Legal Backgrounder

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California Supreme Court Clarifies Broader Application of State's Anti-SLAPP Law

by Thomas R. Burke

Last August, the California Supreme Court determined the scope of the state's anti-SLAPP (Strategic Lawsuits Against Public Participation) statute in "mixed"-conduct situations, *i.e.* where a plaintiff's cause of action combines allegations about a defendant that the statute protects along with allegations of *unprotected* activity. *Baral v. Schnitt*, 1 Cal. 5th 376 (2016).[1] California's anti-SLAPP statute, Cal. C.C.P. § 425.16 *et seq.*, provides that "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech ... shall be subject to a special motion to strike, unless the court determines ... there is a probability that the plaintiff will prevail on the claim."

For over a decade, California's trial and appellate courts lacked clear guidance on how to handle such mixed-claim situations. Courts that followed *Mann v. Quality Old Time Service, Inc.*, 120 Cal. App. 4th 90 (2004) (the *Mann* rule), allowed an anti-SLAPP motion *only* if the plaintiff's entire cause of action would be dismissed.[2] Other courts permitted a defendant to file an anti-SLAPP motion to dismiss only the discrete portions of a plaintiff's cause of action that arose from the defendant's protected activities.[3] This growing split of appellate authority led to anomalous results. Without explicit direction from the state's supreme court, California's appellate courts and practitioners were left to read tea leaves.[4]

Justice Carol Corrigan, writing for a unanimous court in *Baral*, evaluated the meaning of the word "cause of action" in the context of the anti-SLAPP statute. "Viewing the term in its statutory context,

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[1] Mr. Burke and several colleagues filed an *amicus* brief in *Baral* on behalf of Los Angeles Times Communications LLC, Reporters Committee for Freedom of the Press; The First Amendment Coalition; The McClatchy Company; First Look Media, Inc.; The Associated Press; News Corporation; Dow Jones & Co., Inc.; The New York Times Company; Cable News Network, Inc.; ABC, Inc. (including ABC News, KABC-TV, KGO-TV and KFSN-TV); The Hearst Corporation; Bloomberg, L.P.; and CBS Broadcasting, Inc.

[2] *See*, *e.g.*, *Platypus Wear, Inc. v. Goldberg*, 166 Cal. App. 4th 772, 786 (2008); *A.F. Brown Electrical Contractor, Inc. v. Rhino Electric Supply, Inc.*, 137 Cal. App. 4th 1118, 1118-25 (2006).

[3] *See, e.g., Cho v. Chang*, 219 Cal. App. 4th 521, 526-27 (2013); *City of Colton v. Singletary*, 206 Cal. App. 4th 751 (2012); *Haight Ashbury Free Clinics, Inc.,* 184 Cal. App. 4th 1539, 1556-57 (2010) (conc. & dis. opn. of Needham, J.).

[4] Following the California Supreme Court's rulings in *Taus v. Loftus*, 40 Cal. 4th 683 (2007) and *Oasis West Realty, LLC v. Goldman*, 51 Cal. App. 4th 811 (2011)—neither of which, ironically, involved a mixed cause of action—lower courts attempted to discern the Supreme Court's guidance on the mixed-conduct question, some believing that *Oasis* amounted to an implicit disapproval of *Taus* and signaling the court's support of the *Mann* rule. *See*, *e.g.*, *Wallace v. McCubbin,* 196 Cal. App. 4th 1169, 1196-1212 (2011); *Burrill v. Nair*, 217 Cal. App. 4th 357, 380. *Baral* set the record straight (*see* 1 Cal. 5th at 388-92), with the court dryly observing that, "[c]learly, our decisions in *Taus* and *Oasis* have occasioned some confusion in the Courts of Appeal." 1 Cal. 5th at 388.

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we conclude that the Legislature used 'cause of action' in a particular way in section 425.16 (b)(1), targeting only claims that are based on the conduct protected by the statute." 1 Cal. 5th at 382. Rejecting the *Mann* rule, the Supreme Court in *Baral* unanimously held that the anti-SLAPP statute is available to strike any portion of a cause of action that arises from a defendant's protected petitioning or free-speech activities regardless of whether the plaintiff's *entire* cause of action or claim is dismissed. As the court put it: "Section 425.16 is not concerned with how a complaint is framed, or how the primary right theory might define a cause of action. While an anti-SLAPP motion may challenge any claim for relief founded on allegations of protected activity, it does not reach claims based on unprotected activity." *Ibid*.

The court chose substance over form—ensuring that a plaintiff cannot simply game their complaint and avoid an anti-SLAPP motion by artfully combining alleged protected and unprotected conduct by a defendant. In allowing an anti-SLAPP motion to reach any portions of a plaintiff's claim that are based on a defendant's protected activities, the court emphasized the importance of the anti-SLAPP statute's role in dismissing claims based on protected activity early in litigation. The court explained that "the *Mann* court's reading of § 425.16 (b) does not withstand scrutiny. Its refusal to permit anti-SLAPP motions to reach distinct claims within pleaded counts undermines the central purpose of the statute: screening out meritless claims that arise from protected activity, before the defendant is required to undergo the expense and intrusion of discovery." 1 Cal. 5th at 392. Rather than curb the growing use of the anti-SLAPP statute by litigants, the ruling embraces use of the anti-SLAPP statute even against portions of claims for relief.

Admittedly, how to dissect "mixed" conduct claims consistently with the anti-SLAPP statute is a topic to which few lawyers quickly warm. Yet the supreme court's unanimous ruling in *Baral* is vital. Plaintiffs' ability to artfully draft a complaint will no longer allow them to avoid an anti-SLAPP motion. After all, California's anti-SLAPP statute is an extremely powerful defense tool: it provides for an early potential dismissal of a plaintiff's claims, an automatic stay of discovery, an interlocutory appeal if the motion is denied, and mandatory attorneys' fees if the motion is granted. Cal. Civ. Proc. § 425.16 *et. seq.* *Baral* provides explicit guidance that in the typical lawsuit for libel involving challenges to multiple statements from the same publication, an anti-SLAPP motion should be available to strike allegations regarding statements that are not actionable regardless of how the complaint is styled.[5]

Examples of how a plaintiff's styling of her complaint could avoid the reach of the statute—intentionally or not—underscore *Baral*'s significance. For example, a libel complaint might be drafted in two different ways. A plaintiff might allege separate causes of action or claims for each of the defendant's alleged statements or combine them in one claim. If the defendant's underlying conduct arose from the exercise of the defendant's petitioning or free-speech activities, the anti-SLAPP statute would be available. However, the same plaintiff could instead include allegations of both protected and unprotected conduct by the defendant within the same claim. In that scenario, under the *Mann* rule, if any portion of the plaintiff's claims were viable, the anti-SLAPP motion would be denied in its entirety.

Indeed, this is precisely what happened in *Mann*. An industrial water systems maintenance company sued two competitors for defamation, trade libel, and two related claims after the defendants allegedly made disparaging remarks to the company's customers and also allegedly falsely reported the corporation's purported illegal acts to governmental agencies. The defendants' anti-SLAPP motion was

[5] 1 Cal. 5th at 392-393 (*citing to Shiveley v. Bozanich*, 31 Cal. 4th 1230, 1242 (2003) (each separate defamatory statement gives rise to a new cause of action)).

denied because, although the alleged reports to the agencies were protected by the anti-SLAPP statute, their alleged remarks to the plaintiff's customers were not. Because the defendants' alleged conduct was pled together and the plaintiff was able to demonstrate a probability of prevailing on the allegations about the defendants' disparaging comments to plaintiff's customers, the entire anti-SLAPP motion was denied. *Mann,* 120 Cal. App. 4th at 100-01.

The plaintiff's efforts to avoid the anti-SLAPP statute in *Baral v. Schnitt* were far more calculated. The court granted the defendant's anti-SLAPP motion to defeat claims regarding the creation, publication, and refusal to correct an allegedly defamatory audit report. Subsequently, the plaintiff abandoned his appeal of the adverse ruling on his anti-SLAPP motion and simply re-alleged *the same conduct* in an amended complaint under a new paragraph heading that also included conduct that was unprotected by the anti-SLAPP statute. Baral defeated the defendant's renewed anti-SLAPP motion in the trial court and the court of appeal rulings that the California Supreme Court reversed.

Justice Corrigan offered the following guidance on how lower courts should apply the anti-SLAPP statute in mixed-claims situations post-*Baral*:

> At the first step, the moving defendant bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them. When relief is sought based on allegations of both protected and unprotected activity, the unprotected activity is disregarded at this stage. If the court determines that relief is sought based on allegations arising from activity protected by the statute, the second step is reached. There, the burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated. The court, without resolving evidentiary conflicts, must determine whether the plaintiff's showing if accepted by the trier of fact, would be sufficient to sustain a favorable judgment. If not, the claim is stricken. Allegations of protected activity supporting the stricken claim are eliminated from the complaint, unless they also support a distinct claim on which the plaintiff has shown a probability of prevailing.

1 Cal. 5th at 396.

The *Baral* court rejected concerns that defendants would use anti-SLAPP motions to target "fragmentary allegations, no matter how insignificant." Calling this contention "misplaced," the court emphasized that allegations in a complaint that are "merely incidental" or "collateral" are not subject to an anti-SLAPP motion. 1 Cal. 5th at 394. "[A]llegations of protected activity that merely provide context, without supporting a claim for recovery, cannot be stricken under the anti-SLAPP statute." 1 Cal. 5th at 394.

As it fashioned its rule for handling mixed claims, the court also favorably observed how the Fourth Appellate District in *Cho v. Chang* struck a portion of a plaintiff's claim using the anti-SLAPP statute while allowing the remainder of the complaint to proceed. *Cho* offers a practical example of how *Baral* may apply in practice going forward.

A female employee sued a male co-worker and their employer for sexual harassment and related torts. The co-worker, Cho, then filed a cross-complaint for defamation and intentional infliction of

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emotional distress against Chang. Cho alleged that Chang had defamed him both in a report that she made to their employer detailing her alleged sexual assault and harassment (which was later the basis of a discrimination claim that she filed with government agencies) and also when speaking with co-workers about Cho's alleged behavior. This was a classic mixed-conduct case as the cross-complaint combined both protected and unprotected conduct.

The appellate court affirmed the trial court's granting of Chang's anti-SLAPP motion in part, dismissing only the portion of Cho's cross-complaint that challenged Chang's report filed with the state, which the court determined was constitutionally-protected petitioning and free-speech activity. The court observed: "[i]t would make little sense if the anti-SLAPP law could be defeated by a pleading … in which several claims are combined into a single cause of action, some alleging protected activity and some not." *Cho*, 219 Cal. App. 4th at 526. After all, in such a case, "[s]triking the entire cause of action would plainly be inconsistent with the purposes of the statute," but "[s]triking the claims that invoke protected activity but allowing those alleging nonprotected activity to remain would defeat none of them."[6] The appellate court noted that the trial court's "ruling makes sense, and renders justice to both sides." 219 Cal. App. 4th at 527.

Some commentators have opined that *Baral* may prompt an increase in the filing of anti-SLAPP motions—a prospect that critics of the growing popularity of anti-SLAPP motions in the trial and appellate courts will not relish. However, the California Supreme Court's unanimous ruling in *Baral*—combined with its opinion in *City of Montebello v. Vasquez* [7] (issued one week later) in which the court re-emphasized that exemptions to the anti-SLAPP statute are to be narrowly construed so that the anti-SLAPP statute itself is broadly construed—make clear that the anti-SLAPP statute remains broadly available to litigants who face claims that are based on their constitutionally-protected petitioning and free-speech activities.

[6] 219 Cal. App. 4th at 526. In the unpublished portion of the court's opinion, the court of appeal affirmed the denial of Chang's motion for attorneys' fees after the trial court found that her partially successful anti-SLAPP motion "produced nothing of consequence." *Id.* at 525. However, with other anti-SLAPP motions, attorneys' fees should be awarded unless "the results of the motion were minimal and insignificant" so that the defendant did not achieve any "practical benefit" from bringing the motion. *Mann v. Quality Old Time Service, Inc.*, 139 Cal. App. 4th 328, 340 (2006).

[7] 1 Cal. 5th 409, 419-20 (2016) ("[E]xpansive interpretation of exemptions from the anti-SLAPP statute is inconsistent with the Legislature's express intent that the statute's core provisions 'shall be construed broadly.'").

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