How to Prevent the Sting of a SLAPP

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By: Laura Lee Prather

It used to be people thought of the Internet as an entertainment medium, but today we are realizing the full potential of our voice over the Internet. A voice that can impact presidential elections, a voice that can determine public policy, a voice that can influence purchasing decisions and more. The seemingly omnipresent Wikimedia describes its mission as being "committed to building a world in which every single human being can freely share in the sum of all human knowledge." In creating this new medium of global communication, democracy in action can reach all ends of the earth. The flip side, though, is that one must be responsible for speaking in a legal manner. What does that mean? The Internet does not give one a free license to defame others. It also should not give those who do not like what is said about them a free license to sue those who speak about their experiences with a business or seek to right a wrong in government solely for the purpose of silencing them.

The Rise of Anti-SLAPP Legislation in America

With the rise of the Internet, there has also been an increase in meritless lawsuits brought for the purpose of harassing and intimidating those who urge a government result or speak out on an issue of public interest. Think: bully on the playground. These lawsuits are commonly known as Strategic Lawsuits Against Public Participation (SLAPPs). In response to these "bullies," several states have adopted anti-SLAPP legislation, and the federal government is considering following suit. The Citizen Participation Act, H.R. 4364, has received support from more than 100 organizations and individuals.

The bill is gaining momentum and is expected to receive substantial consideration during the next Congress. The bill provides for an expedited motion to dismiss procedure when one is simply sued for what they say without there being a valid basis for the claim. When this happens, the fees are shifted so that the party who brought the case ends up paying the fees that were spent fighting the meritless claim. This means a lot when you are the consumer

who has been sued for speaking out and you have no insurance to protect you against a baseless lawsuit. One would assume the consumer would ultimately prevail in a lawsuit without the anti-SLAPP statute being passed; the practical reality, though, is that the consumer could be bankrupted by the cost of defending himself or herself in the process.

Without federal legislation, plaintiffs are able to "forum shop" so they can choose a state where anti-SLAPP legislation has not passed yet and tie a speaker up in court for years – effectively silencing them (and others) in the process. Think about the intimidation factor the bully has on all those observing the fight. The federal legislation would permit the removal of all SLAPP cases to federal court so a federal judge could determine whether there were grounds to move forward with the litigation or whether the claims are meritless and fees should be imposed against the party who filed suit. At this point, however, the need still exists on both a state and federal level for such legislation.

California Set the Standard and Other States Have Followed

Long before the Internet became popular as a forum for public speech, California recognized the problem when well-funded companies were suing citizens who were holding the companies accountable. The solution California came up with in 1992 was the adoption of an anti-SLAPP law that made it easier for defendants to seek early dismissal of these suits at no cost to them. Since that time, 26 other states have passed anti-SLAPP laws, two states (Colorado and West Virginia) have adopted judicial procedures to protect against such suits, and several jurisdictions, including Michigan, Texas and Washington, D.C., are considering adopting similar statutes this legislative session. The trend for passage of anti-SLAPP legislation is ongoing. In the last decade, Arizona, Arkansas, Illinois, Missouri, New Mexico, New York, Oregon, Utah and Washington have all adopted anti-SLAPP statutes – again showing this is not a red or a blue state issue. It is a speech issue that transcends both parties and strikes at the heart of patriotism.

Each state has examples of why a law like this is necessary. In Michigan, college student Justin Kurtz was sued for $750,000 for speaking out on his Facebook page after his car was towed from his apartment parking lot where

he said he had permission to park. Kurtz's testimony proved compelling before the Michigan Legislature earlier this year. After he testified, D.C. used the Michigan template and Kurtz's experience to propose its own anti-SLAPP legislation. D.C. citizens have seen lawsuits filed against them for providing comments about YouTube postings, for describing the lack of cleanliness of eating establishments and for providing book reviews. None of these lawsuits had viable claims; they were just more efforts to silence opponents into submission.

Even when lawsuits are not brought, just threatened, the impact is real. In Florida, a lawsuit was threatened against Thomas Alascio for negative remarks he made about a Florida car dealership on his Twitter account. His comment, "There is not a worse dealership on the planet," is protected opinion under our Constitution – an indisputable point. What the dealership really sought with its threat, though, was the removal of the offending statements. More and more, the goal of the company is to get someone to "take back" or "remove" what he or she said that the company found offensive.

The rise of this sort of litigation is directly related to the rise of the popularity of the Internet – the difference being that before when one commented on service and experiences with corporate America or the government, the audience who received the message was those within earshot or those to whom a letter was mailed. Now, in real time, one's statements can go global instantaneously with the click of a button on the Internet. Still, if the statements are false, defamation laws exist to protect and hold people accountable for what they say. That is where the line belongs – not with the bully being able to silence speech before words are spoken.

Texas Lawmakers Will Get to Decide Whether to Protect Free Speech

Texans, by nature, are an outspoken breed, and they, too, are finding themselves in need of additional protection against the moneyed interests of those with lawyers on retainer so they can continue to speak out about matters of public concern. When Janis Garraway filed a complaint against the Texas State Board of Medical Examiners about her doctor and then went to her local television station for help when nothing was being done, she found herself on the receiving end of a costly lawsuit, all because she was reporting wrongdoing. Garraway and the television

station ultimately prevailed in the lawsuit, and the doctor was ultimately sanctioned by the Texas State Board of Medical Examiners, but not until after a costly legal battle that should never have occurred.

In Texas and other jurisdictions where the state procedural rules do not provide for a motion to dismiss, the need for anti-SLAPP legislation is heightened because, without it, consumers who have been wrongfully sued must spend money defending themselves at least until the summary judgment stage. That usually comes after several months of extensive and expensive discovery. With anti-SLAPP legislation, the court would have the opportunity to determine at the outset whether a lawsuit was baseless and shift the fees appropriately if there is no merit to the claims. Sen. Rodney Ellis (D-Houston) and Rep. Todd Hunter (R-Corpus Christi) will be filing the Texas Citizen Participation Act in the 2011 legislative session to remedy this problem. Then, Texas lawmakers will have the opportunity to determine whether to support this bipartisan measure to protect free speech. Without laws like these in place, the bullies prevail, and the public stands to lose a tremendous tool for information and discourse.

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