

When Its Not Extortion: Court of Appeal Rules That Attorney’s Pre-Litigation  
Correspondence Is Litigation Protected Even Though The Letter Expressed That A  
Criminal Investigation Could Ensur If A Lawsuit Was Filed

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Under California's Anti-SLAPP law, see Code of Civil Procedure § 425.26, a litigation defendant may seek a summary resolution of a matter if it is determined that the defendant is being sued for exercising the defendant’s rights of petition (litigation privilege). The Anti-SLAPP statute can present a number of intriguing questions as to what, exactly, are pre-petition activities covered by the statute.

In the case of Flickinger v. Finwall (2022) 85 Cal.App.5<sup>th</sup> 822 (“Flickinger case”), a California Court of Appeal addressed this very situation. In that case, Plaintiff, Jason Flickinger, a homeowner (“Flickinger”), had retained a contractor, Robert Pendergrast (“Pendergrast”), to perform home remodeling of his residence. During the course of the remodeling, Flickinger confided to Pendergrast that he had obtained funds, totaling \$1 million, through kick backs that he had obtained while he was in China as an employee for Apple, the computer conglomerate. Pendergrast kept working on the project. Disputes later arose and Pendergrast refused to complete work. Flickinger then had a pre-litigation lawsuit demand sent to Pendergrast. Pendergrast’s attorney responded, communicating, among other things, that if suit was filed, Apple would be notified of the bribery payments, and intimated that a fraud investigation would occur.<sup>1</sup>

Flickinger then sued Pendergrast in 2017 based on Pendergrast’s refusal to complete the project and for failing to obtain permits. In discovery, Pendergrast sought to substantiate a defense of unclean hands based on his allegations of kick backs. He deposed Flickinger, asking a number of questions about Flickinger’s Apple-related overseas vendor contacts. Flickinger refused to answer these questions based on his Fifth Amendment right against self-incrimination. Pendergrast then subpoenaed Apple for records relevant to Flickinger’s dealings with Apple vendors. Apple objected on relevance grounds. Pendergrast met and conferred with Apple's counsel, explaining the relationship between Pendergrast's unclean hands defense and plaintiff's work for Apple. When his explanation failed to persuade Apple to turn over any records, Pendergrast dropped the matter and stopped communicating with Apple. The Flickinger/Pendergrast lawsuit then went to a

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<sup>1</sup> According to the Court of Appeal decision, the attorney letter expressed in part: “If [plaintiff] initiates litigation, Mr. Pendergrast's position will not change and he will aggressively defend himself. I suggest you discuss with [plaintiff] how such litigation may result in Apple opening an investigation into [plaintiff's] relationships with vendors.”

court trial. Flickinger prevailed and was awarded \$169,000 in damages (the defense of unclean hands was rejected).

In a second lawsuit, Flickinger sued Pendergrast and Pendergrast's attorney which included causes of action for civil extortion and violation of the Ralph Civil Rights Act based on allegations that Pendergrast "used threats, intimidation, and coercion to prevent [p]laintiff from filing [Flickinger's first lawsuit]" based on Pendergrast's attorney's letter to the prelitigation demand.

The attorney for Pendergrast then filed an Anti-SLAPP motion. The Trial Court, however, denied the motion. The matter went to the Court of Appeal and the Court of Appeal reversed. The Court of Appeal ruled that the warning in the attorney's letter was not extortion. The Court further ruled that the threat in the letter did not trigger illegal speech exception to anti-SLAPP protection and the litigation privilege applied to attorney's letter.

The Flickinger case is important in that it expresses that a finding of extortion based on an attorney letter (at least as a matter of law) will only occur where an attorney's threats fall wholly outside the bounds of professional norms.

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