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How State High Courts Are Reshaping Anti-SLAPP Laws

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Law360, New York (July 31, 2017, 1:03 PM EDT) -- Three recent decisions, just weeks apart, from the California, Massachusetts and Texas high courts reflect continued judicial shaping of anti-SLAPP statutes. Anti-SLAPP statutes are aimed at curbing "strategic lawsuits against public participation," or "SLAPPs," which are meritless lawsuits intended to intimidate and silence critics exercising their First Amendment rights.

In the California and Massachusetts decisions, the courts held that defendants may use the state's anti-SLAPP statute only against plaintiffs' claims with an actual impact on First Amendment activity. But in the third decision, the Texas high court held that defendants may use the anti-SLAPP statute against plaintiffs' claims that at least allege an impact on First Amendment activity.

Anti-SLAPP statutes will continue to evolve through the judicial process — balancing plaintiffs' rights to bring legitimate claims against defendants' interests in curbing suits that chill First Amendment rights — and sometimes in opposite directions.

California Supreme Court Limits Reach of Anti-SLAPP Statute in Tenure Denial Case

The California Supreme Court clarified an issue on which the state's Courts of Appeal were divided: how to determine when a claim "aris[es] from" activity protected by the anti-SLAPP statute.

In Park v. Board of Trustees of the California State University, a unanimous court held that a claim so arises "only if the speech or petitioning activity itself is the wrong complained of. ..."[1] Accordingly, the court rejected a university's attempt to quickly dismiss, as a SLAPP, a professor's claim that he was denied tenure because of national origin discrimination.

Sungho Park, an assistant professor at California State University, sued the university alleging that he was denied tenure because he is Korean. The university moved to dismiss under California's anti-SLAPP statute, which provides:

A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.[2]

The trial court denied the motion. It held that Park's claim did not "arise from" the university's protected speech, but rather was "based on" the university's decision to deny him tenure. A divided Court of Appeal reversed. The appellate court reasoned that the claim did "arise from" protected speech because the university's decision "rested on" protected communications in an official proceeding.[3]

The California Supreme Court reversed and remanded. It held that the university's tenure denial was not itself "an act in furtherance of the right of petition or free speech" under the anti-SLAPP statute. The anti-SLAPP statute does not apply merely because an action or decision the plaintiff complains of was arrived at, or conveyed, by means of speech or petition:

[A] claim is not subject to a motion to strike simply because it contests an action or decision that was arrived at following speech or petitioning activity, or that was thereafter communicated by means of speech or petitioning activity. Rather, a claim may be struck only if the speech or petitioning activity itself is the wrong complained of, and not just evidence of or a step leading to some different act for which liability is asserted.[4]

The court pointed out that in a discrimination case, liability does not arise from speech or an illicit animus alone. Rather, "[w]hat gives rise to liability is not that the defendant spoke, but that the defendant denied the plaintiff a benefit, or subjected the plaintiff to a burden. ..."[5]

A contrary interpretation of the anti-SLAPP statute, the court said, could doom most employment-related lawsuits. The court rejected the university's argument that its tenure decision and the communications leading up to it were "intertwined and inseparable."[6] It also rejected the argument that the tenure decision is a matter of public interest; that issue had no bearing on whether the decision is protected activity under the anti-SLAPP statute.[7]

Park demonstrates that even a broad anti-SLAPP statute such as California's is not unbounded. Merely characterizing the defendant's actions as, or connected to, protected "speech" will not trigger the anti-SLAPP law's expedited motion to dismiss procedure. The defendant's actions must themselves be actions in furtherance of protected speech. In other words, for the anti-SLAPP statute to apply, the plaintiff's claim must necessarily depend on that speech.

Massachusetts Supreme Judicial Court Tightens Up Anti-SLAPP Statute in Employee Defamation Case

The Massachusetts Supreme Judicial Court further restricted the application of the state's anti-SLAPP statute in Blanchard v. Steward Carney Hospital Inc.[8]

The statute had already been restricted in Duracraft v. Holmes Products Corp.,[9] wherein the court held that a defendant may bring a special motion to dismiss only where a plaintiff's claim is "solely" based on protected petitioning activity. The new Blanchard restriction allows a plaintiff to defeat a special motion to dismiss by demonstrating that the plaintiff's claim was "not brought primarily to chill" petitioning activity.

In Blanchard, nurses sued a hospital for defamation over statements that the hospital's president made to the Boston Globe and by hospital-wide e-mail related to allegations of abuse in the hospital's psychiatric unit. In statements to the Boston Globe, the hospital's president referred to a decision to "replace" the nurses and "start over on the unit." In his hospital-wide e-mail, the president accused the nurses of not acting in the best interest of patients and advised of the hospital's decision to terminate them.

The hospital filed a special motion to dismiss under Massachusetts' anti-SLAPP statute, which provides:

In any case in which a party asserts that the civil claims, counterclaims, or cross claims against said party are based on said party's exercise of its right of petition under the constitution of the United States or of the commonwealth, said party may bring a special motion to dismiss.[10]

The trial court denied the motion. It held that the hospital did not meet its threshold burden of showing that the defamation claim was "based on" protected petitioning. The appeals court reversed in part, holding that the hospital president's statements to the Boston Globe (but not his related e-mail) did constitute protected petitioning, and thus the burden shifted to the plaintiff nurses on remand. But the appeals court also concluded that the nurses could not meet their merits burden to survive the motion.

The Supreme Judicial Court agreed with the appeals court that the hospital's statements to the Boston Globe constituted petitioning activity, but disagreed that the nurses could not still survive a special motion to dismiss. Under the anti-SLAPP statute, the nurses could still attempt to show that the hospital's petitioning was without any reasonable factual support or any arguable basis in law — "sham" petitioning.[11]

Alternatively, the nurses could demonstrate that their "claim was not primarily brought to chill the [hospital's] legitimate petitioning activities."[12] In other words, the nurses could defeat a special motion to dismiss by simply demonstrating — via pleadings and affidavits — that their primary goal was "not to interfere with and burden [the hospital's] petition rights, but to seek damages for the personal harm" caused.[13]

In creating this alternative, non-statutory defense to an anti-SLAPP special motion to dismiss, the court sought to address:

a long recognized difficulty in the statute. It is one rooted in the fact that both parties enjoy the right to petition, including the right to seek redress in the courts. The anti-SLAPP statute is meant to subject only meritless SLAPP suits to expedited dismissal, yet it nonetheless may be used to dismiss meritorious claims not intended primarily to chill petitioning.[14]

Blanchard reflects an ongoing concern by some courts that anti-SLAPP statutes may be used for purposes other than which they were intended.

Texas Supreme Court Expands Anti-SLAPP Statute in Emotional Distress Case

The Texas Supreme Court went in the opposite direction of California and Massachusetts in Hersh v. Tatum. There, the court held that a defendant may obtain early dismissal of a lawsuit based on alleged First Amendment activity even if the defendant denies the allegation of First Amendment activity. [15]

Hersh arose from the suicide of Paul Tatum, the plaintiffs' son, hours after he wrecked his mother's car. Paul's obituary stated only that he died as a result of injuries from the car crash. Three weeks later, the Dallas Morning News published a column advocating for transparency in obituaries when the cause of death is suicide.

The column didn't mention Paul, but included enough detail to identify him and his obituary as the subject. The Tatums then sued the newspaper and columnist for defamation. They also sued Julie Hersh, an advocate for and writer on suicide prevention, for intentional infliction of emotional distress, claiming that Hersh directly communicated with and encouraged the other defendants to write the column criticizing Paul's obituary.[16]

Hersh denied communicating with the other defendants about Paul, but argued that, even if she had, the suit should be dismissed under Texas' anti-SLAPP statute, which provides:

If a legal action is based on, relates to, or is in response to a party's exercise of the right of free speech, right to petition, or right of association, that party may file a motion to dismiss the legal action.[17]

Hersh argued the Tatums' claim was "based on, relates to, or is in response to" her alleged communications about suicide prevention, a matter of public concern. The Tatums responded that Hersh could not invoke the anti-SLAPP law while also denying that she had communicated with the other defendants about Paul.[18]

The trial court sided with Hersh, but the appeals court reversed and remanded, holding that the anti-SLAPP statute did not apply because Hersh denied making the very speech required to invoke the statute.

The Texas Supreme Court reversed and dismissed the Tatums' claims. It didn't matter, the court said, that Hersh denied engaging in the claimed protected speech. The Tatums' allegations alone were enough to show that the lawsuit was "based on" Hersh's exercise of free speech:

The basis of a legal action is not determined by the defendant's admissions or denials but by the plaintiff's allegations. ... When it is clear from the plaintiff's pleadings that the action is covered by the Act, the defendant need show no more.[19]

The court also held that Hersh's alleged speech covered a matter of public concern — suicide prevention and awareness — and that the Tatums failed to establish a prima facie case of intentional infliction of emotional distress.

In contrast to the California and Massachusetts decisions, the Texas decision expands the scope of an anti-SLAPP statute — to allegations of First Amendment protected activity even when the special movant denies engaging in that activity. These three recent decisions from opposite corners of the country highlight a still evolving interpretation of anti-SLAPP laws.

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[1] 2 Cal. 5th 1057, 1060 (May 4, 2017) (emphasis in original).

[2] Cal. Code Civ. Proc. § 425.16(b)(1).

[3] Park, 2 Cal. 5th at 1061-62.

[4] Id. at 1060 (emphasis in original).

[5] Id. at 1066.

[6] Id. at 1069.

[7] Id. at 1072.

[8] 477 Mass. 141 (May 23, 2017).

[9] 427 Mass. 156 (1998).

[10] Mass. Gen. Laws Ann. ch. 231, § 59H (emphasis added).

[11] Blanchard, 477 Mass. at 148.

[12] Id. at 160.

[13] Id.

[14] Id. at 143.

[15] No. 16-0096, ___ S.W.3d ___ [2017 WL 2839873] (Tex. June 30, 2017).

[16] Id. at *1-2.

[17] Tex. Civ. Prac. & Rem. Code § 27.003(a) (emphasis added).

[18] Hersh, 2017 WL 2839873, at *2.

[19] Id. at *4.