Calif. Case Law Is An Excellent Anti-SLAPP Resource

Law360, New York (February 28, 2014, 1:42 PM ET) -- Over the last 25 years, state legislatures in well over half the states have passed statutes aimed at halting lawsuits designed to chill the valid exercise of constitutional rights of freedom of speech and petition, denominated as "strategic lawsuits against public participation" (or "SLAPP" suits). These statutes come in all shapes and sizes, taking aim at the SLAPP problem with varying degrees of precision.

California was among the first states to pass such legislation, and its statute remains one of the broadest in the nation. Further, California courts have developed an extensive body of case law interpreting the more controversial aspects of the law.

As we show below, given the breadth of the California statute, the number of complex issues already addressed by California courts, and the sheer number of opinions issued, California is well positioned to lead the way as other states grapple with the inevitable interpretive issues that will arise as they attempt to define the scope of their own anti-SLAPP provisions.

California's Anti-SLAPP Law

In 1992, the California Legislature expressed concern about "a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition." Cal. Code. Civ. Proc. § 425.16(a) (West 2014).

To address these concerns, California enacted California Code of Civil Procedure Section 425.16, otherwise known as California's anti-SLAPP statute. Lawmakers designed the statute to discourage meritless SLAPP litigation and enable defendants to defeat them more quickly, by permitting defendants to file a "special" motion to strike at the inception of a lawsuit. The California statute is broad, allowing for anti-SLAPP motions to be filed in any case where a plaintiff's claim arises from a person's right of petition and/or free speech in connection with a "public issue or an issue of public interest."

In the decades following California's passage of its anti-SLAPP statute, numerous states have passed their own anti-SLAPP statutes. The structure of these statutes varies greatly, with some states passing broad statutes similar to California's, and other states passing much more narrow statutes, designed to target a specific subset of possible SLAPP suits.[1] Nevada, Oregon and Texas, among others, have all passed anti-SLAPP statutes similar in scope to California's statute and these statutes share many common features.[2]

California appellate courts have already issued over 2,000 published opinions respecting its anti-SLAPP statute, in comparison to the 16 opinions issued by Nevada appellate courts, 20 opinions issued by Oregon appellate courts, and 19 opinions issued by Texas appellate courts.[3] Accordingly, California's extensive body of case law interpreting its anti-SLAPP statute is extremely useful to practitioners and courts in these other jurisdictions.

Indeed, courts in Nevada, Oregon and Texas have already looked to California courts for guidance in interpreting their own anti-SLAPP statutes. See, e.g., Newspaper Holdings Inc. v. Crazy Hotel Assisted Living Ltd., 416 S.W.3d 71, 89 (Tex. Ct. App. 2013) (following the California Supreme Court's analysis in holding that the non-moving party must establish that it meets the commercial speech exception); Young v. Davis, 314 P.3d 350, 357 (Or. Ct. App. 2013) (noting that it "was intended that California Case

law would inform Oregon courts regarding the application" of Oregon's anti-SLAPP law (quoting Page v. Parsons, 277 P.3d 609, 619 (Or. Ct. App. 2012))); Stubbs v. Strickland, 297 P.3d 326, 329 (Nev. 2013) (adopting the California Supreme Court's reasoning that a defendant should not be entitled to attorneys' fees if a plaintiff voluntarily dismisses a complaint before an anti-SLAPP motion is filed).

Anti-SLAPP Issues

Although comprehensively written, California's statute engendered a number of complex and interesting issues likely to arise in other states as well. For example, California courts have addressed what actions may be defined as being "in furtherance of" a defendant's right to free speech and petition; how to define "public interest"; how to address causes of action that have both protected and unprotected claims; the appropriate standard for evaluating whether plaintiff has met its burden of proof; whether a complaint may be amended after an anti-SLAPP motion is filed; and whether a defendant remains entitled to attorneys' fees if a plaintiff voluntarily dismisses a lawsuit after an anti-SLAPP motion is filed, but before that motion is decided.

As illustrated by the foregoing authority, California case law on these topics can and should be applied in jurisdictions with broad anti-SLAPP statutes, such as Oregon, Nevada and Texas.

"In Furtherance Of"

The anti-SLAPP statutes in California and other states, such as Nevada, limit their application to claims that challenge conduct "in furtherance of" a defendant's right of petition or free speech.[4] California courts have applied an expansive definition of this term, as illustrated by the decision in Hunter v. CBS Broadcasting Inc., 221 Cal. App. 4th 1510 (2013).

In that case, the court held that a television station's hiring decisions for its weather anchors "advanced or assisted" its First Amendment expression. Thus, the statute applied to employment discrimination claims that challenged the station's casting decisions. Id. at 1521.

Furthermore, "California courts have held that pre-publication or pre-production acts such as investigating, newsgathering, and conducting interviews constitute conduct that furthers the right of free speech." Doe v. Gangland Productions, Inc. 730 F.3d 946, 953 (9th Cir. 2013).

Thus, practitioners representing defendants in jurisdictions with anti-SLAPP statues that resemble the one in California might benefit from citing the foregoing and other authority to advance a similarly broad interpretation of this standard.

Issue of Public Interest

In many anti-SLAPP statutes, certain categories of protected exercises of free speech or petition are limited to those made in connection with a "public issue" or an issue of "public interest." California courts have struggled to define "public interest" over the last two decades. Initially, courts were hostile to the act and issued a number of opinions that narrowly defined what qualified as a "public" interest. However, in response to such cases, in 1997, the Legislature amended Section 425.16 to make it explicit that the statute "shall be construed broadly." C.C.P. § 425.16(a); Nygard Inc. v. Uusi-Kerttula, 159 Cal. App. 4th 1027, 1039 (2008).

Still, although courts have developed an impressive body of case law regarding this topic, there are no bright lines. Courts have emphasized that "[an] issue need not be 'significant' to be protected by the anti-SLAPP statute — it is enough that it is one in which the public takes an interest." Nygard, 159 Cal. App. 4th at 1042. On the other hand, "the statute requires that there be some attributes of the issue which make it one of public, rather than merely private, interest." Weinberg v. Feisel, 110 Cal. App. 4th 1122, 1132 (2003).

Interestingly, despite a California court's admonition that "it is doubtful an all-encompassing definition could be provided," id., Texas lawmakers have accepted that challenge, and defined the term "public concern" in their statute itself, providing that a "'[ma]tter of public concern' [is] an issue related to: (A) health or safety; (B) environmental, economic, or community well-being; (C) the government; (D) a public official or public figure; or (E) a good, product, or service in the marketplace." Tex Civ. Prac. & Rem. Code Ann. § 27.001(7) (Vernon 2013).

While this definition is also broad, it is arguably more limited in scope than California's judicially created definition of "public interest," which is open-ended and does not specify any particular topics of application.

However, other states have not defined "public interest" in their anti-SLAPP statutes. Accordingly, practitioners and courts in such states would benefit from using California case law as a guide in exploring the boundaries of that term.

Mixed Conduct Cases

California courts are divided when addressing a single cause of action that involves both protected and unprotected activity under the anti-SLAPP law (also known as "mixed-conduct cases"). See Cho v. Chang, 219 Cal. App. 4th 521, 526-27 (2013) (discussing the split in California courts regarding mixed-conduct cases). One line of cases employs a "scalpel" approach, allowing the court to strike protected activity from a cause of action while allowing the remainder of the claim to proceed. See City of Colton v. Singletary, 206 Cal. App. 4th 751, 772-774 (2012).

The other line of cases takes an "all or nothing approach," allowing the entire cause of action to survive where the plaintiff meets its burden on any protected activity and striking the entire cause of action where the plaintiff fails to do so. See Haight Ashbury Free Clinics Inc. v. Happening House Ventures, 184 Cal. App. 4th 1539, 1554 (2010); Mann v. Quality Old Tim Serv. Inc., 120 Cal. App. 4th 90, 106 (2004).

Jurisdictions with similar anti-SLAPP statutes will need to address this issue. Accordingly, practitioners may choose to rely on the reasoning of one of these approaches when dealing with a mixed-conduct case.

Plaintiff's Burden of Proof

California's anti-SLAPP statute, on its face, states that a plaintiff must establish a "probability of success" on the merits to defeat an anti-SLAPP motion. However, California courts, "noting the potential deprivation of jury trial that might result were the[] statute[] construed to require the plaintiff first to prove the specified claim to the trial court, have instead read the statute[] as requiring the court to determine only if the plaintiff has stated and substantiated a legally sufficient claim," such that a plaintiff need only establish a prima facie case. Rosenthal v. Great Western Fin. Sec. Corp., 14 Cal. 4th

394, 412 (1996).

Courts in Oregon and Nevada have similarly lowered the burden of proof for plaintiffs from the standard set forth in their respective anti-SLAPP statutes. Oregon's anti-SLAPP statute, on its face, requires that the plaintiff present "substantial evidence" to support a prima facie case on the claim at issue. Or. Rev. Stat. Ann. § 31.150(3) (West 2013).

However, Oregon has expressly followed California's lead and, in Young, 314 P.3d at 356-58, noted that the burden of proof the plaintiff must provide is the consistent with the burden a plaintiff bears on a motion for summary judgment (i.e., to disprove that the moving party will prevail as a matter of law). Id.

Although Nevada's anti-SLAPP statute requires that the nonmoving party establish by "clear and convincing evidence a probability of prevailing on the claim," Nev. Rev. Stat. Ann.§ 41.660(3)(b) (West 2013), Nevada courts have similarly held that the nonmoving party need only "demonstrate a genuine issue of material fact." See, e.g., John v. Douglas Cnty. Sch. Dist., 219 P.3d 1276, 1282 (Nev. 2009).

In Texas, the nonmoving party must establish "by clear and specific evidence a prima facie case for each essential element of the claim in question." Tex. Civ. Prac. & Rem. Code Ann. § 27.005(c) (Vernon 2013). At present, Texas courts have not similarly lowered the burden of proof and have routinely required plaintiffs to put forth clear and specific evidence, i.e., evidence "unaided by presumptions, inferences, or intendments," for each element of a claim. See Rehak Creative Servs. Inc. v. Witt, 404 S.W.3d 716, 725-27 (Tex. Ct. App. 2013).

However, only a "minimum quantum of clear and specific evidence" is required to establish each essential element of the claim. Id. at 727. Furthermore, it remains to be seen whether the Texas Supreme Court will follow California, Nevada and Oregon in continuing to lower the burden of proof for plaintiffs.

Amendments

In California, courts have concluded that, despite the absence of any express statutory language on the subject, a plaintiff may not amend its pleadings to nullify an anti-SLAPP motion after the motion has already been filed. City of Colton, 206 Cal. App. 4th at 775 (stating that "there is a history of case law setting forth the rule that a party cannot amend around a[n anti-]SLAPP motion").

The California courts have reasoned that permitting amended pleadings will defeat the purpose of the statute, which is to bring a speedy end to SLAPP suits. See Salma v. Capon, 161 Cal. App. 4th 1275, 1294 (2008) (stating that allowing a plaintiff to amend "would undermine the legislative policy of early evaluation and expeditious resolution of claims arising from protected activity"). Thus, practitioners in other jurisdictions might also argue that courts in their jurisdictions should follow California's lead by disallowing amended pleadings.

Attorneys' Fees

Like California, the anti-SLAPP statutes in Nevada, Oregon, Texas and other states award mandatory attorneys' fees to a defendant that prevails on an anti-SLAPP motion. Moreover, California courts have determined that a defendant's attorneys' fees are still available even if the plaintiff voluntarily dismisses after the anti-SLAPP motion has been filed, provided that the moving party can demonstrate that the

anti-SLAPP motion would have been granted. See S.B. Beach Props. v. Berti, 39 Cal. 4th 374, 381 n.2 (2006). Consequently, defendants in other jurisdictions might also be able to obtain the fees incurred filing an anti-SLAPP motion, even when the lawsuit is voluntarily dismissed before the motion is heard.

Conclusion

As detailed above, California courts have developed an extensive body of case law on complex areas of anti-SLAPP law which can clearly serve as a basis for the interpretation of other jurisdictions' anti-SLAPP statutes. In light of this, and because California courts have altered and/or imposed requirements on parties to SLAPP litigation that are not evident from the text of its anti-SLAPP statute, a practitioner in any other state that has enacted a similar anti-SLAPP statute — for example, Louisiana or Washington[5] — would likely benefit from contacting a practitioner who has experience with California anti-SLAPP motions.

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[1] See, e.g., N.Y. Civ. Rights Law § 76-a (McKinney 2014) (limiting anti-SLAPP protections to actions "brought by a public applicant or permittee and [] materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission"). The definition of "public applicant or permittee" is limited to any person who has applied for or obtained a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body, or any person with an interest, connection or affiliation with such person that is materially related to such application or permission." Id.

[2] See Cal. Civ. Proc. Code §§ 425.16 et seq. (West 2014); Nev. Rev. Stat. Ann. §§ 41.635 et seq. (West 2013); Or. Rev. Stat. Ann. §§ 31.150 et seq. (West 2013); Tex. Civ. Prac. & Rem. Code Ann. §§ 27.001 et seq. (Vernon 2013).

[3] These numbers reflect the reported opinions available on Westlaw.

[4] Oregon also protects, among other things, any conduct "in furtherance of" the exercise of free speech or petition in connection with a public issue or issue of public interest. Or. Rev. Stat. Ann. § 31.150(2)(d) (West 2013). With respect to its definition of the phrase "[e]xercise of the right of free speech," Texas' statute uses slightly different language, limiting its statute's application to communications made "in connection with" a matter of public concern. Tex. Civ. Prac. & Rem. Code Ann. § 27.001 (Vernon 2013).

[5] See La. Code Civ. Proc. Ann. art. 971 (2013); Wash. Rev. Code Ann. § 4.24.525 (West 2013).

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