

A New Model for Anti-SLAPP Laws

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The movement to better protect citizens' First Amendment rights won two big victories this year, when the Uniform Law Commission and the New York Legislature each approved new anti-SLAPP measures. Anti-SLAPP laws aim to safeguard individuals from the chilling effect of lawsuits brought in retaliation for the exercise of protected First Amendment rights. To date, 32 states and the District of Columbia have enacted some form of statutory anti-SLAPP protections.

The victories at the ULC and in New York came as legislators in eight states introduced anti-SLAPP measures over the past year. These proposals largely reflected a new consensus over the best ways to discourage SLAPP suits. Several of these bills are still being considered, and others, although not passed, garnered strong legislative support that could carry over into future sessions.

Uniform Law Commission

Members of the ULC overwhelmingly approved the Uniform Public Expression Protection Act at the commission's annual meeting in July. The ULC Act contains substantial protections for citizens who exercise their First Amendment rights, including a broad definition of public participation, automatic stays of discovery early in anti-SLAPP proceedings, interlocutory appeals of rulings on anti-SLAPP motions, and mandatory attorneys' fees upon dismissal of a SLAPP suit.

The process of developing the ULC Model Act took more than two years with commissioners, advisors and observers from all over and with vastly different levels of exposure to SLAPP suits. Now that it has been resoundingly approved, it will be promulgated and an enacting committee will be formed to assist in its consideration by legislatures nationwide. The ULC Act will serve as an important model for states that have yet to enact anti-SLAPP legislation, and those that wish to strengthen their existing laws.

Strengthening Existing Anti-SLAPP Laws

New York

New York was one of several states with existing anti-SLAPP statutes that sought to strengthen its First Amendment protections this year. The state has had an anti-SLAPP statute for more than 25 years, but the existing law limits coverage to suits involving real estate and development.

The anticipated new law, co-sponsored by Assemblywoman Helene Weinstein and state Senator Brad Hoylman, greatly expands the scope of anti-SLAPP protections, and enacts many of the key provisions that were also included in the ULC Act. The bill broadens the scope of protection to include any communication in a public forum "in connection with an issue of public interest," or "any other lawful conduct" furthering the right to free speech and petition in connection with an issue of public interest. That expanded definition is especially significant in New York, where many of the nation's media companies did not enjoy anti-SLAPP protection under the old law. The new law also provides for a stay of discovery upon the filing of an anti-SLAPP motion and makes attorneys' fees

mandatory when a judge finds the suit has “[no] substantial basis in fact and law.” Because New York law already freely permits interlocutory appeals from denials of dispositive motions, it was not necessary for the bill to specifically address that issue.

The bill passed with strong support in both chambers, by votes of 116-26 in the Assembly, and 58-2 in the Senate. The *New York Times* editorialized in support of the bill shortly before its passage, writing that an “effective anti-SLAPP statute for New York is long overdue and could well prod recalcitrant legislatures, including Congress, to take action.”

The bill awaits Governor Cuomo’s signature.

Maryland

In Maryland, a bill to strengthen the state’s existing anti-SLAPP law passed the House of Delegates by a vote of 98-40. Maryland has had an anti-SLAPP statute in place since 2004, but the law requires a showing of “bad faith” — a difficult legal standard that is often unwieldy in practice.

The bill that passed the House of Delegates this year would have removed the “bad faith” requirement and expanded the scope of public participation covered by the act. The bill did not come to a vote in the state Senate before Maryland’s legislature adjourned in March.

Pennsylvania

In Pennsylvania, legislators have proposed a bill to bolster their state’s anti-SLAPP statute. The Pennsylvania bill, which cites a “disturbing increase” in SLAPP lawsuits in the state, would also add a discovery stay and mandatory attorneys’ fees, along with broadening the law to cover more constitutionally protected communications. The bill also includes a right to appeal a dismissal that fails to include the mandatory attorneys’ fees.

This bill has been stuck in committee since February and appears to be stalled,

Enacting New Anti-SLAPP Statutes

Virginia

Virginia has a very narrow anti-SLAPP statute. Unlike California and other states, the Virginia statute does not create a special procedure for filing anti-SLAPP motions requiring judges to conduct an early assessment of the plaintiff’s probability of success; there is no presumptive limitation of discovery, and no provision for an interlocutory appeal when anti-SLAPP motions are denied. But under the law as it stands, claims for defamation and tortious interference (and similar theories) involving statements regarding matters of public concern that would be protected under the First Amendment and that are published to a third party are subject to an immunity defense unless uttered with “actual or constructive knowledge that they are false, or with reckless disregard for whether they are false.” Further, when such claims are dismissed pursuant to this immunity, the plaintiff may be awarded reasonable attorneys’ fees. The exception to the immunity has been slightly rephrased: it does not apply to “statements made with actual or constructive knowledge that they are false, or with reckless disregard for whether they are false.”

This year, the Virginia legislature made considerable progress toward further strengthening the state’s anti-SLAPP statute. Although Virginia had a short legislative session this year, both houses of the General Assembly passed anti-SLAPP bills, though a conference committee was unable to reconcile the two measures before the session concluded.

The two chambers did agree on a provision for mandatory attorneys' fees when a SLAPP suit is dismissed, and the sponsors of both bills have indicated they plan to re-introduce anti-SLAPP bills in the next session. In the meantime, Virginia's lack of broad protection continues to make it a magnet for high-profile defamation suits, including actions filed by Rep. Devin Nunes of California and the actor Johnny Depp.

Iowa

In Iowa, the House of Representatives unanimously approved a new anti-SLAPP measure that would have protected a wide swath of public participation. At a hearing on the bill, the co-owner of the *Carroll Times Herald* told legislators how his small newspaper was forced to spend \$140,000 in legal fees defending a libel suit that was ultimately dismissed. The paper's plight, which included a GoFundMe page to help cover its legal costs, drew national attention to the problem of SLAPP suits.

The bill attracted bipartisan support in the Iowa Senate, where a key committee recommended that it be passed. The measure ultimately failed to come to the Senate floor during the frantic end to a legislative session that was disrupted by the coronavirus, but it could be primed for approval in next year's session.

Ohio

Legislators in Ohio are in the process of considering an anti-SLAPP bill that would provide broad protection for First Amendment rights. A Senate hearing on the bill drew supportive testimony from representatives of the Ohio News Media Association, the *Cincinnati Enquirer*, Americans for Prosperity, and the Ohio Domestic Violence Network. The Ohio bill is still in the committee process, with the legislative session scheduled to conclude at the end of the year.

West Virginia and Kentucky

Legislators in West Virginia and Kentucky also introduced anti-SLAPP bills that would have provided significant protections for public participation, including discovery stays, interlocutory appeals and mandatory attorneys' fees upon dismissal of a SLAPP suit. Those measures did not emerge from committee before the end of their respective legislative sessions.

Conclusion

Given the increasing need for protection of one's ability to speak out about matters of public concern, it is not surprising that so many states are engaged in efforts to try to pass and/or expand their anti-SLAPP statutes. Now that the Uniform Law Commission has passed the Uniform Public Expression Protection Act, for those states who are looking for a model approved by a group of scholars (the same group that enabled the passage of the Uniform Commercial Code), this model will provide a strong template from which to draft legislation.

**Summer Associate Reid Pillifant contributed to this article.*