



The Litigation Reporter

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Arbitration

Employee Must Arbitrate Claims Against Successor Employer

Plaintiff's employment agreement with Financial had an arbitration clause. After Financial transferred its assets to Alliance and plaintiff began working for Alliance, plaintiff sued Financial and Alliance for, among other things, breach of the employment agreement. Granting the motion of Alliance to compel arbitration, the Court held that because plaintiff was relying on the agreement to support his claims, he was equitably required to arbitrate those claims against both defendants, even though Alliance was not a signatory to the agreement. (*Alliance Title Company, Inc. v. Bucher*, 127 Cal. App. 4th 262 (2005))

Bankruptcy

Sole Shareholder Who Files For Bankruptcy Has No Interest In Corporate Property

The debtor, the sole stockholder of a small trucking company, filed for personal bankruptcy under Chapter 7 of the Bankruptcy Code. As a result, his stock in the trucking company became property of the Chapter 7 estate and subject to the control of the Chapter 7 trustee. Under the Wisconsin exemptions, made available to Wisconsin debtors by the Bankruptcy Code, an individual chapter 7 debtor, to help get his "fresh start," can exempt from property of his estate a certain amount of equity in motor vehicles. The debtor, arguing that his shareholdings in the trucking company made him an equitable owner of the trucking company's property under Wisconsin law, sought to claim two vehicles owned by the company as exempt. The bankruptcy court, the district court, and, ultimately, the Seventh Circuit



held that since the corporation had not been dissolved before the plaintiff filed for bankruptcy (which would have enabled the stockholder to become the *legal* owner of the dissolved corporation's property), the vehicles remained property of the corporation at the time of the bankruptcy and were not eligible for personal exemption by the debtor. As the Seventh Circuit observed, since the stock of the corporation now belonged to the bankruptcy estate, the dissolution of the corporation resulted in the estate becoming the legal owner of the corporation's property. (*Fowler v. Shadel*, 400 F.3d 1016 (7th Cir. 2005)).

Civil Procedure

Duty To Preserve Evidence Required To Support Spoliation Claim

Plaintiff alleged that defendant intentionally destroyed a report, certain accompanying photographs and an analysis of the report. The Court held that to succeed on its claim, plaintiff must demonstrate that defendant owed it a duty to preserve the materials. In granting summary judgment to defendant, the Court held that no such duty existed and that plaintiff was not harmed as a result of the loss of the evidence. (*J.S. Sweet Company, Inc., v. Sika Chemical Corp.*, 400 F.3d 1028 (7th Cir. 2005))

Statute Of Limitations Begins When Refund Check Clears

In an action to recover an erroneous refund, the event that triggers the running of the statute of limitations is the "making of the refund." In a case of first impression, the Seventh Circuit has held that the refund is made when the check clears the Federal Reserve Bank, as opposed to the date the check was issued, mailed to, or received by, the taxpayer. (*United States v. Llwellyn Greene-Thapedi*, 398 F.3d 635 (7th Cir. 2005))

Candidates' Libel And Defamation Suits Subject To Dismissal

Two candidates for public office sued a Web site operator for allegedly posting defamatory statements that imputed fraudulent and criminal conduct. Defendant moved to strike under CCP 425.16, contending that the candidates were public figures and that it had a substantial and reasonable belief that the allegations were truthful. The Court of Appeal held that the matters at issue were squarely within the statute and, because plaintiffs had not shown a probability of prevailing on the merits, defendant's motion to strike should have been granted. (*Vogel v. Felice*, 2005 WL 675837 (Cal. App. 6th Dist.))



Insurance

Uninsured Motorcyclist's Personal Injury Claim Barred

A New York court has denied a motion for an order granting petitioner leave to bring an action against the Motor Vehicle Accident Indemnification Corporation (MVAIC) for personal injuries suffered when his motorcycle collided with an uninsured vehicle. Because petitioner failed to establish that he was an insured motorist himself at the time of the accident, the Court held that he was not qualified, under Article 5218 of the New York State Insurance Law, to sue the MVAIC. (*Quinones v. Motor Vehicle Accident Indemnification Corp.*, 2004 WL 3078702 Sup. Ct. Kings Co.)).

Labor and Employment

Inability To Work In "A Class Or Range Of Jobs" An ADA Prerequisite

After plaintiff municipal employee was injured at work, he became unable to perform certain duties within his job description. Failing to find him an alternative position, his employer fired him. Plaintiff, claiming that he was fired not because he was unable to perform his job, but because his employer "regarded him as having an impairment that substantially limited a major life activity," sued under the ADA. Although recognizing that "working" can be a "major life activity" giving rise to a claim under the ADA, the Court held that plaintiff could not prevail merely by showing that his employer regarded him as unable to perform "a specific job." Instead, he must show that his employer regarded him as having an impairment that rendered him unable to perform in "a class or range of jobs," a showing that plaintiff could not make since his employer made efforts to accommodate him by seeking to find alternative positions for him. (*Kupstas v. City of Greenwood*, 398 F.3d 609 (7th Cir. 2005))

Patent

No Requirement That U.S. Register Trademark Registered In Country Of Origin

Petitioner, a German citizen, applied to register marks for nutritional supplements, books, and educational services based upon ownership of a German registration for the marks. The examiner, finding the marks to be primarily surnames, refused registration. The Federal Circuit agreed, rejecting petitioner's argument that the Paris Convention requires registration of a mark already registered in its country of origin. (*In re Rath*, 2005 WL 673647 (Fed. Cir.))



Product Liability

Claim For Failure To Warn Requires Duty To Warn

The Southern District of New York has granted summary judgment dismissing a products liability claim alleging that plaintiff suffered a severe allergic reaction from defendant's hair coloring products. Plaintiff failed to show that defendant had a duty to warn of the potential adverse effects of PPD, a hair coloring agent used in most hair dyes; the fact that three European countries had banned the use of PPD and that materials found on the Internet allegedly established PPD's toxicity were insufficient. And, because plaintiff did not read the warnings on the product he used, no duty to warn arose from the fact that another manufacturer's hair coloring product with a different formula contained a warning concerning PPD. Finally, plaintiff did not offer any evidence tending to show that PPD caused his allergic reaction or that any other user of the product had ever experienced a similar severe allergic reaction. (*Smallwood v. Clairol, Inc.*, 03 CV 8394 (SWK), 2005 U.S. Dist. LEXIS 2726 (S.D.N.Y. Feb. 18, 2005))

Unfair Competition

Retroactivity Of Proposition 64 Requires Actual Injury By Plaintiff

While plaintiff's action for violations of the California Unfair Competition Law (UCL) was pending, California passed Proposition 64, which requires private parties to have sustained an actual injury to bring a UCL action. The Court held that Proposition 64 was retroactive and, because plaintiff only alleged a claim on behalf of the general public, defendant was entitled to judgment on the pleadings. (*Lytwyn v. Fry's Electronics, Inc.*, 126 Cal. App. 4th 1455 (2005))



Editors	Contributors
Diane da Cunha Jonathan J. Faust Marlyn M. Gates David J. Stagman	Geoffrey Cahen Bonnie Chmil Alexis L. Cirel Julia Chung Daniel A. Edelson Allen B. Gutterman Ryan J. Larsen

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

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Katten Muchin Zavis Rosenman

www.kmzr.com

525 West Monroe Street
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.