



Professional Perspective

Anti-SLAPP: Tort Defense

Laura Prather, Michael Lambert, & Reid Pillifant, Haynes and Boone, LLP

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Anti-SLAPP: Tort Defense

Editor's Note: This Overview covers the defense of anti-SLAPP in tort law. For more comprehensive resources on tort defenses, see [Tort Defenses](#). For more on torts generally, see [Tort Actions](#) and [Tort Damages and Relief](#).

Contributed by [Laura Prather](#), [Michael Lambert](#), & [Reid Pillifant](#), Haynes and Boone, LLP

An anti-SLAPP motion can be brought when a defendant is faced with a meritless lawsuit targeting the legitimate exercise of the right to engage in truthful speech, lawful petitioning, and legal association. Such lawsuits are known as “Strategic Lawsuits Against Public Participation” (SLAPPs). SLAPPs are designed to chill First Amendment activities and subject individuals to intimidation and the expense of defending a meritless lawsuit. See [Court Opinions](#); e.g., [Point of Law](#) (POL). Anti-SLAPP statutes, which vary by state, provide substantive protections for SLAPP defendants and enable them to file expedited motions to dismiss to evaluate the merits of the claims early in the litigation and ease financial burdens associated with defending against meritless claims.

There is no prototypical SLAPP claim, although they often include claims for [defamation](#), [business disparagement](#), [civil conspiracy](#), [tortious interference](#), and [invasion of privacy](#). Individuals and entities, regardless of their financial status, can raise an anti-SLAPP defense motion when they are targeted with a frivolous lawsuit for exercising their free speech rights.

PRACTICE TIP: Anti-SLAPP statutes may allow for an anonymous speaker, whose personally identifying information is sought in a subpoena or discovery order after speaking out on a public issue, to file a special motion to quash the subpoena or order.

Features of Anti-SLAPP Statutes

Although anti-SLAPP statutes differ across jurisdictions and offer varying degrees of protection, the six most common features of broad anti-SLAPP statutes, which will be addressed in this Overview, are:

- (1) Timing for filing a [motion to dismiss](#) or [motion to strike](#).
- (2) Requiring an expedited hearing on the motion.
- (3) Burden shifting framework of anti-SLAPP.
- (4) Stay of discovery until the motion is resolved.
- (5) Awarding attorney's fees when the respondent cannot meet his burden (to make the SLAPP victim whole).
- (6) Interlocutory appeal if the motion is denied.

Jurisdictional Considerations

The first thing to consider when bringing an anti-SLAPP defense is whether and where it can be brought. More than 30 states have anti-SLAPP statutes, which allow motions to be filed in state courts to defend against state claims, but the scope of each statute's protections varies. Additionally, not all federal courts apply state anti-SLAPP laws. This, again, will be a state-by-state determination, as shown below.

State Courts

Over 30 states, the District of Columbia, and Guam (as well as Ontario and British Columbia) have enacted anti-SLAPP statutes designed to help parties seek dismissal of meritless claims and to deter litigants from bringing such claims in the first place. See [Comparison Table - State Anti-SLAPP Statutes](#).

The breadth of protections vary significantly among jurisdictions. For example, anti-SLAPP statutes in [California](#), [Texas](#), and [New York](#) provide comprehensive coverage for a wide range of speech and petitioning activity. On the other hand, anti-SLAPP statutes in [Pennsylvania](#) and [Massachusetts](#) only narrowly protect limited petitioning activity.

In 2020, the Uniform Law Commission adopted the Uniform Public Expression Protection Act (UPEPA), a model anti-SLAPP statute. In July 2020, Washington became the first state to enact UPEPA after the state's Supreme Court found its prior anti-SLAPP statute to be unconstitutional in 2015. A number of states are currently considering passing UPEPA.

Federal Courts

Practically speaking, whether one can file an anti-SLAPP motion in federal court is a highly specific analysis. Federal courts have agreed that anti-SLAPP statutes do not apply to *federal* claims in federal court. See, e.g., [POL](#). But they are divided on whether anti-SLAPP statutes apply to *state* claims in federal courts sitting in diversity.

State anti-SLAPP statutes generally apply in federal diversity actions in the First and Ninth Circuits because these courts have found them to provide substantive protections. See, e.g., [POL](#) (Ninth Circuit); see [Court Opinions](#).

State anti-SLAPP statutes do not typically apply in the Tenth and D.C. Circuits because these courts have held that anti-SLAPP statutes are procedural and conflict directly with the Federal Rules of Civil Procedure. See, e.g., [POL](#) (D.C. Circuit); see [Court Opinions](#).

Courts in the Fifth and Eleventh Circuits have split depending on which state's law they are considering. See generally [Court Opinions](#). For instance, the Fifth Circuit has held that the Texas anti-SLAPP statute does not apply in federal court, even though it previously held that the Louisiana statute did. Compare [Klocke v. Watson](#) to [Henry v. Lake Charles Am. Press, L.L.C.](#)

And, some circuits even split on whether certain state statutes apply in federal court. For instance, the Ninth Circuit held long ago that the California anti-SLAPP statute applies in federal diversity cases. See [POL](#). But more recently, the Second Circuit has held that the California anti-SLAPP statute does not apply in federal court. See [POL](#).

PRACTICE TIP: If you practice in a circuit that has not yet decided the issue and you want to assert your state's anti-SLAPP statute in federal court, you should follow the reasoning from the First and Ninth Circuits and argue that they provide substantive rather than procedural protections.

Forum Shopping

The patchwork of state anti-SLAPP statutes and the circuit split over their application in federal courts allows “forum shopping” by plaintiffs who can file SLAPPs in jurisdictions where anti-SLAPP protections are absent or weak. If available, defendants may consider transferring their case to a venue in which anti-SLAPP protections are strong or arguing [choice of law](#) or *dépeçage* issues to encourage the court to apply the anti-SLAPP laws of other jurisdictions when applicable.

PRACTICE TIP: The doctrine of *dépeçage* may be involved when the state law of liability (for example, the applicable defamation law in the forum state) is distinct from the state law that applies to a defense or immunity (for example, anti-SLAPP). If *dépeçage* applies, which is itself a question of state law, the laws of different states are applied based on the precise issue involved.

Federal Procedural Considerations

When to File an Anti-SLAPP Motion

To assert an anti-SLAPP defense, a movant must file a special motion to dismiss within a certain time frame (designated by statute) of being served with the claim (UPEPA suggests 60 days). Once the motion is filed, proceedings between the movant and respondent, including discovery and any pending hearings or motions, are oftentimes stayed. Limited discovery may be allowed in certain circumstances if good cause is shown.

Courts' Consideration

Based upon deadlines designated in the statute, courts will schedule an expedited hearing within a certain number of days of the motion being filed (UPEPA suggests 60 days). At the hearing, courts usually consider the pleadings, the motion, any response or reply to the motion, and any evidence that could be considered in ruling on a motion for summary judgment or upon which judicial notice can be taken. Courts must typically rule on the motion on an accelerated basis (UPEPA suggests 60 days).

PRACTICE TIP: In determining what evidence the court will consider, you should consult your state's anti-SLAPP statute and its jurisprudence on what may be considered on a motion for summary judgment.

Burden-Shifting Framework

The burden-shifting framework involved with an anti-SLAPP motion usually requires the court to consider three questions: Does the statute apply? Is there a viable claim? Does a defense apply? Practitioners should address each question when drafting an anti-SLAPP motion and be mindful of how the burden shifts between the movant (typically the defendant) and the respondent (typically the plaintiff).

(1) Does the statute apply?

The movant bears the initial burden of showing that the statute applies, and because the scope of protection under each state's law varies significantly, one must consult their particular state's statute. In those jurisdictions that provide broad protections, the movant looks to whether the cause of action implicates their right to free speech, petition, or association on a matter of public concern or interest. To determine whether the burden is met, courts often look to how the U.S. Supreme Court and the state's highest court have defined a "matter of public concern." See, e.g., [Snyder v. Phelps](#); [BCite Analysis](#). Some anti-SLAPP statutes provide specific guidance. For example, the New York anti-SLAPP statute states "public interest" "shall be construed broadly, and shall mean any subject other than a purely private matter. [N.Y. Civ. Rights Law § 76-A\(1\)\(d\)](#). If the movant fails to carry this burden, the motion will be denied.

PRACTICE TIP: In determining what evidence the court will consider, you should consult your state's anti-SLAPP statute and its jurisprudence on what may be considered on a motion for summary judgment. Be aware that the respondent may argue that the anti-SLAPP statute does not apply under one of its exemptions. The exemptions—and their scope—vary among states. UPEPA exempts from its protections claims by or against the government and claims brought against a person engaged in certain types of commercial speech.

(2) Does the respondent have a viable cause of action?

If the cause of action implicates a matter of public concern and no exemptions apply, the burden shifts to the respondent to establish a prima facie case for each essential element of the cause of action challenged by the motion. If the respondent fails to establish a prima facie case, the motion to dismiss will be granted.

PRACTICE TIP: Be sure to look at the precise language of your state's anti-SLAPP statute when defining the respondent's burden of proof. The California anti-SLAPP statute asks, for example, whether "there is a probability that the plaintiff will prevail on the claim," [Cal. Civ. Proc. Code § 425.16\(b\)](#), while the District of Columbia anti-SLAPP statute asks whether "the claim is likely to succeed on the merits." [D.C. Code § 16-5502\(b\)](#). Under the New York anti-SLAPP statute, a respondent must show all "necessary elements" and establish, by clear and convincing evidence, that any communication giving rise to the action was made with actual malice. [N.Y. Civ. Rights Law § 76-A\(2\)](#).

(3) Does the movant have an affirmative defense?

If the respondent establishes a prima facie case, the burden reverts to the movant to show that the claim fails because of an affirmative defense. In [defamation](#) cases, for example, a movant may assert that the claim is barred under the statute of limitations or a statutory or common law privilege. If the movant makes this showing, the motion will be granted. If the movant fails to make the showing, the motion will be denied.

Stay of Discovery

All proceedings between the movant and respondent, including discovery and any pending hearings, motion, and appeals, are typically stayed upon the filing of an anti-SLAPP motion. In addition, a court may stay a hearing, motion, or discovery involving a third party if it relates to an issue material to the anti-SLAPP motion. Under UPEPA, the stay will remain in effect until the court enters an order ruling on the motion and the time for the moving party to appeal the order expires. Limited discovery may be allowed if a party shows that specific information is necessary to establish whether a party has satisfied or failed to satisfy its burden and the information is not reasonably available unless discovery is permitted.

PRACTICE TIP: Even if the statute does not provide for a stay of discovery, the movant should ask the court for one through the pendency of an appeal so that it is not fighting on two fronts.

Awarding Attorney's Fees

If the movant prevails on the motion, courts will typically dismiss the respondent's cause of action with prejudice and award costs, reasonable attorney's fees, and reasonable litigation expenses to the movant. If the respondent prevails on the motion *and* the motion was frivolous or filed solely with the intent to delay the proceedings, courts may award costs, reasonable attorney's fees, and reasonable litigation expenses to the respondent. While this is the majority view, there are some outliers, like the Florida anti-SLAPP statute that automatically award fees to the prevailing party. See [Fla Stat. Ann. § 768.295\(4\)](#). Not all statutes provide for the recoupment of fees.

Appealing Anti-SLAPP Orders

Anti-SLAPP statutes usually allow movants to appeal an order denying an anti-SLAPP motion, in whole or in part, as a matter of right. The appeal must be filed within a certain period after the order is entered (UPEPA suggests 21 days).

PRACTICE TIP: Even if the statute does not provide for an interlocutory appeal, if the motion is denied, the movant should seek a discretionary appeal because constitutional rights are at issue.