

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

SB 329 (Jones)
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Fiscal: No
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JT

SUBJECT

Wills and trusts: no contest clauses

DIGEST

This bill exempts actions to enforce no-contest clauses in wills or trusts from the “anti-SLAPP” statute. The bill also establishes a timeline for filing pleadings for no-contest enforcements before the hearing or trial on the contest.

EXECUTIVE SUMMARY

A typical “strategic lawsuit against public participation” (SLAPP) is a meritless civil lawsuit filed to chill the defendant’s exercise of their political rights and deplete their resources. The anti-SLAPP statute enables such defendants to expeditiously unmask SLAPP suits with a special motion to strike that stays discovery proceedings and may result in an award of attorney’s fees and costs if the plaintiff is unable to show a probability of prevailing on the claim. Although commonly associated with the protection of constitutional rights, the anti-SLAPP statute applies to a broad range of contexts, including proceedings to enforce a no-contest clause in a trust or will that penalizes beneficiaries who challenge the terms of the will without probable cause.

This bill would exempt no-contest enforcement from the anti-SLAPP statute. The bill is co-sponsored by the California Conference of Bar Associations and the Executive Committee of the Trusts and Estates Section of the California Lawyers Association (TEXCOM), who argue that the statute was not intended to apply in this context and that it offers minimal upside while opening the door to needless litigation and cost. The bill would also require that pleadings for no-contest enforcement actions be filed within a certain timeframe in advance of an evidentiary hearing or trial on a contest to a will or trust. The bill has no opposition.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Governs the enforcement of a no-contest clause. Limits the enforcement of no-contest clauses to “direct contests without probable cause.” (Prob. Code § 21311(a)(1).) Provides that probable cause exists if, at the time of filing a contest, the facts known to the contestant would cause a reasonable person to believe that there is a reasonable likelihood that the requested relief will be granted after an opportunity for further investigation or discovery. (*Id.* at (b).)
 - a) Defines “contest” as a pleading filed with the court by a beneficiary that would result in a penalty under a no contest clause, if the no contest clause is enforced. (Prob. Code § 21310(a).)
 - b) Defines “direct contest” as a contest that alleges the invalidity of a protected instrument or one or more of its terms, based on enumerated grounds that include: forgery, lack of due execution, lack of capacity, menace, duress, fraud, or undue influence, revocations, and disqualifications of beneficiaries, as specified. (*Id.* at (b).)
 - c) Defines “no contest clause” as a provision in an otherwise valid instrument that, if enforced, would penalize a beneficiary for filing a pleading in any court. (*Id.* at (c).)

- 2) Establishes anti-SLAPP procedures. Provides that a cause of action 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” is subject to a special motion to strike, unless the court determines, based on the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based, that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim. (Code Civ. Proc. § 425.16(b).)
 - a) Defines an “act 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” to include:
 - i. any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law;
 - ii. any written or oral 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;
 - iii. 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, or
 - iv. 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. (§ 425.16(e).)

- b) Entitles a prevailing defendant, with certain exceptions, to attorney's fees and costs; likewise for a prevailing plaintiff, provided the court finds the motion was frivolous or solely intended to cause unnecessary delay pursuant to section 128.5 of the Code of Civil Procedure. (*Id.* at (c).)
 - c) Stays discovery proceedings upon filing of notice of a SLAPP motion. (*Id.* at (g).)
- 3) Generally exempts certain actions from the anti-SLAPP statute:
- a) Actions brought solely in the public interest or on behalf of the general public, provided that (1) the plaintiff does not seek any relief greater than or different from the relief sought for the class; (2) the action enforces an important right affecting the public, and confers a significant benefit on the public or a large class of persons; and (3) private enforcement is necessary and places a disproportionate financial burden on the plaintiff in relation to their stake in the matter. (Code Civ. Proc. § 425.17(b).)
 - b) Actions against a person for statements or conduct, provided the person is primarily engaged in the business of selling or leasing goods or services, the statement or conduct consists of representations of fact related to the business, and the intended audience is a potential buyer or customer, as specified. (*Id.* at (c).)

This bill:

- 1) Exempts no contest enforcement actions from the anti-SLAPP statute.
- 2) Provides that a party who has notice of the contest and wishes to enforce a no contest clause in the will or trust must file their pleading to enforce the no contest clause on or before the later of the following dates:
 - a) 120 days before the date initially set for commencement of the evidentiary hearing or trial; or
 - b) 60 days after the date of the setting of the evidentiary hearing or trial.
- 3) Provides that, when possible, and subject to the court's discretion as to the order of proof, the contest and the proceeding to enforce a no contest clause should be adjudicated at the same evidentiary hearing or trial.

COMMENTS

1. SLAPP suits

The seminal article entitled *Strategic Lawsuits Against Public Participation* defined SLAPP suits as "civil lawsuits ... that are aimed at preventing citizens from exercising their

political rights or punishing those who have done so.”¹ While SLAPP suits “masquerade as ordinary lawsuits” such as defamation and interference with a prospective economic advantage, they are generally meritless suits brought primarily to chill the exercise of free speech or petition rights by the threat of severe economic consequences for the defendant, and not to vindicate a legally cognizable right.²

In 1992, Code of Civil Procedure section 425.16 was added by SB 1264 (Lockyer, Ch. 726, Stats. 1992) to provide a “special motion to strike” for use by defendants in SLAPP suits to obtain an early judicial ruling and termination of a meritless claim arising from a person’s exercise of their constitutional rights of petition and free speech in connection with a public issue. In passing the anti-SLAPP law, the Legislature found “that 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” and “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.” (Code Civ. Proc. § 425.16(a).)

The special motion to strike must be brought within 60 days of service of complaint; it can result in an award of attorney’s fees and costs, stays discovery proceedings, and must be heard within 30 days if the court’s docket permits. (Code Civ. Proc. § 425.16(c), (f), (g).) The motion involves two steps. First, the moving party must show that the claim at issue arises from a protected activity, which includes any “statement or writing made in connection with an issue under consideration or review by a ... judicial body.” (*Id.* at (e).) If so, under the second step the burden shifts to the opposing party to demonstrate a reasonable probability of prevailing on the merits. (*See id.* at (b).) If the opposing party meets this burden, the special motion to strike is denied.

2. Exempts no-contest clause enforcement actions from the anti-SLAPP statute

A no-contest clause is a provision that disinherits a beneficiary who challenges a will or trust. Forfeiture applies if the claim is a “direct contest that is brought without probable cause” (Prob. Code § 21311(a)(1)), which is an allegation that the trust or will, or some part thereof, is invalid due to, among other things, undue influence, lack of capacity, or fraud (*id.* at (b)). “Such clauses promote the public policies of honoring the intent of the donor and discouraging litigation by persons whose expectations are frustrated by the donative scheme of the instrument.” (*Donkin v. Donkin* (2013) 58 Cal.4th 412, 422.)

Two recent cases from the Second District Court of Appeal establish that the anti-SLAPP statute applies to no-contest enforcement petitions. (*Key v. Tyler* (2019) 34 Cal.App.5th 505; *Urick v. Urick* (2017) 15 Cal.App.5th 1182.) This conclusion follows

¹ Canan, Penelope & Pring, George, (1988) 35 Social Problems 506.

² Canan, Penelope & Pring, George, *SLAPPS: Getting Sued for Speaking Out* (Temple University Press, 1996).

from the plain language of the statute: a no-contest enforcement petition is a “statement or writing made in connection with an issue under consideration or review by a ... judicial body” and thus is “an act in furtherance of a person’s right of petition or free speech” protected under the statute. (Code Civ. Proc. § 425.16(e).) The court entertained policy arguments to the contrary, but ultimately concluded that there were reasonable arguments on both sides and hence no basis for departing from the plain language. In both cases, the court reversed the probate court’s decision granting the special motion to strike, concluding that the parties attempting to enforce the no-contest clause had a reasonable probability of prevailing on the merits.

This bill would exempt no-contest clause enforcement actions from the anti-SLAPP procedure. The bill would add this exemption to the existing exemptions contained in Code of Civil Procedure section 425.17, which was enacted by SB 515 (Kuehl, Ch. 388, Stats. 2003) in response to concerns that the statute was being interpreted too broadly, enabling large corporations to weaponize and subvert the anti-SLAPP statute. SB 515 made the anti-SLAPP statute inapplicable to specified actions brought solely in the public interest or on behalf of the general public and certain actions based on the defendant’s commercial speech or conduct. This Committee’s analysis of the bill questioned whether the anti-SLAPP law had become a rotting tree or a tree with a few rotten branches.³

While the roots have since grown deeper, it appears that no-contest clauses are a branch worthy of trimming. Proponents of the bill note that although the anti-SLAPP statute and no-contest provisions have been on the books for multiple decades, it was only few years ago that an enterprising probate attorney thought to connect the two, leading to the case law described above. The author argues that the bill would close “a loophole that has allowed for the intentional misuse of anti-SLAPP motions to interfere with probate cases.”

Indeed, the dynamics at play in no-contest enforcement seem well outside the core concern animating the anti-SLAPP statute. As noted above, the statute was enacted in the early 1990s to prevent abuses of the judicial system with meritless cases intended to chill the exercise of the constitutional rights of petition and free speech. In *Wilcox v. Superior Court* (1994) 27 Cal. App. 4th 809, 815-816, the court set forth a description of the quintessential SLAPP suit:

The favored causes of action in SLAPP suits are defamation, various business torts such as interference with prospective economic advantage, nuisance and intentional infliction of emotional distress. [Citations.] Plaintiffs in these actions typically ask for damages which would be ruinous to the defendants. [Citations.]

³ Sen. Jud. Com. Analysis of SB 515 (Kuehl), as amended May 1, 2003, (May 6, 2003 hearing), p. 8. In 2005, the Legislature enacted AB 1158 (Lieber, Ch. 535, Stats. 2005) to enact rules governing “SLAPPback” lawsuit for malicious prosecution or abuse of process arising from the filing of a prior cause of action that was dismissed as a SLAPP lawsuit pursuant to an anti-SLAPP motion.

SLAPP suits are brought to obtain an economic advantage over the defendant, not to vindicate a legally cognizable right of the plaintiff. [Citations.] . . . [t]hey are generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal rights or to punish them for doing so. [Citation.]

By contrast, no-contest enforcement would appear for the most part to involve disgruntled beneficiaries clashing over multi-generational wealth. This tempers any concern over vindication of important public rights and the exploitation of power imbalances.

Moreover, the no-contest provisions have recently undergone substantial reform favoring challenges to wills and trusts. Originally a common law doctrine with limited public policy exceptions, the no-contest clause provisions were codified by AB 156 (Freidman, Ch. 544, Stats. 1989). In recognition of the harsh consequences of enforcement and the existence of unremedied abuses, AB 156 introduced a safe-harbor procedure that enabled parties to determine if their challenge would result in disinheritance. But this turned out to be worst of both worlds: a regime in which all-encompassing no-contest clauses could be enforced, without the benefit of reduced litigation. (See *Key v. Tyler* (2019), *supra*, 34 Cal.App.5th at 516.) At the Legislature's behest, the Law Revision Commission studied the issue and recommended narrowing the statute substantially by limiting it to its current form – direct contests without probable cause.⁴ TEXCOM argues that a contestant's use of a SLAPP motion against the enforcement of a no-contest clause needlessly increases pre-contest litigation and delay, undermining the purpose of the Legislature's repeal of the safe harbor procedure.

In view of the fact that the anti-SLAPP procedure appears to be an ill-fit for this context and that the Legislature has recently recalibrated no-contest enforcement in favor of beneficiaries getting their day in court, it appears that the application of anti-SLAPP in this context offers minimal upside. Given the low bar for proceeding with a will or trust contest, it seems unlikely that exempting no-contest enforcement from anti-SLAPP protection would result in a proliferation of baseless no-contest petitions that deter challenges supported by probable cause. As such, the costs of the status quo probably outweigh its benefits.

3. Timeline for filing a pleading to enforce a no-contest clause

Existing law does not establish a specific timeframe for filing a pleading to enforce a no-contest clause, which may necessitate a hearing separate from the hearing on the contest itself. According to TEXCOM, this enables a respondent on a contest claim to wait for

⁴ CA Law Rev. Comm., *Recommendation: Revision of No Contest Clause Statute* (January 2008), available at <http://www.clrc.ca.gov/pub/publishers/2008/Pub229-8-NoContest.pdf> (as of Feb. 20, 2021). The Legislature implemented these recommendations in SB 1264 (Harman, Ch. 174, Stats. 2008).

the court's ruling on the contest before filing the no-contest clause violation claim. To reduce expense and conserve judicial resources, this bill would require pleadings for violation of a no-contest clause to be filed by the later of 120 days before the date initially set for commencement of the evidentiary hearing or trial on the contest, or 60 days after the date of the setting of such an evidentiary hearing or trial. This would enable courts to determine whether the contest and no-contest clause violation claims should be decided in the same evidentiary hearing or trial, a result the bill encourages but does not require.

SUPPORT

California Conference of Bar Associations (co-sponsor)
Executive Committee of the Trusts and Estates Section of the California Lawyers Association (co-sponsor)

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation: *See* Comments 1 and 2.
