



Legislative Affairs
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2019 – 2020 Legislative Memorandum

Subject: Strengthening New York’s Anti-SLAPP Statute

Bill(s): A.5991-A (Weinstein) / S.52-A (Hoylman)

The New York Civil Liberties Union (NYCLU) strongly supports A.5991-A (Weinstein) / S.52-A (Hoylman), which would strengthen an existing law that deters SLAPPs – frivolous lawsuits intended to punish First Amendment-protected speech.

What’s a SLAPP?

Imagine the following scenario: a journalist publishes truthful, accurate information suggesting an elected official is unfit for office. The report damages the official’s public image, but instead of responding on the merits, the official – who is wealthy and powerful – sues the journalist for defamation and invasion of privacy. The official *knows the journalist’s information is true and his lawsuit baseless*, but that doesn’t matter, because he also knows the journalist doesn’t have the money or time to defend the suit and call the official’s bluff. The journalist knows this too, and so, faced with financial ruin simply for telling the truth, she retracts her report and issues a public apology to the official, who then withdraws a lawsuit he knows he would have lost if he’d gone forward. The journalist is wrongfully silenced and chastened, the public is denied valuable information, and the official remains convinced that the “truth” is whatever he can afford.

That sort of lawsuit is called a “SLAPP,” or Strategic Lawsuit Against Public Participation. Usually filed by a famous figure or public official against outspoken critic, a SLAPP isn’t meant to be won; it’s just meant to be so ruinously expensive and time-consuming to defend that the victim agrees to self-censor if the suit is dropped. SLAPPs are one of the many ways powerful figures use the legal system to punish critics, silence journalists and whistleblowers, and stifle the flow of information and opinions protected by the First Amendment. And as social media has amplified the public’s capacity to speak truth to power, SLAPPs have grown commonplace.

Because SLAPPs threaten free speech, a free press, open government, and an informed national debate, many states – roughly 30 – have adopted “anti-SLAPP” laws that allow courts to quickly dismiss SLAPPs *and* punish those who file them. New York has one, but it’s narrow and out-of-date, applying only in the context of government permitting and licensing. It offers nothing to journalists, whistleblowers, authors, publishers, artists, critics, and commentators who nowadays suffer litigation as the price of telling the truth.

A.5991-A / S.52-A would change that. It would make New York’s anti-SLAPP law applicable to *any* lawsuit arising out of First Amendment-protected communication on issues of public concern, aligning New York’s speech and press protections with those of California, Texas, Louisiana, Nevada, Oregon, Colorado, and other states that recognize the threat SLAPPs pose to the exercise of First Amendment rights. The NYCLU strongly supports this bill, and urges you to do the same.

Details: Why New York’s Anti-SLAPP is Broken, and How this Bill Fixes It

Broad Protections for All Truthful Speech on Public Issues

A good anti-SLAPP law protects *all* speech on issues of public concern – not just speech in certain contexts, forms of media, or legal proceedings – and applies to *any* lawsuit arising out of *any* protected communication. It also defines “public concern” broadly, ensuring that anything the public deserves to know is fully protected.

New York’s current anti-SLAPP law, however, is far too narrow. It applies only to lawsuits brought by a “public applicant or permittee,” against a defendant who “report[s] on, comment[s] on, rule[s] on, challenge[s] or oppose[s] such application or permission.”¹ Essentially, it affords anti-SLAPP protection to just a tiny class of people who speak out about someone who has applied for a permit, zoning change, lease, license, certificate, or government entitlement, *or* for government permission to do something. The law does nothing for the much larger class of outspoken individuals who regularly suffer SLAPPs: journalists, authors, publishers, commentators, broadcasters, filmmakers, artists, humorists, and ordinary speakers who are sued into silence for speaking about issues of public importance *outside* the government permitting context.

This bill would expand New York’s anti-SLAPP protections to “any communication in a place open to the public or a public forum in connection with an issue of public concern” and “any other lawful conduct in furtherance of the exercise

¹ N.Y. Civ. Rights Law § 76-a(1)(a)

of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition” – the same level of protection afforded by California law, widely considered the best anti-SLAPP law in the country. California’s courts have construed that broad definition to cover almost any subject of public concern, wherever discussed, and New York’s courts would be on sure footing to do the same.

Speedy, Efficient Resolution that Keeps Defendant’s Costs Down

A well-constructed anti-SLAPP law allows the court to quickly identify and weed out SLAPPS. The defendant brings the alleged SLAPP to the court’s attention, the court puts the entire suit on hold, and after very limited discovery, requires the plaintiff demonstrate that the suit has enough merit to go forward. The court evaluates the plaintiff’s argument and issues a ruling in a matter of months, not years, efficiently dismissing SLAPPS and keeping defendants’ costs down, while – just as importantly – allowing genuinely aggrieved plaintiffs their day in court.

New York’s current anti-SLAPP law neither stays the lawsuit nor meaningfully accelerates the review process. But both features are critical, as *the whole point of a SLAPP is to make the lawsuit too expensive for the defendant to fight long enough for the court to see the case for what it is*. This bill fixes those critical flaws by providing for both a stay and expedited review.

Attorney Fee Awards to Deter SLAPP Filers

Lastly, an effective anti-SLAPP law *requires* a plaintiff whose SLAPP is dismissed to pay the defendant’s attorney fees. This is a crucial deterrent, as SLAPP plaintiffs almost always have greater resources than the defendants they harass and intimidate, and usually don’t care how much they spend as long as it costs the defendant too much to win. A mandatory fee-shifting provision eliminates that incentive altogether.

New York’s current anti-SLAPP law has a fee-shifting provision, but it makes a fee award optional, whereas most anti-SLAPP laws make such an award mandatory. The bill would make the award mandatory.

For the above reasons, the NYCLU urges lawmakers to support and pass this legislation.