Recent Supreme Court Cert Denial Highlights Need for Passage of Federal Anti-SLAPP Statute

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Strategic Lawsuits Against Public Participation (otherwise known as “SLAPP” suits) are more prevalent than ever given the ease of communication and multitude of platforms available for getting messages out. They are gaining even more notoriety in the presidential election since candidate Donald Trump vowed to “open up” the current libel laws to further protect him from facing public criticism. The irony is, Trump has been filing and threatening lawsuits to shut up critics and adversaries his entire career. He forced reporter Tim O’Brien through years of litigation over the Trump biography that assigned a lower valuation of his net worth than Trump felt was correct. He sued the Chicago Tribune’s architecture critic over a piece in which he commented that a planned Trump skyscraper in lower Manhattan would be “silly.” He used the threat of litigation to get an investment firm to fire an analyst who correctly predicted that the Taj Mahal casino would not be a financial success. And, he sued comedian Bill Maher over a joke. When asked about this laundry list of litigation arising out of other people’s speech, Trump commented at times he knew he couldn’t win but brought the suit anyway to make a point. “I spent a couple of bucks on legal fees, and they spent a whole lot more. I did it to make his life miserable, which I’m happy about.” This is a quintessential SLAPP suit – one without merit brought to silence a critic.

The Legislatures in twenty-nine states, the District of Columbia and the territory of Guam have all seen the merit in passing Anti-SLAPP legislation to curtail the ability of bullies from using the court system to squelch the First Amendment rights of others. This has left a patchwork of protection that savvy plaintiffs have been known to work around by filing actions in jurisdictions that have not enacted SLAPP statutes. Another quandary presented by this primarily state-born protection is whether it applies in federal court. For more than fifteen years, federal courts have applied state anti-SLAPP statutes to federal cases when sitting in diversity jurisdiction because they have viewed SLAPP statutes as being designed to prevent substantive consequences – the impairment of First Amendment rights and the time and expense of defending against litigation that has no demonstrable merit under state law regarding defamation. In 2014, however, the D.C. Circuit found the Erie doctrine barred the application of the D.C. anti-SLAPP statute in federal court. The conflict now results in a circuit split.

The U.S. Supreme Court had the chance to solve this problem when petition for certification was filed in the *Mebo International v. Yamanaka*, D.C. No. 4:13-cv-03240-YGR, (9th Cir. 2015) case because the sole question presented in that proceeding was:

> Whether state anti-SLAPP statutes are properly applied in federal diversity cases, or whether doing so runs afoul of the Erie doctrine. A split in the circuit courts on this question currently exists with the Ninth Circuit applying state anti-SLAPP statutes in diversity actions, but the D.C. Circuit refusing to do so. *Compare U.S. ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963, 972 (9th Cir. 1999) and *Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328, 1333 (D.C. Cir. 2015).

On March 21, 2016 the High Court declined the invitation making the need for a federal anti-SLAPP statute even more crucial.

Efforts to create a federal anti-SLAPP law started at least six years ago, but this year marks the first time that a sizable and bipartisan group is backing such a bill. One impetus is the growing number of SLAPP suits aimed at Web-based businesses (and their customers) that provide a forum for the public to discuss, rate and criticize the world around them. The proposal – HR 2304 – or the "SPEAK FREE Act" by Rep. Blake Farenthold (R-Texas) and Rep. Anna Eshoo (D-California) – has, at last count, 32 co-sponsors from both sides of the aisle. Groups and companies that support the effort include: American Center for Democracy, American Society of News Editors, Avvo, Competitive Enterprise Institute, Consumer Electronics Association, Consumer Technology Association, Electronic Frontier Foundation, Glassdoor, Information Technology & Innovation Foundation, Media Law Resource Center, Online News Association, Newspaper Association of America, Public Knowledge, Public Participation Project, R Street, Reporters Committee for Freedom of the Press, Trip Advisor, and Yelp.

Borrowing heavily from the California and Texas SLAPP statutes, the bill would allow people sued in federal court or in states with little protection against SLAPPs to have a federal judge dismiss frivolous claims based on speech "made in connection with an official proceeding or about a matter of public concern." The bill has been referred to the House Subcommittee on the Constitution and Civil Justice and a hearing is anticipated in the near future. A consistent approach to the application of anti-SLAPP laws in federal court is critical to serve the purpose of Anti-SLAPP statutes and to avoid forum shopping, and nothing would satisfy that need more efficiently than passage of the SPEAK FREE Act.