Help Restore Balance to Free Expression Litigation with Anti-SLAPP Statutes

CHARLES D. TOBIN

Charles D. Tobin

Some of the most difficult conversations in counseling reporters and news managers come when explaining that, very often, there's no quick exit from libel litigation. We have to tell them that our overall legal system simply isn't geared toward protecting their First Amendment rights.

Instead, to the clients' dismay, as with most other lawsuits, court rules and the common law principles of construction are designed to give these plaintiffs their day in court against the press. Of course, "day" is just a euphemism. Libel cases typically take months, and sometimes years, to resolve.

While that may sound like a typical defense lawyer's gripe, the standard litigation regime is an especially bad fit for freedom of expression. The First Amendment was specifically adopted to allow maximum speech—for the good of society as a whole and for the realization of individual potential.

But, honestly, how uninhibited and robust does a freelancer with no insurance feel after spending her retirement fund defending a baseless lawsuit challenging an expression of her opinion? Can anyone doubt that hesitation will fill a newsroom manager's mind when he approaches the next big story after spending half of his budget vindicating an entirely truthful story?

Far too often, these lawsuits are not brought to compensate a wrongfully injured person or to punish a bad actor. Instead, for the very most part, plaintiffs sue the media for one form of retaliation or another. Diversionary retaliation to shift focus from something they just got caught doing. Umbrage retaliation because they just got publicly disrespected. Machismo retaliation encouraged by the plaintiff's friends, who don't want him to take it lying down. As a trio of leaders in the media defense bar aptly put it in an upcoming article, the goal of many libel plaintiffs simply "is to chill the defendant's speech through costly and emotionally exhausting litigation."[1]

In the past few decades, starting in Washington State and California, media lawyers have worked with free expression stakeholders and state legislators to thaw the chill. Following their lead, twenty-eight states and the District of Columbia now have some form of codified law to combat vindictive Strategic Lawsuits Against Public Participation or SLAPP suits.

Anti-SLAPP statutes typically share the following characteristics:

- The defendant may bring an early motion to strike the complaint. Once the defendant demonstrates the expression involved a matter of public concern, the burden shifts to the plaintiff to show a likelihood of prevailing.
- To meet its burden, the plaintiff must proffer evidence to support every element of its claim. In defamation litigation, that typically requires an early showing that the expression is an actionable statement of fact, concerned the plaintiff, and caused the plaintiff cognizable harm.
- All discovery is stayed pending resolution of the special motion, unless the plaintiff can show targeted discovery on the special motion is necessary. The judge may order the plaintiff to pay for the discovery proceedings.
- If the plaintiff cannot meet its burden, the court must dismiss the case with prejudice.
- Some statutes also provide for mandatory fee awards to the prevailing defendant. Others provide for a discretionary fee award.
- Some statutes permit interlocutory appeal when the court denies an anti-SLAPP statute.

Anti-SLAPP statutes in certain states, such as Florida[2] and Georgia,[3] are not terribly helpful to media clients. Their legislatures or courts have limited the laws to narrow settings, such as citizens sued for their comments at public meetings. The laws in these states, and some others, need to be revisited and broadened. Moreover, federal courts seem split

Charles D. Tobin (charles.tobin@hklaw.com), chair of the Forum on Communications Law, is a partner in the Washington, D.C., office of Holland & Knight LLP where he heads the firm's National Media Practice Team.

Communications Lawyer (ISSN: 0737-N7622) is published four times a year by the Forum on Communications Law of the American Bar Association, 321 North Clark St., Chicago, IL 60654-7598. POSTMASTER: Please send address corrections to ABA Service Center, 321 North Clark St., Chicago, IL 60654-7598. The opinions expressed in the articles presented in ***Communications Lawyer*** are those of the authors and shall not be construed to represent the policies of the American Bar Association or the Forum on Communications Law.

on whether the statutes conflict with the Federal Rules and therefore don't apply in federal cases.[4]

But other, new statutes, such as the laws passed last year in Texas[5] and the District of Columbia,[6] already have met with success in state courts.[7] And a large coalition of groups is supporting a bill in the U.S. Congress to enact a federal anti-SLAPP bill.[8]

The Forum on Communications Law—along with two other ABA components that focus on these issues, the Media, Privacy, and Defamation Law Committee of the Torts Trial & Insurance Practice Section and the Section of Litigation's First Amendment & Media Litigation Committee—have asked the ABA's House of Delegates to adopt a resolution supportive of efforts to enact and strengthen anti-SLAPP laws around the country. The proposal is reprinted below.

The House of Delegates will meet in August in Chicago. Please identify the delegates you know as soon as possible and urge them to support the resolution actively. It's a colossally important issue for everyone who reads this newsletter and for the dedicated newspeople we admire and serve.

Anti-SLAPP statutes, and the special motions brought under them, are helping the First Amendment live up to its promise and potential. They bring balance back into litigation over journalism on issues of public importance. And they sure make difficult conversations with unhappy clients a lot more hopeful.

* * *

PROPOSED RESOLUTION

RESOLVED, That the American Bar Association urges federal and state governments to enact legislation and support efforts to get legislation passed to protect the First Amendment rights of all citizens from lawsuits designed to chill their ability to communicate with their government or speak out on issues of public interest.

Endnotes

1. Mark I. Bailen, Bruce E.H. Johnson and Laura Lee Prather, *Anti-SLAPP Laws: Taking the Punch from Defamation Suits*, Media, Privacy and Defamation Law Committee Newsletter, ABA Torts & Ins. Prac. Sec. (Spring 2012).

2. Fla. Stat. Ann. §§ 720.304(4), 768.295 ; *see also* 2000 Fla. Sess. Law Serv. ch. 2000-174 (H.B. 135) .

3. Ga. Code Ann. § 9-11-11.1.

4. *Compare* United States *ex rel*. Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963 (9th Cir. 1999) (California anti-SLAPP law applied in diversity action) *with* Sherrod v. Breitbart, 2012 WL 506729 (D.D.C. Feb. 15, 2012) (refusing to apply District of Columbia anti-SLAPP law in federal court).

5. Tex,. Civ. Prac. & Rem. Code § 27.

6. D.C. Code § 16-5502 et seq.

7. *See* Simpton v. High Plains Broad., Inc., Cause No. 2011-CI-13290 (Bexar Cnty. (Tex.) 285th Dist. Ct. Apr. 10, 2012) (order granting anti-SLAPP motion); Salvaggio v. High Plains Broad., Inc., Cause No. 2011-CI-10127 (Bexar Cnty. (Tex.) 131st Dist. Ct. Mar. 9, 2012) (same); Lehan v. Fox Television Stations Inc., 40 Media L. Rep. 1075 (D.C. Super. Ct. 2011) (same).

8. HR 4364, the "Citizen Participation Act of 2009," was introduced in the House of Representatives in 2009. *See* Public Participation Project, *The Petition Act: Summary of Proposed Federal Anti-SLAPP Legislation*, http://www.anti-slapp.org/the-citizen-participation-act-h-r-4364/.