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LITIGATION PRIVILEGE

CALIFORNIA LAW

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**Rusheen v. Cohen** (2006) 37 Cal.4<sup>th</sup> 1048

*The Supreme Court holds that the litigation privilege protects a non-communicative act that derives from a communicative act.*

Barry Cohen used a process server's declaration of personal service of a complaint and vexatious litigant order to obtain a default judgment against Terry Rusheen. Cohen's client filed a notice of foreign judgment in Nevada and began executing on Rusheen's property.

Rusheen moved to vacate the default judgment and the vexatious litigant orders claiming he was not served with the supporting papers. Cohen submitted declarations stating Rusheen had been served and the trial court denied Rusheen's motion. The Court of Appeal reversed the judgment on other grounds.

On remand, Rusheen initiated a cross-complaint against Cohen for abuse of process. Rusheen claimed, among other things, that the declarations of service were false. The trial court granted Cohen's special motion to strike asserting that there was no reasonable probability Rusheen would prevail because Cohen's conduct was privileged under Civil Code § 47(b), California's codification of the litigation privilege. The Court of Appeal decided the motion

was improperly granted because Cohen could be liable for abuse of process. The action to execute on the judgment was a non-communicative act not covered by the privilege.

The Supreme Court noted that the common law tort of abuse of process arises when one uses the court's process for a purpose other than that for which the process was designed. It has been interpreted broadly to encompass the entire range of procedures incident to litigation. It is an act done in the name of the court and under its authority for the purpose of perpetrating an injustice. A litigant must establish that the defendant contemplated an ulterior motive in using the process, and committed a willful act in the use of the process not proper in the regular conduct of the proceedings.

The litigation privilege is applicable to any communication and all torts except malicious prosecution. The privilege applies to any communication made in judicial or quasi-judicial proceedings; by litigants or other participants authorized

by law; to achieve the objects of the litigation; and that have some connection or logical relation to the action. It is not limited to statements made during a trial or other proceedings, but extends to steps taken before or after.

The litigation privilege gives parties and witnesses free access to the courts without the threat of subsequent tort actions, encourages open channels of communication and zealous advocacy, promotes complete and truthful testimony, gives finality to judgments, and avoids unending litigation. Thus the privilege is absolute and applies regardless of malice.

The privilege applies to the filing of allegedly false or perjurious testimony or declarations. Cohen's communicative act of filing an allegedly false declaration of service of process fell within the litigation privilege. The question was whether the alleged wrongful levy on Rusheen's property in execution of judgment was a non-communicative act in its "essential nature," and thus not covered by the privilege.

The gravamen of Rusheen's claim was not the levying act, but the procurement of the judgment based on the use of allegedly perjured declarations of service.

It would thwart application of the litigation privilege if it did not apply to efforts to enforce a judgment acquired by communicative acts which are protected by the privilege. Where the gravamen of the complaint is a privileged communication the protection extends to necessarily related non-communicative acts.

The Court acknowledged that expansion of the litigation privilege would narrow the scope of the tort of abuse of process in the judgment enforcement context. However, modern public policy seeks to encourage free access to the courts and finality of judgments by limiting derivative tort claims arising out of litigation-related misconduct and by favoring sanctions within the original lawsuit. This is not to protect a dishonest attorney but to protect the honest attorney from subsequent derivative actions.

Rusheen's abuse of process claim posed a threat to the goal of finality of judgments. The trial court found that Rusheen had been personally served with the documents impliedly finding that the declarations of service were not perjured. Rusheen's abuse of process claim would be another round of litigation to decide that same issue.

Since there are alternative remedies for improper service and procedural protections against improper enforcement, the litigation privilege should limit the tort of abuse of process in the judgment enforcement context.

*Comment:* While the Supreme Court continues to limit the protection of the litigation privilege to communicative acts, including non-communicative acts that derive from communicative acts broadens the scope of its application.

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