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BKCG

BURKHALTER KESSLER CLEMENT & GEORGE LLP

Caution! Holiday Party Liabilities

As we close out 2022, more and more businesses have relaxed COVID restrictions and called employees back to the office full-time or on a hybrid schedule. Once again employers find themselves asking "what should we do to say thank-you to our employees for a hard year's work?" If businesses decide to answer that question by planning a holiday party, employers generally find themselves with more options than the last two years. Employers, however, should plan these events carefully to lessen potential liability.

I am sure we all recall the surge of COVID infections that followed 2021's year-end. No employer wants to host a super-spreader event. With new variations of COVID currently circulating, there are steps employees can take to reduce risks when hosting an in-person event. For example, where and how a business hosts that event can be impactful. An outside event is, for obvious reasons, safer and, at least in California, the weather is usually temperate enough to allow for such events. Businesses should also consider whether the location hosting the event has any vaccination or masking requirements. Most businesses have lifted these restrictions so the safest route will be for businesses to follow the current Center for Disease Control guidelines for hosting an in-person gathering.

Along with COVID safety issues, businesses must also be cognizant of other liabilities if they host an in-person event. If a business plans to have alcohol served (or even if it is available at the venue), make sure to lay ground rules ahead of time to limit liability. If the employer itself is making alcoholic drinks available, it should consider providing a limited number of "drink tickets" to each invitee, only serving wine and beer and no hard alcohol and/or providing Uber, Lyft or another ride-share alternative to employees so the risk of drinking and driving is decreased. Of course, employers should never forget that they can be held liable if an intoxicated employee gets into an accident driving home from a workplace event where the employer allowed alcohol to be consumed. (continued on page 6)

Is The Theft Of Cryptocurrency A Property Loss?

The issue of what constitutes "direct physical loss or damage" triggering coverage under a property insurance policy has been the topic of discussion in recent years as a result of the COVID-19 pandemic. Many businesses that were forced to shut down for periods of time sought coverage under their first party property insurance policies for cleaning their premises and for business interruption losses.

The overwhelming majority of courts throughout the country concluded that the presence of a virus such as COVID-19 did not constitute "physical property loss or damage" – a requirement to trigger coverage. If a loss caused by a "virus" is not considered to be a "physical loss," is a loss of cryptocurrency a "physical loss"? After all, neither a virus nor cryptocurrency have a material existence.

But many people would equate cryptocurrency with cash, which is physical. Recently, a Federal Court in California was asked to analyze the "physical property loss" question in the context of cryptocurrency; that is, whether the theft of cryptocurrency constituted " physical loss or damage" that would trigger coverage under an all risk property policy. (continued from page 6)

In This Issue

A Delicious Serving Of False Advertising, Or Just Another Meritless Lawsuit?

Breaking news! "Italy's #1 Brand of Pasta®" is not made in Italy! Thanks to a lawsuit filed by two heroic Bay Area citizens who were collectively and maliciously cheated out of $6, the truth behind this massive conspiracy has finally come to light.

In the latest lawsuit *shamefully not* thrown out of court for sheer audacity, the plaintiffs have targeted pasta maker Barilla America, Inc. alleging that the packaging of more than 50 of its delicious dry pasta products are replete with false, misleading, and deceptive marketing practices. Never minding that the company's name is actually Barilla *America*, Inc., or that the boxes actually state that the pasta is made in the United States, these unsuspecting heroes contend that they were deceived into believing that the $2 boxes of Classic Barilla Blue Box angel hair and spaghetti pasta contained ingredients that were sourced exclusively in Italy because the boxes replicate the colors of the Italian flag and contain the company's trademark "Italy's #1 Brand of Pasta."

Although there is no mention of the origin of the sauce the plaintiffs used (but Chef Boy-R-Dee should probably go into hiding), these plaintiffs who were duped into purchasing American-made pasta (*ugh*) found some lawyers willing to lay it all on the line, and together they filed a class action lawsuit seeking both monetary damages and injunctive relief on behalf of a nation of defrauded carb-based plaintiffs.

Barilla filed a motion to dismiss under Federal Rules of Civil Procedure Rule 12(b)(6), pursuant to which the Court accepts all allegations in the Complaint as true and determines whether a claim has been sufficiently stated. Barilla's lawyers were no doubt stunned when the Court denied their motion and allowed the case to proceed.

The Court held that the plaintiffs, who spent $6 on some dry noodles, had stated a "plausible economic injury" based on their allegation that they "would not have purchased the Product[s], or would not have overpaid a premium for the Product[s'] purported Italian origin, had [they] known" the products were actually made in the United States using ingredients not sourced exclusively from Italy.

In making this finding, the Court had to deny Barilla's request that the Court take judicial notice of its actual pasta boxes. Judicial notice is a legal tool that allows the Court to accept as evidence facts that are commonly accepted and documents that are easily verifiable, but here, the Court refused to do so. Rather than look at the actual pasta boxes and consider them as evidence, the Court limited itself to only what was alleged in the Complaint. This critical evidentiary ruling allowed the Court to ignore the language on every Barilla pasta box stating "Made in the USA", with the location of Barilla's headquarters in Illinois, and allowed the plaintiffs' damage claim to proceed.

The plaintiffs also sought injunctive (forward-looking) relief based on their allegations that they would want to continue to purchase Barilla products in the future if they continued to see the boxes, even though they now know that those boxes contain inferior, domestic pasta. This, however, was a bridge too far for the Court, who exercised incredible discretion in finding that these plaintiffs could no longer "plausibly allege that they remain unaware that the products are manufactured in the United States from ingredients that are not from Italy…"

Although the plaintiffs could not sue for harm going forward, the Court did say they can sue for products they never even bought. These plaintiffs bought only spaghetti and angel hair pasta, but their lawsuit includes claims based on the boxes for 52 Barilla products, including artisanal pasta, whole grain pasta, veggie, and gluten-free (*double ugh*). Unfortunately, the Court decided this issue in favor of proliferating litigation and held that the plaintiffs "had standing" to assert claims based on products they did not purchase "so long as the products and alleged misrepresentations are substantially similar."

Barilla finally argued that the plaintiffs' claims should be dismissed because the statements on their boxes would not mislead a "reasonable consumer" into believing that its pastas were manufactured in Italy. With the Court refusing to consider the entire pasta boxes (instead only evaluating what was written in the Complaint), Barilla's argument wilted and failed, at least at the preliminary stage.

Barilla will no doubt challenge all of plaintiffs' claims with a motion for summary judgment, and the Court will be allowed to consider evidence beyond the Complaint's allegations in making its ruling on that motion. Until then, *Sinatro v. Barilla America, Inc.* will be just another of the thousands of meritless lawsuits clogging our state and federal court systems impeding the real administration of justice.

Please contact Michael Oberbeck at moberbeck@bkcglaw.com or (949) 975-7500 if you have any questions about this article, or any other related matter.

ADA Attorney's Fees Awards Finally Reigned In

In a win for commercial property owners and a blow to the attorneys representing serial ADA (Americans with Disabilities Act) plaintiffs, the 9th Circuit upheld the district court's decision to greatly reduce the statutory attorney's fee award in a typical over litigated case.

In *Shayler v. 1310 PCH, LLC,* 51 F. 4th 1015 (2022), the Court of Appeals, Ninth Circuit, upheld the decision by the district court to drastically reduce the plaintiff's attorney's fees award, hopefully sending a message to the cottage industry of law firms who use serial plaintiffs, boilerplate pleadings and the threat of attorney's fees to coerce small businesses into quick settlements that benefit only the attorneys for the plaintiff, and rarely achieve the intended purpose of making a commercial property more accessible to disabled patrons.

The Court noted that while California attempted to limit these abusive lawsuits in the state courts by imposing stricter procedural requirements and higher filing fees on "high-frequency litigants", plaintiffs' attorneys circumvent these restrictions by filing in federal court, asserting federal question jurisdiction over the ADA claim and supplemental jurisdiction over the related state-law claims. This has resulted in the number of ADA cases ballooning from 3% of its civil docket to 20% in the Central District of California alone.

Shayler sued the Defendant for ADA and state law (Unruh Act) violations, seeking injunctive relief and attorney's fees as well as monetary damages for the Unruh Act claim. The dispute concerned accessible parking spaces. Early in the case, the trial court identified the Plaintiff as a "high-frequency litigant" as defined in CCP § 425.55(b) and so declined to exercise supplemental jurisdiction over the Unruh Act claim. Shayler later moved for summary judgment, to which the Defendant filed a notice of non-opposition, yet Shayler's attorneys filed a reply brief anyway.

The trial court granted summary judgment on the ADA claim but declined to award damages under the Unruh Act because of its earlier jurisdictional ruling.

Shayler's lawyers then moved for $31,714 in attorney's fees plus $3,185 in costs. This was based on the work of four lawyers with hourly rates from $295/hr. to $495/hr., collectively billing 75 hours on an undisputed case. The trial court found that both the hourly rates for the attorneys and the time they spent on the case were unreasonable, excoriating them for the manner in which they over litigated the matter. So, the court applied a blended rate of $300/hr., 75 hours and a downward 65% adjustment, and arrived at a reduced fee award of $7,896 (substantially less than the $31,185 sought) and also reduced the award of costs from $3,185 to $1,955, rejecting such expenses as a site inspector.

The 9th Circuit upheld the trial court's ruling, stating, "[i]n sum, while Shayler may be dissatisfied with the district court's explanations, they are sufficient to undergird its fee award under Ninth Circuit precedent. At bottom, this was a simple, relatively uncontested case. Given the repetitive nature of high-frequency ADA litigation, there was nothing irrational about the district court's conclusions that, in effect, much of the work here could have been performed by junior associates or even paralegals, or that much of the motion practice in the case was superfluous." Expect this ruling to shake up ADA shake downs.

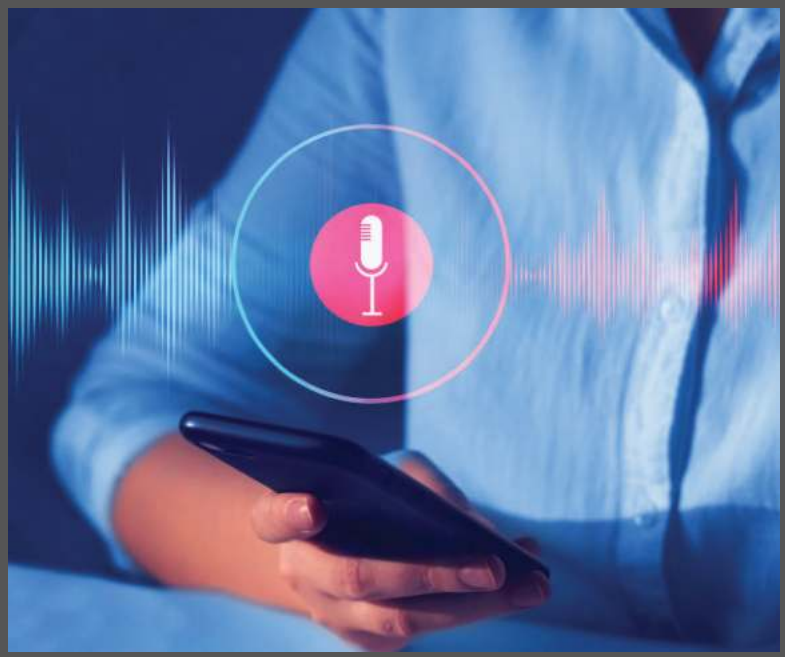
Please contact Alton Burkhalter at aburkhalter@bkcglaw.com or (949) 975-7500 if you have any questions about this article, or any other related matter.

It Takes Two To Tango: Two Party Consent In California

Audio, video, or photographic evidence can often turn the tide of litigation if they show or explain the actions of one party against the other. This is specifically true when either a plaintiff or defendant are recorded saying something about the actions or conduct at issue before the court. Of course this makes sense, people's statements at the time an event is happening, or their reasoning or acknowledgement for engaging in certain activity is inherently reliable. This is especially true when a person says something when they think they are not being recorded. However, in California, audio recording another without their consent not only makes that evidence inadmissible in court, it can possibly expose the person recording the conversation to criminal liability.

While it may seem like a good business practice to record telephone conversations to retain accurate records, under section 632 of the California Penal Code, it is illegal for an individual to "maliciously and without the consent of all parties to the communication" intercept, receive, or assist in receiving any communication over the phone. This makes California a "two-party consent" state, meaning that every party to a telephone communication must be made aware they are being recorded and consent to that recording. Violation of Section 632 of the California Penal Code can lead to rather severe penalties, including a fine of up to $2,500 or by imprisonment in county jail for up to one year.

Frio v. Superior Court (1988) 203 Cal.App.3d 1480 is a good example of how courts treat recorded phone conversations without all parties' consent as inadmissible evidence. There, a record producer appealed a trial court's decision to exclude evidence of recorded telephone conversations where the other party did not know they were being recorded and had a reasonable expectation of privacy in their conversations. The Court of Appeals went even further, however, also ruling that the notes the record producer had prepared from the recording were also not admissible as evidence.

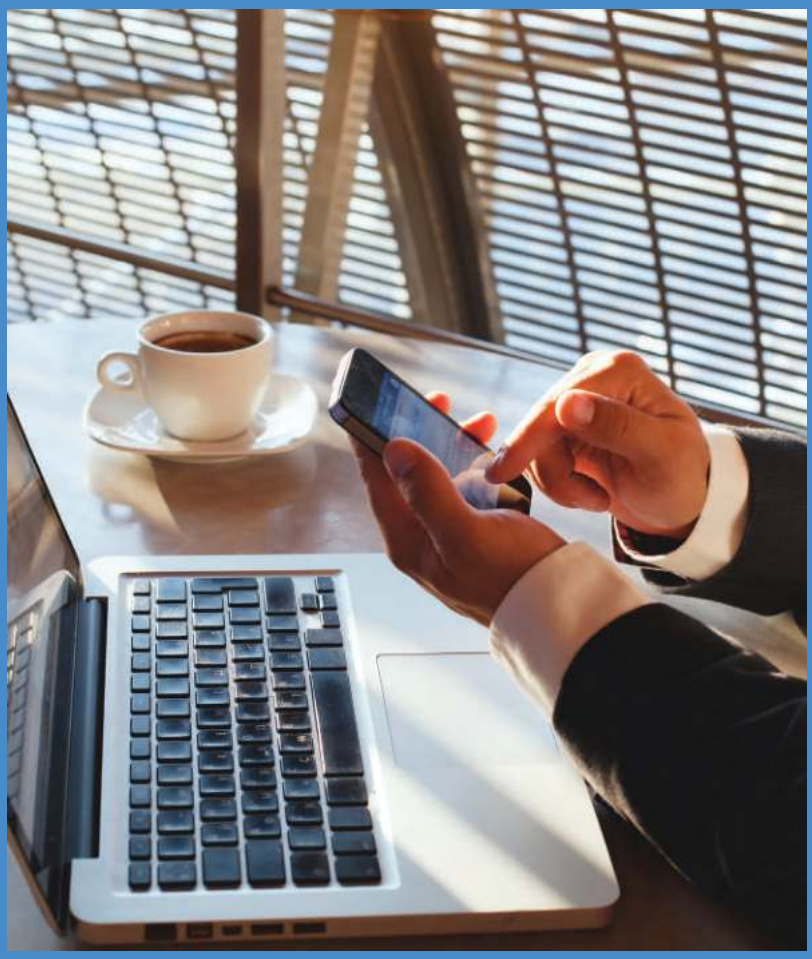


These rules apply to people who are both in California, but the analysis changes slightly when communications cross state lines. For instance, in *Kearney v. Salomon Smith Barney, Inc.* (2006) 39 Cal.4th 95, the California Supreme Court was faced with a simple, yet interesting question. Can someone being recorded over the phone without their knowledge in California, a two-party consent state, sue a company based in Georgia, a one-party consent state, that recorded these conversations. The California Supreme Court found in favor of the Plaintiffs, finding that as long as the person who was being recorded with their consent was in California during the relevant conversations, California's two-party consent law will apply, irrespective of the laws of the state where the other party to the phone conversation.

Ultimately, if you plan on recording phone conversations as a record keeping practice, ensure that you have consent of all parties to that phone conversation. This is likely best practice for recording Zoom of Microsoft Teams meetings. If there's no consent, the recording will be worthless in a court of law and, even worse, opens the recorder up to criminal exposure.

Please contact Cody Franklin at cfranklin@bkcglaw.com or call (949) 975-7500 if you have any questions about any issue discussed in this article, or any other related matter.

The Conclusion To The Saga Of Musk's Takeover Of Twitter



We have been tracing the legal labyrinth that began with Elon Musk's astonishing offer to purchase Twitter outright for approximately $44 billion earlier this year. Twitter initially responded to this announcement by adopting a "poison pill," to make it more expensive and difficult for Musk to accomplish such a takeover. In our previous Newsletter, my colleague Cody Franklin discussed Musk's subsequent reversal, and attempt to pull out of that deal, perhaps in part due to Twitter's implementation of the poison pill. Musk claimed that Twitter had concealed the true number of fake accounts and so-called "bots" in the course of negotiating the deal.

As the deal and market conditions evolved, Twitter also reversed its position, apparently finding that a purchase by Musk would in fact benefit the company after the chaos of the preceding months. As a result, Twitter sued to enforce the deal. Musk fought back and intense litigation ensued. It appeared that the case was heading full-steam into trial, with depositions of Musk and Twitter executives set for September and October, just days before the trial date of October 17. However, in another stunning turn of events, Twitter CEO Parag Agrawal failed to appear for his deposition in late September, further exacerbating the already fraught litigation.

Just days later, on October 4, never failing to surprise, Musk suddenly abandoned his fight against Twitter, and agreed to go through with the original deal to purchase Twitter for $44 billion. One lesson that stands out from this situation is that the incredibly expensive threat of a looming trial is enough to move the needle in even the biggest of cases, which is why almost all cases settle before trial–and sometimes just minutes before the trial is set to start.

The trial court pushed out the trial date to allow time for the deal to go through. However, it seemed entirely unclear whether the deal would indeed close given the tumultuous and contentious history between the parties. However, on October 26, Musk walked into Twitter's offices to close the deal. In keeping with the drama that characterized every other part of this deal, Musk did so while carrying a literal sink–apparently a pun intended to convey Musk's desire that doubters "let it sink in" that he has actually purchased Twitter and will have full control over the social media platform.

In the days since Musk has taken the reins at Twitter, he has already made sweeping changes. Musk reportedly laid off thousands of employees on November 4, and just a few days later on November 7, reports were already emerging that Twitter was asking some of those very employees to return to work. Naturally, this chaos has already spawned lawsuits from employees. Amid all of this chaos, Musk has also announced a fundamental change to Twitter's operations and stated that the company will begin charging for the verified blue checkmarks.

While it is difficult to forecast how the deal will shake out for Twitter, its employees, and its shareholders, it seems that Musk's legal troubles regarding Twitter are only beginning.

If you or your business need advice regarding contract litigation, or require representation in any matter, BKCG's experienced attorneys can assist with any issues your business faces.

Please contact Michael McConnell at mmcconnell@bkcglaw.com or (949) 975-7500 if you have any questions about this article, or any other related matter.

Is The Theft Of Cryptocurrency A Property Loss? (continued from page 1)

In *Burt v. Travelers Commercial Insurance Company* (2022 WL 3445941, N.D. Cal.), two siblings inherited a Coinbase account that contained cryptocurrency in the form of Bitcoin, Ethereum, and Chainlink. Hackers were able to take control of the Coinbase account. Within 24 hours, the hackers transferred all $339,000 of the cryptocurrency from the siblings' account to their own electronic wallet. The siblings submitted a claim for theft to their property insurer. The claim was denied and the siblings filed a lawsuit against Travelers. The case was removed to U.S. District Court for the Northern District of California. Since the insurance policy covered the peril of theft, the main issue for the Court was whether cryptocurrency was "physical" property. Without a loss of or damage to "physical property," there is no coverage. Deciding in favor of Travelers and dismissing case law from other jurisdictions, the Court held that under California law, the term "physical" meant something that is tangible and perceptible through the senses and "subject to the laws of nature." Losses that are intangible or incorporeal may have an unfortunate economic impact on the insured but it is not a "physical" loss. Here, the Court viewed cryptocurrency as being akin to a data loss (i.e., not physical) as opposed to a loss of cash.

It remains to be seen whether the Court's reasoning will be followed by other courts and how the opinion will be distinguished. While the *Burt* case involves cryptocurrency electronically stored in a Coinbase account, there could be a different result where cryptocurrency is stored or maintained in some offline manner (i.e., on an off-line hard storage unit like a flash-drive). It also remains to be seen whether cryptocurrency will be viewed as physical property in other settings such as a claim for conversion. As cryptocurrency is a fairly new method of monetary payment, the law is bound to develop as warranted by the specific factual scenarios.

Please contact Keith Butler at kbutler@bkcglaw.com or (949) 975-7500 if you have any questions about this article, or any other related matter.

Caution! Holiday Party Liabilities (continued from page 1)

Businesses should gauge their own risk tolerance when deciding these types of issues but, regardless, a business needs to make sure there are provisions in its employee handbook that provide clear guidance to employees about what is acceptable conduct at a work-sponsored event. Further, if an employee violates those provisions, there should be discipline of some sort to demonstrate that the employer's rules are fairly enforced.

Things in 2022 are greatly improved for most businesses from the past few years, but this year has still been challenging so it's a great idea to take some time and reward employees for their hard work. At the same time, employers must remember that employment liability exists at all work-sponsored events even though it is a more relaxed environment.

Please contact Ros Lockwood at rlockwood@bkcglaw.com or call (949) 975-7500 if you have any questions about any issue discussed in this article, or any other related matter.

The BKCG Bulletin is Published By:
Burkhalter Kessler Clement & George LLP

2020 Main Street
Suite 600
Irvine, CA 92614
Attn: Alton G. Burkhalter
949.975.7500
949.975.7501 fax

340 North Westlake Blvd.
Suite 110
Westlake Village, CA 91362
Attn: William C. George
805.373.1500
805.373.1503 fax

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www.bkcglaw.com

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