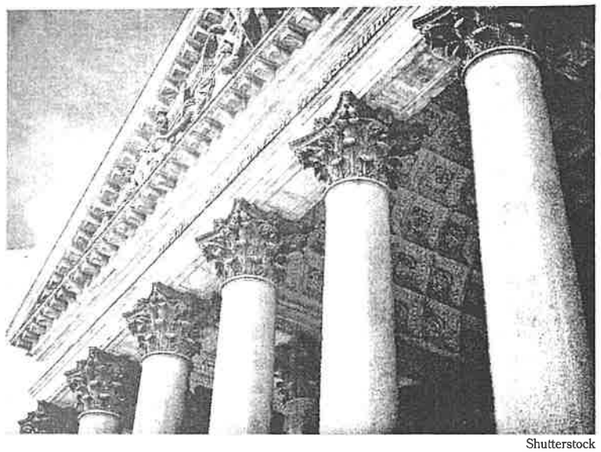
9th Circuit in review: The top civil cases of 2018

By James Azadian and
Tian Wei (Kathryn) Han



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With the new year upon us, it seems appropriate to reflect on the 9th U.S. Circuit Court of Appeals' significant cases decided this past year. While there were many to choose from, we have selected what we consider to be the most significant civil cases of 2018.

1. Second Amendment

***Gallinger v. Becerra* (No. 16-56125):** In August, the 9th Circuit affirmed the district court's dismissal of an action challenging Senate Bill 707, California's 2015 amendment to its Gun-Free School Zone Act. That 2015 Amendment preserved the retired officer exception for firearm possession on school grounds, as well as within school zones, but prohibited permitted concealed-carry weapon holders from possessing a firearm on school grounds. The appellate court held that, even assuming that retired peace officers and concealed-carry permit holders were similarly situated, Senate Bill 707 did not violate the equal protection clause, given the applicable level of scrutiny. Applying rational basis review, the panel held that the Senate Bill implicates neither a suspect classification nor a fundamental right. The panel determined that the Legislature's interest in public safety was sufficiently connected to permitting retired peace officers to carry other kinds of firearms on school grounds.

***Duncan v. Becerra* (No. 17-56081):** In July, however, a different 9th Circuit panel affirmed a district court's order preliminarily enjoining California from enforcing Proposition 63, a voter-approved ban on high-capacity gun magazines. California has banned magazines holding more than 10 rounds since 2000, but a previously intact grandfather clause allowed lawful owners who purchased high-capacity magazines before the law's enactment to keep them. Proposition 63, coincidentally passed by 63 percent of voters in 2016, eliminated the grandfather clause. A section of Proposition 63 required owners of guns with high-capacity magazines to surrender lawfully purchased property or face criminal prosecution. The ban was to take effect on July 1, 2017. The district court temporarily blocked a portion of Proposition 63 that prohibits possession of magazines holding more than 10 rounds of ammunition, reasoning that the "entitlement to enjoy Second Amendment rights ... is not eliminated simply because they possess 'unpopular' magazines holding more than 10 rounds." The California attorney general appealed, arguing the district court abused its discretion in granting the injunction. The 9th Circuit's ruling came in an unpublished memorandum disposition, which included a dissenting opinion by Judge J. Clifford Wallace. The panel majority held that the district court did not abuse its discretion by concluding that magazines for a weapon likely fall within the scope of the Second Amendment, and added that the California attorney general hadn't pointed to any errors made by the district court. According to the panel majority, the attorney general's argument was "insufficient to establish that the district court's findings of fact and its application of the legal standard to those facts were 'illogical, implausible, or without support in inferences that may be drawn from facts in the record.'"

2. Gender Equal Pay/ Employers' Inquiry About Prior Salary

***Rizo v. Yovino* (No. 16-15372):** Ms. Rizo was hired as a math consultant by the Fresno County Office of Education and later discovered that she was being paid less than her male peers. The county did "not dispute that Ms. Rizo established a prima facie case" under the federal Equal Pay Act of 1963 (29 U.S.C. Section 206(d)(1)), but argued that the pay differential was attributable to men entering the job with better salary histories. The district court agreed with Ms. Rizo that her prior salary was not a valid factor under the Act. But it allowed an interlocutory appeal of the issue to the 9th Circuit, which reversed the district court based on its prevailing authority that had been on the books for close to four decades. The 9th Circuit then ordered rehearing of the case en banc. In April, an en banc panel of the 9th Circuit held that a "factor other than sex" under the Act must be "job-related," and thus rejected an employer's use of pre-employment salary history as a reason to pay a woman less than a man doing the same work. The act mandates that men and women be paid the same for work that "requires equal skill, effort, and responsibility, and which are performed under similar working conditions." An employer can escape liability only by proving that the disparity is "pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." For many years, employers have argued that they may consider an applicant's prior, pre-employment salary history in setting a starting salary, and that this falls under the act's "catchall" category of "factor other than sex." This argument gained approval in some courts, including the 9th Circuit. But the en banc panel's decision threw out the old 9th Circuit law, bringing the court in line with other circuits who have rejected prior salary as a "factor other than sex," and the decision arguably goes beyond those of other courts by setting a bright-line rule barring use of that factor. As a point of interest, it should be noted that the late Judge Stephen Reinhardt — who (according to a footnote) completed the opinion right before his death — wrote the lead decision for the en banc court, fittingly as this inimitable jurist's swan song.

3. First Amendment and Protests at the Border

***Jacobson v. U.S. Dep't of Homeland Security* (No. 16-17199):** In February, the 9th Circuit vacated the district court's grant of summary judgment for the federal government in an action challenging plaintiffs' exclusion from an enforcement zone set up around a U.S. Border Patrol checkpoint area near their homes in rural Arizona. This was a First Amendment case brought against the Department of Homeland Security, U.S. Border Patrol, and certain named federal officials for their interference with the plaintiffs' right to protest, observe, and record activity at the Border Patrol's checkpoint near the Arizona-Mexico border. The plaintiffs are members of an Arizona community organization that organized a "checkpoint monitoring campaign" in response to a number of complaints of civil rights abuses by agents at the checkpoint. Although the federal government claimed that this checkpoint was temporary, it had been in continuous existence for seven years. Many residents in that area of Arizona must drive through the checkpoint every day to reach jobs, schools and shops. The district court entered summary judgment in favor of the federal government before any discovery had occurred. The 9th Circuit held that, based on the limited record before the district court, it could not conclude, as a matter of law, that the enforcement zone was a nonpublic forum or, if it was, that the government satisfied the requirements for excluding plaintiffs from that nonpublic forum. The panel noted that, on remand, and after appropriate discovery, the district court will need to determine if there remain genuine issues of material fact regarding whether, and what part of, the enforcement zone was a public forum, and whether the government's exclusion policy was permissible under the principles of forum analysis.

4. California's anti-SLAPP Statute in Federal Court

***Planned Parenthood v. Center for Medical Progress* (No. 16-16997):** In May, the 9th Circuit affirmed the district court's denial of a motion to dismiss claims under California's Strategic Lawsuit Against Public Participation statute, California Code of Civil Procedure Section 425.16. Planned Parenthood and other plaintiffs alleged that the defendants used fraudulent means to enter their conferences and gain meetings with their staff for the purpose of creating false and misleading videos that were then disseminated on the internet. To succeed on their anti-SLAPP motion, the defendants had to show both that their claims arose from acts to further their speech rights and that the plaintiffs had shown no probability of success on their claims. The 9th Circuit affirmed the district court's conclusion that the defendants failed to overcome the second prong of the anti-SLAPP statute. In order to eliminate conflicts between the anti-SLAPP statute's procedural provisions and the Federal Rules of Civil Procedure, the panel held that California anti-SLAPP motions are reviewed in federal court under different standards depending on the motion's basis. If a defendant makes an anti-SLAPP motion founded on purely legal arguments, then the analysis is made under Federal Rules of Civil Procedure 8 and 12 standards; if it is a factual challenge, then the motion must be treated as though it were one for summary judgment and discovery must be permitted. In a concurring opinion, Judge Ronald Gould reminds us once again that he is not in favor of allowing anti-SLAPP motions in federal court and believes that the *Erie* doctrine would bar such motions. This view has been expressed many times by Judge Gould and now-retired Judge Alex Kozinski, and the 9th Circuit has time and time again declined to overrule its precedent allowing California anti-SLAPP motions in federal court as substantive devices to afford the movants complete immunity from suit, thus

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distinguishing the California anti-SLAPP statute from some other states' anti-SLAPP statutes that provide non-substantive, procedural challenges or protections.

5. A Business's Duty to Disclose to Customers Unflattering Facts About the Business Under California's Consumer Protection Laws

***Hodsdon v. Mars, Inc.* (No. 16-15444):** In June, the 9th Circuit affirmed dismissal of a putative class action that was based on the defendant chocolate manufacturer's failure to disclose that its chocolate products may have been produced using slave labor. The court held that, "[i]n the absence of any affirmative misrepresentations by the manufacturer, we hold that the manufacturers do not have a duty to disclose the labor practices in question, even though they are reprehensible, because they are not physical defects that affect the central function of the chocolate products." The 9th Circuit's discussion of when California law imposes a duty of disclosure for a product defect highlights a key area of potential uncertainty that may affect many consumer class actions predicated on California law.

The leading 9th Circuit case in this area is *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1141 (9th Cir. 2012), which held that, absent a material misrepresentation, a defendant's disclosure obligation is limited to situations where a product defect presents a known safety issue. But there are California appellate court decisions that arguably can be read to require disclosure even in the absence of a safety issue.

For example, the plaintiff in this case relied on the 3rd District Court of Appeal's decision in *Collins v. eMachines, Inc.*, 202 Cal. App. 4th 249 (Cal. Ct. App. 2011), and the 6th District Court of Appeal's decision in *Rutledge v. Hewlett-Packard Co.*, 238 Cal. App. 4th 1164 (Cal. Ct. App. 2015). Both of those cases observed a duty of disclosure in the absence of a safety issue. The alleged defect in that *Collins* case was an issue that could cause critical data corruption on the hard drive of a computer. And in that *Rutledge* case, the alleged defect could cause the laptop monitor to go blank, rendering the computer unusable.

According to the 9th Circuit, the basis for these California Court of Appeal decisions was not entirely clear, but those decisions still required a "physical defect [that] was central to the product's function." The 9th Circuit reasoned that, even if the California Court of Appeal in *Collins* and *Rutledge* had correctly stated California law, Hodsdon's allegations here in the case before the 9th Circuit did not state a claim because "the alleged lack of disclosure about the existence of slave labor in the supply chain is not a physical defect at all, much less one related to the chocolate's function as chocolate." In other words, in a "pure omissions case concerning no physical product defect relating to the central function of the chocolate and no safety defect, Plaintiff has not sufficiently pleaded that Mars had a duty to disclose on its labels the labor issues in its supply chain."

Interestingly, the 9th Circuit declined to address the continuing vitality of its own precedent, its prior decision in the *Wilson* case, saving that scrutiny for another day. The 9th Circuit did note, however, that *Wilson* and the California Court of Appeal's decisions in *Collins* and *Rutledge* might be reconciled because "*Wilson* may still apply where the defect in question does not go to the central functionality of the product, but still creates a safety hazard." Courts are sure to face the question of how to square these cases, as well as what constitutes a "physical product defect relating to the central function" of a product under California case law.

James Azadian *and* **Tian Wei (Kathryn) Han** *are attorneys at Dykema Gossett.*

AZADIAN

HAN