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Enforcing No-Contest Clauses in the Face of Anti-SLAPP Motions

A STRATEGIC LAWSUIT against public participation (SLAPP) is a malicious or frivolous cause of action intended to chill the valid exercise of First Amendment rights. California's anti-SLAPP statute provides for a special motion to strike any cause of action arising from the exercise of the rights of petition and free speech.[1] Recently, trust and estate litigators have been turning to anti-SLAPP motions to attack petitions to disinherit beneficiaries under no-contest clauses,[2] with twofold consequences: 1) parties seeking to disinherit a beneficiary for violating a no-contest clause must meet a higher evidentiary burden before proceeding to the fact-finding stage, and 2) parties must endure delays while the anti-SLAPP issues are decided and appealed.

In probate court, a beneficiary may bring an anti-SLAPP motion to strike an adversary's petition to disinherit him or her under a no-contest clause. Anti-SLAPP analysis entails a two-step inquiry: if the beneficiary establishes that the adversary's cause of action arises from the beneficiary's protected activity, the burden shifts to the adversary to demonstrate its probability of prevailing on the underlying petition to disinherit.[3] If the adversary fails to meet this burden, the court will strike the petition.

A beneficiary has much to gain by filing an anti-SLAPP motion in response to a petition to disinherit under a no-contest clause. Because any petition to disinherit based on a beneficiary's challenge to a testamentary instrument necessarily arises from the challenge (an exercise of the beneficiary's right to petition), the beneficiary will have a strong argument that the first prong of the anti-SLAPP analysis is satisfied. In a recent decision, *Rosenberg v. Reid,* the court of appeal acknowledged that "actions to enforce a no contest clause will…in many cases arise from protected activity under the anti-SLAPP statute."[4] Although the *Rosenberg* court did not explicitly recognize that all actions to enforce a no-contest clause will satisfy the first prong of the anti-SLAPP analysis, this conclusion can be inferred from the court's reasoning for affirming the applicability of the anti-SLAPP statute. Responding to the defendant's argument that applying the anti-SLAPP statute to her petition "would in effect render all valid No Contest clause enforcement actions SLAPPs," the court explained that this effect "hardly seems excessive" because the second prong of the anti-SLAPP test ensures that only meritless pleadings will ultimately be stricken.[5] Thus, a beneficiary's adversary will likely be forced to demonstrate a probability of prevailing at the outset to avoid having its petition stricken.

This situation confers at least three strategic advantages on the beneficiary: 1) the beneficiary's adversary may be unable to prove a probability of prevailing at such an early stage and with limited discovery, 2) in any event, the beneficiary's adversary must tip its hand by revealing its supporting evidence, and 3) the beneficiary's anti-SLAPP motion will effect a delay in the proceedings—filing an anti-SLAPP motion stays all discovery relating to the petition to disinherit,[6] and the trial court's decision on the anti-SLAPP motion is immediately appealable.[7] Moreover, while the party opposing the anti-SLAPP motion must demonstrate the motion was "frivolous" or "solely intended to cause unnecessary delay" to recover attorney's fees and costs, the beneficiary is entitled to fees and costs simply for prevailing on the motion.[8]

Consequently, litigators should keep the following practical considerations in mind when seeking to enforce or defend against the enforcement of a no-contest clause. On one hand, a beneficiary filing a challenge that might trigger a no-contest clause should be prepared to file an anti-SLAPP motion if another party files a petition to disinherit. The beneficiary should file this motion quickly to halt discovery and force the adversary to make the required evidentiary showing based on limited information. On the other hand, the beneficiary's adversary should only file a petition to disinherit once he or she is prepared to demonstrate a probability of prevailing. Indeed, the adversary could wait until the beneficiary's contest is fully litigated before bringing a petition to disinherit so the beneficiary would no longer have grounds to argue that the petition curtails his or her right to petition the court.

Although the legislature likely did not foresee that the anti-SLAPP statute would be applied to no-contest clause enforcement proceedings,[9] this procedure is a recurring reality today. Thus, until the legislature or courts intervene, litigators either filing or opposing a petition to disinherit a beneficiary under a no-contest clause should be aware of the implications of anti-SLAPP's application in this context so that they are better positioned to advance and protect client interests. ■

[1] CODE CIV. PROC. §425.16(b)(1).

[2] *See, e.g.*, Rosenberg v. Reid, No. B256895, 2015 WL 5883893 (Cal. Ct. App. Oct. 8, 2015).

[3] Navellier v. Sletten, 29 Cal. 4th 82, 89-90 (2002). The second prong of anti-SLAPP analysis "operates like a motion for summary judgment in reverse." Grewal v. Jammu, 191 Cal. App. 4th 977, 990 (2011). The plaintiff need only "demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment…." Oasis West Realty, LLC v. Goldman, 51 Cal. 4th 811, 820 (2011). "If the plaintiff can show a probability of prevailing on any part of its claim, the cause of action is not meritless and will not be stricken." *Id.*

[4] Rosenberg, 2015 WL 5883893, at *6.

[5] *Id.*, citing Navellier, 29 Cal. 4th at 93-94.

[6] CODE CIV. PROC. §425.16(g).

[7] CODE CIV. PROC. §425.16(i).

[8] CODE CIV. PROC. §425.16(c)(1).

[9] Applying anti-SLAPP to no-contest clause proceedings creates the same type of cost and delay the legislature sought to eliminate by repealing the safe harbor provision of former Probate Code §21320. *See* S. Rules Comm., Office of S. Floor Analyses, 3d reading analysis of SB 1264 (2007-2008 Reg. Sess.) at 2-3 (as amended June 18, 2008).

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