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What's Next For Federal Anti-SLAPP Legislation

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Law360, New York (April 19, 2017, 12:21 PM EDT) -- Suppose you own a family-run jewelry store. You sell high-quality products, provide excellent service and build your customer base on reputation alone. One day, "John Doe" posts a review of your store online, falsely claiming that you sold him a fake diamond engagement ring. You sue Doe for defamation and seek to unmask him.

Now suppose you are getting engaged. You buy a beautiful diamond engagement ring from a large jewelry store chain. One day, you discover that the ring is fake. You post a scathing review of the chain online. The chain serves you with a defamation lawsuit.

How these lawsuits proceed in the courts may well depend on whether they're deemed "SLAPP" suits — "strategic lawsuits against public participation" — and whether state "anti-SLAPP" laws apply. These laws may or may not derail the family-run jewelry store's case, or protect the defrauded fiancé against corporate intimidation.

"SLAPP" commonly denotes lawsuits designed to intimidate and silence critics exercising First Amendment rights to speak, publish and petition. But some state anti-SLAPP laws are so broad that they can apply even to meritorious suits. Not surprisingly, federal anti-SLAPP legislation has gained traction in recent years, particularly with the increasing popularity of online reviews. The Citizen Participation Act of 2009 was introduced in the House. The Free Press Act of 2012 was introduced in the Senate. Last session, the SPEAK FREE Act of 2015 was introduced in the House.[1]

But none of these bills made it out of committee. In this current session, members in both chambers have expressed renewed interest in federal anti-SLAPP legislation. If the next bill looks anything like past bills, there are important practical and constitutional issues that Congress will need to address.

State Anti-SLAPP Laws

More than half the states have passed anti-SLAPP laws. These laws establish a special motion to dismiss

procedure, with little or no discovery, that can quickly dispose of SLAPPs. But state anti-SLAPP laws are not a one-size-fits-all model; their applicability varies, raising the potential for forum shopping. For example, on the narrow side, Delaware's anti-SLAPP law applies to lawsuits related to licensing and government permits,[2] and Pennsylvania's law applies to suits related to environmental issues.[3] On the broad side, anti-SLAPP laws in California and Oklahoma apply to cases arising from the exercise of free speech and petition rights.[4]

If a lawsuit arises out of federal law, state anti-SLAPP laws likely do not apply.[5] If the lawsuit arises out of state law but is heard in federal court (e.g., in diversity jurisdiction cases), the laws may also not apply, although there is a split of authority on this issue under the Erie doctrine.[6]

A federal anti-SLAPP law may provide uniformity. Below we examine the substance of past federal anti-SLAPP bills, their key features and concerns, and areas to improve upon for any newly introduced bill.

Past Federal Anti-SLAPP Legislation

The 2009, 2012, and 2015 anti-SLAPP bills each would have created procedures under Title 28 for the speedy disposal of SLAPPs. The bills shared these elements:

- a special motion to dismiss a plaintiff's claim arising from a defendant's exercise of a constitutional right to speak or petition
- a stay of discovery pending the outcome of the motion to dismiss
- immediate interlocutory appeal of a decision on the motion to dismiss
- a special motion to quash any discovery order to disclose a personally identifying information
- removal to federal court
- an award of costs, attorneys' fees, and expert witness fees to the prevailing movant
- preemption of state laws that do not provide "equivalent or greater" protection for First Amendment activities

The SPEAK FREE Act of 2015 was not a model of clarity; it takes some mental gymnastics to decipher it. But as the most recent and comprehensive bill, it provides the best example of key provisions to expect in any new bill.

Scope

Under the Act, a "SLAPP suit" is defined as a plaintiff's "claim" arising from a "statement" or other expression, or conduct in furtherance of such expression, by the defendant in connection with an "official proceeding or about a matter of public concern." This definition includes claims related to health, safety, environmental well-being, the government, and "a good, product, or service in the marketplace." In other words, with a few exceptions, a SLAPP is defined as a lawsuit arising from the defendant's speech or conduct connected to a matter of public concern.

Procedure

Under the Act, anti-SLAPP motions are to be filed, heard, and decided quickly. Generally, the defendant may file a special motion to dismiss not later than 45 days (30 days if the case is removed) after service of the lawsuit. The motion shall be granted if the defendant makes a prima facie showing that the lawsuit is a SLAPP, unless the plaintiff demonstrates that the lawsuit is likely to succeed on the merits.

Unless good cause is shown, discovery is stayed while the motion is pending. Except for extensions for discovery (or other postponements), the court must hear the motion not later than 30 days after service of the motion and must rule on it not later than 30 days after the hearing.

Personally Identifying Information

Under the act, if the court orders disclosure of a person's "personally identifying information" (for example, to enable the plaintiff to identify an anonymous defendant), that person (whether a party or not) may file a special motion to quash the order. The motion shall be granted if the person makes a prima facie showing that the order is indeed for PII, unless the plaintiff demonstrates "with an evidentiary showing" that the lawsuit is likely to succeed on the merits on each element of the claim, irrespective of the need for PII.

Key Features of a Federal Anti-SLAPP Law

First, and foremost, a federal law would help ensure uniform treatment and application of First Amendment rights to speak, publish and petition across the nation, whether a case is brought in state or federal court. Forum shopping among state courts should diminish.

Second, the law would provide a single nationwide schedule for resolving special motions to dismiss, rather than leaving parties and courts to face different schedules across states.

Third, the law would subject to dismissal as SLAPPs lawsuits that might otherwise be outside the scope of anti-SLAPP laws.

Fourth, the law would level the playing field between litigants through a fee-shifting provision favoring the defendant.

Concerns With a Federal Anti-SLAPP Law

First, a too-broad definition of "SLAPP suit" could allow special motions to dismiss in unintended cases such as employment and whistleblower claims if they involve "matters of public concern." If so, this would undercut one of the main purposes of anti-SLAPP laws: to prevent retaliatory lawsuits against critics properly exercising First Amendment rights.

Second, the law's standard to avoid dismissal ("likely to succeed on the merits") may be higher than the standard to avoid dismissal under Federal Rule of Civil Procedure 12(b)(6) (a "plausible" claim for relief). And the court's application of this standard — weighing the evidence in the form of affidavits and pleadings — might invade the Seventh Amendment right to a jury trial.[7]

Third, the law's standard for quashing orders to disclose PII might overly favor nondisclosure in meritorious cases. Under the SPEAK FREE Act, the plaintiff seeking PII could get caught in a Catch-22: the plaintiff may need PII to establish that he is likely to succeed on the merits of some elements of his claim; and yet, the plaintiff may not obtain discovery of PII without establishing that he is likely to succeed on the merits of all elements of his claim. By contrast, in anonymous defamation cases, some courts will order the disclosure of PII if the plaintiff establishes a prima facie case on only those elements within his control.[8]

Fourth, the law's removal provisions might allow state cases to be removed that otherwise could not, such as a defamation case between nondiverse parties.

Areas to Improve Federal Anti-SLAPP Legislation

Congress should aim to provide the key features of a uniform anti-SLAPP law without creating burdensome issues that will be left to litigants to fight over and judges to resolve. Indeed, anti-SLAPP laws are meant to resolve issues early on at reduced expense. Here are some areas to improve in federal anti-SLAPP legislation (assuming the case is made that such a law is needed):

- Define a "SLAPP suit" narrowly by limiting the scope of a "matter of public concern" and/or exempting certain types of lawsuits such as employment discrimination, whistleblower, securities fraud, antitrust and products liability cases.

- Set a standard to avoid dismissal that is no higher than a summary judgment standard.

- Include limited discovery in the special motion to dismiss process.

- Set a standard for quashing a PII discovery order that balances a person's First Amendment rights against the strength of the plaintiff's lawsuit, handicapped for the absence of PII.[9]

- Restrict the removal of state cases to only those involving federal defenses, such as the First Amendment, so that removed cases raise a federal question for jurisdictional purposes.

Depending on one's perspective, anti-SLAPP laws can be either a strong protector of First Amendment rights, or a significant obstacle to meritorious lawsuits. If federal legislation is introduced, Congress should examine the practical and constitutional concerns of past bills to develop a better law.

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[1] H.R. 2304, 114th Cong. (2015).

[2] Del. Code tit. 10, § 8136(a)(1).

[3] 27 Pa. C.S.A. § 8302.

[4] Cal. Code Civ. P. § 425.16(b)(1); Okla. Stat. Ann. tit. 12, § 1432.

[5] Hilton v. Hallmark Cards, 599 F.3d 894, 901 (9th Cir. 2010); Vang v. Lopey, No. 2:16-cv-2172-JAM-CMK, 2017 U.S. Dist. LEXIS 1698, at *5 (E.D. Cal. Jan. 4, 2017).

[6] Compare Wynn v. Chanos, No. 15-15639, 2017 U.S. App. LEXIS 5407, at *3 (9th Cir. Mar. 28, 2017), with Abbas v. Foreign Policy Group, 783 F.3d 1328, 1332 (D.C. Cir. 2015).

[7] Unity Healthcare, Inc. v. County of Hennepin, 308 F.R.D. 537, 552-53 (D. Minn. 2015) (concluding that motion to dismiss procedure cannot be applied in federal court because it violates the right to jury trial); Davis v. Cox, 351 P.3d 862, 874 (Wash. 2015) (same); Opinion of Justices, 641 A.2d 1012, 1015 (N.H. 1994) (opining that proposed motion to dismiss procedure would violate right to jury trial).

[8] See, e.g., Mobilisa, Inc. v. Doe, 170 P.3d 712 (Ariz. 2007); Doe v. Cahill, 884 A.2d 451 (Del. 2005); Solers, Inc. v. Doe, 977 A.2d 941 (D.C. 2009); Pilchesky v. Gatelli, 12 A.3d 430, 444 (Pa. Super. Ct. 2011).

[9] See Dendrite Int'l, Inc. v. Doe No. 3, 775 A.2d 756, 760-61 (N.J. Super. 2001).

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