GIBSON DUNN

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RECENT DEVELOPMENTS IN CALIFORNIA ANTI-SLAPP CASE LAW, SUMMER 2021

To Our Clients and Friends:

This alert surveys recent case law and legislative developments involving California's anti-SLAPP statute, California Code of Civil Procedure § 425.16(e). The anti-SLAPP statute offers defendants in actions brought pursuant to California law a powerful procedural tool to seek early dismissal of lawsuits that target defendants' actions taken in furtherance of their "right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue."[1]

Courts apply a two-pronged analytical framework to evaluate an anti-SLAPP special motion to strike. The first is the "protected activity" prong, under which the defendant has the burden of proving that the activity that gave rise to the plaintiff's cause of action arises from one of the four enumerated categories under § 425.16(e):

1. any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law,

2. any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law,

3. any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or

4. any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

If the first prong is met, the burden shifts to the plaintiff to establish on the second prong that "there is a probability that the plaintiff will prevail on the claim."[2] Giving additional teeth to the law, a defendant who prevails on an anti-SLAPP special motion to strike is entitled to recover its attorneys' fees and costs incurred in bringing the motion.[3]

Below, we discuss recent substantive decisions by state and federal courts that apply the anti-SLAPP statute's framework to lawsuits in the media, finance, employment, and real estate contexts and which involve claims regarding revenge porn, trade libel, unfair competition, business torts, and employment discrimination, and also implicate the law's commercial-speech exemption.

1. *Hill v. Heslep et al.*, Case No. 20STCV48797 (Apr. 7, 2021, L.A. Cnty. Super. Ct.)

Facts: Plaintiff Katherine Hill, a former U.S. Representative from California's 25th congressional district, sued Mail Media, Inc. (publisher of the *Daily Mail*) in a California state court for publishing to its MailOnline website nonconsensually distributed nude photographs of Hill.[4] The photographs had been disseminated by Kenneth Heslep, Hill's ex-husband (also named as a defendant). Hill also sued talk-radio host Joe Messina for statements referencing the images that he made on-air and in an article posted to his blog, as well as Salem Media Group, Inc. (owner of the conservative political blog RedState) and RedState editor Jennifer Van Laar for their alleged roles in the distribution of the nude photos. Hill alleged that the actions of each defendant violated California Civil Code § 1708.85, the state's revenge porn law, which prohibits the "distribution" of certain types of intimate photographs (among other types of media) without the consent of the depicted individual. Distribution is not defined by the statute, but Judge Yolanda Orozco of the Los Angeles County Superior Court construed it broadly enough to include activities such as dissemination of prohibited photographs by an individual to others as well as publication by media outlets. On April 7, 2021, Judge Orozco heard and granted Mail Media's anti-SLAPP motion to strike; Hill has filed a notice of appeal.

Prong 1: In analyzing prong one, Judge Orozco noted that "reporting the news is speech subject to the protections of the First Amendment and subject to an anti-SLAPP motion if the report concerns a public issue or an issue of public interest,"[5] and "'[t]he character and qualifications of a candidate for public office constitutes a "public issue or public interest"' for purposes of section 425.16."[6] While the court agreed with Hill that "the gravamen of her Complaint against [Mail Media] is [its] distribution of Plaintiff's intimate images,"[7] it noted that this distribution occurred via an online news publication, and the "intimate images published by Defendant spoke to Plaintiff's character and qualifications for her position, as they allegedly depicted Plaintiff with a campaign staffer whom she was alleged to have had a sexual affair with and appeared to show Plaintiff using a then-illegal drug…"[8] Thus, "the gravamen of Plaintiff's Complaint against Defendant constitutes protected activity under Section 425.16(e)(3) and (4)."[9]

Prong 2: On the second (merits) prong, Judge Orozco noted that Hill's claims presented a novel intersection of California's anti-SLAPP and revenge porn laws. Section 1708.85(a) states, in relevant part,

> A private cause of action lies against a person who intentionally distributes… a photograph… of another, without the other's consent, if (1) the person knew that the other person had a reasonable expectation that the material would remain private, (2) the distributed material exposes an intimate body part of the other person… and (3) the other person suffers general or special damages…

However, Judge Orozco held that the newspaper's activities fell squarely within the "matter of public concern" exemption contained in § 1708.85(c)(4), as the published images "speak to Plaintiff's character and qualifications for her position as a Congresswoman."[10] Thus, "Plaintiff failed to carry her burden establishing that there is a probability of success on the merits of her claim."[11]

Other Case Notes & Attorneys' Fees Awards: In a subsequent hearing on June 2, 2021, Judge Orozco granted Mail Media's motion for costs and prevailing-party attorneys' fees, totaling $104,747.75.[12] The dismissal of Mail Media's claims followed the earlier dismissals and awards of attorneys' fees for all of the other defendants except for Heslep, the lone defendant remaining in the case.[13] In total, Hill has been ordered to pay over $200,000 in attorneys' fees to the prevailing defendants.[14]

Of note, Hill was ordered to pay $30,000 in fees and costs to Messina, the radio personality who merely commented about the pictures on his program and blog.[15] Shortly after Messina filed his anti-SLAPP motion to strike, but before the scheduled hearing, Hill voluntarily withdrew her claims against Messina. Despite this, Judge Orozco entertained Messina's motion for attorneys' fees as the prevailing defendant under Section 425.16. Judge Orozco noted that "'because a defendant who has been sued in violation of his… free speech rights is entitled to an award of attorney fees, the trial court must, upon defendant's motion for a fee award, rule on the merits of the SLAPP motion even if the matter has been dismissed prior to the hearing on that motion.'"[16] Judge Orozco concluded that Messina was the prevailing party on the merits of the motion to strike and granted the motion for attorneys' fees.

While the trial court's orders are non-precedential, the Court of Appeal will have a chance to review them, as on June 18, 2021, Hill filed notices of appeal for the orders granting the anti-SLAPP motions of Mail Media, Van Laar, and Salem Media.

2. Muddy Waters, LLC v. Superior Court, 62 Cal. App. 5th 905 (2021)

Facts: In 2017, Perfectus Aluminum, Inc., a distributor of aluminum products, sued Muddy Waters, LLC, a financial analysis firm that engages in activist short selling, following the latter's publication of a pair of reports that allegedly implicated Perfectus in a scheme to inflate aluminum sales for Zhongwang Holdings, Ltd., a publicly traded Chinese company.[17] The two reports ("Dupré Reports") were published by Muddy Waters on a publicly accessible website under the business pseudonym "Dupré Analytics." In its complaint, Perfectus alleged that U.S. Customs detained a shipment of the company's aluminum awaiting export in the port of Long Beach and lost potential business as a result of the allegations in the Dupré Reports, bringing claims for 1) violation of California's Unfair Competition Law; 2) trade libel; and 3) intentional interference with prospective economic advantage.

The Superior Court of San Bernardino County denied Muddy Waters's anti-SLAPP motion on the grounds that Muddy Waters failed to prove that the causes of action arose from protected activity and, alternatively, that the commercial speech exemption of Section 425.17(c) applied to the publication of the Dupré Reports, thereby barring an anti-SLAPP challenge. Because the trial court found Section 425.17 applied, Muddy Waters lacked the immediate right of appeal that is otherwise available upon denial of an anti-SLAPP motion and thus sought a writ of mandate from the Court of Appeal.

Prong 1: The Court of Appeal began its analysis of the first prong by highlighting the third category of protected activities in § 425.16(e): "any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest." The Court divided the first prong's analysis into two stages. In the first stage, the Court determined whether a publicly accessible

website constitutes a public forum, and found that it does, as "Internet postings on websites that 'are open and free to anyone who wants to read the messages' and 'accessible free of charge to any member of the public' satisfies the public forum requirement of section 425.16."[18]

In the second stage, the Court asked whether the content of the Dupré Reports represented an issue of public interest, and found that it did because the reports alleged that Zhongwang was artificially inflating reported sales and allegations of "mismanagement or investor scams" made against a publicly traded company constitute an "issue of public interest" for purposes of the anti-SLAPP law.[19]

Commercial Speech Exemption: Before moving to the merits prong of the anti-SLAPP analysis, the Court of Appeal addressed the trial court's determination that the § 425.17(c) commercial speech exemption applied, thereby barring Muddy Waters's ability to bring an anti-SLAPP motion. The Court noted that the plaintiff has the burden of proof to establish the applicability of the commercial speech exemption, and that the exemption is "narrow," excluding only a "'subset of commercial speech—specifically, comparative advertising.'"[20] Thus, it noted, the commercial speech exemption is triggered only with respect to "speech or conduct by a person engaged in the business of selling or leasing goods or services when… that challenged [speech or] conduct pertains to the business of the speaker or his or her competitors."[21] In other words, the Court noted, the commercial speech exemption does not apply in circumstances like the current case, where a defendant has made representations of fact about a *noncompetitor's* goods in order to promote sales of the defendant's goods or services. Accordingly, the Court of Appeal reversed the Superior Court's determination that the commercial speech exemption applied and barred Muddy Waters from bringing an anti-SLAPP motion.

Prong 2: The Court of Appeal next determined whether Perfectus had satisfied the merits prong for each of its three causes of action.

For the California UCL claim, the Court wrote that "nothing in the record suggests that plaintiff has lost money or property such that it would have standing to pursue a UCL action against Muddy Waters."[22] The Court found that Perfectus had not produced any evidence that would establish a nexus between the alleged unfair practice (publication of the Dupré Reports) and the loss of property (the aluminum that was detained by U.S. Customs), and therefore lacked standing to bring a UCL claim.

For the trade libel claim, the Court noted that Perfectus failed to produce evidence identifying a specific third party that was deterred from conducting business with Perfectus as a result of the Dupré Reports, a required element for the claim. It wrote, "'it is not enough to show a general decline in [Perfectus's] business resulting from the falsehood, even where no other cause for it is apparent… it is only the loss of specific sales [as a result of the defendant's actions] that can be recovered.'"[23] Thus, Perfectus's failure to specify a particular business partner that was convinced by the Dupré Reports to refrain from dealing with Perfectus doomed the trade libel cause of action.

Finally, on the intentional-interference-with-prospective-economic-advantage claim, the Court noted that Perfectus would need to prove an "actual economic relationship with a third party"[24] and that the relationship "'contains the probability of future economic benefit to [Perfectus],'"[25] but that Perfectus

failed to submit evidence that identified such an actual economic relationship with a specific third party.[26]

Result: The Court of Appeal issued a writ of mandate directing the Superior Court to vacate its order denying Muddy Waters's anti-SLAPP motion and to enter in its place a new order granting the motion. Perfectus has sought review in the California Supreme Court.

3. *Verceles v. Los Angeles Unified School District*, 63 Cal. App. 5th 776 (2021)

Facts: Plaintiff Junnie Verceles, a Filipino man who was 46 years old at the time he filed his complaint in March 2019, was a teacher in the Los Angeles Unified School District from 1998 until his termination on March 13, 2018.[27] On December 1, 2015, following unspecified allegations of misconduct, Verceles was reassigned and placed on paid suspension, which Verceles described as "teacher jail." In November 2016, Verceles filed a discrimination complaint with the California Department of Fair Employment and Housing (DFEH) while an investigation by the District into the alleged misconduct was still underway. The DFEH case was closed on March 7, 2017, and roughly one year later, the District terminated Verceles's employment. Verceles alleged three violations of California's Fair Employment and Housing Act (FEHA): 1) age discrimination, 2) race and national origin discrimination, and 3) retaliation; in response, the District filed an anti-SLAPP motion to strike each of the three causes of action. After the Los Angeles County Superior Court granted the District's motion, Verceles appealed; the Court of Appeal reversed.

Prong 1: The District argued that each cause of action arose out of its investigation into teacher misconduct, and was thus protected activity under § 425.16(e). Verceles argued that the gravamen of his complaint was not the investigation into teacher misconduct, but the discrimination and retaliation that resulted in his firing by the District. The trial court granted the motion, characterizing the investigation and resulting termination (and alleged discrimination and retaliation) as a single "proceeding" that gave rise to the causes of action.

The Court of Appeal, however, rejected the District's attempt to "define the alleged adverse action broadly to encompass the entirety of its investigation into Verceles's purported misconduct."[28] Instead, the Court found persuasive Verceles's argument that the investigation as a whole into his alleged misconduct was not tainted by discriminatory or retaliatory intent. After all, Verceles argued, the investigation began before Verceles filed his DFEH complaint, and so up to that point, there was nothing for the District to retaliate against. Furthermore, Verceles argued, the District's other investigations into alleged misconduct did not demonstrate a pattern of discrimination against protected groups that resulted in the requisite disparate impact; however, according to Verceles, the District's termination practices and use of "teacher's jail" to discipline a relative few number of teachers like him *did* demonstrate such a pattern of disparate, adverse impacts on protected groups. Thus, the Court concluded that the activities that underpinned Verceles's complaint were his reassignment to "teacher's jail" and termination.

The District argued that the "investigation was an 'official proceeding authorized by law' for purposes of [425.16(e)(2)]," and that all actions taken in the course of the investigation—including the decision

to reassign and terminate Verceles—fell within the ambit of this protected activity.[29] The Court acknowledged that the District was generally correct to state that an investigation into alleged misconduct by a public employee is categorized as "an official proceeding"; however, the Court rejected the idea that every action taken during the course of such an investigation constituted a protected activity for anti-SLAPP purposes.[30] "Such an interpretation," wrote the Court, "ignores the plain language of the statute, which requires a claim be based on a written or oral statement made in connection with the proceeding."[31] Instead, Section 425.16(e) protects the District's speech and petitioning activity "that led up to or contributed" to the decision to reassign and terminate Verceles, but it did not protect the actual acts of reassignment and termination.[32] Thus, "In the absence of any oral or written statements from which Verceles' claims arise, the District's decisions to place Verceles on leave and terminate his employment are not protected activity within the meaning of [Section 425.16(e)(2)]."[33]

Result: Thus, the Court held that the District failed to meet its burden under the first prong of the anti-SLAPP analysis and reversed the trial court's judgment granting the District's motion to strike and motion for attorney's fees as the prevailing party. The Court also granted Verceles's the costs related to his appeal of the order granting the motion to strike. The District filed a petition for review, which is currently pending before the California Supreme Court.

4. *Appel v. Wolf*, 839 F. App'x 78 (9th Cir. 2020)

Facts: Defendant Robert Wolf is an attorney who represents Concierge Auctions, LLC, a company that specializes in auctioning off luxury real estate. A dispute arose between Concierge and the plaintiff Howard Appel over the sale of property in Fiji. During the course of this dispute, Wolf sent an email containing an allegedly defamatory statement that Wolf knew Appel and that Appel "had legal issues (securities fraud)."[34] After Appel sued Wolf for defamation, Wolf filed an anti-SLAPP motion to strike, arguing that the statements in the email were made pursuant to settlement discussions in the course of litigation and so were protected under Section 425.16. The district court denied the motion to strike and Wolf appealed. Though it found the district court erred in its prong-one analysis, the Ninth Circuit found such error harmless and therefore affirmed.

Prong 1: In its first prong analysis, the Ninth Circuit held that the district court erred in holding that Wolf's email communication was not protected activity, as acts that occur in the course of litigation "are generally considered protected conduct falling within section 425.16(e)(2)'s broad ambit."[35] The panel noted that "[t]his protection extends to 'an attorney's communication with opposing counsel on behalf of a client regarding pending litigation' and includes 'an offer of settlement to counsel.'"[36] The panel then found that "[t]he district court misapplied California law when it reasoned that Wolf's email—which was sent to Appel's counsel, allegedly 'begging for a phone[-]call discussion about possible settlement of Appel's case against Concierge'—was insufficiently concrete to qualify as protected conduct," because "Section 425.16(e)(2) has no such 'concreteness' requirement."[37] Thus, the allegedly libelous email qualified for Section 425.16(e)(2)'s protection, and Wolf satisfied his burden of establishing the first prong.

Prong 2: However, the Ninth Circuit held that the district court's error on prong one was ultimately harmless, because Appel was "reasonably likely to succeed on the merits of his claim, given that Wolf's

email was facially defamatory and not immunized by California's litigation privilege."[38] First, the complaint's allegations and the email itself supported the district court's finding that Wolf's statement "would have negative, injurious ramifications on [Appel's] integrity."[39] Next, though Wolf's statement was made in the context of settlement negotiations, the panel held it was not privileged, as "the privilege 'does not prop the barn door wide open' for every defamatory 'charge or innuendo,' merely because the libelous statement is included in a presumptively privileged communication,"[40] and "Appel established that Wolf's false insinuation that he had been involved in securities fraud is not reasonably relevant to Appel's underlying dispute with Concierge."[41]

Result: The Ninth Circuit thus affirmed the district court's denial of Wolf's anti-SLAPP motion.

5. SB 329 Proposes Limitation on Use of Anti-SLAPP Motions in "No Contest" Wills and Trust Actions

Finally, a new bill, California Senate Bill 329, introduced by Senator Brian Jones (R, 38th Dist.), proposes to prohibit the use of anti-SLAPP motions in actions relating to wills and trusts. The bill would amend Section 425.17 to add the following provision: "(e) Section 425.16 does not apply to an action to enforce a no contest clause contained in a will, trust, or other instrument. As used in this subdivision, 'no contest clause' has the meaning provided in Section 21310 of the Probate Code." A "no-contest" clause is a provision that disinherits a beneficiary who challenges a will or trust.

The Senate Floor Analysis of the bill notes that "[a]lthough commonly associated with the protection of constitutional rights, the anti-SLAPP statute applies to a broad range of contexts, including proceedings to enforce a no-contest clause in a trust or will that penalizes beneficiaries who challenge the terms of the will without probable cause." The Senate Judiciary notes that two recent Court of Appeal cases "establish that the anti-SLAPP statute applies to no-contest enforcement petitions."[42] SB 329 is sponsored by the California Conference of Bar Associations and the Executive Committee of the Trusts and Estates Section of the California Lawyers Association, which "argue that the statute was not intended to apply in this context and that it offers minimal upside while opening the door to needless litigation and cost."

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[1] Cal. Civ. Code § 425.16(b)(1).

[2] *Id*.

[3] *Id.* § 425.16(c)(1).

[4] *Hill v. Heslep et al.*, Case No. 20STCV48797, at *1 (Apr. 7, 2021, L.A. Cnty. Super. Ct.).

[5] *Id.* at *8 (citing *Liberman v. KCOP Television, Inc.*, 110 Cal. App. 4th 156, 164 (2003)).

[6] *Id.* at *6-7 (quoting *Collier v. Harris*, 240 Cal. App. 4th 41, 52 (2015)).

[7] *Id.* at *7-8.

[8] *Id.* at *8.

[9] *Id.* at *7.

[10] *Id.* at *13.

[11] *Id.*

[12] *Hill v. Heslep et al.*, Case No. 20STCV48797 at *5 (Super. Ct. of L.A. Cnty., June 2, 2021).

[13] Nathan Solis, *Katie Hill Owes Daily Mail $105K for Attorney Fees in Nude Photo Fight*, Courthouse News Service (June 2, 2021), https://www.courthousenews.com/katie-hill-owes-daily-mail-105k-for-attorney-fees-in-nude-photo-fight/.

[14] *Id.*

[15] *Hill v. Heslep, et. al.*, Case No. 20STCV48797, at *12 (Super. Ct. of L.A. Cnty., May 4, 2021).

[16] *Id.* at *3 (citing *Pfeiffer Venice Properties v. Bernard*, 101 Cal. App. 4th 211, 218 (2002)).

[17] *Muddy Waters, LLC v. Superior Ct.*, 62 Cal. App. 5th 905, 912-93 (2021), *reh'g denied* (Apr. 23, 2021), petition for review filed (May 18, 2021).

[18] *Muddy Waters*, 62 Cal. App. 5th at 917 (citing *ComputerXpress, Inc. v. Jackson*, 93 Cal. App. 4th 993, 1007 (2001)).

[19] *Id.* at 918.

[20] *Id.* at 919-20 (citing *Dean v. Friends of Pine Meadow*, 21 Cal. App. 5th 91, 105 (2018)).

[21] *Id.* at 919.

[22] *Id.* at 923.

[23] *Id.* at 925 (citing *Erlich v. Etner*, 224 Cal. App. 2d 69, 73 (1964)).

[24] *Id.* at 926.

[25] *Id.* (citing *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal 4th 1134, 1164 (2003)).

[26] *Muddy Waters*, 62 Cal. App. 5th at 926-27.

[27] *Verceles v. Los Angeles Unified Sch. Dist.*, 63 Cal. App. 5th 776, 779 (2021), petition for review filed (June 3, 2021).

[28] *Id.* at 785.

[29] *Id.* at 787.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.* at 788.

[34] *Appel v. Wolf*, 839 F. App'x 78, 80 (9th Cir. 2020).

[35] *Id.*

[36] *Id.* (citing *GeneThera, Inc. v. Troy & Gould Pro. Corp.*, 171 Cal. App. 4th 901, 905 (2009)).

[37] *Id.* at 80.

[38] *Id.*

[39] *Id.*

[40] *Id.* at 81 (quoting *Nguyen v. Proton Technology Corp.*, 69 Cal. App. 4th 140, 150 (1999)).

[41] *Id.*

[42] Citing *Key v. Tyler*, 34 Cal. App. 5th 505 (2019); *Urick v. Urick*, 15 Cal. App. 5th 1182 (2017).

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