Talk softly, or carry a big (Anti-SLAPP) stick

Talking to the press about your cases carries certain risk, but the protections are many

By Christopher Wimmer and Seth Rosenberg

Plaintiffs' attorneys who speak publicly about their cases may find themselves the targets of defamation suits brought by the defendants they have sued. These suits are frequently subject to the Anti-SLAPP statute, and the evidence that would support them is frequently barred by the fair report privilege. Three recent appellate cases show how courts evaluate these motions, point to a trend in favor of keeping factfinding out of the hands of juries, and provide practical guidance for avoiding a defamation suit in the first place.

Statutory purpose and the Anti-SLAPP two-step

California's Anti-SLAPP (Strategic Litigation Against Public Participation) statute was passed in 1992 to provide a mechanism for early dismissal of complaints brought "primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." It authorizes a special motion to strike a complaint based on acts in furtherance of the right of petition or free speech, and directs courts to dismiss any such complaint unless there is a probability that the plaintiff will prevail on the claim.[1]

An Anti-SLAPP motion requires a two-step analysis. The first step requires the defendant to make a threshold showing that that the alleged wrongful conduct arises from one of a few categories of protected speech – written or oral statements in or in connection with an official proceeding (including court), or
• in a public forum about a matter of public concern, or
• in a private forum about a matter of public concern.

If that showing is made, the burden shifts to the plaintiff to prove a probability of success on its claim.[2]

To satisfy the defendant's moving burden, it need only make a prima facie

showing, based on the pleadings, declarations, and matters subject to judicial notice, that the cross-complaint "arises from" the defendant's constitutionally-protected free speech or petition activity; the scope of the statute is "construed broadly" to effectuate its purpose.[3]

Once the moving party establishes that a cause of action is subject to Anti-SLAPP protection, the burden of proof shifts to the plaintiff, who must then submit evidence that would be admissible at trial establishing a probability of success on all elements of the cause of action. Plaintiff must also present sufficient evidence to satisfy the standard of proof required under applicable substantive law. Combined, these two requirements essentially require plaintiffs to meet the standard for defeating a summary judgment motion.

Favors the party attacking a pleading

Consistent with its stated purpose, the Anti-SLAPP statute substantively, procedurally, and strategically favors the party attacking a pleading. Substantively, they cast a wide net, encompassing not only complaints based solely and expressly on protected conduct, but causes of action involving a mixture of protected and unprotected activity; and not requiring that the conduct has been intended to chill free speech.

Procedurally, the plaintiff is put to a high standard of proof early on in the case: The Anti-SLAPP motion must be brought within 60 days of the complaint's filing, and so discovery will likely be in its nascence. Further, the mere filing of the motion stays all discovery. While discovery can be obtained, it requires a noticed motion and a showing of good cause.

Strategically, it creates an imbalanced risk of an attorneys' fees award: The defendant who prevails on a special motion to strike will receive a mandatory attorneys' fee award, while the victorious plaintiff may only recover fees if the court finds the motion was frivolous or a delay tactic.[4]

This is not to say the statute is anti-plaintiff, or anti-plaintiff's attorney. Cross-complaints are also subject to a special motion to strike, and in two of the recent cases discussed below, plaintiffs' attorneys being sued by former defendants against whom they had asserted claims were the movants and beneficiaries of the statute. But "plaintiff" and "defendant" scan better than "moving party" and "responding party."

The fair report privilege

The party opposing an Anti-SLAPP motion is hindered in yet another way: Evidence barred by any privilege cannot be used to defend the pleading. So, for example, the litigation privilege, which protects a statement or writing made "in connection with" an ongoing matter, bars claims that an attorney has engaged in bad-faith settlement negotiations or sent improper prelitigation notices, because all of the evidence that would be used to show the improper conduct is inadmissible. And, of particular interest to the attorney who wishes to use the press to his or her client's advantage, the fair report privilege protects a "fair and true report" of a judicial proceeding published in a public journal (which has been construed to include television, radio, and websites). Since 1996, the privilege has also extended to those who communicate information about judicial proceedings to such outlets, connecting the litigation privilege with the traditional press privilege, and so it is sometimes called the "bridge privilege."[5]

This privilege was at the center of three recent opinions from the First and Second District Courts of Appeal, each of which involved attorneys sued after making public statements to the press. These decisions throw practical light on how counsel can advocate for their clients and market their practices in the press without making themselves vulnerable to suit. They also reinforce, in the courts' willingness to decide factual issues as a matter of law, the high burdens facing the opponent of an Anti-SLAPP motion.

J-M Manufacturing

Last May, in *J-M Manufacturing v. Phillips & Cohen LLP*, a Second District case, a PVC pipe manufacturer sued the law firm that represented a number of states, cities, and local water districts against the manufacturer in a multi-billion dollar, qui tam suit. The plaintiffs' firm had prevailed at the liability phase of a bifurcated trial, earning a jury verdict at a trial in which J-M falsely represented that it complied with industry manufacturing standards when making all of its pipes. Rightly pleased by their win, counsel published a three-and-a-half page press release the next day. Three months later, J-M sued them for defamation and trade libel.[6]

In a smart strategic move, the plaintiffs' counsel had emphasized to the jury that the case was not a products liability matter, and that they did not need to prove that any pipes had actually failed, but only that the manufacturer had claimed it was uniformly following industry standards. The press release, however, arguably painted a different picture. The headline read, "JM Eagle faces billions in damages after jury finds JM liable for making and selling faulty water system pipes," and the body of the press release discussed in some detail the evidence that the company's pipes and manufacturing practices were "shoddy" or "faulty." J-M's complaint alleged that these differences made the press release false.

The law firm brought an Anti-SLAPP motion, arguing its press release was protected by the fair report privilege, because it fairly and truly reported the contents of a judicial proceeding: The jury had found J-M liable for mispresenting its compliance with industry standards; substantial evidence had been introduced at trial that this non-compliance was due to substandard manufacturing; and the potential damages in the next phase were in the billions of dollars. J-M contended the privilege did not apply because the press release was, owing to the differences between the jury verdict and the contents of the lengthy press release, not "fair and true."

The appellate court sided with the law firm, analyzing particular aspects of the press release seriatim, and concluding that the privilege applied, because the headline and remarks about "shoddy" pipe would not lead any reasonable reader to misunderstand the verdict. In so doing, it expressed a readiness to decide not only whether statements fall within the scope of the fair report privilege because they describe a judicial proceeding, but also whether the statements are, in fact, "fair and true" – a determination traditionally left, as the court acknowledged, to the jury. "Although determining whether a communication is privileged under Civil Code section 47, subdivision (d), may properly be left to a jury in some instances, appellate courts have not been reluctant to decide the fair report privilege applies as a matter of law when the undisputed facts are insufficient to support a judgment for the plaintiff." J-M's suit was dismissed, and the law firm recovered its attorneys' fees.

A lengthy dissent challenged the majority's decision of the truthfulness of the press release as a matter of law, arguing it "marks a substantial expansion of the role of a court in deciding defamation cases," which should be left to the jury "unless the facts permit but one conclusion." The dissent also criticized the majority's "divide and conquer" approach to the release, taking pieces in isolation rather than considering the "totality of the circumstances."

Healthsmart

In December, in *Healthsmart Pacific Inc. v. Kabateck*, another Second District case, plaintiffs' attorneys were again successful in striking a complaint based on their public comments about a pending lawsuit.

There, the owner of a hospital that specialized in spinal surgeries pleaded guilty to a bribing a state senator to support legislation that permitted medical hardware costs to be passed through to workers compensation carriers, took advantage of the legislation to fraudulently inflate the price of the hardware one of his other companies sold, and paid between $20 million and $50 million in kickbacks to doctors, marketers, and others for referring patients for spinal surgery.

A flood of suits predictably followed the guilty plea, and two attorneys representing a woman who had undergone spinal surgery at the hospital appeared on a television program and news program, discussing the case.[7]

The hospital and its owner sued the attorneys for defamation, pointing to remarks in the interviews that went beyond the owner's plea agreement, including the claims that he and the hospital had schemed to use counterfeit (and potentially not sterile) screws in the surgeries, and had hired prostitutes as part of the referral kickbacks. The attorneys moved to strike the complaint under the Anti-SLAPP statute, relying on the fair report privilege.

As in *J-M*, the court decided the issue as a matter of law, ruling that, because there was "no dispute as to what was contained in the report[s]," there was no dispute to submit to a jury. It then analyzed the two interviews in detail, concluding that they were both "fair and true" descriptions of the complaint the attorneys had filed, and that – even if the attorneys did not make clear that they were always speaking about their client's allegations, as opposed to their independent knowledge of the facts – the average viewer or listener would understand that the attorneys were speaking about the complaint when the interviews were heard "in context."

Argentieri – The Facebook matter

This month, in *Argentieri v. Zuckerberg*, the First District again sided with an attorney and granted an Anti-SLAPP motion striking a complaint based on the attorney's statements to the press – although this time, the attorney was defense counsel.[8]

In what is now a familiar trope, in 2010, one Paul Ceglia claimed in New York state court to have contracted with a young coder named Mark Zuckerberg to acquire an 84 percent interest in "The Face Book" in exchange for $1,000 and "certain other consideration." Initially represented by one New York attorney, Paul A. Argentieri, Ceglia won an early TRO and was then joined by law firm giants DLA Piper, Kasowitz Benson, and others – who withdrew when they discovered that Ceglia's contract was a fake. Ceglia's complaint was dismissed, and Facebook and Zuckerberg sued for malicious prosecution.

On the same day as the company filed suit, its general counsel emailed members of the press, stating that counsel for Ceglia "knew the case was based on forged documents yet they pursued it anyway" and that Facebook intended to hold them to account. Attorney Argentieri filed suit in California, claiming the general counsel's email defamed him.[9]

The Facebook parties moved to strike under Anti-SLAPP, arguing that the email was nothing more than a fair and true report of the malicious prosecution suit they had filed. Argentieri's opposition hinged on a nuance of pleading: Facebook's complaint alleged he "knew or should have known" the documents were forged, and made other allegations on information and belief, while its counsel's email said directly that he "knew" of the forgery, and so "more definitively asserted" his knowledge, taking the statement outside the privilege. Once again, the appellate court sided with the moving attorney, and once again, made its determination as a matter of law, finding no genuine issue of fact about the contents of the lawsuit or in-house counsel's email about it, or about whether an average reader would understand the email to be a "fair and true report of the gist" of the company's malicious prosecution suit.

A doctrinal question and a few practical lessons

These decisions raise an interesting doctrinal question about the allocation of authority between the judge and jury, and provide important practical lessons for

counsel to bear in mind when speaking to the press.

Is the Court of Appeal deciding too many of these cases as a matter of law, instead of letting a jury decide what an "average" reader or viewer would understand a press release or interview to mean? Truth and falsity are classic jury questions, and while *Argentieri* is an easy case – a single statement that differed only slightly from the allegations of the complaint – the court probably overreached in *Healthsmart* by deciding what several minutes' worth of television and radio interviews meant. (A decade ago, in *Scott v. Harris*, the United States Supreme Court did the same thing with police video of a car chase, with similarly troubling implications for the Seventh Amendment jury right in Fourth Amendment excessive force cases.) And it almost certainly erred in *J-M Manufacturing* by deciding that no reasonable reader could have been misled by a lengthy press release whose headline was plainly inaccurate and contrary to the case pressed by counsel at trial.

Parties contesting Anti-SLAPP motions already have the deck stacked against them – they bear a summary judgment-like burden at the outset of their case with the benefit of limited or no discovery, and face a one-sided risk of paying an attorneys' fee award. Taking away access to the jury seems a bridge too far for the "bridge privilege."

While the appellate courts have handed attorneys speaking to the press a recent string of wins, there is no reason to invite danger. By mining the decisions above, we can divine several lessons to bear in mind when issuing press releases, posting on a blog or social media account, or communicating with reporters:

- Make clear that you are speaking about your client and his or her pleading, not your personal knowledge. Including a copy of the pleading is an easy way to provide this needed context.
- If you are talking about a case at the pleading stage, stick to the allegations in the complaint.
- If you are talking about a case at summary judgment or trial, refer to what the evidence shows.
- If you offer an opinion, point to the facts on which you base it.
- Remember that reporters will edit your comments, potentially in ways that leave you outside the fair report privilege. Keep your correspondence with the press and take notes of the interviews you give.


Wimmer

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Rosenberg

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Endnotes

[1] Cal. Code Civ. Proc. § 425.16(a)&(b)
[2] Cal. Code Civ. Proc. § 425.16(b)(1); *Briggs v. Eden Council for Hope and Opportunity*, 19 Cal.4th 1106, 1119 (1999)
[3] CCP § 425.16(a); *Briggs*, 19 Cal.4th at 1121-22; *Brill Media Co., LLC v. TCW Group, Inc.*, 132 Cal.App.4th 324, 329 (2005); *Governor Gray Davis Committee v. American Taxpayers Alliance*, 102 Cal.App.4th 449, 458-59 (2002)
[4] *Taus v. Loftus*, 40 Cal.4th 683, 714 (2007); *Soukup v. Law Offices of Herbert Hafif*, 29 Cal.4th 260, 291 (2006); *Navellier v. Sletten*, 29 Cal.4th 82, 93 (2002); *Fox Searchlight Pictures, Inc. v. Paladino*, 89 Cal.App.4th 294, 308 (2001)
[5] Cal. Civ. Code § 47; *Flatley v. Mauro*, 39 Cal.4th 299, 323 (2006); *Bergstein v. Stroock & Stroock & Lavan LLP*, 236 Cal.App.4th 793, 815 (2015); *Seltzer v. Barnes*, 182 Cal.App.4th 953, 964-967 (2010); *CKE Restaurants, Inc. v. Moore*, 159 Cal.App.4th 262, 271 (2008)
[6] *J-M Manufacturing Co. v. Phillips & Cohen LLP*, 247 Cal.App.4th 87 (2016)
[7] *Healthsmart Pacific, Inc. v. Kabateck*, 7 Cal.App.5th (2016), as modified January 10, 2017
[8] *Argentieri v. Zuckerberg*, __ Cal.Rptr.3d __, 2017 WL 605313 (Feb. 15, 2017)
[9] *Paul A. Argentieri v. Mark Elliot Zuckerberg et al.*, case number CGC-15-548503, in the Superior Court of the State of California for the County of San Francisco.