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**PROGRAM MATERIALS**

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## **The (New) New York Anti-SLAPP**

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- **Daniel Novack, Esq. - Penguin Random House**
- **Christina Lee - Cornell Law School**

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**5255 North Federal Highway, Suite 100, Boca Raton, FL 33487**

**Phone 561-241-1919**



# The [New York] State of Anti-SLAPP

Daniel Novack and Christina Lee



# *Agenda*

This presentation will cover:

- What is a “SLAPP” and How Do Anti-SLAPP laws work?
- New York’s Anti-SLAPP:
  - History
  - The Substantial Basis Test
  - SLAPP-Back / Fee Shifting
  - Application in Federal Court



# What is a SLAPP?

- “Strategic Lawsuit Against Public Participation.” The term was coined in the 1980’s by two University of Denver professors, George Pring and Penelope Canan, who co-authored *SLAPPS: Getting Sued for Speaking Out*.
- SLAPP suits\* are cases filed with the intent to bury opponents in legal fees and deter further discussion. Winning a judgment is besides the point. The message sent is that criticism will cost you.
  - \*Technically a “SLAPP suit” is a tautology (like PIN number), but just go with whatever makes sense to you.
- SLAPPs are a go-to tactic of wealthy individuals, corporations, and - increasingly - politicians.
  - “Ultimately I had great success doing what I wanted to do - costing this third rate reporter a lot of legal fees.” – Donald Trump, reflecting on his unsuccessful lawsuit against reporter Tim O’Brien.



## *What is Anti-SLAPP Law?*

- Anti-SLAPP laws act to dismiss meritless cases earlier, prevent needless discovery, and impose financial penalties on plaintiffs.
- Anti-SLAPP laws cover certain types of protected speech, depending on the jurisdiction. Some are broader than others. We will later discuss the changes in New York state's Anti-SLAPP law which broadened the types of speech covered.
- Roughly 30 jurisdictions, including the District of Columbia, have enacted Anti-SLAPP laws of varying strength.



## *Why Do We Need Anti-SLAPP Laws?*

- SLAPPs put a literal price tag on free speech, and therefore pose a serious risk to our society. Our ability to share information as neighbors, consumers, and voters is critical to a healthy society.
- Imagine whether your YELP review is worth the time and expense of a legal battle.
- Anti-SLAPP laws do not prevent meritorious litigation.



# *How Do Anti-SLAPP Suits Work?*

## *Phase One:*

- A defendant files a motion alleging that the conduct targeted by the lawsuit is protected speech covered by the statute.
  - HYPOTHETICAL: A California resident testifies before the state legislature that EvilCorp is violating the law. EvilCorp sues for defamation.
    - California's Anti-SLAPP law covers (among other activity) "any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law."
    - Therefore, the defendant is entitled to the protection of the statute.
- Sometimes this analysis can be difficult because plaintiffs try to couch their claims as non-speech.
  - For example, a plaintiff can sue under a theory of interference with contract rather than, or in addition to, defamation.
  - However, once a defendant demonstrates that the case turns on their protected speech, it triggers the statute's substantive and procedural safeguards.



## *How Do Anti-SLAPP Suits Work?*

### *Phase Two:*

- Once the statute is triggered, a plaintiff must demonstrate that they can win. Some Anti-SLAPP laws phrase this in terms of probability.
  - In some states, courts are directed to give priority to SLAPP claims and/or to freeze discovery until the second phase is resolved.
- HYPOTHETICAL: Plaintiff sues Defendant, alleging that Defendant falsely stated he was convicted of a felony in 2011. In Defendant's jurisdiction, this qualifies as protected speech. Now, Plaintiff must provide support for his claim – for instance, he can specify that the 2011 case Defendant referred to was for a speeding ticket.
- This part of Anti-SLAPP law makes motion practice substantially stronger because it forces the plaintiff to produce early on - and with specificity - evidence supporting their theory of the case.
  - Saying “it’s not true” might not be good enough.





## *Mo Money Mo Problems:*

- Some Anti-SLAPP laws provide that if the defendant wins, they are entitled to attorney's fees. This is often referred to as a “fee shifting provision.”
  - California is higher stakes. There, an unsuccessful Anti-SLAPP motion is subject to the defendant covering the plaintiff's legal costs/fees associated with the motion.
- Fee shifting provides the greatest disincentive for plaintiffs to file meritless suits.



## *New York State Anti-SLAPP - A Trumpy Origin Story:*

- New York passed its initial Anti-SLAPP law nearly thirty years ago, in 1992. The original Anti-SLAPP law covered a narrow sliver of protected speech: only plaintiffs who were “public applicant[s] or permittee[s]” fell under the law’s purview.
  - At the time, real estate companies were seen as the primary abusers of the court system.
- This meant that the law applied mostly to “plaintiffs who had sought public permits, zoning changes, or other similar entitlements from a government body, against defendants who had reported on, ruled on, or challenged the plaintiff’s petition to the government body. It generally did not apply to speech by journalists in traditional media outlets or speech by anyone on social media.”
  - *See* <https://www.arnoldporter.com/en/perspectives/publications/2020/11/new-yorks-new-anti-slapp-law>.



## *The Statutory Scheme:*

- New York's Anti-SLAPP law is comprised of four statutes:
  - CPLR §76-a: Who Qualifies and the Evidentiary Standard
  - CPLR §70-a: SLAPP-Back Fees and Damages
  - CPLR §3211(g): Motion to Dismiss Standard
  - CPLR §3212(h): Motion for Summary Judgment Standard



## New York CPLR §76-a (Original):

- *Definition:* An “action involving public petition and participation” was “materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission.”
- *Evidentiary/Liability Standard:* The plaintiff may have recovered damages only if they established, “by clear and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false.”
  - Mirrors the actual malice requirement established by the US Supreme Court in *New York Times v. Sullivan*.



## New York CPLR §70-a (Original):

- *SLAPP-Back*: Costs and attorney's fees may be recovered upon a demonstration that the action was commenced or continued without a substantial basis in fact and law.
  - Discretionary standard which had been proven toothless over the years.
  - We will delve into “substantial basis” later.
- Compensatory and punitive damages: available upon an additional demonstration that the action involving public petition and participation was commenced or continued for the purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights.



## *New York CPLR §3211(g) & §3212(h):*

- New York CPLR §3211(g): Motion to Dismiss Standard
  - To survive a motion to dismiss, the plaintiff must demonstrate that their claim has a "substantial basis in law."
- New York CPLR §3212(h): Motion for Summary Judgement Standard
  - To survive a motion to dismiss, the plaintiff demonstrate that their claim has a "substantial basis in fact and law."
- We will delve into Substantial Basis (still) later.



## *Putting It All Together – The Old Statutory Scheme:*

- Essentially protected critical speech relating to real estate/zoning/permitting.
- Burden on Plaintiff to show Substantial Basis in law/facts to avoid dismissal.
- Clear and Convincing evidentiary standard.
- Knowledge of falsity or reckless disregard liability standard.
- Discretionary fee shifting.



# Trump Returns – The Empire (State) Strikes Back


- Though the original scheme comported with the underlying philosophy of Anti-SLAPP laws, many believed it did not cover enough ground. Ironically, Donald Trump's raft of lawsuits against former advisors and family members helped make the case for updating the statute.
- Additionally, New York state courts read the law narrowly.
  - For example: An intermediate appellate court held that “merely advocating one’s agenda at public meetings, or initiating legal action, does not bring an individual within the ambit of an applicant or permittee” as defined in the statute. *Hariri v. Amper*, 51 A.D.3d 146, 151 (N.Y. App. Div. 2008).
- New York state is one of the biggest hubs for media, entertainment, and journalism in the country. Having strong Anti-SLAPP law is critical to the survival and promotion of these industries.
- The New York State Legislature passed Senate Bill S.52 / Assembly Bill A5991, a measure that would strengthen the Anti-SLAPP law by broadening its reach and strengthening its enforceability. *See* <https://legislation.nysenate.gov/pdf/bills/2019/S52A>.
- Governor Andrew Cuomo signed the bill into law on November 10, 2020.





# *New and Improved New York Anti-SLAPP - Broadening the Scope:*

- Dramatically expands the activity covered:
  - (a) An “action involving public petition and participation” is a claim based upon:
    - (1) any communication in a place open to the public or a public forum in connection with an issue of public interest; or
    - (2) 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.
  - (b) “Claim” includes any lawsuit, cause of action, cross-claim, counterclaim, or other judicial pleading or filing requesting relief.
  - (c) “Communication” shall mean any statement, claim, allegation in a proceeding, decision, protest, writing, argument, contention or other expression.
  - (d) “Public interest” shall be construed broadly, and shall mean any subject other than a purely private matter.” N.Y. Civ. Rights Law § 76-a (McKinney)



## *New and Improved New York Anti-SLAPP - Stay of Discovery:*

- “(g) Stay of proceedings and standards for motions to dismiss in certain cases involving public petition and participation. All discovery, pending hearings, and motions in the action shall be stayed upon the filing of a motion made pursuant to this section. The stay shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and upon a showing by the nonmoving party, by affidavit or declaration under penalty of perjury that, for specified reasons, it cannot present facts essential to justify its opposition, may order that specified discovery be conducted notwithstanding this subdivision. Such discovery, if granted, shall be limited to the issues raised in the motion to dismiss.” N.Y. C.P.L.R. 3211 (McKinney).
- This provision benefits defendants by preventing costly discovery when the suit may be dismissed before reaching further stages of litigation.



## *New and Improved New York Anti-SLAPP - Mandatory Award of Attorney's Fees:*

- “[C]osts and attorney's fees shall be recovered upon a demonstration, including an adjudication pursuant to subdivision (g) of rule thirty-two hundred eleven or subdivision (h) of rule thirty-two hundred twelve of the civil practice law and rules, that the action involving public petition and participation was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law” N.Y. Civ. Rights Law § 70-a (McKinney).
- If applied robustly, potential defendants will be able to stand up against threats knowing they will not ultimately bear the financial burden of mounting a successful defense.



# *New and Improved New York Anti-SLAPP – Summary:*

- While overarching statutory scheme remains the same, the new amendments to New York’s Anti-SLAPP law:
  - Broaden the scope to truly cover First Amendment activity.
  - Promote efficiency by staying discovery until a plaintiff makes a threshold showing of merit.
  - Disincentives meritless suits and incentivizes defense of free speech via fee awards.
- Open Questions:
  - What is a “Substantial Basis” for purposes of dismissal and fees?
  - How will federal courts apply the law?



# The “Substantial Basis” Test:

The term “Substantial Basis” appears in two different statutory contexts:

- CPLR § 3211(g) and 3212(h), which dictate the legal standard by which court must review a Motion to Dismiss or a Motion for Summary Judgment, respectively.

(g) Standards for motions to dismiss in certain cases involving public petition and participation. A motion to dismiss based on paragraph seven of subdivision (a) of this section, in which the moving party has demonstrated that the action, claim, cross claim or counterclaim subject to the motion is an action involving public petition and participation as defined in paragraph (a) of subdivision one of section seventy-six-a of the civil rights law , shall be granted unless the party responding to the motion demonstrates 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.

- CPLR § 70-a, the fee shifting provision (SLAPP-back):
  - Costs and attorney's fees shall be recovered upon a demonstration, including an adjudication pursuant to subdivision (g) of rule thirty-two hundred eleven or subdivision (h) of rule thirty-two hundred twelve of the civil practice law and rules, that the action involving public petition and participation was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law.

Given the parallel language, if a court determines that a SLAPP lawsuit is deficient, it necessarily follows that costs/fees must be awarded, since the same “Substantial Basis” standard applies.



## *Substantial Basis – Defined:*

The legislature did not define “Substantial Basis,” but a number of factors indicate a heightened standard:

- *Plain Meaning:* Ordinarily, a claim must be merely “cognizable” to be sufficient in New York. *Guggenheimer v. Ginzberg*, 43 NY2d 268, 274 (1977). On its face, the word “substantial” is more stringent than “cognizable.”
- *Statutory Scheme:* § 3211(g) incorporates by reference § 3211(a)(7), which is an ordinary Motion to Dismiss based on failure to state a claim. In order for § 3211(g) to have any relevance, it follows that it must confer additional protection to defendants.
- *Legislative Intent:* The Legislature’s stated goal of disincentivising lawsuits attacking free speech can only be effectuated if they are procedurally and substantively easier to defeat. The legislative intent is also evident in the statute’s burden shift from defendant to plaintiff.



# Substantial Basis - New York Common Law:

- The “Substantial Basis” test has been used for nearly three decades in New York.
- A review of 42 reported opinions in which the standard was directly applied (plus several cases discussing the standard in dicta) indicates that New York’s courts view the standard as more robust than an ordinary Motion to Dismiss. See <https://beta.documentcloud.org/documents/20412398-index-a-ny-anti-slapp-substantial-basis-cases>
- *Harfenes v. Sea Gate Ass’n*, 167 Misc. 2d 647, 652 (Sup. Ct. 1995):
  - “At the same time, the Legislature amended CPLR 3211 and 3212, allowing defendants in actions involving public petition and participation to obtain quick dismissal or summary judgment unless the plaintiff can demonstrate 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.’ (CPLR 3211 [g]; 3212 [h].) Prior to adoption of the new legislation, plaintiffs in actions involving public petition and participation needed only demonstrate a reasonable basis in fact or law to defeat a motion to dismiss or motion for summary judgment.”
  - “The new anti-SLAPP law creates a new right of action for victims of SLAPP suits. It places new restrictions on the ability of public applicants to seek redress from the courts by requiring them to demonstrate their claims contain a substantial, rather than merely a reasonable, basis in fact or law.”



# *Substantial Basis Statistics:*

Among the 42 cases reviewed . . .

- At the Appellate level, defendants won 6 out of 10 motions to dismiss (60%) and 2 out of 4 motions for summary judgment (40%).
- At the trial level, defendants won 11 of 17 motions to dismiss (65%) and 8 out of 10 motions for summary judgment (80%).
- Courts often cited the “Clear and Convincing Evidence” standard required by § 76-A in dismissing claims, even at an early stage. *See Reeve v. Andes*, 2020 NYLJ LEXIS 739, \*16-17 (Sup. Ct. 2020):
  - “[T]o survive dismissal or judgment as a matter of law, the proponent of the putative SLAPP suit must sustain the burden in opposition to a motion to dismiss or for summary judgment under either CPLR 3211(g) or CPLR 3212(h) by demonstrating in clear and convincing form that the actions has substantive merit in law or fact, or presents a reasonable argument for extension or modification of existing law.”
- For more analysis, *see* <https://www.law.com/newyorklawjournal/2020/11/17/what-is-a-substantial-basis-under-new-yorks-anti-slapp-law>.





# *SLAPP-BACK / Fee Shifting:*

- § 70-a provides defendants with the opportunity to SLAPP back:
  - 1. A defendant in an action involving public petition and participation, as defined in paragraph (a) of subdivision one of section seventy-six-a of this article, may maintain an action, claim, cross claim or counterclaim to recover damages, including costs and attorney's fees, from any person who commenced or continued such action; provided that:
    - (a) Costs and attorney's fees shall be recovered upon a demonstration, including an adjudication pursuant to subdivision (g) of rule thirty-two hundred eleven or subdivision (h) of rule thirty-two hundred twelve of the civil practice law and rules, that the action involving public petition and participation was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law.
    - (b) other compensatory damages may only be recovered upon an additional demonstration that the action involving public petition and participation was commenced or continued for the purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights; and
    - (c) punitive damages may only be recovered upon an additional demonstration that the action involving public petition and participation was commenced or continued for the sole purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights.



## *SLAPP-Backs – continued:*

- By employing the “Substantial Basis” standard in the dismissal and fee contexts, the legislature has created a mandatory fee regime.
- So long as the defendant demonstrates that the plaintiff commenced or continued a case without a substantial basis in fact and law, the court must award fees. Therefore, a defendant can SLAPP-back at any stage of a proceeding.
  - Therefore, even a plaintiff with a reasonable case at the outset must withdraw if discovery or evidentiary rulings render the possibility of victory remote.
  - HYPOTHETICAL: Plaintiff learns, via the discovery process, that Defendant relied on multiple highly credible sources who turned out to be honestly mistaken. Given the remote odds of prevailing on an Actual Malice standard via Clear and Convincing evidence, Plaintiff should withdraw their claim or else risk continuing a case without a substantial basis.
- The SLAPP-back is a substantive cause of action. Ordinarily, a defendant will file a counter-claim seeking the fee award, and in extreme circumstances, compensatory/punitive damages.



## *Federal Court Application:*

- There is no federal Anti-SLAPP law. Therefore, a federal court sitting in diversity must conduct two analyses:
  - 1) Choice of Law: determine which state's substantive law applies.
  - 2) *Erie* Doctrine: determine whether the state's Anti-SLAPP law conflicts with the Federal Rules of Civil Procedure.
- There is an emerging Circuit Split on the *Erie* Doctrine. For instance, the 9<sup>th</sup> Circuit has applied the California Anti-SLAPP law, but the 2<sup>nd</sup> Circuit recently rejected it.
  - Pro-Anti-SLAPP: 1<sup>st</sup> and 9<sup>th</sup> Circuits.
  - Anti-Anti-SLAPP: D.C., 5<sup>th</sup>, 11<sup>th</sup> Circuits.
  - *Note*: not an apples-to-apples comparison because the underlying statutes vary.



## *Erie Issues:*

- Just prior to the passage of New York's updated Anti-SLAPP, the 2<sup>nd</sup> Circuit held that California's Anti-SLAPP statute is inapplicable in federal court. *La Liberte v. Reid*, 2020 WL 3980223 (2d Cir. July 15, 2020).
- Under the California statute, upon the filing of a Special Motion to Strike, a SLAPP plaintiff must establish a "probability of success" to avoid dismissal and fees. California Code of Civil Procedure Section 425.16.
- In evaluating the California statute, the Court considered whether the "probability of success" standard conflicts with the Federal Rules of Civil Procedure. The Court held that the standard was procedural, and therefore conflicts with the "plausibility standard" as articulated by the US Supreme Court. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 570 (2007).
- The Court also declined to award fees, reasoning that relief is tied to a procedural mechanism unavailable in federal court (the Special Motion to Strike).



## Hope for New York Anti-SLAPP in 2<sup>nd</sup> Circuit?

- The *Reid* Court was careful not to step on its prior decision in *Adelson* upholding the Nevada Anti-SLAPP statute. *Adelson v. Harris*, 774 F.3d 803, 809 (2d Cir. 2014).
- Calling the (then) Nevada statute "quite different," the Court explained:
  - As the district court in *Adelson* recognized, "[t]he Nevada statute does not establish a 'reasonable probability of success' standard that must be met without discovery, like the California Anti-SLAPP law." ... Instead, "the Nevada statute immunizes 'good faith communication[s]' — defined as communications that are 'truthful or ... made without knowledge of ... falsity' — thereby effectively raising the substantive standard that applies to a defamation claim." ... Accordingly, "even if the procedural elements of certain Anti-SLAPP statutes present [conflicts with the Federal Rules of Procedure], those problems [were] not presented in [*Adelson*], where the effects of the [Nevada] Anti-SLAPP law ... are substantive."
  - In other words, *Adelson* allows for a state to set a higher liability threshold (in Nevada's case, bad faith), which is more challenging for plaintiffs to plausibly allege.
- The *Reid* Court also made clear that "[t]he California Legislature presumably could have awarded attorneys' fees to the prevailing party in any defamation action, but it chose not to do so." *La Liberté v. Reid*, 2020 WL 3980223 (2d Cir. July 15, 2020).



# Win Some, Lose Some

- Despite some superficial similarities to the California Anti-SLAPPtute, the New York version is actually more similar to Nevada's and therefore should fare better in the 2<sup>nd</sup> Circuit. See <https://www.law360.com/articles/1300073>.
  - Out:
    - Stay of Proceedings.
    - Sufficiency of Pleading: 2<sup>nd</sup> Circuit courts will not apply "Substantial Basis" standard at Motion to Dismiss or Motion for Summary Judgment stages. However, the plausibility calculation must account for the heightened evidentiary/liability standards, per *Adelson*.
  - Still Applicable:
    - SLAPP actions must meet the *Times v Sullivan* standard for public figures (knowledge (or reckless disregard) of falsity via clear and convincing evidence.
    - Fee awards.
      - There is no special procedural mechanism tied to fees. *Cotton v. Slone*, 4 F.3d 176, 180 (2d Cir.1993) ("Attorney's fees mandated by state statute are available when a federal court sits in diversity.").



## Goodbye To Libel Tourists?

- Fee shifting is the single greatest disincentive for filing SLAPP actions. So long as that component survives, New York will become a less desirable destination for forum-shopping plaintiffs.
- While federal courts will not apply the “Substantial Basis” standard to dismiss claims, they will still have to apply it when assessing whether fees are mandated.
- *Key Question:* Will courts respect the legislature’s desire to tether dismissal and fees?
  - In one recent case, a Southern District court dismissed a SLAPP claim but declined to award fees under the New York statute. In other words, the Court found the claim to have a substantial basis, despite being implausible. *Egiazaryan v. Zalmayev*, 2014 U.S. Dist. LEXIS 36285.
    - However, this was under the prior version of the statute, when fees were discretionary, and is out of step with how New York’s own courts interpret the standard.



## *Defining Anti-SLAPP Law: Resources*

- <https://popehat.substack.com/p/what-is-an-anti-slapp-anyway-a-lawsplainer-44b>
- <https://www.dmlp.org/legal-guide/responding-strategic-lawsuits-against-public-participation-slapps>
- <https://www.youtube.com/watch?v=UN8bJb8biZU> [SLAPP Suits: Last Week Tonight]





# *New York State Anti-SLAPP Resources*

- <https://www.rcfp.org/anti-slapp-guide/new-york/>
- <https://www.arnoldporter.com/en/perspectives/publications/2020/11/new-yorks-new-anti-slapp-law>
- [https://www.gibsondunn.com/new-york-legislature-passes-revised-anti-slapp-law-to-deter-frivolous-lawsuits-and-strengthen-free-speech-protections/#\\_ftn9](https://www.gibsondunn.com/new-york-legislature-passes-revised-anti-slapp-law-to-deter-frivolous-lawsuits-and-strengthen-free-speech-protections/#_ftn9)
- <https://www.dmlp.org/legal-guide/anti-slapp-law-new-York>