

June 28, 2017

## California Anti-SLAPP Motions: Potential Pitfalls for Plaintiffs

by Jeffrey M. Singletary, Elizabeth M. Weldon, and Patrick W. Kelly

California's anti-SLAPP ("strategic lawsuit against public participation") law has been an inviting first line of attack for defendants and cross-defendants—and a potential pitfall for plaintiffs and cross-complainants—ever since its passage 25 years ago. Enacted in 1992 as a deterrent to the filing of meritless lawsuits which prevent or punish the exercise of petition or free speech rights, the anti-SLAPP statute's unique discovery stay, immediate appeal provisions, unavailability of leave to amend, and one-sided mandatory attorney-fee provisions make the anti-SLAPP special motion to strike one of the most powerful dispositive motions in California civil litigation.

### BACKGROUND

The California legislature enacted the anti-SLAPP statute in response to a "disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition."<sup>1</sup> An anti-SLAPP motion is a special motion to strike to expedite the early dismissal of unmeritorious causes of action that are aimed at preventing citizens from exercising their constitutional rights of petition or free speech in connection with a public issue.<sup>2</sup>

The motion involves a two-step process.<sup>3</sup> In step one, the moving defendant (or cross-defendant) has the burden of making a prima facie showing that the plaintiff's (or cross-complainant's) cause of action arises from an act "in furtherance of the [defendant's] right of petition or free speech . . . in connection with a public issue."<sup>4</sup> For the defendant to meet its burden in step one, it must establish that the statement or conduct on which the cause of action is based falls within one of the four categories set forth in California Code of Civil Procedure section 425.16(e):<sup>5</sup>

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

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

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

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

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

<sup>1</sup> Cal. Civ. Proc. § 425.16(a).

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

<sup>3</sup> *Equilon Enters. v. Consumer Cause, Inc.* (2002) 29 Cal. 4th 53, 67.

<sup>4</sup> Cal. Civ. Proc. § 425.16(b)(1).

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

<sup>6</sup> Cal. Civ. Proc. § 425.16(e)(1).

<sup>7</sup> Cal. Civ. Proc. § 425.16(e)(2).

<sup>8</sup> Cal. Civ. Proc. § 425.16(e)(3).

<sup>9</sup> Cal. Civ. Proc. § 425.16(e)(4).

<sup>10</sup> *Gallimore v. State Farm Fire & Casualty Ins. Co.* (2002) 102 Cal. App. 4th 12, 21.

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

## DISCOVERY IS STAYED, WITH FEW EXCEPTIONS

With limited exceptions, the filing of an anti-SLAPP motion stays all discovery proceedings in the action.<sup>14</sup> Plaintiffs or cross-complainants asserting claims that may draw an anti-SLAPP motion (for example, defamation, interference or nuisance claims) therefore should consider conducting early discovery aimed at establishing the elements of their prima facie case. Plaintiffs have a short window of time to conduct discovery before the filing of an anti-SLAPP motion, which must be filed within 60 days after service of the complaint or cross-complaint.<sup>15</sup> Plaintiffs can initiate written discovery 10 days after service of the complaint, with responses arriving 30-days thereafter—i.e., potentially 20 days before defendants’ deadline to file an anti-SLAPP motion.<sup>16</sup> Be aware, though, that nothing prevents a defendant from filing the anti-SLAPP motion earlier than the 60-day deadline.

The discovery stay is effective immediately upon the filing of the anti-SLAPP motion.<sup>17</sup> If, as is often the case, a plaintiff needs additional discovery to oppose defendant’s motion—for example, to find evidence of actual malice in a defamation action—a plaintiff must file a motion to obtain the needed discovery.<sup>18</sup> Discovery will only be permitted by the court if the plaintiff establishes good cause. Establishing good cause requires more than merely showing relevancy; the plaintiff must affirmatively demonstrate a prima facie showing of the viability of its claims and describe the additional facts it expects to discover.<sup>19</sup> Even if ordered, the discovery will be narrowly limited to the issues raised by the anti-SLAPP motion—i.e., matters that may help plaintiff establish a “reasonable probability of prevailing” on its claims, rather than collateral issues like credibility.<sup>20</sup> Accordingly, the plaintiff must show that aside from the discovery sought, plaintiff’s claim is, in other respects, viable.<sup>21</sup> Plaintiffs are well advised to quickly respond to an anti-SLAPP motion by moving to obtain additional discovery to support its claims, as plaintiffs cannot merely oppose the anti-SLAPP motion based on their lack of opportunity to obtain such information.<sup>22</sup> This discovery, and the motion necessary to obtain it, further increases the costs and stakes for plaintiffs in defending against an anti-SLAPP motion.

## SUCCESSFUL DEFENDANT ENTITLED TO ATTORNEYS’ FEES AND COSTS

Attorneys’ fees add an additional wrinkle in anti-SLAPP cases. A successful moving defendant is entitled to its attorneys’ fees and costs incurred in connection with the motion.<sup>23</sup> The award is mandatory.<sup>24</sup> Mandatory fees include

<sup>11</sup> Cal. Civ. Proc. § 425.16(b)(1).

<sup>12</sup> *Varian Med. Sys., Inc. v. Delfino* (2005) 35 Cal. 4th 180, 193.

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

<sup>14</sup> Cal. Civ. Proc. § 425.16(g).

<sup>15</sup> Cal. Civ. Proc. § 425.16(f).

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

<sup>17</sup> *Id.*; *Mattel, Inc. v. Luce, Forward, Hamilton & Scripps* (2002) 99 Cal. App. 4th 1179, 1190 (noting that in enacting the anti-SLAPP statute, “not only did the Legislature desire early resolution to minimize the potential costs of protracted litigation, it also sought to protect defendants from the burden of traditional discovery pending resolution of the motion.”).

<sup>18</sup> Cal. Civ. Proc. §§ 2030.020(b), 2030.260(a), 2031.020(b), 2031.260(b), 2033.020(b) and 2033.250(a).

<sup>19</sup> Cal. Civ. Proc. § 425.16(g); *Paterno v. Super. Ct.* (2008) 163 Cal. App. 4th 1342, 1349 (to demonstrate “good cause” for discovery on actual malice in defamation action, plaintiff must make *prima facie* showing of falsity of the published statements); see also *Blanchard v. DIRECTV, Inc.* (2004) 123 Cal. App. 4th 903, 922 (trial court did not abuse its discretion denying plaintiff’s discovery request because plaintiff failed to demonstrate what additional facts it expected to uncover).

<sup>20</sup> *Id.*; *Sipple v. Foundation for Nat’l Progress* (1999) 71 Cal. App. 4th 226, 247.

<sup>21</sup> *See Garment Workers Ctr. v. Super. Ct.* (2004) 117 Cal. App. 4th 1156, 1162 (where the plaintiff seeks discovery on only one issue, the court should resolve all other significant issues before permitting “what may otherwise turn out to be unnecessary, expensive, and burdensome discovery proceedings”).

<sup>22</sup> *Lafayette Morehouse, Inc. v. Chronicle Publ’g Co.* (1995) 37 Cal. App. 4th 855, 867.

<sup>23</sup> Cal. Civ. Proc. § 425.16(c).

<sup>24</sup> *Kethcum v. Moses* (2001) 24 Cal. 4th 1122, 1131

those incurred in the trial court (including any anti-SLAPP-related discovery permitted by the court), appellate court, and enforcement of a fee award.<sup>25</sup> In contrast, a plaintiff successful in fending off an anti-SLAPP motion may only recover attorneys' fees and costs if the court finds the anti-SLAPP motion is "frivolous or is solely intended to cause unnecessary delay."<sup>26</sup> "Frivolous" is a high standard—i.e., "any reasonable attorney would agree such motion is totally devoid of merit."<sup>27</sup>

**RIGHT TO IMMEDIATE APPEAL**

An order granting or denying an anti-SLAPP motion is immediately appealable.<sup>28</sup> A plaintiff who loses an anti-SLAPP motion must appeal within 60 days of notice of entry of the decision. Any such anti-SLAPP appellant must post a bond or undertaking to stay enforcement of a judgment for attorney's fees and costs pending appeal.<sup>29</sup>

**PLEAD WITH CAUTION: DISMISSAL IS NOT AN OPTION AFTER THE ANTI-SLAPP MOTION IS FILED**

Once an anti-SLAPP motion is filed (which the defendant can do without warning), the plaintiff cannot evade fees by amending or withdrawing the complaint.<sup>30</sup> Plaintiffs and cross-complainants therefore must tread carefully when asserting claims where the underlying facts directly or indirectly implicate litigation-related activities (whether the activities be post-dispute but pre-litigation activities or activities conducted in connection with ongoing litigation).<sup>31</sup>

**CONCLUSION**

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

<sup>25</sup> *Wanland v. Mastagani, Holstedt & Chirazzi* (2006) 141 Cal. App. 4th 15, 20-21; *Dowling v. Zimmerman* (2001) 85 Cal. App. 4th 1400, 1425-26.

<sup>26</sup> Cal. Civ. Proc. § 425.16(c).

<sup>27</sup> *Moore v. Shaw* (2004) 116 Cal. App. 4th 182, 199

<sup>28</sup> Cal. Civ. Proc. § 425.16(i).

<sup>29</sup> *Dowling*, supra, 85 Cal. App. 4th at 1434.

<sup>30</sup> *Liu v. Moore* (1999) 69 Cal. App. 4th 745, 749-51.

<sup>31</sup> *Navellier v. Sletten* (2002) 29 Cal. 4th 82, 85 (noting that "[a]ny cause of action arising from the defendant's prior litigation activity may appropriately be the subject of a special motion to strike").



**Jeffrey M. Singletary**  
714.427.7473  
jsingletary@swlaw.com

Jeff Singletary concentrates his practice on business litigation in state and federal courts. He represents clients in matters involving breach of contract, business competition torts, real estate, public and private construction projects, and various intellectual property litigation matters, including trademark, trade dress, trade secret and patent claims.



**Elizabeth M. Weldon**  
714.427.7461  
eweldon@swlaw.com

Elizabeth Weldon concentrates her practice on business litigation, franchise litigation, and intellectual property litigation. She represents both large and small businesses in commercial and intellectual property litigation matters, including breach of contract, tort, class action, trademark, and trade dress claims.



**Patrick W. Kelly**  
213.929.2533  
pkelly@swlaw.com

Patrick Kelly's practice is concentrated in business and commercial litigation, with an emphasis in contract disputes and claims relating to corporate, franchise, and partnership disputes, commercial lease disputes, and uniform commercial code issues.