SLAPPlash: the Courts Finally turn on California's Anti-SLAPP Motion

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I. Introduction

From its inception both heralded and controversial, the special motion to strike pursuant to California Code of Civil Procedure Section 425.16 (the “anti-SLAPP motion”) has knifed a path through nearly every California litigator's battlefield.

A strategic lawsuit against public participation, also known as a SLAPP, aims to prevent defendants from exercising their constitutionally protected rights of free speech and petition. Rather than necessarily hoping to win the lawsuit, a party who files a SLAPP tries to wear down the other side by forcing it to spend time, money, and resources battling the SLAPP instead of the protected activity. The prototypical SLAPP is filed by a well-heeled land developer trying to silence a neighborhood organization that protests the developer's plans.¹

Enacted in 1992 to combat Strategic Lawsuits Against Public Participation, Section 425.16 is a special motion to strike a complaint or cause of action, and was intended to safeguard the rights of speech and petition.² In the more than a decade since its enactment, California's anti-SLAPP motion has been plagued from too frequent abuse and excess, and untethered from its policy moorings.³ Slowly, the courts have begun to reclaim long-ceded territory, reinvigorating anti-SLAPP motion jurisprudence with common sense and deliberation, not only restraining unwarranted exploitation, but punishing malefactors. This Article identifies an emergent trend in the California courts to explicate anti-SLAPP motion analysis, reversing years

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of assumed standing and lenient analysis for a more contemplative, meaningful burden shifting framework.

II. Too long too broadly construed, the courts begin to interpret protected activity sensibly and consistent with the Statute.

A Court reviewing an anti-SLAPP motion engages in a two step process: first, the court decides whether the defendant has made a threshold showing that the causes of action alleged arise from the defendant's protected activity. The movant-defendant’s burden is to demonstrate that the acts complained of by plaintiff arise from defendant’s right of speech or petition under the United States’ or California Constitution. Upon such a showing, the court determines whether plaintiff has demonstrated a probability of prevailing on the merits. The mere filing of an anti-SLAPP motion stays all discovery and a prevailing defendant is entitled to his attorneys’ fees.

Given the ability to both stay a proceeding and leverage the danger of an adverse fees award, the anti-SLAPP motion quickly lost its way, becoming a cloak of invincibility for the professional liability defense bar, insurance companies, collection agents and unscrupulous attorneys. Anti-SLAPP motions have been filed by insurers in bad faith cases, attorneys engaged in misconduct, bill collectors and myriad other actors uninvolved in speech or petition activity. The breadth of the statute’s language and the courts’ preference for broad construction emboldened abuse of the motion up to and including parties who sued on fraudulent documents.

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5 *Id.* [citation omitted].
6 Code Civ. Proc. §425.16(c), (g).
In Olsen v. Harbison the Third District Court of Appeal explicitly noted that the anti-SLAPP motion had become a tactic prone to abuse.9

On January 5, 2009, the California Supreme Court decided Episcopal Church Cases, an ownership dispute over church real estate between the Episcopal Church and a “breakaway” congregation.10 As a predicate to reaching the ultimate issues, the Court concluded that although protected activity arguably lurked in the background of the case, the case was actually a real property dispute not entitled to SLAPP protection.11 In so doing the Court punctuated the emergent backlash towards the anti-SLAPP motion's exploitation.

Episcopal Church Cases, together with the Court's earlier decision in Flatley v. Mauro12, bookends the increasing body of case law limiting abuse of the anti-SLAPP motion. Among the earliest courts to recognize the limits of Section 425.06' broad reach was the Second District in Paul for Council v. Hanyecz,13 which concluded that illegal political campaign donations, though arising from political speech, were not protected by the SLAPP statute. The Second District Court of Appeal in People ex rel. 20th Century Ins. Co. v. Building Permit Consultants, Inc.,14 similarly denied SLAPP standing to a defendant who created fraudulent documents which became the subject of a later lawsuit. The Court noted that permitting such a

10 (Episcopal Church Cases (2009) slip opn., Case No. S155094.)
11 (Id. at 2.)
defendant to have SLAPP standing “would effectively be providing immunity for any kind of
criminal fraud so long as the offending party was willing to take its cause to court.”

The Third District Court of Appeal, in *Beech v. Harco Ins. Co.*, supra, denied SLAPP
protection to an insurance company-defendant which filed an anti-SLAPP motion in a bad faith
tort suit. Justice Hull writing for the majority noted the purpose of Section 425.16 was to
"eliminate at an early stage of the proceedings unmeritorious or retaliatory litigation meant to
chill the valid exercise of the constitutional rights of free speech and petition." The insurermovant’s attempt to bring its own claims processing conduct (and lack thereof) within the
meaning of Section 425.16 was rejected. The Court noted further that Section 425.16 intended
only that “unmeritorious” actions suffer an early demise. Thus, the Court unequivocally
rejected a meretricious attempt to insulate alleged tortious conduct behind a procedural
gimmick.

So abused has the anti-SLAPP motion been, that motions have been filed against
government prosecutors. Notably, governmental prosecutions in the name of The People were
specifically exempted in Section 425.16(d), but hair-splitting motions have been brought
nonetheless. As the First District Court of Appeal wisely recognized, “Nothing in the legislative

15 *(Id. at 285)*


17 *(Id. at 93-95).*

18 *(Id. at 92 [quotations added].)*

19 “Gimmick” is an appropriate label. While the anti-SLAPP motion is a perfectly credible procedural tactic where
the defendant has engaged in protected speech or petition activity, the movant’s contentions in *Beech v. Harco* were
untenable and frivolous. Simply, a bad faith tort suit alleges the defendant-insurer wrongfully and in bad faith
refused to honor its obligations to provide the insured with coverage. The failure to provide insurance coverage
pursuant to a contract, wrongfully or not, nowhere resembles protected speech or petition activity.

history of Section 425.16 implies that the problem the Legislature sought to rectify thereby was created by prosecutors bringing meritless enforcement actions."\textsuperscript{21} The California Supreme Court itself catapulted the backlash in \textit{Flatley v. Mauro}\textsuperscript{22} holding that an attorney-defendant engaged in ethical violations and extortion could not file an anti-SLAPP motion. Notably, at least one court has suggested that an attorney sued for his professional conduct may not have SLAPP standing because the exercise of protected petition activity is not \textit{his}, but his client's.\textsuperscript{23}

Much anti-SLAPP motion abuse occurs in the trial courts. By staying the proceeding, Defendants can effectively stall a plaintiff's case, using the threat of an adverse fee award, mandatory under Section 425.16(c), to force settlement of otherwise merited cases. In a recent example, a hospital chain was sued by State regulators for violating California laws regarding the prohibited collection of healthcare bills from HMO consumers.\textsuperscript{24} Defendants filed an anti-SLAPP motion contending that its bill collection efforts constituted activity in furtherance of the right to petition.\textsuperscript{25} The Superior Court disagreed with Defendant's contention that bill collection was protected pre-petition activity, denying the motion.\textsuperscript{26} While the trial court's holding that bill collection is just that, bill collection and not protected speech or petition activity, is itself logically unremarkable, the case exemplifies both anti-SLAPP motion abuse, and the courts' trend towards limiting such exploitation.

\textsuperscript{21} (\textit{People v. Health Lab. N. Am. Inc.}, supra, 87 Cal.App.4\textsuperscript{th} at p. 450.)

\textsuperscript{22} \textit{Flatley v. Mauro} (2006) 39 Cal.4th 299.

\textsuperscript{23} \textit{Shekhter v. Financial Indemnity Co.} (2001) 89 Cal.App.4\textsuperscript{th} 141, 152 [italics supplied].

\textsuperscript{24} See, \textit{People v. Prime}, Case No. 30-2008-00108627, Orange County Super. Ct.

\textsuperscript{25} Defendants contended their bill collection activity was lawful pre-litigation conduct protected by Cal. Civil Code §47 [litigation privilege]. Though the court did not give this argument much traction, it is noteworthy that the California Supreme Court in \textit{Flatley}, soundly rejected the argument that conduct which may in fact be covered by the litigation privilege would suffice for standing under Section 425.16.

\textsuperscript{26} \textit{People v. Prime}, Order, Oct. 27, 2008.
Anti-SLAPP motion abuses are unmistakable because they are typically filed in opposition to ordinary complaints involving no retaliation for protected speech or petition activity. As the Second District has defined the inquiry: “While SLAPP suits ‘masquerade as ordinary lawsuits’ the conceptual features which reveal them as SLAPP’S are that they 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.”27 The Paul Court cited the opinion in Paul for Council v. Hanyecz, supra, with approval as a proper restriction on Section 425.16 protection, and further noted that although courts are required to construe the statute broadly, courts must also adhere to its express words and remain mindful of its purpose.28

II. Punishing the Frivolous Motion: A defendant's lack of standing exemplifies the frivolous anti-SLAPP motion.

One area in which work still remains lies with the ability of plaintiffs to recover their attorneys' fees in opposing bad-faith anti-SLAPP motions. While a prevailing defendant automatically recovers his fees in making the successful anti-SLAPP motion, a plaintiff forced to successfully oppose a frivolous or bad-faith anti-SLAPP motion may only recover fees if the court finds that the defendant's special motion to strike was frivolous or solely intended to cause unnecessary delay.29 While becoming increasing more vigilant of whether a particular defendant has standing to file an anti-SLAPP motion, the Courts of Appeal still lag far behind in defining

28 Id. at 90-91.
the circumstances and rationale entitling the successful plaintiff to his fees. The courts have not, however, been completely silent.

Section 425.16(c) creates a mandatory fees award in the plaintiff's favor upon a finding that the defendant's anti-SLAPP motion was frivolous or intended to cause delay.\textsuperscript{30} A determination of frivolousness requires a finding the anti-SLAPP “motion is ‘totally and completely without merit’ i.e., any reasonable attorney would agree such motion is totally devoid of merit.”\textsuperscript{31} In interpreting Section 425.16(c)'s frivolity requirement, the courts have focused on a defendant's failure to meet the threshold showing of protected activity as evidence of frivolity.\textsuperscript{32} In \textit{Moore v. Shaw} the defendant, an estates and trust attorney was sued for breach of trust arising from a trust instrument drafted by the defendant.\textsuperscript{33} In reviewing the trial court's denial of defendant's anti-SLAPP motion, the Court of Appeal not only concluded that the motion was properly denied because the defendant-attorney lacked standing to file the motion, but held that the motion was frivolous precisely because the defendant could not demonstrate any protected activity.\textsuperscript{34} Indeed, the Court expressly conditioned its finding the motion was frivolous on the fact that the defendant's underlying conduct "clearly did not constitute an act in furtherance of the right to speech or petition..." \textsuperscript{35} Other courts have followed \textit{Moore's} rule.\textsuperscript{36} In \textit{Visher v. City of Malibu}, a different division of the Second District Court of Appeal followed its

\textsuperscript{31} Id.
\textsuperscript{32} See, Id; see also, \textit{Visher v. City of Malibu}, supra fn. 1.
\textsuperscript{33} Moore v. Shaw, supra, footnote 25.
\textsuperscript{34} Id. at 199.
\textsuperscript{35} Id. at 200.
\textsuperscript{36} e.g., \textit{Visher v. City of Malibu}, supra, 126 Cal.App.4th 364.
brethren in *Moore*, equating a defendant's failure to make a threshold showing of protected activity with frivolity.\(^{37}\)

In *Visher*, real property owners sued the City of Malibu for a development permit at the same time the City was litigating the legality of a California Coastal Commission action taken against the City compelling it to issue permits.\(^{38}\) The City responded to the Visher's suit by filing an anti-SLAPP motion contending that the plaintiffs' suit to compel the City to issue the building permit was connected to the City's litigation with the Coastal Commission.\(^{39}\) The Court of Appeal affirmed the trial court's denial of the City's anti-SLAPP motion, and upheld the award of $35,000 in attorneys' fees the plaintiffs incurred in opposing the motion.\(^{40}\) The *Visher* Court concluded the City's motion was frivolous because "Malibu had no reasonable basis" for asserting the Visher's lawsuit arose from the City's litigation against the Coastal Commission.\(^{41}\) Particularly, the Court noted "that a cause of action arguably may have been “triggered” by protected activity does not entail it is one arising from such."\(^{42}\) Thus, the Court concluded the critical consideration is whether the cause of action is based on the defendant's protected free speech or petitioning activity.\(^{43}\) Where the plaintiffs' cause of action does not arise from protected free speech or petitioning activity, the Court found that an award of attorneys' fees to the successful plaintiff was required.\(^{44}\)

The Fourth District confronted a different circumstance in *Lockyer v. Brar*.\(^{45}\) There, the attorney general sued a defendant-attorney, seeking to stop him from filing allegedly abusive

\(^{37}\) Id.
\(^{38}\) Id.
\(^{39}\) Id. at 370-371.
\(^{40}\) Id. at 371.
\(^{41}\) Id.
\(^{42}\) Id. at 370.
\(^{43}\) Id.
\(^{44}\) Id. at 371.
unfair competition lawsuits.\textsuperscript{46} Notwithstanding the exception for public prosecutors in Section 425.16(d), the defendant filed an anti-SLAPP motion contending that the Attorney General's alleged political motives removed the case from the subdivision(d) exception. The Fourth District Court of appeal disagreed, dismissing the appeal as frivolous, awarding the Attorney General his attorneys' fees.\textsuperscript{47} The Court noted that there was no "political motive" exception to subdivision (d) and an argument attempting to create one from thin air was "a loser, at a 'mere glance.'"\textsuperscript{48} In light of its limited application and public prosecutor fact setting, \textit{Lockyer} is likely of limited use to private plaintiffs. however, the case is noteworthy for the Court's grounded analysis giving effect to the statute's text and purpose - to eliminate at an early stage of the proceedings unmeritorious or retaliatory litigation meant to chill the valid exercise of the constitutional rights of free speech and petition.\textsuperscript{49}

Perhaps the more important unanswered inquiry is whether some grounds other than the lack of standing recognized by the courts in \textit{Moore} and \textit{Visher}, can suffice for a showing of frivolity? For example, would the filing of an anti-SLAPP motion where the plaintiff could clearly make his burden, i.e., prove a probability of prevailing on the merits, constitute a frivolous motion? Would not a defendant-attorney's filing of a 425.16 motion in a malicious prosecution case, post-\textit{Flatley},\textsuperscript{50} not be equally frivolous where the plaintiff had written evidence of the attorney's ethical violation? These cases are admittedly more difficult conceptually than the bright-line rule of \textit{Moore}, however, there is no doctrinal reason why a plaintiff's probable

\textsuperscript{46} Id.
\textsuperscript{47} Id. at 1319.
\textsuperscript{48} Id.
\textsuperscript{49} See, \textit{Beech v. Harco}, supra, footnote 15.
\textsuperscript{50} A defendant in a malicious prosecution action may file an anti-SLAPP motion. \textit{Jarrow Formulas v. LaMarche} (2003) 31 Cal.4th 728. However, post-\textit{Flatley}, it is difficult to conceive of an attorney caught in ethical violations or criminal conduct receiving standing to file an anti-SLAPP motion; the attorney's unlawful conduct is not the lawful exercise of a protected activity. See, \textit{Flatley v. Mauro}, supra
success on the merits, at no less than a pre-discovery, pre-Answer pleading stage, ought to exclude a finding of frivolity.

IV. Conclusion

The proliferation in anti-SLAPP motion abuse has been contemptible, forming a veritable impenetrable moat around the unethical and frequently unlawful conduct of many defendants including particularly, attorneys. These acts are not inchoate, but have real effects on those plaintiffs with well-founded cases who settle rather than risk a mandatory adverse fee award imposed by a formerly cursory judiciary.

There is now an established body of case law holding the anti-SLAPP motion to its intended purposes. Whether confronting the unethical, extortionate lawyer as in Flatley, the insurer in Beech, the fraudulent actor in People ex rel 20th Century Ins., or the ordinary case identified in Episcopalian Church Cases, plaintiffs need fear the anti-SLAPP motion no longer. As trial courts become more versed in the breadth of case law limiting the motion to its proper protections, abuses will become fewer while preserving an important procedural tool for safeguarding vital speech and petition activities.

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