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Insights

NEW YORK BECOMES LATEST STATE TO STRENGTHEN ANTI-SLAPP LAW, PROVIDING GREATER PROTECTIONS FOR THE EXERCISE OF FREE SPEECH, PETITION, AND ASSOCIATION

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For years, a growing number of United States jurisdictions – such as California, Colorado, Texas, Georgia, Nevada, Oregon, Louisiana, Oklahoma, Kansas, and Tennessee – have been enacting (or refining) strong anti-SLAPP laws, which provide defendants in lawsuits arising from speech and petitioning activities with important tools for achieving early dismissal and for recovering their attorneys' fees. But even though New York is "the media capital of the country if not the world," *Holmes v. Winter*, 22 N.Y.3d 300, 316 (2013), and the media are frequent users of anti-SLAPP statutes, New York had a weak anti-SLAPP law that was applicable only in limited circumstances.

No longer. On November 10, 2020, Governor Cuomo signed into law legislation that strengthens New York's existing anti-SLAPP law (Civil Rights Law § 76-a). The legislation significantly expands the categories of claims that are subject to anti-SLAPP protections. It also expands the anti-SLAPP protections given to defendants sued for such claims, including making recovery of attorneys' fees mandatory when an anti-SLAPP motion to dismiss is successful and providing for a stay of discovery and other proceedings while the motion is pending.

The Senate Sponsor Memo for the bill confirms that the purpose of the new statute is to provide "the utmost protection for the free exercise of speech, petition, and association rights, particularly where such rights are exercised in a public forum with respect to issues of public concern."

"SLAPP" refers to "strategic lawsuits against public participation." Previously, under New York Civil Rights Law § 76-a, anti-SLAPP motions to dismiss were limited to claims "brought by a public applicant or permittee" and "materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission," such as in the real estate context.

Under the amended law, the anti-SLAPP provisions apply to any claim that is based upon (1) "any communication in a place open to the public or a public forum in connection with an issue of public interest," or (2) "any other lawful conduct in furtherance of the exercise of the constitutional right of

free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition."

While media defendants that are sued for content-related claims certainly will be among the most frequent users of the new anti-SLAPP statute, those outside the media industry will find New York's new anti-SLAPP protections to be useful as well – and not just for defamation claims. In other states that have enacted similar anti-SLAPP statutes, courts have dismissed suits alleging a variety of claims implicating speech, including but not limited to claims for business disparagement, tortious interference with contract or business relations, false advertising, deceptive trade practices, false light, intentional and negligent infliction of emotional distress, malicious prosecution, abuse of process, misappropriation, unfair competition, and breach of contract.

In other states, a variety of online forums have been found to be "public forums" for the purposes of anti-SLAPP laws. In California, the "Supreme Court [has] held that Web sites accessible to the public are 'public forums' for the purposes of the anti-SLAPP statute." *Kronemyer v. Internet Movie Database, Inc.*, 150 Cal. App. 4th 941, 950 (2007). By way of just one example, the United States District Court for the Northern District of California found that an online blog used for the discussion of real estate investment trusts (REITs) was a public forum. *Piping Rock Partners, Inc. v. David Lerner Associates, Inc.*, 946 F. Supp. 2d 957 (N.D. Cal. 2013). Similarly, the Supreme Court of Nevada has held that emails sent to a listserv of approximately 50,000 people were "akin to a radio or television broadcast or newsletter" and therefore constituted a public forum for purposes of Nevada's strong anti-SLAPP statute. *Abrams v. Sanson*, 458 P.3d 1062, 1067 (Nev. 2020).

The question of whether a communication is one made in connection with an issue of public interest for the purposes of an anti-SLAPP statute also has been the subject of extensive litigation in states with statutes that incorporate that standard. For example, in *FilmOn.com Inc. v. DoubleVerify Inc.*, 439 P.3d 1156 (Cal. 2019), the California Supreme Court addressed the scope of "public interest" under California's anti-SLAPP statute, holding that "a court must consider the context as well the content of a statement in determining whether" it addresses an issue of public interest. *Id.* at 1164. Notably, "whether speech has a commercial or promotional aspect is not dispositive of whether it is made in connection with an issue of public interest." *Id.* at 1168. Rather, "the inquiry [is] whether a statement contributes to the public debate" and "incorporate[s] considerations of context – including audience, speaker, and purpose." *Id.* at 1166.

Similarly, the Nevada Supreme Court has adopted five considerations (adapted from California appellate decisions) to determine whether a statement is made in connection with an issue of public interest: (1) "public interest" does not equate with mere curiosity; (2) a matter of public interest should be something of concern to a substantial number of people; (3) there should be some degree of closeness between the challenged statements and the asserted public interest; (4) the focus of the speaker's conduct should be the public interest; and (5) a person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people. *Stark v. Lackey*, 458 P.3d 342, 346 (Nev. 2020).

Where the New York anti-SLAPP statute applies, a defendant can bring a motion to dismiss that relies not just on the pleadings and judicial notice, but also on affidavits and declarations. And the motion "shall be granted" if the court determines that the action does not have a "substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification, or reversal of existing law."

Other key aspects of the revised statute are that all "discovery, pending hearings and motions in the action shall be stayed upon the filing of" a motion to dismiss pursuant to the anti-SLAPP law, and that where a defendant prevails on a motion to dismiss brought under the law, the defendant "shall" recover its attorney's fees.

The possibility of bringing an anti-SLAPP motion to dismiss, and related strategic and procedural considerations, must be considered very early in the life of a lawsuit. Properly deployed, an anti-SLAPP motion to dismiss can be a game-changer for a defendant, flipping the balance of power and allowing the defendant to take control early in a lawsuit. Just as importantly, the new statute should be a consideration for plaintiffs when deciding whether to bring a claim that might fall within the scope of New York's newly-expanded anti-SLAPP statute. For the potential plaintiff, it is important that these considerations should be evaluated *before* a suit is brought.

Because they frequently litigate defamation and related claims, BCLP's Media and First Amendment team are experienced in litigating anti-SLAPP motions for clients both inside and outside the media industry in a variety of jurisdictions.

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