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PERSPECTIVE

California Supreme Court poised to consider anti-SLAPP catch-all framework

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Two years ago, the California Supreme Court unanimously decided *FilmOn.com Inc. v. Double-Verify Inc.* In that opinion, the court established a two-step framework to determine whether a defendant's alleged speech or other conduct is protected under California Code of Civil Procedure Section 425.16(e) (4) (the "catch-all provision") of California's anti-SLAPP statute. Later this term, *Geiser v. Kuhns* will present the court another opportunity to clarify what must be shown to establish anti-SLAPP protection. The court should use this opportunity to clearly distinguish between the first and second steps of the framework. The two steps are intended to consider (1) whether the defendant has identified an issue of public interest; and, if so, (2) whether the defendant's specific speech or other expressive conduct contributes in some manner to a public debate or discussion about that issue of public interest.

In *Geiser*, the court granted review to consider if "deference should be granted to a defendant's framing of the public interest" at the first step. It should answer that question in the affirmative. A court's inquiry at the first step should be limited to assessing whether the defendant has properly identified an

issue of public interest (such as a person in the public eye or general topic of widespread public interest). The second step requires a court carefully examine the nexus between the issue of public interest and the defendant's particular speech based on a consideration of the overall factual context. A clear roadmap for judicial analysis under the catch-all provision will further clarify a notoriously confusing and heavily fact-driven area of the law.

The Catch-All Provision in California's Anti-SLAPP Statute and FilmOn

California's anti-SLAPP statute is a powerful procedural device originally intended to prevent plaintiffs from using the legal system to chill another's exercise of free speech or petition rights. This statute — the broadest anti-SLAPP motion in the nation — permits a defendant to strike a complaint at the pleading stage if the claims arise out of certain protected activities.

When originally enacted in 1992, the anti-SLAPP statute protected three distinct categories of speech — speech that (1) took place in, or (2) in connection with, official governmental proceedings or (3) in public forums. Code Civ. Proc. Section 425.16(e)(1)-(3). In 1997, the statute was amended to add a fourth category known as the "catch-all" provision. It is "both broader in scope" and "less firmly anchored to any partic-

ular context" than the original three categories. This catch-all provision protects "any other conduct in furtherance of the exercise of the constitutional right ... of free speech in connection with a public issue or an issue of public interest." Code Civ. Proc. Section 425.16(e)(4). Since the 1997 amendment, litigants and the courts have struggled — with the catch-all provision in particular — to determine when speech is protected. Because the anti-SLAPP statute provides that it "shall be construed broadly," much of the uncertainty has resulted in an overbroad application of the statute. This has caused some to suggest that the anti-SLAPP "cure has become the disease." *Navellier v. Sletten*, 29 Cal. 4th 82, 96 (2002) (Brown, J., dissenting).

In 2019, the *FilmOn* court found "a statement is made 'in connection with' a public issue for the purposes of the catch-all provision when it ... 'participat[es]' in or furthers — some public conversation on the subject." The court established the following two-step analysis: "First, we ask what 'public issue or ... issue of public interest' the speech in question implicates — a question we answer by looking to the content of the speech." "Second, we ask what functional relationship exists between the speech and the public conversation about some matter of public interest," which requires a "relatively careful analysis" of the par-

ticular speech at issue and the entire factual context, including the identity of the speaker, identity of the audience and purpose of the speech. *FilmOn.com Inc. v. Double-Verify Inc.*, 7 Cal. 5th 133, 145-51 (2019).

Geiser and the FilmOn Framework

Defendants in *Geiser* are former homeowners who had lost their home through foreclosure and eviction, as well as a director of a non-profit. Plaintiff had acquired the home in a foreclosure sale and had subsequently evicted the former homeowner defendants. Following eviction, defendants sought to negotiate repurchase of their former home from the plaintiff. Plaintiff refused to communicate with defendants. The former homeowners then, with the assistance of a housing rights organization and a small group of supporters, staged a sit-in inside the lobby of plaintiff's private office building and subsequently held a demonstration outside the residence of plaintiff's principal. The purpose of these demonstrations was to convince the plaintiff to negotiate a sale of the home back to the former homeowner defendants. But instead of engaging in any negotiation, plaintiff sued to obtain restraining orders and filed a civil lawsuit for trespass and other claims against the former homeowners and certain of their supporters. Defendants brought anti-SLAPP motions under

the catch-all provision, arguing that the plaintiff had improperly sued them for protesting unfair real estate practices that displace residents.

On appeal before the 2nd District Court of Appeal, the majority assumed that unfair residential real estate practices is an issue of public interest. Although a finding to this effect should have been sufficient to satisfy the first step of the *FilmOn* framework, the majority went on to examine the content of the defendants' speech and their motivations. The court ruled that the purpose of that speech was to negotiate a repurchase of the family's home, which was a "purely private matter" and did not therefore implicate an issue of public interest. *Geiser v. Kuhns*, B279738 (Cal. Ct. App., Aug. 30, 2018).

The majority should have examined the nexus between defendants' speech and the issue of public interest at the second step based on an examination of the entire factual context. *FilmOn* criticized decisions that attempt to discern the true meaning of speech based on the content of the speech alone as "less than satisfying[.]" *FilmOn. com Inc. v. DoubleVerify Inc.*, 7 Cal. 5th 133, 149 (2019). Dissenting Justice Lamar Baker explained the flaw in the *Geiser* analysis: "even if helping the [evicted tenants] were the only objective, the way in which defendants and the other protesters hoped to achieve it was by connecting the[ir] individual plight to public interest in, and disapproval of, long-time community resident displacement and unfair foreclosure

practices." 7 Cal. 5th at 149. Indeed, the act of protesting itself conveys a message designed to attract public attention. In addition to protecting written and spoken speech, the catch-all provision expressly applies to "other conduct," which surely captures expressive conduct.

Surely, a defendant cannot avoid legal liability for misconduct merely by characterizing that conduct as a protest. But where a protest connects to a larger issue of public interest, speech and conduct related to that protest may well be protected under the anti-SLAPP catch-all provision. To determine whether such speech is protected, courts should closely scrutinize a defendant's claim that its speech or other conduct has contributed to a public debate on an issue of public

interest. Under the catch-all provision, however, that scrutiny should take place at the second step of the *FilmOn* framework where the entire factual context is examined. ■

Ryan Baker, Scott Malzahn and Chloe George are attorneys at Waymaker LLP (formerly Baker Marquart LLP), a trial and appellate boutique based in Los Angeles. The firm has extensive experience handling anti-SLAPP motions on both the defense and plaintiff-side and successfully represented *FilmOn* in *FilmOn v. DoubleVerify* before the California Supreme Court, which resulted in a unanimous decision that established a two-part framework for analyzing anti-SLAPP cases under the catchall provision.