

## Think Twice Before You Send that Demand Letter Out of State

The case of *Metabolic Research, Inc. v. Scott J. Ferrell, et al.* is turning out to be a fascinating case on several levels, including liability considerations for attorneys and SLAPP issues. Briefly, here are the facts as set forth in a recent opinion of the Ninth Circuit Court of Appeals.

Scott J. Ferrell is an attorney practicing in Orange County, California. He apparently believes that a supplement being made by Metabolic and sold by GNC (Stemulite) is bad stuff. To that end, he sent demand letters to Metabolic and GNC in Pennsylvania and Nevada, accusing them of violating the California Consumer Legal Remedies Act by way of false advertising, and threatening to sue them (presumably in California)\* if they did not stop their (allegedly) evil ways and agree to an injunction to that effect.

In California, Ferrell's letter would likely have been determined to be part of the litigation process and therefore protected, UNLESS it was deemed to be extortion. (See *Flatley v. Mauro.*) In California, the issue would have proved very interesting, because while Ferrell was not demanding any money, the hallmark of true extortion, the injunction he was demanding was so onerous – including a requirement that all profits be disgorged – that Metabolic claimed it would have put it out of business. Nonetheless, in California it might have been decided that the letters did not cross the line, and Ferrell would have been safe from suit.

But Ferrell's letters were sent outside of California. In November 2009 Metabolic filed a lawsuit in Nevada State Court against Ferrell, charging extortion and racketeering based on his demand letter. Ferrell removed the case to Federal Court (I never would have done that for the reasons that follow), and then brought a motion to dismiss based upon Nevada's anti-SLAPP statute, claiming that the lawsuit amounted to a SLAPP because it was suing him for engaging in litigation.

**Motion DENIED.** The District Court found that “Nevada’s anti-SLAPP legislation only protected communications made directly to a governmental agency and did not protect a demand letter sent to a potential defendant in litigation.” Again, as would be appropriate in California but not necessarily elsewhere, Ferrell took an immediate appeal.

**Appeal DENIED.** Federal courts do not like interlocutory appeals, and will find a way to reject them. The court did an in-depth review of Nevada's anti-SLAPP statute, and concluded there was no right of immediate review of a denial of an anti-SLAPP motion. The court referred to this as a “run of the mill anti-SLAPP motion” (ouch), and held that a District Court judge affords sufficient safeguards to protect defendants from SLAPP actions without the added protection of an immediate appeal. However, to twist the knife a little, the Ninth Circuit threw in that Ferrell could have proceeded by way of a writ of mandamus, and that it was offering “no opinion on how we might have decided” such an application had it been pursued.

Lesson 1: Consider that when you send a demand letter out of State, you may be subjecting yourself to an action in that jurisdiction.

Lesson 2: (And I have seen this over and over) Don't remove a case to Federal court just because you can. The motion may well have been decided the same way in State court, but I think the odds would have been far better.

\* That's not me presuming, the court opinion used those words.