Year in review: attorneys as defendants

By Kenneth C. Feldman
and Alex A. Graft

Although there were no earth-shattering appellate opinions in cases against attorneys in 2016, attorney-defendants did achieve a number of victories, including decisions strengthening the statute of limitations and in pari delicto defenses and seemingly broadening the reach of the anti-SLAPP statute.

Statute of Limitations

There was mostly good news for attorney defendants in decisions concerning the statute of limitations set forth in Code of Civil Procedure Section 340.6, as appellate courts built on prior precedent to clarify the reach of the attorney statute of limitations, and limitations associated with the continuous representation tolling basis.

Foxen v. Carpenter, 6 Cal. App. 5th 284 (2016), extended the California Supreme Court's reasoning from *Lee v. Hanley*, 61 Cal. 4th 1225 (2015), in holding that Section 340.6 applies not only to any claim against an attorney (other than actual fraud) relating to the provision of legal services, but also nonlegal services if governed by an attorney's professional obligations. *Foxen* involved claims that attorneys misappropriated settlement funds, which the plaintiffs characterized as both contractual breaches and deceptive business practices. The *Foxen* court concluded that because the contract claims inherently required demonstrating a breach of either a professional duty or nonlegal services "closely associated" with them, that Section 340.6 applied. The court further held that even though the unfair business practices claim included its own distinct limitations period, it had to yield to Section 340.6, which the court deemed a more specific statute than Business and Professions Code Section 17208.

Whether the limitations period is tolled due to continuous representation was addressed in *Gotek Energy, Inc. v. SoCal IP Law Group, LLC*, 3 Cal. App. 5th 1240 (2016), in which the court held that tolling ceases as soon as the attorney provides notice of intent to withdraw, even if there are further communications later. *Gotek* arose from the alleged failure of the law firm to timely file patent applications. Upon receiving a communication from its client threatening malpractice, the firm indicated its intent to immediately withdraw by email. The following day, the client sent a letter to the firm instructing where to send the client file. One week later, but just within one year of the ultimate filing of suit, the firm confirmed in an email that "we have terminated the attorney client relationship with you," and advised that it would be sending the client file shortly.

Gotek centered on whether the continuous representation tolling ceased as of the law firm's notice of its intent to withdraw, or a week later, when it sent the confirmation email. The court determined it was the former, as by then, the client "could not reasonably have expected that [the firm] would provide further legal services." In fact, the court flatly rejected the client's argument for the latter, calling it "unreasonable as a matter of law," since the firm had previously made it clear that it would not provide further legal services and the transfer of files was a mere "clerical, ministerial activity."

While *Gotek* made it clear that continuing representation may cease well before a formal substitution is filed, the court in *Kelly v. Orr*, 243 Cal. App. 4th 940 (2016) refused to find that tolling ended as to claims maintained by a successor trustee against attorneys who had allegedly been negligent while representing his predecessor. Analogizing to the attorney-client privilege which succeeds to a successor trustee, the court in *Kelly* reasoned that because the services provided to the predecessor trustee were on behalf of the trust, and the acting trustee maintains the right to sue, tolling did not cease merely because the trustee changed.

In Pari Delicto/Unclean Hands

The successor trustee did not fare as well in *Uecker v. Zentil*, 244 Cal. App. 4th 789 (2016), in which the court applied the in pari delicto doctrine to dismiss a claim by a bankruptcy trustee against an attorney defendant accused of assisting the debtor company in perpetrating a fraud. Noting that the bankruptcy trustee succeeds to the claims held by the debtor company, which perpetrated the alleged fraud, the *Uecker* court did something worse than sending the bankruptcy trustee to the cheap seats, it justifiably threw him out of court all together. The court reasoned in sustaining a demurrer without leave to amend that because the unclean hands doctrine would preclude suit by the company, the claims asserted by the trustee as successor to the company were similarly barred.

Anti-SLAPP Statute

Attorney defendants utilizing the anti-SLAPP procedure set forth in CCP Section 425.16 also obtained mostly positive results.

In *J-M Manufacturing Co, Inc. v. Phillips & Cohen, LLP*, 247 Cal. App. 4th 87 (2016), the court held both that the anti-SLAPP statute protected a law firm's press release regarding a favorable jury verdict, and that the "fair report" privilege precluded the plaintiff from showing a probability of prevailing.

The plaintiff's burden of showing a probability of prevailing also remains substantial, as the court in *Karnazes v. Ares*, 244 Cal. App. 4th 344 (2016), reinforced. While a principal thrust of *Karnazes* was to affirm that the filing of a motion to transfer venue effectively tolls the 60-day filing deadline from service of the complaint within which an anti-SLAPP motion must be filed, it also emphasized that the showing required of a plaintiff to establish a probability of prevailing must extend beyond verified allegations in the pleadings, and that the moving defendant may present evidence in order to meet the burden of showing protected conduct tied to a claim for relief.

Contreras v. Dowling, 4 Cal. App. 5th 774 (2016), went a step further than *Karnazes*, explaining that the first prong showing by a defendant also cannot be refuted simply through bare allegations, a seeming departure from the rationale set forth in *Sprengel v. Zbylut*, 241 Cal. App. 4th 140 (2015), which essentially allowed the plaintiff to be the arbiter of prong one based upon the way the complaint was pleaded. *Contreras* arose from a dispute between homeowners and a tenant who refused to vacate the property. The tenant sued the homeowners and added their counsel as a defendant, alleging that he aided and abetted unlawful entries into her apartment, agreed to conceal evidence, and lied to opposing counsel about the alleged entries. In reversing the denial of the attorney's anti-SLAPP motion (for which the trial court had also imposed sanctions), the court in *Contreras* explained that the complaint's allegations of conspiracy or aiding and abetting are "no more than legal conclusions" and should not deflect the analysis away from the *attorney's* actions to the conduct he allegedly merely assisted. Because the attorney's actions — advising clients and communicating with opposing counsel — were unquestionably protected as petitioning ac-

tivity under the anti-SLAPP statute, the *Contreras* court concluded that the tenant's causes of action against the attorney correspondingly arose from protected activity.

Both *Karnazes* and *Contreras* are further notable in that they reaffirmed that mere allegations of "illegal" conduct is insufficient to invoke the criminal exception to otherwise protected conduct first announced in *Flatley v. Mauro*, 39 Cal. 4th 299 (2006). Both explained that allegations of protected conduct do not lose anti-SLAPP protection unless they establish illegality as a matter of law, either by express concession from the SLAPP defendant, or if the evidence "conclusively" established that a crime was committed. Neither could be shown in the circumstances of *Karnazes* and *Contreras*.

Even in anti-SLAPP cases not involving attorney defendants, there was plenty to like as both the California Supreme Court and 9th U.S. Circuit Court of Appeals endorsed a broad application of the statute. In *Baral v. Schnitt*, 1 Cal. 5th 376 (2016), the Supreme Court addressed the split among the lower courts concerning so-called "mixed cause of action" cases, and ultimately holding that any allegation implicating conduct protected by free speech was subject to the anti-SLAPP statute, even if combined in a single cause of action asserting non protected conduct as well. In reversing the lower court, *Baral* noted that the term "cause of action" in the anti-SLAPP statute must mean any allegation implicating protected conduct because otherwise, the plaintiff could, through artful pleading, frustrate the purpose of the anti-SLAPP statute of "screening out meritless claims that arise from protected activity, before the defendant is required to undergo the expense and intrusion of discovery."

The *Baral* court further reasoned that the Legislature's use of the phrase "motion to strike" indicated an intent to treat the anti-SLAPP motion like a conventional motion to strike, which allows the movant to attack distinct parts of each count alleged in the complaint regardless of how they are pled. The result is a broadening of the reach of the anti-SLAPP procedure as any allegation in a complaint implicating protected conduct tied to a claim for relief can be subject to the statute and its concomittment benefits, including a stay on discovery, direct right to appeal and prospect of a reasonable attorneys fee recovery.

Similarly, in *Travelers Casualty Ins. Co. of America v. Hirsh*, 831 F.3d 1179 (9th Cir. 2016), the 9th Circuit fortified the viability of anti-SLAPP motions in federal court, agreeing with the holding in *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003), reasoning that the anti-SLAPP statute is substantive law, and therefore permissible in federal court. However, perhaps more notable was the concurring opinion of Judge Alex Kozinksi urging *Batzel*'s reconsideration on the premise that the anti-SLAPP statute should be construed as merely a procedural mechanism inapplicable in federal court under the *Erie* doctrine, perhaps creating the slightest crack in any assumption that the anti-SLAPP procedure will remain a permanent feature of federal practice.

Attorney Disqualification

In *Ontiveros v. Constable*, 245 Cal. App. 4th 686 (2016), and *Costello v. Buckley*, 245 Cal. App. 4th 748 (2016), the Court of Appeal made clear that attorneys could be disqualified from representing a client if they obtained privileged information in a prior representation that could harm their former client. In *Ontiveros*, the court held that an attorney representing a corporation and its shareholders faces an unwaivable conflict when the directors are charged with fraud. That said, *Ontiveros* did allow that an attorney may still represent individual majority shareholders. Along similar lines, in *Costello*, the court upheld the disqualification of counsel due to the prior representation of the adverse plaintiff, even though the cases were not related, since the attorney did, in fact, obtain confidential information from the prior representation.

Attorney-Client Privilege

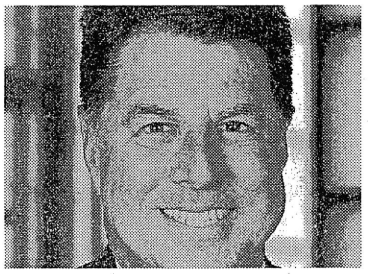
The near inviolableness of the attorney client privilege was buoyed in *City of Petaluma v. Superior Court*, 248 Cal. App. 4th 1023 (2016), in which the court held that a report prepared by outside counsel after an independent investigation was protected by the privilege even though the outside counsel was not expressly retained to offer advice. The *City of Petaluma* court explained that whether the report itself provided legal advice was immaterial because the purpose of the retention was to engage the attorneys' legal expertise regarding fact gathering, synthesizing facts, and providing conclusions.

That bright line was not as clear cut in one of the more controversial decisions of the year, issued just before its end on Dec. 29 in *Los Angeles County Board of Supervisors v. Superior Court*, 2016 DJDAR 12740, in which the Supreme Court decided the issue of "whether invoices for legal services transmitted to a government agency by outside counsel are categorically protected by the attorney-client privilege and therefore exempt from disclosure under the [Public Records Act], and if not, whether any of the information sought ... is nonetheless covered by the privilege." In a 4-3 decision reversing the lower court and remanding, the Supreme Court distinguished *Costco Wholesale Corp. v. Superior Court*, 47 Cal. 4th 725 (2009), which involved a closed case, and held "the contents of an invoice are privileged only if they either communicate information for the purpose of legal consultation or risk exposing information that was communicated for such a purpose" and that "[t]his latter category includes any invoice that reflects work in active and ongoing litigation."

What to Watch for in 2017

Lawyer defendants generally fared well before the appellate courts in 2016, benefitting from expanded protection through the statute of limitations, in pari delicto doctrine, and anti-SLAPP statute. Further clarity was also provided with respect to the attorney client privilege and conflict of interest rules. The year ahead certainly promises further developments which all lawyers will be well served to keep an eye on.

We may, for instance, receive new Rules of Professional Conduct in 2017. The Legislature — via the Law Revision Commission — also continues to evaluate whether to modify the hotly debated opinion in *Cassel v. Superior Court*, 51 Cal. 4th 113 (2011), which significantly strengthened mediation confidentiality. Finally, the Supreme Court will likely decide *Parrish v. Latham & Watkins* (reviewing the lower court's opinion cited at 238 Cal. App. 4th 81 (2015)), a malicious prosecution case involving both the applicable statute of limitations (perhaps since resolved when *Roger Cleveland Golf Company, Inc. v. Krane & Smith, APC*, 225 Cal. App. 4th 660 (2014), was expressly disapproved of in *Lee*, 61 Cal. 4th 1225, issued last year), as well as the "interim adverse judgment rule" defense, which permits parties defending a malicious prosecution action to rely on a previous interim ruling (such as the denial of a prior summary judgment motion) to show there was probable cause for their claim.



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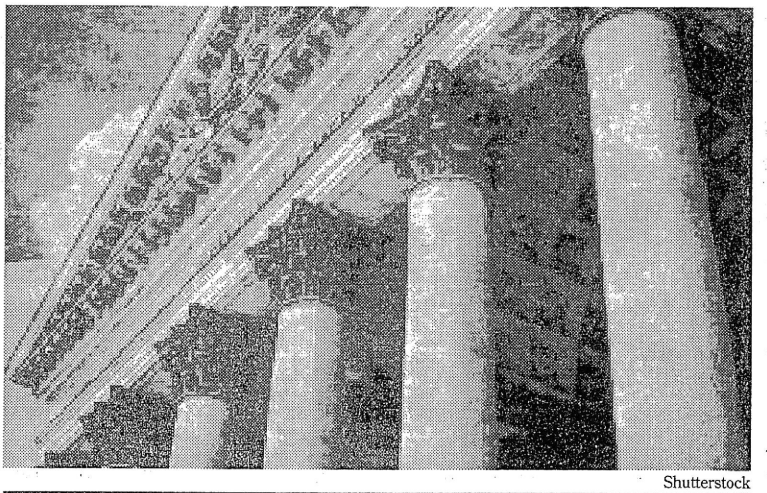

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1. In *Foxen v. Carpenter,* the court held that the statute of limitations as outlined in Code of Civil Procedure Section 340.6 applies not only to any claim against an attorney relating to the provision of legal services, but also nonlegal services governed by the attorney's professional obligations.
❑ True ❑ False

2. *Gotek Energy, Inc. v. SoCal IP Law Group, LLC* held that tolling ceases as soon as the attorney provides notice of intent to withdraw from employment, even if communications extend beyond that date.
❑ True ❑ False

3. The court in *Kelly v. Orr* found that tolling ended as to claims maintained by a successor trustee against attorneys who had allegedly been negligent while representing his predecessor.
❑ True ❑ False

4. In *Uecker v. Zentil,* the court held that the doctrine of pari delicto barred a claim by a bankruptcy trustee against an attorney defendant accused of assisting the debtor company in perpetrating fraud.
❑ True ❑ False

5. The court in *J-M Manufacturing Co, Inc. v. Phillips & Cohen, LLP* held that the anti-SLAPP statute did not protect a law firm's press release regarding a favorable jury verdict.
❑ True ❑ False

6. However, the court in that case did find that the "fair report" privilege precluded the plaintiff from showing a probability of prevailing.
❑ True ❑ False

7. *Contreras v. Dowling* explained that the defendant's showing on the first prong of an anti-SLAPP analysis can be refuted simply through bare allegations.
❑ True ❑ False

8. In *Baral v. Schnitt,* the court held that allegations implicating conduct protected by free speech were not subject to the anti-SLAPP statute, if combined in a single cause of action asserting non protected conduct as well.
❑ True ❑ False

9. In *Travelers Casualty Ins. v. Hirsh,* the 9th Circuit found that the anti-SLAPP statute is substantive law and, therefore, permissible in federal court.
❑ True ❑ False

10. Judge Alex Konsinski wrote a concurring opinion urging the reconsideration of *Batzel* on the premise that the anti-SLAPP statute should be construed as merely a procedural mechanism inapplicable in federal court.
❑ True ❑ False

11. In *Ontiveros v. Constable,* the court made it clear that attorneys could be disqualified from representing a client if they obtained privileged information in a prior representation that could harm their former client.
❑ True ❑ False

12. *Costello v. Buckley* held that attorneys could not be disqualified under the same conditions.
❑ True ❑ False

13. In *City of Petaluma v. Superior Court,* the court held that a report prepared by outside counsel after an independent investigation was not protected by attorney-client privilege.
❑ True ❑ False

14. *Los Angeles County Board of Supervisors v. Superior Court* held that the "contents of an invoice for legal services transmitted to a government agency by outside counsel are privileged if they communicate information for the purpose of legal consultation."
❑ True ❑ False

15. The court in that case held, however, that invoices are not privileged if they risk exposing information that was communicated for such a purpose.
❑ True ❑ False

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