

# CA Court of Appeal Confirms Narrow Construction for Anti-SLAPP Commercial Speech Exemption

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A recent California Court of Appeal decision highlights the narrow construction given to the commercial speech exemption of California's anti-SLAPP statute, and the burden on plaintiffs opposing an anti-SLAPP motion on the basis of the exemption.

## Background

In [Dean v. Friends of Pine Meadow](#), plaintiffs filed an action for interference with prospective economic advantage and defamation in response to defendants' negative statements and publications concerning a planned housing development on a golf course. Plaintiffs alleged defendants had tried to deceive citizens into believing they represented the interests of the golf course and its owners, and had then made false public statements about, among other things, the planned use of the golf course, and published false media pieces opposing the development.

Defendants filed an anti-SLAPP motion to strike the entire complaint, contending the claims arose from protected speech and petitioning activity. Plaintiffs opposed the motion, primarily on the ground that defendants' so-called campaign of misinformation was not a "public issue." Plaintiffs also contended defendants engaged in commercial speech designed to give them a commercial advantage by devaluing the golf course so that someone else would purchase it. The trial court rejected plaintiffs' conception of what constitutes a "public issue," found plaintiffs did not meet their burden on the commercial speech exemption, and granted the motion.

## The Appellate Decision

Plaintiffs appealed, abandoning their argument that the speech did not relate to a public issue, but still contending their claims against defendants arose out of commercial speech, not protected under California's anti-SLAPP law.

The Court of Appeal began by concluding plaintiffs' claims arose out of alleged speech protected under some aspect of C.C.P.: much of the speech alleged was made in connection with legislative proceedings to amend the City's general plan, and all of the speech or petitioning activity related to an issue of public interest.

Turning to the commercial speech exemption, the Court of Appeal recognized three elements that distinguish commercial from noncommercial speech: (1) the speaker, who is likely someone engaged in commerce; (2) the intended audience, who is likely the buyer of the goods or services; and (3) the content, which must be commercial in character, such as representations about the speaker's business or services, to promote sales or other commercial transactions in that business or service. Applying this test, the appellate court concluded the speech alleged in the complaint was political rather than commercial. The Court did not buy plaintiffs' argument that defendants acted like competitors by trying to get someone else to purchase the golf course so it would be used for a different purpose.

The Court went on to stress that even if there was a commercial element to defendants' speech, commercial speech is not categorially excluded from anti-SLAPP protection. Regardless of the nature of the speech, a defendant meets its burden if it shows that the plaintiff's claims arise from an act in furtherance of the person's right of petition or free speech in connection with a public issue. [C.C.P. § 425.16\(e\)](#).

The burden then shifts to the plaintiff to show the commercial speech exemption applies. Here, the *Dean* court reiterated that the commercial speech exemption – as a “statutory exception to 425.16” – should be narrowly construed.

Finally, the Court rejected plaintiffs' perhaps novel claim that commercial speech that doesn't fall within the exemption may still be excluded from anti-SLAPP protection because the Constitution gives less protection to commercial than noncommercial speech. The Court observed that the Legislature did not limit the scope of the anti-SLAPP law to activity protected by constitutional rights of speech and petition. Instead, it extends to “any act...in furtherance of” those rights. The statute is to be “construed broadly” to encourage continued participation in matters of public significance. In sum, the Court determined, plaintiffs can't use First Amendment principles to limit the scope of anti-SLAPP protection. Not every anti-SLAPP motion is a constitutional case.

After disposing of plaintiffs' various contentions regarding commercial speech, the Court concluded the speech at issue fell within the protection of the anti-SLAPP statute, found plaintiffs failed to show evidence sufficient to sustain a favorable judgment, and affirmed the grant of defendants' anti-SLAPP motion.

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