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California Courts of Appeal Judge's Anti-SLAPP Comments Challenged
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Justice James A. Richman of the 1st District Court of Appeal used a published opinion two months ago to draw attention to California's anti-SLAPP law and accuse lawyers of abusing the procedure to gain litigation advantage.

Instead of prompting changes in the law, however, Richman's missive has had the opposite effect.

A coalition of 20 groups that rely on the law to ward off SLAPPs, or strategic lawsuits against public participation, have fired back. On Thursday, the coalition asked the state Supreme Court to depublish the opinion.

Jeremy B. Rosen of Horvitz & Levy LLP said he was troubled when he read the court's opinion in Grewal v. A.B. Publication Inc., 2011 DJDAR 607. He pulled together a coalition that includes the ACLU, the Association of Southern California Defense Counsel, the California Anti-SLAPP Project, the California Newspaper Publishers Association, the Electronic Frontier Foundation and the First Amendment Coalition.

"What we're concerned about is the Legislature might read this and be concerned, or other courts may look at it and start thinking maybe this motion in front of me is abusive," Rosen said.

The underlying case was fairly straightforward. Hardev Singh Grewal, a 73-year-old interpreter for Alameda County Superior Court and member of the Sikh Temple, sued for libel four years ago over statements published in the Punjab Times. A trial judge denied the defendants' anti-SLAPP motions and the appellate court affirmed.

But Richman went further by criticizing defense lawyer Mark Cohen for the timing of his motion, filed years after the suit was filed and after other defendants had been unsuccessful in getting the suit dismissed as a SLAPP.

"We would say that this filing alone would be an abuse. And certainly when followed by the abuse coup de grace - the appeal," Richman wrote.

Justice J. Anthony Kline and Paul R. Haerle also signed the opinion.

Richman invited the Legislature to reconsider whether defendants who lose anti-SLAPP motions should get an automatic right to appeal.

"A losing defendant's 'loss' of the right to appeal a lost anti-SLAPP motion, we submit, is a much smaller price to pay than a winning plaintiff having to expend thousands of dollars in attorney fees on appeal, while plaintiff's case is stayed for anywhere from 19 to 26 months, all in a setting where the original motion was without merit, if not downright frivolous," Richman said.

Richman cited statistics showing the number of anti-SLAPP filings in

the appellate courts skyrocketed to 558 in 2009 from 55 in 1999.

Rosen said the filings still make up a tiny percentage of the 11,000 cases handled by the appellate courts each year, which is "hardly a crisis."

"The picture that's painted by this opinion is just wrong," he said.

Rosen acknowledged that some litigants abuse the statute, but said judges have the power of sanctions to punish wrongdoers.

Cohen, a sole practitioner in Fremont, also wrote a letter asking for depublication of the opinion.

"This decision's use of unduly hostile tones, its bewildering criticism of a legitimate anti-SLAPP motion and appeal, and its 10-page attack against the use of the anti-SLAPP remedies and the right to appeal represents a most unfortunate display of judicial temperament gone awry," Cohen wrote in the letter being filed today.

The attorney who represented the plaintiff in the case, N. Maxwell Njelita of Njelita Law Offices in Oakland, said his client nearly ran out of money trying to bring the case to trial.

"It seemed to me like a strategy to avoid at all costs having my client present the case at trial," he said.

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