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California Business Litigation Newsletter

Highlighting Significant Business Litigation Decisions from the First Quarter of 2013

With one of largest economies in the world, California also has one of the busiest court systems as evidenced by the sheer number of cases that are filed daily. Apart from the size and complexity of its economy and the volume of lawsuits, California courts routinely address some of the most significant and cutting edge legal issues in the nation. From intellectual property to real estate to privacy and securities cases, California state and federal courts are continually adjudicating parties' rights in such disputes and others.

Companies conducting business in California are often challenged to keep on top of this constantly evolving dynamic legal and regulatory framework. Seyfarth Shaw LLP California litigators help our clients with this challenge and have a strong commitment to deliver high quality, cost-effective, and responsive services.

As part of that commitment, we are pleased to provide a quarterly California business litigation alert for our clients to keep them apprised of the most significant legal decisions issued in the preceding months. While the breadth of coverage in our alert is broad, it is largely a function of the labyrinth of laws and regulations that companies conducting business in California are exposed to and we have only highlighted those decisions that may have the largest applicability and significance.

This quarterly alert is highlighted by four key decisions. First, the California Supreme Court issued a startling decision that may allow parties to a contract to assert fraud claims notwithstanding provisions in the contract that contradict the fraud allegations. Second, the California Supreme Court found that online transactions involving downloadable items are outside the scope of the Song Beverly Credit Card Act. Third, the California Supreme Court issued an important decision that may permit plaintiffs to attempt to plead around the four-year statute of limitations for claims under California's Unfair Competition Law ("UCL"), Business and Professions Code section 17200. Fourth, a California Court of Appeal issued a significant section 17200 decision loosening standing requirements, which may result in an increase in the number of suits between competitors.

Supreme Court weakens parol evidence rule. The California Supreme Court held that the parol evidence rule, which generally precludes parties from introducing extrinsic evidence to contest the validity of an integrated written contract, does not prevent a party from using oral statements made before entry into the contract, which contradict the written terms of the agreement, to show that the contract was obtained though fraud. *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn.* (Supreme Ct., 01/14/2013) *http://www.courts.ca.gov/opinions/documents/S190581.PDF*.

For a more detailed discussion of the holding in this case, please see the Management Alert at the following link: *http://www.seyfarth.com/uploads/siteFiles/publications/MA0113.pdf*

Online, but Off Song-Beverly. Plaintiff alleged that defendant online retailer violated Section 1747.08 of the Song-Beverly Credit Card Act when it requested and required him to provide his address and telephone number during credit card transactions for downloadable items. Plaintiff brought a class action suit against defendant. The trial court overruled defendant's demurrer, and the Court of Appeal denied defendant's petition for writ of mandate seeking review of the trial court's order. The California Supreme Court held that online transactions involving downloadable items are outside the scope of the Song-Beverly Credit Card Act. Accordingly, the Court reversed the Court of Appeal's judgment and remanded the case with directions to issue a writ consistent with its opinion. *Apple, Inc. v. Superior Court* (Supreme Ct., 02/04/2013). *http://www.courts.ca.gov/opinions/documents/S199384.PDF*.

For a more detailed discussion of the holding in this case, please see the Management Alert at the following link: *http://www.seyfarth.com/publications/OMM020413.*

Continuous Unfair Competition Law violations may extend statute of limitations. Plaintiff copy business entered into agreements with defendant to lease photocopiers for a five-year term. Plaintiff brought claims against defendant under California's Unfair Competition Law on the grounds that defendant ran excessive test copies during service visits and subsequently charged plaintiff for those excess copies . Defendant demurred, arguing that the claim was barred by, among other things, the statute of limitations because plaintiff first realized the alleged overcharges more than four years before bringing the claim. The trial court sustained the demurrer without leave to amend, and a divided Court of Appeal affirmed. Resolving a long-standing split in both state and federal courts, the California Supreme Court held that the continuous accrual doctrine applies to UCL claims, and, thus, prevents plaintiff's claim from being dismissed at the demurrer stage. *Aryeh v. Canon Business Solutions, Inc.* (Supreme Ct., 01/24/2013). *http://www.courts.ca.gov/opinions/documents/S184929.PDF*.

For a more detailed discussion of the holding in this case, please see the Management Alert at the following link: *http://www.seyfarth.com/publications/OMM012913*.

UCL suits brought against competitors made easier. Plaintiff law firm specializing in record expungement services, sued defendant competitor under Business and Professions Code section 17200 alleging that it used employees who were neither licensed to practice law nor registered or bonded as "legal document assistants" under California law. The defendant argued that plaintiff lacked standing because it could allege no direct business dealings with the defendant. The defendant argued that a loss of market share is not the type of economic injury that qualifies as an injury in fact for the purposes of standing under the UCL. The trial court sustained defendant's demurrer for lack of standing. The Court of Appeal reversed and held that Prop. 64 did not eliminate section 17200 actions brought against a competitor whose unlawful business practices were allegedly stealing away the plaintiff's customers, market share and profits. The court held that plaintiff, having alleged that he had been forced to pay increased advertising costs and to reduce his prices for services in order to compete, and that he had lost business and the value of his law practice had diminished, succeeded in alleging at least an identifiable trifle of injury as necessary for standing under the UCL. The Court observed that it is possible to "allege facts sufficient to support causation in the absence of direct business dealings" and concluded "the language of the UCL does not leave the court hamstrung, unable to even consider an action seeking injunctive relief just because the defendant engages in its purportedly unlawful activity via the Internet and has not had any direct business dealings with the plaintiff." *Law Offices of Mathew Higbee v. Expungement Assistance Services* (Cal.App., 4th Dist., 03/14/2013). *http://www.courts.ca.gov/opinions/documents/G046778.PDF*.

Traceability is a must. Defendant issued shares in multiple offerings, under more than one registration statement. Plaintiffs purchased defendant's shares in the aftermarket. When the value of their shares declined, plaintiffs sued defendant, claiming that such shares had been issued under a materially false and misleading prospectus supplement. The Ninth Circuit held that plaintiffs lacked standing to bring their suit because they could not trace the shares they purchased to the allegedly false or misleading registration statement, as opposed to some other registration statement. *In re Century Aluminum Company Securities Litigation* (9th Cir., 01/02/2013). *http://cdn.ca9.uscourts.gov/datastore/opinions/2013/01/02/11-15599.pdf*.

Ruling on Superman's anti-SLAPP motion immediately appealable. In a dispute between the heirs of Superman's creators and DC Comics, the trial court denied heirs' motion to strike DC Comics' intentional interference and unfair competition claims under California's anti-SLAPP statute. On an interlocutory appeal by heirs, DC Comics argued that the appellate court lacked jurisdiction because the trial court's ruling was not a "final decision." The Ninth Circuit held that the denial of a motion to strike based upon California's anti-SLAPP statute is immediately appealable under the collateral order doctrine (which allows an immediate appeal from a limited class of rulings deemed to be final decisions, even though the entire action is not terminated). *DC Comics v. Pacific Pictures Corp.* (9th Cir., 01/10/2013). *http://cdn.ca9.uscourts.gov/datastore/opinions/2013/01/10/11-56934.pdf.*

California employee's challenge of non-compete agreement fails based upon forum selection provision. Employee and new employer brought declaratory relief action to invalidate employee's non-compete agreement. A federal court in the Northern District of California dismissed the claims based upon an enforceable forum selection provision requiring that disputes be adjudicated in Washington. The court rejected plaintiffs' claim that the enforcement of the forum selection would violate California public policy. The basis of plaintiffs' argument was that the enforcement of the forum selection clause would lead to the application of Washington law, which, because Washington allows for certain non-competition agreements, would create a result that is contrary to California public policy. The court took issue with this three-part chain of events and plaintiffs' conflation of enforcing a forum selection clause and deciding what law applies. The court explained that there is nothing in the forum selection clause that "dictate[s] a priori" that Washington law would apply, and simply having a case heard in a different forum is not contrary to California public policy. Therefore, by severing the tie between where the case is heard and what law will apply, court reasoned that the forum selection clause in the non-compete was enforceable and valid and that plaintiffs' case should be dismissed. *Meras Engineering v. CH20, Inc.* (N.D. Cal., 1/14/2013). *http://www.tradesecretslaw.com/files/2013/02/https___ecf.cand_.uscourts.gov_cgi-bin_show_temp.pl_file9267107-0-29481.pdf.*

For a more detailed discussion of this case, please see the blog entry on Seyfarth's Trade Secrets, Non-Compete, and Computer Fraud blog: *http://www.tradesecretslaw.com/?s=Meras+Engineering*.

Be careful what you release. Plaintiff entered into settlement agreement in which he agreed to release not only the named defendants, but also all other persons, corporations, firms, associations and partnerships from liability arising for the underlying car crash. In a second action, plaintiff sued the employer of one of the prior defendants. Employer moved for summary judgment based upon language of the release in the settlement agreement. The trial court granted the motion and the court of appeal affirmed. The appellate court found that given the unambiguous language of the release, plaintiff bore the burden of showing that employer was an incidental and not an intended beneficiary of the release. *Rodriguez v. Oto* (Cal. App., 6th Dist., 01/15/2013). *http://www.courts.ca.gov/opinions/documents/H036865A.PDF*.

Alleged wrongful levy claim barred by litigation privilege. Plaintiffs obtained a judgment in a separate action and provided written instructions to defendant Sheriff's Department as to the partial release of funds in connection with an execution garnishment. Plaintiffs claimed that defendant negligently ignored the instructions when it released the entirety of the funds. Trial court sustained defendant's demurrer, without leave to amend, finding, among other things, that defendant's actions were protected by the litigation privilege. The Court of Appeal affirmed, holding that the litigation privilege precludes an action against a party who wrongfully carries out instructions to effect a writ of execution. *Tom Jones Enterprises, Ltd. v. County of Los Angeles* (Cal. App., 2nd Dist., 01/17/2013). *http://www.courts.ca.gov/opinions/documents/B242535.PDF*.

Out of state judgment entered by Delaware Chancery Court entitled to full faith and credit. Former minority shareholders brought an action which arose from a tender offer and merger asserting two general claims: a shareholders' derivative claim and a class-action claim for quasi-appraisal. The trial court sustained defendants' demurrers to plaintiffs' complaint without leave to amend, based on a prior adjudication of related claims in a Delaware court. The appellate court affirmed the dismissal concluding that collateral estoppel, whether analyzed under California or Delaware principles, was properly applied to bar relitigation of the issue determined by the Chancery Court regarding the reach of its prior judgment.

The appellate court found no due process violation as plaintiffs were given notice of both the injunction proceedings and defendants' objective in bringing the motion. The court found that the policies intrinsic to res judicata -- fairness, avoidance of vexatious litigation, judicial economy, and interstate comity -- supported the trial court's order sustaining defendants' demurrers without leave to amend. *Proctor v. Vishay Intertechnology Inc.* (Cal. App., 6th Dist., 02/19/2013). *http://www.courts.ca.gov/opinions/documents/H037428.PDF*.

Removal clock does not start until all necessary facts for diversity jurisdiction are pled. The Ninth Circuit reversed a district court's order remanding plaintiff's proposed class action involving a California car dealership. Plaintiff alleged that defendant's removal was untimely because it was filed more than thirty days after the filing of the original state complaint. The panel held that because the amount in controversy was not sufficiently stated by the initial pleading, plaintiff had not pled all the facts necessary for diversity jurisdiction under the Class Action Fairness Act, and therefore the removal clock under Section 1446(b) was not triggered. The Court reasoned that nothing in plaintiff's complaint indicated the value, even as an approximation, of other class members' vehicle financing contracts, and the defendant was not obligated to supply information which plaintiff had omitted. *Kuxhausen v. BMW Financial Services NA LLC* (9th Cir., 02/25/2013). *http://cdn.ca9.uscourts.gov/datastore/opinions/2013/02/25/12-57330.pdf*.

Invalid Notice of Appeal Validated by Revival of Corporate Powers. Plaintiff corporation failed to pay its taxes, resulting in the suspension of its corporate powers by the California Secretary of State. After the defendants prevailed in the trial court, the corporation timely filed a notice of appeal. Later, after the time to appeal had expired, the corporation paid its taxes and its corporate powers were revived. Relying on two decisions it handed down in 1972 and 1973, the California Supreme Court ruled that the revival of the powers validated the earlier notice of appeal. It therefore held that the corporate plaintiff's appeals could go forward, even though its notice of appeal was invalid when initially filed. *Bourhis v. Lord* (Supreme Ct., 03/04/2013). *http://www.courts.ca.gov/opinions/documents/S199887.PDF*.

Forensic Search of Electronic Devices at Border Requires Reasonable Suspicion. In a case of first impression, the Ninth Circuit ruled that a showing of reasonable suspicion must be made before a forensic search of electronic devices coming through U.S. borders may be made. The case involved the government's forensic search of a computer taken from defendant as he tried to reenter the country from Mexico. Defendant had an older conviction for child molestation and was on a Treasury Department watch list as a possible "sexual tourist." When border agents could not access certain password protected files on the computer, they sent it to an expert 170 miles from the border for analysis. After several days, the expert broke the passwords and found a considerable amount of child pornography in the files. The Court rejected the government's position that the search was a "routine" border search that did not require even reasonable suspicion. The Court observed that given the heighten expectation of privacy individuals have with respect to electronic devices, and the intrusiveness of the forensic search, there must be reasonable suspicion to justify such an in depth search. Under the facts of this case, the Court found reasonable suspicion existed to justify the search. *U.S. v. Cotterman* (9th Cir., 03/08/2013. *http://cdn.ca9.uscourts.gov/datastore/opinions/2013/03/08/09-10139.pdf*.

Smooth Sailing for Operator of Video Sharing Web Site. Veoh operates a publicly available web site, which users can access to share user-uploaded video content on the Internet. Although users were prohibited from uploading copyright protected content, some infringing videos made their way onto the website. Veoh installed filters to try to screen out infringing content. In addition, when alerted to the existence of infringing content on its site, it took prompt action to remove it. Plaintiff Universal Music Group sued Veoh alleging copyright infringement. The trial court granted Veoh's motion for summary judgment, ruling that Veoh's actions fell within the safe harbor provision of the Digital Millennium Copyright Act, thereby protecting it from liability. The Ninth Circuit agreed, finding that Veoh: (A)(i) did not have actual knowledge that the material on its system was infringing, (ii) was not aware of facts or circumstances from which infringing activity was apparent, and (ii) upon obtaining such knowledge acted promptly to remove the material; (B) did not receive a financial benefit directly attributable to the infringing activity, where it had the right and ability to control such activity; and (C) after being notified of the claimed infringement, it acted expeditiously to remove and disable access to the infringing material. *UMG Recordings Inc. v. Shelter Capital Partners LLC* (9th Cir., 03/14/2013). *http://cdn.ca9.uscourts.gov/datastore/opinions/2013/03/14/09-55902.pdf*.

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