

PROFESSIONAL LIABILITY UPDATE

October 27, 2006

Issue No. 245

Juan C. Araneda

Jennifer A. Becker

David P. Borovsky

Robert J. Buccieri

Chip B. Cox

Kim O. Dincel

Kathleen M. Ewins

Howard M. Garfield

Jason A. Geller

J. Michael Higginbotham

John B. Hook

Jessica R. MacGregor

Joseph P. McMonigle

Douglas J. Melton

Glen R. Olson

Jordan Rojas

Steven Sharafian

Ann L. Strayer

John B. Sullivan

Jennifer W. Suzuki

Jeanette Traverso

Beth A. Trittipio

Karen L. Uno

Seth E. Watkins

Kevin Whittaker

Irene K. Yesowitch

STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION

CALIFORNIA LAW

By Jessica R. MacGregor

Flatley v. Mauro (2006) 39 Cal.4th 299

In this companion case to Soukup v. Hafif (PL Update No. 244) the California Supreme Court holds that a complaint premised on uncontroverted evidence of criminal extortion is not subject to the state's anti-Strategic Lawsuit Against Public Participation statute. In addition, although complaints premised on communicative or non-communicative conduct that is illegal as a matter of law may be subject to the litigation privilege, they are not subject to the anti-SLAPP statute.

Michael Flatley is a celebrity dance impresario who engaged in a consensual sexual relationship with Tyna Roberts in Las Vegas. More than two months later Roberts's Illinois attorney, Mauro, sent Flatley's representative a lengthy, rambling letter informing Flatley that Roberts accused him of rape and intended to sue him and seek millions of dollars in punitive damages. Mauro threatened to "go public" with these accusations if settlement was not reached within 30 days. In numerous subsequent telephone calls to Flatley's representatives he repeated his threat and demanded a "seven-figure" settlement.

Flatley reported Mauro to the FBI and did not settle. After Mauro filed a complaint against Flatley in Illinois, Flatley sued Mauro in California, for, among other things, civil extortion.

Mauro filed an anti-SLAPP motion alleging his letter and related telephone

calls were pre-litigation settlement demands, protected by the litigation privilege. He argued Flatley's complaint arose from protected free speech and petitioning activity. Mauro submitted his declaration, in which he admitted to sending the letter, having numerous telephone calls with Flatley's representative and his attorney, and filing Roberts's complaint.

Flatley argued that Mauro's communications constituted criminal extortion, which could not be protected under the anti-SLAPP statute. Flatley's opposition was supported by his declaration as well as those of his representative and attorney. They explained the consensual nature of Flatley's relationship with Roberts and Mauro's campaign to obtain a seven-figure settlement by threatening to "go public" to numerous news outlets wherever Flatley or his dance troupes appeared.

The trial court held that Mauro had not established his communications were protected by the anti-SLAPP statute. The Court of Appeal affirmed, holding Mauro's communications constituted criminal extortion and were not protected under the anti-SLAPP statute.

Applying its holding in *Soukup v. Hafif* (PL Update No. 244), the Supreme Court reasoned that a defendant whose conduct is conceded or established via conclusive evidence to be illegal cannot challenge a complaint via an anti-SLAPP motion. However, if a plaintiff is unable to demonstrate illegality as a matter of law in response to defendant's first prong showing (i.e., in response to defendant's prima facie showing that the challenged complaint arises from the defendant's exercise of free speech or petitioning rights), this is an issue that must be raised and supported in plaintiff's second prong showing of a probability of prevailing on the merits.

The Court rejected Mauro's argument that because his pre-litigation communications were protected by the litigation privilege, the anti-SLAPP statute applied, finding the two statutes are related but not substantively the same. For example, malicious prosecution actions, which are specifically excluded from the protections afforded by the litigation privilege, can be challenged via the anti-SLAPP statute. Some communications and non-communicative conduct that are illegal, such as filing perjured declarations under oath, may be protected by the litigation privilege. However, this does not mean that such illegal conduct, which by definition is not constitutionally protected, is subject to the anti-SLAPP statute.

Flatley had established Mauro's actions and communications were illegal as a matter of law because Mauro submitted no evidence to contradict Flatley's on this issue. Given the specific and extreme circumstances of the case, Flatley's evidence established conclusive evidence of Mauro's extortion.

Comment: Application of this new defense to the first prong of an anti-SLAPP motion is simple in cases such as *Flatley*, which presented uncontroverted evidence of egregious conduct. However, Justice Werdegar's concurring opinion raises legitimate concerns about how the application of the holding of *Flatley* will affect anti-SLAPP litigation on a going-forward basis. Because all conduct sued upon is alleged to be illegal, there is a concern that the *Flatley* "illegal as a matter of law" defense will be raised frequently and not only in "rare cases" such as *Flatley*. The showing required to establish conduct "illegal as a matter of law" is unclear and application of *Flatley* to the typical anti-SLAPP motion will impose additional unwarranted burdens on defendants whose Constitutionally protected conduct has already subjected them to litigation in order to receive the protections of the anti-SLAPP statute.

This publication is intended for general information purposes only and does not constitute nor is it intended to constitute legal advice. None of the material is intended to imply or establish standards of care applicable to any attorney in any particular circumstance. The reader must consult with counsel to determine how the concepts and decisions discussed herein may apply to specific circumstances.