



DEFENDING YOUR RIGHT TO SPEAK OUT

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David L. Finger
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1201 Orange Street, Suite 725
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Re: Arday SLAPP Suit (Case # C.A. 1758-N in the Court of Chancery, New Castle County, Delaware): Court's delay of ruling on case undermines the intent of the law.

Dear Mr. Finger,

On behalf of the SLAPP Resource Center, I am responding to a request from you and your clients, Susan and David Arday, for input on the above referenced case. More information about the SLAPP Resource Center is provided at the end of this letter. I have reviewed the relevant briefing in this case and the Delaware anti-SLAPP law, which provides that Courts shall give "preference in the hearing of" motions to dismiss or motions for summary judgment based on the protections for SLAPP victims in the law. *See* Delaware Code § 8136. This letter provides a review of similar provisions in the 24 other U.S. States and Territories that require courts to expedite the review of motions to dismiss in SLAPP cases.

As I understand this case, the Plaintiff Nichols added the Ardays as Defendants in [December] 2005. By January 2006, the Ardays filed a motion to dismiss based on the Delaware anti-SLAPP law. I also understand that discovery has been permitted throughout 2006 (including allowing the Plaintiff to review the contents of the Arday's computers) and an oral argument on the Ardays' Motion to Dismiss will not be heard until January 2007, at least one year after they filed their Motion to Dismiss.

Delaware is one of at least 27 U.S. states and territories that have statutory protections for victims of SLAPP suits. The other states and territories include: Arkansas, California, Colorado, Florida, Georgia, Guam, Hawaii, Indiana, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Washington, and West Virginia. Requiring the Courts to engage in expedited review of claims for protection under the Petitioning Clause of the First Amendment is a defining element of nearly every anti-SLAPP law in the country, including Delaware's law. Unlike Delaware's law, which provides for a vague "preference" for Motions to Dismiss under the anti-SLAPP statute, several states laws provide specific guidance on how quickly the Courts should resolve such issues. Six states have requirements that a hearing be held on Motions to Dismiss

within 30 days of the filing of the relevant motion unless that time frame is impracticable, including: (1) Arkansas Code § 16-63-507(a)(2) (Stating “A hearing on a motion filed under § 16-63-506 shall be conducted not more than thirty (30) days after service unless emergency matters before the court require a later hearing.”); (2) California Code of Civil Procedure §§ 425.16(f) (Requiring the Court to hold a hearing on a Motion to Dismiss within 30 days of filing.); (3) Georgia Code § 9-11-11.1(d) (Stating “The motion shall be heard not more than 30 days after service unless the emergency matters before the court require a later hearing.”); (4) Louisiana Code of Civil Procedure Art. 971(C) (Stating “The motion shall be noticed for hearing not more than thirty days after service unless the docket conditions of the court require a later hearing.”), (5) Nevada Revised Statutes § 41.660(3)(c) (Stating the Courts shall “Rule on the motion within 30 days after the motion is filed.”); and (6) Oregon Revised Statute § 31.152 (Stating “A hearing shall be held on the motion not more than 30 days after the filing of the motion unless the docket conditions of the court require a later hearing.”).

The longest time frame listed is 180 days. *See* Indiana Code § 34-7-7-9 (Requiring the Court to rule on the Motion to Dismiss within 180 days of its filing.). All other states require courts to hear such motions “as soon as practicable” or on an expedited basis.¹

Based on these provisions, it appears that the Court in the Arday case has delayed consideration of their Motion to Dismiss well beyond the time allowed in other states for consideration of such motions. Allowing such litigation to drag on undermines one of the major purposes of anti-SLAPP laws, which is to quickly resolve potentially abusive lawsuits that attempt to punish people for exercising their First Amendment rights. As one New York Court noted,

[B]rought by private interests to stop citizens from exercising their political rights or to punish them from having done so. . . . SLAPP suits function by forcing the target into the judicial arena where the SLAPP filer foists upon the target the expenses of a defense. The longer the situation can be stretched out, the more litigation that can be churned, the greater the expense that can be inflicted and the closer the SLAPP filer moves to success. The purpose of such gamesmanship ranges from simple retribution for past activism to discouraging future activism. . . . The ripple effect of such suits in our society is enormous. Persons who have been outspoken on issues of public importance targeted in

¹ Florida Statute § 768.295(5) (Stating “the court shall set a hearing on the petitioner's motion [to dismiss], which shall be held at the earliest possible time after the filing of the” opposing parties response.”); Guam Code Title 7 § 17106 (Stating “the trial court shall use a time period appropriate to preferred or expedited motions.”); Hawaii Revised Statute § 634F-2(1) (Stating “the court shall expedite the hearing of the motion.”); 14 Maine Revised Statutes § 556 (Stating “The court shall advance the special motion so that it may be heard and determined with as little delay as possible.”); Maryland Code § 5-807(d)(1) (Stating “the court shall hold a hearing on the motion to dismiss as soon as practicable.”); Massachusetts Statute Chapter 231, § 59H (Stating “The court shall advance any such special motion so that it may be heard and determined as expeditiously as possible.”); Missouri Statute Chapter 537.528(1) (Stating a motion for summary judgment “shall be considered by the court on a priority or expedited basis to ensure the early consideration of the issues raised by the motion and to prevent the unnecessary expense of litigation.”); Nebraska Revised Statute § 25-21,245 (Stating “The court shall expedite and grant preference in the hearing of such motion.”); New Mexico Statute 38-2-9.1 (Stating a Motion to Dismiss “shall be considered by the court on a priority or expedited basis to ensure the early consideration of the issues raised by the motion and to prevent the unnecessary expense of litigation.”); and Utah Code § 78-58-104 (Stating “the trial court shall hear and determine the motion as expeditiously as possible.”).

such suits or who have witnessed such suits will often choose in the future to stay silent. Short of a gun to the head, a greater threat to the First Amendment can scarcely be imagined.

Gordon v. Marone, No. 185 44/90, slip op. at 26-28 (Sup. Ct. Westchester County N.Y., Apr. 13, 1992), *quoted in* Pring and Canan, “*SLAPPs: Getting Sued for Speaking Out*,” Temple University Press (1996), at 11. Another New York Court explained --

The importance of summary adjudication in [such] litigation cannot be overemphasized. [These] actions are notoriously expensive to defend, and indeed the threat of being put to a lawsuit. . . may be as chilling to the exercise of First Amendment Freedoms as fear of the outcome of the lawsuit itself. To unnecessarily delay the disposition of [such an action] is not only to countenance waste and inefficiency but to enhance the value of such actions as instruments of harassment and coercion inimical to the exercise of First Amendment rights . . .

Immuno A.G. v. Moor-Jankowski, 537 N.Y.S.2d 129, 137 (N.Y. App. Div. 1989). The Delaware Court’s actions may be attributable to the fact that there is no specific time limit in the statute for review of Motions to Dismiss.

In addition, the SLAPP Resource Center notes that there are no provisions in the Delaware anti-SLAPP law addressing how discovery should be handled after a motion to dismiss is made. The anti-SLAPP laws of thirteen other states contain provisions specifically limiting discovery during the pendency of such motions.² Generally, these provisions stay discovery during the pendency of the motion to dismiss, though some limited discovery may be allowed upon the showing of good cause by the proponent of discovery to the extent necessary to resolve the motion.

Allowing extensive discovery in SLAPP cases can facilitate the continued abuse of SLAPP victims. Without making any judgments about the Court’s decision to allow discovery in the Arday case, the lack of a provision in the Delaware statute regarding limiting discovery undermines the purpose of the anti-SLAPP law. If victims are forced to engage in lengthy and invasive discovery, the proponent of a SLAPP suit will have achieved its goal of punishing First Amendment activity.

Feel free to contact me if you have any additional questions.

Sincerely,

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² See e.g., the anti-SLAPP laws of California, Georgia, Guam, Hawaii, Indiana, Louisiana, Maine, Massachusetts, Minnesota, Missouri, Nevada, Oregon, Rhode Island, and Utah. Links to all laws are available at www.casp.net.

More about the SLAPP Resource Center

The SLAPP Resource Center (SRC) was started by experts in the field³ in 1999, with a mission of promoting and preserving the right to petition the government under the petition clause of the First Amendment, which protects “The right of the people ... to petition the Government for a redress of grievances.” U.S. Constitution, First Amendment. Despite this Constitutional right, citizens are regularly sued for libel, slander, defamation, and interference with contracts when attempting to influence government actions or private actions through a government process. These suits are known as SLAPP suits (strategic lawsuit against public participation). SLAPP suits seek to punish those who speak out by inflicting legal costs on those who exercise their First Amendment rights. This phenomenon was first studied in depth by two of SRC’s Board Members, Professors George “Rock” Pring and Penelope Canan, in their book “*SLAPPs: Getting Sued for Speaking Out*,” Temple University Press (1996).

Since its founding, the SRC Board of Directors have engaged in the following activities: (1) submitted amicus briefs in the successful defense of SLAPP litigation in Colorado, *Brisben v. Krystkowiak*, on behalf of the victim with SRC and League of Women Voters as clients; (2) submitted an amicus brief in the Hawaii Supreme Court on behalf of the victim, Friends of Puako, with SRC as client (case eventually settled); (3) published a law review article on the SLAPP problem in the *Environmental Law Reporter*, available at www.slapps.org; (4) answered hundreds of requests for assistance from victims or potential victims in the United States and abroad; (5) testified multiple times at the request of the Colorado legislature on anti-SLAPP legislation; and (6) testified numerous times as experts in SLAPP lawsuits.

The SRC provides the following services: (1) targeted assistance and support to SLAPP victims, including creating a robust website to serve as a national database of SLAPP case law, statutory citations, defense briefs, and limited and cost-effective direct assistance to defense attorneys on this issue; (2) policy and appellate education, including providing information to activists and legislators (if requested) on SLAPP issue and providing amicus briefs on selected important cases; (3) engaging in extensive public education around the country to raise awareness about the abuses of SLAPP suits and the existing defenses available; (4) engaging in continued academic study with the goal of updating the work of Pring and Canan: a book entitled “*SLAPPs: Getting Sued for Speaking Out*”; and (5) organizing a national network of lawyers willing to represent or advise SLAPP victims. SRC also develops and recommends legislative reforms in targeted states in hopes of creating additional protections from SLAPP suits around the country.

³ The Board of Directors consists of University of Denver Law Professor George “Rock” Pring; University of Central Florida Sociology Professor Penelope Canan; Attorney Lori Potter (Partner Kaplan Kirsch Rockwell); Attorney Frank Fink (Former ACLU Attorney); and Attorney Mark Goldowitz (Director, California Anti-SLAPP Project). The Executive Director of the SLAPP Resource Center is Sean T. McAllister, Esq.. For more information, see the SLAPP Resource Center website at www.slapps.org.