

Too late for an anti-SLAPP?

A look at the limiting language of this popular statute and recent decisions regarding it

By Alyssa Dillard

California's anti-SLAPP law was enacted by the state Legislature in 1992 to protect the petition and free speech rights of all Californians. When a defendant believes a plaintiff has filed a case against him in order to quell his right to free speech on a matter of public interest, the defendant can file a special motion to strike called an anti-SLAPP (strategic lawsuit against public participation) motion with the court.

The Legislature enacted California Code of Civil Procedure section 425.16 to prevent and deter "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (Code Civ. Proc., § 425.156.) The Legislature determined that SLAPP suits are inherently meritless and are often brought for the primary purpose of depleting a party's resources. In enacting section 425.16, the Legislature sought to reduce SLAPP suits and disincentivize potential plaintiffs from bringing SLAPP suits by providing defendants with a mechanism to dispose of these cases early, before too much time and effort have been expended. The statute "establishes a procedure where the trial court evaluates the merits of the lawsuit using a summary-judgment-like procedure at an early stage of the litigation." (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192.)

However, a defendant's ability to bring an anti-SLAPP motion in response to a SLAPP suit is not unlimited. It is governed by limiting language in section 425.16, which allows a defendant to file an anti-SLAPP motion only "within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper." (Code Civ. Proc., § 425.156.) Despite this limitation, the code does not specify whether the language applies to an *amended complaint* as well as an original complaint. Due to the arguably open-ended language of this statute, competing opinions have arisen within California's appellate courts regarding the application of section 425.16's time limitation.

A recent decision, *Newport Harbor Ventures LLC v. Morris Cerullo World Evangelism* (2018) 4 Cal.5th 637, attempts to resolve the issues surrounding the application of section 425.16. Prior to *Newport Harbor*, there were two contrasting holdings regarding the issue: *Lam v. Ngo* (2001) 91 Cal.App.4th 832, and *Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298 (*Yu*).

In *Lam v. Ngo*, Lam, a city councilman filed suit after a group of protestors began demonstrating outside a restaurant he owned, protesting his alleged inaction as a councilman in allowing a neighborhood video store to display a North Vietnamese flag and poster of Ho Chih Minh. Lam brought an action for preliminary injunction against Ky Ngo, who was the protestors' organizer, Lam's landlord, who allowed the protestors to remain on the premises, and 1500 Doe defendant protestors, who had allegedly caused extensive damage to Lam's restaurant and the property of his patrons while engaging in their protest. Four days prior to the hearing regarding the preliminary injunction, Lam filed an amended complaint, adding his wife as a plaintiff and additional various tort causes of action against the defendants.



In response, Ngo filed an anti-SLAPP motion, attacking the first amended complaint. The trial court denied Ngo's anti-SLAPP motion, making it very clear that the denial was based on the fact that Ngo had already lost the preliminary injunction battle and had brought forth nothing new for the court to consider. Ngo timely appealed.

On appeal, Lam attacked the timing of the anti-SLAPP, arguing that the anti-SLAPP had to be made within 60 days of the *original complaint*, or not at all. The Court of Appeal disagreed, holding that "the purpose of the anti-SLAPP suit law would be

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readily circumventable if a defendant's only opportunity to strike meritless SLAPP claims were in an attack on the original complaint," and "[i]t would make no sense to read 'complaint' to refer to an earlier complaint that contained no anti-free-speech claims, but not allow such a motion for a later complaint that had been amended to contain some." (*Lam, supra,* 91 Cal.App.4th at 840-841.)

The second major holding, *Yu v. Signet*, stemmed from a lengthy litigation in which credit card holders brought claims for abuse of process and unlawful and unfair business practices against Virginia banks that obtained default judgments against them in debt-collection actions. In *Yu*, the trial court entered summary judgment in favor of defendants, the plaintiffs appealed, and the case was reversed in part and remanded. On remand plaintiffs filed a third amended complaint and defendants brought an anti-SLAPP motion. The trial court denied the motion, stating that it was moot as untimely.

On appeal of these issues, the Court of Appeal held that the language of section 425.16 applies to not only the original, but also any amended complaints. The court reasoned that there are other statutes in the Code of Civil Procedure where the term "complaint" implicitly encompasses "amended complaint." The Court of Appeal held that section 425.16 thus gives defendants a right to bring an anti-SLAPP motion within 60 days of the filing of the original or any amended complaints.

Although not in obvious direct conflict, *Lam* and *Yu* provide two different answers to the same question. Under both *Lam* and *Yu*, an anti-SLAPP motion may be brought after an amended complaint, at least as to new claims not previously made. However, according to *Lam*, a defendant cannot be categorically barred from bringing an anti-SLAPP against an amended complaint, as the original complaint may not have contained causes of action that would give rise to an anti-SLAPP. In contrast, according to *Yu*, section 425.16 gives defendants an *absolute right* to bring an anti-SLAPP motion within 60 days of the filing of the original or any amended complaints.

This dispute regarding the practical application of section 425.16's time limitation went unresolved for over 15 years, until it arose in front of the California Supreme Court this past March in *Newport Harbor*. In *Newport Harbor*, a defendant attempted to file an anti-SLAPP motion within 60 days of service of the plaintiff's third amended complaint. The litigation had been ongoing for over two years, in which time the plaintiff had filed two previous amended complaints, each seeking causes of action substantially similar to those sought in the third amended complaint. Within 60 days of service of the plaintiff's third amended complaint, defendants brought an anti-SLAPP motion, seeking to dismiss various causes of action that had been included in plaintiff's earlier complaints.

The Court took *Newport Harbor* as an opportunity to clear up some of the debate amongst the Court of Appeal decisions regarding the timeliness of anti-SLAPP motions. The Court noted that the appellate court's decision in *Yu*, while attempting to prevent abuse of the judicial system, could be subject to abuse itself. Since the filing of an anti-SLAPP stays discovery, defendants could use an anti-SLAPP as a tactical device to introduce delay. Further, if defendants have an absolute right to file an anti-SLAPP in response to an amended complaint, even where the contested causes of action appeared in a previous iteration, a defendant could bring an anti-SLAPP years into the litigation, despite the fact that the statutory purpose for these motions is to expediently discard meritless suits.

This type of delay is precisely what occurred in *Newport Harbor*, and what prompted the Court to state that "[i]t is far too late for the anti-SLAPP statute to fulfill its purpose of resolving the case promptly and inexpensively." (*Newport Harbor*, *supra*, 4 Cal.5th at 645.) The Court, quoting dicta from the recent appellate case *San Diegans for Open Government v. Har Construction, Inc.* (2015) 240 Cal.App.4th 611, also emphasized that "[a]n anti-SLAPP motion is not a vehicle for a defendant to obtain a dismissal of claims in the middle of litigation; it is a procedural device to prevent costly, unmeritorious litigation at the initiation of the lawsuit."

The Court, in confirming the decision in *Lam*, held that an anti-SLAPP can timely be brought in response to an amended complaint *only* where the amended complaint adds new causes of action (or new allegations that make previously pleaded causes of actions subject to an anti-SLAPP motion). By doing so, the Court explicitly disapproved *Yu*, holding that a defendant's right to bring an anti-SLAPP is *not* absolute where the contested cause of action appeared in a previous version of the complaint.

Instead, a defendant must move to strike a cause of action within 60 days of service of the *earliest complaint that contains that cause of action*. The Court ultimately held that, subject to the trial court's discretion to permit a late motion, section 425.16 "should be interpreted to permit an anti-SLAPP motion against an amended complaint if it could not have been brought earlier, but to prohibit belated motions that could have been brought earlier." (*Newport Harbor*, *supra*, 4 Cal.5th at 645.) As the Court reasoned, "[t]his interpretation maximizes the possibility the anti-SLAPP statute will fulfill its purpose while reducing the potential for abuse." (*Newport Harbor*, *supra*, 4 Cal.5th at 645.)

Newport Harbor highlights the importance of evaluating one's claims and defenses early on and refraining from attempting to use section 425.16 for tactical purposes. *Newport Harbor* makes it clear that a plaintiff cannot plead its way

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around an anti-SLAPP motion by saving its causes of action which may give rise to an anti-SLAPP for an amended complaint. Likewise, a defendant cannot use an amended complaint as a mechanism to reopen the statutory period when the causes of action giving rise to an anti-SLAPP appeared in substantially similar form in previous versions of the complaint.


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