

Case ALERT

ORTHOPEDIC SYSTEMS V. SCHLEIN

2011 Cal. App.
LEXIS 1646 (Cal. Ct. App. Dec. 29, 2011)

Overview

On December 29, 2011, the California Court of Appeal ruled in the case of *Orthopedic Systems v. Schlein*, 2011 Cal. App. LEXIS 1646 (Cal. Ct. App. Dec. 29, 2011) that California's right of publicity statute, Civil Code section 3344, permits an injured party to recover actual damages as well as any profits from the unauthorized use of one's name/likeness that are attributable to such use, and not taken into account in calculating actual damages. In reaching its decision, the Court of Appeal acknowledged the ambiguity in the statute's damages provision as to whether a court can award profits when there is no finding of actual damages beyond the statutory minimum of \$750. The Court resolved this issue in no uncertain terms, and affirmed that disgorgement of profits is an available remedy under section 3344 even if no actual damages are proven past the statutory minimum.

Detailed Summary

The Orthopedic Systems case involved claims for breach of contract and violation of section 3344 by surgeon Dr. Schlein against Orthopedic Systems, Inc. ("OSI"), a manufacturer of orthopedic products that sold medical devices created in part by Dr. Schlein, and which bore his name. The jury found that Dr. Schlein and OSI had entered into a contract that required OSI to pay royalties to Schlein for the sale of the device he helped develop, and that OSI breached that contract when it ceased payment of royalties. In addition, the jury found in favor of Dr. Schlein on his right of publicity claims, and determined that Dr. Schlein suffered damages in the amount of \$750 (the minimum damage award set forth in section 3344) for OSI's improper use of his name. The jury also specified on the verdict form that OSI's profits attributable to its use of Schlein's name amounted to \$1,220,000.

However, the trial court excluded an award of OSI's profits in the judgment. Instead, the court entered judgment awarding Schlein only the breach of contract damages (which the jury

found to be \$616,043), and the \$750 in statutory damages in connection with his right of publicity claims. Dr. Schlein appealed the trial court judgment, arguing that the court erred in its refusal to award him the \$1,220,000 in profits that the jury found were attributable to use of his name.

On appeal, OSI argued that section 3344 should be interpreted to exclude an award of profits when there is no finding of actual damages beyond the statutory minimum of \$750. The Court of Appeal declined to adopt OSI's interpretation and agreed with Dr. Schlein. Accordingly, it modified the judgment to include the \$1,220,000 award of profits. In construing the right of publicity statute, the Court of Appeal determined that the California legislature could not have intended to limit the \$750 minimum award set forth in section 3344 as an alternative to all other types of damages including profits. As the Court explained, "If someone profits from the unauthorized use of another's name, it makes little sense to preclude the injured party from recouping those profits because he or she is entitled to statutory damages as opposed to actual damages."

Thus, the Court of Appeal held that under section 3344, an injured party may recover either the amount of damages specified by the statute (\$750) or actual damages, whichever is greater, in addition to profits from the unauthorized use.

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