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Anti-SLAPP at the Supreme Court

THE LONG AND WINDING ROAD, UNABATED: A REVIEW OF MAJOR ANTI-SLAPP RULINGS SINCE 2016

Anti-SLAPP motions to strike (Code Civ. Proc., § 425.16) remain a powerful and effective procedural device to shoot down plaintiffs' claims early and often. With a one-way attorney's fee provision (defendant only); an automatic stay on discovery; and the right to immediately appeal an order denying the motion, there's much for defendants to like, and much risk for plaintiffs whose complaints suggest the appearance of "protected activity."

For these reasons and more, anti-SLAPP motions continue to be heavily litigated at all levels in the state and federal courts. Not only does the defense bar come up with new and creative arguments as to what claims qualify as a "strategic lawsuit against public participation," but the rich statutory language lends itself to appellate quandaries and multitudes of published opinions. A quick search on Westlaw reveals *788* state court appellate opinions – including *139* published opinions – discussing Code of Civil Procedure section 426.16 to a greater or lesser extent *since 2016*. That's a lot of case law in less than four years.

Adding to the litigator's burden is the California Supreme Court's keen interest in the boundaries and contours of the anti-SLAPP statute. Over the same four-year period (since 2016) the Supreme Court has issued ten significant opinions interpreting, expanding and confining the application of the statutory scheme in ways that directly and profoundly affect civil litigation in general and the representation of plaintiffs in particular. Among other developments, recent Supreme Court jurisprudence expands the application of the anti-SLAPP statutes to some wrongful termination claims and to an attorney's liability for breaching settlement agreements that the attorney approved as to form and content, and limits application of the

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statutory scheme to private disputes between business entities.

What follows is a brief, case-by-case summary of the Supreme Court's ten major anti-SLAPP opinions since 2016. These summaries do not explore the nuances or all of the issues resolved by these cases. Remember as well that there are more than another 100 recently published (since 2016) Court of Appeal opinions that concern or mention the anti-SLAPP statute!

Anti-SLAPP refresher

An anti-SLAPP motion targets meritless lawsuits that, in very general terms, threaten free speech on matters of public interest. The special motion to strike such claims is a statutory procedure (Code Civ. Proc., § 425.16 et seq.) that offers early screening of cases that threaten "protected activity."

There are two steps to an anti-SLAPP motion. First, the moving defendant must establish that the challenged claim arises from activity protected by section 425.16. If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate a "probability of prevailing," in what is essentially a summary judgment-like procedure. (See, generally, *Sweetwater Union High School District v. Gilbane Building Co.* (2019) 6 Cal.5th 931, 940.)

May a court strike discrete allegations that do not constitute discrete causes of action?

In *Baral v. Schnitt* (2016) 1 Cal.5th 376, the Supreme Court considered whether an anti-SLAPP motion can be applied only to an entire cause of action as pleaded in the complaint, or whether, instead, the motion to strike can be applied to isolated allegations within causes of action, i.e., to a claim that does not itself constitute a discrete cause of action. In short, the issue was "what showing is required of a plaintiff with respect to a pleaded cause of action that includes allegations of both protected and unprotected activity" as those terms are used in section 425.16. (*Id.* at 387.)

The Supremes, in an opinion by Justice Corrigan, concluded that an anti-SLAPP motion, like a conventional motion to strike, "may be used to attack parts of a count as pleaded." (*Id.* at 394.) At the same time, the Court was careful to explain that assertions that are "merely incidental" or "collateral" to the claim are not subject to the motion to strike. "Allegations of protected activity that merely provide context, without supporting claim for recovery, cannot be stricken" by an anti-SLAPP motion. (*Id.* at 394.)

Does a municipality's anti-corruption lawsuit against former city councilmembers implicate the councilmember's First Amendment Rights?

In *City of Montebello v. Vazquez* (2016) 1 Cal.5th 409, a municipality filed suit against four former members of its City Council and its former city administrator, seeking a declaration that the City's contract with a waste collection company was void, and requiring the former city members to disgorge campaign contribution they received from the company, allegedly as inducement to approve the contract, in violation of Government Code section 1090, which prohibits government officers and employees from having a financial interest in contracts approved by them. (*Id.* at 415.) The defendants filed an anti-SLAPP motion claiming that the lawsuit sought to punish them for exercising their First Amendment rights in connection with issues of public interest. (*Ibid.*)

The trial court found that the action was not barred by the public enforcement exemption found in section 425.16, subdivision (d), but that the defendant's votes in favor of the contract were protected activity. But it then denied the motion to strike, finding that the City had demonstrated a probability of prevailing. The Court of Appeal affirmed, but for different reasons. It agreed that the public enforcement exemption did not apply, but then found that the council members' statements and votes were not protected activity and so the action was not a SLAPP. (*Id.* at 415-16.)

The Supreme Court, in an opinion by Justice Corrigan, reversed the Court of Appeal. First, the Court construed the public enforcement exemption that applies to an action brought both in the name of the people of the state of California, and also brought by the Attorney General, or a local prosecutor. The Court found that the instant action was not brought in the name of the People, but by a city attorney's office, with private counsel, seeking to set aside a contract and obtain disgorgement of campaign contributions, and so the public enforcement exemption did not apply. (*Id.* at 417-421.)

But the Court next found that the councilmembers' votes, as well as statements they made in the course of deliberations at the city council meeting, qualify as "written or oral" statements made before a legislative proceeding, and that the City's action was therefore a SLAPP. (*Id.* at 422-427.) The Supreme Court remanded the matter to the trial court for consideration of the "probability of prevailing" prong. (*Id.* at 427.)

Where the trial court has no jurisdiction over the claim, may that court still grant an anti-SLAPP motion and award attorneys' fees?

In *Barry v. State of California* (2017) 2 Cal.5th 318, the plaintiff was an attorney who initially stipulated to a 60-day suspension from practicing law for violation of the Rules of Professional Conduct. She subsequently filed an action in the Superior Court against the State Bar, alleging that the State Bar's actions were retaliatory and discriminatory, asserting causes of action under a variety of state laws her Constitutional right to due process. (*Id.* at 322-323.)

The trial court granted the State Bar's anti-SLAPP motion, finding first that all of plaintiff's claims concerned State Bar disciplinary proceedings and thus were protected activity. As to the second prong, the trial court found that plaintiff had no probability of success for a variety of reasons, including that

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the court had no jurisdiction over attorney discipline matters. The trial court granted the motion to strike and awarded attorneys' fee. (*Ibid.*)

On appeal, plaintiff did not challenge the finding that the disciplinary proceedings were protected activity. Instead she argued that because the trial court had no jurisdiction to adjudicate her claims, it had no jurisdiction to adjudicate the anti-SLAPP motion or award fees. The Court of Appeal agreed and reversed. (*Id.* at 323.)

The Supreme Court, in an opinion by Justice Kruger, reversed the Court of Appeal, reasoning that the anti-SLAPP statute simply requires the trial court to determine whether the plaintiff can prove a "likelihood of prevailing on the merits" in order to meet the second prong. Thus it does not matter if that showing depends on a failure of proof, lack of substantive merit, or other, non-merits-based reasons such that the trial court "lacks the power to entertain the claims in the first place." (*Id.* at 324-325.) The Court concluded that a lack of subject matter jurisdiction does not bar a court from imposing an award of attorneys' fees and costs. (*Id.* at 325-326.)

Does speech that leads to wrongful termination constitute protected activity for anti-SLAPP purposes?

In *Park v. Board of Trustees of the California State University* (2017) 2 Cal.5th 1057, the Supreme Court considered the distinction between a lawsuit that contests an action or decision that was arrived at following protected speech or petitioning activity or was communicated thereby, and a claim alleging that the protected speech itself was the wrongful conduct. (*Id.* at 1060.)

In an opinion by (now retired) Justice Werdeger, the Supreme Court held that a FEHA lawsuit alleging that a lawsuit by a tenure-track assistant professor who filed suit alleging national origin discrimination in the denial of tenure, does not arise from protected activity merely because the decision to deny tenure was the result of official proceedings. (*Id.* at 1060-1061.)

The Court relied on earlier cases holding that for anti-SLAPP purposes, a claim arises from protected activity when that activity underlies or forms the basis for the claim and that the defendant's conduct underlying the cause of action "must *itself* have been an act in furtherance of the right of petition or free speech" in order to garner anti-SLAPP protection. (*Id.* at 1063, emphasis in the original.)

The Court warned that failing to distinguish between a challenged decision, and the speech that leads to the decision, would, in the employment context, protect employers and chill attempts to enforce anti-discrimination public policy. An employer who initiates an investigation of an employee, whether for lawful or unlawful motives "would be at liberty to claim that its conduct was protected and thereby shift the burden of proof to the employee who, without the benefit of discovery and with the threat of attorneys' fees looming, would be obligated to demonstrate the likelihood of prevailing on the merits," thus rendering the anti-SLAPP statute "fatal for most harassment, discrimination and retaliation actions against employers." (*Id.* at 1067.)

More recently, however, the Supreme Court appears to have opened the anti-SLAPP floodgates in employment-discrimination cases. (See *Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871, discussed below.)

Can an anti-SLAPP motion, brought after the filing of an amended complaint, reach back to claims first made in earlier pleadings?

An anti-SLAPP motion must be filed within 60 days of service of the complaint or, in the court's discretion, at a later time if proper. (§ 425.16, subd. (f).) But what about amended complaints? Can a motion filed within 60 days of service of an amended complaint, reach back to attack causes of action first asserted in the original complaint? That was the issue resolved by the Supreme Court in *Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism* (2018) 4 Cal.5th 637.

Here the plaintiff filed a third-amended complaint after two years of discovery and litigation. The defendant responded with an anti-SLAPP motion, attempting to reach back to causes of action asserted in earlier complaints. The trial court found the anti-SLAPP motion was untimely as to the earlier stated causes of action and denied leave to file a delayed motion. The Court of Appeal affirmed, as did the Supreme Court in a decision by Justice Chin, finding that an anti-SLAPP motion is timely only as to newly pleaded causes of action, and not to claims that were first presented or could have been first presented in earlier versions of the complaint. Because an anti-SLAPP motion is intended to end meritless SLAPP suits early without great cost to the defendant, permitting a defendant an absolute right to file an anti-SLAPP motion to an amended complaint "would encourage gamesmanship that could defeat rather than advance that purpose." (*Id.* at 645.)

The Court held that an anti-SLAPP motion is "not a vehicle for a defendant to obtain a dismissal of claims in the middle of litigation; it is a procedural device to present costly, unmeritorious litigation at the initiation of the lawsuit." Thus, an anti-SLAPP motion is permitted against an amended complaint as to new claims that could not have been brought earlier, but is improper to reach claims that could have been brought earlier, subject to the trial court's discretion to permit a late motion. (*Id.* at 645.) This rule will also inhibit plaintiffs from holding back from an initial complaint, causes of action that might be subject to an anti-SLAPP motion, or otherwise attempting to add, in mid-litigation, claims that arise from protected activity. (*Id.* at 641, 645-646.)

Can private speech about ostensibly public matters qualify as "protected activity"?

In *Rand Resources LLC v. City of Carson* (2019) 6 Cal.5th 610, the Supreme Court clarified and demonstrated the

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application of its prior holdings in cases such as *Park v. Board of Trustees of the California State University* (discussed above), as to what is meant by claims that "arise" from matters of public interest, reiterating that matters of concern "to a relatively small, specific audience is not a matter of public interest" and that private information cannot be converted into a matter of public interest by "simply communicating it to a large number of people." (*Id.* at 621.)

In this litigation a stadium developer filed suit against the City of Carson and against a competing firm that succeeded to the plaintiff's role as the City's negotiator regarding a failed effort to bring an NFL stadium to the City. Plaintiff alleged, inter alia, that the City breached its contract and engaged in promissory fraud and, as to the competing developer, alleged intentional interference with contract and prospective economic advantage. The trial court granted the defendants' anti-SLAPP motions and the Court of Appeal reversed, finding that the claims did not arise from conduct in furtherance of the defendants' constitutional rights of free speech in connection with a public issue. (*Id.* at 619.)

In what is otherwise a factually dense opinion by Justice Cuellar, the Court articulated a two-step approach to determining whether a claim is a SLAPP subject to the motion to strike. The first step is to identify the conduct or statements that underlie plaintiff's claims; the second step asks whether that conduct was in furtherance of the defendants' rights of petition or free speech in connection with a public issue. (*Id.* at 623.)

Thus, for example, in concluding that the plaintiff's claims against the City did not meet the first prong, the Court distinguished between the subject of building an NFL stadium (a matter of public interest) and the speech concerning who should represent the City in those negotiations – a narrower issue that is outside the protected activity sphere. (*Id.* at 623.) The Court advised that trial courts must focus on the "speech at hand, rather than the prospects that such speech may conceivably have indirect consequences for an issue of public concern." (*Id.* at 625.) The Court also explained that there is a temporal component to determining whether the alleged conduct concerns a matter "under consideration or review" in an official proceeding: such conduct does not mean statements made years before the matter came up for review by the City. (*Id.* at 628.)

What type of evidence may a trial court consider in determining the second prong of an anti-SLAPP proceeding (probability of prevailing)?

Section 425.16(b)(2) directs the trial court to consider the pleadings and supporting and opposing "affidavits" stating the facts upon which the liability or defense is based when considering the probability of prevailing (second prong.) But can the trial court consider declarations and other statements under oath, such as prior testimony?

The answer is yes. In *Sweetwater Union High School District v. Gilbane Building Company* (2019) 6 Cal.5th 931, the Supreme Court clarified that although declarations and affidavits are hearsay that may not be admissible when offered for the truth of their content at a contested trial, they are admissible in certain motion proceedings pursuant to Code of Civil Procedure section 2009. (*Id.* at 945.) Also admissible for anti-SLAPP purposes is previously recorded testimony provided under oath, given the law's central purpose of "screening out meritless claims that arise from protected activity" before the defendant must undergo the expense and intrusion of discovery. (*Id.* at 945-947.)

The caveat is that the declarations, affidavits and recorded testimony must itself set forth evidence that is reasonably likely to be admissible at trial. On the other hand, if the evidence contained in the hearsay documents cannot be admitted at trial because it is categorically barred or undisputed factual circumstances show its inadmissibility, it cannot be relied upon by either party in addressing the probability of prevailing prong. (*Id.* at 949.)

When, if ever, does a commercial dispute between two businesses invoke protected activity protection?

In *FilmOn.Com Inc. v DoubleVerify Inc.* (2019) 7 Cal.5th 133, a company that provides private information about websites, including the content of the website (such as whether it contains adult content or indulges in copyright infringement), to potential advertisers, was sued for making allegedly false and disparaging remarks about the plaintiff's website, resulting in lost advertising. (*Id.* at 141-142.)

The trial court and the Court of Appeal both found that the complaint constituted a SLAPP under section 425.16, subdivision (e)(4), the "catchall provision" that makes available the motion to strike claims that arise from "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." (*Id.* at 142-143.)

The Supreme Court granted review to decide whether the commercial nature of a defendant's speech is relevant in determining whether the speech merits protection under this catchall provision, and whether the context of a statement, including the identity of the speaker, the audience, and the purpose of the speech – informs a court's determination of whether the statement was made in furtherance of free speech in connection with a public issue. (*Ibid.*)

In an opinion by Justice Cuellar, the Court explained that whether speech is covered by the catchall provision is not easily determined by labeling the speech commercial or non-commercial. The inquiry instead requires a court to examine "contextual clues" – whether it was made in private or public, to whom it was said, and for what purpose – that may bear on whether the speech is protected activity. (*Id.* at 148.)

The Court rejected a functional view that asks what the speech is really

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"about" and adopted a more nuanced perspective that analyzes the "functional relationship between the speech and public conversation about some matter of public interest." (*Id.* at 149-150.) Thus it was not sufficient for the defendant to assert that the speech in question concerned matters of widespread public interest such as adult content or piracy on the internet; what needed to be examined is the "degree of closeness" between the challenged statements and the asserted public interest. (*Id.* at 150.)

The Court ultimately concluded that this case arose from a private dispute between two well-funded for-profit entities over one party's characterization – in a confidential report – of the other's business practices, and so those characterizations were not made in furtherance of free speech in connection with an issue of public interest. The Court of Appeal's conclusion otherwise was reversed, (*Id.* at 154.)

When can an attorney be held liable for breaching a settlement agreement approved "as to form and content"?

In *Monster Energy Co. v. Schechter* (2019) 7 Cal.5th 781, the Supreme Court lobbed a hand grenade into the lap of California litigation attorneys, holding that under some circumstances an attorney's signature approving the "form and contents" of a settlement agreement can bind that attorney to specified performance.

In an opinion by Justice Corrigan, the Court held that in the context of an anti-SLAPP motion, that the standard notation in a settlement agreement that the parties' attorneys approve the agreement "as to form and content" does not necessarily limit an attorney's personal liability for breach of the substantive terms of the agreement (i.e., a confidentiality clause.) The Court found that the notation does not preclude a factual finding that counsel both recommended their clients sign the document and intended themselves to be bound by its terms, when the settlement agreement states that it was made on behalf of the parties as well as, among others, their attorneys. (*Id.* at 785-786.)

The first important takeaway here is that the parties did not dispute that the complaint, seeking to enforce a broad confidentiality provision of the settlement agreement against the defendant's attorneys who made statements about the settlement to a legal website, qualified as a SLAPP. (*Id.* at 788.) That makes complete sense, as public statements allegedly made by the attorney in violation of the confidentiality clause were made in connection with an issue under consideration by a judicial body or in connection with an official proceeding. (§ 425.16, subd. (e).) But that should give pause to any party that files suit to enforce the terms of a previous settlement: beware the SLAPP.

Moving on to the second prong, the Court noted that the language of the settlement agreement generally, and the confidentiality provisions in particular, appeared to encompass not only the parties, but also their counsel. The Court was careful to agree with the "general consensus" that "approved as to form and content" has a fixed meaning that the attorney has read the document, that it embodies the parties' agreement, and that counsel perceives no impediment to signing by the client, (*Id.* at 792.) But such language does not preclude, as a matter of law, a finding that the attorney also intended to be bound by the substantive provisions of the agreement that appear to impose duties on the attorney. (*Ibid.*)

The Supreme Court found that the plaintiff had sufficiently established a probability of prevailing, reversed the decision of the Court of Appeal, and remanded the matter for trial proceedings. (*Id.* at 796.)

Are wrongful-termination claims categorically exempt from an anti-SLAPP motion?

In *Wilson v. Cable News Network, Inc.* (2019) 7 Cal 5th 871, the Supreme Court may have opened the floodgates to a new storm of anti-SLAPP motions to strike FEHA claims for wrongful termination.There, a veteran CNN journalist sued the network for wrongful termination and defamation. The network filed an anti-SLAPP motion, arguing that the termination was an act in furtherance of its right to determine who should speak on its behalf on matters of public interest, and that the defamation claim was grounded in the network's decision that the journalist did not meet editorial standards in reporting matters of public concern. (*Id.* at 881-883.)

The trial court agreed that the complaint was a SLAPP and determined that the plaintiff did not meet his burden on the second prong. The Court of Appeal reversed by a divided opinion. (*Id.* at 882.)

In an opinion by Justice Kruger, the Supreme Court overruled prior opinions holding that the anti-SLAPP statute cannot be used to screen claims alleging discriminatory or retaliatory employment actions, finding that the statute itself contains no such limitations and that in "some cases the action a plaintiff alleges in support of his or her claims may qualify" as protected activity under section 425.16. (*Id.* at 881.) The Court found that in some cases the defendant-employer will be able to demonstrate that its allegedly wrongful conduct was taken for speech-related reasons, and that plaintiff's allegation of discriminatory intent alone are not dispositive of that issue. (*Id.* at 889.)

The Court rejected plaintiff's argument that its holding would subject most or all claims of harassment, discrimination and retaliation to an anti-SLAPP motion, describing the concern overstated, explaining that to carry its burden on the first prong the defendant in a discrimination case "must show that the complained- of adverse action, in and of itself, is an act in furtherance of its speech or petitioning rights. Cases that fit that description are exception, not the rule." (*Id.* at 891.)

As for the second-prong burden on wrongful-termination plaintiffs, the Court went on to express confidence that trial courts will utilize their discretionary right to allow limited discovery to

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"mitigate the burdens of anti-SLAPP enforcement on discrimination and retaliation plaintiffs even if they cannot eliminate it altogether." Hedging its bet on the practical impact of its ruling, however, the Court invited the Legislature to "adjust" the statutory scheme if the burden on wrongful-termination plaintiffs becomes excessive. (*Id.* at 891-892.)

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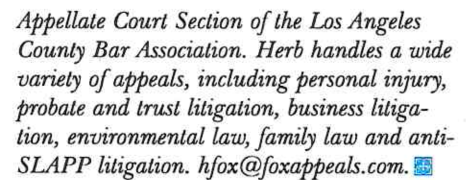
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