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NEW YORK LEGISLATURE PASSES REVISED ANTI-SLAPP LAW TO DETER FRIVOLOUS LAWSUITS AND STRENGTHEN FREE SPEECH PROTECTIONS

To Our Clients and Friends:

On July 22, 2020, the New York State Senate and Assembly passed legislation that, if signed into law by Governor Andrew M. Cuomo, will expand First Amendment protections under New York’s anti-SLAPP law by providing new tools for defendants to challenge frivolous lawsuits. The bill amends and extends New York’s current statute (sections 70-a and 76-a the New York Civil Rights Law) addressing so-called strategic lawsuits against public participation (“SLAPPs”):[1] suits that seek to punish and chill the exercise of the rights of petition and free speech on public issues by subjecting defendants to expensive and burdensome litigation.[2] Prominent First Amendment and free speech advocates, including the Reporters Committee for Freedom of the Press,[3] Time’s Up Now,[4] the New York Civil Liberties Union,[5] and the Authors Guild[6] have all come out in its support, as has the Editorial Board of *The New York Times*. [7]

Anti-SLAPP laws currently exist in 30 states and the District of Columbia, yet despite being home to some of the world’s most prominent media and news organizations,[8] New York’s own anti-SLAPP law, enacted in 2008, has been narrowly limited to litigation arising from a public application or permit, often in a real estate development context.[9] The new proposed statute, sponsored by Senator Brad Hoylman and Assemblywoman Helene E. Weinstein, would amend the civil rights law in several ways to expand and strengthen New York’s anti-SLAPP protections. Governor Cuomo has not yet commented on whether he will sign the bill.

The following is a summary of the law’s changes, which would take effect immediately upon enactment, and key continuing features:

- Expands the statute beyond actions “brought by a public applicant or permittee,” to apply to any action based on a “communication in a . . . public forum in connection with an issue of public interest” or “*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.*”[10]
- Confirms that “public interest” should be construed broadly, including anything other than a “purely private matter.”[11]
- Requires courts to consider anti-SLAPP motions based on the pleadings and “supporting and opposing affidavits stating the facts upon which the action or defense is based.”[12]

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- Provides that all proceedings—including discovery, hearings, and motions—shall be *stayed* while a motion to dismiss is pending, except that the court may order limited discovery where necessary to allow a plaintiff to respond to an anti-SLAPP motion.[13]
- Alters the formerly permissive standard (“may”) for awarding attorneys’ fees to provide that where the court grants such a motion, an award of fees and costs is mandatory: *i.e.*, “costs and attorney’s fees *shall* be recovered.”[14]

While the amended statute provides welcome tools to defendants facing SLAPP suits, it remains to be seen how the revisions will function in practice. For example, while the proposed revisions incorporate some of the key language and structure of California’s anti-SLAPP statute[15] —including a stay of discovery, and mandatory attorneys’ fees and costs to prevailing defendants—the proposed law preserves the standard for evaluating the merits: a motion to dismiss such an action “shall be granted” unless the plaintiff can show “that the cause of action has a *substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law.*”[16] In the context of the current limited anti-SLAPP law, New York courts have interpreted that standard to impose a “heavy burden” on plaintiffs opposing anti-SLAPP motions,[17] requiring them to make an evidentiary showing of the facts supporting their claim and demonstrating that the defendant cannot establish a defense against it.[18] It will be up to courts to determine how that standard functions when applied to a broader range of cases, including defamation and other tort claims, that may present closer questions.

Separately, the status of the applicability of state anti-SLAPP statutes in federal court remains an open question, especially in light of the Second Circuit’s recent decision that California’s anti-SLAPP statute does not apply in federal court. *La Liberte v. Reid*, No. 19-3574, 2020 WL 3980223 (2d Cir. July 15, 2020). Whether New York’s revised anti-SLAPP law would be available to defendants in federal lawsuits in the Second Circuit is an open question that federal courts may soon need to confront.

Finally, courts will be asked to determine whether the revised statute is effective in currently pending actions, or if it will only have effect in actions filed after enactment. New York reserves this question as “a matter of judgment made upon review of the legislative goal,” based on “whether the Legislature has made a specific pronouncement about retroactive effect or conveyed a sense of urgency; whether the statute was designed to rewrite an unintended judicial interpretation; and whether the enactment itself reaffirms a legislative judgment about what the law in question should be.”[19] New York courts will likely conclude that the revised statute has “retroactive” effect and will apply in pending cases in light of the statute’s clear “remedial purpose.”[20] The legislature was careful to explain that the revisions intend to correct judicial “narrow[] interpret[ation]” of the existing anti-SLAPP statute and to remedy the courts’ “fail[ure] to use their discretionary power to award costs and attorney’s fees” in SLAPP suits, and that the revised statute “will better advance the purposes that the Legislature originally identified in enacting New York’s anti-SLAPP law.”[21] These factors all suggest that the revisions will take immediate effect in both pending and post-enactment lawsuits.

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[1] 2020 N.Y. Senate Bill No. 52-A/Assembly Bill No. 5991A (July 22, 2020), <https://www.nysenate.gov/legislation/bills/2019/s52/amendment/a>.

[2] *Understanding Anti-SLAPP Laws*, Reporters Committee for Freedom of the Press, <https://www.rcfp.org/resources/anti-slapp-laws/> (last visited August 3, 2020).

[3] *Reporters Committee supports legislation that would strengthen New York’s anti-SLAPP law*, Reporters Committee for Freedom of the Press, <https://www.rcfp.org/briefs-comments/rcfp-supports-ny-anti-slapp-bills/> (last visited August 3, 2020).

[4] TIME’S UP (@TIMESUPNOW), Twitter, <https://twitter.com/TIMESUPNOW/status/1286031156446728193> (last accessed August 3, 2020).

[5] Senator Brad Hoylman (@bradhoylman), Twitter, <https://twitter.com/bradhoylman/status/1286002251685863424> (last accessed August 3, 2020).

[6] *Authors Guild Signs Letter in Support of Anti-SLAPP Statute*, Authors Guild, <https://www.authorsguild.org/industry-advocacy/authors-guild-signs-letter-in-support-of-anti-slapp-statute/> (last accessed August 3, 2020).

[7] *The Legal System Should Not Be a Tool for Bullies*, N.Y. Times, <https://www.nytimes.com/2020/07/17/opinion/new-york-slapp-frivolous-lawsuits.html>.

[8] *Id.*

[9] 2020 N.Y. Senate Bill No. 52-A/Assembly Bill No. 5991A (July 22, 2020), <https://www.nysenate.gov/legislation/bills/2019/s52/amendment/a>.

[10] *Id.* (emphasis added).

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.* (emphasis added).

[15] Cal. Civ. Proc. Code § 425.16.

[16] 2020 N.Y. Senate Bill No. 52-A/Assembly Bill No. 5991A (July 22, 2020), <https://www.nysenate.gov/legislation/bills/2019/s52/amendment/a> (emphasis added).

[17] *161 Ludlow Food, LLC v. L.E.S. Dwellers, Inc.*, 107 N.Y.S.3d 618, at *4 (N.Y. Sup. Ct. 2018), *aff’d*, 176 A.D.3d 434 (1st Dep’t 2019).

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- [18] *Edwards v. Martin*, 158 A.D.3d 1044, 1048 (3d Dep't 2018).
- [19] *Nelson v. HSBC Bank USA*, 87 A.D.3d 995, 997–98 (2d Dep't 2011).
- [20] *In re Gleason (Michael Vee, Ltd.)*, 96 N.Y.2d 117, 122–23 (2001).
- [21] 2020 N.Y. Senate Bill No. 52-A/Assembly Bill No. 5991A (July 22, 2020), <https://www.nysenate.gov/legislation/bills/2019/s52/amendment/a>.



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