

PROFESSIONAL LIABILITY UPDATE

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LITIGATION PRIVILEGE

California Law

by Jessica Rudin

On remand from the California Supreme Court, the First District holds that the litigation privilege does not automatically bar a complaint based on the Constitutionally protected activity of the right to petition. It also holds that the litigation privilege will not preclude liability for breach of contract.

Navellier v. Sletten (2003) 106 Cal.App.4th 763

Navellier was an investment advisor for a mutual fund of which Sletten was a trustee. Sletten, along with other trustees, terminated Navellier. When the trustees requested Navellier return, he conditioned his return on Sletten releasing him from liability for certain claims, which Sletten agreed to do. When Navellier sued Sletten for breach of fiduciary duty, Sletten filed counter-claims against Navellier. Navellier obtained summary judgment on these counter-claims based on the release.

Navellier then sued Sletten for fraud and breach of contract, alleging that Sletten misrepresented his intent to be bound by the release and breached the release by filing the counter-claims. Sletten filed an anti-SLAPP (Strategic Lawsuit Against Public Participation) motion, which was denied on the grounds that the complaint did not arise from Sletten's acts in furtherance of a right of petition or free speech. After the

California Supreme Court found that Navellier's complaint arose from Sletten's constitutionally protected activity it remanded the case to the Court of Appeal to determine whether Navellier could establish the second prong of an anti-SLAPP analysis: a probability of prevailing on his claims of fraud and breach of contract.

Sletten argued Navellier could not establish he could prevail because the litigation privilege embodied in California Civil Code § 47(b) barred the complaint. The Court acknowledged the litigation privilege "informs" interpretation of the "arising from" analysis of the anti-SLAPP statute, but cautioned that the privilege and the statute are not co-extensive. The anti-SLAPP statute can apply to causes of action based on non-communicative acts of petition and free speech but the litigation privilege applies only to communicative acts. The litigation

privilege barred Navellier's fraud cause of action because it was based entirely on the content of Sletten's counterclaims, not the act of asserting them.

The breach of contract action was not barred by the litigation privilege. The litigation privilege precludes liability in tort, not breach of contract. Second, as the California Supreme Court observed in *Navellier v. Sletten* (2002) 29 Cal.4th 82, a defendant who has agreed not to speak or petition by signing a release also waives the right to claim protection under the anti-SLAPP statute. Third, it followed the rule of *Stacey & Whitbeck, Inc. v. City and County of San Francisco* (1996) 47 Cal.App.4th 1, in which the Court held that the litigation privilege was not intended to preclude litigation for breach of contract. Immunizing parties from breach of contract liability would frustrate the purpose of the contract and prevent enforcement of the contract.

Although the litigation privilege did not preclude the breach of contract claim, the court granted Sletten's anti-SLAPP motion because Navellier failed to submit evidence of damage.

Comment: Practitioners must analyze each cause of action challenged in an anti-SLAPP motion, as the litigation privilege and right of petition are not co-extensive.