

1-1-2004

## Pennsylvania anti-SLAPP Legislation

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### Recommended Citation

Sheri Coover, *Pennsylvania anti-SLAPP Legislation*, 12 *Penn St. Envtl. L. Rev.* 263 (2004).

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# Pennsylvania Anti-SLAPP Legislation

## I. Introduction

Intimidation is an effective method in silencing someone. It is a strategy typically employed by bullies on elementary school playgrounds. Increasingly, real estate developers have adopted this tactic to silence people or groups opposing their projects.<sup>1</sup> In an increasing phenomena experienced throughout the United States, citizens, or groups of citizens, who are appropriately, through various government channels, expressing opposition to real estate development are increasingly finding themselves threatened with expensive litigation.<sup>2</sup> Large development firms and commercial enterprises, with more resources at their disposal than the average citizen, will initiate lawsuits with the intention of scaring the petitioning party into retracting opposition to their proposed development.<sup>3</sup>

These lawsuits have earned the name SLAPP litigation, an acronym which stands for “Strategic Lawsuits Against Public Participation”.<sup>4</sup> Most plaintiffs of SLAPP lawsuits ask for large damage awards with the intention of conveying a message that with expressed opposition to their projects comes severe and expensive punishment.<sup>5</sup> The possibility of having to incur the expense of a large judgment award is an effective way to attract the attention of even the most sophisticated defendant. As the initiator of the SLAPP lawsuit hopes, many defendants are deterred by the possibility of having to pay the amount of the lawsuit and agree to halt their efforts against the project in exchange for the lawsuit being

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1. *Tri-County Concrete Company v. Uffman-Kirsch*, No. 76866, 2000 WL 1513696 at \*6 (Ohio Ct. App. Ohio 12, 2000).

2. *Id.*

3. *Id.*

4. *Id.* The use of the phrase “SLAPP” was coined by Professors George Pring and Penelope Canan in two 1988 articles – George Pring and Penelope Canan, *Strategic Lawsuits Against Public Participation*, 35 SOC. PROBS. 506 (1988); George Pring and Penelope Canan, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 L. & SOC’Y REV. 384 (1988).

5. *Tri-County*, 2000 WL 1513696 at \*6. “SLAPP suits are also intended to warn others that political opposition to their projects will be punished.” *Florida Fern Grower’s Ass’n, Inc. v. Concerned Citizens of Putnam County*, 616 So.2d 562 (Fla. Dist. Ct. App. 1993).

dropped.<sup>6</sup> Those who are not immediately intimidated, face paying attorney fees and court costs to defend against the lawsuit, even though most SLAPP suits are willingly dropped by the plaintiffs before the case goes to trial.<sup>7</sup>

Although SLAPP litigation has been identified in a wide range of political activities, it is predominantly found in the field of environmental law.<sup>8</sup> Typically, SLAPP filers are real estate developers, property owners, police officers, alleged polluters and state or local government agencies.<sup>9</sup>

In 1991, the Lancaster County Court of Common Pleas was the first Pennsylvania Court to recognize a case as a SLAPP lawsuit.<sup>10</sup> In that case, Haines and Kibblehouse, Inc., a corporation with business operations in Lancaster County, Pennsylvania, entered into a settlement agreement with Brecknock Township whereby the corporation's asphalt operations would be declared a non-conforming use.<sup>11</sup> At the meeting where the township supervisors approved the settlement agreement, a group of residents expressed their opposition to the settlement.<sup>12</sup> The citizen group, which was known by the acronym of SHAPE,<sup>13</sup> presented a petition bearing one-hundred and forty signatures opposing the settlement.<sup>14</sup>

The following month, SHAPE (along with another corporation and three individuals) filed a land use appeal to the settlement agreement in

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6. *Tri-County*, 2000 WL 1513696 at \*6.

7. *Averill v. Superior Court*, 42 Cal. App. 4th 1170, 1175 (Cal. Ct. App. 1996). "SLAPP plaintiffs do not intend to win their suits; rather they are filed solely for delay and distraction and to punish activists by imposing litigation costs on them for exercising their constitutional right to speak and petition the government for redress of their grievances." *Id.* Another incentive for SLAPP plaintiffs to drop their lawsuit is the difficulty that they face in meeting the burden of their cause of action. Most SLAPP lawsuits are brought under theories of tortious interference with business or contract, civil conspiracy or abuse of process, constitutional or civil rights violations, or nuisance. *Tri-County*, 2000 WL 1513696 at \*6.

8. *Tri-County*, 2000 WL 1513696 at \*6. The underlying dispute of cases that have been identified as SLAPP litigation cases include "zoning, land use, taxation, civil liberties, environmental protection, public education, animal rights, and the accountability of professionals and public officials." *Id.*

9. *Tri-County*, 2000 WL 1513696 at \*6.

10. *Haines and Kibblehouse, Inc. v. Silver Hill Assoc.*, 11 Pa. D. C. 4th 228 (Pa. D. & C. 4th 1991).

11. *Id.* at 229.

12. *Id.*

13. *Id.* SHAPE was the acronym for Silver Hill Association for protecting the Environment. *Id.* at 228.

14. *Id.* at 229. The petition stated that the settlement was "contrary to the Brecknock Township Comprehensive Plan, the Lancaster County Plan and the nature and extent of the use of the property which existed in 1973, when the township's first zoning ordinance became effective" and that the settlement was "contrary to the public health, safety and welfare."

the Court of Common Pleas of Lancaster County.<sup>15</sup> Thirteen days later, the township supervisors rescinded the settlement agreement.<sup>16</sup> In response to their settlement being withdrawn, the corporation brought an action against the members of SHAPE alleging that the citizen group maliciously interfered with their contract.<sup>17</sup> The Lancaster Court of Common Pleas determined that the corporation brought the action against SHAPE as retaliation for exercising their constitutionally protected right to expression.<sup>18</sup>

Since that case, Pennsylvania courts have recognized several lawsuits brought before them to be SLAPP lawsuits.<sup>19</sup> This trend has prompted the Pennsylvania legislature to enact an anti-SLAPP statute in Title 27 of Pennsylvania Statutes Section 7707 and 8301-8308.<sup>20</sup> The

15. *Haines*, 11 Pa. D. & C.4th at 229.

16. *Id.* at 230.

17. *Id.* at 228.

18. *Id.* The right to petition the government and to freedom of speech is protected under the First Amendment to the United States Constitution and the Pennsylvania State. U.S. CONST. AMEND. I.

19. See *Wawa, Inc. v. Alexander J. Litwornia & Assoc.*, 54 Pa.D.& C.4th 375 (2001). Although most courts identify with the intention of preventing a plaintiff from intimidating a person or group from stating their opinions, some courts have started to recognize cases as SLAPP suits with the intention to give deference to an administrative agency decision. For example, in *Wawa, Inc.*, a corporation that sought to open three convenience food markets in the Lehigh Valley of Pennsylvania claimed that an individual, who owned convenience stores in the area, presented false information to the zoning body in an effort to get the zoning body to reject the corporation's application for zoning approval. *Id.* The corporation alleged that the potential competitor prepared a videotape that contained false information as to the volume of traffic and safety hazard at the location of the plaintiff's proposed stores and provided the videotape to the zoning board. *Id.* The Court dismissed the corporation's complaint as a SLAPP suit that was intended to silence the competitor's opposition to the proposed development. *Id.* The court stated, "The ability to petition the governmental entities, even for a selfish motive, must be protected if our democracy is to survive." The court further stated that the corporation should have confidence in the zoning board's ability to identify the credibility of the videotape. *Wawa, Inc. v. Alexander J. Litwornia & Assoc.*, 54 Pa.D. & C.4th 375 (2001).

20. 27 Pa. Const. Stat. § 8301 - § 8305(2000).

SEC.

8301. Definition

8302. Immunity

8303. Right to a Hearing

8304. Intervention

8305. Construction

8301. Definition

The following words and phrases when used in this chapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Communication to the Government." A written or oral statement or writing made:

- (1) Before a legislative, executive, or judicial proceeding or any other official proceeding authorized by law;
- (2) In connection with an issue under consideration or review by a legislative, executive or judicial body or any other official proceeding

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authorized by law; or

(3) To a government agency in connection with the implementation and enforcement of environmental law and regulations.

“Enforcement of Environmental Law and Regulation.” Activity relating to the identification and elimination of violations of environmental laws and regulations, including investigations of alleged violation, inspections of activities subject to regulation under environmental law and regulations and responses taken to produce correction of the violations.

“Government Agency.” The Federal Government, the Commonwealth and any of the Commonwealth’s departments, commissions, boards, agencies, authorities, political subdivisions, or their departments, commissions, boards agencies of authorities.

“Implementation of Environmental Law and Regulation.” Activity relating to the development and administration of environmental programs developed under environmental regulation.

#### 8302. Immunity

A. General Rule. B Except as provided in subsection (B), a person that pursuant to federal or state law, files an action in the courts of this commonwealth to enforce an environmental law or regulation or that makes an oral or written communication to a governmental agency relating to enforcement or implementation of an environmental law or regulation shall be immune from liability in any resulting legal proceeding for damages where the action or communication is aimed at procuring favorable government action

B. Exceptions. B A person shall not be immune under this section if the allegation in the action or any communication to the government is relevant or material to the enforcement or implementation of an environmental law or regulation and:

(1) The allegation in the action or communication is knowingly false, deliberately misleading or made with malicious and reckless disregard for the truth or falsity;

(2) The allegation in the action or communication is made for the sole purpose of interfering with existing or proposed business relationships; or

(3) The oral or written communication to a government agency relating to enforcement or implementation of an environmental law or regulation is later determined to be a wrongful se of process or an abuse of process

#### 8303. Right to a Hearing

A person who wishes to raise the defense of immunity from civil liability under this chapter may file a motion with the court requesting the court to conduct a hearing to determine the preliminary issue of immunity. If a motion is filed, the court shall then conduct a hearing and if the motion is denied, the moving party shall have an interlocutory appeal of right to the Commonwealth Court, during which time all discovery shall be stayed.

#### 8304. Intervention

A government agency has the right to petition to intervene or otherwise participate as an amicus curiae in the action involving public petition and participation.

#### 8305. Construction.

Nothing in this chapter shall be construed to limit any constitutional, statutory or common law protections of defendants to actions involving public petition and participation.

27 Pa. Cons. Stat. § 8301 - § 8305 (2000). The provision for remedies is stated in 27 Pa. Cons. Stat. § 7707(2000), which states:

A person that successfully defends against an action under Chapter 83 (relating to participation in environmental law or regulation) shall be awarded reasonable attorney fees and the costs of litigation. If the person prevails in

anti-SLAPP statute, which was passed into law on December 20, 2000, gives courts an expedited process with which to dispose of SLAPP lawsuits, and, as a deterrent, assesses penalties to people who bring such actions.<sup>21</sup>

## II. SLAPP Suits Are Based Upon the Noerr-Pennington Doctrine

SLAPP suits are typically initiated in response to a private citizen or group petitioning the government to influence the governmental body in its decision on a matter in which the plaintiff has an interest, such as a request for a variance from existing zoning.<sup>22</sup> The concept that a citizen should enjoy the right to petition the government has evolved into the Noerr-Pennington doctrine.<sup>23</sup> This doctrine provides that every United States citizen has the right to participate in government and should not be penalized for exercising their First Amendment right to petition the government.<sup>24</sup> Under the Noerr-Pennington doctrine, a citizen's right to petition the government should be protected regardless of whether the motivation for doing so is to advance their own interests.<sup>25</sup>

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part, the court may make a full award or a proportionate award.

27 Pa. Cons. Stat. § 7707 (2000).

21. *See id.*

22. *Tri-County Concrete*, 2000 WL 1513696 at \*6. However, in a few cases, courts have recognized causes of action where the statements that are the basis of the lawsuit have been made between private individuals, as opposed to being communicated to the government. For example, in *Averill*, *supra*, Jeannie Averill opposed the purchase of a home in her neighborhood by a charitable organization for the purpose of using the property as a shelter for battered women. *Id.* at \*8. Averill made public her opposition to the purchase of the property and unsuccessfully attempted to dissuade her employer from supporting the organization as a charity. *Id.* The charitable organization brought a slander suit against Averill based on the statements that she made to her employer. *Id.* The Court of Appeal for the Fourth District of California determined that California law provided protection to private conversations and that the court could strike the pleadings as a whole on the basis that the lawsuit was SLAPP litigation. *Averill*, 42 Cal. App. 4th 1170 (1996).

23. The Noerr-Pennington doctrine is based on two Supreme Court cases - *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). Although both of these cases dealt with anti-trust litigation, the Noerr-Pennington doctrine has been extended to protect other action in which a citizen or organization petitions the government. *Barnes Found v. Township of Lower Merion*, 927 F. Supp 874 at 876 (E.D.Pa. 1996).

24. *Barnes Found. v. Township of Lower Merion*, 927 F.Supp 874 at 876 (E.D.Pa. 1996).

25. *Id.* at 877. In *Barnes*, the Eastern District Court of Pennsylvania stated:

"In a representative democracy such as this, these branches of government act on behalf of the people and to a very large extend, 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 people cannot freely inform the government of their wishes would be particularly unjustified."

The Noerr-Pennington doctrine, however, does not protect a citizen's right to petition the government when the petitioning process is strictly intended to harass or as a delay tactic to keep an opponent from exercising their rights.<sup>26</sup> The exclusion of frivolous claims is referred to as the "sham exception."<sup>27</sup>

The United States Supreme Court outlined a two-part test that should be used to determine if an action that is filed with the government falls under the "sham exception."<sup>28</sup> First, the Court identified that a "sham" petition is baseless in that "no reasonable litigant could realistically expect success on the merits."<sup>29</sup> Second, a "sham" petition is directed at injuring the opposition through the use of government process - as opposed to the outcome of the process.<sup>30</sup> Any filing that meets both of these prongs of the Supreme Court's test is determined to be a "sham" petition.<sup>31</sup>

The use of court proceedings as a weapon has taken two forms in Pennsylvania courts - causes of action for abuse of process and malicious use of process.<sup>32</sup> An abuse of process claim uses the court proceedings for a purpose that they are not intended.<sup>33</sup> In abuse of process claims, the parties are involved in the legal system for a totally different cause of action, but once involved, the parties use the court processes to lash out against the other party.<sup>34</sup> An abuse of process claim brings action for this abuse of the court system.<sup>35</sup>

In contrast, a malicious use of process claim addresses situations where a party wrongfully initiates a lawsuit.<sup>36</sup> This action was originally founded in common law;<sup>37</sup> however the Pennsylvania legislature adopted

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*Id.*

26. *Id.* "The only restriction placed on Noerr-Pennington immunity is that the petitioners must make a genuine effort to influence a legislation or procure favorable government action." *Id.*

27. *Id.* Factors present in sham litigation include, but are not limited to, the presence of repetitive litigation, deliberate fraud, supplying false information, and whether lower courts have stated or implied the action is frivolous or objectively baseless and whether they have dismissed it. *Id.* These same considerations are used to determine that a case is not a SLAPP case. See *Tri-County*, 2000 WL 1513696 at \*6.

28. *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60-62 (1993).

29. *Id.* at 60.

30. *Id.*

31. *Id.*

32. *Cameron v. Graphic Mgmt. Assoc., Inc.*, 817 F.Supp. 19, 21 (E.D.Pa. 1992).

33. *Id.* "Typical forms of abuse of process actions include extortion by means of attachment, execution or garnishment, and blackmail by means of arrest or criminal prosecution." *Zappala v. Hub. Foods, Inc.*, 683 F.Supp. 127, 129 (W.D.Pa. 1988).

34. *Cameron*, 817 F.Supp. at 19.

35. *Id.*

36. *Cameron*, 817 F.Supp. at 21.

37. *Zappala*, 683 F.Supp. at 129.

it into law in 1980 as the Dragnetti Act.<sup>38</sup> A malicious use of process claim addresses situations where a party wrongfully initiates a suit against another person.<sup>39</sup>

The SLAPP statute that was adopted by the Pennsylvania legislature is an extension of the Dragnetti Act. Both the malicious use of process cause of action and the SLAPP give power to an individual against someone is using the court process against them in a way in which the court system was not intended. The Dragnetti Act gives a person who is brought to court on a frivolous or wrongful charge a cause of action to be compensated for their damages that result from a wrongful lawsuit being initiated against them.<sup>40</sup> In comparison, the SLAPP statute gives Pennsylvania courts an expedited method of dismissing claims that are without merit.<sup>41</sup>

### III. Legislative Debate over Enactment of Pennsylvania's Anti-SLAPP Statute

The preamble to the SLAPP act, signed into law by the Governor on

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38. 42 Pa. Cons. Stat. § 8351-54 (1980). Section 8351 provides:  
Wrongful use of civil proceedings:

(A) Elements of action - A person who takes part in the procurement, initiation or continuation of civil proceedings against another is subject to liability to the other for wrongful use of civil proceedings, if:

- (1) He acts in a grossly negligent manner or without probable cause and primarily for a purpose other than that of securing the proper discovery, joinder of parties or adjudication of the claim in which the proceedings are based; and
- (2) The proceedings have terminated in favor of the person against whom they are brought.

(B) Arrest or seizure not required B The arrest or seizure of the person or property of the plaintiff shall not be a necessary element for an action brought pursuant to this subchapter.

42 Pa. Cons. Stat. § 8351 (1980). Section 8354 addresses the burden that is placed on a plaintiff to prove that the opposing party initiated a lawsuit "wrongfully" under this Section.

Section 8354 provides:

A plaintiff alleging wrongful use of civil proceedings must prove:

- (1) That the defendant procured, initiated, or continued civil proceedings against him,
- (2) That the proceedings were terminated in his favor
- (3) That the defendant did not have probable cause for his action
- (4) That the primary purpose for which the proceedings were brought was not that of securing the proper discovery, joinder of parties or adjudication of the claim upon which the proceedings were based, and
- (5) the plaintiff has suffered damages as set forth in section 8353.

42 Pa. Cons. Stat. § 8354 (1980).

39. *Cameron*, 817 F.Supp. at 21.

40. *Zappala*, 683 F.Supp. at 129.

41. *See* 27 Pa. Cons. Stat. § 8301 - § 8305 (1980).



December 20, 2000,<sup>42</sup> stated:

The General Assembly finds and declares as follows:

- (1) It is contrary to the public interest to allow lawsuits, known as Strategic Lawsuits Against Public Participation (SLAPP), to be brought primarily to chill the valid exercise by citizens of their constitutional right to freedom of speech and to petition the government for the redress of grievances.
- (2) It is in the public interest to empower citizens to bring a swift end to retaliatory lawsuits seeking to undermine their participation in the establishment of State and local environmental policy and in the implementation and enforcement of environmental law and regulations.<sup>43</sup>

Although this quote acknowledges that the Pennsylvania legislature appreciated the threat that SLAPP lawsuits pose, the issue of the appropriate substance of the anti-SLAPP law generated considerable controversy for the legislators. It took several years of debate within the Pennsylvania House and Pennsylvania Senate, as well as several different proposals and amendments, before the existing anti-SLAPP law was finally adopted.

On January 24, 1995, Representative Camille "Bud" George<sup>44</sup> introduced House Bill 281 that was intended to protect citizens who participated in environmental policy debate from civil liability.<sup>45</sup> The act was named the Environmental Policy Participation Law.<sup>46</sup> The act urged that the rights of the public to participate in making, implementing and enforcing environmental laws needs to be protected by "great diligence."<sup>47</sup> Act 281 sought to protect these rights by declaring that any person who exercises their right of free speech in connection with enforcement or implementation of an environmental law or regulation would be immune from civil liability for communications aimed at

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42. This was almost ten years after the Court of Common Pleas of Lancaster County first recognized the case brought by Haines and Kibblehouse, Inc. to be a SLAPP lawsuit. *See, Haines and Kibblehouse, Inc. v Silver Hill Assoc.*, 11 Pa. D & C.4th 228 (Pa. D & C.4th 1991).

43. H.B. 393, 182d Leg., Reg. Sess. (Pa. 1999).

44. Representative Camille "Bud" George is a Democratic Representative from the 74th Congressional District. He has been a Representative in the Pennsylvania House of Representatives from November of 1974 until the present. He is Chairman of the Environmental Resources and Energy Committee (formerly known as the House Conservation Committee).

45. H.B. 281, 179th Leg., Reg. Sess. (Pa. 1995).

46. H.B. 281. Section 1 states "This act shall be known and may be cited as the Environmental Policy Participation Law."

47. H.B. 281.

procuring a favorable governmental action.<sup>48</sup>

In determining if a lawsuit was a claim brought merely with the intention of intimidating or harassing an opponent of an environmental proposal, Act 281 directed the court to consider whether the plaintiff has established, by clear and convincing evidence, that there is a substantial likelihood that the plaintiff will prevail on their claim.<sup>49</sup> If it was determined by a court that the plaintiff initiated the action as a SLAPP lawsuit, the court had the authority to direct the plaintiff to pay costs to the defendant, including reasonable counsel fees and costs of litigation.<sup>50</sup> Act 281's tool to dispense with any cause of action, which arose from the act of a person in furtherance of their right of petition or free speech, was

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48. H.B. 281. Section 3 stated:

Immunity from suit B A person who acts in furtherance of the person's right of petition or free speech under the Constitution of the United States or the Constitution of Pennsylvania in connection with an issue related to enforcement or implementation of environmental law or regulation shall be immune from civil liability in any action regardless of intent or purpose except where the communication to the government agency is not genuinely aimed at procuring a favorable governmental action, result, or outcome. A communication is not genuinely aimed at procuring a favorable governmental action, result or outcome if it is not material or relevant to the enforcement or implementation of environmental law or regulation.

H.B. 281. Sect. 3.

49. H.B. 281. Section 4(a) stated:

General rule B A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the Constitution of Pennsylvania in connection with a public issue shall be subject to a special motion to strike unless the court determines that the plaintiff has established that there is a substantial likelihood that the plaintiff will prevail on the claim. In making its determination, the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based. The court shall advance any motion to strike so that it may be heard and determined with as little delay as possible.

H.B. 281. Sect. 4(a).

50. H.B. 281. Section 5 stated:

Attorney fees B If a person successfully defends against an action [involving public petition or participation] under this act, that person shall be awarded reasonable attorney fees and the costs of litigation, if the person prevails in part, the court may award reasonable attorney fees and costs of litigation or an appropriate portion thereof. A person successfully defends against an action if the person prevails on a motion to strike a cause of action under Section 4 or later prevails on the merits in the action.

H.B. 281. § 5.

H.B. 281. Section 7 stated:

Abuse of legal process B In addition to other costs allowable by general rule or statute, the environmental hearing board may award costs, including reasonable counsel fees if the board determines that an appeal is frivolous or taken solely for delay or that the conduct of the appellant is dilatory or vexatious.

H.B. 281. § 7.

the motion to strike.<sup>51</sup>

The bill produced serious debate on the Pennsylvania House floor when it was presented for consideration on June 28, 1996.<sup>52</sup> Representative Barley stated, "I oppose this legislation. It is a very dangerous piece of legislation. It is going to set some very dangerous precedents."<sup>53</sup> Barley stated that the granting of immunity for civil liability was too wide and would result in abuse of the system.<sup>54</sup> He expressed his concern that there was not a provision in the act which required that the communications to the government agencies that was sought to be protected had to be true or that the person who made these statements had to have a reasonable belief that the statement or writing was true.<sup>55</sup>

In response to Representative Barley's remarks, Representative George stated that he believed that Representative Barley had an ulterior motive in opposing the legislation and that the intention of the bill was to protect the rights of Pennsylvania's citizens.<sup>56</sup> Representative Manderino rose in support of the bill and expressed the importance of providing an avenue for Pennsylvania's citizens to be able to freely communicate with regulatory agencies.<sup>57</sup> Representative Hennessey commented on the House floor as to the extent of immunity that the bill granted. He acknowledged the need for immunity in a truth-seeking forum such as on the floor of the House and Senate. In contrast, he believed that immunity was not appropriate for statements that could potentially be made outside of a governmental forum and which were not guaranteed to be authentic statements.<sup>58</sup> Ultimately, the bill was sent to the Judiciary Committee for

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51. H.B. 281.

52. H. 179-2677, Gen. Sess. (Pa. 1996).

53. H. 179-2677, Gen. Sess. at 1 (Pa. 1996).

54. *Id.*

55. *Id.* Barley stated,

"[I]f this legislation is adopted, a business is faced with the possibility of being horrendously libeled or slandered in public, at a public hearing, or practically anywhere else that a public issue is raised by someone who knows that the statement or writing that they have offered is false. . .[t]hat business will be denied the ability to seek redress for these actions since this act would grant such speaker or writer complete civil liability."

*Id.*

56. H. 179-2677, Gen. Sess. at 2 (Pa. 1996). Rep. George stated, "We have our rights, and the rights will continue to be ours as long as we allow the people to have them." *Id.*

57. H. 179-2677, Gen. Sess. at 2 (Pa. 1996).

58. H. 179-2677, Gen. Sess. at 3 (Pa. 1996). Rep. Hennessey stated, "I understand the intention of the maker. I believe it is the proper thing to do to level the playing field between a very rich corporation and an individual seeking to impose some environmental protective measures, but I think the bill goes too far. It has some unintended consequences." *Id.*

reconsideration.<sup>59</sup> Act 281 eventually died in committee.<sup>60</sup>

During the 1997-1998 Regular Session, a new bill, House Bill 394, was introduced that was almost identical in text to House Bill 281.<sup>61</sup> It also died in committee.<sup>62</sup> However, the exact same language to the two previous bills reappeared in an amendment to House Bill 1744, which was proposed by Representative George on October 28, 1997.<sup>63</sup>

The amendment produced significant debate on the house floor. Representative Birmelin<sup>64</sup> claimed that the amendment violated Pennsylvania Constitution Article V, section 10, subsection c,<sup>65</sup> since the amendment included a motion to strike provision.<sup>66</sup> The constitutionality of the proposal had not been raised before, even though the motion to strike appeared in the text of both the previous bills. Representative Birmelin stated that the Pennsylvania Rules of Civil Procedure do not

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59. H. 179-2677, Gen. Sess. at 4 (Pa. 1996).

60. California Anti-SLAPP Project at <http://www.casp.net/statepa.html> (Last visited on November 25, 2002.) [hereinafter Ca. Project].

61. H.B. 281, 179th Leg., Reg. Sess. (Pa. 1995).

62. Ca. Project, supra note 60.

63. H.B. 281.

64. Rep Jerry Birmelin, Republican from the 139<sup>th</sup> District; member of the House of Representatives from 1985 to present.

65. P.A. CONST. ART. V. § c states, "The Supreme Court shall have the power to prescribe all general rules governing practice, procedure and the conduct of all courts."

66. H.B. 1744, 180th Leg., Reg. Sess. (Pa. 1997). The portion of the amendment that addressed the motion to strike stated:

§ 1840.1(B) Motion to Strike B

(1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the constitution of the United States or the constitution of Pennsylvania in connection with a public issue shall be subject to a special motion to strike unless the court determines that the plaintiff has established that there is a substantial likelihood that the plaintiff will prevail on the claim. In making its determination, the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability to defense is based. The court shall advance any motion to strike so that it may be heard and determined with as little delay as possible.

(2) The court shall stay all discovery proceeding in the action upon the filing of a motion to strike, provided, however that the court, on motion and after a hearing and for good cause shown, may order that specified discovery be conducted. The stay of discovery shall remain in effect until notions of the entry of the order ruling on the motion to strike.

(3) If the court determines that the plaintiff has established that there is a substantial likelihood that he will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination.

(4) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper.

H.B. 1744. § 1840.1 (B).

provide for a motion to strike in litigation that is heard in Pennsylvania state courts.<sup>67</sup> He expressed that only the Supreme Court could introduce a new procedure such as a motion to strike and that the legislature did not have the authority to do so.<sup>68</sup>

In response to Representative Birmelin's accusations, the Speaker presented the issue to the floor to comment on the constitutionality of the amendment.<sup>69</sup> Some of the legislators argued that the motion to strike was constitutional.<sup>70</sup> There were inferences made on the floor that the question of constitutionality was only raised to avoid the actual substance of the bill as anti-SLAPP litigation.<sup>71</sup> Some representatives expressed the opinion that the bill should be passed and the question of constitutionality should be left for the courts to decide if a party challenged the bill on those grounds.<sup>72</sup> Ultimately, when the vote was

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67. H. 180-2466, Gen. Sess. at 3 (Pa. 1997).

68. *Id.* Rep. Gannon agreed and stated, "Legislature has authority to deal with substantive law- this is procedural law. This Amendment is overstepping our [the Congress's] boundaries into the court's business." *Id.*

69. H. 180-2466, Gen. Sess. at 7 (Pa. 1997).

70. Rep. Kathy M. Manderino, Democrat, District 194, member of the House of Representatives from 1993 to present, expressed her belief that the amendment was constitutional. She stated, "Motion to strike is not a new creation. It is a regular court proceeding. Anyone...who practices law has probably filed a motion to strike sometime." H. 180-2644, Gen. Sess. at 4 (Pa. 1997). Rep. Mark B. Cohen, Democrat from the 121st District, member of the House from 1974 to the present, expressed his agreement with the statement that made by Rep. Manderino.

71. H. 180-2466, Gen. Sess. at 4 (Pa. 1997). Rep. Kevin Blaum, Democrat, from the 121st District, member of the House of Representatives from 1981 to the present, stated, "When important issues, controversial issues come before this chamber that members do not want to vote on, the issue of germaneness is raised and the issue of constitutionality is raised and the people of Pennsylvania should know that when this happens, that prevents the House from being recorded on an up-or-down vote on whether or not that the issue of SLAPP suits can be put into Pennsylvania law."

*Id.*

72. H. 180-2644, Gen. Sess. at 5 (Pa. 1997). Some of the representatives felt that too much deference was being given to the judicial breach by rejecting the bill just to keep from stepping onto the court's toes. Rep. Horsey stated,

"I am outraged, Mr. Speaker, that constantly when we are doing the business of the House of Representatives here that we have to be sensitive to the courts. Mr. Speaker, they are overly sensitive as a branch of government themselves. . . I need to remind us that the initial branch of the U.S. government, if you go back into history, was the legislature first, Mr. Speaker, and then the judiciary branch, and I think here are members in this chamber who keep forgetting that. . . I think that we should pass statutes, pass laws, and whatever the courts decide to do as a branch of government, they should do it."

*Id.* Allegations were made that the representatives who were also lawyers or who served on the judiciary committee gave too much deference to the courts. Rep. Mike J. Horsey, Democrat from District 190, member of the House of Representatives from 1995 to the present, also stated,

"...[I]t is not coincidental that the gentleman who constantly raises the

put onto the floor, the constitutionality of the bill was upheld by a narrow vote of 113-80.<sup>73</sup> Although the bill eventually passed the House, the portion of the bill that pertained to SLAPP lawsuits was defeated in the Senate before it was enacted.<sup>74</sup>

The bill that finally became Pennsylvania's anti-SLAPP law was introduced on February 8, 1999 by Representative George.<sup>75</sup> House Bill 393 varied from its predecessors in that it not longer contained the motion to strike provision that had been controversial in the past.<sup>76</sup> The bill proposed to grant immunity to any communication to a government agency concerning the enforcement or implementation of any environmental law or regulation.<sup>77</sup> The bill also reflected the concerns of Representative Barley, in that it stated that protection would only be provided if the communication to the government agency was "aimed at procuring a favorable governmental action, result or outcome."<sup>78</sup> The bill specified that an action was not "genuinely aimed at procuring a favorable governmental action, result or outcome" if the communication was "(i) not material or relevant to the enforcement or implementation of environmental law or regulation; (ii) was knowingly false when made; (iii) was rendered with reckless disregard as to the truth or falsity of the statement when made; or (iv) represented a wrongful use of process or abuse of process."<sup>79</sup>

A defendant, who believed that a lawsuit filed against him was directed toward speech or actions to which the bill provided immunity, is directed by the bill to file preliminary objections to the legal insufficiency of the pleading or file another appropriate motion that raises the defense of immunity.<sup>80</sup> All discovery was to be postponed

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question that we need to be sensitive to the courts is a member and an officer of that branch of government also as well as being a member of this branch, and he should be careful of that, because it appears to be he cannot handle being a member of the House of Representatives and being an officer of the court."

*Id.* Representative George furthered this sentiment by stating,

"The big problem is that everybody either wants to be an attorney or thinks he or she is an attorney. Maybe if we dealt more with issues of the heart and issues of the mind, used a little logic and a little perception of where we are going and why we are here, then why would we fear legislation that has been passed in 12 states?"

*Id.*

73. H. 180-2466, Gen. Sess. at 7 (Pa. 1997).

74. Ca. Project, *supra* note 60.

75. *Id.*

76. H.B. 393, 182nd Leg., Reg. Sess. (Pa. 1999).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

until after the court made its ruling on the issue of immunity.<sup>81</sup> If the court determined that the speech or actions of the defendants were immune under the bill, or that there was not a substantial likelihood that the plaintiff would prevail at trial, the court could direct the plaintiff to pay the court costs incurred by the defendant, including reasonable attorney fees.<sup>82</sup> Additionally, if the court overrules the defendant's motion and finds that the plaintiff's claims are likely to prevail at trial, the plaintiff is not allowed to introduce this finding into evidence to sway the jury.<sup>83</sup>

The bill passed unanimously in the Pennsylvania House on April 19, 1999.<sup>84</sup> Controversy erupted once again over the issue of anti-SLAPP legislation when the bill was sent to the Pennsylvania Senate.<sup>85</sup> The bill was amended significantly by the Senate Environmental Resources and Energy Committee in April 1999 and on the Senate floor on November 21, 2000.<sup>86</sup> The final version of the bill was signed into law by Governor Ridge on December 20, 2000.<sup>87</sup>

The new statute is a weaker version of the original bill that had been proposed.<sup>88</sup> The anti-SLAPP statute directed the defense of immunity to be raised by filing a motion with the court requesting a hearing to determine the issue of immunity.<sup>89</sup> If the court grants the motion for immunity, the case is dismissed.<sup>90</sup> The law does not provide any direction to the courts as to the procedure to be employed at the hearing or as to which party bares the burden of proof in establishing whether to grant the defendant's motion for immunity.<sup>91</sup>

Another change from the proposed bill is that the provision that discovery would be stayed until the Court determined whether to grant the motion for immunity is deleted from the enacted bill.<sup>92</sup> Discovery is now only stayed during an interlocutory appeal of a decision to deny the motion for immunity.<sup>93</sup> The Pennsylvania anti-SLAPP statute retains the

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81. H.B. 393, 182nd Leg., Reg. Sess. (Pa. 1999).

82. *Id.*

83. *Id.*

84. Ca. Project, *supra* note 60.

85. Citizens Advisory Council Oversight Committee, Citizens Advisory Council Administrative Oversight Committee to the Pennsylvania Department of Environmental Protection, at <http://www.cacdep.state.pa.us/cac/mineral/slapp.htm> (last visited January 17, 2002).

86. Ca. Project, *supra* note 60.

87. *Id.*

88. *Id.*

89. 27 Pa. Cons. Stat. § 8303(1980).

90. *Id.*

91. *Id.*

92. 27 Pa. Cons. Stat. § 8302 (1980).

93. *Id.*

provision that in order for the statement to be protected it must be aimed at favorable governmental action, result or outcome,<sup>94</sup> as well as, the provision granting discretion to the trial court in awarding attorney fees and court costs against a plaintiff determined by a court to have filed a SLAPP suit with the intention of deterring the defendant's right to petition or his right to free speech.<sup>95</sup>

#### IV. Pennsylvania's Anti-SLAPP Statute in Comparison to SLAPP Legislation in Other States

Washington was the first state to adopt a law against SLAPP lawsuits in 1989.<sup>96</sup> Since that time, twenty other states have adopted anti-SLAPP legislation and several other states have bills that propose such legislation.<sup>97</sup> While all the anti-SLAPP statutes are aimed at providing protection for individuals who are exercising their first amendment rights, the anti-SLAPP laws that have been enacted vary greatly in the manner in which protection is provided and the nature of the remedy available to a defendant successful in establishing that an action against him is a SLAPP lawsuit.

The protection provided by the anti-SLAPP statutes in Oklahoma and Florida are very narrow. Protection in Oklahoma is limited to cases where libel is alleged.<sup>98</sup> Restriction as to the cause of action is not found in any other state anti-SLAPP statute. Florida's law only prohibits SLAPP lawsuits initiated by governmental entities.<sup>99</sup> This is the only anti-SLAPP statute that places a limitation on who can be the defendant of a SLAPP action. Oregon, Louisiana and California anti-SLAPP statutes include the motion to strike provision that produced significant debate within the Pennsylvania House.<sup>100</sup> Most anti-SLAPP laws direct the defendant to bring the claim of immunity from prosecution via the

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94. *Id.*

95. 27 Pa. Cons. Stat. § 7707 (1980).

96. Wash. Rev. Code § 4.24.500 - 4.24.520 (1989). The legislation was initiated in response to an action that was brought against a young woman who was sued for defamation by a real estate company after she helped the state collect back taxes owed by the company. Ca Project, *supra* note 60.

97. Ca. Project, *supra* note 60. The states that have codified anti-SLAPP measures into law are the states of California, Delaware, Florida, Georgia, Hawaii, Indiana, Louisiana, Maine, Massachusetts, Minnesota, Nebraska, Nevada, New Mexico, New York, Oklahoma, Oregon, Rhode Island, Tennessee, Utah and Washington. At the present time, nine other states have anti-SLAPP bills pending. These states are Arkansas, Colorado, Kansas, Maryland, Michigan, New Hampshire, New Jersey, Texas, and North Carolina. Ca. Project, *supra* note 60.

98. Okla. Stat. tit. 12 § 1443.1(1995).

99. Fla. Stat. ch. 768.295 (2000).

100. See, Cal. Civ. Proc. § 425.16 (1992); La. Rev. Stat. Ann. § 971 (1999); H.B. 2460, 2001 Leg., 71st Sess. (Or. 2001)(enacted).



avenues of the motion to dismiss or the motion for summary judgment.<sup>101</sup> Some statutes provide direction to the court in determining if the motion should be granted.<sup>102</sup> Pennsylvania is the only state that provides in its statute that the defendant should make a motion for a hearing to determine if the defendant's actions, that are the basis of the cause of action, are immune under the statute.<sup>103</sup> The statute does not give any direction as to procedures for the hearing or considerations of the court in making the determination as to whether the defendant should be granted immunity under the anti-SLAPP law.<sup>104</sup>

The anti-SLAPP laws in some states are very specific as to the burden needing to be established by each party to gain or overcome immunity under the statute. For example, in Oregon, when a defendant makes a motion to strike part of the pleading, the defendant has the burden to establish that the claim arises out of an act protected by either the federal or state constitution.<sup>105</sup> If the defendant meets this established standard, the burden then shifts to the plaintiff to produce evidence to support a *prima facie* case that the lawsuit is not a SLAPP lawsuit.<sup>106</sup> If the plaintiff is successful in this showing, then the law directs the courts to deny the motion to strike.<sup>107</sup>

Other states use a variation on this burden-shifting technique. For example, in Rhode Island, the defendant has the burden of proving that the defendant's speech or petition does not qualify for immunity.<sup>108</sup> The defendant can meet this burden by showing that the defendant's act was a "sham" which was not aimed at procuring a favorable government action.<sup>109</sup>

More stringent anti-SLAPP laws place the burden on the plaintiff to show that the litigation is not meant to invade the First Amendment rights of any citizen or group. In Delaware and Nebraska, a plaintiff can only recover by proving all necessary elements of their cause of action. Additionally, the plaintiff must prove that the communication to the government agency, which is the basis of the plaintiff's cause of action,

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101. See Haw. Rev. Stat. § 634F-1; Ind. Code § 34-7-7-1 - 34-7-7-10 (1998); Me. Rev. Stat. Ann. tit. 14 § 556 (1998); Neb. Rev. Stat. § 25-21,241 - 25-21,246 (1996); N.M. Stat. Ann. § 38-2-9.1- 38-2-9.2 (2001); N.Y. Civ. Rights Laws § 70-a (1995); R.I. Gen. Laws § 9-33-2 - 9-33-3 (1995) ; Citizens Participation in Government Act, Utah Code Ann. § 78-58-101 - 78-58-105 (2001).

102. See, Me. Rev. Stat. Ann. tit. 14 § 556 (1998); Neb. Rev. Stat. § 25-21,241 - 25-21,246 (1996).

103. 27 Pa. Cons. Stat. § 8303 (1980).

104. *Id.*

105. H.B. 2460, 2001 Leg., 71st Sess. (Or. 2001) enacted.

106. *Id.*

107. *Id.*

108. R.I. Gen. Laws § 9-33-2 (1995).

109. *Id.*

was made with the knowledge that the statement was false or made with total disregard as to the truth of the statement.<sup>110</sup>

Similarly, in Georgia, upon the filing of any claim against an action that could be construed as the defendant exercising his right of free speech or right to petition the government, both the plaintiff and the plaintiff's lawyer must file a written verification that the action is not a SLAPP lawsuit.<sup>111</sup> The written verification, which is required to be signed under oath, must state that the claim is well founded and not meant to suppress the right of free speech, the right to petition the government or to harass or cause unnecessary delay.<sup>112</sup> Upon its own initiative or in response to a motion to dismiss or a motion to strike, the court will award any party who signed the verification to pay the defendant reasonable costs and attorney fees.<sup>113</sup>

Damage awards are imposed to discourage the filing of SLAPP lawsuits. Pennsylvania, along with most other states, impose reasonable attorney fees and the costs of litigation to a defendant when the court or agency determines that the action against him is a SLAPP suit.<sup>114</sup> Delaware, Minnesota, Nebraska, and Rhode Island provide for punitive damages for cases where it is established that the suit was brought for the purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of petition, speech or association rights.<sup>115</sup> New York law provides that both punitive damages and compensatory damages can potentially be ordered upon the finding that litigation was commenced with such a purpose.<sup>116</sup>

The most stringent damage provisions are found in the Hawaii anti-SLAPP statute which directs that if it is determined that a lawsuit is a SLAPP action, the court should direct the plaintiff to pay the greater amount of either the actual damages incurred by the defendant or \$5,000, as well as the costs of the suit and defendant's reasonable attorney

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110. Del. Code. Ann. tit. 10 § 8137 (1992); Neb. Rev. Stat. § 25-24,244 (1996).

111. Ga. Code Ann. § 9-11-11.1 (1997).

112. *Id.*

113. *Id.*

114. See, 27 Pa. Cons. Stat. § 7707 (2000); Del. Code. Ann. tit. 10 § 8137 (1992); Fla. Stat. ch. 768.295 (2000); Ga. Code Ann. § 9-11-11.1 (1997); Ind. Code § 34-7-7-7 (1998); La. Rev. Stat. Ann. § 971 (1999); Me. Rev. Stat. Ann. tit. 14 § 556 (1998); Minn. Stat. § 554.04 (1994); Neb. Rev. Stat. § 25-21-243 (1994); Nev. Rev. Stat. 41.670 (1993); N.M. Stat. Ann. § 38-2-9.1 (2001); N.Y. Civ. Rights Law § 70-a (1995); H.B. 2460, 2001 Leg., 71<sup>st</sup> Sess. (Or. 2001)(enacted), R.I. Gen. Laws § 9-33-2 (1995); Tennessee Anti-SLAPP Act of 1997, Tenn. Code Ann. § 4-21-1003 (1997); Citizens Participation in Government Act, Utah Code Ann. § 78-58-105 (2001); Wash. Rev. Code § 4.24.520 (2002).

115. Del. Code Ann. tit. 10 § 8137 (1992); Minn. Stat. § 554.04 (1994); Neb. Rev. Stat. 25-21,243 (1994); R.I. Gen. Laws § 9-33-1 (1995).

116. N.Y. Civ. Rights Law § 70-a (1995).

fees.<sup>117</sup> The Hawaiian court may assess additional sanctions upon the party, its attorneys or the law firm, if the court decides such action would be a sufficient deterrent to similar future action.<sup>118</sup>

The Pennsylvania statute provides that a government agency may intervene or participate in the lawsuit.<sup>119</sup> In the state of Washington, the agency to which the communication was made has the option of providing the defense against a lawsuit that pertains to the exercise of the defendant's free speech or the right to petition the government.<sup>120</sup> If the agency decides not to intervene or participate in the case, the attorney general has the option to intervene or provide the defense.<sup>121</sup> The Nevada anti-SLAPP statute directs that the defense of a SLAPP action must be provided by the governmental agency to which the communication was made or the attorney general.<sup>122</sup>

Some states anticipated that an anti-SLAPP statute could be abused by alleging a suit to be a SLAPP lawsuit as a means to delay a legitimate lawsuit. Those legislatures initiated provisions called "SLAPP-backs" that provide for damages to be awarded against a defendant who unsuccessfully asserted that a claim by the plaintiff was a SLAPP action.<sup>123</sup> For example, the Oregon anti-SLAPP statute provides that if the court determines that the defendant's motion to strike on the basis of the action being a SLAPP action is frivolous, the court can direct the defendant to pay reasonable costs and attorney fees that the plaintiff paid in defending against the motion. Similarly, in California, the court will direct the payment of such costs if the court determines that the motion to strike filed by the defendant was merely for the purpose of causing delay.<sup>124</sup> The Pennsylvania anti-SLAPP statute does not contain a "SLAPP-back" provision.

#### V. Analysis of the Effectiveness of Pennsylvania's Anti-SLAPP Statute

The intention of the Pennsylvania legislature in enacting the Pennsylvania anti-SLAPP law was to protect the rights of Pennsylvania's citizens that are provided for in the United States Constitution and the Pennsylvania Constitution. Citizens who have had a SLAPP action

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117. *Id.*

118. Haw. Rev. Stat. § 634F-2 (2002).

119. 27 Pa. Cons. Stat. § 8302 (2000).

120. Wash. Rev. Code § 4.24.520 (2002).

121. *Id.*

122. Nev. Rev. Stat. 41.670 (1993).

123. *See*, Ind. Code ' 34-7-7-8 (1998); H.B. 2460, 2001 Leg., 71<sup>st</sup> Sess. (Or. 2001)(enacted); Neb. Rev. Stat. ' 25-21,244 (1996).

124. H.B. 2460, 2001 Leg., 71<sup>st</sup> Sess. (Or. 2001).

brought against them or who have witnessed others endure the cost and time of defending against a SLAPP lawsuit are discouraged from exercising these rights. Additionally, SLAPP lawsuits, which are filed merely to intimidate without the intention of going to trial, waste the time and resources of the court that could more efficiently be directed toward legitimate lawsuits. Therefore, to be an effective law, the Pennsylvania anti-SLAPP statute needs to strongly discourage the filing of SLAPP lawsuits and remove the threat imposed on the right of free speech and the right of petition of Pennsylvania citizens. As written, the Pennsylvania anti-SLAPP statute is not adequate to protect those rights.

A defendant, who believes they should be granted immunity under the Pennsylvania statute, is directed to file a motion for a hearing. At the hearing, the court will determine whether to grant immunity under the statute. Although the exact procedure of the immunity hearing is not specified by the statute, the plaintiff should appear at the meeting to defend against the motion by asserting that their lawsuit is legitimate and not intended as a SLAPP action. Of course, the plaintiff has another option - the plaintiff can decide to dismiss the lawsuit instead of attending the hearing. Since, as mentioned previously, most plaintiffs dismiss the lawsuit before the case actually goes to trial, this would be an opportune time to do so. Plaintiffs that dismiss the action at this time still have conveyed their intended message "Do not interfere with my business plans, or I intend to retaliate."

Although it is not clear from the statute, the court could potentially direct a plaintiff who dismisses an action before the hearing to pay damages. However, the only damages that are provided for in the statute are the payment of attorney fees and court costs. Developers and big businesses who make millions of dollars may not consider such damages to be a deterrent. It is a small price to pay to convey their message.

Additionally, a damages award of attorney fees and court costs are not an appropriate remedy to a citizen who has been forced to defend against a SLAPP lawsuit. Payment of attorney fees may repay the defendant lost money, but it does not compensate for the emotions that a defendant experiences upon the commencement of a SLAPP action. Even the most sophisticated defendant is likely to feel a little intimidated by being brought to court by a developer or large business. Court processes do not usually move very quickly. The experience of the lawsuit may be one that the defendant has to endure for a considerable amount of time and may cause the defendant a tremendous amount of stress and strife. That is exactly what the plaintiff in a SLAPP lawsuit desires.

Also, since the legislature deleted the bill provision which stayed discovery until the court had made a finding on the issue of immunity, a

developer or corporation who has more resources at their disposal can generate a lot of expensive discovery before the case is dismissed. Even though the court will order the plaintiff to compensate for attorney fees that the defendant incurs, fees may have to be paid by the defendant as they are incurred, depending on the contract between the attorney and the defendant. A large corporation or developer may maintain several lawyers on its payroll who can generate an enormous amount of requests for depositions, interrogatories and production of documents without incurring a considerable expense to the company.

In contrast, a private lawyer for an individual citizen or interest group can easily be overwhelmed by the amount of discovery which a law division within a corporation can generate. The demands that a corporation can place on the defendant and the defendant's attorney through discovery can also be used as intimidation. Further, an individual or citizen group may be strained to pay the costs of expensive discovery as they are incurred, even if they are ultimately compensated. The tension imposed by discovery may deter a defendant from exercising his right to free speech and right to petition the government on a later occasion.

The imposition of damages to the parties who file SLAPP lawsuits needs to be enough to be a deterrent. Big businesses and large developers may have more resources and money than the average citizen, however, these resources and money are not infinite. A large award for punitive damages will catch the attention of even a large company. A provision, such as found in Hawaii's anti-SLAPP statute, which gives the judge discretion to impose such damages as may be an effective deterrent, would be appropriate.<sup>125</sup> In determining the proper amount of damages to be imposed, the judge should take into account such considerations as the net worth of the defendant and extent and nature of the offense. Courts should be advised that using these considerations, the court should impose such damages that would provide justice to the defendant, as well as a deterrent to the plaintiff.

There probably is no way that a state can completely ensure that no SLAPP lawsuits will be filed in their courts. It is hard to police the intention of plaintiffs in filing lawsuits. However, the written verification system imposed by Georgia's anti-SLAPP statute makes the plaintiff state under oath that their intention in filing the lawsuit is not to suppress the freedom of speech or the right to petition the government.<sup>126</sup> Additionally, the attorney for the plaintiff must also sign the

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125. Haw. Rev. Stat. § 634F-2 (2002).

126. Ga. Code Ann. § 9-11-11.1 (1997).

verification.<sup>127</sup> These verifications stress to the party, and the lawyer filing the action, that the courts in Georgia will not tolerate SLAPP lawsuits. The verifications are required to be made under oath, which is intended to generate a feeling of the need for integrity in the filing of the lawsuit.

Probably the most effective provision of this system is the requirement for the attorney to sign the written verification. In addition to the threat of damages to both the party and the attorney, the potential of facing sanctions, such as license suspension, would discourage any lawyer from filing a lawsuit that may be construed as a SLAPP action. A lawyer is not likely to want to tarnish his/her reputation or risk being disbarred to file a case that is probably intended to be dismissed without going to trial.

Finally, the statute could ensure that the provisions are not misused by enacting a SLAPP-back provision. This provision would direct that if it were determined that a defendant was alleging that the action was a SLAPP suit, even though the defendant did not legitimately believe it to be one, but was instead concerned with creating a delay to litigation, the court could impose a damage award upon the defendant who initiated the motion. A proper damage award that the statute would assess to a defendant on a SLAPP-back action would be the imposition of the plaintiff's costs in defending against the motion, along with any damages that the court would determine to provide justice. In levying these additional damages, the court should be directed to consider the expenses at the disposal of both parties as well as the extent and nature of the offense.

## VI. Conclusion

The Pennsylvania anti-SLAPP statute provides protection for its citizens from defending against lawsuits that are intended to intimidate them from exercising their rights of freedom of speech and freedom of petition. However, it does not prevent the filing of such actions with the intention to dismiss the action at a later time with the same result of intimidation. The statute would be more effective in ensuring the goals of protecting the rights of all of its citizens and discourage the filing of such lawsuits if the plaintiff and the plaintiff's attorney were required to sign a written verification that the action is not intended to suppress the rights of defendant. Appropriate damages should be imposed upon the plaintiff and the attorney if it later is determined by the court that the case was actually a SLAPP lawsuit.

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127. *Id.*

Additionally, from the point of time that the defendant files the motion for immunity until the court announces its holding, all discovery should be stayed, to prevent the additional expense of discovery. Further, the damages that are assessed to a party who initiates a SLAPP action should be sufficient to be an effective deterrent from the plaintiff ever filing such a suit in the future and provide an example to others of the consequences of filing a SLAPP lawsuit. Finally, the court should contain a "SLAPP-back" provision, which would prevent defendants from alleging an action to be a SLAPP lawsuit merely as a means to postpone litigation.

Pennsylvania would take a firm stance against SLAPP lawsuits by imposing these features into the Pennsylvania anti-SLAPP statute. The statute would deter the misuse of court proceedings as an intimidation method, and would ensure Pennsylvania citizens the right to freely petition the government on environmental issues.

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