SEYFARTH SHAW

California Litigation Newsletter

Highlighting Significant Business Litigation Decisions from the Third Quarter of 2013

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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 third 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 and legislation that may have the largest applicability and significance to your business.

This quarterly alert is highlighted by two key decisions from the California Supreme Court confirming the expansive scope of California's unfair competition law, as well as a California Court of Appeal decision demonstrating the strong protections provided by the litigation privilege for pre-litigation demands. We hope that you enjoy this quarter's alert.

Private Action for Unfair Competition Available Against Insurer for Claims Independent of Insurance Code § 790.03. Plaintiff sued her insurer regarding coverage for fire damage to her property. Her complaint included claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and violation of California's Unfair Competition Law ("UCL"). The UCL claim asserted that defendant's advertising was unfair, deceptive, untrue and/or misleading. The trial court sustained defendant's demurrer to the UCL claim, finding the alleged underlying conduct was covered by the Unfair Insurance Practices Act ("UIPA"), which precludes private causes of action for various unfair practices listed in Cal. Ins. Code § 790.03. The Court of Appeal reversed finding that plaintiff's false advertising claim could support her UCL claim. In a significant decision resolving a split among the Courts of Appeal, the California Supreme Court held that insureds may bring private UCL causes of action against their insurers, where the grounds for such claims are independent of § 790.03, even though the underlying conduct may also violate § 790.03. *Zhang v. Superior Court (Cal. Capital Ins. Co.)* (Supreme Ct., 08/01/2013). *http://www.courts.ca.gov/opinions/documents/S178542.PDF*.

Repeal of Federal Provision Allowing Private Action No Bar to State UCL Claim. In a companion case to Zhang, the California Supreme Court addressed the question of whether a UCL claim could be maintained after a provision in a federal statute, authorizing a private cause for conduct on which the UCL claim was based, had been repealed. From 1991

to 2001, the federal Truth in Savings Act ("TISA") permitted the recovery of civil damages for violations of that statute. In 2001, the provision allowing for recovery of civil damages expired. However, the savings clause in TISA, allowing states to enact disclosure laws not inconsistent with TISA, remained in force. After the expiration of the private cause of action provision, plaintiffs filed a class action claiming unlawful and unfair business practices by defendants, based on violations of TISA disclosure requirements. The trial court and the Court of Appeal held that the repeal of the civil damages provision showed Congress's intent to preclude private actions to enforce TISA. The Supreme Court reversed. The Court found that by retaining the savings clause, Congress approved state laws -- not inconsistent with TISA -- relating to TISA's disclosure requirements. The fact that the UCL does not specifically relate to such disclosure requirements is irrelevant. The Court emphasized that plaintiffs were not attempting to enforce TISA, but rather an unlawful business practices claim based upon violations of TISA. In other words, the UCL treats violations of other laws as unlawful business practices, and makes them independently actionable. *Rose v. Bank of America* (Supreme Ct., 08/01/2013). *http://www.courts.ca.gov/opinions/documents/S199074.PDF*.

Inflammatory Demand Letter Protected by Litigation Privilege. Plaintiff sued defendant and her counsel after defendant's counsel sent plaintiff a letter accusing him of stealing assets from defendant to arrange for sexual liaisons with older men. The letter also demanded that plaintiff reach a settlement with defendant in five days, or she would file a complaint with those allegations. Plaintiff's complaint alleged clams for civil extortion (the demand letter), and civil rights violations, and intentional and negligent infliction of emotional distress (alleged wiretapping and computer hacking). Defendant moved to dismiss under the anti-SLAPP statute. The trial court denied the motion. The Court of Appeal reversed as to the civil extortion claim, finding that counsel's letter was protected by the litigation privilege because it was related to defendant's claims in the case and was contemplated in good faith and under serious consideration However, it affirmed as to the other claims, holding that they were not based upon any protected activity, and thus the anti-SLAPP statute did not apply. *Malin v. Singer* (Cal. App., 2nd Dist., 07/16/2013). *http://www.courts.ca.gov/opinions/documents/B237804.PDF*.

Government Database Must be Produced Under Public Records Act. Pursuant to the California Public Records Act ("Act"), the Sierra Club sought access to information contained in Orange County's OC Landbase, a large database holding information about land parcels in the county, in a geographic information system ("GIS") file format. The county rejected the request, taking the position that such information was not a public record under the Act. Specifically, the Act excludes from the definition of a public record computer software, including mapping systems. The California Supreme Court found that while the GIS mapping software fell within the statutory exclusion for computer software, a GIS-formatted database, like the OC Landbase, did not. Thus, such databases, unless otherwise exempt, are public records that must be produced if requested, at the actual cost of duplication. *Sierra Club v. Superior Court* (County of Orange) (Supreme Ct.; 07/08/2013) 57 Cal.4th 157. *http://www.courts.ca.gov/opinions/documents/S194708.PDF*.

Counsel's Disqualification Not Warranted for Hiring Opposing Side's Expert. Before starting a second trial after appeal, plaintiff told defendant he was going to use one of defendant's experts from the earlier trial. Defendant objected, stating that the expert had been given attorney-client privileged and work product information during the engagement. Arguing that plaintiff's counsel had access to such information, defendant moved to disqualify the former. The trial court granted the motion. In reversing, the appellate court noted that where a motion to disqualify is based on contact by opposing counsel with the moving party's expert, the moving party has the initial burden to show that the expert possesses confidential information materially related to the proceedings. Also, after an expert has testified, his/her opinions are no longer subject to attorney-client or work product protection. If the expert does not possess any confidential information, opposing counsel is free to hire the expert. Here, the Court of Appeal found that defendant had failed to meet its initial burden of proof. *Deluca v. State Fish Co., Inc.* (Cal. App., 2nd Dist., 06/27/2013) 217 Cal.App.4th 671. *http://www.courts.ca.gov/opinions/documents/B240597.PDF*.

CAFA Amount in Controversy Shown by Controller's Declaration. In a putative class action against defendant in California state court, plaintiff alleged state law claims and a national class of consumers. He also alleged that aggregate class damages were likely in the millions of dollars. Defendant removed the case under the Class Action Fairness Act of 2005 ("CAFA"). Defendant filed two declarations to support its claim that the amount in controversy was more than the requisite $5 million. The district court remanded the case sua sponte, finding that defendant failed to show that the amount in controversy was met. The court's order suggested that it had not read one of the declarations stating that defendant's sales

of the subject product over the last four years had exceeded $5 million. The Ninth Circuit reversed, holding this evidence was enough to show that the amount in controversy requirement had been met. *Watkins v. Vital Pharmaceuticals, Inc.,* (9th Cir., 07/02/2013). *http://cdn.ca9.uscourts.gov/datastore/opinions/2013/07/02/13-55755.pdf.*

For a more detailed discussion of this case, please see the blog entry on Seyfarth's Consumer Class Defense Blog: *http://www.consumerclassdefense.com/2013/07/ninth-circuit-decision-instructs-lower-courts-and-businesses-on-evidence-that-satisfies-class-action-fairness-acts-amount-in-controversy-requirement/*.

Court Erred in Awarding Attorney's Fees After Granting Motion to Compel Arbitration. After plaintiffs filed a malpractice action against their former attorneys, defendants petitioned to enforce an arbitration clause in the parties' contingency fee agreement. After granting the motion, the trial court awarded attorney's fees to defendants as the prevailing parties on the petition. The Court of Appeal reversed, holding that attorney's fees could not be awarded before the underlying claims are arbitrated. The court noted that procedural steps taken during a case are not an "action" for purposes of determining the prevailing party. The court further observed that only one side could be the prevailing party in the action to enforce the parties' contract, and that party would only be known after the arbitration is completed. *Roberts v. Packard, Packard & Johnson* (Cal. App. 2nd Dist., 07/03/2013). *http://www.courts.ca.gov/opinions/documents/B240452.PDF*.

Expert Witness Fees Recoverable Under § 998 Even if Action Voluntarily Dismissed. In a slip and fall suit, defendant made a timely settlement offer of $10,000 under CCP § 998. Plaintiff failed to respond to the offer before it lapsed. Later, plaintiff filed a request for dismissal of the case, without prejudice. Defendant filed a cost memorandum, which included expert witness fees. Plaintiff moved to strike the memorandum or to tax the expert fees. The motion to tax was granted. In a case of first impression, the appellate court rejected the trial court's ruling, holding that where a plaintiff voluntarily dismisses its complaint, § 998 expands the costs recoverable under CCP § 1032 to include a discretionary expert witness fee award. Entry of a judgment is not necessary to such recovery. The conclusion of the action is when to determine if a more favorable judgment or award has been obtained, even if that occurs as a result of a voluntary dismissal of the complaint, without prejudice, and even though there is a possibility that the action may be re-filed. *Mon Chong Loong Trading Corp. v. Superior Court (Cui)* (Cal. App., 2nd Dist., 07/23/2013). *http://www.courts.ca.gov/opinions/documents/B240828.PDF*.

Court Refuses to Enjoin Use of Commercial-Skipping Technology. Dish Network and Fox Broadcasting Company contracted to permit Dish to distribute Fox television programs. Later, Dish offered subscribers a feature enabling them to record some or all prime time shows on the four major networks for later viewing. Dish then introduced another new product that allowed customers to skip commercials on shows recorded using the prime time recording feature. For quality control purposes, Dish made copies of shows to which the commercial skipping technology was applied. Fox then sued Dish for copyright infringement and breach of contract, the latter claim extending to Dish's copying of Fox's programing. Fox sought a preliminary injunction to stop Dish from offering the commercial-skipping product and making the copies. The district court denied Fox's request for injunction relief. The Ninth Circuit affirmed, holding that Fox had failed to show a likelihood of success on its copyright infringement claim, particularly because the copies were being made by subscribers, which constituted a fair use. It also ruled that the denial of injunctive relief as to the contract breach claim did not constitute an abuse of discretion because Fox had not shown a likelihood of irreparable harm. *Fox Broadcasting Co. v. Dish Network LLC* (Ninth Cir., 07/24/2013). *http://cdn.ca9.uscourts.gov/datastore/opinions/2013/07/24/12-57048.pdf*.

Parties' Incorporation of UNCITRAL Rules Establishes Intent to Arbitrate Arbitrability. In an action for breach of contract, copyright infringement, violation of the Lanham Act and unfair competition, defendant moved to compel arbitration based upon language in a Source License Agreement ("Agreement"). The Agreement provided that the arbitration was to be conducted in accordance with the United Nations Commission on International Trade Law ("UNCITRAL"). The district court granted the motion as to plaintiff's breach of contract claim, but denied it as to the remaining causes of action, holding that the incorporation of the UNCITRAL rules did not provide "clear and unmistakable evidence" of the parties' intent to arbitrate questions of arbitrability. The Ninth Circuit reversed. Finding this to be an issue of first impression in the circuit, the Court ruled that the Agreement's provision to employ the UNCITRAL rules constitutes clear and unmistakable evidence of the parties' agreement to arbitrate arbitrability. *Oracle America, Inc. v. Myriad Group A.G.* (Ninth Cir., 07/26/2013). *http://cdn.ca9.uscourts.gov/datastore/opinions/2013/07/26/11-17186.pdf*.

Suits for Violation of Debt Collection Acts Not Barred by Litigation Privilege. District Attorney brought action against debt collection agency for unfair competition, based upon alleged violations of California's Rosenthal Fair Debt Collection Practice Act ("California Act") and the Federal Fair Debt Collection Practices Act ("Federal Act"). Defendants argued that their actions were protected by the litigation privilege. The trial court agreed and sustained defendants' demurrer without leave to amend. The Court of Appeal reversed. The appellate court observed that the litigation privilege does not apply to the California Act and the Federal Act because their provisions are more specific than the privilege. It further noted that if the litigation privilege could be used to shield violations of those statutes, the protections afforded by the Acts would be negated. Although plaintiff's suit was not brought under either Act, the Court ruled that because the unfair competition claim was based upon violations of the California Act and the Federal Act, the litigation privilege was inapplicable to the unfair competition claim for the same reasons. *People v. Persolve, LLC* (Cal. App., 5th Dist., 08/15/2013). *http://www.courts.ca.gov/opinions/documents/F064571.PDF*.

Preponderance of Evidence Standard Applies to Establishing Amount in Controversy Under CAFA. Defendant removed plaintiff's putative class action to federal district court pursuant to the Class Action Fairness Act of 2005 ("CAFA"), alleging that the amount in controversy exceeded CAFA's minimum amount of $5 million. Plaintiff then agreed to waive any damages above $5 million and moved to remand. Based on that waiver, the district court granted the motion, finding that the amount in controversy could not be satisfied. Thereafter, the U.S. Supreme Court, in another case, held that such a waiver was ineffective and not binding on other putative class members. In response to this decision, the Ninth Circuit ruled in this case that its prior controlling opinion on this question had been effectively overruled by the Supreme Court. It also held that the burden of proof imposed upon a defendant to establish the CAFA amount in controversy was no longer "to a legal certainty," but rather "by a preponderance of evidence." The Ninth Circuit then reversed the trial court's decision and remanded the case so the district court could apply this new burden of proof standard. *Rodriguez v. AT&T Mobility Services LLC* (Ninth Cir., 08/27/2013). *http://cdn.ca9.uscourts.gov/datastore/opinions/2013/08/27/13-56149.pdf*.

Shareholder Derivative Action Tanked for Lack of Demand on Directors. Plaintiffs brought shareholder derivative suit against corporate directors, officers and others, based on the board of directors adoption of an executive compensation plan, alleging breach of fiduciary duty, fraud, etc. Plaintiffs' complaint alleged that no pre-suit demand was made upon the board because doing so would be futile. The trial court sustained defendants' demurrer to the complaint, without leave to amend, finding plaintiffs' facts supporting the alleged futility of making a pre-suit demand were insufficient. The Court of Appeal affirmed. Applying Delaware law (the subject corporation's state of incorporation), the court found that plaintiffs had failed to allege particularized facts to create a reasonable doubt that: (1) the directors were disinterested and independent, and (2) the challenged transaction was the product of a valid exercise of business judgment, which would have supported a claim of demand futility. Because plaintiffs failed to do this, the pre-suit demand requirement was not excused and their complaint was fatally defective. *Charter Township of Clinton Police and Fire Retirement System v. Martin* (Cal. App., 2nd Dist., 09/17/2013). *http://www.courts.ca.gov/opinions/documents/B241087.PDF*.

No Free Pass for Internet Commentary. Apartment building owners brought a libel action against a former tenant who posted a negative online review of the building. In particular, Plaintiff stated that the building was "occupied by a sociopathic narcissist—who celebrates making the lives of tenants hell." The former tenant filed a special motion to strike under California's Anti-SLAPP statute, but was denied by the trial court. The Court of Appeal affirmed, stating: "While many Internet critiques are nothing more than ranting opinions that cannot be taken seriously, Internet commentary does not ipso facto get a free pass under defamation law. *Bently Reserve L.P. v. Papaliolios* (Cal. App., 1st Dist., 07/30/2013). *http://www.courts.ca.gov/opinions/documents/A136191.PDF*.

Rock Band's Unauthorized Use of Artist's Street Illustrations in Concerts is Fair Use. Plaintiff filed suit against the rock band Green Day and others, alleging violations of the Copyright Act and the Lanham Act because Green Day used Plaintiff's street illustration, "Scream Icon," in the video backdrop of its stage show. The district court granted summary judgment in favor of Green Day. Plaintiff appealed. The Ninth Circuit Court of Appeals concluded that Green Day's use of the illustration was fair use under the Copyright Act where the purpose and character of the use was transformative and not overly commercial; the nature of the work included its status as a widely disseminated work of street art; Green Day's use of the work was not excessive in light of its transformative purpose; and Green Day's use did not affect the value of the piece or of Plaintiff's artwork in general. The court also concluded that Plaintiff failed to establish any trademark rights to support

his claims under the Lanham Act,. The court concluded, however, that the district court clearly erred in finding that Plaintiff's claims were objectively unreasonable. Accordingly, the court affirmed the district court's grant of summary judgment but vacated the award of attorney's fees. *Seltzer v. Green Day, Inc.* (Ninth Cir., 08/07/2013). *http://cdn.ca9.uscourts.gov/datastore/opinions/2013/08/07/11-56573.pdf*.

California Enacts Legislation to Protect Minors from Their Internet Postings. On September 23, 2013, California's governor signed into law the so-called "online eraser" bill. This law, which expands upon the federal Children's Online Privacy Protection Act, requires websites to: (a) permit users under 18 years old either to be able remove, by themselves, personal content they have posted on the internet, or (b) provide a means by which such users can ask to have the data to be removed. The law is intended to permit minors to correct mistakes they may have made by imprudently posting personal information, which might later come back to haunt them. The law goes in to effect on January 1, 2015. *http://legiscan.com/CA/text/SB568/id/883962/California-2013-SB568-Enrolled.html*

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