

# STRATEGIC LITIGATION AGAINST PUBLIC PARTICIPATION (SLAPP):

## FIRST AMENDMENT FREE SPEECH AND EXPRESSION UNDER ATTACK

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### **Introduction**

Over the last 30 years, there has been a steady and progressively increasing movement by some individuals, corporations and members of government to unravel, compress, and lessen First Amendment rights of speech, expression, and petition by a mechanism called a *Strategic Litigation Against Public Participation* lawsuit, otherwise known as a SLAPP.

George Pring and Penelope Canan, the University of Colorado professors who defined the concept of the SLAPP suit and coined the term, note that in such suits the goal is not to win but rather to silence, intimidate, and crush critics into submission via the legal system. New York Supreme Court Judge J. Nicholas Colabela has stated, "...short to a gun to the head, a greater threat to First Amendment expression

[than SLAPP] can scarcely be imagined." Pring and Canan argue that such suits for the defendant are costly, time consuming, (at least 40 months), ultimately chill free speech in the future and almost always result in a loss for the plaintiff or originator of the suit. The loss of victory in the suit for the plaintiff is actually a success in that it takes time away from the defendant in being able to promote the criticism challenging the plaintiff.

### **The Nature and Scope of SLAPP Attacks**

The *City Journal* reported that following the right to petition to warn the government of safety issues, six passengers aboard a US Airways plane reported suspicious behavior of some other passengers. The

passengers whose behavior was reported were removed and later sued the airline, and the passengers who had reported them, for discrimination. Congress immediately jumped in and passed legislation against retaliatory lawsuits involving potentially terror-related activity. The passengers, who had been reported, later dropped their suits.

In an investigatory book published only in the USA, Joan Eickenrand notes that a particular Middle Eastern group is funding terrorist activities. The author is sued not only in America where the book was published but also in England by a Middle Eastern billionaire for defamation. In the first case the plaintiff dropped the suit for fear that the group would have to provide information about its activities, and relationships with alleged terrorist groups. In the second case involving a foreigner suing in an American court, the Governor in New York signed a bill outlawing such foreign suits because they violated constitutional First Amendment rights.

Barbra Streisand, the famous singer and actress, filed a free expression SLAPP suit against a photographer for taking pictures of her shore house. In a move to stifle the photo from being disseminated, Streisand soon found the photo uploaded to the Internet and being seen by thousands who would have never seen it. The unintended consequence of the SLAPP suit and a frequent outcome of SLAPP is that the attempt to silence and stifle creates an opposite effect of excessive and loud presentation. Streisand lost the suit.

Wright Gore, a Tennessee small business owner, was offered \$270,000 for his land and business by a developer. Gore turned down the offer on the basis that the actual worth was \$1,300,000. The city decided to take the land under Eminent Domain. Gore fought back by posting billboard notices, handing out leaflets, and developing a website presenting his case. The developer filed a SLAPP suit alleging defamation. Carla Main, an editor of the National Law Journal, jumped into the fracas by writing an article stating that the developer was in cahoots with Clarksville Tennessee officials to seize the land. The developer filed a SLAPP suit against Main, her publisher, a professor who wrote a blurb about the case, a reviewer, and two newspaper companies. Some suits were settled

others remain. The city continues its suit to take the land under Eminent Domain.

According to the Center for Media and Democracy, SLAPP suits are occurring like tulips in spring. A doctor in Las Vegas was sued for asserting that a city hospital violated the state's cost containment law. In West Virginia, an environmental activist was SLAPPed for criticizing a coal company for poisoning a local river. In Washington State, a homeowner found that her real estate company failed to pay not only her real estate taxes but many others as well. Her findings cost the company thousands of dollars. The company filed a SLAPP suit charging slander. In Missouri a teacher complained to a weekly newspaper that a hospital incinerator was burning waste which might be a health hazard. The hospital filed a one million dollar libel suit against him.

Fine Art Registry® reported that in a case of consumers not happy purchasing art from a Michigan gallery, instead of getting their money back, the customers received a SLAPP suit. The gallery charged defamation and contract interference. It would seem that dissatisfaction with a product is equal to stating an untruth about the product. The Michigan gallery also filed duplicate suits in two states against the advocacy group and the writer who were exposing their business practices and against an art dealer who was doing likewise, and later filed a suit against a recognized art expert who found that some of the art the gallery was selling was fake. One of the cases has been dismissed; the others are ongoing.

## **The SLAPP Issue: Free Speech and the Right to Petition Government v. Protection Against Slander, Libel, and Defamation**

### **First Amendment Freedoms and Rights**

Except for certain activities such as yelling fire in a theatre when no fire existed, using derogatory language against protected groups, or libeling, slandering, or defaming another (real libel, slander or defamation always entails knowingly spreading a falsehood), free speech is assumed to be a legal right,

and an obligation. We expect to be able to assert almost anything not in violation of the law, and to demand that those in positions to inform the populace tell it like it is. In some countries one could be arrested, thrown in jail, and even assassinated and murdered for criticizing those in power.

### **Free Speech and Expression**

Some people regard free speech as a freedom to be protected. Others see it as a bane. For some the truth sets us free; for others, it constitutes a significant threat to their well-being. The recent case in Illinois is instructive in that as journalists were writing about the violations taking place in the Governor's office, the Governor was threatening the publisher of the paper to remove the journalists or else. The "or else" was that the publisher would lose a 100 million dollar deal provided by the State of Illinois. The Governor has since been removed, testimony to the necessity of free speech as a mechanism to control both legal and illegal activities which are not producing a healthy state of the union.

### **The Right to Petition Government**

Along with the right to free expression comes the right to petition the government. If a citizen or a group feels that a certain activity is harmful or at best not beneficial, that citizen or group may assert to the governing body that the particular activity is not acceptable. In point, the first amendment carries the right to speech and petition in writing, creating, depicting, petitioning, or vocalizing as long as it does not violate existing laws.

### **First Amendment Violations**

Slander, libel and defamation are violations of the law. Each state has standards or conditions which must be fulfilled in order that litigation may proceed. The essence of any such suit requires, as its basis that what was stated was untrue. If there is no basis of falsity, there is no basis for a violation. Over the last few years, states have also ruled on using derogatory names as violations.

### **SLAPP: Turning the First Amendment Upside Down**

In states where laws do not exist to regulate SLAPP, SLAPP plaintiffs have found a way to get around the First Amendment by turning criticism and complaint into gold. Through a process of filing suit for slander, libel, and defamation founded on a critic's statement or petition, the SLAPP gang alleges that the critic's words violated the law. The defendant has a very specific time frame to respond, and failing to do so forces the court to rule in favor of the SLAPPER by default without any examination of the merits of the case. In point, SLAPP plaintiffs have taken a legally protected right, twisted it, and turned it into a legal violation. In the absence of any law or regulation the court has no choice but to continue the process; the defendant has no choice but to defend the plaintiff's allegation. The plaintiff via the legal system has taken over the legal process of discovery of violation and used it not as a settlement of a grievance, but as an ultimate financial benefit if the case is won and at the same time silencing and crushing a critic who is holding up a potential business operation. The bottom line is that the court cannot rule against someone filing a suit since the constitution allows a complaint.

### **The Fairness Doctrine Deleted**

At about the same time that SLAPP began as a movement, the Fairness Doctrine, a bulwark grounding and promoting First Amendment freedoms, mandating that free speech in the media required that media entities be responsible for providing balance to aired content, began to be seen as unnecessary. From the 1980s into the 1990s governing bodies and presidents saw fit to allow the doctrine to be eroded to the point that it was sent out to pasture on the basis that it was an unnecessary law. The Internet would serve as the invisible hand forcing balance between contending views. Today the Fairness Doctrine does not exist and only a few politicians have an interest in bringing it back. And this slight interest has not resulted in any bills requiring a balancing of opposing views in the media.

## **SLAPP and its Process**

**S**LAPP consists of a civil complaint or counterclaim filed against an entity as a result of that entity's correspondence to a governmental agency or to the public in general on a problem, which is of public interest or concern. Actionable examples are writing a letter to an editor, petitions, reporting misconduct of public officials such as police, teachers, and so on, speaking at public meetings, displaying signs, writing investigatory articles, publicly complaining about products, erecting banners or signs, and taking photos to name a few. Seemingly innocuous behaviors of complaining about an issue or criticizing can galvanize a SLAPP suit. Such suits appear out of the blue. They don't seem to be connected to some illegal activity. You will not receive a complaint that you are trespassing or that you assaulted your neighbor. More than likely you will not understand why you are being sued, since defamation, libel, slander, and tortuous interference are not common illegalities. The intent and the hope is that the language of the suits will cause the defendant to delay a response so that the court appointed window closes before the defendant enters a defense. Failing to respond within the time period results in a win for the plaintiff. The defendant will not hear the plaintiff yelling "Shut up!" It will be a quiet thud of the door closing while the plaintiff counts your money from the loss of the suit.

## **SLAPP and Its Attack Structures**

**T**he typical SLAPP suit identifiers come in the form of defamation, libel, slander, invasion of privacy, nuisance, malicious prosecution, conspiracy, emotional distress, or interference with contract. The average time frame for such suits to be resolved is 40 months. Make no mistake, these suits are grounded in intimidation with the hope of crushing those who criticize or complain against those powerful companies and political agencies whose interests clash with constitutional First Amendment and petition rights.

## **Responding to a SLAPP Attack**

When an entity receives notice of attack via the above suit designations, attorneys advise that:

1. The first step is to understand that you must respond in writing to the suit in the time required.
2. Given that such suits are complicated it is best to secure an attorney experienced in this type of suit.
3. If the SLAPP contains a temporary restraining order it must be vigorously opposed since it places handcuffs on the defendant to carry out a defense. Request a summary judgment or motion to strike. Here the judge may rule that the complaint has no merit to begin with and as such dismisses the suit, or halts the discovery process until he or she rules.
4. If the trial must proceed, be prepared for many months/years before settlement is reached.

## **Unintended Consequences of SLAPP**

**I**n the unabashed attempt to silence criticism by litigation, SLAPP adherents have found that they won more enmity than success. Several unintended consequences followed from the thousands of suits to the extent that they have become household monikers.

**The Streisand Effect:** As mentioned above, the singer brought suit against a photographer who posted a picture of her house on the net. Instead of curtailing additional future photos from being transmitted, the image was posted thousands of times. The ironical effect here is that the wish to silence or curtail a protected freedom increased significantly rather than decreased the effect, which the actress was trying to prevent.

## **SLAPP Back Laws**

**T**wenty-six states now have laws providing penalties for plaintiffs using SLAPP maliciously, and protection for SLAPP victims. The states are: Arkansas, Arizona, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska,

Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Washington, Colorado, and West Virginia. Note that there are no federal protections for SLAPP. Many more states are considering adding such laws. California was the first state to implement a SLAPP Back law and is considered the exemplar for other states to follow.

SLAPP suits have galvanized support groups ready and willing to take on those entities promulgating such suits. The First Amendment Project, the American Civil Liberties Union, Universities, and an amalgam of interested parties are publishing writings criticizing SLAPP, and providing advice to those potential and current victims of SLAPP.

SLAPP Back attorneys have noted that SLAPP plaintiffs usually lose and may suffer high financial penalties imposed by the courts if it is found that such suits are frivolous or malicious.

### **Protecting oneself against SLAPP**

Given that our First Amendment rights have been seriously weakened by political correctness and the SLAPP phenomenon, it behooves us as artists, writers, and citizens to become more cognizant of what we say and how we say it. It is great to believe that our free speech rights are only contained by the common notion that we just can't yell fire in a movie theatre when no fire exists or publish slurs against ethnic or religious minorities or people of specific sexual orientation. Our present political representatives appear to be severely lacking in their

ability to contain massive fraud, and are also deficient when it comes to outlandish and transparent corporate thievery. First Amendment advocate groups provide the following guidelines to protect our artistic and civic rights of petition and free expression:

1. Take care in what you say. False facts not opinions serve as the meat dish for SLAPP suits. If what you say is factually false the corporate carnivores have been given the first cause to yell defamation. Prefacing your statement with "In my opinion" does not serve as a protection.
2. Know your homeowner insurance policy protections. Personal liability protection may be covered, and if not, add it as a rider.
3. Consult with a SLAPP Back attorney for advice if you are not sure about what you are expressing or critiquing.
4. Keep records of where your facts come from to support your statements.
5. Unless your facts support your statement, do not assert the statement.
6. Stay clear of emotional utterances and statements. The entity may be the ultimate in sleaze, the biggest crook, most egregious liar, and produce lousiest product on the market, but unless you can provide facts supporting your assertions (in the above cases you probably can't) put a lid on them. If you don't, you will potentially become another easy mark for a SLAPP attack. 📌



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