Bloomberg BNA

BNA's
Health Law Reporter™

California Anti-SLAPP Motions in a Post-*Fahlen* World

BY DEBRA J. ALBIN-RILEY AND PAUL RIGALI

Many physicians in California agree that serving on a hospital's medical staff peer review committee is a thankless and underpaid task. Worse, those involved in peer review decisions face the threat of disruptive and expensive lawsuits brought by physicians whose medical staff privileges have been denied or curtailed through peer review. But peer review actions are ''protected activity'' in California, and lawsuits dealing with peer review activities can be dismissed under California's ''Anti-SLAPP'' statute.[1]

In *Fahlen v. Sutter Cent. Valley Hosps.*, the California Supreme Court raised serious concerns about the Anti-SLAPP motion's continued viability in cases involving peer review actions. But more recent decisions suggest that Anti-SLAPP motions remain a potent response to physician lawsuits targeting peer reviewers. It remains to be seen whether courts in other states will interpret their own Anti-SLAPP statutes in a similar manner.

[1] Cal. Civ. Proc. Code § 425.16. This code section is designed to prevent Strategic Lawsuits Against Public Participation.

Debra J. Albin-Riley is a partner and Paul Rigali is an associate in the Complex Litigation Group in the Los Angeles office of Arent Fox LLP. Their practices focus on representation of hospitals and medical staffs in peer review matters, including Anti-SLAPP motions. Debra can be reached at debra.riley@arentfox.com or 213-443-7545. Paul can be reached at Paul.Rigali@arentfox.com or 213-443-7583.

A Powerful Tool

Designed to thwart retaliatory lawsuits that seek to interfere with free speech, the right of petition, and ''other official proceedings authorized by law,'' the Anti-SLAPP motion became a powerful tool for medical staffs and hospitals to stop those lawsuits in their tracks. Because peer review activities are governed by Cal. Bus. & Prof. Code § 809 *et seq*. and the medical staff's bylaws, aggrieved physicians were told to exhaust their administrative remedies, namely to go through what is commonly called a judicial review committee hearing and appellate review by the hospital's governing board before filing a lawsuit challenging those activities. If a physician lost during the administrative hearing process, she had to persuade a trial court to overturn the final administrative decision before filing any suit seeking money damages. Only if the physician prevailed at some point in this process could she sue for damages in court.

Tensions increased in 2008 when the Legislature amended Cal. Health & Safety Code § 1278.5, a section that gives protection to ''whistleblowers'' in health care settings, to include medical staff members. On one side of the dispute, physicians lauded the expansion of the whistleblower protection as necessary to prevent ''sham peer review,'' claiming that peer review committees and hospital administrations used medical staff discipline to retaliate against physicians who complained about patient safety conditions. On the other side, hospital boards ultimately responsible for patient safety in their facilities and physicians on peer review committees feared that the orderly process of legitimate peer review would be severely disrupted by lawsuits, lawyers, depositions, and the like.

State Supreme Court Rules

On Feb. 20, 2014, the California Supreme Court decided *Fahlen v. Sutter Cent. Valley Hosps.*, finding that a physician did not need to exhaust his administrative remedies before seeking damages in court for a claim that the adverse decision as to his medical staff privileges was retaliatory.[2] The *Fahlen* holding marked a clear departure from previous court rulings requiring exhaustion of administrative and judicial remedies

[2] *Fahlen v. Sutter Cent. Valley Hosps.*, 58 Cal. 4th 65, 2014 BL 45933 (2014).

 ISSN 1064-2137

prior to the assertion of any claim for damages.[3] In *Fahlen's* wake, hospitals, physicians and their lawyers who routinely relied on Anti-SLAPP protections wondered whether they could still use the Anti-SLAPP motion to ward off retaliation claims rooted in medical staff peer review activity.

More will be revealed as peer review whistleblower retaliation cases wind their way through the appeals process and decisions are published, but recent appellate and trial court decisions suggest that, when the defendants are armed with the right facts, an Anti-SLAPP motion remains a powerful weapon for hospitals and medical staffs defending their peer review decisions. This is so even if the doctor claims whistleblower retaliation forms the heart of the adverse action.

How Does Anti-SLAPP Work?

Enacted to prevent frivolous or malicious lawsuits designed to chill the exercise of certain rights, California's Anti-SLAPP statute allows a trial court to strike claims that involve the right of petition or free speech, including statements and actions made in connection with ''other official proceedings authorized by law.'' ''Official proceedings'' under the Anti-SLAPP statute include medical staff peer review activity.[4]

In the Anti-SLAPP motion, once the hospital or medical staff establishes that the claim involves peer review, the burden shifts. It is then up to the plaintiff to show a probability of success on the merits of her claim. Prior to *Fahlen*, the requirement that a physician exhaust the peer review hearing and appeal processes and get mandamus relief from a court overturning any peer review decision adverse to her negated most physicians' ability to show probable success on the merits as to any type of damage claim.[5]

Retaliation Trumps Exhaustion

In *Fahlen,* the plaintiff claimed the hospital violated Cal. Health & Safety Code § 1278.5[6] by terminating his medical staff privileges through the peer review process after he had complained about the nursing staff.[7] Defendants filed an Anti-SLAPP motion, arguing that hospital peer review is protected activity under the California Supreme Court case of *Kibler v. N. Inyo Cty. Local Hosp. Dist.*,[8] and that the plaintiff could not establish a likelihood of success because he failed to exhaust his administrative and judicial remedies before filing his retaliation claim.[9] The *Fahlen* court rejected the hospital's exhaustion arguments and held that a physician need not exhaust administrative and judicial remedies prior to filing a whistleblower lawsuit under Section 1278.5.[10]

Although some thought this decision completely changed the *status quo*, it's important to note that the *Fahlen* court did not disturb the notion that peer review is ''protected activity,'' under the first prong of the Anti-SLAPP statute. The *Fahlen* court expressly left unanswered broader questions, such as the impact on retaliation claims rooted in peer review that disclose legitimate issues related to the whistleblower doctor's quality of patient care.[11]

Life After *Fahlen*

We are now seeing that *Fahlen's* narrow holding leaves room for Anti-SLAPP challenges to retaliation actions based on peer review activities. In *DeCambre v. Rady Children's Hosp.-San Diego*, the California Court of Appeal affirmed the Anti-SLAPP dismissal of certain of plaintiff's claims, including her retaliation claim.[12] In that case, the defendants proved their decision not to renew Dr. Marvalyn DeCambre's contract stemmed from protected peer review activity and satisfied the first prong of the Anti-SLAPP analysis.[13] DeCambre established that she was a member of a protected class and her claims for harassment, intentional infliction of emotional distress and defamation survived as they were based on activity outside of peer review. But the court granted defendants' Anti-SLAPP motion as to her retaliation claim, holding that defendants' undisputed evidence of patient complaints provided sufficient ''evidence of a legitimate non-retaliatory explanation for [defendants'] decision not to renew DeCambre's contract.''[14]

Trial courts in Los Angeles, Riverside, and Orange counties have since made similar rulings, relying on well-settled, pre-*Fahlen* authorities to show that peer review proceedings remain protected activity under Section 425.16(e)(2) of California's Anti-SLAPP statute.[15] These rulings confirm that *Fahlen's* narrow exception to the exhaustion requirement only applies to retaliation claims arising under Section 1278.5. Where a physician alleges damage claims not based on Section 1278.5, the complaint is still subject to a motion to strike under *Westlake Cmty. Hosp. v. Super. Ct.* and its progeny if she has not exhausted her administrative and judicial remedies.[16]

Significantly, where a physician claims defendants have violated Section 1278.5 and the exhaustion of remedies argument is not available, defendants may still

---

[3] In *Fahlen,* the state supreme court expressly disapproved that part of *Nesson v. N. Inyo Cnty. Local Hosp. Dist.*, 204 Cal. App. 4th 65, 2012 BL 54794 (2012), wherein the court of appeal held that ''a plaintiff who has failed to exhaust his administrative and judicial remedies therefore cannot prove a probability of prevailing on any claim.'' *Id.* at 77.

[4] *Kibler v. N. Inyo Cnty. Local Hosp. Dist.*, 39 Cal. 4th 192 (2006).

[5] *Westlake Cmty. Hosp. v. Super. Ct.*, 17 Cal. 3d 465, 469 (1976); *see also Kaiser Found. Hosp. v. Super. Ct.*, 128 Cal. App. 4th 85, 100 (2005).

[6] Section 1278.5 prohibits a hospital from ''discriminat[ing] or retaliat[ing], in any manner'' against a patient, employee or member of the medical staff because that person has presented a grievance, complaint or report related to patient care or safety. *See* Cal. Health & Safety Code § 1278.5.

[7] *Fahlen,* 58 Cal. 4th at 676.

[8] *Kibler v. N. Inyo Cnty. Local Hosp. Dist.*, 39 Cal. 4th 192 (2006).

[9] *Fahlen,* 58 Cal. 4th at 676.

[10] *Fahlen,* 58 Cal. 4th at 677.

[11] *Fahlen,* 58 Cal. 4th at 686.

[12] *DeCambre v. Rady Children's Hosp.-San Diego*, 235 Cal. App. 4th 1, 2015 BL 65149 (2015).

[13] *See id.* at 22 (relying on *Nesson v. N. Inyo Cnty. Local Hosp. Dist.*, 204 Cal. App. 4th 65, 83, 2012 BL 54794 (2012).

[14] *DeCambre* at 20, 24.

[15] *See, e.g., Young v. Tri-City Healthcare Dist.*, 210 Cal. App. 4th 35, 57-58, , 2012 BL 273771 (2012).

[16] *See Westlake Cmty. Hosp. v. Super. Ct.*, 17 Cal. 3d 465, 469 (1976); *see also Kaiser Foun. Hosp. v. Super. Ct.*, 128 Cal. App. 4th 85, 100 (2005).

  HLR ISSN 1064-2137

prevail on an Anti-SLAPP motion. We have seen this when defendants show that either 1) plaintiff cannot establish a *prima facie* claim for retaliation under the statute, or 2) defendants had non-retaliatory explanations for their decisions. In these cases, documents created during the peer review process and peer review hearing decisions in favor of the hospital or medical staff peer review body play a crucial role. Defendants can still use the Anti-SLAPP statute to shut down a case if they can show that the plaintiff's actions fail to meet the statute's requirements, or legitimate patient safety and quality of care concerns and not retaliation caused the adverse action.[17]

In a recent case decided in Los Angeles Superior Court, a judge granted defendants' Anti-SLAPP motion in a Section 1278.5 case, finding that plaintiff had not made the ''grievance, complaint, or report'' required to make a claim under the statute.[18] There, defendants established that the plaintiff had not followed the hospital's prescribed channels for reporting but had merely submitted an operative report prepared after peer review proceedings had commenced. The plaintiff in another recent case filed in Orange County Superior Court produced facts showing that his adverse action was taken within 120 days of his complaints. In the ruling on the Anti-SLAPP motion, the trial court found the temporal proximity of the complaints to the discipline created a rebuttable presumption of retaliatory motive under Section 1278.5.[19] Yet, the hospital and medical staff defendants won the Anti-SLAPP motion, defeating the rebuttable presumption by presenting evidence of legitimate, nondiscriminatory reasons for their peer review actions.

Conclusion

Defending a retaliation claim arising out of peer review activity requires thorough factual investigation and meticulous documentation of the reasons for the adverse action. The *Fahlen* court acknowledged that myriad factual scenarios would, in the future, challenge California courts' need to simultaneously both serve the patient safety aims of medical staff peer review and provide whistleblower retaliation protections.[20] Future appellate decisions will further define the contours of the Anti-SLAPP statute and its interplay with peer review and whistleblower retaliation. Until then, an aggrieved physician's counsel should closely analyze the risks of losing an Anti-SLAPP motion before filing a complaint involving medical staff peer review, as a successful defendant is entitled to attorneys' fees if the motion succeeds. Even after *Fahlen*, the Anti-SLAPP motion remains a mighty defensive tool for medical staff leaders and hospitals conducting peer review in California.

What about Anti-SLAPP and physician whistleblower cases outside of California? Several states and the District of Columbia have enacted Anti-SLAPP laws. This legislation could be construed to apply to medical peer review in those jurisdictions if the Anti-SLAPP law protects quasi-judicial proceedings, or matters ''in the public interest.'' The California courts have shown a keen interest in appropriately balancing all of the competing public policy interests involved in these cases: patient safety, whistleblower protection and the need for peer review hearings and processes to play out unimpeded by unmeritorious litigation. As Anti-SLAPP, peer review and anti-retaliation laws continue to evolve across the country, time will tell whether other courts will tip the scales in the same way.

---

[17] Federal courts have ruled that it is appropriate to recognize an Anti-SLAPP motion in cases before them. *See, e.g.*, *Lee-Tzu Lin v. Dignity Health-Methodist Hosp. of Sacramento*, No. 2:14-cv-666, 2014 BL 193117 (E.D. Cal. 7/11/14). There the court held that a ''defendant in federal court may bring an anti-SLAPP motion against state court claims'' and granted the Anti-SLAPP motion as to the plaintiff's whistleblower claim based on Section 1278.5. The court found that the plaintiff did not make a ''report'' as required by Section 1278.5 and thus could not show a reasonable likelihood of prevailing on her claim.

[18] *Melamed v. Cedars-Sinai Med. Ctr.*, No. BC 551415, 2015 WL 3995226 (Cal. Super. Ct. *filed* July 11, 2014).

[19] *Bonni v. St. Joseph Health Sys.*, No. 30-2014-00758655-CU-OE-CJC (Cal. Super. Ct. *filed* Nov. 25, 2014).

[20] *See Fahlen* at p. 684.