A Primer on SLAPP Suits and Anti-SLAPP Motions

I routinely receive calls from parties and attorneys who have run afoul of California's anti-SLAPP statute. It is clear that business people need to have at least a cursory understanding of what constitutes a SLAPP action before pursuing litigation, since it is equally clear that many attorneys are not conversant with this area of the law.

What is a SLAPP suit, and what is an anti-SLAPP motion?

A "SLAPP suit" is a lawsuit that is intended to censor, intimidate and silence critics by burdening them with the cost of a legal defense until they abandon their criticism or opposition. I use the expression Spurious Litigation Against Public Participation, since that better captures both the goal of the plaintiff and the nature of the lawsuit, but the standard verbiage is "strategic lawsuit against public participation".

The action is spurious and frivolous because the typical SLAPP plaintiff does not care whether he wins the lawsuit, and often knows he has no chance of prevailing. The plaintiff's goals are accomplished if the defendant succumbs to fear, intimidation, mounting legal costs or simple exhaustion and abandons the criticism. The heart of California's anti-SLAPP legislation is set forth in subpart (e) of Code of Civil Procedure section 425.16, which provides:

(e) As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes:

(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law;

(2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law;

(3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest;

(4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

To win an anti-SLAPP motion, the defendant must first show that the speech in question falls under one of the four sections set forth above. But that is just the first prong of the analysis. If the defendant proves the speech was protected, the plaintiff can show that he is still likely to prevail on the action. In other words, defamatory speech is not protected simply because it falls under one of the four sections.

So how do you know a SLAPP action when you see it? That is not always obvious, and as many attorneys and their clients have painfully learned, failing to recognize they have created a SLAPP

can be extremely costly. One of my recent anti-SLAPP successes provides a good example of how an attorney can be caught in this trap.

I'll Sue You if You Sue Me.

In this case, our (future) client had entered into a settlement agreement with the defendant in a prior action. The settlement agreement required the defendant company to pay damages to our client, and contained a confidentiality agreement. Two years after the settlement agreement was signed, the defendant had still not paid the damages to the plaintiff, so he retained our firm to sue to collect the money due under the agreement.

We filed the action for breach of contract, attaching a copy of the settlement agreement. The defendant answered the complaint and also filed a cross-complaint, claiming that it was a breach of the confidentially agreement to attach the settlement agreement to the complaint. Incidentally, counsel for defendant had discussed with me his intention to cross-complain on this basis, and I had warned him that would be a really bad idea. He did so anyway.

The reason the cross-complaint was a bad idea was because it was a SLAPP. Do you see why? Remember again what SLAPP stands for – Spurious Litigation Against Public Participation. Under section 42516(e)(1), "any . . . writing made before a . . . judicial proceeding" is an "act in furtherance of person's right of petition." Defendant had breached the settlement agreement, so clearly we were entitled to sue for breach of that contract. That is the public participation – taking a case before a court for redress of a grievance. By claiming that we had breached the agreement by attaching the confidential settlement agreement, Defendant was just suing our client for suing. Stated another way, the defendant company was in essence saying, "for daring to make our breach of the agreement public, I'm going to sue you." I filed an anti-SLAPP motion against the company for the cross-complaint.

So let's run this case through the two-prong, anti-SLAPP analysis. Our burden was to show that the speech was protected under the anti-SLAPP statute. The speech here was the complaint itself, with the settlement agreement attached. Filing a complaint is a specifically protected activity under the anti-SLAPP statute, and comments made in conjunction with litigation are protected under Section 47. There was no issue that our complaint was a protected activity.

That takes us to the second prong, by which the plaintiff, here the cross-complainant, must show a reasonable likelihood of success on the merits of the case, even if the speech is a protected activity. The company had failed to pay our client the money due under the agreement, so it was clearly in breach, and therefore could not possibly prevail on its own breach of contract claim, since one of the elements of a breach claim is performance.

The court granted our anti-SLAPP motion, to the utter shock of opposing counsel. Counsel had argued that the motion could not be granted because the facts were in dispute. He erroneously thought that, like a motion for summary judgment, the evidence cannot be weighed. But an anti-SLAPP motion is supported by evidence. We provided evidence that the money owed had never been paid, and there was no evidence that could be presented to the contrary.

The company had to pay all the attorney fees we incurred in bringing the motion, which in this case was a quite reasonable $14,000. Fortunately for the company, I am very efficient at these motions, but I have received calls from attorneys facing fees exceeding $100,000 after they unwittingly created a SLAPP action.

Bottom line for businesses: Most attorneys have only a passing knowledge of SLAPP law, and the vast majority think it only applies to defamation actions. As you can see from the above case discussion, that is a dangerous misunderstanding. You probably have no desire to become acquainted with the minutia of California's anti-SLAPP laws, but if you are going to be involved with any litigation, whether bringing or defending an action, the possibility of a SLAPP action needs to be on your mental checklist. It may never be a thought to your attorney, but you will be the one to pay the price.