

# ANTI-SLAPP LITIGATION

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**October 2022**



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This book should be cited as Burke, Anti-SLAPP Litigation (The Rutter Group 2022).

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## About the Author

**Thomas R. Burke** is a partner with Davis Wright Tremaine LLP in San Francisco where he practices media law, intellectual property, and First Amendment law. Mr. Burke defends and counsels clients (including journalists, authors, publishers, networks, studios, and Internet companies) in libel, invasion of privacy, right of publicity, and IP litigation, including Internet content liability matters. He provides production related counseling for entertainment clients and vets scripts, books and documentaries. Mr. Burke also represents clients seeking access to public records and to government proceedings. For nearly two decades, Mr. Burke also taught media law at the Graduate School of Journalism, the University of California, Berkeley.

Mr. Burke has successfully used the anti-SLAPP statute hundreds of times in a variety of factual settings since the statute was enacted. He was lead defense counsel in *Taus v. Loftus*, 40 Cal. 4th 683 (2007); *Club Members for an Honest Election v. Sierra Club*, 45 Cal. 4th 309 (2008); and *Simpson Strong-Tie Co., Inc. v. Gore*, 49 Cal. 4th 12 (2010), in which the California Supreme Court interpreted the anti-SLAPP statute. Mr. Burke also represented clients in the following published anti-SLAPP matters: *Seelig v. Infinity Broadcasting Corp.*, 97 Cal. App. 4th 798 (2002); *S. B. Beach Properties v. Berti*, 39 Cal. 4th 374 (2006) (counsel for amici); *Overstock.com, Inc. v. Gradient Analytics, Inc.*, 151 Cal. App. 4th 668 (2007) (counsel for amici); *Stewart v. Rolling Stone LLC*, 181 Cal. App. 4th 664 (2010); *Rivera v. First DataBank, Inc.*, 187 Cal. App. 4th 709 (2010); *Young v. CBS Broadcasting, Inc.*, 212 Cal. App. 4th 551 (2012); *Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414 (9th Cir. 2014); *Hardin v. PDX, Inc.*, 227 Cal. App. 4th 159 (2014); *Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328 (D.C. Cir. 2015) (counsel for amici); *Brodeur v. Atlas Entertainment, Inc.*, 248 Cal. App. 4th 665 (2d 2016) (counsel for amici); *Baral v. Schnitt*, 1 Cal. 5th 376 (2016); (counsel for amici); *Park v. California State University*, 2 Cal. 5th 1057 (2017) (counsel for amici); *Resolute Forest Products, Inc. v. Greenpeace International*, 302 F. Supp. 3d 1005 (N.D. Cal. 2017) (counsel for GPI); *Cline v. Reetz-Laiolo*, 329 F. Supp. 3d 1000 (N.D. Cal. 2018) (counsel for Cline plaintiffs and defendants); *Rand Resources, LLC v. City of Carson*, 6 Cal. 5th 610, 243 Cal. Rptr. 3d 1, 433 P.3d

899 (Cal. 2019) (counsel for media amici); *Resolute Forest Products, Inc. v. Greenpeace International*, 2019 WL 8377690 (N.D. Cal.) (counsel for GPI); *Sonoma Media Investments, LLC v. Superior Court of Sonoma County*, 34 Cal. App. 5th 24 (1st Dist. 2019) (counsel for defendants); *FilmOn.com Inc. v. DoubleVerify Inc.*, 7 Cal. 5th 133, 246 Cal. Rptr. 3d 591, 439 P.3d 1156 (Cal. 2019) (counsel for amici); *Alfasigma USA Inc. v. First Databank, Inc.*, 398 Supp. 3d 578 (N.D. Cal. 2019) (defense counsel); *Planet Aid v. Center for Investigative Reporting*, 2021 WL 1110252 (N.D. Cal.), 44 F. 4th 918 (9th Cir. 2022) (defense counsel); and *CoreCivic Inc. v. Candide Group LLC*, 2021 WL 1267259 (N.D. Cal.), 2022 WL 3724307 (9th Cir.) (defense counsel); *Serova v. Sony Music Entertainment*, 13 Cal. 5th 859 (2022) (counsel for media amici); *Geiser v. Kuhns*, 2022 WL 3711582 (Cal. 2022). Mr. Burke was an observer and advisor to the Uniform Law Commission’s effort to enact the Uniform Public Expression Protection Act (“UPEPA”), a model anti-SLAPP statute, now being considered for adoption in states across the nation.

With over 30 years of trial and appellate court experience, Mr. Burke has been recognized in First Amendment and Media Law in *Best Lawyers in America* from 2003 to present and nationally since 2018 to present. In 2015, 2021, and 2023, *Best Lawyers* recognized Mr. Burke as First Amendment Lawyer of the Year for Litigation in San Francisco. He is also listed as one of “America’s Leading Lawyers for Business” in Media & Entertainment Litigation (California) by *Chambers USA*, 2003 to present and nationally since 2018. Since 2004, Mr. Burke has also been recognized by his peers as a “Super Lawyer” in First Amendment Law in Northern California. Mr. Burke is a long-time legal advisor to the First Amendment Coalition and to Reveal – from the Center for Investigative Reporting. He is also a member of the Lawyers Committee for Civil Rights of the San Francisco Bay Area.

A native of Hastings, Nebraska, Mr. Burke majored in journalism and earned his Bachelor’s degree, *magna cum laude*, in 1984 from Arizona State University and his J.D., *magna cum laude*, in 1989 from the University of San Francisco School of Law. Mr. Burke was an extern law clerk to the Hon. Judge Marilyn Hall Patel, of the U.S. District Court for the Northern District of California. Mr. Burke and his family live in Albany, CA, and Rio Novo do Sul, Espirito Santo, Brazil.

## Acknowledgements

Mr. Burke is indebted to Bill Rutter for providing early guidance in support of this book and for the assistance of Kalman Zemleny with The Rutter Group for shepherding it to publication. Special thanks to Morgan McCall and Andrew Ruffing for editing and organization assistance.

Jason Callan, Allan Patterson, Howard Jones, Bret Masterson, Natasha Majorco, Jo Ellen Rein, Thomas Steele and Sean Woo provided extraordinary administrative support for the database of anti-SLAPP decisions used to prepare this book.

Judy Alexander, Ambika Doran, Jeff Glasser, Laura Hoehn, Paul Kleven, Linda Lye, and Rochelle Wilcox provided invaluable comments and suggestions for the original manuscript.

I am privileged to work with my renowned colleagues in the media practice at Davis Wright Tremaine LLP. This book is inspired by their decades of First Amendment litigation on behalf of the firm's remarkable clients.

I am grateful for the enduring patience and love of Eliana H. Elias, Sofia H.E. Burke and Julian H.E. Burke.



## How to Use this Book

This book is designed to be a toolkit for anti-SLAPP litigation. Hundreds of published appellate decisions involving the anti-SLAPP statute decided by California’s appellate courts and the Ninth Circuit Court of Appeals are analyzed and organized by key provisions of Code Civ. Proc. § 425.16.

**Chapter One** provides an overview of Code Civ. Proc. § 425.16 and the many features of the statute.

**Chapter Two** outlines the various procedural rules with anti-SLAPP motions, including timing issues, the automatic stay of discovery and respective burdens, as well as appellate court procedures for anti-SLAPP motions and how anti-SLAPP motions are handled in federal court.

**Chapter Three** summarizes the showing a defendant must make to trigger application of the anti-SLAPP statute in what is often referred to as “prong one” of the statute. This chapter reviews the extensive body of published case law that has developed concerning what actions are subject to the anti-SLAPP statute, including discussion of the four statutory categories of activity and conduct that is expressly protected by the statute, as well as other prong-one considerations. Chapter Four should be consulted with this chapter.

**Chapter Four** features citations to hundreds of published appellate anti-SLAPP decisions in which the anti-SLAPP statute was triggered (or not), and is organized by individual causes of action, in alphabetical order. Case citations appear in chronological order to illustrate how the anti-SLAPP statute has developed over time and to help practitioners to quickly locate relevant case citations. Use this chapter to locate the appellate court decisions associated with over 40 different causes of action where anti-SLAPP statute protection may be available in chronological order. The heading “compare” identifies those decisions where the anti-SLAPP statute did not apply to the facts of a particular case.

**Chapter Five** summarizes the “merits” showing that a plaintiff must make in “prong two” to defeat an anti-SLAPP motion. This chapter reviews the plaintiff’s pleading and ev-

identifiary burdens in prong two and includes summaries of published appellate anti-SLAPP decisions that have been decided on the merits, and is organized by individual causes of action. The heading “compare” identifies those decisions where the plaintiff was able to defeat an anti-SLAPP motion.

**Chapter Six** outlines the statutory (Code of Civ. Proc. §§ 425.17 et seq.) and judicially created exemptions to Code Civ. Proc. § 425.16 in which the anti-SLAPP statute is unavailable.

**Chapter Seven** includes several anti-SLAPP forms.

**Chapter Eight** includes the text of California’s anti-SLAPP statute—Code of Civ. Proc. § 425.16 et. seq.—and anti-SLAPP statutes in 31 other states, the District of Columbia, and Guam, many of which are modeled on and/or influenced by California’s anti-SLAPP statute.

**Methodology:** The contents of this book are based on the author’s comprehensive review of all anti-SLAPP decisions published by the California Supreme Court, California Courts of Appeal, and the Ninth Circuit Court of Appeals since Code Civ. Proc. § 425.16 was enacted in 1992. Although literally thousands of trial court and unpublished appellate court decisions interpreting the anti-SLAPP statute have been issued by California courts over the past two decades, this book summarizes only those opinions that courts have designated as having precedential value. The author maintains a database of published anti-SLAPP appellate decisions and is committed to annually updating this book so as to chronicle the burgeoning body of anti-SLAPP appellate decisions issued by state and federal courts in California. Future editions of this book will also address case law in other states with anti-SLAPP statutes.

The author welcomes questions and comments through email at [thomasburke@dwt.com](mailto:thomasburke@dwt.com).



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