

## Alerts

### Ninth Circuit Holds That Legal Malpractice Claim May Arise From Activity Protected by Anti-SLAPP

August 6, 2010

*Lawyers for the Profession® Alert*

*Mindys Cosmetics, Inc. v. Dakar*, \_\_\_ F.3d \_\_\_, 2010 WL 2652480 (9th Cir. 2010)

#### Brief Summary

The U.S. Court of Appeals for the Ninth Circuit declined to strike a legal malpractice claim based on an alleged conflict of interest, even though the act which formed the basis for the claim, registering a trademark, was within the ambit of California's anti-SLAPP statute.

#### Complete Summary

This legal malpractice action arose out of defendant lawyer's representation of a family-owned cosmetics company. The lawyer registered the company's trademarks in the name of one of the family members who was not a shareholder. There was then a rift in the family, which resulted in litigation including claims for legal malpractice, breach of fiduciary duty, fraudulent concealment and conversion, based on the lawyer's trademark registration. The lawyer moved to strike these claims based on California's anti-SLAPP statute.

The Ninth Circuit held that the lawyer's activity was covered by the statute, but denied the motion to strike because plaintiff established a reasonable probability of prevailing on the merits. The anti-SLAPP statute protects acts in furtherance of a person's right to petition for free speech and lists four categories of protected conduct. The lawyer's activity was covered, the court held, because under the first category of protected conduct, filing trademark applications constitutes a "writing made before . . . [an] executive [or] . . . other official proceeding authorized by law." The court further clarified that this activity was more than an unprotected ministerial business communication because it involved "establish[ing] a property right under a comprehensive federal statutory scheme."

The court then addressed whether plaintiff's claims arose from the lawyer's protected activity. The court cited several California cases in which the courts found no connection between legal malpractice claims and anti-SLAPP protected activity. But the court held, "there is no categorical exclusion of claims of attorney malpractice from the anti-SLAPP statute[.]" and noted that "[b]ut for the trademark application, [the company] would have no reason to sue [the lawyer]."

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The court, however, denied the lawyer's motion to strike because plaintiff established a reasonable probability of prevailing on its claims. The "reasonable probability" standard only requires a "minimum level of legal sufficiency and triability." Plaintiff established this probability as to the malpractice and breach of fiduciary duty claims by alleging that the lawyer improperly represented the company and the individual trademark registrant simultaneously, and negligently failed to determine who had authority to act on behalf of the company.

The court further held that the lawyer could not use California's litigation privilege as a defense. That privilege applies to litigation communications, the court noted, and the trademark registration at issue was neither in anticipation of litigation nor designed to instigate official investigation into wrongdoing.

### **Significance of Opinion**

This opinion demonstrates that an activity protected by the anti-SLAPP statute can still be the basis for a legal malpractice claim, at least to the extent that the attorney may have acted pursuant to a conflict of interest. As the court held, "there is no categorical exclusion of claims of attorney malpractice from the anti-SLAPP statute."

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