

Two SLAPPS Don't Make a Right:

But They Do Clog Our Courts



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The latest twist in the anti-SLAPP law — the so-called SLAPPback — is sure to generate an increase in court congestion in the form of more legal malpractice suits and derivative tort actions. Every time a SLAPP motion is granted in California, the SLAPP filer (*i.e.*, the plaintiff, cross-complainant or petitioner who files a SLAPP suit) and their attorneys are now subject to a secondary malicious prosecution or abuse of process suit without a meaningful SLAPP defense. The secondary malicious prosecu-

tion is referred to as the SLAPPback suit.

AB 1158 was passed into law on October 5, 2005 and is now codified as California Code of Civil Procedure § 425.18. (2005-2006 Reg. Sess.) *Soukup v. Hafif*, 39 Cal. 4th 260 (2006) 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 250 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 Anti-SLAPP Statute —

“The Legislature enacted section 425.16 to prevent and deter lawsuits...brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.” (CCP § 425.16(a).) Because these meritless suits

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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 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*, 39 Cal. 4th 260, 278 (2006), citing *Varian Medical Systems v. Delfino*, 35 Cal. 4th 180, 192 (2005).

Section 425.16 sets up a two-step procedure for determining, first, whether the challenged cause of action "arises from protected activity." If it does not, the motion must be denied as a matter of law. If it does, the court proceeds to the second step and evaluates 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*, 27 Cal. App. 4th 809, 823-824 (1994).

**Anti-SLAPP Motions
Before the SLAPPback 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 its compensatory and deterrent power. The motion is essentially the equivalent of a "super summary judgment" motion with a nuclear warhead attached. First, 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 CCP section 425.16(f). Moreover, filing the notice of special motion to strike effects an automatic stay on all discovery while the motion is pending under section 425.16(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*,

92 Cal. App. 4th 1068 (2001).

The specially-moving defendant has an immediate right of appeal if the motion is denied by the trial court under section 425.16(i). All proceedings embraced within the appeal are automatically stayed pending appellate review under CCP § 916. *Varian*

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Of most exigent concern, however, is the SLAPP defendant's right to mandatory attorney's fees under section 425.16(c) if the motion is successful. This often includes very substantial loadstar enhancements for contingent risk assumed because the SLAPP defendant sits in the shoes of a civil rights plaintiff for purposes of a fee award. *Ketchum v. Moses*, 24 Cal. 4th 1122 (2001); *Computer Xpress v. Jackson*, 93 Cal. App. 4th 993 (2001). Depending on the nature and complexity of the case and the contin-

gent risk assumed, SLAPP fee awards can reach 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*, 85 Cal. App. 4th 1400, 1425-1426 (2001). Moreover, a plaintiff appealing

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*, 69 Cal. App. 4th 745, 749-753 (1999).

It is well established that all malicious prosecution and abuse of process claims necessarily 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*, 31 Cal. 4th 728 (2003); *Rusheen v. Cohen*, 37 Cal. 4th 1048 (2006). 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 Supreme Court decision in *Rusheen, supra*, however, it is 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.

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— The SLAPPback Statute —

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

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 pursuant to section 425.16 (c). *Dowling v. Zimmerman*, 85 Cal. App. 4th 1400, 1426-1434 (2001).

Conversely, the plaintiff or cross-complainant opposing the motion is not entitled

procedures otherwise applicable to anti-SLAPP motions under section 425.16 and sets forth special procedures that apply only to SLAPPbacks. *Id.*

Additionally, the Legislature amended subdivision (b)(3) of section 425.16 to



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include “subsequent proceedings.” The effect of this amendment is to narrowly abrogate the Supreme Court holding in *Wilson v. Parker, Covert & Chidester*, 28 Cal. 4th 811 (2002). *Wilson* essentially held that the denial of an anti-SLAPP motion or motions for summary judgment 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.

**SLAPP Law
in the SLAPPback Era**

Some believe that these changes to the SLAPP statute actually encourage the filing of these otherwise-disfavored torts, *i.e.*, abuse of process and malicious prosecution, as SLAPPbacks because any lawsuit dismissed as a SLAPP suit under section 425.16 in the underlying action, qualifies as a predicate to a SLAPPback suit under section 425.18, subd. (b). Thus, a number of causes of action, including defamation, libel, slander, intentional interference and other business torts, declaratory relief actions, negligent infliction of emotional distress, intentional infliction of emotional distress, and the like can all constitute SLAPP suits if they arise from protected activity and are found to be without merit.

Before the SLAPPback statute was enacted, there was a powerful check on the ten-

dency for SLAPP suits to generate derivative tort litigation, which was the anti-SLAPP procedure itself. For example, assume that a plaintiff files a defamation, malicious prosecution or other cause of action arising from activity protected by the anti-SLAPP statute as defined in CCP § 425.16, 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 for that prevailing defendant to file a secondary, derivative SLAPPback malicious prosecution or abuse of process action was strongly curtailed by the specter of drawing a counter anti-SLAPP motion and having to pay the attorney's fees of the SLAPPback defendant (*i.e.*, the plaintiff in the original action) if the SLAPPback malicious prosecution suit is itself 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 an equipoise by ending meritless lawsuits arising from protected speech or petition activity at an early stage of the litigation. That objective was accomplished without generating further SLAPPback litigation or, potentially, actions against attorneys.

That all changed with the enactment of section 425.18. Although the SLAPPback malicious prosecution defendant 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(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(f).)

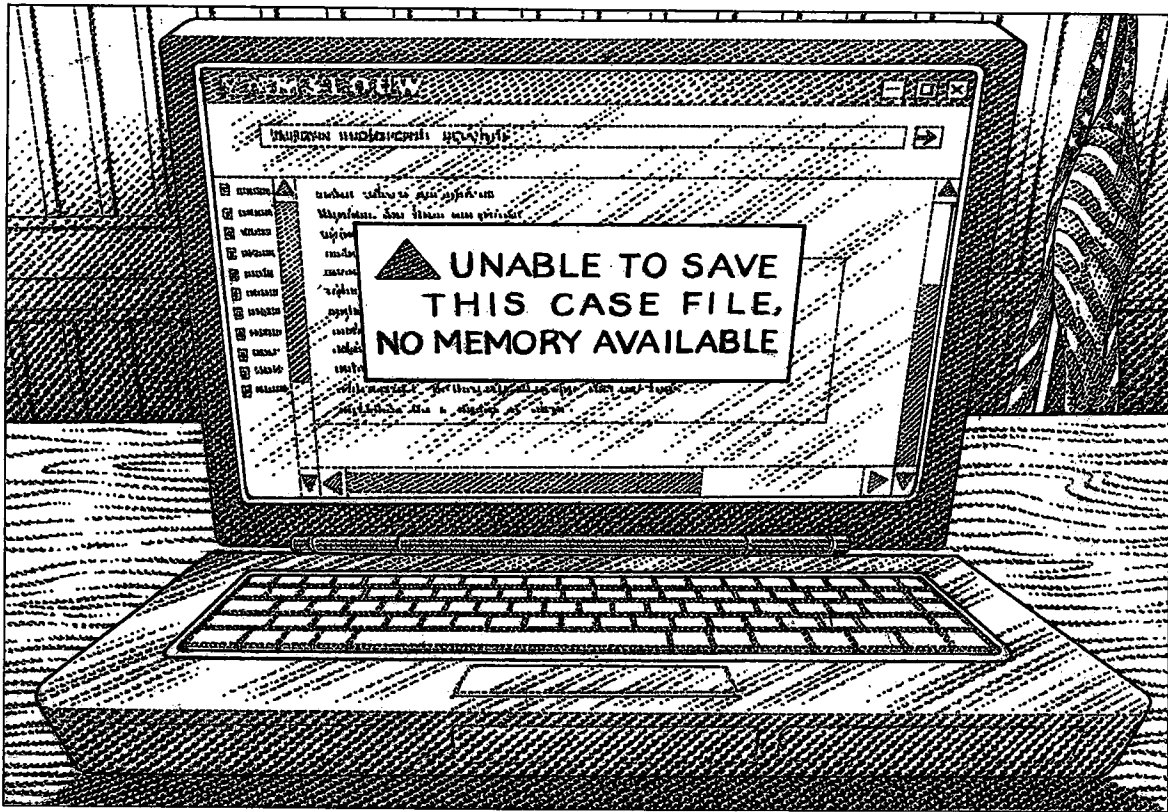
In addition to immunizing the SLAPPback plaintiff from a fee award, section 425.18 allows the plaintiff to obtain full discovery on an *ex parte* basis and gives the plaintiff more time to respond to the SLAPP motion. (CCP § 425.18(c),(d),(e).) If the trial court denies the special motion to strike the SLAPPback suit, the defendant has no right of appeal and is limited to review by peremptory writ. (CCP § 425.18, subd. (g).)

Hence, there is no cost to a SLAPPback plaintiff bent on retaliation against a SLAPP filer 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*, 47 Cal. 3d 863, 873-874 (1989):

"...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 it existed before the enactment of 425.18, did exactly that — it awarded fees for filing meritless litigation in the first action without encouraging subsequent rounds of malicious prosecution litigation.

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 then obtains the right to switch roles with the adversary and become the SLAPPback plaintiff in a tertiary round of malicious prosecution litigation, while being exempt from fees and the other strict procedural provisions of section 425.16. In sharp contrast, if the SLAPPback defen-



dant in suit number two were to successfully demur or file a motion for summary judgment, 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.

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 the SLAPP plaintiff's former attorneys as

well. Thus, malicious prosecution suits are generated against not only the SLAPP filer in the underlying action but also against the SLAPP filer's former attorneys.

The SLAPPback provisions set forth in section 425.18 are likely 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 their former attorney for legal malpractice due to the greater damages the SLAPP filer will inevitably 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 pass" to generate more litigation. This is sure increase the workload for our court system with suits that are SLAPP suits in their own right.