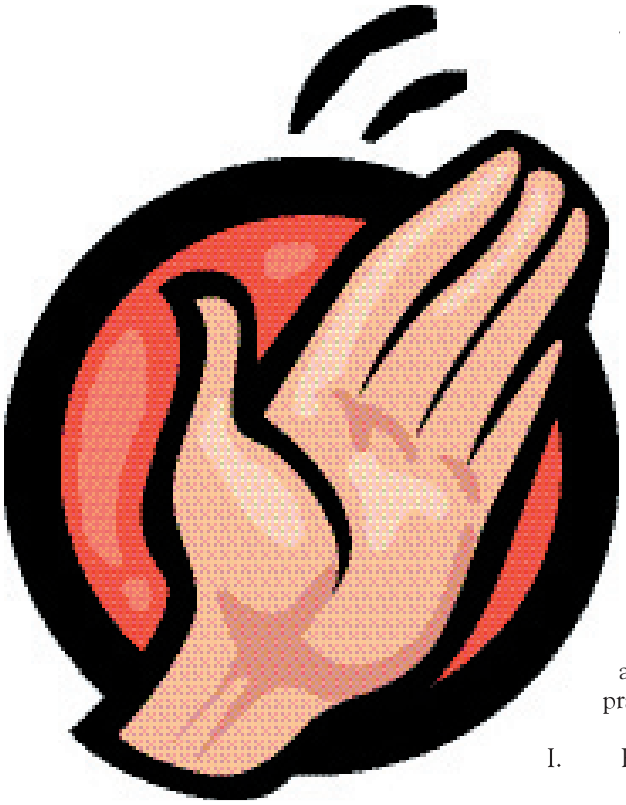
Defending Consumers From Retaliatory Litigation

"SLAPP"-ed Around

Chad Baruch*



There is a new trend in American consumer litigation that presents a "pernicious and unacceptable threat" to American liberty.[1] In growing numbers, consumers and consumer activists who communicate with government officials find themselves facing retaliatory lawsuits. These lawsuits are known as "Strategic Lawsuits Against Public Participation" or "SLAPPs."[2]

Consumer activity often involves lobbying or requesting assistance from government officials, as well as litigation. Some of these consumers are affiliated with watchdog groups, but the vast majority are individuals acting on their own. Whether lobbying or litigating, consumers are discovering that activism is rewarded with costly and protracted retaliatory litigation.

Part I of this article describes the elements of a SLAPP, part II analyzes the constitutional issues implicated by SLAPPs, and part III offers practitioners advice on defending their clients from retaliatory lawsuits.

I. Recognizing the SLAPP

Recognition is the key to successfully defending against a SLAPP. The goal of this litigation is intimidation. If the party defending the SLAPP is forced to expend significant time and resources then the suit was a success. Early action is essential, and early action necessitates early recognition.

To recognize a SLAPP, an attorney must first set aside traditional notions of the lawsuit's subject matter. SLAPPs, after all, do not come with a warning label – they are camouflaged, most frequently as claims for defamation or interference with contract. Rather than treating the claim as one for defamation or interference with contract, the attorney must recognize that the claim actually is a SLAPP.

While defining a SLAPP may not be a matter of absolute precision, most SLAPPs share common characteristics. As a general matter, a SLAPP is:

(1) A civil complaint or counterclaim;
(2) Filed against non-government individuals or organizations;
(3) Alleging injuries from their communications to influence government actions (communications to government officials);
(4) On an issue of some public interest or importance.[3]

Consumer SLAPP claims arise in different contexts. A consumer or activist who complains to government officials about a company or industry may end up defending a SLAPP suit. Additionally, SLAPP claims frequently are asserted as counterclaims in pending actions brought by consumers. In either case, the most common SLAPP claims are defamation (including libel and slander), interference with contract, abuse of process, and conspiracy.

Although many different types of consumer disputes may result in the assertion of SLAPP claims, a fairly typical case is Bass v. Rohr.[4] In that case, a homeowner hired a licensed home improvement contractor to perform residential renovations.[5] When disputes arose about the work and charges, the consumer filed a complaint with the Maryland Home Improvement Commission.[6] The commission declined to initiate charges against the contractor for violations of Maryland's home improvement laws, instead believing the matter was a civil dispute.[7] The contractor then sued the consumer for defamation, basing that claim upon the consumer's written communications with the commission.[8] The defamation claim – a classic SLAPP – was eventually dismissed based upon the petition right.[9] Bass presents an excellent example of a consumer who seeks help from the appropriate governmental body, only to be sued for those communications. Among the many other types of consumer transactions that have led to SLAPP claims are furniture sales,[10] securities investments,[11] real estate development,[12] mobile home park management agreements,[13] retirement community memberships, and cemetery plot purchases.[14]

II. Defending the SLAPP – Strategy

Once the SLAPP is recognized, the next step is obtaining its early dismissal. This necessitates focusing on the political and constitutional issues engendered by SLAPP claims. Too often, attorneys are so focused on defending the "convenience heading" of the SLAPP that they miss the larger societal issues. By the time they realize this error, their client has expended enormous sums of money in defense of the claims.

It is essential to defense of a SLAPP claim not only to treat it as a SLAPP, but to call it a SLAPP. The level of media and political attention focused on SLAPP claims over the past decade virtually ensures that judges are familiar with the concept and have formed a dim view of it. Attaching the SLAPP label – where it is warranted – may give consumer clients an immediate rhetorical advantage. It may also cause the judge to expect and receive favorably a dispositive motion based upon the First Amendment.

Since the goal of most SLAPP claims is intimidation and expense, dispositive motions should be filed as early in the litigation as possible. Many states now have anti-SLAPP laws providing special procedures for dismissal or summary adjudication of SLAPP claims.[15] Texas, unfortunately, has yet to enact anti-SLAPP legislation. The most expeditious means for eliminating a SLAPP claim in Texas is to seek traditional summary judgment on the basis of the U.S. and Texas Constitutions.

A summary judgment motion may be met with an offer of settlement. The party maintaining the SLAPP claims may offer to dismiss them in exchange for an agreement not to pursue whatever communication or activity precipitated the SLAPP. This is a settlement, of course, that accomplishes all the goals of the SLAPP! It is, in fact, no settlement at all other than an admission that the SLAPP did precisely what it was supposed to do – force the consumer to cease activity. A better approach is to pursue the summary judgment motion to its conclusion.

III. Defending the SLAPP - Substance

A. The United States Constitution

The Petition Clause of the United States Constitution provides in relevant part that "Congress shall make no law . . . abridging the freedom … to petition the Government for a redress of grievances.[16] There, in astonishingly succinct fashion, is encapsulated the most seminal right of a free people to petition their government. The Petition Clause, other constitutional guarantees, and the entire American political ethos encourage, promote, and purport to protect citizens who testify, debate, lobby, write, petition, and appeal to their government.

The right to petition the government is the wellspring of American political rights:

> Its roots run deep in many cultures. It appears in the earliest English laws of more than 1,000 years ago. In 1215, in a field called Runnymede, it gave birth to the Magna Carta. By the seventeenth century, it was a firm fixture in English law. It was vigorously asserted in our American colonies a full decade before the Revolution, figured prominently in the Declaration of Independence, and appeared in eight state constitutions even before the Bill of Rights added it to the U.S. Constitution in 1791. Some admirers even claim that it is the "original" political right.[17]

The right to petition the government for redress of grievances is "among the most precious of the liberties safeguarded by the Bill of Rights."[18] It shares the preferred place accorded in our system of government to other First Amendment freedoms and "has a sanctity and a sanction not permitting dubious intrusions."[19] In fact, the right to petition the government is necessarily implicit in and fundamental to the very notion of American democracy.[20]

The scope of the Petition Clause was initially addressed by the U.S. Supreme Court under what is known as the Noerr-Pennington Doctrine, based upon the Court's antitrust decisions in Eastern Rail Presidents Conference v. Noerr Motor Freight, Inc.[21] and United Mine Workers v. Pennington.[22] The Noerr case involved a dispute between railroads and trucking companies for control of freight hauling business.[23] The railroads launched advertising and lobbying campaigns, and the truckers sued alleging antitrust violations.[24] The Court held that attempts to solicit government action could not give rise to antitrust liability:

> In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives.[25]

Once the SLAPP is recognized, the next step is obtaining its early dismissal.

Five years later, the Court decided Pennington, holding that "joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition."[26]

Though the concepts underlying the doctrine appeared to apply to all petition claims, the Court made clear that the Noerr-Pennington Doctrine was limited to antitrust cases. The interplay between the Petition Clause and First Amendment doctrines in other areas of the law remained the source of significant confusion. In 1985, however, the Court held that a citizen may not be sued for defamatory statements made in the context of a government petition without proof of malice.[27] The court's holding adopted the test established in the free press arena in New York Times v. Sullivan.[28]

In 1991, the Court extended the scope of the Noerr-Pennington Doctrine in City of Columbia v. Omni Outdoor Advertising, Inc., a classic antitrust SLAPP involving two outdoor advertising companies.[29] Newcomer Omni was attempting to gain a foothold in the Columbia market.[30] To forestall Omni's efforts, competitor COA successfully lobbied the city to adopt rezoning ordinances that effectively destroyed Omni's ability to compete.[31] Omni sued COA and the city claiming that COA's petitioning was a "sham" designed to interfere with Omni's business.[32] A jury awarded Omni $2.2 million in damages.[33] The Supreme Court reversed the award, holding that the case should have been dismissed on Petition Clause grounds. Omni dramatically strengthens the Petition Clause by holding that it shields an effort "to influence public officials regardless of intent or purpose."[34] After Omni, the test for protection in the antitrust arena is clear: if the petitioning was aimed at procuring governmental action, it is protected and any claim arising from it should be should be dismissed – without respect to other motives or purposes. Under Omni, then, communications to government officials are protected from antitrust liability in all cases except where they are not genuinely aimed at procuring favorable government action. This principle is sometimes termed the "Sham Doctrine."[35]

The Court has yet to apply the Noerr-Pennington Doctrine, and particularly its recent enunciation in Omni, to other types of cases. At the same time, a strong argument exists that the Sham Doctrine makes more sense under non-antitrust Petition Clause cases than the actual malice standard. There is little rational basis for the existence of a different test for petition rights in the antitrust arena, as the nature of the political right being asserted is no different than in other cases. Moreover, the actual malice standard does not sufficiently protect the petition right from coercion:

> [T]he malice standard invites intimidation of all who seek redress from the government; malice is easy to allege under modern pleading rules . . . and therefore in most cases even those who acted without malice would be put to the burden and expense of defending a lawsuit. Thus, the malice standard does not supply the "breathing space" that First Amendment freedoms need to survive.[36]

At a minimum, then, SLAPP filers in consumer cases must prove that the communications complained of were undertaken with actual malice – a standard that most SLAPP claimants will be unable to meet. Attorneys defending consumer SLAPP claims must attack those claims using the actual malice standard and, in the absence of evidence establishing malice, summary judgment under the U.S. Constitution is appropriate. Additionally, attorneys representing consumers should also argue forcefully that the Sham Doctrine should be expanded to govern all cases arising under the Petition Clause.[37]

Properly understood, the Texas Constitution protects virtually all consumer communications with government officials.

B. The Texas Constitution

The Texas Constitution provides even greater protection of the petition right than federal provisions. The Petition Clause of the Texas Constitution provides that "citizens shall have the right, in a peaceable manner, to assemble together for their common good; and apply to those invested with the powers of government for redress of grievances or other purposes, by petition, address, or remonstrance."[38]

When interpreting the Texas Constitution, Texas courts are not bound by the decisions of the U.S. Supreme Court, so long as the U.S. Constitution is not offended.[39] Under our federal system, states are free to reject federal holdings so long as minimum federal constitutional standards are met,[40] and the Supreme Court has long stressed the important role of independent state constitutional jurisprudence in our federal scheme.[41] Thus, the protections of the Texas Constitution may exceed those of the federal constitution even though the phrasing of a guarantee is the same or similar in both charters.

Texas law zealously guards the petition right. Under Texas law, "a citizen's right to approach an elected official or body cannot be abridged."[42] The petition right, at least in Texas, means at a minimum that "[e]very communication is privileged which is made in good faith with a view to obtain redress for some injury or to prevent some public abuse."[43] Where statements in a communication to government officials are alleged to be actionable, it must first be proved that the statements at issue "were made in bad faith and for reasons other than to obtain action on a valid grievance."[44]

Texas law appears to be ahead of federal jurisprudence is applying what is essentially the Omni standard to all cases under the Petition Clause. There appears to be little distinction in practice between the Sham Doctrine, which protects communications so long as they are genuinely aimed at procuring favorable government action, and the Texas rule protecting all communications except those made in bad faith and for reasons other than to obtain favorable governmental action.

Properly understood, the Texas Constitution protects virtually all consumer communications with government officials. The standard that SLAPP filers must meet to overcome that protection is exceptionally high – they must prove that the consumer's communications with the government were in bad faith and made for some reason other than to obtain favorable governmental action.

C. "SLAPP"-ing Back

SLAPP targets in other states have successfully countersued and obtained significant verdicts against SLAPP filers in what are sometimes called SLAPPBACK suits.[45] In addition to lacking anti-SLAPP legislation, Texas also limits the types of claims used in SLAPPBACKs – usually malicious prosecution, abuse of process, or negligent infliction of emotional distress. These claims are either not available or are severely limited in Texas.[46]

Of course, Texas law does afford a remedy to aggrieved SLAPP targets in the form of sanctions for groundless claims. Chapters 9 and 10 of the Texas Civil Practice and Remedies Code permit the imposition of sanctions for the filing of frivolous pleadings.[47] Similarly, Rule 13 of the Texas Rules of Civil Procedure permits a trial court to impose sanctions for pleadings that are either groundless and brought in bad faith, or groundless and brought for the purpose of harassment.[48]

Attorneys representing SLAPP targets who prevail in summary judgment motions on constitutional grounds should give serious consideration to seeking sanctions on behalf of their clients. In addition to the potential for clients to recoup their litigation expenses, the consistent imposition of sanctions against SLAPP fliers may operate as a deterrent to the filing of such claims.

IV. Conclusion

The threats presented by SLAPP claims are real and serious. "Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined."[49] As a result, Texas practitioners and judges must be especially vigilant in asserting and protecting the constitutional petition rights of consumers. The alternative would be to undermine the very fabric of American society:

> We shudder to think of the chill . . . were we to allow this lawsuit to proceed. The cost to society in terms of the threat to our liberty and freedom is beyond calculation . . . . To prohibit robust debate on these questions would deprive society of the benefit of its collective thinking and . . . destroy the free exchange of ideas which is the adhesive of our democracy.[50]

* J.D., University of Minnesota Law School. Chad Baruch is an attorney in Rowlett, Texas, and is the Assistant Principal of Yavneh Academy of Dallas, an Orthodox Jewish college preparatory high school. He is the Treasurer of the Consumer Law Section of the State Bar of Texas

1. See Ralph Michael Stein, SLAPP Suits: A Slap at the First Amendment, 7 Pace Envtl. L. Rev.45 (1989).
2. The term was apparently coined by George W. Pring and Penelope Canan of the University of Denver to describe what they call a "new breed of lawsuits stalking America." Alexandra Dyan Lowe, The Price of Speaking Out, A.B.A. J., Sept. 1996, at 48.
3. George W. Pring & Penelope Canan, "SLAPPs" –"Strategic Lawsuits Against Public Participation" in Government Diagnosis and Treatment of the Newest Civil Rights Abuse, 9 Civil Rights Litigation & Attorney's Fee Annotated Handbook359 359-360 (Clark, et al. eds., 1993).
4. Bass v. Rohr,471 A.2d 752 (Md. 1984).
5. Id. at 753.
6. Id.
7. Id. at 754-55.
8. Id. at 755.
9. Id.
10. Behr v. Weber, 568 N.Y.S.2d 948 (N.Y. App. Div. 1991). In Behr, a consumer activist faced a SLAPP suit arising from activities including writing to the Suffolk County Department of Consumer Affairs to complain about a furniture manufacturing company.
11. Havoco of America, Ltd. V. Hollowbow, 702 F.2d 643 (7th Cir. 1983).
12. Great Western Cities, Inc. v. Binstein, 476 F. Sup. 827 (N.D. Ill. 1979), aff'd mem., 614 F.2d 775 (7th Cir. 1979).
13. Smith v. Silvey, 197 Cal. Rptr. 15 (Cal. Ct. App. 1983). In Smith, a mobile home park resident lodged repeated complaints with various government officials alleging criminal or regulatory violations at the park (at least some of which were apparently true, and resulted in issuance of citations or criminal charges), and also filed suit against the park. The owner of the park sued and obtained an injunction to prevent further litigation and communications. The appellate court reversed on the basis of the petition right.
14. For a discussion of these cases and others, see George W. Pring & Penelope Canan, SLAPPS: Getting Sued for Speaking Out 130-134 (1996). This book is the definitive work on SLAPPs, and is an invaluable resource for any attorney defending a SLAPP claim.
15. See, e.g.,Haw Rev. Stat.§ 634F-2 (2002); Ind. Code § 34-7-7-9 (1998); La. Code Civ. Proc. Ann. art. 971 (West 2004); Me. Rev. Stat. Ann. tit. 14, § 556 (West 2004).
16. U.S. Const. amend. I.
17. Pring & Canan, supra note 4, at 15-16 (citations omitted).
18. United Mine Workers of America, District 12 v. Illinois State Bar Ass'n, 389 U.S. 217, 222 (1967).
19. Thomas v. Collins, 323 U.S. 516 (1945).
20. See United States v. Cruikshank, 92 U.S. 542, 552 (1875).
21. Eastern Rail Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).
22. United Mine Workers v. Pennington, 381 U.S. 657 (1965).
23. Noerr, 365 U.S. at 128-29.
24. Id. at 129-30.
25. Id. at 137.
26. Pennington, 381 U.S. at 670.
27. McDonald v. Smith, 472 U.S. 479 (1985).
28. New York Times v. Sullivan, 376 U.S. 254 (1964).
29. City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365 (1991).
30. Id. at 368.
31. Id.
32. Id. at 369.
33. Id.
34. Id. at 380 (citation omitted).
35. Eastern Rail Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 144.
36. Sierra Club v. Butz, 349 F. Supp. 934, 938 (D. Cal. 1972).
37. The unanimity of the court in the portion of the Omni decision addressing petition rights suggests the reasonable possibility that the Court may at some point expand it beyond the sphere of antitrust law.
38. Tex. Const. art. I, § 27.
39. Heitman v. State, 815 S.W.2d 681 (Tex. Crim. App. 1991).
40. See Cooper v. California, 386 U.S. 58 (1967).
41. See, e.g., Massachusetts v. Upton, 466 U.S. 727, 735 (1984) (Stevens, J., concurring); Minnesota v. Nat 'l Tea Co., 309 U.S. 551, 557 (1940).
42. Corpus Christi Indep. School Dist. V. Padilla, 709 S.W.2d 700, 704 (Tex.App. – Corpus Christi 1986, no writ).
43. Connellee v. Blanton, 163 S.W. 404, 406 (Tex. Civ. App. – Fort Worth 1913, no writ); see also Aransas Harbor Terminal Ry. Co. v. Taber, 235 S.W. 841 (Tex. 1921) (citing Connellee favorably in petition case).
44. Wood v. State, 577 S.W.2d 477, 479 (Tex. Crim. App. 1978), overruled on other grounds by Hankins v. State, 646 S.W.2d 191 (Tex. Crim. App. 1981).
45. See, e.g., Leonardini v. Shell Oil Co., 264 Cal. Rptr. 883, 886 (Cal. Ct. App. 1989); see also George W. Pring & Penelope Canan, "Strategic Lawsuits Against Public Participation" ("SLAPPS"): An Introduction for Bench, Bar, and Bystanders, 12 Bridge. L. Rev. 937, 955-57 (1992).
46. Texas does not recognize any claim for negligent infliction of emotional distress. See Boyles v. Kerr, 855 S.W.2d 593 (Tex. 1993). Claims for malicious prosecution are recognized, but disfavored. See, e.g., Browning-Ferris Indus. V. Lieck, 881 S.W.2d 288, 291 (Tex. 1994).
47. Tex. Civ. Prac. & Rem. Code Ann.§§ 9.001-9.014, 10.001-10.006 (Vernon 2002).
48. Tex. R. Civ. P. 13 (West 2004).
49. Gordon v. Marrone, 590 N.Y.S.2d 649, 656 (Sup. Ct.1992), aff'd, 616 N.Y.S.2d 98 (App. Div. 1994).
50. Webb v. Fury, 282 S.E.2d 28, 43 (W. Va. 1981).