

SLAPPED: A Tool for Activists

Part 4: Modern-Day SLAPP Suits



The following are examples of various modern SLAPP suit trends. These examples are not intended to be an exhaustive presentation of all SLAPP suits, but rather to highlight the multitude of forms that SLAPP suits may take.

Food Disparagement SLAPP Suits

Forty years after *New York Times v. Sullivan* -- a case where the court recognized that debate on public issues should be uninhibited, robust, and wide-open -- states began adopting food disparagement laws at the urging of major meat, dairy, and agricultural lobbyists. These laws are designed to make it easier for food producers to hold individuals liable for criticizing their products.¹

Since 1991, thirteen states, including Alabama, Arizona, Colorado, Florida, Georgia, Idaho, Louisiana, Mississippi, North Dakota, Ohio, Oklahoma, South Dakota, and Texas, have adopted some form of food disparagement laws.² In general, these laws lower the actual malice or reckless disregard standard required to successfully litigate a defamation claim for statements related to matters of public concern set out in *New York Times Co. v. Sullivan*.³ Additionally, these laws often allow the plaintiff to collect punitive damages and attorney's fees against the defendant, on top of any compensatory damages from the defendant's statements. The breadth of potential damages and fee awards may entice a company to engage in this type of litigation. Unfortunately, these

laws are rarely challenged, and many of the cases are dismissed before being fully litigated.

"Ag-Gag"

Seven states have adopted 'ag-gag' laws which criminalize whistle-blowing investigations at factory farms and specifically target animal rights advocates who expose illegal and cruel practices. In March 2014, the ACLU of Idaho filed a lawsuit challenging their recently adopted ag-gag law which imposes jail time on activists who take photos or videos at a factory farm or slaughterhouse without the owner's express consent.

- One early example of a food disparagement SLAPP suit occurred in 1989 after CBS aired a 60 Minutes episode on the dangers of a chemical sprayed on apples.⁴ The chemical, Daminozide, commonly known as Alar, was the subject of a National Resources Defense Council study which found that Alar was a carcinogen that potentially exposed millions of children to a risk of cancer later in life. This report had a dramatic impact. Grocery stores pulled apples off their shelves, schools stopped serving apples in their cafeterias, and apple growers lost millions of dollars. Additionally, the maker of Alar was forced to

stop production, and the EPA banned its use. As a result, Washington state apple growers sued CBS claiming the 60 Minutes segment falsely disparaged their product.⁵ The lower court determined that, since the growers were not able to prove that the statements about Alar's dangerous effects were false, there was no basis for the suit. On appeal, the growers argued that, although they could not prove that the statements were false, it was possible that a jury could conclude it contained a false message. The appellate court rejected this argument and affirmed the lower court's decision.

- This case proved to be a wake-up call for agri-business. Soon after, in what is now an alarmingly common practice by powerful special interest groups, the American Feed Industry Association ("AFIA") retained a law firm to draft model legislation to protect its members' interests. The model legislation was then disseminated through political channels to state legislatures, where they were dutifully passed and signed into law in a dozen states.⁶

The Agricultural Disparagement SLAPP Suit that Made Headlines

One of the most infamous agricultural disparagement cases involved Oprah Winfrey.⁷ In 1996, in connection with the mad cow disease crisis in Great Britain, a link between Bovine Spongiform Encephalopathy (a.k.a. mad cow disease) and a fatal disease that affects the human brain was established. After this news broke, the subject of dangerous foods was addressed in a panel discussion on an episode of the Oprah Winfrey show. Among the questions addressed by the panel was whether there could be an outbreak of mad cow disease in the United States. One panelist stated that he believed it could happen, and Oprah Winfrey responded that she was stopped cold from eating another burger.

Hoping to chill Winfrey and other's speech on this topic, a group of Texas cattle ranchers sued Winfrey, her production company, and a guest on the show under the Texas agricultural disparagement statute, claiming that false and disparaging comments were made about their beef products. Ultimately, this case was thrown out on a motion for directed verdict because the court ruled that beef did not fall within the definition of "perishable" under the Texas agricultural disparagement law.

Additionally, the court held the plaintiffs utterly failed to show the defendants had actual knowledge that the information presented on the show was false.

"It would be difficult to conceive of any topic of discussion that could be of greater concern and interest to all Americans than the safety of the food that they eat."

- Judge Mary Lou Robinson

Ohio's Food Disparagement or "Veggie Libel" Law

In 1996, Ohio passed a food disparagement, or veggie libel, statute. Under this law, a food producer may sue anyone who makes a false statement, or a statement not supported by "reasonable and reliable scientific data," about a perishable food product, if the statement causes

damage to a producer of those products. If the false statement is held to have been made intentionally, a food producer can seek compensatory and punitive damages.⁸

Perhaps the most well-known Ohio agricultural disparagement case is *AgriGeneral Co. v. Ohio Public Interest Research Group*.⁹ The plaintiffs, now known as Buckeye Egg Farms, were the largest egg producer in Ohio. At a press conference, a representative of the Ohio Public Interest Group alleged that Buckeye Egg Farms placed expired eggs in cartons with newer eggs without alerting the consumer to this practice and exclaimed that it was unknown whether any consumers became ill from consuming these eggs. Buckeye Egg Farms responded by suing the Ohio Public Interest Research Group based on Ohio's veggie libel law claiming that the statements made at the press conference were defamatory. As the ACLU of Ohio prepared to join in the Ohio Public Interest Group's defense, Buckeye Egg Farm dismissed the lawsuit. Therefore, the constitutionality of Ohio's food disparagement law has not been addressed.

SLAPP Suits Brought by Public Servants Against Citizens

One common type of SLAPP suit occurs when public sector entities or employees sue citizens for speaking out on an issue of concern. For example, sometimes police departments will sue citizens who file misconduct reports, teachers will sue parents who lodge complaints with school administrators, and public officials will sue their own constituents who speak out at public hearings.¹⁰ Below are examples of each of the above-mentioned SLAPP suit examples.

SLAPPs Involving Police Officer Conduct

In *Welter v. Fellin*, a social worker observed a young African-American man being chased and then beaten by a group of men.¹¹ Ms. Fellin observed the victim break free and a police cruiser come on to the scene. As she approached the police officers, Ms. Fellin saw the victim being held on the ground and placed in handcuffs while being kicked by the two officers. Ms. Fellin complained to the officers, who responded by threatening to arrest her. As a result, Ms. Fellin wrote a letter to the District Captain about how the officers treated the victim and sent copies of this letter to other safety force officials. Both officers were cleared of any wrongdoing, but one of them, with the support of his union, filed a \$50,000 libel suit against Ms. Fellin. The original judge denied Ms. Fellin's motion to dismiss, because he believed there was a question as to whether she acted with malice. However, the case was reassigned to a different judge and was eventually dismissed because Ms. Fellin never mentioned the officer's name—a requirement in a libel case—in her letter of complaint. Therefore, this case did not set any constitutional precedent.

A local SLAPP suit which arose out of an incident involving the police occurred in Cleveland in September 2005.¹² In connection with a robbery investigation, Cleveland Police Officers Habeeb and Kraynik entered the suspect's home with a search warrant. The officers shot and killed the suspect, who was fifteen years old, in an upstairs bedroom after he allegedly came at them with a shank. The incident was investigated by several governmental entities, all of whom cleared the two officers of any wrongdoing. During the investigation, State Representative Shirley Smith sent a letter to Cleveland's Director of Public Safety, and sent copies to several other city

officials. In this letter, Ms. Smith referred to the police officers as “two malicious sharpshooters” and “hit men” on an “execution assignment.”

The officers initially brought suit against Representative Smith in the Court of Claims seeking a ruling as to whether she was immune from suit since she was a public official. The Court determined she was not acting in her official capacity when she sent the letter and, therefore, was not immune from suit. As a result, the officers sued Rep. Smith for defamation, hoping to stifle public criticism of their actions. The ACLU of Ohio stepped in to defend Rep. Smith in the related defamation case. In April 2012, after numerous pre-trials, discovery disputes, and efforts to seek summary judgment, the plaintiffs dismissed the case.

SLAPPs Involving School Officials

The typical SLAPP suit in this sub-category begins with parents calling attention to alleged unfair discipline of their child, a teacher denying their child the grade the parents think the child should have received, or a parent accusing a teacher of being incompetent. At some point, the teacher responds to the accusations by suing the parents in an effort to silence their criticism. In addition to teachers, school principals and other school employees are often the target of related complaints from the public. This SLAPP suit sub-category is difficult to analyze, because rather than suing solely to silence their critic, the public servant may actually be attempting to use the court system to remedy a wrong suffered.

Swenson-Davis v. Martel is one example of a SLAPP suit filed regarding a parent’s concern over their child’s grade.¹³ An honors student received a B+ rather than an A- in honors English. His father filed a complaint under the school’s fair treatment procedure and went through the various grievance steps. During the grievance process, the parent accused the teacher of trying to use intimidation, as well as being unfair, insensitive, and unprofessional towards his son. The grievance process culminated in a hearing where the hearing officer determined that the teacher was insensitive and miscalculated the grade but not that she was unprofessional. Ultimately, the hearing officer recommended that the teacher change the grade.

The teacher did not appeal the ruling but believed that the complaint process had marked her as damaged goods, and as a result, she began seeing a psychiatrist. She also filed suit against the parent for libel and intentional infliction of emotional distress. The trial court dismissed the suit, the court of appeals affirmed, and the Michigan Supreme Court refused to reconsider the issue, but this case took four years to complete.¹⁴ Unfortunately, the court of appeals based its dismissal on a state law regarding privileged communications between parties with a common interest and ducked the constitutional question. However, one judge wrote a separate opinion stating that the case should have been dismissed on First Amendment grounds.

Other examples of various school-related SLAPP suits:

- *Central Transportation, Inc. v. Stephens*: A Pennsylvania school bus company sued 68 parents because they filed safety complaints with the school board.¹⁵

- *Board of Educ. of the Miami Trace School Dist. v. Marting*: An Ohio school district sued the leader of the PTA and his lawyers for taking legal action to challenge the legality of a bond issue.¹⁶

SLAPPs Involving Public Officials

A local SLAPP involving a public official who sued citizens for their speech occurred in December 2012. In this case, three individuals were sued by the South Euclid Law Director Michael Lograsso over public comments made at South Euclid City Council meetings, which were subsequently published online.¹⁷ In fall 2012, Robert Frey spoke in support of recently passed legislation requiring that city council approve the mayor's appointment of the city law director. Mr. Frey stated that he believed the law was necessary due to Mr. Lograsso's financial history and listed numerous cases regarding debts and judgment liens. Emilie Difranco and David Furry videotaped Mr. Frey's comments at the city council meeting and posted them on YouTube and their blog, *South Euclid Oversight*. Mr. Lograsso filed a SLAPP suit against Frey, Difranco, and Furry for defamation and false light in an attempt to chill their and other citizen's public criticism on his capacity as South Euclid Law Director. In July 2013, the Cuyahoga County Court of Common Pleas ruled in favor of Frey, Difranco, and Furry, and Lograsso appealed. On May 15, 2014, the 8th Appellate District Court of Appeals upheld the decision in favor of the defendants.

In March 2014, MoveOn.org ("MoveOn") sought to bring attention to Governor Bobby Jindal's refusal to extend Medicaid to those without health insurance.¹⁸ MoveOn posted a billboard that parodied the state's slogan, "Pick Your Passion." The billboard read, "LOUISIANA Pick your passion! But hope you don't love your health. Gov. Jindal's denying Medicaid to 242,000 people." MoveOn also ran television ads with essentially the same message. These ads prompted the state to sue MoveOn claiming trademark infringement for unauthorized use of the state's tourism motto, hoping to silence MoveOn and other organizations that may be inclined to voice their opinion on the refusal to extend Medicaid coverage. As of April 2014, this lawsuit is still pending.

Real Estate SLAPP Suits

SLAPP suits involving real estate are becoming increasingly common and comprise a large portion of all SLAPP suits filed. The typical real estate SLAPP suit is filed by a developer who has encountered resistance to a plan to develop a tract of land by local residents.¹⁹

More than 30 years ago, New York became a hotbed of SLAPP suits. One of the more widely known real estate SLAPP suit examples is *SRW Associates v. Bellport Beach Property Owners*.²⁰ In this case, the plaintiff developer wanted to develop a forty-acre tract of beach-front property into 44 multifamily condos. For years, the tract of land had essentially been used as a public beach. The residents opposed the planned development, and it was rejected by the township planning board. For two years, the developer tried presenting alternatives to appease the residents and township officials. Eventually the planning board approved a cluster configuration of 36 single-family homes, and the residents were up in arms. The residents organized a

campaign against final approval and urged individuals to come to the hearing where the decision would be made. While publicizing their campaign, the residents described the proposal as “multiple-family housing” when it actually comprised detached single-family homes. During the hearing, the developer’s attorney attacked this mischaracterization, and a petition supporting the project was presented. Ultimately, the residents were successful in persuading the board to reject the proposal.

As a result, and hoping to suppress the residents’ further outspokenness on the development, the developer sued the defendants for libel, conspiracy to libel, and tort claims. The defendants fought against this SLAPP suit by filing a motion for summary judgment for violating their First Amendment rights, as well as a counterclaim for abuse of process alleging that the lawsuit was frivolous and intended to harass and intimidate the residents into refraining from further opposition to the development. These two actions are now regarded as crucial elements to a successful SLAPP defense. The developer then took what has become a boilerplate approach in its response by seeking leave to file an amended complaint and filing its own motion to dismiss. This caused the case to be further delayed, and the defendants incurred more expenses. Three years after the case was filed, the court denied both motions, and the defendants appealed. Two years later, the appellate court dismissed both suits. Thus, neither side came away as victors; however, the developers were eventually able to complete the project and succeeded in chilling the residents’ speech against future development.

Eco-SLAPP Suits

Large corporations have often sought to suppress the opinions of those who oppose them. Over the past four decades, the environmental movement has consistently been the target of SLAPP suits aimed at suppressing environmental activists’ speech on a variety of issues such as logging, mountain top removal, pollution, and hydraulic fracturing.

One of the oldest documented eco-SLAPP suits is *Sierra Club v. Butz*, a California case regarding land being opened up for logging.²¹ In 1965, the U.S. Forest Service awarded a contract to Humboldt Fir to conduct logging near an area in northern California that came to be known as the Salmon-Trinity Alps Wilderness. The Sierra Club challenged this decision and asked that the area be kept as a wilderness zone free from logging. The Sierra Club’s request was denied, so they filed a lawsuit to overturn the ruling. Within days, Humboldt Fir filed a counterclaim alleging interference with contract because the Sierra Club engaged in a campaign to compel the U.S. Forest Service to break its contract with Humboldt Fir. The Sierra Club responded by filing a motion to dismiss, asserting their First Amendment right to petition, and the U.S. District Court ultimately granted Sierra Club’s motion to dismiss on First Amendment grounds.

Company vs. Critic SLAPP Suits

Consumers are often the target of SLAPP suits for a variety of reasons. For example, many dissatisfied tenants, or purchasers of homes or cars, are later sued by their landlord or merchant as a result of their complaint.

A good example of this sub-category of SLAPP suit is *Westlawn Cemetery Corp. v. Forston*.²² In this case, the Westlawn Cemetery located in McLewis, Texas, had been the subject of numerous complaints to the state attorney general regarding poor maintenance, selling the same plot to more than one person, and failing to build crypts that had already been paid for. Terry Forston, who owned a plot in the cemetery, contacted the attorney general, organized other plot owners, and spoke to the local media about his complaint. The Westlawn Cemetery attempted to silence Mr. Forston and the other plot owners by filing a \$200,000 lawsuit against Mr. Forston for slander, alleging that all the negative publicity caused them to lose business. Two months later, the attorney general intervened on behalf of the consumers, the cemetery ultimately filed for bankruptcy, and the case was not pursued.

One local consumer rights SLAPP suit evolved from a dispute between a landlord and tenant. In September 2013, the Connor Group of Dayton sued a former tenant for online comments made about his experience renting a unit in one of their apartment complexes.²³ Mr. Raney discussed his experiences renting one of the Connor Group's "luxury" apartments online, including on his own blog, www.rentn.org. As a result, the Connor Group filed a defamation and tortious interference SLAPP suit in an attempt to silence Mr. Raney's public criticism of the company and the apartment complex. The Connor Group is seeking damages in excess of \$25,000 as to each alleged defamatory statement made by Mr. Raney, totaling more than \$1.5 million. As of May 01, 2014, this case is ongoing.

CyberSLAPPs

CyberSLAPPs are filed as a result of an individual's online free speech and typically involve a person who posted anonymous criticism of a corporation or public figure on the Internet. Perhaps the most notorious Ohio case involving a SLAPP being filed as a result of online communications was *Saltzman v. Goddard*.²⁴ The case was an outgrowth of a disturbing incident involving two Steubenville Big Red High School football players accused of raping a female juvenile from another community. Alexandra Goddard claimed to be concerned that numerous others involved in the assault were not charged and decided to blog about the incident and allow others to post anonymous comments on her blog posts. Cody Saltzman, one of the accused, was the subject of many of these blogs, although other football players who were not charged were mentioned along with the view that they should be brought to justice.

As in many cyberSLAPPs involving anonymous online speech, Saltzman's parents filed suit against Goddard and sought to subpoena records that would reveal the identity of anonymous commenters. The ACLU of Ohio stepped in to represent the anonymous commenters to defend their First Amendment Right to anonymous online speech. This case was eventually settled without money exchanging hands or restrictions being imposed on Goddard's future online speech. Ms. Goddard agreed to publish a statement from one of the plaintiffs on her blog.

Another good example of an attempt to suppress online speech that made headlines involved posting criticisms of a construction contractor on Yelp and Angie's List.²⁵ Jane Perez contracted with Dietz Development for re-modeling work in her home. Disagreements arose over the nature of the work, which lead to unpaid invoices, and eventually a lawsuit filed by the contractor. The lawsuit was dismissed on procedural grounds, and Ms. Perez posted comments critical of Dietz on Yelp and Angie's List, including claims of incomplete performance, damage to her home, and the theft of jewelry.

Dietz Development responded to the comments by filing suit against Perez for defamation and sought \$750,000 in damages and a preliminary injunction removing the negative comments from the websites and barring Ms. Perez from making similar statements. The Court granted the contractor's motion and ordered that Ms. Perez remove any post referring to "lost jewelry." The contractor later commented about the case, stating that he lost five to ten proposals worth a half million dollars because of Ms. Perez's negative posts. Ultimately, this case went to trial by jury, and after five days, the jury determined that each party defamed the other and awarded no damages.

References:

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3. Civil Liberties Defense Center, *supra* note 1, at ¶ 2.
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5. *AUVIL v. CBS "60 Minutes,"* 67 F.3d 816 (1995), *cert. denied* 116 S. Ct. 1567 (1996).
6. Civil Liberties Defense Center, *supra* note 1, at ¶ 8.
7. *See Texas Beef Group v. Winfrey*, 11 F. Supp 2d 858 (N.D. Tex. 1998), *aff'd*, 201 F.3d 680 (5th Cir. 2000).
8. *See* Ohio Rev. Code § 2307.81.
9. *See AgriGeneral Co. v. Ohio Public Interest Group*, No. 397CV7262 (N.D. Ohio, Mar. 25, 1997).
10. George W. Pring and Penelope Canan, *SLAPPs: Getting Sued for Speaking Out*, pg. 46 (Temple University Press 1966).
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15. Nos. 1978-2083 (Com. Pleas t., Cambria County, Pa., filed May 26, 1978; dismissed 1979).
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