INTIMIDATION LAWSUITS AND THE POLITICS OF REAL ESTATE DEVELOPMENT

by

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# INTIMIDATION LAWSUITS AND THE POLITICS OF REAL ESTATE DEVELOPMENT

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DAVID VICTOR DRUBNER

Submitted to the Department of Urban Studies and Planning on July 31, 1990 in partial fulfillment of the requirements for the degree of Masters of Science in Real Estate Development at the Massachusetts Institute of Technology

ABSTRACT

This paper examines Strategic Lawsuits Against Public Participation (SLAPPs), which are lawsuits that attempt to stop political debate through the use of civil tort actions. These lawsuits are characterized as either attempts to prevent citizens from exercising their political rights, or efforts to punish citizens who have exercised those political rights. Not all suits brought by developers against citizens which are labeled SLAPPs are accurately classified as intimidation suits. Most suits classified as SLAPPs are heavy-handed intimidation tactics employed by developers. However, some suits are actually legitimate responses to abuses of the political or judicial process by citizens.

I intend to focus on three cases which have been classified as SLAPP suits by the press and have received a great deal of media coverage. I will investigate the origins of each dispute and analyze how the controversy changed once a lawsuit was filed.

When a developer files a SLAPP suit against a citizen activist he may: 1) not intimidate the citizen, but make him more involved in the process; 2) cause a broad back-lash against the project; and 3). risk losing the suit, prompting a countersuit for abuse of process or malicious prosecution.

The importance of vigorous debate in the political process requires some new legal process which will provide quicker resolution to the SLAPP suits, thereby minimizing their effects. The solution to SLAPPs may be: 1) a mechanism to quickly dismiss baseless suits; 2) to allow abuse of process and malicious claims to be filed as counterclaims; and 3) to allow SLAPP target to recover legal fees from the filers if the suit is determined to be without merit.

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This paper is dedicated to my mother and my father.

My mother has shown me what compassion and caring are. She is truly a very special person.

With all that my father has accomplished, he has given me the drive and the will to succeed. Without his guidance and assistance, I would not have accomplished what I have to date.
CHAPTER ONE

Intimidation Lawsuits: An Overview

In recent years, in virtually every jurisdiction, there have been lawsuits filed which have been characterized as "political intimidation" suits. These suits have generally been filed against citizens who have chosen to participate in the political process. The suits are characterized as either attempts to prevent citizens from exercising their political rights, or efforts to punish citizens who have exercised those political rights. The question is whether these suits are legitimate responses to abuses of the political or judicial process by the citizens, or heavy-handed intimidation tactics employed by developers? These "retaliatory" suits have been brought against citizen activists in many areas, including civil rights, civil liberties, health, safety, and consumer protection.

According to Professors Pring and Canan, from the University of Denver, who have conducted extensive research on intimidation suits, Strategic Lawsuits Against Public Participation (SLAPPs) have become the instrument whereby opposition to the process may be quelled. These SLAPP suits are a premature attempt to stop political debate through the use of civil tort actions. SLAPPs involve the use of litigation to quell political claims by moving public debate from a political forum to a judicial forum, where it seems more favorable to the developer. The SLAPPs claim injury due to citizen participation in the political

1. Interview with Penelope Canan, Associate Professor of Sociology at the University of Denver, June 12, 1990.

process. The injury is caused by the citizen's efforts to influence a governmental entity on some issue of public importance. Others believe that many of the lawsuits depicted as SLAPP suits are legally justifiable claims filed by parties who believe that they have been aggrieved by citizens efforts to influence government entities or other citizens.4

The Constitution protects a citizen's right to petition the government for redress of grievances, and, therefore, these lawsuits can not be based merely on the citizen's participation in the political process. Accordingly, these suits are usually camouflaged within common tort claims, hiding the true nature of the dispute. According to Pring and Canan, there are six legal claims upon which most SLAPP suits are based: defamation, business torts, conspiracy, abuse of judicial process, civil rights/constitutional rights, and nuisance.5

In one SLAPP case, the League of Women Voters in Beverly Hills, California, supported a ballot initiative to stop a condominium project and wrote

3. Penelope Canan, The SLAPP from a Sociological Perspective, an unpublished address presented during "Strategic Lawsuits Against Public Participation (SLAPPS) -- Protecting Property or Intimidating Citizens," the Fall Colloquium of the Pace Law School Center for Environmental Legal Studies, Co-sponsored by the Environmental Law Committee of the Westchester County Bar Association, White Plains, New York, October 14, 1989. See, also Canan, and Pring, Strategic Lawsuits Against Public Participation, at p. 506.


two letters to a local newspaper criticizing it. The developer SLAPPed the league claiming $63,000,000 in damages.6 In another case in Wantagh Woods, New York, a developer, Terra Homes, announced plans to cut down some large oak trees in a neighborhood. A neighbor hung a banner saying that the neighborhood would "not be Terra-ized." When a bulldozer began taking down the trees, the neighbor swatted at it with a piece of debris. Terra responded with a $6,560,000 harassment lawsuit against the neighbor and five other citizens.7 In yet another case, a West Virginia environmentalist who raised blueberries and honeybees complained to the Environmental Protection Agency that a coal company had polluted the Buckhannon River, killing many trout. The company responded with a $200,000 libel suit.8

These cases are merely a few of the thousands of SLAPP suits that have been filed in the last twenty years.9 Unfortunately, researchers have been unable to determine why the number of suits classified as SLAPPs have increased so dramatically in the recent past.

SLAPP suits are very difficult to locate because they are so well hidden by their proponents. The lawsuits are not labeled "political retaliation" suits or lawsuits against protected speech. Additionally, these suits need not go to trial to be successful in accomplishing their desired purpose.10 The suit may achieve its


9. Interview with Penelope Canan. See note 1 supra.
desired effect to quell the opposition merely by the threat of filing or by the act of filing.

One of the fundamental rights of an American citizen is her right to participate in the political process. The right of a citizen to petition the government for redress of grievances was considered to be so essential that it was included in the First Amendment of the Constitution. The protection given by the Petition Clause in the Constitution has been interpreted by the courts to include any lawful attempt to either encourage or discourage government activity. The "protected behavior" includes disseminating petitions, sending letters to public officials, making complaints to government officials, filing lawsuits, testifying at public hearings, and demonstrating in public.11 Courts ruling on cases in this area face a dilemma because they need to ensure citizen participation in the process as guaranteed by the Constitution, but they must also protect individual rights.

Citizens are constitutionally allowed the right to participate in the land use/zoning process, and the participation of the public is very important to the effective functioning of the process. Most state and local laws have explicit provisions which provide for public participation in the process. However, with the possibility of a SLAPP suit being filed, many people may not feel that they can actively participate in the process. People who fear the reprisals which may result from their involvement in the political process have been effectively "chilled."

10. Canan and Pring, Strategic Lawsuits Against Public Participation at p. 507. See note 2 supra.

11. Id., at p. 511.
Pring and Canan's research has shown that almost 68% of SLAPP suits are dismissed at their first court appearance and approximately 83% of the final judgements favor the targets of the suits. However, the average SLAPP case is not dismissed for 32 months. But, the SLAPP suit does not have to be "won" in the traditional legal sense in order to be successful. The resources of the target may be used up in a protracted legal battle. The target must also deal with the psychological effects of the SLAPP suit and its effects on her family. In addition, other citizens may feel intimidated enough to not get involved in the political process.

Professors Pring and Canan conducted an empirical study to determine whether SLAPP suits actually "chill," or deter, citizen participation in the political process. Consequently, they developed a four-point operational definition of a SLAPP suit. By their terms, a SLAPP is:

1. a civil claim for money damages,
2. filed against nongovernmental individuals or organizations,
3. based on advocacy before a government branch official or electorate, and
4. on a substantive issue of some public or societal significance.

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12. Id., at p. 514.
13 Id., p. 514.
The researchers have also found that SLAPP suits consist of three specific stages: 1) the activity protected by the Petition Clause; 2) the civil damage tort claim or counterclaim; and 3) the final resolution of the case.15

The definition of SLAPP suits proposed by Pring and Canan, HOWEVER, may overstate the SLAPP phenomenon. There are some cases which may be included in Pring and Canan's definition of SLAPPs, which may actually be justifiable legal claims that have been filed by parties who have been aggrieved. In virtually every lawsuit that is filed, the plaintiff will claim that his motives are legitimate. How can we make an objective assessment as to whether a suit is a SLAPP?

Let me suggest, if not a definition for SLAPP suits, at least three points which can help to determine whether a case is in fact a SLAPP: 1) Is the claim as filed legally without merit? 2) Do the plaintiffs actively pursue their claims with vigor and diligence? 3) In hindsight, is it apparent that the suit was filed solely to suppress or harass the defendant? It is important for there to be specific criteria which will clarify the SLAPP issue for both the reader of this thesis and members of the courts and legislatures dealing with the problem. These points are only criteria which should be used to help determine whether a suit is in fact a strategic lawsuit against public participation. They are meant to be an indicator, not a definitive classification.

The SLAPP is generally triggered by some constitutionally protected behavior such as handing out fliers or writing a letter to an administrative agency. However, one must remember that there are limits to constitutionally protected

behavior. Writing a defamatory letter or making a libelous statement is not constitutionally protected behavior.\textsuperscript{16} In SLAPPs, the civil damage claim is alleged when the developer wants to intimidate the citizen group or punish them for their involvement with the matter. The final disposition of a true SLAPP usually depends on whether the target has raised its First Amendment Rights.

The SLAPP filers are typically developers, public corporations and state and local government entities. The filers are often well capitalized and well organized and have sophisticated legal representation. Targets of SLAPPs are frequently individuals, public interest groups, or civic or social organizations. Generally, these groups are poorly financed and poorly organized. Therefore, the filers are better able to survive a protracted legal battle, and the parties being sued are generally more likely to settle. However, the SLAPP filers are not always large corporations or development companies.\textsuperscript{17} Parties on both sides of the development issues have filed intimidation suits, but the citizens groups are much more likely to be targets of such suits.

The damages sought in the SLAPP suits range from $10,000 to $100,000,000. According to Pring and Canan, the average damage claim is for $9,000,000.\textsuperscript{18} However, the amount of the SLAPP damage claim is a mere formality because the filers generally are not planning on prevailing in the lawsuit. But, some of the suits which have been characterized as SLAPPs were filed with the intention that the plaintiff will prevail and collect monetary


\textsuperscript{17} \textit{Political Intimidation Suits: SLAPP Defendant Slaps Back} at 460. See note 15 supra.

\textsuperscript{18} Colino at p. 20. See note 8 supra.
damages. The purpose of most SLAPP suits is not to collect damages, it is to force the citizens group to acquiesce to the developers’ demands. Another goal of the SLAPP suit is to retaliate against the citizen for his involvement in the political process and to discourage any further activism.

Approximately 70% of the SLAPP cases in the sample studied by Pring and Canan occurred when a party approached a governmental body about a matter that affected another party. A second party then filed a lawsuit against the party who approached the governmental body. Approximately 25% of the SLAPPs occurred when two parties simultaneously petitioned the same governmental body seeking different redress.

The escalation of most SLAPPs begins with a developer who usually plays along with the political process until it looks as if the opposition is beginning to "turn the tide." The opposition engages in an activity which is protected by the Petition Clause and the developer files a civil damage tort claim, the SLAPP suit. Many of the SLAPP suits are tied to the particular financial constraints of the developer. In many instances, the financial success of the project depends on expedited governmental approvals. Due to citizen opposition, the project is delayed, costing the developer substantial amounts of money. In some of these instances, the developer feels that he has no choice but to file a SLAPP suit against the opposition in order to get the project approved.

According to Professor Canan, many developers want to take disputes out of the hands of the bureaucrats and put them in the courts. This type of case is

19. Canan and Pring, Strategic Lawsuits Against Public Participation at p. 509. See note 2 supra.

20. Interview with Professor Canan. See note 1 supra.

21. Id.
markedly different from the case where the opposition has begun to "turn the tide." In the case where the developers want to take the case out of the hands of the bureaucrats, it may be inferred that the developer expects to win the case on the merits.
CHAPTER 2
JUDICIAL RESPONSE TO SLAPP SUITS

The research conducted by Pring and Canan has been inconclusive as to the reason for the recent increase in the number of SLAPP suits filed since 1970. According to Professor Pring, they have not yet been able to pinpoint the reason for the recent popularity of intimidation suits.22 But, Joseph Brecher, an attorney who is very familiar with SLAPP suits, believes that the increase in intimidation suits is directly related to the overall increase in public interest litigation which has occurred since the early 1970's.23 Brecher presents three reasons for the increase in public interest litigation: 1) There has been an increase in the number of statutes which authorize private citizens to bring suit to enforce the statute. 2) The courts have liberalized the standing requirements for public interest plaintiffs. In order to be able to sue someone on an issue, an individual must have "standing" (ie. show that he/she was personally harmed). Therefore, almost any citizen can sue on a public interest issue because the Supreme Court has held that a citizen can show "personal" injury on an issue of interest to the public. A and 3) the courts have relaxed the requirements for public interest plaintiffs to obtain injunctions.24

22. Id.
There has been some speculation that developers believe that they are vulnerable to public interest suits because they are acting in ways which are perceived to be contrary to the public interest. Therefore, many of these SLAPP suits may be viewed by developers as offensive maneuvers designed to avoid protracted public interest litigation. But, no single reason for the increase in SLAPPs has been proffered.

There have been very few reported cases involving intimidation lawsuits, but the few cases that have been decided have set a clear precedent. Most states only publish those cases which have been appealed. *Sierra Club v. Butz* (1972) is one of the most notable cases involving an intimidation suit. The Sierra Club filed a federal suit in the U.S. District Court in California, seeking injunctive relief against Humboldt Fir, Inc. in order to temporarily prohibit logging in an area near Salmon-Trinity Alps. Humboldt Fir filed a countersuit alleging the civil tort of interference with an advantageous business relationship. The court viewed the Sierra Club's actions as the exercise of their rights under the Petition Clause by seeking government redress of a grievance. The court looked to *New York Times v. Sullivan*, where the Supreme Court held that in cases of invasion of privacy and defamation where the speech or writing is a genuine attempt to communicate with others concerning matters of "public interest," then the Constitution forbids the court from imposing sanctions, even civil liability, on those exercising their First Amendment rights.


27. 376 U.S. at 254.
The court in *Sierra* held that when a suit based on interference with advantageous business relationship is brought against a party whose "interference" merely consisted of petitioning a governmental body, that activity is protected by the First Amendment. Liability for petitioning the government for redress can only occur if the petition is merely a "sham," and the true purpose of the action is to somehow injure the plaintiff.28

In *Harrison v. Springdale Water & Sewer Commission* (1986)29 the Harrisons, blueberry farmers, filed suit against the Water & Sewer Commission for injunctive relief and damages resulting from sewage discharge into the Harrisons' sole source of irrigation water.30 The Commission retaliated against the Harrisons by filing a counterclaim seeking to condemn the Harrisons' property. The court found that within the First Amendment right to petition, the right of access to the courts shares a "preferred place" in our hierarchy of constitutional freedoms. The court held that the city had no plans to use the Harrisons' property when they filed the counterclaim. The counterclaim was merely an effort to punish the Harrisons for seeking justice in the courts. The court stated:

The cases from this Circuit, as well as from others, make it clear that state officials may not take retaliatory action against an individual designed to punish him or her for having exercised the constitutional right to seek judicial

29. 780 F.2d 1422 (8th Cir. 1986).
30. *Id.* at 1424.
relief or to intimidate or chill his exercise of that right in the future.31

In the Colorado case of Protect Our Mountain Environment v. District Court in and for the County of Jefferson, State of Colorado (1984)32 (hereinafter POME), POME filed suit against the Jefferson County Board of County Commissioners (hereinafter the Board) and Gayno, Inc. in order to overturn the Board’s approval of Gayno’s application for rezoning on the grounds that the Board exceeded its authority and abused its discretion.33 The district court ruled against POME, and, subsequently, Gayno sued POME for $10,000,000 in compensatory damages and $30,000,000 in exemplary damages claiming abuse of process and civil conspiracy. The POME court stated that the right to petition the government is not without limits. The First Amendment does not allow the use of the courts for improper purposes.34 However, the court also recognized that suits filed against citizens for prior administrative or judicial activities can have a substantial chilling effect on the citizens exercise of their First Amendment rights.

The POME court established a three part test that plaintiffs must meet when suing citizens in connection with legitimate efforts to influence government decision-making. The court required that the suing party, when confronted with a motion to dismiss the claim based on the First Amendment right to petition, 31. Id. at 1425.
32. 677 P.2d 1361 (COLO. 1984).
33. Id. at 1363.
34. Id. at 1366.
must demonstrate the constitutional viability of its claim. The court required that the intimidation suit be dismissed if the plaintiff (the person filing the SLAPP suit) can not show that: 1) the defendant's (the person being SLAPPed) administrative or judicial claims lack either factual or legal support; 2) the primary purpose of the defendant's petitioning activity was to harass the plaintiff; and 3) the defendant's actions had the capacity to adversely affect a legal interest of the plaintiff.

Professor Ralph Stein of Pace University Law School argues that the doctrine set out by the Supreme Court in *Eastern R.R. Presidents Conference v. Noerr Motor Freight* and *United Mine Workers of America v. Pennington* (known as the Noerr-Pennington doctrine) results in finding that once a protected activity is involved, liability depends solely on the illegality of the acts themselves, and the aims and motivations underlying the challenged acts are of no legal consequence. The Noerr-Pennington doctrine forces the party filing the SLAPP suit to prove the illegality of the defendant's behavior without relying on the "bolstering quality of the bad motive attacks."

35. *See.*, *Id.* at 1368.
36. *Id.* at 1369.
38. 381 U.S. 657 (1965)
40. *Id.*, at p. 11.
CHAPTER 3
PURPOSE OF THIS THESIS

One of the major political/legal conflicts in this nation occurs when we attempt to balance an individual's right of free speech against individual property rights. The constitution guarantees all individuals the right of free speech, but this right of free speech is not without limits. An individual may not freely libel or slander someone in the name of constitutional free speech. Likewise, the Petition Clause of the First Amendment gives individuals the right to encourage or discourage any government activity, but this right to speak out has been similarly limited by the courts according to the time place and manner of expression.

As previously discussed, there has been a recent increase in the number of lawsuits which have been classified by researchers and the press as SLAPP suits. Consequently, there has been a large number of articles written which focus on the SLAPP phenomenon. However, some of the suits which have been classified as SLAPP suits may actually be lawsuits which are based on valid legal claims, not merely intimidation and retaliation.

41. See., The First Amendment to the United States Constitution.


Professors Pring and Canan have studied the SLAPP phenomenon for more than seven years. They have identified 228 cases which they have classified as SLAPPs, and they have studied these cases using several different approaches. They initially looked at all of the public information available about all of the cases. They summarized the information which they found in legal documents, public records, newspaper clippings, and personal papers. From the general review of the cases, the researchers completed a statistical analysis of the data gathered. The researchers also conducted in-depth studies of eleven cases. They personally interviewed over 100 participants for periods ranging from one to five hours. They made verbatim transcripts of the interviews and then used the results to produce qualitative information which they presented in various articles. In addition, the researchers created a model of SLAPP disputes which they are presently testing.

This thesis is not intended to merely restate Pring and Canan’s findings. They focused their research on a variety of aspects of the SLAPP suit including 1) what activities led up to the lawsuit, 2) the specific disposition of the suits, 3) what the suits have in common, and 4) how the suit has affected the people being sued. I intend to focus on three cases which have been classified as SLAPP suits by the press and have received a great deal of media coverage. Rather than just examining the litigation, I will investigate the origins of each dispute and analyze how the controversy changed once a lawsuit was filed. It is essential to remember

44. Penelope Canan, The SLAPP from a Sociological Perspective. See note 3 supra.

45. Id., See Also., Canan and Pring, Strategic Lawsuits Against Public Participation. see note 2 supra; Canan and Pring, Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches. see note 14 supra.
that even after the judicial proceedings are instituted, the local land-use approvals process usually continues. What sort of "shadow" does such a suit cast on the zoning/permitting process? Are citizens really inhibited from voicing their opposition or does the SLAPP suit actually provoke a stronger counter-reaction? Do developers who sue actually gain bargaining power or lose it? These fundamental questions require an understanding of SLAPP suits within the broader political context of local land-use approvals.
CHAPTER 4
THE BOSWELL CASE

Family Farmers, a committee which was created to provide a vehicle for local farmers to express support for additional water for California's Central Valley, was SLAPPed by J.G. Boswell Company, a large agribusiness company and land developer. Family Farmers took out an ad questioning Boswell's intentions, and they were sued for a substantial sum of money.

THE FACTS

J.G. Boswell Company (hereinafter Boswell) filed a multi-million dollar lawsuit against a group of small farmers in a classic example of a SLAPP suit. But, in this case the farmers SLAPPed back against the large corporation and won.

For several years Boswell was involved in political issues of economic interest to the company. Boswell employed several lobbyists, both full and part time, in Washington D.C. and Sacramento. For example, in 1981 there was a proposition before the California voters regarding the construction of the Peripheral Canal, a project designed to meet the increasing water demands in southern and central California. Boswell opposed construction of the Peripheral Canal as proposed by Proposition 9 because it viewed the construction of the canal as against the pecuniary interests of the company.46 Boswell believed that

the defeat of the Peripheral Canal would result in a subsequent lack of water for
the Kern County area. The lack of water would probably cause many farming
operations to go out of business, thereby giving Boswell the opportunity to
acquire additional properties that could initially be used for farming and
ultimately for development.47 In addition, Boswell had control of substantial
supplies of water and would therefore be in an advantageous position if there was
a shortage of water.

Boswell played a major role in the anti-Canal campaign. They originally
budgeted $1 million to the anti-Canal forces, but admitted that it would have
expended additional funds to ensure the defeat of the referendum.48 Boswell
also made extensive efforts to stop contributions to the pro-proposition campaign
by threatening contributors with whom it was doing business. In one case, a
Boswell executive called Shell Oil Company and "suggested" that they stop
supporting Proposition 9, stating that "our company supports people who support
us, and if they didn't want to support us, we shouldn't support them any
longer."49 When Shell did not comply with Boswell's request, it directed its
supplier to buy its materials from another company. In another instance, Boswell
contacted the Union Oil Company, which owned the local Puregro fertilized
dealership, and asked Union Oil to cease their support of Proposition 9. When
Union Oil did not do so, Boswell stopped purchasing fertilizer from Puregro, and
the Puregro dealership was forced to close.50

47. Wegis v. Boswell, Reporters Transcript 815-816.
On the other side of the issue was Family Farmers, which was created to provide a vehicle for local farmers to express support for additional water for the Central Valley. Family Farmers, as well as most of the California farming community, supported the construction of the Peripheral Canal.51

During the course of the Proposition 9 campaign, the anti-proposition forces began running ads which depicted the pro-proposition forces as large oil companies and corporations. Boswell apparently knew that these advertisements were largely untrue, but continued to run the advertisements because they were informed that the ads were effective.52 Family Farmers became concerned that the public was being misled by the ad campaign. They wanted the public to know that small farmers supported the Canal and were dependent on the water which it would provide. In addition, Family Farmers needed to raise money in order to support Proposition 9.

On May 10, 1982, Family Farmers ran a full page ad in two papers, The Californian and The Hanford Sentinel. The ad said, "WHO ARE BOSWELL & S Alyer? And why are they trying to cut off our water? Boswell and Salyer have built their empires on cheap water smaller farmers don’t have those resources and Boswell and Salyer know this. If the small farms go out of business, Boswell and Salyer will be able to dominate California agriculture, setting prices where they want them."53 Boswell immediately recognized that this ad was very effective and would most likely stimulate farmers to make


campaign contributions to the "Yes on 9 Committee." Immediately thereafter, Boswell decided that it should take legal action against Family Farmers. Rather than consulting the outside law firm it normally retained, or the specialty firm which it used for political matters, Boswell hired William Chertok, an attorney who had handled a workers' compensation case for Boswell eight years earlier. Boswell had no explanation for its failure to use the wealth of legal talent at its disposal. Boswell's choice of its counsel in this suit may be indicative of the fact that this lawsuit was filed merely to quiet Family Farmers. If Boswell had truly believed that they had been defamed, they probably would have hired experts in that field to ensure their success in the litigation. Accordingly, four days after the Family Farmers' ad was published and one day after Chertok had been retained, a libel complaint was filed by Boswell.

The complaint was filed against Family Farmers, Ken Wegis, and 1000 John Does, and sought $1 million in compensatory damages and $1.5 million in damages from each defendant. The purpose of including 1000 John Does in the complaint was that if any party spoke out against Boswell, they could be substituted for one of the John Does; Jeff and Jack Thompson were substituted for two of the John Does shortly thereafter. Boswell's justification for the libel suit was based on one sentence in the newspaper ad which "accused" Boswell of

54. Wegis v. Boswell, Memorandum of Points & Authorities In Opposition To Motion For Judgment NOV And Motion For New Trial, p. 19-20.


56. Id. at p.4.

57. See., Wegis v. Boswell
engaging in a criminal conspiracy to fix prices, perhaps in violation of the Cartwright Anti-Trust Act.58

In addition, Boswell sent the first page of the complaint listing 1000 John Doe plaintiffs to all of the newspapers in the state that Boswell felt might be approached to publish the ad in the future. Accordingly, both the citizens and the press were put on notice that support for the Canal could subject them to inclusion in the aforementioned lawsuit. Once this libel suit had been filed, virtually all of the contributions to Family Farmers ceased.59

Ken Wegis, Jack Thomson, and John Thomson (hereinafter the respondents) filed a countersuit against Boswell for abuse of process and intentional interference with the constitutional right of free speech. On June 3, 1984, the trial court granted the respondents' motion for summary judgment on the original complaint, and dismissed Boswell's complaint. The court held that Family Farmers' ad was "constitutionally protected opinion rather than a statement of fact charging Boswell with criminal conduct, and that the ad did no more than construct a motive for Boswell's opposition to the canal."60

On June 2, 1986, following Boswell's appeal of the trial court's decision, the California Court of Appeal, Fifth Appellate District held that the advertisement was

clear speculation and not a statement of fact, taken in the context of the entire advertisement itself but also in the heated political debate in which it appeared, we cannot believe any reader would be misled into accepting defendants' clear speculation about Boswell's motivations as a factual accusation that Boswell was guilty of a criminal conspiracy.61

Following the Appeals Court's affirmation of the lower court holding, the respondents amended their complaint to include a malicious prosecution claim. The respondents claims withstood Boswell's motion for summary judgement, and the case was tried before a "conservative" jury. After a trial involving 15 days more than twenty-five witnesses, the jury awarded $3,000,000 in compensatory and $10,500,000 in punitive damages. Boswell has appealed the judgment.62

THE SUIT'S IMPACT

The proposition for the Peripheral Canal was defeated in a statewide election in 1982.63 Although it is not clear whether the defeat of the canal was directly related to the SLAPP suit filed by Boswell, Boswell did achieve its goal because of, or in spite of filing the lawsuit against the respondents. Several things are certain, however. The lawsuit clearly had the chilling effect of drying up the fundraising ability of Family Farmers. Before the SLAPP suit was filed Family Farmers had raised several hundred thousand dollars, but after the SLAPP suit

56. Id. at p. 6.


was filed, they only raised only an additional $8,200 to support Proposition 9. 64

The fundraising ability of the Farmers evaporated because no one wanted to be
sued as one of the 1000 John Does included in the suit.

According to the testimony of two prominent Kern County farmers, Fred
Starr and Peter Dellis, they were "extremely afraid"65 of being sued by Boswell,
and, therefore, did not contribute any more money to the Family Farmers. At
the trial, Mr. Dellis stated that Boswell Corporation was a "very powerful
organization and they have a lot of clout politically and I was definitely worried
about them. I thought I was being sued."66  It was evident that because Family
Farmers funds disappeared, they could no longer use the paid media to publicize
their support of the Peripheral Canal. More fundamentally, it appears that
people were inhibited from speaking up in other forums. However, there is no
way to determine whether the lack of positive publicity led to the defeat of the
proposition.

Boswell filed a knowingly baseless lawsuit which was subsequently ruled
by a court to be without merit to silence their opponents in order to achieve their
objective. Boswell outwardly gave the appearance of "playing along with the
game" until it looked as if Family Farmers might have begun to "turn the tide" in
their favor. In reality, Boswell had acted in a heavy-handed manner throughout
the campaign process. When it looked as if Family Farmers had an ad which

64. Wegis v. Boswell, Memorandum of Points & Authorities in Opposition to Motion for Judgment NOV and Motion for

65. Wegis v. Boswell, testimony of Pete Dellis, June 27,
1988, p. 66.

66. Id. at p. 66.
might generate substantial contributions, Boswell decided that it was time to act to stop the Farmers. This is the classic example of a SLAPP suit.

The lawsuit had a very substantial impact on the respondents, Ken Wegis, Jack Thomson, and John Thomson. The insurance companies which represented the respondents refused to fund any losses if the respondents lost their litigation against Boswell.67 Jack Thomson's insurance company cancelled his families policy and as a result his premium were substantially increased. Thomson's insurance company "suggested" that he not get involved in any other political campaigns.68 All of the respondents were worried about the impact of the Boswell suit on their ability to finance their crops with banks. The parties were concerned that the banks would refuse to finance their crops due to the possibility of an adverse judgment.69 They were also put under a tremendous amount of personal stress due to the possibility of losing everything that they owned. The respondents were not merely worried about the possibility of an adverse judgement, they were also very concerned about the mounting legal bills and the time involved in defending the suit.

But the respondents did not stand idly by and allow Boswell to abuse the legal system by impairing their right to speak freely. They countersued Boswell and won a very substantial monetary award.


68. Id. at p. 48.

CHAPTER 5

THE MONIA CASE

Victor Monia was a self-made executive in the product packaging field who decided to become involved in grass roots politics. Monia and several other people formed the West Valley Taxpayers and Environmentalists Association (hereinafter the WVTEA). Under Monia’s influence, WVTEA grew to include 500 families, and they collectively supported a ballot initiative limiting development. Thereafter, Monia and the group were SLAPPed by a developer who opposed the ballot initiative.

THE FACTS

In 1980 in Saratoga, California, an affluent town of 30,000 located in southwestern Santa Clara County, there was a referendum before the residents of the town. "Measure A" was a proposed city ordinance which would severely limit development in the foothills below the Santa Clara mountains. Parnas Corporation, a real estate partnership actively campaigned against the measure. Parnas had preliminary approval to build forty homes in the Saratoga foothills, and if Measure A passed, the plans would have to be re-approved by the city.

On April 8, 1980, Measure A was adopted by the residents of Saratoga. It provided that upon passage, the city would make a complete review of all

70. Penelope Canan, The SLAPP from a Sociological Perspective. See note 3 supra.

71. Id at p. 8.
development issues, and then issue a comprehensive development plan for Saratoga. Interim restrictions would be imposed by the measure, but developers could claim hardship, and exceptions to the restrictions could be made following public hearings. On May 19, 1980, Parnas filed a $40,000,000 libel action against the West Valley Taxpayers and Environment Association (WVTEA), Victor Monia, and several other homeowners associations who had supported Measure A by disseminating of a flier regarding Measure A.

Prior to the election concerning Measure A, several local papers reported extensively about the circumstances of Parnas’s purchase of property from former Fremont Mayor Gene Rhodes and Rhodes’ law firm’s representation of Parnas at the same time that Rhodes was voting on matters affecting Parnas. They also reported that Rhodes had voted on matters relating to property which Parnas had purchased from Rhodes and in which he had retained an interest. At the time of the Saratoga election, the former Fremont mayor Rhodes was being sued by the Alameda County District Attorney’s Office for these and other alleged violations of the state’s Political Reform Act.

About three months prior to the election, a flier was disseminated by several groups. This flier was the subject of the aforementioned lawsuit filed by the Parnas Corp. The flier was entitled "PROTECT YOUR CITY AND RIGHTS: VOTE 'YES' ON MEASURE A." The flier stated:

72. West Valley Taxpayers and Environment Association v. Parnas Corporation, Appellate Court, State of California, Sixth Appellate Division, No. H005918, Appellant’s Opening Brief, p. 10, Appeal from judgment of the Superior Court, Santa Clara County, Case No. 541313.

Powerful interests own land in Saratoga’s hills. The Saratoga City Attorney, Staff and majority of the Council and Planning Commission are strongly pro high density hillside development. Consequently Saratoga has fallen behind San Jose, Los Gatos, and other communities in controlling hillside development. Developers such as Parnas Co., that was involved in the Fremont Mayor’s conflict of interest, are now developing land in Saratoga’s hills.74

The flier was disseminated to citizens of Saratoga between January and March of 1980.

WTVEA and Victor Monia filed an answer to the libel claim by Parnas. However, Parnas did not pursue the libel action after September, 1980. On January 27, 1983, the libel action was dismissed by the court for lack of prosecution. Thereafter, in 1984 Monia sued Parnas and its attorney Stephen Bernard for malicious prosecution seeking damages of $10,000,000.75

Bernard settled his dispute with Monia and the WTVEA for $100,000. In 1989 a jury found that Parnas acted maliciously in bringing the libel suit against Monia and awarded Monia $60,000 in compensatory damages and $200,000 in compensatory damages. The jury determined that Parnas did not have a reasonable good faith belief that the statement in the flier was false.76


75. Cursi at p. 8. See note 58 supra.

76. Id. at p. 8.
THE SUIT’S IMPACT

The process begun by the filing of a $40,000,000 libel suit by Parnas Corp. against Victor Monia took almost nine years to complete. Mr. Monia was forced by Parnas to spend almost nine years of his life trying to protect his right to petition the government for redress of his grievances. Although the lawsuit was dismissed for failure to prosecute, it had significant effects on Victor Monia and the homeowners groups who were sued. During the years that the lawsuit was pending, people withdrew from the homeowners organizations, causing them to disintegrate. The members of the organizations feared personal liability from the $40 million suit, and this caused both personal and financial trauma. The effects of the lawsuit on Victor Monia were similar to those affecting the members of the homeowners organizations. Monia was subjected to emotional, financial and personal stress as a result of the suit. His business suffered because his attention was diverted by the suit.

When Parnas filed the libel suit against Mr. Monia, Measure A, which Monia supported, had already been passed by the voters of Saratoga. The suit by Parnas was possibly retaliatory in nature. It is also possible that Parnas sued Monia and the other citizens groups to keep them out of the hardship process for the interim regulations of Measure A. It seems that by filing an intimidation suit, Parnas neither won nor lost in the political process. Since Measure A had been passed prior to the filing of the suit, Parnas had to comply with the interim regulations set forth by the measure. By suing the citizens groups, Parnas may have prevented them from participating in the hardship process. However, his
project was still delayed by that process. Parnas eventually built the homes on the side of the foothills, but it took much longer than they anticipated.

Victor Monia stated that the intimidation suit had the opposite of the desired affect on him. "We need to give people confidence that, if they go after people who try to manipulate the courts for political purposes, they can win, he said. Monia feels that he has shown that he was not "intimidated" by the Parnas suit, and that his involvement in the process was not squelched.

77. Salner at p. B1, See note 66 supra.
CHAPTER 6
THE PERINI CASE

Perini Land & Development, a national development firm, found themselves involved in a lawsuit which was characterized by the press as a SLAPP suit. Perini sued several citizens for breach of a contract, and the lawsuit was classified as a SLAPP. Perini was eventually vindicated in the courts, but the suit was expensive both in monetary terms and in reputational damage.

THE FACTS

In 1983, Perini Land & Development Company had undertaken the development and construction of a large resort project on 640 acres in Squaw Valley that included a central resort complex, a multi-story resort condominium hotel, and an 18 hole links-style golf course. Squaw Valley, California is located six miles from Lake Tahoe, Nevada, and five miles from Reno, Nevada. Perini proposed to build an all-season destination resort complex in Squaw Valley. Phase I of the project featured 405 luxury hotel units, two ski lifts, a conference center and an 18 hole golf course. Phase II featured 409 luxury hotel units, 36 townhouses, and an additional ski lift.78

The project was to be integrated into the Squaw Valley U.S.A. ski area (the site of the 1960 Olympics). The project was specifically designed by Perini to be well integrated with the surrounding environment. All of the structures

78. HCV Pacific Partners, Offering Memorandum of the Resorts at Squaw Creek, California’s All Season Resort at Squaw Valley.
were designed to blend into the wooded hillside surrounding the project, and none of the buildings were to be higher than the mature pine and fur trees surrounding the project. The proposed 18 hole links-style golf course was to be located on a meadow which had been heavily disturbed because it had been previously used for parking for the 1960 Olympics.79

In 1985, after numerous public hearings, Perini obtained unanimous Master Plan approval for the project and the necessary entitlements from the Placer County Planning Board and the Placer County Board of Supervisors. Perini required subsequent approvals for the project from the Lanotan Sewer District, the Regional Water Quality Control Board, the U.S. Army Corps of Engineers, and from the Tahoe Regional Planning Agency.80 Perini had been involved in the approval process regarding this project for over two years, and the political climate had begun to swing in Perini's favor.81

Shortly thereafter, a group of Squaw Valley residents filed a lawsuit challenging the adequacy of the final Environmental Impact Report (EIR) filed for the project. The lawsuit, called the Pierucci suit, was settled by a written agreement which was approved by the Placer Count Superior Court. The settlement agreement stipulated that the plaintiffs would not take any affirmative action to directly or indirectly oppose or object to the project before any regulatory agency which is required to issue a permit or approval for the project.82

79. Id.

80. Interview with Tom Steele, President of Perini Land & Development, July 1990.

81. Id.

82. Id.
After the *Pierucci* suit was settled, Perini sought approval for the project from the Regional Water Quality Control Board. This approval was primarily for the golf course which was to be located in the meadow used for parking for the 1960 Olympics. This meadow contained various wetlands, and was therefore within the purview of the Regional Board. This approval process also required public hearings, and there was substantial citizen participation in the process. The Regional Board granted Perini initial approvals. Thereafter, the Sierra Club and a number of Squaw Valley resident calling themselves the Institute for Conservation Education (the Institute) began to actively oppose the project. These individuals were in no way involved in the *Pierucci* suit. The groups appealed the Regional Board's approval to the California State Water Resources Control Board, which upheld the Regional Board's approval.83

Following these water approvals, the Sierra Club, the Institute, Frederick D. Sylvester, and Edward Henneveld filed suit against Perini and the State Board challenging the approvals which Perini had received. Perini then negotiated a comprehensive settlement agreement with the plaintiff's. The executed agreement required Perini to make certain adjustments to the project, including implementing an extensive water quality monitoring program (which cost Perini a substantial sum of money to implement). In exchange for these concessions, the agreement provided that if Perini complied with the requirements of the agreement, then the petitioners (those who filed the lawsuit) would

individually or jointly, directly or indirectly, take any further action to oppose, or to encourage opposition to, the issuance of such additional regulatory permits, or any other approvals required for the Resort project, nor shall they

83. Internal Memorandum from Perini’s Counsel Summarizing Litigation.
encourage, promote or support any such opposition by any other person or organization.84

The settlement agreement was signed by the Sierra Club and the representatives of the Institute.

When the settlement agreement was signed, neither Sylvester or Henneveld was available, but their attorney advised Perini that the Institute had their consent to sign the agreement and that they would be bound by virtue of their membership and leadership position in the organization. Sylvester and Henneveld also agreed to sign the documents which would dismiss their case "with prejudice." The dismissals were executed and subsequently filed.

Subsequently, Perini applied to the Army Corps of Engineers (hereinafter the Corps) for a Section 404 waterways permit because the Corps had asserted jurisdiction over portions of the meadow area to be impacted by the golf course. The application and initial field study was completed, and the Corps advised Perini that they would issue a Public Notice If there was not significant citizen opposition, the permit would be issued without a hearing. However, after the Public Notice was issued, the Corps received written comments opposing the permit from Mr. Sylvester and one other principal of the Institutes' leadership. Accordingly, the Corps decided to hold a public hearing prior to issuing the permit.85

Prior to the hearing, Perini received a letter from the attorney for the Sierra Club and the Institute indicating that his clients felt Perini breached the settlement agreement and that the Sierra Club and the Institute would no longer

84. Id.

be bound by the terms of the agreement. Subsequently, Sylvester and members of the original Institute group began actively opposing the issuance of the Corps permit. It became apparent to Perini that several of the key leaders of the Institute were in the process of renewing their active opposition to the project, despite their settlement agreement.

After carefully reviewing the matter with their counsel, Perini filed a suit against the Institute, Mr. Sylvester, and several individuals who had served as leaders of the Institute. The complaint, filed in 1987, alleged breach of contract, inducing breach of contract, and conspiracy. It sought damages in excess of $10 million, based on the estimates of losses incurred as a result of the defendants' actions in causing further delays in the project.

After the filing of the Perini breach of contract suit, Sylvester filed three subsequent lawsuits against Perini.

**The Wetlands suit.** In 1988 Sylvester sued the Corps and Perini Land & Development Company in U.S. District Court, challenging the permit issued to Perini. The permit authorized the dredging and filling of approximately eleven acres of wetlands in connection with the construction of a golf course. The complaint stated four claims for relief based on alleged violation of the National Environmental Policy Act (NEPA), the Clean Water Act (CWA), the Endangered Species Act (ESA), and the Clean Air Act (CAA) by the Corps. The focus of the complaint was against work relating to the construction of the golf course.

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course, and the complaint sought injunctive relief to invalidate the permit authorizing work in that area.

The District Court on August 25, 1988 issued a preliminary injunction enjoining all work on the entire project. The court dismissed Sylvester's ESA claim and required him to post a $100,000 bond to secure Perini for damages if the court determined that the injunction was wrongful. Subsequently, Perini appealed the injunction and Sylvester appealed the bond requirement. On March 23, 1989, the Ninth Circuit Court of Appeals vacated the injunction entirely and remanded the case to the District Court for further proceedings. The Appeals Court held that the Corps had properly limited the scope of its environmental review to the golf course component of the project. On May 2, 1989 the District Court denied Sylvester's subsequent motion for an injunction based on his CWA and CAA claims and granted Perini summary judgment as to Sylvester's NEPA claim. Sylvester then appealed the denial of his motion for preliminary injunction to the Appeals Court which upheld that denial.

Citizen's Rights case. On July 30, 1988, Sylvester filed suit against the Corps, the Administrator of the Environmental Protection Agency, and Perini Land & Development.88 Sylvester filed a second complaint based on the CWA and the ESA which made basically the same claims as the suit previously described, but brought it under the citizens provisions of the CWA and ESA. On May 2, 1989, the Court granted the defendant's motion to dismiss the CWA claim, but the Court allowed Sylvester to amend his ESA claim.

Environmental case. On January 11, 1989, Sylvester filed a complaint in the Placer County Superior Court to set aside the decision of the Placer County Board of Supervisors approving the Development Agreement between Perini and the County. The complaint also alleged that the 1985 EIR for the project was inadequate. On April 6, 1990, the court dismissed the complaint filed by Sylvester.

In June, 1990, Perini Land & Development Company and Frederic Sylvester settled their Federal Court and State Court lawsuits. Pursuant to the settlement, Mr. Sylvester dismissed his two Federal District Court actions and his Superior Court action against Perini Land & Development Company with prejudice (with prejudice means the suit may not be refiled at a later date). Sylvester also agreed to pay Perini the sum of $50,000.

Subsequently, not as part of the settlement with Sylvester, Perini unilaterally decided to terminate its legal action filed in the State Superior Court against Sylvester, the Sierra Club, the Institute, and several other individuals, without prejudice (without prejudice means that they are free to refile the suits at any time in the future). Perini terminated its legal action for various reasons. According to Tom Steele, Perini had received total Master Plan approval for the entire project as well as final approval of the first phase of the project. However, Perini still needed specific approval for the Phase II of the project, and the company believed that it would be beneficial to avoid any further adverse publicity.

89. Sylvester v. County of Placer and Perini Resorts, Inc., Placer County Superior Court Case No. 84061.


91. Interview with Tom Steele. See note 73 supra.
THE SUIT'S IMPACT

_Perini Land and Development Company v. Institute for Conservation Education_, the Perini case was characterized by the press as a substantial abuse of the process by Perini. One article reported that "in 1987 the giant Perini Land and Development Corp. of Framingham Massachusetts, sued Sylvester. This is nothing more than a bullying tactic sending a message not to oppose development in the Tahoe area."92

According to Tom Steele, President of Perini Land & Development, this suit was not a SLAPP suit, but merely an ordinary breach of contract suit.93 The defendants in the lawsuit characterized Perini's actions as being heavy-handed and of denying their rights of free speech. However, according to Steele, those claims were heard and rejected by the Placer County Superior Court, which overruled the demurrers against Perini's Complaint.

In this case there is a question of who abused the process, Perini or Sylvester. The developer worked with the system, appearing at hundreds of public hearings. Perini made many concessions during the approval process. Perini agreed to the onerous requirements which were imposed by the various boards which had jurisdiction over the project. The corporation never tried to interfere with citizens' rights to speak out during the administrative process. When the administrative decisions were not favorable to the citizens, they moved


93. Interview with Tom Steele, See note 73 supra.
the matter from the administrative arena to the judicial arena. Mr. Sylvester filed action upon action, appealing all of the legal decisions to their final dismissal.

Perini was actually victimized by the process in many respects. The corporation suffered significant delays in the construction of its project. In addition, they expended many hundreds of thousands of dollars defending the suits brought by Mr. Sylvester. The corporation did not try and characterize Mr. Sylvester’s actions as abusive. Perini did what it was forced by Sylvester to do: fight for its right to construct the resort project.

The citizens were fortunate because they had the press on their side. It was very easy for the press to look at a large corporation suing an individual for speaking out against a development, and then to characterize that suit as an action intended to quell free speech. The press characterized the suit as the use of the courts "by wealthy interests to prevent citizens from speaking out on issues of controversy." It is possible that this is the case of a wealthy individual bringing specious suits against a developer, as opposed to a developer bringing unjustified suits against a citizen.

However, the courts determined that the suit which was filed by Perini was based on valid legal grounds. A corporation has just as much right to defend its interests as a citizen has to petition the government. This goes back to the debate which was set out previously, the conflict between the individual’s right to speak against property rights.

The lawsuits filed by both parties had a definite impact on the approval process. Prior to the beginning of this dispute, Perini had preliminary approvals

to begin construction of the project. The Corps appears to have responded to the publicity characterizing the Perini suit as a SLAPP. Prior to the Corps' hearing on the 404 Waterway permit, the press reported that people were afraid to speak out against the project. As a result, the Corps extended its public comment period and, uncharacteristically, agreed to accept anonymous testimony.95

When it appeared to Perini that Sylvester and the Institute were breaching their agreement not to object to the project, Perini felt it had no option but to file a lawsuit. Otherwise, their project might have been significantly delayed in the administrative process.96 Perini had virtually all of the approvals which they needed to begin construction of the project, and they thought they had made a deal with the opposition whereby the final approvals could be obtained without incident. Even so, the two injunctions in the Sylvester litigation delayed the project significantly. The corporation expended hundreds of thousands of dollars in legal fees and also lost a substantial sum of money due to the construction delays. It is somewhat speculative of course, but imagine how the approvals process would have gone had it not been for the suit which Perini filed against Sylvester and the Institute. Perini did finally receive approval to build the first phase of the project, and it will be completed in the winter of 1990.

95. Id. at p. 1.

96. Interview with Tom Steele, See note 73 supra.
CHAPTER 7
RECONCILING DEVELOPER AND CITIZEN INTERESTS

Two major traditions of belief in American culture, capitalism and democracy, are often in conflict, and the tension that exists between these values is a definitive feature of American life that has helped shape the ideological divisions of the nation's politics.97

In the United States, we have a society which is very litigious. The courts have been used to resolve numerous political issues such as school prayer, abortion, the death penalty, freedom to practice one's religion, and the like.

During the past twenty years there has been a substantial amount of anti-development litigation filed. It is, therefore, not surprising that developers who believe that their property interests are being threatened by citizen activism themselves resort to litigation. Many of these suits result in the blatant misuse of the judicial process which I have described previously. Citizens are being intimidated by the creative use of the legal system by developers and other members of the business community. These lawsuits range from clearly baseless suits involving protected speech, like Boswell and Monia, to invidious suits which allege some form of business tort such as interference with advantageous business relationship or interference with contract. However, it is important to remember that not all suits brought by developers against citizens which are labeled SLAPPs are accurately classified as intimidation suits. "Developers have rights.

Corporations have rights. These rights can be and often are violated. Their constitutional rights and other legally protected rights are in no way inferior to the rights of those whose causes and commitments we empathize with and support.98

Despite the fact that some suits which are labeled SLAPPs are actually legally justified suits, it is evident that SLAPP does phenomenon present a serious problem. The public's participation is absolutely crucial in zoning, land use and environmental matters. For example, residents of Orange County New York alerted the New York Attorney General's office of the problems with the Tuxedo Landfill, and they helped persuade a judge to close the landfill and order a bond of $4.5 in order to ensure proper closure.99 According to Robert Abrams, New York State's Attorney General, "we must find ways to ensure that citizen activists are able to prevail in their efforts to spur the passage and enforcement of vital environmental laws without being harassed by SLAPP suits."100

98. Ralph Michael Stein, _Slapp Suits: A Slap at the First Amendment_, an unpublished address presented during "Strategic Lawsuits Against Public Participation (SLAPPS) -- Protecting Property or Intimidating Citizens," the Fall Colloquium of the Pace Law School Center for Environmental Legal Studies, Co-sponsored by the Environmental Law Committee of the Westchester County Bar Association, White Plains, New York, October 14, 1989, p. 4.


100. _Id._ at p. 8.
Many people are worried that if the current trend continues, there may be a serious diminution in the number of citizens and citizens groups who are ensuring that the standards and requirements of the public interest statutes and regulations are being adhered to. We can not allow our politically active citizens and government officials to be placed under such pressure that their action and decisions, and even the willingness to participate in the process, are governed by their concerns for their personal financial well-being.

Professors Pring and Canan are conducting extensive research into the SLAPP phenomenon. Their research and publications have provided information which has helped bring the SLAPP phenomenon to the public's attention. However, their research may have overestimated the SLAPP phenomenon because of their definition of what constitutes a SLAPP. According to Professor Canan, "any lawsuit which is filed against an individual engaging in a protected activity should be thrown out of court."

The First Amendment was intended to protect those citizens who are least able to protect themselves. The constitution guarantees citizens the right to petition the government for redress of their grievances, but it does not guaranty them the right to libel or slander individuals or ignore contractual obligations in the process. Defining what is political expression and what is defamation, and deciding what constitutes a "protected activity," may require a case by case analysis of the facts.


103. Interview with Professor Penelope Canan, Associate Professor of Sociology at the University of Denver, July 11, 1990.
The Boswell case is a prime example of baseless intimidation. By contrast, the Perini case is an example of a case where a developer's rights had arguably been violated. Yet the press mistakenly characterized both as SLAPP suits. A standard such as the one proposed by Canan would utterly frustrate litigants who are advancing novel legal theories. Plaintiffs insured in automobile accidents were once barred by privity from suing car manufacturers. Landlords were not until recently required to make their properties habitable for their tenants. Unwed fathers were said to have no voice in the placement of their children.

Is it possible to determine at the outset whether a claim is truly baseless and without legal merit? Pring and Canan seem to indicate that an attorney filing a claim that she believes to have only a twenty percent chance of success is a non-meritorious claim.\(^{104}\) However, many attorneys believe that a lawsuit which has a one in five or two in five chance of success is clearly meritorious.\(^{105}\) Before the landmark product liability cases were decided, such plaintiffs would have been told that their chances of victory were less than one in five. The question is where to draw the line? The line must be drawn by the courts or the legislatures, not by the press.

In the Boswell and Monia cases, many people felt that they could not participate in political debate once they were SLAPPed. In addition, the publicity surrounding such suits has the effect of chilling other citizens who are not involved in the conflict. "The effect on political speech over the long run and across many jurisdictions amounts to a tremendous threat to democratic


\(^{105}\) Id.
governance." As the cases described in Chapters Four, Five, and Six indicate, however, the real or perceived impacts of SLAPP suits are far more complex than commonly believed.

It is evident that the press plays a critically important role regarding the impact of the SLAPP suits. Peoples' perceptions sometimes seem more important than reality. In the Perini case, the company was vindicated in court, but they paid a different kind of price in Squaw Valley. The court determined that Perini's claim against Sylvester was legally sufficient. However, despite the court's preliminary determination in the case and its final resolution with Sylvester paying Perini $50,000, the press continued to characterize Perini's suit as a SLAPP.

Reputation is very important to a development company like Perini because they are always entering new geographic regions, attempting to get their projects approved. The publics' perception of a developer has a considerable role in the approvals process because public opinion is part of that process. If a developer has the reputation of "riding rough shod" over citizens, they will have a much more difficult time getting project approvals.

Despite playing by all of the rules, Perini suffered some damage to its reputation in Squaw Valley as a result of the negative press surrounding the suit against Sylvester. Perini was fortunate that they were able to limit or control the political impact of the suit by its timing. When Perini filed the suit against Sylvester, they had obtained the majority of the approvals for the project. They had also settled their disputes with most of the people who had opposed the

project. The damage to Perini's national reputation can not yet be accessed. However, when an article is written, it is cited and replicated by other publications, typically without additional research. Once a suit is classified as a SLAPP, the press frequently does not investigate the basis for the classification. Therefore, Perini may continue to be labelled as a SLAPPer by the press in the future.

The developer who files a true SLAPP suit takes several substantial risks. One is that instead of chilling the citizen activist, it will force people to become more involved in the process. Both the legal system and the political approvals process are very frightening to the average citizen. Once a citizen has been SLAPPed, however, a casual citizen participant may well have to learn the intricacies of the legal and political processes in order to defend himself.

Second, the developer who files a SLAPP may also cause a broader backlash against his project and himself personally. There may be a groundswell of public support for the party who has been SLAPPed. This will be amplified if, as is often the case, the press is sympathetic with the citizen defendants. The press can be dangerous to a developer who files a valid claim against a citizen activist, as was illustrated by Perini. However, they can be very helpful when citizens are being harassed, as in the Boswell case. In a highly publicized atmosphere, public officials may be hesitant to issue discretionary approvals to a developer, even if they are warranted. Therefore, by filing a SLAPP suit, a developer may risk the discretionary approvals which he is entitled to.

Third, and perhaps most importantly in the long run, the SLAPPing developer runs a substantial risk of losing his suit and being hit for expensive counterclaims. Citizens should draw increasing comfort from the fact that no
intimidation suit has ever resulted in a judgment for the plaintiff. Most public interest defendants fear the financial ramifications on the chance they should lose the lawsuit, and if they are vindicated, it can be very expensive in terms of time, money and aggravation. By comparison, the odds against the plaintiff developer and potential counterclaim liability can be staggering, as in the Boswell case.

There is a learning curve which can be associated with phenomenon like the SLAPP suits. It takes developers some time to find out about judgments like Boswell and Monia. However, with the press disseminating the information widely, developers will become aware of those judgments. Then, developers may think long and hard about the possible consequences of filing a SLAPP.

With SLAPP suits, the problem is that the first amendment nature of the case must be recognized before the courts can give the defendants the heightened protection which those rights demand. Once the first amendment nature of the suit is recognized, the defendants have a much better chance of getting the suit dismissed.

The importance of vigorous debate in the political process may require some new legal process which will provide quicker resolution to the SLAPP suits, thereby minimizing the "chill" and other negative effects of the suit. There are several possible alternatives which may be suggested in order to protect the freedoms guaranteed by the petition clause. Nevertheless, the courts can not protect the victims of SLAPP suits at the expense of the rights of parties seeking redress in the courts for "judicially cognizable harms."108

The U.S. Army Corps of Engineers came up with a solution to the problem of political intimidation by accepting anonymous comments for a public hearing in the Perini case. The solution by the Corps was designed to counteract the chill created by the alleged SLAPP. Allowing citizens to participate in the political process anonymously does not allow for robust debate. The solution allows people to participate in the process without fear of reprisals, but it is not a solution to the problem.

The legal system presently has a mechanism, summary judgment, which is supposed to ensure that baseless suits are disposed of expeditiously. The summary judgment procedure requires that a plaintiff demonstrate the sufficiency of his claim to the court. However, due to the large docket control problem which exists in the judicial system, many cases are not dismissed for substantial periods of time. As previously stated, most SLAPPs are dismissed, but it take an average of 32 months. Therefore, it is evident that summary judgment does not effectively deal with the problem of SLAPPs.

The legislatures or the courts must find a way to dispose of spurious claims quickly. A process must be developed whereby the defendant can demonstrate to the court that a seemingly innocuous tort claim is actually a veiled constitutional issue. Once the court determines that a constitutional right is involved, the plaintiff should be required to demonstrate the sufficiency of his claim. These case must be given the utmost priority because of the importance of the constitutional protections involved. The plaintiff will not be harmed, because if they have a valid claim, they will most likely want it decided quickly.109

108. Id., at p. 11.

Public interest litigants can "SLAPP back" against the party who sued them. There is a body of law which has developed over time which protects against abuse of the judicial process and malicious prosecution. A plaintiff in a malicious prosecution case must demonstrate to the court that the prior action was: "1. It was commenced by or at the direction of the defendant and was pursued to a favorable termination; 2. It was brought without probable cause; and 3. It was initiated with malice." It is very difficult for plaintiffs in malicious prosecution cases to establish actual malice. To prove abuse of process the plaintiff must show that there was an ulterior purpose to the prior lawsuit and a "willful act in the use of the process not proper in the regular conduct of the proceeding." The plaintiff must establish that the defendant used the process as a form of coercion "to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or a club." It seems evident from these requirements that both abuse of process and malicious prosecution are very difficult to prove.

Nonetheless, in the Boswell and Monia cases, the parties who were SLAPPed filed suit for abuse of process and malicious prosecution once the


112. Id. at 128.

113. Id. at 129.
SLAPP suit was dismissed, and they both won their cases. The SLAPP back means more protracted litigation, in some instances for individuals who can not afford it emotionally or financially. However, the rewards of the SLAPP back can be very substantial if the suit is successful. In Boswell, the citizens were awarded $13,000,000 by the court in their SLAPP back.

To avoid the problem of protracted litigation, it is possible that the courts could allow the SLAPP defendant to SLAPP back in a counterclaim. If the SLAPP back occurs in a counterclaim, the facts of the case are only litigated once. If the plaintiff’s claims are determined to be without merit, the court can immediately find for the defendant.114

Another possible solution is to allow the SLAPP targets to recover their legal fees from the plaintiff if the suit is determined by the court to be without merit.115 In the United Kingdom, if the defendant successfully defends herself, the plaintiff must reimburse her for her legal fees.116 The prevailing rule in the United States is that each party pay for her own lawyer.117 Since most SLAPP cases are decided in the defendant’s favor, the possibility of incurring substantial legal fees is one of the most frightening consequences of the SLAPP suit. The potential SLAPPers might think twice about filing a SLAPP suit if they knew that

114. Id. at 137.


117. Id.
they would be responsible for reimbursing the defendant's legal fees if the suit was dismissed because it was baseless.

Final Remarks

Citizen participation in the political process is fundamental to our democratic form of government. Citizens who choose to actively participate in the political process must be aware that they may face SLAPPs, or the threat of SLAPPs. When protected activities are involved, courts usually apply a higher standard of scrutiny, but SLAPPs are usually veiled as inoccous tort claims, and, therefore, the courts must be made aware that there are protected activities involved.

The sooner the SLAPP problem is brought to the attention of the courts and the legislatures, the sooner there will be a solution. Hopefully, papers such as this will heighten peoples awareness to SLAPP suits. The more cognizant people are of the problem, the more easily they can defend themselves against such suits.
BIBLIOGRAPHY

Abrams, Robert
*Strategic Lawsuits Against Public Participation* unpublished address presented during "Strategic Lawsuits Against Public Participation (SLAPPS) -- Protecting Property or Intimidating Citizens," the Fall Colloquium of the Pace Law School Center for Environmental Legal Studies, Co-sponsored by the Environmental Law Committee of the Westchester County Bar Association, White Plains, New York, October 14, 1989.

BNA Civil Trial Manual

Borba, Jeanie

Brecher, Joseph J.

Brooks, Richard
*Les Mains Sales, The Ethical and Political Implications of SLAPP Suits*, an unpublished address presented during "Strategic Lawsuits Against Public Participation (SLAPPS) -- Protecting Property or Intimidating Citizens," the Fall Colloquium of the Pace Law School Center for Environmental Legal Studies, Co-sponsored by the Environmental Law Committee of the Westchester County Bar Association, White Plains, New York, October 14, 1989.

Canan, Penelope, and Pring, George

Canan, Penelope, and Pring, George

Canan, Penelope
*The SLAPP from a Sociological Perspective*, an unpublished address presented during "Strategic Lawsuits Against Public Participation (SLAPPS) -- Protecting Property or Intimidating Citizens," the Fall Colloquium of the Pace Law School Center for Environmental Legal Studies, Co-sponsored by the Environmental Law Committee of the Westchester County Bar Association, White Plains, New York, October 14, 1989.
Canan, Penelope, Pring, George, and Ryan Kevin

Colino, Stacey

Cursi, Mark

Dresslar, Tom

Galperin, Ron

Holtzberg, Bryan

Michigan Law Review

Pell, Eve

Pell, Eve

Pring, George W.
"SLAPPS" Strategic Lawsuits Against Public Participation, an unpublished address presented during "Strategic Lawsuits Against Public Participation (SLAPPS) -- Protecting Property or Intimidating Citizens," the Fall Colloquium of the Pace Law School Center for Environmental Legal Studies, Co-sponsored by the Environmental Law Committee of the Westchester County Bar Association, White Plains, New York, October 14, 1989.

Reed, Scott W.

Rubin, Julian
*Intimidation Lawsuits Chill Public Activism*, Rocky Mountain News, February 8, 1990, p. 2
Salner, Rebecca

Sive, David

Stanford Law Review

Stein, Ralph Michael
*Slapp Suits: A Slap at the First Amendment*, an unpublished address presented during "Strategic Lawsuits Against Public Participation (SLAPPS) -- Protecting Property or Intimidating Citizens," the Fall Colloquium of the Pace Law School Center for Environmental Legal Studies, Co-sponsored by the Environmental Law Committee of the Westchester County Bar Association, White Plains, New York, October 14, 1989, p. 4.

Stiak, Jim

Trihey, Michael

Turque, Bill, Wright, Linda and Pomper, Stephen
*Slapping the Opposition*, Newsweek, March 5, 1990, p. 22.
CASES CITED


Harrison v. Springdale Water & Sewer Commission, 780 F.2d 1422 (8th Cir. 1986).


West Valley Taxpayers and Environment Association v. Parnas Corporation, Appellate Court, State of California, Sixth Appellate Division, No. H005918


Sylvester v. County of Placer and Perini Resorts, Inc., Placer County Superior Court Case No. 84061.
