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PERSPECTIVE

Are *Cumis* counsel disputes with insurers subject to anti-SLAPP?

By Stephen L. Raucher

Is a policyholder's breach of contract and bad faith lawsuit against its insurer for failure to provide independent "*Cumis* counsel" subject to the anti-SLAPP (strategic lawsuit against public participation) statute? In *Miller Marital Deduction Trust v. Zurich Am. Ins. Co.*, 2019 DJDAR 9966 (Oct. 21, 2019), the 1st District Court of Appeal ruled that such claims, even though they involve attorney communications, do not trigger the anti-SLAPP statute because they arise out of an alleged breach of the insurer's duty not premised on the exercise of any constitutional rights.

The Miller Marital Trust was the successor owner of certain real property previously owned by spouses Jack Miller (now deceased) and Helen Miller, and then owned by the Miller Family Trust. In August 2016, the Miller Marital Trust and Helen Miller initiated a federal lawsuit against previous lessee Mary DuBois, as well as the estate of Jack Miller. The complaint sought redress for past environmental contamination that originated from a dry cleaning business that was in operation on the property from about 1956 to 1985. The Millers were represented by the Paladin Law Group. DuBois filed a counterclaim against the Millers, alleging they had "intentionally and negligently caused and contributed to the release of the dry cleaning solvent into the property."

Zurich agreed to defend the Millers against the counterclaim under insurance policies issued from 1977 to 1984, but the Millers asked Zurich to allow the Paladin Law Group to represent them because of Zurich's reservation of rights and its appointment of separate counsel to defend the Miller Estate, an adverse party to the Millers. The Millers contended that these circumstances created a conflict of interest requiring the appointment of independent *Cumis* counsel. Zurich refused that request and instead retained panel counsel to represent Helen Miller individually and as trustee of the Miller Marital Trust.

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The term "*Cumis* counsel" refers to a situation where an insurance company has a duty to defend its policyholder, but the carrier has reserved the right to contest coverage on a given issue and the outcome of that issue can be controlled by counsel's strategic choices in the underlying litigation. In such a situation, the policyholder has a right to select its own independent — *Cumis* — counsel to defend the action at the insurance company's expense, albeit at the typically lower rates paid by the insurer in the defense of similar actions. *See San Diego Federal Credit Union v. Cumis Ins. Society, Inc.*, 162 Cal. App. 3d 358 (1984). The California Legislature codified and clarified the right to *Cumis* counsel in Civil Code Section 2860.

In February 2018, while the federal action against DuBois was pending, the Millers commenced a lawsuit against Zurich, alleging that Zurich was in breach of its contractual duties under its insurance policies by refusing to pay for independent *Cumis* counsel to represent the Millers in defending against the DuBois counterclaim; refusing to pay reasonable and necessary site investigation, regulatory oversight, attorney fees, and other defense costs; and failing to deal in good faith with the Millers by interfering with panel counsel's representation of them. For example, the complaint alleged: "Although Zurich ... [has] retained panel counsel to represent the [Millers], [Zurich has] instructed and limited panel counsel's ability to properly defend the [Millers] and instead [has] relied on Paladin Law Group LLP to do much of the work, [Zurich has] benefited from that work, and yet [Zurich has] refused to pay for that work." Furthermore, the Miller's complaint also alleged, "Zurich also committed bad faith by improperly allowing counsel [retained by Zurich to defend the Miller Estate] to communicate with and advise the [Millers'] claims handlers and to exert influence and control over the handling of the [Millers'] defense by panel counsel appointed by [Zurich]."

Zurich filed an anti-SLAPP motion challenging the two causes of action (breach of the contractual duty to defend and breach of the implied covenant of good faith and fair dealing) on the ground that the claims "arise from allegations about the conduct of attorneys representing Zurich's insured in the course of the" federal action, and that such allegations subjected the complaint to the anti-SLAPP statute. Zurich further argued that, given the

Millers' reliance on attorney communications, the claims could not be proven in light of the litigation privilege.

In evaluating a motion under Code of Civil Procedure Section 425.16, the anti-SLAPP statute, the trial court engages in a two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken in furtherance of the defendant's right of petition, or free speech under the United States Constitution or the California Constitution in connection with a public issue. In this first prong of the anti-SLAPP analysis, the court decides only whether the claims arise from protected activity. If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. Only a cause of action that satisfies both of these prongs of the anti-SLAPP statute is subject to being stricken under the statute.

The Millers opposed the anti-SLAPP motion, arguing that their claims did not arise from petitioning activity allegations, had at least minimal merit, and were not barred by the litigation privilege.

The trial court held that the Millers had met their burden of demonstrating a probability of prevailing on the merits based on evidence supporting their claims that Zurich had not paid all required defense costs and allegations of a conflict of interest that required the appointment of *Cumis* counsel, and that Zurich had not succeeded in showing that the litigation privilege barred the entirety of claims. Zurich appealed.

The Court of Appeal affirmed, but on different grounds. The court noted that not all attorney conduct in connection with litigation, or in the course of representing clients, is protected by the anti-SLAPP statute. Assertions that are simply incidental or collateral to the underlying claims are not subject to the statute. The court acknowledged, "While a breach of the implied covenant of good faith and fair dealing may be carried out by means of communications between the parties' respective counsel, the fact of counsels' communications does not transform the claim to one arising from protected activity within the meaning of section 425.16."

The court noted that the allegations in the Millers' complaint regarding counsels' communications directly related to Zurich's duty to defend the Millers in the DuBois counterclaim. The court reasoned, "what gives rise to liability is not the fact of counsels' communications, but that Zurich allegedly denied the Millers the benefit of panel counsel's independent professional judgment in rendering legal services to them." The court accordingly found that the lawsuit concerned a breach of duty that did not depend on Zurich's exercise of a constitutional right because allegations of counsels' communications were only evidence that provided context for the allegations that Zurich improperly failed to provide *Cumis* counsel and interfered with panel counsel's representation of the Millers in defending against the DuBois counterclaim. Accordingly, the court affirmed based on prong one, and did not address whether the Millers met their burden of showing a reasonable probability of prevailing on the merits of the claim under prong two.

The *Miller* opinion essentially holds that *Cumis* counsel disputes with insurance companies are not subject to the anti-SLAPP statute. Allegations of attorney communications that merely provide context will not trigger the statute. This is good news for policyholders, who otherwise would be potentially looking at years of delay every time a *Cumis* issue arose. ■

Stephen L. Raucher *practices complex business litigation at Reuben Raucher & Blum in Brentwood, with an emphasis on representing policyholders in insurance disputes. You can reach him at sraucher@rrbattorneys.com.*