Drafting Successful Anti-SLAPP Motions In California

By **Jason Russell, Hillary Hamilton and Adam Lloyd** (September 23, 2019, 2:56 PM EDT)

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As many litigants know, a strategic lawsuit against public participation, or SLAPP, is commonly defined as litigation "brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances."[1] In an effort to curb these suits and "encourage continued participation in matters of public significance," California, like many other states, codified an anti-SLAPP procedure, to quickly resolve them at an early stage in the litigation.[2]

California state courts apply a two-step process in determining whether to grant an anti-SLAPP special motion to strike brought under Section 425.16 of the California Code of Civil Procedure. The first prong requires the movant — generally, a defendant — to show that a plaintiff is attempting to assert liability arising from the defendant's protected activity. The second prong requires the plaintiff to show that it has a probability of prevailing on the merits.

The special motion has proven popular since its introduction over 25 years ago; California appellate courts have issued over 100 published anti-SLAPP opinions in the last three years alone. Given this volume, it is unsurprising that a split of authority has developed in the California Courts of Appeal regarding the proper test to apply when evaluating the first prong of the anti-SLAPP analysis. Although the California Supreme Court has yet to resolve this issue, movants may have some control over the test a court will likely apply, depending on how movants style their motion, as explained below.

In 2016, in Baral v. Schnitt, the California Supreme Court held that restricting anti-SLAPP relief only to entire causes of action as pleaded, or to the complaint as a whole, "unduly limits the relief contemplated by the Legislature."[3] To address this issue, the court concluded that an anti-SLAPP statute motion "may be used to attack parts of a count as pleaded" and can reach individual "allegations of protected activity that are asserted as grounds for relief" — even if such allegations are not styled as a formal cause of action — so long as the allegations are used by the plaintiff "to justify a remedy."[4]

Thus, when a defendant identifies individual allegations of protected activity, and the claims for relief supported by them, courts are to "rule on plaintiffs' specific claims of protected activity, rather than reward artful pleading by ignoring such

claims if they are mixed with assertions of unprotected activity."[5]

Before Baral, courts typically conducted a first-prong anti-SLAPP analysis by examining whether the "gravamen" or "principal thrust" of a complaint or an individual cause of action as a whole arose from protected activity. Thus, complaints or causes of action that mixed allegations of protected activity with unprotected activity could pass through the legislatively enacted anti-SLAPP screen.

Although the "gravamen test" now seems inconsistent with Baral's mandate to examine individual allegations that premise liability on protected activity, the Second Appellate District correctly noted in Okorie v. Los Angeles Unified School District that Baral did not specifically "address, let alone disapprove, the principal thrust/gravamen analysis."[6] To answer the question of whether the gravamen test is still a viable method of analysis, courts have turned to another "practical but vital aspect of special motions to strike" left unanswered by Baral — how must an anti-SLAPP motion challenging individual allegations be framed?[7] That is, must the motion follow Rule 3.1322(a) of the California Rules of Court, which governs conventional motions to strike and requires that the notice of motion identify the specific paragraphs or full quotations of the portions of the pleading sought to be stricken?

Although there is no similar rule for anti-SLAPP motions in either the Rules of Court or the text of Section 425.16, the Okorie court determined that it was "[c]ritical[]" to its decision to apply the gravamen test post-Baral that the "Defendants did not move to strike certain subparts of Plaintiffs' complaint" — rather than the entire complaint.[8]

The Okorie court concluded that "[u]nfortunately, absent further guidance to litigants as to how claims must be alleged and/or how special motions to strike must be framed, the protections of the anti-SLAPP law may still be circumvented by the inartful pleading of claims (deliberately or innocently) that allege both protected and unprotected activity," and therefore, "under the facts of this case … the principal thrust/gravamen analysis remains a viable tool by which to assess whether a plaintiff's claim arises out of protected activity."[9] Presiding justice Frances Rothschild dissented on the ground that after Baral, "determining the gravamen has no place in anti-SLAPP analysis."[10]

Given Baral's silence on these issues, some appellate courts have followed Okorie's guidance in continuing to apply the gravamen test when the defendant has failed to move to strike specific allegations in a complaint. For example, in Optional Capital Inc. v. Akin Gump Strauss Hauer & Feld LLP, a panel from Division One of the Second Appellate District applied the gravamen test because "[c]ritically, in this case, Defendants did not move to strike certain subparts of Plaintiffs' complaint" but "expressly moved to strike Plaintiffs' entire complaint and all claims asserted against them."[11]

Similarly, in Newport Harbor Offices & Marina LLC v. Morris Cerullo World Evangelism, a panel from Division Three of the Fourth Appellate District concluded that it "need not address whether to use the gravamen test," and distinguished those cases that had decided the issue because there "the anti-SLAPP motions sought to strike entire causes of action or pleadings and did not move to strike specific allegations within a pleaded cause of action," and in the case at bar, "Defendants moved both to strike specific allegations and to strike entire causes of action."[12] Although the Newport Harbor court applied a Baral specific allegation analysis, it left open the possibility of applying the gravamen test in the future, depending on how the anti-SLAPP motion was styled.

Other panels, from Division Four of the First Appellate District and Division One of the Fourth Appellate District, have concluded that Baral has simply not caused "any fundamental shift in the nature of the 'gravamen' test," regardless of how the anti-SLAPP motion is framed.[13]

In contrast to these cases, panels from the Third and Sixth Appellate Districts have held that the gravamen test is no longer a viable method of first-prong anti-SLAPP analysis in any circumstance, without qualification as to how the motion is styled. In Sheley v. Harrop, a panel from the Third Appellate District flatly held that "[a]fter Baral, when deciding whether claims based on protected activity arise out of protected activity we do not look for an overall or gestalt 'primary thrust' or 'gravamen' of the complaint or even a cause of action as pleaded," but instead to specific allegations or claims within the cause of action.[14]

Likewise, earlier this year, the Sixth Appellate District expressly disagreed with the appellate courts that have found the gravamen test is still viable or unchanged following Baral. Noting that "[t]he Courts of Appeal are divided on whether, after Baral, it is appropriate for courts to disregard allegations that do not constitute the 'gravamen' of the plaintiff's cause of action," the court "agree[d] with the Court of Appeal in Sheley and Justice Rothschild's dissent in Okorie that Baral has eliminated the 'gravamen' analysis, and we therefore do not employ it here."[15]

Despite this recognized split within the California Courts of Appeal and their explicit request for more "guidance," none has been forthcoming so far from the California Supreme Court. As it currently stands, litigants may be subject to differing tests for the first prong of the anti-SLAPP analysis depending on which of the conflicting decisions above a court finds persuasive. This important issue of law thus presents an ideal ground for review under Rule 8.500(b)(1) of the California Rules of Court.

While waiting for the court to provide clarity on this issue and resolve the split, movants and their counsel should consider how best to frame their anti-SLAPP motion in order to influence which test will be applied. For example, movants may consider arguing that the gravamen test is incompatible with Baral, as Rothschild and the Third and Sixth Appellate Districts have already found. The imprecise gravamen test's vague and malleable nature easily lends itself to an "I know it when I see it" analysis, which can result in denials of legitimate anti-SLAPP motions — an erroneous and costly result, given the constitutional rights the statute is meant to protect, and the dispositive nature of the motion before a defendant incurs the burdens of discovery.

Baral's surgical approach is far better suited to the task of analyzing protected activity. Moreover, although nothing in Section 425.16 so dictates, movants may want to err on the side of formalistic caution and structure an anti-SLAPP motion in the same way as a conventional motion to strike.

Rather than generally attacking causes of action as arising from protected activity, movants might consider quoting "in full the portions" of allegations and paragraphs to be stricken from certain claims in the notice of motion and motion itself.[16] As discussed, several appellate panels have indicated that they are willing to apply a Baral specific allegation analysis — instead of the gravamen test — if the anti-SLAPP motion formally and explicitly targets individual allegations that comprise claims for relief.

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[1] See Cal. Civ. Proc. Code § 425.16(a).

[2] Id.

[3] Baral v. Schnitt , 1 Cal. 5th 376, 382 (2016).

[4] Id. at 393, 395.

[5] Id. at 392-93, 395-96.

[6] Okorie v. Los Angeles Unified School District , 14 Cal. App. 5th 574, 588 (2017).

[7] Id. at 589.

[8] Id.

[9] Id. at 590.

[10] Id. at 601 (Rothschild, P.J., dissenting).

[11] Optional Capital Inc. v. Akin Gump Strauss Hauer & Feld LLP , 18 Cal. App. 5th 95, 111 n.5 (2017).

[12] 23 Cal. App. 5th 28, 48 (2018).

[13] Area 51 Productions Inc. v. City of Alameda , 20 Cal. App. 5th 581, 595 n.7 (2018); see also Gaynor v. Bulen , 19 Cal. App. 5th 864, 884-85 (2018).

[14] Sheley v. Harrop , 9 Cal. App. 5th 1147, 1169 (2017).

[15] Laker v. Board of Trustees of California State University , 32 Cal. App. 5th 745, 772 n.19 (2019).

[16] See Cal. R. Ct., rule 3.1322(a).