

January 1994

Exercise of Constitutional Privileges: Deterring Abuse of the First Amendment - Strategic Lawsuits against Political Participation

David J. Abell

Recommended Citation

David J. Abell, Comment, *Exercise of Constitutional Privileges: Deterring Abuse of the First Amendment - Strategic Lawsuits against Political Participation*, 47 SMU L. REV. 95 (1994)
<https://scholar.smu.edu/smulr/vol47/iss1/10>

This Comment is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

EXERCISE OF CONSTITUTIONAL PRIVILEGES: DETERRING ABUSE OF THE FIRST AMENDMENT— “STRATEGIC LAWSUITS AGAINST POLITICAL PARTICIPATION”

David J. Abell

THE Beverly Hills League of Women Voters, exercising their First Amendment rights, wrote letters to the Los Angeles Times and Beverly Hills Courier expressing opposition to a condominium development proposed by Maple Properties. Maple Properties, fearing opposition would hinder their development, sued the League members for \$63 million. The developer claimed damages based on libel, slander, interference with prospective economic advantage, violation of equal protection, and conspiracy. The lawsuit progressed all the way to the United States Supreme Court where an appeals court decision in favor of the League was affirmed. After the claim was dismissed, the League was awarded the statutory maximum of \$20,000 for attorney fees and court costs.¹

A recent surge in lawsuits that attack a citizen's right to speak freely in public or to petition the government has been a serious concern for the adversely affected citizen and legislator alike. Average citizens are being sued for socially encouraged political participation.² Researchers estimate that hundreds of lawsuits are filed each year in order to silence weaker political opponents.³

Suits brought primarily in retaliation for any activity in opposition to the

1. Robert H. Boyle, *Activists at Risk of Being SLAPPED*, SPORTS ILLUSTRATED, Mar. 25, 1991, at 6.

2. For examples of SLAPP suits reported by Pring, *infra* note 3, see *Protect Our Mountain Env't Inc. v. District Court*, 677 P.2d 1361 (Colo. 1984) (en banc); *Webb v. Fury*, 282 S.E.2d 28 (W. Va. 1981); *City of Long Beach v. Bozek*, 645 P.2d 137 (Cal. 1982) (en banc), *vacated and remanded*, 459 U.S. 1095 (1983), *aff'd on indep. state const. grounds*, 661 P.2d 1072 (Cal. 1983); *Smith v. Silvey*, 197 Cal. Rptr. 15 (Cal. Ct. App. 1983); *Myers v. Plan Takoma, Inc.*, 472 A.2d 44 (D.C. 1983); *Streif v. Bovinette*, 411 N.E.2d 341 (Ill. App. Ct. 1980); *Miner v. Novotny*, 481 A.2d 508 (Md. Ct. Spec. App. 1984), *aff'd*, 498 A.2d 269 (Md. 1985); *Weissman v. Mogol*, 462 N.Y.S.2d 383 (N.Y. App. Div. 1983); *Okun v. Superior Court*, 629 P.2d 1369 (Cal.), *cert. denied*, 454 U.S. 1099 (1981), *on remand sub nom.*, *Maple Properties v. Harris*, 205 Cal. Rptr. 532 (Cal. Ct. App. 1984), *cert. denied*, 470 U.S. 1054 (1985); *Chavez v. Citizens for a Fair Farm Labor Law*, 148 Cal. Rptr. 278 (Cal. Ct. App. 1978); *Butte County v. Bach*, 218 Cal. Rptr. 613 (Cal. Ct. App. 1985).

3. George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3, 5 (1989); see generally Penelope Canan, *The SLAPPs from a Sociological Perspective*, 7 PACE ENVTL. L. REV. 23 (1989) (describing the research).

plaintiff's business interest have been labelled "SLAPP" suits (Strategic Lawsuit Against Public Participation).⁴ Another species of retaliatory litigation, also falling within the definition of SLAPP, is the countersuit when used as a vehicle for intimidation.⁵ Although these suits rarely win the specific damages sought, they succeed in accomplishing their true goals of retaliation, intimidation, and the elimination of weaker opponents.⁶ Since it was first identified and defined in 1988 by Penelope Canan and George Pring, the SLAPP suit has engendered much discussion and debate.⁷

The message sent by SLAPP suits is that if you participate in legitimate (and Constitutionally protected) public discussion, you should be prepared to litigate.⁸ Just as corporations consider litigation a cost of doing business,

4. The SLAPP suit acronym was first coined by George Pring and Penelope Canan who led the first intensive research project to study this type of action. The published research of Canan and Pring represents a quantitative and qualitative analysis of over 100 identified SLAPP suits. See Penelope Canan & George W. Pring, *Strategic Lawsuits Against Public Participation*, 35 SOC. PROBS. 506, (1988); see also Canan, *supra* note 3, at 23; Pring, *supra* note 3, at 3.

5. Joseph J. Brecher, *The Public Interest and Intimidation Suits: A New Approach*, 28 SANTA CLARA L. REV. 105, 113 (1988).

6. The weaker opponents may be economically unable or politically unwilling to participate in litigation especially when the claim is ancillary to the original dispute.

7. Bill Ainsworth, *Wilson Signs Bill Curbing SLAPP suits*, RECORDER, Sept. 18, 1992, at 4; Cerrisse Anderson, *Developer's Tax Lawsuit Dismissed as Frivolous*, N.Y.L.J., Apr. 2, 1991, at 1; Cerrisse Anderson, *Judge's Ruling Enlarges Scope of Statute on Recovering Costs; Allows Maximum of \$100,000 for Each Prevailing Party*, N.Y.L.J., Oct. 15, 1992, at 1; Cerrisse Anderson, *Court Assesses \$10,000 Costs in SLAPP Suit*, N.Y.L.J., Apr. 16, 1992, at 1; Andrew Blum, *SLAPP Suits Continue in High Gear: A Pair of Firsts*, NAT. L.J., May 18, 1992, at 3; Robert H. Boyle, *Activists at Risk of Being SLAPPED*, SPORTS ILLUSTRATED, Mar. 25, 1991, at 6; *Curbing SLAPP Suits*, NEWSLETTER, Bar Ass'n of San Francisco, Mar. 17, 1992, at 4 (Supplement to the RECORDER); Mark Cursi, *Developer's SLAPP Suit Called "Repugnant"*, RECORDER, Feb. 27, 1991, at 3; Jim Doyle, *Sewer Agency Must Pay Richmond Man \$205,100 Damages for Suit Against Environmentalist*, S.F. CHRON., Oct. 9, 1992, at D8; Bruce Fein, *Code Green for Impunity*, WASH. TIMES, Oct. 7, 1992, at G1; Ronald J. Fleury, *Gadflies Gain New Ground in Fending Off Libel Suits*, N.J.L.J., Jan. 13, 1992, at 1; Lisa Gibbs, *Getting SLAPPED Around: These Suits are Aimed at Quieting Critics*, LEGAL TIMES, Dec. 24, 1990, at 10; Paula Goedert, *The SLAPP Suit Threat: Squelching Public Debate; Strategic Lawsuits Against Public Participation*, 22 AM. LIBR. ASS'N. 1003 (1991); Philip Hager, *Tide Turns for Targets of SLAPP Lawsuits*, L.A. TIMES, May 3, 1991, at 3; Walter Lucas, *Using the Courts to Quiet Critics: Activists Get SLAPPED Around in New Breed of Cases*, N.J.L.J., Dec. 27, 1990, at 3; Scott E. Mollen, *SLAPP Suits—Award of Attorney's Fees and Expenses Under 22 NYCRR Part 130-1 for Frivolous Conduct, Based on Prosecution of Colorable Claim for Improper Purpose, Not Unconstitutional*, N.Y.L.J., June 3, 1992, [Realty Law Digest] at 4; Karl Olson & Erin Daly, *A Slap at SLAPP Suits is a Signature Away*, RECORDER, Oct. 7, 1991, at 6; Robert D. Richards, *Suing to Squelch: A New Way to Keep Activists Quiet*, WASH. POST, Aug. 16, 1992, at C1; David Sive, *Countersuits, Delay, Intimidation Caused by Public Interest Suits*, NAT. L.J., June 19, 1989, at 26; *SLAPP in the Face of Texas Activists*, GREENWIRE, May 6, 1991, available in LEXIS, Nexis Library, Current File; Gary Spencer, *Bill Aimed at Curbing Retaliatory Suits*, N.Y.L.J., Oct. 3, 1990, at 1; Gary Spencer, *Cuomo Signs Bill to Deter SLAPP Lawsuits*, N.Y.L.J., Aug. 6, 1992, at 1; Ralph M. Stein, *SLAPP Suits: The Threat Can be Enough*, NAT. L.J., July 20, 1992, [Letters] at 14 (author is a professor at Pace University School of Law); Daniel Wise, *Community Groups Protected by Ruling: SLAPP Suit by Club Developer Dismissed*, N.Y.L.J., June 25, 1991, at 1; Todd Woody, *Jury Finds SLAPP Suit Violated Activist's Rights*, RECORDER, Oct. 7, 1992, at 2; Todd Woody, *SLAPP and SLAPP Back*, RECORDER, Sept. 29, 1992, at 1.

8. See generally Pring, *supra* note 3, at 21; Penelope Canan & George W. Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 LAW & SOC'Y REV. 385 (1988). An additional study was conducted of 228 suits fitting the SLAPP definition to help refine their conclusions.

active community members are now being forced to assess the value of their public participation against the potential risk of being hauled into the courtroom by those whose business interests might be adversely affected. Unfortunately, a price is being fixed on the exercise of Constitutional rights as citizens are forced to defend against frivolous, retaliatory lawsuits. When approving New York legislation aimed at SLAPP suits, Governor Mario Cuomo stated, "[t]he aim of SLAPP suits is simple and brutal. The individual is to regret ever having entered the public arena to tell government what she thinks about something directly affecting her."⁹

The use of litigation as a tool of intimidation and retaliation is an extraordinarily complex one. Constitutional guarantees of protected free speech and the right to petition the government compete against the presumptively legitimate interests of the plaintiff who seeks redress through the legal system. Despite the highlighted abuses of the legal system, anecdotal evidence should not be utilized to spur significant changes in the practice of law. The law has a long history of intimidation. It is inherent in the nature of the adversarial context within which litigants operate. Reinforcing the impact of intimidation is the reality that opposing parties will suffer or benefit from inequality of disposable resources.¹⁰ The best interest of the litigant will always be served by use of all tools at the litigant's disposal whenever the expected benefit outweighs the potential cost.

Consideration of the plaintiff's justifications for filing such claims is critical. Many times litigation may be the only source of redress the plaintiff is able to exploit. The plaintiff may have had legitimate business goals emasculated by delays created by zealous opposition groups. Often, the major complaint of the SLAPP plaintiff (i.e. a land developer) is that the defendant (i.e. a neighboring land owner) is the party who is prostituting the Constitution through the unethical invocation of free speech and the petition clause.

Quintessential difficulties that permeate the increasing use of intimidation suits involve notions of due process, fairness, free speech, ability to petition government, and representation. SLAPP suits typically involve a party who suffers from an enormous inequality of resources. The advantaged party is able to use the legal process as a tool of intimidation and retaliation. Intimidation is no longer an element of the process, but becomes the recognized purpose and goal. This goal exploits the legal process in an effort to punish citizens for their involvement in constitutionally protected activities. There-

9. Gary Spencer, *Cuomo Signs Bill to Deter SLAPP Lawsuits*, N.Y.L.J., Aug. 6, 1992, at 1. The legislation enacted by Governor Cuomo's signature was Chapter 767 of the Laws of 1992. 1992 N.Y. Laws 767.

10. See David A. Barrett, *Declaratory Judgments for Libel: A Better Alternative*, 74 CAL. L. REV. 847, 854 (1986). Summary judgment is difficult to obtain in libel actions. Costs have risen substantially, including direct expenses (attorney's fees) as well as indirect expenses (personal time). When the plaintiff claims enormous damages, defendants are forced to defend themselves more vigorously because of the risk of defeat, even if the risk of losing is remote. *Id.* at 856; see also Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 520-24 (1986) (noting that inequality in resources results in asymmetric adjudications).

fore, the principal question to be addressed is how to appropriately and effectively control this aberrant type of intimidation in the legal system.

This Comment takes the position that SLAPP suits do not represent a radical departure from normal practices used in the course of litigation and business. The danger lies not in the use of litigation for intimidation, but in the target of the intimidation and the protected activity that has engendered the dispute. Proposed solutions to the SLAPP problem must weigh the interests of the petitioning citizen as well as those parties legitimately filing a cause of action that can be characterized as SLAPP or intimidation. A failure to adequately address the problem of SLAPP suits undermines the citizen's reliance on political participation to resolve local disputes and to instigate and supplement the enactment and enforcement of governmental regulations.

This Comment addresses proposed and current responses to the problem of SLAPP and intimidation suits. Part I begins with an examination of the philosophical justifications underlying the citizen suit provision. Part I also examines the statutory and judicial encouragement of public participation, focusing on regulatory enforcement and public interest litigation. Part II provides background information on SLAPP suits. Part III investigates the interests of both parties and analyzes responses to the problem that best serve the competing interests. Part IV proposes solutions that afford the best protection against SLAPP suits while also providing equal consideration to the interests of those who file legitimate claims alleging standard SLAPP causes of action.

I. PUBLIC PARTICIPATION: THE FOURTH BRANCH

Before analyzing the repercussions of intimidating and retaliatory lawsuits, consideration of the essential role that the citizen plays in society is necessary. The importance of citizen activity in a democratic form of government is self evident. Public participation is a fundamental part of a representational form of government.¹¹ In its landmark decision in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*¹² the Supreme Court held that the right to petition government, and thereby effect the creation and enforcement of laws, is the centerpiece of a representational form of government, stating that "these branches of the government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives."¹³ The Court also noted that courts should be ever cogni-

11. *Sweezy v. New Hampshire*, 354 U.S. 234, 250-51 (1957) ("Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights. . . . History has amply proved the virtue of political activity by minority, dissident groups. . . ."); *NAACP v. Button*, 371 U.S. 415, 431 (1963) (citing *Sweezy v. New Hampshire*); *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 44 (1969).

12. 365 U.S. 127 (1961).

13. *Id.* at 137.

zant of the valuable information that flows from citizens and groups who actively seek to influence governmental action.¹⁴

Despite the importance of public involvement and interaction with governmental bodies,¹⁵ public participation in American government is at drastically low levels.¹⁶ SLAPP suits directly threaten the few citizens who are active participants in local politics. Anecdotal evidence supports the intuitive conclusion that the threat of costly litigation prompts citizens to end their civic participation.¹⁷ This chilling effect has long been a concern for courts considering the boundaries of defamation law.¹⁸

Even more surprising is that SLAPP suits are not only reserved for wealthy developers and industries, but have also been used by government agencies to silence public critics.¹⁹ For example, Alan LaPointe filed a taxpayer's suit against the San Francisco public sewer agency for allegedly unlawful spending of \$1 million for an incinerator. The sewer district filed a counterclaim accusing LaPointe and 490 other unnamed co-defendants of subversion of economic interests, instigating grand jury proceedings, and challenging the district's air pollution permits. The sewer district claimed \$42 million in damages.²⁰ "A healthy democracy thrives on passionate dis-

14. *Id.* at 137-38.

15. Studies of citizen activism and their effect on growth policy shows that citizen groups are typically instrumental in drafting initiative proposals that eventually generate restrictive municipal growth policies. Todd Donovan & Max Neiman, *Citizen Mobilization and the Adoption of Suburban Growth Controls*, WESTERN POL. Q., Sept. 1992, at 651, 672.

16. Only 10% of the adult population actively participates in politics in the United States. See LESTER W. MILBRAITH, *POLITICAL PARTICIPATION: HOW AND WHY PEOPLE GET INVOLVED IN POLITICS* (1965); SIDNEY VERBA & NORMAN H. NIE, *POLITICAL PARTICIPATION IN AMERICA* (1976).

17. Three farmers placed an ad in their local newspaper supporting a controversial water project and were subsequently sued by a powerful grower for libel. Nine years after the original suit was filed, the farmers find themselves still mired in the legal system. Although the three have won a \$13.5 million jury verdict for malicious prosecution, their attorney claims that "[t]o this day, that suit has chilled them from getting involved in any political activity ever again." Philip Hager, *Tide Turns for Targets of SLAPP Lawsuits*, L.A. TIMES, May 3, 1991, at A3.

18. 600 West 115th St. Corp. v. Von Gutfeld, 610 N.E.2d 930, 933 (N.Y. 1992), *cert. denied*, 113 S. Ct. 2341 (1993). The court considered *New York Times v. Sullivan*, 376 U.S. 254 (1964), and companion defamation cases and recognized that

when the rules of defamation are drawn too finely, when any erroneous statement is likely to open the statement-maker to liability, First Amendment values suffer because would-be communicators, fearing lawsuits, may be reluctant to risk expressing themselves. To avoid that result, and the resulting impoverishment of the public forum, the [Supreme] Court has been willing to allow in some circumstances otherwise valid claims of reputational harm to go uncompensated in order to encourage citizens and media outlets to express themselves freely when matters of public interest are at issue.

600 West 115th St. Corp., 610 N.E.2d at 933-34.

A balance must be formed between the state's interest in protecting against defamatory harm and the Constitutional guarantee that the state not unduly burden the citizen who seeks to participate in governmental processes. The New York court recognized that inequities are suffered by politically active citizens who are charged with defamation as a result of their participation. *Id.*

19. Jim Doyle, *Sewer Agency Must Pay Richmond Man \$205,100 Damages for Suit Against Environmentalists*, S.F. CHRON., Oct. 9, 1992, at D8 (discussing the LaPointe litigation).

20. *Id.*

course," Lapointe said.²¹ "When your own government files a SLAPP against you for speaking out, that is the ultimate outrage."²² The charges against LaPoint demonstrate how the threat of retributive litigation levies a price on all types of civic activity.²³

The United States Constitution established the ability to participate politically for every citizen, inherent in the freedom of speech and the right to petition the government.²⁴ In 1972 the Supreme Court's holding in *California Motor Transport Co. v. Trucking Unlimited*²⁵ extended to citizens the philosophy that petitioning activities are fundamental to our representational form of government.²⁶ The right "to petition for redress of grievances [is] among the most precious of the liberties safeguarded by the Bill of Rights."²⁷ The ability to speak freely and petition the government is considered a "fundamental personal right."²⁸ Petitioning has long been considered by the highest court as a right implicit in the "very idea of government."²⁹ The concept of citizens' public participation in governmental functioning is at the core of the republican form of government and has historically been afforded great respect.³⁰ Courts have consistently extended a deferential hand to citizens exercising their right to petition by providing constitutional immunity from personal liability.³¹

21. *Id.*

22. *Id.*

23. Some of the activities reported by researcher George Pring, for which citizens have been sued, include reporting violations of law, attending public hearings, lobbying for legislation, participating in a peaceful boycott or demonstration, circulating petitions, sending letters to government officials, calling a consumer protection agency, reporting police misconduct, campaigning in initiative or referendum elections, serving as an officer of the League of Women Voters during a good government campaign, speaking up at a school board meeting about a poor teacher or unsafe facilities, testifying at a governmental hearing, supporting a public-interest, and law-reform lawsuit. Pring, *supra* note 3, at 4-5.

24. "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.

25. 404 U.S. 508 (1972). The philosophy of *Noerr* "governs the approach of citizens or groups of them to administrative agencies . . . and to courts. . . . Certainly, the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition." *Id.* at 510. This analysis was recognized by the New York District Court in *Weiss v. Willow Tree Civic Assoc.*, 467 F. Supp. 803, 817 (S.D.N.Y. 1979) (citing additional authority *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329 (7th Cir. 1977), *cert. denied*, 434 U.S. 975 (1978) (petitioning activity included filing a complaint with the Internal Revenue Service)); *International Union UAW v. National Right to Work Legal Defense & Educ. Found., Inc.*, 433 F. Supp. 474, 482 (D.D.C. 1977) (right of party to litigate); *Center for United Labor Action v. Consolidated Edison Co.*, 376 F. Supp. 699, 701 (S.D.N.Y. 1974) (right to petition state administrative agencies).

26. *California Motor Transp. Co.*, 404 U.S. at 510.

27. *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967).

28. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

29. *United States v. Cruikshank*, 92 U.S. 542, 552 (1875).

30. *Id.*; *McDonald v. Smith*, 472 U.S. 479, 482 (1985) (tracing the historical roots of the Petition Clause since 1689). See generally, Norman B. Smith, "Shall Make No Law Abridging. . .": *An Analysis of the Neglected, But Nearly Absolute, Right of Petition*, 54 CINN. L. REV. 1153 (1986); Note, *Petitioning and the Empowerment Theory of Practice*, 96 YALE L.J. 569 (1987).

31. See *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127,

Citizen involvement is crucial at the local level, especially in the environmental review process.³² Citizens are usually on the front line in an environmental battle. They have the most at stake and are generally the first to recognize potential environmental problems and the possible impact on their neighborhoods and families.³³ New York Attorney General Robert Abrams highlighted the vital role played by New York citizen activists in aiding the government in enforcement of environmental laws.³⁴ For example, the civic activity of Louis Gibbs and the Love Canal Homeowners Association brought the enormity of the toxic waste pollution problem into the public consciousness.³⁵

State constitutions, civil rights statutes, privilege and immunity statutes, and judicial decisions recognize and protect the right and ability of citizens to participate in governmental decision making.³⁶ State and local laws relating to land use generally provide for significant participation by the public.³⁷ Much of the federal environmental legislation expressly provides for extensive public participation and considers citizen involvement to be a supplemental enforcement tool.³⁸

138 (1961); *California Motor Transp. Co.*, 404 U.S. at 510 (extending the *Noerr* immunity beyond antitrust to citizen petitioning activities); see also *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 614-15 (8th Cir. 1980) (discussing the extension of constitutional immunity to those exercising their right to petition).

32. Out of 350 lawsuits filed under New York State Environmental Quality Review Act (SEQRA), one-third were brought by citizens. Robert Abrams, *Strategic Lawsuits Against Public Participation*, 7 PACE ENV'T'L. L. REV. 33, 34-35 (1989) (address by Attorney General Robert Abrams, Center for Environmental Legal Studies, Pace University School of Law, White Plains, New York, Oct. 14, 1989). SEQRA is a New York law that requires an environmental impact study to be completed for any project that threatens to have a significant impact on the environment. N.Y. ENVTL. CONSERV. LAW § 8-109(2) (McKinney 1984). The Act requires the impact statement to be available to the public and for public hearings to be held to provide a forum for the expression of public comment. *Id.* § 8-109(4). Attorney General Abrams noted that projects are frequently changed to address public concern and some are canceled. Abrams, *supra*, at 36. "A number of these citizen suits have established essential procedures of early review and strict adherence to the procedures laid out in SEQRA. These principles have served as crucial tools in making projects safer for the environment." *Id.*

33. Abrams, *supra* note 32, at 36.

34. *Id.* at 35. Abrams cites many other situations in which New York citizens were instrumental in his department's enforcement of environmental legislation. The Hudson River Fisherman's Association "blew the whistle" on Exxon for dumping contaminated water from their cargo ships into the Hudson River. *Id.* Citizen groups were responsible for saving Storm King Mountain from destructive plans to build a power plant. *Id.* (citing *de Rham v. Diamond*, 295 N.E.2d 763 (N.Y. 1973)). A New York City highway project was canceled due to the efforts of a group called the Clean Air Campaign. *Id.* at 36 (citing *Sierra Club v. United States Army Corps of Eng'rs*, 772 F.2d 1043 (2d Cir. 1985)). The Tuxedo Landfill in Orange County was placed on the state's list of hazardous waste sites after residents near the dump complained to the attorney general and testified in court. *Id.* (citing *State v. Barone*, 546 N.E.2d 398 (N.Y. 1980)). Allied-Signal was forced to pay for the clean up of eighty tons of mercury and a three-to-four-foot layer of calcite from the bottom of a Syracuse lake. Court action was prompted by the efforts of several citizen groups acting in concert. *Id.* (citing *State v. Allied Signal, Inc.*, No. 89 Civ. 815 (S.D.N.Y. filed June 27, 1989)).

35. *Id.* at 35.

36. *Id.* at 34.

37. *Id.*

38. See *infra* notes 49-89 and accompanying text; S. REP. NO. 1196, 91st Cong., 2d Sess. 37 (1970) (commenting on the adoption of alternate forms of enforcement as a result of the poor enforcement history of federal agencies); 116 CONG. REC. 32,927 (1970) (remarks of Sen.

A. CIRCUMVENTING TRADITIONAL BARRIERS TO LITIGATION

There are several barriers to citizen involvement in public interest litigation. The public interest litigant is generally facing an opponent who enjoys tremendous financial reserves and is able to hire the best lobbyists, publicists, and attorneys.³⁹ Corporate and public entities have the luxury of time and are able to engage in protracted litigation. This economic imbalance provides a significant advantage for the typical target of public interest action and SLAPP plaintiffs. The average citizen or neighborhood group is unable to afford the cost of impact studies and expert witnesses, while their characteristic opponent enjoys the luxury of a large war chest.⁴⁰ The citizen may be forced to continue the expensive battle outside of the courtroom as public interest defendants often utilize public relations consultants to generate support from the media and the public.⁴¹

The litigation process itself is a significant barrier to the citizen who exercises the right to petition. Generally, as in environmental claims, the plaintiff is required to exhaust all administrative remedies. When they do make it to court for review, the review is confined to the administrative record.⁴² The process can become quite complex and overwhelming to the average citizen. Litigants must satisfy traditional requirements of standing to sue. To obtain an injunction, the party must make a showing of irreparable injury. Intervention may also be difficult to obtain. In an effort to facilitate such litigation, the courts and legislatures have devised mechanisms that reduce the barriers faced by the public interest litigant.

1. *Judicial Circumvention*

The courts have recognized the importance of citizen participation in governmental decision making. This realization is especially evident in the enforcement and execution of federal regulations.⁴³ In response, the courts have substantially relaxed the barriers typically faced by litigants, namely the traditional requirements of standing and intervention.⁴⁴ The courts recognize citizen groups as an important regulatory tool and have conferred upon them a special status. For example, one court observed:

[C]itizen groups are not to be treated as nuisances or troublemakers but rather as welcomed participants in the vindication of environmental in-

Muskie) (noting that the Clean Air Act (CAA) regulatory scheme presents an enormous enforcement burden on the EPA and requires the support and assistance of private citizens in the monitoring of the regulated community).

39. Brecher, *supra* note 5, at 109.

40. *Id.*

41. *Id.*

42. *Id.* (citing *Association of Data Processing Serv. Org. v. Board of Governors of the Fed. Reserve Sys.*, 745 F.2d 677, 684 (D.C. Cir. 1984)).

43. See Federal Water Pollution Control Act of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251-1376) (1990)); Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7401-7626 (1990)).

44. Earnest Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359, 359-68 (1972).

terests . . . [t]he citizen suits provision reflected a deliberate choice by Congress to widen citizen access to the courts. . . . [To reflect that choice] jurisdictional barriers to citizen actions, such as amount in controversy and standing requirements are expressly discarded by the Act.⁴⁵

To satisfy the standing requirement in citizen enforcement actions, the citizen must show an injury in fact to interests "arguably within the zone of interests to be protected or regulated" by the legislation.⁴⁶ The harm is not required to be significant. For example, citizens may sue for almost any violation under the Clean Water Act.⁴⁷ The courts have responded by providing mechanisms that allow citizens who lack sufficient grounds to intervene (i.e. citizens who are not personally or economically affected by the outcome) to express their views in a public forum.⁴⁸

2. Legislative Circumvention

Public participation through citizen suits is designed to supplement and expedite official administrative action and is recognized as an effective enforcement tool.⁴⁹ Before the rise of modern environmental regulation, a citizen's only effective redress for environmental injury was an action based on common law tort claims, such as public nuisance, trespass, and negligence.⁵⁰ The growing awareness that these common law actions, in addition to the current environmental regulations, were not providing acceptable levels of compliance⁵¹ led to the proposal and 1970 enactment of a citizen suit provision in the Clean Water Act (CWA).⁵² The addition of the citizen suit enforcement provision and the expansion of the Agency's authority was primarily due to the ineffectiveness of the enforcement provisions contained

45. *Friends of the Earth v. Carey*, 535 F.2d 165, 172-73 (2d Cir. 1976), *cert. denied*, 434 U.S. 902 (1977) (citations omitted).

46. *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972) (holding that standing may be established based on injury to noneconomic interests). A public interest group may sue for noneconomic injury provided one of its members has been harmed. *Id.* at 734-35.

47. *Id.*; *Student Pub. Interest Research Group of N.J. v. Georgia-Pac. Corp.*, 615 F. Supp. 1419, 1424 (D.N.J. 1985). The court ruled, citing *United States v. SCRAP*, 412 U.S. 669 (1973), that standing is not limited by the size of the injury. Plaintiffs do not have to demonstrate that they were "significantly" harmed. *Id.* All that is required is an "identifiable trifle" that constitutes actual or threatened (economic or noneconomic) injury. *Id.*

48. See *Sierra Club*, 405 U.S. at 734-35 (holding that a public interest group may sue for noneconomic injury provided one of its members has been harmed); *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608 (2d Cir. 1965) (accepting the idea of a private attorney general). But see *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2137 (1992) (refusing to provide standing to a group claiming injury due to a lack of consultation regarding activities abroad that result in increased rates of extinction of endangered and threatened species). "Vindicating the public interest is the function of the Congress and the Chief Executive". *Id.* at 2134.

49. S. REP. NO. 414, 92d Cong., 1st Sess., reprinted in 2 U.S.C.C.A.N. 3668, 3745-46 (1972).

50. Sharon Elliot, *Citizen Suits under the Clean Water Act: Waiting for Godot in the Fifth Circuit*, 62 TULANE L. REV. 175, 176 (1987).

51. See generally *United States v. Bishop Processing Co.*, 423 F.2d 469 (4th Cir.), *cert. denied*, 398 U.S. 904 (1970); Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Laws, Part V*, 13 ENVTL. L. REP. 10,309 (1983).

52. 33 U.S.C. § 1365 (1988) (providing the authority to any citizen to initiate a civil action for violation of the Clean Water Act provisions).

in the first generation environmental protection statutes.⁵³ The citizen suit provision was intended to extend to private citizens a broad authority to act as private attorneys general who may bring suit in federal district courts alleging violations of the Environmental Protection Agency's adopted pollution control requirements.⁵⁴

When Congress considered creating avenues for public participation in environmental regulations, it envisioned public regulatory activism as serving two functions. First, public action would serve as an alternate means of regulatory enforcement.⁵⁵ The private citizen would be able to initiate appropriate enforcement action when the EPA was reluctant or unable to institute official enforcement action.⁵⁶ Second, the involvement of the private sector as an additional party with the power to compel compliance would stimulate EPA's efforts to enforce its regulations.⁵⁷

Congress also constructed the citizen suit provision to protect the regulated community from abuse and harassment, while effectuating more comprehensive enforcement of environmental regulations. Three mechanisms were incorporated to check potential abuse of the citizen suit:⁵⁸ a sixty day notice requirement,⁵⁹ a diligent governmental prosecution defense,⁶⁰ and a limitation on the availability of attorneys fees.⁶¹

The Citizen suit provisions were especially important in the manner in

53. Enforcement of these statutes had proved to be complex and time-consuming. See H.R. REP. NO. 1146, 91st Cong., 2d Sess. 1, *reprinted in* 1970 U.S.C.A.N. 5356, 5360 (calling for new legislation to replace the time-consuming and complex procedures outlined in the Air Quality Act, Pub. L. No. 90-148, 81 Stat. 485 (1967)). See generally W. RODGERS, ENVIRONMENTAL LAW 200-21 (1977); Federal Water Pollution Control Act, ch. 758, 62 Stat. 1155 (1948) (codified at 33 U.S.C. §§ 1151-75 (1988)).

54. Clean Air Amendments of 1970, Pub. L. No. 91-604, sec. 12(a), § 304(a), 84 Stat. 1676, 1706 (codified as amended at 42 U.S.C. § 7604(a)(1) (Supp. III 1991)); 33 U.S.C. § 1365 (1988).

55. S. REP. NO. 1196, 91st Cong., 2d Sess. 37 (1970) (commenting on the adoption of alternate forms of enforcement as a result of the poor enforcement history of federal agencies); 116 CONG. REC. 32,927 (1970) (remarks of Sen. Muskie) (noting CAA regulatory scheme presents enormous enforcement burden on the EPA and requires support and assistance of private citizens in the monitoring of the regulated community).

56. *Id.*

57. See S. REP. NO. 1196, 91st Cong., 2d Sess. 37 (1970) (noting that citizen suits motivate governmental agencies); 116 CONG. REC. 33,104 (1970) (remarks of Sen. Hart) (noting that citizen suits are effective and desirable to motivate official action).

58. Many members of Congress expressed concern that a citizen suit provision would generate an enormous number of lawsuits, interfere with EPA enforcement, and lead to unfairness, inequality, and inconsistency in enforcement. See 116 CONG. REC. 32,925 (1970) (statement of Sen. Hruska); *Air Pollution-1970, Part V: Hearings before the Subcommittee on Air and Water Pollution of the Comm. on Public Works, United States Senate on S. 3229, S. 3466, S. 3546*, 91st Cong., 2d Sess. 1588-90 (1970) (statements of Collier, Shannon, Rill, and Edwards) (commenting on the possibility of the generation of multiple suits) [hereinafter *Hearings*].

59. 42 U.S.C. § 7604(b)(1)(A) (1988).

60. "No action may be commenced . . . if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order . . ." 42 U.S.C. § 7604(b)(1)(B) (1988).

61. Congress reacted to concern that the availability of attorneys fees might result in frivolous lawsuits by leaving the award to the discretion of the court. 42 U.S.C. § 7604(d) (stating, in part, "[t]he court . . . may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate").

which the barriers traditionally faced by citizens desiring to compel compliance were eradicated. The standing requirement and the high costs of litigation deter citizens from bringing suit under environmental regulations. In the absence of a private right of action, citizens are required to show that they have a sufficient personal stake in the outcome of the litigation, and must demonstrate a traceable causal connection between their injury and the defendant's conduct to satisfy the standing requirement.⁶² In the environmental context, these requirements present nearly insurmountable obstacles as a particular individualized harm is extremely difficult to link to the defendant's diffuse environmental contamination. Congress responded by enacting provisions circumventing judicial standing limitations that accommodated citizens desiring to enforce environmental provisions.⁶³ Citizens were given the right to bring suit to enforce environmental regulations⁶⁴ as long as their interest was not generated solely from a generalized public desire to reduce pollution or protect the environment.⁶⁵

In addition to standing impediments, Congress realized that, if reliance was to be placed on citizens to file actions as private attorneys general, then there must be some mechanism to avoid the high cost of litigation.⁶⁶ Under the American Rule,⁶⁷ courts are not empowered to award attorney's fees

62. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992). "There must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court' ". *Id.* (citing *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). Plaintiffs are also required to show injury in fact to a legally protected interest that is 1) concrete and particularized and 2) actual or imminent, not "conjectural" or "hypothetical." *Id.* (citing *Warth v. Seldin*, 422 U.S. 490, 508 (1975); *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)); *Sierra Club v. Morton*, 405 U.S. 727, 732-33 (1972) (noting on pages 739-41 that the case and controversy requirement of article III requires that individuals suffer harm particular to the plaintiff and claim injury in fact to attain standing to sue); U.S. CONST. art III, § 2, cl. 1.

63. "[A]ny person may commence a civil action on his own behalf. . . ." 42 U.S.C. § 7604(a) (1988). "[A]ny citizen may commence a civil action on his own behalf. . . ." 33 U.S.C. § 1365(a) (citizen is defined in § 1365(g) as ". . . a person or persons having an interest which is or may be adversely affected").

64. *See Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 16-17 (1981) (affirming the relaxed standing requirements in the Clean Water Act). The Court's interpretation of the CWA citizen suit provision conferred the right to sue as a private attorney general for noneconomic and noncompensable injury. *Id.* at 13.

65. *See Sierra Club v. Morton*, 405 U.S. 727, 735 (1972) (stating that an assertion that alleged illegal activity will affect the plaintiff or its members satisfies article III requirements). *But see Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992) (refusing to extend standing to those claiming injury from extinction of species in foreign countries).

66. The Environmental Law Institute conducted a study in the mid-1980s that focused on citizen suits and found that citizens who decide to prosecute face significant litigation costs ranging from \$4,000 to \$200,000 and averaging \$40,000. ENVIRONMENTAL LAW INSTITUTE, CITIZEN SUITS: AN ANALYSIS OF CITIZEN ENFORCEMENT UNDER EPA-ADMINISTERED STATUTES V-25 to V-27 (1984).

67. The American rule states that "attorney's fees and disbursements are incidents of litigation and the prevailing party may not collect them . . . is based upon the courts desire to avoid placing barriers in the way of those desiring judicial redress of wrongs." *Gordon v. Marrone*, 590 N.Y.S.2d 649, 653 (N.Y. 1992) (citing *A.G. Ship Maintenance Corp. v. Lezak*, 69 N.Y.2d 1, 5 (N.Y. 1986)). The *Gordon* court noted that the American rule has no constitutional basis but is reflective of a policy established in common and statutory law. It does not offer a Constitutional preclusion based on the right to petition. *Id.* (citing *Alyeska Pipeline*

absent independent statutory authority.⁶⁸ The Supreme Court, however, has recognized an inherent authority of a Federal Court to assess attorney's fees if a party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons."⁶⁹ The typical private plaintiff would be able to devote relatively limited resources to initiate and maintain litigation against a well-funded industrial opponent.⁷⁰ Therefore, Congress created an incentive to participate by shifting the costs of reasonable attorney and expert witness fees away from the private plaintiff.⁷¹ Without such a provision, citizens would be forced to incur enormous costs of litigation and thus, be unlikely to supplement governmental enforcement of environmental regulation.

2. *Limitations on Citizen Enforcement*

The citizen suit provision did not enjoy unanimous support among legislators.⁷² Critics feared that a dramatic increase in litigation would result in multiple suits and court congestion.⁷³ Congress also feared that the citizen suit provision would provide an avenue for frivolous and harassing lawsuits.⁷⁴ In an effort to prevent abuse of a private right to intervene or sue, Congress enacted several restrictions that permit citizen participation only under certain conditions. First, the citizen must provide federal and state regulatory agencies the opportunity to commence official enforcement action by filing a notice of their intent to initiate a private enforcement action.⁷⁵ Second, a citizen may not sue a violator if the federal or state agency has already commenced an enforcement action, and is diligently prosecuting in federal or state court.⁷⁶ Finally, the citizen who is found to have initiated

Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247-57 (1975)); see *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306, 306 (1796) (per curiam); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717-718 (1967) (reaffirming the American Rule). "There are ample grounds for recognizing . . . that in narrowly defined circumstances federal courts have inherent power to assess attorney's fees." *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 765 (1980).

68. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 269 (1975). Courts are bound to follow the American Rule unless the legislature has specifically made the exception. *Id.* at 270-71.

69. *Link v. Wabash R.R.*, 370 U.S. 626, 632 (1962) (asserting that the courts have a "well acknowledged" inherent power to levy sanctions in response to abusive litigation practices); *Chambers v. Nasco, Inc.*, 111 S. Ct. 2123, 2133 (1991).

70. NATIONAL COMMISSION ON AIR QUALITY, *TO BREATHE CLEAN AIR* §§ 3.8-3.13 (asserting that a lack of funds is the most significant restraint on citizen suits).

71. Clean Water Act, 33 U.S.C. § 1365(d) (1988); Clean Air Act, 42 U.S.C. § 7604(d) (1988). Litigation costs are awarded to either party whenever appropriate. *Id.*

72. See 116 CONG. REC. 33,925 (1970) (criticizing on the basis that the provision would interfere with the traditionally independent enforcement functions of the executive branch); *id.* at 33,102 (statement of Sen. Griffin) (criticizing the lack of input from the Judicial Conference, the Department of Justice, and the Office of Management and Budget regarding the impact of citizen suits on the judicial system).

73. See *id.* at 33,102 (statement of Sen. Griffin); 116 CONG. REC. 33,925 (1970) (statement of Sen. Hruska); *id.* at 33,926 (statement of Sen. Hruska) (commenting on possible congestion of the courts resulting from allowing citizens access to the courts via citizen suit provision).

74. *Id.* at 33,925-26 (statements of Sen. Hruska); *Hearings, supra* note 58, at 1583-90 (discussing the possible effect of citizen suits on the number of groundless claims filed against regulated industries).

75. 42 U.S.C. § 7604(b)(1)(A) (1988); 33 U.S.C. § 1365(b)(1)(A) (1988).

76. 42 U.S.C. § 7604(b)(1)(B); 33 U.S.C. § 1365(b)(1)(B).

suit based on a motivation to harass will be assessed the litigation costs of both parties.⁷⁷

Citizens who find a violation of a permit under the CWA or CAA are required to give federal and state environmental agencies, and the prospective defendants, a notice of alleged violations sixty days prior to the commencement of the enforcement action.⁷⁸ The notice serves several purposes. Upon notice of a violation, the federal or state agency should be motivated to initiate its own enforcement action.⁷⁹ The sixty day notice period allows the government the absolute right to initiate an enforcement action before the citizen.⁸⁰ The sixty day notice period also allows the violator to adjust processes to come into compliance, possibly avoiding liability under the Supreme Court's "in violation" interpretation (the citizen is prevented from basing a suit on "wholly past violations").⁸¹ The notice period also gives the parties additional time to avoid litigation through discussion of the circumstances that gave rise to the violation, and to negotiate settlement proposals.⁸²

77. 42 U.S.C. § 7604(d); 33 U.S.C. § 1365(d).

78. 33 U.S.C. § 1365(b)(1)(A). Under the Clean Air Act, 42 U.S.C. § 7604(b)(1)(A), citizen enforcement of the CAA accounted for very little of the enforcement activity, primarily due to barriers inherent in the Clean Air Act itself. Stephen Fotis, Comment, *Private Enforcement of the Clean Air Act and the Clean Water Act*, 35 AM. U. L. REV. 127, 155 (1985). The 1990 Amendments to the Clean Air Act have eliminated many of those barriers. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (codified in scattered sections of 42 U.S.C. §§ 7401-7671). Congress attempted to resolve the problem through the addition of provisions requiring permittees to file a routine pollutant discharge self-report and extension of the threat of civil penalties for violations in enforcement suits filed by private citizens. Congress also eliminated a significant judicially created barrier that did not allow citizens to sue for "wholly past" violations (i.e. a requirement that the violation be ongoing). *Gwaltney of Smithfield Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987); *Atlantic States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1135 (11th Cir. 1990). Congress accomplished this by allowing citizens to enforce emission limitations "if there is evidence that the alleged violation has been repeated." Clean Air Act Amendments of 1990, Pub. L. No. 101-549, sec. 707(g), § 304(g), 104 Stat. 2399, 2683 (codified at 42 U.S.C. § 7604(g)); see also David T. Buente, *A Review of Major Provisions: Citizen Suits and the Clean Air Act Amendments of 1990: Closing the Enforcement Loop*, 21 ENVTL. L. 2233, 2239 (1991).

79. See S. REP. NO. 1196, 91st Cong., 2d Sess. 36-37 (stating that citizen suits should help motivate governmental agencies to bring enforcement action); 116 CONG. REC. 33,104 (1970) (statement of Sen. Hart) (asserting that citizen action "prods officials to do their work"); 116 CONG. REC. 32,927 (1970) (statement of Sen. Muskie) (remarking that citizens would trigger government enforcement by monitoring emission reports and notifying the proper enforcement agency).

80. Fotis, *supra* note 78, at 149 (citing S. REP. NO. 414, 92nd Cong., 1st Sess. 80 (1971), reprinted in 2 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 at 1498) (noting that the sixty day waiting period allows a regulatory agency to file its own action against the violator). But see Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Laws Part II*, 14 ENVTL. L. REP. (Envtl. L. Inst.) 10,064-65 (1984) (citing evidence that indicates the sixty day period is insufficient for EPA to initiate an official enforcement action).

81. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found. Inc.*, 484 U.S. 49, 59 (1987). Current compliance with the permit limitations would absolve the violator from liability as the Court's decision required a showing of "ongoing" violations. See *Chesapeake Bay Found. Inc. v. Gwaltney of Smithfield, Ltd.*, 890 F.2d 690, 695 (4th Cir. 1989) (imposing a considerable barrier to the initiation of CWA citizen suits through a good faith belief requirement that the violations be ongoing).

82. Fotis, *supra* note 78, at 149; Miller, *supra* note 80, at 10,067 (claiming that the notice

There are two additional conditions that preclude the filing of a citizen suit action under typical regulations. The first is the diligent prosecution defense.⁸³ This provision has been construed to mean that the enforcement activity must be in a court setting; a federal or state administrative proceeding will not be sufficient to prohibit a citizen suit.⁸⁴ The second limitation on citizen suit activity is the threat of assessing against the citizen the litigation costs of both sides if the court deems the action frivolous.⁸⁵ The intention of this provision was to allow defendants to recover costs when subjected to harassing and meritless litigation, and to discourage the filing of such suits.⁸⁶ In order for the defendant to recover the costs, the plaintiff's claim must be found frivolous.⁸⁷

In summary, Congress' concern that the inclusion of a citizen suit provision would engender abuse resulted in a carefully drafted provision that is well balanced and effectively encourages citizen enforcement of environmental regulations. Congress was cognizant of potential problems and, therefore, included three abuse safeguards and provided access to the courts only in certain situations. The result has been that citizen suit provisions have been utilized responsibly and without abuse. Those instituting citizen suits have generally been found to avoid trivial violations and focus on significant infractions.⁸⁸

Citizen activity plays an important role in the enforcement of environmental regulations. Because of Congressional care taken in the creation of the citizen suit provision, it is not a convenient avenue available to the zealous environmental group for harassment or intimidation of regulated industry.

requirement serves many valuable services beyond limiting frivolous lawsuits); Richard E. Schwartz & David P. Hackett, *Citizen Suits Against Private Industry Under the Clean Air Act*, 17 NAT. RESOURCES L. 327, 327-28 (1984) (noting that parties desire to avoid litigation and generally hold meetings during the sixty day waiting period to discuss possible settlement options).

83. The Clean Air Act, 42 U.S.C. § 7604(b)(1)(B) (1988), states that "no action may be commenced . . . if the administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order. . . ."

84. *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57, 62 (2d Cir. 1985) (preferring a straightforward analysis). The court relied on the wording of the Clean Water Act which "unambiguously" refers to an "action in a court of the United States, or a state." *Id.* The court held that it would be inappropriate to expand this to include administrative enforcement actions. *Id.* at 62; see also *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1524-25 (9th Cir. 1987) (following the Second Circuit's reasoning in *Friends of the Earth* analysis).

85. 42 U.S.C. § 7604(d) (1988); 33 U.S.C. § 1365(d) (1988).

86. Fotis, *supra* note 78, at 127 n.3 (citing S. REP. NO. 1196, 91st Cong., 2d Sess. 36 (1970)) (discussing the appropriate standard as a tool to be utilized to prevent or deter harassing suits); 116 CONG. REC. 32,927 (1970) (statement of Sen. Muskie) (asserting that the whenever appropriate standard should be regarded as an implement to penalize those plaintiffs who initiate harassing citizen suits); see also *supra* notes 35-58 and accompanying text (discussing the congressional fear that allowing citizens to enforce environmental regulations would result in abuses).

87. *Natural Resource Defense Council, Inc. v. Train*, 510 F.2d 692, 728-29 (D.C. Cir. 1975) (preventing defendant's recovery of attorney's fees unless the plaintiff's suit is deemed frivolous or harassing).

88. ENVIRONMENTAL LAW INSTITUTE, *CITIZEN SUITS: AN ANALYSIS OF CITIZEN ENFORCEMENT UNDER EPA-ADMINISTERED STATUTES V-8 TO V-10* (noting that citizen organizations generally initiate actions only for significant rather than minor violations).

Considering the recognized importance of private involvement in environmental regulation (and any other public debate), it is critical that necessary steps are taken to actively foster participation. Potential defendants must be prevented from abusing the legal process to retaliate against a citizen's legitimate participation in the enforcement process.

II. INTIMIDATION SUITS AND SLAPPS: AN ANALYSIS OF THE PROBLEM

In the past decade, a trend has developed that is a growing menace to public interest litigation. Citizens who have committed themselves as advocates of the public interest are being sued by those affected by their activities. Although these suits rarely succeed,⁸⁹ the primary goals of retaliation and intimidation are generally realized. The effect is the stifling of the activities of citizens who are exercising their right to petition the government. Even though the statutory and common law encourages public interest activism⁹⁰ by making it nearly impossible for intimidation plaintiffs to prevail,⁹¹ this species of litigation is successful in achieving the intended effect of silencing and punishing the opponent.

This type of suit has been defined as a SLAPP suit, an acronym for "Strategic Lawsuits Against Public Participation."⁹² The most typical SLAPP suit involves a developer plaintiff suing a group of citizens who oppose the development.⁹³ SLAPP plaintiffs use tort law to punish citizens for exercising their constitutional right to speak and petition the government.⁹⁴ SLAPP suits are essentially civil lawsuits "aimed at preventing citizens from exercising their political rights or punishing those who have done so."⁹⁵

89. Brecher, *supra* note 5, at 105.

90. See generally *supra* notes 11-88 and accompanying text (discussing public participation in governmental functioning and its encouragement).

91. See Brecher, *supra* note 5, at 105.

92. The SLAPP suit was first coined by Canan & Pring, *supra* note 4, at 506. SLAPP's may also be defined as "public interest intimidation suits."

93. Canan & Pring, *supra* note 8, at 389; *Westfield Partners, Ltd. v. Hogan*, 740 F. Supp. 523 (N.D. Ill. 1990). In *Westfield Partners*, a real estate developer sued landowners who had successfully petitioned to defeat construction of a proposed thoroughfare that would have served as an access point to a new subdivision. The developer sought monetary relief on three counts; conspiracy, tortious interference with prospective economic advantage, and slander of title to property. The developer sought three million in compensatory damages and one million in punitive damages against the homeowners that opposed the thoroughfare. The homeowners only activity was to file a petition to vacate the proposed thoroughfare and attend a public hearing. The petition was filed pursuant to Illinois state law and proper notice of a public hearing was provided. Despite the import of the hearing, the plaintiff-developer failed to appear. The proposed thoroughfare was vacated by the decision of the Wayne Township Highway Commissioner. *Id.* at 524.

[D]evelopers who are disappointed with local land use decisions persist in seeking federal avenues to receive favorable decisions. 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'. . . . Examination of the facts and allegations in plaintiff's complaint compel this court to view the underlying purpose of this suit with great skepticism.

Id. at 524-25.

94. U.S. CONST. amend. I.

95. Canan & Pring, *supra* note 4, at 506; see *Westfield Partners, Ltd. v. Hogan*, 740 F.

They are typically commenced when "[o]ne party [has] approached some government body or office about a matter that affected some other party."⁹⁶

Four major SLAPP characteristics have been identified by researchers and commentators.⁹⁷ First, SLAPP suits are frivolous civil actions that disguise constitutionally protected political activity as common tort claims.⁹⁸ Second, the tort claims most frequently alleged by SLAPP plaintiffs include one or more of the following: defamation,⁹⁹ interference with prospective advantage,¹⁰⁰ interference with contractual relations,¹⁰¹ malicious prosecution,¹⁰² abuse of process,¹⁰³ denial of Fifth or Fourteenth Amendment property rights,¹⁰⁴ civil conspiracy,¹⁰⁵ or nuisance.¹⁰⁶ Third, the damages claimed are enormous relative to the resources of the defendant.¹⁰⁷ Fourth, an individual defendant in a SLAPP suit is forced to incur considerable litigation costs,¹⁰⁸ often resulting in the forced termination of the petitioning activity

Supp. 523, 525 (N.D. Ill. 1990). The court held that the defendants' petitioning of local governmental officials was absolutely privileged under the first amendment. *Id.* "Plaintiff's entire complaint against defendants' is based upon nothing more than defendants' exercise of their right, under the first amendment, to petition the government for a redress of grievances." *Id.*

96. Canan & Pring, *supra* note 4, at 508 (noting that 71 percent of the SLAPP suits studied are of this type).

97. See Thomas A. Waldman, Comment, *SLAPP Suits: Weaknesses in the First Amendment Law and in the Courts' Responses to Frivolous Litigation*, 39 UCLA L. REV. 979, 984 (1992).

98. Canan & Pring, *supra* note 4, at 511.

99. *Id.* at 511-12; *Sierra Club v. Butz*, 349 F. Supp. 934, 936 (N.D. Cal. 1972) (claiming defamation in suit by a logging company); see, e.g., *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607 (8th Cir. 1980) (claiming defamation as one of multiple claims).

100. Canan & Pring, *supra* note 4, at 511-12; *Sierra Club*, 349 F. Supp. at 935-36; see, e.g., *Westfield Partners, Inc. v. Hogan*, 740 F. Supp. 523, 524 (N.D. Ill. 1990) (claiming tortious interference with prospective economic advantage as one of three typical SLAPP causes of action).

101. Canan & Pring, *supra* note 4, at 511-12.

102. See, e.g., David Sive, *Countersuits, Delay, Intimidation Caused by Public Interest Suits*, NAT'L L.J., June 19, 1989, at 26 (citing *Adams v. Town of Rockland*, 989 (Sup. Ct., Sullivan Cty., N.Y., filed June 11, 1971) (discussed in Note, *Counterclaim and Countersuit Harassment of Private Environmental Plaintiffs: The Problem, Its Implications and Proposed Solutions*, 74 MICH. L. REV. 106, 107, 112 (1975))).

103. *City of Angoon v. Hodel*, 836 F.2d 1245, 1246 (9th Cir. 1988) (claiming prima facie tort).

104. See *Weiss v. Willow Tree Civic Ass'n*, 467 F. Supp. 803 (S.D.N.Y. 1979); *Westfield Partners, Inc. v. Hogan*, 740 F. Supp. 523, 524 (claiming that city government slandered the title of the plaintiff's real estate).

105. Canan & Pring, *supra* note 4, at 511-12; see *Westfield Partners*, 740 F. Supp. at 524 (alleging defendants conspired with city officials to deprive plaintiff of the right to develop land without due process of law). "Plaintiff's allegations of 'conspiracy' amount to nothing more than the wholly lawful exercise, by citizens in a community, of the right to petition their local government to follow a certain course of action." *Id.* at 526.

106. Canan & Pring, *supra* note 4, at 511-12.

107. *Id.* at 512; see *Westfield Partners*, 740 F. Supp. at 524 (claiming four million dollars in damages against local homeowners); *Gorman Towers*, 626 F.2d at 610 (claiming \$1.7 million in damages against various public officials, landowners, and landowners' attorney for their legitimate effort to rezone land owned by developer).

108. Canan & Pring, *supra* note 4, at 512. The researchers found that the average SLAPP claim for damages was \$7.4 million, ranging from \$10,000 to \$100 million. Attorney's fees are also debilitating to the average SLAPP defendant. Canan and Pring noted one individual defendant who was told that her defense would cost \$10,000. *Id.*

and the correspondent dropping of the suit.¹⁰⁹

Often the intent (and actual effect) of these suits is to chill public participation beyond the activity sought to be repressed.¹¹⁰ For example, in 1980 a citizen group calling itself the West Valley Taxpayers and Environmentalists Association (a tiny *ad hoc* group comprised of suburban homeowners initially formed to oppose the construction of a college football stadium in their neighborhood)¹¹¹ petitioned their local government for a referendum on a proposed hillside development.¹¹² As a result of this citizen involvement, the residents of the community passed a one-year moratorium on hillside development and instituted a controlled growth initiative.

Soon after the moratorium went into effect, Victor Monia, the president of the Association, was SLAPPED with a \$40 million suit filed by the principal developer, the Parnas Company. Parnas also named two other citizens' groups and their presidents in their complaint. Parnas claimed damages resulting from a flier distributed prior to the election. The Parnas Corporation failed to drop Monia or his citizen group even though it later learned that Monia and his group were not responsible for the publication or distribution of the flier.¹¹³ "People just melted away," Monia said.

We had a very active organization with 550 homeowners, and we had won 16 or 18 elections in a row. The year after the suit, we won only one and lost three or four. Membership in the first year dropped to 100, and by the second year of the suit, it was really only the board of directors and hard-core folks, about 25 of us, who were left. People wondered about our judgment. Were they going to be dragged in? People who had been very active just sort of disappeared. They wouldn't even sign a petition.¹¹⁴

Two years later, after the corporation had received favorable zoning, the lawsuit was dismissed for failure to prosecute.¹¹⁵

The Supreme Court has long recognized the potential "chilling effect" on the exercise of First Amendment rights when First Amendment activity is the essence of a plaintiff's claim.¹¹⁶ The problem, and often the SLAPP

109. See Canan, *supra* note 3, at 26-32.

110. Some defendants in environmental actions employ countersuits as a mechanism primarily intended to discourage the vigorous pursuit of environmental cases. The huge amount sought in damages makes the litigation significant to the SLAPP defendant. The SLAPP litigation, at the minimum, redirects the citizen-activists efforts totally towards personal defense and away from public interest activities. An attorney involved in many toxic tort actions stated that SLAPP suits "scare the victims who have been exposed to toxic materials to death" and that his "clients are absolutely freaked out by the cases." Carl Tobias, *Environmental Litigation and Rule 11*, 33 WM. & MARY L. REV. 429, 430 (1992) (citing a telephone interview with an unnamed environmental attorney conducted on Apr. 9, 1991).

111. Canan, *supra* note 3, at 27.

112. *Monia v. Parnas Corp.*, 278 Cal. Rptr. 426 (1991); Canan, *supra* note 3, at 25 (discussing the history of the case and the effects on the citizens involved).

113. Canan, *supra* note 3, at 28.

114. Karl Olsen & Erin Daly, *A Slap at SLAPP Suits is a Signature Away: Legislation on Governor Wilson's Desk Puts a Procedural Hurdle in the Way of Those Who Would Stifle Speech on Public Business*, RECORDER, Oct. 7, 1991, at 6.

115. Canan, *supra* note 3, at 29.

116. *Drombrowski v. Pfister*, 380 U.S. 479, 487 (1965) (noting the potential result of intimidation in the civil rights context). "The chilling effect upon the exercise of First Amendment

plaintiff's intended result, is the "chilling effect"¹¹⁷ on the public's desire to exercise their First Amendment rights.¹¹⁸ A federal district court recently dismissed an action after the plaintiff's filing of their second amended complaint. This complaint represented the third attempt to attack a citizen's participation in a public governmental permit proceeding.¹¹⁹ The court's opinion expressed indignation over the plaintiff's efforts to continue the meritless litigation. The court noted that, "[t]here is simply nothing remotely improper about filing environmental or other [permit] objections. Without something more . . . the continued vitality of this lawsuit would unjustifiably intrude upon defendants' rights to participate in public proceedings."¹²⁰ The court added that, "[i]rrespective of whether that label [SLAPP] fits, the Court is mindful that the pendency of this suit, both in litigation costs and threat of treble damages, could have the effect of chilling the defendants' rights to public participation."¹²¹

The "chilling effect" of such lawsuits may extend well beyond the concern

rights may derive from the fact of prosecution, unaffected by the prospects of its success or failure." *Id.* The Supreme Court is very attuned to the sensitivity of the First Amendment guarantees to the threat of intimidating or harassing litigation. The Court has established obstacles to litigation in an effort to protect those guarantees. *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers*, 542 F.2d 1076, 1082 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977); *see also* 600 West 115th St. Corp. v. Von Gutfeld, 603 N.E.2d 930 (N.Y. 1992) (discussing the Supreme Court's action to prevent the "chilling effect" resulting from the threat of defamation actions and noting that imposition of defamation actions "can deter and silence" people who would otherwise participate in public debate), *cert. denied*, 113 S. Ct. 2341 (1993).

117. "A chilling effect occurs when individuals seeking to engage in activity protected by the first amendment are deterred from doing so . . ." Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect"*, 58 B.U. L. REV. 685, 693 (1978). Citizens are deterred from first amendment activity through the use of tort law by those affected by their activism.

118. *See Drombrowski v. Pfister*, 380 U.S. 479 (1965). Provision of defenses to potential defendants is not enough to prevent the chilling effect. *Id.* at 486 (citing *NAACP v. Button*, 371 U.S. 415, 433 (1963)); *In re Entertainment Partners Group, Inc.*, 590 N.Y.S.2d 979, 985 (1992).

[T]he court observes that plaintiff cast its net deliberately to intimidate selected community leaders. From the court's observation of the individual defendants, plaintiff appeared to select those with sufficient stability to have something to lose in a legal contest. Plaintiff could have made its point as easily with this relatively unified community group by selecting merely one individual as its target. The purpose of a suit of this type is inescapable.

Id.; *see Weiss v. Willow Tree Ass'n*, 467 F. Supp. 803, 819 (S.D.N.Y. 1976). The court recognizes the "dangerous 'chilling effect'" on the exercise of First Amendment rights if plaintiffs are allowed to institute suits against individuals who exercise those rights. *Id.* "To permit maintenance of this type of civil rights lawsuit against a private individual would under the circumstances and uncontested facts shown in this case, have an unfortunate and unjust chilling effect upon the exercise by members of the public of their First Amendment right to complain about a public nuisance." *Id.* (quoting *Aknin v. Phillips*, 404 F. Supp. 1150, 1153 (S.D.N.Y. 1975), *aff'd*, 538 F.2d 307 (2d Cir. 1976)).

119. *Petrochem Insulation, Inc. v. Northern Cal. and N. Nev. Pipe Trades Council*, No. C-90-3628 EFL, 1992 WL 131162 (N.D. Cal. Mar. 19, 1992).

120. *Id.* at *11.

121. *Id.* at *12. The court dismissed the claim stating " '[I]n view of the burden on defendant's exercise of its First Amendment rights which would be imposed by unnecessarily prolonging this litigation, the complaint is dismissed with prejudice.' " *Id.* (quoting *Barger v. Playboy Enter., Inc.*, 564 F. Supp. 1151, 1155 (N.D. Cal. 1983), *aff'd*, 732 F.2d 163 (9th Cir.), *cert. denied*, 469 U.S. 853 (1984)).

immediately at issue. Citizens, who are normally not predisposed to consider the threat of litigation as an inherent cost of participating in government, find themselves less willing to become involved in public debate and governmental decision making.¹²² Citizens, businesses, and governmental officials should not be forced to make civic decisions influenced by an apprehension of costly litigation.¹²³

Several factors combine to create the "chilling effect."¹²⁴ First, there is the reasonable fear that one may be found liable for damages based on the likelihood of an erroneous judgment. Appeal from an erroneous judgment does not lend much comfort as it offers extended litigation, a continued drain on financial resources, and is time consuming. Additionally, there is no guarantee that an appeal will reverse the initial judgment. Also complicating the scenario is the unfamiliarity with complex tort laws that the lay citizen must face when considering the legality of his protected First Amendment activities.¹²⁵ Finally, even if the citizen was assured of the legality of his or her conduct, the time requirements and financial costs of defending against a claim are often prohibitive.¹²⁶

Effective solutions to SLAPP litigation will only be devised if it is understood why these suits are effective. First, SLAPP suits immediately place the citizen-defendant in significant economic peril. Suddenly, instead of fighting for a particular civic cause, the citizen is fighting for his personal financial future. As a defendant, the citizen no longer enjoys the benefits accorded to the public interest litigant (i.e. statutory rules allowing the plaintiff to recover attorney fees and other litigation costs). Not only is the citizen forced to expend significant amounts of time and effort defending against the frivolous claim, but he also risks becoming personally liable for massive damages.¹²⁷ Second, a SLAPP suit redirects the citizen's efforts away from opposing the business interests of the SLAPP plaintiff and towards the legal

122. See *supra* note 110 and accompanying discussion.

123. In *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers*, 542 F.2d 1076 (9th Cir. 1976), *cert. denied*, 420 U.S. 940 (1977), the plaintiff, a franchise of McDonald's restaurant, sued a restaurant, employer and a labor union for their opposition to the grant of permits by the city board. Plaintiff claimed over \$11 million in damages. Recognizing the potential chilling effect that this type of suit might engender, the court asked rhetorically,

[W]hat competitor, knowing that its participation in administrative proceedings might result in expensive and burdensome litigation, which would drag on through the discovery stage at least, would not thereby feel pressured to forego presenting its views to the government? . . . [T]he long drawn out process of discovery can be both harassing and expensive. When this well known fact is combined with the large damages usually claimed (here at \$11,100,000.00) and sometimes awarded, an action like this one can be, from the very beginning, a most potent weapon to deter the exercise of First Amendment rights.

Id. at 1082.

124. See *id.* (discussing the "chilling effect" and providing a thorough free speech analysis). See generally Canan & Pring, *supra* note 4, at 30.

125. STUART M. SPEISER, ET AL., *THE AMERICAN LAW OF TORTS* §§ 29.13-131 (1993).

126. Canan, *supra* note 3, at 26 (finding that the average SLAPP suit required thirty-six months of litigation and a number of appeals before defendant finally was able to prevail).

127. Personal accountability averages \$9,000,000 in the 228 SLAPP suits included in Canan's research. Canan & Pring, *supra* note 4, at 26.

defense.¹²⁸ When claims for damages reach into the tens of millions of dollars and victory is not a certainty, the SLAPP litigation becomes all-consuming. Considering the enormously large claims for damage, the SLAPP suit immediately becomes the most important issue for the citizen at the expense of the petitioning activity.¹²⁹ This intuitive result is evidenced by the "chilling effect" that accompanies the filing of a SLAPP suit.¹³⁰

Third, the SLAPP suit puts citizens on the defensive and places an overwhelming economic burden on their limited personal resources.¹³¹ The inequality of resources becomes the plaintiff's greatest weapon. The SLAPP plaintiff is willing to expend resources as long as the costs do not exceed the anticipated benefit—the cessation of the offensive (but constitutionally protected) petitioning activities of the citizen defendant. The defendant is forced to weigh the benefit of continuing the public interest activities, which may afford only limited personal reward, against potentially massive personal liability.¹³² A risk/utility analysis weighs heavily against continued civic involvement.

Finally, a SLAPP suit effectively suspends the petitioning activity that the SLAPP plaintiff wishes to obstruct.¹³³ Fearful of becoming the targets of a multimillion dollar lawsuit, the community support for the original petitioning activity crumbles.¹³⁴ The fear of retribution squelches the citizens desire to participate in government. Unfortunately, this intimidation comes at the expense of protected First Amendment activity and regulations that rely on public participation as a form of supplemental enforcement.¹³⁵ Legislative

128. Brecher, *supra* note 5, at 118.

129. Consider Victor Monia's account of the ramifications he experienced as a result of the Parnas Corp. SLAPP suit:

I became so preoccupied by the suit that it changed my whole focus and direction in life. . . . I got appraisals on my 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] 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.

Robert H. Boyle, *Activists at Risk of Being SLAPPed*, SPORTS ILLUSTRATED, Mar. 25, 1991, at 6. For an example of how convoluted SLAPP litigation can become, see *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers*, 542 F.2d 1076 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977) (appeal from a judgment dismissing the plaintiff's amended complaint without leave to amend and from an order denying a motion filed after the judgment for leave to amend the first amended complaint).

130. See Eve Pell, *Lawsuits That Chill Local Politics*, 4 CAL. L., Feb. 1984, at 44. See generally Canan & Pring, *supra* note 4; Canan & Pring, *supra* note 8.

131. See Waldman, *supra* note 97, at 993-94.

132. See *supra* note 127.

133. SLAPP defendants generally "prevailed after an average of thirty-six months and the involvement of a number of court levels." Canan, *supra* note 3, at 26.

134. Walter Lucas, *Using the Courts to Quiet Critics; Activists Get SLAPPed Around in New Breed of Cases*, N.Y.L.J., Dec. 27, 1990, at 3.

135. Numerous federal regulatory schemes include provisions that encourage citizen suits as a means of enforcement. See Clean Air Act, § 304, 42 U.S.C. § 7604 (Supp. 1990); Federal Water Pollution Control Act (Clean Water Act), § 505, 33 U.S.C. § 1365 (1988); Resource Conservation and Recovery Act (RCRA), § 7002, 42 U.S.C. § 6972 (1988); Comprehensive

and judicial action will be required to resolve the current threat, actual and prospective, to the constitutionally protected activities of both parties.

III. LEGITIMATE AND COMPETING INTERESTS OF BOTH PARTIES: DESIGNING SOLUTIONS TO PROTECT ADVERSE PRIVILEGES

A. THE SLAPP PLAINTIFF'S INTEREST

The use of lawsuits as an implement of intimidation is not a new concept. In the 1960s, similar lawsuits were filed against civil rights activists who boycotted white merchants in an effort to end racial discrimination.¹³⁶ Like those merchants, SLAPP plaintiffs are attempting to protect their interests, many claiming that litigation of the original suit is considered to be their last resort.¹³⁷ It is for this reason that the New York State Builders Association opposed the New York anti-SLAPP bill.¹³⁸ The New York State Builders Association's executive vice president, Robert Weebolt, stated that current sanctions provide an adequate level of protection.¹³⁹ His position is that "vituperation and calumny" is often directed toward land developers, and the threat of a lawsuit is necessary "to keep the debate within certain bounds of civility."¹⁴⁰ Often a lawsuit is the only mechanism available for a developer or regulated industry to obtain redress for monetary injury. Losses that are caused by meritless, overzealous political opposition and frivolous citizen suits cannot be recovered without the aid of a lawsuit.¹⁴¹

SLAPP suits are preferred over other judicially established mechanisms to

Environmental Response, Compensation, and Liability Act (CERCLA), § 310, 42 U.S.C. § 9659 (1988); Emergency Planning and Community Right-to-Know Act of 1986, § 326, 42 U.S.C. § 11046 (1988); Toxic Substances Control Act, § 20, 15 U.S.C. § 2619 (1988); Safe Drinking Water Act, § 1449, 42 U.S.C. § 300j-8 (1988); Surface Mining Control and Reclamation Act of 1977, § 520, 30 U.S.C. § 1270 (1988); Marine Protection, Research, and Sanctuaries Act of 1972 (Ocean Dumping Act), § 105(g), 33 U.S.C. § 1415(g) (1988); Noise Control Act of 1972, § 12, 42 U.S.C. § 4911 (1988); Endangered Species Act of 1973, § 11(g), 16 U.S.C. § 1540(g) (1988); Deepwater Ports Act of 1974, § 16, 33 U.S.C. § 1515 (1988); Outer Continental Shelf Lands Act, § 23, 43 U.S.C. § 1349(a) (1988).

136. See, e.g., *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886 (1982).

137. Gary Spencer, *Bill Aimed at Curbing Retaliatory Suits*, N.Y.L.J., Oct. 3, 1990, at 1.

138. *Id.* The anti-SLAPP bill was recently passed by the New York legislature and signed by Governor Mario Cuomo. Gary Spencer, *Cuomo Signs Bill to Deter SLAPP Lawsuits*, N.Y.L.J., Aug. 6, 1992, at 1. The legislation became effective January 1, 1993. *Id.*; 1992 N.Y. Laws 767.

139. Spencer, *supra* note 137, at 1.

140. *Id.*

141. See *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972) (extending the antitrust *Noerr-Pennington* immunity to petitioning activity unrelated to antitrust actions); *Westfield Partners, Ltd. v. Hogan*, 740 F. Supp. 523, 526 (N.D. Ill. 1990) (citing *California Motor Transport* and noting that the "sham" exception to the *Noerr-Pennington* doctrine would not allow the extension of liability to petitioning activity when it is shown that the petitioning was essentially nothing more than an attempt to harass). But see *Weiss v. Willow Tree Civic Ass'n*, 467 F. Supp. 803 (S.D.N.Y. 1979). The *Weiss* court rejected plaintiff's claim that defendants were not afforded First Amendment immunity because their "real motivation" was to pressure town officials and harass plaintiffs, and not to air public issues openly. The court held that the First Amendment protection is not dependent on motivation, but depends instead on the nature of the defendants' conduct. *Id.* at 816 (citing *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)).

control frivolous litigation. Rule 11 sanctions are rarely sought by environmental litigants.¹⁴² An informal investigation of environmental attorneys found that Rule 11 is rarely utilized.¹⁴³ The principal reason underlying the lack of reliance on Rule 11 by environmental defendants is that the use of a SLAPP suit exposes citizen activists to "liability which is orders of magnitude larger than Rule 11."¹⁴⁴ The use of a SLAPP suit substantially increases the potential "chilling effect" on the citizens and serves to restrict federal court access.¹⁴⁵ Professor George Pring noted that SLAPP plaintiffs choose SLAPP suits over the Rule 11 avenue because SLAPP litigation threatens the target with greater exposure to liability.¹⁴⁶

Any regulation of SLAPP suits to protect the rights of the defendant would tax the rights that any deserving plaintiff should be able to enjoy.¹⁴⁷ If it is true that litigation is a last resort for many SLAPP plaintiffs, then SLAPP regulation would directly threaten the plaintiff's right to petition for redress of grievances.¹⁴⁸ SLAPP plaintiffs allege that the transformation of a political battle into a legal battle is a tool traditionally employed by the reformer, not the developer.¹⁴⁹ Many who do not view SLAPP suits as a problem argue that the judicial process has always been used for purposes of intimidation.¹⁵⁰ The difference today is that the party using the lawsuit to intimidate was once the party who was intimidated.

Courts should not be too eager to summarily dismiss the expressed justifications of SLAPP plaintiffs or to even characterize a lawsuit as a SLAPP. There are instances where an entity is victimized by the corrupt use of environmental litigation.¹⁵¹ For example, some organized labor groups claim to

142. Tobias, *supra* note 110, at 434.

143. *Id.*

144. *Id.* at 489 (citing a telephone interview with environmental attorney on Apr. 9, 1991 and with Professor George Pring, Denver University College of Law on Mar. 19, 1991). Professor Pring received a National Science Foundation grant to study SLAPP suits with Professor Penelope Canan at Denver University.

145. *Id.*

146. *Id.* at 479 n.244.

147. See *Curbing SLAPP Suits*, NEWSLETTER, BAR ASSOC. OF SAN FRANCISCO, Mar. 17, 1992, at 4 (Supplement to the RECORDER) (supporting California anti-SLAPP bill in principle but expresses concern over the difficulty in distinguishing a SLAPP suit from a legitimate defamation suit).

148. See Kenneth J. Garcia, *Slapp in the Face for Protesting Homeowners*, L.A. TIMES, July 5, 1990, at J1 (claiming that litigation was plaintiff's last resort).

149. Richard O. Brooks, *Les Mains Sales: The Ethical and Political Implications of SLAPP Suits*, 7 PACE ENVTL. L. REV. 61, 62 (1989) (citing S. SCHEINGOLD, *THE POLITICS OF RIGHTS* (1974)).

150. *Id.* at 62-63.

151. See 136 CONG. REC. S 16878 (1990) (statement of Sen. Symms). "As Mr. Schneider of the Sierra Club said, you have to use your own judgment and how far you want to go with shading and distorting the truth in order to gin up, and stir up the controversy." *Id.* Sen. Symms continued with a quote from Dr. Jo Kwong Echard's book entitled *Studies in Organization Trends Protecting the Environment*:

Other corporations are well aware of the environmental activists agenda but have found that settlement seems to be the least harmful and least costly course to pursue. Under the citizen suit provisions of the Clean Air Act and Clean Water Act, as we have seen, environmentalists can negotiate substantial out-of-court settlements merely by threatening to sue . . . Although it is difficult to substantiate, it is widely felt that corporations contribute heavily to environmen-

have found a tool to use against non-union companies. Northern California construction unions are using "environmental extortion" against non-union employers.¹⁵² When a non-union employer comes to town, the union raises environmental concerns as an obstacle and "aggressively" intervenes in the permitting process.¹⁵³ The tactic appears to be working as many employers eventually grant the environmental or labor concessions.¹⁵⁴ The employers, noting that the environmental action is stopped once labor demands are met, charge the unions with abuse of the permitting and environmental review processes.¹⁵⁵ Instead of settling the labor problems at the bargaining table, the unions will attack environmental problems "full bore, challenging everything from air pollution assessments to plans for sewage treatment, from water supply and soil contamination to traffic impact."¹⁵⁶

A federal district court recently faced such a dispute in *Petrochem Insulation, Inc. v. Northern California and Northern Nevada Pipe Trades Council*.¹⁵⁷ Petrochem Insulation contended that the Pipe Trades Council was abusing the permitting process by making "baseless environmental objections"¹⁵⁸ in an effort to delay Petrochem's permitting until they agreed to hire union-only contractors.¹⁵⁹ The court granted the defendant's motion to dismiss, weighing its decision heavily in favor of the Trade Council's right to participate in public proceedings.¹⁶⁰ These types of disputes illustrate the importance of developing a reliable method of distinguishing the legitimate use of the legal process (compensation of real injury) from SLAPP litigation designed to silence civic expression.

1. Economic Injury and Reputational Harm

a. Tortious Interference

A citizen who protests a development is undeniably interfering with the developer's economic advantage. Statements made by citizens at public hearings are rarely designed to praise the opposed developer. Considering

tal activist organizations hoping to buy protection from the overzealous uses of these laws. Contributors to the National Wildlife Federation, for example, include Amoco Foundation, Mobil Oil Foundation, ARCO Foundation, Baltimore Gas and Electric Company, Dow Chemical, Du Pont, Exxon, General Motors, Monsanto, Pennzoil, and Weyerhaeuser.

Id. at \$16890.

152. Stephen G. Hirsh, *Green With Enmity: Organized Labors Use of Environmentalism as Leverage Has Contractors Crying Foul, But So Far Courts Have Sided with the Unions*, *RECORD*, Aug. 6, 1992, at 1.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* A management lawyer says that the threat of environmental action is raised during contract negotiations even before the environmental permits are up for review. "I have a case where, I can't say what the exact words were, but the message was very clearly conveyed that if they did not sign an agreement up front that they would have serious problems in the permitting process." *Id.*

157. No. C-90-3628 EFL, 1992 WL 131162 (Mar. 19, 1992).

158. *Id.* at *1.

159. *Id.*

160. *Id.* at *11.

the nature of the political activities, it is not surprising that the two most common grounds for a SLAPP suit are intentional interference with economic advantage (compensation for economic loss)¹⁶¹ and defamation (compensation for reputational harm).¹⁶²

The tort of interference is important to the business plaintiff because it protects against third parties who intentionally and adversely attempt to influence business relations. A claim of interference traditionally requires a showing of the defendant's intent to disrupt a potential economic advantage.¹⁶³ Citizen efforts to force reconsideration of a governmental action that results in injury to a business plaintiff (i.e. zoning or permitting) may create a *prima facie* case for interference.¹⁶⁴ The relative ease of pleading requirements and the nature of the citizen-government-business relationship render interference a popular SLAPP claim. Generally the interference must be intentional. Some courts, however, have relaxed the intent requirement to one of negligent interference.¹⁶⁵

Some commentators object to the idea that civic activism can constitute a tortious act: "[O]ne who accepts free speech as a fundamental part of our way of life must have at least some doubts about the liability for persuading another person to terminate a contract."¹⁶⁶ The effort to allow all parties to petition for redress of grievances has enabled some plaintiffs to encroach upon the privilege of those exercising the same constitutional right.¹⁶⁷ The tort of interference makes the battle of interests very clear. Continued recognition of the tort of interference without some First Amendment consideration will continue to provide a relatively simple means for SLAPP plaintiffs to punish their opponent's political participation. The status quo will continue to invite harassing and vexatious litigation as it provides the means to the end. However, if tort liability is scaled back in this area, it will result in fewer available opportunities for recovery to the legitimately injured plaintiff. Interference is not a claim that inherently implicates First Amendment rights of the defendant. The best solution may include provision of defenses to the defendant against malicious use of this claim instead of restricting its availability to those whose legitimate interests have been tortiously afflicted. Availability of defenses should be predicated on either the nature of the ac-

161. See generally SPEISER, *supra* note 125, §§ 31.74-.145 (discussing the laws on interference with contractual relations and prospective advantage).

162. Canan & Pring, *supra* note 4, at 511-12.

163. Waldman, *supra* note 97, at 987; see Gary Myers, *The Differing Treatment of Efficiency and Competition in Antitrust and Tortious Interference Law*, 77 MINN. L. REV. 1097, 1126 (1993).

164. Waldman, *supra* note 97, at 987.

165. See *J'Aire Corp. v. Gregory*, 598 P.2d 60, 65-66 (Cal. 1979); *Consolidated Aluminum Corp. v. C.F. Bean Corp.*, 772 F.2d 1217, 1218 (5th Cir. 1985) (reversing the district court grant of summary judgment on basis that negligent interference may constitute a legitimate cause of action). But see *Local Joint Executive Bd. of Las Vegas v. Stein*, 651 P.2d 637, 638 (Nev. 1982); *Getty Ref. & Mkts. Co. v. MT FADI B*, 766 F.2d 829, 832 (3d Cir. 1985) (noting that all courts today, with isolated exceptions, adopt a "bright line rule" that precludes recovery based on negligent interference).

166. Waldman, *supra* note 97, at 987 (citing Dobbs, *Tortious Interference with Contractual Relationships*, 34 ARK. L. REV. 335, 363 (1980)).

167. Dobbs, *supra* note 166, at 376.

tion being commenced (i.e. application of a SLAPP definition) or on the nature of the activity resulting in the alleged interference (i.e. exercise of First Amendment rights).

b. Defamation

The development of defamation law has enabled a lawsuit to be filed against a private figure without at first appearing to be frivolous. The charade is effective initially because a private figure is only required to show that the defendant made a negligent misstatement of fact to successfully state a claim. Contrast the requirement for public figures who must prove actual malice by the defendant. Actual malice is demonstrated by proof of the defendant's reckless disregard for the truth or knowledge of the falsity of the remark.¹⁶⁸ The tort of defamation, as in interference, allows SLAPP plaintiffs to easily clear the pleading hurdle when the defendant makes an adverse public statement.¹⁶⁹

Regulation of SLAPP suits by adjusting traditional defamation law would require the creation of a different plaintiff classification scheme. A change would dictate that plaintiff satisfy significantly more rigorous pleading requirements before recovery would be available for reputational injury. However, drastic changes in defamation law may be avoided simply by including a threshold pleading barrier to prevent characteristic SLAPP litigation.

One way to effectuate such a pleading barrier would be to apply a SLAPP definition (to be used as a definitional filter). The court would rely on the "public figure" standard if the definition was applicable to the lawsuit. This would obviate abuse of liberal defamation pleading requirements to chill public debate. The key is to eliminate, at the outset, a small subclass of claims that assail constitutionally protected activities.

B. INTERESTS OF THE DEFENDANT, NON-PARTIES AND THE COURT

An interest that is often overlooked is that of the judicial system itself. SLAPP suits further overburden the courts.¹⁷⁰ SLAPP researchers, profes-

168. *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 751 (1985); *Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. 2419, 2429 (1991); *Harte-Hanks Comm. Inc. v. Connaughton*, 491 U.S. 657, 658 (1989).

169. An individual who is active in the community and participates politically, perhaps by petitioning or speaking at a public hearing against a proposed development, and causes some degree of reputational harm to the private defendant may be held liable for the resultant damages. If the object of the comments is a public figure, however, they will be unable to sue although the activity of the activist was exactly the same in both instances; the Petition Clause does not afford absolute immunity to those seeking redress. *McDonald v. Smith*, 472 U.S. 479, 482 (1985). "Although the values in the right of petition as an important aspect of self-government are beyond question, it does not follow that the Framers of the First Amendment believed that the Petition Clause provided absolute immunity from damages for libel." *Id.* at 483. A defendant's petitioning is actionable if it was prompted by "express malice" defined as "falsehood and the absence of probable cause." *Id.* at 483 (citing *White v. Nicholls*, 44 U.S. 266 (1845)).

170. *See Entertainment Partners Group, Inc. v. Davis*, 590 N.Y.S.2d 979, 985-87 (N.Y. Sup. Ct. 1992) (noting that the courts are increasingly asked to enforce sanctions because

sors Pring and Canan, estimate that hundreds of these suits are filed every year.¹⁷¹ SLAPP suits appear to represent a relatively new pressure on court dockets since all the SLAPP cases identified had been filed since 1970.¹⁷² The burden on the courts is accentuated by the SLAPP plaintiff's effort to embroil the defendant in expensive, extended legal battles. Professor Canan reports that the typical SLAPP suit continues for an average of thirty-six months and travels through several court levels.¹⁷³

As previously discussed, the effect that SLAPP suits may be having on citizens who plan to participate in their local government does much to discredit the notions of equality, fairness, and justice that citizens expect the justice system to deliver. The SLAPP problem also raises serious questions regarding the real import of First Amendment rights to those sworn to uphold the Constitution.

As discussed in Part II of this Comment, it is the "chilling effect" that is most pervasive and troublesome.¹⁷⁴ As reports of multi-million dollar lawsuits against individual citizens for seemingly harmless and normal activity continue to increase, those involved in their communities will become increasingly cognizant of the threat, real or imagined, that they may be subjected to a similar retaliatory suit.¹⁷⁵ Letters to the editors describing personal experiences as SLAPP targets are certain to make the reader think about the potential costs of becoming active in the community. Elizabeth Leeds, a California resident who opposed local road construction, wrote a letter that appeared in the Los Angeles Times, and commented as follows:

I am being sued in federal court with a SLAPP suit by developers and the quasi-governmental agency (the Transportation Corridor Agency). Being a concerned citizen and affected by the TCA's proposed construction . . . I acted to save this beautiful area of natural wilderness following our environmental protection laws and now the TCA has SLAPPED me in retaliation. . . . The TCA is endeavoring to keep me from challenging the federal environmental impact statement (EIS) for the corridor.¹⁷⁶

Although no empirical studies have been completed on the subject,¹⁷⁷ uncertainty regarding liability, the high costs of litigation and the threat of errone-

"courts are needlessly flooded and clogged with claims that advance no legitimate purpose"); *Rittenhouse v. St. Regis Hotel Joint Venture*, 579 N.Y.S.2d 100, 102 (N.Y. App. Div. 1992) (declaring it "appropriate at this time to indicate to the bar that frivolous and baseless actions will not be tolerated. . .").

171. Pring, *supra* note 3, at 5.

172. *Id.*

173. Canan, *supra* note 3, at 26.

174. See *supra* notes 89-135 and accompanying text.

175. See Waldman, *supra* note 97, at 991-97.

176. Elizabeth Leeds, Letter to the Editor, *Litigation Targets Slap Back at SLAPP Suits*, L.A. TIMES, Aug. 30, 1992, at B7 (calling for public outcry and support to help stop the intimidation by the TCA).

177. Canan and Pring are currently involved in this type of research but have yet to release their results. Pring, *supra* note 3, at 8 n.9. Canan and Pring are extending their research of SLAPP suits to the 'ripples' — those involved in the petitioning activity which provoked the SLAPP, but not named as parties to the suit; and 'untouchables' — those who are politically active, but have never been sued in and have no knowledge of SLAPPs. *Id.*

ous judgments all play a role in the "chilling effect."¹⁷⁸

IV. AN ANALYSIS OF THE PROPOSED SOLUTIONS TO INHIBIT THE ABUSE OF LITIGATION FOR INTIMIDATION AND RETRIBUTION

Most SLAPP defendants prevail. They have effective defenses at their disposal that eventually protect against civil liability.¹⁷⁹ These defenses, unfortunately, become available relatively late in the litigation.

One form of defense is a claim of immunity. The United States Supreme Court has provided a qualified immunity in libel actions for citizens who petition the government.¹⁸⁰ The SLAPP defendant's immunity in a libel action is lost if the plaintiff demonstrates that the petitioning activity was exercised with actual malice.¹⁸¹ The Supreme Court of West Virginia disputed the plaintiff's ability to defeat such an immunity, noting that a number of earlier federal cases hold that even proof of malice or intent would not defeat the defendant's First Amendment right to petition.¹⁸² The basis of those decisions rested on the fear that permitting the introduction of such proof to overcome the Constitutional right to petition would so discourage its exercise as to constitute an impermissible burden on the defendant. The court quoted Judge Zirpoli from *Sierra Club v. Butz*,¹⁸³

[T]he malice standard invites intimidation of all who seek redress from the government; malice is easy to allege under modern pleading rules . . . and therefore in most cases even those who acted without malice would be put to the burden and expense of defending a lawsuit. Thus, the malice standard does not supply the "breathing space" that First Amendment freedoms need to survive.¹⁸⁴

An extension of immunity available to defendants in antitrust actions has afforded a defense to SLAPP defendants.¹⁸⁵ The Noerr-Pennington doctrine

178. See text accompanying notes 110-26 for discussion of the "chilling effect"; Schauer, *supra* note 117, at 693.

179. Many have already been discussed in this article. They include the constitutional right to petition and the constitutional right to free speech. First Amendment protection was examined in *Sierra Club v. Butz*, 349 F. Supp. 934 (N.D. Cal. 1972). The *Sierra Club* brought an injunction action against a logging company to prevent logging activities. The logging company filed a countersuit claiming interference with a contractual right. The claim was eventually dismissed based on the protection provided by the first amendment right to petition the government for redress of grievances. *Id.* at 935.

180. *McDonald v. Smith*, 472 U.S. 479, 483 (1985).

181. The Court defines "actual malice" as "knowledge at the time that the words are false, or . . . without probable cause or without checking for truth by the means at hand." *McDonald v. Smith*, 472 U.S. at 485 (quoting *Dellinger v. Belk*, 238 S.E.2d 788, 789 (N.C. 1977)). This holding forces a ruling on the actual malice claim and extinguishes the prospect of early dismissal. Summary judgment is not an available mechanism to SLAPP defendants since notice pleading renders the establishment of a factual controversy a relatively simple task for the SLAPP plaintiff. The SLAPP defendant thus has a difficult time establishing the malicious motivation of the plaintiff. Brecher, *supra* note 5, at 112.

182. *Webb v. Fury*, 282 S.E.2d 28, 40 (W. Va. 1981).

183. *NLRB v. Handy Hardware*, 349 F. Supp. 934, 938 (N.D. Cal. 1972).

184. *Id.* at 938.

185. See generally *Westfield Partners, Ltd. v. Hogan*, 740 F. Supp. 523, 526 (N.D. Ill. 1990) (dismissing claims based on immunity under extension of *Noerr-Pennington*).

creates an immunity for citizens and companies that are politically involved. "Noerr-Pennington is rooted on the First Amendment right to petition the government, and 'genuine efforts to induce government to take such lawful action are beyond the Sherman act.'"¹⁸⁶ Courts have used Noerr-Pennington as a method to provide immunity to the SLAPP defendant.¹⁸⁷ The doctrine has been applied so as to provide an absolute immunity to citizens who petition the government based on the First Amendment.¹⁸⁸

One of the few circumstances where liability would attach to a petitioning activity is if the activity is found to be a "sham" under the Noerr-Pennington Doctrine.¹⁸⁹ The Noerr-Pennington "sham exception" is available as a mechanism for the SLAPP plaintiff to defeat the defendant's "absolute" privilege.¹⁹⁰ The Noerr-Pennington doctrine itself provides little protection to most SLAPP defendants as it is invoked late in the litigation after the objectives of the SLAPP plaintiff have been fulfilled.¹⁹¹ The SLAPP plaintiff has already succeeded in intimidating the citizen-activist with the threat of liability and has forced the consumption of plaintiff's limited resources in preparing a defense.¹⁹²

Malicious prosecution and abuse of process countersuits are sometimes used by SLAPP defendants as a method to recoup the damage inflicted by frivolous SLAPP litigation.¹⁹³ These countersuits have been coined "SLAPP-backs." Some SLAPP defendants have found the countersuit to be very effective. Significant damage awards for claims of malicious prosecution are not uncommon in the SLAPP context.

In 1982, three farmers from Kern County, California placed an ad in a local newspaper that expressed their support for the proposed Peripheral Canal, a controversial local water project. J.B. Boswell Co., a powerful

186. *Id.* (citing *Metro Cable v. CATV of Rockford, Inc.*, 516 F.2d 220, 224 (7th Cir. 1975)).

187. *See id.* (citing *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 614 (8th Cir. 1980)).

188. *Id.*

189. *Eastern R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965). The problem with the application of the *Noerr-Pennington* doctrine is that the SLAPP plaintiff still achieves the SLAPP objective. The suit is filed and must still progress to the point where *Noerr-Pennington* can be invoked. Once the court recognizes that, as a matter of law, the defendant has participated in a constitutionally protected activity, the burden shifts to the plaintiff to prove the illegality or tortious nature of the defendant's actions. The objective of the plaintiff has already been fulfilled as the case must navigate packed court dockets and significant delays.

190. *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 113 S. Ct. 1920, 1929-30 (1993).

191. *See Stein, supra* note 7, at 54-55 (discussing *Noerr-Pennington* and its inability to address the chilling effect of SLAPP litigation).

192. *Id.* (stating that "virtually 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").

193. *See Monia v. Parnas Corp.*, 227 Cal. App. 3d 1349 (1991) (awarding SLAPP defendant \$260,000 in compensatory and punitive damages for malicious prosecution against a developer); Philip Hager, *Tide Turns for Targets of SLAPP Lawsuits*, L.A. TIMES, May 3, 1991, at A3 (noting that three farmers sued for supporting a controversial water project SLAPPed-back and were awarded a \$13.5 million jury verdict for malicious prosecution).

"agribusiness giant" opposed to the water project, unsuccessfully sued the farmers for libel. The defendant farmers decided to take the offensive and SLAPPED-back with a lawsuit based on malicious prosecution. Nearly ten years after the initial suit was filed against them, the farmers received a jury verdict for \$13.5 million.¹⁹⁴ Punitive damages comprised \$10.5 million of the total award.¹⁹⁵

The SLAPP-back may provide some relief to the successful countersuit plaintiff and may make the decision to file a SLAPP suit somewhat more difficult. In many jurisdictions, however, SLAPP-backs may not be filed until the original SLAPP litigation has been decided on its merits.¹⁹⁶ Since it is only available after the original action has concluded, the countersuit fails to prevent the primary evil of SLAPP litigation: intimidation of political participants and the consequential "chilling effect" on petitioning activity.

A. JUDICIAL REFORMS

In addition to the SLAPP-back suit, other remedies are available to the courts to contain the harm induced by SLAPP litigation. One significant tool was created by the Colorado Supreme Court in *Protect Our Mountain Environment Inc. (POME) v. District Court*.¹⁹⁷ The decision provides judges with the power to dismiss the claim, under certain circumstances, if the plaintiff is unable to meet a higher pleading standard. A three-part test was created for use in actions that are based on a citizen's petitioning activities. The court adopted a heightened standard for the plaintiff when the defendant files a motion to dismiss based on First Amendment petitioning activity.¹⁹⁸ Since dismissal is predicated on the constitutionality of the plaintiff's claims, the motion to dismiss is treated as one for summary judgment and the burden shifts to the plaintiff.¹⁹⁹ For a court to conclude that the defendant's activities were not immune from liability, the plaintiff must show:

- (1) the defendant's administrative or judicial claims were devoid of reasonable factual support, or, if so supportable, lacked any cognizable basis in law for their assertion; 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.²⁰⁰

If the plaintiff fails to meet the *POME* criteria, the claim is dismissed.

The *POME* court noted that "this standard will safeguard the constitutional right of citizens to utilize the administrative and judicial processes for redress of legal grievances without fear of retaliatory litigation and, at the

194. Hager, *supra* note 193, at A3.

195. *J.S. Boswell Co. v. Family Farmers*, No. 179027 (Cal. Super. Ct. July 8, 1988).

196. *Paint Products Co. v. Minwax Co., Inc.*, 448 F. Supp. 656, 658 (D. Conn. 1978) (refusing to allow a party to countersue based on a claim of vexatious litigation until the precipitating suit had been decided in favor of the defendant).

197. 677 P.2d 1361 (Colo. 1984).

198. *Id.* at 1368.

199. *Id.*

200. *Id.* at 1369.

same time, will permit those truly aggrieved by abuse of these processes to vindicate their own legal rights."²⁰¹ Although the *POME* solution is a promising response, it may not be enough to prevent the SLAPP suit from being used as a tool to silence opponents. Other judicial tools must be used in conjunction with the *POME* standard to stem the tide of SLAPP litigation.

Early dismissal is critical to the battle against SLAPP suits. Dismissal should be granted with prejudice, especially when the plaintiff has used discovery or liberal pleading requirements to delay or harass a defendant and if the litigation is likely to have a "chilling effect" on the exercise of First Amendment rights.²⁰² Since the mere pendency of a suit seeking relief based on a defendant's protected petitioning activity chills the exercise of First Amendment rights, courts should demand that specific allegations be pled once the First Amendment is invoked in order to dispose of frivolous suits as quickly as possible.²⁰³

Liberal discovery rules provide ripe opportunities for harassment, abuse, intimidation, and the "vexatious" imposition of expense.²⁰⁴ Although the rules work to produce relevant evidence, they also allow a plaintiff with a frivolous claim to delay the conclusion of the action and increase the costs associated with defense. The liberal interpretation of discovery rules, when utilized to terrorize the defendant, "is a social cost rather than a benefit."²⁰⁵

In addition to methods of early dismissal, courts may help battle frivolous litigation by awarding attorney's fees to the successful SLAPP defendant. The American Rule prevents the court from awarding attorney's fees unless one party has acted in bad faith or a statute provides otherwise.²⁰⁶ Other instances where a court can award attorney's fees include willful failure to obey a court order or when a party has acted "vexatiously, wantonly, or for oppressive reasons."²⁰⁷ One method of easing the judicial imposition of attorney's fees would be to apply a SLAPP definition. If the suit is determined to be a SLAPP under the definition, then the plaintiff's conduct would be

201. *Id.*

202. See *Petrochem Insulation, Inc. v. Northern Cal. and N. Nev. Pipe Trades Council*, No. C-90-3628 FEL, 1992 WL 131162 (N.D. Cal. 1992) (dismissing plaintiff's claims with prejudice, citing multiple amendments to the complaint and the potential chilling effect).

203. *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers*, 542 F.2d 1076, 1082-83 (9th Cir. 1976) (requiring more specific allegations than normally required when protected petitioning activity is basis of the claim), *cert. denied*, 430 U.S. 940 (1977).

204. See *id.* at 1083.

205. *Id.* at 1084.

[T]he present suit for \$11,000,000 has an inherent chill factor with respect to defendants' freedom to oppose future permits. In any event, the case illustrates, in my view, an effect of the unhappy marriage of 'notice' pleading and virtually unlimited discovery. The 'might makes right' potential in that combination is, of course, completely contrary to the intent behind the effort to free the pre-trial phase from formalism and surprise.

Id. at 1086 (Markey, J., concurring) (citation omitted).

206. See generally *Alyeska Pipeline Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975).

207. *Id.* at 258-59.

considered presumptively vexatious, wanton, and oppressive; thus ensuring, at a minimum, the defendant's recovery of attorney's fees.

Institution of SLAPP suits are often defensive measures to protect multi-million dollar investments. The costs associated with a developer's defense of a project are certainly an acceptable cost, if not an expected expense of the development itself. Even though SLAPP defendants may be reasonably certain that attorney's fees will be reimbursed under this scheme, there remains a high level of uncertainty and personal risk. They are still forced to pay the costs of their defense up front and continue to fear the threat of a possible adverse judgment in the millions of dollars. The defendant has an enormous personal stake in the litigation. The plaintiff, on the other hand, is making reasonably prudent business decisions as litigation is considered a cost of doing business and effectively silences critics. Therefore, the threat of the assessment of attorney's fees in isolation will not act as a deterrent to the SLAPP filer.

As previously discussed, Rule 11 is rarely used by developers in environmental litigation brought by public interest groups.²⁰⁸ Rule 11 prohibits pleadings that are filed with an improper purpose such as harassment or intentionally causing unnecessary delays.²⁰⁹ The Rule 11 standard is one of "objective reasonableness."²¹⁰ The *POME* approach²¹¹ may be a better tool and avoid Rule 11's disadvantages, such as limiting federal court access, chilling legitimate lawsuits, spawning satellite litigation, and erosion of civility among judges, attorneys, and litigants.²¹² Rule 11's judicially recognized purposes of deterrence rather than compensation make it unsuited for recouping SLAPP litigation expenses and discouraging SLAPP suits.²¹³

Instead of immediately running to the courts, defamed parties should attempt to remedy the injury before filing a lawsuit. Courts should recognize that self-help must be the first remedy sought by those defamed. Self-help is especially appropriate in cases where the alleged defamatory remarks were made in a public place. The Supreme Court has recognized that, "[t]he first remedy of any victim of defamation is self-help — using available opportunities to contradict the lie or correct the error and thereby minimize its adverse impact on reputation."²¹⁴ Courts should, therefore, be reluctant to

208. See *supra* notes 142-46 and accompanying text; FED. R. CIV. P. 11.

The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law . . . and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Id.

209. *Id.*

210. *Kapco Mfg. Co. v. C&O Enter., Inc.*, 886 F.2d 1485, 1491 (7th Cir. 1989).

211. The *POME* approach is discussed *supra* notes 197-202 and accompanying text.

212. Tobias, *supra* note 110, at 431; see *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 392-93 (1990) (discussing the disadvantages of Rule 11).

213. Tobias, *supra* note 110, at 431.

214. 600 West 115th St. Corp. v. Von Gutfeld, 603 N.E.2d 930, 934 (N.Y. 1992) (citing *Gertz v. Robert Welch, Inc.* 410 U.S. 323, 344 (1973)), *cert. denied*, 113 S. Ct. 2341 (1993).

allow claims of defamation that arise from public hearings. The public hearing, instead of the courtroom, is the preferred arena in which to remedy the harm. The defamed party has an immediate opportunity to defend itself by discrediting the defamatory statements in front of the same audience.²¹⁵ The fundamental purpose of the public hearing is to enable parties to have such exchanges. The notion of self-help supports the rationality of heightened pleading requirements when the plaintiff claims damages resulting from expression during a public hearing. One minimal pleading requirement might include holding prospective plaintiffs responsible for showing that efforts were made to remedy the damage through self-help.

Finally, when a plaintiff's attorney is faced with a client's desire to file a SLAPP suit, the attorney should consider the ethical implications of filing such a suit.²¹⁶ Disciplinary rules should be stringently enforced to prohibit harassing or malicious litigation.²¹⁷ The ABA Model Rules for Professional Conduct prohibit an attorney from bringing a suit "unless there is a basis for doing so that is not frivolous. . . ."²¹⁸ The comments following Model Rule 3.1 define an action as "frivolous" if the client files the lawsuit "primarily for the purpose of harassing or maliciously injuring a person. . . ."²¹⁹ The Model Rules also temper the attorney's duty to use legal procedure for the benefit of the client with an additional duty not to "abuse legal procedure."²²⁰ The attorney that accepts employment involving SLAPP litigation should expect some sort of disciplinary action. Placing the initial burden on the attorney that files the action is the most efficient and most effective solution as the attorney is in the best position to identify litigation that is intended to harass or maliciously injure. The vigorous application of rules of professional conduct to an attorney's involvement will go far in the deterrence of SLAPP litigation.

B. LEGISLATIVE REMEDIES

In addition to the judicial responses to SLAPP litigation, state legislatures have taken steps to curb the expansion of the SLAPP suit. Most recent legislation has attempted to specifically identify SLAPP suits and address them in a remedial and preventive manner.²²¹ The approach is to identify SLAPPs early in the litigation, and then dismiss them as quickly as possible.

215. *Id.* "Courts should be reluctant to employ their powers to correct uttered in the give-and-take of live public debate when there is reason to believe that the give-and-take itself can adequately, and more appropriately remedy the harm." *Id.* "The First Amendment 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.'" *Id.* (quoting Judge Learned Hand) (citation omitted).

216. *Entertainment Partners Group, Inc. v. Davis*, 590 N.Y.S.2d 979, 989 (N.Y. 1992).

217. *Id.* The court cites New York Disciplinary Rule 7-102 which prohibits a lawyer from initiating litigation "merely to harass or maliciously injure another." New York Disciplinary Rule 2-109(A)(1) requires a lawyer to decline such employment. *Id.*

218. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1983).

219. *Id.* cmt.

220. *Id.*

221. See Laura J. Ericson-Siegel, *Silencing Slapps: An Examination of Proposed Legislative Remedies and a "Solution" for Florida*, 20 FLA. ST. U. L. REV. 487, 502 (1992) (defining

New York recently passed legislation attempting to address SLAPP litigation.²²² The new statute is triggered when a public applicant or permittee files an action for damages relating to the efforts of the defendant to "report on, comment on, rule on, challenge or oppose such application or permission."²²³ SLAPP plaintiffs who claim defamation as a cause of action will be recognized as public figures requiring a showing of actual malice to afford recovery.²²⁴ The legislation places an extra burden on the plaintiff requiring the claim to have a "substantial basis in fact and law."²²⁵ If the SLAPP plaintiff fails to meet this burden, defendants will be awarded attorney's fees and costs.²²⁶ Most significantly, the court is granted the power to award compensatory damages to the defendant if the lawsuit was filed "for the purpose of harassing, intimidating, punishing" or otherwise maliciously inhibiting the free exercise of speech.²²⁷ Punitive damages are available to the SLAPP defendant if the litigation was initiated for the sole purpose of harassment.²²⁸

In addition to the deterrence goal, the New York legislation also attempts to address the SLAPP problem through fast, efficient disposal of frivolous suits against political participants. Courts are required to grant preference for motions for summary judgment and motions to dismiss.²²⁹ To survive summary judgment or a motion to dismiss, the plaintiff must demonstrate that the lawsuit has a substantial basis in law or is "supported by a good faith argument for an extension, modification or reversal of existing law."²³⁰

The findings and purpose stated by the New York legislature may be an indication of future legislative responses to SLAPP litigation:

The legislature hereby declares it to be the policy of the state that the rights of citizens to participate freely in the public process must be safeguarded with great diligence. The laws of the state must provide the utmost protection for the free exercise of speech, petition and association rights, particularly where such rights are exercised in a public forum with respect to issues of public concern. The legislature further finds that the threat of personal damages and litigation costs can be and has been used as a means of harassing, intimidating or punishing indi-

SLAPPs using those characteristics identified in the Canan and Pring SLAPP studies conducted at Denver University College of Law).

222. N.Y. CIV. RIGHTS LAW § 70-a (McKinney 1993) (the legislation applies to actions commenced after January 1, 1993).

223. See Ericson-Siegel, *supra* note 221, at 512 n.147; N.Y. CIV. RIGHTS LAW § 70-a (McKinney 1993); Gary Spencer, *Cuomo Signs Bill to Deter SLAPP Lawsuits*, N.Y.L.J., Aug. 6, 1992, at 1.

224. N.Y. CIV. RIGHTS LAW § 70-a.

225. *Id.*

226. *Id.* Courts and legislatures have recognized that the "remedy of an assessment of attorney's fees and disbursements has become the single most important device suggested to deter [frivolous litigation]." *Entertainment Partners Group, Inc. v. Davis*, 590 N.Y.S.2d 979, 982 (N.Y. 1992) (citing *In re A.G. Ship Maintenance Corp. v. Lezak*, 511 N.Y.S.2d 216 (N.Y. 1986) and N.Y. CIV. PRAC. L. & R. 8303-a (McKinney 1992)).

227. *Entertainment Partners Group*, 590 N.Y.S.2d at 983.

228. *Id.*

229. *Id.*

230. *Id.*

viduals, unincorporated associations, not-for-profit corporations and others who have involved themselves in public affairs.²³¹

Governor Cuomo's signature on this legislation may represent the beginning of widespread legislative reaction to the abuse of litigation to silence public opposition.

In California, the state legislature has passed a bill that identifies suits arising from the exercise of a First Amendment right and subjects such suits to motions to strike unless the plaintiff is able to show a "substantial probability of success" on the merits.²³² California's "anti-SLAPP" law offers the defendant a significant tool to stop SLAPP plaintiffs in their tracks.²³³ The law allows SLAPP defendants to file a motion to strike, and if they succeed they have shown that the lawsuit is focused on the exercise of his right to free speech.²³⁴ Once the defendant demonstrates this intention, the burden shifts to the SLAPP plaintiff to prove that the litigation has a "probability" of success.²³⁵ Additionally, to encourage volunteerism and political participation, the legislation provides limited immunity for directors of non-profit organizations and absolute immunity to directors of organizations that carry liability policies.²³⁶

Other states are poised to react to SLAPP litigation. Rhode Island, Minnesota and Massachusetts are considering legislation aimed at curbing the effect of SLAPP suits.²³⁷ A bill introduced in Massachusetts will allow defendants to file a special motion to dismiss forcing the suspension of discovery while the court considers the motion.²³⁸ The bill also threatens to allow the court to award attorney's fees and damages upon dismissal.²³⁹

Texas may soon be considering its own anti-SLAPP legislation.²⁴⁰ Texas House Bill 149, submitted in 1990, allowed the burden to be shifted to the SLAPP plaintiff for summary judgment motions. In order to obtain this advantage, the SLAPP defendant would be required to demonstrate that the claim is based on the defendant's exercise of First Amendment rights at a governmental proceeding.²⁴¹ The proposed legislation defined governmental proceeding as including judicial, administrative, and legislative proceed-

231. *Id.* (citing N.Y. CIV. RIGHTS LAW § 70-a (McKinney 1993)).

232. Tom Dresslar, *SLAPP Suit Limits Vetoed by Governor*, LOS ANGELES J., Oct. 16, 1991, at 4.

233. California Governor Pete Wilson signed Senate Bill 1264 in mid-September. It became to be known as the Lockyer Bill after Senator Bill Lockyer's three year battle to effectuate a SLAPP defense. See Bill Ainsworth, *Wilson Signs Bill Curbing SLAPP Suits*, RECORDER, Sept. 18, 1992, at 4.

234. *Id.*

235. *Id.*

236. *Id.*

237. Dianne Dumanoski, *Bill Aims to Thwart Bullying Lawsuits*, BOSTON GLOBE, Mar. 23, 1993, at 20.

238. *Id.*

239. *Id.*

240. Ericson-Siegel, *supra* note 221, at 514 (citing Tex. H.B. 58, 72d Leg., S.S. (1991)). This bill was identical to House Bill 149 filed a year earlier. Tex. H.B. 149, 71st Leg., S.S. (1990).

241. Tex. H.B. 58 at 1-2.

ings.²⁴² Summary judgment would be granted if the court could reasonably conclude that the primary purpose of the suit was to harass or to wrongfully injure the defendant.²⁴³ The legislation also contemplated the award of damages to the successful defendant in addition to the grant of summary judgment.²⁴⁴ Although this legislation was not considered by the Texas legislature, it marks the growing awareness of the SLAPP problem and the increasing use of SLAPP-style intimidation outside of the recognized SLAPP hot beds of California, New York, and Florida.

C. THE FIFTH ESSENCE: GUIDANCE

Any solution to the problems posed by SLAPP suits and intimidation suits must address four principal problems. First, the SLAPP defendant must be protected economically. Unfortunately for the defendant, SLAPP suits are rarely dismissed prior to discovery. Liberal discovery rules offer an enormous opportunity for the SLAPP plaintiff to harass, to abuse, and to impose significant costs on the defendant. "[I]t 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."²⁴⁵ Without some sort of economic protection, the cost of defending one's protected First Amendment activities may force defendants to settle early in the litigation unless they enjoy some level of immunity.

Second, the chilling effect of SLAPPs must be contained. Possible remedies include increasing the specificity of the pleading requirements. Uncertainty would be reduced by shifting a heavier burden to the plaintiff when the defendant is engaged in First Amendment activities. The award of attorney's fees, related litigation costs, and compensatory and punitive awards would help ease the burden on real and potential SLAPP defendants. Some action is necessary to limit the negative side effects of legitimate petitioning activities. Additionally, members and directors of public organizations should be provided with an adequate level of immunity from litigation and financial liability. Immunity will serve as an effective offensive tool to battle the pernicious chilling effect that SLAPP litigation engenders.

Third, SLAPP suits should be resolved quickly. This remedy would entail defining SLAPP suits for early identification and early disposition. This would benefit the defendant as well as the burdened court dockets. Since one of the major goals of a SLAPP suit is to distract the defendant from his or her petitioning activity, expeditious resolution would help to eliminate this incentive to initiate litigation.

Fourth, the economic incentive to file a SLAPP suit must be eliminated. The plaintiff files the suit because the costs of litigation are far less than the

242. *Id.* at 1.

243. *Id.* at 2.

244. *Id.*

245. *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).

expected benefit the plaintiff will derive from stopping the petitioning activity. The idea would be to create such enormous costs on the plaintiff who brings a frivolous suit for the purpose of squelching political participation that it would no longer be economically justified. One way in which to achieve this goal is to fashion penalties that are commensurate with the economic advantage the plaintiff had envisioned when filing the claim.

Judicial and legislative efforts designed to control SLAPP litigation to recognize constitutionally protected activities must concentrate on the following criteria: provision of economic protection for the SLAPP defendant (immunity); speedy identification and disposal of SLAPP suits (certainty); acknowledgement of the chilling effect on political participation; prevention of economic benefit for the SLAPP plaintiff (award attorney's fees, costs, compensatory and punitive damages); and, symmetric recognition of typical SLAPP plaintiffs and the potential negative effect on legitimate claims. All the above objectives must be achieved to fairly address the effects of SLAPP litigation.