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FOCUS

Businesses take advantage of statute meant to aid citizens

A strategic lawsuit against public participation is a lawsuit brought to intimidate an opponent into silence.

These so-called SLAPP lawsuits are filed with the intent of squashing dissent or independent voices. A party that files such a lawsuit rarely is concerned with winning. Rather, SLAPP suits accomplish their goals simply by forcing defendants to spend time and money.

A traditional SLAPP suit arises after a citizen protests some proposed action. For example, a resident objects to a proposed development in his community. The developer then sues the citizen for defamation. The citizen — unable to afford the cost of defending himself in litigation — is forced to drop his opposition to the development.

In 2001, the Oregon legislature passed an anti-SLAPP statute. The statute has an extremely broad reach and is a weapon, or shield, that may be used in a variety of business litigation settings. While the anti-SLAPP law was intended to protect regular citizens from meritless litigation by well-funded interests, it has now become a powerful tool for defendants in all kinds of cases.

The law introduces an immediate hurdle that a plaintiff must clear before he can proceed with his case. The law also introduces a significant risk to any plaintiff filing a case with a speech aspect, or that involves a matter of public concern. If a defendant wins its anti-SLAPP motion, the plaintiff has to pay the defendant's attorney fees.

However, if a defendant loses its anti-SLAPP motion, it must pay the plaintiff's attorney fees only if its motion was frivolous.

The anti-SLAPP law gives a clear advantage to a defendant in a civil case. Even if the defendant loses his motion, the plaintiff has been forced to show his hand at the outset of the litigation and to incur substantial costs.

Oregon's anti-SLAPP statute has been used as a shield in myriad business cases, including commercial litigation between: a recreational vehicle retailer and a talk show host; a university professor and a think tank; and an employee and his employer.

As long as a defendant can make a plausible argument that some aspect of speech is involved in the case, Oregon courts seem willing to apply the anti-SLAPP statute. Because courts have determined that the statute has a very wide reach, it has potential application in many types of business litigation. For example, the statute could be used in litigation involving:

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- Disparaging comments made by an employee or posted on a company website;
- Alleged disclosures of trade secrets to a competitor;
- "Insider" company information provided to the public or investors; or
- Any published or posted report about the safety, efficacy or quality of a product.

Oregon's anti-SLAPP statute has an upside and a downside for Oregon businesses. It is is a useful tool to any defendant being sued for defamation, or over any published statement or spoken remark. Even if a defendant does not prevail on his motion, the plaintiff is forced to spend money just to get his case out of the starting gate. The cost of fighting an anti-SLAPP motion may well prevent a plaintiff from pursuing his case further.

For a small startup that finds its products maliciously disparaged on a competitor's website, the anti-SLAPP statute may be an insurmountable hurdle. Before the startup can proceed with its litigation to get the disparaging information removed or corrected, it must defeat (and pay for) an expensive and time-consuming anti-SLAPP motion.

Oregon courts have said that the statute applies to any arguably public discussion about politics, consumer goods and services, public health, an individual's decision to resign from a company, an employee's termination and an individual's arrest history.

Ironically, as a result, a law intended to prevent well-funded business interests from pursuing meritless litigation against citizens who participate in the public process is now being used as a defense weapon by businesses to prevent or delay litigation.

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