

## **RESOLUTION 10-01-2010**

### **DIGEST**

#### SLAPP Motions: Correcting Erroneous Cross-Reference

Amends Code of Civil Procedure section 425.17, subdivision (e) to correct an apparent error in a cross-reference to another section.

### **RESOLUTIONS COMMITTEE RECOMMENDATION**

**APPROVE IN PRINCIPLE**

#### History:

No similar resolutions found.

#### Reasons:

This resolution amends Code of Civil Procedure section 425.17, subdivision (e) to correct an apparent error in a cross-reference to another section. This resolution should be approved in principle because the current cross-reference to Code of Civil Procedure section 425.16, subdivision (j) does not make sense when read in the context of the entirety of Code of Civil Procedure section 425.17.

Code of Civil Procedure section 425.17, subdivision (e) states that “If any trial court denies a special motion to strike on the grounds that the action or cause of action is exempt pursuant to this section, the appeal provisions in subdivision (j) of Section 425.16 and paragraph (13) of subdivision (a) of Section 904.1 do not apply to that action or cause of action.” Subdivision (j) of Section 425.16, however, has nothing to do with appealing a denial of a motion to strike.

On the other hand, subdivision (i) states in full that “An order granting or denying a special motion to strike shall be appealable under Section 904.1.” When Code of Civil Procedure section 425.17, subdivision (e) is read as is, it makes no sense. When the words “subdivision (j)” are replaced with “subdivision (i),” however, the statute makes sense and fits within the context of the entire statute.

The discrepancy appears to be a typographical error when the sections were re-designated in a prior revision. This resolution should be approved to fix this apparent error and to carry out the legislative intent behind Code of Civil Procedure section 425.17, subdivision (e).

### **TEXT OF RESOLUTION**

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 425.17 to read as follows:

- 1     § 425.17
- 2             (a) The Legislature finds and declares that there has been a disturbing abuse
- 3     of Section 425.16, the California Anti-SLAPP Law, which has undermined the
- 4     exercise of the constitutional rights of freedom of speech and petition for the
- 5     redress of grievances, contrary to the purpose and intent of Section 425.16. The

6 Legislature finds and declares that it is in the public interest to encourage continued  
7 participation in matters of public significance, and that this participation should not  
8 be chilled through abuse of the judicial process or Section 425.16.

9 (b) Section 425.16 does not apply to any action brought solely in the public  
10 interest or on behalf of the general public if all of the following conditions exist:

11 (1) The plaintiff does not seek any relief greater than or different from the  
12 relief sought for the general public or a class of which the plaintiff is a member. A  
13 claim for attorney's fees, costs, or penalties does not constitute greater or different  
14 relief for purposes of this subdivision.

15 (2) The action, if successful, would enforce an important right affecting the  
16 public interest, and would confer a significant benefit, whether pecuniary or  
17 nonpecuniary, on the general public or a large class of persons.

18 (3) Private enforcement is necessary and places a disproportionate financial  
19 burden on the plaintiff in relation to the plaintiff's stake in the matter.

20 (c) Section 425.16 does not apply to any cause of action brought against a  
21 person primarily engaged in the business of selling or leasing goods or services,  
22 including, but not limited to, insurance, securities, or financial instruments, arising  
23 from any statement or conduct by that person if both of the following conditions  
24 exist:

25 (1) The statement or conduct consists of representations of fact about that  
26 person's or a business competitor's business operations, goods, or services, that is  
27 made for the purpose of obtaining approval for, promoting, or securing sales or  
28 leases of, or commercial transactions in, the person's goods or services, or the  
29 statement or conduct was made in the course of delivering the person's goods or  
30 services.

31 (2) The intended audience is an actual or potential buyer or customer, or a  
32 person likely to repeat the statement to, or otherwise influence, an actual or  
33 potential buyer or customer, or the statement or conduct arose out of or within the  
34 context of a regulatory approval process, proceeding, or investigation, except where  
35 the statement or conduct was made by a telephone corporation in the course of a  
36 proceeding before the California Public Utilities Commission and is the subject of a  
37 lawsuit brought by a competitor, notwithstanding that the conduct or statement  
38 concerns an important public issue.

39 (d) Subdivisions (b) and (c) do not apply to any of the following:

40 (1) Any person enumerated in subdivision (b) of Section 2 of Article I of  
41 the California Constitution or Section 1070 of the Evidence Code, or any person  
42 engaged in the dissemination of ideas or expression in any book or academic  
43 journal, while engaged in the gathering, receiving, or processing of information for  
44 communication to the public.

45 (2) Any action against any person or entity based upon the creation,  
46 dissemination, exhibition, advertisement, or other similar promotion of any  
47 dramatic, literary, musical, political, or artistic work, including, but not limited to, a  
48 motion picture or television program, or an article published in a newspaper or  
49 magazine of general circulation.

50 (3) Any nonprofit organization that receives more than 50 percent of its  
51 annual revenues from federal, state, or local government grants, awards, programs,

52 or reimbursements for services rendered.

53 (e) If any trial court denies a special motion to strike on the grounds that the  
54 action or cause of action is exempt pursuant to this section, the appeal provisions in  
55 subdivision (j i) of Section 425.16 and paragraph (13) of subdivision (a) of Section  
56 904.1 do not apply to that action or cause of action.

(Proposed new language underlined; language to be deleted stricken.)

**PROPONENT:** Bar Association of Northern San Diego County

### **STATEMENT OF REASONS**

Existing Law: The reference in Section 425.17, subdivision (e) to “the appeal provisions in subdivision (j) of Section 425.16” is meaningless, because subdivision (j) relates to the reporting to and record keeping functions of the Judicial Council in connection with Special Motions to Strike, and says nothing of appeal.

This Resolution: This Resolution would amend Section 425.17, subdivision (e) to reflect that it is referring to subdivision (i) of Section 425.16, not subdivision (j).

The Problem: Read literally, subdivision (e) of Section 425.17 is a nullity, because it refers to appeal under subdivision (j) of Section 425.16, which provides:

(j)(1) Any party who files a special motion to strike pursuant to this section, and any party who files an opposition to a special motion to strike, shall, promptly upon so filing, transmit to the Judicial Council, by e-mail or facsimile, a copy of the endorsed, filed caption page of the motion or opposition, a copy of any related notice of appeal or petition for a writ, and a conformed copy of any order issued pursuant to this section, including any order granting or denying a special motion to strike, discovery, or fees.

(2) The Judicial Council shall maintain a public record of information transmitted pursuant to this subdivision for at least three years, and may store the information on microfilm or other appropriate electronic media.

Code of Civil Procedure section 425.16, subdivision (i) provides:

(i) An order granting or denying a special motion to strike shall be appealable under Section 904.1.

It would seem obvious that the intention of Section 425.17, subdivision (e) is to refer to the appeal provision contained in Section 425.16, subdivision (i), not (j), and this inconsistency should be rectified to confirm the obvious legislative intent of prohibiting immediate appeal when a Special Motion to Strike is denied pursuant to Section 425.17.

**IMPACT STATEMENT**

This resolution does not affect any other law, statute or rule.

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