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Public Policy Brief

State & Local Government Area of Expertise Team

Anti-SLAPP Bills Introduced in State House

Gary D. Taylor, J.D., State & Local Government Specialist
Department of Agricultural Economics
Michigan State University Extension

Introduction

We will begin with a short quiz. Would you expect to find the following stories (a) in a book entitled "Scary Campfire Tales for the Civic-Minded," or (b) actual court records?

- A developer sues members of a neighborhood group individually for over $11 million for "defamation, malicious interference with economic advantage and business relations, malicious abuse of process, interference with economic advantage and business relations, and civil conspiracy." The members of the group had voiced their concerns over the developer's rezoning request at planning board and city council meetings, and had filed a successful court challenge to the council's decision to grant the rezoning.[1]
- A convenience store chain sues a traffic engineering firm, and its partners individually, for testifying at a zoning hearing, alleging that the engineers "conspired to injure [the convenience store chain] by waging a campaign of misinformation designed to scare the public into believing that convenience food markets that dispense gasoline cause severe traffic congestion, safety hazards and fatalities."[2]
- A husband and wife are sued separately for statements made to a newspaper reporter about a fire at a neighboring unlicensed construction and demolition debris recycling facility. The couple had previously requested that the Town Council revoke the facility's use permit because of numerous citations issued by the Rhode Island Department of Environmental Management.[3]

If you answered (b) you are already familiar with the legal phenomenon known as the "SLAPP" lawsuit. The "SLAPP", an acronym for **S**trategic **L**awsuits **A**gainst **P**ublic **P**articipation, strikes at the basic assumption that we, as Americans, have a right to speak out to each other and to public officials on important public issues. SLAPPs chill public debate by moving it from the courthouse steps to the courtroom, often at great financial cost to the defendant. Two separate packages of bills currently in the House Civil Law and Judiciary Committee[4] seek to make Michigan the 17th state with legislation designed to curb SLAPP suits and impose financial consequences on those who bring them. This article will look at SLAPP suits, including efforts by other states to discourage them, and the legislation currently pending in Michigan.

What are SLAPPS?

SLAPPs involve communications made by individuals or interest groups to influence a government action or outcome that result in a civil complaint or counterclaim being filed against the communicator. SLAPPs are "a unilateral initiative by one side to transform a public, political dispute into a private, legalistic adjudication, shifting both forum and issues to disadvantage the opposition."[5] Professors George Pring and Penelope Canan, now working together at the University of Denver, first identified the SLAPP phenomenon. Each was drawn separately to the subject through their involvement in causes that brought the threat of legal action against them

personally. Their resulting separate research agendas had uncovered an alarming number of lawsuits brought by business interests (often large corporations) against individual citizens or small interest groups. These suits were often filed using legal causes of action such as libel, slander, defamation, interference with business relations, interference with contractual relations, and civil conspiracy. Regardless of the legal labels, both had come to understand that the underlying motives of all these suits were to stifle public participation in the political process. In 1984 they founded the Political Litigation Project at the University of Denver to carry out the first systematic nationwide study of SLAPPs. The study revealed that thousands of SLAPP suits have been filed in the United States since the 1970s. Through qualitative and statistical analysis of court records, and extensive interviews with litigants they were able to develop a thorough description of the "typical" SLAPP suit. Their results were written up in what is viewed as the seminal work on the subject: *SLAPPs: Getting Sued for Speaking Out.*

Pring and Canan describe the usual progression of events that leads to the filing of a SLAPP. First, a citizen or group of citizens develops a position about some matter of public concern and voice their views to some government decision-maker. This position is, by definition, in opposition to someone else's interests or plans. Second, the other side reaches a point where they have "had enough" of the opposition and files a lawsuit that targets those that are speaking out. By characterizing the targets' activity as a legal harm (such as defamation, libel, business interference, etc.) the filers have changed the nature of the dispute (i.e. from a political debate to a legal "wrong"), the forum (from council meetings to the courtroom) and the issue (for example, from the proposed development to the "harms" inflicted upon the developer). Finally, the case is disposed of in one of two ways. Either the defendants and their lawyers recognize the case for what it is and raise the appropriate First Amendment defenses (discussed below) that usually result in dismissal, or the case proceeds as framed by the filers (i.e., as a defamation or libel case), in which case the defendants typically lose.[6]

In the early 1990's a New York court succinctly described the intent and implications of a SLAPP suit:

> "**SLAPP** suits function by forcing the target into the judicial arena where the **SLAPP** filer foists upon the target the expenses of a defense. The longer the litigation can be stretched out, the more litigation can be churned, the greater the expense that is inflicted and the closer the **SLAPP** filer moves to success. The purpose of such gamesmanship ranges from simple retribution for past activism to discouraging future activism…. 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." [7]

SLAPPs are typically filed by large, economically powerful organizations. Occasionally they are targeted at well-established citizen's activist groups such as the Sierra Club. More frequently, however, the targets are individuals who do not regularly engage in political activity.[8] For land use lawyers and planners, and citizens regularly involved in the land use process it is important to note that Pring and Canan found lawsuits related to real estate development projects to be the single most frequent type of SLAPP suit filed.[9] In a case they describe as "a mirror image" of the typical real estate SLAPP, a real estate partnership sued nine area civic and homeowner groups and 16 of their leaders individually for $11.25 million for mischaracterizing their development proposal as multi-family housing in informational leaflets and public hearings when, in fact, it was clustered, detached single-family dwellings.[10]

Michigan is no stranger to SLAPPs. The southeast Michigan press has recently picked up on the phenomenon and documented several cases of private citizens being sued for their participation in public matters.[11] The cases range from retaliatory suits brought by ousted public officials against recall campaign leaders; suits, and threats of suits, by developers against citizens opposing land use

projects; to a suit by an industrial landowner against neighbors complaining of noise violations. Most of these suits were ultimately dismissed, or judgment was returned in favor of the defendants; however, in all cases the defendants were subjected to the costs, stresses and intimidations of being tied up in months or even years of litigation.

Judicial Responses

Courts have attempted to come to terms with the potentially chilling effect of **SLAPP** suits on the right of citizens to participate in the political process. The First Amendment to the U.S. Constitution has offered the most potent protection for SLAPP targets. The last, and often overlooked, phrase of the First Amendment guarantees individuals the right "to petition the government for a redress of grievances." Targets of SLAPP suits in many states have utilized a series of cases decided by the U.S. Supreme Court interpreting the Petition Clause to shield them from liability for their political activity. Two of these cases decided in the 1960s created what is known as the *Noerr-Pennington* doctrine.[12] The doctrine bars litigation arising from injuries received as a consequence of First Amendment petitioning activity, regardless of the underlying cause of action asserted by the plaintiffs (defamation, libel, interference with business expectations, etc.), unless the petitioning activity is merely a sham to cover what is nothing more than an attempt to do harm to another. Another of these cases, *City of Columbia v. Omni Outdoor Advertising,*[13] clarified that the "sham exception" removes First Amendment protections only if the defendant is using the governmental process itself as a weapon to impose delays, costs or inconveniences; rather than using the process to reach a desired policy outcome.

The breadth of the *Noerr-Pennington* doctrine is currently the subject of a case before the Michigan Supreme Court. In *J & J Construction Co. v. Bricklayers and Allied Craftsmen, Local 1*,[14] the Michigan Court of Appeals determined that the *Noerr-Pennington* doctrine applies outside the antitrust arena. Relying on other U.S. Supreme Court[15] and Michigan Supreme Court[16] decisions, however, the Court of Appeals went on to say that the sham exception outlined in *Omni* was not the only exception available. It determined that statements made in the context of political petitioning may fall outside the protections provided by *Noerr-Pennington* upon a finding that the defendant made the statements knowing that they were false or with a reckless disregard for the truth.

J & J Construction is currently awaiting review by the Michigan Supreme Court. The outcome could affect the future viability of SLAPP suits in this state and increase the importance of the bills currently pending in the House. The exception for false statements or statements made with reckless disregard for the truth is criticized by Pring and Canan for its practical implications in SLAPPs.[17] Although at first blush it seems only fair to hold people responsible for their false or misleading statements, in SLAPPs the very objective of the lawsuit is to intimidate political activists with the threat of costly, unending litigation. It is easy for a plaintiff to allege that false statements were made; therefore, even individuals who acted without malice would be put to the burden and expense of a lawsuit. The difficulty of proving or disproving such a question almost guarantees that SLAPPs will not be dismissed prior to a full-scale trial. Pring and Canan argue that it is an essential part of the political process to give the public body to whom the political speech is directed ultimate responsibility for separating fact from fiction, and not transplant such decisions into the court system.

Legislative Responses, Including Pending Michigan Legislation

In response to the negative consequences of some SLAPPs proceeding unchecked through the judicial system, a handful of states have sought to offer a legislative solution to the problem. New York, Rhode Island, Washington, Minnesota and California are among those states that have enacted specific anti-SLAPP laws. Although each state's legislation is different, most contain some or all of the following features: (a) a definition of the "public participation" that the bill is designed to protect; (b) a provision that subjects the SLAPP suit to early dismissal if certain facts are proven; (c) a provision that shifts the burden of proof to the SLAPP filer to prove the case should survive the early motion to dismiss; and/or (d) allowance for the recovery of costs, damages and/or attorneys fees if the case is in fact dismissed.

Based on their research into SLAPPs and their review of adopted state legislation, Pring and Canan suggest

that to be effective, a state law discouraging SLAPP suits must, at a minimum, cover (1) all public advocacy and communications to government, whether direct or indirect and whether in the form of testimony, letters, reports of crime, peaceful demonstrations or petitions; (2) all government bodies and agents, whether federal, state, or local, and whether legislative, executive, judicial or the electorate; and (3) set out an effective early review for filed SLAPPs, shifting the burden of proof to the filer and, in so doing, serving a clear warning against the future filing of such suits.[18] They include in their text a model bill that combines the "most effective elements" of the California, New York and Minnesota legislation, and a provision that makes the sham exception as set forth in *Omni* the exclusive exception to the bill's protections.[19]

How do the bills currently in the Michigan House Civil Law and Judiciary Committee stack up against these criteria? The first bill, H.B. 5592, introduced by Rep. James Koetje (R-Grandville) contains most of the relevant provisions as the model bill provided by Pring and Canan. It defines "public participation" broadly to include "speech or conduct intended, in whole or in part, to initiate, obtain, or procure an act or response by a governmental unit." This would appear to exclude communications not designed to affect political outcomes; thus by inference incorporating the Omni exception into the definition of public participation. "Governmental unit" is essentially state government, including political subdivisions of the state, and authorized representatives.

H.B. 5592 prohibits a person from filing a lawsuit "based on another persons public participation." A defendant in such a suit may bring a motion to dismiss, at which time further discovery shall be suspended unless ordered otherwise after motion and hearing. The plaintiff has the burden of proving by "clear and convincing evidence" that the suit is not based on the defendant's public participation. If the motion is granted the defendant is entitled to recover actual damages, costs and attorney fees. Finally the bill allows the attorney general or the "governmental unit to which the public participation …was directed" to intervene on behalf of the defendant.

The package of bills (H.B. 5593-5597) introduced by Rep. David Woodward (D-Royal Oak) and others was patterned after similar legislation in California and Colorado. The details of definitions aside, the bills differ from H.B. 5592 in the following respects:

1) Individuals are exempt from protection if the communications were made with the knowledge that they were false or with reckless disregard for their truth; essentially capturing the standard set out by the Michigan Court of Appeals in *J & J Construction.*
2) Individuals are exempt from protection if the communication included information that the individual was prohibited from disseminating by law.
3) A defendant may recover the greater of $5,000 or treble damages, costs and attorney fees if a judge determines the primary purpose of the suit was to harass, intimidate or hinder the defendant's public participation.
4) Early dismissal provisions appear to have been omitted from the printed bills through a drafting oversight.[20]
5) The package does not contain provisions allowing the government to intervene on behalf of a defendant.

It is unlikely that any further action will be taken on either of these proposals in this election year. You can contact Rep. Koetje at (517) 373-0846, or Rep. Woodward at (517) 373-2598 to express your views on their respective legislation.

Conclusion

The SLAPP phenomenon is growing throughout the country, particularly in the real estate development arena. With it, however, grows the recognition that the phenomenon must be countered to insure that an individual's right to engage in public debates is not suppressed. The bills currently pending in the Michigan House of Representatives follow the actions of a number of other states to protect Michigan's citizens against the expense and intimidation brought on by misuse of the judicial process. The fate of these bills, together with pending Michigan Supreme Court rulings, could determine the viability of SLAPPs in Michigan in the years to come.

Footnotes

[1] *Baglini et al v. Lauletta et al.,* discussed in *New Jersey Law Journal* (April 2001).
[2] *Wawa, Inc. v. Alexander J. Litwornia & Associates, et. al*., discussed in *Pennsylvania Law Weekly*, Vol. 25, No. 4 (February 2002).
[3]*Global Waste Recycling, Inc. v. Mallette*, 762 A.2d 1208 (R.I. 2000).
[4] H.B. 5592 and H.B 5593-5597.
[5] Pring and Canan. (1996). *SLAPPs: Getting Sued for Speaking Out.* Philadelphia: Temple University Press, p. 212.
[6] Pring and Canan, p. 10.
[7] *Gordon* v. *Marrone*, 590 N.Y.S.2d 649 (1992).
[8] Tollefson. (1996). Strategic Lawsuits and Environmental Politics: Daishowa, Inc., v. Friends of the Lubicon*, Journal of Canadian Studies* 31:119.
[9] Pring and Canan, p. 30.
[10] *SRW Associates v. Bellport Beach Property Owners,* 517 N.Y.S.2d 741 (1987).
[11] *Hour Detroit,* February 2002, p. 51-54; Detroit News, August 19, 2001 (accessed at http://detroitnews.com/2001/metro/0108/20/b01-272671.htm)
[12] *Eastern Railroad Presidents' Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961); *United Mine Workers v. Pennington,* 381U.S. 657 (1965).
[13] 499 U.S. 365 (1991).
[14] 245 Mich. App. 722 (2001) *appeal granted* No. 119357 (Mich. April 30, 2002).
[15] *McDonald v. Smith,* 472 U.S. 479 (1985).
[16] *Hodgins Kennels, Inc. v. Durbin,* 170 Mich. App. 474 (1988). Pring and Canan give this case extensive treatment in their text at pages 100-104.
[17] Pring and Canan, p. 23.
[18] Pring and Canan, p. 189.
[19] Pring and Canan, p. 201.
[20] An aide to Rep. Woodward indicated that the package is intended to include early dismissal provisions.

Public Policy Brief: Contacts

Room 88, Agriculture Hall, MSU, East Lansing, MI 48824-1039 (http://www.msue.msu.edu/aoe/slg/)

State & Local Governement Area of Expertise Team Members

John Amrhein (amrheinj@msue.msu.edu, 231-779-9480)
Dave Fenech (fenechd@msue.msu.edu, 810-244-8522)
Lynn Harvey (harvey@msue.msu.edu, 517-355-0118)
Roy Hayes (hayes@msue.msu.edu, 517-546-3950)
Hal Hudson (hudson@msue.msu.edu, 989-539-7805)
Elizabeth Moore (mooree@msue.msu.edu, 517-353-9694)
Ann Nieuwenhuis (nieuwenh@msue.msu.edu, 269-383-8830)
Julie Pioch (piochj@msue.msu.edu, 269-657-7745)
Marilyn Rudzinski (rudzinsk@msue.msu.edu, 586-469-5180)
Gary Taylor (taylorg@msue.msu.edu, 517-353-9460)

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