LOS ANGELES
Daily Journal
www.dailyjournal.com
TUESDAY, DECEMBER 20, 2011

LITIGATION

Uncertainty looms over anti-SLAPP issues in 2011

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In 2011, California's appellate courts issued 29 published opinions interpreting the state's anti-SLAPP statute (Code of Civil Procedure Sections 425.16 et seq.). The anti-SLAPP statute provides a procedure for the early dismissal of strategic lawsuits against public participation (SLAPPs) — i.e., causes of action that arise from acts in furtherance of the rights of petition or free speech. If a complaint is subject to the anti-SLAPP statute, the plaintiff must then make a prima facie showing that the complaint has merit.

With nearly 400 published opinions interpreting the anti-SLAPP statute to digest when analyzing whether such a motion can be filed or opposed, the task is daunting for any lawyer. The task is even more difficult given that many issues are still unsettled, a trend that continued in 2011.

Courts have still not settled what happens when a cause of action arises from actions that are both protected and unprotected under the anti-SLAPP statute — for example, in a retaliatory eviction claim based on the defendant's unlawful detainer actions and complaints to animal control (protected petitioning activities) as well as on the defendant's threats to have the plaintiffs evicted unless they parted with their service dog (not protected). See *Wallace v. McCubbin*, 196 Cal. App. 4th 1169 (2011).

In such cases, the question is whether the plaintiff must show a likelihood of success on the cause of action as a whole, only on the part of the claim premised on protected activity, or on any part of the claim, whether protected or unprotected. In *Wallace*, the court chose the third option. The court was reluctant to do so, explaining that a contrary conclusion (only needing to show a probability of prevailing on the part of the cause of action relating to protected activity) was supported by the statutory language, legislative history, and the public policy against chilling protected speech. The court did so because of dicta in *Oasis West Realty v. Goldman*, 51 Cal. 4th 811 (2011). But, given that *Oasis West Realty* did not involve a "mixed" cause of action, it remains an open question how this issue will ultimately be decided.

In *Oasis West Realty*, the plaintiff sued its former attorney for breach of fiduciary duty. The Supreme Court declined to decide whether the attorney's conduct was protected under the anti-SLAPP statute, but proceeded directly to the likelihood-of-success prong of the analysis.

Justice Joyce L. Kennard wrote separately to point out that the attorney's political involvement against his former client's redevelopment project was clearly protected conduct under the statute. Thus, Justice Kennard's opinion suggests that the anti-SLAPP statute can cover lawsuits against lawyers for breach of fiduciary duty or malpractice. This is an issue that has long been the subject of a split among appellate courts. Indeed, three state appellate court opinions this year deepened that existing split. See *Coretronic Corp. v. Cozen O'Connor*, 192 Cal. App. 4th 1381, 1392-93 (2011) (holding that giving legal advice regarding a party with interests adverse to that of another client is not protected under the anti-SLAPP statute); *Bleavins v. Demarest*, 196 Cal. App. 4th 1533, 1541-42 (2011) (claim relating to the "representation by counsel" subject to anti-SLAPP motion); *Fremont Reorg'n Corp. v. Faigin*, 198 Cal. App. 4th 1153, 1166-77 (breach of fiduciary duty claims subject to anti-SLAPP motion).

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The anti-SLAPP statute also applies to petitioning activities relating to public issues and issues of public interest. Code of Civil Procedure Sections 425.16(e)(3)-(4). For many years, courts' views of what is "of public interest" have ranged from very broad to very narrow. This division continued in 2011.

In *Price v. Operating Engineers Local Union No. 3*, 195 Cal. App. 4th 962, 974 (2011), the court held that speech attacking a company leader during a labor dispute did not address an issue of public concern because the company leader lacked power to change his company's labor policy and because there was little demonstrated interest in the dispute outside the participants.

By contrast, in *No Doubt v. Activision Publishing Inc.*, 192 Cal. App. 4th 1018, 1027 (2011), the court held the use of musicians' likenesses in a videogame was a matter of public interest simply "because of the widespread fame [the band] No Doubt has achieved" since celebrities "create a legitimate and widespread attention to their activities" merely by virtue of their "accomplishments, mode of living, professional standing or calling."

A defendant prevailing on an anti-SLAPP motion is entitled to attorney fees. Code of Civil Procedure Section 425.16(c)(1). A prevailing plaintiff is only entitled to attorney fees if the defendant's anti-SLAPP motion is "frivolous or is solely intended to cause unnecessary delay[.]" However, this year's cases reveal that a lower standard for "frivolity" may be emerging.

In *Gerbosi v. Gaims, Weil, & Epstein, LLP*, 193 Cal. App. 4th 435, 441-43 (2011), the defendant was sued for wiretapping conversations between an opposing party and her neighbor. He filed an anti-SLAPP motion, arguing that his actions were in furtherance of his client's right to petition. The trial court denied the motion and awarded plaintiffs substantial attorneys fees. The appellate court affirmed the fee award even though the court acknowledged that the complaint was subject to an anti-SLAPP motion as to some of the claims. But under the reasoning of the court, nearly any plaintiff who successfully opposes a motion would be entitled to fees, a standard that is directly contrary to the statute. See also *City of Alhambra v. D'Ausilio*, 193 Cal. App. 4th 1301, 1309 (2011) (awarding plaintiff attorney fees because defendant "raise[d] no new permissible arguments that change[d] the result").

Hopefully, 2012 will provide us with some answers to these and other open questions in anti-SLAPP law.

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