

## RESOLUTION 1-12-03

### DIGEST

#### SLAPP Motions: Trial Court Discretion to Award Attorney Fees

Amends Code of Civil Procedure section 425.16 to make the award of attorney fees to a defendant prevailing on a special motion to strike discretionary, rather than mandatory.

### RESOLUTIONS COMMITTEE RECOMMENDATIONS

APPROVE IN PRINCIPLE

#### History:

Similar to resolution 10-12-02, which was disapproved.

#### Reasons:

This resolution amends Code of Civil Procedure section 425.16 to make the award of attorney fees to a defendant prevailing on a special motion to strike discretionary, rather than mandatory. This resolution should be approved in principle because case law has expanded the scope of the SLAPP motion beyond the intent of the Legislature.

SLAPP (Strategic Lawsuit Against Public Participation) suits 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* (1994) 27 Cal.App.4th 809, 816.) However, in recent decisions, appellate courts have significantly reduced the requirement that the lawsuit be filed to “chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances” in order to be claimed as a SLAPP suit. (*Equillon Enterprises, LLC v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 58; *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76.) Instead, the courts appear to be expanding the concept of “matters of public significance” to include an ever larger number of suits. (See, e.g., *Stroock, Stroock & Lavan v. Tendler* (2002) 102 Cal.App.4th 318.)

The effect of this expansion is to increasingly allow large corporations and insurance defense counsel to file SLAPP motions. If on such motion the trial court determines the case should not proceed, under section 425.16 as currently written, it is forced to award attorney fees against the plaintiff, regardless of whether it feels the case is truly a SLAPP. (See *White v. Lieberman* (2002) 103 Cal.App.4th 210.) Such mandatory fee shifting makes courts reluctant to grant SLAPP motions and any legitimate defense motions brought concurrently with the SLAPP motion.

In addition, existing section 425.16 provides that a moving defendant who loses a SLAPP motion is only liable for attorney fees if the trial court, in its discretion, finds the motion to be “frivolous or intended to cause unnecessary delay.” (Code Civ. Proc., § 425.16, subd. (c).) This resolution would begin to give plaintiffs and defendants equivalent standards, as in Civil Code section 1717, which renders unilateral attorney fees clauses in contracts bilateral.

### SECTION/COMMITTEE REPORT

#### THE STATE BAR'S COMMITTEE ON ADMINISTRATION OF JUSTICE

Recommendation: **DISAPPROVE**

#### Reasons:

Some members of the Committee on Administration of Justice (“CAJ”) believe that switching from a mandatory fee-shifting paradigm to a permissive fee-shifting paradigm (by changing “shall” to “may”)

would undercut the “private attorney general” aspect of the statute. Assuming a change to permissive fee-shifting were to be made, CAJ agrees that making that change would create serious problems, in the absence of any guidance to the courts regarding when a defendant who prevails on a special motion to strike should (or should not) be awarded its fees. While CAJ takes no position at this time regarding fee-shifting in general, it does believe that parties, counsel, and the courts must be given clear guidance as to when a prevailing defendant should or should not receive its reasonable fees. That guidance is absent from this proposal.

## TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 425.16 to read as follows:

1 §425.16

2 (a) The Legislature finds and declares that there has been a disturbing increase in lawsuits  
3 brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and  
4 petition for the redress of grievances. The Legislature finds and declares that it is in the public  
5 interest to encourage continued participation in matters of public significance, and that this  
6 participation should not be chilled through abuse of the judicial process. To this end, this section  
7 shall be construed broadly.

8 (b)(1) A cause of action against a person arising from any act of that person in furtherance of  
9 the person's right of petition or free speech under the United States or California Constitution in  
10 connection with a public issue shall be subject to a special motion to strike, unless the court  
11 determines that the plaintiff has established that there is a probability that the plaintiff will prevail on  
12 the claim.

13 (2) In making its determination, the court shall consider the pleadings, and supporting and  
14 opposing affidavits stating the facts upon which the liability or defense is based.

15 (3) If the court determines that the plaintiff has established a probability that he or she will  
16 prevail on the claim, neither that determination nor the fact of that determination shall be admissible  
17 in evidence at any later stage of the case, and no burden of proof or degree of proof otherwise  
18 applicable shall be affected by that determination.

19 (c) In any action subject to subdivision (b), a prevailing defendant on a special motion to  
20 strike ~~shall~~ may be entitled to recover his or her attorney's fees and costs. If the court finds that a  
21 special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall  
22 award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section  
23 128.5.

24 (d) This section shall not apply to any enforcement action brought in the name of the people  
25 of the State of California by the Attorney General, district attorney, or city attorney, acting as a  
26 public prosecutor.

27 (e) As used in this section, "act in furtherance of a person's right of petition or free speech  
28 under the United States or California Constitution in connection with a public issue" includes:

29 (1) any written or oral statement or writing made before a legislative, executive, or judicial  
30 proceeding, or any other official proceeding authorized by law;

31 (2) any written or oral statement or writing made in connection with an issue under  
32 consideration or review by a legislative, executive, or judicial body, or any other official proceeding  
33 authorized by law;

34 (3) any written or oral statement or writing made in a place open to the public or a public  
35 forum in connection with an issue of public interest;

36 (4) or any other conduct in furtherance of the exercise of the constitutional right of petition  
37 or the constitutional right of free speech in connection with a public issue or an issue of public  
38 interest.

39 (f) The special motion may be filed within 60 days of the service of the complaint or, in the  
40 court's discretion, at any later time upon terms it deems proper. The motion shall be noticed for  
41 hearing not more than 30 days after service unless the docket conditions of the court require a later  
42 hearing.

43 (g) All discovery proceedings in the action shall be stayed upon the filing of a notice of  
44 motion made pursuant to this section. The stay of discovery shall remain in effect until notice of  
45 entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may  
46 order that specified discovery be conducted notwithstanding this subdivision.

47 (h) For purposes of this section, "complaint" includes "cross-complaint" and "petition,"  
48 "plaintiff" includes "cross-complainant" and "petitioner," and "defendant" includes "cross-defendant"  
49 and "respondent."

50 (i) On or before January 1, 1998, the Judicial Council shall report to the Legislature on the  
51 frequency and outcome of special motions made pursuant to this section, and on any other matters  
52 pertinent to the purposes of this section.

53 (j) An order granting or denying a special motion to strike shall be appealable under Section  
54 904.1.

55 (k) (1) Any party who files a special motion to strike pursuant to this section, and any party  
56 who files an opposition to a special motion to strike, shall, promptly upon so filing, transmit to the  
57 Judicial Council, by e-mail or fax, a copy of the endorsed-filed caption page of the motion or  
58 opposition, a copy of any related notice of appeal or petition for a writ, and a conformed copy of any  
59 order issued pursuant to this section, including any order granting or denying a special motion to  
60 strike, discovery, or fees.

61 (2) The Judicial Council shall maintain a public record of information transmitted pursuant  
62 to this subdivision for at least three years, and may store the information on microfilm or other  
63 appropriate electronic media.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Bar Association of Northern San Diego County

#### STATEMENT OF REASONS

Existing Law: Subdivision (c) of Code of Civil Procedure section 425.16 specifically provides that the trial court shall award attorney fees to a defendant who prevails on a special motion to strike, but may award attorney fees to a plaintiff who succeeds in having such a motion denied. Current case law confirms the mandatory nature of an award of attorney fees to prevailing defendant, even if the trial court concludes the action on a procedural basis other than the granting of a special motion to strike, for example by dismissal on its own motion or by the sustaining of a demurrer. (*Pfeiffer Venice Properties v. Bernard* (2002) 101 Cal.App.4th 211.)

This Resolution: Changes the provision regarding availability of attorney fees to a defendant prevailing through a SLAPP motion from one where the trial court is forced to award such fees regardless of the interests of justice, to one where the trial court has discretion not to award such fees in the interests of justice.

The Problem: Mandatory attorney fees to a successful defendant made sense when the gist of a SLAPP motion was to nip a case filed by a large corporation against an individual for reasons unrelated to its merits, a "Strategic Lawsuit Against Public Participation", maintained for the purpose of chilling the free speech of individuals, in the bud. An example of this type of case is where a developer sues an individual on a tort theory for successfully speaking out against a development at a public hearing. The purpose of the lawsuit is not to recover damages so much as to drag the defendant through the courts to discourage

him or her from speaking out in the future.

However, recently the SLAPP motion has become an insurance defense tactic in cases which do not fit the original SLAPP paradigm, e.g., malicious prosecution cases where the plaintiffs are individuals, not large corporations. Please see, e.g., *Stroock, Stroock & Lavan v. Tandler* (2002) 102 Cal.App.4th 318; *Jarrow Formulas v. LaMarche* (2002) 97 Cal.App.4th 1 (review granted). The effect of this is that now anyone who evaluates the filing of a lawsuit has to take into consideration the question of whether any cause of action contained therein can be “shoehorned” into the SLAPP definition, giving rise to a right to attorney fees that did not previously exist. An additional effect of this is that if a SLAPP motion is filed, the trial court has the obligation to award attorney fees regardless of its basis for throwing out the lawsuit and regardless of whether it believes that the award of such fees is in the interests of justice. The effect of this harsh requirement can be to cause a trial court to deny or decline to consider an otherwise meritorious motion so as to avoid the necessity of imposing fees it believes would be unjust.

The trial court should be able to exercise its discretion as to whether attorney fees should be available to a prevailing SLAPP defendant, particularly when such defendant is not an individual.

#### IMPACT STATEMENT

This resolution does not affect any other law, statute or rule.

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#### COUNTERARGUMENT

##### **SAN DIEGO COUNTY BAR ASSOCIATION**

The overriding purpose of the SLAPP statute is to dismiss cases quickly where they are designed to impinge on First Amendment rights. Proponent complains of the use of a SLAPP motion to attack a malicious prosecution action. However, the proponent fails to appreciate that petitioning the government for redress of grievances is indeed a valid First Amendment exercise worthy of protection. Further, the SLAPP statute seeks to protect the exercise of First Amendment rights regardless of whether a “large corporation” or “individuals” for a good reason, one’s First Amendment rights are not superior to the other’s.

The proffered solution in this resolution is the wrong one. The answer is not to give the court discretion to award attorneys fees, which are in effect an award to compensate the moving party for a violation of their First Amendment rights. The answer is to amend the SLAPP statute to limit the parties and/or situations under which the statute may be used.