Appellate Reports and Cases in Brief

Recent cases of interest to members of the plaintiffs' bar

By Jeffrey Isaac Ehrlich

Short(er) takes

Products Liability; duty to warn; strict liability; replacement parts; asbestos *O'Neil v. Crane Co.* (2012) 53 Cal.4th 335 (Cal. Supreme).

In a wrongful-death action brought by family of Naval Officer who served on an aircraft carrier and was exposed to asbestos during the maintenance of pumps and valves that contained asbestos parts, the Supreme Court affirms non-suit. The Court held that a manufacturer's liability for selling a product that contains asbestos parts terminates once those parts are replaced with substitutes made and sold by another company. The Court held that there was no defect in the valves or pumps themselves that caused the injury, and that the valves and pumps were not designed to be used with asbestos-containing parts. Rather, the asbestos was specified by the Navy. The Court held that the plaintiff's exposure to asbestos occurred after the original asbestos-containing parts delivered by the pump and valve manufacturers had been replaced, and therefore the plaintiff had not been injured by the defendants' products. In the Court's view, the injuries were caused, not by the valves and pumps, but by "other" products (the asbestos gaskets and packing inside the pumps and valves) that could foreseeably have been used in conjunction with the valves and pumps. California public policy would not be served by requiring manufacturers to warn about the dangerous propensities of products that they do not design, make, or sell.

Appellate costs; interest expenses *Rossa v. D.L. Falk Constr. Co.* (2012) __ Cal.4th __ (Cal. Supreme).

Filing a notice of appeal does not stay enforcement of a money judgment unless an undertaking is given. (Code Civ. Proc., § 917.1, subd. (b).) The undertaking may be in the form of a bond issued by a surety. Insurance companies who provide such bonds typically charge a premium for the bond, and also require the appellant to provide collateral for the bond, such as a letter of credit. If the appellant prevails, it may recover as costs on appeal "the cost to procure a surety bond, including the premium and the cost to obtain a letter of credit as collateral." (Cal.R. Court, Rule 8.278(d)(1)(F).) The question presented is whether the reference in the rule to "the cost to obtain a letter of credit" extends to the interest expense incurred by the appellant who is forced to borrow money to secure the letter of credit that collateralizes the bond. The Supreme Court held that it did not.

Due process; use of statistical or representative proof at trial; class actions; wage-and-hour exemptions *Duran v. US Bank National Assoc.* (2012) __ Cal.App.4th __ (1st Dist., Div. 1.)

US Bank lost a $15 million judgment in an action brought by 260 current and former employees who claimed that they had been misclassified as exempt from overtime pay. The Court of Appeal reversed the judgment, holding that the trial court's trial-management plan deprived the bank of due process. The plan required the parties to rely solely on the testimony derived from a 21-witness sample to determine class-wide liability. The approach produced a 43.3 margin of error in weekly overtime hours, which was excessive as a matter of law. In addition, the trial court infringed on the bank's due-process rights when it refused to allow the bank to introduce evidence challenging the individual claims of 239 absent class members. There was no statistical foundation for the trial courts' initial assumption that 20 out of 260 was a sufficient size to create a representative sample to extrapolate either liability or damages. The trial court essentially used the same type of "trial by formula" approach to liability that the U.S. Supreme Court rejected in the context of class certification in *Wal Mart Stores, Inc. v. Dukes* (2011) 564 U.S. __, 131 S.Ct. 2541. The trial court rejected as "irrelevant" evidence by the bank that up to one-third of the class members were properly classified. The trial court's relevancy determination was dictated by its trial plan rather than by the way the actual trial unfolded in its courtroom. This error was plainly prejudicial. Essentially, the procedures that the trial court used to manage the case created a high risk that the bank was compelled to pay money to absent class members, who were either properly classified, or who never worked overtime.

Attorney's fees; excusable neglect; error of law; post-trial costs; deadlines; good cause to extend deadline; automatic bankruptcy stay *Lewow v. Surfside II Condominium Owner's Ass'n* (2012) __ Cal.App.4th __ (2d Dist., Div. 6.)

Lewow unsuccessfully sued his condo association. On the day that notice of entry of judgment was served, the association filed bankruptcy. The association's counsel prepared a motion seeking

attorney's fees against Lewow, but delayed filing it because he believed that any proceedings in the trial court were subject to the automatic bankruptcy stay (11 U.S.C. § 362(a)). The association's counsel ultimately filed the motion for attorney's fees 32 days after the mailing of notice that the association's bankruptcy had been dismissed. The trial court held that the time to file the motion was tolled during the pendency of the automatic stay, and granted the motion. Lewow appealed. Affirmed.

The automatic stay did not toll the running of the 60-day period to file the motion for fees. The trial court's finding on that point was error. 11 U.S.C. § 108(c) would have provided the association with an additional 30 days after the expiration of the stay to file the motion, but the motion was filed 32 days after – two days late. Nevertheless, the trial court had the power to extend the deadline in California Rules of Court, rule 3.1702(d) for good cause. The rule is remedial and is to be given a liberal, rather than a strict interpretation. Counsel's mistake of law concerning the effect of the automatic stay constituted good cause that would have permitted the trial court to extend the time to file the motion for attorney's fees. The trial court's acceptance of the association's tolling argument was tantamount to a finding of good cause based on mistake.

Strict liability for raw materials; *Maxton v. Western States Metals* (2012) __ Cal.App.4th __ (2d Dist. Div. 3.)

Plaintiff Maxton alleged that he sustained personal injuries as a result of working with metal products manufactured by various defendants and supplied to his employer. The metal products were essentially raw materials that could be used in innumerable ways. Generally, suppliers of raw materials cannot be held liable on either negligence or strict products liability theories. Liability will be found only in extraordinary cases, such as when the materials are contaminated, the supplier exercises substantial control over the manufacturing process, or the material itself is inherently dangerous (such as asbestos.) Because none of these elements was present, and no other circumstances justified imposing liability on the defendants, the demurrers and motions for judgment on the pleadings against the defendants was affirmed.

Expert fees as costs recoverable under Code of Civil Procedure section 998; motions to tax costs; *Chaaban v. Wet Seal, Inc.* (2012) __ Cal.App.4th __ (4th Dist., Div. 3.)

Chaaban sued her employer, Wet Seal, for wrongful termination in violation of public policy. The jury returned a verdict for Wet Seal, which later filed a cost memorandum claiming $29,770. Chaaban filed a motion to tax costs, objecting to several items. The trial court awarded Wet Seal virtually all of the claimed costs. Affirmed.

Wet Seal made a 998 offer that Chaaban rejected. Wet Seal's claimed costs included the amount it had paid Chaaban's expert, Locker, for his deposition testimony, plus the costs related to his deposition transcript, including an expedite fee that doubled the cost. Wet Seal successfully excluded Locker as a trial witness by means of a motion in limine. Chaaban argued that Wet Seal should not have been permitted to recover the costs to expedite the transcript, or to recover the fees it paid her experts (as opposed to fees paid to its own experts.) She also claimed that because Locker's testimony was excluded at trial by Wet Seal, his testimony was not "necessary" and therefore Wet Seal could not claim reimbursement. The court rejected all these arguments. Wet Seal had to determine what Locker's testimony would be before it could move to exclude his testimony. His deposition was therefore reasonably necessary. While there is no law on the issue about whether reimbursement for expert fees under section 998 includes all experts, or just the prevailing party's experts, the court determined that the policies underlying section 998 would be better served by extending it to all experts. "We therefore hold that section 998, subdivision (c) gives the trial court the discretion to award defendant's expert fees, regardless of whose witness the expert is, in the event that the plaintiff fails to obtain a more favorable judgment or award, pursuant to the terms of the statute. "

The trial court did not abuse its discretion in finding that Wet Seal demonstrated good cause to expedite the Locker deposition transcript. Hence, it was not error to include that cost as reimbursable.

UCC.; battle of the forms; indemnification *C9 Ventures v. SVC-West, LP.* (2012) __ Cal.App.4th __ (4th Dist. Div. 3.)

SVC telephoned C9 and placed a rush order for eight helium-filled tanks used to inflate festive balloons. C9 accepted the order and later that day delivered the tanks without obtaining a signature on an invoice for them. On the reverse side of the invoice was an indemnification provision requiring SVC to indemnify C9 for any loss arising from the use or possession of the helium-filled tanks. After the tanks were delivered, a boy was injured when one of the tanks fell on him at the birthday party where the tank was being used. C9 later picked up the tanks, and weeks later, SVC paid the invoice. Both C9 and SVC paid the boy's family to settle his claims. C9 filed a cross-complaint against SVC to enforce the indemnity provision on the back of the unsigned invoice. The trial court held that the provision was enforceable under UCC section 2207, because the provision did not materially alter the contract and it became an added term. Reversed.

The oral contract between C9 and SVC was created when C9 accepted SVC's telephone order for the eight tanks. The oral contract was not a transaction in goods, however; it was an oral lease of personal property (the helium-filled tanks.) Personal-property leases are governed by Division 10 of the UCC, not Division 2. Division 10 lacks a provision that parallels UCC § 2207. So, the terms on the back of the invoice would have

become part of the contract only if SVC manifested its assent to them. The unsigned invoice contained no manifestation of assent, and SVC's payment of the invoice merely constituted its performance of the obligation under the oral contract to pay for the rental of the helium-filled tanks. Even if the contract had been governed by Division 2 as a transaction in goods, the indemnity clause would not be enforceable, because an indemnity provision is deemed a material alteration of the contract. Under section 2207, it would therefore not have become part of the contract.


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