

RESOLUTION 04-08-2016

DIGEST

Anti-SLAPP: Prevailing Party Attorney Fee Award

Amends Code of Civil Procedure section 425.16 to make attorney fee awards reciprocal.

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 furtherance
8 of the person's right of petition or free speech under the United States Constitution or the
9 California Constitution in connection with a public issue shall be subject to a special motion to
10 strike, unless the court determines that the plaintiff has established that there is a probability that
11 the plaintiff will prevail on the claim.

12 (2) In making its determination, the court shall consider the pleadings, and supporting
13 and 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 ~~party prevailing defendant~~ on a special motion to strike shall be entitled to recover his or her
21 attorney's fees and costs. ~~If the court finds that a special motion to strike is frivolous or is solely~~
22 ~~intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to~~
23 ~~a plaintiff prevailing on the motion, pursuant to Section 128.5.~~

24 (2) A defendant who prevails on a special motion to strike in an action subject to
25 paragraph (1) shall not be entitled to attorney's fees and costs if that cause of action is brought
26 pursuant to Section 6259, 11130, 11130.3, 54960, or 54960.1 of the Government Code. Nothing
27 in this paragraph shall be construed to prevent a prevailing defendant from recovering attorney's
28 fees and costs pursuant to subdivision (d) of Section 6259, or Section 11130.5 or 54960.5, of the
29 Government Code.

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, acting
32 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 judicial
36 proceeding, or any other official proceeding authorized by law, (2) any written or oral statement
37 or writing made in connection with an issue under consideration or review by a legislative,
38 executive, or judicial body, or any other official proceeding authorized by law, (3) any written or
39 oral statement or writing made in a place open to the public or a public forum in connection with
40 an issue of public interest, or (4) any other conduct in furtherance of the exercise of the
41 constitutional right of petition or the constitutional right of free speech in connection with a
42 public issue or an issue of public interest.

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

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

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

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

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

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

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

PROPONENT: Sacramento County Bar Association

STATEMENT OF REASONS

The Problem: Code of Civil Procedure section 425.16, the anti-SLAPP statute, was enacted to curb 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." (Code of Civ. Proc. § 425.16, subd. (a).) But as appellate courts have noted, over the past decade there have been "far more anti-SLAPP motions in garden-variety civil disputes" than in lawsuits intended to chill freedom of expression. *Hewlett-Packard Company v. Oracle Corporation* (2015) 239 Cal.App.4th 1174, 1184. Many reported decisions deal with anti-SLAPP motions in such commonplace lawsuits as actions for personal injury, legal malpractice, breach of contract, insurance coverage, failure to arbitrate, landlord-tenant proceedings and marital disputes. *Id.*

(collecting cases); *Grewal v. Jammu* (2011) 191 Cal.App.4th 977, 999 (same).

One incentive to the misuse of anti-SLAPP motions is that the defendant prevailing on the motion is entitled to recover attorney fees from plaintiff, but a defendant who loses rarely faces liability for plaintiff's fees. The prevailing plaintiff cannot recover fees unless the court finds the motion was frivolous or solely intended to cause unnecessary delay. (Code Civ. Proc., § 425.16, subd. (c)(1).)

The Solution: This resolution would provide a disincentive to misuse of anti-SLAPP motions by entitling the party prevailing on the motion to attorney fees. The entitlement to and liability for attorney fees incurred in making or defending the motion would be mutual. Defendants would no longer be able to misuse anti-SLAPP motions risk-free. The plaintiff who loses the motion will still be liable for defendant's attorney fees. But the defendant who loses will now be liable to pay the plaintiff's fees, even when the motion was not so lacking in merit as to be entirely frivolous. This mutual, reciprocal liability for attorney fees is the same means Civil Code section 1717 uses to level the playing field where a contract entitles only one party to attorney fees.

Courts have pled for legislative reform to slow the burgeoning misuse of anti-SLAPP motions. E.g., *Hewlett-Packard*, 239 Cal.App.4th at 1196; *Grewal*, 191 Cal.App.4th at 1003. This resolution is one means of effective reform.

IMPACT STATEMENT

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

CURRENT OR PRIOR RELATED LEGISLATION

Not known.

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RESOLUTIONS COMMITTEE RECOMMENDATION APPROVE IN PRINCIPLE

History:

Similar to Resolution 08-03-2014, which was approved as amended.

Reasons:

This resolution amends Code of Civil Procedure section 425.16 to make attorney fee awards reciprocal. This resolution should be approved in principle because reciprocity of attorney fees is fair to both sides, and is calculated at both preventing abuse of SLAPP (Strategic Lawsuits

Against Public Participation) suits by plaintiff as well as strategic misuse and abuse of anti-SLAPP motions to strike by defendants.

The courts in *Hewlett-Packard Company v. Oracle Corporation* (2015) 239 Cal.App.4th 1174, 1183-1186, and *Grewal v. Jammu* (2011) 191 Cal.App.4th 977, 997-1001, discuss the worrisome Pandora's Box opened with the enactment of Code of Civil Procedure section 415.16—the anti-SLAPP statute—and the critical need to address both lawsuits brought to chill the valid exercise of constitutional rights, and defendants who strategically bring unmeritorious special motions to strike for improper purposes, be it delay or to increase costs. The prospect of the prevailing party, plaintiff or defendant, being awarded attorney fees in connection with a special anti-SLAPP motion to strike, is not only fair, but is likely to make the parties think twice. An award of attorney's fees can serve as a deterrent to a defendant bringing an unjustified motion or for improper purposes, while also leaving intact the salutary purpose behind the statute, which is to deter plaintiffs who file retaliatory lawsuits against those who were simply exercising their constitutional rights. The existing statutory provision does not adequately or predictably provide plaintiffs the protection they deserve when improper motions are advanced by defendants. The resolution will fix that, and put both sides on an even playing field with a strong incentive to conduct themselves within the letter and spirit of the law.