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**IN THE
SUPREME COURT OF CALIFORNIA**

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SIMPSON STRONG-TIE COMPANY, INC.

Plaintiff, Appellant and Petitioner,

vs.

PIERCE GORE and THE GORE LAW FIRM,

Defendants and Respondents.

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AFTER A DECISION BY THE COURT OF APPEAL
SIXTH APPELLATE DISTRICT
CASE NO. H030444

SUPREME COURT
FILED

JUN 06 2008

Frederick K. Onton Clerk

Deputy

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PETITION FOR REVIEW

(Service on Attorney General and District Attorney required by
Bus. & Prof. Code, §§ 17209, 17536.5)

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
ISSUES PRESENTED	1
INTRODUCTION: WHY REVIEW SHOULD BE GRANTED	2
BACKGROUND	6
A. Simpson Strong-Tie Company	6
B. The corrosive effect of pressure-treated wood on metal fasteners	6
C. Simpson’s efforts to educate the public and ensure proper selection of metal fasteners for wood decks	7
D. Gore’s defamatory advertisement	9
E. Simpson’s confirmation of the advertisement’s defamatory nature	10
F. Simpson’s lawsuit and the anti-SLAPP dismissal	11
G. The Court of Appeal’s decision	13
LEGAL DISCUSSION	15
I. DEFENDANT SHOULD HAVE THE BURDEN OF SHOWING THAT ACTIVITY FALLS OUTSIDE THE NEW STATUTORY EXEMPTIONS FROM ANTI-SLAPP PROTECTION	15
A. As a matter of stare decisis, defendant has the burden of showing that a claim arises from protected activity under the anti-SLAPP statute	15

B.	Defendant’s burden on an anti-SLAPP motion necessarily encompasses the question whether activity is statutorily exempt from anti-SLAPP protection	18
II.	THE NEW STATUTORY EXEMPTION OF COMMERCIAL SPEECH FROM ANTI-SLAPP PROTECTION SHOULD BE CONSTRUED TO INCLUDE ADVERTISING BY A LAWYER SOLICITING CLIENTS FOR A CONTEMPLATED LAWSUIT.	19
A.	The exemption for statements made in the course of delivering services logically includes services incidental to the defendant’s typical business transactions.	19
B.	The exemption for statements about the speaker’s services can encompass factual representations about those services contained in a statement that includes actionable language.	22
III.	TECHNICAL FLAWS IN A PUBLIC OPINION SURVEY GO TO WEIGHT, NOT ADMISSIBILITY, AND THUS SHOULD NOT BE THE BASIS FOR AN ANTI-SLAPP DISMISSAL	24
IV.	A PREDICTION OF FUTURE EVENTS CAN BE DEFAMATORY IF IT IMPLIES KNOWLEDGE OF FACTS THAT MAKE THE PREDICTION PROBABLE	29
	CONCLUSION	30
	CERTIFICATE OF WORD COUNT	33

TABLE OF AUTHORITIES

Page

CASES

APH Subsidiary Holding Co. v. Stuart Hale Co. (7th Cir. 1993) 1 F.3d 611	27
American Foot Wear Corp. v. General Footwear Co. (2d Cir. 1980) 609 F.2d 655	27
Borba v. Thomas (1977) 70 Cal.App.3d 144	29
Brill Media Co., LLC v. TCW Group, Inc. (2005) 132 Cal.App.4th 324	4, 13, 15, 16, 19, 20
C.A. May Marine Supply Co. v. Brunswick Corp. (5th Cir. 1981) 649 F.2d 1049	27
California Assn. of Psychology Providers v. Rank (1990) 51 Cal.3d 1	20
Conagra, Inc. v. Geo. A. Hormel & Company (D. Neb. 1992) 784 F.Supp. 700	28
Equilon Enterprises v. Consumer Cause, Inc. (2002) 29 Cal.4th 53	12, 16, 17, 18
HMS Capital, Inc. v. Lawyers Title Co. (2004) 118 Cal.App.4th 202	13, 29
Halbert’s Lumber, Inc. v. Lucky Stores, Inc. (1992) 6 Cal.App.4th 1233	20
Harolds Stores, Inc. v. Dillard Dep’t Stores, Inc. (10th Cir. 1996) 82 F.3d 1533	27
Jackson v. County of Los Angeles (1997) 60 Cal.App.4th 171	21

Jellibeans, Inc. v. Skating Clubs of Georgia, Inc. (11th Cir. 1983) 716 F.2d 833	27
Keith v. Volpe (9th Cir. 1988) 858 F.2d 468	26
Kyle v. Carmon. ((1999) 71 Cal.App.4th 901	12
Leighton v. Old Heidelberg, Ltd. (1990) 219 Cal.App.3d 1062	28
MacLeod v. Tribune Publishing Co. (1959) 52 Cal.2d 536	23, 30
Navellier v. Sletten (2002) 29 Cal.4th 82	12, 17
Paley v. Superior Court (1955) 137 Cal.App.2d 450	17
People ex. rel. Lockyer v. R.J. Reynolds Tobacco Co. (2004) 116 Cal.App.4th 1253	24
Pittsburgh Press Club v. United States (7th Cir. 1978) 579 F.2d 751	24
Prudential Ins. Co. v. Gibraltar Financial Corp. (9th Cir. 1982) 694 F.2d 1150	26
Schering Corp. v. Pfizer, Inc. (2d Cir. 1999) 189 F.3d 218	27
Simon Property Group L.P. v. mySimon, Inc. (S.D. Ind. 2000) 104 F.Supp.2d 1033	27
Squirtco v. Seven-Up Company (8th Cir. 1980) 628 F.2d 1086	27, 28
Taheri Law Group v. Evans (2008) 160 Cal.App.4th 482	20, 21

Tip Top Foods, Inc. v. Lyng (1972) 28 Cal.App.3d 533	28
United States v. 88 Cases, More or Less, Etc. (3d Cir. 1951) 187 F.2d 967	27
United Steelworkers of America v. Board of Education (1984) 162 Cal.App.3d 832	17
Vogel v. Felice (2005) 127 Cal.App.4th 1006	12
Wendt v. Host, Int'l, Inc. (9th Cir. 1997) 125 F.3d 806	26, 27
Western Landscape Construction v. Bank of America (1997) 58 Cal.App.4th 57	17
Wilson v. Parker, Covert & Chidester (2002) 28 Cal.4th 811	13, 29

STATUTES AND COURT RULES

Business & Professional Code § 17200	12
Business & Professional Code § 17500	11, 12
Civil Code 47	21
Code of Civil Procedure § 425.16	<i>passim</i>
Code of Civil Procedure § 425.17	<i>passim</i>
California Rules of Court, rule 8.500(b)(1)	4
California Rules of Court, rule 8.504(d)(1)	33

MISCELLANEOUS

2 J. McCarthy, Trademarks and Unfair Competition (2d ed. 1984) § 32.50, p. 779	28
5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 776, p. 1126	29

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PETITION FOR REVIEW

ISSUES PRESENTED

1. Consistent with the rule that a defendant has the burden of showing that a claim arises from protected activity under the anti-SLAPP statute, does a defendant likewise have the burden of showing that activity is protected because it falls outside the new statutory exemptions from the anti-SLAPP statute?

2. Does the new statutory exemption of commercial speech from anti-SLAPP protection include advertising by a lawyer soliciting clients for a contemplated lawsuit?

3. Do purported technical flaws in a public opinion survey that proves a claim make the survey inadmissible, or do they merely go to the weight of the evidence?

4. Can a statement couched as a prediction of future events be defamatory?

INTRODUCTION: WHY REVIEW SHOULD BE GRANTED

This case probes two matters of statewide importance: the scope of new statutory restrictions that the Legislature has imposed on California's anti-SLAPP statute, and the appropriate limits on lawyers' mass advertising.

Defendant Pierce Gore is an attorney who specializes in plaintiffs' class action lawsuits. Plaintiff Simpson Strong-Tie Company, Inc., is a manufacturer of construction fasteners and connectors. Gore targeted Simpson and two other companies for a class action he hoped to file, for which he had no clients. He published an advertisement in a major daily newspaper saying that users of those companies' galvanized screws in wood deck construction "may have certain legal rights and be entitled to monetary compensation" and should contact him "if you would like an attorney to investigate whether you have a potential claim." (Appellant's Appendix 4 (AA).) The advertisement falsely implied that Simpson's galvanized screws are defective. It produced no clients for Gore.

Simpson sued Gore for damages and injunctive relief, alleging defamation and other causes of action. Gore filed an anti-SLAPP motion (Code Civ. Proc., § 425.16),^{1/} which the trial court granted. The Court of Appeal affirmed the anti-SLAPP dismissal.

California's anti-SLAPP statute has been a great success – indeed, too much of a success. The statute's 1992 enactment created something of a monster which clever lawyers increasingly exploited throughout the late 1990s so that, by the beginning of the new century, the California trial and appellate courts were dealing with an explosion of anti-SLAPP motions. That explosion has not yet abated, as this court well knows.

In 2003, the Legislature recognized this problem and sought to curb the proliferation of anti-SLAPP litigation by enacting Code of Civil Procedure section 425.17, which prescribes certain exemptions from the scope of the anti-SLAPP statute. The preamble to section 425.17 plainly states: “The Legislature finds and declares that there has been a disturbing abuse of Section 425.16, the California anti-SLAPP Law” (§ 425.17, subd. (a).) Section 425.17 reins in anti-SLAPP motions by creating two classes of exemptions from anti-SLAPP protection.

The first class of exemptions (§ 425.17, subd. (b)) – which does not apply to the present case – prohibits anti-SLAPP motions in certain public interest litigation. The second class of exemptions (§ 425.17, subd. (c)) is for two types of commercial speech by providers of goods and services – persons like Gore, who provides legal services. One of the commercial speech exemptions from anti-SLAPP protection is for a statement or conduct by a seller or lessor of goods or services if “the statement or conduct was made in the course of delivering that person's goods or services.” (§ 425.17, subd.

^{1/} All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

(c)(1).) The other commercial speech exemption is for a statement or conduct by a seller or lessor of 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.” (*Ibid.*)

Section 415.17 has yet to receive extensive appellate scrutiny, but there has been some. One of the most prominent cases addressing the new statute is *Brill Media Co., LLC v. TCW Group, Inc.* (2005) 132 Cal.App.4th 324 (*Brill*), where Division Five of the Second Appellate District grappled with the statute in several significant respects. Most significant for purposes of the present petition for review are two holdings: First, *Brill* held the *defendant* has the burden of showing that activity is *not* within the scope of the exemptions section 425.17 prescribes. (*Id.* at pp. 330-331.) Second, *Brill* held that the statutory exemption for statements made in the course of delivering services *includes* services incidental to defendant’s typical business transactions. (*Id.* at p. 341.)

In the present case, the Court of Appeal expressly disagreed with *Brill* on both of these points (see typed opn. pp. 7, 15) and held precisely the opposite – the *plaintiff* has the burden of showing that activity *is* within the scope of the statutory exemptions (see *id.* p. 8), and the exemption for statements made in the course of delivering services *does not include* services incidental to defendant’s typical business transactions (see *id.* p. 16). Thus, the Court of Appeal has created a twofold conflict with *Brill*, throwing the law regarding section 425.17 into disarray and calling for this court’s intervention “to secure uniformity of decision.” (Cal. Rules of Court, rule 8.500(b)(1).)

The Court of Appeal’s decision has also created a conflict with decisions in California and other jurisdictions regarding the law pertaining to evidence of public opinion surveys. Simpson sought to overcome Gore’s anti-SLAPP motion with evidence of a statistically-valid public opinion survey

which demonstrated the defamatory nature of Gore's advertisement. The Court of Appeal rejected the survey evidence in its entirety because of technical flaws the court perceived in one of six questions the survey posed. (See typed opn. pp. 29-31.) Case law in California and other jurisdictions, however, states a contrary approach that is the majority rule nationwide: Technical flaws in a public opinion survey go to its weight, not its admissibility. And if Simpson's survey is admissible, then Simpson has met its burden on Gore's anti-SLAPP motion to show a probability of prevailing on the claim. This court's intervention is needed to determine the propriety of the Court of Appeal's departure from the majority rule, by which the court violated yet another rule – that the weight of the evidence may not be considered in ruling on an anti-SLAPP motion.

Finally, in a holding that has significant implications for the law of defamation, the Court of Appeal said that, as a matter of law, Gore's advertisement was not defamatory because its assertion that readers "may have certain legal rights and be entitled to monetary compensation" and may have a "potential claim" was merely a prediction of future events. (See typed opn. p. 26.) This holding conflicts with analogous California decisional law on fraud, which states that a prediction of future events *can* be actionable if it implies knowledge of facts that make the prediction probable – as in the present case, where the clear implication is that Simpson's galvanized screws are defective. The consequence is yet another rent in the fabric of California law and an invitation for lawyers to use defamatory advertising to solicit clients with impunity under the guise of a so-called "prediction."

Supreme Court review is needed to resolve the multiple decisional conflicts that the Court of Appeal's decision creates, to help effectuate the Legislature's intent to curb overuse of anti-SLAPP motions, and to set limits on defamatory mass advertising by lawyers.

BACKGROUND

A. Simpson Strong-Tie Company.

Simpson Strong-Tie Company began in 1914 as a family-run window screen business based in Oakland, California. In 1956, the business expanded into construction fasteners and connectors – screws, nails, joist hangers and the like – after a neighbor asked the founder’s son, Barclay Simpson, for help in making metal connectors for a roofing project. The company has since grown to be the world’s largest manufacturer of construction fasteners and connectors used in wood-frame construction to make structures stronger and safer. (See AA 465.)

B. The corrosive effect of pressure-treated wood on metal fasteners.

Simpson sells two types of fasteners – that is, screws – for use with exterior wood decks: stainless steel and galvanized steel. (AA 467, 662-663.) Stainless steel is an alloy containing chromium, which makes the steel very resistant to corrosion. Galvanized steel, in contrast, does not contain chromium but is coated with a layer of zinc, which also resists corrosion. Stainless steel is more corrosion-resistant than galvanized steel, but is far more expensive. (AA 451, 661-662.) Simpson makes several types of galvanized screws as well as stainless steel screws, giving purchasers a range of economic choices depending on building materials and environmental conditions. (AA 467, 480.)

Wood used for exterior construction (which Simpson does not manufacture or sell) is commonly “pressure-treated,” a process which forces chemical preservatives into the wood, helping to protect it from insects and

fungal decay. (AA 658.) In the past, the chemical preservative of choice for wood was Chromated Copper Arsenate (CCA-C), an arsenic-based preservative that was compatible with existing types of galvanized screws. In recent years, however, arsenic became disfavored, and the wood products industry phased it out. By 2004, the lumber industry had fully switched to other chemicals believed to be more environmentally friendly. Some of these new chemicals – which vary among wood manufacturers in type and quantity used – are more corrosive to galvanized steel than arsenic. (AA 451, 462, 658, 660.)

In 2002, Simpson commenced an on-going program of evaluating the effects of the new wood chemicals on its metal products and found that, depending on environmental conditions, some of the new chemicals were more harmful to Simpson's galvanized screws than other new chemicals, and under many conditions only stainless steel screws should be used. Simpson also determined that different types of its galvanized screws could be used with some types of chemical treatments. (AA 452, 462, 467, 715, 854.) Ultimately, Simpson concluded, builders and consumers would have to make an informed choice of which products to use for each individual project, depending on whether the circumstances made it safe to use various types of galvanized screws. (AA 453.)

C. Simpson's efforts to educate the public and ensure proper selection of metal fasteners for wood decks.

Simpson undertook a comprehensive program to provide consumers, builders, architects and engineers with information necessary to choose safely between various types of galvanized and stainless steel screws. Simpson provided this information through six separate vehicles: (1) Simpson's

Internet website, (2) Simpson's annual catalog, (3) trade publications, (4) bulletins issued to the building industry, (5) point-of-sale display materials, and (6) Simpson's annual report. (AA 453-455.) No other metal products company has come close to doing the extensive research and public education that Simpson has done on the corrosion issue. (AA 453.)

For example, Simpson's website explains: "The pressure-treated wood industry has transitioned away from the use of Chromated Copper Aresenate (CCA-C) to alternative preservative systems for residential use, effective 12/31/03. Some of the replacement alternatives are generally more corrosive than CCA-C." This explanation is followed by a link to a "Pressure Treated Wood Technical Bulletin" for assistance in "select[ing] the appropriate connector for use with various pressure treated woods." There is also this "Warning," titled in bold-face: "While galvanized steel provides some protection, testing has shown that it is still likely to corrode if in contact with treated wood. The service life of galvanized parts depends on many variables including the location, installation, exposure, and the thickness of the galvanized coating." (AA 878.)

The "Pressure-Treated Wood Technical Bulletin" contains detailed guidelines for selecting the proper type of screw for use with various pressure-treated wood products. It includes a chart which enables the builder or consumer to determine the level of corrosion risk presented – low, medium or high – depending on environmental factors and the chemical content of the wood being used, and recommends specified types of galvanized screws for low and medium risk conditions and stainless steel screws for high risk conditions. (AA 730-733, 874-877.)

Point-of-sale consumer warnings and recommendations are also an essential element of Simpson's public education campaign. For example, at Home Depot, Simpson's product displays include copies of a two-page

handout, entitled “Critical Information[:] New Pressure-Treated Woods Require Additional Corrosive Resistance,” which contains Simpson’s guidelines and chart – the same as in the “Pressure Treated Wood Technical Bulletin” – to assist purchasers in selecting the proper type of screw. (AA 9, 820-821.) Other point-of-sale warnings include a notice entitled “Bulletin: Corrosion Risks, ” which states: “Metal connectors, anchors, and fasteners may corrode. Treated wood products may cause corrosion and recent changes in the chemical treatment of wood increases this risk. . . . Consult the Simpson Strong-Tie catalog or [Simpson’s website] for detailed information concerning use, conditions for applications and limitations of metal products in potentially corrosive conditions. . . .” (AA 819.)

D. Gore’s defamatory advertisement.

Given Simpson’s extensive and comprehensive efforts to warn of the risks the new pressure-treated wood products have created, as well as to provide information necessary to choose safely among galvanized and stainless steel screws, company officials were surprised and dismayed when, in early January of 2006, they saw the following advertisement in the *San Jose Mercury News*:

ATTENTION:

WOOD DECK OWNERS

If your deck was built after January 1, 2004 with galvanized screws manufactured by Phillips Fastener Products, Simpson Strong Tie or Grip-Rite, you may have certain legal rights and be entitled to monetary compensation, and repair or replacement of your deck.

Please call if you would like an attorney to investigate whether you have a potential claim:

Pierce Gore
GORE LAW FIRM
900 East Hamilton Ave.
Suite 100 Campbell, CA 95008
408-879-7444

(AA 4.) The advertisement ran five times in the *San Jose Mercury News* and once in the *Los Gatos Weekly Times*. (AA 124-125.)

Gore had no potential clients for a lawsuit against Simpson. He had not discovered a single incident of wood deck collapse caused by a Simpson product – and, indeed, Simpson is unaware of any failure of its screws due to corrosion caused by pressure-treated wood chemicals. (AA 451.) Gore had not located a single user of Simpson products. He had not so much as walked into a hardware store and looked at a Simpson product or point-of-sale consumer notice. His advertisement was nothing more than a fishing expedition for new business – an attempt to drum up litigants against Simpson. It produced no possible parties to litigation. Gore has never filed a lawsuit against Simpson. (AA 5, 125.)

E. Simpson’s confirmation of the advertisement’s defamatory nature.

It seemed plain that if people who saw Gore’s advertisement were given a choice between purchasing a Simpson product and another manufacturer’s product, they would not be inclined to buy the Simpson product. Nevertheless, before commencing this litigation, Simpson was careful to confirm independently whether the advertisement was defamatory and had caused Simpson harm. Simpson hired a qualified opinion survey firm to conduct a statistically-valid study of the advertisement’s effect on consumers’ opinions of Simpson and its products. (AA 373-376.)

Using generally accepted survey techniques (see AA 373-377), the survey firm’s interviewers showed the advertisement to 214 randomly-selected shoppers at nine randomly-selected home improvement stores (AA 376) and obtained two sets of responses to each of six questions asked before and after

the shoppers saw the advertisement (AA 424-429). The survey revealed the following:

- Before seeing Gore's advertisement, 6% thought it likely that Simpson's galvanized screws are defective; after seeing the advertisement, 46% thought it likely that Simpson's galvanized screws are defective. (AA 378.)
- Before seeing Gore's advertisement, less than 1% thought Simpson's galvanized screws are of low quality; after seeing the advertisement, 23% thought Simpson's galvanized screws are of low quality. (AA 377.)
- Before seeing Gore's advertisement, 10% said they were unlikely to buy galvanized screws made by Simpson; after seeing the advertisement, 37% said they were unlikely to buy galvanized screws made by Simpson. (AA 379.)

The survey firm concluded that Gore's advertisement "is capable of significantly damaging the reputation of Simpson Strong-Tie and that it results in a lower stated likelihood that customers would purchase products made by the company." (AA 379.)

F. Simpson's lawsuit and the anti-SLAPP dismissal.

After the survey confirmed the defamatory nature of Gore's advertisement, Simpson filed the present action against Gore and his law firm, asserting causes of action for defamation, trade libel, false advertising (Bus.

& Prof. Code, § 17500) and unfair competition (Bus. & Prof. Code, § 17200). (AA 10-12.) The complaint seeks damages and an injunction narrowly restricted to prohibiting Gore from including Simpson's name in his advertising seeking clients for a lawsuit related to corrosion resulting from wood construction (leaving Gore free to advertise for clients experiencing corrosion problems without the advertisement specifying manufacturers by name). (AA 13.) Gore filed a motion to strike the action as a SLAPP pursuant to section 425.16. (AA 50-52.)

Section 425.16 establishes "a two-step process" for ruling on an anti-SLAPP motion to strike. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 (*Equilon*); accord, *Navellier v. Sletten* (2002) 29 Cal.4th 82, 88 (*Navellier*).) "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity." (*Equillon, supra*, at p. 67; accord, *Navellier, supra*, at p. 88.) "A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause of action fits one of the categories spelled out in section 425.16, subdivision (e)' [citation]." (*Navellier, supra*, at p. 88.)

Second, "[i]f the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Equilon, supra*, 29 Cal.4th at p. 67; accord, *Navellier, supra*, 29 Cal.4th at p. 88.) To establish a probability of prevailing, the plaintiff need only demonstrate that the complaint is legally sufficient and is supported by a prima facie showing of facts sufficient to sustain a favorable judgment if the plaintiff's evidence is credited. (*Vogel v. Felice* (2005) 127 Cal.App.4th 1006, 1017.) "The burden on the plaintiff is similar to the standard used in determining motions for nonsuit, directed verdict, or summary judgment." (*Kyle v. Carmon* (1999) 71 Cal.App.4th 901, 907.) This means the court does not weigh the plaintiff's evidence but accepts it as true, drawing all reasonable

inferences in favor of the plaintiff. (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821; *HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 202, 212.)

Although section 425.16 generally casts a wide net, the Legislature has, through the recent enactment of section 425.17, expressly exempted certain specified types of actions from the scope of an anti-SLAPP motion, including actions involving commercial speech. Among the exemptions prescribed by section 425.17 are actions “against a person primarily engaged in the business of selling or leasing goods or services” (§ 425.17, subd. (c)) where the statement or conduct giving rise to the action “consists of representations about that person’s or a business competitor’s business operations, goods or services” or “was made in the course of delivering the person’s goods or services” (§ 425.17, subd. (c)(1)) and the “intended audience is an actual or potential buyer or customer” (§ 425.17, subd. (c)(2)).

In opposing Gore’s anti-SLAPP motion, Simpson contended that (1) the above-quoted provisions of section 425.17 exempt this action from the scope of section 425.16, and (2) even under section 425.16 the action is not a SLAPP because Simpson has established a probability of prevailing. (AA 325-335, 343-361.) The superior court granted the anti-SLAPP motion and entered a judgment of dismissal, finding that section 425.17 does not apply and that Simpson has not established a probability of prevailing. (AA 960, 974.)

G. The Court of Appeal’s decision.

On April 30, 2008, the Court of Appeal affirmed the superior court’s decision in a published opinion. The Court of Appeal expressly disagreed with *Brill, supra*, 132 Cal.App.4th 324, on two important questions pertaining to section 425.17’s exemptions from anti-SLAPP protection: first, whether the

defendant has the burden of showing that activity is *not* within the new statutory exemptions; and second, whether the new exemption for statements made in the course of delivering services *includes* services incidental to defendant's typical business transactions. As to both questions, *Brill* answered *yes* while the Court of Appeal here answered *no*, saying "[w]e respectfully decline to adhere to [*Brill's*] reasoning" on the first question (typed opn. p. 7) and "we must again respectfully decline to follow that case" on the second question (*id.* p. 15). Thus, four years into section 425.17's life, this decision by the Court of Appeal has created a twofold conflict in California law.

The Court of Appeal's opinion has also created a decisional conflict with respect to the broader issue of whether a plaintiff has demonstrated a probability of prevailing on its claim. The Court of Appeal held that purported methodological, grammatical and definitional flaws (none of which Gore has asserted) that the court perceived in one of the six questions asked in Simpson's public opinion survey rendered the entire survey "crippled as evidence of defamatory meaning." (Typed opn. p. 30.) This holding conflicts with authorities in California and other jurisdictions stating that any technical flaws in a public opinion survey go to the weight of the evidence, not its admissibility, and with settled California law stating that courts may not weigh the plaintiff's evidence on an anti-SLAPP motion.

Finally, the Court of Appeal held that, as a matter of law, Gore's advertisement was not defamatory because it was merely "a *prediction of future events*," and "a prediction of future events is intrinsically incapable of conveying a provable (or disprovable) assertion of fact." (Typed opn. p. 26, original italics.) Thus, the Court of Appeal has created a decisional conflict with the analogous California law of fraud stating that a prediction of future events can be actionable if it implies knowledge of facts that make the prediction probable.

Upon Simpson’s petition for rehearing, the court modified its opinion and denied rehearing.

LEGAL DISCUSSION

I.

DEFENDANT SHOULD HAVE THE BURDEN OF SHOWING THAT ACTIVITY FALLS OUTSIDE THE NEW STATUTORY EXEMPTIONS FROM ANTI-SLAPP PROTECTION.

A. As a matter of stare decisis, defendant has the burden of showing that a claim arises from protected activity under the anti-SLAPP statute.

We first demonstrate that, because defendant has the burden of showing that a claim has anti-SLAPP protection, defendant necessarily must show that activity is protected because it falls outside section 425.17’s exemptions.

In *Brill, supra*, 132 Cal.App.4th at page 330, Division Five of the Second Appellate District said it is “procedurally unclear” how a court determines the applicability of section 425.17’s new exemptions from anti-SLAPP protection. *Brill* asked: “Is this ruling made as part of the first prong” of anti-SLAPP analysis “where the defendant has the burden of proof?” (*Brill, supra*, at p. 330.) *Brill* concluded the answer is *yes*. According to *Brill*, “common sense tells us the better analysis is that” the matter “is a first prong determination” on which defendant has the burden (*ibid.*), for three reasons: (1) pertinent language in section 425.17 “closely parallel[s]” language used by the Courts of Appeal to describe the first prong of anti-SLAPP analysis, (2)

application of section 425.17 “is not a merits based or second prong issue,” and (3) no evidence or legislative history indicates that section 425.17 was intended “to alter the two-prong burden-shifting procedural requirements” for anti-SLAPP analysis “or to impose a separate procedural format for evaluating” section 425.17 exemption issues. (*Brill, supra*, at p. 331.)

In the present case, however, the Sixth Appellate District reached precisely the opposite conclusion, stating that “[w]e respectfully decline to adhere to this reasoning” in *Brill*. (Typed opn. p. 7.) Instead, the Court of Appeal held that “Simpson, as the party claiming such an exemption, has the burden of establishing its applicability.” (*Id.* p. 8). According to the Sixth Appellate District, the *Brill* court went wrong by relying on this court’s statement in *Equilon, supra*, 29 Cal.4th at page 67, that section 425.16 establishes “a two-step process” for ruling on an anti-SLAPP motion. The Sixth Appellate District rejected what it called “the supposition” that every anti-SLAPP motion invokes this two-step process, and observed that “[t]he court in *Equilon* said nothing about the treatment of a claim of exemption.” (Typed opn. p. 7.) The Court of Appeal concluded that *Equilon*’s pronouncement of the two-step process “was not even a *reason*” for *Equilon*’s holding and thus “furnishes no authority for imposing upon a moving defendant the burden of negating the possibility that the plaintiff’s cause of action falls within an exemption to the anti-SLAPP statute.” (*Id.* p. 8, original italics.)

In other words, in rejecting *Brill*, the Court of Appeal determined that this court’s enunciations of the two-step process in *Equilon* and *Navellier* are not stare decisis but merely dicta that the California courts are free to disregard outside the precise procedural postures of those cases.

The Court of Appeal wrongly disregarded *Equilon* and *Navellier*, for they indeed establish, as a rule of general application and as a matter of stare

decisis, the two-step anti-SLAPP analysis and its burden-shifting process. The test of stare decisis is not strictly, as the Court of Appeal asserted, whether a pronouncement was “a *reason* for the [court’s] holding” (typed opn. p. 8, original italics), but, more broadly, whether the pronouncement was “*necessary* to the decision.” (*Western Landscape Construction v. Bank of America* (1997) 58 Cal.App.4th 57, 61, italics added.) Plainly this court’s pronouncement of the two-step process in *Equilon* was necessary to the court’s decision in that case, for the court explained that “[w]hen *analyzed in this manner*, the Court of Appeal’s ruling is correct.” (*Equilon, supra*, 29 Cal.4th at p. 67, italics added.) In other words, for this court to have decided in *Equilon* that “the Court of Appeal’s ruling is correct” (*ibid.*), it was necessary for the court to analyze the Court of Appeal’s decision “in this manner” (*ibid.*) – that is, according to the two-step process that *Equilon* enunciated.

Equilon’s pronouncement of the two-step process also guided this court’s contemporaneous decision in *Navellier*: First the *Navellier* opinion summarized the two-step process, citing *Equilon* (see *Navellier, supra*, 29 Cal.4th at p. 88); then the opinion followed that process, ruling for the defendant on the first step (*id.* at pp. 89-95) and remanding for further litigation on the second step (*id.* at p. 95). Thus, *Navellier*’s threshold pronouncement of the two-step process was necessary to the court’s subsequent analysis, making the pronouncement stare decisis in *Navellier*, too. (*Western Landscape Construction v. Bank of America, supra*, 58 Cal.App.4th at p. 61.) Furthermore, an appellate pronouncement may be stare decisis if intended for guidance in further litigation on remand (see *United Steelworkers of America v. Board of Education* (1984) 162 Cal.App.3d 832, 834; *Paley v. Superior Court* (1955) 137 Cal.App.2d 450, 460), which was the situation in *Navellier*.

B. Defendant's burden on an anti-SLAPP motion necessarily encompasses the question whether activity is statutorily exempt from anti-SLAPP protection.

Once the two-step analysis with its shifting burdens is properly recognized as the rule of general application this court enunciated in *Equilon* and *Navellier*, it becomes apparent that the Court of Appeal's decision in the present case is wrong and *Brill* is right. The defendant's first-prong burden on an anti-SLAPP motion *necessarily* encompasses the question whether activity is statutorily exempt from anti-SLAPP protection. Defendant's first-prong burden is to show "that the challenged cause of action is one arising from *protected activity*." (*Equilon, supra*, 29 Cal.4th at p. 67, italics added.) In enacting subdivision (c) of section 425.17, the Legislature has determined that certain forms of commercial speech are not *protected activity*. Thus, where a plaintiff asserts a statutory exemption under section 425.17, the defendant, in order to show that a cause of action arises from protected activity, necessarily must show that the activity is not within a statutory exemption from such protection. For this reason, and for those stated in *Brill*, the *Brill* court's resolution of this issue is correct.

Brill correctly applied the two-step process and its shifting burdens to properly conclude that the defendant has the burden of showing that activity falls outside the new statutory exemptions from anti-SLAPP protection. The Court of Appeal's contrary conclusion in the present case throws the law into disarray, requiring this court's intervention to secure uniformity of decision on this important procedural aspect of section 425.17.

As we next demonstrate, with the burden properly on Gore, his anti-SLAPP motion must fail because he cannot sustain that burden.

II.

**THE NEW STATUTORY EXEMPTION OF
COMMERCIAL SPEECH FROM ANTI-SLAPP
PROTECTION SHOULD BE CONSTRUED TO INCLUDE
ADVERTISING BY A LAWYER SOLICITING CLIENTS
FOR A CONTEMPLATED LAWSUIT.**

- A. The exemption for statements made in the course of delivering services logically includes services incidental to the defendant’s typical business transactions.**

One of section 425.17’s commercial speech exemptions from anti-SLAPP protection is for a statement or conduct by a seller or lessor of goods or services if “the statement or conduct was made in the course of delivering that person’s goods or services.” (§ 425.17, subd. (c)(1).) *Brill* held that this exemption was triggered in that case by “statements . . . made and conduct engaged in as part of . . . the type of business transaction engaged in by defendants.” (*Brill, supra*, 132 Cal.App.4th at p. 341.) In the present case, Gore asserted in the Court of Appeal that he and other class-action plaintiffs’ attorneys “routinely” run advertisements like this one in pursuing class-action litigation. (Respondent’s Brief p. 53; see also AA 124.) Simpson replied: “The advertisement being typical of what Gore does as part of ‘the type of business transaction engaged in by’ him [citing *Brill*], it was published in the course of delivering his services [citation omitted].” (Appellant’s Reply Brief and Answer to Amicus Curiae Brief p. 8.)

In rejecting Simpson’s argument, the Sixth Appellate District expressly disagreed with *Brill*’s pronouncement on this point, saying “we must again

respectfully decline to follow that case.” (Typed opn. p. 15.) According to the Court of Appeal here, “[t]he Legislature has not chosen to exempt conduct *incidental* to ‘the type of business transaction engaged in by [the] defendant[.]’” (Typed opn. p. 16, italics added, quoting *Brill, supra*, 132 Cal.App.4th at p. 341.)

Again, the Court of Appeal in this case has created a conflict in the law regarding the new statutory exemptions from anti-SLAPP protection. And, again, *Brill* got it right and the Court of Appeal here is wrong. The Court of Appeal here relied on legislative history – specifically, a Senate committee analysis – to justify a “much narrower” construction of section 425.17 than in *Brill*. (Typed opn. pp. 16, 19-20.) But the Legislature has declared in the preamble to section 425.17 that the exemption statute is intended to curb “a disturbing abuse of Section 425.17, the California Anti-SLAPP Law.” (§ 425.17, subd. (a).) This legislative purpose of reining in overuse of anti-SLAPP motions requires *Brill*’s more expansive construction of the newly-prescribed exemptions from anti-SLAPP protection, not the crabbed construction the Court of Appeal applied here. A declaration of findings and purpose in a statute’s preamble is “the most significant source” for ascertaining legislative intent. (*California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 15.) As such, it should trump any contrary indications in a legislative committee analysis, for “it is the language of the statute itself that has successfully braved the legislative gauntlet.” (*Halbert’s Lumber, Inc. v. Lucky Stores, Inc.* (1992) 6 Cal.App.4th 1233, 1238.)

The Court of Appeal’s narrow reading of section 425.17 puts all lawyer advertising like Gore’s outside the scope of the commercial speech exemptions from the anti-SLAPP statute. This has created yet another conflict with existing decisional authority – *Taheri Law Group v. Evans* (2008) 160 Cal.App.4th 482 – where the court said in a dictum that “we can envision

circumstances – such as a ‘massive advertising campaign’ divorced from individualized legal advice – under which the commercial speech exemption to the anti-SLAPP statute conceivably might apply to a lawyer’s conduct.” (*Id.* at p. 492.)

Here again, this court’s intervention is needed to secure uniformity of decision – both as to the specific point of decisional conflict (whether this statutory exemption includes services incidental to defendant’s typical business transactions) and as to the larger question of whether the new statutory exemptions from anti-SLAPP protection are to be so narrowly construed.

This point is pivotal to the outcome of this litigation because Gore asserted below that his advertisement *was* incidental to his typical business transactions. (See RB p. 53; AA 124.) Indeed, by invoking the Civil Code section 47 litigation privilege as purportedly protecting his defamation (see RB pp. 46-54) – an issue the Court of Appeal did not reach – Gore has necessarily conceded that the advertisement was an element of the litigation services he delivers, as something he does “routinely” in pursuing class-action litigation. (RB p. 53.) Gore is now judicially estopped to claim otherwise in an effort to evade application of the commercial speech exemptions section 425.17 prescribes. (See *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181.) Thus, if the burden is on him to show that his advertisement falls outside those statutory exemptions, his anti-SLAPP motion necessary fails because judicial estoppel prevents him from sustaining that burden.

B. The exemption for statements about the speaker's services can encompass factual representations about those services contained in a statement that includes actionable language.

The other commercial speech exemption from anti-SLAPP protection is for a cause of action “arising from any statement or conduct” by a seller or lessor of goods or services if “[t]he statement or conduct consists of representations of fact about that persons’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.” (Code Civ. Proc., § 425.17, subd (c) & (c)(1).)

Simpson argued in the Court of Appeal that this exemption applies here because Gore’s advertisement implied factual representations about his business operations and services – specifically, that he had investigated the named companies and had discovered that they are selling defective screws, and that he would provide the service of investigating to determine whether a reader has a potential claim. (See RB 25.) The Court of Appeal rejected this argument because “Simpson’s claims do not ‘arise from’ Gore’s offer to investigate.” (Typed opn. p. 12, quoting §425.17(c).) According to the Court of Appeal, all three statutory elements – (1) a representation of fact, (2) a representation about the person’s or a business competitor’s business operations or services, and (3) a statement giving rise to a cause of action – “must coincide in a single ‘representation[],’ or the exemption is inapplicable by its terms.” (*Id.* p. 13, quoting § 425.17(c)(1).)

Once again, the Court of Appeal has construed section 425.17 narrowly, even though the statute’s preamble counsels otherwise. Nowhere does section

425.17 say that all three elements of this exemption “must coincide in a single representation.” Nowhere does section 425.17 suggest that the exemption can be evaded by parsing a statement into its elemental components, as the Court of Appeal has done here.

The Court of Appeal’s narrow construction depends on a restrictive reading of the words “statement or conduct” and “consists of” in subdivision (c)(1). To be sure, the confluence of these words in section 425.17 means that the “statement or conduct” giving rise to Simpson’s causes of action must “consist of” factual representations about Gore’s business operations or services. But if “statement or conduct” is construed to include Gore’s entire advertisement, then the statement giving rise to Simpson’s causes of action – the whole advertisement – *does* consist of factual representations about Gore’s business operations or services.

As Justice Traynor observed in *MacLeod v. Tribune Publishing Co.* (1959) 52 Cal.2d 536 (*MacLeod*), in determining whether a publication is defamatory the law of defamation looks to “the sense and meaning *under all the circumstances attending the publication* which such language may fairly be presumed to have conveyed to those to whom it was published.” (*Id.* at pp. 546-547, italics added, internal quotation marks omitted.) The Court of Appeal’s parsing of Gore’s advertisement to find that no single part of it contains all three statutory elements – even though the advertisement as a whole *does* contain all three elements – violates the *MacLeod* rule that *all the circumstances* of the publication are to be considered.

Moreover, even if the Court of Appeal is right in holding that the specific part of the statement giving rise to this lawsuit must consist of factual representations about Gore’s business operations or services, that is precisely the situation here. Gore’s factual representations about his business operations and services – that users of Simpson’s galvanized screws “may have certain

legal rights and be entitled to monetary compensation” and should contact him “if you would like an attorney to investigate whether you have a potential claim” (AA 4) – contain the defamatory implication that Simpson’s screws are defective, which gives rise to this lawsuit.

No other court has yet probed the meaning of this language in section 425.17. Again, this court’s guidance is needed.

III.

TECHNICAL FLAWS IN A PUBLIC OPINION SURVEY GO TO WEIGHT, NOT ADMISSIBILITY, AND THUS SHOULD NOT BE THE BASIS FOR AN ANTI-SLAPP DISMISSAL.

A central focus of the Court of Appeal’s second-prong anti-SLAPP analysis – to determine whether Simpson has demonstrated a probability of prevailing – is the public opinion survey that Simpson submitted as evidence of the advertisement’s defamatory nature. Simpson presented undisputed evidence that the survey was conducted in accordance with generally accepted survey principles and that the results were used in a statistically correct way – which makes such evidence admissible. (See *People ex. rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2004) 116 Cal.App.4th 1253, 1275-1279; *Pittsburgh Press Club v. United States* (7th Cir. 1978) 579 F.2d 751, 758.) Gore has never claimed otherwise.

Michael Sullivan, Ph.D., whose firm crafted and conducted the survey, is a highly-trained and oft-published professional with 25 years of experience as a population surveyor. (AA 373-374.) The survey’s questions were designed to ensure that the respondents were part of the relevant market and that the survey measured their familiarity with various brands of construction

materials. (AA 375.) Random assignment of the respondents ensured that the observed differences in their before-and-after answers resulted from exposure to Gore’s advertising; the survey was conducted by experienced interviewers in home improvement store parking lots; neither the interviewers nor the respondents were aware of the survey’s purpose or sponsors; and a formal protocol for selecting respondents was followed. (AA 376.)

Yet the Court of Appeal concluded that the entire survey is “crippled as evidence of defamatory meaning” – and thus the court ignored the survey’s statistical data which showed a drastic negative shift in opinions about Simpson’s products after the respondents saw Gore’s advertisement – because, in the court’s view, one of the six questions asked in the survey was methodologically, grammatically and definitionally flawed. (Typed opn. pp. 29-30.) That question, which the court called “nebulous” (*id.* p. 29), was: “How likely would it be that galvanized screws manufactured by Simpson Strong-Tie would be defective?” (AA 426.)

The court found the survey’s methodology to be flawed with regard to the inquiry whether persons thought it “likely” upon seeing Gore’s advertisement that Simpson’s galvanized screws are defective. According to the Court of Appeal, the survey improperly combined the respondents’ actual responses of *very likely* and *somewhat likely* into a single category of *likely*, and “failed to provide a complete breakdown of [those] responses.” (Typed opn. pp. 29-30.) The court found fault with the survey’s positing of the possible responses *somewhat likely* and *somewhat unlikely* because “logically those terms mean exactly the same thing.” (*Id.* p. 30.) The court faulted the survey for listing last the possible responses *not sure* and *don’t know*, because this “arguably relegat[ed] those responses to a disfavored position.” (*Id.* p. 30, fn. 15.) And the court criticized the survey’s methodology on the ground it was done by “anonymous interrogators in public parking lots.” (*Id.* p. 29)

The court found the survey to be grammatically flawed with regard to its use of the common phrase “would be” in the portion of the question asking whether the respondents thought Simpson’s galvanized screws “would be defective.” (AA 426.) According to the Court of Appeal, the “would be” language “was not only illogically incoherent in its allusion to an unspecified condition; it also connoted a pervasive uncertainty that made respondents’ estimates of ‘likel[ihood],’ already couched in highly ambiguous terms, all but meaningless.” (Typed opn. p. 31, original brackets.)

Finally, the Court of Appeal found the survey to be definitionally flawed because it “failed to inform respondents what it meant by the characterization ‘defective’”(typed opn. p. 31) – as if “defective” were an obscure word with no commonly-understood meaning.

Thus, the Court of Appeal rejected the survey in its entirety because the court perceived *technical flaws* in the survey – even though there was no evidence that the survey deviated from generally accepted survey principles. This approach is in conflict with the majority view – well established nationwide and appearing in at least two California cases – that technical flaws in a public opinion survey go to the weight of the evidence, not its admissibility.

The Ninth Circuit has described the rule as follows: “Technical unreliability goes to the weight accorded a survey, not its admissibility.” (*Prudential Ins. Co. v. Gibraltar Financial Corp.* (9th Cir. 1982) 694 F.2d 1150, 1156.) Although “[a] few cases” support a contrary position, “[t]he majority view, however, to admit the survey and discount its probative value, seems the better course.” (*Ibid.*) More specifically: “Technical inadequacies in the survey, *including the format of the questions or the manner in which it was taken*, bear on the weight of the evidence, not its admissibility.” (*Keith v. Volpe* (9th Cir. 1988) 858 F.2d 468, 480, italics added; accord, *Wendt v. Host*

Int'l, Inc. (9th Cir. 1997) 125 F.3d 806, 814 [“Challenges to a survey methodology go to the weight given the survey, not its admissibility.”].) The Eighth Circuit says likewise: “In evaluating survey evidence, technical deficiencies go to the weight to be accorded them rather than to their admissibility.” (*Squirtco v. Seven-Up Company* (8th Cir. 1980) 628 F.2d 1086, 1091.)

This is just a sampling of the cases. Courts in the Second, Third, Fifth, Seventh, Tenth and Eleventh Circuits have similarly embraced the majority view. (See, e.g., *Schering Corp. v. Pfizer, Inc.* (2d Cir. 1999) 189 F.3d 218, 228; *United States v. 88 Cases, More Or Less, Etc.* (3d Cir. 1951) 187 F.2d 967, 974; *C.A. May Marine Supply Co. v. Brunswick Corp.* (5th Cir. 1981) 649 F.2d 1049, 1055, fn. 10; *AHP Subsidiary Holding Co. v. Stuart Hale Co.* (7th Cir. 1993) 1 F.3d 611, 618; *Harolds Stores, Inc. v. Dillard Dep’t Stores, Inc.* (10th Cir. 1996) 82 F.3d 1533, 1546, fn. 9; *Jellibeans, Inc. v. Skating Clubs of Georgia, Inc.* (11th Cir. 1983) 716 F.2d 833, 845; but see *American Foot Wear Corp. v. General Footwear Co.* (2d Cir. 1980) 609 F.2d 655, 660, fn. 4 [upholding exclusion of survey evidence]; *Simon Property Group L.P. v. mySimon, Inc.* (S.D. Ind. 2000) 104 F.Supp.2d 1033, 1039 [“If the flaws in the proposed survey are too great, the court may find that the probative value of the survey is substantially outweighed by the prejudice, waste of time, and confusion it will cause at trial.”].)

As one federal district judge court observed, quoting a leading treatise that addresses the point:

“[O]ne must keep in mind that there is no such thing as a ‘perfect’ survey. . . . Like any scientific method related to statistics in the social sciences, every survey, no matter how carefully constructed and conducted, has some potential flaws somewhere. The proper approach is to view such evidence with some understanding of the difficulty of devising and running a survey and to use any technical defects only to lessen evidentiary weight, not to reject the result out-of-hand.”

(*Conagra, Inc. v. Geo. A. Hormel & Company* (D. Neb. 1992) 784 F.Supp. 700, 722, quoting 2 J. McCarthy, *Trademarks and Unfair Competition* (2d ed. 1984) § 32.50, p. 779.)

This majority approach appears in at least two California cases. In *Tip Top Foods, Inc. v. Lyng* (1972) 28 Cal.App.3d 533, the court upheld the admission of survey evidence, saying “the trial judge realized the defects in the survey and we must assume that he gave proper weight to the evidence.” (*Id.* at p. 553.) And in a dictum in a dissenting opinion in *Leighton v. Old Heidelberg, Ltd.* (1990) 219 Cal.App.3d 1062, where the majority had not addressed the point, the dissenter commented: “Once a survey has been shown to conform to ‘conventional methodology,’ its arguable deficiencies usually are said to affect its weight rather than its admissibility.” (*Id.* at p. 1083, (dis. opn. of Johnson, J.), citing *Squirtco v. Seven-Up Co.*, *supra*, 628 F.2d 1086.)

In the present case, however, the Court of Appeal treated the technical flaws it perceived in one of six questions as a basis for rejecting the entire survey out-of-hand, thus putting the court’s opinion in conflict with the majority approach – followed nationwide and appearing in California law – which treats such technical flaws as going to admissibility rather than weight. Indeed, the Court of Appeal’s opinion even goes so far as to suggest that survey evidence is *never* admissible to prove defamation, because “the constitutional entitlement to speak truthfully . . . is not subject to defeasance by plebiscite, let alone by private opinion survey.” (Typed opn. p. 29.) This court’s intervention is needed to determine the propriety of the Court of Appeal’s departure from the majority rule of admissibility and resolve the decisional conflicts it creates.

If indeed the Court of Appeal erred in rejecting the survey out-of-hand, then the court necessarily erred in ruling against Simpson on the second prong of anti-SLAPP analysis, because in conducting that analysis the court “does

not weigh credibility *or compare the weight of the evidence*. Rather, the court’s responsibility is to accept as true the evidence favorable to the plaintiff” (*HMS Capital, Inc. v. Lawyers Title, Co.*, *supra*, 118 Cal.App.4th at p. 212, italics added; see also *Wilson v. Parker, Covert & Chidester*, *supra*, 28 Cal.4th at p. 821.) The technical flaws the Court of Appeal perceived go only to the weight of the evidence, which may not be considered in ruling on an anti-SLAPP motion.

IV.

A PREDICTION OF FUTURE EVENTS CAN BE DEFAMATORY IF IT IMPLIES KNOWLEDGE OF FACTS THAT MAKE THE PREDICTION PROBABLE.

The Court of Appeal held that, as a matter of law, Gore’s advertisement cannot have been defamatory because, in stating that readers “may have certain legal rights and be entitled to monetary compensation” and may “have a potential claim” (AA 4), the advertisement conveyed not an assertion of existing fact but merely “a *prediction of future events*.” (Typed opn. p. 26, original italics.) According to the Court of Appeal, “a prediction of future events is intrinsically incapable of conveying a provable (or disprovable) assertion of fact.” (*Ibid.*)

This reasoning is at variance with analogous California decisional law on fraud, which states that a prediction of future events *can* be actionable if it implies knowledge of facts that make the prediction probable. (See *Borba v. Thomas* (1977) 70 Cal.App.3d 144, 152; 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 776, p. 1126.) Thus, for example, the obviously damaging statement that “Mr. Jones may molest your little girl if given the chance” is a prediction of future events, but it implies knowledge of facts indicating that

Mr. Jones has previously molested children – and thus it is defamatory if in fact Mr. Jones has *not* molested children. Similarly, Gore’s advertisement implies knowledge of facts indicating that Simpson’s galvanized screws are defective – which is defamatory because Gore knows no such facts. The defamation is only insinuated, but “[a] defendant is liable for what is insinuated, as well as for what is stated explicitly.” (*MacLeod, supra*, 52 Cal.2d at p. 547, internal quotation marks omitted.)

As Justice Traynor observed in *MacLeod*, whether a publication is defamatory “is to be measured not so much by its effect when subjected to the critical analysis of a mind trained in the law, but by the natural and probable effect upon the mind of the average reader.” (52 Cal.2d at p. 547, internal quotation marks omitted.) The average reader of Gore’s advertisement would think that Simpson’s galvanized screws must be defective – regardless of whether “the critical analysis of a mind trained in the law” (*ibid.*) might call the advertisement technically “predictive” (a notion that is itself disputable in this case).

Here, yet again, is a decisional conflict – this one by analogy to the law of fraud – which merits this court’s review.

CONCLUSION

In addition to creating multiple decisional conflicts within and outside California, the Court of Appeal’s opinion has far-reaching consequences to the extent it sends the wrong message to attorneys – that they can publish defamatory mass advertising with impunity under the protective cloak of California’s anti-SLAPP statute.

Imagine a lawyer’s advertisement that states: “If you are a patient of Dr. John Jones, you may have certain legal rights and be entitled to monetary

compensation. Please call if you would like an attorney to investigate whether you have a potential claim.” Assume the lawyer knows of no patient who has ever been harmed by Dr. Jones. Can there be any doubt that the advertisement is defamatory in that it wrongly implies that Dr. Jones has committed malpractice? Yet the Court of Appeal’s opinion would give the advertisement carte blanche anti-SLAPP protection. The lawyer could publish the advertisement in newspapers, on the radio, on television, and over the Internet, and Dr. Jones would be powerless to stop the damage, other than by paying the lawyer to stop. The potential for abuse is palpable.

It is not too much to require that attorneys carefully adhere to the truth when using mass advertising to solicit clients for an as-yet-nonexistent lawsuit contemplated against a targeted and specified individual or business entity. The Court of Appeal’s opinion weakens that requirement and exposes businesses and individuals to shakedown scenarios where, because of the cloak of anti-SLAPP protection, the only practical approach for dealing with harmful defamatory advertising may be to buy off the offending lawyer in order to put a quick end to the harm.

This court should grant review to resolve the decisional conflicts the Court of Appeal’s decision creates and to send a cautionary message to lawyers who advertise their services without scrupulously adhering to the truth.

Dated: June 6, 2008

Respectfully submitted,

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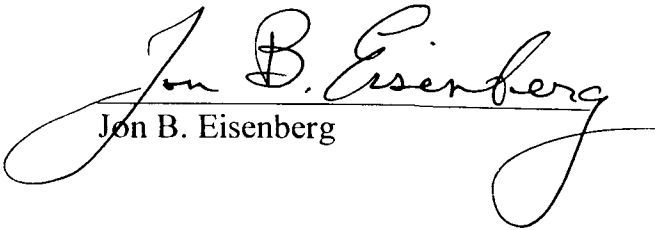
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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.504(d)(1))

The text of this brief consists of 8,397 words as counted by the Corel WordPerfect version 10 word-processing program used to generate the brief.

Dated: June 6, 2008


Jon B. Eisenberg

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

SIMPSON STRONG-TIE COMPANY,
INC.,

Plaintiff and Appellant,

v.

PIERCE GORE et al.,

Defendants and Respondents.

H030444
(Santa Clara County
Super. Ct. No. CV057666)

An attorney published a newspaper advertisement stating that users of certain brand name galvanized screws under specified circumstances “may” have legal rights to compensation or other relief. The manufacturer of one of the named brands brought this action for defamation, trade libel, false advertising, and unfair business practices. We are called upon to decide: (1) Is this a strategic lawsuit against public participation (SLAPP) so as to be subject to summary disposition under the anti-SLAPP law? (2) Is it exempt from that law as a statement “about” the attorney’s services, or one made in the course of delivering those services? (3) If it is not exempt, has the manufacturer established that it is likely to prevail on the merits, so as to avoid dismissal?

The trial court answered these questions yes, no, and no, respectively. We find no error in these rulings, and will therefore affirm. In a companion appeal, we affirm the associated award of attorney fees to the defendant attorney.

BACKGROUND

In January 2006, defendant Pierce Gore caused an advertisement to appear in the San Jose Mercury News and Los Gatos Weekly Times in substantially the following form:¹

ATTENTION:

WOOD DECK OWNERS

If your deck was built after January 1, 2004 with galvanized screws manufactured by Phillips Fastener Products, Simpson Strong Tie or Grip Rite, you may have certain legal rights and be entitled to monetary compensation, and repair or replacement of your deck.

Please call if you would like an attorney to investigate whether you have a potential claim:

Pierce Gore
GORE LAW FIRM
900 East Hamilton Ave.
Suite 100 Campbell, CA 95008
408-879-7444

On February 7, 2006, plaintiff Simpson Strong-Tie Co., Inc. (Simpson), filed this action, asserting causes of action against Gore and his firm for defamation, trade libel, false advertising, and unfair business practices. Simpson alleged that Gore's advertisement was false "in that it communicates that Simpson's galvanized screws are defective."² Simpson admitted, however, that there were risks in using some of its products with the "pressure-treated wood" that "is commonly used in outdoor

¹ We see no clear statement in the record of the size of the ad. Assuming the copy in the body of the complaint has not been enlarged or reduced, the ad was about 4 inches in width and 2-3/4 inches in height.

² Simpson also alleged that the advertisement is false in that it "communicates that the alleged problem is not widespread in the screw manufacturing industry, but is limited only to the three particular manufacturers identified." Simpson places no reliance on this allegation on appeal.

decks” According to a Simpson web page included in the record, “Pressure treatment is a process that forces chemical preservatives into the wood.”³ Simpson alleged in its complaint that wood so treated “can have a corrosive effect on steel products, including galvanized screws, that potentially shortens their service life and compromises their ability to support their recommended loads or endure seismic and environmental stresses.” These risks had been magnified by the treated wood industry’s abandonment, effective December 31, 2003, of the preservatives formerly used in favor of “chemicals that are considered safer for human contact, but more corrosive to galvanized steel products.” Simpson alleged, “The amount of corrosion that can occur when Simpson’s screws are used in combination with pressure-treated wood varies depending on the type of metal screw and coating used, the type and amount of chemicals used in pressure treatment, the design and location of the deck, and numerous environmental conditions. Because different metals and different coatings resist corrosion at different rates, the selection of metal type or coating should vary depending on the conditions and circumstances in which the products will be used. All of these factors are beyond Simpson’s control. Simpson has no way of knowing which of these many variables will be present when its parts are used.”

Gore moved to strike the complaint under Code of Civil Procedure section 425.16 (§ 425.16). He argued that Simpson’s causes of action arose from his exercise of speech rights and were thus subject to summary disposition under the statute. He contended that Simpson could not establish the probability of success necessary to survive such a motion (see § 425.16, subd. (b)(1)), because (1) all of its claims were barred by the privilege for

³ The page continues, “Wood is placed inside a closed cylinder, then vacuum and pressure are applied to force the preservatives into the wood. The preservatives help protect the wood from attack by termites, other insects, and fungal decay.” (See Pressure Treated Wood FAQs <<http://www.strongtie.com/productuse/PTWoodFAQs.html>> (as of Feb. 13, 2008).)

communications in a judicial proceeding (Code Civ. Proc., § 47, subd. (b)); (2) Simpson could not show that the advertisement contained a false statement; and (3) Simpson could not show that Gore published the advertisement with knowledge of falsity or reckless disregard for the truth.

Gore supported his motion with a declaration asserting in essence that the germ of the advertisement was his viewing of three local television news reports suggesting that users of galvanized hardware on recently constructed outdoor decks might be unwittingly exposing themselves to the risk of premature failure and collapse due to the heightened corrosiveness of the new pressure treatments. Gore then made various inquiries, including conversations with a Contra Costa County District Attorney's inspector whose views on the hazards of galvanized hardware had been a subject of the television reports. After learning of a Massachusetts suit against another manufacturer of galvanized fasteners and connectors, he ran the advertisement expecting to find persons who had actually used the described products and who "might be interested in filing a lawsuit as a plaintiff." At the time of drafting his declaration, he averred, he was in the process of preparing class action complaints against Simpson and the other manufacturers named in the ad.⁴

In opposition to the motion, Simpson argued that its causes of action were exempt from the anti-SLAPP statute by virtue of Code of Civil Procedure section 425.17, subdivision (c) (§ 425.17(c)), which excludes claims arising from representations of fact about the speaker's or a competitor's products or services, or statements made in the course of delivering the speaker's products or services. Simpson contended, in the alternative, that it had demonstrated a probability of prevailing on its claims under section 425.16, subdivision (b)(1). It submitted several declarations including that of its

⁴ It appears that no such lawsuit has ever been filed, at least by Gore.

engineering vice president, who declared that Simpson “manufactures its screws to industry standards” and that “[t]here is nothing defective about our screws and coatings. Our fastener products provide long and useful life when properly selected, installed, inspected and maintained.”

Simpson also offered the declaration of statistician Michael Sullivan, who declared that he was hired by Simpson to “determine whether and to what extent” Gore’s advertisement “injures [Simpson’s] reputation and/or causes consumers to be less inclined to purchase its products.” He caused a survey to be conducted by “intercept[ing] 214 shoppers in the parking lots of nine randomly selected Lowe’s Home Improvement stores located in Northern and Southern California between January 28th and February 5th of 2006.” Insofar as the results were disclosed by Simpson, they indicated that the advertisement reduced subjects’ ratings of the quality of galvanized screws manufactured by Simpson, increased their estimate of the likelihood that the screws “would be defective,” and reduced the reported likelihood that subjects would purchase galvanized screws manufactured by Simpson. No definition of “defective” was given to the subjects.

The trial court granted the special motion, stating in part, “The court finds that CCP §425.17(c) does not apply because the statement was not made about a business competitor’s products or services. Defendants have made a threshold showing that the statement was made in furtherance of their right of petition or free speech regarding an issue of public interest. (CCP §425.16(e)(4).) The burden shifts to Plaintiff to demonstrate a probability of prevailing on the merits. Plaintiff’s evidence is insufficient to establish that Defendants’ advertisement is false.” The court implicitly denied a motion by Simpson for relief from the statutory stay on discovery (§ 425.16, subd. (g)) in order to “conduct limited discovery of Pierce Gore and Gore Law Firm on the subject of actual malice”

The court thereafter entered judgment. Simpson filed this timely appeal from both the judgment and the order granting the special motion to strike.

DISCUSSION

I. *General Principles; Standard of Review*

A. *Mode of Proceeding; Burden of Persuasion*

The anti-SLAPP statute provides for a special motion to strike—in effect, to summarily dismiss—a cause of action that (1) tends to chill the defendant’s rights of speech and petition, and (2) lacks demonstrable merit.⁵ It is said that ruling on such a motion involves “a two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant’s burden is to demonstrate that the act or acts of which the plaintiff complains were taken ‘in furtherance of the [defendant]’s right of petition or free speech under the United States or California Constitution in connection with a public issue,’ as defined in the statute. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. Under section 425.16, subdivision (b)(2), the trial court in making these determinations considers ‘the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.’ ” (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 (*Equilon*)).

This approach is perfectly sound as far as it goes, but it fails to account for a third issue that may arise in this context, and which is central to this appeal: whether the plaintiff’s cause of action, though arising from protected activity as described in section 425.16, is *exempted* from the operation of that statute because it falls within a statutory exclusion. Here, for instance, Simpson does not contest the premise that its complaint

⁵ “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.” (§ 425.16, subd. (b)(1).)

arises from conduct described in, and protected by, section 425.16. It contends, however, that its claims are excluded from the operation of that statute by section 425.17(c), which states that section 425.16 “does not apply” to certain causes of action. Such a contention requires that we consider who bears the burden of persuasion with respect to the applicability of such an exemption—the party invoking the anti-SLAPP law (i.e., the defendant), or the party invoking the exemption (the plaintiff)?

One court has imposed this burden on the moving defendant. (*Brill Media Co., LLC v. TCW Group, Inc.* (2005) 132 Cal.App.4th 324 (*Brill*.) Its analysis seems to rest on the supposition, which it attributes to *Equilon*, that every anti-SLAPP motion entails a “two-prong burden-shifting procedur[e].” (*Id.* at p. 331.) From this it reasons, essentially by process of elimination, that the applicability of an exemption must be a “first prong determination,” such that the defendant bears the burden of establishing that the cause of action is *not* exempt. (*Id.* at p. 330.)

We respectfully decline to adhere to this reasoning. The court in *Equilon* said nothing about the treatment of a claim of exemption. There was no such claim in that case. The court was concerned only with the two “prongs” first noted above, i.e., whether the cause of action arises from protected conduct, and whether the plaintiff has shown a likelihood of prevailing. We will not lightly cast aside the fundamental principle of stare decisis that decisions are authority only for matters actually decided in them. The reasons for that rule were summarized thus in *Hart v. Burnett* (1860) 15 Cal. 530, 598-599: “Chief Justice Marshall, in the case of *Cohens v. The State of Virginia*, (6 Wheat. 399) thus defines the rule: ‘It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which these expressions are used; if they go beyond the case, they may be respected, but they ought not to control the judgment in a subsequent suit where the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate

it. are considered in their relation to the case decided, but their possible bearing on all other cases is seldom investigated.’ Chief Justice Best, in *Richardson v. Mellish*, (2 Bingham, 248) says: ‘The expressions of every Judge must be taken with reference to the case on which he decides, otherwise the law will get into extreme confusion. That is what we are to look to in all cases. The manner in which he is arguing is not the thing ---- it is the principle he is deciding.’ ”

The “two-pronged analysis” attributed to *Equilon* in *Brill* was not even a *reason* for the former decision’s holding but rather a description or model of the approach to be taken where, as there, the only issues are whether the cause of action arises from protected activity and whether the plaintiff is likely to prevail. The court clearly gave no thought to, let alone “investigated with care, [or] considered in its full extent,” the possible application of its analysis to a claim of exemption from the anti-SLAPP law. Its reasoning has no bearing on that issue, and furnishes no authority for imposing upon a moving defendant the burden of negating the possibility that the plaintiff’s cause of action falls within an exemption to the anti-SLAPP statute.

There is, however, a well recognized general principle that directly governs this issue: “One claiming an exemption from a general statute has the burden of proving that he comes within the exemption.” (*Norwood v. Judd* (1949) 93 Cal.App.2d 276, 282; see *In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1345; *Irwin v. Mascott* (N.D.Cal. 1999) 96 F.Supp.2d 968, 980; *Goodrow v. Lane Bryant, Inc.* (2000) 732 N.E.2d 289, 294 [432 Mass. 165].) For purposes of this rule, section 425.16(c)(1) is a “general statute.” It prescribes a procedure applicable to a described class of claims. The statutory exclusions, including the one invoked by Simpson, exempt certain claims from the prescribed procedure even though they fall within the described class. Under the principle just cited Simpson, as the party claiming such an exemption, has the burden of establishing its applicability.

B. *Standard of Review*

It is settled that an appellate court independently reviews the questions whether a cause of action rests on protected activity, and whether the plaintiff has shown a probability of prevailing. (*Contemporary Services Corp. v. Staff Pro Inc.* (2007) 152 Cal.App.4th 1043, 1052; *Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2006) 136 Cal.App.4th 464, 472.) We see no reason to think that a different standard of review governs the applicability of a statutory exemption to the plaintiff's cause of action. We will therefore exercise our independent judgment with respect to all three questions.⁶

II. Anti-SLAPP Exemption

A. Statement About Defendant's or a Competitor's Product or Services

Section 425.17(c) exempts from the anti-SLAPP law certain causes of action that arise from statements of that either (1) concern the speaker's or a competitor's products or services, or (2) are made in the course of delivering the speaker's product's or services.⁷

⁶ The constitutional shield for truthful speech may also implicate "the relatively searching standards of "constitutional fact review," " at least in considering whether the publication at issue conveys a provably false and defamatory assertion of fact. (*O'Grady v. Superior Court* (2006) 139 Cal.App.4th 1423, 1466, quoting *DVD Copy Control Association v. Bunner* (2003) 31 Cal.4th 864, 889; see *Krinsky v. Doe 6* (2008) 159 Cal.App.4th 1154, 1161-1162 (*Krinsky*)). Our analysis, however, makes it unnecessary to closely consider the issue.

⁷ Section 425.17(c) provides, "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

Although the exemption has been described as applying to claims arising from “commercial speech” (*Contemporary Services Corp. v. Staff Pro Inc.* (2007) 152 Cal.App.4th 1043, 1047, 1053; *Foundation for Taxpayer and Consumer Rights v. Garamendi* (2005) 132 Cal.App.4th 1375, 1391), that description is substantially overbroad.⁸ To fall within the exemption, a cause of action must satisfy several fairly concrete and specific criteria: (1) the defendant must be “a person primarily engaged in the business of selling or leasing goods or services” (§ 425.17(c)); (2) the plaintiff’s cause of action must “arise[] from a[] statement or conduct by” the defendant (*ibid.*); (3) the statement or conduct must be of a type qualifying the cause of action for exemption (§ 425.17, subd. (c)(1)); and (4) the statement must be addressed to or intended to reach a qualifying audience, or be made in a qualifying setting (*id.*, subd. (c)(2)).

It is not here disputed that Gore is in the business of selling legal services, that Simpson’s cause of action arises from a statement by Gore, or that the statement was addressed to a qualifying audience. The point of dispute is whether the statement is the type specified in the statute. To trigger the exemption, the statement from which the cause of action arises must either (1) meet specified criteria of content and purpose, or (2) be made in the course of delivery of goods or services. We will characterize these alternatives as the *content exemption* and the *delivery exemption*, respectively.

The content exemption shields a cause of action against summary dismissal under the anti-SLAPP statute if the cause of action arises from a statement that “consists of

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.”

⁸ Because we find that Simpson’s claims fall squarely outside the exemption’s plain terms, it is unnecessary to resolve any question of whether Gore’s advertisement is properly viewed as “commercial speech.”

representations of fact about [the speaker's] or a business competitor's business operations, goods, or services," and was "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" (§ 425.17, subd. (c)(1).) There appears to be no dispute, and little room for doubt, that Gore's advertisement satisfies the *purpose* element of the exemption. It appears obvious, and Gore does not deny, that he ran the advertisement to promote the services he acknowledges he is in the business of providing. The question, then, is whether Simpson's cause of action arises from any statement "consist[ing] of [a] representation[] of fact about [Gore's] or a business competitor's business operations, goods, or services" (See *ibid.*)

Simpson asserts in its opening brief that its claims arise from "Gore's false assertion that Simpson's galvanized screws are defective." As is discussed in greater detail below, no such assertion can be fairly attributed to Gore's advertisement. But even if it could, such an assertion is not "about" Gore's or a competitor's "business operations, goods, or services" (§ 425.17, subd. (c)(1).) It is, rather, a statement "about" *Simpson*—or more precisely, Simpson's products. It therefore falls squarely outside the content-based exemption.

Simpson seeks to avoid this seemingly obvious conclusion by attributing to the advertisement, the statute, or both, meanings they cannot reasonably be understood to convey. Thus Simpson asserts that the advertisement contains "factual representations" that "Gore has investigated the named companies and has discovered that they are selling defective screws" But this simply is not so. The advertisement neither says nor implies anything about any previous investigation by Gore or anyone else. Some readers might surmise that Gore conducted an investigation. Others might suppose he had heard or read about issues with Simpson's products. Some might fancy he was making things up out of whole cloth. Reasonable readers would refrain from any such speculation, since the advertisement affords no basis for it. The statutory exemption does not extend

to every statement that might precipitate unbridled guesswork about the speaker's business-related activities by unusually imaginative readers. It applies only to *factual representations* that are *about* the speaker's own, or a competitor's, products or services.

Moreover, even if Gore had said, "I investigated Simpson and found its products defective," Simpson's cause of action would arise not from the statement about Gore ("I investigated and found") but from the statement about Simpson ("it's products [are] defective"). The same point defeats Simpson's attempt to attribute to the ad the "factual representation" that "Gore will provide the service of investigating to determine whether someone responding to the advertisement has a potential claim." Certainly the advertisement conveys such an implication, and we may assume for present purposes that it constitutes a "factual representation" about Gore's services. The problem is that Simpson's claims do not "arise from" Gore's offer to investigate. They arise from the supposed implication that Simpson's products are defective. The exemption does not extend to every cause of action arising from a statement *accompanied by* factual representations about the speaker's services. It extends only to causes of action arising from statements "*consist[ing] of* representations of fact about [the speaker's] or a business competitor's business operations, goods, or services." (§ 425.17(c)(1).) To the extent that Gore's advertisement "consists of" representations about his services, Simpson's action does not "arise[] from" it; to the extent that Simpson's action "arise[s] from" a representation by Gore, the representation was not "about" Gore's or a competitor's services or business operations.

Indeed, Simpson elsewhere implicitly concedes that its cause of action does not arise from any representation about Gore by insisting that Gore could have obviated any claim by running substantially the same advertisement *without Simpson's name*. Simpson writes in its opening brief that Gore could have "compose[d] his advertisement in a way that did not defame Simpson" by stating simply, "If your deck was built after January 1, 2004 with galvanized screws, you may have certain legal rights and be entitled

to monetary compensation, and repair or replacement of you[r] deck.” This assertion is accompanied by a mock-up of Gore’s ad with the amended text, offered to illustrate how “easy for Gore” this would have been. In the trial court, the mock-up was accompanied by the statement, “Simpson only wants its name out of any advertisement that falsely asserts Simpson’s galvanized screws are defective.” These statements confirm the obvious: This action arises from Gore’s statements about *Simpson* and its products, not from any representation about his own or a competitor’s services.

The content exemption requires the party invoking it to identify a statement or instance of conduct that (1) “consist[s] of representations of fact,” (2) is “about” the speaker’s or a competitor’s business, product, or service, and (3) gives rise to the cause of action sought to be exempted. These elements must coincide in a single “representation[],” or the exemption is inapplicable by its terms. Here any express or implied representations about Gore were unrelated to Simpson’s causes of action, which arose entirely from Gore’s statements about Simpson. Since Simpson was not Gore’s competitor, the exemption was inapplicable.

B. *Statement During Delivery of Services*

Nor does Simpson’s cause of action fall within the second exemption of section 425.17(c)(1), because Gore’s advertisement was not a statement made “in the course of delivering” his “services.”

For section 425.17(c) to apply at all, the defendant must be “a person primarily engaged in the business of selling or leasing goods or services” (§ 425.17(c).) It is these “goods or services”—the ones the defendant is “in the business of selling or leasing”—that the Legislature manifestly had in mind when it referred in section 425.17(a)(1) to statements made “in the course delivering the person’s goods or services” (See *Stillwell v. State Bar* (1946) 29 Cal.2d 119, 123 [“[I]t is a well-established rule of construction that when a word or phrase has been given a particular scope or meaning in one part or portion of a law it shall be given the same scope and

meaning in other parts or portions of the law”]; *People v. Dillon* (1983) 34 Cal.3d 441, 468 [“[I]t is generally presumed that when a word is used in a particular sense in one part of a statute, it is intended to have the same meaning if it appears in another part of the same statute”].) Accordingly, for the delivery exemption to apply, the statement in question must occur while the defendant is providing the goods or services *he is in the business of selling*.

The services an attorney typically “sell[s]” include counseling, advice, legal research, drafting of instruments, investigation, discovery, representation in litigation, and representation in negotiations or other dealings with third parties. An attorney does not sell advertising, and advertising is not a “business” in which he is “primarily engaged.” Certainly it was not a business or activity in which Gore was engaged when he caused the subject advertisement to appear.⁹ When an attorney advertises for clients, he is simply not delivering any services he is in the business of providing—which are the only “services” whose “delivery” may trigger the exemption.¹⁰

In its opening brief Simpson attempts to surmount this obstacle by reading the phrase *delivering services* to include any “*attempt to deliver services*,” which it then implicitly construes to include any act in anticipation of or preparation for the delivery of services. (Italics added.) Thus it contends that the exemption applies because Gore

⁹ Simpson seemed to all but acknowledge this fact in the trial court in contesting Gore’s contention (which we do not reach) that his statements were privileged under Civil Code section 47, subdivision (b), because they were made in the course of a judicial proceeding. Insisting that the advertisement was too remote from any anticipated suit to be privileged, Simpson wrote, “Here, Defendants are *simply advertising for business in the newspaper*. There is no client, no dispute, and no demand.” (Italics added.)

¹⁰ Occasions may of course arise when an attorney’s services to a client include publishing advertisements, or legal notices resembling advertisements. We are here concerned exclusively with an advertisement promoting the attorney’s services by seeking clients to engage those services.

stated that he “published the advertisement ‘in advance of class action litigation he intend[ed] to file,’ ” to the “ ‘end’ of preparing a lawsuit,” and “ ‘to further the anticipated class action litigation.’ ” Simpson also notes Gore’s averment that “he was ‘drafting and preparing class-action complaints against Simpson’ ” and others. Simpson acknowledges that “this attempt was unsuccessful,” in that Gore never filed such a suit, but finds that fact “inconsequential” to the application of the exemption “since the advertisement was part and parcel of services typical of Gore’s law practice.” But the exemption does not extend to attempts to deliver services, let alone acts in preparation for delivering services. It extends only to the *actual* provision (delivery) of the services the defendant is in the business of selling. A grocer, no less than Gore, advertises his wares “in advance of” sales he “intend[s]” to make. Such advertising may be “part and parcel” of his retail business. This does not make advertising part of the goods or services sold by a grocer, any more than of those sold by an attorney.

Simpson also asserts that Gore’s advertisement qualified under the delivery exemption because, borrowing language from *Brill, supra*, 132 Cal.App.4th 324, 341, the ad was “typical of what Gore does as part of ‘the type of business transaction engaged in by’ him” However we must again respectfully decline to follow that case.

Although the facts of that controversy were complex, it appears essentially to have been an action by a borrower who alleged that the defendant lenders had wrongfully interfered with his attempts to sell assets, thereby rendering him insolvent and forcing him into default for their own advantage. The defendants asserted that the claims were subject to an anti-SLAPP motion because section 425.16 covered their filing of petitions placing the plaintiff in bankruptcy. We fail to perceive, and the opinion does not explain, how this conduct could be viewed as occurring in the course of “delivering” a “service” sold by the defendants. The court’s entire treatment of the question consists of the following two sentences: “These statements were made and conduct engaged in as part of an effort to secure control of the Brill Media entities. Securing control of the Brill Media entities was

the type of business transaction engaged in by defendants.” (*Brill, supra*, 132 Cal.App.4th at p. 341.)

The Legislature has not chosen to exempt conduct incidental to the “type of business transaction engaged in by [the] defendant[.]” (*Brill, supra*, 132 Cal.App.4th at p. 341.) It has instead prescribed a much narrower exemption, predicated by its plain terms on conduct in the course of *delivering* the *goods or services* the defendant is in the business of *selling or leasing*. Placing borrowers in bankruptcy may have been the kind of thing the *Brill* defendants profited by doing, but it does not appear to have been a “service” they delivered (or sold or leased) to anyone. The control of “turf” may be a common feature of organized crime, and eliminating rivals may be “the type of business transaction engaged in” by gang bosses. But it does not follow that by ordering a killing for that purpose, a boss is delivering any service he is in the business of selling.¹¹ So too, a cropduster may be engaging in a transaction typical of his business when he purchases spray and fuel, but that hardly means he is “delivering” his “services” by making such a purchase.

In its reply brief Simpson suggests that Gore’s advertisement constituted “the delivery of services to the *general public*” An advertisement warning of possible hazards associated with a product may indeed constitute a public “service” in the sense of a favor or beneficence. (See American Heritage College Dict. (3d ed. 1997) p. 1246 [defining “service” as “[a]n act of assistance or benefit to another or others”]; Merriam-Webster’s Collegiate Dict. (10th ed. 1999) p. 1067 [“a helpful act”].) But the statute does not use the word “service” in that sense. Indeed, it does not speak of “service” at all, but of “services,” and in a purely commercial context, i.e., as performed by “a person

¹¹ To be sure, the boss might also offer to commit “contract” killings, and a “hit” pursuant to such an arrangement would plainly constitute the delivery of a service as contemplated in section 425.17(c)(1). We suspect, however, that the anti-SLAPP statute will not often be implicated in cases involving those or similar facts.

primarily engaged in the *business of selling or leasing* goods or services.” (§ 425.17(c).) “Services” thus contemplates not altruistic acts but “[w]ork done for others as an occupation or business.” (American Heritage College Dict., *supra*, p. 1246; see Merriam-Webster’s Collegiate Dict., *supra*, p. 1067 [“useful labor that does not produce a tangible commodity—usu. used in pl. <charge for professional ~s>”].) An attorney’s advertisement in anticipation of class action litigation is not “work done for others” or “useful labor” for which an attorney can “charge.” It is not “services” for purposes of the delivery exemption.

Simpson also suggests that the statute must be read to embrace the delivery of services to prospective clients because it contemplates statements addressed to a “*potential* buyer or customer” (§ 425.17, subd. (c)(2).) But the reference to “potential” buyers operates to harmonize the “intended audience” element of the statute (§ 425.17, subd. (c)(2)) with the *content* exemption discussed *ante*. (See *id.*, subd. (c)(1).) That exemption expressly extends to statements made for the purpose of “obtaining approval for, *promoting, or securing sales . . . of . . . the [speaker’s] goods or services*” (*Id.*, subd. (c)(1).) To limit the “intended audience” to actual or existing customers would severely limit, if not conflict with, this language. The reference to “potential” customers avoids that effect. It does *not* operate in derogation of the distinct exemption for statements “made in the course of delivering . . . goods or services.” (*Ibid.*)

We do not hold that services can never be delivered to a prospective customer for purposes of the delivery exemption. A different case would be presented if, for instance, an attorney made a phone call on behalf of a prospective client by whom he had not been formally retained. This is not such a case. The advertisement in question was *seeking business from* prospective clients, not *delivering services to* them. The delivery exemption is inapplicable to such a communication.

C. Conformity to Legislative Purpose

We have granted Gore’s motion for judicial notice of legislative materials concerning the enactment of section 425.17. These materials are cited by Gore and amici California First Amendment Coalition (CFAC) and California State Senator Sheila Kuehl in support of the proposition that section 425.17 was never intended to exempt claims such as Simpson’s from the anti-SLAPP statute.¹²

It is not strictly necessary to reach this contention, because we detect no ambiguity by which the statutory language might be construed to exempt Simpson’s claims. In the absence of such an ambiguity there is generally no occasion to delve into extrinsic evidence of legislative intent. (*California Highway Patrol v. Superior Court* (2008) 158 Cal.App.4th 726, 735 (*California Highway Patrol*); *Gardenhire v. Superior Court* (2005) 127 Cal.App.4th 882, 894-895.) However, “[t]he literal meaning of unambiguous statutory language ‘may be disregarded to avoid absurd results or to give effect to manifest purposes that, in the light of the statute’s legislative history, appear from its provisions considered as a whole.’ ” (*California Highway Patrol, supra*, 127 Cal.App.4th at p. 736, quoting *Silver v. Brown* (1966) 63 Cal.2d 841, 845.) Therefore we have reviewed the proffered materials out of an abundance of caution. (See also *Equilon, supra*, 29 Cal.4th 53, 61-62.)

¹² Senator Kuehl authored the bill that became section 425.17. While she of course enjoys the same right as any other citizen to address our courts, she is no more competent than any other citizen to opine retrospectively upon the intent underlying a legislative act. (See *C-Y Development Co. v. City of Redlands* (1982) 137 Cal.App.3d 926, 932-933 [legislators’ after-the-fact statements about purpose of statute not admissible as aids to interpretation] ; cf. *City of King City v. Community Bank of Central California* (2005) 131 Cal.App.4th 913, 924, fn. 5 [legislator’s intentions communicated to body prior to enactment “may well be admissible, at least where the purpose is to explain and illuminate a patently ambiguous enactment and not to impeach an otherwise valid one or alter a plain meaning otherwise facially apparent”].) We accept her arguments on this point as contentions of law, but not as *evidence* of legislative intent.

Our application of section 425.17(c) is entirely consistent with the statutory purpose reflected in the legislative history. Indeed, these materials establish that it would be absurd, if not perverse, to grant Simpson the shelter of the statutory exemptions.

The impetus for enacting the exemptions was the growing use of anti-SLAPP motions by commercial enterprises seeking to impede or obstruct litigation brought against them by public-interest or consumer class plaintiffs. As reflected in a senate committee report, anti-SLAPP motions were themselves being used as a kind of SLAPP to inhibit litigation against well-heeled defendants. Senate Bill 515, which became section 425.17, was proposed by the Consumer Attorneys of California (CAOC), who complained that “in recent years, a growing number of large corporations have invoked the anti-SLAPP statute to delay and discourage litigation against them by filing meritless SLAPP motions, using the statute as a litigation weapon.” (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 515 (2003-2004 Reg. Sess.), as amended May 1, 2003, p. 4.) It was noted that seminars were being given on how to utilize the anti-SLAPP statute against consumer rights actions. (*Ibid.*) Another proponent asserted that “a simple pro bono public interest case that should be completed in six months with \$5,000 in expenses becomes a costly and financially risky ordeal when the anti-SLAPP law is misused. The filing of the meritless SLAPP motion by the defendant, even if denied by the court, is instantly appealable, which allows the defendant to continue its unlawful practice for up to two years, the time of appeal.” (*Ibid.*) Section 425.17 was necessary, proponents argued, “to stop corporate abuse of the statute and to return Section 425.16 to its original purpose of protecting a citizen’s rights of petition and free speech from the chilling effect of expensive retaliatory lawsuits brought against them for speaking out.” (*Ibid.*)

The report quoted Professor Penelope Canan, the “co-author of the seminal research on SLAPP suits,” who had written in support of an earlier proposed exemption that by using meritless motions under section 425.16 “as a litigation weapon,” corporate defendants had “turn[ed] the original intent of one of the country’s most comprehensive

and effective anti-SLAPP laws on its head.’ ” (Sen. Com. on Judiciary , Analysis of Sen. Bill No. 515 (2003-2004 Reg. Sess.), as amended May 1, 2003, at p. 5; see Pring & Canan, SLAPPs: Getting Sued for Speaking Out (1996); Canan, et al., Political Claims, Legal Derailment, and the Context of Disputes (1990) 24 L. & Soc’y Rev. 923; Canan & Pring, Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches (1988) 22 L. & Soc’y Rev. 385.) The report also noted commentary by Professor Canan and others to the effect that since a SLAPP suit depends for its effectiveness on the economic burden and risk it imposes on the defendant, the concept has little if any application to actions against large commercial enterprises, which “ ‘have far greater resources to defend themselves when sued, and as a group are far less likely—or not likely at all—to be chilled in the exercise of their First Amendment Rights.’ ” (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 515 (2003-2004 Reg. Sess.), as amended May 1, 2003, p. 5.)

Here a seemingly large commercial enterprise has attempted to use the new exemptions to perpetuate a lawsuit that may fairly be described as a paradigmatic SLAPP in that it plainly arises from conduct protected by the anti-SLAPP statute and, as will appear momentarily, lacks substantial merit. To permit this effort to succeed would be a perversion of legislative purpose at least as striking as the one that motivated the Legislature to enact the exemptions Simpson invokes. As applied in this case, at least, the plain meaning of the statute, and the result it produces, is wholly consistent with its purpose. The legislative history only confirms our conclusion that Simpson’s claims are subject to scrutiny under the anti-SLAPP law.

III. *Probability of Prevailing*

A. *Procedural Principles*

Once it is determined that a cause of action is subject to a special motion to strike, the plaintiff is required to establish “a probability that [he] will prevail on the claim.”

(§ 425.16, subd. (b)(1).) “In order to establish a probability of prevailing on the claim [citation], a plaintiff responding to an anti-SLAPP motion must ‘state[] and substantiate[] a legally sufficient claim.’” [Citations.] 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.’ [Citations.] 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. [Citation.]” (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821; *Vogel v. Felice* (2005) 127 Cal.App.4th 1006, 1017 (*Vogel*); see *Navarro v. IHOP Properties, Inc.* (2005) 134 Cal.App.4th 834, 840 [plaintiff must show “reasonable probability of prevailing”].)

B. Defamatory Utterance

To establish a libel, the plaintiff must show that the defendant published a “false and unprivileged” statement that “exposes [the plaintiff] to hatred, contempt, ridicule, or obloquy, or . . . causes him to be shunned or avoided, or . . . has a tendency to injure him in his occupation.” (Civ. Code, § 45.) The requirement of falsity rests on the nearly absolute constitutional protection granted to truthful speech. (See *Gregory v. McDonnell Douglas* (1976) 17 Cal.3d 596, 600-601 (*Gregory*).) Because the law does not recognize the possibility of a false *opinion*, a claim for defamation cannot succeed unless the challenged statement can be reasonably understood to express or imply a *provably* false assertion of *fact*. (*Kahn v. Bower* (1999) 232 Cal.App.3d 1599, 1607, 1608, 1609.) “If the meaning conveyed cannot by its nature be proved false, it cannot support a libel claim.” (*Vogel, supra*, 127 Cal.App.4th at p. 1020.)

A statement is not false for purposes of a defamation claim if it is *substantially* true. (*Vogel, supra*, 127 Cal.App.4th at p. 1021.) Liability is precluded “ “if the *substance* of the charge be proved true, irrespective of slight inaccuracy in the details.” [Citations.] . . . [Citation.] . . . Minor inaccuracies do not amount to falsity so long as “the substance, the gist, the sting, of the libelous charge be justified.” [Citations.] Put another way, the statement is not considered false unless it “would have a different effect on the mind of the reader from that which the pleaded truth would have produced.” [Citations.]’ (*Masson v. New Yorker Magazine* (1991) 501 U.S. 496, 516-517. . . , italics added [discussing California law].)” (*Ibid.*, fn. omitted.) Thus, to establish liability it is not enough that the challenged statement be false in one respect, but injurious to reputation in another. Its provably false factual meaning must coincide with its defamatory “gist” or “sting.” (See *Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 646-647 [“It is sufficient if the defendant proves true the *substance* of the charge, irrespective of slight inaccuracy in the details, ‘so long as the imputation is substantially true so as to justify the “gist or sting” of the remark’ ”].)

In ascertaining the gist of a publication, “ ‘a court is to place itself in the situation of the hearer or reader, and determine the sense or meaning of the language of the . . . publication according to its natural and popular construction.’ That is to say, the publication is to be measured not so much by its effect when subjected to the critical analysis of a mind trained in the law, but by the natural and probable effect upon the mind of the average reader.” (*MacLeod v. Tribune Pub. Co.* (1959) 52 Cal.2d 536, 547; *Morningstar, Inc. v. Superior Court* (1994) 23 Cal.App.4th 676, 688.)

In view of these principles, Simpson could only show a likelihood of prevailing on its defamation claim by showing that a jury could find Gore’s advertisement had the effect of conveying to the average reader an assertion of fact that was provably false and was more damaging to Simpson than the truth would have been. Simpson’s main argument on this point is most cogently stated as follows: “[I]t is provably false that

Simpson's screws are defective because Simpson gave ample warnings of the risks from using galvanized screws with pressure-treated wood and provided clear recommendations for proper use of its screws" Later Simpson explains further: "A product may be 'defective' because of (1) a manufacturing defect, (2) a design defect, or (3) a failure to warn of foreseeable risks of harm posed by the product. [Citations.] Gore does not claim any manufacturing or design defect in Simpson's products, and he does not assert any particular failure or defect of a Simpson fastener actually observed anywhere. His theory of defective product liability therefore must be failure to warn. [Record citations.] [¶] Yet the record is replete with evidence of warnings by Simpson sufficient to preclude any *defective product liability* on a failure-to-warn theory." (Italics added.)

It thus appears that the points essential to Simpson's main claim of provable falsity are the following: (1) The gist of Gore's advertisement was that Simpson's galvanized screws "are defective"; (2) Simpson's screws are only "defective" if Simpson would be held liable in a products liability suit; (3) Simpson could not be held liable in a products liability suit because it took adequate steps to inform the public about the hazards of using its galvanized screws with pressure-treated wood; (4) therefore the screws were not defective and the imputation to the contrary was false.

Three of these four propositions are demonstrably unsound.¹³ First and most obviously, even if the gist of the advertisement were that Simpson's products "are defective," falsity could not be demonstrated by determining the outcome of a hypothetical products liability suit. To the average reader of a general circulation newspaper, the meaning of "defective" is not determined by the law of products liability but by common usage. Simpson's argument thus falls prey to the precise error decried in

¹³ Simpson understandably emphasizes the one colorable proposition advanced by it, i.e., that it took adequate steps to advise the public about the hazards of using galvanized hardware with pressure treated wood. Commendable as its efforts may be, they can have no bearing on this lawsuit unless the other three propositions are sound.

MacLeod v. Tribune Pub. Co., *supra*, 52 Cal.2d at page 547, i.e., it “measure[s]” the challenged publication “by its effect when subjected to the critical analysis of a mind trained in the law”

Further, the gist of the advertisement is *not* that Simpson’s galvanized screws “are defective,” or “are so defective they subject Simpson to liability.” The word “defective” nowhere appears in the advertisement. To the average reader, the advertisement would at most suggest that some of Simpson’s galvanized screws were *unsuitable for use* in specified applications and that persons who used them *might* have a remedy *against someone*. This is not a provably false assertion of fact for several reasons: (1) insofar as it asserted any fact about Simpson’s galvanized screws, it did not substantially diverge from the truth *as admitted by Simpson in its complaint*; (2) it is in any event explicitly couched in terms not of fact but of *possibility*; and (3) insofar as it alludes to the possibility of a right to relief, it is explicitly *predictive* and thus cannot be understood to assert a proposition of fact because it is almost universally understood that no one knows the future.

Simpson has conceded time and again that many of its galvanized screws are wholly unsuitable for use in pressure treated wood decks. According to a “connector coating recommendation” table in a Simpson publication attached to the declaration of Simpson engineer Crawford, Simpson manufactured three categories of fasteners and connectors: “G90” galvanized, “ZMAX/HDG” galvanized, and stainless steel.¹⁴ G90 products are recommended for exterior use only in “dry” *untreated* wood. In other words, Simpson does not consider them suitable for use in *any* exterior pressure-treated wood application. ZMAX/HDG products are recommended for exterior pressure-treated woods *only when the wood contains no ammonia*. In all other exterior applications, and

¹⁴ The publication also refers to “painted” hardware, but that category appears immaterial here.

all other pressure-treated wood applications (interior or exterior), Simpson recommends the use of stainless steel connectors and fasteners.

In sum, G90 galvanized screws are deemed unsuitable for *all* pressure-treated woods and *all* exterior applications other than “dry” ones; and *all* galvanized screws are deemed unsuitable for any pressure-treated wood containing ammonia. For some outdoor treated-wood applications, then, *all* galvanized screws are deemed unsuitable. As Simpson acknowledges, the risk of using the wrong screw in the wrong application is that the screw may corrode to the point of failure, which in turn may produce structural collapse. It therefore seems fair to say that many if not all Simpson galvanized screws were *dangerous* to use in at least some outdoor treated-wood applications.

If Gore’s advertisement had flatly stated, “Simpson galvanized screws are unsuitable for use in wood decks,” it would be true with one qualification: *some* galvanized hardware—the ZMAX/HDG line—may be suitable for use with *some* exterior pressure treated woods. But even there, Simpson’s literature is pervaded with warnings and disclaimers the gist of which is that all doubts should be resolved against galvanized hardware and in favor of stainless steel. Thus, after advising users to obtain comprehensive information from wood suppliers, Simpson states, “If the needed information is not provided then Simpson would recommend the use of Stainless Steel connectors and fasteners.” Likewise, for woods not listed on the selection table, Simpson states that it “cannot make any recommendation other than the use of Stainless Steel with that product.” Further, even though ZMAX/HDG hardware is described as suitable for use with ammonia-free woods in “exterior – wet” applications, Simpson issues the following disclaimer in a footnote: “Test results indicate that ZMAX/HDG will perform adequately, subject to regular maintenance and periodic inspection. However, the nationally-approved test method used, AWWA E12-94, is an accelerated test, so data over an extended period of time is not available. If uncertain, use Stainless Steel.”

Gore's advertisement would thus diverge substantially from the facts admitted by Simpson only if it were understood as an absolute and categorical assertion that *no* galvanized hardware is suitable for use on wood decks. We do not believe any rational reader could interpret the advertisement to convey such a message. Far from making a direct and categorical assertion that all galvanized screws are unsuitable, it *implies* that *some* unknown number of galvanized screws—possibly all, possibly many, possibly few, possibly none—are unsuitable for the specified purpose. The substantial accuracy of this statement appears from Simpson's own product literature.

Further, in anticipating the investigation of "potential claims," Gore's advertisement conveyed not an assertion of existing fact but a *prediction of future events*. The vast majority of newspaper readers understand the future to be unknowable and unprovable, such that a statement about it is incapable of proof or disproof. To be sure, a prediction may be eventually be borne out by events, in which case we say that it "came true." But this does not mean that it was provably true when made. And perhaps more importantly, when a prediction is not borne out by events, we do not ordinarily characterize it as *false*, but as *inaccurate*, meaning only that it missed its mark, as an arrow misses its target. This linguistic difference reflects the universal understanding that the future does not exist. Like anything that does not exist, it cannot be spoken of in factual terms, but only in suppositional or probabilistic ones. In general, therefore, a prediction of future events is intrinsically incapable of conveying a provable (or disprovable) assertion of fact.

Moreover, contrary to the implication alleged by Simpson, the advertisement neither states nor implies that Simpson's products "*are defective*," or *are anything else*. Rather it states that persons who used Simpson's galvanized screws in a stated manner "may" have a "potential claim" to relief, subject to "investigat[ion]" by Gore. This implies no facts at all. Rather it speaks of a *possible* state of fact, the *actual* existence of which is subject to two intervening contingencies—one express (investigation) and the

other implied (litigation). A statement will not ordinarily be deemed factual when it is “cautiously phrased in terms of apparency.” (*Gregory, supra*, 17 Cal. 3d 596, 603.) Here Gore’s advertisement is phrased not only in terms of apparency, but of apparent *possibility*. It does not assert that something *is* true or *will* happen, but only that something “may” be true. An assertion that “X may be Y” posits only *some possibility* that X is Y. Such a statement is true so long there is *any possibility* that X is Y. To prove it false, one must establish that X *could not* be Y. That is why one who speaks carefully will concede almost any proposition couched in terms of “may” or “might,” perhaps with a grudging, “Anything is possible.” Here, insofar as Gore’s advertisement conveys the assertion that users of its galvanized screws “may” be entitled to legal relief, proof of literal falsity would require a demonstration that no reader could possibly be entitled to any relief, from anyone, on any theory or state of facts.

By its nature such a burden is practically impossible to carry. Certainly Simpson could not carry it here. The product literature submitted by Simpson establishes that the choice of correct hardware was both critical and potentially quite difficult unless buyers defaulted to the safer but much more expensive alternative of stainless steel. It would be astonishing if no deck owner or contractor used galvanized hardware in a situation where it created a danger of property damage and even personal injury. Assuming that Simpson’s product warnings afforded it a bulletproof shield against liability—a question we do not decide—it was entirely possible that one or more owners of such improperly constructed decks had legally viable claims against wood manufacturers, wood retailers, or fastener retailers for selling *their* products without adequate warnings. Moreover, persons whose decks were built by contractors might have claims against the contractors for selecting unsuitable hardware. It would therefore be astonishing if it were not substantially true, and indeed literally true, that some readers of the advertisement might be entitled to legal relief. Indeed, it would be highly surprising if none of them were *in fact* entitled to relief. Certainly Simpson made no attempt to prove such an imposing

negative, instead confining itself to the claim that *it* was not in fact liable because it gave adequate product warnings. Since the advertisement did not assert or imply that Simpson was in fact liable, Simpson's proofs did not meet the issue.

A statement of opinion may sustain liability where it implies that the speaker knows additional, undisclosed defamatory facts. (See *Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1, 18 ["If a speaker says, 'In my opinion John Jones is a liar,' he implies a knowledge of facts which lead to the conclusion that Jones told an untruth"]; *Krinsky v. Doe 6* (2008) 159 Cal.App.4th 1154, 1175 [" '[T]he communicator implies that a concealed or undisclosed set of defamatory facts would confirm his opinion' "].) Here Gore did the opposite: By conditioning any "potential claim" on further investigation, he directly implied that he *did not know*—and *could not* know without further investigation—whether Simpson or anyone else was liable. A reader might suppose that Gore possessed additional facts relevant to the question, but no reasonable reader could suppose they facts established Simpson's liability, or indeed the actual existence of any "defect," because Gore himself impliedly pronounced them insufficient to do so.

Echoing an argument we have already addressed in the context of the statutory exemptions, Simpson contends that the advertisement conveyed three specific, provably false defamatory facts: "First, . . . that *Gore conducted an investigation* and identified Simpson as one of three manufacturers of defective galvanized screws, so that *all that remains is for Gore to find consumers* who have those defective screws. Second, . . . that *Simpson's defective galvanized screws have failed* in some instances, *requiring Simpson to pay compensation*. Third, . . . that *Simpson actually has been sued* for defective product liability." (Italics added.) No reasonable reader could attribute such assertions to Gore's advertisement. It might *suggest these possibilities* to some readers, but there is a crucial difference between what is "implied" by a speaker and what is surmised by a listener. If a man says simply that he is tired, it might trigger speculation that he has loaded 16 tons of coal, or been chased by 20 hounds, or leapt a tall building at a single

bound. It hardly *implies* any of these things. Similarly, Gore's advertisement might stimulate a fertile imagination to invent any number of colorful scenarios, but it implies nothing about any completed investigation by Gore, past failures of Simpson products, or past lawsuits. Indeed Simpson's attributed implications go so far as to *contradict* the words of the ad by suggesting that Gore only had to "find consumers who have these defective screws" to establish Simpson's liability. What the ad actually *said* was that Gore could *investigate* whether people who used Simpson's galvanized screws in specified circumstances had "a potential claim."

Simpson also contends that a finding of actionable defamatory meaning may be based upon the public opinion survey conducted at its behest after the publication of Gore's advertisement. The requirement of a provably false assertion of defamatory fact is grounded in the constitutional entitlement to speak truthfully. That entitlement is not subject to defeasance by plebiscite, let alone by private opinion survey. It is for the courts, as guardians of our constitutional liberties, to say whether a statement is the type that will permit a judgment for libel. That function cannot be delegated to anonymous citizens questioned by anonymous interrogators in public parking lots.

Further, the survey fails to show what Simpson claims for it, i.e., that "consumers understood Gore's advertisement to mean Simpson's galvanized screws *are defective*" (Italics added.) What respondents were asked was the nebulous question, "*How likely would it be that galvanized screws manufactured by Simpson Strong-Tie would be defective?*" (Italics added.) The available responses, in the order offered to respondents, were, "[v]ery [l]ikely," "[s]omewhat [l]ikely," "somewhat unlikely," "[v]ery [u]nlikely," "[n]ot [s]ure," and "[d]on't [k]now." Simpson does not provide a complete breakdown of responses, choosing instead to disclose only that after seeing the advertisement, 46 percent of respondents "said they thought it was very likely *or somewhat likely* that the galvanized screws made by Simpson Strong Tie [*sic*] were

defective.”¹⁵ (Italics added.) This result does not support the interpretation attributed to it by Simpson. What it shows is that an unknown proportion of respondents thought it “very likely” that Simpson’s galvanized screws “would be defective” in some unspecified situation. To reach a number approaching one-half, Simpson had to combine that group’s responses with those who thought this hypothesis “somewhat likely.” But describing a proposition as “somewhat likely” is deeply ambiguous. It triggers all the concerns we have already expressed about the unprovability of statements of mere possibility. To be sure, ambivalent respondents were permitted to choose between “somewhat likely” and “somewhat unlikely,” but logically those terms mean exactly the same thing—the posited proposition is possible, but the degree of probability cannot be estimated.

The survey is further crippled as evidence of defamatory meaning by its use of the highly inappropriate construction “would be.” The term “would” signals a conditional proposition—e.g., X would be true *if Y were true*. (See Merriam-Webster’s Collegiate Dict., *supra*, at p. 1361 [describing “would,” as pertinent here, as an auxiliary verb “used . . . in the conclusion of a conditional sentence to express a contingency or possibility <if he were coming, he [would] be here now>”].) But no condition was specified. Worse, the verb “would” also operates “in [an] auxiliary function to express doubt or uncertainty,” e.g., “the explanation [would] seem unsatisfactory.” (*Ibid.*) Thus

¹⁵ The corresponding number for respondents who did not see the advertisement was six percent. It is no surprise that people are more likely to *entertain the possibility* of a proposition to which they have been exposed, however tentatively, than of one to which they have not been exposed. We also question the effect of making the most reasonable responses to the question—“not sure” and “don’t know”—the last ones offered to respondents, thus arguably relegating those responses to a disfavored position. The advertisement and survey were, after all, an interruption in activities on which respondents were already embarked—entering a store to shop, or leaving the store for their next destination. Newspaper readers *choose* to engage in that activity, and may be expected to devote themselves somewhat more carefully to comprehending what they read.

the construction used in the survey was not only logically incoherent in its allusion to an unspecified condition; it also connoted a pervasive uncertainty that made respondents' estimates of "likel[i]hood," already couched in highly ambiguous terms, all but meaningless. As a result, none of the permitted responses can be rationally construed as reflecting a belief that the screws "are defective." At most it showed that respondents who saw the advertisement were more likely to consider the possibility that Simpson's screws were "defective." The law of defamation is concerned with perceived derogatory *facts*, not vaguely disquieting possibilities.

Moreover, the survey failed to inform respondents what it meant by the characterization "defective," or ascertain what they meant insofar as they might accede to it. A survey more nearly tracking the meaning reasonably attributed to the advertisement would have asked respondents whether the advertisement caused them to believe that some or all galvanized screws made by Simpson were unsuitable for use in wood decks after January 1, 2004, such that some users of those screws for that purpose might have a claim against someone. Since Simpson's own literature establishes the truth of this proposition, a survey couched in these terms—and yielding results comparable to those actually gleaned—would establish that Gore's advertisement did, indeed, perform a public service. Instead the survey supplied the respondents with an attribution of "defective[ness]" that the advertisement cannot reasonably be understood to convey. That some respondents accepted the proffered imputation can hardly warrant attributing it to Gore. The law rightly mistrusts leading questions. It should not trust them more when they are posed out of court by anonymous interrogators to unsworn anonymous declarants.

Because the advertisement cannot be reasonably understood to convey a provably false assertion of fact, there was no possibility that Simpson could prevail on its libel claim. The trial court therefore acted properly in granting the anti-SLAPP motion as to

that cause of action. This makes it unnecessary to consider the numerous other deficiencies Gore has asserted in connection with that cause of action.

C. Trade Libel

To establish liability for trade libel, a plaintiff must prove at least the following elements: (1) the defendant published a statement; (2) the statement tended to disparage the plaintiff's product or property; (3) the statement was provably false; (4) the defendant acted with knowledge that the statement was false or with reckless disregard for its falsity; and (5) the statement caused specific pecuniary damage to the plaintiff. (See 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 645, pp. 951-952; *Melaleuca, Inc. v. Clark* (1998) 66 Cal.App.4th 1344, 1360-1362.)

Simpson alleges that Gore's statements "disparaged Simpson's goods in that the Advertisement falsely communicates to the reader that Simpson's galvanized steel screws are defective, when they are not. Defendants assert that Simpson galvanized screws are so defective they subject Simpson to liability." We concluded above that Simpson cannot establish a provably false statement by Gore that was damaging to Simpson's reputation. The same goes for a false statement disparaging Simpson's product. The advertisement conveyed at most that Simpson's galvanized screws, or some of them, *might* be unsuitable for use in specified applications. Simpson admitted as much in its complaint. Even if it had not, such a proposition cannot be shown to have been provably false when made. Simpson cannot prevail on its trade libel claim.

D. False Advertising

In its third cause of action, Simpson alleges that Gore's advertisement, which was "used to solicit Defendants' legal services," asserted that "Simpson's galvanized screw products are defective when they are not," and also that they "are so defective that they subject Simpson to liability." These statements were "false and misleading," and Gore "knew, or should have known, that such assertions were false and misleading." Gore's

conduct thus constituted false advertising subject to injunction under Business and Professions Code section 17500.¹⁶

We have already concluded that the advertisement contained no provably false statement about Simpson or its products. The focus of Simpson's false advertising cause of action, however, is that the advertisement contains false statements "about Gore's services." According to Simpson, these consist of the express statement "that 'an attorney' will 'investigate whether you have a potential claim,'" and the "reasonably inferred" assertion "that Gore has investigated the named companies and has discovered that they are selling defective screws." The second assertion does not appear in, and cannot reasonably be attributed to, the advertisement. The first assertion is certainly implied—indeed, stated—in the ad; but there is no suggestion that it was in any respect false. The ad says nothing about Gore except that he is an attorney, he can be reached at a specified number and address, and he will or may investigate the potential claims of persons who call him. There is no indication that any of these statements could be shown to be false. There is thus no apparent possibility of Simpson's prevailing on a false advertising claim.

E. Unfair Business Practices

In its fourth cause of action ("Unfair Business Practices"), Simpson claims an entitlement to an injunction and attorney fees because Gore "engaged in unfair business practices in violation of [section] 17200 et seq. of the California Business and Professions Code in that [he] utilized the false misleading Advertisement to recruit potential plaintiffs

¹⁶ In its opening brief Simpson made no attempt to show that the elements of a false advertising claim are present. It referred specifically to that cause of action only to say that Simpson could prevail on it without having to establish a knowing or reckless falsehood. This hardly establishes the elements of such a claim. Because the opening brief failed to cogently assign error on this point, Gore argued that Simpson had "abandoned" its causes of action for false advertising and unfair business practices. We decline to decide the issue on grounds of abandonment.

to participate in an unjustified class action lawsuit against Simpson.” As we have concluded, Simpson lacks the apparent ability to establish that anything in the advertisement is “false and misleading.”

We also observe that Simpson seeks only an injunction and ancillary attorney fees. “[A]n injunction serves to prevent future injury and is not applicable to wrongs that have been completed. An injunction is authorized only when it appears that wrongful acts are likely to recur.” (*Russell v. Douvan* (2003) 112 Cal.App.4th 399, 402.) There is no reason to suppose that Gore intends, or ever intended, to run further advertisements concerning Simpson, or otherwise threatens any future wrong against Simpson. We conclude that Simpson failed to establish the requisite likelihood that it would prevail on any of its causes of action.

IV. Denial of Discovery

The filing of Gore’s anti-SLAPP motion stayed discovery except as the trial court might otherwise direct for good cause shown. (§ 425.16, subd. (g).) Simpson moved to conduct discovery on the issue of Gore’s mental state in publishing the advertisement, and now challenges the trial court’s failure to allow such discovery. Under our view of the issues, that question is academic. Simpson indirectly concedes as much, stating, “if this court concludes that Simpson’s prima facie factual showing on defamation and trade libel is insufficient *on the issue of actual malice*, the court should remand the cause with directions to the superior court to allow limited discovery on that issue” We have found it unnecessary to reach the question of Gore’s mental state because his advertisement cannot be shown to have conveyed a provably false defamatory meaning.

DISPOSITION

The order and judgment appealed from are affirmed.

RUSHING, P.J.

WE CONCUR:

PREMO, J.

ELIA, J.

Trial Court:

Santa Clara County Superior Court
Superior Court No.: CV057666

Trial Judge:

The Honorable John Herlihy

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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

SIMPSON STRONG-TIE COMPANY,
INC.,

Plaintiff and Appellant,

v.

PIERCE GORE et al.,

Defendants and Respondents.

H030444
(Santa Clara County
Super. Ct. No. CV057666)

ORDER MODIFYING OPINION AND
DENYING REHEARING

NO CHANGE IN JUDGMENT

THE COURT:

It is ordered that the opinion filed herein on April 30, 2008, be modified as follows:

1. The paragraph commencing at the bottom of page 29 with “Further, the survey fails” and ending at the top of page 30 with “cannot be estimated” is modified to read as follows:

Further, the survey fails to show what Simpson claims for it, i.e., that “consumers understood Gore’s advertisement to mean Simpson’s galvanized screws *are defective . . .*” (Italics added.) Respondents were asked six questions before and after seeing the advertisement. The most germane was the nebulous query, “*How likely would it be that galvanized screws manufactured by Simpson Strong-Tie would be defective?*” (Italics added.) The available responses, in the order offered to respondents, were, “[v]ery [l]ikely,” “[s]omewhat [l]ikely,” “somewhat unlikely,” “[v]ery [u]nlikely,” “[n]ot [s]ure,” and “[d]on’t [k]now.” The declaration describing the survey does not provide a complete breakdown of responses, disclosing most pertinently that after seeing the advertisement,

46 percent of respondents “said they thought it was very likely *or somewhat likely* that the galvanized screws made by Simpson Strong Tie [*sic*] *were defective.*”¹⁵ (Italics added.) This result does not support the interpretation attributed to it by Simpson. What it shows is that an unknown proportion of respondents thought it “very likely” that Simpson’s galvanized screws “would be defective” in some unspecified situation. To reach a number approaching one-half, the declarant had to combine that group’s responses with those who thought this hypothesis “somewhat likely.” But describing a proposition as “somewhat likely” is deeply ambiguous. It triggers all the concerns we have already expressed about the unprovability of statements of mere possibility. To be sure, ambivalent respondents were permitted to choose between “somewhat likely” and “somewhat unlikely,” but logically those terms mean exactly the same thing—the posited proposition is possible, but the degree of probability cannot be estimated.

2. On page 30, footnote 15 is modified to read as follows:

¹⁵The corresponding number before seeing the advertisement was six percent. It is no surprise that people are more likely to *entertain the possibility* of a proposition to which they have been exposed, however tentatively, than of one to which they have not been exposed. We also question the effect of making the most reasonable responses to the question—“not sure” and “don’t know”—the last ones offered to respondents, thus arguably relegating those responses to a disfavored position. The advertisement and survey were, after all, an interruption in activities on which respondents were already embarked—entering a store to shop, or leaving the store for their next destination. Newspaper readers *choose* to engage in that activity, and may be expected to devote themselves somewhat more carefully to comprehending what they read.

There is no change in the judgment.

Appellant’s request for rehearing is denied.

PROOF OF SERVICE

I, WENDY CORNELL, declare:

1. I am employed in the City and County of San Francisco, California by Shartsis Friese LLP at One Maritime Plaza, 18th Floor, San Francisco, California 94111.

2. I am over the age of eighteen years and am not a party to the within cause.

3. I am readily familiar with Shartsis Friese LLP's practice for collection and processing of correspondence and documents for mailing with the United States Postal Service, which in the normal course of business provides for the deposit of all correspondence and documents with the United States Postal Service on the same day they are collected and processed for mailing.

4. On June 6, 2008, at Shartsis Friese LLP located at the above-referenced address, I served the attached **PETITION FOR REVIEW** on the interested parties in said cause by

Personal delivery by messenger service of the document(s) above to the person(s) at the address(es) set forth below:

Placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in accordance with the firm's practice of collection and processing correspondence for mailing to the person(s) at the address(es) set forth below:

Facsimile transmission pursuant to Rule 2008 of the California Rules of Court on this date before 5:00 p.m. (PST) of the document(s) listed above from sending facsimile machine main telephone number (415) 421-2922, and which transmission was reported as complete and without error (copy of which is attached), to facsimile number(s) set forth below:

Consigning the document(s) listed above to an express delivery service for guaranteed delivery on the next business day to the person(s) at the address(es) set forth below:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 6, 2008 in San Francisco, California.



WENDY CORNELL

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