LOS ANGELES
Daily Journal
www.dailyjournal.com

TUESDAY, OCTOBER 20, 2015

Legal malpractice should be subject to anti-SLAPP statute

By Timothy D. Reuben

It is a rare but delightful thing to see an experienced, knowledgeable and highly respected appellate justice say about a line of appellate anti-SLAPP authority: "I do not agree those cases refusing to apply Section 425.16 to 'garden variety malpractice actions' were properly decided." Yet that is just what Justice Dennis Perluss, presiding justice of Division 7 of the 2nd District Court of Appeal, wrote in his well-reasoned dissent in *Sprengel v. Zbylut*, 2015 DJDAR 11364 (Oct. 13, 2015), regarding use of the anti-SLAPP statute in attorney malpractice actions.

Indeed, while politely agreeing with the majority (Justice Laurie Zelon and newly appointed Justice John Segal) that the Sprengel case "cannot be meaningfully distinguished" from other attorney malpractice cases refusing to apply the anti-SLAPP statute, Perluss points out, "The developing consensus in this area is neither unanimous nor uniform." He proceeds to make an effective and consistent argument that the statute by its terms and relevant authority is clearly applicable to malpractice cases, citing California Supreme Court authority. He notes that the statute is expressly supposed to be "construed broadly." He suggests that this line of case authority refusing to apply anti-SLAPP to attorney malpractice actions was "perhaps fueled by an understandable distaste for the explosion of section 425.16 motions with their related prejudgment appeals."

Hooray! A justice of note has finally said it and we can only hope the California Supreme Court has heard it. Putting aside arguments about the anti-SLAPP statute's flaws, it is simply true that by its terms, it should apply to a case against an attorney who is sued by his client for litigating a matter — and what would be so bad about that?

The pertinent facts of the case make a compelling basis for application of the anti-SLAPP statute: The well-regarded firm of Leopold Petrich & Smith (LPS) was retained to represent a limited liability corporation named Purposeful Press to protect the company's intellectual property rights. Sadly, Purposeful Press was owned equally by two people that did not get along, Jean Sprengel and Lanette Mohr. Sprengel thus litigated with Purposeful Press in federal court over who owned the copyright and related issues, a case in which LPS represented the company.

After the copyright suit was over, Sprengel sued LPS and several individual attorneys for malpractice and related claims. LPS responded in its anti-SLAPP motion by pointing out that LPS was not Sprengel's attorney, but rather Purposeful Press was their client. Sprengel "admitted" she did not enter into an express fee agreement with LPS, but argued that there was an "implied" agreement due, among other things, to the small size of Purposeful Press and the fact that company funds were used to pay LPS.

The majority only reached the "first prong" of the anti-SLAPP statute in affirming Judge Elizabeth Allen White of the Los Angeles County Superior Court, pursuant to which the court must determine "whether a defendant has made a threshold showing that the challenged cause of action is one arising from protected activity." Since LPS was sued essentially for litigating a matter on behalf of its alleged client, claims "arising" from such protected conduct would clearly appear to be subject to the anti-SLAPP statute and the court should have proceeded to the "second prong," requiring the plaintiff to make a prima facie case of liability. But the majority refused to go further, based on a line of cases that Perluss (correctly) argues suffer from a flawed analysis. The majority acknowledged that an attorney's "litigation-related activities" — including prosecuting a civil action on behalf of a client — are clearly protected activity subject to the statute, but then found that the causes of action arose not from the protected conduct, but from a breach of professional or ethical duty, consistent with other holdings specifically regarding legal malpractice.

While a number of appellate courts have adopted the above approach to legal malpractice claims, such an approach is frankly inconsistent with the statute. To avoid the straightforward statutory language, those courts have stressed the need to look to the "gravamen" of the action — the basis of the claim. Acknowledging that it is not the name or type of cause of action that is the issue (anti-SLAPP can apply to a breach of contract, a tort or a statutory claim such as unfair competition or the like), this line of authority has found that the gravamen of claims by clients against their lawyers arising out of litigation-based representation is a so-called breach of duty to the client, and not the actual conduct that gives rise to the claim of breach of duty.

Perluss points out the flaws in this analysis. He notes that the California Supreme Court has held that "malicious prosecution actions necessarily satisfy the first step of the section 425.16 analysis because they arise from an underlying lawsuit." He points out the statute is not ambiguous and that the "same reasoning applies to the so-called garden variety malpractice actions." He points out that policy arguments made by prior courts that the statute just shouldn't apply to a client's claim against his own lawyer are not appropriate in the case of clear statutory language to the contrary. He notes: "Whatever the label for the former client's causes of action — professional negligence, breach of fiduciary duty or breach of contract — if those claims are based on the lawyer's actions in litigation (or in anticipation of litigation), they arise from acts in furtherance of the right of petition. There is no more justification for a categorical exclusion of legal malpractice actions from the scope of section 425.16 than for excluding malicious prosecution cases."

Perluss' logic and analysis are hard to debate, and it would seem that the line of cases relied on by the majority should be reviewed and overruled by the Supreme Court, which should examine this muddied area of the law.

Although he does not argue the point, Perluss implies another error in the majority's analysis which is worth noting. Citing language from *Prediwave Corp. v. Simpson Thacher & Bartlett*, 179 Cal. App. 4th 1204 (2009), he references "nonclients' causes of action against attorneys." In Sprengel, the majority incorrectly refused to consider black letter law that "an attorney's representation of a corporate entity does not give rise to an implied attorney-client relationship with the individual shareholders of the entity." Zelon reasoned that the defense argument that there was no evidence that any attorney client relationship actually existed between defendants and plaintiff would "improperly conflate the first and second prongs of the Section 425.16 test." However, while clearly the lack of an attorney-client relationship was directly relevant to prong two on the issue of liability, it was also relevant to analysis of prong one.

Similar to malicious prosecution actions, and consistent with the category of claims as described by Prediwave, if the claim against a lawyer is by a non-client, it should be slappable, and the inquiry into whether an attorney-client relationship existed is a necessary predicate for the majority's reliance on the line of cases properly criticized by Perluss. In this respect, it appears the majority may have used the wrong standard in reviewing evidence under prong one — a type of demurrer standard where the court apparently felt it was bound by the mere allegation of the pleading; however, that is not the standard and even the majority noted that, in evaluating prong one, it was to "review the parties' pleadings, declarations, and other supporting documents." If there was no evidence that Sprengel was actually a client and (contrary to Sprengel's contention) the law is clear that representing the entity does not give rise to an "implied" attorney-client relationship to the shareholders, then the majority's reliance on the line of cases involving actual client relationships was misguided and the anti-SLAPP statute should have applied anyway.

Thus, the *Sprengel* decision is problematic at best; but the dissent offers in concise and direct terms a critique of application of the anti-SLAPP statute to litigation-based claims by clients against lawyers. One can only hope that the Supreme Court takes up the matter — certainly this case cries out for it.

Timothy D. Reuben *is the founding principal of Reuben Raucher & Blum, a litigation boutique located in Westwood. He handles matters at both the trial and appellate level and in arbitration and specializes in complex matters including real estate, intellectual property, unfair competition, and related business disputes. He can be reached at treuben@rrbattorneys.com.*

TIMOTHY D. REUBEN
Reuben Raucher & Blum

RRB
REUBEN RAUCHER & BLUM
ATTORNEYS AT LAW