

MAR 23 2018

Jorge Navarrete Clerk

IN THE
SUPREME COURT OF CALIFORNIA

Deputy

FILMON.COM

Plaintiff and Petitioner,

vs.

DOUBLEVERIFY, INC.

Defendant and Respondent

After Decision By the Court of Appeal,
Second Appellate District, Division Three
Case No. B264074

**RESPONDENT'S REQUEST FOR JUDICIAL NOTICE IN
SUPPORT OF RESPONDENT'S ANSWERING BRIEF;
DECLARATION OF ROM BAR-NISSIM; [PROPOSED] ORDER**

LINCOLN D. BANDLOW (BAR NO. 170449)
LBANDLOW@FOXROTHSCHILD.COM
ROM BAR-NISSIM (BAR NO. 293356)
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**Attorneys for Respondent
DoubleVerify, Inc.**

TO PETITIONER AND ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Respondent DoubleVerify, Inc. (“DoubleVerify”) hereby moves the California Supreme Court to take judicial notice of various materials that support DoubleVerify’s answering brief.

The Motion is made on the following grounds:

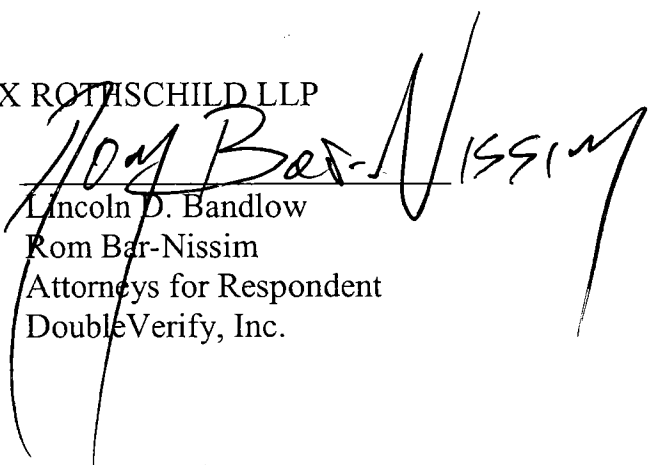
- 1) Evidence Code sections 452, subdivisions (c), (d), (g), and (h) authorize this Court to take judicial notice of the material offered by DoubleVerify; and
- 2) The materials offered by DoubleVerify are relevant to the issues raised in the briefs filed by Petitioner FilmOn.com, Inc. (“FilmOn”) and DoubleVerify.

This Motion is based on this Notice of Motion, the accompanying Memorandum of Points and Authorities, the Declaration of Rom Bar-Nissim and the attached exhibits, and such other matters as may properly come before this Court.

Dated: March 22, 2018

FOX ROTHSCHILD LLP

By:


Lincoln D. Bandlow
Rom Bar-Nissim
Attorneys for Respondent
DoubleVerify, Inc.

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT
OF DOUBLEVERIFY'S REQUEST FOR JUDICIAL NOTICE**

I. INTRODUCTION

Respondent DoubleVerify, Inc. (“DoubleVerify”) hereby requests that this Court take judicial notice of the materials that DoubleVerify relies on in its answering brief. These materials include:

- Court Order from the United States District Court for the District of Columbia issued May 23, 2017 granting a Stipulated Consent Judgment and Permanent Injunction against Appellant FilmOn.com, Inc. (“FilmOn”) in the case titled *Fox Television Stations, Inc., et al. v. FilmOn X, LLC, et al.* [Case No.: 13-758 (RMC), Dkt. No. 168] (Attached as **Exhibit A** to the Declaration of Rom Bar Nissim [“Bar-Nissim Decl.”]);
- Court Order from the United States District Court for the Central District of California issued May 24, 2017 granting a Stipulated Consent Judgment and Permanent Injunction against FilmOn in the case titled *Fox Television Stations, Inc., et al. v. FilmOn X, LLC, et al.* [Case No.: CV 12-06921-GW(JCx), Dkt. No. 243] (Attached as **Exhibit B** to the Bar-Nissim Decl.);
- Court Order from the United States District Court for the Northern District of Illinois issued May 25, 2017 granting a Stipulated Consent Judgment and Permanent Injunction against FilmOn in the case titled *FilmOn X, LLC v. Window To The World Commc’n, Inc.* [Case No.: 1:13-cv-08451, Dkt. No. 130] (Attached as **Exhibit C** to the Bar-Nissim Decl.);

- The Legislative Counsel’s Digest for Senate Bill 515 (codified as California Code of Civil Procedure (“C.C.P.”) § 425.17), that indicates that Senate Bill 515 was approved by the governor on September 6, 2003 and chaptered with the Secretary of State on September 8, 2003 (Attached as **Exhibit D** to the Bar-Nissim Decl.).
- The Legislative History for Senate Bill 1296 (*i.e.*, the 1997 amendment to C.C.P. § 425.16), specifically:
 - The May 12, 1997 Senate Judiciary Committee Analysis (Attached as **Exhibit E** to the Bar-Nissim Decl.);
 - The May 12, 1997 Senate Floor Analysis (Attached as **Exhibit F** to the Bar-Nissim Decl.);
 - The June 23, 1997 Assembly Floor Analysis (Attached as **Exhibit G** to the Bar-Nissim Decl.);
 - The June 23, 1997 Senate Floor Analysis (Attached as **Exhibit H** to the Bar-Nissim Decl.);
 - The June 23, 1997 Senate Floor Analysis (Attached as **Exhibit I** to the Bar-Nissim Decl.);
 - The July 2, 1997 Assembly Committee On Judiciary Analysis (Attached as **Exhibit J** to the Bar-Nissim Decl.).
- The Legislative History for Senate Bill 515 (codified as C.C.P. § 425.17), specifically:
 - The May 7, 2003 Senate Judiciary Committee Analysis (Attached as **Exhibit K** to the Bar-Nissim Decl.);
 - The May 9, 2003 Senate Floor Analysis (Attached as **Exhibit L** to the Bar-Nissim Decl.);

- The May 12, 2003 Senate Floor Analysis (Attached as **Exhibit M** to the Bar-Nissim Decl.);
- The May 21, 2003 Senate Floor Analysis (Attached as **Exhibit N** to the Bar-Nissim Decl.);
- The June 30, 2003 Assembly Committee Analysis (Attached as **Exhibit O** to the Bar-Nissim Decl.);
- The July 9, 2003 Assembly Floor Analysis (Attached as **Exhibit P** to the Bar-Nissim Decl.);
- The August 22, 2003 Senate Floor Analysis (Attached as **Exhibit Q** to the Bar-Nissim Decl.);
- The Legislative History for Assembly Bill 1158 (codified as C.C.P. § 425.18), specifically:
 - The April 4, 2005 Assembly Committee On Judiciary Analysis (Attached as **Exhibit R** to the Bar-Nissim Decl.);
 - The April 20, 2005 Assembly Floor Analysis (Attached as **Exhibit S** to the Bar-Nissim Decl.);
 - The April 27, 2005 Assembly Floor Analysis (Attached as **Exhibit T** to the Bar-Nissim Decl.);
 - The July 14, 2005 Senate Judiciary Committee Analysis (Attached as **Exhibit U** to the Bar-Nissim Decl.);
 - The August 17, 2005 Senate Judiciary Committee Analysis (Attached as **Exhibit V** to the Bar-Nissim Decl.);
 - The August 24, 2005 Senate Floor Analyses (Attached as **Exhibit W** to the Bar-Nissim Decl.);
 - The August 25, 2005 Senate Floor Analyses (Attached as **Exhibit X** to the Bar-Nissim Decl.);

- The August 29, 2005 Assembly Floor Analysis
(Attached as **Exhibit Y** to the Bar-Nissim Decl.).

II. THE EVIDENCE CODE AND THE RULES OF COURT PERMIT THIS COURT TO TAKE JUDICIAL NOTICE OF THESE MATTERS REQUESTED BY DOUBLEVERIFY

Evidence Code section 452 permits judicial notice be taken of, *inter alia*:

- Official acts of the judicial, legislative and executive departments of the United States and of any state [Evid. Code § 452(c)];
- Records of any court in this state or any court of record of the United States or of any state [Evid. Code § 452(d)];
- Facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute [Evid. Code § 452(g)];
- Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy [Evid Code § 452(h)].

Appellate courts may take judicial notice of any matter subject to discretionary judicial notice by the trial court under Evidence Code section 452. Evid. Code § 459(a).

A. The Court Should Take Judicial Notice of the Court Orders Granting Stipulations of Judgment and Injunctive Relief (Exs. A-C)

DoubleVerify requests that this Court take judicial notice of three court orders (Exs. A-C) which each granted a stipulated judgment and permanent injunction against FilmOn that prohibited FilmOn from engaging in the unauthorized re-transmission of broadcast television

programming. These materials constitute (1) orders that embody official acts of the judicial departments of the United States (Evid. Code § 452(c)); and (2) records from the United States District Court for the District of Columbia, United States District Court for the Central District of California, and United States District Court for the Northern District of Illinois (Evid. Code § 452(d)).

These court orders are directly relevant to the determination under C.C.P. section 425.16(e) of whether DoubleVerify's reports concern, or are otherwise connected with, an issue of public interest. The orders demonstrate that FilmOn, a leading web-based entertainment provider whose content can be potentially viewed by millions of people each day, has consented to cease engaging in copyright infringement through the unauthorized retransmission of broadcast television programming.

B. The Court Should Take Judicial Notice of the Legislative Counsel's Digest For Senate Bill 515 And The Date Of Its Enactment And Filing With The Secretary Of State (Ex. D)

The Legislative Counsel's Digest may be judicially noticed pursuant to Evid. Code section 452(c) as an official act of the legislature of the state of California. *See Kaufman & Broad Comty., Inc. v. Performance Plastering, Inc.* (2005) 133 Cal. App. 4th 26, 31, 35 (holding documents from the Legislative Counsel's Digest to be appropriate for judicial notice and listing cases in support). Further, the date a bill is enacted is a fact of such common knowledge and/or capable of immediate and accurate determination by sources of reasonably indisputable accuracy that it cannot be reasonably disputed. Evid. Code § 452(g) and (h).

The Legislative Counsel's Digest is relevant because Petitioner cites a number of cases for the proposition that commercial speech may be analyzed under Section 425.16 but those cases were decided before Section 425.17 was enacted on September 6, 2003 and filed with the Secretary of

State on September 8, 2003. *See* Petitioner's Opening Brief, pp. 20-22 and 28 (citing *Weinberg v. Feisel* (July 25, 2003) 110 Cal.App.4th 1122; *Commonwealth Energy Corp. v. Investor Data Exch., Inc.* (June 30, 2003) 110 Cal.App.4th 26; *Nagal v. Twin Lab., Inc.* (May 22, 2003) 139 Cal.App.4th 39; *Consumer Justice Ctr. v. Trimedica Int'l, Inc.* (March 27, 2003) 107 Cal.App.4th 595; *Globetrotter Software, Inc. v. Elan Comput. Grp., Inc.* (N.D. Cal. September 1, 1999) 63 F.Supp.2d 1127).

C. The Court Should Take Judicial Notice Of The Legislative History Materials For Senate Bill 1296 From 1997 (Exs. E-J)

DoubleVerify requests that this Court take judicial notice of the legislative history of Senate Bill 1296 (*i.e.*, the 1997 Amendment to C.C.P. § 425.16) (Exs. E-J). These materials constitute (1) orders that embody official acts of the legislative department of the State of California (Evid. Code § 452(c)); and (2) records from the State of California (Evid. Code § 452(d)). *See Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 45 fn. 9 (Legislative History materials are subject to judicial notice).

The legislative history for Senate Bill 1286 is directly relevant to interpreting C.C.P. § 425.16. *See Torres v. Parkhouse Tire Serv., Inc.* (2001) 26 Cal.4th 995, 1003 (Legislative history is relevant to determining the California Legislature's intent regarding a statute).

D. The Court Should Take Judicial Notice Of The Legislative History Materials For Senate Bill 515 From 2003 (Exs. K-Q)

DoubleVerify requests that this Court take judicial notice of the legislative history of Senate Bill 515 (codified as C.C.P. § 425.17) (Exs. K-Q). These materials constitute (1) orders that embody official acts of the legislative department of the State of California (Evid. Code § 452(c)); and (2) records from the State of California (Evid. Code § 452(d)). *See*

Quelimane, 19 Cal.4th at 45 fn. 9 (Legislative History materials are subject to judicial notice).

The legislative history for Senate Bill 1286 is directly relevant to interpreting C.C.P. §§ 425.16 & 425.17. *See Torres*, 26 Cal.4th at 1003 (Legislative history is relevant to determining the California Legislature’s intent regarding a statute).

E. The Court Should Take Judicial Notice Of The Legislative History Materials For Assembly Bill 1158 (Exs. R-Y)

DoubleVerify requests that this Court take judicial notice of the legislative history of Assembly Bill 1158 (*i.e.*, the 1997 Amendment to C.C.P. § 425.16) (Exs. R-Y). These materials constitute (1) orders that embody official acts of the legislative department of the State of California (Evid. Code § 452(c)); and (2) records from the State of California (Evid. Code § 452(d)). *See Quelimane*, 19 Cal.4th at 45 fn. 9 (Legislative History materials are subject to judicial notice).

The legislative history for Senate Bill 1286 is directly relevant to interpreting C.C.P. §§ 425.16 & 425.17. *See W. Sec. Bank v. Super. Ct.* (1997) 15 Cal.4th 232, 244. (“A subsequent expression of the Legislature as to the intent of the prior statute, although not binding on the court, may properly be used in determining the effect of a prior act.”).

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III. CONCLUSION

For the reasons stated above, DoubleVerify respectfully requests that this Court grant DoubleVerify's request for judicial notice of Exhibits A through D attached to the Bar-Nissim Decl.

Dated: March 22, 2018

FOX ROTHSCHILD LLP

By: 

Lincoln D. Bandlow

Rom Bar-Nissim

Attorneys for Respondent

DoubleVerify, Inc.

**DECLARATION OF ROM BAR-NISSIM IN SUPPORT OF
DOUBLEVERIFY'S REQUEST FOR JUDICIAL NOTICE**

I, Rom Bar-Nissim, declare as follows:

1. I am an attorney duly licensed to practice law before all courts of the State of California. I am an associate at the law firm of Fox Rothschild, LLP, and am counsel of record for Respondent DoubleVerify, Inc. ("DoubleVerify") in the above-captioned action. I make this declaration in support of DoubleVerify's Request for Judicial Notice. I have personal knowledge of the facts contained in this declaration and, if called and sworn as a witness, I could and would competently testify thereto.

2. Attached hereto as **Exhibit A** is a true and correct copy of the Court Order from the United States District Court for the District of Columbia issued May 23, 2017 granting a Stipulated Consent Judgment and Permanent Injunction against FilmOn in the case titled *Fox Television Stations, Inc., et al. v. FilmOn X, LLC, et al.* [Case No.: 13-758 (RMC), Dkt. No. 168]. This copy was downloaded on or about March 5, 2018, from the Public Access to Court Electronic Records ("PACER") system.

3. Attached hereto as **Exhibit B** is a true and correct copy of the Court Order from the United States District Court for the Central District of California issued May 24, 2017 granting a Stipulated Consent Judgment and Permanent Injunction against FilmOn in the case titled *Fox Television Stations, Inc., et al. v. FilmOn X, LLC, et al.* [Case No.: CV 12-06921-GW(JCx), Dkt. No. 243]. This copy was downloaded on or about March 5, 2018, from PACER.

4. Attached hereto as **Exhibit C** is a true and correct copy of the Court Order from the United States District Court for the Northern District of Illinois issued May 25, 2017 granting a Stipulated Consent Judgment and

Permanent Injunction against FilmOn in the case titled *FilmOn X, LLC v. Window To The World Commc'n, Inc.* [Case No.: 1:13-cv-08451, Dkt. No. 130]. This copy was downloaded on or about March 5, 2018, from PACER.

5. Attached as **Exhibit D** is a true and correct copy of the Legislative Counsel's Digest for Senate Bill No. 515 (codified as California Code of Civil Procedure Section 425.17), which was approved by the governor on September 6, 2003 and filed with the Secretary of State on September 8, 2003. On or about March 19, 2018 I downloaded a copy of this document from the State of California's Legislative Information website located at:

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=200320040SB515

6. Attached as **Exhibit E** is a true and correct copy of the May 12, 1997 Senate Judiciary Committee Analysis for Senate Bill 1296 (*i.e.*, the 1997 amendment to C.C.P. § 425.16). On March 22, 2018, I downloaded a copy of this document from Westlaw.

7. Attached as **Exhibit F** is a true and correct copy of the May 12, 1997 Senate Floor Analysis for Senate Bill 1296 (*i.e.*, the 1997 amendment to C.C.P. § 425.16). On March 22, 2018, I downloaded a copy of this document from Westlaw.

8. Attached as **Exhibit G** is a true and correct copy of the June 23, 1997 Assembly Floor Analysis for Senate Bill 1296 (*i.e.*, the 1997 amendment to C.C.P. § 425.16). On March 22, 2018, I downloaded a copy of this document from Westlaw.

9. Attached as **Exhibit H** is a true and correct copy of the June 23, 1997 Senate Floor Analysis for Senate Bill 1296 (*i.e.*, the 1997 amendment to C.C.P. § 425.16). On March 22, 2018, I downloaded a copy of this document from Westlaw.

10. Attached as **Exhibit I** is a true and correct copy of the June 23, 1997 Senate Floor Analysis for Senate Bill 1296 (*i.e.*, the 1997 amendment to C.C.P. § 425.16). On March 22, 2018, I downloaded a copy of this document from Westlaw.
11. Attached as **Exhibit J** is a true and correct copy of the July 2, 1997 Assembly Committee On Judiciary Analysis for Senate Bill 1296 (*i.e.*, the 1997 amendment to C.C.P. § 425.16). On March 22, 2018, I downloaded a copy of this document from Westlaw.
12. Attached as **Exhibit K** is a true and correct copy of the May 7, 2003 Senate Judiciary Committee Analysis for Senate Bill 515 (codified as C.C.P. § 425.17). On March 22, 2018 I downloaded a copy of this document from the State of California's Legislative Information website located at: <http://legalinfo.legislature.ca.gov>
13. Attached as **Exhibit L** is a true and correct copy of the May 9, 2003 Senate Floor Analysis for Senate Bill 515 (codified as C.C.P. § 425.17). On March 22, 2018 I downloaded a copy of this document from the State of California's Legislative Information website located at:
<http://legalinfo.legislature.ca.gov>
14. Attached as **Exhibit M** is a true and correct copy of the May 12, 2003 Senate Floor Analysis for Senate Bill 515 (codified as C.C.P. § 425.17). On March 22, 2018 I downloaded a copy of this document from the State of California's Legislative Information website located at:
<http://legalinfo.legislature.ca.gov>
15. Attached as **Exhibit N** is a true and correct copy of the May 21, 2003 Senate Floor Analysis for Senate Bill 515 (codified as C.C.P. § 425.17). On March 22, 2018 I downloaded a copy of this document from the State of California's Legislative Information website located at:
<http://legalinfo.legislature.ca.gov>

16. Attached as **Exhibit O** is a true and correct copy of the June 30, 2003 Assembly Committee Analysis for Senate Bill 515 (codified as C.C.P. § 425.17). On March 22, 2018 I downloaded a copy of this document from the State of California's Legislative Information website located at:

<http://legalinfo.legislature.ca.gov>

17. Attached as **Exhibit P** is a true and correct copy of the July 9, 2003 Assembly Floor Analysis for Senate Bill 515 (codified as C.C.P. § 425.17). On March 22, 2018 I downloaded a copy of this document from the State of California's Legislative Information website located at:

<http://legalinfo.legislature.ca.gov>

18. Attached as **Exhibit Q** is a true and correct copy of the August 22, 2003 Senate Floor Analysis for Senate Bill 515 (codified as C.C.P. § 425.17). On March 22, 2018 I downloaded a copy of this document from the State of California's Legislative Information website located at:

<http://legalinfo.legislature.ca.gov>

19. Attached as **Exhibit R** is a true and correct copy of the April 4, 2005 Assembly Committee On Judiciary Analysis for Assembly Bill 1158 (codified as C.C.P. § 425.18). On March 22, 2018 I downloaded a copy of this document from the State of California's Legislative Information website located at: <http://legalinfo.legislature.ca.gov>

20. Attached as **Exhibit S** is a true and correct copy of the April 20, 2005 Assembly Floor Analysis for Assembly Bill 1158 (codified as C.C.P. § 425.18). On March 22, 2018 I downloaded a copy of this document from the State of California's Legislative Information website located at:

<http://legalinfo.legislature.ca.gov>

21. Attached as **Exhibit T** is a true and correct copy of the April 27, 2005 Assembly Floor Analysis for Assembly Bill 1158 (codified as C.C.P. § 425.18). On March 22, 2018 I downloaded a copy of this document from

the State of California's Legislative Information website located at:

<http://legalinfo.legislature.ca.gov>

22. Attached as **Exhibit U** is a true and correct copy of the July 14, 2005 Senate Judiciary Committee for Assembly Bill 1158 (codified as C.C.P. § 425.18). On March 22, 2018 I downloaded a copy of this document from the State of California's Legislative Information website located at:

<http://legalinfo.legislature.ca.gov>

23. Attached as **Exhibit V** is a true and correct copy of the August 17, 2005 Senate Judiciary Committee Analysis for Assembly Bill 1158 (codified as C.C.P. § 425.18). On March 22, 2018 I downloaded a copy of this document from the State of California's Legislative Information website located at: <http://legalinfo.legislature.ca.gov>

24. Attached as **Exhibit W** is a true and correct copy of the August 24, 2005 Senate Floor Analyses for Assembly Bill 1158 (codified as C.C.P. § 425.18). On March 22, 2018 I downloaded a copy of this document from the State of California's Legislative Information website located at:

<http://legalinfo.legislature.ca.gov>

25. Attached as **Exhibit X** is a true and correct copy of the August 25, 2005 Senate Floor Analyses for Assembly Bill 1158 (codified as C.C.P. § 425.18). On March 22, 2018 I downloaded a copy of this document from the State of California's Legislative Information website located at:

<http://legalinfo.legislature.ca.gov>

26. Attached as **Exhibit Y** is a true and correct copy of the August 29, 2005 Assembly Floor Analysis for Assembly Bill 1158 (codified as C.C.P. § 425.18). On March 22, 2018 I downloaded a copy of this document from the State of California's Legislative Information website located at:

<http://legalinfo.legislature.ca.gov>

[PROPOSED] ORDER

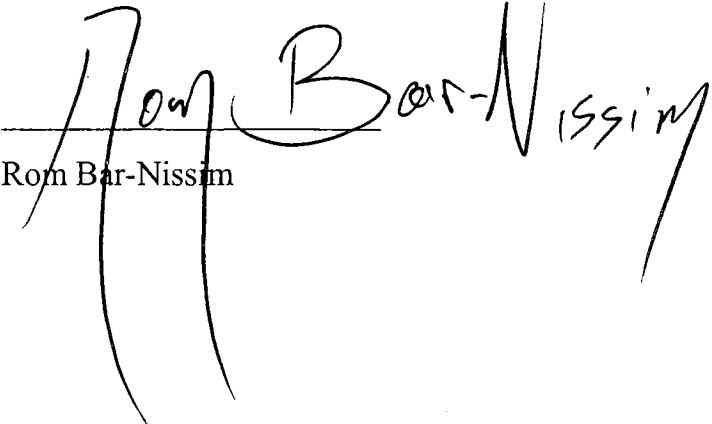
Good cause appearing therefor,

IT IS HEREBY ORDERED that judicial notice is taken of the documents requested by Respondent DoubleVerify.

Dated: _____, 2018

Justice of the California Supreme Court

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 22nd day of March, 2018, in Los Angeles, California.


Rom Bar-Nissim

PROOF OF SERVICE

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 10250 Constellation Blvd., Suite 900, Los Angeles, California 90067.

On March 22, 2018, I served the following document(s) described as **RESPONDENT'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF RESPONDENT'S ANSWERING BRIEF; DECLARATION OF ROM BAR-NISSIM; [PROPOSED] ORDER** on the interested parties in this action as follows:

Ryan G. Baker, Esq. Brian E. Klein, Esq. Scott M. Malzahn, Esq. BAKER MARQUART LLP 2029 Century Park East, Suite 1600 Los Angeles, CA 90067 Tel: 424-652-7800 Facsimile: 424-652-7850 E-Mail: rbaker@bakermarquart.com bklein@bakermarquart.com	Attorneys for Plaintiff and Petitioner, FILMON.COM, Inc.
Hon. Terry A. Green Los Angeles County Superior Court Stanley Mosk Courthouse Department 14 111 North Hill Street Los Angeles, CA 90012	Trial Judge (LASC Case No.: BC561987)
Clerk of the Court California Court of Appeal Second Appellate District, Div. 3 Ronald Reagan State Building 300 S. Spring Street, 2 nd Floor Los Angeles, CA 90013	Appeal Case No.: B264074

[X] BY OVERNIGHT MAIL (FEDEX): I enclosed said document(s) in an envelope or package provided by FEDEX and addressed to the persons at the addresses listed above. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of FEDEX or delivered such document(s) to a courier or driver

authorized by FEDEX to receive documents.

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

Executed on March 22, 2018, at Los Angeles, California.

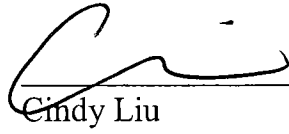

Cindy Liu

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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FOX TELEVISION STATIONS, INC.,)
<i>et al.</i> ,)
)
Plaintiffs,)
)
v.)
)
FILMON X, LLC, <i>et al.</i> ,)
)
Defendants.)
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Civil Action No. 13-758 (RMC)

STIPULATED CONSENT JUDGMENT
AND PERMANENT INJUNCTION

WHEREAS, Plaintiffs Fox Television Stations, LLC, Twentieth Century Fox Film Corporation, Fox Broadcasting Company, NBC Subsidiary (WRC-TV) LLC, Universal Television LLC, Universal Cable Productions LLC, Open 4 Business Productions LLC, Telemundo Network Group LLC, American Broadcasting Companies, Inc., Disney Enterprises, Inc., CBS Broadcasting Inc., CBS Studios Inc., Tegna Inc., and Sinclair Television Stations, LLC filed the above-captioned action asserting claims of copyright infringement against Defendants FilmOn X, LLC (formerly known as Aereokiller LLC), FilmOn.TV Networks, Inc., FilmOn.TV, Inc., FilmOn.com, Inc., and Alkiviades David (the "Defendants") (Dkt. Nos. 1 and 66);

WHEREAS, on September 5, 2013, the United States District Court for the District of Columbia, the Honorable Rosemary M. Collyer, presiding, entered a preliminary injunction against Defendants and its agents, servants, employees, and attorneys, and all those acting in concert or participation with them, restraining them from streaming, transmitting, retransmitting, or otherwise publicly performing, displaying, or distributing any Copyrighted Programming over the Internet (through websites such as filmon.com or filmonx.com), via web applications

(available through platforms such as the Windows App Store, Apple's App Store, the Amazon App Store, Facebook, or Google Play), via portable devices (such as through application on devices such as iPhones, iPads, Android devices, smart phones, or tablets), or by means of any device or process (*see* Dkt. Nos. 33 and 34);

WHEREAS, on September 25, 2014, Defendants filed a second amended counterclaim alleging that FilmOn X, LLC is entitled to a compulsory copyright license to retransmit broadcast television pursuant to 17 U.S.C. § 111 (the "Section 111 Counterclaim") (Dkt. 67);

WHEREAS, on November 12, 2015, the Court entered an order on the parties' cross motions for partial summary judgment in which it dismissed the Section 111 Counterclaim (Dkt. No. 128);

WHEREAS, on January 5, 2016, the Court entered an order in which it entered a final judgment on the Section 111 Counterclaim and found there is no just reason for delay of appeal from this partial judgment under Federal Rule of Civil Procedure 54(b) (Dkt. No. 136);

WHEREAS, on January 29, 2016, Defendants appealed (Dkt. No. 140) and oral argument took place on March 17, 2017;

WHEREAS, the Parties have reached agreement for resolution of this action, the terms and conditions of which are set forth in a settlement agreement dated May 11, 2017 (the "Settlement Agreement"); and

WHEREAS, the Parties' Settlement Agreement is conditioned upon entry by the Court of a stipulated consent judgment and permanent injunction and the continuing jurisdiction of the Court on the terms and conditions set forth herein;

THEREFORE, the Parties stipulate and agree that this Court has jurisdiction to enter a stipulated consent judgment and permanent injunction on the following terms and conditions and that the Court shall have continuing jurisdiction for purposes of construction, modification and

enforcement of this consent judgment and permanent injunction and the Parties' Settlement Agreement, and request that the Court enter the attached ~~Proposed~~ Consent Judgment and Permanent Injunction Pursuant to Stipulation ("Stipulated Consent Judgment and Permanent Injunction").

IT IS SO STIPULATED.

Dated: May 23, 2017

Respectfully submitted,

/s/ Julie A. Shepard

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*Attorneys for Plaintiffs Fox Television Stations,
LLC, Twentieth Century Fox Film Corporation,
and Fox Broadcasting Company*

Dated: May 23, 2017

/s/ James S. Blackburn

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*Attorneys for Plaintiffs NBC Subsidiary
(WRC-TV) LLC, Universal Television LLC,
Universal Cable Productions LLC, Open 4
Business Productions LLC, Telemundo
Network Group LLC, American
Broadcasting Companies, Inc., Disney
Enterprises, Inc., TEGNA, Inc., CBS
Broadcasting Inc., CBS Studios Inc., and
Sinclair Television Stations LLC*

Dated: May 23, 2017

/s/ Ryan G. Baker

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*Attorneys for Defendants and Counterclaim
Plaintiffs FilmOn X, LLC, FilmOn.TV, Inc.,
FilmOn.TV Networks, Inc., and FilmOn.com, Inc.
and Defendant Alkiviades David*

Pursuant to the Settlement Agreement reached between Plaintiffs and Defendants, the foregoing stipulation of the Parties, and for good cause shown, the Court hereby enters the following Stipulated Consent Judgment and Permanent Injunction:

STIPULATED CONSENT JUDGMENT AND PERMANENT INJUNCTION

1. Defendants, its affiliated companies, and all of its officers, directors, agents, servants, and employees, and all natural and corporate persons in active concert or participation or in privity with any of them (collectively, the “Enjoined Persons”) ARE HEREBY PERMANENTLY RESTRAINED AND ENJOINED from streaming, transmitting, retransmitting, or otherwise publicly performing, displaying, or distributing without Authorization any Copyrighted Programming over the Internet (through websites such as filmon.com or filmonx.com), via web applications (available through platforms such as the Windows App Store, Apple’s App Store, the Amazon App Store, Facebook, or Google Play), via portable devices (such as through applications on devices such as iPhones, iPads, Android devices, smart phones, or tablets), or by means of any device or process, and from otherwise infringing, by any means, directly or indirectly, any of Plaintiffs’ exclusive rights under Section 106 of the Copyright Act with respect to Copyrighted Programming. “Authorization” means and requires a written license from the copyright holder.

2. “Copyrighted Programming” shall mean each of those television programming works, or portions thereof, whether now in existence or later created, including but not limited to original programming, motion pictures and newscasts, in which the Plaintiffs, or any of them, (or any parent, subsidiary, or affiliate of any of the Plaintiffs) owns or controls an exclusive right under the United States Copyright Act, 17 U.S.C. §§ 101 et seq.

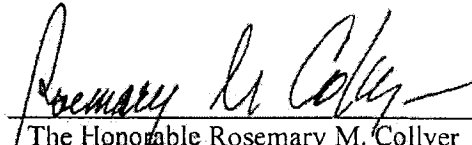
3. Violation of this Stipulated Consent Judgment and Permanent Injunction shall expose Defendants and all other persons bound by this Stipulated Consent Judgment and Permanent Injunction to all applicable penalties, including contempt of Court.

4. All claims and defenses in this action are hereby resolved by this Stipulated Consent Judgment and Permanent Injunction.

5. This Court shall retain continuing jurisdiction over the Parties and the action for purposes of construction, modification, and enforcement of this Stipulated Consent Judgment and Permanent Injunction and/or enforcing the Parties' Settlement Agreement.

6. All parties are to bear their own costs.

IT IS SO ORDERED.



The Honorable Rosemary M. Collyer
United States District Judge

23 May 2017

EXHIBIT B

1 JENNER & BLOCK LLP
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 5

6 Attorneys for Plaintiffs Fox
 Television Stations, Inc., Twentieth
 Century Fox Film Corp., and Fox
 7 Broadcasting Company
 8

9 UNITED STATES DISTRICT COURT
 10 CENTRAL DISTRICT OF CALIFORNIA
 11 WESTERN DIVISION

12 FOX TELEVISION STATIONS, INC.,
 13 TWENTIETH CENTURY FOX FILM
 14 CORP., and FOX BROADCASTING
 COMPANY,

15 Plaintiffs,

16 v.

17 FILMON X, LLC, FILMON.TV, INC.,
 18 FILMON.TV NETWORKS, INC.,
 19 FILMON.COM, INC., ALKIVIADES
 DAVID, and JOHN DOES 1-3,
 inclusive,

20 Defendants.

21 NBCUNIVERSAL MEDIA, LLC, et al.

22 Plaintiffs,
 23

24 v.

25 FILMON X LLC, et al.,

26 Defendants.
 27
 28

Case No.: CV 12-6921-GW(JCx)
 (consolidated with Case No. CV 12-
 6950-GW(JCx))

Hon. George H. Wu

**STIPULATED CONSENT
 JUDGMENT AND PERMANENT
 INJUNCTION**

1 Pursuant to the Settlement Agreement reached between Plaintiffs and
2 Defendants, the foregoing stipulation of the Parties, and for good cause shown, the
3 Court hereby enters the following Stipulated Consent Judgment and Permanent
4 Injunction:

5 **STIPULATED CONSENT JUDGMENT AND PERMANENT INJUNCTION**

6 1. Defendants, its affiliated companies, and all of its officers, directors,
7 agents, servants, and employees, and all natural and corporate persons in active
8 concert or participation or in privity with any of them (collectively, the “Enjoined
9 Persons”) ARE HEREBY PERMANENTLY RESTRAINED AND ENJOINED
10 from streaming, transmitting, retransmitting, or otherwise publicly performing,
11 displaying, or distributing without Authorization any Copyrighted Programming
12 over the Internet (through websites such as filmon.com or filmonx.com), via web
13 applications (available through platforms such as the Windows App Store, Apple’s
14 App Store, the Amazon App Store, Facebook, or Google Play), via portable
15 devices (such as through application on devices such as iPhones, iPads, Android
16 devices, smart phones, or tablets), or by means of any device or process, and from
17 otherwise infringing, by any means, directly or indirectly, any of Plaintiffs’
18 exclusive rights under Section 106 of the Copyright Act with respect to
19 Copyrighted Programming. “Authorization” means and requires a written license
20 from the copyright holder.

21 2. “Copyrighted Programming” shall mean each of those television
22 programming works, or portions thereof, whether now in existence or later created,
23 including but not limited to original programming, motion pictures and newscasts,
24 in which the Plaintiffs, or any of them, (or any parent, subsidiary, or affiliate of any
25 of the Plaintiffs) owns or controls an exclusive right under the United States
26 Copyright Act, 17 U.S.C. §§ 101, et seq.

27 3. Violation of this Stipulated Consent Judgment and Permanent
28

1 Injunction shall expose Defendants and all other persons bound by this Stipulated
2 Consent Judgment and Permanent Injunction to all applicable penalties, including
3 contempt of Court.

4 4. All claims and defenses in this action are hereby resolved by this
5 Stipulated Consent Judgment and Permanent Injunction.

6 5. This Court shall retain continuing jurisdiction over the Parties and the
7 action for purposes of construction, modification, and enforcement of this
8 Stipulated Consent Judgment and Permanent Injunction and/or enforcing the
9 Parties' Settlement Agreement.

10 6. All parties are to bear their own costs.

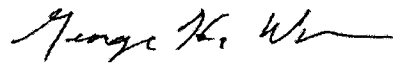
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12 IT IS SO ORDERED.

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14 SIGNED at Los Angeles, California, this 24th day of May, 2017.

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The Honorable George H. Wu
United States District Judge

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EXHIBIT C

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

FILMON X, LLC,)	Case No. 13-CV-08451
)	
Plaintiffs,)	The Honorable Charles P. Kocoras
)	
v.)	Magistrate Geraldine Brown
)	
WINDOW TO THE WORLD COMMUNICATIONS, INC.,)	
)	
Defendant.)	
)	
v.)	
)	
WINDOW TO THE WORLD COMMUNICATIONS, INC. d/b/a WTTW,)	
)	
Counterclaim Plaintiff,)	
)	
v.)	
)	
FILMON X, LLC, FILMON.TV, INC., FILMON.TV NETWORKS, INC., FILMON.COM, INC., AND ALKIVIADES DAVID)	
)	
Counterclaim Defendants.)	

**STIPULATED CONSENT JUDGMENT
AND PERMANENT INJUNCTION**

WHEREAS, Plaintiff FilmOn X, LLC (formerly known as Aereokiller LLC) (“FilmOn X” or “Plaintiff”) filed the above-captioned action asserting a declaratory relief action against Defendant and Counterclaimant Window to the World Communications, Inc. (“WTTW”) (Dkt. No. 1);

WHEREAS, WTTW filed an amended counterclaim for copyright infringement against FilmOn X, FilmOn.TV Networks, FilmOn.TV, Inc., FilmOn.com, Inc. and Alkiviades David (collectively, "Counterclaim Defendants") (Dkt. No. 38);

WHEREAS, Counterclaim Defendants filed an answer and asserted affirmative defenses to WTTW's amended counterclaim for copyright infringement (Dkt. Nos. 39, 39.1);

WHEREAS, on March 23, 2016, the United States District Court for the District of Illinois, Northern District, Eastern Division, the Honorable Charles P. Kocoras, presiding, entered an order on the parties' cross motions for partial summary judgment, finding that FilmOn X, LLC is not entitled to a compulsory copyright license under 17 U.S.C. § 111 (the "Section 111 Claim") (Dkt. No. 109);

WHEREAS, on May 5, 2016, the Court entered an order granting the parties' joint stipulation in which it entered a final judgment on the Section 111 Claim and found there is no just reason for delay of appeal from this partial judgment under Federal Rule of Civil Procedure 54(b) (Dkt. No. 114);

WHEREAS, on June 23, 2016, FilmOn X appealed (Dkt. No. 115) and oral argument took place on January 19, 2017;

WHEREAS, Plaintiff, Counterclaim Defendants and WTTW (collectively, "the Parties") have reached agreement for resolution of this action, the terms and conditions of which are set forth in a settlement agreement dated May 13, 2017 (the "Settlement Agreement"); and

WHEREAS, the Parties' Settlement Agreement is conditioned upon entry by the Court of a stipulated consent judgment and permanent injunction and the continuing jurisdiction of the Court on the terms and conditions set forth herein;

THEREFORE, the Parties stipulate and agree that this Court has jurisdiction to enter a stipulated consent judgment and permanent injunction on the following terms and conditions and

that the Court shall have continuing jurisdiction for purposes of the construction, modification, and enforcement of the consent judgment and permanent injunction and the Parties' Settlement Agreement, and request that the Court enter the attached [Proposed] Consent Judgment and Permanent Injunction Pursuant to Stipulation ("Stipulated Consent Judgment and Permanent Injunction"). IT IS SO STIPULATED.

Dated: May 23, 2017

Respectfully submitted,

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*Attorneys for Defendant and Counterclaim
Plaintiff Window to the World Communications,
Inc.*

Dated: May 23, 2017

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Attorneys for Plaintiff and Counterclaim

*Defendant FilmOn X, LLC and Counterclaim
Defendants FilmOn.TV, Inc., FilmOn.TV
Networks, Inc., FilmOn.com, Inc. and Alkiviades
David*

Pursuant to the Settlement Agreement reached between FilmOn and WTTW, the foregoing stipulation of the Parties, and for good cause shown, the Court hereby enters the following Stipulated Consent Judgment and Permanent Injunction:

STIPULATED CONSENT JUDGMENT AND PERMANENT INJUNCTION

1. Plaintiff and Counterclaim Defendants, their affiliated companies, and all of their officers, directors, agents, servants, and employees, and all natural and corporate persons in active concert or participation or in privity with any of them (collectively, the “Enjoined Persons”) ARE HEREBY PERMANENTLY RESTRAINED AND ENJOINED from streaming, transmitting, retransmitting, or otherwise publicly performing, displaying, or distributing without Authorization any Copyrighted Programming over the Internet (through websites such as filmon.com or filmonx.com), via web applications (available through platforms such as the Windows App Store, Apple’s App Store, the Amazon App Store, Facebook, or Google Play), via portable devices (such as through application on devices such as iPhones, iPads, Android devices, smart phones, or tablets), or by means of any device or process, and from otherwise infringing, by any means, directly or indirectly, any of WTTW’s exclusive rights under Section 106 of the Copyright Act with respect to Copyrighted Programming. “Authorization” means and requires a written license from the copyright holder.

2. “Copyrighted Programming” shall mean each of those television programming works, or portions thereof, whether now in existence or later created, including but not limited to original programming, motion pictures and newscasts, in which WTTW owns or controls an exclusive right under the United States Copyright Act, 17 U.S.C. §§ 101 et seq.

3. Violation of this Stipulated Consent Judgment and Permanent Injunction shall expose Plaintiff and Counterclaim Defendants and all other persons bound by this Stipulated

Consent Judgment and Permanent Injunction to all applicable penalties, including contempt of Court.

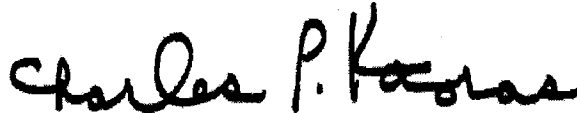
4. All claims and defenses in this action are hereby resolved by this Stipulated Consent Judgment and Permanent Injunction.

5. This Court shall retain continuing jurisdiction over the Parties and the action for purposes of construction, modification, and enforcement of this Stipulated Consent Judgment and Permanent Injunction and/or enforcing the Parties' Settlement Agreement.

6. All parties are to bear their own costs.

IT IS SO ORDERED.

Dated: 5/25/2017

A handwritten signature in black ink that reads "Charles P. Kocoras". The signature is written in a cursive, slightly slanted style.

The Honorable Charles P. Kocoras
United States District Judge

EXHIBIT D

**SB-515 Civil actions.** (2003-2004)

SHARE THIS:

**Senate Bill No. 515****CHAPTER 338**

An act to add Section 425.17 to the Code of Civil Procedure, relating to civil actions.

[Filed with Secretary of State September 08, 2003. Approved by Governor September 06, 2003.]

LEGISLATIVE COUNSEL'S DIGEST

SB 515, Kuehl. Civil actions.

Existing law provides that 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, as specified, is subject to a special motion to strike, unless the court, after considering the pleadings and supporting and opposing affidavits, determines that there is a probability that the plaintiff will prevail on the claim.

This bill would provide that certain actions are not subject to a special motion to strike, as specified, including, but not limited to, any action brought solely in the public interest or on behalf of the general public, if specified conditions exist. The bill would further provide that related appeal provisions are not applicable to these actions. The bill would also provide that its provisions are severable, and would make specified findings and declarations.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 425.17 is added to the Code of Civil Procedure, to read:

425.17. (a) The Legislature finds and declares that there has been a disturbing abuse of Section 425.16, the California Anti-SLAPP Law, which has undermined the exercise of the constitutional rights of freedom of speech and petition for the redress of grievances, contrary to the purpose and intent of Section 425.16. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process or Section 425.16.

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

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

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

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

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

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

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

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

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

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

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

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

SEC. 2. The provisions of this act are severable. If any provision of this act or its application is held invalid, that invalidity does not affect other provisions or applications that can be given effect without the invalid provision or application.

CA B. An., S.B. 1296 Sen., 5/12/1997

California Bill Analysis, Senate Committee, 1997-1998 Regular Session, Senate Bill 1296

May 12, 1997
California Senate
1997-1998 Regular Session

SENATE JUDICIARY COMMITTEE

John L. Burton, Chairman
1997-98 Regular Session

SB 1296

Senator Lockyer

As Amended May 12, 1997

Hearing Date: May 13, 1997

Code of Civil Procedure

GWW:lgh

SUBJECT

Civil Procedure: Special Motion to Strike oSLAPPo (Strategic Lawsuits Against Public Participation) Suits”

DESCRIPTION

This bill would revise the anti-SLAPP statute to also cover conduct in furtherance of the constitutional right of petition or of free speech in connection with a public issue or an issue of public interest, and to express the Legislative intent behind the statute to state that section shall be construed broadly.

BACKGROUND

Strategic Lawsuits Against Public Participation, or SLAPP suits, as they have become popularly termed, were first defined by University of Denver Law School Professor George Pring and University of Denver Sociology Professor Penelope Canan in their seminal article, oStrategic Lawsuits Against Public Participationo (1988) 35 Social Problems 506, as ocivil lawsuits ... that are aimed at preventing citizens from exercising their political rights or punishing those who have done so.o

While SLAPP suits omasquerade as ordinary lawsuitso such as defamation and interference with prospective economic advantage, they are generally meritless suits brought primarily to chill the exercise of free speech or petition rights by the threat of severe economic sanctions against the defendant, and not to vindicate a legally cognizable right. (See Pring and Canan, SLAPPS: Getting Sued for Speaking Out (Temple University Press, 1996).)

In 1992, Code of Civil Procedure Section 425.16 was enacted by SB 1264 (Lockyer), Chapter 726 of Stats. 1992, to provide a “special motion to strike” which could be used by defendants in “SLAPP” suits to obtain an early judicial ruling and termination of a meritless claim arising from a person’s exercise of the right to petition or free speech under the United

States or California Constitution in connection with a public issue. In enacting the provision, the Legislature expressly found that there has been a disturbing increase in lawsuits primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances....that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process.

CHANGES TO EXISTING LAW

Existing law, Code of Civil Procedure Section 425.16, provides that 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, is subject to a special motion to strike, unless the court, after considering the pleadings and supporting and opposing affidavits, determines that there is a probability that the plaintiff will prevail on the claim.

1. Existing law defines specified acts in furtherance of free speech or petition rights which fall within the aegis of Section 425.16, including any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest.

This bill would also apply the law to "any other conduct in furtherance of the constitutional right of petition or of free speech in connection with a public issue or an issue of public interest."

2. Existing law sets forth the intent of the Legislature that it is in the public interest to encourage continued participation in matters of public significance and that this participation should not be chilled through abuse of the judicial process.

This bill would additionally provide that the section shall be construed broadly.

3. Existing law applies its provisions to a complaint and provides that a special motion to strike may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time it deems proper.

This bill would provide that a complaint includes a cross-complaint and a petition. It would further provide that the special motion may be filed within 60 days of service of any amended or supplemental complaint.

COMMENT

1. Stated need to clarify that protected conduct is also protected by anti-SLAPP statute

Proponents assert that the constitutional right of free speech and petition also includes constitutionally protected expressive conduct. This facet of First Amendment jurisprudence was recognized in *Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, which held that the protections of Section 425.16 applies to both "communicative conduct" and "noncommunicative conduct." (Id. at pp. 18-20.)

This bill would reflect that law and specifically apply the provisions of Section 425.16 to "any other conduct in furtherance of the constitutional right of petition or of free speech in connection with a public issue or an issue of public interest."

The proposed phraseology ("any other conduct") would appear to limit the provision to "conduct" when that phrase is compared to categories (1), (2), and (3) which refers exclusively to "written or oral statements or writings."

2. Purpose of broad construction of statute is to better protect exercise of constitutional rights against meritless claims

According to proponents, as Section 425.16 is beginning to be defined by the courts of appeal, there have been conflicting opinions as to whether the Legislature intended the statute to be construed narrowly to protect a narrowly defined category of cases (*Zhou v. Wong* (1996) 48 Cal.App.4th 1114 - statute applies only to limited sphere of activities, those closely tied to the right of petition and free speech), or to have "broad application" to protect exercises of a person's constitutional rights of free speech and petition for redress of grievances (see, e.g., *Averill v. Superior Court* (1996) 42 Cal.App.4th 1170 and *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628). In *Wollersheim*, the court noted that the statute applies to any cause of action arising from the exercise of the right to petition government for redress of grievances, such as the filing of any court action.

This bill would declare the Legislature's intent that the intent provisions of Section 425.16 should be construed broadly. Those provisions, enacted in 1992, provide that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance and that this participation should not be chilled through abuse of the judicial process. Appended to that existing declaration would be added: o[T]o this end, this section shall be construed broadly.o

Proponents contend that the additional declaration of Legislative intent would strengthen the statute against narrow readings of its protections, which in turn would better protect a person's exercise of his or her constitutional rights of petition and free speech in matters of public significance against meritless claims designed to stifle that exercise.

3. Application to amended complaints and cross-complaints

According to proponents, these provisions are clarifying provisions to make it clear that the statute also applies to cross-complaints and amended complaints.

Inclusion in the statute, however, would not bring all cross-complaints or amended complaints within the statute. As with original complaints, the cross-complaint or amended complaint must still qualify as a SLAPP suit under the terms of Section 425.16.

Support: ACLU; Planning and Conservation League; California Anti-SLAPP Project; California Broadcasters Association.

Opposition: None Known

HISTORY

Source: California Newspaper Publishers Association

Related Pending Legislation: None Known

Prior Legislation: None Known

CA B. An., S.B. 1296 Sen., 5/12/1997

CA B. An., S.B. 1296 Sen., 5/12/1997

California Bill Analysis, Senate Floor, 1997-1998 Regular Session, Senate Bill 1296

May 12, 1997
California Senate
1997-1998 Regular Session

SENATE RULES COMMITTEE

Office of Senate Floor Analyses

THIRD READING

Bill No: SB 1296

Author: Lockyer (D)

Amended: 5/12/97

Vote: 21

SENATE JUDICIARY COMMITTEE: 5-2, 5/14/97

AYES: Burton, Lee, Lockyer, O'Connell, Sher

NOES: Haynes, Wright

NOT VOTING: Calderon, Leslie

SUBJECT: Civil procedures: special motion to strike "SLAPP" (Strategic Lawsuits Against Public Participation) suits

SOURCE: California Newspaper Publishers Association

DIGEST: This bill would revise the anti-SLAPP statute to also cover conduct in furtherance of the constitutional right of petition or of free speech in connection with a public issue or an issue of public interest, and to express the legislative intent behind the statute to state that section shall be construed broadly.

ANALYSIS: Strategic lawsuits against public participation, or SLAPP suits, as they have become popularly termed, were first defined by University of Denver Law School Professor George Pring and University of Denver Sociology Professor Penelope Canan in their seminal article, "Strategic Lawsuits Against Public Participation" (1988) 35 Social Problems 506, as "civil lawsuits ... that are aimed at preventing citizens from exercising their political rights or punishing those who have done so."

While SLAPP suits "masquerade as ordinary lawsuits" such as defamation and interference with prospective economic advantage, they are generally meritless suits brought primarily to chill the exercise of free speech or petition rights by the threat of severe economic sanctions against the defendant, and not to vindicate a legally cognizable right. (See Pring and Canan, SLAPPS: "Getting Sued for Speaking Out" (Temple University Press, 1996).)

In 1992, Code of Civil Procedure Section 425.16 was enacted by SB 1264 (Lockyer), Chapter 726 of Stats. 1992, to provide a "special motion to strike" which could be used by defendants in "SLAPP" suits to obtain an early judicial ruling and termination of a meritless claim arising from a person's exercise of the right to petition or free speech under the United

States or California Constitution in connection with a public issue. In enacting the provision, the Legislature expressly found that "there has been a disturbing increase in lawsuits primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances....that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process."

Existing law, Code of Civil Procedure Section 425.16, provides that 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, is subject to a special motion to strike, unless the court, after considering the pleadings and supporting and opposing affidavits, determines that there is a probability that the plaintiff will prevail on the claim.

Existing law defines specified acts in furtherance of free speech or petition rights which fall within the aegis of Section 425.16, including "any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest."

This bill would also apply the law to "any other conduct in furtherance of the constitutional right of petition or of free speech in connection with a public issue or an issue of public interest."

Existing law sets forth the intent of the Legislature that it is in the public interest to encourage continued participation in matters of public significance and that this participation should not be chilled through abuse of the judicial process.

This bill would additionally provide that the section shall be construed broadly.

Existing law applies its provisions to a complaint and provides that a special motion to strike may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time it deems proper.

This bill would provide that a complaint includes a "cross-complaint" and "petition." It would further provide that the special motion may be filed within 60 days of service of any amended or supplemental complaint.

This bill would declare the Legislature's intent that the intent provisions of Section 425.16 should be construed broadly. Those provisions, enacted in 1992, provide that "there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance and that this participation should not be chilled through abuse of the judicial process." Appended to that existing declaration would be added: "[T]o this end, this section shall be construed broadly."

Proponents contend that the additional declaration of legislative intent would strengthen the statute against narrow readings of its protections, which in turn would better protect a person's exercise of his or her constitutional rights of petition and free speech in matters of public significance against meritless claims designed to stifle that exercise.

FISCAL EFFECT:

Appropriation: No

Fiscal Com.: No

Local: No

SUPPORT: (Verified 5/15/97)

California Newspaper Publishers Association (source)

American Civil Liberties Union

Planning and Conservation League

California Anti-SLAPP Project

California Broadcasters Association

ARGUMENTS IN SUPPORT: Proponents assert that the constitutional right of free speech and petition also includes constitutionally protected expressive conduct. This facet of First Amendment jurisprudence was recognized in Ludwig v Superior Court (1995) 37 Cal.App.4th 8, which held that the protections of Section 425.16 applies to both “communicative conduct” and “noncommunicative conduct.” (Id. at pp. 18-20.)

This bill would reflect that law and specifically apply the provisions of Section 425.16 to “any other conduct in furtherance of the constitutional right of petition or of free speech in connection with a public issue or an issue of public interest.”

According to proponents, as Section 425.16 is beginning to be defined by the courts of appeal, there have been conflicting opinions as to whether the Legislature intended the statute to be construed narrowly to protect a narrowly defined category of cases (Zhou v Wong (1996) 48 Cal.App.4th 1114 - statute applies only to limited sphere of activities, those closely tied to the right of petition and free speech), or to have “broad application” to protect exercises of a person's constitutional rights of free speech and petition for redress of grievances (see, e.g., Averill v Superior Court (1996) 42 Cal.App.4th 1170 and Church of Scientology v Wollersheim (1996) 42 Cal.App.4th 628). In Wollersheim, the court noted that the statute applies to any cause of action arising from the exercise of the right to petition government for redress of grievances, such as the filing of any court action.

RJG:ctl 5/15/97 Senate Floor Analyses

SUPPORT/OPPOSITION: SEE ABOVE

CA B. An., S.B. 1296 Sen., 5/12/1997

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CA B. An., S.B. 1296 Assem., 6/23/1997

California Bill Analysis, Assembly Floor, 1997-1998 Regular Session, Senate Bill 1296

June 23, 1997
California Assembly
1997-1998 Regular Session

SENATE THIRD READING

SB 1296 (Lockyer)

Amended June 23, 1997

Majority vote

SENATE VOTE: 34-0

JUDICIARY 13-0

Ayes: Escutia, Morrow, Aroner, Baugh, Caldera, Figueroa, Honda, Keeley, Kuehl, Martinez, Ortiz, Pacheco, Shelley

SUMMARY: Clarifies the intent behind, and the coverage of, California's so-called "anti-SLAPP" statute. Specifically, this bill:

- 1) Amends the anti-SLAPP statute to clarify that the Legislature intended it to be construed broadly.
- 2) Amends the statute to clarify that it covers conduct in furtherance of the constitutional rights of petition and of free speech in connection with a public issue, or with an issue of public interest.
- 3) Clarifies various definitions in the statute, specifying that a 'complaint' includes a 'cross-complaint' and 'petition,' 'plaintiff' includes 'cross-complainant' and 'petitioner,' and 'defendant' includes 'cross-defendant' and 'respondent.'

EXISTING LAW:

- 1) Provides that 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 is subject to a special motion to strike, unless the court, after considering the pleadings and supporting and opposing affidavits, determines that there is a probability that the plaintiff will prevail on the claim. (Code of Civil Procedure Section 425.16. Hereafter all statutory references are to the Code of Civil Procedure.)
- 2) Defines specified acts in furtherance of free speech or petition rights which fall within the scope of Section 425.16, including "any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest."
- 3) Sets forth legislative intent that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process.
- 4) Applies its provisions to a complaint and provides that a special motion to strike may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time it deems proper.

FISCAL EFFECT: Unknown, though substantial reductions in litigation costs arising from the exercise of the rights of petition and speech are anticipated.

COMMENTS: This bill is sponsored by the California Newspaper Publishers Association to address recent court cases that have too narrowly construed California's anti-SLAPP suit statute. The bill's proponents also believe that some courts have failed to understand that this statute covers any conduct in furtherance of the constitutional rights of petition and of free speech in connection with a public issue or with any issue of public interest.

Strategic Lawsuits Against Public Participation, or SLAPP suits, are "civil lawsuits ... that are aimed at preventing citizens from exercising their political rights or punishing those who have done so."

This bill is designed to address some recent court cases narrowly interpreting the scope of the anti-SLAPP statute. This bill clarifies that constitutionally-protected conduct (the rights of free speech and of petition) is unequivocally protected by the statute, and makes clear that the statute applies to cross-complaints and petitions, as well as to complaints.

Regarding the statute's reach into constitutionally-protected "conduct" as well as statements, this bill comports with the reasoning of the court in the recent case of Ludwig v. Superior Court (1995) which held that Section 425.16's protections apply to both of these basic forms of protected communication.

Analysis prepared by: Drew Liebert / ajud / (916) 445-4560

FN 033599

CA B. An., S.B. 1296 Assem., 6/23/1997

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CA B. An., S.B. 1296 Sen., 6/23/1997

California Bill Analysis, Senate Floor, 1997-1998 Regular Session, Senate Bill 1296

June 23, 1997
California Senate
1997-1998 Regular Session

SENATE RULES COMMITTEE

Office of Senate Floor Analyses

UNFINISHED BUSINESS

Bill No: SB 1296

Author: Lockyer (D)

Amended: 6/23/97

Vote: 21

SENATE JUDICIARY COMMITTEE: 5-2, 5/14/97

AYES: Burton, Lee, Lockyer, O'Connell, Sher

NOES: Haynes, Wright

NOT VOTING: Calderon, Leslie

SENATE FLOOR: 34-0, 5/23/97

AYES: Alpert, Ayala, Brulte, Burton, Calderon, Costa, Greene, Hayden, Haynes, Hughes, Hurtt, Johnson, Johnston, Karnette, Kelley, Knight, Kopp, Lee, Leslie, Lewis, Lockyer, Maddy, Monteith, Mountjoy, O'Connell, Peace, Rainey, Rosenthal, Schiff, Sher, Solis, Thompson, Watson, Wright

NOT VOTING: Craven, Dills, Johannessen, McPherson, Polanco, Vasconcellos

ASSEMBLY FLOOR: Not Available

SUBJECT: Civil procedures: special motion to strike "SLAPP"

(Strategic Lawsuits Against Public Participation) suits

SOURCE: California Newspaper Publishers Association

DIGEST: This bill would revise the anti-SLAPP statute to also cover conduct in furtherance of the constitutional right of petition or of free speech in connection with a public issue or an issue of public interest, and to express the legislative intent behind the statute to state that section shall be construed broadly.

Assembly Amendments make technical changes to the bill.

ANALYSIS: Strategic lawsuits against public participation, or SLAPP suits, as they have become popularly termed, were first defined by University of Denver Law School Professor George Pring and University of Denver Sociology Professor Penelope Canan in their seminal article, "Strategic Lawsuits Against Public Participation" (1988) 35 Social

Problems 506, as “civil lawsuits ... that are aimed at preventing citizens from exercising their political rights or punishing those who have done so.”

While SLAPP suits “masquerade as ordinary lawsuits” such as defamation and interference with prospective economic advantage, they are generally meritless suits brought primarily to chill the exercise of free speech or petition rights by the threat of severe economic sanctions against the defendant, and not to vindicate a legally cognizable right. (See Pring and Canan, SLAPPS: “Getting Sued for Speaking Out” (Temple University Press, 1996).)

In 1992, Code of Civil Procedure Section 425.16 was enacted by SB 1264 (Lockyer), Chapter 726 of Stats. 1992, to provide a “special motion to strike” which could be used by defendants in “SLAPP” suits to obtain an early judicial ruling and termination of a meritless claim arising from a person's exercise of the right to petition or free speech under the United States or California Constitution in connection with a public issue. In enacting the provision, the Legislature expressly found that “there has been a disturbing increase in lawsuits primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances....that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process.”

Existing law, Code of Civil Procedure Section 425.16, provides that 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, is subject to a special motion to strike, unless the court, after considering the pleadings and supporting and opposing affidavits, determines that there is a probability that the plaintiff will prevail on the claim.

Existing law defines specified acts in furtherance of free speech or petition rights which fall within the aegis of Section 425.16, including “any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest.”

This bill would also apply the law to “any other conduct in furtherance of the constitutional right of petition or of free speech in connection with a public issue or an issue of public interest.”

Existing law sets forth the intent of the Legislature that it is in the public interest to encourage continued participation in matters of public significance and that this participation should not be chilled through abuse of the judicial process.

This bill would additionally provide that the section shall be construed broadly.

Existing law applies its provisions to a complaint and provides that a special motion to strike may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time it deems proper.

This bill would provide that a complaint includes a “cross-complaint” and “petition.” It would further provide that the special motion may be filed within 60 days of service of any amended or supplemental complaint.

This bill would declare the Legislature's intent that the intent provisions of Section 425.16 should be construed broadly. Those provisions, enacted in 1992, provide that “there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance and that this participation should not be chilled through abuse of the judicial process.” Appended to that existing declaration would be added: “[T]o this end, this section shall be construed broadly.”

Proponents contend that the additional declaration of legislative intent would strengthen the statute against narrow readings of its protections, which in turn would better protect a person's exercise of his or her constitutional rights of petition and free speech in matters of public significance against meritless claims designed to stifle that exercise.

FISCAL EFFECT:

Appropriation: No

Fiscal Com.: No

Local: No

SUPPORT: (Verified 7/18/97)

California Newspaper Publishers Association (source)

American Civil Liberties Union

Planning and Conservation League

California Anti-SLAPP Project

California Broadcasters Association

Orange County Register

ARGUMENTS IN SUPPORT: Proponents assert that the constitutional right of free speech and petition also includes constitutionally protected expressive conduct. This facet of First Amendment jurisprudence was recognized in Ludwig v Superior Court (1995) 37 Cal.App.4th 8, which held that the protections of Section 425.16 applies to both "communicative conduct" and "noncommunicative conduct." (Id. at pp. 18-20.)

This bill would reflect that law and specifically apply the provisions of Section 425.16 to "any other conduct in furtherance of the constitutional right of petition or of free speech in connection with a public issue or an issue of public interest."

According to proponents, as Section 425.16 is beginning to be defined by the courts of appeal, there have been conflicting opinions as to whether the Legislature intended the statute to be construed narrowly to protect a narrowly defined category of cases (Zhou v Wong (1996) 48 Cal.App.4th 1114 - statute applies only to limited sphere of activities, those closely tied to the right of petition and free speech), or to have "broad application" to protect exercises of a person's constitutional rights of free speech and petition for redress of grievances (see, e.g., Averill v Superior Court (1996) 42 Cal.App.4th 1170 and Church of Scientology v Wollersheim (1996) 42 Cal.App.4th 628). In Wollersheim, the court noted that the statute applies to any cause of action arising from the exercise of the right to petition government for redress of grievances, such as the filing of any court action.

RJG:ctl 7/18/97 Senate Floor Analyses

SUPPORT/OPPOSITION: SEE ABOVE

CA B. An., S.B. 1296 Sen., 6/23/1997

CA B. An., S.B. 1296 Sen., 6/23/1997

California Bill Analysis, Senate Floor, 1997-1998 Regular Session, Senate Bill 1296

June 23, 1997
California Senate
1997-1998 Regular Session

SENATE RULES COMMITTEE

Office of Senate Floor Analyses

UNFINISHED BUSINESS

Bill No: SB 1296

Author: Lockyer (D)

Amended: 6/23/97

Vote: 21

SENATE JUDICIARY COMMITTEE: 5-2, 5/14/97

AYES: Burton, Lee, Lockyer, O'Connell, Sher

NOES: Haynes, Wright

NOT VOTING: Calderon, Leslie

SENATE FLOOR: 34-0, 5/23/97

AYES: Alpert, Ayala, Brulte, Burton, Calderon, Costa, Greene, Hayden, Haynes, Hughes, Hurtt, Johnson, Johnston, Karnette, Kelley, Knight, Kopp, Lee, Leslie, Lewis, Lockyer, Maddy, Monteith, Mountjoy, O'Connell, Peace, Rainey, Rosenthal, Schiff, Sher, Solis, Thompson, Watson, Wright

NOT VOTING: Craven, Dills, Johannessen, McPherson, Polanco, Vasconcellos

ASSEMBLY FLOOR: 69-0, 7/18/97

SUBJECT: Civil procedures: special motion to strike "SLAPP"

(Strategic Lawsuits Against Public Participation) suits

SOURCE: California Newspaper Publishers Association

DIGEST: This bill would revise the anti-SLAPP statute to also cover conduct in furtherance of the constitutional right of petition or of free speech in connection with a public issue or an issue of public interest, and to express the legislative intent behind the statute to state that section shall be construed broadly.

Assembly Amendments make technical changes to the bill.

ANALYSIS: Strategic lawsuits against public participation, or SLAPP suits, as they have become popularly termed, were first defined by University of Denver Law School Professor George Pring and University of Denver Sociology Professor Penelope Canan in their seminal article, "Strategic Lawsuits Against Public Participation" (1988) 35 Social

Problems 506, as “civil lawsuits ... that are aimed at preventing citizens from exercising their political rights or punishing those who have done so.”

While SLAPP suits “masquerade as ordinary lawsuits” such as defamation and interference with prospective economic advantage, they are generally meritless suits brought primarily to chill the exercise of free speech or petition rights by the threat of severe economic sanctions against the defendant, and not to vindicate a legally cognizable right. (See Pring and Canan, SLAPPS: “Getting Sued for Speaking Out” (Temple University Press, 1996).)

In 1992, Code of Civil Procedure Section 425.16 was enacted by SB 1264 (Lockyer), Chapter 726 of Stats. 1992, to provide a “special motion to strike” which could be used by defendants in “SLAPP” suits to obtain an early judicial ruling and termination of a meritless claim arising from a person's exercise of the right to petition or free speech under the United States or California Constitution in connection with a public issue. In enacting the provision, the Legislature expressly found that “there has been a disturbing increase in lawsuits primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances....that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process.”

Existing law, Code of Civil Procedure Section 425.16, provides that 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, is subject to a special motion to strike, unless the court, after considering the pleadings and supporting and opposing affidavits, determines that there is a probability that the plaintiff will prevail on the claim.

Existing law defines specified acts in furtherance of free speech or petition rights which fall within the aegis of Section 425.16, including “any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest.”

This bill would also apply the law to “any other conduct in furtherance of the constitutional right of petition or of free speech in connection with a public issue or an issue of public interest.”

Existing law sets forth the intent of the Legislature that it is in the public interest to encourage continued participation in matters of public significance and that this participation should not be chilled through abuse of the judicial process.

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Existing law applies its provisions to a complaint and provides that a special motion to strike may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time it deems proper.

This bill would provide that a complaint includes a “cross-complaint” and “petition.” It would further provide that the special motion may be filed within 60 days of service of any amended or supplemental complaint.

This bill would declare the Legislature's intent that the intent provisions of Section 425.16 should be construed broadly. Those provisions, enacted in 1992, provide that “there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance and that this participation should not be chilled through abuse of the judicial process.” Appended to that existing declaration would be added: “[T]o this end, this section shall be construed broadly.”

Proponents contend that the additional declaration of legislative intent would strengthen the statute against narrow readings of its protections, which in turn would better protect a person's exercise of his or her constitutional rights of petition and free speech in matters of public significance against meritless claims designed to stifle that exercise.

FISCAL EFFECT:

Appropriation: No

Fiscal Com.: No

Local: No

SUPPORT: (Verified 7/18/97)

California Newspaper Publishers Association (source)

American Civil Liberties Union

Planning and Conservation League

California Anti-SLAPP Project

California Broadcasters Association

Orange County Register

ARGUMENTS IN SUPPORT: Proponents assert that the constitutional right of free speech and petition also includes constitutionally protected expressive conduct. This facet of First Amendment jurisprudence was recognized in Ludwig v Superior Court (1995) 37 Cal.App.4th 8, which held that the protections of Section 425.16 applies to both "communicative conduct" and "noncommunicative conduct." (Id. at pp. 18-20.)

This bill would reflect that law and specifically apply the provisions of Section 425.16 to "any other conduct in furtherance of the constitutional right of petition or of free speech in connection with a public issue or an issue of public interest."

According to proponents, as Section 425.16 is beginning to be defined by the courts of appeal, there have been conflicting opinions as to whether the Legislature intended the statute to be construed narrowly to protect a narrowly defined category of cases (Zhou v Wong (1996) 48 Cal.App.4th 1114 - statute applies only to limited sphere of activities, those closely tied to the right of petition and free speech), or to have "broad application" to protect exercises of a person's constitutional rights of free speech and petition for redress of grievances (see, e.g., Averill v Superior Court (1996) 42 Cal.App.4th 1170 and Church of Scientology v Wollersheim (1996) 42 Cal.App.4th 628). In Wollersheim, the court noted that the statute applies to any cause of action arising from the exercise of the right to petition government for redress of grievances, such as the filing of any court action.

RJG:ctl 7/23/97 Senate Floor Analyses

SUPPORT/OPPOSITION: SEE ABOVE

CA B. An., S.B. 1296 Sen., 6/23/1997

CA B. An., S.B. 1296 Assem., 7/02/1997

California Bill Analysis, Assembly Committee, 1997-1998 Regular Session, Senate Bill 1296

July 2, 1997
California Assembly
1997-1998 Regular Session

Date of Hearing: July 2, 1997

ASSEMBLY COMMITTEE ON JUDICIARY

Martha Escutia, Chair

SB 1296 (Lockyer) - As Amended: June 23, 1997

SUBJECT: "SLAPP" ("STRATEGIC LAWSUIT AGAINST PUBLIC PARTICIPATION") SUITS

KEY ISSUES:

- 1) SHOULD CALIFORNIA'S ANTI-SLAPP STATUTE BE AMENDED TO CLARIFY THE LEGISLATURE'S INTENT THAT THE STATUTE BE CONSTRUED BROADLY?
- 2) SHOULD THE STATUTE BE AMENDED TO CLARIFY THAT IT COVERS CONDUCT IN FURTHERANCE OF THE CONSTITUTIONAL RIGHTS OF PETITION AND FREE SPEECH IN CONNECTION WITH A PUBLIC ISSUE, OR AN ISSUE OF PUBLIC INTEREST?

SUMMARY: Clarifies the intent behind, and the coverage of, California's so-called "anti-SLAPP" statute. Specifically, this bill:

- 1) Would amend the anti-SLAPP statute to clarify that the Legislature intended it to be construed broadly.
- 2) Would amend the statute to clarify that it covers conduct in furtherance of the constitutional rights of petition and of free speech in connection with a public issue, or with an issue of public interest.
- 3) Would clarify various definitions in the statute, specifying that a 'complaint' includes a 'cross-complaint' and 'petition', 'plaintiff' includes 'cross-complainant' and 'petitioner', and 'defendant' includes 'cross-defendant' and 'respondent'.

EXISTING LAW:

- 1) Code of Civil Procedure Section 425.16 provides that 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 is subject to a special motion to strike, unless the court, after considering the pleadings and supporting and opposing affidavits, determines that there is a probability that the plaintiff will prevail on the claim. (Hereafter all statutory references are to the Code of Civil Procedure.)
- 2) Defines specified acts in furtherance of free speech or petition rights which fall within the scope of Section 425.16, including "any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest."
- 3) Sets forth legislative intent that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process.
- 4) Applies its provisions to a complaint and provides that a special motion to strike may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time it deems proper.

FISCAL EFFECT: Unknown, though substantial reductions in litigation costs arising from the exercise of the rights of petition and speech are anticipated.

COMMENTS:

The Problem: This bill is sponsored by the California Newspaper Publishers Association to address recent court cases that have too narrowly construed California's anti-SLAPP suit statute. The bill's proponents also believe that some courts have failed to understand that this statute covers any conduct in furtherance of the constitutional rights of petition and of free speech in connection with a public issue or with any issue of public interest.

Strategic Lawsuits Against Public Participation, or SLAPP suits, are "civil lawsuits ... that are aimed at preventing citizens from exercising their political rights or punishing those who have done so." (See Pring and Canan, SLAPPS: Getting Sued for Speaking Out (Temple University Press, 1996).)

One commentator has suggested the following land development hypothetical case as a typical SLAPP suit scenario:

"A developer plans to build over one hundred luxury condos on a hillside in the town of Pleasantville, and has submitted a plan to the town Planning and Zoning Commission. Ms. Jones, a citizen of Pleasantville, is concerned about the environmental effects of the proposed project and has assembled a group of neighbors to oppose the plan. The group distributes flyers describing possible environmental damage that could result from the development. They appear before members of the Planning and Zoning Commission and express their opposition. The Commission rejects the developer's plan. The developer then files a multimillion dollar lawsuit against Ms. Jones and each member of her group, alleging defamation and conspiracy to deprive her of her constitutional rights. The developer claims the members of the Planning and Zoning Commission conspired with the protesters and sues them not only in their capacities as municipal employees, but in their individual capacities as well." (Sills, Jennifer E., "SLAPPS: HOW CAN THE LEGAL SYSTEM ELIMINATE THEIR APPEAL?" (1993) 25 Conn.L.Rev. 547.)

As this troubling scenario demonstrates, such lawsuits are often pernicious, masquerading as standard defamation and interference with prospective economic advantage litigation, while really brought by well-heeled parties who can afford to misuse the civil justice system to chill the exercise of free speech or petition rights by the threat of impoverishing the other party.

According to Pring and Canaan, approximately twenty-five percent of SLAPP suits filed relate to development and zoning, while twenty percent arise out of complaints against public officials and employees.

Judges often have a difficult time distinguishing SLAPP suits from legitimate suits because they "often do not, or cannot, identify the true colors under which the SLAPP suit sails the seas of litigation." Stein, Ralph M., "SLAPP Suits: A Slap at the First Amendment" (1989) 7 PACE ENVTL.L.REV. 45, 53.

Statutory Backdrop: In 1992, Section 425.16 was enacted by SB 1264 (Lockyer), Chapter 726, Stats. of 1992, to provide a "special motion to strike" which could be used by defendants in SLAPP suits to obtain an early judicial ruling and termination of a meritless claim arising from a person's exercise of the right to petition or free speech. In enacting the provision, the Legislature expressly found that "there has been a disturbing increase in lawsuits primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances....that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process."

When an action is subject to a Section 425.16 special motion to strike, a prevailing defendant is entitled to recover attorneys' fees and costs. However, if the court determines that the special motion to strike is frivolous, or solely intended to cause unnecessary delay, the court shall award costs and reasonable attorneys' fees to the plaintiff. Section 425.16(c). The special motion to strike may be filed within 60 days of the service of the complaint or, in the court's discretion, at a later time upon terms the court deems proper. Section 425.16(f). In addition, discovery proceedings in the action are

stayed upon the filing of a noticed motion, except upon a showing of good cause for specified discovery, upon noticed motion.

As noted earlier, a cause of action is not subject to a special motion to strike where the plaintiff establishes that there is a probability that he will prevail on the claim. The court must consider the pleadings, along with supporting and opposing affidavits, in making its determination. However, a determination by the court that the plaintiff has established a probability of prevailing on the claim is inadmissible at a later stage of the case, and does not affect the burden or degree of proof. Section 425.16(b). In addition, Section 425.16 does not apply to any enforcement action brought by the Attorney General, district attorney, or city attorney, acting as a public prosecutor. Section. 425.16(d).

The Solution: This bill is designed to address some recent court cases narrowly interpreting the scope of the anti-SLAPP statute. The bill clarifies that constitutionally-protected conduct (the rights of free speech and of petition) is unequivocally protected by the statute, and makes clear that the statute applies to cross-complaints and petitions, as well as to complaints.

Regarding the statute's reach into constitutionally-protected "conduct" as well as statements, the bill comports with the reasoning of the court in the recent case of Ludwig v. Superior Court (1995) 37 Cal.App.4th 8, which held that Section 425.16's protections apply to both of these basic forms of protected communication.

The bill's proponents have provided ample evidence that the state's courts of appeal are issuing conflicting opinions about the breadth of Section 425.16. While some courts have construed the statute broadly (see, e.g., Averill v. Superior Court (1996) 42 Cal.App.4th 628; Church of Scientology v. Wollersheim (1996) 42 Cal.App.4th 628; and Braun v. Chronicle Publishing Co. (1997) 52 Cal.App.4th 1036), others have construed it very narrowly. See, e.g., Zhao v. Wong (1996) 48 Cal.App.4th 1633; and Briggs v. Eden Council for Home and Opportunity (1997) 54 Cal.App.4th 1237. This bill would clarify the Legislature's intent that the provisions of Section 425.16 be construed broadly.

Issue: May the Legislature Validly Express the Legislative Intent Behind a Measure Passed Prior to the Time Many of Its Members Commenced Their Terms ?

This bill, as with SB 340 (Sher) also being considered by the committee today, raises the oft-raised question whether a current Legislature may validly express the legislative intent as to a previous measure passed by a prior Legislature. This question was squarely addressed, and answered in the affirmative, in Re-Open Rambla, Inc. v. Board of Supervisors of Los Angeles County (1995) 39 Cal.App.4th 1499.

Proponents' Arguments: The Planning and Conservation League strongly supports this bill, claiming that "SB 1296 would ensure that our current statute is 'broadly construed' to protect free speech and public participation in matters of public significance. . . [SLAPP suits] must be discouraged, if citizens are going to be able successfully to participate in public affairs. We all have an important stake in protecting public participation and free speech. SB 1296 would help make our current law work better--and to work in the way it was intended to when first enacted and signed into law."

The California Newspaper Publishers Association, the bill's sponsor, writes that the state's anti-SLAPP statute "has been instrumental in stopping hundreds of ... SLAPPS ... in the early stages of litigation. These lawsuits are brought not to seek redress for actual harm, but instead to silence people who have engaged in political speech, petition speech and expression on public issues. The law's Special Motion to Strike allows courts to quickly and efficiently dispose of lawsuits that would otherwise effectively chill political expression."

Prior Related Legislation: SB 1264 (Lockyer, Ch. 726 of Stats. 1992): Enacted the current anti-SLAPP statute this bill seeks to clarify.

REGISTERED SUPPORT / OPPOSITION:

Support

Calif. Newspaper Pub. Assoc. (source)

ACLU

Planning and Conservation League

California Anti-SLAPP Project

California Broadcasters Assoc.

Opposition

None on file.

Analysis prepared by: Drew Liebert / ajud / (916) 445-4560

CA B. An., S.B. 1296 Assem., 7/02/1997

End of Document

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SENATE JUDICIARY COMMITTEE
Martha M. Escutia, Chair
2003-2004 Regular Session

SB 515	S
Senator Kuehl	B
As Amended May 1, 2003	
Hearing Date: May 6, 2003	5
Code of Civil Procedure	1
GMW	5

SUBJECT

Anti-SLAPP (Strategic Lawsuit Against Public Participation) Law:
Restrictions on Use of Special Motion to Strike

DESCRIPTION

_ This bill would make the SLAPP motion (special motion to strike a cause of action arising from any act of the defendant in furtherance of that person's right of petition or free speech) inapplicable to: a) public interests and class action lawsuits when specified conditions are met; and b) lawsuits brought against a business that arises from commercial statements or conduct of that business, as specified.

This bill would also provide if the trial court denies a SLAPP motion because of the new exemptions, the stay of discovery and the right to an immediate appeal provisions of the anti-SLAPP law do not apply.

The bill would also make legislative findings relating to the disturbing abuse of the anti-SLAPP law, and stating that continued participation in matters of public significance should not be chilled through abuse of the judicial process or the anti-SLAPP law.

BACKGROUND

Strategic Lawsuits Against Public Participation, or SLAPP suits,

(more)

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as they have become popularly termed, were first defined by University of Denver Law School Professor George Pring and University of Denver Sociology Professor Penelope Canan in their seminal article, Strategic Lawsuits Against Public Participation (1988) 35 Social Problems 506, as "civil lawsuits ... that are aimed at preventing citizens from exercising their political rights or punishing those who have done so."

While SLAPP suits "masquerade as ordinary lawsuits" such as defamation and interference with prospective economic advantage, they are generally meritless suits brought primarily to chill the exercise of free speech or petition rights by the threat of severe economic sanctions against the defendant, and not to vindicate a legally cognizable right. (See, Pring and Canan, SLAPPS: Getting Sued for Speaking Out (Temple University Press, 1996).)

In 1992, Code of Civil Procedure Section 425.16 was enacted by SB 1264 (Lockyer), Ch. 726, Stats. of 1992, to provide a "special motion to strike" for use by defendants in SLAPP lawsuits to obtain an early judicial ruling and termination of a meritless claim arising from a person's exercise of the constitutional rights of petition and free speech in connection with a public issue. In passing the Anti-SLAPP law, the Legislature found that "there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances . . . that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process." (Emphasis added.)

In 1997, this preamble of the anti-SLAPP law was amended to provide that the Section 425.16 shall be broadly construed. (SB 1296 (Lockyer), Ch. 271, Stats. of 1997.)

Since becoming law in 1993, there have been at least 100 reported appellate opinions construing Section 425.16, including 13 federal appellate decisions and 6 California Supreme Court decisions, providing 33 pages of annotations to the West codes.

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CHANGES TO EXISTING LAW

1. Existing law provides that 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, as specified, is subject to a special SLAPP motion to strike, unless the court determines there is a probability that the plaintiff will prevail on the claim. This SLAPP motion is not applicable to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor. (Code of Civil Procedure Section 425.16. All references are to this code unless stated otherwise.)

This bill would further provide that the following claims or actions are not subject to a special motion to strike:

Any action brought solely in the public interest or on behalf of the general public when all three following conditions are met: _

- a) The plaintiff does not seek any relief greater than or different from the relief sought for the general public or a class of which the plaintiff is a member. A claim for attorney's fees, costs, or penalties would not constitute greater or different relief. _
- b) The action, if successful, would enforce an important right affecting the public interest, and would confer a significant benefit on the general public or a large class of persons.
- c) Private enforcement is necessary and places a disproportionate financial burden on the plaintiff in relation to the plaintiff's stake in the matter.

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 of that person when both the following conditions are met:

- a) 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

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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 good's or services; and,

- b) either i) is aimed at an actual or potential buyer, or person likely to repeat the statement to, or otherwise influence the buyer, or ii) arose out of or within the context of a regulatory approval process, proceeding or investigation, even if that statement or conduct concerns an important public issue.

2. Existing law provides that an order denying a special motion to strike is appealable to the court of appeal. (Section 425.16(j).) Existing law generally provides that the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby. (Section 916.) Existing law also provides for a stay of discovery when a SLAPP motion is filed, but allows the court to allow specified discovery for good cause shown. (Section 425.16(g).)

This bill would make those stay and appeals provisions

inapplicable when a trial court denies a special motion to strike on the grounds that a cause of action is exempt pursuant to this bill.

3. The bill would make legislative findings and declarations decrying the disturbing abuse of the anti-SLAPP law, which has undermined the exercise of constitutional rights of freedom of speech and petition for redress of grievances, and stating that public participation in matters of public significance should not be chilled through abuse of the judicial process or the anti-SLAPP law.

COMMENT

1. Stated need to prevent Anti-SLAPP law from being abused as a litigation weapon

The Consumer Attorneys of California (CAOC), sponsors of SB 515, assert that SB 515 is needed to stop corporate abuse of the statute and to return Section 425.16 to its original

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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. They note 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.

As evidence of their claim, CAOC points to the raising number of SLAPP motions filed in the superior courts of Sacramento, Los Angeles, and San Francisco where total SLAPP motions in those courts have jumped from 93 in the year 2000 to 200 in the year 2002. CAOC argues that seminars such as those promoted by the Practicing Law Institute, "Challenging a 17200 Claim as a 'SLAPP' Suit," are encouraging corporations to use the SLAPP motions as new litigation weapon to slow down and perhaps even get out of litigation.

Asserts the Consumer Justice Center, 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.

Proponents assert that the increased use by corporations of meritless SLAPP motions subverts the purpose of the anti-SLAPP law to protect citizens from expensive retaliatory lawsuits brought to chill their valid exercise of constitutional rights. In *Wilcox v. Superior Court* (1994) 27 Cal. App. 4th 809, 815-816, the court set forth a description of the quintessential SLAPP suit:

The favored causes of action in SLAPP suits are defamation, various business torts such as interference with prospective economic advantage, nuisance and intentional infliction of emotional distress. [Citations.] Plaintiffs in these actions typically ask for damages which would be ruinous to the defendants. [Citations.] SLAPP suits are brought to obtain an economic advantage over the defendant, not to vindicate a legally cognizable right of the

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plaintiff. [Citations.] . . . [t]hey are generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal rights or to punish them for doing so. [Citation.]

Proponents argue that this chilling effect does not apply when a large corporate defendant has massive resources that it may rely upon in litigation, unlike the private citizen. In support of SB 1651, last year's vetoed bill, University of Denver Professor, Dr. Canan, co-author of the seminal research on SLAPP suits, writes:

Anti-SLAPP legislation is intended ? to provide citizens who are sued for speaking out with a speedy and relatively inexpensive defense mechanism against attacks on their First Amendments rights by SLAPPS?.

How ironic and sad, then, that corporations in California have now turned to using meritless anti-SLAPP motions as a litigation weapon. This turns the original intent of one of the country's most comprehensive and effective anti-SLAPP laws on its head.

Corporate defendants 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. Wealthy corporate defendants, some with their own legal departments, simply do not suffer the chilling effect on their rights when faced with a lawsuit claiming, for example, false advertising or fraud or illegal business practices, that common citizens suffer when sued for speaking out.

2. Asserted SLAPP motion abuse stems from recent court cases broadly interpreting anti-SLAPP law in response to recent legislation

The increased use of the SLAPP motion appears to coincide with the California Supreme Court's decision in *Briggs v. Eden Council for Hope and Opportunity* (1999) 19 Cal.4th 1106, in which the court followed the Legislature's direction and broadly construed the anti-SLAPP law to find that any statement made in any legislative, judicial or other

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official proceeding was protected under the anti-SLAPP law, even if the statement did not concern a public issue or issue of public interest.

In 1997, this Legislature enacted SB 1296, which directed that the anti-SLAPP statute shall be construed broadly to effectuate its purposes. That measure sought to overturn cases that were thought by its supporters to be unduly limiting the reach of the anti-SLAPP law. One such specifically identified case was *Zhao v. Wong* (1996) 48 Cal.App.4th 1114, which was abrogated by the Supreme Court in *Briggs*. However, as Justice Baxter noted in his dissenting opinion on this point: "[t]he anti-SLAPP statute is a powerful tool to be broadly construed to promote 'the open expression of ideas, opinions and the disclosure of information.' (Citation omitted.) It is not, however, generally available to the parties in any civil action, but is instead expressly limited to lawsuits 'brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances' 'in connection with a public issue' (Citations omitted.) The majority's holding in this case belies that carefully delineated legislative purpose and will authorize use of the extraordinary anti-SLAPP remedy in a great number of cases to which it was never intended to apply." (Emphasis added.)

More recently, relying on *Briggs* and the Legislature's express command that the anti-SLAPP law "shall be construed broadly," (Section 425.16, subd. (a).), the Supreme Court in *Navellier v. Sletten* (2002) 29 Cal.4th 82, held that the plaintiff's breach of contract claim was subject to a SLAPP motion. Justice Brown, dissenting (with Justices Baxter and Chin concurring), wrote: "the majority appears willing to consider any suit a SLAPP, based largely on when it was filed? The cure has become the disease-SLAPP motions are now just the latest form of litigation abuse." (Id., at p. 96. Emphasis added.)

While this Committee might someday wish to engage in a lengthier debate on whether the anti-SLAPP law has become a rotting tree or a tree with a few rotten branches, or is just fine as is, before us for consideration in SB 515 is a measure that seeks to trim off a few bad branches as argued and

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identified by the CAOC.

3. SB 515's exemptions would overturn DuPont Merck case

Proponents assert that SB 515's exemptions are necessary following an appellate court's expansion of the law to allow a SLAPP motion in a class action lawsuit alleging that the defendant's public false statements and conduct before a regulatory agency and to the general public violated California's Consumer Legal Remedies Act and Unfair Business Practices Act. (DuPont Merck Pharmaceutical Co. v. Superior Court (2000) 78 Cal. App. 4th 562.)

In ruling that the anti-SLAPP statute applied, the court stated that the allegations relating to the defendant's FDA activities were lobbying activities and fell squarely within the "petitioning" prong of the statute. Additionally, the court held the false advertising related allegation involved free speech rights and also constituted a matter of public concern because the complaint itself admitted that the advertising involved 1.8 million users of the drug and involved very serious conditions. (Since DuPont, the California Supreme Court in *Kasky v. Nike* (2002) 27 Cal.4th 939, after noting that commercial speech is subject to limited first amendment protection, said:

"statements may properly be categorized as commercial 'notwithstanding the fact that they contain discussions of important public issues,' and that 'advertising which link a product to a current public debate is not thereby entitled to the constitutional protection afforded non-commercial speech.'" (Id., at p. 957.)

Proponents argue that the Merck decision is a very dangerous precedent for eroding the ability of citizens to bring private lawsuits to correct public or private wrongs. SB 515 seeks to "correct" DuPont by enacting the proposed exemptions to the anti-SLAPP law.

4. SB 515 would make SLAPP motion inapplicable to cases against a business where cause of action arises from the business's commercial speech or activity

This bill would effectively overturn the DuPont case by making

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Section 425.16 inapplicable 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 of that person when both the following conditions are met:

- a) 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 good's or services; and,
- b) either i) is aimed at an actual or potential buyer, or person likely to repeat the statement to, or otherwise influence the buyer, or ii) arose out of or within the context of a regulatory approval process, proceeding or investigation, even if that statement or conduct concerns an important public issue.

CAOC argues that this restriction is necessary in light of the abuses of the statute by corporate defendants who are routinely bringing SLAPP motions in ordinary personal injury and products liability cases to increase the time and expense for plaintiff's attorneys to handle these cases. As an example, CAOC points to *Nutter v. Metabolife*, (Superior Court of San Diego County), in which the plaintiff had to argue against SLAPP motions filed against the plaintiff's cause of action for strict liability, breach of implied warranty, negligence, and fraud. (However, a fifth motion against an Unfair Competition claim was granted and was appealed.)

CAOC writes that this formulation is consistent with the recommendation of the Senate Judiciary Committee analysis last year on SB 1651 which urged the sponsors to look at the content and context of the statement or conduct when crafting an exemption, rather than enacting a wholesale exclusion of a class of defendants which had been proposed in SB 1651.

Under this approach, lobbying activities to gain regulatory authority to market a product, or speech intended to persuade an audience to buy one product instead of another, can be

viewed in the context of its offering, just as a speech by a

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person against the building of a waste facility in the neighborhood. The latter can clearly be seen to have been made in the context of exercising the person's constitutional right of speech and petition of government and is fully protected speech, while the content and context of the former activities are clearly more in furtherance of business considerations and may be characterized as commercial speech which does not enjoy full constitutional first amendment protection. SB 515 indeed borrows from the *Kasky v. Nike* formulation of commercial speech in the provision stating that a statement or conduct consisting of representations of fact about the person's business or its operations that arose out of or within the context of a regulatory approval process, proceeding or investigation, is deemed commercial speech and activity, and outside the protections of the anti-SLAPP law, even if that conduct or statement concerns an important public issue. (*Kasky v. Nike*, supra.)

CAOC argues that this latter exemption is particularly important in light of the fact that false and misleading statements are often made by companies seeking approval of their products in the regulatory process. Subjecting these statements to the SLAPP process would, in CAOC words, engulf every product defect in a morass of satellite SLAPP litigation, adding years and potentially tens of thousands of dollars to the cost.

a) Opposition to commercial speech exemption

CJAC argues that "SB 515 attempts to enact a wholesale denial of the ability of an entire class of defendants to protect themselves against a harassing lawsuit intended to attack those defendants' constitutional rights of freedom of speech and petition for redress of grievances?. Nothing can justify the total denial of the Anti-SLAPP suit protections to every statement by every entity regarding its products, services, or business operations."

CJAC contends that SB 515's carte blanche denial of the ability to protect one's free speech rights against intentionally chilling litigation is an affront to the courts and to the spirit of Section 425.16.

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The California Healthcare Institute (CHI) asserts that "the essence of SB 515 is a wholesale denial of a special procedural tool developed by the Legislature in the early 1990's to provide early, pre-discovery dismissals of lawsuits premised on the defendant's exercise of some form of protected speech - even commercial speech. CHI asserts that SB 515 is extremely unfair in its denial of the anti-SLAPP protections to businesses for their commercial speech and argues that the measure "would likely fail a constitutional challenge."

Opponents also point out that when *Kasky* was recently argued before the United States Supreme Court, several justices questioned the ease with which a bright line can be drawn, so that protected speech is not chilled, under the California Supreme Court's conclusion that Nike's speech was commercial speech even when that speech touched upon issues that was part of a public debate or was intermingled with noncommercial speech. CAOC responds that this measure is a more measured approach than that considered by this Committee last year in SB 1651. That bill proposed a wholesale exclusion of defendants who were product sellers from the anti-SLAPP law. The failure of that proposal to distinguish between conduct that may well fall within the paradigm of a SLAPP, as opposed to simple commercial speech intended to further the speaker's business interest, was also troubling.

Thus, the proposal was recrafted to take a different tack and instead looks at the conduct and context of the

statement in order to determine if the underlying statement should be protected by the anti-SLAPP law. This new approach also avoids the problem of over-inclusiveness when all speech and conduct by a class is excluded from protection, regardless of its content or context. CAOC contends that SB 515 would withstand a constitutional challenge.

b) Constitutional considerations

As proposed Section 425.17(c) would exempt lawsuits based on defendant's acts that would be categorized as commercial speech, the proposed exception to the anti-SLAPP law would

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not be unconstitutional. The provision does not prohibit the commercial speech, and the bill does not punish it with penal sanctions or the like. Nor does the bill regulate or impinge that commercial speech. However, the bill would provide that the anti-SLAPP special protections, intended to weed out frivolous lawsuits that chill the valid exercise of first amendment rights of speech or participation in matters of public significance, are not applicable to the specified type of commercial speech. As stated in *Virginia Pharmacy Board v. Virginia Consumer Council* (1975) 425 U.S. 748, at 772, fn. 24, commercial speech is "less likely to be chilled by proper regulation." Moreover, commercial speech to be protected by the First Amendment must concern lawful activity and not be misleading. (*Central Hudson Gas & Elec. V. Public Service Comm.* (1980) 447 U.S. 557.) Thus, it is within the full power of the Legislature to punish false speech, to distinguish commercial speech from non-commercial speech, and provide less protection, or even no protection, for false or commercial speech in the procedural protections of the anti-SLAPP statute.

Even if the United States Supreme Court were to toss out *Kasky's* broad definition of commercial speech, that event would not be necessarily fatal to SB 515. At its core, the anti-SLAPP law is a procedural device crafted by the Legislature to weed out certain frivolous lawsuits arising out of the defendant's valid (and thus protected) first amendment conduct. The classifications enacted by the Legislature, such as an existing exemption for actions brought by public prosecutors, may be justified when supported by a rational basis. (See *People v. Health Laboratories* (2001) 87 Cal.App.4th 442, 448,449, which upheld public prosecutor exemption against equal protection attack: "Section 425.16 is tangentially related to the constitutional right of free speech, insofar as it was enacted to prevent unscrupulous plaintiffs from filing meritless lawsuits in order to stymie a person's exercise of free speech or petition for redress of grievances ". Rather, section 425.16 is merely "a procedural screening mechanism for determining whether a plaintiff can demonstrate sufficient facts to establish a prima facie case to permit the matter to go to a trier of fact."

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(Citations.) Emphasis added.)

In *People v. Health Laboratories*, a rational basis was all that was necessary to sustain the exemption for actions brought by public prosecutors. Even if the statute is determined to be a content-based regulation of commercial speech, the courts would apply an intermediate scrutiny test and uphold the statute if there is a reasonable fit between the government's purpose and the means chosen to achieve it. (*Central Hudson*, supra.)

5. Making the anti-SLAPP motion inapplicable to certain class actions and public interest lawsuits

SB 515 would make the SLAPP motion inapplicable to public interest and class action lawsuits "brought solely in the public interest or on behalf of the general public" when three specified conditions are met. In general, the qualifying

language would clearly encompass claims brought under the Unfair Competition Law (Business and Professions Code Section 17200 et. seq.), the Unfair Practices Act (Business and Professions Code Section 17500 et. seq.), the Consumer Legal Remedies Act (Civil Code Section 1750 et. seq.), as well as any other public interest or class actions lawsuits where the three specified conditions are met.

The three conditions have been carefully crafted so that not all public interest or class actions would be automatically exempt from the anti-SLAPP law. This is necessary, according to CAOC, because there are some abusive uses of the unfair competition law that should be subject to the SLAPP motion. CAOC asserts that cases that are motivated by personal gain, such as the recent Trevor Law Group unfair competition actions, would not be covered by the exemption.

In specific support of this exemption, the California Anti-SLAPP Project writes: "The reason this exemption is needed and appropriate is as follows: 'There are certain statutes that protect public health or consumers that allow for enforcement by private attorneys general, without an injured plaintiff. Conceptually, these are virtually identical to when the D.A. or Attorney General enforces those same statutes. (Citations omitted.) Since the statute already

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exempts actions filed by public prosecutors, it should provide a parallel protection when people are acting only in the public interest as private attorneys general, and are not seeking any special relief for themselves."

Opponents assert that there is no reason to grant what is effectively a presumption of validity to cases purportedly brought on behalf of the general public or in the public interest. While the public prosecutor exemption has been justified on the grounds that public prosecutors may be rationally presumed by the Legislature to act in the public interest, opponents contend that such a presumption or rationale cannot be applied to private litigants who have shown much more regard to the collection of outlandish attorneys' fees awards than a decent recovery for the class of plaintiffs purportedly represented by the attorney. Opponents point out that it has not been uncommon for plaintiffs attorneys in these cases to collect millions in attorneys fees while the plaintiff class gets a minor rebate or a coupon towards the purchase of the next product.

6. Exemption from exemption for media and motion picture defendants

Proposed subdivision (d) of newly added Section 425.17 would exempt the news media and other media defendants (such as the motion picture industry) from the bill when the underlying act relates to news gathering and reporting to the public with respect to the news media or to activities involving the creation or dissemination of any works of a motion picture or television studio. For claims arising from these activities, the current SLAPP motion would remain available to these defendants.

CAOC argues that the reason for these exemptions is simple. "Newspapers and other media are in the business of disseminating information to the public."

Opponents object to this selective exclusion from SB 515 and argue that it is not justified.

7. Right to immediate appeal and automatic stay provisions of existing law would not apply if trial court denies SLAPP motion because of SB 515 exemption

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On page 3, lines 31 to 34, SB 515 provides: "If any trial court denies a special motion to strike on the ground that the cause of action is exempt pursuant to this section, the stay and appeal provisions of subdivisions (g) and (j) of Section 425.16 do not apply."

As to nullifying the right to an immediate appeal in these cases, CAOC asserts that current law is being used by defendants to unreasonably delay a case from being heard on the merits, thus adding litigation costs and making it more cumbersome for plaintiffs to pursue legitimate claims. As noted earlier, the Consumer Justice Center argued 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.

SB 515 would make the right to an immediate appeal inapplicable to SLAPP motions that are denied by the trial court based upon one of the new grounds.

SB 515 would also make the provisions of subdivision (g) of Section 425.16, relating to a stay of discovery upon the filing of a SLAPP motion, inapplicable to SLAPP motions that are denied by the trial upon one of the new grounds.

How this proposed provision is supposed to work is not clear. The confusion arises because existing subdivision (g) dictates an action when the SLAPP motion is filed and does not address the circumstance when a motion is denied. In contrast, CCP Section 916 provides for that the perfecting of an appeal stays the proceedings in the trial court.

In SB 1651, CAOC had asserted that Section 916's mandatory stay of proceedings is severely damaging to a plaintiff's case, and that the mandatory stay creates an incentive for a defendant to file a meritless special motion and then appeal a denial, because that process ensures a delay of at least two years in the court's hearing of the claim. In the meantime,

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costs are incurred, discovery is stalled and critical evidence can be lost or destroyed. Moreover, the inability to conduct discovery pending the appeal may prejudice the plaintiff in his or her argument on appeal. Even if the plaintiff prevails on appeal, and the motion is denied, the passage of time may have irreparably damaged the plaintiff's case.

SHOULD THIS PROVISION BE CLARIFIED? SHOULD, INSTEAD, THE PROVISIONS OF SECTION 916, PROVIDING FOR AUTOMATIC STAY UPON A PERFECTED APPEAL, BE REFERENCED?

8. Other opposition arguments

Novartis Pharmaceuticals Corporation argues that SB 515 would significantly the protections against frivolous litigation which are now provided by the anti-SLAPP statute. It asserts that it was able to obtain a quick dismissal in a purported class action lawsuit that attacked Novartis' actions in taking positions on scientific issues. Without the special motion, Novartis writes that it would have had to spend years and hundreds of thousands of dollars or more in attorneys fees to defend the action.

The building industry coalition also opposes SB 515, concerned that it would grant absolute protection to and encourage unmeritorious NIMBY (Not in My Back Yard) litigation by granting opponents of new development projects immunity from the SLAPP motion. They note that such litigation often takes the form of a CEQA (California Environmental Quality Act) challenge. These opponents argue that California cannot afford more NIMBY lawsuits.

The California Dental Association (CDA) also opposes, noting that the SB 515 would eliminate the only legal tool the CDA has been able to employ to avoid fully litigating Unfair Competition nuisance lawsuits filed against them for their public statements about dental filling materials.

The Association of California Insurance Companies writes that "SB 515 is a transparent and unwarranted attempt to eviscerate the anti-SLAPP procedure by expanding the exceptions so broadly that the exceptions will inevitably swallow the rule."

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Support: California Anti-SLAPP Project

Opposition: California Dental Ass'n.; Civil Justice Association
of California; California Healthcare Institute;
California Association of Realtors; California
Building Industry Ass'n.; California Business
Properties Ass'n.; California Chamber of Commerce;
Consulting Engineers and Land Surveyors of California;
Home Ownership Advancement Foundation; Novartis;
Association of California Insurance Companies

HISTORY

Source: Consumer Attorneys of California

Related Pending Legislation: None Known

Prior Legislation: SB 789/SB 1651 (Kuehl) - Vetoed, 2002
AB 1675 (Asm. Judiciary Committee), Ch. 960,
Stats. of 1999
SB 1296 (Lockyer), Ch. 271, Stats. of 1997
SB 1264 (Lockyer), Ch. 726, Stats. of 1992

SENATE RULES COMMITTEE	SB 515
Office of Senate Floor Analyses	
1020 N Street, Suite 524	
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327-4478	

THIRD READING

Bill No: SB 515
 Author: Kuehl (D)
 Amended: 5/1/03
 Vote: 21

SENATE JUDICIARY COMMITTEE : 5-1, 5/6/03
 AYES: Escutia, Cedillo, Ducheny, Kuehl, Sher
 NOES: Ackerman

SUBJECT : Civil actions

SOURCE : Consumer Attorneys of California

DIGEST : This bill would make the Strategic Lawsuit Against Public Participation motion (SLAPP) (special motion to strike a cause of action arising from any act of the defendant in furtherance of that person's right of petition or free speech) inapplicable to: (a) public interests and class action lawsuits when specified conditions are met; and (b) lawsuits brought against a business that arises from commercial statements or conduct of that business, as specified.

This bill would also provide if the trial court denies a SLAPP motion because of the new exemptions, the stay of discovery and the right to an immediate appeal provisions of the anti-SLAPP law do not apply.

The bill would also make legislative findings relating to the disturbing abuse of the anti-SLAPP law, and stating that continued participation in matters of public

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 significance should not be chilled through abuse of the judicial process or the anti-SLAPP law.

ANALYSIS : Existing law provides that 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, as specified, is subject to a special SLAPP motion to strike, unless the court determines there is a probability that the plaintiff will prevail on the claim. This SLAPP motion is not applicable to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.

This bill would further provide that the following claims or actions are not subject to a special motion to strike:

1. Any action brought solely in the public interest or on behalf of the general public when all three following conditions are met:
 - A. The plaintiff does not seek any relief greater than or different from the relief sought for the general public or a class of which the plaintiff is a member. A claim for attorney's fees, costs, or penalties would not constitute greater or different relief.
 - B. The action, if successful, would enforce an important right affecting the public interest, and would confer a significant benefit on the general public or a large class of persons.
 - C. Private enforcement is necessary and places a

disproportionate financial burden on the plaintiff in relation to the plaintiff's stake in the matter.

1. 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 of that person when both the following conditions are met:

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- A. 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 goods or services.
- B. Either i) is aimed at an actual or potential buyer, or person likely to repeat the statement to, or otherwise influence the buyer, or ii) arose out of or within the context of a regulatory approval process, proceeding or investigation, even if that statement or conduct concerns an important public issue.

Existing law provides that an order denying a special motion to strike is appealable to the court of appeal. Existing law generally provides that the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby. Existing law also provides for a stay of discovery when a SLAPP motion is filed, but allows the court to allow specified discovery for good cause shown.

This bill would make those stay and appeals provisions inapplicable when a trial court denies a special motion to strike on the grounds that a cause of action is exempt pursuant to this bill.

The bill would make legislative findings and declarations decrying the disturbing abuse of the anti-SLAPP law, which has undermined the exercise of constitutional rights of freedom of speech and petition for redress of grievances, and stating that public participation in matters of public significance should not be chilled through abuse of the judicial process or the anti-SLAPP law.

Background

Strategic Lawsuits Against Public Participation, or SLAPP suits, as they have become popularly termed, were first defined by University of Denver Law School Professor George Pring and University of Denver Sociology Professor Penelope

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In his veto message for SB 789 the Governor wrote:

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"I am concerned, however, that this legislation unduly interferes with the court's discretion. The First Amendment right to free speech should be carefully guarded and the Court may be in the best position to ensure this right is protected by examining these claims on a case by case basis.

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FISCAL EFFECT : Appropriation: No Fiscal Com.: No
Local: No

SUPPORT : (Verified 5/8/03)

Consumer Attorneys of California (source)
California Anti-SLAPP Project
Congress of California Seniors

OPPOSITION : (Verified 5/12/03)

American Civil Liberties Union
 Association of California Insurance Companies
 California Association of Realtors
 California Building Industry Association
 California Business Properties Association
 California Chamber of Commerce
 California Dental Association
 California Healthcare Institute
 Civil Justice Association of California
 Consulting Engineers and Land Surveyors of California
 Home Ownership Advancement Foundation
 Novartis Pharmaceuticals Corporation
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ARGUMENTS IN SUPPORT : The Consumer Attorneys of California (CAOC), sponsors of SB 515, assert that SB 515 is needed 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. They note 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.

As evidence of their claim, CAOC points to the raising number of SLAPP motions filed in the superior courts of Sacramento, Los Angeles, and San Francisco where total SLAPP motions in those courts have jumped from 93 in the year 2000 to 200 in the year 2002. CAOC argues that seminars such as those promoted by the Practicing Law Institute, "Challenging a 17200 Claim as a 'SLAPP' Suit,"

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are encouraging corporations to use the SLAPP motions as new litigation weapon to slow down and perhaps even get out of litigation.

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"The effect of SB 515 is to eliminate the Anti-SLAPP suit motion as a tool for dismissing frivolous or malicious lawsuits which are aimed at intimidating a business from exercising its free speech right. Businessses are frequently the target of lawsuits designed to harass or coerce a business into settling for nuisance value, or to stop a legitimate business activity. There is no good public policy reason why business defendants should be excluded from utilizing the Anti-SLAPP suit statute to dismiss unmeritorious lawsuits rather than being coerced into settling or incurring unnecessary litigation costs simply for exercising their constitutional rights.

Several court cases are currently pending before the California Supreme Court that will clarify issues that have arisen in interpreting the Anti-SLAPP suit law. Those cases were granted review last year by the court and decisions by the court can be anticipated in the near future. We urge the Legislature to await those decisions before making any changes to the law."

Novartis Pharmaceuticals Corporation argues that SB 515 would significantly the protections against frivolous litigation which are now provided by the anti-SLAPP statute. It asserts that it was able to obtain a quick dismissal in a purported class action lawsuit that attacked Novartis' actions in taking positions on scientific issues. Without the special motion, Novartis writes that it would have had to spend years and hundreds of thousands of dollars or more in attorneys fees to defend the action.

The building industry coalition also opposes SB 515, concerned that it would grant absolute protection to and encourage unmeritorious NIMBY (Not in My Back Yard) litigation by granting opponents of new development projects immunity from the SLAPP motion. They note that

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such litigation often takes the form of a CEQA (California Environmental Quality Act) challenge. These opponents argue that California cannot afford more NIMBY lawsuits.

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RJG:n1 5/12/03 Senate Floor Analyses

SUPPORT/OPPOSITION: SEE ABOVE

**** END ****

SENATE RULES COMMITTEE	SB 515
Office of Senate Floor Analyses	
1020 N Street, Suite 524	
(916) 445-6614 Fax: (916)	
327-4478	

THIRD READING

Bill No: SB 515
 Author: Kuehl (D)
 Amended: 5/1/03
 Vote: 21

SENATE JUDICIARY COMMITTEE : 5-1, 5/6/03
 AYES: Escutia, Cedillo, Ducheny, Kuehl, Sher
 NOES: Ackerman

SUBJECT : Civil actions

SOURCE : Consumer Attorneys of California

DIGEST : This bill would make the Strategic Lawsuit Against Public Participation motion (SLAPP) (special motion to strike a cause of action arising from any act of the defendant in furtherance of that person's right of petition or free speech) inapplicable to: (a) public interests and class action lawsuits when specified conditions are met; and (b) lawsuits brought against a business that arises from commercial statements or conduct of that business, as specified.

This bill would also provide if the trial court denies a SLAPP motion because of the new exemptions, the stay of discovery and the right to an immediate appeal provisions of the anti-SLAPP law do not apply.

The bill would also make legislative findings relating to the disturbing abuse of the anti-SLAPP law, and stating that continued participation in matters of public

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significance should not be chilled through abuse of the judicial process or the anti-SLAPP law.

ANALYSIS : Existing law provides that 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, as specified, is subject to a special SLAPP motion to strike, unless the court determines there is a probability that the plaintiff will prevail on the claim. This SLAPP motion is not applicable to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.

This bill would further provide that the following claims or actions are not subject to a special motion to strike:

1. Any action brought solely in the public interest or on behalf of the general public when all three following conditions are met:
 - A. The plaintiff does not seek any relief greater than or different from the relief sought for the general public or a class of which the plaintiff is a member. A claim for attorney's fees, costs, or penalties would not constitute greater or different relief.
 - B. The action, if successful, would enforce an important right affecting the public interest, and would confer a significant benefit on the general public or a large class of persons.
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disproportionate financial burden on the plaintiff in relation to the plaintiff's stake in the matter.

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- A. 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 goods or services.
- B. Either i) is aimed at an actual or potential buyer, or person likely to repeat the statement to, or otherwise influence the buyer, or ii) arose out of or within the context of a regulatory approval process, proceeding or investigation, even if that statement or conduct concerns an important public issue.

Existing law provides that an order denying a special motion to strike is appealable to the court of appeal. Existing law generally provides that the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby. Existing law also provides for a stay of discovery when a SLAPP motion is filed, but allows the court to allow specified discovery for good cause shown.

This bill would make those stay and appeals provisions inapplicable when a trial court denies a special motion to strike on the grounds that a cause of action is exempt pursuant to this bill.

The bill would make legislative findings and declarations decrying the disturbing abuse of the anti-SLAPP law, which has undermined the exercise of constitutional rights of freedom of speech and petition for redress of grievances, and stating that public participation in matters of public significance should not be chilled through abuse of the judicial process or the anti-SLAPP law.

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FISCAL EFFECT : Appropriation: No Fiscal Com.: No
Local: No

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FISCAL EFFECT : Appropriation: No Fiscal Com.: No
Local: No

SUPPORT : (Verified 5/21/03)

Consumer Attorneys of California (source)
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OPPOSITION : (Verified 5/12/03)

American Civil Liberties Union
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RJG:nl 5/21/03 Senate Floor Analyses

SUPPORT/OPPOSITION: SEE ABOVE

**** END ****

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Date of Hearing: July 1, 2003

ASSEMBLY COMMITTEE ON JUDICIARY
 Ellen M. Corbett, Chair
 SB 515 (Kuehl) - As Amended: June 27, 2003

SENATE VOTE : 21-13SUBJECT : ANTI-SLAPP MOTIONS: APPROPRIATE USE OF THE PROCEDUREKEY ISSUES :

- 1) SHOULD USE OF THE ANTI-SLAPP MOTION BE PROHIBITED AGAINST SPECIFIED PUBLIC INTEREST ACTIONS AND CAUSES OF ACTION BROUGHT AGAINST PERSONS PRIMARILY ENGAGED IN THE SALE OR LEASE OF GOODS OR SERVICES WITH RESPECT TO SPECIFIED COMMERCIAL SPEECH AND ACTIVITY?
- 2) AS AN EXCEPTION TO THE FOREGOING PROHIBITIONS, SHOULD THE ANTI-SLAPP MOTION CONTINUE TO BE PERMITTED WHEN CERTAIN NON-PROFIT ORGANIZATIONS ARE SUED OR WHEN SPECIFIED PUBLISHERS AND SIMILAR PERSONS ARE SUED FOR ACTS ARISING FROM THE COLLECTION AND DISSEMINATION OF INFORMATION TO THE PUBLIC, AS WELL AS THE CREATION, DISSEMINATION, AND PROMOTION OF DRAMATIC, LITERARY, MUSICAL, POLITICAL OR ARTISTIC WORK?
- 3) SHOULD THE INTERLOCUTORY APPEAL PROVISION OF THE ANTI-SLAPP PROCEDURE NOT APPLY WHEN A TRIAL COURT DENIES A SPECIAL MOTION TO STRIKE ON THE GROUNDS THAT THE ACTION OR A CAUSE OF ACTION IS EXEMPT PURSUANT TO THE FOREGOING PROHIBITIONS AND EXCEPTIONS?

SYNOPSIS

Substantively identical to the author's measure last year, this bill seeks to ensure that the anti-SLAPP motion is employed appropriately to accomplish the purposes for which it was designed. So-called Strategic Litigation Against Public Participation or "SLAPP" actions are generally suits or counter-claims brought against individuals and public interest organizations who are targeted by powerful business interests. The purpose of the SLAPP filing is to discourage the exercise of free speech and petition rights. In response to this phenomenon, California in 1992 enacted an anti-SLAPP procedure

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by which the target of the SLAPP action may file a special motion to strike a claim or action alleged to be based on acts in furtherance of the target's constitutional rights to free speech and/or petition in connection with a public issue. When this anti-SLAPP motion is invoked, the party who filed the claim bears the heavy burden of proving to the court that there is a probability of success on the claim. While the motion is pending, all discovery is generally stayed. Moreover, either party may take an immediate appeal from the court's decision on the motion, further staying the underlying lawsuit.

According to the sponsor of this bill, however, the same types of businesses who used the SLAPP action are now inappropriately using the anti-SLAPP motion against their public interest adversaries. In order to correct this abuse and return the anti-SLAPP procedure to its original intent, this bill provides that the anti-SLAPP motion may not be used against specified public interest actions and certain causes of action regarding statements about goods, services or business operations of persons engaged in business. The bill exempts - and thereby continue to allow the anti-SLAPP motion to be used by - all persons and entities engaged in the press or broadcast media, publishing of books and journals, and all those who are sued for protected activities based upon creative and promotional activities regarding dramatic, literary, musical, political or artistic works. Likewise, the bill exempts non-profit organizations that receive more than 50 percent of their annual revenue from federal, state, or local government grants, awards, programs, or reimbursements for services rendered.

Opponents argue that the bill impermissibly affects commercial speech, and will subject businesses to harassing SLAPP suits intended solely to attack their exercise of constitutional free speech and petition rights. As a result, opponents contend,

businesses will be subject to many meritless lawsuits and will be coerced into settling or incurring unnecessary litigation costs simply for exercising their constitutional rights.

SUMMARY : Revises who may invoke, and when, the special anti-SLAPP procedure for striking a lawsuit or claim on the ground that the suit or claim is based on the exercise of specified constitutional rights. Specifically, this bill :

1) Prohibits an anti-SLAPP motion from being employed against any action brought solely in the public interest, or on behalf of

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the general public, if the plaintiff does not seek any relief greater than or different from the relief sought for the public or the class of which plaintiff is a member, and also satisfies the standards for a private attorney general action.

- 2) Prohibits the anti-SLAPP motion from being used in specified causes of action against businesses sued for statements or conduct consisting of representations of fact about their goods, services or business operations, or those of a competitor, when those statements or conduct were for the purpose of obtaining approval for, promoting, or securing sales or leases of the person's goods or services, or in the course of delivering the person's goods or services, if 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, notwithstanding that the conduct or statement concerns an important public issue.
- 3) Permits, as an exception to the foregoing prohibitions, the anti-SLAPP motion to be employed against claims arising from gathering, receiving or processing information for communication to the public by a publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, press association or wire service, or a person engaged in the dissemination of ideas or expression in any book or academic journal, or an action based upon the creation or promotion of a dramatic, literary, musical, political or artistic work.
- 4) Permits, as a further exception to the foregoing prohibitions, the anti-SLAPP motion to be employed in claims against any non-profit organization that receives more than 50 percent of its annual revenue from federal, state, or local government grants, awards, programs, or reimbursements for services rendered.
- 5) Provides that whenever a trial court denies a special motion to strike on the grounds that the cause of action is exempt pursuant to the foregoing exemptions and their exceptions, the otherwise applicable immediate appeal provisions of the anti-SLAPP statute shall not apply to the action or cause of

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action that is the basis of the exemption.

EXISTING LAW :

- 1) Provides that 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 stricken via a special motion procedure, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim. (Code of Civil Procedure 425.16(b). All further statutory references are to this code unless otherwise noted.)
- 2) Provides that a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to the law

regarding frivolous actions and motions. (Id.)

FISCAL EFFECT : This bill is keyed non-fiscal.

COMMENTS : According to the sponsor, Consumer Attorneys of California (CAOC), this bill is needed to stop corporate abuse of the anti-SLAPP statute and return to its original purpose of protecting citizens' rights of petition and free speech. CAOC asserts that in recent years a growing number of large corporations have inappropriately invoked the anti-SLAPP statute to delay and discourage consumer and other litigation against them by filing meritless anti-SLAPP motions. As evidence that corporations are turning the anti-SLAPP law into a litigation weapon, the sponsor points to a seminar promoted by the Practising Law Institute: "Challenging a 17200 Claim as a 'SLAPP' Suit." Ironically, it might be added that one recent example of the controversial use of the anti-SLAPP motion against section 17200 claims arose in the Trevor Law Group's resort to the motion in response to the Attorney General's suit against Trevor. CAOC also cites a number of recent published opinions where corporate defendants brought anti-SLAPP motions. Although each of these motions was unsuccessful, CAOC contends that they delayed the litigation because of the automatic discovery stay and interlocutory appeal provisions of the anti-SLAPP statute.

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Proponents contend that the increased use of meritless anti-SLAPP motions by corporate defendants subverts the purpose of the anti-SLAPP law. CAOC argues that the anti-SLAPP statute was created in direct response to legislative concern about the filing of lawsuits primarily to chill the valid exercise of constitutional rights, and that the anti-SLAPP protections were intended to protect citizens from expensive retaliatory lawsuits that are brought to chill their valid exercise of their free speech and petition rights. Proponents argue that this chilling effect does not apply when a large corporate defendant has massive resources that they may rely upon in litigation, unlike the private citizen.

Background on SLAPP suits . The sponsor explains that Strategic Lawsuits Against Public Participation, or SLAPP suits, as they have become popularly termed, were first defined in a 1988 article by University of Denver professors George Pring and Penelope Canan as "civil lawsuits . . . that are aimed at preventing citizens from exercising their political rights or punishing those who have done so." While SLAPP suits "masquerade as ordinary lawsuits" such as defamation and interference with prospective economic advantage, they are generally meritless suits brought primarily to chill the exercise of free speech or petition rights by the threat of severe economic sanctions against the defendant, and not to vindicate a legally cognizable right.

In *Wilcox v. Superior Court*, 27 Cal. App. 4th 809 (1994), the court set forth a description of the quintessential SLAPP suit:

The favored causes of action in SLAPP suits are defamation, various business torts such as interference with prospective economic advantage, nuisance and intentional infliction of emotional distress. Plaintiffs in these actions typically ask for damages which would be ruinous to the defendants. SLAPP suits are brought to obtain an economic advantage over the defendant, not to vindicate a legally cognizable right of the plaintiff. . . . [T]hey are generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal rights or to punish them for doing so. (Wilcox, at 815-816 (citations omitted).)

California's Legislative Response to SLAPP suits . In 1992, Code

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of Civil Procedure section 425.16 was enacted by SB 1264 (Lockyer), Ch. 726, Stats. 1992, to provide a "special motion to strike" which could be used by defendants in SLAPP suits to obtain an early judicial ruling and termination of a meritless claim arising from a person's exercise of the right to petition or free speech in connection with a public issue. In enacting

the anti-SLAPP law, the Legislature declared its finding that "there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances, . . . that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process."

In 1997, Section 425.16 was amended to provide that the section be broadly construed. (SB 1296 (Lockyer), Ch. 271, Stats. 1997.) Since becoming effective in 1993, there have been at least 59 published appellate opinions, including six Supreme Court decisions, construing its provisions.

A Substantively Identical Measure Was Passed Last Year . The author carried a similar bill last year, SB 789, which the Governor vetoed but agreed to work with the author again this year. CAOC comments that SB 515 differs from SB 789 in two respects. The public interest and commercial speech exceptions to the statute are laid out in a new statute (CCP 425.17) for reasons of clarity. Additionally, SB 515 was amended to clarify that motions denied under the new section are not immediately appealable.

ARGUMENTS IN OPPOSITION : A coalition of business and property groups, including the California Association of Realtors and the California Building Industry Association, opposes SB 515. This group states that it is concerned that the bill would grant absolute protection to and encourage unmeritorious NIMBY (Not in My Back Yard) litigation by granting opponents of new development projects immunity from the SLAPP motion. They comment that such litigation often takes the form of a CEQA (California Environmental Quality Act) challenge, and argue that California cannot afford more NIMBY lawsuits.

The California Healthcare Institute argues that "SB 515 is extremely unfair and quite likely would fail a constitutional challenge. CHI member companies are devoted to solving major

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unmet medical needs?. Why should their free speech rights be less deserving than others? Additionally, if SB 515 were enacted, biomedical companies confronting a harassing SLAPP suit would have to divert resources away from drug research and development to fund expensive litigation that should have been dismissed for lack of merit."

The Civil Justice Association of California states: "Senate Bill 515 attempts to enact a wholesale denial of the ability of an entire class of defendants [businesses selling or leasing goods or services] to protect themselves against a harassing lawsuit intended to attack those defendants' constitutional rights of freedom of speech and petition for the redress of grievances. Nothing can justify the total denial of the anti-SLAPP suit protections to every statement by an entity regarding its products, services, or business operations."

The Personal Insurance Federation of California and the American Insurance Association argue that without the protection of the anti-SLAPP motion, businesses will be subject to meritless lawsuits and will be coerced into settling or incurring unnecessary litigation costs simply for exercising their constitutional rights.

The California Dental Association (CDA) also opposes, contending that the SB 515 would eliminate the only legal tool the CDA has been able to employ to avoid fully litigating UCL lawsuits filed against them for their public statements about dental filling materials. In light of the Supreme Court's refusal to upset Kasky, "CDA believes that it is more imperative than ever that the anti-SLAPP remedy enacted by the Legislature a decade ago and subsequently refined by legislative amendment and judicial interpretation not be disturbed."

The California First Amendment Coalition opposes the bill unless amended on the ground that it creates novel issues and potential ambiguities and therefore new fodder for protracted appellate clarification. For example, CFAC states, "the appellate courts would be called on to parse the meaning and effect of these qualification criteria in proposed Section 425.17, subd. (b), and just as surely, the same artful lawyering that is perceived as the plague now could be brought to bear in pursuing ambiguities introduced in these criteria as applied to a wide variety of situations. Where is the check on dilatory defense tactics when the defense is simply offered more ingredients for

delay?"

Constitutional Protections for Commercial Speech . As discussed in more detail below, opponents have expressed concerns regarding the impact of this bill on the free speech rights of businesses. Nevertheless, the bill closely tracks the constitutional principles governing regulation of commercial speech in its exception from the anti-SLAPP motion for causes of action against businesses based on the specified statements and conduct. In *Kasky v. Nike*, 27 Cal. 4th 939 (2002), the California Supreme Court recently surveyed the law regarding the constitutional protections afforded commercial speech.

The [federal] Constitution accords less protection to commercial speech than to other constitutionally safeguarded forms of expression. To determine the validity of a content-based regulation of commercial speech, the United States Supreme Court has articulated an intermediate-scrutiny test. The court first articulated this test in *Central Hudson Gas & Elec. v. Public Service Comm'n* (1980) 447 U.S. 557, 65 L. Ed. 2d 341, 100 S. Ct. 2343 (Central Hudson) and has since referred to it as the Central Hudson test. The court explained the components of the test this way: 'At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.' The court has clarified that the last part of the test -determining whether the regulation is not more extensive than 'necessary' - does not require the government to adopt the least restrictive means, but instead requires only a 'reasonable fit' between the government's purpose and the means chosen to achieve it. (*Kasky*, at 952 (citations and emphasis omitted).)

The court went on to explain the reasons for the lower constitutional protection afforded commercial speech:

The United States Supreme Court has given three reasons for the distinction between commercial and noncommercial speech

in general and, more particularly, for withholding First Amendment protection from commercial speech that is false or actually or inherently misleading.

First, 'the truth of commercial speech ... may be more easily verifiable by its disseminator than ... news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else.'

Second, commercial speech is harder than noncommercial speech in the sense that commercial speakers, because they act from a profit motive, are less likely to experience a chilling effect from speech regulation.

Third, governmental authority to regulate commercial transactions to prevent commercial harms justifies a power to regulate speech that is 'linked inextricably' to those transactions. The high court has identified 'preventing commercial harms' as 'the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech', and it has explained that 'the interest in preventing commercial harms justifies more intensive regulation of commercial speech than noncommercial speech even when they are intermingled in the same publications.' (*Kasky*, at 954-56 (citations and emphasis omitted).)

The Status of California Case Law on Commercial Speech After *Kasky v. Nike* . The *Kasky* decision has been criticized by some business and commercial free speech advocates. The U.S. Supreme Court initially granted certiorari to review the case, but recently dismissed the writ as improvidently granted. *Kasky*

thus remains the latest and most authoritative teaching on commercial free speech rights.

What is Commercial Speech? After a thorough review of the case law, Kasky discerned the following principles for distinguishing commercial from non-commercial speech:

[W]hen a court must decide whether particular speech may be subjected to laws aimed at preventing false advertising or other forms of commercial deception, categorizing a particular statement

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as commercial or noncommercial speech requires consideration of three elements: the speaker, the intended audience, and the content of the message.

In typical commercial speech cases, the speaker is likely to be someone engaged in commerce - that is, generally, the production, distribution, or sale of goods or services - or someone acting on behalf of a person so engaged, and the intended audience is likely to be actual or potential buyers or customers of the speaker's goods or services, or persons acting for actual or potential buyers or customers, or persons (such as reporters or reviewers) likely to repeat the message to or otherwise influence actual or potential buyers or customers.

Finally, the factual content of the message should be commercial in character. In the context of regulation of false or misleading advertising, this typically means that the speech consists of representations of fact about the business operations, products, or services of the speaker (or the individual or company that the speaker represents), made for the purpose of promoting sales of, or other commercial transactions in, the speaker's products or services. (Kasky, at 960-61 (citations and emphasis omitted).)

Does this Bill Impact Commercial or Noncommercial Speech? This bill closely tracks Kasky's guidelines on commercial speech, focusing on the speaker, content of the message, and the intended audience.

Specifically, the bill would exempt from the anti-SLAPP motion only causes of action where the speaker is a person primarily engaged in the business of selling or leasing goods or service. The content of the covered speech under the bill is 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. Finally, the bill also considers the intended-audience element of the Kasky test. Under the bill, the intended audience must be an actual or potential buyer or customer, or a person likely to repeat the statement to or otherwise influence an actual or

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potential buyer or customer, or the statement or conduct arose out of or within the context of a regulatory approval process, proceeding, or investigation, notwithstanding that the conduct or statement concerns an important public issue, such as alleged illegal conduct by a corporation.

— Certainly, the bill does exclude certain types of actions from the anti-SLAPP special motion to strike procedure. While it may be asserted that this distinction disadvantages the excluded speech, it should be remembered that the anti-SLAPP motion is designed to advance the significant governmental interest in protecting the exercise of free speech and petition rights by citizens and community groups who are subject to SLAPP suits. In other words, even if the bill excludes some commercial speech from the anti-SLAPP motion, there is a countervailing governmental interest in protecting the non-commercial speech of individual citizen and small community that is targeted by SLAPP suits. It is also important to keep in mind that the bill does not attach liability to any speech, nor does it override existing law, which may provide a defense against liability

based on the nature of the speech. (E.g., Civil Code section 47 (absolute immunity for specified statements based on the speaker and the circumstances of the statement, such as those made in governmental proceedings.)) Moreover, it is also true that a party who believes that legal claims have been asserted against them because of the exercise of constitutional rights may still assert a demurrer or other dispositive motion, even if the special anti-SLAPP procedure is not available.

As set out above, Kasky teaches that commercial speech may be regulated when the government has a sufficient interest, and selects reasonable means to achieve that interest. Inarguably, the prohibition of SLAPP actions, which involve countervailing speech and petition rights, is a substantial governmental interest, and the means do not appear unreasonable.

Exception for Public Interest Cases . The bill also exempts from the anti-SLAPP motion actions brought solely in the public interest or on behalf of the general public if a specific set of restrictions is satisfied. This exception is sharply defined by factors corresponding to the state's private attorney general statute. This public interest exception, supporters say, parallels the existing exception for actions by the attorney general and public prosecutors. Just as actions by the attorney general are not now subject to the anti-SLAPP motion, actions by

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private attorneys general would not be subject to the anti-SLAPP procedure. In support of this exemption, the California Anti-SLAPP Project writes: "The reason this exemption is needed and appropriate is as follows: There are certain statutes that protect public health or consumers that allow for enforcement by private attorneys general, without an injured plaintiff. Conceptually, these are virtually identical to when the D.A. or Attorney General enforces those same statutes. (Citations omitted.) Since the statute already exempts actions filed by public prosecutors, it should provide a parallel protection when people are acting only in the public interest as private attorneys general, and are not seeking any special relief for themselves."

The public interest criteria also make clear that suits motivated by personal gain are not exempted from the anti-SLAPP motion. This is necessary, according to CAOC, because there are some abusive uses of the unfair competition law that should be subject to the SLAPP motion. CAOC asserts that cases that are motivated by personal gain, such as the recent Trevor Law Group's unfair competition actions, would not be covered by the exemption.

Specified Exclusions From the Foregoing Exemptions . In order to preserve the anti-SLAPP motion for the protection of those frequent targets it was intended to protect, this bill excludes from the foregoing exemptions specified persons and entities, such as those engaged in speech-related activities, specified nonprofits, and actions against persons or entities based on the creation or promotion of constitutionally protected artistic works and the like. These exclusions were likewise contained in the author's similar measure last year, except that the exclusion in this year's bill for actions against persons or entities involved in dramatic, literary and other works is more narrow than last year's language.

Appeal Provision . Generally the anti-SLAPP statute provides that an order granting or denying a special motion to strike is immediately appealable. In order to prevent the appeal process from frustrating the intent to prevent improper delay of actions in which the anti-SLAPP procedure is inappropriate, this bill provides that the denial of a special motion to strike because of an exemption or exception under the provisions of this bill does not trigger the anti-SLAPP appeal provisions. This provision is comparable to existing law exempting Attorney

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General actions from the appeal and discovery stay provisions of the anti-SLAPP motion. Nevertheless, the subject of the anti-SLAPP motion could continue to make use of the anti-SLAPP appeal procedure if the court granted an anti-SLAPP motion to strike after rejecting an argument that the case should be exempt.

Author's Technical Amendments . In order to clarify the bill, the author appropriately proposes to amend the bill as follows:

In subdivision (c)(2): except where the statement or conduct was made by a telephone corporation in ~~a matter~~ in the course of a proceeding before the California Public Utilities Commission and is the subject of a lawsuit brought by a competitor ?.

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

Prior Related Legislation . SB 789 (Kuehl) of 2002 was a virtually identical measure that won approval in this Committee but was vetoed by the Governor. AB 1675 (Asm. Judiciary Committee), Ch. 960, Stats. 1999, provided for immediate appeal from the denial of an anti-SLAPP motion. SB 1296 (Lockyer), Ch. 271, Stats. 1997, amended the anti-SLAPP statute to provide that the section shall be broadly construed. _

REGISTERED SUPPORT / OPPOSITION :

Support

Consumer Attorneys of California (co-sponsor)
California Anti-SLAPP Project
California Community Health Advocates
Californians for Alternatives to Toxics
California League for Environmental Advancement Now
California Employment Lawyers Association
California Nurses Association
Center for Environmental Health
Communities for a Better Environment
Consumer Federation of California
Ecological Rights Foundation

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Environmental Law Foundation
Lexington Law Group
Mateel Environmental Justice Foundation
Milberg, Weiss, Bershad, Hynes & Lerach
Natural Resources Defense Council
Occupational Knowledge
Physicians for Social Responsibility - SF Bay Area
Rose Foundation for Communities and the Environment
SLAPP Resource Center
Sierra Club California
WaterKeepers Northern California

Opposition

American Insurance Association
California Association of Realtors
California Building Industry Association
California Business Properties Association
California Chamber of Commerce
California Dental Association
California First Amendment Coalition
California Healthcare Institute
Civil Justice Association of California
Consulting Engineers and Land Surveyors of California (CELSOC)
Home Ownership Advancement Foundation
Personal Insurance Federation of California

Analysis Prepared by : Kevin G. Baker / JUD. / (916) 319-2334

SENATE THIRD READING
SB 515 (Kuehl)
As Amended July 8, 2003
Majority vote

SENATE VOTE :22-14 _

JUDICIARY 9-4

Ayes:	Corbett, Hancock, Jackson, Laird, Lieber, Longville, Montanez, Steinberg, Levine		
Nays:	Harman, Bates, Pacheco, Spitzer		

SUMMARY : Revises who may invoke, and when, the special anti-Strategic Litigation Against Public Participation (SLAPP) procedure for striking a lawsuit or claim on the ground that the suit or claim is based on the exercise of specified constitutional rights. Specifically, this bill :

- 1) Prohibits an anti-SLAPP motion from being employed against any action brought solely in the public interest, or on behalf of the general public, if the plaintiff does not seek any relief greater than or different from the relief sought for the public or the class of which plaintiff is a member, and also satisfies the standards for a private attorney general action.
- 2) Prohibits the anti-SLAPP motion from being used in specified causes of action against businesses sued for statements or conduct consisting of representations of fact about their goods, services or business operations, or those of a competitor, when those statements or conduct were for the purpose of obtaining approval for, promoting, or securing sales or leases of the person's goods or services, or in the course of delivering the person's goods or services, if 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, notwithstanding that the conduct or statement concerns an important public issue.

- 3) Permits, as an exception to the foregoing prohibitions, the anti-SLAPP motion to be employed against claims arising from gathering, receiving or processing information for communication to the public by a publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, press association or wire service, or a person engaged in the dissemination of ideas or expression in any book or academic journal, or an action based upon the creation or promotion of a dramatic, literary, musical, political or artistic work.
- 4) Permits, as a further exception to the foregoing prohibitions, the anti-SLAPP motion to be employed in claims against any non-profit organization that receives more than 50% of its annual revenue from federal, state, or local government grants, awards, programs, or reimbursements for services rendered.
- 5) Provides that whenever a trial court denies a special motion to strike on the grounds that the cause of action is exempt pursuant to the foregoing exemptions and their exceptions, the otherwise applicable immediate appeal provisions of the anti-SLAPP statute shall not apply to the action or cause of action that is the basis of the exemption.

FISCAL EFFECT : None

COMMENTS : According to the sponsor, Consumer Attorneys of California (CAOC), this bill is needed to stop corporate abuse

of the anti-SLAPP statute and return to its original purpose of protecting citizens' rights of petition and free speech. CAOC asserts that in recent years a growing number of large corporations have inappropriately invoked the anti-SLAPP statute to delay and discourage consumer and other litigation against them by filing meritless anti-SLAPP motions. As evidence that corporations are turning the anti-SLAPP law into a litigation weapon, the sponsor points to a seminar promoted by the Practising Law Institute: "Challenging a 17200 Claim as a 'SLAPP' Suit." Ironically, it might be added that one recent example of the controversial use of the anti-SLAPP motion

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Page 3

against Business and Profession Code Section 17200 claims arose in the Trevor Law Group's resort to the motion in response to the Attorney General's suit against Trevor. CAOC also cites a number of recent published opinions where corporate defendants brought anti-SLAPP motions. Although each of these motions was unsuccessful, CAOC contends that they delayed the litigation because of the automatic discovery stay and interlocutory appeal provisions of the anti-SLAPP statute.

Proponents contend that the increased use of meritless anti-SLAPP motions by corporate defendants subverts the purpose of the anti-SLAPP law. CAOC argues that the anti-SLAPP statute was created in direct response to legislative concern about the filing of lawsuits primarily to chill the valid exercise of constitutional rights, and that the anti-SLAPP protections were intended to protect citizens from expensive retaliatory lawsuits that are brought to chill their valid exercise of their free speech and petition rights. Proponents argue that this chilling effect does not apply when a large corporate defendant has massive resources that they may rely upon in litigation, unlike the private citizen.

This bill does exclude certain types of actions from the anti-SLAPP special motion to strike procedure. While it may be asserted that this distinction disadvantages the excluded speech, it should be remembered that the anti-SLAPP motion is designed to advance the significant governmental interest in protecting the exercise of free speech and petition rights by citizens and community groups who are subject to SLAPP suits. In other words, even if this bill excludes some commercial speech from the anti-SLAPP motion, there is a countervailing governmental interest in protecting the non-commercial speech of individual citizen and small community that is targeted by SLAPP suits. It is also important to keep in mind that this bill does not attach liability to any speech, nor does it override existing law, which may provide a defense against liability based on the nature of the speech. Moreover, it is also true that a party who believes that legal claims have been asserted against them because of the exercise of constitutional rights may still assert a demurrer or other dispositive motion, even if the special anti-SLAPP procedure is not available.

Analysis Prepared by : Kevin G. Baker / JUD. / (916) 319-2334

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FN: 0002208

SENATE RULES COMMITTEE	SB 515
Office of Senate Floor Analyses	
1020 N Street, Suite 524	
(916) 445-6614 Fax: (916)	
327-4478	

UNFINISHED BUSINESS

Bill No: SB 515
 Author: Kuehl (D), et al
 Amended: 7/8/03
 Vote: 21

SENATE JUDICIARY COMMITTEE : 5-1, 5/6/03
 AYES: Escutia, Cedillo, Ducheny, Kuehl, Sher
 NOES: Ackerman
 NO VOTE RECORDED: Morrow

SENATE FLOOR : 22-14, 5/29/03
 AYES: Alarcon, Bowen, Burton, Cedillo, Chesbro, Ducheny,
 Dunn, Escutia, Figueroa, Florez, Karnette, Kuehl, Murray,
 Ortiz, Perata, Romero, Sher, Soto, Speier, Torlakson,
 Vasconcellos, Vincent
 NOES: Aanestad, Ackerman, Ashburn, Battin, Brulte, Denham,
 Hollingsworth, Johnson, Knight, Margett, McClintock,
 McPherson, Oller, Poochigian
 NO VOTE RECORDED: Alpert, Machado, Morrow, Scott

ASSEMBLY FLOOR : 44-30, 8/21/03 - See last page for vote

SUBJECT : Civil actions

SOURCE : Consumer Attorneys of California

DIGEST : This bill would make the Strategic Lawsuit
 Against Public Participation motion (SLAPP) (special motion
 to strike a cause of action arising from any act of the
 defendant in furtherance of that person's right of petition
 or free speech) inapplicable to: (a) public interests and
 CONTINUED

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class action lawsuits when specified conditions are met;
 and (b) lawsuits brought against a business that arises
 from commercial statements or conduct of that business, as
 specified.

This bill would also provide if the trial court denies a
 SLAPP motion because of the new exemptions, the stay of
 discovery and the right to an immediate appeal provisions
 of the anti-SLAPP law do not apply.

The bill would also make legislative findings relating to
 the disturbing abuse of the anti-SLAPP law, and stating
 that continued participation in matters of public
 significance should not be chilled through abuse of the
 judicial process or the anti-SLAPP law.

Assembly Amendments (1) includes specified non-profit
 organizations in those entities whose claims or actions are
 not subject to a special motion to strike, (2) add a
 co-author.

ANALYSIS : Existing law provides that 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,
 as specified, is subject to a special SLAPP motion to
 strike, unless the court determines there is a probability
 that the plaintiff will prevail on the claim. This SLAPP
 motion is not applicable to any enforcement action brought
 in the name of the people of the State of California by the
 Attorney General, district attorney, or city attorney,
 acting as a public prosecutor.

This bill would further provide that the following claims

or actions are not subject to a special motion to strike:

1. Any action brought solely in the public interest or on behalf of the general public when all three following conditions are met:
 - A. The plaintiff does not seek any relief greater than or different from the relief sought for the general public or a class of which the plaintiff is a member. A claim for attorney's fees, costs, or penalties would

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not constitute greater or different relief.

- B. The action, if successful, would enforce an important right affecting the public interest, and would confer a significant benefit on the general public or a large class of persons.
 - C. Private enforcement is necessary and places a disproportionate financial burden on the plaintiff in relation to the plaintiff's stake in the matter.
1. 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 of that person when both the following conditions are met:
 - A. 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 good's or services.
 - B. Either (i) is aimed at an actual or potential buyer, or person likely to repeat the statement to, or otherwise influence the buyer, or (ii) arose out of or within the context of a regulatory approval process, proceeding or investigation, except where the statement or conduct was made by a telephone corporation in a matter before the California Public Utilities Commission and is the subject of a lawsuit brought by a competitor, even if that statement or conduct concerns an important public issue.

Existing law provides that the above provisions do not apply to specified individual or entities engaged in the various forms of communications and other specified associated venues.

This bill would expand that group to include any nonprofit

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organization that receives more than 50 percent of its annual revenues from federal, state or local government grants, awards, programs or reimbursement for services rendered.

Existing law provides that an order denying a special motion to strike is appealable to the court of appeal. Existing law generally provides that the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby. Existing law also provides for a stay of discovery when a SLAPP motion is filed, but allows the court to allow specified discovery for good cause shown.

This bill would make those stay and appeals provisions inapplicable when a trial court denies a special motion to strike on the grounds that a cause of action is exempt pursuant to this bill.

The bill would make legislative findings and declarations decrying the disturbing abuse of the anti-SLAPP law, which

has undermined the exercise of constitutional rights of freedom of speech and petition for redress of grievances, and stating that public participation in matters of public significance should not be chilled through abuse of the judicial process or the anti-SLAPP law.

Background

Strategic Lawsuits Against Public Participation, or SLAPP suits, as they have become popularly termed, were first defined by University of Denver Law School Professor George Pring and University of Denver Sociology Professor Penelope Canan in their seminal article, Strategic Lawsuits Against Public Participation (1988) 35 Social Problems 506, as "civil lawsuits ... that are aimed at preventing citizens from exercising their political rights or punishing those who have done so."

While SLAPP suits "masquerade as ordinary lawsuits" such as defamation and interference with prospective economic advantage, they are generally meritless suits brought primarily to chill the exercise of free speech or petition

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rights by the threat of severe economic sanctions against the defendant, and not to vindicate a legally cognizable right. (See, Pring and Canan, SLAPPS: Getting Sued for Speaking Out (Temple University Press, 1996).)

In 1992, Code of Civil Procedure Section 425.16 was enacted by SB 1264 (Lockyer), Chapter 726, Statutes of 1992, to provide a "special motion to strike" for use by defendants in SLAPP lawsuits to obtain an early judicial ruling and termination of a meritless claim arising from a person's exercise of the constitutional rights of petition and free speech in connection with a public issue. In passing the Anti-SLAPP law, the Legislature found that "there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances . . . that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process." (Emphasis added.)

In 1997, this preamble of the anti-SLAPP law was amended to provide that the Section 425.16 shall be broadly construed. (SB 1296 (Lockyer), Chapter 271, Statutes of 1997.)

Since becoming law in 1993, there have been at least 100 reported appellate opinions construing Section 425.16, including 13 federal appellate decisions and six California Supreme Court decisions, providing 33 pages of annotations to the West codes.

Prior Legislation

SB 789/SB 1651 (Kuehl) passed the Senate Floor on 8/31/02, 22-11, (NOES: Battin, Brulte, Haynes, Johannessen, Margett, McClintock, McPherson, Montieth, Morrow, Oller, Poochigian) and was vetoed by the Governor on September 30, 2002.

In his veto message for SB 789 the Governor wrote:

"This bill would place restrictions on the use of California's anti-SLAPP statute (Code of Civil

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Procedure Section 425.16) by persons engaged in certain businesses. The intent of a SLAPP lawsuit is to prevent citizens from exercising their First Amendment rights to free speech. Strategic Lawsuits Against Public Participation (SLAPP) were originally intended to protect against frivolous lawsuits brought typically by industry against public protestors. SLAPP suits are also used to dilute financial resources of public protestors by requiring them to expend monies to defend their First Amendment rights

in court.

"This bill essentially prohibits those engaged in commercial speech from bringing an anti-SLAPP motion. It attempts to protect, for example, plaintiffs who file product liability and negligence claims from having their claims subjected to an anti-SLAPP motion.

"I am concerned, however, that this legislation unduly interferes with the court's discretion. The First Amendment right to free speech should be carefully guarded and the Court may be in the best position to ensure this right is protected by examining these claims on a case by case basis.

"There are important competing interests here. On the one hand, we should not discourage valid public interest claims. On the other hand, we must be careful about chilling free speech. This bill was a product of a late in the session "gut and amend" and I am not satisfied that it strikes the right balance."

FISCAL EFFECT : Appropriation: No Fiscal Com.: No
Local: No

SUPPORT : (Verified 8/21/03)

Consumer Attorneys of California (source)
California Anti-SLAPP Project
Congress of California Seniors
Consumer Federation of California

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OPPOSITION : (Verified 8/21/03)

American Civil Liberties Union
Association of California Insurance Companies
California Association of Realtors
California Building Industry Association
California Business Properties Association
California Chamber of Commerce
California Dental Association
California Healthcare Institute
Civil Justice Association of California
Consulting Engineers and Land Surveyors of California
Home Ownership Advancement Foundation
Novartis Pharmaceuticals Corporation
Personal Insurance Federation of California

ARGUMENTS IN SUPPORT : The Consumer Attorneys of California (CAOC), sponsors of SB 515, assert that SB 515 is needed 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. They note 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.

As evidence of their claim, CAOC points to the raising number of SLAPP motions filed in the superior courts of Sacramento, Los Angeles, and San Francisco where total SLAPP motions in those courts have jumped from 93 in the year 2000 to 200 in the year 2002. CAOC argues that seminars such as those promoted by the Practicing Law Institute, "Challenging a 17200 Claim as a 'SLAPP' Suit," are encouraging corporations to use the SLAPP motions as new litigation weapon to slow down and perhaps even get out of litigation.

ARGUMENTS IN OPPOSITION : The Personal Insurance Federation of California argues that:

"The effect of SB 515 is to eliminate the Anti-SLAPP suit motion as a tool for dismissing frivolous or malicious

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lawsuits which are aimed at intimidating a business from exercising its free speech right. Businesses are frequently the target of lawsuits designed to harass or coerce a business into settling for nuisance value, or to stop a legitimate business activity. There is no good public policy reason why business defendants should be excluded from utilizing the Anti-SLAPP suit statute to dismiss unmeritorious lawsuits rather than being coerced into settling or incurring unnecessary litigation costs simply for exercising their constitutional rights.

Several court cases are currently pending before the California Supreme Court that will clarify issues that have arisen in interpreting the Anti-SLAPP suit law. Those cases were granted review last year by the court and decisions by the court can be anticipated in the near future. We urge the Legislature to await those decisions before making any changes to the law."

Novartis Pharmaceuticals Corporation argues that SB 515 would significantly the protections against frivolous litigation which are now provided by the anti-SLAPP statute. It asserts that it was able to obtain a quick dismissal in a purported class action lawsuit that attacked Novartis' actions in taking positions on scientific issues. Without the special motion, Novartis writes that it would have had to spend years and hundreds of thousands of dollars or more in attorneys fees to defend the action.

The building industry coalition also opposes SB 515, concerned that it would grant absolute protection to and encourage unmeritorious NIMBY (Not in My Back Yard) litigation by granting opponents of new development projects immunity from the SLAPP motion. They note that such litigation often takes the form of a CEQA (California Environmental Quality Act) challenge. These opponents argue that California cannot afford more NIMBY lawsuits.

The California Dental Association (CDA) also opposes, noting that the SB 515 would eliminate the only legal tool the CDA has been able to employ to avoid fully litigating Unfair Competition nuisance lawsuits filed against them for their public statements about dental filling materials. _

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ASSEMBLY FLOOR :

AYES: Berg, Bermudez, Calderon, Chan, Chavez, Chu, Cohn, Corbett, Correa, Diaz, Dymally, Frommer, Goldberg, Hancock, Jerome Horton, Jackson, Kehoe, Koretz, Laird, Leno, Levine, Lieber, Liu, Longville, Lowenthal, Matthews, Montanez, Mullin, Nation, Negrete McLeod, Nunez, Oropeza, Parra, Pavley, Reyes, Ridley-Thomas, Salinas, Simitian, Steinberg, Vargas, Wiggins, Wolk, Yee, Wesson

NOES: Aghazarian, Bates, Benoit, Bogh, Campbell, Cogdill, Cox, Daucher, Dutton, Garcia, Haynes, Shirley Horton, Houston, Keene, La Malfa, Leslie, Maddox, Maldonado, Maze, McCarthy, Mountjoy, Nakanishi, Pacheco, Plescia, Richman, Runner, Samuelian, Spitzer, Strickland, Wyland

RJG:nl 8/22/03 Senate Floor Analyses

SUPPORT/OPPOSITION: SEE ABOVE

**** END ****

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Date of Hearing: April 5, 2005

ASSEMBLY COMMITTEE ON JUDICIARY
Dave Jones, Chair
AB 1158 (Lieber) - As Introduced: February 22, 2005

As Proposed To Be Amended

SUBJECT : ANTI-SLAPP STATUTE: MALICIOUS PROSECUTION AND RELATED ACTIONS

KEY ISSUES :

- 1) SHOULD MALICIOUS PROSECUTION AND RELATED CLAIMS ASSERTED BY THE TARGET OF A SO-CALLED "SLAPP" ACTION BE EXEMPT FROM THE ANTI-SLAPP STATUTE?
- 2) SHOULD "SLAPP" VICTIMS BE ALLOWED TO SEEK DAMAGES BEYOND LAWYER'S FEES IN A SUBSEQUENT MALICIOUS PROSECUTION ACTION?

SYNOPSIS

This non-controversial urgency measure clarifies the protections of California's anti-SLAPP law, which protects the public's First Amendment rights by prohibiting Strategic Lawsuits Against Public Participation (SLAPPs) - lawsuits pursued solely to prevent members of the public from participating in their government or speaking out on public issues. In order to ensure that victims of SLAPP suits are fully compensated for their losses, and to prohibit an emerging practice of abusing the anti-SLAPP law as a means to defend meritless lawsuits, this bill amends the anti-SLAPP statute to exempt so-called SLAPPback suits - that is, abusive claims filed by the target of a SLAPP suit against the SLAPP filer after the dismissal of the SLAPP suit as a result of the target's appropriate use of the SLAPP statute. Similarly, the bill prevents a claim determined to be a meritless SLAPP claim from being used as probable cause in response to a malicious prosecution suit. It also precludes automatic right to appeal when a court denies a special motion to strike based on the finding that the action or cause of action is exempt from the anti-SLAPP statute because it is a public prosecution action or a "SLAPPback" suit. The bill also makes needed technical and clarifying procedural changes to promote efficiency.

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SUMMARY : Revises application of the anti-SLAPP statute. Specifically, this bill :

- 1) Provides that so-called "SLAPPback" actions (typically malicious prosecution claims filed by the target of a SLAPP suit against the SLAPP filer after the dismissal of the SLAPP suit as a result of the target's use of the anti-SLAPP special motion to strike) are exempt from the anti-SLAPP statute.
- 2) Prevents a claim determined to be a meritless SLAPP claim from being used as probable cause in response to a malicious prosecution suit.
- 3) Precludes automatic right to appeal when a court denies a special motion to strike based on the finding that the action or cause of action is exempt from the anti-SLAPP statute because it is a public prosecution action or a "SLAPPback" suit.
- 4) Allows SLAPP victims more flexibility in scheduling hearing on anti-SLAPP motions by making clear that the current requirement that an anti-SLAPP motion to strike must be heard within 30 days is not jurisdictional.
- 5) Provides that objections to evidence in an anti-SLAPP hearing are not waived merely because the trial court does not rule on the objections.

EXISTING LAW:

- 1) Provides pursuant to the anti-SLAPP statute that 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, as specified, shall be subject to a special motion to strike, unless the court, after considering the pleadings and supporting and opposing affidavits, determines that there is a probability that the plaintiff will prevail on the claim. (Code of Civil Procedure section 426.16. All further statutory references are to this code unless otherwise noted.)

- 2) Exempts from the anti-SLAPP statute specified enforcement actions brought by public prosecutors and private attorneys general brought in the name of the people of the State of

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California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor and certain commercial claims. (Sections 425.16, 425.17.)

FISCAL EFFECT : As currently in print, this bill is keyed non-fiscal.

COMMENTS : According to the author, this bill clarifies the protections of California's anti-SLAPP law, which protects the public's First Amendment rights by prohibiting Strategic Lawsuits Against Public Participation (SLAPPs) - lawsuits pursued solely to prevent members of the public from participating in their government or speaking out on public issues. The author states that this bill will ensure that victims of SLAPP suits are fully compensated for their losses, and prohibit an emerging practice by those who file SLAPP suits of abusing the anti-SLAPP law to defend their meritless lawsuits.

Background on SLAPP Suits and California's Anti-SLAPP Statute

SLAPP suits were first defined in a 1988 article by University of Denver professors George Pring and Penelope Canan as "civil lawsuits ... that are aimed at preventing citizens from exercising their political rights or punishing those who have done so." While SLAPP suits "masquerade as ordinary lawsuits" such as defamation and interference with prospective economic advantage, they are generally meritless suits brought primarily to chill the exercise of free speech or petition rights by the threat of severe economic sanctions against the defendant, and not to vindicate a legally cognizable right.

In 1992, California enacted an anti-SLAPP statute, codified at Code of Civil Procedure section 425.16 to provide a "special motion to strike" which could be used by defendants in SLAPP suits to obtain an early judicial ruling and termination of a meritless claim arising from a person's exercise of the right to petition or free speech in connection with a public issue. That statute was amended in 2003 to exempt specified public interest actions and certain causes of action regarding statements about goods, services or business operations of persons engaged in business.

Exempts So-Called "SLAPPback" Suits From The Anti-SLAPP Law.

The author states that in most SLAPPs the attorneys' fees and costs recoverable under the anti-SLAPP law are only part of the

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overall damages suffered by the SLAPP victim. SLAPP victims, the author states, commonly experience stress-related health issues, strained family relationships, and financial distress or even insolvency. The only way a SLAPP victim can recover for these damages is to pursue a legal claim against the person or entity that filed the original SLAPP. These claims, (typically malicious prosecution claims filed after successful use of the anti-SLAPP statute to dismiss the SLAPP) are known as "SLAPPback" suits.

AB 1158 provides that SLAPPback actions are exempt from attack by the anti-SLAPP statute. This will allow SLAPP victims the right to seek damages beyond lawyer's fees in a subsequent malicious prosecution action. In so doing the bill would overrule two appeals court decisions in which the court held that a SLAPPback malicious prosecution claim filed by the SLAPP victim after dismissal of (and in response to) a SLAPP action was itself subject to the anti-SLAPP statute. In other words, the author argues, the courts allowed the SLAPPer to use the anti-SLAPP law to defeat the victim's efforts to recover all of

her loses arising from the SLAPP suit.

The sponsor, California Anti-SLAPP Project (CASP), states that the language in this proposed amendment was recommended in a report to the Judicial Council to "clear up this potential loophole" and prevent the law from creating "a merry-go round of abuse."

Similarly, the bill also prevents a claim determined to be a meritless SLAPP from being used as probable cause in response to a malicious prosecution suit, thereby allowing SLAPP victims to recover their damages in a subsequent malicious prosecution suit. The sponsor asserts that this provision overrules an appeals court decision that narrowly construed the anti-SLAPP law by holding that the trial court's denial of a special motion to strike in a prior action, on grounds that plaintiffs had shown a probability of prevailing, establishes probable cause for bringing the prior action. This holding thus precluded a subsequent malicious prosecution suit by the prevailing defendants, supporters state, even though the trial court's ruling was eventually reversed.

Eliminates SLAPPer's Ability To File An Immediate Appeal When The Victim Brings a SLAPPback Case And The Court Protects the Case Against Misuse of the Anti-SLAPP Statute, As Well As When

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The Case Is Exempt From The Anti-SLAPP Law As A Public Prosecution. Current law allows for an automatic right to appeal from denial of an anti-SLAPP motion. This bill removes that automatic right to appeal when a court denies an anti-SLAPP motion based on the finding that the action or cause of action is exempt from the anti-SLAPP motion as a "SLAPPback" or as public prosecution enforcement action.

The author argues, "The Legislature has chosen, for sound policy reasons, to exempt certain actions or causes of action from the protections of the anti-SLAPP law. Therefore, the determination by the trial court that such an exemption applies should not be subject to an immediate appeal. The right to an immediate appeal is one of the special protections enacted by the anti-SLAPP law, and should not be available in cases where the anti-SLAPP statute does not apply. This is particularly important because an appeal of such a motion automatically stays the related proceedings in the trial court. Permitting an immediate appeal in these cases would allow for abuse of the anti-SLAPP law."

It should also be noted that this provision is consistent with existing law, enacted in 2003, precluding automatic appeal when a court denies an anti-SLAPP motion on the ground that the claim or cause of action is exempt because it is a public interest action or brought against a business that arises from commercial statements or conduct of that business.

Allows SLAPP Victims More Flexibility In Scheduling Hearing On Anti-SLAPP Motion. Current law requires that when an anti-SLAPP motion to strike is filed it must be heard within 30 days. According to the sponsor, the purpose of this provision in existing law is to ensure that a defendant can quickly obtain a hearing on his or her motion, in order to defeat a SLAPP suit at the earliest possible time. Two recent appellate court decisions have held that this requirement is jurisdictional, and the motion must be dismissed if not heard within that time period. However, in some instances, the defendant (for whose benefit the 30 day rule exists) may desire a longer time period, supporters argue. The changes to subsection (f) make clear that a defendant may seek a later hearing, while also providing either party the right to seek an earlier hearing upon ex parte motion. In addition, the author states, this provision enacts a recommendation to the Judicial Council that is intended to prevent abusive denials of motions filed more than 60 days after

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service.

Precludes Objections To Evidence In An Anti-SLAPP Hearing From Being Waived Merely Because The Trial Court Does Not Rule On The Objections. The bill also provides that on appeal a party's evidentiary objections in the trial court are not deemed waived

if the trial court does not rule on or sustain them. In one recent case, the author reports, the court held that the defendant waived its evidentiary objection to a crucial piece of evidence "because it did not obtain a ruling on it in the trial court." The court gave no explanation for this holding, other than an ambiguous reference to a case construing the summary judgment statute. The author argues that the reasoning behind this decision is flawed and it unfairly penalizes SLAPP victims for the trial courts' failure to rule on a timely objection.

Author's Clarifying Amendments. In order to further the purposes of the bill and clarify certain provisions, the author prudently proposes the following amendments:

~~(b)(4) The denial of a defendant's special motion to strike or other dispositive motion by the trial court, or the affirmance of the trial court's denial of the motion by an intermediate appellate court, shall not ~~be deemed to be~~ constitute probable cause for bringing or maintaining the cause of action challenged by the motion if the defendant ~~eventually~~ ultimately prevails under this section with respect to that cause of action.~~

~~(d)(2) This section shall not apply to malicious prosecution claims or any other cause of action arising from ~~any~~ the assertion of a prior cause of action ~~which~~ that has been dismissed pursuant to a special motion to strike under this section~~

~~(f) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper, to carry out the intent of subdivision (a). . The motion shall be ~~noticed~~ scheduled by the clerk of the court for a hearing not more than 30 days after ~~service~~ the filing of the motion unless the docket conditions of the court require a later hearing or the defendant requests one. Any affected party may seek an earlier hearing date by ex parte application, which shall be granted for good cause shown.~~

~~(i) On or before January 1, 1998, the Judicial Council shall~~

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report to the Legislature on the frequency and outcome of special motions made pursuant to this section, and on any other matters pertinent to the purposes of this section.

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

~~(j) On appeal, a party's timely evidentiary objections in the trial court shall not be deemed waived on the ground that the trial court failed to rule on the objection.~~

~~SECTION 2. In adding subdivision (d)(2) to Section 425.16, it is the intent of the Legislature to overrule the decision in Soukup v. Stock (2004) 118 Cal.App.4th 1490, petition for review granted 10/20/04, S126864. In adding subdivision (b)(4) to section 425.16, it is the intent of the Legislature to overrule the decision in Wilson v. Parker, Covert & Chidester (2002) 28 Cal.4th 811. These decisions misconstrue Section 425.16 by interpreting it in a way which does not protect SLAPP targets. Malicious prosecution actions are generally disfavored because of the danger that they may chill petition and speech activity. (Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal.3d 863, 872-74.) However, a so-called SLAPPback suit (malicious prosecution and related claims arising from the dismissal of a SLAPP suit) should instead be a favored action, because it furthers petition and speech rights.~~

~~In amending subdivision (f), the Legislature intends to overrule the decisions in Decker v. UD Registry (2003) 105 Cal.App.4th 1382, 1387-90, and Fair Political Practices Commission v. American Civil Rights Coalition (8/26/04) 121 Cal.App.4th 1171, 1174-78, and to apply this amendment to cases pending at the time this act is adopted.~~

~~In amending subdivision (i), it is the intent of the Legislature to overrule the decisions in HMS Capital v. Lawyers Title Co. (2004) 118 Cal.App.4th 204, 219, and Slauson Partnership v. Ochoa (2003) 112 Cal.App.4th 1005, 1014, fn.4. and to apply this amendment to cases pending at the time this act is adopted.~~

~~SECTION 3. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:~~

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In order to clarify the law to protect SLAPP targets and avoid chilling petition and speech rights at the earliest time, it is necessary for this act to take effect immediately.

Prior Related Legislation. SB 515 (Kuehl), Ch. 338, Stats 2003, exempted public interest suits and certain causes of action arising out of commercial activity.

REGISTERED SUPPORT / OPPOSITION :

Support

California Anti-SLAPP Project (sponsor)
California Broadcasters Association
California Medical Association
California Newspaper Publishers Association
Golden State Manufactured-Home Owners League
Mexican Political Association
Natural Resources Defense Council
Planning and Conservation League
Prof. George W. Pring
4 individuals

Opposition

None on file

Analysis Prepared by : Kevin G. Baker / JUD. / (916) 319-2334

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ASSEMBLY THIRD READING
 AB 1158 (Lieber)
 As Amended April 14, 2005
 Majority vote

JUDICIARY 6-3

Ayes:	Jones, Evans, Laird, Levine, Lieber, Montanez		
Nays:	Harman, Haynes, Leslie		

SUMMARY : Revises application of the anti-Strategic Lawsuits Against Public Participation (SLAPP) statute. Specifically, this bill :

- 1) Provides that so-called "SLAPPback" actions (typically malicious prosecution claims filed by the target of a SLAPP suit against the SLAPP filer after the dismissal of the SLAPP suit as a result of the target's use of the anti-SLAPP special motion to strike) are exempt from the anti-SLAPP statute.
- 2) Prevents a claim determined to be a meritless SLAPP claim from being used as probable cause in response to a malicious prosecution suit.
- 3) Precludes automatic right to appeal when a court denies a special motion to strike based on the finding that the action or cause of action is exempt from the anti-SLAPP statute because it is a public prosecution action or a "SLAPPback" suit.
- 4) Allows SLAPP victims more flexibility in scheduling hearing on anti-SLAPP motions by making clear that the current requirement that an anti-SLAPP motion to strike must be heard within 30 days is not jurisdictional.
- 5) Provides that objections to evidence in an anti-SLAPP hearing are not waived merely because the trial court does not rule on the objections.

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FISCAL EFFECT : None

COMMENTS : According to the author, this bill clarifies the protections of California's anti-SLAPP law, which protects the public's First Amendment rights by prohibiting SLAPPs, lawsuits pursued solely to prevent members of the public from participating in their government or speaking out on public issues. The author states that this bill will ensure that victims of SLAPP suits are fully compensated for their losses, and prohibit an emerging practice by those who file SLAPP suits of abusing the anti-SLAPP law to defend their meritless lawsuits.

The author states that in most SLAPPs the attorneys' fees and costs recoverable under the anti-SLAPP law are only part of the overall damages suffered by the SLAPP victim. SLAPP victims, the author states, commonly experience stress-related health issues, strained family relationships, and financial distress or even insolvency. The only way a SLAPP victim can recover for these damages is to pursue a legal claim against the person or entity that filed the original SLAPP. These claims, (typically malicious prosecution claims filed after successful use of the anti-SLAPP statute to dismiss the SLAPP) are known as "SLAPPback" suits.

This bill provides that SLAPPback actions are exempt from attack by the anti-SLAPP statute. This will allow SLAPP victims the right to seek damages beyond lawyer's fees in a subsequent malicious prosecution action. In so doing, this bill would overrule two appeals court decisions in which the court held that a SLAPPback malicious prosecution claim filed by the SLAPP victim after dismissal of (and in response to) a SLAPP action was itself subject to the anti-SLAPP statute. In other words,

the author argues, the courts allowed the SLAPPER to use the anti-SLAPP law to defeat the victim's efforts to recover all of her losses arising from the SLAPP suit.

The sponsor, California Anti-SLAPP Project, states this provision of the bill was recommended in a report to the Judicial Council to "clear up this potential loophole" and prevent the law from creating "a merry-go round of abuse."

Similarly, this bill also prevents a claim determined to be a meritless SLAPP from being used as probable cause in response to

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a malicious prosecution suit, thereby allowing SLAPP victims to recover their damages in a subsequent malicious prosecution suit.

Current law allows for an automatic right to appeal from denial of an anti-SLAPP motion. This bill removes that automatic right to appeal when a court denies an anti-SLAPP motion based on the finding that the action or cause of action is exempt from the anti-SLAPP motion as a "SLAPPback" or as public prosecution enforcement action.

This bill allows SLAPP victims more flexibility in scheduling hearing on anti-SLAPP motion. Current law requires that when an anti-SLAPP motion to strike is filed it must be heard within 30 days. According to the sponsor, the purpose of this provision in existing law is to ensure that a defendant can quickly obtain a hearing on his or her motion, in order to defeat a SLAPP suit at the earliest possible time.

This bill also precludes objections to evidence in an anti-SLAPP hearing from being waived merely because the trial court does not rule on the objections. This bill also provides that on appeal a party's evidentiary objections in the trial court are not deemed waived if the trial court does not rule on or sustain them. In one recent case, the author reports, the court held that the defendant waived its evidentiary objection to a crucial piece of evidence "because it did not obtain a ruling on it in the trial court." The court gave no explanation for this holding, other than an ambiguous reference to a case construing the summary judgment statute. The author argues that the reasoning behind this decision is flawed and it unfairly penalizes SLAPP victims for the trial courts' failure to rule on a timely objection.

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Analysis Prepared by : Kevin G. Baker / JUD. / (916) 319-2334

FN: 0009745

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ASSEMBLY THIRD READING
 AB 1158 (Lieber)
 As Amended April 25, 2005
 2/3 vote. Urgency

JUDICIARY 6-3

Ayes:	Jones, Evans, Laird, Levine, Lieber, Montanez		
Nays:	Harman, Haynes, Leslie		

SUMMARY : Revises application of the anti-Strategic Lawsuits Against Public Participation (SLAPP) statute. Specifically, this bill :

- 1)Provides that so-called "SLAPPback" actions (typically malicious prosecution claims filed by the target of a SLAPP suit against the SLAPP filer after the dismissal of the SLAPP suit as a result of the target's use of the anti-SLAPP special motion to strike) are exempt from the anti-SLAPP statute, except with respect to public entities.
- 2)Prevents a claim determined to be a meritless SLAPP claim from being used as probable cause in response to a malicious prosecution suit, except with respect to a defendant that is a public entity
- 3)Precludes automatic right to appeal when a court denies a special motion to strike based on the finding that the action or cause of action is exempt from the anti-SLAPP statute because it is a public prosecution action or a "SLAPPback" suit.
- 4)Allows SLAPP victims more flexibility in scheduling hearing on anti-SLAPP motions by making clear that the current requirement that an anti-SLAPP motion to strike must be heard within 30 days is not jurisdictional.
- 5)Provides that objections to evidence in an anti-SLAPP hearing are not waived.

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FISCAL EFFECT : None

COMMENTS : According to the author, this bill clarifies the protections of California's anti-SLAPP law, which protects the public's First Amendment rights by prohibiting SLAPPs, lawsuits pursued solely to prevent members of the public from participating in their government or speaking out on public issues. The author states that this bill will ensure that victims of SLAPP suits are fully compensated for their losses, and prohibit an emerging practice by those who file SLAPP suits of abusing the anti-SLAPP law to defend their meritless lawsuits.

The author states that in most SLAPPs the attorneys' fees and costs recoverable under the anti-SLAPP law are only part of the overall damages suffered by the SLAPP victim. SLAPP victims, the author states, commonly experience stress-related health issues, strained family relationships, and financial distress or even insolvency. The only way a SLAPP victim can recover for these damages is to pursue a legal claim against the person or entity that filed the original SLAPP. These claims, (typically malicious prosecution claims filed after successful use of the anti-SLAPP statute to dismiss the SLAPP) are known as "SLAPPback" suits.

This bill provides that SLAPPback actions are exempt from attack by the anti-SLAPP statute. This will allow SLAPP victims the right to seek damages beyond lawyer's fees in a subsequent malicious prosecution action. In so doing, this bill would overrule two appeals court decisions in which the court held that a SLAPPback malicious prosecution claim filed by the SLAPP victim after dismissal of (and in response to) a SLAPP action was itself subject to the anti-SLAPP statute. In other words, the author argues, the courts allowed the SLAPPER to use the

anti-SLAPP law to defeat the victim's efforts to recover all of her losses arising from the SLAPP suit.

The sponsor, California Anti-SLAPP Project, states this provision of the bill was recommended in a report to the Judicial Council to "clear up this potential loophole" and prevent the law from creating "a merry-go round of abuse."

Similarly, this bill also prevents a claim determined to be a meritless SLAPP from being used as probable cause in response to a malicious prosecution suit, thereby allowing SLAPP victims to

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recover their damages in a subsequent malicious prosecution suit.

Current law allows for an automatic right to appeal from denial of an anti-SLAPP motion. This bill removes that automatic right to appeal when a court denies an anti-SLAPP motion based on the finding that the action or cause of action is exempt from the anti-SLAPP motion as a "SLAPPback" or as public prosecution enforcement action.

This bill allows SLAPP victims more flexibility in scheduling hearing on anti-SLAPP motion. Current law requires that when an anti-SLAPP motion to strike is filed it must be heard within 30 days. According to the sponsor, the purpose of this provision in existing law is to ensure that a defendant can quickly obtain a hearing on his or her motion, in order to defeat a SLAPP suit at the earliest possible time.

This bill also precludes objections to evidence in an anti-SLAPP hearing from being waived merely because the trial court does not rule on the objections. This bill also provides that on appeal a party's evidentiary objections in the trial court are not deemed waived if the trial court does not rule on or sustain them. In one recent case, the author reports, the court held that the defendant waived its evidentiary objection to a crucial piece of evidence "because it did not obtain a ruling on it in the trial court." The court gave no explanation for this holding, other than an ambiguous reference to a case construing the summary judgment statute. The author argues that the reasoning behind this decision is flawed and it unfairly penalizes SLAPP victims for the trial courts' failure to rule on a timely objection.

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SENATE JUDICIARY COMMITTEE
 Senator Joseph L. Dunn, Chair
 2005-2006 Regular Session

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As Amended April 25, 2005	
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SUBJECT

Anti-SLAPP (Strategic Lawsuit Against Public Participation)
 Law:
 -Anti-SLAPP motions and SLAPPback lawsuits-

DESCRIPTION

As amended by author's amendments to be offered in committee, this bill would enact the following rules with respect to anti-SLAPP motions and SLAPPback lawsuits (defined as a cause of action for malicious prosecution or abuse of process arising from the filing of a prior cause of action that was dismissed as a SLAPP lawsuit pursuant to an anti-SLAPP motion).

For an anti-SLAPP motion (Code of Civil Proceeding Section 425.16 special motion to strike):

- * The court's denial of an anti-SLAPP motion would be inadmissible for any purpose in any subsequent action and would not affect any burden of proof or degree of proof otherwise applicable. (Under current law, these rules are applied to bar any adverse collateral effect of that determination at any later stage of the case.)
- * The motion would be scheduled by the court clerk for hearing within 30 days after the service of the motion unless the docket conditions require a later hearing. (Current law requires that the hearing be noticed, but not necessarily scheduled.)

(more)

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- * On appeal, a party's timely evidentiary objections in the trial court would not be waived, provided the party requested a ruling on them at the hearing, if there is a hearing. (This provision is being added to the anti-SLAPP law.)

This bill would also enact Code of Civil Procedure (CCP) Section 425.18 to govern SLAPPback lawsuits. While it would permit an anti-SLAPP motion to be filed in a SLAPPback action, the bill would establish the following:

- * Legislative findings that a SLAPPback action is distinguishable in character and origin from the ordinary malicious prosecution action, and that a SLAPPback should be treated differently from the ordinary malicious prosecution action because a SLAPPback is consistent with the legislature's intent to protect the valid exercise of the constitutional rights of free speech and petition by its deterrent effect on SLAPP litigation and by its restoration of public confidence in participatory democracy.
- * There would be no right to mandatory attorney's fees for a prevailing defendant filing an anti-SLAPP motion in a SLAPPback action. (Proposed Section 425.18(c).)
- * There would be no automatic right to appeal the denial of the motion, but an expedited writ process is provided. (Proposed Section 425.18(c).)
- * There would be no limitation on discovery upon the filing of an anti-SLAPP motion. Further, a party opposing the motion to strike a SLAPPback may file an ex parte application for a continuance to obtain necessary

discovery, which shall be granted if it appears to the court that facts essential to justify opposition to the motion may exist. (Proposed Section 425.18(c) and (e).)

- * Defendants would have 120 days after service of the SLAPPback action to file the motion, (instead of 60-days) and for any delayed filing beyond six-months after service, the court must find that the delayed filing was an extraordinary case and circumstance due to no fault of the defendant. (Proposed Section 425.18(d).)

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- * The filing of a frivolous anti-SLAPP motion in a SLAPPback action would be sanctioned by an award of reasonable attorney's fees to the plaintiff. (Proposed Section 425.18(f) is taken from the existing anti-SLAPP law.)
- * A special motion to strike may not be filed in a SLAPPback action by a person whose indisputably illegal statement or indisputably illegal conduct was the basis of the prior action that was dismissed in that prior proceeding pursuant to a special motion to strike. (Proposed Section 425.18(g).)
- * The SLAPPback provisions would not apply to any SLAPPback action filed by a public entity. (Proposed Section 425.18(1).)
- * The bill would make specified findings to abrogate or overrule specified court decisions. (Proposed Section 3 of the bill.)

The bill would take effect immediately as an urgency measure.

(This analysis reflects author's amendments to be offered in committee.)

BACKGROUND

Strategic Lawsuits Against Public Participation (SLAPP) suits were first identified by University of Denver Law School Professor George Pring and University of Denver Sociology Professor Penelope Canan in their seminal article, Strategic Lawsuits Against Public Participation (1988) 35 Social Problems 506, as "civil lawsuits ... that are aimed at preventing citizens from exercising their political rights or punishing those who have done so."

While SLAPP suits "masquerade as ordinary lawsuits" such as defamation and interference with prospective economic advantage, they are generally meritless suits brought primarily to chill the exercise of free speech or petition rights by the threat of severe economic sanctions against the defendant, and not to vindicate a legally cognizable

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right. (Pring and Canan, SLAPPS: Getting Sued for Speaking Out, (Temple University Press, 1996).)

In 1992, SB 1264 (Lockyer), Ch. 726, Stats. of 1992, enacted CCP Section 425.16 to provide a "special motion to strike" for use by defendants in SLAPP lawsuits to obtain an early judicial dismissal of a meritless claim arising from the person's valid exercise of his or her constitutional rights of petition and free speech in connection with a public issue. In passing the anti-SLAPP law, the Legislature found that "there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances . . . that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process." (Italics added.)

In 1997, this preamble of the anti-SLAPP law was amended to require that Section 425.16 be broadly construed. (SB 1296 (Lockyer), Ch. 271, Stats. of 1997.)

In 2003, responding to concerns that the statute was being interpreted too broadly and to concerns about disturbing abuses of the law which undermined its intent, the Legislature in SB 515 (Kuehl), Ch. 338, Stats. 2003, provided that certain actions were not subject to the special motion to strike, such as specified actions brought solely in the public interest or on behalf of the general public and certain actions based on the defendant's commercial speech or conduct.

Since becoming law in 1993, there have been at least 174 reported appellate opinions construing Section 425.16, including 23 federal appellate decisions and 10 California Supreme Court decisions, providing 94 pages of annotations to the West codes, an addition of 61 pages in the last three years alone. While the Supreme Court's anti-SLAPP jurisprudence has, in its words, "scrupulously honored" the Legislature's intent "as exhibited in the plain meaning of the actual words of the law," (*Jarrow Formulas, Inc. v. La Marche* (2003) 31 Cal. 4th 728), three members of the Supreme Court have also opined, "the majority appears willing to consider any suit a SLAPP, based largely on when

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it was filed?. The cure has become the disease-SLAPP motions are now just the latest form of litigation abuse." (Justice Brown, dissenting (with Justices Baxter and Chin concurring), *Navellier v. Sletten* (2002) 29 Cal.4th 82, 96.)

CHANGES TO EXISTING LAW

Existing law provides that 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, as specified, is subject to a special SLAPP motion to strike, unless the court determines there is a probability that the plaintiff will prevail on the claim. This SLAPP motion is not applicable to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor. (Code of Civil Procedure Section 425.16. All references are to this code unless stated otherwise.)

Existing law provides that certain actions are not subject to a special motion to strike. They are: a) an action brought solely in the public interest or on behalf of the general public when specified conditions are met; and b) a cause of action brought against a person primarily engaged in the business of selling or leasing goods or services, arising from any statement or conduct of a commercial nature or purpose. (Section 425.17.)

This bill would enact specified provisions with respect to anti-SLAPP motions and SLAPPback lawsuits, as detailed above in DESCRIPTION.

COMMENT

1. Stated need to help SLAPP victims who wish to vindicate their rights

The sponsor, the California Anti-SLAPP Project (CASP), and proponents assert that victims of SLAPP lawsuits suffer great damages as a result of being SLAPPED, and

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that the costs and attorneys' fees recoverable under the anti-SLAPP law are only a small part of the overall damages suffered by a SLAPP victim. CASP points out that some victim's lives have been literally destroyed by having to defend against a SLAPP. Some have lost or had to mortgage their homes to pay the upfront defense costs, and many have suffered severe emotional distress, adverse health consequences, and strained family relationships caused by SLAPP-related stress. Writes CASP:
"Frequently, much more significant are damages for emotional distress and punitive damages, arising from

violations of the defendant's constitutional rights. Attorneys' fees and costs will not compensate."

This bill will enhance the ability of SLAPP victims to recover damages for being SLAPPED in two major ways. First, it would narrowly abrogate a part of the Supreme Court decision in *Wilson v. Parker, Covert & Childrester*, (2002) 28 Cal.4th 811, in which the Court narrowly construed legislative intent and declined to bar the denial of an anti-SLAPP motion from having an adverse effect in a later action. That ruling effectively bars many SLAPP victims from filing a SLAPPback action even though that prior denial of the motion was overturned on appeal. The proposal limited abrogation would allow those SLAPP victims to file a SLAPPback claim. (See Comment 3.) A second major provision would enact new Section 425.18 to govern SLAPPback actions to specifically ameliorate some of the potential harshness of the anti-SLAPP law if applied to a SLAPPback action. (See Comments 2, 4, and 5.)

2. Provisions to protect SLAPPback lawsuit from harsh application of anti-SLAPP law

While SLAPP victims may now file a malicious prosecution to recover their damages, CASP asserts that the available use of the anti-SLAPP motion in a SLAPPback lawsuit serves as a real chill on the willingness of many SLAPP victims to proceed. If the anti-SLAPP motion succeeds, the SLAPP victim bringing the SLAPPback lawsuit would be revictimized by having to pay the prevailing defendant's attorney's fees. In some cases, the fees can be \$100,000 to \$200,000 or more; this threat of a huge attorney's fee assessment is a major deterrent to those who might

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otherwise wish to vindicate their rights through a SLAPPback lawsuit.

This revised proposal would eliminate that threat of attorney's fees from a successful anti-SLAPP motion in a SLAPPback action by making the mandatory attorney's fee provision inapplicable to SLAPPback cases. This provision would also eliminate another risk in the anti-SLAPP law that provides for a mandatory fees award even if the SLAPPER dismisses the action after the SLAPP victim files a motion to strike. (*Pfeiffer Venice Properties v. Bernard* (2002) 101 Cal.App.4th 211.) Thus, if a SLAPP victim files a SLAPPback and is served with a special motion to strike, the SLAPPback filer may dismiss without fear of a mandatory attorney's fees assessment. This would give the SLAPP victim/SLAPPback filer and his or her counsel an opportunity to consider whether to drop the case without having to pay attorney's fees or proceed with the SLAPPback litigation and face a potential large fees award if the anti-SLAPP motion prevails. As noted above, this option is not now available under the anti-SLAPP law to a SLAPP filer.

Other provisions of the anti-SLAPP law are also mitigated or eliminated in a SLAPPback lawsuit so that the SLAPP victim could more easily pursue his or her case without undue encumbrance from the anti-SLAPP law. For example, unlike the anti-SLAPP law, a SLAPPback defendant losing a special motion to strike would not have right to immediate appeal, and would instead be able to file a peremptory writ which may be granted at the appellate court's discretion. Proponents argue that permitting an immediate appeal in a SLAPPback case will usually enable the well-heeled SLAPP plaintiff/now SLAPPback defendant to again punish the SLAPP victim, economically and emotionally, through extended appeals of a meritless motion. As another example, the bar of discovery in anti-SLAPP motions would not apply in SLAPPback claims, thereby allowing the SLAPPback plaintiff the opportunity to obtain evidence to support his or her claim and to defeat an anti-SLAPP motion. In fact, another provision would expressly allow a SLAPPback plaintiff to obtain additional time for discovery pending the anti-SLAPP motion if it appears to the court that facts essential to the opposition to the motion may exist. This is appropriate, argue proponents, so that the anti-SLAPP law

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does not unfairly deprive the SLAPP victim of a valid claim just because he or she has not had sufficient time to obtain evidence of the defendant's malice, a key element for a malicious prosecution claim.

Further, the proposed SLAPPback provisions limit the delayed filing of an anti-SLAPP motion that could unfairly surprise a SLAPPback plaintiff by limiting the court's discretion to allow a delayed filing more than six months after the filing of the complaint to extraordinary cases and circumstances where the defendant shows that the delay was not the defendant's fault and the court makes a written finding to that effect. Under the existing law, SLAPPback attorneys assert that they have been served with an anti-SLAPP motion months after the deadline and there appears to be no reason for the extraordinary delay except to allow the defendant to run up attorneys' fees.

To prevent the filing of a anti-SLAPP motion that is frivolous or solely intended to cause delay, the bill would require payment of the prevailing SLAPPback plaintiff's attorneys' fees and costs upon that motion's denial. This provision is taken from the existing anti-SLAPP law.

Further, the bill would bar a special motion to strike from being filed in a SLAPPback action by a person whose indisputably illegal statement or indisputably illegal conduct was the basis of the prior action that was dismissed in that prior proceeding pursuant to a special motion to strike. (See Comment 4, below.) These and two other key ameliorative provisions, the legislative findings regarding SLAPPback actions (proposed Section 3(a) of the bill) and the narrow abrogation of Wilson's reading of legislative intent, would provide significant protections to SLAPP victims who decide to file a SLAPPback lawsuit. (See Comments 3 and 5, below.)

3. Narrow abrogation of Wilson's interpretation of legislative intent

CCP Section 425.16(b)(3) [henceforth "(b)(3)"] currently provides that "[i]f the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor

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the fact of that determination shall be admissible in evidence in any later stage of the case, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination."

In *Wilson v. Parker, Covert & Childester*, (2002) 28 Cal.4th 811, the Court was asked to construe (b)(3) to bar a denial of an anti-SLAPP motion to strike from precluding the SLAPP victim from bringing a SLAPPback lawsuit even though the victim eventually prevailed on appeal on that motion or prevailed in a later trial. The Court declined and instead ruled that a denial of the anti-SLAPP motion (on the ground that the plaintiffs had established the requisite probability of success) gives a SLAPP filer a probable cause defense in any subsequent malicious prosecution SLAPPback claim. Since one of the critical elements of an action for malicious prosecution is the absence of probable cause for bringing the prior action (*Sheldon Appel Co. v. Albert & Olliker* (1989) 47 Cal. 3d 863, 874), that determination is fatal to many SLAPP victims who nonetheless prevailed on appeal or at trial, but cannot file a SLAPPback action to recover compensatory damages because of that Wilson ruling.

While the Court may have been correct in its strict, literal interpretation of the statute, the Court in this instance arguably failed to heed the Legislature's direction to broadly construe the statute to further the legislative intent that the anti-SLAPP procedures be employed to quickly end abusive litigation against protected speech and activity. The clear and indisputable intent of (b)(3) is to not penalize the SLAPP victim for filing a special motion to end the case early, before any real discovery had been done and where the court does not weigh the evidence but simply looks to see if the plaintiff can make a showing of prima facie minimal case. The Court's view at page 826 that the minor effect of its ruling to force a SLAPP victim to choose between filing an anti-SLAPP at the risk of jeopardizing a subsequent malicious prosecution claim or foregoing that special motion to preserve the claim, does not comport with the clear intent of (b)(3) to not

penalize the SLAPP victim for filing and losing an anti-SLAPP motion.

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This proposal would correct that situation by amending (b)(3) to provide that the denial of the motion has no impact at any later stage of the case or in any subsequent action. Legislative intent language would reinforce the fineness of this provision by specifying that in amending (b)(3) in AB 1158, the Legislature is abrogating that part of Wilson at pages 825 and 826 discussing the legislative intent of (b)(3) to the extent it is inconsistent with (b)(3) as amended by AB 1158.

This approach avoids the problems posed by the original proposal in AB 1158 in Section 425.16(b)(4) to overturn Wilson and Roberts in their entirety, which would have affected the law of summary judgment as well as malicious prosecution. This approach also removes CDC's opposition, which was strongly opposed to any change in the Wilson-Roberts line of cases. This also addresses CJAC's specific objection to the (b)(4) provision, but is not likely to remove their general opposition to AB 1158.

4. Indisputably illegal conduct may not be the basis for an anti-SLAPP motion in a SLAPPback case

In Bill Johnson's Restaurants, Inc. v. National Labor Relations Board, 461 U.S. 731 (1983), the court held that "baseless litigation is not immunized by the First Amendment right to petition."

The proposed revision adopts this principle in the SLAPPback context and provides that "a special motion to strike may not be filed in a SLAPPback action by a person whose indisputably illegal statement or indisputably illegal conduct was the basis of the prior action that was dismissed in that prior proceeding pursuant to a special motion to strike."

Thus, where a person whose prior SLAPP lawsuit based on "indisputably illegal conduct" was thrown out on a special motion and the SLAPP victim files a malicious prosecution action, that bad actor cannot use the anti-SLAPP law to defend against the lawsuit or to vex and harass the SLAPP victim. However, if there is a genuine issue of material fact that turns on the

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credibility of witness or on proper inferences to be drawn from indisputable facts, then the matter is not indisputable.

This concept in part originates from Attorney General Bill Lockyer's amicus curiae brief in Flatley v. Mauro, pending before the California Supreme Court (S128429, review granted Dec. 15, 2004), in which the Court is being asked to consider whether a defendant engaged in illegal and even criminal speech behavior may use the anti-SLAPP procedures in a lawsuit against him for civil extortion and intentional infliction of emotional distress. This bill, as it pertains only to SLAPPbacks, does not directly affect that pending case although the Court may, if it wishes, take judicial notice of the Legislature's treatment of "indisputably illegal" statements or conduct.

5. Findings regarding SLAPPbacks and its deterrent effect on SLAPPS

The proposed findings in Section 3 are intended to sensitize the courts to the different character and origin of SLAPPback lawsuits and its value in protecting against SLAPP litigation as a deterrent. The revised proposal follows its predecessor statutes, Sections 425.16 and 425.17, in stating legislative intent to guide the court's interpretation of the statute.

6. Some proponents prefer the broader Assembly version

passed 74 - 0, prior to recordation of opposition from
CJAC and CDC

As proposed to be amended, AB 1158 is narrower than the version approved 74 - 0 by the Assembly. That bill would have categorically barred an anti-SLAPP motion from being filed in a SLAPPback; would have overturned a Supreme Court and a court of appeal case holding that the denial of an anti-SLAPP motion (*Wilson v. Parker, Covert & Childester, supra*) or a defense summary judgment motion (*Roberts v. Sentry Life Insurance* (1999) 76 Cal. App. 4th 375) shows probable cause for the party to file the action, thus providing a defense to a malicious prosecution action; and would have enacted legislative findings deeming any SLAPPback action (not just limited

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to malicious prosecution or abuse of process claims) to be a favored action. Some proponents of AB 1158 strongly favor the broader version, contending that the revised proposal has been watered down until it has no value.

In the Assembly version approved 74 - 0, the Civil Justice Association of California (CJAC) and the California Defense Counsel (CDC) have "opposed" positions. Their recorded positions came after the Assembly vote. The Consumer Attorneys of California (CAOC) also had concerns which they were addressing with the author's office. The revised proposal removes the opposition of the CDC. CAOC reports that its concerns have been addressed. CJAC is likely to still oppose, however.

a) Categorical exemption for SLAPPbacks from
anti-SLAPP motion

As passed by the Assembly, AB 1158 proposed to make the anti-SLAPP motion inapplicable in any SLAPPback action (any malicious prosecution claim or any other cause of action arising from the filing or maintenance of a prior cause that has been dismissed pursuant to the granting of an anti-SLAPP motion). Proponents argued that is unfair and illogical to use the anti-SLAPP statute to protect a SLAPPER. Some proponents also argued that this provision was necessary to encourage contingency fee attorneys to accept SLAPPback cases; otherwise, the possibility of having to defend against an anti-SLAPP motion would deter these attorneys from taking the cases.

Proponents also argued that Professor Pring had recommended this provision to the Judicial Council in his 1999 report to the Legislature on SLAPPs. Proponents assert that the change would prevent the law from creating a "merry-go-round of abuse." In response, the Judicial Council declined to adopt the recommendation as being unnecessary because the judge hearing the SLAPPback case can determine whether the special motion is meritorious or not. Implicitly, the Council appears to recognize that a SLAPPback claim may itself be a SLAPP, which should be dismissed pursuant to an anti-SLAPP motion.

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Committee staff and others, such as the CAOC and CDC, also had significant reservations about the categorical exemption. Since the California Supreme Court's decision in *Briggs v. Eden Council for Hope and Opportunity* (1999) 19 Cal.4th 1106, where the Court followed the legislature's direction and broadly construed the anti-SLAPP law to protect any statement made in any legislative, judicial or other official proceeding under the anti-SLAPP law, even if the statement did not concern a public issue or issue of public interest, anti-SLAPP motions are apparently the favored motion of business and "little guy" defendants alike. Indeed, as noted earlier, three members of the Supreme Court have opined, "the majority appears willing to consider any suit a SLAPP, based largely on when it was filed". The cure has become the disease-SLAPP motions are now just the latest form of

litigation abuse." (Justice Brown, dissenting (with Justices Baxter and Chin concurring), *Navellier v. Sletten* (2002) 29 Cal.4th 82, 96.)

Thus, unforeseeable court rulings that broadly construe the anti-SLAPP law could result in cases of first impression where the "little-guy" plaintiff was truly not engaging in SLAPP litigation, but is nonetheless found to be a SLAPPer. That person would be precluded from using the anti-SLAPP law to defend himself or herself against the follow-up SLAPPback SLAPP suit. Particularly in light of the unforeseeable application of the anti-SLAPP motion to more and more situations, a categorical exemption seemed fraught with the risk of unintended consequences. Can every future SLAPPback claim be presumed to not be a SLAPP case itself?

A categorical exemption of SLAPPbacks from the anti-SLAPP law would also abrogate *Jarrow Formulas Inc v. LaMarche* (2003) 31 Cal. 4th 728, a unanimous decision which held that a malicious prosecution suit is not exempt from scrutiny under the anti-SLAPP law.

In light of the above concerns, committee staff with the author's office and interested parties

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convened, discussed alternatives, and arrived at the compromise proposal to continue allowing the filing of an anti-SLAPP motion in a SLAPPback but eliminating some of the risks to the SLAPPback filer if the motion succeeds.

Some proponents of AB 1158 argue that a categorical exemption better protects SLAPP victims, and that any fear of unintended consequences is sheer abstract speculation.

b) Overturning Roberts and Wilson

A second component of that bill would, in Section 425.16(b)(4) [henceforth (b)(4)], provide that "a denial of a defendant's special motion to strike or other dispositive motion shall not constitute probable cause for bringing or maintaining the cause of action challenged by the motion if the defendant ultimately prevails under this section with respect to that cause of action." This language was intended to overturn a Supreme Court case (*Wilson*) and a court of appeals case (*Roberts*), both malicious prosecution cases. In *Wilson*, the Supreme Court held a trial court's denial of an anti-SLAPP motion established probable cause to bring that underlying action and, therefore, precluded the filing of a subsequent malicious prosecution action, even if that court ruling is later reversed on appeal. (One element of a malicious prosecution action is the absence of probable cause for bringing the prior action.) In *Roberts*, a non-SLAPP case, a court of appeal held that a denial of a defense summary judgment motion establishes probable cause, sufficient to defeat any later malicious prosecution action, even if a party succeeds in overturning that denial on appeal.

Proposed (b)(4) would have overturned those two cases to allow a party who eventually prevailed on the anti-SLAPP motion in that action to file a SLAPPback claim, regardless of prior adverse rulings. However, the language of (b) (4) was not just applicable to anti-SLAPP and summary judgment motions. It would also have applied to motions for directed verdict and motions for judgment notwithstanding the verdict. It seem particularly problematical to say that where a

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jury has rendered a verdict, and where the JNOV motion was denied but the jury verdict is overturned on appeal, perhaps due to new law or new facts, that the plaintiff did not have probable cause to file the original claim and would no probable cause defense to a malicious prosecution lawsuit even though a jury had

once found in his favor. Here, too, the provision did not seem well crafted.

The California Defense Counsel strongly opposed the overturning of the Wilson and Roberts cases, contending that the bill would upset long settled precedents holding malicious prosecution to be a disfavored action, and unwisely sought to cure one evil of perceived litigation abuse by promoting more of the same historically disfavored litigation.

c) Deeming a SLAPPback a favored action

In addition to overturning a line of malicious prosecution cases, AB 1174 would deem a malicious prosecution action and related claims arising from dismissal of a SLAPP suit to be a "favored action because it furthers petition and speech rights."

This statement, if adopted, would have overturned cases holding malicious prosecution to be a "disfavored remedy" as applied to a SLAPPback action. Moreover, because of its reference to related claims arising from dismissal of the SLAPP suit, any claim filed as part of a SLAPPback action would be "favored." Thus, damages claim for emotional distress, conspiracy, common law tort, defamation, unfair trade, business interference, invasion of privacy, extortion, abuse of position of public trust, misrepresentation, sex discrimination, and even assault and battery, would be deemed favored if filed as part of a SLAPPback action. Like the categorical exemption for SLAPPbacks, this provision was thought to be fraught with risks of unintended consequences.

7. Providing hearing scheduling flexibility for anti-SLAPP motion

Existing law requires that when an anti-SLAPP motion is

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filed it must be noticed for hearing within 30 days. This provision is intended to ensure that a defendant can quickly obtain a hearing on his or her motion to defeat a SLAPP suit at the earliest possible time. Two recent appellate court decisions, however, have held that this requirement is jurisdictional, and the motion must be dismissed if not heard within that time period.

This bill would correct those cases and would instead require the motion to be scheduled by the clerk for court hearing not more than 30 days after service of the motion unless docket conditions of the court require a later hearing.

8. Preserving evidentiary objections in an anti-SLAPP hearing

The bill also provide that on appeal a party's evidentiary objections in the trial court are not deemed waived if the trial court does not rule on or sustain them, so long as the party requested a ruling on them at the hearing if one occurred. In one recent case, the sponsor reports, the court held that the defendant waived its evidentiary objection to a crucial piece of evidence by failing to obtain a ruling on it in the trial court. The court gave no explanation for this holding, other than an ambiguous reference to a case construing the summary judgment statute. The sponsor argues that the reasoning behind this decision is flawed and it unfairly penalizes SLAPP victims for the trial courts' failure to rule on a timely objection.

This bill would set forth a clear rule for litigants to preserve on appeal their evidentiary objections in an anti-SLAPP motion.

Support: Professor George Pring; California Broadcasters Association; California Medical Association; California Newspaper Publishers Association; Golden State Manufactured-Home Owners League; Mexican Political Association; Natural Resources Defense Council; Planning and Conservation League; 8 individuals; 3 attorneys

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Opposition: Civil Justice Association of California;
(California Defense Counsel is neutral on
proposed amended version)

HISTORY

Source: California Anti-SLAPP Project

Related Pending Legislation: None Known

Prior Legislation: SB 515 (Kuehl), Ch. 338, Stats. 2003
SB 789/SB 1651 (Kuehl) - Vetoed, 2002
AB 1675 (Asm. Judiciary Committee), Ch. 960,
Stats. of 1999
SB 1296 (Lockyer), Ch. 271, Stats. of 1997
SB 1264 (Lockyer), Ch. 726, Stats. of 1992

Prior Vote: Assembly Floor (74 - 0)
Assembly Judiciary Committee (6 - 3)

SENATE JUDICIARY COMMITTEE
 Senator Joseph L. Dunn, Chair
 2005-2006 Regular Session

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Hearing Date: August 16, 2005	1
Code of Civil Procedure	1
GWW:cjt	5
	8

SUBJECT

Anti-SLAPP (Strategic Lawsuit Against Public Participation)
 Law:
 -Anti-SLAPP motions and SLAPPback lawsuits-

DESCRIPTION

As amended August 15, this bill would enact the following rules with respect to anti-SLAPP motions and SLAPPback lawsuits (defined as a cause of action for malicious prosecution or abuse of process arising from the filing of a prior cause of action that was dismissed as a SLAPP lawsuit pursuant to an anti-SLAPP motion).

For an anti-SLAPP motion (Code of Civil Procedure Section 425.16 special motion to strike):

- * The court's denial of an anti-SLAPP motion would be inadmissible for any purpose in any subsequent action and would not affect any burden of proof or degree of proof otherwise applicable. (Under current law, these rules are applied to bar any adverse collateral effect of that determination at any later stage of the case.)
- * The motion would be scheduled by the court clerk for hearing within 30 days after the service of the motion unless the docket conditions require a later hearing. (Current law requires that the hearing be noticed, but

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not necessarily scheduled.)

This bill would also enact Code of Civil Procedure (CCP) Section 425.18 to govern SLAPPback lawsuits. While it would permit an anti-SLAPP motion to be filed in a SLAPPback action, the bill would establish the following:

- * Legislative findings that a SLAPPback action is distinguishable in character and origin from the ordinary malicious prosecution action, and that a SLAPPback should be treated differently from the ordinary malicious prosecution action because a SLAPPback is consistent with the Legislature's intent to protect the valid exercise of the constitutional rights of free speech and petition by its deterrent effect on SLAPP litigation and by its restoration of public confidence in participatory democracy.
- * There would be no right to mandatory attorney's fees for a prevailing defendant filing an anti-SLAPP motion in a SLAPPback action. (Proposed Section 425.18(c).)
- * There would be no automatic right to appeal the denial of the anti-SLAPP motion, but an expedited writ process is provided. (Proposed Section 425.18(c) and (g).)
- * There would be no limitation on discovery upon the filing of an anti-SLAPP motion. Further, a party opposing the motion to strike a SLAPPback may file an ex parte application for a continuance to obtain necessary discovery, which shall be granted if it appears to the court that facts essential to justify opposition to the motion may exist. (Proposed Section 425.18(c) and (e).)

- * Defendants would have 120 days after service of the SLAPPback action to file the anti-SLAPP motion, (instead of 60 days). Any filing of the anti-SLAPP motion after 120 days and before six months would be at the court's discretion, and for any delayed filing beyond six months after service, the court must find that the delayed

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filing was an extraordinary case and circumstance due to no fault of the defendant. (Proposed Section 425.18(d).)

- * The filing of a frivolous anti-SLAPP motion in a SLAPPback action would be sanctioned by an award of reasonable attorney's fees to the plaintiff. (Proposed Section 425.18(f) is taken from the existing anti-SLAPP law.)
- * A special motion to strike may not be filed in a SLAPPback action by a party whose filing or maintenance of the prior cause of action from which the SLAPPback arises was illegal as a matter of law. (Proposed Section 425.18(h).)
- * The SLAPPback provisions would not apply to any SLAPPback action filed by a public entity. (Proposed Section 425.18(1).)
- * The bill would make specified findings to abrogate or overrule specified court of appeals decisions. (Proposed Section 3 of the bill.)

The bill would take effect immediately as an urgency measure.

(This analysis reflects a technical author's amendments to be offered in committee.)

BACKGROUND

Strategic Lawsuits Against Public Participation (SLAPP) suits were first identified by University of Denver Law School Professor George Pring and University of Denver Sociology Professor Penelope Canan in their seminal article, Strategic Lawsuits Against Public Participation (1988) 35 Social Problems 506, as "civil lawsuits ... that are aimed at preventing citizens from exercising their political rights or punishing those who have done so."

While SLAPP suits "masquerade as ordinary lawsuits" such as

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defamation and interference with prospective economic advantage, they are generally meritless suits brought primarily to chill the exercise of free speech or petition rights by the threat of severe economic sanctions against the defendant, and not to vindicate a legally cognizable right. (Pring and Canan, SLAPPS: Getting Sued for Speaking Out, (Temple University Press, 1996).)

In 1992, SB 1264 (Lockyer), Ch. 726, Stats. of 1992, enacted CCP Section 425.16 to provide a "special motion to strike" for use by defendants in SLAPP lawsuits to obtain an early judicial dismissal of a meritless claim arising from the person's valid exercise of his or her constitutional rights of petition and free speech in connection with a public issue. In passing the anti-SLAPP law, the Legislature found that "there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances . . . that it is in the public interest to encourage continued participation in matters of public significance, and that

this participation should not be chilled through abuse of the judicial process." (Italics added.)

In 1997, this preamble of the anti-SLAPP law was amended to require that Section 425.16 be broadly construed. (SB 1296 (Lockyer), Ch. 271, Stats. of 1997.)

In 2003, responding to concerns that the statute was being interpreted too broadly and to concerns about disturbing abuses of the law which undermined its intent, the Legislature in SB 515 (Kuehl), Ch. 338, Stats. 2003, provided that certain actions were not subject to the special motion to strike, such as specified actions brought solely in the public interest or on behalf of the general public and certain actions based on the defendant's commercial speech or conduct.

Since becoming law in 1993, there have been at least 174 reported appellate opinions construing Section 425.16,

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including 23 federal appellate decisions and 10 California Supreme Court decisions, providing 94 pages of annotations to the West codes, an addition of 61 pages in the last three years alone. While the Supreme Court's anti-SLAPP jurisprudence has, in its words, "scrupulously honored" the Legislature's intent "as exhibited in the plain meaning of the actual words of the law," (Jarrow Formulas, Inc. v. LaMarche (2003) 31 Cal. 4th 728), three members of the Supreme Court have also opined, "the majority appears willing to consider any suit a SLAPP, based largely on when it was filed. The cure has become the disease-SLAPP motions are now just the latest form of litigation abuse." (Justice Brown, dissenting (with Justices Baxter and Chin concurring), Navellier v. Sletten (2002) 29 Cal.4th 82, 96.)

CHANGES TO EXISTING LAW

Existing law provides that 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, as specified, is subject to a special SLAPP motion to strike, unless the court determines there is a probability that the plaintiff will prevail on the claim. This SLAPP motion is not applicable to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor. (Code of Civil Procedure Section 425.16. All references are to this code unless stated otherwise.)

Existing law provides that certain actions are not subject to a special motion to strike. They are: a) an action brought solely in the public interest or on behalf of the general public when specified conditions are met; and b) a cause of action brought against a person primarily engaged in the business of selling or leasing goods or services, arising from any statement or conduct of a commercial

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nature or purpose. (Section 425.17.)

This bill would enact additional provisions with respect to anti-SLAPP motions and SLAPPback lawsuits, as detailed above in DESCRIPTION.

COMMENT

1. Stated need to help SLAPP victims who wish to vindicate

their rights

The sponsor, the California Anti-SLAPP Project (CASP), and proponents assert that victims of SLAPP lawsuits suffer great damages as a result of being SLAPPED, and that the costs and attorneys' fees recoverable under the anti-SLAPP law are only a small part of the overall damages suffered by a SLAPP victim. CASP points out that some victim's lives have been literally destroyed by having to defend against a SLAPP. Some have lost or had to mortgage their homes to pay the upfront defense costs, and many have suffered severe emotional distress, adverse health consequences, and strained family relationships caused by SLAPP-related stress. Writes CASP: "Frequently, much more significant are damages for emotional distress and punitive damages, arising from violations of the defendant's constitutional rights. Attorneys' fees and costs will not compensate."

This bill will enhance the ability of SLAPP victims to recover damages for being SLAPPED in two major ways. First, it would narrowly abrogate a part of the Supreme Court decision in *Wilson v. Parker, Covert & Childester*, (2002) 28 Cal.4th 811, in which the Court narrowly construed legislative intent and declined to bar the denial of an anti-SLAPP motion from having an adverse effect in a later action. That ruling effectively bars many SLAPP victims from filing a SLAPPback action even though that prior denial of the motion by the trial court was overturned on appeal. The proposed limited abrogation would allow those SLAPP victims to file a

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SLAPPback claim. (See Comment 3.) A second major provision would enact new Section 425.18 to govern SLAPPback actions to specifically ameliorate some of the potential harshness of the anti-SLAPP law if applied to a SLAPPback action. (See Comments 2, 4, and 5.)

2. Provisions to protect SLAPPback lawsuit from harsh application of anti-SLAPP law

While SLAPP victims may now file a malicious prosecution to recover their damages, CASP asserts that the available use of the anti-SLAPP motion in a SLAPPback lawsuit serves as a real chill on the willingness of many SLAPP victims to proceed. If the anti-SLAPP motion succeeds, the SLAPP victim bringing the SLAPPback lawsuit would be revictimized by having to pay the prevailing defendant's attorney's fees. In some cases, the fees can be \$100,000 to \$200,000 or more; this threat of a huge attorney's fee assessment is a major deterrent to those who might otherwise wish to vindicate their rights through a SLAPPback lawsuit.

The revised AB 1158 would eliminate that threat of liability for attorney's fees from a successful anti-SLAPP motion in a SLAPPback action by making the mandatory attorney's fee provision inapplicable to SLAPPback cases. This provision would also operationally eliminate another risk to SLAPPback filers in the anti-SLAPP law that provides for a mandatory fees award even if the SLAPP lawsuit is dismissed after the SLAPP victim files an anti-SLAPP motion to strike. (*Pfeiffer Venice Properties v. Bernard* (2002) 101 Cal.App.4th 211.) Thus, if a SLAPP victim files a SLAPPback and is served with a special motion to strike, the SLAPPback filer may elect to dismiss without fear of a mandatory attorney's fees assessment. This would give the SLAPP victim/SLAPPback filer and his or her counsel an opportunity to consider whether to drop the case without having to potentially pay the defendant's attorney's fees or proceed with the SLAPPback litigation and face a

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potential large fees award if the anti-SLAPP motion prevails. As noted above, this option is not now available under the anti-SLAPP law to a SLAPP filer.

Other provisions of the anti-SLAPP law are also mitigated or eliminated in a SLAPPback action so that the SLAPP victim could more easily pursue his or her case without undue encumbrance from the anti-SLAPP law. For example, unlike the anti-SLAPP law, a SLAPPback defendant losing a special motion to strike would not have the right to immediate appeal, and would instead be able to file a peremptory writ which may be granted at the appellate court's discretion. Proponents argue that permitting an immediate appeal in a SLAPPback case will usually enable the well-heeled SLAPP plaintiff/now SLAPPback defendant to again punish the SLAPP victim, economically and emotionally, through extended appeals of a meritless motion. As another example, the bar of discovery in anti-SLAPP motions would not apply in SLAPPback claims, thereby allowing the SLAPPback plaintiff the opportunity to obtain evidence to support his or her claim and to defeat an anti-SLAPP motion. In fact, another provision would expressly allow a SLAPPback plaintiff to obtain additional time for discovery pending the anti-SLAPP motion if it appears to the court that facts essential to the opposition to the motion may exist. This is appropriate, argue proponents, so that the anti-SLAPP law does not unfairly deprive the SLAPP victim of a valid claim just because he or she has not had sufficient time to obtain evidence of the defendant's malice, a key element for a malicious prosecution claim.

Further, AB 1158's proposed SLAPPback provisions would restrict the delayed filing of an anti-SLAPP motion that could unfairly surprise a SLAPPback plaintiff by limiting the court's discretion to allow a delayed filing more than six months after the service of the complaint to extraordinary cases and circumstances where the defendant shows that the delay was not the defendant's fault and

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the court makes a written finding to that effect. Under the existing law, SLAPPback attorneys assert that they have been served with an anti-SLAPP motion months after the deadline and there appears to be no reason for the extraordinary delay except to allow the defendant to run up attorneys' fees.

To prevent the filing of an anti-SLAPP motion that is frivolous or solely intended to cause delay, the bill would require payment of the prevailing SLAPPback plaintiff's attorneys' fees and costs upon that motion's denial. This provision is taken from the existing anti-SLAPP law.

Further, the bill would bar a special motion to strike from being filed in a SLAPPback action by a party whose filing or maintenance of the prior cause of action from which the SLAPPback arises was illegal as a matter of law (and by definition, be dismissed pursuant to an anti-SLAPP motion). (See Comment 4, below.) These and two other key ameliorative provisions, the legislative findings regarding SLAPPback actions (proposed Section 3(a) of the bill) and the narrow abrogation of Wilson's reading of legislative intent, would provide significant protections to SLAPP victims who decide to file a SLAPPback lawsuit. (See Comments 3 and 5, below.)

3. Narrow abrogation of Wilson's interpretation of legislative intent

CCP Section 425.16(b)(3) [henceforth "(b)(3)"] currently provides that "[i]f the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence in any later stage of the case, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination."

In *Wilson v. Parker, Covert & Childester*, (2002) 28

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Cal.4th 811, the Court was asked to construe (b)(3) to bar a trial court's denial of an anti-SLAPP motion from precluding the SLAPP victim's bringing of a SLAPPback lawsuit when the victim eventually prevailed on appeal on that motion or prevailed in a later trial. The Court declined and instead ruled that a denial of the anti-SLAPP motion (on the ground that the plaintiffs had established the requisite probability of success) gives a SLAPP filer a probable cause defense in any subsequent malicious prosecution SLAPPback claim. Since one of the critical elements of an action for malicious prosecution is the absence of probable cause for bringing the prior action (*Sheldon Appel Co. v. Albert & Olier* (1989) 47 Cal. 3d 863, 874), that determination is fatal to many SLAPP victims who nonetheless prevailed on appeal or at trial, but cannot file a SLAPPback action to recover compensatory damages because of that Wilson ruling.

While the Court may have been correct in its strict, literal interpretation of the statute, the Court in this instance arguably failed to heed the Legislature's direction to broadly construe the statute to further the legislative intent that the anti-SLAPP procedures be employed to quickly end abusive litigation against protected speech and activity. The clear and indisputable intent of (b)(3) is to not penalize the SLAPP victim for filing a special motion to end the case early, before any real discovery had been done and where the court does not weigh the evidence but simply looks to see if the plaintiff can make a showing of prima facie minimal case. The Court's view at page 826 that the minor effect of its ruling to force a SLAPP victim to choose between filing an anti-SLAPP at the risk of jeopardizing a subsequent malicious prosecution claim or foregoing that special motion to preserve the claim, does not comport with the clear intent of (b)(3) to not penalize the SLAPP victim for filing and losing an anti-SLAPP motion.

This bill would correct that situation by amending (b)(3)

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to provide that the denial of the motion has no impact at any later stage of the case or in any subsequent action.

This approach avoids the problems posed by the original proposal in AB 1158 in Section 425.16(b)(4) to overturn *Wilson and Roberts v. Sentry Life Insurance*, (1999) 76 Cal. App. 4th 375, in their entirety, which would have affected the law of summary judgment as well as malicious prosecution. This approach also removes the California Defense Counsel's (CDC) opposition, which had strongly opposed any change in the Wilson-Roberts line of cases. This approach also addresses the Civil Justice Association of California's (CJAC) specific objection to the (b)(4) provision, and CJAC has removed its opposition.

4. A party filing a prior case that was illegal as a matter of law and that is the basis of a SLAPPback may not file an anti-SLAPP motion in the SLAPPback.

In *Bill Johnson's Restaurants, Inc. v. National Labor Relations Board*, 461 U.S. 731 (1983), the U.S. Supreme Court held that "baseless litigation is not immunized by the First Amendment right to petition."

AB 1158's proposed Section 425.18(h), on page 7, line 7, adopts this principle in the SLAPPback context and

provides that "a special motion to strike may not be filed against a SLAPPback by a party whose filing or maintenance of the prior cause of action from which the SLAPPback arises was illegal as a matter of law." (A SLAPPback, by definition, is a malicious prosecution or abuse of process action arising from the filing or maintenance of a prior cause of action that has been dismissed pursuant to a special motion to strike under Section 425.16.)

Thus, where a person whose prior SLAPP lawsuit was illegal as a matter of law, as shown by being thrown out

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on a special motion to strike, and the SLAPP victim files a subsequent malicious prosecution action, that bad actor cannot use the anti-SLAPP law to defend against the lawsuit or to vex and harass the SLAPP victim.

This concept in part originates from Attorney General Bill Lockyer's amicus curiae brief in *Flatley v. Mauro*, pending before the California Supreme Court (S128429, review granted Dec. 15, 2004), in which the Court is being asked to consider whether a defendant engaged in illegal and even criminal speech behavior may use the anti-SLAPP procedures in a lawsuit against him for civil extortion and intentional infliction of emotional distress. This bill, as it pertains only to SLAPPbacks, does not directly affect that pending case although the Court may, if it wishes, take judicial notice of the Legislature's treatment of conduct illegal as a matter of law.

5. Findings regarding SLAPPbacks and its deterrent effect on SLAPPS

The proposed findings in Section 2, under proposed Section 425.18(a), are intended to sensitize the courts to the different character and origin of SLAPPback lawsuits and its value in protecting against SLAPP litigation as a deterrent. The proposed findings follow its predecessor statutes, Sections 425.16 and 425.17, in stating legislative intent to guide the court's interpretation of the statute.

6. Some proponents prefer the broader Assembly version passed 74 - 0, prior to recordation of opposition from CJAC and CDC

As amended August 15, AB 1158 is narrower than the version approved 74 - 0 by the Assembly. That bill would have overturned *Jarrow Formulas Inc. v. LaMarche* (2003) 31 Cal. 4th 728 and categorically barred an anti-SLAPP motion from being filed in a malicious prosecution

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SLAPPback; would have overturned a Supreme Court and a court of appeal case holding that the denial of an anti-SLAPP motion (*Wilson v. Parker, Covert & Childester*, supra) or a defense summary judgment motion (*Roberts v. Sentry Life Insurance* (1999) 76 Cal. App. 4th 375) shows probable cause for the party to file the action, thus providing a defense to a malicious prosecution action; and would have enacted legislative findings deeming any SLAPPback action (not just limited to malicious prosecution or abuse of process claims) to be a favored action. Some proponents of AB 1158 strongly favor the broader version, contending that the revised proposal has been watered down until it has no value.

In the Assembly version approved 74 - 0, both the Civil Justice Association of California (CJAC) and the

California Defense Counsel (CDC) had "opposed" positions. Their recorded positions came after the Assembly vote. The Consumer Attorneys of California (CAOC) also had concerns which they were addressing with the author's office. The revised AB 1158 removes the opposition of the CDC and CJAC; in fact, CDC now supports the bill. CAOC reports that its concerns have been addressed.

a) Categorical exemption for SLAPPbacks from anti-SLAPP motion

As passed by the Assembly, AB 1158 proposed to make the anti-SLAPP motion inapplicable in any SLAPPback action (any malicious prosecution claim or any other cause of action arising from the filing or maintenance of a prior cause that has been dismissed pursuant to the granting of an anti-SLAPP motion). Proponents of the broader exemption argued that is unfair and illogical to use the anti-SLAPP statute to protect a SLAPPER. Some proponents also argued that this provision was necessary to encourage contingency fee attorneys to accept SLAPPback cases; otherwise, the possibility of having to defend against an anti-SLAPP motion would deter these attorneys from taking the

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cases. Another proponent argues that it is unfair to require a person filing a malicious prosecution action to spend tens of thousands, if not over a hundred thousand dollars, to defend against an anti-SLAPP motion filed against a SLAPPback action. This proponent of the broader exemption argues that the Supreme Court's decision in *Jarrow Formulas v. LaMarche* has effectively killed the tort of malicious prosecution by allowing anti-SLAPP motions to be filed in such claims as few litigants can afford the costs to defend against the anti-SLAPP motion.

Proponents of the broader exemption also argued that Professor Pring had recommended this provision to the Judicial Council in his 1999 report to the Legislature on SLAPPs, asserting that the change would prevent the law from creating a "merry-go-round of abuse." In response, the Judicial Council declined to adopt the recommendation as being unnecessary because the judge hearing the SLAPPback case can determine whether the special motion is meritorious or not. Implicitly, the Council appears to recognize that a SLAPPback claim may itself be a SLAPP, which should be dismissed pursuant to an anti-SLAPP motion.

Committee staff and others, such as the CAOC and CDC, had significant reservations about the categorical exemption. Since the California Supreme Court's decision in *Briggs v. Eden Council for Hope and Opportunity* (1999) 19 Cal.4th 1106, where the Court followed the legislature's direction and broadly construed the anti-SLAPP law to protect any statement made in any legislative, judicial or other official proceeding under the anti-SLAPP law, even if the statement did not concern a public issue or an issue of public interest, anti-SLAPP motions are apparently the favored motion of business and "little guy" defendants alike. Indeed, as noted earlier, three members of the Supreme Court have opined, "the majority appears willing to consider any suit a SLAPP,

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based largely on when it was filed?. The cure has become the disease-SLAPP motions are now just the latest form of litigation abuse." (Justice Brown, dissenting (with Justices Baxter and Chin concurring),

Navellier v. Sletten (2002) 29 Cal.4th 82, 96.)

Thus, unforeseeable court rulings that broadly construe the anti-SLAPP law could result in cases of first impression where the "little-guy" plaintiff was truly not engaging in SLAPP litigation, but is nonetheless found to be a SLAPPER. That person would be precluded from using the anti-SLAPP law to defend him or herself against the follow-up SLAPPback SLAPP suit. As the Supreme Court itself noted in Jarrow Formulas at page 739: "spurious malicious prosecution suits may, like others, 'chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.' "

Particularly in light of the unforeseeable application of the anti-SLAPP motion to more and more situations, a categorical exemption seemed fraught with the risk of unintended consequences. Can every future SLAPPback claim be presumed to not be a SLAPP case itself?

A categorical exemption of SLAPPbacks from the anti-SLAPP law would also abrogate Jarrow Formulas Inc v. LaMarche (2003) 31 Cal. 4th 728, a unanimous decision which held that a malicious prosecution suit is not exempt from scrutiny under the anti-SLAPP law. In reaching its decision, the 7 - 0 Court rejected arguments that applying the anti-SLAPP law to malicious prosecution claims would kill the tort, "thereby giving a 'green light to parties and counsel' to bring meritless actions and rendering unscrupulous litigators and attorneys 'exempt from any accountability for their acts.' " Jarrow Formulas, at page 740. Wrote the Court: "Not so. Neither section 425.16 itself or anything in our anti-SLAPP

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jurisprudence diminishes the viability of meritorious malicious prosecution claims that may be articulated against such persons." (Id.) Further, wrote the court earlier on page 738: "The anti-SLAPP statute 'does not bar a plaintiff from litigating an action that arises out of the defendant's free speech or petitioning' (citations omitted); rather 'it subjects to potential dismissal only those actions in which the plaintiff cannot 'state [] and substantiate [] a legally sufficient claim.' "

In light of the above concerns, committee staff with the author's office and interested parties convened, discussed alternatives, and arrived at the compromise August 15 AB 1158 proposal to continue allowing the filing of an anti-SLAPP motion in a SLAPPback but eliminating some of the risks to the SLAPPback filer if the motion succeeds.

Proponents of the broader categorical exemption argue that a categorical exemption better protects SLAPP victims, that allowing an anti-SLAPP motion to be filed in a SLAPPback will make it cost-prohibitive for many SLAPP victims to proceed, and that any fear that a SLAPPback action may itself be a SLAPP is sheer abstract speculation.

b) Overturing Roberts and Wilson

A second component of the Assembly version of AB 1158 would have, in Section 425.16(b)(4) [henceforth (b)(4)] of the April 25 version, provided that "a denial of a defendant's special motion to strike or other dispositive motion shall not constitute probable cause for bringing or maintaining the cause of action challenged by the motion if the defendant ultimately prevails under this section with respect to that cause of action." This language was intended to overturn a Supreme Court case (Wilson) and a court of appeals case (Roberts), both malicious prosecution cases. In

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Wilson, the Supreme Court held a trial court's denial of an anti-SLAPP motion established probable cause to bring that underlying action and, therefore, precluded the filing of a subsequent malicious prosecution action, even if that court ruling is later reversed on appeal. (One element of a malicious prosecution action is the absence of probable cause for bringing the prior action.) In Roberts, a non-SLAPP case, a court of appeal held that a denial of a defense summary judgment motion establishes probable cause, sufficient to defeat any later malicious prosecution action, even if a party succeeds in overturning that denial on appeal.

The April 25 AB 1158's proposed (b)(4) would have overturned those two cases to allow a party who eventually prevailed on the anti-SLAPP motion in that action to file a SLAPPback claim, regardless of prior adverse rulings. However, the language of (b)(4) was not just applicable to anti-SLAPP and summary judgment motions. It would also have applied to motions for directed verdict and motions for judgment notwithstanding the verdict. It seem particularly problematical to say that where a jury has rendered a verdict (JNOV), and where the JNOV motion was denied but the jury verdict is overturned on appeal, perhaps due to new law or new facts, that the plaintiff did not have probable cause to file the original claim and would have no probable cause defense to a malicious prosecution lawsuit even though a jury had once found in his favor. Here, too, the provision did not seem well crafted.

The California Defense Counsel strongly opposed the overturning of the Wilson and Roberts cases, contending that the bill would upset long settled precedents holding malicious prosecution to be a disfavored action, and unwisely sought to cure one evil of perceived litigation abuse by promoting more of the same historically disfavored litigation. CJAC

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agreed with the CDC position.

The August 15 AB 1158 deletes the proposed (b)(4) change and addresses the problem in a different manner. (See Comment 3 above.) This change (and others) has switched CDC from an opposed position to a support position.

c) Deeming a SLAPPback to be a favored action

In addition to overturning a line of malicious prosecution cases, the April 25 AB 1158 would have deemed a malicious prosecution action and related claims arising from dismissal of a SLAPP suit to be a "favored action because it furthers petition and speech rights."

This statement, if adopted, would have overturned cases holding malicious prosecution to be a "disfavored remedy" as applied to a SLAPPback action. Moreover, because of its reference to related claims arising from dismissal of the SLAPP suit, any claim filed as part of a SLAPPback action would be "favored." Thus, claims for emotional distress, conspiracy, common law tort, defamation, unfair trade, business interference, invasion of privacy, extortion, abuse of position of public trust, misrepresentation, sex discrimination, and even assault and battery, would be deemed favored if filed as part of a SLAPPback action. Like the categorical exemption for SLAPPbacks, this provision was thought to be fraught with risks of unintended consequences.

The August 15 amendments to AB 1158 deleted the

provision.

7. Providing hearing scheduling flexibility for anti-SLAPP motion

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Existing law requires that when an anti-SLAPP motion is filed, it must be noticed for hearing within 30 days. This provision is intended to ensure that a defendant can quickly obtain a hearing on his or her motion to defeat a SLAPP suit at the earliest possible time. Two recent appellate court decisions, however, have held that this requirement is jurisdictional, and the motion must be dismissed if not heard within that time period.

This bill would correct those cases and would instead require the motion to be scheduled by the clerk for court hearing not more than 30 days after service of the motion unless docket conditions of the court require a later hearing.

8. Technical author's amendment

On page 7, line 11, strike out "action"

The word is unnecessary since a SLAPPback is defined in the bill, in pertinent part, as any cause of action for malicious prosecution or abuse of process.

Support: California Defense Counsel; CA Medical Association; California Broadcasters Association; Golden State Manufactured-Home Owners League; Mexican Political Association; three individuals

Opposition: Jarrow Rogovin, President of Jarrow Formulas

HISTORY

Source: California Anti-SLAPP Project

Related Pending Legislation: None Known

Prior Legislation: SB 515 (Kuehl), Ch. 338, Stats. 2003
SB 789/SB 1651 (Kuehl) - Vetoed, 2002
AB 1675 (Asm. Judiciary Committee), Ch. 960, Stats. of 1999

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SB 1296 (Lockyer), Ch. 271, Stats. of 1997
SB 1264 (Lockyer), Ch. 726, Stats. of 1992

Prior Vote: Assembly Floor (74 - 0)
Assembly Judiciary Committee (6 - 3)

SENATE RULES COMMITTEE	AB 1158
Office of Senate Floor Analyses	
1020 N Street, Suite 524	
(916) 445-6614 Fax: (916)	
327-4478	

THIRD READING

Bill No: AB 1158
 Author: Lieber (D)
 Amended: 8/24/05 in Senate
 Vote: 27 - Urgency

SENATE JUDICIARY COMMITTEE : 5-1, 8/16/05
 AYES: Ackerman, Cedillo, Escutia, Figueroa, Kuehl
 NOES: Morrow
 NO VOTE RECORDED: Dunn

ASSEMBLY FLOOR : 74-0, 5/9/05 - See last page for vote

SUBJECT : Anti-SLAPP (Strategic Lawsuit Against Public Participation)
 Law: Anti-SLAPP motions and SLAPPback lawsuits

SOURCE : California Anti-SLAPP Project

DIGEST : This bill enacts additional provisions with respect to anti-SLAPP motions and SLAPPback lawsuits, as specified.

ANALYSIS : Existing law provides that 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, as specified, is subject to a special SLAPP motion to strike, unless the court determines there is a probability that the plaintiff will prevail on the claim. This SLAPP motion is not applicable to any enforcement action brought

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in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor. (Section 425.16 of the Code of Civil Procedure. All references are to this code (CCP) unless stated otherwise.)

Existing law provides that certain actions are not subject to a special motion to strike. They are (1) an action brought solely in the public interest or on behalf of the general public when specified conditions are met, and (2) a cause of action brought against a person primarily engaged in the business of selling or leasing goods or services, arising from any statement or conduct of a commercial nature or purpose. (Section 425.17)

This bill enacts the following rules with respect to anti-SLAPP motions and SLAPPback lawsuits (defined as a cause of action for malicious prosecution or abuse of process arising from the filing of a prior cause of action that was dismissed as a SLAPP lawsuit pursuant to an anti-SLAPP motion).

For an anti-SLAPP motion (Section 425.16 - special motion to strike):

1. The court's denial of an anti-SLAPP motion will be inadmissible for any purpose in any subsequent action and will not affect any burden of proof or degree of proof otherwise applicable. (Under current law, these rules are applied to bar any adverse collateral effect of that determination at any later stage of the case.)
2. The motion will be scheduled by the court clerk for hearing within 30 days after the service of the motion

unless the docket conditions require a later hearing.
(Current law requires that the hearing be noticed, but not necessarily scheduled.)

This bill also enacts Section 425.18 to govern SLAPPback lawsuits. While it permits an anti-SLAPP motion to be filed in a SLAPPback action, this bill establishes the following:

1. Legislative findings that a SLAPPback action is

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distinguishable in character and origin from the ordinary malicious prosecution action, and that a SLAPPback should be treated differently from the ordinary malicious prosecution action because a SLAPPback is consistent with the Legislature's intent to protect the valid exercise of the constitutional rights of free speech and petition by its deterrent effect on SLAPP litigation and by its restoration of public confidence in participatory democracy.

2. There will be no right to mandatory attorney's fees for a prevailing defendant filing an anti-SLAPP motion in a SLAPPback action. (Proposed Section 425.18(c).)
3. There will be no automatic right to appeal the denial of the anti-SLAPP motion, but an expedited writ process is provided. (Proposed Section 425.18(c) and (g).)
4. There will be no limitation on discovery upon the filing of an anti-SLAPP motion. Further, a party opposing the motion to strike a SLAPPback may file an ex parte application for a continuance to obtain necessary discovery, which shall be granted if it appears to the court that facts essential to justify opposition to the motion may exist. (Proposed Section 425.18(c) and (e).)
5. Defendants will have 120 days after service of the SLAPPback action to file the anti-SLAPP motion, (instead of 60 days). Any filing of the anti-SLAPP motion after 120 days and before six months will be at the court's discretion, and for any delayed filing beyond six months after service, the court must find that the delayed filing was an extraordinary case and circumstance due to no fault of the defendant. (Proposed Section 425.18(d).)
6. The filing of a frivolous anti-SLAPP motion in a SLAPPback action will be sanctioned by an award of reasonable attorney's fees to the plaintiff. (Proposed Section 425.18(f) is taken from the existing anti-SLAPP law.)
7. A special motion to strike may not be filed in a

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SLAPPback action by a party whose filing or maintenance of the prior cause of action from which the SLAPPback arises was illegal as a matter of law. (Proposed Section 425.18(h).)

8. The SLAPPback provisions will not apply to any SLAPPback action filed by a public entity. (Proposed Section 425.18(1).)
9. This bill makes specified findings to abrogate or overrule specified court of appeals decisions. (Proposed Section 3 of the bill.)

FISCAL EFFECT : Appropriation: No Fiscal Com.: No
Local: No

SUPPORT : (Verified 8/24/05)

California Defense Counsel
California Medical Association
California Broadcasters Association
Golden State Manufactured-Home Owners League

Mexican American Political Association

ARGUMENTS IN SUPPORT : The sponsor, the California Anti-SLAPP Project (CASP), and proponents assert that victims of SLAPP lawsuits suffer great damages as a result of being SLAPPed, and that the costs and attorneys' fees recoverable under the anti-SLAPP law are only a small part of the overall damages suffered by a SLAPP victim. CASP points out that some victim's lives have been literally destroyed by having to defend against a SLAPP. Some have lost or had to mortgage their homes to pay the upfront defense costs, and many have suffered severe emotional distress, adverse health consequences, and strained family relationships caused by SLAPP-related stress. CASP writes: "Frequently, much more significant are damages for emotional distress and punitive damages, arising from violations of the defendant's constitutional rights. Attorneys' fees and costs will not compensate."

This bill will enhance the ability of SLAPP victims to recover damages for being SLAPPed in two major ways.

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First, it narrowly abrogates a part of the Supreme Court decision in Wilson v. Parker, Covert & Childester, (2002) 28 Cal.4th 811, in which the Court narrowly construed legislative intent and declined to bar the denial of an anti-SLAPP motion from having an adverse effect in a later action. That ruling effectively bars many SLAPP victims from filing a SLAPPback action even though that prior denial of the motion by the trial court was overturned on appeal. The proposed limited abrogation allows those SLAPP victims to file a SLAPPback claim. A second major provision enacts new Section 425.18 to govern SLAPPback actions to specifically ameliorate some of the potential harshness of the anti-SLAPP law if applied to a SLAPPback action.

ASSEMBLY FLOOR :

AYES: Aghazarian, Arambula, Baca, Bass, Benoit, Berg, Bermudez, Blakeslee, Bogh, Canciamilla, Chan, Chavez, Chu, Cogdill, Cohn, Coto, Daucher, De la Torre, DeVore, Dymally, Emmerson, Evans, Frommer, Garcia, Goldberg, Hancock, Harman, Haynes, Jerome Horton, Shirley Horton, Huff, Jones, Karnette, Keene, Klehs, La Malfa, Laird, Leno, Leslie, Levine, Lieber, Matthews, Maze, McCarthy, Montanez, Mountjoy, Mullin, Nakanishi, Nation, Nava, Negrete McLeod, Niello, Oropeza, Parra, Pavley, Plescia, Richman, Ridley-Thomas, Sharon Runner, Ruskin, Saldana, Salinas, Spitzer, Strickland, Torrino, Tran, Umberg, Vargas, Villines, Walters, Wolk, Wyland, Yee, Nunez
NO VOTE RECORDED: Calderon, Gordon, Houston, Koretz, La Suer, Liu

RJG:mel 8/24/05 Senate Floor Analyses

SUPPORT/OPPOSITION: SEE ABOVE

**** END ****

SENATE RULES COMMITTEE	AB 1158
Office of Senate Floor Analyses	
1020 N Street, Suite 524	
(916) 445-6614 Fax: (916)	
327-4478	

THIRD READING

Bill No: AB 1158
 Author: Lieber (D)
 Amended: 8/24/05 in Senate
 Vote: 27 - Urgency

SENATE JUDICIARY COMMITTEE : 5-1, 8/16/05
 AYES: Ackerman, Cedillo, Escutia, Figueroa, Kuehl
 NOES: Morrow
 NO VOTE RECORDED: Dunn

ASSEMBLY FLOOR : 74-0, 5/9/05 - See last page for vote

SUBJECT : Anti-SLAPP (Strategic Lawsuit Against Public Participation)
 Law: Anti-SLAPP motions and SLAPPback lawsuits

SOURCE : California Anti-SLAPP Project

DIGEST : This bill enacts additional provisions with respect to anti-SLAPP motions and SLAPPback lawsuits, as specified.

ANALYSIS : Existing law provides that 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, as specified, is subject to a special SLAPP motion to strike, unless the court determines there is a probability that the plaintiff will prevail on the claim. This SLAPP motion is not applicable to any enforcement action brought

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in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor. (Section 425.16 of the Code of Civil Procedure. All references are to this code (CCP) unless stated otherwise.)

Existing law provides that certain actions are not subject to a special motion to strike. They are (1) an action brought solely in the public interest or on behalf of the general public when specified conditions are met, and (2) a cause of action brought against a person primarily engaged in the business of selling or leasing goods or services, arising from any statement or conduct of a commercial nature or purpose. (Section 425.17)

This bill enacts the following rules with respect to anti-SLAPP motions and SLAPPback lawsuits (defined as a cause of action for malicious prosecution or abuse of process arising from the filing of a prior cause of action that was dismissed as a SLAPP lawsuit pursuant to an anti-SLAPP motion).

For an anti-SLAPP motion (Section 425.16 - special motion to strike):

1. The court's denial of an anti-SLAPP motion will be inadmissible for any purpose in any subsequent action and will not affect any burden of proof or degree of proof otherwise applicable. (Under current law, these rules are applied to bar any adverse collateral effect of that determination at any later stage of the case.)
2. The motion will be scheduled by the court clerk for hearing within 30 days after the service of the motion

unless the docket conditions require a later hearing.
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2. There will be no right to mandatory attorney's fees for a prevailing defendant filing an anti-SLAPP motion in a SLAPPback action. (Proposed Section 425.18(c).)
3. There will be no automatic right to appeal the denial of the anti-SLAPP motion, but an expedited writ process is provided. (Proposed Section 425.18(c) and (g).)
4. There will be no limitation on discovery upon the filing of an anti-SLAPP motion. Further, a party opposing the motion to strike a SLAPPback may file an ex parte application for a continuance to obtain necessary discovery, which shall be granted if it appears to the court that facts essential to justify opposition to the motion may exist. (Proposed Section 425.18(c) and (e).)
5. Defendants will have 120 days after service of the SLAPPback action to file the anti-SLAPP motion, (instead of 60 days). Any filing of the anti-SLAPP motion after 120 days and before six months will be at the court's discretion, and for any delayed filing beyond six months after service, the court must find that the delayed filing was an extraordinary case and circumstance due to no fault of the defendant. (Proposed Section 425.18(d).)
6. The filing of a frivolous anti-SLAPP motion in a SLAPPback action will be sanctioned by an award of reasonable attorney's fees to the plaintiff. (Proposed Section 425.18(f) is taken from the existing anti-SLAPP law.)
7. A special motion to strike may not be filed in a

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SLAPPback action by a party whose filing or maintenance of the prior cause of action from which the SLAPPback arises was illegal as a matter of law. (Proposed Section 425.18(h).)

8. The SLAPPback provisions will not apply to any SLAPPback action filed by a public entity. (Proposed Section 425.18(1).)
9. This bill makes specified findings to abrogate or overrule specified court of appeals decisions. (Proposed Section 3 of the bill.)

FISCAL EFFECT : Appropriation: No Fiscal Com.: No
Local: No

SUPPORT : (Verified 8/25/05)

California Broadcasters Association
California Defense Counsel
California Medical Association
California Newspaper Publishers Association

Golden State Manufactured-Home Owners League
Mexican American Political Association

ARGUMENTS IN SUPPORT : The sponsor, the California Anti-SLAPP Project (CASPP), and proponents assert that victims of SLAPP lawsuits suffer great damages as a result of being SLAPPED, and that the costs and attorneys' fees recoverable under the anti-SLAPP law are only a small part of the overall damages suffered by a SLAPP victim. CASPP points out that some victim's lives have been literally destroyed by having to defend against a SLAPP. Some have lost or had to mortgage their homes to pay the upfront defense costs, and many have suffered severe emotional distress, adverse health consequences, and strained family relationships caused by SLAPP-related stress. CASPP writes: "Frequently, much more significant are damages for emotional distress and punitive damages, arising from violations of the defendant's constitutional rights. Attorneys' fees and costs will not compensate."

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First, it narrowly abrogates a part of the Supreme Court decision in Wilson v. Parker, Covert & Childester, (2002) 28 Cal.4th 811, in which the Court narrowly construed legislative intent and declined to bar the denial of an anti-SLAPP motion from having an adverse effect in a later action. That ruling effectively bars many SLAPP victims from filing a SLAPPback action even though that prior denial of the motion by the trial court was overturned on appeal. The proposed limited abrogation allows those SLAPP victims to file a SLAPPback claim. A second major provision enacts new Section 425.18 to govern SLAPPback actions to specifically ameliorate some of the potential harshness of the anti-SLAPP law if applied to a SLAPPback action.

ASSEMBLY FLOOR :

AYES: Aghazarian, Arambula, Baca, Bass, Benoit, Berg, Bermudez, Blakeslee, Bogh, Canciamilla, Chan, Chavez, Chu, Cogdill, Cohn, Coto, Daucher, De La Torre, DeVore, Dymally, Emmerson, Evans, Frommer, Garcia, Goldberg, Hancock, Harman, Haynes, Jerome Horton, Shirley Horton, Huff, Jones, Karnette, Keene, Klehs, La Malfa, Laird, Leno, Leslie, Levine, Lieber, Matthews, Maze, McCarthy, Montanez, Mountjoy, Mullin, Nakanishi, Nation, Nava, Negrete McLeod, Niello, Oropeza, Parra, Pavley, Plescia, Richman, Ridley-Thomas, Sharon Runner, Ruskin, Saldana, Salinas, Spitzer, Strickland, Torrico, Tran, Umberg, Vargas, Villines, Walters, Wolk, Wyland, Yee, Nunez
NO VOTE RECORDED: Calderon, Gordon, Houston, Koretz, La Suer, Liu

RJG:mel 8/25/05 Senate Floor Analyses

SUPPORT/OPPOSITION: SEE ABOVE

**** END ****

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CONCURRENCE IN SENATE AMENDMENTS
 AB 1158 (Lieber)
 As Amended August 24, 2005
 2/3 vote. Urgency

ASSEMBLY:	174-0	(May 9, 2005)	SENATE:	31-1	(August 29,
					2005)

Original Committee Reference: JUD.

SUMMARY : Revises application of the anti-Strategic Lawsuits Against Public Participation (SLAPP) statute. Specifically, this bill :

- 1) Declares that so-called "SLAPPback" actions (defined as malicious prosecution or abuse of process claims filed by the target of a SLAPP suit against the SLAPP filer after the dismissal of the SLAPP suit as a result of the target's use of the anti-SLAPP special motion to strike), are consistent with the Legislature's intent to protect free speech and provides that they are generally exempt from the anti-SLAPP statute, except with respect to public entities, and are subject to various procedures, as specified.
- 2) Prevents a claim determined to be a meritless SLAPP claim from being used as probable cause in response to a malicious prosecution suit or in any subsequent action, except with respect to a defendant that is a public entity.
- 3) Precludes automatic right to appeal when a court denies a special motion to strike based on the finding that the action or cause of action is exempt from the anti-SLAPP statute because it is a public prosecution action or a "SLAPPback" suit.
- 4) Allows SLAPP victims more flexibility in scheduling hearing on anti-SLAPP motions by making clear that the current requirement that an anti-SLAPP motion to strike must be heard within 30 days is not jurisdictional.
- 5) Provides that objections to evidence in an anti-SLAPP hearing are not waived.

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The Senate amendments set forth the legislative declarations regarding SLAPPback actions and provide specific procedures for such actions. Prevent a claim determined to be a meritless SLAPP claim from being used as probable cause in any subsequent action, except with respect to a defendant that is a public entity.

AS PASSED BY THE ASSEMBLY , this bill was substantially similar, except as set forth above.

FISCAL EFFECT : None

COMMENTS : According to the author, this bill clarifies the protections of California's anti-SLAPP law, which protects the public's First Amendment rights by prohibiting SLAPPs, lawsuits pursued solely to prevent members of the public from participating in their government or speaking out on public issues. The author states that this bill will ensure that victims of SLAPP suits are fully compensated for their losses, and prohibit an emerging practice by those who file SLAPP suits of abusing the anti-SLAPP law to defend their meritless lawsuits.

The author states that in most SLAPPs the attorneys' fees and costs recoverable under the anti-SLAPP law are only part of the overall damages suffered by the SLAPP victim. SLAPP victims, the author states, commonly experience stress-related health issues, strained family relationships, and financial distress or even insolvency. The only way a SLAPP victim can recover for these damages is to pursue a legal claim against the person or entity that filed the original SLAPP. These claims, (typically malicious prosecution claims filed after successful use of the anti-SLAPP statute to dismiss the SLAPP) are known as "SLAPPback" suits.

This bill provides that SLAPPback actions are generally exempt from attack by the anti-SLAPP statute. This will allow SLAPP victims the right to seek damages beyond lawyer's fees in a subsequent malicious prosecution action. In so doing, this bill would overrule two appeals court decisions in which the court held that a SLAPPback malicious prosecution claim filed by the SLAPP victim after dismissal of (and in response to) a SLAPP action was itself subject to the anti-SLAPP statute. In other words, the author argues, the courts allowed the SLAPPER to use the anti-SLAPP law to defeat the victim's efforts to recover all

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of her losses arising from the SLAPP suit.

The sponsor, California Anti-SLAPP Project, states this provision of the bill was recommended in a report to the Judicial Council to "clear up this potential loophole" and prevent the law from creating "a merry-go round of abuse."

Similarly, this bill also prevents a claim determined to be a meritless SLAPP from being used as probable cause in response to a malicious prosecution suit or in any subsequent action, thereby allowing SLAPP victims to recover their damages in a subsequent malicious prosecution suit.

Current law allows for an automatic right to appeal from denial of an anti-SLAPP motion. This bill removes that automatic right to appeal when a court denies an anti-SLAPP motion based on the finding that the action or cause of action is exempt from the anti-SLAPP motion as a "SLAPPback" or as public prosecution enforcement action.

This bill allows SLAPP victims more flexibility in scheduling hearing on anti-SLAPP motion. Current law requires that when an anti-SLAPP motion to strike is filed it must be heard within 30 days. According to the sponsor, the purpose of this provision in existing law is to ensure that a defendant can quickly obtain a hearing on his or her motion, in order to defeat a SLAPP suit at the earliest possible time.

This bill also precludes objections to evidence in an anti-SLAPP hearing from being waived merely because the trial court does not rule on the objections. This bill also provides that on appeal a party's evidentiary objections in the trial court are not deemed waived if the trial court does not rule on or sustain them. In one recent case, the author reports, the court held that the defendant waived its evidentiary objection to a crucial piece of evidence "because it did not obtain a ruling on it in the trial court." The court gave no explanation for this holding, other than an ambiguous reference to a case construing the summary judgment statute. The author argues that the reasoning behind this decision is flawed and it unfairly penalizes SLAPP victims for the trial courts' failure to rule on a timely objection.

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Analysis Prepared by : Kevin G. Baker / JUD. / (916) 319-2334

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