Phillips Lytle LLP

Beyond Dispute

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New York State's Amendments to Its Anti-SLAPP Law Could Impact Business Litigants

For several decades, state legislators throughout the country have been concerned about so-called SLAPP suits ("Strategic Lawsuit Against Public Participation").[1] A SLAPP suit is a meritless lawsuit, typically alleging defamation, filed in bad faith to intimidate people who speak out on public issues. An oft-cited example is a real estate developer suing vocal opponents of a project. Another is a celebrity or public official suing a journalist over unfavorable news coverage. If such a lawsuit lacks a good-faith basis, it falls within the traditional definition of a SLAPP suit.

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To deter SLAPP suits, about 30 states have enacted anti-SLAPP laws. These laws generally contain two components: (1) procedures that facilitate early dismissal of SLAPP suits and (2) provisions allowing legitimate victims of SLAPP suits to recover damages and attorneys' fees.

New York enacted a relatively narrow anti-SLAPP law in 1992, but the law was amended—and broadened—in November 2020.[2] Knowledge of the amended law's scope and effect is essential for clients and counsel who might be involved in speech-related disputes.

[1] See George W. Pring & Penelope Canan, *"Strategic Lawsuits Against Public Participation" ("SLAPPs"): An Introduction for Bench, Bar and Bystanders*, 12 BRIDGEPORT L. REV. 937, 959–60 (1992).

[2] N.Y. Civ. Rights Law §§ 70-a, 76-a; CPLR 3211(g), 3212(h).

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SCOPE

Before the 2020 amendments, New York's anti-SLAPP law was limited to cases brought by a "public applicant or permittee" that were "materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose [an] application or permission."[3] In other words, the only plaintiffs who had to worry about getting hit with an anti-SLAPP counterclaim were those who had applied for or received a government permit, license, zoning change or other authorization.

Not anymore. The anti-SLAPP law is now much broader and does not restrict its scope to public applicants or permittees. Rather, it applies to claims "based upon … lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition."[4] The law defines "an issue of public interest" broadly, to mean "any subject other than a purely private matter."[5]

This new language likely encompasses a wide range of claims, including meritless defamation claims against journalists, publishers of Internet content, purported whistleblowers, and sexual-misconduct accusers. Business and employment disputes, commercial tort claims, and trademark-infringement actions could also implicate the law—if the defendant can demonstrate that a claim is "based upon" constitutionally protected speech on an issue that is not "a purely private matter."

In these disputes, plaintiffs should avoid needlessly implicating a defendant's speech or petitioning activities. For their part, defendants should consider if the lawsuit against them targets speech on an "issue of public interest."

Another interesting issue the amendments present is whether the anti-SLAPP law protects businesses sued by activists, competitors, regulators and other adverse parties.

Case law from California, which has an anti-SLAPP law similar to New York's,[6] is instructive. For example, in *DuPont Merck Pharmaceutical Co. v. Superior Court*, prescription drug customers brought a class action against the manufacturer for alleged false statements in advertising, marketing and public relations activities.[7] The manufacturer, characterizing its activities as constitutionally protected commercial speech, moved to dismiss under California's

[3] N.Y. Civ. Rights Law § 76-a(1)(a) (as added by L. 1992, Ch. 767, § 3); *see also National Fuel Gas Distrib. Corp. v PUSH Buffalo*, 104 A.D.3d 1307, 1308 (4th Dep't 2013).

[4] N.Y. Civ. Rights Law § 76-a(1)(a) (current version).

[5] *Id.* § 76-a(1)(d).

[6] Cal. Civ. Proc. Code § 425.16.

[7] 78 Cal. App. 4th 562, 564, 566 (2000).

anti-SLAPP law.[8] Similar to the New York amendments, the California statute applied to claims "arising from any act … in furtherance of [a] person's right of petition or free speech … in connection with a public issue."[9]

The trial court determined the manufacturer's alleged conduct did not qualify for anti-SLAPP protection and denied the motion,[10] but the California Court of Appeal disagreed. As the appellate court explained, the defendant's advertising, marketing and public relations activities were, in fact, constitutionally protected speech, and the speech concerned a public issue: a widely used medicine that treats serious health conditions.[11] The court, having concluded that the anti-SLAPP law applied, remanded with instructions to the trial court to determine whether the consumer claims survived anti-SLAPP scrutiny.[12] This result is no aberration—other cases have yielded similar outcomes.[13]

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EFFECT

If New York's anti-SLAPP law applies, the party defending against speech-based claims receives several protections. Some of the protections existed before the 2020 amendments, and some are new.

First, defendants are entitled to recover costs and attorneys' fees upon a demonstration that the plaintiffs' claims lack a "substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification, or reversal of existing law."[14] Defendants may also recover compensatory damages if, in addition, the claims were "commenced or continued for the purpose of … maliciously inhibiting the free exercise of speech, petition or association rights."[15] Punitive damages are available if such malice was the "sole purpose."[16]

Second, if "the truth or falsity of [a] communication is material to the cause of action at issue"—for example, in a defamation or false advertising case—and if the case falls within the anti-SLAPP law's scope, then plaintiffs may recover damages only after producing "clear and convincing evidence that [the] communication … was made with knowledge of its falsity or with reckless disregard of whether it was false."[17] This knowledge or reckless disregard constitutes "actual malice," proof of which is required by the U.S. Constitution in some defamation cases, although the statute might apply more broadly.[18]

Third, the law creates procedures designed to facilitate the early adjudication of SLAPP claims via a heightened standard for an early motion to dismiss or for summary judgment.[19] This will also cause a stay of "discovery, pending hearings, and [other] motions in the action."[20] Such motions are not limited to an examination of the pleadings; courts "shall consider … supporting and opposing affidavits."[21] The law also creates an arguably defendant-friendly standard of adjudication for motions to dismiss and motions for summary judgment: once the purported SLAPP victim demonstrates the anti-SLAPP law applies, the motion will be granted unless the opposing party demonstrates its claim has "a substantial basis" or "is supported by a substantial argument for an extension, modification or reversal of existing law."[22]

These rules may be challenged for cases venued in federal courts.[23] The reason: even in cases arising under state law, federal courts generally

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[8] *Id.* at 565.
[9] *Id.* (quoting Cal. Civ. Proc. Code § 425.16(b)(1)).
[10] *Id.* at 564.
[11] *Id.* at 567.
[12] *Id.* at 568–69.
[13] *See, e.g., Wilkes & McHugh, P.A. v. LTC Consulting, L.P.,* 830 S.E.2d 119, 128 (Ga. 2019) (Georgia anti-SLAPP law applied where nursing homes sued a law firm for false advertisement and deceptive trade practices); *Vess v. Ciba-Geigy Corp. USA,* 317 F.3d 1097, 1109 (9th Cir. 2003) ("California and federal courts have repeatedly permitted defendants to move to strike under the anti-SLAPP statute despite the fact that they were neither small nor championing individual interests"). California later amended its anti-SLAPP law to exclude certain commercial-speech and public-interest claims. Cal. Civ. Proc. Code § 425.17. Anti-SLAPP laws in other jurisdictions contain similar exclusions. *See, e.g.,* Tex. Civ. Prac. & Rem. § 27.010(a); Okla. Stat. tit. 12, § 1439(2); D.C. Code § 16-5505; Colo. Rev. Stat. § 13-20-1101(8)(a)(II), (III).
[14] N.Y. Civ. Rights Law § 70 a(1)(a).
[15] *Id.* § 70-a(1)(b).
[16] *Id.* § 70-a(1)(c).
[17] *Id.* § 76-a(2).
[18] *See Palin v. New York Times Co.,* 2020 WL 7711593, at *4 n.5 (S.D.N.Y. 2020); *see also Coleman v Grand,* 2021 WL 768167 (E.D.N.Y. Feb. 26, 2021) (appeal filed).
[19] CPLR 3211(g), 3212(h).
[20] CPLR 3211(g)(3); *see also* CPLR 3214(b) (stay of discovery).
[21] CPLR 3211(g)(2).
[22] CPLR 3211(g)(1), 3212(h).
[23] *See La Liberte v. Reid,* 966 F.3d 79, 87–89 (2d Cir. 2020).

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adhere to federal procedural rules.[24] But the provisions on fee shifting, damages and actual malice have a better chance of being deemed substantive, so their applicability in federal court is a closer call.[25]

Another issue is whether the anti-SLAPP law violates the constitutional right to trial by jury.[26] The highest courts in both Washington and Minnesota struck down their states' anti-SLAPP laws on this basis.[27] In essence, the laws were unconstitutional because they erected too high a hurdle for plaintiffs to survive a pre-trial dismissal motion.[28] While the New York anti-SLAPP law is different from these other state laws in relevant ways, this issue (and a few of the other issues above) will engender litigation.

CONCLUSION

Potential plaintiffs should plan carefully before initiating a speech-related lawsuit. To avoid the anti-SLAPP law, the complaint should not needlessly implicate constitutionally protected speech. Further, federal court may be the preferred forum, assuming its procedural rules will trump the new procedural rules applicable to anti-SLAPP issues. Additionally, given the possibility of an early anti-SLAPP motion to dismiss, it is especially important that allegations be detailed and thoroughly investigated from the start.

On the other hand, defendants—including business defendants—should consider whether claims against them trigger anti-SLAPP protections. Because of the law's broad language, it may apply in a wide range of situations.

If you have any questions regarding anti-SLAPP laws, contact John G. Schmidt Jr., Partner, at (716) 847-7095, jschmidt@phillipslytle.com; Steven B. Salcedo, Associate, at (716) 504-5782, ssalcedo@phillipslytle.com; or the Phillips Lytle attorney with whom you have a relationship. ■

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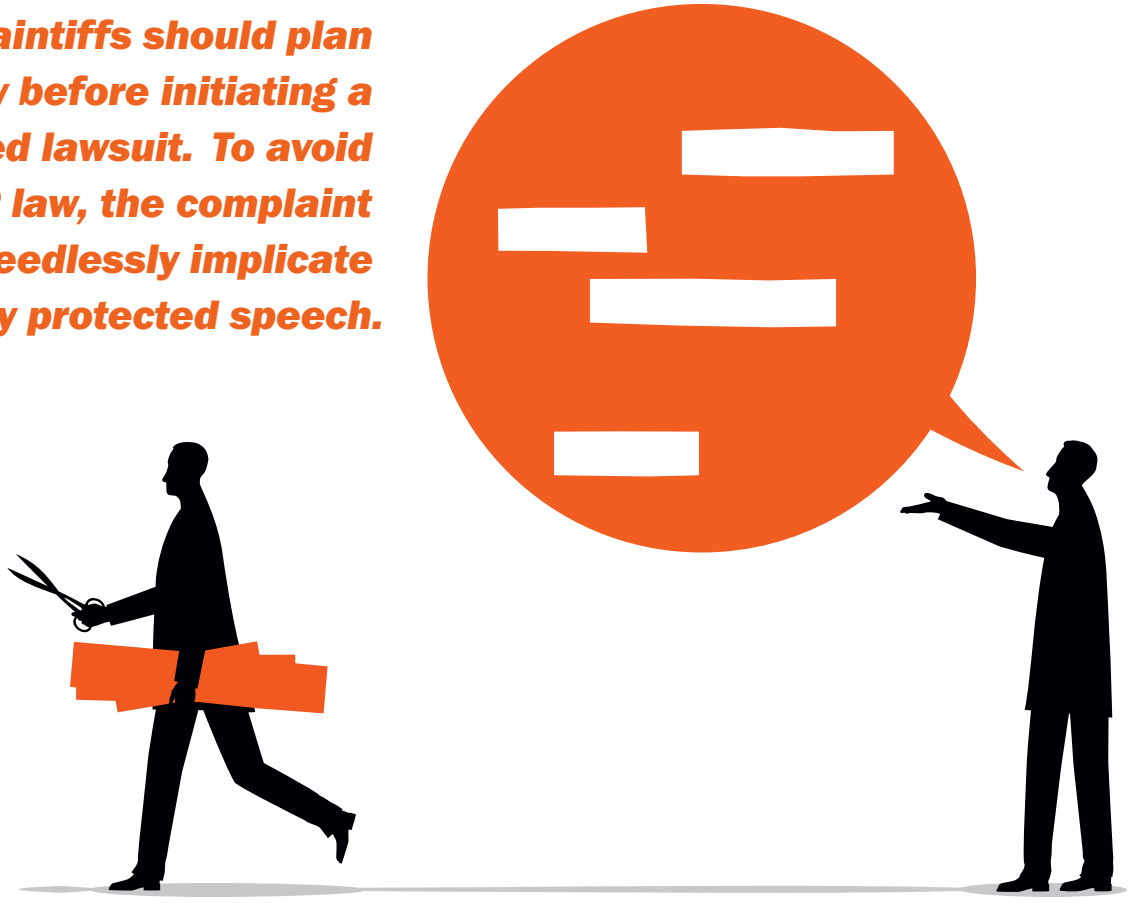

[24] *See Pappas v. Philip Morris, Inc.*, 915 F.3d 889, 893–94 (2d Cir. 2019).

[25] *See La Liberte,* 966 F.3d at 86 n.3 (discussing *Adelson v. Harris*, 774 F.3d 803, 809 (2d Cir. 2014)); *Coleman v. Grand*, 2021 WL 768167, at *7 (actual malice standard is substantive).

[26] Nick Phillips & Ryan Pumpian, *A Constitutional Counterpunch to Georgia's Anti-SLAPP Statute*, 69 MERCER L. REV. 407 (2018).

[27] *Davis v. Cox*, 351 P.3d 862, 864 (Wash. 2015) (en banc), abrogated on other grounds by *Maytown Sand & Gravel, LLC v. Thurston Cnty.*, 423 P.3d 223, 248 n.15 (Wash. 2018) (en banc); *Leiendecker v. Asian Women United of Minn.*, 895 N.W.2d 623, 638 (Minn. 2017) (finding anti-SLAPP law unconstitutional "as applied to claims at law alleging torts"); *but see Taylor v. Colon*, 482 P.3d 1212, 1213 (Nev. 2020) (Nevada's anti-SLAPP law does not violate right to jury trial).

[28] *Davis*, 351 P.3d at 867, 873; *Leiendecker*, 895 N.W.2d at 636.