Filed 6/22/16 Kirk v. First American Title Co. CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

PATRICK KIRK, Plaintiff and Appellant, v. FIRST AMERICAN TITLE COMPANY, Defendant and Respondent.	B257508 (Los Angeles County Super. Ct. No. BC372797)

APPEAL from a judgment of the Superior Court of Los Angeles County, John J. Kralik, Judge. Affirmed.

The Kick Law Firm, Taras Kick, James Strenio and Thomas Segal; The Bernheim Law Firm, Steven J. Bernheim and Nazo S. Semerjian for Plaintiff and Appellant.

Mayer Brown, John Nadolenco, Andrew Z. Edelstein, Archis A. Parasharami and Craig W. Canetti for Defendant and Respondent.

I. INTRODUCTION

Plaintiff, Patrick Kirk, individually and as a class representative, and defendant, First American Title Company, appeal from a judgment following a bench trial for violation of the Unfair Competition Law. The parties also appeal the cost order. This action concerns defendant, an underwritten title company, and the sub-escrow and disbursement fees charged related to title insurance and real property sale. Defendant's filed rate for sub-escrow fees was a minimum $60 with upward increases based on certain listed factors. Defendant's filed rate for the disbursement fees was: overnight mail service for $15; special messenger service for $25; and wire transfer service for $15. The trial court found defendant had immunity from plaintiff's ambiguity theory of liability under Insurance Code section 12414.26. However, the trial court also found defendant violated Insurance Code section 12414.27 by failing to charge its own filed rates.

In plaintiff's appeal from the judgment, plaintiff contends the trial court erred by finding defendant had immunity from plaintiff's ambiguity theory. Plaintiff contended defendant's ambiguous rates should be interpreted in the class's favor--sub-escrow fees should be $60 only and the disbursement fees should be per transaction. Plaintiff also contends the trial court erred by calculating the restitution for the sub-escrow fees as the difference between the charged fee and the value of the sub-escrow fee. The trial court ruled the value of a sub-escrow fee was $100 during the class period. Plaintiff contends the value of the sub-escrow fee was the minimum amount of $60. Plaintiff also contends the trial court erred by calculating prejudgment interest from the date the class period closed instead of from the date each overcharge occurred.

In defendant's appeal from the judgment, defendant asserts that it should have immunity from any liability under Insurance Code section 12414.26. Defendant contends the trial court erred by finding liability for failing to charge its own filed rates. Alternatively, defendant contends the trial court erred in its calculation of the restitution for the sub-escrow fees. Defendant asserts the value of the sub-escrow fee was $125.

The trial court awarded costs to plaintiff under the discretionary, rather than the mandatory, language of Code of Civil Procedure section 1032, subdivision (a)(4). The trial court apportioned costs for plaintiff at 25 percent of the allowed costs. In plaintiff's appeal from the cost order, he asserts the class was not subject to the Code of Civil Procedure section 1032, subdivision (a)(4) discretionary language. Defendant also appeals from the cost order. Defendant asserts the trial court abused its discretion by awarding any costs to plaintiff.

We affirm the judgment and cost order.

II. BACKGROUND

A. Factual Background Prior to Plaintiff's Complaint

On February 25, 2004, plaintiff sold real property in Los Angeles, California to Jeffrey Sjobring. Plaintiff and Mr. Sjobring retained an independent escrow company named Prestige Escrow, Inc., to close the transaction. Defendant provided sub-escrow services related to the transaction. Defendant invoiced Prestige Escrow for the following services: $100 for sub-escrow fees; $25 for two wire transfers; $15 for overnight delivery; and $20 for messenger delivery. Plaintiff paid these charges. Defendant is a wholly-owned subsidiary of First American Title Insurance Company. Defendant is classified as an underwritten title company under the Insurance Code. (Ins. Code, § 12340.5; see 12 Witkin, Summary of Cal. Law (10th ed. 2005) Real Property, § 353, p. 414 ["[A]n underwritten title company only searches and prepares abstracts on which the insurer writes policies."].)

B. Defendant's Filed Rate Schedule

Pertinent to this action, First American Title Insurance Company filed the following rate schedule with the Department of Insurance (insurance department).

Regarding its sub-escrow fees, defendant's parent company filed the following in section J-24: "In connection with an order for title insurance the Company may provide limited escrow service in support of a primary escrow agent for a minimum charge of $60 per order. . . . [¶] . . . [¶] The fee charged pursuant to this sub-section may be adjusted upward or downward pursuant to the provisions of section A-16 of this schedule." Section A-16 of the fee schedule provides: "Where title, escrow and/or any other services are requested in circumstances for which no charge has been specifically contemplated in this schedule, a charge should be made which is consistent with the general pricing procedures set forth herein. Special consideration may be given to various classifications of services or divisions thereof, based upon factors including but not limited to, size of the particular transaction or transactions involved, expenses, risk, volume, geographical considerations, single point of entry, centralized service, required technology, competitive environment, and any other reasonable considerations." Defendant's parent company also filed the following rates for escrow related services (disbursement services) at section J-32: overnight mail service, $15; special messenger service, $25; and wire transfer service, $15.

On September 6, 2007, First American Title Insurance Company filed another rate schedule with the insurance department which superseded its previous schedule. First American Title Insurance Company filed this new schedule in response to a comprehensive market conduct examination by the insurance department. This new schedule became effective October 8, 2007.

C. Plaintiff's Complaint and Certified Class

Plaintiff filed his complaint on June 15, 2007. Plaintiff filed his second amended complaint on November 17, 2008. Plaintiff asserts claims for: fraud and constructive fraud; contract breach; breach of the implied covenant of good faith and fair dealing (implied covenant breach); negligence; negligent misrepresentation; unjust enrichment; violation of the Consumer Legal Remedies Act; and unfair competition in violation of

Business and Professions Code section 17200 (Unfair Competition Law). Plaintiff alleges defendant charged the class members more than the filed rate for the sub-escrow and disbursement services.

On March 14, 2012, plaintiff moved for class certification. The trial court granted plaintiff's motion. The trial court certified classes for four causes of action: fraud and deceit; unjust enrichment; Unfair Competition Law violation; and the Consumer Legal Remedies Act violation. Plaintiff would later dismiss the causes of action for violation of the Consumer Legal Remedies Act, fraud and unjust enrichment. Thus, the class's sole remaining cause of action was for violation of the Unfair Competition Law.

The matter proceeded to trial solely on a class claim for violation of the Unfair Competition Law. There were two certified opt-out classes with a certified subclass for each. The sub-escrow fee class was composed of customer who were charged more than $60 for a sub-escrow fee in California prior to October 8, 2007. The sub-escrow fee subclass did not receive an owner policy in the same transaction. As noted, October 8, 2007,was when the new rate schedule took effect. The disbursement fee class was composed of people who were charged more than defendant's filed rate for a wire transfer, overnight or messenger fee in California real estate transactions. The disbursement fee subclass included all people who were charged but did not receive an owner policy in the same transaction. The class time period was from June 15, 2003, to October 7, 2007.

D. Defendant's Summary Judgment and Adjudication Motion

Defendant moved for summary adjudication for plaintiff's individual claims of contract breach, implied covenant breach, negligent misrepresentation and constructive fraud. Defendant's motion was granted for these individual claims. The trial court also granted summary judgment in favor of defendant's parent entity, First American Title Insurance Company. However, the trial court denied the summary judgment motion as to

the Unfair Competition Law cause of action directed at defendant. The trial court found defendant had not met its burden of persuasion.

E. Procedural History Prior to Trial

Defendant moved to compel arbitration against the class members who had received an owner policy. Defendant asserted the owner policy contained an arbitration agreement which applied to the cause of action. The trial court denied defendant's motion. Defendant subsequently appealed the denial order. In an unpublished opinion, we affirmed the denial of defendant's motion to compel arbitration. (*Kirk v. First American Title Ins. Co.* (Apr. 7, 2015, B252238) [nonpub. opn.].)

Defendant's appeal stayed the case as to some class members. The subclasses proceeded to trial during the appeal of the arbitration dispute. The trial court calculated that the claims of 368,769 out of 640,806 class members went to trial. The trial commenced on December 5, 2013, and completed on January 16, 2014.

F. Parties' Arguments Following Trial

Both parties filed closing briefs. Plaintiff contended defendant violated the Unfair Competition Law by engaging in unlawful conduct, namely violating Insurance Code section 12414.27. Insurance Code section 12414.27 provides in pertinent part, "Commencing 120 days following January 1, 1974, no title insurer, underwritten title company or controlled escrow company shall charge for any title policy or service in connection with the business of title insurance, except in accordance with rate filings which have become effective pursuant to [Division 2, Part 6, Chapter 1 of the Insurance Code] Article 5.5 (commencing with Section 12401) of this chapter or as otherwise authorized by such article . . . ."

Plaintiff argued the "minimum charge" in section J-24 of defendant's submitted rate schedule was ambiguous because it was impossible to determine the amount of the

charge for a sub-escrow fee. Plaintiff contended that because there was ambiguity, the construction should be against the rate filer, defendant. Plaintiff asserted defendant could only charge $60 for a sub-escrow fee.

Plaintiff asserted the escrow related service fees, the disbursement fees, in section J-32 were ambiguous because they did not specify whether the charge was per transaction or per usage. Construing the ambiguity in favor of the consumer, plaintiff asserted that defendant was required to charge per transaction, not per usage. Plaintiff contended the restitution should be calculated based on the difference between the rate actually charged and the filed rate. And plaintiff asserted this calculation should be construed in the consumers' favor. Plaintiff also argued the fair market value was not relevant to calculating restitution.

Defendant asserted its filed rates fell within the safe harbor provisions of Insurance Code section 12414.26. Insurance Code section 12414.26 provides, "No act done, action taken, or agreement made pursuant to the authority conferred by Article 5.5 (commencing with Section 12401) . . . of this chapter shall constitute a violation of or grounds for prosecution or civil proceedings under any other law of this state heretofore or hereafter enacted which does not specifically refer to insurance." (See *Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 267 ["[T]he Legislature . . . included specific provisions exempting specified classes of insurance from other laws. (E.g., §[] . . . 12414.26 [title insurance].)"].) Defendant argued: the insurance department engaged in de facto approval of its filed rate schedule; it would be inequitable to hold it liable for rates that were essentially approved by the insurance department; its rates were unambiguous; the sub-escrow fee was a minimum $60 charge which may be adjusted upward based on section A-16 of the schedule and the disbursement fee applied on a per use basis.

G. Statement of Decision and Judgment

On May 12, 2014, the trial court issued its final statement of decision. The trial court found the civil liability immunity under Insurance Code section 12414.26 applied to

immunize defendant from plaintiff's ambiguity theory of liability. The trial court reasoned that article 5.5 of the Insurance Code involved the making and use of rates. In this regard, the trial court relied on Insurance Code section 12401.3. The trial court found: defendant's application of a charged rate fell within the "use" of a rate under article 5.5 of the Insurance Code; and plaintiff's ambiguity argument was a challenge to defendant's charge of its filed rate. The trial court reasoned, "To apply Plaintiff's construction of the rates requires the Court to 'make' the rates by interpreting them in view of the statutory language contained in Division 2, Part 6, Chapter 1, Article 5.5 [of the Insurance Code]."

However, the trial court found defendant had violated Insurance Code section 12414.27 by applying unfiled charges. The trial court noted plaintiff had alleged generally in his second amended complaint that defendant had overcharged beyond its filed rates in violation of Insurance Code section 12414.27. The trial court found defendant had inconsistently followed its own filed rates to the point of haphazardness. For example, John Hollenbeck, an executive vice president for First American Title Insurance Company, testified that the sub-escrow rate was a minimum $60. James J. Dufficy was defendant's former regulatory counsel during the relevant class period. Mr. Dufficy also testified the sub-escrow rate was a minimum $60. Mr. Hollenbeck and Mr. Dufficy testified the local county managers for defendant could adjust the rate upward by applying section A-16 of the rate schedule. However, defendant could not substantiate that any adjustments actually used section A-16. Christopher Clemens, defendant's Riverside County manager, testified that the sub-escrow rate for his county had increased above $60 two or three times. Mr. Clemens testified that he could not remember any documents indicating the sub-escrow rate was increased using section A-16 factors. The trial court found the rates charged for sub-escrow services varied widely even within a county. In 2003, for example, defendant's Riverside County office charged sub-escrow fees ranging from $20 to $296.

As for the disbursement fees, the trial court found one situation in which an overcharge occurred during the class period when applying the per usage rate.

Defendant's supplemental response to special interrogatory No. 45 states in relevant part: "Though it is not possible to conclusively determine the number of responsive transactions without a file-by-file review, the [First American System Technology] data indicates that the following number of transactions *may* have been charged a wire transfer fee in excess of $15 for a single transfer: [¶] 2003, 3,545. [¶] 2004, 4,407. [¶] 2005, 9,971. [¶] 2006, 8,419. [¶] 2007, 6,464."

The trial court calculated restitution as follows. For the sub-escrow fees, the trial court decided the proper restitution for the subclass was the difference between the amount charged and the fair market value. The trial court cited testimony from Dr. Bruce Strombom who holds a Ph.D. in economics. He testified for defendant regarding the value of wire, messenger, overnight and sub-escrow services. Dr. Strombom testified: "[F]or firms that had an explicit dollar amount for [sub-]escrow fees, the rates ranged from $100 to $125 . . . . So for all of those firms, the filed rates are equal to or greater than the rate that was charged in the [plaintiff] transaction of $100." He also testified, "[E]ven using the minimum amount for those firms, my conclusion would not really be affected because it would still indicate that $100 fee [charged to plaintiff] was commensurate with the fair market rates." The trial court decided $100 was the appropriate fair market value to apply. The trial court similarly found the fair market value for wire transfer services was $15.

The trial court ordered restitution for sub-escrow subclass members who had paid more than $100 for sub-escrow services in the amount of $1,066,039, based on numbers submitted by the parties. The number of prevailing sub-escrow fee subclass members was 37,626. For the disbursement fee subclass members who paid more than $15 for a single wire transfer, the trial court ordered restitution in the amount of $406,314. The number of prevailing disbursement fee subclass members was 32,806. The trial court determined interest would be calculated from October 8, 2007 citing equitable factors. The trial court found the remaining subclass members, including plaintiff, were not entitled to recovery. Judgment was entered on May 12, 2014.

H. Costs

Plaintiff submitted his cost memorandum, asserting entitlement to recovery of all costs as the prevailing party. The trial court disagreed. Code of Civil Procedure section 1032, subdivision (a)(4) provides: "'Prevailing party' includes the party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant. When any party recovers other than monetary relief and in situations other than as specified, the 'prevailing party' shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not and, if allowed may apportion costs between the parties on the same or adverse sides pursuant to rules adopted under Section 1034."

The trial court ruled none of the four enumerated situations in Code of Civil Procedure section 1032, subdivision (a)(4) applied. Applying the discretionary portion, the trial court ruled plaintiff was the prevailing party. But the trial court found plaintiff was not entirely successful. Relying on equitable considerations, the trial court limited plaintiff's awarded costs based on the following analysis. The trial involved 368,789 subclass members. As noted, the trial court found 37,626 sub-escrow fee subclass members and 32,806 disbursement fee subclass members were entitled to restitution. Assuming no overlap, 70,432 of the 368,789 subclass members received relief. This represented 11 percent of total class members and 19 percent of the claims that proceeded to trial. The trial court, rounding in favor of plaintiff, estimated his level of success at 25 percent. Of the over $1 million in allowable costs sought by plaintiff, the trial court awarded him $265,501.

III. DISCUSSION

A. Unfair Competition Law

Business and Professions Code section 17200 provides in pertinent part, "[U]nfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice . . . ." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180 (*Cel-Tech*); *Smith v. State Farm Mutual Automobile Ins. Co.* (2001) 93 Cal.App.4th 700, 717.) Our Supreme Court held, "By proscribing 'any unlawful' business practice, 'section 17200 "borrows" violations of other laws and treats them as unlawful practices' that the unfair competition law makes independently actionable. [Citations.]" (*Cel-Tech, supra,* 20 Cal.4th at p. 180; *Smith v. State Farm Mutual Automobile Ins. Co.*, supra, 93 Cal.App.4th at p. 718.) Here, as noted, plaintiff asserted defendant violated Insurance Code section 12414.27. Injunctive relief and restitution are authorized remedies. (Bus. & Prof. Code, § 17203; *Smith v. State Farm Mutual Automobile Ins. Co., supra,* 93 Cal.App.4th at p. 717.) Plaintiff did not seek injunctive relief because the alleged unlawful conduct ceased on October 8, 2007. In evaluating plaintiff's unfair competition claims, we review questions of law and statutory interpretation de novo. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432; *Crocker Nat. Bank v. City & County of San Francisco* (1989 49 Cal.3d 881, 888; *In re Marriage of Schofield* (1998) 62 Cal.App.4th 131, 137.) We review the trial court's resolution of disputed factual findings for substantial evidence. (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874.)

B. Insurance Code Section 12414.26 Applies to Plaintiff's Ambiguity Theory for the Disbursement Fees Claim

We first address the applicability of Insurance Code section 12414.26 to plaintiff's ambiguity theory for the disbursement fees claim. As noted, Insurance Code section 12414.26 provides civil liability immunity under these circumstances, "No act done, action taken, or agreement made pursuant to the authority conferred by Article 5.5 (commencing with Section 12401) . . . of this chapter shall constitute a violation of or grounds for prosecution or civil proceedings under any other law of this state heretofore or hereafter enacted which does not specifically refer to insurance." Plaintiff asserts the trial court erred by finding immunity under Insurance Code section 12414.26 applied to the disbursement fees claim. (Plaintiff also asserted the trial court erred regarding Insurance Code section 12414.26 applying to the sub-escrow fees. However, plaintiff chose not to raise that issue on appeal because of the trial court's finding that defendant failed to follow its own rate.) Plaintiff contends he was not challenging the rates being filed, but rather the interpretation of the rates.

Article 5.5 of the Insurance Code describes rate filing and regulation. (Ins. Code, § 12401, et seq.) Several sections of article 5.5 of the Insurance Code describe how a company like defendant files rates. Insurance Code section 12401 provides in pertinent part, "The purpose of this article is to promote the public welfare by regulating rates for the business of title insurance as herein provided to the end that they shall not be excessive, inadequate or unfairly discriminatory." Insurance Code section 12401.1 provides: "Every title insurer, underwritten title company, and controlled escrow company shall file with the commissioner its schedules of rates, all regularly issued forms of title policies to which such rates apply, and every modification thereof which it proposes to use in this state. Every schedule of rates filed by a title insurer shall set forth the entire charge to the public for each type of title policy included within such schedule and shall include without separate statement thereof that portion of the charge, if any, which is based upon work performed by an underwritten title company; there shall be no

separate filing by an underwritten title company for such work. Every filing shall set forth its effective date, which shall be not earlier than the 30th day following its receipt by the commissioner, and shall indicate the character and extent of the coverages and services contemplated." Insurance Code section 12401.7 provides in pertinent part, "No title insurer, underwritten title company or controlled escrow company shall use any rate in the business of title insurance prior to its effective date . . . ." There is no requirement for prior approval of title insurance rates by the insurance commissioner. (See Ins. Code, §§ 1861.01, subd. (c) ["Commencing November 8, 1989, insurance rates . . . must be approved by the commissioner prior to their use."], 1851 ["The provisions of this chapter [regarding rate approval] shall apply to all insurance on risks or on operations in this state, except: [¶] . . . [¶] (d) Title insurance."].)

Plaintiff's ambiguity theory for the disbursement fees claim is barred by the Insurance Code section 12414.26 civil immunity. Our Supreme Court has held, "Article 5.5 applies only to rate regulation . . . ." (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 44; see 13 Witkin, Summary of Cal. Law (10th ed. 2005) Equity,§ 112, p. 418 ["[Insurance Code, Section 12414.26] is expressly limited to title insurance company activities related to rate setting."].) The previously cited sections of the Insurance Code govern how defendant is to file its title insurance rates. Namely, defendant must merely file its rate schedule with the insurance commissioner 30 days prior to the charge becoming effective. (Ins. Code, §§ 12401, 12401.1, 12401.7.) It is undisputed defendant properly filed the disbursement rate at issue under article 5.5 of the Insurance Code with the insurance department.

The gravamen of plaintiff's ambiguity theory is that defendant's rates are improper. Plaintiff asserted the disbursement fees were ambiguous and should be charged per sub-escrow transaction. Plaintiff is seeking to apply his interpretation of the rate as the correct one. That interpretation of the rates under plaintiff's ambiguity theory would be a challenge to the rate as filed by defendant. Insurance Code section 12414.26 immunizes defendant from civil liability on this ground. We note that customers facing an ambiguous rate are not without a remedy. Insurance Code sections 12414.13 and

12414.14 provide that customers under these circumstances can file a complaint with the insurance commissioner. The insurance commissioner's ruling is ultimately subject to judicial review. (*Ibid.*, § 12414.19.)

C. Defendant's Violation of Insurance Code section 12414.27

As noted, Insurance Code section 12414.27 provides in pertinent part, "[N]o title insurer, underwritten title company or controlled escrow company shall charge for any title policy or service in connection with the business of title insurance, except in accordance with rate filings which have become effective pursuant to Article 5.5 (commencing with Section 12401) of this chapter or as otherwise authorized by such article . . . ." To evaluate whether defendant violated Insurance Code section 12414.27, we first determine what the rate filing was during the class period. As asserted by defendant, the sub-escrow fee was a minimum $60 with increases determined by applying the factors in section A-16 of the rate schedule. The disbursement fees as asserted by defendant were: $15 per overnight mail use; $25 per special messenger use; and $15 per wire transfer use. The trial court used defendant's interpretation when it construed the filed rate's language. Because this is the application of law to undisputed evidence, we conduct our own independent review. Based on our own independent review, we find the trial court's construction of the filed rate was not error. (Civ. Code, § 3542 ["Interpretation must be reasonable."]; see *Universal Pictures Corp. v. Superior Ct.* (1935) 9 Cal.App.2d 490, 493-494.)

The trial court found defendant violated Insurance Code section 12414.27 by failing to properly apply its own rates. Whether defendant failed to properly apply its own rates involves resolution of a disputed fact. Substantial evidence supports the trial court's finding. Defendant could not identify any documents which indicated the sub-escrow rate was increased using section A-16 of the rate schedule. Evidence was also presented indicating sub-escrow fees varied in the same county in the same year. This supports the trial court's conclusion that sub-escrow rate increases were done in a

haphazard manner such that the section A-16 factors were not actually applied. As for the disbursement service for wire transfer fees, defendant's response to a special interrogatory indicated 32,806 subclass members were charged more than $15 for one wire transfer.

Defendant contends that under the Insurance Code section 12414.26 civil immunity plaintiff is entirely barred from pursuing his unfair competition claim. Defendant argues the insurance department has exclusive authority to regulate "unfairly discriminatory" rates. Defendant contends the trial court's finding that it had inconsistently applied its rate was the equivalent of applying its rate in an "unfairly discriminatory" manner.

We disagree that these principles apply in this aspect of our case. It is undisputed the insurance department has exclusive authority to regulate rates that are "unfairly discriminatory." (Ins. Code, §§ 12401, 12414.13, 12414.29.) However, the trial court did not find defendant's rate was "unfairly discriminatory." Rather, the trial court ruled defendant applied its rate so inconsistently as to not be applying the filed rate at all. As noted, substantial evidence supported the trial court's finding. There is a difference between denying a challenge as to what the filed rate is and examining whether the amount charged was in accordance with the filed rate. The Insurance Code section 12414.26 limited immunity would apply when there is a challenge to defendant's filed rate. However, defendant is not permitted to charge more than its filed rate under Insurance Code section 12414.27. Additionally, Insurance Code section 12414.27 is beyond the scope of Insurance Code section 12414.26. Thus, defendant violated the Unfair Competition Law by charging the subclass members beyond its filed rate in violation of Insurance Code section 12414.27. We need not address the parties' remaining arguments concerning liability.

D. Restitution and Sub-Escrow Fees

Plaintiff asserts the trial court erred in its calculation of restitution regarding the sub-escrow fees. Plaintiff contends the trial court incorrectly determined restitution should be calculated as the difference between the amount charged and the fair market value of $100. Plaintiff asserts restitution should be the difference between the charged amount and $60, the minimum rate filed by defendant. Defendant alternatively asserts the fair market value should be calculated as $125.

Business and Professions Code section 17203 provides in pertinent part: "Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition." The Court of Appeal has held: "While the 'may have been acquired' language of Business and Professions Code section 17203 is so broad as to allow restitution without individual proof of injury, it is not so broad as to allow recovery without any evidentiary support. (*Colgan v. Leatherman Tool Group, Inc.* (2006) 135 Cal.App.4th 663, 697.) The difference between what the plaintiff paid and the value of what the plaintiff received is a proper measure of restitution. (*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 174.)" (*In re Vioxx Class Cases* (2009) 180 Cal.App.4th 116, 131 (*Vioxx*).) The Court of Appeal also has held: "*Vioxx* does not purport to set forth the exclusive measure of restitution *potentially* available in a[n Unfair Competition Law] case. It remains, however, that plaintiffs had the burden of proving entitlement to an alternative measure of restitution proper under all the circumstances." (*In re Tobacco Cases II* (2015) 240 Cal.App.4th 779, 792.)

Restitution under the Unfair Competition Law is an equitable remedy. (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1144; *Cortez v. Purolator*

Air Filtration Products Co., *supra*, 23 Cal.4th at p. 173.) Because a trial court has broad discretion when fashioning its equitable remedy, we review for an abuse of discretion. (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773; *Thayer v. Wells Fargo Bank, N.A.* (2001) 92 Cal.App.4th 819, 833.) Our Supreme Court has held: "The court's discretion is very broad. [Business and Professions Code] [s]ection 17203 does not mandate restitutionary or injunctive relief when an unfair business practice has been shown. Rather, it provides that the court '*may* make such orders or judgments . . . as may be necessary to prevent the use or employment . . . of any practice which constitutes unfair competition . . . or as may be necessary to restore . . . money or property.' (*Ibid*.) That is, as our cases confirm, a grant of broad equitable power. A court cannot properly exercise an equitable power without consideration of the equities on both sides of a dispute." (*Cortez v. Purolator Air Filtration Products Co.*, *supra*, 23 Cal.4th at p. 180; accord, *Zhang v. Superior Court* (2013) 57 Cal.4th 364, 371.)

Plaintiff contends the trial court's equitable analysis cannot justify the restitution calculation. We disagree. Here, the trial court weighed the equities. The trial court noted defendant filed a new rate schedule in response to an examination by the insurance department which ended the offending practice. Defendant's parent company also paid a fine to the insurance department regarding its prior filed rate schedule. Mr. Dufficy testified that around April 22, 1998, section A-16 of the schedule was revised to the one at issue specifically at the insurance department's request. Based upon these equities, the trial court calculated restitution utilizing the *Vioxx* method—the difference between what plaintiff and the class members paid and the value of what they received. The trial court had considerably broad discretion to fashion an equitable remedy. (*Zhang v. Superior Court*, *supra*, 57 Cal.4th at p. 371; *Cortez v. Purolator Air Filtration Products Co.*, *supra*, 23 Cal.4th at p. 180.) Plaintiff has not demonstrated how the trial court abused its discretion by using this method.

Plaintiff asserts $60 is the applicable sub-escrow fee rate. We disagree. As previously discussed, the trial court determined the sub-escrow fee was $60, which could be increased using factors in section A-16 of the rate schedule. There is no dispute the

sub-escrow fee could vary. Thus, the trial court, without abusing its discretion, could calculate the value of the sub-escrow fee to determine the value of what plaintiff received. The fair market value of the sub-escrow fee would reflect the value of what plaintiff received. (*In re Tobacco Cases II*, *supra*, 240 Cal.App.4th at p. 791; *Vioxx*, *supra*, 180 Cal.App.4th at p. 131.) Substantial evidence supports the trial court's finding that the fair market value for the sub-escrow fee was $100. As noted, Dr. Strombom testified that companies similar to defendant who published their rates had charged from $100 to $125 for a sub-escrow fee. Dr. Strombom further testified plaintiff being charged $100 for the sub-escrow fee was commensurate with the market rates at the time.

Defendant's argument that the fair market value figure should have been $125 also fails. Dr. Strombom testified to a range of $100 to $125 for sub-escrow fees during the class period. Nothing prohibits the trial court from choosing the lower end of that range to determine the value of what plaintiff received. (See *Vioxx*, 180 Cal.App.4th at p. 131 ["When the plaintiff seeks to value the product received by means of the market price of another, comparable product, that measure cannot be awarded without evidence that the proposed comparator is actually a product of comparable value to what was received."]; Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2015) ¶ 16:12 ["In *nonjury* trials . . . it is the judge's duty to *weigh* the evidence, *determine credibility* of witnesses, and *decide questions of fact*, as well as issues of law."].) Accordingly, the trial court did not abuse its discretion by determining the restitution for the sub-escrow subclass members should be the difference between what was paid and $100.

One last comment is in order concerning the Unfair Competition Law and the Insurance Code section 12414.26 immunity. Because of that immunity, no trial court may assess the fair market value of a service and order a title company to change that amount in place of a filed rate. But once a trial court concludes the filed rate was not charged, causing detriment to the customers, fair market value calculations may be appropriate in fashioning a restitution remedy. The Unfair Competition Law authorizes use of fair market value calculations in imposing a restitution remedy. (*In re Tobacco*

Cases II, *supra*, 240 Cal.App.4th at p. 791; *Vioxx*, *supra*, 180 Cal.App.4th at p. 131.) We are merely allowing, in a filed rates case where a violation of the Unfair Competition Law has occurred, the use of fair market value principles *when calculating restitution*. In doing so, we harmonize the Unfair Competition Law restitution remedy with the Insurance Code section 12414.26 immunity. And in doing so, we give effect to the liberal construction afforded remedial statutes such as the Unfair Competition law. (*Pineda v. Williams-Sonoma Stores, Inc.* (2011) 51 Cal.4th 524, 530 ["'[C]ivil statutes for the protection of the public are, generally, broadly construed in favor of that protective purpose.'"]; *Korea Supply Co. v. Lockheed Martin Corp.*, *supra*, 29 Cal.4th at p. 1143 [referring to remedial provisions of Unfair Competition Law].)

E. Interest

Plaintiff argues the court should have calculated prejudgment interest from the date of the overcharge, not October 7, 2007. Plaintiff contends the trial court's equitable rationale was erroneous. The trial court may grant prejudgment interest based on equitable considerations in an Unfair Competition Law cause of action. (*Rodriguez v. RWA Trucking Co., Inc.* (2013) 238 Cal.App.4th 1375, 1410; *M & F Fishing, Inc. v. Sea-Pac Ins. Managers, Inc.* (2012) 202 Cal.App.4th 1509, 1539.) As we stated previously, we do not find the trial court abused its discretion regarding its equitable remedy. Likewise no abuse of discretion occurred when the trial court chose to calculate prejudgment interest beginning after the class period ended. Plaintiff also cites Civil Code section 3287 to contend legal interest begins on the date defendant imposed the unlawful charge. Civil Code section 3287 does not apply because it is limited to interest on damages. (*Rodriguez v. RWA Trucking Co., Inc.*, *supra*, 238 Cal.App.4th at pp. 1409-1410; *M & F Fishing, Inc. v. Sea-Pac Ins. Managers, Inc.*, *supra*, 202 Cal.App.4th at p. 1538.)

F. Costs

Plaintiff contends that the subclass is the prevailing party under Code of Civil Procedure section 1032, subdivision (a)(4). Under this theory of costs, every subclass member, whether litigating or not, is considered one plaintiff. According to plaintiff, the subclass is entitled to recover all of its costs.

Code of Civil Procedure section 1032, subdivision (a)(4) provides in pertinent part: "'Prevailing party' includes the party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant. When any party recovers other than monetary relief and in situations other than as specified, the 'prevailing party' shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not and, if allowed may apportion costs . . . ." (See *Chinn v. KMR Property Management* (2008) 166 Cal.App.4th 175, 188.) We will refer to the first portion as the mandatory prong and the second portion as the discretionary prong.

We apply the following standard of review: "Generally, a trial court's determination of costs is reviewed for abuse of discretion. [Citation.] However, where 'the determination of whether costs should be awarded is an issue of law on undisputed facts, we exercise de novo review.' [Citation.]" (*MacQuiddy v. Mercedes-Benz USA, LLC* (2015) 233 Cal.App.4th 1036, 1050; accord, *Sharif v. Mehusa, Inc.* (2015) 241 Cal.App.4th 185, 191; *City of Long Beach v. Stevedoring Services of America* (2007) 157 Cal.App.4th 672, 678.) Plaintiff asserts the class is the "prevailing party" because it received a net monetary recovery.

The following sets forth the nature of a class action: "A class action is a representative action in which the class representatives assume a fiduciary responsibility to prosecute the action on behalf of the absent parties. [Citation.] The representative parties not only make the decision to bring the case in the first place, but even after class certification and notice, they are the ones responsible for trying the case, appearing in

court, and working with class counsel on behalf of absent members. The structure of the class action does not allow absent class members to become active parties, since 'to the extent the absent class members are compelled to participate in the trial of the lawsuit, the effectiveness of the class action device is destroyed.' [Citation.] The very purpose of the class action is to 'relieve the absent members of the burden of participating in the action.' [Citation.] [Fn. omitted.]" (*Earley v. Superior Court* (2000) 79 Cal.App.4th 1420, 1434; see *Luckey v. Superior Court* (2014) 228 Cal.App.4th 81, 99 ["What is clear . . . is that absent class members in a *postcertification* class -- those who have received notice and elected not to appear or opt out -- are not 'parties litigant.'"].)

As found by the trial court and supported by substantial evidence, plaintiff personally did not receive a net monetary recovery as a sub-escrow fee or disbursement fee subclass member. We must determine whether the subclasses as a whole were a "prevailing party" under the mandatory prong of Code of Civil Procedure section 1032, subdivision (a)(4). The trial court relied upon *Earley v. Superior Court*, *supra*, 79 Cal.App.4th at page 1434, footnote 11, in which the Court of Appeal held, "Absent class members may be 'parties' for certain purposes, but for other purposes they are not." The trial court concluded in its cost order: "The Court does not believe that the legislature had class actions in mind at all when it sought to define four simple situations in which a party would prevail, and be entitled to costs as of right. By nature, class actions are less susceptible to evaluation by a simple up or down rule of the kind articulated in the first prong of [Code of Civil Procedure section 1032, subdivision (a)(4)] . . . . [A] class action will often require specialized consideration as to the identity of the prevailing party, and an allocation of costs between the parties will often be appropriate in the interest of justice." Having conducted our own independent review, we agree with the trial court. None of the situations in the mandatory prong of Code of Civil Procedure section 1032, subdivision (a)(4) apply to plaintiff.

In support of his position, plaintiff relies on *Collins v. City of Los Angeles* (2012) 205 Cal.App.4th 140, 154-155 and *Beasley v. Wells Fargo* (1991) 235 Cal.App.3d 1407, 1413-1418. These cases are inapposite. They involve Code of Civil Procedure section

1021.5 and the discretionary award of attorney's fees. (*Collins v. City of Los Angeles*, *supra*, 205 Cal.App.4th at p. 153; *Beasley v. Wells Fargo*, *supra*, 235 Cal.App.3d at p. 1413.)

Plaintiff also contends that *Acree v. General Motors Acceptance Corp.* (2001) 92 Cal.App.4th 385, 392-405 (*Acree*) is dispositive. In *Acree*, the class plaintiffs prevailed against the defendant in a jury trial for contract breach. (*Id.* at p. 392.) The trial court awarded costs for a class action to the plaintiffs as the prevailing party. (*Acree*, *supra*, 92 Cal.App.4th at p. 392.) The defendant asserted it could recover costs on an individual basis because it had prevailed against most of the class members and three of the four named plaintiffs. (*Id.* at p. 405.) The Court of Appeal affirmed the trial court's award of costs. (*Ibid*.) *Acree* is silent as to whether the trial court awarded costs to the class as a prevailing party by reason of party with a net monetary recovery. Additionally, one of the representative plaintiffs in *Acree* actually had a monetary recovery. (*Ibid*.) Plaintiff did not have a monetary recovery here. Accordingly, we find none of the enumerated situations in the mandatory prong of Code of Civil Procedure section 1032, subdivision (a)(4) apply.

Finally, we address the trial court's decision to find plaintiff the prevailing party under the discretionary prong of Code of Civil Procedure section 1032, subdivision (a)(4) and to apportion costs. Defendant contends that it had actually prevailed substantially in this action because the representative plaintiff and over 80 percent of the subclass members would receive nothing. Defendant asserts costs should not be awarded to plaintiff at all. The trial court did not abuse its discretion. As noted, the trial court determined plaintiff had successfully represented 19 percent of the subclass members against defendant. The trial court found plaintiff's success was 25 percent and apportioned the costs accordingly. The trial court's decision does not exceed the bounds of reason. (*Lincoln v. Schurgin* (1995) 39 Cal.App.4th 100, 105-106; *Texas Commerce Bank v. Garamendi* (1994) 28 Cal.App.4th 1234, 1249.) We need not address the parties' remaining arguments.

IV. DISPOSITION

The judgment and cost order are affirmed. The parties are to bear their own appellate costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P. J.

We concur:

BAKER, J.

KUMAR, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.