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## **S.L.A.P.P. SUITS: A FIRST AMENDMENT ISSUE AND BEYOND**

**ALICE GLOVER\***  
**AND MARCUS JIMISON\*\***

*SLAPP suits function by forcing the target into the judicial arena where the SLAPP filer foists upon the target the expenses of a defense. The longer the litigation can be stretched out, the more litigation that can be churned, the greater the expense that is inflicted and the closer the SLAPP filer moves to success. The purpose of such gamesmanship ranges from simple retribution for past activism to discouraging future activism . . . . Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined.*

WESTCHESTER COUNTY, NEW YORK TRIAL JUDGE <sup>1</sup>

In the decade of the eighties, an interesting phenomenon began to develop in the field of tort law<sup>2</sup> — the Strategic Lawsuit Against Public Participation (hereinafter referred to as the SLAPP suit).<sup>3</sup> A SLAPP suit is a legal maneuver used by a party, usually the plaintiff, who wishes to stifle the expressions of another. In such cases, the plaintiff typically initiates some type of tort action against a particular defendant. Instead of seeking a specific legal remedy from this defendant, the litigation is primarily instituted as a strategic move to intimidate that party into silence.<sup>4</sup> The danger of a SLAPP suit is that

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1. *Gordon v. Marrone*, No. 185 44/90 Sup. Ct., Westchester County, N.Y. (April 13, 1992), Decision at 26-28 (citations omitted).

2. A tort case is defined as: "A major classification category for civil cases that includes cases involving a court action resulting from an injury or wrong committed either against a person or against a person's property by a party who either did something that he was obligated not to do, or failed to do something that he was obligated to do." CONFERENCE OF STATE COURT ADMINISTRATORS & THE NATIONAL CENTER FOR STATE COURTS, STATE COURT MODEL STATISTICAL DIRECTORY 61 (1989).

3. See George W. Pring, "SLAPPS" - *Strategic Lawsuits Against Public Participation — A New Ethical, Tactical, and Constitutional Dilemma*, C534 A.L.I.-A.B.A. 937 (1990). Professors George W. Pring and Penelope Canan of the University of Denver were two of the earliest researchers in the area of Strategic Lawsuits Against Public Participation. They developed the term "SLAPP" to describe the phenomenon and initiated a detailed analysis and case study of the problem of SLAPPS.

4. *Id.* at 939.

average citizens exercising their constitutional right to free speech and petitioning the government to redress their grievances are penalized and threatened by litigation claiming tortious behavior, such as defamation or libel.<sup>5</sup>

While this strategic maneuver is most often recognized in cases which have a land-use or an environmental component, the strategy has recently begun to gain momentum in other areas. For example, the San Francisco Police Officers Association sued the NAACP<sup>6</sup> for fifty million dollars as a consequence of the NAACP's publicly voicing concerns over police brutality in that area of California.<sup>7</sup> In another case, the National Organization for Women [hereinafter NOW] was the target of a SLAPP suit when it organized a boycott in states where the Equal Rights Amendment had not been passed. In response to the boycott, the state Attorney General of Missouri sued NOW on the basis that local businesses were detrimentally affected by the NOW boycott.<sup>8</sup>

Because the definition of this legal area is as yet incomplete, there are conflicting views on the topic, ranging from controversy over the scope of a SLAPP suit to viable solutions available to combat SLAPP suits.<sup>9</sup> A handful of state legislatures have found the problem troublesome enough to pass anti-SLAPP suit legislation aimed at discouraging the temptation to initiate SLAPP suits.<sup>10</sup>

This article will give an overview of perspectives on the scope of SLAPP suits and their potentially devastating effect on the constitutional right of free speech and the right to petition the government for redress of grievances. This article will also analyze legislative solutions adopted to date.

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5. 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).

6. NAACP is the acronym for the National Association for the Advancement of Colored People, an organization established in 1910 with the merging of the Niagara Movement headed by W.E.B. DuBois and a group of concerned white citizens, dedicated to ending racial inequality and segregation. *THE CONCISE COLUMBIA ENCYCLOPEDIA* 581 (Avon Books 1983).

7. Pring, *supra* note 3, at 939.

8. *Missouri v. NOW*, 467 F. Supp. 289 (W.D. Mo. 1979), *aff'd*, 620 F.2d 1301 (8th Cir. 1980), *cert. denied*, 449 U.S. 842 (1980).

9. Victor J. Cosentino, Comment, *Strategic Lawsuit Against Public Participation: An Analysis of the Solutions*, 27 CAL. W. L. REV. 399, 401 (1993) (contending that the Pring definition of SLAPPS is too restrictive in that it is limited to lawsuits based on petitioning the government on a matter of "public interest or concern." Cosentino suggests that SLAPPS should also be distinguished from environmental countersuits).

10. See generally Edward W. McBride, Jr., *The Empire SLAPPS Back: New York's Legislative Response to SLAPP Suits*, 17 VT. L. REV. 925 (1993).

## I. MECHANICS OF SLAPP SUITS

While there have been a number of different approaches to defining a SLAPP suit, it is generally accepted that SLAPP suits are "a response by detrimentally affected parties to the activities of citizens who petition the government."<sup>11</sup> SLAPPs are intended to silence those citizens and "in doing so, SLAPPs effectively deny vocal citizens their constitutional right to petition the government."<sup>12</sup> A SLAPP suit is distinguished from other intimidation mechanisms in that it specifically rechannels "efforts initiated in the political arena and recasts them in the judicial arena."<sup>13</sup>

Professors Penelope Canan and George W. Pring, two of the primary analysts of this legal phenomenon, have categorized the development of SLAPP suits into three separate stages. First, a citizen exercises his constitutional rights by publicly addressing the government on an issue of public concern. This is clearly protected speech under the First Amendment petition clause.<sup>14</sup> Inevitably, the citizen's view is opposed by an individual or a group of people who are threatened by the speech because they stand to lose some interest, often a monetary interest, because of the petition to governmental action.<sup>15</sup> Second, those threatened by the citizen's activities attempt to thwart further citizen activity by intimidating the citizen with a lawsuit. They file the lawsuit anticipating that the citizen will now be forced to expend time and money in defending his actions instead of pursuing the original activities of petitioning the government for a redress of grievances.<sup>16</sup> Third, the defendant must offer a defense that his original behavior was constitutionally protected under the First Amendment. These three stages of a SLAPP suit cause the dispute to shift into the judicial arena under the auspices of a tort case involving such claims as defamation, libel, business torts and nuisance.

A prototypical and often cited illustration of a SLAPP suit centers on the case of a developer who invests time and money into drafting plans for a tract of land to be developed. As the proposal progresses,

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11. Cosentino, *supra* note 9, at 399 (referring to Professors Canan and Pring's coining of the term Strategic Lawsuit Against Public Participation).

12. *Id.*

13. See generally Penelope Canan & George W. Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 LAW AND SOC'Y REV. 386 (1988); Penelope Canan & George W. Pring, *Strategic Lawsuits Against Public Participation*, 35 SOC. PROBS. 506 (1988).

14. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

15. Pring, *supra* note 3, at 940.

16. *Id.*

the public becomes aware of the project through news accounts and announcements of public hearings. Upon being alerted to the development, some members of the public, often neighbors of the undeveloped land, become concerned over general environmental or public health issues. They begin to actively participate by writing letters to the media or involving themselves in governmental hearings to express these concerns. This participation then hinders the original plans of the developer, and in retaliation, the developer files a lawsuit against the person or group of persons voicing their opposition.<sup>17</sup> The developer initiates the legal action in an effort to force the loosely-organized citizens' group into redirecting their efforts away from voicing concerns against the proposed development to focusing on defending themselves in a legal battle. Further, the developer is aware that this litigation may scare or intimidate the group into terminating its protests altogether.

## II. THE CANAN AND PRING MODEL

Canan and Pring describe SLAPP suits as "attempts to use civil tort action to stifle political expression."<sup>18</sup> They suggest that "[t]hese lawsuits claim injury resulting from citizen efforts to influence the government or sway voters on an issue of public significance."<sup>19</sup> In reaching this conclusion, Canan and Pring present a detailed case study of *Warembourg v. City Council of City of Louisville*.<sup>20</sup>

In *Warembourg*, Elizabeth Johnson and others petitioned the City Council of Louisville, Colorado, in 1983, to vote against a plan to annex a tract of land proposed for a housing development. The City Council approved the annexation of the land, but Ms. Johnson was able to obtain enough petition signatures to put the matter before the public for a referendum. Rather than submit the issue to a vote, the City Council reversed itself and repealed the ordinance permitting annexation.<sup>21</sup>

Consequently, the developer, Medema Homes, Inc., and the landowner, Klubert Warembourg, sued Ms. Johnson, three other petition representatives, and the City Council of Louisville for constitutional violations of due process and equal protection, as well as conspiracy to unreasonably limit the development of property. The damages were "for an amount to be determined at trial."<sup>22</sup> Canan and Pring contend

17. Cosentino, *supra* note 9, at 402.

18. Pring, *supra* note 3, at 939.

19. *Id.*

20. No. 83-CV-1231-2 (Boulder County Dist. Ct., Colo., dismissed Jan. 4, 1983).

21. Pring, *supra* note 3, at 940.

22. Pring, *supra* note 3, at 942-43.

that Ms. Johnson and the three other petition representatives had been "slapped" with a lawsuit by the developer and were subsequently forced to expend time, money and energy to wage a legal battle instead of pursuing the referendum issue.<sup>23</sup>

While Canan and Pring believe that hundreds of these types of lawsuits are initiated every year against average citizens who are simply attempting to exercise their constitutional rights, the actual number of such lawsuits is difficult to pinpoint because the traditional judicial system in the United States allows such lawsuits to be camouflaged among the thousands of tort claims filed each year.<sup>24</sup> To further increase the difficulty of statistical analysis, SLAPP suits, unlike normal tort claims, do not have to be won in court in order to achieve objectives. Because the goal of SLAPP suits is often political control rather than a judicial outcome, success can often be equated with freezing out the opposition and intimidating them into silence on that political issue.

It is this political retaliation, through the law, that distinguishes SLAPP suits from the commonly observed intimidation and retaliation through litigation between commercial competitors, business partners, labor and management, and regulatory agencies and licensees. Strategic lawsuits against public participation, on the other hand, claim injury from citizen efforts to influence a government body or the electorate on an issue of public significance.<sup>25</sup> To further delineate SLAPP suits from that business-related litigation, Canan and Pring suggest five defining factors to more completely narrow the definition.

First, the conduct upon which the lawsuit is based is generally protected speech or activity under the First Amendment of the United States Constitution.<sup>26</sup> While many citizens are not familiar with every aspect of the Constitution, the First Amendment freedoms which are key to our democratic system of government are taught to all Americans at an early age.<sup>27</sup>

The First Amendment protects a wide variety of activities, and the Supreme Court over the years has been reluctant to render decisions which threaten these rights. While the Court has pronounced limits on some types of speech such as obscenity,<sup>28</sup> commercial speech,<sup>29</sup> and

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23. Pring, *supra* note 3, at 943.

24. See Pring, *supra* note 3, at 937.

25. Pring, *supra* note 3, at 939.

26. Pring, *supra* note 3, at 937.

27. McBride, *supra* note 10, at 925.

28. In *Roth v. United States*, 354 U.S. 476 (1957), the United States Supreme Court held that obscenity was not protected by the First Amendment. Later Supreme Courts attempted to define "obscenity," but the issue was not settled until the Court decided *Miller v. California*, 413

"fighting words,"<sup>30</sup> the speech which is the subject of SLAPP suits is clearly protected by the First Amendment.<sup>31</sup> Some of the activities which trigger SLAPP suits include:

- \* Corresponding with public officials;
- \* Reporting violations to public health authorities;
- \* Speaking out at public hearings for land re-zoning issues;
- \* Circulating or simply signing a citizen petition;
- \* Testifying at school board meetings;
- \* Participating in peaceful demonstrations;
- \* Lobbying for legislative reform;
- \* Filing complaints with government agencies for consumer affairs, civil rights or labor relations.<sup>32</sup>

These activities form the foundation of what makes our country so unique — the opportunity to challenge our elected officials and to influence their decisions through the democratic process. "In a representative democracy, government acts on behalf of the people, and effective representation depends to a large extent upon the ability of the people to make their wishes known to government officials acting on their behalf."<sup>33</sup> Moreover, economic efficiencies are usually better served when a credible cost-benefit analysis can be conducted. The suppression of an opposing viewpoint inherently forecloses such meaningful analysis, thereby increasing the likelihood that a governmental entity may make inefficient decisions in allocating resources.

The second distinguishing factor of a SLAPP suit is that the defendant is generally advancing causes of genuine public interest and is not motivated by pecuniary or personal gain. The classic defendant is a citizen (or perhaps a non-governmental advocacy group) who at-

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U.S. 15 (1973). In *Miller*, the Court promulgated guidelines on obscenity, a three part analytical framework for the trier of fact to use in determining whether material is obscene: (a) the first prong of the test is whether the entire work would be considered to be appealing to the prurient interest, using a reasonable person standard applying contemporary community practices; (b) the second prong is whether the work describes in a patently offensive way sexual conduct which is specifically detailed in the applicable state law; and (c) the final prong is whether the entire work lacks serious literary, artistic, political or scientific value.

29. Commercial speech is generally defined as speech of any kind that advertises a product or service for profit or for business purposes, or speech that has a dominant theme which is simply to propose a commercial transaction. It is afforded protection of the First Amendment but can be regulated in a number of permissible ways. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

30. In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), the United States Supreme Court held that speech or writing that, by its very utterance, tends to incite an immediate breach of the peace is not constitutionally protected and may be prevented, punished or regulated by the states. The test developed in *Chaplinsky* is whether or not men of common intelligence would understand the words as likely to cause the average addressee to fight — words and expressions that by general consent are "fighting words" when said "without a disarming smile."

31. Pring, *supra* note 3, at 937.

32. Canan & Pring, *supra* note 5, at 938.

33. Canan & Pring, *supra* note 5, at 942 (quoting from the opinion rendered in *Protect Our Mountain Env't, Inc. v. District Court*, 677 P.2d 1361, 1364-65 (Colo. 1984)).

tempts to sway the opinion of some governmental entity by petitioning for the redress of grievances.<sup>34</sup> Often, the only reason that a defendant has become involved in the process is because of concern that the proposed action will somehow harm the surrounding environment or become a public or private nuisance<sup>35</sup> to a neighborhood or a local community. While some defendants have been nationally known and well-organized advocacy groups, like the Sierra Club, most SLAPP defendants are average citizens or ad hoc groups which are formed for a one-time chance to mobilize forces against a local proposal or project.<sup>36</sup>

The third prong of the SLAPP suit delineation is the classification of the plaintiff in the action. Most often, a SLAPP suit plaintiff is an individual who believes, or an organization that contends, the continued statements or actions of the defendants are detrimental to the advancement of the plaintiff's plans. The motivations of a SLAPP plaintiff include retaliation in the judicial arena to political opposition by the defendant, attempts to silence and intimidate the defendants into terminating their activity against the threatened plaintiff, and offensive strategy to prevent others from opposing the plaintiff's plans.<sup>37</sup> While there are different reasons which motivate SLAPP plaintiffs to file these lawsuits, one commentator has suggested that the common characteristic is an unfounded claim or a meritless complaint.<sup>38</sup>

Fourth, the complaints of SLAPP plaintiffs have traditionally alleged constitutional violations based on the following theories:

a. Defamation - The most frequent claim of SLAPP plaintiffs is defamation.<sup>39</sup> Defamation is defined as a deliberately false statement, either spoken or written, which allegedly injures another's reputation. Words are defamatory if they harm the victim so as to damage his reputation within the community or to discourage other people from

34. Canan & Pring, *supra* note 5, at 938.

35. Generally, a nuisance is considered to be something or some activity which annoys and disturbs one in possession of his property, thereby hindering its ordinary use or occupation and making it physically uncomfortable to him. Some examples are odors, smoke, noise or vibrations. *Patton v. Westwood Country Club Co.*, 247 N.E.2d 761, 763 (1969).

36. See David Sive, *Environmental Litigation Countersuits and Delay*, C427 A.L.I.-A.B.A. 1319, 1326 (1989).

37. McBride, *supra* note 10, at 928.

38. Jeffrey A. Benson & Dwight H. Merriam, *Strategic Lawsuits Against Public Participation (SLAPPS): An Overview*, C750 A.L.I.-A.B.A. 837, 840 (1992).

39. Thomas A. Waldman, *SLAPP Suits: Weaknesses in First Amendment Law and in the Courts' Responses to Frivolous Litigation*, 39 UCLA L. REV. 979, at 986-87 (1992). See also Penelope Canan & George W. Pring, *Strategic Lawsuits Against Political Participation*, 35 Soc. PROBS. 506, 511 (1988).



continued relationships with the victim. The definition includes both libel or slander.<sup>40</sup>

This type of claim is illustrated by the New York case of a development company, Terra Homes, which filed a defamation lawsuit against a local homeowner who, opposed to local development by Terra Homes, picketed the development with a sign that read: "This neighborhood will not be Terra-ized."<sup>41</sup> Terra Homes promptly sued the homeowner for defamation claiming that he had no right to call the company "a terrorist."<sup>42</sup>

b. Business torts - Business torts are also a common foundation for complaints in SLAPP suits. A business tort is a breach of a legal duty by a business that causes an individual to suffer injury or sustain damages. Causes of action for interference with a contract (or interference with business relationships) and a claim for restraint of trade are both business torts.<sup>43</sup> The showing required for interference with

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40. RESTATEMENT (SECOND) OF TORTS sec. 559. In *New York Times v. Sullivan*, 376 U.S. 254 (1964), the United States Supreme Court redefined the common law of defamation when the Court heard what may have been the first SLAPP suit. The case resulted when the *New York Times* printed an advertisement alleging that the Montgomery, Alabama police department had a political of practicing police brutality and violation of citizens' civil rights. The plaintiff, the Montgomery police commissioner, won a five hundred thousand dollar libel judgment. The law of libel, as it existed in 1964, placed the burden on the defendant to show that his statements were true. At that time, if the defendant were unable to meet this burden, then he would most probably be found liable to pay damages. In this sense the common law of libel approximated a form of strict liability.

Justice William Brennan, writing for the majority, recognized the potential "chilling effect" inherent in the law of defamation on citizen participation in the democratic process. Brennan, reversing the trial court's verdict, wrote that the First Amendment exudes "a profound national commitment to the principle that debate on public issue should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." In order to preserve this national commitment to open and robust debate from the inhibitory characteristic of defamation law, the Court imposed a new rule requiring that in actions involving public officials [later extended in some degree to public figures and issues of public interest], the plaintiff must show by clear and convincing evidence actual "malice" on the part of the defendant. In the context of this new rule, actual malice means a statement with knowledge of its falsity or with reckless disregard for the truth.

The addition of actual malice as an essential element to defamation actions for cases involving the public interest greatly reduced the threat of plaintiffs prevailing in their lawsuits. However, *New York Times* does not remove, nor does the decision address, the incentive a plaintiff has to file such lawsuits for purposes of intimidating a small group from opposing his objectives. Ironically, the requirement of actual malice actually lends itself to requiring lengthier, costlier, and more burdensome discovery. As a result, many defendants are subjected to long and costly legal proceedings and trials even when it appears that the conduct at issue is protected by the First Amendment.

Although *New York Times* and its progeny provide substantive legal protection against jury verdicts, the decisions do little to discourage the incentive for filing SLAPP suits, particularly if the objectives of the litigation can be met by pre-trial tactics.

41. Waldman, *supra* note 38, at 986 (citing Holzberg, *Defamation Suits "Chill" Activists*, NAT'L L.J., July 25, 1988, at 3, cols. 1,3).

42. *Id.*

43. Waldman, *supra* note 39, at 987.

a contract is "an intentional disruption of a potential economic advantage (or of a contract), plus causation and damages. There is no need to prove that the defendant acted with ill will toward the plaintiff." Because of this, some legal commentators have suggested that the standard of proof that the plaintiff must bear is lower and therefore easier to demonstrate than in other tort claims.<sup>44</sup>

The typical case of interference with a contract often involves a charge that a SLAPP defendant solicited a party, usually a governmental entity, into action that breached a contract. If the SLAPP defendant, usually an advocate, actually caused enough of a change to the governmental entity's previous commitment with the SLAPP plaintiff, then the plaintiff is in a position to claim injury to his business and to present a prima facie case for interference.

In an early and well-known SLAPP case, *Sierra Club v. Butz*,<sup>45</sup> Humboldt Fir was a logging company that alleged injury when the Sierra Club sought an injunction against further logging in a forest area which was eligible for protection under the National Wilderness Preservation System. Humboldt sued the Sierra Club for, among

44. *Id.*

Some commentators suggest that the Noerr-Pennington doctrine may in some courts provide a substantive defense for a defendant in this type of action. The Noerr-Pennington doctrine arises from antitrust law but has been interpreted by some courts to provide constitutional protection for certain conduct that falls outside the antitrust sphere.

The Noerr-Pennington doctrine, developed in antitrust law, was predicated upon *Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). In that case, a railroad organization fought deregulation of the trucking industry in several states. The railroad's opposition was in the form of paid advertisements and press releases. The district court concluded that the motivation fueling the defendant's opposition was protection of its market share, which was a substantial interest. The Supreme Court ruled that motivation alone cannot violate the antitrust laws when the defendants' actions were legitimate governmental petitioning.

To determine whether the defendants' use of the government process was legitimate or a "sham," the court developed an outcome-process test. If the defendant looks toward the outcome of the governmental process to resolve the dispute, then the petitioning conduct is legitimate.

In comparison to substantive First Amendment protections, the Noerr-Pennington doctrine would lend itself to quicker procedural disposition. With a lawsuit where the Noerr-Pennington doctrine is applied, some courts have imposed a specific pleading requirement of sham petitioning. Such a pleading requirement mandates that the plaintiff show that the defendant's petitioning was a sham in order to survive summary judgment. This places the burden on the plaintiff to allege specific facts that the defendant misused the governmental process to effectuate his goals.

Furthermore, the sham requirement, unlike actual malice, concerns itself with the defendant's conduct, not a state of mind, making it generally easier to prove. Since this requirement is imposed at the pleading stage, a court can dismiss a lawsuit before any costly discovery is undertaken.

In 1984, the Colorado Supreme Court applied Noerr-Pennington and indicated that upon a motion to dismiss a plaintiff must make a showing of sham petitioning. *Protect Our Mountain Env't, Inc. v. District Court*, 677 P.2d. 1361 (Colo. 1984). However, many courts do not believe that Noerr-Pennington is of constitutional dimensions. Instead, these courts have chosen to narrowly interpret the doctrine as applying only to suits alleging a violation of the antitrust statutes.

45. 349 F. Supp. 934 (N.D. Cal. 1972).

other things, economic interference. Humboldt charged that the Sierra Club induced the United States government into breaching a timber contract when it sought an injunction against further logging in the protected acreage.<sup>46</sup>

c. Civil Rights Violations - Third, plaintiffs often claim a violation of the basic and fundamental rights which are guaranteed to every United States citizen under the Constitution, due process and equal protection. The Warembourg<sup>47</sup> case study is a clear illustration. When a neighborhood advocate Johnson rallied enough supporters to force the City Council to hold a referendum on the issue of further annexation by the city, the land developer sued Johnson and several others for constitutional violations of due process and equal protection.<sup>48</sup>

d. Conspiracy to commit one of the above tortious acts - Another technique often utilized by SLAPP plaintiffs is to charge that a defendant is part of a conspiracy to commit one of the tortious acts listed above. In *Brownsville Golden Age Nursing Home, Inc. v. Wells*,<sup>49</sup> Joanna Snyder and Paula Wells were interested in locating a nursing home to care for a relative. On a visit to the Brownsville Golden Age Nursing Home in Pennsylvania, they were shocked to see the poor treatment that the nursing home residents received. Consequently, they complained to a number of officials including state health officials, news agencies and politicians. When the nursing home concerns were investigated, the state found some of the allegations to be valid and promptly revoked the license. In retaliation, the Brownsville Golden Age Nursing Home sued Snyder, Wells and others for "tortiously conspiring to interfere with the nursing home's business relations."<sup>50</sup>

e. Misuse of judicial process - Though not technically an affirmative cause of action in SLAPP litigation, occasionally a counterclaim will be based on theories of abuse of process or malicious prosecution. In *City of Angoon v. Hodel*,<sup>51</sup> the Sierra Club initially sued the United States Secretary of the Interior to "overturn a conveyance of land to Shee Atika and stop logging on Admiralty Island."<sup>52</sup> Shee Atika counterclaimed under the theory of abuse of process based on the lis pendens filed by the Sierra Club but ultimately lost the suit when the

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46. *Sierra Club*, 349 F. Supp. at 935-36.

47. See *supra* text accompanying note 19.

48. See generally Pring, *supra* note 3.

49. 839 F.2d 155 (3rd Cir. 1988).

50. *Id.* at 157-58.

51. 836 F.2d 1245 (9th Cir. 1988).

52. *Id.* at 1246.

Ninth Circuit Court of Appeals ruled that the *lis pendens* filing was not abuse of process.<sup>53</sup>

The primary remedy sought by the SLAPP plaintiff is one of money damages. The average award sought in SLAPP litigation is nine million dollars.<sup>54</sup> Injunctions or declaratory relief are usually sought as secondary relief.<sup>55</sup> The priority that the SLAPP plaintiff places on the monetary damages, as opposed to other remedies designed to terminate the defendant's actions, serves to bolster the premise that SLAPP suits are designed to intimidate defendants into silence. The SLAPP defendant potentially faces enormous damages and must bear substantial legal costs to defend himself against the SLAPP suit. This element often serves as a deterrent to the defendant and others privy to the lawsuit in terms of further participation in the SLAPP-related activity or other future activities that might result in the same sort of litigation.

### III. ALTERNATIVE VIEWS OF A SLAPP SUIT

Some legal commentators have taken a more marginal view of the SLAPP phenomenon. Based on a study conducted in California,<sup>56</sup> Thomas Waldman contends that the issue of SLAPPs is one of conflicting values:

On the one hand, . . . political protests have social costs. Pesky activists can undermine legitimate business interests or injure the reputa-

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53. *Id.* at 1247-48.

Some have argued that SLAPP defendants themselves should countersue for malicious prosecution, creating a SLAPP-back suit. To prevail on a malicious prosecution counterclaim, one must show that the underlying proceeding was favorably decided and that the underlying proceeding was brought without probable cause and with malice. In California there were two SLAPP-back verdicts for 11.1 million and 13 million dollars. See *Appeal of Milestone Damages Case Fails*, L.A. TIMES, October 4, 1991, at A3, col. 5 and *A New Way to Intimidate Activists*, UTNE READER, Nov./Dec., 1989.

There are, however, drawbacks to SLAPP-back suits. First, lack of probable cause and malice are difficult to prove. Second, the countersuit will require more litigation expense. This is a problem for many SLAPP defendants, particularly if they are small or local citizens' groups as contrasted to larger and more established groups like the Sierra Club. Indeed, it is the financial vulnerability of the SLAPP defendant which makes him a target of the initial SLAPP suit in the first instance. For the most part, a SLAPP defendant would like to see the lawsuit go away.

However, Professor Pring has not discounted the value of the countersuit as a tactical tool. "Now SLAPP plaintiffs must realize that besides probably losing the case, there's also a chance of losing millions in a countersuit. This sends a signal no attorney can ignore." See *A New Way to Intimidate Activists*, UTNE READER, Nov./Dec., 1989.

54. Benson & Merriam, *supra* note 38, at 841.

55. Robert I. McMurry and David H. Pierce, *Strategic Lawsuits Against Public Participation (SLAPPS): The Benefits and Risks*, C750 A.L.I. - A.B.A. 823, 828 (citing the Pring analysis).

56. See generally Waldman, *supra* note 39. Thomas A. Waldman is a recent graduate of UCLA School of Law. In 1992, working closely with Professor David Binder of UCA, he conducted a detailed study of SLAPP suits in the state of California. The results of this study are examined in his article cited above.

tion of others. As a result, constitutional protections for activism are not absolute. On the other hand, one price of democracy may be enduring unnecessary, undesirable political activity without resorting to the courts to stop it. SLAPP suits thrive on the margin between the state interest in orderly economic activity and activists' rights to advance their agenda.<sup>57</sup>

While Waldman ultimately takes the view that SLAPP suits should be controlled, he is careful to balance this opinion with a sympathetic portrait of a SLAPP plaintiff, quoting Professor Gideon Kanner of Loyola Law School who stated that "These people [anti-development advocates] come out of the woodwork" and "have become drunk with power." Kanner contends that public officials who want to get re-elected are essentially "blackmailed" into ignoring a developer's right to build on his or her own land.<sup>58</sup> In these cases, the offensive use of a lawsuit merely becomes a negotiating tool.<sup>59</sup>

Furthermore, Waldman is less certain than Canan and Pring that a SLAPP suit has a universal effect of chilling protected speech.

This chilling effect may not be universal. Consider the following statement, which was made by the representative of a homeowners' group responding to the survey reported in this comment: "I would not like to think people would back down and not stand up for their beliefs due to a threat of a lawsuit."<sup>60</sup>

Waldman allows the label of SLAPP to include plaintiff suits which are motivated for legitimate reasons: tortious conduct on the part of the defendant which is independent from a plaintiff strategy to suppress the defendant's protected activity. In these cases, the plaintiff's objective is not directly to silence the defendant, although the result of such a suit may have this effect.<sup>61</sup> This broad definition of SLAPP may make it difficult for courts to identify SLAPP suits in a timely manner so to eliminate their effectiveness.

Victor J. Cosentino of the California Western School of Law is another commentator who has published an alternative view to the Canan and Pring model.<sup>62</sup> Cosentino identified several problems with the Canan and Pring SLAPP delineation. He contends that Canan-Pring's approach is too narrowly defined — to qualify under that view, the defendant must have been advocating before a governmental entity regarding a matter of "public interest of concern." Cosentino points out that the "First Amendment protects all legitimate

57. Waldman, *supra* note 39, at 982.

58. Waldman, *supra* note 39, at 986 (quoting Professor Kanner as cited in Ron Galperin, *Getting SLAPPed*, L.A. Times, Apr. 29, 1990, at K1, col. 4, K. 15, col. 3).

59. Waldman, *supra* note 39, at 986.

60. Waldman, *supra* note 39, at 991.

61. Waldman, *supra* note 39, at 985.

62. See generally Cosentino, *supra* note 9.

petitioning of government regardless of its objective." He posits that the focus of SLAPPS should be on the plaintiff's motives in initiating the lawsuit and not on the defendant's objectives in petitioning the government.<sup>63</sup>

Alternatively, Cosentino contends that if a definition is too broad, environmental countersuits will be labelled as SLAPP suits. Cosentino suggests that these broad definitions would include countersuits initiated by a business organization or an individual in response to an earlier lawsuit brought by a citizen's group. "In this scenario, the original suit is filed to stop some action which the plaintiff believes is detrimental to the environment. The defendant countersues solely to intimidate the plaintiff."<sup>64</sup>

Cosentino outlines three reasons for excluding environmental countersuits from the SLAPP definition:

These countersuits are distinguishable from SLAPPS for three reasons. First, they have a different procedural posture which requires a different procedural solution. Second, they are only used to counter lawsuits initiated by other parties so the original plaintiff will have anticipated both a legal battle and the possibility of a countersuit. In contrast, SLAPPS are initiated against citizens who are using only the political process to air their grievances. Those citizens are not anticipating, are not prepared for, and should not be subjected to legal action. Finally, the chilling effect inherent in SLAPPS is probably not as significant in countersuits.<sup>65</sup>

Under the Cosentino view, one of the earliest SLAPP-categorized cases might not be considered to fall into the SLAPP suit category at all. In *Sierra Club v. Butz*, the Sierra Club initiated court action seeking a temporary injunction against further logging on some land potentially protected by the National Wilderness Preservation System. In response, the Club was sued for economic interference by one of the logging companies, Humboldt Fir.<sup>66</sup>

In Cosentino's opinion, when a citizens' group takes the time and trouble of initiating a lawsuit, it is the party changing the arena from a political one to a judicial one. As well, the legal counsel for the citizens' group will certainly have advised the group of the possibility of a countersuit so it will likely have anticipated and prepared for such an action.

In contrast, Cosentino urges that surprise for the purpose of intimidation is an important element of a SLAPP suit. Under his definition of SLAPP suit, the defendant/citizens' group is caught off-guard and

63. Cosentino, *supra* note 9, at 401.

64. Cosentino, *supra* note 9 at 405.

65. Cosentino, *supra* note 9, at 405.

66. 349 F. Supp. 934 (N.D. Cal. 1972).

its focus of concern about a particular issue is transformed into an unanticipated legal battle having little to do with the initial matter. Additionally, by his analytical framework, it is the citizens' group that is being forced to move from the political arena to the judicial arena. For this reason, Cosentino contends that SLAPP suits should be viewed with the primary focus on the motive of the original plaintiff and not on the defendant's goals in the original petition.<sup>67</sup>

Since the exact criteria and definition of SLAPP suits have not been settled, it is difficult to estimate the true success of SLAPP suits. Looking only at the final disposition of cases that actually make it to court, the plaintiff rarely prevails because of the SLAPP defendant's constitutionally protected rights to free speech and to petition the government for redress of grievances.<sup>68</sup> One estimate holds that more than eighty percent of these lawsuits are dismissed by the courts, "generally on grounds that the activity is protected as an exercise of the opponent's First Amendment rights."<sup>69</sup>

In particular, SLAPP suits have rarely been successful and consequently the tactic is not often used against strong activist organizations like the Sierra Club or the Natural Resources Defense Council, Inc. The most likely reason is that these groups are well-organized, financially secure and have staff with the experience and expertise to fend off such lawsuits.<sup>70</sup>

#### IV. IMPLICATIONS OF SLAPP SUIT LITIGATION

Both liberal and conservative legal scholars have criticized the SLAPP suit as being "one of the most troubling legal trends in our country."<sup>71</sup> Probably the most serious concern is that this special kind of lawsuit threatens to erode First Amendment rights for its sole purpose is to "chill" healthy public dialogue.<sup>72</sup>

Research has shown that only a small percentage of Americans actually exercise their rights to participate in government. In fact, Americans have a significantly lower level of electoral voting participation than other industrialized democratically-governed countries.<sup>73</sup> Further, if voting is discounted, only ten percent of Americans are actively involved in other types of political activity.<sup>74</sup> Pring believes this lack of government participation only serves to aggravate the problem

67. See generally Cosentino, *supra* note 9, at 403-405.

68. Benson & Merriam, *supra* note 38, at 843.

69. McMurray & Pierce, *supra* note 55, at 826-27.

70. Sive, *supra* note 36, at 1325-26.

71. Benson & Merriam, *supra* note 38, at 840.

72. Pring, *supra* note 3, at 943.

73. Pring, *supra* note 3, at 943 (citing the theoretical analysis of Taylor and Jodice).

74. Pring, *supra* note 3, at 943 (citing Milbraith's statistics).

of SLAPP suits. The "chilling effect" created by the lawsuit causes a "ripple effect" throughout the community, and the already small percentage of citizens who would likely have participated by speaking at a public hearing or writing letters to the media is effectively silenced. Acknowledging that not all citizens will be intimidated into silence, Pring believes that a great number will be daunted at the prospect of a possible lawsuit.<sup>75</sup>

The detrimental effect of this type of lawsuit is long term. The folklore and old war stories passing from one community to another which detail the plight of "would-be" activists who were forced to pay thousands of dollars to defend themselves in SLAPP suits will likely prevent others from moving forward on similar development projects in their areas. In an 1989 article on SLAPP suits, New York Attorney General Robert Abrams examined the Love Canal issue<sup>76</sup> and asked the sobering question of "how much longer Love Canal might have gone unchecked if we lived in a society without a significant level of public participation." Attorney General Abrams further highlighted the gravity of the SLAPP problem by stating that public participation in environmental matters is "the cornerstone of our very survival as a planet" and suggested that the results of silence could be devastating.<sup>77</sup>

A second concern is that this type of litigation can force land use decisions to become imbalanced ones. Local city and county planners look to a myriad of sources and seek advice from diverse groups while making important decisions regarding local land use. They often rely on the varied opinions of developers, business leaders and affected citizen or neighborhood groups as a natural balancing test in making recommendations on zoning and land use permits. If the views of one of these parties is effectively excluded, then the recommendations are potentially imbalanced and more heavily weighted in the direction of development, possibly at the cost of important public health or environmental issues.<sup>78</sup>

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75. Pring, *supra* note 3, at 943.

76. Love Canal, an area near Niagara Falls, New York, has been referred to as the "nation's most infamous toxic dump." Laurie Goodstein, *Army Linked to Love Canal Dumping; Documents Spur Charges of Coverup in Radioactive Waste Disposal*, THE WASHINGTON POST, May 18, 1991. This environmental issue has been covered in the national news for some fifteen years, and a fourteen year court battle resulted in a settlement of ninety-eight million dollars. *98 Million in Love Canal Suit*, THE WASHINGTON POST, June 22, 1994, at Sec. A, pg. 2.

77. Benson & Merriam, *supra* note 38, at 840 (quoting from Robert Abrams, *Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 33 (1989)).

78. Benson & Merriam, *supra* note 38, at 841 (noting the case of Rick Welker from Enfield, Connecticut who actively worked to bar a proposed development from his community by accusing the town officials of making "back room deals" with the developer. Welker participated in a series of Planning and Zoning Commission meetings and after a lengthy review, the development plans were overturned. In retaliation, the developer sued Welker for economic damages



An issue which affects both the plaintiff and defendant in a SLAPP suit is the time-consuming nature of such litigation and the tremendous expense that often must be invested.<sup>79</sup> Most SLAPP suits take many months (and maybe even years) to finalize, and the attorney's fees alone can range in the tens of thousands of dollars.<sup>80</sup> In the *Warembourg* case, for example, an attorney advised Ms. Johnson, a neighborhood advocate, that it would cost more than ten thousand dollars to defend against the SLAPP suit.<sup>81</sup> In addition, the damages sought in SLAPP suits range anywhere from ten thousand dollars to one hundred million dollars,<sup>82</sup> with the average award sought being approximately nine million dollars.<sup>83</sup>

Some have argued that the problem of expense is compounded by the fact that current libel laws offer little protection to those defendants who do not have the financial or legal resources necessary to combat these constitutional claims.<sup>84</sup> Professor David Anderson of the University of Texas Law School states:

But the law that protects media so well from ultimate judgments protects poorly against harassment, the financial and journalistic costs of litigating, or the spectre of devastating loss. It fails to discourage the filing of libel suits for intimidation and other collateral purposes. It invites extensive discovery which multiplies the potential for harassment. It fails to place any advance limits on damages, which encourages the parties to treat virtually any dispute as a potential high-stakes case and to litigate accordingly. And although the appellate courts so far generally have controlled the eventual damage awards effectively, no media lawyer can assure a client that its case will not be the first in which a catastrophic judgement is affirmed.

The result is a system that works quite well for those defendants who have more wealth, better counsel, and more staying power than their adversaries.<sup>85</sup>

Noting that Anderson's comments are directed to news media organizations, the effect would be even more severe for individual defend-

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resulting from Welker's vocal opposition. Welker's defense team made a motion to dismiss which was eventually granted.)

79. See generally Pring, *supra* note 3 (where, in addition to the *Warembourg* case, he cites numerous other illustrations of SLAPP suits).

80. Pring, *supra* note 3, at 943.

81. *Id.*

82. *Id.*

83. Benson & Merriam, *supra* note 38, at 841.

84. David Anderson, *Who Needs Libel Reform?*, 338 P.L.I./Pat. 639 (1992).

David Anderson is the Thompson and Knight Centennial Professor at the University of Texas Law School. Having over twenty years of experience in the field of libel law, Professor Anderson has written extensively on the subject. His review in the article above concludes that "[t]he present law works pretty well for the most influential members of the media community, though poorly for nearly everyone else."

85. *Id.* at 642.

ants who had no legal resources or advisors. Additionally, Anderson believes that first-rate attorneys specializing in First Amendment free speech issues are hard to locate. Once found, they are either extremely expensive to retain or are already working for the opposition, who can better afford the costs. These lawyers are members of some of America's best law firms and often far more knowledgeable in First Amendment issues than most of the attorneys they confront. They have a "virtual monopoly on legal expertise in a Byzantine field of law that the novice has little chance of mastering."<sup>86</sup>

Professors Canan and Pring believe that literally hundreds of SLAPP suits are filed every year and that SLAPP defendants win in court the majority of the time, estimating their success rate at eighty-three percent.<sup>87</sup> The problem, however, is that when these lawsuits are lumped with already tremendous backlog that courts are experiencing, it can often take an average of thirty-six months for a SLAPP case to be finalized.<sup>88</sup>

Remembering that one of the major objectives of the SLAPP suit is to simply distract the activists by drawing them into a legal battle, it is hard to appreciate that these types of cases are deserving in the already overburdened federal and state court systems. It is even more difficult to reconcile when one considers that SLAPP suits are generally baseless claims with the ultimate goal of silencing the opponent who may be providing a valuable service to the community by raising genuine environmental or public health concerns. The irony is that a SLAPP suit does not have to succeed in court to meet its objectives. It is simply the means chosen to silence the opposition. If fear sets in and those hit with the SLAPP suit indeed terminate their earlier activities which initially led to their being "slapped" with a lawsuit, then the SLAPP plaintiff will have succeeded.

## V. RECOMMENDATIONS FOR ACTION

In addition to substantive law defenses, there have been several procedural and statutory responses to the phenomenon of SLAPP suits.

Federal Rule of Civil Procedure 11 states:

The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a

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86. *Id.* at 643.

87. Pring, *supra* note 3, at 943.

88. Benson & Merriam, *supra* note 38, at 840 (citing Penelope Canan, *The SLAPP from a Sociological Perspective*, 7 PACE ENVTL. L. REV. 23, 26 (1989)).

good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.<sup>89</sup>

Certainly, the language of Rule 11, like many of its state counterparts,<sup>90</sup> encompasses a response to the typical SLAPP suit. As a result, many lawmakers are unwilling to enact legislation to combat the problem of SLAPP suits. However, lawmakers should be made aware that Rule 11 is not the panacea that some believe it to be.<sup>91</sup>

There are some problems with Rule 11 sanctions. First, the sanctions are discretionary, and, thus, subject to judicial inconsistencies even in the imposition.<sup>92</sup> In the event that a judge does impose sanctions, he retains the authority to set the amount of such sanctions.<sup>93</sup> Therefore, even if a plaintiff is sanctioned, the amount does not necessarily have to cover the defendant's costs and attorney's fees.

Moreover, Rule 11 sanctions must be pled, and sometimes argued, separately.<sup>94</sup> This imposes most costs and litigation time on the SLAPP defendant, and again, there is no guarantee of prevailing. Finally, sanctions usually will not be considered until after discovery, often an expensive and time-consuming process in itself.

Some state lawmakers have proposed legislation to confront the problem of SLAPP suits. Most, if not all, of these proposals provide for attorney's fees and recoupment of court costs for a defendant who can show he was the victim of a frivolous SLAPP suit. However, the problem of identifying a SLAPP suit remains, and often legislative proposals do not address this.

In Washington, a law was passed which immunized citizens who "complain to a public entity in good faith and without actual malice."<sup>95</sup> However, such a law just repeats present day First Amendment jurisprudence and provides no statutory guidance to courts in identifying SLAPP suits quickly. Another shortcoming of the statute

89. FED. R. CIV. P. 11.

90. See N.C. GEN. STAT. § 1A-1, Rule 11.

91. See Waldman, *supra* note 39, at 1035 (noting that the Supreme Court has posited, "It is now clear that the central purpose of Rule 11 is to deter baseless filing in district court." Cooter & Gell v. Hartmarx Corp. 496 U.S. 386 (1990)).

92. Waldman, *supra* note 39, at 1035.

93. *Id.*

94. *Id.*

95. WASH. REV. CODE § 4.24.510 (1993).

Good faith communication to government agency - Immunity.

A person who in good faith communicates a complaint or information to any agency of federal, state, or local government regarding any matter reasonably of concern to that agency shall be immune from civil liability on claims based upon the communication to the agency. A person prevailing upon the defense provided for in this section shall be entitled to recover costs and reasonable attorneys' fees incurred in establishing the defense.

is that only direct petitioning of a "public entity" is protected. This leaves activities such as picketing, writing letters to the editor or distributing leaflets unprotected.<sup>96</sup>

Though not solving the dilemma of statutory definition, a more monetarily effective legislative solution enacted by the Washington legislature was the statutory provision authorizing intervention on behalf of the defendants by a local governmental agency or the state attorney general.<sup>97</sup> In this regard, once the defendant has made a showing that he may be the victim of a SLAPP suit, the state attorney general may intervene as counsel on behalf of the defendant. This procedure would offer financial reassurance to a defendant served with a lawsuit. Further, this proposed response evens the playing field in that it protects the plaintiff's access to the courts by providing for the recoupment of costs a plaintiff incurs when proving that the defendant's conduct was not protected by the anti-SLAPP statute.<sup>98</sup>

However, there are some limitations to the intervention provision of the statute. As with the provision authorizing the recovery of costs, intervention is only allowed when the defendant's conduct involved direct petitioning of a governmental unit. Thus letter writing, picketing and other forms of public participation go unprotected.<sup>99</sup> Secondly, intervention is discretionary, and because many state attorney general offices are financially constrained, actual intervention in most cases is unlikely.<sup>100</sup>

California and New York enacted legislation which heightens the plaintiff's pleading requirements in suits involving public petitioning. In California, upon a defendant's motion to strike, a plaintiff must show a "probability" that he would prevail on the merits in order to

96. See McBride, *supra* note 10, at 947.

97. Wash. REV. CODE § 4.24.520 (1993).

Good faith communication to government agency —When agency or attorney general may defend against lawsuit—Costs and fees

In order to protect the free flow of information from citizens to their government, an agency receiving a complaint or information under RCW 4.24.510 may intervene in and defend against any suit precipitated by the communication to the agency. In the event that a local governmental agency does not intervene in and defend against a suit arising from any communication protected under this act, the office of the attorney general may intervene in and defend against the suit.

98. *Id.*

An agency prevailing upon the defense provided for in RCW 4.24.510 shall be entitled to recover costs and reasonable attorneys' fees incurred in establishing the defense. If the agency fails to establish the defense provided for in RCW 4.24.510, the party bringing the action shall be entitled to recover from the agency costs and reasonable attorney's fees incurred in proving the defense inapplicable or invalid.

99. See McBride, *supra* note 10, at 947-48.

100. *Id.*

survive the motion.<sup>101</sup> If a plaintiff fails to survive this motion, then the court may, in its discretion, award costs and attorney's fees.<sup>102</sup>

The California law is presently the strongest medicine yet to discourage the filing of SLAPP suits. What is troubling about the California law, however, is exactly what many civil libertarians fear — a legislative overreaction that creates a “chilling effect” on the exercise of one's right of access to the courts. The burden that the plaintiff bears — essentially having to prove his case in the preliminary stages of trial — could deter all but the most airtight claim. Thus, a corporate plaintiff with a legitimate claim may find himself not filing, even though he may have been wrongfully injured, because of this inability to survive a preliminary motion to strike. Thus, the California law possesses the inequity and imbalance of creating a chilling effect on one group's exercise of a constitutional right in an attempt to remove the chilling effect on another group's exercise of constitutional rights. Indeed, it is not hard to imagine a situation where a corporate plaintiff may be foreclosed from a judicial remedy for a tortious act committed against the corporation based solely on the status of the parties — huge corporate plaintiff vs. small local citizens groups.<sup>103</sup>

The New York legislature recently amended its civil rights laws to provide protection for those who legitimately exercise their First Amendment rights and are sued as a result. The laws which became effective on January 1, 1993, essentially do two things to discourage

101. CAL. CIV. PROC. CODE § 425.16(b) (West Supp. 1993).

A cause of action against a person arising from any act of the 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, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim. In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither the determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination.

102. CAL. CIV. PROC. CODE § 425.16(c) (West Supp. 1993).

In any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. 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 . . .

103. It is not difficult to imagine a hypothetical scenario — a local environmentalist group, formed to oppose the economic development of a certain piece of land, may make exaggerated or even false allegations in order to garner sympathy for their opposition to the project. As a result of adverse publicity and ensuing public outcry, the corporation loses its bid to develop the land and sustains losses. The corporation brings suit against the activists claiming defamation. However, because of the very status of the parties involved and the nature of the complaint, the court will be on notice of a possible SLAPP suit. If the corporation is required to prove a “probability” of prevailing and that burden is difficult or impossible to meet, then the losses of the corporation will be borne immediately by stockholders and, potentially, by the consumer in the form of higher prices.

SLAPP suits: (1) raise the standard of proof for "actual malice" to that of clear and convincing evidence and (2) authorize the maintenance of a claim to recover attorney's fees, compensatory damages and punitive damages against any party who "commenced or continued for the purpose of harassing, intimidating, punishing, or inhibiting the defendant from exercising First Amendment rights."<sup>104</sup>

Unfortunately, New York's legislative response mirrors the protection and shortcomings of the substantive law doctrines.<sup>105</sup> Section 70-a does allow that a counterclaim for filing and maintaining a frivolous lawsuit [essentially a malicious prosecution counterclaim] can be commenced without a showing that the original claim was resolved in favor of the defendant.

Holding these legislative responses in perspective, it appears that Washington's straightforward intervention provision remains the best policy implementation in that it balances the need to discourage SLAPP suit filings with a consideration that all should have access to the courts. However, certain modifications should be explored.

First, protected activities under the rule should be expanded to include non-governmental conduct such as distributing leaflets, writing letters to the editor and other regulatory agencies, and demonstrating. Second, the state should make available sufficient recourse to ensure

104. N.Y. CIV. RIGHTS LAW § 70-a (McKinney 1994),

Actions involving public petition and participation; recovery of damages

1. A defendant in an action involving public petition and participation, as defined in paragraph (a) of subdivision (1) of § 76-a of this article, may maintain an action, claim, cross claim or counterclaim to recover damages, including costs and attorney's fees, from any person who commenced or continued such action . . . .

N.Y. CIV. RIGHTS LAW § 76-a (McKinney 1994).

Actions involving public petition and participation; when actual malice to be proven

1. For purposes of this section:

(a) 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.

(b) "Public applicant or permittee" shall mean any person who has applied for or obtained a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body, or any person with an interest, connection or affiliation with such person that is materially related to such application or permission.

(c) "Communication" shall mean any statement, claim, allegation in a proceeding, decision, protest, writing, argument, contention or other expression.

(d) "Government body" shall mean any municipality, the state, any other political subdivision or agency of such, the federal government, any public benefit corporation, or any public authority, board, or commission.

2. In an action involving public petition and participation, damages may only be recovered if the plaintiff, in addition to all other necessary elements, shall have established by clear and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false, where the truth or falsity of such communication is material to the cause of action at issue.

105. See *supra* text accompanying notes 40 and 44 and notes 40 and 44.

that the attorney general or governmental agencies will actually intervene when a citizen's First Amendment rights are threatened - perhaps a combination of additional funding and promulgation of regulatory guidelines for agencies. Third, borrowing from the New York laws, the governmental agency should initiate and pursue a malicious prosecution claim on behalf of the defendants. The incentive for the governmental agency to take this course of action would be the potential of covering its costs for its initial intervention. This could be accomplished by having the defendant reimburse the government agency for costs incurred while defending the original SLAPP and by sharing in any judgment. Furthermore, if an award of punitive damages results, the government agency should collect a percentage, thus providing a budget surplus to defend other suits.<sup>106</sup>

## VI. CONCLUSION

While there are variations in delineating and quantifying the results of SLAPP suits, there can be no doubt that the legal phenomenon exists. Quantifying the number of suits, delineating their parameters, calculating damages is an easy task compared to the nearly impossible task of measuring the chilling effect that this type of lawsuit may have on public debate. Therefore, state legislatures should be called on to attack the problem of SLAPP suits and those who file them. The courts should also be on guard, because the repugnancy of using the judicial system to circumvent free speech is an affront to anyone who values the ideals of American democracy and citizen participation.

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106. One idea is to have public pro bono agencies also defend these suits with the aid of governmental assistance. If the government identifies a potential SLAPP defendant, the case could be referred to a litigation clinic or legal services agency. There the case would be pursued, and in the event of a favorable jury award, the defendant and the pro bono agency could share a percentage. This would prevent a windfall to the plaintiff and help defer the costs that the pro bono agency incurred in handling the case.