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## Supreme Court Adds a Scalpel to Anti-SLAPP Motions

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On August 1, 2016, the California Supreme Court issued an opinion that clears up confusion over how the anti-SLAPP statute is applied to mixed causes of action, and in doing so provided greater protections against SLAPP suits.

In the case of Robert Baral v. David Schnitt, Baral and Schnitt owned and managed a company called IQ BackOffice LLC (“IQ”). Things deteriorated between Baral and Schnitt, culminating in a lawsuit, with Baral alleging that Schnitt had negotiated the sale of IQ under terms that were great for Schnitt but detrimental to Baral. The complaint included claims for fraud, breach of fiduciary duty, libel and slander.



The defamation claims were based on allegations that Schnitt unilaterally commissioned an accounting firm Moss Adams to investigate possible misappropriation of IQ assets. Baral claimed that Schnitt gave false information to the accounting firm and told the firm not to interview Baral, which led to a report that put Baral in a false light. That false report was then provided to potential purchasers and the other owners of IQ.

Schnitt responded to the complaint with an anti-SLAPP motion, resulting in the court striking the defamation claims. The Los Angeles Superior Court concluded that, because the defamation claims were based on communications in a pre-litigation fraud investigation, they were protected by the litigation privilege.

The case went through some procedural steps that are not important to the analysis, but ultimately Baral was permitted to file an amended complaint, this time alleging breach of fiduciary duty, constructive fraud, negligent misrepresentation, and a claim for declaratory relief. Baral alleged that Schnitt violated his fiduciary duties by usurping Baral’s ownership and management interests so that Schnitt could benefit from the sale of IQ. Schnitt sold a 72.6 percent interest in IQ based on his representation that he was its sole member and manager, and negotiated an employment position and ownership interest for himself without Baral’s knowledge or consent. Schnitt also excluded Baral from the accounting firm’s audit, in an effort to coerce his cooperation in the sale of the business.

**Here is where the important anti-SLAPP issue arose.**

In conjunction with the first anti-SLAPP motion, the court had already concluded that the audit was part of the pre-litigation fraud investigation, and therefore was protected by the litigation privilege. However, in the amended complaint, Baral was more skillful in his pleading, and his complaints about the audit (protected activity) were mixed in with allegations of unprotected activities.

In his second anti-SLAPP motion, Schnitt sought to strike all references to the audit. He was attempting what I refer to as the scalpel approach, where he was seeking to have individual allegations stricken. But on that basis, the trial court denied the motion, holding that an anti-SLAPP motion applies only to entire causes of action as pleaded in the complaint, or to the complaint as a whole, but not to isolated allegations within causes of action, like the audit claims.

Schnitt appealed, and the Court of Appeal affirmed the holding and reasoning of the trial court. The Court of Appeal agreed with Schnitt that the allegations concerning the audit arose from protected activity, but it agreed with the trial court that Schnitt's motion improperly sought to excise allegations from mixed causes of action. Schnitt conceded that Baral could make a *prima facie* case supporting his claims based on the sale of IQ, and that only the audit claims were vulnerable to the motion to strike. The Court of Appeal therefore concluded that anti-SLAPP relief was not available because none of the causes of action enumerated in the amended complaint would be eliminated if the allegations of protected activity were stricken.

The Court of Appeal recognized a split of authority in appeal cases dealing with mixed causes of action. It sided with those holding that section 425.16 applies to such causes of action in their entirety, and may not be used to strike particular allegations within them. Schnitt petitioned the Supreme Court, which agreed to accept the appeal in order to deal with the split of authority.

After summarizing the case decisions that lead to the split of authority on how to deal with mixed causes of action, the Supreme Court adopted a very simple approach. In essence, the Supreme Court concluded that courts were forgetting the "motion to strike" language of "special motion to strike", and were taking a too literal approach to the meaning of "cause of action".

A motion to strike can be used to remove any improper matters and allegations from a complaint, such as an improper request for punitive damages or attorney fees. The Legislature was no doubt aware of how motions to strike work when it drafted the "special motion to strike" procedure, the Supreme Court reasoned. Thus, there is no reason to conclude that allowing an anti-SLAPP motion to strike individual allegations of protected activity would be in contravention of the Legislature's intent.

As to the use of section 425.16 of the term "cause of action", the scope of the term is evident from its statutory context. When the Legislature declared that a cause of action arising from activity furthering the rights of petition or free speech may be stricken unless the plaintiff establishes a probability of prevailing, it had in mind allegations of protected activity that are asserted as grounds for relief. The targeted claim must amount to a cause of action in the sense that it is alleged to justify a remedy. By referring to a cause of action against a person arising from any act of that person in

furtherance of the protected rights of petition and speech, the Legislature indicated that particular alleged acts giving rise to a claim for relief may be the object of an anti-SLAPP motion.

For these reasons, the Supreme Court reversed and remanded the denial of the anti-SLAPP motion and, in an effort to avoid further confusion on the mixed cause of action issue, it took the unusual step of explaining how the analysis will play out in further cases.

“For the benefit of litigants and courts involved in this sometimes difficult area of pretrial procedure, we provide a brief summary of the showings and findings required by section 425.16(b). At the first step, the moving defendant bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them. When relief is sought based on allegations of both protected and unprotected activity, the unprotected activity is disregarded at this stage. If the court determines that relief is sought based on allegations arising from activity protected by the statute, the second step is reached. There, the burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated. The court, without resolving evidentiary conflicts, must determine whether the plaintiff’s showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment. If not, the claim is stricken. Allegations of protected activity supporting the stricken claim are eliminated from the complaint, unless they also support a distinct claim on which the plaintiff has shown a probability of prevailing.”

Although the Supreme Court did not go into this level of detail, in my opinion a special motion to strike, where a mixed cause of action is involved, should follow the format of a garden variety motion to strike. Specifically, California Rule of Court 3.1322 provides:

“A notice of motion to strike a portion of a pleading must quote in full the portions sought to be stricken except where the motion is to strike an entire paragraph, cause of action, count, or defense. Specifications in a notice must be numbered consecutively.”

Here the Supreme Court held that the trial court, on remand, should strike any allegations concerning the audit. Although that may be self-evident, as with any motion to strike, the motion is pointless unless you end up with a complaint devoid of the improper matter. That means there must be an order specifying which allegations are to be stricken, and that mandates a notice specifically stating what the defendant is seeking to have stricken.

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