

PROFESSIONAL LIABILITY UPDATE

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By Jessica B. Rudin

Benasara v. Mitchell, Silberberg & Knuff (2004) 123 Cal.App.4th 1179

The Second District holds that causes of action for breach of fiduciary duty asserted against an attorney do not arise from an attorney's exercise of a constitutional right of free speech or petition. Thus, these claims are not susceptible to attack via a Special Motion to Strike under California's anti-SLAPP (Strategic Lawsuit Against Public Participation) statute.

Mitchell Silberberg & Knuff ("MS&K") represented Pour Le Bebe, Inc. prior to representing Guess? Inc. in an arbitration proceeding adverse to Pour Le Bebe. Pour Le Bebe sued MS&K for violating California Rule of Professional Conduct 3-310(e), which prohibits an attorney from accepting employment in a matter adverse to a former client where the attorney has confidential information material to the new employment. MS&K sought to strike the complaint under C.C.P. §425.16, California's anti-Strategic Lawsuit Against Public Participation (anti-SLAPP) statute, arguing that it arose out of MS&K's statements made and conduct undertaken in a quasi-judicial proceeding. In support of the motion, MS&K argued that it did not represent Pour Le Bebe at the time of the Guess? Inc. arbitration and that there was no substantial relationship between the matters in which it formerly represented Pour Le Bebe and the Guess? Inc. arbitration. The trial court reasoned that the cause of

action sought to impose liability upon MS&K for statements made or writings submitted in an arbitration proceeding and concluded the cause of action was subject to C.C.P. §425.16. It found that Pour Le Bebe failed to establish a probability of prevailing on its claim and granted MS&K's motion.

The Court of Appeal acknowledged that while MS&K had engaged in protected activity, Pour Le Bebe's claim did not "arise from" that activity. The complaint was based on conflicting representation in violation of RPC 3-310(e), which is not dependent upon disclosure of client confidences. The claim arises once an attorney accepts representation adverse to a former client. While a breach of fiduciary duty claim may follow litigation engaged in by an attorney against his former client, it does not "arise from" that litigation. Based on this important distinction, the Court held that a cause of action for breach of fiduciary duty does not "arise from" a

lawyer's exercise of a constitutional right of free speech or right of petition and is therefore not subject to attack under C.C.P. §425.16.

Comment: *Benasra* underscores the reluctance to permit attorneys to attack claims brought against them by their clients based on the anti-SLAPP statute.