Michael R. Diliberto, Esq.

Privileged Remarks

Nondisparagement clauses are commonly used in settlement agreements. Some clauses are simple one-liners such as "The parties agree not to disparage each other." The agreement in *Monster Energy Co. v. Schechter* (2019) 7 Cal.5th 781 had a more detailed clause that did not limit "Plaintiffs' attorneys' ability to disparage (within the confines of the law) Defendants or Defendants' products in connection with other current or future litigation against the Released Parties in any jurisdiction and venue" or "Plaintiffs' attorneys' prosecution of other current or future litigation against the Released Parties in any jurisdiction and venue." So how is the scope of a simple nondisparagement clause determined?

In *Olson v. Doe* (Jan. 13, 2022, S258498) __ Cal.5th __ [2022 WL 121309], Doe sought a civil harassment restraining order against Olson because of alleged sexual assault, stalking and harassment. In the process of obtaining a long-term restraining order, the parties were ordered to day-of-court mediation. The restraining order proceeding resolved with a settlement agreement that included a nondisparagement clause that stated "The parties agree not to disparage one another." Doe later filed a civil damages action for sexual battery and assault, and related claims against Olson. Olson filed a cross-complaint for breach of contract and specific performance, asserting that Doe's damages suit violated the nondisparagement clause in the prior proceeding. Olson filed a special motion to strike the cross-complaint under the anti-SLAPP statute. The Superior Court found for Doe, but the Court of Appeal found for Olson.

The Supreme Court of California reversed. The scope of the nondisparagement clause did not extend to statements in Doe's civil complaint. The court noted that the settlement agreement was reached within the context of a civil restraining order proceeding, a specialized "expedited procedure for enjoining acts of 'harassment.' " The settlement agreement contained no release from liability or waiver of claims. Though the parties' vague clause could be seen as expansive, it did not provide clear notice to Doe that it would operate as a waiver or release. To the contrary, the parties' agreement contemplated possible future litigation beyond the restraining order proceeding.

The breadth of the mediation agreement "extends only to those things concerning which it appears that the parties intended to contract." The relief available under a harassment proceeding is limited to injunctive relief. Tort and other actions seeking damages for the conduct underlying a petition are not cognizable. Thus, restraining order proceedings do not provide a forum for a global resolution of a petitioner's potential claims for the conduct at issue. In addition, Olson's broad reading of the nondisparagement clause would impair Doe's exercise of constitutional rights (Doe's administrative and civil complaints constitute petitioning activity protected by the

California Constitution). As a result, Doe had no obligation under the contract to refrain from making disparaging remarks in litigation.

The Takeaway

The scope of a nondisparagement clause is determined by the terms of the agreement as a whole, the statutory context in which it was negotiated, and any constitutional rights.