An Active Year in Anti-SLAPP Developments

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"SLAPP" (Strategic Lawsuits Against Public Participation) lawsuits are on the rise, and in response state legislatures over the last decade have been increasingly passing broad protections in the form of anti-SLAPP laws to address this form of judicial harassment. The last year has seen significant developments in the world of anti-SLAPP legislation: from the adoption of a uniform law to stalwart states like New York passing broad legislation that was a decade in the making. At the same time, federal courts are still grappling with the issue of whether, and how, to apply state anti-SLAPP laws in federal court, with a significant circuit split emerging on the issue, leaving litigants with more strategic decisions than ever in filing and defending against lawsuits aimed at retaliating against those who exercise their First Amendment rights.

Legislative Advancements

First, and perhaps the most broad-sweeping development, is the Uniform Law Commission ("ULC")'s passage of a model anti-SLAPP law to help guide state legislatures that are seeking to pass or expand existing laws in this area. After more than two years of analysis and drafting, the ULC — the same group that devised and oversaw the enactment of the Uniform Commercial Code in all 50 states — adopted the Uniform Public Expression Protection Act ("UPEPA") — a model for anti-SLAPP laws nationwide. On July 15, 2020, the ULC overwhelmingly approved UPEPA at its annual meeting, demonstrating the Commission's desire to provide substantive protections for citizens who exercise their First Amendment rights. The model Act includes 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. In developing the model bill, the ULC considered the strengths and weaknesses of existing laws in the 32 states that have already passed anti-SLAPP statutes and the need for applicability in federal court to prevent the pervasive forum shopping currently employed.

The amendment to New York's anti-SLAPP statute was a longer time coming. Although New York has had a law on the books for over 25 years, it was limited to actions involving the real estate permitting process and was essentially worthless for the sizeable media and entertainment industry in that state. After a decade-long effort to expand the reach of the anti-SLAPP law, on November 10, 2020, the New York Governor signed into law Assembly Bill No. 599A/Senate Bill No. 52-A, substantially expanding the protection of New York's anti-SLAPP law, Civ. Rts. Law sec. 70-a, 76a. The bill provides protection for 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. It also provides that "public interest" shall be construed broadly. The new law includes many of the key elements contained in the ULC Model Act, including a stay of discovery upon the filing of an anti-SLAPP motion and an award of mandatory attorneys' fees when a judge finds the suit has "[no] substantial basis in fact and law." The New York reform has already had a major effect on media cases. Less than two months after the law took effect, the U.S. District Court for the Southern District of New York, applied the new anti-SLAPP law retroactively in *Palin v. New York Times* and required a showing of actual malice for the case to move forward.

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The New York bill passed into law was written prior to the passage of UPEPA. Since then, the ULC Model Act has served as the template for legislation in several states, including the recently passed Washington state law, SB 5009 (signed into law on May 12, 2021).

Federal Courts Wrestle with Applicability of Anti-SLAPP Laws

Although there appears to be a trend among state lawmakers in favor of passing broad anti-SLAPP laws, the federal courts are still wrangling with whether these laws provide primarily substantive protections or procedural remedies that conflict with federal rules and cannot be applied in federal court. In fact, the last year has seen a myriad of opposing holdings from circuit and district courts, sometimes even rejecting precedent from the anti-SLAPP laws' forum states.

Circuit Court Rulings Reach Inconsistent Results

On July 15, 2020, the same day the ULC adopted its model anti-SLAPP Act, the Second Circuit held, in a matter of first impression, that the California anti-SLAPP statute did not apply in federal court. The holding in *La Liberte v. Reid* directly contradicts the Ninth Circuit's long-standing holding in *Newsham v. Lockheed*, that the California anti-SLAPP law is primarily substantive and does apply in federal court.

The Second Circuit relied heavily on the Eleventh Circuit's recent holding in *Carbone v. CNN*, in which the Court found that the "probability of prevailing on the merits" standard (found in both the California and Georgia anti-SLAPP statutes) was higher than that required under Federal Rules of Civil Procedure 12 and 56. Accordingly, the California anti-SLAPP law could not be applied in federal court.

On July 31, 2020, approximately two weeks later, in *Clifford v. Trump*, the Ninth Circuit concluded the Texas anti-SLAPP statute applied in federal court, in this instance breaking ranks with Fifth Circuit precedent in *Klocke v. Watson*. Though the Court recognized the Fifth Circuit's recent ruling, it found that

> [T]he reasoning of the Fifth Circuit's opinion cannot be reconciled with our circuit's anti-SLAPP precedent, *compare Newsham*, 190 F.3d at 972 ("[T]here is no indication that [Federal Rules of Civil Procedure] 8, 12, and 56 were intended to 'occupy the field' with respect to pretrial procedures aimed at weeding out meritless claims."), *with Klocke*, 936 F.3d at 247 ("Rules 8, 12, and 56 provide a comprehensive framework governing pretrial dismissal and judgment.")

Clifford v. Trump, 818 Fed. Appx. 746, 2020 WL 4384081, *2 (9th Cir. July 31, 2020). Both decisions deepened the divide and increased the confusion over whether state anti-SLAPP laws apply in diversity actions in federal court.

District Court Decisions add to the Confusion

On August 5, 2020, a federal district court in Iowa (in the Eighth Circuit) decided *Nunes v. Lizza*, a lawsuit involving defamation claims against a Hearst reporter filed by California Congressman Devin Nunes, holding that the California anti-SLAPP law did not apply in federal court diversity cases. In prior years, courts in that circuit had split on the legal issue of whether state anti-SLAPP laws applied in federal court. *Compare Harrington v. Hall County Bd. of Supervisors*, 2016 WL 1274534 (D. Neb. Mar. 31, 2016) (finding a statute providing for attorney's fees and costs substantive and thus permitting the filing of a motion for attorney's fees under Nebraska's anti-

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SLAPP statute) *with Unity Healthcare, Inc. v. County of Hennepin*, 308 F.R.D. 537 (D. Minn. 2015) ("Minnesota's anti-SLAPP law is inapplicable in this case because it conflicts with Federal Rule of Civil Procedure 56."), *appeal dismissed*, 2016 WL 11339506 (8th Cir. 2016).

A day later, on August 6, 2020, in *Bongino v. The Daily Beast Co., LLC*, a SLAPP lawsuit alleging defamation and trade libel filed by "an outspoken supporter of President Donald Trump" against a media company that had reported on the termination of his NRATV show, a federal district court in Florida granted the defendant's motion to dismiss and awarded fees under the Florida anti-SLAPP law. The court held that the Florida statute's right to prevailing party fees was "a garden variety fee shifting provision," which was substantive and enforceable in federal court, notwithstanding the prior Eleventh Circuit decision (*Carbone v. CNN*) that rejected Georgia's anti-SLAPP law, which it said had required a substantive, evidentiary determination of the plaintiff's "probability" of prevailing that conflicted with remedies available under the federal civil rules.

The Supreme Court Continues to Avoid Wading into the Discussion

With all of this disagreement—and the "murky" waters of Erie underlying the entire mess—one might assume that the Supreme Court would resolve the issue. To the contrary, the Supreme Court has consistently refused to take cases involving state anti-SLAPP laws. *See, e.g., Yagman v. Edmondson*, 723 Fed. App'x 463 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 823 (2019); *Planned Parenthood Federation of America, Inc. v. Center for Medical Progress*, 897 F.3d 1224 (9th Cir. 2018), *cert denied*, 139 S. Ct. 1446 (2019). As recently as February 2021, the Supreme Court again refused, denying review in the *Clifford v. Trump* case (141 S.Ct. 1374 (2021)) which presented the conflict between the Ninth Circuit and the Fifth Circuit's holdings on the applicability of the Texas anti-SLAPP law in federal court.

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 laws. Now that the Uniform Law Commission has passed the Uniform Public Expression Protection Act, those states considering the issue may benefit from a strong template approved by this nationwide group of legal scholars when drafting future legislation. With regard to diversity cases in federal court, because of the unpredictability as to whether the substantive protections of state anti-SLAPP laws apply, one can expect forum shopping to abound until the U.S. Supreme Court resolves the issue or a federal law is enacted.

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