

**ELF-01-2015**

**DIGEST**

Civil Procedure: Limitation on Appellate Review of Anti-SLAPP Special Motion to Strike  
Amends Code of Civil Procedure sections 425.16 and 904.1 to limit the circumstances under which a decision on an anti-SLAPP special motion to strike may be immediately appealed.

**TEXT OF RESOLUTION**

**RESOLVED** that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure sections 425.16 and 904.1 to read as follows:

**§ 425.16.**

(a) The Legislature finds and declares 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. To this end, this section shall be construed broadly.

(b)(1) 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 Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

(2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(3) If 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 at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.

(c)(1) Except as provided in paragraph (2), in any action subject to subdivision (b), 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 Section 128.5.

(2) A defendant who prevails on a special motion to strike in an action subject to paragraph (1) shall not be entitled to attorney's fees and costs if that cause of action is brought pursuant to Section 6259, 11130, 11130.3, 54960, or 54960.1 of the Government Code. Nothing in this

paragraph shall be construed to prevent a prevailing defendant from recovering attorney's fees and costs pursuant to subdivision (d) of Section 6259, 11130.5, or 54690.5.

(d) This section shall not apply 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.

(e) As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) 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, (3) 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, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

(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. The motion shall be scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.

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

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

(i) An order ~~granting or~~ denying a special motion to strike shall be appealable under Section 904.1, but only if (1) the special motion was filed within 60 days of the service of the complaint, and (2) the special motion would—if granted—dispose of the entire action.

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

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

**§ 904.1.**

(a) An appeal, other than in a limited civil case, is to the court of appeal. An appeal, other than in a limited civil case, may be taken from any of the following:

(1) From a judgment, except (A) an interlocutory judgment, other than as provided in paragraphs (8), (9), and (11), or (B) a judgment of contempt that is made final and conclusive by Section 1222.

(2) From an order made after a judgment made appealable by paragraph (1).

(3) From an order granting a motion to quash service of summons or granting a motion to stay the action on the ground of inconvenient forum, or from a written order of dismissal under Section 581d following an order granting a motion to dismiss the action on the ground of inconvenient forum.

(4) From an order granting a new trial or denying a motion for judgment notwithstanding the verdict.

(5) From an order discharging or refusing to discharge an attachment or granting a right to attach order.

(6) From an order granting or dissolving an injunction, or refusing to grant or dissolve an injunction.

(7) From an order appointing a receiver.

(8) From an interlocutory judgment, order, or decree, hereafter made or entered in an action to redeem real or personal property from a mortgage thereof, or a lien thereon, determining the right to redeem and directing an accounting.

(9) From an interlocutory judgment in an action for partition determining the rights and interests of the respective parties and directing partition to be made.

(10) From an order made appealable by the provisions of the Probate Code or the Family Code.

(11) From an interlocutory judgment directing payment of monetary sanctions by a party or an attorney for a party if the amount exceeds five thousand dollars (\$5,000).

(12) From an order directing payment of monetary sanctions by a party or an attorney for a party if the amount exceeds five thousand dollars (\$5,000).

(13) From an order ~~granting or~~ denying a special motion to strike under Section 425.16, but only if (1) the special motion was filed within 60 days of the service of the complaint, and (2) the special motion would—if granted—dispose of the entire action.

(b) Sanction orders or judgments of five thousand dollars (\$5,000) or less against a party or an attorney for a party may be reviewed on an appeal by that party after entry of final judgment in the main action, or, at the discretion of the court of appeal, may be reviewed upon petition for an extraordinary writ.

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

**PROPONENT:** California Society of Entertainment Lawyers

## **STATEMENT OF REASONS:**

The Problem: “Something is wrong with this picture, and we hope the Legislature will see fit to change it.” (*Grewal v. Jammu* (2011) 191 Cal.App.4th 977, 1003.) Justice Richman wrote the foregoing words referring to the problem posed by the plague of “nonmeritorious appeals by defendants who lost anti-SLAPP motions.” (*Ibid.*) The Court of Appeals has noted with alarm the profusion of anti-SLAPP appeals, “no letup seems in sight, as one cannot pick up a volume of the official reports without finding an anti-SLAPP case. Or four.” (*Id.* at p. 998.) The appellate courts are telling us loud and clear that they are sick of all the meritless anti-SLAPP motions which are brought, even though the people bringing them know they are going to lose, in order to delay proceedings for a couple years, or longer, while the automatic appeal works its way through appellate review.

On August 27, 2015, a unanimous three-judge panel of the Court of Appeal again took the highly unusual step of explicitly calling on the Legislature to amend the SLAPP law, in a published opinion. (*Hewlett-Packard Co. v. Oracle Corp.*, Cal.Ct.App. No. H039507 (6th Dist., August 27, 2015) [“many courts and commentators have attempted to draw attention—particularly legislative attention—to this ‘explosion of anti-SLAPP motions’ and resulting appeals, and to particular ‘ways in which the anti-SLAPP procedure is being misused—and abused.’ . . . It is as if a city had decided to cure an illness afflicting a few of its residents by lacing the water supply with a chemical that would indeed cure those sufferers, but would sicken a larger number of previously healthy citizens.”].) This time, however, the court actually went so far as to put forward a specific proposal as to how some of the worst abuse can be reduced, while still staying true to the original intent of the SLAPP statute. Specifically, “In this regard, we offer the suggestion that one simple fix might substantially reduce the motivation to abuse the anti-SLAPP procedure: Limit the right to interlocutory appeal to denials, and allow them only where the motion (1) is filed within the allotted 60 days, and (2) would—if granted—dispose of the entire action. . . . Such an amendment would limit invocation of the statute to cases where it may serve its stated purpose and greatly reduce its tactical utility in many if not most of the situations where it is now being most sorely abused.” (*Ibid.*)

The Solution: This resolution would implement the exact suggestion of the Court of Appeal in *HP v. Oracle*, *supra*. Most significantly, a defendant who files an anti-SLAPP motion, which is denied, would only have a right to immediately appeal if the motion would resolve all causes of action. The resolution would also eliminate automatic appeals by a plaintiff where a special motion is granted, and would eliminate an automatic right to immediately appeal a special motion filed late (i.e., more than 60 days after service on the defendant) in the case.

## **CURRENT OR PRIOR RELATED LEGISLATION:**

This ELF resolution is addressed to the same problem as 08-03-2014, which passed the conference and is currently being worked on in Sacramento, which would make it easier for plaintiffs who prevail in defeating meritless anti-SLAPP motions to recover their attorneys’ fees. If adopted, 08-03-2014 would be an important and synergistic counterpoint with respect to any borderline frivolous arguments as to ancillary causes of action that are not really properly the subject of SLAPP suits, but which defendants would be incentivized to challenge under the SLAPP law, so as to potentially be able to take an immediate appeal and thereby delay the case.

This ELF resolution is similar, but less radical, than 11-03-2015, which would eliminate the right of immediate interlocutory appeal of anti-SLAPP motions altogether and replace it with merely discretionary interlocutory review by writ, and a regular right to appeal after final judgment.

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