vantage point

When Threatened, Sue

It isn't uncommon. In fact, it's common enough that it has a special name: SLAPP, or Strategic Lawsuit Against Public Participation. The ploy is for someone with a vested interest in something to sue, or threaten to sue, anyone attempting to oppose that interest. Often, but not always, the plaintiff is a business and the defendant has much less money. Therefore the defendant will drop any protests to the plaintiff's actions and the plaintiff wins by default (and the brute force of money). Such suits serve to stop the expression of opposing opinions, SLAPPing them down.

About half the states have initiated legislation to limit SLAPP suits, although they vary as to what is or is not protected against such litigation. Some cover all free speech, some focus on defamatory statements, others on communications relating to environmental proceedings for issues under review by a governmental body or agency.

One of the more well publicized SLAPP suits was leveled by Texas cattle ranchers against Oprah Winfrey in 1996 when during one of her shows investigating mad cow disease she said she wouldn't eat hamburger. The suit alleging $12 million in damages was found in Oprah's favor both before a jury and again on appeal in federal court in 2000. Other famous (lost) cases include Washington apple farmers against the television show *60 Minutes* for an investigation of harmful effects of alar (a chemical also known as Daminozide, used in regulating the growth of apples) and Sharper Image against Consumers Union for a poor review of one of its air cleaning systems in *Consumer Reports*.

What we more usually hear about on the local level is SLAPPs against individuals and organizations speaking out against the litigator's plans. Writing a letter to the local Board of Commissioners or protesting a development can be enough to set a SLAPP in motion. The threat of a suit is often enough for would-be defendants to back off, and the would-be plaintiff to get its way—even if the suit has no merit and defendants would have been reimbursed their legal expenses. Having been on the receiving end of a SLAPP related to group protests against residential development proposal on a contaminated floodprone wetland site, I can verify how nerve-wracking the process of figuring out both finances and the odds can be. (We won.)

Short of a full SLAPP is the threat to sue for injunctive relief. Injunctions are pursued when money can't compensate for an alleged wrong, and are secured by filing a civil lawsuit to have a judge either prohibit a certain act or to require it. This is the approach a local developer has just taken in my township. After receiving a series of variances and conditions before the floodprone, limited access site could be developed, the developer managed to locate electric transformers in an area that was to have been set aside as open space. The local commissioners were initially adamant that the transformers had to move. The developer's attorney said that would cost between $1- and $1.5-million. (So whose fault is that?) This attorney acknowledged that there "could have been better communication" with the township before the violating installations. But then he brought up the possibility of a suit for injunctive relief to allow the transformers to remain in place if the commissioners did not drop its demands to correct the situation back to the original agreement. The reason the commissioners gave for backing off was that they were afraid of incurring high legal costs in a case they might not win.

In the real estate world, if someone does something detrimental to themselves because you encourage them to do so, you are prevented by law from then coming back to punish them, whether by demanding money or removal of encroachments or other self-serving actions. That is based on what we call estoppel; you are estopped from benefiting from your less than fully honest influence on the other person. But if someone goes ahead and knowingly does something wrong, deciding to act first and ask permission later, should that action be overlooked simply because it was expensive? Now we get into the realm where sometimes the courts look at balancing the equities due both sides of the argument. Other times they just order the right thing to be done. When AT&T decided to install a fiber optic cable system throughout the US in the mid 1980s, negotiation with railroads to use their corridors seemed the easiest route. This business decision disregarded whether railroad interests in the land were fee or easement. It was all about hurry up and build first, then ask forgiveness later if discovered. Indiana landowners discovered AT&T's encroachment and sued, setting off a nation-wide class action suit. Settlement with those joining the class action did not prevent others from successfully suing for more than the proffered pittance per encroaching linear foot. ■

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