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Civil / Chapter 338: Another New Law, Another SLAPP in the Face of California Business

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Code Section Affected
Code of Civil Procedure § 425.17 (new).
SB 515 (Kuehl); 2003 STAT. Ch. 338.

Enactment of [Chapter 338] signal[s] to the nation that the California business environment is hostile, unsafe, and extremely unfair.[1]

I. INTRODUCTION

Consider the following hypothetical: a community group wants to file a lawsuit against a large and powerful corporation known for misleading the community about the quality of its products. The community group is sick and tired of the corporation's immoral actions and alleges that the corporation's marketing and advertising lies are violations of various state unfair business practice laws. Although the group does not have much financial power, it files the lawsuit anyway because it believes that the corporation needs to be punished. In response to these allegations, the corporation files a "special motion" with the court that puts an immediate halt to the proceedings until the group can show that, more likely than not, it will ultimately prevail in the case. Though it takes some time for the court to come to a conclusion, it ultimately denies the coporation's special motion and rules that the group's case can continue. However, because the law that allowed the corporation to file the "special motion" also allows the corporation to file an immediate appeal of the court's ruling, the corporation does so. Unfortunately, it takes even more time for the appellate court to address this issue. As time ticks by, the community group's financial resources dwindle. Eventually, after two years of litigation and before the appellate court has had a chance to make a ruling, the community group withdraws its suit.

Now, consider this hypothetical: the local Mom and Pop bookstore stands up before the city council to protest the city's offer of substantial tax breaks to the much larger corporation Books-R-Us. The tax breaks are meant to encourage the larger company to join the local business community, but Mom and Pop is

1. Letter from David L. Gollaher, President and CEO, California Healthcare Institute, to Senator Sheila Kuehl, Cal. State Senate (June 17, 2003) [hereinafter Gollaher Letter] (on file with the *McGeorge Law Review*).

worried that if the Books-R-Us comes to town, Mom and Pop will no longer be able to survive. During the course of its protest to the council, Mom and Pop mentions how well it has served the community over the years and how its prices have always been low compared to other stores, and also criticizes the business practices of Books-R-Us.[2] Based on these arguments, the city council votes to back off from encouraging Books-R-Us to come to town. Furious that it has lost the potential for more money, Books-R-Us files a lawsuit against Mom and Pop alleging that it has tortiously interfered with the larger corporation's contractual relations with the city. Luckily, however, Mom and Pop is able to file a "special motion" with the court that immediately puts an end to any litigation that is brought in response to a person's or company's exercise of constitutional rights. Thus, this "special motion" protected Mom and Pop's rights to petition the government and engage in free speech, removing the possibility that Mom and Pop would have to face meritless and financially ruinous litigation.

The foregoing scenarios concern the use of the "special motion to strike" that is available to defendants in lawsuits commonly known as "Strategic Lawsuits Against Public Participation," or "SLAPP" suits. And this is where Chapter 338 comes in. The tension at issue involves how to ensure that abuse of the motion is deterred while at the same time ensuring the meritorious use of the special motion. According to proponents, Chapter 338 is the answer to finding this precarious balance. As will be seen, however, although the motivations behind Chapter 338 indicate that it may be a useful tool in preventing the growing corporate abuse of the special motion to strike, Chapter 338's potential for adverse consequences to California businesses and the legal system in general may be more than what the state can really afford.

II. THE EVOLVING HISTORY OF SLAPPS AND THE FOUNDATION FOR CHAPTER 338

A. *What is a "SLAPP"?*

Strategic Lawsuits Against Public Participation, or "SLAPP suits" as they have become known, are defined as civil lawsuits filed with the dual intention of punishing those who have exercised their political rights under the Constitution and discouraging the same from engaging in similar conduct in the future.[3] SLAPP suits typically involve allegations of defamation, nuisance and interference with prospective economic advantage.[4]

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2. Letter from Terry Francke, General Counsel, California First Amendment Coalition, to Senator Sheila Kuehl, California State Senate (June 26, 2003) [hereinafter Francke Letter] (on file with the *McGeorge Law Review*).

3. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 515, at 5 (July 1, 2003).

4. Wilcox v. Superior Court, 33 Cal. Rptr. 446, 449, 27 Cal. App. 4th 809, 816, (1994).

According to critics of SLAPP suits, filers[5] typically demand outrageous damages in their suits for the purpose of gaining an economic advantage over the target rather than vindicating a legally cognizable right.[6] The suit's lack of merit, however, is usually of no concern to the filer.[7] In fact, the filer usually knows that success in the lawsuit is not likely and thus really only wishes to tie up the target's resources long enough for the filer to accomplish its ultimate goals,[8] which will usually include prolonging the litigation long enough to deplete the target's resources. "As long as the [target] is forced to devote its time, energy and financial resources to combating the lawsuit, its ability to combat the [filer] in the political arena is substantially diminished."[9] Thus, SLAPP suits lead to a "chilling effect" that discourages targets from engaging in public participation in the future. This "chilling effect" is evidenced by research conducted on SLAPP suits brought during the 1980s and 1990s, indicating that at the time "thousands have been sued into silence, and that more thousands who [have] heard of the SLAPPs will never again participate freely and confidently in the public issues and governance of their town, state, or country."[10]

Although SLAPP suits may be a lopsided phenomenon, many argue that it is not one-sided.[11] Those who are not necessarily opposed to SLAPP suits often ask the following questions: Doesn't the First Amendment's Petition Clause apply just as equally to the filer as it does to the target?[12] Doesn't the Seventh Amendment guarantee filers "the right of trial by jury"?[13] Aren't there cases where the filers do not have any other choice but to sue, or where targets actually deserve to be sued?[14] Certainly the answer to these questions is "yes."[15] Citizens no doubt have the constitutional right to sue, to go to trial, and to have their plans and reputations protected.[16] However, these constitutional rights are not absolute;[17] in fact, no constitutional right is absolute.[18] "When two sides each have fundamental constitutional rights, they must be balanced, must somehow be

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5. *See* GEORGE W. PRING & PENELOPE CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT 9 (1996) (stating that, because of the obvious relationship between the respective parties involved in a SLAPP suit, plaintiffs are typically referred to as "filers" and defendants are characterized as "targets." However, there are no strict rules for who can be a filer and who can be a target. In fact, it is certainly possible for a person or group to be in the position of filer in one SLAPP suit and then in the position of target in another. This is especially true for corporations).

6. *Wilcox*, 33 Cal. Rptr. at 450, 27 Cal. App. 4th at 816.

7. *Id.*

8. *Id.*

9. *Id.*

10. PRING & CANAN, *supra* note 5, at 3.

11. *Id.* at 11.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 12.

17. *Id.*

18. *Id.* at 11.

qualified or limited so that each does not cancel out the other."[19] It just so happens that courts more often than not strike this balance by finding for targets in the overwhelming majority of SLAPP suits.[20] This is generally so because targets are seen to be a representative of two different concerns: first, on a narrow scale, targets are of course seen to be representatives of their own personal interests and injuries;[21] second, on a larger scale, targets are seen as representing the broader concerns of continued public participation in government, often considered to be the life-line of the representative process itself.[22]

B. *California's Legislative Response to SLAPP Suits*

In reaction to the rising number of SLAPP suits that were being filed throughout the country, legislatures and courts nationwide began seeking procedural remedies to promptly expose and dismiss what they considered to be nothing more than abusive lawsuits.[23] California's legislative response to SLAPP suits was the enactment, in 1992, of what has since become known as the "Anti-SLAPP suit statute" ("Anti-SLAPP Statute").[24] The preamble of the Anti-SLAPP Statute clearly identifies the specific intent and purpose behind the legislation:

> there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances[,] . . . it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process.[25]

Under the terms of the Anti-SLAPP Statute, if a lawsuit[26] is brought against a person for committing an "act" in furtherance of that person's right of petition or free speech under either the United States or California Constitution,[27] then the target will be given the ability to file a "special motion to strike" the lawsuit.[28]

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19. *Id.* at 12.

20. *Id.*

21. *Id.*

22. *Id.*

23. Briggs v. Eden Council for Hope & Opportunity, 969 P.2d 564, 576, 19 Cal. 4th 1106, 1127 (1999) (Baxter, J., dissenting).

24. *Briggs*, 969 P.2d at 576, 19 Cal. 4th at 1127 (Baxter, J., dissenting). The Anti-SLAPP Statute is codified at California Civil Procedure Code section 425.16.

25. CAL. CIV. PROC. CODE § 425.16(a) (West Supp. 2003).

26. *See id.* § 425.16(d) (stating that this section does not apply to enforcement actions brought in the name of the people of California "by the Attorney General, district attorney, or city attorney, acting as a public prosecutor").

27. *See id.* § 425.16(b)(1) (stating that the "act" must have been committed "in connection with a public issue"); *id.* § 425.16(e) (stating further that such an act includes:

> (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral

Filing the special motion to strike automatically stays all discovery proceedings until the court rules on the motion.[29] Unless the filer can establish that he or she will more than likely succeed with the claim if it is allowed to continue, the court will grant the motion and the case will be immediately dismissed.[30] However, the suit will be allowed to continue if the court determines that the motion was solely intended to be a delay tactic or is otherwise frivolous.[31] Whichever party prevails is entitled to collect those attorney's fees and costs incurred as a result of the motion.[32] Either party may appeal the court's order granting or denying the special motion to strike.[33]

In order to overturn cases that were thought to limit the reach of the Anti-SLAPP Statute, the California Legislature amended its preamble in 1997, dictating that the Anti-SLAPP Statute was from then-on to "be construed broadly"[34] in order to effectuate its original purpose.[35] As will be seen, by directing the courts to do this, the Legislature in effect gave a free pass to the courts to open the doors of the Anti-SLAPP Statute to corporate abuse.[36]

C. *So Why All the Fuss Now? The Growing Corporate Abuse of the Anti-SLAPP Statute*

The Consumer Attorneys of California ("CAOC") predicate the need for Chapter 338 on the recent corporate abuse of the Anti-SLAPP Statute.[37] The CAOC points out that legal seminars are continually encouraging corporations to employ the anti-SLAPP motion as a new litigation weapon by filing it in

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> statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) 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; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest).

28. *Id.* § 425.16(b)(1); *see id.* § 425.16(f) (stating that the "special motion may be filed within 60 days of the service of complaint or . . . at any later time upon terms [the court] deems proper").

29. *See id.* § 425.16(g) (stating that the court may order specified discovery to be conducted notwithstanding the stay of discovery proceedings).

30. *Id.*; *see id.* § 425.16(b)(2) (stating that when determining whether the plaintiff has established a probability that he or she will prevail on the claim, "the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based"); *id.* § 425.16(b)(3) (stating that if the plaintiff is successful in establishing a likelihood that he or she will prevail on the claim, "neither that determination nor the fact of that determination shall be admissible in evidence" at any time during trial, and "no burden of proof or degree of proof otherwise applicable shall be affected").

31. *Id.* § 425.16(c).

32. *Id.*

33. *Id.* § 425.16(j).

34. *Id.* § 425.16(a).

35. SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 515, at 7 (May 6, 2003); *see, e.g.*, Zhao v. Wong, 55 Cal. Rptr. 2d 909, 48 Cal. App. 4th 1114 (1996) (holding that the anti-SLAPP statute applied only to causes of action arising from statements or writings on issues that were of *public significance*).

36. *Infra* Parts II.C, II.D.

37. SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 515, at 5 (May 6, 2003).

otherwise ordinary personal injury and products liability cases.[38] The primary purpose of bringing these motions is to increase the time and expense for plaintiffs' attorneys to handle these cases,[39] further discouraging litigation from being filed against them in the future.[40] The rising number of anti-SLAPP motions filed by corporations in the last few years is evidenced by the fact that in the superior courts of Sacramento, San Francisco, and Los Angeles, ninety-three anti-SLAPP motions were filed in 2000, whereas 200 were filed in 2002.[41]

How and why did this trend begin? In *Briggs v. Eden Council for Hope and Opportunity*, the California Supreme Court followed the Legislature's 1997 directive and broadly interpreted the Anti-SLAPP Statute, holding that any "statement made before, or in connection with an issue under consideration by, a legally authorized official proceeding need *not* separately demonstrate that the statement concerned an issue of *public significance*."[42] It was immediately clear to at least one dissenting justice that the majority had unlocked a door that was never meant to be opened:

> The anti-SLAPP legislation is a powerful tool to be broadly construed to promote ". . . the open expression of ideas, opinions and the disclosure of information." It is not, however, generally available to the parties to any civil action, but is instead expressly limited to those lawsuits "brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances' 'in connection with a pubic issue.'" The majority's holding in this case belies that carefully delineated legislative purpose and will authorize use of the extraordinary anti-SLAPP remedy in a great number of cases to which it was never intended to apply.[43]

Three years later, in *Navellier v. Sletten*, the Court went so far as to hold that the plaintiff's breach of contract claim against a corporation was subject to the special motion to strike.[44] Clearly, the door had been opened: "[T]he majority appears willing to consider any suit a SLAPP, based largely on when it was filed . . . . The cure has become the disease—SLAPP motions are now just the latest form of abusive litigation."[45]

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38. *Id.* at 9; *see id.* at 5 (stating that an example of such a seminar is one promoted by the Practicing Law Institute entitled, "Challenging a 17200 Claim as a 'SLAPP' Suit."); CAL. BUS. & PROF. CODE § 17200 (West 1997) (defining "unfair competition" as "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with section 17500) of Part 3 of Division 7 of the Business and Professions Code").

39. SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 515, at 9 (May 6, 2003).

40. *Id.* at 5.

41. *Id.*

42. 969 P.2d 564, 575, 19 Cal. 4th 1106, 1123 (1999).

43. *Id.* at 576, 19 Cal. 4th at 1124 (Baxter, J., dissenting) (citations omitted).

44. 52 P.3d 703, 29 Cal. 4th 82 (2002).

45. *Id.* at 714, 29 Cal. 4th at 96 (Brown, J. dissenting).

D. Finally: The Anti-SLAPP Motion and Its Relation to Commercial Speech

1. The DuPont Case

One specific issue that has arisen directly from the courts' broad interpretations of the Anti-SLAPP Statute specifically relates to corporations using the special motion to strike in lawsuits that are brought in response to that corporation's commercial speech.

The seminal case that brought this issue to the forefront was *DuPont Merck Pharmaceutical Co. v. Superior Court*, decided in 2000.[46] The filers in this case alleged that the target violated a variety of state unfair business practice laws by making false statements before regulatory bodies, the medical profession and to the public with the intent of preventing the Food and Drug Administration's ("FDA") approval of a generic form of one of the target's pharmaceutical products.[47] In response, the target filed a special motion to strike pursuant to the Anti-SLAPP Statute, arguing that its alleged advertising, marketing and public relations activities fell within the protections of the First Amendment's right to petition and free speech.[48] Finding that the target's alleged activities were not protected by the Anti-SLAPP Statute, the trial court denied the motion and thus did not require the filers to show that they had a probability of prevailing on the complaint.[49]

The appellate court reversed this decision for two reasons. First, it held that the target's lobbying of the FDA was an activity protected by the First Amendment's right to petition, clearly placing this issue within the first prong of the Anti-SLAPP Statute.[50] Second, it held that the target's allegedly false statements were a matter of protected free speech, and would remain protected until it was shown that the statements were indeed false.[51] The court stated, "[t]he allegation in the unverified complaint that the statements were false may or may not be true. Whether or not they were true should be considered in the second part of the [Anti-SLAPP Statute] analysis; whether there is a probability plaintiffs will prevail."[52]

The appellate court's ruling in *DuPont* clearly laid the groundwork for corporations to use the anti-SLAPP motion as a defense to allegations based on its commercial speech, indicating just how far corporations have been able to go in using it as a tool to delay or even avoid litigation. As a result, many believe that *DuPont* represents a dangerous willingness by the courts to allow corporations

46. 92 Cal. Rptr. 2d 755, 78 Cal. App. 4th 562 (2000).
47. *Id.* at 757, 78 Cal. App. 4th at 564.
48. *Id.* at 758, 78 Cal. App. 4th at 565-66.
49. *Id.* at 760, 78 Cal. App. 4th at 568.
50. *Id.* at 758, 78 Cal. App. 4th at 566.
51. *Id.* at 759, 78 Cal. App. 4th at 566.
52. *Id.*

an effective path for engaging in false commercial speech.[53] In fact, proponents of Chapter 338 cite this case as one of the main driving factors behind the need for the new legislation.[54]

2. *What Is Commercial Speech?*

Before exploring how Chapter 338 will affect commercial speech (among other things), it is important to understand two additional points: first, the difference between commercial speech and noncommercial speech, and second, to what extent commercial speech can be regulated.

Distinguishing commercial from noncommercial speech is important because the federal Constitution gives "less protection to commercial speech than to other constitutionally safeguarded forms of expression".[55] "Commercial speech" is loosely defined as a "communication . . . that involves only the commercial interests of the speaker and the audience."[56] In *Kasky v. Nike, Inc.*, the California Supreme Court held that determining the difference between commercial and noncommercial speech requires the consideration of three elements: the speaker, the intended audience, and the content of the message.[57] In commercial speech, the "speaker" is typically someone who is engaged in commerce or someone acting on behalf of a person who is so engaged;[58] the "intended audience" includes actual or potential customers, or persons likely to repeat the message or in some other way influence actual or potential customers, such as reporters or commercial critics;[59] and the "content of the message" is usually characterized as commercial,[60] which "typically means that the speech consists of representations of fact about the business operations, products, or services of the speaker (or the individual or company that the speaker represents) made for the purpose of promoting sales of, or other commercial transactions in, the speaker's products or services."[61]

While the federal Constitution affords less protection for commercial speech, this does not mean that commercial speech will be subjected to any and all regulations. In *Central Hudson Gas & Electric v. Public Services Commission*, the U.S. Supreme Court developed a four-part analysis, recognized as the *Central Hudson* test,[62] to determine the validity of a content-based regulation on

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53. SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 515, at 8 (May 6, 2003).

54. *Id.*

55. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 64-65 (1983).

56. BLACK'S LAW DICTIONARY 1407 (7th ed. 1999).

57. Kasky v. Nike, Inc., 45 P.3d 243, 256, 27 Cal. 4th 939, 954 (2002).

58. *See id.* at 256, 27 Cal. 4th at 955 (stating that, to be engaged in commerce generally means to be engaged in the production, distribution, or sale of goods or services).

59. *Id.*

60. *Id.* at 256, 27 Cal. 4th at 956.

61. *Id.*

62. *Id.* at 251, 27 Cal. 4th at 952.

commercial speech.[63] First, it must be determined whether the expression in question is protected by the First Amendment:[64] "For commercial speech to come within [this] provision, it at least must concern lawful activity and not be misleading."[65] Second, it must be determined whether the asserted governmental interest in regulating the speech is substantial.[66] If both of these questions yield positive answers, the third step is to determine whether the regulation in question directly advances the governmental interest asserted.[67] Fourth, it must be determined whether the regulation is not more extensive than is necessary to serve that interest.[68]

III. CHAPTER 338: THE NEXT STEP IN THE EVOLUTION OF CALIFORNIA'S ANTI-SLAPP LAW

Chapter 338 was enacted in response to the growing corporate abuse of the Anti-SLAPP Statute. The goal of Chapter 338 was to clarify by whom and when the anti-SLAPP remedy may be invoked to strike a claim based on the target's exercise of specified constitutional rights.[69]

A. The Public Interest Exemption

Adopting the "private attorney general" doctrine, Chapter 338 prohibits the anti-SLAPP motion from being used by a target in any action that is brought solely in the public interest or on behalf of the general public, if the filer shows that:[70] (1) it is not seeking relief greater than or different from the relief sought by either the general public or a class of which the filer is a member;[71] (2) "the action, if successful, would enforce an important right affecting the public interest and would confer a significant benefit on the general public or a large class of persons;"[72] and (3) "private enforcement is necessary and places a disproportionate financial burden" on the filer in relation to the filer's actual stake in the matter.[73]

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63. Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980).

64. *Id.* at 566.

65. *Id.*

66. *Id.* at 556.

67. *Id.*

68. *Id.*

69. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 515, at 2 (July 1, 2003).

70. CAL. CIV. PROC. CODE § 425.17(b) (enacted by Chapter 338); *see* ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 515, at 11 (July 1, 2003) (characterizing the set of restrictions under California Civil Code of Procedure section 425.17(b)(1)-(3) as corresponding to the "state's private attorney general" doctrine).

71. *See* CAL. CIV. PROC. CODE § 425.17(b)(1) (enacted by Chapter 338) (stating further that a "claim for attorney's fees, costs, or penalties does not constitute greater or different relief for purposes of this subdivision").

72. *See id.* § 425.17(b)(2) (stating that the "significant benefit" could be either pecuniary or nonpecuniary).

73. *Id.* § 425.17(b)(3).

B. The Commercial Speech Exemption

Chapter 338 prohibits the special anti-SLAPP motion from use by a target in any action based on the target's commercial speech, if three conditions are met:[74] (1) the target, as the "speaker," must be a person primarily engaged in the business of selling or leasing goods or services;[75] (2) the "content" of the commercial speech must consist of representations of fact about the speaker's or a competitor's business operations, goods, or services;[76] and (3) the "intended audience" of the speech must have been an actual or potential customer, or at least a person who was likely to repeat the speech to another actual or potential customer.[77]

C. Special Exceptions to the Commercial Speech Exemption: Media Outlets and Certain Nonprofit Organizations

Chapter 338 makes two exceptions to the foregoing exemptions. First, Chapter 338 permits the special anti-SLAPP motion to be employed in claims made against persons engaged in the gathering, receiving or processing of information for communication to the public.[78] Second, Chapter 338 permits the anti-SLAPP motion to be employed in claims made against any nonprofit organization that receives more than half of its annual revenue from federal, state, or local governments.[79]

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74. *Id.* § 425.17(c)(1)-(2).

75. *Id.* § 425.17(c).

76. *See id.* § 425.17(c)(1) (stating that, within the context of "content," the speech must also have been "made for the purpose of obtaining approval for, promoting, or securing commercial transactions in the speaker's goods or services, or the speech must have been made in the course of delivering the speaker's goods or services").

77. *See id.* § 425.17(c)(2) (stating also that the "intended audience" element is satisfied if the speech arises "out of or within the context of a regulatory approval process, proceeding, or investigation," unless the speech "was made by a telephone corporation in the course of a proceeding before the California Public Utilities Commission and is the subject of a lawsuit brought by a competitor, notwithstanding that the conduct or statement concerns an important public issue").

78. *See id.* § 425.17(d)(1) (stating specifically that protected persons under this provision include those who are "enumerated in subdivision (b) of section 2 of Article I of the California Constitution or section 1070 of the Evidence Code, or any person engaged in the dissemination of ideas or expression of any book or academic journal, while engaged in the gathering, receiving, or processing of information for communications to the public"); *see also* CAL. CONST. art. I, § 2(b) (amended 1980) (enumerating "publisher[s], editor[s], reporter[s], [and] other person[s] connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service . . ."); CAL. EVID. CODE § 1070 (West 1995) (enumerating publishers, editors, reporters and other persons connected with or employed by a newspaper, magazine or other periodical publication, as well as radio and television news reporters and others who are connected with or employed by a radio or television station); CAL. CIV. PROC. CODE § 425.17(d)(2) (enacted by Chapter 338) (stating further that the anti-SLAPP motion can also be used in any "action against any person or entity based upon the creation, dissemination, exhibition, advertisement, or other similar promotion of any dramatic, literary, musical, political, or artistic work, including . . . a motion picture or television program, or an article published in a newspaper or magazine of general circulation").

79. CAL. CIV. PROC. CODE § 425.17(d)(3) (enacted by Chapter 338).

D. The No-Appeals Provision

Chapter 338 provides that if the trial court denies a special motion to strike on the grounds that the action is exempt pursuant to the foregoing prohibitions or exceptions, then the otherwise applicable immediate-appeal provisions in the Anti-SLAPP Statute will not apply.[80] In other words, if a motion to strike is denied pursuant to Chapter 338, then the target will not have the right to an interlocutory appeal.

IV. SLAPP TIME: AN ANALYSIS OF CHAPTER 338

According to proponents, the same types of businesses who originally created the need for the Anti-SLAPP Statute are now abusing the special motion to strike by inappropriately filing it in litigation brought against them by their public interest adversaries.[81] Proponents argue that the increasing abuse has subverted the original purpose of the Anti-SLAPP Statute—to protect citizens from the chilling effect that follows the filing of a SLAPP suit.[82] This chilling effect, proponents argue, does not affect corporations in the same way as it does private citizens.[83] For example, when wealthy corporations are faced with a lawsuit alleging false advertising or illegal business practices, they do not suffer the same chilling effect on their rights that common citizens suffer when they are sued for speaking out.[84] This is so because, unlike common citizens, corporations have far greater resources to defend themselves.[85] Now, instead of corporations using the SLAPP suit as a way to chill public participation, they are using the Anti-SLAPP Statute as a way to chill otherwise ordinary lawsuits brought against them. Thus, proponents such as the CAOC argue that Chapter 338 was needed in order to halt the growing corporate abuse of the Anti-SLAPP Statute.[86]

Opponents, on the other hand, argue that Chapter 338 is an impermissible attack on California businesses because it subjects them to harassing SLAPP suits brought in response to their exercise of the constitutionally protected rights to petition and free speech.[87] In other words, Chapter 338 results in businesses being subject to numerous meritless lawsuits unfairly forcing them to either settle or incur unnecessary litigation costs.[88] This result produces costs that the California economy cannot afford. However, potential economic costs are not the

80. *Id.* § 425.17(e).
81. SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 515, at 2 (May 6, 2003).
82. *Id.* at 5.
83. *Id.* at 6.
84. *Id.*
85. *Id.*
86. *Id.* at 4-5.
87. *Id.* at 2.
88. *Id.*

only argument against Chapter 338. Chapter 338's complex nature will lead to increased litigation, as appellate courts are asked to clarify particular portions of Chapter 338. This will add an unneeded cost to California's legal system that cannot be measured in economic terms.

A. *The Public Interest Exemption*

Pursuant to the Anti-SLAPP Statute and without regard to Chapter 338, the special motion to strike cannot be filed in any action that is brought by the Attorney General or other public prosecutor.[89] The public interest exemption in Chapter 338 parallels this exception by not allowing the special motion to strike in any case that is brought solely in the public interest and by someone who satisfies the three elements of the "private attorney general" doctrine.[90] According to supporters, this exemption is both necessary and appropriate in order to bring the Anti-SLAPP Statute in-line with other public health and consumer protection statutes.[91] Proponents argue that, since there is no conceptual difference between a suit that is brought by a public prosecutor or a private one, Chapter 338's public interest exemption is justified. It merely provides a parallel protection for people who are acting in the public interest as private prosecutors.[92] This makes even more sense, considering that the Anti-SLAPP Statute already exempts actions brought by public prosecutors from the special motion to strike.[93]

Chapter 338's public interest exemption makes it clear that lawsuits motivated by personal gain will not be exempted from the anti-SLAPP motion.[94] According to supporters, abuses of law that result in a privately-motivated lawsuit against a business should still be subject to an anti-SLAPP motion.[95]

However, the California First Amendment Coalition ("CFAC") questions whether the approach Chapter 338 takes in achieving the goal of eliminating the abuse of the Anti-SLAPP Statute does not merely introduce a whole new level of complex issues that will cloud litigation with novel questions for appellate review.[96] Specifically, the CFAC argues that the three "private attorney general doctrine" criteria for Chapter 338's public interest exemption will be subject to numerous requests for review by the appellate courts.[97] Further, the CFAC is concerned that the same artful lawyering that initially led to the abuse of the Anti-SLAPP Statute will now be brought to bear in pursuing similar ambiguities

89. CAL. CIV. PROC. CODE § 425.16(d) (West Supp. 2003).
90. *Id.* § 425.17(b)(1)-(3) (enacted by Chapter 338).
91. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 515, at 12 (July 1, 2003).
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. Francke Letter, *supra* note 2.
97. *Id.*

in the criteria for the public interest exemption.[98] The CFAC asks, how can Chapter 338 be perceived as a "check on dilatory defense tactics when the defense is simply offered more ingredients for delay?"[99]

Further, both the California Association of Realtors ("CAR") and the California Building Industry Association ("CBIA") oppose Chapter 338 because of their concerns that the public interest exemption will encourage unmeritorious "Not in My Back Yard" ("NIMBY")[100] lawsuits.[101] The CAR and CBIA argue that Chapter 338 grants filers of suits in opposition to new development projects absolute immunity from the anti-SLAPP motion because these litigants can easily color their lawsuit as brought in the public interest.[102] It is arguable that, without the protection of the Anti-SLAPP Statute, targets of these potential meritless lawsuits will have to deal with the likelihood of protracted litigation. In turn they will have to slow down their development plans in order to refocus their resources towards the litigation. This could lead to slower land development in California, not only because one particular company's efforts would be thwarted, but more importantly, because it could chill development generally. According to the CAR and CBIA, "infrastructure projects including roads, energy production facilities, water facilities, schools, and particularly infill and low-income housing have become targets for NIMBY litigation."[103] California cannot afford to hinder infrastructural development by removing the ability for target-companies to have an easy way out of meritless NIMBY litigation.[104]

The arguments of both supporters and opponents revolve around what each group considers to be better for society. Proponents believe the public interest exemption is good for society because it will protect lawsuits filed in the name of the public interest from being dismissed too early.[105] Opponents argue that the exemption's arguably complex nature will lead to protracted litigation and a likelihood of more litigation brought against such entities such as development companies.[106] Determining where one stands in relation to either of these arguments depends on a determination of what one considers to be more important: the right of society to file more lawsuits, or the right of society to be free from excessive and protracted lawsuits.

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98. *Id.*

99. *Id.*

100. *See* STEERING COMMITTEE ON UNMET LEGAL NEEDS OF CHILDREN AND COMMISSION ON HOMELESSNESS AND POVERTY, AMERICAN BAR ASSOCIATION, NIMBY: A PRIMER FOR LAWYERS AND ADVOCATES 5 (1999) (defining "NIMBY" as "the term commonly used to describe efforts to block the establishment of housing and service facilities within a particular community").

101. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 515, at 6 (July 1, 2003).

102. ASSEMBLY COMMITTEE ON JUDICIARY, ASSEMBLY REPUBLICAN ANALYSIS OF SB 515, at 2 (July 9, 2003).

103. *Id.*

104. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 515, at 6 (July 1, 2003).

105. *See supra* Part IV.A (discussing proponents' argument with relation to the public interest exemption).

106. *See supra* Part IV.A (discussing opponents' argument with relation to the public interest exemption).

B. The Commercial Speech Exemption

The CAOC argues that the commercial speech exemption is necessary due to the recent abuses of the Anti-SLAPP Statute by corporate defendants who are utilizing the special motion to strike in otherwise ordinary lawsuits, such as personal injury or products liability cases.[107] Specifically, this exemption is meant to "correct" *DuPont Merck*, which proponents assert is a very dangerous precedent that erodes the ability of citizens to bring private lawsuits against corporations to correct public or private wrongs.[108] Chapter 338 effectively overturns *DuPont Merck* by making the Anti-SLAPP Statute inapplicable to any lawsuit brought against a person or entity primarily engaged in the business of selling or leasing goods or services.[109]

Proponents argue that, rather than being a complete exclusion of a class of defendants, this exemption focuses on the content and context of the commercial speech that Chapter 338 is meant to deter, thus demonstrating an important sensitivity to the varying constitutional protections that are afforded to commercial and noncommercial speakers.[110] In support of this proposition, proponents point out that Chapter 338 borrowed its formulation of commercial speech directly from the California Supreme Court's ruling in *Kasky v. Nike, Inc.*[111] According to proponents, Chapter 338 follows the guidelines set in *Kasky* with regard to the regulation of commercial speech by stating that a representation of fact about a person's business or its operations is outside the protections of the Anti-SLAPP Statute. This is true if the representation concerns an important public issue or if the representation was made before some regulatory body.[112] Because "false and misleading statements are often made by companies seeking the approval of their products during the regulatory process," proponents such as the CAOC argue that the commercial speech exemption is especially important.[113] Without Chapter

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107. SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 515, at 9 (May 6, 2003).

108. *Id.* at 8.

109. *Id.* at 9.

110. *See id.* at 9-10 (giving the following as an example of Chapter 338's sensitivity towards the constitutional issues at hand: lobbying activities engaged in to gain regulatory approval to market a product, or speech intended to persuade the purchase of one product over the other, can be viewed in the context of how and why the speech is offered; the same holds true for speech engaged in by a person who is opposed to the building of a waste facility in his or her neighborhood. However, while the speech in the latter situation can be seen to have been made in the context of the person exercising his or her constitutional rights to petition and free speech, the content and context of the speech in the former situation shows that it was made with the purpose of furthering business considerations and thus should be characterized as commercial speech, which of course does not enjoy full constitutional First Amendment protection).

111. 45 P.3d 243, 27 Cal. 4th 939 (2002); SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 515, at 10 (May 6, 2003).

112. SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 515, at 10 (May 6, 2003).

113. *Id.*

338, a company would be able to utilize the anti-SLAPP motion in every case brought against it, thus adding undue expense and duration to the litigation.[114]

On the other hand, the Personal Insurance Federation of California ("PIFC") and the American Insurance Association ("AIA") oppose Chapter 338 because of the commercial speech exemption's potential for adverse consequences.[115] According to the PIFC, meritless lawsuits are often aimed at California businesses with the intent of harassing or coercing them into settling claims for nuisance value, or to stop some legitimate business activity.[116] Without the protection of the anti-SLAPP motion, California businesses will be left open to such lawsuits, and in turn will be forced into either settling the claims or incurring unnecessary litigation costs merely because they engaged in commercial speech.[117] It is arguable that, if insurance companies will thereby have to increase their indemnification of these companies, then insurance rates will inevitably go up for California businesses. This could lead to several other adverse consequences: businesses might have to raise prices to cover higher insurance premiums; companies might find that doing business in California is becoming too expensive and may opt to leave; businesses may choose not to come to California if already out of state; companies may close down; or companies might find that they can no longer afford insurance and thus opt not to purchase it, leaving the possibility that a company would not be able to afford possible damages against it in a more meritorious lawsuit down the line.

Additionally, the CFAC opposes Chapter 338's commercial speech exemption because of its potential for ambiguities.[118] For example, is the "puffery"[119] found virtually everywhere in advertising a "representation of fact" or merely an expression of opinion?[120] Do the "sales" of "services" covered in this exemption reach to already-regulated professional services, such as legal, medical, and educational services?[121] And, while statements made in the "course of delivering" the goods and services are included in the exemption, what about post-delivery statements?[122] The CFAC argues that because questions like these point out novel issues and potential ambiguities in Chapter 338, the commercial

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114. *Id.*

115. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 515, at 7 (July 1, 2003).

116. Letter from Dan C. Dunmoyer, President, Personal Insurance Federation of California, to Assemblymember Ellen Corbett, California State Assembly (June 9, 2003) (on file with the *McGeorge Law Review*).

117. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 515, at 7 (July 1, 2003).

118. Francke Letter, *supra* note 2.

119. *See* BLACK'S LAW DICTIONARY 1247 (7th ed. 1999) (defining "puffery" as "the expression of an exaggerated opinion—as opposed to a factual representation—with the intent to sell a good or service").

120. Francke Letter, *supra* note 2.

121. *Id.*

122. *Id.*

speech exemption has really done nothing more than create the possibility for protracted appellate clarification.[123]

Perhaps even more importantly, the CFAC is concerned that Chapter 338's commercial speech exemption strips small businesses of the anti-SLAPP "shield."[124] For example, prior to Chapter 338, small businesses had the protection of the Anti-SLAPP Statute when larger businesses would file meritless litigation against them.[125] This was especially helpful in cases where such litigation was filed in response to a small business's public criticism of the practices of the larger business done with the hope of encouraging the local government to reject the proposal of the larger business from joining the community.[126] According to the CFAC, few members of society have greater knowledge as to whether a larger company is offering the government or the public a safe and secure deal than a smaller competitor in the same business.[127] Further, few members of society are more aware than a small business competitor of when the grant of a permit, license or some other concession to a larger company would be in the public interest.[128] However, as a result of Chapter 338, small businesses throughout the state can no longer defend themselves by publicly criticizing the practices of a larger business in the forum provided by a local government.[129] At least, they can no longer do so without the risk of having a meritless lawsuit filed against them.[130]

Thus, proponents argue that the commercial speech exemption is beneficial to the state because it will help to prevent companies from having an easy way out of litigation that is filed against them in response to their false or misleading statements.[131] Opponents, on the other hand, argue that the exemption will not only leave California businesses in general open to meritless litigation, but will also prevent smaller businesses from being able to publicly criticize the actions of larger companies.[132] Ultimately, then, the question of whether the commercial speech exemption is good for society depends upon a determination of whether it would be better for the state if its businesses were *more* open to lawsuits, or if its businesses were *less* open to lawsuits.

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123. *Id.*

124. *Id.*

125. *See supra* Part II.B (discussing the implications of the anti-SLAPP statute prior to passage of Chapter 338).

126. Francke Letter, *supra* note 2; *see, e.g.*, discussion *supra* Part I.

127. Francke Letter, *supra* note 2.

128. *Id.*

129. *Id.*

130. *Id.*

131. *See supra* Part IV.B (discussing proponents' argument with relation to the commercial speech exemption).

132. *See supra* Part IV.B (discussing opponents' argument with relation to the commercial speech exemption).

C. *The Special Exclusions from the Commercial Speech Exemption: Media Outlets and Certain Nonprofit Organizations*

While Chapter 338 specifically prohibits certain businesses from using the anti-SLAPP motion in litigation brought on the basis of their commercial speech,[133] Chapter 338 nevertheless carves out exceptions to this exemption that allow media outlets and certain nonprofit organizations to continue using the anti-SLAPP motion if needed.[134] Specifically referring to the exception for media outlets, the CAOC argues that the exclusion is warranted simply because "[n]ewspapers and other media are in the business of disseminating information to the public[,]"[135] and thus are deserving of more protection from SLAPP suits than are businesses that engage in commercial speech.

However, the CFAC counters that if Chapter 338 is meant to eliminate the abuse of the Anti-SLAPP Statute without chilling legitimate communications, "then there is no reason for the blanket communications/entertainment industry exemptions."[136] The CFAC argues that the CAOC's simple rationalization for why media outlets and members of the entertainment industry are excluded from Chapter 338's commercial speech exemption "begs the question of [why] the benefited industries, which encompass far more extensive enterprises than news and comment on public affairs, may engage in unlawful or tortious marketing activities" when other businesses may not?[137] Presumably, the broad range of enterprises included in Chapter 338's exclusion from the commercial speech exemption includes toys, apparel and other retail goods that can be licensed as promotions of a book, motion picture or television program.[138] Thus, the exclusion "given to entertainment-linked promotions gives such branding arrangements a particular market value" and allows for "a license to use the anti-SLAPP motion in circumstances where it [is] unavailable to most businesses without the brand."[139]

Another group opposed to Chapter 338's exclusion from the commercial speech exemption is the California Health Institute ("CHI"), which represents companies that are devoted to solving major medical problems such as cancer, diabetes, and AIDS/HIV.[140] Specifically, the CHI asks why its free speech rights are less deserving than those of the media and entertainment industry?[141] Now, because of Chapter 338, biomedical companies that are confronted with

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133. CAL. CIV. PROC. CODE § 425.17(c) (enacted by Chapter 338).
134. *Id.* § 425.17(d).
135. SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 515, at 14 (May 6, 2003).
136. Francke Letter, *supra* note 2.
137. *Id.*
138. *Id.*
139. *Id.*
140. Gollaher Letter, *supra* note 1.
141. *Id.*

harassing SLAPP suits have to divert important resources away from drug research and development in order to fund potentially expensive litigation.[142] Prior to Chapter 338, this could have been easily avoided through use of the anti-SLAPP motion.[143] Thus, according to the CHI, Chapter 338 "is extremely unfair and [is] quite likely to fail a constitutional challenge."[144]

As can be seen, the exclusion of certain businesses from Chapter 338 is especially controversial. The primary basis for this controversy is that Chapter 338 can be interpreted as basically stating that some companies—the media and entertainment industry in particular—are too important to society to limit their access to the anti-SLAPP motion in a potential lawsuit. Whether one finds this to be a strong enough reason for the special exception to exist will depend on whether one believes that the media and entertainment industries, and non-profit organizations for that matter, are any more important to the state than are those companies that are devoted to improving the quality of life through advancements in medicine and technology.

D. The No-Appeals Provision

According to Chapter 338, if a trial court denies the filing of a special motion to strike because the lawsuit is in someway exempt from the anti-SLAPP motion, then the provisions in the Anti-SLAPP Statute that would otherwise allow for an appeal of this decision would not apply.[145] In other words, if a special motion to strike is denied pursuant to Chapter 338, then that decision cannot be appealed. Proponents of Chapter 338 assert that this provision is necessary to prevent the growing abuse of the appeal procedures in the Anti-SLAPP Statute.[146] This abuse has been the result of the manipulation of different laws that come into effect once the Anti-SLAPP Statute is evoked by the filing of a special motion to strike.[147]

For example, according to the Consumer Justice Center ("CJC"), prior to Chapter 338, a simple pro bono public interest case brought against a corporation, which would have normally been completed in six months and at a cost of $5,000, instantly became an expensive and financially-risky ordeal when the anti-SLAPP motion was used by the corporation being sued.[148] According to the Anti-SLAPP Statute, the special motion to strike filed by the target is instantly appealable.[149] This allowed the possibility for the target to continue with

142. *Id.*
143. *See supra* part II.B.
144. *Id.*; *see* discussion *infra* Part IV.D (discussing the constitutionality of Chapter 338).
145. CAL. CIV. PROC. CODE § 425.17(e) (enacted by Chapter 338).
146. SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 515, at 15 (May 6, 2003).
147. *Id.*
148. *Id.* at 5.
149. CAL. CIV. PROC. CODE § 425.16(j) (West Supp. 2003).

its allegedly unlawful activity for up to two years, which is the typical length of time for an appeal to be heard.[150] In the meantime, costs incur, discovery is stalled and critical evidence can be potentially lost or destroyed.[151] Even if the filer eventually prevailed on appeal and the motion was denied, the passage of time had already irreparably damaged the filer's case.[152] Thus, proponents argue that because Chapter 338 disallows an appeal of a trial court's decision to deny a special motion to strike, targets will no longer be able to abuse the appeals process and unnecessarily prolong litigation.[153]

It is arguable, however, that while the ultimate goal of the no-appeals provision of Chapter 338 is difficult to disagree with, the process by which Chapter 338 accomplishes that goal presents at least two potential problems. First, if the no-appeals provision is meant to prevent frivolous delays in litigation,[154] then why not amend the Anti-SLAPP Statute's allowance of the appeals procedure rather than merely ban appeals of those denials of the special motion to strike that are made pursuant to Chapter 338? Because of Chapter 338, businesses who are sued in response to their commercial speech now not only no longer have the option of utilizing the anti-SLAPP motion, but also cannot even appeal the decision of the trial court that originally denied the businesses' opportunity of using the anti-SLAPP motion.[155] Arguably, Chapter 338's no-appeals provision is just another indication of the Legislature's intent to make it easier to sue businesses.

Second, the argument that Chapter 338 represents the Legislature's intent to make it harder for businesses to escape litigation is further encouraged by the fact that it is only the *targets* of lawsuits that are prevented from using the appeals procedure, not the *filers*.[156] For example, suppose a business is sued and it files a special motion to strike, hoping the court will find that the lawsuit is not exempt from the motion. If the court finds in favor of the filer, then the business cannot appeal the decision and thus must continue defending itself, no matter how meritless the lawsuit may be. However, if the trial court finds in favor of the target and rules that the special motion to strike may be used because the lawsuit is not one that is exempt pursuant to Chapter 338, the target-business is still not out of the clear. While Chapter 338 states that targets may not appeal the decision of the trial court in denying the special motion to strike,[157] nothing within Chapter 338 states that the filer cannot appeal the decision. Therefore, even if the trial

150. SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 515, at 5 (May 6, 2003).

151. *Id.* at 16.

152. *Id.*

153. *Id.* at 15.

154. *See supra* Part IV.D.

155. *See supra* Part IV.D.

156. CAL. CIV. PROC. CODE § 425.17(e) (enacted by Chapter 338); *see also supra* Part III.D (discussing the implications of the no-appeals provision).

157. *Id.*

court were to rule in favor of the target-business by granting the special motion to strike, the filer could nevertheless extend the litigation by appealing this ruling. This could be especially damaging to development companies that have been forced into diverting their resources from developing a community to defending a meritless lawsuit. Small businesses as well may not be able to afford protracted litigation if sued by stronger community groups or even larger businesses. Arguably, it makes little sense—in fact, no sense at all—why the appeals procedure would be denied to only targets of lawsuits and not the filers. Unless, of course, one were to understand that perhaps the idea behind this provision of Chapter 338 is to further ease the way in suing California businesses.

It is relatively clear that proponents and opponents of the no-appeals provision at least both agree that the ultimate goal is valid—to curb the abuse of the Anti-SLAPP Statute's procedure that allows an appeal of denials of the special motion.[158] However, disagreement occurs over whether the path taken by Chapter 338 to achieve this goal is the best option. Proponents' argument for the need for this provision clearly indicates that proponents believe that it is only businesses that are responsible for the abuse of the appeals procedure of the Anti-SLAPP Statute. If this is true, then perhaps the no-appeals provision of Chapter 338 just may work in curbing this abuse. However, if businesses are not the only targets that are known to abuse the appeals procedure, then it is arguable that the only real goal that will be achieved by Chapter 338 will be to provide an easier route for California businesses to be sued. It is arguable that, if this indeed was the goal of the Legislature in including the no-appeals provision, then Chapter 338 is likely to be successful.

E. Is Chapter 338 Constitutional?

According to the CHI, not only is Chapter 338 extremely unfair in its denial of the Anti-SLAPP Statute protections to business that engage in commercial speech, but it also "would likely fail a constitutional challenge."[159] This statement has opened up the doors to a debate over the constitutionality of Chapter 338. According to proponents, two arguments exist as to why Chapter 338's commercial speech exemption will be found constitutional.[160] On the other hand, it can be argued that there is a high potential for Chapter 338 to be declared unconstitutional, not only because proponents' constitutional arguments are flawed, but also because they fail to address all of the relevant issues.

158. *See supra* Part IV.D.

159. Gollaher Letter, *supra* note 1; *see* discussion *supra* Part IV.D (discussing the constitutionality of Chapter 338).

160. SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 515, at 11-12 (May 6, 2003).

1. Chapter 338 Is Likely to Be Held Constitutional

Proponents first argue that Chapter 338 is constitutional because its guidelines on regulating commercial speech are in accordance with the *Central Hudson* test.[161] The first step of this test states that in order for particular commercial speech to be protected by the First Amendment, "it at least must concern lawful activity and not be misleading."[162] It follows, then, that *false* speech is not deserving of First Amendment protection. Therefore, proponents argue, the Legislature has full power to punish *false* speech by providing it less protection, or even no protection, through the regulation of how and when the Anti-SLAPP Statute can be used.[163]

The second step of the *Central Hudson* test states that, in order for a content-based regulation of commercial speech to be valid, the governmental interest must be substantial.[164] Proponents argue that the Anti-SLAPP Statute was initially designed to advance the substantial governmental interest of protecting the exercise of free speech and petition rights by citizens and community groups who are subjected to SLAPP suits.[165] Thus, although Chapter 338 does in fact exclude those who engage in commercial speech from being able to use the anti-SLAPP motion, there is nevertheless a countervailing substantial governmental interest in protecting the noncommercial speech of the individual citizen and community group targeted by a SLAPP suit.[166]

The third and fourth steps of the *Central Hudson* test state that the regulation in question must directly advance the asserted governmental interest in such a way that it is not more extensive than necessary.[167] Unfortunately, however, proponents do not spend much time discussing how Chapter 338 specifically satisfies these last two elements. Instead of addressing whether Chapter 338's regulations are "more extensive than necessary" or not, proponents merely conclude that the means by which Chapter 338 is meant to achieve the government's goal of prohibiting SLAPP suits "do not appear unreasonable."[168] Proponents make several arguments in reaching this conclusion. First, Chapter 338 does not prohibit commercial speech per se, nor does it regulate or impinge general commercial speech.[169] Rather, it merely provides that the protections under the Anti-SLAPP Statute are not available to those who engage in commercial speech.[170] Second, Chapter 338 does not attach liability to any speech, nor does it

161. *Id.* at 12-13.
162. Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980).
163. SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 515, at 12 (May 6, 2003).
164. *Cent. Hudson Gas & Elec.*, 447 U.S. at 566.
165. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 515, at 11 (July 1, 2003).
166. *Id.*
167. *Cent. Hudson Gas & Elec.*, 447 U.S. at 566.
168. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 515, at 11 (July 1, 2003).
169. SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 515, at 12 (May 6, 2003).
170. *Id.*

override existing law that may already provide a defense against liability based on the nature of the speech.[171] And third, Chapter 338 does not remove the option for a party who believes that a lawsuit has been filed in response to that party's exercise of constitutional rights to utilize other available dispositive motions, such as a demurrer, even if the anti-SLAPP motion is not available.[172]

Also, proponents argue that Chapter 338 is constitutional because it correctly distinguishes between commercial speech and noncommercial speech in direct accordance with *Kasky*.[173] Specifically, Chapter 338 states that to be exempt from utilizing the anti-SLAPP motion, the three considerations from *Kasky* must be satisfied:

> (1) the "speaker" must be a "person primarily engaged in the business of selling or leasing goods or services[;]"[174] (2) the "content" of the speech must consist of "representations of fact" about the speaker's or the speaker's competitor's business operations;[175] and (3) the "intended audience" must be an actual or potential customer, someone likely to repeat the statement to another actual or potential customer, or if the speech arose out of the context of some sort of regulatory approval process.[176]

Chapter 338's differentiation of commercial speech is in line with *Kasky* because it incorporates the three factors used to determine commercial speech.

2. *Chapter 338 Is Likely to Be Held Unconstitutional*

It can be argued that, while Chapter 338 may be in accordance with *Kasky*, proponents nevertheless fail to sufficiently argue that the last two elements of the *Central Hudson* test are satisfied. Thus, Chapter 338's failure to satisfy the third and fourth prongs of the *Central Hudson* test will likely lead to it being held as an unconstitutional regulation of commercial speech. Specifically, proponents make no argument to show how the government's substantial interest in prohibiting SLAPP suits is directly advanced by preventing businesses engaged in commercial speech from having the same ability as others to use the anti-SLAPP motion. Arguably, businesses being able to use the anti-SLAPP motion to fight meritless

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171. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 515, at 11 (July 1, 2003); *see, e.g.*, CAL. CIV. CODE § 47 (West 1982) (stating that absolute immunity from libel and slander charges is given for specified statements, such as those made in governmental proceedings).

172. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 515, at 11 (July 1, 2003).

173. *Id.* at 10.

174. CAL. CIV. PROC. CODE § 425.17(c) (enacted by Chapter 338).

175. *See id.* § 425.17(c)(1) (stating further that the speech must have been made "for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the [speaker's] goods or services, or the [speech] was made in the course of delivering the [speaker's] goods or services").

176. *Id.* § 425.17(c)(2).

litigation filed against them does not affect the government's goal in preventing the filing of SLAPP suits. To the contrary, because businesses are now prevented from being able to use the anti-SLAPP motion, Chapter 338 can arguably be seen to implement a policy that is in direct contrast to the initial goals of the Anti-SLAPP Statute. Further, proponents' assertion that Chapter 338's provisions relating to commercial speech do "not appear unreasonable"[177] does not by itself satisfy the question of whether the regulation is more extensive than necessary. This is especially true in light of the fact that proponents have seemingly failed to show how the government's substantial interest is advanced by preventing businesses from using the anti-SLAPP motion.

Another potential argument is that, even if Chapter 338 were found to be in direct accordance with *Kasky* and *Central Hudson*, proponents nevertheless fail to address how it would be constitutional for one group—businesses—to be validly prevented from using the anti-SLAPP motion, while another group—the media and entertainment industry—would not be. An equal potential exists for both groups to be engaged in commercial speech, but only one group would be afforded the protections of the Anti-SLAPP Statute in the case of meritless litigation filed against it in response to its commercial speech. Arguably, it is possible that when the CHI stated that Chapter 338 "is extremely unfair and quite likely to fail a constitutional challenge[,]"[178] it was not referring to a challenge based on the regulation of commercial speech but instead a constitutional challenge based on the potential Equal Protection irregularities found in Chapter 338.

V. CONCLUSION

According to the Legislature, because it is in the public interest to encourage the continued participation in matters of public significance, this participation should not be chilled through the abuse of the judicial process or of the Anti-SLAPP Statute.[179] The Legislature has also declared that there has been recent and disturbing abuse of the Anti-SLAPP Statute, which has undermined the exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.[180] Thus, Chapter 338 was enacted to curb this abuse by limiting when the anti-SLAPP remedy may be invoked to strike a claim based on the target's exercise of specified constitutional rights.[181]

On its face, this declaration of the Legislature's intent in enacting Chapter 338 seems innocent enough. In fact, it seems to be promoting one of American society's most treasured rights: the right to say what one wants, whenever one

177. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 515, at 11 (July 1, 2003).

178. Gollaher Letter, *supra* note 1.

179. CAL. CIV. PROC. CODE § 425.17(a) (enacted by Chapter 338).

180. *Id.*

181. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 515, at 2 (July 1, 2003).

wants. According to proponents, Chapter 338 is meant to ensure that the protections of the Anti-SLAPP Statute are recognized to their full extent, thereby ensuring that people will be free to exercise their constitutional rights to engage in public participation without fear of having a lawsuit filed against them.

However, not everyone is in agreement that Chapter 338 is the best option for protecting the constitutional rights to engage in free speech and to petition for the redress of grievances. What many people see in Chapter 338, on the other hand, is a discriminatory piece of legislation that denies the ability of an entire class of defendants—businesses selling or leasing goods or services—to protect themselves against meritless litigation brought in response to the exercise of these constitutional rights.[182]

However one feels about the logic behind Chapter 338 and its various exceptions, one thing should be clear: the attack on California companies that Chapter 338 arguably imposes will not increase the likelihood of more companies coming to California, but instead will keep companies out and perhaps even encourage existing companies to leave. Thus, while supporters of Chapter 338 may rejoice that this result will likely lead to a lesser abuse of the Anti-SLAPP Statute, opponents will only be left with an affirmation of their initial fears: the "[e]nactment of [Chapter 338] signal[s] to the nation that the California business environment is hostile, unsafe, and extremely unfair."[183]

182. SENATE REPUBLICAN POLICY OFFICE, ANALYSIS OF SB 515, at 3 (July 8, 2003).

183. Gollaher Letter, *supra* note 1.