

## Supreme Court SLAPPS for Lawyers

In a well-written opinion, our California Supreme Court has further clarified the twilight zone of the anti-SLAPP statute and happily ruled that lawyers can strike lawsuits against them by potential defendants when attorneys advertise for clients who may have been damaged by a particular company. Justice Marvin Baxter, writing for a unanimous court in *Simpson Strong-Tie Co. v. Gore*, 2010 DJDAR 7087, held that the exemption from the anti-SLAPP statute for commercial speech under Code of Civil Procedure Section 425.17 does not apply to advertisements by lawyers seeking clients even if the attorneys arguably disparage a potential defendant's product or reputation. In a nutshell, lawsuits seeking to limit a lawyer's First Amendment Rights can be "SLAPped."

The facts of this case are simple enough: Simpson Strong-Tie Co. manufactures galvanized screws, which are used in outdoor wooden decks. Unfortunately, the pressure-treated wood commonly used in outdoor decks is corrosive and tends to cause these galvanized deck fasteners to fail. Pierce Gore, a California lawyer, put an advertisement in the *San Jose Mercury News* to try to locate potential clients who had purchased galvanized products for their outdoor decks in the hope of putting together a class action or filing other claims. The ad ran five times in 2005-2006 and stated in part: "If your deck was built after January 1, 2004 with galvanized screws manufactured by...Simpson Strong-Tie..., you may have certain legal rights and be entitled to monetary compensation and repair or replacement of your deck." Needless to say, Simpson was not pleased and conducted a survey to prove that the advertisement caused people to believe its products were defective, so Simpson sued for defamation, trade libel, false advertising, and unfair competition. Gore moved to strike the complaint under Code of Civil Procedure Section 425.16, but Simpson contended that since the advertisement was commercial speech, the murky language of Section 425.17 applied to prohibit "SLAPPING" the complaint. The trial court nonetheless granted the motion to strike, and the Court of Appeal affirmed. The Supreme Court granted review because of conflicts in appellate decisions

about the scope of the commercial speech exemption. After carefully interpreting the statute, the Court affirmed this case.

Section 425.17 was originally enacted to try to fix the problems created by the original anti-SLAPP statute enacted in 1992. A "strategic lawsuit against public policy" or "SLAPP" is a lawsuit "aimed at preventing citizens from exercising their political rights or punishing those who have done so." The anti-SLAPP statute contains a number of unusual provisions, including mandatory attorneys' fees for the party successfully bringing a motion to strike plus an automatic and direct right of appeal of the result by either party with an attendant stay of the entire case, sometimes for years. Because of the right to immediately appeal anti-SLAPP orders, there have been plenty of appellate decisions — with courts going various ways, and the statute became the subject of controversy. In 2003, the California Legislature became concerned about the "disturbing abuse" of this flawed legislation — since Section 425.16 was being used by big and powerful defendants against the little guys to stymie their cases — and that wasn't what our legislators really wanted. So, like a cook trying to remedy a bad tasting soup, the Legislature added some new ingredients to the anti-SLAPP stew: two exemptions — the public interest exemption and the commercial speech exemption. In 2008, the Supreme Court took a crack at clarifying and narrowing the public interest exemption in *Club Members v. Sierra Club* (2008) 45 Cal 4th 309, narrowly construing that exemption is to apply "only when the entire action is brought in the public interest." Now, the Court has narrowly construed the commercial speech exemption as well.

The Court in a classic statutory interpretation analysis parses the English of the statute and follows time worn rules of construction to interpret its somewhat ambiguous meaning. Presuming that the advertisement implies that Simpson's products are defective, the opinion points out that Gore's advertisement is not at all about either Gore's or a competitor's business — in that case the exemption would apply. Rather, the actionable statements are "about a noncompetitor's goods for the purpose of promoting the speaker's own services." The commercial speech exemption is to avoid suits between competitors being subject to the anti-SLAPP statute — those are really business disputes and not about fundamental free speech rights. To allow the broad use of the commercial speech exemption against a



lawyer attempting to help clients pursue their rights through a proper legal process would undermine the purpose of the anti-SLAPP statute that is supposed to protect free speech — "a press release critical of a political candidate — i.e., core political speech — would lose protection of the anti-SLAPP statute if the press release also mentioned the products sold by the business." The common sense of the ruling combined with its scholarship is exemplary — lawyers should not be subject to an expensive suit because they seek clients who might be aggrieved by a product. It is just such legitimate activity that the anti-SLAPP statute should protect. Of course, lawyers mustn't defame other lawyers in the process — in such a case, the exemption would apply, and that is the right ruling.

The Court also held that the "burden of proof as to the applicability of the commercial speech exemption...falls on the party seeking the benefit of it — i.e., the plaintiff." While the defendant and moving party in an anti-SLAPP motion bears the burden of showing the statute's applicability, the typical rule is that the one claiming an exemption must prove it, and the Court saw no reason to deviate from that even though the facts underlying the commercial speech exemption are often "peculiarly" within the speaker's knowledge.

The anti-SLAPP statute has become a huge factor in litigation over the past 15 years and its applicability continues to be debated. Thankfully, the Supreme Court has begun to clarify the jurisprudence and provide the much needed guidance to lawyers and judges alike in dealing with this flawed legislation. Let's hope the Legislature doesn't get further involved and instead allows the courts to sort this area of the law out!



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