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11-5-2018

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### Recommended Citation

Freeman, Aaron, "The Future of Anti-SLAPP Laws" (2018). *SLU Law Journal Online*. 26.  
<https://scholarship.law.slu.edu/lawjournalonline/26>

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## The Future of Anti-SLAPP Laws

By Aaron Freeman\*

### Introduction

On October 15, 2018, The Honorable S. James Otero, United States District Court Judge for the Central District of California granted President Donald Trump's special motion to dismiss Stephani Clifford's (a.k.a. Stormy Daniels) defamation complaint.<sup>1</sup> The special motion was made pursuant to a Texas anti-SLAPP statute that is meant to "encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government. . ." <sup>2</sup> Anti-SLAPP laws have been used recently by unpopular figures to defend against lawsuits, including a defamation claim against the controversial InfoWars owner Alex Jones and a slander suit made by a former employee against ExxonMobil.<sup>3</sup> Despite being used by controversial or unpopular parties, the purpose of the anti-SLAPP laws is to protect the right of less powerful persons to participate in public discourse.

### History

In the late eighties and early nineties, a growing trend began to emerge of multimillion-dollar lawsuits being filed against private citizens and organizations to prevent them from speaking out on political issues.<sup>4</sup> The lawsuits were filed to prevent citizens and groups from circulating petitions, publicly voicing criticism, engaging in public demonstrations,

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<sup>1</sup> Clifford v. Trump, 2018 WL 4997419 at \*1 (C.D. Cal. 2018).

<sup>2</sup> *Id.* at \*6.

<sup>3</sup> Elizabeth Williamson, *Alex Jones, Pursued Over Infowars Falsehoods, Faces a Legal Crossroads*, The New York Times (July 13, 2018),

<https://www.nytimes.com/2018/07/31/us/politics/alex-jones-defamation-suit-sandy-hook.html>; Daniel Fisher, *ExxonMobil Wins Anti-SLAPP Motion in Texas, While Landry's Loses*, Forbes (February 24, 2017).

<sup>4</sup> George Pring & Penelope Canan, "Strategic Lawsuits Against Public Participation" ("SLAPPS"): *An Introduction For Bench, Bar And Bystanders*, 12 Bridgeport L. Rev. 937, 938 (1992).

and many other acts.<sup>5</sup> These civil actions came to be known as Strategic Lawsuits Against Public Participation, or SLAPPs for short.<sup>6</sup>

The goal of a SLAPP, as the name suggests, is to stifle public participation from opposing groups by imposing substantial legal, personal, and financial costs.<sup>7</sup> The lawsuits are typically filed by one side of a public or political dispute to punish or prevent opposing points of view.<sup>8</sup> The vast majority of SLAPPs as actual lawsuits “are losers,” but they still accomplish their goal of imposing costs and chilling speech.<sup>9</sup> They can take the form of defamation claims, business torts, or even constitutional or civil rights claims.<sup>10</sup> According to Pring and Canan, this practice had become widespread, and thousands of people were being sued in order to prevent them from taking part in the political process.<sup>11</sup> Even more surprisingly, the typical target of these lawsuits were not extremists or professional activists, but typical, middle-class Americans trying to exercise their First Amendment rights.<sup>12</sup>

In response to this trend, states began to pass Anti-SLAPP laws in order to provide an avenue for victims of SLAPP lawsuits to dismiss and deter them.<sup>13</sup> As of 2017, nearly 30 states as well as Washington D.C. have adopted some form of Anti-SLAPP legislation.<sup>14</sup> The laws have wide spread bi-partisan support and have passed in both red and blue states.<sup>15</sup> Anti-SLAPP laws vary from state to state, but most apply a two-step process similar to that in California. First, the defendant must make a showing that the acts the plaintiff complained of are protected under the statute.<sup>16</sup> The range of protected activities vary from state to state. In California, where

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 939.

<sup>7</sup> *Id.* at 942.

<sup>8</sup> *Id.* at 941.

<sup>9</sup> *Id.* at 944.

<sup>10</sup> Prings *supra* note 4 at 947.

<sup>11</sup> *Id.* at 940.

<sup>12</sup> *Id.*

<sup>13</sup> Jeremy Rosen & Felix Shafir, *Helping Americans to Speak Freely*, 18 *Federalist Soc’y Rev.* 62, 63 (2017).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

the protections are very broad, any acts in furtherance of defendant's right to petition or free speech in connection to a public issue are protected.<sup>17</sup> In contrast, in New York, where the protections are narrow, only actions involving public petition and participation are protected.<sup>18</sup> Second, the burden shifts to the plaintiff to show that the complaint is legally sufficient and is supported by sufficient evidence to support a judgment in their favor.<sup>19</sup> If the court finds in favor of the defendant the lawsuit will be dismissed or stricken and the defendant will be awarded attorney fees.<sup>20</sup> However, if the motion is denied, some states allow the plaintiff to recover attorney fees associated with the motion if they can show the motion was frivolous and meant to delay the proceeding.<sup>21</sup> In addition to these remedies, the filing of an anti-SLAPP motion triggers other procedures that can impact the outcome of a proceeding. For example, all discovery proceedings are stayed when the motion is filed.<sup>22</sup> In some states, such as California, motions are automatically appealable following the judge's ruling regardless of whether they were granted or denied.<sup>23</sup> These procedures can cause significant delays and costs in a proceeding.<sup>24</sup>

### Problems Facing Anti-SLAPP Laws

More recently, some of the broader statutes have come under fire because they can and are being used in cases only tangentially related to public issues or actions protected by the First Amendment.<sup>25</sup> Nina Golden, in the Rutgers Journal of Law and Public Policy, gives the example of *Hunter v. CBS Broadcasting*, an employment discrimination case out of California.<sup>26</sup> In that case, CBS successfully argued to a California appellate court that their hiring decisions for on-air weather anchors were acts in furtherance of the networks free speech and entitled to protection under the

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<sup>17</sup> *Id.*

<sup>18</sup> Rosen *supra* note 10 at 66.

<sup>19</sup> *Id.* at 64.

<sup>20</sup> *Id.*

<sup>21</sup> Nina Golden, *SLAPP Down: The Use (and Abuse) of Anti-SLAPP Motions to Strike*, 12 Rutgers J. L. & Pub. Pol'y 426, 429 (2015).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 430.

<sup>26</sup> Golden *supra* note 21 at 449.

anti-SLAPP law.<sup>27</sup> Golden also argues that the overbroad nature of the law contributes to its overuse, as well as saying that courts should narrow their interpretation of the law.<sup>28</sup>

In contrast, narrow statutes run the risk of providing inadequate protections. For example, New York's anti-SLAPP is narrow and has been construed by the courts to the point that they only protect against half of all SLAPPs.<sup>29</sup> The law only covers acts that directly challenge an application or permission, meaning the act must relate to a person or organization who has applied for or obtained a permit, zoning change, lease, license, certificate or other entitlement or permission from the government.<sup>30</sup>

While these laws have faced criticism, the next major development in this area is their applicability in federal courts. Circuits have split on the issue of whether the state anti-SLAPP laws conflict with the Federal Rules of Civil Procedure 12 and 56 which govern when a case can be dismissed pre-trial.<sup>31</sup> The core of the dispute is whether the anti-SLAPP laws apply a different standard than Rules 12 and 56.<sup>32</sup> This circuit split will have to be settled in one of two ways: either the Supreme Court will have to decide the applicability of state anti-SLAPP laws in federal diversity cases, or Congress can pass its own federal version of an anti-SLAPP law. The latter option would prevent parties from forum shopping for the most favorable anti-SLAPP laws for their position.<sup>33</sup>

## Conclusion

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<sup>27</sup> *Id.* at 449-454.

<sup>28</sup> *Id.* at 454-461.

<sup>29</sup> Rosen *supra* note 10 at 67.

<sup>30</sup> *Id.* at 66.

<sup>31</sup> Compare *Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328, 1333-37 (U.S. App. D.C. 2015) (holding that the Washington D.C. anti-SLAPP law conflicted with FRCP 12 and 56) and *Godin v. Schencks*, 629 F.3d 79, 81, 92 (1st Cir. 2010) (holding that the state's anti-SLAPP law applies); see also *Henry v. Lake Charles American Press, L.L.C.*, 566 F.3d 164, 168-69 (5th Cir. 2009); see also *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 973 (9th Cir. 1999).

<sup>32</sup> See *Abbas*, 783 F.3d at 1334-1335.

<sup>33</sup> See Rosen *supra* note 10 at 68-70.

Anti-SLAPP laws have become an important protection for the exercise of First Amendment rights. Without them individuals and organizations would be subject to frivolous suits meant to intimidate and punish them for engaging in the political process. Many of the states are still struggling to find a proper balance between providing the desired protection and not allowing the law to be abused or misused. The next major question that needs to be addressed is whether state anti-SLAPP laws should apply in the federal courts or whether Congress should enact its own version of the law.

Edited by Carter Gage