# Is it Time for New Jersey to SLAPP Back?

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**by Bruce S. Rosen**

It is a more typical story than you might expect. A local political gadfly, blogger or even a small publisher investigates or rails against a building project that is perceived to involve local corruption. Or perhaps a non-profit inveighs against building on wetlands. The project's developer or a business owner, fed up with the public criticism that they believe affects their reputation and economic interests, sues for defamation and tortious interference.

The lawsuit may have some nub of truth, but it is likely filled with exaggerated damage claims that would be difficult if not impossible to prove. The plaintiff's purpose, though, is probably not to collect damages, but to shut down the opposition's voice with a daunting threat of excessive legal fees and personal costs necessary to defend the actions.

There is no dispute that the filing of such a suit, referred to as a "Strategic Lawsuit Against Public Participation" (or SLAPP), can chill public commentary and undermine First Amendment rights and values. Although effective defenses may abound—especially in those cases involving matters of public concern—unless experienced counsel is retained, a defendant will likely be forced to capitulate, or will flail away by filing *pro se* filings until whipsawed into submission. In the end, the defendant's constitutional right to participate in the public process will have been confiscated by a system lacking both a real a deterrent to such abuse as well as a mechanism to resolve these cases as soon as they are filed.

SLAPP suits come in all sorts of contexts, from posting on the internet, circulating flyers or petitions, filing complaints with government agencies, or even by filing legal claims or lawsuits. In at least 30 states and the District of Columbia,[1] anti-SLAPP (or "SLAPP-back") statutes, as they are known, address SLAPP suits head-on by creating a mechanism that permits defendants to file a preliminary motion designed to test the allegations in an accelerated and abbreviated fashion.

Most of these statutes stay the expensive discovery process while a judge first determines whether the allegations have enough merit to risk undermining the defendant's First Amendment rights to speech and public participation. These rights are further protected by a right of immediate appeal and, if the defendant is successful, a fee award, which in turn attracts attorneys to defend these cases.

It appears to be a banner time for state anti-SLAPP statutes: In July 2020 the National Conference of Commissioners on Uniform State Laws approved the Uniform Public Expression Protection Act[2], while almost simultaneously New York State replaced a narrowly focused and rarely-used anti-SLAPP law with one that was far more comprehensive.[3] Late in 2019, even the conservative American Legislative Exchange Council distributed a similar draft law called the Public Participation Protection Act to its patron legislators around the country.[4] Connecticut enacted its statute in 2018.

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An anti-SLAPP bill (A-1077) first passed the state Assembly in 2005 by a 79–0 vote and died in the Senate. A bill (A-3505) sponsored by then-Assemblyman Joseph Lagana (D-Bergen) passed the Assembly in 2015 only to expire at the end of the session.[5] Assemblyman Lagana reintroduced an identical proposal in January 2016 (A-603)[6] only to have it die in the Senate. However, even A-603 came without sharp teeth: The imposition of legal fees upon a judicial finding that litigation was a SLAPP suit was discretionary (although there was a flat $10,000 award for a statutory violation) and there was no right to an interlocutory appeal, two emendations that its sponsor says came from the Administrative Office of the Courts. The AOC in the past has discouraged such laws arguing, among other things, of a potential explosion of SLAPP suits, but the Assembly-approved version of A-603, according to Lagana, addressed those concerns.[7]

The New Jersey Supreme Court's antipathy toward anti-SLAPP statutes is reflected in the 2009 opinion in *LoBiondo v. Schwartz*.[8] In *LoBiondo*, the defendants were sued after opposing a club owner's zoning applications and were forced to go through the entire litigation process and engage in multiple appeals. Unable to draw from a statute, a unanimous Court, in a decision written by Justice Helen Hoens, instead created a makeshift, rarely used redress procedure for victims of SLAPP suits by resurrecting the disfavored tort of malicious abuse of process—but allowed its use only after a defendant had suffered through and prevailed in the underlying case.

The elements of malicious use of process are (1) filing a complaint without probable cause, (2) actuated by malice, (3) that terminated in favor of the party seeking relief, and (4) that caused the party seeking relief to suffer a special grievance. The *LoBiondo* Court said that one who could demonstrate that their right of free speech or to petition was actually infringed satisfied the special

grievance element. The case also allowed losing plaintiffs sued under this tort to claim advice-of-counsel as a complete defense, setting forth a standard for determining counsel's liability.

*LoBiondo* described how anti-SLAPP statutes find their roots in the United States Supreme Court's *Noerr—Pennington* doctrine, creating immunity that protects actions that fall within the parameters of seeking the redress of one's grievances from the government. The Court noted that the statutes fall into two general categories. Generally, the first category allows for various definitions for how broad the statute's application would reach but are meant to provide protection for public participants and all allow for a special motion for dismissal that can be made to a court, creating a remedy and allowing for the award of attorneys' fees. The second category creates a separate cause of action and defines a SLAPP suit as being brought in bad faith and with the intention of limiting free speech, and many of this type of statute also require proof of an intention to harass or to interfere with the free exercise of those rights. These statutes also allow for various types of damages and attorneys' fees.[9]

*LoBiondo* was not particularly sympathetic to anti-SLAPP statutes, noting that such defamation or tortious interference lawsuits may, in fact, be a good faith effort to protect one's own reputation or business. "Defining the line that divides one from the other is neither simple nor straightforward," Justice Hoens wrote, citing two commentators critical of such statutes.[10] Referring approvingly to the Appellate Division's refusal to craft a new judicial cause of action to combat SLAPP suits, the opinion focuses on its improvised resolution.

By any measure, *LoBiondo* is more an example of the Court's reluctant recognition of a problem in the face of continued legislative inaction, than a real solution to the issue of wealthy interests using the courts to silence detractors. In retrospect, at least, the Court's concern regarding anti-SLAPP statutes were not only overblown, but clearly against the trend of the past 11 years. The whole idea of an anti-SLAPP law is to allow an early resolution of a defendant's claims that a lawsuit was meant to undermine free speech and public participation. A *LoBiondo* suit for malicious abuse of process is exactly the opposite: A cumbersome and difficult process that requires enormous resources (from both the parties and the judiciary) and interminable patience for an uncertain result. The Courts should be looking more seriously at the SLAPP suits undermining individual rights that will be expeditiously removed from the trial docket than worrying about those who feel aggrieved and would file such suits in the future. There may be a reticence on the part of the Court to sanction plaintiffs under an anti-SLAPP scheme but that has not prevented "shall grant" fee awards—and created a plaintiff's bar in Open Public Records Act cases. Without a mandatory fee structure, there is little incentive for many attorneys to take these cases. Without a right to interlocutory appeal, an error by the trial judge, resulting in the threat of a torrent of legal proceedings, could easily cause capitulation and loss of rights.

The recently unveiled UPEPA, on the other hand, provides first for a broad definition of those defendants who are protected. The uniform law could be applied when a person believes that a lawsuit is meant to interfere with their communications in or with a court, governmental, or judicial proceeding or any "exercise of the right of freedom of speech or the press, the right to assemble or petition." It exempts certain actions by government and suits arising out of a sale or lease of goods.

A party would have up to 60 days (the proposed New Jersey statute said 45 days) to file a special motion to dismiss and a hearing would need to take place within a similar timeframe. A stay of discovery is instituted (though limited discovery may be allowed on the relevant issues) and would remain in effect until after an appeal from the trial court's decision has been taken.

Once the moving party establishes that the statute applies (or the responding party fails to establish that it does not apply), the burden switches to the responding party to establish a *prima facie* case as to each essential element (or the moving party shows the converse). This is harder than it sounds for defamation matters, since it should require, as it does in some states, that a *prima facie* case of actual malice and/or overcoming privileges like fair report or common interest must also be presented. The court may also dismiss under the summary judgment standard.

Even if a plaintiff withdraws the suit, the moving party has the right to continue to obtain a ruling and, if successful, legal fees and costs which "shall" be awarded (rather than "may" be awarded, as provided in the New Jersey bill). In fact, mandatory fee-shifting is the trend (except in Florida, the only state to enact a statute in the past 10 years without a "shall" provision). The recently passed New York bill[11] provides that legal fees "shall" be required but only where there has been a showing that the claim at issue "lacks a substantive basis in law or is [not] supported by a substantial argument for an extension, modification or reversal of existing law," the same standard employed by the frivolous filing statute pursuant to R. 1:4-8 in New Jersey.

While there have been abuses of anti-SLAPP laws—particularly in California, where the laws are applied most broadly—the statute has also occasionally become a tool of large corporations and unpopular figures which file their own anti-SLAPP actions. The CBS Network successfully used the law to argue that

their hiring decision for an on-air weather anchor who had sued for employment discrimination was in furtherance of the network's free-speech rights.[12] President Donald Trump used the statute to dismiss a lawsuit brought by Stephanie Clifford (aka Stormy Daniels),[13] and Exxon Mobil tried to use it to defeat a slander suit brought by a former employee.[14] Despite these aberrations, at their core, anti-SLAPP laws are designed to protect the rights of less powerful individuals to participate in public discourse.[15]

Obviously, any statute enacted in New Jersey would require it to be interpreted through its own (not as cutting-edge, like California) jurisprudence before it becomes settled law. In the meantime, however, litigators across the country have been attempting to apply anti-SLAPP statutes in federal Court, where the circuits are now split as to whether these state law devices apply because they are conflict with when and how cases can be dismissed under Federal Rules of Civil Procedure 12 and 56. This also dovetails with a movement to create a federal anti-SLAPP law, a movement which has yet to gain significant traction but may do so if the U.S. Supreme Court moves to limit the various state laws' application.

Back in New Jersey, Assemblyman Lagana is now a state Senator and pledges to try again to pass an anti-SLAPP statute—especially with the impetus of the new uniform law. There is no reason, short of a political power play by business forces, which should stop it. In other states, including Texas, which does not otherwise have a motion to dismiss in its rules, these statutes passed with a wide coalition of consumer tort reform and environmental groups, the Better Business Bureau, the American Civil Liberties Union and the media. Obviously, the law would enhance press freedom as well. Established media, which is reeling financially, would benefit greatly from the statute because it could short-circuit virtually every questionable libel suit, some of which might otherwise resist a motion to dismiss and be forced into expensive discovery.)

In fact, passage of a tough new anti-SLAPP statute would very much be in line with the New Jersey Supreme Court's long and distinguished tradition of tilting the scales for speech rights against reputational interests involving matters of public concern. Ample reason thus exists for New Jersey's political constituencies to coalesce around the UPEPA. The free speech rights of those subject to these suits have been SLAPPED-back long enough. ⚖

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**Endnotes**

1. rcfp.org/introduction-anti-slapp-guide/#:~:text=As%20of%20fall%202019%2C%2030,New%20York%2C%20Oklahoma%2C%20Oregon%2C. See also Business Litigation March 2020, International Association of Defense Counsel Committee newsletter for a complete breakdown of the SLAPP laws in each state at iadclaw.org
2. uniformlaws.org/viewdocument/as-approved-act-2020-july-1?CommunityKey=3442392f-ccac-438d-af50-e3a3dd7faec1&tab=librarydocuments
3. hollywoodreporter.com/thr-esq/new-york-legislature-passes-bill-protect-free-speech-frivolous-lawsuits-1303992; nysenate.gov/legislation/bills/2019/s52/amendment/a
4. alec.org/model-policy/public-participation-protection-act/#:~:text=Summary,on%20matters%20of%20public%20concern.
5. For a history of anti-SLAPP legislation prior to 2016, see njappleseed.org/2017/04/08/slapp/
6. billtrack50.com/BillDetail/697007
7. Interview with Sen. Joseph Lagana, July 21, 2020.
8. 199 N.J. 62 (2009).
9. *Id*. at 86-87.
10. *Id*. at 88.
11. As of this writing the bill awaits Gov. Cuomo's signature.
12. *See* Golden, Nina, *SLAPP down: The use (and abuse) of Anti-SLAPP motions to strike*, 12 Rutgers J. of Law & Pub. Policy 4 (Summer 2015) published at rutgerspolicyjournal.org/sites/jlpp/files/Golden.pdf
13. abajournal.com/news/article/stormy_daniels_is_ordered_to_pay_nearly_300k_in_attorney_fees_to_trump_unde. See the decision upheld in Ninth Circuit slip opinion in *Clifford v. Trump*, No. 18-56351, Docket No. 45 (9th Cir., dec. July 31, 2020), causing a split in the circuits, which is referred to in the decision.
14. forbes.com/sites/danielfisher/2017/02/24/exxonmobil-wins-an-anti-slapp-motion-in-texas-while-landrys-loses/#46557225cb41
15. *See* Freeman, Aaron, *The Future of Anti-SLAPP Laws*, 2018-19 St. Louis Univ. L. J. published at slu.edu/law/law-journal/online/2018-19/future-anti-slapp-laws.php