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California Litigation Newsletter

Highlighting Significant California Business Decisions from the Second Quarter of 2013

California's courts routinely address some of the most significant and cutting edge legal issues. From intellectual property and real estate, to privacy and securities cases, California state and federal courts continually adjudicate parties' rights in a wide array of disputes and shape the legal framework in which businesses operate.

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

As part of that commitment, we are pleased to provide our second quarter 2013 California business litigation alert for our clients to keep 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 to which companies conducting business in California are exposed. Accordingly, we highlight only those decisions that may have the largest applicability and significance to your business.

This quarterly alert is highlighted by four key decisions. First, a recent Court of Appeal decision strengthened retailers' efforts to defend against Song-Beverly Credit Card Act suits by holding that the statute does not apply to retailers' fraud prevention efforts, such as verifying customers' identifies at the point of sale. Second, another Court of Appeal decision makes it easier for parties to pursue unfair competition claims against their competitors by loosening standing requirements. Third, while putative call recording class actions continue to be filed against companies by opportunist plaintiffs' counsel at an increasing rate, a California federal court recently denied class certification in a call recording case, finding that plaintiffs did not meet the commonality and predominance requirements. Finally, a Court of Appeal decision held that parties can agree by way of settlement agreement who the prevailing party is in an action and agree to permit that party to seek attorneys' fees incurred in the action from the court notwithstanding the resolution of the action. We hope that you enjoy this quarter's alert.

Fraud-Prevention Exception Flattens Song-Beverly Act Claim. Putative class action plaintiffs filed suit alleging that Chevron's requirement that pay-at-the-pump purchasers using credit cards provide their zip codes violated the Song-Beverly Credit Card Act's proscription on requiring persons to provide "personal identification information" as a condition to accepting a credit card payment. Plaintiffs relied upon the California Supreme Court case, *Pineda v. Williams-Sonoma Stores, Inc.* (2011) 51 Cal. 4th 524, 527, which held that the definition of "personal identification information" encompassed zip codes. After *Pineda*, the Legislature amended the Act to provide that requesting or requiring personal identification information does not violate the Act if such information "is required for a special purpose incidental but related to the individual credit card transaction." The trial court granted Chevron's motion for summary judgment. On appeal, the Court rejected Plaintiffs' assertion that Chevron's request for zip codes in this context is not covered by the special purpose exception. It found that preventing fraud, the stated purpose for the requested information, is incidental but related to the individual credit card transaction, and therefore comes within this exception to the Act. *Flores v. Chevron U.S.A, Inc.* (Cal. App., Second Dist., June 20, 2013). *http://www.courts.ca.gov/opinions/documents/B240477.PDF*

Door Widened For Unfair Competition Suits Against Competitors. The California Court of Appeal reversed a trial court's order sustaining a demurrer with respect to a plaintiff's Unfair Competition Law ("UCL") claims, finding that a party's lack of direct dealings with a competitor does not necessarily preclude that party from stating a cause of action for unfair competition against the competitor, so long as the party can show it suffered an injury in fact and lost money or property as a result of the competitor's acts of unfair competition. This decision arguably contradicts the language and intent of Proposition 64, which California voters passed in 2004 in order to limit individual standing to bring UCL claims and stop unscrupulous attorneys from filing "shakedown lawsuits." Indeed, as the Supreme Court held in

2011, under Proposition 64, only those who had "suffered injury in fact or had lost money or property as a result of unfair competition" could bring a private UCL claim. (See *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 320-321.) *Law Offices of Matthew Higbee v. Expungement Assistance Services* (Cal. App., Fourth Dist., March 14, 2013). *http://www.seyfarth.com/dir_docs/publications/G046778.pdf*

For more information, see Seyfarth's management alert at *http://www.seyfarth.com/publications/MALIT041213*

No Commonality or Predominance: Class Certification In Call Recording Case Denied. Plaintiffs alleged that Nutrisystem violated California Penal Code sections 632 and 632.7 (California's prohibition on surreptitious recording of confidential telephone communications) when it allegedly secretly recorded customer cellphone calls to its 1-800 hotline. Nutrisystem did in fact record these calls, but it also provided a welcome message at the outset of the call that disclosed that the call may be monitored or recorded for quality and training purposes. Callers could, however, bypass the disclosure by hitting any button during the welcome message. The District Court denied class certification, finding that plaintiffs did not meet the commonality requirement of Federal Rule of Civil Procedure 23(a) and did not satisfy the predominance requirement of Rule 23(b)(3). The court found that the ability to bypass the message created a significant individual issue as to whether the putative class members had an objectively reasonable expectation of privacy or consented to the recording. Additionally, the court suggested that commonality and predominance may be lacking even absent the disclosure issue because call recording is so common that individualized inquiries would be necessary to determine each plaintiff's expectation of confidentiality. Finally, the court found that plaintiffs failed to satisfy Rule 23(b)(2), as Nutrisystem no longer allows callers to bypass the disclosure. *Torres v. Nutrisystem, Inc.*, SACV 12-01854-CJC (JPRx) (C.D. Cal. 2013).

For more information, see Seyfarth's management alert at *http://www.seyfarth.com/publications/OMMLIT041913*

Hey, I Thought We Had An Agreement: Plaintiff Permitted to Seek Fees From Court Per Parties' Settlement Agreement. After entering into a settlement agreement in a trade secret misappropriation case, Plaintiff submitted to the trial court a motion for attorney's fees and costs. At the hearing, the trial court refused to consider Plaintiff's motion, finding that the settlement effectively barred Plaintiff from seeking attorney's fees and that, despite the language of the agreement, Plaintiff was not the "prevailing party" under the provision of California Code of Civil Procedure section 1032(a)(4). The Second District Court of Appeals reversed and ruled that there is nothing that prevents a plaintiff, who voluntarily dismisses its case after settlement, from being the prevailing party. The Court went on to find that the only reasonable interpretation of the settlement agreement was that the parties had agreed to submit to a procedure whereby the court would use its discretion to determine whether plaintiff was the prevailing party and, if so, whether defendants committed willful and malicious misappropriation, the necessary finding for an award of fees. This decision may pave the way for more parties to include provisions in settlement agreements calling for post-settlement determinations by courts as to the right of one side to recover attorney's fees, not just in the trade secret misappropriation context, but in other areas as well. *Khavarian Enterprises, Inc. v. Commline, Inc.* (Cal. App., Second Dist., May 14, 2013). *http://www.seyfarth.com/dir_docs/publications/B243467.pdf*

For more information on this case see Seyfarth's Trade Secrets blog: *http://www.tradesecretslaw.com/2013/06/articles/trade-secrets/hey-i-thought-we-had-an-agreement-california-appellate-court-allows-party-to-seek-attorneys-fees-in-trade-secret-case/*

Idea Theft Suit Over LOST TV Show Tossed Out To Sea. A creative writer sued ABC alleging that ABC developed and produced the television show *LOST* from a script he submitted to ABC in 1977. The Court of Appeals affirmed the lower court's finding of summary judgment, finding that the writer failed to produce evidence that ABC used his materials. Furthermore, the Court of Appeals found that ABC established the independent creation of *LOST*, an absolute defense to idea theft. As this case demonstrates, those who produce "ideas" should document milestones in the development process. Additionally, those who believe that their "idea" has been purloined should remember that in an idea theft case based on the implied-in-fact contract, similarities that do not result from copying are similarities without legal significance. In most jurisdictions, ideas are as "free as air," and being essentially "free," courts look with a very jaundiced eye on those who would charge for the thought. *Spinner v. American Broad. Cos.*, (Cal. App., Second Dist., March 8, 2013) *http://www.courts.ca.gov/opinions/documents/B239229.PDF*

For more information on this case see Seyfarth's Trade Secrets blog: *http://www.tradesecretslaw.com/2013/04/articles/trade-secrets/california-court-tosses-idea-theft-suit-over-lost-television-show-out-to-sea/*

The Devil is in The Details: Court Finds Proceeds From Sale of Property Within Scope of Guaranty. Defendant Robert Eve unconditionally personally guaranteed a $3.1 million loan by plaintiff Series AGI West Linn Of Appian Group of Investors De LLC to third party West Linn Partnership, LLC for a construction project. In negotiating the continuing guaranty, Defendant identified certain assets to be excluded from the guaranty. Among these was the Defendant's personal residence in Como, Italy. Ultimately, WLP defaulted on the loan. Thereafter, Plaintiff filed suit against, among others, Defendant on his personal guaranty, seeking to recover about $6.3 million (principal plus accrued interest and attorney's fees). A month after filing suit, Plaintiff applied for a writ of attachment against Defendant based upon the guaranty. In his opposition, Defendant challenged only that part of the application directed at proceeds from the sale of

his home in Como, Italy, which sale occurred after Defendant provided his guaranty. Defendant took the position that those proceeds, like the residence itself, was excluded from the scope of the guaranty. The Court of Appeal disagreed. Observing that this case is one of first impression in both California and around the country, the Court of Appeal held that the guaranty exclusion spoke only in terms of the residence, not proceeds from the sale of that home. Had Defendant wished to extend the guaranty exclusion to the sale proceeds, he could easily had done so. In fact, provisions for excluding such proceeds from the liquidation of other property could be found in the guaranty. Defendant's failure to include this contingency in the guaranty resulted in bringing the proceeds from the sale of the Como house back within the ambit of Defendant's guaranty. *Series AGI West Linn of Appian Group Investors de LLC v. Eves* (Cal. App., First Dist., June 14, 2013). *http://www.courts.ca.gov/opinions/documents/A135832.PDF*

Section 998 Offer to Compromise Benefits Run From Time of First Offer When Multiple Offers Made. Plaintiff served a Code of Civil Procedure Section 998 offer to compromise on Defendant to which Defendant failed to respond. Plaintiff later served a second Section 998 offer on Defendant, to which Defendant also did not respond. At trial, Plaintiff obtained a result that was better than both of those offers. Plaintiff then sought to recover, among other things, expert fees incurred after her first settlement offer. The trial court denied this request, stating that the most recent 998 offer extinguish the prior offer. The Court of Appeal reversed. The Supreme Court upheld the decision by the Court of Appeal. Writing for a unanimous Court, Justice Baxter observed that the purpose of Section 998 is to promote settlements, and that goal is better served if general contract law, which would dictate that the later offer would entirely extinguish a prior offer, is not applied under these circumstances. The Court reasoned that to be consistent with Section 998's financial incentives and disincentives, a party should not be penalized for making multiple offers, which enhance the chance of settlement. Conversely, the responding party should not be rewarded for rejecting multiple "reasonable" offers. The Court appeared to limit its finding to those situations where multiple Section 998 offers are made and the offeree fails to obtain a judgment more favorable than any of those offers. The Court added that because an award of expert witness fees under Section 998 rests with the sound discretion of the trial court, the court has a vehicle by which to address any perceived attempt to abuse this holding. *Martinez v. Brownco Construction Company, Inc.* (Ca. Supreme Court, June 10, 2013). *http://www.courts.ca.gov/opinions/documents/S200944.PDF*

Venue Selection Provision Enforceable. Plaintiff and Defendant entered into contract providing, among other things, that any litigation relating to the contract must be brought in federal or state court in Orange County, California. Plaintiff was based in San Diego County, while Defendant's headquarters were in Orange County. Thereafter, Plaintiff sued Defendant in San Diego County Superior Court alleging breach of contract. Defendant moved to transfer venue to Orange County, per the contract's venue selection provision. Plaintiff opposed, arguing that venue selection provisions in California are void, based upon the California Supreme Court's decision in *General Acceptance Corp. v. Robinson* (1929) 207 Cal. 285 ("GAC"). After Defendant's motion was granted, Plaintiff applied for a writ of mandate. The Court of Appeal observed that at the time *GAC* was decided, the only permissible venue was the county in which the defendant was located. In *GAC*, while the contract between the parties called for disputes to be litigated in San Francisco County, the defendant lived in Alameda County. In upholding the lower court's decision to transfer the case to Alameda County, the Supreme Court rejected the idea that parties could contractually elect to venue a case in a county not authorized by law. The Fourth District Court of Appeal rejected Plaintiff's argument that *GAC* invalidates all venue selection clauses as contrary to public policy. Instead, the Court of Appeal ruled that venue selection clauses could be enforced where the venue selected in the contract was among those locations now authorized by the legislature. *Battaglia Enterprises, Inc. v. Superior Court* (Yard House) (Cal App., Fourth Dist., April 11, 2013). *http://www.courts.ca.gov/opinions/documents/D063076.PDF*

Petition a No Go For Enforcing Foreign Money Judgment. Plaintiff obtained a judgment of almost $19 million against Defendant, its former chief executive officer, in an action brought in South Korea. After recovering most of the judgment in South Korea, Plaintiff brought an action in Los Angeles County Superior Court to recover the outstanding amount of approximately $41,000, plus interest, under California's "Uniform Foreign-Country Money Judgment Recognition Act" (the "Act"). After commencing the action, Plaintiff filed a first amended complaint. Plaintiff then filed a petition of entry of a California judgment pursuant to the Act. The trial court granted the petition. On appeal, the Second District Court of Appeal held that a foreign-country money judgment can only be recognized in California upon a duly noticed motion for summary judgment, judgment on the pleadings, or trial; a petition is not sufficient. Accordingly, the appellate court reversed the trial court's judgment and remanded for further proceedings. *Hyundai Securities Co., Ltd. v. Lee* (Cal. App., Second Dist., April 18, 2013). *http://www.courts.ca.gov/opinions/documents/B242002.PDF*

Disobeying Trial Courts in Other States May Get Your California Appeal Dismissed. Defendants, an individual and a corporation, appealed from a California judgment in favor of Plaintiffs, but did not post a bond to stay enforcement of the judgment. Plaintiffs registered the judgment in New York and proceeded with execution. Defendants failed to comply with a New York subpoena or with a New York court order compelling compliance with the subpoena, and Defendants were accordingly held in contempt of the New York court. The California Court of Appeals dismissed the California appeal from the underlying judgment under the "disentitlement doctrine," which allows an appellate court to dismiss an appeal "where there has been willful disobedience or obstructive tactics." *Stoltenberg v. Ampton Investments, Inc.* (Cal. App., Second Dist., April 4, 2013). *http://www.courts.ca.gov/opinions/documents/B235731.PDF*

Watch What You Write: Threatening to Report Someone To Authorities Unless Money Is Paid Is Criminal Extortion and Not Protected Petitioning Activity. Business owner Gary Chow believed that his business manager Miguel Mendoza stole from him. Prior to filing suit, Chow, though his attorney Reed Hamzeh, sent Mendoza a demand letter that (1) outlined Mendoza's alleged unlawful actions; (2) threatened to file a lawsuit; and (3) threatened to report Mendoza to a variety of agencies, including the California Attorney General, the Los Angeles District Attorney, the IRS, the Better Business Bureau, and customers and vendors. Mendoza consequently sued Hamzeh for civil extortion. Hamzeh moved to strike Mendoza's complaint and argued that his demand letter was a protected litigation communication under California's anti-SLAPP statute. The trial court denied this motion and the Court of Appeal affirmed, explaining that a threat to report a crime becomes criminal extortion when made in conjunction with a demand for money. Thus, even if litigation privilege were to apply to Hamzeh's letter, the fact that it constitutes criminal extortion meant that Hamzeh could not dismiss Mendoza's complaint under the anti-SLAPP law. *Mendoza v. Hamzeh* (Cal. App., Second Dist., April 22, 2013). *http://www.courts.ca.gov/opinions/documents/B239245.PDF*

Conclusory Allegations In Complaint Do Not Amount To Judicial Admissions. Barsegian sued the law firm Kessler & Kessler for legal malpractice and additional defendants for breach of lease, fraud, and related claims arising from an allegedly botched real estate transaction. Kessler moved to compel arbitration, but the trial court denied its motion because of the possibility of inconsistent rulings resulting from litigation with the third parties. Kessler appealed, arguing that, because Barsegian had alleged in her complaint that "each of the defendants was the principal, partner, co-venturer, agent, servant, trustee, or employee of each of the other defendants herein," there existed a binding judicial admission that gave the remaining defendants the ability to enforce the arbitration agreement between Barsegian and Kessler. The Court of Appeal flatly rejected Kessler's argument. Carrying Kessler's argument to its logical conclusion, the Court pointed out that these "boilerplate allegations of mutual agency" could force every defendant in all multi-defendant cases into arbitration as long as one defendant has signed an arbitration agreement with the plaintiff, no matter how vague the connection between defendants might be. The Court also took this chance to draw a clear distinction between statements and judicial admissions. The former can only become the latter when the opposing party admits to their truth; otherwise, "there would never be any disputed facts to be tried." *Barsegian v. Kessler & Kessler* (Cal. App., Second Dist., April 15, 2013). *http://www.seyfarth.com/dir_docs/publications/B237044.pdf*

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