

# SLAPP: THE FIRST AMENDMENT AND COMMUNITY ASSOCIATION POLITICS

*By:*

*J. Nussbaum, Esq.*

*Editor, Community Association Management Insider*

*Steven S. Weil, Esq.*

*Berding & Weil, LLP*

## I. Introduction

- A Vancouver woman tells state revenue officials that a developer has failed to pay its real estate taxes on some three hundred homes it had built. The state collects more than \$300,000 in back taxes and penalties, but the woman gets sued by the developer for \$100,000 for defamation.
- A Colorado environmental protection group files administrative and court actions to oppose a developer's plan to build a large mixed-use project in the foothills of the Rocky Mountains and gets sued for \$40 million for interfering with an advantageous relationship. Its attorney gets sued too.
- Community association trustees and unit owners place numerous phone calls to a senator, congressman, federal administrative agency, and city officials voicing their opposition to the prospect of a phone sex business operating out of the community. The owner of the business sues the lot of them under a variety of tort and contract claims. Its attorney gets sued too.
- Association directors in Central California get sued for challenging project developer's authority to transfer the Association's sewer system to a nonprofit corporation so that the system could also be used to service another project proposed to be built by the developer.

In none of these cases did the plaintiff ultimately prevail, largely because the First Amendment to the U.S. Constitution protects the rights of citizens to petition their government for redress of grievances. But winning the case wasn't the point anyway. Lawsuits like these, commonly known as SLAPP suits, aren't filed to resolve problems; they're filed to intimidate opponents and chill citizens' rights to participate in public issues by the threat of extended, expensive litigation. Twenty-three states currently have anti-SLAPP laws on their books, and Congress has formally encouraged other states to pass them as well.

Community associations can find themselves the target of SLAPP suits because they tend to oppose local development plans they feel will adversely affect community life or property values. Associations can also find themselves the targets of SLAPP suits in several other ways, such as the examples offered above.

The acronym SLAPP, coined by two Colorado academics and made famous by an episode of *L.A. Law*, stands for Strategic Lawsuit Against Public Participation. The lawsuit itself can be for anything: intentional interference with business relationships, defamation, conspiracy, malicious prosecution, nuisance, interference with contract and economic advantage, abuse of legal process, emotional distress--it doesn't really matter. As we've said, the ultimate goal isn't a court victory; it's the intimidation of opponents. The targets are usually those who have spoken out in opposition to the

SLAPP filer's interests, either in a letter to a congressman, a newspaper editorial, during a public appearance such as before a town planning board or zoning board, or otherwise. In all instances, SLAPP suits attack rights guaranteed by the First Amendment. In this way, the initiation of a SLAPP suit is a rather cynical use of our court system, to the discredit of the client who demands that one be brought and more to the discredit of the attorney who agrees to do so.

But there's another side to the issue too. That is, to what extent is a community association director required to endure personal attacks on his or her credibility, honesty, competence, and so on, before she has the right to take action on behalf of the community? Does the fact of volunteering to serve on the board of what has sometimes been described as a quasi-municipal entity mean that directors forfeit the rights that everyone else has, regardless of how disingenuous, reckless, or spiteful the attacks might be? If anyone else in the room were the target of such attacks, they would conceivably have a cause of action in tort. But does the director's position transform the unit owner in question into a SLAPP defendant should the director take action? The first President Bush, speaking against SLAPP suits, once said: "The ripple effect of just one suit on the willingness of people to serve as volunteers is great. Although volunteers may seldom actually pay judgments, the fear of lawsuits, which place an individual's bank account and home at risk, has increasingly deterred volunteer activity."<sup>1</sup> But community association directors are volunteers too. Does that change the balancing of equities?

This paper will consider both sides of the SLAPP issue. It will review common law, constitutional law, and statutory law with regard to retaliatory litigation. And it will demonstrate how the law has evolved, and how it is treated differently in the statutory framework than it has in either the common law or constitutional framework.

## II. Historical Perspective on SLAPP Suits

Neither the right to petition government for redress of grievances nor lawsuits brought in retaliation for one's exercise of that right are modern phenomena. The philosophical underpinnings to our First Amendment's petition clause date back at least as far as the 17th century, to the Bill of Rights exacted of William and Mary.<sup>2</sup> (Some commentators have even traced it back as far as the 10th century.<sup>3</sup>) In 1765, the Declaration of Rights and Grievances that emerged from the Stamp Act Congress included a right to petition the King and Parliament.<sup>4</sup> And the Declaration of Rights enacted by many state conventions, such as Pennsylvania's convention of 1776, included a right to petition government for redress of grievances.<sup>5</sup>

Not that everyone always took kindly to it. According to the Supreme Court, in *McDonald v. Smith*, sometime around 1790, in response to a public assembly of some 150,000 people gathered to protest for various reforms, English Parliament banned public meetings of more than 50 people held to petition the King, "except in the presence of a magistrate with authority to arrest everybody present."<sup>6</sup> Private individuals have proven no more tolerant of opposition. In 1815, the prothonotary of the Court

---

<sup>1</sup> *SLAPPs: Getting Sued for Speaking Out*, by G. Pring and P. Canan, p. 188. (Temple Univ. Press, 1996).

<sup>2</sup> 1 Wm. & Mary, Sess. 2, ch. 2 (1689).

<sup>3</sup> Pring and Canan, p. 15.

<sup>4</sup> See *McDonald v. Smith*, 472 U.S. 479, 105 S. Ct. 2787, 86 L. Ed. 2d 384 (1985).

<sup>5</sup> *Id.*

<sup>6</sup> 472 U.S. at 484, 105 S. Ct. at 2790, 86 L. Ed. 2d 389.

of Common Pleas of Allegheny County, Pennsylvania, sued a man who sent a letter to the governor alleging that the former was “unfit to perform the duties of his office with dignity and propriety” due to “frequent intoxication.”<sup>7</sup> Although the defendant in that case was able to prevail due to the parol evidence rule, the court makes clear that, had the plaintiff been able to produce the letter in question, and had it indeed been libelous, the court would not have given immunity to the defendant’s statements.<sup>8</sup>

Unfortunately, the line of cases in the modern era that have attempted to balance petition clause rights with the right of access to courts have not always viewed such cases strictly as petition clause cases. To a degree, and not without consequences, courts have often categorized and considered such cases primarily according to the particular claim brought, i.e., an antitrust case, a tort case, etc. This has led to a certain amount of fragmentation of judicial logic, as well as to the existence of parallel, sometimes contradictory cases that remain good law.<sup>9</sup> The evolution and current state of protections afforded by the petition clause would probably be clearer if the cases focused on the common constitutional thread--whether petitioning activity is immunized from liability and, if so, to what extent.

The decision that is widely considered the precursor to modern day SLAPP cases and legislation is the 1961 case of *Eastern Railroad Presidents Conference, et al. v. Noerr Motor Freight, Inc., et al.*<sup>10</sup> *Noerr* involved a by-all-accounts nasty market showdown between the trucking and railroad industries over the long-distance freight business. The highlight of the showdown was a publicity campaign waged by the railroads against the truckers, which the latter claimed was designed to lead to the adoption of laws destructive to the trucking business, to turn the general public against the trucking industry, and to drive a wedge between truckers and their existing customers.<sup>11</sup> The truckers said that the campaign was “vicious, corrupt, and fraudulent,” in that its sole motivation was to destroy the truckers as competitors.<sup>12</sup> Specifically, one of the truckers’ charges against the railroad industry was that the latter had persuaded the governor of Pennsylvania to veto the Fair Truck Bill.<sup>13</sup> And so forty-one Pennsylvania truck operators, along with their trade association, sued twenty-four railroads, an association of the presidents of those railroads, and the public relations firm that ran the campaign for violating the Sherman Act by conspiring to restrain trade and monopolize the long-distance freight business.

In an opinion by Justice Black, the U.S. Supreme Court ruled that no violation of the Sherman Act could be predicated on mere attempts to influence the passage or enforcement of a law, even if multiple companies colluded in order to try to get the law passed or vetoed.<sup>14</sup> In so construing the Sherman Act, the Court rendered it constitutionally coexistent with the petition clause. Explaining its reasoning, the Court said:

In a representative democracy such as this...branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives...[S]uch a construction of the Sherman Act would raise important constitutional questions. The right of petition is one

---

<sup>7</sup> *Gray v. Pentland*, 2 Serg. & Rawle 23 (1815).

<sup>8</sup> *Id.*

<sup>9</sup> See 472 U.S. 479 (1985).

<sup>10</sup> 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961).

<sup>11</sup> *Id.*

<sup>12</sup> 365 U.S. 129, 81 S. Ct. 525, 5 L. Ed. 2d 466.

<sup>13</sup> See, 365 U.S. 127.

<sup>14</sup> *Id.*

of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.<sup>15</sup>

Notably, however, the Court added:

There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere indirectly with the business relationships of a competitor and the application of the Sherman Act would be justified.<sup>16</sup>

This dicta established the “sham exception” to petitioning activity (even if it didn’t apply it in the case at bar), a carveout that would be developed in subsequent years, to significant impact.<sup>17</sup> But *Noerr* is only obliquely a petition clause case, inasmuch as the Court expressly stated that it did not have to reach the question of whether the defendants’ petitioning activities were protected under the First Amendment since it didn’t think the ad campaign had violated the Sherman Act at all. It is more directly an antitrust case.

*Noerr* was followed four years later by *United Mine Workers of America v. Pennington*, a case that reaffirmed *Noerr* and emphasized that the intent of those engaging in petitioning activity was not relevant to the question of whether efforts to influence public officials violated anti-trust laws.<sup>18</sup> Like *Noerr*, however, while *Pennington* recognized the sham exception, it declined to apply it to the case at bar. It wasn’t until seven years after *Pennington* that the Court had the opportunity to apply the sham exception to an actual case, *California Motor Transport Co., et al. v. Trucking Unlimited, et al.*<sup>19</sup>

In *California Motor Transport*, a group of trucking companies sued a group of its competitors under the Sherman and Clayton Acts, claiming that the latter had conspired to restrain and monopolize the highway common carriage business in California and elsewhere.<sup>20</sup> The lower court dismissed the case based on *Noerr-Pennington*; however, the Supreme Court reinstated it.<sup>21</sup> As is often the case in Supreme Court decisions, the facts of *California Motor Transport* are related in so antiseptic a manner as to obscure just how deplorably the defendants behaved in attempting to thwart the plaintiffs’ political efforts. Simply put, every time Trucking Unlimited and its co-plaintiffs sought licenses to expand operations to a new state, California Motor Transport and its co-defendants would flood the California Public Utilities Commission and Interstate Commerce Commission--as well as courts when relevant--with objections to the license and appeals from decisions.<sup>22</sup> But what is most noteworthy is that, according to the plaintiffs, it was never the defendant’s ultimate goal to prevail in any of the objections or appeals filed. Instead, the goal was to overwhelm the administrative and court system to such an extent that, in general, obtaining licenses would be a far more expensive and time-consuming a process than it would’ve otherwise been. The alleged result, they said, was that the agencies and courts “were

---

<sup>15</sup> 365 U.S. at 137, 81 S. Ct. at 529-530, 5 L. Ed. 2d at 471.

<sup>16</sup> 365 U.S. at 144, 81 S. Ct. at 533, 5 L. Ed. 2d at 475.

<sup>17</sup> See *City of Columbia v. Omni Outdoor Advertising Inc.*, 499 U.S. 365, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991).

<sup>18</sup> 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965).

<sup>19</sup> 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

effectively closed” to the plaintiffs.<sup>23</sup> With these facts before it, the Court finally found a case worthy of application of the *Noerr-Pennington* sham exception.

First, the Court noted that administrative agencies and courts were just as much of an arm of government as was the legislature, and so petitioning activity directed at administrative agencies and courts was also entitled to immunity from liability, unless the activity involved was a sham.<sup>24</sup> Second, the Court stated that, if the facts as alleged by the plaintiffs were proven at trial, then the defendants’ actions would constitute a violation of antitrust laws.<sup>25</sup> The distinction between *California Motor Transport* and *Noerr-Pennington*, said the Court, was that:

In the present case, however, the allegations are not that the conspirators sought to “influence public officials,” but that they sought to bar their competitors from meaningful access to adjudicatory tribunals and so to usurp that decisionmaking process.<sup>26</sup>

This was an important step forward in the evolution of SLAPP logic. Another important step occurred when *Sierra Club v. Butz*, a federal district court case, took the *Noerr-Pennington* logic out of the antitrust arena and applied it to common law tort claims.<sup>27</sup> In *Sierra Club*, the organization initiated a lawsuit seeking to enjoin certain logging activities. The defendant filed a counterclaim, claiming that by filing its lawsuit, as well as administrative appeals, the plaintiff had sought to induce a breach of contract and had interfered with an advantageous relationship.

Although not a Supreme Court case, *Sierra Club* combined two important lines of Supreme Court cases--the *New York Times Co. v. Sullivan*<sup>28</sup> defamation cases and the *Noerr-Pennington* antitrust cases. The court acknowledged that, while the Supreme Court had never ruled on the interaction between petitioning activity and common law tort actions, it had ruled on the interaction between other types of First Amendment rights and common law tort actions. Specifically, it said that, according to *New York Times* and its progeny, the First Amendment guarantees of free speech and press constituted a constitutional defense to defamation claims. It added that liability could only result “when what appears to be an attempt to discuss matters of public interest is a ‘sham’ in that the speaker knows his statements are false or speaks with reckless disregard of whether they are true or false,” and that, absent such a sham, “common law ‘malice’ is irrelevant.”<sup>29</sup>

The court then extrapolated the *New York Times* standard to petition clause cases via *Noerr-Pennington*, expressly stating that the right to petition government for redress of grievances cannot be made to depend on the existence or absence of malice. The court reasoned that, “the malice standard invites intimidation,” because “malice is easy to allege.”<sup>30</sup> Therefore, said the court, liability can only be imposed in common law tort actions based on petitioning activity when that activity is a sham, whose “real purpose is not to obtain governmental action, but to otherwise injure the plaintiff.”<sup>31</sup>

---

<sup>23</sup> 404 U.S. 511, 92 S. Ct. 612, 30 L. Ed. 2d 647.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> 404 U.S. at 512, 92 S. Ct. at 612, 30 L. Ed. 2d 647.

<sup>27</sup> 349 F. Supp. 934 (U.S. Dist. Ct. 1972).

<sup>28</sup> 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964).

<sup>29</sup> 349 F. Supp. at 937.

<sup>30</sup> *Id.* at 938.

<sup>31</sup> *Id.* at 939.

Although the line of cases from *Noerr* to *Sierra Club* had succeeded in establishing the qualified immunity of petitioning activity from liability for either common law tort or antitrust violations, it left some logistical problems, as are well illustrated by the Colorado Supreme Court case of *Protect Our Mountain Environment, Inc. v. District Court of County of Jefferson*<sup>32</sup> (hereinafter POME). In POME, a local environmental group sued to overturn the county board's approval of a developer's application to rezone a 507-acre parcel in order to build a large, mixed-use development. The group lost, appealed, and lost again. Then the developer sued POME, several of its leaders, and its attorneys for the torts of abuse of process and civil conspiracy. Saying that POME's lawsuits had increased the developer's financing and development costs, the developer demanded \$10 million in compensatory damages and \$30 million in exemplary damages. The case dragged on for approximately four years. Here were the results:

1. The Colorado Supreme Court established a creative and helpful standard for courts to use in deciding whether to grant summary judgment when a tort claim is based on petitioning activity, including shifting the burden of proof to the plaintiff to show that the activity in question was devoid of reasonable factual support and lacked a cognizable basis in law, *and* that the primary purpose of the activity was to harass the plaintiff or accomplish some other improper goal, *and* that the activity had the capacity to adversely affect a legal interest of the plaintiff.<sup>33</sup>
2. The developer never built the project on the site in question.<sup>34</sup>
3. After enduring the stress of a \$40 million lawsuit, many of POME's leaders withdrew from public life and, in some cases, even moved out of town.<sup>35</sup>
4. According to commentators, "a decade later, environmental campaigns in that county can be withered by the phrase: 'Remember POME.'"<sup>36</sup>

Clearly, judicial recognition of constitutional rights, alone, isn't enough. In POME, in the end, those who sought to participate in their local government--believing their actions were protected under the First Amendment--were vindicated but driven away from future participation nonetheless. Their judicial victory came at a terrible cost, but as heavy to bear as that cost was for the individuals involved, it was at least as heavy for society at large. Evergreen, Colorado, lost one of its most dedicated environmental protection groups, as well as many of the group's leaders. Worse, this confluence of constitutional and judicial attention failed in the end to achieve its ultimate goal--to encourage citizen participation in government by letting those who participate know that they are protected from liability when they do so. This loophole is exacerbated by the fact that, because, as stated above, these cases have historically been considered more according to the particular tort or federal law involved--as opposed to strictly as a uniform line of petition clause cases--strands of parallel or even contradictory

---

<sup>32</sup> 677 P.2d 1361 (1984).

<sup>33</sup> 677 P.2d at 1369.

<sup>34</sup> See Pring and Canan, p. 6.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

cases have sometimes been left in their wakes.<sup>37</sup> It is for this reason that, eventually, it would be up to the legislature to close the loophole.

The legislature's challenge in doing so would be twofold:

1. To balance the rights involved: On the one hand, the right to petition government for redress of grievances, and on the other hand, the right of access to courts for those affected by the *abuse* of petition clause rights; and
2. To not only protect citizens' rights to participate in the governmental process without fear of retribution, but also to dispose of retaliatory cases in a timely enough fashion so as not to drain the financial resources of citizens along the way. (The *Noerr* case discussed above, for example, was decided in 1961. The Fair Truck Bill, the veto of which was one of the centerpieces to the case, was introduced for passage in the Pennsylvania legislature in 1951--*ten years earlier!* Fortunately, that case featured two presumably well-capitalized litigants.)<sup>38</sup>

### III. SLAPP Statutes

At least twenty-three states have attempted to meet the challenge of mediating between free speech and retaliatory conduct by enacting some form of anti-SLAPP legislation.<sup>39</sup> The type of speech protected and the procedures used to effect that protection vary from state to state. The statutory schemes of California, New York, Maryland, and Washington illustrate some of the differing ways legislatures have attempted to protect free speech and petition while also assuring those disparaged or harmed by unprotected activities are not denied appropriate civil remedies.

First enacted in 1992, California has one of the most substantively and procedurally comprehensive and liberal anti-SLAPP statutes in the nation.<sup>40</sup> Its breadth is evident in the statute's first paragraph:

*The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.*

A "cause of action" "arising from" the federal or state constitutional right of petition or free speech "in connection with a public issue" is subject to a special motion to strike unless plaintiff can establish a probability of prevailing on the claims sought to be dismissed. Pleadings and affidavits are considered by the court in ruling on the motion.

---

<sup>37</sup> See 472 U.S. 479, 105 S. Ct. 2787, 86 L. Ed. 2d 384 (1985).

<sup>38</sup> See 365 U.S. 127.

<sup>39</sup> A list of state SLAPP statutes is attached.

<sup>40</sup> California Code of Civil Procedure section 425.16.

Perhaps the most distinctive aspect of the California legislation is that the scope of statutory protection reaches communications not necessarily related to pending judicial, planning commission, or governmental proceedings. Conduct subject to SLAPP scrutiny includes:

*(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.*<sup>41</sup>

New York's anti-SLAPP statutes (also originally enacted in 1992), by contrast, do not protect speech in as many situations as does California law. Instead, New York's SLAPP laws focus on attacks arising out of applications for defined governmental "permits."<sup>42</sup> The anti-SLAPP attack can be made by motion, cross-complaint, or in a separate action. If by a motion to dismiss, once the moving party demonstrates that the action involves statutorily protected public petition and participation rights, the court shall grant the motion unless the responding party shows its claim has a substantial basis in law or constitutes a substantial argument to change existing law.

In New York, anti-SLAPP protection is given to defendants sued by a "a public applicant or permittee" (that is, 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) for conduct materially related to any efforts of the defendant to report on, comment on, rule on, challenge, or oppose such application or permission. Communications protected are "any statement, claim, allegation in a proceeding, decision, protest, writing, argument, contention or other expression" dealing with the granting of or request for a "permit."

Maryland takes a third approach. SLAPP activities are broader than those protected in New York but not as broad as those encompassed by California's SLAPP law. Like New York, Maryland's statute places a heavy emphasis on the malicious intent of the party who brought the initial suit.<sup>43</sup> Effective October 4, 2004 (but only applied prospectively), a SLAPP suit is one materially related to the exercise of rights granted by state statute or the First Amendment "brought in bad faith...intended to inhibit..." a challenge or report to a governmental body "or the public at large" on "any matter within the authority of a government body." Qualified immunity from civil liability is available to a defendant who successfully moves to dismiss a Maryland SLAPP suit.

Washington State statutes limit the SLAPP privilege to communications made to governmental agencies, but its emphasis is on the watchdog role citizens can play in assuring good government.<sup>44</sup> The

---

<sup>41</sup> California Code of Civil Procedure section 425.16(e). In one case, this included defamatory claims asserted by homeowner association members about the community manager. *Damon v. Ocean Hills Journalism Club* (2000) 93 Cal.App.3d 993.

<sup>42</sup> New York Civil Rights Law 70-a and 76-a; NYCPLR 3211(g) and 3212(h).

<sup>43</sup> Section 5-807 Annotated Code of Maryland.

<sup>44</sup> Rev. Code Wash. (ARCW) § 4.24.500-4.24.520.

laws are intended to protect individuals who make good faith reports to appropriate governmental bodies (or to self-regulatory organizations regulating securities and subject to oversight by government agencies) regarding any matter reasonably of concern to that agency or organization. Reflecting the state's concern that the protection of government is a key ingredient in Washington's SLAPP law, the attorney general or the state agency receiving the communication from the target of the SLAPP suit may intervene in that action and defend the suit's target (but if the free speech defense cannot be proven, the state can be held liable for the plaintiff's litigation expenses).

#### IV. Judicial Interpretation of Anti-SLAPP Legislation

The number of SLAPP cases has increased dramatically in the last few years (especially in California). Depending on the jurisdiction, SLAPP actions include those based on malicious prosecution arising out of zoning disputes,<sup>45</sup> abuse of process based on prior litigation,<sup>46</sup> interference with prospective business advantage,<sup>47</sup> recall of political officials,<sup>48</sup> defamation<sup>49</sup> and breach of contract and declaratory relief claims.<sup>50</sup> Other SLAPP cases deal with "procedural" questions, including the recovery of attorney fees,<sup>51</sup> discovery rights<sup>52</sup> and the burden of proof.<sup>53</sup>

Decisions in California (and especially those rendered by the California Supreme Court) reflect the broad scope of protections afforded by its anti-SLAPP law. To invoke the protection of the SLAPP statute, defendant need only show that the plaintiff's lawsuit "*arises from*" an act in furtherance of defendant's exercise of free speech or petition rights as defined in California Code of Civil Procedure §425.16(e). In a case involving a suit by oil companies against a public interest group which itself had threatened to file suit for toxic tort type claims, the California Supreme Court held that an intent to chill the exercise of constitutionally protected speech or petition rights is not a required element of an anti-SLAPP motion.<sup>54</sup>

Any cause of action arising from the furtherance of a right of petition or free speech in connection with a public issue is subject to a special motion to strike unless there is a probability plaintiff will prevail on the allegations contained in the complaint.<sup>55</sup> An anti-SLAPP movant need not

---

<sup>45</sup> *Cove Road Development v. Western Cranston Industrial Park Associates*, 674 A. 2d 1234 (Sup. Ct. R.I. 1996).

<sup>46</sup> *Fabre v. Wilson*, 436 Mass 517 (Sup. Ct. 2002).

<sup>47</sup> *Florida Fern Growers Association v. Concerned Citizens of Putnam Co.*, 606 So. 562 (Fl. Ct. App. 1993).

<sup>48</sup> *Hawks, et al. v. Hinely, et al.*, 252 Ga. App. 510 (2001).

<sup>49</sup> *Damon v. Ocean Hills Journalism Club* (2000), *supra*, 93 Cal.App.3d 993.

<sup>50</sup> *Navellier v. Sletten* (2002) 22 Cal.4<sup>th</sup> 82; *Equilon Enterprises, LLP v. Consumer Cause, Inc.* (2002) 29 Cal.4<sup>th</sup> 53.

<sup>51</sup> *West Branch Conservation Assoc. v. Town of Clarkstown* 222 A.D.2d 513 (N.Y. 1995).

<sup>52</sup> *Schroeder v. Irvine City Council* (2002) 97 Cal.App.4<sup>th</sup> 174, 191-192 (refusing to allow depositions to ascertain if voters were misled).

<sup>53</sup> *Morse Brothers Inc. v. Webster*, 772 A. 2d 842 (Maine Sup. Ct. 2001).

<sup>54</sup> *Equilon Enterprises, L.L.C. v. Consumer Cause, Inc.*, *supra*, 29 Cal.4<sup>th</sup> 53, 61. The importance of whether a SLAPP movant must prove intent to chill free speech rights was illustrated by the number and nature of the organizations appearing before the California Supreme Court in *Equilon*. Attorneys and amicus curie included the California Attorney General, the California Newspaper Publishers Association, Los Angeles Times, Copley Press, Inc., McClatchy Newspapers, San Jose Mercury, Freedom Communications, Inc., The Hearst Corporation, Media News Group, and The (legal newspaper) Recorder, Pacific Legal Foundation, California Anti-SLAPP Project, American Civil Liberties Union Foundation of Northern California, Inc., ACLU Foundation of Southern California, American Civil Liberties Union Foundation of San Diego and Imperial County, Ecological Rights Foundation, Kairos Project, and the Environmental Law Foundation.

<sup>55</sup> California Code of Civil Procedure section 425.16(b)(1). Louisiana has a similar two-step procedure and its anti-SLAPP statutes are almost identical to California law. See *Thomas v. City of Monroe Louisiana*, LA. App. 2nd Cir (December 2002) 833 S.O. 2d 1282.

show that the behavior complained of concerns an issue of “public significance” if the conduct was made before or in connection with an issue under consideration by an official body or proceeding.<sup>56</sup> Further, the conduct protected includes statements and actions in anticipation of or preparatory to litigation<sup>57</sup> and, in some jurisdictions, statements posted on a website criticizing operation of a state university<sup>58</sup> or comments made to the media bearing negatively on a debris recycling facility.<sup>59</sup>

The “critical consideration is whether the cause of action is based on the defendant’s protected free speech or petitioning activity.”<sup>60</sup> This is determined by the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.<sup>61</sup> A SLAPP defendant’s right to be free from attacks on free speech and petitioning outweighs plaintiff’s first amendment right to utilize the courts to seek redress for “objectionable” conduct.<sup>62</sup>

Some jurisdictions limit SLAPP protection where the speaker acts in bad faith. The Supreme Court of Washington adopted the “*New York Times*” malice standard<sup>63</sup> and held that immunity from defamatory communications made to public officials would *not* exist if the defamed party shows, by clear and convincing evidence, that the speaker acted with malice, that is, if the defendant knew the communications to public officials were false or acted with reckless disregard of their falsity.<sup>64</sup> Likewise, in Florida, there is no absolute immunity for statements made to public officials responsible for issuance of water use permits. The existence of the qualified privilege turns on whether the mode, manner, or purpose of the communication amounted to abuse or forfeiture of the privilege.<sup>65</sup>

And, regardless of malice, in some jurisdictions, not all petitions made to public officials or in the courts are protected by SLAPP laws. In a New York case, a homeowners association located on a shoreline sued homeowners who had previously filed suit in a dispute concerning payment of an environmental fine and had allegedly taken steps to delay the association’s receipt of a governmental loan to protect the shoreline from environmental damage. The homeowners filed a motion to dismiss arguing that SLAPP laws should be interpreted broadly to cover almost all types of retaliatory lawsuits. The court rejected this approach and instead affirmed the narrow reach of New York’s amended SLAPP statute holding that it protected only an “action involving public petition and participation” which was

---

<sup>56</sup> *Briggs v. Eden Council for Hope and Opportunity* (1999) 19 Cal.4<sup>th</sup> 1106.

<sup>57</sup> The *Briggs* court disapproved of another case (*Zhao v. Wong* (1996) 48 Cal.App.4<sup>th</sup> 1114.), which asserted that the only activities qualifying for statutory protection are those which meet the lofty standard of pertaining to the heart of self-government. In other states, such as Washington and New York, it is unlikely the type of conduct deemed privileged in *Briggs* would have been protected since their laws focus on, respectively, good government or permitting issues.

<sup>58</sup> *Rhymes v. Forrester, Jordan & Dick*, No 37-092-CW (2003) Ct. Appeal 2<sup>nd</sup> Cir. Louisiana.

<sup>59</sup> *Global Waste Recycling, Inc. v. Mallette*, 762 A.2d 1208, 1211-1213 (R.I. 2000) (rejecting claims that to be protected, the objectionable statements had to have been made in a “proceeding”).

<sup>60</sup> *City of Cotati v. Cashman* (2002) 29 Cal.4<sup>th</sup> 69, 78.

<sup>61</sup> *Navellier v. Sletten*, *supra*, 29 Cal.4<sup>th</sup> 82, 92 (reversing Court of Appeal and affirming application of anti- SLAPP to breach of contract claim arising out of filing of cross-complaint but remanding action to determine plaintiff’s probability of prevailing on merits).

<sup>62</sup> See *Equilon*, *supra*, 29 Cal.4<sup>th</sup> at 62, rejecting the argument that the First Amendment generally bars liability for filing lawsuits which are not “sham.”

<sup>63</sup> *New York Times Co. v. Sullivan*, *supra*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964).

<sup>64</sup> *Right-Price Recreation, LLC. v. Connells Prairie Community Council, et al.*, 46 P3d. 789 (Wash. 2002), approving *Gilman v. MacDonald*, 857 P. 2d 697 (Wash. App. 1994). In *Right-Price*, however, the court barred a developer’s suit for defamation and interference with contract pursued against community activists whose statement made for county planning agencies were neither defamatory nor malicious.

<sup>65</sup> *Florida Fern Growers Association v. Concerned Citizens of Putnam Count*, *supra*, 616 So. 2d 562 Rev. Code Wash. (ARCW) § 4.24.500-4.24.520 (Fla. App. 1993).

brought by a “public applicant or permittee” and which was “materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission.” While the association was an applicant and permittee (allowing the deposit of materials to minimize shoreline damage), its lawsuit was unrelated to any challenge made by the owners to the permit process; also relevant was the fact that the action was brought years after the permit had been approved and the owners conceded they were unaware of the permit application at the time it was pending.<sup>66</sup>

The goal of a SLAPP suit is not necessarily to have a legal right vindicated but rather to discourage the opposition of proposed development plans.<sup>67</sup> As long as the defendant is forced to devote time, energy, and financial resources to combating the lawsuit, its ability to combat the plaintiff in the political arena is substantially diminished.<sup>68</sup> Even so, it does not automatically follow that the successful dismissal of a SLAPP case entitles a party to all or even some of the legal fees and costs incurred in its successful defense of the SLAPP action.

While New York’s public policy “strongly disfavors” SLAPP suits designed to discourage a petition to the government or appropriate administrative agency for redress of a perceived “permitting” wrong, an award of attorney fees and costs to the successful anti-SLAPP movant is nevertheless merely discretionary and proper only when the underlying suit is “frivolous.”<sup>69</sup> The Maine Supreme Court likewise held, based on the “permissive” not “mandatory” statutory language of the relevant statute, that the award of attorney fees is discretionary (and that appellate review is based on abuse of discretion standards).<sup>70</sup> In Washington State, a person sued for such protected speech or conduct can recover litigation costs and statutory damages of ten thousand dollars (\$10,000) if the defense is successfully proven. Statutory damages may be denied if the court finds that the complaint or information was communicated in bad faith.<sup>71</sup>

In California, “(A)ny SLAPP defendant who brings a successful motion to strike is entitled to mandatory attorneys’ fees” though the amount awarded is discretionary.<sup>72</sup> Relevant factors include the nature of the litigation, the complexity of the issues, the experience and expertise of counsel, and the amount of time involved.<sup>73</sup> While California SLAPP law is expansive, one case applied a restrictive approach and permitted recovery of only those fees and costs arising out of the motion to dismiss and not other litigation fees and costs incurred in the action.<sup>74</sup> This may be an aberration to the extent that

---

<sup>66</sup> *Harfenes, et al. v. Sea Gate Association* 167 Misc.2d 647, 647 N.Y.S.2d 329 (Sup. Ct. NY 1995).

<sup>67</sup> *Wilcox v. Superior Court* (Peters) (1994) 27 Cal.App.4th 809, 816.

<sup>68</sup> *Gordon v. Marrone* (1992) 590 N.Y.S.2d 649, 651, 656.

<sup>69</sup> *West Branch Conservation Assoc. v. Town of Clarkstown*, 222 A.D.2d 513 (N.Y. 1995), New York law only allows recovery if the permittee’s underlying action was brought without substantial basis. On the other hand, New York’s statutory scheme allows for the recovery of additional compensatory damages if it can be shown that the SLAPP case was brought to harass, intimidate, punish, or maliciously inhibit first amendment rights; punitive damages are permitted if the *sole* purpose of the underlying action was to harass and intimidate those opposing the proposed permit. The target of the harassment must demonstrate by “clear and convincing evidence” that the attacks were knowingly false or with reckless disregard for the truth or falsity of the protected speech attacked. New York Civil Rights Law 70-a (1)(a)-(c).

<sup>70</sup> *Maietta Construction, Inc., et al. v. Wainwright* (2004) 204 ME 53. In this case, the court awarded attorney fees to the defendant-attorney sued for asserting anti-developer claims possessed by his client but the client itself did not receive the award. The majority felt the case against the client was stronger than that asserted against the lawyer. The dissent (by three justices) was particularly long and vigorous.

<sup>71</sup> Rev. Code Wash. (ARCW) § 4.24.500-4.24.520.

<sup>72</sup> *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131.

<sup>73</sup> *Wilkerson v. Sullivan* (2002) 99 Cal.App.4th 443, 448.

<sup>74</sup> *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1996) 39 Cal.App.4th 1379.

the underlying case involved causes of action not “SLAPPable” and was distinguished and not followed in another, subsequent decision of a federal court applying California law.<sup>75</sup>

## V. Procedural Quirks

Many procedural rules have been adopted to deal with the unique nature of SLAPP litigation. In several states, the motion to dismiss must be brought within sixty (60) days of the filing of the lawsuit<sup>76</sup> and/or must be heard promptly thereafter.<sup>77</sup> Several jurisdictions permit discovery in a SLAPP case only upon an affirmative showing of good cause.<sup>78</sup> In California, an “automatic discovery stay” state, discovery is only available if the party resisting the motion to dismiss can show that the movant or a witness possesses evidence needed to establish a prima facie case thereby defeating the motion.<sup>79</sup> Discovery seeking to test the moving party’s declarations is impermissible.<sup>80</sup> The idea behind no or limited discovery rights is to prevent delays or unnecessary expense before a ruling on the motion to dismiss can be heard. This principle of prompt resolution is also reflected in states that permit immediate appellate review of a trial court’s ruling on a motion to dismiss.<sup>81</sup>

Since an anti-SLAPP motion generally involves the collision of a claimed protected activity and a “privilege” for the attack on that activity, the burden of proof on the claim and defense are divided between the moving and responding parties. Typically, once the defendant-SLAPP target establishes that its conduct is protected, the burden shifts to plaintiff to establish, in varying degrees according to the jurisdiction, that the underlying lawsuit has merit<sup>82</sup> or that defendant’s speech was malicious or its conduct otherwise wrongful.<sup>83</sup> California, while a state fairly hostile to SLAPP plaintiffs, also provides no sanctuary for those who seek to abuse the anti-SLAPP motion process. The motion will not lie against plaintiffs whose actions are brought solely in the public interest, in certain class actions, or various business marketing contexts.<sup>84</sup>

---

<sup>75</sup> *Metabolife International, Inc. v. Wornick*, 213 F.Supp.2d 1220, 1223 (S.D. Cal. 2002).

<sup>76</sup> *Id.*; California Code of Civil Procedure section 425.16; 14 Maine Revised Statutes, section 556; Indiana Code 34-7-7-6; Oregon Revised Statutes, sections 30.142-146.

<sup>77</sup> See, e.g., Florida Statutes 768.295(5); N.Y. Civil Practice Law and Rules, Rule 3211(g).

<sup>78</sup> See, e.g., General Laws of Rhode Island, Title 9, Chapter 33-2(b); California Code of Civil Procedure section 425.16(g); Massachusetts General Law c. 231, section 59H; Indiana Code Chap. 7, 34-7-7-6; Nevada Revised Statutes. Chapter 41.660(3)(b).

<sup>79</sup> *1-800 Contacts v. Steinberg* (2003) 107 Cal.App.4<sup>th</sup> 568, 593 (affirming dismissal of a SLAPP suit and the trial court’s refusal to permit deposition of defendants in case seeking to enjoin him from urging legislation harming plaintiffs’ business).

<sup>80</sup> See, e.g., *Sipple v. Foundation for National Progress* (1999) 71 Cal.App.4<sup>th</sup> 226, 247.

<sup>81</sup> California Code of Civil Procedure section 425.16(j); *Fabre v. Walton*, 436 Mass 517 (Mass. Sup. Ct. 2002).

<sup>82</sup> In California, plaintiff must show a “probability” of prevailing on the claim by making a prima facie showing of facts that would, if proved, support a judgment in the plaintiff’s favor. *Equilon, supra*, 29 Cal.4<sup>th</sup> at 51; *Wilcox v. Superior Court, supra*, 27 Cal.App.4<sup>th</sup> 809, 815; in Massachusetts, the burden shifts to plaintiff to demonstrate, by a preponderance of evidence, that the activity was “devoid of any reasonable factual support or any arguable basis in law,” *Fabre v. Walton, supra*, 436 Mass. 517 (Mass. Sup. Ct. 2002); also see *Morse Brothers Inc. v. Webster*, 772 A. 2d 842 (Maine Sup. Ct. 2001).

<sup>83</sup> See, e.g., *Gilman v. MacDonald*, 875 P2d 697 (Wash. App. 1992) (defamatory anti-development statements); Minnesota Statutes Annotated Chapter 554.02, subdiv. 2(2),(3), “the responding party has the burden of proof, of going forward with the evidence, and of persuasion on the motion...the court shall grant the motion and dismiss the judicial claim unless the court finds that the responding party has produced clear and convincing evidence that the acts of the moving party are not immunized from liability....”

<sup>84</sup> California Code of Civil Procedure section 425.17.

## **VI. Practical Points**

SLAPP suits are generally brought by developers whose development plans are stymied by disparaging, if not defamatory, claims asserted in public environments and whose profits and contracts are jeopardized if those claims succeed in the denial or revocation of development rights. Not infrequently, those objecting to the developer's plans are volunteer community association leaders or owners or members of non-profit environmental or other anti-development organizations. As in the Colorado experience discussed above, these volunteers must have a great deal of fortitude to withstand what can sometimes be vicious SLAPP attacks by well-financed developers bent on procuring permits or otherwise completing construction plans.

Prior to the filing of a SLAPP suit, the parties will generally interact either privately or in public forums, thus giving their attorneys an opportunity to enhance future claims or defenses or take steps to negotiate solutions that avoid or minimize litigation altogether.

In states where forums for registering political objections are relatively narrow (such as New York and Washington), development foes should base their strategy on objections in those forums and not, for example, in the press or amongst a community. In states where the objector's state of mind is relevant to the success of the anti-SLAPP motion, counsel should work hard to create a record establishing the good faith nature and altruistic purposes behind anti-development platforms. In particular, the solicitation of political support and funding for campaign contributions, lobbyists, or litigation and all communications with media representatives should be developed very carefully and with an eye toward future attacks based on abuse of process, defamation, and intentional interference with prospective business advantage. In homeowner associations, even "internal" campaigns to raise cash for anti-development purposes or to elect directors running on anti-development platforms can become fodder for future lawsuits and so should be carefully orchestrated to respect developer rights while not surrendering the most important rights to exercise--those of free speech and petition.

## **VII. Conclusion**

Based on the foregoing, the authors conclude that states that have passed anti-SLAPP statutes are, by and large, to be commended. Although some states deal with the issues and logistics involved better than others, most, if not all, states' laws represent an improvement over pre-statutory treatment of retaliatory lawsuits that attack First Amendment rights. Common law and constitutional law--due to the particular ways that judicial logic has evolved over the years--often leave courts ill-equipped to effectively separate meritorious litigation from non-meritorious litigation in an efficient, cost-sensitive way. And an inability to do that is an inability to resolve the problem at all, because most SLAPP plaintiffs aren't counting on a judicial victory anyway.

By shifting burdens of proof, raising evidentiary thresholds, and expediting procedures, state legislatures have succeeded in making the SLAPP suit a less effective tool for the quelling of public debate than it had been in the past. To be sure, many states' anti-SLAPP statutes still fall short. Those that define protected petition clause activity too narrowly fail to cover too many situations that deserve protection. Those that fail to obviate the need for extensive discovery miss the point. But these states are the minority, and as the law's experience with statutory application continues to evolve, one can only hope that state legislatures evolve along with it, and continue to refine their statutes for the greatest effect.

## STATE'S CURRENTLY WITH ANTI-SLAPP LAWS

At present, the following 23 states have anti-SLAPP laws:

### Positive

California (California Code of Civil Procedure section 425.16)  
Delaware (Delaware Code, Sections 8136-8138)  
Florida (Florida Statutes, Sections 768.295, 720.304(4))  
Georgia (Code of Georgia, Section 9-11-11.1)  
Hawaii (Hawaii Revised Statutes, Chapter 634F)  
Indiana (Indiana Code 34-7-7)  
Louisiana (Code of Civil Procedure, Art. 971)  
Maine (14 Maine Revised Statutes, Section 556)  
Maryland (Section 5-807 Annotated Code of Maryland)  
Massachusetts (Chapter 231, Section 59H)  
Minnesota (Minnesota Statutes Annotated Chap. 554)  
Missouri (RSMo Section 537.800)  
Nebraska (Nebraska Revised Statutes Sections 25-21,241 through 25-21,246)  
Nevada (Nevada Revised Statutes Sections 41.635 - 41.670)  
New Mexico (New Mexico Statutes Sections 38-2-9.1 and 9.2)  
New York (Civil Rights Law 70-a and 76-a, and NYCPLR 3211(g) and 3212(h))  
Oklahoma (Oklahoma Statutes Annotated Section 1443.1)  
Oregon (Oregon Revised Statutes Sections 30.142 - 30.146)  
Pennsylvania (27 Pennsylvania Statutes Section 7707, Sections 8301 - 8305)  
Rhode Island (General Laws 9-33, General Laws 45-24-67)  
Tennessee (Tennessee Code Annotated Sections 4-21-1001 through 4-21-1004)  
Utah (Utah Code Annotated Sections 78-58-101 - 78-58-105)  
Washington (RCW 4.24.500 - 4.24.520)

*Source: [www.casp.net](http://www.casp.net) (California Anti-SLAPP Project)*