

## PROFESSIONAL LIABILITY UPDATE

### ANTI-SLAPP

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#### ***Copenbarger v. Morris Cerullo World Evangelism* 2013 WL 1809626**

*The Fourth District holds where protected activity to evict a tenant merely precedes or triggers a complaint, but is not the basis of the complaint, it is not subject to the anti-SLAPP statute.*

Cerullo leased its interest in real property, and quit-claimed its interest in improvements on the property, to a partnership which included Copenbarger. Years later a dispute arose and Curello filed notices to quit and an unlawful detainer action against the partnership. After a second notice to quit was served, Copenbarger filed suit to resolve the dispute and also made a claim for intentional interference with contract against third parties. Cerullo brought a special motion to strike Copenbarger's complaint under California's anti-Strategic Lawsuit Against Public Participation (anti-SLAPP) statute. The trial court granted the motion, concluding the complaint was prompted by a protected activity, legal process taken to evict the partnership, and Copenbarger failed to demonstrate a probability of prevailing in the suit.

California's anti-SLAPP statute requires a two-step analysis. First, the court must decide whether the defendant has made a threshold showing that the challenged cause of action arose from the defendant's protected activity. If so, the court must decide whether the plaintiff has demonstrated a probability of prevailing on the challenged cause of action.

The Court of Appeal disagreed that Copenbarger's complaint was based on the service of the notices of default or the unlawful detainer action. Although both are protected activity within the meaning of the anti-SLAPP statute, terminating a lease is not. Thus, a complaint arising out of or based on the dispute or conduct underlying the unlawful detainer action is not subject to a special motion to strike. The question is whether the protected activity merely preceded or triggered the complaint, or whether it was instead the basis or cause of the suit.

While service of the three-day notice preceded the complaint and might have triggered it, the complaint was not based on service of the notice. A cause of action for declaratory relief did not attack the service of the three-day notice or the unlawful detainer action itself. The gravamen of the declaratory relief cause of action was a dispute over the parties' respective rights and obligations under their lease agreements; the notices were evidence of a dispute over interpretation of the leases. The second cause of action, while triggered by the protected attempts to evict the partnership, alleged a breach of the lease. The third cause of

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action, for intentional interference with economic advantage, was not based on the notices but on conduct of third parties inducing Cerullo to terminate the lease.

The Court distinguished a case where a landlord brought an unlawful detainer action against unauthorized subtenants, who filed a cross-complaint alleging, among other things, retaliatory eviction, negligence, and breach of the covenant of quiet enjoyment. In that case the cross-complaint was properly stricken under the anti-SLAPP statute because it was based on the filing of the unlawful detainer action, service of the notice to quit, and statements made by the landlord's agent in connection with the eviction and unlawful detainer action. The activities were not merely evidence of wrongdoing or activities triggering the filing of an action arising out of other independent activity; they were the bases for the causes of action.

Another case, involving a 60-day notice to terminate, was also distinguishable. In that case tenants responded to the notice, and the landlord's refusal to rescind it, with a complaint for wrongful eviction, negligence, breach of the covenant of quiet enjoyment, and intentional infliction of emotional distress. In that case the sole basis for the tenants' lawsuit was the service of the termination notice and the landlord's refusal to rescind it, activities protected under the anti-SLAPP statute.

Since the complaint was not subject to the anti-SLAPP statute, the Court did not analyze the second prong, whether Copenbarger demonstrated he is likely to succeed on the merits.

*Comment:* This decision affects attorneys who must distinguish between protected activities that precede or trigger a lawsuit, and a lawsuit based on the protected activity itself.