

Lawyers Hail New Massachusetts Retaliatory Suit Protocol (1)

By Allie Reed

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- Supreme Judicial Court expands free-speech protections
 - Litigants, lawyers, judges seen as winners in revised process

The Massachusetts Supreme Judicial Court's latest overhaul of the process for defeating a retaliatory lawsuit brought to chill free speech will broaden First Amendment protections and streamline litigation, business and employment lawyers say.

The justices on Thursday revised the process for dismissing a case under the state's anti-SLAPP law, which was passed to protect people from strategic lawsuits brought against them for public participation. The law was meant to create a quick pathway for courts to throw out those types of meritless lawsuits, but the process became overly complex in recent years with the addition of a second pathway for plaintiffs to defend their suits.

The court's 2017 decision creating that second pathway got it wrong, and the justices' decision to eliminate it was a "brave" mea culpa, said employment lawyer Robert Mantell.

"The anti-SLAPP statute will be returned to the scope of what the legislature intended it to do, and it will ultimately protect more people in various kinds of petitioning related cases," said Jeffrey Pyle, a partner at Prince Lobel Tye LLP who practices First Amendment and business litigation. The ruling will also "make the lives of superior court judges a great deal easier and allow them to resolve anti-SLAPP motions more quickly and with less cost," Pyle said.

'Pile of Garbage'

The now-discarded pathway offered a convoluted process those bringing SLAPP suits could meet to avoid having their claims thrown out; plaintiffs could convince a judge that they had another legitimate primary motive in bringing their case, and that it wasn't brought to chill First Amendment rights.

The Supreme Judicial Court "thankfully has thrown out that analysis as the pile of garbage that it is," Pyle said. The pathway "deprived people of the protection of the anti-SLAPP statute who the legislature intended to protect," he said.

For example, that pathway ended up denying some victims of assault and domestic violence protection when they were hit with SLAPP suits after speaking with law enforcement, Pyle wrote in an amicus brief for the New England First Amendment Coalition. The American Civil Liberties Union of Massachusetts also filed an amicus brief.

The criteria of inquiring into a plaintiff's motive for bringing a lawsuit chilled free speech since defendants would not know at the time of their petitioning whether that speech would be protected, Mantell wrote in an amicus brief for the Massachusetts Employment Lawyers Association.

The pathway "created a very complicated analysis that turned on facts and motives that did not exist at the time the petitioner was deciding whether or not to petition," Mantell said.

Now, employees weighing whether to speak out on discrimination, or citizens deciding whether to testify in a case, have "clear rules of the road" when making that determination, Mantell said.

The new framework is a welcome return to the legislature's original intent with the law, said Payal Salsburg, a partner at Laredo & Smith LLP who practices business litigation. "It was only supposed to be for those very rare, narrow cases where there was no doubt whatsoever that the lawsuit has been brought because you exercised your petitioning activity and solely because of that," Salsburg said.

Reduced Complexity

The revised framework will speed up the process for getting cases thrown out that had previously been stymied by a judge's time-intensive analysis of a plaintiff's motive for bringing the case.

"To try to discern a filing party's subjective motivations for filing a suit at the pleading stage, before any discovery has taken place, it's just not an appropriate task for courts to have to embark on," Pyle said.

It also led to uncertainty in how judges decided anti-SLAPP motions, said Joshua Lewin, a partner at Bowditch & Dewey practicing business litigation.

"Now, litigants can pretty easily assess the strength or weakness of a potential special motion to dismiss as well as the risk of bringing a case that's predicated on the defendant's petitioning activity," Lewin said.

"The decision streamlines the analysis on a special motion to dismiss significantly," and will allow them to be resolved "much more expeditiously," Lewin said.

(Updates with additional reporting. A previous version corrected the firm of Robert Mantell.)

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