

Litigation Alert

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Upping the Ante: New York Expands Anti-SLAPP Protections

Gov. Andrew Cuomo has signed into law an amendment to New York's anti-SLAPP (Strategic Lawsuit Against Public Participation) statute. The amendment, which took effect on Nov. 10, significantly broadens the law's protections. Hailed by the governor as a triumph for First Amendment rights, the revamped anti-SLAPP law is especially important to the news, media and entertainment organizations that operate in the state. The protections under the law may be limited, however, as there is substantial doubt as to whether some of its provisions will apply in federal courts—at least in the Second Circuit—which gives plaintiffs a path to potentially circumvent the law's effect. Nevertheless, for defendants in state court facing claims that target their public statements or other First Amendment-protected activities, New York's amended anti-SLAPP law may provide some welcome relief.

Key Takeaways:

- The amended anti-SLAPP statute significantly broadens the category of conduct that triggers the law's protections, and will cover a wide range of speech and other forms of communication—both online and in traditional media.
- Defendants can make an anti-SLAPP motion as either a motion to dismiss or as a motion for summary judgment if discovery is needed to support the motion.
- An anti-SLAPP motion shifts to the plaintiff the burden of demonstrating that their claims are properly alleged at the pleading stage, and that they are supported by sufficient evidence at the summary judgment stage.
- The filing of an anti-SLAPP motion stays all discovery and other proceedings, but plaintiffs may seek permission to take discovery necessary to oppose the motion.



- The amended law makes an award of attorneys' fees mandatory for defendants who prevail on an anti-SLAPP motion.

New York's Old Anti-SLAPP Law

Under New York's prior anti-SLAPP law (N.Y. Civil Rights Law 70-a and 76-a), enacted nearly 30 years ago, if a defendant were able to demonstrate that the plaintiff's claim targeted the defendant's "public petition and participation," the burden would shift to the plaintiff to demonstrate that its claim had "a substantial basis in law" or was "supported by a substantial argument for an extension, modification, or reversal of existing law." Courts have interpreted this standard as requiring the plaintiff to point to specific factual allegations that support each element of its claim—essentially the inverse of the burden normally carried by the defendant on a motion to dismiss. If the motion was made after discovery, the plaintiff would have to demonstrate that the claim had a "substantial basis in fact"—again shifting to the plaintiff the burden that would ordinarily be borne by the defendant at the summary judgment phase.

Defendants rarely invoke the law, however, because the definition of public petition and participation was limited

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to applications for public permits or similar government entitlements, limiting its use primarily to real estate developers defending claims targeting their applications for building permits. Defendants that were able to invoke the law's protections were not entitled to recover their attorneys' fees as a matter of course, as fee awards were left to the court's discretion. These limitations earned New York's old anti-SLAPP law a "D" grade from the Public Participation Project.

Revisions to New York's Anti-SLAPP Law

The recent amendment to New York's anti-SLAPP law preserves the "substantial basis" standard but makes a number of changes that significantly expand the law's reach and effect.

Definition of a SLAPP is dramatically expanded

The amendment to New York's anti-SLAPP statute broadens the definition of public petition and participation, the conduct that triggers the law's protections, to include "any communication in a place open to the public or a public forum in connection with an issue of public interest" as well as "any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition." This definition covers a wide range of speech and other forms of communication—both online and in traditional media.

Defendant's speech must still relate to an issue of public interest, but the revised law directs that that term is to be "construed broadly" and will encompass "any subject other than a purely private matter."

In states that have similarly broad anti-SLAPP laws, they have been applied to a wide variety of claims—including everything from defamation, invasion of privacy and right of publicity, to employment discrimination, racial harassment and products liability. We can expect that New York's amended anti-SLAPP law will apply to a similar variety of claims.

Awarding attorneys' fees and costs is now mandatory

Not only does the amendment make the award of attorneys' fees to prevailing defendants mandatory, the New York statute contains no corollary provision allowing for an award of attorneys' fees to plaintiffs who defeat an anti-SLAPP motion—unlike the anti-SLAPP statutes

in other states including California. The prospect of recovering their attorneys' fees, with little risk of having to pay their adversary's fees, will no doubt encourage defendants that believe they are facing a SLAPP suit to invoke the law's protections.

An anti-SLAPP motion may be made either at the outset or after discovery

The amendment clarifies that an anti-SLAPP motion may take the form of either a motion to dismiss made at the outset of the case or a motion for summary judgment filed after discovery. A defendant may choose to take discovery in order to rebut an expected argument that the plaintiff's claim has a substantial basis, and present that discovery as part of an anti-SLAPP motion at the summary judgment stage. Doing so forces the plaintiff to provide evidence supporting each element of the claim, rather than merely resting on factual allegations.

An anti-SLAPP motion automatically stays discovery and other proceedings

The amended law clarifies that all discovery and other proceedings will be stayed pending the resolution of an anti-SLAPP motion. While New York law already provides for a stay of discovery upon the filing of a motion to dismiss or for summary judgment, a motion under the revised anti-SLAPP law will also stay other proceedings, such as a motion for a preliminary injunction.

The stay of discovery is not absolute. As with other motions to dismiss or for summary judgment, a plaintiff facing an anti-SLAPP motion may seek permission to take discovery that is needed to oppose the motion. Plaintiffs will most likely use this procedure in response to anti-SLAPP motions at the summary judgment stage, where they must come forward with evidence that supports each element of their claim.

New York's Revised Anti-SLAPP Law May Not Apply in Federal Courts

Although New York's revised anti-SLAPP law contains important new protections for defendants facing claims targeting their public statements, those protections may be subject to a significant limitation—they may not apply in federal court.

In *La Liberte v. Reid*, a recent case applying California's analogous anti-SLAPP statute, the Second Circuit held that the California law was a form of procedural rule,

which cannot apply in federal court where a conflict exists with the federal procedural rules. The court reasoned that the California law—which imposes a “probability” standard on the plaintiff to defeat a motion to strike—conflicted with the more liberal “plausibility” standard imposed on defendants to win dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure, and with the “no genuine dispute of material fact” standard imposed on defendants to prevail on motions for summary judgment under Rule 56. (Read our summary of the Second Circuit’s decision [here](#).)

The Second Circuit would likely apply a similar analysis to New York’s new anti-SLAPP law. Like the California law, New York’s statute shifts the burden from the defendant to the plaintiff, and may therefore be seen as conflicting with the standards for motions to dismiss and for summary judgment under the federal rules.

A split is developing among the circuits as to whether state anti-SLAPP laws apply in federal court. While the Fifth, Eleventh and D.C. circuits have reached the same conclusion as the Second Circuit, the First and Ninth circuits have held the opposite, finding no conflict between the Federal Rules of Civil Procedure and the anti-SLAPP statutes of Maine and California, respectively. In a 1999 decision, the Ninth Circuit reasoned that the federal rules can coexist with state anti-SLAPP laws, which are “crafted to serve an interest not directly addressed by the federal rules: the protection of ‘the constitutional rights of freedom of speech and petition for redress of grievances.’” If the circuit split persists or even widens, the U.S. Supreme Court may weigh in on the issue.

A Pending Federal Anti-SLAPP Bill Would Provide Uniform Application in Federal Courts

There is also a possibility that legislative action will resolve the issue of whether anti-SLAPP motions can be made in federal court. A federal anti-SLAPP bill, known as the Citizen Participation Act (H.R. 7771), is currently pending before Congress. If passed, it would not only provide a uniform procedure for defeating SLAPP suits in federal court to the exclusion of state anti-SLAPP laws, but also provide a vehicle to remove SLAPP suits to federal court.

The bill provides for a special motion to dismiss a SLAPP, which can be defeated only if the plaintiff shows that the claim is “both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment.” This standard appears to mirror those of the California and New York anti-SLAPP statutes as interpreted by the respective state courts. Like New York’s revised anti-SLAPP law, the federal bill would stay discovery pending resolution of an anti-SLAPP motion, and entitle a prevailing defendant to recover its attorneys’ fees.

The proposed federal anti-SLAPP law would also allow for the removal of SLAPP actions from state to federal courts, greatly enlarging the jurisdiction of the federal courts. Any state-law cause of action that targets a public statement on matters of public interest could be subject to removal to federal court, regardless of the amount in controversy or the citizenship of the parties.

Whether the proposed federal anti-SLAPP bill will gain enough support to be enacted into law remains to be seen.

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