Maine's Anti-SLAPP Statute: A Tool for Litigators

By: J.D. Hadiaris Defending a claim for defamation, libel, or abusive litigation (i.e., malicious prosecution or abuse of process) can be difficult and time consuming. Even when the plaintiff's claim is weak and the damages small, these cases often require substantial discovery practice before a motion for summary judgment can be filed. Factual disputes can preclude summary judgment, and defendants or their insurers may have to consider paying money to settle a case simply to avoid further litigation costs. Given the practical difficulties of defending these claims, it is important to consider Maine's anti-SLAPP statute, 14 M.R.S.A. § 556, when answering a lawsuit that arguably involves the right to "petition." SLAPP is an acronym for Strategic Lawsuit Against Public Participation. SLAPP litigation, generally, is litigation without merit filed to dissuade or punish the exercise of First Amendment rights of defendants. *Morse Bros. v. Webster, 2001 ME 70, ¶ 10, 772 A.2d 842, 846*. Maine's anti-SLAPP statute is designed to guard against meritless lawsuits brought with the intention of chilling or deterring the free exercise of a defendant's First Amendment right to petition the government by threatening would-be activists with litigation costs. *Schelling v. Lindell*, 2008 ME 59, ¶ 6, 942 A.2d 1226, 1229. In furtherance of this purpose, the anti-SLAPP statute allows a defendant to file a special motion to dismiss claims against it that are based upon the defendant's exercise of the constitutional right to petition. *Nader v. Maine Democratic Party*, 2013 ME 51, ¶ 12, 66 A.3d 571, 575. The Maine Law Court has repeatedly recognized that Maine's anti-SLAPP statute "very broadly defines the exercise of the 'right to petition.'" *Schelling*, 2008 ME 59, ¶ 11, 942 A.2d at 1230; *see also Nader v. Maine Democratic Party*, 2012 ME 57, ¶ 28, 41 A.3d 551, 560. The Law Court has stressed that it "is clear from the language of section 556 [that] the Legislature intended to define in very broad terms those statements that are covered by the statute." *Schelling*, 2008 ME 59, ¶ 12, 942 A.2d at 1230; *see also Maine's Anti–SLAPP Law: Special Protection Against Improper Lawsuits Targeting Free Speech and Petitioning,* 23 Me. Bar J. 32, 37 (2008) at 35 (Maine's anti-SLAPP statute "manifests a breadth of scope beyond that of many other states' anti-SLAPP laws"). Section 556's broad definition of the right of petition includes the following:

1. Any written or oral statement made before or submitted to a legislative, executive or judicial body, or any other governmental proceeding;
2. Any written or oral statement made in connection with an issue under consideration or review by a legislative, executive or judicial body, or any other governmental proceeding;
3. Any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive or judicial body, or any other governmental proceeding;
4. Any statement reasonably likely to enlist public participation in an effort to effect such consideration, or any other statement falling within constitutional protection of the right to petition government.

14 M.R.S.A § 556. The statute does not limit the definition of petitioning activity to statements made to a governmental body or representative. *Id.*; *see also Maine's Anti–SLAPP Law: Special Protection Against Improper Lawsuits Targeting Free Speech and Petitioning,* 23 Me. Bar J. 32, 37 (2008) at 35 ("Section 556 is by its explicit terms, quite broad, providing its qualified immunity to even the most indirect of exercises of one's right to petition the government"). In *Maietta Construction, Inc. v. Wainwright*, the Law Court held that letters written to the city

council, to the mayor, as well as statements made to the newspapers "clearly amount to petitioning activity" for the purposes of the anti-SLAPP statute. 2004 ME 53, ¶7, 847 A.2d 1169. Likewise, in *Schelling,* the Law Court held that a letter to the editor, arguably intended to effect reconsideration of an issue by the Legislature, was within the definition of petitioning activity. 2008 ME 59, ¶13, 942 A.2d 1226, 1230-1231. Other courts have also held that pleadings filed in court constitute "petitioning" activity, because they are "statement[s] reasonably likely to encourage consideration or review of an issue by a … judicial body." The anti-SLAPP statute provides that a special motion to dismiss "may" be filed within 60 days after the date of service of the complaint, or at any time later at the discretion of the court. Given the 60-day window, it is important to consider whether the statute may apply at the time of the answering of the complaint, or soon thereafter. The 60 day period will expire before the deadline to amend pleadings under the court's Standard Scheduling Order, and courts in Maine have in some cases been unwilling to extend that deadline beyond the 60-day period. The primary benefit of the anti-SLAPP statute, from the defendant's perspective, is that it gives the defendant the ability to move to dismiss the claim at the outset, before the defense incurs significant costs. It also allows the defendant to move to dismiss a claim where the plaintiff's complaint is not based upon "actual damages." This is important because in defamation or libel cases, a plaintiff is generally allowed to pursue a claim based upon "per se" damages if the alleged defamatory statements are related to the plaintiff's work, allegations of criminal activity, or "scandalous diseases." In other words, a defendant may pursue a claim for nominal damages, even where he has not suffered any actual harm. When filing a special motion to dismiss under the anti-SLAPP statute, the defendant has the initial burden of demonstrating that the anti-SLAPP statute applies by showing that the claims are based on the defendant's conduct in exercising his/her constitutional right to petition. If the moving party establishes that the anti-SLAPP statute applies, the burden shifts to the non-moving party, and under the second step, the court *must* dismiss the action unless the non-moving party makes a *prima facie* showing, through pleadings and affidavits, that at least one of the moving party's petitioning activities "was devoid of any reasonable factual support or any arguable basis in law … and caused actual injury to the [non-moving] party." *Town of Madawaska v. Cayer*, 2014 ME 121, ¶ 9, 103 A.3d 547, 550; (*citing Nader*, 2013 ME 51, ¶ 14, 66 A.3d 571). This can often be a difficult burden for the plaintiff to prove, and one that the plaintiff would not need to meet if the case were to go to trial. If a party succeeds on his or her special motion to dismiss, the court has discretion to award attorney's fees to the defendant. The other benefit is that the special motion to dismiss under the anti-SLAPP statute is generally decided based upon a limited factual record. The defendant will generally move to dismiss based upon the allegations of the complaint, and may attach affidavits if necessary. The plaintiff will then respond by submitting affidavits as well. The court will make a decision on the motion to dismiss by considering this limited record. Additionally, unlike the denial of a summary judgment motion, the denial of a special motion to dismiss is immediately appealable. Therefore, if the defendant loses a special motion to dismiss, he or she can appeal the decision to the Law Court before expending any further significant funds on discovery (discovery is stayed upon the filing of a special motion to dismiss). The appeal from a denial of a special motion to dismiss is generally reviewed *de novo*, meaning the trial court's ruling is not given any weight on appeal. Based upon these potential benefits, it is important consider the anti-SLAPP statute's special motion to dismiss whenever a complaint for defamation or abusive litigation is filed. Doing so may protect defendants and their insurers from costly litigation, and from having to consider "nuisance" settlements.