

TWO SLAPPS DON'T MAKE A RIGHT. BUT THEY DO CLOG  
OUR COURTS

The latest twist in the anti-SLAPP law - the so-called SLAPPback - is sure to generate a massive increase in court congestion in the form of more legal malpractice suits and an unending roundelay of derivative tort actions. Every time a SLAPP motion is granted in California, the SLAPP filer<sup>1</sup> and his or her attorneys are now subject to a secondary malicious prosecution or abuse of process suit without a meaningful SLAPP defense. The secondary malicious prosecution is referred to as the SLAPPback suit.

AB 1158 was passed into law on 10/5/05 and is now codified as California Code of Civil Procedure § 425.18. (2005-2006 Reg. Sess.). *Soukup v. Hafif* (2006) 39 Cal.4th 260 is the first and only case to date to interpret the provisions of section 425.18, the new SLAPPback statute. AB 1158 is the fourth amendment to the anti-SLAPP legislation since it originally became effective in 1993. There are now well over 200 reported decisions interpreting the provisions of the anti-SLAPP law and its various amendments as codified in Code of Civil Procedure §§ 425.16, 425.17, 425.18. At least 10 of these decisions emanate from the California Supreme Court with other SLAPP cases currently pending review.

"The Legislature enacted section 425.16 to prevent and deter lawsuits 'lawsuits...brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for

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<sup>1</sup> A SLAPP filer is one who file a SLAPP suit and is usually a plaintiff but can also be cross-complainant or petitioner under subd. (h) of section 425.16.

the redress of grievances.' (§ 425.16, subd. (a).) Because these meritless suits seek to deplete 'the defendant's energy and drain his or her resources, the Legislature sought to prevent SLAPP suits by ending them early and without great cost to the SLAPP target.' Section 425.16 therefore establishes a summary-judgment-like procedure where the trial court evaluates the merits of the lawsuit using a summary-judgment-like procedure at an early stage of the litigation." *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 278 citing (*Varian Medical Systems v. Delfino* (2005) 35 Cal.4th 180, 192.). Section 425.16 sets up a two-step procedure for determining first whether the challenged cause of action "arises from protected activity." If not, the motion must be denied as a matter of law. If so, the court proceeds to the second step to evaluate whether the claim is legally sufficient and substantiated by competent admissible evidence that, if credited, would entitle plaintiff to judgment as a matter of law. *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 823-824.

#### ANTI-SLAPP MOTIONS BEFORE THE SLAPBACK LAW

The primary benefits of filing a section 425.16 special motion to strike (anti-SLAPP motion) as a means of defending a civil action are derived from its celerity and unparalleled compensatory and deterrent power. The author likes to think of it as a super summary judgment motion with a nuclear warhead attached. The motion must be filed within 60 days of the service of the complaint and must be noticed for hearing within 30 days after the notice of

motion is served under subd. (f).<sup>2</sup> Moreover, filing the notice of special motion to strike effects an automatic stay on all discovery while the motion is pending under subd (g). Once the anti-SLAPP motion is filed, the court cannot grant leave to amend - the complaint must stand or fall as originally drafted. *Simmons v. Allstate* (2001) 92 Cal.App.4th 1068. The specially moving defendant has an immediate right of appeal if the motion is denied by the trial court under subd. (i). All proceedings embraced within the appeal are automatically stayed pending appellate review under CCP § 916. *Varian Medical Systems* (2005) 35 Cal.4th 180. Of most exigent concern, however, is the specially moving SLAPP target's right to mandatory attorney's fees under subd. (c) if the motion is successful. This often includes very substantial loadstar enhancements for contingent risk assumed as the SLAPP defendant sits in the shoes of a civil rights plaintiff for purposes of a fee award. *Ketchum v. Moses* (2001) 24 Cal.4th 1122; *Computer Xpress v. Jackson* (2001) 93 Cal.App.4th 993. Depending on the nature and complexity of the case and contingent risk assumed, SLAPP fee awards can exceed six-figures just for services performed in connection with the motion in the trial court. More fees are awarded if the moving party is successful on appeal. *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1425-1426. Moreover, a plaintiff appealing from an order granting a special motion to strike is required to put up a bond or undertaking in order to stay enforcement of a judgment awarding attorney's fees and costs

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<sup>2</sup> All statutory references are to CCP § 425.16 unless otherwise indicated.

pursuant to section 425.16, subd. (c). *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1426-1434. Conversely, the plaintiff or cross-complainant opposing the motion is not entitled to any fees for successful opposition unless the motion is found to be completely frivolous. Finally, the plaintiff cannot evade fees by dismissing the action before the hearing on the SLAPP motion. *Liu v. Moore* (1999) 69 Cal.App.4th 745, 749-753.

It is well established that all malicious prosecution and abuse of process claims meet the first prong of the anti-SLAPP inquiry because they arise from oral or written statements or writings made before a judicial proceeding or statements made in connection with issues under review in a judicial proceeding under subdivisions (e) (1), (2), (4). *Jarrow Formulas v. LaMarche* (2003) 31 Cal.4th 728; *Rusheen v. Cohen* (2006) 37 Cal.4th 1048. All such suits are therefore subject to a special motion to strike and the plaintiff will be required to meet the second prong burden of establishing a probability of prevailing on those claims. *Ibid.* With the recent High Court decision in *Rusheen, supra*, however, it is equally unlikely that an abuse of process plaintiff will be able to show a probability of prevailing given the Court's broad interpretation of the absolute litigation privilege of Civil Code § 47, subd. (b) in the abuse of process context.

Section 425.18 actually encourages the filing of these disfavored torts du jour, which are the driving force behind an unending roundelay of SLAPP and SLAPPback litigation that has the potential to span decades as happened in *Soukup*. But as will be shown *infra*, any lawsuit dismissed as a SLAPP suit under section

425.16 in the underlying action will qualify as a predicate to a SLAPPback suit under section 425.18, subd. (b). Besides malicious prosecution and abuse of process, defamation, libel, slander, intentional interference and other business torts, declaratory relief actions, NIED, IIED etc. can all constitute SLAPP suits if they arise from protected activity and are found to be without merit. CCP § 425.18, subd. (b) defines a SLAPPback as "any cause of action for malicious prosecution or abuse of process arising from the filing or maintenance of a prior cause of action that has been dismissed pursuant to a special motion to strike under Section 425.16."

Pre-425.18, there was a powerful check on the tendency for SLAPP suits to generate the proverbial roundelay of derivative tort litigation, which was the anti-SLAPP procedure itself. For example, a plaintiff unwittingly files a defamation, malicious prosecution or other cause of action arising from activity protected by the anti-SLAPP statute as defined in subd. (e). The specially moving defendant files an anti-SLAPP motion which is granted. The defendant is then awarded mandatory attorney's fees and costs at fair market value. The incentive to file a secondary derivative SLAPPback malicious prosecution or abuse of process action was strongly curtailed by the specter of drawing another anti-SLAPP motion and having to pay the SLAPPback defendant's attorney's fees if the SLAPPback malicious prosecution suit is stricken under section 425.16. Moreover, the SLAPPback defendant was equally entitled to all the procedural benefits of a section 425.16 motion. Hence, the anti-SLAPP statute had reached the

proper balance by ending meritless lawsuits arising from protected speech or petition activity at an early stage of the litigation at the SLAPP filer's expense. The objective was accomplished without generating secondary, tertiary, or even quaternary rounds of derivative SLAPP and SLAPPback litigation that are now beginning to inundate our court dockets. And because the SLAPP plaintiff's liability was strictly limited to paying the attorney's fees awarded to the SLAPP target in an amount that was certain and fixed, the damages plaintiff sustained from attorney negligence were much less pre-425.18. Accordingly, the likelihood of the plaintiff filing a legal malpractice action against his or her attorney for filing the SLAPP suit was significantly less pre-425.18.

#### SLAPP LAW IN THE SLAPPBACK ERA

A SLAPPback suit is an action, typically for malicious prosecution "filed by the target of a SLAPP suit against the SLAPP filer after dismissal of the SLAPP suit as result of the SLAPP target's appropriate use of the SLAPP statute." *Soukup v. Hafif*, *supra*, 39 Cal.4th at 279. The Legislature declared that "SLAPPbacks should be treated differently... from an ordinary malicious prosecution action because a SLAPPback is consistent with the Legislature's intent to protect the valid exercise of the constitutional rights of free speech and petition by its deterrent effect on SLAPP... litigation..." *Id.*, at 268. Section 425.18 exempts SLAPPbacks from certain procedures otherwise applicable to anti-SLAPP motions under section 425.16 and sets forth special procedures that apply only to SLAPPbacks. *Id.* Although the

SLAPPback malicious prosecution defendant ordinarily has the right to file a special motion to strike the SLAPPback suit, substantially different rules come into play. First and foremost, a defendant who successfully moves to strike a SLAPPback suit has no right to recover attorney's fees or costs for defending the action. [CCP § 425.18, subd. (c)] The SLAPPback plaintiff can, however, recover fees and costs from the defendant if the motion to strike is "frivolous or solely intended to cause unnecessary delay," but makes no provision for such fees or costs to be awarded to prevailing defendants. [CCP § 425.18, subd. (f)]. Hence, there is no cost to a SLAPPback plaintiff hell bent on revenge from filing a secondary round of malicious prosecution litigation. As our Supreme Court noted long ago in the landmark malicious prosecution case, *Sheldon-Appel v. Albert & Oliker* (1989) 47 Cal.3d 863, 873-874:

"...in our view the better means of addressing the problem of unjustified litigation is through the adoption of measures facilitating the speedy resolution of the initial lawsuit and authorizing the imposition of sanctions for frivolous or delaying conduct in the first action itself, rather than through an expansion of the opportunities for initiating one or more rounds of malicious prosecution litigation after the first action has been concluded. ..."

The anti-SLAPP statute, as drafted pre-425.18, did exactly that - it awarded fees for filing meritless litigation in the first action without encouraging subsequent rounds of malicious prosecution litigation. A close look at the legislative history of AB 1158 reveals that the Legislature did not heed our High Court's wisdom in *Sheldon-Appel* and instead impulsively passed a law based a perceived injustice that allegedly occurred in one unpublished Court of Appeal decision - *Terrie Hutton v. Hafif*. And it is

California courts, litigants, attorneys, and taxpayers that will ultimately pay the price for the Legislature's improvidence in scrambling to pass section 425.18 before the California Supreme Court could decide the *Soukup v. Hafif* case. As the saying goes: "Don't fix what is not broken" and "haste makes waste." Notwithstanding the above, even the Senate Judiciary Committee was astute enough to recognize that even a SLAPPback suit can be a SLAPP suit in its own right:

"...continued broad application of the statute [section 425.16] might 'result in cases of first impression where the 'little guy' plaintiff was truly not engaging in SLAPP litigation but is nonetheless found to be the alleged SLAPPER. That person would be precluded from using the anti-SLAPP law to defend him or herself against the follow-up SLAPPback SLAPP suit. ... Thus, a categorical exemption seemed fraught with the risk of unintended consequences. 'Can every future SLAPPback claim be presumed to not be a SLAPP suit itself?'" [Sen. Com. on Judiciary, Analysis of Assem. Bill No. 1158 (2005-2006 Reg. Sess.) as amended April 25, 2005, p. 13] *Soukup v. Hafif, supra*, 39 Cal.4th at 284.

Hence, even the Legislative history evinces that two SLAPPS don't make a right. Clearly, two SLAPPS are not better than one when it comes to our overcrowded dockets.

The new SLAPPback provisions take all the fun out of filing traditional SLAPP motions as they operate to stack the deck in favor of the SLAPPback plaintiff. Aside from immunizing the SLAPPback plaintiff from a fee award, section 425.18 allows the plaintiff to obtain full discovery on an ex parte basis and gives the plaintiff more time to respond to the SLAPP motion. [CCP § 425.18, subds. (c), (d), (e)] If the trial court denies the special motion to strike the SLAPPback suit, the defendant has no right of appeal and is limited to review by peremptory writ. [CCP § 425.18, subd. (g)].

In light of the foregoing, the pivotal question thus becomes what is the advantage, if any, of filing an anti-SLAPP motion to defend a SLAPPback suit instead of a demurrer or a summary judgment motion? The only advantage of filing a section 425.16 special motion to strike a SLAPPback suit is that if the motion is successful, that SLAPPback defendant obtains the right to switch roles with his adversary and become the SLAPPback plaintiff in yet a tertiary round of malicious prosecution litigation while being exempt from fees and other strict procedural provisions of section 425.16. A boon to the SLAPPback plaintiff and a bust for the court system. In sharp contrast, if the SLAPPback defendant in suit number two were to successfully demur or file an MSJ, SLAPPback suit number three would be subject to the traditional rules applicable to special motions to strike under section 425.16 without the limitations set forth in section 425.18. Otherwise, there is no significant procedural or substantive benefit for a SLAPPback defendant to file an anti-SLAPP motion to strike a SLAPPback claim. It is thus readily apparent that section 425.18 is premised on faulty assumptions and lopsided policies that do more harm than good. This is a prime example of a well-intentioned law gone haywire.

So how does section 425.18 affect California civil litigation attorneys and our courts? In short, more malicious prosecution suits, more malpractice suits, and more court congestion. As demonstrated in the recent *Soukup v. Hafif* case, the SLAPPback malicious prosecution plaintiff, Soukup, sued not only the SLAPP plaintiff, Hafif, in the underlying SLAPP suit but also sued every

one of SLAPP plaintiff, Hafif's, former attorneys. The first line of suits generated is more malicious prosecution suits against not only the SLAPP filer in the underlying action but also against the SLAPP filer's former attorneys.

Moreover, the Legislature amended subdivision (b)(3) of section 425.16 to include "subsequent proceedings". The effect of this amendment is to narrowly abrogate the High Court holding in *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811. *Wilson* essentially held that the denial of an anti-SLAPP motion or MSJ in the trial court on the ground that the plaintiff had established a probability of prevailing even though later reversed on appeal establishes probable cause as a matter of law in a subsequent malicious prosecution action. Newly amended section 425.16, subd. (b)(3) abrogates the *Wilson* holding in the SLAPPback context and deprives a SLAPPback defendant of a substantive probable cause defense where the trial court initially denies the SLAPP motion in the underlying SLAPP action but is later reversed on appeal. This limitation applies only in a SLAPPback malicious prosecution suit.

Second, the SLAPP plaintiff in the underlying suit is more likely to sue his or her former attorneys for malpractice for filing the initial SLAPP suit because not only does the SLAPP filer become liable for the SLAPP target's attorney's fees in the SLAPP action but the SLAPP filer/plaintiff now becomes liable for the costs of defending the second round of malicious prosecution litigation in the SLAPPback suit. If the SLAPPback suit is successful, then the SLAPP filer's damages attributable to his or her attorney's negligence escalate dramatically with the specter of

emotional distress and punitive damages.

#### CONCLUSION

The SLAPPback provisions set forth in section 425.18 are virtually guaranteed to generate more malicious prosecution actions against SLAPP filers and their attorneys while at the same time increasing the likelihood that the SLAPP filer will sue his or her former attorney for legal malpractice due to the greater damages the SLAPP filer will ineluctably incur as a direct and proximate result of the secondary SLAPPback suit in addition to the mandatory fees awarded in the underlying SLAPP action. The net effect of section 425.18 is to give prevailing SLAPP targets a free SLAPPback pass to generate an unending roundelay of derivative tort litigation. Such legislative improvidence is sure to deluge our already overburdened court system with unnecessary retaliatory lawsuits that are, more often than not, SLAPP suits in their own right. In sum, the SLAPPback statute is replete with incentives to generate more court clogging litigation in ping pong fashion.

#### BIO

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