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Newcases of BUSINESS LITIGATION INTEREST

Orange County Bar Association • Business Litigation Section

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Litigation—998 Offer—Application in FEHA Cases.

In *Huerta v. Kava Holdings, Inc.*, 29 Cal.App.5th 74 (2018), the court of appeal found that pursuant to an amendment to the Fair Employment and Housing Act (see Gov. Code § 12965(b)), the cost-shifting provisions in Code Civ. Proc. section 998 have no application in a FEHA action unless the lawsuit is found to be "frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigate after it clearly became so." The court further held the rule to retroactively apply to cases that predate the amendment.

Litigation—Appealability of Cost Order After Voluntary Dismissal Without Prejudice

In *Gassner v. Stasa*, 30 Cal.App.5th 346 (2018), the Fourth District, Division Two, recognized "a split in authority as to whether an order either allowing or taxing costs (costs order) is appealable when it is made after a voluntary dismissal without prejudice." The court sided with the authority holding that such an order is appealable. Notably, a costs order is ordinarily separately appealable as an order after final judgment under Code Civ. Proc. section 904.1(a)(2). But a voluntary dismissal without prejudice is not itself a judgment; therefore, "a costs order following a voluntary dismissal by the clerk without prejudice is not appealable as a postjudgment order . . . ." Moreover, such an order "cannot be reviewed in an appeal from some subsequent final judgment." According to the court of appeal in *Gassner*, however, such a costs order should be considered an appealable final judgment because it is a

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"final determination" of the parties' only remaining rights in the litigation.

Litigation—Appealability of Postjudgment Discovery Orders in Enforcement Proceedings

In *Finance Holding Co., LLC v. The American Institute of Certified Tax Coaches*, 29 Cal.App.5th 663 (2018), the Fourth District, Division One, addressed an issue that has vexed the courts of appeal—whether a postjudgment discovery order made in judgment enforcement proceedings is appealable. Although Code Civ. Proc. section 904.1(a)(2) provides that an order made after an appealable judgment is itself appealable, the Supreme Court has made clear that a postjudgment order is only appealable if, among other things, it reflects a final determination of the parties' rights. In *Finance Holding*, the trial court issued a broad discovery order against a third party (the judgment debtor's employer), who promptly appealed. The judgment creditor argued that the order was not final, and therefore not appealable, because the trial court may be required to issue further, related discovery orders. The court of appeal disagreed. The court concluded that "the key test for finality of a third party discovery order in enforcement proceedings is whether the challenged order reflects a final determination of the rights or obligations of the parties or whether it contains language showing it is preparatory to a later ruling that will be embodied in an appealable judgment or order." Under that test, the discovery order was final. "[T]he fact there may be additional orders relating to the enforcement or scope of the required document production does not mean this discovery order is not a 'final' appealable order."

Litigation—Class Actions—Five-Year Statute

The decision in *Warner Bros. Entertainment, Inc. v. Superior Court*, 29 Cal.App.5th 243 (2018) is a good reminder that "absent compelling justification, a class action must be dismissed under the five-year statute if the class issues are not decided with enough time for notice to the class and a minimally reasonable period for class members to exercise their options before trial begins." There, plaintiffs filed a class action complaint alleging that Warner Brothers failed to properly account for income derived from distribution of home videos. Six days before the five-year statute expired, the trial court granted plaintiffs' motion for trial preference and set the case for immediate trial despite that, among other things, plaintiffs' motion for class certification had not yet been decided. The court of appeal issued a writ of mandate directing the trial

court to reverse its order granting trial preference and to dismiss the action. The court of appeal explained that "[n]otification to class members with a reasonable time to exercise their options, before expiration of the five-year period, was plainly an impossibility." Moreover, although a trial court may, under limited circumstances, begin a trial and then immediately postpone it to avoid an "unjust" application of the five-year statute—e.g., where the case is prevented from going to trial because no courtroom is available due to docket overcrowding—there was no justification for doing so here because the plaintiffs had not been diligent in pursuing their class claims.

Litigation—Damages—Admissibility of Evidence.

The decision in *Copenbarger v. Morris Cerullo World Evangelism, Inc.*, 29 Cal.App.5th 1 (2018) serves as a warning that evidence supporting each element of a cause of action must be properly authenticated and admitted. There, Maag Trust obtained a judgment against Morris Cerullo World Evangelism, Inc. (MCWE) for breaching a settlement agreement that required it to dismiss an underlying unlawful detainer action. On appeal, MCWE did not challenge its liability, but argued that (i) Maag Trust could not recover its attorneys' fees in the unlawful detainer action as damages, and (ii) the evidence was not sufficient to support the damages. On the first contention, the court of appeal opined that "it appears to us attorney fees may be recovered as damages for breach of contract," but ultimately declined to decide that issue. Instead, the court reversed the judgment because Maag Trust failed to prove its damages. The court noted that Maag Trust: (1) did not authenticate its attorney invoices as business records or admit them into evidence and (2) did not present testimony of the attorneys' billing rates or scope of work in the unlawful detainer action. Instead, Maag Trust relied solely on its trustee, who based his testimony on the attorney invoices he received. This drew hearsay and secondary evidence rule objections from MCWE's trial attorney, which the trial court overruled. The court of appeal reversed. Because the trustee acknowledged that he did not know what the Maag Trust's attorneys did in the unlawful detainer action, and otherwise failed to lay a foundation for the invoices, the court of appeal held that the judgment was unsupported by any admissible evidence of damages.

Litigation—Default Judgment—Trial Court's Rule as Gatekeeper.

In *Grappo v. McMills,* 11 Cal.App.5th 996 (2017), the court of appeal "remind[ed] trial courts that however burdened they be, they must vigilantly attend to their duty in connection with the default process," and must "act as a gatekeeper, ensuring that only the appropriate claims get through." (Citations omitted). There, the complaint filed by pro se plaintiff Donald Grappo suffered from a number of deficiencies. The complaint, among other things, did not name or describe or identify any of the defendants, did not describe plaintiff's connection or relationship with any of the defendants, and did not properly plead any cause of action. The complaint was served on, among others, Ken McKean of McKean & McMills LP. Following McKean's death, the trial court granted a default judgment against McKean and his law firm based on Grappo's declaration stating that $60,000 worth of his property had been removed from a garage and destroyed. Although it was never served with notice of the default judgment, the trustee of McKean's estate learned of the judgment and successfully moved to vacate it. Grappo appealed. The court of appeal not only affirmed the trial court's order vacating the default judgment, but further chastised the trial court for entering default judgment in the first place given the glaring deficiencies in Grappo's complaint. Almost as interesting, the lengthy dissent would have upheld the judgment because the trustee waited six months to file a motion to vacate despite having discovered the default judgment before it was made final.