

RESOLUTION 10-10-06

DIGEST

Anti-SLAPP Motions: Award of Attorneys Fees Discretionary

Amends Code of Civil Procedure section 425.16 to make an award of attorneys fees to a prevailing defendant on an anti-SLAPP motion discretionary.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

Similar to Resolution 01-12-2003, which was disapproved; Resolution 03-03-2002, which was approved; and Resolution 04-11-2005, which was disapproved.

Reasons:

This resolution amends Code of Civil Procedure section 425.16 to make an award of attorneys fees to a prevailing defendant on an anti-SLAPP motion discretionary. This resolution should be approved in principle because the anti-SLAPP statute has been judicially extended beyond the bounds intended by the Legislature, subjecting unwary yet bona fide plaintiffs to onerous and unjust sanctions.

The anti-SLAPP statute was originally intended to prevent the chilling of the exercise of constitutional rights. (*Briggs v. Eden Council for Hope and Opportunity* (1999) 19 Cal.4th 1106, 1126.) However, judicial interpretation of this statute has resulted in a trap for plaintiffs with legitimate complaints. The courts have held that for the statute to apply, a lawsuit need not actually have been filed with the intent to hinder free speech. If the lawsuit (or even one cause of action) fits within the technical but broad sweep of section 425.16, it must be stricken. (*Equilon Enterprises v. Consumer Cause, inc.* (2002) 29 Cal.4th 53, 58; *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 74.) Once that happens, the court *must* award attorneys fees to the defendant; it has no discretion otherwise. (Code Civ. Proc., § 425.16, subd. (c); *White v. Lieberman* (2002) 103 Cal.App.4th 210, 220.) Conversely, a plaintiff who defeats an anti-SLAPP motion (usually after years of appeals by the defendant and the concomitant stay of the action, see Code Civ. Proc., § 425.16, subdivisions (g) and (j)) can recover attorneys fees only at the court's discretion – a rare feat.

The unilateral nature of the attorneys fees provision of section 425.16 results in two injustices. First, innocent plaintiffs can be subjected to ruinous awards of attorneys fees and years of delaying appeals simply because of a pleading misstep. Second, the mandatory nature of the fees provision can make courts more reluctant to grant meritorious anti-SLAPP motions out of residual concerns that the award of attorneys fees would be unjust.

Making the award of attorneys fees discretionary would allow judges to assess whether an action was truly brought to chill free-speech rights. This would bring the anti-SLAPP statute closer to the actual intent of the Legislature.

TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates 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, neither that determination nor the fact of that determination
18 shall be admissible in evidence at any later stage of the case, or in any subsequent action,
19 and no burden of proof or degree of proof otherwise applicable shall be affected by that
20 determination in any later stage of the case or in any subsequent proceeding.

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

26 [Subdivisions (d) through (k), inclusive, remain unchanged.]

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

PROPONENT: Bar Association of Northern San Diego County

STATEMENT OF REASONS

Existing Law: Currently the Anti-SLAPP statute makes mandatory the attorney's fees for defendants so long as the motion is not clearly frivolous. The plaintiff's attorney must win the motion and file another motion to regain his/her fees. Current case law confirms the mandatory nature of an award of attorney fees to prevailing defendant. (*Pfeiffer Venice Properties v. Bernard* (2002) 101 Cal.App.4th 211) Further, recent courts have had to tread with difficulty around the strong language of the statute to do justice and deny defendants fees when they were granted the motion as to certain causes of action, but denied as to the majority of the complaint. (*Endres v. Moran* (2006) B176874 Cal.App)

This Resolution: Would change 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.

Since the enactment of the statute with the ability for defense to obtain fees, there has been abuse “which has undermined the exercise of the constitutional rights of freedom of speech and petition for the redress of grievances, contrary to the purpose and intent of Section 425.16” (See CCP §425.17, statement of the Legislature in attempting to limit use of prior section) Although the legislature saw fit to provide exclusions to the statute in 2003, abuse of the statute, as written, will likely continue. It is hoped by this resolution, the motion to strike pursuant to this statute will be raised where and only when appropriate, and not as a tactic to obtain fees without some iota of protection within the court’s discretion.

As such, 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 proposed resolution does not affect any other law, statute or rule.

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COUNTERARGUMENTS

SACRAMENTO COUNTY BAR ASSOCIATION

This is the same resolution as 4-11-05, which the Conference disapproved. This resolution should also be disapproved.

There are sound reasons why attorney fees are routinely awarded to a defendant who obtains dismissal 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. It provides a remedy against frivolous lawsuits that would chill free speech and the right to petition the government. Like the statute in *Christiansberg*, § 425.16 promotes 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.

SAN DIEGO COUNTY BAR ASSOCIATION

The Legislature, at CCP § 425.17, has noted that “there has been disturbing abuse of the Anti-SLAPP Law, which has undermined the exercise of the constitutional rights of freedom of speech and petition for the redress of grievances, contrary to the purpose and intent of Section 425.16.” However, the award of attorney’s fees to the prevailing defendant is wholly consistent with the remedial purpose of the statute to discourage the filing of Strategic Lawsuits Against Public Participation.