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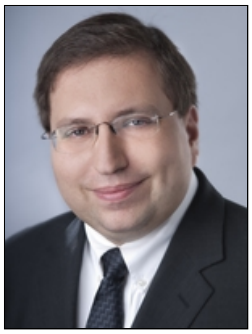
Does Anti-SLAPP Law Apply To Legal Malpractice Claims?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Law360, New York (February 13, 2017, 5:57 PM EST) -- California's anti-SLAPP law provides "an efficient procedural mechanism to obtain an early and inexpensive dismissal of nonmeritorious claims 'arising from any act' of a defendant 'in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue.'" (Brenton v. Metabolife International Inc. (2004) 116 Cal.App.4th 679, 684.) But this law "is a complex statute" that has "spawned a 'plethora of appellate litigation.'" (Burke, Anti-SLAPP Litigation (The Rutter Group 2016) § 2.1, p. 2-5.)

Among the issues that have generated the most litigation is whether the anti-SLAPP statute applies to claims alleging legal malpractice or similar breaches of an attorney's legal or ethical obligations. Many courts have determined that actions based on an attorney's breach of professional and ethical duties do not fall within the anti-SLAPP statute's scope. Others, however, have reached a contrary conclusion. Below, we examine these conflicting lines of authority as well as recent developments that may lead the California Supreme Court to resolve this division in the law.

Cases that Apply the Anti-SLAPP Law to Legal Malpractice Claims

More than a decade ago, a California Court of Appeal applied the anti-SLAPP statute to claims alleging that a law firm committed legal malpractice and aided and abetted a breach of fiduciary duty. (Peregrine Funding Inc. v. Sheppard Mullin Richter & Hampton LLP (2005) 133 Cal.App.4th 658, 665-666, 669-675.)

In Peregrine Funding, "investors who lost millions" due to the collapse of a large Ponzi scheme sued a law firm, claiming its "negligence and affirmative misconduct helped the perpetrators of the scheme avoid detection and prosecution by securities regulators." (Peregrine Funding, supra, 133 Cal.App.4th at p. 665.) Although the "gravamen" of the plaintiffs' claims was that the law firm "breached duties of care and loyalty," Peregrine Funding held that the anti-SLAPP statute applied because "the overarching thrust of plaintiffs' claims" was that the law firm's alleged misconduct included "positions the firm took in court, or in anticipation of litigation" with the U.S. Securities and Exchange Commission. (Id. at pp. 671-675.) Peregrine Funding concluded that the anti-SLAPP statute applied to these claims because plaintiffs asserted "they were injured by specific communications" the law firm "made in the SEC action opposing temporary restraining orders and opposing the appointment of a receiver." (Id. at p. 673.)

Other courts have since followed Peregrine Funding's lead. (See, e.g., Fremont Reorganizing Corp. v. Faigin (2011) 198 Cal.App.4th 1153, 1159-1162, 1166-1172 [applying the anti-SLAPP statute to a company's cross-claim against its former in-house counsel for allegedly breaching "his lawyer/client legal, fiduciary, and ethical obligations" based on the statements he made in connection with a liquidation proceeding involving the California Insurance Commissioner]; Mindy's Cosmetics Inc. v. Dakar (9th Cir. 2010) 611 F.3d 590, 594-598 [applying California's anti-SLAPP statute to claims against an attorney for legal malpractice and breach of fiduciary duty arising

from the attorney's act of applying to register trademarks, since "there is no categorical exclusion of claims of attorney malpractice from the anti-SLAPP statute"].)

As one California Court of Appeal justice recently summarized: "Whatever the label for the former client's causes of action — professional negligence, breach of fiduciary duty or breach of contract — if those claims are based on the lawyer's actions in litigation (or in anticipation of litigation), they arise from acts in furtherance of the right of petition" within the meaning of the anti-SLAPP statute. (Sprengel v. Zbylut (2015) 241 Cal.App.4th 140, 162 (dis. opn. of Perluss, J.).)

Cases that Refuse to Apply the Anti-SLAPP Statute to Malpractice Actions

By contrast, other courts refuse to apply the anti-SLAPP statute to claims predicated on an attorney's breach of professional or ethical duties.

The first decision to reach this conclusion was Jespersen v. Zubiate-Beauchamp (2003) 114 Cal.App.4th 624. Jespersen held that the anti-SLAPP statute did not apply to a legal malpractice action because it was based on the attorneys' failure to act during litigation — i.e., their failure to serve timely discovery responses and failure to comply with court orders. (Id. at pp. 627-632.)

The following year, the same court of appeal that decided Jespersen extended its holding to claims based on affirmative actions taken by attorneys. (See Benasra v. Mitchell Silberberg & Knupp LLP (2004) 123 Cal.App.4th 1179, 1181-1189.) The plaintiffs in Benasra sued a law firm and two of its partners for allegedly breaching their duty of loyalty by affirmatively abandoning their representation of the plaintiffs to represent the plaintiffs' opponent in connection with that new client's arbitration against the plaintiffs. (See id. at pp. 1182-1184.) Benasra concluded that the anti-SLAPP statute did not apply because the alleged breach occurred when the defendants abandoned their old client rather than when they stepped into court to represent the new client. (Id. at p. 1189.) Benasra held that, while "[t]he breach of fiduciary duty lawsuit may follow litigation pursued against the former client," it "does not arise from" it. (Ibid.)

Subsequent courts of appeal generally followed Benasra's lead while rejecting Jespersen's earlier rationale.

For example, Kolar v. Donahue McIntosh & Hammerton (2006) 145 Cal.App.4th 1532, 1539, agreed that "'garden variety' attorney malpractice claims" fall outside the anti-SLAPP statute's scope. Kolar determined that this statute does not apply to such lawsuits because they do "not have the chilling effect on advocacy found in ... claims typically covered by the anti-SLAPP statute" since the plaintiff "is not suing because the attorney petitioned on his or her behalf, but because the attorney did not competently represent the client's interests while doing so." (Id. at p. 1540.)

In arriving at this conclusion, Kolar rejected Jespersen's view that the application of the anti-SLAPP statute turned on whether an attorney had failed to act. (Kolar, supra, 145 Cal.App.4th at p. 1539.) Kolar's refusal to adopt this rationale is unsurprising since that rationale is at odds with Briggs v. Eden Council for Hope & Opportunity (1999) 19 Cal.4th 1106, 1115, which held that the anti-SLAPP statute applied to claims that were based on a defendant's failure to take action in the course of litigation — there, the defendant's failure to comply with a deposition subpoena in a civil action.

Many court of appeal decisions have since built on Benasra and Kolar, holding that the anti-SLAPP statute is inapplicable to legal malpractice actions and similar claims while generally refusing to adopt Jespersen's rationale to the extent it focuses on a defendant's failure to take action. (See, e.g., Freeman v. Schack (2007) 154 Cal.App.4th 719, 722, 727-733; see also Sprengel, supra, 241 Cal.App.4th at pp. 159-160 (dis. opn. of Perluss, J.) [collecting cases].)

Courts' Flawed Efforts to Reconcile the Conflict in the Law

For years, courts questioned one line of authority or the other in the debate over whether the anti-SLAPP statute applies to legal malpractice actions and similar claims. (See, e.g., Robles v. Chalilpoyil (2010) 181 Cal.App.4th 566, 580, fn. 2; Peregrine Funding, supra, 133 Cal.App.4th at p. 674.) Some even openly disagreed with part of Peregrine Funding's rationale, without rejecting

Peregrine Funding completely. (See, e.g., Prediwave Corp. v. Simpson Thacher & Bartlett LLP (2009) 179 Cal.App.4th 1204, 1226.)

But, until recently, published decisions suggested that the diverging lines of authority could nonetheless be reconciled. Case law, however, belies this suggestion.

For example, some decisions maintained that the differences in the cases amounted to little more than factual distinctions between claims that were based on the work attorneys did in connection with litigation or other official proceedings and claims suing the attorney for activities that had only an incidental link to such proceedings. (See, e.g., Fremont Reorganizing Corp., supra, 198 Cal.App.4th at pp. 1170-1172; Robles, supra, 181 Cal.App.4th at pp. 575-580.) But these decisions ignore that one line of authority originating in cases like Benasra and Kolar categorically holds "that the anti-SLAPP statute does not apply to claims of attorney malpractice" (Chodos v. Cole (2013) 210 Cal.App.4th 692, 702-703), while the line of authority originating in Peregrine Funding rejects any such categorical exclusion and has applied this law to these types of claims (Peregrine Funding, supra, 133 Cal.App.4th at pp. 670-675).

Other published decisions maintain that any differences in the case law merely demonstrate that the anti-SLAPP statute can apply to claims brought by nonclients against attorneys for their activities in connection with litigation or other official proceedings, but that this law is inapplicable to a client's claims against its own attorneys. (See, e.g., Thayer v. Kabateck Brown Kellner LLP (2012) 207 Cal.App.4th 141, 153-158; Loanvest I LLC v. Utretcht (2015) 235 Cal.App.4th 496, 499-500, 502-506.) But, contrary to the distinctions drawn by these decisions, courts have applied the anti-SLAPP statute to claims brought against an attorney by his own client. (See, e.g., Fremont Reorganizing Corp., supra, 198 Cal.App.4th at pp. 1159-1162, 1166-1172.)

Justice Perluss' Recent Exposure of the Split of Authority

After years of appellate opinions seeking to play down or mitigate the divisions among courts over the anti-SLAPP statute's application to claims against attorneys for alleged malpractice or other professional or ethical misconduct, Justice Dennis Perluss of the Second District Court of Appeal, Division Seven, recently issued a published dissent that openly acknowledges the clear and unmistakable conflict in the law. (See Sprengel, supra, 241 Cal.App.4th at pp. 158-163 (dis. opn. of Perluss, J.).)

In Sprengel, the plaintiff asserted that she had an implied attorney-client relationship with the defendant attorneys and sued them for allegedly breaching professional and ethical duties that lawyers owe to their clients. (Sprengel, supra, 241 Cal.App.4th at pp. 143-144.) A majority of the court, following the line of authority that originated with cases like Benasra and Kolar, held that the anti-SLAPP statute did not apply to the plaintiff's claims. (Id. at pp. 150-158.)

Justice Perluss dissented. (See Sprengel, supra, 241 Cal.App.4th at pp. 158-163 (dis. opn. of Perluss,J.).) He emphasized that the viewpoint expressed by the line of authority on which the majority relied was "neither unanimous nor uniform," and cited several contrary decisions, like Peregrine Funding and Freemont Reorganizing Corp., that reached a contrary conclusion. (Id. at p. 160, fn. 2.) Much like these contrary authorities, Justice Perluss indicated that the anti-SLAPP statute applies to the plaintiff's claims because they were based on prelitigation and litigation-related activities. (See id. at pp. 158-163.)

Justice Perluss' dissent expressly disagreed with the different conclusions reached by cases like Benasra and Kolar. (See Sprengel, supra, 241 Cal.App.4th at pp. 160-163.) First, he explained that while many such cases were premised on the notion that malpractice actions are not brought primarily to chill the valid exercise of First Amendment rights, the California Supreme Court has long rejected the argument that a defendant must establish that the lawsuit was filed with the intent to chill the exercise of these rights or that the action actually had the effect of doing so. (Id. at pp. 158-161.) Second, Justice Perluss stressed that such cases violated the anti-SLAPP statute's plain language, which the California Supreme Court has "'scrupulously honored,'" because the claims at issue arose from the attorney's litigation-related activities and therefore fell within the unambiguously clear text of the statute. (Id. at pp. 161-163.) Justice Perluss concluded that there is no justification "for a categorical exclusion of legal malpractice actions from the scope" of the anti-SLAPP law and the statute must therefore apply even to "'garden variety malpractice actions.'"

(Id. at p. 162.)

California Supreme Court precedent supports Justice Perluss' dissenting opinion.

The line of authority originating in cases like Benasra often justifies the conclusion that the anti-SLAPP statute is inapplicable to malpractice actions by insisting such claims do not sue an attorney for constitutional petitioning activity. But the California Supreme Court has held that "courts determining whether a cause of action arises from" activities protected by the anti-SLAPP law should look to whether the conduct in question falls within one or more of the four statutorily defined categories of protected activities set out in the statute rather than to whether those activities are protected by the First Amendment. (City of Montebello v. Vasquez (2016) 1 Cal.5th 409, 422.) This is so because the "Legislature did not limit the scope of the anti-SLAPP statute to activity protected by the constitutional rights of speech and petition," and the Legislature's "directive that the anti-SLAPP statute is to be 'construed broadly'" demonstrates that the anti-SLAPP law extends "beyond the contours of the constitutional rights themselves." (Id. at p. 421.)

Consequently, the "'critical'" question in determining if the anti-SLAPP law applies to a claim "is whether the plaintiff's cause of action itself was based on an act" that fits within the categories of protected activities expressly spelled out in the statute. (City of Cotati v. Cashman (2002) 29 Cal.4th 69, 78.) None of those categories "categorically excludes any particular type of action from [the anti-SLAPP law's] operation." (Navellier v. Sletten (2002) 29 Cal.4th 82, 92.) Courts have no power to rewrite the anti-SLAPP statute to render it categorically inapplicable to particular types of claims. (Ibid.)

Furthermore, the California Supreme Court has "reject[ed] attempts to read into [the anti-SLAPP law] requirements not explicitly contained in [its] language" (Flatley v. Mauro (2006) 39 Cal.4th 299, 312). Thus, as Justice Perluss' dissent correctly pointed out, the California Supreme Court has declined to read into the statute a requirement that the plaintiff's action must intend to chill the exercise of constitutional rights or must actually create such a chilling effect. (See Navallier, supra, 29 Cal.4th at p. 88; City of Cotati, supra, 29 Cal.4th at pp. 74-76.)

Under this precedent, the considerations cited by cases like Benasra and Kolar to conclude that the anti-SLAPP statute is inapplicable to legal malpractice actions — i.e., whether the defendant's activities amounted to constitutional petitioning activity, or whether the lawsuit intended to chill or actually chilled constitutional rights — are irrelevant. The only question that should matter is whether the acts underlying the challenged claim fall within one or more of the statutory categories of activities protected by the anti-SLAPP statute.

The first and second of these categories protect any written or oral communications made before, or made in connection with an issue under consideration or review by, a judicial proceeding or any other official proceeding authorized by law. (Code Civ. Proc., § 425.16, subd. (e)(1), (e)(2).)

Claims against an attorney for malpractice can fall within such categories where the claims are based on activities the attorney undertook in the course of, or in connection with, litigation or another official proceeding and these activities cause injuries for which the plaintiff seeks relief. (See, e.g., Peregrine Funding, supra, 133 Cal.App.4th at pp. 670-675 [law firm's allegedly tortious opposition to SEC's efforts to obtain restraining orders and appoint a receiver fell within the first statutory category of protected activities]; Fremont Reorganizing Corp., supra, 198 Cal.App.4th at pp. 1166-1172 [lawyer's allegedly tortious statements to the California Insurance Commissioner fell within the second statutory category of protected activities because they were made to the commissioner in his capacity as the court-appointed liquidator in a liquidation proceeding].) After all, "when relief is sought" by a plaintiff "based on allegations arising from activity protected by the [anti-SLAPP] statute," the anti-SLAPP law applies and "the burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated." (Baral v. Schnitt (2016) 1 Cal.5th 376, 396.)

Some courts have insisted that defendants are systematically abusing the anti-SLAPP statute based in part on defendants' efforts to apply this law to malpractice claims. (See Grewal v. Jammu (2011) 191 Cal.App.4th 977, 999.) But Justice Perluss' published dissent in Sprengel demonstrates that, far from being an example of abuse, such efforts simply fall afoul of a division among California Courts of Appeal over whether the anti-SLAPP law applies to legal malpractice actions

and similar claims. It is high time for the California Supreme Court to step in and resolve this conflict that has caused substantial confusion for litigants and courts alike for well over a decade.

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