THE BKCG
BULLETIN
Winter 2017 Edition

BKCG
BURKHALTER KESSLER CLEMENT & GEORGE LLP

BKCG Scores "Gouda" Result At Trial

On October 16, 2017, after less than a day in deliberations, a jury in Riverside County returned a unanimous verdict in favor of BKCG's clients in the amount of $4,356,670. This result marks the end of a painful, decade-long family dispute in which BKCG's clients were subjected to the vengeful litigation tactics of one rogue faction of their LLC. While every successful verdict is sweet, allowing our clients in this case to move on with their lives and rest easy knowing that they are not defendants in a lawsuit for the first time since 2005 makes this verdict especially sweet (and savory!).

BKCG's clients, Pauline and David Thornton and Betty and Leo Wesselink were the majority members of Winchester-Wesselink, LLC. The LLC was founded by their father, Jules Wesselink, in the early 1990s after Jules travelled to his homeland of Holland to master the art of cheesemaking – particularly, gouda cheese. Jules' children invested in Jules' cheesemaking venture after everyone who tasted Jules' product went crazy for it. By 2001, Leo and his wife Betty Wesselink, Pauline and her husband Dave Thornton, and Jules' other daughter, Valerie Thomas and her husband, David, all decided to participate in the LLC and make a go at the family cheese business.

With an award-winning product and high hopes for the future, the Wesselink family embarked upon their family cheesemaking business in Winchester, California that they operated through the LLC under the name, The Winchester Cheese Company. The company was operated in converted trailers on 80 acres of dairy land rented by the LLC from Jules' brother-in-law and childhood friend, Pete Van Loon. Pete's son, Richard Van Loon, also took note of the company's promising future and offered to invest in the LLC. Thus, at the end of 2001, Richard Van Loon (first cousin of Leo and Pauline) and his wife Dianne bought a 9% minority interest in the LLC.

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Court of Appeal Upholds Malicious Prosecution Claim Following Voluntary Dismissal Without Prejudice

California businesses seem to be under constant attack, with aggressive plaintiff's lawyers unabashedly filing frivolous lawsuits. The goal usually seems to be to extract a settlement just below the cost to the Defendant of defending the claim. However, when the Defendant refuses to settle, the Plaintiff and its lawyer may be creating liability for themselves.

Malicious prosecution is committed when a prior action is brought with malice and without probable cause by the plaintiff, and is subsequently terminated in favor of the defendant. "Favorable termination" typically means winning in the trial court whether by way of trial or dispositive motion, but in some cases, it can also mean simply obtaining a dismissal from the other side. To protect themselves from malicious prosecution claims, the Plaintiff will typically dismiss the case "without prejudice" which does not bar a later lawsuit on the same claim. Since one of the requirements for malicious prosecution is "favorable termination of the prior action reflecting its lack of merit", a dismissal without prejudice may be ambiguous as to the merits of the action. For example, matters of cost may have led to the dismissal. But, in many instances, the true reason for dismissal was Plaintiff and its lawyer finally acknowledging that their bluff was called. And, in those instances, both the Plaintiff and its lawyer can be sued for malicious prosecution.

Last month the California Court of Appeal looked at such a case involving a large commercial real estate loan and some very large institutional players.

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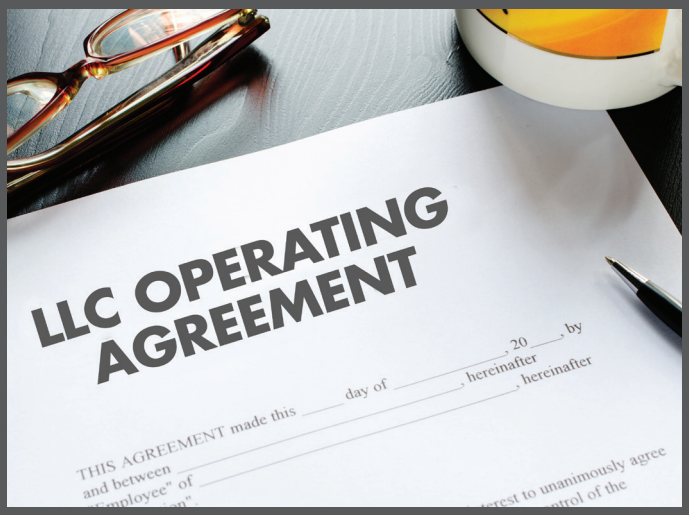
Many years earlier and adding to the family intrigue, Jules, who was the original owner of the 80 acres of dairy land, made a deal with Pete whereby Jules would sell the property to Pete who would then lease it back to Jules to operate his dairy with an option to buy it back for a set price by a set date. Ultimately, the option to buy the property was renegotiated in favor of the LLC who had the option to buy it from the Van Loon Family Trust for $2.5 million. The majority of LLC members voted to and did exercise the option to purchase the property in 2004 at a time when the value of the property greatly increased. The only members who were not in favor of exercising the highly profitable option were Richard and Dianne Van Loon who did not want to see ownership of the property taken out of the hands of the Van Loon Family Trust.



After the LLC exercised the option, the Van Loons filed their first of FIVE LAWSUITS against the LLC and the other members in 2005 challenging both the majority status of the other members and the majority's authority to act in the best interest of the LLC. Of course, the constant litigation plaguing the LLC ruined the LLC's opportunity to sell the property during the real estate boom. Instead, the LLC and its members were embroiled in this first lawsuit through the trial in 2009 and through the appeal which lasted until 2013. Tragically, Jules passed away soon after the trial in 2010.

Unsatisfied with the trial result in which the court affirmed the Van Loons' minority interest, and while there were still collateral issues on appeal from the first lawsuit, the Van Loons sued the LLC and the other members (including Jules' elderly widow) again in October of 2013 for many of the same reasons already litigated in the first lawsuit. Because of the crippling effect of endless litigation, the majority members (who funded a majority of the LLC's operations) could no longer pay attorney fees, the debts on the property, and the costs of running the LLC. Thus, all of the members, with the exception of the Van Loons, voted to dissolve the LLC and liquidate its only valuable asset, the property, before it was lost in foreclosure proceedings. Indeed, the Van Loon Family Trust, of which Richard Van Loon was a beneficiary, initiated judicial foreclosure proceedings against the LLC in 2013. A junior lienholder on the property then initiated non-judicial foreclosure proceedings against the LLC.

In hopes of salvaging as much value as possible to then distribute to the members, in 2014, the majority members located a third-party to purchase the real property for $4.5 million which would have avoided foreclosure and bestowed a profit upon the LLC of over $1,000,000 after paying all of the LLC's debts. All of the members of the LLC, with the exception of the Van Loons, voted in favor of selling the property for $4.5 million.

Because the prospective buyer was well-aware of the Van Loons' penchant for litigation (the Van Loons filed three additional lawsuits against the LLC and its members between 2014 and 2016), he required all members of the LLC, including the minority member Van Loons, to sign off on the sale. Despite the pleas of the LLC and its members to the Van Loons to sign off on the sale, the Van Loons refused and falsely communicated to the prospective buyer that the Van Loons were the majority members who wanted the property for themselves – even though the Van Loons could not match the $4.5 million offer. Rightfully fearful of litigation at the hands of the Van Loons, the prospective purchaser chose not to proceed with the purchase, and the LLC lost the property at a foreclosure sale. Once again, the Van Loons caused the further ruin of the LLC and thwarted the LLC's last chance to salvage some value for its members – including the Van Loons who were now 18.33% members.

Thus, the LLC filed a cross-complaint against the Van Loons who intentionally caused the LLC to lose over $1 million by throwing a wrench in property sale. The Van Loons then filed a FIFTH retaliatory lawsuit against the LLC and the other members absurdly claiming the Van Loons were the majority members and that the Thorntons and Wesselinks did not have the right to dissolve the LLC. Seasoned trial attorney, Carl Pentis, joined the trial team as conflict counsel for the LLC.

When these claims by and against the Van Loons finally went to trial in September of 2017, the Thorntons and the Wesselinks were eager to finally have the opportunity to expose the Van Loons for who they are – vengeful and vexatious litigants taking advantage of the legal system to further their one-sided family vendetta in spite of their own interests and the interests of the LLC. BKCG attorneys, Dan Kessler and Amber Sanchez, were also impassioned to give this family the long overdue day in court they deserved and put the Van Loon "Vendetta" theme front and center at trial.

After 16 days of trial in which BKCG, through the use of sophisticated trial technology, colorfully illustrated the Van Loon vendetta by way of extensive documentary evidence and damning testimony from Richard Van Loon himself (both live and on video), it took the jury only one day to award the LLC damages of $1,856,670 for the lost sale of the property, and to find there was no merit to Van Loon's claims against the Thorntons and the Wesselinks. And, clearly convinced of the Van Loons' malicious vendetta, it only took a matter of minutes for the jury to award the LLC punitive damages of $2,500,000.

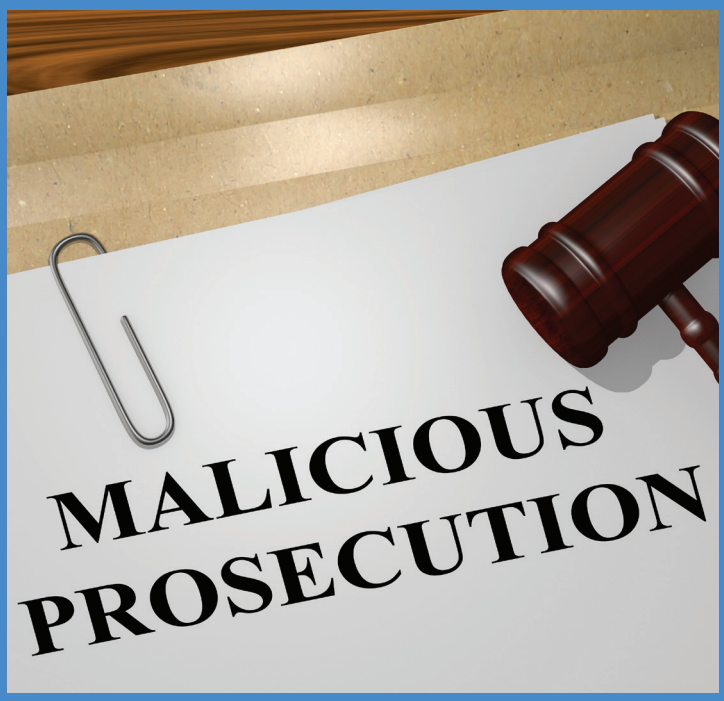
While $4.3 million in damages to the LLC does not come close to restoring to the Thorntons and the Wesselinks all they lost since 2005, including multiple family members and their late father's dream, it is a strong statement to the Van Loons they can no longer bully the other members with endless and frivolous litigation. BKCG will also pursue its fees and costs in addition to the $4.3 million verdict.

Please contact Daniel J. Kessler or Amber M. Sanchez at (949) 975-7500 or dkessler@bkcglaw.com / asanchez@bkcglaw.com if you have questions about any issue discussed in this article, or any other related matter.

Court of Appeal Upholds Malicious Prosecution Claim Following Voluntary Dismissal Without Prejudice

(continued from page 1)

In that case, Medley Capital Corporation (MCC/NYSE) was dragged into a lawsuit by way of a cross-complaint filed by Security National Guaranty, Inc. (SNG). The underlying suit involved a loan foreclosure against SNG, who was represented by Jeffer Mangels Butler & Mitchell.



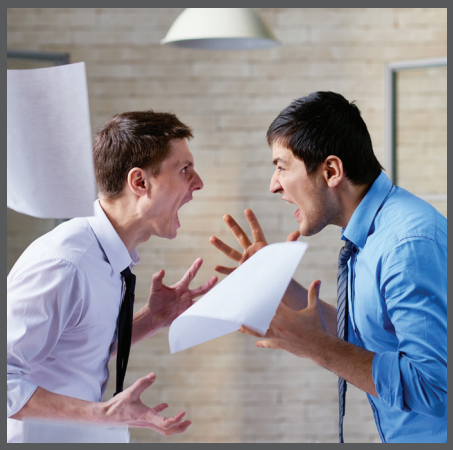
The cross-complaint improperly named MCC alleging that MCC was a servicer of the loan and an agent of the lender. Neither allegation was true. In the negotiations leading up to the lawsuit, SNG's lawyers had written MCC to make such allegations and MCC's lawyers explained to SNG that MCC was not involved in any capacity with the loan or the lender. So, when SNG filed the cross-complaint, SNG and its lawyers were on notice that its claims against MCC were baseless. After receiving the cross-complaint, MCC's lawyers again notified SNG that it had named an improper party. SNG and its lawyers ignored the warnings and proceeded with case. Several months later SNG and the lender settled on terms that excluded MCC and so SNG's cross-complaint against MCC continued. However, a few months later, SNG filed a dismissal of its cross-complaint against MCC without prejudice. MCC then filed its complaint for malicious prosecution against SNG and its president. After the trial court ruled that MCC could bring the malicious prosecution lawsuit, SNG appealed.

The Court of Appeal also ruled in MCC favor, noting "when the [underlying] proceeding terminates other than on the merits, the court must examine the reasons for termination to see if the disposition reflects the opinion of the court of the prosecuting party that the action would not succeed." The opinion of the court might be found from unfavorable rulings on prior motions in the underlying case. The opinion of the prosecuting party is often a factual dispute, but in this case SNG failed to show that it dismissed the cross-complaint against MCC for any valid reason, such as an economic burden.

With respect to the other elements of a malicious prosecution claim, the Court of Appeal noted that SNG's lawyers presented no evidence they did anything to research the allegations against MCC, and this degree of indifference could infer malice. So too, was the fact that SNG and its lawyers were notified no fewer than four times that MCC was the wrong entity to sue. As a result, SNG, its president, and potentially SNG's lawyers are all exposed to a substantial new lawsuit for malicious prosecution.

If you have questions about any of the issues discussed in this article, please contact Alton Burkhalter at aburkhalter@bkcglaw.com or at 949-975-7500.

Civility in Litigation



A party involved in litigation should always keep its sights set on the end goal – a good result – instead of continuing the behavior that brought it into litigation. After all, the purpose of litigation is to find a legal solution to a dispute that parties have not solved through other means. Too often, parties are not able to resolve their problems through non-legal means because the disputes are contentious and stir up emotion in even the most stoic characters. When all else fails, many turn to attorneys and resort to potentially costly litigation. But that is also why litigants must remain civil and allow the process to take them towards a solution. Repeating the pre-litigation behavior is not only counter-productive but can also be extremely damaging to one's claims or defenses.

Indeed, just because one is involved in litigation, he or she should not assume "the writing is on the wall"– or, in other words, that the facts of his or her case have crystallized and that the case is "what it is." Thinking this way can foster a combative and ineffective litigation environment that can either take away from the good result a plaintiff is after– or the limited exposure a defendant is after. By taking matters into one's hands, the plaintiff can diminish the value of his or her case, and the defendant can create new facts that the plaintiff can use against him or her. Ironically, by acting outside litigation with combative behavior, the accuser can become the accused, i.e., the plaintiff can become the subject of a counter-claim by the defendant.

There is a simple way to avoid these pitfalls: KEEP LITIGATION CIVIL! If you're wondering how, look no further, and follow some simple guidelines:

- Only communicate with the opposing side through your counsel;
- If you have to communicate with or run into the other side in any setting, discuss the issues with your counsel and come up with a plan to keep your hands clean during the encounter(s);
- Do not independently try to gather evidence or investigate your case, i.e., speak to witnesses without your counsel;
- If you are tempted to act outside litigation, ask yourself whether the act benefits your case. If the answer is anything but a confident "yes," do not take action-and if you don't know, ask your counsel; and
- When making substantial decisions about your case, always ask yourself a simple question: how does this decision to act or not act help or hurt my case? If you don't know the answer, ask your counsel – that is why you have counsel.

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

California Appellate Court Deals Blow To Internet Anonymity

Last month, a California Court of Appeal delivered its decision in a pivotal lawsuit about anonymous speech online. In *Yelp, Inc. v. Superior Court* (Case No. G054358), the Court of Appeal held that Yelp must disclose documents that could identify an anonymous user who was accused of defaming an accountant in a review posted on the Yelp website.

In 2016, a tax preparer named Gregory Montagna accused a Yelp user with the moniker, "Alex M.", of defamation for an online review in which the user wrote: "Too bad there is no zero star option! I made the mistake of using them and had an absolute nightmare. Bill was way more than their quote; return was so sloppy I had another firm redo it and my return more than doubled. If you dare to complain get ready to be screamed at, verbally harassed and threatened with legal action."

Montagna believed that "Alex M." was a woman named Sandra Nunis, and he filed a lawsuit against her for trade libel. Montagna contended that in order to prove defamation, he had to know for certain who made the defamatory statements, and therefore he served a subpoena on Yelp seeking the production of documents and electronic data concerning the review in question. Yelp objected on the ground that it had a demonstrable business interest in making its users feel comfortable in stating whatever opinions they believed, anonymously. Many other online companies, including Twitter, Reddit, Dropbox, and Google supported Yelp's position and contended that they must assert the rights of their users in court to deter frivolous efforts to unmask speakers and uphold "their own platforms' views on the importance of free speech. They also seek to make their platforms hospitable to important speech that may only be offered under the veil of anonymity." The online companies raised valid points – not only would it be burdensome to constantly comply with every request for de-anonymizing a user who might be making a false statement, but if the online community does not feel comfortable being honest, they will stop contributing to the platform.

Unfortunately for Yelp and other online platforms, the Court of Appeal rejected their arguments and upheld the lower court's order requiring Yelp to produce the requested information. However, there is a silver lining for these platforms because the court expressly recognized that platforms like Yelp can assert First Amendment rights on behalf of their users. Here, the court ruled that Montagna had provided sufficient evidence that the review was defamatory until proven otherwise, "Alex M." would have to establish the truth of that review.

Although there is the risk that this ruling will be applied across the board, the appellate court did rely on case law stating that the court must resolve, on a case-by-case basis, whether there is "a conflict between a plaintiff's right to employ the judicial process to discover the identity of an allegedly libelous speaker and the speaker's First Amendment rights to remain anonymous." For those participating in these online communities, the best practice going forward, as always, is to keep your comments honest and truthful.

If you have questions about any of the issues discussed in this article, please contact Michael Oberbeck at moberbeck@bkcglaw.com or at 949-975-7500.

INTRODUCING THE NEWEST BKCG TEAM MEMBER

Keith E. Butler joins BKCG's Irvine, California office as a Senior Litigation Associate and brings a wealth of experience to the office. Keith spent a number of years representing corporate clients including the representation of insurance companies where he litigated commercial first party property disputes. Keith has also represented municipal clients where he litigated real estate, eminent domain, and construction defect cases in both state and federal court. Prior to entering private practice, Keith was an Assistant State's Attorney for Cook County, Illinois. Keith is admitted to practice law in California, Illinois, and Georgia. He is also admitted in all districts for the U.S. District Court of California as well as the U.S. District Court for the Northern District of Illinois. Keith received his J.D. from Emory University School of Law and his undergraduate degree from the University of Colorado, Boulder.

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