

WHAT TO DO IF YOU'RE SLAPP'ED

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How would you characterize a plaintiff who deliberately filed suit against a wide array of persons, knowing that the suit could not succeed but willing to spend vast amounts of time and money to litigate it? An eccentric crackpot? For a corporation whose large real estate or industrial development project encounters vociferous opposition from local citizens, such a lawsuit can be merely a cost of doing business. In the last 30 years such suits have come to be known as SLAPPs – strategic lawsuits against public participation.

A typical SLAPP targets the individuals who have spoken out against the developer's project in a public forum. The developer sues them for defamation, abuse of process, wrongful interference with business advantage, and other torts. When the SLAPP defendants finally win summary judgment after a year or more of discovery (assuming they have not caved in long before then), they are too exhausted and impoverished even to consider striking back against the developer with a suit for wrongful use of civil proceedings.

Anti-SLAPP statutes are now on the books in 26 states.¹ Their purpose, as expressed in the preamble of the California statute, is to respond to the “disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.” The wording of these statutes, and their interpretation by the courts, vary from state to state. This article will focus on the anti-SLAPP experience of two states with nearly identical statutes – probably the most far-reaching in the country – and a substantial volume of anti-SLAPP litigation.

ANTI-SLAPP STATUTE OF MAINE AND MASSACHUSETTS

The key elements of the Massachusetts and Maine anti-SLAPP statutes are:

- When a party asserts that the civil claims (including counterclaims and cross-claims) against him are based on his exercise of his right of petition under the U.S. or State Constitution, he may bring a “special motion to dismiss” within 60 days after service of the complaint or, in the court's discretion, at any later time.
- The court shall advance the special motion so that it may be heard and determined with as little delay as possible.
- All discovery proceedings (except, with the court's permission, specified discovery pertaining to the special motion itself) are stayed until the court has ruled on the special motion.

- The court must grant the special motion unless the opposing party shows that “the moving party's exercise of its right of petition was devoid of any reasonable factual support or any arguable basis in law,” and that the moving party's acts caused actual injury to the responding party.
- In making its determination, the court shall consider the pleading and supporting and opposing affidavits.
- If the court grants a special motion to dismiss, it may award costs and reasonable attorney fees to the moving party.

The two statutes then define “a party's exercise of its right of petition” to mean any statement:

- Made before or submitted to a legislative, executive or judicial body, or any other governmental proceeding;
- Made in connection with an issue under consideration or review by a legislative, executive or judicial body, or any other governmental proceeding;
- Reasonably likely to encourage consideration or review of an issue by a legislative, executive or judicial body, or any other governmental proceeding;
- Reasonably likely to enlist public participation in an effort to effect such consideration; or
- Falling within constitutional protection of the right to petition government.

The Massachusetts/Maine experience has served as a laboratory for both the strengths and the unintended consequences of this legislative attempt to curb an abuse in the civil justice system.

JUDICIAL INTERPRETATION OF ANTI-SLAPP STATUTE

The anti-SLAPP statute is a more potent weapon than the traditional motion to dismiss for failure to state a claim, which can be deployed immediately but is rarely successful, or the summary judgment motion, which is more often successful but cannot be used until months or even years of discovery have taken place. The anti-SLAPP statute is a game changer, and courts in Massachusetts and Maine have had to wrestle with a number of difficult questions that arise under it.

What constitutes “petitioning activity”?

Reports of illegal activities to the proper governmental authorities are “petitioning activity.” These include reports of crime to the police or District Attorney, reports of

child abuse to the Department of Human Services, and similar reports to environmental, landlord/tenant, professional regulation, and other governmental agencies.

Petitioning activity also includes speaking out at (for example) planning or zoning board meetings, or submitting written comments. Nor is it necessary for the petitioner's statement to address a topic on a current hearing or legislative agenda; petitioning activity extends to statements that may have the effect of bringing some new issue into consideration or review by any governmental body. Furthermore, the statement is not required to deal with a matter of public concern in order to be protected petitioning activity. It may express the petitioner's personal, commercially motivated point of view.

A person may engage in petitioning activity indirectly. In a recent federal case in Maine, a chiropractor sued a 77-year-old former patient who had accused him of sexual assault. She reported him to the police and sued him (clearly petitioning activities), and also published the allegation of sexual abuse on a website, concluding with an appeal to others who had been similarly mistreated by the same chiropractor to share their stories. The court found that the website content was arguably a statement "reasonably likely to enlist public participation in an effort to effect consideration" by some governmental body in the future, but denied her anti-SLAPP motion as devoid of factual support.

Any lawsuit is a constitutionally protected petitioning activity, which raises a conundrum: why isn't a SLAPP suit a petitioning activity? In the paradigm case of a huge developer cynically crushing opposition by suing the local citizens who have spoken out against its environmentally ruinous project, it is easy to identify the white hat and the black hat. Such was not the case, however, in *Ralph Nader v. Maine Democratic Party*, decided in April 2012. The former presidential candidate sued the Maine Democratic Party and the Democratic National Committee alleging they had deliberately filed numerous baseless complaints challenging his nomination papers, for the admitted purpose of distracting his campaign and draining it of money, time, and resources. The defendants filed an anti-SLAPP motion, which was granted by the Superior Court because their tactics, even if unsuccessful, had constituted petitioning activity. The Maine Supreme Judicial Court reversed, pointing out that the case implicated *Nader's* right to petition the court, and also the fundamental right of voters to cast their votes effectively.

Who has standing to be protected for petitioning activity?

The statute refers to "the moving party's exercise of the moving party's right of petition," and ordinarily the defendant seeking the protection of the statute will have engaged in activities seeking to further his own interest. In addition, the Massachusetts courts early recognized that "the statute would provide but hollow protection for citizens who wished to exercise the right of petition if statements made by an attorney on their behalf were not covered by the anti-SLAPP statute to the same extent as statements made by them directly."

Conversely, speaking out on a subject of public concern does not automatically qualify as petitioning activity. In a 2010 Massachusetts case, a journalist who was a longtime resident of Boston's North End wrote five newspaper articles critical of a local property owner, who then sued her for defamation and interference with business relations. The court agreed that her articles fell within at least one branch of the definition of "petitioning activities," but held that the statute was inapplicable because her articles did not seek to redress a grievance *of her own*.

How should the court determine whether a petitioning activity was devoid of any reasonable factual support or any arguable basis in law?

To prevail on an anti-SLAPP motion, the defendant bears the initial burden of showing that the suit was based on some activity that would qualify as an exercise of his right to petition. The burden then falls on the plaintiff to "show" that the exercise of the right of petition was "devoid of any reasonable factual support or any arguable basis in law." Except for stating that "the court shall consider the pleading and supporting and opposing affidavits," the statute is silent on how the court is to evaluate this "evidence." Unlike a motion to dismiss for failure to state a claim or a summary judgment motion, the anti-SLAPP statute requires the judge to assume a fact-finding role. The only facts available, however, will often be those stated in the parties' affidavits, which are not subject to cross-examination and are likely to contradict each other.

In an early anti-SLAPP case, the Maine Supreme Judicial Court ruled that the trial judge must view this evidence "most favorably to the moving party," which is the opposite of how motions to dismiss or for summary judgment are treated. As the federal judge observed in the 2011 chiropractor case described above,

If that were correct, any defendant could succeed on a special motion under anti-SLAPP merely by filing a false affidavit, and there would be no way around it. Of course false affidavits can be filed to defeat summary judgment, but the result is to move the case to trial where the jury can decide the facts. Here, the result would be to prevent trial, and no one would ever decide the facts.

Seven months later the Maine SJC tacitly acknowledged this point and announced, in the *Nader* case, a change in the law. Reversing its earlier decisions, the court held that henceforth a plaintiff confronted with an anti-SLAPP motion need only make a *prima facie* showing that *any* of the petitioning activities was devoid of any reasonable factual basis or arguable basis in law.

EVALUATION OF ANTI-SLAPP STATUTES

The course correction in the *Nader* case may have saved the Maine statute from going off a constitutional cliff, but anti-SLAPP statutes in general will continue to raise constitutional concerns. Because of the breadth of the right to petition government, most of the litigants who have taken advantage of its protection are startlingly different from the public-spirited environmentalist standing in front of the developer's bulldozer. Furthermore, because the denial of the anti-SLAPP motion gives rise to an immediate appeal, meritorious lawsuits can be monkey-wrenched by tactical anti-SLAPP motions with little chance of success. In spite of these drawbacks, however, the anti-SLAPP statute does provide a powerful response to a serious abuse of the judicial system by the rich and powerful, and until a more surgical instrument can be developed it will serve an important purpose.

¹ AZ, AR, CA, DE, FL, GA, HI, IL, IN, LA, ME, MD, MA, MN, MO, NE, NV, NM, NY, OK, OR, PA, RI, TN, UT, and WA.

On August 7, 2012 the ABA passed a Resolution encouraging the remaining states to enact anti-SLAPP statutes.



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