

Welcome to California Business Litigation #6

California Anti-SLAPP Motions: Potential Pitfalls for Plaintiffs

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This sixth installment of the “Welcome to California Business Litigation” provides a brief examination of California’s unique and often used anti-SLAPP statute that provides for a special motion to strike certain causes of action that implicate the constitutional rights of free speech and petition.

In this series of articles, Snell & Wilmer lawyers familiar with both California and non-California business litigation practices will share a series of tips—both procedural and substantive—that in-house counsel may find useful in navigating the shoals of California business litigation.

California’s anti-SLAPP (“strategic lawsuit against public participation”) law has been an inviting first line of attack for defendants and cross-defendants—and a potential pitfall for plaintiffs and cross-complainants—ever since its passage 21 years ago. Enacted in 1992 as a deterrent to the filing of meritless lawsuits which prevent or punish the exercise of petition or free speech rights, the anti-SLAPP statute’s unique discovery stay, immediate appeal provisions, unavailability of leave to amend, and one-sided mandatory attorney-fee provisions make the anti-SLAPP special motion to strike one of the most powerful dispositive motions in California civil litigation.

Background

The California legislature enacted the anti-SLAPP statute in response to a “disturbing increase in lawsuits brought primarily to chill

the valid exercise of the constitutional rights of freedom of speech and petition.”¹ An anti-SLAPP motion is a special motion to strike to expedite the early dismissal of unmeritorious causes of action that are aimed at preventing citizens from exercising their constitutional rights of petition or free speech in connection with a public issue.²

The motion involves a two-step process.³ In step one, the moving defendant (or cross-defendant) has the burden of making a prima facie showing that the plaintiff’s (or cross-complainant’s) cause of action arises from an act “in furtherance of the [defendant’s] right

1 Cal. Civ. Proc. § 425.16(a).

2 *Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal. 4th 12, 21; Cal. Civ. Proc. § 425.16(b)(1).

3 *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal. 4th 53, 67.

of petition or free speech ... in connection with a public issue.”⁴ For the defendant to meet its burden in step one, it must establish that the statement or conduct on which the cause of action is based falls within one of the four categories set forth in California Code of Civil Procedure section 425.16(e):⁵

(1) written or oral statements made before a judicial proceeding (or other official proceedings);⁶

(2) written or oral statements made in connection with an issue under consideration or review by a judicial body (or other official bodies);⁷

(3) written or oral statements made in a place open to the public or a public forum in connection with an issue of public interest;⁸ or

(4) other conduct in furtherance of the exercise of the right of petition or free speech regarding a public issue or an issue of public interest.⁹

If the defendant fails to meet its threshold burden under step one, the inquiry ends.¹⁰ The reader should also note that there are numerous statutory exceptions to these four categories, such as the commercial speech exception, the criminal conduct exception, and the prosecutorial exception, among others.

⁴ Cal. Civ. Proc. § 425.16(b)(1).

⁵ *Robles v. Chalilpoyil* (2010) 181 Cal. App. 4th 566, 574.

⁶ Cal. Civ. Proc. § 425.16(e)(1).

⁷ Cal. Civ. Proc. § 425.16(e)(2).

⁸ Cal. Civ. Proc. § 425.16(e)(3).

⁹ Cal. Civ. Proc. § 425.16(e)(4).

¹⁰ *Gallimore v. State Farm Fire & Casualty Insurance Co.* (2002) 102 Cal. App. 4th 12, 21.

If the defendant satisfies step one, the court proceeds to step two to decide if the plaintiff can meet its burden of establishing “a probability that [the] plaintiff will prevail on the claim.”¹¹ This second step makes an anti-SLAPP much more than an ordinary attack on the pleadings. Rather, like a motion for summary judgment, the motion forces plaintiffs to present evidence to support the claims pleaded.¹² If the plaintiff presents sufficient evidence to support its claims and the court denies the defendants’ anti-SLAPP motion, the denial may bar a later defense motion for summary judgment.¹³

With limited exceptions, the filing of an anti-SLAPP motion stays all discovery proceedings in the action.¹⁴ Plaintiffs or cross-complainants asserting claims that may draw an anti-SLAPP motion (for example, defamation, interference or nuisance claims) therefore should consider conducting early discovery aimed at establishing the elements of their prima facie case. Plaintiffs have a short window of time to conduct discovery before the filing of an anti-SLAPP motion, which must be filed within 60 days after service of the complaint or cross-complaint.¹⁵ Plaintiffs can initiate written discovery 10 days after service of the complaint, with responses arriving 30-days thereafter — *i.e.*, potentially 20 days before defendants’ deadline

¹¹ Cal. Civ. Proc. 425.16(b)(1).

¹² *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal. 4th 180, 193.

¹³ *Bergman v. Drum* (2005) 129 Cal. App. 4th 11, 18-19 (holding that denial establishes existence of triable issues of fact on plaintiff’s claim under “law of the case” doctrine).

¹⁴ Cal. Civ. Proc. § 425.16(g).

¹⁵ Cal. Civ. Proc. § 425.16(f).

to file an anti-SLAPP motion.¹⁶ Be aware, though, that nothing prevents a defendant from filing the anti-SLAPP motion earlier than the 60-day deadline.

The discovery stay is effective immediately upon the filing of the anti-SLAPP motion.¹⁷ If, as is often the case, a plaintiff needs additional discovery to oppose defendant's motion—for example, to find evidence of actual malice in a defamation action—a plaintiff must file a motion to obtain the needed discovery.¹⁸ Discovery will only be permitted by the court if the plaintiff establishes good cause and, if ordered, the discovery will be narrowly limited to the issues raised by the anti-SLAPP motion—*i.e.*, matters that may help plaintiff establish a “reasonable probability of prevailing” on its claims, rather than collateral issues like credibility.¹⁹ Plaintiffs are well advised to quickly respond to an anti-SLAPP motion by moving to obtain additional discovery to support the claims, as plaintiffs cannot merely oppose the anti-SLAPP motion based on their lack of opportunity to obtain such information.²⁰ This discovery, and the motion necessary to obtain it, further increases the costs and stakes involving for plaintiffs in defending against an anti-SLAPP motion.

Attorney's fees add an additional wrinkle in anti-SLAPP cases. A successful moving defendant is

entitled to its attorneys' fees and costs incurred in connection with the motion.²¹ The award is mandatory.²² Mandatory fees include those incurred in the trial court (including any anti-SLAPP-related discovery permitted by the court), appellate court, and enforcement of a fee award.²³ In contrast, a plaintiff successful in fending off an anti-SLAPP motion may only recover attorney's fees and costs if the court finds the anti-SLAPP motion is “frivolous or is solely intended to cause unnecessary delay.”²⁴ “Frivolous” is a high standard—*i.e.*, “any reasonable attorney would agree such motion is totally devoid of merit.”²⁵

An order granting or denying an anti-SLAPP motion is immediately appealable.²⁶ A plaintiff who loses an anti-SLAPP motion must appeal within 60-days of notice of entry of the decision. Any such anti-SLAPP appellant must post a bond or undertaking to stay enforcement of a judgment for attorney's fees and costs pending appeal.²⁷

16 Cal. Civ. Proc. §§ 2030.020(b), 2030.260(a), 2031.020(b), 2031.260(b), 2033.020(b) and 2033.250(a).

17 *Id.*

18 *Id.*

19 *Id.*; *Sipple v. Foundation for National Progress* (1999) 71 Cal. App. 4th 226, 247.

20 *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 37 Cal. App. 4th 855, 867.

21 Cal. Civ. Proc. § 425.16(c).

22 *Kethcum v. Moses* (2001) 24 Cal. 4th 1122, 1131.

23 *Wanland v. Mastagani, Holstedt & Chuirazzi* (2006) 141 Cal. App. 4th 15, 20-21; *Dowling v. Zimmerman* (2001) 85 Cal. App. 4th 1400, 1425-26.

24 Cal. Civ. Proc. § 425.16(c).

25 *Moore v. Shaw* (2004) 116 Cal. App. 4th 182, 199.

26 Cal. Vic. Proc. § 425.16(i).

27 *Dowling, supra*, 85 Cal. App. 4th at 1434.

Plead with Caution: Dismissal Is Not an Option After the Anti-Slapp Motion is Filed

Once an anti-SLAPP motion is filed (which the defendant can do without warning), the plaintiff cannot evade fees by amending or withdrawing the complaint.²⁸ Plaintiffs and cross-complainants therefore must tread carefully when asserting claims where the underlying facts directly or indirectly implicate litigation-related activities (whether the activities be post-dispute but pre-litigation activities or activities conducted in connection with ongoing litigation).²⁹

28 *Liu v. Moore* (1999) 69 Cal. App. 4th 745, 749-51.

29 *Navellier v. Sletten* (2002) 29 Cal. 4th 82, 85 (noting that “[a]ny cause of action arising from the defendant’s prior litigation activity may appropriately be the subject of a special motion to strike”).

Conclusion

Plaintiffs can beat anti-SLAPP motions, but they face high risk and expense in doing so. From the plaintiff’s perspective, at best, an anti-SLAPP motion may well create a complicated and lengthy detour from the ordinary flow of litigation and, at worst, mark the early dismissal of its claims. The best way to avoid anti-SLAPP problems is for a plaintiff or cross-complainant to carefully craft the initial pleading, develop the facts supporting its claims, and conduct the necessary discovery early to oppose any anti-SLAPP motion. For defendants and cross-defendants, well taken anti-SLAPP motions may well be an effective strategy to obtain the early dismissal of claims or, at a minimum, flesh out plaintiffs’ claims, and the evidence supporting those claims, at an early stage in the litigation.



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