

First Supplement to Memorandum 2007-48

New Topics and Priorities: Anti-SLAPP Issue

Code of Civil Procedure Section 425.16, the anti-SLAPP statute, was enacted in 1992. It is designed to deter lawsuits that are brought primarily to chill valid exercise of the constitutional right to freedom of speech or petition for redress of grievances. Under it, a lawsuit arising from the defendant's exercise of one of those rights is subject to a special motion to strike, unless the plaintiff can demonstrate at the time the lawsuit is filed that the plaintiff has a probability of success on the merits.

Section 425.16(c) provides for attorney's fees relating to such a motion:

(c) 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.

Michael Rubin, who has represented both plaintiffs and defendants on anti-SLAPP issues, believes this provision is unfair. Exhibit p. 1. In his experience, "when such motions are granted, the attorney fees awarded have been exorbitant and unduly punitive against the plaintiff." *Id.* He urges the Commission to study the matter and suggests a number of possible reforms. *Id.* at 1-2.

This area is complicated and controversial, however, and has been the subject of much litigation. The Governor's 1992 signing message and a subsequent amendment make clear that subdivision (c) was specifically crafted to provide fees to the plaintiff as well as the defendant in certain circumstances. **Given the Commission's overfull workload, it should not undertake to reexamine that balance at this time.**

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

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Law Revision Commission
RECEIVED

Attention: Chairman

NOV 21 2007

Re: CCP Section 425.16

File: _____

To Whom It May Concern:

This letter concerns CCP Section 425.16, the so called "anti-SLAPP" statute. Primarily, this letter is to complain about, and point out, the unfairness of CCP Section 425.16 (c.).

In the last several years, I been involved in a significant amount of litigation concerning the statute, on both sides of the fence. In my experience, when such motions are granted, the attorney fees awarded have been exorbitant and unduly punitive against the plaintiff. This section is not clear cut, and from my experience, many judges struggle with it.

The purpose of the statute is a good one; to prevent punitive lawsuits against innocent people excising their Constitutional rights in appropriate manner. In many cases, plaintiffs file suit based on claims that are not clearly prohibited by that section. These days, it seems that defendants' knee jerk reaction is to file a motion to strike under the section, and hope for the best. Again, courts typically struggle with the simple elements, i.e. whether there is protected speech or conduct, and whether the plaintiff can establish likelihood prevailing. The courts struggle with the first prong whenever the speech or conduct is other than a simple petition for redress of grievances. Courts also struggle with plaintiff's burden of proof and how far a plaintiff must go to prove his or her case at that early pleading stage.

I question whether there should be award of attorney's fee at all. If the motion is granted, the defendant is relieved from defending the action in the infancy stage of the proceeding. That relief alone should be enough.

I propose that the section be amended in one of two ways. Firstly, the attorney's fees can be eliminated, or should be equally available to a plaintiff who successfully defends against such motion. Alternatively, the attorney's fee should simply be eliminated entirely. Alternatively, the attorney's fee should be allowed only if the complaint is utterly frivolous, which will require a court finding that it was filed solely for harassment purposes. Another

alternative would be insertion of a requirement that the defendant first give a written demand to the plaintiff to dismiss the case, and state the factual and legal bases. If the plaintiff unreasonably refuses to dismiss his case, or against that particular defendant in the case of multiple defendants, and the defendant ultimately prevails in the motion then attorney's fees will awarded. A final alternative would be for the legislature to put limiting language in the statue for attorney's fees. The recovery of attorneys' fees pursuant to other statutes, such as in contempt or in small claims appeals, are strictly limited. Likewise, the attorneys fee available under Section 425.16 should likewise be limited.

I hope you will consider this request in its proper context. I have seen attorney's fees requested well above \$20,000, and awarded. Many attorneys seek exorbitant fees award and even if the court reduces those, the remaining awards are still usually excessive.

At very least, I request that your commission considers investigating the types of attorneys fee awards courts have made and are making under that section.

If you agree that a need exists, that a need exists, please amend Section 425.16 accordingly.

Thank you for your attention in this matter. If you have any questions or comments, please do not hesitate to call.

Sincerely,



MICHAEL P. RUBIN
MPR/ic