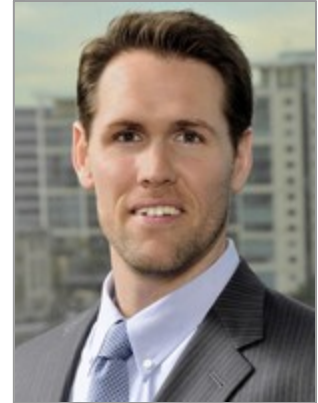

Clarifying Calif. Bad Faith Law For Trial Courts

Law360, New York (August 2, 2016, 6:16 PM ET) -- In 1981, in an effort to create a statutory mechanism to address bad faith litigation tactics, the California Legislature enacted Code of Civil Procedure section 128.5. This statute authorized courts to order “a party, the party’s attorney or both to pay any reasonable expenses, including attorneys’ fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.”



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In its original form, Section 128.5 required “both an objective standard that the act was without merit and a subjective bad faith motive, which was difficult to prove.”[1] As a result, in 1994, the Legislature decided to lower the standard of proof. The Legislature effectively shut down Section 128.5, limiting it to proceedings initiated on or before Dec. 31, 1994. The Legislature then created a new statute, Code of Civil Procedure section 128.7, which applied to all proceedings initiated on or after Jan. 1, 1995. Section 128.7 was created with a similar purpose — to address pleadings “presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation” — but “only require[ed] the attorney’s conduct to be objectively unreasonable.”[2] This brought the California standard in line with the federal standard.[3]

The Legislature later recognized the “[u]nfortunately” narrow scope of Section 128.7 that excluded “bad faith tactics outside the scope of filing frivolous pleadings.”[4] So, in 2014, the Legislature decided to amend and re-enact Section 128.5 with the intent of “reducing the frequency and severity of bad-faith actions or tactics that would not be subject to sanction under Section 128.7.”[5] Effective Jan. 1, 2015, the Legislature removed the restriction limiting Section 128.5 to cases filed on or before Dec. 31, 1994, and restored this “important tool used to ensure [all] bad faith actions that can materially harm the other party or the fairness of a trial are discouraged.”[6] The Legislature left intact Section 128.7.

Differences between Sections 128.5 and 128.7

Section 128.5, as amended, is “intended to be read in harmony with the salutary cognate provisions of section 128.7.”[7] While both Sections 128.5 and 128.7 now use only an objective standard, there are several differences between the statutes.

As noted above, Section 128.5 applies to any “bad faith tactics,” regardless of whether contained in a pleading. Section 128.7, on the other hand, applies only to conduct contained or reflected in pleadings or other court filings.[8]

Section 128.5 authorizes only monetary sanctions, whereas Section 128.7 authorizes any

sanction that is "sufficient to deter repetition of this conduct ... [and] may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation." [9]

Perhaps most notably, Section 128.7 contains a 21-day safe harbor provision, requiring a movant to give the opposing party 21 days' notice — and the opportunity to correct pleading errors — before filing a motion for sanctions. Section 128.5 does not contain a safe harbor provision. The amended version of Section 128.5 does, however, include a new subsection (f), which states that "any sanctions imposed pursuant to this section shall be imposed consistently with the standards, conditions, and procedures set forth in subdivisions (c), (d), and (h) of Section 128.7." Section 128.7(c)(1) is the safe harbor provision. This has led to confusion among California trial courts as to the applicability of the safe harbor provision to motions filed under Section 128.5.

Trial Court Confusion

Since it was amended and re-enacted in 2015, trial courts have come to different conclusions as to whether Section 128.5 requires safe harbor notice. The Los Angeles Superior Court, in *Murtagh v. Baker* [10], held that Section 128.5 does not require a safe harbor period. The court noted that Section 128.5 does not expressly incorporate Section 128.7's safe harbor provision, and pointed to the lack of authority requiring the incorporation of a safe harbor period. [11] The court acknowledged that it "is not entirely clear" whether the safe harbor should apply, but held that the provision should not be incorporated in the absence of an express requirement to do so. [12]

A few months later, the Los Angeles Superior Court followed a different analysis in *Garcia-Laverentz v. Sedgwick Claims Management Services Inc.* [13] In that case, the court stated that the statutory language of Section 128.5 — requiring that "sanctions ... be imposed consistently with the standards, conditions, and procedures set forth in subdivisions (c), (d), and (h) of Section 128.7" — suggests that the safe harbor provision should apply. The court pointed out that "the safe harbor period is designed to promote compliance with statutory standards of conduct" by providing time for a party to correct pleading errors before facing a sanctions motion. [14] But the court acknowledged that, even with a safe harbor period, "there would be no ability to correct" bad faith conduct that fell outside the pleadings. [15] Ultimately, the court denied the motion on substantive grounds and avoided the question of whether the safe harbor provision applied.

Other California trial courts have held that Section 128.5 does indeed require a safe harbor period. In short, the issue remained unresolved. That is, until earlier this summer, when the Court of Appeal provided the answer.

San Diegans for Open Government v. City of San Diego

On June 7, 2016, the Court of Appeal addressed this issue of first impression in *San Diegans for Open Government v. City of San Diego*. [16] The court noted that Section 128.5 does not include or expressly incorporate a safe harbor provision. [17] The court stated that Section 128.7 "is limited to misconduct in filing or advocacy of groundless claims made in signed pleadings and other papers," and thus the purpose of the safe harbor period is to allow a party to avoid sanctions by withdrawing or correcting the offending pleading. [18] The court reasoned that, because Section 128.5 covers a broader range of conduct, "requiring a party to comply with the safe harbor waiting period of section 128.7 before filing a sanctions motion under section 128.5 makes little sense as the waiting period cannot be used to 'withdraw or appropriately correct[]' past bad faith actions or tactics." [19]

The court found the legislative history contained no reference to any safe harbor requirement, and concluded it was "inconceivable the Legislature intended to incorporate by reference a prerequisite filing requirement without mentioning the requirement."^[20] The court thus held that Section 128.5(f), requiring that sanctions be "imposed consistently with the standards, conditions, and procedures set forth in subdivisions (c), (d), and (h) of Section 128.7," pertains solely to "who can be sanctioned and whether the party seeking sanctions exercised due diligence."^[21]

San Diegans for Open Government finally established that Section 128.7's safe harbor provision does not apply to Section 128.5, and provides clear guidance for trial courts going forward.

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[1] Assemb. Comm. on Judiciary, Cal. Comm. Rep.: Courts: Bad Faith Actions or Tactics, Reg. Sess. (Cal. 2014).

[2] Id.

[3] See Fed. R. Civ. Proc. 11(b).

[4] Assemb. Comm. on Judiciary, Cal. Comm. Rep.: Courts: Bad Faith Actions or Tactics, Reg. Sess. (Cal. 2014).

[5] Assemb. 2494, 2013-2014 Assemb., Reg. Sess. (Cal. 2014).

[6] Assemb. Comm. on Judiciary, Cal. Comm. Rep.: Courts: Bad Faith Actions or Tactics, Reg. Sess. (Cal. 2014).

[7] Id.

[8] See *Trans-Action Comm. Inv. Ltd. v. Firmaterr Inc.*, 60 Cal. App. 4th 352, 368-69 (1997).

[9] Civ. Proc. Code § 128.7(d).

[10] 2015 WL 9252665 (Cal. Super. Oct. 28, 2015)

[11] Id. at *2.

[12] Id.

[13] 2016 WL 540986 (Cal. Super. Jan. 25, 2016)

[14] Id. at *4.

[15] Id.

[16] 247 Cal. App. 4th 1306 (2016)

[17] Id. at 1317.

[18] Id. (internal citations omitted).

[19] Id. (internal citations omitted).

[20] Id.

[21] Id. at 1316-1317.