

AGMB Info Brief: California's Anti-SLAPP Law

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I. Introduction

You may have never heard the word SLAPP before, except in the context of “to hit something with a flat object.” In the context of a lawsuit, a SLAPP is a vicious tool used to intimidate someone and saddle them with litigation costs in an effort to force them to give up a valuable right.

More formally, a SLAPP—Strategic Lawsuit Against Public Participation—is a lawsuit that seeks to deter or punish citizens for exercising their right to free speech and petition.¹ Generally, a SLAPP is a “meritless lawsuit filed primarily to chill the defendant’s exercise of First Amendment rights.”²

The distinguishing feature of a SLAPP is that the goal is not to win the lawsuit but to obtain an economic advantage over a party.³ Because the goal is to obtain economic advantage, a defendant’s traditional safeguards against meritless actions, e.g., lawsuits for malicious prosecution or requests for sanctions, are inadequate to contend with SLAPPs.⁴

Plaintiffs disguise SLAPPs by asserting various claims for relief against the defendants. One of

the favored causes of action is defamation.⁵ Another favored tool used to punish a person for asserting his or her right to petition is a lawsuit for malicious prosecution.⁶

Defendants who face a SLAPP lawsuit in California have a powerful weapon they can use to dispose of a SLAPP through a streamlined procedure referred to as an anti-SLAPP motion.

Many states have adopted anti-SLAPP legislation, but California’s anti-SLAPP statute has put California on the forefront of anti-SLAPP litigation. In 2009, there were approximately 1727 reported anti-SLAPP filings nationwide.⁷ Of those, 1,386—80%—of the cases were in the State of California.⁸

II. Background

The Supreme Court has recognized that we have a profound national commitment to the free exchange of ideas, which is enshrined in the First Amendment.⁹ Courts often use terms like “enshrined” to emphasize just how

¹ *Wilcox v. Superior Court*, 27 Cal. App. 4th 809 (1994).

² *Bradburry v. Superior Court*, 49 Cal. App. 4th 1108, 1113 (1996).

³ *Wilcox* at 816.

⁴ *Id.* at 817.

⁵ *Chavez v. Mendoza*, 94 Cal. 4th 1083, 1087-1090 (2001).

⁶ “By definition, a malicious prosecution suit alleges that the defendant committed a tort by filing a lawsuit.” *Jarrow Formulas, Inc. v. LaMarche*, 31 Cal. 4th 728, 734-735 (2003) (fn. Omitted).

⁷ http://en.wikipedia.org/wiki/Strategic_lawsuit_against_public_participation#United_States

⁸ *Id.*

⁹ *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 685-86 (1989).

important our right to free speech is, especially to our political processes and institutions. The case law governing our exercise of First Amendment rights is designed “so that protected speech is not discouraged.”¹⁰ For example, in the context of a malicious prosecution lawsuit, the California Supreme Court has created a very lenient standard for bringing a civil action—a petition protected by the First Amendment—because of “the important public policy of avoiding the chilling of novel or debatable legal claims.”¹¹

To those ends, the California Legislature enacted Code of Civil Procedure section 425.16 (the “anti-SLAPP statute”) **to provide a procedural remedy to dispose of lawsuits that are brought to chill the exercise of a party’s right to free speech and petition.**¹²

The anti-SLAPP statute authorizes a “special motion to strike,” akin to a motion to dismiss, for the “prompt exposure, dismissal, and discouragement of [SLAPPs].”¹³ It “establishes a procedure where the trial court evaluates the merits of the lawsuit using a summary-judgment-like procedure at an early stage of the litigation.”¹⁴

III. Activities Protected by the Anti-SLAPP Statute.

¹⁰ *Id.*

¹¹ *Sheldon Appel Co., v. Albert & Oliker*, 47 Cal. 3d 765, 863 (1989).

¹² *Rusheen v. Cohen*, 37 Cal. 4th 1048, 1055-56 (2006) (citations omitted).

¹³ *United States ex rel Newsham v. Lockheed Missiles & Space Company*, 190 F.3d 963, 971 (1999) (quoting *Wilcox* at 817).

¹⁴ *Soukup v. Law Offices of Herbert Hafif*, 39 Cal. 4th 260, 278 (2006).

California’s anti-SLAPP statute defines four broad categories of conduct that constitute an “act in furtherance of a person’s right of petition or free speech under the United States or California Constitution in connection with a public issue.”¹⁵ Those four categories are the following:

1. any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law;
2. any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law;
3. any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest;; or
4. any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

The first category encompasses all “petition-related” activities made in an official proceeding, such as statements or writings presented in legislative or executive proceedings, and filing or defending lawsuits. The second category encompasses statements or writings concerning an issue that is under consideration by an governmental body or in an official proceeding. For example, writing an open letter regarding a new crime bill pending before Congress, protesting proposed new zoning laws, and the like.

¹⁵ Cal. Civ. Proc. Code § 425.16(e).

The third category covers statements or writings made (1) in a public place and (2) about an issue that has public interest. This category protects statements and writings that are about subjects that are not presently pending before a governmental body and are not made in any official proceeding. The fourth category is a catchall that protects any first-amendment related activity in connection with public issues or matters in the public interest.

IV. The Anti-SLAPP Special Motion to Strike

Under the anti-SLAPP statute, the defendant may move to strike any cause of action (or an entire complaint) that arises out of any act described above. The court undertakes a two-step analysis to determine whether the lawsuit (or cause of action) is a SLAPP. If it is a SLAPP, the court will dismiss it.

A. Two-Step Analysis and Standard of Review

The California Supreme Court determined that a court must undertake the following two-step analysis when a defendant moves to strike a plaintiff's claims pursuant to the anti-SLAPP statute¹⁶:

1. The court first decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate only that the act or acts of which the plaintiff complains were taken "in furtherance

¹⁶ *Equilon Enterprises, LLC v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 67 (2002)

of the [defendant]'s right of petition or free speech under the United States or California Constitution," as defined in the statute.¹⁷

2. If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim.

In undertaking this analysis, the trial court considers "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based."¹⁸ Courts have determined that in their analysis, the anti-SLAPP statute should be construed broadly.¹⁹

B. Defendant's Threshold Showing.

In order to invoke the protection of the anti-SLAPP statute, the defendants need only make a *prima facie* showing that the plaintiff's lawsuit "arises from" the defendants' exercise of free speech of petition rights as defined in section 425.16.²⁰

"[T]he statutory phrase 'cause of action . . . arising from' means simply that the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech."²¹ In the Anti-SLAPP context, the critical consideration is whether the cause of action is based on the

¹⁷ Cal. Civ. Proc. Code § 425.16(b)(1).

¹⁸ Cal. Civ. Proc. Code § 425.16 (b)(2).

¹⁹ *Verizon Del., Inc. v. Covad Communs. Co.*, 377 F.3d 1081, 1091 (9th Cir. 2004).

²⁰ *Governor Gray Davis Committee v. American Taxpayers Alliance*, 102 Cal. App. 4th 449 (2002); see also *Equilon Enterprises, LLC*, 29 Cal. 4th at 61.

²¹ *City of Cotati v. Cashman*, 29 Cal. 4th 69, 78 (2002) (italics in original); *Navellier v. Sletten*, 29 Cal. 4th 82, 88 (2002).

defendant's protected free speech or petitioning activity.²²

In determining whether the defendants have sustained their initial burden, the Court shall consider the pleadings, declarations, and matters that may be judicially noticed.²³

The defendants need not show that the plaintiff's lawsuit was brought with the subjective intent to "chill" their rights of petition and free speech.²⁴ Moreover, the defendants need not demonstrate that the plaintiff's complaint actually had a "chilling" effect.²⁵

C. Plaintiff Must Demonstrate a Probability of Prevailing on the Claims Asserted in the Complaint.

If the defendant meets the threshold showing, the plaintiff must establish a "probability" of prevailing on the merits. To do so, the plaintiff must demonstrate that the Complaint is both legally sufficient and supported by *prima facie* evidence supporting a favorable judgment if the evidence submitted by the plaintiff were to be accepted.²⁶

To make its determination, the court shall consider the pleadings and evidentiary submissions of both the plaintiff and the defendant, but shall not weigh credibility or

comparative strength of the evidence.²⁷ The court considers the defendants' evidence only to determine if it defeats the plaintiff's showing as a matter of law.²⁸

Generally, the plaintiff need only establish that his or her claim has "minimal merit" to avoid being stricken as a SLAPP.²⁹ "Minimal merit," however, must be sufficient evidence to satisfy the standard of proof under applicable law: e.g., where "clear and convincing" evidence is required, the plaintiff's proof must meet the higher standard.³⁰

D. The Complaint Must not be Subject to Any Exceptions Contained in California Code of Civil Procedure Section 425.17

The anti-SLAPP special motion to strike is not available to a defendant in three circumstances set forth in California Code of Civil Procedure section 425.17.³¹ In addition to making the threshold showing described above, the defendant also has the burden to establish that the case is not subject to the exceptions, which are the following:

1. the plaintiff's lawsuit is an enforcement action brought in the name of the state by an agency authorized to act as a public prosecutor;³²

²² *Episcopal Church Cases*, 45 Cal. 4th 467, 477 (2009).

²³ *Brill Media Co., LLC v. TCW Group, Inc.*, 132 Cal. App. 4th 324, 339 (2005).

²⁴ *Equilon* at 58.

²⁵ *Equilon* at 59, *City of Cotati* at 69, and *Navellier* at 88.

²⁶ *Navellier*, 29 Cal. 4th at 88-89.

²⁷ *Soukup*, 39 Cal. 4th at 291.

²⁸ *Id.*

²⁹ *Navellier*, 29 Cal. 4th at 89.

³⁰ *Christian Research Institute v. Alnor*, 148 Cal. App. 4th 71, 84 (2007).

³¹ *Brill Media Co.*, 132 Cal. App. 4th at 330.

³² Cal. Civ. Proc. Code § 425.17(b); See *Holbrook v. City of Santa Monica*, 144 Cal. App. 4th 1242, 1249 (2006)

2. the plaintiff's lawsuit is an action brought solely in the public interest or on behalf of the general public;³³ or
3. the plaintiff's lawsuit was brought against a defendant primarily engaged in the business of selling or leasing goods or services.³⁴

V. Timing

The anti-SLAPP statute provides that an anti-SLAPP special motion to strike must be filed within 60 days after service of the complaint or amended complaint.³⁵ If that deadline has elapsed, a court, in its discretion, may permit filing of the motion "upon terms it deems proper."³⁶ Those time periods can also be extended under certain circumstances. Your lawyer can address the timing nuances with you when he or she analyzes the facts.

The hearing on the anti-SLAPP motion must be scheduled within 30 days after service of the motion.³⁷ The only exception is where the court's docket conditions require a later hearing.³⁸ (Thus, the burden to justify a later date falls on the court clerk, not the movant.)

VI. Stay of Discovery

One of the real benefits of the anti-SLAPP procedure is that all discovery is stayed until the

³³ See *Blanchard v. DIRECTV, Inc.*, 123 Cal. App. 4th 903, 914 (2004)

³⁴ Cal Code Civ. Proc. § 425.17(c)

³⁵ Cal. Civ. Proc. Code § 425.16(f); *Yu v. Signet Bank/Virginia ("Yu II")*, 103 Cal. App. 4th 298, 314 (2002).

³⁶ *Id.*

³⁷ Cal. Civ. Proc. Code § 425.16(f).

³⁸ *Id.*

motion is resolved.³⁹ Conducting or responding to discovery tends to be quite costly and time consuming, so the stay is truly beneficial to defendants faced with a SLAPP.

The stay commences upon filing the notice of motion and remains in effect until notice of entry of an order ruling on the motion.⁴⁰

The plaintiff may move for an order allowing discovery, but cannot oppose the motion on the grounds of lack of opportunity to obtain discovery.⁴¹ The motion will be granted only if plaintiff can establish good cause for discovery, which requires plaintiff to establish the viability of his or her claim by a *prima facie* showing.⁴² If discovery is allowed, it will be limited.⁴³

VII. Applicability in Federal Court

There is no federal anti-SLAPP law. There is a split among the federal circuits whether state anti-SLAPP remedies are available in federal district courts within that state. For example, the United States Court of Appeals for the First Circuit concluded that the Massachusetts anti-SLAPP law is not available in federal court.⁴⁴

The story is different for federal courts in

³⁹ Cal. Civ. Proc. Code § 425.16.

⁴⁰ *Id. at* § 425.16(g). The court has no inherent power to rule on pending discovery motions or to allow discovery while the motion is pending, absent a noticed motion under section 425.16(g).

⁴¹ *Lafayette v. Morehouse, Inc. v. Chronicle Publ. Co.*, 37 Cal. App. 4th 855, 867 (1995).

⁴² *Paterno v. Superior Court*, 163 Cal. App. 4th 1342, 1349 (2008).

⁴³ See *Sipple v. Foundation For Nat'l Progress*, 71 Cal. App. 4th 226, 247 (1999).

⁴⁴ *Stuborn Ltd. Partnership v. Bernstein*, 245 F. Supp. 2d 312 (D. Mass. 2003) (holding that Massachusetts anti-SLAPP statute is a "mere matter of procedure").

California, however. The United States Court of Appeals for the Ninth Circuit has concluded that California's anti-SLAPP statute applies in federal court.⁴⁵ Thus, a defendant facing a SLAPP suit brought in a United States District Court venued in California can file an anti-SLAPP motion.

VIII. Attorneys' Fees

Prevailing defendants are entitled to an award of attorneys' fees and costs.⁴⁶ Moreover, "Under the plain language of [California Code of Civil Procedure section] 425.16(c), such an award is mandatory."⁴⁷

IX. How Can AGMB Help You?

If you have been threatened with legal proceedings—or if actual proceedings have been instituted against you—in connection with exercising your First Amendment rights to free speech or your right to petition the government (e.g., to demonstrate, file a lawsuit, or the like), please contact an attorney right away. Our office has experience handling anti-SLAPP motions and appeals and would be willing to discuss your case with you.

For a free initial consultation, please contact Thomas H. Vidal at tvidal@agmblaw.com or

⁴⁵ See, e.g., *U.S. ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963, 972-73 (1999) (concluding that the anti-SLAPP statute is a substantive right); *Thomas v. Fry's Elecs., Inc.*, 400 F.3d 1206, 1206-07 (9th Cir. 2005) (reaffirming *Lockheed* and finding the district court "erroneously concluded that the anti-SLAPP statute was unavailable in federal court"); and *Globetrotter Software, Inc. v. Elan Computer Group, Inc.*, 63 F. Supp. 2d 1127, 1130 (1999)

⁴⁶ *Verizon Del., Inc.* at 1091.

⁴⁷ *Cornwell v. Belton*, 245 Fed. Appx. 592, 594 (9th Cir. 2007)

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X. About Thomas Vidal



Mr. Vidal handles civil litigation and trials in five broad areas of law: intellectual property rights; licensing & contract disputes; business torts; antitrust & unfair competition; and corporate/commercial disputes. He represents clients in the technology sector—software developers, hardware designers, web developers, and end users; the entertainment industry—recording artists, labels, publishers, film production companies, distributors, screenwriters, actors, and directors; the toy and game industry; and the food and fashion industries. Clients also include consumer products and lifestyle brands. Mr. Vidal is a competitive runner at 5k, 10k, half-marathon, and marathon distances, and a United States Masters swimmer. Mr. Vidal can be reached by email at tvidal@agmblaw.com.

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