A Better SLAPP Trap: Washington State's Enhanced Statutory Protection for Targets of "Strategic Lawsuits Against Public Participation"

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I. INTRODUCTION

A group of concerned citizens band together to oppose a powerful developer's plan to build a solid waste disposal facility near a residential area. The citizen group appears at public hearings on the matter, submits letters and reports to relevant federal and state agencies, and publishes letters in the local

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media. The enraged developer then files suit against the citizen group and its individual members alleging, among other things, defamation, intentional interference with business relations, abuse of process, and civil conspiracy. The citizen group asserts a defense based on its constitutional right to petition the government. The tenacious and well-funded developer survives the citizen group's early attempt to dismiss on the pleadings. The developer then assails the citizen group with oppressive discovery, seeking such information as membership lists, meeting minutes, and financial records. Eventually, after years of litigation, the citizen group prevails and recovers statutory costs and attorney fees. Notwithstanding the loss in court, the developer is pleased; it expected to lose going in, but the cost was sustainable. More importantly, the developer achieved an important strategic victory. The exhausted members of the citizen group, fearful of future litigation, will find it difficult to organize and sustain a campaign if a similar issue arises in the future.

The above scenario is typical of a Strategic Lawsuit Against Public Participation ("SLAPP"). A SLAPP is a retaliatory lawsuit filed against public interest groups and individuals whose constitutionally protected use of the political process offends their opponents.[1] SLAPPs rose to prominence in the 1980s in a number of contexts.[2] In the most common type of SLAPP, a private business enterprise sues a public interest group, and all individuals connected with it, under a variety of theories, particularly defamation.[3] The vast majority of such suits fail on the merits, but not before achieving, or at least furthering, the strategic goal of disrupting the public interest activity and placing a chill on the public's future participation in political activity.[4]

A number of states have enacted legislation to deter and combat SLAPPs. Several legal commentators have cited Washington Revised Code sections 4.24.500-.520 as an example of such legislation. Historically, Washington has seen few SLAPPs, but a recent case, *Right-Price Recreation v. Connells Prairie Community Council*,[5] is a classic example. Although neither the Washington State Court of Appeals, nor the Washington Supreme Court interpreted sections 4.24.500-.520 in *Right-Price Recreation*, the procedural history of that case exposed certain weaknesses in the scope of protection a SLAPP target can expect from the Washington statutes. The Washington

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1. GEORGE W. PRING & PENELOPE CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT 8-9 (1996).

2. *See id.* at 3.

3. *See id.* at 6-7.

4. *See id.* at 29.

5. 105 Wash. App. 813, 21 P.3d 1157 (2001), *remanded by* 146 Wash. 2d 370, 46 P.3d 789 (2002) *(Right-Price Recreation I)*. In his capacity as a judicial law clerk for the Washington Court of Appeals, the author had no role in connection with *Right-Price Recreation*.

Supreme Court eventually dismissed the developer's complaint under general principles of defamation law without addressing the weaknesses of sections 4.24.500-.520.[6] While *Right-Price Recreation* was before the Washington Supreme Court, the Washington State Legislature revisited sections 4.24.500-.520 and amended it to provide greater protection from SLAPPs.[7]

The purpose of this Article is to examine former and amended sections 4.24.500-.520, along with statutes from other states, and to determine whether the amended statute offers better protection from SLAPPs. First, this Article will provide a brief historic overview of SLAPPs. Next, this Article will examine judicial and legislative responses to the SLAPP problem. Third, this Article will discuss former sections 4.24.500-.520 and the recorded cases applying it. Finally, this Article will examine the amended statute, assess its probable effectiveness, and recommend further improvements.

II. THE SLAPP PROBLEM

SLAPP litigation has been a problem for some time. In a pioneering series of articles and a subsequent book, Professors Penelope Canan and George W. Pring coined the acronym SLAPP and first alerted the legal community of the problems such actions posed.[8] A few SLAPPs arose as early as the 1960s, followed by a deluge of them in the 1980s.[9]

The identifying characteristics of a SLAPP are: (1) a civil complaint or counterclaim; (2) filed against a target consisting of a nongovernmental entity, its members, and other nongovernmental individuals; (3) in response to the target's communications to government or media; (4) on a subject matter of some public interest.[10]

SLAPPs arise in a wide array of contexts. Occasionally, a governmental entity or employee may file a SLAPP against private individuals critical of the entity or employee.[11] One could also characterize many SLAPPs as reverse

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6. Right-Price Recreation, LLC v. Connells Prairie Cmty. Council 146 Wash. 2d 370, 384, 46 P.3d 789, 796 (2002) (*Right-Price Recreation II*).

7. WASH. REV. CODE § 4.24.510 (2002).

8. *See, e.g.*, PRING & CANAN, *supra* note 1; George W. Pring & Penelope Canan, *"Strategic Lawsuits Against Public Participation" ("SLAPPS"): An Introduction for Bench, Bar and Bystanders*, 12 BRIDGEPORT L. REV. 937, 940 n.3 (1992) (listing the authors' previous SLAPP articles).

9. Pring & Canan, *supra* note 8, at 940 n.5 (listing SLAPP cases).

10. Penelope Canan & George W. Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 LAW & SOC'Y REV. 385, 387 (1988).

11. *See, e.g.*, Sewell v. Brookbank, 581 P.2d 267 (Ariz. Ct. App. 1978) (discussing a libel and slander action a public school teacher filed against parents and students who had presented grievances to the local school board); Kefgen v. Davidson, 617 NW. 2d 351 (Mich.

whistleblower suits. Most SLAPPs, however, occur in the commercial context—businesses frequently file SLAPPs against groups and individuals alleging environmental or consumer protection violations.[12] SLAPPs are particularly common in the land use arena.[13] Developers often file SLAPPs against individuals and public interest entities opposed to a proposed project.[14] Regardless of the filer's status, the common thread running through SLAPPs is the filer's strategic aim of silencing its targets.[15]

A New York court exhibited a particularly clear grasp of the SLAPP issue when it stated:

> SLAPP suits function by forcing the target into the judicial arena where the SLAPP filer foists upon the target the expenses of a defense. The longer the litigation can be stretched out, the more litigation that can be churned, the greater the expense that is inflicted and the closer the SLAPP filer moves to success. The purpose of such gamesmanship ranges from simple retribution for past activism to discouraging future activism. Needless to say, an ultimate disposition in favor of the target often amounts merely to a pyrrhic victory. Those who lack the financial resources and emotional stamina to play out the "game" face the difficult choice of defaulting despite meritorious defenses or being brought to their knees to settle. The ripple effect of such suits in our society is enormous. Persons who have been outspoken on issues of public importance targeted in such suits or who have witnessed such suits will often choose in the future to stay silent. Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined.[16]

In sum, SLAPP litigation is of paramount concern because of its potential chilling effect on the target's constitutional rights to free expression and to petition the government.

Ct. App. 2000) (describing a defamation action a former school superintendent brought against parents of students for communications in connection with school board meetings).

12. *See* PRING & CANAN, *supra* note 1, at xii.

13. *Id.* at 30.

14. *Id.* at 35-36.

15. As is customary in the literature concerning this issue, the author will generally refer to the parties initiating SLAPP litigation as "filers" and those defending against such actions as "targets." *See* Pring & Canan, *supra* note 8, at 942 n.11.

16. Gordon v. Marrone, 590 N.Y.S.2d 649, 656 (1992).

III. SLAPP AND THE FIRST AMENDMENT

A. *Freedom of Expression and Defamation*

The First Amendment to the United States Constitution prohibits Congress from "abridging the freedom of speech, or of the press."[17] These protections were "fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[18] This constitutional guarantee reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[19]

The line of cases arising from *New York Times Co. v. Sullivan*[20] provides a framework for understanding the First Amendment expression issues raised by SLAPP litigation. In *New York Times Co.*, the United States Supreme Court recognized the First Amendment implications of a defamation claim brought by a public official against the publisher of an allegedly defamatory statement regarding official conduct.[21] The Court reasoned that "neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct."[22] The Court feared that public official defamation actions against critics of official policy would compel self-censorship and deter further criticism.[23] Accordingly, the Court held that a publication criticizing a public official in connection with his or her official duties was privileged; thus the official alleging defamation must prove by clear and convincing evidence that the allegedly defamatory statement was made with actual malice.[24]

The Court later clarified the *New York Times Co.* actual malice standard to state that "the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection."[25] In *Curtis Publishing Co. v. Butts*,[26] the Court extended the *New York Times Co.* standard to "public figures" as well as "public officials."[27]

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17. U.S. CONST. amend. I.

18. Roth v. United States, 354 U.S. 476, 484 (1957).

19. New York Times Co. v. Sullivan, 376 U.S. 254, 270-71 (1964) (citing Terminiello v. Chicago, 337 U.S. 1, 4 (1949); De Jonge v. Oregon, 299 U.S. 353, 365 (1937)).

20. *Id.; see also* PRING & CANAN, *supra* note 1, at 22-23.

21. *New York Times Co.*, 376 U.S. at 270-71.

22. *Id.* at 273.

23. *Id.* at 279.

24. *Id.* at 283. Not long afterward, the Court extended the *New York Times Co.* standard to state criminal sanctions imposed for criticism of official conduct of public officials. Garrison v. Louisiana, 379 U.S. 64, 74 (1964).

25. *Garrison*, 379 U.S. at 75.

26. 388 U.S. 130 (1967).

27. *Id.* at 164-65 (Warren, C.J., concurring in result). *Butts* is a plurality opinion

However, in *Gertz v. Robert Welch Inc.*,[28] the United States Supreme Court declined to extend the *New York Times Co.* standard to situations in which the defamed party is a private individual.[29] The Court reasoned that because private individuals lack ready access to the means of communication needed to counteract defamatory messages, they are "more vulnerable to injury, and the state interest in protecting them is correspondingly greater."[30] Accordingly, a trial court may impose liability on the publisher of a message defaming a private individual on a standard less demanding than in *New York Times Co.*[31] Most states have adopted a negligence standard in private figure defamation cases.[32]

Although private figure defamation plaintiffs ordinarily need to show mere negligence to establish prima facie defamation,[33] some defendants may escape liability under certain qualified privileges.[34] Once the defamation defendant establishes that the defamatory communication falls within one of these qualified privileges, the burden falls on the private figure plaintiff to prove that the defendant abused that privilege.[35] Concerned that the lower standard approved in *Gertz* stripped the qualified privileges of their meaning, the drafters of the *Restatement (Second) of Torts* added an actual malice standard consistent with *New York Times Co.* requirements.[36] Washington, along with many other states, requires clear and convincing proof that the defendant abused the qualified privilege.[37] The net effect of a properly invoked qualified privilege is to cloak the defendant with protection similar to that available

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wherein five justices concurring in three separate opinions agreed on applicability of the *New York Times Co.* standard. 388 U.S. at 164-65 (Warren, C.J., concurring), 170 (Black, J., concurring), 172 (Brennan, J., concurring).

28. 418 U.S. 323 (1974).

29. *Id.* at 347-48.

30. *Id.* at 344.

31. *Id.* at 348.

32. *See generally* Rosner v. Field Enter., Inc., 564 N.E.2d 131, 141-42 & n.4 (Ill. App. 1990) (listing majority jurisdictions recognizing negligence standard).

33. *See, e.g.*, Bender v. City of Seattle, 99 Wash. 2d 582, 599, 664 P.2d 492, 503 (1983); Haueter v. Cowles Publ'g Co., 61 Wash. App. 572, 580, 811 P.2d 231, 236 (1991).

34. *See, e.g.*, Moe v. Wise, 97 Wash. App. 950, 957, 989 P.2d 1148, 1154 (1999); RESTATEMENT (SECOND) OF TORTS §§ 593-597 (1977).

35. Lillig v. Becton-Dickinson, 105 Wash. 2d 653, 657-58, 717 P.2d 1371, 1374 (1986).

36. RESTATEMENT (SECOND) OF TORTS § 580*b* cmt. l § 592*a*, at 260; *see Moe*, 97 Wash. App. at 965 n.5, 989 P.2d at 1158 n.5; *see also Gertz*, 418 U.S. 323; *New York Times Co.*, 376 U.S. 254.

37. *Lillig*, 105 Wash. 2d at 658, 717 P.2d at 1374; *Bender*, 99 Wash. 2d at 601, 664 P.2d at 504.

under the *New York Times Co.* standard.[38]

SLAPP filers frequently allege defamation.[39] As will be discussed more fully below, SLAPP targets have had some success defending against such litigation under the *New York Times Co.* standard.[40]

B. *The Petition Clause and the* Noerr/Pennington *Doctrine*

Another aspect of the First Amendment relevant to SLAPP litigation is the Petition Clause. The First Amendment to the United States Constitution prohibits Congress from abridging the right of the people "to petition the Government for a redress of grievances."[41] The right to petition is so fundamental that its origins predate the United States Constitution by more than half a millennium.[42] Regarding the primacy of this right, the United States Supreme Court stated:

> [T]he rights to assemble peaceably and to petition for a redress of grievances are among the most precious of the liberties safeguarded by the Bill of Rights. These rights, moreover, are intimately connected, both in origin and in purpose, with the other First Amendment rights of free speech and free press.[43]

Moreover, in an earlier case the Court reasoned, "It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable."[44] And, as the Colorado Supreme Court aptly noted:

> Citizen access to the institutions of government constitutes one of the foundations upon which our republican form of government is premised.

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38. *See Moe*, 97 Wash. App. at 963, 989 P.2d at 1157 (reasoning that once a qualified privilege is established, private figure plaintiffs must prove abuse by the same standard applicable to public figure plaintiffs).

39. *See, e.g.*, Kajima Eng'g and Constr., Inc. v. City of Los Angeles, 116 Cal. Rptr.2d 187, 192 (2002); Dowling v. Zimmerman, 103 Cal. Rptr.2d 174, 191 (2001).

40. *See, e.g.*, Sierra Club v. Butz, 349 F. Supp. 934, 937 (N. D. Cal. 1972); Right-Price Recreation, LLC v. Connells Prairie Cmty. Council, 146 Wash. 2d 370, 383-84, 46 P.3d 789, 796 (2002) (*Right-Price Recreation II*).

41. U.S. CONST. amend. I.

42. *See* Jerome I. Braun, *Increasing SLAPP Protection: Unburdening the Right of Petition in California*, 32 U.C. DAVIS L. REV. 965, 974-75 (1999) (tracing origins of right of petition to the Anglo-Saxon era of the ninth century).

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

44. Thomas v. Collins, 323 U.S. 516, 530 (1945).

> In a representative democracy government acts on behalf of the people, and effective representation depends to a large extent upon the ability of the people to make their wishes known to governmental officials acting on their behalf.[45]

In a pivotal development, the United States Supreme Court applied the Petition Clause to an antitrust claim in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*[46] There, a group of railroad companies, with the aid of a public relations firm, conducted a publicity campaign designed to encourage legislation restricting the trucking industry.[47] A group of trucking companies responded with an antitrust suit alleging the publicity campaign constituted a violation of the Sherman Act.[48] The trial court, characterizing the railroad companies' publicity campaign as "malicious and fraudulent" and an antitrust violation, awarded the truckers a broad injunction and monetary damages.[49]

In *Noerr Motor Freight, Inc.*, however, the Supreme Court declined to hold that the Sherman Act prohibits activities directed at "influencing the passage or enforcement of laws."[50] As the *Noerr Motor Freight, Inc.* Court reasoned:

> In the first place, such a holding would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade. In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act. Secondly, and of at least equal significance, such a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms. Indeed, such an imputation would be particularly unjustified in this case in view of all the

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45. Protect Our Mountain Env't Inc. v. District Court In and For Jefferson County, 677 P.2d 1361, 1364 (Colo. 1984).

46. 365 U.S. 127, 137-38 (1961).

47. *Id.* at 129-31.

48. *Id.* at 129.

49. *Id.* at 132-34.

50. *Id.* at 137.

> countervailing considerations enumerated above. For these reasons, we think it clear that the Sherman Act does not apply to the activities of the railroads at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws.[51]

The *Noerr Motor Freight, Inc.* Court further rejected the proposition that the railroads' campaign constituted a Sherman Act violation based on incidental damage to the truckers even though the railroads may have hoped for such injury.[52] The Court reasoned:

> It is inevitable, whenever an attempt is made to influence legislation by a campaign of publicity, that an incidental effect of campaign may be that infliction of some direct injury upon the interests of the party against whom the campaign is directed. And it seems equally inevitable that those conducting the campaign would be aware of, and possibly even pleased by, the prospect of such injury. To hold that the knowing infliction of such injury renders the campaign itself illegal would thus be tantamount to outlawing all such campaigns.[53]

Nevertheless, the Court recognized the possibility that a publicity campaign could be launched purportedly aimed at influencing government action, but actually functioning purely as an attack on "the business relationships of a competitor."[54] In such a case, the Court reasoned, the Sherman Act could apply.[55]

In a subsequent antitrust opinion, *United Mine Workers of America v. Pennington*,[56] the Supreme Court noted that in *Noerr Motor Freight, Inc.* it had rejected the argument that it was a violation of the Sherman Act to seek advantage over competitors by influencing public officials.[57] The *Pennington* Court reiterated that the Sherman Act did not bar such activities despite the eventual damage suffered by the targeted competitors as a result of government action.[58] The Court made clear that "*Noerr* shields from the Sherman Act a concerted effort to influence pubic officials regardless of intent or purpose."[59]

In a case pitting two groups of trucking companies against each other,

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51. *Noerr Motor Freight, Inc.*, 365 U.S. at 137-38 (1961).
52. *Id.* at 143.
53. *Id.* at 143-44.
54. *Id.* at 144.
55. *Id.*
56. 381 U.S. 657 (1965).
57. *Id.* at 669 (citing *Noerr Motor Freight, Inc.*, 365 U.S. 127).
58. *Id.* at 669.
59. *Id.* at 670.

California Motor Transport Co. v. Trucking Unlimited,[60] the Supreme Court expanded the *Noerr/Pennington* protection to parties instituting agency and court proceedings against business competitors using the same reasoning.[61] The right to petition, concluded the Court, extends to all areas of the government.[62] The Court held:

> We conclude that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-à-vis their competitors.[63]

However, the Court also recalled its admonition in *Noerr Motor Freight Inc.* against "sham" campaign masquerading as efforts to influence public policy.[64] In this connection, the Court reasoned that "illegal and reprehensible" conduct, such as perjury, fraud, and bribery, "may corrupt the administrative or judicial processes" which could result in antitrust violations.[65] As the Court further reasoned:

> Petitioners, of course, have the right of access to the agencies and courts to be heard on applications sought by competitive highway carriers. That right, as indicated, is part of the right of petition protected by the First Amendment. Yet that does not necessarily give them immunity from the antitrust laws.[66]

Accordingly, the *California Motor Transport Co.* Court determined that a party could show an antitrust violation if it could prove its rival had used the administrative and judicial process for an unlawful end.[67] Regardless of the legality of the method employed, violations of the Sherman Act can be found "[i]f the end result is unlawful."[68] The Court characterized this doctrine as "the 'sham' exception [to] the *Noerr* case, as adapted to the adjudicatory process."[69]

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60. 404 U.S. 508 (1972).
61. *Id.* at 510-11.
62. *See id.* at 510 ("Certainly the right to petition extends to all departments of the Government.").
63. *Id.* at 510-11.
64. *Id.* at 511 (quoting *Noerr Motor Freight Inc.*, 365 U.S. at 144).
65. *Id.* at 512-13.
66. *Id.* at 513.
67. *California Motor Transp. Co.*, 404 U.S. at 515.
68. *Id.*
69. *Id.* at 516.

SLAPP filers often claim abuse of process, malicious prosecution, and intentional interference with a business expectancy or other similar torts.[70] As shown below, the *Noerr/Pennington* "sham" doctrine has proven to be an effective framework for courts confronted with SLAPP litigation.

C. *Defamation and the Right to Petition*

A sub-category of the issues of the right to petition on free expression relates to defamation. In *McDonald v. Smith,*[71] the United States Supreme Court held that the Petition Clause did not provide an absolute privilege for uttering a defamatory statement.[72] In *McDonald,* the defendant wrote letters to various government officials, including the President of the United States, assailing the plaintiff.[73] The defendant pleaded an absolute immunity defense based on the Petition Clause.[74]

In rejecting the claim of absolute immunity, the *McDonald* Court reasoned that absolute immunity would raise the Petition Clause to a special status.[75] "The Petition Clause, however, was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble."[76] Deciding that there was no sound basis for affording the right to petition any greater protection than other First Amendment guarantees, the Court refused to expand the petition privilege beyond that available under the *New York Times Co.* standard.[77]

IV. RESPONSES TO SLAPP FILINGS

Some SLAPP targets have prevailed with the aid of judicially formulated doctrines. Other successful SLAPP targets have relied on statutory remedies. This section will examine both approaches.

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70. *See, e.g.*, Kajima Eng'g & Constr. Inc. v. City of Los Angeles, 116 Cal. Rptr.2d 187, 192 (2002); Dowling v. Zimmerman, 103 Cal. Rptr.2d 174, 191 (2001).

71. 472 U.S. 479 (1985).

72. *Id.* at 483-84.

73. *Id.* at 480-81.

74. *Id.* at 481-82.

75. *Id.* at 485.

76. *McDonald,* 472 U.S. at 485 (citing Mine Workers v. Illinois Bar Assn., 389 U.S. 217, 222 (1967)).

77. *Id.*

A. *Judicial Responses*

In an early SLAPP decision, *Sierra Club v. Butz*,[78] the United States District Court for the Northern District of California applied the *Noerr Motor Freight, Inc.* analysis.[79] In that case, a logging company, alleging tortious interference with an advantageous relationship, filed a counterclaim against the Sierra Club and four individuals in response to their filing suit to prevent logging operations in a sensitive area.[80] In defense, the SLAPP targets moved for dismissal asserting their constitutional right to petition the government.[81]

The district court noted that the United States Supreme Court, in a line of cases starting with *New York Times Co.*, reasoned, in the defamation and right to privacy context, that the Constitution generally forbids imposing liability "upon those exercising First Amendment rights."[82] "Liability can be imposed only when what appears to be an attempt to discuss matters of public interest is a 'sham' in that the speaker knows his statements are false or speaks with reckless disregard of whether they are true or false."[83] Addressing the right to petition context, and relying primarily on *Noerr Motor Freight, Inc.* and *California Motor Transport*, the *Butz* court held "that all persons, regardless of motive, are guaranteed by the First Amendment the right to seek to influence the government or its officials to adopt a new policy, and they cannot be required to compensate another for loss occasioned by a change in policy should they be successful."[84]

Another groundbreaking SLAPP case was *Protect Our Mountain Environment, Inc. v. District Court* ("POME").[85] POME, alleging environmental concerns, sued unsuccessfully to stop a real estate development project.[86] The prevailing real estate developer then brought a tort claim alleging abuse of legal process and civil conspiracy against POME and its legal counsel.[87] The developer also sought $10 million in compensatory damages and $30 million in exemplary damages.[88] POME moved for dismissal, invoking its

78. 349 F. Supp. 934 (N.D. Cal. 1972).
79. *Id.* at 938-39.
80. *Id.* at 935-36.
81. *Id.* at 936.
82. *Id.* at 937.
83. *Butz*, 349 F. Supp. at 937.
84. *Id.* at 938.
85. 677 P.2d 1361 (Colo. 1984).
86. *Id.* at 1363.
87. *Id.* at 1364.
88. *Id.*

First Amendment right to petition the government.[89] The trial court summarily denied the motion, reasoning POME's suit to stop the proposed development was a "sham" unworthy of First Amendment protection.[90]

The court, relying partly on the *Noerr Motor Freight, Inc.* and *Pennington* line of cases, noted the conflicting issues of the chilling effect on the petition rights of persons sued for their use of administrative or judicial forums and the potential for damage caused by baseless actions masquerading as protected petitioning activity.[91] "Accommodation of these competing concerns can best be achieved by requiring the suing party, when confronted with a motion to dismiss predicated on the First Amendment right to petition the government for redress of grievances, to demonstrate the constitutional viability of his claim."[92] The court then formulated a three-part burden a party must meet to convince the trial court that the defendant's activities were not afforded constitutional protection.[93] Under the test, the plaintiff must show:

> (1) the defendant's administrative or judicial claims were devoid of reasonable factual support, or, if so supportable, lacked any cognizable basis in law for their assertion; and (2) the primary purpose of the defendant's petition activity was to harass the plaintiff or to effectuate some other improper objective; and (3) the defendant's petitioning activity had the capacity to adversely affect a legal interest of the plaintiff.[94]

The court remanded the matter for reconsideration under this newly adopted standard.[95]

The above-cited cases show SLAPP targets may prevail on doctrines set forth in *Noerr Motor Freight, Inc., Pennington,* and *New York Times Co.* As the procedural history of these cases show, however, significant litigation may be necessary before the target can defeat the SLAPP filer. That delay in resolving the matter in court may result in a strategic victory for the SLAPP filer.

B. *Legislative Responses*

The more recent trend has been to provide a statutory remedy, sometimes aimed at defeating SLAPPs more quickly. In several states, including

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89. *Id.*
90. *Protect Our Mountain Env't, Inc.*, 677 P.2d at 1364.
91. *Id.* at 1368.
92. *Id.*
93. *Id.* at 1369.
94. *Id.*
95. *Protect Our Mountain Env't, Inc.*, 677 P.2d at 1370.

Washington, SLAPP targets can seek statutory protection. Washington's statue will be discussed in more detail below.

1. Policy Objectives

The anti-SLAPP statutes available in a number of states vary widely in their scope of protection. Significantly, some statutes establish specific legislative policy objectives. California's anti-SLAPP statute attempts to meet a concern about chilling public participation.[96] There is also a Georgia anti-SLAPP statute that addresses similar concerns.[97] Further, Rhode Island has provided some relief from SLAPP suits.[98] There, the legislature added a specific goal for quick resolution to such litigation.[99] Moreover, a Tennessee statute explicitly addresses the SLAPP problem:

> The general assembly finds that the threat of a civil action for damages in the form of a strategic lawsuit against political participation (SLAPP), and

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96. CAL. CIV. PROC. CODE § 425.16(a) (West Supp. 2002).
> The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

Id.

97. GA. CODE ANN. § 9-11-11.1(a) (Supp. 2002). The statute reads:
> The General Assembly of Georgia finds and declares that it is in the public interest to encourage participation by the citizens of Georgia in matters of public significance through the exercise of their constitutional rights of freedom of speech and the right to petition government for redress of grievances. The General Assembly of Georgia further finds and declares that the valid exercise of the constitutional rights of freedom of speech and the right to petition the government for a redress of grievances should not be chilled through abuse of the judicial process.

Id.

98. R.I. GEN. LAWS § 9-33-1 (1997).
> The legislature finds and declares that full participation by persons or organizations and robust discussion of issues of public concern before the legislative, judicial, and administrative bodies and in other public fora are essential to the democratic process, that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances; that such litigation is disfavored and should be resolved quickly with minimum cost to citizens who have participated in matters of public concern.

Id.

99. *Id.*

> the possibility of considerable legal costs, can act as a deterrent to citizens who wish to report information to federal, state, or local agencies. SLAPP suits can effectively punish concerned citizens for exercising the constitutional right to speak and petition the government for redress of grievances.[100]

The Tennessee legislature specifically named this statute the "Tennessee Anti-SLAPP Act of 1997."[101] Without resorting to the SLAPP acronym, a Nebraska statute also gives the problem extensive treatment.[102]

In contrast to the above provisions, Washington's most analogous statute, Washington Revised Code sections 4.24.500, originally lacked any reference to the constitutional issues implicated by SLAPP litigation. The Washington statute merely noted the Legislature's concern that the threat of lawsuits would deter individuals from reporting wrongful activity to the appropriate authorities.[103] Thus, Washington's initial statutory scheme lacked a strong

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100. TENN. CODE ANN. § 4-21-1002(b) (1998).

101. TENN. CODE ANN. § 4-21-1001 (1998).

102. NEB. REV. STAT. § 25-21,241 (1995). This section reads:

> (1) It is the policy of the state that the constitutional rights of citizens and organizations to be involved and participate freely in the process of government must be encouraged and safeguarded with great diligence. The information, reports, opinions, claims, arguments, and other expressions provided by citizens are vital to effective law enforcement, the operation of government, the making of public policy and decisions, and the continuation of representative democracy. The laws, courts, and other agencies of this state must provide the utmost protection for the free exercise of these petition, speech, and association rights;
>
> (2) Civil actions for damages have been filed against citizens and organizations of this state as a result of the valid exercise of their constitutional rights to petition, speech, and association. There has been a disturbing increase in such strategic lawsuits against public participation in government;
>
> (3) The threat of strategic lawsuits against public participation, personal liability, and burdensome litigation costs significantly chills and diminishes citizen participation in government, voluntary public service, and the exercise of these important constitutional rights. The abuse of the judicial process can and has been used as a means of intimidating, harassing, or punishing citizens and organizations for involving themselves in public affairs; and
>
> (4) It is in the public interest and it is the purpose of sections 25-21,241 to 25-21,246 to strike a balance between the rights of persons to file lawsuits for injury and the constitutional rights of persons to petition, speech, and association, to protect and encourage public participation in government to the maximum extent permitted by law, to establish an efficient process for identification and adjudication of strategic lawsuits against public participation, and to provide for costs, attorney's fees, and actual damages.

Id.

103. WASH. REV. CODE § 4.24.500 (2000).

policy statement recognizing the constitutional dimension of the SLAPP problem.[104] The Washington Legislature recently addressed this weakness, however. That reform will be discussed more fully in Part V.

2. Statutory Defenses

As noted earlier, the scope of protection available under anti-SLAPP statutes varies. Accordingly, these statutes afford a degree of immunity, remedies, or both.

a. Immunity

A number of states have enacted statutes declaring immunity for the types of communication subject to SLAPP litigation. For example, in Nevada, those who petition the government in good faith are immune from liability for the consequences of that communication.[105] In Minnesota, "Lawful conduct or speech that is genuinely aimed in whole or in part at procuring favorable government action is immune from liability, unless the conduct of speech constitutes a tort or a violation of a person's constitutional rights."[106]

In Tennessee, the immunity is somewhat more broad, specifically protecting the target's rights of free speech and petition.[107] The immunity is lost, however, if the target knew the communicated information was false, communicated the information "in reckless disregard of its falsity," or, when the subject of the communication is not a public figure, if the communication was made without adequate investigation into its truth or falsity.[108]

In Rhode Island, the target's exercise of free speech and petition rights are conditionally immune from legal attack.[109] The conditional immunity is lost, however, if the free speech or petition activity is a "sham;" an activity "not genuinely aimed at procuring favorable government action, result, or outcome, regardless of ultimate motive or purpose."[110]

In contrast to the constitutionally based statutes cited above, the Oklahoma statute merely states that a privileged communication, which includes one made in the course of any judicial or government proceeding, is not punishable as

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104. *Id.*
105. NEV. REV. STAT. § 41.650 (2000).
106. MINN. STAT. ANN. § 554.03 (West 2000).
107. TENN. CODE ANN. § 4-21-1003(a) (1998).
108. TENN. CODE ANN. § 4-21-1003(b) (1998).
109. R.I. GEN. LAWS § 9-33-2(a) (1997).
110. *Id.*

libel.[111] Similarly, the Washington statute originally provided immunity for anyone who communicated or filed a complaint in good faith to a government agency or regulatory body.[112] Given their tenuous connections with the SLAPP problem, it might be more accurate to characterize the Oklahoma statue and the original version of the Washington statute as general immunity provisions rather than anti-SLAPP statutes. As will be shown in Part V, the Washington statute now contains language aimed directly at the SLAPP problem.

b. Remedies

Of greatest importance to the SLAPP target are the remedies available. Some statutory remedies will apply only after the target has been subjected to a considerable course of litigation. Such statutes offer incomplete relief because the SLAPP filer can still achieve its strategic goal of disrupting the target's First Amendment activities.[113] But legislatures in a growing number of states have recognized this problem and have formulated statutory remedies allowing for early detection and quick resolution of SLAPP litigation.[114]

In New York, a SLAPP target may bring an action or claim against the filer and have the ability to recover damages such as court costs and attorney fees.[115] While this provision provides the target with a means of obtaining ultimate relief, it still requires extensive litigation.[116] By contrast, a more immediate remedy can be found in the New York Civil Practice Law and Rules.[117] These rules authorize the trial court to dismiss an alleged SLAPP unless the filer can show that its lawsuit has a "substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law."[118]

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111. OKLA. STAT. ANN. tit. 12, § 1443.1 (West 1993).
112. WASH. REV. CODE § 4.24.510 (2000).
113. *Gordon v. Marrone*, 590 N.Y.S.2d 649, 656 (1992).
114. N.Y. C.P.L.R. 70(a)(1) (McKinney, Supp. 2002).
115. N.Y. CIV. RIGHTS LAW 70-a(1) (McKinney, Supp. 2002).
116. *Id.*
117. N.Y. C.P.L.R. 3211(g) (McKinney, Supp. 2002).
118. *Id.* The New York rule states:

> A motion to dismiss . . . in which the moving party has demonstrated that the action, claim, cross claim, or counterclaim subject to the motion is an action involving pubic petition and participation . . . shall be granted unless the party responding to the motion demonstrates that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification, or reversal of existing law. The court shall grant preference in the hearing of such motion.

Id. The same standard applies when the target files a summary judgment motion. N.Y. C.P.L.R. 3212(h) (McKinney, Supp. 2002); *see also* Marnie Stenson, Note, *Reforming SLAPP*

It is the promise of early relief that marks the most effective anti-SLAPP legislation. In this regard, Delaware has a dismissal provision nearly identical to New York's.[119] Similarly, a SLAPP target in Maine may bring a "special motion to dismiss."[120] The trial court will grant the motion unless the SLAPP filer can show that the target's public participation activities were without a reasonable basis in fact or law, and that those activities led to actual injury.[121] The Maine statute provides a particularly powerful defense because it enables the target to quash the SLAPP in its infancy.[122] This is a feature absent from Washington's anti-SLAPP statute.

V. SLAPP LEGISLATION AND LITIGATION IN WASHINGTON

Washington State does not have an extensive history of SLAPP litigation. An early example is *Lange v. Nature Conservancy*.[123] There, landowners, upset that their property had been listed in an inventory of natural areas, filed suit against a nonprofit environmental organization and others alleging trespass, civil rights violations, inverse condemnation, unfair trade practice, and monopolization.[124] In addition to rejecting the landowners' various theories on the merits, the *Lange* court recognized the environmental organization's "First Amendment right to try to influence government action."[125]

In 1989, the Washington Legislature addressed the SLAPP problem indirectly when it enacted Washington Revised Code sections 4.24.500-.520. The Legislature enacted these sections for the following purpose:

Reform: New York's Anti-SLAPP Statute, 70 N.Y.U. L. REV. 1324, 1356 (1995) (discussing the above-cited statutes).

119. The Delaware statute states:

> A motion to dismiss in which the moving party has demonstrated that the action, claim, cross-claim or counterclaim subject to the motion is an action involving public petition and participation . . . shall be granted unless the party responding to the motion demonstrates that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law. The court shall grant preference in the hearing of such motion.

DEL. CODE ANN. tit. 10, § 8137(a) (1999). Again, like its New York counterpart, the Delaware statute contains a nearly identical provision for summary judgment motions. DEL. CODE ANN. tit. 10, § 8137(b) (1999).

120. ME. REV. STAT. ANN. tit. 14, § 556 (West Supp. 2001).

121. *Id.*

122. *See id.*

123. 24 Wash. App. 416, 601 P.2d 963 (1979).

124. *Id.* at 419, 601 P.2d at 965.

125. *Id.* at 422, 601 P.2d at 967 (citing E.R.R. Presidents Conf. v. Noerr Motor Freight, Inc. 365 U.S. 127 (1961); Sierra Club v. Butz, 349 F. Supp. 934 (N.D. Cal. 1972)).

> Information provided by citizens concerning potential wrongdoing is vital to effective law enforcement and the efficient operation of government. The legislature finds that the threat of a civil action for damages can act as a deterrent to citizens who wish to report information to federal, state, or local agencies. The costs of defending such suits can be severely burdensome. The purpose of RCW 4.24.500 through 4.24.520 is to protect individuals who make good-faith reports to appropriate governmental bodies.[126]

The operative provision of the legislative package affords a degree of immunity to people reporting to governmental bodies.[127] The section provides that a person who communicates in good faith with a government body is immune from liability stemming from that communication. Further, a person may recover costs and attorneys' fees associated with defending against a SLAPP filer.[128] In addition to the tools provided to a private party defending against a SLAPP suit, another provision authorizes the concerned agency or the office of the Attorney General to intervene.[129]

The Legislature enacted sections 4.24.500-.520, commonly known as the "Brenda Hill Bill," in response to a real estate developer's suit against individual home buyers who had reported the developer's tax and other legal

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126. WASH. REV. CODE § 4.24.500 (2000).

127. *Id.*

128. WASH. REV. CODE § 4.24.510 (2002). The section reads:

> A person who in good faith communicates a complaint or information to any agency of federal, state, or local government, or to any self-regulatory organization that regulates persons involved in the securities or futures business and that has been delegated authority by a federal, state, or local government agency and is subject to oversight by the delegating agency, is immune from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization. A person prevailing upon the defense provided for in this section shall be entitled to recover costs and reasonable attorneys' fees incurred in establishing the defense.

Id.

129. WASH. REV. CODE § 4.24.520 (2002). This section reads:

> In order to protect the free flow of information from citizens to their government, an agency receiving a complaint or information under RCW 4.24.510 may intervene in and defend against any suit precipitated by the communication to the agency. In the event that a local governmental agency does not intervene in and defend against a suit arising from any communication protected under chapter 234, Laws of 1989, the office of the attorney general may intervene in and defend against the suit. An agency prevailing upon the defense provided for in RCW 4.24.510 shall be entitled to recover costs and reasonable attorneys' fees incurred in establishing the defense. If the agency fails to establish the defense provided for in RCW 4.24.510, the party bring the action shall be entitled to recover from the agency costs and reasonable attorney's fees incurred in proving the defense inapplicable or invalid.

Id.

violations.[130] Although legal commentators commonly describe sections 4.24.500-.520 as Washington's anti-SLAPP statute, the legislation more closely resembles a whistleblower immunity statute. In this connection, there appear to be only three recorded opinions, arising from two cases, in Washington discussing sections 4.24.500-.520 in the SLAPP context.

In the first of these cases, *Gilman v. MacDonald*,[131] Division I of the Washington Court of Appeals reasoned that when a defendant in a defamation action raises a defense under section 4.24.510, principles governing abuse of a qualified privilege apply when determining whether the defendant's communication was made in good faith.[132] In that case, a real estate developer filed a defamation claim against an individual homeowner who had claimed to public officials that the developer illegally cleared land within the proposed development.[133] The court noted that a common-law qualified privilege applies to communications uttered to a public officer authorized or privileged to act on the subject matter of the communication.[134] The court further observed that once the defendant has established that the defamatory communication falls within a qualified privilege, the burden shifts to the plaintiff to prove abuse of the privilege by clear and convincing evidence.[135] Accordingly, the court concluded:

> It follows, and we so hold, that where a defendant in a defamation action claims immunity under RCW 4.24.510 on the ground his or her communications to a public officer were made in good faith, the burden is on the defamed party to show by clear and convincing evidence that the defendant did not act in good faith. That is, the defamed party must show, by clear and convincing evidence, that the defendant knew of the falsity of the communications or acted with reckless disregard as to their falsity.[136]

In a more recent SLAPP case, *Right-Price Recreation, LLC v. Connells Prairie Community Council*,[137] two citizen groups opposed a real estate

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130. Pring & Canan, *supra* note 8, at 959 & n.53

131. 74 Wash. App. 733, 875 P.2d 697 (1994).

132. *Id.* at 738, 875 P.2d at 699-700.

133. *Id.* at 735-36, 875 P.2d at 698.

134. *Id.* at 738, 875 P.2d at 700; *see also* Getchell v. Auto Bar Sys. N.W., Inc., 73 Wash. 2d 831, 836, 440 P.2d 843, 847 (1968).

135. *Gilman*, 74 Wash. App. at 738, 875 P.2d at 700; *see also* Lillig v. Becton-Dickinson, 105 Wash. 2d 653, 658, 717 P.2d 1371, 1374 (1986); Bender v. Seattle, 44 Wash. 2d 582, 601, 664 P.2d 492, 504 (1983).

136. *Gilman*, 74 Wash. App. at 738-39, 875 P.2d at 700.

137. 105 Wash. App. 813, 21 P.3d 1157 (2001), *remanded by* 146 Wash. 2d 370, 46 P.3d 789 (2002) (*Right-Price Recreation I*).

developer's proposed subdivisions.[138] The developer sued both groups and their members (collectively citizen groups) alleging slander, commercial disparagement, tortious interference, and civil conspiracy.[139] The trial court denied the citizen groups' motion to dismiss.[140] Additionally, while summary judgment motions were pending, the court issued a discovery order requiring the citizen groups to produce various documents for in camera review—including membership lists, meetings minutes, internal correspondence, and financial records.[141]

The Washington State Court of Appeals, Division II, granted discretionary review solely on the discovery issue.[142] The citizen groups had also asked the appeals court to review the trial court's denial of their motion to dismiss.[143] While acknowledging the SLAPP issue and the target's immunity afforded under section 4.24.510, the court of appeals declined to address the motion to dismiss, reasoning that the matter was not properly before the court.[144]

However, the intermediate court reasoned that the developer's discovery request had a potential chilling effect on the citizen groups' exercise of their First Amendment rights.[145] The court of appeals further reasoned that the requested material lacked relevance and materiality.[146] Accordingly, the court reversed the discovery order and remanded the case for further proceedings.[147]

The citizen groups also sought attorney fees under section 4.24.510.[148] The court of appeals declined the request on the grounds that the citizen groups had not yet prevailed in the underlying action.[149] The court also declined the citizen groups' request for sanctions against the developer for filing a frivolous lawsuit.[150]

The Washington Supreme Court granted review and agreed with the citizen groups' contention that the court of appeals should have reviewed the trial court's denial of their motion to dismiss.[151] The court applied a summary

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138. *Id at* 816, 21 P.3d at 1160.
139. *Id.*
140. *Id.*
141. *Id.* at 817, 21 P.3d at 1160.
142. *Right-Price Recreation I,* 105 Wash. App. at 817, 21 P.3d at 1160.
143. *Id.* at 818, 21 P.3d at 1160.
144. *Id.* at 819, 21 P.3d at 1161.
145. *Id.* at 823-25, 46 P.3d at 116-64.
146. *Id.* at 826, 46 P.3d at 1164.
147. *Right-Price Recreation I,* 105 Wash. App. at 826, 21 P.3d at 1164.
148. *Id.* at 826, 46 P.3d at 1164.
149. *Id.* at 826, 46 P.3d at 1164-65.
150. *Id.* at 826, 46 P.3d at 1165.
151. Right-Price Recreation, LLC v. Connells Prairie Cmty. Council, 146 Wash. 2d 370, 377, 46 P.3d 789, 793 (2002) *(Right-Price Recreation II).*

judgment analysis and followed the "actual malice" standard set forth in *Gilman*.[152] Accordingly, the court concluded that "Right-Price failed to establish a prima facie case of defamation."[153] The court further concluded that even if the offending statements were defamatory, the "groups were entitled to immunity under former section 4.24.510, as Right-Price totally failed to establish clear and convincing evidence that the groups' statements were made with actual malice."[154] Reasoning it could resolve the matter under the statute alone, the court declined to address the constitutional aspects of SLAPP litigation.[155] Thus, the court remanded the matter to the trial court for entry of an order of dismissal and for determination of attorney fees under former section 4.24.510.[156] The court declined to impose sanctions under the civil rule or the equivalent appellate rule governing frivolous appeals.[157]

Both *Gilman* and the *Right-Price Recreation* cases demonstrate that former section 4.24.510 afforded the SLAPP target a less than perfect defense. Under the original statute, the SLAPP filer's defamation claim would necessarily trigger *New York Times Co.* fact issues that increase the likelihood that the SLAPP will entail discovery in preparation for summary judgment or trial. Similarly, the target's claim of statutory immunity will inevitably open the door to fact inquiries on whether the target acted in "good faith."[158] Moreover, while *Right-Price Recreation* seemingly places First Amendment limits on the scope of the SLAPP filer's discovery, it does not preclude onerous discovery requests in their entirety. Another consequence is that while the SLAPP target can expect to recover costs and attorney fees, and now statutory damages, the SLAPP target will have greater difficulty obtaining sanctions.

On a positive note, the Washington Supreme Court's decision in *Right-Price Recreation II* approved resolution through summary judgment dismissal for failure to state a prima facie claim of defamation.[159] Of course, *Right-Price Recreation* did not result in dismissal until the case had worked its way to the Washington Supreme Court.[160] Thus, while the citizen groups ultimately prevailed on the merits, the developer likely had the perverse satisfaction of

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152. *See* Gilman v. MacDonald, 74 Wash. App. 733, 734, 875 P.2d 697, 698 (1994).

153. *Right-Price Recreation II*, 146 Wash. 2d at 384, 46 P.3d at 796.

154. *Id.*

155. *Id.* at 382, 46 P.3d at 796.

156. *Id.* at 384, 46 P.3d at 796-97.

157. *Id.*; *see also* Washington Court Rules, Civil Rules, CR 11 (2002) (authorizing sanctions in superior court); Washington Court Rules, Rules of Appellate Procedure, RAP 18.9 (2002) (authorizing sanctions in appellate court for frivolous appeals).

158. *See Right-Price Recreation II*, 146 Wash. 2d at 382, 46 P.3d at 796.

159. *Id.* at 384, 46 P.3d at 796.

160. *Id.* at 374, 46 P.3d at 791.

dragging the citizen groups through more than three years of litigation.[161] The bitter comments individual targets in the case gave to the media reflect a sense of pyrrhic victory.[162]

It all boils down to more time spent in litigation. Time is the SLAPP filer's ally; the longer the case survives, the more distressed the target will become.[163] Accordingly, even though the SLAPP filer will inevitably lose, it may well have achieved its strategic goal of intimidating and punishing the target for its past opposition and possibly deterring it from future opposition.

VI. WASHINGTON'S IMPROVED SLAPP PROTECTION

As originally enacted, sections 4.24.500-.520 did not afford a SLAPP target with a particularly efficient remedy. While the target could ordinarily expect to prevail, it had to endure considerable litigation before it could do so.

To deal with the SLAPP problem, in 2002 the Legislature amended section 4.24.510 in several significant ways. First, the change included a new first section containing a strong policy statement recognizing the constitutional threat of SLAPP litigation.[164] Second, the Legislature removed the good faith

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161. *Id.* at 374, 46 P.3d at 792 (noting that the developer filed suit in April 1999).

162. Peter Callaghan, *Developer Used Courts to Intimidate Opponents*, TACOMA NEWS TRIB., May 21, 2002 at B1. One of the individual targets asked a newspaper reporter, "'Everyone wants to celebrate, but what did we win?... All the developer wanted was to shut us up for three years. This worked exactly as these suits are supposed to work.'" *Id.* Another target lamented, "'Our money dried up, our membership dried up. Everything went to pot.'" *Id.* The newspaper article went on to report that the developer no longer existed as a corporate entity and its principal was insolvent. *Id.* Thus, it seems unlikely the SLAPP targets will recover any of their attorneys' fees from the filer.

163. *See* Gordon v. Marrone, 590 N.Y.S.2d 649, 656 (1992).

164. WASH. REV. CODE § 4.24.510(1)(2002); This section reads:

> Strategic lawsuits against public participation, or SLAPP suits, involve communications made to influence a government action or outcome which results in a civil complaint or counterclaim filed against individuals or organizations on a substantive issue of some public interest or social significance. SLAPP suits are designed to intimidate the exercise of First Amendment rights and rights under Article I, section 5 of the Washington state Constitution.
>
> Although Washington state adopted the first modern anti-SLAPP law in 1989, that law has, in practice, failed to set forth clear rules for early dismissal review. Since that time, the United States supreme court has made it clear that, as long as the petitioning is aimed at procuring favorable government action, result, product, or outcome, it is protected and the case should be dismissed. This bill amends Washington law to bring it in line with these court decisions which recognizes that the United States Constitution protects advocacy to government, regardless of content or motive, so long as it is designed to have some effect on government decision making.

Id.

requirement as an element of the SLAPP defense.[165] Third, the statute now authorizes statutory damages of $10,000, as well as expenses and attorney fees, if the SLAPP target prevails in asserting the statute's defense.[166] Fourth, the amended statute authorizes the trial court to deny the SLAPP target statutory damages if the plaintiff can prove the target had communicated to the government agency in bad faith.[167] The practical effect of the latter provision is to impose on the SLAPP plaintiff the burden of proving the target had acted in bad faith.

The amended section 4.24.510 provides much greater protection to SLAPP targets. Now the potential SLAPP target enjoys a near absolute statutory immunity. Even communications made in bad faith will be immune, although the SLAPP target will then lose his or her right to statutory damages.[168] The changes convert section 4.24.510 from a whistleblower statute to a true anti-SLAPP statute.

The amended statute will certainly deter most potential SLAPP filers. However, there is some question as to whether the statute will deter particularly deep-pocketed filers. First, $10,000 in statutory damages is a paltry sum for wealthier individuals and entities. Such a filer may reason the nuisance value of bringing suit could easily outweigh the statutory costs. Second, the provision pertaining to statutory damages and bad faith creates a potential *New York Times Co.* fact issue. If the filer drafts a complaint expertly enough to survive a motion to dismiss for failure to state a claim for relief,[169] he or she could still cause the target to go through an extensive and time-consuming discovery process. Even if the SLAPP target prevails on the merits, the filer can lengthen the statutory damages phase of the proceedings by raising

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165. WASH. REV. CODE § 4.24.510(2) (2002).

166. *Id.*

167. *Id.* The entire amended section now states:

A person who communicates a complaint or information to any branch or agency of federal, state, or local government, or to any self-regulatory organization that regulates persons involved in the securities or futures business and that has been delegated authority by a federal, state, or local government agency and is subject to oversight by the delegating agency, is immune from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization. A person prevailing upon the defense provided for in this section is entitled to recover expenses and reasonable attorney's fees incurred in establishing the defense and in addition shall receive statutory damages of ten thousand dollars. Statutory damages may be denied if the court finds that the complaint or information was communicated in bad faith.

Id.

168. *Id.*

169. *See* Washington Court Rules, Civil Rules, CR 12(b)(6) (2002).

fact issues alleging the SLAPP target had acted in bad faith.[170] In essence, the *New York Times Co.* issues merely shift from the prima facie elements to the damages elements of the anti-SLAPP statute. As a consequence, a SLAPP target pursuing statutory damages may unwittingly aid the filer's strategic aims.

If the court can classify the filer's action as a SLAPP, the best remedy would be early dismissal with appropriate sanctions. However, even the amended version of section 4.24.510 is inadequate in this regard; the statute should provide accelerated procedures for disposition of alleged SLAPP litigation.

Illustratively, the California SLAPP statute addresses this issue to a considerable extent.[171] Under this statute an alleged SLAPP is subject to a "special motion to strike" unless the filer can establish probable success on the merits.[172] The target may file the special motion within sixty days of the service of the filer's complaint or, "in the court's discretion at any later time upon terms it deems proper."[173] The trial court will hear argument on the special motion "not more than thirty days after service unless the docket conditions of the court require a later hearing."[174]

As noted above, discovery was the main concern of the Washington Court of Appeals in *Right-Price Recreation*.[175] Forcing targets to bear the heavy burdens of extensive litigation, including oppressive discovery, is a primary goal of SLAPP filers.[176] In this regard, the California statute states:

> All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.[177]

The Washington statute should incorporate a similar discovery stay in order to avert oppressive discovery practices.

Under the California statute, the trial court determines the special motion

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170. *See* Right-Price Recreation, LLC v. Connells Prairie Cmty. Council, 146 Wash. 2d 370, 46 P.3d 789 (2002) (*Right-Price Recreation II*).

171. *See* CAL. CIV. PROC. CODE § 425.16 (West Supp. 2002).

172. § 425.16(b)(1).

173. § 425.16(f).

174. *Id.*

175. Right-Price Recreation, LLC v. Connells Prairie Cmty. Council, 105 Wash. App. 813, 822-26, 21 P.3d 1157, 1163-64 (2001) (*Right-Price Recreation I*).

176. *See, e.g.*, Gordon v. Marrone, 590 N.Y.S.2d at 649, 656 (1992).

177. CAL. CIV. PROC. Code § 425.16(g).

to strike on the basis of the pleadings and affidavits.[178] The order granting or denying the motion is appealable.[179] In this connection, one of the issues the *Right-Price Recreation II* court dealt with was appealability of the trial court's denial of the target's order to dismiss.[180] Appellate courts seem to disfavor interlocutory appeals, thus review of such an order may be difficult to obtain. The California Legislature, recognizing that SLAPP litigants frequently confront the problem of interlocutory appeals, made disposition of a special motion to strike appealable as a matter of right.[181] Again, the Washington Legislature should consider adopting such an appealability provision.

If the SLAPP target prevails on the special motion to strike, he or she is entitled to attorney fees and costs.[182] On the other hand, should the SLAPP filer prevail, he or she is entitled to fees if the court finds the target's special motion to strike to be frivolous or "solely intended to cause unnecessary delay."[183] As noted earlier, section 4.24.510 contains a fee provision, and the *Right-Price Recreation II* court granted the prevailing target such fees.[184] However, the California statute is better suited than the Washington statute for early actions to dismiss. Further, the California statute retains an element of balance in recognizing that the alleged SLAPP target is potentially capable of filing frivolous actions.

VII. CONCLUSION

SLAPPs impermissibly chill the public's constitutional right to affect political change. Washington's original legislative response provided an inadequate defense against SLAPPs. The newer version of Washington Revised Code section 4.24.510 affords greater relief, but still lacks early detection and dismissal procedures. Moreover, the amended statute seemingly allows for prolonged litigation on the existence of bad faith, albeit in the statutory damages stage of litigation. By adding provisions specifically allowing for early identification and dismissal of SLAPPs, the legislature can protect the public's right to participate in political activity even more effectively.

178. § 425.16(b)(2).
179. § 425.16(j).
180. *Right-Price Recreation II*, 146 Wash. 2d 370, 46 P.3d 789.
181. CAL. CIV. PROC. CODE § 425.16(j).
182. § 425.16(c).
183. *Id.*
184. *Right-Price Recreation II*, 146 Wash. 2d at 384, 46 P.3d at 796.