

**MINUTES OF THE MEETING OF THE APPELLATE COURTS SECTION
OF THE LOS ANGELES COUNTY BAR ASSOCIATION**

Tuesday, October 18, 2016, 4:30 p.m. to 6:00 p.m.

Court of Appeal, Second District, Employee Lounge, Third Floor North Tower
300 S. Spring Street, Los Angeles, California 90013

“Anti-SLAPP Appeals: What You Don’t Know Could Hurt You”

Moderator:

Jens Koepke, Esq., Shaw Koepke & Satter

Panelists:

The Hon. Lamar Baker, Associate Justice, Court of Appeal, 2nd. Dist., Div. 5
Jeremy Rosen, Esq., Horvitz & Levy

Attendees:

Emmanuel Akudinobi	Sarvenaz Bahar	Daniel Barer
Blithe Bock	Megan Braun	Anita Brenner
Christina Burrows	Todd Chayet	Dawn Cushman
Don Dennis	John Dratz	Karen Duryea
Jacqueline Fabe	Gabriel Ganor	Margaret Grignon
Glenn Hamovitz	Edward Hoffman	Edward Horowitz
Mark Irvine	Jeanne Irving	Laurence Jay
John Jensen	Barbara Johnson	Mimi Keller
Robert Kern	Terri Keville	Scott Klausner
James Link	Joshua Mandell	Joanna McCallum
Richard Nakamura	Tyna Orren	Gary Ostrick
Joseph Persoff	Ann Qushair	Brett Stroud
Brian Thomley	Leonard Torres	Joshua Traver
A. Marco Turk	J. Alan Warfield	H. Thomas Watson
Roy Weatherup	Michael Weiss	David Zaft

RECENT AND NOTEWORTHY CASES:

City of Montebello v. Vasquez (2016) 1 Cal.5th 409

In this case, the Supreme Court ruled that (a) three city council members’ action in voting on a proposed city contract with an entity in which they had a financial interest did not come within the anti-SLAPP exemption for public enforcement action; still, (b) the council members’ votes in favor of the contract constituted protected activity. In so concluding, the Court arguably broadened the scope of protected activities by focusing on the open-ended category set forth in §425.16, subd. (e)(4)—“*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” [italics added].

Baral v. Schnitt (2016) 1 Cal.5th 376

In this case, the Supreme Court ruled that for anti-SLAPP purposes, a "cause of action" refers to allegations of protected activity asserted as grounds for relief, hence the anti-SLAPP statute can reach distinct claims within pleaded counts, even if mixed with assertions of unprotected activity, and allegations targeting protected activity can be excised from mixed causes of action. The Court discussed at length the distinction between a “claim” and a traditional “cause of action,” clarifying that a “claim” that may be stricken under §425.16, unlike a traditional “cause of action,” is not based on a primary right, but can be based on any number of instances of wrongdoing forming *part* of a cause of action.

HOT AND UNDECIDED ISSUES

Does Section 425.16 Apply To Attorney Malpractice Claims?

The trend of decisions is that, at least where a former client sues an attorney for negligent representation, anti-SLAPP principles do not apply. See, e.g. *Loanvest I, LLC v. Utrecht* (2015) 235 Cal.App.4th 496, 504: Where a malpractice action is brought by a former client, claiming deficient representation, the action does not threaten to chill the exercise of protected rights. To the contrary, the threat of malpractice encourages the attorney to petition competently and zealously. But this view is not universal. See the dissent of Justice Perluss in *Sprengel v. Zbylut* (2015) 241 Cal.App.4th 140. A clear answer, one way or the other is needed.

What constitutes “an issue of public interest”?

For a digest of the case law on this question, see the unpublished opinion in *Nygaard, Inc. v. Kustannusosakeyhtio Iltalehti* (June 21, 2007, No. B192639) [2007 Cal. App. Unpub. LEXIS 5005]. The California Supreme Court recently granted review in *Rand Resources LLC v. City of Carson* (S235735), a case raising this question.

Does California’s anti-SLAPP statute apply in diversity cases in federal court?

There is disagreement among federal judges on this question. Much of the controversy arises out of the United States Supreme Court’s decision in *Shady Grove Orthopedic Associates P.A. v. Allstate Ins. Co.*, 559 US 393 (2010), where the court ruled that the Rules Enabling Act (28 U.S.C. § 2072(a)), not *Erie v. Tompkins*, governs the question of whether a federal procedural rule governs over a state law in a diversity case. If the applicable Federal Rule regulates “procedure,” it governs, regardless of its effect upon state-created rights.

A federal anti-SLAPP bill has been introduced in Congress.

Are anti-SLAPP motions being abused?

There has been concern that the anti-SLAPP process is being abused, but court statistics indicate otherwise. In 2010 to 2014: 2051 anti-SLAPP motions were filed state-wide out of 5,006,580 total civil filings (.041 %); the courts of appeal decided between 105 and 123 anti-SLAPP appeals per year, totaling 585 opinions out 48,403 total opinions (1.209 %); of the 585 anti-SLAPP appeals, only 269 challenged denials of anti-SLAPP motions; of those, 71 were reversed, for a reversal rate of 26%, exceeding the average reversal rate for appeals. Inferentially, while some litigants may be abusing anti-SLAPP procedures in some cases, there is no significant trend of abuse.

Approved on November 10, 2016

/s/

Tyna Thall Orren, Acting Secretary, Appellate Courts Section