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"citizens' slapp suit guide"

The Unslapped: A Primer For Protecting You & Your Affiliate Against SLAPP Suits

You've been instrumental in helping the affiliate take a strong stance against a developer's proposal to fill in a small wetland so it can build new apartment buildings. You helped with the research, you organized others to assist in fighting the issue, and you testified at a recent planning commission meeting against the project. Last week you reported the good news to your board of directors that the proposal was defeated: your efforts paid off.

What you didn't expect was to be served with papers for a lawsuit by the developer claiming you "defamed" the developer. The complaint alleges that you made inaccurate statements about the developer, thereby causing it to lose thousands of dollars. What might the developer be trying to do? How do you recognize a SLAPP suit? What can you do to avoid future suits? What can you do to eliminate this SLAPP suit? Read on.

What Might The Developer Be Trying To Do?

You've probably just been "SLAPPED." SLAPPs are "**Strategic Lawsuits Against Public Participation**" that are brought by businesses or municipalities to prevent citizens from speaking out against dubious development projects or in retaliation for such public opposition. A SLAPP suit is usually a desperate attempt by a project proponent to save the project or recoup lost expenses or profits...no matter what it takes.

SLAPP suits are rarely brought for the reasons alleged in their complaints. More often, the primary purpose of the suit is to stifle -or in legal terms "chill" -- public criticism of proposed projects. By bringing a suit against you claiming mega-damages, the developer is hoping that you and others will be intimidated into silencing your opposition to this or future project proposals. Thus, in the words of two experts in the field, Professors George W. Pring and Penelope Canan of the University of Denver, "SLAPPs have `worked' even when they lose."

The purpose of SLAPPs is not to win on the merits. Rather, they are won when targeted defendants no longer are able to find the financial, emotional, or mental wherewithal to sustain their defence. Fortunately, courts often recognize this. According to one court's ruling on a 1992 New York SLAPP suit:

The ripple effect of such suits in our society is enormous. Persons who have been outspoken on issues of public importance targeted in such suits or who have witnessed such suits will often choose in the future to stay silent. Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined.

The increasingly common use of SLAPPs threatens citizens' willingness to exercise their right of free speech and their right to petition the government for a redress of grievances under the Constitution. According to a report by the Library of Congress, the right to petition the government "has been expanded beyond its literal terms to protect any peaceful, lawful attempt to promote or discourage government actions at all levels and branches of government, including the electorate." Thus, the rights of freedom of speech and to petition the government include the right to challenge or influence government actions, whether by petitioning for government approval or disapproval of projects, providing public comment, testifying, lobbying, litigating, and even demonstrating peacefully or otherwise speaking out against a proposed project.

The rights of free speech and petition have always been mainstays of American democracy. The late U.S. Supreme Court Justice Oliver Wendell Holmes recognized the importance of public interest speech when he wrote: "The ultimate good desired is better reached by free trade in ideas [and] the best test of truth is the power of the thought to get itself accepted in the competition of the market...That at any rate is the theory of our Constitution." If Justice Holmes had been alive today, he undoubtedly would have found SLAPP suits offensive to your Constitutional rights. Fortunately, as you will soon read, many of today's judges recognize the true threat that SLAPPs present to ordinary people who want social change.

How Do You Recognize A SLAPP Suit?

SLAPP suits have common characteristics. Therefore, it's not difficult to know if you're being SLAPPED:

1. The suit is a civil complaint or counterclaim;
2. filed against nongovernmental individuals or organizations;
3. because of their communications to governmental entities, officials, or the general population (electorate); and
4. on a substantive issue of some public interest or concern.

Some of the most common issues of public interest or concern are: real estate development and zoning, environmental protection, wetlands and wildlife preservation, and neighborhood defence (otherwise known as "NIMBY" or

"Not In My Back Yard"). Some of the most common legal claims are: defamation (slander or libel); business torts (interference with contract, business, economic expectancy, product disparagement, restraint of trade); other torts (nuisance, invasion of privacy); judicial or administrative torts (abuse of process), or conspiracy to commit one of the above torts; and constitutional and civil rights violations (i.e., discrimination, "taking" private property rights, etc.).

What Can You Do To Avoid SLAPP Suits?

The most important element to the SLAPP equation is to not let the possibility of a lawsuit deter you in your efforts. That's exactly what most SLAPP plaintiffs are counting on. According to the late U.S. Supreme Court Justice Louis Brandeis: "The greatest menace to freedom is an inert people."

Although there is no way to avoid being SLAPPed, you can take certain measures to greatly reduce the likelihood of being SLAPPed in the future. First, make sure your advocacy is factually accurate, on firm legal footing, and not undertaken for some improper purpose (for example, inciting others to protest a proposal so that you can gain financially would be improper). It is not necessary that every word be grounded in fact. If, for example, your criticisms are levelled at proponents of projects that are of public concern, you need only ensure that your statements are not made with the knowledge that they are false. Likewise, you cannot make statements with reckless disregard for whether they are false or not. Remember, the truth is an absolute defence in most cases. In short, don't engage in hyperbole. Stick to the facts. **Act responsibly.**

Then there are actions you can take to minimize financial and legal risk to yourself. First, it helps if you're speaking on behalf of an organization after receiving the authorization to do so. Because SLAPPs are intended primarily to intimidate, SLAPP plaintiffs are less likely to sue targets that may be able to sustain a defence over time. Obviously, a legal defence is more difficult for an individual citizen to sustain than for a group of people or a financially-stable organization to sustain. Coordinate closely with your affiliate board, particularly on issues that are likely to be controversial. Second, make sure the organization for which you speak properly identifies those who speak out on its behalf. This may usually be achieved by including an indemnity provision in the organization's constitution or by-laws. Appendix A provides a sample indemnification clause. To make sure that the constitution's or by-laws' indemnification is meaningful, investigate whether the affiliate carries adequate Directors' and Officers' (D &O) insurance.

For more long-term protection, try to enact anti-SLAPP legislation in your state. New York, Washington, and California have enacted such legislation and many others

have attempted to do so. Appendix B contains references to adopted and proposed anti-SLAPP laws. You may want to help work toward the passage of anti-SLAPP legislation in your state or propose new anti-SLAPP legislation where the issue has not been raised (SLAPP suits have been documented in every state and the District of Columbia!) An easy guide to what legislation should entail and a model bill can be obtained by writing to Professor George Pring at the address listed in the Reference section below.

Obviously, you should count on organizing widespread support for getting this legislation passed; and be sure to rally support from public interest organizations outside of the environmental community. Allow two years or more for your efforts to snowball in success until the legislature passes your legislation.

What Can You Do To Eliminate A SLAPP Suit?

First, prepare to retain an attorney. But, depending on the circumstances, you may not have to retain her yourself. For example, if you were speaking on behalf of your affiliate, you may be "indemnified," that is, the affiliate may undertake a lawsuit to defend you. You are relatively safe if you are a board member, received authorization by the board to speak out against the wetland-fill project, and your affiliate's constitution and by-laws indemnify you while you are acting within the scope of your duties as a board member. You may also be protected if you are a member or volunteer and received authorization to speak out.

You might also approach the governmental entity to which you testified and convince it to assist in your defence by arguing that SLAPP suits will chill input to the entity in the future (which is ultimately not in the entity's interest) or that by inviting testimony, the entity should come to the aid of those who testify in good faith. Often, those who testify to a governmental entity are privileged to do so. In other words, testimony is often a safe harbor from lawsuits by those against whom you have testified. Nevertheless, these efforts will merely shift the burden of defending the lawsuit, not eliminate the lawsuit.

If your organization can't or won't obtain an attorney to defend you, check with other organizations or the state bar association to see if there are lawyers who have offered to provide legal service on a "pro bono" (free or reduced fee) basis to public interest groups. Because SLAPP suits pose such a threat to public interest activities and important constitutional rights, it may be fairly easy to find a public interest lawyer willing to take your case on a pro bono basis. If all else fails and you can't find a lawyer to take your case pro bono, hire one yourself. SLAPP suits should never be taken lightly -- you must defend yourself! Don't wait until the last minute to seek legal assistance.

To try to eliminate the suit, you should request that your attorney communicate to the plaintiff's attorney the personal risks of continuing with a SLAPP suit. SLAPP attorneys themselves can be penalized under Rule 11 of the Federal Rules of Civil Procedure for bringing frivolous lawsuits or lose SLAPP back jury verdicts. Rule 11 sanctions, which carry with them the possibility of stiff monetary penalties and even the possibility of losing licenses to practice law, may be the appropriate specter to raise to deter plaintiffs' attorneys from continuing in the litigation. Rule 11 will make the attorney personally sit up and take notice. Some states have rules that are the same or similar to the Federal Rule 11.

There are tools to make the plaintiffs sit up and take notice too. Because SLAPP suits are rarely successful on the merits of the case and are increasingly recognized for what they are, violations of citizens' constitutional rights, chances are good your attorney can eliminate the suit before it becomes protracted. SLAPP suits are often eliminated early in the litigation by filing preliminary motions (usually a Motion to Dismiss or a Motion for Summary Judgment). Although the former is probably quicker, the latter allows your attorney to build a case against the plaintiff through the discovery process, thereby allowing you to bring a counterclaim or to "SLAPP back," an option that has resulted in awards of millions of dollars (up to even \$86,500,000 in one case!) against SLAPP suit plaintiffs. SLAPP back suits may be grounded on legal theories of malicious prosecution; abuse of process; violation of constitutional rights; violation of civil rights (if a government brought the original SLAPP suit); intentional or negligent infliction of emotional distress; defamation; or other claims.

Another way to put the pressure on plaintiffs to discontinue frivolous suits -- while realizing that there is a risk of exacerbating the legal claims against you -- is to mobilize on the public relations front: organizing media exposé, demonstrating or boycotting against the business will cause the business to rethink whether the benefits of litigation outweigh the costs of a bad commercial reputation. Likewise, going to the media alleging interference with one of the most-valued of American rights --constitutionally-guaranteed freedom of expression -stands a good chance of receiving attention by the press. Nevertheless, while you can consider these alternatives, again, they may be risky in actual practice and should not be attempted without thorough debate within your own organization and solid legal advice.

Don't Be Deterred!

SLAPP suits are losers, rarely successful, especially when citizens have anticipated them and taken proper precautions. Courts are becoming more and more sensitive to the chilling

effect of SLAPP suits on citizens who are standing up for the environmental ideals in which they believe...and are coming down hard financially -- to the tune of millions of dollars in penalties -- on those that use the legal system to harass citizens into silence.

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References

George W. Pring and Penelope Canan, "Symposium: Strategic Lawsuits Against Public Participation," 12 Bridgeport L. Rev. 937 (Summer 1992). This article is a comprehensive review of SLAPP suits and was relied upon extensively in the formulation of this guide. Professor Pring can be contacted at: the SLAPP Project, University of Denver, College of Law, 1900 Olive Street, Denver, CO 80220.

7 Pace Env'l. L. Rev.1 (Fall 1989). This issues of the Pace Environmental Law Review is the seminal work on SLAPP suits and should be examined should the reader find himself or herself in a SLAPP suit situation.

Tanner v. Decom Medical Waste Systems, Inc., No. 892-107, Cir. Ct., St. Louis, Mo. (verdict May 17, 1991).

Dwight H. Merriam and Jeffrey A. Benson, "Identifying & Beating a Strategic Lawsuit Against Public Participation," Duke Env. Law & Policy Forum, Vol. III (1993). This article was used extensively in the formulation of this guide and is also an excellent source of additional reference for the interested reader.

Appendix A Sample Indemnification Provision

The following is a sample indemnification clause that may be used in developing a similar clause for an affiliate constitution or, more appropriate, affiliate by-laws. This is a

sample only; the affiliate should ensure that its own clause is custom-fitted to the organization's own needs.

The (organization) shall indemnify, as fully as is possible under (the state in which the organization is incorporated) law, any person who is made or threatened to be made a party to any threatened, pending, or completed proceeding, whether civil, criminal, administrative, or investigative, and whether formal or informal. This indemnification covers such persons acting as a director or officer of the (organization), against expenses, attorney fees, judgments, fines, penalties, and amounts paid in settlement which that person actually and reasonably incurs in such matter or its appeal. These indemnification rights are not exclusive of any other rights which such person may have. No repeal or amendment of this provision shall adversely affect any person's right to indemnification with respect to acts or omissions occurring before the repeal or modifications.

Appendix B

Your local law school library or bar association should be able to point you in the right direction to obtain copies of the following.

States Where Anti-SLAPP Laws Are In Effect

California California Code of Civil Procedure Section 425.16, effective January 1, 1993. The California law extends protection to any act performed in connection with a public issue, including written or oral statements made before any official proceeding or in a public forum. The law includes a legislative finding that "there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition." The law permits the initial filing of claims but subjects them to a special motion to strike unless the court determines the plaintiff has established a substantial probability of prevailing on the claim. The law contains timetables for hearings on those motions and provides for stays of discovery proceedings until such motions are decided. Defendants who prevail on the special motion to strike are entitled to recover attorney fees and costs. See also, Cal. Civ. Code Sec. 47(b).

New York New York Assembly Bill 4299, effective August 3, 1992. The New York law offers both limited immunity and damage awards to SLAPP targets. It also offers expedited hearings for certain motions in "actions involving public participation." The protection of the New York law is triggered when a person who has applied for a permit, zoning change, lease, permit, license, etc., sues another based on efforts to "report on, comment on, rule on, challenge or oppose" the application or permission. See also, Civil Rights

Law Sec. 70-a and 76-a; Civil Practice Rule 3211(g) and 3212(h), eff. Jan. 1, 1993.

Washington Revised Code of Washington, Section 4.24.510, effective 1989. Washington has enacted a statute based on immunity from suit when the activity involves communication to a governmental agency. The statute states: "A person who in good faith communicates a complaint or information to any agency of federal, state or local government regarding any matter reasonably of concern to that agency shall be immune from civil liability on claims based on the communication to the agency."

When a defendant establishes that the suit brought against him or her is based upon a good faith communication to the agency, (s)he is entitled to costs and fees from the party who brought the suit. The Washington statute also authorizes the agency or attorney general to intervene in the suit on behalf of the defendant.

States Where Anti-SLAPP Legislation Has Been Proposed But Not Passed

Connecticut Raised Bill 7374 (1991, failed); House Bill 1026, Senate Bill 182, Senate Bill 248 (1993, failed).

Florida House Bill 759, Senate Bill 2188 (1992, failed); House Bill 185, Senate Bill 70 (1993, failed).

Maryland 1992 Md. H. 486, 398 Legislative Session, 1992 Regular Session.

New Jersey Senate Bill No. 3136 (1991, failed); Assembly Bill 190 (1992, failed); and 1993 (pending).

Rhode Island 1992 R.I. S. 2005, 1992 Regular Session;

Texas House Bill 7266 (1993, failed).

Virginia Senate Bill 424 (1992, 1993, failed).

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