Interstate Commerce Initiative

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Free Speech and Innovation Would Benefit From Federal Anti-SLAPP Law

As long as the common law legal system has existed, people have found ways to use it as a cudgel rather than a tool for seeking justice. When a pair of University of Denver professors termed this abuse of the legal system "Strategic Lawsuits Against Public Participation" (or SLAPP lawsuits), they were not identifying a new phenomenon. They did, however, succeed in ushering in a wave of state laws intended to address the issue.

SLAPP lawsuits can be defined as governments, businesses, or public officials using litigation for the purpose of chilling the target's free speech rights. Even when the defendant is reasonably confident of holding the legal high ground, the prospect of engaging in a long, drawn-out, and expensive legal battle to prove this can be sufficient to coerce the defendant into silence.

In response, 30 states and the District of Columbia have passed into law some form of anti-SLAPP law.[1] Generally, these laws

[1] West Virginia has no anti-SLAPP law, but does have certain case law precedent protecting defendants from SLAPP laws. Washington state and Minnesota passed anti-SLAPP laws, but had most or all of the law struck down by the courts.

Key Facts:

Many states have instituted so-called anti-SLAPP laws, which protect against frivolous lawsuits that aim to achieve their goals not on legal merit, but by saddling their targets with expensive litigation.

Strong anti-SLAPP laws can protect free speech and innovation from legal abuse perpetrated by powerful entities, but the current patchwork of state laws renders that protection less effective and threatens interstate commerce.

By passing federal anti-SLAPP legislation, Congress could execute on its constitutional mission to defend the free flow of interstate commerce by comprehensively protecting upstarts from costly suits attacking their right to speak and compete.

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allow defendants to request that the case be dismissed under the anti-SLAPP provisions early on, potentially allowing the defendant a quick resolution and, in some states, leaving the plaintiff liable for the defendant's legal fees. For a plaintiff to avoid having the lawsuit thrown out on anti-SLAPP grounds, they must prove that their case has a reasonable chance of succeeding.

NTUF began the Interstate Commerce Initiative to address the growing problem of states taxing and regulating beyond their borders. In the past, most Interstate Commerce Initiative analyses have looked at state actions which have a negative policy impact in their own right, an impact which is only exacerbated by cross-border reach.[2] Yet in this case, well-crafted anti-SLAPP laws can be conducive to free competition and speech.

In its Constitutionally-prescribed role as defender of the free flow of interstate commerce, Congress has a duty to consider how such a law might be needed to advance speech and innovation. Anti-SLAPP legislation remains an area that would benefit from Congress creating a single, uniform framework to resolve inconsistencies and uncertainty that exists in the current piecemeal approach.

Broader Applicability

The obvious flipside of the aforementioned number of states that have anti-SLAPP laws on the books is that 20 states do not.[3] A single federal standard would ensure that defendants can enjoy the same protections against frivolous lawsuits regardless of jurisdiction.

Not every anti-SLAPP law is created equal. Anti-SLAPP laws in the 30 states that *do* have them vary considerably on the particulars of what is protected and how. Arizona, for example, protects only statements made when petitioning the government as part of an initiative, referendum, or recall. Vermont, on the other hand, protects statements or actions connected to any issue of public interest.

And that's hardly the only area where anti-SLAPP laws can differ. Most states with such laws require the payment of legal fees by the plaintiff if the defendant successfully defends their case on anti-SLAPP grounds, but states such as Nebraska and Utah leave this up to the judge's discretion. Where Texas's law explicitly allows defendants who fail to have a case dismissed on anti-SLAPP grounds to immediately appeal the decision, New Mexico's does not.

In the past, the phrase "libel tourism" generally referred to the practice of filing libel suits in other countries with weaker free speech protections, such as the United Kingdom. Ever since recent federal efforts to limit this practice, the phrase has increasingly come to refer to the practice of choosing to file SLAPP suits in states without an anti-SLAPP law. In the absence of a uniform federal framework, it will be difficult to curtail this practice.

Whether state anti-SLAPP laws apply in federal courts is also somewhat of an open question at the moment. While district courts in Massachusetts and Maine have chosen not to abide by their states' anti-SLAPP laws, district courts in Utah, Georgia, and Indiana have done so. On the other hand, district and circuit courts have by and large chosen not to apply state anti-SLAPP laws to federal question cases.

Even where federal courts have allowed state anti-SLAPP laws to be invoked, they have occasionally been forced to ignore aspects of the laws as inconsistent with Federal Rules of Civil Procedure. While the Ninth Circuit has allowed defendants to invoke portions of California and Oregon anti-SLAPP laws under certain circumstances, it has not abided by aspects of these laws that limit the costly discovery phase.

[2] See NTUF publications regarding California's consumer privacy law, sales taxes on out-of-state businesses, and telemedicine restrictions, among others.
[3] Or 19, if one counts West Virginia's case law approach.

Broadly speaking, these inconsistencies leave prospective SLAPPers with three means of bypassing state anti-SLAPP statutes. First, they can engage in interstate "libel tourism" or "forum shopping," choosing a state without an anti-SLAPP law to file suit in. Second, they can file suit in federal court. And if even if the federal court in question has allowed state anti-SLAPP laws to apply in the past, there's the third option — file the suit under federal causes of action.

These relatively easy workarounds make it clear that anti-SLAPP law avoidance would be fairly straightforward even if each state in the country drafted and passed its own anti-SLAPP law. A federal standard would be far more effective at preventing gaming of the system.

A Bigger Problem in the Digital Age?

The need for federal action on anti-SLAPP legislation coincides with increasing attacks on Section 230 of the 1996 Communications Decency Act, which protects internet companies from being held liable for what their users choose to say and write. In the absence of Section 230, social media companies would have a strong incentive to heavily restrict what speech is allowed on their platforms, lest it expose them to litigation.

In response to proposed legislation by Senator Josh Hawley and an executive order by President Donald Trump, both aiming to weaken Section 230, the National Taxpayers Union spearheaded a letter campaign, signed by 50 legal experts and 27 advocacy organizations, to preserve Section 230. Not only did this letter highlight Section 230's role in protecting free speech, but it also noted the importance of the law for innovation, as it shields small start-ups from potentially crippling litigation.

But just as Section 230 has taken on greater importance with the rise of social media, so too must anti-SLAPP protections. One notable example of the increased role SLAPP suits can play as social media takes an ever greater role came when sitting Representative Devin Nunes sued two parody accounts (@DevinCow and @DevinNunesMom) as well as Twitter for $250 million.

Though Nunes represents the state of California and Twitter is headquartered in the state, California has one of the strictest anti-SLAPP laws in the country. Nunes chose to file his suit in Virginia, a state that has a less stringent anti-SLAPP law.

Though the case in question may appear fairly humorous due to the circumstances, the underlying reality is anything but — a Twitter parody account which at the time had less than two thousand followers was threatened with a $250 million suit. Nunes is still pursuing legal action over a year later.

Thanks to the attention the case received, administrators of the Twitter accounts in question have been able to raise over $90,000 on GoFundMe to defray legal expenses related to the case. But that is no alternative to an adequate anti-SLAPP framework; the average Twitter user should not have to count on a donor campaign to be protected from frivolous lawsuits.

And Twitter isn't the only platform whose users have faced SLAPP suits. Four residents of Uniontown, Alabama (a state with no anti-SLAPP law on the books) who started a Facebook page to advocate against the dumping of coal ash in a local landfill found themselves hit with a $30 million defamation suit. Eventually the ACLU stepped in to represent the defendants, resulting in the suit being dropped.

These are just two examples of how innocuous usage of social media platforms can expose one to intimidating legal action. As social media expands the ability of everyday Americans to interact with one another, so too must Congress protect that speech from unfounded legal action.

Threats to Market Competition

While SLAPP suits are generally thought of as a free speech issue, they can have profound consequences for start-ups or smaller businesses hoping to compete with larger, established businesses as well. New and emerging businesses seeking to carve out their niche in the market can be smothered in the crib by frivolous lawsuits.

An example of this occurred when ADP, an established player in the payroll-processing industry, hit up-and-comer Zenefits with a defamation lawsuit over comments made by Zenefits CEO Parker Conrad. In many circumstances, this easily could have turned into an albatross for Zenefits, saddling the start-up with legal defenses and draining resources it could not afford to devote.

Fortunately for Zenefits, however, ADP filed its defamation suit in California, a state with one of the most expansive anti-SLAPP laws in the country. The speech at issue in ADP's suit was covered by California's anti-SLAPP law, ultimately proving pivotal in ADP's decision to settle the dispute largely in Zenefits's favor.

Yet while Zenefits was able to dodge a bullet in this case, many other states with anti-SLAPP statutes may not be broad enough to cover the conduct in question. Not only does California's anti-SLAPP law cover speech made in front of a governmental body, but also any statements or actions made "in a place open to the public or a public forum in connection with an issue of public interest" or "in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."

Other states define what is covered by their anti-SLAPP laws much more narrowly. Massachusetts, for example, focuses on the right to petition, generally covering only speech intended to influence government policy. Zenefits would have had a much more difficult time claiming its speech was protected by Massachusetts's anti-SLAPP statute.

Congressional Action?

A framework for federal anti-SLAPP laws exists already in the form of the bipartisan Securing Participation, Engagement, and Knowledge Freedom by Reducing Egregious Efforts (SPEAK FREE) Act of 2015. The SPEAK FREE Act would have represented an important milestone in protecting free speech from SLAPP suits.

The SPEAK FREE Act would have eliminated all three of the workarounds to state anti-SLAPP suits. Not only would the bill provide an anti-SLAPP mechanism for cases brought in federal court, but it would also authorize the removal of suits brought in states lacking anti-SLAPP laws to federal courts, thereby preventing forum shopping.

The SPEAK FREE Act would also likely cover issues such as those experienced by Zenefits. One element of the bill covers oral or written statements in connection with "matters of public concern," one definition of which includes "goods, products or services within the marketplace."

In the SPEAK FREE Act, Congress has a ready-made blueprint for addressing the workarounds SLAPPers currently utilize. Should Congress seek to revitalize its efforts to address SLAPP suits at the federal level, the SPEAK FREE Act would be the place to start.

Conclusion

Though there are fairly straightforward and bipartisan paths forward for reforming the current state of defamation and libel law to prevent frivolous and harassing lawsuits intended to chill free speech, the status quo is untenable. Speech is more difficult when it can be suppressed through specious litigation.

Lasting reform, however, must come through Congress and the federal government, as a patchwork of state anti-SLAPP laws is too easy for plaintiffs to avoid. An effective anti-SLAPP statute at the federal level would ensure every American targeted by frivolous speech-silencing suits can avail themselves of mechanisms to avoid costly and drawn-out litigation.

About the Authors

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