

Colorado, Real Estate, Legislation, Litigation

Colorado Enacts Anti-SLAPP Law

Jul 01, 2019

Client Alert

Brownstein Client Alert, July 1, 2019

Following the Lead of Many Other States in the Nation, Colorado Passes Its Own Robust Statute to Curb Retaliatory Litigation for Speaking Out on Public Issues

Strategic Lawsuits Against Public Participation (“SLAPP”) lawsuits are generally initiated as retaliatory measures against individuals or groups for speaking out on public issues. Traditionally, these lawsuits were brought by real estate developers against those who spoke out against development projects. A SLAPP lawsuit can come in many forms, but most often it consists of claims such as defamation, abuse of the judicial process, interference with contract or economic advantage, or intentional infliction of emotional distress. Even if the claims are meritless and likely to fail, defending against SLAPP lawsuits can be costly and time-consuming. Thus, anti-SLAPP laws are designed to protect the exercise of First Amendment rights and to discourage lawsuits brought with the intent of retaliating against or intimidating citizens.

Until recently, Colorado did not have an anti-SLAPP statute, though defendants were afforded some protection under common law. With the passage of HB19-1324, Colorado’s anti-SLAPP law is now embodied in statute, like it is in many other states. Colorado’s new anti-SLAPP statute is modeled after California’s. However, it lacks a “SLAPPback” provision, which in California enables the defendant in a SLAPP suit to file one in return after successfully obtaining dismissal of the original SLAPP suit. The SLAPPback essentially behaves as a malicious prosecution lawsuit.

Colorado Law Before the Statute

The Colorado Supreme Court set forth the first anti-SLAPP framework in the 1984 case, *Protect Our Mountain Env’t, Inc. v. Dist. Court* (“*POME*”). In that case, an environmental group challenged a real estate developer’s approved application to rezone 507 acres of land. The case was dismissed, but the real estate developer responded by suing the group for abuse of process. The group filed a motion to dismiss, arguing that its previous action against the developer was a lawful exercise of its First Amendment right to petition the government for redress of grievances. The case ultimately went to the Colorado Supreme Court which, in an effort to balance constitutional free speech rights with the deterrence of baseless litigation, established a protocol that made it easier for defendants to obtain dismissal of SLAPP suits.

Typically, defendants who file motions to dismiss bear the burden of demonstrating that the case should be dismissed. Under the heightened standard, however, the burden shifts to the plaintiff asserting the abuse of process claim to show that the previous lawsuit is not protected by the First Amendment, and thus the claim should not be dismissed. This heightened standard made it easier for defendants to obtain early dismissal of SLAPP suits. Later Colorado cases suggested that (1) lawsuits based on claims other than abuse of process may also require *POME*’s elevated scrutiny; and (2) *POME* should protect the exercise of other First Amendment rights. However, the full scope of *POME* was never completely defined.

Colorado’s New Anti-SLAPP Statute

Similar to the prior framework, Colorado’s new anti-SLAPP statute provides a mechanism for early dismissal.

However, it goes beyond *POME* and offers defendants the opportunity to recover costs and attorneys' fees if they are successful on a special motion to dismiss (with some narrow exceptions). To account for the competing goal of deterring baseless litigation, the statute provides that the special motion is unavailable if the court determines that the plaintiff has established a reasonable likelihood that it will prevail on its claim.

The statute also clarifies the scope of Colorado's SLAPP protection: The special motion is available to defendants who are sued for any act in furtherance of the constitutional rights of petition or free speech in connection with a public issue. It delineates a few examples of protected conduct, such as an oral statement made in a public forum, but leaves the protection open to any other conduct or communication related to a public issue and in furtherance of those First Amendment rights.

This document is intended to provide you with general information regarding Colorado's new anti-SLAPP statute. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact the attorneys listed or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.

Meet The Team

Wayne F. Forman	Shareholder	T 303.223.1120	wforman@bhfs.com
Carolynne C. White	Shareholder	T 303.223.1197	cwhite@bhfs.com

Related Practices

- Litigation