Appellate Reports and Shorter Takes

Baral v. Schnitt — *Substantially broadens the scope of the anti-SLAPP statute by holding that it can be used to attack allegations of constitutionally protected activity*

By Jeffrey I. Ehrlich

Baral v. Schnitt (2016)

__ Cal.4th __ (Cal. Supreme)

Who needs to know about this case? Lawyers bringing or defending anti-SLAPP motions.

Why it's important: *Baral* substantially broadens the scope of the anti-SLAPP statute by holding that it can be used to attack allegations of constitutionally protected activity within a cause of action, even if that cause of action is also supported by allegations of unprotected activity. Like a conventional motion to strike, an anti-SLAPP motion can be used to attack specific parts of a cause of action, without being directed to the cause of action as a whole.

Synopsis: The anti-SLAPP statute is designed to allow courts to weed out, at an early stage, meritless claims arising from constitutionally protected activity. Resolution of an anti-SLAPP motion involves two steps. First, the defendant must establish that the challenged claim arises from activity protected by section 425.16. If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success. In resolving the second step, the court does not weigh evidence or resolve conflicting factual claims. Its inquiry is limited to whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment. It accepts the plaintiff's evidence as true, and evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law.

The issue confronted in this case is, "What showing is required of a plaintiff with respect to a pleaded cause of action that includes allegations of both protected and unprotected activity?" In *Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 106, the court held that "Where a cause of action refers to both protected and unprotected activity and a plaintiff can show a probability of prevailing on *any part of its claim*, the cause of action is not meritless and will not be subject to the anti-SLAPP procedure." The *Mann* rule was followed by some courts, even as they criticized it. (*See, e.g., Wallace v. McCubbin* (2011) 196 Cal.App.4th 1169, 1196-1212.) Other courts refused to apply it. (See, *e.g., City of Colton v. Singletary* (2012) 206 Cal.App.4th 751, 772-774; *Cho v. Chang* (2013) 219 Cal.App.4th 521, 527.)

The Court held that the *Mann* rule was not consistent with the terms and purposes of the anti-SLAPP statute because it allows a plaintiff to rely on "artful pleading" to evade the reach of the anti-SLAPP statute by combining allegations of protected activity with unprotected activity. The Court explained that the term "cause of action" as used in the anti-SLAPP statute does not focus on the form of the plaintiff's pleaded cause of action, or on a "primary rights" definition, but on the defendant's activity.

The Court explained: "The anti-SLAPP procedures are designed to shield a defendant's constitutionally protected *conduct* from the undue burden of frivolous litigation. It follows, then, that courts may 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." The Legislature's choice of the term "motion to strike" to describe an anti-SLAPP motion reflects an understanding that an anti-SLAPP motion, like a conventional motion to strike, may be used to attack parts of a count as pleaded.

The Court therefore disapproved *Mann* and its progeny, and it offered a brief summary of all the showings and findings required by the anti-SLAPP statute:

> At the first step, the moving defendant bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them. When relief is sought based on allegations of both protected and

unprotected activity, the unprotected activity is disregarded at this stage. If the court determines that relief is sought based on allegations arising from activity protected by the statute, the second step is reached. There, the burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated. The court, without resolving evidentiary conflicts, must determine whether the plaintiff's showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment. If not, the claim is stricken. Allegations of protected activity supporting the stricken claim are eliminated from the complaint, unless they also support a distinct claim on which the plaintiff has shown a probability of prevailing.

Sandquist v. Lebo Automotive, Inc. (2016)

__ Cal.4th __ (Cal. Supreme)

Who needs to know about this case? Lawyers seeking to obtain classwide arbitration or lawyers opposing it.

Why it's important: The California Supreme Court holds in a 4-3 decision that the issue of who decides this issue is a matter of agreement, which is decided under state contract law. Under state law, the parties' arbitration agreement allocated the decision to the arbitrator. Since this result did not conflict with federal arbitration law, the issue remains one for the arbitrator to decide. (The dissent would hold that the availability of classwide arbitration is a gateway issue under the Federal Arbitration Act, and should be decided by a court.)

Synopsis: Sandquist was hired in 2000 to work as an automobile salesperson at Lebo Automotive. On his first day, he was given roughly 100 pages of pre-printed forms with instructions, and was required to fill out and sign each one as quickly as possible so that he could begin work. They were not discussed with him, and he was required to sign them all as a condition of employment. The documents included three different form arbitration agreements. In 2012, Sandquist sued Lebo for racial discrimination, harassment, and retaliation. His complaint was asserted as a class action. Lebo moved to compel arbitration. The motion was granted, but the trial court determined that the agreement did not authorize class arbitrations. The Court of Appeal reversed, concluding that the availability of class proceedings under an arbitration agreement is a question of contract interpretation for the arbitrator to decide in the first instance.

The Supreme Court agreed. "No universal one-size-fits-all rule allocates that question to one decision maker or the other in every case. Rather, 'who decides' is a matter of party agreement . . . . so the question who has the power to decide the availability of class arbitration turns upon what the parties agreed about the allocation of *that* power."

That examination is initially made through the prism of state law. The Supreme Court held that the arbitration agreements seemed to indicate that the decision would be made by the arbitrator, but because the agreements were ambiguous, it also considered "the parties' likely expectations about allocations of responsibility." The Court then applied two maxims of contract construction: (1) that when the allocation of a matter to the courts or arbitrator is uncertain, the default rule presumes that the arbitrator should decide; and (2) ambiguities in written agreements are to be construed against the drafter, Lebo.

Finally, after deciding that State law did not contain any contrary presumption, the Court looked to federal law. It concluded that neither the text nor legislative history of the Federal Arbitration Act answered the question. So it looked to the Supreme Court's arbitration precedents. The Court held that, because the question of who decides whether classwide arbitration is available is not a "threshold" or gateway issue, which is reserved for the courts to decide, the issue was properly resolved by the arbitrator.

Short(er) takes:

Discrimination; Unruh Act; standing to sue: *Osborne v. Yasmeh* (2016) __ Cal.App.4th __ (2d Dist, Div. 4.)

Plaintiffs alleged that they visited a hotel owned and managed by the defendants. One of the plaintiffs is paraplegic and uses a service dog. The other plaintiffs are her husband and children. They alleged that defendants refused to let them rent a room in their hotel unless they first agreed to pay a non-refundable $300 cleaning fee. The plaintiffs refused to pay and left. They then sued for violations of the Unruh Act. The trial court sustained the defendant's demurrer without leave to amend, finding that they lacked standing to sue because they had not paid the discriminatory fee. Reversed.

Civil Code Section 52, which provides remedies for violations of the Unruh Act, states that any person aggrieved by conduct that violates the Unruh Act may bring a civil action. (§ 52, subd. (c).) When a disabled person alleges that he or she visited a business establishment and was required to pay a fee relating to his or her disability before accessing the products or services offered, the plaintiff has stated facts sufficient to establish that he or she is a person aggrieved as defined in section 52, subdivision (c), and has therefore alleged facts sufficient to demonstrate

standing to sue under the Unruh Act. A plaintiff is not required to pay a discriminatory fee to establish standing to sue under the Unruh Act, as long as the plaintiff alleges facts showing that he or she has directly experienced a denial of rights as defined in sections 51 and 52. In addition, when a disabled individual has standing to sue under section 52, subdivision (c), any person "associated with" that individual (§ 51.5, subd. (a)) has standing if the associated person has also directly experienced the discriminatory conduct.


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