Docket Nos. 11-55275 (L), 11-55359

In the

United States Court of Appeals

For the

Ninth Circuit

CELEDONIA X. YUE, M.D.,
on behalf of the class of others similarly situated and on behalf of the General Public,

Plaintiff-Appellee,

v.

CONSECO LIFE INSURANCE COMPANY,
Successor: Philadelphia Life Insurance Company,
fka Massachusetts General Life Insurance Company,

Defendant-Appellant.

On Appeal from the United States District Court for the Central District of California,
No. 08-CV-01506 · Honorable A. Howard Matz

FOURTH BRIEF ON CROSS-APPEAL

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REPLY BRIEF ON CROSS-APPEAL

In its opposition to the cross-appeal of Plaintiff-Appellee Celedonia X. Yue ("Yue"), Defendant-Appellant Conseco Life Insurance Company ("Conseco") makes five *seriatim* arguments why the flat statement in *Karl Storz Endoscopy-Am., Inc. v. Surgical Techs., Inc.*, 285 F.3d 848, 857 (9th Cir. 2002) that the discovery rule does not apply to claims under Cal. Bus. & Prof. Code § 17200, *et. seq*. ("UCL") governs Plaintiff's UCL claim, notwithstanding the subsequent pronouncement of the matter as an open issue by the California Supreme Court and the anticipated pending resolution of the open question by that Court in *Aryeh v. Canon Business Solutions, Inc.*, 116 Cal.Rptr.3d 881 (2010). None are well-taken.

First, Conseco argues that the district court was obligated to follow *Karl Storz*. That is precisely the problem and Yue's reason for cross-appeal. The flat statement of California law in *Karl Storz* is undermined by the California Supreme Court's subsequent express recognition in *Grisham v. Phillip Morris USA, Inc.*, 40 Cal.4th 623, 634 n.7 (2007) that, to the contrary, application of the discovery rule is "not settled under California law." Conseco in response simply ignores *Grisham*. The Ninth Circuit itself acknowledged the open question after *Grisham* in *Betz v. Trainer Wortham & Co.*, 236 Fed. Appx. 253, 256 (9th Cir. 2007) (it remains "an open question under California law whether the discovery rule applies

to unfair business practices claims"). Conseco in response simply ignores *Betz*. Certainly, at a minimum, it is fair to say that the blanket statement in *Karl Storz* is undercut by the California Supreme Court's acknowledgement in *Grisham* that matter is instead an open question under California law.

Second, even though the California Supreme Court's statement certainly "undermines" the reasoning of the contrary statement in *Karl Storz*, Conseco argues that this Court should not "overturn" *Karl Storz* out of a sense of "restraint and comity" to the prior panel. Third Br. at 47. It is hard to see how the panel could be offended by subsequent developments under California law or subsequent statements by the California Supreme Court on an issue it had not previously addressed. In any event, overturning *Karl Storz* is not the only option; indeed Plaintiff seeks only a determination that the flat statement of *Karl Storz* is not binding in this case. Second Br. at 66. This Court can and should simply distinguish *Karl Storz,* given (a) the subsequent developments in California law that admit to exceptions to the flat rule stated in *Karl Storz*, and (b) the district court's finding in this case that:

> the injury and the act causing the injury were both nigh to impossible for Plaintiff to detect in October 2002. Conseco does not disclose the actual cost of insurance rates to policyholders but only advises as to monthly cost of insurance charge deducted from the account value. In addition, [Conseco] did not at any point notify policyholders of the upcoming change of rates in their policies. Further, the actual increases would not be visible in a policyholder's annual report until Year 21 when the rates increase.

ER 37-38 (citations and footnote omitted). Alternatively, simply deferring resolution of Plaintiff's cross-appeal pending the California Supreme Court's ruling in *Aryeh* would in no way offend comity.

Third, Conseco disputes the suggestion that *Karl Storz*'s flat rejection of any discovery rule is "outdated"– not because that statement is consistent with *Grisham* and other California case law (it plainly is not), but because many courts within this circuit have, like Judge Matz, followed *Karl Storz* as precedent. Third Br. at 47-48. But, by the same token, other courts within the Ninth Circuit have not, leading to inconsistent outcomes. *See, e.g., Burdick v. Union Sec. Ins. Co.*, 2009 WL 4798873, at *10 & n. 16 (C.D. Cal. Dec 9, 2009) (applying discovery rule to UCL claim following *Betz*); *Whelan v. BDR Thermea*, 2011 WL 6182329, at *4 (N.D. Cal. Dec. 13, 2011) (declining to summarily follow *Karl Storz* on motion to dismiss); *Vaccarino v. Midland Nat. Life Ins. Co.*, 2011 WL 5593883, at *5-6 (C.D. Cal. Nov. 14, 2011) (delayed discovery rule acknowledged despite *Karl Storz*, though inadequately pled); *Portney v. CIBA Vision Corp*., 2009 WL 305488, at *7 (C.D. Cal. Feb. 6, 2009) (acknowledging possible application of discovery in denying motion to dismiss); *Garcia v. Coleman*, 2008 WL 4166854, at *10 (N.D. Cal. Sept. 8, 2008) (assuming for purposes of summary judgment that discovery rule applies, in light of *Grisham*). Conseco in response simply ignores *Burdick, Whelan*, *Vaccarino* and *Garcia*.

Fourth, Conseco attempts to harmonize the flat statement in *Karl Storz* with *Broberg v. Guardian Life Ins. Co.*, 171 Cal.App.4th 912, 920-21, *review denied*, (2009). *See* Third Br. at 49 ("*Broberg* neither 'overrules' *Karl Storz* nor even disagrees with it."). Yue should have the same opportunity to distinguish *Karl Storz* below: if *Broberg* is consistent with *Karl Storz*, then Yue should have the opportunity to argue application of the discovery rule in this case is consistent with *Broberg*.

Fifth and finally, Conseco argues that the California Supreme Court might not resolve the open issue in *Aryeh* despite of its grant of review, because the Supreme Court's website not surprisingly includes a disclaimer that warns the general public that the Court may not ultimately address issues which it has accepted review. No one can deny that the Court may, for some reason, decline to resolve an issue that it specifically accepted for review. But that is not expected here. *See, e.g., Beaver v. Tarsadia Hotels*, 2011 WL 6098165, at *10 (S.D. Cal. Dec. 6, 2011) (declining to dismiss UCL claim on limitations grounds pending the ruling in *Aryeh*); *see also Hameed v. IHOP Franchising, LLC*, 2011 WL 590905, at *3 n.5 (E.D. Cal. Feb. 10, 2011) (noting the possibility of a resolution of the issue in *Aryeh*); Stern, *Bus. & Prof. C. § 17200 Practice*, § 5:291 (2011) (noting California Supreme Court's acceptance of the issue in *Aryeh*). Application of the discovery rule to UCL claims is a major issue of California jurisprudence given

the extent of UCL practice in the State. The matter is fully briefed in *Aryeh* and awaiting disposition.

In the unlikely event that the Supreme Court does not resolve the matter in *Aryeh*, this Court could, as a final alternative, certify the issue to the California Supreme Court under California Rules of Court, Rule 8.548. *See, e.g., Albano v. Shea Homes Ltd. P'ship.*, 634 F.3d 524 (9th Cir. 2011) (certifying open issue of state law to the Arizona Supreme Court).

Respectfully submitted,

Dated: January 17, 2012 LAW OFFICES OF TIMOTHY P. DILLON

By: s/ Timothy P. Dillon
Timothy P. Dillon

Dated: January 17, 2012 BONNETT, FAIRBOURN, FRIEDMAN & BALINT, PC

By: s/ Andrew S. Friedman
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CERTIFICATE OF COMPLIANCE

I certify that:

This brief complies with the brief size permitted by Federal Rules of Appellate Procedure, Rule 28.1(e)(2)(B)(i). The brief's type size and type face complies with Federal Rules of Appellate Procedure, Rule 32(a)(5) and (6). This brief is proportionately spaced, has a typeface of 14 points and contains 1,082 words.

Respectfully submitted,

Dated: January 17, 2012 LAW OFFICES OF TIMOTHY P. DILLON

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STATEMENT OF RELATED CASES

In accordance with Ninth Circuit Rule 28-2.6, Plaintiff states there are no related cases, but these appeals are related to appeal no. 11-56579 in this Court as it involves the district court's award of attorneys' fees.

Dated: January 17, 2012 s/Timothy P. Dillon

CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Stephen Moore