Appellate Reports and Cases in Brief

Recent cases of interest to members of the plaintiff's bar

By Jeffrey Isaac Ehrlich

Matrixx Initiatives, Inc., et al. v. Siracusano

(2011) __ U.S. __, 2011 WL 977060 (U.S. Supreme Court)

Who needs to know about this case? Lawyers handling federal securities cases

Why it's important: Clarifies standard to allege elements of materiality and scienter in complaints under section 10(b) of the 1934 Act and Rule 10(b)(5).

Synopsis: Matrixx's leading product is Zicam Cold Remedy. Plaintiffs alleged that Matrixx failed to disclose reports linking use of the product to a loss of smell (anosomia), which violated section 10(b) and Rule 10(b)(5). The district court dismissed the complaint, arguing that plaintiffs had not sufficiently pleaded a material misstatement or omission, or scienter. The Ninth Circuit reversed, and the Supreme Court agreed. Affirmed.

Section 10(b)'s materiality requirement is satisfied when there is a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.

Matrixx told the market that revenues were going to rise 50 and then 80 percent when it had information indicating a significant risk to its leading revenue-generating product. It also publicly dismissed reports linking Zicam and anosomia and stated that zinc gluconate's safety was well established, when it had evidence of a biological link between Zicam's key ingredient and anosomia and had conducted no studies to disprove that link.

Matrixx contended that plaintiffs failed to plead scienter and materiality because they did not allege that the reports Matrixx received reflected statistically-significant evidence that Zicam caused anosomia. Matrixx's suggested bright-line rule – that adverse event reports regarding a pharmaceutical company's products are not material absent a sufficient number of such reports to establish a statistically significant risk that the product is causing the events – would artificially exclude information that would otherwise be considered significant to a reasonable investor's trading decision. Matrixx's premise that statistical significance is the only reliable indication of causation is flawed. Both medical experts and the FDA rely on evidence other than statistically significant data to establish an inference of causation. It is substantially likely that a reasonable investor would have viewed this information as having significantly altered the "total mix" of information made available.

Matrixx's proposed bright-line rule requiring an allegation of statistical significance to establish a strong inference of scienter is also flawed. The complaint's allegations, taken collectively, give rise to a cogent and compelling inference that Matrixx elected not to disclose adverse event reports not because it believed they were meaningless but because it understood their likely effect on the market. A reasonable person would deem the inference that Matrixx acted with deliberate recklessness at least as compelling as any plausible opposing inference.

Ming-Ho Leung v. Verdugo Hills Hosp.

(2011) __ Cal.App.4th __,121 Cal.Rptr.3d 913 (Second Dist. Div. 4).

Who needs to know about this case: Any lawyer contemplating releasing a defendant accused of being a joint tortfeasor

Why it's important: Holds the medical-malpractice plaintiff who settles with doctor for $1 million – the doctor's policy limit – effectively discharges ALL remaining defendants for ALL economic damages, unless trial court has found that settlement is in "good faith" under section 877.6 of the Code of Civil Procedure. Here, the court found that the settlement did not qualify as a good-faith settlement, under section 877.6, but the plaintiff proceeded with it anyway. Hence, plaintiff's judgment against hospital for economic damages in excess of $90 million was reversed.

Synopsis: Plaintiff's newborn infant was at increased risk of developing complications from jaundice for several reasons. He was discharged by hospital and pediatrician without adequate information to parents about risks. He developed jaundice and ultimately suffered irreversible brain damage because he was not evaluated soon enough to prevent toxins in his bloodstream from building up to dangerous levels.

Before trial, plaintiffs settled with the pediatrician for $1 million – the limit of his malpractice coverage. The trial court found this was too low to constitute a good-faith settlement under section 877.6. Plaintiff proceeded with the settlement anyway, figuring that they could use the proceeds to provide needed care for their son, and then enforce the entire judgment for economic damages against the hospital. At trial, the hospital was found 40 percent liable, the pediatrician 55 percent liable, and the parents 2.5 percent liable each. The judgment for economic damages was in excess of $90 million (with future medical costs and lost earnings reduced to present value.)

The Court of Appeal reversed the award of economic damages against the hospital. The court found that where a settlement is not made in good faith under section 877.6, the provisions of section 877 do not apply either; therefore, the effect of the settlement is governed by the common law. At common law, the effect of the plaintiff releasing one joint tortfeasor was to release all joint tortfeasors. While the Supreme Court abolished this rule as to successive tortfeasors, and has criticized it, it never abrogated it as to joint tortfeasors. Therefore the principles of stare decisis required the Court of Appeal to reverse. The court urged the Supreme Court to grant review and to abrogate the common-law release rule.

Branson v. Sharp Healthcare

(2011) __ Cal.App.4th __, 2011 WL 1136233 (4th Dist. Div 1)

Who needs to know about this case: Lawyers handling personal-injury cases that include a Medi-Cal lien

Why it's important: Illustrates the proper method to calculate a Medi-Cal lien; confirms that the trial court has jurisdiction to order Medi-Cal to make reimbursement to the plaintiff if prior lien payments have resulted in an overpayment of the Medi-Cal lien.

Synopsis: The beneficiary of medical services under the California Medical Assistance Program (Medi-Cal) is required to reimburse the Department of Health Care Services (the Department) for the costs of medical care from a recovery obtained in a tort action against a third party liable for the beneficiary's injuries. The Department's claim, however, "is limited to that portion of a settlement, judgment, or award that represents payment for medical expenses, or medical care, provided on behalf of the beneficiary." When a settlement of third-party litigation is unallocated between categories of damages, such as medical costs, lost earnings, and pain and suffering, the trial court may determine the appropriate Medi-Cal lien amount by comparing the percentage of the settlement to the beneficiary's total damages, and applying that percentage to the past medical costs for which the Department seeks reimbursement.

In 2004 Daniel Branson, then 42, was the victim of medical malpractice: the failure to diagnose a spinal abscess. As a result he suffers from quadriplegia and a plethora of attendant physical and psychological problems. He requires around the clock nursing care, and he faces additional surgeries and many other expensive medical procedures. Branson brought a medical malpractice action against a hospital, an emergency medical group, and individual physicians. The Department filed a notice of lien on any recovery for reimbursement of medical expenses Medi-Cal had covered.

In 2007 Branson settled his claims against two of the defendants for a total of $2 million. The settlement was not allocated among categories of damages. In an August 8, 2007, letter to Branson's attorney, the Department stated it had paid $611,133.94 in medical costs for him, and it would accept $440,478.64 in reimbursement based on the $2 million settlement, attorney fees of zero and litigation costs of $58,487.41. In October 2007 Branson paid the full amount the Department requested.

In November 2008 Branson settled his claims against the remaining defendants for a total of $4,804,269. Again, the settlement was not allocated among categories of damages. In a November 19 letter to Branson's attorney, the Department stated Medi-Cal had paid an additional $513,979.71 for his medical costs. It sought reimbursement of an additional $370,390.66 to satisfy the Medi-Cal lien. Again, the letter did not explain how it calculated the reimbursement amount.

Branson calculated his actual damages as in excess of $29 million. His total settlement amounted to only 23.4 percent of those damages. Accordingly, he believed that the Department's lien should be no more than 23.4 percent of the total it paid. Under that view, Branson had overpaid, particularly since he was entitled to a reduction for 25 percent attorney's fees. In all, by paying the Department's initial demand for reimbursement of $440,478, he overpaid his debt by $250,729.

The trial court agreed with his calculation, and ordered that he was not required to pay the Department any additional amount. The court, however, found it lacked authority to order the Department to refund the overpayment. The Court of Appeal affirmed the calculation of the lien, but further found that under the plain language of subdivision (c) of Welfare & Institutions Code section 14124.76, the court has jurisdiction to order the Department to refund Branson's overpayment. Section 14124.76, subdivision (c) states that in a proceeding to establish the appropriate amount of a Medi-Cal lien, the "court shall issue its findings, decision, or order, which shall be considered the final determination of the parties' rights and obligations with respect to the director's lien . . ." (Italics added.)

De La Cuesta v. Benham

(2011)__ Cal.App.4th __, 2011 WL 1126585 (Fourth Dist. Div. Three.)

Who needs to know about this case: Lawyers seeking attorneys' fees under an attorney's fees clause in a contract, who have won a partial victory at trial; lawyers defending against such claims

Why it's important: Makes clear that trial court discretion to deny claims is not unlimited

Synopsis: De La Cuesta rented residential real property to Benham. He brought an unlawful detainer action for unpaid rent. Benham denied that she owed anything because there were leaks on the premises. She vacated the premises before the unlawful-detainer trial, so the matter was converted into an ordinary civil action. De La Cuesta obtained roughly 70 percent of the monetary relief he sought, but the trial court denied him attorney's fees, finding that there was no "prevailing party" for the purposes of the attorney's fees clause in the agreement. Reversed.

Civil Code section 1717, subd. (b) (1) contains two clauses dealing with fee awards. The "entitlement clause" mandates an award of fees to the prevailing party; the "discretion clause" follows, and gives the court discretion to determine that there is no prevailing party. A party who wins a "simple, unqualified win" is a prevailing party who is entitled to fees. A party who obtains a mixed result is subject to the discretion clause. "But just because a litigant is not entitled to its fees as a matter of the entitlement clause of section 1717 does not mean that discretion cannot be abused." The law is not that, unless you win a complete victory the trial court has unfettered discretion to declare you a non-winner. "If anything short of 'complete victory' allows the trial court unrestricted freedom to ignore the *substance* of a result, then trial courts have the freedom to nullify the normal expectations of parties who enter into contracts with prevailing party attorney fee clauses."

Although the appellate court did not attempt to fashion a one-size-fits-all rule for all cases, it held: "If the results in a case are lopsided in terms of one party obtaining "greater relief" than the other in comparative terms, it may be an abuse of discretion for the trial court *not* to recognize that the party obtaining the 'greater' relief was indeed the prevailing party." Here, because the landlord ultimately won 70 percent of the relief he sought, that threshold was passed, and it was an abuse of discretion for the trial court to refuse to find that there was a prevailing party.

CASES IN BRIEF

Fair Labor Standards Act; anti-retaliation; oral complaints; *Kasten v. St. Gobain Performance Plastics* (2011) __ U.S.__, 2011 WL 977061 (U.S. Supreme Court)

The Fair Labor Standards Act forbids employers to discharge any employee because the employee has "filed any complaint" alleging a violation of the Act. Kasten claimed the he had been fired because he had made oral complaints to the company about the placement of time-clocks in a location that prevented workers from receiving credit for the time taken to don and doff protective gear. The district court granted summary judgment for the employer, finding that the Act's anti-retaliation provision did not apply to oral complaints. The Seventh Circuit affirmed. Reversed. The scope of statutory term "filed any complaint" includes oral, as well as written, complaints.

Cal-OSHA; negligence-per se; independent contractors; *Iversen v. California Village Homeowners Ass'n* (2011) __ Cal.App.4th __ (Second Dist. Div. 5.) Iversen, an independent contractor, was hired to supervise the removal of air-conditioning equipment from the roofs of defendant HOA's buildings as they were repaired. Iversen climbed to the roof on one of the buildings on a fixed ladder attached to the building, and fell from it, sustaining serious injuries. The ladder did not comply with the Cal-OSHA requirements that required certain fall protection. The trial court granted summary judgment against Iversen, finding that he could not rely on Cal-OSHA to establish negligence because he was an independent contractor. Affirmed. Only "employees" can invoke the Cal-OSHA regulations to rely on negligence per se, and Iversen's expert failed to say that the regulations were relevant simply as evidence of the standard of care.

Cal-OSHA; non-delegable duties; independent contractors; *Tverberg v. Fillner Const., Inc.* (2011) __ Cal.App.4th __ (First Dist., Div. 4) Tverberg, an independent contractor, was hired by Fillner Construction to supervise construction of a metal canopy over some fuel-pumping units at a commercial fuel facility. A different subcontractor had dug holes near the worksite to install concrete bollards that would prevent vehicles from colliding with the fuel dispensers. This work was not connected with the erection of the canopy. Tverberg asked Fillner to cover the holes with metal plates. This was not done. Tverberg fell into a hole while walking to his truck. The trial court granted summary judgment against Tverberg. Reversed. Triable issues of fact were presented about whether Fillner retained control over the safety conditions at the site and exercised that control in a way that affirmatively contributed to Tverberg's injuries. In addition, there was a triable issue of fact about whether Fillner breached a non-delegable duty owed to Tverberg. Fillner was responsible for compliance with Cal-OSHA regulations requiring that all pits be barricaded or securely covered. Because Fillner ordered that the bollard holes be dug, and was generally responsible for the safety conditions on the site, the regulation created a non-delegable duty that can form the basis of direct liability. [Ed. note – the finding in *Tverberg* that an independent contractor could rely on the Cal-OSHA regulations appears contrary to the holding in *Iversen.* Rehearing on *Iversen* has been sought on that basis, among others.]


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