Missouri's New Anti-SLAPP Law

This article offers an examination of the newly-enacted legislation adopted by the Missouri legislature to protect citizens who exercise petition or free speech rights in connection with public hearings and meetings.

I. SLAPP Lawsuit Background

A fundamental principle of democracy is public participation or citizen involvement in government. Encouragement of such participation is found in the First Amendment, which not only includes the right of free speech, but also the right to petition government. These fundamental rights are at the core of our political system and permeate our laws, institutions and lifestyles.

In recent years, a serious threat to the exercise of the constitutional right of free speech and the right to petition has arisen in the form of a strategic lawsuit against public participation, or "SLAPP." SLAPP lawsuits were diagnosed and analyzed in a legal/sociological study by the University of Denver, which examined lawsuits nationwide that were brought against people based upon their conduct and speech seeking to influence official action by governments. This study produced a series of publications resulting in a book entitled, "*SLAPP: Getting Sued for Speaking Out*," published by George W. Pring and Penelope Canan (hereinafter "PRING: SLAPPs"). The authors found that thousands of Americans have been the victims of SLAPP lawsuits. Their handbook has since become a bible for lawyers in disputes involving citizen opposition and for governmental officials in adopting anti-SLAPP legislation.

Stephen L. Kling[1]

The typical SLAPP lawsuit involves citizens opposed to a particular real estate development.[2] The group opposed to the development, usually a local neighborhood, protests by distributing flyers, gathering protest petitions, writing letters to local newspapers and speaking at planning commission and city council meetings. The developer responds by filing a SLAPP lawsuit against one or more of the citizens, alleging defamation or various business torts.[3] My observation as a practitioner is that these suits arise, in part, from the substantial amount of dollars at stake in connection with real estate development and the strong emotional ties individuals have with respect to protecting the enjoyment and value of their property.

A SLAPP lawsuit is "filed solely for delay and distraction, and to punish activists by imposing litigation costs on them for exercising their constitutional right to speak and [to] petition government."[4] The primary purpose of a SLAPP lawsuit is not to resolve the allegation in the petition, but to punish or retaliate against citizens who have spoken out against the plaintiffs in the political arena and to intimidate those who would otherwise speak in the future.[5] A SLAPP lawsuit is often intended to make the victim an example and a carrier who spreads the virus of fear throughout the community.[6] The longer a SLAPP lawsuit continues, the more a plaintiff satisfies the goal of burdening the defendant and chilling constitutionally protected free speech and petitioning rights. In furtherance of this strategy, SLAPP plaintiffs often use the discovery process to impose costly and time-consuming depositions and interrogatories upon a defendant.[7] Not only are there numerous examples of SLAPP lawsuits throughout the country, there are countless additional examples of threats of lawsuits that have had the same desired effect: causing citizens to rethink and retreat from their public participation for fear of costly and time-consuming litigation.[8] "Short of a

[1] Stephen L. Kling, Jr. is a principal in the law firm of Jenkins & Kling, P.C., located in St. Louis. He received his J.D. from St. Louis University School of Law in 1981 and received his M.S. in finance from St. Louis University School of Business in 1980.

[2] Barbara Arco, *Comment, When Rights Collide: Reconciling the First Amendment Rights of Opposing Parties in Civil Litigation*, 52 U. Miami L. Rev. 587, 611 (1998).

[3] John C. Barker, *Common-Law and Statutory Solutions to the Problems of SLAPP*, 26 Loy. L.A. L. Rev. 395, 396 (1993).

[4] *Dixon v. Superior Court*, 36 Cal. Rptr.2d 687, 693 (Cal. Ct. App. 1994).

[5] *Gordon v. Marrone*, 590 N.Y.S.2d 649, 656 (N.Y. Sup. Ct. 1992).

[6] Frederick M. Rowe & Leo M. Romero, *Resolving Land-Use Disputes by Intimidation*, 32 N.M. L. Rev. 217, 219 (2002).

[7] Jennifer E. Sills, *SLAPP (Strategic Lawsuits Against Public Participation): How Can the Legal System Eliminate Their Appeal?*, 25 Conn. L. Rev. 547, 566 (1993).

[8] George W. Pring & Penelope Canan, Slapps: Getting Sued for Speaking Out, 1996 xi-xii.

gun to the head, a greater threat to [the] First Amendment expression can scarcely be imagined [than a lawsuit brought to silence public speech]."[9]

Twenty-two states have adopted anti-SLAPP legislation to further protect citizens in exercising their rights of free speech and to petition government as guaranteed by the First Amendment.[10] These laws are intended to discourage SLAPPs and shift the risks or costs from the target to the filer.[11] The core provisions of these laws are: (i) establishment of a process for motions to dismiss or strike claims targeting public participation; (ii) expediting the hearing of such motions and suspending or sharply limiting discovery until a ruling is made; and (iii) shifting the attorneys' fees and costs to the filer when the target prevails on the motion.[12] The message to judges and lawyers by state legislatures that adopt these laws is that the era of intimidation of the public by SLAPP lawsuits is over.[13] The Missouri legislature recently joined these states and enacted a law that facilitates the early identification and dismissal of SLAPPs by trial courts before SLAPP victims are subjected to discovery and other pre-trial maneuvers to wear them down and bleed them dry.

II. Missouri's Anti-SLAPP Legislation

Missouri's anti-SLAPP legislation is found in § 537.528, RSMo, and became effective on August 28, 2004.[14] This new law applies to "[*a*]*ny action* seeking money damages against a person for conduct or speech undertaken or *made in connection with* a public hearing or meeting."[15] The law applies not only to conduct or speech in connection with matters subject to public hearings, but conduct or speech in connection with "*any* [public] meeting established and held by [governmental] entit[ies]."[16] The law essentially provides additional procedural protections for SLAPP defendants when a SLAPP lawsuit is filed in connection with their petitioning activities. At the heart of the law is the authorization for a SLAPP defendant to file a "special motion to dismiss, . . . for judgment on the pleadings or motion for summary judgment."[17] The court is required to consider these motions "on a priority or expedited basis" in order "to prevent the unnecessary expense of [lengthy] litigation."[18] The law also provides that "all discovery shall be suspended pending a decision by the court [on the special motion] and the exhaustion of all appeals regarding the special motion."[19] Providing a financial disincentive for SLAPP plaintiffs to intimidate citizens, the law mandates the "payment of attorney[s'] fees and costs incurred" by a SLAPP victim who prevails on its special motion.[20] While the ability to file motions of this type existed prior to the new law, this right is augmented under the statute by the requirements of expedited consideration of the special motion, discovery suspension, attorneys' fees and cost recovery, etc.

The Missouri anti-SLAPP statute's coverage is very broad. "The 'in connection with' text of the statute protects citizen activity outside of public hearings [and] meetings. . . . Thus, letters to the editor, communications among opposing citizens, or other conduct that in some way relates to either the ongoing, past or prospective land-use proceedings would be treated as occurring 'in connection with' such expressly covered proceedings."[21] California case law clearly supports this expansive interpretation of this language.[22] California was one of the first states to enact an anti-SLAPP statute and has been the most active state in the development of SLAPP case law. Indiana recently had occasion to confirm such interpretation by noting that its statute is a typical anti-SLAPP statute covering both direct petitioning of government *and* petitioning-related statements and writings.[23] The U.S. Supreme Court has also recognized that "[c]irculars, speeches, newspaper articles, editorials, magazine articles, memoranda and all other documents" espousing a petitioner's

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[9] *Gordon*, 590 N.Y.S.2d at 656.

[10] California, Delaware, Florida, Georgia, Hawaii, Indiana, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah and Washington. Most state constitutions, including Missouri's, have similar constitutional protections.

[11] Lori Potter, *Strategic Lawsuits Against Public Participation and Petition Clause Immunity*, 31 Envtl. L. Rep. 10852 (July 2001).

[12] *Id.* at 10856.

[13] Rowe & Romero at 239.

[14] There was some confusion on the author's part and others as to codification. The approved SB 807 referenced the new law as § 537.800, RSMo. The Revisor of Statutes assigned the new law to § 537.528, RSMo Supp. 2005.

[15] Section 537.528.1, RSMo Supp. 2005. (Emphasis added).

[16] Section 537.528.4, RSMo Supp. 2005. (Emphasis added).

[17] Section 537.528.1, RSMo Supp. 2005.

[18] *Id.*

[19] *Id.*

[20] Section 537.528.2, RSMo Supp. 2005.

[21] Rowe & Romero at 237.

[22] *Briggs v. Eden Council for Hope and Opportunity*, 969 P.2d 564 (Cal. 1999) (statements in anticipation of proceedings); *DuPont Merck Pharm. Co. v. Superior Court*, 92 Cal. Rptr.2d 755 (Cal. Ct. App. 2000) (lobbying and media-related activities); *Dove Audio, Inc. v. Rosenfeld, et al.*, 54 Cal. Rptr. 2d 830 (Cal. Ct. App. 1996) (citizens' communications prior to complaint seeking official investigation); *Averill v. Superior Court*, 50 Cal. Rptr. 2d 62 (Cal. Ct. App. 1996) (private statements made during ongoing proceeding); *Lafayette Morehouse, Inc. v. Chronicle Publ. Co.*, 44 Cal. Rptr.2d 46 (Cal. Ct. App. 1995) (newspaper articles reporting on dispute and related hearings); *Ludwig v. Superior Court*, 43 Cal. Rptr.2d 350 (Cal. Ct. App. 1995) (statements encouraging others to speak at public hearings — no requirement that petitioning activities be made directly to official body); *Dixon v. Superior Court*, 36 Cal. Rptr. 2d 689 (Cal. Ct. App. 1994) (letter writing campaign during ongoing proceeding).

[23] *Poulard v. Lauth*, 793 N.E.2d 1120, 1122 (Ind. Ct. App. 2003).

viewpoint deserve First Amendment petition clause immunity when they are part of an overall effort "to influence governmental action."[24]

Upon the filing of the special motion authorized by Missouri's anti-SLAPP statute, the burden shifts to the plaintiff, without the aid of discovery, to show by credible and admissible evidence that the defendant's petitioning activities were not immunized by the First Amendment. The anti-SLAPP laws essentially codify procedures developed in *Mountain Environment v. District Court*,[25] which was primarily based upon the "Noerr-Pennington Doctrine" developed by the United States Supreme Court in a line of decisions. The decision in *Mountain Environment* has been cited as a model approach for the early identification, evaluation and disposition of SLAPP lawsuits.[26] The court in *Mountain Environment* imposed upon the plaintiff, in overcoming a motion to dismiss, the burden of making a "sufficient showing to permit the court to reasonably conclude that the defendant's petitioning activities were not immunized from liability under the First Amendment."[27] Subsequent case law has refined this test and has made it clear that dismissal of a SLAPP lawsuit should be granted in all cases except where the defendant's activities are "not genuinely aimed at procuring favorable governmental action at all."[28] In other words, the plaintiff must show the defendant's activities were a "sham." If the defendant was seeking "a governmental result," the case should be dismissed, and it does not matter if the defendant's motives are impure or the defendant uses "improper means."[29]

III. First Amendment Immunization For Petitioning Activities And Speech

The new law creates no new substantive legal rights or defenses for those being sued based upon their constitutionally protected rights. Rather, Missouri's anti-SLAPP law, like other states' anti-SLAPP legislation, essentially establishes an expedited procedure for raising and vindicating First Amendment rights of free speech and petitioning. The Missouri statute is a more streamlined and progressive anti-SLAPP statute avoiding some of the politically-driven burden requirements of the early statutes. The focus under the Missouri anti-SLAPP statute is on a defendant's activities and not the merit or lack thereof of a plaintiff's claim.

Besides the more well-known right to free speech, the First Amendment gives every citizen the right "to petition the government for a redress of grievances."[30] While less frequently discussed, it is the right to petition, as opposed to free speech, that is the heart of the new law. The right to petition "is a basic freedom in a participatory government . . . that cannot be abridged if a government is to continue to reflect the desires of the people."[31] The petition clause guarantees citizen access to government, and its broad protection covers "any peaceful, lawful attempt to promote or discourage government action at all levels and branches of government," including circulating petitions, testifying at public hearings, writing to government officials, reporting violations of law and lobbying for legislation.[32] Moreover, when a lawsuit is filed stemming from the legitimate exercise of the right to petition local government officials, "the underlying purpose [of the lawsuit should be viewed] with a great deal of skepticism."[33] The common theme is that activities conducted as part of a genuine attempt to influence governmental action are immunized from civil liability by the First Amendment's petition clause, regardless of whether the opposing parties are harmed by the resulting governmental action or suffer injury as an incidental effect of the petitioning activities.[34]

The corollary of the right of citizens to petition the government is the government's need for open communication to properly govern and better respond to the need of its constituents. Public participation is an important part of the governmental process, especially at the local level. The U.S. Supreme Court has long recognized "the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment" and that it is "in our tradition to allow the widest room for discussion, the narrowest range for its restriction."[35] In the area of real estate development, citizens participate by attending open meetings of local governing bodies and planning commissions. Public hearings are held to obtain the views of local citizens regarding a planned development or use of land.[36] Many local ordinances also

[24] *Eastern R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 142-143 (1961).

[25] *Mountain Environment v. District Court*, 677 P.2d 1361 (Colo. 1984)

[26] George W. Pring & Penelope Canan, *Strategic Lawsuits Against Public Participation ("SLAPPS"): An Introduction for Bench, Bar and Bystanders*, 12 Bridgeport L. Rev. 937, 951 (1992).

[27] 677 P.2d at 1369.

[28] *Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 380 (1991).

[29] *Id.*

[30] U.S. Const. amend. I.

[31] *Sierra Club v. Butz*, 349 F. Supp. 934, 936 (N.D. Cal. 1972), quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

[32] George W. Pring, *SLAPP: Strategic Lawsuits Against Public Participation*, 7 Pace Envtl. L. Rev. 3, 9 (1989); *Eastern R.R. Presidents Conference*, 365 U.S. at 142-143.

[33] *Westfield Partners, Ltd. v. Hogan*, 740 F. Supp. 523, 525 (N.D. Ill. 1990).

[34] *Zeller v. Consolini*, 758 A.2d 376, 381-382 (Conn. App. Ct. 2000).

[35] *Thomas*, 323 U.S. at 530.

[36] *See, e.g.*, § 89.050, RSMo 2004 (requiring a public hearing by municipal government for any change of zoning regulations, restrictions and boundaries); § 89.360, RSMo 2004 (requiring a public hearing by municipal government for approval or amendment to a land use plan for the development of the municipality); § 89.410.7, RSMo 2004 (requiring a public hearing by a municipal government to adopt or amend subdivision regulations governing the subdivision of land).

require public hearings or meetings for approval or amendment of plats, conditional use permits, commercial service procedures, site development plans and other land use approvals. In this manner and through other forms of communication, such as letters and petitions, citizens may bring specific problems, issues or concerns with a proposed development or land use regulations to the attention of a local governmental body.

The garden variety SLAPP lawsuit is grounded in defamation. Whether a statement is defamatory is a question of law.[37] The court is entitled to decide if statements are defamatory.[38] First, to determine if a statement is defamatory, the words themselves must first "be stripped of any pleaded innuendo . . . and construed in their most innocent sense."[39] Second, the "words must be considered in context" and given their plain and ordinary meaning.[40] If a "statement is reasonably capable of a [non]-defamatory meaning" and can be reasonably "construed in . . . [an] innocent sense," the court must hold the statement non-actionable "as a matter of law."[41] Even if a statement is capable of a defamatory meaning, an "absolute privilege [under the First Amendment is] accorded [to] statements of opinion."[42] "[W]hether a statement is a pure opinion or an assertion of fact is [also] a question of law."[43] "The context in which the statements [are] made is [also] extremely relevant and important."[44] This defamatory statement/opinion analysis was recently discussed at length in *Mandel v. O'Connor*.[45] Missouri's anti-SLAPP law was enacted in direct response to that case so that such matters could be dismissed in a more summary manner without undue attorney expense and cost.[46] Under the Missouri anti-SLAPP statute, an analysis of the merits of a plaintiff's claim is no longer necessary.

Occasionally, SLAPP suits are shrouded in the form of an alleged business tort, such as tortious interference with business relations or a contract, antitrust claims and even civil rights actions. By law, the "absence of justification" element of a tortious interference claim requires improper means that are independently wrongful, generally an alleged defamation.[47] A claimant cannot evade defenses applicable to defamation merely by placing a new label on what is, in essence, a defamation claim.[48] All "causes of action thus hav[ing] as their gravamen the alleged injurious falsehood of a statement . . . must satisfy the requirements of the First Amendment."[49] The courts seem to have had little problem immunizing petitioning activities from these claims.[50] Missouri courts should recognize that such lawsuits are attempts to conceal the true nature of the action. They should focus on the true test, whether the conduct or speech was part of a genuine attempt to influence government action. Unless such activities are shown to be a sham, disposition in favor of the defendant should be granted in all cases.

IV. Some Unresolved Issues

1. *Attorneys' Fees*. Section 537.528.2, RSMo, mandates the payment of attorneys' fees and costs if the rights under the section are raised affirmatively as a defense and the court grants the special motion. While this is clear as to its effect when the court actually rules, there is a question of whether attorneys' fees and costs can be recovered if the plaintiff dismisses the petition before the court rules on a special motion.

Section 537.528, RSMo, is a procedural statute with remedial provisions. While the filing of a voluntary dismissal generally divests the court of further jurisdiction of a case, this is not the case where a counterclaim is pending.[51] A voluntary dismissal also does not "operate to discontinue any ancillary matter pending before the court."[52]

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[37] *Ribaudo v. Bauer*, 982 S.W.2d 701, 704 (Mo. App. E.D. 1998).

[38] *Ampleman v. Scheweppe*, 972 S.W.2d 329, 332 (Mo. App. E.D. 1998).

[39] *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 311 (Mo. banc 1993).

[40] *Id.* at 311.

[41] *Amplemann*, 972 S.W.2d at 333.

[42] *Henry v. Halliburton*, 690 S.W.2d 775, 786-87 (Mo. banc 1995); *Ribaudo*, 982 S.W.2d at 704.

[43] *Ribaudo*, 982 S.W.2d at 705.

[44] *Id.*

[45] *Mandel v. O'Connor*, 99 S.W.3d 33 (Mo. App. E.D. 2003).

[46] Press Release, Missouri Sen. John Loudon Passes Legislation Protecting Missourians From "SLAPP" Lawsuits (May 15, 2003) (available at www.senate.state.mo.us/03info/mememberss) (last visited April 25, 2005); Press Release, ACLU of Eastern Missouri, Court Upholds SLAPP Suit Dismissal: Case Demonstrates Need for Anti-SLAPP Legislation (February 18, 2003) (available at www.aclu-em.org/press releases) (last visited April 25, 2005).

[47] *Vikings, USA Bootheel v. Modern Day Veterans*, 33 S.W.3d 709, 711 (Mo. App. S.D. 2000).

[48] *Blatty v. New York Times Co.*, 728 P. 2d 1177, 1180 (Cal. 1986), *cert. denied*, 485 U.S. 934 (1988).

[49] *Id.* at 1184.

[50] *See, e.g., Eaton v. Newport Board of Education*, 975 F.2d 292 (6th Cir. 1992) (civil rights and "outrageous conduct"); *Havoco of America, Ltd. v. Hollobow*, 702 F.2d 643 (7th Cir. 1983) (tortious interference with a business opportunity); *Gorman Towers v. Bogoslavsky*, 626 F.2d 607 (8th Cir. 1980) (civil rights and defamation); *Miller & Son Paving, Inc. v. Wrightstown Township Civic Ass'n*, 443 F. Supp. 1268 (E.D. Pa. 1978) (antitrust and civil rights); *Sierra Club v. Butz*, 349 F. Supp. 934 (N.D. Cal. 1972) (wrongful interference with business relationships and inducement to breach contract); *Office One, Inc. v. Lopez*, 769 N.E.2d 749 (Mass. 2002) (interference with business relations, interference with contractual relations and civil conspiracy); *Hometown Properties, Inc. v. Fleming*, 680 A.2d 56 (R.I. 1996) ("tortious interference with contractual relations and defamation"); *Dixon v. Superior Court*, 36 Cal. Rptr.2d 687 (Cal. Ct. App. 1994) (tortious interference with business relationships and trade libel); *Anchorage Joint Venture v. Anchorage Condominium Ass'n*, 670 P.2d 1249, 1250 (Colo. Ct. App. 1983) ("negligence, an abuse of process, and tortious interference with . . . business expectancies"); *In re Entertainment Partners Group, Inc. v. Davis*, 590 N.Y. S. 2d 979 (N.Y. Sup. Ct. 1992) ("tortious interference with prospective" claims and defamation).

[51] Rule 67.05; *Samland v. J. White Transp. Co., Inc.*, 675 S.W.2d 92, 96 (Mo. App. W.D. 1984).

[52] Rule 67.05.

A special motion stating that it is filed pursuant to § 537.528, RSMo, should be sufficient to invoke the protections and rights under the statute. A special motion should affirmatively claim and request attorneys' fees and costs in each instance of requested disposition, and assert that the defendant is entitled to the defense and procedural protections afforded by § 537.528, RSMo. Such claim and prayer, in essence, should constitute a counterclaim or ancillary proceeding preserving collateral statutory rights that the court must determine and enforce, and are in furtherance of the purpose of Missouri's anti-SLAPP statute. Whether or not such claim is designated expressly as a counterclaim is irrelevant. A court judges a pleading by its subject matter and not its caption.[53] A court is also empowered to treat an affirmative defense as a counterclaim.[54]

As discussed earlier in this article, Missouri is the most recent in a long line of states to adopt anti-SLAPP legislation. The state of California was one of the earliest to adopt such legislation, and has by far the largest body of case law on a multitude of issues raised in connection with its anti-SLAPP law. California's anti-SLAPP legislation was adopted in 1992. Although amended several times since 1993, it has consistently contained a provision entitling a defendant prevailing on "a special motion . . . to recover his or her attorney's fees and costs."[55] This subsection is very similar to § 537.528.2, RSMo.

The state of California has had to deal squarely with the issue of attorneys' fees and costs when a petition was dismissed *before* a decision on the special motion. Under California law, it is well settled that once a special motion is filed, the dismissal of a petition *after* the special motion is filed, *but prior* to a hearing on the motion, does not deprive the court of jurisdiction.[56]

This issue was first decided by the California courts in *Coltrain v. Shewalter*.[57] In *Coltrain*, the plaintiffs voluntarily dismissed their lawsuit 10 days after the defendants filed a special motion under the California SLAPP statute. The court held that where a plaintiff voluntarily dismissed an alleged SLAPP suit while a special motion is pending, the trial court could consider whether the defendant was the prevailing party for purposes of the attorneys' fees and costs provision. The court affirmed the trial court's award of attorneys' fees and costs and remanded for further proceedings.

After *Coltrain*, California courts have consistently interpreted its anti-SLAPP legislation to authorize the recovery of attorneys' fees and costs incurred where an alleged SLAPP suit was dismissed prior to a ruling on the special motion.[58] These courts have refined their holdings and currently hold that, upon filing of a special motion, the trial court retains jurisdiction despite any voluntary dismissal. The court is required to rule on the merits of the motion and to award attorneys' fees and costs when the defendant demonstrates the plaintiff's action falls within the provisions of the statute and the plaintiff is unable to demonstrate a reasonable probability of success.[59] Any other rule would deprive the SLAPP defendant of the statutorily authorized fees, frustrating the purpose of the statute's remedial provisions.[60]

The holding in *Liu v. Moore* is instructive as to the purpose in these holdings. The court found that permitting a plaintiff to avoid responsibility for defendant's attorneys' fees merely by dismissing its SLAPP lawsuit "works a nullification of an important [attorneys' fees] provision" of the statute.[61] The purpose of the statute, the court reasoned, is clearly to give relief — including financial relief — in the form of attorneys' fees and costs to persons who have been victimized by meritless, retaliatory SLAPP lawsuits.[62] Accordingly, the court held that a party who brings a special motion has the right to have its motion heard, even if the underlying complaint is dismissed before the hearing.[63]

There are substantial policy reasons behind these holdings. The policy behind the adoption of anti-SLAPP laws to protect against SLAPP lawsuits clearly calls for this result. Otherwise, SLAPP plaintiffs could achieve most of their objectives with little risk by filing a SLAPP lawsuit, forcing the defendant to incur the effort and expense of preparing a special motion, then dismissing without prejudice. The specter of the action being refiled (at least until the statute of limitations had run) would continue to have a chilling effect on the defendant's exercise of First Amendment rights. At that point, the plaintiff would have accomplished all of the wrongdoing that triggers the defendant's eligibility for attorney's fees, but the defendant would be cheated of redress.[64]

The court in *S.B. Beach Properties* elegantly stated its reasoning for liberal construction of the attorneys' fees and

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[53] *Clayco Const. Co. v. THF Carondelet Dev.*, 105 S.W.3d 518, 524 (Mo. App. E.D. 2003).
[54] Rule 55.08.
[55] CAL. CIV. PROC. CODE § 425-16(c) (West 1999).
[56] *S.B. Beach Properties v. Berti*, 16 Cal. Rptr.3d 204 (Cal. Ct. App. 2004).
[57] *Coltrain v. Shewalter*, 77 Cal. Rptr.2d 600 (Cal. Ct. App. 1998).
[58] *Pfeiffer-Venice Properties v. Bernard*, 123 Cal. Rptr.2d 647 (Cal. Ct. App. 2002); *Wilkerson v. Sullivan*, 121 Cal. Rptr.2d 275(Cal. Ct. App. 2002); *Kyle v. Carmon*, 84 Cal. Rptr.2d 303 (Cal. Ct. App. 1999); *Liu v. Moore*, 81 Cal. Rptr.2d 807 (Cal. Ct. App 1999).
[59] *Pfeiffer-Venice Properties*, 123 Cal. Rptr. 2d 647.
[60] *Id.*
[61] *Liu*, 81 Cal. Rptr.2d 807.
[62] *Id.*
[63] *Id.*
[64] *Coltrain*, 77 Cal. Rptr.2d 600.

costs provisions in its anti-SLAPP legislation:

> The filing and service of a complaint demanding substantial damages can inhibit participation in matters of public significance. Once served, the typical defendant must seek counsel to represent him. Counsel will no doubt inform him of the substantial fees and costs involved in defending the action. Visions of financial loss and public mortification may loom like a horrific specter before defendant's eyes. The likelihood of answering mind-numbing interrogatories, and enduring wearisome hours of contentious depositions can leave the most stalwart defendant dispirited. And this is just the prelude to the trial. But even if the complaint is dismissed relatively soon after service, the defendant is unlikely to forget the trauma. He will be reluctant to participate further in the public debate, and his example may deter others from participating. The purpose of the anti-SLAPP statute will not be achieved if an offending plaintiff can avoid sanctions simply by dismissing his complaint before the defendant files his motion.[65]

Unresolved from the *S.B. Beach Properties* decision is whether a court can award attorney's fees and costs where the case is dismissed *before* an anti-SLAPP motion is filed. That limited issue is currently on appeal in front of the California Supreme Court, case no. S127513.

Attorneys' fees and costs awards are a cornerstone of anti-SLAPP legislation. The ability of a plaintiff to file and re-file at will, without impunity or consequence, is in direct conflict with the purpose of this law. The remedial nature of § 537.528, RSMo, must be preserved and the legislative intent is clear. SLAPP defendants should be entitled to, and should be awarded, attorneys' fees and costs even when a SLAPP suit is dismissed before a ruling on a special motion.

2. *Procedure*. Section 537.528.1, RSMo, authorizes the filing of a special motion. The statute specifically authorizes three alternative types of special motions: a motion to dismiss, a motion for judgment on the pleadings, and a motion for summary judgment. Several states with anti-SLAPP statutes provide for a motion to strike as to the pleadings to induce the protection under the statute.[66] Other state statutes provide that the motion will be treated as a motion for summary judgment regardless of its form or style.[67] It is unclear under the Missouri anti-SLAPP statute whether a motion to dismiss, motion for judgment on the pleadings based solely on the pleadings, or a motion for summary judgment with a supporting affidavit should be used. A motion for summary judgment would clearly be appropriate where the pleadings themselves do not adequately establish that the claim arose from conduct or speech in connection with a public hearing or meeting, necessitating an affidavit or other admissible documentary evidence to such effect. Caution might dictate asking for both a motion to dismiss and, in the alternative, a motion for summary judgment. While any of the motions allowed by the Missouri statute could arguably be used to dispose of the claim, it has been suggested the motion for summary judgment is preferred. This is the approach reflected in the model act suggested in PRING: SLAPPS. This allows for finality of the decision and minimizes the prospect for re-filing that could exist under a ruling on a motion to dismiss, unless the ruling is with prejudice.

3. *Individuals Covered*. The Missouri anti-SLAPP statute provides coverage to a person. While this clearly covers an individual citizen, a question arises as to how broad is the coverage. Does it apply to public officials, such as planning commissioners, city council members, etc.? The last several years have seen developers sue city officials individually. In some instances city officials have sued other city officials. There is no definition of "person" in the statute and its plain meaning would argue for expansive coverage. California courts have consistently held that their state's anti-SLAPP statute applies to public officials and governmental agencies.

4. *Governmental Intervention or Support*. Section 537.528, RSMo, does not expressly provide for intervention or support by a governmental body, though the lack of such provision may not preclude such action. Several states' anti-SLAPP statutes expressly authorize the governmental body to which the petitioning activities were directed or the states' attorney generals' office to intervene, defend or otherwise support a SLAPP defendant. Even where there is no express statutory authority, a state's attorney general may still intervene.[68]

V. SLAPP-Backs

Beyond the legislative arena, a growing reaction to the spread of SLAPP lawsuits has been the SLAPP-back lawsuit. A SLAPP-back lawsuit is a countersuit in which SLAPP targets turn the tables and sue the original filers for injuries and losses caused by the SLAPP lawsuit. The most common forms of SLAPP-back lawsuits are those claiming malicious prosecution or abuse of process. Such actions generally require the termination of the original proceeding in favor of the SLAPP target. Success on a special motion disposing of a SLAPP lawsuit can be strong ammunition to support malicious prosecution or abuse of process claims. Consideration should also be given to potential non-litigants who may

[65] *S.B. Beach Properties*, 16 Cal.Rptr.3d at 207.

[66] *See, e.g.*, Cal. Civ. Proc. Code § 425.16 (West 1999); La. Civ. Code art. 971 (West 1999); Or. Rev. Stat. § 30.142 (2003).

[67] *See, e.g.*, Haw. Rev. Stat. § 634 F-2 (2002); Ind. Code Ann. § 34-7-7-1 (West 1998); Nev. Rev. Stat. § 41.635 (1997).

[68] *See, e.g.*, Brief of Amicus Curiae Attorney General of the State of New Mexico filed in *Saylor v. Valles*, 63 P.3d 1152 (N.M. Ct. App. 2002). The attorney general in that case filed the brief over her concern about the improper use of the courts to deter New Mexico citizens from exercising their First Amendment rights to petition.

have participated in the decision to file the SLAPP lawsuit. Active participation in liability is grounded in the RESTATEMENT (SECOND) OF TORTS § 674 (1977). That section, as cited in *Valles v. Silverman*, states "that '[o]ne who takes an active part in the initiation, continuation or procurement of civil proceedings' may be liable for the wrongful use of civil proceedings."[69] Liability in this regard has been recognized in other states.[70]

Judgments in SLAPP-back lawsuits can be quite high. "Jury verdicts of $5,000,000, $9,000,000, $13,000,000 and even a staggering $86,000,000 have been handed down against SLAPP filers in the 1980s and 1990s."[71] A whole area of expertise and special bar of attorneys has evolved in California to handle these cases. At the onset of the filing of a SLAPP lawsuit, serious strategic thought should be given to a potential SLAPP-back lawsuit, since the case for both can often be built at the same time.[72]

Punitive damages may also be requested in these types of cases. It has been strongly suggested that the anti-SLAPP statutes be revised to expressly allow for punitive damages.[73] This position is based upon the belief that "[w]ithout punitive damages as a possible consequence of filing a SLAPP, filers will continue to regard SLAPP [lawsuits] as a cost-effective way to press their strategic advantage."[74] Given the normal economic disparity of the parties in almost all SLAPP litigation, and citizen participation being a fundamental principle of American democracy, this remedy seems warranted.

VI. CONCLUSION

Section 537.528, RSMo, codifies the important public policy of this state that valid petitioning activities engaged in by Missouri citizens can be shielded from baseless and retaliatory lawsuits at the very beginning of litigation. Early dismissal is the cornerstone of this protection, to negate the chilling effect of such lawsuits on the exercise of First Amendment rights. Missouri's new anti-SLAPP law should provide pause for those considering the filing of a lawsuit to silence or retaliate against citizens who participate in free speech and petitioning activities.

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[69] *Valles v. Silverman*, 84 P.3d 1056 (N.M. Ct. App. 2003).

[70] *Valles* at 1061; *Checkley v. Boyd*, 14 P.3d 81, 91-92 (Or. Ct. App. 2000).

[71] PRING: SLAPPS at 169.

[72] PRING: SLAPPS at 164.

[73] Penelope Canan & Chris Barker, *Inside Land-Use SLAPPs: The Continuing Fight to Speak Out*, 55 LAND USE L. & ZONING DIG., at 12 (2003).

[74] *Id.*