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District court has jurisdiction to review OMB’s denial of petition under Paperwork Reduction Act (N.R. Smith, J.)

Hyatt v. Office of Management and Budget

9th Cir.; November 15, 2018; 17-17101

The court of appeals reversed a district court judgment of dismissal and remanded. The court held that the district court had jurisdiction to review the denial of a petition under the Paperwork Reduction Act (PRA) by the Office of Management and Budget (OMB).

The Patent and Trademark Office (PTO) submitted a number of collections of information to the OMB, as required by the PRA. The submission included purported collections of information that had not previously been approved or assigned an OMB control number. The OMB did not approve or disapprove these purported collections of information. Instead, in July 2013, it affirmatively declared that these purported collections were “not subject to the PRA.” It did not issue a control number for the purported collections. The purported collections included the collection of information from patent claimant Gilbert Hyatt. Hyatt petitioned the OMB under 44 U.S.C. §3517(b), seeking a determination as to whether or not he needed to disclose the information sought in the purported collections, given that the PTO had not obtained an OMB control number, as required by §3507(a)(3). The OMB denied the petition, finding that the purported collections were not subject to the PRA.

Hyatt filed a complaint with the district court, challenging both the OMB’s July 2013 determination and its denial of his petition. The district court dismissed Hyatt’s complaint for lack of subject matter jurisdiction, finding (1) §3507(d)(6) precluded judicial review, (2) the challenged administrative actions did not constitute final agency actions, and (3) the OMB’s decision not to provide any remedial action in response to Hyatt’s petition was discretionary.

The court of appeals reversed, holding that the district court erred in finding a lack of subject matter jurisdiction. First, §3507(d)(6) precludes judicial review only of an OMB decision approving an agency’s collection of information. Here, the OMB concluded only that the purported collections fell outside the PRA. That determination was not a decision to approve a collection of information. The denial of Hyatt’s petition thus fell outside the scope of §3507(d)(6). Further, the denial of Hyatt’s petition constituted a final agency action that left him with no adequate remedy other than to seek judicial review. Finally, the OMB had a ministerial duty to respond to Hyatt’s petition. The denial of Hyatt’s petition was thus subject to judicial review.

Employment Litigation

Post-judgment award of §998 expert witness fees and costs not available to prevailing employer in non-frivolous FEHA action (Dunning, J.)

Huerta v. Kava Holdings, Inc.

C.A. 2nd; November 14, 2018; B277164

The Second Appellate District reversed a post-judgment order. In the published portion of its opinion, the court held that a post-judgment award of expert witness fees and costs under Code Civ. Proc. §998 is not available to a prevailing employer in a non-frivolous FEHA action.

After being terminated from his employment as a restaurant server, Felix Huerta sued employer Kava Holdings, Inc. for retaliation, discrimination, and related causes of action arising under the Fair Employment and Housing Act (FEHA). Judgment was rendered in favor of Kava. Finding that Huerta’s action was not frivolous, the trial court denied Kava’s motion for attorney fees, expert witness fees, and costs under Gov. Code §12965(b). Kava then moved for an award of costs and expert witness under §998, citing Huerta’s rejection of its pretrial settlement offer.

The trial court granted the motion, awarding Kava $50,000 in costs and expert witness fees.

The court of appeal reversed the trial court’s post-judgment order, finding that §998 did not apply. Echoing the reasoning of Arave v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (2018) 19 Cal.App.5th 525, the court found that because the Legislature has expressly pegged §998 to §1032(b), where §1032(b) does not apply, neither can §998. Thus, because §12965(b), which controls the award of costs in FEHA actions, overrides §1032(b) in non-frivolous actions, it necessarily also overrides §998.

Legal Malpractice

Notice of impending lawsuit sufficed to put plaintiff on notice of possible malpractice by prior attorneys (Elia, Acting P.J.)

Genisman v. Hopkins Carley

C.A. 6th; October 16, 2018; H042543

The Sixth Appellate District affirmed a judgment. The court held that notice that he was being sued sufficed to put plaintiff on notice that there might be a problem with transaction documents drafted by his prior attorneys.

In 2005, Robert Genisman retained law firm Hopkins Carley to represent him in the sale of his ownership interests in two private companies. In connection with the buyout, Genisman sought to be released from the personal guarantees he
had made to lenders, including Stanley Blumenfeld. Initial drafts of the transaction documents structured it as a buyout. At some point, Hopkins Carley revised the documents to restructure the transaction as a redemption, without notifying Genisman. Genisman signed the documents believing that he was authorizing a buyout. In March 2012, Blumenfeld threatened to sue Genisman for lying about the nature of the 2005 transaction. A few months later, Blumenfeld made good on his threat and filed suit. In October 2012, Genisman retained new counsel to represent him in that lawsuit. From October 17 through December 20, 2012, he incurred $2,475.40 in legal fees.

On December 31, 2013, Genisman sued Hopkins Carley for malpractice based on the law firm’s unauthorized restructure of the 2005 transaction as a redemption rather than a buyout. The trial court granted summary judgment to the law firm on statute of limitations grounds.

The court of appeal affirmed, holding that Genisman failed to file suit within one year of when he discovered or “through the use of reasonable diligence should have discovered” the law firm’s alleged wrongful act or omission. The undisputed facts compelled the conclusion that Genisman was on inquiry notice of his claim more than one year before his complaint was filed. On March 1, 2012, Genisman knew Blumenfeld was accusing him of misrepresenting the nature of the 2005 transaction. The March 2012 conversation with Blumenfeld and Blumenfeld’s subsequent lawsuit would have prompted a reasonable person to inquire into the structure of the transaction. Such inquiry would have led Genisman to discover the true nature of the transaction, which was the basis for his claim against Hopkins Carley. That Genisman did not believe Blumenfeld’s accusations was of no consequence. If a person becomes aware of facts which would make a reasonably prudent person suspicious, he or she has a duty to investigate further. In addition, the legal fees incurred by Genisman from October through December 2012 constituted “actual injury” suffered by him more than a year before filing suit. On this record, the trial court properly concluded that Genisman’s lawsuit was untimely.

The court of appeal granted Kohler’s writ petition, holding that plaintiffs’ claims were not eligible for certification as class actions. The court denied the motion as to plaintiffs’ Right To Repair Act claim. Kohler filed a petition for writ of mandate challenging that ruling.

The court of appeal granted Kohler’s writ petition, holding that plaintiffs’ Right To Repair Act claim could not be brought as a class action. The court found that class actions are permissible under the Act in one limited context only—to assert claims that address the incorporation into a residence of a defective component, unless that component is a product that is completely manufactured offsite. The purpose and legislative history of the Act supported this conclusion. One of the key goals of the act is to further the prompt resolution of disputes between homeowners and builders without litigation. Class actions would make prelitigation resolution of claims impossible. Even if the class representatives comply with the prelitigation process, thus giving the builder of their homes an opportunity to attempt to repair whatever defect is claimed as to their homes, the builders would have no such opportunity with respect to the unnamed class members. The exception to the class action bar is thus limited, and waives the prelitigation procedures for that limited category of claims only. Because the claim in this case involves allegedly defective products that were completely manufactured offsite, it did not fall within that category of claims that could be litigated a class action.

### Products Liability

**Homeowners may not bring class action under Right To Repair Act to assert claim regarding allegedly defective plumbing components** (Willhite, J.)

**Kohler Co. v. Superior Court (Park-Kim)**

C.A. 2nd; November 14, 2018; B288935

The Second Appellate District granted a petition for writ of mandate. The court held that homeowners could not bring a class action under the Right To Repair Act to assert a claim regarding allegedly defective plumbing components that were manufactured offsite prior to being installed in their homes.

Homeowners Joanna Park-Kim and Maria Ramos filed a putative class action against Kohler Co., asserting a claim, among others, under the Right To Repair Act. Plaintiffs alleged that Kohler’s “Rite-Temp Pressure Balancing Valves” and “Mixer Caps,” which were designed to regulate water flow and temperature in household plumbing, did not operate as intended due to their defective design and manufacturing, and were “corroding, failing, and/or will inevitably fail,” which had caused or would cause damage to other components of household plumbing lines or fixtures. Plaintiffs brought their action on behalf of themselves and all other owners of California residential dwellings in which these valves and mixer caps were installed during original construction.

Kohler sought a ruling that plaintiffs’ claims were not eligible for certification as class actions. The court denied the motion as to plaintiffs’ Right To Repair Act claim. Kohler filed a petition for writ of mandate challenging that ruling.

The court of appeal granted Kohler’s writ petition, holding that plaintiffs’ Right To Repair Act claim could not be brought as a class action. The court found that class actions are permissible under the Act in one limited context only—to assert claims that address the incorporation into a residence of a defective component, unless that component is a product that is completely manufactured offsite. The purpose and legislative history of the Act supported this conclusion. One of the key goals of the act is to further the prompt resolution of disputes between homeowners and builders without litigation. Class actions would make prelitigation resolution of claims impossible. Even if the class representatives comply with the prelitigation process, thus giving the builder of their homes an opportunity to attempt to repair whatever defect is claimed as to their homes, the builders would have no such opportunity with respect to the unnamed class members. The exception to the class action bar is thus limited, and waives the prelitigation procedures for that limited category of claims only. Because the claim in this case involves allegedly defective products that were completely manufactured offsite, it did not fall within that category of claims that could be litigated a class action.
Ninth Circuit Court of Appeals

Cite as 18 C.D.O.S. 10836

GILBERT P. HYATT; AMERICAN ASSOCIATION FOR EQUITABLE TREATMENT, INC., Plaintiffs-Appellants,
v.
OFFICE OF MANAGEMENT AND BUDGET; SHAUN DONOVAN, Defendants-Appellees.

No. 17-17101
United States Court of Appeals for the Ninth Circuit
D.C. No. 2:16-cv-01944-JAD-GWF
Appeal from the United States District Court for the District
of Nevada
Jennifer A. Dorsey, District Judge, Presiding
Argued and Submitted October 12, 2018
Seattle, Washington
Filed November 15, 2018
Before: N. Randy Smith and Morgan Christen, Circuit Judges,
and Robert E. Payne,* District Judge.

Opinion by Judge N.R. Smith

* The Honorable Robert E. Payne, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

COUNSEL

Andrew M. Grossman (argued) and Mark W. DeLaquil, BakerHostetler LLP, Washington, D.C., for Plaintiffs-Appellants.

Jennifer L. Utrecht (argued) and Mark R. Freeman, Appellate Staff; Chad A. Readler, Acting Assistant Attorney General; Civil Division, United States Department of Justice, Washington, D.C.; Mark R. Paoletta, General Counsel, Office of Management and Budget, Washington, D.C.; for Defendants-Appellees.

OPINION

N.R. Smith, Circuit Judge:

The Paperwork Reduction Act (“PRA”) authorizes individuals to petition the Office of Management and Budget (“OMB”) for a determination of whether they must provide information requested by or for a government agency. 44 U.S.C. § 3517(b). Where such a petition does not challenge an OMB decision “to approve or not act upon a collection of information contained in an agency rule,” see 44 U.S.C. § 3507(d)(6),1 the subsequent determination is subject to judicial review under the Administrative Procedure Act (“APA”). See 5 U.S.C. § 704. Thus, the district court has jurisdiction to review the OMB’s decision to deny Gilbert Hyatt’s PRA petition (“Petition”). We reverse and remand.

I. BACKGROUND

In January 2013, the Patent and Trademark Office (“PTO”) submitted a number of collections of information to the OMB, as required by the PRA. See 44 U.S.C. § 3507. The PTO’s submission included several previously approved collections of information, which had already been issued an OMB control number pursuant to § 3507(d). The OMB renewed these collections and their corresponding OMB control number (0651-0031).

The submission also included purported collections of information, contained in PTO rules 111, 115, and 116 (“PTO Rules”), that had not previously been approved or assigned an OMB control number. The OMB did not approve or disapprove these purported collections of information. Instead, on July 31, 2013, the OMB affirmatively declared that these purported collections were “not subject to the [PRA]” (“July 2013 Determination”). As a result, the OMB did not issue a control number for the purported collections.

On August 1, 2013, Hyatt filed his Petition, pursuant to 44 U.S.C. § 3517(b), asking the OMB to determine that he did not need to disclose the information sought by the PTO Rules, because the PTO had not obtained an OMB control number, as required by 44 U.S.C. § 3507(a)(3). The OMB denied the Petition on September 13, 2013. The agency referenced its July 2013 Determination, explaining that the PTO Rules did not contain any collections of information, because three regulatory exceptions to the definition of “information” applied. See 5 C.F.R. § 1320.3(h)(1), (6), (9). Consequently,

1. “Collection of information” is defined as

   [O]btaining, causing to be obtained, soliciting, or requiring
   the disclosure to third parties or the public, of facts or
   opinions by or for an agency, regardless of form or format,
   calling for either –

   (i) answers to identical questions posed to, or identical
       reporting or recordkeeping requirements imposed on, ten or
       more persons, other than agencies, instrumentalities, or em-
       ployees of the United States; or

   (ii) answers to questions posed to agencies, instrumen-
       talities, or employees of the United States which are to be
       used for general statistical purposes… .

44 U.S.C. § 3502(3)(A); see also 5 C.F.R. § 1320.3(c), (h) (further
defining “collection of information” and “information”).

2. Before conducting or sponsoring a collection of information, the collecting agency must “obtain[] from the [OMB] a control num-
   ber to be displayed upon the collection of information.” 44 U.S.C. § 3507(a)(3).

3. The PTO Rules, among other things, describe the information a patent applicant might provide when filing amendments for a patent application and when challenging adverse PTO actions. 37 C.F.R. §§ 1.111, 1.115, 1.116.
the agency concluded that the PTO Rules were not subject to the PRA.

Hyatt filed a complaint with the district court on August 16, 2016, asserting two claims under the APA. He challenged both the OMB’s July 2013 Determination and the OMB’s denial of his Petition, which itself was based on the July 2013 Determination. On November 11, 2016, the OMB moved to dismiss the case on the grounds that the district court lacked subject matter jurisdiction to review the OMB’s actions under the APA.

The district court granted the motion to dismiss. It determined that it lacked subject matter jurisdiction to hear Hyatt’s asserted APA claims on three independent grounds. First, 5 U.S.C. § 701(a)(1) precluded judicial review. Second, the challenged administrative actions did not constitute final agency actions. Third, the OMB’s decision (not to provide any remedial action in response to Hyatt’s Petition) was discretionary. Hyatt timely appealed.

II. STANDARD OF REVIEW

We review de novo “dismissals under Rules 12(b)(1) and 12(b)(6).” Rhoades v. Avon Prod., Inc., 504 F.3d 1151, 1156 (9th Cir. 2007). “In the context of reviewing a decision of an administrative agency, de novo review means that we ‘view the case from the same position as the district court.’” Nev. Land Action Ass'n v. U.S. Forest Serv., 8 F.3d 713, 716 (9th Cir. 1993) (quoting Marathon Oil Co. v. United States, 807 F.2d 759, 765 (9th Cir. 1986)).

We give no deference to the OMB’s interpretation of the PRA in this case, because “the question of judicial review” is “a matter within the peculiar expertise of the courts.” Love v. Thomas, 858 F.2d 1347, 1352 n.9 (9th Cir. 1988).

III. DISCUSSION

“The APA confers a general cause of action upon persons ‘adversely affected or aggrieved by agency action within the meaning of a relevant statute.’” Block v. Cnty. Nutrition Inst., 467 U.S. 340, 345 (1984) (quoting 5 U.S.C. § 702). However, no cause of action under the APA exists if (1) “statutes preclude judicial review,” 5 U.S.C. § 701(a)(1); (2) the relevant agency action is not a “final agency action for which there is no other adequate remedy in a court,” 5 U.S.C. § 704; or (3) the “agency action is committed to agency discretion by law,” 5 U.S.C. § 701(a)(2). See City of Oakland v. Lynch, 798 F.3d 1159, 1165 (9th Cir. 2015).

A. Statutory Preclusion

The district court determined that Hyatt’s APA claim was statutorily precluded by a provision of the PRA that declares “[t]he decision by the [OMB] to approve or not act upon a collection of information contained in an agency rule shall not be subject to judicial review.” 44 U.S.C. § 3507(d)(6); see also 5 U.S.C. § 701(a)(1) (prohibiting an APA claim where “statutes preclude judicial review”). Hyatt argues that judicial review of the denial of his Petition is not statutorily precluded, because the Petition did not involve a decision subject to the PRA's prohibition. We agree.

There is a “strong presumption that Congress intends judicial review of administrative action.” Pinnacle Armor, Inc. v. United States, 648 F.3d 708, 718 (9th Cir. 2011) (quoting Helgeson v. Bureau of Indian Affairs, 153 F.3d 1000, 1003 (9th Cir. 1998)). Only “a showing of ‘clear and convincing evidence’ of a contrary legislative intent” will overcome that presumption. Id. (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 140–41 (1967)). “In the context of preclusion analysis, the ‘clear and convincing evidence’ standard is not a rigid evidentiary test,” and the “presumption favoring judicial review [is] overcome, whenever the congressional intent to preclude judicial review is ‘fairly discernible in the statutory scheme.’” Block, 467 U.S. at 351 (quoting Data Processing Serv. v. Camp, 397 U.S. 150, 157 (1970)). “Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved.” Id. at 345. The presumption has not been overcome in this case.

The PRA provides that agencies cannot “conduct or sponsor” a “collection of information” unless they comply with several procedural requirements. 44 U.S.C. § 3507(a). Those requirements include conducting a review of the proposed collection, providing notice of the proposed collection in the Federal Register, receiving and evaluating the public comments, submitting the proposed collection and relevant documents to the OMB, and obtaining an OMB control number “to be displayed upon the collection of information.” Id.; id. § 3506(c). When a proposed collection of information is submitted for OMB review, the OMB may either expressly approve or disapprove the proposed collection or implicitly approve it by not acting upon it. See 44 U.S.C. § 3507(c), (d). If the collection of information is approved, whether expressly or implicitly, the OMB must assign a control number to the collection. Id. § 3507(a), (c), (d); 5 C.F.R. § 1320.11(i).

Within this context, the PRA’s bar on judicial review, 44 U.S.C. § 3507(d)(6), is demonstratively narrow in scope. For example, it does not prohibit judicial review of an OMB decision to approve collections that are not contained in an agency rule. See 44 U.S.C. § 3507(c). Nor does it foreclose judicial review of an OMB decision to disapprove collections, regardless of whether those collections are contained in an agency rule. See generally Dole v. United Steelwork-
ers of Am., 494 U.S. 26 (1990) (reviewing the OMB’s disapproval of three provisions in regulations established by the Department of Labor). Thus, the statute precludes judicial review only of a decision by the OMB to approve, whether through express approval or a failure to act upon, a collection within an agency rule. Any other decision remains subject to judicial review. See Silvers v. Sony Pictures Entm’t, Inc., 402 F.3d 881, 885 (9th Cir. 2005) (en banc) (“The doctrine of expressio unius est exclusio alterius ‘as applied to statutory interpretation creates a presumption that when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions.’” (quoting Boudette v. Barnette, 923 F.2d 754, 756–57 (9th Cir. 1991))).

Judicial review of the denial of Hyatt’s Petition is not barred in this case, because it does not involve a decision by the OMB to approve or not act upon a collection of information contained in an agency rule. The Petition was denied based on the OMB’s July 2013 Determination, that the purported collections of information in the PTO Rules fell outside the PRA. That determination was not a decision to approve or not act upon a collection of information contained within an agency rule.

In a vacuum, the phrase “decision … to … not act upon,” 44 U.S.C. § 3507(d)(6), might be interpreted broadly, to incorporate the July 2013 Determination. However, the statutory scheme of the PRA demands a narrower interpretation, because the legal consequence of a decision to not act upon a collection of information under the PRA is exactly the same as that of a decision to expressly approve the collection—an OMB control number is issued that the collecting agency must display on the collection. 44 U.S.C. § 3507(a), (c), (d); 5 C.F.R. § 1320.11(i). In other words, where an OMB decision does not result in the issuance of an OMB control number, it cannot be construed as a decision to not act upon a collection of information.

That is the case here—the July 2013 Determination did not result in the issuance of a control number for the purported collections of information in the PTO Rules. See 5 C.F.R. § 1320.11(i). Indeed, in determining that the PRA did not apply to the purported collections, the OMB entirely negated any need for the PTO to obtain or display a control number for those collections. See 44 U.S.C. § 3507(a)(3).

Accordingly, the denial of Hyatt’s Petition lies outside the narrow scope of the PRA’s judicial review bar, and his APA claim challenging the denial of the Petition is not statutorily precluded.

B. Final Agency Action

The district court next determined that the OMB’s denial of Hyatt’s Petition was not a “final agency action for which there is no other adequate remedy in a court,” as required by 5 U.S.C. § 704. A “final” agency action is one that both determines “rights or obligations … from which legal consequences will flow” and “mark[s] the ‘consummation’ of the agency’s decisionmaking process.” Bennett v. Spear, 520 U.S. 154, 177–78 (1997) (internal citations omitted).

Section 3517(b), which governs Hyatt’s Petition, expressly requires the OMB to determine a petitioner’s obligation to provide information requested by or for a government agency. It permits “any person” to “request the Director to review any collection of information conducted by or for an agency to determine, if, under this subchapter, a person shall maintain, provide, or disclose the information to or for the agency.” Id. (emphasis added). After receiving the request, the OMB “shall … respond to the request within 60 days” and “take appropriate remedial action, if necessary.” Id.

Additionally, the statute does not provide for any administrative review of the OMB’s response, nor does it provide any alternative administrative recourse for petitioners if the OMB determines that they must provide the relevant information to the collecting agency. Id. Therefore, in denying Hyatt’s Petition, the OMB made a determination of his rights and obligations to provide information to the PTO, and it did so in an action that consummated the OMB’s decisionmaking process.

However, Hyatt’s APA claim would still be precluded if he has another adequate remedy in a court. 5 U.S.C. § 704. An adequate alternative remedy in a court exists where “a legal remedy under the APA would impermissibly provide for duplicative review.” City of Oakland, 798 F.3d at 1165.

In looking for such a remedy, we ask whether the statutory scheme provides a forum for adjudication, a limited class of potential plaintiffs, a statute of limitations, a standard of review, and authorization for judicial relief.” Hinck v. United States, 550 U.S. 501, 506 (2007); see also City of Oakland, 798 F.3d at 1165–66 (discussing Hinck).

The PRA does not provide a forum for adjudication, a limited class of potential plaintiffs, a statute of limitations, a standard of review, or an authorization for any manner of judicial relief. See e.g., 44 U.S.C. § 3517. In fact, the PRA

6. We reject Hyatt’s assertion that the PRA’s judicial review prohibition applies only to OMB decisions regarding collections of information contained in proposed agency rules currently undergoing the notice and comment process. Unlike 44 U.S.C. § 3507(d)(1), which specifically refers to “proposed” agency rules, subsection (d)(6) is not so limited: “[t]he decision by the Director to approve or not act upon a collection of information contained in an agency rule shall not be subject to judicial review,” 44 U.S.C. § 3507(d)(6) (emphasis added). Congress understood the difference between proposed agency rules and agency rules in general, and determined not to limit the bar on judicial review to proposed rules.

In that light, § 3507(d)(5)’s declaration that “[t]his subsection shall apply only when an agency publishes a notice of proposed rulemaking and requests public comments” is best read not as limiting the application of the PRA’s bar of judicial review, which is found in the same subsection, but merely as indicating that rules that are exempt from the standard notice and comment rulemaking process need not comply with § 3507(d)’s supplementary notice and comment requirements. See, e.g., 5 U.S.C. § 553(a) (exempting certain rules from the standard notice and comment rulemaking process).

7. The OMB can extend this period “to a specified date” if “the person making the request is given notice of such extension.” 44 U.S.C. § 3517(b)(1).
“does not authorize a private right of action” against the government. *Sutton*, 192 F.3d at 844. The district court and the OMB agree.

Instead, the district court and the OMB suggest that Hyatt nevertheless has an adequate alternative remedy through the PRA’s “public protection provision,” which provides that “no person shall be subject to any penalty for failing to comply with a collection of information that is subject to [the PRA]” if either (1) the collection “does not display a valid OMB control number,” or (2) the collecting agency “fails to inform the person” that he or she is “not required to respond to the collection of information unless it displays a valid control number.” 44 U.S.C. § 3512(a). However, the public protection provision functions only as a defense to an enforcement action brought by an agency, not as an independent mechanism for a person to affirmatively challenge the validity of the collection of information. 44 U.S.C. § 3512(b). That sort of alternative remedy is insufficient to defeat an APA claim, as “parties need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of ‘serious criminal and civil penalties.’” *U.S. Army Corps of Eng’rs v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016) (quoting *Abbott Labs.*, 387 U.S. at 153).

If Hyatt withheld information from the PTO, believing that the public protection provision would protect him in a subsequent enforcement action, he would risk the forfeiture of his patent claims if his belief proved unwarranted. Hyatt “need not assume such risks while waiting for [the PTO] to ‘drop the hammer’ in order to have [his] day in court.” *Id.* (quoting *Sackett v. EPA*, 566 U.S. 120, 127 (2012)). He is entitled instead to have the OMB determine his obligations, 44 U.S.C. § 3517(b), and to have that determination judicially reviewed before deciding whether to provide the requested information to the PTO.

C. Non-Discretionary Action

Finally, the district court determined that the OMB’s decision not to provide any remedial action in response to Hyatt’s Petition was discretionary. An APA claim is precluded where the relevant “agency action is committed to agency discretion by law.” 5 U.S.C. § 701(a)(2). “An action is committed to agency discretion where there is no ‘meaningful standard against which to judge the agency’s exercise of discretion.’” *Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 989 (9th Cir. 2015) (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)).

The PRA directs the OMB to take two distinct actions when it receives a petition to determine whether an individual is legally obligated to respond to a collection of information. First, the OMB “shall … respond to the request within 60 days of receiving the request.” 44 U.S.C. § 3517(b)(1) (emphasis added). Second, it “shall … take appropriate remedial action, if necessary.” *Id.* § 3517(b)(2).

The initial determination—whether, under the PRA, the petitioner must provide or disclose information to a government agency—is not discretionary. There is an express mandate that the OMB “shall” make such a determination. *Id.* § 3517(b); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (“[T]he mandatory ‘shall’ … normally creates an obligation impervious to judicial discretion.”). Additionally, the standards for making such a determination are specified by the PRA. See 44 U.S.C. § 3507(a) (outlining steps an agency must take before it may conduct a collection of information). Thus, the OMB’s decision to deny Hyatt’s Petition is judicially reviewable under the APA.

On the other hand, the second determination—of what appropriate remedial action should be taken, if any—is committed to the agency’s discretion. Although this determination is also mandatory, the OMB is directed to take “appropriate” remedial action, and only “if necessary.” *Id.* § 3517(b)(2). There is no express standard in the PRA to guide the OMB in determining whether any particular remedy is either “appropriate” or “necessary.” Accordingly, the OMB’s decision regarding whether or what remedial action should be taken is beyond judicial review. See *United States v. George S. Bush & Co.*, 310 U.S. 371, 380 (1940). However, if the first determination is reversed after judicial review, the OMB should revisit its second determination in light of that reversal.

IV. CONCLUSION

Because the denial of Hyatt’s Petition is judicially reviewable under the APA, we REVERSE the district court’s decision to dismiss this case for a lack of subject matter jurisdiction and REMAND to the district court to review the denial.

8. The OMB argues that when it determines that the relevant information request is not a collection of information, it is not required to respond to a § 3517 petition, which asks the OMB to review “any collection of information.” Such an interpretation would allow the OMB to abdicate its duties under the PRA—without judicial review—by simply declaring that no information requests constitute collections of information. Nothing in the statutory scheme suggests Congress intended to provide the OMB with such extreme power. See *Anchorage Sch. Dist. v. M.P.*, 689 F.3d 1047, 1056 (9th Cir. 2012) (noting that an agency “cannot abdicate its affirmative duties” assigned by Congress). The OMB’s interpretation would also eliminate any legal protection for persons who believe that the agency’s decision was faulty. See 44 U.S.C. § 3512(a) (“[N]o person shall be subject to any penalty for failing to comply with a collection of information that is subject to this subchapter … .” (emphasis added)).
FELIX HUERTA, Plaintiff and Appellant, v. KAVA HOLDINGS, INC., Defendant and Respondent.

No. B277164, B281303
In The Court of Appeal of the State of California
Second Appellate District
(Los Angeles County Super. Ct. No. BC554145)
Consolidated Appeals from a judgment and a postjudgment order of the Superior Court of Los Angeles County, Ruth Ann Kwan, Judge. Judgment affirmed; order reversed.
Filed November 14, 2018

CERTIFIED FOR PARTIAL PUBLICATION*

* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, only the Introduction, parts I. F. and II. C., and the Disposition are certified for publication.

COUNSEL
Shegerian & Associates, Carney R. Shegerian and Jill McDonell for Plaintiff and Appellant.
Horvitz & Levy, Peter Abrahams, Bradley S. Pauley, Dean A. Bochner; Stokes Wagner, Arch Y. Stokes, Peter B. Maretz, Diana L. Dowell and Adam L. Parry for Defendant and Respondent.

OPINION
INTRODUCTION
Defendant Kava Holdings, Inc., dba Hotel Bel-Air (defendant) terminated two restaurant servers after they were involved in an altercation during work. One of the fired employees, plaintiff Felix Huerta, sued defendant on a variety of legal theories, most of which were dismissed before or during trial. The trial court granted defendant’s motion for nonsuit as to plaintiff’s claim for retaliation under the Fair Employment and Housing Act (FEHA; Gov. Code, § 12900 et seq.), and allowed the jury to decide plaintiff’s FEHA causes of action for harassment based on a hostile work environment, discrimination, and failure to prevent harassment and/or discrimination. The jury returned a verdict in defendant’s favor.

Postjudgment, the trial court found plaintiff’s action was not frivolous and denied defendant’s motion for attorney fees, expert fees and costs under Government Code section 12965, subdivision (b) (section 12965(b)). Based on plaintiff’s rejection of defendant’s pretrial Code of Civil Procedure section 998 settlement offer, however, the trial court awarded defendant $50,000 in costs and expert witness fees under that statute.

In the unpublished portion of the opinion, we affirm the judgment. The trial court properly granted nonsuit on plaintiff’s FEHA retaliation claim and did not prejudicially limit his counsel’s closing argument.

In the published portion of the opinion, we note that effective January 1, 2019, section 998 will have no application to costs and attorney and expert witness fees 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.” For litigation that predates the application of the amended version of section 12965(b), we hold section 998 does not apply to nonfrivolous FEHA actions and reverse the order awarding defendant costs and expert witness fees pursuant to that statute. (Arave v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (2018) 19 Cal.App.5th 525 (Arave).)

I. FACTUAL AND PROCEDURAL BACKGROUND

[ PARTS I.A. TO E, See FOOTNOTE*, Ante ]

F. Postjudgment Proceedings

As the prevailing party in a FEHA action, defendant sought costs, expert witness fees, and attorney fees pursuant to section 12965(b). As the prevailing party that obtained a result more favorable than the sum it was willing to settle for, defendant sought the same costs and fees pursuant to section 998. Defendant’s memorandum of costs was in the total amount of $111,242.83, which included $47,322.50 in expert witness fees. Defendant asked for $1,318,955 in attorney fees.

Plaintiff moved to tax and/or strike defendant’s costs, arguing section 12965(b) precluded an award of costs to defendant as prevailing party unless the trial court determined plaintiff’s action was “‘unreasonable, frivolous, meritless or vexatious.’” (Cummings v. Benco Building Services (1992) 11 Cal.App.4th 1383, 1387, quoting Christiansburg
Garment Co. v E. E. O. C. (1978) 434 U.S. 412, 421 (Christiansburg) Plaintiff opposed the request for attorney fees on the same basis.

Almost six months of briefing and collateral motions followed. During this period, defendant submitted a revised memorandum of costs in the amount of $98,863.59. This memorandum eliminated costs incurred before service of the section 998 offer. After a hearing, the trial court took the motions under submission and issued a detailed written ruling one month later.

The trial court first analyzed each item of claimed post-settlement offer ordinary costs (§ 1033.5) and determined the requested amounts were necessary and reasonable. Nonetheless, finding plaintiff’s action was not frivolous, the trial court determined section 12965(b) precluded awarding defendant ordinary costs, expert witness fees, and attorney fees.

The trial court then considered each category of post-settlement offer costs and analyzed whether they could be awarded based on the rejected section 998 settlement offer. The trial court concluded defendant was not entitled to post-offer expert witness fees because the action was not frivolous. It did, however, award defendant its postoffer ordinary costs and expert witness fees pursuant to section 998. Although the trial court previously found defendant’s incurred costs to be necessary and reasonable, the trial court reduced the award to $50,000 based on plaintiff’s economic circumstances.

Plaintiff timely appealed from the judgment and the post-judgment order awarding defendant costs and expert witness fees pursuant to section 998. We ordered the appeals consolidated for all purposes.

II. DISCUSSION

[ PARTS II.A TO B, See FOOTNOTE*, Ante ]

C. Section 998 Does Not Apply to This Nonfrivolous FEHA Action

1. Overview

In awarding defendant its ordinary costs and expert witness fees pursuant to section 998, but reducing the award from a sum accepted as necessary and reasonable to an amount that reflected plaintiff’s limited economic resources, the trial court relied on Seever v. Copley Press, Inc. (2006) 141 Cal.App.4th 1550 (Seever) and Hohman v. Altana Pharma US, Inc. (2010) 186 Cal.App.4th 262 (Hohman). (Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455.)

Both Seever and Hohman predate Williams v. Chino Valley Independent Fire Dist. (2015) 61 Cal.4th 97 (Williams), where the Supreme Court held section 12965(b), which controls the award of costs in FEHA actions, is an “express exception” to section 1032, subdivision (b). (Williams, at p. 105.) Additionally, since the trial court entered its post-judgment order in this case, the legal landscape has expanded to include Arave, supra, 19 Cal.App.5th 525. In Arave, the Court of Appeal tackled Holman head-on and held section 998 does not apply in nonfrivolous FEHA actions.

For the reasons that follow, we find the Arave analysis and result persuasive. We hold the general policies behind section 998 must yield to the specific policies concerning costs and attorney and expert witness fee awards in nonfrivolous FEHA actions.5

We begin our analysis by discussing the law applicable to prevailing party costs in civil actions generally (§§ 1032, 1033.5) and in FEHA actions specifically (§ 12965(b)). We then review the authorities relied upon by the trial court and the interplay between those authorities and section 998, the statute designed “to encourage the settlement of lawsuits before trial . . . by punishing a party who fails to accept a reasonable offer from the other party.” (Hurlbut v. Sonora Community Hospital (1989) 207 Cal.App.3d 388, 408.)

2. Prevailing party costs: Civil Actions v. FEHA Actions

Generally, the prevailing party in “any action or proceeding” is entitled to costs as a matter of right. (§ 1032, subd. (b).) By statute, a defendant against whom a plaintiff recovers no relief is a “prevailing party.” (Id., subd. (a)(4).) A trial court has no discretion to deny prevailing party status to such a defendant. (Charton v. Harkey (2016) 247 Cal.App.4th 730, 738 (Charton).)

A trial court also has no discretion to deny the prevailing party its ordinary costs; they are to be awarded “as a matter of right,” unless a statute expressly dictates otherwise. (§ 1032, subd. (b).) Section 1033.5 lists the ordinary costs that must be awarded to a prevailing party. The fees of expert witnesses, unless ordered by the trial court, are not recoverable as ordinary costs. (Id., subd. (b)(1).) Nor are attorney fees, unless authorized by law or the parties’ contract. (Id., subd. (a)(10).)

In addition to being automatic, cost awards to the prevailing party pursuant to section 1032, subdivision (b) are

5. The Legislature agrees. Section 12965(b) has been amended, effective January 1, 2019, to add the following bold language in the concluding sentence: “In civil actions brought under this section, the court, in its discretion, may award to the prevailing party, including the department, reasonable attorney’s fees and costs, including expert witness fees, except that, notwithstanding Section 998 of the Code of Civil Procedure, a prevailing defendant shall not be awarded fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigate after it clearly became so.”

We also emphasize nothing in our opinion is intended to apply to FEHA actions deemed “frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigate after it clearly became so.” In those cases, the trial court retains discretion to award fees and costs pursuant to section 12965(b). (Williams, supra, 61 Cal.4th at p. 115; Arave, supra, 19 Cal.App.5th at p. 554.)

4. These costs included jury fees, deposition costs, service of process fees, expert witness fees, models/blowups/exhibit photocopies, and court reporter fees.
symmetrical, i.e., the prevailing party, whether a plaintiff or a defendant, is entitled to them. (Charton, supra, 247 Cal. App.4th at p. 738.)

On the other hand, an award of costs to the prevailing party in a FEHA action is never a matter of right, but is always within a trial court’s discretion. (§ 12965(b); Williams, supra, 61 Cal.4th at p. 108.) Notably, that discretion extends to awarding the prevailing party in a FEHA action not just the ordinary litigation costs, but also attorney fees and expert witness fees.6

As always, however, a trial court’s discretion has boundaries. The demarcation here is an asymmetrical one: the trial court’s discretion to award costs—including attorney fees and expert witness fees—to a prevailing defendant in a FEHA action is not coextensive with the discretion it possesses when a plaintiff is the prevailing party.

The asymmetrical standard was articulated by the United States Supreme Court 40 years in Christiansburg, supra, 434 U.S. 412. There, the Supreme Court recognized trial courts have discretion to award attorney fees to the prevailing plaintiff in an Equal Employment Opportunity Commission action simply because plaintiff prevailed. The Supreme Court held that discretion does not extend to an award of attorney fees to a prevailing defendant unless the trial court also finds the plaintiff’s “claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so.” (Christiansburg, supra, at p. 422.) California courts, of course, adhere to Christiansburg’s asymmetrical standard for awards of attorney fees in FEHA actions. (Chavez v. City of Los Angeles (2010) 47 Cal.4th 970, 985.)

In Baker v. Mulholland Security & Patrol, Inc. (2012) 204 Cal.App.4th 776, this court applied the Christiansburg asymmetrical standard to expert witness fees as well: “We agree the standard applicable to attorney fees should apply to expert witness fees for a prevailing FEHA defendant. Expert fees, just like attorney’s fees, are not ordinary litigation costs which are routinely shifted under Code of Civil Procedure sections 1032 and 1033.5. Like attorney’s fees, expert fees should be treated differently than ordinary litigation costs because they can be expensive and unpredictable, and could chill plaintiffs from bringing meritorious actions.” (Id. at p. 783.)

Finally, in Williams, supra, 61 Cal.4th 97, the California Supreme Court held the Christiansburg standard applies to the award of ordinary costs as well as attorney fees7 when the defendant prevails in a nonfrivolous FEHA action: “To reiterate, under that standard a prevailing plaintiff should ordinarily receive his or her costs and attorney fees unless special circumstances would render such an award unjust. [Citation.] A prevailing defendant, however, should not be awarded fees and costs unless the court finds the action was objectively without foundation when brought, or the plaintiff continued to litigate after it clearly became so.” (Id. at p. 115.)

3. Section 998 and FEHA Actions

In addition to the asymmetrical standard, the law is now well settled that section 12965(b) is an express exception to the prevailing party cost provisions in section 1032, subdivision (b). Section 1032, subdivision (b) does not apply in FEHA actions, as the trial court acknowledged. (Williams, supra, 61 Cal.4th at p. 109.)

What had not been settled, though, is whether section 998 applies in nonfrivolous FEHA actions when a plaintiff refuses a defendant’s reasonable statutory settlement offer, but fails to achieve a better result. Under this scenario, appellate courts traditionally discussed section 998’s applicability by cost category, i.e., ordinary costs, attorney fees, and expert witness fees. The trial court followed that formula and determined defendant was not entitled to section 998 attorney fees, but did award ordinary costs and expert witness fees pursuant to section 998, albeit in a reduced sum based on plaintiff’s economic resources. In so ruling, the trial court relied on a trio of pre-Williams appellate decisions:

The trial court denied defendant its postoffer attorney fees under section 998, citing Mangano v. Verity, Inc. (2008) 167 Cal.App.4th 944 (Mangano). In Mangano, the trial court granted the defendant employer’s summary judgment motion in a FEHA action. Defendant then sought an award of expert witness fees and attorney fees incurred after it served a section 998 settlement offer. The trial court awarded the defendant expert witness fees, but denied its request for attorney fees. Both sides appealed; the Court of Appeal affirmed.

No one contended on appeal the FEHA action was frivolous. (Mangano, supra, 167 Cal.App.4th at p. 951, fn. 10.) With that understanding, Mangano held the Christiansburg standard applied and there was no “persuasive argument for allowing the application of section 998 to supplant the established standard that seeks to deter frivolous suits while providing adequate support and incentive for meritorious actions.” (Id. at p. 951.) Accordingly, it affirmed the trial court’s denial of an award of attorney fees to the prevailing defendant.8

Citing Seever, supra, 141 Cal.App.4th 1550, the trial court granted defendant’s request for section 998 postoffer ordinary costs, but in a reduced amount based on plaintiff’s economic resources. Seever involved an award of ordinary costs

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6. Section 12965(b), as originally enacted in 1980, did not give trial courts the discretion to award expert witness fees to the prevailing party in a private FEHA action. The Legislature amended the section in 1999 to add that discretion, abrogating the holding in Davis v. KGO-T.V., Inc. (1998) 17 Cal.4th 436. (Williams, supra, 61 Cal.4th at p. 106, fn. 1.)

7. Expert witness fees were not an issue in Williams, and the Supreme Court did not address that category of costs in the FEHA context.

8. On the other hand, Mangano also affirmed the grant of expert witness fees to the prevailing defendant pursuant to section 998. That portion of the decision is not published (Mangano, supra, 167 Cal. App.4th at p. 948), however, so we have no insight into the appellate panel’s reasoning on that score, other than to observe Christiansburg was an attorney fees case and did not involve a claim for expert witness fees.
and expert witness fees to the prevailing defendant whose section 998 offer was rejected.

Nowhere in Seever does one find the words “frivolous” or “nonfrivolous.” Seever’s initial citation to Christiansburg was in the context of “the imbalance inherent in allowing equal cost-shifting between unequal parties.” (Seever, supra, 141 Cal.App.4th at p. 1562.) Seever attributed the denial of attorney fees and discretionary costs to prevailing defendants in a FEHA action to judicial concerns that “shifting these litigation expenses to what ordinarily are modest- or low-income individuals would unduly discourage these plaintiffs from litigating legitimate claims.” (Ibid.)

Seever did not cite or make reference to section 12965(b). Instead, the appellate panel appeared to accept that the strong public policy behind section 998 compelled its application in FEHA actions, and then focused on the potential inequities of shifting costs to a plaintiff whose economic circumstances were typically more modest than those of the defendant. To that end, Seever fashioned a “means” test to fairly weight economic incentives and consequences: “Thus, seldom would a court properly deny a successful defendant its entire section 998 cost award, even in a FEHA case. But consistent with the rationale of Christiansburg and like California decisions, it is entirely appropriate and indeed necessary for trial courts to ‘scale’ those awards downward to a figure that will not unduly pressure modest- or low-income plaintiffs into accepting unreasonable offers.” Because the [trial] court here made no inquiry about Seever’s financial situation, we do not know whether the cost award . . . represents an unduly powerful settlement incentive to a litigant of Seever’s means.” (Seever, supra, 141 Cal.App.4th at p. 1562.)

The trial court relied on Holman, supra, 186 Cal.App.4th 262 to award defendant its section 998 postoffer expert witness fees, also in a reduced amount, per Seever. In Holman, the Court of Appeal held a trial court has discretion to award the prevailing employer in a FEHA case expert witness fees under section 998 without first establishing the plaintiff’s case was frivolous. (Id. at p. 280.) Where the FEHA action is not frivolous, however, the trial court must “scale” an award of expert witness fees to take into account the plaintiff’s economic resources. (Id. at pp. 283-284.)

Although it predated Williams, Holman presciently “assume[d] for purposes of this appeal that . . . the Christiansburg standard applied when not only attorney fees, but also expert witness fees, are awarded under section 12965 to a prevailing defendant.” (Holman, supra, 186 Cal.App.4th at p. 280.) Holman rejected, however, the notion that section 12965(b) was an express exception to section 1032, subdivision (b) prevailing cost provisions. (Holman, at p. 281.) That conclusion led to Holman’s reliance on Murillo v. Fleetwood Enterprises, Inc. (1998) 17 Cal.4th 985 (Murillo) to analyze whether section 998 authorized an award of expert witness fees in FEHA actions.

In Murillo, the Supreme Court held the prevailing party cost provisions in the Song-Beverly Consumer Warranty Act (Civ. Code, § 1790 et seq.) are not “express exception[s]” to section 1032, subdivision (b). (Murillo, supra, 17 Cal.4th at p. 991.) Having reached that conclusion, the Supreme Court “likewise conclude[d]” the Song-Beverly Act provided no impediment to awarding expert witness fees to the prevailing defendant whose section 998 settlement offer was rejected: “[T]he requirements for recovery of costs and fees under section 998 must be read in conjunction with section 1032(b), including the requirement that section 998 costs and fees are available to the prevailing party ‘except as otherwise expressly provided by statute.’” (§ 1032(b), italics added.) Because the cost-shifting provisions of the Song-Beverly Act do not “expressly” disable a prevailing defendant from recovering section 998 costs and fees in general, or expert witness fees in particular, we find nothing in the Act prohibiting the trial court’s exercise of discretion to award expert witness fees to seller” pursuant to section 998. (Murillo, at p. 1000, fn. omitted.)

Holman found no inconsistency with Mangano, supra, 167 Cal.App.4th 944. Holman concluded, again relying on Murillo, that “attorney fees are subject to different rules than those applicable to other costs.” (Holman, supra, 186 Cal.App.4th at p. 283.) But erasing the distinction between the treatment of attorney fees and costs pursuant to section 12965(b), including the requirement that section 998 costs and fees are available to the prevailing party “except as otherwise expressly provided by statute,” (§ 1032(b), italics added) because the cost-shifting provisions of the Song-Beverly Act do not “expressly” disable a prevailing defendant from recovering section 998 costs and fees in general, or expert witness fees in particular, we find nothing in the Act prohibiting the trial court’s exercise of discretion to award expert witness fees to seller” pursuant to section 998. (Murillo, at p. 1000, fn. omitted.)

Williams did not involve section 998, so its Murillo discussion is limited to the express exception/section 1032, subdivision (b) issue. In 2018, however, our colleagues in Division Two of the Fourth Appellate District analyzed both Murillo and Williams, surveyed the development of the law, and concluded there is no statutory authority to award section 998 postoffer fees and costs in nonfrivolous FEHA action. (Arave, supra, 19 Cal.App.5th at p. 553.)

Arave reasoned as follows: Section 12965(b) is an express exception to section 1032, subdivision (b). Section 998 “operates only as an adjustment to cost awards under Section 1032(b), [so] it follows that Section 12965(b) overrides Section 998(c). . . . [I]f a defendant may not obtain an award of costs under Section 1032(b) [because] plaintiff’s claim are nonfrivolous, the trial court may not augment an award of costs by awarding expert witness fees under Section 998(c).” (Arave, supra, 19 Cal.App.5th at p. 553.)

We find Arave’s logic unassailable. The Legislature expressly pegs section 998 to section 1032. (§ 998, subd. (a).) In non-FEHA actions, a “defendant is entitled under section 998 to those costs incurred after the settlement offer to which a prevailing party would be entitled under section 1032.” (Scott

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9. Seever observed that section 998 “is designed to create economic incentives on both parties to settle rather than try their lawsuits. To do so, both sides must face some economic consequences if it turns out they miscalculate and lose.” (Seever, supra, 141 Cal.App.4th at p. 1562.)
Co. v. Blount, Inc. (1999) 20 Cal.4th 1103, 1112-1113.) In non-FEHA actions, where the special prevailing party cost statute is not an express exception to section 1032, a defendant is also entitled under section 998 to its postoffer costs. (Murillo, supra, 17 Cal.4th at p. 1000.) But in nonfrivolous FEHA cases, the prevailing party cost provisions are express exceptions to section 1032. (Williams supra, 61 Cal.4th at p. 105.) It follows, then, that section 998 does not apply in nonfrivolous FEHA actions. (Arave, supra, 19 Cal.App.5th at p. 553.)

Analyzed thusly, for cases that predate the amendment to section 12965(b), we see no reason to differentiate between the treatment of ordinary costs, attorney fees, and expert witness fees in nonfrivolous FEHA actions. The language in section 12965(b) indicates all three categories are subject to the same rules.

DISPOSITION

The judgment is affirmed. The postjudgment order awarding respondent costs and expert witness fees pursuant to section 998 is reversed. In the interests of justice, no costs on appeal are awarded.

DUNNING, J.*

We concur: RUBIN, Acting P. J., GRIMES, J.

* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

COUNSEL


Newmeyer & Dillion, Alan H. Packer, Jeffrey R. Brower and Joseph A. Ferrentino for California Building Industry Association as Amicus Curiae on behalf of Petitioner.

No appearance for Respondent.


OPINION

In 2000, the California Supreme Court ruled in Aas v. Superior Court (2000) 24 Cal.4th 627 (Aas) that a homeowner could not recover on a negligence claim for construction defects unless the homeowner could show actual property damage or personal injury (as opposed to purely economic loss, such as diminution in value of the home or the cost to repair the defects). After Aas was decided, representatives from the building industries, insurance companies, and homeowners came together with members of the Legislature to devise a comprehensive statutory scheme to govern construction defect litigation. That statutory scheme, commonly known as the Right to Repair Act (the Act) was enacted in 2002. (Stats. 2002, ch. 722, principally codified at Civ. Code,1 §§ 895-945.5.) As recently explained by the Supreme Court, “[t]he Act sets forth detailed statewide standards that the components of a dwelling must satisfy. It also establishes a prelitigation dispute resolution process that affords builders notice of alleged construction defects and the opportunity to cure

1. Further undesignated statutory references are to the Civil Code.
such defects, while granting homeowners the right to sue for deficiencies even in the absence of property damage or personal injury.” (McMillin Albany LLC v. Superior Court (2018) 4 Cal.5th 241, 247 (McMillin).

In the present case, we are asked to determine whether homeowners may bring a class action asserting a claim under the Act against the manufacturer of an allegedly defective plumbing fixture used in the construction of class members’ homes. Based on our examination of the structure and language of the Act, as well as the legislative history, we conclude that class actions are not allowed under the Act except in one limited context: to assert claims that address solely the incorporation into a residence of a defective component, unless that component is a product that is completely manufactured offsite.

Because the claim in this case involves allegedly defective products that were completely manufactured offsite, we hold that the claim alleged under the Act cannot be litigated as a class action. Accordingly, we grant the writ petition filed by defendant Kohler Co. (Kohler), and issue a writ of mandate directing the trial court to vacate its order to the extent it denied in part Kohler’s anti-class certification motion and to enter a new order granting the motion in its entirety.

BACKGROUND

Plaintiffs Joanna Park-Kim and Maria Cecilia Ramos are each owners of a residential condominium dwelling in which “Rite-Temp Pressure Balancing Valves” and “Mixer Caps” (which are contained in “Rite-Temp Valve assemblies”) manufactured by Kohler were installed during construction. In the third amended complaint, plaintiffs allege that these valves and mixer caps, which are designed to regulate water flow and temperature in household plumbing, do not operate as intended due to their defective design and manufacturing, and “are corroding, failing, and/or will inevitably fail,” which has caused or will cause damage to other components of the household plumbing lines or fixtures.

Plaintiffs brought the instant lawsuit on behalf of themselves and all owners of residential dwellings in California in which these valves and mixer caps were installed during original construction, alleging a claim for violations of the Act, as well as claims for strict liability, warranty claims, and other claims. It is estimated that Kohler sold approximately 630,000 of the identified valves and mixer caps in California during the relative time period.

After plaintiffs received numerous extensions of time, totaling 18 months, to file their motion for class certification, Kohler sought to resolve the case by filing a motion for summary judgment or adjudication on threshold legal issues. The trial court granted summary adjudication as to all claims except plaintiff Ramos’ warranty and negligence claims, both plaintiffs’ claims under the Act, and their UCL claim. Kohler then filed a “motion re anti-class-certification,” seeking a ruling that none of the remaining causes of action can be certified as a class action.

On January 22, 2018, the trial court granted Kohler’s motion as to the warranty, negligence, and UCL claims, but denied it as to the claim under the Act. The court also certified its ruling for appellate review, on the grounds that it presented a controlling question of law upon which there were substantial grounds for differences of opinion, and that appellate resolution of the question would greatly advance the conclusion of the litigation. The court then stayed all proceedings pending resolution of the instant petition.

Kohler filed the instant petition for writ of mandate, asking this court to order the trial court to vacate its January 22, 2018 order to the extent it denies Kohler’s anti-class-certification motion with respect to the claim under the Act and to issue a new order granting the motion in its entirety. We summarily denied the petition, and Kohler filed a petition for review in the Supreme Court. The Supreme Court granted review and transferred the matter back to this court with directions to vacate our order denying mandate and to issue an order directing the superior court to show cause why the relief sought should not be granted.

We issued the order to show cause as directed by the Supreme Court, and have received a return to the petition from plaintiffs and a traverse from Kohler. In the return, plaintiffs demurred to the petition on the ground that the petition fails to state a justiciable basis for granting a writ of mandate and/or prohibition. But, as Kohler observes in its traverse, the Supreme Court has concluded otherwise and directed us to issue an order to show cause and consider the issue Kohler presents. The Supreme Court’s order constitutes a determination that writ review is proper. (Borg-Warner Protective Services Corp. v. Superior Court (1999) 75 Cal.App.4th 1203, 1206-1207.) Therefore, we overrule plaintiffs’ demurrer and address Kohler’s petition.

DISCUSSION

In McMillin, the California Supreme Court was asked to determine whether the Act “was designed only to abrogate Aas [and] supplant[] common law remedies with a statutory claim for purely economic loss,” or whether it was intended “to go further and supplant the common law with new rules governing the method of recovery in actions alleging property damage.” (McMillin, supra, 4 Cal.5th at p. 247.) In reaching its conclusion that the Legislature intended the broader

2. Plaintiffs’ non-Act claims, which are not at issue in this proceeding, are for (1) strict liability/failure to warn; (2) strict liability/manufacturing defect; (3) strict liability/design defect; (4) negligence; (5) breach of express warranty; (6) breach of implied warranty of fitness; (7) breach of implied warranty of merchantability; and (8) violations of Business and Professions Code section 17200 (the UCL claim). With regard to the claim asserted under the Act, the class is limited to owners who purchased their dwellings on or after December 14, 2005.

3. We also received an application from California Building Industry Association to file an amicus curiae brief. We have granted that request and have considered the amicus brief, as well as plaintiffs’ response to that brief.
displacement, and “made the Act the virtually exclusive remedy not just for economic loss but also for property damage arising from construction defects” (ibid.), the Court analyzed the text, purpose, and legislative history of the Act. We conduct a similar analysis to resolve the issue before us: whether the Act permits homeowners to bring a class action against the manufacturer of a plumbing fixture that was installed in the construction of their homes, alleging that the product was defective and resulted in violations of the standards set forth in the Act.

A. Overview of the Act

Because of the complexity of the Act and the interplay between many of the statutory provisions, we begin with an overview of the statutory scheme. As the Supreme Court observed, “the Act . . . ‘comprehensively revises the law applicable to construction defect litigation for individual residential units’ within its coverage.” (McMillin, supra, 4 Cal.5th at p. 250.) The Court explained that “[t]he Act added title 7 to division 2, part 2 of the Civil Code. (§§ 895-945.5.) That title consists of five chapters. Chapter 1 establishes definitions applicable to the entire title. (§ 895.) Chapter 2 defines standards for building construction. (§§ 896-897.) Chapter 3 governs various builder obligations, including the warranties a builder must [or may] provide. (§§ 900-907.) Chapter 4 creates a prelitigation dispute resolution process. (§§ 910-938.) Chapter 5 describes the procedures for lawsuits under the Act. (§§ 941-945.5.)” (McMillin, supra, 4 Cal.5th at p. 250.) For purposes of the case before us, our focus is on chapters 2, 4, and 5, particularly as they relate to claims made against the manufacturer of a product used in the construction of a residential unit, rather than against the builder of that unit.

1. Chapter 2

Chapter 2 contains two sections, sections 896 and 897. Section 896 provides a detailed and comprehensive set of standards for residential construction, addressing water, structural, soil, fire protection, plumbing and sewer, and electrical systems issues, and issues regarding other areas of construction; it also provides various time periods within which an action must be brought, depending upon the standards applicable to the entire title. (§ 895.) Chapter 2 defines standards for building construction. (§§ 896-897.) Chapter 3 governs various builder obligations, including the warranties a builder must [or may] provide. (§§ 900-907.) Chapter 4 creates a prelitigation dispute resolution process. (§§ 910-938.) Chapter 5 describes the procedures for lawsuits under the Act. (§§ 941-945.5.)” (McMillin, supra, 4 Cal.5th at p. 250.)

For purposes of the case before us, our focus is on chapters 2, 4, and 5, particularly as they relate to claims made against the manufacturer of a product used in the construction of a residential unit, rather than against the builder of that unit.

2. Chapter 4

a. Prelitigation Procedures

Chapter 4 sets out a detailed set of procedures that must be followed before a claimant may file litigation asserting claims under the Act. It begins with section 910, which provides, in relevant part: “Prior to filing an action against any party alleged to have contributed to a violation of the standards set forth in Chapter 2 (commencing with Section 896), the claimant shall initiate the following prelitigation procedures: ¶ (a) The claimant or his or her legal representative

4. The Act applies “only to new residential units where the purchase agreement with the buyer was signed by the seller on or after January 1, 2003.” (§ 938.)

5. A “claimant” is defined as “the individual owners of single-family homes, individual unit owners of attached dwellings and, in the case of a common interest development, any association as defined in Section 4080 [e.g., a homeowner’s association].” (§ 895, subd. (1.)

6. We note that, as the Supreme Court observed in McMillin, supra, 4 Cal.5th at p. 253.)
shall provide written notice via certified mail, overnight mail, or personal delivery to the builder, in the manner prescribed in this section, of the claimant’s claim that the construction of his or her residence violates any of the standards set forth in Chapter 2 (commencing with Section 896).” (Italics added.)

The builder must acknowledge receipt of the notice (§ 913), and may elect to inspect the claimed violation of the standards and conduct testing (§ 916, subd. (a)). If the builder intends to hold a subcontractor, design professional, individual product manufacturer, or material supplier responsible for its contribution to the violation of the standards, the builder must provide notice to that person or entity sufficiently in advance to allow them to attend the inspection and testing and to participate in the repair process. (§ 916, subd. (e).) After the inspection or testing, the builder may offer in writing to repair the violation. The offer must include, among other things, a detailed statement explaining the nature and scope of the repair, with a reasonable completion date for the repair, and it must compensate the homeowner for all applicable damages recoverable under the Act. (§ 917.) The offer to repair must also be accompanied by an offer to mediate the dispute if the homeowner so chooses. (§ 919.) If the homeowner rejects the offer to mediate, he or she must either authorize the builder to proceed with the repair, or request that the repair be completed by an alternative contractor chosen by the homeowner in accordance with specified procedures. (§ 918.) If mediation takes place but fails to resolve the dispute, the homeowner must allow the repair to be performed either by the builder or by the alternative contractor as selected under the procedures set forth in section 918. (§ 919.)

The various sections of Chapter 4 set time limits for all of the acknowledgements, notices, offers, and repairs set forth in the chapter. If the builder fails to strictly and timely comply with the requirements, the claimant is released from the requirements of the chapter and may proceed with the filing of an action. (§§ 915; 916, subd. (c); 920; 925.)

If the procedures set forth in Chapter 4 do not resolve the dispute between the parties, the claimant may file an action to enforce the other chapters of the Act. (§ 914, subd. (a).) If the builder has elected to repair the alleged violation of the standards, the claimant may, at the completion of the repair, file an action for violation of the applicable standards or for a claim of inadequate repair, or both, seeking all applicable damages available under the Act. (§ 926.) However, before bringing a post-repair action, the claimant must request mediation if there was no previous mediation between the parties. (§ 928.) If the claimant does not satisfy the requirements of Chapter 4, the builder may bring a motion to stay any court action or other proceeding until the requirements are satisfied. (§ 930, subd. (b).)

b. Other Provisions of Chapter 4

In addition to the sections detailing the prelitigation procedures that must be followed, Chapter 4 also includes provisions addressing various issues, including (as relevant to this action) claims that combine causes of action not covered by the Act with those that are covered (§ 931) and parties subject to application of the Act (§ 936).

Section 931, which we discuss in more detail in part B.1. of this opinion, post, provides that when a claim of construction defects combines causes of action or damages that are not covered by the Act with claims of “unmet standards” (i.e., violations of one or more of the section 896 standards and/or section 897) under the Act, the claims of unmet standards must be administered in accordance with the Act. Section 936 provides, as relevant to this case, that all of the provisions of the other chapters of the Act apply to general contractors, subcontractors, material suppliers, individual product manufacturers, and design professionals to the extent that those people or entities caused, in whole or in part, a violation of one of the standards as the result of a negligent act or omission or a breach of contract.

3. Chapter 5

Chapter 5 sets forth the procedures for litigation under the Act. The chapter includes sections on the statute of limitation for such actions (§ 941), elements of a claim for violation of the Chapter 2 standards (§ 942) [to establish a claim, the homeowner need only demonstrate that the home does not meet the applicable standard; “[n]o further showing of causation or damages is required to meet the burden of proof”], and available affirmative defenses (§ 945.5).

The chapter also includes a section setting forth the exclusivity of, and exceptions to, the Act: “Except as provided in this title, no other cause of action for a claim covered by this title or for damages recoverable under Section 944 is allowed. In addition to the rights under this title, this title does not apply to any action by a claimant to enforce a contract or express contractual provision, or any action for fraud, personal injury, or violation of a statute.” (§ 943, subd. (a).)

Finally, Chapter 5 includes a section setting forth the damages recoverable under the Act: “If a claim for damages is made under this title, the homeowner is only entitled to damages for the reasonable value of repairing any violation of the standards set forth in this title, the reasonable cost of repairing any damages caused by the repair efforts, the reasonable cost of repairing and rectifying any damages resulting from the failure of the home to meet the standards, the reasonable cost of removing and replacing any improper repair by the builder, reasonable relocation and storage expenses, lost business income if the home was used as a principal place of a business licensed to be operated from the home, reasonable
investigative costs for each established violation, and all other costs or fees recoverable by contract or statute.” (§ 944.)

**B. Class Actions Under the Act**

With this statutory scheme in mind, we turn to the question presented in this case: May a claim for violation of certain standards under the Act caused by an alleged defect in plumbing fixtures be brought against the manufacturer of the fixtures in a class action? To answer this question, we start with an examination of section 931, the only provision of the Act that mentions class actions.

1. **Section 931**

Section 931 provides in full: “If a claim combines causes of action or damages not covered by this part, including, without limitation, personal injuries, class actions, other statutory remedies, or fraud-based claims, the claimed unmet standards shall be administered according to this part, although evidence of the property in its un repaired condition may be introduced to support the respective elements of any such cause of action. As to any fraud-based claim, if the fact that the property has been repaired under this chapter is deemed admissible, the trier of fact shall be informed that the repair was not voluntarily accepted by the homeowner. As to any class action claims that address solely the incorporation of a defective component into a residence, the named and unnamed class members need not comply with this chapter.”

There is no question that the language of this section is somewhat obscure. Although its precise meaning has not been at issue in cases decided by the courts of this State up to this point, the Supreme Court and other courts generally have viewed the first sentence of section 931 to provide a (nonexclusive) list of exclusions from the Act. (See, e.g., McMillin, supra, 4 Cal.5th at pp. 252, 254; Gilvott v. Stewart (2017) 11 Cal.App.5th 875, 890, 893.) That list of exclusions is provided in the context of explaining the operation of the Act in a lawsuit that includes both claims under the Act alleging violations of the section 896 and/or section 897 standards and claims that are “not covered by” —i.e., excluded from—the Act. Section 931 explains that the prelitigation procedures must be followed with regard to the claims under the Act, but those procedures do not apply to claims that are outside of the Act, examples of which are listed.

One of the listed exclusions is “class actions.” While this appears at first glance to be an unambiguous exclusion of class actions in the first sentence of section 931, ambiguity is introduced when the first sentence is read in conjunction with the last sentence: “As to any class action claims that address solely the incorporation of a defective component into a residence, the named and unnamed class members need not comply with this chapter [i.e., the prelitigation procedures].” This sentence seems to suggest that at least some class actions are allowed under the Act. So how do we reconcile these seemingly contradictory sentences in the same statute?

Plaintiffs contend that, despite the inclusion of class actions on the list of exclusions, the first sentence of the statute cannot be interpreted to exclude class actions asserting claims under the Act because a class action is neither a cause of action nor a form of damages; rather, “it is a procedural vehicle for enforcing substantive law.” (Citing City of San Jose v. Superior Court (1974) 12 Cal.3d 447, 462.) Thus, they argue that the inclusion of class actions in the list merely means that the Act does not cover causes of actions for personal injuries, fraud-based claims, or other statutory causes of action, or class actions asserting those causes of action. They contend the last sentence reinforces that interpretation because it demonstrates that the Act anticipates the use of class action procedures to bring claims under the Act and facilitates the use of the procedure by waiving the prelitigation requirements.

Kohler contends the sentences are not contradictory. It argues that the first sentence of the statute excludes all class actions for any claim under the Act, while the last sentence refers to class actions for claims that are outside of the Act. It reasons that because the language used in the last sentence is so similar to the language used in the exclusion set forth in section 896(g)(3)(E) —both refer to claims “solely” for a defective component or manufactured product—the last sentence must be understood to be referring to the same claims. And, since section 896(g)(3)(E) excludes those claims from operation of the Act, the last sentence of section 931 must be understood to refer to claims that are outside the Act.

We disagree with both parties’ interpretations of section 931.

We disagree with plaintiffs’ interpretation because it ignores the actual language used in the statute. (Manufacturers Life Ins. Co. v. Superior Court (1995) 10 Cal.4th 257, 274 [when interpreting a statute, the court cannot “insert what has been omitted, or . . . omit what has been inserted,” and “must give significance to every part of a statute to achieve the legislative purpose”].) While it is true that class actions are neither causes of action nor a form of damages, we observe that causes of action that are asserted in class actions often are referred to as “class action claims.” And given the inconsistent and imprecise use of the terms “causes of action” and “claims” throughout the Act (see Acqua Vista Homeowners Assn. v. MWI, Inc. (2017) 7 Cal.App.5th 1129, 1145), it is not surprising that the language used in section 931 is imprecise. We do not believe that the use of this imprecise language demonstrates an intent to treat class actions differently than the other items on the list of exclusions in the first sentence of section 931 for purposes of interpreting the statutory language. (See Hassan v. Mercy American River...
Hospital (2003) 31 Cal. 4th 709, 715 ["Well-established rules of statutory construction require us to ascertain the intent of the enacting legislative body so that we may adopt the construction that best effectuates the purpose of the law"]).

Moreover, plaintiffs’ interpretation of the first sentence makes no sense. Had the Legislature intended the interpretation plaintiffs give the sentence, logically it would have placed “class actions” at the end of the items on the list of exclusions, rather than in the middle of the list, with language qualifying that “class actions” means only those actions asserting the previous items listed. And in any event, there would be no reason for the Legislature to specify that the Act does not cover class actions that assert claims that are not covered by the Act. If the claims themselves are not covered by the Act, any procedural devices normally available outside of the Act, such as class actions, necessarily are available with regard to those claims.

Kohler’s interpretation of the first sentence of section 931—i.e., that it excludes all class actions—also makes little sense because it conflicts with the last sentence of the statute. Although Kohler tries to reconcile the apparent conflict by arguing that the last sentence refers only to claims that are excluded from the Act under section 896(g)(3)(E), its interpretation of that sentence is flawed for two reasons.

First, Kohler’s interpretation ignores the critical difference between the language of the two statutes. The section 896(g)(3)(E) exclusion applies to claims “solely for a defect in a manufactured product” used in the construction of the residence and excludes those claims from the Act entirely (§ 896(g)(3)(E), italics added), while the last sentence of section 931 relieves claimants from the prelitigation requirements of Chapter 4 of the Act for class action claims based “solely on the incorporation of a defective component into a residence” (§ 931, italics added). A “component” is not the same thing as a “manufactured product.” The term “component” as used in the Act may include a “manufactured product,” but it is not limited to manufactured products. Indeed, there are many kinds of components referenced in section 896. (See, e.g., § 896, subds. (a)(4) [“Roofs, roofing systems, chimney caps, and ventilation components”], (10) [“Stucco, exterior siding, exterior walls, . . . and other exterior wall finishes and fixtures and the systems of those components and fixtures”], (b)(1) [“Foundations, load bearing components, and slabs”], (g)(9) [“Untreated steel fences and adjacent components”].) Similarly, section 900, which addresses limited warranties that must be provided to cover the fit and finish of certain “building components,” sets forth a list of those components, which includes items that might be “manufactured products” as defined in section 896, subdivision (g)(3)(C), as well as items that clearly would not. (§ 900 [listing “cabinets, mirrors, flooring, interior and exterior walls, countertops, paint finishes, and trim”].) Thus, contrary to Kohler’s assertion, the claims referred to in the last sentence of section 931 are not entirely the same as the claims referred to in section 896(g)(3)(E).

Second, Kohler’s interpretation of the last sentence of section 931 would render that sentence superfluous. Since the Act does not apply at all to claims based solely on a defect in a manufactured product, there is no reason for the Legislature to specify that Chapter 4 of the Act does not apply to those excluded claims if they are brought as class actions.

What, then, are we to make of the last sentence of section 931? Plaintiffs contend that this sentence specifies that class actions are allowed and waives the prelitigation procedures for those claims. But once again, plaintiffs’ interpretation ignores the statutory language. We agree that the language of the last sentence could, when read in isolation, be interpreted to mean that class actions generally are allowed for claims under the Act. But the waiver of the prelitigation procedures provision cannot be interpreted to apply to all class actions because its plain language states that it applies only as to a specific category of class action claims: those “that address solely the incorporation of a defective component into a residence.” (§ 931.) It is illogical to conclude that the Legislature intended the last sentence to excise the exclusion of class actions contained in the first sentence of the statute, and also intended to waive the prelitigation procedures for some class action claims (those that address solely the incorporation of a defective component into a residence), but not all class action claims. Instead, the more logical interpretation is that the last sentence, although inartfully written, carves out a limited exception to the exclusion of class actions—for “claims that address solely the incorporation of a defective component into a residence” (§ 931)—and waives the prelitigation procedures for those class action claims. (See California Mfrs. Assn. v. Public Utilities Com. (1979) 24 Cal.3d 836, 844 [“Interpretive constructions which render some words surplusage, defy common sense, or lead to mischief or absurdity, are to be avoided”].)

2. Legislative History and Purpose of the Act

The legislative history and purpose of the Act as a whole support our conclusion that the class action device may not be used to prosecute claims under the Act, with one very narrow exception.

When enacting the Act, the Legislature declared that “[t]he prompt and fair resolution of construction defect claims is in the interest of consumers, homeowners, and the builders of homes, and is vital to the state’s continuing growth and vitality. However, under current procedures and standards, homeowners and builders alike are not afforded the opportunity for quick and fair resolution of claims. Both need clear standards and mechanisms for the prompt resolution of claims. [¶]. . . . It is the intent of the Legislature that this act improve the procedures for the administration of civil justice, including standards and procedures for early disposition of construction defects.” (Stats. 2002, ch. 722, § 1, p. 4247.)

In its analysis of Senate Bill No. 800, which created the Act, the Senate Judiciary Committee observed that “[t]he
The alleged violation, and allow the manufacturer to participate in the manufacturer, allow the manufacturer to attend the inspection and testing of the standards, the builder must provide notice to the manufacturer is to be held responsible in whole or in part for the violation of any action is to be filed "against any party." (§ 910.) If the manufacturer, prior to filing an action. But the claimant must do so true that the claimant must give notice to the builder, rather than the sands of different builders, each of whom must be given notice of the incorporation of a widely-used plumbing fixture into potentially homes an opportunity to attempt to repair whatever defect is as quickly as possible, and, if possible, without litigation. It makes sense, then, that the Legislature intended to exclude class actions for virtually any claim under the Act, because class actions make prelitigation resolution impossible. Even if the named plaintiffs bringing a class action comply with the prelitigation process, thus giving the builder of their homes an opportunity to attempt to repair whatever defect is claimed as to their homes, the builders of other homes are given no such opportunity with respect to the unnamed class members, thus thwarting one of the most significant aspects of the Act. (See McMillin, supra, 4 Cal.5th at pp. 255-256 [rejecting an interpretation of the Act that would thwart the mandatory prelitigation process and the granting of a right to repair].)

C. Application to the Present Case

Having determined that section 931 excludes class actions, with a narrow exception created by the last sentence, we must determine whether the claim alleged in this case may be brought in a class action. We conclude it may not. First, the narrow exception applies only to “class action claims that address solely the incorporation of a defective component into a residence.” (§ 931.) But plaintiffs’ claim does not address solely the incorporation of a defective component into their homes. Rather, they allege that the use of the allegedly defective valves and mixer caps violated and/or caused violations of several of the standards set forth in section 896, and that they caused damage to other components in their homes.12

Second, even if plaintiffs’ claim could be deemed to address solely the incorporation of a defective component into their homes, that claim could not be brought under the Act because the allegedly defective component is a manufactured product, and such claims are expressly excluded. (See § 896, subd. (g)(3)(E) ["This title does not apply in any action seeking recovery solely for a defect in a manufactured product located within or adjacent to a structure.”].) For this reason, we conclude that despite the class action exception in the last sentence of section 931 relating to actions solely for defective components, that exception must be interpreted to include its own exclusion for claims that seek to recover solely for the incorporation of a defective manufactured product—i.e., “a product that is completely manufactured offshore” (§ 896, subd. (g)(3)(C)). (See Moyer v. Workmen’s Comp Appeals Bd. (1973) 10 Cal.3d 222, 230 ["the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole"]).

In short, we hold that the Act does not permit class action claims except when those claims address solely the incorporation into the home of a defective component other than a product that is completely manufactured offshore. Therefore,

10. This is especially true in a case such as this one, which alleges the incorporation of a widely-used plumbing fixture into potentially hundreds of thousands of dwellings, presumably constructed by thousands of different builders, each of whom must be given notice of the alleged defect and an opportunity to repair it.

11. Plaintiffs argue that this significant aspect is not thwarted in this case because only the builders are given an opportunity to attempt to repair the claimed defects under the Act. That is not correct. It is true that the claimant must give notice to the builder, rather than the manufacturer, prior to filing an action. But the claimant must do so whenever an action is to be filed “against any party.” (§ 910.) If the manufacturer is to be held responsible in whole or in part for the violation of the standards, the builder must provide notice to the manufacturer, allow the manufacturer to attend the inspection and testing of the alleged violation, and allow the manufacturer to participate in the repair process. (§ 916, subd. (e).)

12. We note that plaintiffs also allege that the valves and mixer caps violated and/or caused violations of section 897. It would appear that if plaintiffs’ claim was limited to that allegation, that might qualify as a claim that addresses solely the incorporation of a defective component into their homes, so long as the defect caused damage. (§ 897 [“To the extent that a function or component of a structure is not addressed by these standards, it shall be actionable if it causes damage”]; see also McMillin, supra, 4 Cal.5th at pp. 253-254 [explaining that the Act covers, with certain specified exceptions, claims alleging violations of the standards under section 896, and claims under section 897 for defective components that do not violate an articulated section 896 standard but cause damage].) But their claim is not so limited, and therefore the claim does not come within section 931’s exception to the class action exclusion.
the trial court erred by denying Kohler’s anti-class certification motion with respect to the cause of action under the Act.

DISPOSITION

Let a peremptory writ of mandate issue directing respondent Superior Court for Los Angeles County to vacate its January 22, 2018 order to the extent it denied Kohler’s anti-class certification motion and to issue a new and different order granting the motion in its entirety. Kohler shall recover its costs with regard to this writ proceeding.

CERTIFIED FOR PUBLICATION

WILLHITE, J.

We concur: MANELLA, P. J., COLLINS, J.

Cite as 18 C.D.O.S. 10851

ROBERT GENISMAN, Plaintiff and Appellant,
v.
HOPKINS CARLEY et al., Defendants and Respondents.

No. H042543
In The Court of Appeal of the State of California
Sixth Appellate District
(Santa Clara County Super. Ct. No. 1-13-CV-258405)
Filed October 16, 2018
Certified for Publication November 14, 2018

COUNSEL

Counsel for Plaintiff and Appellant: Robert Genisman, Charles Steven Bronitsky, Law Offices of Charles S. Bronitsky
Counsel for Defendants and Respondents: Hopkins Carley et al., Ellyn E. Nesbit, Bruce D. Macleod, Bradley A. Bening, Willoughby, Stuart, Bening & Cook

ORDER GRANTING REQUEST FOR PUBLICATION

THE COURT:

Pursuant to California Rules of Court, rule 8.1105(b), the request for publication is hereby granted. It is ordered that the opinion in this matter, filed on October 16, 2018, shall be certified for publication.

ELIA, ACTING P. J.
BAMATTRE-MANOUKIAN, J., MIHARA, J.

OPINION

In this legal malpractice action, appellant Robert Genisman alleges his former attorneys, Hopkins Carley and Mark Heyl (collectively respondents), were negligent in their representation of him in connection with the 2005 sale of his ownership interest in two private companies (the Transaction). Genisman alleges the Transaction initially was structured as a buyout and respondents restructured it as a redemption without properly advising him regarding that change. As a result, Genisman alleges, he was sued for failing to properly disclose the nature of the Transaction to others. The trial court granted summary judgment to respondents on statute of limitations grounds. We affirm.

I. BACKGROUND

In 2005, Genisman and Pete Cline co-owned ECI Corporation and Coast Capital Mortgage Co., Inc. (Coast Capi-
Genisman wanted Cline to buy out his interest in the companies. In connection with the buyout, Genisman sought to be released from the personal guarantees he had made to lenders, including Stanley Blumenfeld. Genisman retained the law firm of Hopkins Carley to represent him in the Transaction. Initial drafts of the Transaction documents structured it as a buyout. At some point, respondents revised the documents such that the Transaction was a redemption of Genisman’s interest by the companies. Genisman was unaware of the change. When he signed the Transaction documents, he believed they required Cline to buy him out when in fact they called for his shares to be redeemed.

Genisman and Blumenfeld were longtime friends and business associates. On March 1, 2012, Blumenfeld threatened to sue Genisman for lying “about Pete Cline buying his interest in ECI Corporation and Coast Capital when in fact Genisman was taking money out of ECI Corporation instead.” That evening, Genisman e-mailed Heyl to request copies of the Transaction documents and to advise Heyl that Blumenfeld might sue him. Genisman wrote that Blumenfeld “now indicates that if he had known (and that I should have told him) that I was selling to ECI and not to Cline, he never would have let me off the hook on the guarantee for his loan to ECI because ECI, using the funds to buy me out, depleted their resources and therefore [sic] left him with less assets under the guarantee.”

Blumenfeld sued Genisman on July 13, 2012. Blumenfeld’s first amended complaint, filed on September 11, 2012, asserted claims against Genisman for intentional misrepresentation, negligent misrepresentation, and constructive fraud, among others. The complaint alleged that Blumenfeld had loaned $3.5 million to Coast Capital, secured by the assets of Coast Capital and by the personal guarantees of Genisman and Cline. Blumenfeld further alleged that he released Genisman from his personal guarantees in December 2005 and, at approximately the same time, requested repayment of his loans by Coast Capital. Coast Capital repaid a portion of the loans, but $750,000 remained unpaid when, in 2009, Coast Capital became insolvent. In January 2012, Blumenfeld learned that the Transaction documents called for Coast Capital to pay Genisman $1,115,000. Blumenfeld alleged that he would not have agreed to release Genisman from his personal guarantees had Genisman properly advised him of the terms of the Transaction.

Genisman hired a law firm to defend him against the Blumenfeld lawsuit in October 2012. That firm billed Genisman $2,475.40 for work performed between October 17, 2012 and December 20, 2012.

Genisman filed this legal malpractice action against respondents on December 31, 2013. He alleged that his former attorneys changed the structure of the Transaction from a buyout to a redemption “without specifically addressing the issue with” him, advising him “of the potential repercussions of structuring the [T]ransaction as a redemption,” advising him to “disclose that change to any and all parties that may be [a]ffected by such change,” or “determin[ing] whether or not the agreement could be legally structured as a redemption.” Genisman further alleged that those negligent omissions caused him to be sued and to incur damages in the form of “amounts paid . . . to defend [himself] from such lawsuits.”

Respondents moved for summary judgment on the ground that the action was untimely under Code of Civil Procedure section 340.6, subdivision (a), which requires legal malpractice claims be brought one year after actual or constructive discovery. The trial court granted the motion and entered judgment in favor of respondents. Genisman timely appealed.

II. DISCUSSION

A. Standard of Review

“A defendant moving for summary judgment has the burden of showing that a cause of action lacks merit because one or more elements of the cause of action cannot be established or there is a complete defense to that cause of action.” (Jones v. Wachovia Bank (2014) 230 Cal.App.4th 935, 945.) The expiration of the applicable statute of limitations is one such complete defense. (Cucuzza v. City of Santa Clara (2002) 104 Cal.App.4th 1031, 1037; Rose v. Fife (1989) 207 Cal.App.3d 760, 770.) A defendant moving for summary judgment based on the affirmative defense of the statute of limitations carries its burden by presenting evidence establishing that the plaintiff’s claim is time barred. (Police Retirement System of St. Louis v. Page (2018) 22 Cal.App.5th 336, 340 (Police Retirement System).) “It then falls to plaintiff[] to counter with evidence creating a dispute about a fact relevant to that defense.” (Ibid.) That is, plaintiff must submit evidence that would allow a “reasonable trier of fact [to] find in plaintiff’s[] favor on the statute of limitations issue.” (Ibid.; Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 850 [“There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof”).) “If defendant[] presented evidence establishing the defense and plaintiff[] did not effectively dispute any of the relevant facts, summary judgment was properly granted.” (Code Civ. Proc., § 437c, subd. (p)(2).)” (Police Retirement System, supra, at p. 340.)

In reviewing an order granting summary judgment, we review the entire record de novo in the light most favorable to the nonmoving party to determine whether the moving and

1. In the context of securities, the term “redemption” refers to “the reacquisition of a security by the issuer,” and may “refer to the repurchase of stock and mutual-fund shares.” (Black’s Law Dict. (10th ed. 2014) p. 1468, col. 1.) In his deposition, Heyl explained that in a redemption “the shares of the stock of a shareholder are absorbed” or “repurchase[d]” by the corporation.

2. All further statutory citations are to the Code of Civil Procedure unless otherwise indicated.

**B. Summary Judgment was Proper**

Section 340.6, subdivision (a) sets forth the statute of limitations for legal malpractice actions. (Shaoxing City Maalong Wuzhong Products, Ltd. v. Keen & Associates, APC (2015) 238 Cal.App.4th 1031, 1035.) It provides that such a claim is timely if “commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first.” (§ 340.6, subd. (a).) Both the one-year and four-year limitations periods are tolled, however, until the plaintiff sustains “actual injury.” (§ 340.6, subd. (a)(1); Jocer Enterprises, Inc. v. Price (2010) 183 Cal.App.4th 559, 567.) The four-year limitations period also is tolled while “[t]he attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney . . . .” (§ 340.6, subd. (a)(3) [“this subdivision shall toll only the four-year limitation”].) Thus, the limitations period is one year from actual or imputed discovery, or four years (whichever is sooner), unless tolling applies. (Beal Bank, SSB v. Arter & Hadden, LLP (2007) 42 Cal.4th 503, 508.)

Below, respondents relied on, and the trial court ruled based on, the one-year limitations period. On appeal, the parties primarily dispute when Genisman had inquiry notice of the facts giving rise to the alleged malpractice and when he suffered actual injury, for purposes of triggering the one-year limitations period. Genisman also argues that the willful concealment tolling provision applies. And respondents argue for the first time on appeal that Genisman’s claim is barred by section 340.6, subdivision (a)’s four-year limitation period.

**1. Genisman Was on Inquiry Notice by October 2012**

Summary judgment was proper under section 340.6, subdivision (a)’s one-year limitations period only if the undisputed facts compel the conclusion that Genisman was on inquiry notice of his claim more than one year before the complaint was filed. Inquiry notice exist where “the plaintiffs have reason to at least suspect that a type of wrongdoing has injured them.” (Fox v. Ethicon Endo-Surgery, Inc. (2005) 35 Cal.4th 797, 807.) “A plaintiff need not be aware of the specific ‘facts’ necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her.’ [Citation.]” (Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP (2005) 133 Cal.App.4th 658, 685 (Peregrine Funding).)

On March 1, 2012, Genisman knew Blumenfeld was accusing him of selling his interest in Coast Capital “to ECI and not to Cline,” thereby depleting ECI’s resources. And Genisman knew Blumenfeld—a longtime friend and business associate—might sue based on that accusation. Genisman took the threat seriously enough to notify his attorney, Heyl, and to request copies of the Transaction documents. Blumenfeld did sue several months later, alleging that Coast Capital had paid Genisman $1,115,000 in connection with the Transaction. Genisman engaged counsel to handle that lawsuit in October 2012. The March 2012 conversation with Blumenfeld and Blumenfeld’s subsequent lawsuit would have prompted a reasonable person to inquire into the structure of the Transaction. Such inquiry would have led Genisman to discover the true nature of the Transaction, which is the basis for his claim against respondents.

Genisman says he “had no reason to believe that anything Mr. Blumenfeld said was true . . . .” But “[s]ubjective suspicion is not required. If a person becomes aware of facts which would make a reasonably prudent person suspicious, he or she has a duty to investigate further and is charged with knowledge of matters which would have been revealed by such an investigation.” (Wilshire Westwood Associates v. Atlantic Richfield Co. (1993) 20 Cal.App.4th 732, 740.) Any reasonably prudent person, upon being informed that he or she was being sued for failing to disclose the structure of a transaction, would conduct further investigation into the matter.

Genisman also argues that he could not reasonably have discovered the malpractice until respondents provided his counsel with the Transaction documents in March 2013. While receipt and review of the Transaction documents may have been required for Genisman to discover “the specific ‘facts’ necessary to establish [his malpractice] claim,” inquiry notice requires only “a suspicion of wrongdoing . . . .” (Peregrine Funding, supra, 133 Cal.App.4th at p. 685.)

Genisman’s reliance on Favila v. Katten Muchin Rosenman LLP (2010) 188 Cal.App.4th 189 is misplaced. Not only was that case decided at the demurrer stage, but there the plaintiffs were unaware of the law firm’s “involvement, and thus its malpractice, until . . . less than one year prior to the filing of the” complaint. (Id. at p. 224.) Here, Genisman always was aware of respondents’ involvement in the Transaction. And, more than a year before he filed suit, Blumenfeld’s lawsuit put him on notice that the Transaction may not have been structured as he believed.

In sum, “no reasonable trier of fact could conclude [from the undisputed facts] that as of [October 2012 Genisman] did not have enough information to at least make [him] suspicious that” respondents had not properly advised him about the Transaction’s structure. (Police Retirement System, supra, 22 Cal.App.5th at p. 342.)
2. Genisman Suffered Actual Injury More Than A Year Before Suing

While Genisman was on inquiry notice of his claim more than a year before he filed suit, the grant of summary judgment to respondents on statute of limitations grounds was proper only if he also sustained actual injury more than a year before suing. (Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison (1998) 18 Cal.4th 739, 757 (Jordache) [“a plaintiff who actually or constructively discovered the attorney’s error, but who has suffered no damage to support a legal malpractice cause of action, need not file suit prematurely”].) For purposes of section 340.6, “actual injury occurs when the plaintiff sustains any loss or injury legally cognizable as damages in a legal malpractice action based on the facts or omissions that the plaintiff alleged.” (Jordache, supra, at p. 762.) While “nominal damages will not end the tolling of section 340.6’s limitations period,” it is “the fact of damage, rather than the amount, [that] is the critical factor.” (Id. at p. 752.) “When the material facts are undisputed, the trial court can resolve the question [of when the plaintiff sustained actual injury under section 340.6] as a matter of law according to the principles governing summary judgment.” (Id. at p. 764.)

The undisputed facts establish that, between October 17, 2012 and December 20, 2012, Genisman incurred and paid more than $2,000 in attorney fees defending against the Blumenfeld action. Those fees are among the damages Genisman seeks in this malpractice action. The undisputed facts thus compel the conclusion that Genisman sustained actual injury more than a year before he filed suit on December 31, 2013. (Truong v. Glasser (2009) 181 Cal.App.4th 102, 114 [“Plaintiffs first sustained actual injury when they were required to obtain and pay new counsel to file a lawsuit seeking to escape the consequences of their signing the lease and Lease Addendum, which were among the actual damages Plaintiffs suffered as a result of Glasser’s alleged malpractice”].)

Genisman’s argument that these fees are akin to “nominal damages” is unavailing. “Nominal damages are properly awarded in two circumstances: (1) Where there is no loss or injury to be compensated but where the law still recognizes a technical invasion of a plaintiff’s rights or a breach of a defendant’s duty; and (2) although there have been, real, actual injury and damages suffered by a plaintiff, the extent of plaintiff’s injury and damages cannot be determined from the evidence presented.” (Avina v. Spurlock (1972) 28 Cal.

3. Genisman’s brief states that he “paid litigation counsel less than $2,000 in attorneys’ fees” through December of 2012. But the billing statements to which he cites, and the parties’ separate statements of undisputed facts, establish that he was billed $159 on October 24, 2012; $1,743.45 on November 21, 2012; and $572.95 on December 21, 2012 for a total of $2,475.40. The same documents show he paid the $159 October bill and a $10,000 retainer, which was applied to pay the November and December bills. In any event, whether Genisman paid $1,900, or $2,000, or $2,475.40 in attorney fees is not dispositive. As discussed below, none of these amounts is nominal.

3. Willful Concealment Does Not Toll The One-Year Limitations Period

Finally, Genisman contends there is a disputed issue of material fact as to whether respondents willfully concealed the facts underlying his malpractice claim. The tolling provision concerning an attorney’s willful concealment of facts tolls “only the four-year limitation,” which we need not address given our conclusion that the trial court correctly granted summary judgment to respondents based on the one-year limitation. (§ 340.6, subd. (a)(3).)

III. DISPOSITION

The judgment is affirmed. Respondents shall be awarded costs on appeal.

ELIA, ACTING P. J.

WE CONCUR: BAMATTRE-MANOUKIAN, J., MIHARA, J.
THE PEOPLE, Plaintiff and Appellant,

v.

EDDIE RANDOLPH, Defendant and Respondent.

No. F075085
In The Court of Appeal of the State of California
Fifth Appellate District
Filed October 16, 2018
Certified for Publication November 14, 2018

ORDER MODIFYING OPINION
AND DENYING REHEARING
[NO CHANGE IN JUDGMENT]

It is ordered that the opinion filed herein on October 23, 2018, be modified as follows:

1. On page 5, footnote 7, beginning “In raising this appeal, appellant” is deleted in its entirety.

This modification requires the renumbering of all subsequent footnotes.

This modification does not effect a change in the judgment.

The petition for rehearing is denied.

LEVY, Acting P.J.
WE CONCUR: FRANSON, J., PEÑA, J.