

PROFESSIONAL LIABILITY UPDATE

ANTI-SLAPP LITIGATION PRIVILEGE

By Jennifer Becker

Travelers Casualty Insurance Company of America v. Hirsh (9th Cir. 2016) 831 F.3d 1179

The Ninth Circuit holds a claims about post-settlement failure to disburse settlement funds and to report information to a carrier as mandated by California's independent counsel statute do not involve protected petitioning activity and are not barred by the litigation privilege.

Robert Hirsh was retained to represent Travelers's insured as independent counsel. When Travelers sued him for failing to release settlement funds received in the litigation, he filed a motion under California's anti-SLAPP statute, C.C.P. § 425.16.

The Ninth Circuit affirmed the District Court's denial of the motion. Anti-SLAPP motions involve a two-step process. The court decides whether the defendant has made a threshold showing the challenged cause of action is one arising from activity to further the constitutional right of petition or free speech. If so, the court then determines whether the plaintiff has demonstrated a probability of prevailing on the claim.

The Court agreed Traveler's claims did not involve Hirsh's representation in the prior suit. Some claims were about Hirsh's retention of settlement funds without offsetting the fees he charged to Travelers. Others were about Hirsh's failure, as independent counsel, to disclose non-

privileged information to Travelers as mandated by Civ. Code § 2860(d). Although the activity occurred in the context of litigation, it did not involve protected conduct because it was not based on an act in furtherance of Hirsh's or his client's right of petition or free speech.

Even though the court did not need to consider the second prong, since Hirsh had failed to carry his burden of proof on the first, the Court observed Travelers made a prima facie showing of facts supporting its causes of action to establish a probability of prevailing on the merits.

The claims were not barred by the litigation privilege under Civ. Code § 47(b). The causes of action arose from Hirsh's post-settlement conduct, not his communications with the insured client. The litigation privilege protects only publications and communications; the distinction between communicative and non-communicative conduct hinges on the gravamen of the action.

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A concurring opinion by Justice Kozinski acknowledged that the decision followed Ninth Circuit precedent by applying California's anti-SLAPP statute, but questioned the entire premise of applying what he characterized as a procedural statute in Federal Court. He observed that the D.C. Circuit had "got it right" holding anti-SLAPP motions don't belong in federal court because they directly conflict with the Federal Rule of Civil Procedure 12, the sole test for evaluating claims at the pleading stage.

Comment: Kozinski lamented the growing tide of anti-SLAPP motions as expensive and time consuming for the Courts. Their increasing use demonstrates they are a powerful means to cut claims short.