

The SLAPP Statute

ORS 31.150, popularly known as a “SLAPP” or an “anti-SLAPP” statute, stands for “strategic lawsuit against public participation.” This statute creates a procedural defense to civil actions that can result in a dismissal without prejudice at the pleading stage, based on a weighing and balancing of the likelihood of success on the merits at trial *Englert v. MacDonnell*, 551 F.3d 1101 (9th Cir. 2009).

A moving defendant has the initial burden of showing that the challenged pleading is within one of the categories of civil actions described in ORS 31.150(2), which are:

“(a) Any oral statement made, or written statement or other document submitted, in a legislative, executive or judicial proceeding or other proceeding authorized by law;

“(b) Any oral statement made, or written statement or other document submitted, in connection with an issue under consideration or review by a legislative, executive or judicial body or other proceeding authorized by law;

“(c) Any oral statement made, or written statement or other document presented, in a place open to the public or a public forum in connection with an issue of public interest; or

“(d) Any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.”

A special motion to strike under ORS 31.150 is available to a defendant in a civil action, if brought within 60 days of service ORS 31.152(1) and is treated as a motion to dismiss under ORCP 21A; thus the motion must be filed before a responsive pleading. *Horton v. Western Protector Insurance Co.*, 217 Or App 443, 176 P3d 419 (2008), but does not require the consolidation of ORCP 21F.

"The anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's activity that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning." *Navellier v. Sletten* (2002) 29 C4th 82, 92, 124 CR2d 530; *Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 187 ["a plaintiff cannot avoid operation of the anti-SLAPP statute . . . through artifices of pleading"].)

A moving defendant need not present any evidence of its own, other than its initial showing that protected activity as defined in ORS 31.150(2) is involved. *Or. Educ. Ass'n v. Parks*, 253 Or.App. 558, 291 P.3d 789, 794 (Or. App., 2012). If the defendant meets the initial burden, “the burden shifts to the plaintiff in the action to establish that there is a probability that the plaintiff will prevail on the claim by presenting substantial evidence to support a prima facie case. If the plaintiff meets this burden, the court shall deny the motion.” ORS §31.150(3).

The point of the anti-SLAPP statute is that you have a right not to be dragged through

the courts because you exercised your constitutional rights.” *Varian Med. Systems, Inc. v. Delfino* (2005) 35 C4th 180, 193, 25 CR3d 298, 308.

Effects:

- ⇒ *prevents entry of default;*
- ⇒ potentially *reduces the costs of defense* by (1) establishing a *short time frame* for anti-SLAPP filings and hearings and (2) imposing an *automatic stay on discovery* pending a ruling on the motion; cf. *A & B Asphalt, Inc. v. Humbert Asphalt, Inc.* (D. Or., 2013)
- ⇒ *pierces the pleadings* by requiring an *evidentiary showing* to support plaintiff's allegations; and
- ⇒ creates an *incentive to early settlement* by exposing plaintiff to a *fee award* if the motion is granted;
- ⇒ it can force plaintiffs to present *evidence to support the claims pleaded.*
- ⇒ SLAPP statute provides for no interlocutory appeal *Batzel v. Smith*, 333 F.3d 1018, 1025 (9th Cir.2003); *Will v. Hallock*, 546 U.S . 345, 126 S.Ct. 952, 163 L.Ed.2d 836 (2006).

Applications of the Statute in Oregon State Courts

Horton v. Western Protector Ins. Co., 176 P.3d 419, 217 Or. App. 443 (2008)
Staten v. Steel, 191 P.3d 778, 222 Or. App. 17 (2008)
Levasseur v. Armon, 240 Or.App. 250, 246 P.3d 1171 (2010)
Page v. Parsons, 249 Or App 445, 277 P3d 609 (2012)
Or. Educ. Ass'n v. Parks, 253 Or.App. 558, 291 P.3d 789 (2012)

Applications of the Oregon Statute in Federa Courts

Northon v. Rule, 494 F.Supp.2d 1183 (D Or 2007)
Englert v. MacDonnell, 551 F.3d 1101 (9th Cir. 2009).
Obsidian Fin. Grp. LLC v. Cox (D. Or., 2011)
Owens v. Klamath Falls Oregon State Police Dep't (D. Or., 2012)

Where Oregon hasn't ruled

The statute was modeled after, although not a mirror image of, a similar California statute. See Oregon House Committee on the Judiciary, HB 2460, OR B. Summ., 2001 Reg. Sess. H.B. 2460 (West Apr. 16, 2001). *Englert v. MacDonell*, 551 F.3d 1101 (9th Cir. 2009). Subsequent to the decision in *Englert*, Oregon amended its anti-SLAPP statute. See ORS §§ 31.150(1), 31.152(4) (amended 2010) *Metabolic Research, Inc. v.*

Ferrell, 693 F.3d 795, 799, fn.5 (9th Cir., 2012). Where Oregon hasn't addressed a particular SLAPP issue, it is clear from the legislative record described in *Page v. Parsons*, 249 Or App 445, 277 P3d 609 (2012), that "it was intended that California case law would inform Oregon courts regarding the application of ORS 31.150 to ORS 31.155." (at 619).

Examples of issues:

Applies to Pleadings: A legal action is a quintessential exercise of a party's constitutional right to petition for grievances. It is clear that the California Supreme Court has held that the anti-SLAPP statute protects all petition related activity before a governmental body whether or not the statements involve a public issue: "(A)ll that matters is that the First Amendment activity take place in an official proceeding or be made in connection with an issue being reviewed by an official proceeding." *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 C4th 1106, 1116, 81 CR2d 471, 477.

Reporting crime: Truthfully reporting another's unlawful conduct to law enforcement officials constitutes a petition to an official body, and is protected activity within the meaning of California's anti-SLAPP statute *Gressett v. Contra Costa County* USDC N.Cal., no. No. C-12-3798 EMC (May 17, 2013); *Wang v. Hartunian* (2003) 111 CA4th 744, 749, 3 CR3d 909, 912;

Child abuse reporting to police, and repetition to parents at urging of investigating officer, were protected petitions to government. *Chabak v. Monroy* (2007) 154 CA4th 1502, 1512, 65 CR3d 641, 647, 648.

Artful Pleading Anti-SLAPP motions challenge particular causes of action rather than individual allegations or theories supporting a cause of action. *Bulletin Displays, LLC v. Regency Outdoor Advertising, Inc.*, 448 F.Supp.2d 1172, 1180 (C.D.Cal.2006) Where a complaint contains both SLAPP and non-SLAPP causes of action, the SLAPP claims alone may be stricken. *Id.*, unless the allegations of protected conduct are merely incidental to the unprotected activity. *Salma v. Capon*, 161 Cal.App.4th 1275 1287-88, 74 Cal.Rptr.3d 873 (2008) [plaintiff cannot frustrate purposes of Anti-SLAPP statute through pleading tactic of combining allegations of protected and nonprotected activity under label of one cause of action].

Malicious prosecution is recognized as being susceptible to an anti-SLAPP motion. *Siam v. Kizilbash* (2005) 130 Cal.App.4th 1563.

Scienter not required defendant *need not show* that the lawsuit was brought with the subjective intent to "chill" these rights. *Equilon Enterprises, LLC v. Consumer Cause, Inc.*, (2002) 29 C4th 53, 68, 124 CR2d 507, 519, fn. 5).

No actual chilling effect Nor need defendant demonstrate that plaintiff's complaint actually had a "chilling" effect on his or her First Amendment rights. *Equilon Enterprises, LLC v. Consumer Cause, Inc.*, supra, 29 C4th at 59, 124 CR2d at 512; *City of Cotati v. Cashman* (2002) 29 C4th 69, 74, 124 CR2d 519, 524; *Navellier v. Sletten* (2002) 29 C4th 82, 88, 124 CR2d 530, 535.