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Litigation

SLAPP Happy?

California's anti-SLAPP statute has been undergoing some changes

By Thomas R. Burke

The First Amendment's best friend in California is §425.16 of the Code of Civil Procedure Section. Commonly known as the "anti-SLAPP" statute — SLAPP is an acronym for strategic lawsuit against public participation — §425.16 since 1992 has singlehandedly forced the early judicial review, if not the outright dismissal, of hundreds of lawsuits threatening to chill or punish free speech activity.

In 2003, the Legislature enacted §425.17 (sometimes called the "anti-anti-SLAPP statute) in response to concerns that the underlying law was being abused. Last year, the law was amended to eliminate the requirement that a defendant notice an anti-SLAPP motion for a hearing within 30 days. Also, §425.18 was added to deprive virtually all of the benefits of the anti-SLAPP statute to a defendant facing a complaint called a "SLAPP back" — in which a defendant is sued for malicious prosecution or abuse of process after a complaint they've filed is successfully dismissed using the anti-SLAPP statute.

Given the prominence that the anti-SLAPP statutes figure in the resolution of most First Amendment-related lawsuits filed in California, lawyers who only occasionally practice in this area are wise to appreciate the scope and procedural protections that are unique to §425.16 and to the recent amendments to this powerful law.

Under §425.16, a defendant (or cross-defendant) who demonstrates that one or more of the causes of action in a complaint arises from an act "in furtherance of the [defendant's] rights of petition or free speech under the United States or California Constitution in connection with a public issue," can move to summarily dismiss those causes of action, if not the entire complaint, unless the plaintiff "demonstrates a probability of prevailing on its claims." The defendant sets this in motion by filing a special motion to strike within 60 days of service of the complaint or cross-complaint or later, if they show good cause.

In general, §425.16 protects written or oral statements made before or in connection with an issue under consideration or review by legislative, executive or judicial body or other official proceedings as well as statements made in public forums in connection with an issue of public interest. A defendant can also bring a special motion to strike if the plaintiff's claims otherwise arise from the defendant's petitioning activity or are based on a defendant's free speech activities in connection with a public issue or an issue of public interest.

Earlier debates over whether the

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basic anti-SLAPP statute was to be narrowly or broadly construed were resolved by a trio of California Supreme Court decisions that held in favor of a broad construction. Those rulings can be found at *Briggs v. Eden Council for Hope & Opportunity*, 19 Cal.4th 1106 (1999); *Ketchum v. Moses*, 24 Cal.4th 1122 (2001); and *Equilon Enterprises LLC v. Consumer Cause*, 29 Cal.4th 53 (2002).

Defendants may rely upon §425.16 without proving that plaintiffs intended to chill their free speech or petitioning rights even if defendants allegedly acted wrongfully. Indeed, the broad constitutional protection provided by §425.16 is found in its simple application — the statute applies to all causes of action — including garden variety breach of contract and fraud claims. That's because, under *Navellier v. Sletten,* 29 Cal.4th 82 (2002), the sole initial focus is whether the defendant's activity involved speech or petitioning activity protected by the statute.

If a defendant satisfies the initial threshold, in the second prong the burden shifts to the plaintiff to establish a "probability" of prevailing on each cause of action. At this stage the plaintiff cannot simply rely on the allegations included in the complaint. Instead, the plaintiff must present admissible evidence in support of the probability of prevailing on each claim. If the plaintiff fails to satisfy this evidentiary burden, the court must strike each cause of action. Significantly, the recovery of attorneys' fees and costs is mandatory.

Even if a special motion to strike is not immediately granted, §425.16 provides defendants with other immediate tangible benefits. Once a defendant files a special motion to strike, all discovery in the action is stayed, absent permission from the trial court. Further, the defendant has the right to automatically appeal a trial court's denial of a special motion to strike. Lastly, even if the trial court denies the motion after deciding that the plaintiff has established a probability of prevailing, this determination is not admissible for other purposes in the case or in any subsequent proceeding.

In response to what some legislators viewed as abuses of the anti-SLAPP statute, §425.17, which went into effect on Jan. 1, 2004, exempts certain conduct from protections of the underlying statute. The result is a cobbling of two distinctly different categories of complaints: lawsuits brought "solely in the public interest" and lawsuits targeting certain commercial speech. Although only a few published decisions have analyzed either subdivision, the rulings have interpreted §425.17 to be consistent with the Legislature's goal of curbing abuses of the law. At the same time, however, courts have declared that the anti-SLAPP statute remains available to those facing threats to First Amendment activities.

The Legislature curtailed the anti-SLAPP statute in response to allegations of abuse of the underlying law.

While part B of §425.17 exempts certain "public interest" lawsuits from being quickly dismissed with an anti-SLAPP motion, that can happen only if three conditions are satisfied. First, the plaintiff must not seek any relief greater than or different from the relief sought for the public or a class of which the plaintiff is a member. Second, the plaintiff's lawsuit must enforce an "important right affecting the public interest" and confer a significant benefit on the general public or a large class of persons. Third, private enforcement must be necessary, with a disproportionate financial burden placed on the plaintiff in relation to its stake in the matter.

In *Ingles v. Westwood One Broadcasting Services*, 129 Cal.App.4th 1050 (2005), the court of appeal noted that §425.17(b) applies to a limited category of lawsuits brought "solely" in the public interest or on behalf of the general public. In *Ingles*, the court determined that even though the plaintiff brought a cause of action under California's Unruh Act for age discrimination, the complaint did not satisfy the requirements of §425.17(b) because the plaintiff sought monetary damages for himself. The court also found that the plaintiff's cause of action for violation of Business & Professions Code §17200 did not meet the requirement of 425.17(b)(2) because the injunctive relief sought was also personal to the plaintiff.

Similarly, in *Blanchard v. DirecTV,* 123 Cal.App.4th 903 (2004), the court of appeal determined that while both pecuniary and nonpecuniary relief can be considered when deciding whether the plaintiff is seeking personal gain or public benefit under §425.17(b)(2), the "relevant inquiry is whether the cost of the plaintiff's legal victory transcends their personal interest." In *Blanchard*, the appellate court found that the plaintiff's lawsuit challenging demand letters sent by customers of a satellite television company would not enforce an important right affecting the public interest and therefore was not exempt from the bar of §425.17.

Section 425.17(c) forbids reliance on the anti-SLAPP statute against causes of action brought against those who are "primarily engaged in the business of selling or leasing goods or services, including, but not limited to, insurance, securities, or financial instruments ..." For this exemption to apply, two conditions must be satisfied. First, the challenged statements must be representations of fact about the defendant's or the defendant's competitor's business operations, goods or services made for the purpose of obtaining approval for, promoting, securing sales or leases or commercial transactions in the person's goods or services or if the statement or conduct

was made in the course of delivering the person's goods or services. Second, the intended audience receiving the statement must include an actual or potential customer or a person likely to repeat the statement to a customer or involve situations where the statement arises out of a regulatory approval process. Because there are obviously many undefined terms and elements involved in §425.17(c), future court decisions are likely to further define its contours.

To date, the constitutionality of §425.17(c) has been upheld against assertions that it unduly restricts commercial speech (*Brenton v. Metabolife Int'l*, 116 Cal.App.4th 679 (2004)) and violates equal protection guarantees (*Metcalf v. U-Haul Int'l*, 118 Cal.App.4th 1261, (2004)).

Meanwhile, two published federal court decisions restrict §425.17(c) to situations in which a defendant makes a factual representation about his own goods and services or about a competitor's goods and services. In *New.net v. Lavasoft*, 356 F.Supp.2d 1090 (C.D. Cal. 2004), a software company was sued after including information about the plaintiff's product in its anti-spyware database. In analyzing §425.17(c), the court first questioned whether the defendant was engaged in the business of selling goods and, after observing that the parties were not competitors, determined that the exemption to the anti-SLAPP statute did not apply.

Similarly, the use of §425.17(c) was rejected in *Troy Group v. Tilson*, 364 F. Supp.2d 1149 (C.D. Cal. 2005), a libel lawsuit arising from allegedly defamatory comments about the defendant company that were published in an email message. The court observed that the e-mail was not about Tilson's business but instead was about Troy, a non-competitor. The same business-competitor analysis was also followed in *Brill Media v. TCW Group*, 132 Cal.App.4th 324 (2005).

Separate and independent of §425.17's public interest litigation and commercial speech exemptions is subdivision (d), which expressly exempts journalists from the scope of §425.17 due to their protection under California's shield law. Subdivision (d)(1) also exempts others engaged in the gathering and dissemination of ideas to the public. Lastly, subdivision (d)(2) exempts lawsuits that are based on any "dramatic, literary, musical, political or artistic works." In *Major v. Silna*, 134 Cal.App.4th 1485 (2005), the court of appeal found that the defendant's election-related letter and advertisement were "not different in kind" from the illustrative examples identified in subdivision (d)(2), leaving the anti-SLAPP statute available to the defendant.

In 2005, the Legislature removed from §425.16(f) the requirement that the moving party schedule a special motion to strike for a hearing within 30 days after service of the motion. The responsibility for scheduling is now left with the clerk of the court.

This amendment expressly overturned a pair of court rulings — *Decker v. U.D. Registry*, 105 Cal.App.4th 1382, and *Fair Political Practices Commission v. American Civil Rights Coalition*, 121 Cal.App.4th 1171, (2004) — that said the previous 30-day notice requirement was jurisdictional.

Finally, the Legislature late last year closed another emerging loophole — the use of the anti-SLAPP statute by a defendant facing a malicious prosecution or abuse of process lawsuit by someone who successfully prevailed against them earlier. By enacting §425.18, the Legislature barred a defendant in these so-called "SLAPP back" situations from benefiting from the protections otherwise available under §425.16. Although no published decisions have yet to analyze §425.18, by its plain language, although a defendant in a SLAPP back lawsuit may still use the anti-SLAPP statute, there is no right to recover attorneys' fees, stay discovery or immediately appeal the trial court's ruling.

After more than a decade on the books, §425.16 remains the workhorse when it comes to First Amendment litigation in California. Because of this law, trial courts now routinely analyze the legitimacy of complaints implicating free speech and petitioning activities. Nine SLAPP-related matters are currently awaiting action by the California Supreme Court. And while the recent legislative amendments to the anti-SLAPP statute will certainly shape the contours of the law, they are unlikely to curtail the statute's protection of most First Amendment activities. ❖

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