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

STATE

Anti-SLAPP—Catchall Provision—Context of Speech Relevant

In *FilmOn.com Inc. v. DoubleVerify Inc.*, 7 Cal.5th 133 (2019), the Supreme Court again sought to curb an overly broad interpretation of the anti-SLAPP statute by holding the *context* of a statement—including its commercial nature and the identity of the speaker and audience—is relevant to determine whether the statement was made "in furtherance" of free speech "in connection with" a public issue. CCP § 425.16(e)(4). The Supreme Court reversed the court of appeal, which held the analysis should be limited to the *content* of the statement. The Supreme Court recognized that defendants can almost always draw a line, "'however tenuous,' connecting their speech to an abstract issue of public interest." But a tenuous connection is insufficient; the challenged speech must "contribute to the public debate." The court thus found that reports generated for profit and exchanged confidentially that were not part of a larger public discussion do not qualify for anti-SLAPP protection even where the topic discussed is one of public interest.

Arbitration—Arbitrator's Authority to Award Section 998 Costs

Heimlich v. Shivji, 7 Cal.5th 350 (2019) contains an important discussion of the scope of an arbitrator's authority after issuing a final award and the scope of review where the arbitrator erroneously believes he has no authority to act. *Heimlich* concerned an arbitrator's authority to grant a motion for section 998 costs that was filed after the final award. The Supreme Court held that

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

when the legislature amended section 998 in 1997 to encompass arbitrations, "it sought to place parties in arbitration on equal footing with parties to civil actions." Thus, "[t]he arbitrator has implicit power under section 998 to consider" a cost motion timely filed under that statute—i.e., within 15 days after issuance of a final award. The Court rejected plaintiff's argument that issuance of the final award deprived the arbitrator of jurisdiction, holding "the rule that issuance of a final award terminates an arbitrator's power is not so rigid." Nonetheless, the Supreme Court held the court of appeal erred in vacating the award. Although the arbitrator refused to consider defendant's request for costs, believing he lacked jurisdiction to do so, that conclusion was a legal error that cannot be reviewed by the court. The Supreme Court rejected defendant's argument that the arbitrator's refusal to consider the cost motion amounted to a refusal to hear evidence. "There is a difference between a legal conclusion that jurisdiction is lacking and an arbitrary refusal to hear relevant evidence on an issue properly before the arbitrator," and only the latter is reviewable by the courts.

Arbitration—Mandatory Fee Arbitration Act ("MFAA")—Denial of Motion to Compel Not Appealable

In *Levinson Arshonsky & Kurtz LLP v. Kim*, 35 Cal.App.5th 896 (2019), the court again emphasized it has no jurisdiction to review an order or judgment unless appellate jurisdiction is provided by statute. Under the Mandatory Fee Arbitration Act ("MFAA"), which governs attorney's fee disputes, arbitration is optional for the client, but mandatory for attorneys if properly initiated by the client. The question in *Levinson* was whether an order denying a client's motion to compel arbitration was appealable under the California Arbitration Act ("CAA"), which allows an appeal from "[a]n order dismissing or denying a petition to compel arbitration." CCP § 1294(a). The court answered "no," reasoning that the CAA and MFAA appear in different parts of the California code, provide different arbitration frameworks governed by different rules, and apply to distinct subject matters.

Business Organizations—Partnerships—Trust as Partner

Because a trust is not a person, but only a fiduciary relationship with respect to property, a trust cannot sue or be sued or otherwise act in its own name. But, can a trust be a partner in a general partnership under the Uniform Partnership Act? In *Han v. Hallberg*, 35 Cal.App.5th 621 (2019), the court answered "yes," expressly disagreeing

with the holding in *Presta v. Tepper*, 179 Cal.app.4th 909 (2009). In *Han,* with the consent of the other partners, Hallberg assigned his partnership interest to his living trust. When Hallberg died, litigation ensued over whether he was a partner at his death, triggering certain buyout rights. The court of appeal concluded that "Hallberg was not a partner when he died. His trust, or the trustee of his trust, was the partner." The court noted the UPA includes both a "business trust" and "trust" among the "person[s]" that may associate in a partnership. This plain statutory language "is reinforce by other provisions of the statute, as well as by its legislative history." Thus, the assignment of the partnership interest to the trust was valid, and the trust, not Hallberg, was thereafter the partner.

Collections—Nonjudicial Foreclosure—Recovery of Deficiency Judgment on Junior Lien

Under CCP section 580d, a creditor recovering debt through nonjudicial foreclosure cannot collect a deficiency judgment. In *Roseleaf Corp. v. Chierighino* (1963) 59 Cal.2d 35, 43, the Supreme Court held that section 580d does not preclude a deficiency judgment for a third-party junior lienholder. But where a single creditor holds two deeds of trust on the same property, can that creditor recover a deficiency judgment on the junior lien? Overruling a long line of decisions, the Supreme Court in *Black Sky Capital, LLC v. Cobb*, 7 Cal.5th 156 (2019) held "yes." The Court relied on the plain language of section 580d(a), which bars a deficiency judgment on a note secured by a deed of trust when the trustee has sold the property "under power of sale contained in *the* . . . deed of trust." (Emphasis added). The Court warned, however, against gamesmanship by creditors—where a creditor structures a single loan into separate notes to recover under the junior note, the two liens held by the same creditor may be treated as a single lien within the meaning of section 580d.

Litigation—Postjudgment Enforcement Costs

A motion for postjudgment enforcement costs under CCP section 685.080 must be brought before the judgment is "satisfied." In *Wertheim, LLC v. Currency Corp.*, 35 Cal.App.5th 1124 (2019), the court held a judgment is not satisfied for purposes of this statute until the creditor is actually paid. The issue arose because, after a judgment against it was affirmed on appeal, Currency Corp. blocked payment of the bond money that had been used to stay the judgment. The bond issuer deposited the money with the trial court, and the parties litigated their respective rights

to the funds. During that litigation, Wertheim moved for postjudgment enforcement costs, which the trial court denied on the ground that the bond issuer's deposit of the money with the court satisfied the judgment before Wertheim's motion was filed. The court of appeal reversed. The court recognized that depositing the money was a "satisfaction" of the judgment stopping the accrual of interest under section 685.030, but the court refused to apply that definition to the statute governing postjudgment motions for costs. Rather, "[a] judgment is not satisfied for purposes of postjudgment motions until the judgment creditor has been paid."

Litigation—Set Aside Default Judgments—Civility

In *Lasalle v. Vogel*, 36 Cal.App.5th 127 (2019), Justice Bedsworth gives an epic discourse on civility and cooperation between parties and counsel. There, plaintiff Lasalle sued attorney Vogel for malpractice. Shortly after the time for filing a responsive pleading had run, Lasalle's attorney sent an email threatening to obtain a default if Vogel did not file the responsive pleading by close of business the next day (Friday). Following through on that threat, Lasalle requested entry of default the following business day (Monday). Vogel promptly filed a motion to set aside the default, which the trial court denied. The court of appeal reversed. Quoting CCP section 583.130, the court noted "[t]he policy of the state is that the parties to a lawsuit 'shall cooperate.' Period. Full stop." In light of that policy and the "ethical obligation to warn opposing counsel of an intent to take a default," the court found problematic Lasalle's counsel's use of email to give the warning (a method the court viewed as "hardly distinguishable from stealth") and the unreasonably "short-fuse deadline" for Vogel to respond. "Quiet speed and unreasonable deadlines do not qualify as 'cooperation' and cannot be accepted by the courts." The court was "reluctant to come down too hard on respondent's counsel or the trial court because we think the problem is not so much a personal failure as a systemic one. Court and counsel below are merely indicative of the fact practitioners have become inured to this kind of practice." The court expressed its "hope" that next time counsel will act with "dignity, courtesy, and integrity" in cooperating to avoid an unnecessary default.

Litigation—Venue—Forum Non Conveniens

In *Global Financial Distributors Inc. v. Superior Court*, 35 Cal.App.5th 179 (2019), the court reconciled statutes governing motions to dismiss for forum non conveniens. CCP section 418.10 provides a defendant may file such a motion "on or before the last day of his or her time to plead," and failure to do so "at the time of filing a demurrer or motion to strike constitutes a waiver of the issue[] . . . of inconvenient forum." § 418.10(a), (e)(3). Section 410.30 also authorizes a forum non conveniens motion and provides "[t]he provisions of Section 418.10 do not apply to a motion to stay or dismiss the action by a defendant who has made a general appearance." § 410.30(a), (b). But "[h]ow can a party bring a motion under section 410.30 . . . if the moving party waived the issue under section 418.10 by making a general appearance?" After looking at the statutory history and taking into account practical concerns, the court of appeal reconciled this conflict by holding "[s]ection 418.10 applies before a defendant has made a general appearance" and "allows a defendant filing a motion to dismiss for lack of personal jurisdiction to file simultaneously a motion to stay or dismiss the action for inconvenient forum, without having the latter motion constitute a general appearance. Section 410.30 applies after a defendant has made a general appearance."