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class action alleging improper appropriation of individuals' likenesses falls within the public interest exception to california's anti-slapp statute

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In *Batis v. Dun & Bradstreet Holdings, Inc.*, Case No. 23-15260, 2024 WL 3325663 (9th Cir,. July 8, 2024), the Ninth Circuit held that California's anti-SLAPP provisions could not overcome a class action seeking to preclude the appropriation of individuals' names and likenesses.

Defendant Dun & Bradstreet Holdings, Inc. ("D&B") operates a searchable business-to-business database called D&B Hoovers, which contains information about businesses and the professionals who work there. When a user searches a particular professional, such as Plaintiff Odette R. Batis ("Batis"), a librarian, D&B Hoovers returns a profile that contains that individual's contact information. Alongside the profile, an advertisement promoting a subscription to D&B Hoovers appears. Batis filed a class action suit against D&B, asserting claims for (i) violation of her right of publicity, (ii) tortious misappropriation of her name and likeness, and (ii) violation of unfair competition laws.

D&B filed a motion to strike the lawsuit pursuant to California's anti-SLAPP statute, Cal. Civ. Proc. Code § 425.16. The anti-SLAPP statute was enacted to protect against "strategic lawsuits against public participation," or, in other words, "lawsuits brought primarily to chill the exercise of speech and petition rights." It provides, in relevant part, that "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike…" D&B argued that the database and contact information contained within D&B Hoovers was in furtherance of their right of free speech.

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However, Batis argued that her lawsuit was immune from an anti-SLAPP motion under the public interest exemption, Cal. Civ. Proc. Code § 425.17(b). That section provides, in relevant part, that the anti-SLAPP law "does not apply to any action brought solely in the public interest or on behalf of the general public if … (1) The plaintiff does not seek any relief greater than or different from the relief sought for the general public or a class of which the plaintiff is a member … (2) The action, if successful, would enforce an important right affecting the public interest … [and] (3) Private enforcement is necessary and places a disproportionate financial burden on the plaintiff in relation to the plaintiff's stake in the matter." Cal. Civ. Proc. § 425.17(b).

The District Court denied D&B's anti-SLAPP motion. The Ninth Circuit affirmed, holding that Batis's lawsuit was "brought solely in the public interest or on behalf of the general public" and therefore fell within the bounds of the statutory public interest exemption, Cal. Civ. Proc. Code § 425.17(b). The Court engaged in the following analysis:

Relief Different from the Class. First, the Court found that Batis's class action sought "the same categories of relief for all class members." Such relief included both monetary damages and emotional distress damages. In other words, no member of the class was precluded, on the face of the Complaint, from seeking any form of requested relief. Whether all class members could ultimately establish their entitlement to all forms of requested relief was, at this stage, irrelevant.

Important Right Affecting Public Interest. Second, the Court found that Batis's "lawsuit clearly intersects with California's public policy goal of protecting an individual's right to control the use of his or her persona." Examining the history of California courts over the last century, the Ninth Circuit reiterated that California "considers the right to control one's name and likeness to be an important right affecting the public interest" (citing *Melvin v. Reid*, 297 P. 91, 93 (Cal. Ct. App. 1931); *Stilson v. Reader's Dig. Ass'n, Inc.*, 104 Cal. Rptr. 581, 582 (Ct. App. 1972); *Hill v. Nat'l Collegiate Athletic Ass'n*, 7 Cal. 4th 1, 15 (1994)). On the face of the Complaint, the Court held that this is precisely the type of right Batis's lawsuit seeks to enforce; even if it is not "a particularly egregious violation of that right."

Necessity of Private Enforcement. Third, the Court found that private enforcement of Batis's claims was "both necessary and disproportionately burdensome." It was necessary based on the singular fact that "no public entity has sought to enforce the right plaintiff seeks to vindicate in the lawsuit." And, it was disproportionately burdensome because Batis's recovery may very well be limited to the minimum statutory damages, or $750. Thus, even if successful, Batis's individual recovery would not cover the cost of litigation. By contrast, if her class action succeeds, the total recovery of the putative class could be substantial.

Section 425.17(d). Finally, the Court was not persuaded that section 425.17(d) precluded application of the public interest application here. That section provides, in relevant part, that the public interest exemption does not apply to: "… Any action against any person or entity based upon the creation, dissemination, exhibition, advertisement, or other similar promotion of any dramatic, literary, musical, political, or artistic work, including, but not limited to, a motion picture or television program, or an article published in a newspaper or magazine of general circulation."

The court concluded that subsection (d) "does not apply to all works that receive First Amendment protection," but rather, identifies only "a few categories of works so important that protecting them from suit must override the important policy goals furthered by the public interest exemption." Those categories include, "dramatic,

literary, musical, political, or artistic work." Cal. Civ. Proc. Code § 425.17(d)(2). The Court found that D&B Hoovers—"a database of professional contact information used to facilitate commercial transactions"—was lacking in artistic or intellectual expression required to categorize it as a "literary work," so as to bring it within the ambit of section 425.17(d). Accordingly, the Ninth Circuit affirmed that Batis's lawsuit is immune from an anti-SLAPP motion under the public interest exemption.

It will be interesting to see if future plaintiffs seek to use class actions as a way to avoid an anti-SLAPP motion. Also note that this suit in federal court, and a California state court might reach a different result.