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Amici Take Issue With Anti-SLAPP 'Dicta'

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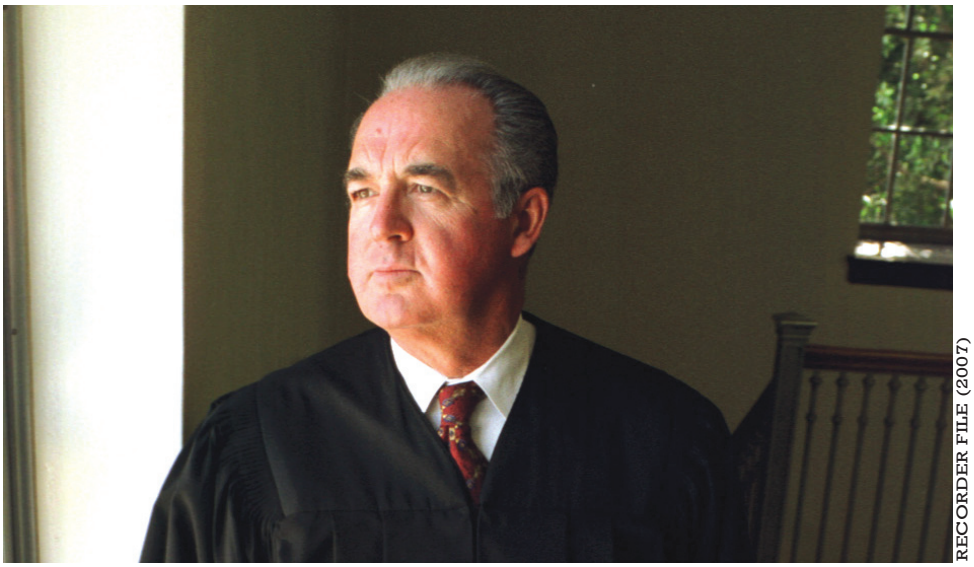

RECORDER FILE (2007)

SAN FRANCISCO — Two months ago, First District Court of Appeal Justice James Richman teed off on the "abuse" of California's anti-SLAPP law.

After siding with a court interpreter who sued an ethnic newspaper for libel, Richman then tore into the process, citing the voluminous briefs in the case, the expense of the appeal and the proliferation of anti-SLAPP appeals statewide. He recommended the Legislature do something about the heavy-handed use of the law, saying the briefing in the case shows "how burdensome a misguided anti-SLAPP motion can be."

In its 19 years, the anti-SLAPP law has spawned all sorts of precedents and has morphed, even some backers allow, from a special tool designed to protect free speech and public participation in specific David v. Goliath contexts to a commonplace litigation tactic. "Something is wrong with this picture," Richman wrote.

That didn't sit well with Horvitz & Levy partner Jeremy Rosen.

When Rosen read the opinion — an otherwise unremarkable ruling — he was "very disturbed" by its *dicta*. He wondered if the hostility, despite a history of liberal interpretation of the anti-SLAPP statute by the high court, indicated a groundswell of discontent in the courts of appeal.

"This opinion signals a different mindset," Rosen said. "If it starts infecting other intermediate courts, I think it's going to make it difficult for people to vindicate their rights."

So Rosen and Mark Goldowitz, founder and director of the California Anti-SLAPP Project, rallied a coalition of lawyers from 20-some groups — from the ACLU to the Association of Southern California Defense Counsel — to ask the Supreme Court to depublish the opinion.

Former Chief Justice Ronald George made a point of limiting the high court's use of depublication, and Rosen doesn't anticipate any big change on that front from new Chief Justice Tani Cantil-Sakauye.

"My guess is that she'll continue her predecessor's reluctance to depublish cases, and the rest of the court probably shares that," he said. "The rare case they will depublish is where the underlying result is correct but the reasoning of the case is wrong — I think that is the exact situation here."

Most compelling in the letter asking for depublication, said appellate specialist Jon Eisenberg, are the statistics cited — especially that rulings on anti-SLAPP appeals make up less than one percent of the appellate court's workload. "Hardly a crisis," the letter notes.

The letter also points to a relatively high reversal rate for denied anti-SLAPP motions, and says the numbers "confirm that defendants often require the immediate right of appeal" to dispose of a SLAPP, or Strategic Lawsuit Against Public Participation.

But Richman isn't the only one sounding the alarm. .

Anti-SLAPP motions, and the appeals that follow, have proliferated in a way the Legislature never foresaw, said Fred Hiestand, general counsel for the Civil Justice Association of California.

"It's a weird thing that once you say you want to protect someone's right of expression, it spawns endless litigation," Hiestand said. "That's what's happened with the anti-SLAPP statute. It's created a virtual whole cottage industry of lawyers who have become experts on the anti-SLAPP statute and know how to employ it in almost infinite manner to keep hope alive."

The anti-SLAPP law provides a mechanism for quick dismissal of complaints that defendants contend are meant to chill their speech or petition rights. Anti-SLAPP motions are routinely brought by defendants in defamation cases, and often in other suits as well. A few days ago, for example, the Second District ruled against a law firm that had filed anti-SLAPP motions against plaintiffs accusing it of using notorious private investigator Anthony Pellicano to illegally eavesdrop on their conversations.

But Eisenberg, who has handled both sides of anti-SLAPP appeals, said if the court wanted to tackle misuse of the law and its appeal mechanism, it would have been more effective to first solicit briefing from amici curiae.

"It's a very elegant and eloquent piece of advocacy for abolition of the right of appeal, but it's done without a full airing of the issues by the parties," he said. "What we have here is a piece of advocacy, not adjudication."