

RESOLUTION 08-03-2014 (as amended)

DIGEST

Civil Procedure: Discretionary Fees for Prevailing Anti-SLAPP Plaintiff

Amends Code of Civil Procedure section 425.16 to authorize discretionary fees to a plaintiff who prevails on an anti-SLAPP motion to strike.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE (Rescomm recommendation mooted by amendments)

History:

Similar to Resolution 03-03-2002, which was approved in principle.

Reasons:

~~This resolution amends Code of Civil Procedure section 425.16 to authorize discretionary fees to a plaintiff who prevails on an anti-SLAPP motion to strike. This resolution should be disapproved because the proposed amendment is unnecessary.~~

~~Code of Civil Procedure section 425.16, subdivision (c) already grants judicial discretion to award reasonable attorney's fees to a prevailing plaintiff under Code of Civil Procedure section 128.5, where the defendant's motion is frivolous or was solely intended to cause unnecessary delay—essentially the grounds advanced in the resolution, though in different and more narrowly phrased language.~~

TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 425.16 to read as follows:

§ 425.16

- 1 (a) The Legislature finds and declares that there has been a disturbing increase in lawsuits
2 brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and
3 petition for the redress of grievances. The Legislature finds and declares that it is in the public
4 interest to encourage continued participation in matters of public significance, and that this
5 participation should not be chilled through abuse of the judicial process. To this end, this section
6 shall be construed broadly.
- 7 (b) (1) A cause of action against a person arising from any act of that person in
8 furtherance of the person's right of petition or free speech under the United States Constitution or
9 the California Constitution in connection with a public issue shall be subject to a special motion
10 to strike, unless the court determines that the plaintiff has established that there is a probability
11 that the plaintiff will prevail on the claim.
- 12 (2) In making its determination, the court shall consider the pleadings, and supporting and
13 opposing affidavits stating the facts upon which the liability or defense is based.
- 14 (3) If the court determines that the plaintiff has established a probability that he or she
15 will prevail on the claim, neither that determination nor the fact of that determination shall be
16 admissible in evidence at any later stage of the case, or in any subsequent action, and no burden
17 of proof or degree of proof otherwise applicable shall be affected by that determination in any
18 later stage of the case or in any subsequent proceeding.
- 19 (c) (1) Except as provided in paragraph (2), in any action subject to subdivision (b), a
20 prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's
21 fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to

22 cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff
23 prevailing on the motion, pursuant to Section 128.5. The court also may award costs and
24 reasonable attorney's fees to a plaintiff prevailing on the motion, in its discretion.

25 (2) A defendant who prevails on a special motion to strike in an action subject to
26 paragraph (1) shall not be entitled to attorney's fees and costs if that cause of action is brought
27 pursuant to Section 6259, 11130, 11130.3, 54960, or 54960.1 of the Government Code. Nothing
28 in this paragraph shall be construed to prevent a prevailing defendant from recovering attorney's
29 fees and costs pursuant to subdivision (d) of Section 6259, 11130.5, or 54690.5.

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

33 (e) As used in this section, "act in furtherance of a person's right of petition or free speech
34 under the United States or California Constitution in connection with a public issue" includes:

35 (1) any written or oral statement or writing made before a legislative, executive, or
36 judicial proceeding, or any other official proceeding authorized by law,

37 (2) any written or oral statement or writing made in connection with an issue under
38 consideration or review by a legislative, executive, or judicial body, or any other official
39 proceeding authorized by law,

40 (3) any written or oral statement or writing made in a place open to the public or a public
41 forum in connection with an issue of public interest, or

42 (4) any other conduct in furtherance of the exercise of the constitutional right of petition
43 or the constitutional right of free speech in connection with a public issue or an issue of public
44 interest.

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

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

53 (h) For purposes of this section, "complaint" includes "cross-complaint" and "petition,"
54 "plaintiff" includes "cross-complainant" and "petitioner," and "defendant" includes "cross-
55 defendant" and "respondent."

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

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

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

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: California Society of Entertainment Lawyers
STATEMENT OF REASONS

The Problem: California’s Anti-SLAPP law was enacted in response to lawsuits where powerful interests attempted to abuse the litigation process to wear down opponents engaged in protected First Amendment activity through costly litigation (e.g., real estate developer sues pesky environmental protestors). Shortly after the Anti-SLAPP statute was enacted, the Legislature recognized it was being abused, and limited it in certain ways by enacting Section 425.17. However, the balance is still askew. Under the current Anti-SLAPP regime, defendants win even for losing, because even if they lose an Anti-SLAPP motion in the trial court, they can tie up a case for years given that decisions are immediately appealable. (Code Civ. Proc. § 425.16(i).) Where a defendant wins an Anti-SLAPP motion, not only is an award to the defendant of its reasonable fees mandatory (Code Civ. Proc. § 425.16(c)), but expanded damages for malicious prosecution are often available to the defendant pursuant to a SLAPPback motion (Code Civ. Proc. § 425.18). The only possible downside to bringing an Anti-SLAPP motion for a defendant is the threat of paying a prevailing plaintiff’s costs and fees. However, that threat is hardly much of a deterrent because, under the current law, a plaintiff will only be awarded fees if the Anti-SLAPP motion is so tenuous that the motion is deemed “frivolous or is solely intended to cause unnecessary delay.” (See Code Civ. Proc. 425.16(c)(1).) In practice, meritless Anti-SLAPP motions asserting tenuous First Amendment concerns occur frequently. Very often, Anti-SLAPP motions are brought by big companies in an attempt to thwart legitimate grievances (grievances that are themselves protected by the First Amendment right to petition the government), which is basically the opposite of the Anti-SLAPP statute’s intent.

The Solution: This resolution would cut down on meritless, dilatory Anti-SLAPP motions by tipping the fee award balance ever so slightly back in favor of plaintiffs. In deciding SLAPP fees, what a court should really be doing is balancing *competing* First Amendment concerns: a plaintiff’s right to petition the government for redress of grievances (through filing suit) versus a defendant’s right to speak and petition on issues of public interest. The proposal also focuses the question of awarding fees to the plaintiff on whether there is really a “public issue” asserted by the defendant that passes the smell test, which is the issue currently most prone to abuse. This proposal is not radical and preserves the overall balance of the SLAPP regime, which still heavily favors defendants. The immediate right of appeal is untouched. And a prevailing *defendant* can still expect mandatory fees and costs, plus the possibility of SLAPPback damages. However, the key new change would be that because discretionary fees would be in play *if the plaintiff prevails* (presumably payable in most cases after the inevitable appeal), then defendants would have to think just a little bit harder before moving forward with Anti-SLAPP motions which assert tenuous First Amendment concerns that smack of overly-clever-lawyering and not actual matters of public concern.

LEGISLATIVE HISTORY

Not known.

IMPACT STATEMENT

The proposed resolution does not affect any other law, statute or rule.

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COMMENTS TO RESOLUTION 08-03-2014

SAN DIEGO COUNTY BAR ASSOCIATION

DISAPPROVE: This Resolution should be disapproved because it is unnecessary and contrary to the reasons behind the anti-SLAPP statute which seeks to protect free speech and petitioning activities while providing the aggrieved defendant with an expedient remedy to compensate for the damage caused by the violation, thereby avoiding a multiplicity of lawsuits. When the motion is denied, plaintiffs who are potentially entitled to an award of contractual or statutory attorney's fees as a prevailing party in the case may ultimately recover fees incurred in defending against the motion upon winning their case. (See *Bank of Idaho v. Pine Avenue Associates* (1982) 137 Cal.App.3d 5, 15; *Urbaniak v. Newton* (1993) 19 Cal.App.4th 1837, 1844.)