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# THE “NUTS AND BOLTS” OF ANTI-SLAPP

## *What Every Lawyer Should Know About Anti-SLAPP Motions Under Code of Civil Procedure § 425.16*

By  
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### BACKGROUND AND PURPOSE OF CALIFORNIA’S ANTI-SLAPP STATUTE

*What is a SLAPP Suit?* “SLAPP” stands for “strategic lawsuit against public participation.” Courts have adopted this acronym for any lawsuit filed primarily to chill the defendant’s exercise of First Amendment rights – such as free speech, petitioning a government body for redress of grievances, or pursuing legal remedies in a court of law. (See *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1109, fn.1 (*Briggs*).)<sup>1</sup>

SLAPP-plaintiffs are not necessarily concerned with “winning.” The primary aim of the SLAPP suit “is preventing citizens from exercising their political rights or punishing those who have done so.” (*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 642 (*Wollersheim*) disapproved on another point in *Equilon Enterprises LLC v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn.5(*Equilon*); *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 783 (*Dove Audio*) citing *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 815-816 (*Wilcox*) disapproved on another point in *Equilon, supra*, 29 Cal. 4th at p. 68, fn.5.)

SLAPP suits, thus, often masquerade “as ordinary civil claims such as defamation, conspiracy, malicious prosecution, nuisance, interference with contract and/or economic advantage, as a means of transforming public debate into lawsuits.” (*Wilcox, supra*, 27 Cal.App.4th at pp.816-817; E. Pritzter & M. Goldowitz, *GUARDING AGAINST THE CHILL: A SURVIVAL GUIDE FOR SLAPP VICTIMS* (1994-present) at pp. 2-3 [California Anti-SLAPP Project @ [www.casp.net](http://www.casp.net)].)

While most SLAPP suits are ultimately unsuccessful in enforcing any valid legal right on behalf of the plaintiff, they often “succeed” in other areas. This is because defending a SLAPP suit – even when there is a strong defense – requires a substantial investment of

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<sup>1</sup> The term was coined by two University of Denver professors, Penelope Canan and George W. Pring, who authored seminal studies on the social phenomenon of this discredited litigation tactic. (See, e.g., Canan & Pring, *Strategic Lawsuits Against Public Participation* (1988) 35 SOC. PROBLEMS 506, 507.)

money, time and personal resources of the “SLAPPed” defendant long enough for the plaintiff to accomplish his underlying objectives. (*Wollersheim, supra*, 42 Cal.App.4th at p.642.) This “chilling” effect is not confined to those who are the targets of the SLAPP suit.

Other parties who are similarly situated, participants in matters of public concern, and their legal representatives, also may be “chilled” in the free exercise of their First Amendment rights for fear of becoming the targets of future litigation.

***Screening Meritless Lawsuits That “Chill” The Exercise of First Amendment Rights.*** California Code of Civil Procedure section 425.16, the so-called “anti-SLAPP” statute, was originally enacted in 1992, and has been broadened by amendments in recent years to provide the targets of SLAPP suits with a procedural vehicle for the early examination and disposal of meritless actions. (Stats. 1992, ch. 726, § 2, pp. 3523-3524.) A special motion to strike may be filed in response to such “a meritless suit filed primarily to chill the defendant’s exercise of First Amendment rights.” (*Dove Audio, supra*, 47 Cal.App.4th at p. 83, internal citation omitted.)

Section 425.16, subdivision (a) declares the Legislature’s purpose in enacting this summary remedy: “[T]here has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the Constitutional rights of freedom of speech and petition for the redress of grievances. . . . [I]t is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.”

Given its intent, the anti-SLAPP statute is a “screening” procedure requiring the plaintiff who brings an action arising out of protected speech or petition activity, at the outset of the SLAPP suit, to “make a prima facie showing [verified under oath] which would, if proved at trial, support a judgment in [the plaintiff’s] favor.” (Code Civ. Proc., § 425.16, subd. (b).) Under this statutory scheme, once the moving defendant has demonstrated that the plaintiff’s cause of action arises from protected free speech or petition activity, “the burden shifts to the plaintiff to establish a probability that the plaintiff will prevail on the claim.” (*Kyle v. Carmon* (1999) 71 Cal.App.4th 901, 907.)

This screening mechanism operates like a nonsuit or summary judgment motion – only “in reverse.” Rather than requiring the defendant to defeat the plaintiff’s pleading by showing it is legally or factually meritless, the motion requires the plaintiff to demonstrate that he possesses a legally sufficient claim which is ‘substantiated,’ that is, supported by competent, admissible evidence.” (*College Hospital v. Superior Court* (1994) 7 Cal.4th 704, 718-719.) If the plaintiff cannot satisfy the burden of proving a prima facie case under oath, then the defendant is entitled to dismissal of the SLAPP suit, and an award of his or her attorneys’ fees and legal costs necessarily incurred in defending the action. (See *Briggs, supra*, 19 Cal.4th 1106 at pp.1121-1123; *Wollersheim, supra*, 42 Cal.App.4th at p. 644; Code Civ. Proc., § 425.16, subd. (c).)

Like other screening statutes, the special motion to strike does not unconstitutionally impair the right to a jury trial of legitimate claims. Rather, it merely requires substantiation and summary disposition of legally meritless claims at an early stage. (*Briggs, supra*, 19 Cal.4th at p.1123, citing *College Hospital, supra*, 7 Cal.4th at pp.718-719.) Section 425.16 thereby provides for the “fast and inexpensive unmasking and dismissal” of improper SLAPP

suits falling within the purview of the statute. (*Wilcox, supra*, 27 Cal.App.4th at p. 823.)

***Employing Other Available Defenses – The Noerr-Pennington Doctrine.*** Because anti-SLAPP procedure permits the court to consider any matter bearing on the merits of the lawsuit, the defendant should not be content to merely challenge the elements of the plaintiff’s case. Other substantive law defenses and privileges ought to be included in the moving papers which serve to demonstrate that the plaintiff’s lawsuit is a “SLAPP” and has no reasonable likelihood of success.

“Section 425.16 sets out a mere rule of procedure, but it is founded on constitutional doctrine. Those who petition the government are generally immune from ... liability. This principle is referred to as the ‘*Noerr-Pennington*’ doctrine[.]” (*Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 21, internal citations omitted.)

The *Noerr-Pennington* doctrine, which evolved decades ago in the context of federal antitrust cases, generally holds that no liability will attach under the Sherman Act for a party’s efforts to influence a governmental body. Those activities are protected by the First Amendment right to petition for redress of grievances, even though the motive behind such activity is anti-competitive. (See generally *Eastern R. Conference v. Noerr Motors* (1961) 365 U.S. 117, 81 S.Ct. 523 and *United Mine Workers v. Pennington* (1965) 381 U.S. 657, 699-670, 85 S.Ct. 1585; *Professional Real Estate Investors, Inc. v. Columbia Pictures Ind., Inc.* (1993) 508 U.S. 49, 55-58, 113 S.Ct. 1920.)

Later precedent extended *Noerr-Pennington* to judicial, as well as administrative and legislative, proceedings. (*Professional Real Estate Investors, supra*, 508 U.S. at pp. 55-60; *Hi-Top Steel Corp. v. Leherer* (1994) 24 Cal.App.4th 570, 574 (*Hi-Top Steel*)). Although originating in the field of federal antitrust litigation, the *Noerr-Pennington* doctrine has been consistently applied by California courts to actions for intentional interference with economic relations and similar common law “tort” theories. Thus, the scope of economic interference claims is limited by the constitutional right to petition for redress of grievances, including the right to seek relief in a court of law. (*Pacific Gas & Elec. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1137 (*PG&E*); *Hi-Top Steel, supra*, 24 Cal.App.4th at pp. 577-578.)

The only limitation on the qualified immunity afforded under *Noerr-Pennington* is the so-called “sham” exception. (*Hi-Top Steel, supra*, 24 Cal.App.4th at p. 577.) However, genuine efforts to influence government action will not constitute a sham. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 322; *Hi-Top Steel, supra*, 24 Cal.App.4th at pp. 578-583.) By parity of reasoning, litigation – the process of petitioning a judicial body – will not be deemed a sham, unless the action is so “objectively baseless” and maliciously motivated that any reasonable litigant would have no realistic expectation of success on the merits. (*Professional Real Estate Investors*, 508 U.S. at pp. 60-61 & n. 5.) Similarly, claims having “colorable merit” are immune from suit, even if there is a financial or competitive motivation behind them. (*Ibid.*; *PG&E, supra*, 50 Cal.3d at p.1137.)

Thus, the constitutional privilege underlying *Noerr-Pennington* is consistent with the stated goal of section 425.16 – the early dismissal of unmeritorious claims.

*Civil Code § 47(b) – The Absolute Litigation Privilege.* The Legislature and the courts have also noted the close interrelationship between section 425.16’s screening procedure and the “absolute litigation privilege” codified by Civil Code section 47(b).

The litigation privilege bars tort claims against parties, their lawyers and other participants (e.g., public officials and witnesses) arising out of communications made during the course of judicial or official proceedings. Although cast in terms of immunity from defamation, “for well over a century [section 47’s broad reach has been applied to] communications with some relation to judicial proceedings [rendering participants in a prior lawsuit] absolutely immune from tort liability” on any theory – with the sole exception of malicious prosecution. (*Rubin v. Green* (1993) 4 Cal.4th 1187, 1193-1194 (*Rubin*).

The absolute privilege is unconditional and unqualified – all that must be demonstrated is that there is a logical relationship to an official proceeding: “Just as communications preparatory to or in anticipation of the bringing of an action or other official proceeding are within the protection of the litigation privilege of Civil Code section 47, subdivision (b), . . . such statements are equally entitled to the benefits of section 425.16.” (*Dove Audio, supra*, 47 Cal.App.4th at p. 784, citing *Rubin, supra*, 4 Cal.4th at pp. 1194-1195; *Ludwig v. Superior Court, supra*, 37 Cal.App.4th at p. 19; see also *Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1998) 65 Cal.App.4th 713, 728 overruled on another point in *Briggs, supra*, 19 Cal.4th at p.1123, fn.10.)

The anti-SLAPP procedure is frequently employed in conjunction with challenges to derivative lawsuits targeting speech and petition activity that also would be protected by the absolute litigation privilege under Civil Code section 47(b) and the *Noerr-Pennington* doctrine. In this way, section 425.16 supplements – but does not “supplant” – other applicable privileges and defenses. (See, e.g., J. Moneer, *No-Win Situation, Opposing a SLAPP Motion is Time-Consuming and Expensive*, Los Angeles Daily Journal, Aug. 4, 2000, at p. 5; D. Seider, *SLAPP Shot*, Los Angeles Lawyer (Nov. 2000) 32 at pp. 32-36, 53.)<sup>2</sup>

In some respects, the anti-SLAPP statute may be applied even more broadly than these other substantive law privileges, enabling the moving party to shift the burden to the plaintiff to show how either “communicative conduct” or “noncommunicative conduct” in furtherance of First Amendment rights could result in a liability judgment. (See, e.g., *Ludwig, supra*, 37 Cal. App. 4th at pp.18-20; *Rubin, supra*, 4 Cal.4th at pp.1195-1196; *Briggs, supra*, 19 Cal.4th at pp.1115-1116.)

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<sup>2</sup> Other conditional privileges or qualified immunities should not be overlooked when attacking the “merits” of a SLAPP suit, such as, the “true and fair report” privilege available to media defendants under Civil Code section 47, subdivision (d). (See, e.g., *Colt v. Freedom Communications, Inc.* (2003) 109 Cal.App.4th 1551 [“substantially” accurate report of SEC charges and consent decree barred claims of libel, invasion of privacy and interference with prospective business advantage]; but cf. *Lieberman v. KCOP Television, Inc.* (2003) 110 Cal.App.4th 156 [news gathering activity is not protected by the First Amendment, and plaintiff stated a statutory cause of action for illegal tape recording of “private” communications].)

## WHAT FIRST AMENDMENT ACTIVITY IS PROTECTED?

Section 425.16 is available to screen any “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, subd. (b)(1), emphasis added; see *Equilon, supra*, 29 Cal.4th at p. 58; *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1415.)

What kind of petition activity and speech are protected, and what qualifies as a “public issue”? Section 425.16 subdivision (e) broadly identifies four categories of First Amendment activity encompassed by the statute.

***Petition Activity and Speech Relating to Official Proceedings.*** The first two categories identified by subdivision (e) (1) and (2) involve: “any written or oral statement or writing made before” or “in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law[.]” (Code Civ. Proc., § 425.16, subd. (e)(1), (2); see *Briggs, supra*, 19 Cal.4th at p.1123.)

Heeding the Legislature’s command to broadly construe the statute, the courts have held that “[any] cause of action *arising from litigation activity* may appropriately be the subject of a section 425.16 motion.” (*Shekhter v. Financial Indemnity Co.* (2001) 89 Cal.App.4th 141,151 (*Shekhter*), emphasis added.) Such activity plainly encompasses “the filing and prosecution of [civil] actions as well as statements made . . . in relation to those lawsuits” as well as other official proceedings before all branches of government. (*Ibid.*; *Briggs, supra*, 19 Cal.4th at pp.1115-1116 “[p]etitioning activity involves lobbying the government, suing, [and] testifying”.)

By the same token, any communication (written or oral) made before or relating to an issue “under consideration” by a judicial or official body falls within the ambit of section 425.16. To illustrate:

- ⊗ **Criminal Complaint.** Making a police report regarding suspected criminal activity. (*Hagberg v. California Federal Bank FSB* (Jan. 5, 2004, No. S105909) \_\_\_ Cal.4th \_\_\_, 2004 Cal. LEXIS 2.)
- ⊗ **Administrative Investigation.** Asking the Attorney General to initiate an administrative investigation of copyright infringement. (*Dove Audio, supra*, 47 Cal.App.4th at p. 83.)
- ⊗ **Real Estate Development.** Lobbying government agencies for approval – or disapproval – of zoning and land use planning issues. (*Ludwig, supra*, 37 Cal.App.4th at p. 19; *Mission Oaks Ranch, supra*, 65 Cal.App.4th at p.728.)
- ⊗ **Promoting or Initiating Lawsuits.** Counseling services provided by a legal-aid organization to tenants regarding potential civil actions in connection with a HUD investigation involving their landlord. (*Briggs,*

*supra*, 19 Cal.4th at pp. 1109-1110, 1115-1119.)

- ✿ **Malicious Prosecution and Derivative Torts.** Causes of action for malicious prosecution or abuse of process which, by definition, arise out of prior litigation activity. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 736-738, fn. 6 [noting multiple references to both theories as “potential SLAPPs” in the legislative history of section 425.16]; see discussion of Malicious Prosecution below.)

In such cases, the “public issue” component of the statute is automatically satisfied by virtue of the relationship between some protected First Amendment activity and an official proceeding.

The burden is on the defendant to demonstrate the connection between the speech or petitioning activity and the “official proceeding.” (*Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 931 [where claims seek to impose liability based on unprotected conduct, such as the submission of false inspection reports and repair estimates, collateral references to later litigation involving protected conduct do not make the claims subject to anti-SLAPP treatment; *Paul v. Freidman, supra*, 95 Cal.App.4th at 866 “[no] anti-SLAPP protection [for] suits arising from any act having any connection, however remote, with an official proceeding where the cause of action is based essentially on nonprotected activity”].) In doing so, the defendant need not establish that the speech or activity complained of involved a matter of “significant public interest.” (*Briggs, supra*, 19 Cal.4th at pp.1115-1116; *DuCharme v. International Brotherhood of Electrical Workers, Local 45* (2003) 110 Cal.App.4th 107, 113 (*DuCharme*).)

***Speech Concerning Matters of “Public Interest.”*** Section 425.16, subdivision (e)(3) and (4) both require an additional showing that the act “in furtherance of [defendant’s right of petition or free speech] . . . [was] made *in a place open to the public or a public forum* in connection with *an issue of public interest. . . .*” (Emphasis added.)<sup>3</sup>

In other words, “when the defendant’s alleged acts fall under the first two prongs of section 415.16, subdivision (e) (speech or petitioning before a legislative, executive, judicial or other official proceeding, or statements made in connection with an issue under review or consideration by an official body), the defendant *is not* required to independently demonstrate that the matter is a ‘public issue’ within the statute’s meaning.” (*Consumer Justice Center v. Trimedica International, Inc.* (2003) 107 Cal.App.4th 595, 600-601

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<sup>3</sup> In 1997, subdivision (e)(4) was adopted as a catch-all category, extending the already broad reach of the anti-SLAPP statute to “*any other conduct* in furtherance of the exercise of the constitutional right of petition or . . . of free speech in connection with a public issue or an issue of public interest.” (Stats. 1997, ch. 271, §1, emphasis added.) Presumably, by adding the phrase “any other conduct,” the Legislature meant conduct *other than* that specified in the three preceding subsections (e)(1), (2) and (3) – i.e., “any written or oral statement or writing.”

(*Trimedica*), emphasis added.) “If, however, the defendant’s acts fall under the third or fourth prongs of subdivision (e) there is an express ‘issue of public interest’ limitation.” (*Trimedica, supra*, 107 Cal.App.4th at pp. 600-601, citing *Briggs, supra*, 19 Cal.4th at pp. 1113, 1117.)

Essentially, the subdivisions (e)(3) and (4) of the anti-SLAPP screening mechanism may be invoked for “ex-hearing speech” (i.e., speech that does not relate to an official or judicial proceeding) – provided, that the speech or other First Amendment conduct involves “an issue of public interest.” (See generally D. Seider, *SLAPP Shot*, Los Angeles Lawyer (Nov. 2000), *supra*, at p.34; *Commonwealth Energy Corp. v. Investor Data Exchange* (2003) 110 Cal.App.4th 26, 32-33 (*Commonwealth Energy*).) If a matter of “public interest” is not at issue, then section 425.16 does not come into play. (*Trimedica, supra*, 107 Cal.App.4th at pp. 600-601; see also *Commonwealth Energy, supra*, 110 Cal.App.4th at p. 33.)

The *public issue-public interest* aspect of the anti-SLAPP statute has not been defined systematically, but instead has developed on a case-by-case basis. General categories fitting the “public interest” prong include:

- ⊗ **Public Figure Defamation.** The subject of the statement or activity was a person or entity in the public eye (i.e., a “public figure” defamation case). (See generally, *Rivero v. American Federation of State, County and Municipal Employees, AFL-CIO* (2003) 105 Cal.App.4th 913, 924 (*Rivero*); *Sippel v. Foundation for National Progress* (1999) 71 Cal.App.4th 226, 239 [article accusing nationally-known political consultant of domestic violence].)
- ⊗ **Political Speech.** The statement or activity involved conduct that could affect large numbers of people beyond the direct participants concerning their financial interests or right of representation. (*Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 479-480 [derogatory statements in a newsletter circulated to a large senior citizen community concerning elections for board of a homeowners association]; *Roberts v. Los Angeles County Bar Assn.* (2003) 105 Cal.App.4th 604 [unsuccessful judicial candidate’s action against Bar Association for “unqualified rating” subject to SLAPP screening]; *Global Trimedia International, Inc. v. Doe 1* (C.D. Cal. 2001)132 F.Supp.2d 1261, 1264-1266 [statements by investors or potential investors about a publically traded company on an internet message board].)
- ⊗ **Topics of Widespread Public Interest or Debate.** The statement or activity involved a topic of widespread, public interest. (*M.G. v. Time Warner, Inc.* (2001) 89 Cal.App.4th 623, 629 [Sports Illustrated article on child molestation in youth groups]; *Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798, 806-807 [radio talk show hosts ridiculing contestant on Who Wants to Marry a Millionaire involved issue of “public interest” – noting that the content of the speech does not imply any qualitative assessment of

the issue's significance].)

Unless the defendant can demonstrate the nexus between an "official proceeding" or "public issue," then the burden does not shift to the plaintiff to demonstrate a prima facie case. (See *Martinez, supra*, 113 Cal.App.4th at p. 188.)

**What Isn't a SLAPP?** By contrast, cases which do not meet the public issue-public interest test may generally be described as those involving speech relating to purely private disputes, or so-called "commercial speech," such as advertising and telemarketing campaigns that target consumers of the speaker's particular products and services. Thus:

- ✿ **Employment Disputes.** Union flyers defaming a janitorial supervisor managing a staff of eight custodians at a residential house on the U.C. Berkeley campus did not constitute a "public issue" or an "issue of public interest." (*Rivero, supra*, 105 Cal.App.4th at p. 924.) Otherwise, a private or personal incident arising in *every* workplace dispute would qualify as a matter of "public interest." (*Ibid.*)
- ✿ **False Advertising.** Advertising claims made on behalf of an herbal supplement promising breast enlargement did not invoke a public issue or issue of public interest, but rather promoted "the specific properties and efficacy of a particular product." (*Trimedica, supra*, 107 Cal.App.4th at pp. 600-603; *Nagel v. Twin Laboratories* (2003) 109 Cal.App.4th 595 [false advertising about weight-loss supplements was calculated to promote "private interest of increasing sales of its products"].) But compare *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 567-568 [Section 425.16 applied to class action against drug manufacturer because allegedly false statements were "inextricably intertwined" with defendant's protected speech and lobbying activities providing medical information to doctors and consumers about benefits of its prescription medications over competing generic brands].)
- ✿ **Products Liability.** Even if a manufacturer's advertising and product warranties could be characterized as "commercial speech" protected by the First Amendment, the principal thrust of the complaint involved unprotected conduct that the defendant manufactured and sold a defective product resulting in plaintiff's personal injuries. (*Martinez v. Metabolife International, Inc.* (2003) 113 Cal.App.4th 181, 193-194.)
- ✿ **Telemarketing.** "[A] telemarketing pitch" made to potential customers to solicit the caller's goods or services did not involve issues of public interest or concern. (*Commonwealth Energy, supra*, 110 Cal.App.4th at pp. 28, 32-35.)<sup>4</sup>

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<sup>4</sup> Commenting on the absence of a "public issue" in the preceding examples, the *Commonwealth Energy* court observed: "Selling an herbal breast enlargement product is not a disquisition on alternative medicine. Lying about the supervisor of



- ⊗ **Trade Libel.** Libelous statements made by a company about a competitor’s products or services. (*Globetrotter Software v. Elan Computer Group* (N.D. 1999) 63 F.Supp.2d 1127, 1130 [“if such statements were construed as coming within the statute’s protection, any lawsuit alleging trade libel, false advertising or the like in the context of commercial competition would be subject to attack as a SLAPP suit.”].)
  
- ⊗ **Declaratory Relief.** An action for declaratory relief by a municipality seeking to determine the validity of its ordinance did not constitute a SLAPP suit merely because it followed a similar lawsuit brought in federal court by a mobile home park owner attacking the same ordinance. Rather, the city’s action “arose” not from the owner’s prior federal suit, but from the controversy underlying both actions; namely, the constitutionality of the ordinance itself. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78; accord *State Farm General Ins. Co. v. Magorino* (2002) 99 Cal.App.4th 974, 977-978 [insurance company’s declaratory relief action sought a determination of coverage issues that *arose* from the tender of defense and the terms of the insurance policy, not the underlying personal injury action].)

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eight union workers is not singing one of those old Pete Seeger songs (e.g., ‘There Once Was a Union Maid’). And in the case before us hawking an economics lecture on the importance of information for efficient markets.” (*Commonwealth Energy, supra*, 110 Cal.App.4th at p. 34.) By contrast, allegedly defamatory statements contained in political flyers sent to 10,000 union members during an election were clearly protected speech relating to a “public issue”; namely, “the qualifications of a candidate to run for office.” (Cf. *Macias v. Hartwell* (1997) 55 Cal.App.4th 669, 675.)

- ⊗ **Consumer Actions Under the Unfair Competition Law (UCL).** A consumer rights action under Business & Professions Code § 17200 of the UCL against a property insurer and the insurer’s employees alleging “regulatory violations” in the adjustment of property damage claims arising from the Northridge earthquake is not a SLAPP. Although based upon a Department of Insurance (DOI) market examination report prepared from information furnished by defendants, the lawsuit did not necessarily “arise from the report” nor from any communication made by the defendants to DOI. (*Gallimore v. State Farm Fire & Casualty Ins. Co.* (2002) 102 Cal.App.4th 1388, 1392-1400 (*Gallimore*);<sup>5</sup> see also *Commonwealth Energy, supra*, 110 Cal.App.4th at pp. 32-33.)



- ⊗ **Plaintiff Demonstrates a Prima Facie Case in Response to the Anti-SLAPP Motion.** In the final analysis, “[o]nly a cause of action that satisfies both prongs of the anti-SLAPP statute – i.e., that arises from protected speech or petitioning activity and lack even minimal merit – is a SLAPP, subject to being stricken under the statute.” (*Navellier, supra*, 29 Cal.4th at p. 89, internal citations omitted.)

No doubt, the official proceeding and public interest-public issue prongs will continue to be hotly litigated topics. Meanwhile, in the context of actions for misappropriation of trade secrets, products liability, false advertising, breach of warranty, and unfair business practices (to name a few), the debate about the proper application of the anti-SLAPP statute rages on and recently became the subject of legislation that takes effect in 2004 modifying the scope of the anti-SLAPP statute (see discussion of new section 425.17 below).

#### **MOTION PROCEDURE UNDER THE ANTI-SLAPP STATUTE – HOW IT WORKS**

**Statutory Priority.** To minimize the financial burdens imposed on the defendant who is subjected to an abusive lawsuit, section 425.16 requires resolution of the SLAPP issue on a fast-track basis. The special motion to strike takes precedence over virtually all other proceedings, ordinarily requiring that the motion be filed within 60 days after service of the complaint, and the “merits” hearing take place within 30 days thereafter (unless congestion of the court’s calendar requires a later hearing). (Code Civ. Proc., § 425.16, subd. (f).)

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<sup>5</sup> *Gallimore* suggests that to the extent “the defendant’s protected acts of speech that were the acts complained of,” as in the context of defamation or false advertising the outcome might be different. But mere threatened use of information critical of the insurance company’s conduct contained in the DOI’s market condition examination report as evidence did not satisfy the defendants’ burden to show that the plaintiff’s complaint “arises from” or is “based upon” conduct or communications protected by the First Amendment. (*Gallimore, supra*, 102 Cal.App.4th at p. 1400.) Other pretrial procedures, such as summary judgment or evidentiary or substantive law privileges (e.g., *Noerr-Pennington*) might preclude the use of confidential and privileged information obtained during the DOI’s administrative proceeding. (*Ibid.*)

This requires defense counsel to immediately identify the action as arising from protected First Amendment activity, and marshal the evidence necessary to support the anti-SLAPP motion which can be a substantial undertaking. Although the court may extend the 60-day filing and 30-day hearing requirements, failure to adhere to these deadlines is grounds for denial of the motion. (*Decker v. U.D. Registry, Inc.* (2003) 105 Cal.App.4th 1382, 1387 (*Decker*) [be prepared to “show [in the moving papers] that the trial court’s docket condition required a hearing beyond the 30-day deadline”]; *DuCharme, supra*, 110 Cal.App.4th at p. 113 [encouraging timeliness despite subdivision (f)’s “giant discretionary clause”]; see also *Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298, 313-314 [statutory deadlines begin to run anew upon service of an amended pleading that contains SLAPP allegations].)

While section 425.16 offers considerable procedural advantages, the statutory message is clear: “use it – or lose it.”

***Limitations on Discovery While the Motion is Pending.*** Discovery is stayed from the date of filing until the motion is decided, except on a noticed motion for “good cause” shown, and then only such “specified discovery” as may be allowed by the court limited to the issues raised by the anti-SLAPP motion. (Code Civ. Proc., § 425.16, subd. (g); see *Mattel, Inc. v. Luce Forward Hamilton & Scripps* (2002) 99 Cal.App.4th 1179, 1190-1191 (*Mattel*)). Again, the legislative aim is “early resolution to minimize the potential costs of protracted litigation, [and] to protect defendants from the burden of traditional discovery pending resolution of the motion.” (*Mattel, supra*, 99 Cal.App.4th at p. 1190.)

If you are opposing an anti-SLAPP motion be prepared to tell the court exactly what “specified discovery” you need, and why you need it, in order to demonstrate a prima facie case. (*Jarrow Formulas, supra*, 31 Cal.4th at pp. 740-741.) When discovery from the defendant or third parties is truly necessary, it helps to request that moving party’s counsel stipulate that limited discovery should be allowed to proceed (and a brief postponement of the anti-SLAPP hearing if required to conclude it) before involving the court. Although the procedure is somewhat similar to requesting discovery to oppose a summary judgment motion (cf. Code Civ. Proc., § 437c, subd. (h), (i)), remember that a noticed motion and prior court approval is required to conduct discovery while the anti-SLAPP motion is pending. And it is risky under the “good cause” standard to delay your request until the eve of the hearing, or attempt to “specify” what you needed in your opposition brief.

***Defendant’s Initial Burden of Proof – the “Arising From” Prong.*** The anti-SLAPP statute requires that the trial court engage in a two-step process when determining whether to grant the special motion to strike. First, the court considers whether the moving party has carried its burden of showing that the lawsuit falls within the purview of section 425.16. The defendant bears the initial burden of demonstrating a prima facie case that plaintiff’s cause of action arises out of the defendant’s acts in furtherance of petition or free speech rights. (Code Civ. Proc., § 425.16, subd. (b) (1); *Equilon, supra*, 29 Cal.4th at p. 67.)

Recent California Supreme Court cases have clarified, however, that the moving defendant has no obligation to prove that plaintiff’s subjective intent was to “chill” the exercise of constitutional speech or petition rights, nor that the action actually had the effect of “chilling” those rights. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88 (*Navellier*); *Equilon,*

*supra*, 29 Cal.4th at p. 66.)

It is the *principal thrust* or *gravamen* of the plaintiff's cause of action that determines whether the anti-SLAPP statute applies with any doubts resolved in favor of construing the statute "broadly" to vindicate the defendant's constitutionally protected speech or petition activity. (*Navellier, supra*, 29 Cal.4th at pp. 90-92.) Because the statute is to be construed broadly, the plaintiff cannot avoid the operation of the anti-SLAPP screening procedure by attempting, through the artifices of pleading, to characterize the lawsuit as a "garden variety breach of contract [or] fraud claim" when in fact the liability claim is based on protected speech or conduct. (*Ibid.*; *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 308 (*Fox Searchlight*) ["plaintiff cannot frustrate the purposes of the SLAPP statute . . . [by] combining allegations of protected and unprotected activity under the label of 'one cause of action.'"]).<sup>6</sup>

Thus, the "pleadings merely frame the issues to be decided." (*Wollersheim, supra*, 42 Cal.App.4th at p. 656.) "Unlike demurrers or motions to strike, which are designed to eliminate sham or facially meritless allegations, at the *pleading* stage, [an anti-SLAPP] motion like a summary judgment motion, *pierces* the pleadings and requires an evidentiary showing [by both sides]." (*Simmons v. Allstate Ins. Co.* (2001) 92 Cal.App.4th 1068, 1073.)

***Plaintiff's Ultimate Burden of Proof – "Probability" of Success on the Merits.*** Once the moving party's initial burden is met, the burden shifts to the plaintiff to demonstrate that there is a "probability" of prevailing on the merits of his or her claims. (*Equilon, supra*, 29 Cal.4th at p. 67.)

The plaintiff's opposition 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." (*Jarrow Formulas, supra*, 31 Cal.4th at pp. 740-741.) "In deciding the question of potential merit, . . . 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 of the claim." (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821 (*Wilson*) emphasis in original.)

The special motion is not necessarily an all-or-nothing proposition. The defendant may attack one or more "causes of action," and may not prevail in having the entire action dismissed where, for example, plaintiff is able to demonstrate a "probability" of success on some but less than all of the claims asserted. (*Shekhter, supra*, 89 Cal.App.4th at p. 150 ["a

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<sup>6</sup> "In a SLAPP complaint, the defendant's act of petitioning the government is made to appear as defamation, interference with business relations, restraint of trade and the like." (*Wilcox, supra*, 27 Cal.App.4th at p. 821.) For this reason, the Legislature recognized the necessity of a speaking-motion because satisfying the defendant's initial burden "is not always easily met" by simply reviewing the pleadings. (*Equilon, supra*, 29 Cal.4th at p. 66.)

single cause of action [may] be stricken”]; *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1019-1020 (*ComputerXpress*) [defendant entitled to statutory fees and costs where five of nine causes of action were dismissed].)

However, once a suspect cause of action is determined by the screening process to be a SLAPP, there is no right for “leave to amend,” because the trial courts are required to go beyond the pleadings and put an immediate end to claims that chill First Amendment activity. (*Simmons, supra*, 92 Cal.App.4th at pp. 1073-1074.)

**Right to Attorneys’ Fees.** If the moving defendant prevails, attorneys’ fees are awarded as part of the statutory costs of defending the lawsuit – whereas the plaintiff who successfully demonstrates a prima facie case must show that the anti-SLAPP motion was objectively “frivolous.” (Code Civ. Proc., § 425.16, subd. (c); *Jarrow Formulas, supra*, 31 Cal.4th at p. 740; *Decker, supra*, 110 Cal.App.4th at p. 1392 [fees are awarded to prevailing defendant as a matter of right, but fees awarded to plaintiff as sanctions require factual findings which demonstrate “any reasonable attorney would agree such motion is totally devoid of merit.”].)

Because the anti-SLAPP motion takes statutory priority in ascertaining the bona fides of the claim, even if the action is voluntarily dismissed by the plaintiff before the hearing on the special motion to strike, or because of some other procedural defect, the defendant is still entitled to the “merits” hearing under section 425.16, and if successful, an award of attorneys’ fees in defending any claims dismissed. (*Liu v. Moore* (1999) 69 Cal.App.4th 745, 751-754 [voluntary dismissal required determination on the merits, otherwise “plaintiff succeeded in chilling the valid exercise of constitutional rights”]; *White v. Lieberman* (2002) 103 Cal.App.4th 210, 220-221 [claim barred by statute of limitations was an improper SLAPP; hence, defendant entitled to fees] (*White*); accord *Pfeiffer Venice Properties v. Bernard* (2002) 101 Cal.App.4th 211, 218-219.)

The fee award should be sufficient to compensate the defendant for the cost of defending the improper action, or at least that portion of it which constituted a SLAPP. (*ComputerXpress, supra*, 93 Cal.App.4th at pp. 1019-1020 [defendant who prevailed on only five of nine causes of action, entitled to dismissal and statutory fees and costs on those claims].)<sup>7</sup>

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<sup>7</sup> Compare cases limiting award to fees incurred only in connection with the motion itself – *Marcias, supra*, 55 Cal.App.4th at p. 675 [\$44,445]; *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 39 Cal.App.4th 1379, 1383-1384; *Dove Audio, supra*, 47 Cal.App.4th p. 785 [trial court awarded \$28,296] – with cases opting for the “entire action” or “all proceedings” theory of recovery – *Coltrain v. Shewalter* (1998) 66 Cal.App.4th 94, 96 [affirming trial court award of \$73,000];

***Right to Immediate Appeal.*** “[A]n order granting or denying an anti-SLAPP motion is expressly made appealable by section 425.16, subdivision (j). An order declaring the motion to be moot [and declining to decide the merits] is the equivalent of a denial and is appealable [as a denial of the motion].” (*White, supra*, 103 Cal.App.4th p. 220, emphasis and brackets added.)



According to the Legislative history of the 1999 amendment of section 425.16, the notice of appeal from denial of the motion automatically stays all proceedings in the trial court encompassed within the subject of the anti-SLAPP motion. (Code Civ. Proc., § 425.16, subd. (j); § 904.1, subd. (a)(13); see *Mattel, supra*, 99 Cal.App.4th at pp. 1189-1190; but see contra *Varian Medical Systems, Inc. v. Delfino* (2003) 113 Cal.App.4th 273, 309-310 [where defendant appeals denial of anti-SLAPP motion “trial of plaintiff’s action is not automatically stayed”].)<sup>8</sup>

The trial court’s determination is reviewed de novo. The Court of Appeal examines the evidentiary record independently to decide if the plaintiff’s case should be allowed to proceed. (*Shekhter, supra*, 89 Cal.App.4th at pp. 150-151; *Gov. Gray Davis Com. v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 456.)

If so, that portion of the case which is not a SLAPP is returned for further proceedings. According to subdivision (b)(3), the final determination that plaintiff has indeed established a “probability” of prevailing on the merits “shall not be admissible in evidence at any later stage of the case,” and no party’s burden of proof shall be affected by that determination.

However, if the defendant prevails on appeal, he or she is entitled to all attorneys’ fees and costs – both in the trial court and on appeal – associated with any dismissed cause of action that did not pass final muster under the screening procedure. (*Coltrain v. Shewalter* (1998) 66 Cal.App.4th 94, 108; *White, supra*, 103 Cal.App.4th at p. 221 [case remanded for determination of fees in both courts].)

### **MALICIOUS PROSECUTION – A CLASSIC “SLAPP”**

***The Anti-SLAPP Statute Applies to Malicious Prosecution and Other Derivative Tort Claims.*** The scope of the anti-SLAPP statute should be a matter of great significance for every practicing California lawyer. According to data compiled by the Los Angeles County Bar Association-sponsored legal malpractice insurance program and the ABA’s Standing Committee on Professional Liability, the risk of claims by third parties (people you

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*Tuchscher Development Enterprises, Inc. v. San Diego Unified Port District* (2003) 106 Cal.App.4th 1219 [upholding \$55,900]; *Wollersheim, supra*, 42 Cal.App.4th at pp. 658-659 [trial court awarded \$130,506.71].

<sup>8</sup> Perhaps the recent disagreement expressed by the courts regarding the right to an *automatic* stay on appeal might be reconciled depending upon whether the anti-SLAPP motion “embraces the entirety of the action” or simply the causes of action addressed by the motion. (*Mattel, supra*, 99 Cal.App.4th at p. 1191.)

don't represent) is at an all-time high. Today, the biggest threat of litigation facing a lawyer practicing in Los Angeles is not a malpractice claim by his or her client – it is a malicious prosecution action by the disgruntled opposing litigant who was named as a party in that client's unsuccessful prior lawsuit. (Chamberlain & Chait, *Lawyers SLAPP Back!* (2nd Quarter 2002) VERDICT 30 at pp. 30-31.)

Malicious prosecution is a classic “derivative tort” claim – a secondary lawsuit that targets opposing parties or their legal advisors for conduct and communications arising in the context of another pending or contemplated legal action. (See *Rubin, supra*, 4 Cal.4th at p. 1194; *Temple Community Hospital v. Superior Court* (1999) 20 Cal.4th 464, 470 [disapproving “spoilation” of evidence as a tort cause of action against litigants or third parties in favor of sanctions, criminal and administrative remedies].)

During the past two decades the California Supreme Court has closely circumscribed the “disfavored tort” of malicious prosecution and similar derivative torts. (See, e.g., *Sheldon Appel & Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 872 (*Sheldon Appel*).) “Seeking to avoid an unending roundelay of litigation, [the Supreme Court has] cautioned against creating or expanding derivative tort remedies [including malicious prosecution].” (*Brennan v. Tremco, Inc.* (2001) 25 Cal.4th 310, 314-315, citing *Silberg v. Anderson* (1990) 50 Cal.3d 205, 214.)

Given the interplay between section 425.16 and the protection of petition rights, the application of the anti-SLAPP statute would seem obvious: “We specifically discounted another round of litigation as an antidote for the fevers of litigiousness, preferring instead the increased use of sanctions within the underlying lawsuit and legislative measures . . . . Consistent with that view, litigants may invoke a range of remedies, some recently made available by the Legislature, ‘to facilitate the *early weeding out of patently meritless claims* and to permit the imposition of sanctions [statutory fees] in the initial lawsuit . . . .” (*Rubin, supra*, 4 Cal.4th at pp. 1199-1200, emphasis and brackets added, internal citations omitted].)

However, until recently, the California courts were undecided regarding whether section 425.16 was available to “screen” malicious prosecution actions. (See Carroll, *The New Assault on Malicious Prosecution: The Anti-SLAPP Statute*, L.A. County Bar Update (Oct. 2000) at pp.1-3; *Paul v. Friedman* (2002) 95 Cal.App.4th 853, 865 [questioning applicability].) Several appellate courts applied the statute to test the merits of malicious prosecution claims, and “functionally indistinguishable” derivative tort theories. (See *Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083, 1087-1088; *Jarrow Formulas, Inc. v. LaMarche* (2002) 97 Cal.App.4th 1, 17, *review granted, opn. vacated and aff'd*, (2003) 31 Cal.4th 728 (*Jarrow Formulas*); *ComputerXpress, supra*, 93 Cal.App.4th at pp. 1005-1010, 1015 [abuse of process]; *Schekhter, supra*, 89 Cal.App.4th at p. 151 [unfair competition and business interference torts “arising from” filing and prosecuting a prior

lawsuit].)

In *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, the Supreme Court conclusively resolved the issue – the statute applies. (*Id.* at pp. 734-735 & fn. 2, digesting cases from “sister states” applying similar anti-SLAPP procedures to malicious prosecution; e.g., *McLarnon v. Jokisch* (2000) 431 Mass. 343, 347, 727 N.E.2d 813, 816; *Morse Bros., Inc. v. Webster* (Maine 2001) 2001 Me. 70, 772 A.2d 842, 849.)

***Lawyers Have Standing Under Section 425.16.*** Another unsettled question resolved by *Jarrow Formulas* extends the protection of section 425.16 to the activities of lawyers and other legal advisors who facilitate their clients’ rights to petition the courts.

A party’s legal representatives would plainly appear to have standing to invoke the statute’s protection in the exercise of their own personal rights of free speech with respect to that representation, advice and counsel. (See *Paul v. Friedman, supra*, 95 Cal.App.4th at p. 865 [questioning lawyer standing]; and compare *Briggs, supra*, 19 Cal.4th at pp. 1109-1110, 1115-1119 [section 425.16 applied to legal aid society personnel who allegedly “instigate” and “counsel” tenants in property disputes]; *Dove Audio, supra*, 47 Cal.App.4th at p. 785 [lawyers initiating Attorney General investigation]; *Schekhter, supra*, 89 Cal.App.4th at p. 151 [“Mr. Kass and the Manning law firm [the lawyers for Allstate] had standing to bring the special motion”]; see also Code Civ. Proc., § 425.16, subd. (e)(4) [do lawyers additionally qualify as persons engaged in “*other conduct* in furtherance of the exercise of the constitutional right of petition or . . . of free speech”?].)

Any lingering doubts about lawyer-standing have been laid to rest in favor of that right. (*Jarrow Formulas, supra*, 31 Cal.4th at pp. 733-734; see also *Wilson, supra*, 28 Cal.4th at p. 821.)

***Attacking the Merits of a Malicious Prosecution Claim Under the Section 425.16 – Defendant’s Burden Under the “Arising From” Prong.*** How the anti-SLAPP statute may be utilized by lawyers and clients to attack a malicious prosecution claim is well illustrated by *Jarrow Formulas*. Plaintiff Jarrow Formulas, a company which manufactured vitamins and nutritional supplements, sued Sandra LaMarche, a graphic artist, over the ownership rights to certain artworks she designed for use in the packaging and promotional materials of Jarrow’s products. LaMarche hired a lawyer to defend the lawsuit, and cross-complained against Jarrow for defamation and wrongful interference with LaMarche’s other business opportunities. The proceedings were hotly contested and acrimonious. Everyone lost – LaMarche’s cross-action was dismissed by summary judgment, and Jarrow’s claims were defeated at trial. (*Jarrow Formulas, supra*, 31 Cal.4th at p. 732.)<sup>9</sup>

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<sup>9</sup> Some of the more “colorful” factual background from the now-superseded opinion of the Court of Appeal does not appear in the Supreme Court’s recitation of the facts. Jarrow frequently threatened LaMarche and her counsel with the prospect of a subsequent malicious prosecution action. In a letter to one of LaMarche’s lawyers, Jarrow’s president wrote “people who file bullshit lawsuits – AND THEIR LAWYERS – should know what it is like to have their lives made miserable by crap litigation just like mine has been.” (*Jarrow Formulas, supra*, 97 Cal.App.4th at pp.12-13 [*opn. superseded by grant of review*], emphasis in original.)



Jarrow nonetheless sued LaMarche and her lawyer for malicious prosecution. The trial court ruled that the anti-SLAPP did not apply to malicious prosecution claims, and the Court of Appeal reversed. (*Jarrow Formulas, supra*, 31 Cal.4th at pp. 732-733.) Claims for malicious prosecution are classic SLAPP suits because they “chill” the rights of free speech and petition for redress of grievances: “Courts have long recognized that the tort has the potential to impose an undue ‘chilling effect’ on a citizen’s willingness to . . . bring a civil dispute to court, and, as a consequence, the tort has historically been regarded a disfavored cause of action.” (*Sheldon Appel, supra*, 47 Cal.3d at p. 872.)

The Supreme Court agreed: “[B]y its terms, section 425.16 potentially may apply to every malicious prosecution action, because every such action arises from an underlying lawsuit, or petition to the judicial branch. By definition, a malicious prosecution suit alleges that the defendant committed a tort by filing a lawsuit[,]” thus satisfying the statute’s first prong. (*Jarrow Formulas, supra*, 31 Cal.4th at p. 735, emphasis added.)

***Plaintiff’s Burden Under the “Probability” Prong.*** Applying the “probability of prevailing” prong, the trial court must evaluate whether the plaintiff has demonstrated by satisfactory proof the essential elements of the claim: (1) that the prior action was initiated by or at defendant’s direction and was terminated in plaintiff’s favor; (2) was brought without probable cause; and (3) was commenced with malice, resulting in damages to the malicious prosecution plaintiff (defendant in the prior action). (*Jarrow Formulas, supra*, 31 Cal.4th at pp. 741-742, citing *Sheldon Appel, supra*, 47 Cal.3d at pp. 871-872.)

Favorable termination is not necessarily established by the dismissal of the prior lawsuit. For example, a voluntary dismissal in furtherance of a settlement or simply to avoid further litigation expenses is not a favorable termination *on the merits*. (*Pender v. Radin* (1994) 23 Cal.App.4th 1807, 1814-1817.) The same is true where the prior case is disposed of as untimely under the applicable statute of limitations “because it does not reflect at all on the substantive merit of the claim alleged.” (*Stanley v. Superior Court* (1982) 130 Cal.App.3d 460, 465.)

The second element – probable cause – ordinarily presents a question of law where the facts are not materially disputed. The courts have imposed strict limits in this regard, requiring that “[t]he plaintiff in a malicious prosecution action must prove *each of the necessary elements of the tort*, and the trial court must carefully consider the issue of probable cause so that recovery is not permitted for mere negligence in bringing an action, or simply because the action was not successful.” (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 1515, 1562, internal citations omitted, emphasis added.) “Counsel and their clients have the right to present issues that are arguably correct, even it is extremely unlikely they will win . . .” (*Hufstедler, Kaus & Ettinger v. Superior Court* (1996) 42 Cal.App.4th 55, 66 .) “If a court finds that the initial lawsuit was in fact *objectively tenable*,” then the prior action was not frivolous, and the malicious prosecution plaintiff has suffered no “improper or unjustified hardship” in being required to defend the prior suit. (See *id.* at p. 63, emphasis added; *Sheldon Appel, supra*, 47 Cal.3d at p. 878; *Vanzant v. DaimlerChrysler Corp.* (2002) 96 Cal.App.4th 1283, 1288-1290.)

As a matter of law, a favorable interim ruling in the first lawsuit tends to establish that probable cause existed: “Claims that have succeeded at a hearing on the merits [e.g., summary judgment or nonsuit], even if subsequently reversed by the trial or appellate court, are not so lacking in potential merit that a reasonable attorney or litigant would necessarily have recognized their frivolousness.” (*Wilson, supra*, 28 Cal.4th at p. 818; see also *id.* at p. 816 [“the denial of a SLAPP motion parallels denial of a motion for summary judgment’ . . . [which] normally establishes probable cause”].)

But the converse is not necessarily true – the granting of a pretrial motion (e.g., summary judgment), or prevailing at trial does not automatically amount to a lack of probable cause, because “every case litigated to a conclusion has a losing party, but that does not mean the losing position was not arguably meritorious when it was [filed]. (*Wilson, supra*, 28 Cal.4th at p. 824.) And just as an action that ultimately proves nonmeritorious may have been brought with probable cause, successfully defending a lawsuit does not establish that the suit was brought without probable cause.” (*Jarrow Formulas, supra*, 31 Cal.4th at p. 743.)

The separate element of “[m]alice must be established by other, additional evidence.” (*Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 498.) Merely because the prior action lacked probable cause, “without more, would not logically or reasonably permit the inference that such lack of probable cause was accompanied by the actor’s subjective malicious state of mind. . . . [¶] [T]hat evidence must include proof of actual hostility or ill will on the part of the defendant or the subjective intent to deliberately misuse the legal system . . . for the intentionally wrongful purpose of injuring another person.” (*Id.* at pp. 498-499, citing *Sheldon Appel, supra*, 47 Cal.3d at p. 885; accord *Jarrow Formulas, supra*, 31 Cal.4th at p. 743 [“obtaining summary judgment for the defense on the underlying claim does not necessarily establish the malice element of a subsequent malicious prosecution claim”]; but compare *Mattel, supra*, 99 Cal.App.4th at p. 1192 [suggesting lack of probable cause gives rise to an inference of “malice”].)

If you are the plaintiff opposing the second prong of an anti-SLAPP motion, you cannot ignore proof of the final essential element of a prima facie claim – *damages*. Do not forget that each element of a cause of action must satisfy the “probability of prevailing” test by competent and admissible evidence.

In affirming the Court of Appeal, the Supreme Court concluded that even assuming Jarrow had received a favorable termination on the merits in the prior action, LaMarche’s cross-complaint was at least “legally tenable,” albeit unsuccessful. Jarrow’s failure to satisfy the second and third elements of its malicious prosecution claim barred recovery. Having prevailed under the anti-SLAPP statute, defendants “were entitled to [recover from Jarrow] *their costs and attorneys’ fees on appeal and in the trial court.*” (*Jarrow Formulas, supra*, 97 Cal.App.4th at p. 22 [*opn. superseded by grant of review*], emphasis added; *Jarrow Formulas, supra*, 31 Cal.4th at pp. 732, 744 [affirming that judgment].)



## NEW SECTION 425.17 – EXCEPTIONS TO THE ANTI-SLAPP STATUTE

*A Question of “Corporate Abuse”?* The broad application of the statute to protect First Amendment speech and petition activity – particularly by corporations and business entities – has raised some question about whether the statute is being applied as originally intended. From the early days following enactment of the original section 425.16, cases recognized that “the ‘paradigm’ SLAPP suit is an action filed by a land developer against environmental activists who were objecting neighbors of the proposed development. However, . . . ‘SLAPP’s’ . . . are by no means limited to environmental issues . . . nor are the defendants necessarily local organizations with limited resources.” (*Ludwig, supra*, 37 Cal.App.4th at pp. 14-15, citing *Wilcox, supra*, 27 Cal.App.4th at p. 815.) Indeed, a substantial body of authority has developed that is “far removed from the prototype ‘big developer v. private citizen [paradigm SLAPP],” and the focus of many cases deals with application of section 425.16 to litigation of a commercial nature “involving conduct by a defendant which was directed to obtaining a financial advantage.” (*Ludwig, supra*, 37 Cal.App.4th at p. 15 & fn.8; *Wilcox, supra*, 27 Cal.App.4th at p. 818 [unfair practices actions between competitors].)<sup>10</sup>

Fueling the controversy, on September 6, 2003, former Governor Davis signed Senate Bill 515 now codified as Code of Civil Procedure § 425.17 creating statutory exceptions to the application of the anti-SLAPP statute that took effect on January 1, 2004. Supporters of the bill decried “the increasing use of the anti-SLAPP law by corporations to obstruct or delay public-interest and consumer lawsuits against them.” (*Measure Revives Original Intent of Anti-SLAPP Law*, L.A. DAILY JOURNAL (Dec. 3, 2003) Forum, at p. 6 (*Original Intent*)).

***Exceptions and Exemptions Created by Section 425.17.*** In passing section 425.17, “[t]he Legislature declares that there has been a disturbing abuse of Section 425.16 . . . which has undermined the exercise of the constitutional rights of freedom of speech and petition for redress of grievances, contrary to the purpose and intent of Section 425.16.” (§ 425.17, subd. (a).)

To correct this perceived imbalance, the new law creates exceptions from the anti-SLAPP statute for two types of lawsuits: (1) public-interest lawsuits brought solely for the benefit of the general public (§ 425.17, subd. (b)), and (2) lawsuits involving “false representations” made by a business (including but not limited to manufacturers, insurers, and securities dealers) directed at potential customers regarding the business’ products or services or the products or services of a competitor (§ 425.17, subd. (c)).

But that’s not all. There are also “exemptions” to the exceptions. In order to qualify as a “public interest” lawsuit, the plaintiff must demonstrate *all* of the following:

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<sup>10</sup> Indeed, *Noerr-Pennington*, the constitutional doctrine underlying anti-SLAPP procedure, protects the rights of businesses as well as individuals to petition and lobby government agencies regarding matters of commercial and financial concern. (*Ludwig, supra*, 37 Cal.App.4th at p. 21; see discussion of *Noerr-Pennington* above.)

- (1) The action does not seek any greater relief than or different from a relief sought for the general public or a class which the plaintiff is a member. (Claims for attorneys' fees, costs or penalties do not constitute greater or different relief.)
- (2) The action, if successful, would enforce an important right affecting the public interest, and would confer a significant benefit whether pecuniary or nonpecuniary, on the general public or a large class of persons. And . . .
- (3) Private enforcement is necessary and places a disproportion financial burden on the plaintiff in relation to the plaintiff's stake in the matter.

There's more. Certain defendants are not subject to either exception. In other words, these defendants may continue to rely upon section 425.16's screening procedure to defend suits affecting their First Amendment rights: (1) members of the news media and authors, (2) any person or entity engaged in dramatic, literary, musical, political or artistic work, including motion pictures, television and news media; and (3) a non-profit organization receiving more than 50% of its annual revenues from government sources. (Code Civ. Proc., § 425.17, subd. (d)).

Confused? Apparently, so were some of those who promoted the bill and voted for it.

According to Kevin Baker, consultant and lawyer for the Assembly Judiciary Committee, "this is the legal equivalent of a quadratic equation . . . You've got an anti-SLAPP by a plaintiff against a defendant being excepted from exemptions. It's easy to get lost." (Rapittoni, *Think of It As An Easy Quadratic Equation*, S.F. DAILY JOURNAL (July 17, 2003) Reporter's Notebook.)

***But is it Constitutional?*** The first part of the "quadratic equation" is easy enough to follow. The two exceptions – subdivisions (b) and (c) – ostensibly overturn cases applying the anti-SLAPP statute in cases involving "commercial speech" or to defend against UCL representative actions that threaten to interfere with the defendant's right to free speech. (See, e.g., *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562; *Original Intent*, *supra*, L.A. DAILY JOURNAL (Dec. 3, 2003) at p. 6.)

Recently, there has been lively constitutional debate regarding the protection that should be afforded to so-called "commercial speech." The California Supreme Court recently held in *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 969 (*Nike*), that commercial speech does not enjoy the same level of constitutional protection as other First Amendment speech: "Commercial speech, because it is more readily verifiable by its speaker and more hardy than non-commercial speech, can be effectively regulated to suppress false and actually or inherently misleading messages without undue risk of chilling public debate." (*Id.* at p. 969.)<sup>11</sup>

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<sup>11</sup> Prior California cases similarly concluded that, "Criticism of commercial conduct does not deserve the special protection of the actual malice test. Balancing one individual's limited First Amendment interest against another's reputation interest, we conclude that a person in the business world advertising his wares does not

At issue in *Nike* were statements made by the Oregon-based shoe manufacturer in press releases, letters to university presidents and athletic directors and op-ed pieces that disputed adverse publicity suggesting its overseas labor practices constituted “sweat shops” and violated child labor laws. A UCL action was brought by plaintiff Kasky who alleged that Nike’s response amounted to “unfair competition and false advertising.” Nike countered that it was engaged in protected political speech, offering its side of a public debate over the effects of globalization. The lower courts dismissed the UCL claims on First Amendment grounds, but the California Supreme Court reinstated the lawsuit by a 4-to-3 vote.

The United States Supreme Court initially granted certiorari last year, but after hearing argument, dismissed the case as “improvidently granted” on technical grounds. (See *Nike, Inc. v. Kasky, cert. granted* (Jan. 10, 2003) 537 U.S. 1099, 123 S.Ct. 817, *cert. dismissed* (June 26, 2003) 123 S.Ct. 2554.) Adding to this unusual result, six justices concurred and dissented from the dismissal. The dissenting opinion of Justice Stephen G. Breyer, joined by Justice Sandra Day O’Connor, noted that lingering issues will require resolution in future cases, including the extent to which the First Amendment embraces “commercial speech,” such as representations made about a business’ own products, and the constitutional implications of permitting an action under the UCL “brought on behalf of the state, by one who has suffered no injury, [threatening] to impose a serious burden upon speech – if at least it extended to encompass the type of speech at issue under the standards of liability [contained in the UCL].” (*Nike, supra*, 123 S.Ct. at pp. 2563-2567 [dis. opn. of Breyer, J.].)

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necessarily become part of an existing public controversy.” (*Vegod Corp. v. American Broadcasting Companies, Inc.* (1979) 25 Cal.3d 763, 770.) By contrast, the truth or falsity of political speech or matters involving public controversy would be governed by the actual malice standard. (*Ibid.*)

Harvard Law Professor Lawrence H. Tribe, who argued the case for Nike, said that regardless of the procedural outcome, the views expressed by the split opinions refuted the California Supreme Court's premise that Nike's statements were simply "garden-variety commercial speech." (Greenhouse, *Nike Free Speech Case Is Unexpectedly Returned to California*, NEW YORK TIMES (June 27, 2003).) So the California Supreme Court's holding in *Nike* stands (incorporated in part by the new limitations contained in section 425.17), and the extent of the constitutional protection afforded to commercial speech engaged in by businesses, including multinational corporations such as Nike, on a variety of topics of public controversy remains cloudy.<sup>12</sup>

***What's Next?*** Small wonder, new section 425.17 contains a "severability" clause: "If any provision of this act or its application is held invalid [the remaining provisions] can be given effect . . ." (§ 425.17, SEC. 2.)

In the dozen years after California first enacted its anti-SLAPP statute, "courts have struggled to refine the boundaries of a cause of action that arises from protected [First Amendment] activity." (*Martinez, supra*, 113 Cal.App.4th at pp. 186-187.) Time will tell – as these boundaries continue to evolve on a case-by-case basis.

Meanwhile, the new statutory exemptions and exceptions offer fertile ground for litigators, and whatever the outcome of potential future challenges to section 425.17, the anti-SLAPP statute is a rule of procedure that implements and protects constitutional rights. Those substantive rights remain intact with or without a statutory screening device.

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<sup>12</sup> See generally *Quadratic Equation* S.F. DAILY JOURNAL (July 17, 2003); *Original Intent*, L.A. DAILY JOURNAL (Dec. 3, 2003), *supra*.

## APPENDIX

**CODE OF CIVIL PROCEDURE § 425.16.** Legislative findings; Special motion to strike action arising from “act in furtherance of person’s right of petition or free speech under United States or California Constitution in connection with a public issue”

(a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

(b)(1) 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 shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

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

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

(c) In any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney’s fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause

unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.

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

(e) As used in this section, “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” includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) 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; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other 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.

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

(g) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.

(h) For purposes of this section, “complaint” includes “cross-complaint” and “petition,” “plaintiff” includes “cross-complainant” and “petitioner,” and “defendant” includes “cross-defendant” and “respondent.”



(i) On or before January 1, 1998, the Judicial Council shall report to the Legislature on the frequency and outcome of special motions made pursuant to this section, and on any other matters pertinent to the purposes of this section.

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

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

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

**LEGISLATIVE HISTORY:** Added Stats 1992 ch 726 § 2 (SB 1264). Amended Stats 1993 ch 1239 § 1 (SB 9). Amended Stats 1997 ch 271 § 1 (SB 1296); Stats 1999 ch 960 § 1 (AB 1675), effective October 10, 1999.

**CODE OF CIVIL PROCEDURE § 425.17.** Legislative findings as to abuse of § 425.16; Inapplicability of § 425.16 to certain actions; Appeal provisions not applicable

(a) The Legislature finds and declares that there has been a disturbing abuse of Section 425.16, the California 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. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process or Section 425.16.

(b) Section 425.16 does not apply to any action brought solely in the public interest or on behalf of the general public if all of the following conditions exist:

(1) The plaintiff does not seek any relief greater than or different from the relief sought for the general public or a class of which the plaintiff is a member. A claim for attorney's fees, costs, or penalties does not constitute greater or different relief for purposes of this subdivision.

(2) The action, if successful, would enforce an important right affecting the public interest, and would confer a significant benefit, whether pecuniary or nonpecuniary, on the general public or a large class of persons.

(3) Private enforcement is necessary and places a disproportionate financial burden on the plaintiff in relation to the plaintiff's stake in the matter.

(c) Section 425.16 does not apply to any cause of action brought against a person primarily engaged in the business of selling or leasing goods or services, including, but not limited to, insurance, securities, or financial instruments, arising from any statement or conduct by that person if both of the following conditions exist:

(1) The statement or conduct consists of representations of fact about that

person's or a business competitor's business operations, goods, or services, that is made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services, or the statement or conduct was made in the course of delivering the person's goods or services.

(2) The intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer, or the statement or conduct arose out of or within the context of a regulatory approval process, proceeding, or investigation, except where the statement or conduct was made by a telephone corporation in the course of a proceeding before the California Public Utilities Commission and is the subject of a lawsuit brought by a competitor, notwithstanding that the conduct or statement concerns an important public issue.

(d) Subdivisions (b) and (c) do not apply to any of the following:

(1) Any person enumerated in subdivision (b) of Section 2 of Article I of the California Constitution or *Section 1070 of the Evidence Code*, or any person engaged in the dissemination of ideas or expression in any book or academic journal, while engaged in the gathering, receiving, or processing of information for communication to the public.

(2) Any action against any person or entity based upon the creation, dissemination, exhibition, advertisement, or other similar promotion of any dramatic, literary, musical, political, or artistic work, including, but not limited to, a motion picture or television program, or an article published in a newspaper or magazine of general circulation.

(3) Any nonprofit organization that receives more than 50 percent of its annual revenues from federal, state, or local government grants, awards, programs, or reimbursements for services rendered.

(e) If any trial court denies a special motion to strike on the grounds that the action or cause of action is exempt pursuant to this section, the appeal provisions in subdivision (j) of Section 425.16 and paragraph (13) of subdivision (a) of Section 904.1 do not apply to that action or cause of action.

**LEGISLATIVE HISTORY:** Added Stats 2003 ch 338 § 1 (SB 515).