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Newcases of BUSINESS LITIGATION INTEREST

Orange County Bar Association • Business Litigation Section

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Arbitration—Waiver of Representative Claims—Non-Severability Provision

The decision in *Kec v. Superior Court of Orange County*, 51 Cal.App.5th 972 (2020) serves as a warning about including broad non-severability language in an arbitration agreement. The arbitration agreement there included a waiver of all representative actions, which indisputably was broad enough to cover a PAGA claim. While it is now well established that a predispute PAGA waiver is invalid, courts generally will sever that single provision and enforce the broader agreement to arbitrate the remaining claims. But the agreement in *Kec* also included language stating the provision containing the waiver of representative actions "may not be modified or severed from this Agreement for any reason." The court of appeal held this language must be enforced, and rejected defendants' interpretation that would have allowed "trial of individual claims in arbitration, and a representative claim in court." "Plaintiff is entitled to pursue her PAGA claim, and because that claim is not arbitrable . . . , the entire dispute must remain in court."

Litigation—Anti-SLAPP Statute—Entitlement to Ruling on Merits

The decision in *Sandlin v. McLaughlin*, 50 Cal.App.5th 805 (2020) is a good reminder that when a defendant files an anti-SLAPP motion, the trial court must decide that motion even if the court resolves the underlying action on the merits. Sandlin filed a petition for writ of mandate challenging the candidate statements submitted by Real Parties in Interest for Irvine City Council. Real Parties filed

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an anti-SLAPP motion, but while that motion was pending, the trial court denied the writ petition on the merits. The trial court then denied the anti-SLAPP motion as moot. The court of appeal reversed, holding that even when the underlying dispute has been resolved, defendants are entitled to a ruling on the anti-SLAPP motion, which carries with it the possibility of an award of attorneys' fees. "If a writ petitioner files a meritless SLAPP petition, he should not be permitted to avoid the anti-SLAPP statute's attorney fee provision simply because the trail court resolves the writ petition first. A contrary rule would nullify the anti-SLAPP statute's fee provision."

Litigation—Class Actions—Absent Member Not Barred by Previous Action Where Class Decertified

An order denying certification of a proposed class does not preclude an absent member from seeking to certify an identical class in a second action. In *Williams v. U.S. Bancorp Investments, Inc.*, 50 Cal.App.5th 111 (2020), the court tackled a related matter of first impression—whether collateral estoppel bars an absent member in a putative class that was first certified, but later decertified, from pursuing an identical class action. The court held "no," reasoning: (1) absent class members in the earlier action were not "parties" for purposes of preclusion; (2) the absent member was not adequately represented by class counsel in litigating whether the earlier class was properly certified because the trial court's final judgment was to decertify the class based on the lack of commonality. The dissent disagreed, reasoning that at the time the decertification was argued in the earlier action, the class was certified, and class counsel had been found to adequately represent the interests of all class members. Also interesting in *Williams* was the court's threshold decision that the trial court's order compelling plaintiff to arbitration was immediately appealable. Generally, orders denying a motion to compel arbitration are immediately appealable while orders granting such motions are not. But under the death knell doctrine, an order allowing a plaintiff to pursue individual claims, but preventing plaintiff from maintaining the claims as a class action is immediately appealable because it "effectively r[ings] the death knell for the class claims." Because Williams was the only named plaintiff, the court reasoned the order compelling arbitration effectively terminated the class action.

Litigation—Costs—Entitlement to Costs for Exhibits Not Used at Trial

Courts of appeal are split regarding whether costs related to exhibits *not used at trial* are recoverable under section 1033.5(a)(13), which gives the trial court discretion to award costs for exhibits "if they were reasonably helpful to aid the trier of fact." In *Segal v. Asics America Corporation*, 50 Cal.App.5th 659 (2020), the Second District, Division Four, took a "pragmatic" view of the statute to hold that such costs are recoverable. According to the court, "[t]he meaning of the phrase 'reasonably helpful to the trier of fact' is broader than the limited notion of helpfulness in the specific task of finding facts, and encompasses as well the more general concept of helpfulness in the form of efficiency in the trial in which the trier of fact is asked to perform that task." To facilitate an efficient trial, exhibits and demonstratives must be prepared well in advance of trial, and many court rules require counsel to pre-mark the exhibits and prepare multiple binders for use during trial. "Even if the binders contain exhibits never offered or admitted at trial, their preparation facilitates trial proceedings and helps avoid wasting the jurors' time." Those costs are, therefore, recoverable.

Litigation—Evidence—Company Logo and Name Not Hearsay

In *Hart v. Keenan Properties, Inc.*, 9 Cal.5th 442 (2020), the Supreme Court granted review to determine whether a company's name and logo on an invoice constitutes hearsay. After he developed mesothelioma, Frank Hart and his wife sued Keenan Properties, Inc. and other entities involved in distributing pipes containing asbestos. At trial, Hart had to show defendant Keenan was the source of pipes he installed in the 1970s. Keenan Pipe and Supply was a wholesale distributor of asbestos-cement pipe between 1965 and 1983. It changed its name in 1977 to Keenan Supply, but retained its distinctive logo, which was the letter "K" drawn to resemble a straight pipe and an angled pipe, enclosed in a circle. There were no sales records from this period, but Keenan's representative acknowledged what appeared to be a copy of a Keenan invoice, which bore Keenan's name and logo. Hart's former supervisor, Glaumuzina, recalled seeing the "Keenan" name and logo on invoices. The trial court denied Keenan's motion to exclude references to Keenan invoices on hearsay grounds, and the jury found Keenan liable and awarded Hart over $1.6 million. The court of appeal reversed, concluding Glaumuzina's descriptions of the invoice were hearsay. The Supreme Court reversed the

court of appeal, agreeing with the trial court's conclusion that Glaumuzina's observations were circumstantial evidence of Keenan's identity as the source of the pipes, and therefore not hearsay. The court explained "the link between the word 'Keenan' and the pipes does not depend on the word 'Keenan' being a true statement that Keenan supplied the pipes. Instead, the link relies on several circumstances demonstrated by the evidence, [which] was relevant to prove the disputed link between Keenan and the pipes, regardless of the content the words on the invoice might otherwise have asserted."

Litigation—SLAPP Suits—No 21-Day Safe Harbor

In order to recover costs and attorneys' fees, a plaintiff who defeats an anti-SLAPP motion must show the motion was "frivolous or [] solely intended to cause unnecessary delay." CCP 425.16(c)(1). Upon such showing, the trial court "shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5." *Ibid*. But must a plaintiff comply with the 21-day safe harbor provided by section 128.5? In *Changsha Metro Grp. Co. v. Peng Xufeng*, 49 Cal.App.5th 173 (2020), the court answered "no," finding the provision "contradicts the goals of the anti-SLAPP statute." The court held that section 128.5 provides two procedures for an award of attorneys' fees: (1) request attorneys' fees as "expenses" in moving or opposing papers and allow an opportunity to respond as provided by subsections (a) and (c) or (2) after obtaining attorneys' fees as "expenses" under subsection (a), request a sanction of attorneys' fees by filing a separate motion and providing a 21-day safe harbor under subsection (f). The *Changsha* court concluded the procedure set forth in subsections (a) and (c) is the "only practical procedure to apply in the anti-SLAPP context," where the motion must be filed within 60 days of service of the complaint and the hearing must be held no more than 30 days after service of the motion. Holding otherwise would force a plaintiff to choose between lengthening the anti-SLAPP process by obtaining a continuance for the motion or risking needless expense by drafting an opposition during the safe harbor period, both of which contradict the anti-SLAPP goals of ending SLAPP cases quickly and with minimal expense.