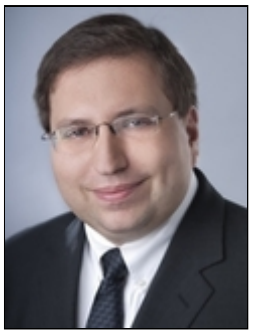
Portfolio Media. Inc. | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

What Is 'Public Interest' Under California Anti-SLAPP Law?

By **Felix Shafir and Jeremy Rosen, Horvitz & Levy LLP**


Felix Shafir


Jeremy Rosen

Law360, New York (December 1, 2016, 5:35 PM EST) -- California's anti-SLAPP statute "allows a court to strike any cause of action that arises from the defendant's exercise of his or her constitutionally protected right of free speech or petition for redress of grievances." (Flatley v. Mauro (2006) 39 Cal.4th 299, 311-312.) Two of the four categories of activities protected by the anti-SLAPP law "require a specific showing" that the challenged cause of action "concerns a matter of public interest." (Damon v. Ocean Hills Journalism Club (2000) 85 Cal.App.4th 468, 474.)

But the statute "does not define what constitutes a 'public issue or an issue of public interest.'" (Albanese v. Menounos (2013) 218 Cal.App.4th 923, 929.) Consequently, "[w]here the margins are drawn as to what constitutes an 'issue of public interest' ... has been one of the many subjects of anti-SLAPP jurisprudence which has garnered substantial judicial attention in the last several years." (Thomas v. Quintero (2005) 126 Cal.App.4th 635, 658.)

To date, the California Supreme Court has set no definitive standard for resolving this question. (See Briggs v. Eden Council for Hope & Opportunity (1999) 19 Cal.4th 1106, 1122 & fn. 9.) Years ago, the court acknowledged that, in the absence of a "bright-line" test, "confusion and disagreement about what issues truly possess public significance inevitably will arise, thus delaying resolution [of anti-SLAPP motions] and wasting precious judicial resources." (Id. at p. 1122.)

But the court has yet to definitively define what issues are of public interest. (See Burke, Anti-SLAPP Litigation (The Rutter Group 2015) § 3-103, p. 3-55 (hereafter Burke).)

In the absence of such a standard, California Courts of Appeal "have developed different criteria or tests for determining whether particular speech or conduct concerns an issue of public interest," and some of these tests conflict. (Burke, supra, § 3-103, p. 3-55; Hilton v. Hallmark Cards (9th Cir. 2010) 599 F.3d 894, 906-907 & fn. 10.)

Indeed, some courts view the lack of a definition as "little more than a message to judges and attorneys that no standards are necessary because they will, or should, know a public concern when they see it." (Los Angeles Unified School District v. Superior Court (2014) 228 Cal.App.4th 222, 240, quotation marks omitted.)

Thus, as the state Supreme Court predicted, the failure to provide a "bright-line" test for this subject has sown confusion and conflict.

In Rand Resources v. City of Carson, case no. S235735, the California Supreme Court may soon provide meaningful guidance concerning which issues satisfy the "public interest" requirement. To understand how the court may resolve this question, it is first helpful to know the differing criteria California's intermediate appellate courts have employed to address this subject.

The split of authority over which issues implicate a public interest

Some California Courts of Appeal, following the Legislature's statutory directive to construe the anti-SLAPP statute broadly, have concluded "that 'an issue of public interest' ... is any issue in which the public is interested. In other words, the issue need not be 'significant' to be protected by the anti-SLAPP statute — it is enough that it is one in which the public takes an interest." (Nygård, Inc. v. Uusi-Kerttula (2008) 159 Cal.App.4th 1027, 1039-1042.)

Under this broad standard, courts have said that whether an issue is of public interest "can be 'evidenced by media coverage'" (Sipple v. Foundation for Nat. Progress (1999) 71 Cal.App.4th 226, 238-239), as well as by whether members of the public have posted commentary about the topic in question on the internet (Chaker v. Mateo (2012) 209 Cal.App.4th 1138, 1146-1147).

Courts adhering to such a broad interpretation of the anti-SLAPP statute have concluded that a diverse range of issues satisfy the "public interest" standard. For example:

- In Sipple, the Court of Appeal held that statements about a nationally known political consultant's alleged abuse of his former wives involved issues of public interest. (Sipple, supra, 71 Cal.App.4th at pp. 230-231, 236-240.)
- In Nygård, the Court of Appeal found an issue of public interest to be at stake in an employer's lawsuit against a former employee where the employee described to a Finnish magazine the alleged conditions under which he and others worked for the employer and revealed that a dancer and her granddaughters were Christmas guests of the company's founder. (Nygård, Inc., supra, 159 Cal.App.4th at pp. 1032-1033, 1039-1044.) The court arrived at this conclusion because the Finnish public was interested in the company's founder — and particularly in his famous Bahamas residence. (Id. at p. 1042.)
- In a different defamation lawsuit brought by the same company, the Court of Appeal held that the public interest requirement was satisfied because the statements in question concerned the release of a movie and the "sexual conduct occurring during the filming" of that movie at the same businessman's famous Bahamas residence. (Nygård, Inc. v. Kustannusosakeyhtiö Iltalehti (June 21, 2007, B192639) 2007 WL 1775963, at pp. *1, *8-*9 [nonpub. opn.].) The appellate court concluded that the "[s]exual conduct and lifestyles" of such businessmen, as well as the "sexual lifestyles of actors," are issues of public interest. (Id. at p. *9.)
- In Chaker, the Court of Appeal concluded that a businessman's defamation lawsuit against his ex-girlfriend and her mother involved the public interest where these defendants allegedly made derogatory remarks about his character and his business on various websites. (Chaker, supra, 209 Cal.App.4th at pp. 1141-1142, 1145-1147.) The appellate court "emphasized that the public interest may extend to statements about conduct between private individuals" and held that the statements in question fell "within the broad parameters of public interest" since the information about his "character and business practices" were plainly meant as warnings for consumers. (Id. at pp. 1145-1147.)
- In Rivera v. First DataBank, Inc. (2010) 187 Cal.App.4th 709, the Court of Appeal decided that pamphlets concerning the drug Paxil implicated an issue of public interest where the plaintiffs — relatives of a man who committed suicide after he was prescribed Paxil for stress — sued the publisher based on their contention that the pamphlets were confusing and misleading. (Id. at pp. 713-714, 716-717.) The appellate court stressed that the public interest requirement "may encompass activity between private people" and decided this requirement was met by these pamphlets since "[t]reatment for depression is a matter of public interest." (Id. at p. 716.)
- In Ingels v. Westwood One Broadcasting Services Inc. (2005) 129 Cal.App.4th 1050, the Court of Appeal determined that matters of public interest were at issue in an age discrimination lawsuit against a radio station and call-in show host where the host ridiculed the plaintiff, who had called into the show, on air about his age. (Id. at pp. 1062-1064.)

But not all California courts interpret "public interest" quite so broadly. Some courts instead apply a narrower interpretation of the anti-SLAPP law under which activities are deemed to be of public interest only if they generally fall within one or more of three categories. (Rivero v. American Federation of State, County, and Municipal Employees, AFL-CIO (2003) 105 Cal.App.4th 913, 919-

924.)

"The first category comprises cases where the statement or activity precipitating the underlying cause of action [is] 'a person or entity in the public eye.'" (Cross v. Cooper (2011) 197 Cal.App.4th 357, 373.)

"The second category comprises cases where the statement or activity precipitating the underlying cause of action 'involve[s] conduct that could affect large numbers of people beyond the direct participants.'" (Ibid.) "And the third category comprises cases where the statement or activity precipitating the claim involve[s] 'a topic of widespread, public interest.'" (Ibid.)

Applying this more restrictive test, the Courts of Appeal have determined that a wide array of issues are not of public interest. For example:

- In Rivero, the Court of Appeal concluded that a union's statements about the plaintiff's supervision of a staff of custodians was "hardly a matter of public interest" even though the statements involved criticism of an allegedly unlawful workplace activity and was part of a labor dispute. (Rivero, supra, 105 Cal.App.4th at pp. 924-925.)
- In Albanese, the Court of Appeal held that the public interest requirement was not satisfied by a television personality's comments accusing the plaintiff celebrity stylist of stealing from her even though the evidence showed "some public interest" in the plaintiff "based on her profession as a celebrity stylist and style expert" and even though she received "publicity" from "creating and maintaining a Web page." (Albanese, supra, 218 Cal.App.4th at pp. 934-937.)

In short, the Courts of Appeal have developed differing tests for determining what constitutes an issue of public interest and some of those tests are more restrictive than others. (See Hilton, supra, 599 F.3d at pp. 906-907 & fn. 10.) Moreover, even under the more restrictive tests, California courts disagree over the precise circumstances that implicate a "public interest."

For example, some courts applying more restrictive standards have held that, "in cases where the issue is not of interest to the public at large, but rather to a limited, but definable portion of the public (a private group, organization or community), the constitutionally protected activity must, at a minimum, occur in the context of an ongoing controversy, dispute or discussion, such that it warrants protection by a[n] [anti-SLAPP] statute that embodies the public policy of encouraging participation in matters of public significance." (Du Charme v. International Brotherhood of Electrical Workers, Local 45 (2003) 110 Cal.App.4th 107, 119.)

Still others have gone farther to hold that a statement must involve an "ongoing controversy" even where the statement does "refer to a subject of widespread public interest." (Cross, supra, 197 Cal.App.4th at p. 381, fn. 15 [collecting cases].)

But other courts have rejected the premise "that an existing controversy is necessary for speech to be on a matter of public interest," instead holding that the public interest requirement "is not limited to speech made in the context of an ongoing controversy." (Industrial Waste and Debris Box Service Inc. v. Murphy (2016) 4 Cal.App.5th 1135, 1151.)

Although California's intermediate appellate courts have utilized differing tests to decide whether an issue is of public interest (Burke, supra, at § 3-103, p. 3-55), few of them have openly acknowledged these divisions in the law. Instead, Courts of Appeal often lump such differing standards together and discuss them as if they were all part of a uniform "framework" for assessing whether the public interest requirement is met. (See, e.g., Cross, supra, 197 Cal.App.4th at pp. 372-374.)

Nonetheless, some courts have openly recognized the tension or outright conflicts among the Courts of Appeal on this subject. (See, e.g., Hilton, supra, 599 F.3d at pp. 906-907 & fn. 10; Pham v. Lee (Dec. 11, 2014, No. H039184) 2014 WL 6992251, at p. *5 [nonpub. opn.].)

The Rand Resources case

In Rand Resources v. City of Carson, case no. S235735, the California Supreme Court is finally poised to offer guidance that may begin to resolve these conflicts.

That case stems from an agreement in which the City of Carson appointed Rand Resources as its sole and exclusive agent for coordinating and negotiating with the National Football League (NFL) over the designation and development of an NFL football stadium in the city during a specific period of time. (Rand Resources LLC v. City of Carson (2016) 247 Cal.App.4th 1080, 1084-1085.)

Subsequently, the city allegedly stopped adhering to this agreement and allowed others to begin acting as the city's "'agent and representative' with respect to the NFL and development of the sports and entertainment complex." (Id. at p. 1086.)

Rand Resources, its sole member Richard Rand, and Carson El Camino LLC (the assignee of Rand Resources' interest in the agreement) then filed a lawsuit alleging that the city breached the exclusive agency agreement by allowing others to act as the city's agent in securing the NFL stadium, and also accused the city and those other developers of concealing their meetings and communications to circumvent the agreement. (Rand Resources LLC, supra, 247 Cal.App.4th at pp. 1086-1088.)

Several defendants filed anti-SLAPP motions, which the trial court granted. In doing so, the trial court concluded that the communications in question satisfied the public interest requirement because they involved a contract with a public entity for the proposed development of commercial property. (Rand Resources LLC v. Bloom (Los Angeles County Superior Court May 7, 2015, No. BC564093) 2015 WL 10354248, at pp. *1-*3 [nonpub. opn.].)

The Court of Appeal reversed, holding that the activities in question did not implicate the public interest. (See Rand Resources LLC, supra, 247 Cal.App.4th at pp. 1091-1097.) In arriving at this conclusion, the appellate court applied the narrow public interest test previously articulated by another Court of Appeal in Weinberg v. Feisel (2003) 110 Cal.App.4th 1122. (Id. at pp. 1091-1092.)

According to Weinberg: (1) "'public interest' does not equate with mere curiosity"; (2) "a matter of concern to the speaker and a relatively small, specific audience is not a matter of public interest"; and (3) "there should be some degree of closeness between the challenged statements and the asserted public interest" since "the assertion of a broad and amorphous public interest is not sufficient." (Weinberg, supra, 110 Cal.App.4th at p. 1132.)

Applying such restrictive standards, the Court of Appeal in Rand Resources held that although the city's goal of bringing a football stadium to Carson was a matter of public interest, plaintiffs' complaint focused on the identity of the city's agent, which the appellate court determined was not an issue of public interest.

But the Weinberg standards for assessing whether a matter is of public interest conflict with other Court of Appeal cases that broadly construe the anti-SLAPP law to hold that any issue of interest to the public meets the public interest requirement. (Hilton, supra, 599 F.3d at p. 907, fn. 10.)

Given these disagreements among the Courts of Appeal, it is perhaps unsurprising that the California Supreme Court has recently granted review in Rand Resources to decide whether the plaintiffs' claims there "arise out of a public issue or an issue of public interest" under the anti-SLAPP statute. (Rand Resources v. City of Carson (2016) 208 Cal.Rptr.3d 282, 282.)

California's lower courts have long grappled with how to define an issue of public interest under California's anti-SLAPP law, often by applying conflicting tests. The state's high court may soon weigh in about these conflicts, and it will be interesting to see how broadly, or narrowly, the Supreme Court defines matters of "public interest" in Rand Resources.

Felix Shafir and Jeremy Rosen are partners at Horvitz & Levy LLP, a firm devoted to civil appellate litigation. They have collectively handled more than 50 anti-SLAPP appeals.

for general information purposes and is not intended to be and should not be taken as legal advice.
