

Protecting Public Participation against SLAPPs in the 2001 Legislature: Prospects of House Bill 2460

By Joe Landry

The summer/fall issue of Oregon's Future featured Jerry Ritter's "SLAPPS: Travesties of Justice," which outlined the problem of SLAPP suits in Oregon. This article updates readers on anti-SLAPP legislation in the 2001 Legislature.

Freedom of speech is never as simple in practice as it sounds in principle. Does the right to participate in public affairs trump the right to defend oneself from abusive or defamatory speech? What if abuse of the legal right to defend oneself also silences public debate? Can these conflicting rights be reconciled to protect individuals and secure the public interest in free speech? These are the questions posed by the growing problem of SLAPPs in Oregon and attempts to pass anti-SLAPP legislation in the 2001 Legislature.

Free Speech in Oregon

Section VIII of the Oregon Constitution covers freedom of speech and states clearly that "no law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right." To guard against "the abuse of this right," individuals injured by defamatory speech have the right to defend themselves through our civil courts.

Section XXVI of the Oregon Constitution also addresses matters of free speech and ensures the right of Oregonians to peaceably assemble, consult their common good, and petition the Legislature for redress of grievances. The Oregon Constitution also recognizes the right to petition the government for redress of grievances, a special form of free speech essential to a deliberative body.

The status of a communicator and the forum of public communication in some cases grants degrees of protection from civil damages. Address to judicial and some quasi-judicial bodies is absolutely privileged; so is speech before certain licensing boards. Speech before the legislature is conditionally privileged, meaning that a witness is not subject to an action for civil damages "unless the witness knowingly makes a false and immaterial statement for the purpose of defaming another" (ORS 171.530). In lesser legislative bodies such as city councils, county commissions, and planning commissions, public speech is less protected from civil lawsuits. Public speech in these forums is the most vulnerable to SLAPPs.

Ten other states ahead of Oregon have passed legislation to protect SLAPP victims. In the 1999 proponents of an anti-SLAPP bill, HB2805, attempted to elevate the protections for speech in lesser legislative bodies to those provided to testimony before the Legislature. While the Oregon House of Representatives overwhelmingly supported HB2805, several interest groups strongly opposed the bill. Lobbyists for the builders, realtors, and aggregate mining industries, as well as Oregonians in Action, felt the language in the bill was too broad and would create a "license to lie." Consequently, HB2805 had a series of amendments and was ultimately tabled by the Republican caucus on the floor of the senate.

The failure of HB 2805 prompted the Oregon Chapter of the American Planning Association (OAPA) to review the laws of other states aimed at preventing SLAPP suits. The OAPA identified a California law passed in 1992 that has reduced the number of successful SLAPP suits. Under the California law, citizens can invoke a special pre-trial motion to throw out frivolous lawsuits quickly and cheaply. This "special motion to strike" amounts to an expedited summary judgment, which removes the effectiveness of a SLAPP by requiring the filer to demonstrate that his lawsuit has a probability of success. The special motion to strike filters SLAPPs and passes legitimate lawsuits to the civil courts. Under HB2460, any lawsuit against a citizen who speaks on an "issue of public significance" will be measured against a higher standard. The purpose is to avoid abuse of the



Representative Max Williams, chairing the House Judiciary Committee on the night the committee unanimously passed HB2460 to the floor with a recommendation to pass.

judicial process by making sure that individuals use the courts as they are intended and not to undermine the democratic process.

House Bill 2460

In preparation for the 2001 Oregon Legislative Session, the OAPA presented this concept to two perennial supporters of anti-SLAPP legislation: Representatives Kurt Schrader D-Canby and Lane Shetterly R-Dallas. Schrader and Shetterly drafted HB2460. The OAPA collaborated with key groups that have spearheaded anti-

SLAPP

SLAPP legislation over the past few years. Oregon Communities for a Voice in Annexations, 1000 Friends of Oregon, League of Women Voters, the Department of Land Conservation and Development, and their Citizen Involvement Advisory Committee decided to support the passage of the bill.

Unlike HB2805, HB2460 would not change the level of the immunity for citizens testifying before representative bodies. Instead, HB2460 would institute the "special motion to strike," a procedural change that would help enforce the free speech protections already secured in the Constitution and Oregon state law.

Like the California law, HB2460 affirms the idea that a civil lawsuit brought against an individual petitioning the government for redress of grievances or otherwise participating in public decision making differs from a civil lawsuit claiming damages in other circumstances. Speech that exercises one's right to petition the government is treated differently because such speech is essential to the deliberative process of self-government and, therefore, deserves greater freedom from civil claims.

Defining public interest in free speech, however, is not always as simple as it sounds. The California Supreme Court has interpreted the 1992 law broadly, granting the special motion to strike in a case where Dupont, a drug manufacturer, was sued for allegedly making false statements regarding a drug before regulatory bodies, the medical profession, and the public. In this case, the statements made to the public, raise concerns about exactly which statements qualify as free speech under this law. The Supreme Court ruled on a previous case that the anti-SLAPP statute be construed broadly to allow the "special motion to strike" in any lawsuit targeting speech on any "issue of public significance."

A critical question becomes how the proposed law defines protected speech. As written the special motion to strike would apply to:

Any oral statement made, or writ-

ten statement or other document presented, in a place open to the public or a public forum in connection with an issue of public interest; or

Any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

SLAPP stands for "strategic lawsuits against public participation." These frivolous suits seek damages for written or spoken statements made by citizens participating in formal processes of public decision-making. A SLAPP frequently has little chance of victory in court, but victory is not its purpose. Rather, they serve as a delaying tactic intended to intimidate citizens by tying them up in court and threatening significant financial burden. SLAPPs don't use courts for their traditional purpose of resolving civil disputes. These lawsuits attempt to transform political debate in public forums into private judicial disputes. Those who file SLAPP suits ("filers") rarely intend to succeed in their suit; their true goal is to silence the "target" by burdening him or her with emotional and financial costs.



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It is clear from this language and the previous example, that this motion can be used for anyone who is promoting their first amendment rights. The advantage is a law that does not favor one group over another but simply favors free speech over judicial abuses.

A second outstanding issue relates to punitive damages. HB2460 will also slow down SLAPPs by creating a potentially incalculable financial risk for those filing the suits. Under the proposed law, if a court grants a special motion to strike, the filer will be obligated to pay reasonable attorney fees and costs to the defendant. The court will also have the option of requiring the filer to pay punitive damages. On the other hand, if the court does not grant the special motion to strike and determines the request for a special motion to strike frivolous or for the sole purpose of delaying the lawsuit, the defendant must pay reasonable attorney fees and costs to the filer.

Many opponents of anti-SLAPP legislation would support HB2460 without a provision allowing punitive damages when a motion to strike is granted. Many proponents feel that without this provision, anti-SLAPP legislation will not deter SLAPP filers who treat legal fees as a calculable cost of delaying or intimidating their adversaries.

On April 16, 2001, the House Judiciary Committee unanimously passed HB2460; the bill will likely pass the House with a large majority. However, HB2460 may face greater opposition in the Senate.

The intent of HB2406 is to protect citizens' right to participate in the public decisions that affect their lives. Effectively protecting these rights with a balanced and fair judicial procedure remains a major challenge to the 2001 Legislature.