

# SLAPPED in Illinois: The Scope and Applicability of the Illinois Citizen Participation Act

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## I. INTRODUCTION

On August 28, 2007 Illinois Governor Rod Blagojevich signed Senate Bill 1434 into law,<sup>1</sup> thereby creating the Illinois Citizen Participation Act.<sup>2</sup> With enactment of the Citizen Participation Act (CPA), Illinois joined more

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1. B. Status for S. B. 1434, 95th Gen. Assem. (Ill. 2007), 14 LEGIS. SYNOPSIS & DIGEST, at 876-77, *available at* <http://www.ilga.gov> (follow “Bills and Resolutions” hyperlink; then under the “Senate-Bills” heading follow “1401 – 1500” hyperlink; then follow “SB 1434 Citizen Participation” hyperlink).

2. Citizen Participation Act, Pub. Act 95-506, 2007 Ill. Legis. Serv. 5223-24 (West) (codified at 735 ILL. COMP. STAT. ANN. 110/1-99).

than twenty other states<sup>3</sup> in passing legislation that attempts to eliminate or diminish what have come to be termed “Strategic Lawsuits Against Public Participation,” or “SLAPPs.”<sup>4</sup> While the problem of SLAPP litigation is one deserving of legislative attention, this comment will argue that the Citizen Participation Act could apply to situations well outside those it was meant to address, and in doing so, fails to achieve its stated goal of balancing the constitutional rights of civil plaintiffs and defendants.<sup>5</sup>

Part I of this comment will provide an overview of the SLAPP phenomenon, including a discussion of the hallmark attributes of a SLAPP, the reasons why SLAPPs have been deemed contrary to public policy, and other solutions proposed to combat and eliminate SLAPPs. Part II will discuss the legislative history of the Illinois Citizen Participation Act, outline its stated goals, and discuss the substantive and procedural mechanisms employed to achieve those goals. Part III will compare the CPA to similar legislation enacted by other states to analyze the potential for the CPA to overstep its boundaries, chill potential plaintiffs from bringing meritorious claims, and thereby fail to achieve the goals it sets out to accomplish. Part III will then suggest and explain two relatively simple measures that, if taken, could counteract the potential for such chilling effects and better effectuate the balance Illinois is attempting to achieve.

## II. THE SLAPP PHENOMENON

### A. STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION

The term “Strategic Lawsuit Against Public Participation,” or “SLAPP,” was developed by University of Denver professors George W. Pring and Penelope Canan<sup>6</sup> to help describe what they saw as the increasing use of civil litigation to quash citizen participation in government.<sup>7</sup> Gener-

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3. See *infra* note 149 for a listing of statutes from other jurisdictions. A comprehensive directory of states that have passed or considered legislation directed at the SLAPP issue is also available on the California Anti-SLAPP Project’s website at <http://www.casp.net>.

4. See *infra* note 6 and accompanying text.

5. Citizen Participation Act, Pub. Act No. 95-506, § 5, 2007 Ill. Legis. Serv. 5223 (West) (codified at 735 ILL. COMP. STAT. ANN. 110/5).

6. GEORGE W. PRING & PENELOPE CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT 3 (1996) [hereinafter PRING & CANAN, SLAPPS]. See also Penelope Canan & George W. Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 LAW & SOC’Y REV. 385, 386 (1988) (demonstrating early use of the term “SLAPP”).

7. See PRING & CANAN, SLAPPS, *supra* note 6, at 2. Pring and Canan consider SLAPPS a “new breed” of litigation, but they claim to have found SLAPP suits in American courts that date back as far as 1802. PRING & CANAN, SLAPPS, *supra* note 6, at 1, 3, 17. However, Pring stated that “virtually all of the cases we have found have been filed after

ally, SLAPPs are “legally meritless suits designed, from their inception, to intimidate and harass political critics into silence.”<sup>8</sup> The SLAPP suit does not seek victory on the merits, but rather victory by attrition.<sup>9</sup> According to Jerome Braun, the “object is to quell opposition by fear of large recoveries and legal costs, by diverting energy and resources from opposing the project into defending the lawsuit, and by transforming the debate from a political one to a judicial one, with a corresponding shift of issues from the targets’ grievances to the filers’ grievances.”<sup>10</sup> More bluntly, “[t]he apparent goal of SLAPPs is to stop citizens from exercising their political rights or to punish them for having done so.”<sup>11</sup>

As one would expect, SLAPPs do not announce themselves as such; instead they “masquerade” as any number of seemingly “ordinary” tort suits, including libel, slander, tortious interference with a contract or a business interest, abuse of process, malicious prosecution, and, less often, causes of action based on alleged violations of the prospective plaintiff’s constitutional rights, such as due process or equal protection.<sup>12</sup> Ultimately, the SLAPP plaintiff is not limited to any one category of tort action because the goal is political, not legal, success, and proving the precise elements of any particular cause of action is of secondary concern—if of any concern at all.<sup>13</sup> The idea is that the SLAPP plaintiff’s goals are achieved through the ancillary effects of the lawsuit itself on the defendant, not through an adjudication on the merits.<sup>14</sup> Therefore, the plaintiff’s choice of what cause of action to plead matters little.<sup>15</sup>

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1970.” George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3, 5 (1989) [hereinafter Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*].

8. Edmond Costantini & Mary Paul Nash, *SLAPP/SLAPPback: The Misuse of Libel Law for Political Purposes and a Countersuit Response*, 7 J.L. & POL. 417, 423 (1991) (defining SLAPPs in the context of libel suits).

9. See U.S. *ex rel.* Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 970-71 (9th Cir. 1999) (“The hallmark of a SLAPP suit is that it lacks merit, and is brought with the goals of obtaining an economic advantage over a citizen party by increasing the cost of litigation to the point that the citizen party’s case will be weakened or abandoned, and of deterring future litigation.”).

10. Jerome I. Braun, *Increasing SLAPP Protection: Unburdening the Right of Petition in California*, 32 U.C. DAVIS L. REV. 965, 969-70 (1999) [hereinafter Braun, *Increasing SLAPP Protection*].

11. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, *supra* note 7, at 5-6.

12. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, *supra* note 7, at 8-9 & n.11-15.

13. See Braun, *Increasing SLAPP Protection*, *supra* note 10, at 970.

14. Braun, *Increasing SLAPP Protection*, *supra* note 10, at 970.

15. See Braun, *Increasing SLAPP Protection*, *supra* note 10, at 970.

Because SLAPPs come disguised in various forms of tort suits, and because a successful SLAPP will, almost by definition, preclude appellate review and reporting, a primary difficulty with SLAPPs is properly identifying them as such.<sup>16</sup> Pring and Canan, regarded as the seminal experts on the subject, have therefore developed a working definition: a SLAPP is a lawsuit involving "communications made to influence a governmental action or outcome," that, "secondarily, result[s] in . . . a civil complaint or counterclaim . . . filed against nongovernment[al] individuals or organizations . . . on . . . a substantive issue of some public interest or social significance."<sup>17</sup> For Pring and Canan, the hallmark of any SLAPP lawsuit is the involvement of activity that implicates the defendant's First Amendment<sup>18</sup> right to petition the government for redress of grievances.<sup>19</sup> Their definition explicitly eschews reliance on the underlying subjective motivation behind the plaintiff's suit as a tool for identifying a SLAPP, instead relying on the nature of the conduct giving rise to the litigation in the first place.<sup>20</sup> Accordingly, it is the implication of a citizen's right to petition that distinguishes a SLAPP from the "everyday retaliatory lawsuits seen in the business, labor, contract and other arenas."<sup>21</sup> Such petitioning activity may include testifying at a local school board or zoning commission meeting; writing letters to public officials; filing a consumer complaint; circulating a petition; lobbying for reform legislation; or participating in a political demonstration.<sup>22</sup>

The status of the parties to SLAPP litigation can vary widely and there are no set categories for who initiates and who is targeted by a SLAPP.<sup>23</sup> However, SLAPPs typically occur in a local setting and relate to a matter of local concern.<sup>24</sup> The targets<sup>25</sup> of SLAPPs are, more often than not, con-

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16. See Braun, *Increasing SLAPP Protection*, *supra* note 10, at 973.

17. PRING & CANAN, *SLAPPS*, *supra* note 6, at 8-9. Pring and Canan developed their criteria as a means of objectively and efficiently identifying SLAPP litigation for inclusion in their extensive research studies on the alleged phenomenon. See PRING & CANAN, *SLAPPS*, *supra* note 6, at 8.

18. U.S. CONST. amend. I.

19. See PRING & CANAN, *SLAPPS*, *supra* note 6, at 8. *But cf.* Joseph W. Beatty, Note, *The Legal Literature on SLAPPS: A Look Behind the Smoke Nine Years After Pring and Canan First Yelled "Fire!"*, 9 U. FLA. J.L. & PUB. POL'Y 85, 96 (1997) (criticizing Pring and Canan for artificially elevating the right to petition above other First Amendment rights for the purposes of constitutional analysis).

20. PRING & CANAN, *SLAPPS*, *supra* note 6, at 8.

21. PRING & CANAN, *SLAPPS*, *supra* note 6, at 8.

22. George W. Pring & Penelope Canan, "Strategic Lawsuits Against Public Participation" ("SLAPPS"): *An Introduction for Bench, Bar, and Bystanders*, 12 BRIDGEPORT L. REV. 937, 938 (1992).

23. See PRING & CANAN, *SLAPPS*, *supra* note 6, at 214-17.

24. See PRING & CANAN, *SLAPPS*, *supra* note 6, at 215. The implication is that larger, nationally-oriented entities have less need to rely on SLAPPs to further their interests

cerned citizens acting primarily on a matter relating to the public interest.<sup>26</sup> In contrast, the parties who initiate SLAPPs, whether an individual or some manner of business organization, are overwhelmingly focused solely on their own economic benefit.<sup>27</sup> The classic SLAPP thus pits the concerned citizen, or group of citizens, against some business interest, such as a land developer or industrial polluter, who would face the prospect of economic loss from the citizens' petitioning activity.<sup>28</sup> The archetypal SLAPP plays out something like this:<sup>29</sup> a group of homeowners, concerned with a land developer's plan to utilize their street as a means of access to a proposed residential subdivision, successfully petitions their local government to have the street de-classified as a public roadway, thereby placing the developer's plan for the new subdivision into jeopardy.<sup>30</sup> The developer's economic interests now at risk, he or she files a lawsuit against the homeowners for slander, conspiring with town officials, and intentionally interfering with the developer's prospective economic advantage.<sup>31</sup> The suit seeks compensatory damages in the millions.<sup>32</sup> The action is eventually dismissed as meritless,<sup>33</sup> but the harm has already been done; having to endure the emotional and financial strain of years of litigation, the defendants, though victorious, have learned all too well the potential consequences of speaking their mind, and they are possibly deterred from ever again interjecting themselves into local politics.<sup>34</sup>

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because their status and economic resources grant them access to more effective means by which to influence political debate. See PRING & CANAN, *SLAPPS*, *supra* note 6, at 216.

25. To avoid confusion when discussing SLAPPs that emerge via counterclaims to already existing lawsuits, Pring and Canan prefer to use the terms "filer" and "target" in lieu of "plaintiff" and "defendant." PRING & CANAN, *SLAPPS*, *supra* note 6, at 9-10. For purposes of this article, the terms plaintiff and defendant are sufficient so long as it is recognized that in certain situations, such as countersuits, the roles can be reversed.

26. See PRING & CANAN, *SLAPPS*, *supra* note 6, at 215. Pring and Canan's empirical conclusions regarding the motives of parties involved in SLAPPs are based on data collected in a national survey conducted in connection with the research study that forms the basis for their book; the findings of the study are appended to the treatise. See PRING & CANAN, *SLAPPS*, *supra* note 6, at 211.

27. See PRING & CANAN, *SLAPPS*, *supra* note 6, at 216.

28. See PRING & CANAN, *SLAPPS*, *supra* note 6, at 213-15, 220.

29. The following hypothetical is based on *Westfield Partners, Ltd. v. Hogan*, 740 F. Supp. 523 (N.D. Ill. 1990). *Westfield* is an oft-cited example of a SLAPP suit. See, e.g., Marnie Stetson, *Reforming SLAPP Reform: New York's Anti-SLAPP Statute*, 70 N.Y.U. L. REV. 1324, 1324 (1995).

30. *Westfield*, 740 F. Supp. at 524.

31. *Id.*

32. *Id.*

33. *Id.* at 527.

34. See PRING & CANAN, *SLAPPS*, *supra* note 6, at 5, 8, 29.

## B. THE CHILLING EFFECTS OF SLAPPS

It is this alleged chilling effect on citizen involvement with government that is the great evil of the SLAPP.<sup>35</sup> The First Amendment right to petition is “among the most precious of the liberties safeguarded by the Bill of Rights.”<sup>36</sup> The First Amendment “embodies our Nation's commitment to popular self-determination and our abiding faith that the surest course for developing sound national policy lies in a free exchange of views on public issues.”<sup>37</sup> Furthermore, no aspect of the First Amendment “is more rightly treasured than its protection of the ability of our people through free and open debate to consider and resolve their own destiny.”<sup>38</sup> SLAPPs chill these important rights in a number of ways.

First, defending a SLAPP can impose significant temporal<sup>39</sup> and financial burdens on the defendant, sapping his or her resolve to move forward with the underlying petitioning activity that gave rise to the SLAPP in the first place.<sup>40</sup> Financial costs to a SLAPP defendant can include legal fees, opportunities lost as a result of time spent defending the suit, and, in cases where the defendants are fortunate enough to have coverage to pay for their defense, increased insurance premiums.<sup>41</sup> Typically, though not always, the plaintiffs in SLAPPs have more substantial financial resources at their disposal with which to prosecute their claims than the defendants have available to counter them.<sup>42</sup> Economically strong plaintiffs are thus in a position to absorb the costs associated with protracted litigation in a manner not usually available to the prospective defendants.<sup>43</sup> This effect is only exacerbated by the often exorbitant damages sought in SLAPP suits.<sup>44</sup> Defendants are thus forced to weigh the importance of exercising their right to be

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35. See, e.g., Braun, *Increasing SLAPP Protection*, *supra* note 10, at 971 (“SLAPP suits chill the right of free expression and free access to government, a double-barreled assault on the core values of our society.”).

36. *United Mine Workers, Dist. 12 v. Ill. State B. Ass'n*, 389 U.S. 217, 222 (1967).

37. *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 862 (1974) (Powell, J., dissenting).

38. *Id.*

39. Pring and Canan found that the average lifespan for a SLAPP lawsuit in the judicial system was 40 months. PRING & CANAN, *SLAPPS*, *supra* note 6, at 218.

40. See Frederick M. Rowe & Leo M. Romero, *Resolving Land-Use Disputes by Intimidation: SLAPP Suits in New Mexico*, 32 N.M. L. REV. 217, 219 (2002).

41. See Costantini & Nash, *supra* note 8, at 420-21 n.9. Costantini and Nash provide a sobering estimate of how high the price can be, estimating that the average cost of defending a libel suit at the time of their article was \$150,000. Costantini & Nash, *supra* note 8, at 420-21 n.9.

42. Braun, *Increasing SLAPP Protection*, *supra* note 10, at 970.

43. Braun, *Increasing SLAPP Protection*, *supra* note 10, at 970.

44. At the time of their national survey, Pring and Canan estimated that the average damages sought by plaintiffs in SLAPP suits was \$9.1 million. PRING & CANAN, *SLAPPS*, *supra* note 6, at 217.

heard against what can appear to be a potentially crippling risk to their personal financial security.<sup>45</sup> The result is that instead of maintaining focus on the political issue that brought about the SLAPP, defendants will almost inevitably attempt to shift their efforts to expeditiously resolving their now preeminent legal troubles.<sup>46</sup> Furthermore, even if a SLAPP defendant is victorious on the merits, he or she will certainly think twice before ever again participating in civic affairs.<sup>47</sup> Such results are exactly what the SLAPP plaintiff desires.<sup>48</sup>

Second, and perhaps more troubling than the direct chilling effect on a particular named defendant, is the ripple effect a SLAPP produces in a given community.<sup>49</sup> Even the hardest of community activists can be deterred from voicing their opinions when they witness their neighbors face lawsuits for similar actions.<sup>50</sup> The irony is that the more important the issue, the greater likelihood the chilling effect will spread through the community.<sup>51</sup> As media coverage would presumably be the greatest for issues of wide appeal or importance, it follows that more of the citizenry will be aware of the potential consequences of voicing their opinion.<sup>52</sup>

The combined result of both the direct and indirect chilling effects brought about by SLAPPs is no less than a distortion of the American process of open government.<sup>53</sup> Simply put, “[i]nstitutions such as a free press and a reasonably neutral government do not work if people are afraid to use them.”<sup>54</sup>

### C. COMBATING SLAPPS

Once the chilling effects of SLAPPs were recognized as a threat to the constitutional rights of citizens, the obvious question was what should (and could) be done to reduce or stop them. However, solutions to the SLAPP

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45. See PRING & CANAN, SLAPPS, *supra* note 6, at 138-39.

46. See PRING & CANAN, SLAPPS, *supra* note 6, at 138-39.

47. See PRING & CANAN, SLAPPS, *supra* note 6, at 5.

48. Braun, *Increasing SLAPP Protection*, *supra* note 10, at 969-70.

49. See ROWE & ROMERO, *supra* note 40, at 219; see also PRING & CANAN, SLAPPS, *supra* note 6, at 11 (“[T]he lives of most SLAPP targets are dramatically altered and the political lives and futures of untold others in the community influenced by the ‘ripple effects’—predominantly the recommendation of those affected that others not speak out or participate in government decision-making.”).

50. See PRING & CANAN, SLAPPS, *supra* note 6, at 219.

51. See ROWE & ROMERO, *supra* note 40, at 219.

52. See ROWE & ROMERO, *supra* note 40, at 219; see also PRING & CANAN, SLAPPS, *supra* note 6, at 219 (explaining the connection between awareness of SLAPPs and the likelihood of future political participation).

53. Braun, *Increasing SLAPP Protection*, *supra* note 10, at 972.

54. Braun, *Increasing SLAPP Protection*, *supra* note 10, at 971-72.

phenomenon are not easy.<sup>55</sup> In addition to the inherent difficulty in identifying SLAPPs,<sup>56</sup> solutions to SLAPP litigation are complicated by the competing interests of prospective plaintiffs to seek redress from the courts and recover damages for injuries sustained and the interests of potential defendants to exercise their rights of speech and petition.<sup>57</sup> Thus, any solution to the problem of SLAPPs must pay careful attention to avoid infringing on one right in favor of another.<sup>58</sup> Different approaches have emerged to combat the SLAPP problem, including countersuits by SLAPP defendants against the plaintiffs,<sup>59</sup> reliance on constitutional legal doctrines,<sup>60</sup> and, perhaps the most prevalent, statutory responses.<sup>61</sup>

Suits by SLAPP defendants against plaintiffs, or "SLAPPbacks" as they are typically known,<sup>62</sup> attempt to turn the tables on the SLAPP plaintiff by filing a countersuit grounded in claims of abuse of judicial process, malicious prosecution, and interference with the defendant's constitutional rights.<sup>63</sup> The idea is that such countersuits will deter potential SLAPP plaintiffs through large damage awards and negative publicity.<sup>64</sup> While Pring and Canan have called the SLAPP-back the "most promising prevention and cure for the SLAPP phenomenon," the tactic is not without its flaws.<sup>65</sup> First, because SLAPP plaintiffs are not concerned with conventional legal victory, traditional remedies to meritless litigation, such as sanctions against the plaintiff attorney or suits for abuse of process or malicious prosecution, are ill-suited to the SLAPP paradigm.<sup>66</sup> Abuse of process or malicious prosecution claims typically cannot arise unless the litigant filing the action has lost the underlying case.<sup>67</sup> This both prolongs litigation, with its attendant costs, and keeps the focus of the dispute in the courts as opposed to the political arena—the exact results the SLAPP plaintiff hopes to

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55. Braun, *Increasing SLAPP Protection*, *supra* note 10, at 972-73.

56. *See supra* note 16 and accompanying text.

57. John C. Barker, *Common-Law and Statutory Solutions to the Problem of SLAPPs*, 26 LOY. L.A. L. REV. 395, 397-98 (1993) [hereinafter Barker, *Common-Law*]; *see also* Barbara Arco, Comment, *When Rights Collide: Reconciling the First Amendment Rights of Opposing Parties in Civil Litigation*, 52 U. MIAMI L. REV. 587 (examining the conflicting rights debate in greater detail).

58. *See, e.g.*, Barker, *Common-Law*, *supra* note 57, at 397-98; Braun, *Increasing SLAPP Protection*, *supra* note 10, at 972-73.

59. *See, e.g.*, Costantini & Nash, *supra* note 8, at 425.

60. *See* Braun, *Increasing SLAPP Protection*, *supra* note 10, at 984-89.

61. *See* statutes cited *infra* note 149.

62. *See, e.g.*, PRING & CANAN, SLAPPS, *supra* note 6, at 168; Costantini & Nash, *supra* note 8, at 425.

63. *See* Costantini & Nash, *supra* note 8, at 425.

64. *See* Costantini & Nash, *supra* note 8, at 425.

65. *See* PRING & CANAN, SLAPPS, *supra* note 6, at 168.

66. *Dixon v. Superior Court*, 36 Cal. Rptr. 2d 687, 693 (Cal. Ct. App. 1994).

67. Braun, *Increasing SLAPP Protection*, *supra* note 10, at 990-91.



achieve.<sup>68</sup> Furthermore, malicious prosecution and abuse of process claims are generally disfavored by courts and success on the merits is difficult.<sup>69</sup> Second, as Pring and Canan themselves point out, the SLAPP-back is only practically feasible if there is a solid chance of success, as attorneys working on a contingency fee basis will only take the case if they see a likelihood of recouping the expenses incurred in developing the action.<sup>70</sup> This prevents the SLAPP-back from being a viable model in all circumstances.<sup>71</sup>

Constitutional remedies to SLAPP suits have also received much attention, particularly the United States Supreme Court's *Noerr-Pennington* doctrine.<sup>72</sup> *Noerr-Pennington* stems from a series of Supreme Court cases in the antitrust arena.<sup>73</sup> The doctrine has its origins in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, where the Court reviewed a trucking association's allegations that a publicity and lobbying campaign directed by competitor railroads violated federal antitrust statutes.<sup>74</sup> The Court held that the Petition Clause<sup>75</sup> exempted the railroads' conduct from application of the statute, regardless of whether it was anti-competitive in nature, because their conduct was directed at influencing government decisions.<sup>76</sup> However, the Court also stated in dicta that situations might arise where a "publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified."<sup>77</sup> The Court later seized upon *Noerr's* so-called "sham exception"<sup>78</sup> and held that a trucking conglomerate was not immune from anti-

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68. Braun, *Increasing SLAPP Protection*, *supra* note 10, at 991.

69. See Levin v. King, 648 N.E.2d 1108, 1110 (Ill. App. Ct. 1995). King is a prototypical SLAPP-back and exemplifies the inherent difficulties in the SLAPP-back model.

70. See PRING & CANAN, SLAPPS, *supra* note 6, at 185-86.

71. See PRING & CANAN, SLAPPS, *supra* note 6, at 185-86.

72. See, e.g., PRING & CANAN, SLAPPS, *supra* note 6, at 15-29; Braun, *Increasing SLAPP Protection*, *supra* note 10, at 980-83; Erin Malia Lum, Note, *Hawai'i's Response to Strategic Litigation Against Public Participation and the Protection of Citizens' Right to Petition the Government*, 24 U. HAW. L. REV. 411, 417-22 (2007).

73. *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

74. *Noerr*, 365 U.S. at 129. In particular, the truckers alleged violations of the Sherman Act, 15 U.S.C. §§ 1-2 (2000). *Id.*

75. U.S. CONST. amend. I ("Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.").

76. *Noerr*, 365 U.S. at 138, 145. The Court affirmed *Noerr* in the subsequent case of *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965), where it reversed an award of damages against a coal miner's union because the damages were based in large part on the union's attempts to influence government decision making relating to miners' wages. *Pennington*, 381 U.S. at 670-72.

77. *Noerr*, 365 U.S. at 144.

78. See, e.g., Braun, *Increasing SLAPP Protection*, *supra* note 10, at 982.

trust liability when their petitioning activity was aimed at denying their competition "meaningful access" to the courts.<sup>79</sup>

In *City of Columbia v. Omni Outdoor Advertising, Inc.*, the Court clarified when a defendant's conduct constituted such a "sham."<sup>80</sup> Omni Outdoor Advertising filed an antitrust suit against a competitor, alleging that the competitor was conspiring with Columbia, South Carolina city officials to prevent Omni from entering the local billboard market.<sup>81</sup> The lower court found for Omni and awarded damages.<sup>82</sup> In reversing the decision, the Supreme Court found the competitor's actions were immune from anti-trust liability because they were a "genuine attempt to influence governmental action."<sup>83</sup> The Court stated that "[t]he 'sham' exception to *Noerr* encompasses situations in which persons use the governmental *process* - as opposed to the *outcome* of that process - as an anticompetitive weapon."<sup>84</sup>

The Court later adopted a two-part test to determine when ostensible petitioning activity was a "sham" not genuinely aimed at influencing government action and therefore not protected by the general *Noerr* immunity.<sup>85</sup> To constitute a "sham," petitioning activity must first be "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits."<sup>86</sup> Second, and only if the court finds that the petitioner's activity was objectively baseless, the subjective intent of the petitioner must be examined to determine "whether the baseless lawsuit conceals 'an attempt to interfere *directly* with the business relationships of a competitor.'"<sup>87</sup>

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79. *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 512, 516 (1972).

80. *See City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 380 (1991).

81. *Id.* at 368-69.

82. *Id.* at 369.

83. *Id.* at 382.

84. *Id.* at 380.

85. *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993). *Professional Real Estate Investors* involved an antitrust action by a group of hotel operators against a number of major motion picture studios. *Id.* at 52. The dispute originated when the studios filed a copyright suit against the hotel operators for improperly renting and distributing copies of recorded movies to which the studios held the rights. *Id.* The hotels counterclaimed and sought damages for restraint of trade and conspiracy. *Id.* They alleged that the *Noerr* immunity should not apply because the studios' copyright suit was really just a sham designed to cover up their monopolistic and anti-competitive motives. *Id.* at 54. The Court was tasked with deciding whether subjective or objective criteria govern the determination of whether a petitioner's actions were "genuinely" aimed at procuring favorable government action. *Id.* at 57.

86. *Id.* at 60.

87. *Id.* at 60-61 (quoting *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961)).

Although the *Omni* decision was lauded for articulating a clear, simple test that would allow for early and efficient dismissal of SLAPPs,<sup>88</sup> the efficacy of the *Noerr-Pennington* doctrine to deal with SLAPPs expeditiously enough to avoid their chilling effects is still somewhat uncertain.<sup>89</sup> Furthermore, while various federal courts, including the Supreme Court, have used the logic of *Noerr-Pennington* beyond its antitrust origins,<sup>90</sup> the propriety of doing so has been vigorously criticized.<sup>91</sup> However, *Noerr-Pennington* has been influential in the development of what appears to have now become the primary method employed to combat SLAPPs—the state “anti-SLAPP” statute.<sup>92</sup>

### III. THE ILLINOIS CITIZEN PARTICIPATION ACT

#### A. LEGISLATIVE HISTORY OF THE ILLINOIS CITIZEN PARTICIPATION ACT

The CPA was not the first attempt by Illinois legislators to enact some form of anti-SLAPP remedy: several bills had been introduced in previous General Assemblies, but all withered and eventually died in committee.<sup>93</sup>

88. PRING & CANAN, SLAPPS, *supra* note 6, at 26.

89. See Stetson, *supra* note 29, at 1340 (arguing that because the current incarnation of *Noerr-Pennington* requires at least some inquiry into the intent of the litigants, a jury trial could be in order and preclude an early resolution of the SLAPP); see also Lum, *supra* note 72, at 420 (arguing that *Noerr-Pennington*, while “providing guidelines for protection of First Amendment petitioning rights [does] not constitute a formal ‘test’ for determining the scope of protection to be afforded”).

90. See, e.g., NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982) (applying the logic of *Noerr-Pennington* to the civil rights action); *Manistee Town Center v. City of Glendale*, 227 F.3d 1090, 1091-93 (9th Cir. 2000) (utilizing *Noerr-Pennington* in context of § 1983 action).

91. See Christopher L. Sagers, *The Legal Structure of American Freedom and the Provenance of the Antitrust Immunities*, 2002 UTAH L. REV. 927, 932 (2002) (arguing that *Noerr-Pennington* has been improperly applied outside the antitrust arena); Beatty, *supra* note 19, at 102 (arguing that interpreting *Claiborne* to extend *Noerr-Pennington* beyond the antitrust context is to misread the case).

92. See PRING & CANAN, SLAPPS, *supra* note 6, at 199-201 (discussing how Minnesota and Rhode Island have incorporated language from the *Noerr-Pennington* line of cases into their anti-SLAPP laws).

93. These include Senate Bill 1633 and House Bill 4315 introduced in 2002 and Senate Bill 168 and House Bill 2649 introduced in 2003. While not identical to the CPA, the bills were all similarly aimed at immunizing Illinois citizens from SLAPP-style lawsuits. To find the status and history of any of the above bills, see the Illinois General Assembly’s website at <http://www.ilga.gov> (follow “Previous General Assemblies” hyperlink; select the appropriate legislative session from the drop-down menu, “92nd (2002-2003)” for Senate Bill 1633 and House Bill 4315, “93rd 2003-2004” for Senate Bill 168 and House Bill 2649; then select the “Search” option next to the topic “Legislation & Laws”; then enter the appropriate bill number into the search field, for example “HB4135” for House Bill 4315). While the failure of the bills to pass is ultimately a political matter and likely impossible to ascer-

The CPA avoided the fate of previous efforts and was passed unanimously by both the Illinois House and Illinois Senate.<sup>94</sup> Proponents of the bill claimed it was “common-sense” legislation designed to protect a citizen’s right to speak out on important issues.<sup>95</sup> Not surprisingly, two supporters of the bill, State Representatives Jack D. Franks and Sara Feigenholtz, mentioned specific cases within their respective districts as evidence of the problem.<sup>96</sup> Although the details were limited, both situations involved land developers suing citizen advocates over public issues—classic SLAPP territory.<sup>97</sup> Notably, Representative Franks specifically stated that the CPA was directly based on the Supreme Court’s *Omni* decision.<sup>98</sup> Absent one alteration, the bill was enacted as introduced with little or no debate.<sup>99</sup>

#### B. SUBSTANTIVE AND PROCEDURAL PROVISIONS OF THE ILLINOIS CITIZEN PARTICIPATION ACT

The preamble to the CPA states that “[t]he information, reports, opinions, claims, arguments, and other expressions provided by citizens are vital to effective law enforcement, the operation of government, the making of public policy and decisions, and the continuation of representative democracy.”<sup>100</sup> Accordingly, the self-announced public policy behind the CPA is to “encourage[] and safeguard[] with great diligence” the “constitutional rights of citizens and organizations to be involved and participate freely in

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tain, in speaking to the Illinois House Judiciary Committee in relation to the CPA, State Representative Jack D. Franks alluded to conflicting lobbying efforts as the reason for the previous failures. Audio recording: Proceedings of the Ill. H. Judiciary Comm., 95th Ill. Gen. Assem. (May 8, 2007) (on file with author).

94. See B. Status for S.B. 1434, 95<sup>th</sup> Gen. Assem. (Ill. 2007), 15 LEGIS. SYNOPSIS & DIGEST, at 926-27, available at <http://www.ilga.gov> (follow “Bills and Resolutions” hyperlink; enter “SB1434” into the search field on the left of the page; then select the “Votes” tab at the top; the resulting page will display links to the voting records for both the Illinois House and Senate on the CPA).

95. See Audio recording: Proceedings of the Ill. H. Judiciary Comm., 95th Ill. Gen. Assem. (May 8, 2007) (on file with author).

96. See Audio recording: Proceedings of the Ill. H.R., Floor Debate, Third Reading, 95th Ill. Gen. Assem. (May 31, 2007) (on file with author).

97. *Id.*

98. *Id.*

99. The solitary amendment by the Illinois Senate dealt with Section 5 of the CPA. The bill initially cited “[t]he threat of SLAPPs, personal liability, and burdensome litigation costs” as the chilling effects the CPA was designed to prevent, however, the amendment removed the “personal liability, and burdensome litigation costs” language. See B. Status for S.B. 1434, 95th Gen. Assem. (Ill 2007), 15 LEGIS. SYNOPSIS & DIGEST, at 926-27, available at <http://www.ilga.gov> (follow “Bills and Resolutions” hyperlink; enter “SB1434” into the search field on the left of the page; then select “Senate Floor Amendment No. 1” hyperlink). See discussion *infra*, Part III.

100. Citizen Participation Act, Pub. Act 95-506, § 5, 2007 Ill. Legis. Serv. 5223 (West) (codified at 735 ILL. COMP. STAT. ANN. 110/5).

the process of government” and ensure that the “laws, courts, and other agencies of this State . . . provide the utmost protection for the free exercise of these rights of petition, speech, association, and government participation.”<sup>101</sup>

In addition to the policy underlying the CPA, the Act states four explicit goals. First, the CPA attempts “to strike a balance between the rights of persons to file lawsuits for injury and the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government.”<sup>102</sup> Second, it attempts “to protect and encourage public participation in government to the maximum extent permitted by law.”<sup>103</sup> The third purpose is “to establish an efficient process for identification and adjudication of SLAPPs.”<sup>104</sup> Finally, the Act “provide[s] for attorney’s fees and costs to prevailing movants.”<sup>105</sup>

The CPA attempts to achieve its stated goals through a series of substantive and procedural mechanisms: first, it explicitly immunizes certain activity from civil liability;<sup>106</sup> second, it provides for expedited judicial handling of motions filed under the CPA, including an accelerated appellate process and cessation of discovery;<sup>107</sup> and third, it mandates a prevailing movant be awarded reasonable attorney’s fees and costs incurred in connection with the motion.<sup>108</sup>

The heart of the CPA is its broad grant of conditional immunity for First Amendment activity derived from the Supreme Court’s *Omni* decision.<sup>109</sup> Section 15 of the CPA<sup>110</sup> states that “[a]cts in furtherance of the constitutional rights to petition, speech, association, and participation in government are immune from liability, regardless of intent or purpose, ex-

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101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. Citizen Participation Act, Pub. Act 95-506, § 15, 2007 Ill. Legis. Serv. 5224 (West) (codified at 735 ILL. COMP. STAT. ANN. 110/15).

107. Citizen Participation Act, Pub. Act 95-506, § 20, 2007 Ill. Legis. Serv. 5224 (West) (codified at 735 ILL. COMP. STAT. ANN. 110/20).

108. Citizen Participation Act, Pub. Act 95-506, § 25, 2007 Ill. Legis. Serv. 5224 (West) (codified at 735 ILL. COMP. STAT. ANN. 110/25).

109. According to proponents of the CPA, the conditional immunity language comes directly from the Supreme Court’s *Omni* case. Memorandum in Support of Senate Bill 1434 (“The Citizen Participation Act”), from Mary Dixon, Legislative Dir. of the Am. Civil Liberties Union of Ill. to Rod Blagojevich, Ill. Governor (June 18, 2007), available at <http://www.aclu-il.org/legislative/alerts/sb1434memo.pdf> [hereinafter Dixon, ACLU Memorandum in Support].

110. Pub. Act 95-506, § 15.

cept when not genuinely aimed at procuring favorable government action, result, or outcome.”<sup>111</sup>

A defendant can seek to have a plaintiff’s case dismissed under the CPA by filing a motion that essentially invokes the immunity.<sup>112</sup> No particular type of motion is required; it may take a number of different forms, including a motion to dismiss, motion for summary judgment, or motion to strike.<sup>113</sup> The motion must allege that a plaintiff’s claim is “based on, relates to, or is in response to any act or acts of the moving party in furtherance of the moving party’s rights of petition, speech, association, or to otherwise participate in government.”<sup>114</sup>

Once the motion has been filed, the CPA mandates that a hearing be held and that the trial court render a decision within ninety days of the respondent receiving notice of the filing.<sup>115</sup> All discovery is stayed pending resolution of the motion, however, the court may grant limited discovery on the issue of whether the moving party’s acts fall under the immunity provisions of section 15, provided that the responding party show good cause for allowing the limited discovery.<sup>116</sup> The court has an obligation to grant the defendant’s motion unless the responding party produces clear and convincing evidence that the acts giving rise to the suit were not immunized from liability.<sup>117</sup> Thus, once a defendant files a motion invoking the immunity provision of section 15, the burden of production, which would typically shift to the defendant once the plaintiff establishes they have at least some evidence to support the allegations contained in the complaint, shifts back to the plaintiff to disprove the immunity by clear and convincing evidence.<sup>118</sup>

The responding party can meet this burden in one of two ways: either by producing clear and convincing evidence that the defendant’s acts were in no way connected to the rights immunized, or by proving that the acts, while ostensibly in furtherance of the defendant’s immunized rights, were not “genuinely aimed at procuring favorable government action, result, or

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111. *Id.*

112. *See id.*

113. For purposes of the CPA, “motion” is defined broadly, including “any motion to dismiss, for summary judgment, or to strike, or any other judicial pleading filed to dispose of a judicial claim.” Citizen Participation Act, Pub. Act 95-506, § 10, 2007 Ill. Legis. Serv. 5223 (West) (codified at 735 ILL. COMP. STAT. ANN. 110/10).

114. Pub. Act 95-506, § 15.

115. Citizen Participation Act, Pub. Act 95-506, § 20(a), 2007 Ill. Legis. Serv. 5224 (West) (codified at 735 ILL. COMP. STAT. ANN. 110/20(a)).

116. Pub. Act 95-506, § 20(b).

117. Pub. Act 95-506, § 20(c).

118. *See generally* City of Chicago v. Ill. Workers’ Comp. Comm’n, 871 N.E.2d 765, 774 (Ill. App. Ct. 2007) (discussing the usual sequence of burden shifts in Illinois).

outcome.”<sup>119</sup> Should the responding party fail to do so, the CPA requires that the movant be awarded reasonable attorney’s fees and costs associated with the section 15 motion.<sup>120</sup> Additionally, should the trial court deny the defendant’s motion or fail to rule on it within the prescribed ninety days, the CPA mandates an expedited appeals process.<sup>121</sup>

When viewed in totality, the substantive and procedural mechanisms of the CPA appear to extend beyond the conduct implicated by the classic SLAPP paradigm. Using Pring and Canan’s definition of SLAPP<sup>122</sup> as a baseline, an overview of the CPA will show that it can apply to conduct far outside that deemed essential to SLAPP nexus. First, where Pring and Canan focus on the right to petition as the definitive hallmark of the SLAPP,<sup>123</sup> the CPA applies not only to acts in furtherance of a citizen’s right to petition, but also acts in furtherance of a citizen’s rights to “speech, association, or to otherwise participate in government.”<sup>124</sup> Second, while Pring and Canan’s definition of a SLAPP includes a public interest component,<sup>125</sup> the CPA contains no language limiting application of its provisions to situations where a matter of social or civic concern is at issue.<sup>126</sup> This divergence from the carefully crafted definition of SLAPPs put forth by academicians catapults the CPA into the ranks of the most expansive anti-SLAPP legislation enacted by other jurisdictions.<sup>127</sup>

#### IV. ANTI-SLAPP LEGISLATION AND THE EFFECTIVENESS OF THE ILLINOIS CITIZEN PARTICIPATION ACT

There is one overarching problem connected with the provisions of the CPA as enacted: because the CPA’s grant of conditional immunity is broad and potentially sweeping in its coverage, the CPA could, on its face, violate

119. Pub. Act 95-506, § 15. However, nowhere does the CPA define or provide a test for what exactly delineates genuine from non-genuine actions.

120. Citizen Participation Act, Pub. Act 95-506, § 25, 2007 Ill. Legis. Serv. 5224 (West) (codified at 735 ILL. COMP. STAT. ANN. 110/25) (“The court shall award a moving party who prevails in a motion under this Act reasonable attorney’s fees and costs incurred in connection with the motion.”).

121. Pub. Act 95-506, § 20(a) (“An appellate court shall expedite any appeal or other writ, whether interlocutory or not, from a trial court order denying that motion or from a trial court’s failure to rule on that motion within 90 days after that trial court order or failure to rule.”).

122. See *supra* note 17 and accompanying text.

123. See *supra* note 17 and accompanying text.

124. Pub. Act 95-506, § 15.

125. See *supra* note 17 and accompanying text.

126. See Pub. Act 95-506, § 15.

127. See RODNEY A. SMOLLA, LAW OF DEFAMATION, § 9:109 (2d ed. 1999 & Supp 2007) (discussing how some anti-SLAPP statutes apply suits well outside Pring and Canan’s SLAPP definition).

the balance it seeks to achieve between rights of citizens to freely speak, petition, associate, and otherwise participate in the process of government and the rights of potential plaintiffs to utilize the courts to recover for injuries incurred.<sup>128</sup> In contrast to other states that have limited use of their respective anti-SLAPP statutes to defined sets of circumstances,<sup>129</sup> the CPA's broad language may result in its application to a host of potential situations for which it was not designed. This broad applicability could chill potential plaintiffs from filing suit for otherwise valid claims and result in defendants bringing frivolous motions in hopes of benefiting from the powerful mechanisms the CPA provides for dismissing a lawsuit. In order to counteract these potential effects, Illinois courts will have to clarify what constitutes activity "genuinely aimed at procuring favorable government action, result, or outcome"<sup>130</sup> to provide guidance to trial courts and practitioners in utilizing the CPA. Additionally, the Illinois General Assembly should consider amending the CPA to allow a prevailing plaintiff to recover attorney's fees and costs should he or she prove that a defendant's motion was frivolous or dilatory in nature.<sup>131</sup>

#### A. THE RIGHTS AT ISSUE

The United States Constitution protects the rights of persons to speak, associate, and petition the government for redress of grievances.<sup>132</sup> The United States Supreme Court has held that the right to petition includes a right of access to the courts.<sup>133</sup> The Illinois Constitution provides similar protections, guaranteeing the rights of persons to "speak, write and publish freely,"<sup>134</sup> to "assemble in a peaceable manner" and "to make known their opinions to their representatives and to apply for redress of grievances."<sup>135</sup> Thus, citizens have both the right to speak their minds freely and have their voices heard by their political leaders and to turn to the courts for a remedy

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128. Citizen Participation Act, Pub. Act 95-506, § 5, 2007 Ill. Legis. Serv. 5223 (West) (codified at 735 ILL. COMP. STAT. ANN. 110/5).

129. See *infra* note 153 and accompanying text.

130. Pub. Act 95-506, § 15.

131. See Lum, *supra* note 72, at 436 (arguing for Hawaii to similarly amend its anti-SLAPP statute).

132. U.S. CONST. amend. I.

133. Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972) ("Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition.").

134. ILL. CONST. art. I, § 4.

135. ILL. CONST. art. I, § 5.



when they have been wronged. It is the careful balancing of these important rights that the CPA attempts to achieve.<sup>136</sup>

B. THE SCOPE AND APPLICABILITY OF THE ILLINOIS CITIZEN PARTICIPATION ACT

Anti-SLAPP statutes can prove to be powerful tools for potential civil defendants.<sup>137</sup> If used improperly, they can seemingly mirror the harm sought to be prevented by anti-SLAPP legislation in the first place.<sup>138</sup> A particular danger inherent in anti-SLAPP statutes is that when constructed or construed too broadly in protecting the rights of defendants, they may impose a counteractive chilling effect on prospective plaintiffs' own rights to seek redress from the courts for injuries suffered.<sup>139</sup> The question that inevitably arises is whether the provisions of the CPA properly effectuate its stated purpose of "striking a balance between the rights of persons to file lawsuits for injury and the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government."<sup>140</sup>

As enacted, the CPA could arguably overstep its boundaries and fail in its stated goals of balancing the interests of civil defendants and plaintiffs by placing a substantial chill on any prospective plaintiff's right to seek redress from the courts. Given its wide grant of immunity,<sup>141</sup> suspension of discovery,<sup>142</sup> limited fee-shifting arrangements,<sup>143</sup> and liberalization provisions,<sup>144</sup> the CPA arguably provides potential civil defendants an enticing tool to rid themselves of the strain of a lawsuit without providing adequate security for a plaintiff's countervailing interests. The CPA not only auto-

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136. See Citizen Participation Act, Pub. Act 95-506, § 5, 2007 Ill. Legis. Serv. 5223 (West) (codified at 735 ILL. COMP. STAT. ANN. 110/5).

137. See *Briggs v. Eden Council for Hope & Opportunity*, 969 P.2d 564, 579 (Cal. 1999) (Baxter, J., dissenting) (calling the anti-SLAPP statute a "drastic and extraordinary remedy").

138. See Joshua L. Baker, *Chapter 338: Another New Law, Another SLAPP in the Face of California Business*, 35 MCGEORGE L. REV. 409, 413-14 (2004) (arguing that some California defendants were bringing anti-SLAPP motions to "increase the time and expense for plaintiffs' attorneys to handle these cases") [hereinafter *Baker, Chapter 338*].

139. See SMOLLA, *supra* note 127, at § 9:109 (explaining the chilling effect of anti-SLAPP statutes on plaintiffs in libel suits).

140. Pub. Act 95-506, § 5.

141. Citizen Participation Act, Pub. Act 95-506, § 15, 2007 Ill. Legis. Serv. 5224 (West) (codified at 735 ILL. COMP. STAT. ANN. 110/15).

142. Citizen Participation Act, Pub. Act 95-506, § 20(b), 2007 Ill. Legis. Serv. 5224 (West) (codified at 735 ILL. COMP. STAT. ANN. 110/20(b)).

143. Citizen Participation Act, Pub. Act 95-506, § 25, 2007 Ill. Legis. Serv. 5224 (West) (codified at 735 ILL. COMP. STAT. ANN. 110/25).

144. The CPA specifically states it is to be "construed liberally to effectuate its purposes and intent fully." Citizen Participation Act, Pub. Act 95-506, § 30(b), 2007 Ill. Legis. Serv. 5224 (West) (codified at 735 ILL. COMP. STAT. ANN. 110/30(b)).

matically shifts the burden of production to the plaintiff to disprove the defendant's allegations that the acts complained of arise from the defendant's constitutional rights of petition, speech, and association,<sup>145</sup> but also mandates that attorneys' fees related to the motion be awarded to the defendant should the plaintiff fail to meet his or her burden.<sup>146</sup> Additionally, any defendant can invoke the provisions of the CPA simply by alleging that their acts were in furtherance of their immunized constitutional rights and that the plaintiff's lawsuit relates to such immunized activity.<sup>147</sup> The danger thus exists that plaintiffs will be chilled from bringing otherwise meritorious claims because those claims happen to resemble a typical SLAPP and, by bringing suit, the plaintiff risks incurring increased expenses should he or she fail to prove the defendant's acts were not immunized.<sup>148</sup>

### C. THE CPA COMPARED TO ANTI-SLAPP LEGISLATION FROM OTHER JURISDICTIONS

Well over twenty states have enacted some manner of statute aimed at addressing the problem of SLAPPs.<sup>149</sup> While often containing similar mechanisms to achieve their respective ends, such as stays on discovery, fee-shifting arrangements, and expedited judicial handling, SLAPP statutes vary considerably in the scope and breadth of their coverage.<sup>150</sup> When the

145. See Citizen Participation Act, Pub. Act 95-506, § 20(c), 2007 Ill. Legis. Serv. 5224 (West) (codified at 735 ILL. COMP. STAT. ANN. 110/20(c)).

146. See Pub. Act 95-506, § 25.

147. See Pub. Act 95-506, § 15.

148. Sean P. Trende, *Defamation, Anti-SLAPP Legislation and the Blogosphere: New Solutions for an Old Problem*, 44 DUQ. L. REV. 607, 645-46 (2006) (acknowledging that the fee-shifting arrangements of anti-SLAPP legislation can chill a plaintiff's desire to bring suit).

149. ARK. CODE ANN. §§ 16-63-501 to 508 (West 2005); CAL. CIV. PROC. CODE §§ 425.16-18 (West 2004 & Supp. 2008); DEL. CODE ANN. tit. 10, §§ 8136-8138 (1999); FLA. STAT. ANN. § 768.295 (West 2005); GA. CODE ANN. § 9-11-11.1 (2006); HAW. REV. STAT. ANN. §§ 634F1 to 634F4 (West, Westlaw through 2007, Act 126); IND. CODE ANN. §§ 34-7-7-1 to 34-7-7-10 (West 1999); LA. CODE CIV. PROC. ANN. art. 971 (2005); ME. REV. STAT. ANN. tit. 14, § 556 (2003); MASS. GEN. LAWS ANN. ch. 231, § 59H (West 2000); MINN. STAT. ANN. §§ 554.01 to 554.05 (West 2000); MO. ANN. STAT. § 537.528 (West, Westlaw through 2007 First Extraordinary Session of the 94th Gen. Assem.); NEB. REV. STAT. §§ 25,241 to 25,246 (1995); NEV. REV. STAT. ANN. §§ 41.650 to 41.670 (LexisNexis 2006); N.M. STAT. ANN. §§ 38-2-9.1 to 38-2-9.2 (LexisNexis 1998 & Supp. 2007); N.Y. CIV. RIGHTS LAW §§ 70-a, 76-a (McKinney Supp. 2008); OR. REV. STAT. ANN. §§ 31.150 to 31.155 (Supp. 2007); 27 PA. CONS. STAT. ANN. §§ 7707, 8301 to 8305 (Supp. 2007); R.I. GEN. LAWS §§ 9-33-1 to 9-33-4 (1997); TENN. CODE ANN. §§ 4-21-1001 to 4-21-1004 (2005); UTAH CODE ANN. §§ 78-58-101 to 78-58-105 (2002); WASH. REV. CODE ANN. §§ 4.24.500 to 4.24.520 (West 2005).

150. SMOLLA, *supra* note 127, at § 9:109. See, e.g., FLA. STAT. ANN. § 768.295 (West 2005) (limiting application of anti-SLAPP statute to suits brought by government agencies); NEV. REV. STAT. ANN. §§ 41.650 to 41.670 (LexisNexis 2006) (limiting applica-

CPA is compared to legislation from other states, its broad applicability becomes apparent and it arguably ranks amongst the most sweeping anti-SLAPP statutes enacted to date.

In contrast to Illinois' broad grant of immunity to any defendant who alleges their conduct was protected First Amendment activity,<sup>151</sup> some states allow only certain classes of defendants to utilize an anti-SLAPP motion.<sup>152</sup> For example, defendants in Delaware, Nebraska, and New York can only avail themselves of the protection afforded by the states' anti-SLAPP statutes if they are sued by a "public applicant or permittee" and the lawsuit relates to actions on the part of the defendant to oppose or comment on efforts by the plaintiff to secure some type of favorable government endorsement, such as a zoning change, lease, or building permit.<sup>153</sup> Florida is even more restrictive, allowing only defendants actually sued by governmental entities to take shelter under the state's anti-SLAPP protections.<sup>154</sup> While statutes of this type have been criticized as being so narrow as to exclude significant numbers of SLAPPs from their coverage,<sup>155</sup> they have the benefit of precisely applying only to classic SLAPP paradigms, such as developers suing citizens over their opposition to a zoning proposal.<sup>156</sup>

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tion of anti-SLAPP statute to defendants sued because of "good faith communication in furtherance of the right to petition."); 27 PA. CONS. STAT. ANN. § 8302 (Supp. 2007) (limiting application of anti-SLAPP statute to environmental cases).

151. See Citizen Participation Act, Pub. Act 95-506, § 15, 2007 Ill. Legis. Serv. 5224 (West) (codified at 735 ILL. COMP. STAT. ANN. 110/15).

152. SMOLLA, *supra* note 127, at § 9:109.

153. DEL. CODE ANN. tit. 10, § 8136(a)(1) (1999) ("An 'action involving public petition and participation' is an action, claim, cross-claim or counterclaim for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, rule on, challenge or oppose such application or permission."); NEB. REV. STAT. § 25-21,242(1) (1995) ("Action involving public petition and participation shall mean an action, claim, cross-claim, or counterclaim for damages that is brought by a public applicant or permittee and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge, or oppose the application or permission;"); N.Y. CIV. RIGHTS LAW § 76-a(1)(a) (McKinney Supp. 2008) ("An 'action involving public petition and participation' is an action, claim, cross claim or counterclaim for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission;").

154. See FLA. STAT. ANN. § 768.295(5) (West 2005) (limiting relief under the anti-SLAPP statute to "[a] person or entity sued by a governmental entity").

155. See PRING & CANAN, *supra* note 6, at 194. (stating that New York's statute may cover less than half of all SLAPPs); see also Lum, *supra* note 72, at 426-27 (echoing Pring and Canan's assessment).

156. SMOLLA, *supra* note 127, at § 9:109; Arco, *supra* note 57, at 597 (stating that the Delaware, Nebraska and New York statutes "impart a precise standard for courts to apply in discerning whether the target's activity is absolutely immune from liability").

## D. THE NEW YORK EXPERIENCE

An example of the advantages and disadvantages of the narrow applicability of these types of statutes compared with the more broad immunity granted by the CPA can be seen in the New York case of *Gill Farms, Inc. v. Darrow*.<sup>157</sup> In *Gill Farms*, the defendant responded to what she believed was the improper spraying of aerial pesticides at a neighboring farm by complaining to government officials and starting an advocacy group ostensibly designed to educate the public about the dangers associated with pesticide spraying.<sup>158</sup> The neighboring farmers claimed the defendant falsified her complaints to government officials and that she had tortiously levied threats against the contractor they employed to spray their fields, causing him to quit, which, in turn, resulted in an infestation and complete loss of the farmers' crops.<sup>159</sup> The farmers sued the defendant for tortious interference with their business and intentional infliction of emotional distress.<sup>160</sup> On its face, the plaintiffs' claim appeared to be a prototypical SLAPP<sup>161</sup> and the defendant moved for dismissal under New York's anti-SLAPP legislation.<sup>162</sup> The trial court denied the defendant's motion and the appellate court affirmed, holding that the anti-SLAPP statute was inapplicable because the plaintiff farmers had never applied for a permit to conduct aerial pesticide spraying and therefore, they were not a "public applicant or permittee" for purposes of the New York anti-SLAPP statute.<sup>163</sup>

The *Darrow* result might seem somewhat unjustified and overly technical on its face because it involves litigation that would likely qualify as a SLAPP but the court was unable to employ the anti-SLAPP statute to dismiss the farmers' case.<sup>164</sup> However, it shows how through the use of the "permittee" requirement New York has maintained a closer connection between direct petitioning of government and statutory immunity from SLAPPs than Illinois has with its broad grant of conditional immunity.

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157. 682 N.Y.S.2d 306 (N.Y. App. Div. 1998).

158. *Id.* at 307.

159. *Id.* at 307-08.

160. *Id.* at 308.

161. The plaintiff's suit seems to meet all of Pring and Canan's requirements to be classified as a SLAPP—by complaining to government officials, the defendant was engaged in petitioning activity presumably designed to spur government action, such as levying a fine against the plaintiffs or enjoining their spraying activities. The actions resulted in a claim for damages against the defendant, and the subject of the suit concerned a matter of public interest, namely the potential harm caused by aerial pesticide spraying. *See supra* note 17 and accompanying text.

162. *Darrow*, 682 N.Y.S.2d at 308.

163. *Id.* at 309.

164. *See id.* at 997-98.

This arguably leads to a more even balancing of rights between defendants' rights to speech and petition and plaintiffs' right to redress.

Had the *Darrow* case occurred in Illinois after passage of the CPA, the result would likely be strikingly different. The defendant's petitioning and speech activity would be immunized, even if it was maliciously directed at injuring the plaintiff farmers,<sup>165</sup> unless the farmers could clearly establish that the defendant's complaints to government officials or the activities of the public advocacy group were not immunized activity or were not genuinely aimed at procuring favorable government action,<sup>166</sup> a burden it seems they would have been unlikely to meet. Under the CPA, the burden of production would rest with the farmers to disprove the immunity of the defendant's actions,<sup>167</sup> not with the defendant to establish the status of the plaintiff.<sup>168</sup>

By limiting the scope of its anti-SLAPP provisions, the New York law sacrifices protection for some speech and petitioning activities in exchange for a more precise and limited scope of applicability—and a greater connection with direct petitioning activity between citizen and government.<sup>169</sup> This better protects plaintiffs' rights by lessening the number and type of circumstances under which an otherwise legitimate or viable suit could be dismissed as a SLAPP. In contrast, the CPA's broad applicability provides greater protection for a defendant's rights to petition and speech, but reduces protection for a plaintiff's right to seek redress from the courts by placing the burden of production on the plaintiff to disprove the immunity of the defendant's activities<sup>170</sup> and by allowing the provisions of the act to be invoked in all cases, without any need to prove the status of the litigating parties.<sup>171</sup>

Other state statutes, while more inclusive than those based on the respective status of the defendant and plaintiff, still retain some required connection between a defendant's acts and an attempt to directly influence the

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165. Citizen Participation Act, Pub. Act 95-506, § 15, 2007 Ill. Legis. Serv. 5224 (West) (codified at 735 ILL. COMP. STAT. ANN. 110/15) (providing that a defendants constitutional acts are immune from liability "*regardless of intent or purpose*") (emphasis added).

166. *Id.*

167. *See id.*

168. New York law places the burden of establishing the permittee status of the plaintiff on the movant. *See* N.Y. C.P.L.R. 3211(g) (McKinney 2005 & Supp. 2008) (describing burden for anti-SLAPP statute in regard to motion to dismiss); N.Y. C.P.L.R. 3212(h) (McKinney 2005 & Supp. 2008) (describing burden for anti-SLAPP statute in regard to motion for summary judgment).

169. *See* Arco, *supra* note 57, at 587.

170. Citizen Participation Act, Pub. Act 95-506, § 20(c), 2007 Ill. Legis. Serv. 5224 (West) (codified at 735 ILL. COMP. STAT. ANN. 110/20(c)).

171. *See* Citizen Participation Act, Pub. Act 95-506, § 5, 2007 Ill. Legis. Serv. 5223 (West) (codified at 735 ILL. COMP. STAT. ANN. 110/5).

actions of a governmental deliberative body.<sup>172</sup> For example, New Mexico's anti-SLAPP statute is limited to "conduct or speech undertaken or made in connection with a public hearing or public meeting in a quasi-judicial proceeding."<sup>173</sup> Hawaii's anti-SLAPP statute is similar but more limited, extending its coverage to situations where a defendant is sued for statements or acts constituting "public participation," defined as "any oral or written testimony submitted or provided to a governmental body during the course of a governmental proceeding."<sup>174</sup> Like the New York model, these types of statutes limit the availability of an anti-SLAPP motion to a defined set of circumstances, albeit circumstances defined by the place and manner of the defendant's alleged petitioning activities rather than the status of the person or entity to whom those activities relate. By doing so, they strike a balance between defendants' and plaintiffs' rights more in favor of the former than the New York-type statutes. However, statutes of this type are still considerably more restrictive in terms of the conduct to which they apply than the CPA, which requires absolutely no connection between a defendant's activity and a formal or semi-formal governmental proceeding.<sup>175</sup>

Much like the CPA, the most expansive forms of anti-SLAPP legislation reject the requirement that the defendant's actions somehow relate to a speech or conduct under review by a government body, instead extending their reach to cover "virtually any exercise of free speech rights on matters of public concern."<sup>176</sup> These statutes tip the scales decidedly in favor of a defendant's right to petition or speech at the expense of a plaintiff's right to

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172. See SMOLLA, *supra* note 127, at § 9:109. Examples of states with statutes typically included in this categorization include New Mexico, N.M. STAT. ANN. § 38-2-9.1(A) (LexisNexis 1998 & Supp. 2007), Hawaii, HAW. REV. STAT. ANN. § 634F1-2 (West, Westlaw current through 2007, Act 126), and Georgia, GA. CODE ANN. § 9-11-11.1 (2006). See SMOLLA, *supra* note 127, at § 9:109 (identifying the Georgia, New Mexico, and Hawaii statutes as moderate).

173. N.M. STAT. ANN. § 38-2-9.1(A) (LexisNexis 1998 & Supp. 2007).

174. HAW. REV. STAT. ANN. § 634F1-2 (West, Westlaw current through 2007, Act 126).

175. See Citizen Participation Act, Pub. Act 95-506, § 15, 2007 Ill. Legis. Serv. 5224 (West) (codified at 735 ILL. COMP. STAT. ANN. 110/15).

176. SMOLLA, *supra* note 127, at § 9:109. States regarded to have expansive anti-SLAPP provisions include Louisiana, LA. CODE CIV. PROC. ANN. art. 971 (2005), Oregon, OR. REV. STAT. ANN. §§ 31.150 - 31.155 (West Supp. 2007), and Minnesota, MINN. STAT. ANN. §§ 554.01 to 554.05 (West 2000). SMOLLA, *supra* note 127, at § 9:109 (identifying the Louisiana and Oregon laws as broad); Arco, *supra* note 57, at 603 (calling Minnesota's law "perhaps the most broadly drawn of all"). For a slightly different categorization scheme, see Shannon Hartzler, Note, *Protecting Informed Public Participation: Anti-SLAPP Law and the Media Defendant* 41 VAL. U.L. REV. 1235, 1262-70 (2007).

access the courts.<sup>177</sup> The result is the potential for a paradoxical form of vexatious litigation. While anti-SLAPP statutes are designed, at least in part, to avoid the use of judicial processes themselves as a means of intimidating or punishing an opponent,<sup>178</sup> the most broadly drawn anti-SLAPP statutes arguably have the same effect on potential plaintiffs because they expand use of anti-SLAPP remedies to conduct that has little or no connection to the traditional SLAPP paradigm.<sup>179</sup>

#### E. THE CALIFORNIA EXPERIENCE

Widely regarded as one of the most far-reaching of all anti-SLAPP laws when it was passed in 1992,<sup>180</sup> California's law<sup>181</sup> provides that any "cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike."<sup>182</sup> The law defines the types of petitioning and speech activities that qualify liberally, so as to include any statement made either directly before a government or quasi-governmental body or any statement made that somehow relates to an issue being considered by such a body.<sup>183</sup> The law also applies to public statements or other

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177. See generally Arco, *supra* note 57, at 587 (exploring how the tension between the rights of petition and free speech and the right to seek redress from the courts is affected by SLAPPs and anti-SLAPP legislation).

178. See Citizen Participation Act, Pub. Act 95-506, § 5, 2007 Ill. Legis. Serv. 5223 (West) (codified at 735 ILL. COMP. STAT. ANN. 110/5).

179. See SMOLLA, *supra* note 127, at § 9:109 (discussing how California's anti-SLAPP statute applies to cases not strictly considered SLAPPs).

180. See, e.g., Jerome I. Braun, *California's Anti-SLAPP Remedy After Eleven Years*, 34 MCGEORGE L. REV. 731, 732 (calling the California statute "the most ambitious and far-reaching of all the state anti-SLAPP laws" at the time of its enactment).

181. CAL. CIV. PROC. CODE § 425.16-18 (West 2004 & Supp. 2007).

182. CAL. CIV. PROC. CODE § 425.16(b)(1) (West 2004 & Supp. 2007).

183. The full text of the applicability provisions states:

As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) 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; (3) 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; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

CAL. CIV. PROC. CODE § 425.16(e) (West 2004 & Supp. 2007).

conduct in furtherance of the rights to petition or speech, as long as those statements bear some connection to an issue of public interest.<sup>184</sup>

In *Briggs v. Eden Council for Hope & Opportunity*, the Supreme Court of California determined the language of the California anti-SLAPP statute mandated a broad construction, concluding a defendant in California could take shelter under the anti-SLAPP law in one of two ways.<sup>185</sup> A defendant could invoke the anti-SLAPP statute by showing that his or her speech or conduct was somehow related to an official proceeding, regardless of whether or not the official proceeding had any connection with a public issue, or by establishing that his or her speech, while having no connection to a governmental proceeding, was related to a public issue or an issue of public interest.<sup>186</sup> The dissent vehemently disagreed with the majority's interpretation, calling it "overly broad" and fearing it would "expand[] the definition of a SLAPP suit to include a potentially huge number of cases" and make "the special motion to strike available in an untold number of legal actions that will bear no resemblance to the paradigm retaliatory SLAPP suit to which the remedial legislation was specifically addressed."<sup>187</sup>

The dissenting justices' fears were arguably realized in *Navellier v. Sletten*.<sup>188</sup> In *Navellier*, the plaintiffs sued the defendant for fraud and breach of contract relating to the alleged violation of a liability release the defendant executed in connection with a prior lawsuit.<sup>189</sup> The defendant countered by filing a motion to strike under California's anti-SLAPP statute.<sup>190</sup> The trial court denied the motion and the reviewing appellate court affirmed.<sup>191</sup> The Supreme Court of California found the "critical consideration" in reviewing motions to strike under the anti-SLAPP statute was "whether the cause of action is based on the defendant's protected free speech or petitioning activity," and held that the defendant's execution of the liability release constituted such activity and therefore potentially fell

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184. *Id.*

185. *See Briggs v. Eden Council for Hope & Opportunity*, 969 P.2d 564, 575 (Cal. 1999).

186. *Briggs*, 969 P.2d at 575.; *Jewett v. Capital One Bank*, 6 Cal. Rptr. 3d 675, 679 (Cal. Ct. App. 2003) (citing *Briggs*).

187. *Briggs*, 969 P.2d at 579 (Baxter, J., dissenting).

188. *Navellier v. Sletten*, 52 P.3d 703 (Cal. 2002). The California courts have since found the anti-SLAPP law applicable to numerous cases that seem, at best, remotely related to the paradigmatic SLAPP situation. *See, e.g., Kronemyer v. Internet Movie Data Base, Inc.*, 59 Cal. Rptr. 3d 48 (Cal. Ct. App. 2006) (finding anti-SLAPP statute protected informational on-line movie site from plaintiff seeking declaratory relief over defendant's failure to credit him as a producer in several movie listings on their website).

189. *Navellier*, 52 P.3d at 707, 713.

190. *Id.*

191. *Id.*



under the gamut of the anti-SLAPP statute.<sup>192</sup> The court remanded the case to the appellate level to determine whether the plaintiffs could defeat the anti-SLAPP statute by “establishing a probability of prevailing on their claim.”<sup>193</sup>

Like in *Briggs*, the majority’s decision was vigorously criticized, the dissent arguing that the “SLAPP problem warrants a specific remedy. Unfortunately, the majority opts for an all-inclusive definition of SLAPP’s, which ignores the practical impact of legal rules, treats identical cases differently, and may chill the right of petitioning the law was designed to protect,” and that the majority’s “presumptive application of [the anti-SLAPP statute] will burden parties with meritorious claims and chill parties with nonfrivolous ones.”<sup>194</sup> In sum, the dissent believed the “cure ha[d] become the disease-SLAPP motions are now just the latest form of abusive litigation.”<sup>195</sup>

After *Navellier* and other cases that broadly interpreted California’s anti-SLAPP statute,<sup>196</sup> the California legislature amended the law so as to limit its availability where the defendant is a business entity and is sued over acts constituting commercial speech or where the plaintiff is bringing suit exclusively for the benefit of the general public or solely in relation to an issue of public concern.<sup>197</sup> However, one practitioner has concluded that even this action by the California legislature “will not completely eliminate the expanded use of the anti-SLAPP statute. The anti-SLAPP statute will continue to apply to ‘garden variety’ claims . . . [and] there will be considerable litigation to determine which plaintiffs are exempted from, and which defendants can bring, motions to strike,” concluding that “[o]nly one certainty exists. Until the legislature constricts its scope, every type of defendant will invoke the anti-SLAPP statute.”<sup>198</sup>

192. *Id.* at 709, 713.

193. *Navellier*, 52 P.3d at 713. The California statute provides that a plaintiff facing a special motion to strike can defeat the motion by establishing that “there is a probability that the plaintiff will prevail on the claim.” CAL. CIV. PROC. CODE § 425.16(b)(1) (West 2004 & Supp. 2007). Not surprisingly, on remand the plaintiffs were unable to meet their burden and the California Court of Appeal for the First District dismissed their claims under the anti-SLAPP statute. *Navellier v. Sletten*, 106 Cal. Rptr. 2d 201, 212 (Cal. Ct. App. 2003).

194. *Navellier*, 52 P.3d at 714 (Brown, J., dissenting).

195. *Id.*

196. *See, e.g.*, *Dupont Merck Pharm. Co. v. Super. Ct.*, 92 Cal. Rptr. 2d 755, 757 (Cal. Ct. App. 2000) (affording SLAPP protection to a drug manufacturer sued over false statements made to government regulators).

197. *See* CAL. CIV. PROC. CODE § 425.17(b), (c) (West 2004 & Supp. 2007). For a discussion of the impact of this new legislation, see generally Barker, *Chapter 338, supra* note 138.

198. Edward P. Sangster, *Back SLAPP: Has the Development of Anti-SLAPP Law Turned the Statute Into a Tool to be Used Against the Very Parties it was Intended to Protect?*, L.A. LAW., Sept. 2003, at 37, 48.

California's experience serves as a cautionary tale: while California's law was ostensibly designed to remedy one form of vexatious litigation,<sup>199</sup> it arguably created another. California defendants have invoked the anti-SLAPP statute in a number of contexts that seemingly have little or no relation to ensuring public participation in government, including foreclosure and nuisance suits.<sup>200</sup> Plaintiffs with legitimate causes of action who find themselves facing a motion to dismiss in these types of scenarios must presumably expend time, effort and resources in defeating facetious claims of immunity, possibly deterring them from bringing otherwise valid claims.<sup>201</sup> Given the broad grant of immunity and powerful tools the CPA places at the disposal of defendants in civil suits, Illinois courts could very well encounter unintended effects similar to those experienced by California.

#### F. THE MASSACHUSETTS EXPERIENCE

The potential for the CPA to overstretch its bounds and fail in its stated goals is exacerbated by the lack of any requirement that conditionally immunized conduct relate to an issue of public concern.<sup>202</sup> Pring and Canan consider the involvement of an issue of public concern central to their definition of a SLAPP<sup>203</sup> and a number of anti-SLAPP statutes from other states only extend immunity to situations where the defendant's conduct giving rise to the suit relates to such an issue.<sup>204</sup> However, the CPA contains no

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199. Although the California law does not mention SLAPPs directly, a facial intent to eliminate them can be inferred. See CAL. CIV. PROC. CODE § 425.16(a) (West 2004 & Supp. 2007) ("The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process.").

200. See *Garretson v. Post*, 68 Cal. Rptr. 3d 230, 232 (Cal. Ct. App. 2007) (filing of anti-SLAPP motion in wrongful foreclosure action related to loan default); *Castillo v. Pacheco*, 58 Cal. Rptr. 3d 305 (Cal. Ct. App. 2007) (filing of anti-SLAPP motion by defendant who alleged that plaintiff's nuisance suit violated his right to free exercise of religion).

201. *Trende*, *supra* note 148, at 646. However, the author believes any potential chilling effects on plaintiffs are substantially outweighed by the importance of the defendant's First Amendment rights. See *Trende*, *supra* note 148, at 646.

202. See Citizen Participation Act, Pub. Act 95-506, § 15, 2007 Ill. Legis. Serv. 5224 (West) (codified at 735 ILL. COMP. STAT. ANN. 110/15).

203. See *supra* note 17 and accompanying text.

204. See, e.g., IND. CODE ANN. §§ 34-7-7-1 (West 1999) (stating that the law "applies to an act in furtherance of a person's right of petition or free speech under the Constitution of the United States or the Constitution of the State of Indiana *in connection with a public issue or an issue of public interest*") (emphasis added); R.I. GEN. LAWS § 9-33-2(a) (1997) ("A party's exercise of his or her right of petition or of free speech under the United States or

such requirement and, as a result, may apply to cases that are wholly private disputes between two persons, with little or no connection to the types of important citizen interaction with government the law was designed to protect.<sup>205</sup>

In *Duracraft Corp. v. Holmes Products Corp.*<sup>206</sup> the Supreme Judicial Court of Massachusetts had occasion to interpret the state's anti-SLAPP statute<sup>207</sup> and discussed its lack of a public interest element at length.<sup>208</sup> The plaintiff, Duracraft Corporation, claimed that a former employee who had left to work for a competitor, Holmes Products, breached fiduciary duties and a nondisclosure agreement when he consulted with Holmes' attorneys and gave deposition testimony about an ongoing trademark dispute between the two companies.<sup>209</sup> The employee and Holmes moved to dismiss the suit under Massachusetts's anti-SLAPP statute, alleging the deposition testimony was petitioning activity and therefore immune from liability.<sup>210</sup> The trial court denied the defendants' motion and the appellate court affirmed.<sup>211</sup>

In construing the statute, the supreme court held that the anti-SLAPP law was not limited to cases where the underlying petitioning activity involved a matter of public interest because such language was expressly rejected in the legislative history of the law.<sup>212</sup> However, in doing so, the

Rhode Island constitutions *in connection with a matter of public concern* shall be conditionally immune from civil claims, counterclaims, or cross-claims.”) (emphasis added).

205. See Citizen Participation Act, Pub. Act 95-506, § 5, 2007 Ill. Legis. Serv. 5223 (West) (codified at 735 ILL. COMP. STAT. ANN. 110/5).

206. 691 N.E.2d 935, 939 (Mass. 1998).

207. MASS. GEN. LAWS ANN. ch. 231, § 59H (West 2000).

208. See *Duracraft*, 691 N.E.2d. at 941. For an in-depth analysis of the *Duracraft* decision and its impact on Massachusetts jurisprudence, see Rebecca Ariel Hoffberg, *The Special Motion Requirements of the Massachusetts Anti-SLAPP Statute: A Real Slap in the Face for Traditional Civil Practice and Procedure*, 16 B.U. PUB. INT. L.J. 97 (2006).

209. *Duracraft*, 691 N.E.2d. at 937-38.

210. *Id.* at 939. The Massachusetts law defines “a party's exercise of its right of petition” as:

[A]ny written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding; any 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.

MASS. GEN. LAWS ANN. ch. 231, § 59H (West 2000).

211. *Duracraft*, 691 N.E.2d at 938.

212. *Id.* at 941.

court expressed concern that the statute was ill-suited to achieving its stated purpose and that it unduly infringed on a potential plaintiff's own right to petition the government.<sup>213</sup> Although the lower courts' denial of Duracraft's motion was upheld, the precedent had been set.<sup>214</sup>

Since *Duracraft*, defendants in Massachusetts, like those in California, have invoked the anti-SLAPP statute in situations that fall well outside the traditional SLAPP definition.<sup>215</sup> Given that the CPA grants defendants immunity regardless of whether or not their actions relate to a matter of public concern,<sup>216</sup> Illinois can expect similar results. By foregoing any public concern requirement, the CPA takes a remedy designed to combat a specific problem and expands its potential applicability to situations it was arguably never intended to address.

The legislative history and preamble to the CPA make it clear that it was a law designed to remedy SLAPPs, not to grant immunity to litigants in disputes concerning the furtherance of solely private interests.<sup>217</sup> As originally drafted, the CPA stated that the "threat of SLAPPs, *personal liability, and burdensome litigation costs* significantly chills and diminishes citizen participation in government, voluntary public service, and the exercise of . . . important constitutional rights."<sup>218</sup> The "personal liability" and "burdensome litigation costs" language was excised from the statute by the Illinois Senate before the law was passed.<sup>219</sup> The Senator sponsoring the bill, John J. Cullerton, called the change a "technical amendment" and the rationale

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213. *Id.* at 943. ("Despite the apparent purpose of the anti-SLAPP statute to dispose expeditiously of meritless lawsuits that may chill petitioning activity, the statutory language fails to track and implement such an objective. By protecting one party's exercise of its right of petition, unless it can be shown to be sham petitioning, the statute impinges on the adverse party's exercise of its right to petition, even when it is not engaged in sham petitioning.").

214. The Court adopted an interpretation of the anti-SLAPP statute that would bar a plaintiff's claim only if it was exclusively based on a defendant's petitioning conduct. *Id.* Because Duracraft's claims were based on both the employee's petitioning activity (the deposition testimony) and non-petitioning activity (the nondisclosure agreement) the Supreme Court ruled that a dismissal was unwarranted. *Id.* at 943-44.

215. See *N. Am. Expositions Co. v. Corcoran*, 874 N.E.2d 466, 470-71 (Mass. App. Ct. 2007) (invoking anti-SLAPP statute in dispute between owner of convention center and former licensee); *Baker v. Hobson*, 818 N.E.2d 1087, 1088 (Mass. App. Ct. 2004) (invoking anti-SLAPP statute in property line dispute between neighbors).

216. Citizen Participation Act, Pub. Act 95-506, § 15, 2007 Ill. Legis. Serv. 5224 (West) (codified at 735 ILL. COMP. STAT. ANN. 110/15).

217. See Citizen Participation Act, Pub. Act 95-506, § 5, 2007 Ill. Legis. Serv. 5223 (West) (codified at 735 ILL. COMP. STAT. ANN. 110/5).

218. B. Status for S.B. 1434, 95th Gen. Assem. (Ill. 2007), 15 LEGIS. SYNOPSIS & DIGEST, at 926-27, available at <http://www.ilga.gov> (follow "Bills and Resolutions" hyperlink; enter "SB1434" into the search field on the left of the page; then select "Senate Floor Amendment No. 1" hyperlink).

219. *Id.*

behind it was not discussed or debated on the Senate floor.<sup>220</sup> However, he did explain the purpose behind the CPA, stating that it was designed to combat “certain lawsuits that could be filed that significantly would chill [sic] and diminish citizen participation in government or voluntary public service or the exercise of those constitutional rights.”<sup>221</sup> The preamble to the CPA echoes the purpose stated by Senator Cullerton in supporting the legislation. It speaks in broad terms about the importance of citizen interaction with the government, not about protecting parties in private disputes.<sup>222</sup> It therefore seems relatively clear that the CPA was designed to remedy SLAPPs, and as Pring and Canan’s definition states, SLAPPs relate to issues of public interest.<sup>223</sup>

#### G. PROPOSED SOLUTIONS

Despite the CPA’s potential to overstep its boundaries and apply to situations well outside the classic SLAPP definition, two actions could be taken that would help the CPA achieve its stated goals of balancing the rights of potential plaintiffs and defendants.<sup>224</sup> First, Illinois courts should utilize the two-prong test articulated by the United States Supreme Court in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*<sup>225</sup> to determine when petitioning activity is not “genuinely aimed at procuring favorable government action, result, or outcome” and therefore outside the protection afforded by the conditional immunity provision of section 15.<sup>226</sup> Second, the Illinois General Assembly should consider amending the fee-shifting provisions of the CPA to allow a prevailing respondent to recover costs incurred in defeating a movant’s motion should certain conditions be met.<sup>227</sup>

Although the CPA defines numerous terms used through the Act, it does not explicitly define what constitutes speech or conduct not “genuinely

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220. See Transcript, Ill. Gen. Assem., 95th Reg. Sess., April 20, 2007, at 14-15, available at <http://www.ilga.gov/senate/transcripts/strans95/09500029.pdf>.

221. *Id.* at 15.

222. Citizen Participation Act, Pub. Act. 95-506, § 5, 2007 Ill. Legis. Serv. 5223 (West) (codified at 735 ILL. COMP. STAT. ANN. 110/5) (“The information, reports, opinions, claims, arguments, and other expressions provided by citizens are vital to effective law enforcement, the operation of government, the making of public policy and decisions, and the continuation of representative democracy.”).

223. See *supra* note 17 and accompanying text.

224. See Pub. Act. 95-506, § 5.

225. *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993).

226. Citizen Participation Act, Pub. Act. 95-506, § 15, 2007 Ill. Legis. Serv. 5224 (West) (codified at 735 ILL. COMP. STAT. ANN. 110/15).

227. Citizen Participation Act, Pub. Act. 95-506, § 25, 2007 Ill. Legis. Serv. 5224 (West) (codified at 735 ILL. COMP. STAT. ANN. 110/25).

aimed at procuring favorable government action, result, or outcome.”<sup>228</sup> This omission is somewhat glaring considering that a responding party can only defeat the motion by proving such a lack of genuineness or by establishing the acts giving rise to the suit are not constitutionally protected or in furtherance of acts constitutionally protected.<sup>229</sup> The lack of a precise standard by which to determine the genuineness of a petitioning party’s activities compounds the potential of the CPA to impose a chilling effect on a plaintiff’s right to gain remedy and redress from the courts. If potential plaintiffs cannot reasonably determine what conduct falls outside the CPA’s protections, they very well might defer suit on otherwise meritorious claims for fear that the defendant will invoke the immunity provisions of the CPA—a result inconsistent with the goals of the law.<sup>230</sup>

Furthermore, once litigation has commenced and a defendant does, in fact, invoke the immunity provisions of section 15, a reasonably clear standard regarding the genuineness provision<sup>231</sup> will provide guidance to both courts and plaintiffs regarding what manner of limited discovery should be allowed in regard to the moving party’s acts, further expediting the resolution of the dispute. Additionally, in order to effectuate the CPA’s goal of encouraging citizen participation in government,<sup>232</sup> the types of conduct to which the law applies should be clear so that the citizenry is able to readily ascertain whether or not the actions in which they intend to engage fall under the CPA’s protective umbrella because, as the Illinois General Assembly recognized,<sup>233</sup> it is not only the actual filing of SLAPPs that chills citizen participation in government, but the *threat* of SLAPPs as well.<sup>234</sup> A clear standard would help defendants understand prior to any litigation whether or not the conduct they intend to engage in is protected, potentially leading to a more politically proactive and confident citizen.

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228. See Pub. Act 95-506, § 25.

229. See Pub. Act 95-506, § 15; Citizen Participation Act, Pub. Act 95-506, § 20(c), 2007 Ill. Legis. Serv. 5224 (West) (codified at 735 ILL. COMP. STAT. ANN. 110/20(c)).

230. See Citizen Participation Act, Pub. Act 95-506, § 5, 2007 Ill. Legis. Serv. 5223 (West) (codified at 735 ILL. COMP. STAT. ANN. 110/5).

231. See Pub. Act 95-506, § 20 (b) (“[D]iscovery may be taken, upon leave of court for good cause shown, on the issue of whether the movant’s acts are not immunized from, or are not in furtherance of acts immunized from, liability by this Act.”).

232. Citizen Participation Act, Pub. Act 95-506, § 5, 2007 Ill. Legis. Serv. 5223 (West) (codified at 735 ILL. COMP. STAT. ANN. 110/5).

233. *Id.* (“The threat of SLAPPs significantly chills and diminishes citizen participation in government, voluntary public service, and the exercise of these important constitutional rights.”).

234. Ralph Michael Stein, *SLAPP Suits: A Slap at the First Amendment* 7 PACE ENVTL L. REV. 45, 55 (1989) (“[O]ften the threat [of SLAPPs], rather than the institution of litigation achieves the desired result of intimidation and surrender.”).

As a preliminary matter, when interpreting statutes, Illinois courts can look beyond the statute's plain language only if the meaning of the statutory provision in question is unclear or ambiguous.<sup>235</sup> A statute is ambiguous when it is "capable of being understood by reasonably well-informed persons in two or more different senses."<sup>236</sup> Section 15 can be so understood because it does not state whether the genuineness of a moving party's acts or conduct are to be determined on an objective or subjective basis.<sup>237</sup> Should an Illinois court find this provision of the CPA ambiguous, then it could look to the legislative history of the law to determine the meaning of the language.<sup>238</sup>

In doing so, any reviewing court would likely uncover the CPA's explicit origins in the Supreme Courts' *Omni* decision.<sup>239</sup> From that point, it is a small step to view the two-prong test of *Professional Real Estate Investors*<sup>240</sup> as a logical standard to employ in clarifying what constitutes activity falling outside the protection of the CPA, as *Professional Real Estate Investors* explicitly interpreted the "sham" provision of the *Noerr-Pennington* doctrine,<sup>241</sup> which serves as the basis for the CPA's immunity standards.<sup>242</sup> *Professional Real Estate Investors* articulates a two-tiered approach to determining whether petitioning activity lacks genuineness.<sup>243</sup> First, a court must determine whether the petitioning activities of the party claiming immunity are "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits."<sup>244</sup> Immunity will be granted should an "objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome."<sup>245</sup> If a court finds that a suit is objectively baseless, then the second prong of the test looks to the subjective motivation behind the petitioning party's activity to determine whether the judicial process itself, rather than the outcome of that process, is the goal of the litigation.<sup>246</sup>

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235. See, e.g., *Kunkel v. Walton*, 689 N.E.2d 1047, 1053-54 (Ill. 1999).

236. *In re J.W.*, 787 N.E.2d 747, 768 (Ill. 2003) (quoting *Illinois v. Jameson*, 642 N.E.2d 1207, 1210 (Ill. 1994)).

237. See *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 61 (1993) ("The word 'genuine' has both objective and subjective connotations.").

238. See *Kunkel*, 689 N.E.2d at 1053-54.

239. See *supra* note 109 and accompanying text.

240. *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993).

241. See *Prof'l Real Estate Investors*, 508 U.S. at 60.

242. Dixon, ACLU Memorandum in Support, *supra* note 109.

243. *Prof'l Real Estate Investors*, 508 U.S. at 60.

244. *Id.*

245. *Id.*

246. See *id.* at 60-61.

The objective/subjective approach of *Professional Real Estate Investors* is still a fact-specific inquiry and would not provide a bright-line rule to determine what conduct falls within the scope of the CPA, but it would provide litigants with a more specific standard than the currently ambiguous language of section 15.<sup>247</sup> Rhode Island's anti-SLAPP statute contains a conditional immunity provision similar to the CPA<sup>248</sup> and specifically defines when conduct is not "genuinely aimed at procuring favorable government action, result or outcome"<sup>249</sup> in a manner based on the Court's *Professional Real Estate Investors* test.<sup>250</sup> Furthermore, the test has arguably proven to be a fair and efficient standard that works well in practice.<sup>251</sup>

In addition to adopting the *Professional Real Estate Investors* test for determining what constitutes genuine petitioning or speech activity, the potential for the broad sweep of the CPA to chill potential plaintiffs' desire to bring suit could be lessened by allowing a party responding to the motion to recover his or her costs under certain circumstances.<sup>252</sup>

Because much of the chilling effect arising from SLAPPs stems from the cost of mounting a legal defense, fee-shifting provisions are a necessary element of any effective anti-SLAPP statute.<sup>253</sup> However, they can also

247. Citizen Participation Act, Pub. Act 95-506, § 15, 2007 Ill. Legis. Serv. 5224 (West) (codified at 735 ILL. COMP. STAT. ANN. 110/15).

248. See R.I. GEN. LAWS § 9-33-2(a) (1997) ("A party's exercise of his or her right of petition or of free speech under the United States or Rhode Island constitutions in connection with a matter of public concern shall be conditionally immune from civil claims, counterclaims, or cross-claims. Such immunity will apply as a bar to any civil claim, counterclaim, or cross-claim directed at petition or free speech as defined in subsection (e) of this section, except if the petition or free speech constitutes a sham. The petition or free speech constitutes a sham only if it is not genuinely aimed at procuring favorable government action, result, or outcome, regardless of ultimate motive or purpose.").

249. *Id.* ("The petition or free speech will be deemed to constitute a sham as defined in the previous sentence only if it is both: (1) Objectively baseless in the sense that no reasonable person exercising the right of speech or petition could realistically expect success in procuring the government action, result, or outcome, and (2) Subjectively baseless in the sense that it is actually an attempt to use the governmental process itself for its own direct effects. Use of outcome or result of the governmental process shall not constitute use of the governmental process itself for its own direct effects.").

250. *Hometown Properties, Inc. v. Fleming*, 680 A.2d 56, 62 (R.I. 1996).

251. See *Global Waste Recycling, Inc. v. Mallette*, 762 A.2d 1208, 1210, 1213 (R.I. 2000) (utilizing "objectively baseless" standard to dismiss defamation claim by waste recycler against a neighbor who made statements concerning recycler's operations to local newspaper); *Alves v. Hometown Newspapers, Inc.*, 857 A.2d 743, 747, 754 (R.I. 2004) (utilizing "objectively baseless" standard to dismiss defamation claim by public official against citizen who had written letters to local newspaper alleging official was corrupt).

252. See *Lum*, *supra* note 72, at 436 (stating that the inability of a plaintiff to recover attorneys' fees and costs "imposes a costly and unfair burden on a filer who must defend its (legitimate) claim against a target's improper motion to dismiss").

253. See PRING & CANAN, SLAPPS, *supra* note 6, at 204-05 (providing for attorney's fees and costs in their model anti-SLAPP statute).



impose a chilling effect on potential plaintiffs because “[p]laintiffs who have valid-yet-borderline claims may well decide not to bring suit because of the fear of being forced to pay a defendants’ legal bills, especially if the defendant is a large corporation.”<sup>254</sup> Given the substantial risk that the breadth of the CPA will already impose such a chilling effect on potential plaintiffs, the Illinois legislature should consider amending the law to allow a prevailing respondent to recover his or her fees if they make a showing that the movant’s assertion of immunity under section 15 was frivolous or otherwise disingenuous.<sup>255</sup>

Other states allow for an award of reciprocal fees in such situations.<sup>256</sup> The frivolous standard would curb the potential use of the CPA by defendants whose case might have no real relation to immunized activity, but who would bring a motion anyway in hope of procuring a quick, efficient dismissal.<sup>257</sup> At the same time, by setting a higher, more flexible, standard for a plaintiff to recover, the benefits derived from the mandatory award of fees to a prevailing movant<sup>258</sup> will not be vitiated because a defendant with an honest belief in the protected nature of his or her conduct would face no risk of an adverse award of fees.

## V. CONCLUSION

It is difficult to disagree with the motivations behind the Citizen Participation Act. After all, what greater calling is there for elected officials than safeguarding the rights that lie at the heart of representative democracy? As such, the Illinois General Assembly should be commended for tackling the complicated and important issue of SLAPPs. However, as has proven to be the case in other states, anti-SLAPP statutes can radically alter the fine balance between one person’s right to be heard and another person’s right to seek redress from the courts. The CPA attempts to preserve this balance but employs mechanisms that make achievement of that laudable goal difficult. The broad grant of conditional immunity, lack of any

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254. Trende, *supra* note 148, at 646.

255. See Lum, *supra* note 72, at 436.

256. E.g. CAL. CIV. PROC. CODE § 425.16(c) (West 2004 & Supp. 2007) (“If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney’s fees to a plaintiff prevailing on the motion . . . .”); IND. CODE ANN. § 34-7-7-8 (West 1999) (“If a court finds that a motion to dismiss made under this chapter is: (1) frivolous; or (2) solely intended to cause unnecessary delay, the plaintiff is entitled to recover reasonable attorney’s fees and costs to answer the motion.”); see also Lum, *supra* note 72, at 436 (discussing the California and Indiana statutes).

257. See Lum, *supra* note 72, at 436.

258. Citizen Participation Act, Pub. Act 95-506, § 5, 2007 Ill. Legis. Serv. 5223 (West) (codified at 735 ILL. COMP. STAT. ANN. 110/5).

required nexus between protected activity and issues of public concern, and absence of defined standards for what constitutes conduct “genuinely aimed at procuring favorable government action, result, or outcome”<sup>259</sup> all serve to undermine the viability of the CPA as an effective means of securing the competing interests of civil plaintiffs and defendants. The ultimate hope is that legislators and judges will fashion creative and effective solutions to these problems. As it stands, it looks as if they will be forced to.

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259. Citizen Participation Act, Pub. Act 95-506, § 15, 2007 Ill. Legis. Serv. 5224 (West) (codified at 735 ILL. COMP. STAT. ANN. 110/15).

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