ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

LOS ANGELES

SUMMER 2016

TO BRIEF, OR NOT TO BRIEF (FURTHER) — THAT IS THE QUESTION

Justice Elizabeth A. Grimes

Sean M. SeLegue

Not infrequently, an appellate court concludes that the parties have neglected a critical issue or framed it incorrectly, causing the court to consider deciding the case on a basis neither side advocated. That can be disconcerting to the parties, to say the least, and raises important issues for courts and advocates.

The inclination to decide a case based on a court-generated theory seems deep rooted and has been the subject of controversy for some time. Bernard E. Witkin approved the

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— INSIDE —

SPEAKING FREELY

Felix Shafir

Jeremy Rosen

David Moreshead

Nearly 25 years ago, California's Legislature enacted the anti-SLAPP statute "in response to a 'disturbing increase' in lawsuits brought for the strategic purpose of chilling a defendant's rights of petition and free speech." (*Kurz v. Syrus Systems, LLC* (2013) 221 Cal.App.4th 748, 756-757.) This statute "was intended" to "provid[e] a fast and inexpensive unmasking and dismissal of SLAPP's." (*Bernardo v. Planned Parenthood Federation of America* (2004) 115 Cal.App.4th 322, 340, quotation marks omitted.) It has succeeded: thousands of defendants have used the anti-SLAPP statute to dismiss meritless lawsuits targeting their exercise of First Amendment rights.

In his Spring 2016 ABTL Report article, *SLAPPing Cobras*, Justice Brian Hoffstadt points to critics of the anti-SLAPP statute who state that the law is overwhelming the courts without providing the relief intended by the Legislature. The title of the article links the arguments raised by the statute's critics to colonial India's misguided efforts to reduce the cobra population by paying for dead cobras, thus encouraging cobra breeding.

The snake analogy is apt, for the snake and the anti-SLAPP law have much in common. In 1754, in one of the

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PRESIDENT'S REPORT

Bryan A. Merryman

As my term as President comes to an end, I am grateful and owe many thanks to a very active and supportive Board of Governors and Judicial Advisory Council. All of our committee chairs performed above and beyond what I asked of them this past year. The committee chairs were: Hon. Margaret Grignon (Ret.) and John Querio (ABTL Report); Jeanne Irving and Erik Swanholt (Membership); Robyn Crowther and Sascha Henry (Lunch Programs); Jason Murray (Dinner Programs); David Graeler and Manuel Cachan (Courts); Mary Haas (Public Service); Jeff Koncius (Technology); Aaron Bloom, Rachel Feldman, and Ben Williams (Young Lawyers Division); Valerie Goo (2016 Annual Seminar); and Erin Ranahan (2015 Annual Seminar). As you can see, it takes a large number of volunteers, all of whom are very busy and successful attorneys, to provide the best programs, an annual seminar on cutting edge legal issues, and the many other benefits of ABTL membership, as well as community outreach. The Board is also fortunate to have federal and state court judges, including many of the leaders of our local courts, who generously give their time because they believe in the importance of the ABTL's mission.

The ABTL's mission is to promote a dialogue between the California bench and bar on business litigation issues. I have been fortunate to serve for seven years on the Board, following many years of attending ABTL events, where I was able to observe and learn the value of this mission. When I first attended ABTL events as a junior lawyer at the encouragement of one of the partners for whom I worked, I marveled at how many of the lawyers and judges knew each other and how attending the reception before dinner programs was an opportunity for them to reconnect with old friends, whether they had been on the other side of a case, on the same side, or sitting on the bench. The ABTL was, in part, responsible for their ability to foster and grow those professional relationships

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after those cases ended.

Now, we have an active Young Lawyers Division which hosts monthly events limited to lawyers who have practiced less than ten years. Among other activities, they meet in small groups for purely social purposes, and they also learn from in-house lawyers, law firm partners, and judges, all of whom volunteer their time to help these young lawyers grow. The ABTL lunch and dinner programs and the Annual Seminar continue to provide these opportunities for the rest of the business litigation bar and bench to reconnect and, of course, provide important continuing education focused on business litigation. There is no question that when attorneys know each other, litigation progresses more efficiently even when lawyers zealously represent their clients.

I owe my greatest thanks to the ABTL's Executive Director, Linda Sampson, without whom this organization would not have achieved so much in recent years. It is because of Linda and our officers, Nancy Thomas (Vice President), Michael McNamara (Treasurer), and Sabrina Strong (Secretary), that the ABTL is in good hands and will continue to play a significant role. The Board is full of energetic leaders in the Los Angeles legal community, both attorneys and judges. Membership, the number of events, and community outreach sponsored by the ABTL are at an all-time high. I appreciate all of the support and look forward to seeing everyone at the next dinner program in September and the Annual Seminar in Hawaii in October.

Bryan A. Merryman
White & Case LLP
ABTL President, 2015-2016

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Looking to Contribute An Article?

The ABTL Report is always looking for articles geared toward business trial lawyers.

If you are interested,
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THE INSIGHT INTERVIEW

Donald Bunnin

The Insight Interview features interviews with leading jurists, lawyers and business executives. The series focuses specifically on practical, real-world advice for lawyers in their first 10 years of practice.

This installment features Donald Bunnin, Senior Litigation Counsel at Allergan, plc, the $23 billion diversified global pharmaceutical company that makes products such as BOTOX®, Juvéderm®, Namenda XR® and Restasis®. Mr. Bunnin was interviewed by Steven Feldman, an associate with Hueston Hennigan LLP in Los Angeles, CA.

Steven Feldman

How would you describe your role as Allergan's Senior Litigation Counsel and what are the key issues with which you deal on a day-to-day basis?

We have an approximately 120-person legal team at Allergan, and I am part of a four-lawyer team responsible for all of Allergan's commercial litigation. That essentially means everything but patent infringement cases. I spend a lot of my time on antitrust cases, government investigations, class actions, product liability cases and employment litigation.

What do you enjoy most about your job at Allergan?

The variety of work. I handle almost 80 cases at any one time, and I have the flexibility to pick and choose where I want to dig in. Consequently, I get to spend my time at the hearings, trials and mediations that matter most. I also enjoy dealing with budgets, and working creatively with outside counsel on developing alternative fee arrangements that align Allergan's interests with theirs and reward excellent work.

Based on your years of experience in-house, do you have any advice for associates on how to stand out to a client?

Do good work. Ultimately, that's what the job is about. Also, try to be proactive: an email identifying a problem is only half an email. The full email identifies the problem and provides a suggested solution. Associates should realize that this is a relationship business. Just like you're trying to build a relationship with partners in your firm, you should be trying to do that with the client because – at the end of the day – that is how you will get more work, more cases and more opportunities. If you're an associate and want to argue a motion to dismiss, and I don't know you, it will be hard for me to say yes. I want to say yes, but I need to know I can trust that person.

What advice do you have for associates and junior partners who are thinking about how they can generate business?

The way I look at it is, the moment you are doing client work, you are doing business development. Every interaction you have with a client is business development because you are building that relationship. Business development is just building relationships. Yes, you must have excellent lawyering skills, but you need more than that.

You could be a fantastic antitrust lawyer, but there are dozens of fantastic antitrust lawyers, so the question is: How do you become the one I give the case to when they are all pitching for it? The answer is building a relationship. And that should start on day one – from the first e-mail or the first coffee we have. The lawyers that get a lot of business understand that.

Generally, when a new matter comes in, automatically four lawyers or firms pop into my mind. You need to figure out how to be one of those four people or four firms. And if you think business development is just cocktail mixers, you are missing out on the most important interactions you'll have. You need to find

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A DEFENDANT'S PYRRHIC VICTORY: THE DEMURRER SUSTAINED WITHOUT LEAVE TO AMEND

Justice Elizabeth A. Grimes

Barbara Seeley Moreno

Can a Superior Court judge commit reversible error despite doing absolutely nothing wrong in the matter before the court? Yes, potentially, every time a judge sustains a demurrer without leave to amend. If you're shaking your head in disbelief, asking how that can be true, join the crowd. This rule seems to be unknown to many, resulting in unexpected reversals to the surprise of the trial judge and the defendant.

"A rule requiring a request to amend as a predicate for relief on appeal would conform to the sound general principle that matters not raised in the trial court are waived on appeal. However, the Legislature in Code of Civil Procedure section 472c, subdivision (a) enacted the contrary rule[.]" (*Kolani v. Gluska* (1998) 64 Cal.App.4th 402, 412.) That statute provides, "[w]hen any court makes an order sustaining a demurrer without leave to amend the question as to whether or not such court abused its discretion in making such an order is open on appeal even though no request to amend such pleading was made." Therefore, even when a plaintiff fails to ask the trial court for further leave to amend, or to tell the court anything at all about what additional facts may be alleged to cure a defective pleading, that plaintiff can, on appeal, claim abuse of discretion by the trial court in denying leave to amend. There is no waiver by failing to seek leave in the trial court.

Usually, a ruling sustaining a demurrer is challenged on appeal after a judgment of dismissal. But in *City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, the trial court had overruled a demurrer, and the Court of Appeal issued a writ of mandate directing the trial court to sustain the demurrer. The Supreme Court affirmed the judgment directing the trial court to sustain the demurrer but found the appellate court erred by declining to reach the question whether the plaintiff should be granted leave to amend. Noting that the appellate court mistakenly reasoned the only question before it was whether the operative complaint was sufficient, the Supreme Court found the "issue of leave to amend is always open on appeal, even if not raised by the plaintiff." (*Id.* at p. 746.). The Court concluded that, "[i]f the plaintiff has not had an opportunity to amend the complaint in response to the demurrer, leave to amend is liberally allowed as a matter of fairness, unless the complaint shows on its face that it is incapable of amendment." (*Id.* at p. 747).

On appeal from the sustaining of a demurrer without leave to amend, the courts require the plaintiff to not only raise the issue of leave to amend, but also to state in the opening brief exactly what new or different facts can be alleged to cure the defective pleading. "A party may propose amendments on appeal where a demurrer has been sustained, in order to show that the trial court abused its discretion in denying leave to amend. [Citation.] However, the vague claim that 'concerns' could be 'address[ed]' by an amendment or there may be a type of relief 'that will not conflict with the [ground relied upon by the court in sustaining the demurrer]' does not satisfy an appellant's duty to spell out in his brief the specific proposed amendments on appeal." (*People ex rel. Brown v. Powerex Corp.* (2007) 153 Cal.App.4th 93, 112.)

"[T]here is nothing in the general rule of liberal allowance of pleading amendment which 'requires an appellate court to hold that the trial judge has abused his discretion if on appeal the plaintiffs can suggest no legal theory or state of facts which they wish to add by way of amendment.' [Citation.]" (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1387-1388.) The burden falls squarely on the plaintiff to demonstrate in what manner the pleading can be amended and how that

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The Insight Interview with Donald Bunnin …continued from Page 4

common ground and develop real friendships and real relationships.

Do you have any advice for outside counsel that you think isn't heeded often enough?

Be honest and up front. If there's bad news, tell me. At the end of the day, surprises are what get in-house counsel upset. Also, it is critical to be mindful of cost when staffing cases – it can be very frustrating when there are too many attorneys involved.

When you graduated from law school at USC, you worked as an associate at Latham & Watkins and then another firm. On what type of work did you focus during your years as an associate, and do you find that background useful today?

As an associate, I handled a mix of intellectual property matters – including copyright and Lanham Act litigation – and securities and regulatory work – including SEC and FTC investigations. A good deal of the civil procedure and e-discovery that I learned as an associate is still helpful today. When working with Allergan's outside firms, that experience allows me to make better strategic decisions and ask better questions. As an in-house lawyer, it is critical that you know those nuts and bolts, and that you know how to not let e-discovery spin out of control.

Is there anything you miss about working in a law firm?

There are good and bad things about working at a law firm, just as there are in-house. While I miss the brief writing and arguing in court, in my current job, I don't have to deal with those aspects of the law firm job I did not like, such as extensive legal research. Perhaps most importantly, as an in-house lawyer, I have more control over how I spend my time.

Steven Feldman *is a senior associate with Hueston Hennigan LLP, in Los Angeles.*

"THE DEMURRER SUSTAINED" …continued from Page 5

amendment will change its legal effect. (*Id.* at p. 1388.)

Here are some suggestions for lawyers and trial courts to consider. If the plaintiff appears at the hearing on the demurrer with a proposed amended complaint, defense counsel should not object that it is "too late," but should ask the court to consider whether the new pleading cures the defects. Or, if the plaintiff orally requests leave to amend at the hearing, defense counsel should invite the court to inquire exactly what additional or different facts the plaintiff can allege. The parties and court can then decide whether to take the hearing off calendar, continue the hearing, or submit the matter to the court, perhaps with further briefing. Defense counsel should not think we are suggesting they should "help out the opponent." We are suggesting it is better for the trial court to consider the amendment to avoid the cost and delay of reversal on appeal.

On appeal, if there are new facts the plaintiff can allege, those facts should be clearly stated with as much specificity as possible in the opening brief, so that the defendant has an opportunity to respond in its brief. If the proposed facts will not cure the defect, the defendant should point out the deficiencies of the proposed amendments with citation to the relevant authorities. The issue of leave to amend is open on appeal. But, the rule of liberal amendment does not apply with unyielding force to each new round of unsuccessful amendments, nor will a reversal be ordered where amendment is shown to be futile.

Hon. Elizabeth A. Grimes *is an Associate Justice of the California Court of Appeal, Second Appellate District, Division Eight, in Los Angeles.*
Barbara Seeley Moreno *is a Senior Appellate Attorney, California Court of Appeal, Second Appellate District, Division Eight, in Los Angeles.*

CONTRACTS IN TODAY'S SHARING ECONOMY: LIMITATION OF LIABILITY CLAUSES HAVE COME A LONG WAY

Mhare Mouradian

With the explosion of smartphones, tablets and laptops, innovative tech startups are being created in the sharing economy marketplace. Sharing economy services include ridesharing and house hiring, with companies like Uber, Lyft and Airbnb dominating their respective industries. The sharing economy marketplace is also evolving and infiltrating other industries, including the banking industry—referred to as "fintech," short for financial technology—with companies like SoFi. They are conducting business at light speed through the use of "apps" on your smartphone. Most of these tech startups attempt to limit their liability through Terms of Service or Terms and Conditions (collectively, "TOS").

The term "sharing economy" refers to a new economic model in which individuals and companies are able to use or rent physical assets owned by someone else in exchange for money. A contract can be entered into by a simple mouse click on a laptop or the touch of a finger on a smartphone or tablet. With certain exceptions, such a written contract between two parties is binding and enforceable and may be a trap for the unwary. An individual or company will be bound by the terms of such contracts. Therefore, it is important to review and understand such contract provisions. This article discusses contracts in the sharing economy space, particularly limitation of liability clauses, to help illustrate the need to carefully review contract terms in the TOS. Doing so will help to safeguard a business and eliminate potential litigation.

Sharing economy companies use the Internet to facilitate the connection between users and providers in the sharing economy. Sharing economy companies are part of the fabric of today's culture, providing more efficient, affordable and attractive services than their traditional counterparts. However, contractual implications may arise when conducting business with a sharing economy company. Most people download the company's application ("app"), complete the registration process, quickly zip through and agree to the TOS without reading them, and are ready to use the app within minutes. But these contracts contain many protections for the sharing economy companies and limitations of user rights. Although the TOS are not negotiable, an understanding of how these contracts can affect liability is important.

The TOS typically limit the sharing economy company's liability exposure through limitation of liability clauses. These provisions " 'have long been recognized as valid in California.' " (*Lewis v. YouTube, LLC* (2015) 244 Cal.App.4th 118, 125.) In *Lewis*, a user sued the video-sharing service operator YouTube for breach of contract, alleging that YouTube temporarily removed users' videos from public view and permanently removed records of the videos having been watched and commented upon by other users. (*Id.* at pp. 121-122.) YouTube's TOS provided that YouTube was not liable for any damages for any omissions in any "content," and defined "content" to include the "text, software, scripts, graphics, photos, sounds, music, videos, audiovisual combinations, interactive features and other materials" that the user "may view on, access through, or contribute to the Service." (*Id.* at pp. 125-126.) The trial court sustained YouTube's demurrer without leave to amend, and the user appealed. The Court of Appeal affirmed, holding that (1) the limitation of liability clause in the TOS precluded the user from establishing the damages element of her breach of contract claim, and (2) the TOS did not require YouTube to continue displaying comments or an accurate view count for the user's videos. (*Id.* at pp. 125-127.)

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"LIMITATION OF LIABILITY CLAUSES"…continued from Page 7

Sharing economy tech companies also limit their liability by distancing themselves from the person who owns the physical asset. The TOS typically state that the sharing economy company does not endorse third-party services and content and in no event shall be responsible or liable for any products or services of such third-party providers. For example, if a rider uses Uber's mobile app for transportation, the TOS distance Uber from the driver of the vehicle by stating that Uber "does not provide transportation logistics services or function as a transportation carrier." Uber's TOS also attempt to insulate Uber from any liability for the driver's wrongful conduct.

Additionally, the TOS typically state that the agreement a user enters into to use the third party's asset is only between the user and the owner of the physical asset. The sharing economy company is not a party to that agreement. For example, if a user books an apartment using the Airbnb mobile app, the TOS state that the agreement is between the user (whom Airbnb refers to as the Guest) and the owner of the apartment (whom Airbnb refers to as the Host).

Sharing economy companies also utilize several provisions requiring a user to indemnify the sharing economy company and limit its liability to a nominal amount or an amount no greater than the amount a user has paid or owes for using the asset. For example, Uber's TOS limit its total liability "to an amount that shall not exceed $500.00." Airbnb's TOS also limit its liability to either $100 or an amount not to exceed the amount a user paid or owes for bookings, whichever is less.

Limitation of liability clauses in TOS are not a guaranteed constraint. They are not enforceable if they are unconscionable—that is, the improper result of unequal bargaining power—or contrary to public policy. (*Food Safety Net Services, Inc. v. Eco Safe Systems USA, Inc.* (2012) 209 Cal.App.4th 1118, 1126 (*Food Safety Net Services*); *Markborough California, Inc. v. Superior Court* (1991) 227 Cal.App.3d 705, 714-715.) Furthermore, such clauses are not enforceable with respect to claims for ordinary negligence where the underlying transaction "affects the public interest" under the criteria specified in *Tunkl v. Regents of University of California* (1963) 60 Cal.2d 92, 98–100. (*Food Safety Net Services, supra*, 209 Cal.App.4th at p. 1126; *McCarn v. Pacific Bell Directory* (1992) 3 Cal.App.4th 173, 178–179.) Additionally, limitation of liability clauses cannot bar claims for fraud and misrepresentation. (Civ. Code, § 1668; *Food Safety Net Services, supra*, 209 Cal.App.4th at p. 1126; *Blankenheim v. E.F. Hutton & Co.* (1990) 217 Cal.App.3d 1463, 1471–1473.)

Sharing economy companies will continue to attempt to safeguard their businesses and reduce potential litigation through the effective use of TOS. Even though the legality of some of these practices is being challenged and efforts are underway to address the lack of regulation in this area, the sharing economy is here to stay, and users should carefully review TOS before clicking or touching "agree."

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"SPEAKING FREELY"…continued from Page 1

most famous examples of an American risking much to speak freely, Benjamin Franklin created a political cartoon captioned "Join or Die" showing a snake cut into eight parts, which symbolized the need for the American colonies to unite to protect their freedoms. The snake became an enduring symbol of our revolution to safeguard our rights. Today, as free speech is under attack in the political arena, on college campuses, and throughout the country, it would be wrong to weaken the anti-SLAPP statute because it similarly protects the rights of those sued for speaking freely.

This article analyzes the anti-SLAPP statute's effect on the judicial system. The available data demonstrate that the anti-SLAPP statute is not being systematically abused, but instead is operating in precisely the manner intended by the Legislature. We also explore the real problem with the statute—inconsistent Court of Appeal opinions construing critical portions of the statute. To the extent there are unnecessary motions and appeals filed, that can be traced to the lack of clear guidance in the face of such splits of authority.

A. Judicial Council data show that litigants are not systematically abusing the anti-SLAPP statute in the trial courts.

Critics of the anti-SLAPP statute observe that the pace of anti-SLAPP motions "shows no sign of slowing," and suggest that, given the amount of litigation it has engendered, the statute has created "a problem." Available data suggest a different view.

The Judicial Council maintains data on anti-SLAPP court filings, which is available upon request. (*Grewal v. Jammu* (2011) 191 Cal.App.4th 977, 998-999.) The data demonstrate that anti-SLAPP motions are little more than a tiny fraction of trial courts' civil dockets.

For example, between fiscal years 2010 and 2014, parties filed a total of 2,051 anti-SLAPP motions in trial courts, or roughly 410 anti-SLAPP motions per year on average. Given the 5,006,580 total civil filings over that same period, these 2,051 motions constitute only about 0.041% of total civil filings. (See Judicial Council of Cal., Admin. Off. of Cts., Rep. on Court Statistics (2015) Superior Courts Data for Figures 3-16, p. 70 (hereafter 2015 Court Statistics Report).)

Simply put, the data show that no systematic abuse of the anti-SLAPP statute is occurring. A comparison of anti-SLAPP motions to summary judgment motions is telling because an anti-SLAPP motion operates "like a motion for summary judgment in reverse." (*Comstock v. Aber* (2012) 212 Cal.App.4th 931, 947, quotation marks omitted.) "[C]ourts routinely render thousands of summary judgment motions annually" (Mullenix, *The 25th Anniversary of the Summary Judgment Trilogy: Much Ado About Very Little* (2012) 43 Loy. U. Chi. L.J. 561, 566)—which far exceeds the few hundred anti-SLAPP motions filed on average every year. That fewer anti-SLAPP motions are filed annually than their summary judgment counterparts corroborates the absence of systematic abuse.

B. Data also demonstrate that litigants are not systematically abusing the anti-SLAPP statute on appeal.

Anti-SLAPP critics place particular emphasis on the number of anti-SLAPP appeals that have been decided over the years, suggesting that the right to an immediate appeal from anti-SLAPP orders enables significant mischief. Again, data show that the anti-SLAPP statute's appellate provision is operating in the fashion intended by the Legislature.

To understand the right of appeal afforded by the anti-SLAPP law, it is important to appreciate the history and purpose of this provision.

Before 1999, orders denying anti-SLAPP motions could "only be reviewed by a writ until the proceedings in the trial court" were complete. (Braun, *Increasing SLAPP Protection: Unburdening the Right of Petition in California* (1999) 32 U.C. Davis L. Rev. 965, 1008.) In 1998, SLAPP scholars George Pring and Penelope Canan prepared a report that recommended amending the statute to include an immediate right of appeal from orders denying anti-SLAPP motions. (Braun, *California's Anti-SLAPP Remedy After Eleven Years* (2003) 34 McGeorge L. Rev. 731, 778-779 & fn. 280.)

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In response, the Legislature enacted Assembly Bill (AB) 1675, which provided that "[a]n order granting or denying a special motion to strike shall be appealable." (Stats. 1999, ch. 960, § 1.) The Legislature viewed the right to an interlocutory appeal as essential to protecting defendants from SLAPP suits. (See *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 193 *(Varian)*; *Doe v. Luster* (2006) 145 Cal.App.4th 139, 144-145.)

The enrolled bill report for AB 1675: (1) concluded that under then-existing law, appellate courts reviewed approximately 30 SLAPP motions each year; and (2) noted that "[t]he Judicial Council estimate[d] that the SLAPP appeals authorized in AB 1675 would result in an increase of approximately 90 additional cases per year." (Cal. Dept. of Finance, Enrolled Bill Rep. on Assem. Bill No. 1675 (1999-2000 Reg. Sess.) Sept. 16, 1999, p. 1.) In other words, the Legislature anticipated that appellate courts would consider a mere 120 or so anti-SLAPP appeals per year.

This prediction proved accurate. From 2010 to 2014, appellate courts decided between 105 and 123 appeals per year from orders granting or denying anti-SLAPP motions. (This number consists of both published and unpublished opinions that affirmed or reversed such an order in whole or in part.) These statistics confirm that appellate courts decide roughly the 120 anti-SLAPP appeals per year that the Legislature expected would result from inclusion of an immediate right of appeal in the anti-SLAPP statute.

Moreover, appellate courts issued written opinions in 585 anti-SLAPP appeals between fiscal years 2010 and 2014 out of a total of 48,403 appeals by written opinion for the same period, or 1.209%. (2015 Court Statistics Report, *supra*, Courts of Appeal Data for Figures 22-27, p. 67; Judicial Council of Cal., Admin. Off. of Cts., Rep. on Court Statistics (2012) Courts of Appeal Data for Figures 22-27, p. 70 (hereafter 2012 Court Statistics Report).)

Furthermore, although critics suggest that the anti-SLAPP statute is problematic because it permits appeals from orders denying anti-SLAPP motions, the data tell a different story. Of the 585 anti-SLAPP appeals decided between fiscal years 2010 and 2014, 269 were from orders that denied anti-SLAPP motions in their entirety. Appellate courts completely reversed the orders in 71 of these 269 appeals, or about 26%. The rate is often higher in certain years. For example, in fiscal year 2012, appellate courts decided 64 appeals from orders denying anti-SLAPP motions in their entirety, and they completely reversed 21 of those orders—a reversal rate of roughly 33%.

These reversal rates are markedly higher than the general reversal rate of 9% to 10% during this same period, and also higher than the general reversal rate of 17% to 19% in all civil cases. (See 2015 Court Statistics Report, *supra*, Courts of Appeal Figures 22-27, p. 26; 2012 Court Statistics Report, *supra*, Courts of Appeal Figures 22-27, p. 27.) Thus, the data confirm that defendants often need the right of immediate appeal to vindicate their right to early termination of meritless SLAPP suits because trial courts too often erroneously deny anti-SLAPP motions.

In sum, there is no evidence that the anti-SLAPP statute has fostered an explosion of abusive motions or appeals. Of course, the anti-SLAPP statute, like any other procedural device, can undoubtedly be abused and may thus result in frivolous motions and appeals. (See *Varian, supra*, 35 Cal.4th at p. 195.) But courts are well-armed to correct these occasional instances of abuse. (See *id.* at p. 196.)

C. The intermediate appellate courts foster uncertainty in the law, which multiplies anti-SLAPP appeals.

What some have characterized as abuses of the anti-SLAPP statute is often nothing more than litigants invoking the statute in areas where intermediate appellate courts disagree over whether, or the manner in which, the anti-SLAPP law applies.

Defining matter of public interest. The anti-SLAPP statute protects, among other things, speech and conduct undertaken "in connection with" an "issue of public interest." (Code Civ. Proc., § 425.16, subds. (e)(3)-(4).)

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Not long after the passage of this statute, the Supreme Court acknowledged that there could be "confusion and disagreement about what issues truly possess public significance" and that the test for an issue of public interest might "amount[ ] to little more than a message to judges and attorneys that no standards are necessary because they will, or should, know a public concern when they see it." (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1122 & fn. 9, quotation marks omitted.)

Since then, this "no standards" approach has proved unworkable. More than 60 published intermediate appellate court opinions have grappled with the question of what constitutes an issue of "public interest." (See Notes of Decision, West's Ann. Code Civ. Proc., foll. § 425.16 [heading "Public interest or significance"].) As one opinion noted, "[w]here the margins are drawn as to what constitutes an 'issue of public interest' . . . has been one of many subjects of anti-SLAPP jurisprudence which has garnered substantial judicial attention in the last several years." (*Thomas v. Quintero* (2005) 126 Cal.App.4th 635, 658.)

Some Courts of Appeal interpret "public interest" under a "restrictive test." (*Hilton v. Hallmark Cards* (9th Cir. 2010) 599 F.3d 894, 906.) Others take a broader view, concluding that an issue of public interest " 'is *any issue in which the public is interested.*' " (*Id.* at p. 907, fn. 10.) This discord recently led the Ninth Circuit to lament the entrenched conflict among these various tests as it struggled to discern the meaning of "public interest" under the anti-SLAPP statute. (*Id.* at pp. 906, 907, fn. 10.)

Affirmative defenses. Under prong two of the anti-SLAPP statute, "the plaintiff [must] establish[ ] that there is a probability that the plaintiff will prevail on the claim." (Code Civ. Proc., § 425.16, subd. (b)(1).) In this respect, plaintiffs must often confront affirmative defenses, like the litigation privilege. (See *Flatley v. Mauro* (2006) 39 Cal.4th 299, 323.) But Courts of Appeal are divided over whether a plaintiff opposing an anti-SLAPP motion bears the burden of overcoming an affirmative defense or whether the defendant instead bears the burden of proving the defense. (See *No Doubt v. Activision Publishing, Inc.* (2011) 192 Cal.App.4th 1018, 1029, fn. 4.)

Lawsuits against lawyers. As Justice Perluss recently catalogued (*Sprengel v. Zbylut* (2015) 241 Cal.App.4th 140, 158-163 (dis. opn. of Perluss, J.)), Courts of Appeal are deeply divided over whether the anti-SLAPP statute applies to lawsuits against lawyers for malpractice and other litigation activity, with some courts creating rules barring application of the anti-SLAPP statute for certain claims in seeming violation of the plain text of the statute (see *Mindys Cosmetics, Inc. v. Dakar* (9th Cir. 2010) 611 F.3d 590, 597-598).

* * *

The remedy for these splits of authority is not to blame the anti-SLAPP statute for fostering abusive litigation, to call for the law to be repealed wholesale, or for the evisceration of the vital right of immediate appeal. Rather, as with any other conflicts in the law, the California Supreme Court should step in to provide clarity and thereby reduce the number of motions and appeals these conflicts generate. In any event, given the serious damage caused by lawsuits that target the rights of petition and free speech, we should bend over backwards to ensure the people's right to speak freely is fully protected.

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practice in his 1977 Manual on Appellate Opinions: "The conventional theory is that an opinion should determine points raised by the parties and that it is wrong to inject new issues or apply legal principles neither urged nor mentioned by counsel. But the function of the appellate court is to decide the case, not to judge a debate between counsel; and, if an issue arises from the facts of the case, or if a legal principle may decide it, it may be considered even though it was overlooked or deliberately ignored by the parties." (Witkin, Manual on Appellate Court Opinions (1977) § 85, pp. 154-155.)

But he also acknowledged the "not unfamiliar complaint of a litigation lawyer" that courts should avoid unnecessarily injecting new points, quoting Moses Lasky: "A judge or a court has been awaiting a case in which to convert a pet notion into law or to denounce an aggravation. Along comes an actual controversy which hazily resembles what is needed for the purpose. It is seized upon, an opinion is rendered, and as a result the case described in the opinion is not what the parties thought they were litigating. The losing party is the innocent bystander who just happened to be in the way." (Witkin, *supra*, pp. 154-155.)

In 1986, the Legislature weighed in by enacting Government Code section 68081. It provides that prior to issuing a decision, "based upon an issue which was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing." And "[i]f the court fails to afford that opportunity, a rehearing shall be ordered upon timely petition . . . ." Despite this statutory enactment, there are still appellate courts that decide appeals on grounds the parties did not brief. Ten years after section 68081's enactment, one Court of Appeal felt compelled to express the "significant principle" that "judges, including appellate judges, are required to follow the law. In this case, the Appellate Department of the Los Angeles Superior Court decided a case on a point not raised by the parties, and without notice to the parties that it might do so." (*California Casualty Ins. Co. v. Appellate Department* (1996) 46 Cal.App.4th 1145, 1147 (*California Casualty*).)

In *California Casualty*, the defense in a court trial elicited an expert opinion over plaintiff's objection. On appeal, the defense argued the opinion was inadmissible and the error was prejudicial. Plaintiff responded there was no abuse of discretion and no prejudice. The appellate department scrutinized the record to determine if the expert opinion was admissible and in doing so also scrutinized the defense objection, concluding it was inadequate to preserve the issue for appellate review — an issue no party had asserted or briefed. The Court of Appeal held it was error to decide the case on that ground without warning the parties the court was considering that ground, and giving them an opportunity to brief it. (*California Casualty*, *supra*, 46 Cal.App.4th at p. 1149.)

So what is counsel to do when surprised by a new issue raised by the court at argument? Our advice is to object at the first hint of this. To be sure, counsel faces a dilemma when questioned at oral argument about an issue that was not briefed. On the one hand, counsel want to appear responsive to the court's concern and, if the issue appears adverse, might hope that it can be brushed aside. On the other hand, counsel may be unprepared to answer the question, and it may be wiser to object. Hoping the court might forget about a point that it came up with independently is probably not a good bet.

If you object, leave out the "Respectfully, Your Honor" part; just say, "That issue was not raised or briefed by the parties. I request the court issue a Government Code letter framing the issue and give the parties an opportunity to respond." If your objection is not heeded, and the decision comes down based on an unbriefed issue, petition for rehearing. If you do nothing, you leave any justice who would support you alone in the conference room to argue the error. And take heart that research attorneys are instructed to consult their justices if they identify an unbriefed issue that may be dispositive or substantially affect the result. (Judicial Council of Cal., California Court

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of Appeal Judicial Attorney Manual (3d ed. 2013) pp. 30-31.)

However, be mindful that there is a distinction between an unbriefed issue and different ways of framing or analyzing an issue. In *Plumas County Dept. of Child Support Services v. Rodriquez* (2008) 161 Cal.App.4th 1021, the court wrote that "Government Code section 68081 does not require us to give the parties the opportunity to brief every statute (or other authority) that we may apply in deciding the issues in their case, so long as the parties have had the opportunity to brief the issues themselves." (*Id*. at p. 1029, fn. 1.) This is a good reason to address adverse authority in your own brief — even if opposing counsel has missed it — because otherwise you may lose your best and maybe only opportunity to explain in writing why that authority does not apply to your case or is wrongly decided.

If your panel needs convincing that supplemental briefing is required, point out the benefits the court and the parties get from briefing as compared to a purely oral presentation. There is a reason that briefs are the main way counsel communicate with the court in modern practice. They allow thoughtful and thorough presentation of an issue. When an issue is decided without an opportunity for briefing, some significant problems arise. Counsel do not have time to prepare by researching the record and the law and reflecting on the results. Even when counsel are given notice of a new issue by a "focus letter" from the court prior to argument, there is a limit to what information can be conveyed during argument. In addition, there is a tendency for more liberties to be taken at argument by stating facts not in, or contrary to, the record. That may often be inadvertent and is something that can be avoided by the rigor that reducing an argument to writing compels.

In seeking additional briefing when truly needed, do not limit your efforts to convincing the court that Government Code section 68081 requires supplemental briefing. Remember, section 68081 entitles a party to relief only when an issue that neither party asserted or briefed is the basis for decision. That does not include every rule, principle or theory of law that the parties did not brief in discussing an issue. You may well be able to make the case that supplemental briefing should be received even if section 68081 does not require it. But if you hang your hat entirely on a contention that the court must do something, rather than that it should do something, you may regret it.

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YLD UPDATE

Aaron Bloom

Rachel Feldman

Ben Williams

The Young Lawyers Division is in the midst of another fantastic year. The YLD has hosted several successful and well-attended events so far, with additional exciting events on the horizon.

On April 27, the YLD hosted its annual judicial mixer at F.O.H. in downtown Los Angeles. The mixer, which presents a unique and rare opportunity for young lawyers to mingle with Los Angeles-area state and federal court judges, was attended by over 30 young lawyers and members of the judiciary. Rachel Feldman, YLD Co-Chair, aptly noted the chief benefit that the annual judicial mixer provides: "It permits young lawyers and distinguished members of the judiciary to strike up conversations in a relaxed, intimate setting—allowing young lawyers to get the judges' views on a range of topics. This year's mixer was no exception, and I'm pleased to report it was a great success."

On May 25, Steve Feldman of Hueston Hennigan hosted a superb YLD Insight Roundtable event, featuring Kimberly D. Harris, the executive vice president and general counsel of NBCUniversal. Before joining NBCUniversal, Ms. Harris served at the White House as Deputy Counsel to President Obama, and before that as a partner with Davis Polk & Wardwell in New York. Ms. Harris offered hilarious and helpful anecdotes about her own career path, her face-to-face brushes with the President, and her experience traveling aboard Air Force One. She also offered straightforward, poignant advice to young lawyers about how best to shape their career trajectories, position themselves for success, and balance demanding careers with demanding personal commitments. Ms. Harris offered unique insight into what general counsel expect of their outside lawyers on everything from responsiveness and acumen to demonstrated commitment to diversity and inclusion. More than 30 YLD members from throughout the city came to the event, and it received overwhelmingly positive reviews. YLD Co-Chair Ben Williams, who attended, said, "This was hands down one of the best roundtable events I've been to. Kim's advice about being open to career opportunities that come your way unexpectedly was spot-on, and her wit and sense of humor made the whole event not just informative, but fun. I'd love to see more roundtable events like this become a staple of the YLD program."

More YLD events are planned throughout the season, including an ethics seminar featuring a panel discussion and a screening of the 1992 hit movie My Cousin Vinny.

For questions about the YLD, please contact Rachel, Aaron, or Ben.

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