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"Pay Me, Or Else…": California Court Rules Employee's Pre-Litigation Qui Tam Threat is Extortionate

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A California appellate court recently issued a warning to employees who try to negotiate settlements with their employers by making veiled threats to report an employer's real or imagined criminal activity. In *Stenehjem v. Sareen*, No. H038342 (Cal. Ct. App. June 13, 2014), the court held that an employee's pre-litigation settlement demand was extortionate where the employee threatened to expose criminal activity by filing a qui tam action under the federal False Claims Act unless the employer tendered payment. This is an encouraging legal development for employers, and may signal an increasing willingness of the courts to curtail over-the-top pre-litigation settlement practices.

Background

In January 2011, the plaintiff was terminated from employment with Akon, Inc., a supplier of microwave products based in San Jose, California. Shortly thereafter, the plaintiff claimed that the employer defamed him when the company's president and CEO told other employees that the plaintiff was terminated because he assaulted and battered a female coworker. The plaintiff hired an attorney who demanded that the company pay $675,000 to settle the plaintiff's defamation and other civil claims. After the company rebuffed all settlement attempts made by the plaintiff's counsel, the plaintiff took matters into his own hands and unilaterally emailed the president and CEO's counsel. It is this email that forms the basis of the company president and CEO's extortion claim.

The Extortionate Email

The subject of the email was entitled "Qui Tam." Among other veiled threats, the email indirectly accused the president and CEO of engaging in illegal activity by ordering the plaintiff to create false accounting documents. The email also stated that the plaintiff "never wanted this to become a long and expensive process let alone involve the United States Attorney General, the Department of Justice or the DOD." The email asserted that the plaintiff did "not wish to make a Federal case out of this," and that it was "not [his] first choice to procede [sic] with the Qui Tam option," but that he had consulted with attorneys who specialized in such cases.

The Anti-SLAPP Statute

When the president and CEO's counsel failed to respond to the plaintiff's email, the plaintiff sued the company and its president and CEO for (among other things) defamation and wrongful termination. The president and CEO countersued for civil extortion. Thereafter, the plaintiff filed a special motion to strike the extortion cross-complaint under California's anti-SLAPP statute (California Code of Civil Procedure § 425.16). "SLAPP" is an acronym for "Strategic Lawsuit Against Public Participation." A SLAPP suit is one where the plaintiff seeks to chill a party's exercise of his or her constitutional right to free speech. Under California's anti-SLAPP statute, SLAPP suits may be disposed of summarily by a special motion to strike. If the alleged protected speech is illegal as a matter of law, however, the defendant cannot avail itself of the statute.

In his anti-SLAPP motion, the plaintiff argued that his settlement email to the president and CEO's counsel was a pre-litigation settlement communication expressly protected by the anti-SLAPP statute. In opposition, the president and CEO argued that the plaintiff's email was extortionate, and therefore not a valid exercise of free speech protected under the statute.

Extortion as a Matter of Law

The California appeals court rejected the plaintiff's arguments, finding that the plaintiff's pre-litigation email demand constituted extortion as a matter of law in that it "threatened to expose [the president and CEO] to federal authorities for alleged violations of the False Claims Act unless he negotiated a settlement of [the plaintiff's] private claims." Accordingly, the plaintiff was not protected under the anti-SLAPP statute.

In so holding, the court considered the totality of the email and the history between the parties leading up to its transmission, including the company's repeated declinations to engage in settlement negotiations. Considering the context, the court reasoned that the plain implication of the email was that, unless the president and CEO accepted the plaintiff's settlement demand for his personal claims, the plaintiff would, through pursuit of the "qui tam option," expose his employer's alleged criminal wrongdoing. The court found it significant that the alleged criminal activity that the plaintiff threated to expose in the qui tam action was "entirely unrelated to any alleged injury suffered by" the plaintiff, as alleged in his defamation and wrongful termination claims.

The court explicitly rejected the plaintiff's argument that the email was not extortionate because there was no threat to file a false criminal complaint, nor a demand for money, finding that: "The absence of either an express threat or a demand for a specific sum of money in the email does not negate its fundamental nature as an extortionate writing." The court observed that threats are often made vaguely, by innuendo, and that parties guilty of extortion commonly deal in mysterious and ambiguous language.

Conclusion

Pre-litigation settlement negotiations can be heated and parties often take aggressive positions. A party crosses the line, however, by threatening to go to the authorities or the media with claims of criminal wrongdoing. It remains to be seen whether the holding of *Stenehjem* applies where the employee is a whistleblower who contends that she has been terminated for reporting wrongdoing that would violate the federal False Claims Act. In that case, the qui tam threat would be directly related to the employee's personal claims. At a minimum, the *Stenehjem* decision forewarns that, under certain circumstances, employees (or their counsel) that make veiled criminal threats in order to leverage their own personal claims are liable for extortion.

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