

Blessed Be the Anti-SLAPP Motion

BY HERB FOX

Sixteen years ago, the Legislature created the Special Motion to Strike action arising from the exercise of constitutional rights (the anti-SLAPP statute, *Code of Civil Procedure* § 425.16. The civil litigation bar has been thankful ever since.

Given the interplay of a quick, early procedure that shuts down litigation (orders granting or denying the motion are appealable), invokes lofty constitutional law issues, and rewards prevailing parties with statutory attorneys fees, the anti-SLAPP statute has become one of the most useful (and used) procedural devices in our quiver, at both the trial court and appellate level. Since Section 425.16 became effective in 1992, there have been 292 published opinions concerning or mentioning the statute, and thousands of unpublished ones.

Two more local SLAPP cases came down from Division Six in Ventura in January alone—one published, one not, both concerning the applicability of the anti-SLAPP statute to complaints seeking declaratory relief.

The published opinion involved our hometown fast food giant CKE Restaurants in a declaratory relief action against a would-be plaintiff who threatened the company with a Proposition 65 action for allegedly failing to identify the presence of a cancer-causing chemical in its French fries. CKE was served with the mandatory 60-day pre-filing notice, after which a citizen may bring a private enforcement action if governmental agencies do not do so first (*H&S* § 25249.7, *subd. (d)(1)*). CKE struck first, however, responding to the notice with a declaratory relief action in the Santa Barbara Superior Court, seeking a judicial determination as to whether in fact the chemical was present in its food.

The defendant filed an anti-SLAPP motion, arguing that the Prop 65 notice was a protected activity and that CKE could not demonstrate a probability of prevailing. CKE, in turn, argued that the anti-SLAPP statute does not apply to declaratory relief actions, and that there is no evidence that its food contains any detectible amount of the suspect chemical. Superior Court Judge James W. Brown granted the motion and dismissed CKE's complaint. CKE appealed.

The Court of Appeal, in an opinion written by Associate Justice Paul Coffee, affirmed the order dismissing the action. The Court found that CKE requested a judicial determination that its food products complied with Proposition 65, and that instead of using the 60-day period to avoid litigation, CKE "used it to commence litigation." The declaratory relief action was therefore aimed at a protected speech. The Court of Appeal also found that CKE did not meet its burden of proving that it would likely have prevailed in its action.

The published opinion is *CKE Restaurants Inc. v. Moore* (*Court of Appeal Case No. B197077*) filed on January 24, 2008. CKE was represented by Scott J. Ferrell, Melinda Evans, and Scot D. Wilson of Call, Jensen & Ferrell in Newport Beach, and Lol Sorenson of Mullen & Henzell. The Respondent was represented by Thomas H. Clarke, Jr., Terry Anastasiou, and Timothy A. Dolan Ropers of Majeski, Kohn & Bentley in San Francisco.

The second case concerns the latest saga of the long-running controversy over the Santa Barbara County Sheriff's Council. Readers may recall that in December, 2005, Council Board members James Petrovich, Dale Grimm, Charles Pira, and Alan Cavaletto filed suit against interim Board President Helen Jepsen, alleging that Council funds had been misappropriated and seeking a forensic audit. Later that month, Jepsen stipulated to an audit. Several weeks later, Jepsen filed a cross-complaint seeking the same relief requested in the complaint.

The cross-defendants filed an anti-SLAPP motion, which was granted by Superior Court Judge James Brown along with a \$15,000 attorney fee award. Jepsen appealed from the order dismissing her cross-complaint, arguing inter alia that the anti-SLAPP motion does not apply to declaratory relief actions. The cross-defendants cross-appealed from the attorney fee award, arguing that they were entitled to \$90,000, reflecting all fees they incurred in the case (not just the fees incurred on the motion).

In an opinion written by Acting Presiding Justice Ken Yegan, the Court of Appeal affirmed in full. The Court



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