

A Matter of Interpretation

Is Application of the Bay State's Anti-SLAPP Statute Too Broad?

By ROBERT S. MURPHY Jr.

In 2006, concerned citizens of the town of Falmouth filed suit in Suffolk Superior Court seeking review of a decision of the state Department of Environmental Protection. The suit named both the department and the town. The town responded with counterclaims against the plaintiff/citizens for malicious prosecution and abuse of process, essentially claiming that action was only brought as a tactic to delay the community's plan to construct a sewer collection and treatment system.

What makes the case remarkable was the town's aggressive choice to counterclaim against its residents for protesting proposed land development. The trial court recently dismissed the town's counterclaim under the provisions of the anti-SLAPP statute and awarded the plaintiff/citizens \$30,000 in fees expended in defense of the town's counterclaims. This case demonstrates how the reach of the anti-SLAPP statute has evolved.

In 1994, Massachusetts enacted the so-called anti-Strategic Lawsuit Against Public Participation (anti-SLAPP) law. Since then, the statute has been widely used in many circumstances perhaps never envisioned by the original lawmakers.

The Mass. Supreme Judicial Court (SJC) describes the original legislative purpose behind anti-SLAPP as a quick method to dispose of meritless suits brought by large private interests intended to deter or punish common citizens from petitioning the government in lawful exercise of their political or legal rights. Plaintiffs in SLAPP lawsuits commonly allege that the defen-

dant defamed them, maliciously prosecuted claims, or otherwise unlawfully interfered with the plaintiff's business interests.

When the first cases involving anti-SLAPP reached the trial court, many judges inferred the existence of a requirement that the matter involve a matter of 'public concern.' The SJC subsequently rejected that narrow interpreta-

When a defendant's right to petition clashes with a plaintiff's right to recover for injury allegedly caused by the defendant, the power and breadth of the anti-SLAPP statute becomes clear.

The statute identifies five types of actions that broadly define the right to petition, which the law is intended to protect. They include what most would agree is classic

- That the claimed petitioning activities are devoid of any reasonable factual support or any arguable basis in law; and

- That he or she has suffered harm.

If the plaintiff cannot meet this burden, the sanction is that the plaintiff's case is dismissed, and costs and attorney's fees incurred by the defendant in bringing the special motion to dismiss are awarded. Some argue that because of the broad language used in the statute, the Legislature has created a cure that is worse than the affliction.

Since 1994, more than 600 decisions involving the anti-SLAPP statute have been reported. Use of the anti-SLAPP statute is widespread because it is broadly phrased to apply to almost any enterprise or action where business activity, citizens' interests, and government regulation or control do or could possibly intersect. The language of the statute provides the special motion-to-dismiss remedy to a defendant who claims her actions are based on the exercise of her "right to petition under the Constitution of the United States or of the Commonwealth."

In January 2007, the SJC re-examined the anti-SLAPP statute in *Cadle Company v. Schlichtmann*. Schlichtmann was engaged in a lengthy legal battle with a debt collection agency, Cadle, over certain debts allegedly owed. Interestingly, Schlichtmann was the attorney featured in the book *A Civil Action* and portrayed by John Travolta in the movie of the same name. Schlichtmann also repre-

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tion of the statute, finding that the Legislature specifically considered and rejected such a limitation.

As a result, Massachusetts appears to be the only state instituting anti-SLAPP that failed to include public concern as an element of the petitioning activity. Thus, the Bay State's anti-SLAPP statute has been invoked in such cases as a trademark dispute between corporations; a dispute between two psychiatrists, one of whom rendered an unfavorable expert opinion concerning the other's medical practices; a lawsuit between a divorced couple over the veracity of the ex-wife's claim of physical abuse; and breach-of-contract actions between commercial landlords and tenants. While important to the litigants, these cases are hardly the *David v. Goliath* scenarios involving political rights that the law was arguably initially aimed at.

petitioning activity, such as: making statements at a legislative hearing, voicing one's opinion regarding an issue under consideration in a governmental proceeding, making statements aimed at encouraging governmental review of an issue, and enlisting public participation to affect governmental review. The definition also contains a catch-all clause protecting "any other statement falling within constitutional protection of the right to petition government."

The protection provided by the anti-SLAPP statute (G.L. c. 231, §59H) allows defendants in SLAPP suits to file a special motion to dismiss the case early in the proceedings. If the defendant can show that the plaintiff's claims of harm are solely based on the certain petitioning activities described above, the burden shifts to the plaintiff to demonstrate the following:

sented clients who allegedly had been victimized by Cadle's "fraudulent business practices." He allegedly made numerous statements to the news media claiming Cadle was doing business illegally, using strong-arm tactics, hiding assets, and that the principal of Cadle was a fugitive from justice.

Schlichtmann also set up a Web site that described Cadle as "a collection arm of a fraudulent enterprise" whose "sole purpose and intent ... is to defraud consumers and businesses." The Web site provided links to news articles containing Schlichtmann's statements, copies of demand letters, court pleadings and documents, and contact information for Schlichtmann's law firm.

Based on the content of the Web site, Cadle filed suit against Schlichtmann alleging defamation, libel, tortious interference with advantageous contractual business relations, and unfair and

deceptive trade practices. It sought monetary damages and a permanent injunction against Schlichtmann for maintaining what it claimed were false accusations on his Web site. This lawsuit demonstrates the clash of rights that the anti-SLAPP statute is intended to address.

Certainly Schlichtmann had the right to petition the Commonwealth to take action against Cadle. Meanwhile, Cadle had the right to try and prevent or recover for damage from what it claimed were demonstrably false statements.

The SJC concluded that Schlichtmann had created the Web site "at least in part to generate more litigation to profit himself and his law firm." Based on that finding, the court ruled that his special motion to dismiss was properly denied because the statements were published not as a member of the public who had been injured by the alleged prac-

tices, but as an attorney advertising his legal services.

It is this type of mixed-motive scenario that forces courts to make difficult decisions between one person's right to petition and another's right to prevent or obtain relief for damages caused by dissemination of false information. To further complicate these issues, the court's decision is usually made shortly after a suit is filed and before a plaintiff is fully able to develop the factual basis of its claim through discovery.

The Massachusetts anti-SLAPP statute was passed despite then-Gov. William Weld's veto, which described the statute's effect as "a bludgeon where the scalpel will do." It cannot be denied that anti-SLAPP has altered the legal landscape in Massachusetts. It is a potent weapon for those who are petitioning for change while seriously affecting the ability or willingness

of people to bring suit for defamation or injury to business interests.

As a practical matter, the anti-SLAPP statute seems to give the upper hand to a defendant. If the plaintiff fails in her attempt to exercise her rights, she must pay the defendant's attorney's fees and costs. No such risk exists for the defendant if the special motion to dismiss is denied.

This reality, coupled with one's ability via the Internet to widely disseminate information, creates challenging issues for lawyers, litigants, and the courts, for which there are no easy answers.❖

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