PROFESSIONAL LIABILITY NEWS

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DEVELOPMENTS REGARDING ANTI-SLAPP LAW AND ETHICAL WALLS

CLARIFICATIONS IN ANTI-SLAPP LAW

By David F. Innis

Section 425.16 of the Code of Civil Procedure provides a way for a defendant served with a complaint to quickly and inexpensively dispose of the lawsuit. Under the statute, a defendant can immediately bring a "special motion to strike" to force a plaintiff to put up or shut up. If a court finds that section 425.16 applies, the Court must dismiss a cause of action unless the plaintiff can make an evidentiary showing – within 30 days and normally without any discovery – that the plaintiff has a probability of prevailing on the claim. There is relatively little risk to bringing an anti-SLAPP motion: if the defendant loses the motion, the statute prohibits use of such a ruling as evidence in any later stage of the case. And there is a potential benefit: if the defendant wins the motion, the plaintiff must pay the defendant's attorneys fees connected to the motion.

The statute was enacted to protect those who participate in public issues from "strategic lawsuits against public participation" designed to intimidate them. Hence the phrase "anti-SLAPP." Although special motions to strike under section 425.16 are known colloquially as "anti-SLAPP" motions, the statute does not restrict their use to combating SLAPPs. Instead, the statute contains a broad description of protected activity that can be the subject of anti-SLAPP motions. The expanding use of the statute led the California Legislature to pass Senate Bill 789 this year, which would have put limits on the scope of the anti-SLAPP statute, but the bill did not survive Governor Gray Davis's veto.

Four California Supreme Court Cases

After confusion and contradictory rulings in the California Courts of Appeal over the application of section 425.16, on August 29 the California Supreme Court issued three separate opinions clarifying the proper use of anti-SLAPP motions: *Equilon Enterprises, LLC v. Consumer Cause, Inc.*, 29 Cal. 4th 53 (2002); *City of Cotati v. Cashman*, 29 Cal. 4th 69 (2002), and *Navellier v. Sletten*, 29 Cal. 4th 82 (2002). Those three cases, combined with a fourth case decided by the Supreme Court on August 1, *Wilson v. Parker, Covert & Chidester*, 28 Cal. 4th 811 (2002), establish unusually straightforward rules that define when anti-SLAPP motions are permitted and how they will be decided. Overall, these four decisions combine to confirm that anti-SLAPP motions are available in a wide range of cases, but may indicate that these motions may be more difficult to win. These decisions also make clear that an anti-SLAPP motion is a critical option for every malicious prosecution defendant, and may even need to be considered in a broader range of cases arising from an attorney's litigation activities.

The California Supreme Court Made it Easier for a Defendant to Prove that a Plaintiff's Action Arises From Protected Activity

Anti-SLAPP motions involve two steps. First, the defendant who brings the anti-SLAPP motion has to prove that plaintiff's lawsuit arises from protected activity. § 425.16(b)(1). If the defendant meets that burden, the burden then shifts to the plaintiff to demonstrate a probability of prevailing on the challenged claim. *Id*.

The three new cases emphasize that the specific language of section 425.16 controls the defendant's burden to show that the plaintiff's case arises from protected activity. Under the statute, a defendant may file an anti-SLAPP special motion to strike within 60 days after service of a complaint "a cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free

speech under the United States or California Constitution in connection with a public issue." § 425.16(b)(1). The statute defines "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" in a very specific – while at the same time very broad – way. § 425.16(e). The definition of such an act includes "any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law," § 425.16(e)(1), and "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." § 425.16(e)(2).

A number of California Courts of Appeal had resisted the broad definitions of protected activity by creating additional, extra-statutory proof requirements. The Supreme Court helped defendants who want to file anti-SLAPP motions by strongly disapproving the requirement of any additional proof beyond the specific requirements found in the language of subsections (b)(1) and (e). In *Equilon Enterprises, LLC v. Consumer Cause, Inc.*, the Supreme Court firmly rejected any requirement the defendant must prove that, in filing the suit, the plaintiff acted with *intent* to chill defendant's exercise of constitutional speech or petition rights. 29 Cal. 4th at 57. It also rejected any requirement that defendant prove an *actual* effect of chilling a defendant's rights in *City of Cotati v. Cashman*. 29 Cal. 4th at 75-76.

However, the Supreme Court slightly narrowed the range of acceptable anti-SLAPP motions by limiting the definition of "arising from." Section 425.16 allows an anti-SLAPP motion against a "cause of action against a person *arising from* any act of that person in furtherance of the person's right of petition or free speech . . . ." § 425.16(b)(1) (emphasis added). The principal holding of *Cotati* is that "the statutory phrase 'cause of action . . . arising from' means simply that the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech" *Id*. at 78 (emphasis in original). The Supreme Court emphasized that "the mere fact that an action was filed after protected activity took place does not mean it arose from that activity." *Id*. at 76-77. It felt that this limitation was necessary to avoid rendering all cross-actions potential SLAPPs.

The difficulty of applying the Supreme Court's new definition of "arising from" in close cases was made obvious in the third August 29 opinion, *Navellier v. Sletton*. In that case, the Supreme Court divided 4-3 (the other two cases were unanimous) in concluding that a cause of action for breach of a settlement agreement that was the product of an earlier court proceeding was a proper target of an anti-SLAPP motion. The opinion turned on the conclusion that, "but for the [earlier] federal lawsuit and [defendant's] alleged actions taken in connection with that litigation, plaintiff's present claims would have no basis." 29 Cal. 4th at 90. Justice Brown's bitter dissent accused the majority of defining "arising from" so broadly it has allowed anti-SLAPP motions to become as abusive as the SLAPP litigation they were designed to forestall. *Id*. at 96. *Navelllier*'s support for an anti-SLAPP motion in litigation based on prior settlement agreement sets a wide boundary for anti-SLAPP motions that encompasses most any litigation based on activity that took place in a prior official proceeding.

The three August 29 opinions make clear that anti-SLAPP motions may be brought by all malicious prosecution defendants, since they necessarily arise from actions that took place in connection with issues under consideration in a judicial proceeding. *See* § 425.16(e)(2). The motion may also be available in a broader range of causes of action related to a lawyer's representation of a client before a "legislative, executive, or judicial proceeding, or any other proceeding authorized by law." § 425.16(e).

The Supreme Court Also Provided Guidance on What a Plaintiff Must Demonstrate to Defeat an Anti-SLAPP Motion

In *Wilson v. Parker, Covert & Chidester*, the Supreme Court also gave lower courts some guidance on how to judge whether a plaintiff has established a probability of prevailing.

> In order to establish a probability of prevailing on the claim (§ 425.16, subd. (b)(1)), a plaintiff responding to an anti-SLAPP motion must "'state[] and substantiate[] a legally sufficient claim'" (citation omitted). Put another

> way, the plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited" [citation omitted]. In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant (§ 425.16, subd. (b)(2)); though the court does not weigh the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim.

28 Cal. 4th at 821 (citations omitted). It remains to be seen how lower courts will handle the "probability of prevailing" prong.

David Innis is an attorney in RJOP's Government Contracts Practice Group, which represents a wide range of private contractors that do business with the federal government and the State of California. In that capacity, he has been involved in a number of cases in which defendants have used the anti-SLAPP statute to challenge unsubstantiated complaints against private entities operating in the public arena.

ETHICAL WALLS

By Pamela Phillips

In August 2002, the Court of Appeal for the Fourth District approved the use of an ethical wall to avoid a conflict. *Panther v. Park*, 101 Cal. App. 4th 69 (2002). The California Supreme Court granted review on October 23, 2002, so the opinion in *Panther* cannot now be cited. We are hopeful that the Supreme Court will affirm the Court of Appeal's decision, which was very well reasoned and long overdue.

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