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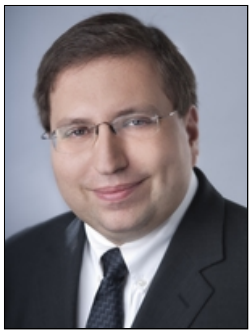
When Demand Letters Constitute Extortion In California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Law360, New York (September 23, 2016, 10:51 AM EDT) -- Attorneys often send prelitigation demand letters that describe their clients' grievances and threaten to file a civil lawsuit unless the dispute is settled for a monetary payment. Although demand letters are commonplace and often afforded legal protection, their legality has drawn increasing scrutiny.

In 2006, the California Supreme Court held that a lawyer's prelitigation communications — including demand letters — can constitute extortion. Ever since, lower courts have wrestled with how to distinguish between extortionate threats and proper demand letters. The most important distinction identified by these courts is between letters threatening to file a civil action (which are protected) and letters threatening to file a criminal complaint (which are often improper).

A Demand Letter's Role in Litigation

"[A]ccess to the courts is not an end in itself but only one means to achieve satisfaction for a client. If this can be obtained without resort to the courts — even without the filing of a lawsuit — it is incumbent upon the attorney to pursue such a course of action first."[1] Thus, it is a "well established legal practice to communicate promptly with a potential adversary, setting out the claims made upon him, urging settlement, and warning of the alternative of judicial action."[2]

Demand letters are "typical example[s] of such a missive."[3] The paradigmatic letter seeks to pressure the potential adversary "to do whatever is demanded" through the "threat of [civil] litigation and its attendant costs and headaches."[4] These "prelitigation letters airing grievances and threatening litigation if they are not resolved are commonplace."[5]

Demand letters are "frequently much more elaborate than a pro forma demand for payment or a simple and inflated settlement."[6] They "now often include a sophisticated and integrated narrative of law and fact written to persuade," such as a "synopsis" of the facts, an "explanation" of the liability and damages, and accompanying photographs or other graphics supporting the threatened claim.[7] "These letters read much like a closing argument to a judge or jury," seeking to convey the lawyer's "strongest case" to persuade the potential adversary to settle.[8]

While Many Demand Letters are Proper, Some Can Be Extortionate Threats

California's Penal Code prohibits extortion, which is defined as "the obtaining of property from another, with his consent, induced by a wrongful use of force or fear," including by way of various threats.[9]

Demand letters are ordinarily protected by California's litigation privilege.[10] The "classic prelitigation demand letter is precisely the type of statement that [California's] litigation privilege

is intended to protect since it represents the first step toward litigation."[11]

For years, courts applied the litigation privilege to conclude that demand letters could not be the basis for an extortion claim in civil actions.[12] However, these courts generally did not examine whether the letters met the definition of illegal extortion because California's litigation privilege applies to all communications that "are logically related to litigation," regardless of whether they are "'fraudulent, perjurious, unethical or even illegal.'"[13] The litigation privilege therefore "protects even extortionate threats if the threat is made 'in relation' to a pending, or genuinely contemplated" judicial proceeding.[14] Accordingly, the question of when (if ever) a demand letter could amount to extortion typically arose in proceedings other than civil actions, such as in state bar matters or criminal prosecutions.

But that changed with Flatley v. Mauro.[15] In Flatley, a well-known entertainer brought a civil action against an attorney for extortion based on the lawyer's prelitigation communications. Flatley found the attorney's statements constituted criminal extortion as a matter of law because, in addition to a demand letter threatening a civil action against the plaintiff for alleged rape, the attorney: (1) repeatedly threatened to publicize the alleged rape to "worldwide" media; (2) threatened to publicize completely unrelated (and unspecified) additional criminal activity having nothing to do with the attorney's client; and (3) threatened to pursue criminal charges against the plaintiff unless he paid an exorbitant settlement, a part of which the lawyer would have allocated to himself.[16] The lawyer also made a sham police report, did not negotiate the proposed settlement in good faith, and stood to gain personally from the settlement through a substantial lien on the total recovery.[17]

Flatley opened the floodgates to litigation over when demand letters could form the basis for a civil lawsuit alleging extortion.

Anti-SLAPP Litigation Over Whether Demand Letters Constitute Extortion

Flatley arose in the context of California's "anti-SLAPP" statute. This law "allows a court to strike any cause of action that arises from a defendant's exercise of his or her constitutionally protected rights of free speech or petition for redress of grievances."[18] Therefore, the threshold question raised by an anti-SLAPP motion — the first prong of the test for striking a claim under the statute — is whether "the challenged cause of action is one 'arising' from protected activity."[19] If the answer to this question is yes, then, under the second prong of the anti-SLAPP test, the plaintiff is required to show a probability of prevailing.[20] The litigation privilege is relevant to this "second step in the anti-SLAPP analysis in that it may present a substantive defense a plaintiff must overcome to demonstrate a probability of prevailing."[21]

"Ordinarily, a demand letter sent in anticipation of litigation is legitimate speech or petitioning activity" that satisfies the first prong.[22] Such letters are also generally protected by the litigation privilege, which often precludes plaintiffs from demonstrating the requisite probability of prevailing under the second prong.[23] Hence, lawsuits asserting claims based on demand letters are often stricken under the anti-SLAPP statute.

Flatley, however, concluded that if "either the defendant concedes or the evidence conclusively establishes ... that the assertedly protected speech or petition activity was illegal as a matter of law," it is not protected under the first prong of the anti-SLAPP statute.[24] This is so because illegal activities are "not protected" by the First Amendment's "constitutional guarantees of free speech and petition."[25] Thus, where the conduct is "criminal extortion as a matter of law"[26], a cause of action based on this illegal activity cannot satisfy the first prong. Given this illegality exception, it was vitally important for Flatley to decide whether the prelitigation communications there were illegal threats because, if they were, the attorney in Flatley could not meet his first prong burden.[27]

But Flatley did not upend case law holding that the litigation privilege typically protects demand letters. Examining the distinctions between how the anti-SLAPP law and litigation privilege treat illegal activities, Flatley concluded that, while the application of the litigation privilege to protect "unlawful litigation-based activity" could advance the privilege's broad goals, the anti-SLAPP statute "by its very terms" cannot apply to "illegal activity."[28] Flatley therefore determined that, even to the extent the litigation privilege protected extortionate demand letters and could prevent

a plaintiff from showing a probability of prevailing under prong two, activities that constituted criminal extortion fell outside the anti-SLAPP law's scope under prong one.[29]

Since Flatley, plaintiffs whose lawsuits target prelitigation communications like demand letters have increasingly opposed anti-SLAPP motions by arguing the communications constitute criminal extortion as a matter of law and therefore fall outside the anti-SLAPP statute under prong one — regardless of whether the communications could be shielded by the litigation privilege under prong two.

Demand Letters Threatening Civil Litigation are Typically Not Extortionate

After Flatley, the Courts of Appeal concluded that an attorney's prelitigation communications — including demand letters — constitute extortion if they threaten to file a criminal complaint or otherwise report criminal activities to government authorities.[30] But courts decided that demand letters are not extortionate if they simply threaten to file a civil lawsuit.[31]

Malin is illustrative. There, plaintiff Michael Malin and one of the defendants, Shereene Arazm, were business partners. Arazm consulted a lawyer concerning the "alleged misappropriation of company assets."[32] Her legal counsel then sent a demand letter to Malin on Arazm's behalf. This letter said that Arazm intended to sue Malin for "'misappropriat[ing]'" over $1 million unless the matter was resolved to Arazm's satisfaction.[33] In doing so, the letter set out the factual bases of the anticipated civil lawsuit. This description indicated "that Malin had misused company resources to arrange sexual liaisons with older men, including 'Judge [first and last name omitted], a/k/a "Dad" (see enclosed photo).'"[34] The letter came with "a photograph of the judge" referenced in the letter.[35]

Malin sued Arazm and her legal counsel for extortion based on the letter.[36] The trial court refused to strike the extortion claim under the anti-SLAPP statute based on Flatley's illegality exception, concluding that "'[t]he letter is best read as extortion as a matter of law'" since it "'threaten[ed] to reveal the names of sexual partners, including a retired superior court judge, and enclosed a photo of one of the alleged sexual partners.'"[37]

The Court of Appeal reversed, concluding that the letter was not criminal extortion as a matter of law.[38] The court explained that "[t]he demand letter accused Malin of embezzling money and simply informed him that Arazm knew how he had spent those funds."[39] "There is no doubt the demand letter could have appropriately noted that the filing of the complaint would disclose Malin had spent stolen monies on a car or a villa, if that had been the case. The fact that the funds were allegedly used for a more provocative purpose does not make the threatened disclosure of that purpose during litigation extortion."[40]

Malin distinguished cases like Flatley, where the illegality exception had been applied to attorney communications that threatened far more than the mere filing of a civil action.[41] As the court explained, there was "a critical distinction between [the attorney's] demand letter, which made no overt threat to report Malin to prosecuting agencies or the Internal Revenue Service, and the letters in Flatley" and similar cases, "which contained those express threats and others that had no reasonable connection to the underlying dispute."[42]

This distinction between demand letters that threaten to file civil lawsuits and those threatening to file criminal complaints is firmly supported by the law. Courts have long recognized that threats to file non-sham civil litigation are not extortion under California law.[43] Any conclusion to the contrary would likely violate the First Amendment.

Constitutional Protection for Threats to File Civil Lawsuits

Prelitigation demand letters are ordinarily "legitimate speech or petitioning activity" rather than extortionate threats.[44] At a minimum, the constitutional rights of petition and free speech protect a party's threat to file civil litigation where the threatened lawsuit is not a sham.[45] Consequently, courts have interpreted extortion laws narrowly to exclude such threats from their coverage in order to avoid unconstitutionally impinging on these First Amendment rights.[46] This makes constitutional sense. "Restricting such prelitigation conduct when the same demands asserted in a petition to the court is protected would render the entire litigation more onerous,

imposing a substantial burden on a party's ability to seek redress from the courts."[47]

By contrast, extortion statutes may not impose the same burden by prohibiting demand letters that threaten to file criminal complaints. While demand letters threatening to file civil actions are closely related to a party's constitutional right to seek monetary redress in court, threats to commence or support criminal prosecutions generally lack this relationship because criminal prosecutions are not concerned with monetarily compensating an injured person.[48]

Malin nonetheless asserted that a threat to expose intimate details about a party's private life in a civil complaint is extortion. But such a rule would be at odds with extortion law. For example, in a lawsuit that arose out of a "'threat to sue'" over "'alienation of affections'" — whose theme is "sexual misconduct"[49] — the court did not say extortion occurred whenever a threat to file a civil action would expose another's sexual acts during the lawsuit.[50] Instead, the court held that a threat to sue could amount to extortion "only in the event" the threatened claim was a sham claim.[51]

It has long been the law that threats to file non-sham civil complaints are "not within the scope of the extortion statutes, even though the execution of the threat could result in public disgrace or prosecution."[52] A demand letter's "[m]ere warnings" that a prospective litigant intends "to assert nonfrivolous claims" is "not improper," regardless of "those claims' likely public reception."[53] A demand letter's threat of "legitimate litigation, and the promise of concomitant publicity" that could ensue if private or sensitive information is publicized "through the judicial process," fall "far short" of the extortionate threats in Flatley.[54]

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Attorneys litigating extortion claims arising out of prelitigation demand letters should be aware of this distinction between threats of civil litigation and threats of criminal prosecution. Whether demand letters are proper prelitigation communications protected by the First Amendment (and thus the anti-SLAPP statute) or extortionate demands can turn on this significant distinction.

—By Felix Shafir and Jeremy Rosen, Horvitz & Levy LLP

DISCLOSURE: The authors were appellate counsel for several of the defendants in Malin v. Singer, discussed in this article.

Felix Shafir and Jeremy Rosen are partners at Horvitz & Levy, a firm devoted to civil appellate litigation. They have handled numerous anti-SLAPP matters, including cases alleging extortion.

[1] Lerette v. Dean Witter Organization Inc. (1976) 60 Cal.App.3d 573, 577.

[2] Ibid.

[3] Ibid.

[4] Garner, Demand letters are designed to produce results for your clients (Apr. 2002) vol. 30, No. 8, Student Lawyer 9, 9.

[5] Sussman v. Bank of Israel (2d Cir. 1995) 56 F.3d 450, 459.

[6] Subin & Main, The Integration of Law and Fact in an Uncharted Parallel Procedural Universe (2004) 79 Notre Dame L.Rev. 1981, 2002.

[7] Id. at pp. 2002-2008.

[8] Id. at pp. 2003, 2007-2008.

[9] People v. Goodman (1958) 159 Cal.App.2d 54, 61; Pen. Code, §§ 518-519.

[10] E.g., Lerette, supra, 60 Cal.App.3d at pp. 576-578.

[11] Aronson v. Kinsella (1997) 58 Cal.App.4th 254, 270.

[12] See, e.g., Blanchard v. DirecTV, Inc. (2004) 123 Cal.App.4th 903, 910, 918-922; Knoell v. Petrovich (1999) 76 Cal.App.4th 164, 167-168, 170-171.

[13] (Blanchard, at pp. 920-921.)

[14] (Nelson v. Kremer (Apr. 29, 2016, A144130) 2016 WL 1749769, at p. *6 [nonpub. opn.].)

[15] Flatley v. Mauro (2006) 39 Cal.4th 299

[16] Id. at pp. 307-311, 326-332.

[17] Id. at pp. 308, 331-332.

[18] Flatley, supra, 39 Cal.4th at pp. 311-312.

[19] City of Cotati v. Cashman (2002) 29 Cal.4th 69, 76.

[20] Flatley, at pp. 314, 320.

[21] Id. at p. 323.

[22] Malin v. Singer (2013) 217 Cal.App.4th 1283, 1293.

[23] Id. at pp. 1300-1302.

[24] Flatley, supra, 39 Cal.4th at p. 320.

[25] Id. at p. 317.

[26] Id. at p. 306.

[27] See id. at p. 333.

[28] Id. at pp. 323-324.

[29] See id. at pp. 322-325.

[30] E.g., Stenehjem v. Sareen (2014) 226 Cal.App.4th 1405, 1411, 1420-1427; Mendoza v. Hamzeh (2013) 215 Cal.App.4th 799, 802, 806-807.

[31] E.g., Malin, supra, 217 Cal.App.4th at pp. 1298-1299.

[32] Id. at pp. 1287-1288.

[33] Id. at pp. 1288-1289.

[34] Id. at p. 1288.

[35] Id. at p. 1289.

[36] Id. at pp. 1289-1290, 1294.

[37] Id. at p. 1292.

[38] Id. at pp. 1293-1302, 1306.

[39] Id. at p. 1289.

[40] Ibid.

[41] Id. at p. 1299.

[42] Ibid.

[43] See, e.g., Sosa v. DirecTV, Inc. (9th Cir. 2006) 437 F.3d 923, 939-940; Fuhrman v. California Satellite Systems (1986) 179 Cal.App.3d 408, 426; In re Nichols (1927) 82 Cal.App. 73, 76-77.

[44] Malin, supra, 217 Cal.App.4th at pp. 1293-1294.

[45] See, e.g., Sosa, supra, 437 F.3d at 929-940; Wilcox v. Superior Court (1994) 27 Cal.App.4th 809, 822-823, fn. 6.

[46] See, e.g., Sosa, at pp. 931-932, 939-940; I.S. Joseph Co., Inc. v. J. Lauritzen A/S (8th Cir. 1984) 751 F.2d 265, 267-268.

[47] Sosa, at p. 936.

[48] See Prosser & Keeton, Torts (5th ed. 1984) § 2, p. 7.

[49] Askew v. Askew (1984) 22 Cal.App.4th 942, 954, fn. 20

[50] See Nichols, supra, 82 Cal.App. at pp. 75-76.

[51] Ibid.

[52] Note, A Rationale of the Law of Aggravated Theft (1954) 54 Colum. L. Rev. 84, 94 & fn. 81.

[53] Sussman, supra, 56 F.3d at p. 459.

[54] Stark v. Withrow (Nov. 20, 2009, B212070) 2009 WL 3957538, at pp. *4-*5, *9 [nonpub. opn.].
