
# Public Hearing on House Bill 95
# House Judiciary Committee

Testimony of Thomas G. Wilkinson, Jr.

Past President

Pennsylvania Bar Association

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| **TO:** | The Honorable Rob W. Kauffman, Chair<br>The Honorable Tim Briggs, Democratic Chair<br>House Judiciary Committee |
| **FROM:** | Thomas G. Wilkinson, Jr. |
| **DATE:** | December 11, 2019 |
| **RE:** | **Public Hearing on House Bill 95 - Anti-SLAPP** |

Thank you for the invitation to submit this testimony on behalf of the Pennsylvania Bar Association ("PBA").[1] I am a past president of the PBA and the Pennsylvania Bar Institute.[2] I am a member of Cozen O'Connor, where I primarily practice commercial litigation and also advise lawyers and law firms in professional responsibility and liability matters.

As more fully set forth below, the PBA supports HB 95 (P.N. 97) and SB 95 or similar legislation which would amend Title 42 to create a process to quickly dismiss SLAPP lawsuits based upon protected speech.

## Summary of Background of PBA's Support for Anti-SLAPP Legislation

"SLAPP" refers to "strategic lawsuits against public participation." This is the term applied to the initiation of litigation against citizens or associations of citizens by business interests to deter citizens from

[1] The PBA has been designated by the Supreme Court of Pennsylvania under 42 Pa.C.S. § 1728(a)(3) as the organization "most broadly representative of the members of the bar of this Commonwealth." No. 198 Supreme Court Rules Docket No. 1 (June 29, 1998).

[2] I have served as chair of the PBA Civil Litigation Section and the Legal Ethics and Professional Responsibility Committee, and remain an active member of various other committees and sections. I reside in Lower Merion, Montgomery County, in Rep. Tim Briggs' district, and am also a member of the Montgomery Bar Association.

opposing any particular application for property development or use. These suits chill free speech and healthy debate by targeting those who communicate with their government or speak out on matters of public interest.[3]

In November 2015 the PBA Board of Governors and House of Delegates approved a recommendation supporting anti-SLAPP legislation but expressed concerns with certain provisions.[4] In the interim the legislation was modified to address two concerns addressed in the previous recommendation.[5] As a result, in May 2018, the PBA Board of Governors unanimously approved a recommendation expressing support for the pending version of SB 95. The House of Delegates, the PBA's policymaking body, thereafter overwhelmingly approved the recommendation on May 11, 2018.[6]

The Senate approved SB 95 by strong majority votes in each of the last two sessions. The PBA supports the bill because it provides a legal procedure for an expedited pretrial judicial determination of anti-SLAPP

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[3] The Supreme Court has stated that "Speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

[4] The PBA's anti-SLAPP recommendation initiated with the Civil and Equal Rights Committee and was supported by various other committees and sections, including the Civil Litigation Section.

[5] The PBA expressed concern in 2015 that the then pending version of SB 95 defined "Constitutionally protected communication" as "any good faith communication ...", whereas the First Amendment generally does not restrict the rights of free speech based on the motive of the speaker. The "good faith" limitation was later removed and does not appear Section 8340.4(g) of HB 95. In addition, the previous bill had amorphous language concerning those persons who could, directly or "indirectly," be deemed responsible to pay an award of fees, costs or damages under the Act. That overbroad language was thereafter amended to permit recovery from the "person deemed responsible for such fees, costs or damages."

[6] The PBA communicated its support for SB 95 in a letter dated May 24, 2018 from PBA President Charles Eppolito III addressed to bill sponsor Senator Larry M. Farnese, and Senator Stewart J. Greenleaf, then Chair of the Senate Judiciary Committee.

claims. The bill provides for the imposition of counsel fees, costs and damages against an unsuccessful SLAPP plaintiff. This tends to increase the likelihood that citizens and citizen groups will be able to obtain legal representation to defend against SLAPP suits, and serves as an important disincentive for those who would pursue SLAPP lawsuits.

**Brief Overview of the Anti-SLAPP Remedy**

The majority of states provide some form of anti-SLAPP remedy.[7] However, Pennsylvania only offers a very limited scope of protection in the narrow area of environmental law and regulations.[8] Individual municipal and countywide zoning ordinances are excluded from the anti-SLAPP protections of the current Pennsylvania statute, regardless of the environmental impact of the particular regulation at issue. Absent a direct connection between citizen action and an environmental law or regulation, Pennsylvania offers no anti-SLAPP protection.[9]

The First Amendment protects "the right of the people peaceably to assemble, and to petition the Government for redress of grievances," as

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[7] The most recent statute was enacted in Colorado in 2019. There are anti-SLAPP laws in over 30 states, the District of Columbia and the territory of Guam. Recently, the Ohio Citizen Participation Act (SB 215) was introduced in October 2019, and already has garnered significant support.

[8] *See* 27 Pa.C.S.A. § 8301- § 8305; H.B. No. 393, 184th Reg. Sess. (2000). Section 8302 has been interpreted by the courts only to afford immunity where the communication at issue or action is "aimed at procuring favorable government action." In *Penllyn Green Assoc., L.P. v. Clouser*, 890 A.2d 424, 433-34 (Pa. Cmwlth. 2005), for example, the court concluded that residents' statements to the media about agent orange contamination were not protected by the Act because they could not have "realistically have expected success in procuring government action" at the time the statements were made.

[9] *See, e.g., Carlson v. Ciavarelli*, 100 A.3d 731, 738 (Pa. Cmwlth. 2014)(court rejected contention applicant's communications with township and zoning hearing board concerning zoning approval were protected because they were "not actions to enforce any environmental law or regulation."). *See also Maransky v. Scott*, No. 559 C.D. 2018 (Pa. Cmwlth. April 5, 2019)(unpublished).

does Article I, §§ 7 and 20 of the Pennsylvania Constitution. Section 7 states, in part, that "[t]he free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty." Separately, a judicially created federal statutory remedy, the *Noerr-Pennington* doctrine,[10] serves to immunize parties from certain claims brought in conflict with the First Amendment, particularly civil rights and other civil suits.[11] Legislatures have looked to the Noerr-Pennington doctrine as a guide for the development of state anti-SLAPP statutes.[12] However, *Noerr-Pennington* immunity is limited and a pretrial decision denying such immunity is not generally appealable as a collateral order.[13]

SB 95 passed the Senate on April 25, 2017 by a vote of 42-8 and 48-1 during the 2015-16 session.[14] As noted above, the bill was thereafter amended in several beneficial respects. The current anti-SLAPP bills in both Houses are essentially identical.

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[10] *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 129 (1961) and United Mine Workers of Am. v. Pennington, 381 U.S. 657, 669 (1965)("Joint efforts to influence public officials do not violate antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act."). In the following decades the federal courts extended ***Noerr's*** principles outside of antitrust law to various tort causes of action used to disguise SLAPPs, and thereby supporting protections for petitioning activities. However, *Noerr-Pennington* immunity is not immunity from suit. Rather it is immunity from liability. Moreover, the immunity, in the context of litigation, is forfeited where the initiation of litigation is merely a "sham." *Barnes Foundation v. Township of Lower Merion*, 242 F.3d 151, 162 (3d Cir. 2001).

[11] *United Artists Theatre v. Township of Warrington*, 316 F.3d 392 (3d Cir. 2003).

[12] *LoBiondo v. Schwartz*, 970 A.2d 1007, 1020 (N.J. 2009)("[T]he majority of the [state anti-SLAPP statutes find their roots in the United States Supreme Court's *Noerr-Pennington* doctrine, creating immunity that protects actions that fall within the parameters of the redress of one's grievances to the government.").

[13] *We, Inc. v. City of Philadelphia*, 174 F.3d 322 (3d Cir. 1999).

[14] Matt Fair, "Pa. Senate Passes Anti-SLAPP Measure," Law360 (July 1, 2015).

One concern expressed by the PBA in 2015 concerned the lack of a trial by jury on the preliminary question to be assessed by the court whether the challenged claim is based on a constitutionally protected communication.[15] The party seeking to dismiss a SLAPP suit will prevail where a judge determines that the moving party has established by a preponderance of the evidence that the claim is based upon a "constitutionally protected communication."[16] After further consideration and research the PBA found that anti-SLAPP statutes in other states typically provide for the trial judge to make the preliminary assessment rather than a jury, and the PBA formally withdrew that expression of concern in its 2018 recommendation in favor of SB 95.

There are several reasons why this preliminary assessment of an anti-SLAPP challenge should be made by the trial court rather than a jury.

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[15] Research discloses that two state supreme courts concluded that their state constitution language governing the scope of a trial by jury conflicted with the anti-SLAPP laws adopted by their legislatures. One case arose from questions posed by the New Hampshire Senate to its Supreme Court on a pending bill 25 years ago. The New Hampshire court opined that the special motion to strike procedure provided in the bill conflicted with the New Hampshire state constitution's broad right to a jury trial, notwithstanding the court's "profound concern with abuse of the judicial system by lawsuits designed to intimidate citizens and exact a price for participation in the democratic process." 138 N.H.445, 451, 641 A.2d 1012, 1015 (NH 1994). In *Davis v. Cox*, 183 Wash.2d 269, 351 P.2d 862 (WA 2015), the Washington Supreme Court was the first state to strike down such a statute on the ground that it conflicted with the right of trial by jury under Section 21 of the Washington Constitution. The court heavily emphasized that the bill's requirement that the trial court make a factual determination of whether the plaintiff has established by "clear and convincing evidence" a probability of prevailing on the claim, unlike the California ant-SLAPP law on which it was modeled. *Id.* at 868, 869, 873. HB 95 and SB 95 both provide for application of a "preponderance of the evidence" standard whether the claim is based upon a constitutionally protected communication, and apply the same standard to the nonmoving party (the plaintiff). The concerns raised by the Washington court are largely obviated here due to the different, lower evidentiary standard similar to that employed by trial courts on summary judgment. In any event, the anti-SLAPP procedure does not supplant the role of a jury as factfinder on any claim triable by jury.

[16] This term is defined in HB 95 to be a "communication in furtherance of a right to petition or a right to free speech, which right is exercised in connection with an issue of public concern or social significance" under any one of four circumstances, such as a matter under consideration by the legislative or executive branches.

First, it would be cumbersome, time consuming and more expensive to mandate the empaneling of a jury in what is a preliminary legal challenge in the course of a case. Second, just as a temporary restraining order and preliminary injunction proceeding are conducted before a trial judge, the anti-SLAPP argument or hearing should be held before a trial judge.[17] Third, if the anti-SLAPP argument is frivolous or clearly lacking in merit, then that determination may be made by the trial court on the pleadings submitted without any hearing, or may be made following a brief hearing and oral argument. If the anti-SLAPP challenge fails, then both parties will have an opportunity to try the disputed fact issues before a judge or jury after the completion of discovery and any summary judgment motion practice. Stated another way, trial courts are frequently asked to make rulings on motions to dismiss (or preliminary objections in state court) and on summary judgment motions.[18] When courts grant such motions they are obviously concluding that no reasonable jury could find otherwise.[19] In

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[17] For example, the Louisiana Court of Appeals in *Lee v. Pennington*, 830 So.2d 1037, 1043 (La. Ct. App. 2002), *cert. denied*, 836 So.2d 52 (La. 2003), explained that ant-SLAPP motions turned on questions of law, which are reserved for the court, not a jury: "[T]he only purpose of [the state's anti-SLAPP provision] is to act as a procedural screen for meritless suits, which is a question of law for a court to determine at every stage of a legal proceeding." Similarly, the California Supreme Court noted that the legislature took pains to avoid depriving the non-moving party of the right to trial by jury. *S.B. Beach Properties v. Berti*, 138 P.3d 713, 716-17 (Cal. 2006).

[18] *See* Pa.R.Civ.P. 1035.2: "After the relevant pleadings are closed, ..., any party may move for summary judgment in whole or in part as a matter of law (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or (2) if, after completion of discovery relevant to the motion, ..., an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury."

[19] The existing narrow anti-SLAPP statute applicable to those petitioning the government over environmental issues also provides for swift dismissal of retaliatory lawsuits to undermine citizen participation in the establishment of state and local environmental policy. The trial court holds an

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sum, the PBA believes that the adjustments made to the earlier version of the bill were beneficial and adequately addressed the concerns expressed in 2015.

**Availability of Interlocutory Appeal**

Additionally, the language in HB 95 (and SB 95) allows an immediate interlocutory appeal of **the trial court's ruling on a** motion to dismiss under the pertinent section of the law.[20] This is a proper failsafe review of a trial court ruling resolving an anti-SLAPP motion. The trial court also may permit, on good cause shown, specified discovery tailored to the matters raised by the anti-SLAPP motion. The important public policy objective is to preclude or promptly shut down improper SLAPP lawsuits, especially when designed to silence individual and nonprofit citizen groups who often have very limited resources to litigate. The Act provides that where there is doubt regarding whether a communication is protected speech the court is to interpret the section broadly in favor of protection for such speech.

Under subpart (d)(1)-(3), even if part of the lawsuit is improperly predicated upon a constitutionally protected communication and should therefore be dismissed, other distinct claims that are not so predicated may proceed in the normal course. By way of example, a defamation claim

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evidentiary hearing on the special motion to determine the preliminary issue of immunity from suit and determines whether the communications are protected by the Act. There is no jury trial right under the Act, and an interlocutory appeal is available.

[20] *See* § 8340.4(b)(3).

brought over a critical expression of opinion on a protester's sign displayed on the sidewalk next to a development may be deemed protected, whereas a private property damage claim arising from the same protest might proceed, even if all pled as claims in the same complaint.

**Prevailing Party Recovery of Attorney's Fees and Costs**

Nearly every state anti-SLAPP statute includes a section for mandatory or discretionary fee shifting for the benefit of the prevailing movant. The main purpose of such provisions is to discourage the bringing of baseless SLAPP suits by "plac[ing] the financial burden of defending against so-called SLAPP actions on the party abusing the judicial system."[21] Another important purpose of such provisions is to encourage private representation of parties defending against SLAPP actions, even where the party might not be able to afford fees.

HB 95 and SB 95 provide that the moving party who prevails on an anti-SLAPP motion to dismiss is entitled to recover attorney fees and costs from the party who filed the action, where part or all of the action has been dismissed pursuant to the subsection (b)(1). Under subsection (b)(2) the court is to schedule a prompt hearing to determine damages to be assessed to the nonmoving party, typically the plaintiff. As with the statutes in various other states, the act sets a floor of $10,000 in damages (which

[21] *Poulard v. Lauth*, 793 N.E.2d 1120, 1124 (Ind. Ct. App. 2003); *Ketchum v. Moses*, 17 P.3d 735, 745 (CA 2001).

approximates the fees incurred in preparing and filing a typical anti-SLAPP motion and supporting brief) to be imposed on the responsible party. Fee recovery provisions provide monetary consequences for bringing meritless defamation or similar cases designed to chill speech on public issues.

The prospect of having to pay damages for a SLAPP lawsuit designed to muzzle First Amendment protected speech should cause some would be plaintiffs to pause before proceeding. The damages remedy also will tend to make competent counsel more available to targets of SLAPP suits that might not otherwise be in a position to fund their defense. Many small nonprofits, such as civic associations, do not have adequate funds in their treasuries to pay counsel an advance retainer to undertake a representation, let alone research, prepare, file and participate in a hearing on an anti-SLAPP motion.

**Remedy for Frivolous Anti-SLAPP Motion**

Under subpart (e)(3), if the court finds that a motion to dismiss under **the Act is "frivolous" or is intended solely to cause** unnecessary delay, the **court shall award costs and reasonable attorney's fees to the nonmoving** party prevailing on the motion.[22] This provision should effectively serve as an incentive for those filing anti-SLAPP motions to be mindful that there should be a good faith underpinning for the motion that the challenged

[22] **In determining "reasonable attorney fees" to the nonmoving prevailing party,** the court presumably will draw upon existing authority in other contexts where prevailing parties are entitled by prevailing law or contract to a fee award, and deny any fees or costs sought that are deemed unreasonable or excessive.

lawsuit or claim is designed to interfere with a party's constitutionally protected speech.[23] This is consistent with the existing remedy for frivolous filings in Pennsylvania state court under 42 Pa.C.S. § 1023.1, et seq.,[24] and the corresponding Rule of Professional Conduct.[25]

By way of example, citizens do not have a First Amendment right to breach a contract, nor to defame others.[26] But when defendants can show that one or more causes of action are based on their conduct or communication exercising the rights of free speech, free association or free petition, the statutory dismissal mechanism becomes available. However, if the party responding to the motion to dismiss under the Act demonstrates that the claim (such as defamation or tortious interference with contract) is not predicated upon constitutionally protected communication(s), the

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[23] *See also Moore v. Shaw*, 116 Cal. App. 4th, 182, 200 (Cal. Ct. App. 2004)(awarding reasonable attorney's fees in opposing the anti-SLAPP motion because the motion clearly did not address an act in furtherance of the right to petition or free speech in connection with a public issue).

[24] Rule 1023.1 was adopted following discussions involving the PBA and the legislature concerning an appropriate remedy for frivolous litigation and a perceived need for a state court equivalent to Rules 11 of the Federal Rules of Civil Procedure. *See* T. Wilkinson, Sanctioning Power Available to Pennsylvania Trial Judges In Civil Litigation – With An Emphasis On Pennsylvania's New Rule Addressing Frivolous Filings," *PA Bar Ass'n Quarterly*, Vol. LXXIII, No. 4 (Oct. 2002).

[25] *See* Pa.RPC 3.1 (Meritorious Claims and Contentions): "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for extension, modification or reversal of existing law."

[26] Nothing in the anti-SLAPP law would change the substantive law of defamation or other established torts. For example, Blake Shelton's defamation claim against the publisher of *In Touch Weekly* withstood an anti-SLAPP challenge because he showed that the cover story suggesting that he had a severe drinking problem and plans to go to rehab likely satisfied the elements of a libel claim notwithstanding his status as a public figure. *Shelton v. Bauer Publishing, Co., L.P.*, Case 2:15-cv-9057 (CD CA April 18, 2016).

motion should be denied in whole or in part.[27] In this sense, the procedure mirrors that of summary judgment.

**Practical Applications of the Anti-SLAPP Statute**

Freedom of speech is under attack here and overseas, on college campuses and on the most popular social media platforms. SLAPP lawsuits are often filed not to achieve a favorable resolution on the merits, but rather to intimidate and discourage the targeted speaker(s) from speaking out, through the threat of costly and time-consuming litigation.[28] SLAPP suits come in a variety of forms and legal theories, such as defamation, invasion of privacy, business torts, abuse of process, and civil conspiracy. It is not always the major corporation initiating the SLAPP suit; it can be an individual with ready access to a legal team[29] or others who use litigation as a tactical weapon to chill the exercise of free speech on matters of public concern.

Nonprofits and community organizations are frequent targets of SLAPP suits. One impetus for the anti-SLAPP legislation in Pennsylvania was the ordeal faced by the Old City Civic Association, which was forced to

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[27] *See* § 8340.4(d).

[28] *E.g.*, *Fisher v. Lint*, 868 N.E.2d 161, 165 (Ma. App. Ct. 2001)("The purpose of filing a SLAPP suit is not to prevail in the matter, but rather to use litigation to chill, intimidate, or punish citizens who have exercised their constitutional right to petition the government to redress a grievance.").

[29] For example, West Virginia coal magnate Bob Murray sued comedian John Oliver and HBO over a satirical segment aired in 2017 critical of Murray and his company for, among other things, employment practices involving coal miners. The court refused Murray's request to prohibit rebroadcast of the segment and dismissed the lawsuit. Last Week Tonight with John Oliver (HBO) (Nov. 10, 2019). However, it took an extended period of time and substantial legal fees to vindicate the show's position in the absence of an anti-SLAPP statute.

disband after finding insurance unavailable due to threatened legal action over controversial zoning issues.[30] Individuals can also face SLAPP suits designed to force them to cease voicing their concerns over public matters, from zoning cases to overspending by government agencies or private contractors performing governmental or state regulated functions, from trash removal to electric service. In any event, the protections of the anti-SLAPP law do not only extend to nonprofits and citizens with limited resources.[31]

**Conclusion**

Speech on a matter of public concern "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to speech protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983). On behalf of the 25,000 members of the Pennsylvania Bar Association, we urge your support for the adoption of anti-SLAPP legislation that can act as important protection of the rights that encourage citizen participation in matters of public concern. The Pennsylvania legislature has a prime opportunity to ensure that constitutionally protected communications are duly protected against lawsuits filed primarily to chill that protected speech. We therefore

[30] D. Gambacorta, "How the Powerful can use SLAPP Lawsuits and Muzzle Free Speech for About $300," The Morning Call (May 26, 2019). The civic was sued for seeking to require developers who wished to convert parcels of the historic neighborhood into investment property to comply with zoning laws. The civic also was sued by a company that blamed it for a development deal that fell through, and by a pub owner after the civic opposed his plans for a new restaurant during a zoning hearing.

[31] President Donald J. Trump, for example, successfully pursued an anti-SLAPP claim under the expansive Texas Citizens Participation Act against an accuser, Stormy Daniels, who had claimed that a presidential tweet was defamatory. The federal court found the tweet protected opinion under the First Amendment, and awarded prevailing party legal fees.

urge that the General Assembly support and approve HB 95 or similar anti-SLAPP legislation.

We appreciate the opportunity to present testimony in support of the pending legislation.

Respectfully submitted,

*Thomas G. Wilkinson, Jr.*

**Pennsylvania Bar Association**