Oregon's Anti-SLAPP Statute: A Striking Defense

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Oregon's Anti-Strategic Lawsuits Against Public Participation (anti-SLAPP) statute, ORS 31.150, permits defendants who are sued for certain civic and constitutionally protected activities to obtain a speedy dismissal of questionable cases at a minimum of expense. The statute has generated increased attention from appellate courts as defendants begin to utilize this motion more often with mixed results. This article discusses recent appellate interpretations of the statute and highlights relevant considerations in litigating these motions.


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Briefly, Oregon's anti-SLAPP statute applies to certain statements and documents submitted to or made in connection with legislative, executive, or judicial proceedings, any other proceeding authorized by law, or in a public forum in connection with an issue of public interest.[1] At its most broad, the statute applies to any conduct in furtherance of free speech and petition rights in connection with an issue of public interest.[2] The statute provides a two-step burden-shifting process for anti-SLAPP motions: first, defendant must make a prima facie showing that the claim against it arises out of conduct protected by the statute, and, second, if defendant succeeds, plaintiff must establish that there is a probability of prevailing on the claim by presenting substantial evidence to support a prima facie case. To facilitate its goal of quick and inexpensive dismissal of non-meritorious claims, the statute provides significant procedural benefits as well: motions are to be heard within 30 days of filing, discovery is generally stayed until a judgment is rendered on the motion, and attorney fees "shall" be awarded on a successful anti-SLAPP motion. ORS 31.152. Additionally, if an anti-SLAPP motion is denied, a limited judgment is entered and is eligible for immediate appeal.[3]

In effect, the statute provides an opportunity for a defendant to go on offense and force a plaintiff to defend the merits of its claims. Consider *Oracle America, Inc. v. Keith Looper, et al.*, Multnomah County Circuit Court Case No. CV1504705. There, Oracle sued former-Governor Kitzhaber's political advisors for intentional interference with economic relations, based on campaign statements related to Oracle's role in the failed Cover Oregon website. Oracle's complaint prayed for $33 million in damages. The defendants moved to strike the claim under ORS 31.150, arguing that Oracle's claim arose out of the defendants' protected political speech and that Oracle could not support a prima facie case for its claim. The trial court agreed, granted the defendants' motion, and awarded the defendants attorney fees of approximately $200,000. The time from the filing of Oracle's complaint to the trial court's order was just over five months.[4]

However, unlike the Oracle case, it may not always be obvious whether a defendant's conduct is protected by the anti-SLAPP statute. Significantly, Oregon's anti-SLAPP statute was modeled after California's, and courts presume that the Oregon legislature intended to adopt prior constructions of California's statute by the California Supreme Court.[5] This rule of statutory construction may expand the scope of the anti-SLAPP statute beyond what is apparent from the text. For example, in *Deep Photonics Corp. v. LaChappelle,* a former director of a company filed an Oregon lawsuit against the company's attorney for advising the company to file a lawsuit against him.[6] In response, the company attorney filed an anti-SLAPP motion citing a California Supreme Court precedent holding that its anti-SLAPP statute applies "to statements made preparatory to or in anticipation

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of litigation."[7] Although the Oregon Court of Appeals ultimately determined that the former director's claims did not arise out of that conduct, as defined by California case law, the case nonetheless demonstrates the expansive (and perhaps unexpected) scope that Oregon courts may ascribe to Oregon's anti-SLAPP statute. Consequently, in determining whether Oregon's anti-SLAPP statute offers protection to the conduct forming the basis of plaintiff's complaint, researching California case law is prudent. For example, the California Supreme Court has held that a hospital's peer review process for determining physician privileges qualifies as an "official proceeding authorized by law" under California's anti-SLAPP statute and, therefore, statements and conduct in connection with those proceedings are entitled to anti-SLAPP protection.[8] As such, hospitals facing suits from physicians dissatisfied with credentialing decisions might consider bringing an anti-SLAPP motion.

With respect to plaintiff's burden under the statute, the Court of Appeals recently declined to decide whether a plaintiff must overcome a defendant's affirmative defenses in presenting substantial evidence of a prima facie case, although the Court entertained the notion in *Plotkin v. SAIF.* There, the individually named defendant brought an anti-SLAPP motion against plaintiff's claim of intentional interference with economic relations, which alleged, *inter alia,* that defendant misrepresented plaintiff's comments about milking goats to imply that he had made inappropriate comments about breasts.[9] The trial court granted defendant's motion to strike. On appeal, defendant argued that plaintiff failed to show, as part of his prima facie case, that the defendant was not entitled to the affirmative defense of qualified privilege in making the statements. Ultimately, the Court of Appeals declined to address that question, reasoning that defendant's argument presented substantial issues of statutory and constitutional law that were "insufficiently developed."[10] The lesson? Because appellate records for anti-SLAPP motions are typically thin and the issues are, by nature, not fully developed, defendants should strive to thoroughly present all legal arguments on appeal.

The importance of making a thorough appellate argument is highlighted by the fact that appellate courts have shown a willingness to address both steps of an anti-SLAPP motion, even when the trial court determines that the claim does not arise out of protected conduct. For example, in *Mullen v. Meredith Corp.,* the trial court denied defendants' anti-SLAPP motion on the ground that plaintiff's claims did not arise out of protected activity.[11] The Court of Appeals reversed that ruling and, notably, proceeded to address the second step of the burden shifting process, explaining that the issue was fairly presented at the trial court and the record was sufficiently developed for appellate review. Ultimately, the Court of Appeals concluded that plaintiff did not present sufficient evidence of a prima facie case and remanded with instructions to grant defendants' motion.[12]

In sum, Oregon's anti-SLAPP statute provides an advantageous and potent means of moving against certain claims. As illustrated by *Deep Photonics* and *Plotkin,* what qualifies as protected conduct may not be immediately obvious, and research into California case law may reveal some interesting wrinkles. Additionally, every effort should be made to fully develop these issues at trial and on appeal, because anti-SLAPP motions present purely legal questions on review and appellate courts have indicated a willingness to address the merits of both steps of the burden-shifting process, even when the trial court determines the claims are not subject to the anti-SLAPP statute. The prudent defense attorney will explore asserting an anti-SLAPP motion as part of her initial case evaluation.

Endnotes

1 ORS 31.150 (a)-(c).
2 ORS 31.150(d).
3 ORS 31.150(1). This is true in federal court as well. *Schwern v. Plunkett,* No. 14-35576, slip op. at 7 (9th Cir Jan 17, 2017).
4 The case was dismissed while on appeal.
5 *Handy v. Lane County,* 360 Or 605, 619 (2016). California cases decided after 2001 are relevant only for their persuasive value, and this principle only applies to sections that were copied from California's anti-SLAPP statute.
6 282 Or App 533 (2016).
7 *Id.* at 544.
8 *See Kibler v. Northern Inyo County Local Hosp. Dist.,* 39 Cal 4th 192, 138 P3d 193 (2006) (affirming dismissal of doctor's tort lawsuit against hospital based on restriction of privileges and holding that hospital's peer-review proceedings qualify for anti-SLAPP protections); *see also* ORS 441.055(1)(d) (mandating organization of medical staff to facilitate peer review at health care facilities).
9 280 Or App 812, 818 (2016).
10 *Id.* at 827.
11 271 Or App 698, 704 (2015).
12 *Id.* at 707-08.