statute in this case lacks such specificity. Instead, it is more analogous to the worker's compensation exemption statute, which has been interpreted to exclude benefits received. Furthermore, since the two existing Louisiana decisions are conflicting, there is also no judicial guidance. Thus, focusing on the plain language of the statute, the Fifth Circuit held that there is no protection for wages once they have been deposited into the employee's bank account.

A MANUFACTURER HAS A STATUTORY DUTY TO INDEMNIFY A SELLER FOR LOSSES INCURRED IN A PRODUCTS LIABILITY ACTION IN THE ABSENCE OF PROOF THAT THE ALLEGEDLY DEFECTIVE PRODUCT WAS PRODUCED BY THAT MANUFACTURER

Dutton-Lainson Co. vs. Do It Best Corp., ____S.W.3d____ (Tex. App.—San Antonio 2005).

FACTS: Plaintiff Huddleston alleged injuries caused by the malfunctioning of a brake winch handle. Huddleston filed a products liability lawsuit against the alleged manufacturer, the distributor, and his employer who purchased the winch. Plaintiff's claims were later dismissed. In response to the suit, the distributor, Do It Best Corporation ("DIB")// filed a cross-claim against the manufacturer Dutton-Lainson. DIB sought statutory indemnification under section 82.002 of the Texas Products Liability Act. DIB then filed for summary judgment on its indemnity claim and supported the motion with an affidavit stating that DIB has been a distributor of Dutton-Lainson products. Dutton-Lainson responded that the identity of the manufacturer is not verifiable because the winch was discarded prior to the suit. Dutton-Lainson further provided affidavits describing the alleged winch as "silver", but Dutton-Lainson had never sold any "silver" winches to DIB. The trial court granted summary judgment in favor of DIB and ordered Dutton-Lainson to pay DIB's incurred defense costs plus any additional defense costs until the action was resolved. Dutton-Lainson filed an appeal asserting that the trial court erred in granting summary judgment on the indemnity claim. Dutton-Lainson contended that the Texas Products Liability Act imposed liability only on the manufacturer who produced the specific product at issue. Furthermore, there was a genuine issue of material fact because Dutton-Lainson provided support that it did not manufacture or distribute the winch in question.
HOLDING: Affirmed
REASONING: The Fourth Court of Appeals held that, under the Texas Products Liability Act, a manufacturer has a statutory duty to indemnify a seller for losses incurred in a products liability action in the absence of proof that the allegedly defective product was produced by that manufacturer. The language of the statute only requires that the seller show that the defendant qualifies as a statutory manufacturer. The statute does not require the seller to show that the defendant manufactured the product in question or that the defendant was in the chain of distribution. As the Texas Supreme Court held in *Meritor Automotive Inc. v. Ruan Leasing Co.*, "a manufacturer's duty to indemnify the seller is invoked by the plaintiff's pleadings and joinder of the seller as defendant." 44 S.W.3d 86, 91 (Tex. 2001). Because DIB supported its motion for summary judgment with the plaintiff's pleadings and the affidavit, the Fourth Court of Appeals held that DIB was entitled to indemnity as a matter of law.

FAN HIT BY A FOUL BALL WHILE STANDING AT A CONCESSION STAND CAN SUE BALLPARK

Louis Maisonave v. Newark Bears Professional Baseball Club, Inc., 881 A.2d 700 (N.J. 2005).

FACTS: A foul ball struck plaintiff, Louis Maisonave, in the eye as he purchased a beverage from a mobile vending cart on the concourse of a minor league stadium. Plaintiff was standing on the mezzanine at Riverfront Stadium, the home field of minor league baseball team, The Newark Bears. The stadium used movable vending carts for the sale of beverages because construction of the stadium had not yet been completed and the built-in concession stands were not operational. The vendors stood with their backs to the diamond while the patrons faced it. The beverage cart the plaintiff patronized was on the first base line, but beyond the protection of netting used to protect seating areas. The trial court granted summary judgment in favor of the defendant. The appellate court reversed and remanded before certification was granted to the Supreme Court of New Jersey.
HOLDING: Remanded to trial court.
REASONING: The court recognized a two part test to evaluate a limited duty of care from stadium owners and operators due to their patrons. First, the operator must provide protected seating sufficient for those spectators who may be reasonably anticipated to desire protected seats on an ordinary occasion, and second, the operator must provide protection for spectators in the most dangerous section of the stands. The limited duty rule is a specialized negligence standard that has protected stadium owners and operators since the early days of modern baseball. The court then considered whether the limited duty rule should apply to stadiums, and, more specifically, to the stands. Further, recognition of a duty of care ultimately rests on considerations of public policy and on notions of fairness.

The court reasoned it would be unfair to hold owners and operators liable for injuries to spectators in the stands when the potential danger of fly balls is an inherent, expected, and even desired part of the baseball fan's experience. To clarify the term "stands" includes the stairs that fans ascend and descend to access their seats in the stands. Similarly, areas immediately adjacent to the stands designated as "standing room only," and dedicated solely to viewing the game fall within the purview of the limited duty rule. In contrast, multi-purpose areas, such as concourse and playground areas, are outside the scope of the rule. The limited duty rule does not apply in areas outside of the stands, including concourse and mezzanines, such as the one in this case.

To apply the baseball rule [limited duty in stands] to the entire stadium would convert reasonable protection for owners to immunity by virtually eliminating their liability for foreseeable, preventable injuries to their patrons even when the fans are no longer engaged with the game. The court does not impose strict liability for owners in areas outside the stands but do apply traditional tort principles and conclude that the proper standard of care for all other areas of the stadium is the business invitee rule. As the court noted, "a landowner owe[s] a duty of reasonable care to guard against any dangerous conditions on his or her property that the owner either knows about or should have discovered." The limited duty rule is an exception to general negligence principles, and more particularly, to the application of the business invitee standard of care in the commercial context.

ANNUAL STATEMENT OMITTING SOME REQUIRED INFORMATION DOES NOT INVOKE THE LIQUIDATED DAMAGE PROVISION

Flores v. Millennium Interests, Ltd, ____S.W.3d____(Tex. 2005).

FACTS: In July of 2000, Millennium Interests, Ltd, a residential developer, contracted with Concord Servicing Corp. to perform reporting and accounting services for its financing transactions. Millennium financed its development of residential subdivisions in part through executory contracts known as contracts for deed. Financing property sales using contracts for deed was regulated by Tex. Prop. Code Section 5.077. The code required that on or before January 31st of each year, purchasers should be provided with an annual accounting statement or the seller would be subject to liability for the purchaser's liquidated damages and attorney's fees. Although Concord sent out the annual accounting statement, it failed to include the number of payments remaining under the contract and the amount paid under the contract required by Section 5.077c. Three purchasers sued Millennium because of the omissions in their 2001 and 2002 annual statements. The purchasers sought damages in excess of the purchase price of their properties. The trial court granted summary judgment for Millennium holding that liquidated damages were not owed when a seller delivered a timely annual statement that omitted some of the information listed in subsection (b) of that statute. The purchasers appealed.

HOLDING: Affirmed.

REASONING: The court held that an omission of some of the information required by Section 5.077(b) did not invoke the liquidated damages under Section 5.077(c) unless the statement was so deficient "as to be something other than a good faith attempt by the seller to inform the purchaser of the current status of their contractual relationship." The court explained that Section 5.077 conditioned liability for liquidated damages on the seller's failure to provide an annual statement by the statutory deadline. The court stated that the Legislature's purpose for the liquidated damages provision was made apparent by its invocation being tied to a failure to supply the annual statement by the statutory deadline. The court stated that the purpose of the liquidated damages provision was not to serve as an award when some information was missing, but rather as an incentive to annually provide purchasers with information about their executory contracts and to incite further inquiry if some of the information was missing or incomplete. Therefore, the liquidated damages provision of the code would not be triggered unless Millennium had failed to supply the annual statements by the statutory deadline. Concord, the company that Millennium had retained to supply the annual statements, complied with the statutory requirement to provide annual statements on or before January 31st of each year. Millennium supplied the annual statements through Concord on time. The fact that the annual statements omitted certain information did not trigger the liquidation damages provision.

The liquidated damages provision of the code would not be triggered unless Millennium had failed to supply the annual statements by the statutory deadline.

WORKERS' COMPENSATION CLAIMANT'S ATTORNEY FEES SHOULD NOT BE PAID OUT OF THE CLAIMANT'S RECOVERY

Dean Foods v. Anderson, __ S.W.3d __, (Tex. App.—Amarillo 2005).

FACTS: Claimant Anderson's husband was murdered while employed by Dean Foods, and she filed a claim for workers' compensation benefits. Employer Dean Foods opposed the claim. The Texas Worker's Compensation Commission (TWCC's) found that the death was a compensable injury and that claimant Anderson was the sole beneficiary and entitled to TWCC benefits.

Dean Foods appealed the award of death benefits to Anderson. In her answer and counterclaim, Anderson sought affirmative relief, including attorney's fees. Dean Foods filed a motion for nonsuit a year later. After receiving notice of the nonsuit motion, Anderson submitted an additional motion seeking $320,855.20 in attorney's fees along with supporting affidavits. The trial court held: "1) it had jurisdiction to award attorney's fees, 2) Anderson was not the 'prevailing party' in the suit, 3) reasonable and necessary attorney's fees in the amount of $100,167.86 were incurred by Anderson, and 4) the attorney's fees were to be paid out of Anderson's death benefit award." Both parties appealed the decision, and TWCC intervened in the appeal.

HOLDING: Corrected regarding payment of attorney fees.

REASONING: Although the general rule is that the workers' compensation claimant's attorney's fees are paid out of the claimant's recovery, section 408.221(c) is an exception to that general rule. The intent of the legislature was to place the risk of having to pay the claimant's attorney's fees upon the insurance carrier, if the carrier appealed an award delaying the payment of benefits. The court reasoned that this exception is justified since an appeal to the district court necessarily requires an attorney, while no attorney is required to represent a worker in TWCC proceedings. The court concluded that the carrier's appeal to the district court made section 408.22(c) authorizing the award of attorney's fees to the "prevailing party" applicable in this case.

APPEAL NOT ALLOWED TO COURT OF APPEALS FROM JUDGMENT IN CASE ORIGINATING IN SMALL CLAIMS COURT

Sultan v. Mathew, ____S.W.3d____ (Tex. 2005).

Facts: Sultan was sued by Mathew in small claims court for damages related to laminate flooring in Mathew's home. Sultan lost and was ordered to pay $4,000. Sultan filed an appeal in the

Harris County Civil Court at Law No. 2 and, pursuant to Tex. Gov't Code section 28.052(a), 28.053(b), requested a de novo trial. Sultan claimed that he did not receive notice of the trial date and thus failed to appear. As a result, the court entered a default judgment against him.

Next, Sultan filed an appeal to the First Court of Appeals. The court of appeals dismissed the appeal because it held that it lacked jurisdiction. The Texas Supreme court granted Sultan's petition for review on the issue of whether a court of appeals has jurisdiction to review judgments that originate from a small claims court.

Holding: Affirmed

Reasoning: In a 6-3 decision, the Texas Supreme Court held that courts of appeals lack jurisdiction over cases originating in small claims court. The court based its decision on legislative intent and statutory interpretation. Accordingly, under section 28.053(d) of the Texas Government Code, county courts' and county courts at law's reviews of small claims court judgments are final and non-appealable.

The Legislature intended the Small Claims Court Act to offer an affordable and speedy alternative in matters involving small sums of money. This legislative intent was evident throughout various aspects of the small claims court. Furthermore, section 28.053(d) specifically provides for appeal to the county court or county court at law. An interpretation of the act to further allow appeals to the courts of appeals would be redundant because, without section 28.053(d), such appeals would be allowed under Tex. Gov't Code section 22.220(a). Thus, the court reasoned that the legislature intended section 28.053(d) as a restriction on appeals.

Lastly, the court recognized that, because small claims courts share jurisdiction with justice courts in certain matters, the holding in the case would lead to illogical results. It would be illogical to allow courts of appeals jurisdiction over cases originating in a justice court but not if the same case arose from small claims court. However, small claims courts would be redundant if they were meant to be identical to justice courts. Moreover, this issue should be left to the legislature.

VOLUNTARY PAYMENT DEFENSE BARS CLASS ACTION AND LIQUIDATED DAMAGES MUST BE REASONABLE ESTIMATE OF DAMAGES IN ORDER TO BE ENFORCEABLE

BMG Direct Marketing, Inc. v. Peake, ____S.W.3d____ (Tex. 2005).

FACTS: BMG Direct Marketing, Inc. ("BMG") operated music clubs that sell compact discs to members through mail and online services. BMG assessed a late fee of $1.50 if the members do not pay for the compact discs within thirty days. BMG promotions, namely the Membership Guide and the invoices included with each shipment, stated that the late fees would apply to past-due accounts. Customers were given ten days to decline membership and may return the compact discs at BMG's expense with no further obligation or expense.

Patrick Peake, a BMG member, bought dozens of compact discs from the company. During the same time, he incurred late fees totaling $7.35. Peake sued BMG in 2002 to recover the late fees by claiming said fees were illegally charged because they did not reasonably forecast BMG's actual damages resulting from customers' late payments.

Peake moved to certify a class of all present and former members in Texas who paid late fees to BMG since 1998. BMG opposed, arguing the voluntary payment rule applied to each member's claims and that precluded a finding that common issues would predominate. The trial court found it unlikely the rule would apply because it was equitable and "need not be applied where the rationale for its existence does not exist." Class certification was granted, and a divided court of appeals affirmed the ruling, which BMG appealed to the Texas Supreme Court.

HOLDING: Reversed and Remanded.

REASONING: "Money voluntarily paid on a claim of right, with full knowledge of all the facts, in the absence of fraud, deception, duress, or compulsion, cannot be recovered back merely because the party at the time of payment was ignorant of or mistook the law as to his liability." *Pennell v. United Ins. Co.,* 243 S.W.2d 572, 576 (Tex. 1951). Historically the rule has been widely used by Texas courts, but its scope has been diminished by other statutory remedies in the last forty years, during which it has been applied by the Texas Supreme Court only once. However, the rule has never been abrogated.

Peake contended that to satisfy the requirement that payment must be made with "full knowledge of the facts," the customers must have known that the late fees were illegal and unenforceable when they paid them. The court rejected this argument and agreed with BMG's contention that the literature sent with the shipments gave members "full knowledge of the facts." If the customers were aware of the late fees and paid such fees under the belief that they were reasonable later deciding the same fees were unreasonable, then the customers were operating under a mistake of law, which the court found was not a viable exception to the voluntary-payment defense.

For a liquidated damages clause to be enforceable, the fee charged must be a reasonable estimate of damages, and those damages must be incapable of precise calculation.

Peake attacked the application of the voluntary-payment defense, *inter alia,* on grounds that companies like BMG will be able to apply illegal fees to their customers without conscience. The court rejected the claim in agreeing with *Putnam v. Time Warner Cable,* 649 N.W.2d 626, 634 (Wisc. 2002), that a claim of an unlawful penalty was not tantamount to a claim of fraud, duress, or coercion. The court concluded that the voluntary-payment rule was an equitable one and may require balancing competing interests depending on the parties' circumstance. In the present case, the unlawful-penalty allegation did not implicate duress because the class did not suggest they had no alternative means of obtaining the compact discs. Thus, the court applied voluntary-payment in the present case.

For a liquidated damages clause to be enforceable, the fee charged must be a reasonable estimate of damages, and those damages must be incapable of precise calculation. In this way, parties allocate the risk of uncertainty over the actual loss that will be realized if a customer's payment is untimely. The court argued, in this way, both parties recognized that the fee quantifies the level of uncertainty and allocated the risk between the parties. For determination of this and other remaining issues, the court remanded the case to the trial court.

JUNK FAX SUIT CAN BE REMOVED TO FEDERAL COURT

Brill v. Countrywide Home Loans, Inc., 427 F.3d 446 (7th Cir. 2005).

FACTS: Countrywide Home Loans violated the Telephone Consumer Protection Act (TCPA), by sending fax advertisements. James Brill, one of the recipients, filed suit in state court seeking to represent a class of recipients. Countrywide filed a notice of removal under the Class Action Fairness Act of 2005 (CAFA). Brill's suit was commenced after February 18, 2005, the Act's effective date. The class compromises more than 100 members, minimal diversity of citizenship is present, and Countrywide alleged in the notice of removal that the amount in controversy exceeds $5 million, the statutory threshold. Countrywide concedes that it sent at least 3,800 advertising faxes and provides that the court may award $500 per fax, a sum that may be tripled if "the defendant willfully or knowingly violated this…regulation prescribed." The award could reach $5.7 million. The district court remanded the case, ruling not only that Countrywide had not carried its burden of showing that the stakes exceed $5 million but also that suits under the TCPA never may be removed because state jurisdiction is exclusive. Countrywide filed a petition for interlocutory appeal.

When a statute authorizes interlocutory appellate review, it is the district court's entire decision that comes before the court review.

HOLDING: Reversed.

REASONING: Whichever side chooses federal court must establish jurisdiction; it is not enough to file a pleading and leave it to the court or the adverse party to negate jurisdiction. When the defendant has vital knowledge that the plaintiff may lack, a burden that induces the removing party to come forward with the information exist so that the choice between state and federal court may be made accurately is desired. The district judge thought that a removing litigant must produce "evidence… that a favorable judgment will award Plaintiff" more than the jurisdictional minimum. The judge restated this as a need for "competent proof to establish" that the statutory threshold has been exceeded.

Once the proponent of jurisdiction has set out the amount in controversy, however, only a "legal certainty" that the judgment will be less forecloses federal jurisdiction. Jurisdictionally, sender only had to show reasonable probability that amount satisfying CAFA's jurisdictional minimum was being claimed, and TCPA did not confer exclusive jurisdiction upon state courts and thus did not foreclose removal. Removal is authorized not only by the CAFA but also by 28 U.S.C. section 1441 because the claim arises under federal law. Because 28 U.S.C. section1453(c)(1) permits appellate review of remand orders "notwithstanding section 1447(d)," we are free to consider any potential error in the district court's decision, not just a mistake in application of the CAFA. When a statute authorizes interlocutory appellate review, it is the district court's entire decision that comes before the court review.