

A SLAPP Split

By Jeremiah A. Ho

The intentions behind adopting Section 425.16 of the California Civil Code of Procedure — otherwise known as the California Anti-SLAPP statute — were laudable with respect to protecting First Amendment speech and petitioning rights. Back in 1992, California was the third state in the nation to pass legislation curtailing the sting of SLAPPs (or Strategic Lawsuits Against Public Participation). A SLAPP suit is a meritless lawsuit filed by one party (usually one with considerable means) against another as retaliation for that other party's legitimate use of the political process — generally some First Amendment expression or petitioning — to combat an activity in which that filing party was engaged. The classic SLAPP suit can be illustrated by the scenario of the Big Bad Developer versus the small-time grassroots environmentalists. The Big Bad Developer eyes a vacant but precious piece of undeveloped property for development into a lucrative shopping mall. The environmentalists discover the plan and launch protest campaigns that include demonstrations and informational fliers. In order to chew up the environmentalists' time and money, the Big Bad Developer sues them for defamation and interference with prospective economic advantage. The lawsuit is meritless, but the litigation expenses curb the environmentalists' momentum, drain funds and make members think twice about ever using the political process to further their causes again.

A SLAPP suit does its damage merely with its filing and existence because the goal its filer is not to prevail in their meritless claims but rather in using the lawsuit to chill their opponents' free speech or petitioning activities. After Washington and New York states passed laws combating such suits, California enacted its version by allowing the targeted SLAPP suit victim to file a special motion to strike the suit pre-trial. The logic was to prevent the victim from having to defend itself against a meritless suit all the way through trial. At the time of enactment, it was a device that had seemed to greatly protect those engaged in government petitioning.

But no good deed goes unpunished. True, Section 425.16 has done much to prevent potential SLAPP suit filers from even thinking about stifling opponents with the threat of a frivolous, but costly, business tort or defamation claim. But since 1992, the gradual perseverance of clever lawyers has eventually poked holes in the statute — enough for some reform. One example of a needed

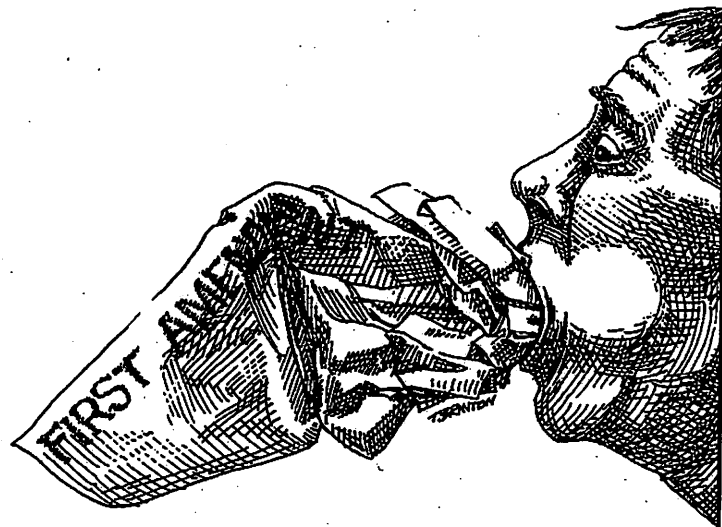
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change lies in subsection (c) of the statute, which provides that "in any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs." In a classic SLAPP suit involving the use of a Section 425.16 motion to strike, where the proceedings lead all the way up to a determination of that motion, the prevailing party is easy to pinpoint. If the claim is meritless, then the SLAPP suit filer should lose and the victim is the prevailing party for attorney fees. But murkier situations arise when a SLAPP suit is filed, the SLAPP victim moves to strike under Section 425.16, and then before the motion is nearly determined, the filer voluntarily

dismisses her suit entirely. Who is the prevailing party in that situation? Cases have differed as to how to determine this. There is a trend for one particular kind of resolution, but no legislative guidance has surfaced to give certainty, and as Edward Coke once wrote, "the knowe certaintie of the law is the safetie of all." One prominent case on the subject is *Coltraine v. Shevalter*, 77 Cal.Rptr.2d 600 (1998). This case arose from a landlord-tenant dispute where deadbeat landlords of a run-down apartment complex sued their tenants for emotional distress, defamation and trade libel after the tenants had already filed nuisance abatement claims. The tenants moved to strike under Section 425.16. Before the motion was determined, the landlords voluntarily dismissed the suit. The tenants then sought attorney fees, claiming they were prevailing parties under subsection (c) of Section 425.16. But because the tenants' motion to strike had not been decided, the landlords challenged whether the tenants were rightfully the prevailing parties. Section 425.16 gave no guidance. All the statute proffered was that "a prevailing party on a special motion to strike" receives attorney fees and costs. It did not define what constituted a prevailing party.

On appeal, the 4th District Court of Appeal, adopted a "pragmatic approach" to resolving this quandary. By borrowing from California Supreme Court cases that decided how prevailing parties should be determined in contracts cases when the plaintiff voluntarily dismisses, the *Coltraine* court fashioned a rule providing that where the SLAPP suit filer has voluntarily dismissed, the victim of the SLAPP is presumed the prevailing party unless the filer could rebut by showing that it voluntarily dismissed because it had substantially achieved its litigation objectives.

While within the *Coltraine* case, this "pragmatic approach" allowed the tenants to recover as prevailing parties, the mechanism set forth was not satisfactory as to the letter of the statute. A different approach was crafted just a year later when a similar case reached the 2nd District Court of Appeal in *Liu v. Moore*, 81 Cal.Rptr.2d 807 (1999). In *Liu*, an alternative healer sued a medical bills processor for breach of fiduciary duty, interference with



prospective economic advantage, apportionment of fault, indemnity and declaratory relief after the processor had reported the healer's infractions to governmental agencies. The processor moved to strike under Section 425.16 and the healer voluntarily dismissed before the motion was decided. The bills processor asked for attorney fees as the prevailing party. Again, Section 425.16 offered no guidance.

But when the case went on appeal, the 2nd District found fault with *Coltraine's* pragmatic approach — in particular, noting that a SLAPP suit filer could easily rebut the *Coltraine* presumption and therefore deny a SLAPP victim from recovering fees as the prevailing party. After all, a SLAPP filer's litigation objectives in initiating the suit is not necessarily to win the suit but rather to drain the SLAPP victim of time and money. If a SLAPP filer drags its meritless lawsuit against a hapless, SLAPP victim all the way up until the last moments before the Section 425.16 motion is decided and then the filer simply dismisses the suit without recourse as it never happened, doesn't this mean that the SLAPP filer's litigation objectives were met?

Because of this reasoning, the 2nd District fashioned a different test for determining the prevailing party in voluntary dismissal cases. The court abandoned *Coltraine's* presumption-based approach and created a test based on visiting merits of the anti-SLAPP motion despite the voluntary dismissal. Because no other guidance in Sec-

tion 425.16 exists, the court read "prevailing party" contextually with "on a special motion to strike." And how is a prevailing party on a motion to strike determined when the SLAPP suit was voluntarily dismissed? A court determines by proceeding to rule on the merits of the motion to strike anyway. Essentially, the 2nd District is saying to SLAPP suit filers: Don't think you can get away with filing a meritless SLAPP, forcing your opponent to incur costs in defending itself and in filing an anti-SLAPP motion and then get away with dismissing the suit entirely right before a ruling is made on that anti-SLAPP motion. The victim can still get the motion determined and be considered the prevailing party for attorney fees if it can be shown that a SLAPP suit had indeed been filed.

No subsequent published opinion has weighed in on the *Coltraine* and *Liu* split, nor on the hole in Section 425.16 created by the voluntary dismissal scenario — though many unpublished California SLAPP cases dealing with voluntary dismissals have settled between the *Liu* and *Coltraine* continuum (mostly siding closer with *Liu*). Practitioner guides and persuasive authorities have reviewed *Liu* and *Coltraine* with most criticizing *Coltraine*. For instance, B.E. Witkin openly calls out the flaws with *Coltraine* in "California Procedure, Pleading." Meanwhile, "California Practice Guide: Civil Procedure Before Trial" is more tactful, listing both *Coltraine* and *Liu* as available approaches, but then adding that the

Coltraine approach deviates from Section 425.16 because it shifts the statute's burden of proof.

Between the two approaches, *Liu* seems closer to the statute's intent of effectively deterring SLAPPs because its approach more successfully patches the loophole that voluntary dismissal cases present in allowing SLAPP filers, once again, a chance to use litigation to retaliate against their victims for some legitimate exercise of free speech or petitioning rights. Such preferences toward *Liu*, however, have not amounted to a definitive end-stop to the debate. Likely, what would be more effective would be reform of Section 425.16, recognizing that voluntary dismissal cases can subvert the section's intent and clarifying that the proper way to determine a "prevailing party on a special motion to strike" in subsection (c) is to read "prevailing party" within the context of the statutory phrase "on a special motion to strike." The latter could be done without disrupting the statute's operative sections simply by adding an actual definition of "prevailing party" alongside the statute's other definitional terms. The Legislature could then codify *Liu* by inserting its approach within that definition for voluntary dismissal situations.

In this way, there may be safety in certainty after all.

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