



CIVIL TRIALS & EVIDENCE NEWS

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LIBEL

Magazine publisher says 'CSI Miami' star's rep bars libel lawsuit

Cibrian v. Bauer Publishing Co. et al., No. BC426340, *answer filed* (Cal. Super. Ct., L.A. County Mar. 8, 2010).

The publisher of Life & Style magazine says television star Eddie Cibrian's "reputation for infidelity" bars him from suing the tabloid for reporting that he has been two-timing country singer LeAnn Rimes.

The soon-to-be-divorced star of "CSI Miami" seeks more than \$1 million from the magazine's publisher, Bauer Publishing Co., for claiming he cheated on Rimes with an aspiring actress.

In a general denial of the allegations in the Los Angeles County Superior Court, Bauer says Cibrian's reputation "renders him libel-proof" with regard to the magazine's statements and implications.

(See LIBEL on page 7)

CONSOLIDATED CASES

Calif. federal judge disbands 141-plaintiff pain-pump 'mass action'

Adams et al. v. I-Flow Corp. et al., No. 09-cv-9550, 2010 WL 1339948 (C.D. Cal., W. Div. Mar. 30, 2010).

A federal judge in Los Angeles has dismantled a "mass action" transferred from state court in which 141 plaintiffs claim injury from treatment with pain pumps, finding that the many variables in their cases preclude a consolidated proceeding.

U.S. District Judge Manuel Real of the Western District of California severed the cases after first dismissing the plaintiffs' breach-of-warranty, design-defect and failure-to-warn claims.

(See CONSOLIDATED CASES on page 8)

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DNA SAMPLING

California defends DNA sampling law in 9th Circuit

Haskell et al. v. Brown et al., No. 10-15152, *appellees' brief filed* (9th Cir. Mar. 18, 2010).

The collection of DNA samples from people who are arrested for or charged with a felony is an important crime-solving measure that "far outweighs" an offender's interest in concealing his or her identity, the state of California has told a federal appeals court.

In a brief filed in the 9th U.S. Circuit Court of Appeals the state says the practice is no different than the taking of a fingerprint.

"Both reveal an individual's identity and nothing more," Attorney General Jerry Brown argues for the state.

Brown's brief comes in response to an appeal by two California residents who allege that the collection of DNA at the time of arrest violates constitutional guarantees of privacy and freedom from unreasonable search and seizure.

Elizabeth Haskell and Reginald Ento turned to the 9th Circuit after U.S. District Judge Charles Breyer of the Northern District of California denied their motion for an injunction stopping the practice.

The law at issue went into effect Jan. 1, 2009. According to the voter-approved provision, any adult arrested for or charged with a felony offense must provide a DNA sample by a cheek swab that will be stored in a criminal database accessible to local, state, national and international law enforcement agencies.

The plaintiffs say the law "dramatically expanded the scope of mandatory, suspicionless and warrantless seizure and testing" of DNA in California.

They also claim that it will result in the mandatory DNA sampling of hundreds of thousands of people "who have not been, and in many cases never will be, convicted of any crime."

However, Judge Breyer sided with the state Dec. 23, when he refused to issue an injunction.

"While arrestees certainly have a greater privacy interest than prisoners, it is this court's view that they also have a lesser privacy interest than the general population," the judge wrote.

The plaintiffs argue in the 9th Circuit that Judge Breyer erred by considering the government's "purported interest in identifying" an arrestee.

Such an interest does not exist in the present case, their appeal brief says, because the reason for the cheek swabs is not for identification purposes, but rather to help law enforcement officials investigate thousands of people who have not been convicted of a crime.

The fact that this collection of samples occurs without any judicial or prosecutorial review, and regardless of whether the DNA evidence is relevant to the crime for which the individual is arrested, is a violation of the Fourth Amendment's prohibition on unreasonable searches and seizures, according to the plaintiffs.

But Brown says in his response that arrestees generally have a "minimal interest" in the privacy of their identities.

He also says California has a compelling interest in preventing future crime by collecting DNA at the time of arrest.

"Two-thirds of felony arrestees will be convicted of a crime, and given the high rate of recidivism, many of those individuals will commit additional crimes in the future," the brief says.

Brown adds that DNA collection prevents law enforcement "from wasting scarce resources in investigating the wrong individual and saves innocent individuals from the time, expense and embarrassment of being investigated for a crime they did not commit."

See Wegner, Fairbank, Epstein & Chernow, CAL. PRAC. GUIDE: CIVIL TRIALS AND EVIDENCE (The Rutter Group 2009): 8:600-602.4 (DNA "fingerprinting" as scientific evidence)

GOOD-FAITH SETTLEMENT (ENVIRONMENTAL)

Town prevails over railroad's contribution claims

Fullerton Redevelopment Agency et al. v. Southern California Gas Co. et al., No. G041781, 2010 WL 1213264 (Cal. Ct. App., 4th Dist. Mar. 30, 2010).

Union Pacific Railroad Co. may not seek contribution for cleanup costs from the town of Fullerton, Calif., a state appeals court has ruled, finding a good-faith settlement of a contamination controversy barred the claim.

The terms of the settlement should be upheld because agreements that provide funding to resolve environmental issues are in the public interest, the 4th District Court of Appeal ruled.

Fullerton sued Southern California Gas Co. over contamination of city-owned property, seeking injunctive relief and damages.

SoCal Gas filed a cross-complaint against Fullerton and Union Pacific, seeking contribution and indemnity.

The proposed parkland was contaminated by several hazardous materials that had been deposited on or migrated to the property, according to court records.

The California Department of Toxic Substances Control ordered Fullerton, SoCal Gas, Union Pacific and others, as potentially responsible parties, to take remedial action to clean up the property.

Fullerton and SoCal Gas reached a settlement agreement in September 2008 that resolved all disputes between them.

The agreement included a promise from SoCal to pay the city \$800,000 if it obtained a full release from Union Pacific of claims against Fullerton or \$1 million if a full release was not obtained from the railroad.

The town asked the Orange County Superior Court to find that the settlement barred all other alleged joint tortfeasors from bringing any claims against Fullerton for contribution or indemnity.

Union Pacific unsuccessfully argued that California Health & Safety Code § 25363 would allow it to bring a claim against Fullerton. The railroad appealed.

The Court of Appeal referred to California Civ. Proc. Code §§ 877 and 877.6, which it said permit a party to a settlement to shield itself from claims for indemnity and contribution by a joint tortfeasor when the settlement is entered into in good faith.

The policy behind allowing the claims to be barred is based on the state's interest in seeing parties comply with government-issued cleanup and abatement orders, the appeals court concluded.

See Wegner, Fairbank, Epstein & Chernow, CAL. PRAC. GUIDE: CIVIL TRIALS AND EVIDENCE (The Rutter Group 2009): 8:2820; 8:2824; 13:154; 17:80; 17:80.3; 17:193.1 (Cal. Civ. Proc. Code § 877) 4:352; 17:95 (Cal. Civ. Proc. Code § 877.6)

JURY INSTRUCTIONS

Plumber urges court to uphold \$7.2 million award against Union Carbide

Stewart et al. v. Union Carbide Corp., No. B216193, 2010 WL 1422951, *brief filed* (Cal. Ct. App., 2d Dist. Mar. 23, 2010).

A plumber who was awarded more than \$7.2 million in an asbestos-related lung cancer case against Union Carbide Corp. has urged a California appeals court to uphold the jury's decision and award.

In a brief to the 2nd District Court of Appeal plaintiff Larry Stewart says there were no prejudicial errors in the instructions given to the jury, the allocation of fault was proper and the award of punitive damages was appropriate.

Stewart claimed he was exposed to Union Carbide's Calidria-brand asbestos from 1972 to 1978 while working on new construction. He said drywall tradesmen sanded and swept up dust from joint compounds near him, causing asbestos fibers to become airborne.

He identified joint-tape compounds made by Hamilton Materials Inc. and U.S. Gypsum Co., which he said incorporated Union Carbide products into theirs.

According to the complaint, filed in the Los Angeles County Superior Court, Union Carbide mined asbestos from a large deposit about 55 miles east of King City, Calif., from 1963 through 1985.

A jury found for the plaintiff following a seven-week trial presided over by U.S. District Judge Alan S. Rosenfield.

The panel awarded \$2.2 million in lost income and medical expenses, \$500,000 in pain and suffering, and \$500,000 to Stewart's wife for loss of consortium.

Based on its finding of malice, fraud and oppression by Union Carbide, the case went to a second-phase trial on punitive damages, and the jury awarded the plaintiff \$6 million in punitive damages.

The jury allocated 85 percent of liability to Union Carbide and 15 percent to Hamilton Materials. However, Ward said that Union Carbide, as the sole

remaining defendant, would be 100 percent liable under the chain-of-distribution theory.

In post-trial proceedings, the trial court reduced the compensatory damages award by prior settlement credits and noneconomic damages. The judgment against Union Carbide then totaled more than \$7.2 million.

Union Carbide appealed, pointing to what it claims are prejudicial errors in some of the jury instructions and in the allocation of fault.

The defendant also claims the punitive damages award was excessive and violated its right to due process.

In response Stewart says the record does not support a finding that the rejection of Union Carbide's proposed jury instructions (concerning the "sophisticated purchaser" doctrine) was prejudicial.

Under the sophisticated-purchaser theory Hamilton, as a sophisticated purchaser, would have had an independent duty to warn the plaintiff of the dangers of asbestos exposure.

The defendant withdrew its proposed jury instruction. Therefore, the issue was not preserved on appeal, the plaintiff says.

Union Carbide is improperly attempting to carve out a "no duty to warn" defense tantamount to the "bulk supplier" defense, Stewart argues.

The defendant claims that *Johnson v. American Standard Inc.*, 43 Cal. 4th 56 (Cal. 2008), created a "sophisticated intermediary" defense.

However, that defense does not exist in California, where all product manufacturers and suppliers have a duty to warn of known or reasonably knowable dangers, the plaintiff argues.

The defendant cannot meet its burden of showing that it believed Hamilton and other purchasers understood the risks of its asbestos and would communicate those risks to customers, Stewart argues.

Union Carbide engaged in a "deliberate, misleading, concealing and constant approach of withholding key information from customer[s]," and it tried to mislead customers about Occupational Safety and Health Administration regulations, the plaintiff adds.

Because of its alleged misrepresentation to customers, Union Carbide cannot meet its burden of showing that

asbestos purchasers failed to warn others, Stewart argues.

The jury's allocation of fault was proper, and the evidence supports the award of punitive damages, Steward says.

"The evidence did not show UCC merely had doubts and acted cautiously regarding its asbestos; [It] showed active concealment and a conscience disregard to Stewart's safety, all for the sake of profits, and the award should stand," the brief says.

See Wegner, Fairbank, Epstein & Chernow, CAL. PRAC. GUIDE: CIVIL TRIALS AND EVIDENCE (The Rutter Group 2009):

14:215-217; 18:195.1 (challenging improper or erroneous jury instructions)

14:214; 14:225 (objection)

14:225 (preserving record for appeal)

14:222; 18:195.1 (refusal to give proposed instruction)

4:424-425 (appellate review of punitive damages)

18:406-410 (new-trial motion based on excessive punitive damages)

8:3697 (standard of proof)

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MOTION FOR NEW TRIAL

Appeals court refuses retrial of toxic-tort claim

Helm et al. v. Lincoln Air Conditioning Corp., No. A124410, 2010 WL 828348 (Cal. Ct. App., 1st Dist. Mar. 10, 2010).

Three air traffic controllers who allege they suffered personal injuries from exposure to toxic fumes from a sealant are not entitled to a retrial, a California appeals court has ruled.

The 1st District Court of Appeal said an alleged mistake in professional judgment committed by the plaintiffs' counsel does not justify a new trial.

Daniel Helm and two other air traffic controllers at the San Jose International Airport filed suit in the Alameda County Superior Court against Lincoln Air Conditioning Corp.

Lincoln worked on an air conditioning unit at the airport's air traffic control tower in November 2006.

The plaintiffs claimed they suffered permanent injuries to their vision and respiratory systems after being exposed to toxic fumes from a sealant the Lincoln employees used.

After a three-week trial, the state court jury determined that Lincoln was not negligent and had not engaged in any intentional misconduct.

The trial court entered judgment for Lincoln in December 2008.

The plaintiffs filed a motion for a new trial, arguing that their lawyer was preoccupied during the trial by his father's ill health. The trial court denied the motion Feb. 24, 2009, and the plaintiffs filed a notice of appeal.

While the appeal was pending, the plaintiffs, for a second time, filed a motion for a new trial, alleging jury misconduct. The trial court again denied the motion for a new trial Oct. 16.

In briefing the appeal, the plaintiffs argued that they were challenging both trial orders denying their motions for a new trial.

The appeals panel said it lacked jurisdiction to consider a review of the plaintiffs' renewed motion for a new trial and the resulting trial court order.

"It has long been settled that an order denying a motion for a new trial is not independently appealable and may be reviewed only on appeal from the underlying judgment," the panel said.

As for the trial court's Feb. 24 order, the panel affirmed the judgment.

The trial court made an offer to the plaintiffs' counsel to continue the trial, but that offer was refused, the appeals court noted.

The panel said the trial court's ruling (that any mistake in professional judgment by the party's own attorney is not an irregularity in the proceedings that would justify

a new trial) was supported by *In re Marriage of Liu*, 197 Cal. App. 3d 143 (Cal. Ct. App., 6th Dist. 1987).

In that case, the appellate court rejected a party's argument that she was entitled to a new trial because her attorney failed to call a key witness or to introduce crucial evidence during trial.

"The *Liu* decision establishes that the negligence of trial counsel is not a ground upon which a new trial may be granted," the 1st District said.

See Wegner, Fairbank, Epstein & Chernow, CAL. PRAC. GUIDE: CIVIL TRIALS AND EVIDENCE (The Rutter Group 2009):

18:149; 18:153.4-153.5; 18:357 (*In re Marriage of Liu*)

4:423; 18:102-103 (new-trial motion)

12:18 (grounds for motion)

12:18; 18:132-139.2; 18:396 (irregularity in proceedings)

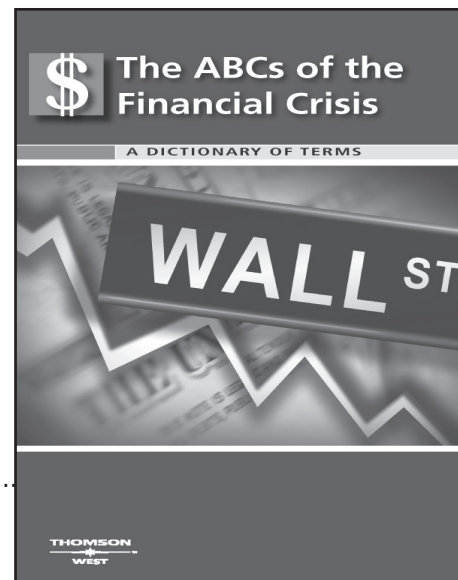
7:118.52; 12:18; 15:272-272.2; 15:277-282; 18:140-140.4; 18:397 (jury misconduct)

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(LIBEL continued from page 1)

According to the actor's complaint, Life & Style published an article Nov. 4 headlined "Eddie's Cheating on LeAnn Already." The article said Cibrian and his former girlfriend, actress Scheana Jancan, were dating without Rimes' knowledge.

The magazine reported Cibrian had bragged to fellow "CSI" actors about "hooking up" with an unidentified woman while in New York.

A representative for Cibrian immediately released a statement after the article appeared, claiming that the story was "filled with inaccuracies and deceitful lies."

Cibrian followed up that assertion by suing Life & Style last November.

"Since the separation from his wife, Eddie Cibrian has not had a romance or sexual relationship with any woman other than Ms. Rimes," the lawsuit charges.

The suit says Cibrian and Jancan have both denied the alleged affair.

But Bauer says the allegedly defamatory statements are "true or substantially true" and that any harm caused by the article is a result of Cibrian's own "legal fault."

The publisher argues that its article falls under "free-speech rights in connection with a public issue" and is protected by Cal. Civ. Proc. Code § 425.16.

Cibrian filed for divorce from model Brandi Glanville in August after eight years of marriage. Weeks later Rimes announced her divorce from dancer Dean Sheremet.

See Wegner, Fairbank, Epstein & Chernow, CAL. PRAC. GUIDE: CIVIL TRIALS AND EVIDENCE (The Rutter Group 2009): 17:153.1d; 17:153.1p (Cal. Civ. Proc. Code § 425.16)
8:2531-2533 (defamation/libel actions; qualified constitutional privilege for news media)



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(CONSOLIDATED CASES continued from page 1)

However, the judge said the plaintiffs whose claims are timely under California's two-year limitations period for negligence and strict liability claims as outlined in Cal. Civ. Proc Code. §§ 335 and 335.10 can refile individual suits alleging those causes of action that were dismissed.

The plaintiffs alleged that their shoulder joint cartilage was destroyed because pain pumps from several manufacturers were used to infuse anesthetics directly into their shoulder joints in connection with orthopedic surgery.

The mass action, composed of 141 plaintiffs from 37 states, names 22 defendants allegedly involved in the manufacture of the infusion pumps or the anesthetics they administered.

In addition to the warranty, design-defect and warnings claims, the plaintiffs also alleged negligent misrepresentation and deceptive trade practices.

The defendants filed motions to dismiss and/or strike, arguing that the cases were improperly joined and cannot effectively be adjudicated together because the plaintiffs underwent separate shoulder surgeries in different hospitals by different doctors to treat different injuries, over a 10-year span.

They also said the plaintiffs did not state claims upon which relief can be granted because they failed to identify the infusion pump or the anesthetic applicable to them.

The plaintiffs' counsel told the court that some of their clients have obtained such information since the filing of the joint complaint.

However, Judge Real granted the dismissal motions, saying plaintiffs whose claims are timely under California law and who had surgery within two years of the complaint's Oct. 28 filing are free to re-plead their claims in individual actions against their identified defendants.

The judge said the original mass complaint was defective because it named 14 pain-pump manufacturers and eight anesthetic makers without identifying which of the defendants were linked to the plaintiffs' alleged injuries.

"The complaint does not allege that any particular plaintiff was administered a particular drug through a particular pain pump that was manufactured by a particular defendant," the judge wrote. "Instead, plaintiffs plead only generally that they were injured by pain pumps and anesthetics of the type made by defendants."

In filing new, independent suits, the judge said that plaintiffs with timely claims can replead them to allege negligent misrepresentation and deceptive trade practices and support them with available causal evidence.

See Wegner, Fairbank, Epstein & Chernow, CAL. PRAC. GUIDE: CIVIL TRIALS AND EVIDENCE (The Rutter Group 2009):

8:3638.2-3638.3 (burden of proof for statute of limitations)

8:3638.3 (delayed discovery rule)

4:432.10-432.13 (consolidated cases)