CALIFORNIA'S ANTI-SLAPP STATUTE

A POWERFUL TOOL FOR LITIGATORS

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Passed into law in 1992, California's anti-SLAPP statute (prohibiting strategic lawsuits against public participation, or SLAPPs) has evolved into a nuanced but powerful procedural device for litigants facing lawsuits arising from protected petitioning or speech activity. Found at Code of Civil Procedure sections 425.16 through 425.18, it presents a mechanism to defendants to strike potentially meritless causes of action early in litigation while obtaining a mandatory fee award. If used effectively, it can quickly transform the landscape of litigation.

Yet many attorneys who have not encountered California's anti-SLAPP statute in litigation assume it is an abstract and nebulous device, perhaps reserved only for the First Amendment specialist. Few practitioners consider it something with broad application that should be added to every standard California civil litigation checklist. This article provides an overview of California's anti-SLAPP statute by considering its background, analytical framework, procedural advantages, and possible future evolution in light of recent case developments.

BACKGROUND

The term *SLAPP* appears to have first been coined by Penelope Canan and George W. Pring in their 1988 article, "Strategic Lawsuits Against Public Participation,"[1] in which they observed an increase in "attempts to use civil tort action to stifle political expression." An example of such an action would be an individual who decides to voice an opinion at a governmental proceeding—such as a school board meeting—and whose comments become the basis for a defamation or other action meant to silence the opinion of the speaker. Shortly after the publication of Canan and Pring's article, states began enacting anti-SLAPP statutes to provide protection to litigants subject to such lawsuits. In 1992, California became one of the first states to enact an anti-SLAPP statute.

In enacting California's anti-SLAPP statute, the legislature acknowledged a "disturbing increase" in actions cloaked as tort claims meant to silence legitimate free speech activity. As such, the legislature directed that the anti-SLAPP statute be "construed broadly" to achieve its objective of rooting out these sorts of actions.

PROTECTED ACTIVITY AND A PROBABILITY OF PREVAILING

In considering an anti-SLAPP motion brought pursuant to Code of Civil Procedure section 425.16, a court will engage in a two-part inquiry. First, the court will consider whether the movant has demonstrated that some cause of action against it arises from protected activity. If the movant is successful, then the burden shifts to the nonmoving party to demonstrate a probability of prevailing on that cause of action. If the nonmoving party is unable to meet this burden, then the cause of action is stricken and fees are awarded to the prevailing moving party.

Code of Civil Procedure section 425.16(e) divides "protected activity" into four categories. The first two categories include speech or petitioning activity that either occur in or are made "in connection with" legislative, executive, or judicial proceedings. The third category addresses statements made in certain other public forums relating to "an issue of public interest." Finally, the fourth category serves as a sort of catchall encompassing various other forms of speech or petitioning activity "in connection with a public issue or an issue of public interest."

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The collective result of section 425.16(e)'s definition of protected activity has been the creation of an expansive realm of speech and petitioning activity that may be susceptible to an anti-SLAPP motion to strike under California law. For example, California courts have found activities such as the filing of a right-to-sue notice (*Equilon Enterprises, LLC v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67), statements made during grievance procedures created by state law (*Vergos v. McNeal* (2007) 146 Cal.App.4th 1387, 1400), and statements made in peer-review proceedings established by state law (*Kibler v. Northern Inyo County Local Hosp. Dist.* (2006) 39 Cal.4th 192, 198) fit within the types of legislative, judicial, executive, and other "official proceedings" within which conduct may constitute protected activity. Further, statements made outside of such proceedings related to homeowners' association governance (see *Ruiz v. Harbor View Community Ass'n* (2005) 134 Cal.App.4th 1456, 1469–1470), warnings of fraud (*Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 899–900), and explosive ordnance removal in Iraq (*Sarver v. Chartier* (9th Cir. 2016) 813 F.3d

891, 902) have also been found to constitute protected activity. As demonstrated by these cases, protected activity under California's anti-SLAPP statute can encompass a seemingly endless variety of conduct.

The second step in a court's inquiry into an anti-SLAPP motion looks to the movant's probability of prevailing on the cause of action arising from the alleged protected activity. As the Supreme Court of California has noted, this analysis operates like a "summary judgment in reverse" in that it forces the nonmoving party—usually a plaintiff—to come forward with some proof to support its claim. (See *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 719.) As discussed further below, the nonmoving party may have little or no opportunity to conduct discovery to gather such evidence and may therefore be limited to only its own evidence and declarations as a means to defeat such a motion. If the nonmoving party is unable to demonstrate a probability of prevailing, the court must strike the subject cause of action and award attorney's fees to the moving party for prevailing in its anti-SLAPP motion.

PROCEDURAL CONSIDERATIONS

California's anti-SLAPP statute contains a number of procedural provisions that should be considered by both moving and nonmoving parties involved in anti-SLAPP litigation. Unless a court finds good cause exists, Code of Civil Procedure section 425.16(f) permits only sixty days within which an anti-SLAPP motion may be filed. Once an anti-SLAPP motion is filed, Code of Civil Procedure section 425.16(g) places a stay on "all discovery proceedings in the action"; however, a party may seek to have this stay lifted via noticed motion.

Perhaps most importantly, Code of Civil Procedure section 425.16(c)(1) mandates a fee award to a prevailing anti-SLAPP movant. The impact of this provision can be to change the landscape of litigation materially by quickly creating circumstances under which a plaintiff may be pressured to settle or dismiss remaining claims in lieu of the leverage created by a large fee award. (Costs and fees attendant to collecting such awards and successful defense of appeals are also recoverable.) Further, nonmoving parties may not attempt to avoid a fee award by simply dismissing offensive claims. In such cases, a court will retain jurisdiction to make a prevailing party determination for the purposes of a potential fee award. Despite the availability of fee awards, movants should nevertheless exercise caution before filing an anti-SLAPP motion. Section 425.16(c)(2) also makes mandatory an award of fees to a nonmoving party if a court finds a motion "is frivolous or is solely intended to cause unnecessary delay."

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Finally, federal court litigants considering the filing of an anti-SLAPP motion should also weigh the impact of the *Erie* doctrine on the procedural devices described above. For example, federal courts in California examining the discovery stay and limitations period have found them to be in conflict with the Federal Rules of Civil Procedure and therefore inapplicable. However, the mandatory fee award provisions have largely been upheld to date.

APPLICATION AND EVOLUTION

Given the broad conduct deemed protected activity, one can see how California's anti-SLAPP statute may apply in all types of civil litigation. Statements made in nearly any forum or setting may potentially give rise to a claim that is susceptible to an anti-SLAPP motion to strike. So long as such a motion is not deemed frivolous, it will have the impact—if filed in state court—of staying the proceedings

and potentially making a large fee award available to the movant. In circumstances where, for example, a plaintiff may have included a claim that may not be asserted against a party as a matter of law (and on which there would be no probability of prevailing), settlement discussions may occur much sooner than had the litigation been allowed to proceed without being subject to an anti-SLAPP motion.

Whether the framework described above remains available to defendants in state and federal courts in its current form remains in flux. Although meant to be interpreted broadly to achieve its purpose, California's anti-SLAPP statute has nevertheless been amended once since its inception due to what the legislature deemed a "disturbing abuse" of its provisions. (See Code of Civil Procedure section 425.17(a).) Further, United States Court of Appeals for the Ninth Circuit Judge Alex Kozinski recently indicated the entirety of California's anti-SLAPP statute should be deemed a procedural device that may therefore be in conflict with the Federal Rules of Civil Procedure under the *Erie* doctrine. (See *Makaeff v. Trump University, LLC* (9th Cir. 2013) 715 F.3d 254, 273 [Kozinski, J., concurring].) Nevertheless, California's anti-SLAPP statute appears to be firmly established as a tool available to California state court litigants and should be considered by any party that may be able to avail itself of the statute's protections and advantages.

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Note

1. Penelope Canan and George W. Pring, "Strategic Lawsuits Against Public Participation," December 1988 issue of *Social Problems*. https://www.jstor.org/stable/800612?seq=1#page_scan_tab_contents.