State "Anti-SLAPP" Statutes Codify First Amendment Doctrine Protecting a Corporation's Right to Petition

*By Raymond J. Tittmann**

On January 21, 2010, the Supreme Court found in *Citizens United v. Federal Election Commission*[1] that corporations have First Amendment rights in the context of campaign finance. But in some respects that ruling was not as newsworthy as critics suggest. Ironically, individuals and groups that are often at odds with corporate America[2] are largely responsible for a series of powerful statutes that have spread across the country over the last twenty years[3] applying the First Amendment's right of petition to corporate entities.

As illustrated in the chart at the conclusion of this article, about twenty-eight states now have statutes enabling defendants to attack at the outset of litigation "Strategic Lawsuits Against Public Participation" in government, or "SLAPPs" as they are popularly called. In December 2009, Representative Steve Cohen (D-TN) introduced a federal anti-SLAPP statute (H.R. 4364), which is awaiting consideration.

The anti-SLAPP movement is built on a fifty-year-old line of U.S. Supreme Court authority applying the First Amendment to protect a citizen's—including a corporate citizen's—petitioning activity (known as the "*Noerr-Pennington* doctrine").[4] One can reasonably speculate that Justice Alito had the *Noerr* line of cases in mind when President Barack Obama famously criticized the Court for reversing a hundred years of precedent. *Citizens United* relied on the *Noerr* line of cases in noting that corporations have consistently received First Amendment protection.[5]

In the most sympathetic scenario, anti-SLAPP statutes are motivated by stories of large corporations punishing community activists in court, alleging that an individual or group's petitioning activity interfered with a business opportunity. However, careful to achieve maximum effect, drafters have typically included several elements that are extremely useful to corporate entities of all sorts.

First, anti-SLAPP statutes typically define "person" broadly to include corporate entities. The Illinois Citizen Participation Act, for example, defines person as "any individual, corporation, association, organization, partnership, two or more persons having a joint or common interest, or other legal entity."[6]

Second, the right to petition the government includes the right to petition all branches of government, including the judicial branch. Thus a corporate defendant's pleadings in court are protected, and countersuits criticizing those pleadings qualify as "SLAPP" suits subject to immediate dismissal.

Third, anti-SLAPP statutes often extend protection to acts *in furtherance* of the right to petition. Thus, for example, a corporation's pre-lawsuit negotiations are also protected, and corporations will not be held liable for such conduct.

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There are countless examples of corporate defendants using anti-SLAPP statutes to their benefit, especially in California. Still, in other states like Illinois, the statute appears underutilized, judging from the scarcity of published decisions. This article discusses the basic statutory framework and the powerful tools available to corporate defendants under anti-SLAPP statutes.

I. The Statutory Framework

Though legislatures passing anti-SLAPP statutes are often motivated by stories of sympathetic defendants, the legislation typically requires only two considerations, and neither turns on the relative strength of the parties or the political nature of the petition: (1) whether the conduct complained of is protected by the right to petition, and (2) whether the petitioning activity was "genuine," i.e., motivated to achieve a favorable *outcome* rather than taking advantage of the *process* (e.g., as a delaying tactic).

For example, the Illinois anti-SLAPP statute, which is similar to most anti-SLAPP statutes, permits early motions to dismiss complaints against conduct that is "immune" under the First Amendment right to petition. "Immune" under this statute means the conduct was (1) "in furtherance of the constitutional rights to petition, speech, association, [or] participation . . . regardless of intent or purpose . . ."; (2) "except when not genuinely aimed at procuring favorable government action, result or outcome."[7]

These two elements of immunity therefore create a two-step process, which is common among anti-SLAPP statutes.

On the first step, there is no doubt that the right to petition protects a corporate lawsuit seeking redress from the courts, to the same extent it protects an activist petitioning the government. In fact, this has long been the holding of the Supreme Court under the *Noerr-Pennington* doctrine.[8]

For example, in *Shekhter v. Financial Indem.*, Allstate sought redress in the courts for its belief that a policyholder engaged in insurance fraud. The policyholder countersued, claiming that the suit itself constituted a tortious breach of contract (i.e., bad faith). Allstate successfully argued that the policyholder's SLAPP countersuit should be dismissed, as the statute applied to Allstate's pleading with the same merit it would apply to an environmental activist sued for petitioning the EPA.[9]

The "not genuine" language in the second step of the inquiry comes from the *Noerr* line of Supreme Court decisions holding that a "sham" petition is not protected:

> The "sham" exception to *Noerr* encompasses situations in which persons use the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon. A classic example is the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but

simply in order to impose expense and delay. A "sham" situation involves a defendant whose activities are "**not genuinely aimed at procuring favorable government action**" at all, not one "who 'genuinely seeks to achieve his governmental result, but does so *through improper means*.'"[10]

The Supreme Court has interpreted "genuine" in this context to have both an objective and subjective component. Thus, to establish the "sham" exception, the infringing party would have to show that the protected conduct was (1) "objectively baseless"; and (2) subjectively aimed at gaining an advantage from the process alone, and not from the outcome.[11]

Thus, the only two issues in a typical anti-SLAPP motion are (using the language of the Illinois statute) whether the infringing plaintiff can show that:

(1) The counterclaim does *not* complain of acts in furtherance of the constitutional rights to petition; and

(2) The protected conduct is *not* genuinely aimed at procuring favorable government action, both (a) subjectively and (b) objectively (i.e., the infringed party's claims are "objectively baseless").

Obviously none of these requirements suggest that corporations of whatever size and interest are not entitled to the same protection of an individual or activist.

II. The Power Is in the Procedure

Substantively, anti-SLAPP statutes do no more than what the First Amendment already does—protect the right to petition. But the statutes provide defendants with tremendous and rare procedural power to safeguard those rights.

There are basically four key procedural elements. Anti-SLAPP statutes entitle the defendant of a SLAPP suit to file (1) an early motion to dismiss that (2) requires the infringing claimant to present clear and convincing evidence that the claim does not infringe—either because the claim does not implicate protected conduct or because the protected conduct was a sham. (3) Discovery is generally stayed pending a decision, thus preserving costs. And (4) the moving party is entitled to attorneys fees if it prevails.

The "clear and convincing" standard is adopted from federal First Amendment law, which always places a "clear and convincing" evidentiary burden on the party imposing on First Amendment rights.[12]

The evidentiary requirement means the infringing plaintiff cannot rest on the facts as pled: "In this respect, a special motion to strike is akin to a motion for summary judgment. A plaintiff cannot rely solely on the allegations set forth in his pleadings, nor may the court simply accept those allegations."[13]

Anti-SLAPP procedures therefore provide the evidentiary advantage of a defense motion for summary judgment, forcing the plaintiff to meet a heavy burden, but the plaintiff must meet this burden at the initial stages of litigation before discovery (in Illinois, the anti-SLAPP motion must be decided within 90 days after the motion is filed):

> [I]t "would subvert the intent of the anti-SLAPP legislation" to allow a plaintiff to conduct discovery—thereby delaying adjudication of the defendant's special motion to strike and increasing the financial burden on the defendant—on anything less than a showing of good cause.[14]

State anti-SLAPP statutes generally apply in federal court as well, because these anti-SLAPP procedures do not conflict with the Federal Rules. Accordingly, state anti-SLAPP statutes "add[] an *additional*, unique weapon whose sting is enhanced by an entitlement to fees and costs":

> Two aspects of California's Anti-SLAPP statute are at issue: the special motion to strike, Cal. Civ. P.Code § 425.16(b), and the availability of fees and costs, Cal. Civ. P.Code § 425.16(c). We conclude that these provisions and Rules 8, 12, and 56 "can exist side by side . . . each controlling its own intended sphere of coverage without conflict." *Walker v. Armco Steel*, 446 U.S. at 752, 100 S.Ct. 1978, 64 L.Ed.2d 659.[15]

"Plainly, if the anti-SLAPP provisions are held not to apply in federal court, a litigant interested in bringing meritless SLAPP claims would have a significant incentive to shop for a federal forum."[16]

State provisions for mandatory attorneys fees also apply in federal court.[17]

One significant aspect of the state anti-SLAPP statutes may not apply in federal court. The Ninth Circuit generally applies the discovery standard of Fed. R. Civ. Proc. 56(f) to anti-SLAPP motions in federal court, meaning that the discovery stay does not apply if the infringing party can show that discovery is needed to respond.[18] But federal courts still recognize the need to decide anti-SLAPP motions early if possible, such as when resolution can be based on the pleadings or evidence already before the court.[19]

If discovery is allowed and the moving party prevails on the anti-SLAPP motion afterwards, it may be entitled to attorneys fees for the discovery. As the Southern District of Indiana has explained:

> [F]ee awards to prevailing defendants under the anti-SLAPP statute should reimburse them for all time reasonably spent on the litigation to achieve the successful result. That time will often include, as it does here, taking, responding to, and defending necessary discovery. Those activities will be necessary preludes to a successful motion. They should be reimbursed to make the defendant whole and to make the plaintiff bear the financial burden of the defense.[20]

III. Anti-SLAPP Statutes Apply to a Variety of Claims

Once a court determines that genuine protected conduct is implicated, there is no other limitation. For example, policyholders have failed in attempts to argue that bad faith suits are exempt from anti-SLAPP limitations: "To the extent that [the plaintiff] suggests bad faith claims should be exempt from anti-SLAPP motions case law holds otherwise. There is simply no authority for creating a categorical exception for

any particular type of claim, as the California Supreme Court recently affirmed . . . ."[21]

Not only does this law protect a corporation's contentions in court, it also protects acts "in furtherance" of the right to petition. The California Supreme Court interprets "in furtherance" to protect conduct in anticipation of litigation:

> [The complained-of conduct], apparently, was in anticipation of litigation, and courts considering the question have concluded that "[j]ust as communications preparatory to or in anticipation of the bringing of an action or other official proceeding are within the protection of the litigation privilege of Civil Code section 47, subdivision (b), . . . such statements are equally entitled to the benefits of [the anti-SLAPP statute]."[22]

Thus, pre-litigation attorney and party discussions and settlement offers are most likely protected.[23]

An anti-SLAPP motion can also challenge "mixed" causes of action that only partially challenge litigation conduct:

> A mixed cause of action is subject to [the anti-SLAPP statute] if at least one of the underlying acts is protected conduct, unless the allegations of protected conduct are merely incidental to the unprotected activity. A plaintiff cannot frustrate the purposes of the anti-SLAPP statute through a pleading tactic of combining allegations of protected and non-protected activity under the label of one "cause of action."[24]

A corporate defendant would, therefore, only need to show that some aspect of a cause of action attacks the defendant's litigation or pre-litigation conduct.

IV. Conclusion

Courtesy of various First Amendment activists who traditionally find themselves at odds with corporate America, in part, numerous state anti-SLAPP statutes have followed Supreme Court doctrine in giving corporations tremendous abilities to block complaints attacking a corporation's litigation or pre-litigation conduct. Below is a chart of approximately twenty-eight states with anti-SLAPP laws of varying force. Even if a corporation's own state does not have an anti-SLAPP law, the corporation can make similar arguments under the *Noerr-Pennington* doctrine—though without the procedural advantages. It has thus long been the holding of the Supreme Court that the First Amendment's right of petition applies to corporations.

V. States and Territories with Anti-SLAPP Statutes and Judicial Doctrines[25]

State	Citation and Comment
States with Anti-SLAPP Statutes	
Arizona	• ARS § 12-751, signed 4/28/2006 • Limits "the right of petition" to specifically exclude judicial proceedings
Arkansas	• AC § 16-63-501, signed 4/11/2005 • Precludes liability for any "privileged communication" as defined in the Act • Immunity would not apply to a "statement or report made with knowledge that it was false or with reckless disregard of whether it was false."
California	• CCP § 425.16 • Gives SLAPP targets an opportunity to have the court rule at the outset whether a SLAPP filer can show a probability of winning the suit. If the judge finds that the filer cannot prove that the case has a probability of winning, the court will "strike" the complaint and dismiss the suit. The court will also order the filer to pay to the SLAPP target his or her attorneys' fees and costs.
Delaware	• Delaware Code § 8136

Florida	• FS § 718.1224 and § 720.304(4) give full anti-SLAPP protection to condominium and land parcel owners petitioning the government in that capacity. • FS § 768.295 is a very weak anti-SLAPP statute limited to suits by a government agency.
Georgia	• CG § 9-11, enacted in 1996 • In *Berryhill v. Georgia Community Support*,[26] the Georgia Supreme Court held that the state's anti-SLAPP statute covers only speech linked to official proceedings.
Guam	• GCA Title 7, § 17101, enacted in 1998
Hawaii	• HRS Chapter 634F, signed 6/25/2002
Illinois	• 735 ILCS 110, the Citizen Participation Act • Requires courts to decide anti-SLAPP motions within 90 days; discovery is suspended pending a decision • Acts in furtherance of the constitutional rights to petition are immune from liability, regardless of intent or purpose, except when not genuinely aimed at procuring favorable government action. • Attorney's fees and costs to be awarded to the prevailing moving party
Indiana	• Indiana Code 34-7-7, effective 6/30/1998
Louisiana	• Code of Civil Procedure Art. 971, effective 8/15/1999 • *Thomas v. City of Monroe Louisiana*[27]: A television station, operating as a corporation, is a "person" authorized to use the special motion to strike. A city employee did not meet the burden to prove that the television station knew a police report was false.
Maine	• 14 MRS § 556, enacted in 1995 • Provides for a special motion to dismiss claims that arise from exercise of the right of petition under the United States and Maine constitutions
Maryland	• ACM § 5-807 (HB 930), signed 5/11/2004
Massachusetts	• Chapter 231, § 59H • Passed both chambers in Jan. 1994 but was vetoed by Governor Weld. The bill was reintroduced as House Bill 1520 and enacted in Dec. 1994 after a second veto by the governor.
Minnesota	• MSA Chap. 554
Missouri	• RSMo § 537.528, effective 8/ 28/2004 • As in many states, SB 807 was a response to a lawsuit.[28]
Nebraska	• NRS § 25-21,241 • Nebraska's anti-SLAPP statute, enacted in 1994, was one of the earliest in the United States. • *Sand Livestock Systems, Inc. v. Svoboda*[29]: A jury awarded $900,000 in damages plus legal fees to the defendant farmers on an anti-SLAPP counterclaim. The plaintiff had sued the farmers for complaining to state regulators. The appellate court overturned and remanded, saying a judge, not a jury, needed to determine whether the lawsuit had any basis.

Nevada	• NRS § 41.635 • Nevada's anti-SLAPP statute was enacted in 1993 and amended 1997.
New Mexico	• NMS § 38-2-9.1, enacted in April 2001
New York	• Civil Rights Law 70-a and 76-a, enacted 1992 • NYCPLR 3211(g) and 3212(h): These two N.Y. Civil Practice rules establish standards for motions to dismiss and for summary judgment in SLAPP cases.
Oklahoma	• OSA §1443.1 • Not specifically an anti-SLAPP statute, but the statute exempts from prosecution for libel any communication made in a "proceeding authorized by law"
Oregon	• ORS § 31.150, amended 2009
Penn.	• 27 PS §§ 7707, 8301 – 8305 • Limited to participation in environmental law or regulation
Rhode Island	• General Laws 9-33 § 1-4, amended in 1995 over the veto of the governor • Protects "any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding; or any written or oral statement made in connection with an issue of public concern"
Tennessee	• TCA § 4-21-1001, signed into law 6/6/1997
Utah	• UCA §§ 78-58-101-105, effective 4/30/2001
Vermont	• VS § 1041, signed into law 5/6/2006 • Interest was prompted by a case in Barnard where a wealthy landowner sued neighbors and the Zoning Board based on a petition filed to the town Zoning Board. The defendants paid $9500 to settle the case.
Washington	• RCW 4.24.500 - 520 • Enacted in 1989, it was the first modern anti-SLAPP law in the U.S. It passed unanimously in reaction to the plight of a young woman sued for defamation by a real estate company after she helped the state collect back taxes.[30] • The statute was amended in March 2002, with the following explanation (HB 2699, §1): "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 . . . ."

States with Case Law on SLAPPs (But No Statute)	
Colorado	• *Protect Our Mountain Environment, Inc. v. District Court Colorado Supreme Court*[31]: An action against a defendant arising out of defendant's legitimate petition for redress of grievances under the First Amendment is subject to summary judgment. The court promulgated the following elements: (1) whether the plaintiff's action is devoid of reasonable factual support or, if so supported, is lacking a cognizable basis in law; (2) whether defendant's petition for redress of grievances was primarily for the purpose of harassment or some other improper purpose.
West Virginia	• *Webb v. Fury*[32]: "The people's right to petition the government for a redress of grievances is a clear constitutional right and the exercise of that right does not give rise to a cause of action for damages." "[W]e shudder to think of the chill our ruling would have on the exercise of the freedom of speech and the right to petition were we to allow this lawsuit to proceed. . . . We see this dispute between the parties as a vigorous exchange of ideas which is more properly within the political arena than in the courthouse."

Endnotes

1 130 S. Ct. 876 (2010).

2 For example, the Illinois Citizen Participation Act was passed two years ago at the urging of the ACLU. *See* Memorandum in Support of Senate Bill 1434 ("The Citizen Participation Act"), from Mary Dixon, Legislative Dir. Of the Am. Civil Liberties Union of Ill. To Rod Blagojevich, Ill. Governor (June 18, 2007), *available at* www.aclu-il.org/legislative/alerts/sb1434memo.pdf. The Federal anti-SLAPP law under consideration is supported by "consumer rights advocates, environment defense groups, legal reformers and at-home bloggers," according to The Public Participation Project (formerly the Federal Anti-SLAPP Project). *See* www.anti-slapp.org.

3 California, one of the leading states on anti-SLAPP law, enacted Code of Civil Procedure § 425.16 in 1992.

4 *See generally* Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49 (1993).

5 *Citizens United*, 130 S. Ct. at 907 ("[T]he First Amendment protects the right of corporations to petition legislative and administrative bodies.") (citing First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 792 n.31 (1978); Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510-511 (1972); E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 137-138 (1961)).

6 735 ILCS 110/10.

7 735 ILCS 110/15.

8 *See* Cal. Motor Transp. v. Trucking Unlimited, 404 U.S. 508, 510 (1972) ("Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right to petition.").

9 89 Cal. App. 4th 141, 151 (2001) (granting Allstate's anti-SLAPP motion, as its claim for insurance fraud was protected by the First Amendment).

10 City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 380 (1991) (citations omitted) (italics in original, bolding added).

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

12 MCI Comms. Corp. v. Am. Tel. & Tel. Co., 708 F.2d 1081, 1155 (7th Cir. 1983); Westmac, Inc. v. Smith, 797 F.2d 313, 318 (6th Cir. 1986).

13 Price v. Stossel, 590 F. Supp. 2d 1262, 1266 (C.D. Cal. 2008).

14 *Id.* at 1267 (citing Sipple v. Found. for Nat'l Progress, 71 Cal. App. 4th 226, 247 (1999)).

15 United States *ex rel.* Newsham v. Lockheed Missile & Space Co., Inc., 190 F.3d 963, 972 (9th Cir. 1999) (emphasis added); *see also* Henry v. Lake Charles Am. Press LLC, 566 F.3d 164, 182 (5th Cir. 2009) (reversing the district court and dismissing the claim under the Louisiana anti-SLAPP statute); Containment Tech Group, Inc. v. Am. Soc'y of Health Sys. Pharms., Case No. 07-0997, 2009 WL 838549, *8 (S.D. Ind. Mar. 26, 2009) (applying Indiana's anti-SLAPP procedures in federal court).

16 *Lockheed*, 190 F.3d at 973.

17 *See, e.g.*, Kearney v. Foley & Lardner, 553 F. Supp. 2d 1178, 1182 (S.D. Cal. 2008) ("[A]ttorneys' fees are mandatory, and therefore, a substantive right under the anti-SLAPP statute."); *Containment Tech.*, 2009 WL 838549, *8 (same).

18 Metabolife Int'l, Inc. v. Wornick, 264 F.3d 832, 845-46 (9th Cir.2001) (allowing discovery upon a proper showing by the responding party).

19 Flores v. Emerich & Fike, Case No. 1:05-CV-0291, 2006 WL 2536615 (E.D. Cal. Aug. 31, 2006); New.Net v. Lavasoft, 356 F. Supp. 2d 1090, 1101-02 (S.D. Cal. 2004); USANA Health Scis., Inc. v. Minkow, No. 2:07-159 TC, 2008 WL 619287, *2 (D. Utah Mar. 4, 2008) ("[T]he anti-SLAPP law does not conflict with the Federal Rules of Civil Procedure because 'both statutes confer discretion on the trial court to permit discovery in the face of a dispositive motion, in the appropriate case and *upon a proper showing*.'") (emphasis in original).

20 Containment Techs. Group, Inc. v. Am. Soc'y of Health Sys. Pharms., Case No. 1:07- 0997DFHTAB, 2009 WL 2750093, *4 (S.D. Ind. Aug. 26, 2009).

21 Beach v. Harco Nat'l Ins. Co., 110 Cal. App. 4th 82, 91 (2003) (citing Equilon Enters. v. Consumer Cause, Inc., 29 Cal. 4th 53, 60 (2002)).

22 Briggs v. Eden Council for Hope & Opportunity, 19 Cal. 4th 1106, 1115 (1999) (citation omitted).

23 *See* GeneThera, Inc. v. Troy & Gould Prof. Corp., 171 Cal. App. 4th 901 (2009) (holding that a settlement offer and attorney communications with opposing counsel were subject to SLAPP motion); Feldman v. 1100 Park Lane Assocs., 160 Cal. App. 4th 1467 (2008) (holding that a landlord's threats to subtenants during a pending dispute were in anticipation of litigation and therefore protected).

24 Salma v. Capon, 161 Cal. App. 4th 1275, 1287-88 (2008) (citations omitted).

25 Information based on www.casp.net, the California Anti-SLAPP project.

26 281 Ga. 439 (2006).

27 833 So.2d 1282 (2002).

28 *See* Mandel v. O'Connor, 99 S.W.3d 33 (Mo. 2003).

29 56 N.W.2d 299 (Neb. Ct. App. 2008).

30 Robert John Real Estate Co. v. Hill, No. 872016983, Superior Court, Clark County, Washington, filed July 14, 1987.

31 677 P.2d 1361 (Colo. 1984).

32 282 S.E.2d 28 (W. Va. 1981).