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COMMELTS

STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION: AN ANALYSIS OF THE SOLUTIONS

These people are being sued for the crimes of speaking up at City Council and Planning Commission meetings and talking to their neighbors. This lawsuit is an attempt to stop residents from voicing their concerns in violation of their 1st Amendment rights.1

[W]e shudder to think of the chill our ruling would have on the exercise of freedom of speech and the right to petition were we to allow this lawsuit to proceed. The cost to society in terms of the threat to our liberty and freedom is beyond calculation.2

The court perceives this, with a great deal of alarm, as part of a growing trend of what have come to be known as "SLAPP suits."3

INTRODUCTION

Strategic Lawsuits Against Public Participation ("SLAPPs")4 are a response by

1. Fiore, Developers Slap Neighborhood Protestors With Suit, L.A. Times, Aug. 31, 1990, Metro sec., pt. B, at 10, col. 1 (quoting attorney Marc Allen Coleman). "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.
3. Westfield Partners, Ltd. v. Hogan, 740 F. Supp. 523, 524-25 (N.D. Ill. 1990) (The court granted defendant's motion to dismiss claims of conspiracy, interference with prospective economic advantage, slander, and claims for three million dollars in compensatory and one million dollars in punitive damages. The defendants successfully petitioned to have a roadway they lived on vacated as a public highway after the plaintiff developer announced plans for a new subdivision which would have used that road as a main access route.), 744 F. Supp. 189 (N.D. Ill. 1990) (granting defendant's motions for sanctions and attorney's fees). See also note 106, infra.
4. This term was coined by two University of Denver professors, Penelope Canan and George W. Pring. Two of their published works examine data collected on 100 SLAPPs. Their initial studies establish the qualitative and quantitative analysis of this phenomenon. See Canan & Pring, Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches, 22 LAW & SOC'Y REV. 385 (1988) [hereinafter Canan & Pring 1]; Canan & Pring, Strategic Lawsuits Against Public Participation, 35 SOC. PROBS. 506 (1988) [hereinafter Canan & Pring 2]. Subsequently, Canan and Pring's study was expanded to examine a total of 228 SLAPPS. See Pring, SLAPPs, Strategic Lawsuits Against Public Participation, 7 PACE ENVTL. L. REV. 3 (1989); Canan, The SLAPP from a Sociological Perspective, 7 PACE ENVTL. L. REV. 23 (1989).
detrimentally affected parties to the activities of citizens who petition the government. SLAPPs are intended to silence those citizens. In doing so, SLAPPs effectively deny vocal citizens their constitutional right to petition the government. Currently, it appears unlikely that this abuse of the legal system will be resolved without focused judicial or legislative action.

Accordingly, the goal of this Comment is to discuss the forms such focused action may take. Section I of this Comment provides a background to the problem. Section II enumerates and discusses the factors that must be considered in formulating a solution to SLAPPs, as well as the limitations that must be observed in implementing a solution. Section III analyzes existing responses to SLAPPs in light of those factors and limitations. Finally, Section IV analyzes proposed responses to SLAPPs and recommends modifications to maximize the success of those responses. The proposed solutions consist of a judicial solution suggested in 1981 by the dissenting justice in Webb v. Fury, and a legislative solution currently under consideration in California.

I. BACKGROUND

A. An Examination of the Problem

The SLAPP problem may be understood best by examining the difficulties in identifying SLAPPs, the types of parties who file SLAPPs, the motivations for filing SLAPPs, and the reasons that SLAPPs are effective.

The difficulties in identifying a suit as a SLAPP are twofold. First, the exact criteria for calling a suit a SLAPP are not settled. The researchers who initially identified this phenomena, Professors Canan and Pring, limit their definition of SLAPPs to suits based on advocacy before the government regarding a matter

5. The right to petition encompasses "any attempt to promote or discourage governmental action, and in most cases governs activity also protected by the right to free speech." Note, The Misapplication of the Noerr-Pennington Doctrine in Non-Antitrust Right to Petition Cases, 36 STAN. L. REV. 1243, 1244 (1984). "It protects communications to all governmental departments, including courts and administrative agencies as well as the executive and the legislature. Sit-ins and other protest demonstrations are among the activities implicitly recognized as petitions. The precise definition of petition is not carved in stone, but changes with political norms and technological advances to encourage communication between the people and their representatives." Id. at 1247 (footnotes omitted). But see Note, A Short History of the Right to Petition Government for the Redress of Grievances, 96 YALE L.J. 142 (1986), which argues that the original right to petition was not merely a variant of free speech directed towards government but was also an indispensable part of the colonial legislative process which was eliminated during the pre-Civil War slavery crisis.

6. "Defenitively, litigation of this type claims injury from citizen contact with a government official, agency, or the electorate on a substantive issue of public significance." Canan & Pring 1, supra note 4, at 386 (emphasis omitted).

7. Outside the scope of this Comment is any analysis of the actual extent of SLAPP's chilling effect on public participation and public policy making.


9. Though overwhelmingly passed by the legislature, this legislation was vetoed by the Governor of California in 1990. It has recently been reintroduced. See infra Section IV.B.
of "public interest or concern." This definition is too restrictive. The first amendment protects all legitimate petitioning of government regardless of its objective. The definition of SLAPPs must focus solely on the SLAPP plaintiff's motive in suing, not the defendant's objective in petitioning. If the suit is intended to intimidate and thus deny citizens their first amendment rights, the suit is a SLAPP.

Following Canan and Pring's more limited definition also creates a loophole through which many SLAPPs might slip to the detriment of defendants. In order to trigger a SLAPP solution based on the Canan and Pring definition, the defendant's actions must be prompted by an issue of public interest or concern. This creates an additional factual issue that must be decided at trial, extending the resolution of the SLAPP and increasing the risk of an adverse judgment for the defendant. This Comment takes the position that the defendant's motives in petitioning the government should be irrelevant in determining whether a suit is a SLAPP.

The second difficulty in identifying SLAPPs arises in the context of the SLAPP plaintiff's complaint. In a SLAPP complaint, the defendant's petitioning actions are redrawn, causing the dispute to appear as a tort case involving claims such as defamation, conspiracy, or interference with prospective economic advantage. In turn, the difficulty in distinguishing SLAPPs from legitimate tort

10. Canan and Pring used four criteria to identify the SLAPPs they studied:
1. a civil complaint or counterclaim (for monetary damages and/or injunction),
2. filed against non-governmental individuals and/or groups,
3. because of their communications to a government body, official, or the electorate,
4. on an issue of some public interest or concern.

Pring, supra note 4, at 7-8. The first element was expanded from Canan and Pring's earlier definition of "a civil claim for money damages." Canan & Pring 1, supra note 4, at 387. Also, the fourth prong of the test is limited by Canan and Pring to areas of "broader, more common public interest." Id. at 387 n.5.

11. The more common perception of these suits seems to include more self-interested petitioning. See Westfield Partners, 740 F. Supp. 523, where the court characterized a suit to retaliate against homeowners' self-interested behavior as a SLAPP. The Pring and Canan criteria also might be biased against selecting suits where the abuse of the legal process was committed by environmentalists. Brooks, Les Mains Sales: The Ethical and Political Implications of SLAPP Suits, 7 PAC ENVTL. L. REV. 61, 66 (1989).

12. The Supreme Court has stated "[t]he right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so." Eastern Railroads Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 139 (1961). "Noerr held that the right to engage in political activity cannot be curtailed simply because one has a financial interest in the outcome of the political controversy involved ..." Webb, 167 W. Va. at 461, 282 S.E.2d at 44 (Neely, J., dissenting).

13. See infra Section II.A. for a discussion of the ramifications of increased delay and risk.

14. 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). This definition is used when discussing tort case statistics in notes 35, 36, 68 & 105, infra.

15. The six claims most frequently observed were defamation, business torts, conspiracy, judicial process abuse, constitutional rights, and nuisance. Canan & Pring 2, supra note 4, at 511.
cases makes it difficult to determine the extent of the problem. Although it is estimated that thousands of SLAPPs are now being filed annually, the total number of these suits filed over the last several years is unknown because they are so difficult to recognize among the thousands of similar, but legitimate lawsuits filed. Equally important, the number of such suits merely threatened and the rate of success of those threats is, and probably will remain, unknown.

SLAPPs are generally filed by large, well-financed organizations against private citizens or local citizen's groups whose political activism may be detrimental to the organization's business interests. The classic example of a SLAPP is a land developer suing area residents who are protesting a new development. However, SLAPPs are not limited to just those types of parties. Defendants have included large public interest organizations such as the National Organization of Women, the National Association for the Advancement of Colored People, and the Sierra Club. Plaintiffs have included government agencies such as state attorneys general and police departments. Nevertheless, the most important plaintiffs remain business organizations (or their representatives) simply because this group makes up the vast majority of the SLAPP filers.

Unlike legitimate lawsuits, SLAPPs are not filed to seek compensation or to make right a perceived wrong. Rather they are filed for any of four motives: retaliation for successful opposition, discouraging future opposition, intimidation, and as a strategic tool in a political battle. These motives not only indicate

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16. Dellios, Builder's Suit Puts Clamp on Picketing Homeowners, Chicago Tribune, Apr. 4, 1990, at 1, col. D (Dupage Sports Final ed.). But see Pring, supra note 4, at 5, estimating that only "hundreds" are filed each year.

17. Penelope Canan, co-author of the most comprehensive quantitative research on SLAPPs to date, stated: "We will never know exactly how many of these lawsuits exist, because they are designed to mask their actual intent." Colino, SLAPP-Happy, STUDENT LAWYER, Mar. 1990, at 20.


19. In the Canan and Pring study, three business or economically motivated categories made up 84% of the SLAPP filers ("individual participants, economic role" 20%; "individual participants, occupational role" 25%; "group participants, industry group" 39%). "Individual participants citizen" made up 38% of the targets. "Public Interest Groups" and "Civic/Social Organizations" totaled 27%, combined. Canan & Pring 2, supra note 4, at 511, table 1.

20. Frequent SLAPP filers, in addition to real estate developers, are property owners, police officers, alleged polluters, public utilities, and state or local governments. SLAPP filers and targets represent the full political spectrum from radical liberals to ultra-conservatives. Canan & Pring 1, supra note 4, at 389.


26. See supra note 19.

27. Canan, supra note 4, at 30. "These motives are: (1) the intent to retaliate for successful opposition on an issue of public interest; (2) the attempt to prevent expected future, competent opposition on subsequent public policy issues; (3) the intent to intimidate and, generally, to send a message that opposition will be punished; and (4) a view of litigation and the use of the court system
that SLAPPs are an abusive manipulation of the American legal system, but also show why the existing safeguards are insufficient to deal with this abuse. The safeguards found in our legal system are designed to control and check abusive behavior which occurs when parties are overzealous in their pursuit of a favorable decision. An adverse judgment or the application of monetary sanctions will harm the abusive party. However, in SLAPPs the motivation for filing the suit has nothing to do with winning the case. The result is that existing controls on abusive behavior have no effect.

In short, the major problem with SLAPPs, and consequently the reason they deserve special attention (rather than treatment as another variation of frivolous suits), is that their effectiveness comes from merely placing the dispute into the legal system. SLAPPs are not intended to resolve the issue. Rather, filing a SLAPP is a means of manipulating the dispute so the petitioning party is immediately placed on the defensive. Once the dispute is in the court, almost all the legal maneuvering of the defendant plays into the hands of the plaintiff. The whole point of a SLAPP is to move the dispute out of the political arena where the plaintiff has been losing, even if only long enough to let the plaintiff fulfill its original objective.

In defining the SLAPP problem, it is also important to understand why these suits are effective. These suits are effective for four main reasons: (1) they transform the position of the parties; (2) they increase the risks involved; (3) they divert the attention of the petitioning party, and (4) they delay resolution of the original issue.

First, SLAPPs transform the position of the parties when the dispute is moved from the political forum to the legal forum. This changes the balance of power and resources between the parties. In the political forum, a group of vocal individuals can wield significant clout by mobilizing the voting populace against an elected body. They can also focus media attention on administrative committees to ensure that the committees will abide by every rule and regulation in handling the matters before them. In contrast, a court of law is relatively isolated from this political pressure. A change in forum also transforms the focus of the dispute. In the political forum, the controversy surrounds the plaintiff's actions, but in court, much of the controversy surrounds the

as simply another tool in a strategy to win a political and/or economic battle. Id. Note that these motives, like the selection criteria, are also couched in terms of public interest.


29. This is particularly true when the SLAPP is filed while the petitioning is still ongoing so the plaintiff can silence his or her current opposition. In a case where the plaintiff has already lost in the political forum, the SLAPP is an attempt to undo that damage and, more importantly, chill future petitioning in the community.


31. But see Brooks, supra note 11, at 62, which argues "transformation of a political struggle into a legal battle is a time-honored trick perfected by the reformer, not the developer."
defendant’s actions.

Second, SLAPPs increase the financial risks faced by the citizen. Persons acting on behalf of the community must now prepare a legal defense using their individual resources. Prior to the filing of the lawsuit, these people are generally fighting for some important goal such as an improved or undisturbed community.32 The major cost they incur is a limited expenditure of their time. After the SLAPP is filed, citizens risk becoming personally accountable to the plaintiff for massive damages.33

Third, the suit diverts the defendant’s attention away from the petitioning activity and towards a legal defense.34 A SLAPP may become all-encompassing for the defendant even though it is merely a strategic maneuver for the plaintiff. The petitioning citizen’s most valuable resource—time—is diverted to legal defense.35 Also, in addition to their concerns about the quality of their community which prompts them to become vocal in the first place, citizens must now worry about the possibility of losing the suit and their financial independence.

Finally, a SLAPP may delay the resolution of the original issue dramatically,36 causing the support of the community to wane and the purpose of the original petitioning to become moot.37

Exacerbating the problem of SLAPPs is their "chilling effect."38 The filing of, or even the threat of filing, these types of suits may intimidate many people who

32. For example, a homeowner’s association protested waiver by the city of Los Angeles of a tract map requirement for a pre-development environmental impact report (EIR). The city attorney’s office, responding to the association’s protests, informed the city that the requirement could not be waived without violating the California Environmental Quality Act. As a result, the city planners reversed their decision and ordered the EIR performed. The developers who sought the waiver, sued the association claiming that the association was attempting to stall or block the development. The claim for damages was unspecified but is estimated to be in the millions. The waiver of the EIR requirement was the focus of the dispute in the political forum. The association’s protest was the focus of the legal forum. Garcia, Developers Slap Back at Their Opponents, L.A. Times, July 10, 1990, at B8, col. 1 (Ventura County ed.).

33. Personal accountability averaged $9,000,000 in the 228 SLAPPs studied. Canan, supra note 4, at 26. In the 100 cases analyzed in the initial Pring and Canan research, 70 requested quantified damages (as opposed to "an amount to be determined at trial") ranging from $10,000 to $100 million and averaging $7.4 million per lawsuit. Canan & Pring 2, supra note 4, at 512.


35. The value of defendant’s time and expenses (other than legal fees and expenses) has been estimated between $6,125 and $6,467 for federal and state tort cases in courts of general jurisdiction throughout the country in 1985. J. KAKALIK & N. PACE, COSTS AND COMPENSATION PAID IN TORT LITIGATION 61 (1986).

36. SLAPP defendants generally "prevailed after an average of thirty-six months..." Canan, supra note 4, at 26. The earlier Canan and Pring publications reported a mean of 31.4 months (ranging from 3-140 months) for the 100 SLAPPs studied. Canan & Pring 2, supra note 4, at 512. Compare this with the length of cases in federal courts for the statistical year 1986: 91% of tort cases are terminated in less than three years (48.6% in one year or less) and 93.5% of all civil cases are terminated in less than three years (61.1% in one year or less). T. DUNGWORTH & N. PACE, STATISTICAL OVERVIEW OF CIVIL LITIGATION IN THE FEDERAL COURTS 21-23 (1990).

37. Colino, supra note 17, at 21.

38. See infra Section II.A.2, for a more thorough discussion of the causes of this chilling effect.
become vocal in petitioning the government. These lawsuits may also effectively eliminate the desire of many other people to petition government. The number of people silenced by SLAPPs may never be known. Intimidation will naturally exist anytime a community member is sued by an organization for millions of dollars even if it is probable that the suit will be dismissed and attorney's fees paid to the defendant. Probability is not something most people will rely on when told that they may lose everything they have. It is much safer to be quiet.

SLAPPs should be distinguished from another means of intimidation called "environmental countersuits." 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. 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.

B. The Need for Eliminating SLAPPs

This Comment relies on the premise that SLAPPs are an abuse of the legal system that must be eliminated. This abuse unjustly harms SLAPP defendants and undermines the public's confidence in the American legal system.

39. See Pell, Lawsuits That Chill Local Politics, 4 CALIF. L. W., Feb. 1984, at 44. See generally Canan & Pring 1; Canan & Pring 2, supra note 4.
40. Determining the actual extent of this "chilling effect" is one of the goals of the Canan and Pring research. They have not yet released a conclusion based on their studies. Canan & Pring 2, supra note 4, at 516. The common perception appears to be these suits do have a chilling effect and reduce the number of people interested in petitioning government.
41. See supra note 33.
42. Occasionally, the filing of these suits forces citizens to take a stand, making them even more vocal. After the successful defense of her suit, one SLAPP suit defendant was motivated to run for city council and was elected to a seat there. Colino, supra note 17, at 21. It is unlikely, however, that these isolated cases outweigh the voices of the people intimidated into never petitioning again.
44. Although this chilling effect could conceivably reduce the number of individuals willing to act as private attorneys general under state and federal laws, it should not reduce the efforts of well represented environmental organizations. Note, supra note 43, at 110.
45. Abuse of the judicial process "needlessly delays resolution of disputes. It provides an unwarranted advantage to more prosperous litigants who have the resources to bury their opponents in irrelevant paper. Finally, such abuse serves to place the entire legal system in disrepute." ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, JUDICIAL RESPONSE TO LAWYER MISCONDUCT IV.3 (1984)
This premise rests on two main points. First, the courts are not the proper forum for this type of dispute resolution. SLAPP plaintiffs would urge that the courts are intended to provide a forum for dispute resolution; therefore, SLAPPs are a legitimate use of the courts because they are brought when a dispute arises between activists and the potential plaintiffs. SLAPP plaintiffs would also argue that the biggest problem with SLAPPs is that the law of torts does not yet recognize the proper cause of action for this type of dispute. More accurately, however, a court is the appropriate place for resolving disputes only where one party is injured by the other in violation of the law. SLAPPs are lawsuits used to deny citizens the ability to exercise their right to petition the government, not to redress legal violations, and are therefore brought for harassment purposes only. In SLAPP disputes there is, by definition, no violation of the law even though one side may be hurt. The plaintiff's loss is the unfortunate but unavoidable result of political decision making.

Second, SLAPPs reduce citizen petitioning, which in turn reduces citizen communication to government officials. The resulting lack of citizen input will only harm the representative form of public policy making practiced in this country. In the United States, political involvement other than voting is limited to approximately ten percent of the voting population. This ten percent is therefore responsible for articulating most of the public opinion upon which local legislative and administrative bodies rely in making public policy decisions. Consequently, if the "chilling effect" of SLAPPs becomes widespread, access to the opinions of the American people will be restricted even further. This could cause this country's republican form of government to become less representational since elected officials will have to rely heavily on the feedback they receive during the election campaign to guide their entire term in office.

[hereinafter JUDICIAL RESPONSES].

46. This whole line of argument may create an apparent tautology based on the way in which the law develops. Either there is no cause of action and no legally recognized injury so the defendant's behavior is legal or the defendant's behavior is only legal until the courts recognize the injury and a cause of action. That is, the action is legal until it is declared illegal. However, the problem is illusory because petitioning the government must always remain a protected activity in this country regardless of its effect on a potential SLAPP plaintiff.

47. Protect Our Mountain Environment, Inc. v. District Court, 677 P.2d 1361 (Colo. 1984). "Citizen access to the institutions of government constitutes one of the foundations upon which our republican form of government is premised. 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 governmental officials acting on their behalf." Id. at 1364.

48. Canan & Pring 2, supra note 4, at 515 (citing L. MILBRATH, POLITICAL PARTICIPATION: HOW AND WHY PEOPLE GET INVOLVED IN POLITICS (1965)). The number of people merely voting is not all that much higher. According to a report by the Committee for the Study of the American Electorate, 19% of those old enough to vote actually did so in the 1990 primary elections. San Diego Union, Oct. 4, 1990, at A25, col. 1 (city ed.). In California, the turnout has been somewhat higher: 31.92% of state residents eligible to vote did so in the 1988 primary elections, and 33.51% did so in the 1988 general election. SECRETARY OF STATE, STATEMENT OF VOTE NOV. 8, 1988 AND STATEMENT OF VOTE, June 7, 1988.

49. It can be argued however, that the protests of a single individual may not realistically represent the interests of "the people," and may simply represent one person's idiosyncratic views which should actually be discounted by an administrative body representing "the people." See Rapaczynski, From Sovereignty to Process: The Jurisprudence of Federalism After Garcia, 1985 SUP. CT.
II. GUIDELINES FOR ANALYSIS

An understanding of the complex nature of the SLAPP problem leads to the realization that it cannot be solved by any simple legal solution.50 Solving the SLAPP problem requires bringing all the powers of the legal process to bear. To properly design the sophisticated solution necessary to remedy the problem, clear objectives must be established. Additionally, there are limitations that must be observed to prevent the solution from becoming a problem in itself. These objectives and limitations establish guidelines which can be used to evaluate currently existing responses to abuses of the legal system as applied to SLAPPs as well as in evaluating and enhancing proposed solutions.

A. Objectives for Eliminating SLAPPs

Ideally, a solution to the problem of SLAPPs would address and nullify the motives for filing SLAPPs.51 This would strike at the true cause of the problem rather than at the symptoms. Unfortunately, this probably cannot be achieved. Few legal responses can directly change the motivation for behavior. What the law can do, however, is address and limit actions prompted by that motivation. In the case of SLAPPs, this can be done by rendering SLAPPs ineffective, which, while not nullifying the motives for filing SLAPPs, would make the actual filing pointless.

To render SLAPPs ineffective, a solution must be designed that not only neutralizes the adverse effects of these suits,52 but also eliminates the incentives that facilitate the filing of these suits. These adverse effects and incentives are embodied in five interrelated and overlapping objectives that must be achieved to produce an effective and lasting solution to the problem of SLAPPs. Achieving these objectives would render SLAPPs ineffective.

1. Protect defendants from economic costs. The defendants in these suits are parties who, regardless of their motives, have committed no legally recognized wrong because they are exercising their constitutional right to petition the government.53 To protect these defendants, the solution must eliminate the economic hardship borne by SLAPP defendants—specifically, the cost of a legal defense. Currently, SLAPPs allow the plaintiffs to take advantage of their superior economic assets to hire attorneys and inundate the defendants with

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50. Abrams, supra note 28, at 41.
51. See supra note 27 and accompanying text.
52. See supra notes 29-42 and accompanying text.
53. U.S. Const. amend. I.
discovery and pretrial motions. Without economic protection, the cost of a defense alone may compel SLAPP defendants to settle.

2. Reduce the "chilling effect" of SLAPPs. In the SLAPP scenario, a suit against one activist citizen reduces the odds that other citizens will become activists. This "chilling effect" can theoretically ripple through a community, reducing public participation, and in turn, reducing the effectiveness of our representational form of government. The "chilling effect" is therefore the most insidious and perhaps the most damaging aspect of SLAPPs.

Several factors combine to create the "chilling effect." First, there is the reasonable fear that due to the real possibility of erroneous judgments, a person may be punished for otherwise lawful conduct. The availability of appellate review does nothing to help relieve this chilling effect because an appeal simply extends the litigation. Further complicating this problem is the uncertainty lay people face as they consider the legality of their petitioning activities in light of highly complex tort laws. Finally, even if there is no possibility of error and the defendant is certain that the petitioning was legal, the cost of defending a suit prompted by petitioning would still be prohibitive.

The "chilling effect" may be reduced in several ways. The possibility for error could be minimized by requiring more specificity in SLAPP pleadings. Citizen uncertainty could be reduced by broadening the protections provided for people engaged in first amendment activities by shifting heavier burdens to the plaintiff. Even the "chilling effect" caused by the costs to the defending party can be reduced by awarding attorney's fees to SLAPP defendants.

Of course, as long as our legal system remains flexible and adaptive in recognizing and redressing injuries, it will remain open to some abuse. And, as

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54. "The liberal discovery rules of the Federal Rules of Civil Procedure offer opportunities for harassment, abuse, and vexatious imposition of expense that can make the mere pendency of a complex lawsuit so burdensome to defendants as to force them to buy their peace regardless of the merits of the case." Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers, 542 F.2d 1076, 1083 (9th Cir. 1976) (citing Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975), cert. denied, 430 U.S. 940 (1977)).

55. "A chilling effect occurs when individuals seeking to engage in activity protected by the first amendment are deterred from doing so by governmental regulation not specifically directed at that protected activity." Schauer, Fear, Risk and the First Amendment: Unraveling the "Chilling Effect," 58 B.U.L. Rev. 685, 693 (1978) (emphasis omitted). Thus, the chilling effect arises in SLAPPs through the plaintiff's ability to use tort law to deter the defendant from continuing to petition and to deter others from joining the petitioning activity.

56. See id. for a detailed free speech analysis of these factors and the "chilling effect" doctrine.

57. For example, defamation, a common SLAPP claim, has only four legal elements (defamatory message, publication, causation, and damages), yet an explanation of the tort and its defenses takes up over 300 pages in Corpus Juris Secundum. 53 C.J.S. Libel and Slander §§ 1-216 (1987 & Supp. 1990).

58. "The chilling effect doctrine reflects the view that the harm caused by the chilling of free speech (or other protected activity) is comparatively greater than the harm resulting from the chilling of the other activities involved. And, the logical and necessary mandate of the chilling effect doctrine is that legal rules be formulated so as to allocate the risk of error away from the preferred value, thereby minimizing the occurrence of those errors which we deem the most harmful." Schauer, supra note 55, at 705.
long as defendants remain subject to erroneous judgments, there will always be some risk to petitioning citizens, and hence, some "chilling effect." Despite these realities, the legislatures and the courts must do everything possible to limit the negative side effects of petitioning government.

3. Resolve SLAPPs expeditiously. The solution must not only discourage SLAPPs in the first place but also must require early identification\(^6\) and expeditious handling of them when they are filed.\(^7\) This is necessary to both reduce the burden on the courts and allow the defendant to return to his or her petitioning activity.\(^8\)

The courts experience increased burdens because SLAPPs, in addition to their uniquely damaging impact on constitutional rights, possess the same the effects of ordinary frivolous suits. As a result, the "court system itself becomes more clogged, disrupted, and delayed, thus affecting the taxpayers in general, and other litigants who have their suits delayed."\(^9\) Only expeditious dispute resolution can reduce this burden once suits are brought.

The solution must be expeditious to minimize the effect of the lawsuit on defendant's petitioning activity. One major purpose of a SLAPP is to distract the defendant from the petitioning activity. SLAPPs take their toll on individual defendants through the prolonged emotional and physical effects of being involved in a lawsuit.\(^10\) Organizations lose members and revenues.\(^11\) Further, SLAPPs delay resolution of the issues which prompted the petitioning. This delay may well render the goal of the petitioning moot and allow the plaintiff to

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61. "In the preservation of the free exercise of speech, writing and the political function, the early termination of [the] lawsuit is highly desirable. We should discourage attempts to recover through the judicial process what has been lost in the political process." Okun v. Superior Court, 29 Cal. 3d 442, 461, 175 Cal. Rptr. 157, 169, 629 P.2d 1369, 1381 (1981) (Mosk, J. dissenting), cert. denied, 454 U.S. 1099 (1981).

62. While expeditious handling of these suits reduces the pecuniary costs of litigation borne by the defendant, one of the goals of an effective solution is to eliminate these costs completely.


64. One SLAPP defendant described the extent of this distraction:

I became so preoccupied by the suit that it changed my whole focus and direction in life. I got appraisals on the house and thought of moving to Oregon. I'm like most Americans: My assets are in my home. This case was an overhanging cloud. Even though you may prevail, you'll spend a ton of money fighting it. You can win and still lose. I didn't function well at work because I was trying to figure out how I was going to protect my family. The president [of the firm I worked for] called me in one day and said my performance wasn't satisfactory and asked me for my resignation. If I didn't resign, I'd get fired the next day. I resigned.


accomplish his or her goal of disrupting petitioning efforts.66 Since SLAPPs distract the defendants from their original goals, winning the lawsuit would be like winning the battle only to lose the war.

4. Discourage attorneys from filing SLAPPs. An effective solution for SLAPPs would eliminate these suits from an attorney's consideration. The low probability of success in and out of court, and the legal and economic ramifications on clients, should discourage attorneys from pursuing these claims. However, the impact on the client has only an indirect effect on the attorney. Therefore, penalties should be devised (through the form of disciplinary proceedings or monetary sanctions) which directly affects the attorney and effectively discourages these suits. Since attorneys would neither wish to risk these penalties nor lose their clients to less scrupulous lawyers, they will be forced to find legitimate, alternative means of resolving the dispute between the client and the petitioning citizens.

5. Eliminate the economic incentives to file a SLAPP. The most important objective of a solution would be to make filing a SLAPP suit economically undesirable. This would mean eliminating the possibility of economic gain obtained by silencing the opposition. As previously pointed out,67 business entities initiate the vast majority of SLAPPs. This is done as part of an economically driven strategy and will continue to be done as long as SLAPPs are an effective business strategy. There are presently economic incentives to filing SLAPPs because the cost of suing a petitioner is significantly less than the cost of allowing the petitioning to continue unchecked.68 It follows then that the most effective way of eliminating these suits is to make them economically infeasible. This disincentive alone may have the most effect in reducing the number of SLAPPs.69 Practically, the only way to eliminate this prospective gain is to seriously penalize the party filing the SLAPP in a manner commensurate with what that party hoped to gain through the intimidation.70

In summary, all of these objectives must be achieved to eliminate SLAPPs by rendering them ineffective. To do so, the solution must be proactive rather than

66. Pell, supra note 39, at 44.
67. See supra note 19.
68. The national estimate of plaintiff's legal fees and expenses for tort cases is between $7,300 and $8,800. J. KASALIK & N. PACE, supra note 33, at 42. The average claim for damages in SLAPP cases is $9 million. See supra note 33.
69. Realistically, some plaintiffs file SLAPPs without regard to economic interests and are merely interested in a form of public vindication or retribution. These SLAPPs will probably never be stopped unless attorneys refuse to bring them.
70. The actual considerations that should be used are similar to those used in determining the award of any sanction. However, the calculation should start at a figure near the plaintiff's claim for damages as a type of SLAPP "lodestar" value. For example, if the plaintiff claims damages of $1 million dollars in lost profits, only a sanction based at $1 million dollars (and then adjusted based on the plaintiff's ability to pay, the nature of the petitioning activity, and the facts of the particular case) will have the desired effect of making the economic risk of bringing the suit greater than the risk of dealing with the petitioners in the political forum.
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reactive. True success will be achieved only when the plaintiff refrains from filing the SLAPP in the first place. The solution must create a chasm for the plaintiff to leap. If the plaintiff's claims are meritorious, he will land safely on the other side where legitimate litigation can begin. If not, he will fall into the chasm and suffer great penalties. This chasm will produce an economic leap of faith. Those plaintiffs with meritorious claims will safely jump, and those without will not even try.

B. Limitations To Observe In Forming A Solution

To attain the objectives outlined above, several limitations must be recognized and addressed to prevent the solution from becoming as damaging as the problem it is trying to solve. The four limitations that must be considered when creating a solution to the problem of SLAPPs center around the common theme of distinguishing legitimate lawsuits from SLAPPs. They are raised here as part of the guidelines for analysis.

1. Avoid reactionary responses to SLAPP-like suits. The solution to SLAPPs must be expedient and quick, but must not trigger a judicial knee-jerk reaction. The solution must avoid impinging on the rights of legitimate plaintiffs whose lawsuits have, at first glance, the characteristics of a SLAPP. At times, defendants will exceed the bounds of legal petitioning, and the plaintiff's grievance will be legitimate. As noted earlier, it is often difficult to identify a SLAPP because the complaint describes the petitioning activity in terms of recognized torts. Not only is it difficult to distinguish a SLAPP from a legitimate suit, but also it is possible that legitimate suits will be classified mistakenly as SLAPPs.

2. Overcome the scarcity of facts in pleadings. There is often a distinct absence or distortion of facts in the complaint that makes distinguishing between a SLAPP and a non-SLAPP difficult. This is particularly true in notice pleading jurisdictions such as federal courts and state courts that model their civil procedure rules after the Federal Rules of Civil Procedure ("FRCP"). Without the benefit of discovery and the presentation of evidence to a trier of fact, determining whether the suit is a SLAPP or not may be impossible under

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71. The methods by which these limitations may be observed are discussed in the context of the proposed solutions. See infra Section IV.

72. See Searle v. Johnson, 646 P.2d 682 (Utah 1982) (boycotts which are intentionally designed to injure the plaintiffs and force them to join defendant’s other, legitimate, petitioning activity are not protected by the petition clause, although incidental injury would be protected).

73. See supra notes 14-18 and accompanying text.

74. See supra notes 14-18 and accompanying text.

75. Fed. R. Civ. P. 8(a). "A pleading which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the grounds upon which the court’s jurisdiction depends, . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks." Id. (emphasis added).
normal notice pleading. Since it is a goal of any SLAPP solution to resolve the suit quickly without a full trial, the solution must provide a means for allowing a trier of fact to quickly determine the true factual issues underlying the complaint.

3. Prevent abuse of the solution. The solution to SLAPPs must not be prone to abuse and must incorporate penalties for abuse when it does occur. In the SLAPP scenario, the form of abuse most likely to occur is petitioning of the government in an attempt to conceal and obtain first amendment protection for actual tortious conduct. Such abuse is the foreseeable result of granting absolute immunity for acts associated with the petitioning of government.76 Because of the need to balance first amendment freedoms with restraints on actual tortious conduct77 no change should be made by any SLAPP solution to the extent of first amendment protection.78 Ample protection for legitimate SLAPP defendants already exists under the first amendment. The solution to SLAPPs must simply bring this forth.

4. Stay within constitutional limits. The solution to SLAPPs must remain within the bounds of the Constitution of the United States. To do so it must not deny plaintiffs due process of law.79 Though quick processing of the case is necessary, the process must not be so summary as to deny plaintiff's fourteenth amendment rights. A party must have an opportunity to be heard and to enforce his or her rights before the court.80

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76. The first amendment has not been interpreted to give absolute immunity for petitioning or free speech. Schauer, supra note 55, at 712-14, argues that the Supreme Court is willing to accept some chilling of protected activity as part of a balancing of interests. See also McDonald v. Smith, 472 U.S. 479 (1985) (holding that the petition clause does not provide absolute immunity from liability for libel), aff'g 737 F.2d 427 (4th Cir. 1984), aff'g 862 Fed. Supp. 529 (M.D.N.C. 1983) (expressly rejecting the absolute immunity under the petition clause afforded the defendant by the majority in Webb, 167 W. Va. 434, 282 S.E.2d 28). See also Protect our Mountain Environment, 677 P.2d at 1366 ("The First Amendment does not grant a license to use the courts for improper purposes."). See infra note 183.

77. "The effective exercise of first amendment rights requires immunity from liability for good faith and negligent false statements, but there must be some protection against the deliberate lie. Some balance must be struck which allows the one to proceed uninhibited while also punishing those who hide irresponsible and malicious actions behind the guise of first amendment freedom." Webb, 167 W. Va. at 468, 282 S.E.2d at 47-48 (Neely, J., dissenting). See infra note 183.

78. The difference between the definition of a SLAPP as used in this Comment and the definition established by Canan and Pring may also explain why Pring seems to espouse an absolute immunity for SLAPP defendants based on their petitioning. Pring, supra note 4, at 15 & 19. When "SLAPP defendants" are defined as only those people acting in the public interest, it is relatively safe (from a moral, if not legal viewpoint) to give them absolute immunity for their petitioning. However, when SLAPP defendants include those involved in more self-interested petitioning, more scrutiny of the petitioning itself is necessary. This scrutiny does not examine whether the petitioning is of public or private concern, rather it examines whether the petitioning is genuine or merely a "sham" intended to conceal actual tortious conduct. See infra note 183.

79. See Stein, supra note 65, at 48. "Our challenge, as lawyers, law professors, and citizens concerned about the SLAPP suit epidemic is to devise remedies which do not themselves imperil the constitutional and legal rights of others. To appeal to the courts for a remedy is, we must not forget, a most elemental demonstration of the right to petition." Id.

III. ANALYSIS OF EXISTING LEGAL RESPONSES

An analysis of existing responses to SLAPPs, undertaken in terms of the objectives and limitations described above, reveals that these responses will have little practical effect in reducing the filing of SLAPPs. Much of the problem stems from the reactive nature of the responses currently available. Existing responses can reduce the harm, but often their effect comes too late, usually after the plaintiff's goal has been achieved. This failure is apparent from comparing the increasing number of these suits filed with the few number of these suits in which the plaintiff prevails.81

A. Specific Defenses On The Merits

The normal method of defense in a lawsuit is a defense on the merits of the claims. This means that during the course of a civil trial, the SLAPP defendant must refute the legal elements of the plaintiff's claims and also attempt to prove all available affirmative defenses. This response is often effective,82 but only to protect the defendant from the plaintiff's claims. It fails to protect the defendant from the real evils of SLAPPs. This response does not protect the defendant from the economic costs of paying an attorney and court costs. It subjects the defendant to the risks inherent in our legal system while doing nothing to address the chilling effect of these suits. A defense on the merits is not expeditious because it requires the long delays and emotional strain associated with litigating a civil case. It also does nothing to discourage attorneys from bringing these suits. Most important, this defense does not address the plaintiff's economic incentive to file a SLAPP. The result is that a specific defense on the merits is the worst solution to this problem.

B. The Petition Clause Constitutional Defense

Typically, the most sweeping defense available is an invocation of the first amendment right to petition government. This defense is raised in the form of the Noerr-Pennington Doctrine.83 This doctrine immunizes parties undertaking legitimate petitioning of the government from any civil cause of action by a third

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81. "[O]ver 77% of SLAPPs are ultimately won by [defendants]." Pring, supra note 4, at 12. In the earlier Canan and Pring study of 100 SLAPPs, 68% of the cases were dismissed in favor of the targets and final legal judgments favored targets in 83% of the cases. Canan & Pring 2, supra note 4, at 514.
82. Brecher, supra note 34, at 123-31. Brecher at length discusses defenses to particular causes of action such as malicious prosecution, abuse of process, defamation, and conspiracy. He concludes that these defenses may work but "the cost is apt to be high." Id. at 131.
party injured by the petitioning action. The only exception, the sham exception, applies when the defendant's activity is found to be a disguised attempt to actually injure the plaintiff, rather than a true attempt to petition the government. Thus, the first amendment petition clause privilege is only a qualified privilege.

This constitutional defense alone, while almost guaranteed to win the lawsuit for the defendant, fails as a solution to SLAPPs because it is a reactive solution to the problem and takes effect too late. It has all the drawbacks of the specific defenses discussed above. It is important to note, however, that under basic constitutional doctrine, petitioning activity is specially protected. This special protection is a critical basis upon which the solutions proposed later in this Comment are formulated.

C. Procedural Defenses

Procedural law provides a variety of defensive responses to SLAPP-like suits. Unfortunately, these procedural defenses fall as solutions to SLAPPs. In federal courts, for example, FRCP 12(b)(6), provides for a dismissal of a suit for failure to state a claim. In the SLAPP scenario, this motion is useless because it is relatively easy for the plaintiff to frame the defendant's petitioning action in terms of legitimate tort claims. It is only during the trial that the petitioning action is revealed and the identity of the suit as a SLAPP becomes clear.

85. See id.
86. It is important to note that this privilege is based on the defendant's intent in acting. Malicious intent, which is unprotected, must be distinguished from the protection granted a genuine intent to petition the government, which is done for a private rather than public interest. See infra note 183.
87. The Canan and Pring study of 228 SLAPPs showed that "the chances of a defendant winning a SLAPP suit substantially improved (from 67% to 82%) if the petition clause had been raised as a defense." Canan, supra note 4, at 26. The initial study of 100 SLAPPs had shown an increase from 57% to 92% when the petition clause was raised. Canan & Pring 2, supra note 4, at 514.
88. Stein, supra note 65, at 55. "[V]irtually always, the SLAPP plaintiff has no desire to allow the litigation to proceed to the point where Noerr-Pennington, or any other speech and petition-protectionist doctrine can be applied." Id.
89. See supra Section III.A.
90. The "state action" doctrine does not limit the use of first amendment rights (as incorporated through the fourteenth amendment) as a defense to civil suits between private parties. New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964) ("The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised."). Id.
91. See infra Section IV.
92. FED. R. CIV. P. 12(b)(6).
93. One attempt to modify a state law motion to dismiss to provide a solution to SLAPPs was created by the court in Protect Our Mountain Environment, 677 P.2d 1361. Under this system a defendant's motion to dismiss on constitutional grounds of a right to petition would require the court to give the parties a reasonable opportunity to present all material pertinent to the motion. The court
Other procedural remedies, such as motions for summary judgment are also limited in their utility. Such motions do not protect the defendant economically from the costs of the discovery process. They do not result in a quick resolution of the dispute because of the considerable time involved in pre-trial practice and discovery. Most importantly, all available procedural defenses fail to reduce the plaintiff's economic incentive to file a SLAPP.65

D. Awarding Attorney's Fees

Awarding attorney fees to the defendant could be a practical and potentially effective method for curtailing most mere nuisance suits because it forces the plaintiff to weigh the probability of achieving success against the cost of failure.66 Unfortunately, there are significant limitations on the effectiveness of awarding attorney's fees as a solution to SLAPPs. First, the American rule generally denies attorney's fees for the prevailing party67 in the absence of applicable statutory provisions.68 Second, there is an inherent difficulty in qualifying for attorney's fees even under existing statutory exceptions to the American rule.69 To illustrate this difficulty, Brecher analyzes California Code

would then treat the motion as one for summary judgment. This motion would be resolved under a new heightened standard established by the court. This heightened standard places the burden on the plaintiff to make a showing sufficient to allow the court to reasonably conclude that the defendant's petitioning actions were not protected by the first amendment because: (1) the defendant's administrative or judicial claims were devoid of reasonable factual support . . .; and (2) the primary purpose of the defendant's petitioning activity was to harass the plaintiff or to effectuate some other improper objective; and (3) the defendant's petitioning activity had the capacity to adversely affect a legal interest of the plaintiff." Id. at 1369. This approach is supported by some legal writers. See Pring, supra note 4, at 18; Abrams, supra note 28, at 42. Unfortunately, this is a limited response to SLAPPs and fails to meet all the objectives of a successful solution, especially that of reducing the economic incentive to SLAPP and protecting the defendant from economic costs. Losing a summary judgment has no deterrent effect and a requirement that the parties present all pertinent material does little to reduce the costs to the defendants of having an attorney go through discovery. See supra Section II.A. For further discussion of the problems with the solution suggested in Protect Our Mountain Environment, see Sive, supra note 43, at 27, col. 2.

64. This is true particularly in federal court because it easy to establish a factual controversy regarding a defendant's motivation. Brecher, supra note 34, at 121.

65. These procedural defenses fail even when accompanied by requests for sanctions. See infra Section III.E.

66. For a detailed analysis of the economic factors motivating and facilitating nuisance suits and the theoretically demonstrable elimination of economic incentive (in nuisance suits) through awarding attorney's fees to the prevailing party, see Rosenberg & Shavell, A Model in Which Suits Are Brought For Their Nuisance Value, 5 Int'l Rev. of L. & Econ. 3 (1985).

67. Alyeska Pipeline Service, Co. v. Wilderness Society, 421 U.S. 240 (1975) (the American rule provides that each party shall bear its own fees unless the other side acts in bad faith).

68. See e.g., 42 U.S.C. § 1988 (1980) (stating that under certain circumstances "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.").

of Civil Procedure section 1021.5,100 a statute which allows an award of attorney's fees in public interest cases. Brecher notes that one element of the statute, whether "the necessity and financial burden of private enforcement are such as to make the award appropriate,"101 presents a formidable obstacle to the party seeking fees.102 This obstacle arises when a prevailing defendant is likely to be found to have a personal need to defend the suit, rather than a public purpose, and that any public benefit is purely coincidental.103 According to the Brecher analysis, absent a finding of an important public interest, SLAPP defendants will not be allowed attorney's fees.

Finally, and most importantly, the SLAPP plaintiff may view the prospect of paying defendant's attorney's fees as an insignificant risk relative to the potential losses that will occur if the petitioning activity is left unchecked. Though the average claim for damages in SLAPPs is $9 million,104 the average for defendant's legal costs paid per claim is approximately $8,500 for tort litigation terminated in state and federal courts of general jurisdiction.105 Even assuming that the plaintiff's actual damages due to the defendant's petitioning action are only a fraction of those claimed, the economic incentive to sue vastly outweighs the costs of suing and paying attorney's fees.106 This is true because the probability of success for the plaintiff is independent of the outcome of the lawsuit. Simply bringing the suit will probably have the desired effect of distracting the defendant and eliminating the petitioning.107 Not only are attorney's fees too difficult to obtain, but also under existing law they provide little economic deterrent to a plaintiff inclined to file a SLAPP.

100. CAL. CIV. PROC. CODE § 1021.5 (West 1980). "Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any . . . ." Id. (emphasis added).

101. Id.

102. Brecher, supra note 34, at 133.

103. Id. at 134.

104. See supra note 33.

105. J. KAKALIK & N. PACE, supra note 35, at 58. This figure represents cases, other than those involving motor vehicles, terminated nationwide in 1985. This figure is significantly lower, $5,400 to $6,600, when auto torts (torts involving vehicular accidents) are included. See id. However, non-statistical data suggests that the costs of defending SLAPPs may be significantly higher (or perhaps only the more sensational figures are published as "newsworthy"). These amounts reported include: $25,000 in legal defense fees (Galperin, Getting Slapped, L.A. Times, Apr. 29, 1990, at K1, col. 4); $35,000 (Get, A Chilling Flurry of Lawsuits, U.S. NEWS & WORLD REPORT, May 23, 1988, at 64); $22,000 (Intimidation, San Francisco Chronicle, Sept. 24, 1990, at A18 (editorial)); $75,000 and $350,000 (Lockyer Bill Report, infra note 170).

106. In Westfield Partners, 744 F. Supp. 189, the court awarded less than $10,000 in attorney's fees to the defendants while the plaintiff claimed $3 million in compensatory damages. If the plaintiff really suffered such large damages, spending $10,000 more as part of an effort to recoup damages is an economically necessary action.

107. Compare the SLAPP plaintiff's indifference to both attorney's fees and obtaining a favorable judgment with the economic incentive vel non to sue if the plaintiff's success depended on the outcome of the lawsuit itself. See generally Rosenberg & Shavell, supra note 96.
E. Imposition Of Sanctions On Lawyers And Clients

With the use of sanctions, the courts can achieve some measure of success in rendering SLAPPs economically ineffective for the plaintiff. This power is available to the courts through statutory provisions such as FRCP 11, through various state rules such as California Civil Procedure Rule 128.5, and also through the court's inherent power to control the litigation before it. In order to have the desired effect, the courts must order sanctions that are commensurate with the plaintiff's potential loss from the petitioning activity. This is within the power of the courts. For example, if the plaintiff will not achieve his or her projected earnings from a potential project if the petitioning activity is successful, the plaintiff could file a SLAPP. If the SLAPP succeeds in eliminating the defendant's petitioning activity (momentarily ignoring the outcome in court), the plaintiff can go ahead with his or her plans and achieve the projected earnings. If the plaintiff wins in court, which is statistically unlikely, the damages awarded are a windfall. If the plaintiff loses, the plaintiff's own attorney's fees are the cost of protecting the future earnings. In contrast, if the court actually applied sanctions to the plaintiff equal to the projected earnings, then the plaintiff will effectively earn nothing and suffer a net loss after paying his or her attorney. Consequently, using sanctions to neutralize the potential profits earned if the defendant's ability to petition is destroyed will

108. Often there is an overlap between the award of attorney's fees and the award of sanctions. However, "the primary purpose of sanctions is to deter attorney and litigant misconduct, not to compensate the opposing party for its costs in defending a frivolous suit." White v. General Motors Corp., 908 F.2d 675, 684 (10th Cir. 1990).

109. FED. R. CIV. P. 11 provides: "Every pleading, motion and other paper . . . . shall be signed by at least one attorney of record . . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, . . . ; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry . . . 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. . . . If a pleading . . . is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction." Id.

110. CAL. CIV. PROC. CODE. § 128.5 (West Supp. 1990). "Every trial court may order a party, the party's attorney, or both to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." Id. § 128.5(a).

111. NASCO, Inc. v. Calcasieu Television and Radio, Inc., 894 F.2d 696 (5th Cir. 1990) (affirming the use of a District Court's inherent powers to impose sanctions of one million dollars and disbar some of the parties' attorneys), cert. granted sub nom., Chambers v. NASCO, Inc., 110 S. Ct. 38 (1990).

112. "The decision of what constitutes an appropriate sanction rests within the sound discretion of the district court. However, the amount of the sanction must be a carefully measured response to the sanctioned conduct. . . ." Kapco Mfg. Co. v. C & O Enter., Inc., 886 F.2d 1485, 1496 (7th Cir. 1989) (citations omitted). "Rule 11 sanctions are meant to serve several purposes, including (1) deterring future litigation abuse, (2) punishing present litigation abuse, (3) compensating victims of litigation abuse, and (4) streamlining court dockets and facilitating case management." White, 908 F.2d at 683 (emphasis added). "The central purpose of Rule 11 is to deter baseless filings in the District Court. . . ." Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447, 2454 (1990).

113. See supra notes 81 & 87.
effectively eliminate the economic incentive to file a SLAPP.

In practice, however, sanctions fall short of their potential because they are
difficult to impose, and even if imposed, they are usually granted in nominal
amounts.114 This result occurs because of the court's fear of deterring attorneys
from pursuing the remedies available to their clients.115
Sanctions can also be levied jointly against lawyers and their SLAPP
plaintiffs.116 Though this may advance the goal of limiting attorney involve-
ment, it may reduce the economic disincentive to the plaintiff if the plaintiff and
attorney share in the payment of the sanctions.117
Because of their practical failure to eliminate the economic incentive to file
SLAPPs, as well as their failure to resolve the dispute expeditiously, sanctions
alone do not provide a solution to SLAPPs.

F. Attorney Disciplinary Proceedings

The filing of SLAPPs should, theoretically, already be limited by the state rules
of professional conduct governing attorney behavior.118 State rules of profes-
sional conduct, most of which are adoptions of the American Bar Association
models,119 prevent attorneys from bringing claims which are not meritori-
ous.120 Though the exact definition of a meritorious claim is broad and open

114. Brecher, supra note 34, at 137. See also White, 908 F.2d at 684-85. The circumstances to
consider when determining monetary sanctions are: (1) reasonableness (lodestar) calculation; (2)
minimum to deter; (3) ability to pay; and (4) other factors. These circumstances all serve as
limitations on the amount assessed. Id.
115. "In imposing sanctions, we are well aware of the strong public policy in favor of the
peaceful resolution of disputes in our courts and that attorneys must not be deterred from pursing
their client's remedies for fear of sanctions against them and/or their clients." Maple Properties v.
See also JUDICIAL RESPONSES, supra note 45, at IV.4.
117. Paying nominal sanctions, even those imposed on their attorneys, may simply be "part of
the cost of doing business" for SLAPP plaintiffs. Stein, supra note 65, at 58.
118. But see Brooks, supra note 11, at 66-74, arguing that a SLAPP solution needs to "weigh the
basic moral value of the lawsuit in the specific case," something which cannot be done with the flawed
ethical standards such as those adopted by the legal profession. Id. at 71 (emphasis in original).
120. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-109(A) (1981) ("A lawyer shall not
accept employment on behalf of a person if he knows or it is obvious that such person wishes to: (1)
Bring a legal action, conduct a defense, or assert a position in litigation, or otherwise have steps taken
for him, merely for the purpose of harassing or maliciously injuring any person. (2) Present a claim
or defense in litigation that is not warranted under existing law, unless it can be supported by good
faith argument for an extension, modification, or reversal of existing law."); MODEL RULES OF
PROFESSIONAL CONDUCT Rule 3.1 (1989) ("A lawyer shall not bring or defend a proceeding, or assert
or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes
a good faith argument for an extension, modification or reversal of existing law."). See also
CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 3-200(A) (1988) ("A member shall not seek,
accept, or continue employment if the member knows or should know that the objective of such
employment is: (A) To bring an action, conduct a defense, assert a position in litigation, or take an
appeal, without probable cause and for the purpose of harassing or maliciously injuring any person;
or (B) To present a claim or defense in litigation that is not warranted under existing law, unless it can
be supported by a good faith argument for an extension, modification, or reversal of such existing
to some interpretation, the intent of the rules clearly is to prevent abuse of the legal process and to prevent suits from being brought primarily to harass or maliciously injure a person. As shown above, the motives for filing SLAPPs include retaliation and intimidation. Suits filed for such purposes are plainly prohibited by the rules. Ideally then, under the existing rules of professional conduct, attorneys, subject to disciplinary proceedings for filing SLAPPs, should be discouraged from filing them, thus achieving an important objective in solving the problem of SLAPPs. Unfortunately, this does not appear to be the case.

The rules of professional conduct have had a limited effect in curbing SLAPPs. There are several reasons for this. First, the mere threat of a SLAPP suit is unlikely to prompt a citizen complaint to a state bar disciplinary committee, and even if reported, a threat is sufficiently inchoate that no action could be reasonably taken. Second, even after the suit is brought, few lay defendants have either the knowledge or the objectivity to distinguish a frivolous claim from a legitimate claim. Third, the deceptive nature of the SLAPP complaint may prevent judges and defendant's attorneys from recognizing the SLAPP as frivolous, which prevents them from reporting it. Finally, despite the duty imposed upon them to report, there appears to be a general reluctance on the part of attorneys and judges to report filings of a frivolous suit and an accompanying lack of enforcement by the bar.

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123. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 comment (1989).

124. See supra note 27 and accompanying text.

125. It is beyond the scope of this Comment to discuss the degree, and the cause, of the bar's failure to regulate itself through disciplinary rules and procedures. See generally Marks & Cathcart, Discipline Within the Legal Profession: Is it Self-Regulation?, 1974 U. ILL. L. F. 193.

126. See supra notes 14-18 and accompanying text.

127. MODEL CODE OF JUDICIAL CONDUCT Canon 3.D.(2) (1990) ("A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct shall take appropriate action."); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103 (1981) ("A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge...."); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A) (1981) ("A lawyer shall not: (1) Violate a Disciplinary Rule."); MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3(a) (1990) ("A lawyer having knowledge that another lawyer has committed a violation of the rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.").


The result is that the rules of professional conduct as currently enforced fail to reduce the filing of SLAPPs despite their potential to do so. Even if enforced, the rules of professional conduct alone can only satisfy one of the five objectives required for a successful solution to SLAPPs. However, since the observance of these rules could significantly reduce the filing of SLAPPs, they are an important part of the proposed solutions to SLAPPs discussed later in this Comment.130

G. Countersuits ("SLAPP-Backs")

One often recommended response to SLAPPs are countersuits filed by SLAPP defendants against the SLAPP plaintiffs, commonly called "SLAPP-Backs."131 These countersuits may be based on several legal grounds including state and federal constitutional rights, state and federal civil right statutes, abuse of process, and malicious prosecution.132 A large award of damages to SLAPP-Back plaintiffs (former SLAPP defendants) could cause substantial economic harm to the former SLAPP plaintiff, eliminating any possible gain obtained through the SLAPP. A SLAPP-Back thus reduces the economic incentive to SLAPP.

There are however, many shortcomings to this type of response. All SLAPP-Backs, regardless of their underlying cause of action, extend the already protracted litigation133 and leave the defendant embroiled in litigation he or she never anticipated. Further, unless and until the SLAPP-Back is resolved in the SLAPP defendant's favor, SLAPP-Backs do little to reduce the economic harm the SLAPP defendant suffered in the original SLAPP. Finally, the individual causes of action for SLAPP-Backs each have problems which limit their effectiveness. A brief examination of the malicious prosecution cause of action is illustrative.

As currently implemented, a malicious prosecution suit is a poor choice for reducing the filing of SLAPPs. These suits cannot be brought until the SLAPP is settled on the merits in favor of the defendant.134 Additionally, malicious prosecution suits are disfavored by the courts and difficult to successfully pursue.135 Admittedly, measures could be taken to remedy some of these

130. See infra Section IV.
131. Pring, supra note 4, at 19.
132. Id. at 20.
133. See supra note 36.
134. A complaint for malicious prosecution must allege malice, lack of probable cause, and a favorable termination of the prior proceedings. Scannell v. County of Riverside, 152 Cal. App. 3d 596, 611, 199 Cal. Rptr. 644, 652 (1984). A cause of action for malicious prosecution accrues at the time of entry of judgment of the underlying action. Id. at 616, 152 Cal. Rptr. at 655. Therefore, a SLAPP that is pursued through discovery and pretrial practice, no matter how much hardship it produces for the defendant, is not grounds for a malicious prosecution suit.
135. See Wade, supra note 63, at 437-39. "The courts have placed stringent restrictions upon this tort action. In some states, the restrictions are so stringent as to render the cause of action essentially unavailable." Id. at 438. See also Brecher, supra note 34, at 125.
problems.

In his article, Joseph Brecher argues that the traditional laws for when a claim of malicious prosecution can be brought should be modified to allow immediate cross-claims for malicious prosecution.\textsuperscript{136} This could reduce the total amount of time spent in litigation if the suit and malicious prosecution action were litigated consecutively. His analysis refutes the traditional arguments against these malicious prosecution cross-claims, including the argument of not having a true cause of action until the original suit is finally adjudicated in the defendant's favor.\textsuperscript{137} He points out that the real difficulty lies in deciding when to allow these claims.

Brecher recommends inquiring into whether the defendant acted in the public interest based on the factors set out in California Code of Civil Procedure section 1021.5 for awarding attorney's fees in public interest cases.\textsuperscript{138} He proposes that a plaintiff (a former SLAPP defendant) meeting the section 1021.5 test should be allowed to bring an immediate malicious prosecution cross-claim. Unfortunately, there are two basic weaknesses in this proposal. The first weakness is that it only works for targets acting in the public interest.\textsuperscript{139} Though most SLAPP defendants probably represent (informally) their communities in an action, there is no reason to believe that they all do so in each case. Petitioning a zoning board to deny a variance because it will affect the property value of one's home or to avoid increased traffic and congestion in one's neighborhood is just as valid as petitioning to save the scenic beauty of the surrounding hillsides. Under the section 1021.5 test, however, the first reason probably would be insufficient to justify a cross-claim, and the second may or may not be considered in the public interest.\textsuperscript{140}

The second weakness is that since the section 1201.5 test is unreliable for SLAPP defendants when it is used as a basis for extracting attorney's fees from the SLAPP plaintiff,\textsuperscript{141} there is little reason to believe it would work any better for malicious prosecution.

In summary, the existing solutions to SLAPPs fail to solve the problem primarily because they have too little impact on the economic incentives that motivate these suits. Further, they fail to achieve the goals of reducing the impact on the target because they (1) generally increase rather than decrease the total amount of litigation; (2) do not guarantee a recovery of economic loss for the defendant; (3) occur too late in the process to thwart the goals of the plaintiff; and (4) are too difficult to invoke.

\begin{thebibliography}{9}
\bibitem{136} Brecher, \textit{supra} note 34, at 125-28.
\bibitem{137} \textit{Id.} at 138.
\bibitem{139} Sive, \textit{supra} note 43, at 27, col. 2.
\bibitem{140} \textit{But see Westfield Partners,} 740 F. Supp. 523, where the court determined that petitioning to have a roadway vacated as a public highway was protected by the first amendment.
\bibitem{141} Brecher, \textit{supra} note 34, at 135-36. "\textit{[U}nder the present state of the law, {[}§ 1201.5{]} it is unwise for intimidation defendants to rely too heavily on extracting their fees from plaintiffs." \textit{Id.} at 136.
\end{thebibliography}
IV. ANALYSIS OF PROPOSED SOLUTIONS

Two proposals could feasibly eliminate SLAPPs. The first involves devising a new judicial application of the existing legal solutions. The second requires legislative action in creating an entirely new solution. This Section analyzes each proposal and recommends modifications for making them more effective in eliminating SLAPPs. There are several features common to both these proposals which serve as hallmarks to any successful SLAPP solution. First, both proposals place greater initial burdens on a potential SLAPP plaintiff, requiring that party to do more than merely file an ordinary complaint to initiate the lawsuit. Second, both proposals require preliminary hearings early in the process. Finally, both solutions require the plaintiff to pay the defendant's attorney's fees and costs in the event the defendant prevails.

A. A New Judicial Solution

In *Webb v. Fury*, Justice Neely's dissent described a new judicial remedy to SLAPPs which he believed the West Virginia Supreme Court had both the power and the occasion to implement. In *Webb*, the petitioners were Rick Webb, Webb's non-profit Braxton Environmental Action Programs, Inc., and Mountain Stream Monitors, an unincorporated association. Petitioners sought a writ of prohibition to prevent the circuit court from proceeding with a tort action filed by DLM Coal Corporation ("DLM"). The petitioners contended that their actions were protected by their right of petition and of free speech, and therefore the lower court was prohibited from proceeding.

In the circuit court action, DLM claimed the petitioners had libeled DLM and also damaged its commercial interests through communications the petitioners exchanged with government agencies. These communications consisted of (1) an administrative complaint filed with the Office of Surface Mining ("OSM"), United States Department of the Interior, claiming that DLM was in violation of the Surface Mining and Reclamation Act of 1977, and (2) a request for an evidentiary hearing before the United States Environmental Protection

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142. Several suggestions have been made for executive branch remedies. These include the filing of *amicus curiae* briefs in favor of SLAPP defendants by the state attorneys general, the direct intervention of state attorneys general on behalf of SLAPP defendants (*Pring*, *supra* note 4, at 16), and county government-funded "citizens' legal defense funds" to provide SLAPP defendants with the money to hire an attorney (*Abrams*, *supra* note 28, at 43). Although these measures would undoubtedly be helpful, they would do little to reduce the filing of SLAPPs because they achieve few if any of the five objectives outlined in Section II.A, *supra*.


144. *Id.* at 436, 282 S.E.2d at 31.

145. *Id.* at 437, 282 S.E.2d at 31. OSM's investigation into surface runoff from DLM mines was inconclusive and no enforcement action was taken. *Id.* at 438, 282 S.E.2d at 31-32.
Agency ("EPA"), claiming that DLM was in violation of the Clean Water Act. The defamation occurred in a newsletter published by Mountain Stream Monitors containing an editorial criticizing strip mining. Without mentioning DLM, the newsletter implied that the criticism was aimed at DLM by indicating DLM owned parcels on a map that accompanied the article.

The Supreme Court of Appeals of West Virginia, considering the petitioners' claim of a violation of their first amendment right of free speech and of petition, applied the Noerr-Pennington doctrine and held that both the newsletter and the direct communications with the government agencies were protected. The court granted petitioner's request for a writ of prohibition.

Dissenting Justice Neely took exception to the majority's decision to grant absolute immunity to the defendants. While recognizing the "potential for chilling legitimate first amendment rights when there is anything less than absolute immunity is awe inspiring," Neely feared that the blanket immunity would protect genuine torts "masquerad[ing] as an act of petitioning the government." In his dissent, he outlined a three-part solution that would "screen legitimate first amendment activity from irresponsible or sham first amendment activity."

First, Justice Neely proposed use of the court's judicial rule-making power to modify the state rules of civil procedure so that, instead of requiring mere notice pleading, in cases where plaintiffs sought damages for conduct that is prima facie protected by the first amendment, the plaintiff must plead "more specific allegations than would otherwise be required."

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146. An evidentiary hearing may be granted by the EPA as part of its permit issuing process under the Clean Water Act. In this case, DLM was attempting to consolidate some existing permits which provided Webb with an opportunity to request the hearing. The court was uncertain whether a hearing was ever held. The EPA granted the permits and later attempted to partially withdraw them. DLM obtained a temporary restraining order to prevent the withdrawal. The EPA and DLM eventually settled their dispute by stipulation when the EPA agreed to rescind the withdrawal and DLM agreed not to mine certain new sources pending an EPA investigation. Id. at 438-39, 282 S.E.2d at 32.

147. See supra Section III.B.


149. Id.

150. Justice Neely was not alone in taking this position. See Smith, 562 F. Supp. at 842. See also Pring, supra note 60, at 17, col. 1 (The Webb decision may have been overruled by McDonald, 472 U.S. 479).


152. Id. at 461, 282 S.E.2d at 43 (Neely, J., dissenting).

153. Id. at 466, 282 S.E.2d at 46 (Neely, J., dissenting).

154. This SLAPP response would protect all activity falling under the scope of the first amendment rather than just activity found to be in the "public interest." This is critical to protect first amendment activity. See infra note 183.

155. "Where a plaintiff seeks damages or injunctive relief, or both, for conduct which is a [sic] prima facie protected by the first amendment, the danger that the mere pendency of the action will chill the exercise of first amendment rights requires more specific allegations than would otherwise be required." Webb, 167 W. Va. at 467, 282 S.E.2d at 47 (Neely, J., dissenting) (quoting the majority opinion in Franchise Realty, 542 F.2d at 1076, 1082-83). Note that Schauer believes that Franchise Realty provides more protection than the Supreme Court authorized. Schauer, supra note 55, at 714.
Second, Justice Neely proposed requiring a preliminary hearing early in the proceedings in which the trial judge would decide whether the plaintiff has enough facts to go forward and whether the suit is brought in good faith.\textsuperscript{156} The court would also order the plaintiff to advance the defendant the costs of discovery needed to get to this preliminary hearing.\textsuperscript{157} In the event that the plaintiff ultimately prevailed on the merits, the advance on costs would be refunded.\textsuperscript{158}

Third, a plaintiff who lost in trial on the merits would be required to reimburse the defendant for full costs, including attorney's fees, without exception. Also, if the court found the plaintiff was actually abusing the judicial process to chill first amendment rights, the court would impose additional costs on the plaintiff, beyond those actually incurred by the defendant.\textsuperscript{159} Justice Neely believed this requirement would prevent the chilling effect of these lawsuits by requiring the plaintiff to pay for the costs of defense.\textsuperscript{160}

As proposed, this solution would meet most of the objectives of an effective solution to the SLAPP problem. It protects the defendant from the costs of litigation, resolves the suit quickly through a preliminary hearing, and provides for economic sanctions to reduce the incentive to sue.\textsuperscript{161} Justice Neely's proposal also complies with the limitations required of an effective solution. It has safeguards built in to prevent abuse because it involves judicial oversight from the start. It also places a greater burden on the plaintiff for specificity in pleading, which will help identify the suit as a SLAPP. Finally, this solution provides a measured response to the problem that is neither reactionary nor a potential defense for malicious "petitioning" activity. The only necessary modification to this solution would be to require the courts to report the plaintiff's attorney to the state bar disciplinary committee if they find that the suit was intended to chill first amendment rights.\textsuperscript{162}

\textsuperscript{156} Webb, 167 W. Va. at 467-68, 282 S.E.2d at 47 (Neely, J. dissenting) (quoting Mauck v. City of Martinsburg, 167 W. Va. 332, 337, 280 S.E.2d 216, 220 (1981) ("[W]hen ever there is a first amendment defense to actions under state law the state court is required to be a judge of both the facts and the law.")

\textsuperscript{157} Id.

\textsuperscript{158} Id.

\textsuperscript{159} Id. (referencing W. Va. CODE § 59-2-11 (Michie Supp. 1989) ("nor shall anything in this article take away or abridge the discretion of a court of equity over the subject of costs. . . ."); W. Va. R. CIV. P. 54(d) (Michie 1990) ("Except when express provision therefor is made either in a statute of this State or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs. . . .")

\textsuperscript{160} Webb, 167 W. Va. at 467-68, 282 S.E.2d at 47 (Neely, J. dissenting). This requirement may limit this judicial solution to state courts since federal courts are prohibited from awarding attorney's fees to the prevailing party in the absence of Congressional authority through express statutory provisions. Alyeska Pipeline, 421 U.S. 240. But, if a federal court were to determine that the suit was not justified it could conceivably exercise its Rule 11 power to sanction the plaintiff for the equivalent of attorney's fees. See Fed. R. CIV. P. 11, supra note 109.

\textsuperscript{161} This is a critical feature of Justice Neely's solution. See supra Section II.A.5. for a discussion of how and why such measures should be applied.

\textsuperscript{162} As shown earlier, filing one of these suits is typically a violation of the Rules of Professional Conduct. See supra Section III.F.
B. A New Legislative Solution

California, like many states where real estate development has been rapid, has seen a dramatic rise in the number of SLAPPs filed.\textsuperscript{163} In response, the California Legislature introduced and passed an addition to the California Code of Civil Procedure.\textsuperscript{164} Though this bill was vetoed by the Governor of California\textsuperscript{165} it was recently reintroduced in the California Senate\textsuperscript{166} and considering the overwhelming support it received in the California Legislature last session, it is likely to pass again.\textsuperscript{167} Moreover, it is worthwhile to analyze this bill because it may serve as a model for laws in other states.\textsuperscript{168} As drafted,\textsuperscript{169} the bill is designed to protect a person's exercise of first

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\textsuperscript{163} "SLAPPs have become particularly widespread in areas—including California, Colorado, and New York—where the quality of life is high, since developers are more likely to try to make a lot of money in these areas." Colino, supra note 17, at 21.
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\textsuperscript{164} This bill, S.B. No. 2313, was introduced into the California Senate on February 27, 1990 by Senator Bill Lockyer, S.B. 2313, 1989-90 Leg., Reg. Sess. (1990). It was passed, after amendments, in the Senate (33 Ayes to 5 Noes) on May 24, 1990. On August 27, 1990 it was passed, after amendments, in the assembly (77 Ayes to 0 Noes). On August 31, 1990 the Senate concurred in Assembly changes (29 Ayes to 5 Noes). \textit{California Legislature, Senate Weekly History} 641 (Oct. 4, 1990).
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\textsuperscript{165} The bill was vetoed on September 26, 1990. The Governor believes there are enough protections against frivolous suits and that "judges should be encouraged to impose liberal sanctions against parties who file such lawsuits." Sotero, \textit{Governor Vetos Bill to Quell "SLAPP" Suits}, Gannett News Service, Sept. 27, 1990.
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\textsuperscript{167} Since California elected a new governor on November 7, 1990, there is a better chance that this bill will be signed into law.
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\textsuperscript{168} Riesenfeld, \textit{Law-Making and Legislative Precedent in American Legal History}, 33 Minn. L. Rev. 103 (1949) (discussing the tendency of legislatures to adopt statutory solutions from other jurisdictions).
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\textsuperscript{169} \textit{Rienkens}, \textit{Law-Making and Legislative Precedent in American Legal History}, 33 Minn. L. Rev. 103 (1949) (discussing the tendency of legislatures to adopt statutory solutions from other jurisdictions).
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New York is currently considering a bill that would curb SLAPPs. This bill accelerates the process for dismissal of the suit, places a burden on the plaintiff to show a substantial basis in law to avoid dismissal, treats plaintiffs as public figures in defamation actions arising from statements made in public debates, awards defendant's costs and attorney's fees and allows compensatory and punitive damages to be awarded to the defendant. Spencer, \textit{Bill Aimed at Curbing Retaliatory Suits}, N.Y. L.J., Oct. 5, 1990, at p. 1. Washington state passed a bill designed to reduce SLAPPs in 1988. This bill immunizes parties who have made good faith communications to government from civil liability and allows prevailing defendants to recover attorney's fees and costs. It also allows government agencies or the attorney general to intervene and defend parties who have been sued for communicating with the government. If the government intervenes, attorney's fees may be awarded to either prevailing party. \textit{Wash. Rev. Code Ann. §§ 4.24.500, .510, .520} (1991). Realistically, this bill does nothing more than provide attorney's fees because the limited immunity granted already exists under the United States Constitution as expressed in the \textit{Noerr-Pennington} doctrine. See supra Section III.B

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\textsuperscript{169} The proposed bill provides:
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Section 1. Section 425.16 is added to the Code of Civil Procedure, to read:

425.16. (a) No cause of action against a person arising from any act of the person in furtherance of his or her first amendment right of petition or free speech in connection with a public issue, shall be included in a complaint or other pleading unless the court enters an order allowing the pleading, after the court determines that the party seeking to file the pleading has established that there is a substantial probability that the plaintiff will prevail on the claim. The court may

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amendment free speech and petition rights from the chilling effect of meritless lawsuits.\(^{170}\) It would achieve this objective in two ways. First, the bill prohibits a claim which arises from an act taken in furtherance of a person's first amendment right of petition or free speech in connection with a public issue.\(^{171}\) The court can only issue that order upon a showing by the plaintiff that there is a substantial probability that the plaintiff will prevail on the claim.\(^{172}\) Failure to comply subjects the pleading to a motion to strike.\(^{173}\) Second, if the defendant prevails, he or she would be entitled to recover attorney's fees and costs.\(^{174}\)

This bill was opposed by the California State Bar Committee on the Administration of Justice on two grounds.\(^{175}\) First, the Bar Committee asserted that protection against frivolous actions currently exists and "judges should be encouraged to impose liberal sanctions against parties and their attorneys who file SLAPP suits."\(^{176}\) Second, malicious prosecution actions against such suits should be encouraged.\(^{177}\) This opposition is not well-founded. This Comment has shown that the existing solutions, including sanctions and malicious prosecution suits, cannot work to stem this type of litigation.\(^{178}\)

Notwithstanding any questions of statutory interpretation of the actual

allow the filing of a pleading that includes that claim following the filing of a verified petition, accompanied by the proposed pleading and supporting affidavits, stating the facts upon which the liability is based. The court shall order service of the petition upon the party against whom the action is proposed to be filed and permit that party to submit opposing affidavits prior to making its determination. The filing of the petition, proposed pleading, and accompanying affidavits shall toll the running of any applicable statute of limitations until the final determination of the matter, which ruling, if favorable to the petitioning party, shall permit the proposed pleading to be filed.

If the court determines that the plaintiff has established a substantial probability that he or she will prevail on the claim, neither that 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. To the extent that any pleading does not comply with the requirements of this section, it shall be subject to a motion to strike.

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


171. **Lockyer Bill Text, supra note 169.**

172. **Id.** This probability showing is denied evidentiary value if the claim is allowed. **Id.** Compare this with similar pleading hurdles that have been established through CAL. CIV. PROC. CODE §§ 425.13-15 (West 1990).

173. **Lockyer Bill Text, supra note 169.**

174. **Id.**

175. **Lockyer Bill Report, supra note 170, at 4.**

176. **Id.**

177. **Id.**

178. **See supra Section III.** It is, however, admirable to try to solve the SLAPP problem with existing law because doing so would both show the cohesiveness and internal safeguards of the legal system and also achieve the desirable goal of minimizing the complexity of the law by accomplishing as much as possible with as few laws as possible.
language of the bill, including a definition of "substantial probability,"179 this bill achieves several of the goals of a successful SLAPP response. First, it protects the defendant by providing economic relief through attorney's fees,180 and provides for a speedy, preliminary decision. Second, it also takes the very important step of making the solution offensive rather than defensive. In theory, the proposed statute puts the burden on the plaintiff to substantially prove the case before the pleading is filed. Unfortunately, even with the application of attorney's fees for the defendants, this bill would not fully achieve the goal of eliminating economic incentives to file SLAPPs.

The bill should be amended so that in the event the defendant prevails, he or she would recover statutory damages which should be reasonably equivalent to plaintiff's projected profits if the petitioning action had been silenced. This type of penalty strikes directly at the economic incentive that causes business organizations to file SLAPPs. In addition, the bill should also be modified to specifically require the court to report the attorney filing a SLAPP to the state bar disciplinary committee for investigation.181 Finally, the bill should not restrict its protection only to acts of free speech involving "a public issue,"182 because this term will probably be construed to exclude cases where the petition to government furthers the interests of a narrow group of people.183

With such modifications, the bill would then achieve all the objectives discussed earlier. It would also fit within the limitations required of an acceptable solution. The bill requires judicial review of the pleadings to avoid reactionary responses. Also, it uses a special determination hearing to overcome the scarcity of facts, allowing valid claims to be tried and invalid claims to be dismissed. Finally, it does not provide any blanket immunity behind which actual defamation or other tortious conduct can hide.

CONCLUSION

The major tasks required to solve a problem are recognizing the problem's cause, measuring the problem's extent, and considering the tools available to solve it. With SLAPPs, the cause is relatively clear: the availability of the legal system to business entities as an effective and economically feasible means of

179. Compare this term with the same term in CAL. CIV. PROC. CODE § 425.13 (West 1990), which has not yet been subjected to judicial interpretation at the appellate level.

180. It is not clear from the text of the bill whether the defendant is entitled to attorney's fees for the cost of the special determination on substantial probability of success if the case never gets beyond that point. To be effective, attorney's fees for this portion of the proceeding must be awarded to the defendant even if the case never gets to trial.

181. See supra Section III.F.

182. Lockyer Bill Text, supra note 169.

183. As discussed earlier, this is a valid use of petitioning under the first amendment which must be protected from SLAPPs. No distinction between "public interest" and "private interest" petitioning should be drawn in any solution proposed to protect petitioning citizens from SLAPPs. The only permissible distinction is between legitimate petitioning and "sham" petitioning. See supra notes 76-78, 86 & 154.
eliminating political opposition. The exact extent of the problem, however, is not as clear. While more data on the extent of the problem is desirable, it is not necessary. Based on the information available, it is apparent that the SLAPP problem is widespread and growing. Further, its extent is magnified by its ability to chill the petitioning activities of people who are not even parties to the litigation. Therefore, an effective response to this problem is required immediately. This Comment has considered the existing tools available to respond to the problem of SLAPPs and has found them lacking. New solutions, either judicial or legislative in origin, must be advanced and implemented.

Judicial lawmaking has worked throughout common law history as a valuable, effective, and measured response to social problems. As shown, however, the courts must be willing to exercise their considerable powers to fashion new procedural remedies and apply their sanctioning power to sharply curtail the growth of SLAPPs. Legislative responses, such as California's proposed amendment to the Code of Civil Procedure, can probably produce a better solution because legislatures have greater flexibility than courts in fashioning remedies.

Until these new solutions are implemented, defendants must act to protect themselves. Understanding the available procedural and substantive defenses they have will allow defendants to undertake their petitioning with the confidence that the legal system will support them. Further, in learning the limits of their rights under the first amendment, defendants will be able to conduct their petitioning within the limits protected by the Constitution.

It is important to remember that the plaintiffs in SLAPPs generally have a legitimate grievance since they will lose prospective profits if the petitioning party is successful. Nevertheless, resolution in the courts is not the correct way of handling this grievance because it ignores the true nature of the dispute and focuses on the tactics the defendant used in declaring his or her position. The dispute should be left in the political forum where it can be decided without the all or nothing, win or lose judgments which often constrain the courts. Instead, the interests of several parties must be weighed and compared in light of the community's best interest as well as the interests of the disputing parties. In the political forum, compromise is an effective and often-used form of dispute resolution and perhaps the one most suited to conflicts between groups that will, because of their proximity in the community, encounter each other continuously.

An effective solution to SLAPPs is the only way to keep these disputes in the political forum where they belong. The solution must do more than merely help the defendant; it must cut to the heart of the problem and eliminate the cause, specifically the economic incentive to employ SLAPPs. Judicial and

184. Canan and Pring have continued their research by expanding their quantitative analysis and undertaking a detailed qualitative study of eleven selected SLAPPs. They are also conducting a nationwide survey of politically involved citizens. Pring, supra note 4, at 8.

185. This is not to suggest that law and politics are separate forces, but rather to suggest that courts make poor forums for the resolution of SLAPPs. But see Stein, supra note 65, at 47.
legislative solutions must do more than make the chasm wide, they must make it deep.

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