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Broken State Speech Shield Unites Courts, Lawmakers Seeking Fix

By Allie Reed

- Top state court considers overhauling 2017 precedent
- Current procedure for retaliatory lawsuits called 'untenable'

Massachusetts lawyers, judges, and lawmakers are all asking for more clarity on the application of a law that protects First Amendment rights, causing the Supreme Judicial Court to consider revisions to a framework it recently altered.

Anti-SLAPP laws, or laws against Strategic Lawsuits Against Public Participation, are in place in most states and create a pathway for courts to quickly and cheaply throw out meritless lawsuits that seek to intimidate people exercising their First Amendment rights.

However, Massachusetts has a relatively weak law compared to other states and lags in promptly resolving cases. Additionally, the law only covers speech related to a person's right to petition the government and isn't a full-throated protection of all free speech, earning it a D+ from the Institute for Free Speech.

Massachusetts lawmakers and the judiciary each currently have the opportunity to reconsider this law.

The Supreme Judicial Court is now soliciting amicus briefs on whether to revise its framework for evaluating special motions to dismiss under the anti-SLAPP statute. At the same time, the legislature is considering a bill that would expand the statute to protect more types of speech.

Recent state high court decisions have weakened First Amendment protections by making it easier for plaintiffs to move forward with their retaliatory lawsuits, business and First Amendment lawyers say. They've also put judges in a difficult position, forcing them to assess the validity of claims at a very early stage in litigation without seeking additional information.

The law "was meant to be used as a shield, but people are using it as a sword," said Payal Salsburg, a partner at Laredo & Smith LLP, who practices business litigation.

Another Primary Motive

Massachusetts' anti-SLAPP law protects defendants from lawsuits filed against them for exercising their right of petition under the Constitution by allowing them to file a special motion to dismiss. Courts are required to grant that motion unless plaintiffs can demonstrate that the defendant's activity lacked any reasonable factual support or basis in the law, and that it caused an actual injury to the plaintiff.

Previously, "it was very difficult for a plaintiff" to proceed because the defendant could simply argue they had legitimate reasons for their petitioning, said Joshua Lewin, a partner at Bowditch & Dewey LLP, who practices business litigation.

The Massachusetts court recognized that the framework to apply the anti-SLAPP statute "wasn't working exactly as how it was intended: to let cases that have merit get beyond the dismissal stage and stop cases from getting too far that are based on petitioning activity," Salsburg said.

The law is meant to "prevent expense and burden on parties who are sued just for seeking redress of grievances with the government," said Jeffrey Pyle, a partner at Prince Lobel Tye LLP, who practices First Amendment law.

The justices altered the framework in *Blanchard v. Steward Carney Hospital* in 2017 and 2019, adding another path plaintiffs can use to avoid having their claims thrown out. They just need to convince a judge that they have another legitimate primary motive in filing their claims, and that the claims aren't brought for the purpose of chilling First Amendment rights.

That change "has just thrown everything into complete disarray and, in my view, left things, untenable," Lewin said.

"The biggest issue is the uncertainty involved in bringing these motions now," Lewin said.

"Whereas the original standard was pretty cut and dry and you could advise a client on the likely outcome," he said, "now, it's much more complicated, difficult, and expensive to litigate."

The Supreme Judicial Court is considering revising this framework as part of a case about a land dispute between Northeastern University and Columbia Plaza Associates. A lower court allowed Northeastern to dismiss some of Columbia Plaza's claims on anti-SLAPP grounds.

"By granting Northeastern's special motion, allowing a large private interest to 'chill' the rightful petitioning of a much smaller" entity, the Superior Court "has thus turned the statute on its head, taking the statutory sling and stone from David's hand and giving them to Goliath," Columbia Plaza said in a brief.

Shield or Sword?

The *Blanchard* case makes it significantly easier for a plaintiff to save their case, even if it lacks merit, business and First Amendment lawyers say.

The new framework allows plaintiffs to bring a frivolous case "with absolute impunity" because "all they've got to do is find a judge who will sit there and say" they can't be convinced that it's not a SLAPP suit, said Robert McLaughlin, managing and senior partner at Gilman, McLaughlin & Hanrahan LLP, who practices general commercial litigation.

"This is a classic example of the medicine being worse than the disease," McLaughlin said.

Courts are also now tasked with determining a plaintiff's intent in bringing a suit at an early stage of litigation without the benefit of discovery. "It's not really a robust set of facts for the court to consider in deciding whether this case is going to move forward or not," leaving a judge with a lot of discretion, Salsburg said.

Judges themselves have admitted the statute isn't working as it was intended.

"The ever-increasing complexity of the anti-SLAPP case law has also made resolution of these cases difficult and time consuming," which risks defeating the very purpose of the anti-SLAPP law, the Supreme Judicial Court said in a 2022 opinion.

There are also "obvious difficulties in applying the latter stages of the augmented framework and requiring judges to be fairly assured that the challenged claim is not a SLAPP suit, absent full discovery and testimony tested through cross-examination," the Appeals Court wrote in a 2022 opinion for a case that McLaughlin and Pyle litigated from different sides.

"It is for the Supreme Judicial Court or the Legislature to address and resolve these concerns should they so choose," the Appeals Court wrote.

Legislative Solution

After denying a request to review the 2022 Appeals Court decision that left the anti-SLAPP law as is, the Supreme Judicial Court again is considering whether to scrap the Blanchard framework.

It would be "totally rare" for the highest court to walk back on its approach so soon after its 2017 adoption, Lewin said.

The long-term fix is most likely up to legislators.

A bill pending in the state Senate (S. 1132) would resolve many of the concerns in the legal community.

It would "completely rewrite the anti-SLAPP law, mooted the questions the [Supreme Judicial Court] is currently asking for amici to weigh in on," Pyle said, by protecting "freedom of speech as well as freedom to petition."

But McLaughlin said he worries "this is not high on their priority list."

"The legislature has got so much on their plate," McLaughlin said. The court "had the chance to straighten it out and didn't. The legislature is going to say, 'I guess they like it the way it is.'"

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