



The Litigation Reporter

September 2004
Recent Noteworthy Decisions

In This Issue:

[Constitutional Law](#)

[Consumer Law](#)

[Contracts](#)

[Discovery](#)

[Employment](#)

[Insurance](#)

[Intellectual Property](#)

[Securities](#)

[Torts](#)

Constitutional Law

Fraudulent Commercial Speech Subject To Injunction

An author claiming that federal income taxes were voluntary sold a book entitled "The Federal Mafia: How the Government Illegally Imposes and Unlawfully Collects Income Taxes" at a book store he operated and via the Internet. A lower court injunction prohibited further sales and required defendant to disclose on his website that the book promoted illegal tax schemes. In affirming, the Ninth Circuit found it likely that defendant would be successfully prosecuted under various federal statutes prohibiting the organization, marketing or promotion of tax evasion schemes. The injunction was not an unlawful prior restraint because the book was fraudulent commercial speech that could mislead customers into believing they could legally stop paying income taxes, and the direction for a website posting, which required disclosure that the tax schemes promoted by defendant are illegal, also was proper. (*United States v. Schiff*, 379 F.3d 621 (9th Cir. 2004))

Consumer Law

California Consumer Legal Remedies Act Not Violated By Time-Limited Rebate Offer

Intuit offered a \$30 discount on Quicken software to purchasers of certain Turbo Tax software products. To obtain the discount, customers had to mail the rebate form within 30 days of the Turbo Tax purchase. Plaintiff alleged that this requirement violated California Civil Code §1770, which prohibits offering of rebates contingent on events occurring after initial transactions. After noting that the intent of the §1770 was to prevent concealment or deception by nondisclosure, the Court of Appeal found that the right to a rebate was activated when one of the products was purchased, and was not



subject to the purchase of additional or more expensive products. In sustaining a lower court's demurrer, the court further reasoned that because the consumer, to obtain the benefit of the rebate, had the option of purchasing the two software applications together, or purchasing one product before the other, the advertised discount was not contingent upon an undisclosed subsequent purchase and, therefore, did not violate the statute. (*Kramer v. Intuit, Inc.*, 2004 WL 1789905 (Cal. Ct. App. 2nd Dist. 2004))

Contracts

Breach Claim May Proceed Where Defendant Caused Plaintiff's Failure To Perform

Because defendant may have caused plaintiff's conceded non-performance, the Southern District of New York has denied a motion for summary judgment seeking dismissal of a breach of contract claim. A breach of contract claim requires that proof of: (i) the existence of a contract; (ii) performance by plaintiff; (iii) breach by defendant; and (iv) damages. Although plaintiff failed to perform within the time specified in the contract, evidence that defendant had caused the delay raised a question of fact as to whether plaintiff had "a valid excuse that negated any [] purported breach on plaintiff's part." Separately, the court rejected defendant's claim that plaintiff failed to present evidence of damages. While plaintiff's designated witness failed adequately to articulate plaintiff's damages, plaintiff's interrogatory responses provided sufficient evidence to raise an issue of fact requiring a trial. (*NeoVision Hypersystems, Inc. v. Interactive Data Corp.*, 01 Civ. 1746, 2004 U.S. Dist. LEXIS 13246 (S.D.N.Y. July 12, 2004))

No Breakup Fee When Contract Conditions Not Met

The Southern District of New York has affirmed a Bankruptcy Court's denial of a motion seeking payment of a breakup fee in connection with the sale of certain real property. Appellant's contract with the trustee provided for payment of a breakup fee in event the trustee cancelled the contract in favor of a better offer presented at an auction and the closing of that offer. Although the trustee accepted a better offer, the offeror defaulted, the sale was not consummated and the property was sold at a second auction in which appellant did not participate. Even though the trustee terminated appellant's contract and sold the property, other conditions set forth in the agreement had not been met and, as a result, appellant was not entitled to a breakup fee. (*Specialty Malls of Tampa, Inc. v. Riverbank Landscape, Ltd.*, 03 Civ. 9305 (RJH), 2004 WL 1620887 (S.D.N.Y. July 19, 2004))

Liquidated Damages Clause Deemed An Unenforceable Penalty

Plaintiff introduced defendant to a potential developer of coal reserve who gave defendant an option to execute a mining lease. Under an agreement with plaintiff, defendant was to pay



certain fees upon entering into the mining lease as well as “liquidated damages” of \$720,000 if defendant neither entered the lease nor released the option by a certain date. Four days after the deadline, defendant released the option. The Seventh Circuit, in affirming a lower court’s finding that the \$720,000 liquidated damages clause was an unenforceable penalty, held that the “payment did not bear a nexus to the gravity of the breach and [plaintiff failed] to provide evidence suggesting that the clause was a reasonable attempt to estimate actual damages” at the time of contracting. (*Energy Plus Consulting, LLC v. Illinois Fuel Co., LLC*, 371 F.3d 907 (7th Cir. 2004))

Discovery

Need For Non-Party Confidential Information May Outweigh Harm From Its Disclosure

After defendant sought documents from plaintiff containing confidential information it had obtained from one of defendant’s competitors, the competitor intervened, seeking to block the disclosure. On appeal, the court held that once a third party shows that the information sought is confidential to it, the burden shifts to the party seeking the information to show both its relevance and that the need for it outweighs the likelihood and magnitude of any harm that might be caused by its disclosure. If the party seeking disclosure meets this burden, the confidential information must be produced. (*International Truck and Engine Corp. v. Caterpillar, Inc.*, No. 2-04-0355, 2004 WL 1783628 (2d Dist. Aug. 4, 2004))

Employment

Failure to Show More Favorable Treatment of Younger Employees Not Fatal

Plaintiffs sued their former employer for age discrimination after they were laid off as part of a reduction in force (“RIF”), under which other employees absorbed their duties. Defendant argued that, in addition to showing that plaintiffs (1) were members of a protected class; (2) reasonably performed to the employer’s expectations; and (3) were discharged, they also had to show that employees substantially younger than they, but otherwise similarly situated, had been treated more favorably. In holding that plaintiffs only had to show that their responsibilities were absorbed by, other employees and not that their positions were eliminated, the court concluded that plaintiffs’ evidence sufficed to shift the burden to their employer to provide a legitimate, nondiscriminatory reason for its decision to terminate them. (*Mangrum v. Morrison Timing Screw Company*, No. 03 C 3891 (N.D. Ill. Aug. 2, 2004))



Insurance

Insured Can State Claim For Diminution In Value Against Insurer

After her vehicle was damaged and her insurer refused to pay for its diminished value, plaintiff sued. On appeal from dismissal of the complaint, the insurer argued that it could not be required to pay for the diminished value of a vehicle following an accident because that value could not be known until the vehicle was sold. It claimed that any other ruling would inundate courts with class action lawsuits and force insurers to raise premiums drastically. The court disagreed, holding that an insured could state a claim for diminution of value and recover upon proper proof and noting that the value of property is commonly estimated for purposes other than sale. Moreover, it was likely that insurers would include an exclusion for diminution in value damages in their policies. (*Allgood v. Meridian Security Ins.*, No. 49A02-0307-CV-580, 2004 WL 1737860 (Ind. Ct. App. Aug. 4, 2004))

Intellectual Property

No Injunction For Alleged Infringement Of Grocery Product Descriptions

Plaintiff appealed the denial of an injunction prohibiting a competitor from using certain product descriptions plaintiff had developed for use in a supermarket's online grocery shopping system. Upholding the denial of the injunction, the Second Circuit noted that even though the product listing would be entitled to copyright protection if it possessed a sufficient degree of creativity, the record did not establish plaintiff's likely success on the merits. In addition, plaintiff did not establish a balance of hardships in its favor: although the harm to either party could be compensated by money damages, the supermarket would be forced to shut down its online shopping site if an injunction were issued. (*MyWebGrocerLLC v. Hometown Info Inc.*, 375 F.3d 190 (2d Cir. 2004))

Securities

No Contribution Claim Against Brokers That Negligently Provided Fraudulent Information

Plaintiffs sued a broker, his employer and the employer's parent company under the federal securities laws, alleging that other brokers had communicated to plaintiffs defendant broker's misrepresentations about the growth potential of a technology company without knowledge of their falsity. The employer's parent asserted contribution claims against plaintiffs' brokers, alleging they were negligent in disseminating information received from defendant broker without first conducting their own investigation. The court, holding that a party asserting contribution claims under the federal securities laws must show that the third-party defendant



acted knowingly or recklessly, dismissed the contribution claims as based solely on allegations that plaintiffs' brokers had acted negligently. (*Ray v. Citigroup Global Markets, Inc.*, No. 03C3157, 2004 WL 1794927 (N.D. Ill. Aug. 4. 2004))

Torts

Proprietor Of Internet Web Site Not Liable For Alleged Defamatory Statements

Plaintiff purchased goods through EBAY from a third party seller which subsequently posted comments on an EBAY message board claiming that plaintiff "[s]hould be banned from EBAY" because he was "[d]ishonest all the way." Plaintiff notified EBAY that the comments were defamatory and demanded their removal. After EBAY refused, plaintiff sued for libel and violation of Cal. Bus. & Prof. Code §17200. A lower court granted EBAY's demurrer, concluding that EBAY was immune from liability for libel and violation of the unfair competition law. The Court of Appeal, determining that immunity did not extend to parties that knew or had reason to know that the material being distributed was defamatory, agreed that EBAY was not liable for the comments at issue. Its User Agreement, which contained a provision releasing EBAY from all claims and demands arising in connection with disputes between EBAY users, was valid and enforceable and applied directly to the dispute in question. (*Roger M. Grace v. EBAY, Inc.*, 16 Cal.Rptr.3d 192, (Cal. Ct. App. 2nd Dist. 2004))



Editors	Contributors
Matthew J. Cannon	Karl R. Barnikol
Diane da Cunha	Geoffrey Cahen
Jonathan J. Faust	Alexis L. Cirel*
Jay W. Freiberg	Julia Chung
Marlyn M. Gates	Megan P. McKnight
Kristin L. Holland	Angela Rochester
	Jowita Walkup

* Awaiting admission to the New York Bar.

The Litigation Reporter summarizes noteworthy decisions selected by the Contributors. Its contents do not constitute legal advice. For more information on any of the decisions discussed, contact Joel W. Sternman at j.sternman@kmzr.com, Bruce M. Sabados at bruce.sabados@kmzr.com, or Gil M. Soffer at gil.soffer@kmzr.com

Published for clients as a source of information about current developments in the law. The material contained herein is not to be construed as legal advice or opinion.

© 2004 Katten Muchin Zavis Rosenman. All rights reserved.

Katten Muchin Zavis Rosenman

www.kmzr.com

525 West Monroe Street
Suite 1600
Chicago, IL 60661-3693
p_312.902.5200
f_312.902.1061

575 Madison Avenue
New York, NY 10022-2585
p_212.940.8800
f_212.940.8776

2029 Century Park East
Suite 2600
Los Angeles, CA 90067-3012
p_310.788.4400
f_310.788.4471

1025 Thomas Jefferson St., N.W.
East Lobby, Suite 700
Washington, DC 20007-5201
p_202.625.3500
f_202.298.7570

401 South Tryon Street
Suite 2600
Charlotte, NC 28202-1935
p_704.444.2000
f_704.444.2050

260 Sheridan Avenue
Suite 450
Palo Alto, CA 94306-2047
p_650.330.3652
f_650.321.4746

5215 N. O'Connor Boulevard
Suite 200
Irving, TX 75039-3732
p_972.868.9058
f_972.868.9068

Katten Muchin Zavis Rosenman is a Law Partnership including Professional Corporations.