



February 14, 2012

The Wide-Ranging Applications Of Calif. Anti-SLAPP Law

California's anti-SLAPP statute provides a procedure for the early dismissal of strategic lawsuits against public participation — causes of action that arise from acts in furtherance of the rights of petition or free speech.[1] When the anti-SLAPP statute applies, it permits a complaint to be dismissed with prejudice 30 to 60 days after the complaint is filed and before any discovery is permitted.[2]

When reviewing an anti-SLAPP motion, a court engages in a two-prong analysis: First, it will decide whether the activity is protected petitioning activity as defined by the statute and, if so, whether the plaintiff has shown a probability of success on the merits, which is said to be a "summary-judgment-like" test.[3]

In 2011 alone, California's appellate courts issued 29 published opinions interpreting California's anti-SLAPP statute (Cal. Civ. Proc. Code § 425.16 (West 2012)), bringing the total to nearly 400 significant published appellate opinions since the statute's passage in 1992.

The anti-SLAPP arena can be complex, and it is not always obvious whether a newly filed complaint can be targeted with such a motion. In this article, we identify a number of subject matters to which the anti-SLAPP statute has been applied in the last few years and we explain ways in which its applicability remains unsettled.

Free Speech Rights

Privacy Torts

Privacy torts such as defamation, misappropriation and intrusion upon seclusion are generally covered by the anti-SLAPP statute if they involve an issue of public concern or interest.[4] Courts have been especially liberal in applying the statute to suits involving celebrities because the public is literally "interested" in celebrities' lives.[5]

As noted above, while activities traditionally protected by the First Amendment, such as media reporting and pamphleting, are generally covered by the anti-SLAPP statute, such activities are not automatically entitled to anti-SLAPP protection.

For example, one court held that union pamphlets 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 there was little demonstrated interest in the dispute outside the participants.[6] Thus, while defamatory speech may sometimes be within the protection of the anti-SLAPP statute, it must relate to an issue of public concern or interest, which does not necessarily track the federal First Amendment standard.

Intellectual Property Torts

In addition, there has been considerable overlap with intellectual property disputes and privacy torts; courts have been inclined to hold those areas covered by the anti-SLAPP statute as well. For example, a lawsuit over the creation of a videogame using celebrity likenesses implicated the anti-SLAPP statute, despite the fact that the use of the likenesses was also covered by a licensing agreement.[7]

And in a case for defamation by individuals on whom fictional television characters were modeled, the court held the anti-SLAPP statute applied because there is a public interest in the creative process underlying the production of film and television episodes.[8]

But by contrast, a run-of-the-mill case involving misappropriation of trade secrets did not implicate the anti-SLAPP statute.[9]

Actions by Municipalities

Courts have held that the anti-SLAPP statute applies to cases against government entities. For example, a suit against a municipality alleging improper government expenditures was within the statute's protection.[10] By contrast, a municipality's allegedly unlawful failure to use competitive bidding in a maintenance contract did not qualify for anti-SLAPP protection.[11]

Real Property Disputes

Courts have applied the anti-SLAPP statute to a variety of matters relating to real property. The statute sometimes applies to landlord-tenant disputes, but not always — it depends on the particular conduct at issue.[12] Courts have generally found that the filing of a lis pendens is protected under the statute, although it is not clear whether this will always be the case, or whether it must be filed in connection with litigation activities to be protected.[13]

Criticism of a homeowner's association board is protected activity, but a homeowners' association's enforcement of restrictive covenants and review of architectural plans is not.[14] Actions taken in furtherance of an eminent domain proceeding appear to be protected, even for events prior to the eminent domain action and despite allegations of misconduct.[15]

However, mere property disputes are not subject to an anti-SLAPP motion, even if a dispute arose in the context of protected activity — for instance, a dispute over church property following a schism over policy.[16]

Petitioning Activities

Negotiation, Settlement and Arbitration

Statements warning of liability or threatening legal action may be protected by the statute, but not if they are made without a good-faith belief in a legally viable claim.[17] Making a settlement offer is protected activity under the anti-SLAPP statute.[18]

Actions taken during settlement negotiations have also been held to be protected activity, but litigation regarding the enforceability or alleged breach of a settlement agreement has been held

not to be protected.[19] And in contrast to settlement and negotiations, a demand to commence private arbitration was held not to arise from activity protected by the anti-SLAPP statute.[20]

Foreign Litigation

Unlike domestic litigation, which is a protected petitioning activity, courts have held that petitioning activity in a foreign country does not qualify for anti-SLAPP protection.[21] However, one court has held that unlike filing suit in a foreign country, filing documents in support of litigation in a foreign country is a protected activity if it is intended to influence the determination of issues pending in a domestic court.[22]

Legal Malpractice and Professional Misconduct

There is an ongoing split of authority regarding the applicability of the anti-SLAPP statute to suits involving attorney malpractice and misconduct.[23] Some courts have held that the act of conflicted representation is not within the protection of the statute,[24] while other courts have held that the statute applies to a client's claim for breach of fiduciary duty against his or her own attorney.[25] In general, however, the anti-SLAPP statute will apply to malicious prosecution and abuse of process actions against attorneys.[26]

Although the broader issue remains unsettled, California Supreme Court Justice Joyce L. Kennard's concurring opinion in *Oasis West Realty LLC v. Goldman*[27] shed some light on whether a malpractice suit falls within the protection of the anti-SLAPP statute. In that case, an attorney engaged in advocacy on a public issue that was directly adverse to the interests of a former client, involving a matter on which the attorney had worked on the client's behalf.

Although the majority did not reach the issue of whether the attorney's conduct was protected, Justice Kennard concurred and wrote separately to explain that an attorney's actions should be regarded as protected petitioning conduct and that therefore the legal malpractice claim was covered by the anti-SLAPP statute.[28]

--By Jeremy B. Rosen and Josephine K. Mason, Horvitz & Levy LLP

Jeremy Rosen is a partner with Horvitz & Levy in the firm's Encino, Calif., office. He specializes in civil appeals, and has handled anti-SLAPP matters in the superior courts, appellate courts and the state supreme court. Josephine Mason (jmason@horvitzlevy.com) is a lawyer in the firm's Encino office.

The opinions expressed are those of the authors and do not necessarily reflect the views of the firm, its clients, or Portfolio Media, publisher of Law360. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] Cal. Civ. Proc. Code § 425.16(b)(1) (West 2012).

[2] *Id.* §§ 425.16(f)-(g).

[3] *E.g.*, *Lefebvre v. Lefebvre*, 199 Cal. App. 4th 696, 702 (2011).

[4] *See, e.g.*, *Taus v. Loftus*, 40 Cal. 4th 683 (2007) (case study of patient's mental health history in scholarly journal protected); *Nguyen-Lam v. Cao*, 171 Cal. App. 4th 858 (2009)

(allegedly defamatory comments regarding an appointee for school board superintendent protected).

[5] *No Doubt v. Activision Publ'g Inc.*, 192 Cal. App. 4th 1018 (2011); accord *Hilton v. Hallmark Cards*, 580 F.3d 874 (9th Cir. 2009) (use of Paris Hilton's likeness and signature phrase on a greeting card was covered by the anti-SLAPP statute).

[6] *Price v. Operating Eng'rs Local Union No. 3*, 195 Cal. App. 4th 962, 974 (2011).

[7] *No Doubt*, 192 Cal. App. 4th at 1018.

[8] *Tamkin v. CBS Broad. Inc.*, 193 Cal. App. 4th 133 (2011).

[9] See *World Fin. Grp. Inc. v. HBW Ins. & Fin. Servs. Inc.*, 172 Cal. App. 4th 1561 (2009).

[10] *Vargas v. City of Salinas*, 46 Cal. 4th 1 (2009).

[11] *Graffiti Protective Coatings Inc. v. City of Pico Rivera*, 181 Cal. App. 4th 1207 (2010).

[12] See *Wallace v. McCubbin*, 196 Cal. App. 4th 1169 (2011) (retaliatory eviction claim based on the defendant's unlawful detainer actions and complaints to animal control were protected petitioning activities, but defendant's threats to have the plaintiffs evicted unless they parted with their service dog were not protected). Cf. *Clark v. Mazgani*, 170 Cal. App. 4th 1281 (2009) (a landlord's alleged unlawful eviction of a tenant was not protected activity under the anti-SLAPP statute).

[13] See, e.g., *Alpha & Omega Dev., LP v. Whillock Contracting Inc.*, 200 Cal. App. 4th 656 (2011) (the filing of a *lis pendens* is covered by the anti-SLAPP statute even if it lacks evidentiary merit). Cf. *Manhattan Loft LLC v. Mercury Liquors Inc.*, 173 Cal. App. 4th 1040 (2009) (the filing of a *lis pendens* was protected activity under the anti-SLAPP statute because it was sufficiently related to ongoing arbitration proceedings).

[14] Compare *Country Side Villas Homeowners Ass'n v. Ivie*, 193 Cal. App. 4th 1110 (2011), with *Turner v. Vista Pointe Ridge Homeowners Ass'n*, 180 Cal. App. 4th 676 (2009).

[15] See *Kearney v. Foley & Lardner LLP*, 590 F.3d 638 (9th Cir. 2009).

[16] See *In re Episcopal Church Cases*, 45 Cal. 4th 467 (2009).

[17] Compare *Bailey v. Brewer*, 197 Cal. App. 4th 781 (2011) (statements threatening litigation not protected without a good-faith basis), with *Digerati Holdings, LLC v. Young Money Entm't LLC*, 194 Cal. App. 4th 873 (2011) (warning regarding liability held protected).

[18] See *Genethera Inc. v. Troy & Gould Prof'l Corp.*, 171 Cal. App. 4th 901 (2009).

[19] Compare *Seltzer v. Barnes*, 182 Cal. App. 4th 953 (2010) (settlement negotiations are protected activity unless they are shown to be unlawful), with *City of Alhambra v. D'Ausilio*, 193 Cal. App. 4th 1301 (2011) (litigation regarding enforceability of a settlement agreement is not a SLAPP merely because the underlying activities prohibited by the settlement agreement involve protected activities), and *Delois v. Barrett Block Partners*, 177 Cal. App. 4th 940 (2009) (alleged

breach of a settlement agreement and related tortious conduct do not qualify for anti-SLAPP protection).

[20] *Century 21 Chamberlain & Assocs. v. Haberman*, 173 Cal. App. 4th 1 (2009).

[21] See *Guessous v. Chrome Hearts LLC*, 179 Cal. App. 4th 1177 (2009).

[22] *Summerfield v. Randolph*, 201 Cal. App. 4th 127 (2011).

[23] Compare, e.g., *Peregrine Funding Inc. v. Sheppard Mullin Richter & Hampton LLP*, 133 Cal. App. 4th 658, 668-75 (2009) (anti-SLAPP statute applied to claims against attorneys for professional malpractice), with *PrediWave Corp. v. Simpson Thacher & Bartlett LLP*, 179 Cal. App. 4th 1204, 1224-28 (2009) (disagreeing with *Peregrine* and holding anti-SLAPP statute did not apply to malpractice claims).

[24] *U.S. Fire Ins. Co. v. Sheppard Mullin Richter & Hampton*, 171 Cal. App. 4th 1617 (2009) (law firm's conflict of interest, rather than specific conduct during the course of representation, not covered by the anti-SLAPP statute); *Coretronic Corp. v. Cozen O'Connor*, 192 Cal. App. 4th 1381 (2011) (engaging in legal representation of a party with interests adverse to that of another client is not protected petitioning activity under the anti-SLAPP statute, regardless of whether the parties actually formed an attorney-client relationship). Cf. *Oasis West Realty LLC v. Goldman*, 51 Cal. 4th 811, 828 (2011) (Kennard, J., concurring).

[25] Compare *Fremont Reorg. Corp. v. Faigin*, 198 Cal. App. 4th 1153 (2011) (cause of action premised in part on in-house counsel's alleged breach of fiduciary duty covered by anti-SLAPP statute), with *Hylton v. Frank E. Rogoziensk Inc.*, 177 Cal. App. 4th 1264 (2009) (claims based on alleged ethical violation and breach of fiduciary duty not protected under anti-SLAPP statute), and *PrediWave Corp.*, 179 Cal. App. 4th at 1204 (the anti-SLAPP statute does not apply to lawsuits brought by clients against their own lawyers for alleged problems with that representation).

[26] *Jarrow Formulas Inc. v. LaMarche*, 31 Cal. 4th 728, 732-41 (2003) (anti-SLAPP statute applied to malicious prosecution action against attorney); *Mallard v. Progressive Choice Ins. Co.*, 188 Cal. App. 4th 531, 534-42 (2010) (anti-SLAPP statute applied to abuse of process claim against attorney).

[27] 51 Cal. 4th 811 (2011).

[28] *Id.* at 828 (Kennard, J., concurring).