



TOPEKA

HOUSE OF
REPRESENTATIVES

Representative Jan Pauls
785-296-7688
January 29, 2015

TESTIMONY ON HB2054
In Support of HB2054

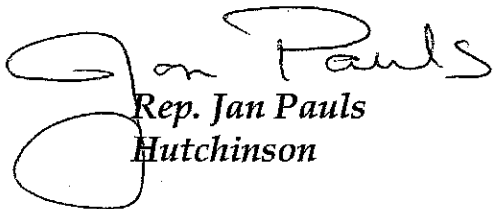
HB2054 is this session's version of HB2711 that was drafted at my request last session with full knowledge that it was improbable that we would be able to have time for any hearing on the subject matter of what is known as anti SLAPP laws. I have found so far that the concept has had widespread bipartisan support in many states and the 2011 Texas anti SLAPP laws passed overwhelmingly. Because it passed out of both Texas houses with greater than two thirds majority, it became law immediately. The Oklahoma anti-SLAPP law was introduced February 2nd of 2014 and passed the House 94-0 and the Senate 42-0 and signed by the Governor on April 22, 2014. The concept of reining in what appears to be "for profit" abuse using the court system has good, popular appeal. The legislatures of states that have passed these laws are making a bold statement that free speech means free speech. Our bedrock first amendment rights should not be circumvented because we have in place a court system that encourages anyone and every one to sue or be sued for voicing an opinion. I think we can find a remedy that fills this soft spot, benefits individuals and small businesses and also reduces the time and financial demands on our court system.

SLAPP stands for Strategic Lawsuits Against Public Participation and usually refers to the all too common use of the Courts to intimidate and silence people of limited means who exercise their first amendment rights of free speech. The goal of the plaintiff in these cases is not to win a lawsuit, but to drag their target into court and bury them with attorney fees and demands upon their time and often inflict stress on their health and emotions that come with looming court battles. In September, the interim Judiciary Committee discussed patent trolling for fraudulent purposes which again makes the legal process the punishment for not quickly bowing to some demand. Our court system is increasingly seen not as means for swift justice,

but as a game, used by some, of drawn out punishment for those without deep pockets.

An "anti-SLAPP" law is meant to provide a timely remedy from SLAPP suits. Twenty eight states, the District of Columbia and Guam currently have statutory protections against SLAPP's. Kansas currently does not have a law and there is no Federal law for this type of suit. Under most state anti-SLAPP statutes, the person sued makes a motion to strike the case based on statutory provisions of the law based on first amendment rights. The plaintiff has the burden to present more than just allegations and show that they have evidence for a favorable verdict if presented. The motion is meant to speed up the process and reduce costs for the individuals and the court system itself. If the defendant prevails on the motion, many of the state statutes allow them to collect reasonable attorney fees from the plaintiff. Larger businesses and entities are not excluded from protection. Just because they could afford the court battle does not mean they have to fend off a SLAPP through a drawn out process.

I think this bill, HB2054, is a good start for a very important concept to protect Kansans from unscrupulous use of our legal system. There is an enormous amount of scholarship and history on these laws. Many states enacted some form of anti SLAPP laws back in the mid 90's and the court cases using this provision have thus far been very positive. I would be glad to provide more reading material and internet sources for committee members who want to get up to speed on details and wording and compare statutes from various states.


Rep. Jan Pauls
Hutchinson

Anti-Slapp Materials
Presented by
Representative Jan Pauls

from: Law360.com

Defamation Suits Face High Bar In Texas Anti-SLAPP Law

By Jeremy Heallen

Law360, Houston (July 24, 2013, 10:16 PM ET) -- In the two years since Texas passed legislation to eliminate groundless defamation suits, courts have overwhelmingly interpreted the Texas Citizens' Participation Act as a high bar to clear, eliminating initial confusion about the reach of the statute, experts say.

In 2011, Texas joined the majority of U.S. states with the enactment of its own statute designed to prevent so-called strategic lawsuits against public participation. The anti-SLAPP law unleashed a wave of uncertainty over when a defamation suit should be dismissed during the early stages of litigation, according to Jeffrey Elkin of Porter Hedges LLP.

But in the wake of a series of appellate decisions and a number of amendments to the TCPA enacted earlier this year, Elkin said the body of law is evolving toward a broad application of the act to dismiss cases that threaten free speech.

"The Legislature made the determination that democracy only works if people are involved, meaning sharing information, exchanging ideas, writing about public issues, commenting on the quality of a business or assembling to support or oppose a cause," he said. "The TCPA is meant to protect citizen participation."

Under the act, a defendant in a defamation case can file a motion to dismiss within 60 days of being served with the suit, on the grounds that the litigation came in response to an exercise of free speech on a "matter of public concern."

Assuming the defendant proves by a preponderance of evidence that the suit was motivated by a desire to quash free speech, the plaintiff then must substantiate its defamation claim by "clear and specific" evidence. The TCPA demands that a trial court act quickly on a motion to dismiss — usually

within 60 days.

Elkin, who earlier this month secured a win for the Better Business Bureau of Metropolitan Houston under the TCPA, said trial courts initially had to confront arguments from plaintiffs that “creative exceptions” exempted their cases from the act.

For instance, plaintiffs have contended the speech or conduct involved must relate directly to participation in government. But courts have repeatedly rejected that argument, Elkin said.

They are also narrowly construing the TCPA’s “commercial speech” exemption as applying only to traditional business transactions where the defendant clearly aimed to profit through the offending words, according to Elkin.

Home repair company John Moore Services Inc. raised both issues when the BBB sought to have the company's defamation suit against it dismissed under the TCPA, according to Elkin.

Although the trial court denied the ratings agency’s motion to dismiss, the First District Court of Appeals reversed, ruling that an “F” rating and other communications on the BBB’s website qualified as matters of public concern.

And the appeals court was not convinced that the commercial speech exemption applied, since the BBB’s ratings target consumers at large, rather than the businesses to which it attempts to sell membership services.

Elkin said the appeals court’s decision was in line with what the Legislature intended.

“The TCPA reflects a public policy decision by the Texas Legislature to give companies and individuals who are being sued for their ‘participation’ a relatively fast and less expensive way to try to end litigation,” he said.

But it wasn’t immediately clear to all trial courts how far the TCPA’s protections reached, according to Robert Latham of Jackson Walker LLP.

"Initially, there was some reluctance on the part of some trial court judges who thought that anti-SLAPP statutes are supposed to protect only someone akin to a whistleblower, with limited assets," he said. "But there is nothing in the TCPA that is so limiting."

Those judges observed that corporate media, unlike individuals sued for defamation, have deep enough pockets to fend off litigation at least through the summary judgment stage, according to Latham.

"But the media argued quite rightly: 'We should be able to avoid the wear and tear and expense of discovery like anyone else if a claim lacks merit,'" Latham said.

Latham conceded that the TCPA establishes a bar that is "somewhat high" for defamation plaintiffs.

"But we're talking about a constitutionally protected activity," he said. "A lot of defamation suits get filed in a pique of anger and emotion in an effort to silence critics. Those are the kinds of suits that are being bounced."

There have been exceptions. In an "unusual" decision, the Second District Court of Appeals ruled in *Jennings v. Wallbuilders Presentations Inc.* that a defendant can launch an interlocutory appeal only if the trial court refuses to rule on a motion to dismiss under the TCPA.

Because the act is meant to ensure that a trial court determines whether a defamation claim passes muster before allowing it to move along, a court's refusal to toss a case isn't immediately reviewable, the appeals court reasoned.

But several other appeals courts have since disagreed, and the state Legislature amended the TCPA earlier this year to clarify that a defendant can appeal in either circumstance, Latham said. The amendments also extend the time frame for a court to act on a motion to dismiss and mandate dismissal if a defendant can prove an affirmative defense to defamation.

Laura Lee Prather of Haynes and Boone LLP, who was the lead author of the bill behind the law and led the charge to clarify it this year, said the TCPA

filled a gap in state procedural law. Before it was passed, defendants' only option was dismissal through summary judgment, usually after expensive and time-consuming discovery.

"Many individuals don't have the resources to fight a lawsuit, and the TCPA gives the court system the ability to evaluate at the onset if a suit is meritorious or meant to intimidate," she said.

This can also help the courts by streamlining case loads, she said.

But Matt Kita, a solo practitioner in Dallas who represents a number of plaintiffs in defamation cases, called the TCPA a "solution looking for a problem," saying it crops up in a broad spectrum of cases where defamation claims have been raised, sometimes tangentially. Kita is currently handling five appeals on behalf of plaintiffs whose cases have been dismissed under the act.

"There are cases that are purely commercial where the anti-SLAPP statute is invoked," he said. "It's unbelievably draconian in what it allows defendants to do."

Kita cited a recent trial court ruling in a case where he represents Direct Commercial Funding, which specializes in securing real estate loans.

The company sued Beacon Hill Estates LLC for defamation and breach of contract after discovering Internet postings accusing Direct Commercial Funding of running a fee scam. But the trial court tossed the case under the TCPA, notwithstanding a contractual provision between the companies that Kita says prohibited it from slandering his client on the Internet.

Kita said he persuaded the Fourteenth District Court of Appeals to overturn the trial court's decision, albeit on procedural, not substantive, grounds.

Ostensibly designed to protect free speech, in reality, the TCPA covers almost any kind of communication, according to Kita. Once the statute has been invoked, the plaintiff has to petition the court for the right to obtain limited discovery, which sometimes raises an impossible bar to prove each element of a defamation claim, according to Kita.

“In a lot of these cases, you have to prove that a defendant acted with actual malice,” he said. “How in the world do you prove that without a reasonable opportunity to conduct discovery?”

--Editing by Kat Laskowski and Melissa Tinklepaugh.

Oklahoma adopts strong anti-SLAPP law

By Michael Bates on April 27, 2014 9:57 PM

There's one more reason for Oklahomans to celebrate April 22.

Last Tuesday, on the 125th anniversary of the Oklahoma 1889 Land Run, Gov. Mary Fallin signed HB 2366, the Oklahoma Citizens Participation Act, giving Oklahomans valuable protection in the exercise of their First Amendment rights. From the bill:

The purpose of the Oklahoma Citizens Participation Act is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.

HB2366 was authored by State Rep. John Trebilcock (R-Broken Arrow) and is a fitting capstone to his twelve years in the Legislature. State Sen. Rick Brinkley (R-Owasso) shepherded the bill through the Senate. Reps. Mike Turner (R-Edmond), Sally Kern (R-Oklahoma City), and Jadine Nollan (R-Sand Springs) joined as co-authors. The bill was approved unanimously by the House Judiciary Committee (14-0), the whole House (94-0, with 7 excused), the Senate Judiciary Committee (6-0), and the whole Senate (42-0, with 6 excused).

When the bill goes into effect on November 1, Oklahoma will have one of the strongest anti-SLAPP laws in the nation.

Ken White, a California 1st Amendment attorney, ably sums up the case for anti-SLAPP bills like HB2366:

The bottom line -- without an anti-SLAPP statute, a malicious litigant can often inflict substantial expense and hardship upon someone in retaliation for their speech, even if their claim lacks merit, and do so with relative impunity.

Some key points:

1. In a Strategic Lawsuit Against Public Participation, a plaintiff seeks to punish the defendant for expressing his opinion or stating a fact he doesn't like aired publicly by subjecting him to a costly legal process. The SLAPP plaintiff can achieve his objective -- silencing criticism -- even if he ultimately loses his case in court. The cost in time, money, and anxiety of defending the lawsuit will deter the defendant from future criticism and may also deter others from speaking out.
2. SLAPPs not only threaten political bloggers and newspaper reporters, but consumer watchdog groups and reviewers on sites like Yelp and TripAdvisor have been hit with SLAPPs as well.
3. The U. S. Supreme Court has issued many decisions protecting 1st Amendment rights by restricting lawsuits against written and spoken expression. For example, proving libel against a public figure requires that you prove the defendant knew he was lying or had a reckless disregard for the truth. But in practical application these protections come into play only at the end of the process, when the judge makes his ruling, or perhaps not until the case is heard by an appellate court. Even if the defendant prevails in the end, the damage has been done.
4. SLAPPs hit hardest when the SLAPPer has ample resources to sustain the prosecution of a lawsuit but the SLAPpee has to choose between (A) possible bankruptcy to defend the suit all the way to the end or (B) an undesirable settlement, which may include a promise to silence his criticism.

In response to this situation, Oklahoma has now become one of a number of states that have passed strong anti-SLAPP legislation to shift consideration of First Amendment protections to the beginning of the process and to deter malicious lawsuits by imposing costs on the plaintiff if the suit is dismissed. An effective anti-SLAPP law acts as an equalizer to ensure that you don't need a vast financial reserve in order to exercise your First Amendment rights, but it still provides for redress of valid defamation claims.

What the Oklahoma Citizens Participation Act does:

The Oklahoma Citizens Participation Act authorizes a special motion to dismiss to be filed and heard early in the process. The motion must be filed within 60 days after the suit is filed, and discovery is suspended until the

court rules on the motion. The hearing on the motion must be held within 60 days of its filing, (The time may be extended to 90 or 120 days under special circumstances, but 120 days is the limit.) After the hearing, the court has 30 days to rule.

The defendant must first establish that the suit is based on, relates to, or is in response to his exercise of his freedom of speech, freedom to petition government, or freedom of association.

In response, the plaintiff must establish "by clear and specific evidence a prima facie case for each essential element of the claim in question." The defendant can obtain dismissal of the case if he can establish "by a preponderance of the evidence each essential element of a valid defense" to the plaintiff's claim.

What makes this different from an ordinary motion to dismiss is that the judge can go beyond "the four corners" of the complaint. The court doesn't have to take the plaintiff's charges at face value.

If the court dismisses the case, the court is required to award court costs, reasonable attorney fees, and legal expenses as well as sanctions "sufficient to deter the party who brought the legal action from bringing similar actions."

If the motion to dismiss is "frivolous or solely intended to delay," the court may award costs to the plaintiff.

Either side can appeal the court's ruling, and the appeal must be expedited; otherwise the benefit of an early motion would be neutralized.

Who is helped by the Oklahoma Citizens Participation Act?

- Newspapers, radio and TV stations, and news bloggers, particularly smaller news outlets which may not have the resources to fight lawsuits.
- Participants in online forums who express their opinions about public issues.
- Consumer protection organizations that rate businesses. The Texas law has been used successfully several times to block SLAPPs brought against such organizations by businesses angry about negative ratings.

- Consumers who register their opinions about experiences with local businesses on sites like Facebook, Twitter, Yelp, Urbanspoon, TripAdvisor, and Angie's List.
- The general public, who enjoy a greater flow of information about matters of public interest because the groups listed above are not intimidated by the threat of SLAPPs.

Some history:

Previously, Oklahoma had a very limited anti-SLAPP provision, covering only libel, but not other causes of action used in SLAPPs (like "tortious interference" or "conspiracy"), and covering only speech related to government proceedings. Oklahoma's law lacked any form of early review that could spare an unjustly charged defendant from a lengthy and costly process. It also lacked any mandatory provision to require the plaintiff in an unwarranted lawsuit to make the defendant whole for the costs of his legal defense. (Laura Long detailed the deficiencies of Oklahoma's statute in the Summer 2007 issue of the Oklahoma Law Review.)

In 1995, two trial lawyers filed suit in Creek County against members of Citizens Against Lawsuit Abuse, a group attempting to launch a tort reform initiative petition. The suit alleged defamation, tortious interference with business relations, intentional infliction of emotional distress, and conspiracy because CALA criticized trial lawyers as a profession in their letter soliciting steering committee members. The lawsuit dragged on for three years and went all the way to the Oklahoma Supreme Court. You can read a summary of the case here and the State Supreme Court decision here

The issue caught my attention way back in 2005 as one of a number of potential legal hazards for political bloggers. In 2006 and 2007, there were news stories about certain Islamic groups using libel suits to silence criticism or investigation of ties to hate groups and terrorist-supporting organizations, and KFAQ had to deal with a defamation suit from a city councilor.

In 2008, neighborhood activists opposed to the 10 N. Yale project faced legal threats from the Mental Health Association of Tulsa and Councilor Jason Eric Gomez. SLAPPs have even been used to target historic preservationists, simply for participating in the public process for approving or denying demolition permits or zoning changes.

In 2009, State Sen. Tom Adelson filed a bill (SB742) to add anti-SLAPP protections modeled after California's law, but the bill died without a hearing in the Judiciary Committee.

In 2012, the Franklin Center for Government and Public Integrity launched the "Protect Your Voice" initiative to push for legislation giving citizen journalists the same protections as traditional journalists in mainstream media.

Last fall, during the legislature's pre-filing period, Rep. Trebilcock put out a request for suggestions for legislation he should author during his final session in the legislature. I suggested anti-SLAPP legislation, and that was one of the bills he decided to pursue. I passed the research I had done on to Rep. Trebilcock, and he took it from there. Not wanting any animus toward me (particularly over my National Popular Vote coverage earlier in the session) to get in the way of a good idea, I kept a low profile on the bill, although I was happy to have the opportunity to answer questions from a few legislators.

The Oklahoma Citizens Participation Act is not the only landmark legislation Rep. Trebilcock has authored in his final session. HB2372, which protects the privacy of an employee's social media accounts from inspection by an employer, has passed the House and Senate unanimously, but in different versions. The Senate amendments are now pending in the House.

The Internet has created unprecedented opportunities for ordinary Oklahomans to make their voices heard. Thanks to Rep. Trebilcock, Sen. Brinkley, legislators of both houses and parties, the chairmen and members of the House and Senate Judiciary Committees, and Gov. Fallin, they can now make responsible use of those opportunities for the betterment of our cities, counties, school districts, and state, secure in their protection from malicious lawsuits.

Lawmaker wants to take the sting out of SLAPPS

Bill would prevent lawsuits
that squelch free speech

By Jonathan Shorman
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Barbra Streisand, the actress and singer,
wanted to stop the image from coming out.

In 2003, an aerial photo of her large Malibu house, which sits high above the shore, was posted online in a collection of thousands of images from the California coast. Streisand sued photographer Kenneth Adelman and the website that hosted the image for \$50 million, despite the fact the photo had up until that point been downloaded only a handful of times.

The lawsuit didn't succeed. But in the process the image Streisand sought to keep private grew popular because of attention surrounding the case.

More than 10 years later, lawmakers here are indicating an openness to minimizing the legal sledgehammers companies as well as individuals such as Streisand can wield in efforts to silence speech and intimidate critics.

SLAPPS, or Strategic Lawsuits Against Public Participation, are legal efforts designed to stop speech and have been direct-

SLAPPS continues on 7A



Streisand

SLAPPS: Lawmakers vote to send bill to Legislature again

Continued from 1A

ed against a variety of targets: individuals speaking at meetings, those posting online reviews and the media.

As recently as this past week, Frederick County, Md., councilman Kirby Delauter threatened a newspaper with a lawsuit if they published his name. Though Delauter later apologized, had he filed suit it would have likely been seen as a SLAPP.

Now, Rep. Janice Pauls wants legislation to prevent what critics view as legal bullying tactics in Kansas. The Hutchinson Republican introduced anti-SLAPP legislation in 2014. The bill went nowhere, dying in the House

Judiciary Committee. This year, however, Pauls has the official backing of some legislative colleagues. At a meeting this past week of the Special Judiciary Committee, composed of senators and representatives, lawmakers voted to send the bill to the Legislature for consideration once again.

Pauls describes her anti-SLAPP bill as a way to counteract frivolous lawsuits that can target someone doing something as ordinary as writing an online review of a product. "Even though they may truthfully criticize whatever the product is, they're subject to this intimidation to keep them from proceeding and oftentimes people are actually ending



Pauls

up in enough litigation that they're bankrupt, their businesses may be bankrupt," Pauls said.

SLAPP lawsuits may also be brought against someone who testifies in front of a city council or other public body about a particular business or company. The business upset at the criticism, will file suit in an effort to stop that person from speaking out again, according to Pauls.

"It's just amazing how

much damage can be done by this type of litigation," Pauls said.

According to the Public Participation Project, a California-based anti-SLAPP group in neighboring Missouri in 2003 a man was sued by a trash disposal company after a man spoke at a public hearing opposing a transportation station the company was proposing. The trash company sued the man for defamation and civil conspiracy to defame, alleging actual damages of more than \$25,000 and punitive damages of \$5 million. The lawsuit was eventually dismissed.

About 30 states have enacted anti-SLAPP laws, according to a map posted by the Public Participation

Project. While Kansas is not one of them, neighbors Missouri, Oklahoma and Nebraska all have measures designed to quash the lawsuits.

Rep. Lance Kinzer, an Olathe Republican who sat on the Special Judiciary Committee, said he has no objection to allowing the bill to be introduced, but he questioned whether lawmakers are targeting the right type of frivolous lawsuits. Kinzer, who is leaving the Legislature, noted there are other types of frivolous lawsuits that aren't being considered for legislative action.

"Even if we were to decide we did need some ramped-up procedures, does it make sense to say these particular types of

cases are so much worse than any other type of frivolous claim that would be brought that they get special protections that we don't give people who are frivolously sued in other contexts?" Kinzer said.

Pauls acknowledges Kansas hasn't had a lot of SLAPPS, but said there is a need to protect public speech. The lawsuits can basically destroy someone's life, she said, and the legislation would hopefully cut off cases soon enough to prevent legal fees from impoverishing someone.

After a favorable vote from the Special Judiciary Committee, the legislation will be sent to a regular legislative committee during the upcoming session that begins this week.