

THE STATE OF THE SUPREME COURT'S ANTI-SLAPP DOCKET



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In the last two years, the California Supreme Court has decided as many anti-SLAPP cases as it did in the prior seven years combined. In fact, these last two years account for nearly 20% of all of the Court's anti-SLAPP cases since the Legislature enacted the statutory protection in 1992. That is a substantial commitment of Court attention to a procedural device that is applicable in a relatively small percentage of cases. But it also underscores the pace of recent developments in an area of the law that implicates substantial competing interests: the concern that meritless suits should not chill free speech and petitioning rights and the concern that plaintiffs' ability to pursue their claims should not be unnecessarily hampered.

The development of anti-SLAPP jurisprudence in the Courts of Appeal shows no signs of abating. Neither does the Supreme Court's interest in this area, with an additional nine anti-SLAPP cases pending on its docket.

The anti-SLAPP statute (Code Civ. Proc., § 425.16) is designed to deter lawsuits that chill the valid exercise of defendants' constitutional rights of freedom of speech and petition for the redress of grievances. It authorizes defendants to file a special motion to strike such claims. Anti-SLAPP motions are considered under a two-prong analysis. First, the defendant must make a threshold showing that the challenged cause of action arises from protected activity. The burden then shifts to the plaintiff to demonstrate a probability of prevailing on that claim, with the court accepting the plaintiff's evidence and deciding the probability of success as a matter of law. To further discourage meritless suits, a defendant who prevails on an anti-SLAPP motion is usually entitled to attorney's fees and costs.

A. Recent Developments

First prong analysis. In the last two years, the Supreme Court decided two cases involving first-prong issues.

The first case cautioned that anti-SLAPP protections extend beyond conduct that is directly protected by the First Amendment. In *City of Montebello v. Vasquez* (2016) 1 Cal.5th 409, a city sued its former council members, alleging that their votes to approve a public contract were tainted by a conflict of interest. The city sought to invalidate the contract and to force the defendants to disgorge campaign contributions received from the contractor. The Supreme Court held that the anti-SLAPP statute applied. The Court recognized that a legislator's vote does not constitute an exercise of his free speech rights. However, the Court found that the claim nonetheless arose from protected conduct because the anti-SLAPP statute protects not just exercises of free speech, but also conduct "in furtherance" of those rights—and a legislator's votes are made in furtherance of his advocacy for the legislation and her communication with constituents about the legislation.

The second case, *Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, cautioned that there are limits in analyzing the requisite nexus between a claim and protected conduct. There, a professor claimed that a university denied his tenure application because of his national origin. The university argued that the claim arose from protected activity because the tenure denial resulted from an official proceeding and related communications. The Supreme Court disagreed. It held that the claim arose only from the decision to deny tenure, which was not itself in furtherance of the university's speech or petitioning rights. The communications (speech) and the official proceeding (petitioning) that led to the tenure denial were not themselves elements of the professor's claim, and thus did not give rise to the claim. That the speech and petitioning ultimately led to the tenure denial was not a sufficient nexus.

Second prong and attorney's fees. Of the Court's three recent second-prong cases, two focused on the method by

which courts apply the second prong, rather than on a substantive legal issue that arose from a particular claim.

Baral v. Schnitt (2016) 1 Cal.5th 376 resolved a major conflict among the Courts of Appeal concerning how to analyze a cause of action that seeks relief both for protected and unprotected conduct—claims referred to as “mixed causes of action.” The Court held that for anti-SLAPP purposes, such mixed causes of action must be treated as separate claims. If the plaintiff cannot establish the minimal merit of her claim regarding protected activity, the allegations of protected activity supporting the cause of action must be stricken. In other words, the plaintiff cannot avoid anti-SLAPP protections by linking claims of protected and unprotected activity and then demonstrating a probability of success on the merits of the unprotected-activity allegations.

Barry v. State Bar of California (2017) 2 Cal.5th 318 corrected a misconception that the second prong examines only the plaintiff’s probability of success on the merits of the claim. The Court explained that the plaintiff can also lose an anti-SLAPP motion when his claim is procedurally or jurisdictionally barred. What’s more, the Court held that trial courts are empowered to decide anti-SLAPP motions and award fees and costs even when they lack subject matter jurisdiction over the plaintiff’s claim. In other words, the anti-SLAPP statute has teeth: Its purpose of discouraging suits that deplete a defendant’s energy and resources will be honored regardless of whether the plaintiff’s claim is substantively meritless or jurisdictionally defective.

B. The Path Ahead

The cases currently pending on the Supreme Court’s anti-SLAPP docket focus largely on first-prong and procedural issues. Here are the highlights that most directly impact business litigators:

Relevance of motive allegations. The Court has thus far granted review in six cases that all pose a recurring issue on which the Courts of Appeal are split: Whether the mere allegation of a bad motive (discrimination, retaliation, etc.) for otherwise protected conduct is enough to defeat an anti-SLAPP motion on the first prong. Until recently, the Courts of Appeal had uniformly answered this question in the negative, holding that the anti-SLAPP statute applies to these claims and that whether the defendant discriminated or retaliated is exclusively a second-prong issue (i.e., whether the plaintiff can show probability of success). That changed in late 2016, when *Nam v. Regents of the University of*

California (2016) 1 Cal.App.5th 1176 expressly disagreed and held that a discrimination claim arose from the defendants’ alleged discriminatory motive rather than from protected conduct, meaning that the defendants could not satisfy the first prong. The issue has since arisen in other cases, with numerous published and unpublished opinions deepening the conflict.

This motive issue is now squarely before the Supreme Court in *Wilson v. Cable News Network, Inc.*, S239686, in which the Court of Appeal ruled that the defendant could not satisfy the first prong in the face of allegations of discriminatory motive for terminating the plaintiff’s employment. At this writing, the case is being briefed. The decision may have far-reaching impact. The Supreme Court has granted review, with briefing deferred pending the *Wilson* decision, in multiple cases—cases where the motive issue is presented in the context of claims for employment discrimination and harassment; for defamation; for the initiation and pursuit of the medical peer review process (proceedings that seek to limit a physician’s hospital privileges); and that a contract for newsgathering and reporting violates the Government Code and involves self-dealing. But the question about the relevance of motive under the first prong presumably applies to an even broader range of claims and motives, including allegations of malice in a malicious prosecution claim and claims that seek punitive damages. And improper motive can be so easily alleged that an affirmance in *Wilson* could cripple the operation of the anti-SLAPP statute in a broad range of cases.

Commercial speech and the relevance of the speaker’s audience and purpose. In *FilmOn.com v. Doubleverfy, Inc.*, S244157, the Court confronts another significant question about the definition of protected speech. The defendant provides its clients—online advertisers—with ratings of online media sites to help the clients effectively use their advertising budgets in ways that do not harm their brand reputation. An internet content provider sued the defendant for slander and other business-related torts over the bad rating that the defendant provided to its clients. The Court of Appeal held that the anti-SLAPP statute applied because the claims arose from the defendant’s protected speech. At issue before the Supreme Court is whether the website rating constitutes activity in furtherance of the exercise of free speech given the intended purpose of the speech (its commercial nature) and the identity of the audience (clients who pay to see the ratings of online media sites). This issue is somewhat different from, and should not be confused with,

the commercial speech exemption to the anti-SLAPP statute. (Code Civ. Proc., § 425.17, subd. (c).) The Court of Appeal opinion did not address that exemption, which withholds anti-SLAPP protection from a defendant's representations of fact about its or its competitor's business operations, goods or services.

Commercial speech and the analysis of issues of public interest. *Rand Resources, LLC v. City of Carson*, S235735, poses a somewhat different issue concerning the intersection of commercial conduct and anti-SLAPP jurisprudence. The City of Carson entered into a contract whereby the plaintiff would serve as the City's exclusive representative to negotiate with the NFL to relocate a football team to Carson. The plaintiff alleged that the City breached that agreement and engaged in fraud by allowing a third party to act as its negotiating agent. The Court of Appeal held that these claims did not fall within the scope of the anti-SLAPP statute. For instance, the court held that the breach of contract claim did not arise from the City's free speech or petitioning rights, but rather from the City's failure to carry out its contract obligations—the mere fact that some speech occurred in the course of the breach did not mean that the claim arose from that speech. The court's opinion expressed concern that “[t]o hold otherwise, would place the vast majority, if not all, of civil complaints alleging business disputes and a large portion of tort litigation within the scope of section 425.16.” (*Rand Resources, LLC v. City of Carson* (2016) 247 Cal.App.4th 1080, 1093.)

The appellate decision also went on to reject the City's argument that the claims alleged speech or conduct that was of substantial public interest. As the Court of Appeal saw it, analysis of whether speech concerns an issue of public interest must focus on the specific speech in question, not the broader topic that might be implicated by or provide background for that speech. Thus, the Court of Appeal recognized that a large-scale construction project and bringing an NFL team to the City were matters of substantial public interest, but it held that the complaint did not concern such broad subjects. Instead, the court construed the complaint more narrowly as involving the identity of the City's unpaid representative to negotiate with the NFL, and the court held that this is not a matter of public interest.

The City's briefs (and the amicus briefs supporting the City) focus primarily on the latter issue—whether the complaint involves an issue of public interest and the method by which courts should analyze that question. Given the Court's statement of the issues on review, it is difficult to

predict whether the Court will consider the issue of whether the plaintiff's claim arose from speech as opposed to the carrying out of a contractual obligation.

Illegality. It is well settled that a defendant cannot establish the first prong of the anti-SLAPP analysis if her assertedly protected activity is criminal as a matter of law. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 312-320.) In *Sweetwater Union High School District v. Gilbane Building Co.*, S233526, a school district seeks to void contracts it entered into with three entities that allegedly engaged in a pay-to-play scheme with school officials. In response to the entities' anti-SLAPP motion, the school district presented evidence that school officials and some of the defendants' officers and employees had pled guilty or no contest to criminal charges. The school district sought to introduce written statements and grand jury testimony from the criminal cases to show that the factual basis for these pleas related to the assertedly protected activity raised by the anti-SLAPP motion. On review, the Supreme Court is considering the admissibility and use of such written statements in the anti-SLAPP context and whether Evidence Code section 1290 et seq. (governing the use of former testimony as an exception to the hearsay rule) has any bearing on that question.

Timeliness of anti-SLAPP motions. Absent relief from the court, anti-SLAPP motions must be filed within 60 days of service of the complaint. *Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism*, S239777, examines the contours of that timing requirement. There, the defendant did not file an anti-SLAPP motion until after the third amended complaint. Then, it sought to strike both the newly-added claims and claims that had been pled in the prior complaint. The Court of Appeal held that the anti-SLAPP motion was timely only as to the new claims—the filing of the third amended complaint did not restart the 60-day clock on the defendant's right to seek anti-SLAPP relief on the preexisting claims. The Supreme Court granted review to resolve this timing issue and clarify the permissible scope of an anti-SLAPP motion directed at an amended complaint.

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