

Chapter 1

Introduction

- § 1:1 Scope
- § 1:2 Prong one/step one
- § 1:3 Prong two/step two
- § 1:4 Exemptions—When the anti-SLAPP statute is not available
- § 1:5 Terminology

KeyCite®: Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

§ 1:1 Scope

Code of Civil Procedure §§ 425.16 et seq.—California’s “anti-SLAPP” statute—is the frontline defense against any action involving petitioning or free speech. In 1992, the California Legislature enacted Civ. Proc. Code § 425.16 to address a “disturbing increase in litigation designed to infringe” free speech and petitioning activities through the filing of a SLAPP (Civ. Proc. Code § 425.16, subd. (a)), an acronym for a “strategic lawsuit against public participation.” The anti-SLAPP statute is available in state court and against state claims filed in federal court. It was enacted to “nip SLAPP litigation in the bud” (*Braun v. Chronicle Publishing Co.*, 52 Cal. App. 4th 1036, 1042, 61 Cal. Rptr. 2d 58, 115 Ed. Law Rep. 989, 25 Media L. Rep. (BNA) 1594 (1st Dist. 1997)) through a very early and very fast summary judgment-like procedure that allows defendants (including cross-defendants) to file a “special motion to strike” to dismiss entire complaints (or specific causes of action) or mere portions of a cause of action, making the plaintiff respond before he or she may have an opportunity to conduct discovery to avoid the costs and delay that chill the exercise of constitutionally protected rights. As one appellate court put it, “[t]he point of the anti-SLAPP statute is that you have a right *not* to be dragged through the courts because you exercised your constitutional rights.” (*People ex rel. Lockyer v. Brar*, 115 Cal. App. 4th 1315, 1317, 9 Cal. Rptr. 3d 844 (4th Dist. 2004).)

Once a defendant files a special motion to strike, the following happens:

- An automatic stay of discovery; absent court permission, no discovery is permitted (Civ. Proc. Code § 425.16, subd. (g)); see § 2:50.
- Amendments to the complaint are not permitted, and the plaintiff cannot dismiss the complaint without facing mandatory attorney's fees; see §§ 2:58; 2:90; 2:91.
- The court hears the motion within 30 days or as soon as docket conditions permit (Civ. Proc. Code § 425.16, subd. (f)); see §§ 2:41 to 2:42.
- If the defendant shows that the plaintiff's action arises from the defendant's petitioning or free speech activities, the plaintiff must prove he or she has pleaded and presented a legally sufficient claim supported by admissible evidence demonstrating that "there is a probability" that the plaintiff will prevail on the action (Civ. Proc. Code § 425.16, subd. (b)(1)); see §§ 5:3 to 5:5.
- If the motion is granted, then the action is dismissed and the defendant recovers his or her attorney's fees and costs (Civ. Proc. Code § 425.16, subd. (c)(1)); see § 2:85.
- If the motion is denied, the defendant has an automatic right of appeal (see § 2:69) and activity in the trial court is stayed pending the appeal (Civ. Proc. Code § 425.16, subd. (i)). See § 2:77.

Because of its strategically powerful features, the anti-SLAPP statute is regularly used in the defense of petitioning and free speech activities arising in a variety of different causes of action. See Chap. 4 (Appendix of Causes of Action). "A plethora of appellate litigation has made the SLAPP acronym a household word—at least in legal households." (*Paterno v. Superior Court*, 163 Cal. App. 4th 1342, 1357 n.1, 78 Cal. Rptr. 3d 244, 36 Media L. Rep. (BNA) 1882 (4th Dist. 2008).) Beyond California, dozens of states have enacted statutes with varying degrees of protection for defendants. See Chapter 8—State Anti-SLAPP Statutes. This book is designed to help make sense of and organize the large and rapidly growing body of anti-SLAPP published appellate case law. This book summarizes hundreds of published California Court of Appeal and California Supreme Court anti-SLAPP decisions as well as anti-SLAPP opinions of the Ninth Circuit Court of Appeals. Practitioners should also consider reviewing the *literally hundreds* of additional *unpublished* anti-SLAPP opinions that have been decided by California's appellate courts, in particular, those rendered by the appellate court that will hear any appeal of their

case. It is organized by key elements of the anti-SLAPP statute, an overview of which follows.

§ 1:2 Prong one/step one

“Resolution of an anti-SLAPP Motion requires a court to engage in a two-step process.” (*Jarrow Formulas, Inc. v. LaMarche*, 31 Cal. 4th 728, 3 Cal. Rptr. 3d 636, 74 P.3d 737 (2003).) In the first step or prong, the defendant must show that the conduct underlying the plaintiff’s cause of action or portions of the cause of action that are asserted as grounds for relief—arises from the defendant’s constitutional rights of free speech or petition. (Civ. Code § 425.16, subd. (b)(1).); *Baral v. Schnitt*, 1 Cal. 5th 376, 395, 205 Cal. Rptr. 3d 475 (Cal. 2016). See § 3:10.

In prong one, “the focus of the statute is not the form of plaintiff’s cause of action, but the defendant’s activity that gives rise to the asserted liability.” (*Midland Pacific Bldg. Corp. v. King*, 157 Cal. App. 4th 264, 272, 68 Cal. Rptr. 3d 499, 64 A.L.R.6th 775 (2d Dist. 2007).) The statute identifies four categories of protected petitioning and free speech activities. (Civ. Proc. Code § 425.16, subd. (e)(1) to (4)). The law expressly provides that it “shall be construed broadly [(Civ. Proc. Code § 425.16, subd. (a))] to encourage participation in free speech and petition activities.” (*Wanland v. Law Offices of Mastagni, Holstedt & Chiurazzi*, 141 Cal. App. 4th 15, 22, 45 Cal. Rptr. 3d 633 (3d Dist. 2006).) A large body of appellate case law has developed concerning conduct by a defendant that is within prong one and protected by the anti-SLAPP statute. See Chap. 4 (Appendix of Causes of Action). Courts have dismissed a wide variety of causes of action using the statute. See §§ 5:36 to 5:82.

If the defendant cannot satisfy prong one, the court will deny the motion without proceeding to prong two.

§ 1:3 Prong two/step two

In the second prong or step, the burden shifts to the plaintiff to prove that he or she has a legally sufficient claim *and* to prove with “admissible evidence” a “probability” that the plaintiff will prevail on the claim. This is similar to a summary judgment standard in which the plaintiff’s claim (or entire complaint) must be “legally sufficient and supported by a prima facie showing of facts to sustain a favorable judgment if plaintiff’s evidence is credited.” (*Navellier v. Sletten*, 29 Cal. 4th 82, 88–89, 124 Cal. Rptr. 2d 530, 52 P.3d 703 (2002).) See §§ 5:3 to 5:5. Because the plaintiff must demonstrate the substantive merits of his or her claim in prong two, a broad swath of substantive law (and evidence) is analyzed by courts in prong two. See §§ 5:36 to 5:82.