

RESOLUTION 4-11-05

DIGEST

Anti-SLAPP Motions: Amendment to Attorney's Fee Provisions

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

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

Similar to Resolution 1-12-03, which was disapproved. Similar to Resolution 3-03-02, which was approved.

Reasons:

This resolution amends Code of Civil Procedure section 425.16 to make the award of attorney's 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 to broaden the circumstances under which such motions are granted.

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. (*Briggs v. Eden Council for Hope and Opportunity* (1999) 19 Cal.4th 1106, 1126.) 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. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 58; *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 74.) Instead, the courts appear to be expanding the concept of "matters of public significance" to include an ever larger number of suits.

The effect of this expansion is increasingly to 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's 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, 220.) Such mandatory fee shifting makes courts reluctant to grant SLAPP motions and any legitimate defense motions brought concurrently with the SLAPP motion.

In addition, this resolution would create equivalent standards for a discretionary award of fees to a prevailing plaintiff or defendant, which would promote fairness given the recent abuses of section 425.16 and the reduction in the standards of proof required for a defendant to prevail on a SLAPP motion to strike.

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(c) 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 interest
- 5 to encourage continued participation in matters of public significance, and that this participation
- 6 should not be chilled through abuse of the judicial process. To this end, this section shall be
- 7 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 be entitled to recover his or her attorney's fees and costs. If the court finds that a special~~
21 ~~motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award~~
22 ~~costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.~~
23 the court may award the prevailing party on a special motion to strike his or her reasonable attorney's
24 fees and costs. In making its determination as to whether or not to make such award to the prevailing
25 party, the court shall consider the interests of justice and the factors specified in Section 128.7(b) and
26 shall make appropriate findings.

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

(e) As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

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

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

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

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

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

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

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

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

PROPONENT: Beverly Hills Bar Association

STATEMENT OF REASONS

Existing Law: Provides for a mandatory award of attorney's fees and costs to a plaintiff prevailing on a special motion to strike, but requires an award of reasonable attorney's fees to a plaintiff prevailing on a special motion to strike only if the special motion is frivolous or is solely intended to cause unnecessary delay.

This Resolution: Provides for the discretionary award of reasonable attorney's fees and costs to the prevailing defendant and plaintiff on a special motion to strike and utilizes the same criteria in determining whether or not to make such award, regardless of whether the plaintiff or defendant prevails. The criteria are borrowed from Code of Civil Procedure Section 128.7(b) and also include the "interests of justice."

The Problem: In its 2002 SLAPP Trilogy of Decisions, the California Supreme Court determined that to prevail on an Anti-SLAPP motion, there is no burden to prove (a) that the plaintiff had the intent to chill free speech or petition rights [Equilon Enterprises, LLC v. Consumer Cause, Inc., 29 Cal.4th 53 (2002)], (b) that the challenged action or claim would have an actual "chilling effect" on the exercise of free speech or petition rights [City of Cotati v. Cashman, 29 Cal.4th 69, 75-76 (2002)], or (c) that the moving party "validly" exercised its free speech or petition rights. [Navellier v. Sletten, 29 Cal.4th 82, 94-95 (2002)]. In effect, the SLAPP Trilogy disconnected the proof requirements for bringing a special motion to strike from the legislative purposes identified in Section 425.16(a). In 2003, the Legislature recognized that dilemma in enacting Code of Civil Procedure Section 425.17, which included a finding that "there has been a disturbing abuse of Section 425.16."

However, the enactment of 425.17 has not eliminated the abuses. The California Anti-SLAPP Law still provides that attorney's fees must be awarded to the prevailing defendant even if the plaintiff acted in absolute good faith and with a proper purpose, the challenged action had no actual "chilling effect" on the exercise of First Amendment rights and/or the defendant did not, in fact, validly exercise those rights. By contrast, attorney's fees may only be awarded to a prevailing plaintiff if the special motion to strike is frivolous or solely intended to cause delay. In view of the California Supreme Court's 2002 SLAPP Trilogy of Decisions, there is no continuing reason to make the award of attorneys' fees asymmetric. Current law is simply unfair.

All of the original purposes of the California Anti-SLAPP Law would be furthered, and abuse of the special motion to strike would be avoided, by permitting the court, in its discretion, to award fees to the prevailing defendant or the prevailing plaintiff based on the interests of justice and the specific criteria set forth in Code of Civil Procedure Section 128.7(b). The Section 128.7(b) criteria were selected because they address most of the pertinent factors: improper purpose (including harassment, unnecessary delay, needless increase in cost), legal contentions warranted by existing law (etc.), and whether the factual allegations and denials have evidentiary support. Thus, environmental protestors sued by a developer with the ulterior purpose of bankrupting the protestors and stanching their efforts could demonstrate the plaintiff's improper purpose; and an impecunious private figure defamed on the Internet could demonstrate good faith in suing a webmaster, even if there is uncertainty regarding the scope of Internet statutory immunity. While this amendment would eliminate the iron-clad certainty that a successful defendant will be awarded attorneys' fees, it would provide disincentives to unnecessary motion practice and assure that all litigants would be treated equably and fairly.

This resolution does not "throw the baby out with the bath water." A defendant in a SLAPP suit retains most of the procedural benefits of the statute: an immediate stay of discovery, a prohibition against amendment by the plaintiff, a prohibition against dismissal by the plaintiff, and a right to an interlocutory

appeal in case the defendant's motion is denied. The only change is to level the playing field in the award of attorney's fees: the court would be vested with discretion; only "reasonable" fees could be awarded; and the court would be empowered to consider such factors as the good or bad faith of the plaintiff, whether or not First Amendment rights were chilled, whether or not the defendant abused his exercise of those rights and the interests of justice (e.g., the uncertain state of the law as it related to claims or defenses).

IMPACT STATEMENT

This resolution would not directly affect any other law, statute or rule, but should reduce the volume of special motions to strike, and the attendant costs to the parties and the trial and appellate courts of litigating such motions.

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COUNTERARGUMENTS

SAN DIEGO COUNTY BAR ASSOCIATION

CCP §425.16 was intended to be unbalanced in treatment of the attorney's fees issue. A defendant prevailing on an Anti-SLAPP motion should be awarded attorney's fees as a matter of right so that lawsuits aimed at abridging the constitutional right of freedom of speech are "chilled." Making the award of attorney's fees discretionary would eviscerate CCP §425.16.

declined to amend the complaint as requested, 2) the defendant thereafter filed a demurrer and 3) the plaintiff then amended, the plaintiff would be sanctioned unless the court found the plaintiff acted with "substantial justification."

If the initial complaint was in fact frivolous and the plaintiff's conduct can be described as engaging in "bad faith tactics or actions," this proposal is unnecessary. (Code Civ. Proc., §§ 128.5 through 128.7; see also Resolution 09-04-05.) If, on the other hand, the situation arises from a legitimate disagreement over the contents of a complaint, the proposal gives too heavy a hand to defendants and their attorneys, which often will be large law firms. It puts too much of a burden on plaintiff and counsel to have to decide at a meet and confer session – of which there will be no accurate record and at which defendants' counsel may not advance the best arguments – whether to amend a complaint. After seeing the actual demurrer, the plaintiff may be convinced that an amendment is warranted and amend the complaint, perhaps not in the precise way request by defendant at the meet and confer session. Plaintiff nevertheless will then be forced to justify its actions under a rather vague standard to avoid sanctions.

While frivolous and bad faith litigation should be discouraged and sanctioned when appropriate, this proposal goes too far in shifting fees in situations that involve fairly ordinary litigation tactics.

SACRAMENTO COUNTY BAR ASSOCIATION

There are sound reasons why attorney fees are routinely awarded to a defendant who obtains dismissal of an action under the anti-SLAPP statute, CCP § 425.16, but a plaintiff who wins an anti-SLAPP motion can recover fees only if the motion was frivolous.

The statute adopts the rule of *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 54 L.Ed.2d 648 (1978). There, the Supreme Court held that a plaintiff who wins a civil rights action should ordinarily recover

statutory attorney fees, since that will promote the purpose of the statute, which is to encourage private enforcement of civil rights. But routinely awarding fees to prevailing defendants in civil rights cases would tend to discourage plaintiffs from suing to enforce civil rights. Therefore, a prevailing defendant should not recover fees unless the lawsuit was “unreasonable, frivolous, meritless or vexatious.” *Id.*; see also *Hughes v. Rowe*, 449 U.S. 5, 14, 66 L.Ed.2d 163 (1980) (same rule in actions under 42 USC § 1983).

Likewise, CCP § 425.16 is designed to protect the exercise of First Amendment rights by providing a remedy against frivolous lawsuits that would chill free speech and the right to petition the government. The statute both promotes and protects the assertion of those fundamental rights. It is, therefore, appropriate to apply the *Christiansburg* rule in § 425.16(c) by providing that a defendant who obtains a dismissal under the statute should recover attorney fees, but a plaintiff who prevails against an anti-SLAPP motion may not recover attorney fees unless the motion was frivolous.