

RESOLUTION 05-04-06

DIGEST

Anti-SLAPP Motions: Amendment to Add Public Issue Requirement

Amends Code of Civil Procedure section 425.16, subdivision (e) to require a defendant to establish that an “official proceeding” relates to a public issue.

RESOLUTIONS COMMITTEE RECOMMENDATION DISAPPROVE

History:

No similar resolutions found.

Reasons:

This resolution amends Code of Civil Procedure section 425.16, subdivision (e) to require a defendant to establish that an “official proceeding” relates to a public issue. This resolution should be disapproved because it thwarts the purpose of the anti-SLAPP statute by narrowly construing what type of petitioning or free speech rights are subject to a special motion to strike.

Code of Civil Procedure section 425.16 permits the filing of a special motion to strike a lawsuit brought against any person arising from an act in furtherance of that person’s right of petition or free speech in connection with a public issue. The lawsuit will be dismissed unless the court determines that the plaintiff has established a reasonable probability of prevailing. (Civ. Code § 425.16, subd. (b)(1).) Paragraphs (1) and (2) of subdivision (e) of this statute define an act in furtherance of a person’s right of petition or free speech as statements made before, or in connection with an issue under consideration by, a legislative, executive or judicial proceeding or any other official proceeding authorized by law. (Civ. Code § 425.16, subd. (e)(1), (2).) This resolution would require that any statements qualifying under subdivision (e)(1) and (e)(2) also relate to a “public issue”.

Civil Code section 425.16 was enacted to limit lawsuits brought primarily for the purpose of chilling free speech and petition rights. (Civ. Code § 425.16, subd. (a).) Petition rights under the state and federal constitution include statements made before official proceedings, which the California Supreme Court held are protected. (*Briggs v. Eden Council for Hope and Opportunity* (1999) 19 Cal.4th 1106.) While the resolution would effectively limit the number of anti-SLAPP motions, limiting such motions by narrowing the types of statements qualifying for protection would overrule *Briggs* and be contrary to the intent of the statute.

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

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

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

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

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

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

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

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

45 (g) All discovery proceedings in the action shall be stayed upon the filing of a notice

46 of motion made pursuant to this section. The stay of discovery shall remain in effect until
47 notice of entry of the order ruling on the motion. The court, on noticed motion and for good
48 cause shown, may order that specified discovery be conducted notwithstanding this
49 subdivision.

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

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

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

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

(Proposed new language underlined; no language deleted.)

PROPONENT: Beverly Hills Bar Association

STATEMENT OF REASONS

Existing Law: Provides that the Anti-SLAPP statute applies to an action arising from any statement or writing made in connection with an issue under consideration or review by an official proceeding or body, without any additional requirement that the matter under consideration be of public significance. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106).

This Resolution: Overrules *Briggs* and amends subdivisions (e)(1) and (e)(2) of section 425.16 to expressly require a defendant to establish that the official proceeding (e.g., a court action) relates to a public issue – which the courts have defined as relating either to governmental matters or “to private conduct that impacts a broad segment of society and/or that affects a community in a manner similar to that of a governmental entity.” (*Du Charme v. International Brotherhood of Electrical Workers* (2003) 110 Cal.App.4th 107, 115.)

The Problem: The Anti-SLAPP Statute was originally enacted to curtail the use of litigation as a strategy to chill speech on matters of public interest. SLAPP (Strategic Lawsuit Against Public Participation) suits were characterized as 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, 815-817.) However, since the decision in *Briggs*, case law has dramatically expanded the scope of the Anti-SLAPP motion

well beyond the intent of the Legislature. In part, that is because under *Briggs* any matter pending before an official proceeding was deemed *ipso facto* to possess some measure of “public significance” owing solely to the public nature of the proceeding. (19 Cal.4th at p. 1118.) Expansion of the Anti-SLAPP Statute was compounded in 2002 when the 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.* (2002) 29 Cal.4th 53), (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* (2002) 29 Cal.4th 69, 75-76), or (c) that the moving party “validly” exercised its free speech or petition rights. (*Navellier v. Sletten*, (2002) 29 Cal.4th 82, 94-95). More recent case law has further expanded the scope of the motions to include, for example, virtually all malicious prosecution actions and abuse of process claims, regardless of whether the underlying action related to a matter of public significance. (*Jarrow Formulas Inc. v. LaMarche* (2003) 31 Cal.4th 72; *Ramona Unified School District v. Tsiknas*, 2005 WL 3346268 (Dec. 9, 2005), ___ Cal.App. 4th ___, ___ Cal.Rptr.3d___.) The original purposes of the anti-SLAPP Law would be furthered, and abuse of the special motion to strike avoided, by restricting the special motion to matters *truly* of public significance.

IMPACT STATEMENT

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

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RESPONSIBLE FLOOR DELEGATE: Elizabeth L. Bradley

COUNTERARGUMENT

BAR ASSOCIATION OF SAN FRANCISCO

The proposed limitation on communications protected by the anti-SLAPP statute is an unwarranted restriction on robust public discourse and, moreover, would create an entirely new area for litigation over the meaning of “an issue of public interest.” Over the past 50 or more years the U.S. Supreme Court and the California Supreme Court have gradually expanded the type of speech that is constitutionally protected, concluding, among other things, that even commercial speech conveys information of public interest. Whether an issue is of public interest will often be in the eye of the beholder, influenced by one’s agreement or disagreement with the position taken in the communication. As the California Supreme Court observed in *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal. 4th 1106, 1122 (which the proponent wishes to overrule by legislation), “confusion and disagreement about what issues truly possess ‘public’ significance inevitably will arise” Such confusion and disagreement, of course, is in

the interests of those who wish to use the courts to stifle public discourse, as it will add another costly layer of litigation in bringing anti-SLAPP motions.