Online Commercial Speech

Do Anti-SLAPP Statutes Protect Bloggers?

By Andrew R. Dennington

Even if a court holds that a defendant's blog post qualifies as protected activity, all hope is not lost for a client seeking legal redress.

Courts across the United States increasingly are called upon to decide the extent to which state anti-SLAPP statutes apply to online speech. In recent decisions, courts have held that a wide range of blog or social media posts qualify as the type of petitioning activity or free speech that is protected under anti-SLAPP statutes. A blog or a social media post need not concern a strictly political issue to qualify as protected activity. Online statements that malign or disparage a particular product, firm, or executive also may be protected under an anti-SLAPP statute, even if the blogger in question is a commercial rival whose motives are less than pure.

The expansion of anti-SLAPP protections to online commercial speech matters to any attorney who represents a business or an individual looking to protect the business' or individual's reputation. Virtually any client could become the victim of disparaging, perhaps defamatory, blog posts that repel would-be clients, customers, and employers. When counseling a client how best to respond to offensive postings, the careful attorney must consider whether a retaliatory lawsuit might be deemed "dead on arrival" due to an anti-SLAPP statute in your particular jurisdiction.

Protected Activity Is Broader Than Traditional "Petitioning Activity"

The acronym "SLAPP" stands for "strategic litigation against public participation." The textbook example of a "SLAPP" suit is a defamation action that a real estate developer files against a local environmental activist who spoke up at a municipal hearing against the developer plaintiff's proposed development. In a SLAPP suit, a plaintiff's goal is not necessarily to recover damages from a defendant. Rather, the plaintiff's true motivation is to burden the defendant—often an individual with limited resources—with the time and the expense of litigation, and thereby deter others from speaking out against the project. As a result, SLAPP actions can have a chilling effect on free speech.

Beginning in the 1980s, U.S. states began to enact anti-SLAPP statutes to protect speakers who found themselves the subject of SLAPP suits. Washington was the first to enact an anti-SLAPP statute in 1989. Numerous other state legislatures followed suit, and at present, 28 states and the District of Columbia now have some form of an anti-SLAPP statute. While there currently is no federal anti-SLAPP statute, a congressional subcommittee held a hearing in 2016 on a bill that would have enacted one.

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The patchwork of existing state law varies significantly from jurisdiction to jurisdiction, but anti-SLAPP statutes nonetheless share several defining features. An anti-SLAPP statute creates a procedural mechanism, such as a "special motion to dismiss" or a "motion to strike," through which a defendant can seek early dismissal of a suit that arises from protected petitioning activity, free speech, or both. Some states automatically stay all discovery until the anti-SLAPP motion is decided. The vast majority of anti-SLAPP statutes provide a mandatory award of attorney's fees to a prevailing defendant. And many jurisdictions provide interlocutory appellate review of denial of an anti-SLAPP motion.

Courts evaluating an anti-SLAPP motion engage in a two-pronged analysis. First, a court considers whether the plaintiff's claim arises from protected activity. If the answer is yes, the court proceeds to the second prong. This second prong addresses whether the plaintiff's claim nonetheless is sufficiently meritorious to proceed, notwithstanding that it arises from protected activity. This is not judged against a typical Rule 12(b)(6) standard in which all reasonable inferences must be drawn in favor of the plaintiff. Rather, the plaintiff has a more demanding evidentiary burden. The exact burden of proof varies from state to state. For example, under the second prong of the Massachusetts anti-SLAPP statute, a suit can still proceed if the plaintiff demonstrates that the defendant's statements are "devoid of any reasonable factual support or arguable basis in law." Mass. Gen. Laws c. 231, §59H. California's anti-SLAPP statute provides that a suit will continue if "the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." Calif. Code Civ. Pro. §425.16(b)(1).

This article focuses on the first prong of the anti-SLAPP analysis concerning what constitutes protected activity. Some anti-SLAPP statutes apply only to "petitioning activity," *i.e.*, statements to a government body, or statements regarding an issue under consideration by a government body. *See, e.g.,* Mass. Gen. Laws ch. 23, §59H (statute applies where plaintiffs suit is based upon defendant's "exercise of its right of petition under the constitution of the United States or of the commonwealth"). This is rooted in the First Amendment right "to petition the Government for a redress of grievances." Some states, notably California, have broader anti-SLAPP statutes that protect both "petitioning activity" and "free speech" more generally. *See, e.g.,* Cal. Civ. Proc. Code §425.16(b)(1) (statute applies to suits "arising from any act of [defendant] in furtherance of that person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue…."). The District of Columbia's anti-SLAPP statute, enacted in 2010, encompasses an even broader range of activity under the protected rubric of the "right of advocacy." D.C. Code §16-5502(a). And at the other end of the spectrum, some states have restrictive anti-SLAPP statutes that apply only to environmental or land use disputes. *See Agar v. Judy,* 151 A.3d 456, 477 (Del. Ch. 2017) (Del. Code tit. 10, §~ 8136–8138); 27 Pa. Cons. Stat. §§7707, 8301–8305.

There is a broad range of blog and social media posts that might not constitute petitioning activity because they are not directed to government bodies, and they do not necessarily concern issues under government consideration. But nonetheless, they might fall within the broader rubric of "free speech" or "right of advocacy," and thereby, they might come within the protections of an anti-SLAPP statute. This article surveys several recent decisions considering which types of blog posts deserve anti-SLAPP protections and which do not. Because anti-SLAPP statutes vary from state to state, it is difficult to generalize whether any particular statement is, or is not, protected. Nonetheless, a series of recurring questions tend to emerge from the case law.

Is a Blog Post a Rallying Cry, or Just a Rant?

Different bloggers blog for different reasons. Some blog to vent; others blog in an attempt to inspire others to take action. And in many cases, it is difficult to discern whether a defendant is simply ranting, or attempting to rally other like-minded readers. Whether a particular blog post deserves anti-SLAPP protection can turn upon the defendant's intent. Courts frequently engage in something approaching a scienter analysis to decide whether particular online statements are, or are not, protected activity. *See, e.g., Pennlyn Greene Assocs., L.P. v. Clouser,* 890 A.2d 424, 433 (Pa. Commw. Ct. 2005) ("[w]hen determining whether a communication is entitled to immunity, the court must look to the nature of the statement keeping in mind the intended audience and the purpose of the communication.").

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Generally speaking, a blog post is more likely to qualify for anti-SLAPP protection if it is aimed at influencing others, as opposed to simply blowing off steam.

For example, in the Massachusetts case of *Cardno Chemrisk, LLC v. Foytlin,* a scientific consulting firm retained by BP sued two individuals, one of whom was a lifelong resident of the Gulf Coast and a full-time environmental activist, and another who was a Boston teacher who also participated in environmental advocacy. 476 Mass. 479, 480-81, 68 N.E.3d 1180, 1184 (Mass. 2017). The two defendants authored a piece on Huffington Post's "Green Blog" that accused the plaintiff of "fraudulent" research practices. The plaintiff sued for defamation, and the defendants responded with an anti-SLAPP special motion to dismiss. The Massachusetts Supreme Judicial Court held that the defendants' blog post was protected activity under the state's anti-SLAPP statute. A key factor in the court's decision was one sentence at the very end of the bloggers' article, which, after extensively criticizing the plaintiffs work for BP, asked whether "anyone will ever… make [things] right" in the Gulf Coast. *Id.* at 1185. Based in part upon that

one sentence, the court held that the article was "reasonably likely to enlist public participation" because it "closes with an implicit call for its readers to take action." *Id.* at 1187–88.

The Minnesota Court of Appeals decision in *Freeman v. Swift* provides a useful contrast. 776 N.W.2d 485 (Minn. Ct. App. 2009). The plaintiff was the chief executive officer of a nonprofit corporation that operated a juvenile sex-offender treatment program, which was looking to relocate to the defendant's town. The defendant was a local resident who vigorously opposed the relocation. She established a website and blog where she commented about the controversy and how it affected her personally. The plaintiff sued for defamation based upon a blog post in which the defendant accused the plaintiff of making "death threats" against her. The blog did not otherwise end with a call to action. Construing Minnesota's anti-SLAPP statute, the appellate court affirmed that the defendant's' blog posting was not protected activity. "Although the blog audience may well include those who Swift [the defendant] could hope would take up her cause, the challenged statements plainly are not directed at bringing about any government action, but… are aimed at creating ill-will towards [the plaintiff]," the court explained. *Id.* at 491. The blog post in *Freeman* was not protected activity in large part because it was deemed more of a rant than a rallying cry.

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Is the Blog Post an Ad Hominem Attack?

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The *Backes v. Misko* decision from Texas, arising out of an unusual set of facts, illustrates this principle. 486 S.W.3d 7 (Tex. App. 2015). The litigants were three women who were competitors in the horse-breeding business and used social media to interact with fellow equestrian enthusiasts. *Id.* at 11. Most of their posts concerned horse-related issues. But one of the three women interspersed her horse-related commentary with personal stories about her daughter's health challenges. Over several months, the online rhetoric between the three women became heated and personal. It escalated to the point where one of the participants suggested that her competitor should be reported to authorities for suspicion of Munchausen Syndrome by Proxy (MSBP), a mental health condition in which one makes up or causes an illness in a person under his or her care. The accused woman sued for libel. The Texas appellate court held that the offending post was protected under the state's broad anti-SLAPP statute, which protected free speech concerning any "matter of public concern," and defined that term to include issues related to "health and safety." *Id.* at 18 *(*citing Tex. Civ. Prac. & Rem. Code §27.001(7)). The court held that the MSBP accusation "not only involved a matter of someone's health, but also a child's safety," and therefore, it was protected. *Id.* at 18. The court's surprising holding essentially afforded anti-SLAPP protection to a personal smear against a commercial competitor, which is far removed from the type of speech that anti-SLAPP statutes were originally designed to protect.

A Massachusetts appellate court similarly has held that personal name-calling can sometimes amount to protected activity. *MacDonald v. Paton,* 57 Mass. App. Ct. 290 (Mass. App. Ct. 2003). The defendant operated a web site reporting on local affairs. In the midst of a public controversy over approval of a new police station, the defendant posted online statements calling the plaintiff, who was a local selectman, a "Nazi." In large part because the defendant's website was operated as a "forum for speech by citizens about issues of public and political concern," the Massachusetts Appeals Court had little difficulty holding that the offending post was protected by the state's anti-SLAPP statute. *Compare id*., *with Freeman,* 776 N.W.2d at 491 (Minnesota decision holding that blog post insinuating that non-profit executive had attempted to commit suicide was not protected activity).

Does a Blog Post Arise from a Private Dispute, or a Public Concern?

Several recent anti-SLAPP cases involve bloggers whose derogatory online statements appear to be motivated by revenge or some type of personal animus against the plaintiffs. In many jurisdictions, this does not matter as long as the blogger can demonstrate that his or her online statements concerning the plaintiff relate to a matter of public concern.

The California case of *Piping Rock Partners, Inc. v. David Lerner Associates, Inc.* illustrates this point. 946 F. Supp. 2d 957 (N.D. Cal. 2013). The plaintiff, who operated his own real estate investment firm, founded a blog called "REIT Wrecks," where he and others discussed real estate investment trusts. One of his posts accused a brokerage firm called David Lerner & Associates, Inc. (DLA) of violating securities regulations. DLA allegedly retaliated through blog posts on websites such as "Ripoff Reports" that accused the plaintiff of engaging in dishonest and fraudulent practices. One of the posts ended with the statement, "[Plaintiff] has a Wall S. background, maybe Bernie Madoff was his mentor. I'm sure Bernie would be proud of him." *Id.* at 968. The plaintiff responded with a libel suit, and DLA asserted similar counterclaims arising from the plaintiff's original postings on "REIT Wrecks." Notwithstanding that this appeared to be an intra-industry squabble, the California court held that both sets of blog posts were protected activity. The statements were warnings to consumers not to do business with the subject of the respective blog posts. Elaborating, the court remarked, "It makes no difference, for purpose of the public interest requirement, that the warn-

ing was not sincere, accurate, or truthful." *Id.* at 969. The court also relied upon *Chaker v. Mateo,* which held that a plaintiff who criticized a defendant's business on "Ripoff Report" was protected under California's anti-SLAPP statute, even though the plaintiff was simultaneously involved in a paternity dispute with the defendant's daughter. 209 Cal. App. 4th 1138, 1146 (Cal. Ct. App. 2012).

In contrast, the Washington Court of Appeals, construing that state's narrower anti-SLAPP statute, recently held that blog posts arising from certain types of personal quarrels should not enjoy anti-SLAPP protection. *Johnson v. Ryan,* 186 Wash. App. 562 (Wash. Ct. App. 2015). This case arose from a dispute between the executive director and the music director of a local nonprofit theater. After the executive director fired the music director for inappropriate behavior, the music director retaliated with a vitriolic blogging campaign against his former boss. The executive director, in turn, sued for defamation and intentional interference with business expectancy. In denying the defendant's anti-SLAPP motion to strike, the Washington court held that "[t]he primary intent of the [defendant's] speech is not some lofty public good, but merely establishing that his employer was wrong in firing him." *Id.* at 580. That the defendant's blog posts were "interspersed with collateral issues of protected public speech.… [was] not enough to transform a private dispute into a matter of public concern." *Id.* A dissenting justice, however, protested: "Personal gain or vengeance is not relevant in determining whether speech is of public concern." *Id.* at 598.

Conclusion and Emerging Anti-SLAPP Issues

There is no bright-line rule that emerges from these recent decisions concerning whether any particular blog posting qualifies as protected activity. Because anti-SLAPP statutes vary widely from state to state, there is no substitute for carefully analyzing the law in the particular jurisdiction. Nonetheless, litigators should be aware that many anti-SLAPP statutes reach far beyond what traditionally has been understood as petitioning activity. Courts increasingly have applied anti-SLAPP statutes to a broad range of blog and social media posts about commercial rather than political topics. Even if the offending post amounts to little more than a personal smear against a direct competitor that has little to do with any issue under consideration by a government body, the defendant nonetheless may make a creative argument that his or her speech is protected activity under an anti-SLAPP statute.

If a court holds that a defendant's blog post qualifies as protected activity, all hope is not lost for a client seeking legal redress for inaccurate or defamatory blog posts. Upon reaching the second prong of the anti-SLAPP analysis, many of the plaintiffs in the above-cited cases still were permitted to proceed because they satisfied their evidentiary burden of proving claims for defamation, intentional interference, commercial disparagement, and the like at the outset of the case.

There are two other emerging defenses to anti-SLAPP motions that deserve mention as well. First, plaintiffs increasingly are challenging whether anti-SLAPP statutes violate the constitutional right to a jury trial in civil cases. In 2015, the Washington Supreme Court struck down that state's anti-SLAPP statute as violating a state constitutional right to a civil jury trial. *Davis v. Cox,* 351 P.3d 862, 871, 183 Wash.2d 269, 289 (Wash. 2015). The court reasoned that the second prong of the anti-SLAPP analysis, through which a judge can dismiss an action unless the plaintiff proves by "clear and convincing evidence a probability of prevailing on the claim," deprives the plaintiff of the right to have a jury resolve questions of disputed material facts. *Id*

Rather than render an entire statute unconstitutional, other courts have altered the evidentiary burden to pass the second prong of the anti-SLAPP analysis to avoid an unconstitutional interpretation of the anti-SLAPP statute in question. *See Nader v. Maine Democratic Party,* 41 A.3d 551, 563 (Me. 2012) (interpreting 14 Me. Rev. Stat. §566); *Hi-Tech Pharmaceuticals, Inc. v. Cohen,* 208 F. Supp. 3d 350, 356 (D. Mass. 2016) (similar holding pertaining to Massachusetts statute).

Second, a plaintiff in federal court may seek to avoid the application of a state anti-SLAPP statute entirely under the doctrine of *Erie v. Tompkins,* 304 U.S. 64 (1938). There is a viable argument that an anti-SLAPP statute does not create substantive rights, but instead, it creates procedural mechanisms and burdens of proof that directly conflict with those set forth in Rules 12 and 56 of the Federal Rules of Civil Procedure. *See Makaeff v. Trump University, LLC,* 715 F.3d 254, 273 (9th Cir. 2013) (Kozinski, C.J.) (concurring opinion arguing that California's anti-SLAPP statute should not apply in federal diversity actions). *But see Godin v. Schencks,* 629 F.3d 79, 88 (1st Cir. 2010) (holding that Maine's anti-SLAPP statute applied to state law defamation claim in federal court). There remains a split of authority on this topic. *See* Benjamin Ernst, *Fighting SLAPPS in Federal Court: Erie, The Rules Enabling Act, and the Application of State Application of State Anti-SLAPP Laws in Federal Diversity Actions,* 56 B.C.L. Rev. 1181, 1197–1204 (2015).

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In sum, an attorney representing a client that is maligned by an inaccurate blog or social media post must think carefully before initiating any type of retaliatory suit for defamation, intentional interference, or similar causes of action. There is a decent chance that a defendant can take advantage of anti-SLAPP statute that will force your client to come forward with admissible proof of all the essential elements of your case at the very outset of the litigation. If the defendant prevails based upon its anti-SLAPP motion, the plaintiff most likely will be on the hook for the defendant's attorney's fees. Therefore, a decision to initiate such litigation should be made only after careful consideration. FD