"If I Had a Hammer": Defending Slapp Suits in Texas

Chad Baruch

Follow this and additional works at: https://scholarship.law.tamu.edu/txwes-lr

Recommended Citation
Chad Baruch, "If I Had a Hammer": Defending Slapp Suits in Texas, 3 Tex. Wesleyan L. Rev. 55 (1996). Available at: https://doi.org/10.37419/TWLR.V3.I1.2
"IF I HAD A HAMMER": DEFENDING SLAPP SUITS IN TEXAS

Chad Baruch†

The court perceives this [lawsuit], with a great deal of alarm, as part of a growing trend of what have come to be known as “SLAPP suits.” . . . The filing of such suits has seen increasing use over the past decade. . . . [T]he wholly lawful exercise, by citizens in a community, of the right to petition their local government to follow a certain course of action . . . should be vigorously protected and should not expose individuals to suit by persons unhappy with the results of such petitioning.¹

Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined.²

INTRODUCTION

There is a new trend in American litigation that is being used with increasing frequency against politically active citizens.³ “Americans by the thousands are being sued, simply for exercising one of our most cherished constitutional rights—‘speaking out’ on political issues.”⁴ This “pernicious and unacceptable threat” to American liberty is part of a growing nationwide phenomenon.⁵ These lawsuits, aimed at sti-

† B.A., J.D., University of Minnesota. Chad Baruch is a partner in the Dallas and Minneapolis law firm of Abbott & Baruch. He is the former Vice-President for Legal Affairs of the ACLU's Dallas chapter, and Adjunct Professor of Government at Brookhaven College.

4. GEORGE S. PRING & PENLOPE CANAN, "SLAPPs" — "Strategic Lawsuits Against Public Participation" in Government — Diagnosis and Treatment of the Newest Civil Rights Abuse, 9 CIVIL RIGHTS LITIGATION & ATTORNEY'S FEE ANNOTATED HANDBOOK 359, 359-60 (Clark et al. eds., 1993).

The targets of these SLAPPs are generally not extremists, radicals, or even professional activists, but instead typical, middle class, middle-of-the-road Americans. Overwhelmingly, targets are individuals, rather than organizations. Of the individuals sued, 'concerned citizens' constitute the largest category, but significant numbers were representing organizations, acting on their own vested economic/property interests, or on family matters.

George W. Pring & Penelope A. Canan, SLAAPs: An Overview of the Practice, C935 ALI-ABA 1, 11 (1994) [hereinafter SLAPP Overview].

5. Ralph Michael Stein, SLAPP Suits: A Slap at the First Amendment, 7 PACE ENVTL. L. REV. 45, 45 (1989). SLAPPs are found in every jurisdiction and virtually all cases have arisen after 1970. See Pring & Canan, supra note 3, at 940.
filing political expression, have come to be known as “Strategic Lawsuits Against Public Participation,” or “SLAPPs.”

SLAPPs are generally an attempt by one party to transform a public issue into a private legal dispute, thereby shifting both forum and issue to the disadvantage of the politically active citizen. This tactic is effective, as the United States Supreme Court has noted:

A lawsuit may no doubt be used . . . as a powerful instrument of coercion or retaliation. . . . Regardless of how unmeritorious the . . . suit is, the [defendant] will most likely have to retain counsel and incur substantial legal expenses to defend against it . . . . Furthermore . . . the chilling effect . . . upon [a target’s] willingness to engage in protected activity is multiplied where the complaint seeks damages in addition to injunctive relief.

The cost to SLAPP targets is significant, and may include attorney’s fees, court costs, emotional trauma, lost wages, political credit problems, and insurance cancellations. The societal costs are also immense:

[W]e shudder to think of the chill . . . were we to allow this lawsuit to proceed. The cost to society in terms of the threat to our liberty and freedom is beyond calculation. . . . To prohibit robust debate on these questions would deprive society of the benefit of its collective thinking and . . . destroy the free exchange of ideas which is the adhesive of our democracy.

This article discusses various approaches to defending SLAPPs in Texas, including defenses available under both federal and state law, and then urges that further action be taken to undermine the effectiveness of SLAPPing in Texas.

I. EARLY DIAGNOSIS OF THE SLAPP

Without question, the most important step in combatting a SLAPP is early diagnosis — in other words, determining that the claim is in fact a SLAPP. The goal of the SLAPP — to curtail political expression

7. See id. at 50. The true goal of a SLAPP is to silence political speech by threatening to file or by filing retaliatory litigation. See David J. Abell, Comment, Exercise of Constitutional Privileges: Deterring Abuse of the First Amendment — “Strategic Lawsuits Against Political Participation,” 47 SMU L. Rev. 95, 96 (1993).
through harassment and intimidation—makes this need for early diagnosis especially important. Most SLAPPs are ultimately unsuccessful, and are eventually dismissed. However, a SLAPP is successful where it deter political expression, regardless of the actual legal outcome of the lawsuit. Thus, a lengthy and expensive legal victory by the SLAPP target is no victory at all. The target has paid dearly for exercising the right to political expression, and other potential political actors shall no doubt take note of the costs attached to political participation. Consequently, an attorney defending a SLAPP must act early to gain dismissal of the lawsuit. A predicate to early action is early diagnosis.

The first step in diagnosing a SLAPP is setting aside traditional notions concerning the lawsuit's subject matter. Rather than viewing the lawsuit in relation to its stated claims, such as libel, defamation, or interference with contract, the defending attorney must recognize and convey to the court quickly that the lawsuit is a SLAPP, and it impli-


12. The University of Denver study found targets eventually “win” more than 77% of SLAPPs, with most other cases settled. Unfortunately, the average duration of these cases was 36 months. See Pring & Canan, supra note 4, at 381 n.21. Thus, “While many of these actions fail at the earliest stages of the civil process, they have the effect of chilling public participation.” McEvoy, supra note 9, at 503.

13. See Pring & Canan, supra note 3, at 944. As commentators have noted:

SLAPP's actually impede solution of the public problem, by removing parties from the public decisionmaking forum where the cause of the dispute can be resolved and by invoking a judicial forum where only the effects of the dispute can be adjudicated. A judge in a defamation case cannot order a zoning change.

Id. at 943. Further, the underlying political issue is often moot by the time the SLAPP is dismissed. See “Political Intimidation Suits: SLAPP Defendant Slaps Back,” 4 Civil Trial Manual (BNA) 459, 459 (Oct. 19, 1988).


15. Based on studies performed by Pring and Canan, SLAPP warning signs include:

1. Local issues (which cause SLAPPs more frequently than grander-scale state or national issues);
2. Bi-polarity (sharply two-sided, go/no-go, win-lose positioning of parties);
3. Public-private dichotomy (one side viewing the issues from a public-good, ideological, or value perspective, while the other side views the issues as private, property rights, personal financial gain, etc.);
4. Non-Goliaths (contrary to expectation, filers are more often small, local entities and individuals, rather than large operators);
5. Legitimizing-delegitimizing labels (potential filers typically delegitimize their opponents by labeling them as “ignorant,” “selfinterested,” “little old persons in tennis shoes,” “opportunist,” etc., while they legitimize themselves as “professional,” “free-enterprise,” “having rights,” “protecting property,” etc.);
6. Forum bias (SLAPPs are typically filed by “losers,” by those who mistrust their ability to win in the public, political forum in which the dispute
icates societal, not merely individual, issues. "[T]oo often, attorneys become so involved with defending the 'convenience heading' of the [SLAPP] that they miss the underlying political issue."16 As a practical matter, most SLAPPS have common threads; including the inclusion of activists as targets, requests for absurdly large damages, and the inclusion of "John Does" as additional defendants.17 To be defined as a SLAPP, a claim generally must be:

1. A civil complaint or counterclaim,
2. Filed against nongovernment individuals or organizations,
3. Alleging injuries from their communications to influence government actions (communications to government officials, government bodies, or the electorate when it is voting on new laws through the initiative or referendum process),
4. On a substantive issue of some public interest or concern.18

Among the most common SLAPP claims are defamation, including slander and libel, interference with contract, abuse of process, and conspiracy.19 In short, the party asserting the SLAPP claim ostensibly attempts to attach legal consequences to the wholly lawful exercise of the petition and speech guarantees.

Once the SLAPP is diagnosed, the next step is obtaining early and favorable resolution. Often, the party initiating the SLAPP may offer voluntary dismissal in exchange for a halt in the target's political activity, waiver of any countersuit, and a confidentiality agreement.20 This is a settlement that achieves all the goals of the SLAPP! A far better approach for the target is a motion for dismissal or an early motion for summary judgment,21 generally on First Amendment grounds.

---


18. *PRING & CANAN, supra* note 4, at 364.

19. See *id.* Further, SLAPPS target certain classes of public issues:
   1. Real estate development and zoning;
   2. Criticism of public officials and employees;
   3. Environmental protection and animal rights;
   4. Civil rights (race, gender, employment, and other forms of discrimination);
   5. Neighborhood problems (frequently characterized as the "Not In My Back Yard" or "NIMBY" syndrome); and
   6. Consumer issues.

Pring & Canan, *supra* note 3, at 947.

20. See *id.* at 951.

21. See *id.* at 950.
II. LEGAL PROTECTIONS AGAINST SLAPPs

A. The Petition Clause

"Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." In remarkably few words, the First Amendment encapsulates "the most seminal rights of a free people to assemble and to petition the government." The Petition Clause, other constitutional guarantees, and the entire American political ethos encourage, promote, and purport to protect citizens who testify, debate, lobby, write, petition, and appeal to their government.

The right to petition for redress of grievances is "among the most precious of the liberties safeguarded by the Bill of Rights." It shares the preferred place accorded in our system of government to the First Amendment freedoms and has "a sanctity and a sanction not permitting dubious intrusions." Indeed, as the Supreme Court has recognized, the right to petition is logically implicit in and fundamental to the very notion of a republican form of government.

The basis for constitutional protection of speech under the Petition Clause finds its genesis in what has come to be known as the "Noerr-Pennington doctrine." The doctrine is based upon the Supreme Court's decisions in Eastern Rail Presidents Conference v. Noerr Motor Freight, Inc., and United Mine Workers v. Pennington. Noerr involved a dispute between railroads and trucking companies for control of freight hauling business. The railroads launched an advertising and lobbying campaign, and the truckers sued alleging antitrust violations. The Supreme Court held that attempts to solicit government action could not give rise to antitrust liability. The Court stated, "In a representative democracy such as this, these branches of government..."
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."\(^{35}\)

The Supreme Court decided *Pennington* five years later. In *Pennington*, a union successfully petitioned the federal government for an increase in the minimum wage paid to miners and thus forced smaller coal companies out of business.\(^{36}\) The *Pennington* court held that "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition."\(^{37}\)

As it has developed, "the *Noerr-Pennington* doctrine creates an immunity from suit which allows citizens and companies to petition public officials to take certain actions or enact certain provisions."\(^{38}\) Its application has extended beyond antitrust to protect citizen communications in a wide variety of cases.\(^{39}\) "The clear import of the *Noerr-Pennington* doctrine is to immunize from legal action persons who attempt to induce the passage or enforcement of law or to solicit governmental action even though the result of such activities may indirectly cause injury to others."\(^{40}\)

The Supreme Court recently extended the protections previously afforded by the *Noerr-Pennington* doctrine.\(^{41}\) In *City of Columbia v.*

\(^{35}\) Id. at 137.

\(^{36}\) See *Pennington*, 381 U.S. at 670.

\(^{37}\) Id.


\(^{39}\) See id. See also *Reichenberger v. Pritchard*, 660 F.2d 280 (7th Cir. 1981) (holding that defendants’ participation in three municipal administrative proceedings, where they attempted to eliminate nude dancing in defendants’ nightclubs, was safeguarded by the First Amendment right to petition and thus, absolutely privileged); *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607 (8th Cir. 1980) (ruling that First Amendment’s guarantee of the right to petition the government protected private landowners and their attorney who sought alleged unconstitutional amendment to zoning ordinance to prevent the plaintiff from building a high-rise apartment complex to house elderly and handicapped persons); *Weiss v. Willow Tree Civic Assoc.*, 467 F. Supp. 803 (S.D.N.Y. 1979) (deciding that a civic association’s appearance at official town meetings and association members’ assembly in large numbers at public meetings for the purpose of voicing their opposition to the defendants’ zoning application to establish Hasidic Jewish housing development fell within the First Amendment’s protections, as the activity constituted nothing more than a peaceable assembly petitioning the municipal authorities for redress of grievances); *Aknin v. Phillips*, 404 F. Supp. 1150 (S.D.N.Y. 1975) (mem.) (holding that citizens who petitioned officials to enforce fire safety regulations and to close down a local discotheque could not be sued because allowing such a lawsuit would have an unjust chilling effect on the exercise of citizens’ First Amendment rights to complain about a public nuisance).

\(^{40}\) *Webb v. Fury*, 282 S.E.2d 28, 35 (W. Va. 1981) (ruling that the defendants’ series of communications to the Environmental Protection Agency, the Office of Surface Mining and publication of a newsletter did not defame a coal mining company but was instead protected by the right to petition the government).

\(^{41}\) See *PRING & CANAN*, supra note 4, at 368.

Until recently, the U.S. Supreme Court has not been a helpful contributor to the SLAPP problem. . . . Instead of seeing the whole SLAPP creature, the Court dealt with lawsuits against Petition-Clause-protected activity as an “antitrust” case, a “labor” case, or a “defamation” case. One obvious prob-
Omni Outdoor Advertising, Inc., the Court considered a classic SLAPP involving two outdoor advertising companies. Newcomer Omni was attempting to gain a foothold in the Columbia market. To keep Omni out of Columbia, the competing company, Columbia Outdoor Advertising, Inc. ("COA") successfully lobbied the city council to adopt rezoning ordinances that effectively destroyed Omni's ability to compete. Omni sued COA and the city claiming that COA's petitioning of the council was simply a "sham" designed to interfere directly with Omni's business. A jury awarded Omni one million dollars in damages, however, the Supreme Court reversed the award.

Justice Scalia delivered the majority opinion in Omni and dealt with the Petition Clause/SLAPP issue. The Omni Court dramatically strengthened protection for SLAPP targets by holding that the Petition Clause shields efforts "to influence public officials regardless of intent or purpose." That the person's motives may be selfish is totally irrelevant. After Omni, the test for protection is clear — as long as the target's petitioning was aimed at procuring favorable government action, it is protected, and any claim arising from it should be dismissed without respect to whether the target's motives or purpose were pure. On this, the nine justices were unanimous.

Id. (citations omitted).

43. See id. at 367-68.
44. See id. at 368.
45. See id.
46. See id. at 369. The sham exceptions to the Noerr-Pennington doctrine "applies when it can be shown that an ostensible campaign to petition the government is actually a cover for nothing more than an attempt to harass (i.e. repeated baseless or repetitive claims)." Westfield Partners, Ltd. v. Hogan, 740 F. Supp. 523, 526 n.10 (N.D. Ill. 1990). See California Motor Trans. Co. v. Trucking Unlimited, 404 U.S. 508 (1972). However, "[t]he [Omni] opinion clarifies and strengthens the Noerr-Pennington line of antitrust SLAPP precedents and dramatically curtails the troublesome California Motor exception which had allowed suits for 'sham' petitioning. Omni speaks in language applicable to all SLAPPs. . . ." Pring & Canan, supra note 4, at 371. Omni narrows the California Motor exception to cases where the governmental process, not the outcome of the process, is used as a weapon. See id.
47. See Omni, 499 U.S. at 369.
48. See id. at 384.
49. See id. at 379-84.
50. Id. at 380.
51. See id.
52. See id. at 383-84.
In short, the SLAPP target should argue that dismissal or summary judgment is warranted because speech aimed at procuring government action is insulated by the Petition Clause. Thus, a SLAPP defendant may request dismissal or summary judgment because: "[p]laintiff's entire complaint against defendants is based upon nothing more than defendants' exercise of their right, under the first amendment, to petition the government for a redress of grievances." It is critical that these arguments be presented to the trial court early and in detail. Judges may otherwise overlook the Petition Clause argument, relying instead on traditional common-law defenses to libel, defamation, or interference with contract. But "[i]n dealing with a First Amendment claim, common-law defenses should be the last thing they look at."

B. The Chilling Effect Doctrine

It is crucial that attorneys representing SLAPP targets focus the attention of the trial judge on the precedential value of SLAPP decisions. Even where SLAPPs fail at the early stages of litigation, they have the effect of chilling public participation. The Supreme Court has consistently recognized the need to avoid such a "chilling effect" on speech.

The chilling effect doctrine was borne of the Cold War era. In response to growing government attempts to infringe on civil liberties, the Supreme Court made clear that it would protect the full range of First Amendment activities. In an effort to avoid court intervention, the government began devising schemes to dissuade, rather than prohibit, the exercise of free speech. For example, in Lamont v. Postmaster General, the postal service began refusing to deliver mail it considered to be communist propaganda unless the intended recipient went through a special requesting process. In Lamont, the Supreme Court asserted that what the government could not do by prohibition,
it could not accomplish by intimidation. The Court recognized that to put a price, any price, on the exercise of a first amendment right would be to chill the exercise of such rights and prevent the free flow of ideas so vital to a democratic society.

The chilling effect doctrine has been variously stated, "but its bedrock principle has never changed: the protection constitutionally afforded any one person participating in the political process must protect all, and the recognition that most citizens are unwilling or unable to pay a price, actual or potential, for the exercise of their rights must be factored into the formulation of first amendment law." SLAPP cases beg for application of the chilling effect doctrine. Like their Cold War predecessors, community activists are ill-equipped economically and politically to withstand SLAPP claims. More often than not, SLAPP targets have lawfully exercised their first amendment rights, and to permit liability to attach, or even to let these claims proceed to trial, would undeniably have the effect of chilling not only their future political participation, but the participation of other citizens as well.

C. State and Federal Constitutional Privilege

In a defamation context, a privileged communication consists of words, slanderous or libelous in character, that are spoken or written on an occasion where they are not actionable. The only privileged communication of this nature specified by Texas statute is newspaper and periodical articles. Thus, whether ordinary communications are

64. See id. at 305-07.
65. See id.
66. Stein, supra note 5, at 51.
67. The "chilling effect" of such [SLAPP] lawsuits may extend well beyond the concern immediately at issue. Citizens, who are normally not predisposed to consider the threat of litigation as an inherent cost of participating in government, find themselves less willing to become involved in public debate and governmental decision making.
69. TEX. CIV. PRAC. & REM. CODE ANN. § 73.002 (Vernon 1986). Section 73.002 states:

(a) The publication by a newspaper or other periodical of a matter covered by this section is privileged and is not a ground for a libel action. This privilege does not extend to the republication of a matter if it is proved that the matter was republished with actual malice after it had ceased to be of public concern.

(b) This section applies to:

1) a fair, true, and impartial account of:

(A) a judicial proceeding, unless the court has prohibited publication of a matter because in its judgment the interests of justice demand that the matter not be published;

(B) an official proceeding, other than a judicial proceeding, to administer the law;
privilege is generally determined by reference to judicial decisions. Broadly speaking, “a communication . . . fairly made by one in discharge of a public or private duty, legal, moral, or social, of perfect or imperfect obligation, or in conduct of his own affairs, to one who has corresponding interest or duty to receive such communication . . . is privileged.”

The United States and Texas Constitutions provide significant protection for speech, and statements concerning matters of public concern are generally privileged. Further, notwithstanding the First Amendment’s guarantee of freedom of speech and press, the Supreme Court has held that statements on matters of public concern be provable as false before there can be liability under state defamation law.

The freedom accorded to speech on public issues under Texas law is addressed in Yiamouyiannis v. Thompson. During a city debate on whether to switch to a fluoridated water supply, the defendant called the plaintiff a “quack,” an “outrageous hokum artist,” an “imported fearmonger,” and implied he lacked solid credentials. The Texas Court of Appeals held that when the topic is a public issue, speakers may express opinions about their opponents without having to prove the substantial truth of those statements.

(C) an executive or legislative proceeding (including a proceeding of a legislative committee), a proceeding in or before a managing board of an educational or eleemosynary institution supported from the public revenue, of the governing body of a city or town, of a county commissioners court, and of a public school board or a report of or debate and statements made in any of those proceedings; or

(D) the proceedings of a public meeting dealing with a public purpose, including statements and discussion at the meeting or other matters of public concern occurring at the meeting; and

(2) reasonable and fair comment on or criticism of an official act of a public official or other matter of public concern published for general information.

Id.


71. See U.S. Const. amend. I; Tex. Const. art. I, § 8. The Texas Constitution proclaims, “Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press.” Id.

72. See, e.g., Rawlins v. McKee, 327 S.W.2d 633, 637 (Tex. Civ. App.—Texarkana 1959, writ ref’d n.r.e.) (“[C]riticism of the official acts or conduct of public officials . . . is privileged and not libelous, unless the charge is of such nature as to be grounds for removal from office.”). Id.

73. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 768-69 (1986) (“Here, we hold that, at least where a newspaper publishes speech of public concern, a private-figure plaintiff cannot recover damages without also showing that the statements at issue are false.”).

74. 764 S.W.2d 338 (Tex. App.—San Antonio 1988, writ denied).

75. Id. at 339-40.

76. See id. at 341.
Existing alongside First Amendment protections is a common law fair comment privilege that has in Texas been codified at Section 73.002(b)(2) of the Texas Civil Practice and Remedies Code. Although directed to media defendants, the same protection exists at common law for non-media speakers. This protection applies to statements that constitute fair or reasonable criticism or comment on a matter of public concern published for general information.

D. Defenses to Defamation

The most frequent SLAPP claim is defamation. Frequently, summary judgment may be available on the basis of common-law defenses to defamation. "Prior to 1901 there was in Texas no statutory definition of civil libel, and actions for recovery of damages for libel were governed by the common law." In 1901, the Texas Legislature for the first time enacted a chapter on civil libel. Under the current version of that statute, libel is defined as:

[D]efamation expressed in written or other graphic form that tends to blacken the memory of the dead or that tends to injure a living person's reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury or to impeach any person's honesty, integrity, virtue, or reputation or to publish the natural defects of anyone and thereby expose the person to public hatred, ridicule, or financial injury.

Often, a defamation claim, including a SLAPP claim, is based upon implication or innuendo. In Texas, however, innuendo or implication may not be used to extend the meaning and effect of language charged as slanderous. "The test is what construction would be placed upon such language by the average reasonable person... not... the plain-

77. TEX. CIV. PRAC. & REM. CODE ANN. § 73.002(b)(2) (Vernon 1986). In addition to state and federal constitutional privilege, "[m]any jurisdictions already provide protection from some SLAPPs, in the form of 'privilege' or 'immunity' laws. These judicial common law precedents or statutes grant a privilege or otherwise immunize and protect communications by citizens in government contexts." Pring & Canan, supra note 3, at 953.
78. See Rawlins v. McKee, 327 S.W.2d 633, 635-37 (Tex. Civ. App.—Texarkana 1959, writ ref’d n.r.e.) (holding privileged and non libelous, under Texas common law, a published criticism in a political advertisement during a campaign that a candidate for public office was a "radical... backed... by the big shot labor bosses").
79. See id. at 637.
80. See SLAPP Overview, supra note 4, at 12; McEvoy, supra note 9, at 507-19.
82. Renfro Drug Co. v. Lawson, 160 S.W.2d 246, 248 (Tex. 1942).
83. See id.
84. TEX. CIV. PRAC. & REM. CODE ANN. § 73.001 (Vernon 1986).
85. See Arant v. Jaffe, 436 S.W.2d 169, 176 (Tex. Civ. App.—Dallas 1968, no writ) (holding innuendo explains, but does not extend, the meaning and effect of language alleged as libelous).
tiff." Likewise, "[a] statement may be false, abusive, unpleasant, and objectionable . . . without being defamatory," and the use of an unpleasant epithet or description is not slander. Further, the use of hyperbole and vigorous epithets are protected as opinion by courts interpreting the First Amendment's guarantee of freedom of speech and press. Of course, truth is an absolute defense to libel or slander.

III. LEGISLATIVE ACTION

As concern about the impact of SLAPPs has grown, several state legislatures have enacted laws intended to counter their chilling effect. Anti-SLAPP laws have been enacted in California, Delaware, Massachusetts, Minnesota, Nebraska, New York, Rhode Island, and Washington.

While the measures enacted by different states may vary, they do have common threads. At the center of most of these laws is "a requirement of early court review of the merits of lawsuits characterized as SLAPPs." Some statutes also provide for some form of burden-shifting, forcing the SLAPP plaintiff to prove that the target's speech is unprotected. Additional protections include an automatic stay of

86. Schauer v. Memorial Care Sys., 856 S.W.2d 437, 448 (Tex. App.—Houston [1st Dist.] 1993, no writ).
87. Id. at 446. See Raymer v. Doubleday & Co., 615 F.2d 241, 242-43 (5th Cir. 1980) (holding that statements like "John Raymer's round face . . . resembled a hard-boiled egg" are not defamatory as a matter of law).
88. See Dworkin v. L.F.P., Inc., 839 P.2d 903, 915 (Wyo. 1992) ("Clearly falling into this category [of non-actionable rhetorical hyperbole] are Hustler [Magazine]'s statements characterizing Dworkin as: "little guy' 'militant lesbian feminist' . . . .' ").
89. See, e.g., Greenbelt Coop. Pub. Ass'n v. Bresler, 398 U.S. 6 (1970) (determining the word "blackmail" used under the circumstances of the case was not slander); Dworkin v. L.F.P., Inc., 839 P.2d 903 (Wyo. 1992) (holding descriptions of the plaintiff as a "foul-mouthed, abrasive man-hater," "cry-baby," and "shit-squeezing sphincter" were not defamatory); El Paso Times, Inc. v. Kerr, 706 S.W.2d 797 (Tex. App.—El Paso 1986, writ ref'd n.r.e.) (deciding accusation of cheating in this case was the defendant's opinion and thus protected speech).
90. See TEX. CIV. PRAC. & REM. CODE ANN. § 73.005 (Vernon 1986); Randall's Food Market, Inc. v. Johnson, 891 S.W.2d 640, 646 (Tex. 1995).
92. Lowe, supra note 6, at 52.
93. Attorney Alexandra Dylan Lowe states:
Although the laws differ somewhat from state to state, at the heart of most anti-SLAPP statutes is a requirement of early court review of the merits of lawsuits characterized as SLAPPs. Minnesota's statute, for example, protects individuals from liability for 'lawful conduct or speech that is genuinely aimed . . . at procuring government action, unless the conduct or speech constitutes a tort or a violation of a person's constitutional rights.'
discovery pending determination of the First Amendment issues and recovery of attorney's fees by the target.94

Texas does not as yet have any anti-SLAPP statutes. To be effective, any anti-SLAPP law in Texas should at a minimum accomplish the following:

(1) Protect all public advocacy and communications to government, whether testimony, letters, or petitions;
(2) Apply to all government agencies and agents, whether federal, state, regional, or local, and regardless of governmental branch;
(3) Serve as a vivid and clear warning against the filing of SLAPPs;
(4) Provide for early and effective review of SLAPPs, with the burden shifting to the SLAPP filer to prove absence of communication privilege;
(5) Provide both a cure for the target and a penalty to the filer, including early and effective review, coupled with awards of attorney's fees.95

At the same time, care must be taken to draft anti-SLAPP provisions to comport with constitutional requirements. Most importantly, the legislation should not require the trial judge to make factual determinations that violate the plaintiff's right to a jury trial. At least two anti-SLAPP statutes have run afoul of the jury trial guarantee.96 Because the primary issue urged by the target in seeking dismissal shall be privilege, an issue of law in most cases, it should not be difficult to draft anti-SLAPP legislation that preserves the right to a jury trial.

As the next section makes clear, Texas citizens are particularly vulnerable to SLAPPs, and legislative action would do much to alleviate this vulnerability.

IV. SLAPPBACKS: THE VULNERABILITY OF TEXANS TO SLAPPs

In the absence of state laws countering the negative effects of SLAPPs, the most popular and successful response to such suits has

---

94. See id.
95. See Abell, supra note 7, at 126-30; John C. Barker, Common-Law and Statutory Solutions to the Problems of SLAPPs, 26 Loy. L.A. L. Rev. 395, 448-51 (1993); Lowe, supra note 6, at 52-53.
96. See Opinion of the Justices (SLAPP Suit Procedures), 641 A.2d 1012, 1015 (N.H. 1994); Lowe, supra note 6, at 53 (citing Halley's Custom Homes v. Levine, No. 95-9126 (Hennepin County Dist. Ct., Minn., Sept. 18, 1995)).
been the "SLAPPBACK." 97 A number of SLAPP targets have filed countersuits alleging injuries from the original SLAPP. 98 Several of these cases have resulted in significant victories for the original SLAPP targets. 99

Among the most common grounds for SLAPPBACKs are abuse of process, malicious prosecution, and intentional or negligent infliction of emotional distress. 100 According to one study, SLAPPBACK wins outnumber the losses by a two-to-one ratio. 101 Among the more significant awards in SLAPPBACK cases are:

(1) A jury verdict of $86.5 million against owners of an infectious-waste disposal company who SLAPPed a worker for criticizing their incinerator operation. 102
(2) An $11.1 million verdict, upheld on appeal, against agribusiness corporations who SLAPPed three family farmers. 103
(3) A verdict of more than $9.8 million against one of the nation’s largest hospital chains for SLAPPing one of its physicians for advocating hospital cost-containment legislation and encouraging others to do the same. 104

These awards may sound particularly encouraging to SLAPP targets. Unfortunately, none of the SLAPPBACK weapons is likely to be available to SLAPP targets in Texas.

It is frequently stated that claims for malicious prosecution are not favored in Texas. 105 The elements of a claim for malicious prosecution are: (1) commencement of a criminal proceeding against the plaintiff at the defendant’s instigation; (2) termination of the proceeding in the plaintiff’s favor; (3) finding of plaintiff’s innocence; (4) absence of probable cause for institution of the proceeding; (5) malice on the part of the defendant; and (6) damage to the plaintiff that must have resulted in an interference with the plaintiff’s person or property. 106

97. See Lowe, supra note 6, at 53; Pring & Canan, supra note 3, at 955.
98. See Pring & Canan, supra note 3, at 955-57. See, e.g., Leonardini v. Shell Oil Co., 264 Cal. Rptr. 883, 886 (Cal. Ct. App. 1989) In Leonardini, an attorney for the California Pipe Trades Council brought a malicious prosecution suit against a manufacturer of polybutylene pipe after the manufacturer filed suit for injunctive and declaratory relief to stop the dissemination of documents alleging the manufacturer’s product contained a carcinogen. See id. at 886-87. The California Court of Appeals affirmed an award to the plaintiff of $197,000 in compensatory damages and $5 million in punitive damages. See id. at 908.
99. See Pring & Canan, supra note 3, at 955-57.
100. See id. at 954-55; Lowe, supra note 6, at 53.
101. See Pring & Canan, supra note 3, at 955.
102. See SLAPP Overview, supra note 4, at 18 n.85 and accompanying text.
103. See id. at n.84 and accompanying text.
104. See id. at n.86 and accompanying text.
The problem for most SLAPP targets in proving malicious prosecution is three-fold. First, there must be a termination of the proceeding in the target's favor, and any settlement bars a malicious prosecution claim. Thus, to keep open the possibility of a malicious prosecution claim, the target must commit the resources to defend the SLAPP through its entire course and risk the outcome of the trial. Second, the burden of establishing malice is at best difficult. To risk continued defense of the SLAPP based on the hope of proving malice is almost certainly an unwise strategy. Finally, the Texas requirement of interference with person or property forecloses the possibility of maintaining a malicious prosecution claim for most SLAPP targets.

Likewise, the abuse of process claim is unlikely to provide any basis for a SLAPPBACK. Abuse of process is the defendant's illegal, improper, or perverted use of a legal process neither warranted nor authorized by the process. However, there is no liability where the defendant merely carried the proceeding to its authorized conclusion, even with bad intent. A groundless suit filed with malice in an attempt to extort a settlement is not sufficient to establish abuse of process. Equally fatal to most SLAPP targets is the requirement that there be damages to person or property because the SLAPP target's only damages may be those incurred in defending the lawsuit.

Finally, most SLAPP targets will be unable to maintain a valid claim for infliction of emotional distress. Texas does not recognize any claim for negligent infliction of emotional distress, and the standard for intentional infliction of emotional distress is difficult to meet. Again, to risk defense of the SLAPP through trial in the hopes of prevailing on a claim for intentional infliction of emotional distress would be terribly risky.

107. See Davidson, 310 S.W.2d at 681.
108. See Detenbeck v. Koester, 886 S.W.2d 477, 480-81 (Tex. App.—Houston [1st Dist.] 1994, no writ); Blanton v. Morgan, 681 S.W.2d 876, 878 (Tex. App.—El Paso 1984, writ ref'd n.r.e.).
110. See Detenbeck, 886 S.W.2d at 480.
112. See Boyles v. Kerr, 855 S.W.2d 593 (Tex. 1993).
113. The elements of a claim for intentional infliction of emotional distress are: (1) that the defendant acted intentionally or recklessly; (2) the defendant's conduct was extreme and outrageous; (3) the defendant's conduct caused the plaintiff emotional distress; and (4) the plaintiff suffered severe emotional distress. See Twyman v. Twyman, 855 S.W.2d 619, 621 (Tex. 1993) (citing RESTATEMENT (SECOND) OF TORTS § 46 (1965)). That acts tortious is not sufficient to establish extreme and outrageous conduct. See Natividad v. Alexis, Inc., 875 S.W.2d 695, 699 (Tex. 1994) (citing RESTATEMENT OF (SECOND) OF TORTS § 46 cmt. d (1965)).
CONCLUSION

The SLAPP target in Texas faces a daunting prospect. The only real options for defense of the SLAPP are a motion to dismiss or a motion for summary judgment based on First Amendment grounds, defense of the claim through trial, or a one-sided settlement. At least one, and probably two of these options necessitate significant expenditure of funds on attorney's fees. Worst of all, even the SLAPP target who prevails or obtains a favorable settlement has little prospect of recovery for the damages caused by the SLAPP.

At a time when issues related to the environment and public education make citizen involvement crucial, the chilling effect engendered by SLAPPs must not be tolerated. The Texas Legislature should provide protection for SLAPP targets. The fabric of the First Amendment should not be allowed to fray.