



Appellate Reports

COURT SAYS METHODOLOGY OF IDENTIFYING CLASS MEMBERS WHO PURCHASED AN INFLATABLE POOL FROM CHAIN STORE NEED NOT BE SHOWN IN ORDER TO CERTIFY CLASS. ALSO, DECISIONS ON CHOICE OF LAW AND WAIVER OF RIGHT TO COMPEL ARBITRATION

Class actions; ascertainability; class-certification: *Noel v. Thrifty Payless, Inc.* (2019) __ Cal.5th __ (Cal. Supreme)

A consumer (Noel) purchased an inflatable pool from a Rite Aid drug store. His decision to purchase the pool was influenced by the photos on the box, showing several adults sitting in the inflated pool. When he inflated and filled the pool, he discovered that it was barely big enough for three children. He filed a putative class action against Rite Aid under the UCL, False Advertising Law, and CLRA on behalf of 18,273 consumers who purchased the pool in the prior four years.

When he moved for class certification, Rite Aid opposed, arguing that Noel failed to demonstrate the existence of an ascertainable class. Specifically, Rite Aid argued that to show an ascertainable class, Noel bore the burden of introducing evidence in connection with his certification motion that would show how members of the putative class could be identified later in the proceeding, so they could be provided with notice of the pending action. The trial court denied the motion, the Court of Appeal affirmed, and the Supreme Court reversed.

Plaintiff's proposed class definition articulates an ascertainable class, in that it defines the class in terms of objective characteristics and common transactional facts that make the ultimate identification of class members possible when that identification becomes necessary. This was all that was required. The ascertainability requirement does not incorporate the additional evidentiary burden that the courts below would have imposed, which would have required Noel to show how class members might be individually identified when the time came to do so

Choice of law; timing of determination and whether it must be revisited as a result of pre-trial settlements. *Chen v. Los Angeles Truck Centers* (2019) __ Cal.5th __ (Cal. Supreme).

Ten Chinese tourists and their guide booked a trip from Los Angeles to tour the Grand Canyon on a 16-seat tour bus operated by TBE, International. The bus was driven by Zhi Lu, a California resident who worked for TBE. While en route in Arizona, Lu drove the bus at a high speed and lost control, causing it to roll over twice. Lu and the guide were in the front seats, which were equipped with three-point seatbelts. They escaped serious injury. None of the passenger seats had seatbelts. Two passengers were killed, six were ejected and suffered major injuries, and the two surviving passengers who were not ejected also suffered injuries.

The plaintiffs filed an action in California against two California-based defendants, TBE and the distributor who sold the bus to TBE, Buswest. Plaintiffs also sued the bus manufacturer, Starcraft, an Indiana company. In December 2012, TBE and Lu settled with the plaintiffs for \$5 million. A year later, after the two-year limitations period had run, Starcraft and Buswest moved for a ruling on choice of law. The trial court determined that Indiana law would apply. Before trial, the plaintiffs settled with Starcraft for \$3.25 million. Over Buswest's objection, the trial court granted Starcraft's motion for a good-faith settlement determination. That left Buswest, a California corporation, as the sole remaining defendant.

Plaintiffs moved for reconsideration of the choice-of-law motion based on the settlement. The trial court denied that motion. The case went to trial under Indiana law, which imports a negligence standard into the definition of a "defective product." The jury returned a defense verdict. The Court of Appeal reversed, finding that the trial court erred in refusing to reconsider the choice-of-law ruling. The Supreme Court reversed.

"[G]iven the importance of determining the choice of law early on in a case – to enable trial courts to manage proceedings in an orderly and efficient

fashion – we conclude that circumstances in which trial courts are *required* to revisit a choice of law determination, if any, should be the exception and not the rule. On that note, we underscore that we do not reach the question whether trial courts *may* revisit a prior choice of law ruling. Nor do we opine that there are *no* circumstances under which the trial court would be obligated to reconsider the choice of law. We hold only that, in this case, plaintiffs fail to demonstrate that their decision to accept a settlement offer from one defendant constitutes such an exceptional circumstance."

Arbitration; Federal Arbitration Act; waiver of right to compel arbitration.

Newirth by and through Newirth v. Aegis Senior Communities, LLC (9th Cir 2019) __ F.3d __.

June Newirth, Margaret Peirce, and Barbara Feinberg were residents of three different senior living communities operated by Aegis. Each signed an arbitration agreement when becoming a resident. Newirth filed a class action complaint against Aegis in California state court in April 2016, alleging that Aegis engaged in a scheme to defraud seniors by falsely representing that staffing levels would be determined by the overall needs of the residents, when in fact staffing was based on budget considerations. Aegis removed the complaint to district court in July 2016, and filed a motion to compel arbitration as well as a motion to dismiss a week later.

Instead of pursuing these motions, however, Aegis and Newirth filed a stipulated agreement a week later. Pursuant to the stipulation, Newirth filed a second amended complaint in August 2016, adding additional plaintiffs. For its part, Aegis withdrew its motion to compel arbitration and its motion to dismiss. In September 2016, it filed a new motion to

dismiss the second amended complaint, in which it made no mention of arbitration or the arbitration agreements. The following day, the parties filed an agreement stating they were attempting mediation of their dispute.

Over the next 11 months, while the second motion to dismiss was pending, the parties actively engaged in the discovery process. The parties participated in a discovery conference, entered into a court-approved stipulation regarding the production of documents and electronic records, and submitted a proposed joint conference report that included a proposed schedule for discovery, class certification briefing and hearing dates, and a date for trial. In December 2016, the parties served their initial disclosures. In the early stages of discovery, Aegis disclosed a copy of the relevant agreements with Newirth, Pierce, and Feinberg; each agreement included an arbitration provision initialed by the party's representative.

Feinberg and Aegis entered into a settlement agreement later that month. The remaining parties continued to meet and confer regarding moving forward with the discovery process. The district court finally denied Aegis's pending motion to dismiss Newirth's second amended complaint in May 2017. Aegis filed a new motion to compel arbitration two months later, almost a year after it had withdrawn its initial motion to compel arbitration.

In September 2017, the district court denied Aegis's renewed motion to compel arbitration on the ground that Aegis had waived its right to arbitrate. Aegis filed a timely notice of appeal. Affirmed.

Under federal law, a party seeking to prove that the right to compel arbitration has been waived must carry the heavy burden of demonstrating: 1) knowledge of an existing right to compel arbitration; 2) intentional acts inconsistent with that existing right; and 3) prejudice to the person opposing arbitration from such inconsistent acts.

There is no concrete test under federal law to determine whether a party has engaged in acts that are inconsistent with its right to arbitrate; rather, the courts consider the totality of the parties' actions. Applying this "holistic approach," the courts have generally asked whether a party's actions indicate a conscious decision ... to seek judicial judgment on the merits of [the] arbitrable claims, which would be inconsistent with a right to arbitrate. That is, a party acts inconsistently with exercising the right to arbitrate when it 1) makes an intentional decision not to move to compel arbitration, and 2) actively litigates the merits of a case for a prolonged period of time in order to take advantage of being in court.

This standard was met here. Seeking a decision on the merits of a key issue in a case indicates an intentional and strategic decision to take advantage of the judicial forum. Seeking a dismissal under Rule 12(b)(6) constitutes seeking a ruling on the merits. Only after receiving an adverse ruling on this motion did Aegis refile the motion to compel arbitration that it had withdrawn a year earlier. Under the totality of these circumstances, the court concluded that Aegis knowingly decided to defer its right to compel arbitration to avail itself of the benefits of the federal court forum, an intentional action inconsistent with its known right to compel arbitration.

With respect to prejudice, a party is not prejudiced by self-inflicted wounds incurred as a direct result of suing in federal court contrary to the provisions of an arbitration agreement. Accordingly, a plaintiff that has breached its arbitration agreement is not prejudiced by costs incurred in preparing the complaint, serving notice, and litigating non-merits issues (such as jurisdiction or venue). Nor is such a plaintiff prejudiced by costs incurred due to substantial discovery in federal court, even though such discovery would be rendered nugatory by a direction that arbitration now be had. Finally, a plaintiff

is not prejudiced by the possibility that there may be some duplication from parallel proceedings in litigation and arbitration.

A breaching plaintiff may nevertheless show prejudice when the defendant has engaged in acts that are inconsistent with its right to arbitrate (as explained above), and the plaintiff has incurred costs due to such inconsistent acts. This prejudice requirement is satisfied when plaintiffs would be forced to "relitigate an issue on the merits on which they have already prevailed in court," or when defendants have sought and "received an advantage from litigating in federal court that they would not have received in arbitration."

Applying these principles, Newirth was not prejudiced by Aegis's participation in discovery and scheduling conferences, development of a proposed order regarding electronic records, and conferring about alternative dispute resolution. She was prejudiced, however, by the costs incurred in defending against Aegis's motion to dismiss her complaint on the merits. Aegis attempted to take advantage of the judicial forum to prevail on the merits of Newirth's arbitrable claims and did not file a motion to compel arbitration until after receiving an adverse ruling. If the court had granted the motion to compel arbitration, Newirth would have been forced to relitigate a key legal issue on the merits on which the district court has ruled in her favor. The costs of rearguing this ruling are directly traceable to Aegis's acts that were inconsistent with its known right to compel arbitration.

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