SJC-13211

COMMONWEALTH vs. EXXON MOBIL CORPORATION.

Suffolk. March 9, 2022. - May 24, 2022.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

"Anti-SLAPP" Statute. Attorney General. Consumer Protection Act, Unfair or deceptive act. Practice, Civil, Consumer protection case, Motion to dismiss.

Civil action commenced in the Superior Court Department on October 24, 2019.

A special motion to dismiss was heard by Karen F. Green, J.

The Supreme Judicial Court granted an application for direct appellate review.

Justin A. Anderson, of the District of Columbia (Patrick J. Conlon, of Texas, Jeremy M. Liss, of New York, & Thomas C. Frongillo also present) for the defendant.

Seth Schofield, Assistant Attorney General (Richard A. Johnston & Christopher G. Courchesne, Assistant Attorneys General, also present) for the Commonwealth.

Edward Notis-McConarty, Jennifer Grace Miller, M. Patrick Moore, & Clinton R. Prospere, for Francis X. Bellotti & others, amici curiae, submitted a brief.

KAFKER, J. The Attorney General brought a civil enforcement action against Exxon Mobil Corporation (Exxon Mobil) for various alleged violations of G. L. c. 93A based on the company's communications with investors and consumers related to the impact of climate change. Exxon Mobil contended that the action was motivated by its "petitioning" activity and filed a special motion to dismiss under G. L. c. 231, § 59H, the "anti-SLAPP" statute (anti-SLAPP motion).[1] The Attorney General responded that the anti-SLAPP statute applies to private parties but not to the Attorney General, and that even if the anti-SLAPP statute did apply to the Attorney General, the instant action was not brought in response to petitioning activities, but rather for unfair or deceptive practices prohibited by G. L. c. 93A. A Superior Court judge denied the anti-SLAPP motion, finding that at least some of the activity alleged in the complaint was not "petitioning" within the meaning of the statute. We affirm on the alternate ground that G. L. c. 231, § 59H, does not apply to civil enforcement actions by the Attorney General.[2]

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[1] "SLAPP" is an acronym meaning "strategic litigation against public participation." See Cadle Co. v. Schlichtmann, 448 Mass. 242, 242 n.2 (2007).

[2] We acknowledge the amicus brief submitted by former Attorneys General Francis X. Bellotti, James M. Shannon, Scott Harshbarger, Thomas Reilly, and Martha Coakley.

1. Background. The present appeal marks the latest round in a years-long struggle between Exxon Mobil and the Attorney General that has played out before courts across the country, including our own. See, e.g., Exxon Mobil Corp. v. Attorney Gen., 479 Mass. 312, 313-314 (2018), cert. denied, 139 S. Ct. 794 (2019). We limit ourselves to the background relevant to disposing of Exxon Mobil's motion.

In October 2019, the Attorney General brought a civil enforcement action on behalf of the Commonwealth against Exxon Mobil in the Superior Court pursuant to her powers under G. L. c. 12, §§ 3 and 11D, and G. L. c. 93A, § 4. After Exxon Mobil unsuccessfully attempted to remove the action to Federal court, see Massachusetts v. Exxon Mobil Corp., 462 F. Supp. 3d 31, 34 (D. Mass. 2020), the Attorney General filed an amended complaint. The amended complaint alleged violations of G. L. c. 93A and related regulations for factual misstatements and failures to disclose information related to Exxon Mobil's products and their impact on the climate. In particular, the first count of the complaint alleged that Exxon Mobil misrepresented or failed to disclose material facts to Exxon Mobil investors in Massachusetts related to climate change and its impact on Exxon Mobil's business. The second count alleged that certain marketing and promotional materials misled Massachusetts consumers as to the climate impact of Exxon

Mobil's products. Finally, the third count alleged that Exxon Mobil is misleading Massachusetts consumers through so-called "greenwashing" campaigns that wrongly imply that Exxon Mobil is taking steps to solve climate change and reduce carbon emissions, thereby influencing consumer purchasing decisions.

Claiming that the Attorney General's complaint was based on its "petitioning" activity, Exxon Mobil filed a special motion to dismiss all counts under G. L. c. 231, § 59H. Without deciding the question whether the anti-SLAPP statute applied to enforcement actions by the Attorney General, a Superior Court judge denied the motion, finding that, although some of the activities mentioned in the complaint constituted "petitioning" within the meaning of the anti-SLAPP statute, the investor communications and marketing efforts in question did not, and therefore the challenged claims were not "solely based on" Exxon Mobil's petitioning activity as required by the anti-SLAPP statute and case law. See Blanchard v. Stewart Carney Hosp., Inc., 477 Mass. 141, 159 (2017), S.C., 483 Mass. 200 (2019). Exxon Mobil exercised its right to interlocutory review of the denial of its special motion. See Fabre v. Walton, 436 Mass. 517, 521-522 (2002), S.C., 441 Mass. 9 (2004). This court granted the Attorney General's application for direct appellate review.

2. Discussion. a. Standard of review. Our review is determined by the threshold issue whether the anti-SLAPP statute applies at all to civil enforcement proceedings brought by the Attorney General. We conclude that it does not, and therefore do not analyze whether Exxon Mobil's actions constituted "petitioning" or whether the other requirements for dismissal were met.

The question whether G. L. c. 231, § 59H, applies to the Attorney General is a question of statutory interpretation. "When interpreting a statute, our primary duty is to 'effectuate the intent of the Legislature in enacting it.'" Wallace W. v. Commonwealth, 482 Mass. 789, 793 (2019), quoting Matter of E.C., 479 Mass. 113, 118 (2018). We determine this intent "from all [the statute's] words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." Conservation Comm'n of Norton v. Pesa, 488 Mass. 325, 331 (2021), quoting Commissioner of Revenue v. Dupee, 423 Mass. 617, 620 (1996). We must also consider that interpreting general statutes to be enforceable against the Commonwealth intrudes on governmental sovereignty, and is therefore disfavored, as reflected in various rules of statutory construction. Hansen v.

Commonwealth, 344 Mass. 214, 219-220 (1962). Additionally, "'[t]o the extent there is any ambiguity in the statutory language, we turn to the legislative history' as a guide to legislative intent." Osborne-Trussell v. Children's Hosp. Corp., 488 Mass. 248, 254 (2021), quoting Ajemian v. Yahoo!, Inc., 478 Mass. 169, 182 (2017), cert. denied sub nom. Oath Holdings, Inc. v. Ajemian, 138 S. Ct. 1327 (2018).

b. G. L. c. 231, § 59H. Section 59H provides:

> "In any case in which a party asserts that the civil claims, counterclaims, or cross claims against said party are based on said party's exercise of its right of petition under the constitution of the United States or of the commonwealth, said party may bring a special motion to dismiss."[3]

[3] As further defined by the case law, at the first stage of the process "a special movant must demonstrate that the nonmoving party's claims are solely based on its own petitioning activities" (emphasis added). Blanchard, 477 Mass. at 159. Although the statute references norms under the First Amendment to the United States Constitution and the Massachusetts Constitution, it does not, however, rely solely on these rights, as defined by the United States Supreme Court or this court, to determine the scope of protected activity, and instead provides its own express -- and broad -- definition of "petitioning". G. L. c. 231, § 59H. See Blanchard, supra at 147-148. The statute defines "petitioning" to include "any written or oral statement" that (i) is made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; (ii) is made in connection with an issue under consideration or review by any governmental proceeding; (iii) is reasonably likely to encourage consideration or review of an issue by a governmental proceeding; (iv) is reasonably likely to enlist public participation in an effort to effect such consideration; or (v) falls within constitutional protection of the right to petition government.

The statute then provides:

> "The court shall grant such special motion, unless the party against whom such special motion is made shows that: (1) the moving party's exercise of its right to petition was devoid of any reasonable factual support or any arguable basis in law and (2) the moving party's acts caused actual injury to the responding party."[4]

The statute also addresses the Attorney General specifically: "The attorney general, on [her] behalf or on behalf of any government agency or subdivision to which the moving party's acts were directed, may intervene to defend or otherwise support the moving party on such special motion." G. L. c. 231, § 59H.

Filing a special motion has an immediate and important effect on the litigation, short-circuiting and rerouting the ordinary trial and appellate process. The court must "advance any such special motion so that it may be heard and determined as expeditiously as possible." G. L. c. 231, § 59H. Filing the motion also stays discovery, although a court may allow "specified discovery" upon motion and a hearing with good cause

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[4] Consistent with the over-all purpose of the statute to "distinguish meritless from meritorious claims," we have also held that the nonmoving party can meet its burden in this "second stage" by showing that the challenged claim "was not primarily brought to chill the special movant's legitimate petitioning activities" (citation omitted). Blanchard, 477 Mass. at 159-160. This involves showing that the claim is "colorable or worthy of being presented to and considered by the court" (alteration omitted). Id. at 160-161, quoting L.B. v. Chief Justice of the Probate & Family Court Dep't, 474 Mass. 231, 241 (2016).

shown. Id. A prevailing movant is also entitled to "costs and reasonable attorney's fees, including those incurred for the special motion and any related discovery matters." Id.[5]

c. Application to civil enforcement proceedings. The central question is whether the anti-SLAPP statute applies to civil enforcement proceedings brought by the Attorney General. We conclude that it does not, relying on the specific statutory

[5] Although originally drafted with a particular purpose in mind -- that is, the prevention of lawsuits used by developers to punish and dissuade those objecting to their projects in the permitting process -- the anti-SLAPP statute's broadly drafted provisions, particularly its wide-ranging definition of petitioning activity, have led to a significant expansion of its application. See 477 Harrison Ave., LLC v. JACE Boston, LLC, 483 Mass. 514, 529-530 (2019); Duracraft Corp. v. Holmes Prods. Corp., 427 Mass. 156, 161-163, 166-167 (1998). The ever-increasing complexity of the anti-SLAPP case law has also made resolution of these cases difficult and time consuming. See Blanchard, 477 Mass. at 159-161. We recognize that this case law may require further reconsideration and simplification to ensure that the statutory purposes of the anti-SLAPP statute are accomplished and the orderly resolution of these cases is not disrupted. See Matter of Hamm, 487 Mass. 394, 395-396 (2021) (affirming denial of anti-SLAPP motion two years after underlying objection to guardianship accounting was filed); Blanchard, 483 Mass. at 201 (affirming second denial of anti-SLAPP motion against complaint filed in 2013); Haverhill Stem LLC v. Jennings, 99 Mass. App. Ct. 626, 627, 629 (2021) (affirming denial of anti-SLAPP motion two years after complaint filed). We also note that other States have defined petitioning activity more narrowly and that bills have been filed in our Legislature to do the same. See, e.g., Ind. Code § 34-7-7-2 (anti-SLAPP statute applies to "any conduct in furtherance of the exercise of the constitutional right of: [1] petition; or [2] free speech; in connection with a public issue or an issue of public interest"); 2021 House Doc. No. 1504 (providing that protected activity under anti-SLAPP statute "shall be defined as those rights are defined under the U.S. Constitution or the Massachusetts Constitution").

language, the rules of construction applicable to the enforcement of statutes against the Commonwealth, and the legislative history and purpose of the anti-SLAPP statute.

The inquiry does not simply end, as Exxon Mobil suggests, with the employment of the general term "party" in the first two sentences of § 59H defining who can sue and be sued. Rather, we conclude that the fourth sentence, specifically defining the role of the Attorney General, is most informative. See G. L. c. 231, § 59H ("The attorney general, on [her] behalf or on behalf of any government agency or subdivision to which the moving party's acts were directed, may intervene to defend or otherwise support the moving party on such special motion"). That the Attorney General is mentioned in connection with her capacity to intervene, but not in any other capacity, suggests that the Legislature envisioned the Attorney General's role in § 59H motions as limited to such intervention.

Indeed, interpreting the general term "party" here to include the Commonwealth or the Attorney General presents a number of problems. As the former Attorneys General explain in their amicus brief, there are conceptual difficulties with including the Commonwealth as a "party," authorized to bring special motions to dismiss:

> "Does the Commonwealth have a protected right to petition itself? Could someone else bring a claim that was 'based on' the Commonwealth's petitioning of itself? That seems

> unlikely given that the right to petition is vested in the 'people.' [First Amendment, cl. 3, to the United States Constitution] (protecting 'right of the people' to petition government for redress of grievances); art. 19 of the Declaration of Rights [of] the Massachusetts Constitution ('people have [a] right' to 'request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them')."

Interpreting the word "party" to include the Attorney General and thus to allow special motions to dismiss against her raises a different set of statutory and even constitutional concerns. As has been explained by this court and as summarized by some of the foremost commentators on statutory construction, "[c]ourts strictly, or narrowly, construe statutes in derogation of sovereignty." 3 S. Singer, Statutes and Statutory Construction § 62:1 (8th ed. 2020) (Sutherland), citing Hansen, 344 Mass. at 219, and other cases. As we have noted in a related context, such a rule "advances important public policies," Brown v. Office of the Comm'r of Probation, 475 Mass. 675, 679 (2016), especially where application of the statute to the government could interfere with "the discretionary functions of a public official" or is necessary "to shield the public fisc," Randall v. Haddad, 468 Mass. 347, 358-359 (2014), quoting Bates v. Director of the Office of Campaign & Political Fin., 436 Mass. 144, 174 (2002). Thus, "it is a widely accepted rule of statutory construction that general words in a statute such as 'persons' will not ordinarily be construed to include the

State or political subdivisions thereof" when they limit the capacity of the government to perform its necessary functions or protect public finances. Hansen, supra at 219-220 (collecting cases and concluding that anti-injunction act did not apply to public employer). See Sutherland, supra at § 62:1. See also Commonwealth v. Dowd, 37 Mass. App. Ct. 164, 166 (1994), citing Will v. Michigan Dep't of State Police, 491 U.S. 58, 64 (1989) ("This canon of construction is scarcely limited to Massachusetts").

Limiting enforcement actions by the Attorney General is particularly problematic. The Attorney General is the "chief law officer" of the Commonwealth, empowered by the Legislature to "set a unified and consistent legal policy for the Commonwealth" (citation omitted). Secretary of Admin. & Fin. v. Attorney Gen., 367 Mass. 154, 159, 163 (1975).[6] The Attorney General has the statutory duty to "appear for the commonwealth and for state departments, officers and commissions in all suits and other civil proceedings in which the commonwealth is a party

[6] The importance of the Attorney General's office, as well as its relevance to publicly contested and politically inflected issues, is underscored by the fact that the Attorney General is separately elected by the people rather than appointed. See art. 17 of the Amendments to the Massachusetts Constitution, as amended by art. 82 of the Amendments. This constitutional amendment stemmed from "an attempt to give the appointing power back to the 'supreme power,' the people." Secretary of Admin. & Fin., 367 Mass. at 161, citing Official Report of the Debates and Proceedings on the State Convention 704 (1853).

or interested, or in which the official acts and doings of said departments, officers and commissions are called in question." G. L. c. 12, § 3. The Attorney General also appears for the Commonwealth in actions to recover money on its behalf. G. L. c. 12, § 5.

Importantly, she is entrusted with the enforcement of the Commonwealth's laws, in large part through bringing civil enforcement proceedings, including the enforcement of G. L. c. 93A. See, e.g., G. L. c. 12, § 11D (authorizing civil, administrative, or criminal proceedings to enforce environmental laws and abate pollution nuisances); G. L. c. 12, § 11H (authorizing Attorney General to bring civil actions to prevent violation of Massachusetts Civil Rights Act); G. L. c. 93A, § 4 (authorizing Attorney General to bring civil actions to enforce consumer protection laws); G. L. c. 149, § 150 ("The attorney general may make complaint or seek indictment against any person for a violation of [Wage Act]"); G. L. c. 151B, § 5 (authorizing Attorney General to file complaints to enforce antidiscrimination laws). In such enforcement actions, the Attorney General may prosecute and remedy past violations and engage in proactive litigation to prevent ongoing harm. See, e.g., G. L. c. 12, 11D; G. L. c. 93A, § 4.

Construing the anti-SLAPP statute to apply to the Attorney General would place significant roadblocks to the enforcement of

the Commonwealth's laws. G. L. c. 231, § 59H. Filing a special motion, as explained above, stays or limits discovery. Id. The motion itself is prioritized over other proceedings in the case. Id. It is also immediately appealable. Fabre, 436 Mass. at 521-522. The result is that the rest of the case must await resolution of the special motion, and often the appeal as well. All of this has a substantial effect on the investigation and enforcement of illegal activity, which is a critical function of the government.

The Legislature may of course place limits on the sovereign authority of government, including on the authority of the Attorney General. See, e.g., G. L. c. 93A, § 6 (5)-(6) (providing limitations on Attorney General's power to issue civil investigative demands to enforce G. L. c. 93A).[7] This must, however, be done clearly and expressly or at least by necessary implication. Hansen, 344 Mass. at 220 (requiring "clear and unequivocal language" to restrict sovereign functions). Cf. Brown, 475 Mass. at 679 (waiver of sovereign immunity must be "expressed by the terms of a statute, or appear by necessary implication from them" [citation and alteration

[7] Legislatively imposed limitations on the Attorney General must also respect the constitutional separation of powers. See art. 30 of the Massachusetts Declaration of Rights. See also Opinion of the Justices, 375 Mass. 827, 832-833, 841 (1978), citing Opinion of the Justices, 302 Mass. 605, 617 (1939).

omitted]); Sutherland, supra at § 62:1 ("the rule seeks to preserve sovereignty, to insulate it from unclear statutory language that might encroach harmfully upon governmental affairs").[8] A good example of a clear and express limitation on the Attorney General's powers appears in the same chapter of the General Laws as the anti-SLAPP statute. General Laws c. 231, §§ 6E-6G, provide for "reasonable counsel fees and other costs and expenses" in civil actions where a "party" is found to have brought claims or defenses that "were wholly insubstantial, frivolous and not advanced in good faith." Id. Consistent with our case law's requirements, the statute expressly defines "party" as "any person, including any officer or agency of the commonwealth or subdivision thereof, or any authority established by the general court to serve a public purpose." G. L. c. 231, § 6E.

The history and purpose of the anti-SLAPP suit also counsels against its application to government enforcement

[8] At oral argument, Exxon Mobil raised the examples of Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974), and Mass. R. Civ. P. 56, 365 Mass. 824 (1974). Application of purely procedural rules to government parties is, however, different, as it does not provide independent substantive grounds for dismissal of a claim, provide a basis of financial recovery against the government, or have a substantial effect on the investigation and prosecution of illegal activity. The government has no legitimate interest in filing complaints that do not state a claim for relief, or in proceeding to trial without raising a triable issue of fact.

actions. The legislative history makes clear that the motivation for the anti-SLAPP statute was vexatious, private lawsuits, especially ones filed by developers to prevent local opposition to zoning approval.[9] See Duracraft Corp. v. Holmes Prods. Corp., 427 Mass. 156, 161 (1998); State House News Service (House Sess.), Dec. 19, 1994; State House News Service (Advances), Dec. 19, 1994; State House News Service (Sen. Sess.), Dec. 29, 1994 (describing lawsuits brought by developers against local residents for opposing developments resulting in steep legal fees). There is no suggestion in the legislative history that it was meant to address government enforcement actions. Furthermore, unlike private litigants, government actors' decisions to prosecute claims are subject to the First Amendment and other constitutional protections. See Wayte v.

[9] Exxon Mobil points to a statement by Governor William F. Weld returning the anti-SLAPP bill to the Legislature and noting his concerns. In particular, the Governor noted, "The bill applies to a broad group of potential claims, sweeping in cases that are far beyond the types of lawsuits which the bill's proponents wish to control." 1994 House Doc. No. 5604. Whether or not the Legislature accepted the Governor's interpretation of the potential scope of the broadly worded statute, see Duracraft Corp., 427 Mass. at 162-163 & n.11, his concerns have proved prescient, as parties have sought to expand the open-ended language of the statute, particularly its broad definition of petitioning activities, to apply to disputes very different from those that prompted its passage. Regardless, there is nothing in the Governor's message to suggest that either he or the Legislature thought the statute would apply to government enforcement actions as opposed to private disputes. 1994 House Doc. No. 5604.

United States, 470 U.S. 598, 610-614 (1985) (discussing limitations imposed on prosecution by First Amendment); Mozzochi v. Borden, 959 F.2d 1174, 1179 (2d Cir. 1992) ("[i]t has long been established that certain adverse governmental action taken in retaliation against the exercise of free speech violates the First Amendment").[10]

The only other court that has had to analyze a similar anti-SLAPP statute has also not extended it to government enforcement actions.[11] Like § 59H, Maine's anti-SLAPP statute neither expressly included nor excluded government enforcement

[10] Exxon Mobil has vigorously and, so far, unsuccessfully pursued these constitutional rights and remedies in Federal and State court. See, e.g., Exxon Mobil Corp. v. Schneiderman, 316 F. Supp. 3d 679, 687-694 (S.D.N.Y. 2018), aff'd, 28 F.4th 383 (2d Cir. 2022).

[11] The Supreme Court of California has rejected the argument that there was an implied exemption for all enforcement actions under that State's anti-SLAPP statute. Montebello v. Vasquez, 1 Cal. 5th 409, 416-420 (2016). However, this was based on the statute's express, limited exemption for actions "brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor." Id. at 416, 419-420, quoting Cal. Civ. Proc. Code § 425.16(d). Consequently, there was a statutory basis to hold that municipal enforcement actions were not exempt, albeit by negative implication. Cf. Reuter v. Methuen, 489 Mass. 465, 474 (2022), citing Halebian v. Berv, 457 Mass. 620, 628 (2010) (emphasizing that Massachusetts courts generally disfavor negative implication arguments). No such statutory language related to government enforcement appears in § 59H.

actions. Me. Rev. Stat. tit. 14, § 556.[12] The Supreme Judicial Court of Maine concluded that a municipal enforcement action for a zoning violation, allegedly brought in retaliation for petitioning activity, was not "an appropriate occasion for application of the anti-SLAPP statute." Madawaska v. Cayer, 2014 ME 121, ¶¶ 14-16. Like the Attorney General, the officer who brought the action was exercising a statutory mandate to enforce the law. Id. at ¶¶ 3-4. See Me. Rev. Stat. tit. 30-A, § 4452.

Our decision in Hanover v. New England Regional Council of Carpenters, 467 Mass. 587 (2014), is not to the contrary, even though there we reversed the denial of a special motion to dismiss against a town. First, the issue whether government entities were subject to the anti-SLAPP statute was not raised, as the question under appeal was whether "support of litigation" by a nonparty counted as petitioning. See id. at 588. Second, the challenged lawsuit was not a statutorily authorized enforcement action as in Madawaska or the present suit, but rather an abuse of process suit. Id. at 589. In fact, the town had been subject to a government enforcement action by the Attorney General concluding that its town bidding process had

[12] Maine's anti-SLAPP statute is "substantively identical" to our own. Gaudette v. Mainely Media, LLC, 2017 ME 87, ¶ 14 n.2.

been fraudulent. Id. at 588. When the town continued to enforce its contract with the winning contractor despite the fraud, ten taxpayers, supported by the defendant union, brought suit. Id. at 588-589. The town then sued the union for its support of the litigation, which led the union to bring the special motion to dismiss. Id. at 589. In sum, this was not a case where the anti-SLAPP statute was applied to prevent a government enforcement action, but rather a case where a local government attempted to retaliate against a private party with litigation for seeking compliance with a State government enforcement action. Thus, nothing in Hanover supports the contention that the anti-SLAPP statute applies to enforcement actions brought by the Attorney General.[13]

3. Conclusion. We affirm the dismissal of Exxon Mobil's special motion. The anti-SLAPP statute does not apply to government enforcement actions brought by the Attorney General.

So ordered.

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[13] We note that the union in Hanover was not seeking to employ the anti-SLAPP statute to prevent local government enforcement of laws. As the issue was not raised in that case, and is not raised here, we need not decide whether any or all local government enforcement actions are beyond the scope of the anti-SLAPP statute. Compare Madawaska, 2014 ME 121 ¶¶ 14-16, with Montebello, 1 Cal. 5th at 416-420.