

Jabs and SLAPPs

The viability of defamation actions and the anti-SLAPP statute – part 2

By Jack Bollier

Part 1 of this article appeared in the January issue of Plaintiff, *which can be found at www.plaintiffmagazine.com.*

As the plaintiff, you are accustomed to driving the litigation. You decide when to file and only after having performed a thorough investigation on the facts and the law. Ideally, you already have your discovery mapped out and drafted before the defendant is even served with the complaint. All you need to do is execute on your plan. It is a privileged position compared to our defense counterparts whose first exposure to the case may be accompanied by a 30-day time limit to respond to the complaint – a comparatively short window to get acquainted on a case with which you have had months to orient yourself. Just don't get too comfortable in your assumption that you are in command of the case. If it involves a claim for defamation, expect that it will be met with a "special motion to strike" under Civil Code section 425.16, colloquially referred to as an "anti-SLAPP" motion. Failing to successfully oppose this motion may expose your client to the fees and costs of the moving party.

SLAPP is an acronym that stands for "Strategic Lawsuit Against Public Participation." The anti-SLAPP statute and its motion to strike are intended to address "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., § 425.16.) Section 425.15 is designed to eliminate "meritless or retaliatory litigation at an early stage of the proceedings." (*Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798, 806-807.) As discussed below, the anti-SLAPP statute essentially shifts the burden to the plaintiff to prove that their claims have merit at the outset of the case. These motions are often filed in response to defamation actions because such claims often encompass the right of protected free speech. Section 425.16 has a one-sided fee-shifting provision that entitles the prevailing *defendant* to recover their attorneys' fees and costs; a plaintiff can only recover fees and costs on a showing that the "special motion to strike is frivolous or is solely intended to cause unnecessary delay."

The jurisprudence of defamation and the anti-SLAPP statute are both vast and each independently could warrant their own treatise. This article is intended to provide the plaintiff practitioner with some helpful tips and authority focusing on the favorable standard of review in order to wrest leverage away from the filer of a special motion to strike and regain control of the litigation.

Basics of the anti-SLAPP statute

The anti-SLAPP analysis is a little bit like a motion for summary judgment in that it involves both a legal and evidentiary component. The statutory language establishes a two-part test. "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity." (*Equilon Enterprises, LLC v. Consumer Cause, Inc.* (2002) 29 Cal.4th 5367.) If this threshold showing is made, then opposing parties must demonstrate a probability of prevailing on the merits of the complaint. (*Equilon Ent., supra*, 29 Cal.4th at p. 67; *Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 548; Code of Civ. Proc., § 425.16, subd. (b)(1).)

Prong one

Under the first prong, protected activity is defined by subpart (e) to section 425.16, which concerns legislative, judicial, and other government-related functions. However, more typically evaluated in the case law, are statements concerning "public issues" or "issues of public interest." The California cases establish that generally, "[a] public issue is implicated if the subject of the statement or activity underlying the claim (1) was a person or entity in the public eye; (2) could affect large numbers of people beyond the direct participants; or (3) involved a topic of widespread, public interest." (*Jewett v. Capital One Bank* (2003) 113 Cal.App.4th 805, 814; see *World Financial Group, Inc. v. HBW Ins. & Financial Services, Inc., supra,* 172 Cal.App.4th at p. 1573; *Century 21 Chamberlain & Associates v. Haberman* (2009) 173 Cal.App.4th 1, 9.)

Ideally, you can cut short the defendant's special motion to strike at the outset by demonstrating that their statements do not encompass matters of public interest. The moving defendant may attempt to characterize what are otherwise matters of private concern by connecting their statements to a larger public interest. But, a Defendant's reliance on an abstract public interest is not sufficient for anti-SLAPP purposes. (*World Financial Group, Inc. v. HBW Ins. & Financial Services, Inc.* (2009) 172 Cal.App.4th 1561, 1570 ["In evaluating the first prong of the anti-SLAPP statute, we must focus on 'the specific nature of the speech rather than the generalities that might be abstracted from it.'"]; *Rand Resources, LLC v. City of Carson* (2019) 6 Cal.5th 610, 625 ["At a sufficiently high level of generalization, any conduct can appear rationally related to a broader issue of public importance"].) Use these authorities to prevent a defendant from spinning a "parochial" matter into something greater than it

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is. (*See Commonwealth Energy Corp. v. Investor Data Exchange, Inc.* (2003) 110 Cal.App.4th 26, 34.)

This article assumes that the defendant has satisfied prong one, successfully shifting the burden to the plaintiff to demonstrate a likelihood of success on the merits.

Prong two: Standard of review

As to the second prong, to establish a probability of success on their defamation claims, the plaintiff must demonstrate the complaint is legally sufficient and supported by an adequate prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited. (*Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809.) In order to preserve the plaintiff's constitutional right to a jury trial, the court's determination of the motion cannot involve a weighing of the evidence. (*Monster Energy Co. v. Schechter* (2019) 7 Cal.5th 781, 788.) The court accepts the plaintiff's evidence as true, and evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law (*Id.* at 795) "[C]laims with the requisite minimal merit may proceed." (*Olson v. Doe* (2022) 12 Cal.5th 669, 679.) "[T]he court may not weigh the evidence or determine questions of credibility but must accept all evidence favorable to the plaintiff as true and indulge every legitimate favorable inference that may be drawn from it." (*Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 828 [standard for assessing evidence is analogous to standard applicable to motions for nonsuit or directed verdict] (*citing Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 838–839).) "[T]he court does not *weigh* the credibility or comparative probative strength of competing evidence . . . ." (*Taus, supra*, 40 Cal.4th at 714.) We can synthesize the above to persuade the court with the following standard:

> *Plaintiff's constitutional rights to a jury trial will prevail over defendant's motion upon a showing of minimal merit. In evaluating the existence of merit, plaintiff's evidence shall be accepted as true, is entitled to every legitimate favorable inference, and shall not be weighed against any conflicting evidence.*

The next section provides the case law needed to persuade the court that the plaintiff's case exceeds the low threshold needed to establish "minimal merit."

Prong two: Existence of defamation

A full summary of defamation is beyond the scope of this series, but see the previous article (Plaintiff January 2025) for a brief overview of defamation. The plaintiff's burden in such an action can vary wildly depending on: (1) the subject matter uttered by the alleged defamer and whether the matter was of public concern; (2) the identity of the defamed party and whether they are a public official or public figure. Depending on the facts of the case, these criteria can affect whether plaintiff must prove mere negligence on the part of the speaker or more intentional conduct amounting to malice. See Civil Code section 44 and thereafter for specific types of defamation amounting to libel or slander. There are also numerous privileges contained in Civil Code section 47 that can torpedo a defamation action, which should be carefully reviewed.

"Defamation is the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or that causes special damage." (*Grenier v. Taylor* (2015) 234 Cal.App.4th 471, 486.) A "statement" "refers to any form of communication or representation, including spoken or written words or pictures or [other] audible or visual representations." (CACI 1706.) "[T]he court must first determine as a question of law whether the statement is *reasonably susceptible* of a defamatory interpretation; if the statement satisfies this requirement, *it is for the jury to determine* whether a defamatory meaning was in fact conveyed to the listener or reader." (*Bently Reserve LP v. Papaliolios* (2013) 218 Cal.App.4th 418, 428 (emphasis added).) It is sufficient if the interpretation "*implies* a provably false assertion of actual fact." (*Id.* (emphasis added); see *Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1370.) It is sufficient if a trier of fact "might" conclude defendants' statements defamatory. (*Bently*, 218 Cal.App.4th at 435.) Determining whether language is libelous requires examination of expressions used as well as the whole scope and apparent object of writer. (*MacLeod v. Tribune Publ'g Co.* (1959) 52 Cal.2d 536, 546.) Determining whether language is defamatory requires examination of the effect of language on the mind of an average reader of ordinary intelligence. (*Id.* At 547; *Williams v. Daily Review, Inc.* (1965) 236 Cal.App.2d 405, 414-415.) Libel is what a "recipient correctly, or mistakenly but reasonably, understands . . . ." (*Washburn v. Wright* (1968) 261 Cal.App.2d 789, 799.) "[F]alse inferences or implications raised by the arrangement and phrasing of apparently non-libelous statements can be as injurious as explicit epithets . . . ." (*Kapellas v. Kofman* (1969) 1 Cal.3d 20, 33.) Defendant is liable for insinuations as well as for explicit statements. (*Ibid.*)

The above can be synthesized into the following:

> *Plaintiff's claim for defamation has minimal merit upon a showing that the totality of the defendant's statements, taken together, might reasonably be interpreted by an ordinary person, even if only mistakenly, to imply or infer a falsity, which causes the plaintiff injury.*

Your opposition should be supported by evidence with proper foundation, which can come from witness or party declarations. If written, authenticate the defamatory statements and remember that they are, while hearsay, still admissible as "operative facts." (*Russell v. Geis* (1967) 251 Cal.App.2d. 560, 571.) Include evidence of any media coverage

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that was garnered, including online articles or social media posts. The comments section of these forums often exceeds the primary subject matter in terms of overall content. This is fertile grounds for possible evidence of defamatory interpretations by average readers. As long as such interpretations are reasonable, looking at the totality of the defendant's statements, including their apparent object, the plaintiff will have satisfied the "minimal merit" standard to overcome an anti-SLAPP special motion to strike.

Retake control of your case

After recovering from the shock of receiving an anti-SLAPP motion, review the above authorities and which should provide reassurance that you can successfully overcome the defendant's attempts to dismiss your case. Now get back in the driver's seat and collect the evidence needed to move forward.


Bollier

Jack Bollier is a partner in the Rains Lucia Stern St. Phalle & Silver, PC *Personal Injury Group. Jack has handled a variety of cases to successful resolution including auto, pedestrian, bicycle, motorcycle, and bus claims; various industrial and construction site accident claims; premises liability and worksite safety claims; and products liability actions.*

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