

## PROFESSIONAL LIABILITY UPDATE

### ANTI-SLAPP

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#### ***Malin v. Singer* 2013 WL 3717056**

*The Second District holds a pre-litigation demand letter was not so extreme as to constitute extortion, and claims based on the letter were subject to an anti-SLAPP motion to strike as protected activity.*

Michael Malin and Lonnie Moore owned a restaurant with Shereene Arazm. Arazm's attorney Martin Singer sent Malin a demand letter accusing him of misusing company resources to arrange sexual liaisons, including one for a judge, and included a draft complaint. Malin sued Singer and Arazm for civil extortion, violation of civil rights, and intentional and negligent infliction of emotional distress. The trial court denied Singer's motion to strike under California's anti-Strategic Lawsuit Against Public Participation statute (anti-SLAPP) ruling the letter amounted to extortion as a matter of law.

The Court of Appeal set forth the two-step analysis of an anti-SLAPP motion to strike. The moving party has the initial burden of showing the challenged cause of action is one arising from a protected activity. Once the moving party has made the threshold showing, the burden shifts to the opposing party to demonstrate a probability of prevailing on the claim.

A demand letter is typically speech or petitioning activity protected under the anti-SLAPP statute. However, the Supreme Court

has created an exception where a demand letter is so extreme it amounts to extortion. Extortion is to obtain property by a wrongful use of force or fear. It can be induced by a threat to accuse an individual of a crime or a "deformity or disgrace." It is a paradoxical crime because it criminalizes threats that may not be illegal, but become so when coupled with a demand for money, even if a debt is actually owed. The threatened accusation need not be specific; it need only put the intended victim in fear of being accused of some crime. The Rules of Professional Conduct specifically prohibit attorneys from threatening to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.

Extortion, which is illegal, is not constitutionally protected speech, and does not meet the requirements of the first prong analysis of the anti-SLAPP statute. While the Supreme Court has found a demand letter could be so extreme as to be extortion as a matter of law, it tempered this with the observation that not every rude, aggressive, or belligerent pre-litigation negotiation that includes threats to file a lawsuit, report criminal behavior to authorities, or publicize allegations of wrongdoing, necessarily constitutes extortion.

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Singer's demand letter did not expressly threaten to disclose Malin's alleged wrongdoings to a prosecuting agency or the public at large. The demand letter accused Malin of embezzling money and simply informed him Arazm knew how he had spent those funds. The letter noted the filing of a complaint would reveal the use of the embezzled funds for a provocative purpose. That does not make the threatened disclosure extortion, and the Court would not conclude the exposure of Malin's alleged activities would subject him to any more disgrace than the claim that he was an embezzler.

Further, extortion requires the threat be directed to a relative or family member. The judge's "secret" was of someone unrelated to Malin.

Thus, the demand letter was not so extreme that it constituted criminal extortion as a matter of law.

In the analysis of the second prong, the Court held the demand letter was protected under the litigation privilege. The litigation privilege applies "to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action.

A protected pre-litigation communication must relate to litigation contemplated in good faith and under serious consideration. The sexual misconduct allegations in the Complaint were related to the demand letter that preceded the complaint and were logically connected to litigation contemplated in good faith and under serious consideration when the letter was sent. Because the demand letter was protected by the litigation privilege, Malin could not show a reasonable probability of prevailing on the extortion cause of action.

Remaining causes of action premised on wiretapping and computer hacking alleged illegal conduct. As such the conduct did not involve protected activity and the causes of action were not subject to the anti-SLAPP statute.

*Comment:* Recent cases have placed constraints on advocacy by characterizing conduct as illegal, malicious, or a breach of an attorney's independent duty to a third party. This case is welcome protection for zealous advocacy.