# *IDENTIFYING AND BEATING A STRATEGIC LAWSUIT AGAINST PUBLIC PARTICIPATION*

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## INTRODUCTION

A pattern is emerging across the United States in which citizens and local community groups are being sued for what has long been considered "ordinary" public participation. Persons who write editorials, take part in referendums, or speak at town meetings are increasingly ending up in court. Although suits against such individuals rarely prevail in court, their true goals of retaliation and intimidation are frequently accomplished. Such suits, called strategic lawsuits against public participation, or SLAPPs,[1] use the courts to silence, harass and obstruct political opponents.

SLAPP suits are particularly common in the environmental and land use areas of law.[2] The most frequent example of a SLAPP suit is the land developer who sues members of a community who oppose a development project.[3] While the developer may realize that her SLAPP suit has no chance of winning on the merits, she knows that the average citizen dislikes going to court, cannot afford large attorney's fees, will be inconvenienced by court appearances and discovery, and will be less likely to speak out either during or after the suit.[4]

This article analyzes SLAPP suits and examines in some depth the most common defenses against such suits. Part I defines the SLAPP suit, looks at

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1. This term was created by Professors Penelope Canan and George W. Pring of the University of Denver, who have written widely on this topic. *See, e.g.*, George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3 (1989); Penelope Canan, *The SLAPP from a Sociological Perspective*, 7 PACE ENVTL. L. REV. 23 (1989); Penelope Canan & George W. Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 LAW & SOC'Y REV. 385 (1988); Penelope Canan & George W. Pring, *Strategic Lawsuits Against Public Participation*, 35 SOC. PROBS. 506 (1988). Throughout this article we use the terms "SLAPP suit" and "SLAPP." The former is admittedly redundant, yet it has become an established part of the vernacular.

2. The SLAPP suits studied by Professors Pring and Canan break down into the following categories: development and zoning (25%); complaints about public officials (20%); environmental and animal rights (18%); civil and human rights (11%); neighborhood problems (7%); and consumer protection (6%). Pring, *supra* note 1, at 9.

3. *Id.*

4. The average suit asks for $9,000,000, an intimidating sum for a private citizen or small community group. Canan, *supra* note 1, at 26.

the most common claims, and provides some examples of typical SLAPP suits. Part II explores the societal impact of SLAPP suits. Part III presents specific defenses used against the most common SLAPP suit charges while Part IV analyzes the SLAPP-Back, a countersuit filed by the SLAPP's target. Part V considers various judicial remedies which have the potential to reduce SLAPP suits. Finally, Part VI examines the ways in which state legislatures have addressed SLAPP suits. The article concludes that while SLAPP suits represent a disturbing trend in litigation, they are generally defeated in court, and steps can and should be taken by judges, legislators and defendants to reduce the suits' effectiveness.

## I. WHAT IS A SLAPP SUIT?

### *A. Defining the Term*

As characterized by Professor George W. Pring, a leading scholar on SLAPP suits,[5] the suits contain the following four criteria:

> 1) a civil complaint or counterclaim for monetary damages and/or an injunction;
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> 2) filed against non-governmental individuals or groups;
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> 3) because of their communication to a government body, official, or the electorate;
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> 4) on an issue of some public interest or concern.[6]

A fifth criterion should be added to Professor Pring's list to fully characterize SLAPP suits: the suits are without merit and contain an ulterior political or economic motive. This criterion is both an integral part of understanding the SLAPP suit and the principal difficulty in identifying one. This additional criterion distinguishes legitimate lawsuits from suits whose purpose is to curtail public participation. If a neighbor seeks money from a developer by threatening to publicly criticize a new development unless given the money, one could understand if the developer sought legal recourse against the neighbor. This situation is quite different from one in which a citizen, simply wishing to preserve the character of her neighborhood, stands up at a zoning hearing to air her grievances about a proposed project and is hit with a suit for slander, interference with contract, or some other frivolous claim. The difference goes to the motivation and the legitimacy of the suit. If a suit is filed because a developer has been legitimately wronged in a legal sense, the suit is not a SLAPP suit. However, if the developer wishes to accomplish a political end, such as silencing legally permissible criticism, the suit is a SLAPP suit.

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5. *See supra* note 1.
6. Pring, *supra* note 1, at 8.

While the fifth definitional criterion is essential in understanding the SLAPP suit, it is often difficult to spot when superficially examining a suit. Not only must one look at the pleadings, but also at the often subtle motivations of the filer. There are cases in which the defendant obviously did nothing legally wrong and was hit with a meritless suit by a person or organization hoping to silence or intimidate the defendant.[7] Many other suits, however, are in a grayer area in which the filer has an arguably tenable claim.[8] It is these gray-area suits which cause problems in devising ways to remedy or curtail the SLAPP suit.

*B. The Claims Frequently Brought By SLAPP Plaintiffs*

There are a variety of claims frequently brought by plaintiffs in SLAPP suits. Defamation, including libel and slander, is the most common claim, accounting for approximately half of SLAPP suits brought.[9] Business torts, such as interference with contract and restraint on trade, are involved in approximately one-third of the suits.[10] Abuse of process, malicious prosecution, conspiracy, constitutional or civil rights violations, and nuisance are other common SLAPP suit claims.[11]

The Sierra Club was the defendant in one of the first and best known SLAPP suits, *Sierra Club v. Butz*.[12] The Sierra Club sought a temporary injunction against logging in an area of forest eligible for designation as part of the National Wilderness Preservation System.[13] They argued that if logging were permitted, the area would be despoiled and no longer eligible for wilderness status.[14] Three days after the Sierra Club filed suit, they were "SLAPPed" by Humboldt Fir, who claimed that the Sierra Club's actions constituted economic interference.[15] Specifically, Humboldt claimed that 1) the Sierra Club sought to induce the U.S. government to breach a timber harvesting contract; 2) but for the Sierra Club's acts, future sales would be made; and 3) the Sierra Club induced the Forest Service to reduce or abandon its timber sale program.[16] The federal district court for the Northern District

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7. *See, e.g*, Liberty Lobby, Inc. v. Dow Jones & Co., Inc., 838 F.2d 1287 (D.C. Cir.), *cert. denied*, 488 U.S. 825 (1988).

8. Such "borderline" suits are particularly common where statements are made which embarrass, and come close to defaming, the individual about whom the statements were made. *See, e.g.*, 600 West 115th Street Corp. v. Von Gutfeld, 603 N.E.2d 930 (N.Y. 1992).

9. Pring, *supra* note 1, at 9.

10. *Id.*

11. *Id.*

12. 349 F. Supp. 934 (N.D. Cal. 1972).

13. *Id.* at 935.

14. *Id.*

15. *Id.* at 935–36.

16. *Id.* at 936.

of California relied on the petition clause of the First Amendment to dismiss Humboldt's claim.[17]

While groups such as the Sierra Club are frequent SLAPP suit targets, more often the suits are aimed at private citizens who lack the same legal wherewithal or financial resources of the large public interest groups. Rick Welker, a private citizen from Enfield, Connecticut, was concerned when he heard that over 300 additional units were going to be added to the residential development where he lived.[18] Welker learned that the development plan was approved in a closed session of the Planning and Zoning Commission and was not recorded in the meeting's minutes, despite the fact that the development would be the largest in town history.[19] Welker complained to the Connecticut Freedom of Information Commission in October of 1988.[20] After six months of Commission hearings, the state overturned the approval of the project, primarily because of the procedural irregularities.[21] The developer then sued Welker in June of 1989,[22] charging tortious interference and slander of title.[23]

The case followed a pattern that is familiar in SLAPP suits. It was drawn out, heightening Welker's anxiety. At the initial hearing for summary judgment, the plaintiff and his counsel failed to appear.[24] The case was dismissed, but then the plaintiff claimed he never received notice of the hearing from the defendant's counsel.[25] The defendant was unable to demonstrate that notice was sent and the case was reopened.[26] Further delays ensued, until finally, in February of 1992, the case was dismissed again.[27] The plaintiff appealed the dismissal to the state appellate court, and the appeal was finally denied in December of 1992, four years after Welker made his initial complaint.[28]

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17. *Id.* at 939. For more on the petition clause defense, see *infra* Part III. B.

18. Telephone interviews with Rick Welker of Enfield, Conn. (Jan. 7–8, 1993); Shelley Emling, *Lawsuit Targets People Who Speak Out*, HARTFORD COURANT, July 15, 1990, at B1, B4.

19. Telephone interviews with Rick Welker (Jan. 7–8, 1993).

20. *Id.*

21. Emling, *supra* note 18, at B1.

22. Telephone interviews with Rick Welker (Jan. 7–8, 1993).

23. Defendants' Memorandum in Support of Motion to Strike, at 2–3, Lizotte v. Welker, No. CV-89-03652375, 1990 WL 276840 (Conn. Super. Sept. 24, 1990), *aff'd*, 612 A.2d 1176 (Conn. App. 1992). Under Connecticut law, the elements of tortious interference are fraud, misrepresentation, intimidation or molestation or malice and absence of privilege, as well as actual damages resulting from the interference with a reasonable expectancy of profit. Blake v. Levy, 464 A.2d 52, 54 (Conn. 1983); DOUGLAS B. WRIGHT & JOHN R. FITZGERALD, CONN. LAW OF TORTS 343-47 (2d ed. 1968). If slander of title is recognized in Connecticut, other than in limited circumstances governing false recording of notices, it appears to require falsity of publication and malice. *Id.* at 349; Realty Co. v. Borough of Wallingford, 111 Conn. 352, 361 (Conn. 1930).

24. Telephone interviews with Rick Welker (Jan. 7–8, 1993).

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

## II. THE IMPACT OF SLAPPS

Commentators from New York Governor Mario Cuomo and New York Attorney General Robert Abrams to Judge Robert Bork have condemned the SLAPP suit as one of the more troubling recent legal trends in our country.[29] SLAPP suits are both a threat to healthy public dialogue and a direct attack on First Amendment rights. Filing, or even threatening to file, these types of intimidation suits may keep many people on the sidelines who would otherwise take part in community debates. If people become afraid to speak out about perceived problems in their communities, the result could be disastrous. In his criticism of SLAPP suits, Attorney General Abrams posed the troubling question of how much longer Love Canal might have gone unchecked if we lived in a society without a significant level of public participation.[30] He correctly characterized public participation in environmental matters as "the cornerstone of our very survival as a planet."[31] That cornerstone is now being chipped away.

Love Canal represents an extreme example of how important citizen input can be in environmental matters. Issues do not need to be as dramatic as Love Canal, however, in order for citizen input to be important. A concern with SLAPP suits is that they will create a distinct imbalance in many land use planning decisions.[32] City planners rely on a balance of testimony among developers, citizen groups, and other interested parties when making decisions on development. Citizen input should not be viewed as a nuisance, but as a constructive, useful and necessary tool in local planning decisions. Without such input, planning decisions may be made with distinctly one-sided information. Supporting this notion of broad participation, the Second Circuit wrote, "citizen groups are not to be treated as nuisances or troublemakers but rather as welcome participants in the vindication of environmental interests."[33]

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29. *See* Mario M. Cuomo, Executive Memoranda on approving L.1992, ch. 767 (August 3, 1992) ("Punitive and needless lawsuits without substantial basis in fact or law should be generally discouraged. But they should be discouraged all the more if, as there is reason to believe, they deter public debate."); Robert Abrams, *Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 33 (1989) ("SLAPP suits . . . represent an attack on first amendment rights which are at the heart of our democracy."); Liberty Lobby, Inc. v. Dow Jones & Co., Inc., 838 F.2d 1287, 1303 (D.C. Cir.), *cert. denied*, 488 U.S. 825 (1988) (opinion by Bork, J.) ("This suit epitomizes one of the most troubling aspects of modern litigation: the use of the libel complaint as a weapon to harass. Despite the patent insufficiency of a number of appellant's claims, it has managed to embroil a media defendant in over three years of costly and contentious litigation.").

30. Abrams, *supra* note 29, at 35.

31. *Id.* at 35, 41.

32. *See* 600 West 115th Street Corp. v. Von Gutfeld, 603 N.E.2d 930, 934 (N.Y. 1992) (discussing the "impoverishment of the public forum" that could result if people become timid in speaking on decisions impacting the development of their community).

33. Friends of the Earth v. Carey, 535 F.2d 165, 172 (2d Cir. 1976), *cert. denied*, 434 U.S. 902 (1977). This was a suit by environmentalists seeking an injunction restraining an increase in New York City's public transportation fares and ordering enforcement of certain anti-pollution

What impact do SLAPP suits have on defendants and on future public input into environmental and land use decisions? Unfortunately, the quantitative societal impact of SLAPP suits is largely speculative. There are, however, many examples of disturbing effects created by SLAPP suits. In one extreme instance, an attorney for a defendant reported that the SLAPP suit ordeal was so traumatic that the family actually moved out of state after the suit was over.[34] In another case, the Army Corps of Engineers was hearing testimony on a proposed golf course in respect to which a SLAPP suit had already been filed against one protester. The Assistant Counsel for the Corps said, "[a]t the hearing, there were people saying that they had something to say, but felt they could not . . . . We were concerned that the public hearing was being stifled by the lawsuit."[35]

In addition to silencing individuals, SLAPP suits also inhibit group participation. Kent Kammerer is a member of a Seattle neighborhood coalition that is active in local politics and meets regularly to discuss city concerns.[36] Some group members were targeted by SLAPP suits, and Kammerer says that the potential for further suits has a discernable effect on his group.[37] He noticed formerly active citizens become much more cautious in their political activity, even when they had not personally been SLAPP suit targets.[38] Kammerer also reports that some members of his group now carry extra homeowners' insurance policies to protect against the potential economic losses caused by SLAPP suits.[39] In November of 1992, the group hosted a symposium to educate its members and others from the community about the suits.[40]

A somewhat different but important problem with SLAPP suits is the additional burden that they impose on court dockets. Professors Pring and

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regulations. The court spoke of citizen participation generally and in the context of the Clean Air Act. Although this suit was not a SLAPP suit, the Second Circuit's support for public input and its reasoning behind that support is clearly applicable in the contexts in which SLAPP suits generally arise.

34. Ron Galperin, *New State Law Tries to Take Punch Out of SLAPP Suits*, L.A. TIMES, (Valley Edition) November 17, 1992, (Business Section) at 12.

35. John J. Fried, *Debate Rages Over Developers' Lawsuits to Hinder Public Participation*, CHI. TRIB., June 23, 1991, at 1G. There are innumerable other examples of persons having gone through SLAPP suits, describing the chilling effect of the ordeal. *See, e.g.*, Greg Braxton, *Builder's Suit Mires Activist in Court Fight*, L.A. TIMES, (Valley Edition) July 15, 1991, at B3 (Burbank, California SLAPP target saying, "[w]hen you say something like this can have a chilling effect on you, that is exactly the case"); Jay Gallagher, *Activists Attack SLAPP Suits*, GANNETT NEWS SERVICE, April 28, 1992 (Executive director of New York environmental group calling chilling effect "horrendous"). Rick Welker also reported that he is much less likely to speak out again on almost any issue, and the press his case generated has likely chilled others. Telephone interviews with Rick Welker (Jan. 7–8, 1993).

36. Telephone interview with Kent Kammerer, Seattle Neighborhood Coalition (Jan. 7, 1993).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

Canan estimate that as many as one hundred or more SLAPP suits are filed each year across the United States.[41] Because one of the plaintiff's primary goals in the SLAPP suit is to force the defendant into a drawn-out, expensive court process, the cases often last for some time.[42] Professor Canan reports that on average SLAPP suit defendants prevail after thirty-six months of litigation.[43]

## III. DEFENDING AGAINST A SLAPP SUIT

SLAPP suit plaintiffs rarely prevail in court. Defendants almost always have adequate defenses against the charges of defamation, contract interference, or other meritless claims.[44] This section looks in some detail at the defenses to defamation and interference with contract, the two most frequent SLAPP suit charges.

### *A. Defamation*

Defamation is the most common SLAPP suit charge[45] and is defined as an oral or written statement "which tends to injure reputation in the popular sense; to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him."[46] Defamation is comprised of "the twin torts of libel and slander—the one being, in general, written while the other in general is oral."[47] In analyzing a claim of defamation, it is important to distinguish between public and private plaintiffs.[48] If plaintiffs are public figures, they are required to prove that the alleged falsehoods uttered by the defendant were issued "with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[49] The Supreme Court's definition of "public figure" is as follows:

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41. Pring, *supra* note 1, at 5.

42. Rick Welker's case is a good example of this. *See supra* notes 18–28 and accompanying text.

43. Canan, *supra* note 1, at 26.

44. Attorney Joseph Brecher, who has studied and written on SLAPP suits, believes that defendants won 100% of SLAPP suits filed as of 1988. Joseph J. Brecher, *The Public Interest and Intimidation Suits: A New Approach*, 28 SANTA CLARA L. REV. 105, 113 (1988). Professor Pring put the defendants' success rate at 77%. Pring, *supra* note 1, at 12. The various perceptions of success rates may reflect differences in whether a particular suit is considered a SLAPP suit.

45. Pring, *supra* note 1, at 9.

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

47. *Id.*

48. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 327–28 (1974); Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 30–31, 78 (1971) (Marshall, J. and Harlan, J., dissenting).

49. New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964).

> For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.[50]

Examples of the first group of public figures are generally those thought of as public servants, such as police officers and politicians. The second group of public figures are those who thrust themselves into a particular public controversy. In the SLAPP suit context, land use developers involved in public approval processes such as rezoning and permit applications have been held to be in this second category of public figures.[51] Thus, the standard for defamation with regard to such persons is much higher than it is for non-public figures.

In addition to the possible "public figure defense" to a defamation claim, statements made by a SLAPP suit defendant may be protected by privilege. Even if the defendant's statements were defamatory, they may be "absolutely privileged" and thus legally permissible.[52] The court in *Walters v. Linhof* held that even if statements criticizing a large scale development project were defamatory, they might be privileged:

> The defense of absolute privilege permits a defendant to escape liability for conduct that would otherwise be actionable because the defendant acted in furtherance of some interest of social importance which is entitled to protection even at the expense of uncompensated harm to the plaintiff's reputation. The interest may be one of the defendant himself, of a third person, or of the general public. Proceedings for rezoning and development of a project of the size of that proposed by plaintiffs fall within this "interest of social importance" category.[53]

Absolute privilege may also exist if "consent is given to defamation."[54] One who invites comments which damage her reputation cannot claim defamation.[55] In *Walters*, the court held that if defamatory statements result from invitations to comment on the issue giving rise to the defamatory comments, the invitation to speak bars the defamation claim.[56]

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50. *Gertz*, 418 U.S. at 345.

51. *See* Walters v. Linhof, 559 F. Supp. 1231, 1235 (D. Colo. 1983); Okun v. Superior Court of Los Angeles, 629 P.2d 1369, 1374 (Cal.), *cert. denied sub. nom.*, Maple Properties v. Superior Court of Los Angeles County, 454 U.S. 1099 (1981).

52. KEETON ET AL., *supra* note 46, § 114; *Walters*, 559 F. Supp. at 1236–37.

53. *Walters*, 559 F. Supp. at 1236–37. *See also*, 600 West 115th Street Corp. v. Von Gutfeld, 603 N.E.2d 930, 934 (N.Y. 1992).

54. KEETON ET AL., *supra* note 46, § 114.

55. *Id.*

56. *Walters*, 559 F. Supp. at 1237.

A SLAPP suit defendant often finds herself facing a defamation claim because she expressed her opinion. Public debates often become heated, and exchanges can take on a bitter and personal tone. Citizens criticizing a developer, for example, may make statements that the developer feels are particularly inappropriate or embarrassing. The developer may then turn around and sue the citizen.[57] It is important for SLAPP suit defendants—as well as any active private citizen—to understand the limits of the constitutional protection afforded opinions. In recent years, the law regarding whether opinions are constitutionally protected has undergone modification. Traditionally, there was broad protection of all communication that could be termed opinion.[58] In *Milkovich v. Lorain Journal Co.*, however, the Supreme Court issued a notable ruling on the role of opinion in defamation law. The Court in *Milkovich* granted certiorari to consider the Ohio Supreme Court's recognition of blanket protection of opinions from defamation liability.[59] The defendant argued that in every defamation case, the First Amendment mandates an inquiry as to whether a statement was one of fact or opinion, and that only communications of fact are actionable.[60] The United States Supreme Court disagreed. The Court held that there was no constitutionally required opinion exemption to defamation law.[61] Instead, the Court said that one must look to prior common law principles of defamation. Among the most significant of these common law principles are the following:

1) Statements on matters of public concern must be capable of being proven false before defamation can occur, and opinions void of provable false facts will receive full constitutional protection.[62]

2) Statements which could not reasonably be interpreted as stating actual facts about an individual (e.g., hyperbole, parody) are protected.[63]

3) Culpability (i.e., malice) is required to show defamation when the issue giving rise to the statement is one of public debate, making the allegedly defamed person a public figure, or when the allegedly defamed person is otherwise a public figure.[64]

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57. *See Von Gutfeld*, 603 N.E.2d at 931-32 (citizen saying a developer's permit application to run a small business "smells of bribery and corruption").

58. *See* Milkovich v. Lorain Journal Co., 497 U.S. 1, 13–14 (1990) ("[C]omment was generally privileged when it concerned a matter of public concern, was upon true or privileged facts, represented the actual opinion of the speaker, and was not made solely for the purpose of causing harm.").

59. *Id.* at 10.

60. *Id.* at 3, 8.

61. *Id.* at 10.

62. *Id.* at 19–20.

63. *Id.* at 20; *see also* Hustler Magazine v. Falwell, 485 U.S. 46, 57 (1988); Old Dominion Branch, No. 496, National Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 283–87 (1974); Greenbelt Coop. Publishing Ass'n v. Bressler, 398 U.S. 6, 13–15 (1970).

64. *Milkovich*, 497 U.S. at 20; New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964).

*Milkovich* thus stands for the proposition that the threshold question in defamation suits is not whether a statement might be held to be an opinion, but whether the statement implies an assertion of an objective fact.[65] Pure opinion is still protected by pre-existing constitutional doctrine. Thus, only those opinions implying an assertion of fact will be actionable.

Despite the heavy burden on the plaintiff and strong defenses for defendants, defamation suits present a problem for SLAPP suit defendants. A plaintiff can claim actual malice, and though unable to prove the malice, subject the defendant to a potentially long and expensive round of litigation.

### *B. Interference With Contract and the Noerr-Pennington Doctrine*

SLAPP suit defendants are often charged with interference with contract or other business torts[66] when they petition the government for redress of a grievance.[67] The defendant has a clear defense to these charges in the constitutionally protected right to petition.[68] The First Amendment prevents Congress from making any law which prohibits "the right of the people . . . to petition the Government for a redress of a grievance."[69] The Supreme Court has characterized the First Amendment petition clause as one of the "fundamental principles of liberty and justice which lie at the base of all civil and political institutions."[70]

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65. *See* Unelko Corp. v. Rooney, 912 F.2d 1049, 1052–54 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 1586 (1991) (applying *Milkovich*).

66. *See* RESTATEMENT (SECOND) OF TORTS, § 766 (1977):

> Intentional Interference with Performance of Contract by Third Person: One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

RESTATEMENT (SECOND) OF TORTS, § 766B (1977):

> One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or (b) preventing the other from acquiring or continuing the prospective relation.

67. *See, e.g.*, Sierra Club v. Butz, 349 F. Supp. 934 (N.D. Cal. 1972). *See* text accompanying notes 12–17.

68. A SLAPP suit defendant may also use the petition clause in less common SLAPP suit charges, such as malicious prosecution. For example, the California Supreme Court has held that the right to petition the government precludes a malicious prosecution suit brought by the government against the petitioning party. *See* City of Long Beach v. Bozek, 645 P.2d 137, *vacated*, 459 U.S. 1095, *on remand*, 661 P.2d 1072 (1983); City of Fresno v. Frampton, 560 F. Supp. 31, 34–35 (E.D. Cal. 1983).

69. U.S. CONST. amend. I.

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

In *Sierra Club v. Butz*, the court relied on the petition clause to quickly dismiss the plaintiff's SLAPP suit. The court held that "when a suit based on interference with an advantageous relationship is brought against a party whose 'interference' consisted of petitioning the government body to alter its previous policy a privilege is created by the guarantee of the First Amendment."[71]

A First Amendment petition clause defense is often based largely on the principles of the *Noerr-Pennington* antitrust doctrine.[72] This doctrine states that parties undertaking legitimate petitioning of the government are immunized from any civil cause of action by a third party injured by the petitioning activity. This protection applies even when the petitioning party has a financial stake in the issue giving rise to the petition.[73] Though the doctrine was developed in the antitrust area, courts have invoked *Noerr-Pennington* outside of antitrust law,[74] including applying it to SLAPPs:

> The application of the *Noerr-Pennington* doctrine has been applied outside the narrow confines of antitrust suits and has been used to protect citizen's communications with the government in a wide variety of cases. Most notably, it has been applied to shield citizens from liability for petitions to a zoning board . . . .[75]

Therefore, even if a SLAPP suit defendant has a financial interest in petitioning the government, he is generally protected under the *Noerr-Pennington* doctrine.

The *Noerr-Pennington* doctrine does not, however, provide a complete blanket of immunity for those wishing to petition. The doctrine's protection is lost when the petitioning activity is a "sham."[76] Actions constitute a sham if the petitioning party is not seeking to obtain legitimate government action, but looks to otherwise injure the opposing party.[77] If the petitioning activity "leads the fact finder to conclude that the administrative and judicial processes have been abused,"[78] the petitioning activity will not be protected.[79] For example, if a citizen group protesting a proposed housing project is acting, in

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71. *Butz*, 349 F. Supp. at 938.

72. The *Noerr-Pennington* doctrine evolved primarily from two Supreme Court cases: Eastern Rail Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), and United Mine Workers v. Pennington, 381 U.S. 657 (1965).

73. *See Noerr Motor Freight*, 365 U.S. at 139 ("The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so.").

74. For a thorough discussion of the expansion of the *Noerr-Pennington* doctrine, *see* Milton Handler & Richard A. De Sevo, *The Noerr Doctrine and Its Sham Exception*, 6 CARDOZO L. REV. 1 (1984).

75. Westfield Partners, Ltd., v. Hogan, 740 F. Supp. 523, 526 (N.D. Ill. 1990).

76. California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 511 (1972); *Noerr Motor Freight*, 365 U.S. at 144; *Westfield Partners Ltd.*, 740 F. Supp. at 525.

77. *Butz*, 349 F. Supp. at 938–39.

78. *California Motor Transp. Co.*, 404 U.S. at 513.

79. *Id.*

fact, as a front group for a competing developer wishing to hurt his competitor's interests, the group's appeal to a public agency will not enjoy constitutional protection under the *Noerr-Pennington* doctrine.[80] The petition clause is thus expansive but not absolute in its protection of petitioning for redress of grievance.

## IV. FIGHTING BACK: THE SLAPP-BACK

A party who is SLAPPed need not turn the other cheek. She can SLAPP right back. Professor Pring argues that the SLAPP-Back, a counterclaim or countersuit for damages by the SLAPP suit target, is the most effective long-range tool for discouraging SLAPP suits.[81] There are a number of legal grounds for a SLAPP-Back:

1) violation of U.S. or state constitutional rights,

2) violation of federal and state civil rights statutes,

3) abuse of process,

4) malicious prosecution and other state law torts.[82]

In many states there are statutes authorizing significant penalties for vexatious litigation.[83] Connecticut law, for example, allows for treble damages when lawsuits are filed without probable cause and with malicious intent to unjustly vex and trouble another person.[84]

Unlike SLAPP suits, SLAPP-Backs have succeeded in court. Perhaps the most dramatic example of such a suit was a SLAPP-Back judgment against a California agribusiness for $11.1 million dollars.[85] In 1982, three farmers bought a newspaper advertisement accusing J.G. Boswell Company of opposing a proposed canal in order to gain a greater market share in regional cotton farming.[86] Boswell filed a libel suit against the farmers.[87] The SLAPP suit failed and the three farmers filed a SLAPP-Back, alleging that Boswell's suit

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80. *See* Landmarks Holding Corp. v. Bermant, 664 F.2d 891, 896 (2d Cir. 1981).

81. Pring, *supra* note 1, at 19.

82. *Id.* at 20.

83. *See, e.g.*, CONN. GEN. ST. ANN. § 52–568 (West 1958 & Supp. 1992); GA. CODE ANN. § 51–7–81 (1992); MICH. COMP. LAWS ANN. § 600.2907 (West 1986).

84. CONN. GEN. ST. ANN. § 52–568 (West 1958 & Supp. 1992).

85. Philip Hager, *Appeal of Milestone Damages Case Fails: State Justices Let Stand an $11.1 Million Punitive Judgment Against a San Joaquin Valley Agribusiness Giant For Unwarranted Libel Suit*, L.A. TIMES, Oct. 4, 1991, at A3; *see also*, Pring, *supra* note 1, at 19–20 (discussing the background of the case).

86. Hager, *supra* note 85, at A3.

87. *Id.*

was baseless and was meant to intimidate and silence political opponents.[88] In 1988, the farmers were awarded $13.5 million (later reduced to $11.1 million),[89] $10.5 million of which was for punitive damages.[90] In October of 1991, the California Supreme Court upheld the award.[91]

In another instance of a successful SLAPP-Back, the West Contra Costa County Sanitation District initially sued Alan LaPointe, a Richmond, California environmentalist, for $42 million for opposing a proposed solid waste incinerator.[92] The SLAPP suit was filed against LaPointe and 490 unnamed defendants after he filed a taxpayer action against the district contending that the sanitation district had improperly used sewer bond money to finance the proposed incinerator.[93] LaPointe's claim led to a grand jury investigation which confirmed his allegations.[94] Attorney General John Van de Kamp called the sanitation district's suit, "a belligerent and unfounded attempt to strangle public debate."[95] The sanitation district's SLAPP suit was dismissed by a superior court judge, and LaPointe then sued for a violation of his First Amendment rights.[96] On October 6, 1992, a jury concluded that the sanitation district, through its SLAPP suit, improperly sought to deny LaPointe his First Amendment rights.[97] Two days later the jury awarded LaPointe $205,000 in damages.[98] A request for $700,000 in attorney's fees is now before the court.[99]

Although SLAPP-Back suits are intuitively appealing, they mean another round of litigation for an often court-weary private citizen or local group. Further court battles, even as a plaintiff, may not be tolerable or affordable for many private citizens and local groups. However, as large SLAPP-Back awards begin to receive media attention, the suits may become more appealing. Moreover, as citizens and groups become more educated about SLAPP suits, they will be more likely to seek vindication through the SLAPP-Back.

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88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. Todd Woody, *SLAPP and SLAPP Back*, THE RECORDER, Sept. 29, 1992, at 1, *available in* LEXIS, Nexis Library, RECRDR File.

93. Todd Woody, *Jury Finds SLAPP Suit Violated Activist's Rights*, THE RECORDER, Oct. 7, 1992, at 2, *available in* LEXIS, Nexis Library, RECRDR File.

94. *Id.*

95. Woody, *supra* note 92, at 1.

96. *Id.*

97. *San Francisco: Jury Vindicates Environmentalist*, S. F. CHRON., Oct. 7, 1992, at D6.

98. Jim Doyle, *Sewer Agency Must Pay Richmond Man $205,000 Damages for Suit Against Environmentalist*, S.F. CHRON., Oct. 9, 1992, at D8.

99. Todd Woody, *Agency SLAPPed With Large Fee Request; Environmentalist Who Was Awarded $205,000 Now Seeks $700,000 For His Counsel*, THE RECORDER, Dec. 21, 1992, at 3, *available in* LEXIS, Nexis Library, RECRDR File.

## V. OTHER JUDICIAL RESPONSES TO SLAPP SUITS

SLAPP-Back suits are by no means the only way that SLAPP suits can be addressed in court. Other means remain open to the courts, and in some cases to the SLAPP target, to discourage SLAPP suits.

### *A. Rule 11*

Along with the SLAPP-Back, sanctions associated with Rule 11 of the Federal Rules of Civil Procedure[100] offer a SLAPP suit defendant the most effective tool for the vindication of her rights. Rule 11 imposes a duty on attorneys to certify that they have conducted a reasonable inquiry and have determined that any papers filed with the court are 1) well grounded in fact, 2) legally tenable, and 3) "not interposed for any improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."[101] The standard employed by the courts to determine if an infraction of Rule 11 has occurred is one of "objective reasonableness,"[102] and if a violation of the rule is found, sanctions are mandatory.[103]

Defense counsel fending off a SLAPP suit should consider pursuing Rule 11 sanctions as soon as the suit is filed.[104] If counsel finds that a case or particular cause of action is not well-grounded in law or fact, or otherwise is outside the scope of permissible conduct, she should immediately notify opposing counsel that the action is baseless and that sanctions and costs will be sought.[105] Prompt notice is essential to reserve rights and to provide the plaintiff and her counsel with an opportunity to reassess their case.[106] For defendants faced with multiple causes of action, it is important to know that

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100. FED. R. CIV. P. 11. This rule is a federal rule, limited to federal courts. There are often state court equivalents to Rule 11. For surveys of the ways various states' rules compare to federal Rule 11, see James G. Middlebrooks, *The New Rule 11: Look Before Leaping*, 34 N.C. ST. BAR Q. 32 (1987); Fredric C. Tausend & Lisa L. Johnsen, *Current Status of Rule 11 in the Ninth Circuit and Washington State*, 14 U. PUGET SOUND L. REV. 419 (1991); Hon. George W. Timberlake & Nancy Plank, *Attorney Sanctions in Illinois Under Illinois Supreme Court Rule 137*, 20 LOY. U. CHI. L.J. 1027 (1989); Erik K. Yamamoto & Danielle K. Hart, *Rule 11 and State Courts: Panacea or Pandora's Box*, 13 U. HAW. L. REV. 57 (1991).

101. FED. R. CIV. P. 11.

102. Kapco Mfg. Co. v. C & O Enters., Inc., 886 F.2d 1485, 1494 (7th Cir. 1989).

103. FED. R. CIV. P. 11 ("If a . . . paper is signed in violation of this rule, the court . . . *shall* impose . . . an appropriate sanction.") (emphasis added).

104. W. Mark Russo, *Rule 11 Sanctions: Practical Considerations for Lawyers*, MASS. LAW. WKLY., June 15, 1992, at 51. Mr. Russo's article is a very good overview of the invocation of Rule 11 in baseless suits. Our analysis in this section borrows from Mr. Russo's article.

105. *Id.* ("This notice should alert opposing counsel to the investigation, the duties imposed upon counsel by the various procedural vehicles discussed and to the intention to take all steps necessary in the interest of one's client, including the recovery of costs and the imposition of sanctions. Finally, a request should be made for the dismissal of the action and/or the particular causes of action.").

106. *Id.*

Rule 11 sanctions are assessed as to each cause of action and valid causes of action do not rescue frivolous ones.[107]

SLAPP suit defendants should recognize that courts are often reluctant to allow separate discovery as to Rule 11.[108] It is important, therefore, to conduct discovery in such a way as to maximize the chance of demonstrating Rule 11 violations, while simultaneously defending the charges on substantive grounds. An effective discovery tool to uncover evidence of improprieties is the deposition of parties knowledgeable about the allegations.[109] If information is uncovered during discovery which indicates or supports a Rule 11 violation, opposing counsel should be alerted. Opposing counsel can then reassess the claim and drop the action if it lacks merit.[110] Moreover, even if the SLAPP suit filer voluntarily dismisses her case[111] Rule 11 sanctions may still be invoked.[112]

A common complaint by commentators regarding Rule 11 sanctions is the inconsistency with which they are applied.[113] An appellate court reviews the district court's decision on Rule 11 matters under the very deferential "abuse of discretion" standard.[114] Consequently, decisions made by district courts as to Rule 11 matters are rarely disturbed. This lack of significant appellate review, and consequent lack of appellate guidance, has fostered inconsistency and uncertainty about when a violation of Rule 11 occurs and how severe sanctions should be.

For the SLAPP suit defendant, this uncertainty as to the scope of Rule 11 may actually be beneficial. Several commentators have argued that uncertainty

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107. *Id.*

108. Advisory Committee's note on Rule 11 proceedings, 97 F.R.D. 165, 198–201 (1983) ("[D]iscovery should be conducted only by leave of the court, and then only in extraordinary circumstances.").

109. Russo, *supra* note 104, at 51.

110. Courts are split on the continuing duty to reassess a potentially frivolous claim. Most jurisdictions seem to hold that one who signs a document is obligated to continually review his position as new facts of the case come to light. *See, e.g.*, Herron v. Jupiter Transp. Co., 858 F.2d 332, 335–36 (6th Cir. 1988); Gaiardo v. Ethyle Corp., 835 F.2d 479, 484 (3d Cir. 1987); Woodfork by and through Houston v. Gavin, 105 F.R.D. 100, 104 (N.D. Miss. 1985). *But see* Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 874 (5th Cir. 1988) (holding that "a construction of Rule 11 which evaluates an attorney's conduct at the time a 'pleading, motion, or other paper' is signed is consistent with the intent of the rulemakers and the plain meaning of the language contained in the rule").

111. FED. R. CIV. P. 41(a)(1)(i).

112. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 395–98 (1989).

113. *See, e.g.*, Marc P. Goodman, *A Uniform Methodology For Assessing Rule 11 Sanctions: A Means to Serve the End of Conserving Public and Private Legal Resources*, 63 S. CAL. L. REV. 1855, 1857 (1990) ("Although Rule 11 was enacted and amended with noble intent, its existence has created as many problems as it was originally designed to resolve."); Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485, 485–86 (1988–1989) ("Confusion and inconsistency have attended the rule's implementation . . . .").

114. *Cooter & Gell*, 496 U.S. at 405.

about the applicability of Rule 11 has had a chilling effect on questionable litigation.[115] Risk averse attorneys may hesitate to bring SLAPP suits if they fear Rule 11 sanctions, and their fear will only be heightened by the great uncertainty about when Rule 11 violations will be found and what sanctions will be applied. This reaction should increase as SLAPP suit defendants use Rule 11 sanctions successfully.[116]

*B. The* POME *Solution*

Another way to weaken the effectiveness of SLAPP suits is to have judges impose a higher evidentiary standard on those bringing suits against persons participating in some form of public debate. In *Protect Our Mountain Environment, Inc. (POME) v. District Court*,[117] the Colorado Supreme Court established a three-part test to be used in suits involving citizen participation in government decision-making. In order to survive a motion to dismiss, the court's test requires the plaintiff to demonstrate that:

1) the defendant's statements or actions lack either a legal or factual basis;

2) the statements or actions are primarily intended to harass the plaintiff; and

3) the statements or actions could likely adversely affect the legal interest of the plaintiff.[118]

If the plaintiff fails to satisfy this test, the suit is dismissed. Similarly, in a dissent from the West Virginia Supreme Court in *Webb v. Fury*, Justice Neely proposed that where the conduct which resulted in the suit is *prima facie* protected by the petition clause of the First Amendment, the plaintiff should have to plead more specific allegations than would otherwise be required.[119]

*C. Attorney's Fees*

The awarding of attorney's fees to a successful defendant could also provide an effective mechanism for curtailing SLAPP suits. The American

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115. *See, e.g.*, Goodman, *supra* note 113, at 1857 (arguing that "the Rule has a 'chilling effect' on the creative and novel arguments that attorneys have available to them."); Melissa K. Nelken, *Sanctions Under Amended Federal Rule 11—Some 'Chilling' Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313 (1986).

116. In two recent New York state cases, the court awarded SLAPP suit defendants the state statutory maximum of $10,000 in costs under 22 N.Y.C.R.R. § 130–1 and C.P.L.R. 8303-a, New York's equivalents to Rule 11. Entertainment Partners Group, Inc. v. Davis, 590 N.Y.S.2d 979, 989 (1992); Gordon v. Marrone, 590 N.Y.S.2d 649, 657–58 (1992). In *Entertainment Partners*, the court held that the $10,000 fee shifting maximum applicable to C.P.L.R. 8303-a may be granted to each prevailing party rather than to the defendants as a group. 590 N.Y.S.2d at 989.

117. Protect Our Mountain Environment, Inc. v. District Court, 677 P.2d 1361 (Colo. 1984).

118. *Id.* at 1368–69.

119. Webb v. Fury, 282 S.E.2d 28, 47 (W. Va. 1981) (Neely, J., dissenting) (quoting Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers, 542 F.2d 1076, 1082-83 (9th Cir.), *cert. denied*, 430 U.S. 940 (1977)).

Rule generally provides that each party to a case pays its own attorney's fees.[120] However, federal courts have the power to award attorney's fees in particular situations, such as when a party has willfully disobeyed a court order or when "the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'"[121] Attorney's fees are also available as a Rule 11 sanction.[122] State courts, provided they do not conflict with a federal statute, are free to exercise their discretion in awarding attorney's fees.[123]

A federal court also may find statutory authority for the award of attorney's fees in SLAPP suits. The Civil Rights Act, for example, allows for the award of fees to a prevailing party if the suit was vexatious, frivolous, or brought to harass or embarrass that party.[124] Defendants have successfully used this Act in petitioning for counsel fees following the dismissal of a SLAPP suit.[125]

Unfortunately, the award of attorney's fees may not discourage SLAPP suits in many cases. If a developer's project is worth several million dollars, it may still be economically efficient to file a SLAPP suit knowing he may have to pay the other side's attorney's fees, with the hope that the suit will at least distract the opposition during the public hearing process.

Despite this practical limitation, attorney's fees hold promise as a means of deterring SLAPP suits. As part of their defense strategy, defendants should petition the court for attorney's fees following the dismissal of the SLAPP suit. If courts are willing to use their discretionary powers broadly and are quick to award fees in countersuits by the targets, SLAPP suits may become less appealing to file and less onerous to defend.

### *D. Immediate Counterclaim or Countersuit*

In many jurisdictions, certain SLAPP-Back claims may not be brought until the SLAPP suit is settled on its merits. For example, in Connecticut a claim for vexatious litigation may not be brought until the allegedly vexatious suit has terminated in favor of the defendant.[126] The result of this inability to file an immediate SLAPP-Back is that such suits are less frequently brought, and the SLAPP suit defendant generally has to submit to the entire SLAPP suit.[127] Courts wishing to cut down on frivolous suits could adopt a rule whereby defendants can immediately file a countersuit, thus expediting and perhaps

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120. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975).

121. *Id.* at 258–59 (citations omitted).

122. FED. R. CIV. P. 11.

123. *Id.*

124. *See* 42 U.S.C. § 1988; Hensley v. Eckerhart, 461 U.S. 424, 429 n.2 (1983).

125. Westfield Partners, Ltd. v. Hogan, 744 F. Supp. 189 (N.D. Ill. 1990).

126. Paint Prods. Co. v. Minwax Co., 448 F. Supp. 656, 658 (D. Conn. 1978).

127. *See* Joseph J. Brecher, *The Public Interest and Intimidation Suits: A New Approach*, 28 SANTA CLARA L. REV. 105, 137–40 (1988) (discussing the example of Babb v. Superior Court, 479 P.2d 379 (1971)).

abbreviating an otherwise harrowing process. SLAPP suit defendants should look at their state's procedural rules to determine when the various SLAPP-Back claims are possible and file at the earliest allowable time.

## VI. LEGISLATIVE RESPONSES TO SLAPPS

Many of the steps that courts might take to curtail SLAPP suits might also be codified by legislatures. Two states, New York and California, passed legislation in 1992 which specifically targeted SLAPP suits.[128] Several other states have recently tried unsuccessfully to pass similar legislation.[129]

The New York law covers "actions involving public petition and participation,"[130] and applies to actions filed by "a public applicant or permittee" relating to "any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission."[131] Developers and other SLAPP suit plaintiffs are considered public figures, requiring them to show malice to recover for defamation.[132] The law also permits defendants to recover costs and attorney's fees,[133] compensatory damages,[134] and even punitive damages.[135]

The New York law also provides for rapid disposition of a SLAPP suit. To survive a motion to dismiss, the plaintiff in cases involving public petition and participation must show that the suit "has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law."[136]

The California law, which is somewhat similar to the New York statute, provides defendants a special motion to strike if the action arises from an act of a person exercising First Amendment rights in connection with a public issue.[137] To avoid the enforcement of that motion, the plaintiff must show "a

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128. *See* Act of Sep. 16, 1992, ch. 726, 1992 Cal. Legis. Serv. 3029 (West) (to be codified at CAL. CIV. PROC. CODE §§ 425.15 & 425.16) [hereinafter California S. 1264]; Slapp Suits—Costs and Fees, Compensatory and Punitive Damages to Defendants, ch. 767, 1992 McKinney's Session Law News of New York 2010 (West) (to be codified in 1992 N.Y. Laws) [hereinafter New York, Chapter 767].

129. *See* 1992 Va. S. 424, 1992–93 Regular Session; 1992 R.I. S. 2005, 1992 Regular Session; 1992 Md. H. 486, 398 Legislative Session, 1992 Regular Session.

130. New York, Chapter 767, *supra* note 128.

131. *Id.*

132. *Id.*

133. Attorney's fees are recoverable if the SLAPP was "commenced or continued without a substantial basis in fact and law." *Id.*

134. Compensatory damages are recoverable if the suit was brought "for the purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech." *Id.*

135. Punitive damages are recoverable when the "sole purpose" of the suit was the "harassing . . . or otherwise maliciously inhibiting" of the defendant's First Amendment rights. *Id.*

136. *Id.*

137. California, S. 1264, *supra* note 128.

probability"[138] that she will prevail on the claim.[139] In making its determination on the motion, the court is to consider the pleadings as well as supporting and opposing affidavits stating the facts upon which the liability is based.[140] If the motion to strike is granted, attorney's fees are automatically awarded to the defendant.[141]

## CONCLUSIONS

From the perspective of the plaintiff, SLAPP suits often work. Even if the defendant ultimately prevails in court, the SLAPP suit's ulterior motives of distracting, intimidating and silencing are often accomplished. Nevertheless, there are proactive, decisive and potentially effective ways to deal with SLAPP suits, both from the perspective of an isolated defendant and from that of the overall legal community.

A SLAPP suit target should not panic. She should get a lawyer and take an aggressive posture looking to eventually vindicate her rights through the courts. The First Amendment petition clause and the difficult evidentiary hurdles often faced in defamation claims make winning SLAPP suits difficult for the plaintiff. With the advice of counsel, the defendant should use the protections afforded by the Constitution and the courts to win the suit on the merits. Additional actions the defendant should consider include a SLAPP-Back suit, petition for attorney's fees, and petition for Rule 11 sanctions against the attorneys and/or plaintiff.

From a societal perspective, SLAPP suits are a serious threat to balanced input on important public concerns, particularly environmental and land use decisions. Fortunately, there are a number of steps that can be taken by the states to reduce SLAPPs. Legislation, like that in New York and California, is a positive step toward reducing SLAPP suits. In enacting such legislation, however, the legislators must be careful to balance the need to prevent SLAPP suits with the needs of developers and others to file legitimate lawsuits. It would be as offensive and unjust to obstruct the rights of developers with overdrawn laws as it is to chill and obstruct the rights of activists with SLAPP suits.

The courts can and should do more to control SLAPP suits. Courts should be willing to raise evidentiary standards and the standard of pleadings when the suit appears to infringe upon First Amendment rights. Requiring a solid factual basis for each suit would cause frivolous and vexatious cases to be dismissed more quickly. Judges could also impose sanctions where meritless suits are aimed at First Amendment rights and could award attorney's fees to defendants in such cases.

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138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*

SLAPP suits are still a relatively new phenomenon and many judges and attorneys may not yet be familiar with them. As the suits gain prominence and practitioners become increasingly educated about what they are and cognizant of their negative societal effects, the SLAPP suit should become increasingly difficult—and more costly—to file.