

Moving Issues From Public Forum to Courtroom Drama: The SLAPP Lawsuit

In Oregon and across the country, a growing threat is endangering meaningful public involvement. This threat has led to multimillion-dollar lawsuits filed against ordinary citizens for taking part in public processes. The actions that provoked these suits ranged from citizens circulating or signing a petition to testifying at a zoning hearing, sending a letter to public officials or newspapers, filing an administrative appeal, or merely attending a public meeting and signing the attendance sheet!

These lawsuits are called “Strategic Lawsuits Against Public Participation” or SLAPP. A SLAPP is generally based on one or more of six types of civil claims - defamation, conspiracy, malicious prosecution, nuisance, or interference with contract and/or economic advantage. At the University of Denver, George Pring (Professor of Law) and Penelope Canan (Associate Professor of Sociology) coined the term SLAPP. They use it to describe a lawsuit that is brought with the intent to “transform a public, political dispute into a private, legal adjudication” (Pring and Canan 1992).

What is a SLAPP?

Based on their nine-year nationwide study of SLAPPs, Pring and Canan contend that thousands of citizen in the U.S. are made defendants in, or are threatened with, SLAPPs each year “for communicating their views to their government” (Pring and Canan 1992). Half of the suits studied by Pring and Canan specified damages ranging up to \$100 million, and averaging \$9.1 million (Pring and Canan 1996).

Pring and Canan define a SLAPP as having the following characteristics: (1) “a civil complaint or counterclaim for monetary damages and/or an injunction; (2) (which is) filed against non-government individuals or groups; (3) because of their communication to a government body, official or the electorate; (4) on an issue of some public interest or concern. To characterize a SLAPP fully, however, a fifth criterion is necessary: (5) “the suits are without merit and contain an ulterior political or economic motive ” (Cook and Merriam 1996).

Although most SLAPPs fail in court, they are far more effective as political tools. Their effectiveness relates primarily to the time, expense and stress associated with litigation (McBride 1993), which can be staggering even when one has a strong legal defense. A defendant in a SLAPP action faces difficulty and distraction in fighting both the lawsuit and pursuing the original issue or concerns that prompted political action in the first place.

Besides the defendant, other citizens may decline to participate in the public decision-making process out of fear of becoming the target of such a suit, or of being added to a suit already in progress. By moving the discussion from a public process to a judicial forum, the essence of the discussion changes. Focus is diverted away from the cause and resolution of the issue and centers on determining the alleged effects of a public controversy.

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Constitutional Rights & Plaintiff Risks

Resolution under these circumstances is no simple matter. Rights provided to both the defendant and plaintiff by the First Amendment of the U.S. Constitution must be upheld and balanced. While the Petition Clause protects the defendant's right to communicate views to a government decision-maker, the plaintiff also has a right of free access to the courts. Pring and Canan acknowledge that a "seeming paradox of the Right to Petition is that we recognize litigation as one of the protected ways one can effectively petition government" (Arco 1998).

Despite the fact that SLAPPs may serve to quiet opposition, they do pose risks to those that bring them, including counterlitigation, sanctions, and legislation. SLAPP filers may find their roles reversed if they are served with a countersuit (sometimes called a SLAPP-Back). These suits are generally based on claims of malicious prosecution, or abuse of process claims, or civil rights violations. They may seek recovery of compensatory damages, and sometimes punitive damages as well.

While SLAPP-Backs have a good track record of decisions, they also have a high incidence of appeal. A SLAPP-Back may further detract from the ability of those involved to continue participating in the public decision making process. A SLAPP-Back can also be costly both financially and emotionally (Stein 1989), and there are no guarantees such a suit will be successful.

Means of Reducing SLAPPs

Neither defendants nor plaintiffs have absolute immunity when involved in a SLAPP or SLAPP-Back. Although the right to petition a court by filing a lawsuit is protected, the "frivolous exercise of (this) right can invoke sanctions" (Arco 1998). Federal Rule of Civil Procedure 11 has sanctions designed to "rid courts of meritless litigation while reducing the increasing costs of civil litigation" (Arco 1998). Both the signing attorney and the filer of the SLAPP may face these sanctions, and the Rule does not prevent a defendant from filing a SLAPP-Back as well. Meant to be a deterrent, the Rules sanctions are not prescriptive, but are decided case by case. Based on the individual case, the court may decide "what amount ... is needed to deter (the plaintiff) from repetition in the same case, (and) what amount is needed to deter similar activity by other litigants" (Arco 1998).

At least 11 states have passed anti-SLAPP legislation, while others, including Oregon, have attempted to pass such legislation. These statutes generally provide for early dismissal of meritless suits, the recovery of attorney's fees, and specify protected activities that vary from those occurring in a public forum to "a place open to the public" (Arco 1998). Some of the proposed statutes have gone as far as to grant immunity from civil liability, and may include sanctions against the plaintiff and the plaintiff's attorney.

Beyond new legislation, there are practical ways citizens can protect themselves against these suits:

- **Focus on substantive issues** - Many SLAPPs cite inflammatory rhetoric and personal attacks on the plaintiff to advance the suit.
- **Understand the difference between statements of fact and statements of opinion** - While a lawsuit may not be brought against a statement of opinion, it will not protect a knowingly false statement presented as opinion.
- **Check the facts** - All materials (letters, petitions, flyers, oral and written statements) need to be accurate and focused on the issues (McEvoy 1990).
- **Check your homeowner's insurance policy** - Some personal injury liability policies protect their policyholders from personal injury lawsuits based on defamation, malicious prosecution, abuse of process, etc.
- **Seek legal advice** - If unsure about the potential for litigation, seek the advice of an attorney (Goldowitz and Pritzker 1995).

Having skilled process facilitators can also help protect citizens by keeping the discussion focused on the decision at hand.

By the very nature of these lawsuits, one inherent concern remains: "Can a legislature enact a statute that provides a remedy for a plaintiff who legitimately believes he has been denied a valid economic opportunity or has been defamed, while singling out a true SLAPP filer?" (Arco 1998) SLAPPs are frivolous and without merit by definition. The ultimate goal is to keep such

suits to a minimum while providing the means of resolution for people who truly believe they have been wronged. There are no obvious solutions.

References

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