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PERSPECTIVE

Mixed causes of action get mixed anti-SLAPP results

By Stephen L. Raucher and K. Cannon Brooks

Recently, in *Baral v. Schnitt*, 2015 DJDAR 1518 (Feb. 2, 2015), the 2nd District Court of Appeal, Division 1, held that California's anti-SLAPP statute can only be applied to strike entire causes of action — not individual allegations of constitutionally protected activity. The *Baral* opinion is just one more entry in a series of inconsistent appellate decisions that make it impossible for litigators to predict which way the wind will blow on their day in court. The state Supreme Court should now resolve the matter once and for all.

In response to a special motion to strike brought under the anti-SLAPP statute, Code of Civil Procedure Section 425.16, the court must strike any "cause of action" that arises from a person's exercise of the right of petition or free speech, unless the pleading party can establish a probability of prevailing "on the claim." In enacting the anti-SLAPP statute, the Legislature clearly intended to shield constitutionally protected activity from meritless litigation, which could be aimed at chilling protected activities.

In its analysis, the court must undertake a two-pronged approach. In prong one, the court determines whether the cause of action is based on allegations of protected activity. In prong two, assuming allegations regarding protected activity are found to exist, the court determines whether the pleading party can make out a prima facie case. However, when a cause of action alleges both protected and unprotected activity (a "mixed" cause of action), what is the pleading party required to prove in prong two *and* what options does the court have when the pleading party cannot demonstrate a probability of prevailing on the allegations concerning protected activity?

This issue was first addressed by the 4th District Court of Appeal in *Mann v. Quality Old Time Service Inc.*, 120 Cal. App. 4th (2004). In Mann, the Court of Appeal held that in mixed causes of action, the pleading party need only prove a probability of prevailing on "any part of its claim," meaning that the entire cause of action could be maintained even if only the allegations regarding unprotected activity were shown to have merit. Soon thereafter, appellate decisions noted that *Mann* opened the door for clever pleading practices (i.e., deliberately pleading mixed causes of action), which could allow parties to circumvent the protections put in place by the anti-SLAPP statute.

In *Taus v. Loftus*, 40 Cal. 4th 683 (2007), the state Supreme Court first addressed this issue and held that the pleading party must prove a probability of prevailing on each challenged basis of liability and that a portion of a cause of action could be stricken pursuant to the anti-SLAPP statute. In this regard, *Taus* appeared to resolve the issue. Nonetheless, the Supreme Court reopened the flood gates again in *Oasis West Realty, LLC v. Goldman*, 51 Cal. 4th 811 (2011), where it cited *Mann* with approval. Notably, the Oasis opinion did not cite *Taus*, nor was it clear whether Oasis even dealt with a mixed cause of action.

Since *Oasis*, various appellate opinions have disagreed on whether the anti-SLAPP statute can be directed at individual allegations or only entire causes of action. There is not even consensus regarding whether *Oasis* implicitly overruled *Taus*, the meaning of the operative language in the anti-SLAPP statute, or even the intent of the legislature in enacting the anti-SLAPP statute.

Some of the appellate districts have followed *Taus* and permitted the excise of the allegations of protected activity — e.g., the 2nd District, *Cho v. Chang*, 219 Cal. App. 4th 521 (2013), and the 4th District, City of *Colton v. Singletary*, 206 Cal. App. 4th 751 (2012). However, others have followed *Oasis* and held that the anti-SLAPP statute can only reach entire causes of action — e.g., the 1st District, *Wallace v. McCubbin*, 196 Cal. App. 4th 1169 (2011), and the 3rd District, *Burrill v. Nair*, 217 Cal. App. 4th 357 (2013). Notably, *Wallace* begrudgingly deferred to the Supreme Court's most recent holding in *Oasis* after a lengthy analysis which strongly implied that *Oasis* was wrongly decided.

Now, with *Baral*, Division 1 of the 2nd District has entered the fray in what it described as "the growing debate of appellate districts." In Baral, the plaintiff, Baral, sued his business partner, Schnitt, alleging, among other things, breach of fiduciary duty. Baral alleged that Schnitt had improperly barred Baral from participating in the management of the partnership and failed to distribute Baral's share of partnership profits. Baral also alleged that Schnitt improperly refused to allow Baral to participate in an audit of the partnership, which had been requested by Schnitt in anticipation of litigation regarding the misappropriation of partnership funds by Baral's son (and possibly Baral himself).

Thus, Baral's cause of action against Schniff was based on activity protected by the anti-SLAPP statute (i.e., allegations regarding the audit done in anticipation of litigation) as well as unprotected activity (i.e., allegations concerning shutting out Baral from partnership participation and profits).

Schnitt responded with an anti-SLAPP motion seeking to strike only the allegations related to the audit (the protected activity), and conceded that Baral could make a prima facie showing based on his allegations regarding Schiff's unprotected activity. In affirming the trial court's denial of the anti-SLAPP motion, the Court of Appeal held that Baral's ability to make a prima facie on any part of his cause of action (i.e., allegations of unprotected activity), meant that his entire cause of action survived — including the allegations concerning protected activity for which no prima facie proof had been proffered.

The *Baral* court reasoned that the plain language of the anti-SLAPP statute only referred to striking a "cause of action," that excising the allegations of protected speech would not advance the core purpose of the anti-SLAPP statute because the allegations were a small part of Schniff's fidicuary duty claim, and that a contrary holding would open the door for the tactical filing of anti-SLAPP motions upon even the most cursory implication of protected activity — which would force the pleading party to make a prima facie case without the benefit of discovery, which is stayed upon the filing of an anti-SLAPP motion.

In its holding, *Baral* follows the Supreme Court (*Oasis*) and the decisions of several appellate districts (*Mann, Wallace, Burrill*), while at the same time contradicting the Supreme Court (*Taus*), other appellate districts (*City of Colton*), and even Division 4 of its own appellate district (*Cho*). This is the crux of the problem that the Supreme Court may now be called onto resolve.

In the humble opinion of the authors, the most practical approach is the one taken in *Taus* and its followers (*Cho* and *City of Colton*), which permits individual allegations to be stricken. This is the best way to respect the aims of the anti-SLAPP statute and prevent intentional and unintentional coupling of allegations to circumvent the statute and chill protected speech. While the anti-SLAPP statute states it applies to a "cause of action," since *Lilienthal & Fowler v. Superior Court*, 12 Cal. App. 4th 1848 (1993), California courts have consistently held that the lumping together of distinct claims in a single cause of action is not dispositive. Hopefully, the Supreme Court will now resolve this issue once and for all.

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