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§ 1:1 Scope

Code of Civil Procedure §§ 425.16 et seq.—California’s “anti-SLAPP” statute—is the frontline defense against any action involving petitioning or free speech. In 1992, the California Legislature enacted Civ. Proc. Code § 425.16 to address a “disturbing increase in litigation designed to infringe” free speech and petitioning activities through the filing of a SLAPP (Civ. Proc. Code § 425.16, subd. (a)), an acronym for a “strategic lawsuit against public participation.” The anti-SLAPP statute is available in state court and against state claims filed in federal court. It was enacted to “nip SLAPP litigation in the bud” (*Braun v. Chronicle Publishing Co.*, 52 Cal. App. 4th 1036, 1042, 61 Cal. Rptr. 2d 58, 25 Media L. Rep. (BNA) 1594 (1st Dist. 1997)) through a very early and very fast summary judgment-like procedure that allows defendants (including cross-defendants) to file a “special motion to strike” to dismiss entire complaints (or specific causes of action) or mere portions of a cause of action, making the plaintiff respond before he or she may have an opportunity to conduct discovery to avoid the costs and delay that chill the exercise of constitutionally protected rights. As one appellate court put it, “[t]he point of the anti-SLAPP statute is that you have a right *not* to be dragged through the courts because you exercised your constitutional rights.” (*People ex rel. Lockyer v. Brar*, 115 Cal. App. 4th 1315, 1317, 9 Cal. Rptr. 3d 844 (4th Dist. 2004).)

Once a defendant files a special motion to strike, the following happens:

- An automatic stay of discovery; absent court permission, no discovery is permitted (Civ. Proc. Code § 425.16, subd. (g)); see § 2:50.
- Amendments to the complaint are not permitted, and the plaintiff cannot dismiss the complaint without facing mandatory attorney's fees; see §§ 2:58; 2:90; 2:91.
- The court hears the motion within 30 days or as soon as docket conditions permit (Civ. Proc. Code § 425.16, subd. (f)); see §§ 2:41 to 2:42.
- If the defendant shows that the plaintiff's action arises from the defendant's petitioning or free speech activities, the plaintiff must prove he or she has pleaded and presented a legally sufficient claim supported by admissible evidence demonstrating that "there is a probability" that the plaintiff will prevail on the action (Civ. Proc. Code § 425.16, subd. (b)(1)); see §§ 5:3 to 5:5.
- If the motion is granted, then the action is dismissed and the defendant recovers his or her attorney's fees and costs (Civ. Proc. Code § 425.16, subd. (c)(1)); see § 2:85.
- If the motion is denied, the defendant has an automatic right of appeal (see § 2:69) and activity in the trial court is stayed pending the appeal (Civ. Proc. Code § 425.16, subd. (i)). See § 2:77.

Because of its strategically powerful features, the anti-SLAPP statute is regularly used in the defense of petitioning and free speech activities arising in a variety of different causes of action. See Chap. 4 (Appendix of Causes of Action). "A plethora of appellate litigation has made the SLAPP acronym a household word—at least in legal households." (*Paterno v. Superior Court*, 163 Cal. App. 4th 1342, 1357 n.1, 78 Cal. Rptr. 3d 244, 36 Media L. Rep. (BNA) 1882 (4th Dist. 2008).) Beyond California, dozens of states have enacted statutes with varying degrees of protection for defendants. See Chapter 8—State Anti-SLAPP Statutes. This book is designed to help make sense of and organize the large and rapidly growing body of anti-SLAPP published appellate case law. This book summarizes hundreds of published California Court of Appeal and California Supreme Court anti-SLAPP decisions as well as anti-SLAPP opinions of the Ninth Circuit Court of Appeals. Practitioners should also consider reviewing the *literally hundreds* of additional *unpublished* anti-SLAPP opinions that have been decided by California's appellate courts, in particular, those rendered by the appellate court that will hear any appeal of their

case. It is organized by key elements of the anti-SLAPP statute, an overview of which follows.

§ 1:2 Prong one/step one

“Resolution of an anti-SLAPP Motion requires a court to engage in a two-step process.” (*Jarrow Formulas, Inc. v. LaMarche*, 31 Cal. 4th 728, 3 Cal. Rptr. 3d 636, 74 P.3d 737 (2003).) In the first step or prong, the defendant must show that the conduct underlying the plaintiff’s cause of action or portions of the cause of action that are asserted as grounds for relief—arises from the defendant’s constitutional rights of free speech or petition. (Civ. Code § 425.16, subd. (b)(1).); *Baral v. Schnitt*, 1 Cal. 5th 376, 395, 205 Cal. Rptr. 3d 475 (Cal. 2016). See § 3:10.

In prong one, “the focus of the statute is not the form of plaintiff’s cause of action, but the defendant’s activity that gives rise to the asserted liability.” (*Midland Pacific Bldg. Corp. v. King*, 157 Cal. App. 4th 264, 272, 68 Cal. Rptr. 3d 499 (2d Dist. 2007).) The statute identifies four categories of protected petitioning and free speech activities. (Civ. Proc. Code § 425.16, subd. (e)(1) to (4)). The law expressly provides that it “shall be construed broadly [(Civ. Proc. Code § 425.16, subd. (a))] to encourage participation in free speech and petition activities.” (*Wanland v. Law Offices of Mastagni, Holstedt & Chiurazzi*, 141 Cal. App. 4th 15, 22, 45 Cal. Rptr. 3d 633 (3d Dist. 2006).) A large body of appellate case law has developed concerning conduct by a defendant that is within prong one and protected by the anti-SLAPP statute. See Chap. 4 (Appendix of Causes of Action). Courts have dismissed a wide variety of causes of action using the statute. See §§ 5:36 to 5:82.

If the defendant cannot satisfy prong one, the court will deny the motion without proceeding to prong two.

§ 1:3 Prong two/step two

In the second prong or step, the burden shifts to the plaintiff to prove that he or she has a legally sufficient claim *and* to prove with “admissible evidence” a “probability” that the plaintiff will prevail on the claim. This is similar to a summary judgment standard in which the plaintiff’s claim (or entire complaint) must be “legally sufficient and supported by a prima facie showing of facts to sustain a favorable judgment if plaintiff’s evidence is credited.” (*Navellier v. Sletten*, 29 Cal. 4th 82, 88–89, 124 Cal. Rptr. 2d 530, 52 P.3d 703 (2002).) See §§ 5:3 to 5:5. Because the plaintiff must demonstrate the substantive merits of his or her claim in prong two, a broad swath of substantive law (and evidence) is analyzed by courts in prong two. See §§ 5:36 to 5:82.

If the plaintiff cannot show a probability of prevailing, then the court will grant the special motion to strike and dismiss the plaintiff's action (either the entire lawsuit, individual causes of action, or portions of causes of action involving protected activity that are asserted as grounds for relief). (Civ. Proc. Code § 425.16, subd. (b)(1).) The defendant is entitled to recover their attorney's fees and costs incurred in the trial and appellate courts. (Civ. Proc. Code § 425.16, subd. (c)(1).) See § 2:85. If the court denies the special motion to strike—either because the anti-SLAPP statute was not triggered or because the plaintiff showed a probability of prevailing—then the defendant may immediately appeal. (Civ. Proc. Code § 425.16, subd. (i).) See § 2:69. A plaintiff may recover their attorney's fees and costs *only* if the filing of the anti-SLAPP motion was frivolous. (Civ. Proc. Code § 425.16, subd. (f).)

§ 1:4 Exemptions—When the anti-SLAPP statute is not available

A special motion to strike is not available against public enforcement actions brought by a public prosecutor (Civ. Proc. Code § 425.16, subd. (d)), actions brought “solely” in the public interest (Civ. Proc. Code § 425.17, subd. (b)), and in certain commercial speech cases. (Civ. Proc. Code § 425.17, subd. (c).) Additionally, a movant may not use the anti-SLAPP statute to protect petitioning or speech activity that is “illegal as a matter of law—meaning criminal activity, not merely violative of a statute or common law.” (*Flatley v. Mauro*, 39 Cal. 4th 299, 320, 46 Cal. Rptr. 3d 606, 139 P.3d 2 (2006).) If the court determines that an action falls within Civ. Proc. Code § 425.16 (d) or any of the exemptions in Civ. Proc. Code § 425.17, then the defendant has no automatic right of appeal. (Civ. Proc. Code § 425.17, subd. (e).)

§ 1:5 Terminology

The term “SLAPP” was coined by Professors George W. Pring and Penelope Canan of the University of Denver. See *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 *Law & Soc’y Rev.* 385 (1988). A lawsuit dismissed by Civ. Proc. Code § 425.16 (the “anti-SLAPP” statute) is said to be a “SLAPP” even though the action may not be frivolous or have little in common with the attributes of the type of lawsuits that prompted the statute’s original enactment. *Hupp v. Freedom Communications, Inc.*, 221 Cal. App. 4th 398, 403, 163 Cal. Rptr. 3d 919 (4th Dist. 2013) (although the complaint brought by individual against Internet publisher “does not

generally fit . . . the description of a typical SLAPP suit, it is subject to an anti-SLAPP motion if it fits within the statutory definition.”).