California, together with some twenty-five other states has enacted legislation to protect its citizens against "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances."[1]

Section 425.16[2] is designed to provide an early and decisive determination of claims "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. . . ."

More specifically, § 425.16(e) describes four separate instances in which an "act in furtherance of a person's right of petition or free speech . . ." is protected by the statute. Subsection (e)(3) protects "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. . . . and subsection (e)(4) shelters "any other conduct in furtherance of the exercise of the constitutional right of free speech in connection with a public issue or an issue of public interest."

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[1] The California Supreme Court in Equilon Enterprises v. Consumer Cause (2002) 29 Cal.4th 53, 124 Cal.Rptr.2d 507 held a defendant need not demonstrate that the action was brought with the intent to chill the defendant's exercise of constitutional free speech and petition rights; it is sufficient to show that plaintiff's action arises from some activity protected by the statute; there is no additional requirement of proving plaintiff's actual intent. (29 Cal.4th 53, 57, 62)

[2] The entire text of the statute, California Code of Civil Procedure § 425.16, its later-added concomitant, § 425.17 and a compendium of state laws in other jurisdictions enacting such statutes are listed in the paper submitted by my colleague Rochelle Wilcox.

The anti-SLAPP motion, in instances where it finds support in the statutory language, is a most compelling litigation tool in defamation actions. There are a number of reasons why:

1. The motion must be filed within sixty days of the service of the complaint and noticed for hearing not more than thirty days thereafter. (Subsection (f))

2. Once the motion is interposed, "all discovery proceedings in the action shall be stayed . . . until notice of entry of the order ruling on the motion." (Subsection (g))

3. An order granting or denying the motion is appealable. (Subsection (j))

4. Prevailing defendants "shall be entitled to recover . . . attorney's fees and costs." Conversely, a prevailing plaintiff may only recover fees and costs if the "special motion to strike is frivolous or is solely intended to cause unnecessary delay. . . ." (Subsection (c))

So strong is the policy on the award of attorney's fees that, even when the suit is dismissed prior to a Court ruling on the anti-SLAPP motion, the trial court retains jurisdiction to award attorney's fees to the moving defendant (provided it find the

requisite elements for granting the motion were present). *Liu v. Moore* (1999) 69 Cal. App. 4th 745, 81 Cal.Rptr.2d 807 (voluntary dismissal by Plaintiff). *See also Pfeiffer Venice Properties v. Bernard* (2002) 101 Cal.App.4th 211, 218, 123 Cal.Rptr.2d 647 (*sua sponte* dismissal by Court).

This lightning-bolt approach to realizing a terminating sanction contrasts with the much more cumbersome process of achieving summary judgment were it otherwise available. Setting aside the necessity in seeking summary adjudication of identifying undisputed material facts sufficient to dispense with the requirement of trials, California law provides that notice of a motion for summary judgment must be given at least seventy-five days before the hearing date. (Cal. Code Civ. Proc. § 437(c)) It goes without saying this time is designed to permit plaintiff to take discovery.

In fact, so abrupt may be the extinction of plaintiff's lawsuit and so time-consuming would be efforts to achieve the same objective via a motion for summary judgment, the anti-SLAPP motion is simply too potent a weapon to be ignored.

Consider also: the statute does not permit amendment of the plaintiff's pleading once defendant has made a prima facie showing of the requisite connection to free speech. This would defeat the purpose of the motion, triggering still another round of pleadings, perhaps a fresh motion to strike and perhaps even another request for leave to amend. *Simmons v. Allstate Insurance Co.* (2001) 92 Cal.App.4th 1068, 1073, 112

Cal.Rptr.2d 397. Nor are amendments to pleadings permitted after a decision on the motion has been made. And in cases where defendant's motion is denied, amendment of the complaint to prevent appeal of the denial is impermissible. *Roberts v. Los Angeles County Bar Association* (2003) 105 Cal.App.4th 604, 612, 129 Cal.Rptr.2d 546.

Union defendants have successfully applied the anti-SLAPP statute in two reported California decisions but were unsuccessful in two others. This paper examines the necessary ingredients for a successful motion and explores the deficiencies of those efforts that were unsuccessful.

CASES WHERE UNIONS WERE SUCCESSFUL

A. The leading California case is *Macias v. Hartwell* (1997) 55 Cal.App.4th 669, 64 Cal.Rptr.2d 222, holding the motion proper under Cal. Code Civ. Proc. § 425.16(e)(3).

Hartwell and Macias were candidates for union office; the former authored a leaflet to the membership of the Local Union reciting the latter had been terminated for misuse of union funds. Applying § 425.16(e)(3), the court held the "public forum" was the union election and the "public issue" was the discussion of qualifications to hold office.

Once these thresholds are met the burden shifts to the Plaintiff to show that (s)he would nonetheless prevail on the merits (in this case the action for libel). Hartwell established on the papers both that his statements were privileged under the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 411(a)(2)[3] and made without malice[4] (the leaflet responded to one by Macias asserting the reason for her termination had been "[d]isloyalty to the President."). He also was awarded $44,445.00 in attorney's fees in the trial court and was granted fees and costs on appeal.[5]

B. *Monterey Plaza Hotel v. Hotel Employees and Restaurant Employees, Local 483* (1999) 69 Cal.App.4th 1057, 82 Cal.Rptr.2d 10.

A union organizer gave a radio interview in which she said, concerning a decision of the General Counsel of the National Labor Relations Board to issue

[3] "Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon the candidates in an election of the labor organization. . . ."

[4] In judging union speech California courts have adopted the reasoning of *Linn v. Plant Guard Workers* (1966) 383 U.S. 53, 86 S.Ct. 657, which in turn applied the standard of *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 84 S.Ct. 710 to protect statements during a labor controversy. *See, e.g., Gregory v. McDonnell Douglas Corp.* (1976) 17 Cal.3d 596, 600, 131 Cal.Rptr. 641.

[5] Macias argued that Hartwell should not recover his attorney's fees as they had been paid by a third party (the Union). The Court responded "(b)ased on her construction of the law (Hartwell) would not be entitled to attorney's fees if the defense costs were paid by his homeowner's insurance carrier, the Union's insurance carrier, or a relative. No court has so held." (55 Cal.App.4th 674, 676-677)

complaint over the firing of two supervisors engaged in organizing activities, "the federal government has found that . . . the firings were illegal." (69 Cal.App.4th 1057, 1061) Slightly inaccurate though her comment was, it was surrounded in the broadcast by statements of news anchors that the Board's charges were "allegations," that the Hotel "may be facing charges of illegally firing two housekeeping employees" and that "(a) hearing before an administrative law judge is set" for a later date. (*Ibid*.) The court, viewing the entire publication as a whole concluded there had been no false statement and that "a viewer could not have reasonably understood (the union official's) statement to mean that there had been a final determination that plaintiff had illegally fired the two employees." (69 Cal.App.4th 1057, 1066)

Thus, the union showed that plaintiff's complaint arose from protected speech activity (the "statement was made during a major labor dispute in the community.") (*Id*. at 1064) and the plaintiff "failed to establish a *prima facie* case of slander in its pleadings . . ." (*Id*. at 1065) and thus failed to show probability of success on the merits. The court properly granted the anti-SLAPP motion; the trial court to determine the amount of costs and attorneys' fees on appeal.

<u>CASES IN WHICH THE UNION'S MOTION WAS UNSUCCESSFUL</u>

C. *Rivero v. American Federation of State, County and Municipal Employees, AFL-CIO* (2003) 105 Cal.App.4th 913, 130 Cal.Rptr.2d 81.

Rivero sued over three union-generated documents accusing him in his role as a custodial supervisor being abusive to his subordinates, soliciting bribes and hiring family members. The Court, after conducting an exhaustive survey of the literature on what constitutes "a public issue" eventually concluded that *Macias v. Hartwell, supra* "is clearly distinguishable. The campaign activity at issue in that case represented the quintessential substance of First Amendment protection (*citation omitted*). Here, in contrast the supervision of eight low-ranking employees holds no similar special place." (105 Cal.App.4th 913, 929)

Rivero is an example of the court finding the allegations of wrongdoing not sufficiently a matter of public interest and therefore not a "public issue" and at that point it becomes unnecessary to "consider whether Rivero met his burden of establishing a probability of success on the merits." (105 Cal.App.4th 1913, 1930)

D. *Du Charme v. International Brotherhood of Electrical Workers, Local 45* (2003) 110 Cal.App.4th 107, 1 Cal.Rptr.3d 501 is quite similar to *Macias v. Hartwell, supra* in that the plaintiff sued over the union's website posting that he had been removed from office for financial mismanagement. But in contrast to *Macias* the statement was not made in the context of an election or any matter of interest among the membership. Rather, it was "unconnected to any discussion, debate or controversy. Du Charme's termination was *fait acompli*; its propriety was no longer at issue. Members of the local

were not being urged to take any position on the matter. In fact, *no* action on their part was called for or contemplated. To grant protection to mere informational statements, in this context, would in no way further the statute's purpose of encouraging *participation* in matters of public significance (§ 425.16, subd. (a))." (110 Cal.App.4th 107, 118) (emphasis in original)

The court held that the statement Du Charme sued over "satisfies neither subdivision (e)(3) nor (e)(4) because, although it may well have been made in a public forum (the Internet) and in furtherance of the exercise of the constitutional right of free speech, defendants have not made a *prima facie* showing that it was made in connection with a public issue or an issue of public interest within the meaning of the anti-SLAPP statute." (110 Cal.App.4th 107, 119)

CONCLUDING OBSERVATIONS

In assessing the availability of the anti-SLAPP defense, unions must recognize, given these decisions, that they must be prepared to show the statements giving rise to the action are of interest to a definable segment of society – their immediate membership. Two cases illustrate this: *Macias*, *supra* (10,000 union members) (55 Cal.App.4th 669, 671) and another appellate decision concerning a 3,000 member homeowners' association, *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 102 Cal.Rptr.2d 205.[6]

Presumably, both Rivero and Du Charme would have won their cases had they been in the context of plaintiffs' status as candidates in a union election as was Ms. Macias, and if that kind of "public issue" is relatively easily made out then the distribution of the offending comments will almost surely be deemed to have occurred in a "public forum," or at least be "an issue of public interest."

In a case I am currently handling concerning a union where, as election time approaches but has not yet arrived, leaflets containing charges and countercharges are the commonplace, a statement by a local union officer that a leader of an opposing caucus has "suckered" caucus members, while indeed a statement on a public issue of

[6] The court in *Damon* discussed the "public forum" issue in the context of the question whether the homeowners' newsletter was entitled to that characterization notwithstanding it did not offer a balanced viewpoint. (85 Cal.App.4th 468, 475, 479)

interest to the membership and in the public forum of that union (gate distribution of a leaflet) nonetheless the trial court concluded plaintiff has shown he may succeed on the merits as the verb used is potentially defamatory. That decision is on appeal.