Blackmail

When does a demand letter rise to the level of blackmail?

By David Cook

Dirty Harry really laid down the bright line: "A man needs to know his limitations."

Attorneys, especially litigators, write rambunctious letters that threaten dire consequences absent compliance with all sorts of demands. When are these dire consequences an act of blackmail, or as it is commonly known, extortion?

The gist of extortion is that the "threats" are coercive by the risk or threat of injury, harm, fright, fears of humiliation or community approbation, and compel the victim to part with money or something of value (*People v. Beggs* (1918) 178 Cal. 79, 83.) Or as depicted in the movies, paying someone for keeping silent as spelled out by *Flatley v. Mauro* ("*Flatley*") (2006) 39 Cal.4th 299:

> Extortion has been characterized as a paradoxical crime in that it criminalizes the making of threats that, in and of themselves, may not be illegal. '[I]n many blackmail cases the threat is to do something in itself perfectly legal, but that threat nevertheless becomes illegal when coupled with a demand for money. [citation omitted] . . . . It is the means employed [to obtain the property of another] which the law denounces, and though the purpose may be to collect a just indebtedness arising from and created by the criminal act for which the threat is to prosecute the wrongdoer, it is nevertheless within the statutory inhibition. The law does not contemplate the use of criminal process as a means of collecting a debt. . . . .

Blackmail is a crime. It is a form of robbery absent the threat to personal safety required for robbery. (Pen. Code, § 518 seq.) Blackmail is a civil tort. (*Flatley* and *Monex Deposit Co. v. Gilliam* (C.D. Cal. 2010) 680 F. Supp. 2d 1148, 1156.) Blackmail leads to discipline (California Rule of Professional Conduct 5-100).) Blackmail gets the attorney and client sued, and gets the client to sue the attorney. Blackmail is an intentional tort, and the insurance company will push back on coverage.

This is simple blackmail:

> Pay me a large sum of money, or I will tell the *world* [or your spouse, employer, friends, members of your congregation etc.] you engaged in 'shameful conduct' that you wish to keep secret

or

> I will contact the police and tell them that you did [criminal] conduct, unless you pay me money.

The Marty Singer case

This is 2013 and extortion seemingly recedes in the shadows of Sam Spade and Jake Gittes. Not so fast. Last year *California Lawyer magazine* reported that Marty Singer, a Los Angeles litigator to the stars, faced a civil extortion lawsuit over the following letter:

> Because Mr. [XXXX] has also received a copy of the enclosed lawsuit, I have deliberately left blank spaces in portions of the Complaint dealing with your using company resources to arrange _____ liaisons with _____ (see enclosed photo), _____. When the Complaint is filed with the Los Angeles Superior Court, there will be no blanks in the pleading . . .
>
> My client will file the Complaint against you and your other joint conspirators unless this matter is resolved to my client's satisfaction within five (5) business days from your receipt of this Complaint.

Through counsel, Singer filed an anti-Slapp motion (Code Civ. Proc., § 425.16(b), and lost at the trial court. The court ruled that the threat was illegal as a matter of law as extortion and denied the motion. Likewise under *Flatley*, communications which are illegal as a matter of law, such as extortion, are not constitutionally protected actively and barred from protections of section 425.16(b). On May 16, 2013, the Court of Appeal heard oral argument in *Malin v. Singer* (b237804, Second Appellate District, Divison 4). The decision is expected in 90 days. Any decision will renovate the landscape of demand letters.

Flatley is the modern, but pre-digital, template.

In *Flatley,* representing a client claiming sexual assault, an attorney demanded that the alleged perpetrator (a worldwide dancing impresario) pay substantial sums of money to settle the claim, and if not, that the attorney would issue press releases to the media, contact law enforcement, the IRS, immigration, and other agencies and, incidentally, file a lawsuit. "Mauro's letter accuses Flatley of rape and also imputes to him other, unspecified violations of various criminal offenses involving immigration and tax law as well as violations of the Social Security Act. With respect to these latter threats, Mauro's letter goes on to threaten that "[w]e are positive the media worldwide will enjoy what they find." (*Flatley v. Mauro* (Cal. 2006) 139 P.3d 2, 22.) Mauro also threatened to accuse Flatley of raping Robertson unless he paid for her silence." (*Id.* at 23.)

The California Supreme court held that under anti-Slapp, constitutionally protected speech does not protect communications which undisputedly are illegal as a matter of law such as extortion.

Mendoza v. Hamzeh

While *Malin v. Singer* is pending, the Second Appellate District handed down *Mendoza v. Hamzeh* (2013) 155 Cal.Rptr.3d 832, a decision that deemed the attorney's demand letter extortive and barred from protection under Code of Civil Procedure section 425.16(b). The *Mendoza* attorney wrote this letter:

> As you are aware, I have been retained to represent Media Print & Copy ('Media'). We are in the process of uncovering the substantial fraud, conversion and breaches of contract that your client has committed on my client.... To date we have uncovered damages exceeding $75,000, not including interest applied thereto, punitive damages and attorneys' fees. If your client does not agree to cooperate with our investigation and provide us with a repayment of such damages caused, we will be forced to proceed with filing a legal action against him, as well as reporting him to the California Attorney General, the Los Angeles District Attorney, the Internal Revenue Service regarding tax fraud, the Better Business Bureau, as well as to customers and vendors with whom he may be perpetrating the same fraud upon [sic].

Mendoza v. Hamzeh (Cal.App.2d Dist. 2013) 155 Cal.Rptr.3d 832

The question stands. What are the rules which set the parameters for the consequences that an attorney may threaten to coerce the payment of money, settlement of a lawsuit or other claim of a client? What can you threaten? How far can you go before you fall off the edge of the flat earth?

We start with *Mendoza v. Hemzeh* which stated the following: "*The rule must be a bright line rule*." In *Mendoza v. Hamzeh* the demand letter was tame and threatened civil and criminal proceeding but lacked the hyperbole of *Flatley v. Maura* which threatened worldwide prosecution and humiliation based on the alleged sexual misconduct perpetrated by an international celebrity. The lack of lawyer pyrotechnics in the one letter or another did not matter to the court. A letter, written by Emily Post, that seeks to extort money or property, is still blackmail.

Punctuation: The bright line burns brightly

Punctuation is the bright line. The bright line is whether the attorney punctuates the sentence that threatens to file a lawsuit with a period that ends the letter, or with a comma that strings along other threats. This is the lesson of *Mendoza v. Hamzeh*. Let's look at the letter in a different light:

> Pay $75,000, and if not, I will file a lawsuit, [comma] and " . . . as well as reporting him to the California Attorney General, the Los Angeles District Attorney, the Internal Revenue Service regarding tax fraud, the Better Business Bureau . . . [sic].

Had the attorney stopped the sentence that embodied the threat to "file a lawsuit" with a period, the letter would not be extortive because the letter would not have threatened criminal conduct or accused the person of a crime, unless money was paid.

Flatley and *Mendoza* hold that a letter is an act of extortion when the attorney threatens public disclosures of private, shameful or humiliating conduct, threatens to report the conduct to law enforcement authorities, or threatens to publically accuse the person of a crime or morally reprehensible conduct unless money is paid. *Flatley* and *Mendoza* lays down the bright line that when the attorney, after the comma ending with " . . . will file a lawsuit," and continues to threaten other dire consequences, the letter becomes extortive and outside of the protections of section 425.16(b).

Let's apply *Flatley* and *Mendoza* to *Malin v. Singer*. The threat in that letter is the following:

> My client will file the Complaint against you and your other joint conspirators unless this matter is resolved to my client's satisfaction . . . . .
>
> Admittedly the lawsuit would be very embarrassing as the letter read:
>
> . . . your using company resources to arrange _____ liaisons with _____. When the Complaint is filed with the Los Angeles Superior Court, *there will be no blanks in the pleading*.

No matter how coercive, alarming, or humiliating exposure might cause, the letter does not transcend the period and threaten disclosures beyond the four corners of the complaint. The letter does not threaten a press release, press conference, media interviews, media blasts, dissemination on a Web site or blog, Twitter feed, FaceBook, or other social media. The letter does not threaten the contacting of law enforcement, the FBI, the IRS, State Board of Equalization (sales tax) or the Alcoholic Beverage Control Department. The letter does not threaten the dissemination of the lawsuit, such as posting the suit online, or even posting the case number. While the Los Angeles Superior Court does not offer free access to the court files, anyone can pay a small fee for access to the LA Superior Court online files, and then a case number is all it takes to gain access to the docket of a case – and all the good stuff.

While the letter threatens the filing of a lawsuit that would offer an embarrassing disclosure, the only threat is to sue, which is always coercive as a matter of law. In *Seidner v. 1551 Greenfield Owner's Association* (1980) 108 Cal.App.3d 895, 904-905, the court stated: " . . . What, if anything else, did the respondents as defendants do except file its lawsuit? *Is it not true that in any lawsuit there is an element of threat or coercion* . . . ."

The bright line is the period after the words "…going to file a lawsuit." This threat is not extortive because the threat to file a lawsuit, even with ensuing revelations, is not a threat to reveal or disclose but a threat to sue. Breaching the bright line is "going to file a lawsuit, and report or disclose this matter to ……" The threat

to "*report or disclose*," is extortive if the threat is to publically accuse, humiliate or embarrass for financial gain as in *Flatley*.

What if the court of appeal upholds the trial court ruling in *Malin v. Singer*? We will enter an age of really short demand letters. Less is more. "Unless you pay the settlement demand, I will sue you." Stop. Stop and say no more.


Cook

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