

1-1-1998

When Rights Collide: Reconciling the First Amendment Rights of Opposing Parties in Civil Litigation

Barbara Arco

Follow this and additional works at: <https://repository.law.miami.edu/umlr>



Part of the [First Amendment Commons](#)

Recommended Citation

Barbara Arco, *When Rights Collide: Reconciling the First Amendment Rights of Opposing Parties in Civil Litigation*, 52 U. Miami L. Rev. 587 (1998)

Available at: <https://repository.law.miami.edu/umlr/vol52/iss2/5>

This Comment is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

COMMENT

When Rights Collide: Reconciling the First Amendment Rights of Opposing Parties in Civil Litigation

I. INTRODUCTION	587
A. <i>Background</i>	589
B. <i>An Historic Perspective</i>	590
C. <i>Modern Trends</i>	591
II. AN ATTEMPT AT LEGISLATIVE REMEDIES	591
A. <i>Universal Legislative Intent</i>	592
B. <i>Comparative Analysis of Enacted Anti-SLAPP Statutes</i>	594
1. PROTECTED ACTIVITIES COVERED BY LEGISLATION	594
2. PROCEDURAL ELEMENTS	598
3. STATUTORILY PRESCRIBED SANCTIONS	600
4. QUICK SYNOPSIS OF LEGISLATION	602
C. <i>Broad Versus Narrow Statutory Construction</i>	604
III. SLAPP SUITS IN ACTION	611
A. <i>The Viable SLAPP Lawsuit Model</i>	612
B. <i>The Right of Access to Courts of Law</i>	616
C. <i>Abuse of Statutory Remedies and Judicial Acquiescence</i>	617
IV. PROFESSIONAL RESPONSIBILITY AND STATUTORY REMEDIES FOR VIOLATORS ...	620
A. <i>SLAPP-Backs</i>	621
B. <i>Model Code of Professional Responsibility and Model Rules of Professional Conduct</i>	622
C. <i>Federal and State Mandates Precluding Frivolous Suits</i>	622
V. FEASIBILITY OF A FEDERAL SOLUTION	625
VI. CONCLUSION	633

I. INTRODUCTION

Endemic in American society is the reflexive behavior of filing a lawsuit based upon one's perceived notion of having been victimized. This litigious propensity has resulted in overloaded court dockets at both the state and federal levels.¹ Though the Constitution grants all citizens the right to seek redress from a neutral judiciary,² discretion should be exercised to ensure that this designated right is not abused. The judiciary and other officers of the court have a corresponding duty to ensure

1. See Guy James Mangano, *Law Day '92: The Struggle for Justice*, N.Y.L.J., May 1, 1992, at S-1; Thomas B. Marvell, *There Is a Litigation Explosion*, NAT'L L.J., May 19, 1986, at 13.

2. See George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3, 9-12 (1989).

that the system is being properly implemented to promote justice and fairness to everyone.

The problem created seems to stem from the Constitution itself, which simultaneously grants rights while imposing duties thereon. Frequently, these rights and duties clash, requiring courts to balance these opposing forces to determine which party's interest outweighs its opponent's, and ultimately decide whose rights should prevail. Faced with this dilemma, courts have understandably reached inconsistent results. These inconsistencies lead not only to further litigation, but also to confusing and precarious precedents.

Illustrative of this dilemma is a modern wave of First Amendment suits which seem to have reached epidemic proportions. These suits, called SLAPPs, an acronym for Strategic Lawsuits Against Public Participation, have proliferated throughout the United States, and have since spilled across its borders to other parts of the globe.³ The suits pit an individual's right to petition the government for redress against one's rightful access to seek a remedy in court. These suits are the focus of this Comment.

This Comment provides an analysis of the anti-SLAPP statutes that have been enacted. To the extent available, this comparative analysis incorporates the legislative history and debates surrounding the controversial topic and the considerations of the committees that proposed the statutes.⁴ This Comment also addresses the feasibility of enacting a uniform anti-SLAPP statute with procedural safeguards to protect a party's First Amendment right of free speech and the right to petition government, as well as the counter-protection of a party's right of free access to courts, a recurring conflict in these types of cases. In this regard, a cursory review of the current state of the law concerning defamation and other tortious acts that are often alleged in these suits will be provided, as well as a discussion of the applicable standards of proof. Questions arise as to how these standards of proof can be maintained in light of the more stringent standards which burden a plaintiff in actions labeled as SLAPPs. Finally, this Comment introduces a sampling of cases that demonstrate how anti-SLAPP statutes are currently abused and identifies potential areas of abuse.

3. See George W. Pring & Penelope Canan, *World Is Getting SLAPP-Happy*, NAT'L L.J., May 20, 1996, at A19.

4. Many states do not record or otherwise memorialize the testimony of the persons contributing to the debates. Therefore, it was necessary to rely on materials published commercially, containing assumably unbiased accounts of the events.

A. Background

Submitted for your approval: A concerned citizen, interested in procuring a safe and healthy community, participates in meetings with a municipal environmental department regarding groundwater contamination allegedly caused by a landfill. These meetings include discussions of the department's rules and regulations concerning landfills. Subsequently, this concerned citizen writes to the department's director and other interested state and federal officials. These letters memorialize the proceedings, including contamination studies and the landfill owner's resistance to monitor the contaminant levels to safeguard the community, and further express gratitude for the department's recognition and consideration of the problem. Riled by these letters, the landfill owner gives the author three options: Provide specific facts and documents in support of the allegations in the letters; formally retract the letters; or brace for formal legal recourse. When no retraction is forthcoming, the citizen is sued. You have now begun your journey into the SLAPP zone.

The situation described above⁵ is common among SLAPP suits. George Pring and Penelope Canan, professors of law and sociology, respectively, at the University of Denver, have studied the SLAPP phenomenon extensively over a ten-year period.⁶ They characterize a typical SLAPP as a civil lawsuit filed against private individuals or organizations who have spoken out on substantive issues of public interest or social significance.⁷ The underlying strategy for these suits is retaliation, aimed at intimidating an individual from engaging in particular behavior believed to be detrimental to the SLAPP filer.⁸ The suits tend to have a chilling effect on public participation in governmental decision making.

The majority of SLAPP filers are seeking to protect their own vested economic or property interests.⁹ Ironically, targets of the suits are usually individuals or groups who are also seeking to protect their

5. See *Hometown Properties, Inc. v. Fleming*, 680 A.2d 56 (R.I. 1996).

6. See GEORGE W. PRING & PENELOPE CANAN, *SLAPPS: GETTING SUED FOR SPEAKING OUT* 2 (1996).

7. See *supra* note 2, at 7-8.

8. See PRING & CANAN, *supra* note 6, at 8. Professors Pring and Canan have found that use of the terms "filers" and "targets," to denote the initiators and objects of the SLAPPS, respectively, is less confusing than use of the terms "plaintiffs" and "defendants," since the actions can be initiated in counterclaims or crossclaims, reversing the customary labels and typical party designations (*i.e.*, the plaintiff may be the target defending or the filer prosecuting a SLAPP action). See *id.* at 9-10.

9. See George Pring & Penelope Canan, *SLAPPS: An Overview of the Practice*, in *SLAPPS: STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION IN GOVERNMENT*, C935 ALI-ABA 1, *12 (1994).

own economic, property, or family interests. Some targets, however, are motivated by a desire to achieve self-gain or revenge, or by other questionable, self-serving goals.¹⁰

Trademark legal claims of SLAPPs include suits for defamation, tortious interference with business relationships, abuse of process, conspiracy, civil rights violations, and other violations of law such as nuisance.¹¹ As these causes of action tend not to arise from federal law, most of the suits are brought in state courts.¹² The pattern seems to be the invocation of a claim that the target is infringing on the filer's right to contract freely, and depends, to a great extent, on rights guaranteed under the U.S. Constitution.¹³

B. *An Historic Perspective*

The First Amendment provides "the right of the people . . . to petition the Government for a redress of grievances."¹⁴ When written, the clause was intended to correct evils experienced by the framers of the Constitution and the Bill of Rights that had been imposed by an overly authoritative sovereign.¹⁵

While professors Pring and Canan have traced the roots of the premise on which SLAPPs rely back over a thousand years, the earliest reported American SLAPP appears in an 1802 Vermont case, *Harris v. Huntington*.¹⁶ In *Harris*, the targets were five citizens of Shaftsbury, Vermont, who opposed the reappointment of Ebenezer Harris as Justice of the Peace for Bennington County. Harris accused these citizens of "devising, writing, and publishing . . . false, scandalous, malicious, and defamatory libel," calling Harris a "breaker of the peace, a quarreling, fighting, and sabbath-breaking member of society . . . possessing a corrupt and wicked heart."¹⁷ Harris alleged that these scandalous writings were designed to prevent his re-election by the Vermont Legislature, ruin his reputation, and lead to criminal prosecution. He sought damages in the amount of \$5000.¹⁸ When the jury returned a verdict for Harris in the amount of one dollar, the defendants moved for an order for Harris to show cause why the verdict should not be set aside, claim-

10. *See id.* at *11.

11. *See id.* at *12.

12. *See id.*

13. *See* PRING & CANAN, *supra* note 6, at 220.

14. U.S. CONST. amend. I.

15. *See* THOMAS E. PATTERSON, *THE AMERICAN DEMOCRACY* 53-54 (1990); *see also* *New York Times v. Sullivan*, 376 U.S. 254, 274 (1964).

16. 2 Tyl. 129 (Vt. 1802).

17. *Id.* at 129-30.

18. *See id.* at 132.

ing that the truth of the statements was exculpatory.¹⁹

In finding that Harris' suit warranted dismissal, the court noted that the allegedly libelous petition was presented to the General Assembly, not dispersed to the general public, and was therefore privileged.²⁰ In the words of the court:

An absolute and unqualified indemnity from all responsibility in the petitioner is indispensable, from the right of petitioning the supreme power for the redress of grievances; for it would be an absurd mockery in a government to hold out this privilege to its subjects, and then punish them for the use of it.²¹

C. *Modern Trends*

After a relatively calm period, SLAPP-type suits reared their ugly heads again over 150 years later during the civil rights movement of the 1960s. These suits were frequently filed against activists who boycotted merchants in protest of racial discrimination.²² Since the 1960s, the incidence of SLAPPs has increased dramatically, ultimately becoming a major threat to involved citizens.²³ Prevalence of SLAPPs is particularly evident in the areas of environmental matters ("eco-SLAPPs") and real estate development. However, their effects can be seen in any area involving political activities, such as "circulating a petition, writing a letter to the editor, testifying at a public hearing, reporting violations of law, lobbying for legislation, peacefully demonstrating, or otherwise attempting to influence government action."²⁴

Whatever claims are asserted by the SLAPP filer, their intent is clear: SLAPPs act as a continuing threat to fundamental American values.²⁵ Though statistics demonstrate that the suits routinely fail in court, they tend to have devastating economic and chilling effects, allowing them to succeed in their underlying purpose—silencing concerned public citizens into submission.²⁶

II. AN ATTEMPT AT LEGISLATIVE REMEDIES

To counteract the chilling effect of SLAPPs, some states have

19. *See id.* at 132, 134.

20. *See id.* at 139.

21. *Id.* at 139-40.

22. *See* Jennifer E. Sills, Comment, *SLAPPs (Strategic Lawsuits Against Public Participation): How Can the Legal System Eliminate Their Appeal?*, 25 CONN. L. REV. 547, 549 (1993).

23. *See* PRING & CANAN, *supra* note 6, at 3.

24. *See* Alexandra Dylan Lowe, *The Price of Speaking Out*, A.B.A. J., Sept. 1996, at 48.

25. *See* Pring & Canan, *supra* note 9, at *22.

26. *See id.*

enacted anti-SLAPP legislation. These statutes are designed to protect a citizen's First Amendment right to speak out against impending community development plans without fear of being sued by the developers they oppose as a result. Although the intent of the anti-SLAPP statutes is genuine, problems arise from the statutes' language, which categorizes the activities sought to be protected in broad terms, providing little guidance to the courts applying them.

The difficulty in identifying a SLAPP exists because it requires evaluating the filer's motivation. Thus, the questions raised include: Is the suit a retaliatory reaction, or is it based on a legitimate belief of having been wronged? Can a legislature enact a statute that provides a remedy for a plaintiff who legitimately believes he has been denied a valid economic opportunity or has been defamed, while singling out a true SLAPP filer? Unfortunately, there are no simple answers to these complex questions, though several states have tried to provide answers with varied levels of success.

A. *Universal Legislative Intent*

Currently, in recognition of the essential role that public participation plays in a democracy, eleven states have passed laws directed at suppressing a SLAPP filer's incentive to initiate such suits.²⁷ These states are California,²⁸ Delaware,²⁹ Georgia,³⁰ Maine,³¹ Massachusetts,³² Minnesota,³³ Nebraska,³⁴ Nevada,³⁵ New York,³⁶ Rhode Island,³⁷ and Washington.³⁸ In addition, anti-SLAPP bills have been proposed in Florida, Indiana, Maryland, New Hampshire, New Jersey, Pennsylvania, Tennessee, and Texas, but have been defeated either at the congressional or gubernatorial level.³⁹

27. See PRING & CANAN, *supra* note 6, at 189. Georgia and Maine have since passed anti-SLAPP legislation, bringing the total number of states at the time of this publication to eleven.

28. See CAL. CIV. PROC. CODE § 425.16 (West Supp. 1997) (effective Jan. 1, 1993).

29. See DEL. CODE ANN. tit. 10, §§ 8136-8138 (Supp. 1996) (effective July 16, 1992).

30. See GA. CODE ANN. § 9-11-11.1 (Supp. 1997) (effective Apr. 1, 1996).

31. See ME. REV. STAT. ANN. tit. 14, § 556 (West Supp. 1997).

32. See MASS. GEN. LAWS ANN. ch. 231, § 59H (West Supp. 1997) (effective Jan. 1, 1995).

33. See MINN. STAT. ANN. §§ 554.01-.05 (West Supp. 1997) (effective Jan. 1, 1995).

34. See NEB. REV. STAT. §§ 25-21,241 to 25-21,246 (1995).

35. See NEV. REV. STAT. ANN. §§ 41.640-.670 (Supp. 1993) (effective July 13, 1993).

36. See N.Y. CIV. RIGHTS LAW §§ 70-a, 76-a (McKinney Supp. 1997-1998) (effective Jan. 1, 1993); N.Y. C.P.L.R. §§ 3211(g), 3212(h) (McKinney Supp. 1997-1998).

37. See R.I. GEN. LAWS §§ 9-33-1 to 9-33-4 (Supp. 1996) (effective Jan. 1, 1994).

38. See WASH. REV. CODE ANN. §§ 4.24.500-.520 (West Supp. 1997) (effective Jan. 1, 1990).

39. See PRING & CANAN, *supra* note 6, at 189; Marnie Stetson, Note, *Reforming SLAPP Reform: New York's Anti-SLAPP Statute*, 70 N.Y.U. L. REV. 1324, 1326 n.12 (1995); Opinion of the Justices, 641 A.2d 1012 (N.H. 1994); Kyle Niederpruem, *Lawmakers Strike Back Against SLAPP Lawsuits*, INDIANAPOLIS STAR, Feb. 17, 1998, at A01.

The scope and effectiveness of the anti-SLAPP laws vary widely, though they share a common purpose and several procedural aspects. For instance, generally stated, the purpose and intent of the anti-SLAPP legislation is to encourage public participation and discourage intimidation of such participation through the use of abusive litigation tactics. This general statement is contained in the preambles to the California and Georgia laws.⁴⁰ However, some states, such as Delaware, Nebraska, and New York, limit their statutes' broad protection by confining the focus to First Amendment rights exercised in public fora.⁴¹

Nebraska's law can be distinguished from the others in its explicitly stated purpose of striking a balance between the right to file lawsuits for perceived injuries and "the constitutional rights of persons to petition, speech, and association . . . to the maximum extent permitted by law" ⁴² On the other end of the spectrum, the statutes of Delaware, Massachusetts, Minnesota, and Nevada do not recite any purpose for enactment. However, some purpose can be implied from the Delaware and Nevada statutes due to the specificity with which the statutes describe the activities designed to be protected.⁴³ Conversely, the Massachusetts and Minnesota laws leave too much to interpretation and provide little guidance for courts to so interpret.⁴⁴

Professors Pring and Canan have devised a litmus test for determining the efficacy and validity of an anti-SLAPP statute. To provide adequate protection and correspondingly encourage public participation, they believe the law must possess the following characteristics:

- It must cover all public advocacy and communications to government, whether direct or indirect and whether in the form of testimony, letters, reports of crime, peaceful demonstrations, or petitions.
- . . . It must cover all government bodies and agents
- . . . It must set out an effective early review for filed SLAPPs, shifting the burden of proof to the filer and, in so doing, serving a clear warning against the future filing of such suits.⁴⁵

40. See CAL. CIV. PROC. CODE § 425.16(a) (West Supp. 1997); GA. CODE ANN. § 9-11-11.1(a) (Supp. 1997).

41. See DEL. CODE ANN. tit. 10, § 8136(a) (Supp. 1996); NEB. REV. STAT. § 25-21,242(1) (1995); N.Y. CIV. RIGHTS LAW § 76-a(1) (McKinney Supp. 1997-1998).

42. NEB. REV. STAT. § 25-21,241(4) (1995).

43. See DEL. CODE ANN. tit. 10, § 8136(a) (Supp. 1996); NEV. REV. STAT. ANN. § 41.650 (Supp. 1993).

44. The language of Maine's legislation is almost verbatim to that of Massachusetts' statute, except the assessment of attorneys' fees and costs to a successful moving party is discretionary under the Maine statute and mandatory under Massachusetts' law. Thus, any discussion regarding the Massachusetts statute will apply equally to the Maine statute.

45. PRING & CANAN, *supra* note 6, at 189.

B. *Comparative Analysis of Enacted Anti-SLAPP Statutes*

1. PROTECTED ACTIVITIES COVERED BY LEGISLATION

A side-by-side statutory analysis of the enacted laws illustrates their similarities while also evidencing their glaring differences. The most obvious differences, and indeed the source of interpretive difficulty, are found in the conduct and activities that the statutes purport to immunize from liability in civil actions.

California's statute endeavors to protect all acts in furtherance of a person's right to petition or free speech in connection with a public issue, which includes:

[A]ny written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law.⁴⁶

This coverage is similar to that expressed in both the Georgia and Rhode Island statutes.⁴⁷

At first glance, the California statute appears to clearly and specifically identify protected activities, but it then deviates by addending broad immunity for "any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest."⁴⁸ Similarly, the Rhode Island statute broadens the areas of protected activity to include "any written or oral statement made in connection with an issue of public concern."⁴⁹ Inclusion of these indefinite activities expands the protection afforded by the petition clause of the First Amendment. Such an expansion could prove lethal to actions raising defamation claims due to the difficulty in succinctly defining "an issue of public interest or concern" and "a place open to the public."⁵⁰ The inference that can be drawn is that *anything* said *anywhere* outside of a person's home is protected. This, in and of itself, contravenes traditional constitutional analysis.

The common dilemma is that the exercise of one right—to pursue a claim through the judicial process—conflicts with the full, robust exercise of free speech and petition rights. California focused on this very

46. See CAL. CIV. PROC. CODE § 425.16(e) (West Supp. 1997).

47. See GA. CODE ANN. § 9-11-11.1(c) (Supp. 1997); R.I. GEN. LAWS § 9-33-2(e) (Supp. 1996).

48. CAL. CIV. PROC. CODE § 425.16(e) (West Supp. 1997).

49. R.I. GEN. LAWS § 9-33-2(e) (Supp. 1996).

50. CAL. CIV. PROC. CODE § 425.16(e) (West Supp. 1997); R.I. GEN. LAWS § 9-33-2(e) (Supp. 1996).

conflict when the law was proposed, noting the concern that adopting short-cut procedures would "invade the province of the jury and conflict with the right to [a] jury trial."⁵¹

Georgia, although adopting similar predicating language concerning the areas it seeks to protect, limits, rather than expands, the privileged conduct by listing specifications for its otherwise broad protection.⁵² Communications deemed privileged under the statute are those:

Statements made with a good faith intent on the part of the speaker to protect his or her interest in a matter in which it is concerned;

. . . Statements made in good faith as part of an act in furtherance of the right of free speech or the right to petition . . . in connection with an issue of public interest or concern . . . ;

. . . Fair and honest reports of the proceedings of legislative or judicial bodies;

. . . Fair and honest reports of court proceedings; [and]

. . . Comments of counsel, fairly made, on the circumstances of a case in which he or she is involved and on the conduct of the parties in connection therewith.⁵³

Unlike California and Rhode Island, Georgia does not provide protection for all statements made which can be deemed relative to a public interest issue made in a place frequented by the public.

The Massachusetts statute echoes those of California, Georgia, and Rhode Island, but dilutes the effect by including:

[A]ny statement reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding; any statement reasonably likely to enlist public participation in an effort to effect such consideration; or any other statement falling within constitutional protection of the right to petition government.⁵⁴

The glaring defect in these statutes is that by broadly defining the activities to be protected, they may immunize from scrutiny the very lawsuits they seek to discourage, as well as all other statements that could be characterized as having been made to persuade others to participate in a

51. Lowe, *supra* note 24, at 53. California's legislation finally passed following vetoes by Governor George Deukmejian in 1990 and Governor Pete Wilson in 1991. Governor Wilson ultimately signed anti-SLAPP legislation into law in 1992, which is codified at section 425.16 of the California Code of Civil Procedure. See Mark Goldowitz, *Study Outline Regarding Legislative Developments, in SLAPPs: STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION IN GOVERNMENT*, C935 ALI-ABA 195, *199 (1994).

52. See GA. CODE ANN. § 51-5-7 (Supp. 1997).

53. *Id.*

54. MASS. GEN. LAWS ANN. ch. 231, § 59H (West Supp. 1997).

matter of public importance, no matter how small the percentage of the public would be affected. Thus, in the absence of any express legislative purpose, these statutes provide little guidance to distinguish a SLAPP suit from one which is grounded on a genuinely actionable tort claim.⁵⁵

Significantly, Massachusetts passed its anti-SLAPP statute over the veto of Governor William F. Weld, who was concerned about a variety of procedural difficulties presented by the law and about the law's potential impact on substantive law.⁵⁶ The breadth of the definitions tend to raise questions as to the intended reach of the statute, which, interpreted broadly, would envelop a wide range of activities, some only tenuously related to "governmental activity."⁵⁷ Such was Governor Weld's concern, as stated in his veto message: "Effectively, the bill covers any statement on a policy issue and thus would completely change the law of libel, slander and abuse of process."⁵⁸ Governor Weld vehemently opposed the law as being a "bludgeon where a scalpel would do," and proselytized that such a law would alter the "balanced and long-settled law."⁵⁹

The author of the Massachusetts statute, Representative David Cohen, rationalized that the law was necessary because the state's environmental laws depend on active citizen participation.⁶⁰ He noted that community officials cannot fulfill their duties if citizens do not speak out because they fear economic ruin as a result of being sued.⁶¹ On the other hand, critics of the law were concerned that the statute would "grant a quasi-immunity to zoning vigilantes . . . who grossly distort a project's impacts or accuse a board official of being 'bought' by a pro-

55. The legislative analysis of Massachusetts' anti-SLAPP statute is equally vague. In analyzing the need for legislation, it was determined that SLAPPs are filed to intimidate or punish people for participating in constitutionally protected activities. Although usually unsuccessful, the suits cost their victims excessive legal fees, personal time, and anxiety over the uncertainty of impending litigation. See Bart J. Gordon, *Law May Have Unanticipated Effects*, MASS. LAW. WKLY., Mar. 6, 1995, at 11.

56. In his veto message, Governor Weld stated:

Under the bill, any claim allegedly falling within its broad definition must be dismissed unless the person bringing the suit shows that the statement in question is devoid of any reasonable support. The bill would thus shift the normal burden of proof and erect a nearly insurmountable barrier to a suit, thereby transforming the law and preventing an absolute privilege for the right to petition, for the first time.

John L. Kennedy, *Bill Targets Environmental Intimidation Lawsuits*, PENN. L. WKLY., Oct. 31, 1994, at 11.

57. See Gordon, *supra* note 55.

58. *Id.*

59. *Tort; SLAPP—Opposition to Liquor License*, MASS. LAW. WKLY., June 3, 1996, at 18 (quoting 1994 House Doc. No. 5570 at 3; 1994 House Doc. No. 5604).

60. See Michael Pill, *Anti-SLAPP Statute Long Overdue*, MASS. LAW. WKLY., Mar. 6, 1995, at 11.

61. See *id.*

ponent or [the use of] other hyperbolic excess.”⁶² In essence, the fear was that the statute would provide project opponents the freedom to say virtually anything about a project, whether true or not, whether for the good of the community as a whole or not, and whether with malicious intent or not.⁶³

Delaware, Nebraska, and New York cautiously worded their laws to shelter only those activities that involve a public applicant or permittee, and that are materially related to efforts to report on, rule on, challenge, or oppose the application or permit.⁶⁴ A public applicant or permittee is defined by these statutes as one who has applied for or obtained a permit, zoning change, lease, license, certificate, or other entitlement for use or permission to act from any government body, or a person with an interest, connection, or affiliation with such person that is materially related to such application or permission.⁶⁵ These definitions impart a precise standard for courts to apply in discerning whether the target’s activity is absolutely immune from liability.

These constraints contrast sharply with Minnesota’s overly broad statute, which provides protection for speech or lawful conduct “genuinely aimed in whole or in part at procuring favorable government action,” unless the conduct or speech “constitutes a tort or a violation of a person’s constitutional rights.”⁶⁶ In addition to being overly broad, Minnesota’s law inflicts two additional concerns on courts that must interpret it. First, it does not define “favorable government action” that would trigger protection. Second, it dilutes the protection granted by excluding protection where “the conduct or speech constitutes a tort or a violation of a person’s constitutional rights,” presumably those rights independent of the right to petition government.⁶⁷ Like the Massachusetts law, Minnesota’s law also fails to state its purpose, leaving courts vulnerable to due process attacks for prematurely dismissing otherwise valid claims.⁶⁸

In contrast, Nevada’s statute, though sparingly verbalized, requires

62. See Gordon, *supra* note 55.

63. See *id.*

64. See DEL. CODE ANN. tit. 10, § 8136(a)(1) (Supp. 1996); NEB. REV. STAT. § 25-21,242(1) (1995); N.Y. CIV. RIGHTS LAW § 76-a(1)(a) (McKinney Supp. 1997-1998).

65. See DEL. CODE ANN. tit. 10, § 8136(a)(2) (Supp. 1996); NEB. REV. STAT. § 25-21,242(4) (1995); N.Y. CIV. RIGHTS LAW § 76-a(1)(b) (McKinney Supp. 1997-1998).

66. See MINN. STAT. ANN. § 554.03 (West Supp. 1997).

67. *Id.*

68. In a recent case brought under Minnesota’s statute, a county court judge ruled that parts of the SLAPP law were “clearly unconstitutional” as applied to citizens who posted allegedly defamatory signs on their properties in order to discourage potential homebuyers from purchasing from a developer whose development, the citizens contended, threatened the integrity of their wetland area. See Doug Grow, *Showing Signs of Not Quitting; Wetlands Defenders Taken Aback by Their Threatening Reputation*, STAR TRIB. (Minneapolis), Feb. 9, 1997, at 2B. The judge

minimal judicial interpretation.⁶⁹ It explicitly immunizes from civil liability only those who in good faith communicate a complaint or information to a legislator, officer or employee of the state, a political subdivision, or of the federal government, "regarding a matter reasonably of concern to the respective governmental entity."⁷⁰ Similarly, Washington immunizes only "good faith reports" made to federal, state, or local agencies.⁷¹ The assumption is that if the communication was not specifically directed to a governmental entity in connection with a public issue, as opposed to a general statement made to the public, the communication would not receive protection under the statute.

2. PROCEDURAL ELEMENTS

Impliedly, all the anti-SLAPP laws were designed to allow a speedy hearing by a judge and a quick dismissal where applicable, though many of the statutes are not so explicit. The common statutory scheme places the burdens of proof and persuasion on the filer to prove that the target should not be protected. Many of the statutes permit a countersuit by the target for legal fees and some even allow awards of punitive damages in certain situations.⁷²

Still, there are some procedural differences among the statutes. The California and Massachusetts laws permit motions to dismiss to be filed within sixty days of service of the complaint.⁷³ In contrast, for all other suits brought in California, a defendant has only thirty days to file a response,⁷⁴ while in Massachusetts, a response must be filed within twenty days.⁷⁵ Therefore, a defendant, by asserting that a suit is a SLAPP, can use this procedural benefit to delay responding to an otherwise meritorious claim.

allowed the case to go to a jury, rather than summarily dismissing it under Minnesota's anti-SLAPP statute. *See id.*

69. Recently, the Nevada Legislature approved passage of a second anti-SLAPP statute. *See* Sean Whaley, *New Laws Take Effect Wednesday*, LAS VEGAS REV.-J., Sept. 28, 1997, at 1B. The new law is designed to broaden the definition of "what speech is protected from frivolous defamation lawsuits." Sean Whaley, *Frivolous Libel Lawsuit Measure Approved by Assembly*, LAS VEGAS REV.-J., June 19, 1997, at 4B. The underlying bill was ultimately approved subject to an amendment requiring "critical statements made about people or their businesses [to] be truthful or made 'without knowledge of falsehood.'" *Id.*

70. *See* NEV. REV. STAT. ANN. § 41.650 (Supp. 1993).

71. *See* WASH. REV. CODE ANN. §§ 4.24.500-.510 (West Supp. 1997).

72. *See, e.g.*, DEL. CODE ANN. tit. 10, § 8138(a) (Supp. 1996); MINN. STAT. ANN. § 554.04 (West Supp. 1997); NEB. REV. STAT. § 25-21,243(1) (1995); N.Y. CIV. RIGHTS LAW § 70-a(1) (McKinney Supp. 1997-1998); R.I. GEN. LAWS § 9-33-2(d) (Supp. 1996).

73. *See* CAL. CIV. PROC. CODE § 425.16(f) (West Supp. 1997); MASS. GEN. LAWS ANN. ch. 231, § 59H (West Supp. 1997).

74. *See* CAL. CIV. PROC. CODE § 412.20(a)(3) (West Supp. 1997).

75. *See* MASS. R. CIV. P. 12(a)(1).

Half the states with SLAPP legislation mandate that courts order a stay on all discovery upon the filing of a motion to dismiss pursuant to their applicable statutes. However, they also allow the courts, upon good cause shown, to order specified and limited discovery.⁷⁶ The remaining five states with anti-SLAPP legislation place no stays on discovery, and, except for Nebraska, which provides for an expedited hearing,⁷⁷ there are no constraints on a plaintiff prohibiting him from conducting discovery that may enable him to prevail at the eventual hearing.

Most of the states place the burden of proof on the filer, or the person opposing the motion to dismiss. For instance, the substance of the Massachusetts statute provides that:

The court shall grant such special motion [to dismiss], unless the party against whom such special motion is made shows that: (1) the moving party's exercise of its right to petition was devoid of any reasonable factual support or any arguable basis in law and (2) the moving party's acts caused actual injury to the responding party.⁷⁸

Some of the statutes require a filer to establish by clear and convincing evidence that the communication giving rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false.⁷⁹ Meanwhile, the statutes of other states couch the burden requirements in terms similar to those imposed by Rule 11 of the Federal Rules of Civil Procedure, requiring that the claim be well grounded in fact and warranted by existing law, or a good faith argument for the extension, modification, or reversal of existing law.⁸⁰

California's statute requires only that the filer establish a *probability* that he will prevail on the claim.⁸¹ Though not as heavy a burden as proof by clear and convincing evidence, when coupled with the mandatory discovery stay, it constitutes an equally high hurdle to overcome. In negotiating enactment of the bill, Senator Bill Lockyer, Chairman of California's Senate Judiciary Committee, entered into a compromise with Governor Wilson, who had voiced concerns that the "pleading hurdle" proposed—a substantial probability that the filer

76. See CAL. CIV. PROC. CODE § 425.16(g) (West Supp. 1997); GA. CODE ANN. § 9-11-11.1(d) (Supp. 1997); MASS. GEN. LAWS ANN. ch. 231, § 59H (West Supp. 1997); MINN. STAT. ANN. § 554.02(2)(1) (West Supp. 1997); R.I. GEN. LAWS § 9-33-2(b) (Supp. 1996).

77. See NEB. REV. STAT. § 25-21,245 (1995).

78. MASS. GEN. LAWS ANN. ch. 231, § 59H (West Supp. 1997).

79. See, e.g., DEL. CODE ANN. tit. 10, § 8136(b) (Supp. 1996); MINN. STAT. ANN. § 554.02(2)(3) (West Supp. 1997); NEB. REV. STAT. § 25-21,244(1) (1995).

80. See, e.g., DEL. CODE ANN. tit. 10, § 8137(a) (Supp. 1996); GA. CODE ANN. § 9-11-11.1(b) (Supp. 1997); N.Y. CIV. RIGHTS LAW § 70-a(1)(a) (McKinney Supp. 1997-1998).

81. See CAL. CIV. PROC. CODE § 425.16(b) (West Supp. 1997) (emphasis added).

would prevail—was too high for a plaintiff.⁸² The substantial probability test is similar to that which must be overcome to sustain a punitive damages claim against doctors and religious organizations.⁸³ The governor contended that such a burden was too restrictive. In lowering the standard to a “reasonable probability” of success on the merits, a plaintiff must only present “evidence that substantiates the claim.”⁸⁴

The Rhode Island law is unique in providing a “sham exception” to immunity.⁸⁵ Under that law, if the petition or free speech constitutes a sham, no immunity attaches to it. Activity defined as a sham is that which is “not genuinely aimed at procuring favorable government action, result or outcome, regardless of ultimate motive or purpose.”⁸⁶ A petition will be deemed a sham under the statute if it is objectively baseless in that no reasonable person could realistically expect success in procuring such government action. Likewise, a subjectively baseless petition is a sham in that it is actually an attempt to use the governmental process for the party’s own direct effect.⁸⁷

As illustrated by the various statutes, there is an odd reversal of roles between the parties in the SLAPP context in that the laws place the burden of persuasion on the party opposing the motion to dismiss to show the validity of the basis of his claim. Though this approach is similar to that imposed by summary judgment procedures, because of the limits placed on discovery, the non-movant is denied access to the very evidence that the motion specifically requires be produced, and which is instrumental in a summary judgment proceeding, as distinguished from a motion for a judgment on the pleadings. These laws also radically rework the effect of the rules of civil procedure, as the special motions to dismiss require an inquiry into the assessment of the facts and the filer’s motives, not merely the more flexible determination of whether a pleading has stated a claim upon which relief can be granted.⁸⁸

3. STATUTORILY PRESCRIBED SANCTIONS

Most of the anti-SLAPP statutes provide for the mandatory recov-

82. See Jeffrey A. Benson & Dwight H. Merriam, *Strategic Lawsuits Against Public Participation (SLAPPs): An Overview*, in LAND USE INSTITUTE: PLANNING, REGULATION, LITIGATION, EMINENT DOMAIN, AND COMPENSATION, C750 ALI-ABA 837, *853 (1992).

83. See *id.*

84. See *id.*

85. See R.I. GEN. LAWS § 9-33-2(a) (Supp. 1996).

86. *Id.*

87. See *id.*

88. See FED. R. CIV. P. 12(b)(6). Most states modeled their local rules pursuant to the federal rules and, therefore, have a correlative rule to Federal Rule 12(b)(6). See, e.g., FLA. R. CIV. P. 1.140(b)(6) (1997).

ery of reasonable attorneys' fees and costs when a target prevails on a motion to dismiss.⁸⁹ Delaware, Maine, Nebraska, and New York, however, give courts discretionary authority to award attorneys' fees and costs to targets who succeed on motions to dismiss.⁹⁰

Ironically, only four states prescribe recovery of attorneys' fees and costs to a successful filer who meets the extraordinary burden imposed and overcomes the motion to dismiss.⁹¹ Nevada simply makes the award mandatory.⁹² California places a condition on the imposition of attorneys' fees and costs, mandating an award if the court finds the motion was brought for a frivolous reason or to otherwise delay the proceedings.⁹³ Nebraska merely makes imposition of fees and costs discretionary once the falsity of the defendant's communication has been established by clear and convincing evidence.⁹⁴

In addition to fees and costs, most of the anti-SLAPP statutes permit a target to recover compensatory damages and, in some instances, punitive damages. The Minnesota and Rhode Island statutes mandate the recovery of compensatory damages if the court determines that the suit was filed to harass, inhibit public participation, interfere with the exercise of protected rights, or otherwise wrongfully injure the target.⁹⁵ By contrast, the courts of Delaware, Nebraska, and New York, upon making the same determination, may award compensatory damages at their discretion.⁹⁶ Those states that provide for an award of punitive damages in their statutes grant courts the discretion to determine whether such a penalty should be imposed.⁹⁷

89. See CAL. CIV. PROC. CODE § 425.16(c) (West Supp. 1997); GA. CODE ANN. § 9-11-11.1(b) (Supp. 1997); MASS. GEN. LAWS ANN. ch. 231, § 59H (West Supp. 1997); MINN. STAT. ANN. § 554.04(1) (West Supp. 1997); NEV. REV. STAT. ANN. § 41.670(1) (Supp. 1993). The Washington statute does not expressly provide for a special motion to dismiss. However, it does provide that a target "prevailing upon the defense provided for in this section shall be entitled to recover costs and reasonable attorneys' fees incurred in establishing the defense." WASH. REV. CODE ANN. § 4.24.510 (West Supp. 1997).

90. See DEL. CODE ANN. tit. 10, § 8138(a) (Supp. 1996); ME. REV. STAT. ANN. tit. 14, § 556 (West Supp. 1997); NEB. REV. STAT. § 25-21,243(1) (1995); N.Y. CIV. RIGHTS LAW § 70-a(1)(a) (McKinney Supp. 1997-1998).

91. See CAL. CIV. PROC. CODE § 425.16(c) (West Supp. 1997); NEB. REV. STAT. § 25-21,244 (1995); NEV. REV. STAT. ANN. § 41.670(1) (Supp. 1993); R.I. GEN. LAWS § 9-33-2(d) (Supp. 1996).

92. See NEV. REV. STAT. ANN. § 41.670(1) (Supp. 1993).

93. See CAL. CIV. PROC. CODE § 425.16(c) (West Supp. 1997).

94. See NEB. REV. STAT. § 25-21,244 (1995).

95. See MINN. STAT. ANN. § 554.04(2)(b) (West Supp. 1997); R.I. GEN. LAWS § 9-33-2(d) (Supp. 1996).

96. See DEL. CODE ANN. tit. 10, § 8138(a)(1) (Supp. 1996); NEB. REV. STAT. § 25-21,243(1) (1995); N.Y. CIV. RIGHTS LAW § 70-a(1)(b) (McKinney Supp. 1997-1998).

97. See DEL. CODE ANN. tit. 10, § 8138(a)(2) (Supp. 1996); MINN. STAT. ANN. § 554.04(2)(b) (West Supp. 1997); N.Y. CIV. RIGHTS LAW § 70-a(1)(c) (McKinney Supp. 1997-1998); R.I. GEN. LAWS § 9-33-2(d) (Supp. 1996).

4. QUICK SYNOPSIS OF LEGISLATION

California's anti-SLAPP law is silent as to both compensatory and punitive damages,⁹⁸ and makes no provision for a cause of action for a prevailing target (a "SLAPP-back"). The statute is of limited duration, requiring the Judicial Council to review its efficacy and report its findings to the California Legislature on or before January 1, 1998. California's statute is very broadly drawn as to the activity covered, although it places a less demanding burden on a filer, requiring only a demonstration of probability of prevailing on the merits, as opposed to requiring proof by clear and convincing evidence.⁹⁹

The Delaware statute does not provide for an expedited hearing, nor does it mention anything about a stay of discovery pending resolution of the special motion to dismiss. It does, however, include a SLAPP-back provision for a successful target. Like Nebraska's statute, Delaware's is loosely drawn and, though it narrowly defines the actors who may trigger invocation of the statute, the definition of "communication" leaves much to interpretation, by defining it as "any statement, claim or allegation in a proceeding, decision, protest, writing, argument, contention or other expression."¹⁰⁰ The statute does not specify whether an objectionable communication must be stated to or before a governmental body, or in a forum other than a public hearing.

The Georgia statute makes no mention as to the standard of proof or evidentiary burdens required of a filer, nor whether the filer has the burden at the hearing. Otherwise, the statute appears to be a good attempt at ensuring that the proceedings are fair to both parties. It also restricts the activity subject to protection.

The Massachusetts law seems narrow in scope, but the activities covered actually makes it appear more expansive. It does not place the clear and convincing evidence burden on the filer. Additionally, it does not express any purpose or legislative intent, nor does it provide for any reimbursement of fees or costs for the successful filer. Although guidance has been provided through judicial interpretation, some recent cases show ambiguity as to the limits of the law's protection.

Minnesota's statute is perhaps the most broadly drawn of all the anti-SLAPP statutes, affording little or no guidance for judicial interpretation as to the activity protected or the fora in which the activity implicates the statute. Thus, as written, it can lead to the protection of anything that is arguably "aimed in whole or in part at procuring

98. This is significant in light of the awards rendered in suits discussed *infra* note 227.

99. See CAL. CIV. PROC. CODE § 425.16(b) (West Supp. 1997).

100. DEL. CODE ANN. tit. 10, § 8136(a)(3) (Supp. 1996).

favorable government action.”¹⁰¹ It provides no protection to the filer for a frivolous motion brought by the target and is silent as to the expediency of hearing a special motion to dismiss. The immunity section is contradictory in that it first grants immunity based on its definition of public participation, but then exempts protection if the conduct or speech constitutes a tort or violation of a person’s constitutional rights,¹⁰² which is the usual basis for the underlying claim in the first place. Absent judicial interpretation, it is difficult to reconcile the gross contradictions in the statute, and it appears that the statute was intentionally drawn this way due to the obvious absence of a policy and purpose in its preamble.¹⁰³

Nebraska’s statute, by contrast, seems more narrow in its intent. It confines the parameters of the underlying activity which can invoke the sanctity of the statute.¹⁰⁴ Though it includes the right to free speech, recovery is limited to those instances that involve a permittee or public applicant to a governmental body and those who oppose him, and does not stretch protection, as other statutes have, to protect any statement relative to an issue of public concern or interest, which broadens the qualification to an indefinable and limitless universe of activity.¹⁰⁵ Nebraska’s statute is silent as to a stay of discovery, and places no time limit on when a motion to dismiss shall be heard, except on an expedited or priority basis.

As drafted, Nevada’s statute has the narrowest scope of all the anti-SLAPP statutes.¹⁰⁶ While it is specific as to the activity protected, it is not specific as to the fora in which the communication must be made. There are no express special provisions for a motion to dismiss, expediency of hearing the motion, or the burdens intended to be placed on either of the parties, if any. It fairly provides for the award of fees to any party who prevails and allows for the intervention of a legal representative of the governmental entity to which the communication is made.

New York’s statute is very similar to Delaware’s except that it supplies no procedures for the filing of a special motion to dismiss or for expediency of a hearing thereon. It does limit the activity protected, and though it does not define the terms “public forum” or “issue of public concern,” in the few cases in which the statute has been interpreted, it

101. MINN. STAT. ANN. § 554.01(6) (West Supp. 1997).

102. *See id.* § 554.03.

103. *But see* discussion *supra* note 68.

104. *See* NEB. REV. STAT. § 25-21,242 (1995).

105. *Compare id.* with MASS. GEN. LAWS ANN. ch. 231, § 59H (West Supp. 1997).

106. *But see supra* note 69.

seems likely that the courts seek to narrowly confine the immunity to very specific activities.

The statute passed in Rhode Island is close to, yet narrower than, that enacted by Massachusetts. However, it does not provide for an expedited hearing on the motion to dismiss, and appears to treat the prevailing party more fairly.¹⁰⁷ Also, it is silent as to who has the burden at the hearing on the special motion to dismiss and the applicable standard of that burden.

The protection and procedures in Washington's statute are wholly non-existent. Although the statute recognizes the vital importance of citizen participation and the deterrent effect of threatened litigation for a citizen's exercise of the right to report "potential wrongdoing," the statute is silent in providing procedural avenues different from those available to other litigants.¹⁰⁸ Indeed, it provides no guidance to courts and, therefore, seems superfluous in its intent to protect an individual exercising his right to petition government for redress.

C. *Broad Versus Narrow Statutory Construction*

As illustrated by the vague definitions of the terms used to identify the activities and actors intended to be immune from civil liability for legitimate exercise of their right to petition, the fundamental problem in attempting to formulate a uniform procedure for detecting and judicially managing a SLAPP lies in the difficulty in drawing a bright line between a true SLAPP and a meritorious claim. In some cases, a SLAPP can be clearly identified. Other times, a claim may have a modicum of merit, or even a great deal of merit. And, of course, the possibility exists that the filer has a legitimate, albeit mistaken, belief that his claim has merit.¹⁰⁹

Real obstacles exist in researching a pattern for the filing of SLAPPs for several reasons. First, since the original claims are based on actionable torts, those states without anti-SLAPP legislation apply traditional First Amendment and tort analyses in assessing the validity of the allegations. Second, many SLAPP targets retreat from their positions to avoid prolonged and expensive litigation. Third, and perhaps most frustrating, the majority of the decisions are rendered at the trial court level; therefore, there are no published reports of the proceedings and findings.

107. See R.I. GEN. LAWS § 9-33-2(d) (Supp. 1996).

108. See WASH. REV. CODE ANN. §§ 4.24.500-.520 (West Supp. 1997). Although the statute professes to provide immunity from civil liability, it appears that a target must still be subjected to full-blown litigation before any relief, such as costs and fees incurred, can be awarded. See *id.* § 4.24.510. Thus, unless the target can afford the financial burdens of litigation, any relief provided in the statute will not act as a deterrent to the filer. See *id.*

109. Benson & Merriam, *supra* note 82, at *848.

Although there is a paucity of reported decisions, in some jurisdictions, the suits are prevalent enough to have attracted the attention of the legal media.¹¹⁰ In those states, the courts appear committed to protecting citizens' petition activities regardless of how blatantly offensive or false their statements may be.¹¹¹ However, in the majority of cases, the courts appear equally committed to deciding each case on its specific facts, precluding the uniformity and precedential value obtained through decisions rendered by appellate tribunals.¹¹²

Anti-SLAPP statutes have been construed most frequently in the courts of California and Massachusetts. California courts have given its statute a very broad interpretation, but have also reached contradictory decisions among the state's appellate districts.¹¹³

A slander suit arising from a private dispute is not covered by California's anti-SLAPP statute, according to the state's First District Court of Appeal.¹¹⁴ This is true even where the dispute spawned a prior legal proceeding.¹¹⁵ In construing the statute and denying the target's special motion to dismiss, that court opined that the statute was narrowly drawn to discourage a type of suit that chills public participation and does not apply to actions concerning matters lacking public significance.¹¹⁶

This appellate decision reversed the order rendered by the San Francisco Superior Court, which dismissed the complaint and ordered the filer to pay the target's fees and costs incurred in defending the suit.¹¹⁷ In the underlying defamation action, Xi Zhao, a molecular biologist, sued Daniel Tai-Yui Wong for having allegedly accused Zhao of murdering Wong's brother. Wong's brother had apparently died under "mysterious circumstances" while Zhao, who had been living with him for the previous three years, was dining with another man whom she later married. The whole dispute arose from a proceeding to determine the validity of a purported will in which Wong's brother devised his

110. To this date, there are over 400 stories referencing SLAPP litigation and legislation available in LEXIS, News Library, CURNWS file.

111. See Robert I. McMurry & David H. Pierce, *Strategic Lawsuits Against Public Participation (SLAPPs): The Benefits and Risks*, in LAND USE INSTITUTE: PLANNING, REGULATION, LITIGATION, EMINENT DOMAIN, AND COMPENSATION, C750 ALI-ABA 823, *833 (1992).

112. See *id.* at *834.

113. See discussion *infra* Part III.A. Even SLAPP co-creator Professor Canan concedes that "some states, including California, have enacted laws that are too broad and go beyond the intent of the anti-SLAPP movement . . ." Sean Whaley, *Measure Targets Lawsuits*, LAS VEGAS REV.-J., Feb. 7, 1997, at 1B.

114. See *Zhao v. Wong*, 48 Cal. App. 4th 1114, 1130-33 (Ct. App. 1996).

115. See *id.* at 1131.

116. See *id.* at 1133.

117. See *id.* at 1118.

entire estate to Zhao.¹¹⁸

The trial court interpreted the statute very broadly, stating that it applied to suits not typically characterized as SLAPPs.¹¹⁹ Put this way, the court reasoned that any comment made about a judicial proceeding is an act in furtherance of a person's right to petition or free speech.¹²⁰ However, the First District cautioned against such an expansive interpretation, stating that the statute was intended only to protect comments about governmental activities or matters affecting the common interests of a substantial part of the community—typical petition-clause-protected activity.¹²¹

The appellate opinion further noted that the statute states a very specific purpose, and therefore, it cannot be assumed that the legislature intended to broadly deny discovery, which is automatically stayed when a motion to strike under section 425.16 is filed in actions requiring proof of malice, since such proof can usually only be obtained through discovery.¹²² The court found that the only petition right arguably implicated involved Wong's effort to influence the coroner's investigation of his brother's cause of death. However, the court found that this connection was too tenuous to invoke the First Amendment right to petition the government for redress regarding an issue of public interest.¹²³

A ruling by Judge Diane Wayne of the Los Angeles Superior Court dealt the advocates of broad interpretation another blow. The case, disposed of at the trial court level, was filed by Elizabeth Taylor, who was seeking to enjoin a broadcaster from using the actress' name or likeness for private commercial purposes.¹²⁴ NBC had planned to air a mini-series in which, Taylor alleged, she was to be parodied in an unflattering manner. Judge Wayne rejected NBC's argument that Taylor's suit was a SLAPP, noting that the cause of action did not arise in connection with a public issue. She found that NBC had not presented facts suggesting the suit was filed to chill the valid exercise of constitutional rights, but rather they showed the suit was brought "in good faith for the purpose of deterring a potentially unflattering rendition of [Taylor's] life story."¹²⁵

The California Supreme Court denied a special motion to dismiss pursuant to the state's anti-SLAPP statute in a libel suit brought by Alan

118. See *Zhao v. Wong (In re Estate of Wong)*, 40 Cal. App. 4th 1198 (Ct App. 1995).

119. See *Zhao*, 48 Cal. App. 4th at 1119.

120. See *id.*

121. See *id.* at 1120-23.

122. See *id.* at 1129.

123. See *id.* at 1132.

124. *Taylor v. National Broad. Co., Inc.*, No. BC110922, 1994 WL 762226, at *1 (Cal. Super. Ct. L.A. County Sept. 29, 1994).

125. *Id.* at *7. "To apply CCP § 425.16 to the facts of this case would be to chill the rights of litigants who are on the 'cutting edge' with new and novel legal theories." *Id.* at *8.

Shugart, a candidate for public office, against a campaign committee that supported the opposing candidate.¹²⁶ The suit arose out of a bitterly-fought initiative campaign in which Shugart contended that television ads which linked him to convicted savings and loan swindler Charles Keating, Jr. through computer manipulation, and which urged voters to protect themselves against "the next Charles Keating," subjected him to "cruel and unjust hardship."¹²⁷ The court found that there were no grounds for the special motion to dismiss as the suit was not *prima facie* retaliation against the defendants' exercise of free speech and decided that a reasonable jury could find Shugart had been libeled. Therefore, the suit was allowed to proceed to trial on the merits.¹²⁸

The leading California case which properly upheld the state's anti-SLAPP legislation involved a dispute between certified shorthand reporters and an alliance of certified shorthand reporters, alleging that the alliance's practice of "direct contracting" constituted an unfair business practice, intentional interference with prospective economic advantage, and interference with existing contracts.¹²⁹ The alliance cross-claimed for defamation and conspiracy to unlawfully restrain trade via a boycott of the alliance's reporting services.¹³⁰ Wilcox, a cross-defendant, filed a motion to strike pursuant to California's anti-SLAPP statute, which the trial court denied.¹³¹ However, the Second Appellate District reversed the trial court, noting that the statute does not apply to all cases in which a First Amendment defense is raised, but is limited to exposing and dismissing suits calculated to chill the valid exercise of constitutional rights guaranteed under the free speech and petition clauses of the First Amendment.¹³²

In reaching its decision, the court rejected the filer's argument that even though the issue of "direct contracting," by being part of a judicial challenge, was a public issue as defined by the statute, the defamatory statements and conspiratorial business injuries had no rational connection to the judicial proceedings.¹³³ Instead, the court found that Wilcox

126. See *Consumers and Their Attorneys Against Propositions 200, 201 and 202 v. Superior Court*, Case No.: S054494 (Cal. 1996), summarized in Bill Ainsworth, *Libel Suit Against Plaintiff's Lawyers Allowed to Proceed*, THE RECORDER, July 3, 1996, at 1.

127. See *id.*

128. See *id.*

129. See *Wilcox v. Superior Court*, 27 Cal. App. 4th 809, 814 (Ct. App. 1994). "Direct contracting" refers to a practice whereby a certified shorthand reporter, or association thereof, enters into an exclusive contract with a major consumer of reporting services which grants the reporter the ability to report depositions taken by attorneys representing that consumer. See *id.*

130. See *id.*

131. See *id.* at 815.

132. See *id.* at 819.

133. See *id.* at 821.

had issued the statements "in the context of exhorting shorthand reporters to contribute to the cost of pursuing that litigation."¹³⁴

In a subsequent decision concerning the same dispute, but involving a motion to strike filed by a different cross-defendant, the Second Appellate District reversed the trial court's order granting the motion.¹³⁵ In this instance, the court determined that the utterances made by the cross-defendant were defamatory,¹³⁶ and that these coercive activities violated California's anti-trust law.¹³⁷ In reaching its decision, the court thoroughly reviewed the statute and considered its applicability to the allegedly protected activity and found that the asserted privilege did not attach.

As previously stated, the Massachusetts anti-SLAPP statute leaves too much to interpretation and offers little guidance. Nevertheless, the courts of that state have been relatively uniform and restrictive in applying the statute. In fact, the opinions generally show that the courts have been less than eager to characterize a suit as a SLAPP, perhaps in deference to the concerns articulated in Governor Weld's veto message.¹³⁸

Shortly after passage of the Massachusetts statute, a judge in Worcester County found that the statute did not apply to the activities of property owners who had placed "for sale" signs and participated in other private actions to discourage prospective buyers of the plaintiff's proposed development.¹³⁹ In that case, the defendants, who owned lots in a subdivision, had petitioned the government in an unsuccessful effort to force a developer to convert a private common drive into a public street. The developer subsequently filed suit against these property owners, alleging defamation and intentional interference with contractual and advantageous business relations in an attempt to drive the developer out of business or coerce it to modify the common drive

134. *Id.* at 821-22. The defamation claim was based on a memorandum circulated by Wilcox in which she described the impending lawsuit of the alliance and solicited financial contributions for litigation costs from the recipients of the memorandum. *See id.* at 825. The conspiracy claim was based on the same memorandum in that the alliance alleged Wilcox's plea to "band[] together . . . to permanently put the Alliance to rest once and for all" inferred an attempt at an agreement between Wilcox and others to injure the alliance in their reputations or business ventures. *See id.* at 828 (second alteration in original).

135. *See Cross Complaint Is Dismissed Under SLAPP but Action for Defamation and Unfair Competition Can Proceed*, 96 DAILY J. D.A.R. 14205, 14214, Nov. 29, 1996 (discussing *Peters v. Saunders*, Case No. B092492 (Cal. Ct. App. 1996)).

136. *See id.* at 14207. In speaking with another court reporter, Saunders called Peters a crook who had been caught in the commission of a fraud. *See id.*

137. *See Cross Complaint, supra* note 135, at 14211, 14213.

138. *See supra* note 56.

139. *See Wigwam Assocs., Inc. v. McBride*, Civil Action No. 92-01570A (Worcester County filed May 28, 1992), summarized in Matthew Mitchell, *Superior Courts Begin Deciding "Anti-SLAPP Suit" Motions*, MASS. ENVTL. COMPLIANCE UPDATE, Vol. 4:2 (Dec. 1995).

plan.¹⁴⁰ The property owners characterized the suit as a SLAPP and filed a special motion to dismiss pursuant to the anti-SLAPP statute. The court denied the motion, finding the plaintiff was seeking “redress for alleged statements made and actions performed outside the context of petitioning the government.”¹⁴¹ The court found that the property owners had engaged in misconduct in the nature of “badmouthing” the developer to prospective home buyers and contractors, interpreted as a form of “self-help” designed to economically coerce the relief which they had unsuccessfully sought to effectuate from governmental entities and in so doing, to drive the developer out of business.¹⁴²

As rationale for its decision, the court found that the offensive statements were not made to any of the boards considering the viability of the developer’s petition. Indeed, the statements “were not made before or submitted to *any* governmental or judicial entity,” but rather were made to potential buyers in order to discourage sales.¹⁴³ The judge in this instance properly narrowed an “overly broad” statute, drawing a distinction that had not previously been drawn. Counsel for the developer pointed out that the statute was intended to stop harassment, and must be narrowly construed “so it doesn’t prevent justifiable lawsuits to prevent inappropriate behavior.”¹⁴⁴

Conversely, in another action, an Essex County judge ruled that writing letters to the editor of a newspaper falls under the statute’s protection “if the letters are statements that are ‘reasonably likely to encourage consideration or review’ by the government, or are ‘reasonably likely to enlist public participation.’”¹⁴⁵ The letters at issue were written by the counter-defendants to the *Boston Globe*, asserting that the counter-plaintiffs were engaging in environmentally unsound and dangerous activities at an industrial site located near the counter-defendants’ residences.¹⁴⁶ The court correctly concluded that the letters were written to bolster a cause the authors had been advocating before the town and, therefore, were “reasonably likely to encourage consideration or review . . . or . . . [to] enlist public participation.”¹⁴⁷

In a more recent Essex County case, another judge denied a special

140. See “Badmouthing” of Subdivision Developer, MASS. LAW. WKLY., Oct. 30, 1995, at 12.

141. *Id.*

142. See *id.*

143. See David L. Yas, *Developer Can Pursue “Badmouthing” Claim; Anti-SLAPP Dismissal Motion Is Denied*, MASS. LAW. WKLY., Oct. 30, 1995, at 1 (emphasis added).

144. *Id.*

145. *Thomson v. Town of Andover*, Civil Action No. 93-1716 (Essex County), reported in *Tort; Defamation—“SLAPP” Statute*, MASS. LAW. WKLY., Aug. 7, 1995, at 21.

146. See *id.*

147. *Id.*

motion to dismiss filed by the defendant.¹⁴⁸ In that case, the plaintiff had sold her home and used the proceeds to help her daughter and son-in-law buy a house. She then filed suit seeking a declaratory judgment that she owned a fifty percent interest in the house, or alternatively, that pursuant to an agreement, she had a right to live in the house for life rent-free. The son-in-law counterclaimed, charging abuse of process and seeking reimbursement for the plaintiff's use and occupancy of the house. The plaintiff responded by moving to dismiss the counterclaim pursuant to Massachusetts' anti-SLAPP law. As grounds for denying the motion, the court stated that "the scope of the statute does not encompass the circumstances of this case."¹⁴⁹ The court reasoned that the claim did not involve a matter of public concern, but instead involved a private dispute, rendering the statute inapplicable since the exercise of the constitutional right to petition was not implicated.¹⁵⁰

The language of the Massachusetts statute is so broad that it could be construed to apply in almost any situation; however, this would significantly alter procedural and substantive law. Absent a clear legislative intent to abrogate existing law, such a broad construction should not be lightly undertaken.¹⁵¹ Legislation should be interpreted according to the statutory language, considered in connection with the reasons for enactment and the main goal to be accomplished.¹⁵² In construing the statute, Massachusetts courts have protected "every bona fide exercise of the right to petition, regardless of the motivation of the petitioner, so long as the exercise of the right meets the criteria set forth in the statute."¹⁵³

In the first case interpreting New York's anti-SLAPP statute, the

148. *Sullivan v. Murphy*, Civil Action No. 94-2866B (Essex County), reported in *Civil Practice; SLAPP Statute—Counterclaim—Ownership of Property*, MASS. LAW. WKLY., Mar. 25, 1996, at 24.

149. *Id.*

150. *See id.*

151. *See Cook v. Hanover Ins. Co.*, 592 N.E.2d 773, 776 (Mass. App. Ct. 1992).

152. *See McNeil v. Commissioner of Correction*, 633 N.E.2d 399, 401 (Mass. 1994).

153. *Andover Liquors, Inc. v. Den Rock Liquors, Inc.*, Civil Action No. 96-0032-C (Essex County 1996), reported in *Tort; SLAPP—Opposition to Liquor License*, MASS. LAW. WKLY., June 3, 1996, at 18. Unfortunately, in a couple of recent Massachusetts cases, judges retreated from the narrow construction. In one of the cases, brought by a company against a former employee for breach of a confidentiality agreement, it was determined "that the SLAPP statute is not confined to claims against persons exercising their right of petition in a matter of public concern . . ." *Durocraft Corp. v. Holmes Products Corp.*, Docket No. 96-P-1203, reported in *Tort; SLAPP—Matter of Public Concern—Confidentiality Agreement*, MASS. LAW. WKLY., May 12, 1997, at 22. In another case, a district court judge took the novel approach of using the statute to prevent a husband from suing his wife who was seeking to enforce a restraining order against him. *See Mark A. Cohen, Anti-SLAPP Law Bars Man's 209A Countersuit; Sued After Cleared of TRO-Violation Claim*, MASS. LAW. WKLY., May 5, 1997, at 1.

law was given a very narrow construction.¹⁵⁴ In so doing, the court found that the statute did not apply to a suit brought against residents trying to delay a federal clean-up loan to their homeowners' association because, as statutorily defined, the loan application process did not constitute a public proceeding. The court noted that the anti-SLAPP law created a new cause of action by placing restrictions on a public applicant's ability to access the court by requiring him to demonstrate that his claim has a substantial, rather than reasonable, basis in law or fact.¹⁵⁵

The court recognized that the new law, being in derogation of the common law, must be narrowly construed.¹⁵⁶ Therefore, the only way a plaintiff could maintain a cause of action under the statute was if he directly challenged the permit application, which was not done in this case.¹⁵⁷ Contrarily, a loan application is merely a request for money and does not make a borrower a "public applicant" seeking permission to act from a government body.¹⁵⁸

III. SLAPP SUITS IN ACTION

SLAPPs have become a widespread tactic since 1970.¹⁵⁹ "SLAPPs are filed by one side of a public, political dispute to punish and/or prevent opposing points of view."¹⁶⁰ They "privatize" public issues and fora, by transforming a public issue in a political forum into a private legal dispute in an adjudicative forum.¹⁶¹ However, this transformation has happened in the reverse, by taking a private dispute between two individuals and declaring that since others may be interested in an issue collateral to the litigation, an aura of public interest is created.

The most frequently filed SLAPPs involve real estate development, zoning, and land use issues.¹⁶² Other favored issues, in descending order, are criticism of public officials and employees, environmental and animal rights protection, civil and human rights, neighborhood problems, and consumer issues.¹⁶³ A natural deduction from this pattern is that most of the suits are triggered by contact on a local government level, and only infrequently by activity on the federal level.¹⁶⁴

To gain access to court, filers claim a judicially cognizable injury,

154. See *Harfenes v. Sea Gate Ass'n, Inc.*, 167 Misc. 2d 647 (N.Y. Sup. Ct. 1995).

155. See *id.* at 652.

156. See *id.* at 652-53.

157. See *id.* at 653.

158. See *id.*

159. See *Pring & Canan*, *supra* note 9, at *9.

160. *Id.*

161. See *id.* at *9-10.

162. See *PRING & CANAN*, *supra* note 6, at 213.

163. See *id.* at 213 & 267 n.26.

164. See *id.* at 213.

translating the offending political behavior into legalistic tort claims.¹⁶⁵ Typically, the suits allege: defamation (e.g., libel, slander, and business libel), business torts (e.g., interference with contract, antitrust, trade restraint, and unfair competition), process violations (e.g., malicious prosecution, judicial or administrative abuse of process), conspiracy, civil and constitutional rights violations, and other legal violations (e.g., nuisance, emotional harms, trespass, and tax exemption attacks).¹⁶⁶ Defamation is by far the most commonly utilized tort, though several filers utilize the "shotgun pleading" approach, alleging numerous categories of tortious behavior.¹⁶⁷

A. *The Viable SLAPP Lawsuit Model*

The indicium of a SLAPP suit is that it is brought in response to a communication made to a governmental body concerning a substantive issue of some public interest or concern. This characterization is based on the legislative history of the anti-SLAPP statutes, focusing on the floor debates.¹⁶⁸

In characterizing a lawsuit as a SLAPP, the first step is to understand the scope of, and limitations to, the right to petition guaranteed by the Constitution. Very few precedents directly address the right to petition; however, generally, it refers to "[t]he right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws"¹⁶⁹ The earliest American codification of the right is contained in the *Massachusetts Body of Liberties of 1642*, which restricts protection in four ways.¹⁷⁰ The activity must be relevant to a proper public question, the subject matter of which is within the jurisdiction of the body to whom the petition is addressed, submitted at a convenient time, and in an orderly and respectful manner.¹⁷¹ Elucidating on this concept, James Madison noted that "[t]he people may . . . publicly address their representatives, may privately advise them, or declare their sentiment by petition to the whole body; in all these ways they may communicate their will."¹⁷² Though the statements were protected even if made maliciously or were false,¹⁷³ it is

165. *See id.* at 217.

166. *See id.*

167. *See id.*

168. *See, e.g., Civil Practice, supra* note 148.

169. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 139 (1961).

170. *See* Norman B. Smith, "Shall Make No Law Abridging . . .": *An Analysis of the Neglected, but Nearly Absolute, Right of Petition*, 54 U. CIN. L. REV. 1153, 1181 (1986).

171. *See id.*

172. *Id.* at 1182 (quoting 1 ANNALS OF CONG. 738 (1789)).

173. *See id.* at 1183.

clear that the protection was intended to extend only to communications proffered to a governmental body, or agent thereof, and concerned a public issue.

The Supreme Court has held that the right to petition is not absolute and is not available to protect otherwise libelous communications disguised as petitioning activity.¹⁷⁴ Two cases, widely cited by SLAPP participants, articulate what has come to be known as the *Noerr-Pennington* doctrine. *Noerr*, the first case to come before the Court, involved allegations that the railroads publicly advertised against deregulation of the trucking industry. The Court held that since the railroads' activity was "directed toward obtaining governmental action, its legality was not at all affected by any anticompetitive purpose."¹⁷⁵ Subsequently, in *United Mine Workers of America v. Pennington*, the Court reiterated that "*Noerr* shields . . . a concerted effort to influence public officials regardless of intent of purpose."¹⁷⁶ The *Noerr-Pennington* doctrine has been interpreted as protecting the right to petition the courts.¹⁷⁷ Although the best defense when moving to dismiss a SLAPP suit is for the target to assert his right to petition, ironically, this same assertion is available to the filer, as the right to petition the courts is correlatively protected.

In contrast to *Noerr* and *Pennington*, the Supreme Court overturned a decision of the National Labor Relations Board that found a restaurant seeking damages from a waitress who had organized a boycott against it was an unfair labor practice.¹⁷⁸ The Court recognized the countervailing interests of access to the courts, holding that "[t]he filing and prosecution of a well-founded lawsuit may not be enjoined as an unfair labor practice, even if it would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights protected by the [National Labor Relations] Act," as long as the suit has a reasonable basis in law and fact.¹⁷⁹

In *McDonald v. Smith*, the Court emphasized that the right to petition does not offer an absolute privilege to one who defames; therefore, known falsity or reckless disregard for the truth applies equally to the contents of petitions as to the freedoms of speech and of the press.¹⁸⁰ The Court has emphatically stated that:

174. See *Noerr*, 365 U.S. at 144.

175. *Id.* at 140.

176. *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 670 (1965).

177. See *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972).

178. See *Bill Johnson's Restaurants, Inc. v. National Labor Relations Bd.*, 461 U.S. 731 (1983).

179. *Id.* at 743.

180. *McDonald v. Smith*, 472 U.S. 479, 484 (1985).

Calculated falsehood falls into that class of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality"181

Preparation and transmission of a communication to the government are essential elements of petitioning.¹⁸² But, when the communication exceeds that which is necessary for petitioning, it must be subjected to other applicable constitutional guarantees, such as the right to free speech.¹⁸³ As deduced from the Court's exposition of the right, the petition clause is meant to provide the maximum protection of a citizen's right to petition government where such a right is exercised in relation to issues of interest to a substantial part of the community.¹⁸⁴ Where the parties are litigating matters pertaining to a purely private interest, not based on matters of public concern, the policies underlying the petition clause are not implicated; instead, ordinary principles of procedural and substantive law apply.¹⁸⁵

In *City of Columbia v. Omni Outdoor Advertising, Inc.*,¹⁸⁶ the Supreme Court addressed the petition clause, holding that petitioning activities are immune from liability if they are genuinely aimed at procuring favorable government action, thereby providing a powerful shield for SLAPP targets.¹⁸⁷ The Court pointed out that sham petitioning, on the other hand, in which the government process is used to injure an opponent, falls outside the petition clause's protection.¹⁸⁸

The prototypical SLAPP suit is one in which a large land developer files a claim against environmental activists or neighborhood associations intending to chill their political or legal opposition to the filer's plans.¹⁸⁹ The filer's purpose is to gain an economic advantage over its target, rather than "to vindicate a legally cognizable right"190

An example of the factual scenario of such a case was previously set forth above.¹⁹¹ In that case, the Rhode Island statute, passed in 1994,

181. *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

182. *See Smith*, *supra* note 170, at 1189.

183. *See id.* at 1190.

184. *See Zhao v. Wong*, 48 Cal. App. 4th 1114, 1121 (Ct. App. 1996) (citations omitted).

185. *See Civil Practice*, *supra* note 148.

186. 499 U.S. 365 (1991).

187. *See id.* at 379-84.

188. *See id.* at 380.

189. *See Wilcox v. Superior Court*, 27 Cal. App. 4th 809, 815 (Ct. App. 1994).

190. *Id.* at 816.

191. *See supra* Section I.A.

was applied retroactively to a case originally filed in 1992.¹⁹² To recap those facts, Hometown Properties, the owner of a landfill in a community in which the defendant, Nancy Hsu Fleming, was a resident, sued Fleming, alleging defamation and tortious interference with contractual relations.¹⁹³ The allegations were based on statements made by Fleming to the director of the Rhode Island Department of Environmental Management and to state legislators in connection with groundwater contamination allegedly caused by the landfill.¹⁹⁴ Fleming was an active participant in assisting Department officials, who were drafting a set of proposed groundwater classification regulations.¹⁹⁵

Hometown, desiring to continue its landfill practices unrestrained, demanded that Fleming retract her comments, threatening to sue if she did not.¹⁹⁶ Fleming made no retraction and Hometown's ominous threat became a reality that dogged her from December of 1992 until June of 1996, when the Rhode Island Supreme Court "directed" the Washington County Superior Court to grant Fleming's motion for summary judgment pursuant to the state's anti-SLAPP provisions.¹⁹⁷

In its opinion, the Rhode Island Supreme Court carefully scrutinized the applicability of the statute, rejecting the lower court's contention that Fleming had not "demonstrated that she [fell] within the class of defendants defined" therein.¹⁹⁸ The court also rejected Hometown's contention that the statute was unconstitutional.¹⁹⁹ In so rejecting, the court made a section-by-section analysis of the law, ultimately deciding that Fleming's petitioning of government was not a sham, as clarified by U.S. Supreme Court decisions,²⁰⁰ noting that Fleming had been invited to participate in the environmental evaluation process by the Department.²⁰¹

The Rhode Island Supreme Court discounted Hometown's conclusory allegations that Fleming had engaged in tortious conduct.²⁰² It concluded that the detailed facts contained in the affidavits submitted by Fleming in support of her motion were substantial, requiring Hometown to challenge them with direct evidence.²⁰³ Since Hometown relied

192. See *Hometown Properties, Inc. v. Fleming*, 680 A.2d 56, 59 (R.I. 1996).

193. See *id.* at 58.

194. See *id.*

195. See *id.*

196. See *id.* at 59.

197. See *id.* at 59, 64.

198. *Id.* at 63.

199. See *id.* at 60.

200. See *id.* at 60-63.

201. See *id.* at 59.

202. See *id.* at 63-64.

203. See *id.* at 64.

solely on the assertions contained in its pleadings, the court found Hometown's opposition insufficient to overcome Fleming's motion and evidentiary support.²⁰⁴ To reiterate the "independence and individualism" that the settlers sought to ensure to a free community, Justice Lederberg, writing for the court, recited the Latin phrase inscribed on the statehouse dome which, translated, states: "Rare felicity of the times when it is permitted to think what you wish and to say what you think."²⁰⁵

B. *The Right of Access to Courts of Law*

Some SLAPP filers claim that the laws infringe on their constitutional right to a jury trial, or that the laws are used to dismiss valid defamation claims involving matters devoid of activity associated with governmental participation.²⁰⁶ Balancing the competing interests of the First Amendment right to petition government for redress of grievances and assuring ready access to courts has proven to be problematic.²⁰⁷ The anti-SLAPP laws do not seem to address this problem; instead, they are deliberately vague and narrowly drawn in order to withstand judicial review.²⁰⁸ This legislative drafting technique has afforded targets favorable rulings in a majority of the reported cases. However, it is difficult to predict how courts will rule, because looking at the decisions *en masse* reveals very little consistency among the jurisdictions—even among different districts within the same state, purportedly applying the same statute.

The right of access to courts and the right to petition the government for redress of grievances spring from the First Amendment's free speech and right-to-petition clauses.²⁰⁹ However, the right of access to courts is actually a discrete fundamental right, derived from various constitutional sources. In part, it derives from the due process clause,²¹⁰ and

204. *See id.*

205. *See id.* at 64 & n.2.

206. *See* William P. Bethke, Cole v. Lehmann: *Practical Reflections on a Teacher Slander Suit Against Parents*, in SLAPPS: STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION IN GOVERNMENT, C935 ALI-ABA 85, *106, *109 (1994).

207. When the New Hampshire Legislature was contemplating passage of an anti-SLAPP statute, it asked the New Hampshire Supreme Court to review the bill and opine as to its constitutionality. The justices unanimously decided the law would "imperil[] constitutional rights," because "[a] solution cannot strengthen the constitutional rights of one group of citizens by infringing upon the rights of another group." Opinion of the Justices (*SLAPP Suit Procedure*), 641 A.2d 1012, 1015 (N.H. 1994).

208. *See* Judith Miller, *States Have Moved to Keep Plaintiffs from Using Courts to Muzzle Critics*, N.Y. TIMES, June 11, 1996, at A22.

209. *See In re Primus*, 436 U.S. 412, 426 (1978).

210. *See Wolff v. McDonnell*, 418 U.S. 539, 579 (1974).

the privileges and immunities clause,²¹¹ as well as from the First Amendment itself.²¹²

Access to courts is a substantive rather than procedural right, and though its exercise can be shaped and guided by the states,²¹³ it cannot be obstructed thereby, regardless of the procedural means applied.²¹⁴ Thus, in fashioning a remedy to stem the flow of frivolous or pretextual actions, courts must take great care not to unduly impair a litigant's constitutional right of access to the courts.²¹⁵

Professors Pring and Canan acknowledge that a "seeming paradox of the Right to Petition is that we recognize litigation as one of the protected ways one can effectively petition government . . ." ²¹⁶ Therefore, when a court abrogates the right of an assertedly aggrieved party to seek court access for redress of a grievance, it, in effect, validates the very behavior that it is simultaneously invalidating on the part of the target.

C. Abuse of Statutory Remedies and Judicial Acquiescence

When the challenged activity involves formal testimony in a public forum concerning a matter of opinion or is a good faith assertion of fact, the protection afforded should be more absolute and certain, regardless of the context of the testimony.²¹⁷ However, statements made outside such fora that are knowingly false and defamatory should not be granted absolute First Amendment protection.²¹⁸ Of course, SLAPP filers may have valid concerns, because sometimes, in the course of heated public hearings, opponents of a project tend to make some pretty outrageous statements which arguably should not be privileged.²¹⁹

One of the most flagrant abuses of California's anti-SLAPP legislation is illustrated in a recent decision entered by the Superior Court for Santa Clara County.²²⁰ The case involved an outspoken attorney, Paul Wotman, who is "reputedly the owner of the fastest fax in the West."²²¹ In 1991, Wotman, a gay rights advocate with a passion for involving the

211. See *Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907).

212. See *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972).

213. See *Bounds v. Smith*, 430 U.S. 817, 824-25 (1977).

214. See *Johnson v. Avery*, 393 U.S. 483, 485 (1969).

215. See *In re Green*, 669 F.2d 779, 786 (D.C. Cir. 1981); see also *In re Green*, 598 F.2d 1126, 1127 (8th Cir. 1979) (en banc) ("It is axiomatic that no petitioner or person shall ever be denied his right to the processes of the court.").

216. Pring & Canan, *supra* note 9, at *7.

217. Bethke, *supra* note 206, at *105.

218. See *id.*

219. See Lowe, *supra* note 24, at 50.

220. See *Huff v. Kiley*, Case No. 722067 (Cal. Super. Ct. June 10, 1992) (unpublished decision) (on file with author).

221. Reynolds Holding, *A Few Small Steps for the Media*, S.F. CHRON., Sept. 29, 1996, at 5/Z1.

press in his litigation strategy, filed a suit on behalf of a gay man who had been attacked by his young neighbor.²²² Wotman and his client publicized the suit by appearing on a variety of tabloid talk shows. The parents of the young neighbor, who were being sued by Wotman's client for civil damages in connection with the assault, filed a defamation suit against Wotman and his client for portraying them as virulently anti-gay homophobes.²²³

When the trial court rejected Wotman's argument that the comments were protected because they were part of the initial lawsuit, he defaulted to another position: The lawsuit was a SLAPP, and the plaintiffs were just trying to make trouble for him and keep him from telling the public about gay bashing. The judge found this argument marginally persuasive and "reluctantly granted" Wotman's motion to dismiss the complaint.²²⁴ The Sixth District Court of Appeal affirmed the trial court's ruling.²²⁵

This case illustrates the danger of broadly interpreting the protective statutes. Wotman was surely not addressing a governmental forum nor seeking action to effectuate a change in the law. Laws criminalizing such activity as that committed against his client already exist. In 1990, Congress enacted legislation specifically designed to encourage states to punish perpetrators of hate crimes.²²⁶

Although Wotman and his client surely had a right to speak out about this issue of public importance and to creatively invoke the anti-SLAPP statute, it was inappropriate for the court to characterize this action as a SLAPP.²²⁷ As long as there is a recognized right to preserve a person's reputation, there is a legitimate role for defamation claims. Therefore, public participation in government should not shield persons who act in reckless disregard of the truth in defaming others.²²⁸ Look-

222. *See id.*

223. *See Huff v. Kiley*, *supra* note 220, Second Amended Complaint at 3; *see also Huff v. Kiley*, Case No. H013637 (Cal. Ct. App. 1995), Appellants' Opening Brief at 3-5 (on file with author).

224. *See Huff v. Kiley*, *supra* note 220, Order dated Jan. 7, 1994 (on file with author).

225. *See Holding*, *supra* note 221.

226. *See* 28 U.S.C. § 534 (1994). California enacted anti-hate crime legislation, codified at CAL. PENAL CODE §§ 422.6-422.95 (West 1988 & Supp. 1997). The California law specifically includes "sexual orientation" as a class for which protection is granted. *See* CAL. PENAL CODE § 422.6(a).

227. It is interesting to note that the special motion to dismiss was granted only as to Wotman, while the case against Kiley was allowed to proceed. Also, the Huffs were awarded attorneys' fees upon finding that Kiley's motion was frivolous. *See Huff v. Kiley*, *supra* note 220, Minute Order on Motion for Attorney Fees (on file with author). However, the Huffs were not as lucky as to Wotman; attorneys' fees and costs in the amount of \$81,840.50 were assessed against them. *See id.*, Order Awarding Attorneys' Fees and Costs (on file with author).

228. *See New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964) (holding that freedom of

ing at the matter in a vacuum, one can easily find justification in the ability of sensational lies meant to gain media play while ruining individual careers and lives. If the anti-SLAPP laws are too broadly interpreted, the torts of malicious prosecution and defamation will be virtually eliminated.²²⁹

In other venues, Chrysler Corporation sued lawyers and law firms who enjoyed lucrative business by bringing products liability class actions against the automobile manufacturer. In one suit, Chrysler sued two lawyers and their firm in the Eastern District of Missouri for filing a baseless claim.²³⁰ The two St. Louis lawyers had allegedly represented Chrysler when they worked for another law firm.²³¹ The company contended that the duo, in using confidential information about the company obtained in the course of prior representation, committed malpractice.²³²

Chrysler's complaint contained counts for malpractice,²³³ breach of confidentiality,²³⁴ breach of fiduciary duty and constructive fraud,²³⁵ breach of contract,²³⁶ and tampering with computer data.²³⁷ The defendants countersued for abuse of process and defamation.²³⁸ They contended that the work done for Chrysler was totally unrelated to the issues raised in the class actions.²³⁹ The lawyers claimed the actions by Chrysler were part of a "terrorism campaign . . . designed to chill and intimidate lawyers from filing legitimate claims."²⁴⁰ They also alleged that Chrysler's actions were a "'publicity stunt' aimed at drumming up support for a tort reform bill in Congress."²⁴¹

In addition to the Missouri action, Chrysler filed a motion for sanctions against three Seattle attorneys and their firm in a Washington federal suit in which Chrysler was a defendant.²⁴² In that case, Chrysler

the press does not extend to knowing or reckless disregard of the truth which defames a public official).

229. See Bethke, *supra* note 206, at *106.

230. See *Chrysler Corp. v. Carey*, Case No. 4:96CV591CDP (E.D. Mo. filed Mar. 26, 1996) (pleadings on file with author).

231. See *id.*, Complaint at 3.

232. See *id.* at 7.

233. See *id.* at 6.

234. See *id.* at 7.

235. See *id.* at 8.

236. See *id.* at 12.

237. See *id.* at 11.

238. See *id.*, Counterclaim at 6, 11.

239. See *id.* See also Defendants' Joint Answer to Chrysler Corporation's First Complaint at 1-2.

240. *Id.*, Counterclaim at 5.

241. Mark Hansen, *A Drive to Stifle Litigation: Chrysler Tries to Slam Door on Class Actions It Calls Frivolous With a Lawsuit and a Request for Sanctions*, 82 A.B.A. J. 22 (June 1996).

242. See *Cowden v. Chrysler Corp.*, Case No. 951710WD (W.D. Wash. filed Nov. 3, 1995) (Motion for Sanctions filed Mar. 25, 1996) (on file with author).

moved for sanctions against opposing counsel, alleging that the basis for the class action they had filed was invented, and that the named plaintiff had not authorized the filing of the claim. Specifically, Chrysler asserted that the lawyers filed the class action without having been retained by the plaintiff named therein.²⁴³ Chrysler sought to recover the costs it incurred in defending the class action,²⁴⁴ which was subsequently dismissed.²⁴⁵

Even Professor Pring, who has extensively studied the SLAPP phenomenon, considers the use of the anti-SLAPP arguments by Chrysler's opposition in these contexts inappropriate, as no governmental petitioning was involved. He reiterated that "[s]uch suits often are filed by developers who claim that groups opposing their building plans defamed them."²⁴⁶ Rather than SLAPPs, Professor Pring would classify the Chrysler actions as "strategic lawsuits against future lawsuits."²⁴⁷ Whatever they are, they are not SLAPPs.²⁴⁸

IV. PROFESSIONAL RESPONSIBILITY AND STATUTORY REMEDIES FOR VIOLATORS

There is a First Amendment right to petition a court by filing a lawsuit, the frivolous exercise of which right can invoke sanctions.²⁴⁹ There are other more appropriate and feasible ways of controlling the intimidation inherent in the practice of law than by filing suit to preempt future litigation.²⁵⁰ The substantive moral content of law seeks to promote both cooperation and advocacy.²⁵¹

Several avenues are available to penalize attorneys for infractions of the rules requiring that only meritorious claims be advanced. These

243. See *id.*, Chrysler's Memorandum of Law in Support of Motion for Sanctions at 2.

244. See *id.*, Chrysler's Motion for Sanctions at 1.

245. See *id.*, Plaintiffs' Opposition to Chrysler's Motion for Sanctions at 20.

246. See Hansen, *supra* note 241.

247. *Id.*

248. Missouri does not have anti-SLAPP legislation; therefore, no such claim was specifically implicated in the *Carey* case. Conversely, Washington does have such legislation, but it is interesting to note that the statute was not expressly invoked in *Cowden*. At the time of this publication, the Missouri case was yet unresolved, although trial is currently scheduled to commence March 2, 1998 before the Honorable Catherine D. Perry. Chrysler's motion for sanctions was denied in the Washington case and, by mandate issued by the Ninth Circuit on July 17, 1997, the lower court's decision was affirmed. However, the importance of these cases is to illustrate the lengths to which SLAPP tactics are implied, as the news articles in which they were reported concern the SLAPP issue, thereby recognizing the connection. These cases, though not later discussed herein, should be recalled when reviewing the feasibility of a federal solution. See discussion *infra* Section V.

249. See *Phillips v. Carey*, 638 F.2d 207, 208 (10th Cir. 1981).

250. See Richard O. Brooks, *Les Mains Sales: The Ethical and Political Implications of SLAPP Suits*, 7 PACE ENVTL. L. REV. 61, 62-63 (1989).

251. See *id.* at 69-70.

remedial measures include Rule 11 sanctions,²⁵² statutory penalties for attorneys who “unreasonably and vexatiously” multiply litigation,²⁵³ and the inherent power of the courts to impose sanctions on lawyers who act in bad faith to abuse the judicial process.²⁵⁴

A. *SLAPP-Backs*

Several of the anti-SLAPP laws provide a prevailing target with a cause of action against the filer. Such suits, called SLAPP-backs, are generally brought in state courts on the basis of malicious prosecution or abuse of process, or in federal courts for civil rights violations. They generally allow recovery of compensatory damages, and sometimes permit awards of punitive damages.²⁵⁵

The SLAPP-back has become the latest legal growth industry in the SLAPP area.²⁵⁶ As formerly noted, these suits are filed by targets against the original filers for abuse of the courts and violating the targets’ First Amendment rights.²⁵⁷ Professors Pring and Canan condemn SLAPPs for posing a danger to already overburdened court systems.²⁵⁸ However, with the new SLAPP-back legislation, this danger is multiplied.²⁵⁹

Some question the efficacy of sanctions in deterring SLAPP suits.²⁶⁰ This skepticism is based on the fact that since the statutes provide for a stay of proceedings pending a quick resolution, recovery of attorneys’ fees will generally be modest; thus, there is no real disincentive to the SLAPP filer.²⁶¹ In addition, a filer may argue that sanctions should not be imposed because such a threat would chill his right to petition the government—in the form of petitioning the court for redress.

252. See FED. R. CIV. P. 11(c). The most relevant provision of the Rule as it relates to SLAPP suits is the certification that it is not being filed for any improper purpose. See *id.* Rule 11(b)(1).

253. See 28 U.S.C. § 1927 (1994).

254. See *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764-67 (1980).

255. See *McMurry & Pierce*, *supra* note 111, at *831.

256. See George W. Pring & Penelope Canan, *SLAPP-Happy Companies*, N.Y. TIMES, Mar. 29, 1996, at A21.

257. See *id.*

258. See *Benson & Merriam*, *supra* note 82, at *841.

259. See *id.* at *845.

260. See Mark A. Chertok, *Sanctions as a SLAPP Deterrent: How Effective Are They?*, in *SLAPPS: STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION IN GOVERNMENT*, C935 ALI-ABA 117, *120-21 (1994).

261. See *id.* at *120.

B. *Model Code of Professional Responsibility and Model Rules of Professional Conduct*

Principles of professional responsibility dictate that an attorney's job is to zealously defend the client's rights. A lawyer is ethically prohibited from "fil[ing] a suit, assert[ing] a position, conduct[ing] a defense, delay[ing] a trial, or tak[ing] other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another."²⁶²

Moreover, the Model Rules of Professional Conduct relieve an attorney from liability for filing a meritorious claim, which is one based on "a good faith argument for an extension, modification or reversal of existing law."²⁶³ A meritorious claim is one that it is grounded in "good faith."²⁶⁴ "Good faith," however, is subjective; therefore, it is whatever the lawyer believes it is.²⁶⁵ An attorney, in representing his client, may genuinely, but mistakenly, believe that a right is being infringed upon or property is being "taken."²⁶⁶

C. *Federal and State Mandates Precluding Frivolous Suits*

It is well established that "Rule 11 sanctions are designed to discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses."²⁶⁷ The major goals of Rule 11 sanctions are to rid courts of meritless litigation while reducing the increasing costs of civil litigation. These goals are achieved by penalizing lawyers, and/or their clients, who abuse the litigation process.²⁶⁸ A pleading, motion or other paper found to be in contravention of Rule 11 subjects the signing attorney and/or the responsible party to appropriate sanctions.²⁶⁹

Pursuant to Rule 11, a lawyer who signs and files a pleading, motion, or other paper in federal court without first conducting an inquiry to ensure that it is well grounded in fact and law, or who files a paper for an improper purpose, may be sanctioned, monetarily or otherwise.²⁷⁰ The Supreme Court clearly stated that "the central purpose of Rule 11 is to deter baseless filings Although the Rule must be read

262. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1) (1983).

263. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1996).

264. *See id.*

265. *See Brooks, supra* note 250, at 67.

266. *See id.* at 67-68.

267. *Donaldson v. Clark*, 819 F.2d 1551, 1556 (11th Cir. 1987) (citations and internal quotations omitted).

268. *See id.* at 1559.

269. *See Collins v. Walden*, 834 F.2d 961, 966 (11th Cir. 1987).

270. *See FED. R. CIV. P.* 11(c)(2).

in light of concerns that it will spawn satellite litigation and chill vigorous advocacy, any interpretation must give effect to the Rule's central goal of deterrence."²⁷¹

Since Rule 11 is designed as a deterrent, it allows courts to exercise discretion in devising sanctions to achieve this goal.²⁷² In making this assessment, courts may consider "what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case," as well as "what amount is needed to deter similar activity by other litigants" ²⁷³ The rule does not preclude a later action for malicious prosecution against the offender.²⁷⁴

Rule 11 permits courts to impose appropriate sanctions on the filing attorney, the represented party, or both.²⁷⁵ Often, only the lawyer is sanctioned. This may be in recognition of the lawyer's ethical duty not to prosecute frivolous claims, or it may reflect the view that the lawyer bears responsibility for having the case entrusted to him.²⁷⁶ However, the rule is silent as to whether the law firm, or merely the attorney who signed the offending filing, should be sanctioned. The Supreme Court demystified this ambiguity, holding that the rule imposes a personal, non-delegable duty on the signers of papers; thus, only those who actually sign the offending papers are subjected to sanctions.²⁷⁷

Levying sanctions against a signing attorney potentially effects the greatest deterrence against filing baseless and harassing claims.²⁷⁸ However, the deterrence value of such sanctions can only be realized upon assurance that the attorney or firm actually pays the sanction imposed. Otherwise, the sanctions will be just another cost of doing business for the filer.²⁷⁹

Most states have rules or statutes that are commensurate with Rule 11 sanctioning. These states include those in which anti-SLAPP legislation has been enacted.²⁸⁰

271. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990) (citation omitted).

272. See Chertok, *supra* note 260, at *121.

273. FED. R. CIV. P. 11(b) and (c), Advisory Comm. Notes.

274. FED. R. CIV. P. 11(d), Advisory Comm. Notes.

275. FED. R. CIV. P. 11(c) & Advisory Comm. Notes.

276. See *Slane v. Rio Grande Water Conservation Dist.*, 115 F.R.D. 61, 63 (D. Colo. 1987).

277. See *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 126-27 (1989).

278. See Chertok, *supra* note 260, at *151. Although Rule 11 sanctions may be allocated between attorney and client, "[t]he attorney and his client do not stand as equals before the court. Sanctions are imposed against the client purely for their deterrent effect. But sanctions are imposed against the attorney *also for disciplinary purposes* . . ." *Eastway Constr. Corp. v. City of New York*, 637 F. Supp. 558, 570 (E.D.N.Y. 1986) (emphasis added), *modified*, 821 F.2d 121 (2d Cir. 1987).

279. See Chertok, *supra* note 260, at *152.

280. See CAL. CIV. PRAC. CODE § 128.5 (West Supp. 1997); DEL. SUPER. CT. CIV. R. 11; GA. CODE 9-15-14 (Supp. 1997); ME. R. CIV. P. 11; MASS. GEN. LAWS ANN. ch. 231 § 6F (West 1985).

In addition to Rule 11, Congress enacted a federal statute designed to punish lawyers whose groundless litigation techniques waste time and cost their opponents money by unnecessarily prolonging litigation.²⁸¹ Specifically, the statute provides that any attorney "who so multiplies the proceedings . . . unreasonably or vexatiously may be required by the court to satisfy *personally* the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."²⁸²

Furthermore, the Supreme Court has held that along with the powers derived from statutes and court rules, federal courts have the inherent power to control the proceedings before them, which includes the power to impose sanctions on parties and their lawyers for abusing the judicial process.²⁸³ However, the Court cautioned that this power must be exercised with great restraint, and requires a sanctioning court to specify on the record the manner in which the offender acted in bad faith and give the offender notice and an opportunity to be heard.²⁸⁴

In sum, "[t]he duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law."²⁸⁵ Being truthful to a client and to the court may not always be easy, but it is necessary to maintain a lawyer's duty to the profession.²⁸⁶ An attorney should truthfully discuss matters with his client, including the fact that the case is weak or that a less-than-honest position is being asserted.²⁸⁷ Abuse of the legal process occurs on both sides of any issue involving political posturing. To signify as privileged all issues that involve political premises is to ignore the fact that many political actions have traditionally traversed through legal channels. A primary example is the civil rights movement, which took political actions and translated them into court actions.²⁸⁸ That is not to say that SLAPPs are ethically correct; the problem is that the filers appear to be on the wrong side of the issue.²⁸⁹ Though both the filers and targets may come to court with "unclean hands," those of the filers seem less clean, and thus, unworthy of judicial sympathy. However, they are no

& Supp. 1997); MASS. R. CIV. P. 11(a); MINN. R. CIV. P. 11; NEB. R. CIV. P. 25-824; NEV. CT. RULES ANN. R. 11; N.Y. C.P.L.R. § 130-1.1 (Consol. Supp. 1997); R.I. GEN. LAWS § 9-29-21 (Supp. 1996); WASH. SUPER. CT. R. 11.

281. See 28 U.S.C. § 1927 (1994).

282. *Id.* (emphasis added).

283. See *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764-67 (1980).

284. See *id.* at 767.

285. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-19 (1983).

286. See Karen O. Bowdre, *Law Practice: A Place for Moral Values*, 57 ALA. LAW. 158, 161 (May 1996).

287. See *id.*

288. See Brooks, *supra* note 250, at 73.

289. See *id.*

less worthy of due process protection.²⁹⁰

V. FEASIBILITY OF A FEDERAL SOLUTION

Some members of the legal community are skeptical about the possibility of ensuring "absolute" free expression, and are unpersuaded that categories that would trigger the anti-SLAPP laws can be precisely defined to guarantee absolutely free expression.²⁹¹ Critics of anti-SLAPP laws profess that they prohibit liability for knowing, reckless or negligent falsehoods uttered in public arenas that are calculated to influence government decisions.²⁹² When construed in this manner, courts dismiss claims of defamation irrespective of whether the participant has lied about the factual evidence upon which his "petition" is based.²⁹³

In *McDonald v. Smith*, the Court rebuked a private citizen's First Amendment attempt to defame a potential U.S. attorney with impunity.²⁹⁴ The Court held that the petition clause does not grant an absolute immunity for defamatory remarks, even if they are made in the course of seeking governmental action.²⁹⁵

A plaintiff seeking damages for defamation under *McDonald* still has the burden of proving that the offensive statements were made with actual malice, pursuant to the holding in *New York Times v. Sullivan*.²⁹⁶ This poses the problem of how to prove actual malice when the maker of the statements is not a public figure, because ten years later, in *Gertz v. Robert Welch, Inc.*,²⁹⁷ the Court ruled that the *Sullivan* standard does not apply to private individuals, even when the statements address matters of public concern.²⁹⁸

In *Gertz*, the Court reiterated its position taken in prior rulings: [T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues. They belong to that category of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and

290. *See id.*

291. *See Bethke, supra* note 206, at *104-05.

292. *See Bruce Fein, Debasing Debate Under Green Cover*, WASH. TIMES, Sept. 4, 1996, at A15.

293. *See id.*

294. 472 U.S. 479, 485 (1985).

295. *See id.*

296. 376 U.S. 254, 279-83 (1964).

297. 418 U.S. 323 (1974).

298. *See id.* at 352.

morality.”²⁹⁹

More recently, in the oft-cited case of *Protect Our Mountain Environment, Inc. v. District Court* (hereinafter *POME*),³⁰⁰ the Colorado Supreme Court adopted a new rule and a heightened standard for accommodating litigants’ competing concerns.³⁰¹ While granting great deference to a defendant’s petitioning activities, the court imposed an extreme burden of proof on a filer alleging abuse of administrative or judicial processes of government. This standard requires the filer, in response to a special motion to dismiss, to

[M]ake a sufficient showing to permit the court to reasonably conclude that the defendant’s petitioning activities were not immunized from liability under the First Amendment because: (1) the defendant’s administrative or judicial claims were devoid of reasonable factual support, or, if so supportable, lacked any cognizable basis in law for their assertion; and (2) the primary purpose of the defendant’s petitioning activity was to harass the plaintiff or to effectuate some other improper objective; and (3) the defendant’s petitioning activity had the capacity to adversely affect a legal interest of the plaintiff.³⁰²

This test was designed to “safeguard the constitutional right of citizens to utilize the administrative and judicial processes for redress of legal grievances without fear of retaliatory litigation and, at the same time, will permit those truly aggrieved by abuse of these processes to vindicate their own legal rights.”³⁰³ The court permitted those participating in public debates significant leeway by allowing erroneous or even defamatory statements to be made as long as they raise issues of public interest and concern.³⁰⁴

Malice is easy to allege but difficult to prove, absent the discovery which the anti-SLAPP laws deny.³⁰⁵ Thus, in distinguishing between a legitimate claim for defamation and one violative of a First Amendment right, the rational approach would be to distinguish between “petitioning” and “speech.”³⁰⁶ The most practical approach for making such a distinction would be to evaluate the body to whom the communication is addressed.³⁰⁷ However, indifference to intent, as held in *POME*, should not be the standard, because that would merely encourage the most

299. *Id.* at 340 (citations omitted).

300. 677 P.2d 1361 (Colo. 1984) (en banc).

301. *See id.* at 1368-69.

302. *Id.* at 1369.

303. *Id.*

304. *See id.*

305. *See Lowe, supra* note 24, at 51.

306. *See Bethke, supra* note 206, at *109.

307. *See id.*

deliberate and malicious defamatory statements to be cast in "petition" form.

The ideal anti-SLAPP law would "[c]over all communications to government regardless of form; . . . [c]over all government agencies and agents; . . . [s]end a clear, unambiguous signal warning against filing SLAPPs; and . . . [s]et up an effective, fair, early review for filed SLAPPs."³⁰⁸ However, contrary to the holding of *Omni Outdoor Advertising*, the protection afforded should be dependent on whether the citizens' input was right or wrong, wise or foolish, well-intentioned or mean-spirited.³⁰⁹ As Justice Powell emphasized in *Gertz*, falsehoods do not constructively contribute to debate in a community designed to be governed by reason.³¹⁰ When a citizen resorts to defamatory falsehoods, all constitutional protections lapse in order to further rational discourse of public affairs. Our democracy cannot be grounded on lies to government in an effort to influence public policy. "If a nation expects to be ignorant and free, . . . it expects what never was and never will be."³¹¹

Assuming a need for uniform legislation, Professors Pring and Canan have drafted a proposed model anti-SLAPP bill which incorporates these ideals.³¹² They believe that a federal bill, fashioned after their proposed model bill, is necessary to ensure uniform decisions among the various jurisdictions. Thus far, the lack of uniformity among the various anti-SLAPP laws has resulted in conflicting interpretations and resolutions.³¹³

The problem with such a proposal is that the underlying causes of action set forth in SLAPPs are based on state tort claims. A federal court is compelled to address the issues as presented in a well-pled complaint,³¹⁴ and apply state law thereto.³¹⁵ Although tort elements do not materially differ among the states, courts have not been harmonious in their application, resulting in discordant holdings.³¹⁶

Defamation is a recurrent tort alleged in SLAPPs. Establishing the defamatory character of a statement generally requires proof that the maker intended to harm the plaintiff's reputation in the community or to deter others from associating or dealing with the plaintiff.³¹⁷ The

308. Pring & Canan, *supra* note 9, at *21-22.

309. *See* City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 378-79 (1991).

310. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).

311. Fein, *supra* note 292 (quoting Thomas Jefferson).

312. *See* PRING & CANAN, *supra* note 6, at 201-05.

313. *See id.* at 190.

314. *See* Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908).

315. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

316. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 111, at 773 (5th ed. 1984).

317. *See* RESTATEMENT (SECOND) OF TORTS § 559 (1989).

Restatement identifies various causes of action for defamation, which require proof of different, although similar, elements. The actions are delineated by the status of the plaintiff and the right or property affected by the defamation.

The basic elements of a defamation claim are the unprivileged publication to a third party of a false and defamatory statement concerning another which amounts, at least, to negligence on the part of the publisher, and causes special harm to the plaintiff.³¹⁸ The defamation can relate to a private person³¹⁹ or to a corporation.³²⁰ Though a corporation has no reputation in a personal sense,³²¹ it can maintain an action for defamation for statements that tend to discredit it or cause it business losses, without proof of special harm,³²² as is required for tortious interference with contractual or business relations³²³ and disparagement of property.³²⁴ Proof of pecuniary loss is not required where the defamation is actionable *per se*.³²⁵

The court must make the initial determination, as a matter of law, whether a statement is capable of a particular meaning and whether that meaning is defamatory.³²⁶ Once this determination is made, the jury determines whether this defamatory meaning was understood by its recipient.³²⁷ In performing their respective functions, the court and jury are to consider the circumstances surrounding the communication, with context being an important factor in the analysis.³²⁸

The Restatement also recognizes two types of privileges that attach to certain activities and statements that would otherwise be actionable in the absence of the privilege. An absolute privilege generally applies where the allegedly defamatory statement was made in the course of executive, legislative or judicial proceedings.³²⁹ Alternatively, a defendant may enjoy a conditional, or qualified, privilege, which takes into account the appropriateness of the occasion on which the defamatory statement was published, the legitimacy of the interest which the publisher sought to promote or protect, and the appropriateness of the per-

318. *See id.* § 558.

319. *See id.* § 580B.

320. *See id.* § 561.

321. *See* KEETON ET AL., *supra* note 316, § 111, at 779.

322. *See* RESTATEMENT (SECOND) OF TORTS § 561 cmt. b (1989).

323. *See id.* § 766.

324. *See id.* § 624.

325. *See id.* § 569; see also *id.* § 569 cmt. b for the definition of what is actionable *per se* in defamation suits.

326. *See id.* § 614(1).

327. *See id.* § 614(2).

328. *See id.* § 614 cmt. d.

329. *See id.* §§ 585-591.

sons to whom the statement was published.³³⁰

A plaintiff is afforded an opportunity to overcome a qualified privilege by showing that the privilege was abused.³³¹ Abuse of privilege may be established in one of three ways: by showing that the defendant published the defamatory statement with actual knowledge that it was false or with reckless disregard as to its truth or falsity; by showing that the defendant published the defamatory statement for an improper purpose; or by showing that the publication was made to persons or contained defamatory elements which were not necessary to serve the purpose of the privilege.³³² Evidence of hostility, ill-will or conflict between the plaintiff and defendant may give rise to an inference that the defendant made the defamatory statement for an improper purpose.³³³

Whether a privilege exists is a question of law for a court to decide in the first instance.³³⁴ If the facts giving rise to an asserted privilege are in dispute, the jury must determine whether the defendant acted for an improper purpose and thereby abused the privilege.³³⁵

Another common tort basis for suits labelled as SLAPPs is intentional interference with business or contractual relations.³³⁶ A defendant may be held liable for intentionally or improperly interfering with the plaintiff's rights under a contract with a third party if the interference causes the plaintiff a pecuniary loss.³³⁷ Whether the interference is improper is determined by considering, among other things, the actor's motive.³³⁸ Thus, the basis of liability for this tort is intent.³³⁹

As evidenced by the elements required to establish defamation and interference with business relations, the defendant's state of mind is an integral issue in determining both the existence of tort liability and the absence of an asserted privilege. Because intent is a material element of these torts and the defense of privilege, trial, rather than summary dismissal,³⁴⁰ as provided by the anti-Slapp legislation, is required. Prior to determining the parties' intent, a reasonable fact finder must hear all the

330. See *id.* § 595; see also *Bainhauer v. Manoukian*, 520 A.2d 1154, 1170 (N.J. Super. Ct. App. Div. 1987).

331. See, e.g., *Ezekiel v. Jones Motor Co., Inc.*, 372 N.E.2d 1281, 1287 (Mass. 1978).

332. See *Bainhauer*, 520 A.2d at 1172-73.

333. See *Slaughter v. Friedman*, 649 P.2d 886, 890 (Cal. 1982) (en banc) (finding that allegations that the defendants knew their statements were false and made them out of ill-will arising out of previous quarrels and rivalries with the plaintiff were sufficient to defeat the privilege claim for purposes of a demurrer).

334. See RESTATEMENT (SECOND) OF TORTS § 619(1) (1989).

335. See *id.* § 619(2) cmt. b.

336. See *id.* § 766.

337. See *id.*

338. See *id.* § 767.

339. See *KEETON ET AL.*, *supra* note 316, § 129, at 982.

340. See *Tew v. Chase Manhattan Bank*, 728 F. Supp. 1551, 1555 (S.D. Fla. 1990).

evidence, draw all reasonable inferences therefrom, and judge the credibility of the witnesses.³⁴¹ Conclusory, unsubstantiated statements of a witness with an interest in the outcome of the case are unreliable and a jury could find them to be less than candid and unworthy of belief.³⁴² It is precisely for this reason that a court should hesitate to cavalierly grant a motion to dismiss without giving the plaintiff a chance to conduct discovery to substantiate a claim that the defendant acted with an improper purpose or motive. In summarily granting dismissal pursuant to an anti-SLAPP statute, a court could erroneously preclude a plaintiff from proving a legitimate assertion that his constitutional rights have been obstructed.

Several possible solutions to the anomalies stated exist that would provide a federal cause of action to discourage SLAPPs, but none are flawless. One such possibility, though not strictly indigenous to SLAPP suits, is to amend the Federal Rules of Civil Procedure to require a heightened pleading standard, as opposed to the current, liberal notice pleading.³⁴³ As currently promulgated, a pleading setting forth a claim for relief is merely required to include "a short and plain statement of the claim showing the pleader is entitled to relief."³⁴⁴

Some states already provide such a heightened pleading standard.³⁴⁵ Contrarily, pursuant to the Federal Rules of Civil Procedure, a complaint may not be dismissed absent a showing that the plaintiff cannot prove a set of facts to support a claim upon which relief can be granted.³⁴⁶ Moreover, a plaintiff in a defamation action is not required to plead, *in haec verbis*, language alleged to be actionable.³⁴⁷

The Federal Rules of Civil Procedure neither mention nor require that facts be stated in a certain manner, or even included at all.³⁴⁸ An oft-cited opinion authored by Judge Jerome Frank observed that the imposition of peculiarly stiff requirements in certain actions would "frustrate the Congressional intent" of the liberal pleading rules.³⁴⁹ Judge Frank also pointed out that if "the defendants, before trial, desire more detailed information from [a] plaintiff, they can seek it by . . .

341. *See id.*

342. *See id.*

343. *See* FED. R. CIV. P. 8(a).

344. *Id.* Rule 8(a)(2).

345. *See, e.g.,* Levin v. King, 648 N.E.2d 1108, 1113 (Ill. App. Ct. 1995); *see also* STEPHEN C. YEAZELL & JONATHAN M. LANDERS, CIVIL PROCEDURE 367-68 (3d ed. 1992) (stating that, although fewer than half the states still require Code pleading, they include the most populous states, such as Illinois, California, and New York).

346. *See* Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

347. *See* Stabler v. New York Times Co., 569 F. Supp. 1131, 1138 (S.D. Tex. 1983).

348. *See* Rannels v. S.E. Nichols, Inc., 591 F.2d 242, 245 (3d Cir. 1979).

349. *See* Package Closure Corp. v. Sealright Co., Inc., 141 F.2d 972, 978 (2d Cir. 1944).

discovery.”³⁵⁰ Justice Black, writing for the Supreme Court, recognized the modern practice of “simplicity and reasonable brevity in pleading.”³⁵¹ He emphasized that, “where a bona fide complaint is filed that charges every element necessary to recover, summary dismissal of a civil case for failure to set out evidential facts can seldom be justified.”³⁵²

Notwithstanding the Supreme Court decisions, some federal courts have required plaintiffs bringing defamation claims to set forth the allegedly defamatory words, holding that failure to do so warrants dismissal on the grounds that the claim is vague and fails to state a claim upon which relief can be granted.³⁵³ Thus, it is evident that even among the federal jurisdictions, what constitutes sufficient notice to maintain a cause of action for defamation is unclear.

Further complicating the feasibility of anti-SLAPP legislation on the federal level is that assertion of a privilege by a defendant is considered an affirmative defense in a defamation suit.³⁵⁴ Therefore, the assertion of a privilege must be proved as well as pled. Accordingly, dismissal of a complaint on the ground of privilege before an answer is filed would be premature.³⁵⁵ This is consistent with the Restatement’s view that the court must first determine whether a privilege exists as properly pled and proved, and then the trier of fact must decide whether the privilege was abused.³⁵⁶

The incongruity of pleading requirements in defamation as well as in other tort claims could be resolved by amending the Federal Rules of Civil Procedure. Such an amendment would still place the onus for pleading in the first instance upon the plaintiff, as does the anti-SLAPP legislation. It would also allow courts a better opportunity to determine the viability of an action and decide whether it should be maintained beyond the pleading phase or is, instead, pretextual in nature.

Furthermore, some state tort claims require that certain elements be specifically pled, even in the absence of a procedural rule for heightened pleading. Such claims fall under the rubric of injurious falsehood, which encompasses a myriad of labels including slander of title, disparagement of title, trade libel, and interference with a prospective business

350. *Id.* at 979.

351. *United States v. Employing Plasterers Ass’n*, 347 U.S. 186, 189 (1954).

352. *Id.*

353. *See, e.g., Walters v. Linhof*, 559 F. Supp. 1231, 1234 (D. Colo. 1983).

354. *See Foltz v. Moore McCormack Lines, Inc.*, 189 F.2d 537, 539 (2d Cir. 1951).

355. *See id.*

356. *See* RESTATEMENT (SECOND) OF TORTS § 619(1) & cmt. b (1989).

advantage.³⁵⁷ The elements of an injurious falsehood claim are the publication or communication of a false statement about the plaintiff, his property, or his business to a third person, which causes the plaintiff some pecuniary loss.³⁵⁸ Requiring a plaintiff to plead "special damages" ensures that such damages are "directly traceable to a defendant's failure to discharge his contract obligations or such duties as are imposed upon him by law."³⁵⁹ Special damages consist of "items of damage which are peculiar to the case."³⁶⁰ By requiring this heightened pleading standard, inclusive of pleading actual and computable damage, the risk of having to defend against a pretextual claim is lessened. This might not be a feasible solution in circumstances such as those presented in *Huff v. Wotman*,³⁶¹ however, where the plaintiffs were private citizens not claiming business losses. Rather, they claimed general damages for loss of reputation in their community, shame, mortification, and hurt feelings.³⁶²

Another possible avenue for ensuring the viability of a claim is through presuit screening requirements, currently available in most states for medical malpractice suits.³⁶³ The purpose of the screening is to give the defendant notice in order to allow investigation of the matter and to promote presuit settlement and resolution.³⁶⁴ Such a device could be utilized in tort claims in which pecuniary loss cannot be substantiated, but where there are non-economic damages such as emotional distress, requiring an expert opinion corroborating the intangible harm caused by the defendant's conduct.³⁶⁵ In theory, the plaintiff would be responsible for expenditures necessary to "discover" its case.

Unless promulgated on a federal level, however, any presuit screening requirements would not be honored by federal courts even in diversity cases. As long as there is "a direct conflict between the requirements of [a state statute] and the Federal Rules of Civil Procedure, and those federal rules have been implemented in a constitutional manner, the [federal] court . . . must abide by the procedural rules estab-

357. See William L. Prosser, *Injurious Falsehood: The Basis of Liability*, 59 COLUM. L. REV. 425, 425 (1959).

358. See *id.*; see also RESTATEMENT (SECOND) OF TORTS § 624 (1989).

359. 22 AM. JUR. 2d § 39 (1970).

360. *Id.*

361. See *Huff v. Kiley*, Case No. 722067 (Cal. Super. Ct. June 10, 1992) (unpublished decision) (on file with author).

362. See *id.*, Complaint at 5.

363. See, e.g., FLA. STAT. ch. 766.203 (1997).

364. See *Shands Teaching Hosp. & Clinics, Inc. v. Barber*, 638 So. 2d 570, 572 (Fla. 1st DCA 1994).

365. Cf. FLA. STAT. ch. 766.203(2) (1997).

lished by Congress.”³⁶⁶ As it currently stands, to institute such a presuit screening requirement would be in direct contravention of the federal rules promoting “simplicity” and expediency.³⁶⁷

As foretold, there appears to be no simple solution for ensuring uniformity in handling suits that are alleged to be SLAPPs. Amending procedural rules could potentially vitiate any success at a constitutional remedy because of a possible loss of a substantive right. Therefore, as previously stated, it seems that the more probable solution would be to place some burdens on the professional—the attorney—to abide by ethical standards of practice.³⁶⁸

VI. CONCLUSION

The Supreme Court has proclaimed that the right to petition conferred by the First Amendment is one of the “fundamental principles of liberty and justice which lie at the base of all civil and political institutions”³⁶⁹ However, it must not be forgotten that a plaintiff in a civil action possesses the same right to petition as does the defendant. This right to petition includes the right of access to courts. It is both illogical and inequitable to grant one right to the exclusion of another.

Rights and duties have corresponding realms of significance. An absolute right to petition for redress of grievances implies the absolute nonexistence of any right to one’s reputation or good name if it is implicated in something styled a “petition.” Thus, reform geared to protect against SLAPPs necessarily lessens the legal protection for personal and professional reputation.³⁷⁰

Although certain statutory safeguards are beneficial in blatant circumstances, the laws should not be abused by using them as a shortcut to relieve a defendant of liability for conduct for which he is truly culpable. Such an abuse could effectively extinguish common law tort claims brought by a genuinely aggrieved party. In interpreting the laws, whether statutory or common law, it is up to the courts to construe the petition clause as originally intended—to protect valid communications made to a governmental entity for the purpose of effecting action from that entity. Providing a defendant who has not participated in legitimate petition activity with immunity would be a farce. It will neither further the goals that the framers sought to achieve when they drafted the First

366. *Braddock v. Orlando Reg'l Health Care Sys., Inc.*, 881 F. Supp. 580, 584 (M.D. Fla. 1995).

367. *See United States v. Employing Plasterers Ass'n*, 347 U.S. 186, 189 (1954).

368. *See discussion supra* Section IV.

369. *DeJonge v. Oregon*, 299 U.S. 353, 364 (1937).

370. *Bethke*, *supra* note 206, at *105.

Amendment nor promote open and robust public participation, just as calling a cat a bird will not make it fly.

BARBARA ARCO*

* I dedicate this Comment to my mother, Mary Palmaccio Arco, who nurtured tolerance, a necessary ideal which underlies the freedom of expression; to Sanford Bohrer, Esq., whose influence provided the impetus for my interest in First Amendment principles; and to the attorneys with whom I have worked, who illustrated the importance of ethical standards of practice. I also wish to extend my deep appreciation to my colleague, Gaye Huxoll, who, unfortunately, was unable to remedy the verbosity with which this dedication is afflicted, but whose editing efforts and expertise rescued the foregoing Comment from a similar fate.