RECIEL 19 (1) 2010. ISSN 0962 8797

The Public Participation Act: A Comprehensive Model Approach to End Strategic Lawsuits Against Public Participation in the USA

Samantha Brown and Mark Goldowitz

Commentators have documented the disturbing use of the courtroom to silence those who speak out on important issues. Too often, parties resort to meritless lawsuits in response to another's free expression or communication with the government. These lawsuits are called SLAPPs, or Strategic Lawsuits Against Public Participation. In the USA, they have emerged as a significant threat to the rights of expression and petition guaranteed in the First Amendment to the US Constitution. A majority of the US States have passed 'anti-SLAPP laws', but there is no uniform protection. The model legislation outlined in this paper is intended to guide those who seek uniform, comprehensive protection against SLAPPs.

INTRODUCTION

Over the past several decades, a particular abuse of the justice system has developed that poses a serious threat to free expression and petition. Strategic Lawsuits Against Public Participation (SLAPPs) are meritless lawsuits that some individuals and businesses use as weapons against those who speak out on public issues or petition their government.

When confronted with speech that threatens their interests, these individuals and businesses have found that even meritless lawsuits are a very effective way to silence such petitioning and speech activity. SLAPPs divert attention away from the public issue and into the private courtroom. They require enormous resources to defend against, particularly when the US discovery process is used as an abusive tool to harass and exhaust the resources of a defendant. Finally, SLAPPs frequently result in settlements contingent upon the defendant's retraction or silence, accomplishing by private litigation a ban on speech as effective as any government gag. New York Judge Nicolas Colabella has said of SLAPPs: 'short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined'.[1]

Twenty-nine US States have 'anti-SLAPP' protection, reflecting a growing awareness about the use of the courts as a weapon. However, the level of protection each State affords its litigants varies widely across jurisdictions. For example, Pennsylvania's law applies only to speech made about the environment to a particular government body.[2] Florida has two laws, one of which protects only against lawsuits brought by a homeowner's association.[3] On the other hand, Illinois' anti-SLAPP law provides full immunity to any exercise of First Amendment rights of petition, speech or assembly, the last of which is not typically mentioned in anti-SLAPP laws.[4] Twenty-one States lack specific protection, and there is no federal anti-SLAPP law.[5] The enormous disparity in anti-SLAPP protection leads to forum shopping by plaintiffs seeking favourable jurisdictions. Further, the disparity in protection magnifies the chilling effect of SLAPPs, because even if one lives and speaks in a State with an anti-SLAPP law, the threat of being sued in a State without protection – or in Federal court – may cause self-censorship. An overarching goal of the model legislation is therefore to establish uniform protection against SLAPPs, across all US States.

A second goal of the model legislation is to provide protection at the federal level. Some question why a particular set of specific protections is necessary to address the problem of SLAPPs at that level, when existing federal law such as the Noerr-Pennington doctrine provides some protection for petitioning activity,[6] and Rule 11 of the Federal Rules of Civil Procedure

[1] *Matter of Gordon v. Marrone*, [1991] 151 Misc. 2d 164, 169 (Sup. Ct., Westchester County 1991) (per Justice Colabella).

[2] Participation in Environmental Law or Regulation, 27 Pa. Cons. Stat. Section 7707 and Sections 8301–8303 (2009).

[3] Right of Owners to Peaceably Assemble; Display of Flag; SLAPP Suits Prohibited, Fla. Stat. Section 720.304 (2009).

[4] Citizen Participation Act (2007), 735 Ill. Comp. Stat. 110/1–110/99 (2007).

[5] The US Congress is currently considering anti-SLAPP legislation for the first time. See the Citizen Participation Act, H.R. 4364, introduced by Rep. Steven Cohen (D-TN) on 16 December 2009. The Citizen Participation Act was informed by this model legislation and tailored to the federal system in the USA. The 111th US Congress will consider the legislation when it resumes in 2010.

[6] The Noerr-Pennington doctrine developed from a pair of cases that confer immunity from antitrust laws for activities in furtherance of First Amendment-protected petitioning. See *Eastern Railroad Presidents*

allows a court to impose sanctions on a party and/or attorney who brings a frivolous lawsuit.[7] However, under the US system, each party pays its own costs, and the system is generally designed to encourage a plaintiff to see wrongs redressed. For example, federal rules require only a 'short and plain'[8] statement to state a claim, pleadings may generally be amended,[9] and extensive discovery, wherein each party may secure information from the other, is typical in most litigation. Plaintiffs are accorded broad deference, so it is difficult to secure early dismissal of a suit, for either failure to state a claim or judgment as a matter of law.[10] Sanctions are very sparingly applied to only the most egregiously frivolous suits. But because SLAPPs do their work through the *process* of litigation itself, stopping the process and allowing parties to retain counsel through a fee-shifting mechanism is the most effective way to combat the lawsuits. Existing civil procedures designed to facilitate lawsuits are inadequate to filter suits that cause damage by their mere existence, regardless of which party ultimately prevails.

The model Public Participation Act provides two tiers of protection. In the first place, it encourages civic engagement by providing absolute immunity for those who petition the government. This includes reporting a crime, testifying to Congress about infirmities in a public company's finances, or reporting environmental regulatory violations to the Environmental Protection Agency. The immunity provided by the model legislation would be a substantive federal right that could be raised as a defence against any civil claim. This is in line with basic democratic principles. The very nature of a representative democracy demands that citizens engage in the process of government, sharing information and guiding governance. The First Amendment mentions 'petitioning', separately in its list of protected activities, and petitioning activity is one of the oldest rights in the Anglo-American tradition.

In addition to immunity for petitioning activity, the model law provides uniform *procedural* protections against SLAPPs. SLAPPs are defined as meritless lawsuits brought against those who petition the government or speak out on issues of public interest. The Bill creates uniform protection by allowing any SLAPP defendant to remove his or her case to Federal court. Once in Federal court, the defendant may invoke protective procedures. The defendant may move to quickly dismiss a SLAPP, by making a showing that the lawsuit arose from a protected activity. The plaintiff must then provide sufficient legal and factual proof of its case to demonstrate minimum merit.[11] While the motion is pending, the court would stay all discovery procedures, except in limited circumstances. If the plaintiff fails to make a showing of minimum merit, the defendant may recover the fees, costs and damages incurred in defending against the SLAPP.

In addition to allowing a defendant to recover fees and costs, the model law also provides a federal cause of action for a defendant to recover other damages – such as time lost from work, loss of insurance coverage, damage to reputation and emotional distress. This provision recognizes that fighting a lawsuit does not just empty one's purse; it drains emotional reserves, imperils employment and saps the desire of the individual to engage in public discourse. By allowing defendants who successfully have a SLAPP dismissed to recover these damages, the model law seeks to make the defendant whole. The provision also serves as an additional deterrent to bringing SLAPPs in the first place, by raising the potential costs of doing so.

In a system wherein each party bears its own costs, the single most important component of anti-SLAPP legislation, and of this model law, is the ability of a defendant to recover attorney's fees. The ability to recoup fees allows a defendant who otherwise could not afford an attorney to secure one on a contingency basis. Very nearly as important is the special set of procedures that allows a defendant to more quickly than usual dispose of a SLAPP, and to avoid the costly and time-consuming discovery process. These provisions make up the bones of anti-SLAPP legislation.

However, this model law goes further, providing additional protections for a defendant, such as making

Conference v. Noerr Motor Freight, Inc., [1961] 365 US 127, 138, and *United Mine Workers v. Pennington*, [1965] 381 US 657, 669–70.

[7] Rule 11 requires attorneys and unrepresented parties to certify that pleadings are based in fact, not brought solely to harass, intimidate or waste time, and are based on existing law or a non-frivolous argument for changing the law. The Rule allows a court to impose monetary and non-monetary sanctions for violations. See Federal Rules of Civil Procedure, Fed R. Civ. P. 11.

[8] See Federal Rules of Civil Procedure, n. 7 above, Rule 8. See also *Conley v. Gibson*, [1957] 355 US 41, 47–48.

[9] Ibid., Rule 15.

[10] Until recently, a court could not dismiss a lawsuit for failure to state a claim unless, taking all the plaintiff's allegations as true, 'no set of facts' could be envisioned that would entitle the plaintiff to relief. See *Conley v. Gibson*, ibid., at 47–48. But see also *Bell Atlantic Corp. v. Twombly*, [2007] 550 U.S. 544, 570 (indicating that in some cases, to survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face). See also *Ashcroft v. Iqbal*, [2009] 566 US 129 S.Ct. 1937 (conclusory bare assertions that amount to nothing more than a formulaic recitation of the elements of the claim are not entitled to the assumption of truth).

[11] The court is expected to determine legal merit by applying State law to State claims, as it would under diversity jurisdiction. See *Erie Railroad Co. v. Tompkins*, [1938] 304 US 64. Federal courts sitting in diversity jurisdiction must apply State law to State claims. In the USA, State courts have plenary jurisdiction, but Congress allows Federal courts only limited jurisdiction. Federal courts may hear any cases involving federal claims, or they may hear cases involving parties from different States, which is called diversity jurisdiction.

SLAPP awards non-dischargeable in bankruptcy proceedings, and allowing the defendant to recover damages, such as for time lost from work and emotional distress. By making a fee and damage award under the law non-dischargeable in bankruptcy, defendants are insured against the possibility of a SLAPP plaintiff avoiding the debt by declaring bankruptcy. As an added measure to disincentivize the bringing of SLAPPs, the model legislation incorporates a non-deductibility provision. Typically, businesses may deduct from their taxes litigation as business expenses. If a business or corporation can calculate the costs of prosecuting a SLAPP – including even a fee award to another party – as a mere cost of doing business, then the efficacy of the law is undermined. But a business that must bear the brunt of the lawsuit's expense, without any tax subsidy, may recalculate the potential costs of bringing a SLAPP, and may refrain from bringing the SLAPP at all.

Professors George Pring and Penelope Canan began exploring the concept of 'SLAPPs' nearly three decades ago, but it still remains relatively a niche issue in the USA. Only a few scholars and institutions have focused fully on broad-scale SLAPP reform efforts. Pring and Canan, in their seminal 1992 work, *SLAPPed: Getting Sued for Speaking Out*,[12] included a model Bill. The Society for Professional Journalists (SPJ) also has an excellent piece of model legislation, accompanied by tips and commentary on passing anti-SLAPP laws. However, both of these excellent resources, upon which this model legislation is heavily based, are geared more toward addressing SLAPPs at the US State level. The Public Participation Act, by contrast, is specifically designed as a piece of *federal* legislation, to close loopholes in protection and offer uniform coverage for the expression of First Amendment rights. In addition to the Pring and Canan and SPJ model Bills, the Public Participation Act draws from the best of the State anti-SLAPP protections and academic and professional commentary.[13] Sources, policy arguments and discussion points are presented as footnotes throughout. The remainder of this paper sets out the provisions of a model anti-SLAPP law: The Public Participation Act.

PUBLIC PARTICIPATION ACT: MODEL LEGISLATION

A BILL

To protect the constitutional rights of petition and free speech by creating immunity from, and procedures to identify, dismiss and remedy, Strategic Lawsuits Against Public Participation (SLAPPs).

Section 1. Short Title and Table of Contents.

This Act may be cited as the Public Participation Act of 2010.

Section 2. Findings and Purposes[14]

(a) FINDINGS. The Congress finds and declares that:
  (1) the framers of the Constitution, recognizing participation in government and freedom of speech as inalienable rights essential to the survival of democracy, secured their protection through the First Amendment to the US Constitution;[15]
  (2) it is in the public interest for individuals, organizations and businesses to participate in matters of public concern and provide information to public entities and other citizens on public issues;[16]
  (3) some parties are bringing meritless civil lawsuits[17] against those who speak out or

[12] G. Pring and P. Canan, *SLAPPs: Getting Sued for Speaking Out* (Temple University Press, 1996).

[13] The model law draws in particular on the California anti-SLAPP law: Claim Arising from Person's Exercise of Constitutional Right of Petition or Free Speech — Special Motion to Strike (Cal. Civ. Proc. Code, Section 425.26).

[14] Findings and purposes 'present supporting arguments for the law's need and materially assist court interpretation of the legislative intent'. See G. Pring and P. Canan, n. 12 above, at 205 (comment regarding Section 2 of Model Bill). See also The Society of Professional Journalists (SPJ) and Baker and Hostetler LLP, A Uniform Act Limiting Strategic Litigation Against Public Participation: Getting it Passed (SPJ, 2004), at 4, found at <http://www.spj.org/pdf/antislapp.pdf> (SPJ Model Bill).

[15] This language is adapted from Pring and Canan's Model Anti-SLAPP Bill, in G. Pring and P. Canan, n. 12 above, at 201, Section 2(a)(1) (Pring and Canan Model Bill), with the addition of a reference to free speech.

[16] This language is adapted from SPJ Model Bill, n. 14 above, at 3, Section 1(a)(4).

[17] This language is adapted from Pring and Canan Model Bill, n. 15 above, at 201–02, Section 2(a)(3). Pring and Canan's Model Bill also has a finding that the number of SLAPPs had increased significantly in the 30 years preceding the publishing of their book in 1996, at

petition the government[18] which put defendants to great expense, harassment, and interruption of their productive activities;[19]

(4) the threat of litigation costs, destruction of one's business, loss of one's home, and other personal losses from groundless lawsuits significantly chills public participation in government, public issues, and in voluntary service;[20]

(5) SLAPPs are an abuse of the judicial process that waste judicial resources and clog the already over-burdened court dockets;[21]

(6) while some courts and State legislatures have recognized and discouraged SLAPPs, protection against SLAPPs has not been uniform or comprehensive;[22]

(7) present tax laws subsidize SLAPP plaintiffs, providing incentives to file and maintain SLAPPs;[23]

(8) some SLAPP targets are deprived of the relief to which they are entitled because current bankruptcy laws allow for the discharge of fees, costs and damages awarded against a party for maintaining a SLAPP.[24]

(b) PURPOSES. The purposes of this Act are:

(1) to protect and encourage citizen participation in government and expression on matters of public interest in furtherance of the First Amendment to the US Constitution;[25]

(2) to strike a balance between the rights of persons to file lawsuits and to trial by jury and the rights of persons to petition the government and to engage in speech about matters of public interest;[26]

(3) to establish an efficient, uniform and comprehensive method for speedy adjudication of SLAPPs;[27]

(4) to provide attorney's fees,[28] costs, and additional relief to prevailing SLAPP defendants where appropriate;

(5) to amend tax law to remove the current subsidies for the filing and maintenance of SLAPPs;[29]

(6) to amend bankruptcy law so that prevailing SLAPP defendants can receive their court-ordered relief.

Section 3. Immunity for Petition Activity[30]

Any act in furtherance of the constitutional right to petition the government, including seeking relief, influencing action, informing, communicating, or otherwise participating in the processes of government, shall be immune from civil liability, regardless of intent or purpose, except where not aimed at procuring a

201–02, Section 2(a)(5), which was based upon data the authors collected in the early 1980s. See G.W. Pring and P. Canan, n. 12 above, at xi.

[18] See Pring and Canan Model Bill, ibid., at 201–02, Section 2 (a)(3). The premise is also found in SPJ Model Bill, n. 14 above, at 3, Section 1(a)(1); and California Anti-Slapp Project, HALT (Help Abolish Legal Tyranny) *et al.*, The Citizen Participation in Government Act of 1995 (HALT, undated), at Section 3(a)(3), found at <http://www.casp.net/statutes/halt.html> (1995 Draft). See also J. Braun, 'Increasing SLAPP Protection: Unburdening the Right of Petition in California', 32 *U.C. Davis L. Rev.* (1998–1999) 965, 969–71.

[19] This language is adapted from Pring and Canan Model Bill, ibid., at 202, Section 2(a)(4).

[20] The language of this provision is adapted from Pring and Canan Model Bill, ibid., at 202, Section 2(a)(7). See also J. DeMint and J. D. Woodard, *Why We Whisper* (Rowman and Littlefield Publishers, Inc. 2008), at 183 (discussing the negative economic consequences of SLAPPs). This provision is in part a placeholder for more specific findings showing a nexus between SLAPPs and inter-State commerce, so that Congress might point to the Commerce Clause as one basis for this law. The Commerce Clause gives Congress the power to regulate commerce with foreign nations, among the States, and with the Indian tribes. See US Constitution, Article 1, Section 8, cl. 3. Congress may only enact laws pursuant to its enumerated powers and recent US Supreme Court decisions have constricted the ability of Congress to regulate State court procedures under the Commerce power. In order for Congress to regulate under the Commerce power, it must show detailed findings of a piece of legislation's relationship to interstate commerce, and such a relationship may not be overly tenuous or based on but–for causation. See *Lopez v. US of America*, [1995] 514 U.S. 538. See also *US of America v. Morrison*, [2000] 529 US 598 (striking down the Violence Against Women Act as exceeding Congress's power under the Commerce Clause because the numerous findings regarding the serious impact of gender-motivated violence relied on a but–for causal chain of attenuated effects upon interstate commerce, which is an insufficient nexus to interstate commerce).

[21] Pring and Canan note the 'major contribution to lawsuit reform' that SLAPP procedures would provide. See Pring and Canan Model Bill, ibid., at 202, Section 2 (a)(6).

[22] This language is adopted from ibid., at 202, Section 2(a)(8).

[23] The language of this finding is adapted from J. Braun, n. 18 above, at 1070.

[24] See K. Tate, 'California's Anti-SLAPP Legislation: A Summary of and Commentary on its Operation and Scope', 33 *Loy. L.A. L. Rev.* (April 2000), 800, for a brief discussion on the injustice perpetrated by bankruptcy laws in the SLAPP context.

[25] This language is adapted from Pring and Canan Model Bill, n. 15 above, at 202, Section 2(b)(1).

[26] Similar language is found at ibid., at 202, Section 2(b)(2); SPJ Model Bill, n. 14 above, at 4, Section 1(b)(1); and 1995 Draft, n. 18 above, Section 3(b)(2).

[27] See SPJ Model Bill, ibid., at 4, Section 1(b)(2).

[28] A standard component of anti-SLAPP laws is allowing successful defendants to recover attorney's fees and costs.

[29] The concept of amending the tax structure is adopted from J. Braun, n. 18 above, at 1070.

[30] This immunity language is adapted from the Pring and Canan Model Bill, n. 15 above, at 203, Section 3, and 1995 Draft, n. 18 above, Section 4. This language is inspired by the description of immunized petition activity as enunciated by Justice Scalia for a unanimous court in *City of Columbia v. Omni Outdoor Advertising, Inc.*, [1991] 499 US 365, 380 (any activity that is 'genuinely aimed at procuring favourable government action', regardless of motive, is immune from anti-trust liability; only 'sham' activity, in which the participation in the governmental process is itself 'employed as a means of imposing cost and delay', is not immunized). Ibid., at 382. Like the Pring and Canan Model Bill, this Bill omits the words 'genuinely' and 'favourable' to secure more protection for petitioning activity. This immunity grant is also drafted with the assumption that statements must have some reasonable connection to the goal of the petitioning activity to be protected. See, e.g., *Silberg v. Anderson*, [1990] 50 Cal. 3d 205, 212.

government or electoral outcome. This immunity shall not apply to any claim brought under Section 8 of this Act or arising from a claim dismissed pursuant to any state anti-SLAPP law.

Section 4. Scope of Procedural Protections[31]

This Act creates a method for dismissing any claim for relief, however characterized, that arises from any act or alleged act[32] in furtherance of the right of petition or free speech. Such a claim shall be known as a Strategic Lawsuit Against Public Participation (SLAPP). As used in this Act, 'an act in furtherance of the right of petition or free speech' includes:[33]

(a) any written or oral statement or writing made or submitted before a legislative, executive, or judicial body, or any other official proceeding authorized by law;
(b) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive or judicial body, or any other official proceeding authorized by law;
(c) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; or
(d) any other conduct in furtherance of the exercise of the constitutional right of petition,[34] or the constitutional right of free speech in connection with a public issue or an issue of public interest.

Section 5. Special Motion to Dismiss

(a) A party may file a special motion to dismiss any claim against the defendant arising from an act in furtherance of the right of petition or free speech within 60 days after service of the claim.
(b) A defendant filing a special motion to dismiss under this Act has the initial burden of making a *prima facie* showing that the claim against which the motion is made arises from an act in furtherance of the right of petition or free speech. If the moving party meets this burden, the burden shifts to the plaintiff to demonstrate that the claim is both legally sufficient and supported by a sufficient *prima facie* showing of facts to sustain a favourable judgment. If the defendant's burden is met and the plaintiff's is not, the court shall grant the special motion to dismiss. Otherwise, the court shall deny it.[35]
(c) Upon the filing of a special motion to dismiss, discovery proceedings in the action shall be stayed.[36] The stay of discovery shall remain in effect until notice of entry of an order denying the motion.
    (1) When a special motion to dismiss under this Section is brought on the grounds that the claim is legally deficient, and no evidence is introduced to support the motion, the court shall not allow discovery.[37]
    (2) Notwithstanding the stay imposed by this section, for a special motion other than that described in subsection (c)(1), the court, on noticed motion and for good cause shown,[38]

[31] Language in this Section is adopted from the California anti-SLAPP statute, Cal. Civ. Proc. Code, n. 13 above, Section 425.16(e).

[32] SLAPPs are often brought on the basis of alleged activity that has not actually occurred. See, e.g., *Briggs v. Eden Council for Hope and Opportunity,* [1999] 19 Cal. 4th 1106, 1114–15 (applying the California anti-SLAPP law to defendant's 'alleged' acts).

[33] The word 'includes' 'implies that other acts which are not mentioned are also protected under the statute'. See *Averill v. Superior Court*, [1996] 42 Cal. App. 4th 1170, 1175 (quoting *Ornelas v. Randolph,* [1993] 4 Cal. 4th 1095, 1101).

[34] Petition and petition-related activity need not be connected to an issue of public interest to be protected by the anti-SLAPP law; only statements made in public fora and other conduct implicating speech rights must have a nexus with an issue of public interest to be protected under the statute.

[35] The language in this burden-shifting scheme follows judicial interpretation of the California anti-SLAPP law. The text of the California law requires a plaintiff to demonstrate a probability of prevailing on the merits to avoid dismissal. See Cal. Civ. Proc. Code, n. 13 above, Section 425.16(b)(1). California courts have interpreted this as requiring the plaintiff to 'demonstrate that the claim is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favourable judgment if the evidence submitted by the plaintiff is credited'. See *Wilson v. Parker, Covert and Chidester*, [2002] 28 Cal. 4th 811, 821 (internal citations omitted). See also, Special Motion to Strike, Or. Rev. Stat. Sections 31.150. Some jurisdictions require a plaintiff to show a higher probability of prevailing to survive an anti-SLAPP motion. See, e.g., Protection of Citizens to Participate in Government, Minn. Stat. Section 554.02(3) and Citizen Participation in Government Act, Guam Code Ann. tit. 7 Section 17106(e) (both providing that plaintiff must produce clear and convincing evidence that acts from which claim arose are not immunized by statute); Citizen Participation Act, 795 Ill. Comp. Stat. 110/20 (c) (plaintiff must produce clear and convincing evidence that acts from which claim arose are not immunized or in furtherance of the acts immunized by the statute).

[36] This provision is intended to apply to all discovery requests, including those made by third parties.

[37] This provision furthers the general goal of the proposed legislation to ensure that SLAPP defendants spend as few resources as possible defending against a SLAPP. If a special motion to dismiss is brought solely on the basis that the plaintiff has failed to state a legally sufficient claim, this provision will spare the defendant the time and expense of defending against a motion for discovery, when discovery is irrelevant to the determination of the special motion to dismiss.

[38] This language is closely patterned after Cal. Civ. Proc. Code, n. 13 above, Section 425.16(g). California courts have defined 'good cause' in the anti-SLAPP context 'to require a showing that the specified discovery is necessary for the plaintiff to oppose the motion and is tailored to that end'. See *Britts v. Superior Court*, [1996] 145 Cal. App. 4th 1112, 1125 (internal citations omitted). Illinois, Citizen Participation Act, 795 Ill. Comp. Stat. 110/20(b); Louisiana, Special Motion to Strike, La. Code. Civ. Proc. Ann. Art. 9713(D), Massachusetts, Strategic Litigation Against Public Participation; Special Motion to Dismiss, Mass. Gen. Laws Ann. ch. 231 Section 59H; Minnesota, Protection of Citizens to Participate in Government, Minn. Stat. Sections 554.01–554.05 subd. 2(1); Oregon, Special Motion to Strike. Or. Rev. Stat. Sections 31.152(2); Rhode Island, Limits on Strategic Litigation Against Public Participation, R.I. Gen. Laws

may order that specified discovery be conducted. Discovery shall be disfavored.[39] If the court permits discovery, it shall limit it both as to means and subject to that which is necessary and designed to uncover evidence directly related to the special motion to dismiss, most expeditiously and at least expense to the party from whom discovery is sought. To this end, the court shall consider the following factors before permitting discovery: whether the information sought goes to the heart of a claim or defense at issue in the special motion; whether the party seeking discovery has made a showing on every element for which discovery is not needed; what efforts the party seeking discovery has made to secure information prior to the filing of the action; whether the information is uniquely held by the party from whom discovery is sought; and whether the party seeking discovery has exhausted all other sources of obtaining the needed information.[40]

(d) In ruling upon a special motion to dismiss, the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.[41] The defendant may, but need not, offer evidence of the plaintiff's motive to intimidate, harass, silence or otherwise interfere with the defendant's rights of petition or free speech.[42]

(e) Upon the filing of a special motion to dismiss, leave to amend the complaint shall not be granted.[43]

(f) The court must hold a hearing on the special motion to dismiss as soon as possible, and no later than 45 days after the filing of the motion.[44] The court must rule on the motion no later than 30 days after the hearing.[45] The court shall explain the reasons for its grant or denial of the motion in a statement for the record.

(g) The defendant shall have a right of immediate appeal from a trial court order denying a special motion to dismiss in whole or in part, or from a trial court failure to rule within 30 days after the hearing, or from a trial court failure to rule within 75 days after the filing of the special motion to dismiss.[46]

(h) If the court determines that the plaintiff has established a *prima facie* case on the underlying claim, that determination shall not be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.[47]

Sections 9–33–2(b); and Utah, Citizen Participation in Government Act, Utah Code. Ann. Section 78B–6–1404 (1)(a) also provide for a discovery stay, but allow the plaintiff to move for discovery.

[39] The word 'disfavoured' here means that a court shall allow it only sparingly, and only when the conditions above specified are met. This is to ensure that the US liberal discovery rules are not used to abuse defendants in SLAPPs.

[40] This language is adapted from Judicial Council of California, Legislative Report: Special Motions to Strike Strategic Lawsuits Against Public Participation (SLAPPs). See K. Tate, n. 24 above, at 882 (Pring and Canan Recommendations).

[41] This sentence is modelled after the California law, Cal. Civ. Proc. Code, n. 13 above, Section 425.16(b)(2), which requires the judge to consider affidavits in addition to the pleadings. Most State anti-SLAPP laws provide that courts should look to pleadings and affidavits in ruling on a special motion.

[42] This sentence avoids the result of courts either requiring SLAPP defendants to prove, or prohibiting them from proving, the plaintiff's malice or ill-intent in bringing the SLAPP. The California Supreme Court has held that the California anti-SLAPP law does not require a defendant to prove intent to chill. See, e.g., *Equilon Enterprises v. Consumer Cause, Inc.,* [2002] 29 Cal. 4th 53, 58–67, but has also held that such evidence is 'not relevant'; and see *City of Cotati v. Cashman*, [2002] 29 Cal. 4th 69, 74. A defendant may introduce such evidence because it can be relevant to show, from the context of a SLAPP, that the claim arises from an act in furtherance of the right of petition or free speech. However, intent is not the ultimate question of a SLAPP – the ultimate question is whether important speech or petitioning is chilled by a meritless lawsuit, regardless of the intent of the plaintiff.

[43] California courts have interpreted the California anti-SLAPP law, which does not contain express language like that in subsection (f), to prohibit amendments to the claim after the anti-SLAPP motion has been filed. See, e.g., *Salma v. Capon*, [2008] 161 Cal. App. 4th 1275, 1294. This sentence adopts this approach, because 'allowing amendment of the claim . . . would completely undermine the statute by providing the pleader a ready escape from . . . [the] quick dismissal remedy'. Ibid. (internal citations omitted).

[44] For clarity, mandating a specific timeframe is preferable to designating anti-SLAPP hearings as 'priority' or 'expedited'. California provides that a hearing must be scheduled no later than 30 days after the filing of the anti-SLAPP motion, unless docket conditions of the court require a later hearing. See Cal. Civ. Proc. Code, n. 13 above, Section 425.16(f).

[45] For clarity, this Bill provides a specific timeframe in which the court must rule on a motion: within 45 days after a hearing on said motion. Some State laws provide similar timeframes. See, e.g., Citizen Participation Act, 735 Ill. Comp. Stat. 110/15 (2007), (Illinois courts must hold hearing and issue decision within 90 days of filing of motion).

[46] This language is patterned after SPJ Model Bill, n. 14 above, at 15, Section 5(c). The SPJ Model Bill, 1995 Draft, n. 18 above, at Section 6(a)(2), and the Pring and Canan Model Bill, n. 15 above, at 203, Section 5(a)(2), all provide for 'expedited' appeal upon the denial of a special motion to dismiss or failure of the trial court to rule within the provided timeframe. To avoid burdening Federal courts unnecessarily, this Bill does not require courts to 'expedite' appeals, but the use of the word 'immediate' provides for an interlocutory appeal. California courts have held that a failure to rule on an anti-SLAPP motion 'is the equivalent of a denial and is appealable'. See *White v. Lieberman*, [2002] 103 Cal. App. 4th 210, 220 (court's ruling that anti-SLAPP motion was moot constituted denial and was appealable).

[47] See Cal. Civ. Proc. Code, n. 13 above, Section 425.16(b)(3). This amended language of California's anti-SLAPP law reversed in part *Wilson v. Parker, Covert and Chidester*, n. 35 above, at 821. That case held that the trial court's denial of an anti-SLAPP motion, although later overturned on appeal, nonetheless established probable cause for the plaintiff's claim, thereby defeating the defendant's subsequent malicious prosecution claim.

(i) Any government body to which the defendant's act was directed, or the Attorney-General of the USA or of any State, may intervene to defend or otherwise support the defendant in the claim arising from an act in furtherance of the right of petition or free speech.[48]

Section 6. Special Motion to Quash[49]

(a) A person whose personally identifying information is sought in connection with an action pending in Federal court arising from an act in furtherance of the right of petition or free speech may make a special motion to quash that discovery order,[50] request or subpoena.
(b) The person bringing the motion to quash under this section must first make a *prima facie* showing that the underlying claim arises from an act in furtherance of the right of free speech or petition. If this burden is not met, the special motion to quash shall be denied. If this burden is met, the burden shifts to the plaintiff in the underlying action to demonstrate that the underlying claim is both legally sufficient and supported by a sufficient *prima facie* showing of facts to sustain a favourable judgment. If the plaintiff meets this burden, the special motion to quash shall be denied. If the plaintiff fails to meet the burden, the special motion to quash shall be granted.

Section 7. Fees, Costs and Sanctions

(a) The court shall award a defendant who prevails on a special motion to dismiss or a moving party who prevails on a special motion to quash:
  (1) costs of litigation, including reasonable attorney's fees, incurred in connection with the motion and in otherwise defending against the SLAPP, and including a motion for attorney's fees or activity to collect said fees;[51] and
  (2) such additional sanctions, under Rule 11 of the Federal Rules of Civil Procedure, upon the plaintiff, its attorneys or law firms, as the court determines will be sufficient to deter repetition of such conduct and comparable conduct by others similarly situated.[52]
(b) If a claim is dismissed voluntarily or on the court's motion, after a special motion to dismiss has been filed but prior to the hearing on that motion, the court shall, upon the defendant's request, determine which party has prevailed on the special motion to dismiss for purposes of determining the defendant's entitlement to fees and costs.[53]
(c) If the court finds that the special motion to dismiss or special motion to quash is frivolous or is solely intended to cause unnecessary delay, the court may award reasonable attorney's fees and costs to the plaintiff.[54]
(d) A government entity may not recover fees pursuant to this section.[55]

[48] See SPJ Model Bill, n. 14 above, at 12, Section 4(e).
[49] This language is adapted from Cal. Civ. Proc. Code, n. 13 above, Sections 1987.1–2, and creates a high standard of proof to obtain the identity of anonymous speakers. The Supreme Court has recognized that anonymous speech is part of an 'honourable tradition of advocacy and dissent'. See *McIntyre v. Ohio Elections Comm'n*, [1995] 514 US 334, 357. Other State courts have also imposed a high burden of proof on a plaintiff seeking the identity of an anonymous speaker. See, e.g., *Doe v. Cahill*, [2005] 884 A.2d 451, 460 (Del. Supr. 2005) (plaintiff seeking the identity of an anonymous Internet poster must support his underlying claim with facts sufficient to defeat a summary judgment motion); *Dendrite Int'l, Inc. v. Doe No. 3*, [2001] 775 A.2d 756, 760–61 (N.J. App. 2001) (plaintiff must make an effort to notify the anonymous poster that he or she is the subject of a subpoena or application for a disclosure order, and give a reasonable time for the poster to file opposition; must set forth the specific statements that are alleged to be actionable; and must produce sufficient evidence to state a *prima facie* cause of action. If this showing is made, then the court balances the strength of that *prima facie* case against the defendant's First Amendment right to speak anonymously); and *Krinsky v. Doe 6*, [2008] 159 Cal. App. 4th 1154, 1171–72 (plaintiff is not entitled to prevail on the motion to quash unless he or she makes a *prima facie* showing in support of at least one cause of action).
[50] Protection of Subscriber Privacy, 47 USC Section 551(c)(2) requires a court order to a cable internet service provider (ISP) and notice to the ISP subscriber before an ISP can disclose the identity of its subscriber to a third party.
[51] Many State anti-SLAPP laws, the SPJ Model Bill, n. 14 above, at 17, Section 6(a)(1), Pring and Canan Model Bill, n. 15 above, at 204, Section 5(g)(1), and the 1995 Draft, n. 18 above, Section 6(g), provide for attorney fees for a successful SLAPP defendant. Fee-shifting is an important part of effective SLAPP legislation because it aids defendants in retaining counsel and deters plaintiffs from filing SLAPPs.
[52] This provision is adapted from Pring and Canan Model Bill, ibid., at 204, Section 5(g)(2).
[53] Because many SLAPPs are dismissed before the hearing of the special motion, this Bill adopts the approach in *Liu v. Moore*, [1999] 69 Cal. App. 4th 745, 751, that when the claim is dismissed prior to a hearing on the motion, the court must determine the prevailing party on a motion to dismiss. Determinations of costs, fees and sanctions are 'collateral matters' over which a court does not lose jurisdiction if the underlying case is dismissed. See *Cooter and Gell v. Hartmarx*, [1990] 496 US 384, 395.
[54] This provision adopts the approach in *Christianberg Garment Co. v. EEOC*, [1978] 434 US 412, 419–21, interpreting the fee-shifting statute Proceedings in Vindication of Civil Rights, 42 USC Section 1988. The Court held that a civil rights plaintiff (analogous to a defendant in a SLAPP) should be awarded attorney's fees upon prevailing 'in all but special circumstances', ibid., at 417, and a court may award fees to a prevailing defendant (analogous to a plaintiff in a SLAPP) only if the suit was 'frivolous, unreasonable or without foundation, even though not brought in subjective bad faith'. Ibid., at 421.
[55] Exempting the government from seeking fee or damage awards protects plaintiffs who bring suit against the government in good faith from the punishment of paying fee awards. The bar on recovering

Section 8. Cause of Action (SLAPPback)[56]

(a) CAUSE OF ACTION. A defendant who has successfully moved for dismissal, pursuant to Section 5 of this Act, of a claim arising from an act in furtherance of the right of petition or free speech, and who is damaged by the filing or maintenance of such claim, may bring an action known as a SLAPPback against any person responsible for the filing or maintenance of said claim.[57]

(b) REMEDIES.[58]
  (1) DAMAGES. A person who brings an action under this section shall be entitled to recover actual and compensatory damages, including damages for emotional distress.
  (2) TREBLE DAMAGES. If, in an action brought under subsection (a), the court or jury determines by a preponderance of the evidence that the person or entity bringing the claim at issue intentionally attempted to suppress the rights of petition or free speech, the court may award treble damages.[59]
  (3) COSTS AND FEES. A person who brings an action pursuant to this section and who prevails in said action shall be entitled to recover costs and attorney's fees incurred in the action.[60]

(c) STATUTE OF LIMITATIONS.[61] For purposes of Section 1658(a) of Title 28,[62] USA Code, the cause of action under subsection (a) accrues on the date on which the claim from which the cause of action arose is finally terminated.

(d) Nothing in this section shall be construed to affect or preclude the right of any party to any recovery otherwise authorized by common law, statute, or rule.[63]

Section 9. Elimination of Tax Subsidies for Filing and Maintaining SLAPPs[64]

Title 26, Section 162 of the USA Code[65] shall be amended by adding at the end the following:

fees or damages is in line with the idea that suits against the government are absolutely privileged against malicious prosecution claims. See, e.g., *City of Long Beach v. Bozek*, [1982] 31 Cal.3d 527, 538–39 (the bringing of suits against the government is absolutely privileged and cannot form the basis for imposition of civil liability for malicious prosecution).

[56] The SLAPPback cause of action plays a critical role in deterring underlying SLAPPs. For a discussion, see G. Pring and P. Canan, n. 12, at 168–87. 11 States allow a SLAPP defendant to seek damages, either in a separate claim or as a cross-claim or counterclaim in the original proceeding: Arkansas, Citizen Participation in Government Act (Ark. Code Ann. Sections16–63–506 (2005)); Delaware, Actions Involving Public Petition and Participation (Del. Code Ann. Tit. 10, Section 8138); Florida, Strategic Lawsuits Against Public Participation (SLAPP) Suits By Government Entities Prohibited. (Fla. Stat. Section 768.295(5) and Right of Owners to Peaceably Assemble; Display of Flag; SLAPP Suits Prohibited, (Fla. Stat. Section 720.304 (4)(C)); Hawaii, Citizen Participation in Government (Haw. Rev. Stat. Section 634F–2(8)(A); Minnesota, Protection of Citizens to Participate in Government (Minn. Stat. Sections 554.04 Subd. (2)(A)); Nebraska, Defendant in Action Involving Public Petition and Participation (Neb. Rev. Stat. Sections 25-21, 243(1)); Nevada, Liability of Persons who Engage in Right to Petition (Nev. Rev. Stat. Section 41.670); New York, Actions Involving Public Petition and Participation (N.Y. C.P.L.R. 70–A), Rhode Island, Limits on Strategic Litigation Against Public Participation (R.I. Gen. Laws Sections 9–33–2(D)); Utah, Citizen Participation in Government Act (Utah Code Ann. Section 78B–6–1405); and Washington, Communication to Government Agency or Self-Regulatory Organization – Immunity from Civil Liability (Wash. Rev. Code Section 4.24.510). California does not have a SLAPPback cause of action, but exempts SLAPPbacks brought in the form of malicious prosecution claims from certain anti-SLAPP provisions. See Cal. Civ. Proc. Code, n. 13 above, Section 425.18. This Bill (at Section 11(b)) also exempts SLAPPbacks from anti-SLAPP procedures.

[57] This language is modified from Hawaii's anti-SLAPP law, Citizen Participation in Government, Haw. Rev. Stat. Section 634F–2(9) and the Free Speech Protection Act of 2008, S. 2977, 110th Cong. Section 3(a) (2008).

[58] This Section does not include a provision for injunctive relief, but such a provision may be desirable. See, e.g., Free Speech Protection Act, ibid., Section 3(c)(1).

[59] This language is adapted from the Free Speech Protection Act, ibid., Section 3(d). Some State SLAPPback provisions allow for punitive damages. See, e.g., Delaware (Actions Involving Public Petition and Participation, Del. Code Ann. tit. 10, Section 8138) and New York's (Actions Involving Public Petition and Participation, N.Y. C.P.L.R. 70–a) anti-SLAPP laws, both of which allow recovery of punitive damages upon a demonstration that underlying action was commenced or continued for the sole purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights. See also Nevada's anti-SLAPP law, Liability of Persons who Engage in Right to Petition, (Nev. Rev. Stat. Section 41.670(2)), which allows a SLAPP defendant to bring a separate action to recover compensatory and punitive damages, attorney's fees and the costs of bringing the separate action.

[60] This model Bill includes a provision for attorney's fees and costs to facilitate the filing of SLAPPbacks. Congress has endorsed facilitating suits to protect rights in the civil rights context. See, e.g., *Christianberg Garment Co. v. EEOC*, n. 54 above, at 420.

[61] This language is adapted from the Free Speech Protection Act of 2008, n. 57 above, Section 3(g).

[62] Time Limitations on the Commencement of Civil Actions Arising under Acts of Congress, 28 USC Section 1658(a) provides: 'Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this Section may not be commenced later than 4 years after the cause of action accrues'.

[63] This language is patterned after Haw. Rev. Stat. Section 634F–(3).

[64] The language in this Section is adapted from J. Braun, n. 18 above, at 1056, who stresses the inequities created by the tax code in the SLAPP context, ibid., at 1070. SLAPP filers are often corporations, which can claim the costs of litigation as tax deductions, while SLAPP targets are frequently individuals or non-profit organizations, with no such option. The perverse result is that SLAPP filers are subsidized for wasting judicial and social resources. This section should create significant deterrence to corporate or business SLAPP filers while resulting in a net gain in income tax receipts for the Federal government. Braun also suggests allowing SLAPP defendants to deduct the costs of the defence from their income tax, Ibid., at 1056, but given current economic conditions, such a deduction is omitted here.

[65] Trade or Business Expenses, 26 USC Section 162(a) allows deductions from income tax for 'ordinary and necessary expenses' incurred by any trade or business. 26 USC Sections 162(b)–(q)

(r) No deduction shall be allowed for any expense, disbursement or other expenditure if made:
  (1) for the payment of any fees, costs, damages or sanctions ordered or awarded pursuant to Sections 7 or 8 of the Public Participation Act, or pursuant to any State anti-SLAPP law as defined in Section 12(e) of said Act;
  (2) for the preparation, filing or maintenance of any claim dismissed by the court pursuant to Section 5 of the Public Participation Act or to any State anti-SLAPP law as defined in Section 12(e) of said Act, or any request for discovery quashed pursuant to Section 6 of said Act, and for any related legal activity, including opposition to a special motion to dismiss or special motion to quash, or to proceedings for fees, costs or sanctions, or to collection of those amounts; provided that this section shall not apply to claims dismissed voluntarily or by the court for any other reason.[66] For purposes of this section, dismissed claims finally restored on appeal or by writ shall not be considered dismissed;
  (3) for the unsuccessful defence of any SLAPPback, or any other claim arising from a SLAPP that has been dismissed pursuant to a special motion to dismiss under the Public Participation Act or any State anti-SLAPP law as defined in Section 12(e) of said Act, and for any related legal activity; provided that, if some SLAPPback claims are successfully defended and others are not, this section applies only to those unsuccessfully defended. For purposes of this section, 'unsuccessful defence' does not include settlement, even if such settlement is reduced to judgment.

Section 10. Bankruptcy Non-Dischargability of SLAPP and SLAPPback Awards[67]

Fees, costs or damages awarded against a party by a court for the prosecution of any claim finally dismissed pursuant to this Chapter shall not be dischargeable in bankruptcy under Title 11, Section 1328 or Title 11, Section 523 of the USA Code.

Section 11. Exemptions

(a) Sections 4 to 10 of this Act shall not apply to any claim brought by the Attorney-General, any State Attorney-General, or any district, city or county attorney, acting as a public prosecutor to enforce laws aimed at public protection.[68]
(b) Sections 4 to 7 of this Act shall not apply to any SLAPPback or other claim arising from a claim that has been dismissed pursuant to a special motion to dismiss under this Act or pursuant to any State anti-SLAPP law.[69]
(c) Sections 4 to 10 of this Act shall not apply to any claim brought solely in the public interest or on behalf of the general public if all of the following conditions exist: [70]
  (1) The plaintiff does not seek any relief greater than or different from the relief sought for the general public or a class of which the plaintiff is a member. A claim for attorney's fees, costs, or penalties does not constitute greater or different relief for purposes of this subsection.
  (2) The action, if successful, would enforce an important right affecting the public interest, and would confer a significant benefit, whether pecuniary or non-pecuniary, on the general public or a large class of persons;
  (3) Private enforcement is necessary and places a disproportionate financial burden on the plaintiff in relation to the plaintiff's stake in the matter.
(d) Sections 4 to 10 of this Act shall not apply to any claim for relief brought against a person primarily engaged in the business of selling or leasing goods or services, including insurance,

specify expenses that may not be deducted under Section 162(a). This provision adds Subsection (r) to Section 162.

[66] The language in this subsection applying only to those claims dismissed pursuant to this Act or State law, and the provision in Subsection (r)(3), which states that settlement does not result in an 'unsuccessful defense' of a SLAPPback, will encourage settlement of SLAPPs. Although settlements can sometimes promote the goals of SLAPP filers, e.g., when filers attach 'gag' orders to settlements (see G. Pring and P. Canan, n. 12 above, at 140), on balance, settlement promotes the goals of this legislation by ending SLAPP litigation.

[67] This section addresses a 'significant loophole' in existing State anti-SLAPP legislation. See K. Tate, n. 24 above, at 886 (internal quotations omitted) (discussing the deterrence loophole created by existing bankruptcy laws that allow some SLAPP filers to be 'judgment proof'). This section protects SLAPP defendants who might otherwise be unable to secure the recovery to which they are entitled.

[68] This exemption is adopted from Cal. Civ. Proc. Code, n. 13 above, Section 425.16(d).

[69] This exemption is adopted from a provision in Judicial Council of California, Legislative Report: Special Motions to Strike Strategic Lawsuits Against Public Participation (SLAPPs), at 880, which was unanimously passed by the California Assembly on 9 May 2005, as part of Assembly Bill 1158, 2005–06 Legis. Sess. (Ca. 2005), but later was substantially revised and enacted as Cal. Civ. Proc. Code, ibid., Section 425.18. This exemption means that a SLAPPback defendant may not bring a motion to dismiss a SLAPPback, nor recover fees for defending against one.

[70] Exemption (c) is patterned after the public interest litigation exemption in California's Cal. Civ. Proc. Code, ibid., Section 425.17(b), which amended the State's anti-SLAPP statute in response to a 'disturbing abuse' of the anti-SLAPP statute by large businesses and corporations. See Cal. Civ. Proc. Code, ibid., Section 425.17(a).

securities, or financial instruments, arising from any statement or conduct by that person if both of the following conditions exist:[71]

(1) The statement or conduct consists of representations of fact about that person's or a business competitor's business operations, goods, or services, that is made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services, or the statement or conduct was made in the course of delivering the person's goods or services. [72]

(2) The intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer, or the statement or conduct arose out of or within the context of a regulatory approval process, proceeding, or investigation, notwithstanding that the conduct or statement concerns an important public issue.[73]

(3) This provision shall not apply to a lawyer, doctor, accountant or other professional's activity, where the professional is engaged not in commercial speech, but in legitimate representation of a client or care of a patient.[74]

(e) Denial of a special motion to dismiss on the grounds that the claim is exempt pursuant to this Section is not subject to the appeal provision in Section 5(g) of this Act.[75]

Section 12. Definitions

In this Act:

(a) 'Claim' includes any civil lawsuit, claim, complaint, cause of action, cross-claim, counterclaim, or other judicial pleading or filing requesting relief.[76]

(b) 'Government entity' includes a branch, department, agency, State, or subdivision of a State or other public authority.[77]

(c) 'Personally identifying information' means first and last name or last name only; home or other physical address including temporary shelter or housing and including a street name or ZIP Code; electronic mail address or other online contact information, such as an instant messaging user identifier or a screen name that reveals an individual's electronic mail address; telephone number; social security number; date of birth, with the exception of the year of birth; Internet protocol address or host name that identifies an individual; or any other information, including the first and last names of children and relatives, racial or ethnic background, or religious affiliation, that, in combination with any other non-personally identifying information, would serve to identify any individual.[78]

(d) 'State' includes the District of Columbia, the Commonwealth of Puerto Rico, and any other territory or possession of the USA.

(e) 'State anti-SLAPP law' includes any state legislation or doctrine seeking to protect SLAPP defendants.[79]

Section 13. Construction

This Act shall be liberally construed to effectuate its findings and purposes fully.[80]

Section 14. Relationship to Other Laws

Nothing in this Act shall pre-empt or supersede any state, constitutional, case or common law that provides the equivalent or greater protection for persons engaging in activities in furtherance of their right of petition or free speech.[81]

[71] Exemption (d) is patterned after the commercial speech exemption in Cal. Civ. Proc. Code, ibid., Section 425.17(c).

[72] See Cal. Civ. Proc. Code, n. 13 above, Section 425.17(c)(1).

[73] This language is from Cal. Civ. Proc. Code, ibid., Section 425.17(c)(2), with the deletion of a provision excepting statements made before proceedings held by the California Public Utilities Commission.

[74] This provision is intended to clarify that the section does not apply to attorneys or other professionals who provide an opinion about their or their competitor's services in the course of serving or representing clients, patients or customers. The language as written in the California law, from which is this modelled, is ambiguous: the court in *Taheri Law Group v. Evans*, [2008] 160 Cal. App. 4th 482, 490, found that a literal reading of the California statute 'could arguably be viewed as' pertaining to non-commercial attorney–client communications. Nonetheless, the court found that such a reading was 'inconsistent with the intent of the Legislature', ibid., and therefore held that the 'commercial speech exemption from the anti-SLAPP statute may not be applied to [a] lawyer's activity' where the lawyer is engaged not in commercial speech, but in legitimate representation of a client. Ibid., at 492.

[75] This provision is based on Cal. Civ. Proc. Code, n. 13 above, Section 425.17(e), and is intended to prevent abuse of the anti-SLAPP law, by not forcing a plaintiff to undergo the immediate appeal provisions of the anti-SLAPP statute if a court finds the lawsuit is exempted from the protections of the statute.

[76] This definition is adopted from Pring and Canan Model Bill, n. 15 above, at 204, Section 6(d).

[77] This definition is adopted from ibid., Section 6(a).

[78] This language is adapted from Cal. Civ. Proc. Code, n. 13 above, Section 1798.79.8(b).

[79] For the text of US State anti-SLAPP laws and related background information, see 'Your State's Free Speech Protection' (Public Participation Project, undated), found at <www.anti-slapp.org/?q=node/12>.

[80] This concept is from Cal. Civ. Proc. Code, n. 13 above, Section 425.16(a); see also Pring and Canan Model Bill, n. 15 above, at 204, Section 7(b), 1995 Draft, n. 18 above, Section 8(b), *and* SPJ Model Bill, n. 14 above, at 20, Section 8.

[81] This provision is patterned after the 1995 Draft, ibid., Section 8(d), and ensures that strong State anti-SLAPP laws will not be pre-empted by the federal law. There are many reasons why a party may

CONCLUSION

Representative Steve Cohen introduced the Citizen Participation Act in the US House of Representatives in December 2009. This Bill, H.R. 4364,[82] marks the first time Congress has considered anti-SLAPP legislation. H.R. 4364 is largely drawn from the model legislation outlined above, along with the input of more than seven dozen coalition members and stakeholders. The model law continues to provide background and policy points for members of the Congress, as they consider and debate H.R. 4364. It also serves as a useful guide in other States and countries that are considering anti-SLAPP legislation. Like the US Congress, each of these jurisdictions will have to develop politically feasible protections that address variances in their particular legal landscapes.

Samantha J. Brown heads the Washington, DC, office of the Public Participation Project. She is a graduate of Stanford Law School, where she focused on poverty and civil and criminal rights. She has served as the Public Participation Project's Legislative Director since November 2008.

Mark Goldowitz is Director of the Public Participation Project. He is based in Berkeley, California, where he defends SLAPP victims. He graduated from Harvard Law School in 1972. In 1991, he founded the California Anti-SLAPP Project, in response to SLAPPs against him and his clients. Since that time, in addition to defending SLAPP victims in California, he has worked to pass and strengthen the California anti-SLAPP law.

wish to litigate a SLAPP in State, rather than Federal court, and it is also important to keep State anti-SLAPP laws intact in respect for State sovereignty.

[82] The Citizen Participation Act, H.R. 4364, 111th Cong. (2009).