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Davis Wright Tremaine LLP

FIRST AMENDMENT LAW LETTER

FALL 2005

CALIFORNIA CODE OF CIVIL PROCEDURE § 425.17(C): A NEW RESTRICTION ON ANTI-SLAPP MOTIONS

by Bruce E.H. Johnson[1]

In the fall of 2004, V. Whitney Tilson sent an e-mail to a *Wall Street Journal* reporter and others regarding Troy Group, Inc., in which he owned stock. The e-mail asked, "Are these guys the biggest crooks on the planet or what?" When the company sued for defamation, Tilson moved to strike the complaint as a Strategic Lawsuit Against Public Participation ("SLAPP"), designed to stifle his speech. The company fought back, claiming that a recent statute barred his anti-SLAPP motion. *Troy Group, Inc. v. Tilson,* 364 F. Supp. 2d 1149 (C.D. Cal. 2005).

A federal district court ruled against Troy Group this April. But the case brought attention to California Code of Civil Procedure § 425.17(c), a new limit on the otherwise broad anti-SLAPP statute. Passed in 2003 to curb perceived abuse of the anti-SLAPP statute, Section 425.17 provides that the anti-SLAPP statute does not apply to specific public interest actions if certain conditions are met. It also withdraws the immediate right of appeal that otherwise is available to a defendant whose SLAPP motion is denied.

Perhaps most controversially, subsection (c) of Section 425.17 exempts from the protection of the anti-SLAPP statute "cause[s] of action brought against a person primarily engaged in the business of selling or leasing goods or services, including, but not limited to, insurance, securities, or financial instruments…" if two conditions are met. First, the challenged statements must be representations of fact about a competitor's business operations, goods, or services. The exemption applies to representations made for the purpose of securing transactions in the person's goods or services, or statements made in the course of delivering them. Cal. Code Civ. Proc. § 425.17(c)(1).

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BATTLE TO MAINTAIN PUBLIC AND PRESS ACCESS TO DIVORCE COURTS

by Susan E. Seager

Each year, more than 1 million people file for divorce in the United States. In most states, divorce court proceedings and records have long been open to the public and press. This tradition of openness has allowed the public and press to scrutinize the shifting rights of men, women, and domestic partners over their financial assets and child custody and to ensure that the laws are being fairly applied. Nancy C. Cott's recent book, *Public Vows: A History of Marriage and the Nation* (2000), conducted an exhaustive look at divorce court records, newspaper articles, and other materials to posit her theory that the government has used marriage laws to shape gender roles, reduce the government's welfare costs, prevent interracial unions, and limit the influx of some immigrant groups. More recently, *The New York Times Magazine* published *The Fathers' Crusade* by Susan Dominus, a May 8, 2005, article about the rise of the fathers' custody rights movement, which contends that divorce courts are biased against fathers in child custody decisions. Neither of these publications would have been possible without public access to divorce court records and the ability of the divorcing parties to freely discuss their cases.

But in the bellwether state of California, the Legislature has hastily enacted a new statute *mandating* the sealing of financial documents filed in

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Second, the intended audience must be an actual or potential customer, or a person likely to repeat the statement to a customer. Alternatively, the statement can arise within the context of some regulatory proceedings. *Id.* § 425.17(c)(2).

Section 425.17(c) has not been extensively litigated. However, the section's legislative history points to a narrow interpretation of the new statute, and the few cases that have arisen reflect a desire to remain true to the legislative intent.

Events leading to subsection (c)

SLAPP suits are "brought to obtain an economic advantage over the defendant, not to vindicate a legally cognizable right of the plaintiff.... [T]hey are generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal rights or to punish them for doing so." *Wilcox v. Superior Court,* 27 Cal. App. 4th 809 (1994), *disapproved on other grounds, Equilon Enterprises v. Consumer Cause, Inc.,* 29 Cal. 4th 53 (2002). Concerned about "a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances," the California Legislature enacted the anti-SLAPP statute, California Code of Civil Procedure § 425.16, in 1992.

The anti-SLAPP statute allows defendants to file a special motion to strike non-meritorious claims that arise from the defendant's exercise of free speech and petition rights. It operates in two stages. First, the defendant must make a threshold showing that the lawsuit is the result of protected conduct. *Equilon Enterprises,* 29 Cal. 4th at 67. The burden then shifts to the plaintiff to show a probability of prevailing on the claim. *Id.* If the plaintiff cannot do so, the suit is dismissed and the plaintiff is liable for the defendant's costs and attorney's fees. *Id.*

The statute has been invoked in hundreds of cases and has been praised by media and consumer groups. However, in the late 1990s, businesses increasingly used the statute in a way many characterized as abuse. The Consumer Attorneys of California argued that corporations were using non-meritorious SLAPP motions to stymie litigation against them. It told a legislative committee that "a simple pro bono public interest case that should be completed in six months with $5,000 in expenses becomes a costly and financially risky ordeal when the anti-SLAPP law is misused." Report of Senate Judiciary Committee on Senate Bill No. 515, as amended May 1, 2003, pp. 4-5.

It added that "[t]he filing of the meritless SLAPP motion by the defendant, even if denied by the court, is instantly appealable, which allows the defendant to continue its unlawful practice for up to two years, the time of appeal." *Id.* The organization pointed to a rapid increase in the number of SLAPP motions filed, and to seminars like the Practising Law Institute's "Challenging a 17200 Claim as a SLAPP Suit." *Id.* at 7.

The legislative history of Section 425.17 reflects that the Legislature was influenced by the comments of Penelope Canan, co-author of the seminal research on SLAPP suits, who wrote, "How ironic and sad ... corporations in California have now turned to using meritless anti-SLAPP motions as a litigation weapon. This turns the original intent of one of the country's most comprehensive and effective anti-SLAPP laws on its head." *Id.* at 6. She and others urged the Legislature to adopt limits on the types of defendants who could bring anti-SLAPP motions. "Wealthy corporate defendants, some with their own legal departments, simply do not suffer the chilling effect on their rights when faced with a lawsuit claiming, for example, false advertising or fraud or illegal business practices, that common citizens suffer when sued for speaking out," she argued. *Id.*

Subsection (c) faced a wide range of opponents

The first legislative attempt to limit anti-SLAPP motions was SB 789, introduced in 2001. Governor Gray Davis vetoed the bill, writing that "[t]he First Amendment right to free speech should be carefully guarded and the Court may be in the best position to ensure this right is protected by examining these claims on a case by case basis." Report of Senate Rules Committee on Senate Bill No. 515, as amended July 8, 2003, p. 6.

SB 515, which became Section 425.17, was introduced the next year. The bill faced opposition from groups as varied as the American Civil Liberties Union, the California Chamber of Commerce, and Novartis Pharmaceuticals Corporation. *Id.* at 7. Novartis feared the bill would close the only avenue available to protect itself from litigation based on its public positions. *Id.* at 8. The California Building Industry Association worried that it would eliminate the protection that the statute had offered from NIMBY (Not in My Back Yard) litigation. *Id.* The California First Amendment Coalition was concerned "that it creates novel issues and potential ambiguities and therefore new fodder for protracted appellate clarification." Report of Assembly Committee on Judiciary on Senate Bill No. 515, as amended June 27, 2003, p. 7.

In addition to these practical objections, some groups argued that SB 515, and particularly the portion that became Section 425.17(c), would unconstitutionally single out commercial speech for regulation. The Civil Justice Association of California said: "Senate Bill 515 attempts to enact a wholesale denial of the ability of an entire class of defendants [businesses selling or leasing goods or services] to protect themselves against a harassing lawsuit." *Id.* at 7. Despite these objections, the Legislature passed the Bill in August 2003.

Courts consistently have rejected constitutional challenges to subsection (c)

Opponents have challenged the statute's constitutionality but courts consistently have rejected these challenges. In *Brenton v. Metabolife Int'l, Inc.,* 116 Cal. App. 4th 679 (2004), defendant MII argued that Section 425.17(c) "cannot be applied to this or any other action because it is a regulation of or restriction on commercial speech that must satisfy the strict scrutiny standard of *Central Hudson Gas & Elec. v. Public Serv. Comm'n* 447 U.S. 557 (1980)." 116 Cal. App. 4th at 691-92.

The court rejected this constitutional challenge because Section 425.17(c) "does not purport to regulate, restrict, condition or penalize MII's ability as a speaker freely to engage in commercial speech; it merely regulates or restricts MII's ability as a litigant to seek dismissal of certain lawsuits at a particular stage of the litigation." *Id.* at 692. The court further noted that "we are unaware of any case law holding there is a constitutional imperative that a legislature must make procedural screening devices available to preempt those private lawsuits." *Id.*

Later courts have agreed that Section 425.17(c) is not an unconstitutional regulation of commercial speech. In one case, defendant U-Haul claimed that Section 425.17(c) violates equal protection guarantees under the state and federal Constitutions because it "selectively exempt[s] corporate defendants … from the protections afforded by the anti-SLAPP statute." *Metcalf v. U-Haul Int'l, Inc.,* 118 Cal. App. 4th 1261, 1266 (2004). That court also rebuffed the constitutional challenge, saying "Section 425.17 does not create impermissible classifications among those who utter constitutionally protected speech. Rather, it creates classifications of litigants who can take advantage of the anti-SLAPP statute." *Id.* It found that the statute survived a rational basis review, saying, "[t]he Legislature enacted the anti-SLAPP statute to prevent powerful plaintiffs from chilling the rights of defendants to participate in the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." *Id.* at 1267. *See also Physicians Comm. for Responsible Medicine v. Tyson Foods,* 119 Cal. App. 4th 120, 130 (2004) ("We do not consider, however, that … subdivision (c), restricts or regulates speech by redefining the availability of a procedure for early adjudication of claims. This contention was expressly rejected in *Brenton*").

Application of subsection (c) to false advertising claims

Three early cases, all dealing with false advertising claims, focused mainly on subsection (c)'s retroactivity and constitutionality, rather than its scope of application. However, the cases provide some insight into what types of cases fall within the ambit of Section 425.17(c).

In *Brenton,* the plaintiff claimed she suffered a psychotic breakdown after using the defendant's product. She sued, asserting claims for products liability, negligence, breach of express and implied warranty, fraud and violations of Business and Professions Code sections 17200 and 17500, based in part on claims of false advertising and product misbranding. 116 Cal. App. 4th at 683. The court noted that "Section 425.17, subdivision (c) appears to remove Brenton's unfair practices claim (as well as her individual claims) from the types of claims against which an anti-SLAPP motion can be filed. MII does not contest that application of subdivision (c) here would be fatal to its present anti-SLAPP motion." *Id.* at 688.

In *Metcalf,* the plaintiff claimed that U-Haul intentionally engaged in a uniform practice of overstating the actual size of its storage units. 118 Cal. App. 4th at 1263. Here, too, the court noted that "U-Haul acknowledges that Metcalf's causes of action against it arise out of its statements in connection with commercial transactions; it concedes if section 425.17 applies to this case, it cannot be considered a SLAPP suit." *Id.* at 1265. Likewise, the *Tyson Foods* plaintiff claimed that Tyson's chicken "advertisement creates the false and misleading impression that chicken is a health food that can protect against the risk of developing heart disease." 119 Cal. App. 4th at 123 (internal quotation marks omitted). The court held that "[t]he present suit comes squarely within [subsection (c)] … PCRM alleges deceptive advertising practices, consisting of misleading statements about Tyson's chicken products, that were made for the purpose of promoting sales of these products." *Id.* at 128.

In each of these three cases, courts found with little discussion that claims based on false advertising satisfied each provision of Section 425.17(c). In each case, the courts found, the defendant was communicating with customers about its products in an attempt to sell them. Two closer cases discuss each element of the statute in more depth.

Courts have refused to extend § 425.17 beyond false advertising

In *New.net, Inc. v. Lavasoft,* 356 F. Supp. 2d 1090 (C.D. Cal. 2004), a producer of spyware sued a software company based on defendant's inclusion of information about the plaintiff's product in defendant's anti-spyware database. The court found that "[j]ust because Defendant operates a business and sells software products does not mean that Defendant is primarily engaged in the business of selling goods." *Id.* at 1103. The court was concerned that, for example, if the definition of business engagement were too broad, "Consumer Reports would be 'primarily engaged in the business of selling ... goods or services,' thus making Consumer Reports ineligible for the protection of the anti-SLAPP statue." *Id.* at 1104.

In addition, the court held that Lavasoft and New.net were not competitors. Noting that there was no statutory definition of a competitor, the court held that the two companies did not meet the dictionary definition of "one selling or buying goods or services in the same market as another." *Id.* Finally, the court noted that New.net's attempt to avoid the SLAPP statute also failed because references to it did not occur until after the defendant's software was downloaded and in use. *Id.* For each of these reasons, New.net's attempt to circumvent the anti-SLAPP statute via Section 425.17(c) failed.

In *Tilson,* 364 F. Supp. 2d 1149, the defamation case discussed above, the court was similarly stringent. The court found, first, that "[t]he September 8 email is clearly not about Tilson's business, rather it is about Troy, which, as the Troy Parties admit, is not a business competitor of Tilson." *Id.* at 1155. Second, it held that "the September 8 email was not made to obtain approval for or promote Tilson's goods or services, or made in the course of delivering his goods or services." *Id.* Finally, the court noted that "the Troy Parties fail to show that the intended audience included an actual or potential buyer or purchaser, or that the allegedly defamatory statement would likely be repeated to such an individual." *Id.* From this, the court concluded that "the exception codified in Section 425.17 has no application here." *Id.*

These two cases show how plaintiffs have tried to use Section 425.17(c) to remove anti-SLAPP protections from statements made outside the false advertising context. But the two rulings, both in the Central District of California, also reflect each court's reluctance to extend the bounds of Section 425.17(c) beyond false advertising.

Exemption for media defendants

Section 425.17, including subsection (c), does not apply to many types of media activity (which therefore remain protected by the anti-SLAPP statute). Subsection (d)(1) expressly exempts from the scope of Section 425.17 journalists, as defined by Section 1070 of the Evidence Code (California's shield law). This includes those "connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed." Cal. Evid. Code § 1070. Similarly protected is any person connected with a radio or television station. *Id.*

Section 425.17(d)(1) also exempts "any person engaged in the dissemination of ideas or expression in any book or academic journal, while engaged in the gathering, receiving, or processing of information for communication to the public." Finally, Section 425.17(d)(2) exempts actions "based upon … 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."

These subsections entirely exempt many types of media activity from the limitations imposed by Section 425.17(c). Moreover, these group listings are not exclusive. One court noted that "[t]he fact that 'radio stations' are not specifically listed is of no moment because the language of the subdivision specifically states it is not inclusive …. We see no distinction in this and the gathering and dissemination of news by other media organizations which are identified in the exception." *Ingels v. Westwood One Broadcasting Services, Inc.,* 129 Cal. App. 4th 1050, 1068 (2005).

Conclusion

Section 425.17(c) represents an attempt to limit perceived abuses of the anti-SLAPP statute without burdening the type of speech that it was intended to protect. So far, courts have applied Section 425.17(c) mainly to false advertising claims, while rejecting creative attempts to expand the statute. They have also made clear that Section 425.17 as a whole does not apply to many media activities.

For those who have relied on the anti-SLAPP statute to protect their public speech, this careful attention to the limitations of Section 425.17(c) should be welcome news. This is because, to borrow Dr. Canan's words, an overly-broad application risks once again turning "the original intent of one of the country's most comprehensive and effective anti-SLAPP statutes on its head."

NOTES

[1] Rory Eastburg, a summer associate in the Los Angeles office of Davis Wright Tremaine, provided valuable assistance in researching and writing this article.

BATTLE TO MAINTAIN PUBLIC AND PRESS ACCESS TO DIVORCE COURTS

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divorce court—California Family Code § 2024.6—that would reverse more than a century of openness.

The first test of the new statute

The Los Angeles Times, California Newspaper Publishers Association, and The Associated Press have launched a legal challenge to the new California secrecy statute in the divorce case of *Burkle v. Burkle,* involving Ronald W. Burkle, a Beverly Hills supermarket magnate who is one of the world's richest men, reputedly the largest political donor to the Democratic Party, and a financial advisor to Michael Jackson.[1] The battle began just a few days before Christmas in 2004. That's when Mr. Burkle filed two *ex parte* applications asking two Los Angeles County Superior Court judges and the California Court of Appeal to seal hundreds of pages of his divorce court records, even though the records had been available to the public as public court records for more than a year. Over the objections of the media organizations and Mrs. Burkle, the trial courts and Court of Appeal issued temporary blanket sealing orders. Demonstrating the danger of such statutes, the Court of Appeal placed the entire *Burkle* divorce appellate record under seal, sealing more than 12 volumes of previously public court records. Those records remain sealed today.

Mr. Burkle relied on Section 2024.6, which requires a court, upon request, to automatically seal a divorce court record – *in its entirety* – if the record contains even a mere footnote that mentions a party's financial assets and the "location" of those assets. This new statute was signed into law as "urgency legislation" by Governor Arnold Schwarzenegger on June 7, 2004, ostensibly to protect divorcing couples from identity theft and kidnappings, although the legislation did not cite a single instance of identity theft or kidnapping that could be linked to public divorce court records. Perhaps not coincidentally, the statute contains the same legal arguments used by Mr. Burkle in his previous legal briefs in his divorce case, and was signed into law shortly after Mr. Burkle and his companies donated nearly $150,000 to the governor's political committees and the state Democratic Party.

The three media organizations opposed Mr. Burkle's sealing requests, contending that Section 2024.6 is unconstitutional because it requires courts to seal public court records without undertaking the line-by-line, document-by-document analysis required by the First Amendment. The United States Supreme Court has struck down similarly overbroad statutes as unconstitutional in *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 609-611 (1982), and other cases.

On Feb. 28, 2005, Los Angeles Superior Court Judge Roy L. Paul found that the statute is unconstitutional because it is "not narrowly tailored." *Burkle v. Burkle,* 2005 WL 497446 at *4-*5 (Cal. Sup. Ct. Feb. 28, 2005). Judge Paul explained that the statute is "not unconstitutional merely because it deprives the court of discretion as to what should be sealed, but because as enacted it seals the entirety of a pleading if any of the specified materials are included in it." *Id.* As written, the statute requires a court to seal "a 100 page pleading filled with legal argument of genuine public interest … if a party's home address appears even in a footnote," which invites "gamesmanship." *Id.*

Mr. Burkle has asked the Court of Appeal to reverse Judge Paul's order, arguing that the financial data provided in divorce court pleadings should be sealed to protect the litigant's privacy, which Mr. Burkle asserts is a compelling interest. Mr. Burkle also contends that the statute can be interpreted to allow limited redactions of financial information, and does not require blanket sealing orders. However, Mr. Burkle could not point to any specific language in the statute that would allow a limited redaction.

The statute is inconsistent with the Supreme Court's "experience and logic" test

In evaluating whether the First Amendment right of public access applies to particular court records or proceedings, the Court of Appeal will follow the United States Supreme Court's two-part "experience and logic" test. *Press-Enterprise Co. v. Superior Court,* 478 U.S. 1, 8-9 (1986) *("Press-Enterprise II"); Globe Newspaper,* 457 U.S. at 9. *First,* the court must evaluate "whether the place and process have historically been open to the press and general public." *Second,* the court must determine "whether public access plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise II,* 478 U.S. at 8; *see also Globe Newspaper,* 457 U.S. at 605-06. The media organizations assert that both prerequisites are easily satisfied here.

California's divorce records traditionally have been open to the public

California's courts have long recognized that divorce proceedings and records are presumptively open to the public and press. More than 100 years ago, the California Supreme Court vacated a contempt order against a reporter for reporting about closed divorce proceedings, declaring that "[i]n this country it is a first principle that the people have the right to know what is done in their courts." *In re Shortridge,* 99 Cal. 526, 530-31 (1893). The Court explained that "the greatest publicity to the acts of those holding positions of public trust, and the greatest freedom in the discussion of the proceedings of public tribunals that is consistent with truth and decency are regarded as essential to public trust." *Id.* at 530-31. California's Courts of Appeal consistently have adhered to this mandate. *See, e.g., Green v. Uccelli,* 207 Cal. App. 3d 1112, 1120 (1989); *In re Marriage of Lechowick,* 65 Cal. App. 4th 1406, 1414 (1998). *See also Estate of Hearst,* 67 Cal. App. 3d 777, 783-84 (1977) (recognizing common law right of access to probate court records over objection of the prominent Hearst family, which asserted fears of terrorism, kidnapping, and other violence).

A hundred years after *Shortridge* the California Supreme Court affirmed this long tradition of access, holding that the public and press had a presumptive constitutional right of access to the palimony trial of celebrity Clint Eastwood, and that this right of access did not disappear merely because the proceedings involved wealthy, powerful public figures. *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court,* 20 Cal. 4th 1187, 1208 & n.25; 1211 n.27, 1218-19 (1999). To the contrary, the public's interest is arguably stronger to ensure that equal treatment is given in celebrity cases. The Court reiterated the important public policy reasons for mandating public access to all court proceedings. 20 Cal. 4th at 1208 n.25; 1210, 1211. Particularly instructive, however, the Court noted that an earlier decision by a California Court of Appeal had not gone far enough in recognizing the First Amendment right of public access to family court proceedings and records when it vacated a blanket order closing divorce court proceedings and sealing records. The Supreme Court noted that in *In re Lechowick,* 65 Cal. App. 4th 1406, the Court of Appeal had relied solely on Family Code § 214, which allows limited closure of portions of family law proceedings, but should have "take[n] into account rules of procedure and substance set out in … cases construing the First Amendment" right of access to judicial proceedings. *NBC Subsidiary,* 20 Cal. 4th at 1195 n.11.

The media organizations contend that these authorities demonstrate that civil proceedings and records dealing with personal business disputes—including divorce proceedings—are historically open in California, clearly satisfying the "experience" test of *Press-Enterprise II* and *Globe Newspaper.* Thus, the first prong of the United States Supreme Court's two-pronged test under the First Amendment is satisfied.

Public access to divorce records provides vital information about an important part of our judicial system

The media organizations assert in *Burkle* that the second part of the Supreme Court test is satisfied because the right of access to divorce proceedings and records "plays a particularly significant role in the functioning of the judicial process and the government as a whole." *Globe Newspaper,* 457 U.S. at 606. Of course, the Supreme Court has made clear that compelling reasons exist for access to public records in general. *Press-Enterprise Co. v. Superior Court,* 464 U.S. 501, 508 (1984) *("Press-Enterprise I").*

No exception exists for the powerful or wealthy. In *NBC Subsidiary,* the California Supreme Court strongly rejected the trial court's assertion that "there is nothing of concern to the public [in the Eastwood trial] 'beyond the fact that two famous people are involved in a private dispute.'" 20 Cal. 4th at 1210. "We believe that the public has an interest, in all civil cases, in observing and assessing the performance of its judicial system, and that interest strongly supports a general right of access in ordinary civil cases." *Id.* The Court cited with approval language from *Estate of Hearst,* a probate case involving the assets of the wealthy Hearst publishing family, observing that "the public has a legitimate interest in access to … court documents …. If public court business is conducted in private, it becomes impossible to expose corruption, incompetence, inefficiency, prejudice, and favoritism." *NBC Subsidiary,* 20 Cal. 4th at 1211 n.28, quoting *Estate of Hearst,* 67 Cal. App. 3d at 777.

The media organizations contend that these principles apply equally to divorce proceedings and records, where the value of public oversight cannot be seriously disputed. Moreover, public and press access to divorce proceedings and records "permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government." *Id.* The need for public oversight is

especially acute in the *Burkle* case, where one of the parties is politically and financially powerful, and has been accused by his wife of hiding financial assets and misrepresenting his marital status to avoid sharing tens of millions of dollars in community property.

Section 2024.6 is neither narrowly tailored nor justified by a compelling state interest

Once the First Amendment's presumptive right of access is found to apply, a statute mandating closure or sealing can only survive constitutional challenge if it is *both* narrowly tailored and justified by a compelling state interest. In *Globe Newspaper,* the Supreme Court struck down as unconstitutional a Massachusetts statute that required trial courts to automatically exclude the public and press from any criminal trial during the testimony of underage sex crime victims, holding that the state could not justify the blanket sealing mandated. 457 U.S. at 608, 610.

The media organizations contend that the blanket sealing mandated by Section 2024.6 is similarly unconstitutional. Section 2024.6(a) provides that "[u]pon request by a party to a petition for dissolution of marriage, nullity of marriage, or legal separation, the court shall order a pleading that lists the parties' financial assets and liabilities and provides the location or identifying information about those assets and liabilities sealed." The statute defines "pleading" very broadly: "a document that sets forth or declares the parties' assets and liabilities, income and expenses, a marital settlement agreement that lists and identifies the parties' assets and liabilities, or any document filed with the court incidental to the declaration or agreement that lists and identifies financial information." *Id.* § 2024(c). The party requesting sealing can do so with an *ex parte* application. *Id.* § 2024.6(a).

As with the Massachusetts statute, Section 2024.6 prohibits courts from engaging in a document-by-document analysis to determine whether secrecy is necessary or whether limited redactions would adequately protect the state interests. Instead, merely upon the demand of one party, the statute mandates the wholesale sealing of records that otherwise would be open to public scrutiny.

Moreover, the state's asserted interests are speculative and defy common sense. According to the legislative history of the statute cited by Mr. Burkle, the secrecy provision was rationalized by "concerns about identity theft, stalking, kidnapping of the divorcing couple's children, theft of artworks and other property, and other finance-related crimes…." But like the Massachusetts statute, no empirical data was presented by the author of Section 2024.6 or anyone else in the Legislature to support these speculative claims of harm arising from public court documents. Instead, the bill's author recited only anecdotal examples of "stolen identities" and of "undue media publicity about divorcing couples with substantial assets," without linking either to publicly-available divorce records. And the California Legislature did not address the fact that similar financial information is available in a wide variety of other court documents in ordinary civil litigation, nor did it consider using an alternative method to protect specific financial information, such as redacting bank account numbers and home addresses.

Based on these authorities and facts, the media organizations are asking the Court of Appeal to find that Section 2024.6 is not narrowly tailored and therefore unconstitutional. The matter is pending before the Court of Appeal, but the *Burkle* records remain sealed pending that Court's resolution of this important issue.

NOTES

[1] Davis Wright Tremaine attorneys Kelli Sager, Alonzo Wickers and Susan Seager represent the media organizations in this case.

CALIFORNIA LEGISLATURE AMENDS ANTI-SLAPP STATUTE AGAIN

by Rochelle L. Wilcox

On Oct. 5, 2005, California's governor signed Assembly Bill 1158 ("AB 1158"), adopting California Code of Civil Procedure § 425.18 to amend the scope of California's anti-SLAPP statute. The anti-SLAPP statute permits a litigation defendant to obtain early dismissal of lawsuits that challenge defendant's rights of petition or speech about public issues, and requires the plaintiff who files such a suit to reimburse defendant's attorneys' fees and costs in pursuing the anti-SLAPP motion. AB 1158 was designated emergency legislation, taking effect immediately. Like previous amendments to the anti-SLAPP statute, this bill was adopted in response to a string of cases presenting a new and unexpected issue: whether a lawsuit by a defendant who prevails on an anti-SLAPP motion and then sues plaintiff for malicious prosecution (a "SLAPPback" action) is itself subject to an anti-SLAPP motion. As discussed below, the Legislature has created new limits on the use of the anti-SLAPP statute, in its attempt to ensure that the statute is used only to protect the public's rights of petition and free speech in connection with public issues, furthering the underlying legislative intent.

The Legislature also took the opportunity to overrule two cases which had held that the requirement that an anti-SLAPP motion be noticed for hearing within 30 days was jurisdictional, providing further protection for those who rely on the anti-SLAPP statute.

A "SLAPPback" now is treated differently from other lawsuits

In a number of cases over the past few years, a litigation defendant who prevailed on an anti-SLAPP motion followed that victory with a lawsuit for malicious prosecution against the unsuccessful plaintiff in the initial suit (a "SLAPPback" suit). The malicious prosecution defendant (the unsuccessful plaintiff in the prior suit) would respond with its own anti-SLAPP motion, claiming that the malicious prosecution action was itself an improper attempt to punish the unsuccessful plaintiff in the first suit from pursuing its right of petition.

Critics claimed that permitting an anti-SLAPP motion in the malicious prosecution action was an abuse of the anti-SLAPP statute and exposed the malicious prosecution plaintiff to an unwarranted risk merely for pursuing his or her right to recover damages incurred in the first litigation (which already had been adjudicated to be a SLAPP suit). The California Legislature agreed and adopted AB 1158 (now Code of Civil Procedure § 425.18) as emergency legislation to protect the right of the malicious prosecution plaintiff to pursue that claim. The new statute expresses this legislative intent:

> The Legislature finds and declares that a SLAPPback is distinguishable in character and origin from the ordinary malicious prosecution action. The Legislature further finds and declares that a SLAPPback cause of action should be treated differently, as provided in this section, from an ordinary malicious prosecution action because *a SLAPPback is consistent with the Legislature's intent to protect the valid exercise of the constitutional rights of free speech and petition by its deterrent effect on SLAPP (strategic lawsuit against public participation) litigation and by its restoration of public confidence in participatory democracy.*

Cal. Code Civ. Proc. § 425.18(a) (emphasis added). The statute then defines the "SLAPPback":

> "SLAPPback" means any cause of action for malicious prosecution or abuse of process arising from the filing or maintenance of a prior cause of action that has been dismissed pursuant to a special motion to strike under Section 425.16.

Id. § 425.18(b)(1).

Section 425.18 makes certain anti-SLAPP provisions inapplicable to a motion to strike a SLAPPback lawsuit. In particular, Section 425.18(c) provides that "[t]he [anti-SLAPP statute's] provisions of subdivisions (c), (f), (g), and (i) of Section 425.16, and paragraph (13) of subdivision (a) of Section 904.1, shall not apply to a special motion to strike a SLAPPback." These subdivisions contain some of the anti-SLAPP statute's most potent weapons:

- Section 425.16(c) provides for a mandatory award of attorneys' fees and costs to any defendant prevailing on an anti-SLAPP motion. A plaintiff who defeats an anti-SLAPP motion is entitled to recover its attorneys fees and costs only if the court finds that the motion "is frivolous or is solely intended to cause unnecessary delay."
- Section 425.16(f) provides that the motion must be filed within 60 days of service of the complaint or, in the court's discretion, at a later date, and it must be heard within 30 days of service of the motion "unless the docket conditions of the court require a later hearing."
- Section 425.16(g) provides for an immediate stay of all discovery in the action unless the court "on noticed motion and for good cause shown" permits "specified discovery."

- Sections 425.16(i) and 904.1(13) permit the immediate appeal of an order granting or denying an anti-SLAPP motion.

In their place, the Legislature has established new procedures and rules to govern a motion filed against a SLAPPback:

- Section 425.18(f) removes the defendant's right to recover its attorneys' fees and costs following a successful anti-SLAPP motion. It mandates an award of attorneys' fees and costs to plaintiff if the motion "is frivolous or solely intended to cause unnecessary delay."
- Section 425.18(d) provides that the motion must be filed within 120 days of service of the complaint, within six months in the court's discretion or, if defendant is not at fault and if the court finds extraordinary circumstances, at any later time.
- Section 425.18(e) permits a party faced with an anti-SLAPP motion to file an ex parte application to continue the motion to conduct necessary discovery.
- Section 425.18(g) permits the losing party to file a peremptory writ—asking the Court of Appeal to exercise its discretion to review the order— within 20 days of service of written notice of entry of the order granting or denying the anti-SLAPP motion.

In addition to these procedural changes, the Legislature imposed an entirely new limit on use of the anti-SLAPP motion in a SLAPPback:

> A special motion to strike may not be filed against a SLAPPback by a party whose filing or maintenance of the prior cause of action from which the SLAPPback arises was illegal as a matter of law.

Id. § 425.18(h).

This subsection is an important restriction on the use of an anti-SLAPP motion to defeat a SLAPPback. As explained by the Legislature in the Senate Judiciary Committee's Final Analysis, this provision is premised on the fact that "baseless litigation is not immunized by the First Amendment right to petition." Bill Analysis, AB 1158 (2004-2005 Session), Senate Judiciary Committee, August 15, 2005, p. 11 (citing *Bill Johnson's Restaurants, Inc. v. National Labor Relations Board,* 461 U.S. 731 (1983).) The Legislature explained:

> Thus, where a person whose prior SLAPP lawsuit was illegal as a matter of law, as shown by being thrown out on a special motion to strike, and the SLAPP victim files a subsequent malicious prosecution action, that bad actor cannot use the anti-SLAPP law to defend against the lawsuit or to vex and harass the SLAPP victim.

Id. at 12.

Prior California Supreme Court cases had limited the rights of SLAPP defendants

The California Supreme Court set the stage for ongoing SLAPPback litigation in *Jarrow Formulas Inc. v. LaMarche,* 31 Cal. 4th 728 (2003), where it held that an anti-SLAPP motion could be used to defend against a malicious prosecution action. In that case, the underlying lawsuit was not a SLAPP; rather, it was resolved on summary judgment. *Id.* at 732. Nonetheless, *Jarrow* made clear that an anti-SLAPP motion was available in all malicious prosecution actions, and consequently that an anti-SLAPP motion also would be available to challenge a malicious prosecution action based on a prior SLAPP. The Court explained:

> The anti-SLAPP statute is not ambiguous with respect to whether its protection of "any act" furthering protected rights encompasses suing for malicious prosecution. As we previously have observed, "[n]othing in the statute itself categorically excludes any particular type of action from its operation."

Id. at 735 (citation omitted). The Court also found that legislative history supported its construction of the statute as applying to all types of actions, without limitation. *Id.* at 736. Finally, the Court rejected Jarrow's claim that anti-SLAPP motions should not be available in malicious prosecution actions because the underlying case is not legal petitioning activity. *Id.* at 739. The Court explained:

> We already have, in another context, considered and rejected Jarrow's "validity" argument, noting it "'confuses the threshold question of whether the SLAPP statute [potentially] applies with the question whether [an opposing plaintiff] has established a probability of success on the merits.'"

Id. at 739-740.

A case decided by the Supreme Court a year earlier also addressed malicious prosecution actions in the anti-SLAPP context. In *Wilson v. Parker, Covert & Childester*, 28 Cal. 4th 811 (2002), the Supreme Court held that denial of an anti-SLAPP motion by a trial court could be used adversely in a subsequent malicious prosecution suit—even if the trial court's decision had been reversed on appeal—if the trial court's decision was based on a conclusion that the case had probable merit. *Id.* at 815. The Court explained that prior caselaw in

other contexts, such as summary judgment motions, established this principle. *Id.* at 817-819. The Court explained the reasoning underlying this rule:

> The rights of litigants and attorneys to bring nonfrivolous civil actions, "'even if it is extremely unlikely that they will win'" ..., would be unduly burdened were they exposed to tort liability for malicious prosecution for actions that had been found potentially meritorious under section 425.16.

Id. at 820 (citation omitted). Because one judge found the action to be potentially meritorious, the court concluded that as a matter of law a reasonable attorney could reach that conclusion. *Id.* at 819.

The Legislature disagreed with both of these decisions, at least in part. The final report of the Senate Judiciary Committee, as amended August 15, 2005, explains:

> The sponsor, the California Anti-SLAPP Project (CASP), and proponents assert that victims of SLAPP lawsuits suffer great damages as a result of being SLAPPed, and that the costs and attorneys' fees recoverable under the anti-SLAPP law are only a small part of the overall damages suffered by a SLAPP victim. CASP points out that some victim's lives have been literally destroyed by having to defend against a SLAPP. Some have lost or had to mortgage their homes to pay the upfront defense costs, and many have suffered severe emotional distress, adverse health consequences, and strained family relationships caused by SLAPP-related stress. Writes CASP: "Frequently, much more significant are damages for emotional distress and punitive damages, arising from violations of the defendant's constitutional rights. Attorneys' fees and costs will not compensate."
>
> This bill will enhance the ability of SLAPP victims to recover damages for being SLAPPed in two major ways. First, it would narrowly abrogate a part of the Supreme Court decision in *Wilson v. Parker, Covert & Childester,* (2002) 28 Cal.4th 811, in which the Court narrowly construed legislative intent and declined to bar the denial of an anti-SLAPP motion from having an adverse effect in a later action. That ruling effectively bars many SLAPP victims from filing a SLAPPback action even though that prior denial of the motion by the trial court was overturned on appeal. The proposed limited abrogation would allow those SLAPP victims to file a SLAPPback claim. (See Comment 3.) A second major provision would enact new Section 425.18 to govern SLAPPback actions to specifically ameliorate some of the potential harshness of the anti-SLAPP law if applied to a SLAPPback action. (See Comments 2, 4, and 5.)

Bill Analysis, AB 1158 (2004-2005 Session), Senate Judiciary Committee, August 15, 2005, pp. 6-7.

The Legislature did not, however, abrogate *Jarrow* in its entirety. The Senate rejected an early version of AB 1158 that would have done so, explaining that it "could result in cases of first impression where the 'little-guy' plaintiff was truly not engaging in SLAPP litigation, but is nonetheless found to be a SLAPPer." *Id.* at 15. The Legislature wanted to preserve the "little-guy" plaintiff's opportunity to use the anti-SLAPP law to defend against a SLAPPback. In addition, the Legislature echoed the Supreme Court's observation in *Jarrow* that "spurious malicious prosecution suits may, like others, chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." *Id.* (citation, internal quotes omitted). Thus, the Legislature ultimately adopted a compromise "to continue allowing the filing of an anti-SLAPP motion in a SLAPPback but eliminating some of the risks to the SLAPPback filer if the motion succeeds." *Id.* at 16.

AB 1158 also overrules cases holding that the SLAPP subsection requiring a hearing to be noticed in 30 days is jurisdictional

In addition to remedying problems that had arisen in connection with SLAPPback lawsuits, the Legislature used the opportunity to overrule two Court of Appeal decisions that had limited use of the anti-SLAPP motion.

Section 425.16(f) previously provided that an anti-SLAPP motion "shall be noticed for hearing not more than 30 days after service unless the docket conditions of the court require a later hearing." Interpreting this subdivision, two Courts of Appeal had held that this limitation was jurisdictional, and the anti-SLAPP motion could not be heard if it was noticed for hearing outside of this time limitation for any reason other the court's docket conditions. *Decker v. U.D. Registry, Inc.,* 105 Cal. App. 4th 1382, 1387-1390 (2003); *Fair Political Practices Comm'n v. American Civil Rights Coalition, Inc.,* 121 Cal. App. 4th 1171, 1174-1178 (2004). The *Decker* court asserted that this furthered the legislative goals underlying the anti-SLAPP statute:

> [I]nterpreting "shall" in subdivision (f) of section 425.16 as mandatory advances the legislative purpose of requiring a prompt hearing on the motion so as not to prolong the discovery stay. Interpreting "shall" in subdivision (f) as mandatory also

> advances the legislative purpose of creating a prompt and efficient means for terminating claims improperly aimed at the exercise of free speech or the right of petition.

Id. at 1390.

The Legislature disagreed. It amended Section 425.16(f) to require the motion to "be scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing." Lest its intent be lost in the arguably ambiguous language, the Legislature also included in AB 1158:

> It is the intent of the Legislature, in amending subdivision (f) of Section 425.16 of the Code of Civil Procedure, to overrule the decisions in *Decker v. U.D. Registry, Inc.* (2003) 105 Cal.App.4th 1382, 1387-1390, and *Fair Political Practices Commission v. American Civil Rights Coalition, Inc.* (2004) 121 Cal.App.4th 1171, 1174-1178.

Assembly Bill 1158, Sec. 3. Now, it is the court clerk's responsibility to attempt to schedule the hearing on the anti-SLAPP motion within 30 days, and the court will not lose jurisdiction over the motion if that requirement is not met. Thus, the Legislature ensured that a SLAPP motion is not denied because of this procedural technicality.

Conclusion

The California Legislature has demonstrated its ongoing commitment to the policies underlying the anti-SLAPP statute by removing a barrier to SLAPP victims being fully compensated for having been subject to a SLAPP. Although AB 1158 limits the use of the SLAPP statute under certain circumstances, it does so only to protect the victims of the original SLAPP suit. The Legislature's decision to overrule *Decker* and *Fair Political Practices* also demonstrates its commitment to the anti-SLAPP statute, and its determination that SLAPP motions be decided on their merits. Both parts of this bill are good news for SLAPP victims in California.

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