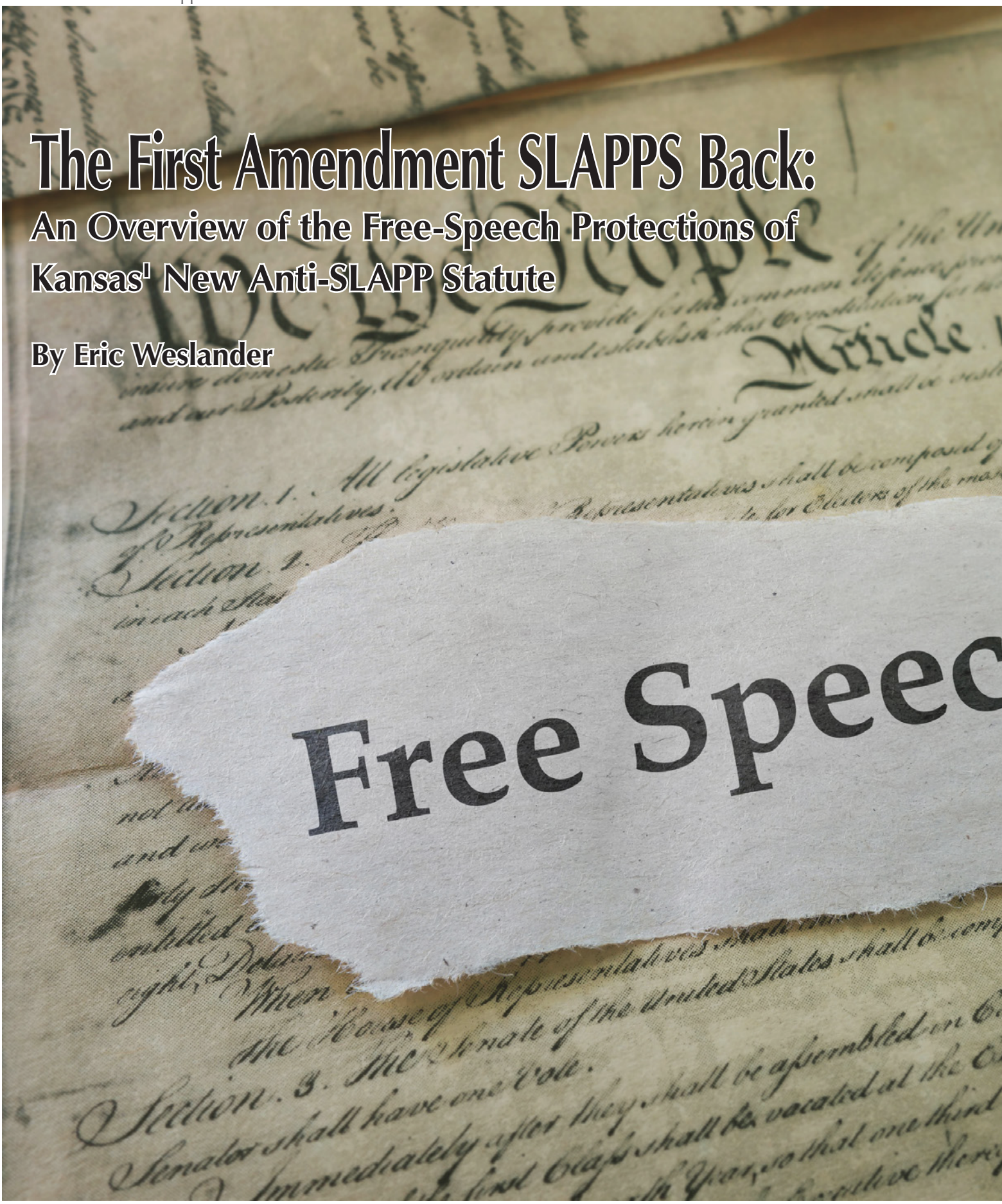

The First Amendment SLAPPS Back:

An Overview of the Free-Speech Protections of Kansas' New Anti-SLAPP Statute

By Eric Weslander

Introduction

One not need look far in today's world for prominent examples of threats of dubious legal action against journalists, in retaliation for unflattering reports on the rich and powerful. Examples include an attorney for movie producer Harvey Weinstein threatening to sue the *New York Times* over reports of sexual-harassment complaints,[1] or an attorney for unsuccessful Alabama U.S. Senate candidate Roy Moore writing that a local news organization should be liable on grounds it "intentionally refused to advance the truth" regarding the sexual-misconduct allegations against Moore, and should be liable for "oppression, fraud, wanntonness, and/or malice."[2]

A Kansas statute enacted in 2016 that has garnered relatively little public attention, K.S.A. 60-5320, the "Public speech protection act," represents the latest in step in a nationwide battle to fight meritless lawsuits that chill free speech, known as SLAPPs, or "strategic lawsuits against public participation." Familiarity with this statute— which provides for mandatory attorneys' fees in the event of a successful anti-SLAPP motion — is a must for attorneys litigating civil matters in Kansas courts. In essence, the statute allows a defendant to bring a special motion to strike a claim early in litigation, if that claim is "based on, relates to or is in response to a party's exercise of the right of free speech, right to petition, or right of association," as extensively defined in the statute, shifting the burden to the plaintiff to show that it has a prima facie case. K.S.A. 60-5320(d)

Notably, the statute requires the court to award a successful anti-SLAPP movant its costs and attorneys' fees, and to order "such additional relief, including sanctions upon the responding party *and its attorneys and law firms*, as the court determines necessary to deter repetition of the conduct by others similarly situated" K.S.A. 60-5320(g) (emphasis added). By contrast, if the party bringing the claim survives the anti-SLAPP motion, the court may award that party its costs and fees only if the court finds "the motion to strike is frivolous or solely intended to cause delay." *Id.* The message to litigants is clear: be very careful before you bring a suit that seeks to punish the exercise of free speech.

Background

The term "SLAPP," coined by two law professors in the 1980s,[3] refers to suits designed to chill free speech and impose costs on the speaker. The most common causes of action associated with SLAPP suits are libel and defamation; other common causes of action for SLAPPs include interference with contract or business, antitrust violation, and unfair competition.[4] As stated by the Maine Supreme Court in a decision involving that state's anti-SLAPP act, the "classic anti-SLAPP case" is one in which "citizens who publicly oppose development projects are sued by companies or other citizens."[5]

The effort to pass these statutes nationwide, in states including Kansas, goes to the very heart of our democracy: the free exchange of ideas and the ability to speak out about matters of public importance, even if the content of the speech is inconvenient or unflattering to someone else. The United States Supreme Court has recognized that this country's origins instilled a "profound national commitment to the principle that debate on public issues

should be uninhibited, robust, and wide-open," as embodied in the First Amendment to the U.S. Constitution.[6] The Bill of Rights of the Kansas Constitution further provides at § 11 that "The Liberty of the press *shall be inviolate*; and all persons may freely speak, write or publish their sentiments on all subjects, being responsible for the abuse of such rights." (emphasis added).

Today, as an extension of this legacy, public officials and public figures generally cannot win a defamation case unless they show that the statement was made with "actual malice," i.e., with knowledge of its falsity or reckless disregard for the truth. The U.S. Supreme Court first adopted this First Amendment standard in its landmark 1964 decision in *New York Times v. Sullivan*, a case in which the Montgomery, Alabama police commissioner sued the *New York Times* for publishing a political advertisement about police handling of civil-rights protesters including Dr. Martin Luther King, Jr. Although the *Sullivan* ruling effectively "constitutionalized" the law of defamation, the "actual malice" standard relating to public officials had long been the law in Kansas and other states at the time of the *Sullivan* decision, and *Sullivan* cites the Kansas decision of *Coleman v. MacLennan*, 78 Kan. 711, 98 P. 281 (1908), for the proposition that "It is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages."

As powerful as the legal protections for free speech are, however, a viable legal defense takes time and money—and often too much of both. In testimony supporting Kansas' anti-SLAPP statute, the late Rep. Jan Pauls stated, "Our court system is increasingly seen not as a means for swift justice, but as a game, used by some, of drawn out punishment for those without deep pockets."[7] Potential costs associated with SLAPP suits include not only out-of-pocket expenses on behalf of the litigants, but also time, distraction, anxiety, and lost work time. On a societal level, proponents of anti-SLAPP acts argue, meritless SLAPP suits create a drain on judicial resources and potentially chill the exercise of free speech.

To well-known Internet-law scholar Eric Goldman, anti-SLAPP statutes exist in part to protect "negative truthful information," such as critical consumer reviews, which he calls the "highly endangered species of the information ecosystem." This type of information is endangered, he says, "because it's goring someone's ox, and the ox is going to gore back."[8] Although the concept of SLAPP laws originally arose in the context of protecting against suits that seek to suppress citizens' rights to petition the government, in today's world, Goldman said "I think about SLAPPS as covering any lawsuit that's designed to suppress socially important speech [such as consumer reviews or investigative journalism]… there's a wide range of other kinds of socially important content that we want to encourage and foster."[9]

As discussed further below, the first Kansas cases testing the anti-SLAPP statute are now working their way through the courts. Some high-profile cases from other jurisdictions show the wide-ranging scenarios that could set the stage for an anti-SLAPP motion to strike, including the following:

- A coal-energy executive and his affiliated companies suing HBO personality John Oliver over a satirical report that likened him to the comic movie character "Dr. Evil."[10] (This suit was filed in state court in West Virginia, which has no anti-SLAPP statute; nevertheless, the suit has been widely analyzed under the rubric of SLAPP-type suits).
- A weekly newspaper publisher suing the publisher of competing publication, alleging defamation based on competing publisher's non-actionable opinions.[11]
- A forest-products company suing the environmental group Greenpeace International, along with various affiliate groups, executives and board members, alleging violation of RICO statutes and other causes of action over allegedly "false and misleading" information disseminated by the group.[12]
- A plaintiff suing the founder of the website "TechDirt.com" for $15 million over a series of detailed, factually supported articles challenging the plaintiff's assertion that he invented email.[13]
- The owner of the Washington Redskins suing the Washington City Paper over factually supported articles criticizing him.[14]

At last count, approximately 32 states and the District of Columbia had anti-SLAPP statutes, although they vary greatly in the type of activities they encompass and the procedures involved in bringing a motion. This variation—with the attendant potential for forum-shopping—has prompted advocates to seek federal anti-SLAPP legislation, and has caused the Uniform Law Commission to convene a drafting committee for a potential Uniform Anti-SLAPP Act, to be convened in early 2018.[15]

The Public Participation Project, which tracks anti-SLAPP statutes and litigation nationwide, rates Kansas' new statute (enacted July 1, 2016) as "good," giving it a grade of "B." As originally proposed, the Kansas statute would have applied only to suits where the defendant's conduct involved "public participation and petition." The scope of the statute was later broadened to encompass any claim that concerns "a party's exercise of the right of free speech, right to petition or right of association."

II. Mechanics/substance of special motion to strike

The basic mechanics of a Kansas anti-SLAPP motion to strike, pursuant to K.S.A. 60-5320, are as follows: the motion to strike must be filed within 60 days of service of the most recent complaint, but the trial court in its discretion can allow the motion to be filed later in the litigation process.[16] Pursuant to the statute, a hearing on the motion shall be held not more than 30 days after service.[17]

To successfully invoke the protections of the anti-SLAPP statute, a defendant bringing the motion to strike must first make a prima facie case that the claim targeted by the motion "concerns a party's exercise of the right of free speech, right to petition *or* right of association" (emphasis added).[18] Each of these terms is separately defined as follows, bringing a wide range of conduct within the scope of the statute:

- "Exercise of the right of free speech" is defined as any communication "made in connection with a public issue or issue of public interest."[19]

In turn, public issues or issues of public interest are defined (without limitation) to include an issue "related to: (A) Health or safety; (B) environmental, economic or community well-being; (C) the government; (D) a public official or public figure; or (E) a good, product or service in the marketplace."[20]

- "Exercise of the right to petition" is defined to include communications "in or pertaining to" various governmental proceedings, or in connection with, encouraging, or seeking consideration of an issue by the government.[21]
- "Exercise of the right of association" means a communication between individuals "who join together to collectively express, promote, pursue or defend common interests."[22]

Based on these broad definitions, virtually any lawsuit that seeks to impose damages for a defendant speaking out on matters that go beyond personal, private affairs—whether that topic is an alleged scam by a business, a school official's actions, a city-commission meeting, or union activity, to name just a few examples—could potentially trigger the anti-SLAPP Act's provisions.

Courts face interpretive challenges when deciding anti-SLAPP motions that relate to speech at the margins of what might be considered a "public issue" or matter of public interest. While no one would dispute that a statement made by a government official in a public meeting, for example, would be an issue of public interest, courts face a more nuanced decision when the speech at issue involves private actors but arguably implicates public concerns. Some examples of topics in which courts have found no public interest (under varying state-law formulations of that term) include distribution of Playboy Mansion party videos; a plaintiff's HIV-positive status, and a website parodying a rival company's business.[23]

Once the party bringing a Kansas anti-SLAPP motion to strike meets this first prong of the test, the burden then shifts to the responding party to establish a likelihood of prevailing on the claim "by presenting substantial competent evidence to support a prima facie case."[24] In making this inquiry, the Court must consider the pleadings and any supporting or opposing affidavits.[25] All other discovery, motions or pending hearings are stayed upon filing of the motion, but the court may allow specified limited discovery upon motion and for good cause shown.[26] The party making the anti-SLAPP motion may bring an interlocutory appeal from a trial-court order denying the motion to strike, or a mandamus action in the event that the trial court fails to rule on the motion in an expedited fashion; in this situation, further proceedings are stayed pending determination of the appeal.[27]

Thus, in one hypothetical scenario in which an anti-SLAPP statute might be employed, imagine that a public figure—a prominent local community leader who is a well-known "local celebrity," in this instance—sues a journalist for defamation over a statement published in a news article, which claimed that the community leader spent public funds improperly as part of a grant program. The community leader knows the basic substance of the article's allegations to be true, but thinks they were "sensationalized" and "negative" and decides to file suit to punish the journalist and deter similar stories in the future. Because the community leader is a public figure and the story at issue relates to the leader's status as a public figure, to succeed on a claim of defamation, the plaintiff would ultimately have to establish that the journalist wrote the article with actual malice, i.e. with knowledge of its falsity, or with reckless disregard for the truth.

Prior to enactment of the anti-SLAPP statute, the journalist's counsel *could* have brought a motion to dismiss pursuant to K.S.A. 60-212(b)(6) early in the lawsuit for failure to state a claim upon which relief could be granted. However, under Kansas' lenient notice-pleading standards—which test only the sufficiency of the allegations, assuming the plaintiff's factual allegations to be true—defense counsel would have faced an uphill battle, in that the trial court would be required to credit plaintiff's allegations for purposes of the motion, deferring resolution of any factual questions until the summary-judgment stage. Thus, if the plaintiff flatly alleged in the petition that the facts alleged in the article were false, and that journalist knew the facts to be false at the time the article was published, those allegations likely would have been enough to survive a motion to dismiss and to open up the door to costly discovery. Although the journalist would have still been able fully articulate constitutional free-speech defenses at the summary-judgment stage, there was no procedural mechanism to "smoke out" the fundamental flaws in the plaintiff's case early in the course of litigation. Nor would there have been the potential to recover attorneys' fees in the event that the trial court was to grant the early motion to dismiss, or the potential for an interlocutory appeal of a ruling denying the motion to dismiss.

By contrast, under the new statute, once the journalist demonstrated that the lawsuit at issue concerned the journalist's right to free speech—here, at minimum, issues related to government, community well-being, and a public figure—the burden would immediately shift to the plaintiff to provide a substantive justification of the claim. Rather than being able

to rest on the bald allegations of the petition—including the groundless assertion that the journalist knew the statements to be false—the plaintiff would now be required to establish *a likelihood of prevailing* on the claim supported by "substantial competent evidence." The plaintiff would therefore have to "put up or shut up" early in the litigation process, and it is likely that during this process this hypothetical plaintiff would not be able to come up with any evidence, much less substantial competent evidence, that the journalist knew the allegations to be false. This failure to muster evidence should thus cause the case to be dismissed up front, sparing the journalist the delay, expense, inconvenience, and frustration of defending a meritless lawsuit through discovery—and potentially imposing attorney's fees on the plaintiff. In the event that the court was to deny the motion, the moving party could appeal the ruling immediately pursuant to the anti-SLAPP statutory provisions.

"The beauty of anti-SLAPP law is that it is a procedural approach to the issue. You start with the premise that if it is challenging socially important speech, the burden is on the plaintiff to explain why they have a case," Internet scholar Goldman stated in a recently recorded panel discussion[28] of the Congressional Internet Caucus Advisory Committee. "They don't just get to go in and say 'I'll figure it out later. I might have a case, maybe I don't. We'll find out later,' with the meter running for the defendant all along the way."[29]

Unlike some states' statutes, the Kansas statute does not specify extent to which non-moving party may amend its petition either before or after the motion, leaving courts to apply and analogize to existing procedural rules regarding amendment.

III. Unresolved issues/concerns:

In recent years, anti-SLAPP statutes around the country have come under fire in a number of legal challenges. The most high-profile of these cases involve questions about whether anti-SLAPP statutes unconstitutionally impinge on a litigant's ability to petition the court for redress and obtain a trial on the merits of their case. In a 2015 decision,[30] the Washington Supreme Court held that Washington's anti-SLAPP statute violated the right to a jury trial. Unlike Kansas' statute, the Washington statute required the plaintiff to establish its probability of success by "clear and convincing evidence," requiring the court to weigh the evidence and therefore creating a "truncated adjudication of the merits of a plaintiff's claim, including non-frivolous factual issues, without a trial."[31]

In May 2017, the Massachusetts Supreme Judicial Court "dramatically shifted" the legal landscape under that state's decades-old anti-SLAPP statute by creating a new, subjective standard under which a plaintiff may defeat an anti-SLAPP motion if the plaintiff can show that its "primary" motivation for bringing the claim was not to chill the defendant's rights.[32] The Massachusetts court stated that the remedy provided by that state's legislature was not intended "to be used instead as a cudgel to forestall and chill the legitimate claims—also petition activity—of those who may be truly aggrieved by the sometimes collateral damage wrought by another's valid petitioning activity."[33]

Also in May 2017, the Maine Supreme Judicial Court introduced new procedural safeguards for early evidentiary hearings, discovery and resolution of conflicting facts under that state's then-22-year-old anti-SLAPP statute (which incidentally applies only to lawsuits based on a defendant's exercise of the "right of petition").[34] The decision noted the varying burden-shifting rules that the state has used over the past two decades to balance two aspects of the right to petition the government—the right to engage in petitioning speech and the right to seek redress from the courts for claimed speech-related injuries—noting that when considering an anti-SLAPP motion, the court "must attempt to recognize and protect both the defendant's actions that might constitute an exercise of his First Amendment right to petition—here, [defendant's] statements about [plaintiff's] alleged involvement in illegal and immoral acts—and [plaintiff's] right of access to the courts to seek redress for those same actions."[35]

Another recent issue that has surfaced is government agencies' attempts to use anti-SLAPP suits to dismiss lawsuits relating to governmental actions. In a May 2017 decision, the California Supreme Court held that the defendant, a public university, could not invoke the anti-SLAPP statute to dismiss a professor's lawsuit over being denied tenure, stating that a claim "may be struck only if the speech or petitioning activity itself is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted."[36] By contrast, in a subsequent decision, the California Court of Appeals in August 2017 upheld the trial court's grant of a school district's anti-SLAPP motion to strike a lawsuit by a teacher, where the "gravamen of the complaint" related to protected conduct by the school district, including communications and actions relating to the internal investigation into sexual-abuse allegations against the teacher.[37]

The most vexing current procedural issue involving anti-SLAPP laws nationwide is a circuit split over whether anti-SLAPP laws are substantive or procedural, an inquiry that is linked to the potential for forum-shopping and the growing movement to enact a federal anti-SLAPP statute. At least two circuits, the U.S. Courts of Appeal for both the First and Ninth Circuits, have held anti-SLAPP provisions to be substantive laws that do not conflict with the Federal Rules of Civil Procedure,[38] thus allowing various state anti-SLAPP laws to be used as a tool for defendants in federal court. The First Circuit, for example, concluded in 2010 that Maine's anti-SLAPP act did not create a substitute for the Federal Rules, but rather "created a supplemental and substantive rule to provide added protections, beyond those in Rules 12 and 56, to defendants who are named as parties because of constitutional petitioning activities."[39] The court held that refusing to apply the Maine anti-SLAPP statute in federal court "would result in an ineq-

uitable administration of justice between a defense asserted in state court and the same defense asserted in federal court… . Likewise, were [the Maine statute] not to apply in federal court, the incentives for forum shopping would be strong."[40]

The U.S. Court of Appeals for the District of Columbia Circuit has taken the opposite view, concluding in a 2015 decision in a case filed by Yasser Abbas (son of Palestinian leader Mahmoud Abbas) that the D.C. anti-SLAPP act "conflicts with the Federal Rules by setting up an additional hurdle a plaintiff must jump over to get to trial."[41] The *Abbas* decision relied in part on a characteristically feisty concurrence by Judge Alex Kozinski in a 2013 decision by the Ninth Circuit Court of Appeals, which has recently garnered newfound attention. In that decision, Kozinski urged the Ninth Circuit to overturn its prior precedent allowing federal courts to apply state anti-SLAPP statutes, stating, "Federal courts have no business applying exotic state procedural rules which, of necessity, disrupt the comprehensive scheme embodied in the Federal Rules, our jurisdictional statutes and Supreme Court interpretations thereof."[42]

Interestingly, Kozinski's concurrence came in a case involving a defamation counterclaim filed by Trump University against a former student who had sued it for deceptive business practices. One observer recently noted that, given the traction that Kozinski's concurrence has now obtained among some courts, Donald J. Trump may have actually played a role in "open[ing] up our libel laws," as he famously promised to do on the campaign trail, before he ever took office.[43]

At the time of this writing, appeals involving whether anti-SLAPP acts are "substantive" or "procedural" are pending in the 11th Circuit (*Carbone v. Cable News Network*, a case involving CNN's reporting on infant-mortality rates at a Florida hospital), and 10th Circuit (*Los Lobos Renewable Power v. Americulture,* a case involving neighbors' dispute over a property leased for a geothermal power facility.)

IV. Kansas' first test case

The first case before the Kansas Court of Appeals involving this state's new anti-SLAPP act is a dispute out of Johnson County in which a businessman sued for defamation over alleged false statements made on blogs, social media and emails, allegedly made by a woman with whom he previously had a romantic relationship.[44] The defendant brought a motion to strike and attached an affidavit in which she denied making many of the alleged statements. (Presumably, absent evidence that a defendant *actually made a statement* of some kind, a plaintiff would be unable to establish a necessary element of a defamation claim). The trial court, however, denied the motion to strike, on the grounds that the defendant could not simultaneously take advantage of the Act while denying that she made the alleged defamatory statements.

Thus, the narrow issue currently on appeal with regard to Kansas' statute is whether a speaker is required to admit that it has made the disputed statements before being entitled to invoke the statute's protections—or, put another way, whether a defendant is entitled to protections of the statute, even while denying having engaged in protected activity. In her brief, the defendant/appellant emphasized that whether the anti-SLAPP act applies depends not on whether a defendant admits or denies specific statements made in the petition, but rather depends solely on the nature of the plaintiff's claims. In defendant/appellant's view, the trial court's ruling relieved the plaintiff of establishing that he had *some* evidence supporting *each* element of his claim, averting the act's requirements, while effectively requiring the defendant to incriminate itself in order to make a motion to strike.

Plaintiff/appellee countered that the trial court's ruling was supported by the statute's plain language, and that if a defendant denies making the statements at issue, the defendant could not have engaged in exercise of free association, speech or petition, all of which necessitate some form of communication under the plain language of the statute.

During oral argument on this case in November, a three-judge panel of the Court of Appeals wrangled with questions such as: is the special motion to dismiss more like a motion to dismiss or a motion for summary judgment? In determining whether to apply the statute, should the trial court primarily look to the nature of the plaintiff's claim or to the nature of the defendant's response? How much limited discovery, if any, should a trial court allow the parties in this situation, assuming the procedure of the special motion to strike applies, before ruling on the plaintiff's likelihood of prevailing? If the Court were to remand the matter for further consideration, would the parties soon end up back before the appeals court on another interlocutory appeal?

In short, although this case raises interesting procedural and mechanical questions and competing public-policy arguments, it does not pose the fundamental constitutional question that other courts have faced regarding a plaintiff's and a speaker-defendant's competing rights to petition the government – an issue that likely will surface in Kansas another day.

Conclusion

In conclusion, all litigators practicing in Kansas Courts should be aware of, and seek to familiarize themselves, with provisions of the anti-SLAPP act. Although the fate of these statutes is uncertain, and they are a magnet for constitutional challenges, they offer proponents of free speech a powerful weapon to expose, eliminate and deter meritless suits. ■

About the Author

Eric Weslander is an associate with Stevens & Brand LLP in Lawrence, KS and a former journalist. His practice includes a variety of litigation matters including business disputes, personal injury and media law.