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PERSPECTIVE

SLAPP happy in 2016

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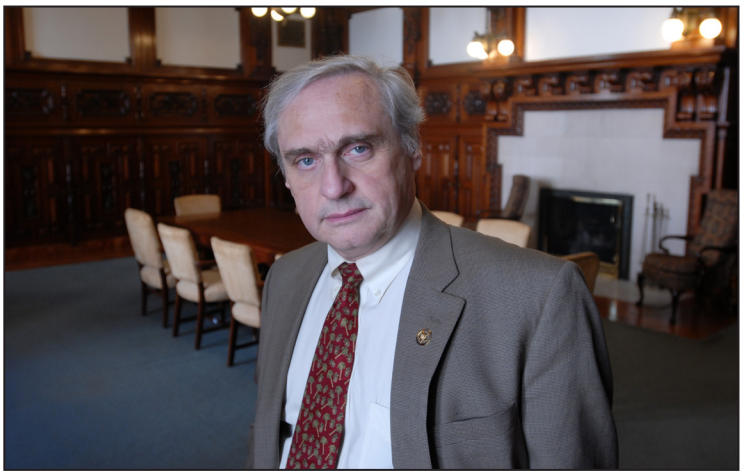
In 2016, the presidential election provided a daily national news platform for an unprecedented and spirited debate about First Amendment-protected freedom of expression. In California, state and federal appellate courts also repeatedly grappled with freedom of speech issues in numerous critical rulings addressing the reach of the state's anti-SLAPP statute — a powerful litigation tool intended to protect free speech. In California, Code of Civil Procedure Section 425.16, the anti-SLAPP statute authorizes a special motion to strike claims that are asserted to suppress constitutionally protected expression, known as "Strategic Litigation Against Public Participation." The use of the anti-SLAPP motion has continued to expand during its nearly 25 years of existence, in part due to the sharp teeth embedded in the statute — including a stay of discovery, recovery of attorney fees and an immediate right to appeal.

California practitioners should understand five key decisions that were issued in 2016 by the California Supreme Court, California Courts of Appeal and the 9th U.S. Circuit Court of Appeal, as they impact the future use of the anti-SLAPP motion as an offensive and defensive tactic. These decisions provide valuable direction on anti-SLAPP motions that may be raised against a wide variety of claims by both private and public litigants.

The California Supreme Court released two major anti-SLAPP decisions in August. In *Baral v. Schnitt*, 1 Cal. 5th 376 (2016), the high court resolved a long-standing conflict among appellate courts regarding whether a special motion to strike can be used against individual allegations where a cause of action alleges both protected free speech and unprotected activity — the so-called "mixed cause of action." There, the plaintiff sued his former business partner, alleging both protected and unprotected activity in four causes of action. Among the mixed allegations was an accusation that the defendant hired and then gave false information to an accounting firm in an audit and investigation of possible misappropriation of corporate assets by plaintiff.

The defendant filed an anti-SLAPP motion to strike all references to the audit as protected communications in a pre-litigation investigation. The trial court denied the motion, ruling that an anti-SLAPP special motion to strike only applied to either an entire cause of action as plead in the complaint, or to the complaint as a whole. The Court of Appeal later affirmed, holding that a defendant could not strike individual allegations within a cause of action involving both protected and unprotected activity. The California Supreme Court reversed, holding "courts may rule on plaintiffs' specific claims of protected activity, rather than reward artful pleading by ignoring such claims if they are mixed with assertions of unprotected activity." The high court concluded that allowing special motions to strike specific allegations of constitutionally protected expression was consistent with both the language and intent of the anti-SLAPP statute.



Judge Alex Kozinski in 2011.

A week later, the California Supreme Court weighed in on the question as to when government employees or entities may invoke the protections of California's anti-SLAPP statute in *City of Montebello v. Vasquez*, 1 Cal. 5th 409 (2016). The city of Montebello filed a complaint alleging conflicts of interest in connection with three city council members who voted to approve a waste removal contract in which they allegedly had a financial interest. The city council members filed an anti-SLAPP motion, arguing that the suit was an effort to punish them for exercising their right of free speech in connection to their official duties. The high court agreed with the council members, holding that the lawsuit was predicated on "conduct in furtherance of the council members' constitutional right of free speech in connection with public issues."

'Anti-SLAPP cases have spread like kudzu through the federal vineyards.'
— Judge Alex Kozinski

Notably, the Supreme Court in *City of Montebello* drew a distinction between the employee and the entity when applying the protections of the statute. This distinction leaves open the possibility that there will be circumstances where an elected official could assert the protections of the anti-SLAPP statute while the public entity itself could not.

The courts of appeal also weighed in on the reach of California's anti-SLAPP statute. The day after the *Baral* decision, the 2nd District Court of Appeal issued its opinion in *John Doe 2 v. Superior Court*, 1 Cal. App. 5th 1300 (2016). The question was whether a plaintiff alleging libel against an anonymous email sender was entitled to discovery of the sender's identity in order to make a prima facie showing of defamation.

Balancing the libel plaintiff's right to seek redress for allegedly

defamatory statements and the anonymous speaker's First Amendment right to speak freely and anonymously, the Court of Appeal reversed the lower court's order granting the motion for special discovery of the sender's identity. The Court of Appeal concluded that the statements in the email were opinions not reasonably susceptible to an interpretation implying any undisclosed false and defamatory fact "of and concerning" the plaintiff. Moreover, there was no evidence presented of any actual harm done to the plaintiff.

In *Cruz v. City of Culver City*, 2 Cal. App. 5th 239 (2016), residents sued the city of Culver City alleging violations of California's open meeting laws under the Brown Act. The residents challenged the city council's unscheduled discussion of parking restrictions on a road in their neighborhood. The city filed a special motion to strike on the basis that their discussion was within the Brown Act's exceptions to discussing non agenda items because it was only a preliminary discussion to have the matter placed on a future agenda. The residents argued that the anti-SLAPP statute was inapplicable because their lawsuit was brought in the public's interest.

Affirming the lower court's dismissal of the action pursuant to the city's motion to strike, the Court of Appeal agreed that the public interest exception to the anti-SLAPP statute did not apply because the residents sought "personal relief," not a vindication of rights for the general public. The appellate court also concluded that the residents had no likelihood of success on the merits, as the city's brief discussion of parking restrictions fell within the Brown Act's enumerated exceptions.

Finally, the 9th Circuit in *Travelers Casualty Insurance Company of America v. Hirsh*, 831 F.3d 1179 (2016), issued a per curiam opinion denying a special motion to strike on the ground that the claims did not involve protected activity or litigation-related speech because the causes of action all arose from defendant's post-settlement conduct, not his communications with the insured. For this reason, the court held that the defendant's actions were not in furtherance of his right of petition or free speech, and thus did not "arise from" protected activity.

While the majority opinion did little to alter the landscape of anti-SLAPP case law, it is noteworthy for Judge Alex Kozinski's concurring opinion which argues that California's anti-SLAPP statute should not be applied by federal courts. That opinion, joined by Judge Ronald Gould, asserts that "anti-SLAPP cases have spread like kudzu through the federal vineyards," especially in the 9th Circuit. Kozinski urged his colleagues to side with the D.C. Circuit, which recently concluded that anti-SLAPP motions are inconsistent with the Federal Rules of Civil Procedure. The concurring opinion is especially intriguing in light of the SPEAK FREE Act of 2015, a recent bipartisan legislative initiative for adoption of a federal anti-SLAPP statute.

Although these five California cases addressed different factual situations and claims, there are lessons to be gleaned from the 2016 anti-SLAPP jurisprudence. First, beware the "surgical strike" — the California Supreme Court's decision in *Baral* may well expand the use of anti-SLAPP motions to challenge specific expression-related allegations buried in broader causes of action. Second, public agencies should tread carefully in this area. Although several recent decisions have upheld the right of public entities to use the anti-SLAPP statute, the *City of Montebello* opinion suggests that public agencies may be entitled to lesser protection than that enjoyed by elected officials. Third, watch for fireworks in the federal arena: Recent congressional efforts to adopt a federal anti-SLAPP statute may be at odds with growing judicial hostility towards these motions in furtherance of free speech. The president-elect's numerous statements about changing libel laws also suggests that the federal courts' role in protecting the freedom of expression may be under increasing scrutiny in the near future.

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