April 2019

Newcases of Business Litigation Interest

Orange County Bar Association • Business Litigation Section

*Todd E. Lundell**
Jenny Hua
Snell & Wilmer L.L.P.

STATE

Anti-SLAPP Statute—Second Prong/Probability of Success—Admissible Evidence

In *Sweetwater Union High School Dist. v. Gilbane Bldg. Co.*, 6 Cal.5th 931 (2019), the Supreme Court addressed the evidence a court may consider in ruling on an anti-SLAPP motion. First, the anti-SLAPP statute provides the court "shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." § 425.16(b)(2). The Supreme Court held that a court may also consider "statements that are the equivalent of affidavits and declarations because they were made under oath or penalty of perjury in California." Thus, the trial court properly considered plea forms and grand jury testimony, even though that evidence was hearsay and not in the form of an affidavit. Second, courts have held that evidence in connection with an anti-SLAPP motion must be admissible at trial. The Supreme Court clarified this only requires a showing that "it is reasonably possible" the evidence would be admissible. The court recognized that "[i]t may not be possible at the hearing to lay a foundation for trial admission," but held that "[t]o strike a complaint for failure to meet evidentiary obstacles that may be overcome at trial would not serve the SLAPP Act's protective purposes."

Anti-SLAPP Statute—First Prong/Action Based on Protected Conduct and Speech

In *Rand Resources, LLC v. City of Carson*, 6 Cal.5th 610 (2019), the California Supreme Court was compelled yet again to clarify the limited scope of the anti-SLAPP statute. Rand sued the City of Carson, its mayor, and a rival land

* Certified Specialist, Appellate Law
The State Bar Board of Legal Specialization

developer after the City replaced Rand as its agent in negotiating with the NFL over a stadium deal. Defendants moved to strike certain causes of action claiming they were based on protected statements made in connection with the City Council's decision not to renew Rand's contract. On review, the Supreme Court first clarified the scope of conduct protected by the anti-SLAPP statute. Section 425.16(e)(2), for example, protects communications "made in connection with an issue under consideration or review by a legislative body." The communications on which Rand based its claims were not protected, however, because they either occurred before the issue came under consideration by the legislative body or were tangential to the issue under consideration. Similarly, while the anti-SLAPP statute protects "speech in connection with a public issue or an issue of public interest" (§ 425.16(e)(4)), and while the building of an NFL stadium in the city of Carson was a matter of public interest, Rand's allegations concerned only the narrow issue of *who* should represent the city in negotiations with the NFL. The Supreme Court also emphasized that the anti-SLAPP statute only applies when the defendant shows that protected conduct *itself* supplies an element of the challenged cause of action. While the anti-SLAPP statute must be read broadly, it does not "swallow a person's every contact with government, nor does it absorb every commercial dispute that happens to touch on the public interest."

Appeals—Recoverable Costs—Appellate Bonds as Reasonable and Necessary Cost

A prevailing party may recover the cost to obtain a bond to stay enforcement of a money judgment if the cost is reasonable. Rule 8.278(d)(1)(F). Can the cost of a bond be reasonable even if the prevailing party had a less expensive option? Yes. *Rostack Investments, Inc. v. Sabella*, 32 Cal.App.5th 70 (2019). There, Sabella prevailed on appeal against Rostack and was awarded costs as the prevailing party. Sabella sought to recover approximately $1.4 million in costs related to her bond, which was secured by a letter of credit. Rostack moved to tax on the basis that the cost was not reasonable because Sabella had sufficient assets to secure a bond with cash, which was a less expensive alternative. The court of appeal rejected Rostack's position because the "mere fact that an alternative procedure, which would have been less expensive, was available does not mandate that the option chosen was unreasonable or unnecessary." Substantial evidence supported the trial

court's finding that the cost was reasonable because there was conflicting evidence on whether Sabella needed to liquidate her assets to obtain the cash-collateralized bond. The court of appeal also held, in a matter of first impression, that it may consider the party's lost opportunity costs in determining whether costs incurred were reasonable.

Arbitration—Parent Company Bound to Subsidiary's Arbitration Agreement

It is well-recognized that nonsignatories may be bound to an arbitration agreement under an agency theory. Surprisingly, *Cohen v. TNP 2008 Participating Notes Program, LLC*, 31 Cal.App.5th 840 (2019), appears to be the first published California decision to address whether a parent company may be compelled to arbitrate claims based on an arbitration agreement signed by its subsidiary. Adopting standards set by a Third Circuit decision, the court of appeal held that a parent company was bound to its subsidiary's arbitration agreement where "(a) the parent controlled the subsidiary to such an extent that the subsidiary was a mere agent or instrumentality of the parent and (b) the claims against the parent arose out of the agency relationship." These "exacting" standards were necessary to ensure equity in binding the parent company to an agreement it did not sign.

Litigation—Class Actions—Tolling for Individual, but not Class Claims

It has long been recognized that the filing of a class action complaint tolls the statute of limitations as to the individual claims of all putative class members until class certification is denied. This tolling is referred to as "*American Pipe* tolling" after the decision in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974). Does *American Pipe* tolling also apply to potential class claims so that a putative class member could bring a new class action complaint after the limitations period expired? In *Fierro v. Landry's Restaurant Inc.*, 32 Cal.App.5th 276 (2019), the Fourth District, Division One, held "no." The court followed the United States Supreme Court's recent decision in *China Agritech, Inc. v. Resh*, 138 S.Ct. 1800 (2018), which held that concerns regarding "efficiency and economy of litigation" that supported tolling of individual claims did not support tolling the limitations period for class claims. The court of appeal in *Fierro* reasoned that applying a similar rule "will not result in unfairness under California law and will contribute to a more efficient and economical class action procedure." As the *Fierro* decision conflicts with an earlier Second District decision, which predated

China Agritech, this issue may ultimately need to be resolved by the California Supreme Court.

Litigation—Section 473 Relief—Voluntary Dismissal

In *Jackson v. Kaiser Foundation Hospitals, Inc.*, 32 Cal.App.5th 166 (2019), the court of appeal held that mandatory relief under CCP Section 473(b) from a "default judgment or dismissal" caused by an "attorney's mistake, inadvertence, surprise, or neglect" is not available where a plaintiff voluntarily dismissed her complaint. There, plaintiff filed a complaint in pro per, which she later voluntarily dismissed on the advice of counsel, who told her she could refile within approximately six months. The attorney later informed plaintiff he was mistaken, and the statute of limitation actually expired before her voluntary dismissal. The attorney thus filed a motion seeking relief from the voluntary dismissal under section 473(b), which the trial court denied and the court of appeal affirmed. The court of appeal held that "the mandatory relief provision reaches only those dismissals that are procedurally equivalent to a default." (Internal quotation marks omitted). The court noted that Section 473(b) was not intended "to be a catch-all remedy for every case of poor judgment on the part of counsel which results in dismissal." (Internal quotation marks omitted).

Litigation—Section 998 Offers—No Independent Right to Attorney Fees

Section 998 offers often designate the plaintiff as the prevailing party and provide that the plaintiff may seek attorney fees allowed by law. In *Linton v. County of Contra Costa*, 31 Cal.App.5th 628 (2019), the court of appeal rejected plaintiff's assertion that this language provided her with an independent right to attorney fees. The court first held plaintiff was not entitled to costs for her statutory claims under the Unruh Act and the Disabled Person Act because both statutes require a finding of liability before the court can award attorney fees. The court held that neither the settlement nor her designation as prevailing party amounted to a finding of liability. Finally, the court of appeal warned that, "a party bringing an action under a statute . . . that requires a judicial determination of liability before that party may recover attorney fees should proceed with caution when using Judicial Council form CIV-090 to make a section 998 offer." To recover fees under those circumstances, a plaintiff would have to supplement the form language to make clear that she was entitled to fees without a judicial determination of liability.