A Brief Overview of Anti-SLAPP Statutes

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As we discussed in this earlier post, anti-SLAPP statutes are laws designed to prevent plaintiffs from using the threat of costly litigation to chill the free speech rights of people seeking to participate in the public debate over important issues.

SLAPP suits -- Strategic Litigation Against Public Participation -- are typically claims for defamation, intentional infliction of emotional distress, invasion of privacy, or tortious interference with contract filed against a party who has criticized or spoken out against the plaintiff in some public context. The paradigm case is a real estate developer filing a defamation or tortious interference suit against a citizen who has spoken out publicly against a proposed development project. By filing suit, no matter how weak its claim might actually be, a plaintiff forces the citizen to spend money responding to the claim and, in the process, to think twice about speaking out publicly again.

In response, twenty-six states and one territory have passed anti-SLAPP statutes that offer some procedural protection to defendants in these actions. In another two states -- Colorado and West Virginia -- courts have granted defendants a defense to lawsuits targeting their exercise of First Amendment rights concerning issues of public importance.

The California statute was the first of its kind and is generally considered the broadest (i.e. most protective of speech rights). Under the law, any action "brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances" will be subject to a special motion to strike by the defendant. This applies to any act by defendant in "furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue." That includes:

(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional

right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

Click here for a compilation of cases outlining the types of speech covered by the California law.

If the defendant can make a *prima facie* case that the suit arises from speech or action covered by the statute, the plaintiff then bears the burden of showing a probability of prevailing on the underlying claim. *See Manufactured Home Cmty., Inc. v. County of San Diego*, 544 F.3d 959, 963 (9th Cir. 2008). Thus, where the underlying claim is for defamation, the plaintiff would have to demonstrate early in the proceedings -- before discovery -- the probability that it could satisfy *each* element of the claim, including falsity and the appropriate standard of fault. This is undoubtedly a heavy burden for any plaintiff, even one with a meritorious claim.

Equally important for both parties, the California statute provides that "a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs." At the same time, "[i]f the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion."

It should be noted that in California (as well as in Georgia, Louisiana, Maine, Massachusetts, Minnesota, Oregon, and Rhode Island) discovery in the underlying case is stayed pending resolution of the anti-SLAPP motion to strike unless there is "good cause." Other states -- Arkansas, Hawaii, Maryland, Missouri, and Pennsylvania -- have an unqualified discovery stay.

States with less far-reaching anti-SLAPP laws than California's limit the scope of the statute to speech concerning public bodies. For example, the Minnesota statute applies to any "public participation," which the law defines as "speech or lawful conduct that is genuinely aimed in whole or in part at procuring favorable government action."

While these narrower statutes may be adequate to protect individuals speaking out about government actions, they offer less protection for media defendants. A court in Massachusetts, for example, held that a newspaper campaign to discourage the construction of a mosque did not fall within the scope of the state's anti-SLAPP statute, which covers the exercise of the "right of petition under the constitution of the United States or of the commonwealth." The court there allowed the plaintiff's defamation claim to go forward. Islamic Soc'y v. Boston Herald, Inc. (Mass. Super. Ct. July 20, 2006).

Finally, eight states (California, Delaware, Hawaii, Minnesota, Nevada, New York, Rhode Island, and Utah) allow so-called "SLAPPback suits," which provide that defendants who have been hit with a SLAPP suit can file a counterclaim against the plaintiff to recover compensatory and

punitive damages for abuse of the legal process. While these suits do not help the defendant avoid the time and expense of litigation, they can act as a deterrent to those considering filing what might be a SLAPP suit.

If you are in a state with an anti-SLAPP law, and you or your news organization gets hit with what you believe is a SLAPP suit, it is important to immediately seek legal counsel familiar with the contours of the statute as it may mandate specific deadlines for filing a special motion to strike.