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IN THIS ISSUE

Strategic lawsuits against public participation (SLAPPs) have long proven to be an effective tool for public figures, corporations and governmental bodies to silence otherwise constitutionally-protected speech. This article examines the efforts of the individual states to curtail the use SLAPP suits.

A SLAPP in the Face to Free Speech? A Nationwide Overview of SLAPPs and Anti-SLAPP Laws

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Strategic lawsuits against public participation (SLAPPs) have long proven to be an effective tool for public figures, corporations and governmental bodies to silence otherwise constitutionally-protected speech. In a nutshell, the purpose of a SLAPP is to discourage outspoken critics from expressing controversial opinions on matters of public interest. SLAPPs are frequently used to exhaust defendants' resources for attorney fees, with hopes that the time and expense of defending the SLAPP will ultimately silence the defendant's speech. In response, several states have enacted anti-SLAPP laws, many of which contain provisions that enable defendants to recoup their legal fees. Anti-SLAPP statutes are rooted in the fundamental principle that every citizen has a constitutional right to free speech.

While SLAPPs often surface in the form of various causes of action, including claims for tortious interference with business relations and even civil conspiracy, most SLAPPs are disguised as defamation claims. Generally, defamation claims are only cognizable when the underlying speech is unprotected by the First Amendment of the United States Constitution. More specifically, a public figure, or anyone who speaks on a matter of public concern, can only be liable for defamation if the speaker recklessly makes a false statement (*i.e.*, when the speaker knows or has reason to know the statement is false) with "malicious intent" to harm the target of the defamatory speech. *See New York Times Company & Ralph Abernathy et al. v. Sullivan*, 376 U.S. 254 (1964). The key distinction between a defamation suit and a SLAPP, however, is simple: whereas, the plaintiff in a defamation suit intends to prevail on the merits of the lawsuit, the plaintiff in a SLAPP is incentivized to silence the defendant's speech rather than win the lawsuit.

A State-by-State Survey of Anti-SLAPP Laws

Today, twenty-nine states, along with the District of Columbia, have enacted anti-SLAPP statutes. Needless to say, the scope of protections those statutes afford to public speakers varies from state to state. For instance, some states do not require plaintiffs to pay the defendant's attorney fees from defending against the SLAPPs. Other states, like Tennessee, only prohibit SLAPPs that seek to silence speech against a governmental entity. Eight of the twenty-nine states[1] with anti-SLAPP statutes allow public speakers to file "SLAPPback" counterclaims while the SLAPP suit is pending. *See* Ca. Civ. Pro. § 425.18 (authorizing defendants in SLAPP suits to file "SLAPPback" counterclaims); *cf. Community Access Unlimited v. Rockcliffe*, No. A-4853-10T4, 2012 WL 1431267 (Sup. Ct. N.J. Apr. 26, 2012) ("…the law is well-settled that [a defendant] may not "SLAPP-back" by way of counterclaim, but instead must wait until the alleged SLAPP suit has terminated in [the defendant's] favor to sue…").

[1] California, Delaware, Hawaii, Minnesota, Nevada, New York, Rhode Island, and Utah authorize parties to file "SLAPPback" counterclaims to a SLAPP action.

Even in jurisdictions without anti-SLAPP laws, their courts have recognized defenses to SLAPP suits. *See Cottrell v. Zagami, LLC*, 94 a.3D 878 (N.J. 2014) (community member who made critical statements about a liquor license holder at a liquor license renewal meeting was privileged "to speak out on a public interest topic at a quasi-judicial municipal hearing[,]" even though New Jersey does not have a statute prohibiting SLAPP litigation). Likewise, nearly every state recognizes common law claims for malicious prosecution or abuse of process. *See LoBiondo v. Schwartz*, 970 A.2d 1007, 1030-31 (N.J. 2009) ("[W]e agree in principle that malicious use of process should be available as a SLAPP suit remedy. To the extent that a SLAPP suit victim can marshal[*sic*] the requisite proofs for the cause of action, we will not prohibit it.")). Each of these laws is premised on the ideal that our civil justice system is not a vehicle for harassment or retaliation.

Many states' anti-SLAPP laws permit defendants to file motions to dismiss (or "anti-SLAPP motions") at the outset of the case. Typically, to prevail on an anti-SLAPP motion, the defendant must first make a *prima facie* showing that the motion is related to the exercise of free speech, the right to petition, or the right of association under the First Amendment; at that point, the burden shifts to the plaintiff to establish a likelihood of success on the merits of the claim with sufficient evidence to support a *prima facie* case. *See* K.S.A. 2016 60-5320(d). Recently, the Fifth Circuit Court of Appeals invalidated a Texas anti-SLAPP law that imposed an additional burden-shifting requirement on the parties. *See Klocke v. Watson*, No. 17-11320, 2019 WL 3977545 (5th Cir. Aug. 23, 2019) (holding Texas Citizens Participation Act conflicts with Federal Rules of Civil Procedure 12 and 56 by imposing additional requirements to prevail on a dispositive motion).

Below is a breakdown of each state's anti-SLAPP laws.[2]

[2] The ^ symbol means parties may appeal rulings on anti-SLAPP motions. The * symbol means plaintiffs may amend their complaints while the anti-SLAPP motion is pending.

Jurisdiction	SLAPPs Prohibited by Statute or Common Law?	Can Claims be Asserted in Any Forum?	Are All Public Issues Protected?	Does the Law Permit the Recovery of Attorney Fees?	Can Claims be Amended after the Court Grants an Anti-SLAPP Motion?	Is there Any Additional Burden of Proof for the Defendant?
Alabama	N/A					
Alaska	N/A					
Arizona	Ariz. Rev. Stat. Ann. § 12-751	Yes		Yes		
Arkansas	Ark. Code Ann. § 16-63-501-8	Yes		Yes		Yes
California	Cal. Civ. Proc. Code § 425.16	Yes	Yes	Yes	*^Only in federal court after obtaining leave	
Colorado	H.B. 19-1324	Yes		Yes		
Connecticut		Yes	Yes	Yes		
Delaware	Del. Code Ann. tit. 10 § 8136	Yes			*Yes	
D.C.	D.C. Law § 16-5501	Yes	Yes	Yes	No	
Florida	Fla. Stat. § 768.295	Yes		Yes		
Georgia	Ga. Code Ann. § 9-11-11.1	Yes		Yes	*^	
Hawaii	Haw. Rev. Stat. §§ 634F-1 through 634F-4			Yes	*^	
Idaho	N/A					

Illinois	735 Ill. Comp. Stat. § 110/115	Yes	Yes	Yes	^	Yes
Indiana	Ind. Code §§ 34-7-7-1 through 10	Yes	Yes	Yes		Yes
Iowa	N/A					
Kansas	K.S.A. § 60-5320	Yes	Yes	Yes	^	
Kentucky	Legislation proposed in 2020 session					
Louisiana	La. Code Civ. Proc. Ann. art. § 971	Yes	Yes	Yes		
Maine	Me. Rev. Stat. tit. 14 § 556	Yes	Yes	Yes	^	
Maryland	Md. Code Ann., Cts. & Jud. Proc. § 5-807	Yes	Yes		*^	Yes
Massachusetts	Mass. Gen. Laws ch. 231 § 59H	Yes		Yes	*^	
Michigan	N/A					
Minnesota	Minn. Stat. §§ 554.01 through 554.05	Yes		Yes	^	
Mississippi	N/A					
Missouri	Mo. Rev. Stat. § 537.528			Yes	^	
Montana	N/A					
Nebraska	Neb. Rev. Stat. §§ 25-21, 243-6	Yes				

Nevada	Nev. Rev. Stat. §§ 41.635-670	Yes		Yes		
New Hampshire	N/A					
New Jersey	N/A					
New Mexico	N.M. Stat. §§ 38-2-9.1 through 38-2-9.2			Yes		
New York	N.Y. CLS Civ. R. §§ 70-a and 76-a	Yes			*	
North Carolina	N/A					
North Dakota	N/A					
Ohio	N/A					
Oklahoma	12 Okl. St. Ann. § 1432					
Oregon	Or. Rev. Stat. § 31.150 et seq.	Yes	Yes	Yes	Yes	
Pennsylvania	27 Pa. Const. Stat. §§ 7707 and 8301-3	Yes		Yes	^Yes	
Rhode Island	R.I. Gen. Laws §§ 9-33-1 through 9-33-4	Yes	Yes	Yes	*	
South Carolina	N/A					
South Dakota	N/A					
Tennessee	T. C. A. § 20-17-101	Yes	Yes	Yes	^	Yes
Texas	Tex. Civ. Prac. & Rem. Code	Yes	Yes		*^	

	§§ 27.002-9					
Utah	Utah Code Ann. § 78B-6-1401-5	Yes			^	
Vermont	12 VSA § 1041	Yes	Yes	Yes	^	
Virginia	Code of VA § 8.01-223.2					
Washington	RCW § 4.24.510			Yes		
West Virginia	*Harris v. Adkins*, 432 S.E.2d 549 (W. Va. 1993)[3]					
Wisconsin	N/A					
Wyoming	N/A					

Do Anti-SLAPP Laws Violate the Right to a Jury Trial?

Equally as important as the right to free speech is the constitutional right to a jury trial. In fact, the right to a jury trial is a derivative component of the right to petition the government. *See Borough of Duryea, Pa. v. Nat'l Labor Relations Bd.*, 461 U.S. 731, 741 (1983) (The U.S. Supreme Court "recognize[s] that the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances.")).

In 2015, the Washington Supreme Court held Washington's anti-SLAPP statute violated the Washington Constitution's guarantee of the right to a jury trial. *Davis v. Cox*, 351 P.3d 862 (Wa. 2015). In *Davis*, a fresh-food cooperative filed a derivative action against its board of directors after the board adopted a boycott of Israeli-based companies. *Id.* at 867. Following the trial court's dismissal of the lawsuit pursuant to Washington's anti-SLAPP statute, the board appealed to the Washington Supreme Court to challenge the constitutionality of the statute. In reaching its decision, the Supreme Court reasoned, although the right to a jury trial does not apply to frivolous lawsuits, Washington's anti-SLAPP statute requires trial judges to "make a factual determination of whether the plaintiff has

[3] *Harris v. Adkins*, 432 S.E. 2d 549 (W.Va. 1993) (holding, because public speakers do not have an "absolute privilege" to petition the government, whether a public speaker acts with actual malice while making the speech is within the discretion of trial courts).

established by clear and convincing evidence a probability of prevailing on the claim" – which, according to the Court, is a function of the jury. *Id.* at 862, 873-74.

Of course, attorneys should not view the *Davis* decision in a vacuum. After all, the question of whether anti-SLAPP statutes violate the right to a jury trial remains unsettled from one jurisdiction to the next. *See Leindecker v. Asian Women United of Minnesota*, 895 N.W.2d 623 (Minn. 2017) (Minnesota's anti-SLAPP statute violates the right to a jury trial); *cf. Lafayette Morehouse, Inc. v. Chronicle Publishing Co.*, 44 Cal. Rptr.2d 4 (Cal. Ct. App. 1995) (California's anti-SLAPP statute does not violate the right to a jury trial). Nonetheless, the *Davis* decision, perhaps, serves as an indication that federal legislation may offer more guidance for how courts should adjudicate, or dispose of, SLAPP suits.

The Rallying Cry for Federal Anti-SLAPP Legislation

In light of the varying breadth of each state's anti-SLAPP laws, free-speech advocates have lobbied relentlessly for federal anti-SLAPP legislation. The push for federal anti-SLAPP legislation can also be attributed to the ongoing circuit split on whether state anti-SLAPP laws apply in federal court. *See Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328, 1333 (D.C. Cir. 2015) (Kavanaugh, J.) (holding District of Columbia's anti-SLAPP statute does not apply in federal court); *see also Klocke v. Watson*, No. 17-11320, 2019 WL 3977545 (5th Cir. Aug. 23, 2019) (holding Texas Citizens Participation Act does not apply in federal court because the statute's burden-shifting framework for motions to dismiss conflicts with Federal Rules of Civil Procedure 12 and 56); *AmeriCulture, Inc., et al. v. Los Lobos Renewable Power, LLC, et al.*, 885 F.3d 659 (10th Cir. 2018) (finding New Mexico's anti-SLAPP statute does not apply in federal court). *But see Godin v. Schencks*, 629 F.3d 79 (1st Cir. 2010) (holding Maine's anti-SLAPP statute, including its provision that enables successful defendants to recover their attorney's fees, "must be applied" in federal court because Erie's pronouncement against forum-shopping and inefficient administration of justice would best be served by applying the law in federal court); *Adelson v. Harris*, 774 F.3d 803 (2d. Cir. 2014) (applying Nevada's anti-SLAPP fee-shifting provision in federal court); *U.S. ex rel. Nesham v. Lockheed Missiles & Space Co.*, 190 F.3d 963 (9th Cir. 1999).

Proponents of federal anti-SLAPP legislation have also argued federal legislation would eliminate the question of which state's anti-SLAPP law should apply in federal cases. In the modern era, determining which state's SLAPP law applies continues to pose new challenges to courts, particularly as internet speech transcends the geographical reach of local, traditional media. For example, if a business owner sues a Texas journalist for defamation based on an online blog post related to an issue in Tennessee, should Tennessee or Texas law apply?

Despite the procedural conflicts and other uncertainties surrounding SLAPP litigation, make no mistake: there is no reason to

expect SLAPP litigation to become an obsolete practice anytime soon. Instead, we should anticipate whether the U.S. Supreme Court will settle the circuit split on the applicability of anti-SLAPP laws in federal court, or in the event Congress passes a federal anti-SLAPP statute, whether the federal statute would preempt state anti-SLAPP laws.

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