NEVADA'S NEW ANTI-SLAPP LAW: THE SILVER STATE SETS THE GOLD STANDARD

BY MARC J. RANDAZZA, ESQ.

A Strategic Lawsuit Against Public Participation, or SLAPP suit, is abusive litigation where a plaintiff brings a legally questionable claim in order to punish the defendant for exercising his or her First Amendment rights. Often, these suits are based upon defamation and other claims arising from expressive conduct. The purpose of a SLAPP suit is not necessarily to win, but to inflict the punishment of litigation itself. Because of SLAPP suits, many people find themselves facing the harsh reality that free speech is not necessarily "free."

Laws commonly known as "anti-SLAPP statutes" provide special protection against this kind of suit. During the last legislative session, the Nevada Legislature passed Senate Bill 286 into law, making sweeping changes to Nevada's existing anti-SLAPP statutes, which are found in Chapter 41 of the Nevada Revised Statutes (NRS). On October 1, 2013, the new law's changes took effect, and Nevadans now have the strongest free speech protections in the United States.

The Origin of SLAPP Suits

In the most important SLAPP suit of all time, John Peter Zenger criticized the colonial governor of New York. (This was 1733, long before the First Amendment existed as a glimmer in the founding fathers' eyes). In response, the governor had Zenger arrested and tried for the crime of "seditious libel." The jury was charged only with deciding whether or not Zenger had published the words. Zenger's attorney, Andrew Hamilton, argued that if a man speaks the truth, no law should punish him for doing so. After 10 minutes of deliberation, the jury rendered a not guilty verdict, establishing one of the first and most fundamental defenses to claims for defamation: truth is an absolute defense to liability.

The Digital Age Makes SLAPP Suits, and Anti-SLAPP Laws, Matter to More of Us

Until recent times, it was difficult for the ordinary citizen to find himself or herself the victim of a SLAPP suit. However, with almost everyone living online at this point, reality has changed. In *Reno v. ACLU*, the Supreme Court noted that on the internet, anyone can become "a town crier or a pamphleteer."[1] But, what the court did not predict was that now every one of us could become the victim of a SLAPP suit – and even for conduct many may consider innocuous.

Along with California, Nevada was one of the first states to enact an anti-SLAPP statute. These laws allow for special motions that dismiss SLAPP suits early on, without subjecting

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defendants to costly discovery, and resulting in an adjudication of the SLAPP suit on its merits (akin to a motion for summary judgment). Additionally, a staple of anti-SLAPP measures is awarding a prevailing movant his or her costs and reasonable attorneys' fees in bringing the anti-SLAPP motion.

While California and Nevada enacted anti-SLAPP laws around the same time, the parallels between the states' laws ended there. Unlike California's broad anti-SLAPP statute, Nevada's anti-SLAPP law initially protected only "good faith communication in furtherance of the right to petition." NRS 41.637. This limited the law's application to suits based on a speaker's communications with a government entity in order to comment upon an issue before it, or to procure its official action – an exceedingly limited scope.[2] Consequently, Nevada's anti-SLAPP statutes have been relatively unused, despite the problem of SLAPPs within the state. Meanwhile, Oregon, Washington, Texas and the District of Columbia all enacted strong anti-SLAPP laws,[3] with Oregon revising its law even further when it was determined to be weaker than California's.[4]

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NEVADA AWAKENS

This past legislative session, State Senator Justin Jones introduced Senate Bill 286 (SB 286) in an effort to make Nevada's anti-SLAPP laws among the best in the nation. The bill strengthened the law enough to make it truly meaningful, encompassing a broad array of First Amendment-protected speech, not merely communication made to the government. Rather than simply replicating other states' laws, SB 286 made specific changes to Nevada's anti-SLAPP statutes, while maintaining provisions that were uniquely Nevadan. A summary of these changes follows:

Expands the Breadth and Scope of Protected Speech

SB 286 broadens NRS 41.637 from just protecting good faith communication in furtherance of the right to petition, to also include "the right to free speech in direct connection with an issue of public concern." Within NRS 41.637's prior subsections, good faith communication in furtherance of the right to petition was constrained to communication seeking to procure or influence government action. SB 286 adds a fourth definition for the expanded types of protected conduct, which

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includes any "communication made in direct connection with an issue of public interest in a place open to the public or in a public forum," so long as the statement is truthful or made without knowledge of falsehood. Rather than being restricted to matters under government consideration, Nevada's anti-SLAPP statutes now cover all matters of public interest, so long as they are truthful and made in a place open to the public.

Allows For an Immediate Appeal of a Denied Anti-SLAPP Motion

Under prior Nevada law, NRS 41.650 provided immunity only from liability, rather than the underlying lawsuit. Therefore, if a movant's special motion to dismiss was denied, he or she had to wait until the end of trial to appeal the denial of an anti-SLAPP motion. *See, e.g., Metabolic Research, Inc. v. Ferrell*, 693 F.3d 795, 796 n. 1 (9th Cir. 2012). SB 286 modifies NRS 41.650 so that a movant is immune from any civil action – not just liability – from claims arising from his or her protected speech. Accordingly, any denial of an anti-SLAPP motion is immediately appealable.

Expedites Judicial Consideration of Anti-SLAPP Motions

Nevada's existing anti-SLAPP laws stayed all discovery within the proceeding and required the court to rule on the movant's motion within a defined, short period of time after it was filed. Currently, Nevada requires courts considering an anti-SLAPP motion to rule on those motions within 30 days of their filing. After SB 286, this time is reduced to seven judicial days after the motion is served upon the plaintiff.

Creates a $10,000 Penalty to Deter Frivolous Claims

An inherent characteristic of anti-SLAPP statutes is the award of costs and reasonable attorneys' fees to a prevailing movant. This mechanism serves to encourage attorneys to file meritorious anti-SLAPP motions that might not otherwise be filed, and to incentivize the protection of the First Amendment. In addition to allowing for a movant's recovery of costs and attorneys' fees, SB 286's change to NRS 41.670 gives the court discretion to award a successful movant up to $10,000 in addition to his or her reasonable costs and attorneys' fees. This discourages questionable attempts to silence successful movants' First Amendment rights.

Creates "SLAPP-Back" Provision to Prevent Frivolous Anti-SLAPP Motions

Because of the additional powers SB 286 infuses into Nevada's anti-SLAPP laws, the legislature incorporated a mechanism to prevent its abuse. Harkening to California's Civil Procedure Code § 425.17, SB 286 amends NRS 41.670 so that a court denying an anti-SLAPP motion must award the non-movant (i.e., the plaintiff) his or her costs and reasonable attorneys' fees upon finding that the anti-SLAPP motion was "frivolous or vexatious." This prevents frivolous anti-SLAPP motions from burdening the courts and becoming a basis for limiting the law's protections.

Retains Key Elements from Nevada's Existing Laws

Despite SB 286's changes, Nevada's existing statutes have, and retain, powerful provisions that are unique among anti-SLAPP laws. First, the Nevada Attorney General or the "chief legal officer or attorney of a political subdivision" in Nevada may "defend or otherwise support the person against whom the action is brought." NRS 41.660(1)(b). Simply stated, the Nevada Attorney General's Office, or the office of a municipal attorney, may act as counsel for a defendant in order to bring an anti-SLAPP motion for him or her.

Also unique to Nevada is its creation of a separate cause of action for prevailing on an anti-SLAPP motion. Thus, not only may successful anti-SLAPP movants recover their attorneys' fees and costs in dismissing the action against them, they may also pursue their own new claim against the party filing a SLAPP suit, with the statutory right to recover a wide range of costly damages under NRS 41.670.

Conclusion

So long as there are people willing to file vexatious lawsuits to shut down public debate, SLAPP suits will continue. However, SB 286 means that the victims of those cases are no longer certain to be victims, whether they win or lose.

All attorneys take an oath to uphold the Constitution, including the First Amendment. Unfortunately, previously, there was no downside to taking a limited view of this duty. While Rule 11 stands as a possible obstacle to the most frivolous claims, such sanctions are rare, and no impediment to a creative litigator's tools. However, this is not a sufficient protection when the possible victim is not just a citizen, but our most cherished Constitutional right. By adopting SB 286's changes to its anti-SLAPP statutes, Nevada enters the realm of states that treat its citizens' First Amendment rights like the sacred protections they truly are. ■

1 *Reno v. ACLU,* 521 U.S. 844, 870 (1997) "Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer."

2 *See Metabolic Research, Inc. v. Ferrell,* 693 F.3d 795, 797 (9th Cir. 2012).

3 Cal. Civ. P. Code § 425.16 (West 2012); D.C. Code § 16-5502 (2012); Ore. Rev. Stat. §§ 31.150–31.155 (2012); Tex. Civ. Prac. & Rem. Code Ann. §§ 27.001–27.011 (West 2011); W.R.C. §§ 4.24.500–4.24.525 (2012).

4 Ore. Rev. Stat. §§ 31.150–31.155 (2012) (revising the Oregon anti-SLAPP law after *Englert v. MacDonell*, 551 F.3d 1099, 1106–07 (9th Cir. 2009), which interpreted Oregon's prior anti-SLAPP law as protecting defendants from liability but not from prosecution. Therefore, denying the defendant a right to an interlocutory appeal).

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