JANUARY 2003

DEFAMATION AND PRIVACY TORTS . FIRST AMENDMENT . INTELLECTUAL PROPERTY . NEW MEDIA . TELECOMMUNICATIONS . DEFAMATION AND PRIVACY TORTS . FIRST AMENDMENT .

First Amendment LAW LETTER

KID GLOVES: INTERVIEWING AND REPORTING ON MINORS

BY VICTOR A. KOVNER AND JENNIFER L. BROCKETT

Minors are always in the news. 2002 has featured stories on kidnapped children, sexual abuse by members of the clergy, foster children lost by their social workers, the dating habits of teenage pop-stars, and a seventeen year-old alleged serial sniper. Relying on children as news sources about non-controversial events is not problematic. But conducting or publishing interviews with minors about sensitive subjects, or about their own involvement in controversial events, poses legal risks not present when adults provide information. Those risks center on two primary issues: whether the minor legally can give binding consent to an interview or photograph, and whether the newsgathering process infringes on the minor's privacy rights or emotional well-being.

Who is a minor?

When publishing sensitive material derived from an apparent minor, a threshold question is whether the individual is, in fact, old enough legally to consent to an interview or a photograph. This question is a matter of state contract law. In most states, for purposes of contracting and consent, children are considered minors until they turn 18. However, in some states the minor will be able to consent to a contract if the minor is over 16 and married, or is emancipated. It is best to

CONTINUED ON NEXT PAGE

CALIFORNIA SUPREME COURT AFFIRMS EXPANSIVE READING OF ANTI-SLAPP STATUTE

BY KELLI SAGER AND ROCHELLE WILCOX

In late August 2002, the California Supreme Court issued three decisions that broadly reaffirm the reach of California's anti-SLAPP statute. The decisions strengthen the protection for expressive activities by confirming that the statute applies to any lawsuit arising from a defendant's exercise of First Amendment rights – even where the plaintiff did not subjectively intend to chill the defendant's expression, and even where the defendant's expression is alleged to be a breach of confidentiality or otherwise unlawful.

The anti-SLAPP statute, California Code of Civil Procedure § 425.16, was enacted in 1992 in response to "a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." *Id.* § 425.16(a). Under this statute, if a defendant can demonstrate that the lawsuit arises from an act "in furtherance of the person's rights of petition or free speech under the United States or California Constitution in connection with a public issue," the lawsuit must be dismissed unless the plaintiff can demonstrate a probability of prevailing on its claims. *Id.* § 425.16(b). The California Legislature defined the conduct that constitutes an "act in furtherance of the person's rights of petition or free speech" and thereby provided a "bright line test" for determining whether a particular claim is

CONTINUED ON PAGE SEVEN

Davis Wright Tremaine LLP

KID GLOVES
CONTINUED FROM PAGE ONE

review the law in the state in which the child resides. As a practical matter, however, the age of the minor – emancipated or not – may influence the court in assessing the weight to be accorded to the rights, privacy interests and possibly the mental health of the child.

Moreover, in some special situations a minor may not be lawfully interviewed without the consent of his or her parent or guardian. For example, Utah law provides that "[n]o person other than a probation officer or a staff member of a detention facility shall be permitted to interview a minor 14 years of age or older in a detention facility without the consent of the minor and the minor's parent, guardian or custodian …" Utah Rule of Juvenile Procedure 8(d). If a reporter intends to interview a child in juvenile detention, foster care or other unusual custodial situation, one should assess whether special rules of consent apply.

A minor's capacity to execute a binding contract also arises when a publisher seeks to acquire rights to material developed by the minor. Many states recognize the general rule that an "infant" has the right to disaffirm a contract even when the contract has been entered into on behalf of the infant by a parent or guardian. *E.g.,* New York General Obligations Law § 3-101; *see, e.g., Olshen v. Kaufman,* 385 P.2d 161, 235 Or. 423 (1963). The right to disaffirm is not absolute. A person who has paid for property is entitled to return of the amounts paid, and possibly to damages. 1 Williston, CONTRACTS (rev. ed.) 765 § 238. In any event, while parental consent to an interview usually will suffice to permit a daily or monthly publication to print an interview, if one seeks or acquires a minor's rights to material for a book or motion picture, even a parent's or guardian's approval will not deprive the minor of the right to disaffirm the contract upon obtaining majority. In some circumstances, assignment of the minor's rights to a corporation controlled by the minor, approved by a parent, guardian or court, may limit the risk of voidability by the minor after attaining majority.

Publication of the identity of minors in sensitive contexts

Articles that portray an identifiable minor in a potentially unfavorable light may be actionable. Two controversial decisions, *M.G., a minor v. Time Warner, Inc.,* 89 Cal. App. 4th 623, 107 Cal. Rptr.2d 504 (2001), *petition for review denied,* 2001 Cal. Lexis 6289 (Cal. Sup. Ct. 2001), and *Hawkins v. Multimedia, Inc.,* 344 S.E.2d 145, 288 S.C. 569 (1986), illustrate how courts may react – and arguably overreact – to portrayals of identifiable minors in sensitive situations, even where the material is based on publicly available sources of information.

In *Hawkins,* Multimedia published a newspaper story concerning teenage pregnancies. While most of the article focused on an unmarried teenage mother, a sidebar identified the plaintiff as the teenage father of her illegitimate child. A jury awarded the plaintiff both compensatory and punitive damages for publication of intimate private facts. Multimedia on appeal argued that the "right of privacy does not prohibit the publication of matter which is of legitimate public or general interest," arguing that teenage pregnancies meet this test. The court, however, held that "[p]ublic or general interest does not mean mere curiosity, and newsworthiness is not necessarily the test. … Ordinarily, whether a fact is a matter of public interest is a question of fact to be decided by the jury. We see no error in submitting this issue to the jury." *Hawkins,* 288 S.C. at 571-72 (citations omitted); *accord, Meetze v. Associated*

Press, 95 S.E.2d 606, 230 S.C. 330 (1956) (report of 12-year old giving birth). In other words, the minor's identity as a teenage father of an illegitimate son, accurately reported, was deemed not newsworthy as a matter of law.

More recently, the California Court of Appeal in *M.G.* reached a similar conclusion. There, *Sports Illustrated* and *Real Sports,* a program of HBO, each used a 1997 Little League team photograph to illustrate stories about adult coaches who sexually molested youths playing team sports. The photograph depicted Norman Watson, the team manager, who had pled guilty to molesting five children he had coached in Little League, together with the team and its coaches. Neither publication named any of the people in the photograph except Watson, and neither identified any of Watson's victims by his or her real name. The team members who had been molested asserted claims for publication of private facts; and those who had not been molested and three coaches depicted in the photograph asserted false light claims.

As to the private facts claim, Time Warner first argued that the team photograph was not private, and that disclosure of information which is public cannot support a private facts claim. As Time Warner argued, the plaintiffs had played a public sport; the photograph had been taken on a public baseball field, where anyone could have watched; it had been widely reported that Watson coached the Little League team; and Watson had admitted to molesting Little League players. In affirming the denial of a motion to strike under California's anti-SLAPP statute, the court adopted a questionable theory:

> Time Warner apparently equates "private" with "secret" and urges any information not concealed has been made public. But the claim of a right of privacy is not " 'so much one of total secrecy as it is of the right to *define* one's circle of intimacy – to choose who shall see beneath the quotidian mask.' " Information disclosed to a few people may remain private.
>
> In the present case, none of the previous media coverage specifically identified plaintiffs as team members. Nor, as the trial court observed, is there evidence in the record that the team photograph was ever widely circulated.

M.G., 89 Cal. App. 4th at 632-633 (citations omitted).

Time Warner also argued that the use of the photograph was protected because the material was newsworthy. In California, "lack of newsworthiness" is "an essential element of a cause of action based upon a claim that publication has given unwanted publicity to allegedly private aspects of a person's life." *Id.* at 635. Time Warner argued the photograph was newsworthy because "showing visually that *any* child who plays sports could be placed in harm's way, the team photos underscore the warnings of the experts featured in the Article and Broadcast." *Id.* The *M.G.* court rejected this contention on the ground that even if the issue – molestation of children playing team sports – was newsworthy, the team photograph was not:

> State law contains many statutes prohibiting the disclosure of the identity of both minors and victims of sex crimes. Public policy favors such protection – as does the journalism profession. Plaintiffs supplied declarations from two journalism experts in which they confirm that use of the faces of the team members was not consonant

> with journalistic standards and practices. Plaintiffs also submitted examples of how the faces in the team photograph could have been obscured.
>
> Furthermore, the article and the program in themselves demonstrate the team members' faces should have been concealed. Although the program showed footage of boys playing baseball, it did not show their faces but photographed them without their faces showing. In the program and the article, the victims were given pseudonyms unless they consented to using their real names.

Id. at 635-636. The court thus used the publisher's precautions as the basis for a legal requirement, again apparently without substantial authority. Plainly, the youth of the plaintiffs contributed to the unusual finding.

Other courts, however, have taken a more reasoned approach. For example, in *Cape Publications, Inc. v. Hitchner,* 549 So. 2d 1374 (Fla. 1989), the Florida Supreme Court held that a newspaper and its reporter could not be held liable for invasion of privacy for the publication of an article including lawfully obtained but confidential information about alleged child abuse following a child abuse trial. In *Hitchner,* the plaintiffs had been prosecuted for child abuse for "maliciously punishing" their daughter by scrubbing her bottom with a steel wool pad. Following entry of a directed verdict in favor of the parents, the reporter interviewed the prosecutor and was permitted to review the prosecutor's case file. That case file included additional allegations of abuse – such as the child's claim that she was "whipped" with paddles, forced to eat hot chili peppers when she lied, and that the child bore three cigarette burn marks – which the reporter included in an article about the trial. Florida law, however, provided that all "records concerning reports of child abuse or neglect" are confidential, and "shall not be disclosed." Fla. Stat. § 827.07. Thus, while the reporter lawfully obtained the information, it was confidential and should not have been provided to him by the prosecutor. The parents asserted a private facts claim.

The trial court found that the information was "private as a matter of law" because the prosecutor was required to maintain the confidentiality of the information, and that, for the same reason, the information was not a matter of public concern. Florida's Supreme Court, however, disagreed, holding that "[t]he public's right to know assumes special importance where judicial proceedings are concerned" – even though the challenged information had not been presented at the criminal trial, but had only been introduced in the case file. *Hitchner,* 549 So. 2d at 1378. The court emphasized the important role of the press as "the handmaiden of effective judicial administration," noting that the press "guards against miscarriage of justice by subjecting police, prosecutors, and judicial processes to extensive public scrutiny and criticism." *Id.* at 1378, quoting *Landmark Comm., Inc. v. Virginia,* 435 U.S. 829, 839 (1978). The court concluded:

> We underscore the fact that the information published by Cape was lawfully obtained; it was freely given by government officials and thus was legitimately within the public domain.

Id. at 1379.

The similarities between *Hitchner* and *M.G.* are striking – indeed, in *M.G.* the Little League team photograph was arguably entitled to *less* protection than the records at issue in *Hitchner,* which were made confidential by state statute.

For more information on DWT's Communications, Media and Information Technologies Department, contact your DWT attorney at any of our offices below or call us on our toll-free client line at:

(877) 398-8415

Anchorage, AK
(907) 257-5300

Bellevue, WA
(425) 646-6100

Honolulu, HI
(808) 538-3360

Los Angeles, CA
(213) 633-6800

New York, NY
(212) 489-8230

Portland, OR
(503) 241-2300

San Francisco, CA
(415) 276-6500

Seattle, WA
(206) 622-3150

Washington, DC
(202) 508-6600

Shanghai, China
011-86-21-6279-8560

or visit our website at
www.dwt.com

Unlike the California court in *M.G.*, the Florida court in *Hitchner* recognized the important function of the press in reporting on child abuse, the public nature of the information, and the public interest in articles addressing child abuse cases. One distinguishing factor is that *M.G.* involved a claim by the victims of child abuse, while *Hitchner* involved a claim by adults who admitted to using harsh disciplinary methods on their daughter. Plainly, the age of the *M.G.* plaintiffs influenced the *M.G.* court.

Hawkins and *M.G.* would not necessarily be followed in many jurisdictions. They illustrate, however, that where there is doubt as to whether the minor or the minor's parents would consent to the use of the minor's name, photograph, or other identifying information in a sensitive context, it is prudent to consider using pseudonyms or obscuring the photograph.

Newsgathering from minors

The very process of interviewing children about disturbing subjects requires special care – especially when a parent's prior consent has not been obtained. For example, in *KOVR-TV, Inc. v. Superior Court,* 31 Cal. App. 4th 1023, 37 Cal. Rptr.2d 431 (1995), a television reporter and cameraman knocked on the door of the plaintiff's house. The door was answered by Jennifer (age 11), Amanda (age 7) and Mandy (age 5); no parents were home. With the camera rolling, the reporter first learned that Jennifer, Amanda and Mandy knew the children next door and played with them. He then told the minors – on camera – that their neighbor had murdered her own two children before committing suicide. The reporter then solicited the reaction of the children to the death of their playmates. KOVR did not broadcast the interview.

The children sued KOVR for intentional infliction of emotional distress. KOVR argued that any imposition of liability based on the conduct disclosed in the video tape infringed upon the First Amendment freedoms of speech and press, arguing that the reporter "was simply 'relaying truthful information,' and that any sanction would be inimical to a free press." 31 Cal. App. 4th at 1032. The court gave this argument short shrift, noting:

> There were no adults in the home and the minors were obviously too young either to consent to an intrusion by strangers into a private residence or to exercise any control over strangers who appeared there. It does not appear that they were given any choice as to whether their images and voices would be captured on video tape and broadcast publicly on television. The video tape reveals an uninvited, intrusive encounter by adult strangers with children of tender years not in a public place but in their home. A jury could conclude that these facts reveal an "alarming absence" of sensitivity and civility.

Id. at 1029-1030 (citations omitted). The court concluded: "A free press is not threatened by requiring its agents to operate within the bounds of basic decency." *Id.* at 1032. The *KOVR* court found it irrelevant that the station had not broadcast the interview, since the emotional distress occurred when the children were "confronted" and videotaped by the reporter.

KOVR serves as a reminder that activity which could well be lawful when directed toward adults may be found invasive or actionable when directed toward children. A journalist can minimize such risks by obtaining the

consent of the minor's parent or legal guardian, especially where the subject of the interview itself may be disturbing to the child.

Exercise caution

The bottom line is that when newsgathering involves obtaining sensitive or controversial information from minors, or reporting on the activities of minors, caution is required. Especially where the article may be distressful to, or reflect badly upon, the minor, it is appropriate to evaluate whether the identification of the minor is essential to the story.

ABOUT THE AUTHORS

Victor A. Kovner is a senior partner in DWT's New York office. He focuses his practice on communications law, intellectual property and commercial litigation. Mr. Kovner provides counsel to many major publishers of newspapers, magazines and books, and has worked with national and regional broadcast clients in all aspects of communications law. His representative clients include Random House, St. Martin's Press, Magazine Publishers of America, Wenner Media, Village Voice Media, Ziff Davis Media, New York Daily News, HarperCollins, Employers Reinsurance and Media Professionals.

Victor can be reached at (212) 603-6451 or victorkovner@dwt.com.

Jennifer L. Brockett is an intellectual property, media and commercial litigation associate in DWT's Los Angeles office. Jennifer has represented motion picture and television studios in litigation and at trial regarding copyright infringement, and international ownership of copyrights and related rights. She also provides regular counsel on copyright and trademark protection and infringement, as well as privacy and trade secret issues.

Jennifer can be reached at (213) 633-6860 or jenniferbrockett@dwt.com.

ANTI-SLAPP DECISIONS

CONTINUED FROM PAGE ONE

subject to the statute. *Briggs v. Eden Council,* 19 Cal. 4th 1106, 1120-21 (1999). Protected conduct includes:

> (a) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

Cal. Code Civ. Proc. § 425.16(e).

In 1997, in response to a series of cases that attempted to limit the reach of the anti-SLAPP statute, the Legislature amended the statute to provide that it "shall be construed broadly." *Id.* § 425.16(a). Nonetheless, before the Supreme Court's recent decisions, a split had developed among California's Courts of Appeal regarding whether a court evaluating a motion brought under Section 425.16 should consider the plaintiff's subjective motivations for bringing the lawsuit. Some cases held that the statute applied only if the plaintiff, in bringing its claim, *intended* to chill defendant's rights of free speech or petition. *E.g., Foothills Townhome Ass'n v. Christiansen,* 65 Cal. App. 4th 688, 76 Cal. Rptr. 2d 516 (1998). Other cases rejected these or similar requirements, finding that they were not supported by the language of the statute. One court explained:

> We find nothing in the statute requiring the court to engage in an inquiry as to the plaintiff's subjective motivations before it may determine the anti-SLAPP statute is applicable.... The fact the Legislature expressed a concern in the statute's preamble with lawsuits brought "primarily" to chill First Amendment rights does not mean that a court may add this concept as a separate requirement in the operative sections of the statute.

Damon v. Ocean Hills Journalism Club, 85 Cal. App. 4th 468, 480, 102 Cal. Rptr. 2d 205 (2000) (citations omitted).

Another area of disagreement among the Courts of Appeal was whether the purported illegality or wrongfulness of the defendant's actions is relevant in determining whether the anti-SLAPP statute applies. One case had held that the statute did not apply if the defendant admitted that its actions underlying the lawsuit were illegal. *Paul for Council v. Hanyecz,* 85 Cal. App. 4th 1356, 102 Cal. Rptr. 2d 864 (2001). In another case, the court rejected the plaintiff's argument that the statute did not apply because the defendant's alleged disclosure of privileged and confidential documents was not constitutionally protected. *Fox Searchlight Pictures, Inc. v. Paladino,* 89 Cal. App. 4th 294, 305, 106 Cal. Rptr. 2d 906 (2001). The court found that the argument "confuses the threshold question of whether the SLAPP statute applies with the question whether Fox has established a probability of success on the merits." *Id.*

To resolve these disputes, the California Supreme Court granted review in three cases, *Equilon Enterprises, LLC v.*

Consumer Cause, Inc., 29 Cal. 4th 53, 124 Cal. Rptr. 2d 507 (2002); *City of Cotati v. Cashman,* 29 Cal. 4th 69, 124 Cal. Rptr. 2d 519 (2002); and *Navellier v. Sletten,* 29 Cal. 4th 82, 124 Cal. Rptr. 2d 530 (2002). The Court explained:

> We granted review in this trio of cases in order to maximize the clarity and guidance respecting application of the anti-SLAPP statute the full group of decisions may provide to bench and bar.

City of Cotati, 29 Cal. 4th at 72 n.2.

Equilon was the primary decision, and laid the groundwork for the other two cases. In this case, Equilon filed a complaint for declaratory and injunctive relief in response to intent-to-sue notices filed by Consumer Cause, Inc., alleging illegal groundwater pollution. In response, Consumer Cause filed a SLAPP motion. Equilon argued that its case was not a SLAPP suit because its motives in bringing the underlying lawsuit were simply to clarify its obligations under the anti-pollution law, not to "chill" Consumer Cause's First Amendment rights. The Court unanimously rejected the argument, explaining,

> [T]he only thing the defendant needs to establish to invoke the [potential] protection of the SLAPP statute is that the challenged lawsuit arose from an act in furtherance of her right of petition or free speech. From that fact the court may [effectively] presume the purpose of the action was to chill the defendant's exercise of First Amendment rights. It is then up to the plaintiff to rebut the presumption by showing a reasonable probability of success on the merits.

Id. at 61 (citation, internal quotes omitted; brackets in original). Relying on both the plain language of the statute and the legislative history, the Court concluded,

> [O]ur anti-SLAPP statute utilizes a reasonable, objective test that lends itself to adjudication on pretrial motion. Such early resolution is consistent with the statutory design "to prevent SLAPPs by ending them early and without great cost to the SLAPP target."

Id. at 65 (citation omitted).

Consequently, the Court held that Equilon's allegedly "pure intentions" in suing Consumer Cause were "ultimately beside the point" because Equilon's lawsuit "expressly was based on Consumer Cause's activity in furtherance of its petition rights."

Id. at 67-68.

In *City of Cotati,* the Court reiterated *Equilon's* ruling that no showing of "intent to chill" is required under the anti-SLAPP statute. 29 Cal. 4th at 75. The Court then went further, rejecting the plaintiff's argument that a defendant should be required to show that the plaintiff's suit *actually* had a chilling effect on defendant's exercise of its rights, holding:

> The same considerations of law and policy, generally, that bar judicial imposition on the anti-SLAPP statute of an intent-to-chill proof requirement bar judicial imposition of a chilling-effect proof requirement. ... Here, as in *Equilon, supra,* 29 Cal. 4th 53, the plain language of the statute and indicia of legislative intent preclude any such requirement.

Id. (citations omitted).

The Court ultimately held that the statute did not apply in *City of Cotati* because the lawsuit did not "arise from" protected activity. The City of Cotati had filed a declaratory relief action in state court regarding the validity of an ordinance after a similar action had been filed in federal court. The City admitted it was forum shopping; however, the Court held that this did not make the state court action a SLAPP suit because the City's "subjective intent ... is not relevant under the anti-SLAPP statute." *Id.* at 78. The Court explained

> [T]he statutory phrase "cause of action ... arising from" means simply that the defendant's act underlying the plaintiff's cause of action must itself have been an act in furtherance of the right of petition or free speech. ... In the anti-SLAPP context, the critical point is whether the plaintiff's cause of action itself was based on an act in furtherance of the defendant's right of petition or free speech."

Id. Because the City's suit was based on the ordinance and sought declaratory relief regarding its validity, it was not a SLAPP suit. *Id.* at 80. In contrast, *Equilon* had arisen "from Consumer Cause's activity in furtherance of its constitutional rights of speech or petition-viz., the filing of Proposition 65 intent-to-sue notices." 29 Cal. 4th at 67. It was a SLAPP suit because it directly challenged that activity.

Navellier was the Court's final and most expansive decision. 29 Cal. 4th 82. In *Navellier,* the majority of the Court held that an action grounded on purported wrongs by the defendant in an earlier lawsuit did "arise from" the defendant's protected activity in connection with a judicial proceeding and therefore was potentially subject to the anti-SLAPP statute. The plaintiff in *Navellier* had alleged fraud in connection with defendant's negotiation, execution and repudiation of a release in an earlier action, and also alleged a claim for breach of contract based on the defendant's filing of counterclaims in that action notwithstanding the release. *Id.* at 86-87. Citing *Equilon,* the Court again rejected the "intent to chill" argument on which the Court of Appeal had relied. *Id.* at 88-89. The Court then held that the case arose out of defendant's rights of petition because both claims were based on actions in connection with a judicial proceeding. The Court noted that "Sletten is being sued because of the affirmative counterclaims he filed in federal court" and thus the action "falls squarely within the ambit of the anti-SLAPP statute's 'arising from' prong."

Id. at 90.

Moving beyond the issues underlying *Equilon* and *Cotati,* the Court then rejected a number of arguments designed to limit the reach of the statute. First, the Court held that the statute applies to all causes of action. Plaintiff had argued that the case was "'a garden variety breach of contract and fraud claim' not covered by section 425.16." *Id.* at 90. The Court disagreed:

> Nothing in the statute itself categorically excludes any particular type of action from its operation, and no court has the power to rewrite the statute so as to make it conform to a presumed intention which is not expressed.... For us to adopt such a narrowing construction, moreover, would contravene the Legislature's express command that section 425.16 "shall be construed broadly."

Id. at 92 (citations omitted).

> The anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action

> but, rather, the defendant's activity that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning.

Id.

Next, the Court rejected plaintiff's argument that the statute should not be applied because it would effectively immunize from suit anyone who breached a release agreement. In making this argument, the Court explained, "plaintiffs fall prey ... to the fallacy that the anti-SLAPP statute allows a defendant to escape the consequences of wrongful conduct by asserting a spurious First Amendment defense." *Id.* at 93 (citation omitted). The Court pointed out that the statute's test is two-pronged, and the plaintiff still can pursue its claims if it can establish they "possess minimal merit." *Id.* (citation omitted).

> In fact, the statute does not bar a plaintiff from litigating an action that arises out of the defendant's free speech or petitioning ...; it subjects to potential dismissal only those actions in which plaintiff cannot "state[] and substantiate[] a legally sufficient claim."

Id. (citation omitted). Thus, a complaint may not be stricken if it "is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited."

Id. (citation omitted).

Finally, the Court rejected the plaintiff's argument that the anti-SLAPP statute did not apply because the defendant's actions were not "valid." The Court explained that the "validity" of the defendant's conduct was relevant only to the second prong of the statute, not in determining its application:

> That the Legislature expressed a concern in the statute's preamble with lawsuits that chill valid exercise of First Amendment rights does not mean that a court may read a separate proof-of-validity requirement into the operative sections of the statute.... Rather, any "claimed illegitimacy of the defendant's acts is an issue which the plaintiff must raise and support in the context of the discharge of the plaintiff's [secondary] burden to provide a *prima facie* showing of the merits of the plaintiff's case.

Id. at 94 (citations omitted; emphasis in original). The Court went on to explain that "[i]f this were the case then the [secondary] inquiry as to whether the plaintiff has established a probability of success would be superfluous." *Id.* (citations omitted). The Court then remanded for consideration of whether the plaintiff could establish a probability of prevailing in the suit, which the trial court had not addressed.

This trio of decisions builds upon the California Supreme Court's earlier mandates that the anti-SLAPP statute be applied broadly and with strict adherence to its language. *Briggs v. Eden Council for Hope & Opportunity,* 19 Cal. 4th 1106, 81 Cal. Rptr. 2d 471 (1999) (no "public interest" requirement may be read into sections of statute that do not contain that requirement); *Ketchum v. Moses,* 24 Cal. 4th 1122, 104 Cal. Rptr. 2d 377 (2001) (fee-shifting in favor of successful defendant mandatory under statute's plain language). In the 10 years since the statute was enacted, the Court three times has granted review of SLAPP cases to resolve disputes among the Courts of Appeal and ensure that the statute is applied broadly. These decisions and the Legislature's 1997 amendment of the statute to direct that it be

"construed broadly" demonstrate that the state's highest court, and the legislature, stand firmly behind the statute's current expansive scope.

ABOUT THE AUTHORS

Kelli L. Sager, a partner in DWT's Los Angeles office, has 17 years of experience in all aspects of media and entertainment litigation, including defamation, privacy, copyright, and reporters' shield laws. Ms. Sager's representative clients include The New York Times Company, The Los Angeles Times, E! Entertainment Television, Paramount Pictures Corporation, Conde Nast Publications Inc., Courtroom Television Network, MTV Networks and Warner Brothers.

Kelli can be reached at (213) 633-6821 or kellisager@dwt.com.

Rochelle L. Wilcox, a litigation associate with DWT's Los Angeles office, lives and works in Sacramento. Ms. Wilcox practices in the area of media law, defamation, invasion of privacy, newsgathering torts, access, and reporters' shield laws. In addition, she practices general business litigation, including contract disputes, fraudulent transactions and employment litigation.

Rochelle can be reached at (213) 633-6883 or rochellewilcox@dwt.com.

FIRST AMENDMENT LAW SERVICES AT DAVIS WRIGHT TREMAINE

DWT's Communications, Media and Information Technologies Department is experienced in the full range of legal issues facing the media, telecommunications, technology and related industries. Our attorneys assist broadcasters, publishers and journalists in all aspects of media law, including pre-publication review, access to courtrooms and public records, newsroom subpoenas and defamation, and invasion of privacy defense. We provide counseling, regulatory, business and litigation services for national and regional clients in the telecommunications, entertainment and computer industries and our First Amendment and intellectual property lawyers represent advertisers nationwide.

This *First Amendment Law Letter* is a publication of the law firm of Davis Wright Tremaine LLP and is prepared by its Communications, Media and Information Technologies Department, Daniel M. Waggoner and Victor A. Kovner, Co-Chairs, Eric M. Stahl, Editor, and Alonzo Wickers IV, Associate Editor.

Our purpose in publishing this law letter is to inform our clients and friends of recent First Amendment and communications law developments. It is not intended, nor should it be used, as a substitute for specific legal advice since legal counsel may be given only in response to inquiries regarding particular factual situations.

To change your address or to receive additional information, please contact Margaret Roberts in our Seattle, Washington office at margaretroberts@dwt.com.

Copyright © 2002
Davis Wright Tremaine LLP

Printed on Recycled Paper

Davis Wright Tremaine LLP
2600 Century Square
1501 Fourth Avenue
Seattle, Washington 98101-1688

FIRST CLASS
PRE-SORT
U.S POSTAGE PAID
SEATTLE, WA
PERMIT NO. 1538

FUTURE ADVISORY BULLETINS VIA EMAIL

We invite you to become part of our growing database of subscribers who choose to receive our First Amendment Law Letter via email. Electronic delivery will keep you on the cutting edge of industry issues and reduce the amount of paper on your desk.

To take advantage of this service, please send an email to: FirstAmendmentLawLetter@dwt.com.

Be sure to include your full name, title, company, mailing address and phone number in the message area of the email.

www.dwt.com

Davis Wright Tremaine LLP