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I. INTRODUCTION

It has been eleven years since California enacted its anti-SLAPP remedy, Code of Civil Procedure section 425.16,[1] allowing defendants an accelerated motion to strike a cause of action if it arose "from any act . . . in furtherance of the . . . right of petition or free speech . . . in connection with a public issue. . . ."[2] Eleven years is long enough for a statutory innovation to mature. How has this no longer new remedy developed since its passage, and what uncertainties still remain?

The elements of a SLAPP suit are: "1. a civil complaint or counterclaim (for monetary damages and/or injunction), 2. filed against . . . individuals and/or groups, 3. because of their communications to a government body, official, or the electorate, 4. on an issue of some public interest or concern."[3] A SLAPP plaintiff's purpose is not to win its claims, because its action is typically barred by constitutional or other privilege, but to intimidate the defendants into ceasing their opposition to what the plaintiffs want to do, and to divert the defendants' resources and energies into defending themselves against an action by a party typically much better able to bear the cost and strain of litigation.[4]

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1. *See* Act of Sept. 16, 1992, ch. 726, sec. 425.16, § 2, 1992 Cal. Stat. 3522, 3523-24. Chapter 338 of the Statutes of 2003 added a new Code of Civil Procedure section 425.17 to the anti-SLAPP law.

2. CAL. CIV. PROC. CODE § 425.16(b)(1) (West Supp. 2003). All statutory references are to California Code of Civil Procedure section 425.16 unless otherwise indicated. SLAPP is an acronym for "Strategic Lawsuit Against Public Participation"—the term was invented by George W. Pring and Penelope Canan, the pre-eminent scholars in the field, in their groundbreaking 1988 article, *Strategic Lawsuits Against Public Participation*, 35 SOC. PROBS. 506 (1988); *see also* Briggs v. Eden Council for Hope & Opportunity, 19 Cal. 4th 1106, 1109 n.1, 81 Cal. Rptr. 2d 471, 472 n.1 (1999); Governor Gray Davis Comm. v. Am. Taxpayers Alliance, 102 Cal. App. 4th 449, 454 n.1, 125 Cal. Rptr. 2d 534, 538 n.1 (2002). The constitutional protections for speech and petitioning are of course derived from the First Amendment. *See* U.S. CONST. amend. I: "Congress shall make no law . . . abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

3. George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3, 8 (1989). The omitted word is "nongovernmental"—under California law SLAPPs can be filed against governmental entities and individuals. *See, e.g.*, Schroeder v. Irvine City Council, 97 Cal. App. 4th 174, 118 Cal. Rptr. 2d 330 (2002).

4. SLAPP suits are brought to obtain an *economic* advantage over the defendant, not to vindicate a legally cognizable right of the plaintiff. Indeed, one of the common characteristics of a SLAPP suit is its lack of merit. But lack of merit is not of concern to the plaintiff because the plaintiff does not

This burden on the exercise of constitutional rights had long required a procedure for the "fast and inexpensive unmasking and dismissal of SLAPP's."[5] That is what the California anti-SLAPP statute was intended to do. At the time it was enacted it was the most ambitious and far-reaching of all the state anti-SLAPP laws. Broadly speaking, it allows a defendant to move to strike a complaint or cause of action arising from protected speech or petitioning activity, without the need for further proceedings unless the plaintiff can show a reasonable probability of succeeding on the merits of the action.[6] "[T]he statute sets forth a remedy for those whose First Amendment rights have been suppressed by the pernicious use of the judicial process."[7] The policy, passage and early interpretation of this statute have been treated in detail in an earlier article.[8] This article will focus on how the remedy has matured after more than a decade of experience by courts, litigants, and the Legislature.[9]

> expect to succeed in the lawsuit, only to tie up the defendant's resources for a sufficient length of time to accomplish plaintiff's underlying objective. As long as the defendant is forced to devote its time, energy and financial resources to combating the lawsuit its ability to combat the plaintiff in the political arena is substantially diminished.

Wilcox v. Superior Court, 27 Cal. App. 4th 809, 816, 33 Cal. Rptr. 2d 446, 450 (1994) (emphasis in original) (citations omitted).

5. *Id.* at 823, 33 Cal. Rptr. 2d at 454; *see also* Simmons v. Allstate Ins. Co., 92 Cal. App. 4th 1068, 1073-74, 112 Cal. Rptr. 2d 397, 401 (2001) ("quick and inexpensive method"). Lam v. Ngo, 91 Cal. App. 4th 832, 841, 111 Cal. Rptr. 2d 582, 589 (2001) (emphasis in original):

> "the whole purpose of the [anti-SLAPP] statute is to provide a mechanism for the *early* termination of claims that are improperly aimed at the exercise of free speech or the right of petition. (See *Paul for Council v. Hanyecz*, [85 Cal. App. 4th 1356, 1364, 102 Cal. Rptr. 2d 864, 869 (2001)] ['the anti-SLAPP legislation found in section 425.16 provides an efficient means of dispatching, early on in a lawsuit, a plaintiff's meritless claims'].)"

6. "For purposes of this section, 'complaint' includes 'cross-complaint' and 'petition,' 'plaintiff' includes 'cross-complainant' and 'petitioner,' and 'defendant' includes 'cross-defendant' and 'respondent.'" § 425.16(h). In the literature the terms "filer" and "target" are sometimes used instead. See, e.g., GEORGE W. PRING & PENELOPE CANAN, GETTING SUED FOR SPEAKING OUT 9-10 (1996).

7. City of Cotati v. Cashman, 109 Cal. Rptr. 2d 407, 412 (2001), *aff'd*, 29 Cal. 4th 69, 124 Cal. Rptr. 2d 519 (2002).

8. *See* Jerome I. Braun, *Increasing SLAPP Protection: Unburdening the Right of Petition in California*, 32 U.C. DAVIS L. REV. 965, 967-73 (1999).

9. For convenient reference the text of the statute is reprinted here.

> **CAL. CIV. PROC. CODE § 425.16. Actions arising from exercise of free speech or right of petition; legislative findings; motion to strike; stay of discovery; fees, costs; exception; report to legislature**
>
> (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 or 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, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination.

(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.

(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; (4) or 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 noticed for hearing not more than 30 days after service 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) On or before January 1, 1998, the Judicial Council shall report to the Legislature on the frequency and outcome of special motions made pursuant to this section, and on any other matters pertinent to the purposes of this section.

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

(k)(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 fax, 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.

CAL. CIV. PROC. CODE § 425.17 (effective Jan. 1, 2004):

(a) The Legislature finds and declares that there has been a disturbing abuse of Section 425.16, the California Anti-SLAPP Law, which has undermined the exercise of the constitutional rights of freedom of speech and petition for the redress of grievances, contrary to the purpose and intent of Section 425.16. 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 or Section 425.16.

(b) Section 425.16 does not apply to any action brought solely in the public interest or on behalf of the general public if all of the following conditions exist:

(1) The plaintiff does not seek any relief greater than or different from the relief sought for the general public or a class of which the plaintiff is a member. A claim for attorney's fees, costs, or penalties does not constitute greater or different relief for purposes of this subdivision.

(2) The action, if successful, would enforce an important right affecting the public interest, and would confer a significant benefit, whether pecuniary or nonpecuniary, on the general public or a large class of persons.

(3) Private enforcement is necessary and places a disproportionate financial burden on the plaintiff in relation to the plaintiff's stake in the matter.

(c) Section 425.16 does not apply to any cause of action brought against a person primarily engaged in the business of selling or leasing goods or services, including, but not limited to, insurance, securities, or financial instruments, arising from any statement or conduct by that person if both of the following conditions exist:

(1) The statement or conduct consists of representations of fact about that person's or a business competitor's business operations, goods, or services, that is made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services, or the statement or conduct was made in the course of delivering the person's goods or services.

(2) The intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer, or the statement or conduct arose out of or within the context of a regulatory approval process, proceeding, or investigation, except where the statement or conduct was made by a telephone corporation in the course of a proceeding before the California Public Utilities Commission and is the subject of a lawsuit brought by a competitor, notwithstanding that the conduct or statement concerns an important public issue.

(d) Subdivisions (b) and (c) do not apply to any of the following:

(1) Any person enumerated in subdivision (b) of Section 2 of Article I of the California Constitution or Section 1070 of the Evidence Code, or any person engaged in the dissemination of ideas or expression in any book or academic journal, while engaged in the gathering, receiving, or processing of information for communication to the public.

(2) Any action against any person or entity based upon the creation, dissemination, exhibition, advertisement, or other similar promotion of any dramatic, literary, musical, political, or artistic work, including, but not limited to, a motion picture or television program, or an article published in a newspaper or magazine of general circulation.

(3) Any nonprofit organization that receives more than 50 percent of its annual revenues from federal, state, or local government grants, awards, programs, or reimbursements for services rendered.

(e) If any trial court denies a special motion to strike on the grounds that the action or cause of action is exempt pursuant to this section, the appeal provisions in subdivision (j) of

All three groups have paid a lot of attention to the anti-SLAPP law. Since its first enactment in 1992, the California Legislature has enacted three bills amending section 425.16, and considered several more. On August 27, 2003, the Legislature amended the law again, this time by adding a new section 425.17.[10] At this writing in July 2003, Westlaw lists 127 California appellate cases mentioning section 425.16. While some mention the law only tangentially, or for other reasons do not actually interpret the anti-SLAPP law, at least two thirds of these contain substantive interpretations of the statute. Another 195 are unpublished California decisions,[11] and thirty-seven more have been decided in federal court.[12] The 1999 amendment allowing immediate appeal[13] from denial of an anti-SLAPP motion has started increasing the numbers of appeals. Uncountable numbers of anti-SLAPP motions have been presented and decided in California trial courts without being appealed.[14] Dozens of articles in law

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> Section 425.16 and paragraph (13) of subdivision (a) of Section 904.1 do not apply to that action or cause of action.

10. S.B. 515 passed its final Senate vote and was enrolled on August 27, 2003—Governor Davis signed it on September 6, and it was chaptered as Chapter 338 of the Statutes of 2003. See text at note 9 above. For more discussion of the new provision see text at notes 257-61 and 302 below.

11. Meaning not that they are actually not published, but that they are non-precedential and may not be cited as authority. *See* Cal. R. Ct. 976-77. These have not been considered in this article.

12. The federal numbers also include a number of unpublished circuit court decisions, non-precedential under Ninth Circuit Rule 36-3, and some which are not substantive interpretations of the law. "The feverish pace with which appellate courts are dispatching issues under this statute is decidedly not subsiding and may, in reality, be accelerating." *Cashman*, 109 Cal. Rptr. 2d at 413. However, most of the appellate action has been at the court of appeal level—in eleven years the Supreme Court has only decided six anti-SLAPP cases. At this writing in July 2003 three grants of review are outstanding in cases mentioning the statute, but these mainly concern other issues. Thus *Gates v. Discovery Communications, Inc.*, 131 Cal. Rptr. 2d 534 (2003), *review granted* 135 Cal. Rptr. 2d 403, 2003 WL 21418657, deals primarily with privacy concerns; *Stroock & Stroock & Lavan v. Tendler*, 125 Cal. Rptr. 2d 694 (2002), *review granted* 130 Cal. Rptr. 2d 655 (2003), deals with substantive issues of malicious prosecution; and the SLAPP issue in *Smith v. M.D.*, 130 Cal. Rptr. 2d 315 (2003), *review granted* 133 Cal. Rptr. 2d 322, was held moot on intermediate appeal. The California Anti-SLAPP Project provides useful summaries of most significant federal and state cases interpreting section 425.16 on their website www.casp.net.

13. *See* Act of Oct. 10, 1999, ch. 960, section 1 (adding CAL. CIV. PROC. CODE § 425.16(j)).

14. To reduce this uncountability, and provide an accurate universe of data for future research, the Legislature in 1999 amended the law to require that

> [a]ny 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 fax, 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.

§ 425.16(k)(1) (added by Act of Oct. 10, 1999, ch. 960, section 1). The Judicial Council is obliged to "maintain a public record of information transmitted pursuant to this subdivision for at least three years. . . ." § 425.16(k)(2). But county clerks do not appear to be enforcing subsection (k) statewide, so caption pages are not always sent to the Judicial Council and the Council's information is fragmentary at best. For the "SLAPP Special Motion Log," with available information arranged by county, see the Judicial Council's website, *at* http://www.courtinfo.ca. gov/cgi-bin/slapp.cgi (last visited Oct. 10, 2003) (copy on file with the *McGeorge Law Review*).

reviews and legal journals have refined understanding of the remedy in the profession generally.[15]

When the first cases interpreting the remedy were decided, beginning with *Wilcox v. Superior Court* in 1994,[16] California courts needed to determine nearly every issue as a matter of first impression. Later, differing interpretations arose among the courts of appeal.[17] But now, after eleven years of experience, a great many questions have been authoritatively resolved, and the reach and operation of the remedy is reasonably well understood. It seems useful to outline what has been settled about the anti-SLAPP remedy, and what issues remain open.

II. QUESTIONS SETTLED IN ELEVEN YEARS OF EXPERIENCE

A. *The Preamble*

The preamble to the statute, before the broad construction amendment in 1997,[18] originally stated:

> 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.[19]

This suggested two related questions to later litigants. The first was whether, to be subject to a special motion to strike, a defendant had to show that the lawsuit was brought with the forbidden purpose or effect, and the second was

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Despite subsection (k), it is still true that "we cannot ever know with precision how many [SLAPP suits] have been filed and whether they are increasing or decreasing, because of imprecise cataloguing, inadequate reporting, and a lack of centralized recording." PRING & CANAN, *supra* note 6, at 210 (footnote omitted). But the time has probably passed where litigants often failed to invoke the anti-SLAPP remedy because they did not know it was available. *See, e.g.*, Pinnacle Holdings, Inc. v. Simon, 31 Cal. App. 4th 1430, 1437, 37 Cal. Rptr. 2d 778, 782 (1995): "Had respondents utilized the procedure set out in Code of Civil Procedure section 425.16, the court might well have granted the motion."

15. As of July 12, 2003, Westlaw reports 41 articles with the terms *425.16* or *SLAPP* in the title, either discussing section 425.16 substantively or noticing developments in the case law. There may be many more under different titles. The same search in the Westlaw texts and treatises database yielded 20 entries.

16. 27 Cal. App. 4th 809, 33 Cal. Rptr. 2d 446 (1994).

17. For example, courts differed on what constituted a "public issue." *Compare, e.g.*, Church of Scientology v. Wollersheim, 42 Cal. App. 4th 628, 49 Cal. Rptr. 2d 620 (1996), *with, e.g.*, Zhao v. Wong, 48 Cal. App. 4th 1114, 55 Cal. Rptr. 2d 909 (1996). This conflict was settled by *Briggs v. Eden Council for Hope & Opportunity*, 19 Cal. 4th 1106, 81 Cal. Rptr. 2d 471 (1999). See discussion in Part II.B below. For a partial list of issues still unsettled see Part IV.A below.

18. § 425.16(a) (added by Act of Aug. 11, 1997, ch. 271, section 1).

19. *Id.*

whether the subjective purpose of the plaintiff made any difference. The California Supreme Court has now decided, in *Equilon Enterprises, LLC v. Consumer Cause, Inc.*,[20] that the defendant need make no such showing, and the plaintiff's intent is immaterial. The court held that there was nothing in the statute (or in the legislative history) which would support such a requirement.[21] The court also explicitly rejected an argument based on the language in the preamble expressing legislative concern about actions brought "primarily to chill" First Amendment rights.[22] The court noted that "a neutral, easily applied definition for SLAPP's 'avoids subjective judgments' about filers' or targets' motives, good faith, or intent."[23]

In a companion case decided the same day, *City of Cotati v. Cashman*,[24] the court held that the same reasons which forbade using an intent-to-chill test also forbade a test based on whether there had been a chilling effect.[25] The court was wise to insist that, whatever the legislative purpose as disclosed in the preamble, the statute operates against claims "arising from" protected acts.[26] It is this objective legal quality of the claims themselves, rather than the subjective intentions of the filers or the practical effects on the targets, which determines whether they are subject to the special motion to strike.[27] Subjective intent is

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20. 29 Cal. 4th 53, 124 Cal. Rptr. 2d 507 (2002).

21. *See id.* at 58-59, 124 Cal. Rptr. 2d at 511-12; *see also, e.g.*, Yu v. Signet Bank/Virginia, 103 Cal. App. 4th 298, 316, 126 Cal. Rptr. 2d 516, 528-29 (2002) (following *Equilon*).

22. *See Equilon*, 29 Cal. 4th at 59-62, 124 Cal. Rptr. 2d at 512-14.

23. *Id.* at 61-62, 124 Cal. Rptr. 2d at 514 (quoting PRING & CANAN, *supra* note 6, at 8). The Court also noted that an "intent to chill" requirement could conflict with the privilege statute, Civil Code section 47. "Were we to impose an intent-to-chill proof requirement, petitioning that is absolutely privileged under the litigation privilege would be deprived of anti-SLAPP protection whenever a moving defendant could not prove that the plaintiff harbored an intent to chill that activity. Our construction avoids that anomalous result." *Id.* at 65, 124 Cal. Rptr. 2d at 516-17. Finally, the Court referred to policy reasons against imposing such a requirement. *Id.*, 124 Cal. Rptr. 2d at 517 (quoting Braun, *supra* note 8, at 969 n.9):

> "Imposing a requirement of establishing bad faith or ulterior motive adds a needless burden to SLAPP targets seeking relief, and destroys the relatively value-free nature of existing anti-SLAPP structures under which actions become suspect because of the circumstances of their arising and the relief sought, without need to litigate motive."

Insofar as they differed from the *Equilon* holding, the court disapproved *Paul for Council v. Hanyecz*, 85 Cal. App. 4th 1356, 102 Cal. Rptr. 2d 864 (2001), *Foothills Townhome Ass'n v. Christiansen*, 65 Cal. App. 4th 688, 76 Cal. Rptr. 2d 516 (1998), *Linsco/Private Ledger, Inc. v. Investors Arbitration Services, Inc.*, 50 Cal. App. 4th 1633, 58 Cal. Rptr. 2d 613 (1996), *Ericsson GE Mobile Communications, Inc. v. C.S.I. Telecommunications Engineers*, 49 Cal. App. 4th 1591, 57 Cal. Rptr. 2d 491 (1996), *Church of Scientology v. Wollersheim*, 42 Cal. App. 4th 628, 49 Cal. Rptr. 2d 620 (1996), and *Wilcox v. Superior Court*, 27 Cal. App. 4th 809, 33 Cal. Rptr. 2d 446 (1994). *Equilon*, 29 Cal. 4th at 68 n.5, 124 Cal. Rptr. 2d at 519 n.5. *Linsco* and *Ericsson* had been disapproved before, on other points, in *Briggs v. Eden Council for Hope & Opportunity*, 19 Cal. 4th 1106, 1123 n.10, 81 Cal. Rptr. 2d 471, 482 n.10 (1999). Of course these cases remain good law on other points—*Wilcox* and *Church of Scientology* remain leading cases for most purposes.

24. 29 Cal. 4th 69, 124 Cal. Rptr. 2d 519 (2002).

25. *Id.* at 75, 124 Cal. Rptr. 2d at 524-25.

26. CAL. CIV. PROC. CODE § 425.16(b)(1) (West Supp. 2003).

27. *See Equilon*, 29 Cal. 4th at 58-59, 124 Cal. Rptr. 2d at 511-512; *Cashman*, 29 Cal. 4th at 75, 124 Cal. Rptr. 2d at 524. In deciding these cases the court relied heavily on earlier authority. *See e.g.*, Fox

notoriously hard to prove, and "actual" effects vary from case to case due to accidental factors unrelated to the serious constitutional purposes of the statute.

A similar question was whether the statute should be applied only in so-called "paradigm" cases. "The paradigm SLAPP is a suit filed by a large land developer against environmental activists or a neighborhood association intended to chill the defendants' continued political or legal opposition to the developers' plans."[28] Although the outrage inspired by such cases undoubtedly helped give the proposed legislation the momentum needed for passage, it is now accepted that the statute is not limited to these cases, and that "[b]oth legislative mandate and judicial interpretation have expanded the application of the anti-SLAPP statute beyond its paradigmatic origins."[29]

> At first, it was envisioned that the anti-SLAPP statute would be limited to situations involving "powerful and wealthy plaintiffs, such as developers, against impecunious protesters. . . ." The state Legislature, however, has directed that Code of Civil Procedure section 425.16 be interpreted broadly. Furthermore, a number of courts have approved the use of the anti-SLAPP statute by media defendants like those here. Therefore, although in this situation, powerful corporate defendants are employing the anti-SLAPP statute against individuals of lesser strength and means, we are constrained by the authorities to permit its use against plaintiffs of this ilk.[30]

Searchlight Pictures, Inc. v. Paladino, 89 Cal. App. 4th 294, 305-07, 106 Cal. Rptr. 2d 906, 915-18 (2001) (rejecting intent test); Damon v. Ocean Hills Journalism Club, 85 Cal. App. 4th 468, 480, 102 Cal. Rptr. 2d 205, 213 (2000) (same).

28. Wilcox v. Superior Court, 27 Cal. App. 4th 809, 815, 33 Cal. Rptr. 2d 446, 449 (1994).

29. M.G. v. Time Warner, Inc., 89 Cal. App. 4th 623, 628, 107 Cal. Rptr. 2d 504, 508 (2001); Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1109 (9th Cir. 2003). Years earlier *Matson v. Dvorak*, 40 Cal. App. 4th 539, 547, 46 Cal. Rptr. 2d 880, 885 (1995), held the same way: although the paradigm "provides useful background regarding SLAPP suits, we are governed by familiar rules of statutory interpretation in evaluating whether section 425.16 can be applied to this action." As the statute provided no paradigmatic limitation, the courts would not add one. *See id.* The Legislature has reverted to the paradigmatic approach by adding section 425.17, which carves out certain exceptions to the law. See text at note 9 above, and discussion in text at notes **257-61** below.

30. *M.G. v. Time Warner, Inc.*, 89 Cal. App. 4th at 628-29, 107 Cal. Rptr. 2d at 508-09 (footnotes omitted). *See also, e.g.*, Lafayette Morehouse, Inc. v. Chronicle Publ'g Co., 37 Cal. App. 4th 855, 864, 44 Cal. Rptr. 2d 46, 51-52 (1995):

> More also argues section 425.16 was not intended to apply to media defendants in libel actions, but only to situations such as that which the court in *Wilcox* [27 Cal. App. 4th at 815-16, 33 Cal. Rptr. 2d at 449-50] characterized as a "paradigm SLAPP" suit, a suit filed by a powerful land developer against individuals or organizations politically or legally opposed to the development. As the *Wilcox* court noted, however, such suits are not limited to environmental issues, nor are SLAPP suits always filed by powerful and wealthy plaintiffs against impecunious protesters who annoy, delay, or frustrate plaintiffs' objectives.

Id. Accord. Sipple v. Found. for Nat'l Progress, 71 Cal. App. 4th 226, 240, 83 Cal. Rptr. 2d 677, 685 (1999): "Appellant's assertion that the statute was aimed at protecting economically weak individuals, rather than the media, has been addressed and rejected in *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.*" (citation omitted).

Likewise, although tort actions such as defamation, emotional distress, and interference are the ones usually relied on in the typical SLAPP suit,[31] actions of a very different sort have been held amenable to striking under section 425.16. Thus in *Church of Scientology v. Wollersheim*, an action for relief from judgment was held a SLAPP suit in the context of the prior litigation history between the parties.[32] Examples could be multiplied.[33] In particular it has been authoritatively held that the anti-SLAPP remedy can be applied to malicious prosecution actions, *even though* these actions are excepted from the operation of the civil immunity statute.[34]

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31. "The favored causes of action in SLAPP suits are defamation, various business torts such as interference with prospective economic advantage, nuisance and intentional infliction of emotional distress." Wilcox v. Superior Court, 27 Cal. App. 4th 809, 816, 33 Cal. Rptr. 2d 446, 449 (1994) (citing John C. Barker, *Common-Law and Statutory Solutions to the Problem of SLAPPs*, 26 LOYOLA L.A. L. REV. 395, 402-03 (1993)).

32. *See* Church of Scientology v. Wollersheim, 42 Cal. App. 4th 628, 648-49, 49 Cal. Rptr. 2d 620, 632 (1996):

> [A]n examination of the history of the underlying litigation reveals that the instant action is consistent with a pattern of conduct by the Church to employ every means, regardless of merit, to frustrate or undermine Wollersheim's petition activity. When a party to a lawsuit engages in a course of oppressive litigation conduct designed to discourage the opponents' right to utilize the courts to seek legal redress, the trial court may properly apply section 425.16. We hold that in making that determination, the trial court may properly consider the litigation history between the parties.

Id.

33. *See, e.g.*, ComputerXpress, Inc. v. Jackson, 93 Cal. App. 4th 993, 113 Cal. Rptr. 2d 625 (2001) (abuse of process); Chavez v. Mendoza, 94 Cal. App. 4th 1083, 114 Cal. Rptr. 2d 825 (2001) (malicious prosecution); *cf.* City of San Diego v. Dunkl, 86 Cal. App. 4th 384, 103 Cal. Rptr. 2d 269 (2001) (action seeking declaratory and injunctive relief re validity of proposed ballot measure); DuPont Merck Pharmaceutical Co. v. Superior Court, 78 Cal. App. 4th 562, 92 Cal. Rptr. 2d 755 (2000) (action under California Consumer Legal Remedies Act and California Unfair Practices Act); Schoendorf v. U.D. Registry, Inc., 97 Cal. App. 4th 227, 118 Cal. Rptr. 2d 313 (2002) (action against credit reporting agency under California Consumer Credit Reporting Agencies Act and federal Fair Credit Reporting Act). *But see* Kajima Eng'g & Constr., Inc. v. City of Los Angeles, 95 Cal. App. 4th 921, 116 Cal. Rptr. 2d 187 (2002) (contract "related" cross-complaint in contract action not subject to anti-SLAPP motion). *Kajima* distinguished *Church of Scientology v. Wollersheim*, 42 Cal. App. 4th 628, 49 Cal. Rptr. 2d 620 (1996), where the statute was held to apply against the church, on the basis that "the church's suit was not related to the transaction or occurrence which is the subject of the [church member's] complaint, but [arose] out of the litigation process itself.'" *Kajima*, 95 Cal. App. 4th at 933, 116 Cal. Rptr. 2d at 196 (quoting *Church of Scientology v. Wollersheim*, 42 Cal. App. 4th at 652, 49 Cal. Rptr. 2d at 634) (alteration in original).

34. *See* Jarrow Formulas, Inc. v. LaMarche, 31 Cal. 4th 728, 737, 3 Cal. Rptr. 3d 636, 643 (2003):

> Jarrow's attempted analogy between the litigation privilege and the anti-SLAPP statute is inapt. As the Court of Appeal noted, the litigation privilege is an entirely different type of statute than section 425.16. The former enshrines a substantive rule of law that grants absolute immunity from tort liability for communications made in relation to judicial proceedings; the latter is a procedural device for screening out meritless claims.

Id. (citations omitted).

The 1997 amendment to the preamble operates so generally that it may be considered the most fundamental and important contribution toward fixing an understanding of the anti-SLAPP remedy. Amending the statute for the second time, the Legislature added these words to the preamble's statement of legislative purpose: "To this end, this section shall be construed broadly."[35] This amendment "was prompted by judicial decisions . . . that had narrowly construed it to include an overall 'public issue' limitation."[36] This statement of legislative intent has permitted resolution of many knotty problems and has been explicitly relied on by a significant number of courts as a key to their decisions.[37]

B. *The Reach of the Statute*

As the statute now reads, the criteria for coverage are as follows:

> 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; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of

35. CAL. CIV. PROC. CODE § 425.16(a) (West Supp. 2003) (as amended by Act of Aug. 11, 1997, ch. 271, section 1).

36. Briggs v. Eden Council for Hope & Opportunity, 19 Cal. 4th 1106, 1120, 81 Cal. Rptr. 2d 471, 479 (1999). For a discussion of the legislative history see *id.* at 1119-21, 81 Cal. Rptr. 2d at 479-80.

37. *See, e.g., id.* at 1118, 81 Cal. Rptr. 2d at 478 (Legislature's "stated intent is best served" by construing statute to encompass broadly "participation in official proceedings, generally, whether or not such participation remains strictly focused on 'public' issues"); Damon v. Ocean Hills Journalism Club, 85 Cal. App. 4th 468, 477, 102 Cal. Rptr. 2d 205, 211 (2000) ("[g]iven the mandate that we broadly construe the anti-SLAPP statute, a single publication does not lose its 'public forum' character merely because it does not provide a balanced point of view"); Dowling v. Zimmerman, 85 Cal. App. 4th 1400, 1425, 103 Cal. Rptr. 2d 174, 194 (2001) ("purpose of the anti-SLAPP statute will be promoted by construing that statute broadly to permit a pro se SLAPP defendant" to recover fees); Lam v. Ngo, 91 Cal. App. 4th 832, 835, 111 Cal. Rptr. 2d 582, 584-85 (2001) ("[b]ecause the Legislature has specified that [§ 425.16] is to be construed broadly," filing deadlines start fresh with amended complaint); Shekhter v. Fin. Indem. Co., 89 Cal. App. 4th 141, 150, 106 Cal. Rptr. 2d 843, 849 (2001) (conclusion that one cause of action out of many can be stricken under section 425.16 "buttressed by the requirement" of broad construction). Examples could be multiplied. *See* City of Cotati v. Cashman, 109 Cal. Rptr. 2d 407, 413 (2001) *aff'd* 29 Cal. 4th 69, 124 Cal. Rptr. 2d 519 (2002): ("in 1997, the frontier of SLAPP advanced materially beyond this dense cluster of rather obvious cases, no doubt prodded by an amendment adding the Legislature's admonition that the statute 'shall be construed broadly.'")

free speech in connection with a public issue or an issue of public interest.[38]

The fourth of these criteria was added in 1997.[39] Until 1999 there was still considerable confusion as to just what the "public issue" requirement meant—how "private" could an issue be and still permit coverage? What made an issue one "of public interest"?[40] In *Zhao v. Wong*,[41] for example, Zhao sued Wong for slander for allegedly telling a newspaper reporter that Zhao murdered Wong's brother.[42] The court held the supposed slander was a private matter unconnected to Wong's rights of free speech or petition, and therefore outside the reach of section 425.16, even though Wong claimed to have made the statement "in an effort to aid" litigation contesting a will.[43] But in *Averill v. Superior Court*,[44] Averill privately asked her employer not to give money to a charity whose intention to place a women's shelter in her neighborhood she opposed. The trial court held the statute applicable, but only on the highly artificial ground that the shelter only had a year's permit and the decision was therefore theoretically still open to government action.[45]

In *Briggs v. Eden Council for Hope & Opportunity*,[46] the Supreme Court's first interpretation of the anti-SLAPP law, the Court disapproved *Zhao* and three other cases that had taken the same narrow view.[47] Relying in part on the "broad construction" amendment,[48] the court held that the "official proceeding" test established a "bright line," and that any action arising from participation in such

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38. § 425.16(e).

39. Act of Aug. 11, 1997, ch. 271, section 1.

40. "The statute does not provide a definition for 'an issue of public interest,' and it is doubtful an all-encompassing definition could be provided. However, the statute requires that there be some attributes of the issue which make it one of public, rather than merely private, interest." Weinberg v. Feisel, 110 Cal. App. 4th 1122, 1132, 2 Cal. Rptr. 3d 385, 392 (2003).

41. 48 Cal. App. 4th 1114, 55 Cal. Rptr. 2d 909 (1996).

42. *See id.* at 1118-19, 55 Cal. Rptr. 2d at 911.

43. *Id.* at 1131, 55 Cal. Rptr. 2d at 920.

44. 42 Cal. App. 4th 1170, 50 Cal. Rptr. 2d 62 (1996).

45. *See id.* at 1175-76, 50 Cal. Rptr. 2d at 65. In *ComputerXpress, Inc. v. Jackson*, 93 Cal. App. 4th 993, 1002-03, 113 Cal. Rptr. 2d 625, 635-36 (2001), the court limited *Averill* to its circumstance: a private conversation about a public issue.

46. 19 Cal. 4th 1106, 81 Cal. Rptr. 2d 471 (1999).

47. *See id.* at 1123 n.10, 81 Cal. Rptr. 2d at 482 n.10. The reference, as with all others to the Supreme Court, means the California Supreme Court. The United States Supreme Court has not considered the California anti-SLAPP remedy. The other cases disapproved by *Briggs* were *Linsco/Private Ledger, Inc. v. Investors Arbitration Services, Inc.*, 50 Cal. App. 4th 1633, 58 Cal. Rptr. 2d 613 (1996) (private arbitration of securities disputes did not involve public issue; statute to be narrowly construed, following *Zhao*); *Ericsson GE Mobile Communications, Inc. v. C.S.I. Telecomms. Eng'rs*, 49 Cal. App. 4th 1591, 57 Cal. Rptr. 2d 491 (1996) (consultant's report pursuant to contract not exercise of free speech or concerned with public issue); and *Mission Oaks Ranch, Ltd. v. County of Santa Barbara*, 65 Cal. App. 4th 713, 728-29, 77 Cal. Rptr. 2d 1, 10-11 (1998) (upholding use of statute, but distinguishing *Ericsson* because tract map in question was "a matter of public interest requiring public hearings," when either of these qualities would independently have sufficed).

48. *See Briggs*, 19 Cal. 4th at 1119-21, 81 Cal. Rptr. 2d at 479-80.

a proceeding was covered by the law even without a public issue.[49] Of the criteria quoted above, the public issue requirement applied only to those in subsections (e)(3) and (e)(4).[50]

> [T]o the extent the acts attributed to defendant constitute exercises of its right to petition under [§ 425.16(e)(1)], we need not inquire whether the issue was "a public issue or an issue of public interest." Likewise, to the extent the statements attributed to defendant were made "in connection with an issue under consideration or review by a legislative [or similar] body" under [§ 425.16(e)(2)], no such inquiry is necessary.
>
> On the other hand, to the extent the statements attributed to defendant were not made "in connection with an issue under consideration or review by a legislative [or similar] body" and may thus only be covered under [§ 425.16(e)(3) and (4)], an inquiry must be made whether the [statement] pertains to "a public issue or an issue of public interest."[51]

Even private matters can now qualify for anti-SLAPP protection if they were, for example, presented to a court or other official body.[52] However,

> the mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute. Moreover, that a cause of action arguably may have been "triggered" by protected activity does not entail it is one arising from such.[53]

The fact that government proceedings may be confidential does not exempt reporting about them from the statute.[54]

Decisions after *Briggs* have found it much easier to deal with the public/private question. For example, in *Zhao v. Wong* the court said that "[m]edia coverage cannot by itself, however, create an issue of public interest within the statutory meaning."[55] But it is now accepted that public interest in a

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49. *Id.* at 1121-22, 81 Cal. Rptr. 2d 471 at 480-81.

50. *Id.* at 1123, 81 Cal. Rptr. 2d at 481.

51. DuPont Merck Pharm. Co. v. Superior Court, 78 Cal. App. 4th 562, 566-67, 92 Cal. Rptr. 2d 755, 759 (2000) (analyzing *Briggs* holding) (alteration in original).

52. *See, e.g.*, Sipple v. Found. for Nat'l Progress, 71 Cal. App. 4th 226, 237-38, 83 Cal. Rptr. 2d 677, 684 (1999) (custody dispute covered by section 425.16 because it was adjudicated in court).

53. Navellier v. Sletten, 29 Cal. 4th 82, 89, 124 Cal. Rptr. 2d 530, 536 (2002) (quoting City of Cotati v. Cashman, 29 Cal. 4th 69, 78, 124 Cal. Rptr. 2d 519, 527 (2002) (citations omitted); *accord* Gallimore v. State Farm Fire & Cas. Ins. Co., 102 Cal. App. 4th 1388, 1398, 126 Cal. Rptr. 2d 560, 568 (2002) (quoting *Navellier*).

54. Braun v. Chronicle Publ'g Co., 52 Cal. App. 4th 1036, 1051-52, 61 Cal. Rptr. 2d 58, 67 (1997).

55. Zhao v. Wong, 48 Cal. App. 4th 1114, 1121, 55 Cal. Rptr. 2d 909, 913 (1996), *disapproved in* Briggs v. Eden Council for Hope & Opportunity, 19 Cal. 4th 1106, 1123 n.10, 81 Cal. Rptr. 2d 471, 482 n.10 (1999). The *Wollersheim* case, decided earlier that year, took what is now the accepted view, stating in dictum

topic (in the sense of fascination) can make it a "question of public interest," whether it is a significant matter or not. So in *Seelig v. Infinity Broadcasting Corp.*[56] an "on-air discussion between . . . talk-radio cohosts and their on-air producer about a television show of significant interest to the public and the media" was held to qualify.[57] If that qualifies it is hard to see what popular subject would not.[58]

To take a somewhat more serious example, in *DuPont Merck Pharmaceutical Co. v. Superior Court*,[59] a consumer class action, the plaintiffs alleged that "[m]ore than 1.8 million Americans have purchased Coumadin, an anti-coagulant medication, for the prevention and treatment of blood clots that can lead to life-threatening conditions such as stroke and pulmonary embolism."[60] The court held that "[b]oth the number of persons allegedly affected and the seriousness of the conditions treated establish the issue as one of public interest."[61] Before *Briggs* and the broad construction amendment courts found such quantitative measures of public interest problematic, even though they sometimes applied them.[62] In *Tuchscher Development*

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that "[t]he record reflects the fact that the Church is a matter of public interest, as evidenced by media coverage and the extent of the Church's membership and assets." Church of Scientology v. Wollersheim, 42 Cal. App. 4th 628, 651, 49 Cal. Rptr. 2d 620, 633 (1996).

56. 97 Cal. App. 4th 798, 119 Cal. Rptr. 2d 108 (2002).

57. *Id.* at 807, 119 Cal. Rptr. at 115.

58. The program was *Who Wants to Marry a Multimillionaire*. The court said:

> This program was a derivative of *Who Wants to Be a Millionaire*, which had proven successful in generating viewership and advertising revenue. Before and after its network broadcast, *Who Wants to Marry a Multimillionaire* generated considerable debate within the media on what its advent signified about the condition of American society. One concern focused on the sort of person willing to meet and marry a complete stranger on national television in exchange for the notoriety and financial rewards associated with the Show and the presumed millionaire lifestyle to be furnished by the groom.

Id. at 807-08, 119 Cal. Rptr. 2d at 115 (footnote omitted). To establish the show's notoriety, the court took judicial notice of press articles about the show. *Id.* at 807 n.5, 119 Cal. Rptr. 2d at 115 n.5. Other subjects which qualify for their broad general interest include domestic violence, see *Sipple v. Found. for Nat'l Progress*, 71 Cal. App. 4th 226, 238, 83 Cal. Rptr. 2d 677, 684 (1999), and "the general topic of child molestation in youth sports," see *M.G. v. Time Warner, Inc.*, 89 Cal. App. 4th 623, 629, 107 Cal. Rptr. 2d 504, 509 (2001). In *Monterey Plaza Hotel v. Hotel Employees & Restaurant Employees*, 69 Cal. App. 4th 1057, 1064, 82 Cal. Rptr. 2d 10, 14 (1999) the court held a statement made on television "during a major labor dispute in the community" constituted covered expression.

59. 78 Cal. App. 4th 562, 92 Cal. Rptr. 2d 755 (2000).

60. *Id.* at 567, 92 Cal. Rptr. 2d at 759.

61. *Id. See also* Kids Against Pollution v. Cal. Dental Ass'n, 134 Cal. Rptr. 2d 373, 381 (2003) *review granted and opinion superseded by* No. S117156, 2003 WL 22232740, at *1 (Cal. Sept. 17, 2003). ("public pronouncements addressing the controversy over the assertedly widespread health effects of the mercury contained in dental amalgam undoubtedly concern an issue of public importance"); Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1110 (9th Cir. 2003) (finding coverage for "public advocacy activities in connection with the use of Ritalin" to treat attention deficit disorder).

62. Even before *Briggs*, courts recognized that "[a]lthough matters of public interest include legislative and governmental activities, they may also include activities that involve private persons and entities, especially when a large, powerful organization may impact the lives of many individuals. Examples are product liability suits, real estate or investment scams, etc." Church of Scientology v. Wollersheim, 42 Cal. App. 4th 628, 650-51, 49 Cal. Rptr. 2d 620, 633 (1996) (citation omitted). The *Wollersheim* court also found that public interest

Enterprises, Inc. v. San Diego Unified Port District,[63] the court held that "[t]he prospect of commercial and residential development of a substantial parcel of bayfront property, with its potential environmental impacts, is plainly a matter of public interest."[64] And the court in *Lieberman v. KCOP Television, Inc.*[65] decided that as "[m]ajor societal ills are issues of public interest," and "[n]ews reports concerning current criminal activity serve important public interests," and as improper prescription of controlled substances is a felony and "[f]ew problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances," a television show accusing a doctor of improperly prescribing pain medication concerned an issue "of great public interest."[66]

In *Rivero v. American Federation of State, County and Municipal Employees*,[67] the court identified three general categories of cases which had been held to meet the public issue requirement. These included cases where "the subject statements . . . concerned a person or entity in the public eye, conduct that could directly affect a large number of people beyond the direct participants[,] or a topic of widespread, public interest."[68]

The definition of "public forum" has received less attention. The courts have not been consistent as to whether a newspaper is a public forum.[69] The law on this

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can be "evidenced by media coverage." *Id.* For recent examples of the quantitative approach to the "public issue" question see, e.g., *ComputerXpress, Inc. v. Jackson*, 93 Cal. App. 4th 993, 1007-08, 113 Cal. Rptr. 2d 625, 639 (2001) (12-24 million shares outstanding); *Global Telemedia Int'l, Inc. v. Doe 1*, 132 F. Supp. 2d 1261, 1265 (C.D. Cal. 2001) (more than 18,000 investors). In *Global Telemedia* the court said the plaintiff company

> has inserted itself into the public arena and made itself a matter of public interest by means of numerous press releases . . . . Further, a publicly traded company with many thousands of investors is of public interest because its successes or failures will affect not only individual investors, but in the case of large companies, potentially market sectors or the markets as a whole. This is particularly so when the company voluntarily trumpets its good news through the media in order to gain the attention of current and prospective investors. The fact that a chat-room dedicated to [the company] has generated over 30,000 postings further indicates that the company is of public interest.
>
> Its status as a commercial enterprise does not . . . insulate it from a SLAPP motion.

Id.

63. 106 Cal. App. 4th 1219, 132 Cal. Rptr. 2d 57 (2003).

64. *Id.* at 1234, 132 Cal. Rptr. 2d at 69.

65. 110 Cal. App. 4th 156, 1 Cal. Rptr. 3d 536 (2003).

66. *Id.* at 164-65, 1 Cal. Rptr. 3d at 541 (citations omitted). The Legislature's attempt to apply special SLAPP rules to commercial speech, found in the new statute, section 425.17, added by Stats. 2003 c. 338, see supra note 9, will complicate the law in this area.

67. 105 Cal. App. 4th 913, 130 Cal. Rptr. 2d 81 (2003).

68. *Id.* at 924, 130 Cal. Rptr. 2d at 89 (citations omitted).

69. *Compare* Damon v. Ocean Hills Journalism Club, 85 Cal. App. 4th 468, 478, 102 Cal. Rptr. 2d 205, 212 (2000) (newsletter published by housing development residents a public forum because it was "a vehicle for open discussion of public issues and was widely distributed to all interested parties . . .") *with* Lafayette Morehouse, Inc. v. Chronicle Publ'g Co., 37 Cal. App. 4th 855, 863 n.5, 44 Cal. Rptr. 2d 46, 51 n.5 (1995) (declining to hold the *San Francisco Chronicle* a public forum; dictum). *Accord* Rogers v. Home Shopping Network, Inc., 57 F. Supp. 2d 973, 985 n.7 (C.D. Cal. 1999) ("newspaper should not be deemed a 'public

question needs (and awaits) further development. But the Internet has been held to constitute a public forum for anti-SLAPP purposes.[70]

More particular questions about the reach of the statute also have been answered. Speech by governments and public officials is covered by the statute.[71] Speech by mail is covered.[72] Things said about candidates or issues in an election campaign are covered.[73] The same seems to be true of prominent election participants who are not themselves candidates.[74] Union elections count as

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forum' for purposes of [section] 425.16"); Condit v. Nat'l Enquirer, Inc., 248 F. Supp. 2d 945, 953 (E.D. Cal. 2002) ("newspaper should not be deemed a 'public forum' for purposes of [section] 425.16").

70. *See* ComputerXpress, Inc. v. Jackson, 93 Cal. App. 4th 993, 1007, 113 Cal. Rptr. 2d 625, 638 (2001) (posting on "Raging Bull" website). Raging Bull is

> "a financial website that organizes individual bulletin boards or 'chat-rooms,' each one dedicated to a single publicly traded company. The chat-rooms are open and free to anyone who wants to read the messages; membership is also free and entitles the member to post messages. . . . Unlike many traditional media, there are no controls on the postings. Literally anyone who has access to the Internet has access to the chat-rooms."

Id. (quoting Global Telemedia Int'l, Inc. v. Doe 1, 132 F. Supp. 2d 1261, 1264 (C.D. Cal. 2001). *Accord* MCSi, Inc. v. Woods, 2003 WL 554638, *2 (N.D. Cal.) ("A web site that organizes chat rooms dedicated to discussion of a large, publicly-traded corporation is a 'public forum' for purposes of CCP § 425.16" (citing *ComputerXpress*, 93 Cal. App. 4th at 1006, 113 Cal. Rptr 2d at 638)); *see also Global Telemedia Int'l*, 132 F. Supp. 2d at 1265 (holding such postings covered by section 425.16). Posting an SEC complaint on the Internet "amounted to a statement in a public forum in connection with an issue of public interest." *ComputerXpress*, 93 Cal. App. 4th at 1009-10, 113 Cal. Rptr. 2d at 640. *Cf.* Batzel v. Smith, 2001 WL 1893843, *7 (C.D. Cal.) *appeal dismissed on other grounds*, 333 F.3d 1018 (9th Cir. 2003) (neither side contended a website was not a "place open to the public" or a "public forum.").

However, a court of appeal has recently sounded a cautionary note. "The fact that the statements at issue in *Nicosia* [*v. De Rooy*, 72 F. Supp. 2d 1093 (N.D. Cal. 1999)] happen to have been published on a website hardly means the case stands for the proposition that *any* statement published on *any* website in *any* context is protected by the anti-SLAPP statute, much less that it comes within subdivision (e)(2)." Du Charme v. Int'l Bhd. of Elec. Workers, Local 45, 110 Cal. App. 4th 107, 114, 1 Cal. Rptr. 3d 501, 506 (2003).

71. *See* Bradbury v. Superior Court, 49 Cal. App. 4th 1108, 57 Cal. Rptr. 2d 207 (1996) (district attorney); Mission Oaks Ranch, Ltd. v. County of Santa Barbara, 65 Cal. App. 4th 713, 730, 77 Cal. Rptr. 2d 1, 11 (1998) (county government) *disapproved on other grounds by* Briggs v. Eden Council for Hope & Opportunity, 19 Cal. 4th 1106, 1123 n.5, 81 Cal. Rptr. 2d 471, 482 n.5 (1999)); Schroeder v. Irvine City Council, 97 Cal. App. 4th 174, 183 n.3, 118 Cal. Rptr. 2d 330, 337 n.3 (2002) (city council). In *Schroeder* the court inserted a disclaimer into its footnote, saying "we do not categorically hold that all lawsuits against governmental agencies and officials automatically qualify for treatment under section 425.16. . . ." *Id.*

72. *See* Macias v. Hartwell, 55 Cal. App. 4th 669, 64 Cal. Rptr. 2d 222 (1997).

73. *See, e.g.*, Conroy v. Spitzer, 70 Cal. App. 4th 1446, 1451-54, 83 Cal. Rptr. 2d 443, 447-48 (1999).

> Section 425.16 applies to suits involving statements made during a political campaign (*Beilenson v. Superior Court* (1996) 44 Cal. App. 4th 944, 950 [52 Cal. Rptr. 2d 357] [campaign mailer]), statements made in connection with a recall election (*Robertson v. Rodriguez* (1995) 36 Cal. App. 4th 347, 352 [42 Cal. Rptr. 2d 464] [campaign mailer]), statements made in a political flyer concerning a candidate (*Matson v. Dvorak* (1995) 40 Cal. App. 4th 539, 548, [46 Cal. Rptr. 2d 880]), and statements made in a recall petition (*Evans v. Unkow* (1995) 38 Cal. App. 4th 1490, 1493-94 [45 Cal. Rptr. 2d 624]).

Macias, 55 Cal. App. 4th at 672, 64 Cal. Rptr. 2d at 224. To this list may now be added *Roberts v. Los Angeles County Bar Ass'n.*, 105 Cal. App. 4th 604, 614, 129 Cal. Rptr. 2d 546, 552 (2003) (bar association's evaluation of judicial candidate). "Our Constitution protects everyone—even politicians." Beilenson v. Superior Court, 44 Cal. App. 4th 944, 946, 52 Cal. Rptr. 2d 357, 359 (1996).

74. *See* Sipple v. Found. for Nat'l Progress, 71 Cal. App. 4th 226, 239-40, 83 Cal. Rptr. 2d 677, 685 (1999) "[T]he details of appellant's career and appellant's ability to capitalize on domestic violence issues in his

elections for this purpose.[75] But although activities related to an election are covered, where the election-related activity is itself illegal, the statute offers no protection, because the activity was not a "valid" exercise of constitutional rights as stated in the preamble.[76] It does not matter whether the speech is made on behalf of others,[77] and "[t]here is no requirement that the writing or speech be

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advertising campaigns for politicians known around the world, while allegedly committing violence against his former wives, are public issues, and the article is subject to the protection of section 425.16." *Id.*

75. *See Macias*, 55 Cal. App. 4th 669, 64 Cal. Rptr. 2d 222.

76. *See* Paul for Council v. Hanyecz, 85 Cal. App. 4th 1356, 1360-61, 102 Cal. Rptr. 2d 864, 866-67 (2001) (laundering of campaign contributions). *Compare* CAL. CIV. PROC. CODE § 425.16(a) (West Supp. 2003) ("the *valid* exercise of the constitutional rights . . . ") (emphasis added). In *Paul for Council* the court noted that

> the probability that the Legislature intended to give defendants section 425.16 protection from a lawsuit based on injuries they are alleged to have caused by their *illegal* campaign money laundering scheme is as unlikely as the probability that such protection would exist for them if they injured plaintiff while robbing a bank to obtain the money for the campaign contributions or while hijacking a car to drive the campaign contributions to the post office for mailing. Under the facts demonstrated by this record, we cannot permit defendants to wrap themselves in this vital legislation.

Paul for Council, 85 Cal. App. 4th at 1366, 102 Cal. Rptr. 2d at 871. But the court also noted that the illegality of the laundering was undisputed—"had there been a factual dispute as to the legality of defendants' actions, then we could not so easily have disposed of defendants' motion." *Id.* at 1367, 102 Cal. Rptr. 2d at 871.

For a case presenting such a factual dispute, see *Kashian v. Harriman*, 98 Cal. App. 4th 892, 910, 120 Cal. Rptr. 2d 576, 590 (2002), where the court distinguished *Paul for Council* on that basis, saying "[t]his is just such a case, where the legality of Harriman's litigation activities is a matter of considerable dispute." The court continued:

> The burden thus shifted to Kashian to make a prima facie showing sufficient to establish a probability of prevailing. In short, conduct that would otherwise come within the scope of the anti-SLAPP statute does not lose its coverage (or . . . the protection of the litigation privilege) simply because it is *alleged* to have been unlawful or unethical. If that were the test, the statute (and the privilege) would be meaningless.

Id. at 910-11, 120 Cal. Rptr. 2d at 590 (footnote omitted). See also *Governor Gray Davis Committee v. American Taxpayers Alliance*, 102 Cal. App. 4th 449, 125 Cal. Rptr. 2d 534 (2002), where the plaintiff sued for injunctive relief to stop the defendant from uttering political speech without complying with the Political Reform Act of 1974, CAL. GOV'T CODE § 8100 et seq. A SLAPP motion was denied, and the denial reversed. The court of appeal noted that the "appellant neither has conceded nor does the evidence conclusively establish the illegality of its communications [which it claimed were] . . . protected speech that cannot be regulated by the Political Reform Act, and consequently no violation of law occurred." *Id.* at 459, 125 Cal. Rptr. 2d at 542. Since the "legality of appellant's exercise of a constitutionally protected right [is] in dispute in the action," a prima facie case has been made on the requirement of an act in furtherance of free speech. *Id.* at 460, 125 Cal. Rptr. 2d at 542. The court concluded that "[i]n view of appellant's successful First Amendment defense to the action, respondent has failed to establish a likelihood of prevailing on the merits," and so the Davis Committee lost on both counts. *Id.* at 472, 125 Cal. Rptr. 2d at 552-53.

In *Yu v. Signet Bank/Virginia*, 103 Cal. App. 4th 298, 317, 126 Cal. Rptr. 2d 516, 529 (2002), the court held an action against a bank, complaining of a challenged collection action, *prima facie* arose out of protected activity, but specifically noted that "[t]his conclusion does not imply that the distant forum abuse alleged by the Yus was a valid exercise of Banks' constitutional rights. The lawfulness of the defendant's petitioning activity is generally not at issue in the 'arising from' prong of the anti-SLAPP inquiry. . . ." *Id.* In a footnote the court said that "the illegality of Banks' petitioning activity [has not] been effectively conceded, or conclusively established by the evidence," citing *Governor Gray Davis Committee*, 102 Cal. App. 4th at 459, 125 Cal. Rptr. 2d at 534. *Id.* at 317 n.3, 126 Cal. Rptr. 2d at 529 n.3.

77. *See* Briggs v. Eden Council for Hope & Opportunity, 19 Cal. 4th 1106, 1116-17, 81 Cal. Rptr. 2d 471, 476-77 (1999).

promulgated directly *to* the official body."[78] And "recruiting and encouraging others to speak out on a matter of public interest [comes] within the protection of section 425.16."[79]

A recent case interpreted for the first time the statutory language "conduct in furtherance *of* the exercise of the constitutional right of petition or . . . free speech. . . ."[80] In *Lieberman v. KCOP Television, Inc.*,[81] a television program segment called "Caught in the Act" sent reporters to a doctor suspected of improperly prescribing pain medication. The reporters secretly recorded the proceedings and ran a story accusing the doctor of improprieties. Dr. Lieberman sued, and the station moved to strike. Lieberman contended that the secret recording was illegal and so not protected. The court agreed that news-*gathering* was not entitled to the same protection as news-*reporting*.[82] But, the court continued,

> [n]either the parties nor we have found authority considering the question whether newsgathering is conduct *in furtherance* of the news media's exercise of its right of free speech. Section 425.16, subdivision (a), mandates, however, that the statute be construed broadly, and the statute's reach is not restricted to speech, but expressly applies to *conduct*. Further, that conduct is not limited to the exercise of its right of free speech, but to all conduct *in furtherance* of the exercise of the right of free speech in connection with a public issue.
>
> *Furtherance* means *helping* to advance, *assisting*. (See Oxford English Dictionary Online (2d ed. 1989).) Reporting the news is free speech. Reporting the news usually requires the assistance of newsgathering, which therefore can be construed as undertaken *in furtherance* of the news media's right to free speech. Because the surreptitious recordings here were in aid of and were incorporated into a broadcast in connection of a public issue, we conclude that Lieberman's complaint fell within the scope of section 425.16.[83]

78. Ludwig v. Superior Court, 37 Cal. App. 4th 8, 17, 43 Cal. Rptr. 2d 350, 357 (1995).

79. Dove Audio, Inc. v. Rosenfeld, Meyer & Susman, 47 Cal. App. 4th 777, 784, 54 Cal. Rptr. 2d 830, 835 (1996) (citing *Ludwig*, 37 Cal. App. 4th at 18, 43 Cal. Rptr. 2d at 357); *see also* Wilcox v. Superior Court, 27 Cal. App. 4th 809, 826-27, 33 Cal. Rptr. 2d 446, 456-57 (1994) (fund-raising).

80. CAL. CIV. PROC. CODE § 425.16(e)(4) (West Supp. 2003) (emphasis added). Similar language appears in subsection (b)(1).

81. 110 Cal. App. 4th 156, 1 Cal. Rptr. 3d 536 (2003).

82. *Id.* at 165, 1 Cal. Rptr. 3d at 542.

83. *Id.* at 166, 1 Cal. Rptr. 3d at 542 (citations omitted).

The requirement that the protected First Amendment activity be "valid" does not mean the movant has a duty to establish its validity.

> "The Legislature did not intend that in order to invoke the special motion to strike the defendant must first establish her actions are constitutionally protected under the First Amendment as a matter of law. If this were the case then the [secondary] inquiry as to whether the plaintiff has established a probability of success would be superfluous." "Rather, any 'claimed illegitimacy of the defendant's acts is an issue which the plaintiff must raise *and* support in the context of the discharge of the plaintiff's [secondary] burden to provide a prima facie showing of the merits of the plaintiff's case.'"[84]

Expression in the course of litigation is protected by the anti-SLAPP statute because of the constitutional right of petition.[85] It is also privileged under the civil immunity statute.[86] Because privilege will defeat an action based on a privileged expression, by definition such an action cannot prevail on its merits and so will be vulnerable to a section 425.16 motion to strike.[87] Activity incidental to litigation—for example the fund-raising in *Wilcox*[88]—is protected, as is preliminary activity before filing.[89] It makes no difference who pays for or

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84. 1-800 Contacts, Inc. v. Steinberg, 107 Cal. App. 4th 568, 583, 132 Cal. Rptr. 2d 789, 801 (2003) (quoting Navellier v. Sletton, 29 Cal. 4th 82, 94-95, 124 Cal. Rptr. 2d 530, 540-41 (2002)) (alterations in original) (citations omitted). *See also Lieberman*, 110 Cal. App. 4th at 165, 1 Cal. Rptr. 3d at 542.

> It is not the defendant's burden in bringing a SLAPP motion to establish that the challenged cause of action is constitutionally protected as a matter of law. Once the defendant shows that the cause of action arose from acts done in furtherance of an exercise of free speech, it becomes the plaintiff's burden to establish that the acts are *not* protected by the First Amendment.

Id. (citations omitted).

85. *See, e.g.*, Briggs v. Eden Council for Hope & Opportunity, 19 Cal. 4th 1106, 1115, 81 Cal. Rptr. 2d 471, 476 (1999). *Accord, e.g.*, Chavez v. Mendoza, 94 Cal. App. 4th 1083, 1087, 114 Cal. Rptr. 2d 825, 828 (2001).

86. CAL. CIV. CODE § 47 (West Supp. 2003) which provides in pertinent part: "A privileged publication or broadcast is one made: * * * (b) In any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable . . . [under California Civil Procedure section 1084 and following sections], except. . . ."

87. *See, e.g.*, Wilcox v. Superior Court, 27 Cal. App. 4th 809, 823-25, 33 Cal. Rptr. 2d 446, 454-55 (1994).

88. *See id.* at 826-27, 33 Cal. Rptr. 2d at 456-57.

89. *See, e.g.*, Dove Audio, Inc. v. Rosenfeld, Meyer & Susman, 47 Cal. App. 4th 777, 54 Cal. Rptr. 2d 830 (1996). This case concerned the proceeds of a recording made by Hollywood celebrities, supposedly for the benefit of animal protection charities. The heirs of the actress Audrey Hepburn, one of the celebrities involved, were preparing to complain to the state Attorney General about possible misapplication of royalties from the recording, and their law firm contacted other participating celebrities to confirm their support for the heirs' action. It was this activity the SLAPP plaintiffs complained of.

"instigate[s]" the litigation.[90] And abusive litigation tactics can, if bad enough, be considered a burden on the right of petition.[91]

But there are limits—"[a] lawsuit seeking redress for a harassing investigation of topics unrelated to those under consideration in an official proceeding is not the type of 'abuse of the judicial process' that the Legislature sought to prevent when it enacted the anti-SLAPP statute."[92] And

> a cross-complaint or independent lawsuit filed in response to, or in retaliation for, threatened or actual litigation is not subject to the anti-SLAPP statute simply because it may be viewed as an oppressive litigation tactic. No lawsuit is properly subject to a special motion to strike under section 425.16 unless its allegations arise from acts in furtherance of the right of petition or free speech.[93]

Thus in *Gallimore v. State Farm Fire & Casualty Insurance Co.*,[94] Gallimore complained of unfair insurance practices by State Farm, using documents from a California Department of Insurance investigation. State Farm moved to strike, claiming Gallimore's action interfered with its responses in a Department of Insurance proceeding the documents related to.[95] The court of appeal reversed a strike order because the acts Gallimore complained of did not arise from the state

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90. *See* Ludwig v. Superior Court, 37 Cal. App. 4th 8, 18, 43 Cal. Rptr. 2d 350, 357 (1995): "We see no meaningful difference between a person who supports and encourages the filing of a lawsuit, and one who supports and encourages a third party to speak out publicly on a matter of public interest." *Id.*

91. "[W]hen a litigant continuously and unsuccessfully uses the litigation process in filing unmeritorious motions, appeals and lawsuits, such actions have constitutional implications which may be reviewed on a motion under section 425.16." Church of Scientology v. Wollersheim, 42 Cal. App. 4th 628, 649, 49 Cal. Rptr. 2d 620, 632 (1996). The court characterized the Church's tactics as an attempt to "use[] the litigation process to bludgeon the opponent into submission." *Id.*

In a recent case, *Yu v. Signet Bank/Virginia*, 103 Cal. App. 4th 298, 316, 126 Cal. Rptr. 2d 516, 529 (2002), the court held that an action challenging credit card collection practices arose from protected activity.

> It is ironic that a lawsuit challenging distant forum abuse—a practice calculated to *prevent* the Yus' "public participation" in the collection action against them—should itself meet the threshold definition of a SLAPP suit, but that is the result under the anti-SLAPP statute. Since the Yus' case is based entirely on the collection action Banks filed against them, we conclude that it satisfies the "arising from" standard.

Id.

92. Paul v. Friedman, 95 Cal. App. 4th 853, 861, 117 Cal. Rptr. 2d 82, 88 (2002). The court noted: "There must be a connection with an issue under review in that proceeding. In [*People ex rel.*] *20th Century Insurance* [*Co. v. Building Permit Consultants, Inc.*, 86 Cal. App. 4th 280, 103 Cal. Rptr. 2d 71 (2000)], there was a connection to an issue but no pending proceeding; here, there is a pending proceeding, but no connection to an issue before the tribunal." *Id.* at 867, 117 Cal. Rptr. 2d at 93.

93. Kajima Eng'g and Constr., Inc. v. City of Los Angeles, 95 Cal. App. 4th 921, 924, 116 Cal. Rptr. 2d 187, 189 (2002).

94. 102 Cal. App. 4th 1388, 126 Cal. Rptr. 2d 560 (2002).

95. *Id.* at 1391-93, 126 Cal. Rptr. 2d at 562-64.

proceeding but from State Farm's insurance conduct itself.[96] There was a similar result in *Santa Monica Rent Control Board v. Pearl Street, LLC*,[97] where the acts complained of were improper residential rental practices rather than a representation to the Board ancillary to those practices.[98] In a surprising decision, which prompted a vigorous dissent by three justices (Brown, Baxter and Chin), the Supreme Court held in *Navellier v. Sletten*[99] that an action against a party who filed a counterclaim in federal court on claims he had released by an earlier settlement could be attacked as a SLAPP because it was based not on the underlying controversy but on the defendant's petitioning act of filing his claim.[100] "Sletten's negotiation and execution of the Release . . . involved 'statement[s] or writing[s] made in connection with an issue under consideration or review by a . . . judicial body' (§ 425.16, subd. (e)(2)), i.e., the federal district court, and his arguments respecting the Release's validity were 'statement[s] or writing[s] made before a . . . judicial proceeding' (*id.*, subd. (e)(1)). . . ."[101] This decision may be expected to spawn a good deal of debate as parties try to characterize cross-actions and litigation maneuvering as SLAPP suits.

The range of official proceedings has been significantly expanded from a basic courts-and-tribunals approach. For example, an investigative audit by the State Auditor under the Reporting of Improper Governmental Activities Act[102]

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96. *Id.* at 1400, 126 Cal. Rptr. 2d at 570. The court said that State Farm had "clearly confuse[d] the *acts* of alleged misconduct with the *evidence* needed to prove them." *Id.* Having reversed the strike order, the court of appeal also reversed the fee award. *Id.* at 1400-01, 126 Cal. Rptr. 2d at 570.

Beach v. Harco Nat'l Ins. Co., 110 Cal. App. 4th 82, 1 Cal. Rptr. 3d 454 (2003), a bad faith action, is similar: the policy-holder complained of nine separate failures and delays in processing his claim, but none of them involved protected conduct by the insurance company.

> Here, plaintiff asserts that conduct by Harco amounted to bad faith in the handling of plaintiff's claim for uninsured motorist coverage. The conduct centers on the delay in responding to and resolving plaintiff's claim. None of this conduct involved Harco's right to petition. While communications preparatory to bringing (or responding to) an action or arbitration might, under the proper circumstances, be deemed to fall within the scope of section 425.16, the conduct complained of here does not cross this threshold. The outlined actions (or nonactions) occurred as part of a coverage dispute between an insurer and its insured, and occurred long before any arbitration or other proceeding commenced.

Id. at 94, 1 Cal. Rptr. 3d at 463 (citations omitted).

97. 109 Cal. App. 4th 1308, 135 Cal. Rptr. 2d 903 (2003).

98. *Id.* at 1318, 135 Cal. Rptr. 2d at 910. In Santa Monica, when residential properties are removed from the rental market and are then returned to it, the landlord is allowed to charge only the pre-removal rent for the *first* post-restoration tenancy. When that tenancy ends, though, a landlord is allowed to charge a market rate. Pearl Street allegedly created sham tenancies to satisfy the requirement for first tenancies, then had them end, and notified the Board of its intention to charge market rates. The Board sued to stop Pearl Street from doing this, and Pearl Street moved to strike. The Court held that "while this suit may have been 'triggered by' defendants' submission of . . . documents to the Board, it is *not* true that this suit is *based on* the filing of such papers. Rather, the suit is based on activity that preceded the filing of the papers." *Id.* The court noted that this "involve[d] a situation quite similar to one . . . in *Gallimore*." *Id.* at 1317, 135 Cal. Rptr. 2d at 909.

99. 29 Cal. 4th 82, 124 Cal. Rptr. 2d 530 (2002).

100. *Id.* at 90, 124 Cal. Rptr. 2d at 537.

101. *Id.* (alterations in original). On remand the court of appeal decided the plaintiff had not met his burden of showing likelihood of success on the merits, and so upheld the strike order. *See* Navellier v. Sletten, 106 Cal. App. 4th 763, 131 Cal. Rptr. 2d 201 (2003).

102. CAL. GOV'T CODE §§ 8547-8547.12 (West 1992 & Supp. 2003).

has been held an "official proceeding authorized by law" for anti-SLAPP purposes.[103] In a 1997 case the anti-SLAPP remedy was held to reach a dispute within a residential community only because the community was a publicly subsidized cooperative housing project, a factor which should have made no difference.[104] Three years later a court found no difficulty in holding that "[a] homeowners association board is in effect 'a quasi-government entity paralleling in almost every case the powers, duties, and responsibilities of a municipal government,'" and so proceedings before it are covered by section 425.16.[105] "The definition of 'public interest' within the meaning of the anti-SLAPP statute," the court held, "has been broadly construed to include not only governmental matters, but also private conduct that impacts a broad segment of society and/or that affects a community in a manner similar to that of a governmental entity."[106] As with litigation, coverage for official proceedings extends to preliminary activity.[107] And a court recently held that demands to fire a reporter for the content of her coverage of litigation fell within the protection "for statements made in connection with an issue under consideration or review by a judicial body."[108]

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103. Braun v. Chronicle Publ'g Co., 52 Cal. App. 4th 1036, 1048, 61 Cal. Rptr. 2d 58, 65 (1997).

104. *See* Ray Delgado, *Elderly Battling Company Lawsuits; Management Sues Five Seniors for Alleged Complaints; Senior Power*, S.F. EXAMINER, Oct. 18, 1997, at A1 (*Freedom Homes* case), discussed in Braun, *supra* note 8, at 968 and n.5.

105. Damon v. Ocean Hills Journalism Club, 85 Cal. App. 4th 468, 475, 102 Cal. Rptr. 2d 205, 210, (citing Cohen v. Kite Hill Cmty Ass'n, 142 Cal. App. 3d 642, 651, 191 Cal. Rptr. 209, 214 (1983)). The *Cohen* case dealt primarily with the duty a homeowners' association owes a member, but it did quote an evocative passage from a 1976 law review article, noting what was even then the "increasingly 'quasi-governmental' nature of the responsibilities of such associations. . . ." *Id.*

> The other essential role directly relates to the association's regulatory powers; and upon analysis of the association's functions, one clearly sees the association as a quasi-government entity paralleling in almost every case the powers, duties, and responsibilities of a municipal government. As a 'mini-government,' the association provides to its members, in almost every case, utility services, road maintenance, street and common area lighting, and refuse removal. In many cases, it also provides security services and various forms of communication within the community. There is, moreover, a clear analogy to the municipal police and public safety functions. All of these functions are financed through assessments or taxes levied upon the members of the community, with powers vested in the board of directors, council of co-owners, board of managers, or other similar body clearly analogous to the governing body of a municipality. Terminology varies from region to region; however, the duties and responsibilities remain the same.

Wayne S. Hyatt & James B. Rhoads, *Concepts of Liability in the Development and Administration of Condominium and Home Owners Associations*, 12 WAKE FOREST L. REV. 915, 918 (1976) (footnotes omitted) (quoted in *Cohen*, *supra*).

106. *Damon*, 85 Cal. App. 4th at 479, 102 Cal. Rptr. 2d at 212. Similarly, in a 1998 case, statements made in a homeowners' association meeting about assessments were held to have "involved matters of sufficient public interest made in a sufficiently public forum to invoke the protection of section 425.16." Foothills Townhome Ass'n v. Christiansen, 65 Cal. App. 4th 688, 695-96, 76 Cal. Rptr. 2d 516, 520 (1998).

107. *See, e.g.*, Dixon v. Superior Court, 30 Cal. App. 4th 733, 743-44, 36 Cal. Rptr. 2d 687, 694-95 (1994) (statutory public comment process).

108. Finke v. Walt Disney Co., 110 Cal. App. 4th 1210, 1229, 2 Cal. Rptr. 3d 436, 453 (2003).

Other forms of constitutionally protected expression also come within the statute. The first case decided under section 425.16 upheld its use against an action arising from a peaceful but issue-related economic boycott.[109] The same case held that "commercial speech" was also covered.[110] And "[t]he dissemination of standards of practice by a voluntary professional organization constitutes an exercise of the right of free speech" for purposes of the statute.[111] But as with litigation activity, there are limits—to be protected by the anti-SLAPP law, the activity must be protected by the Constitution. As the *Wilcox* court noted:

> if the defendant's act was a lawsuit against a developer the defendant would have a prima facie First Amendment defense. But, if the defendant's act was burning down the developer's office as a political protest the defendant's motion to strike could be summarily denied without putting the developer to the burden of establishing the probability of success on the merits in a tort suit against defendant.[112]

But although the criteria for statutory coverage have expanded in the past eleven years,[113] it would be wrong to think they are a dead letter, and the statute covers everything. For example, in *People ex rel. 20th Century Insurance Co. v. Building Permit Consultants, Inc.*,[114] an insurance company sued a repair estimation company, claiming a scheme to defraud it. The court denied a motion to strike, holding this outside the reach of the statute.[115] Likewise in *Globetrotter Software, Inc. v. Elan*

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109. *See* Wilcox v. Superior Court, 27 Cal. App. 4th 809, 820-21, 33 Cal. Rptr. 2d 446, 453 (1994) (court reporters' boycott of reporting agency).

110. *See id.* at 822 n.6, 33 Cal. Rptr. 2d at 454 n.6. However, the statute "does not apply in every case where the defendant may be able to raise a First Amendment defense to a cause of action." *Id.* at 819, 33 Cal. Rptr. 2d at 451-52. *Accord* Paul v. Friedman, 95 Cal. App. 4th 853, 864 n.20, 117 Cal. Rptr. 2d 82, 91 n.20 (2002) (quoting *Wilcox*).

The *Wilcox* court's footnote about commercial speech read in part:

> Cross-complainants have not cited, nor has our research disclosed, any legislative history suggesting the Legislature intended to exclude commercial speech from the protection afforded by section 425.16. To the contrary, the statute has been criticized for the very reason it *does* cover commercial speech. Furthermore, the view SLAPP suits do not include suits aimed at commercial speech was rejected by the Ninth Circuit in *In re Airport Car Rental Antitrust Litigation* (9th Cir. 1982) 693 F.2d 84, 86.

Wilcox, 27 Cal. App. 4th at 822 n.6, 33 Cal. Rptr. 2d at 454 n.6 (citation omitted). The Ninth Circuit case the court cited was of course decided long before the present statute was enacted. And the broad statements about commercial speech have been brought into question by later cases—*see, e.g.*, Nagel v. Twin Labs., Inc., 109 Cal. App. 4th 39, 134 Cal. Rptr. 2d. 420 (2003). Clarification is needed from the California Supreme Court. *See* discussion *infra* text accompanying notes 256-62; *supra* note 9.

111. Kids Against Pollution v. Cal. Dental Ass'n, 134 Cal. Rptr. 2d 373, 388 (2003) *review granted and opinion superseded by* No. S117156, 2003 WL 22232740, at *1 (Cal. Sept. 17, 2003).

112. *Wilcox*, 27 Cal. App. 4th at 820, 33 Cal. Rptr. 2d at 452-53.

113. *See* Governor Gray Davis Comm. v. Am. Taxpayers Alliance, 102 Cal. App. 4th 449, 455, 125 Cal. Rptr. 2d 534, 539 (2002) ("ever widening haven of the SLAPP statute").

114. 86 Cal. App. 4th 280, 103 Cal. Rptr. 2d 71 (2000).

115. *Id.* at 285, 103 Cal. Rptr. 2d at 75.

Computer Group, Inc.,[116] a business's statements "to the market" about competitors and their products were held outside the statute.[117] A citizen's arrest is not petitioning activity under the anti-SLAPP statute.[118] In *State Farm General Insurance Co. v. Majorino*[119] the court held "an insurance company's declaratory relief action to resolve coverage issues [did] not qualify as a SLAPP suit."[120] In *Weinberg v. Feisel*,[121] the court rejected a claim that an accusation of theft by one member of a small collecting society against another member was a public issue within the statute.[122] And in *Rivero v. American Federation of State, County, and Municipal Employees*,[123] the court was firm that a defamation action involving a dispute over the suspension of a supervisor who oversaw eight janitors was not a matter of public interest, even though the workplace issues involved *were* of public interest, the janitors worked at a state-run facility, and the union published and circulated commentary about the dispute.[124]

Moreover, just because an action was filed after exercise of protected rights of speech or petition, it is not necessarily subject to the anti-SLAPP law, even if it was filed in retaliation for the exercise. For the action to be covered, the activity complained of must itself have been protected.[125] And a court of appeal recently announced a new rule:

> We therefore hold that in order to satisfy the public issue/issue of public interest requirement of subdivisions (e)(3) and (4) of the anti-SLAPP statute, in cases where the issue is not of interest to the public at large, but rather to a limited, but definable portion of the public (a private group, organization, or community), the constitutionally protected activity must, at a minimum, occur in the context of an ongoing

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116. 63 F. Supp. 2d 1127, 1130 (N.D. Cal. 1999).

117. *See also* MCSi, Inc. v. Woods, No. C-02-02865JF (RS), 2003 WL 554638, *3 (N.D. Cal. Feb. 25, 2003) (reaching a similar result based on *Globetrotter.*).

118. *See* Wang v. Hartunian, 111 Cal. App. 4th 744, 3 Cal. Rptr. 3d 909 (2003).

119. 99 Cal. App. 4th 974, 121 Cal. Rptr. 2d 719, 720 (2002).

120. *Id.* at 975, 121 Cal. Rptr. 2d at 720.

121. 110 Cal. App. 4th 1122, 2 Cal. Rptr. 3d 385 (2003).

122. Defendant has failed to demonstrate that his dispute with plaintiff was anything other than a private dispute between private parties. The fact that defendant allegedly was able to vilify plaintiff in the eyes of at least some people establishes only that he was at least partially successful in his campaign of vilification; it does not establish that he was acting on a matter of public interest.

Id. at 1134, 2 Cal. Rptr. 3d at 394.

123. 105 Cal. App. 4th 913, 130 Cal. Rptr. 2d 81 (2003).

124. This clearly reasoned opinion contains a scholarly and detailed treatment of several aspects of the public issue requirement. It was followed and relied on, in an even less controversial labor context, in *Du Charme v. International Brotherhood of Electrical Workers, Local 45*, 110 Cal. App. 4th 107, 1 Cal. Rptr. 3d 501 (2003) (public notice of dismissal of union official not within statute).

125. *See* ComputerXpress, Inc. v. Jackson, 93 Cal. App. 4th 993, 1003, 113 Cal. Rptr. 2d 625, 635-36 (2001). Thus if a creditor has delayed filing an action for debt, and then does so after the debtor has picketed his office to protest his stand on a public issue, his action, *even though retaliatory*, is not a SLAPP suit because it complains not of protected activity, but of debt. See, e.g., the hypothetical example of arson in *Wilcox*, quoted *supra* in text at note 112.

> controversy, dispute or discussion, such that it warrants protection by a statute that embodies the public policy of encouraging *participation* in matters of public significance.[126]

The limits on anti-SLAPP protection for advertising are becoming clearer. In *DuPont Merck Pharmaceutical Co. v. Superior Court*[127] the court found protection because the drug product involved (Coumadin) was taken by 1.8 million Americans for a life-threatening condition.[128] This case has since been cited by advertisers responding to false advertising claims with anti-SLAPP motions.[129] But in *Consumer Justice Center v. Trimedica International, Inc.*, the court distinguished claims for Grobust, said to increase breast size in women, as not meeting the public issue test.[130] The court went further and held that specific claims about a specific product would rarely meet that test, stating

> [n]o logical interpretation . . . suggests that "matters of public significance" includes specific advertising statements about a particular commercial product, absent facts which truly make that product a matter of genuine public interest, as was the case in *DuPont*. If we were to do so, nearly any product could claim its speech was about a topic of public interest. Construing the statute in this manner would allow every defendant in every false advertising case (or nearly any case that involves any type of speech) to bring a special motion to strike under the anti-SLAPP statute. . . . We do not believe the Legislature intended the statute to be construed in such a manner. . . .[131]

In *Nagel v. Twin Laboratories, Inc.*[132] labeling and website claims about ingredients of a "dietary supplement" were held outside the reach of the anti-SLAPP remedy, because they were commercial speech "at the other end of the spectrum" from political speech.[133] It would be helpful for the Supreme Court to

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126. Du Charme, 110 Cal. App. 4th at 119, 1 Cal. Rptr. 3d at 510 (footnote omitted).

127. 78 Cal. App. 4th 562, 92 Cal. Rptr. 2d 755 (2000).

128. *Id.* at 567, 92 Cal. Rptr. 2d at 759. Also some of DuPont's speech was directed toward regulatory bodies and constituted petitioning activity. *Id.* at 566-67, 92 Cal. Rptr. 2d at 759.

129. For example, in *Consumer Justice Center v. Trimedica International, Inc.*, 107 Cal. App. 4th 595, 601, 132 Cal. Rptr. 2d 191, 194 (2003); *Nagel v. Twin Laboratories, Inc.* 109 Cal. App. 4th 39, 49-50, 134 Cal. Rptr. 2d 420, 427 (2003).

130. 107 Cal. App. 4th at 601-02, 132 Cal. Rptr. 2d at 194-95.

131. *Id.* at 602, 132 Cal. Rptr. 2d at 195. As a later opinion put it, "*Trimedica* . . . effectively stand[s] for the rejection of what might be called the synecdoche theory of public issue in the anti-SLAPP statute. The part is not synonymous with the greater whole. Selling an herbal breast enlargement product is not a disquisition on alternative medicine." Commonwealth Energy Corp. v. Investor Data Exch., Inc., 110 Cal. App. 4th 26, 34, 1 Cal. Rptr. 3d 340, 395 (2003). In *Commonwealth Energy* the court held a telemarketer's pitch unprotected for anti-SLAPP purposes, noting that "[j]ust because you are selling something that is intrinsically important does not mean that the public is interested in the fact that you are selling it." *Id.*

132. 109 Cal. App. 4th 39, 134 Cal. Rptr. 2d. 420 (2003).

133. *Id.* at 47, 134 Cal. Rptr. 2d at 425. The court relied heavily on the California Supreme Court's

issue a definitive statement of the application of section 425.16 to commercial speech. The Legislature's attempt to apply special SLAPP rules to commercial speech, found in the new section 425.17,[134] will greatly complicate the emerging law in this area. Because the statute restricts the application of a special motion to strike to a "cause of action against a person arising from any act of that person in furtherance of *the person's* right of . . . free speech . . . ,"[135] the question has arisen how far it protects a lawyer who is speaking on behalf of a client. In *Shekhter v. Financial Indemnity Co.* (2001)[136] the court declined to reach this issue, as the lawyer spoke for his client not only in court but to reporters outside the courtroom. But in *Jarrow Formulas, Inc. v. LaMarche* (2002)[137] the court decided that when a lawyer "acting as an advocate, filed papers and presented arguments in the underlying litigation, his advocacy activities arose out of the exercise of the right of free expression," and so is protected by section 425.16.[138]

C. Practice Under the Statute

Despite the relatively straightforward nature of the motion to strike, the details of procedure and burden of proof have proved complex. After eleven years, however, most of the more difficult problems have been settled, and the elements of a proceeding under the statute are well understood.

Subsection (f) provides that

> [t]he 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 noticed for hearing not more than 30 days after service unless the docket conditions of the court require a later hearing.[139]

It has now been decided that the 60-day period starts fresh from the filing of an amended complaint—the alternative would permit abuses in pleading.[140]

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discussion of commercial speech in *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 119 Cal. Rptr. 2d 296 (2002). Certiorari was granted in the *Kasky* case, see 537 U.S. 1099 (2003), but was dismissed as improvidently granted, see 123 S.Ct. 2554 (2003).

134. *See supra* note 9.

135. CAL. CIV. PROC. CODE § 425.16(b)(1) (West Supp. 2003) (emphasis added).

136. 89 Cal. App. 4th 141, 153-54, 106 Cal. Rptr. 2d 843, 851-52 (2001).

137. 97 Cal. App. 4th 1, 118 Cal. Rptr. 2d 388 (2002), *aff'd* 31 Cal. 4th 728, 3 Cal. Rptr. 3d 636 (2003).

138. *Id.* at 19, 118 Cal. Rptr. 2d at 403. It may appear to make more sense to ground the lawyer's protection in the civil immunity statute, which protects communications made "in any . . . judicial proceeding." *See* CAL. CIV. CODE § 47(b)(2) (West Supp. 2003). *See also* White v. Lieberman, 103 Cal. App. 4th 210, 221, 126 Cal. Rptr. 2d 608, 615 (2002) (attorney acting for clients has benefit of section 425.16). But the Supreme Court specifically rejected this approach in its opinion affirming *Jarrow*, see 31 Cal. 4th at 737, 3 Cal. Rptr. 3d at 643.

139. Failure to do this can be fatal. *See* Decker v. U.D. Registry, 105 Cal. App. 4th 1382, 1387-90, 129 Cal. Rptr. 2d 892, 894-97 (2003).

140. Lam v. Ngo, 91 Cal. App. 4th 832, 835, 111 Cal. Rptr. 2d 582, 584-85 (2001); Yu v. Signet

The parameters for deciding SLAPP motions were defined in the *Wilcox* case in 1994, as noted the first appellate case decided under the new statute.[141] The burden lies first upon the party filing the motion to make a prima facie case that the causes of action sought to be stricken fall within the ambit of the statute.[142] The *Wilcox* court decided this based on the legislative history—a version of the legislation vetoed in 1990 had placed the burden entirely on the plaintiff to justify the action.[143] The court stated a rubric which has formed the basis for deciding SLAPP motions ever since: "placing the initial burden on the defendant to show the action should be tested under the provisions of subdivision (b) and the burden on the plaintiff to show the action meets that test."[144]

Ordinarily (although not always), this prima facie requirement is met by showing that the action complained of was privileged, either under the state or federal constitution or under the civil immunity statute.[145] Once this prima facie test has been met, under *Wilcox* and subsequent cases the burden shifts to the plaintiff whose pleading is being attacked to show a reasonable probability of prevailing on the merits.[146] If it can make this showing the motion fails.[147] It is

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Bank/Virginia, 103 Cal. App. 4th 298, 314, 126 Cal. Rptr. 2d 516, 527 (2002). Both cases relied on a federal decision to the same effect. *See* Globetrotter Software, Inc. v. Elan Computer Group, Inc., 63 F. Supp. 2d 1127, 1129 (N.D. Cal. 1999). If the cross-complaint is served by mail, an additional five days are added, as with any other deadline. *Lam*, 91 Cal. App. 4th at 835, 111 Cal. Rptr. 2d at 585; *see* CAL. CIV. PROC. CODE § 1013(a) (West Supp. 2003).

141. *See* Wilcox v. Superior Court, 27 Cal. App. 4th 809, 33 Cal. Rptr. 2d 446 (1994).

142. The reach of the statute is discussed in Part II.B above.

143. *See Wilcox*, 27 Cal. App. 4th at 820, 33 Cal. Rptr. 2d at 452.

144. *Id.* The court continued:

> We do not believe the Legislature intended that to invoke the special motion to strike the defendant must first establish its actions are constitutionally protected under the First Amendment as a matter of law. If this were so the second clause of subdivision (b) [requiring the court to consider the pleadings and affidavits] of section 425.16 would be superfluous because by definition the plaintiff could not prevail on its claim.

Id. Accord, e.g., Fox Searchlight Pictures, Inc. v. Paladino, 89 Cal. App. 4th 294, 305, 106 Cal. Rptr. 2d 906, 916 (2001).

145. CAL. CIV. CODE § 47 (West Supp. 2003)—*see supra* text accompanying note 86.

146. In *Equilon Enterprises v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 67, 124 Cal. Rptr. 2d 507, 518 (2002), the Supreme Court summarized as follows a court's "two-step process" in considering a motion to strike under section 425.16: "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. . . . If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim." *Id.*

"Put another way," said the Supreme Court in a companion case, "the plaintiff must 'demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.'" Navellier v. Sletten, 29 Cal. 4th 82, 88-89, 124 Cal. Rptr. 2d 530, 536 (2002) (quoting Wilson v. Parker, Covert & Chidester, 28 Cal. 4th 811, 821, 123 Cal. Rptr. 2d 19, 26 (2002)). *Accord*, Rivero v. Am. Fed'n of State, County, and Mun. Employees, 105 Cal. App. 4th 913, 919, 130 Cal. Rptr. 2d 81, 85 (2003) (quoting passage).

> Under the statutory scheme, a motion to strike cannot be successful unless the plaintiff's action is a meritless attempt to interfere with the defendant's exercise of petition activity and it is shown it lacks merit. Thus section 425.16 protects the defendant from retaliatory action for his or her exercise of legitimate petition rights but does not unconstitutionally interfere with the plaintiff's own petition rights.

important to remember that the two determinations are made separately and serially. "[W]hether . . . material in question is privileged or confidential is not relevant to the threshold issue of whether the SLAPP statute applies to [the] complaint."[148]

Although the statute only says "probability," the qualifier "reasonable" has been read in, following the Supreme Court's 1994 decision in *College Hospital, Inc. v. Superior Court*.[149] "In making its determination," the statute says, "the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based."[150] This means a plaintiff has "to present evidence showing he would establish a prima facie case at trial."[151]

> [I]n order to satisfy its burden under the second prong of the anti-SLAPP statute, it is not sufficient that plaintiffs' complaint survive a demurrer. Plaintiffs must also substantiate the legal sufficiency of their claim. It would defeat the obvious purposes of the anti-SLAPP statute if mere allegations in an unverified complaint would be sufficient to avoid an order to strike the complaint. Substantiation requires something more than that. Once the court determines the first prong of the statute has been met, a plaintiff must provide the court with sufficient evidence to

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Church of Scientology v. Wollersheim, 42 Cal. App. 4th 628, 648 n.4, 49 Cal. Rptr. 2d 620, 631 n.4 (1996).

147. *See* CAL. CIV. PROC. CODE § 425.16(b)(1) (West Supp. 2003). Kathryn W. Tate, *California's Anti-SLAPP Legislation: A Summary of and Commentary on Its Operation and Scope*, 33 LOYOLA L.A. L. REV. 801, 864-66 (2000), has as an appendix a "Summary of Circumstances Where SLAPPee Has Met or Not Met the Special Motion to Strike Burden of Proof." Although the passage of time has left this summary incomplete, it is still a useful compilation.

148. Fox Searchlight Pictures, Inc. v. Paladino, 89 Cal. App. 4th 294, 308, 106 Cal. Rptr. 2d 906, 918 (2001).

149. 8 Cal. 4th 704, 34 Cal. Rptr. 2d 898 (1994). The first case to decide this in the anti-SLAPP context was *Ludwig v. Superior Court*, 37 Cal. App. 4th 8, 15-16, 43 Cal. Rptr. 2d 350, 355-56 (1995). *College Hospital, Inc.* attempted to harmonize various statutes (such as Civil Code section 1714.10 and Code of Civil Procedure section 425.14), the Supreme Court believing it "unlikely that each subtle difference in phraseology was intended to establish a completely different legal standard." 8 Cal. 4th at 716, 34 Cal. Rptr. 2d at 905. "As one of the statutes cited was section 425.16," said the court of appeal in *Ludwig*, "we must construe it in accordance with the Supreme Court's analysis." 37 Cal. App. 4th at 16, 43 Cal. Rptr. 2d at 356. The word "probability" was itself a legislative compromise, the original phrase having been "substantial probability." See discussion in *Church of Scientology v. Wollersheim*, 42 Cal. App. 4th 628, 654 n.10, 49 Cal. Rptr. 2d 620, 636 n.10 (1996).

150. § 425.16(b)(2). Subsection (b)(3) provides that

> [i]f 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, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination.

§ 425.16(b)(3).

151. Evans v. Unkow, 38 Cal. App. 4th 1490, 1496, 45 Cal. Rptr. 2d 624, 627-28 (1995).

> permit the court to determine whether "there is a probability that the plaintiff will prevail on the claim."[152]

In *Church of Scientology v. Wollersheim*, the court stated the now commonly accepted approach to this showing.

> It is recognized, with the requirement that the court consider the pleadings and affidavits of the parties, the test is similar to the standard applied to evidentiary showings in summary judgment motions pursuant to Code of Civil Procedure section 437c and requires that the showing be made by competent admissible evidence within the personal knowledge of the declarant.[153]

As on summary judgment, "'to preserve the plaintiff's right to a jury trial the court's determination of the motion cannot involve a weighing of the evidence.'"[154] Averments on information and belief may not be considered.[155]

> The difference between a motion for nonsuit and a motion to strike under section 425.16 is that on a motion for nonsuit the court ignores conflicting evidence while on a motion under section 425.16 "the court shall consider

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152. DuPont Merck Pharm. Co. v. Superior Court, 78 Cal. App. 4th 562, 568, 92 Cal. Rptr. 2d 755, 760 (2000) (quoting § 425.16(b)(1)).

153. Church of Scientology v. Wollersheim, 42 Cal. App. 4th 628, 654, 49 Cal. Rptr. 2d 620, 635 (1996). "Put another way, the anti-SLAPP statute require[s] [plaintiff] to 'make a prima facie showing of facts which would, if proved at trial, support a judgment in plaintiff's favor.'" Schoendorf v. U.D. Registry, Inc., 97 Cal. App. 4th 227, 238, 118 Cal. Rptr. 2d 313, 320 (2002) (quoting *Wollersheim*, 42 Cal. App. 4th at 646, 49 Cal. Rptr. 2d at 631).

> "It is recognized" that a SLAPP suit motion to strike "require[s] that the court consider the pleadings and affidavits of the parties," and therefore that "the test is similar to the standard applied to evidentiary showings in summary judgment motions. . . ." Thus, the denial of a SLAPP suit motion to strike parallels the denial of a motion for summary judgment.

Wilson v. Parker, Covert & Chidester, 87 Cal. App. 4th 1337, 1348, 105 Cal. Rptr. 2d 486, 493 (2001). In *Wilson v. Parker, Covert & Chidester*, 28 Cal. 4th 811, 820, 123 Cal. Rptr. 2d 19, 26 (2002), the Supreme Court held that where an anti-SLAPP motion is denied because it lacks the required probability of success, this can be used to establish probable cause in a later malicious prosecution action.

154. *Church of Scientology v. Wollersheim*, 42 Cal. App. 4th at 654, 49 Cal. Rptr. 2d at 635 (quoting Wilcox v. Superior Court, 27 Cal. App. 4th 809, 823, 33 Cal. Rptr. 2d 446, 454 (1994)). *Accord, e.g.*,. Kyle v. Carmon, 71 Cal. App. 4th 901, 907-08, 84 Cal. Rptr. 2d 303, 307 (1999) (quoting case).

155. *See* Evans . Unkow, 38 Cal. App. 4th 1490, 45 Cal. Rptr. 2d 624 (1995). The court of appeal relied on *College Hospital, Inc. v. Superior Court*, 8 Cal. 4th 704, 714-17, 34 Cal. Rptr. 2d 898, 904-05 (1994), where the Supreme Court interpreted Code of Civil Procedure section 425.13. *See* discussion note 149 and accompanying text. Section 425.13 requires a plaintiff demanding punitive damages from a health care provider to "set forth competent *admissible* evidence within the personal knowledge of the declarant." *Coll. Hospital, Inc.*, 8 Cal. 4th at 720, 34 Cal. Rptr. 2d at 903 (emphasis added). The *Evans* court held that "[I]f an averment on information and belief is inadequate under . . . section 425.13, it must likewise be inadequate under section 425.16, for the two statutes are substantially similar." *Evans*, 38 Cal. App. 4th at 1498, 45 Cal. Rptr. 2d at 629.

> the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based."[156]

Even though a decision on probability of success is necessary for both determinations, a decision on granting a preliminary injunction is not *res judicata* for a motion to strike, because there are other elements (for example balance of harms) in the injunctive calculus.[157] The Supreme Court has now held that in a subsequent malicious prosecution action, "denial of the motion to strike does establish the existence of probable cause where . . . the trial court's denial ruling was predicated on a finding that the action had potential merit."[158]

Where the free speech or petitioning aspect of the defendant's actions is undeniable, the first prong of the anti-SLAPP test is often conceded, leaving the motion to be decided on whether the plaintiff has a reasonable probability of success.[159] This in turn means that the matter will turn on points of substantive law, or a relatively undeveloped evidentiary record, unrelated to the anti-SLAPP law itself.[160]

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156. *Wilcox*, 27 Cal. App. 4th at 828, 33 Cal. Rptr. 2d at 457 (quoting § 425.16(b)) (citations omitted).

> Unlike demurrers or motions to strike, which are designed to eliminate sham or facially meritless allegations, at the *pleading* stage a SLAPP motion, like a summary judgment motion, *pierces* the pleadings and requires an evidentiary showing. As we observed in *Kyle v. Carmon* (1999) 71 Cal. App. 4th 901, [907-08,] [84 Cal. Rptr. 2d 303], [307,] the test applied to a SLAPP motion is similar to that of a motion for summary judgment, nonsuit, or directed verdict. Evidence is considered, but not weighed. If the initial evidentiary burden is met by the moving party, the burden shifts to the party opposing the motion to avoid dismissal of the action.

Simmons v. Allstate Ins. Co., 92 Cal. App. 4th 1068, 1073, 112 Cal. Rptr. 2d 397, 400 (2001).

157. *See* Lam v. Ngo, 91 Cal. App. 4th 832, 836, 111 Cal. Rptr. 2d 582, 585 (2001). Additionally, the court noted,

> a key difference between preliminary injunctions and special motions to strike is the role of the individual cause of action. A single cause of action can sustain a preliminary injunction. By contrast, an anti-SLAPP suit motion involves examination of each of the causes of action attacked, because the purpose is to weed out meritless "claims" at an early stage.

Id. at 844, 111 Cal. Rptr. 2d at 591 (citations omitted).

158. *Wilson v. Parker, Covert & Chidester*, 28 Cal. 4th at 815, 123 Cal. Rptr. 2d at 21.

159. The exemptions provided in the new section 425.17 will, when they become effective in January 2004, provide another way to avoid the statute. *See supra* note 9.

160. *See, e.g.*, Schroeder v. Irvine City Council, 97 Cal. App. 4th 174, 118 Cal. Rptr. 2d 330 (2002) (whether a city program was supported by an unlawful expenditure of public funds); Seelig v. Infinity Broad. Corp., 97 Cal. App. 4th 798, 119 Cal. Rptr. 2d 108 (2002) (whether terms "chicken butt" and "skank" were actionable). Examples could be multiplied—whether a statement is defamatory, and what standard is to be applied to a quasi-public figure, are frequent determinants in SLAPP motions. *See, e.g.*, Conroy v. Spitzer, 70 Cal. App. 4th 1446, 83 Cal. Rptr. 2d 443 (1999).

> Once a complaint has been stricken, it may not ordinarily be amended.[161]
>
> Allowing a SLAPP plaintiff leave to amend the complaint once the court finds the prima facie showing has been met would completely undermine the statute by providing the pleader a ready escape from section 425.16's quick dismissal remedy. Instead of having to show a probability of success on the merits, the SLAPP plaintiff would be able to go back to the drawing board with a second opportunity to disguise the vexatious nature of the suit through more artful pleading. This would trigger a second round of pleadings, a fresh motion to strike, and inevitably another request for leave to amend.
>
> By the time the moving party would be able to dig out of this procedural quagmire, the SLAPP plaintiff will have succeeded in his goal of delay and distraction and running up the costs of his opponent. Such a plaintiff would accomplish indirectly what could not be accomplished directly, i.e., depleting the defendant's energy and draining his or her resources. This would totally frustrate the Legislature's objective of providing a quick and inexpensive method of unmasking and dismissing such suits.[162]

As another recent case noted, "the anti-SLAPP statute allows a motion to strike to be made against only a cause of action, not a cause of action as it applies to an individual plaintiff."[163] Therefore if a cause of action is valid as to some plaintiffs in an action, for anti-SLAPP purposes it is deemed sound as to all plaintiffs.[164] Moreover, "Section 425.16 requires separate consideration of each cause of action, but the special motion to strike may not parse any finer. Unlike

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161. *See Simmons*, 92 Cal. App. 4th at 1073, 112 Cal. Rptr. 2d at 401.

> [P]ermitting plaintiffs to remove their complaints from the scope of section 425.16 by withdrawing allegations in the face of an anti-SLAPP motion would be inconsistent with the decision in *Simmons v. Allstate Ins. Co.* that leave to amend to delete allegations from a complaint may not be granted "once the court finds the requisite connection to First Amendment speech." (*Simmons v. Allstate Ins. Co.*, 92 Cal. App. 4th at p. 1073, [112 Cal. Rptr. 2d 397]; see also *Roberts v. Los Angeles County Bar Ass'n.* (2003) 105 Cal. App. 4th 604, 612-613, [129 Cal. Rptr. 2d 546] [same rule when appeal taken from denial of motion to strike].).

Kids Against Pollution v. Cal. Dental Ass'n, 134 Cal. Rptr. 2d 373, 383 (2003) (final two alterations in original), *review granted and opinion superseded by* No. S117156, 2003 WL 22232740, at *1 (Cal. Sept. 17, 2003).

162. *Simmons*, 92 Cal. App. 4th at 1073-74, 112 Cal. Rptr. 2d at 401 (citations omitted). *Accord* Roberts v. Los Angeles County Bar Ass'n, 105 Cal. App. 4th 604, 613, 129 Cal. Rptr. 2d 546, 551 (2003) (quoting passage, and adding: "There would be little benefit in a right to appeal if the plaintiff could get around appellate review by filing an amended pleading. Nor would a competitive rush to the courthouse fulfill the Legislative purpose of a quick and inexpensive method of unmasking and dismissing SLAPP suits.").

163. M.G. v. Time Warner, Inc., 89 Cal. App. 4th 623, 627-28, 107 Cal. Rptr. 2d 504, 508 (2001).

164. *See id.*

conventional motions to strike under sections 435 and 436, the court has no authority under section 425.16 to strike particular allegations."[165]

The 1999 statutory amendment made a grant or denial of a motion to strike an appealable order under Code of Civil Procedure section 904.1.[166] The same result is reached in federal court by way of the collateral order doctrine.[167] But such an appeal "does not automatically stay enforcement of the judgment," including the fee award if any, and "to stay enforcement of such a judgment, the SLAPP plaintiff must give an appropriate appeal bond or undertaking under the money judgment exception to the automatic stay rule."[168] On appeal, "[w]hether section 425.16 applies and whether the plaintiff has shown a probability of prevailing are both reviewed independently. . . ."[169]

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165. *Kids Against Pollution*, 134 Cal. Rptr. 2d at 381 (citations omitted) *review granted and opinion superseded by* No. S117156, 2003 WL 22232740, at *1, (Cal. Sept. 17, 2003).

166. CAL. CIV. PROC. CODE § 425.16(j) (West Supp. 2003) (added by Act of Oct. 10, 1999, ch. 960, section 1):

> So solicitous is California law of free speech that orders on SLAPP-suit motions under section 425.16 are immediately appealable. (See § 425.16, subd. (j).) Compare that with *denials* of summary judgment motions, where a litigant may only file a writ petition if he or she wants an immediate review of a possibly erroneous trial court ruling denying the motion. (See § 437c, subd. (*l*).)

Lam v. Ngo, 91 Cal. App. 4th 832, 839 n.4, 111 Cal. Rptr. 2d 582, 588 n.4 (2001). See also section 425.17(e), providing that the immediate appeal provision does not apply where a motion to strike is denied because an action is exempt under newly passed section 425.17. CAL. CIV. PROC. CODE § 425.17(e) (effective Jan. 1, 2004).

167. *See* Batzel v. Smith, 333 F.3d 1018, 1024-25 (9th Cir. 2003):

> In California state court, a denial of an anti-SLAPP motion is immediately appealable. *See* § 425.16(j). The issue before us as a federal court is whether a district court's denial of an anti-SLAPP motion is an immediately appealable "final decision" under 28 U.S.C. § 1291, so that we have jurisdiction to address Cremers' appeal. We conclude that we have jurisdiction to review the denial of an anti-SLAPP motion pursuant to the collateral order doctrine. . . . The collateral order doctrine establishes a "narrow class of decisions that do not terminate the litigation, but must, in the interest of achieving a healthy legal system nonetheless be treated as final. [Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 867, 114 S.Ct. 1992, 1995 (1994)] . . . To fall into this narrow class of immediately appealable orders, a district court decision must (1) be "conclusive," (2) "resolve important questions completely separate from the merits," and (3) "render such questions effectively unreviewable on appeal from a final judgment in the underlying action."

Batzel, 333 F.3d at 1024-25 (quoting *Digital Equip. Corp.*, 511 U.S. at 867, 114 S.Ct. at 1995-96).

168. Dowling v. Zimmerman, 85 Cal. App. 4th 1400, 1405-06, 103 Cal. Rptr. 2d 174, 180 (2001). The money judgment exception is codified at Code of Civil Procedure section 917.1(a), which provides in pertinent part: "Unless an undertaking is given, the perfecting of an appeal shall not stay enforcement of the judgment or order in the trial court if the judgment or order is for any of the following: (1) Money or the payment of money . . ." CAL. CIV. PROC. CODE § 917.1(a) (West Supp. 2003). A proposal before the Legislature in its 2002-2003 session would have provided for a stay pending appeal. *See* text at *infra* note 303 and accompanying text.

169. ComputerXpress, Inc. v. Jackson, 93 Cal. App. 4th 993, 999, 113 Cal. Rptr. 2d 625, 632 (2001). *See also* Mattel, Inc. v. Luce, Forward, Hamilton & Scripps, 99 Cal. App. 4th 1179, 1189-90, 121 Cal. Rptr. 2d 794, 801 (2002) (applying automatic stay provisions of CCP section 916 to an appeal after denial of an anti-SLAPP motion to strike).

In federal court, challenges to the complaint (including those under section 425.16) may be made serially.[170] In *Vess v. Ciba-Geigy Corp. USA*,[171] a district court held that "[i]f Plaintiff's complaint survives Rule 9(b) and Rule 12(b)(6) challenges, the Court will consider Defendants' Motions to Strike."[172]

D. Discovery

Subsection (g) of the statute provides:

> 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.[173]

Although this means discovery is discretionary with the court, an early case has influenced the prevailing view of when discovery should properly be permitted. In *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.*,[174] the court

> recognized the discovery stay and 30-day hearing requirement of section 425.16, if literally applied in all cases, could adversely affect a plaintiff's due process rights by placing the burden on the plaintiff to show a prima facie case without permitting the collection of evidence needed to satisfy that burden, particularly where the principal source of evidence critical to establishing the prima facie case is in the possession of the defendant and not available from other sources. Accordingly, the *Lafayette* court stated . . . that "[I]f the plaintiff makes a timely and proper showing in response to the motion to strike[] that a defendant or witness possesses evidence needed by plaintiff to establish a prima facie case, the plaintiff must be given the reasonable opportunity to obtain that evidence through discovery before the motion to strike is adjudicated. The trial court, therefore, must liberally exercise its discretion by authorizing reasonable and specified discovery timely petitioned for by a plaintiff . . . , when evidence to establish a prima facie case is reasonably shown to be held, or known, by defendant or its agents and employees." We may not

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170. For a discussion of section 425.16 in federal court, see Part III below.

171. No. Civ. 00CV1839B (CGA), 2001 WL 29033 (S.D. Cal. Mar. 9, 2001), *rev'd. in part on other grounds* 317 F.3d 1097 (9th Cir. 2003).

172. *Vess*, 2001 WL 290333, at *3.

173. CAL. CIV. PROC. CODE § 425.16(g) (West Supp. 2003).

174. 37 Cal. App. 4th 855, 868, 44 Cal. Rptr. 2d 46, 54 (1995).

> disturb the trial court's ruling on such a discovery request absent an abuse of discretion. . . .[175]

But unless there is a showing that the matter proposed to be discovered will bear materially on the prima facie showing the plaintiff must make to avoid a strike order, a court is justified in denying the request and stay.[176]

The situation is otherwise in federal court, where under *Rogers v. Home Shopping Network, Inc.*, "if a plaintiff requires discovery to oppose a motion brought under § 425.16, the hearing on the motion should be stayed until discovery is completed."[177] California appellate courts have been rather strict that a request for discovery must observe the formalities of a noticed motion.[178]

E. Attorney Fees

Reflecting the deliberate policy of the Legislature to protect poorer defendants from attacks by well-funded plaintiffs, the statute provides for attorney fees for prevailing defendants.

> 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.[179]

Accordingly, "any SLAPP defendant who brings a successful motion to strike is entitled to mandatory attorney fees."[180] But the attorney fee provisions of the statute are not symmetrical—a defendant "shall" recover fees and costs if it prevails, but a plaintiff only recovers if it prevails *and* the motion to strike was frivolous or dilatory.[181]

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175. Schroeder v. Irvine City Council, 97 Cal. App. 4th 174, 190-91, 118 Cal. Rptr. 2d 330, 343 (2002) (quoting *Lafayette Morehouse, Inc.*, 37 Cal. App. 4th at 868, 44 Cal. Rptr. 2d at 54) (citations omitted).

176. *See id.* at 192-93, 118 Cal. Rptr. 2d at 344-45.

177. Global Telemedia Int'l, Inc. v. Doe 1, 132 F. Supp. 2d 1261, 1271 (C.D. Cal. 2001) (citing Rogers v. Home Shopping Network, Inc., 57 F. Supp. 2d 973, 985 (C.D. Cal. 1999)).

178. *See, e.g.*, Braun v. Chronicle Publ'g Co., 52 Cal. App. 4th 1036, 1052, 61 Cal. Rptr. 2d 58, 67 (1997) ("failure to comply with subdivision (g) dooms the discovery request"); Evans v. Unkow, 38 Cal. App. 4th 1490, 1499, 45 Cal. Rptr. 2d 624, 630 (1995) ("failure to comply . . . makes . . . discovery request meritless"); Robertson v. Rodriguez, 36 Cal. App. 4th 347, 357, 42 Cal. Rptr. 2d 464, 469 (1995) (failure to comply justifies adverse procedural decision).

179. CAL. CIV. PROC. CODE § 425.16(c) (West Supp. 2003). The word *shall* in the second sentence was changed from *may* by Cal. Stats. 1993, c. 1239 (SB 9), § 1.

180. Ketchum v. Moses, 24 Cal. 4th 1122, 1131, 104 Cal. Rptr. 2d 377, 383 (2001). This was only the second case in which the Supreme Court interpreted the anti-SLAPP law.

181. A defendant making a SLAPP motion and a plaintiff in a civil rights action thus enjoy the same preference for attorney fees if they are successful. Given this similarity in approach between . . .

> The fee-shifting provision was apparently intended to discourage such strategic lawsuits against public participation by imposing the litigation costs on the party seeking to "chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." The fee-shifting provision also encourages private representation in SLAPP cases, including situations when a SLAPP defendant is unable to afford fees or the lack of potential monetary damages precludes a standard contingency fee arrangement.[182]

One situation which has received a lot of attention in the appellate courts is that where a SLAPP plaintiff, about to lose a motion to strike, voluntarily dismisses the action. Is the SLAPP defendant now a prevailing defendant, entitled to attorney fees under section 425.16(c), or not? The statute does not define "prevailing defendant."[183] In *Coltrain v. Shewalter*, the court held that

> where the plaintiff voluntarily dismisses an alleged SLAPP suit while a special motion to strike is pending, the trial court has discretion to determine whether the defendant is the prevailing party for purposes of attorney's fees under [§ 425.16(c)]. In making that determination, the critical issue is which party realized its objectives in the litigation. Since the defendant's goal is to make the plaintiff go away with its tail between its legs, ordinarily the prevailing party will be the defendant. The plaintiff, however, may try to show it actually dismissed because it had substantially achieved its goals through a settlement or other means, because the defendant was insolvent, or for other reasons unrelated to the probability of success on the merits.[184]

Thus voluntary dismissal erects a presumption that the defendant is the prevailing party; unless rebutted this presumption permits a fee award.[185] But

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> section 425.16, subdivision (c) and [42 U.S.C.] section 1988, authority under section 1988 is particularly helpful in applying section 425.16, subdivision (c).

ComputerXpress, Inc. v. Jackson, 93 Cal. App. 4th 993, 1018, 113 Cal. Rptr. 2d 625, 647 (2001).

182. *Ketchum*, 24 Cal. 4th at 1131, 104 Cal. Rptr. 2d at 383 (quoting § 425.16(a)) (citation omitted).

183. See, e.g., Code of Civil Procedure section 1032(a)(4), defining "prevailing party" as including "a defendant in whose favor a dismissal is entered" CAL. CIV. PROC. CODE § 1032(a)(4) (West Supp. 2003); *see also* CAL. CIV. CODE § 798.85 (West Supp. 2003) (mobilehome residency law): "[a] party shall be deemed a prevailing party . . . where the litigation is dismissed in his or her favor prior to or during the trial, unless the parties otherwise agree in the settlement or compromise." *But see* CAL. CIV. PROC. CODE § 1717(b)(2) (West 1998) ("[w]here an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party. . . ."; *id.* § 3176 (West 1993) (same) (action on bonded stop notice).

184. Coltrain v. Shewalter, 66 Cal. App. 4th 94, 107, 77 Cal. Rptr. 2d 600, 608 (1998).

185. *See id.* Similar results have been reached in later cases. *See, e.g.*, Kyle v. Carmon, 71 Cal. App. 4th 901, 84 Cal. Rptr. 2d 303 (1999). *Kyle* also held that a plaintiff may dismiss its action voluntarily after the motion to strike has been heard, but before it has been ruled on. *Id.* at 910, 84 Cal. Rptr. 2d at 308. The adjudication was therefore void, but the court retained jurisdiction to award fees under section 425.16(c). *Id.* at 908 & n.4, 84 Cal. Rptr. 2d at 307 & n.4. *Accord* eCash Techs., Inc. v. Guagliardo, 127 F. Supp. 2d 1069, 1084

other courts have disagreed. In *Liu v. Moore*[186] the court held that, since "the trial court's adjudication of the merits of a defendant's motion to strike is an essential predicate to ruling on the defendant's request for an award of fees and costs,"[187] no fees can be awarded under the statute until a decision has been made on the SLAPP issue, and so a SLAPP defendant has a right to a merits determination of this issue despite the dismissal.[188] As there are no pending legislative proposals to settle this question, it will be up to the Supreme Court to decide which approach will prevail.[189] It seems unnecessary to require adjudication of a motion to strike a dismissed action if the prevailing party can be identified in a fee hearing.

Other fee issues have been settled more tidily. What is a "reasonable" fee is within the discretion of the trial court to determine,[190] and may be less than was actually paid.[191] Attorney fees can be awarded for the motion to strike, but not for the entire action if there are parts unaffected by the motion to strike.[192] But losing some parts of the action does not defeat the fee entitlement for the motion attacking those causes of action which were actually stricken under the statute.[193]

A fee request need not be documented at the time of filing the motion to strike, and can be made not only in that motion but in a subsequent motion for fees or in a costs memorandum.[194] "[A]n award of fees may include not only the

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(C.D. Cal. 2000) *aff'd* No. 00-57107, 2002 WL 987324, 35 Fed. Appx. 498 (9th Cir. May 13, 2002) (granting motion to strike would be improper after voluntary dismissal, but merits of motion may still be considered in proceeding for fees and costs) (citing *Kyle*).

186. 69 Cal. App. 4th 745, 81 Cal. Rptr. 2d 807 (1999).

187. *Id.* at 752, 81 Cal. Rptr. 2d at 812.

188. *See id.* at 754-55, 81 Cal. Rptr. 2d at 813.

189. For a full discussion of the case law, see *Pfeiffer Venice Properties v. Bernard*, 101 Cal. App. 4th 211, 216-19, 123 Cal. Rptr. 2d 647, 651-53 (2002), holding that fees may be awarded to the defendants despite an involuntary dismissal under the doctrine *de minimis non curat lex.*

190. *See* Church of Scientology v. Wollersheim, 42 Cal. App. 4th 628, 659, 49 Cal. Rptr. 2d 620, 638 (1996); Metabolife Int'l, Inc. v. Wornick, 213 F. Supp. 2d 1220, 1222 (S.D. Cal. 2002).

191. *See* Robertson v. Rodriguez, 36 Cal. App. 4th 347, 360-62, 42 Cal. Rptr. 2d 464, 471-72 (1995).

192. *See* Lafayette Morehouse, Inc. v. Chronicle Publ'g Co., 39 Cal. App. 4th 1379, 1381, 46 Cal. Rptr. 2d 542, 542-43 (1995). This case, dealing with fees, is sometimes called *More II* (after More University, which figured largely in the case), to distinguish it from the more substantive leading case *More I*, meaning *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.*, 37 Cal. App. 4th 855, 44 Cal. Rptr. 2d 46 (1995). In *More II* the court based this holding on the legislative history—for example, a Senate Floor Report stating "[t]his bill . . . provides that a prevailing defendant in the motion to strike is entitled to recover his or her attorney's fees *for that motion.*" *More II*, 39 Cal. App. 4th at 1383, 46 Cal. Rptr. 2d at 544 (quoting SENATE FLOOR ANALYSIS OF SB 1264, at 1 (Apr. 9, 1991).

193. *See* ComputerXpress, Inc. v. Jackson, 93 Cal. App. 4th 993, 997-98, 113 Cal. Rptr. 2d 625, 631 (2001).

194. *See* Am. Humane Ass'n v. L.A. Times Communications, 92 Cal. App. 4th 1095, 1103, 112 Cal. Rptr. 2d 488, 494 (2001).

> There are three ways the special motion to strike attorney fee issue can be raised. The successful defendant can: make a subsequent noticed motion as was envisioned by defendant in this case; seek an attorney fee and cost award at the same time as the special motion to strike is litigated, as is often done; or as part of a cost memorandum. The successful defendant who specially moves to strike pursuant to section 425.16 has the option of utilizing a separate noticed attorney fee motion. A trial court cannot deny a section 425.16 attorney fee

fees incurred with respect to the underlying claim, but also the fees incurred in enforcing the right to mandatory fees" under the statute.[195] Fees can be awarded even though the prevailing defendant was not itself liable for them, as in *Macias v. Hartwell*, where the defendant's union paid for his representation.[196] The Supreme Court has held that the lodestar method for setting fee awards, including multipliers for various factors including skill, difficulty and contingency, may be used for awards under section 425.16.[197] Attorney fees are available for an appeal of a motion to strike, and of a fee award.[198] But a party who prevailed below but is reversed on appeal cannot gain fees, because it "should not have prevailed."[199]

> motion because the defendant seeks to litigate that issue in a separate subsequently filed noticed motion.

Id. (citations omitted).

195. Ketchum v. Moses, 24 Cal. 4th 1122, 1141, 104 Cal. Rptr. 2d 377, 391 (2001); *see* Metabolife Int'l, Inc. v. Wornick, 213 F. Supp. 2d 1220, 1222 (S.D. Cal. 2002).

196. *See* Macias v. Hartwell, 55 Cal. App. 4th 669, 675-76, 64 Cal. Rptr. 2d 222, 226 (1997). The court noted that a contrary rule would block a fee award "if the defense costs were paid by his homeowner's insurance carrier, the union's insurance carrier, or a relative. No court has so held." *Id.* at 676, 64 Cal. Rptr. 2d at 226. *See also, e.g.*, Rosenaur v. Scherer, 88 Cal. App. 4th 260, 265, 105 Cal. Rptr. 2d 674, 678 (2001) ("partial" pro bono representation, waiving payment by client but not by opponent's insurer). In *Dowling v. Zimmerman*, 85 Cal. App. 4th 1400, 1405, 103 Cal. Rptr. 2d 174, 179 (2001), the court held that

> in order to effectuate the purpose of the anti-SLAPP statute and the Legislature's intent to deter SLAPP suits, a defendant who appears in a SLAPP action in propria persona and later retains specially appearing counsel who successfully brings on behalf of the defendant a special motion to strike the complaint under section 425.16 is entitled to recover an award of reasonable attorney fees under the mandatory provisions of [subsection (c)] in order to compensate the retained counsel for the legal services provided in connection with both the special motion to strike, and the recovery of attorney fees and costs under that subdivision.

Id.

197. *See Ketchum*, 24 Cal. 4th at 1132, 104 Cal. Rptr. 2d at 384. Even before *Ketchum* it was considered proper to consider many aspects of an attorney's performance in awarding a fee under section 425.16

> The matter of reasonableness of attorney's fees is within the sound discretion of the trial judge. Determining the weight and credibility of the evidence, especially credibility of witnesses, is the special province of the trier of fact. In determining what constitutes a reasonable compensation for an attorney who has rendered services in connection with a legal proceeding, the court may and *should* consider the nature of the litigation, its difficulty, the amount involved, the skill required and the skill employed in handling the litigation, the attention given, the success of the attorney's efforts, his learning, his age, and his experience in the particular type of work demanded. . . ; the intricacies and importance of the litigation, the labor and necessity for skilled legal training and ability in trying the cause, and the time consumed.

Church of Scientology v. Wollersheim, 42 Cal. App. 4th 628, 659, 49 Cal. Rptr. 2d 620, 638-39 (1996) (citations and quotation apparatus omitted) (quoting Stokus v. Marsh, 217 Cal. App. 3d 647, 656-57, 266 Cal. Rptr. 90, 96 (1990)).

198. *See* Evans v. Unkow, 38 Cal. App. 4th 1490, 1499-1500, 45 Cal. Rptr. 2d 624, 630 (1995); *accord, e.g.*, Wilkerson v. Sullivan, 99 Cal. App. 4th 443, 446, 121 Cal. Rptr. 2d 275, 277 (2002); Dove Audio, Inc. v. Rosenfeld, Meyer & Susman, 47 Cal. App. 4th 777, 785, 54 Cal. Rptr. 2d 830, 835 (1996).

199. Paul for Council v. Hanyecz, 85 Cal. App. 4th 1356, 1368, 102 Cal. Rptr. 2d 864, 872 (2001). "Because we have determined defendants should not have prevailed on their motion to strike, it follows that they are not entitled to the fees and costs the trial court awarded them." *Id. See also, e.g.*, Gallimore v. State Farm Fire & Cas. Ins. Co., 102 Cal. App. 4th 1388, 1401, 126 Cal. Rptr. 2d 560, 570 (2002) ("In view of our reversal of that order [to strike], however, the attorney's fee award no longer has a legal basis and must

In a recent case, the court of appeal held that the cases holding that a court must determine which party would have prevailed at the trial level (in order to set fees in a dismissed action) do not apply where it is an appeal that is dismissed before decision.[200]

In *Schroeder v. Irvine City Council*[201] the City Council won a motion to strike, and Schroeder argued that when a governmental body was involved the mandatory fee award provided by section 425.16(c) "impermissibly infringes on the plaintiff's First Amendment right to petition for redress of grievances."[202] Unless the provision were read as permissive, Schroeder argued, it would be unconstitutional. The court was unpersuaded by this or other ingenious attacks on the constitutionality of applying the mandatory fee provision to governmental entities.[203]

F. Exemption for Enforcement Actions

Subsection (d) of the statute provides that "[t]his 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."[204] Only two cases decided so far have construed this provision. In *People v. Health Laboratories of North America, Inc.*,[205] two district attorneys brought an action on behalf of the People against the makers of a supposed weight loss product, charging false advertising and unfair business practices.[206] The manufacturers moved to strike the action as a SLAPP. They acknowledged that section 425.16(d) would exempt the action against them, but attacked the section's constitutionality, claiming it "arbitrarily discriminated against them and violated their

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necessarily fall as well."); Santa Monica Rent Control Bd. v. Pearl St., LLC, 109 Cal. App. 4th 1308, 1320, 135 Cal. Rptr. 2d 903, 911-12 (2003) ("Th[e] statutory basis for the award no longer exists because we have determined that the Board should have prevailed on the motion to strike. Therefore, it follows that the order awarding fees and costs cannot stand.").

200. A plaintiff's voluntary dismissal of an appeal from an order granting an anti-SLAPP motion (and awarding attorney fees) stands on different footing than the voluntary dismissal of an action with an anti-SLAPP motion pending. In the former circumstance, the trial court has ruled on the motion to strike on the merits and concluded that the action was a SLAPP suit, thus entitling the defendant to recover attorney fees in connection with the motion. The dismissal of an appeal from the trial court's determination leaves intact the judicial finding that the action was a SLAPP suit, which in turn entitles the defendant to recover fees under section 425.16.

Wilkerson v. Sullivan, 99 Cal. App. 4th 443, 447, 121 Cal. Rptr. 2d 275, 278 (2002). The court continued: "We discern no reason for denying a recovery of attorney fees and costs on appeal simply because the plaintiff decides not to pursue the appeal to final determination." *Id.* at 448, 121 Cal. Rptr. 2d at 278-79.

201. 97 Cal. App. 4th 174, 193, 118 Cal. Rptr. 2d 330, 345 (2002).

202. *Id.*

203. *See id.* at 193-96, 118 Cal. Rptr. 2d at 345-48. In 1999, Senator Ray Haynes (R., Riverside/San Diego Counties) introduced a bill (SB 1188) which would have deprived public entities, or public officers acting in their official capacities, of the right to bring anti-SLAPP motions at all. The bill had no success in the Legislature.

204. CAL. CIV. PROC. CODE § 425.16(d) (West Supp. 2003).

205. 87 Cal. App. 4th 442, 445, 104 Cal. Rptr. 2d 618, 620 (2001).

206. *See* CAL. BUS. & PROF. CODE §§ 17200, 17500, 17508 (West 1997 & Supp. 2003).

right to equal protection of the law because private plaintiffs who sue a defendant for conduct which is in furtherance of the defendant's free speech rights are subject to the anti-SLAPP statute but public prosecutors are not."[207] The court held the exemption constitutional.[208] First, the statutory history supported the view that the exemption was not arbitrary, but a deliberate response to concerns raised in the legislative process.[209] Second, the exemption affected speech only tangentially, so the court applied a rational basis test rather than strict scrutiny.[210] And finally, the classification did bear a rational relation to legitimate state objectives, and was justified on practical grounds.[211]

In the second case, *City of Long Beach v. California Citizens for Neighborhood Empowerment*,[212] decided in August 2003, the court of appeal decided against a literal interpretation of the exemption. Again relying on legislative history, the court held that to be covered an action did not need actually to be brought "in the name of the people of the State of California," but that an action brought by a city attorney "aimed at consumer and/or public protection" would qualify for the exemption.[213]

The exemption for enforcement actions was significantly enlarged on September 6, 2003, when Governor Davis signed S.B. 515, creating a new section 425.17. This section

> provide[d] that certain actions are not subject to a special motion to strike, as specified, including, but not limited to, any action brought solely in the public interest or on behalf of the general public, if specified conditions exist. The bill . . . further provide[d] that related appeal provisions are not

207. 87 Cal. App. 4th at 445, 104 Cal. Rptr. 2d at 620.

208. *Id.* at 951, 104 Cal. Rptr. 2d at 624. Earlier attacks on the constitutionality of the anti-SLAPP law, on other grounds, were rejected when courts of appeal upheld the statute in *Dixon v. Superior Court*, 30 Cal. App. 4th 733, 746, 36 Cal. Rptr. 2d 687, 696-97 (1994) and *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.*, 37 Cal. App. 4th 855, 865-66, 44 Cal. Rptr. 2d 46, 52 (1995). In *Shalaby v. Jacobowitz*, No. C 03-0227-CRB, 2003 WL 1907664 (N.D. Cal. Apr. 11, 2003), the court rejected for lack of standing some rather muddy challenges to the statute's constitutionality. A later constitutional challenge to the anti-SLAPP law, by the same plaintiff against Attorney General Lockyer, was dismissed under Eleventh Amendment immunity. *See* Shalaby v. California, 2003 WL 21556930 (N.D. Cal. July 3, 2003).

209. *See* 87 Cal. App. 4th at 446-47, 104 Cal. Rptr. 2d at 621. The court pointed out that in 1990 Governor Deukmejian vetoed a bill (SB 2313) (1990) without the exemption. But in 1991 Governor Wilson vetoed one (SB 10) (1991) which had been amended to include the exemption, which makes it a wash. *Id.* Nevertheless this history does show that the question was considered and deliberately decided.

210. *See id.* at 448-49, 104 Cal. Rptr. 2d at 622.

211. *See id.* at 447-51, 104 Cal. Rptr. 2d at 621-24.

212. 111 Cal. App. 4th 302, 3 Cal. Rptr. 3d 473 (2003).

213. *Id.* at 308, 3 Cal. Rptr. 3d at 478. The court also rejected a similarly literal argument that the phrase "*acting as a public prosecutor*" meant the exemption applied only in criminal cases. *See id.* at 306, 3 Cal. Rptr. 3d at 476.

applicable to these actions. The bill ... also provide[d] that its provisions are severable, and would make specified findings and declarations.[214]

The "specified conditions" exempting an action from the anti-SLAPP remedy are:

> (1) The plaintiff does not seek any relief greater than or different from the relief sought for the general public or a class of which the plaintiff is a member. A claim for attorney's fees, costs, or penalties does not constitute greater or different relief for purposes of this subdivision.
>
> (2) The action, if successful, would enforce an important right affecting the public interest, and would confer a significant benefit, whether pecuniary or nonpecuniary, on the general public or a large class of persons.
>
> (3) Private enforcement is necessary and places a disproportionate financial burden on the plaintiff in relation to the plaintiff's stake in the matter.[215]

Also exempted from an anti-SLAPP motion to strike are actions *against*

> a person primarily engaged in the business of selling or leasing goods or services, including, but not limited to, insurance, securities, or financial instruments, arising from any statement or conduct by that person if both of the following conditions exist:
>
> (1) The statement or conduct consists of representations of fact about that person's or a business competitor's business operations, goods, or services, that is made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services, or the statement or conduct was made in the course of delivering the person's goods or services.
>
> (2) The intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer, or the statement or conduct arose out of or within the context of a regulatory approval process, proceeding, or investigation, except where the statement or conduct was made by a telephone corporation in the course of a proceeding before the California Public Utilities Commission and is the subject of a lawsuit brought by a

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214. Statement of the Legislative Analyst accompanying S.B. 515 (Feb. 20, 2003), *available at* http://www.leginfo.ca.gov/pub/bill/sen/sb_0501-0550/sb_515_bill_20030220_introduced.html (last visited Nov. 12, 2003) (copy on file with the *McGeorge Law Review*).

215. CAL. CIV. PROC. CODE § 425.17(b) (effective Jan. 1, 2004).

> competitor, notwithstanding that the conduct or statement concerns an important public issue.[216]
>
> But exempted from the exemption are actions brought against
>
> (1) Any person enumerated in subdivision (b) of Section 2 of Article I of the California Constitution or Section 1070 of the Evidence Code, or any person engaged in the dissemination of ideas or expression in any book or academic journal, while engaged in the gathering, receiving, or processing of information for communication to the public.
>
> (2) Any action against any person or entity based upon the creation, dissemination, exhibition, advertisement, or other similar promotion of any dramatic, literary, musical, political, or artistic work, including, but not limited to, a motion picture or television program, or an article published in a newspaper or magazine of general circulation.
>
> (3) Any nonprofit organization that receives more than 50 percent of its annual revenues from federal, state, or local government grants, awards, programs, or reimbursements for services rendered.[217]

These persons will still be permitted to use the motion to strike. The new measure does not take effect until January 1, 2004, so no case law is yet available. It seems certain to prompt clarifying litigation in the coming years.[218]

III. SECTION 425.16 IN FEDERAL COURT

In *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*,[219] the Ninth Circuit decided that California's anti-SLAPP remedy applies to diversity actions in federal court. The court of appeals reversed on this point a decision of the Northern District of California,[220] and held that section 425.16 did not conflict with the Federal Rules of Civil Procedure, but could "exist side by side . . . each controlling its own intended sphere of coverage without conflict."[221]

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216. *Id.* § 425.17(c) (effective Jan. 1, 2004).

217. *Id.* § 425.17(d) (effective Jan. 1, 2004).

218. A similar proposal had passed the preceding year as S.B. 789, but Governor Davis vetoed it. His veto message can be found at http://www.governor.ca.gov/govsite/msdocs/press_release/L02_250_SB_789_veto_message.doc.

219. 190 F.3d 963 (9th Cir. 1999).

220. *Lockheed Missiles & Space Co.*, No. C88-20009 JW, 1995 WL 470218 (N.D. Cal. Aug. 2, 1995).

221. *Lockheed Missiles & Space Co.*, 190 F.3d at 972 (quoting Walker v. Armco Steel, 446 U.S. 740, 752, 100 S.Ct. 1978, 1986 (1980). The rules section 425.16 was said to have conflicted with were "Rule 8 (requiring specificity in pleadings), Rule 12(f) (motions to strike), Rule 12(b)(6) (motions to dismiss for failure to state a claim), and Rule 56 (motions for summary judgment)." *Id.* The court considered only the motion to strike and the fee provision. *Id.* at 972 & n.11. Other topics such as the discovery stay were left for a later day. *Id.*

> A *qui tam* plaintiff, for example, after being served in federal court with counterclaims like those brought by [Lockheed], may bring a special motion to strike pursuant to [section] 425.16(b). If successful, the litigant may be entitled to fees pursuant to [section] 425.16(c). If unsuccessful, the litigant remains free to bring a Rule 12 motion to dismiss, or a Rule 56 motion for summary judgment. We fail to see how the prior application of the anti-SLAPP provisions will directly interfere with the operation of Rule 8, 12, or 56. In summary, there is no "direct collision" here.[222]

As there was no "direct collision" with the Federal Rules, the court was left with a "typical, relatively unguided *Erie* choice."[223] The parties did not identify "any federal interests that would be undermined by application of the anti-SLAPP provisions,"[224] but "California has articulated . . . important, substantive state interests furthered by the Anti-SLAPP statute."[225] Moreover, as the California procedure offers mandatory fee awards,

> if the anti-SLAPP provisions are held not to apply in federal court, a litigant interested in bringing meritless SLAPP claims would have a significant incentive to shop for a federal forum. Conversely, a litigant otherwise entitled to the protections of the Anti-SLAPP statute would find considerable disadvantage in a federal proceeding. This outcome appears to run squarely against the "twin aims" of the *Erie* doctrine.[226]

Once it was settled that section 425.16 applied in diversity actions, litigants in California federal courts started making anti-SLAPP motions with some frequency. One of the first issues to be decided (in *Rogers v. Home Shopping Network, Inc.*)[227] was that, while the motion to strike was available in federal court, the interplay between subsections (f) and (g) of the California law, which "allows the defendant served with a complaint to immediately put the plaintiff to his or her proof before the plaintiff can conduct discovery,"[228] did conflict with federal procedure.[229] The court cited a number of California cases where the

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222. *Id.* at 972.

223. *Id.* (citing Hanna v. Plumer, 380 U.S. 460, 471, 85 S.Ct. 1136, 1144 (1965) and 19 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4511 (2d ed. 1996)). The "*Erie* choice" refers, of course, to *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938).

224. *Lockheed Missiles & Space Co.*, 190 F.3d at 973.

225. *Id.*

226. *Id.* The "twin aims" are "discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna*, 380 U.S. at 468, 85 S.Ct. at 1142.

227. 57 F. Supp. 2d 973 (C.D. Cal. 1999).

228. *Id.* at 980.

229. *Id.* at 983. Section 425.16 "sets out a mere rule of procedure. . . ." Ludwig v. Superior Court, 37 Cal. App. 4th 8, 21, 43 Cal. Rptr. 2d 350, 360 (1995) (quoted in *Rogers*, 57 F. Supp. 2d at 977). The *Ludwig* court continued: "but it is founded in constitutional doctrine. 'Those who petition the government are generally

plaintiff stated a claim upon which relief could be granted, but where motions to strike were granted because the plaintiffs could not support their claims with adequate evidence.[230] "Thus, a special motion to strike can be used as a summary judgment motion."[231] Considering the two provisions as summary judgment rules,

> [section] 425.16 and Rule 56(f) have different objectives. Section 425.16 was designed to allow a party defending a SLAPP action to resolve the matter as early as possible, before extensive discovery is permitted. Rule 56(f), however, was designed to ensure that a nonmoving party will not be forced to defend a summary judgment motion without having an opportunity to marshal supporting evidence. These divergent goals can produce directly conflicting outcomes.[232]

To avoid a collision between the two rules, the court held that

> if a defendant [in a federal action] desires to make a special motion to strike based on the plaintiff's lack of evidence, the defendant may not do so until discovery has been developed sufficiently to permit summary judgment under Rule 56. Once the nonmoving party has been given the opportunity to conduct discovery, the special motion can be heard and attorney's fees will be available as provided in § 425.16(c).[233]

The next federal case decided a point equally important for federal practice under the statute: the availability of the anti-SLAPP remedy depends on the source of federal jurisdiction. The *Lockheed* case involved state law claims, prosecuted in federal court under diversity jurisdiction. In *Globetrotter Software, Inc. v. Elan Computer Group, Inc.*,[234] Judge Fogel held that federal question claims are not subject to the remedy, even if pendent state claims in the same action are subject to it.[235]

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immune from . . . liability.'" *Id.* (quoting Prof'l Real Estate Investors v. Columbia Pictures, Indus., Inc., 508 U.S. 49, 56, 112 S.Ct. 1920, 1926 (1993)).

230. *See Rogers*, 57 F. Supp. 2d at 980-81. The cases the court cited included *Beilenson v. Superior Court*, 44 Cal. App. 4th 944, 950-52, 52 Cal. Rptr. 2d 357, 362-63 (1996), *Church of Scientology v. Wollersheim*, 42 Cal. App. 4th 628, 655, 49 Cal. Rptr. 2d 620, 636 (1996), *Matson v. Dvorak*, 40 Cal. App. 4th 539, 46 Cal. Rptr. 2d 880, 886-87 (1995), and *Robertson v. Rodriguez*, 36 Cal. App. 4th 347, 356-57, 42 Cal. Rptr. 2d 464, 469-70 (1995).

231. *Rogers*, 57 F. Supp. 2d at 981.

232. *Id.* at 981-82.

233. *Id.* at 982. The Ninth Circuit, in its second substantive published decision on section 425.16, agreed with the court's reasoning and adopted its rule. *See* Metabolife Int'l, Inc. v. Wornick, 264 F.3d 832, 846 (9th Cir. 2001). Judge Rymer dissented. *See* 264 F.3d at 850 (Rymer, J., concurring in part and dissenting in part).

234. 63 F. Supp. 2d 1127 (N.D. Cal. 1999).

235. *Id.* at 1129-30.

IV. FUTURE DEVELOPMENTS

A. *In the Courts*

Even after eleven years not every question about California's anti-SLAPP law has been decided, nor has every desirable improvement been made. The Supreme Court decided four SLAPP cases in August 2002,[236] remarkable as the court had decided only two SLAPP cases in all of the previous decade.[237] As noted, the *Equilon* and *Cashman* cases decided one of the main issues still outstanding in SLAPP litigation—whether a SLAPP defendant need show a chilling effect or an intent to chill First Amendment rights. This clarified the law significantly, as this question affected every anti-SLAPP filing no matter what its procedural posture.

But other questions remain unsettled. One important surviving area of uncertainty concerns discovery. As noted, since its passage in 1992 section 425.16(g) has imposed a stay of discovery during the pendency of a motion to strike, provided that "[t]he court, on noticed motion and for good cause shown, may order that specified discovery be conducted. . . ."[238] A useful dictum in *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* states that a timely showing by the plaintiff that evidence needed to establish a prima facie case is under the control of the defendant warrants permitting discovery.[239] But beyond that there is little in the case law to guide the court in its exercise of discretion. Supreme Court attention to this topic is long overdue.

Bench and bar could also benefit from Supreme Court review of other more specialized issues.

Severable and "mixed" causes of action. Disharmonious (if not quite conflicting) decisions obscure the question of how to deal with a complaint where some causes of action are subject to a motion to strike and others are not. "[I]n *M.G. v. Time Warner, Inc.*,"[240] the

> court held that, where the plaintiffs had shown a probability of prevailing on some of their causes of action, the action as a whole could not be said to be without merit. Therefore it was unnecessary to consider whether the

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236. Wilson v. Parker, Covert & Chidester, 28 Cal. 4th 811, 123 Cal. Rptr. 2d 19 (2002), Equilon Enterprises, LLC v. Consumer Cause, Inc., 29 Cal. 4th 53, 124 Cal. Rptr. 2d 507 (2002), City of Cotati v. Cashman, 29 Cal. 4th 69, 124 Cal. Rptr. 2d 519 (2002), and Nevellier v. Sletten, 29 Cal. 4th 82, 124 Cal. Rptr. 2d 530 (2002).

237. Briggs v. Eden Council for Hope & Opportunity, 19 Cal. 4th 1106, 81 Cal. Rptr. 2d 471 (1999); Ketchum v. Moses, 24 Cal. 4th 1122, 104 Cal. Rptr. 2d 377 (2001). Although other Supreme Court cases mentioned the statute, they did so only tangentially.

238. CAL. CIV. PROC. CODE § 425.16(g) (West Supp. 2003). As noted above, *supra* note 177, the situation is different in federal court. *See, e.g.*, Rogers v. Home Shopping Network, Inc., 57 F. Supp. 2d 973, 985 (C.D. Cal. 1999).

239. 37 Cal. App. 4th 855, 868, 44 Cal. Rptr. 2d 46, 54 (1995).

240. 89 Cal. App. 4th 623, 637, 107 Cal. Rptr. 2d 504, 515 (2001).

> plaintiffs had shown they probably would prevail on the remaining causes of action. Instead, all of the causes of action should survive the defendants' SLAPP motion.[241]

But in *Shekhter v. Financial Indemnity Co.*,[242] the court held the statute "allows a single cause of action to be stricken. The fact that other claims remain does not bar a trial judge from granting a section 425.16 special motion to strike."[243] This seems the better view.[244] Also, in *ComputerXpress, Inc. v. Jackson*,[245] the court suggested the difference was that in *M.G.* the claims subject to strike were "factually or legally intertwined."[246] Is that the proper test? Moreover, in *Kids Against Pollution v. California Dental Ass'n*, the court decided that where a single cause of action alleges both protected and unprotected speech, it should be treated as protected if the protected expression forms a "significant part" of the cause of action.[247] And in *Finke v. Walt Disney Co.* the court held that "a defendant may move to strike a cause of action under section 425.16 if at least one of the predicate acts was an act in furtherance of the defendant's right to petition or free speech in connection with a public issue."[248] These holdings seem correct, but the rationales have become tangled, and it would help to have the Supreme Court clarify the law.

Newspaper as public forum. To what extent is a newspaper *ipso facto* a "public forum" for anti-SLAPP purposes? It has been said that the statute was

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241. ComputerXpress, Inc. v. Jackson, 93 Cal. App. 4th 993, 1004, 113 Cal. Rptr. 2d 625, 636 (2001) (characterizing *M.G.*).

242. 89 Cal. App. 4th 141, 106 Cal. Rptr. 2d 843 (2001).

243. *Id.* at 150, 107 Cal. Rptr. 2d at 849.

244. [T]he fact the court cannot strike particular allegations from the cause of action logically leads to the conclusion the cause of action must be subjected to SLAPP scrutiny if any of the allegations of conduct giving rise to liability involve conduct in furtherance of the defendant's rights of petition or free speech on a public issue.

Finke v. Walt Disney Co., 110 Cal. App. 4th 1210, 1224, 2 Cal. Rptr. 3d 436, 448 (2003) (footnote omitted).

245. 93 Cal. App. 4th at 1004, 113 Cal. Rptr. 2d at 636.

246. The court said:

> Under those circumstances, it can be said that, if one cause of action survives a SLAPP motion, the rest should too, because the causes of action are factually and legally intertwined. And because the causes of action are so closely related, even "cumulative," a probability of prevailing on one claim shows the rest of the claims are not without merit.
>
> Here, however, the claims are not factually or legally intertwined.

Id.

247. Kids Against Pollution v. Cal. Dental Ass'n, 134 Cal. Rptr. 2d 373 (2003) *review granted and opinion superseded by* No. S117156, 2003 WL 22232740, at *1 (Cal. Sept. 17, 2003).This case built on a similar holding in *Fox Searchlight Pictures, Inc. v. Paladino*, 89 Cal. App. 4th 294, 106 Cal. Rptr. 2d 906 (2001), and was explicitly followed in *Finke v. Walt Disney Co.*, 110 Cal. App. 4th 1210, 2 Cal. Rptr. 3d 436 (2003). In *Finke* the court reaffirmed the holding of *Fox* that "a plaintiff cannot frustrate the purposes of the SLAPP statute through a pleading tactic of combining allegations of protected and nonprotected activity under the label of one 'cause of action.'" 110 Cal. App. 4th at 1218, 2 Cal. Rptr. 3d at 443 (quoting. *Fox*, 89 Cal. App. 4th at 308, 106 Cal. Rptr. 2d at 918).

248. 110 Cal. App. 4th at 1227, 2 Cal. Rptr. 3d at 456.

intended to cover newspaper reporting generally,[249] and a newspaper even of very limited circulation may be a public forum,[250] but newspapers in general have not been explicitly held to be so,[251] and indeed have explicitly been held not to be so.[252] Certainly a newspaper's reporting of public affairs is free speech.[253] But dicta in the case law leave the broader issue uncertain.[254] The Supreme Court should clarify that a newspaper is a public forum, at least for anti-SLAPP purposes.[255]

Advertising. The courts of appeal have been inconsistent on the extent to which section 425.16 applies to advertising and statements about commercial products. For example, in *DuPont Merck Pharmaceutical Co. v. Superior Court*[256] statements about

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249. *See* Michael D. Stokes, *SLAPPing Down the Right to Trial by Jury: The SLAPP Legislation Confusion of 1992*, 14 CIV. LITIG. REP. 485, 487 (1992). Stokes participated in drafting the 1992 legislation, and his views in this article, drawn from his experience, have been cited by several courts—*see* Wilcox v. Superior Court, 27 Cal. App. 4th 809, 820, 33 Cal. Rptr. 2d 446, 452 (1994); Lafayette Morehouse, Inc. v. Chronicle Publ'g Co., 37 Cal. App. 4th 855, 863-64, 44 Cal. Rptr. 2d 46, 51 (1995) ("the language of the statute was broad enough to cover news reporting activity and that newspapers and publishers, who regularly face libel litigation, would be one of the 'prime beneficiaries' of section 425.16." (citing *Stokes, supra*)).

250. A good example is the housing development residents' newsletter in *Damon v. Ocean Hills Journalism Club*, 85 Cal. App. 4th 468, 476, 102 Cal. Rptr. 2d 205, 210 (2000): "The stated purpose of the Village Voice newsletter was to 'communicate information of interest and/or concern to the residents.' The newsletter was distributed to the approximately 3,000 Ocean Hills residents and neighboring businesses." The court declared that even if it were true that the paper was "essentially a mouthpiece for a small group of homeowners who generally would not permit contrary viewpoints to be published," *id.*, it would still be a public forum. *Id. See also, e.g.*, Metabolife Int'l, Inc. v. Wornick, 72 F. Supp. 2d 1160, 1165 (S.D. Cal. 1999) ("a widely disseminated television broadcast . . . is undoubtedly a public forum"); Sipple v. Found. for Nat'l Progress, 71 Cal. App. 4th 226, 238, 83 Cal. Rptr. 2d 677, 684 (1999) (*Mother Jones* magazine).

251. *See, e.g.*, *Lafayette Morehouse* ("*More I*"), 37 Cal. App. 4th at 863 n.5, 44 Cal. Rptr. 2d at 51 n.5, where the court specifically declined to rule on this question and said: "We find this . . . rationale . . . somewhat dubious. No authorities have been cited to us holding a newspaper printing allegedly libelous material is a 'place open to the public or a public forum.'" *Accord* Rogers v. Home Shopping Network, Inc., 57 F. Supp. 2d 973, 985 n.7 (C.D. Cal. 1999) ("newspaper should not be deemed a 'public forum' for purposes of § 425.16") (citing *More I*). Nevertheless *More I* held the news reporting at issue in the case to be covered by the statute. *Lafayette Morehouse, Inc.*, 37 Cal. App. 4th at 863-64, 44 Cal. Rptr. 2d at 51.

252. *See* Weinberg v. Feisel, 110 Cal. App. 4th 1122, 2 Cal. Rptr. 3d 385, 391 (2003): "Means of communication where access is selective, such as most newspapers, newsletters, and other media outlets, are not public forums." (citing Ark. Educ. TV v. Forbes, 523 U.S. 666, 678-680 (1998)); *see also* Condit v. Nat'l Enquirer, Inc., 248 F. Supp. 2d 945, 953 (E.D. Cal. 2002): "A newspaper should not be deemed a 'public forum; for purposes of § 425.16."

253. *See Lafayette Morehouse, Inc.*, 37 Cal. App. 4th at 864, 44 Cal. Rptr. 2d at 51; Braun v. Chronicle Publ'g Co., 52 Cal. App. 4th 1036, 1045, 61 Cal. Rptr. 2d 58, 62 (1997).

254. *See supra* note 251 and accompanying text.

255. At least a newspaper of general circulation. In *Weinberg v. Feisel*, 110 Cal. App. 4th 1122, 1131 n.4, 2 Cal. Rptr. 3d 385, 391 n.4 (2003), the court stated:

> Those cases establish beyond doubt that a private, selective-access newsletter is the very antithesis of a public forum. While it might be shown in a particular case that a newsletter is sufficiently open to general public access as to come within section 425.16, a private, selective-access newsletter cannot be found to be a public forum without such a showing. To the extent the decision in *Damon v. Ocean Hills Journalism Club,* suggests otherwise, it is contrary to the plain language of the statute, and we decline to follow it.

This identified conflict only underscores the need for authoritative resolution of the question.

256. 78 Cal. App. 4th 562, 567, 92 Cal. Rptr. 2d 755, 759 (2000).

Coumadin were held protected because they concerned a matter of public interest, but in *Consumer Justice Center v. Trimedica International, Inc.*[257] statements about Grobust were held not protected.[258] In *Nagel v. Twin Laboratories, Inc.*[259] the court held labeling and website claims unprotected as commercial speech, based in part on *Kasky v. Nike, Inc.*,[260] but left undecided the application of the commercial speech exception to more substantive speech. Now that the U.S. Supreme Court has postponed indefinitely its consideration of this issue in the *Kasky* case,[261] there is no reason for the California Supreme Court to delay any further an authoritative resolution of this question as it affects the reach of the anti-SLAPP law.[262]

Quasi-governmental bodies. In *Damon v. Ocean Hills Journalism Club*[263] the court of appeal made the remarkable statement that "[a] homeowners association board is in effect 'a quasi-government entity paralleling in almost every case the powers, duties, and responsibilities of a municipal government,'" and so proceedings before it are covered by section 425.16.[264] Is this really the law? An earlier case had extended anti-SLAPP coverage only on the basis that statements made in an association meeting "involved matters of sufficient public interest made in a sufficiently public forum to invoke the protection of section 425.16."[265] It is quite a step from that to recognizing a parallel "quasi-government." Another way to put the question is: when section 425.16(e)(1) and (2) speak of "legislative, executive, or judicial" proceedings or consideration or review by such a "body, or any *other* official proceeding authorized by law,"[266] must *any* such proceeding or body be authorized "by law" to qualify for anti-SLAPP coverage, or can informal "amateur" bodies (and their proceedings) really qualify also? And if so, how can we tell a quasi-government from a social club or a business? Does the constitutional right of petition (which specifically refers to government)[267] truly extend to such bodies? If the Supreme Court authoritatively expands the reach of the statute to cover private associations, the scope of anti-SLAPP litigation will inevitably expand with it.

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257. 107 Cal. App. 4th 595, 601, 132 Cal. Rptr. 2d 191, 194 (2003).

258. *See also* cases mentioned *supra* note 61.

259. 109 Cal. App. 4th 39, 48-49 134 Cal. Rptr. 2d. 420, 426-27 (2003).

260. 27 Cal. 4th 939, 119 Cal. Rptr. 2d 296 (2002).

261. See 123 S.Ct. 2554, 2554 (2003), dismissing certiorari as improvidently granted. The case has since been settled. *See, e.g.*, William McCall, *Nike Free-Speech Case Settled for $1.5 Million*, SEATTLE TIMES, Sept. 13, 2003.

262. For a discussion of some of the open issues in commercial speech, see Amber McGovern, Kasky v. Nike, Inc.: *A Reconsideration of the Commercial Speech Doctrine*, 12 DEPAUL-LCA J. ART & ENT. L. & POL'Y 333 (2002).

263. 85 Cal. App. 4th 468, 102 Cal. Rptr. 2d 205 (2000).

264. *Id.* at 475, 102 Cal. Rptr. 2d at 210; *see supra* note 105.

265. Foothills Townhome Ass'n v. Christiansen, 65 Cal. App. 4th 688, 695-96, 76 Cal. Rptr. 2d 516, 520 (1998).

266. CAL. CIV. PROC. CODE § 425.16(e)(1)-(2) (West Supp. 2003) (emphasis added).

267. U.S. CONST. amend. I "[T]o petition the *government* for redress of grievances." (emphasis added).

Voluntary dismissal. When a SLAPP plaintiff voluntarily dismisses its complaint before adjudication, what determination must a court make before awarding fees and costs to the defendant? As noted there is a conflict in the courts of appeal - in *Liu v. Moore*[268] the court required the merits of the dismissed action to be decided;[269] but in the earlier case of *Coltrain v. Shewalter*[270] the court held an independent determination on "which party realized its objectives in the litigation" would be sufficient.[271] *Coltrain* seems a more sensible solution, as it does not require adjudication of a moot issue with constitutional implications. But the Supreme Court should decide whether this approach is permissible.

Shareholders. In deciding whether a controversy about a company was a "public issue" or "issue of public interest" for anti-SLAPP purposes, several courts have considered the number of shareholders as a factor favoring coverage.[272] But does this factor work the other way? Presumably in a closely held family corporation the number of shareholders would not be enough to help with coverage. Where is the dividing line? We know 18,000 shareholders is enough[273]—is 1800? Can a quantitative division be anything other than arbitrary?[274]

Actions on released claims. As noted, in *Navellier v. Sletten*[275] the Supreme Court held 4-3 that an action on a released claim could qualify for anti-SLAPP protection. The three justices in dissent argued that as the claim had been released, petitioning on it was not "valid" and should not be protected. "Sletten no longer possessed the lawful right to sue Navellier, and thus his nonexistent right could not be chilled or abridged."[276] The dissent gave the example of *Paul for Council v. Hanyecz*, where money laundering, although in aid of an election, was not considered a "valid" exercise of constitutional rights so as to qualify for anti-SLAPP protection.[277] It should not be expected that *Navellier* has settled this issue once and for all—the Court may have opened a new debate on the same day

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268. 69 Cal. App. 4th 745, 754, 81 Cal. Rptr. 2d 807, 813 (1999).

269. *See also* Kyle v. Carmon, 71 Cal. App. 4th 901, 918-19, 84 Cal. Rptr. 2d 303, 314-15 (1999).

270. 66 Cal. App. 4th 94, 77 Cal. Rptr. 2d 600 (1998).

271. *Id.* at 107, 77 Cal. Rptr. 2d at 608; *see supra* note 184 and accompanying text.

272. *See* ComputerXpress, Inc. v. Jackson, 93 Cal. App. 4th 993, 1007-08, 113 Cal. Rptr. 2d 625, 639 (2001) (millions of shares); Global Telemedia Int'l, Inc. v. Doe 1, 132 F. Supp. 2d 1261, 1265 (C.D. Cal. 2001) (18,000 investors).

273. *See Global Telemedia Int'l,* 132 F. Supp. 2d at 1265.

274. And while on that subject, is there an inconsistency between the position in, for example, *Globetrotter Software, Inc. v. Elan Computer Group, Inc.*, 63 F. Supp. 2d 1127, 1130 (N.D. Cal. 1999), that statements by companies about their competitors are not covered, and those in, for example, *ComputerXpress, Inc.*, 93 Cal. App. 4th at 1007-08, 113 Cal. Rptr. 2d at 639 and *Global Telemedia International, Inc.*, 132 F. Supp. 2d at 1264-65, that if a company is publicly held with lots of shareholders, statements about it concern public issues? The issue was not mentioned in *Globetrotter Software*, but should it have mattered for anti-SLAPP purposes whether Elan was a publicly held corporation? Is a company subject to suit, for example for trade libel, for what it says about a sole proprietorship but not what it says about a public corporation?

275. 29 Cal. 4th 82, 124 Cal. Rptr. 2d 530 (2002).

276. 29 Cal. 4th at 98, 124 Cal. Rptr. 2d at 543 (Brown, J., dissenting).

277. *Id.* (Brown, J., dissenting).

it closed another one in *Equilon*. As the Supreme Court has so recently spoken on this issue it may be up to the Legislature to address the problem in its 2003-2004 Session.

Section 425.17. The new section, just added, contains many provisions whose meaning is not yet certain.[278] Just as the meaning of the statute was becoming clear on most points, a new and fertile source of dispute has been created. Supreme Court clarification would be welcome at the earliest possible moment.

B. *Statutory Reform*

In recent years there have been a few suggested programs for amending the anti-SLAPP statute. The original statute required the Judicial Council to report to the Legislature, by January 1, 1998, on the first five years' experience with the statute.[279] In the event, however, the Judicial Council found data-gathering difficult, and after the deadline had passed it retained the noted SLAPP scholars George Pring and Penelope Canan to prepare the report.[280] Pring and Canan prepared a report containing seven recommendations. These were:

(1) Requiring anti-SLAPP movants to file a form for statistical purposes;
(2) Extending the attorney fee provisions "to cover the full costs that filers have imposed on targets";
(3) Amending the statute to reinforce the judge's discretion regarding the deadline for filing the motion;
(4) Permitting immediate appeal of denial of an anti-SLAPP motion;
(5) Providing that the anti-SLAPP law does not apply to SLAPP-backs;[281]

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278. *See supra* note 9 and accompanying text.

279. "On or before January 1, 1998, the Judicial Council shall report to the Legislature on the frequency and outcome of special motions made pursuant to this section, and on any other matters pertinent to the purposes of this section." CAL. CIV. PROC. CODE § 425.16(i) (West Supp. 2003). Senate Bill 789, passed but vetoed in 2002, would have repealed this section as obsolete.

280. One reason it was difficult was that SLAPP suits look on their face like other suits—there is no way to distinguish them at filing so as to separate out SLAPPs as a universe for further study. For a detailed examination of the data available to Pring and Canan for their report, and their methods of analysis, see Tate, *supra* note 147, at 867-71, a more easily accessible source than the original report. *See* Penelope Canan & George W. Pring, *Anti-SLAPP Motions: A Report to the Legislature Pursuant to CCP 425.16(2) (sic) Under Contract to the Administrative Office of the Courts(,) Judicial Council of California (1998), Attachment 2 to Judicial Council of California, Administrative Office of the Courts: Legislative Report: Special Motions to Strike Strategic Lawsuits Against Public Participation ("SLAPP suits")—Code of Civil Procedure Section 425.16* (May 28, 1999), at 12.

281. A SLAPP-back is an action, in its purest form a cross-action in the original SLAPP suit, seeking restitution for the injury caused by a SLAPP suit. "The origin of this term is obscure—Pring and Canan trace it back through phrases in article titles as follows: '. . . SLAPP Defendant Slaps Back' (1988); 'SLAPPs are Back' (1989); 'Sierra Club SLAPPs Back' (1990); 'SLAPPed . . . ? SLAPP back' (1991)." Braun, *supra* note 8, at 990 n.101. For full citations, see PRING & CANAN, *supra* note 6, at 256 n.1.

(6) Amending the statute to control trial court lifting of the discovery stay; and

(7) Adding a provision for sanctions against filers and their attorneys.[282]

In its report to the Legislature, filed May 28, 1999, the Judicial Council rejected all seven suggestions.[283] Of these the first—requiring a record of filings for statistical purposes—was elaborated and enacted anyway, and now forms subsection (k) in the statute.[284] Likewise their fourth recommendation—that denial of an anti-SLAPP motion be immediately appealable—was adopted by the Legislature and is now subsection (j).[285] The sixth relates to the need for more certain discovery standards, already mentioned.[286] The other four suggestions have been largely ignored. They are all good ideas and deserve legislative attention.

Soon after the Judicial Council's report was filed, the present author published an account of the anti-SLAPP statute containing a different set of nine proposed reforms, with commentary on each (and on six more not recommended).[287] The recommended reforms included the following:

(1) Expanding the public interest and issue requirement by including "political expression" and making other technical changes in sections (a) and (e).

(2) Excepting the government enforcement exemption in subsection (d) from the recently added provision that the statute be broadly construed.

(3) Allowing for interlocutory appeal of grant or denial of a motion to strike. As noted, Pring and Canan made a similar suggestion, and this idea has since been enacted as subsection (j). The proposed reform would also have provided for entitlement to a stay of proceedings until one level of review had been completed, and would have allowed the Judicial Council to adopt rules giving priority to review of SLAPP decisions.

(4) Allowing for sanctions against SLAPP filers and their attorneys. Building on a Georgia statute,[288] this provision would have required the attorney and the plaintiff to verify at the time of filing that the action was properly grounded, that

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282. This summary of Pring and Canan's recommendations is adapted from Braun, *supra* note 8, at 1010. The full text of Pring and Canan's recommendations, with the Judicial Council's responses and the author's extensive comments, is found in Tate, *supra* note 147, at 871-84.

283. *See* Judicial Council of California, Administrative Office of the Courts: Legislative Report: Special Motions to Strike Strategic Lawsuits Against Public Participation ("SLAPP suits")—Code of Civil Procedure Section 425.16 (May 28, 1999), *reprinted in* Tate, *supra* note 147, at 871-84.

284. *See* CAL. CIV. PROC. CODE § 425.16(k) (West Supp. 2003) (added by Act of Oct. 10, 1999, ch. 960, section 1); *see also supra* note 14 and accompanying text.

285. *See id.* § 425.16(j) (added by Act of Oct. 10, 1999, ch. 960, section 1). "An order granting or denying a special motion to strike shall be appealable under Section 904.1." But if a trial court "denies a special motion to strike on the grounds that the action or cause of action is exempt pursuant to" newly added section 425.17, this does not apply. *Id.* § 425.17(e) (effective Jan. 1, 2004).

286. *See supra* note 239 and accompanying text.

287. *See* Braun, *supra* note 8, at 1045-57, for the text of the proposed statutory revisions and at 1057-70 for a detailed defense of each proposal.

288. GA. CODE ANN. § 9-11-11.1(b) (Harrison 1998).

the acts complained of were not privileged, and that the action was not brought for an improper purpose. This statement, which echoed the requirements of Rule 11 of the Federal Rules of Civil Procedure,[289] would have forced filers and their attorneys to confront these issues in advance of filing. As noted, Pring and Canan made a less ambitious suggestion toward the same end.

(5) Providing for a form notice to accompany every anti-SLAPP motion, and a register of actions involving these motions to be maintained by county clerks. The need for this reform has been largely (although not entirely) obviated by the addition of subsection (k) in 1999. Here too Pring and Canan made a less comprehensive proposal toward the same end.

(6) Allowing a complaint for malicious prosecution to be brought as a cross-action, the grant of a motion to strike being considered a favorable conclusion for this purpose, and creating a rebuttable presumption of lack of probable cause. The suggested reform as a whole would have allowed the tables to be turned swiftly on a SLAPP filer, and exposed it to compensatory damages for emotional distress and constitutional tort as well as punitive damages, without the need for a separate action for which no attorney fee award would have been available.[290] The Supreme Court has recently ruled that defeat of an anti-SLAPP motion, if decided on the issue of probability of success, can establish probable cause for a later malicious prosecution action.[291]

(7) A strengthened immunity statute, based on that suggested in a model law proposed by Pring and Canan.[292]

(8) A new Government Code provision allowing the Attorney General to intervene and assume the cost of defending a SLAPP suit.

(9) A new Revenue and Taxation Code provision rectifying the anomaly in the present state tax laws, under which the cost of bringing a SLAPP suit is deductible as a business expense, while the cost of defending it is not.[293]

As with Pring and Canan's unenacted suggestions, these too still merit the attention of the Legislature. Suggestions four (pre-filing verification), six

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289. FED. R. CIV. P. 11.

290. This proposal has a useful synergy with the sixth of Pring and Canan's proposals, to declare that the anti-SLAPP law does not apply to SLAPP-backs. At the moment an action against a SLAPP filer could itself encounter a motion to strike, based on the idea that the SLAPP filer was exercising his right to petition. The counter-argument is that the SLAPP filer's action was a sham. Compare *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609 (1972), where concerted activity to block competitors' regulatory applications was held a "sham" and thus subject to antitrust remedies even though it was "nominally" constitutionally protected petitioning activity, with *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 111 S.Ct. 1344 (1991) (genuine attempt to influence government action, distinguishing *California Motor Transport*). For a California SLAPP case approaching the same result in a different context, see *Paul for Council v. Hanyecz*, 85 Cal. App. 4th 1356, 1360-63, 102 Cal. Rptr. 2d 864, 866-68 (2001) (laundering of campaign contributions not a "valid" exercise of constitutional rights subject to anti-SLAPP protection).

291. *See* Wilson v. Parker, Covert & Chidester, 28 Cal. 4th 811, 820, 123 Cal. Rptr. 2d 19, 26 (2002).

292. *See* PRING & CANAN, *supra* note 6, at 203.

293. It was intended that the state tax reform be a model for a parallel federal tax reform. *See* Braun, *supra* note 8, at 1070.

(malicious prosecution cross-action) and nine (correction of tax inequity) would probably have the most markedly beneficial effects in preventing the abuse of SLAPP filing.

On February 21, 2002, Senator Sheila Kuehl (D., Los Angeles) who had sponsored the 1999 amendment to the statute, introduced SB 1651 in the Legislature.[294] Originally the bill did nothing more than abolish the obsolete subsection (i), requiring the 1998 report.[295] But two public interest organizations, the California Anti-SLAPP Project and Consumer Attorneys of California, urged Senator Kuehl to amend her bill to include several new provisions, which she did on May 7, 2002.[296]

The first of these provisions would have expanded the government enforcement exemption to exempt also (a) actions "brought [solely] in the public interest or on behalf of the general public," and (b) actions against sellers or lessors of goods or services, provided certain conditions existed.[297] Another new provision would have exempted from this carveout "any person enumerated" in two long lists: the state constitutional freedom of the press provision, and the "newsmen's privilege" section of the Evidence Code.[298]

During legislative maneuvering late in the session the provisions of SB 1651 became incorporated into SB 789.[299] It was passed on August 31, 2002 but vetoed on September 30.[300] On February 20, 2003 Senator Kuehl introduced a new bill, SB 515, which passed and was signed into law on September 6, enacting the principal provisions of the former bills.[301] It also made the general stay and appeal

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294. SB 1651 (2002) (as introduced on Feb. 21, 2002, but not enacted).

295. *See id.*

296. *Id.* (as amended on May 7, 2002, but not enacted).

297. *Id.* § 1 (Cal. 2002).

298. *Id.*

299. *Compare* SB 789 (2001) (as amended Aug. 15, 2002, but not enacted), *with* SB 1651 (2002) (as amended May 7, 2002, but not enacted).

300. In his veto message Governor Davis said the bill "was a product of a late in the session 'gut and amend' and I am not satisfied that it strikes the right balance." He added that he "would be willing to consider legislation that provides for expedited review of an appeal granting an anti-SLAPP motion." Governor's Veto Message, *supra* note 218.

301. The 2002 bill contained some other provisions not found in the bill which passed into law in 2003. It would, for example, have enacted a legislative note, to read:

> In enacting the amendments to this section made by Senate Bill 1651 of the 2001-02 Regular Session, it is the intent of the Legislature to respond in disapproval to the holding of *DuPont Merck Pharm. Co. v. Superior Court* (2000) 78 Cal. App. 4th 562, in that a drug manufacturer invoked the use of this section to defend against a class action suit that alleged a violation of the Consumers Legal Remedies Act (Title 1.5 (commencing with Section 1750) of Part 4 of Division 3 of the Civil Code) and Section 17500 of the Business and Professions Code, including allegations of the publishing and dissemination of false and misleading information to regulatory bodies, the medical profession, and the public.
>
> It is further the intent of the Legislature that the applicability of this section does not restrict the ability of the news media to comment on matters of public significance and gather and disseminate information as news to the public, and is not limited to the news media. It is further the intent of the Legislature that this act does not apply to the dissemination of ideas or expression in any book or academic journal.

provisions, which apply to a denied motion, inapplicable when it is denied on this basis.[302] The principal purpose of these provisions is to carve out an exception for commercial speech. The problem as perceived in the Legislature was that when large companies are sued for their commercial speech (or on other grounds such as products liability) they sometimes respond with an anti-SLAPP motion, which can be effective tactically even if it ultimately fails.[303] The new legislation withholds the anti-SLAPP maneuver from companies exercising commercial speech while retaining it for a long list of people and entities exercising

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S.B. 1651, § 1 (Cal. 2002).

302. As amended on May 1, 2003, SB 515 moved the new exemption provisions proposed for section 425.16 to a new section 425.17. This new section had its own preamble, section 425.17(a), reading

> The Legislature finds and declares that there has been a disturbing abuse of Section 425.16, the California Anti-SLAPP Law, which has undermined the exercise of the constitutional rights of freedom of speech and petition for the redress of grievances, contrary to the purpose and intent of Section 425.16. 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 or Section 425.16.

SB 515 (2003) (as amended May 1, 2003) (approved by Governor Gray Davis Sept. 6, 2003, filed with Secretary of State Sept. 8, 2003).

303. According to the sponsor, Consumer Attorneys of California (CAOC), this bill is needed to stop corporate abuse of the anti-SLAPP statute and return to its original purpose of protecting citizens' rights of petition and free speech. CAOC asserts that in recent years a growing number of large corporations have inappropriately invoked the anti-SLAPP statute to delay and discourage consumer and other litigation against them by filing meritless anti-SLAPP motions. . . . CAOC also cites a number of recent published opinions where corporate defendants brought anti-SLAPP motions. Although each of these motions was unsuccessful, CAOC contends that they delayed the litigation because of the automatic discovery stay and interlocutory appeal provisions of the anti-SLAPP statute. [¶] Proponents contend that the increased use of meritless anti-SLAPP motions by corporate defendants subverts the purpose of the anti-SLAPP law. CAOC argues that the anti-SLAPP statute was created in direct response to legislative concern about the filing of lawsuits primarily to chill the valid exercise of constitutional rights, and that the anti-SLAPP protections were intended to protect citizens from expensive retaliatory lawsuits that are brought to chill their valid exercise of their free speech and petition rights. Proponents argue that this chilling effect does not apply when a large corporate defendant has massive resources that they may rely upon in litigation, unlike the private citizen.

ASSEMBLY FLOOR ANALYSIS OF SB 515, at 2-3 (July 8, 2003), *available at* http://www.leginfo.ca.gov/pub/bill/sen/sb_0501-0550/sb_515_cfa_20030709_163817_asm_floor.html (last visited Oct. 17, 2003) (copy on file with the *McGeorge Law Review*). A much fuller set of legislative history materials may be found by entering the bill number at www.leginfo.ca.gov.

The Analyst's Report continues:

> This bill does exclude certain types of actions from the anti-SLAPP special motion to strike procedure. While it may be asserted that this distinction disadvantages the excluded speech, it should be remembered that the anti-SLAPP motion is designed to advance the significant governmental interest in protecting the exercise of free speech and petition rights by citizens and community groups who are subject to SLAPP suits. In other words, even if this bill excludes some commercial speech from the anti-SLAPP motion, there is a countervailing governmental interest in protecting the non-commercial speech of individual citizen and small community that is targeted by SLAPP suits. It is also important to keep in mind that this bill does not attach liability to any speech, nor does it override existing law, which may provide a defense against liability based on the nature of the speech. Moreover, it is also true that a party who believes that legal claims have been asserted against them because of the exercise of constitutional rights may still assert a demurrer or other dispositive motion, even if the special anti-SLAPP procedure is not available.

Id. at 3.

traditional First Amendment speech. As adopted, it may have the effect of deliberately unbalancing a statute which up until now has operated more or less the same way for everyone.[304] The exemptions may cause as many problems as they solve, and will be a fruitful source of litigation for some time to come.[305]

V. CONCLUSION

Although there remains ample scope for the Legislature to improve California's anti-SLAPP remedy, eleven years after its passage it appears to be well established and working more or less as it was intended to do. And while difficult issues remain, and will no doubt continue to arise as they do with every statutory scheme of any complexity, it seems fair to say that the early period of uncertainty is now over, and (with the obvious exception of the new statutory exemptions just added) there is now an ample body of precedent sufficient to guide bar, bench and litigants in most areas of practice under the statute.

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304. An earlier Legislative Analyst's Report (on June 30, 2003) characterized the opposition position as follows:

> Opponents argue that the bill impermissibly affects commercial speech, and will subject businesses to harassing SLAPP suits intended solely to attack their exercise of constitutional free speech and petition rights. As a result, opponents contend, businesses will be subject to many meritless lawsuits and will be coerced into settling or incurring unnecessary litigation costs simply for exercising their constitutional rights.

ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 515, at 2 (July 1, 2003), *available at* http://www.leginfo.ca.gov/pub/bill/sen/sb_0501-0550/sb_515_cfa_20030630_121334_asm_comm.html (last visited Oct. 17, 2003) (copy on file with the *McGeorge Law Review*).

305. It also moves back toward a view of the statute that conditions its application on the original paradigm of protecting small activists from large corporations. This view has been rejected by the courts, based on the scrupulously even-handed language of the statute before the most recent revision. *See, e.g.*, cases cited *supra* note 29 and accompanying text.

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