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Appellate Reports

IN PEOPLE v. VEAMATAHAU, CAL SUPREME COURT CLARIFIES AND RESTRICTS THE MEANING OF "CASE-SPECIFIC HEARSAY" THAT MUST BE EXCLUDED UNDER *PEOPLE v. SANCHEZ*

People v. Veamatahau

(2020) 9 Cal.5th 16, 259 Cal.Rptr.3d 205

Who needs to know about this case? Lawyers seeking to admit or object to evidence as inadmissible hearsay under *People v. Sanchez* (i.e., all trial lawyers)
Why it's important: Clarifies and restricts the meaning of "case-specific hearsay" that must be excluded under *People v. Sanchez*

Defendant Veamatahau was arrested with pills wrapped in cellophane in his pocket. During interrogation, the arresting officer asked about the pills, saying, "What about the pills that you had, the bars? The Xanibars?" Defendant responded, "I take those," and admitted to taking "a lot," "four or five" pills "[e]very day," "until I feel good." At trial, the officer testified concerning his experience in narcotics investigation and referred the pills recovered as "Xanax pills."

At trial the prosecution also presented the testimony of a criminalist from the San Mateo County Sheriff's Office Forensic Laboratory. He testified that he was able to identify the pills found on the defendant as alprazolam (Xanax) based on the logo on the tablets by matching them to a database. He testified that this method of identification was the generally accepted method of testing for this kind of substance in the scientific community. Defense counsel tried to cast doubt on this testimony in cross-examination by having the criminalist admit that he did not test the pills to determine their chemical composition. The criminalist admitted that he did not know who put "those little letters" on the pills.

The trial court denied the defense motion for acquittal based on the failure to test the chemical composition of the pills. On appeal, the defendant argued that the criminalist's testimony should have been excluded as case-specific hearsay under *People v. Sanchez*. The court rejected this argument. The Supreme Court granted review and affirmed.

Sanchez holds that an expert witness cannot relate to the jury inadmissible case-specific facts about which the expert has no independent knowledge. Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried. Testimony relating such facts, unlike testimony about non-case-specific background information, is subject to exclusion on hearsay grounds. Experts can, however, rely on hearsay in informing opinions and may tell the jury in general terms that they did so.

Hence, the distinction between case-specific facts and background information is crucial – the former may be excluded as hearsay, the latter may not.

The Supreme Court held that the criminalists' testimony did not include prohibited case-specific facts that required exclusion under *Sanchez*. On direct examination, the criminalist (Rienhardt) testified that, in his field, it is standard practice to identify pharmaceutical pills by visual inspection, whereby one compares markings found on the pills against a database of imprints that the Food and Drug Administration requires to be placed on tablets containing controlled substances. He then testified that he performed this visual inspection on the pills seized from defendant and formed the opinion that they contained alprazolam. Rienhardt's opinion, offered "while testifying at the hearing," was not hearsay. Likewise, Rienhardt's testimony about the appearance of the seized pills was not hearsay, because Rienhardt personally examined the pills and saw the imprints on them.

By contrast, some of Rienhardt's testimony elicited on cross-examination constituted hearsay. In response to questioning by defense counsel, he explained that the database he used "tell[s] you" that pills displaying a certain imprint "contain alprazolam, 2 milligrams." This information was hearsay but, crucially, not case specific.

Rienhardt's statement concerning what the database "tell[s] you" related general background information relied upon in the criminalist's field. The facts disclosed by the database, and conveyed by Rienhardt, are "about what [any generic] pills containing certain chemicals look like." The database revealed nothing about "the particular events ... in the case being tried," i.e., the particular pills that were seized from defendant. Any information about the specific pills seized from defendant came from Rienhardt's personal observation (that they contained the logos "GG32 – or 249") and his ultimate opinion (that they contained alprazolam), not from the database. In short, information from the database was not case specific but was the kind of background information experts have traditionally been able to rely on and relate to the jury.

An example we gave in *Sanchez* illustrates this point. In *Sanchez*, we said, "[t]hat an associate of the defendant had a diamond tattooed on his arm would be a case-specific fact that could be established by a witness who saw the tattoo, or by an authenticated photograph. That the diamond is a symbol adopted by a given street gang would be background information about which a gang expert could testify. The expert could also be allowed to give an opinion that the presence of a diamond tattoo shows the person belongs to the gang.

"To reiterate, the relevant hearsay analysis under *Sanchez* is whether the expert is relating general or case-specific out-of-court statements. The focus of the inquiry is on the information conveyed by the expert's testimony, not how the expert

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came to learn of such information. Thus, regardless of whether an expert testified to certain facts based on composite knowledge 'acquired from sources too numerous to distinguish and quantify' or if the expert simply looked up the facts in a specific reference as part of his or her duties in a particular case, the facts remain the same. The background or case-specific character of the information does not change because of the source from which an expert acquired his or her knowledge."

Short(er) takes

Federal class actions

FRCP 23; standing; all class members must satisfy Article III standing requirements: *Ramirez v. TransUnion LLC* (9th Cir. 2020) 951 F.3d 1008

Ramirez was denied credit based on credit report containing "terrorist alert" indicating that he potentially matched the name of a person on United States government's list of Specially Designated Nationals (SDNs), that is, terrorists, drug traffickers, and others with whom persons in the United States are prohibited from doing business pursuant to Treasury Department's Office of Foreign Assets Control (OFAC) regulation. He filed a putative class action against the consumer credit reporting agency, alleging that it violated the Fair Credit Reporting Act (FCRA) by placing false OFAC alerts on consumers' credit reports and later sending misleading and incomplete disclosures about the alerts. The trial court certified a class and at trial the jury returned a verdict in Ramirez's favor, awarding statutory and punitive damages of more than $60 million for three willful violations of the statute. TransUnion moved for judgment as matter of law, or in the alternative, for a new trial, remittitur, or an amended judgment. The district court denied the motions and TransUnion appealed. Affirmed in part, reversed and vacated in part, and remanded with instructions.

As a matter of first impression in the Ninth Circuit, the court held that every member of a class certified under Rule 23 must satisfy the basic requirements of Article III standing at the final stage of a money damages suit when class members are to be awarded individual monetary damages.

The Supreme Court has held, albeit in a different context, that all parties seeking to recover a monetary award in their own name must show Article III standing. (See *Town of Chester, N.Y. v. Laroe Estates, Inc.*, ––– U.S. ––––, 137 S. Ct. 1645, 1651 (2017) (holding that "an intervenor of right" under Federal Rule of Civil Procedure 24(a)(2) "must have Article III standing in order to pursue relief that is different from that which is sought by a party with standing[,]" including where "both the plaintiff and the intervenor seek separate money judgments in their own names."); see also *Tyson Foods, Inc. v. Bouaphakeo*, ––– U.S. ––––, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., concurring) ("Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not. The Judiciary's role is limited 'to provid[ing] relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm.'" (quoting *Lewis v. Casey*, 518 U.S. 343, 349, 116 S.Ct. 2174 (1996).)

The same rule applies here. To hold otherwise would directly contravene the Rules Enabling Act, because it would transform the class action – a mere procedural device – into a vehicle for individuals to obtain money judgments in federal court even though they could not show sufficient injury to recover those judgments individually. (See 28 U.S.C. § 2072(b) ("[Rules of procedure] shall not abridge, enlarge or modify any substantive right.").)

Insurance

California allows "vertical" exhaustion of lower-level excess coverage to access higher-level excess coverage; "horizontal" exhaustion is not required. *Montrose Chemical Corp. v. Superior Court* (2020) __ Cal.5th __ (Cal. Supreme).

Montrose Chemical Corporation (Montrose) was sued for causing continuous environmental damage in the Los Angeles area between 1947 and 1982 and subsequently entered into partial consent decrees to resolve various claims. Montrose now seeks to tap its liability insurance to cover amounts it owes in connection with those claims. For each policy year from 1961 to 1985, Montrose had secured primary insurance and multiple layers of excess insurance. Montrose argued that it is entitled to coverage under any relevant policy once it has exhausted directly underlying excess policies for the same policy period. The insurers, by contrast, argued that Montrose may call on an excess policy only after it has exhausted every lower level excess policy covering the relevant years. Reading the insurance policy language in light of background principles of insurance law, and considering the reasonable expectations of the parties, the Supreme Court agreed with Montrose: It is entitled to access otherwise available coverage under any excess policy once it has exhausted directly underlying excess policies for the same policy period. An insurer called on to provide indemnification may, however, seek reimbursement from other insurers that would have been liable to provide coverage under excess policies issued for any period in which the injury occurred.

Each excess policy purchased by Montrose provides that Montrose must exhaust the limits of its underlying insurance coverage before there will be coverage under the policy. The policies describe the applicable underlying coverage in four main ways:

1. Some policies contain a schedule of underlying insurance listing all of the underlying policies in the same policy period by insurer name, policy number, and dollar amount.
2. Some policies reference a specific dollar amount of underlying insurance in the same policy period and a schedule of underlying insurance on file with the insurer.
3. Some policies reference a specific dollar amount of underlying insurance in

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the same policy period and identify one or more of the underlying insurers.
4. Some policies reference a specific dollar amount of underlying insurance that corresponds with the combined limits of the underlying policies in that policy period.

In a variety of ways, the excess policies also provide that "other insurance" must be exhausted before the excess policy can be accessed.

The rule Montrose proposed is a rule of "vertical exhaustion" or "elective stacking," whereby it may access any excess policy once it has exhausted other policies with lower attachment points in the same policy period. The insurers, in contrast, each of which has issued an excess policy to Montrose in one of the triggered policy years, argue for a rule of "horizontal exhaustion," whereby Montrose may access an excess policy only after it has exhausted other policies with lower attachment points from *every* policy period in which the environmental damage resulting in liability occurred. The Court adopted Montrose's position.

First and most obviously, the excess policies explicitly state their attachment point, generally by referencing a specific dollar amount of underlying insurance in the same policy period that must be exhausted. For example, certain Fireman's Fund Insurance Company policies provide: "It is a condition of this policy that the insurance afforded under this policy shall apply only after all underlying insurance has been exhausted." The policies then list the "Underlying Insurance Limit of Liability" – for example, "$30,000,000 each occurrence $30,000,000 aggregate." In other words, this policy agrees to indemnify Montrose once it has exhausted $30 million of underlying insurance. But under the insurers' theory of horizontal exhaustion, Montrose would not be permitted to access this policy until it has exhausted $30 million of underlying insurance *for every relevant policy period* – which would add up to substantially more than $30 million. Indeed, here, where the continuous injury occurred over the course of a quarter century, such a rule would increase the operative attachment point for this policy from $30 million to upwards of $750 million. Thus, where aggregate liability amounts to approximately $200 million, Montrose would not be able to access an insurance policy that, by its terms, kicks in after $30 million of underlying insurance is exhausted.

"In sum, we conclude that in a case involving continuous injury, where all primary insurance has been exhausted, the policy language at issue here permits the insured to access any excess policy for indemnification during a triggered policy period once the directly underlying excess insurance has been exhausted. Parties to insurance contracts are, of course, free to write their policies differently to establish alternative exhaustion requirements or coverage allocation rules if they so wish."

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