



Maine's anti-SLAPP law: Special protection against improper lawsuits targeting free speech and petitioning

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AN OPEN, DEMOCRATIC SOCIETY IS NOISY—DELIBERATELY AND NECESSARILY so. Our country's founders and the overwhelming majority of subsequent leaders have agreed that a little chaos is a small price to pay in order to maintain a flourishing marketplace of ideas and to protect the exercise of our constitutional rights to free speech and to petition government for redress of our grievances—true bulwarks of our democratic society.²

A noisy citizenry is not, however, in every entity's best interest, particularly influential entities holding disproportionate power and wielding that power for their own good. Accordingly, over the years those entities have developed tactics to silence opposition, particularly opposition that damages their economic interests. One such tactic is a Strategic Lawsuit Against Public Participation (SLAPP), a lawsuit aimed at punishing or silencing a party's exercise of free speech or right to petition the government.

In the late 1980s, state legislatures, in response to rising concern over the impact of SLAPPs on First Amendment rights, began enacting anti-SLAPP legislation aimed at protecting those rights against the chilling effect that such lawsuits engendered. In 1995, the Maine legislature joined the movement, enacting 14 M.R.S.A. §556, entitled An Act Protecting a Citizen's Right of Petition under the Constitu-

tion. Although Section 556 remained largely dormant in its early years, activity under that statute has recently increased dramatically. This article will discuss the statute itself, its judicial development, and the various legal and policy issues that remain open under the current state of the law.

The History of Anti-SLAPP Legislation

THE TRADITIONAL ELEMENTS OF A SLAPP, ALTHOUGH DEFINED with some variety in different states' statutes, are as follows: 1) a civil complaint or counterclaim, 2) filed against individuals or groups, 3) because of their communications to a government body, officials or the electorate, 4) on an issue of some public interest or concern.³ The traditional paradigm for a SLAPP is a familiar one. A deep-pocketed developer initiates efforts to build an industrial facility near a residential area. A

group of local citizens opposes the development, appearing at public hearings, submitting letters and statements to relevant public officials, and writing letters to the editors of local newspapers. In response, the developer sues the citizen group and its individual members, alleging a panoply of torts: defamation, civil conspiracy, interference with contract.

The developer's complaint is sufficiently drafted to survive the defendants' initial motion to dismiss under Rule 12, and the developer then embarks upon a course of oppressive discovery and motion practice, forcing the defendants to engage in extensive document production and a seemingly endless string of depositions. After years of litigation, the defendants prevail at summary judgment or trial—but the victory is, in fact, the developer's. The cost, stress and time involved in defending against the suit has fractured the community group, sapped the energy and financial resources of the group's members, diverted their efforts from actually opposing the industrial plant and chilled the likelihood of future opposition to similar projects because of the toll the lawsuit took on the group and its members. The lawsuit, which the developer considers a cost of doing business, thus has effectively disrupted public participation in the government's decision-making regarding the industrial plant and has punished a group of citizens for exercising their First Amendment rights.⁴

SLAPPs have proven effective in silencing citizens' efforts to exercise their First Amendment rights of free speech and to petition government.⁵ Moreover, as the costs imposed on citizens by SLAPPs have become more widely reported, the mere threat of a SLAPP has served as an effective deterrent to the exercise of the rights of free speech and to petition government.⁶ The fact that these SLAPPs are almost always fatally flawed under established constitutional jurisprudence provides scant comfort to the defendant faced with potentially years of conflict and tens (or hundreds) of thousands of dollars in legal fees, in addition to the embarrassment and angst that attends such lawsuits. Clearly, SLAPPs are a problem needing a solution.

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The impact of SLAPPs such as the one described above began to receive scholarly attention in the late 1980s. The SLAPP acronym was coined by George W. Pring and Penelope Canan, two scholars involved in a legal/sociological study at the University of Denver of the impact of lawsuits brought across the nation against defendants based on their efforts to influence government action.⁷ They found that, in the late 1980s, SLAPPs were growing in frequency, efficacy, and scope, effectively targeting and chilling the exercise of the right to petition in a variety of contexts.⁸ The first anti-SLAPP statute was passed in Washington in 1989 in response to a real estate company's defamation suit against a woman after she had helped the state collect back taxes owed by that company.⁹ A number of states quickly enacted similar laws—for example, California's 1992 passage of an anti-SLAPP statute and Massachusetts' 1995 passage of a broad anti-SLAPP statute. About half of the states, as well as Guam, currently have anti-SLAPP statutes in force, with bills pending in perhaps half a dozen other states, and judicially developed anti-SLAPP doctrines in Colorado and West Virginia.¹⁰

The Constitutional Underpinnings of Anti-SLAPP Legislation

ANTI-SLAPP LEGISLATION RESTS PRIMARILY ON TWO JURISPRUDENTIAL FOUNDATIONS: *N.Y. Times v. Sullivan*, protecting free expression; and the *Noerr-Pennington* doctrine, protecting the right to petition. The Petition Clause of the First Amendment is intended to encourage, promote, and protect citizens who testify debate, lobby, write, petition, and appeal to their government. More than forty years ago, in *Eastern R. Presidents Conf. v. Noerr Motor Freight, Inc.*, the U.S. Supreme Court construed this clause as affording broad immunity from lawsuits to citizens exercising their right to advocate their interests in the political arena.¹¹

Just four years later, the Supreme Court decided *United Mine Workers v. Pennington*.¹² In *Pennington*, a union had successfully petitioned the federal government for an increase in the minimum wage paid to miners and thus forced smaller coal companies out of business. *Pennington* holds that “[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition.”¹³ The Supreme Court reiterated that “*Noerr* shields ... a concerted effort to influence public officials regardless of intent or purpose.”¹⁴ *Noerr-Pennington* immunity, moreover, extends to petitioning

activity that is aimed at all forms of government entities, including legislatures, administrative agencies, and courts.¹⁵ Although both *Noerr* and *Pennington* were decided in the context of an antitrust action, the Supreme Court extended the doctrine to confer immunity in other civil actions in *NAACP v. Claiborne Hardware Co.*¹⁶ Federal and state courts now consistently apply the *Noerr-Pennington* doctrine to all types of claims, including state tort and statutory law claims implicating the right to petition.¹⁷

The second doctrinal underpinning to anti-SLAPP legislation, not surprisingly, is *New York Times Co. v. Sullivan*¹⁸ and the line of cases arising out of that decision. In that decision the Supreme Court decided a defamation suit brought by a public official against the publisher of an allegedly defamatory statement regarding official conduct and addressed the implications of that suit on our First Amendment freedom of expression.¹⁹ Concerned that such lawsuits would chill criticism of public officials, the Court provided qualified immunity for any publication criticizing a public official, requiring the complaining official to prove by clear and convincing evidence that the statement was made with actual malice.²⁰ The Court has tweaked that standard over the years, clarifying that statements made with actual malice (knowingly false or made with reckless disregard as to falsity) do not merit constitutional protection,²¹ extending the standard to “public figures” in addition to “public officials,”²² but declining to extend the standard to situations in which the statements are about a private individual.²³ Anti-SLAPP arguments and judicial decisions often follow the logic of these First Amendment cases.

Maine’s Anti-SLAPP Statute

MAINE’S ANTI-SLAPP STATUTE, 14 M.R.S.A. §556, WAS PASSED in 1995, coming out of the legislature’s Judiciary Committee without debate or written testimony and with the committee’s unanimous support.²⁴ The statute is nearly identical to Massachusetts’ anti-SLAPP statute, which had been passed less than a year earlier, in 1994. Both laws are broader than those of many other states.²⁵

The statute, at least in theory, is fairly simple. If a party finds itself defending a lawsuit (or counterclaims or cross-claims) based on that party’s exercise of its right to petition under the U.S. or Maine constitutions, that party may bring a special motion to dismiss. The special motion to dismiss may be filed as a matter of right within sixty days of service of the

complaint or, at the court’s discretion, at any later time upon terms the court determines proper.²⁶ The provision of a “soft” sixty-day period, allowing later filing pursuant to the court’s discretion, unlike the “hard” deadlines for motions to dismiss generally found under Me.R.Civ.P. 12, appears to be a statement that the rights protected by Section 556 are less easily waived than many others.

Upon the filing of a special motion to dismiss, the court’s initial query is whether the claim or claims at issue are “based on” the moving party’s exercise of its right to petition.²⁷ The court *must* then dismiss those claims unless the *non*-moving party “shows that the moving party’s exercise of its right to petition was devoid of any reasonable factual support or any arguable basis in law and that the moving party’s acts cause actual injury to the responding party.”²⁸ Functionally speaking, Section 556 provides qualified immunity to those parties exercising their right to petition government, similar in function to the qualified immunity provided under *New York Times Co. v. Sullivan*.

Given that one of the ills of SLAPPs is the unnecessary expense of defending such suits imposed on defendants of limited means, the statute also includes specific provisions designed to minimize those expenses during consideration of the special motion to dismiss. The statute directs the court to “advance the special motion so that it may be heard and determined with as little delay as possible.”²⁹ Similarly, during briefing, argument and consideration of the special motion to dismiss, all discovery is automatically stayed, with an allowance for limited exceptions if good cause is shown.³⁰ The statutorily-imposed discovery stay remains in effect until the court issues a ruling on the special motion to dismiss, thereby providing a defendant with some breathing room while the special motion to dismiss is under consideration.

In addition to the dismissal of claims under the statute, Maine’s anti-SLAPP statute also provides important, additional relief to a successful movant under the Act: attorneys’ fees. An award of attorneys’ fees is not mandatory; rather, a court “may” award a successfully moving party costs and reasonable attorneys’ fees, both those incurred in filing the special motion to dismiss and those incurred in any related discovery matters.³¹ The statute does not specify whether other attorneys’ fees, such as those incurred in answering a complaint, are recoverable, but the logic of the statute suggests that they are.

Of course, one key issue remains: the contours of a party’s exercise of its right to petition government. It is here that

Maine's anti-SLAPP statute manifests a breadth of scope beyond that of many other states' anti-SLAPP laws. Section 556 defines "a party's exercise of its right of petition" particularly broadly and includes the following:

1. Any written or oral statement made before or submitted to a legislative, executive or judicial body, or any other governmental proceeding;
2. Any written or oral statement made in connection with an issue under consideration or review by a legislative, executive or judicial body, or any other governmental proceeding;
3. Any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive or judicial body, or any other governmental proceeding;
4. Any statement reasonably likely to enlist public participation in an effort to effect such consideration, or any other statement falling within constitutional protection of the right to petition government.³²

At the risk of stating the obvious, the statute casts its net widely in its efforts to protect the right to petition. It neither is limited to statements to government bodies or representatives (paragraphs 2, 3, and 4) nor to issues currently under consideration (paragraphs 3 and 4). Section 556 is, by its explicit terms, quite broad, providing its qualified immunity to even the most indirect of exercises of one's right to petition government.

Judicial Interpretations of Maine's Anti-SLAPP Statute

STATUTORY CODIFICATION OF CONSTITUTIONAL RIGHTS SUCH as those prescribed in the First Amendment, which are general and theoretical rather than more narrow and concrete, often requires a necessary maturation process in which judicial interpretations flesh out the theoretical contours of the statute. Maine's anti-SLAPP statute is just such a law, requiring the judiciary to engage in fairly active interpretation as it gives practical effect to the statute's broad language. For example, what does "based on the moving party's exercise of the moving party's right of petition" mean? What is needed for "reasonable factual support"? What is needed for an "arguable legal basis"? What does "actual injury" mean? Further complicating matters, the statute's various definitions of "a party's exer-

cise of its right of petition" necessarily require the judiciary to make judgment calls. For example, what statements are "reasonably likely to encourage consideration or review of an issue" or are "reasonably likely to enlist public participation in an effort to effect such consideration"? Most vague, of course, is the inclusion of "any other statement falling within constitutional protection of the right to petition government."

This is not to say that Section 556 is an aberrationally or unconstitutionally vague statute. Many of our state and federal statutes require a great deal of active interpretation and application by the judiciary. What it does mean, however, is that the statute's practical effect will remain unclear until it matures through continued interpretation by the Law Court, something likely to occur quickly given recent activity at the trial court level. For now, although many open issues remain, the Law Court has provided some guidance as to Section 556 in the two occasions in which it has interpreted the statute.³³

Morse Brothers, Inc. v. Webster

Morse Brothers arose from a "paradigm" situation of citizen opposition to a local development project.³⁴ Morse Brothers, operators of a bark mulching facility in Windham, obtained site plan approval in Poland and Auburn to relocate its facility to a parcel straddling the two municipalities, provided that it obtain a DEP solid waste license.³⁵ Two landowners, Webster and Platz, appealed the Poland and Auburn planning board decisions to the Superior Court, with the court denying the Poland appeal but sustaining the Auburn appeal based on Auburn's zoning ordinance.³⁶ Morse Brothers adjusted its plan to meet Auburn's zoning ordinance and obtained a conditional solid waste license from the state Department of Environmental Protection, which was affirmed with modifications by the Board of Environmental Protection (BEP) after appeal by Platz and Webster.³⁷ One of Morse Brothers' principals, Tim Morse, then applied for and obtained an entrance permit from Auburn to allow for a truck terminal on the Auburn portion of the property.³⁸ Webster and Platz appealed the BEP ruling as well as Auburn's granting of the truck terminal entrance permit.³⁹ The Superior Court denied the BEP appeal and dismissed the drive entrance appeal based on a lack of standing without reaching the merits.⁴⁰

Prior to the Superior Court's decision on the remainder of the drive entrance appeal, Morse Brothers filed a complaint against Webster and Platz in Superior Court for wrongful use of civil proceedings, seeking damages and injunctive relief

preventing Webster and Platz from commencing any other legal action or appeal regarding the property unless they demonstrate a *prima facie* case to the Superior Court.⁴¹ Along with damages and permanent injunctive relief, Morse Brothers moved for a preliminary injunction as well. Webster and Platz filed a special motion to dismiss Morse Brothers' complaint pursuant to 14 M.R.S.A. § 556.⁴² After the Superior Court denied the special motion to dismiss and a follow-up motion for reconsideration, Webster and Platz appealed to the Law Court and successfully moved the Superior Court to stay the underlying proceedings pending appeal.⁴³

The initial issue faced by the Law Court was whether Webster and Platz merited interlocutory review of the Superior Court's motion to dismiss. Recognizing that precluding a party from interlocutory appeal would exacerbate a key injury the statute seeks to prevent, the burden of unnecessary litigation, the Law Court established a limited exception to the final judgment rule for denials of special motions to dismiss pursuant to Section 556.⁴⁴ Having determined that it could properly hear Platz and Webster's appeal, the Law Court, relying on Massachusetts jurisprudence, then found that if the claims are in fact based on the moving party's exercise of its right of petition (an issue not in dispute), the burden shifts to the responding party to establish a lack of reasonable factual support or arguable legal basis, as well as actual damages.⁴⁵

Focusing on the merits of Webster and Platz's appeals of the Poland Planning Board decision, the BEP decision and the city of Auburn's drive entrance permit (their exercise of their right to petition), the Law Court found none to be "devoid of any reasonable factual support or any arguable basis in law."⁴⁶ With regard to the Poland appeal, the Law Court dismissed as insufficient affidavits from a Poland Planning Board member and from Morse Brothers' attorney alleging that Webster and Platz's attorney made statements suggesting that his clients would adopt aggressive and exhaustive litigation tactics. The Law Court stated "others' recollections of comments made by Webster and Platz's attorney do not speak to Webster's or Platz's intentions."⁴⁷ With regard to the appeal of the BEP decision, the Law Court referenced the Superior Court's ruling denying Morse Brothers' motion to dismiss the BEP appeal as frivolous, concluding that the finding that Webster and Platz's appeal was not frivolous was tantamount to a finding that it was not devoid of the necessary factual or legal support.⁴⁸ Finally, with regard to the defendants' appeal challenging Auburn's grant of a drive entrance permit, the Law

Court found that the dismissal of the appeal based on a lack of standing did not constitute a termination in favor of Morse and therefore could not support a claim for wrongful use of civil proceedings.⁴⁹ Accordingly, Morse Brothers had not met its burden under 14 M.R.S.A. § 556.

In *Morse Brothers*, the Law Court expended most of its energy on fact-specific determinations regarding the merits of each of Webster and Platz's appeals, demonstrating an inclination to hold Webster and Platz to a low standard. It was not faced with, and therefore did not resolve, the plethora of other legal issues that can attend a special motion to dismiss under Section 556. Some of those issues have been resolved in the Law Court's one subsequent foray into interpreting the statute. Others remain open.

Maietta Construction, Inc. v. Wainwright

The Law Court's 2004 decision in *Maietta Construction, Inc. v. Wainwright*⁵⁰ provided a bit more guidance on the practical application of Section 556. *Maietta* departs to some degree from the developer-versus-citizen group paradigm that precipitated the early outcry against SLAPPs, and demonstrates the Law Court's recognition of the breadth of Section 556. The facts are as follows. In 1999, Ted Wainwright sold 150 acres of land to the city of South Portland with the condition that no loam or soil could be removed from the site.⁵¹ Shortly thereafter, Maietta was granted a contract to develop the property into a recreational facility for the city, which contract included a prohibition against removing topsoil or loam from the property.⁵² During construction, Wainwright concluded that Maietta was removing loam and complained to the city council about those actions, retaining Attorney David Lourie to represent him in compelling the city to take action to halt Maietta's alleged loam removal.⁵³ Displeased with the city's response, Wainwright had Lourie contact local news channels, which eventually resulted in a series of articles and television reports regarding the issue.⁵⁴

In response, Maietta sued Wainwright and Lourie in the Superior Court, claiming defamation. Both Wainwright and Lourie filed special motions to dismiss, each of which were granted by the Superior Court.⁵⁵ The Superior Court awarded attorneys' fees to Lourie, finding that "the Plaintiffs were attempting to intimidate or silence an attorney who was representing a client with potentially legitimate concerns."⁵⁶ The Superior Court declined to award attorneys' fees to Wainwright, however, finding that Maietta's claims against

Wainwright, although insufficient to survive a special motion to dismiss under Section 556, held enough merit to militate against an award of attorneys' fees.⁵⁷ Maietta appealed the decision with regard to Wainwright and Wainwright cross-appealed, arguing that the Superior Court had abused its discretion by failing to award him attorneys' fees. The Law Court affirmed both rulings, and in doing so provided useful guidance as to a number of statutory issues.

The first issue the Law Court resolved in its decision was the practical scope of the phrase "a party's exercise of its right of petition," in essence recognizing the breadth of that phrase as defined by Section 556. Maietta's underlying complaint had referenced letters written on the loam issue by Wainwright or Lourie and sent to the city council and the mayor of South Portland, along with statements made by Lourie to various newspapers. In its appeal, Maietta argued that such activities were not the sort of petitioning activity envisioned for protection under the statute.⁵⁸ The Law Court summarily rejected that position, finding that Section 556 clearly applied to such activities.⁵⁹

Moving on to the statutory evaluation of the grounds for Wainwright's petitioning activity, the Court provided additional guidance, some direct and some implicit, as to the practical application of the statute's evaluative terms. As set forth above, Section 556 requires the dismissal of any suit based on petitioning activities unless the non-moving party can demonstrate that the activities were "devoid of any reasonable factual support or any arguable legal basis in law." As a matter of statutory rules of construction, Maine law provides that "and" and "or" are "convertible as the sense of a statute may require."⁶⁰ Accordingly, the statute is unclear on its face as to whether a non-moving party must demonstrate a lack of both reasonable factual support and arguable legal basis in order to avoid dismissal, or whether it need only demonstrate one. In *Maietta*, the Law Court appeared to suggest that the non-moving party must demonstrate both. The Court stated, "[t]he Superior Court was required to dismiss Maietta's complaint unless Maietta could show that there was no reasonable factual basis for Wainwright's petitioning."⁶¹ The Law Court found that Maietta had failed to make that showing and upheld the dismissal in that regard without ever discussing the adequacy of the legal basis for Wainwright's activities.⁶² One can infer that, if the Court had considered it necessary for the non-moving party to prove only one of two infirmities, a lack of reasonable factual support *or* a lack of

arguable legal basis, the Law Court would have engaged in an analysis of the legal bases for Wainwright's activities. Instead, the Law Court evaluated the factual support for Wainwright's actions, ignored the issue of the legal basis for those actions and upheld the Superior Court's dismissal, thereby suggesting that a non-moving party must prove both to avoid dismissal. Evidently, the "or" in Section 556 should be read as "and."

The second piece of guidance the Law Court provided for analyzing the moving party's petitioning activity was a bit more direct. In evaluating the factual support for Wainwright's petitioning, the Law Court referenced Wainwright's affidavit stating that he had personally witnessed loam removal, including attached pictures that Wainwright claimed to corroborate his statement.⁶³ The Law Court then held that "[b]ecause this evidence is viewed most favorably to the moving party, it cannot be said that the trial court exceeded the bounds of its discretion."⁶⁴ Nothing in the statute specifies that evidence must be viewed in such a light, stating only that the burden shifts to the non-moving party to show a lack of reasonable factual support or arguable legal basis. That being said, the Law Court's adoption of a converse summary judgment-like standard makes sense under Section 556. Because the Superior Court cannot make credibility determinations when ruling on a special motion to dismiss (as at summary judgment or on a motion to dismiss), underlying and often competing affidavits must necessarily be weighted toward one party or the other. Given the shift to the non-moving party of the burden to show no reasonable factual support or arguable legal basis and given the statutory goals of alleviating unnecessary litigation costs imposed on parties based on their petitioning activities, viewing underlying material most favorably to the moving party is the only sensible approach.

The Law Court then moved on to an analysis of actual damages under Section 556, which requires a non-moving party to demonstrate that the moving party's acts caused actual injury to the responding party.⁶⁵ In *Maietta*, the Law Court addressed the issue of what constituted "actual" injury. Maietta had taken issue with the Superior Court's ruling that it had failed to demonstrate actual injury arising from Wainwright's petitioning activity, arguing that its allegations of defamation, if established, would have constituted defamation *per se*, with presumed damages, which should suffice to demonstrate actual damage under Section 556.⁶⁶ The Law Court rejected that argument, ruling that damages *per se* are not equivalent to actual damages.⁶⁷ The Law Court went on

to quote an earlier decision requiring that actual damages be demonstrated through “evidence from which damage in a definite amount may be determined with reasonable certainty.”⁶⁸ The Law Court further found “the Legislature imposed the requirements of section 556 understanding that they would require plaintiffs to produce affirmative evidence of an injury.”⁶⁹ Accordingly, post-*Maietta*, plaintiffs faced with a special motion to dismiss under Section 556 must adduce some evidence of an actual injury.

Finally, the Law Court addressed the issue of attorneys’ fees under Section 556 in resolving Wainwright’s cross-appeal. The Superior Court had denied Wainwright’s attorneys’ fees request (while awarding fees to Lourie) on the premise that *Maietta*’s suit against Wainwright had more merit than its suit against Lourie.⁷⁰ The Law Court, in a 4–3 vote, affirmed the Superior Court’s ruling and approved its reasoning, stating “the trial court’s use of the merit of the respective cases, as a measure of whether attorney fees are appropriate, is logical because the anti-SLAPP statute is aimed at preventing litigation that has no chance of succeeding on the merits.”⁷¹ The majority found that, based on the record evidence, the claim against Wainwright had more merit than that against Lourie, justifying the Superior Court’s grant of attorneys’ fees in one instance but not the other.⁷² The dissent did not take direct issue with the majority’s use of relative merit in determining whether the Superior Court properly declined to award attorneys’ fees to Wainwright. Instead, the dissent argued that the majority (and the Superior Court) erred in evaluating the record, concluding that the claim against Wainwright had no more merit than the claim against Lourie and then arguing that neither claim, in fact, had merit.⁷³

Accordingly, both the majority and the dissent in *Maietta* appear to have agreed that a claim having some merit might insulate a plaintiff from an award of attorneys’ fees under the statute, or at least would provide a court with the discretion to decline to award the moving party its attorneys’ fees. *Maietta*’s resolution of the attorneys’ fees issue comports both with the discretionary language of the statute and the historical aversion to the award of attorneys’ fees under state law. Corollary to the Law Court’s merit-based approach to attorneys’ fees, however, is the conclusion that simply having some merit to one’s case against a defendant exercising its right to petition does *not* insulate a plaintiff from having its case dismissed pursuant to Section 556. If a party responding to a special motion to dismiss cannot independently demonstrate that the

petitioning acts were devoid of any reasonable factual support or arguable legal basis and that the responding party incurred actual injury, the fact that its claim has some merit will not save the claim although it might protect it from attorneys’ fees. Again, such a conclusion makes sense given the existing burdens under the statute. Although a claim might have merit under a Rule 12(b)(6) analysis, or pursuant to a summary judgment review, or on the even playing field of trial where credibility determinations play a key role, the burden-shifting under Section 556—heightened by the practice of viewing material most favorably to the *moving* party—necessarily allows for the dismissal of claims that under other standards might have some merit.

In sum, *Maietta* provided useful guidance as to various elements of Section 556. There is no dispute that indirect petitioning activities, such as communications with media outlets, fall within the ambit of the statute’s protection. Once actions are found to serve a petitioning function, it seems likely that a non-moving party will have to demonstrate both a lack of reasonable factual support and a lack of arguable legal basis for that function. When evaluating underlying material, a court should view that material most favorably to the moving party. With regard to the non-moving party’s other required showing, actual damages, it must provide affirmative evidence of injury, sufficient to determine damages with a reasonable certainty. Finally, with regard to attorneys’ fees, a trial court may consider the relative merits of the responding party’s underlying claims when deciding whether to award attorneys’ fees to a successful movant pursuant to Section 556.

Open Issues

NOTWITHSTANDING THE UTILITY OF *MAIETTA* AND *MORSE Brothers* in filling in the scaffolding set up in Section 556, a great many open issues remain. Some of those issues have received attention by courts in other jurisdictions, and charting the course of other states’ anti-SLAPP statutes through those states’ courts can provide useful guidance as to issues that the judiciary in Maine is likely to face. To do so, however, would require far more space than is available here. Instead, a listing of examples of open statutory and policy issues is briefly outlined below. Most have been addressed in some manner by courts in other states (Massachusetts and California are jurisdictions with extensive judicial treatment of their anti-SLAPP statutes) or by legal commentators.

Open Statutory Issues

• **Attorneys' fees**—Although the availability of attorneys' fees to a successful movant under Section 556 is no longer an issue, and it is likely that the *Maietta* merit-based approach will stand, issues remain open. For example, the statute provides for a discretionary award of reasonable attorneys' fees "including those incurred for the special motion and any related discovery matters." Does that include attorneys' fees for a Rule 12 motion to dismiss filed prior to the special motion to dismiss, or for an answer, or for the cost of evaluating the underlying lawsuit? *Maietta* does not distinguish between the award of all attorneys' fees incurred in relation to the lawsuit in general and the subset directly related to the special motion to dismiss.

• **Actual Injury**—What does *Maietta's* "affirmative evidence" of an injury mean, particularly in the context of the quotation in *Maietta* suggesting that evidence sufficient to determine a damage amount with reasonable certainty is required? For example, in response to a special motion to dismiss a defamation claim, does an affidavit stating that the plaintiff was embarrassed or lost sleep suffice as affirmative evidence of an injury? If so, does that largely eviscerate the actual injury requirement? If not, what would be necessary?

• **The Sixty-Day Deadline**—The statute provides for the filing of a special motion to dismiss within sixty days of service of the complaint, but allows for later filing, in the court's discretion, upon terms the court deems proper. What should the court consider in entertaining a motion to file a special motion to dismiss more than sixty days after service? If a special motion to dismiss is based on a cross-claim or counterclaim, is the sixty-day window triggered by service of the complaint, as specified in the statute, or by the cross-claim or counterclaim at issue?

• **The Broad Definition of "government proceeding"**—Many anti-SLAPP statutes, including Maine's, incorporate judicial bodies within the definition of "government proceeding." Doing so has allowed plaintiffs faced with a special motion to dismiss to argue that their lawsuit, filed with a judicial body, is itself an exercise of their right to petition and therefore should not be dismissed under a statute protecting the right to petition. Such a circular argument, of course, rests on a dubious logical foundation, but its circularity is a function of the language of the statute—in theory, any complaint filed in any court would be an exercise of one's right to petition. Given that the whole purpose of Section 556 and similar laws is to

minimize the damage of abusive lawsuits based on a party's exercise of its right to petition, such a literal reading would lead to an absurd result. That being said, until the Law Court resolves the issue, respondents to anti-SLAPP special motions to dismiss will make the argument.

Open Policy Issues

• **Corporate Abuse of Anti-SLAPP Legislation**—Not surprisingly, entities are beginning to find ways to use anti-SLAPP statutes for less legitimate purposes. One example is the trend of corporate defendants' use of special motions to dismiss under anti-SLAPP statutes as a delaying tactic in the face of legitimate consumer protection or product liability lawsuits. Absent a fee-shifting disincentive, defendants are filing largely futile special motions to dismiss and then engaging in interlocutory appeals of the inevitable denials of those motions.⁷⁴ California, in response to such cases—wherein the cure for abusive litigation has morphed into a variant of the disease—has amended its anti-SLAPP statute in a number of ways intended to minimize such abuses, including prohibiting the use of an anti-SLAPP motion in an action based on the movant's commercial speech, prohibiting the use of an anti-SLAPP motion in an action brought solely in the public interest, and removing interlocutory appeal rights in such situations.⁷⁵

• **Potential Inconsistency with Abuse of Process and Malicious Prosecution Claims**—State and federal courts throughout the country consistently recognize that the motive behind a party's exercise of its right to petition is irrelevant to the issue of whether that right is protected.⁷⁶ Many anti-SLAPP statutes, either by their own terms or through judicial interpretations, embrace that principle. However, in most jurisdictions, a party's motive is a key element of an abuse-of-process or malicious prosecution claim. Accordingly, Party X could file a lawsuit against Party Y with the motive of distracting, delaying, and bankrupting Party Y. Party Y could prevail in the lawsuit, then file a legitimate abuse-of-process claim against Party X. Party X, however, could file a special motion to dismiss the abuse-of-process claim and, if Party X's initial lawsuit rested on any nominally reasonable factual support or nominally arguable legal grounds, Party Y's abuse-of-process claim would be dismissed, since motive is irrelevant to an anti-SLAPP analysis. There are ways for courts to address this tension, but this tension clearly exists.⁷⁷

Conclusion

AS NOTED ABOVE, MANY OF THESE ISSUES HAVE RECEIVED some attention by courts in other jurisdictions, and those decisions may serve as useful, if non-binding, guidance in interpreting Section 556. Some of the open issues outlined above, however, are specific to the language of Maine's anti-SLAPP statute. Although the anti-SLAPP statute is currently in its infancy, we expect it to mature through additional interpretations by the Law Court, ideally resolving many of these issues. Anecdotal information suggests that more defendants are recognizing the protections afforded by Section 556, with attendant growth in the filing of special motions to dismiss and thus judicial review. It may very well be that the statute has a short childhood. ¶¶

1. In the interests of disclosure, one of the authors is currently representing a party involved in an appeal before the Law Court of a Superior Court decision on a special motion to dismiss under Maine's anti-SLAPP statute. Both authors also represent parties with pending special motions to dismiss before the Superior Court.

2. Of course, the United States is not a true democracy, rather a representational democracy. Given that each citizen's ability to effect policy change through her acts of voting is, therefore, attenuated, since it is our elected legislators who make policy on our behalf, one can argue that our ability to speak freely is that much more important.

3. George W. Pring, *SLAPPS: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3, 8 (1989).

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

5. GEORGE W. PRING & PENELOPE CANAN, *SLAPPS: GETTING SUED FOR SPEAKING OUT* (1996), xi-xii.

6. Jennifer E. Sills, *SLAPP (Strategic Lawsuits Against Public Participation): How Can the Legal System Eliminate Their Appeal?*, 25 CONN. L. REV. 547, 566 (1993).

7. PRING & CANAN (1996).

8. See generally, Pring, *SLAPPS*, 7 PACE ENVTL. L. REV. 3 (1989).

9. See The California Anti-SLAPP Project, <http://www.casp.net/statewa.html>.

10. See, *id.* (listing all current anti-SLAPP legislation throughout the United States).

11. 365 U.S. 127 (1961).

12. 381 U.S. 657 (1965).

13. *Id.* at 670.

14. *Id.*

15. See *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *Pennington*, 381 U.S. at 670.

16. 458 U.S. 886 (1982)

17. See, e.g., *Chemisor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119, 128 (3rd Cir. 1999) (First Amendment principles reflected in *Noerr-Pennington* doctrine bar state common-law tort claims); *Eaton v. Newport Bd. of Educ.*, 975 F.2d 292 (6th Cir. 1992) (*Noerr-Pennington* analysis applied to prohibit claims for the tort of outrageous conduct); *Hamilton v. Accu-Tek*, 935 F.Supp. 1307, 1321 (E.D.N.Y. 1996) (*Noerr-Pennington* immunity applies to causes other than anti-trust).

18. 376 U.S. 254 (1964).

19. *Id.* at 270-71.

20. *Id.* at 283.

21. See *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964).

22. See *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

23. See *Gertz v. Robert Welch Inc.*, 418 U.S. 323, 347-48 (1974). Pri-

vate individuals can transform themselves into public figures for limited purposes, however, thereby triggering the *New York Times Co.* standard. *Id.* at 344-45.

24. See Legislative History LD 781 (House Report, May 24, 1995). The bill was initially drafted by Portland Representative Fred Richardson with input from one of this article's authors.

25. Compare 14 M.R.S.A. §556 to MASS. GEN. LAWS ch. 231, § 59H; see also *Morse Bros. Inc. v. Webster*, 2001 ME 70, ¶ 15, 772 A.2d at 848.

26. 14 M.R.S.A. §556 (1995).

27. 14 M.R.S.A. § 556.

28. 14 M.R.S.A. § 556.

29. 14 M.R.S.A. § 556.

30. 14 M.R.S.A. § 556.

31. 14 M.R.S.A. § 556.

32. 14 M.R.S.A. § 556.

33. The statute has received slightly more attention from the Superior Courts in the state. The earliest judicial decision on the statute came in *Millet, et. al. v. Atlantic Richfield*, Docket No. CV-98-555, Cumberland Cty. (Cole, August 30, 1999). In that case the plaintiffs filed a class action alleging that the defendants had promoted the use of MTBE-content reformulated gasoline in Maine, resulting ultimately in contaminated wells. Several defendants, two of whom were represented by one of the authors of this article, filed successful special motions to dismiss. The successful defendants argued that they had been sued because of statements they had made to the public, the press and various officials about MTBE. Relying on Massachusetts and federal case law, the court, in an exhaustive 17-page decision, held that the defendants and their statements fell within the scope of the statute and that the defendants' motives were irrelevant as to whether their rights were protected. The court also found that the plaintiffs had failed to demonstrate "actual" injury. The decision was not appealed.

34. 2001 ME 70, ¶¶ 2-7, 772 A.2d 842, 844-45.

35. *Id.* at ¶ 2.

36. *Id.* at ¶ 3.

37. *Id.* at ¶ 4.

38. *Id.* at ¶ 5.

39. *Id.* at ¶¶ 4-5.

40. *Id.* at ¶ 6.

41. *Id.* at ¶¶ 6-7.

42. *Id.* at ¶ 8.

43. *Id.* at ¶ 9.

44. *Id.* at ¶ 15.

45. *Id.* at ¶ 20.

46. *Id.* at ¶ 21.

47. *Id.* at ¶ 24.

48. *Id.* at ¶ 27.

49. *Id.* at ¶ 30.

50. 2004 ME 53, 847 A.2d 1169.

51. *Id.* at ¶ 2.

52. *Id.*

53. *Id.* at ¶ 3.

54. *Id.*

55. *Id.* at ¶¶ 4-5. One of the authors of this article represented Attorney Lourie in this litigation.

56. *Id.* at ¶ 5.

57. *Id.*

58. *Id.* at ¶ 7.

59. *Id.*

60. 1 M.R.S.A. § 71(2).

61. *Id.* at ¶ 8.

62. *Id.*

63. *Id.*

64. *Id.* (emphasis added).

65. 14 M.R.S.A. § 556.

66. 2004 ME 53, ¶ 9.

67. *Id.* at ¶ 10.

68. *Id.*, quoting *Dairy Farm Leasing Co. v. Hartley*, 395 A.2d 1135, 1140 (Me. 1978).

69. *Id.*

70. *Id.* at ¶ 11.

71. *Id.* at ¶ 12.

72. Although the Law Court was probably correct in its finding, particularly given the discretionary language of the statute (“the court *may* award the moving party costs and reasonable attorney’s fees”), its statement that the anti-SLAPP statute “is aimed at preventing litigation that has no chance of succeeding on the merits” may unnecessarily cloud an otherwise clear ruling. Parties responding to special motions to dismiss under Section 556 may seize on this language in order to argue that if their claims have any merit whatsoever, they should not be dismissed. In the view of the authors such an argument would ignore the burden-shifting set forth in Section 556 and heightened in *Maietta*, and would ignore the full context of Section 556 and its goal of protecting the First Amendment right to petition. It would also, of course, contravene the Law Court’s actual ruling in *Maietta*, in which it found that *Maietta*’s claim against Wainwright may have had some merit, thereby justifying the Superior Court’s decision not to award Wainwright his attorneys’ fees, and yet affirmed the dismissal of that claim under Section 556.

73. 2004 ME 53, ¶¶ 27–34. The dissent also took issue with the majority’s distinction between Lourie as agent and Wainwright as principal. *Id.* at ¶¶ 36–38.

74. See Joshua L. Baker, *Chapter 338: Another New Law, Another SLAPP in the Face of California Business*, 35 McGeorge L. Rev. 409, 413 (2004).

75. Cal. Civ. Proc. Code § 425.17(b)-(e) (2003).

76. See, e.g., *United Mine Workers v. Illinois State Bar Ass’n*, 389 U.S. 217, 222 (1967); *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965); *Millett v. Atlantic Richfield Co.*, Docket No. CV-98-555 Decision and Order at 6 (J. Cole, 1999).

77. See Richard J. Yurko & Shannon C. Choy, *Reconciling the Anti-SLAPP Statute with Abuse of Process and other Litigation-Based Torts*, 51 B. B.J. 15, 17 (April 2007). ▲▲