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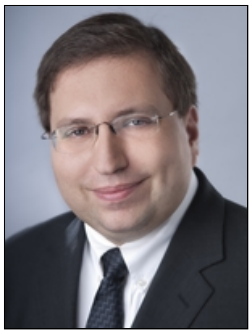
California's Anti-SLAPP Law Is Not Systematically Abused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Law360, New York (June 30, 2016, 4:07 PM EDT) -- In 1992, California's Legislature "enacted the anti-SLAPP law in order to address the 'disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.'" (People ex rel. Fire Insurance Exchange v. Anapol (2012) 211 Cal.App.4th 809, 821). The statute seeks to "'provid[e] a fast and inexpensive unmasking and dismissal'" of such lawsuits. (Dowling v. Zimmerman (2001) 85 Cal.App.4th 1400, 1415). It has succeeded: thousands of defendants have invoked the anti-SLAPP law to dismiss meritless lawsuits targeting their exercise of First Amendment rights.

California's law began a trend, with many other states following California's lead to enact their own anti-SLAPP statutes. (Prather, The Texas Citizens Participation Act — 5 Years Later (June 16, 2016) Law360). As one commentator recently explained, "this is not a red or blue state issue. It is a speech issue that transcends both [political] parties" and goes to "the heart of [American] patriotism." (Ibid.)

Despite the important role it plays in safeguarding constitutional rights, the anti-SLAPP statute encountered resistance from California's judiciary from its inception. In response to the bill that became the anti-SLAPP law, the California Judges Association expressed concern "that the bill's provisions were 'too broad'" and a provision was therefore added to "specify[ ] 'the First Amendment conduct protected by the bill.'" (Braun, Increasing SLAPP Protection: Unburdening the Right of Petition in California (1999) 32 U.C. Davis L.Rev. 965, 1002 (hereafter Braun)). Even after the law was enacted, some Courts of Appeal tried to narrow the anti-SLAPP statute, but, time and again, such efforts were rebuffed by the Legislature, the California Supreme Court, or both. (See e.g., Briggs v. Eden Council for Hope and Opportunity (1999) 19 Cal.4th 1106, 1114, 1120-1121, 1123, fn. 10; Equilon Enterprises LLC v. Consumer Cause Inc. (2002) 29 Cal.4th 53, 58-59, 68, fn. 5).

Undeterred, a vocal minority of California courts have occasionally issued appellate opinions suggesting that litigants are systematically abusing the anti-SLAPP statute, and urging legislative reform to fix the supposed harm the statute is causing the judicial system. (E.g., Hewlett-Packard Co. v. Oracle Corp. (2015) 239 Cal.App.4th 1174, 1196 (Hewlett-Packard); Grewal v. Jammu (2011) 191 Cal.App.4th 977, 994-1003 (Grewal)).

Below, we examine the anti-SLAPP statute's actual impact on the judicial system. The available data demonstrates that the anti-SLAPP law has not been systematically abused, but instead operates in the manner intended by the Legislature. We also analyze the real problem with this law — contradictory Court of Appeal opinions construing critical portions of the statute. To the extent some litigants occasionally file unnecessary motions and appeals, that can generally be traced to the lack of clear guidance in the face of these splits of authority.

Data Shows that the Anti-SLAPP Statute has not been Systematically Abused in the Trial Courts

Critics of the anti-SLAPP statute assert that many anti-SLAPP motions are filed each year, and suggest that the anti-SLAPP law is somehow being abused because "no let up" in the pace of this litigation "seems in sight." (Grewal, supra, 191 Cal.App.4th at pp. 998-999.) But objective data suggests a different view.

The Judicial Council maintains data on anti-SLAPP court filings, which is available upon request. This data demonstrates that anti-SLAPP motions are little more than a tiny fraction of trial courts' civil dockets.

For example, between fiscal years 2010 and 2014, parties filed a total of 2,051 anti-SLAPP motions in trial courts, or roughly 410 anti-SLAPP motions per year on average. Given the 5,006,580 total civil filings over that same period, these 2,051 motions constitute only about 0.041 percent of total civil filings. (See Judicial Council of California, Administrative Office of Courts, Report on Court Statistics (2015) Superior Courts Data for Figures 3-16, p. 70 (hereafter 2015 Court Statistics Report)). Such data shows that no systematic abuse of the anti-SLAPP statute is occurring.

A comparison of anti-SLAPP motions to summary judgment motions is telling because an anti-SLAPP motion operates "like a motion for summary judgment in reverse." (Comstock v. Aber (2012) 212 Cal.App.4th 931, 947, internal quotation marks omitted). "[C]ourts routinely render thousands of summary judgment motions annually," (Mullenix, The 25th Anniversary of the Summary Judgment Trilogy: Much Ado About Very Little (2012) 43 Loy. U. Chi. L.J. 561, 566) — which far exceeds the few hundred anti-SLAPP motions filed on average every year. That fewer anti-SLAPP motions are filed annually than their summary judgment counterparts corroborates the absence of systematic abuse.

Data Also Shows that Parties have not Systematically Abused the Anti-SLAPP Statute on Appeal

Critics also emphasize the supposedly high number of anti-SLAPP appeals that have been decided over the years and maintain that the right to an immediate appeal from anti-SLAPP orders "produces unintended and perverse results." (Hewlett-Packard, supra, 239 Cal.App.4th at p. 1196; Grewal, supra, 191 Cal.App.4th at pp. 998, 1000-1003). But objective data shows that the anti-SLAPP statute's appellate provision is operating in the fashion intended by the Legislature.

To understand the right of appeal afforded by the anti-SLAPP law, it is important to appreciate the history and purpose of this provision.

Prior to 1999, orders denying anti-SLAPP motions could "only be reviewed by a writ until the proceedings in the trial court" were complete. (Braun, supra, 32 U.C. Davis L.Rev. at p. 1008.) In 1998, SLAPP scholars George Pring and Penelope Canan prepared a report that recommended amending the statute to include an immediate right of appeal from orders denying anti-SLAPP motions. (Braun, California's Anti-SLAPP Remedy After Eleven Years (2003) 34 McGeorge L.Rev. 731, 778-779 & fn. 280.) In response, the Legislature enacted Assembly Bill (AB) 1675, which provided that "[a]n order granting or denying a special motion to strike shall be appealable." (Stats. 1999, ch. 960, § 1.) The Legislature viewed the right to an interlocutory appeal as essential to protecting defendants from SLAPP suits. (See Varian Medical Systems Inc. v. Delfino (2005) 35 Cal.4th 180, 193 (Varian); Doe v. Luster (2006) 145 Cal.App.4th 139, 144-145 (Doe)).

The enrolled bill report for AB 1675: (1) concluded that under then-existing law, appellate courts reviewed approximately 30 SLAPP motions each year; and (2) noted that "[t]he Judicial Council estimate[d] that the SLAPP appeals authorized in AB 1675 would result in an increase of approximately 90 additional cases per year." (California Department of Finance, Enrolled Bill Report on Assembly Bill No. 1675 (1999-2000 Reg. Sess.) Sept. 16, 1999, p. 1). In other words, the Legislature anticipated that appellate courts would consider a mere 120 or so anti-SLAPP appeals per year.

This prediction proved accurate. From fiscal years 2010 to 2014, appellate courts decided between 105 and 123 appeals per year from orders granting or denying anti-SLAPP motions. (This number consists of both published and unpublished opinions that affirmed or reversed such an order in whole or in part.) These statistics confirm that appellate courts decide roughly the 120 anti-SLAPP

appeals per year that the Legislature expected would result from inclusion of an immediate right of appeal in the anti-SLAPP statute.

Moreover, the data bears out that the Legislature correctly predicted these anti-SLAPP appeals would have a negligible impact on appellate courts. California's appellate courts issued written opinions in 585 anti-SLAPP appeals between fiscal years 2010 and 2014 out of a total of 48,403 appeals disposed of by written opinion in that same time period. (2015 Court Statistics Report, supra, Courts of Appeal Data for Figures 22-27, p. 67; Judicial Council of Cal., Admin. Off. of Cts., Rep. on Court Statistics (2012) Courts of Appeal Data for Figures 22-27, p. 70 (hereafter 2012 Court Statistics Report)). Thus, anti-SLAPP opinions by the appellate courts during that time period constituted roughly 1.209 percent of the total appellate opinions issued by those courts. Hardly a crisis.

Critics suggest that the anti-SLAPP statute is especially flawed because it permits appeals from orders denying anti-SLAPP motions. (See Hewlett-Packard, supra, 239 Cal.App.4th at p. 1196; Grewal, supra, 191 Cal.App.4th at pp. 1000-1003). They maintain that the Legislature should consider eliminating this appellate right because "[i]n those relatively rare circumstances where a trial court has clearly erred in denying a meritorious anti-SLAPP motion, relief might be obtained by a writ, as it has been in similar circumstances where an appeal does not lie." (Grewal, at p. 1002).

This proposal flies in the face of legislative intent and would place defendants in the same untenable position they were in before an immediate right of appeal was added to the anti-SLAPP statute. Much like critics today, the Judicial Council back then recommended against an immediate right of appeal, insisting no such right was necessary because review by writ petition was "sufficient." (Braun, supra, 32 U.C. Davis L.Rev. at p. 1011 & fn. 182). The Legislature disagreed because writ review was "'discretionary and rarely granted'" and the Legislature therefore deemed the theoretical availability of writ review to be insufficient to protect the constitutional rights at stake in an anti-SLAPP motion. (Doe, supra, 145 Cal.App.4th at p. 145). "'Since the right of petition and free speech expressly granted by the U.S. Constitution are at issue when these motions are filed,'" the Legislature determined that "'the defendant should have the same right to appeal as plaintiffs already have under current law and have the matter reviewed by a higher court.'" (Ibid.)

Furthermore, Westlaw data confirms that the anti-SLAPP statute does not systematically enable meritless appeals from orders denying anti-SLAPP motions. Of the 585 anti-SLAPP appeals decided between fiscal years 2010 and 2014, only 269 were from orders that denied anti-SLAPP motions in their entirety. These 269 appeals were a mere .55 percent — less than one percent — of the 48,403 appeals disposed of by written opinion during that time period. Appellate courts completely reversed the orders in 71 of these 269 appeals, for a 26 percent reversal rate. The rate is often higher in certain years. For example, in fiscal year 2012, appellate courts decided 64 appeals from orders denying anti-SLAPP motions in their entirety, and they completely reversed 21 of those orders — a reversal rate of roughly 33 percent. These reversal rates are markedly higher than the general reversal rate of 9 to 10 percent during this same period, and also higher than the general reversal rate of 17 to 19 percent in all civil cases. (See 2015 Court Statistics Report, supra, Courts of Appeal Figures 22-27, p. 26; 2012 Court Statistics Report, supra, Courts of Appeal Figures 22-27, p. 27). Thus, the data shows that defendants often need the right of immediate appeal to vindicate their right to early termination of meritless SLAPP suits because trial courts too often erroneously deny anti-SLAPP motions.

In sum, there is no evidence that the anti-SLAPP law has generated an explosion of abusive motions or appeals. The anti-SLAPP statute, like any other procedural device, can be abused and may thus result in frivolous motions and appeals. (See Varian, supra, 35 Cal.4th at p. 195.) But courts already possess the procedural tools to correct these occasional instances of abuse. (See id. at p. 196.)

The Intermediate Appellate Courts Foster Uncertainty in the Law, which Multiplies Anti-SLAPP Appeals

The anti-SLAPP law "is a complex statute" and its "complexities" have "spawned a 'plethora of appellate litigation.'" (Burke, Anti-SLAPP Litigation (The Rutter Group 2015) § 2.1, p. 2-5).

Accordingly, what some have depicted as abuses of the anti-SLAPP statute are often little more than defendants turning to the law in areas where intermediate appellate courts disagree over whether, or the manner in which, the anti-SLAPP statute applies.

Defining a Matter of Public Interest. The anti-SLAPP statute safeguards speech and conduct undertaken "in connection with" an "issue of public interest." (Code Civ. Proc., § 425.16, subds. (e)(3)-(4)). The California Supreme Court has acknowledged that there could be "confusion and disagreement about what issues truly possess public significance" but has so far been of the view "that no standards are necessary" to assess which issues are of public interest because "judges and attorneys ... will, or should, know a public concern when they see it." (Briggs v. Eden Council for Hope & Opportunity (1999) 19 Cal. 4th 1106, 1122 & fn. 9, internal quotation marks omitted).

This "no standards" methodology has proved to be ineffectual. More than 60 published Court of Appeal opinions have struggled with the question of what constitutes an issue of "public interest." (See Notes of Decision, West's Ann. Code Civ. Proc., foll. § 425.16 [heading "Public interest or significance."]). "Where the margins are drawn as to what constitutes an 'issue of public interest' ... has been one of many subjects of anti-SLAPP jurisprudence which has garnered substantial judicial attention in the last several years." (Thomas v. Quintero (2005) 126 Cal.App.4th 635, 658).

Some Courts of Appeal interpret "public interest" under a "restrictive test." (Hilton v. Hallmark Cards (9th Cir. 2010) 599 F.3d 894, 906). Others adopt a broader standard, concluding that an issue of public interest "'is any issue in which the public is interested.'" (Id. at p. 907, fn. 10). The Ninth Circuit has decried the deeply-rooted divisions among these various tests as it has grappled with the meaning of "public interest" under the anti-SLAPP statute. (Id. at pp. 906, 907, fn. 10).

Affirmative Defenses. Where the anti-SLAPP law applies, "the plaintiff [must] establish that there is a probability that the plaintiff will prevail on the claim." (Code Civ. Proc., § 425.16, subd. (b)(1)). In doing so, plaintiffs often confront affirmative defenses, like the litigation privilege. (See Flatley v. Mauro (2006) 39 Cal.4th 299, 323). But Courts of Appeal have split over whether plaintiffs opposing anti-SLAPP motions have the burden to overcome affirmative defenses or whether defendants instead bear the burden of proof on these defenses. (See No Doubt v. Activision Publishing Inc. (2011) 192 Cal.App.4th 1018, 1029, fn. 4).

Lawsuits Against Lawyers. Courts of Appeal disagree as to whether the anti-SLAPP law applies to actions against lawyers for malpractice and other litigation activity (see Sprengel v. Zbylut (2015) 241 Cal.App.4th 140, 158-163 (dis. opn. of Perluss, J))., with some courts adopting rules precluding application of the anti-SLAPP statute for certain claims in contravention of the anti-SLAPP statute's plain text (see Mindy's Cosmetics Inc. v. Dakar (9th Cir. 2010) 611 F.3d 590, 597-598).

The cure for these divisions among the Courts of Appeal is not to blame the anti-SLAPP law for promoting abusive litigation, nor to demand that the law be repealed wholesale or that the vital right of immediate appeal be eviscerated. Rather, as with any other splits of authority, the California Supreme Court should step in to provide guidance and thereby reduce the number of motions and appeals these conflicts generate. At any rate, given the serious damage caused by lawsuits that target the rights of petition and free speech, we should bend over backwards to ensure that these constitutional rights are fully protected.

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