

## A R T I C L E S

# SLAPP 2.0: Second Generation of Issues Related to Strategic Lawsuits Against Public Participation

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### Summary

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This Article updates a July 2001 *ELR News & Analysis* article on Strategic Lawsuits Against Public Participation (SLAPPs) and common-law and statutory defenses against them. Since that survey, a dozen additional jurisdictions have enacted statutes providing some degree of protection for SLAPP defendants, and courts have continued to apply these statutes as well as common-law and constitutional (Petition Clause) defenses. In general, while “second-generation” issues have added some wrinkles to SLAPP practice, the results remain the same: almost all SLAPPs are ultimately dismissed.

Captain Eric Krystkowiak was stationed at the U.S. Air Force Academy in Colorado Springs and residing with his wife and family in a home off the base when a new development was proposed for his block. Speaking at a city council hearing, Captain Krystkowiak questioned whether the development would be consistent with city zoning. The city rejected the development on the basis of noncompliance with the city code; the developer then filed suit against him individually. It took six years from the time Captain Krystkowiak first learned of the development until the Colorado Supreme Court, applying the state’s common-law anti-SLAPP standard, finally affirmed the dismissal of the claims. By this time, he had been transferred to another base, where he continued to deal with the SLAPP. He is now a Colonel in the Air Force and Commander of the 45th Launch Group.<sup>1</sup>

### I. Introduction

Strategic Lawsuits Against Public Participation (SLAPPs) may be the legal world’s analog to horror movies: spine-chilling, but hard to look away from. This Article is a sequel to a primer on the issue that appeared in the July 2001 edition of *ELR News & Analysis*.<sup>2</sup> Both articles survey the leading case law, the most recent statutes, and other resources on the subject. For a full treatment of the subject, the two articles should be read together.

A SLAPP is the filing of litigation against an individual who, like Captain Krystkowiak, communicates with or tries to influence the government. Experience shows that nearly all claims targeting petitioning are eventually dismissed,<sup>3</sup> as were those against him, but the mere filing of litigation often serves a plaintiff’s purpose of chilling the continued exercise of First Amendment rights.<sup>4</sup>

The significance of the chilling effect of a SLAPP is hard to overstate. A SLAPP defendant pays a high price in time, money, and peace of mind to defend an action brought in response to that individual’s exercise of the right to petition the government. Frequently, a defendant will cease

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1. See *Krystkowiak v. W.O. Brisben Cos.*, 90 P.3d 859, 872 (Colo. 2004). The author filed an amicus brief for the League of Women Voters and SLAPP Resource Center in support of Krystkowiak in the Colorado Supreme Court.
2. Lori Potter, *Strategic Lawsuits Against Public Participation and Petition Clause Immunity*, 31 ELR 10852 (July 2001).
3. Potter, *supra* note 2, at 10853 and n.26.
4. See generally Potter, *supra* note 2.

petitioning activities immediately after being named in a SLAPP complaint or after settlement of the case, because the psychological and financial costs of carrying on, even with a successful defense, are so burdensome.

The immunity afforded by the Petition Clause of the First Amendment provides an effective defense to almost all SLAPPs.<sup>5</sup> Under a line of cases decided by the U.S. Supreme Court, a SLAPP defendant is entitled to immunity (referred to interchangeably as either Petition Clause immunity or *Noerr-Pennington*<sup>6</sup> immunity) unless the plaintiff can show that the defendant's petitioning was "a sham."<sup>7</sup> So long as the defendant acts to obtain a specific governmental outcome—a governmental decision, action, or refusal to act—the defendant's petitioning is not "a sham" and enjoys immunity under the Petition Clause. A winning petition (for example, a successful lawsuit or a request to an administrative agency that is acted upon favorably) is by definition not "a sham."<sup>8</sup>

George Pring and Penelope Canan coined the term SLAPP in the late 1980s.<sup>9</sup> A September 2014 Google search for the term showed more than 6.8 million hits. Pring and Canan defined a SLAPP as a retaliatory lawsuit against speech to the government within the ambit of the First Amendment's Petition Clause.<sup>10</sup> Since then, the catchy term "SLAPP" has taken on a life of its own and is often applied overbroadly and imprecisely to include retaliatory lawsuits against speech generally.<sup>11</sup>

This shift in, or misuse of, SLAPP terminology is most pronounced in relation to types of speech that did not even exist when Pring and Canan coined the term. So-called Cyber-SLAPPs, for example, invoke the SLAPP framework and attempt to apply it to speech directed not to the government, but to the public at large via the Internet.<sup>12</sup>

Although noteworthy, Cyber-SLAPPs and the general expansion in the usage of SLAPP terminology are beyond the scope of this Article.<sup>13</sup> Instead, the Article focuses on developments in litigation filed in response to speech directed to the government, and on related statutory developments.

## II. Second Generation Anti-SLAPP Statutes

In the 13 years since the original SLAPP article appeared in *ELR News & Analysis*, an additional 11 states and the District of Columbia have joined the 17 that had enacted some form of anti-SLAPP statute.<sup>14</sup> Although there is a significant amount of variation among these statutes, they have a common purpose: preventing, or hastening the disposition of, litigation targeted at protected petitioning activities. As a result, they share a number of common provisions and themes aimed at accomplishing that purpose.

- Expedited motions practice: Each of these statutes provides for a special motions practice aimed at expeditiously resolving SLAPP suits.
- Fee and cost shifting: Eleven of the 12 statutes provide for the award of costs and reasonable attorneys fees.<sup>15</sup> If a court grants an anti-SLAPP motion, nine of the statutes require a court to award costs and reasonable attorneys fees to the moving party.<sup>16</sup> Five of the statutes also require a court to award costs and reasonable attorneys fees to the prevailing party if the anti-SLAPP motion is found to be frivolous or solely intended to delay.<sup>17</sup>

5. *Id.* at 10852-53 and n.10.

6. *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

7. *Professional Real Estate Investors v. Columbia Pictures*, 508 U.S. 49, 60-61 (1993); *City of Columbia v. Omni Outdoor Adver.*, 499 U.S. 365, 380-81 (1991). *See also* *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982).

8. *Professional Real Estate Investors*, 508 U.S. at 60, n.5. *Professional Real Estate Investors* presented the question of Petition Clause immunity as applied to counterclaims in litigation and set forth a two-part definition of "sham."

9. GEORGE W. PRING & PENELOPE CANAN, *SLAPPs: GETTING SUED FOR SPEAKING OUT* 3 (1996); *see also* Penelope Canan & George W. Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 L. & Soc. REV. 385, 386 (1988).

10. PRING & CANAN, *supra* note 9, at 8-9 (defining a SLAPP as: (1) a civil claim for monetary damages; (2) filed against nongovernmental individuals and institutions, resulting from communications to influence a governmental action or outcome; and (3) on a substantive issue of some public interest or societal significance).

11. *See, e.g.*, CAL. CIV. PROC. CODE §425.16(b)(1) (applying California's anti-SLAPP procedures to suits arising from a person's exercise of the right to petition or free speech); Robert D. Richards, *A SLAPP in the Facebook: Assessing the Impact of Strategic Lawsuits Against Public Participation on Social Networks, Blogs, and Consumer Gripe Sites*, 21 DEPAUL J. ART TECH. & INTELL. PROP. L. 221, 222 (2011).

12. Richards, *supra* note 11, at 227.

13. For an in-depth discussion of Cyber-SLAPPs, see Richards, *supra* note 11.

14. ARIZ. REV. STAT. ANN. §12-752 (2014); ARK. CODE ANN. §16-63-501 (2014); D.C. CODE §6-5501 (2014); HAW. REV. STAT. §634F-1 (2014); 735 ILL. COMP. STAT. 110/1 (2014); MD. CODE ANN., CTS. & JUD. PROC. §5-807 (2014); MO. REV. STAT. §537.528 (2014); N.M. STAT. ANN. §38-2-9.1 (2014); OR. REV. STAT. §31.150 (2014); TEX. CIV. PROC. & REM. CODE ANN. §27.001 (2014); UTAH CODE ANN. §78B-6-1401 (2014); VT. STAT. ANN. tit. 12, §1041 (2014). Citations to the 17 previously enacted state statutes can be found at Potter, *supra* note 2, at n.63. Florida's statute has been revised. FLA. STAT. §720.304 (2014); FLA. STAT. §768.295 (2014).

15. Only the Maryland statute fails to provide for an award of costs and reasonable attorney fees.

16. ARIZ. REV. STAT. ANN. §12-752(D); ARK. CODE ANN. §16-63-506(b)(1); HAW. REV. STAT. §634F-2(8)(B); 735 ILL. COMP. STAT. 110/25; MO. REV. STAT. §537.528(2); N.M. STAT. ANN. §38-2-9.1(B); OR. REV. STAT. §31.152(3); TEX. CIV. PROC. & REM. CODE §27.009(a)(1); VT. STAT. ANN. tit. 12, §1041(f)(1). The District of Columbia and Utah allow such an award, but it is not mandatory. D.C. CODE §16-5504; UTAH CODE ANN. §78B-6-1405.

17. ARIZ. REV. STAT. ANN. §12-752(D); MO. REV. STAT. §537.528(2); N.M. STAT. ANN. §38-2-9.1(B); OR. REV. STAT. §31.152(3); VT. STAT. ANN. tit. 12, §1041(f). Texas allows such an award, but it is not mandatory. TEX. CIV. PROC. & REM. CODE §27.009(b).

- Stay of discovery: Ten of the 12 statutes provide for a stay of discovery upon the filing of an anti-SLAPP motion.<sup>18</sup> Five of those 10 statutes preclude all discovery,<sup>19</sup> while five allow limited discovery.<sup>20</sup>
- Damages/sanctions: Five of the 12 statutes provide for an assessment of damages or sanctions against a SLAPP plaintiff.<sup>21</sup>
- Burden shifting and immunity standards: Six of the 12 statutes provide a burden-shifting framework.<sup>22</sup> Once a SLAPP defendant meets her burden of establishing that the SLAPP suit is based on her exercise of a “protected” right, the burden of proof shifts to the non-moving SLAPP plaintiff to establish some “probability” of success of the underlying suit.

Two of the 12 statutes place the burden of proof squarely upon the moving party.<sup>23</sup> Utah’s anti-SLAPP statute requires a SLAPP defendant to establish “by clear and convincing evidence that the primary reason for the filing of the complaint was to interfere with the first amendment right of the defendant.”<sup>24</sup> Similarly, Texas’s anti-SLAPP statute requires a SLAPP defendant to establish “by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the [defendant’s] exercise of: (1) the right of free speech; (2) the right to petition; or (3) the right of association.”<sup>25</sup> Texas’s anti-SLAPP statute also provides a ready defense to a motion to dismiss. If a SLAPP plaintiff “establishes by clear and convincing evidence a prima facie case for each essential element of the claim in question,” plaintiff’s complaint may not be dismissed.<sup>26</sup>

Four of the 12 statutes are silent as to the relative burden borne by the moving and non-moving parties.<sup>27</sup>

- Interlocutory appeal: Seven of the 12 statutes provide for an interlocutory appeal of a court’s resolution of an anti-SLAPP motion.<sup>28</sup>

### III. Second-Generation Litigation Issues

Three emerging issues particularly affect SLAPP practice: (1) the availability of state anti-SLAPP statutory remedies in federal judicial proceedings; (2) the constitutionality of state anti-SLAPP statutory remedies; and (3) the relationship between Petition Clause protection under federal common law and less-protective standards established under the law of a state.

#### A. Availability of Anti-SLAPP Statutes in Federal Proceedings

Although a number of states have adopted some form of anti-SLAPP remedy, there remain significant gaps in the availability of procedures to expeditiously dismiss SLAPPs.<sup>29</sup> Most significantly, there is no federal anti-SLAPP statute.<sup>30</sup> Thus, in federal court cases founded on federal question jurisdiction, SLAPP defendants are subject to traditional procedures such as motions practice and discovery.<sup>31</sup> For federal cases founded on diversity jurisdiction in states having an anti-SLAPP statute, however, there remains an open question regarding the applicability of a state’s anti-SLAPP law.

Under the well-settled *Erie* doctrine, a federal court sitting in diversity jurisdiction will apply state substantive law and federal procedural rules.<sup>32</sup> The choice of law is less certain when a state substantive law implicates procedure. If a substantive law imposes procedural requirements, a federal court sitting in diversity jurisdiction must determine whether those requirements conflict with federal procedural requirements.<sup>33</sup> If so, then the federal procedural requirements control, and the procedures under the state substantive law will not be applied.<sup>34</sup>

Given the hybrid nature (part substantive, part procedural) of state anti-SLAPP laws, federal courts have grappled with whether to apply state anti-SLAPP laws to

18. Neither Arizona nor New Mexico provides for a stay of discovery.

19. HAW. REV. STAT. §634F-2(3); MD. CODE ANN., CTS. & JUD. PROC. §5-807(d)(2); MO. REV. STAT. §537.528.1; TEX. CIV. PRAC. & REM. CODE §27.003(c); UTAH CODE ANN. §78B-6-1404(1)(a).

20. ARK. CODE ANN. §16-63-507; D.C. CODE §16-5502(c); 735 ILL. COMP. STAT. 110/20(b); OR. REV. STAT. §31.152(2); VT. STAT. ANN. tit. 12, §1041(c)(1).

21. ARIZ. REV. STAT. ANN. §12-752(B); ARK. CODE ANN. §16-63-506(b)(1); HAW. REV. STAT. §634F-2(8); TEX. CIV. PRAC. & REM. CODE §27.009(a)(2); UTAH CODE ANN. §78B-6-1405(1)(b).

22. ARIZ. REV. STAT. ANN. §12-752(B); D.C. CODE §16-5503(b); HAW. REV. STAT. §634F-2(4)(B); 735 ILL. COMP. STAT. 110/20(c); OR. REV. STAT. §31.150(3); VT. STAT. ANN. tit. 12, §1041(c)(1)(A).

23. TEX. CIV. PRAC. & REM. CODE §27.005(b); UTAH CODE ANN. §78B-6-1404(1)(b).

24. UTAH CODE ANN. §78B-6-1404(1)(b).

25. TEX. CIV. PRAC. & REM. CODE §27.005(b). The Texas Supreme Court has set oral argument in a case presenting the issue of how to allocate the burden under the Texas anti-SLAPP statute. In re Lipsky, 411 S.W.3d 530 (Tex. App. 2013), *argued*, No. 13-0928 (Tex. Dec. 4, 2014). The *Lipsky* case has drawn national media attention because it arose in the context of a homeowner’s complaints about the effect of fracking on drinking water quality. See also Kelly Knaub, *Texas High Court Takes Up Fracking Defamation Fight*, LAW360, Aug. 22, 2014, <http://www.law360.com/articles/570288/texas-high-court-takes-up-fracking-defamation-fight>.

26. TEX. CIV. PRAC. & REM. CODE §27.005(c).

27. ARK. CODE ANN. §16-63-501; MD. CODE ANN., CTS. & JUD. PROC. §5-807; MO. REV. STAT. §537.528; N.M. STAT. ANN. §38-2-9.1.

28. HAW. REV. STAT. §634F-2(2)(B); 735 ILL. COMP. STAT. 110/20(a); MO. REV. STAT. §537.528.3; N.M. STAT. ANN. §38-2-9.1(C); TEX. CIV. PRAC. & REM. CODE §27.008; UTAH CODE ANN. §78B-6-1404(1)(c); VT. STAT. ANN. tit. 12, §1041(g).

29. Currently, 22 states and the federal government lack any form of anti-SLAPP statute. See Potter, *supra* note 2, at 10855-56 and accompanying notes 63-68.

30. *Id.* There have been efforts to pass a federal anti-SLAPP statute, see, e.g., Citizen Participation Act of 2009, H.R. 4364, 111th Cong. §2 (2009), but those measure have not been successful, see *Bill Summary & Status: 111th Congress (2009-2010): H.R. 4364*, THOMAS, <http://hdl.loc.gov/loc.uscongress/legislation.111hr4364> (last visited Aug. 20, 2014).

31. See Fed. R. Civ. P. 1. The *Noerr-Pennington* doctrine provides a substantive defense to SLAPP suits, but it does not contain any of the expediting procedures common to anti-SLAPP statutes. See, e.g., Bill Johnson’s Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983).

32. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

33. *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 4-6 (1987) (*citing* *Hanna v. Plumer*, 380 U.S. 460, 471-74 (1965)).

34. *Id.*

cases founded on diversity jurisdiction. Absent clear direction from the Supreme Court,<sup>35</sup> lower courts considering whether to apply state anti-SLAPP laws have reached contrary conclusions. A majority of courts have applied state anti-SLAPP laws to federal judicial proceedings founded on diversity jurisdiction, finding either that the anti-SLAPP laws are substantive<sup>36</sup> or that their procedural mechanisms do not conflict with the federal rules.<sup>37</sup> A minority of courts has declined to apply all or part of state anti-SLAPP laws, concluding that their procedural prescriptions conflict with the federal rules.<sup>38</sup>

## B. Constitutional Challenges

Anti-SLAPP statutes have been the subject of numerous constitutional challenges.<sup>39</sup> Relying on both the federal and state constitutions, SLAPP plaintiffs have suggested that anti-SLAPP statutes violate the rights to due process, to trial by jury, to equal protection of the laws, and a number of state-specific constitutional rights. Although the vast majority of the challenges filed to date have been unsuccessful,<sup>40</sup> the constitutionality of the majority of state anti-SLAPP statutes has not yet been litigated.

The burden-shifting provisions contained in many anti-SLAPP statutes provide the most common basis for constitutional challenges. As discussed above, many anti-SLAPP statutes seek to protect the rights of SLAPP defendants by shifting the evidentiary burden to SLAPP plaintiffs early in the judicial process.

Many SLAPP defendants have argued that these burden-shifting provisions implicate the right to due process and impermissibly infringe upon the right to have a jury decide issues of fact.<sup>41</sup> Courts have dismissed challenges relying on the federal Constitution's guarantees of due process and the right to trial by jury, generally finding either that anti-SLAPP statutes do not implicate a protected property interest<sup>42</sup> but instead act only as a "procedural screen for meritless suits," or that they do not implicate the jury's role as the ultimate fact finder.<sup>43</sup>

Some state courts have indicated, however, that the burden-shifting provisions of an anti-SLAPP statute may implicate state constitutional concerns. For instance, the New Hampshire Supreme Court held that the proposed language of an anti-SLAPP statute violated the state's constitution. The statute would have required the SLAPP plaintiff to demonstrate a "probability" that he would prevail on the claim. According to the New Hampshire Supreme Court, this provision would have impermissibly implicated the right to trial by jury because it required the judge to resolve disputed issues of fact.<sup>44</sup>

Similarly, the Maine Supreme Court suggested that an anti-SLAPP statute would violate the state's constitution if the statute required courts to give the benefit of the doubt to the party moving for dismissal under anti-SLAPP procedures.<sup>45</sup> However, the court avoided this issue by determining that the burden-shifting framework (a high evidentiary burden on the plaintiffs) applied by lower courts was not grounded in the text of the state's anti-SLAPP statute.<sup>46</sup> Instead, the court found that the state's anti-SLAPP statute did not require courts to give the benefit of the doubt to a SLAPP defendant and that a lower evidentiary burden should be required of SLAPP plaintiffs when resolving a SLAPP motion to dismiss.<sup>47</sup>

As these cases indicate, the constitutionality of anti-SLAPP statutes has now been litigated in several states. Although such challenges have proven unsuccessful in almost every jurisdiction, the resolution of this issue may vary by state depending upon the nature of the constitutional rights guaranteed by that state's constitution.

## C. The Relationship Between Petition Clause Immunity and Lower Standards of Protection Under State Anti-SLAPP Statutes

The procedural and substantive provisions of state anti-SLAPP statutes do not displace a federal common-law Petition Clause immunity or *Noerr-Pennington* defense. Where a state's anti-SLAPP statute offers less protection than does the First Amendment, a SLAPP defendant may still assert the federal defense.<sup>48</sup> This is important because the First Amendment standard, as articulated in *Professional Real Estate Investors v. Columbia Pictures*<sup>49</sup> and elsewhere, is extremely protective of petitioning activity.

However, a defense based on the federal Constitution likely would not qualify for the expedited procedures provided by a state anti-SLAPP statute and would instead be adjudicated under ordinary procedures, that is, the appli-

35. For an in-depth discussion of the Supreme Court's most recent decision addressing these choice-of-law issues, see Katelyn E. Saner, *Getting SLAPP-ed in Federal Court: Applying State Anti-SLAPP Special Motions to Dismiss in Federal Court After Shady Grove*, 63 DUKE L.J. 781 (2013).

36. See *Liberty Synergistics, Inc. v. Microflo, Ltd.*, 718 F.3d 138, 154-55 (2d Cir. 2013); *Godin v. Schencks*, 629 F.3d 79, 87-91 (1st Cir. 2010); *Henry v. Lake Charles Am. Press, LLC*, 566 F.3d 164, 181-82 (5th Cir. 2009).

37. See *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 972-73 (9th Cir. 1999).

38. See *Greensprings Baptist Christian Fellowship Trust v. Cilley*, 629 F.3d 1064, 1065-66 & n.1 (9th Cir. 2010); *3M Co. v. Boulter*, 842 F. Supp. 2d 85, 102 (D.D.C. 2012).

39. Carson Hilary Barylak, *Reducing Uncertainty in Anti-SLAPP Protection*, 71 OHIO ST. L.J. 845, 864-69 (2010).

40. *Id.* at 868.

41. Challenges based on other constitutional provisions are less common, but at least two courts have determined that anti-SLAPP statutes do not violate the Equal Protection Clause. See *Lee v. Pennington*, 830 So. 2d 1037 (La. App. 4th Cir. 2002); *Lafayette Morehouse, Inc. v. Chronicle Publ'g Co.*, 44 Cal. Rptr. 2d 46 (Cal. Ct. App. 1995).

42. *Nexus v. Swift*, 785 N.W.2d 771, 779 (Minn. Ct. App. 2010).

43. *Lee*, 820 So. 2d at 1043.

44. Opinion of the Justices (SLAPP Suit Procedure), 641 A.2d 1012 (N.H. 1994).

45. *Nader v. Maine Democratic Party*, 41 A.3d 551 (Me. 2012). The concurring opinion alludes to other constitutional issues. *Id.* at 566.

46. *Id.* at 563.

47. *Id.* at 561-63.

48. Because the *Noerr-Pennington* doctrine is an outgrowth of the First Amendment right to petition, the U.S. Constitution provides a defense against SLAPPs in cases where a state law is less protective. See U.S. CONST. art. IV (stating that the Constitution is the "supreme law of the land").

49. 508 U.S. 49 (1993) (see notes 7 and 8 and accompanying text).

cable rules of civil procedure.<sup>50</sup> This is a newly emerging area of the law of Petition Clause immunity that is certain to see additional development.

#### IV. Other Developments in Case Law

In addition to the statutory developments and issues noted above, there have been developments in the judicial application of the *Noerr-Pennington* doctrine and Petition Clause immunity as an anti-SLAPP remedy. The developments in the case law reflect the attempt of courts to reconcile the need to avoid the chilling effect of SLAPP suits on the exercise of First Amendment rights with the need to allow meritorious litigation.<sup>51</sup>

These developments fall within five general categories: (1) adoption of an immunity standard or defense as a matter of state common law; (2) the nature and scope of Petition Clause immunity; (3) exceptions to Petition Clause immunity; (4) the relative pleading burdens of the parties in a case implicating Petition Clause immunity; and (5) ancillary issues relating to the development of an anti-SLAPP common law.

##### A. Adoption of an Immunity Standard or Defense as Matter of State Common Law

The highest courts of the states of Mississippi, Montana, and West Virginia have recognized the existence of a *Noerr-Pennington* or Petition Clause defense or immunity as a matter of common law, joining Colorado in that regard.<sup>52</sup> Thus, although these states have no anti-SLAPP statute, they have indicated that they recognize a substantive defense to a SLAPP.

##### B. The Nature and Scope of Petition Clause Immunity

Courts applying the *Noerr-Pennington* doctrine and Petition Clause immunity have further developed the nature

and scope of the Petition Clause. First, the identity of the speaker is irrelevant to the determination of whether speech is subject to the Petition Clause: to fall within the scope of the Petition Clause, speech need only be directed to influencing a governmental body or official.<sup>53</sup> Second, the governmental body to whom the speech is directed must be acting in a governmental role. If, instead, the governmental body is acting as a “market participant,” some courts have found that speech directed to the governmental body in that context may not be protected by the Petition Clause.<sup>54</sup>

If speech is directed to a governmental body acting in a governmental role, the scope of the Petition Clause is broad. It protects all such speech, regardless of the motive of the speaker or the forum in which the speech is rendered.<sup>55</sup> Protected speech includes speech and conduct incidental to the core petitioning activity; thus, litigation-related proceedings, including discovery<sup>56</sup> and pre-suit litigation conduct,<sup>57</sup> fall within the protection of the Petition Clause.

##### C. Exceptions to Petition Clause Immunity

In spite of the above-noted broad formulation of the *Noerr-Pennington* doctrine and Petition Clause immunity, courts have articulated a limited number of exceptions. The long-standing “sham exception” to *Noerr-Pennington* has been more fully developed. The *Professional Real Estate Investors* test, which focuses on the objective factual reasonableness and the legitimate use of governmental process in a single, underlying lawsuit, continues to be the primary test; and the *California Motor*<sup>58</sup> test, which focuses on the pattern of conduct and is typically applied in situations with a series of legal proceedings, is a secondary test.<sup>59</sup>

Further, some courts have articulated two additional exceptions. First, false statements that infect the core of the petitioning activity and deprive the petitioning activ-

50. See, e.g., *Perry v. Perez-Wendt*, 294 P.3d 1081, 1088 (Haw. Ct. App. 2013) (noting that the *Noerr-Pennington* doctrine provides greater substantive protection than the state’s anti-SLAPP statute, but determining that a *Noerr-Pennington* defense does not qualify for the expedited appeal provided under state’s anti-SLAPP statute). Some courts have found that particular state anti-SLAPP laws are substantively the same as *Noerr-Pennington* protections. See *Kearney v. Foley & Lardner*, 553 F. Supp. 2d 1178, 1181 n.3 (S.D. Cal. 2008) (finding that California’s anti-SLAPP law is “analogous” to the *Noerr-Pennington* doctrine). See also Colin Quinlan, *Erie and the First Amendment: State Anti-SLAPP Laws in Federal Court After Shady Grove*, 114 COLUM. L. REV. 367, 397 and n.164 (Mar. 2014) (stating that “*Noerr-Pennington* immunity is similar to the substantive immunity provided by state anti-SLAPP laws,” but that “*Noerr-Pennington* lacks the detailed procedural safeguards provided by a typical anti-SLAPP law”).

51. See, e.g., *California Pharm. Mgmt., LLC v. Redwood & Cas. Ins. Co.*, 2009 U.S. Dist. LEXIS 126982 (C.D. Cal. July 29, 2009).

52. *Lohmeier v. Montana Eighteenth Judicial Dist.*, 2007 Mont. LEXIS 197 (Mont. 2007); *Harrah’s Vicksburg Corp. v. Pennebaker*, 812 So. 2d 163 (Miss. 2001); *Webb v. Fury*, 282 S.E.2d 28 (W. Va. 1981), *overruled in part by Harris v. Adkins*, 432 S.E.2d 549, 552 (W. Va. 1993). See also *Protect Our Mountain Env’t v. District Court*, 677 P.2d 1361, 1364-66 (Colo. 1984) [hereinafter POME].

53. See *General Steel Domestic Sales, LLC v. Bacheller*, 2012 Colo. LEXIS 14375 (Colo. 2012) (declining to extend Petition Clause immunity to private arbitration action); *Taliaferro v. Darby Twp. Zoning Bd.*, 2008 U.S. Dist. LEXIS 39478 (E.D. Pa. May 15, 2008) (*Noerr-Pennington* applies to petitioning to compel government action and to petitioning against a particular government action); *Manistee Town Ctr. v. City of Glendale*, 227 F.3d 1090 (9th Cir. 2000) (applying Petition Clause immunity to petitioning activities by public officials).

54. See *United States ex rel. Maranto v. Maxxam, Inc.*, 2009 U.S. Dist. LEXIS 14375 (N.D. Cal. Feb. 9, 2009) (*Noerr-Pennington* doctrine does not apply to conduct in connection with business negotiations with the government); *Lockheed Info. Mgmt. Sys. Co. v. Maximus, Inc.*, 524 S.E.2d 420 (Va. 2000) (*Noerr-Pennington* doctrine does not apply to cases where the government is acting as a market participant).

55. *Chantilly Farms, Inc. v. W. Pikeland Twp.*, 2001 U.S. Dist. LEXIS 3328 (E.D. Pa. Mar. 23, 2001) (noting that a speaker’s motive is irrelevant in determining whether speech is subject to Petition Clause immunity and that private meetings with the government involving petitioning activity fall under the scope of *Noerr-Pennington* immunity).

56. *Kearney v. Foley & Lardner, LLP*, 566 F.3d 826 (9th Cir. 2009) (discovery falls within the scope of *Noerr-Pennington*, although the specific case fell within the “sham” exception).

57. *Select Comfort Corp. v. Sleep Better Store, LLC*, 838 F. Supp. 2d 889 (D. Minn. 2012) (*Noerr-Pennington* extends to pre-suit litigation conduct).

58. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

59. *Waugh Chapel South, LLC v. United Food & Commer. Workers Union Local 27*, 728 F.3d 354, 362-64 (4th Cir. 2013).

ity of its legitimacy are not protected by *Noerr-Pennington* or Petition Clause immunity.<sup>60</sup> Second, Petition Clause immunity does not extend to illegal activity, such as bribery, that corrupts the administrative or judicial process.<sup>61</sup>

#### D. Relative Pleading Burdens

Where a claim touches on the right to petition, some courts have imposed a heightened pleading standard on the plaintiff, just as do many state anti-SLAPP statutes.<sup>62</sup> Other courts have declined to impose a heightened pleading standard, however.<sup>63</sup> Further, some courts have held that Petition Clause immunity will not be presumed and instead must be affirmatively asserted by a SLAPP defendant.<sup>64</sup>

#### E. Ancillary Issues

With the adoption of statutory and judicial anti-SLAPP procedures, there has been an increase in litigation related

to the recovery of attorneys fees.<sup>65</sup> Courts have thus far generally proven willing to affirm the grant of attorneys fees where provided for in statutory fee-shifting provisions. In the non-statutory context, the jurisprudence is less clear; courts may grant attorneys fees under Fed. R. Civ. P. 11 or analogous statutes to those who successfully assert Petition Clause immunity where the underlying suit is found to be groundless or frivolous,<sup>66</sup> but generally lack authority to award fees solely because a claim is barred by the assertion of a First Amendment immunity defense.<sup>67</sup>

### V. Conclusion

Second-generation issues may add an intermediate chapter or two to the story of any given SLAPP, but the starting and end points of each story have not changed: The First Amendment guarantees the right of interested parties to attempt to enlist the government on their side of an issue,<sup>68</sup> and almost all SLAPPs are ultimately dismissed.<sup>69</sup>

60. United States ex rel. Maranto v. Maxxam, Inc., 2009 U.S. Dist. LEXIS 14375 (N.D. Cal. Feb. 9, 2009); Hoffer v. Colo. Dep't of Corr., 7 P.3d 989, 991 (Colo. App. 1999), *aff'd*, 27 P.3d 371 (Colo. 2001). There is some debate as to whether the "false statements" exception exists in its own right, or whether it is merely a different species of the "sham" exception. See California Pharm. Mgmt., LLC v. Redwood & Cas. Ins. Co., No. SACV 09-141, 2009 U.S. Dist. LEXIS 126982 (C.D. Cal. July 29, 2009).

61. Astoria v. DeBartolo, 12 So. 3d 956 (La. 2009).

62. See California Pharm. Mgmt., 2009 U.S. Dist. LEXIS 126982 (requiring a would-be SLAPP plaintiff to allege "specific activities" that bring the defendant's conduct into one of the exceptions to Petition Clause immunity).

63. SecurityPoint Media, LLC v. Adason Grp., LLC, 2007 U.S. Dist. LEXIS 57349 (M.D. Fla. Aug. 7, 2007) (liberally construing allegations contained in plaintiff's complaint that defendant had made "baseless threats" and filed a "sham" lawsuit).

64. Baldau v. Jonkers, 725 S.E.2d 170, 178 (W. Va. 2011).

65. See e.g., Vargas v. City of Salinas, 200 Cal. App. 4th 1331, 1350 (Cal. Ct. App. 2011) (awarding fees to defendant city under the California anti-SLAPP statute); Adelson v. Harris, 973 F. Supp. 2d 467, 504 (S.D.N.Y. 2013) (granting request for attorneys fees and costs under Nevada's anti-SLAPP statute); see also Equilon Enters. v. Consumer Cause, Inc., 29 Cal. 4th 53, 62-63 (Cal. 2002) (rejecting argument that the fee-shifting provision might be unconstitutional where the anti-SLAPP statute requires that the underlying suit be brought with an intent to chill).

66. Barnes Found. v. Twp. of Lower Merion, 242 F.3d 151, 165 (3d Cir. 2001) (reversing a Pennsylvania federal district court's denial of attorneys fees after finding that the original complaint was factually groundless); Stahelin v. Forest Pres. Dist., 930 N.E.2d 447, 452-56 (Ill. App. Ct. 2010) (affirming grant of attorneys fees to defendants who successfully asserted *Noerr-Pennington* defense and were subjected to frivolous appeals).

67. Krystkowiak v. W.O. Brisben Cos., 90 P.3d 859, 870 (Colo. 2004) (holding that a claim was properly dismissed on summary judgment under *POME's* immunity standard, which rendered the defendant ineligible for attorneys fees under Colorado's tort dismissal statute, but noting that where an alternative basis for dismissal exists and provides for the grant of attorneys fees, those fees should be awarded). Protect Our Mountain Env't v. District Court, 677 P.2d 1361, 1364-66 (Colo. 1984).

68. Havoco of Am. Ltd. v. Hollobow, 702 F.2d 643, 650 (7th Cir. 1983).

69. Further resources and reference material on the subject of SLAPPs can be found at the websites of the Public Participation Project, <http://www.antislapp.org/> and the California Anti-SLAPP Project, <http://www.casp.net/>.