STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION (“SLAPP”)

Code of Civil Procedure (“C.C.P.”) § 425.16

Ariel J. Sabban, Esq.
ariel@arciplaw.com

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La Jolla Bar Association

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Introduction and Definitions

- *Sierra Club* v. *Butz* (1972, N.D. CA) 349 F.Supp. 934 [Group opposed to logging sued loggers and loggers' counterclaim for group's petitioning activities disposed of on First Amendment grounds]

- *Davis/McCarroll/Hayek* cases in Oceanside

- SLAPP" = Strategic Lawsuit Against Public Participation (a term coined by sociologists)

- "anti-SLAPP motion" = a motion aimed at combating SLAPPs

- C.C.P. § 425.16(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."

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Purpose of the Anti-SLAPP Statute

- Expose and dismiss lawsuits that chill speech/petition rights early.

- Speech/petition "cognate rights." (*Thomas v. Collins* (1945) 323 U.S. 516, 530 [Speech, press, assembly, and petition are "cognate rights" and inseparable])

- Under United States ***and*** California Constitutions (C.C.P. § 425.16(b)(1)) (State constitution can be more protective of First Amendment rights than federal constitution) (*Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899, 908-910)

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Application

- **State court**, except

  -*limited civil cases* per C.C.P. § 92(d) (*1550 Laurel Owner's Assn., Inc. v. Appellate Division of Superior Court* (2018) 28 Cal.App.5th 1146, 1154-1158)

  -private arbitration (*Sheppard* v. *Lightpost Museum Fund* (2006) 146 Cal.App.4th 315, 322-324 ["lawsuits"]; and

- **Federal court** (parts not operative in federal court—does not apply to federal claims, and early motion (f) and discovery stay (g) are not applied as in conflict with FRCP 56) (*Metabolife, Int'l, Inc. v. Wornick* (2001, 9th Cir.) 264 Fed.3d 832, 846)

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SLAPP Paradigm

- SLAPPs are brought to obtain an economic advantage, preoccupy, punish, or deter defendant, not to vindicate legal rights. Lack of merit a characteristic. (*Wilcox* v. *Superior Court* (1994) 27 Cal.App.4th 809, 816, disapproved on other grounds by *Equilon Enterprises* v. *Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5)

- Typically, citizen opposed to development who protests, writes letters, speaks at official proceedings, and developer responds with a SLAPP suit (defamation, business torts) (*Dixon v. Superior Court* (1994) 30 Cal.App.4th 733, 741)

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Why do we need an anti-SLAPP Statute?

- Standard pleading-based motions (demurrers, motions to strike, etc.) were inadequate in combating SLAPP suits (*Wilcox*, *supra*, 27 Cal.App.4th 809, 821), the statute recognizes that a plaintiff's complaint is not trustworthy indicia of the complaint's *bona fides*, and thus as a procedural screening mechanism the statute looks through the pleadings as supplemented by affidavits to the actual substance of the claim. (*Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1286)

- Accordingly, the anti-SLAPP statute has been described as a **summary judgment motion in "reverse"** since instead of defendant showing the claim is meritless the plaintiff must substantiate the claim with evidence. (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 719)

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Intent

- C.C.P. § 426.16(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.*"

- The italicized portion above was added in 1997 in response to cases that narrowly interpreted the statute's reach. (*Briggs* v. *Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1119-1121)

- "The legislative intent is best served by an interpretation which would require a **plaintiff to marshal facts sufficient to show the viability of the action *before* filing a** SLAPP suit." (*Ludwig* v. *Superior Court* (1995) 37 Cal.App.4th 8, 16)

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Advantages

-**Early motion hearing** (60 days from service, 30 days from filing) (C.C.P. § 425.16(f))
-**Stay on discovery** (C.C.P. § 425.16(g))
-**No amending complaint** (*Simmons* v. *Allstate Ins. Co.* (2001) 92 Cal.App.4th 1068, 1073-1074)
-**Striking of allegations or dismissal of claims** (*Dowling* v. *Zimmerman* (2001) 85 Cal.App.4th 1400, 1404)
-**Preferential attorney's fees** (C.C.P. § 425.16(c))
-**Immediate appeal** (C.C.P. § 425.16(i))
-**Plaintiff must also post a bond to appeal an adverse ruling**. (*Dowling* v. *Zimmerman* (2001) 85 Cal.App.4th 1400, 1432)
-**Automatic stay of case on appeal (acts taken in violation void)** (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 186, 198)
-**Implied stay until appeal if the motion is denied** (*Roberts* v. *Los Angeles Co. Bar Assn.* (2003) 105 Cal.App.4th 604, 613).

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TRAP

- Malpractice to fail to advise client of SLAPP risk before filing suit. (*Mireskandari v. Edwards Wildman Palmer LLP* (2022) 77 Cal.App.5th 247, 257-264)

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Who is Protected

Any “person” sued for acts in furtherance of First Amendment rights, including:

-**individuals** (*Mattel, Inc. v. Luce, Forward, Hamilton & Scripps* (2002) 99 Cal.App.4th 1179, 1188)
-**corporations (including successors)** (*Daniell* v. *Riverside Partners I, LP* (2012) 206 Cal.App.4th 1292, 1300-1302)
-**nonprofits** (*Governor Gray Davis Committee v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 456)
-**government bodies/officials** (*Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 17)
-**political candidates** (*Beilenson v. Superior Court* (1996) 44 Cal.App.4th 944, 949–950)
-**attorneys in litigation** (*Jespersen v. Zubiate–Beauchamp* (2003) 114 Cal.App.4th 624, 629)
-**real parties in interest** (e.g., mandamus proceedings) (*Iloh v. Regents of the University of California* (2023) 94 Cal.App.5th 947, 955-956)

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Deadlines (60 Day Deadline)

- **60 Day Deadline.** An anti-SLAPP motion has to be brought (filed) within 60 days of service of the complaint (unless leave is granted to file a late motion). (C.C.P. § 425.16(f)) But, leave granted more than two years after complaint filed an abuse of discretion. (*Platypus Wear, Inc.* v. *Goldberg* (2008) 166 Cal.App.4th 772, 776)

- Amending the complaint reopens the 60 day time period which runs from service of the most recent complaint. (*Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298, 314)

- Service by mail also extends the deadline pursuant to C.C.P. § 1013(a), e.g., an extra 5 days is added if the mailing address is in California. (*Lam v. Ngo* (2001) 91 Cal.App.4th 832, 842)

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Deadlines (30 Day Deadline)

• **30 Day Deadline.** An anti-SLAPP motion has to be set for a hearing **30 days after it is served** unless the docket conditions of the court require a later hearing. (C.C.P. § 425.16(f))

• Defendant who does not obtain hearing date within 30 days after filing anti-SLAPP motion has burden of showing condition of docket required later hearing. (*Barak v. Quisenberry Law Firm* (2006) 135 Cal.App.4th 654, 659–660)

• ***Comment:*** The court should be reminded of this requirement and if a later date is set then either an *ex parte* application to advance the hearing date should be pursued or a declaration should be filed by counsel stating that an earlier hearing date was requested but the docket conditions did not allow it.

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Process

- C.C.P. 425.16(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."

- "**Cause of action**" and **parsing**: *Baral v. Schnitt* (2016) 1 Cal.5th 376, 381-385, settled a longstanding conflict over whether the anti-SLAPP statute can parse a cause of action. **It can.** "Cause of action" for anti-SLAPP purposes means claim for relief based on protected conduct (disregarding unprotected conduct) rather than individual counts within a pleading. (*Id.* at 381-382)

- ***Caveat.*** If defendant wants a surgical analysis, then it is part of defendant's initial burden to identify those allegations and link them to claims for relief. Failure to do so allows a trial court to deny the motion if one claim did not arise from protected conduct. (*Park v. Nazari* (2023) 93 Cal.App.5th 1099, 1106-1109)

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Two Prong Analysis (Threshold then Merits)

- **First Threshold** and if met then **Second Merits** Prong. This is a ***burden shifting*** procedure:

- Litigation of an anti-SLAPP motion involves a two-step process. First, "the moving defendant bears the burden of establishing that the challenged allegations or claims 'aris[e] from' protected activity in which the defendant has engaged. [Citation]" Second, for each claim that does arise from protected activity, the plaintiff must show the claim has "at least 'minimal merit.' " [Citation] If the plaintiff cannot make this showing, the court will strike the claim. (*Bonni v. St. Joseph Health System* (2021) 11 Cal.5th 995, 1004, 1066)

- Only causes of action that satisfy **both prongs** are SLAPPs. (*Navellier* v. *Sletten* (2002) 29 Cal.4th 82, 89)

- **C.C.P. § 425.16(b)(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. (**_City of Cotati_ v. _Cashman_ (2002) 29 Cal.4th 69, 79)

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Exceptions

- Exceptions to the anti-SLAPP statute are ***narrowly* construed** (*Simpson Strong-Tie Co., Inc.* v. *Gore* (2010) 49 Cal.4th 12, 22) and are addressed **at the first prong of the analysis** and the **burden is on the plaintiff** to show any exception applies. (*Demetriades v. Yelp, Inc.* (2014) 228 Cal.App.4th 294, 308)

- Exceptions include:

-**Public Enforcement actions-–C.C.P. § 425.16(d)**;
-**Acts Illegal as a matter of law—C.C.P. § 425.16(a) ("*valid* exercise")**;
-**Private Attorney General & Certain Class Actions—C.C.P. § 425.17(b)**
-**Commercial Speech—C.C.P. § 425.17(c)**
-**SLAPPbacks—C.C.P. § 425.18**

- Most common: **Acts Illegal as a matter of law** and **Commercial Speech**

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Illegal As a Matter of Law & Commercial Speech Exceptions

- **Acts Illegal as a matter of law**—but defendant must **concede** or it must be **indisputably shown** that the act was illegal as a matter of law (*Flatley* v. *Mauro* (2006) 39 Cal.4th 299, 320 [Extortionate demand letter]; C.C.P. § 425.16(a) [“***valid*** exercise”]. **“Illegal”** means **“criminal.”** (*Mendoza v. ADP Screening & Selection Services, Inc.* (2010) 182 Cal.App.4th 1644, 1654))

- **Commercial Speech—C.C.P. § 425.17(c)** further exempts **commercial speech** which contains a **“content exemption”** and a **“delivery exemption”** when the claim is against a person primarily engaged in the business of selling or leasing goods or services and the audience are consumers or influencers/investors. (*Simpson Strong-Tie Co., Inc.* v. *Gore* (2010) 49 Cal.4th 12, 30)

  -***Exception to the Commercial Speech Exception****.* There is an exception to this exception under **C.C.P. § 425.17(d)(2)** for, *inter alia*, the “creation, dissemination, exhibition, advertisement, or other similar promotion of any dramatic, literary, musical, political, or artistic work” including motion pictures, television, or newspapers or magazines of general circulation. (*City of Rocklin v. Legacy Family Adventures-Rockline, LLC* (2022) 86 Cal.App.5th 713 [Designing waterpark not within “artistic work” exception])

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First (Threshold or "Arising From") Prong

- **"Arising from"** in the anti-SLAPP context means **"*based on*."** (*Briggs* v. *Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1114) It does **not** mean **"triggered by"** **nor** **"in response to"** defendant's speech or petitioning activities. (*City of Cotati* v. *Cashman* (2002) 29 Cal.4th 69, 77-80)

- The classic example is the filing of a cross-complaint based on the same transaction or occurrence as the plaintiff's complaint. (*Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 933-934 [Cross-complaint by municipality against contractor for unfair bidding practices not a SLAPP suit])

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C.C.P. § 425.16(b) and (e)

- "The only means specified in section 425.16 by which a moving defendant can satisfy the requirement is to demonstrate that the defendant's conduct ... falls within one of the four categories described in subdivision (e), defining subdivision (b)'s phrase, '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.' " (*City of Montebello v. Vasquez* (2016) 1 Cal.5th 409, 422)

- It has been recognized that a defendant's threshold burden is not always easily met. (*Equilon Enterprises* v. *Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 66)

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Distinctions

- **Mere Evidence Distinction:** There is a distinction between the **evidence** which can be used **to prove a claim** and a **claim that is "based on"** the exercise of speech or petition. (*Gaynor v. Bulen* (2018) 19 Cal.App.5th 864, 869-870 [Trustee's involvement in litigation evidence of alleged breaches of loyalty ("illustrations") by his formulation of plan to benefit himself and improperly use Trust assets to implement that plan])

- **Protected Acts Incidental or Context Distinction:** The protected act has to be the injury producing mechanism that justifies a remedy and cannot be incidental or just to provide context or be a step in the process leading to the basis for liability. (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 394-395 ["merely incidental or collateral," "provide context"]; *Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1060 ["just evidence of liability or a step leading to some different act for which liability is asserted."])

- **Process Versus Outcome Distinction:** There is also a major distinction between the decisional ***outcome*** of an institution (like a government entity, university, hospital, or homeowners association)—**not covered**, versus claims based on the ***process*** of reaching that decision (via speech or petitioning activity like voting)—**covered**, because to hold otherwise could effectively immunize certain institutional misdeeds (such as discrimination) from redress with a possible award of attorney's fees against the plaintiff without discovery, which is a result the Legislature could not have intended. (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1064)

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Non-requirements

- No “intent to chill” requirement. If the act falls within one of the categories of C.C.P. § 425.16(e) then intent to chill is presumed. (*Navellier* v. *Sletten* (2002) 29 Cal.4th 82, 88)

- No “chilling effect” requirement and subjective motivations are not relevant. (*City of Cotati* v. *Cashman* (2002) 29 Cal.4th 69, 77-74)

- Defendant does **<u>not</u>** have to show in the first step **that their act was constitutionally protected as a matter of law** since to do so would render the second step superfluous. (*Navellier* v. *Sletten* (2002) 29 Cal.4th 82, 94-95) The validity or alleged falsity of the speech or petitioning activity is ordinarily not a consideration in analyzing the “arising from” prong of the anti-SLAPP statute. (*M.F. Farming, Co.* v. *Couch Distributing Co.* (2012) 207 Cal.App.4th 180, 195-197, and cases cited therein)

- The anti-SLAPP statute applies to **ongoing as well as concluded acts** of speech or petition and it **applies regardless** of the relative economic strength, financial motivations, or resources of the parties. (*Chavez* v. *Mendoza* (2001) 94 Cal.App.4th 1083, 1090)

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C.C.P. § 425.16(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.

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“Public Issue” Requirement

- *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115, held that that statements and writings made ***before*** or ***in connection with*** issues being considered by any official proceeding have **public significance *per se* and therefore a “bright-line” test applies** under C.C.P. § 425.16**(e)(1) and (2)**. (*Briggs*, *supra*, 19 Cal.4th 1106, 1122) It is the **context** that counts in such cases. (*Id*. at 1116)

- In contrast, C.C.P. § 425.16**(e)(3) and (4)** ***do*** carry express “public issue” limitations. (*Briggs*, *supra*, 19 Cal.4th 1106, 1123)

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Application to Private Acts

Even **private activities** regarding a **public issue** are within the scope of the anti-SLAPP statute. (*Averill* v. *Superior Court* (1996) 42 Cal.App.4th 1170, 1174-1175 [Anti-SLAPP statute implicated by private discussions about battered women's shelter.])

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Prima Facie Complaint Allegations

- Defendant does **not** have to submit any evidence to show a complaint "arises from" protected activity and can rely on the complaint. (*Bel Air Internet, LLC v. Morales* (2018) 20 Cal.App.5th 924, 935-939)

- **Facts:** Complaint stated defendants encouraged fellow employees to quit and sue employer for alleged employment violations rather than sign a release (and encouraging a third party to sue is protected activity).

- One concern is that the defendant may deny the allegations of the complaint and thus potentially be precluded from filing an anti-SLAPP motion to strike a baseless claim if additional evidence is required to make the threshold showing.

- **Analogue:** This has long been the rule under Civil Code § 47(b). (*Cayley* v *Nunn* (1987) 190 Cal.App.3d 300, 305-306 [Defendant can rely on plaintiff's pleading to show connection between publication and proceeding])

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Equipoise

Doubts are resolved **in favor** of **applying** the anti-SLAPP statute. (C.C.P. § 425.16(a) [“construed broadly”]; *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1119)

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Analytical Approach (“Nexus”)

- To determine whether a claim **arises from** protected activity courts have been instructed to consider the **elements** of the **challenged claim** and **what actions by the defendant supply those elements** and **consequently form the basis for liability**. (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1063)

- To this end, the California Supreme Court used its decisions in *Cotati* and *Navellier* to illustrate and noted that in *Cotati* the plaintiff could demonstrate the existence of a *bona fide* controversy without the prior suit which was evidence of a disagreement, whereas in *Navellier* specific elements of the plaintiff’s claims depended upon defendant’s protected activity since the filing of the counterclaim was alleged to be a breach of contract and the misrepresentations occurred in settling prior litigation. (*Id.* at 1064)

- Interpretation aids: ***Noerr-Pennington*** **Doctrine** and **Litigation Privilege**.

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Noerr-Pennington Doctrine

- This constitutional doctrine bars actions based on injuries received as a consequence of First Amendment petitioning activity. (*Hi-Top Steel Corp.* v. *Lehrer* (1994) 24 Cal.App.4th 570, 577-578; *Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 21-23; *Tichinin* v. *City of Morgan Hill* (2009) 177 Cal.App.4th 1049)

- To this end, incidental conduct—like an investigation before filing a lawsuit, engaging in discovery, and settlement talks (including a refusal to settle)—is protected since a certain amount of "breathing space" is necessary for the effective exercise of petition rights (and includes two aspects: "overprotection" and "collateral protection"). (*Id.* at 1065-1068)

- Because the anti-SLAPP statute protects rights arising under the First Amendment (free speech and petition), right to petition cases and the *Noerr-Pennington* doctrine have been used to construe **both prongs** of the anti-SLAPP statute. (See *Takhar v. People ex rel. Feather River Air Quality Management Dist.* (2018) 27 Cal.App.5th 15, 27-29 [*Noerr-Pennington* doctrine instructive to show that investigation into basis for air pollution civil enforcement action satisfies first prong when not a sham]; *Ludwig* v. *Superior Court* (1995) 37 Cal.App.4th 8, 17)

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Official Proceedings (Litigation) Privilege

Civil Code § 47(b) states 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 [by writ of mandate] (with exceptions)."

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Principle of Congruence

- "[j]ust as communications preparatory to or in anticipation of the bringing of an action or other official proceeding are within the protection of the litigation privilege of Civil Code section 47, subdivision (b) [citation], ...such statements are equally entitled to the benefits of section 425.16." (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115) Accordingly, there is a **principle of congruence** between C.C.P. § 426.16 and Civil Code § 47(b).

- But, in *Flatley v. Mauro* (2006) 39 Cal.4th 299, 322-323, the California Supreme Court indicated that the two statutes are ***not coextensive***. Notably, it has been observed that the **anti-SLAPP statute is simply a procedural screening mechanism** whereas the **Civil Code § 47(b) privilege is a rule of substantive law**. (*Jarrow Furmulas, Inc.* v. *LaMarche* (2003) 31 Cal.4th 728, 737)

- As one appellate decision has explained, "The statutory privilege for communications in judicial proceedings is not automatically converted to a *constitutionally* based protection such as that provided in section 425.16." (*Robles* v. *Chalil-Poyil* (2010) 181 Cal.App.4th 566, 581-582;

- **Example:** Although private **arbitration** is a "quasi-judicial" proceeding under the litigation privilege (*Moore* v. *Conliffe* (1994) 7 Cal.4th 634, 658), the anti-SLAPP statute does not apply thereto. (*Century 21 Chamberlain & Associates* v. *Haberman* (2009) 173 Cal. App. 4th 1, 5 [C.C.P. 425.16(a) says "lawsuits"])

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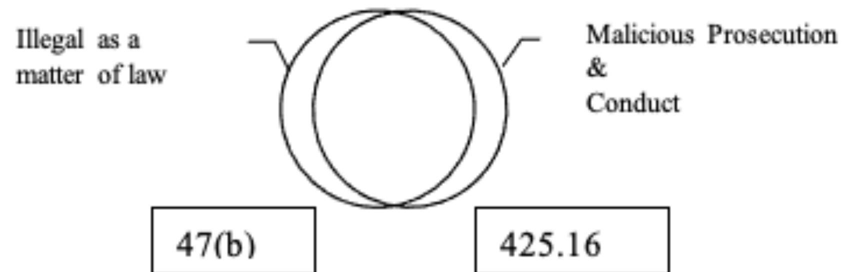
Differences Between the Two

- The anti-SLAPP statute **applies to conduct** not just publications (*Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 19) and **also applies to malicious prosecution claims** (*Jarrow Formulas, Inc. v. Lamarche* (2003) 31 Cal.4th 728) whereas the privilege does not, but the **privilege can apply to matters "illegal as a matter of law,"** e.g., fraud or perjury (*Pettitt v. Levy* (1972) 28 Cal.App.3d 484, 489), when the anti-SLAPP statute does not.

- The Venn Diagram below helps illustrate the point:



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Civil Code § 47(b) Elements

- The usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that has some connection or logical relation to the action. (*Silberg* v. *Anderson* (1990) 50 Cal.3d 205, 212)

    Comment. Elements (3) and (4) have been effectively conflated by the California Supreme Court in *Silberg*. (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 919)

- Civil Code § 47(b) generally bars all **tort** causes of action ***except*** a claim for **malicious prosecution** (*Action Apartment Assn., Inc*. v. *City of Santa Monica* (2007) 41 Cal.4th 1232, 1241-1242) and **<u>not</u> breaches of contract** (*Navellier v. Sletten* (2003) 106 Cal.App.4th 763, 769 ("*Navellier II")* [Case assumes without deciding that the litigation privilege only barred tort claims not breach of contract claims.]; **but see** *Vivian v. LaBrucherie* (2013) 214 Cal.App.4th 267, 277 [Report to internal affairs investigators for sheriff department privileged despite non-disparagement clause])

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Whole Spectrum Application

The privilege applies to statements:

(1) preliminary to an action, e.g., demand letters (*Aronson v. Kinsella* (1997) 58 Cal.App.4th 254), subject to the **good faith serious consideration test** (*Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 39),

(2) made in meetings or interviews (*Rubin v. Green* (1993) 4 Cal.4th 1187, 1195),

(3) made to prompt official action (*Hagberg* v. *California Federal Bank FSB* (2004) 32 Cal.4th 350),

(4) made during litigation (*Dowling* v. *Zimmerman* (2001) 85 Cal.App.4th 1400, 1422), and/or

(5) pertaining to enforcement of judgment proceedings subsequent to litigation (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048).

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Noncommunicative Conduct

- A threshold determination for application of the privilege is whether the claim involves a communication which is privileged or noncommunicative conduct which is not. (*Limandri* v. *Judkins* (1997) 52 Cal.App.4th 326, 345-346 [Tortious course of conduct which included filing a lien not privileged])

- However, in *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1065, the California Supreme Court held that if the gravamen of the cause of action is **communicative in its essential nature** then the privilege **extends to noncommunicative acts necessarily related to** the communicative conduct (disapproving *Drum v. Bleau, Fox & Associates* (2003) 107 Cal.App.4th 1009 which found that an abuse of process claim was stated when a creditor wrongfully seized property enforcing a judgment by levy of execution when the case was stayed).

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Benefit of Any Doubt and Public Policy

Like the anti-SLAPP Statute, any doubt is resolved in favor of applying the privilege. (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 913)

Also, public policy favors exercising existing remedies (sanctions) over burdening the courts with another round of litigation unless the elements of malicious prosecution can be met. (*Rubin v. Green* (1993) 4 Cal.4th 1187, 1199-1200)

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C.C.P. § 425.16(e)(1) and (2) "Official Proceedings" Examples

-Executive: HUD investigation (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1114)

-Legislative: Lobbying activities (*1-800 Contacts, Inc.* v. *Steinberg* (2003) 107 Cal.App.4th 568, 583)

-Judicial: Alleged defamation and misrepresentation in connection with unlawful detainer cases (*Dowling* v. *Zimmerman* (2001) 85 Cal.App.4th 1400, 1420)

Other Official Proceedings:

-Medical Peer Review (*Kibler* v. *Northern Inyo County Local Hosp. Dist.* (2006) 39 Cal.4th 192);

-Grievance procedures set up by the Regents of California (*Vergos* v. *McNeal* (2007) 146 Cal.App.4th 1387, 1396); and

-Filing with National Association of Securities Dealers an official proceeding as a regulatory surrogate for the Securities and Exchange Commission (*Fontani* v. *Wells Fargo Investments, LLC* (2005) 129 Cal.App.4th 719, 728-732, disapproved by *Kibler* to the extent limited to proceedings before government entities or those exercising governmental power).

-Unofficial Proceedings: An employer's private internal sexual harassment investigation is not subject to the anti-SLAPP statute as not an "official" proceeding. (*Carpenter* v. *Jack in the Box Corp.* (2007) 151 Cal.App.4th 454, 471-472; *Olaes v. Nationwide Mutual Ins. Co.* (2006) 135 Cal.App.4th 1501, 1507-1508)

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C.C.P. § 425.16(e)(1) and (2) Terms

- **(e)(1) "Before" Example:** Filing a complaint. (*Chavez* v. *Mendoza* (2001) 94 Cal.App.4th 1083, 1087 [Malicious prosecution arose from filing complaint])

- **(e)(2) "In Connection With":**

- **Scope:** Courts have adopted "a fairly expansive view of what constitutes litigation-related activities within the scope of section 425.16." (*Seltzer v. Barnes* (2010) 182 Cal.App.4th 953, 962) A statement is "in connection with" litigation if it **relates to the substantive issues** in the litigation and is **directed to persons having some interest in the litigation**. (*Neville* v. *Chudacoff* (2008) 160 Cal.App.4th 1255, 1266) That an action is ultimately filed can show a connection to litigation. (*Digerati Holdings, LLC* v. *Young Money Entertainment*, LLC (2011) 194 Cal.App.4th 873, 888)

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“In Connection With” Examples

-Investigations or Communications Preparatory to a Lawsuit. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115; *Neville* v. *Chudacoff* (2008) 1255 Cal.App.4th 1255; *Rhode* v. *Wolfe* (2007) 154 Cal.App.4th 28; *Sylmar Air Conditioning* v. *Pueblo Contracting Services, Inc.* (2004) 122 Cal.App.4th 1049; *Dove Audio, Inc.* v. *Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777; *Kashian v. Harriman* (2002) 98 Cal.App.4th 892; *Contemporary Services Corporation* v. *Staff Pro Inc.* (2007) 152 Cal.App.4th 1043 [litigation update]);

-Settlement Negotiations Before or In the Course of a Lawsuit. (*GeneThera, Inc. v. Troy & Gould Professional Corp*. (2009) 171 Cal.App.4th 901; *Selzer* v. *Barnes* (2010) 182 Cal.App.4th 953; *Navellier* v. *Sletten* (2002) 29 Cal.4th 82, 90; *Applied Business Software, Inc.* v. *Pacific Mortgage Exchange* (2008) 164 Cal.App.4th 1108, 1118 [Entering into settlement agreement protected activity]; *Navarro* v. *IHOP Properties, Inc.* (2005) 134 Cal.App.4th 834, 841-842 [Fraudulent promises in exchange for stipulation of judgment in UD case]; *Dowling* v. *Zimmerman* (2001) 85 Cal.App.4th 1400, 1418-1420 [Misrepresentation in negotiating settlement in UD case]; *Bonni v. St. Joseph Health System* (2021) 11 Cal.5th 995, 1024-1025 [Settlement negotiations before or after suit is filed protected activity because petitioning needs breathing space]; and

-Comments to Third Parties on a Judicial Proceeding. A number of cases have held that statements about litigation to third parties are sufficiently connected to a judicial proceeding for the anti-SLAPP statute to apply. (*Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th 1539, 1549 [Alleged misrepresentation as to facts surrounding partnership court cases in letter to newspaper]; *Contemporary Services Corp. v. Staff Pro Inc.* (2007) 152 Cal.App.4th 1043, 1055 [Litigation update to clients who were witnesses]; *Raining Data Corp*. v. *Barrenechea* (2009) 175 Cal.App.4th 1363, 1368 [same]; *Healy* v. *Tuscany Hills Landscape & Recreation Corp.* (2006) 137 Cal.App.4th 1, 5-6 [Attorney letter to members of homeowners association about pending litigation involving association]; *Wilcox* v. *Superior Court* (1994) 27 Cal.App.4th 809, 821-822 [Statements to nonparties soliciting contributions to litigation fund]; *Summerfield* v. *Randolph* (2011) 201 Cal.App.4th 127, 129 [Attorney’s affidavit filed in Zimbabwe case to influence determination of issues in California case]; *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1419-1420 [Letters written to property manager and HOA board of directors related to pending unlawful detainer action and harassment of tenant that were also about public issues of nuisance and safety])

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Caveat

- Some business-type transactions or “ministerial” acts are outside the scope of (e)(2). (See, e.g., *Blackburn* v. *Brady* (2004) 116 Cal.App.4th 670 where the court held that the ministerial act of a sheriff’s sale (where defendant was accused of chilling the bid) was more akin to a business-type transaction that involved no issue under consideration or review)

    - **Ministerial Acts**: Other business-type transaction or “ministerial” act cases are catalogued in *Mindys Cosmetics, Inc.* v. *Dakar* (2010, 9th Cir.) 611 F.3d 590, 596 [Act of filing a trademark application with USPTO is protected as a writing made before an executive or other official proceeding authorized by law under the Lanham Act, § 1, 15 U.S.C. § 1051, and is not ministerial in nature]. A “ministerial” act is one involving no discretion. (See, e.g., *Morris v. Harper* (2001) 94 Cal.App.4th 52, 62)

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C.C.P. § 425.16(e)(3) and (4) Terms

- **(e)(3) “Public Issue” and “Public Forum” Examples:**
- **“Public Issues”:** While an all encompassing definition has proved elusive, a “public issue” is one that (1) concerns a person or entity **in the public eye**, (2) affects a **large number of people**, or (3) involves a topic of **widespread public interest**. (*Rand Resources, LLC v. City of Carson* (2019) 6 Cal.5th 610, 621)
- **Public Issue examples** include:

-Domestic violence pertaining to nationally known figure political consultant *(Sipple* v. *Foundation for National Progress* (1999) 71 Cal.App.4th 226, 239);

-Articles in newsletters about HOA governance a public issue (*Damon* v. *Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 478-480);

-Close proximity of registered sex offender under Megan’s Law an issue of widespread public interest (*Cooper* v. *Cross* (2011) 197 Cal.App.4th 357, 378); and

-Consumer protection information expressing caution about viaticals settlement broker posted on watchdog website a public issue (*Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 899-900).

- ***Contra*.** Accusation of criminal conduct in trade journal not a public issue (*Weinberg* v. *Feisel* (2003) 110 Cal.App.4th 1122, 1126-1127).

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Caution: Participatory Theory of Public Issue

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 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. (*Wilson v. Cable News Network* (2019) 7 Cal.5th 871, 900-903; *FilmOn.com, Inc. v. DoubleVerify, Inc.* (2019) 7 Cal.5th 133, 145-146)

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Public vs. Private Issue

In *Geiser v. Kuhn* (2022) 13 Cal.5th 1238 the California Supreme Court clarified what qualifies as a "public" as juxtaposed to a "private" issue in an anti-SLAPP case that involved sidewalk picketing of a private residence that the trial court found was a private dispute. (*Id.* 1243) Our Supreme Court reversed commenting that: **"[T]hose who speak on public issues are often driven to do so by circumstances that affect them personally."** (*Id.* at 1253) Our high court observed that **expressive activity can be both** (there unfair and deceptive housing practices exemplified by the eviction of a single tenant). (*Id.* at 1250, 1253) Participation by a nonprofit advocacy group, staging at a public sidewalk, media attention, and a press release can be **contextual clues** of a **"public issue" by inference**. (*Id.* at 1251-1252, 1255)

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“Public Forum” Examples

•**“Public Forum” examples include:**
-Letter (about lesbian adoption case) in newspaper a public forum (*Annette F.* v. *Sharon S.* (2004) 119 Cal.App.4th 1146, 1161);
-Internet websites a public forum (*ComputerXpress, Inc.* v. *Jackson* (2001) 93 Cal.App.4th 993, 1008);
-Movie credit website a public forum (*Kronemyer* v. *Internet Movie Database Inc.* (2007) 150 Cal.App.4th 941, 950);
-Homeowners association meeting a public forum (*Cabrera* v. *Alam* (2011) 197 Cal.App.4th 1077, 1088); and
-Consumer protection information on internet website a public forum (*Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 899-900; *Chaker* v. *Mateo* (2012) 209 Cal.App.4th 1138, 1146-1147)

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(e)(4) “Other Conduct”

- **Background.** In 1997, (e)(4) and the instruction to “*construe the statute broadly*” were added in response to cases that narrowly interpreted the statute’s reach. (See *Briggs* v. *Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1119-1121)

- In doing so, the Legislature cited *Averill* v. *Superior Court* (1996) 42 Cal.App.4th 1170 which held that even private conversations about public issues were protected by the anti-SLAPP statute (regardless of whether they take place in a public forum as with (e)(3)). (See *Terry* v. *Davis Community Church* (2005) 131 Cal.App.4th 1534, 1545-1546)

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(e)(4) Construed

- **Interpretation.** In *FilmOn.com, Inc. v. DoubleVerify, Inc.* (2019) 7 Cal.5th 133 the California Supreme Court authoritatively construed the "other conduct" prong of the anti-SLAPP statute:

- First, the context—including the speaker, the audience, and the purpose of the speech—informs the analysis and is relevant although not dispositive. (*Id.* at 140) Moreover, and as with the litigation privilege (*ante*), context allows for an assessment of the functional relationship between a statement and the issue of public interest on which it touches. (*Ibid*.)

- Second, *FilmOn.com* expressly held that C.C.P. § 425.16(e)(4) is construed in accordance with the other provisions of the anti-SLAPP statute and is both broader in scope but less firmly anchored to any particular context. (*Id.* at 144-145) *FilmOn.com* observes that in the past courts have looked to specific contextual considerations—like whether the person was in the public eye or the matter affects a large number of people and whether the matter was an ongoing controversy or affected a community similar to a government agency—to see if the anti-SLAPP statute applies. (*Id*. at 145-146)

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(e)(4) Construed (continued)

- Third, *FilmOn.com* then turns to ***how*** to apply the catchall and cautions against the practice of trying to discern that speech is "about" any single topic and instead offers a two-part analysis (the **"content-function test"**):

  (1) what public issue the speech implicates (answered by content); and
  (2) what functional relationship exists between the speech and the public conversation about some matter of public interest. (*Id.* at 149-150)

- Fourth, "the catchall demands **'some degree of closeness'** between the challenged statements and the asserted public interest" such that "the statement must in some manner itself contribute to the public debate." (*Id.* at 150) This, *FilmOn.com* says, is simply part of the existing requirement that the act be "in connection with" an issue of public interest because it contributes to (or furthers) some public conversation on the issue. (*Id.* at 151) Abstractions and generalities (the "synecdoche theory" of public issue) are relegated in favor of the "specific nature of the speech." (*Id.* at 152)

- As applied, *FilmOn.com* held that the "tags" in defendant's report on plaintiff's websites identifying adult content or copyright infringement did not contribute to any public issue such that the catchall did not apply. (*Id.* at 153)

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“Other Conduct” Examples

-Conduct in connection with judicial proceeding (*Jarrow Formulas, Inc.* v. *Lamarche* (2003) 31 Cal.4th 728, 734);
-Newsgathering is conduct in furtherance of First Amendment rights (*Lieberman* v. *KCOP Television, Inc.* (2003) 110 Cal.App.4th 156, 165-166);
-E-mail opposing acquisition of hospitals and questioning financial condition fell within C.C.P. § 425.16(e)(4) (*Integrated Healthcare Holdings* v. *Fitzgibbons* (2006) 140 Cal.App.4th 515, 523);
-News reporting (*Carver* v. *Bonds* (2005) 135 Cal.App.4th 328, 342-343);
-Feature article on Indie Rock Bands editorially placed with cigarette ad represented speech made in connection with issue of public interest (*Stewart* v. *Rolling Stone LLC* (2010) 181 Cal.App.4th 664, 678); and
-Statements made in letter critical of the actions of a homeowners association director may qualify as free speech under C.C.P. § 425.16(e)(4) (*Silk* v. *Feldman* (2012) 208 Cal.App.4th 547, 553).

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Causes of Action Covered by C.C.P. § 425.16

- Almost any cause of action alleged in state (and some in federal) court is (are) covered: "The anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action, but, rather, the defendant's *activity* that gives rise to his or her asserted liability..." (*Navellier* v. *Sletten* (2002) 29 Cal.4th 82, 92)

  Example: Allegations of false testimony at labor hearing on wages giving rise to a 42 U.S.C. § 1983 claim subject to anti-SLAPP statute because although a federal cause of action it was filed in state court where state procedure applies. (*Patel v. Chavez* (2020) 48 Cal.App.5th 484, 487-488)

- ***Note*.** Incorporating by reference the preceding allegations or cause(s) of action of a complaint does not *per se* taint other subsequent causes of action (*Kajima Eng'g & Const., Inc.* v. *City of Los Angeles* (2002) 95 Cal.App.4th 921, 931-932), but if it is shown that incorporated allegations, and thus subsequent causes of action, relate to protected activities then the anti-SLAPP statute applies (*ComputerXpress, Inc.* v. *Jackson* (2001) 93 Cal.App.4th 993, 1002 [Conspiracy allegations not shown to involve protected activity but if showing made anti-SLAPP motion could be renewed]).

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Application of C.C.P. § 425.16 to "Mixed" Claims

- **History.** *Ab initio*, a **"mixed" cause of action** is one that **pleads both protected and unprotected acts in a single claim**. Prior to the "commercial speech" exception (C.C.P. § 425.17), some appellate decisions used a **"gravamen" test** for mixed causes of action to avoid application of the anti-SLAPP statute in certain cases. (See, e.g., *Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 188 ["Gravamen" of claims was sale of a defective product and not speech about it]) This **"gravamen" test** held that collateral allusions to speech or petition in a claim based essentially on nonprotected activities do not subject that claim to the anti-SLAPP statute.

- Other appellate courts held that a plaintiff cannot **frustrate** the purposes of the anti-SLAPP statute through a **pleading tactic** of **combining allegations** of protected and nonprotected activity **under the label of one cause of action**. (See *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 308) Still others said the **"gestalt approach"** or the **"essence of a claim"** was a **highly metaphysical, subjective, and unpredictable exercise that would likely lead to inconsistent decisions**. (*Wallace* v. *McCubbin* (2011) 196 Cal.App.4th 1169, 1190-1191, & fn. 9)

- Another issue was that *Mann* v. *Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 100 ("***Mann*** **Rule**") held that even when the anti-SLAPP statute applied to a mixed claim, if the plaintiff could show **probability** as to ***any part of the claim***, then the claim is **not meritless** and **anti-SLAPP motion had to be denied**. This was influenced by earlier decisions that said the anti-SLAPP statute **could not parse** a cause of action (like a traditional "motion to strike" can). (*Id.* at 106)

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Sea Change Resolution

This issue was resolved by the California Supreme Court in *Baral v. Schnitt* (2016) 1 Cal.5th 376, 396, which held that the anti-SLAPP state ***can*** parse a cause of action, and that when the statute applies the plaintiff must show **probability of prevailing** on the **claims that implicate protected acts** or those allegations **can** be struck from the complaint as the overall intent is protect free speech and petition rights. The ***Mann* Rule** was expressly **overruled** on this point as antithetical to the statutory purpose. (*Id.* at 396, fn. 11) More precisely, allowing the allegations of protected acts to continue intact just because the plaintiff showed probability as to unprotected acts fails to protect the rights of free speech and petition frustrating the purpose of the statute. (*Id.* at 392-393)

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Gravamen’s Demise

- Following *Baral*, the imprecise “gravamen” test met its demise in *Bonni v. St. Joseph Health System* (2021) 11 Cal.5th 995. The issue in *Bonni* was whether a defendant moving to strike an entire cause of action for retaliation based on several acts growing of out a medical peer review process is governed by the “gravamen” of that claim or the individual acts as protected or unprotected activity. (*Id.* at 1010-1011) *Bonni* comments:

> If we were instead to adopt Bonni's proposed gravamen approach, we would again risk saddling courts with an obligation to settle intractable, almost metaphysical problems about the ‘essence’ of a cause of action that encompasses multiple claims.” (*Id.* at 1011)

- Concern was expressed about that approach being both overinclusive and underinclusive, and allowing anti-SLAPP protections to turn on a plaintiff’s pleading choices. (*Ibid.*) *Bonni* was careful to **preserve** those cases **using the gravamen test label**, not as the essence or gist, **but instead to determine whether certain acts supply the elements of a claim or are incidental background or context** as being consistent with *Baral*. (*Id.* at 1012)

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Second (Merits or "Probability") Prong

- **Plaintiff's Burden.** When the burden shifts, a plaintiff must **state *and* substantiate** a legally sufficient claim. (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821) The burden is to show **"minimal merit."** (*Navellier* v. *Sletten* (2002) 29 Cal.4th 82, 93-94) The anti-SLAPP motion **"pierces the pleadings"** and requires an **evidentiary showing**. (*Simmons* v. *Allstate Ins. Co.* (2001) 92 Cal.App.4th 1068, 1073)

- Thus, the plaintiff cannot rely on their pleading even if verified and **must produce competent, admissible evidence** to support the claims pled. (*Sweetwater Union High School Dist. v. Gilbane Building Co.* (2019) 6 Cal.5th 931, 940) The court **does not *weigh* the evidence** but just determines if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim. (*Ibid.*)

- This is **similar** to a determination on **summary judgment, nonsuit, or directed verdict**. (*Kyle* v. *Carmon* (1999) 71 Cal.App.4th 901, 907) In fact, the court **accepts as true the evidence favorable to the plaintiff** when it evaluates whether defendant's evidence **defeats** plaintiff's **as a matter of law**. (*Sweetwater Union High School Dist. v. Gilbane Building Co.* (2019) 6 Cal.5th 931, 940) If there is a **conflict in the evidence** (the existence of a disputed material fact) then the anti-SLAPP motion should be **denied**. (*Billauer v. Escobar-Eck* (2023) 88 Cal.App.5th 953, 965)

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Procedural Impediments Included

- A determination that a plaintiff has no probability of prevailing does not necessarily require a determination of the merits of plaintiff's claim, but it may instead be based on a determination that the court lacks the power to entertain the claim in the first place for want of **jurisdiction**. (*Barry v. State Bar of California* (2017) 2 Cal.5th 318, 324-326 [No probability of prevailing includes nonmerits-based reasons like the running of the statute of limitations or where a trial court lacks subject matter jurisdiction to adjudicate a claim such as between an attorney and the State Bar])

- Other examples include if a **plaintiff lacks standing** to pursue a claim (*Bleavins v. Demarest* (2011) 196 Cal.App.4th 1533, 1542-1543), or possibly **issue preclusion** but only as to specific factual allegations found to be protected activity supplying an element of a claim in the first action that are the same in a second action. (*Williams v. Doctors Medical Center of Modesto, Inc.* (2024) 100 Cal.App.5th 1117, 1134-1136 [Issue preclusion inapplicable at first step because protected acts removed from the subsequent lawsuit after first action voluntarily dismissed in response to a SLAPP motion with an award of fees])

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Inference Only Needed

- Because the standard is “minimal merit” (*Navellier* v. *Sletten* (2002) 29 Cal.4th 82, 93), the proper inquiry is whether the plaintiff proffers sufficient evidence to support an **inference** of the fact/element in question. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 822 [Client raised an inference that attorney used client’s confidential information in opposing the development project he was hired to promote])

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Objectionable Evidence

- Since the standard is competent, admissible evidence, hearsay (*Evans* v. *Uknow* (1995) 38 Cal.App.4th 1490, 1497) or otherwise objectionable evidence is not admissible (at least when objected to). (*Gallagher v. Connell* (2004) 123 Cal.App.4th 1260, 1267-1268) "Thus, declarations that lack foundation or personal knowledge, or that are argumentative, speculative, impermissible opinion, hearsay, or conclusory are to be disregarded." (*Alpha & Omega Dev., LP* v. *Whillock Contracting, Inc.* (2011) 200 Cal.App.4th 656, 664)

  ***Distinction*. Lack of foundation** objections may be **cured** by the proffering party. (*Fashion 21* v. *Coalition for Humane Immigrant Rights of Los Angeles* (2004) 117 Cal.App.4th 1138, 1147-1148)

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Higher Burden of Proof Claims

- If there is a **higher burden of proof** for the subject cause of action then a **plaintiff must meet this higher burden**. (*Christian Research Institute* v. *Alnor* (2007) 148 Cal.App.4th 71, 76 & 81 [Public figure plaintiff failed to show "actual malice" by clear and convincing evidence]) However, plaintiff's burden in the anti-SLAPP context (as opposed to at trial) is to **establish only a "probability"** that he or she **can produce clear and convincing evidence** of actual malice. (*Apex Corp.* v. *Cargle* (2005) 128 Cal.App.4th 1569, 1578)

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Affirmative Defenses

- **Affirmative defenses <u>are</u> considered**. (*Traditional Cats Assn., Inc*. v. *Gilbreath* (2004) 118 Cal.App.4th 392, 398-399) However, a defendant that advances an affirmative defense to the plaintiff's claims bears the burden of proof on the defense. (*Neurelis, Inc. v. Aquestive Therapeutics, Inc.* (2021) 71 Cal.App.5th 769, 794) Also, even if the issue is one not raised in the trial court, so long as the relevant facts are not in dispute, the existence of a legal defense that precludes the claim is properly considered on appeal. (*Curtin Maritime Corp. v. Pacific Dredge and Construction, LLC* (2022) 76 Cal.App.5th 651, 668)

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Common Affirmative Defenses

-Expiration of the **statute of limitations**. (*Barry v. State Bar of California* (2017) 2 Cal.5th 318, 324-325, citing *Traditional Cats*);

-**Uniform Single Publication Act** as applied to defamation. (*Traditional Cats Assn., Inc*. v. *Gilbreath* (2004) 118 Cal.App.4th 392, 395);

-**Truth** is a complete defense to defamation and **plaintiff bears the burden of proving falsity when the action involves a public figure *or* issue**. (*Integrated Healthcare Holdings* v. *Fitzgibbons* (2006) 140 Cal.App.4th 515, 529);

-The **First Amendment** is a defense to defamation (*New York Times Company v. Sullivan* (1964) 376 U.S. 254, 268-284) and commercial misappropriation of name or likeness (*Stewart* v. *Rolling Stone LLC* (2010) 181 Cal.App.4th 664, 680-682);

-**Civil Code § 47(b)** (**Litigation Privilege**) is a complete defense to all tort claims save malicious prosecution. (*Flatley* v. *Mauro* (2006) 39 Cal.4th 299, 322-323);

-**Civil Code § 47(c)** (**Common Interest Privilege**) is a defense when no "malice" is shown. (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 914) Like Civil Code § 47(b), Civil Code § 47(c) also bars all causes of action except malicious prosecution. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 293-294);

-**Civil Code § 47(d)** (**Fair/True Report in Public Journal**) is a defense but a newspaper defendant bears the burden of proving the privilege applies. (*Carver* v. *Bonds* (2005) 135 Cal.App.4th 328, 348-349);

-***Noerr-Pennington* Doctrine** (*ante*); and

-**Immunity defense** under the **Communications Decency Act** (47 U.S.C. § 230). (*Barrett* v. *Rosenthal* (2006) 40 Cal.4th 33)

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Anti-SLAPP Motion Hearing

- A party **must obtain rulings** on any evidentiary objections, or the matter is **waived** on appeal, and this can be done by **either** filing **written objections** or making **oral objections** at the hearing, and if the trial court fails to rule then the objections are preserved on appeal. (*Reid* v. *Google, Inc.* (2010) 50 Cal.4th 512, 531-531)

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Attorney's Fees and Cost (Defendant)

- Attorney's fees (and costs) are **mandatory** for a successful **defendant**. (C.C.P. § 425.16(c); *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131) If the anti-SLAPP motion is only **partially successful**, i.e., some but not all causes of action are dismissed, then attorney's fees must be **apportioned** for the successful versus unsuccessful portions. (*Mann* v. *Quality Old Time Service, Inc.* (2006) 139 Cal.App.4th 328, 344-346 ("*Mann II*"))

  - ***Note.*** Attorney's fees are awardable **only for the anti-SLAPP motion** not the whole case (*Lafayette Morehouse* v. *Chronicle Publishing Co*. (1995) 39 Cal.App.4th 1379, 1383), but this **includes appellate attorney's fees** for an appeal (*Dove Audio* v. *Rosenfeld* (1996) 47 Cal.App.4th 777, 785), and also includes **collection attorney's fees**. (*Ketchum*, *supra*, 24 Cal.4th 1122, 1141, fn. 6)

  - ***Fee Calculation Method (Lodestar).*** The **lodestar** or **touchstone adjustment method** (number of hours times a reasonable hourly rate) has been approved for fees under the anti-SLAPP statute, including the potential for an **enhancement multiplier** for things like a contingency fee agreement due to the risk factor. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132-1133)

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Dismissal by Plaintiff

- ***Before SLAPP Motion Filed*.** If dismissed before an anti-SLAPP motion is filed then there is no right to attorney's fees. (*S. B. Beach Properties* v. *Berti* (2006) 39 Cal.4th 374, 377)

- ***After SLAPP Motion Filed*.** If dismissed after an anti-SLAPP motion is filed then one case holds an inference arises that the suit was a SLAPP (*Coltrain* v. *Shewalter* (1998) 66 Cal.App.4th 94, 107) but otherwise the trial court must conduct a merits review as a prerequisite to an award of attorney's fees. (*Pfeiffer Venice Properties v. Bernard* (2002) 101 Cal.App.4th 211, 218; *Kyle v. Carmon* (1999) 71 Cal.App.4th 901, 908, fn. 4; *Liu v. Moore* (1999) 69 Cal.App.4th 745, 751)

- ***Bond Required to Stay Enforcement***. Attorney's fees awarded under the anti-SLAPP statute are a "money judgment" such that a plaintiff appealing an adverse ruling must **post a bond to stay enforcement** of the money judgment. (*Dowling* v. *Zimmerman* (2001) 85 Cal.App.4th 1400, 1432)

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Procedure for Claiming Fees (Defendant)

- Anti-SLAPP attorney's fees may be claimed in three ways: **(1)** simultaneously with litigating the special motion to strike; **(2)** by a subsequent noticed motion; or **(3)** as part of a cost memorandum. (*American Humane Assn. v. Los Angeles Times Communications* (2001) 92 Cal.App.4th 1095, 1103)

- ***Timing (Defendant)*. **The timing for requesting attorney's fees generally is governed by California Rules of Court ("CRC"), Rule 3.1702 which applies in civil cases when the court determines entitlement to fees, the amount of fees, or both (CRC, Rule 3.1702(a)):

- The deadline for ***prejudgment fees*** runs from the **time to appeal** (CRC, Rules 8.104 and 8.108 [unlimited civil] and 8.822 and 8.823 [limited civil]) (CRC, Rule 3.1702(b)(1)).

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Attorney's Fees and Costs (Plaintiff)

- A **plaintiff** opposing an anti-SLAPP motion **may** be awarded attorney's fees but **only if** said motion is **frivolous** or **solely intended to cause unnecessary delay** using the standard under **C.C.P. § 128.5**. (C.C.P. §§ 425.16(c); *ComputerXpress, Inc.* v. *Jackson* (2001) 93 Cal.App.4th 993, 1018; *Carpenter* v. *Jack in the Box Corp.* (2007) 151 Cal.App.4th 454, 460)

- ***Timing: Plaintiff.*** A plaintiff seeking fees has until the entry of judgment to request attorney's fees and this can happen after the denial of the anti-SLAPP motion has been affirmed on appeal. (*Carpenter* v. *Jack in the Box Corp.* (2007) 151 Cal.App.4th 454, 468) Any such award of fees is under the standards applicable to C.C.P. § 128.5 and has to be in writing and recite the circumstances justifying the order. (*Id.* at 469-479)

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Immediately Appealable

- An order granting or denying an anti-SLAPP motion is immediately appealable. (C.C.P. §§ 425.16(i) & 904.1(a)(13); see also *White v. Lieberman* (2002) 103 Cal.App.4th 210, 220 [Ruling that concurrent anti-SLAPP motion was moot after granting demurrer without leave to amend error and amounted to *de facto* denial of anti-SLAPP motion resulting in an appealable order])

- The time to appeal runs from service of a **notice of entry** of the order **if** such notice is served (60 days [unlimited civil]) **<u>or</u>** the **entry date of the order if not** (180 days from entry). (CRC, Rule 8.104(a), (d), & (f) [a "judgment" includes "appealable order"]) **The timeliness requirement is jurisdictional and an untimely appeal must be dismissed.** (CRC, Rule 8.104(b); *Payne v. Rader* (2008) 167 Cal.App.4th 1569, 1573, citing *Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 674)

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Automatic Stay

- As mentioned, on appeal from an anti-SLAPP motion the underlying action is automatically stayed as to matters **embraced therein** or **affected thereby**. (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 186) Indeed, any acts taken in violation of the stay are void. (*Id*. at 198)

  - ***Fees Not Stayed Without Bond***. But, as indicated above, an award of attorney's fees and costs to a defendant is <u>not</u> stayed *unless* the plaintiff posts an appeal bond for double the amount of the award, or, if an admitted surety, one and one-half the amount of the award. (C.C.P. § 907.1; *Dowling* v. *Zimmerman* (2001) 85 Cal.App.4th 1400, 1432)

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Appellate Review Standard and Dismissals

- In determining whether each party has met its burden the appellate court will review the record ***de novo***. (*Damon* v. *Oceanside Hills Journalism Club*, *supra*, 85 Cal.App.4th 468, 474) However, the judgment should be affirmed if it is correct on any legal ground, whether or not the trial court relied on that ground. (*Walker* v. *Kiousis* (2001) 93 Cal.App.4th 1432, 1439)

- **Dismissed Appeal.** A dismissed appeal reinstates the order of the lower court: “The dismissal of an appeal from the trial court's determination leaves intact the judicial finding that the action was a SLAPP suit.” (*Wilkerson v. Sullivan* (2002) 99 CalApp.4th 443, 447)

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