

# THAWING PUBLIC PARTICIPATION: MODELING THE CHILLING EFFECT OF STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION AND MINIMIZING ITS IMPACT

TIMOTHY D. BICHÉ\*

*Those who won our independence believed that . . . the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.*

- Justice Louis Brandeis<sup>1</sup>

## I. INTRODUCTION

The right to petition the government for redress of grievances has occupied a protected position in the fabric of American democracy for more than 350 years.<sup>2</sup> Prior to the American Revolution, nearly half of the colonies guaranteed their citizens the right to make oral or written complaints to their local officials.<sup>3</sup> In 1774, when the First Continental Congress adopted the Declaration of Colonial Rights, the right to petition was one of the ten rights asserted by the colonists.<sup>4</sup> Although the right to

---

\* J.D. 2013, University of Southern California Gould School of Law; B.S. Media, Culture, and Communications 2010, New York University. I would like to thank Professor Nina Walton, for her comments and guidance through the writing process, and Professor Shmuel Leshem for his suggestions on the SLAPP model and for various research suggestions. I would like to thank Marysa Lin for helping me put more time and effort into this Note than I thought I possibly could. Finally I would like to thank the staff and executive board members of the *Interdisciplinary Law Journal* for all the work they put into this Note and all the other pieces we published this year.

1. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

2. See Norman B. Smith, “*Shall Make No Law Abridging . . .*”: *An Analysis of the Neglected, but Nearly Absolute, Right of Petition*, 54 U. CIN. L. REV. 1153, 1170 (1986).

3. Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut from a Different Cloth*, 21 HASTINGS CONST. L.Q. 15, 28 (1993).

4. “*Resolved, N. C. D. 8.* That they have a right peaceably to assemble, consider of their grievances, and petition the king; and that all prosecutions, prohibitory proclamations, and commitments for the same, are illegal.” Declaration and Resolves of the First Continental Congress (1774), reprinted in DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, H. DOC. NO. 398, at 3 (1927).

petition is now protected by the Constitution in the First Amendment along with freedom of speech, press, and religion,<sup>5</sup> James Madison considered the right to be so important that he originally proposed that it be protected in its own separate amendment.<sup>6</sup>

Today, the right to petition is the closest thing Americans have to an absolutely protected right.<sup>7</sup> Although this was not always the case,<sup>8</sup> this right has become an indispensable tool for citizens to have their voices heard by the government.<sup>9</sup> The right to petition is distinct from the other expressive rights and, because petitioning was the first expressive right to be recognized, it is arguably superior to the other rights protected by the First Amendment.<sup>10</sup> The right to petition can be considered the cornerstone of American democracy because it protects citizens' ability to engage in a wide range of activities that are intended to influence government actions.<sup>11</sup> Petitioning is an important way for citizens to bring pressing problems to the attention of the government, and is a significant source of information for the government regarding the public's opinion about government affairs.<sup>12</sup> Additionally, petitioning can be vital to identifying and eliminating incompetence, misconduct, waste, and corruption from government operations.<sup>13</sup>

Despite its important status in American democracy, the right to petition has recently been under attack. Over the past forty years, there has

---

5. U.S. CONST. amend. I.

6. See Spanbauer, *supra* note 3, at 39–40.

7. The final text of the First Amendment omitted limitations that had been placed on the right to petition in earlier drafts, suggesting to some that the framers intended for petitioning to be an absolute right. Smith, *supra* note 2, at 1182.

8. Under British rule, colonial judges and governors served at the will of the king, so their willingness to hear and respond to petitions was limited by their desire for job security. Spanbauer, *supra* note 3, at 29. Additionally, because governors oversaw local colonial assemblies, it was difficult for petitioning to have an impact, even at a local level. *Id.* at 30. As a result, there are a handful of instances in which a citizen was punished for bringing a petition. *Id.* Professor Spanbauer does note, however, that the number of citizens punished for bringing petitions pales in comparison to the number who were punished for other expressive acts, such as speech or press. See *id.* at 37–38.

9. “Petitioning [has] become meaningful because individuals or groups [are] allowed to express dissatisfaction with their government without fear of punishment for the substance of their petitions.” *Id.* at 31.

10. Smith points out that periods of “vigorous exercise” of the right to petition are correlated with the development of the rights of speech, press, and assembly. Smith, *supra* note 2, at 1179. Likewise, when the right to petition has been limited, these other rights have suffered as well. *Id.* at 1180.

11. See *id.* at 1153.

12. *Id.* at 1178.

13. *Id.*

been a surge in the number of lawsuits brought in retaliation for a citizen's exercise of his or her right to petition.<sup>14</sup> Strategic lawsuits against public participation, or "SLAPPs,"<sup>15</sup> are suits filed solely to punish citizens for speaking out on important issues and to discourage them from doing so in the future.<sup>16</sup> The parties who bring these suits seldom expect to prevail at trial, but instead look to silence their opponents by forcing them to abandon their protests in order to handle the lawsuit.<sup>17</sup> Not only are these suits baseless—they claim injuries arising from activities that are protected by the Constitution—but they also have the detrimental effect of chilling the exercise of public participation.

Classic litigation models used in the study of law and economics fail to account for this chilling effect. These models, which are used to predict the behavior of parties to a lawsuit, focus solely on variables contained within the bounds of the legal system. This chilling effect, however, falls outside of the courtroom and outside the scope of the classic models. As a result, classic litigation models fail to predict how the parties filing SLAPPs are likely to make decisions regarding the litigation. Developing a model that takes into account the factors esoteric to SLAPPs would make it easier to understand why parties file SLAPPs and what can be done to minimize the negative effect these suits have on the exercise of a critical constitutional right.

This Note develops an economic model that explains the behavior of parties who file SLAPPs, and from that model identifies the shortcomings of current methods of dealing with SLAPPs and proposes ways of improving SLAPP protections. Part II of this Note will introduce SLAPPs and will discuss some of the remedies available to victims of such suits. Part III will lay out some of the classic law and economic models for three key litigation decisions, explain why those models fail to capture the decisions made by parties to a SLAPP, and propose new models for analyzing how parties make decisions in SLAPPs. Part IV will use the new model to evaluate the effectiveness of some anti-SLAPP measures and, based on those findings, suggest that remedies that help reduce the burden of litigation on the SLAPP victim will be most successful at minimizing the

---

14. See GEORGE W. PRING & PENELOPE CANAN, *SLAPPs: GETTING SUED FOR SPEAKING OUT* 3 (1996).

15. *Id.* at 8.

16. *See id.*

17. Jerome I. Braun, *Increasing SLAPP Protection: Unburdening the Right of Petition in California*, 32 U.C. DAVIS L. REV. 965, 969–70 (1999).

chilling effect and, as a result, discouraging parties from filing SLAPPs. Part V will conclude that, in situations where a party is merely using the legal system as a tool for achieving some nonlegal goal, adjusting the models to focus on the factors that are relevant to the party's true objectives can both explain why the party acts the way it does in the course of litigation and suggest ways to control the parties' behavior.

## II. SLAPPS AND ANTI-SLAPP REMEDIES

### A. SLAPPS

The following anecdote, taken from the facts of *Damon v. Ocean Hills Journalism Club*,<sup>18</sup> is an example of a typical SLAPP.

Leisure Village at Ocean Hills is a residential community for seniors located in Southern California. The approximately three-thousand residents of Leisure Village are all members of the Ocean Hill Country Club Homeowner Association, which is governed by a board of seven elected directors. Between 1994 and 1996, the Homeowner Association was managed by a professional company under the board's direction. Early in 1996, the board chose to become self-managed and terminated its relations with the outside company. The board subsequently hired Dennis Damon to serve as the general manager of the Homeowner Association.

By late 1996, many residents of Leisure Village had become dissatisfied with Damon's management style and had begun to voice their concerns. Six different residents wrote articles, editorials, and letters to the editor criticizing Damon's competence and urging the residents to replace Damon with a professional management company. These articles and letters were published in the *Village Voice* by the Ocean Hills Journalism Club—a private homeowners club.

In August of 1997, the Homeowner Association held the annual board of directors election and several new directors who favored returning to professional management—including Ron Terry and Barney Feldman—were elected. Both Terry and Feldman made comments during board meetings that were critical of Damon's performance as general manager and called into question his qualifications for the position.

The strife over Damon split the community and led to a recall election of board members Terry and Feldman in early 1998. The recall failed to

---

18. *Damon v. Ocean Hills Journalism Club*, 102 Cal. Rptr. 2d 205 (Ct. App. 2000).

remove Terry and Feldman, and shortly thereafter Damon notified the Homeowner Association that he did not intend to renew his contract.

After Damon's departure, the homeowners voted to return to professional management. This, however, was not the end of the saga: Damon filed a defamation complaint against the six residents who authored letters or articles that were published in the *Village Voice*, board members Terry and Feldman, the Journalism Club, and twenty Doe defendants.<sup>19</sup>

Damon's suit is a classic example of a SLAPP: his claim of defamation arose from the defendants' exercise of their First Amendment right to petition. The statements published in the *Village Voice* and the statements by the board members were intended to influence the actions of a government body and, as a result, are afforded a very high level of protection from liability.<sup>20</sup> Damon's suit was meritless. Although the suit was eventually dismissed as a SLAPP, complete dismissal took more than two years.<sup>21</sup>

#### 1. What Are SLAPPs?

A typical lawsuit arises when one party files a claim alleging that a second party has infringed some legally protected right. A SLAPP, however, is brought not because the first party's legally protected right has been infringed, but because the second party has exercised its own legally protected right.<sup>22</sup> SLAPPs, as defined by Professors George W. Pring and Penelope Canan, have four distinct elements; these suits must: (1) involve a communication intended to influence government action that (2) results in a claim or counterclaim (3) filed against a nongovernment individual or organization (4) on a substantive issue of public interest or social significance.<sup>23</sup> SLAPPs are specifically intended to stop and discourage citizens from exercising the rights protected by the petition clause of the First Amendment by saddling them with the burden and expense of

---

19. Doe defendants are a tool used in legal pleadings to avoid statute of limitations issues. By including unnamed "Does" in a suit to serve as placeholders for additional defendants who are not identified at the time of filing, but may later be identified, a plaintiff retains the ability to add additional parties to a suit, even if the statute of limitations has expired. 5 WITKIN SUM CAL. PROC., ch. V, § 478 (5th ed. 2012). See also James E. Hogan, *California's Unique Doe Defendant Practice: A Fiction Stranger Than Truth*, 30 STAN. L. REV. 51, 54–57 (1977) (criticizing the practice in California).

20. See *Damon*, 102 Cal. Rptr. 2d at 209–11 (holding that both the board meetings and the *Village Voice* were "public forums" and, therefore, afforded high levels of protection).

21. Damon filed his complaint in 1998 and final dismissal occurred in late 2000. *Id.* at 208.

22. A SLAPP is a lawsuit brought in response to a party's exercise of his or her First Amendment right to petition. PRING & CANAN, *supra* note 14, at 10.

23. *Id.* at 8–9.

handling a civil lawsuit.<sup>24</sup> The goal of these suits is not to validate a legal right of the party bringing the suit, but to silence citizens who participate in public debate.<sup>25</sup> Actions that have been subjected to SLAPPs include circulating a petition,<sup>26</sup> testifying at a public hearing,<sup>27</sup> reporting a violation of the law,<sup>28</sup> boycotting,<sup>29</sup> and demonstrating peacefully.<sup>30</sup>

This is not to suggest that every suit brought in response to a citizen's activism is a SLAPP. There are situations in which suits filed in response to public participation may be appropriate because the citizen's actions exceed the scope of protected public discourse and are libelous, slanderous, or otherwise tortious. What distinguishes SLAPPs from these valid suits is the underlying intent: the intent of legitimate suits is to seek damages because a legal right has been violated; the intent of SLAPPs is to silence a citizen when a legal right has been exercised.

## 2. Who Gets Involved in SLAPPs?

Because a SLAPP may be brought as an original claim or as a counterclaim, the terms "plaintiff" and "defendant" do not always indicate which party is bringing the SLAPP and which is being SLAPPed.<sup>31</sup> Instead, it is helpful to refer to the party who is looking to chill the protected speech as the "filer" and the party whose protected activity is being challenged as the "target."<sup>32</sup>

Anyone who voices his or her opinion on a public issue can become the target of a SLAPP. SLAPPs can arise from any communication with a government body or the general public that touches upon an issue of public significance.<sup>33</sup> Specifically, citizens opposing private real estate development, bystanders voicing outrage at police brutality, parents concerned about their children's education, watchdog organizations accusing elected officials of corruption, environmentalists objecting to

---

24. According to Pring and Canan, "[i]t is the single element of reaction to political action that distinguishes SLAPPs from the everyday retaliatory lawsuits seen in . . . other arenas." *Id.* at 8.

25. *Id.* at 10–11.

26. *Westfield Partners, Ltd. v. Hogan*, 740 F. Supp. 523, 524 (N.D. Ill. 1990).

27. *Weiss v. Willow Tree Civil Ass'n*, 467 F. Supp. 803, 806 (S.D.N.Y. 1979).

28. *CKE Rests., Inc. v. Moore*, 70 Cal. Rptr. 3d 921, 923 (Ct. App. 2008).

29. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 889 (1982).

30. *N. Star Legal Found. v. Honeywell Projects*, 355 N.W.2d 186, 187 (Minn. Ct. App. 1984).

31. PRING & CANAN, *supra* note 14, at 9–10.

32. *Id.*

33. Penelope Canan & George W. Pring, Research Note, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 L. & SOC'Y REV. 385, 385–86 (1988).

public works projects, and employees reporting discriminatory working conditions have all been the targets of SLAPPs.<sup>34</sup>

Similarly, SLAPP filers can be a wide range of people and organizations that are adversely affected by citizens' activism. Real estate developers, large and small businesses, police, teachers, elected city officials, landlords, and labor unions have all taken their opponents to court in an attempt to silence opposition in the public arena.<sup>35</sup> A more distinct indicator of SLAPP filers is the motive behind the lawsuit. First, SLAPP filers bring suits in retaliation for opposition to some matter of public interest.<sup>36</sup> Second, SLAPP filers intend to discourage future opposition by "send[ing] a message" that opposition in the public forum will be punished.<sup>37</sup> Third, SLAPP filers view the legal system as simply another tool to use in their battle to win some political or economic advantage.<sup>38</sup>

### 3. Why SLAPPs Are Notable

SLAPPs differ from traditional lawsuits in several important respects. First, because these suits are brought in response to activities that are protected by the First Amendment, SLAPPs do not, by definition, present an actionable injury.<sup>39</sup> Second, because silencing the target can be achieved by the mere pendency of the suit, the filer does not need to—and often does not intend to—obtain a favorable judgment at trial for the SLAPP to be successful.<sup>40</sup> Because the filer is not concerned with winning the lawsuit, at least not in a traditional sense, the filer is free to bring almost any cause of action, regardless of its realistic chance of success.<sup>41</sup> Common causes of action used to mask SLAPPs include defamation, business torts, judicial

---

34. See generally PRING & CANAN, *supra* note 14. Pring and Canan were the earliest pioneers of SLAPP research—even coining the term "SLAPP." Their 1996 book, perhaps the seminal text on the subject, provides excellent background material on SLAPPs by outlining the history of these suits, identifying how these suits arise in many different contexts, and analyzing some of the early steps taken to lessen the effect of SLAPPs.

35. George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3, 15 (1989).

36. Penelope Canan, *The SLAPP from a Sociological Perspective*, 7 PACE ENVTL. L. REV. 23, 30 (1989).

37. *Id.*

38. "[T]he SLAPP filer has a total disregard for the citizenship rights of others and a lack of concern over what reduced political debate means for American democracy." *Id.*

39. See Pring, *supra* note 35, at 9.

40. Braun, *supra* note 17, at 970.

41. *Id.* at 970–71. See also Pring & Canan, *supra* note 33, at 389 (finding that SLAPP claims "did not correspond to the original public controversy . . . but recharacterized the controversy in language that effectively assured court acceptance").

torts, and nuisance claims.<sup>42</sup> The flexibility that filers have in choosing a vehicle for their illicit intentions is one reason SLAPPs are so difficult to detect.<sup>43</sup>

When a SLAPP is filed, it transforms the dispute between the target and the filers in three distinct ways. First, there is an issue transformation: the disagreement between the parties is transformed from a political issue to a judicial issue.<sup>44</sup> Second, there is a forum transformation: the dispute is moved from the public arena to the private confines of a courtroom.<sup>45</sup> The forum transformation is significant because the interactions between parties in a formal legal proceeding are governed by a different set of rules than interactions between parties in a public forum. In fact, one of the reasons why a filer may bring a SLAPP is because the filer believes that he or she has some advantage in the judicial forum that he or she lacks in the political forum.<sup>46</sup> For instance, the filer may believe that his or her resources can be more effectively used in the judicial forum, by paying for expensive lawyers or funding very burdensome litigation, or that the target may not have the same clout in the judicial forum that he or she may have in the local community. Third, there is a role transformation: the target who was originally in the role of the complainant is suddenly put on the defensive, and must divert attention and resources away from the political issue in order to deal with the suit.<sup>47</sup>

The most notable, and potentially most serious, effect of these suits is the chilling effect they have on political speech. Filers hope to squelch the target's political actions with the burden of litigation and the threat of large damage awards and legal costs.<sup>48</sup> Additionally, filers hope to discourage future political speech by making it clear that "there is a 'price' for speaking out politically."<sup>49</sup> The negative effect these suits have on citizens' ability and desire to exercise their right to petition subverts the more than three-hundred years of legislative and judicial action that has attempted to protect this important freedom.

---

42. Pring, *supra* note 35, at 8–9.

43. Braun, *supra* note 17, at 970–71.

44. Pring, *supra* note 35, at 12.

45. *Id.*

46. See Canan, *supra* note 36, at 23. The advantage could be in the amount of money at the filer's disposal, the filer's ability to create costs for the target through the legal system, or the filer's familiarity with the judicial system.

47. Braun, *supra* note 17, at 969–70; Pring, *supra* note 35, at 7.

48. Braun, *supra* note 17, at 969–70.

49. Pring, *supra* note 35, at 6.

## B. Anti-SLAPP PROTECTIONS

### 1. The Goals of Anti-SLAPP Protections

Anti-SLAPP protections seek to eliminate the negative effects of SLAPPs in three ways.<sup>50</sup> First, anti-SLAPP protections can try to prevent the filing of SLAPPs. Because “the evil of a SLAPP suit is accomplished by its very pendency,”<sup>51</sup> remedies that can prevent SLAPPs from ever being filed would minimize the negative effects of these suits. However, the ability of filers to disguise their suits as almost any cause of action makes early detection very difficult.<sup>52</sup>

Second, anti-SLAPP protections can provide methods for quick dismissal of SLAPPs. The burdens imposed on the SLAPP target by litigation can be minimized by quickly disposing of illegitimate claims. Quick dismissal may be difficult through standard methods of civil procedure, so many of the statutory anti-SLAPP remedies allow for special motions and procedures when a target believes he or she has been SLAPPED.<sup>53</sup> In addition, many motions allow for other procedural adjustments, such as expedited hearings and stayed discovery, which minimize the burden of litigation while the court considers these motions.<sup>54</sup>

Third, anti-SLAPP protections can discourage future SLAPPs from being filed. One way anti-SLAPP protections try to discourage filers is by awarding punitive damages or attorney’s fees to the target of the suit.<sup>55</sup> Additionally, a target may be able to file his or her own claim against the filer to recover damages for the injuries caused by the pendency of the SLAPP. The threat of compensatory or punitive damages may provide enough deterrence to prevent SLAPP filers from bringing their suits in the first place.

### 2. Types of Anti-SLAPP Protections

Several different types of anti-SLAPP protections have developed to minimize the burdens SLAPPs place on targets. These protections can be in the form of judicial doctrines that deal with SLAPPs in special ways, legislative enactments that provide special mechanisms for targets to

---

50. PRING & CANAN, *supra* note 14, at 145.

51. Braun, *supra* note 17, at 994.

52. *Id.* at 970–71.

53. *Id.* at 994.

54. *See infra* Part II.B.2.b.

55. *E.g.*, 735 ILL. COMP. STAT. 110/25 (2012); MINN. STAT. § 554.04 (2012); NEV. REV. STAT. § 41.670(1) (2011); N.Y. CIV. RIGHTS LAW §70-a (McKinney 2012).

dismiss SLAPPs, or causes of action that allow SLAPP targets to file their own suits seeking damages against the SLAPP filer. Each of these types of protection will be discussed in turn.

*a. Judicial Doctrines*

Various judicial doctrines have been developed to handle claims that arise from politically motivated speech. These doctrines handle such claims by asserting the protections of the First Amendment as a defense. Two of those doctrines, the *New York Times* standard and the *Noerr-Pennington* doctrine, have proven to be particularly applicable to SLAPPs. Although neither one was developed in the context of SLAPPs, both have been used by SLAPP targets with varying degrees of success.<sup>56</sup>

*i. The New York Times Standard*

In *New York Times v. Sullivan*, the Supreme Court heard an appeal from a judgment for damages against the *New York Times* in a defamation case brought by an elected commissioner from Alabama.<sup>57</sup> The case arose from an advertisement run by the *Times* alleging civil rights violations by southern officials. The Supreme Court of Alabama upheld the judgment, even though the jury was not required to find actual malice.<sup>58</sup> The Supreme Court of the United States reversed. The Court held that for a public official to recover damages for defamation, the public official must prove that the defendant acted with actual malice—that the statement was made with “knowledge that it was false or with reckless disregard of whether it was false or not.”<sup>59</sup> The Court recognized a “profound national commitment to the principle that debate on public issues should be uninhibited,” and that this commitment may include “unpleasantly sharp attacks on . . . public officials.”<sup>60</sup>

Although *New York Times* seemingly applied only to public figures, the Supreme Court broadened the scope of the constitutional standards in *Philadelphia Newspapers, Inc. v. Hepps*.<sup>61</sup> The plaintiff in *Hepps*, Maurice S. Hepps, was the principal stockholder of a corporation that franchised a

---

56. For a more thorough analysis of the doctrines presented in this section and their efficiency at fighting SLAPPs, see Thomas A. Waldman, Comment, *SLAPP Suits: Weaknesses in First Amendment Law and in the Courts' Responses to Frivolous Litigation*, 39 UCLA L. REV. 979, 997–1034 (1992).

57. *N.Y. Times, Co. v. Sullivan*, 376 U.S. 254, 256 (1964).

58. *Id.* at 262.

59. *Id.* at 279–80.

60. *Id.* at 270.

61. See *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986).

chain of convenience stores.<sup>62</sup> Hepps brought suit against the owner of the *Philadelphia Inquirer* because the newspaper had run several articles accusing Hepps of being linked to organized crime and using those links to “influence the State’s governmental processes.”<sup>63</sup> In expanding the *New York Times* standard, the Court identified two factors that would define the extent of First Amendment protection: (1) whether the party alleging defamation was a “public official or figure, or [was] instead a private figure”; and (2) whether the alleged defamatory speech was on a topic of “public concern.”<sup>64</sup> When the allegedly defamed party is a public official and the speech pertains to an issue of public concern, as was the case in *New York Times*, the “Constitution clearly requires the plaintiff to surmount a much higher barrier before recovering damages.”<sup>65</sup> If, however, the plaintiff is a private figure and the speech is of public concern, as was the case in *Hepps*, then the “constitutional requirements are . . . less forbidding.”<sup>66</sup> The Court went on to hold that, when the plaintiff is a private figure but the issue is of public concern, the “common-law presumption that defamatory speech is false cannot stand.”<sup>67</sup> As a result, a defendant who is sued for defamation for speaking on a matter of public concern is not required to prove that the speech at issue was true. This meant that, in situations where it could not be proven whether speech was true or false, the defamation claim would fail.<sup>68</sup> In the majority opinion, Justice O’Connor reasoned that this result was necessary in order to “ensure that true speech on matters of public concern is not deterred.”<sup>69</sup> *Hepps* expanded the protections of *New York Times* and opened the possibility that speech criticizing private parties may be afforded similar protections as speech criticizing public officials—so long as the speech related to an issue of public concern.

While the factor analysis in *Hepps* was applied specifically to media defendants, other courts have applied it to defamation claims asserted against private individuals. In *Okun v. Superior Court*—a quintessential SLAPP—the Supreme Court of California dismissed a land developer’s

---

62. *Id.* at 769.

63. *Id.*

64. *Id.* at 775.

65. *Id.*

66. *Id.*

67. *Id.* at 776–77.

68. *Id.* at 766. In other words, it remained the plaintiff’s burden to prove that the defendant’s speech was false.

69. *Id.*

claims for libel and slander against a group of active citizens arising from a petition they had circulated and statements they had made in editorial articles.<sup>70</sup> Even though the land developer was not a “public official or figure” in the way the *Hepps* case envisioned, the court in *Okun* held that the land developer had injected himself into public controversy and, as a result, had made himself a public figure.<sup>71</sup> Because of this elevated status, the statements made in local newspapers suggesting suspicious dealings between the developer and a city council member could not be the basis for the land developer’s defamation claim.<sup>72</sup>

To invoke the *New York Times* doctrine, a SLAPP target must allege that the SLAPP filer is a public figure, either actually or as a result of his or her involvement with a public controversy, and that the issue giving rise to the allegedly defamatory speech is of public concern.<sup>73</sup> If the target can do this, then the SLAPP filer bears the burden of proving that the statements made by the target were made with actual malice.<sup>74</sup> If the filer cannot show that there was malice, then the target’s speech will be constitutionally protected.<sup>75</sup> These protections are easily attainable when the filer is clearly a public official. However, this is not always the case. Often a filer will be a private party and the target will have to argue that there is some reason for the filer to be treated as a public official, which may require some amount of discovery by both sides before sufficient facts can be plead to bring the SLAPP under the purview of the doctrine. Additionally, if the target is able to show that the filer is a public figure, this then shifts the burden to the filer to show that the target acted with malice. Doing so will almost always require deposing the target and other discovery, all of which can be expensive and time consuming.<sup>76</sup>

*ii. The Noerr-Pennington Doctrine*

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, the Supreme Court overturned a judgment against a group of major

---

70. *Okun v. Super. Ct.*, 629 P.2d 1369 (Cal. 1981).

71. *Id.* at 1374. The court held that, similar to First Amendment protection on “sharp attacks on the character, motives, or moral qualifications of a public officer,” there was “analogous leeway for criticism of an individual who voluntarily injects himself or herself into public controversy and so becomes a ‘public figure.’” *Id.* (internal quotations omitted).

72. *Id.* at 1374–76.

73. Waldman, *supra* note 56, at 1000.

74. *Id.*

75. *See id.*

76. *See id.* at 1002.

railroads for violating the Sherman Antitrust Act.<sup>77</sup> The judgment was based on the railroad companies' attempts to hurt the trucking industry by running negative publicity campaigns against the trucking industry and trying to persuade the Governor of Pennsylvania to veto a bill that would have allowed truckers to carry heavier loads over Pennsylvania roads.<sup>78</sup> Although the lower courts found the railroad companies' acts to be anti-competitive, the Supreme Court held that the acts were immune from liability because they were merely a "solicitation of governmental action" regarding the passage of laws.<sup>79</sup> Recognizing the constitutional right to petition, the Court provided broad protection for acts that influence government actions and ignored the railroad companies' intent in supporting the veto of the bill.<sup>80</sup>

Four years after *Noerr*, the Court expanded the protection given to acts intended to influence government decision making in *United Mine Workers v. Pennington*.<sup>81</sup> In *Pennington*, operators of small coal mines brought an antitrust claim against large coal miners' unions. The claim alleged that the large unions had petitioned the Secretary of Labor to implement a higher minimum wage requirement for miners and had convinced the Tennessee Valley Authority to purchase coal only from mines that paid their workers this higher wage.<sup>82</sup> The Court was unmoved by the clearly anticompetitive motivation behind the coal unions' actions. Speaking for the majority, Justice White stated that "[n]othing could be clearer from the Court's opinion [in *Noerr*] than that anticompetitive purpose did not illegalize" attempts to influence government actions.<sup>83</sup>

Despite the Court's broad protection of the right to petition the government, the right to petition the government is not absolute. In *Noerr*, the Court alluded to the possibility that anticompetitive actions might not actually be directed at influencing the government but could be a "mere sham" hiding a direct attempt to interfere with the business relations of a competitor.<sup>84</sup> While the Court indicated this sort of conduct would not be

---

77. *E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 145 (1961).

78. *Id.* at 129–30.

79. *Id.* at 138.

80. The Court stated that it was "neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors." *Id.* at 139.

81. *See United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965).

82. *Id.* at 660.

83. *Id.* at 669.

84. *Noerr Motor Freight, Inc.*, 365 U.S. at 144.

immune from liability, little guidance was provided to help identify a “sham” until the Court applied the “sham exception” in *California Motor Transport Co. v. Trucking Unlimited*.<sup>85</sup> In *California Motor*, one group of trucking companies filed a suit for injunctive relief and damages against another group of trucking companies. The plaintiff truckers alleged that the defendants were in violation of antitrust laws because they had repeatedly instituted state and federal proceedings to prevent the plaintiff from acquiring operating rights.<sup>86</sup> After reiterating the importance of the right to petition the government, the Court held that the acts of the defendant group were not intended to influence public officials but rather were intended to “bar [its] competitors from meaningful access to adjudicatory tribunals.”<sup>87</sup> Because the defendants’ actions made up “a pattern of baseless, repetitive claims,” the Court concluded that they were not within the protection of *Noerr* and the First Amendment.<sup>88</sup>

Although the *Noerr-Pennington* doctrine was developed in antitrust cases, it has found applicability in other arenas as well.<sup>89</sup> In the SLAPP context specifically, the *Noerr-Pennington* doctrine has protected citizens who petition the government from liability arising from the petitioning activity. In *Westfield Partners, Ltd. v. Hogan*, a group of concerned citizens successfully persuaded the city commissioner to block the development of a housing division.<sup>90</sup> When the developer brought suit against the citizens for a variety of claims, including interference with its prospective economic advantage, the court dismissed the claim.<sup>91</sup> Specifically referring to the suit as a SLAPP, the court found the defendants’ actions to be “absolutely privileged under the first amendment.”<sup>92</sup> The court stated that the “exercise of this right [to petition] should be vigorously protected and should not expose individuals to suit by persons unhappy with the results of such petitioning.”<sup>93</sup>

---

85. *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 511–12 (1972).

86. *Id.* at 509.

87. *Id.* at 511–12.

88. *Id.* at 512–13.

89. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (holding that a boycott of local businesses intended to influence government action was protected by the First Amendment, even though it caused various merchants economic injury). *But see Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988) (holding that efforts intended to influence the actions of a private association not protected under *Noerr*).

90. *Westfield Partners, Ltd. v. Hogan*, 740 F. Supp. 523, 524 (N.D. Ill. 1990).

91. *Id.* at 525.

92. *Id.*

93. *Id.* at 526.

Unlike the *New York Times* standard, the *Noerr-Pennington* doctrine can provide complete First Amendment protection for the contested activity. Additionally, instead of putting the burden on the SLAPP target to prove that the filer was a public figure and that the speech is on a public issue, the *Noerr-Pennington* doctrine places the burden on the filer to prove that the target's actions are subject to the sham exception.<sup>94</sup> Depending on how much factual support the court requires, placing this burden on the SLAPP filer may allow the court to dismiss a SLAPP before a substantial amount of discovery takes place.

*b. Statutory Protections*

In recognition of the chilling effects of SLAPPs, twenty-eight states, the District of Columbia, and Guam have passed statutes to give targets tools to fight against SLAPPs.<sup>95</sup> While there are many similarities among the statutes of each individual state, there are subtle differences in three main areas: (1) the scope of petitioning activities immune from liability; (2) the procedural accommodations made for dealing with suits arising from protected activities; and (3) the monetary compensation awarded to the target when a suit is found to be a SLAPP. The differences between the state statutes in each area will be discussed briefly in turn.

*i. Scope of Protection*

The first area of variance between state anti-SLAPP statutes is in the scope of petitioning activities that are immunized from liability. Some states provide very limited protection by only protecting public participation that is subject to suits by public applicants or permittees.<sup>96</sup> While these statutes do protect targets from the most prototypical SLAPPs, there are many other types of petitioning activity that are not covered—such as SLAPPs that arise from election campaigns or from public criticism of an elected official's performance. Other limitations on the scope of protection include only covering conduct or speech made in connection with public hearings,<sup>97</sup> only immunizing publications from libel suits,<sup>98</sup> and only applying to suits brought by the government.<sup>99</sup> These statutes provide

---

94. Waldman, *supra* note 56, at 1010–11.

95. *State Anti-SLAPP Laws*, PUB. PARTICIPATION PROJECT, <http://www.anti-slapp.org/your-states-free-speech-protection> (last visited Mar. 14, 2013).

96. *E.g.*, NEB. REV. STAT. § 25-21,242 (2012); N.Y. CIV. RIGHTS LAW § 76-a (McKinney 2012).

97. MO. REV. STAT. § 537.528 (2012).

98. OKLA. STAT. tit. 12, § 1443.1 (2012).

99. FLA. STAT. § 768.295 (2012). Florida has a second anti-SLAPP statute, but it applies only to statements made by parcel owners about matters concerning homeowners associations. *Id.* § 720.304.

very limited protection and leave citizens vulnerable to SLAPPs that arise from many other forms of petitioning activity not covered by the statute.

On the other end of the spectrum, many states provide sweeping protection for the entire range of Petition Clause activities.<sup>100</sup> Some statutes qualify this protection by exempting petitioning activities that are malicious, tortious, or that violate a person's constitutional rights.<sup>101</sup> Statutes with this sort of limitation seem to align with the *Noerr-Pennington* doctrine and the "sham exception."

Another common scope of protection is for statutes to cover petition activity that is made in connection with an issue of public interest.<sup>102</sup> This line of statutes seems to follow the *New York Times* standard more closely. As with the *New York Times* standard, these statutes appear to open the door for debate over what constitutes a "public issue," and getting past this threshold question could be difficult for some targets.

#### *ii. Procedural Accommodations*

The next area of variance between anti-SLAPP statutes is in how they handle claims that arise out of protected activity. When the claim at issue arises out of protected activities, most statutes allow for a special motion to strike.<sup>103</sup> Some statutes establish that a motion to dismiss a claim arising out of protected activity will be treated as a motion for summary judgment.<sup>104</sup> Regardless of the type of motion provided for, almost all states with anti-SLAPP statutes require that motions filed pursuant to these

---

100. "Acts in furtherance of the constitutional rights to petition, speech, association, and participation in government are immune from liability, regardless of intent or purpose, except when not genuinely aimed at procuring favorable government action, result, or outcome." 735 ILL. COMP. STAT. 110/15 (2012). *See also* 7 GUAM CODE ANN. § 17104 (2012); MASS. GEN. LAWS. ch. 231, § 59H (2012); ME. REV. STAT. tit. 14, § 556 (2012); NEV. REV. STAT. § 41.637 (2011) (protecting any communication "aimed at procuring governmental or electoral action").

101. For instance, Maryland's anti-SLAPP statute protects a defendant from liability if the defendant acts "without constitutional malice." MD. CODE ANN., CTS. & JUD. PROC. § 5-807(c) (West 2012). *See also* MINN. STAT. § 554.03 (2012).

102. *E.g.*, CAL. CIV. PROC. CODE § 425.16 (West 2012); IND. CODE § 34-7-7-2 (2012); LA. CODE CIV. PROC. ANN. art. 971 (2012); N.M. STAT. ANN. § 38-2-9.1 (2012).

103. *E.g.*, CAL. CIV. PROC. CODE § 425.16(b)(1) (West 2012).

104. *E.g.*, IND. CODE § 34-7-7-9 (2012); NEB. REV. STAT. § 25-21,246 (2012); NEV. REV. STAT. § 41.660 (2011). If the motion is treated as a motion for summary judgment, then a favorable ruling is the equivalent of a ruling on the merits. On the other hand, a favorable ruling on a motion to dismiss simply releases the parties from the current suit, but often allows the plaintiff to refile the suit.

statutes be heard on an expedited basis in order to minimize the length of time the potentially baseless suit is pending.<sup>105</sup>

States also allocate the burden of proof differently between the parties with regard to these motions. Some statutes put the burden of proof on the moving party to show that the acts giving rise to the claim were protected public participation.<sup>106</sup> Once the moving party has done this, the burden may shift to the responding party to show that its claim has a substantial basis in fact or law.<sup>107</sup> If the responding party cannot do this, the claim will be dismissed. Other states put the initial burden of proof on the party responding to the motion, the SLAPP filer, to show “clear and convincing evidence” that the SLAPP target’s action was not protected by the applicable statute.<sup>108</sup>

Another common aspect of these statutes is that discovery is stayed pending the consideration of the motion.<sup>109</sup> This helps minimize the burdens of litigation for SLAPP targets while they attempt to have the claim against them thrown out. Some states allow discovery regarding the motion,<sup>110</sup> or will allow discovery only upon a showing of good cause.<sup>111</sup> Additionally, many states also allow for expedited appeal of rulings on these special motions. Some states allow both parties to move for expedited appeal of the motion,<sup>112</sup> while others allow only the moving party to seek expedited appeal.<sup>113</sup>

Several anti-SLAPP statutes also allow the government to intervene and to assist in the defense of the suit. These statutes allow for the state Attorney General or any government agency or subdivision to which the

---

105. *E.g.*, MO. REV. STAT. § 537.528 (2012) (requiring that motion “be considered by the court on a priority or expedited basis to ensure the early consideration of the issues raised by the motion and to prevent the unnecessary expense of litigation”). *See also* ME. REV. STAT. ANN. tit. 14, § 556 (2012); NEV. REV. STAT. § 41.660 (2011).

106. *E.g.*, NEB. REV. STAT. § 25-21,245 (2012).

107. *Id.*; OR. REV. STAT. § 31.150 (2012).

108. *E.g.*, MINN. STAT. § 554.02 (2012).

109. *E.g.*, ME. REV. STAT. ANN. tit. 14, § 556 (2012); MASS. GEN. LAWS ch. 231, § 59H (2012); NEV. REV. STAT. § 41.660 (2011).

110. *E.g.*, IND. CODE § 34-7-7-6 (2012).

111. *E.g.*, R.I. GEN. LAWS § 9-33-2 (2012).

112. *E.g.*, MO. REV. STAT. § 537.528 (2012) (allowing both parties to seek expedited appeal).

113. *E.g.*, UTAH CODE ANN. § 78B-6-1404 (West 2012) (allowing interlocutory appeal of denial of motion only for moving party).

SLAPP target's petition or free speech were directed to defend or otherwise support the party seeking immunity.<sup>114</sup>

*iii. Monetary Compensation*

The final aspect of most anti-SLAPP statutes is the awarding of monetary compensation to the SLAPP target. A majority of—if not all—anti-SLAPP statutes allow the moving party to recover reasonable costs and attorney's fees if it prevails on a special motion to dismiss.<sup>115</sup> Additionally, many statutes allow the SLAPP target to recover additional damages if their motion is granted.<sup>116</sup> Several states allow courts to award actual or punitive damages if the motion is granted.<sup>117</sup> Usually this extra compensation requires an additional showing by the moving party that the dismissed suit was commenced or continued for purposes of “harassment, to inhibit the moving party's public participation, to interfere with the moving party's exercise of protected constitutional rights, or otherwise wrongfully injure the moving party.”<sup>118</sup> Some states provide statutory damages if a special motion to dismiss is granted,<sup>119</sup> and at least one allows for “[s]uch additional sanctions upon the responding party, its attorneys, or law firms as the court determines shall be sufficient to deter repetition of the conduct and comparable conduct by others similarly situated.”<sup>120</sup>

*c. Legal Options*

Perhaps in an attempt to fight fire with fire, several ways of combating SLAPPs through countersuits have developed. These suits, often referred to as SLAPP Backs, seek monetary damages for the injuries caused by the SLAPP filer's unfounded litigation.<sup>121</sup> Seven states specifically provide for a SLAPP Back cause of action as part of their anti-SLAPP statutes,<sup>122</sup> and

---

114. MASS. GEN. LAWS ch. 231, § 59H (2012); ME. REV. STAT. ANN. tit. 14, § 556 (2012); NEV. REV. STAT. § 41.660 (2011); R.I. GEN. LAWS § 9-33-3 (2012); TENN. CODE ANN. § 4-21-1004 (2012).

115. 735 ILL. COMP. STAT. 110/25 (2012); MINN. STAT. § 554.04 (2012); N.Y. CIV. RIGHTS LAW § 70-a (McKinney 2012); NEV. REV. STAT. § 41.670 (2011). A handful of statutes, recognizing the potential for abuse, also allow the party responding to the special motion to recover costs and fees if the anti-SLAPP motion is denied and found to be frivolous. IND. CODE § 34-7-7-8 (2012); MO. REV. STAT. § 537.528 (2012); N.M. STAT. ANN. § 38-2-9.1 (2012); VT. STAT. ANN. tit. 12, § 1041(f)(1) (2012).

116. *E.g.*, HAW. REV. STAT. § 634F-2(8)(C) (2012); R.I. GEN. LAWS § 9-33-2(d) (2012).

117. *E.g.*, R.I. GEN. LAWS § 9-33-2(d) (2012).

118. MINN. STAT. § 554.04 (2012). *See also* N.Y. CIV. RIGHTS LAW § 70-a (McKinney 2011).

119. WASH. REV. CODE § 4.24.510 (2012) (statutory damages of ten thousand dollars).

120. HAW. REV. STAT. § 634F-2(8)(C) (2012).

121. Pring, *supra* note 35, at 19.

122. ARK. CODE ANN. § 16-63-506 (2012); DEL. CODE ANN. tit. 10, § 8138 (West 2013); HAW. REV. STAT. § 634F-2(9) (2012); MINN. STAT. § 544.045 (West 2013); NEV. REV. STAT. § 41.670; N.Y. CIV. RIGHTS LAW § 70-a (McKinney 2013); R.I. GEN. LAWS § 9-33-2 (2012).

California's anti-SLAPP statute recognizes the unique "character and origin" of SLAPP Backs.<sup>123</sup>

In states without a specific statutory provision, SLAPP targets may be able to bring suits in torts for malicious prosecution or abuse of process.<sup>124</sup> Generally, the tort of malicious prosecution is applicable when civil litigation is brought without probable cause and for a purpose other than "securing proper adjudication of the claim in which the proceedings are based."<sup>125</sup> Additionally, the civil proceedings must have terminated in favor of the party against whom they are brought before a claim for malicious prosecution can be filed.<sup>126</sup> This second requirement minimizes the effectiveness of malicious prosecution claims in fighting SLAPPs because the tort claim cannot be brought until the SLAPP proceedings have been completed. It is very possible that the SLAPP may have fulfilled its chilling role before the target would be able to present a viable claim.<sup>127</sup>

### 3. Balancing Concerns of Anti-SLAPP Remedies

While SLAPPs do have a harmful effect on arguably desirable political speech, the interests of the party bringing the suit must be taken into account too, so that anti-SLAPP protections do not infringe on that party's rights. All citizens have a constitutional right to access the courts and to have meritorious claims heard by a jury.<sup>128</sup> If anti-SLAPP protections are too strict, then parties who have suffered actual injuries may be discouraged from bringing claims, and the issues presented by SLAPPs will not have been cured, but will have merely shifted.<sup>129</sup>

While it can be difficult to distinguish valid claims that arise from petitioning activity from SLAPPs, that is not to say they do not exist. Petitioning activity is not completely immune from liability for libel, slander, or defamation; and when speech stretches beyond protected

---

123. CAL. CIV. PROC. CODE § 425.18 (West 2012) ("The Legislature finds and declares that a SLAPPback is distinguishable in character and origin from the ordinary malicious prosecution action. The Legislature further finds and declares that a SLAPPback cause of action should be treated differently . . . from an ordinary malicious prosecution action because a SLAPPback is consistent with the Legislature's intent to protect the valid exercise of the constitutional rights of free speech and petition by its deterrent effect on SLAPP").

124. Braun, *supra* note 17, at 990–93.

125. RESTATEMENT (SECOND) OF TORTS § 674 (1977).

126. *Id.* § 674(b).

127. Braun, *supra* note 17, at 991.

128. U.S. CONST. amend. VII.

129. At least one state has attempted to avoid this outcome by explicitly immunizing certain types of suits from statutory anti-SLAPP procedures. See CAL. CIV. PROC. CODE § 425.17 (West 2012).

petitioning activity a valid legal claim may arise. A legitimate lawsuit will be intended to validate a legal right the party filing the suit feels has been violated—unlike SLAPPs that are meant simply to retaliate for public speech. The party bringing a legitimate suit will be doing so because the party feels that the legal system is the best way to be recompensed for the injury suffered, not because of the cost doing so will impose on the other party. Additionally, a legitimate lawsuit is not intended to send a message to the opposing party or others who may hear about the suit, except to the extent that legitimate lawsuits deter activities that violate others' legal rights.

While striking the proper balance between allowing for legitimate lawsuits and punishing SLAPP filers may be difficult, it is important to ensure that petitioning remains a viable method for the public to influence the government. Developing a model that explains the behavior of SLAPP filers should help identify when a suit is intended as a SLAPP and when a suit is intended to redress a legal injury.

### III. ECONOMIC ANALYSIS OF TRADITIONAL LITIGATION AND SLAPPS

The economic analysis of law is a relatively new field of legal analysis.<sup>130</sup> The study of law and economics uses models of human behavior and legal systems to answer descriptive and normative questions about legal rules.<sup>131</sup> By reducing complex situations to abstract models, it becomes easier to observe patterns of behavior and to understand why actors make certain decisions.<sup>132</sup> These abstract models often function under a set of assumptions—most notably that actors are rational utility-maximizers—in order to allow for general explanations of human behavior.<sup>133</sup>

---

130. Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LITERATURE 1067, 1067 (1989). Professors Cooter and Rubinfeld note that a convenient starting point for the study of law and economics is Ronald Coase's article "The Problem of Social Costs," which was published in 1960—though the economic analysis of law started some time earlier at the University of Chicago. *Id.* at 1067 n.1 (1989).

131. STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* 1 (2004).

132. Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 525 (1997).

133. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 3 (8th ed. 2011). These assumptions, though, have also been subject to criticism. See Reza Dibadj, *Beyond Facile Assumptions and Radical Assertions: A Case for "Critical Legal Economics"*, 2003 UTAH L. REV. 1155 (2003) (arguing that the assumptions used by both law and economics and critical legal studies "mask the potential of each approach").

While the economic analysis of law can be applied to all types of substantive and procedural legal rules and decisions,<sup>134</sup> this Note limits its use to three key decisions in the litigation process: (1) the decision whether to file a claim; (2) the decision whether to settle the claim or to proceed to trial; and (3) the decision whether to spend money on litigation. This Part will begin by presenting two hypothetical cases, one a legitimate lawsuit and one a SLAPP; and will use these hypotheticals to illustrate the classic litigation models, to demonstrate these models' inapplicability to SLAPPs, and to develop a new model that is better suited to explain the behavior of SLAPP filers. Although the SLAPP model is developed in the context of a real estate SLAPP, the last section of this Part demonstrates that the model can be used to explain other types of SLAPPs as well.

#### A. TWO HYPOTHETICAL CASES

##### 1. The Legitimate Lawsuit

Paula Peterson is a frequent customer at Discount Retailers. One day, while shopping at Discount Retailers, Paula slips in a puddle of water and falls, breaking her leg. The puddle Paula slipped in had formed because Discount had neglected to repair its air conditioner and its employees had failed to clear the puddle or to warn patrons of its presence. After her injury, Paula consults an attorney about filing a lawsuit against Discount. Her attorney advises her that she can bring a claim for negligence.

For this hypothetical assume the following: It will cost Paula ("P") \$1000 to file her claim and, based on her attorney's advice, P believes she has a 70 percent chance of winning her suit. If P does win, she believes she will be awarded \$15,000 in damages. Discount ("D"), on the other hand, believes P has only a 50 percent chance of winning and, if P does win, D also believes she will be awarded a judgment of \$15,000. Both P and D will incur legal costs of \$4000 if the case proceeds to trial.

##### 2. The SLAPP

Future Lands, Inc. is a land-developing company that has purchased a large tract of land on which it plans to build a shopping mall. Before Future Lands can build the mall, however, it must convince the city council to rezone the land so that it can be used for commercial purposes. Terry Thompson is a citizen of the town in which Future Lands is looking to develop its land, and she opposes the proposed development. Terry

---

134. For examples of the potential breadth of the economic analysis of law, see generally POSNER, *supra* note 133 and SHAVELL, *supra* note 131.

organizes a coalition of concerned citizens who speak out at town hall meetings, circulate petitions, and write letters to city officials voicing their concern over the effects of the building proposal. Future believes that Terry's opposition movement makes it less likely the city council will approve the rezoning it needs to move forward with its project. To combat the protests, Future files a suit against Terry for defamation<sup>135</sup> and tortious interference of prospective advantage.<sup>136</sup>

For this hypothetical assume the following: It will cost Future Lands ("F") \$5000 to file its claim. F knows that the allegations in the suit are baseless, and is only bringing the suit to pressure Terry ("T") into ceasing her protests and disbanding her organization. As a result, F believes that it has no chance of winning its suit and does not believe it will be awarded any judgment. T, on the other hand, does not know that F's claim is meritless. T believes that F has a 50 percent chance of prevailing at trial and that, if F does prevail, it will likely be awarded \$500,000 in damages. Both parties will incur costs of \$15,000 if the case proceeds to trial.

#### B. THE CLASSIC ECONOMIC MODEL AND REVISED SLAPP MODEL

##### 1. The Decision to File Suit

###### *a. Classic Model*

Before any litigation starts, the injured party must decide whether to file a legal complaint against the alleged injurer.<sup>137</sup> Under the classic model, in order to decide whether to file a suit, the injured party must balance the up-front costs of asserting the claim with the possible future benefits of the suit.<sup>138</sup> Up-front expenses include the cost of hiring an attorney and filing a formal complaint.<sup>139</sup> The potential future benefits include any money the party thinks it will receive as a settlement or as a

---

135. The elements of a cause of action for defamation are: (1) "a false and defamatory statement concerning another"; (2) "an unprivileged publication to a third party"; (3) "fault amounting at least to negligence on the part of the publisher"; and (4) either specific actionability or "special harm caused by the publication." RESTATEMENT (SECOND) OF TORTS § 558 (1977).

136. The elements of a cause of action for interference of prospective advantage are: (1) the existence of a prospective advantage or opportunity; (2) knowledge of the opportunity by the alleged tortfeasor; (3) a purposeful intent to interfere with the advantage or opportunity by the alleged tortfeasor; (4) proximate cause between the interfering act and the impairment of the advantage or opportunity; and (5) actual damage. PHILLIP J. CAMPANELLA ET AL., 2-12 BUSINESS TORTS § 12.03 (Joseph D. Zamore ed., 2012).

137. See Cooter & Rubinfeld, *supra* note 130, at 1082.

138. See *id.*

139. *Id.* at 1069.

judgment after trial.<sup>140</sup> A rational decision maker will choose to assert a legal claim when the expected future benefits of a suit outweigh the cost of bringing the suit.<sup>141</sup> Put simply, the injured party will use the following equation to determine whether to assert the claim:

$$C_A < V_A, \quad (1)$$

where  $C_A$  is the cost of asserting the claim and  $V_A$  is the expected value of the claim.

While a party may have a good idea of what the up-front costs will be, there is inherent uncertainty in what the outcome of the case will be once the claim is filed. There is some chance that the plaintiff will achieve a favorable outcome in the case and, if the plaintiff achieves that outcome, he or she will receive some amount of money as damages.<sup>142</sup> However, in order to obtain a favorable outcome, the plaintiff must spend some amount on trial costs. Accordingly,  $V_A$  will depend on the party's approximation of these values.  $V_A$  can be expanded as such:

$$V_A = \rho_w J - C_T, \quad (2)$$

where  $\rho_w$  is the estimated chance of the party prevailing at trial,  $J$  is the party's estimation of what judgment would be received at trial, and  $C_T$  is the party's expected trial costs.<sup>143</sup>

When the injured party believes that the value of the claim is greater than the cost of asserting the claim, then it is rational for that party to assert its claim.<sup>144</sup>

*b. Applying the Model*

In the legitimate lawsuit between P and D, P will file her suit if the cost of filing the suit is less than expected value from the suit. P's cost of asserting her claim is \$1000. P believes that, if she goes to trial, there is a 70 percent chance she will receive a favorable judgment of \$15,000, and that it will cost \$4000 in legal fees to go to trial. P values her claim accordingly:

$$V_{AP} = (.7)(15,000) - 4000$$

---

140. *Id.* at 1082.

141. *Id.*

142. For the sake of simplicity, this example will ignore the possibility that the case settles before trial.

143. This equation assumes that, if the parties settle, no legal costs are incurred.

144. Cooter & Rubinfeld, *supra* note 130, at 1082.

$$V_{AP} = 6500,$$

where  $V_{AP}$  is the expected value to P of asserting her claim against D. Because the value of P's claim is greater than the cost of asserting her claim, P will choose to file her claim against D.

Turning to the hypothetical SLAPP, the classic model suggests that the suit would not be brought. As stated above, it will cost F \$5000 to bring its claim. If F proceeds to trial, it does not believe there is any chance of being awarded a favorable judgment. F believes that going to trial will cost \$15,000. It would only appear rational for F to file its suit only if the cost of asserting the claim is less than the value of the suit:

$$V_{AF} = (.0)(0) - 15,000$$

$$V_{AF} = -15,000,$$

where  $V_{AF}$  is the expected value to F of asserting its claim against T. The expected value of F's claim is -\$15,000. Because the expected value of the claim is less than the cost of asserting the claim, it would be irrational for F to file the suit. If F files the suit, it can expect to lose the entire \$15,000 it spends at trial. In this instance, because F stands to lose money by bringing the suit, the suit is said to have a "negative expected value."<sup>145</sup> Because F does not expect to be awarded any damages in the event that this claim proceeds to trial,<sup>146</sup> the only way for this claim to have a positive value is for F to reach a settlement with T before trial.<sup>147</sup>

---

145. Lucian Arye Bebchuk, *A New Theory Concerning the Credibility and Success of Threats to Sue*, 25 J. LEGAL STUD. 1, 1 (1996).

146. In this hypothetical, both party's belief about the chance of prevailing at trial and the expected judgment are low. However, even if just one of these variables is low, that can be sufficient to preclude any positive expected value of the suit.

147. Although it might seem irrational for a defendant to ever settle with a plaintiff who brings a negative expected value suit, there are several instances when this might occur. Professors Rosenberg and Shavell suggest that a defendant may choose to settle a suit brought by a plaintiff who would not proceed to trial if the defendant would be forced to expend great legal costs before the plaintiff is required to make any such expenditure. David Rosenberg & Steven Shavell, *A Model in Which Suits Are Brought for Their Nuisance Value*, 5 INT'L REV. L. & ECON. 3, 3 (1985). Another model, described by Professor Bebchuk, suggests that a plaintiff with a negative expected value suit may have a credible threat to proceed to trial when litigation costs are incurred incrementally, instead of all at once. Bebchuk, *supra* note 145, at 6-9. It is unlikely though, as will be shown below, that a SLAPP filer would be willing to settle a case before trial because SLAPP filers intend to draw the process out as long as possible to make the situation as burdensome as possible to the target. A SLAPP filer is unlikely to agree to a settlement unless it is on very strict terms. George W. Pring & Penelope Canan, "Strategic Lawsuits Against Public Participation" ("SLAPPs"): *An Introduction for Bench, Bar and Bystanders*, 12 U. BRIDGEPORT L. REV. 937, 951 (1992).

If the assumptions and parameters of this hypothetical are reasonable, then the classic model of litigation analysis would suggest that SLAPPs would never, or at least rarely, get filed. When the party who can assert a claim believes there is little or no chance of prevailing at trial, the only way for the suit to have value is from the possibility of obtaining a settlement.<sup>148</sup> Extracting a settlement, however, is not the intent of a SLAPP filer,<sup>149</sup> so that is an insufficient reason to explain the existence of these suits.

*c. Revised SLAPP Model*

Unlike legitimate lawsuits, which are intended to use the legal system to achieve a legal end, SLAPPs are filed with a different motivation. While most plaintiffs bring a suit with the goal of winning a legal judgment validating some right, a SLAPP filer is unconcerned with the legal result of the suit. This is why the classic litigation model does not explain these cases: a SLAPP filer is motivated by factors not found inside the courtroom or the four corners of the complaint. In the SLAPP hypothetical, F is not concerned with whether it was actually defamed or if it can prove that T tortiously interfered with its prospective advantage. F is concerned with whether the city approves the rezoning required to proceed with F's development project. F is simply using the legal system as a tool to reach its desired result. A model that properly explains the behavior of SLAPP filers must account for this true motivating factor.

Assume that F believes there is a 50 percent chance that the rezoning will be approved now that T has started protesting. Additionally, F believes that if T is burdened with a lawsuit the chance of rezoning being approved will increase to 80 percent, because T will have to divert resources from protesting the rezoning to respond to the lawsuit. F believes that if the rezoning is approved it will profit \$1,000,000 from the project. The cost of bringing the suit is \$5000 and if the case goes to trial F will spend an additional \$15,000 in legal fees. In this situation, the value of F's claim is based on the amount F stands to profit if the rezoning is approved, the impact the suit may have on the likelihood of the rezoning being approved, and the cost to F of obtaining that impact. The value of F's suit is:

$$V_{AF} = ((.8)(1,000,000) - (.5)(1,000,000)) - 15,000$$

$$V_{AF} = 1,000,000 (.8 - .5) - 15,000$$

148. See Rosenberg & Shavell, *supra* note 147, at 3.

149. See Pring & Canan, *supra* note 147, at 951.

$$V_{AF} = 285,000.$$

Because the value of F's suit, \$285,000, is greater than the cost of filing the suit, \$5000, it is rational for F to file its suit.

Unlike under the classic analysis, F's decision to bring the suit under this model looks like a rational decision because the expected benefit from bringing the suit—when it is framed in relation to the true underlying issue—outweighs the cost of bringing the suit. F's valuation of its claim may be abstracted as:

$$V_{AF} = M (\rho_{AS} - \rho_{AP}) - C_{TF}, \quad (3)$$

where  $M$  is the expected profit from the project that requires rezoning,  $\rho_{AS}$  is the probability that the rezoning occurs after the SLAPP has been brought,  $\rho_{AP}$  is the probability the rezoning occurs after the concerned citizens have petitioned the government but before the SLAPP has been filed, and  $C_{TF}$  is the cost of going to trial.

Equation (3) suggests that the greater the impact the SLAPP is likely to have on the target and his or her opposition to the project, the more likely it is that the benefits of filing a SLAPP will outweigh the cost of doing so. If the SLAPP will have a huge impact on the opposition to the proposed development, then  $(\rho_{AS} - \rho_{AP})$  will be very large and it will likely be rational for the filer to bring the suit. If, on the other hand, the suit was to have no impact on the opposition to the development, then  $\rho_{AS} = \rho_{AP}$  and the right side of the equation would equal the filer's cost of going to trial.<sup>150</sup>

## 2. The Decision to Settle or Proceed to Trial

### a. *Classic Model*

After a claim has been initiated, the parties must decide whether to settle or to proceed to trial.<sup>151</sup> A settlement will only be possible if there is

150. Which was the same result obtained from the classic litigation model.

151. This issue of whether a case settles or proceeds to trial is one of the most interesting decisions in the litigation process, and is widely covered in law and economic studies for three primary reasons. First, understanding which cases settle and which cases proceed to trial is very important in light of the American system of establishing legal rules. Rules of decision are determined by appellate opinions, and appellate opinions are possible only after a trial court has made a decision. Thus, our body of case law is composed of cases that fail to settle. Understanding which cases are likely to settle and which cases are likely to make it to trial helps to clarify why our legal doctrines are the way they are, and was the primary motivation behind Professors Priest and Klein's seminal work on this subject. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 1-4 (1984).

at least one possible settlement amount that is mutually beneficial to both parties.<sup>152</sup> Whether this will be possible will depend on how both parties value the prospect of going to trial. For the plaintiff, this valuation is very similar to equation (2) above: the plaintiff's expected value of trial is equal to the probability of the plaintiff receiving a favorable judgment at trial multiplied by the expected amount of that judgment, less the costs of going to trial. Thus, the plaintiff's expected value is captured by the equation:

$$V_{TP} = \rho_{WP}J_P - C_{TP}, \quad (4)$$

where  $V_{TP}$  is the expected value of proceeding to trial for the plaintiff,  $\rho_{WP}$  is the plaintiff's expected chance of prevailing at trial,  $J_P$  is the judgment the plaintiff expects to be awarded if he or she does prevail, and  $C_{TP}$  is the plaintiff's cost of going to trial. Equation (4) also represents the lowest settlement offer the plaintiff would accept.<sup>153</sup> Because the plaintiff values going to trial as  $V_{TP}$ , if the defendant were to make a settlement offer less

---

Second, trials are expensive and risky affairs. A settlement avoids additional attorney's fees associated with proceeding to trial and provides both sides with a certain outcome. If one believes that individuals are risk-averse, then it would seem logical for most cases to settle. In fact, it seems that most cases do. Although the exact figure for the rate of settlement is difficult to determine, it is widely accepted that settlements are far more common than trials. Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 112–13 (2009). Identifying the reasons parties take cases to trial despite the risks can reveal a great deal about the motivations and perceptions of litigants. Additionally, it is also cheaper for society if the parties settle. See generally Steven Shavell, *The Level of Litigation: Private Versus Social Optimality of Suit and of Settlement*, 19 INT'L REV. L. & ECON. 99 (1999) (arguing that parties to litigation do not consider the social costs of litigating when making their legal decisions). By understanding why settlements occur can help guide the creation of legal rules that make settlement more attractive to litigants. For example, Federal Rule of Civil Procedure 68 allows a defendant to recover a proportion of costs when a plaintiff rejects a settlement offer but obtains a less-favorable judgment at trial. FED. R. CIV. P. 68(d). Several states have similar rules designed to incentivize settlements. *E.g.*, CAL. CIV. PROC. CODE § 998 (West 2012).

Third, unlike the decision to bring suit or to spend money at trial, the decision of whether to settle involves the perspectives of both parties. Understanding how each party's perspective affects its willingness to settle can illustrate the effects of asymmetric information throughout the trial procedure. The decision of whether to settle also involves strategic interactions between the parties in the form of bargaining.

152. SHAVELL, *supra* note 131, at 402 (“if the plaintiff's minimum acceptable amount is less than the defendant's maximum acceptable amount, a mutually beneficial settlement is possible”). This Note, and most of the sources cited herein, focus merely on whether a settlement is possible given the beliefs of the parties. Understanding whether a settlement will actually occur is beyond the scope of this paper. For more information on that aspect of the process, see for example Robert Cooter, Stephen Marks & Robert H. Mnookin, *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982).

153. Priest & Klein, *supra* note 151, at 12.

than  $V_{TP}$ , the plaintiff would be better off rejecting the settlement and proceeding to trial.<sup>154</sup>

In deciding whether to settle, the defendant must make a similar calculation. The defendant's expected value of the suit is equal to the defendant's estimation of the plaintiff's chance of prevailing at trial multiplied by the expected damage award the plaintiff would receive if the defendant is found liable, plus the defendant's trial costs. The defendant's expected value of going to trial is:

$$V_{TD} = \rho_{WD}J_D + C_{TD}, \quad (5)$$

where  $V_{TD}$  is the expected value of proceeding to trial for the defendant,  $\rho_{WD}$  is the defendant's expected chance of losing at trial,  $J_D$  is the judgment the defendant expects to pay if he or she does not prevail, and  $C_{TD}$  is the defendant's cost of going to trial.<sup>155</sup> Equation (5) also represents the largest settlement demand the defendant would accept.<sup>156</sup> Because the defendant expects going to trial to cost  $V_{TD}$ , if the plaintiff made a settlement demand greater than  $V_{TD}$  then the defendant would be better off rejecting the demand and proceeding to trial.

Because  $V_{TP}$  represents the lowest settlement a plaintiff will accept and  $V_{TD}$  represents the largest settlement offer a defendant would pay, a settlement is possible only when  $V_{TP}$  is less than  $V_{TD}$ . Equations (4) and (5) can be combined as such:

$$\begin{aligned} V_{TP} &< V_{TD}, \\ \rho_{WP}J_P - C_{TP} &< \rho_{WD}J_D + C_{TD}, \\ \rho_{WP}J_P - \rho_{WD}J_D &< C_{TD} + C_{TP}. \end{aligned} \quad (6)$$

Equation (6) suggests that the likelihood of a settlement is not dependent on either party's individual belief about the outcome of trial, but on the difference between the two parties' beliefs.<sup>157</sup> If the plaintiff and defendant have the same belief about the likely judgment at trial, then the left-hand

154. This is assuming, as does this Note, that the parties are risk-neutral. As mentioned above, risk-aversion could lead a party to accept a settlement offer that is less than the party's expected value of proceeding to trial. For more on the effect of risk aversion and settlement decisions, see John P. Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279, 280–81 (1973).

155. The trial costs are added to the defendant's expected value of the case because they represent an amount the defendant will have to pay in addition to the judgment. The plaintiff's costs are subtracted from the expected value of the case because those costs will detract from whatever judgment the plaintiff receives.

156. Priest & Klein, *supra* note 151, at 12.

157. SHAVELL, *supra* note 131, at 403.

side of equation (6) simplifies to  $J(\rho_{WP} - \rho_{WD})$ . In that case, the smaller the difference in the parties' beliefs about the likelihood of the plaintiff prevailing at trial, the smaller the value of  $\rho_{WP} - \rho_{WD}$  will be, the smaller the left-hand side of equation (6) will be, and the more likely a settlement will be possible. If the plaintiff and the defendant have the same belief about the plaintiff's chance of succeeding at trial, the left-hand side of equation (6) simplifies to  $\rho_W(J_P - J_D)$  and, again, a settlement is more likely to be possible when the two parties' estimations of the likely judgment are closer.<sup>158</sup>

*b. Applying the Model*

Once P, the plaintiff in the legitimate lawsuit hypothetical, has filed her suit, P and D have the option of settling the case or proceeding to trial. The possibility of settlement will depend on each party's beliefs about the likely outcome of a trial. A settlement will be possible if P's expected value of going to trial is less than D's expected value of going to trial. Using the figures from the hypothetical, P's expected value of going to trial can be computed as:

$$V_{TP} = (.7)(15,000) - 4000$$

$$V_{TP} = 6500,$$

and D's expected value is:

$$V_{TD} = (.5)(15,000) + 4000$$

$$V_{TD} = 11,500.$$

Because D's expected value of litigation is greater than P's, a mutually beneficial settlement could be reached: any settlement where D pays P more than \$6500, but less than \$11,500, would be appealing to both parties because that outcome would be better than the outcome either party expects from proceeding to trial.

Similarly, in the SLAPP hypothetical, a settlement should be viable if F's value of proceeding to trial is less than T's. Because F does not believe it has any chance of prevailing at trial, the value of the suit to F is equal to its litigation costs. On the other hand, because T does not know that F's claim is meritless, T values the claim like a regular defendant. The facts of the SLAPP hypothetical suggest that a settlement should be possible because F's expected value of going to trial is:

---

158. If the plaintiff and defendant have the same beliefs about the plaintiff's chance of success and the likely judgment, the left-hand side of equation (6) equals zero.

$$V_{TF} = (.0)(0) - 15,000$$

$$V_{TF} = -15,000,$$

and T's expected value is:

$$V_{TT} = (.5)(500,000) + 15,000$$

$$V_{TT} = 265,000.$$

Because the filer's claim is worth  $-\$15,000$ , any positive settlement that is less than  $\$265,000$  should be mutually beneficial to both F and T.

Equation (6) makes it clear that when the plaintiff in a case has a pessimistic outlook of the case—either regarding the likelihood of prevailing at trial or the likely judgment that would be awarded—a mutually beneficial settlement will almost always be possible. Because it is common in SLAPPs that the filer does not expect to win the case,<sup>159</sup> it seems likely that almost any SLAPP would present the possibility for a settlement between the parties. But settling the case is not consistent with the filer's objectives for bringing the SLAPP.<sup>160</sup> Even though law and economics would suggest that both parties could be made significantly better off by agreeing on a settlement, this rarely ever happens in the SLAPP context.<sup>161</sup>

*c. Revised SLAPP Model*

Under the classic model, the determination of whether a mutually beneficial settlement is available to the parties depends on each party's perceived value of going to trial. When this is framed in terms of the likely judgment, it appears that the SLAPP filer would prefer any settlement offer to the prospect of going to trial. If, however, the decision is based on F's valuation of the effect the trial will have on the likely success of its rezoning request, then the failure to settle makes more sense. With this in mind, F's true valuation of proceeding to trial should be the same as described in (3). There are two differences between equation (3) and the classic model valuation of a claim. First, equation (3) adjusts the filer's value of going to trial by replacing the value of the expected outcome at trial with the expected outcome the filer will realize when the target is chilled by the SLAPP. Second, equation (3) eliminates the value of settling

---

159. See Braun, *supra* note 17, at 970.

160. It is not out of the question for SLAPP filers to offer settlements. These settlement offers, however, often look to impose egregious limitations on the target's speech and petitioning activity. Pring & Canan, *supra* note 147, at 951.

161. See *id.*

because SLAPP filers do not intend to settle. Because of this, the filer's valuation of its case at the initial stage is the same as it is in the pre-trial stage.

From the perspective of the SLAPP target, the valuation looks the same as it does in the classic model because the target does not have the same extrinsic concerns that the filer does, and instead views the situation as a legitimate lawsuit.<sup>162</sup> When the filer's value of litigation,  $V_{TF}$ , is greater than the target's value of litigation,  $V_{TT}$ , no settlement is possible—that is, there is no settlement offer a rational target could make that would be acceptable to a rational target, and vice versa.

By filling in the figures from the hypothetical, it appears that there is no mutually beneficial settlement the parties could agree on. F's expected value of proceeding to trial is:

$$V_{TF} = ((.8)(1,000,000) - (.5)(1,000,000)) - 15,000$$

$$V_{TF} = 285,000,$$

and T's expected value is:

$$V_{TT} = (.5)(500,000) + 15,000$$

$$V_{TT} = 265,000.$$

Because what the filer expects to gain by proceeding to trial is greater than what the target expects to lose by proceeding to trial, there is no amount the parties could agree on that would make both of them better off by settling. Accordingly, a settlement is not possible.

### 3. The Decision to Spend on Litigation

#### *a. Classic Model*

As a case proceeds toward trial, the parties must decide upon and execute a litigation strategy. This strategy will be composed of many decisions regarding whether to take certain actions. In deciding whether to make a legal maneuver, a party must consider the cost of taking the particular action and what effect taking that action will have on the expected outcome of the litigation. A rational party can be expected to spend on litigation so long as the value from taking an additional legal

---

162. One can envision a more complex model in which the target balances the costs of litigation against the value of participation and achieving the cause he or she is petitioning for, but that is beyond the scope of this Note.

maneuver exceeds the cost of make the maneuver.<sup>163</sup> The benefit of a legal maneuver will depend on how the maneuver affects the party's chance of prevailing at trial and the size of the judgment the party expects.<sup>164</sup> A legal move may alter a party's chance of receiving a favorable judgment, the size of the expected judgment, or both. Accordingly, the value of taking a particular legal action can be expressed as:

$$V_M = \rho_{W2}J_2 - \rho_{W1}J_1, \quad (7)$$

where  $V_M$  is the expected value from taking the action,  $\rho_{W2}$  and  $J_2$  are the expected chance of winning and the expected judgment after taking the maneuver in question, respectively, and  $\rho_{W1}$  and  $J_1$  are the values of those variables before taking the maneuver.<sup>165</sup>

*b. Applying the Model*

In the legitimate lawsuit between P and D, assume that P believes that she could argue that D should be liable for her injuries under a theory of premises liability, in addition to the negligence claim she is already bringing. P believes it will cost an additional \$1000 to advance this second theory and, if she does, she believes it will increase her chance of prevailing at trial from 70 percent to 80 percent. P will choose to advance this theory so long as the cost of doing so is outweighed by the perceived benefit of doing so. The expected benefit can be calculated as:

$$V_{MP} = 15,000 (.8 - .7)$$

$$V_{MP} = 1500.$$

Because the benefit of advancing this second theory is greater than the cost, it would be rational for P to spend to take this action.

However, for F from the SLAPP hypothetical, who does not expect to prevail at trial, all expenditures would seem to have a no expected benefit. Assume F has the option of propounding additional discovery on T. If it would cost F \$1000 in additional attorney's fees to propound the discovery, then the classic model would suggest that F would only take that action if the benefit of taking the action was greater than \$1000. But, because F has

163. SHAVELL, *supra* note 131, at 415.

164. *See id.*

165. It is also possible that a particular act may affect only one variable at a time. If the act affects only the chance of winning, equation (7) can be simplified to  $J(\rho_{W2} - \rho_{W1})$ . If, on the other hand, the legal move affects only the size of the expected judgment, the equation can be written  $\rho_{W}(J_2 - J_1)$ . From the perspective of a defendant, making an expenditure at trial will be rational if it reduces the plaintiff's chances of winning or the size of the potential judgment against the defendant.

no chance of prevailing at trial, either before or after propounding the additionally discovery, the benefit of the action is zero, and it would be irrational for F to do. When there appears to be no possibility of prevailing at trial, any amount spent by F would appear to be irrational.<sup>166</sup>

*c. Revised SLAPP Model*

When the plaintiff has no chance of prevailing at trial, and no amount of spending can change that, then it would appear that any amount of spending would be irrational.<sup>167</sup> However, a SLAPP filer is focused on goals other than prevailing at trial, so it is not necessarily irrational to spend on litigation. A SLAPP achieves its purpose by encumbering the target with the costs of litigation. The SLAPP filer can exploit this by making litigation as burdensome as possible. Spending on litigation can be rational from the perspective of a SLAPP filer if doing so further minimizes the effect of the target's participation. Litigation spending by the filer could have this effect if the legal actions it takes either require the target to divert more resources away from his or her petitioning activities or make litigation so onerous that the target has to drop his or her opposition completely. The decision to spend on litigation in a SLAPP can be expressed as:

$$V_{MF} = M (\rho_{AS2} - \rho_{AS1}), \quad (8)$$

where  $V_{MF}$  is the expected value of the legal move to the filer,  $\rho_{AS1}$  is the likelihood that the filer's land will be rezoned before the additional legal tactic is taken, and  $\rho_{AS2}$  is equal to the likelihood the filer's land will be rezoned after the legal tactic is taken. A positive difference between  $\rho_{AS1}$  and  $\rho_{AS2}$  indicates that the action taken by the filer increased the burden of litigation on the target. The increased burden requires that the target to divert more time and money to the SLAPP and away from the petitioning activity. Because fewer of the target's resources are put toward petitioning, the likelihood of the rezoning being approved increases.

This can be demonstrated by filling in equation (8) with the information from the hypothetical. Assume that F is contemplating making extra discovery requests at a cost of \$1000. The time and money it will take T to respond to the request will divert time and money from her opposition to the rezoning, and will increase the chance of the rezoning getting

---

166. This is in line with beliefs about frivolous suits in general. See Rosenberg & Shavell, *supra* note 147, at 3 (noting that when a plaintiff's case is very weak "he would be unwilling or unlikely actually to pursue his case to trial").

167. *Id.*

approved from 80 percent to 90 percent. It will make sense for F to propound the extra discovery if the burden of responding to the discovery detracts enough from T's opposition efforts to balance the cost of the discovery to F. The value to F of propounding the discovery is:

$$V_{MF} = 1,000,000 (.9 - .8),$$

$$V_{MF} = 100,000.$$

Because F stands to gain more from taking the action than the action costs it would be rational for F to take the action.

### C. SUMMARY AND APPLICATION

While SLAPPs filed by real estate developers are the most common,<sup>168</sup> there are many other situations in which SLAPPs may be used as a tool to silence active citizens. The above model, though framed in the context of a real estate SLAPP, is applicable to all types of SLAPPs.

In all SLAPPs, some future benefit the filer had hoped to capture is jeopardized by the target's petitioning activity. The value of this benefit is represented by M in equations (3) and (8) above. The chance that this benefit is realized by the filer after the target acts is represented by  $\rho_{AP}$  and the chance that the benefit is realized after the SLAPP is filed is represented by  $\rho_{AS}$ . The difference between  $\rho_{AS}$  and  $\rho_{AP}$  is a measure of the chilling effect the SLAPP has on the target. Let  $\Delta\rho_A$  represent the difference between  $\rho_{AS}$  and  $\rho_{AP}$ . When  $\Delta\rho_A$  is large, the SLAPP filer is more likely to realize the future benefit, M, that the SLAPP target has interfered with and filing a SLAPP is more attractive. The chilling effect is likely to be largest when the SLAPP distracts much of the target's time and money away from whatever activity is hurting the filer's chance of realizing M.

For instance, when a target opposes a public works project, such as a dam, the SLAPP filer does not consider the effect this opposition has on its profit.<sup>169</sup> Instead, the filer considers the value to the community of constructing the dam. The value to the community of constructing the dam is represented by M. The decision of whether to file a suit will depend on the value of the dam and the effect the SLAPP has on the likelihood that construction of the dam occurs—or the size of  $\Delta\rho_A$ . Similarly, when a

168. According to a survey by Pring and Canan, SLAPPs of this nature account for as many as one-third of all SLAPPs filed. PRING & CANAN, *supra* note 14, at 30.

169. Assume that the SLAPP is filed by the city considering the project, not by some private contractor who hopes to receive a contract to build the dam. The latter situation is effectively identical to the hypothetical rezoning case used above.

citizen criticizes an elected official, the official places some value on being reelected,  $M$ , and assesses whether to file a SLAPP based on the impact the suit will have on the likelihood of being reelected,  $\Delta\rho_A$ . That criticism may hurt the official's chance of being reelected—an event the official likely places a great value on. If bringing the suit will burden the target enough to have an impact on the possibility of reelection,<sup>170</sup> then filing a SLAPP may be a rational decision.

Another common situation is when a SLAPP is filed in response to a formal complaint filed by a citizen against a public official.<sup>171</sup> When a citizen files a complaint against a public official, police officer, or teacher, that complaint may decrease the probability of a future benefit, such as the official being reelected, the officer receiving a promotion, or the teacher receiving tenure. These future benefits can be ascribed some value,  $M$ . The complaint lodged by the citizen will likely decrease the chance of the SLAPP filer receiving that benefit, and bringing the SLAPP may increase the chance of the future benefit being received even after the citizen's action. This change in the likelihood of the future benefit being realized is  $\Delta\rho_A$ . These suits differ only in that there is a chance that the citizen's act may be complete before a SLAPP is filed. When a citizen protests the approval of a project, his or her opposition usually takes place over a period of time leading up to a decision of whether the filer will receive the benefit it desires. In these instances, a SLAPP can be effective because it may diminish the time and money a target can devote to his or her opposition efforts before the decision is made. The efficacy of a SLAPP when a target has already completed the act that damages the filer's chance of receiving a future benefit is less clear. However, a SLAPP may still be effective for several reasons. First, it is possible that filing a formal complaint against the public employee is a multi-step process and that bringing the SLAPP while the target is in the middle of that process may get the target to drop his or her efforts. Second, even if the complaint has been completely submitted before the SLAPP is brought, the filer may be able to leverage the financial burden of the suit to convince the target to retract the complaint. Third, bringing the suit may not have an effect on a target who has submitted a complaint, but it may force other potential complainants to think twice before lodging separate complaints.

---

170. Or, put another way, if filing the SLAPP will decrease the chance the official will not be reelected.

171. See PRING & CANAN, *supra* note 14, at 46. Pring and Canan deem these sorts of SLAPPs, ones filed against private citizens by public officials, the "ultimate SLAPP."

In each of these situations, the SLAPP will be most appealing to a potential filer when  $\Delta\rho_A$  is very large. A SLAPP filer can try to maximize  $\Delta\rho_A$  by making the litigation as burdensome on the target as possible. Conversely, a SLAPP will be the least effective when  $\Delta\rho_A$  is very small.

#### IV. APPLYING THE SLAPP MODEL TO ANTI-SLAPP REMEDIES

With a better understanding of what motivates SLAPP filers, it should be easier to assess how effective various anti-SLAPP protections are and to make suggestions about how these protections can be improved to further combat the detrimental effect of SLAPPs. As described above, a SLAPP will be the least effective when the chilling effect that the SLAPP has on the target,  $\Delta\rho_A$ , is very small. Effective anti-SLAPP remedies will be ones that manage to minimize  $\Delta\rho_A$ .

##### A. ASSESSING ANTI-SLAPP REMEDIES

###### 1. Judicial Doctrines

The proposed SLAPP model suggests that, of the two judicial remedies discussed above, the *Noerr-Pennington* doctrine would be more discouraging to SLAPP filers than the *New York Times* standard. This is because the *Noerr-Pennington* doctrine should do more to decrease the chance of the rezoning being approved after the suit is brought, making  $\Delta\rho_A$  very small. The *Noerr-Pennington* doctrine gives the SLAPP target the initial burden of showing that the activity giving rise to the claim was petitioning activity. However, this burden should be minimal, because the target will have all the relevant information about the activity that gave rise to the claim. Once the target has shown the activity was petitioning activity, the filer has the obligation to show that the petitioning activity was a sham, or the case will be dismissed. While the target could be subjected to discovery requests that seek information regarding her state of mind or true intention for petitioning, there is a very high standard for bringing otherwise protected activity under the sham exception, so it is unlikely that the filer would be successful. Because the *Noerr-Pennington* doctrine allows for the dismissal of a SLAPP with very little time or money expended by the target, the SLAPP is unlikely to detract a great deal from the target's protesting activity and, as a result,  $\Delta\rho_A$  should be very close to zero.<sup>172</sup>

---

172. As noted above, when  $\rho_{AS}$  and  $\rho_{AP}$  are the same—that is, the SLAPP does not decrease the effectiveness of the target's petitioning—there is no chilling effect.

The *New York Times* standard, on the other hand, would seemingly do less to reduce  $\Delta\rho_A$ . Initially, the *New York Times* standard requires the target to prove that the filer should be treated as a public figure. Because most SLAPP filers are not technically public figures, proving that they should be treated as such could require a great deal of time and money devoted to discovery, research, and legal work. Even if the target is successful in convincing the court to treat the filer as a public figure, this just means that the filer is subject to a higher burden of proof for its claim.<sup>173</sup> This higher burden of proof likely justifies the filer to subject the target to more discovery and likely requires more legal arguments at trial. Though the higher burden of proof means the filer is less likely to prevail, equation (3) shows that the likelihood of success at trial does not factor into the target's decision of whether to bring the claim.

The SLAPP model suggests that neither judicial remedy is likely to have a great impact on the decision to settle or on the decision to spend on litigation. Both doctrines would seem to decrease a filer's chance of winning at trial but, because SLAPP filers are not concerned with prevailing at trial, their likelihood of doing so does not affect their decisions regarding the SLAPP. As for the decision to spend on litigation, while the *Noerr-Pennington* doctrine would lower  $\Delta\rho_A$  initially, that would not affect how  $\Delta\rho_A$  would change when the target is made to respond to additional legal actions the filer takes at trial. This suggests that remedies that focus solely on judicial aspects of the SLAPP—like the burden of proof at trial—are unlikely to be very helpful to SLAPP targets and may even make the situation worse.

## 2. Statutory Provisions

The various statutory remedies are likely to have differing effects on the parties' decisions in a SLAPP. The remedial effect of the special motions that these statutes provide for will depend on which party is given the initial burden of proof. If the initial burden is on the SLAPP target to show that the claim arose from protected activities, then this is likely to lower  $\Delta\rho_A$  more than motions that put the initial burden on the filer to prove that the act was not protected. Similar to the judicial remedies discussed above, when the burden is placed on the filer to make a showing regarding the target's conduct, the filer will have to conduct discovery on

---

173. Specifically, the filer will have to prove that the target acted with “‘actual malice’—that is, with knowledge that [the statement he or she made] was false or with reckless disregard of whether it was false or not.” *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

the subject, which could become costly for the target, thus increasing  $\Delta\rho_A$ . When the burden is initially put on the target, however, this will be less taxing because the information needed to prove that the activity was protected will already be in the target's possession, and  $\Delta\rho_A$  will be much smaller.

Additionally, the statutes that stay discovery and provide for an expedited hearing for the special motion are also likely to reduce  $\Delta\rho_A$ . When discovery is stayed, this will likely lower the financial burden the target faces while the SLAPP is pending. When motions are heard on an expedited basis, this shortens the pendency of the SLAPP, also alleviating some of the burden on the target and allowing the target to divert fewer resources from the protesting activities.

The damage provisions of these statutes should also have a varying effect on the viability of SLAPPs. Awarding attorney's costs and fees when a special motion is granted would seem to reduce the value of trial for the filer in equation (3) by subtracting  $C_{TT}$  from the filer's expected value of proceeding to trial. How much of an effect this has will depend on the value of the target's costs. Awarding costs and fees to a target who prevails on her motion can also help decrease  $\Delta\rho_A$  by recompensing the target for the money spent on his or her defense. The effectiveness of this is questionable though, because the target still has to spend the money in the first place, and that will divert from the petitioning even if the target is eventually repaid. Statutes that allow for an award of actual or punitive damages can factor into the filer's decision to file a SLAPP. When damage awards for the target are a possibility, this should reduce the filer's value of bringing its claim and of proceeding to trial. If the likelihood of being assessed damages and the likely size of the damages are great enough, this could be sufficient to deter the filer from bringing a SLAPP if the possibility of damages eliminates any other potential value the suit may have. It is also possible, however, that these damages provisions could increase  $\Delta\rho_A$ , thus increasing the value of the suit to the filer. When damages are awarded only after the target makes a showing that the suit was brought solely to harass, punish, or inhibit petitioning activities, then the target could be required to divert more time and money from his or her petitioning activities to make the requisite showing and actually receive the damages. This would seem to have the effect of increasing  $\Delta\rho_A$ , similar to when the filer burdens the target with extra legal actions.

Finally, several statutes allow for the state attorney general or some other government agency to intervene on behalf of the SLAPP target to

defend against the SLAPP. Depending on the extent of the intervention, this could reduce  $\Delta\rho_A$  to zero, thus nullifying the chilling effect the SLAPP would have on the target. This sort of intervention would seem to be the death knell for a SLAPP because, if the target is not involved in defending the suit, the SLAPP cannot have the desired chilling effect on the petitioning activity.

### 3. Legal Options

Based on the SLAPP model, it appears that the legal options, or SLAPP Backs, are similar to the statutory provisions allowing for damages. These remedies can impact the filer's decision to bring a SLAPP by forcing it to consider the possibility of being assessed damages as a result of bringing a frivolous suit. Like above, the impact this will have will depend on the probability of damages being assessed, the likely size of the damages, and the additional time and money the SLAPP target will need to expend in order to be awarded the damages. When the likelihood and size of the damages are great, these legal options have their strongest deterrent power. If the SLAPP Back requires the target to devote a great deal of time and money to the additional litigation, then these suits could have the effect of increasing  $\Delta\rho_A$  in the same way as an effective SLAPP. The impact and extent of the chilling effect will depend on the time and money the target must devote to pursue the SLAPP Back; the easier it is for the target to bring the suit, the more likely these suits will serve as an effective deterrent of SLAPPs.

## B. IMPROVING ANTI-SLAPP REMEDIES

### 1. Effective Handling of SLAPPs

As the SLAPP model and the above analysis suggests, the main factor that affects the viability of a SLAPP and, consequently, the effectiveness of anti-SLAPP protections, is the difference between the chance that the filer realizes the future benefit it seeks after bringing the suit and the chance the filer realizes the future benefit it seeks after the target's petitioning activity but before the suit. This variable,  $\Delta\rho_A$ , will be large when the SLAPP diverts a great deal of the target's time and money away from protesting. On the other hand, when the SLAPP can be disposed of with minimal resources expended by the target, then a SLAPP is less likely to be a viable tool for the filer.

An effective SLAPP protection must first cover a wide range of petitioning activity. As a threshold matter, if a SLAPP protection protects only a limited scope of petitioning activity, then it will be hamstrung in its

effectiveness. Second, the best SLAPP protections will provide for a special motion to dismiss the claim. For maximum efficiency, the motion will be heard on an expedited basis and discovery will be stayed during consideration of the motion. To minimize the drain of the target's resources, the initial burden of proof should be put on the target to show that his or her activity was protected petitioning activity. This may be a very easy task if there is a statute that enumerates specific protected activities.<sup>174</sup> Once the target has shown that the activity was petitioning activity, the filer should be given a chance to show that its case has merit. To make this possible, the court should allow some discovery to be conducted by the filer, though it should be limited in scope to a certain number of interrogatories or requests.<sup>175</sup> Because the filer will have limited information at its disposal, the burden the filer must meet to make this showing should be lower than a usual motion. If the filer can show that its case has the required amount of merit, then the court should deny the special motion to dismiss. If the filer cannot make this showing, the motion should be granted. Once the court has decided the motion, either party should have the right to appeal an unfavorable ruling on the motion on an expedited basis.

If the motion is granted, a SLAPP target should automatically be awarded costs, fees, and actual damages. Granting these without requiring another showing by the target would minimize the negative effect a SLAPP has on the target's ability to continue the petitioning activity. Additionally, there should be a cause of action that allows the target to seek punitive damages from the filer if it can be shown that the filer brought its case solely to harass or punish the target for the petitioning activity. However, because the motion to dismiss is decided with limited discovery by the filer, the target should not be allowed to use the dismissal of the first claim as evidence of a malicious purpose.<sup>176</sup> By automatically granting costs, fees, and actual damages, the target is made whole, but the target can only

---

174. A statute that enumerates several specific protected petitioning activities will prevent the issue of whether a target's actions were petitioning activity from being disputed by the filer. This, in turn, reduces the target's litigation expenses because he or she does not need to put forth an argument that the activity at issue should be protected.

175. Discovery could also be limited in scope, as opposed to quantity, but this could be abused by filers who ask for information that is arguably, or obviously, outside the scope of the limitations just to make the target formally oppose the requests. In either case, there should be an option for the court to loosen these restrictions on a showing of good cause by the SLAPP filer.

176. See, e.g., VT. STAT. ANN. tit. 12, § 1041(f)(2) (2012) ("Neither the court's ruling on the special motion to strike nor the fact that it made such a ruling shall be admissible in evidence at any later stage of the case"); WASH. REV. CODE. § 4.24.525(d) (2012).

obtain punitive damages if he or she decides it is worth the extra time and money it will take to pursue that end.

The last thing an ideal SLAPP protection would provide is the opportunity for the government to intervene on behalf of the SLAPP target. This is, perhaps, the most powerful tool for stopping SLAPPs. If the government takes over, or at least aids in, the target's defense, this could greatly defray the costs the target would otherwise incur and could eliminate the burden imposed by the suit. Because governments have an interest in protecting the rights of their citizens, it is likely that intervening to stop malicious suits that look to punish civic participation would be in the government's best interest.

## 2. Adequate Protection of Filer's Rights

As mentioned above, parties filing lawsuits have rights, too. If anti-SLAPP protections are too powerful there could be chilling in the opposite direction—parties who feel they have been legitimately harmed by some unlawful activity may be hesitant to bring a suit because they fear their claim will be treated as a SLAPP. The protections described above, though, attempt to strike a reasonable balance between the rights of the affected parties.

First, a statute that enumerates specific activities that are protected may also enumerate specific activities that are not protected.<sup>177</sup> This would prevent defendants from abusing the anti-SLAPP protections in situations where plaintiffs have legitimately been harmed. Second, the initial burden is placed on the party looking to dismiss the suit. The party who wants the suit dismissed must show that the activity giving rise to the claim should receive special protection. Third, even if the court rules that the activity was petitioning activity, the party bringing the suit is given an opportunity to show that the claim does in fact have a meritorious basis and is not merely intended to silence the target. Although the protection would require that this be done based on limited evidence, the party opposing the special motion to dismiss would only have to meet a lowered burden of proof to defeat the motion. Fourth, both parties are given an opportunity to have a ruling on the motion appealed on an expedited basis. This should be an added safeguard to counteract the limited discovery allowed for consideration of the motion. Allowing for an expedited appeal also provides some relief in light of the fact that costs, fees, and actual damages

---

177. *E.g.*, CAL. CIV. PROC. CODE § 425.17 (West 2012) (exempting certain types of suits from California's anti-SLAPP motion).

are automatically awarded when the motion is decided. Fifth, by allowing the target to obtain punitive damages only in a separate action, and by not allowing the use of the previously dismissed case as evidence, this lowers the chance that the target will be awarded punitive damages, except in truly egregious cases.

Whether these protections for suit filers are constitutionally sufficient is beyond the scope of this Note. It seems that, if nothing else, they give parties who feel they have been legitimately wronged by someone's petitioning activity some peace of mind that they will not be wrongly punished for asserting their rights without a chance to present their case.

## V. CONCLUSION

In the name of abstraction, classic litigation models focus solely on legal elements: the parties' costs of litigation, the parties' expectations of prevailing at trial, and the parties' estimated judgment. In short, law and economics analysis assumes the parties are using the legal system as a legal means to a legal ends. This ignores the possibility that the parties involved in a lawsuit may have something completely different in mind when they enter a courtroom.

SLAPPs demonstrate one of many possible situations in which the parties to a case see the legal process as a tool for achieving some other goal. Because so much of what is driving the parties in these suits is outside the scope of the classic law and economics models, applying those models can lead to confusing results. In constructing a model to explain the parties' decisions in the SLAPP context, this Note has suggested replacing some of the classic law and economic variables with variables that better reflect the true motivation of SLAPPs—to chill citizens' participation in public discussion. By adjusting classic models to include this chilling effect and the factors that are truly driving SLAPP filers, this Note has attempted to develop a more logical explanation of why SLAPP filers act the way they do and to provide for a better understanding of what should make SLAPP protections the most effective.