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## ANTI-SLAPP

### California Law

By John S. Hong and Jennifer A. Becker

**Freeman v. Schack** (2007) 154 Cal.App.4<sup>th</sup> 719

*The Fourth District holds that there is no anti-SLAPP protection for petitioning activity only incidental to unprotected activity.*

Arleen Freeman and James Alexander initiated an antitrust action against a real estate listing service. When Alexander Schack learned that they were seeking class certification, he offered his services as a class action attorney with antitrust litigation experience. Freeman and Alexander's attorney, David Barry, accepted and Schack signed a retainer agreement. Barry and Schack shared work product and discussed confidential and privileged matters.

Schack later filed a motion to replace Freeman and Alexander with Alan Hemphill, claiming that Freeman and Alexander were inadequate. When Barry learned the terms of Schack's settlement proposal, he ceased conveying privileged information and work product to Schack in the belief that he represented interests adverse to Freeman and Alexander. Schack unilaterally communicated settlement terms on behalf of Hemphill and represented at a settlement conference that an agreement in principle had been reached. Schack obtained preliminary approval of a settlement class excluding

Freeman and Alexander. Freeman and Alexander settled their antitrust action and then filed an action for breach of contract, professional negligence, and breach of fiduciary duty against Schack.

The trial court granted Schack's anti-Strategic Lawsuit Against Public Participation (anti-SLAPP) special motion to strike reasoning that all of causes of action arose from constitutionally protected petitioning activity and that plaintiffs failed to establish a probability of prevailing.

The Court of Appeal held that the critical point was whether the "principal thrust or the gravamen" of the causes of action arose from protected activities in furtherance of Schack's right of petition or unprotected activities for which the right to petition was merely incidental or collateral. Freeman and Alexander argued their core claim was that Schack represented conflicting interests in the same case. Schack argued that the causes of action arose from his representation of Hemphill and ensuing

settlement with the real estate listing service.

The Court noted that the “arising from” requirement is not always easily met. The Court held that Schack’s liability arose from his representation of a party with interests adverse to Freeman and Alexander, in violation of his duty of loyalty to them. The settlement of the Hemphill litigation, otherwise protected activity, was merely incidental to the unprotected activity. Although a cause of action may be triggered by or associated with a protected act, it does not always mean the cause of action arises from that act.

*Comment.* Courts are reluctant to allow the anti-SLAPP statute to protect attorneys from claims by their own clients.