Loyola of Los Angeles Law Review

Volume 54 | Number 2 Article 7

Winter 2-1-2021

Free Speech in the Balance: Judicial Sanctions and Frivolous Slapp Suits

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FREE SPEECH IN THE BALANCE: JUDICIAL SANCTIONS AND FRIVOLOUS SLAPP SUITS

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The balance between free speech and access to courts in defamation tort actions is fraught with public policy concerns. On one hand, plaintiffs should have unencumbered access to the justice system to remedy real harms brought upon them by defamatory statements. However, defamation suits should not be wielded to suppress the constitutionally protected free speech rights of news organizations and of concerned citizens that are vital for well-functioning democracies. This Article argues for a new type of remedy, namely enhanced Rule 11 attorney sanctions, such as suspension or debarment, that should be available to defendants of defamation suits brought by repeat players that use "cookie-cutter" complaints. This Article specifically proposes a novel four-part test implicating use of attorney sanctions as a remedy for filing niche types of frivolous lawsuits. Per this test, a court should weigh the following factors to determine if such sanctions are warranted: (1) if the plaintiff habitually files and loses defamation-type suits to prevent protected free speech; (2) the nature of the defendant, especially if the defendant is a news organization; (3) the proportionality of the damages requested, and; (4) if a countersuit is at issue.

In this Article, we examine a case study in the form of a decades' long frivolous litigation pattern exhibited by Murray Energy and Robert Murray as its CEO. Murray Energy has been characterized as the single largest privately-owned coal corporation in the United States, and thus constitutes a prominent actor well-suited for assessing the potential strengths and weaknesses of developing this new remedy. We ultimately conclude that enhanced Rule 11 attorney sanctions, as weighed and levied vis-à-vis the proffered test, could constitute a potentially potent deterrent to frivolous lawsuits designed to inhibit the free speech of the press and of concerned citizens—which indeed occupy a crucial watchdog role in healthy democracies.

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INTRODUCTION

Current remedies are ineffective at halting frivolous lawsuits intended to suppress constitutionally protected free speech, rather than to make the injured party whole—generally termed Strategic Lawsuits Against Public Participation (SLAPP) suits.[1] Remedies for such frivolous lawsuits include early dismissal at the 12(b)(6) stage as well as attorney's fees.[2] However, such monetary remedies often prove insufficient when the legally savvy, well-capitalized parties that typically bring SLAPP suits make a simple cost-benefit analysis. That is, such parties conclude that the benefits of suppressing critical speech via SLAPP suits—i.e., including the projected future benefits of chilling later-in-time critical speech—outweighs the direct costs of any monetary sanctions.[3] Rational SLAPP suit filers therefore often determine that these frivolous suits constitute, on the balance, an exceedingly fair bargain; consequently, the free speech of the press and of related watchdog entities is suppressed by such powerful actors—to the profound detriment of core democratic principles.[4]

This Article argues for a new remedy to combat such frivolous lawsuits, which involves courts utilizing a four-part test to determine if Rule 11 sanctions are warranted. We argue that, in certain situations, deterrence is best achieved when sanctions are directed towards the attorneys filing frivolous lawsuits, and not the plaintiffs bringing them. Thus, to achieve actual deterrence, courts should apply sanctions against attorneys that file such suits—as compared to the well-capitalized clients that prove all too willing to absorb the relatively small monetary sanctions. Moreover, the appropriate remedy for particularly egregious SLAPP suits should be attorney suspension or debarment; as noted above, monetary damages often prove insufficient in deterring powerful plaintiffs, and thus such institutional-professional ramifications for involved attorneys are required for true deterrence. Attorneys, then, should function as gatekeepers against frivolous lawsuits—which is a proper role given their institutional expertise and ethical responsibilities. As this Article

1. Laura J. Ericson-Siegel, Comment, *Silencing SLAPPs: An Examination of Proposed Legislative Remedies and a "Solution" for Florida*, 20 FLA. ST. U. L. REV. 487, 496 (1992).

2. *Id*; Michael Eric Johnston, *A Better SLAPP Trap: Washington State's Enhanced Statutory Protection for Targets of "Strategic Lawsuits Against Public Participation"*, 38 GONZ. L. REV. 263, 264 (2002/3).

3. Johnston, *supra* note 2, at 264.

4. *Id.*

contends, such enhanced sanctions are warranted for those particularly egregious circumstances where attorneys merely "cut and paste" complaints from suits previously dismissed at the 12(b)(6) or summary judgment stage.

This Article examines a case study as one important exemplar of such egregious misconduct: a decades' long litigation pattern exhibited by Murray Energy, pertinent subsidiaries, and Robert Murray as its CEO designed to halt the critical speech of news agencies. Our case study reveals that such "cut and paste" complaint strategies were utilized in a series of cases dismissed at the 12(b)(6) or summary judgment stage in the Murray Energy litigation context—and that traditional remedies designed to curtail such frivolous suits indeed proved insufficient. As a consequence, this case study demonstrates that the variety of enhanced Rule 11 sanctions explored in this Article likely are required to combat such deeply problematic litigation patterns.

This Article will proceed as follows. Part I provides an overview of SLAPP suits and of anti-SLAPP legislation adopted in some jurisdictions. Part II proffers a case study in the form of particularly egregious SLAPP litigation pattern exhibited by Murray enterprises. Part III discusses potential solutions to frivolous SLAPP suits. Part IV focuses on the use of Rule 11 sanctions to deter attorneys from filing frivolous suits. Part V proposes a novel, four-part test to determine if such enhanced attorney sanctions are warranted. Finally, Part VI ultimately concludes that enhanced Rule 11 attorney sanctions likely are required to curtail such frivolous lawsuits that are greatly detrimental to free speech of the press and thus ultimately to core democratic values.

I. STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION SUITS

SLAPP suits are civil lawsuits generally filed against news organizations, private individuals, or non-governmental agencies that communicate with government bodies, officials, or the electorate on specific issues of public interest or concern.[5] These suits can involve environmental concerns; neighborhood concerns (e.g., siting issues involving dumps, toxic waste disposals, and mines); dissatisfied

5. George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENV'T L. REV. 3, 7–8 (1989).

consumers or tenants; and opponents of urban or suburban development.[6] As examples, SLAPP suits often are filed by "real estate developers, property owners, police officers, alleged polluters, business owners, and state or local government agencies."[7] The goals of SLAPP suits are fourfold: (1) to recover for financial losses due to successful opposition regarding an issue of public interest; (2) to prevent future losses on similar subsequent public policy issues; (3) to intimidate and deter others from joining the opposition; and (4) to silence current and future opposition to the political issue.[8]

SLAPP suit filers improperly wield litigation as an instrument to suppress political claims and public debate.[9] The filer focuses on the judicial process to silence the target and has scant concern about the substantive outcome of the litigation.[10] SLAPP filers utilize the judicial system because of perceived and genuine advantages. First, filers—unlike respondents—typically have the advantage of familiarity with the judicial system. Second, use of the judicial system advantages filers with access to large amounts of capital. Third, there is the potential psychological trauma individual respondents experience when faced with multimillion-dollar lawsuits—i.e., filers use the legal system as a psychological weapon.[11] And more broadly, damage to reputational, personal, financial, and psychological interests are harms that are usually not as poignant with corporations as compared to individual respondents.[12] Fourth, and finally, SLAPP filers have an added advantage of reaping indirect, later-in-time benefits, in that such suits disincentivize future parties from filing suit or bringing public attention to the issue due to fear of financial retribution.[13]

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6. Penelope Canan, *The SLAPP from a Sociological Perspective*, 7 PACE ENV'T L. REV. 23, 25 (1989).

7. *Id.* at 26.

8. Ericson-Siegel, *supra* note 1, at 492.

9. Canan, *supra* note 6, at 23.

10. J. Reid Mowrer, Casenote, *Protection of the Public Against Litigious Suits ("PPALS"): Using 1993 Federal Rule 11 to Turn SLAPPs Around*, 38 NAT. RES. J. 465, 466 (1998).

11. Canan, *supra* note 6, at 26 (stating that the average SLAPP suit was for $9 million).

12. *Id.* at 26–29 (describing the case of Victor Monia whose career and personal life were detrimentally affected by his fear of a $40,150,000 suit).

13. *Id.* (describing a SLAPP lawsuit brought by Parnas Corporation against multiple homeowners' associations and their presidents in which the company deposed city council members to cause fear in the community and which led to the homeowners' groups dissolving because they feared the financial liability associated with the suit).

SLAPP suits constitute a particularly enticing option for those filers that possess substantial amounts of capital. Specifically, for those filers who are worth millions or even billions of dollars, a few thousand spent on legal fees to suppress negative speech may be an exceedingly fair bargain.[14] For instance, with "eco-SLAPP suits"—i.e., as discussed in more detail below—investment of thousands of dollars to suppress negative press is often a profitable investment in the long term.

Statistically, most SLAPP defendants prevail, but only after an average of thirty-six months in the litigation process.[15] Savvy filers can leverage their expertise with the legal system to strategically extend the process. Thus, even with a favorable dismissal of the suit, the legal fees can cost more than $20,000.[16] And simply seeking a high damage award can create multidimensional problems for the SLAPP target; for instance, defendants "can face bankruptcy, loss of credit, and foreclosure" in contesting such frivolous suits.[17]

SLAPP suits also produce a significant social cost. SLAPP suits, by their very nature, aim to chill debate on important public and political issues. SLAPP suits attempt to decrease public participation and suppress the speech of those who may raise valid concerns—which thus routinely imperils the free speech rights of news organizations and related entities that occupy a crucial watchdog role in democracies.[18] Ripple effects of SLAPP suits also are far-reaching, as the broader organizations involved in SLAPP suits can see decreased membership and participation, resulting in such organizations becoming defunct or disbanded.[19]

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14. Victor J. Cosentino, Comment, *Strategic Lawsuits Against Public Participation: An Analysis of the Solutions*, 27 CAL. W. L. REV. 399, 410 (1991).

15. Canan, *supra* note 6, at 26.

16. Ericson-Siegel, *supra* note 1, at 494.

17. *Id.*

18. Ralph Michael Stein, *SLAPP Suits: A Slap at the First Amendment*, 7 PACE ENV'T L. REV. 45, 53 (1989).

19. *Id.*; *see also* Canan, *supra* note 6, at 29 (explaining that three homeowners' groups "fell apart" as members "withdrew from the organizations, afraid that they would be swept under $40,150,000 worth of liability"); Robert H. Boyle, *Activists at Risk of Being SLAPPed*, SPORTS ILLUSTRATED, Mar. 25, 1991, at 6, 7–8 (quoting Victor Monia regarding a SLAPP suit brought by Parnas Corporation against the West Valley Taxpayers and Environmentalists Association: "We had had a very active organization with 550 homeowners . . . . The year after the suit . . . . [m]embership had dropped to 100, and by the second year of the suit, it was really only the board of directors and hard-core folks, about 25 of us, who were left.").

A. "Eco-SLAPP" Litigation

Eco-SLAPP litigation emerged in the early 1970s to oppose the rising environmental movement.[20] Eco-SLAPP litigation follows a formulaic pattern: environmentalists initially petition the government and/or news agencies or bring specific environmental concerns to the public's attention.[21] Thereafter, the opposing party sues these environmentalists or news agencies for monetary damages based on defamation or tortious interference with contract.[22] These eco-SLAPP suits usually have two goals in mind. First, such suits can result in real monetary hardship for defendants.[23] Second, eco-SLAPP suits can produce a chilling effect on free speech—as news agencies or concerned individuals will refrain, in the future, from bringing such matters of environmental concern to the broad public's attention due to fear of legal retribution.[24]

Many eco-SLAPP suits, however, prove unsuccessful on the substantive merits. For instance, in *Sierra Club v. Butz*,[25] a U.S. District Court dismissed the counterclaim and stated:

> [T]he First Amendment provision guaranteeing the right of the people to petition the government for a redress . . . . is a basic freedom in a participatory government . . . these are the "indispensable democratic freedoms" that cannot be abridged if a government is to continue to reflect the desires of the people.[26]

But libel and defamation actions are notoriously expensive and difficult to defend.[27] Furthermore, the mere threat of being put in defense of a lawsuit may chill the exercise of First Amendment

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20. GEORGE W. PRING & PENELOPE CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT 84 (1996).

21. *Id.*

22. *See generally id.* at 83–104 (stating numerous opposing parties who sought monetary damages based on defamation or tortious interference with contract).

23. As representative examples, in *Immuno AG. v. Moor-Jankowski*, 567 N.E.2d 1270 (N.Y. 1991), Dr. Moor-Jankowski spent more than $1 million and seven years defending a SLAPP suit; and in *Hodgins Kennels, Inc. v. Durbin*, 429 N.W.2d 189 (Mich. Ct. App. 1988), *rev'd in part*, 438 N.W. 2d 247 (Mich. 1989) (mem.), five animal welfare advocates in Michigan settled for over $800,000 and spent nine years in court, whereas the kennel owners were awarded $329,739 in damages. *See* PRING & CANAN, *supra* note 20, at 100–03.

24. Canan, *supra* note 6, at 30.

25. 349 F. Supp. 934 (N.D. Cal. 1972).

26. *Id.* at 936.

27. Lee Levine & Stephen Wermiel, *Behind the* U.S. Reports*: Justice Brennan's Unpublished Opinions and Memoranda in* New York Times v. Sullivan *and Its Progeny*, 19 COMMC'N L. & POL'Y 227, 246 (2014).

freedoms.[28] Consequently, there is legitimate concern that eco-SLAPP suits are improperly wielded by such powerful actors to harass and coerce their targets, and thus such suits are deeply problematic from a public policy standpoint.

B. SLAPP Suits Against the Media

Frivolous lawsuits directed towards media outlets are a second subcategory of SLAPP suit.[29] These suits increasingly are gaining public prominence as President Trump continues to threaten the press, focusing expressly on news organizations.[30] There are two different funding models for SLAPP suits directed against the media: (1) direct litigation—wherein well-capitalized entities (e.g., billionaires) sue news organization directly; and (2) indirect litigation—wherein such powerful entities set up funds for the broader purpose of defraying litigation costs for any parties seeking to sue news organizations.[31]

Indirect funding for litigation constitutes a particularly egregious mechanism when effectuated covertly—i.e., as such tactics enhance the chilling effect of lawsuits. That is, covert third-party funding often has an ultimate goal of achieving censorship of the target and not of legitimate compensation for alleged tortfeasor harms.[32] Accordingly, if a suit is funded by a third party with improper censorship motivations, then such bad-faith actors might "embrace economically questionable scorched-earth litigation tactics or refuse reasonable settlements in order to increase the costs of publication."[33] This type of litigation may intimidate publishers and news organizations to avoid publishing "liberal" messages as opposed to "conservative" articles due to distorted litigation costs.[34] Ultimately, then, such mechanisms can greatly compromise freedoms of speech and of the

28. Stein, *supra* note 18, at 53.

29. *See generally* Lili Levi, *The Weaponized Lawsuit Against the Media: Litigation Funding as a New Threat to Journalism*, 66 AM. U. L. REV. 761 (2017) (discussing SLAPP suits brought against media and its effects).

30. Justin Wise, *Trump Escalates Fight Against Press with Libel Lawsuits*, THE HILL (Mar. 8, 2020, 6:02 AM), https://thehill.com/homenews/media/486273-trump-escalates-fight-against-press-with-libel-lawsuits.

31. Levi, *supra* note 29, at 763–64 n.4.

32. *Id.* at 782–83.

33. *Id.* at 785.

34. *Id.* at 785–86.

press—which, of course, implicate core democratic-constitutional principles.[35]

II. CASE STUDY: ROBERT MURRAY AND MURRAY ENERGY

Murray Energy has been characterized as the largest privately owned coal corporation in the nation.[36] Murray claims to operate seventeen mines in the United States and Colombia with approximately seven thousand employees.[37] Throughout the time period of pertinent litigation, Murray Energy's chairman, president, and chief executive officer (CEO) was Robert E. Murray.[38] Over the years, Murray Energy and its CEO very publicly voiced opposition or support for various energy policies, depending on the shifting politics of presidential administrations.[39]

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35. *Id.* at 784–85.

36. Broghan Swart, *Is Murray Energy the Nation's Largest Coal Company?*, POLITIFACT (Nov. 8, 2019), https://www.politifact.com/west-virginia/statements/2019/nov/08/joe-manchin/murray-energy-nations-largest-coal-company/. Note that like numerous other coal corporations in the prior decade, Murray Energy filed for Chapter 11 bankruptcy in October 2019. *See, e.g.*, Pippa Stevens, *Murray Energy Joins Growing List of Coal Companies to Declare Bankruptcy*, CNBC (Oct. 29, 2019, 9:17 AM), https://www.cnbc.com/2019/10/29/murray-energy-joins-list-of-coal-companies-to-declare-bankruptcy.html. Despite this recent bankruptcy filing, Murray Energy nevertheless constitutes an exceedingly useful case model for this Article due to both (1) Murray's decades-long litigation pattern involving "cookie-cutter" complaints and court dismissals, and (2) the acute national attention given to Murray's misconduct in very recent years.

37. *Corporate Overview*, MURRAY ENERGY CORP., http://www.murrayenergycorp.com/corporate-overview/ (last visited Nov. 22, 2020) [https://web.archive.org/web/20200828183821/http://www.murrayenergycorp.com/corporate-overview/] [hereinafter *Murray Corporate Overview*].

38. Robert E. Murray, *A Message from Our Chairman, President, and Chief Executive Officer*, MURRAY ENERGY CORP., http://www.murrayenergycorp.com/message-from-the-founder-ceo/ (last visited Nov. 22, 2020) [https://web.archive.org/web/20180328145108/http://www.murrayenergycorp.com/message-from-the-founder-ceo/].

39. Lisa Friedman, *How a Coal Baron's Wish List Became Trump's To-Do List*, N.Y. TIMES (Jan. 9, 2018), https://nyti.ms/2ErSbf0; *see also* Murray, *supra* note 38 ("[O]ur industry is embattled from excessive federal government regulations from the Obama Administration and by the increased use of natural gas for the generation of electricity."); Matthew Kazin, *Murray Energy CEO on What's Smothering the Coal Industry*, FOXBUSINESS (Apr. 14, 2016), https://www.foxbusiness.com/politics/murray-energy-ceo-on-whats-smothering-the-coal-industry (quoting Robert E. Murray as blaming the coal industry's decline on "the Obama Administration and the Democrat Party and the Democrats in Washington D.C." and commenting that Ted Cruz was his favored candidate in the 2016 presidential race because he "has shown concern about low-cost electricity"); *More Obama-Era Coal Rules Should be Rolled Back: Murray Energy CEO*, FOXBUSINESS (July 20, 2018), https://www.foxbusiness.com/energy/more-obama-era-coal-rules-should-be-rolled-back-murray-energy-ceo (quoting Robert E. Murray praising the Trump Administration for easing energy regulations and urging President Trump to do more to prevent coal-fired plants from closing).

On June 21, 2017, Murray Energy and Robert Murray as its CEO sued television host and comedian John Oliver for defamation in a West Virginia court, after Oliver aired a segment critical of Murray and his corporation.[40] The *Oliver* case was dismissed from circuit court less than a year later.[41] A few months prior to the *Oliver* suit, Murray Energy had, in fact, sued the *New York Times* for defamation in the same West Virginia court.[42] And both suits occurred within a much broader context spanning two decades wherein Murray filed a series of lawsuits against media and individual citizens critical of Murray enterprises.[43]

As West Virginia, like many jurisdictions, lacks anti-SLAPP legislation—i.e., unpacked at length below—courts should utilize common law doctrine regarding free speech and their sanctioning powers under Rule 11 to combat bad-faith actors that systematically file frivolous lawsuits to curtail public debate.[44] As the American Civil

40. *See* Complaint at 1, Marshall Cnty. Coal Co. v. Oliver, No. 17-C-124 (W. Va. Cir. Ct. June 21, 2017) [hereinafter Oliver Complaint]; Kevin Lui, *Coal Boss Robert Murray Is Suing John Oliver After Being Mocked on Last Week Tonight*, TIME (June 23, 2017, 9:28 AM), http://time.com/4829720/john-oliver-lawsuit-robert-murray-coal/.

41. Findings of Fact, Conclusions of Law and Order Granting Defendants' Motions to Dismiss for Failure to State a Claim at 1, 27–28, Marshall Cnty. Coal Co. v. Oliver, No. 17-C-124 (W. Va. Cir. Ct. Mar. 15, 2018) [hereinafter Order Granting Motion to Dismiss Oliver Complaint].

42. *See* Complaint at 1, Marshall Cnty. Coal Co. v. The N.Y. Times Co., No. 17-C-70 (W. Va. Cir. Ct. May 3, 2017) [hereinafter The N.Y. Times Complaint].

43. *See infra* Table 1.

44. S.B. 698, 2007 Leg., Reg. Sess. (W. Va. 2007) (introduced version), http://www.wvlegislature.gov/bill_status/bills_text.cfm?billdoc=sb698%20intr.htm&yr=2007&sesstype=RS&i=698. The bill, titled the "Anti-SLAPP Actions Act," was introduced February 19, 2007, and sponsored by Senator Unger with no other sponsors. It was referred to the Committee on the Judiciary but died in Committee. *See Bill Status—2007 Regular Session: Senate Bill 698*, W. VA. LEG., http://www.wvlegislature.gov/bill_status/bills_history.cfm?year=2007&sessiontype=RS&input=698 (last visited Nov. 22, 2020); *see generally* Pushinsky v. W. Va. Bd. of L. Exam'rs, 266 S.E.2d 444, 449 (W. Va. 1980) (concluding that the West Virginia Constitution's limitations on the power of the government to inquire about associations and speech is more stringent than the federal Constitution); Webb v. Fury, 282 S.E.2d 28, 37 (W. Va. 1981) (finding an absolute privilege for free speech regarding matters of a public concern in the context of an environmental group speaking out about violations of a coal company), *overruled by* Harris v. Adkins, 432 S.E.2d 549 (W. Va. 1993); Woodruff v. Bd. of Trs. of Cabell Huntington Hosp., 319 S.E.2d 372, 379 (W. Va. 1984) (regarding whether a collective bargaining agreement could waive the rights of the workers from picketing; deciding that the waiver of fundamental constitutional rights under the West Virginia state constitution "is more stringent . . . than is the federal constitution"); Long v. Egnor, 346 S.E.2d 778, 782 (W. Va. 1986) (granting a writ of prohibition where an action was filed against the West Virginia Educational Association and its employee by individuals of the Cabell County Board of Education for allegations in a memorandum alleging harassment and coercion because of the risk of chilling effects should the case proceed); State *ex rel.* Suriano v. Gaughan, 480 S.E.2d 548, 565 (W. Va. 1996) (granting a writ of prohibition to stop the proceedings of a libel suit against the Ohio County Education Association and its former president after publications and

Liberties Union of West Virginia succinctly outlines in its amicus curiae brief in the *Oliver* case, the lawsuit was baseless, Murray Energy and its CEO have a history of filing such speech-chilling cases, and it is within the power of the court to issue Rule 11 sanctions against plaintiffs for such a clear abuse of litigation and to deter similar conduct in the future.[45] We concur with such arguments: when the object is not to prevail on the merits, but rather to merely silence opponents, such bad-faith actors must receive adequate punishment. This is required from the standpoint of sound public policy and in the interests of maintaining core democratic-constitutional values.[46]

A. The John Oliver Defamation Case

On June 18, 2017, the late-night news satire program "Last Week Tonight" aired an HBO segment on the coal industry critical of Robert Murray and Murray Energy—specifically regarding their role in degrading coal-mining safety.[47] Prior to the segment's air date, Murray's attorneys sent a cease-and-desist letter warning the show and its host that if aired, litigation would ensue.[48] On June 21, 2017, Murray Energy, certain Murray Energy subsidiaries,[49] and Robert Murray filed a lengthy defamation lawsuit against John Oliver, Charles Wilson, Partially Important Productions, LLC, Home Box Office, Inc., Time Warner, Inc., and Does 1 through 10 in reaction to the airing of the segment and its subsequent YouTube posting.[50] The tort claims included defamation, false light invasion of privacy, and intentional infliction of emotional distress.[51] Requested relief included general damages, special damages, punitive damages, attorney's fees

advertisements in the *Wheeling Register* named healthcare providers withdrawing from certain state insurance programs); Harris v. Adkins, 432 S.E.2d 549, 552 (W. Va. 1993) (holding that the right to petition the government in connection with an issue of public interest is entitled to heightened protection); *see also infra* Table 1.

45. Proposed Amended Brief Amicus Curiae of the American Civil Liberties Union of West Virginia Foundation in Opposition to Plaintiffs' Motion for a Temporary Restraining Order and in Support of Dismissal and Rule 11 Sanctions at 1–2, 10, Marshall Cnty. Coal Co. v. Oliver, No. 17-CV-99 (N.D. W. Va. Aug. 2, 2017) [hereinafter ACLU Amicus Curiae Brief].

46. Cosentino, *supra* note 14, at 402–03.

47. Lui, *supra* note 40.

48. *Id.*

49. Specifically, Marshall County Coal Company, The Marion County Coal Company, The Monongalia County Coal Company, The Harrison County Coal Company, and The Ohio County Coal Company. *See* Oliver Complaint, *supra* note 40, at 1.

50. *See generally id.* at 17 (indicating the subsequent posting of the episode on YouTube).

51. *See generally id.* at 17, 19, 21 (stating all the causes of action brought by plaintiffs).

and costs of suit, and, importantly, a permanent injunction "prohibiting rebroadcast of the Defamatory Statements and requiring the removal of the Defamatory Statements from public access."[52]

The West Virginia circuit court advised that it would grant the defendants' motion to dismiss the complaint.[53] Accordingly, the circuit court granted the defendants' motions to dismiss for failure to state a claim, dismissing the complaint on March 15, 2018.[54] The final order was entered on April 4, 2018.[55] The plaintiffs appealed the decision to the West Virginia Supreme Court of Appeals on April 13, 2018.[56]

This litigation exhibits the classic anatomy of a SLAPP suit: a powerful entity sued a target for claims such as defamation and false light in clear retaliation for critical speech in an attempt to silence that party—which quite literally involved, in this case, a request to prohibit the segment's rebroadcast.[57] However, the anatomy of this specific case is not the only factor we can weigh in ultimately classifying it as a SLAPP suit. That is, the *Oliver* litigation is merely one of a series of cases filed by Murray Energy, pertinent subsidiaries, and Robert Murray as Murray Energy's CEO in the past two decades involving similar claims against the media, individual citizens, and union officials that have spoken or published critical information about Murray enterprises—i.e., with a majority of those cases being dismissed at the same stage of the proceeding.[58]

As one significant and foundational example, a court previously chastised Murray for filing "virtually identical" complaints.[59] In the 2002 *Murray v. Tarley*[60] case, Murray sued the Secretary-Treasurer of the United Mine Workers of America (UMWA) for "malicious defamation arising from allegedly false and defamatory public

52. *See generally id.* at 22–23 (indicating all relief sought by the plaintiffs).

53. Letter from Hon. Jeffrey D. Cramer, C.J., Second Judicial Circuit, to Counsel (Feb. 21, 2018), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20180221_docket-17-C-124_letter.pdf.

54. *See* Order Granting Motion to Dismiss Oliver Complaint, *supra* note 41, at 1–2.

55. *See* Docket Entries, Final Order Entered, Marshall Cnty. Coal Co. v. Oliver, No. 17-C-124 (Apr. 4, 2018).

56. *See* Docket Entries, Notice of Appeal (Supreme Court of Appeals of WV.) and Its Attachments, Marshall Cnty. Coal Co. v. Oliver, No. 17-C-124 (Apr. 13, 2018).

57. *See generally* Oliver Complaint, *supra* note 40 (epitomizing the general anatomy of a SLAPP suit).

58. *See infra* Table 2; ACLU Amicus Curiae Brief, *supra* note 45, at 1–2.

59. Murray v. Tarley, No. C2-01-693, 2002 WL 484537, at *9 (S.D. Ohio Feb. 21, 2002).

60. No. C2-01-693, 2002 WL 484537 (S.D. Ohio Feb. 21, 2002).

statements . . . in three press releases and at a public rally" during the course of collective bargaining agreements between the UMWA representing the miners at the Powhatan No. 6 Mine and the company.[61] The court raised the issue of res judicata sua sponte because plaintiffs sued the same party for an identical action in the Federal District Court for the Western District of Pennsylvania.[62] In this case, just one month previously, in January 2002, the court dismissed it for lack of subject matter jurisdiction under 12(b)(1).[63] The court noted that the "Amended Complaints in each case are virtually identical."[64]

Taken as a whole, then, the most appropriate classification for the *Oliver* case is that of a SLAPP suit whose aims are to impede constitutional free speech rights. This assertion is not only supported by the complaint itself, but also by the fact that these suits were routine for Murray Energy and Robert Murray as its CEO over the course of two decades—i.e., as illustrated by yet more examples discussed below beyond *Tarley* and detailed in the two Tables appended to this Article.[65] Here, we are concerned with an abuse of litigation by Murray for the clear purpose of chilling free speech, which indeed arises when a party exhibits a pattern of frivolous lawsuits filed with complaints of strikingly similar construction year after year.[66] Despite case dismissal or settlement in many instances, the chilling of speech still occurs, thereby achieving the actual purpose of the lawsuit—and not success of the case on the substantive merits.[67]

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61. *Id.* at *1.

62. *Id.* at *8.

63. *Id.*

64. *Id.* at *9.

65. *See infra* Table 1 and Table 2; ACLU Amicus Curiae Brief, *supra* note 45, at 1–2.

66. In its amicus brief, the American Civil Liberties Union of West Virginia points out the repeated filings of Murray over the past two decades, as well as the role of Rule 11 in deterring future abuse. *See* ACLU Amicus Curiae Brief, *supra* note 45, at 5–6, 14. *See generally* Marshall Cnty. Coal Co. v. Oliver, No. 5:17-CV-99, 2017 WL 10436072 (N.D. W. Va. Aug. 10, 2017).

67. In our present case study, cases dismissed at the 12(b)(6) stage include Murray v. Moyers, No. 2:14-CV-02334, 2015 WL 5626509 (S.D. Ohio Sept. 24, 2015) (defamation claim dismissed); Murray v. HuffingtonPost.com, Inc., 21 F. Supp. 3d 879 (S.D. Ohio 2014) (defamation action dismissed); Order Granting Motion to Dismiss Oliver Complaint, *supra* note 41, at 1–2 (defamation action dismissed); *Tarley*, 2002 WL 484537, at *1 (defamation action dismissed); Murray Energy Holdings Co. v. Bloomberg, L.P., No. 2:15-CV-2845, 2016 WL 3355456 (S.D. Ohio June 17, 2016) (defamation claim dismissed). Cases dismissed at the summary judgment stage include *Chagrin*; however, there was still a retraction of the article at issue. Murray v. Chagrin Valley Publ'g Co., 25 N.E.3d 1111 (Ohio Ct. App. 2014) (dismissal affirmed); *see infra* Table 2; *see also* ACLU Amicus Curiae Brief, *supra* note 45, at 1–2. And the *Knight-Ridder* case had a reversal of

B. A Pattern and Practice: A Comparison of Complaints

Lawsuits with similar causes of action will logically bear some resemblance; nevertheless, the degree to which Murray Energy and its subsidiaries' complaints resemble and indeed copy one another is striking and cause for concern from a public policy standpoint.[68] As Victor Cosentino argues, there can be a great deal of difficulty in distinguishing a SLAPP suit from "legitimate tort cases" because the causes of action are generally torts.[69] Hence, he recognizes the need to closely investigate the "motive in suing."[70]

Based on our close examination, however, the motive of Murray Energy and related parties is clear: to chill the constitutionally protected free speech of critics. In a general sense, Murray Energy's filing of practically identical complaints in two different jurisdictions in the early 2000s foreshadowed the appearance of "cut and paste" complaints filed in the years to come against various reporters, newspapers, broadcasting companies, bloggers, cartoonists, and a television host.[71] Six complaints filed by Murray Energy, its CEO, or one of the subsidiaries had multiple paragraphs that were either identical or nearly identical.[72] Granted, some counts, by their very nature, will be similar, and the facts examined are not identical.[73]

Nevertheless, because the Murray complaints contain such similar language—as combined with the causes of action deployed, the targets of the litigation, the frequency in which the cases were filed, and their ultimate dismissals—our case study reveals that the suits were brought for an improper, frivolous purpose: to unconstitutionally suppress critics speaking out on matters of great public concern.[74] And as we argue in more detail below, under Rule

summary judgment, settlement, and a retraction of article. Murray v. Knight-Ridder, Inc., No. 02 BE 45, 2004 WL 333250 (Ohio Ct. App. Feb. 18, 2004) (defamation action dismissed).

68. *See infra* Table 2.

69. Cosentino, *supra* note 14, at 401–02.

70. *Id.* at 401.

71. *See Tarley*, 2002 WL 484537, at *9; *infra* Table 1.

72. *See infra* Table 1.

73. *See infra* Table 1.

74. Pring and Canan list the typical claims signaling a potential SLAPP as follows:

> 1. Defamation (libel, slander, etc.); 2. Business torts (interference with business, economic expectancy, contract, etc.; product disparagement, and antitrust or restraint of trade); 3. Judicial-administrative torts (malicious prosecution, abuse of process); 4. Conspiracy (to commit any of these torts); 5. Constitutional and civil rights violations (chiefly "taking" of filer's property and unlawful "discrimination" against filer); and 6.

11 of the West Virginia Rules of Civil Procedure and controlling West Virginia case law, imposition of sanctions is appropriate when there has been a pattern of improper practice within a lawsuit by a party or attorney.[75]

C. Silencing the Media

In select cases involving Murray Energy, media outlets were unwilling to risk litigation, most likely due to the high costs of litigation and to concerns regarding high damages sought. Additionally, some activist groups have settled with Murray to avoid delays in their mission potentially associated with prolonged litigation. In these cases, Murray succeeded in silencing key voices in public discourse, while also sending a clear chilling message to all

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Miscellaneous wrong (including nuisance, invasion of privacy, attack on nonprofit tax status, etc.).

George W. Pring & Penelope Canan, *"Strategic Lawsuits Against Public Participation" ("SLAPPs"): An Introduction for Bench, Bar and Bystanders*, 12 U. BRIDGEPORT L. REV. 937, 947 (1992). They go on to list "six broad dispute areas": "1. Real estate development and zoning; 2. Criticism of public officials and employees; 3. Environmental protection and animal rights; 4. Civil rights (race, gender, employment, and other forms of discrimination); 5. Neighborhood problems (frequently characterized as the 'Not In My Back Yard' or 'NIMBY' syndrome); and 6. Consumer issues." *Id.* Further, their early study showed that most SLAPPs were dismissed. *Id.* at 944.

75. W. VA. CODE. ANN. R. 11 (LexisNexis 2021):

> (b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, and attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief formed after an inquiry reasonable under the circumstances,
>
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a non frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations and other factual contentions have evidentiary support or, of specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.
>
> (c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions state below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

Considerations for the imposition of sanctions under West Virginia law were established under *Bartles v. Hinkle*: "[T]o determine what will constitute an appropriate sanction, a court may consider the seriousness of the conduct, the impact the conduct had in the case and in the administration of justice, any mitigating circumstances, and whether the conduct was an isolated occurrence or was a pattern of wrongdoing throughout the case." Bartles v. Hinkle, 472 S.E.2d 827, 836 (W. Va. 1996).

potential future media outlets who may seek to publish critical analyses of Murray.

As a prime example, following a mine accident of Murray Energy in Utah, the publication *Coal Age* ran a critical editorial about Murray's subsequent press conference. After Murray threated to sue Steve Fiscor, editor of *Coal Age* and of *Engineering & Mining Journal*, the journal issued an apology to Murray for the editorial.[76] As another example, Robert Murray sued a Washington, D.C. based advocacy group, Public Citizen, for radio ads attacking him.[77] Public Citizen settled with Murray and paid $7,500 for the legal costs of removing the lawsuit from federal to state court.[78] As yet another example, in 2001, Murray sued Margaret Newkirk, a former reporter for the *Akron Beacon Journal*, after she wrote an article profiling Murray and his status in the coal industry.[79] The newspaper and Murray reached a settlement involving the *Beacon* issuing what Murray called a "retraction"—as the *Beacon* published an article stating that the prior editorial contained material "from which a reader could have drawn incorrect conclusions" about Murray, and that the paper "regrets any harm to [Murray], his family or his business."[80] Interestingly, one news article relayed that "[a]s far as Mr. Murray is concerned, any payment is an admission of guilt and an indication that in this lawsuit, Murray Energy has won."[81]

III. BREAKING THE PATTERN

A. Anti-SLAPP Statutes

The court in one Murray suit examined in this case study, *Murray v. Chagrin Valley Publishing Co.*,[82] called for the Ohio legislature to

76. Anya Litvak, *Coal Company Owner on a Mission to Save His Industry*, PITTSBURGH POST-GAZETTE (Oct. 10, 2015, 9:00 PM), https://www.post-gazette.com/business/powersource/2015/10/11/Murray-Energy-owner-Robert-Murray-on-a-mission-to-save-his-industry/stories/201510110111; Jonathan Peters, *A Coal Magnate's Latest Lawsuit Was Tossed—but Ohio Can Do More to Defend Free Expression*, COLUM. JOURNALISM REV. (May 28, 2014), https://archives.cjr.org/united_states_project/murray_energy_defamation_lawsuits_huffington_post.php.

77. Litvak, *supra* note 76.

78. *Id.*

79. *See* Peters, *supra* note 76.

80. *See id.* (alteration in original).

81. Litvak, *supra* note 76.

82. 25 N.E.3d 1111 (Ohio Ct. App. 2014).

enact an anti-SLAPP statute after review of the case.[83] And earlier that year, American Civil Liberties Union (ACLU) of Ohio attorney, Jonathan Peters, authored an article in the *Columbia Journalism Review* detailing the history of Murray Energy and its CEO's penchant for filing lawsuits against the press and argued for Ohio to adopt anti-SLAPP legislation.[84] At the time of this writing, approximately six years later, twenty-nine states have anti-SLAPP legislation on the books; however, Ohio is not one of them.[85]

Several states have attempted to combat SLAPP suits by fashioning special remedies available to litigation targets. Some statutory remedies will apply only after defendants have concluded litigation; these solutions therefore offer incomplete relief because the SLAPP filer might have already achieved the goal of disrupting the target's protected First Amendment speech and chilling future free speech efforts.[86] Select states have directly addressed this issue by formulating statutory remedies to help facilitate a quick resolution to SLAPP litigation.[87] For instance, in New York, the trial court can dismiss an alleged SLAPP suit unless the filer can show that the lawsuit has "a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law."[88] Similarly, Maine courts have created a "special motion to dismiss" which allows a trial court to grant early dismissal unless the SLAPP filer can show that the target's activities were without a reasonable basis in law or fact, and that those activities led to actual injury.[89]

Unfortunately, early dismissal and cost-shifting remedies address only an immediate SLAPP suit—and not instances where a party exhibits a clear pattern of such suits. When a plaintiff is a habitual SLAPP filer, such has been the case with Murray enterprises, then a different remedy must be fashioned.

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83. *Id.* at 1124–25.

84. *See* Peters, *supra* note 76.

85. *Anti-SLAPP Statutes and Commentary*, MEDIA L. RES. CTR., http://www.medialaw.org/topics-page/anti-slapp (last visited Nov. 22, 2020).

86. Johnston, *supra* note 2, at 279.

87. *Id.*

88. N.Y. C.P.L.R. 3211(g) (MCKINNEY 2020); *see also* Johnston, *supra* note 2, at 279 (explaining that section 3211(g) provides a "more immediate remedy" than statutory schemes that "apply only after the target has been subjected to a considerable course of litigation").

89. ME. STAT. tit. 14, § 556 (2019); *see also* Johnston, *supra* note 2, at 280 ("[A] SLAPP target in Maine may bring a 'special motion to dismiss.' The trial court will grant the motion unless the SLAPP filer can show that the target's public participation activities were without a reasonable basis in fact or law, and that those activities led to actual injury.").

B. West Virginia and the Absence of Anti-SLAPP Legislation

West Virginia currently lacks anti-SLAPP legislation, despite introduction of an anti-SLAPP bill in the past.[90] In 2016, a new study committee was appointed to consider "the need for and feasibility of" an anti-SLAPP Act by the West Virginia Commission on Uniform State Laws, which was to report its findings to the West Virginia legislature.[91] And recall also that in the context of our case study, two 2017 actions were filed in West Virginia by Murray—one against the *New York Times* and the other against Oliver and other defendants.[92]

Note that, significantly, curtailing SLAPP suits in West Virginia comports with the state's legacy of protecting a citizen's constitutional free speech rights.[93] While West Virginia lacks anti-SLAPP legislation to date, the West Virginia Supreme Court of Appeals has always been protective of the chilling effects of SLAPP suit litigation.[94] If a lawsuit interferes with a citizen's right to free speech with "insufficient allegations," the case cannot proceed to trial if the remedy sought "is manifestly inadequate to protect against the chilling effect of allowing a suit to proceed."[95] And notably, West Virginia's Constitution is "more stringent" in its free speech protections than the national Constitution.[96]

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90. *See* sources cited *supra* note 44 and accompanying text.

91. W. VA. COMM'N ON UNIF. STATE L., REPORT TO THE WEST VIRGINIA LEGISLATURE REGULAR SESSION 2017, at 8 (2017), http://www.wvlegislature.gov/legisdocs/reports/agency/C06_FY_2017_13670.pdf.

92. *See* The N.Y. Times Complaint, *supra* note 42, at 1; Oliver Complaint, *supra* note 40, at 1.

93. *See* sources cited *supra* note 44 and accompanying text.

94. *See generally* Pushinsky v. W. Va. Bd. of L. Exam'rs, 266 S.E.2d 444 (W. Va. 1980) (explaining that West Virginia's Constitution imposes limits the state's power "to inquire into lawful associations and speech more stringent than those imposed on the states by the Constitution of the United States"); Woodruff v. Bd. of Trs. of Cabell Huntington Hosp., 319 S.E.2d 372, 379 (W. Va. 1984) (holding that public sector employees cannot waive by contract their constitutionally protected speech guarantees, and collective bargaining agreements that abrogate these fundamental rights are void under the West Virginia Constitution); State *ex rel.* Suriano v. Gaughan, 480 S.E.2d 548, 565 (W. Va. 1996) (stating that participants in public debate "must steel themselves to harsh criticism that does not exceed the actual malice privilege" mandated by both the United States Constitution and West Virginia's Constitution).

95. *Suriano*, 480 S.E.2d at 551, 554. As the court notes, "[p]rohibition will lie to prohibit a case from proceeding to trial when the remedy of appeal is manifestly inadequate to protect against the chilling effect of allowing a suit to proceed because the complaint, as a matter of constitutional law, contains insufficient allegations to warrant interference." *Id.* at 551 (quoting Long v. Egnor, 346 S.E.2d 778, 779–80 (W.Va. 1986)).

96. *See* sources cited *supra* note 44 and accompanying text. The West Virginia State Constitution reads in pertinent part:

Harris v. Adkins[97] is the leading case regarding SLAPP suits in West Virginia, and it stands on the shoulders of *Webb v. Fury*.[98] *Webb* was, in fact, one of the most powerfully worded opinions in the nation regarding the importance of protecting free speech from the chilling effect of frivolous litigation; *Webb* was handed down in the context of SLAPP suits gaining traction in the courts in the 1970s and 1980s.[99] In 1981, before the articulation of the "SLAPP" suit per se by commentators Penelope Canan and George Pring,[100] the West Virginia Supreme Court of Appeals argued in *Webb* that the "cost to society in terms of the threat to our liberty and freedom is beyond calculation" with regard to deciding whether to allow a defamation lawsuit by a coal company against a citizen critical of that company to proceed in court.[101] Furthermore, the court stated that "[s]urface mining, and energy development generally, are matters of great public concern," and that vigorous debate and the free exchange of ideas are the "adhesive of our democracy."[102]

More specifically, in *Webb*, a community organizer was sued under a defamation claim for filing citizen complaints against the DLM Coal Corporation for violations related to mining practices and for circulating a newsletter describing mining impacts on streams in Upshur County, West Virginia.[103] DLM sued Webb and environmental groups for, among other things, libel as a result of the publication and circulation of the newsletter.[104] Webb filed a writ of

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> No law abridging the freedom of speech, or of the press, shall be passed; but the Legislature may, by suitable penalties, restrain the publication or sale of obscene books, papers, or pictures, and provide for the punishment of libel, and defamation of character, and for the recovery, in civil actions, by the aggrieved party, of suitable damages for such libel, or defamation.

W. VA. CONST. art. III, § 7.

97. 432 S.E.2d 549 (W. Va. 1993).

98. 282 S.E.2d 28 (W. Va. 1981), *overruled by* Harris v. Adkins, 432 S.E.2d 549 (W. Va. 1993). The issue in *Webb* was whether the defendant in the matter had absolute immunity in petitioning the government under the West Virginia State Constitution, article III, section 16, allowing for a writ of prohibition. *Id.* at 30–31, 34–35 The court held in the affirmative. *Id.* at 43. *Harris v. Adkins* overruled *Webb* to the extent that there was absolute immunity under the West Virginia State Constitution, article III, section 16, changing the standard from absolute immunity to actual malice as articulated in *New York Times Co. v. Sullivan*. *Harris*, 432 S.E.2d at 550 (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964)).

99. Pring & Canan, *supra* note 74, at 940, 943.

100. Pring, *supra* note 5, at 3–4.

101. *Webb*, 282 S.E.2d at 30–31, 43.

102. *Id.* at 43.

103. *Id.* at 31.

104. *Id.*

prohibition asserting that under the West Virginia Constitution, the lawsuit must be terminated because he had absolute immunity in his action of petitioning government.[105] After applying the *Noer-Pennington* doctrine, the court in *Webb* agreed.[106] The Court argued that speech on matters of great public concern definitively belongs outside of the courthouse—as it is necessary to maintain a democracy.[107]

Despite the *Webb* court being concerned with a citizen's right to petition the government, "its primary concern was the chilling effect of litigation on a citizen who was exercising a sensitive constitutional right, which was at the heart of the litigation."[108] The fact that there is no absolute immunity does not diminish this line of reasoning; what is more, the "actual malice" standard established in *New York Times, Co. v. Sullivan*[109] functions as a powerful preventative measure against potentially frivolous litigation.[110] Ultimately, then, West Virginia's robust history of protecting citizens from the chilling effect of frivolous litigation supports the argument that SLAPP suits should be curtailed.

The dissent in *Webb* argued that the court's approach was too broad, and the opinion was, in fact, partially overturned a decade later, aligning the "actual malice" standard with *New York Times v. Sullivan*.[111] Justice Neely proposed a three-stage test for these types of lawsuits.[112] First, the test requires a prima facie showing if the plaintiff seeks damages or an injunction; second, a preliminary hearing at the early stages of the case is required to determine if the suit is reasonable and brought in good faith; and third, the test requires that the plaintiff pay full costs to the defendant if the case goes to trial but loses on the substantive merits.[113] On the third factor, Justice Neely proposes that if, after the trial, "it becomes apparent that the plaintiff actually was using the legal process . . . to oppress citizens who have legitimately exercised first amendment rights, then the courts should exercise their

105. *Id.* at 30–31, 34.
106. *Id.* at 34, 37, 42.
107. *Id.* at 43.
108. Long v. Egnor, 346 S.E.2d 778, 781 (W. Va. 1986) (discussing *Webb*).
109. 376 U.S. 254 (1964).
110. *Id.* at 280.
111. *See Webb*, 282 S.E.2d at 43–44 (Neely, J., dissenting); Harris v. Adkins, 432 S.E.2d 549, 552 (W. Va. 1993).
112. *Webb*, 282 S.E.2d at 47.
113. *Id.*

equitable powers to impose costs against the plaintiff in excess of the actual costs of defending the case."[114] Note, however, that while Justice Neely's proposed test focuses on the imposition of costs on bad-faith filers, we instead contend below that non-monetary attorney sanctions ultimately would constitute a more effective deterrent.

Justice Neely's dissent thus recognizes the need for enhanced mechanisms to protect courts from abusive litigation practices and to safeguard constitutionally protected free speech.[115] Specifically, Justice Neely states that "[t]he potential for chilling legitimate first amendment rights when there is anything less than absolute immunity is awe inspiring. The key to solving this dilemma is finding a device which will screen legitimate first amendment activity from irresponsible or sham first amendment activity."[116]

The subsequent failure of the West Virginia legislature to enact anti-SLAPP legislation despite its introduction and consideration therefore has left defendants without a statutory shield against retaliatory lawsuits.[117] Despite the lack of anti-SLAPP legislation in West Virginia, however, there are mechanisms inherent in Rule 11 of the West Virginia Rules of Civil Procedure and pertinent case law that can be utilized to combat such frivolous lawsuits—as we argue below. And such remedies also, of course, could be fruitfully explored in similarly situated jurisdictions that lack such comprehensive statutory shields (e.g., Ohio, as also implicated in our present case study).

C. Rule 11

Federal Rule of Civil Procedure 11(b) requires four representations by the attorney to the court.[118] In sum, the attorney certifies that the pleading, written motion, or other paper: (1) is not being presented for any improper purpose; (2) the claims, defenses, and other legal contentions are warranted by existing law;[119] (3) the factual contentions have evidentiary support; and (4) the denials of factual contentions are warranted on the evidence.[120]

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114. *Id.*

115. *Id.* at 47–48.

116. *Id.* at 46. As discussed *infra* in Part V.A, we suggest one such test for screening legitimate First Amendment activity from the use of the justice system to chill free speech.

117. *See* sources cited *supra* note 44 and accompanying text.

118. *See* FED. R. CIV. P. 11(b).

119. Or reversing existing law or for establishing new law. *See* FED. R. CIV. P. 11(b)(2).

120. *See* FED. R. CIV. P. 11(b). As Rule 11(b) states from the Federal Rules of Civil Procedure:

As the ACLU of West Virginia argues in its amicus curiae brief, sanctions can be levied by the court on parties who bring cases for an improper purpose and can be used to deter future conduct.[121] The Federal Rules of Civil Procedure likewise provide a mechanism to discourage the filing of frivolous lawsuits or suits filed for an "improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation" by levying sanctions against attorneys or the parties they represent for such filings.[122]

One may contend that monetary fines are sufficient to compensate the injured party when punitive damages are taken into account. However, attorneys who file frivolous briefs may be able to ex ante protect themselves by simply charging a higher fee to pass the risk onto the client.[123] Additionally, filers may rationally determine that the benefits of filing such frivolous suits outweigh the costs—in that removing the debate from a public forum to the legal arena would justify any direct monetary costs associated with filing a lawsuit.[124] Additionally, if the attorney is afraid of losing a lucrative client, she or he may be more willing to file a frivolous lawsuit in an effort to appease the client.[125] Consequently, use of enhanced non-monetary sanctions against attorneys likely would prove more effective in deterring such frivolous lawsuits.[126]

> (b) REPRESENTATIONS TO THE COURT. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
>
> (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
>
> (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

Id. Rule 11(c) outlines the procedure for imposing sanctions under these circumstances. FED. R. CIV. P. 11(c).

121. ACLU Amicus Curiae Brief, *supra* note 45, at 10; *see also* Cabell v. Petty, 810 F.2d 463, 466 (4th Cir. 1987); *In re* Kunstler, 914 F.2d 505, 524 (4th Cir. 1990).

122. FED. R. CIV. P. 11(b)–(c); *see also supra* text accompanying note 120.

123. *See infra* Part V.B.1 on the cost-benefit analysis that factors into filing a SLAPP suit.

124. *See infra* Part V.B.1 on the cost-benefit analysis that factors into filing a SLAPP suit.

125. *See infra* Part V.B.1.

126. *See infra* Part V.B.1.

D. History of Federal Rule 11

1. Overview

In J. Reid Mowrer's 1998 article proposing the use of Rule 11 to curb SLAPP suits, he succinctly addresses the history of Rule 11 of the Federal Rules of Civil Procedure.[127] In 1983, Rule 11 was amended to enhance its effectiveness as a deterrent—i.e., to ultimately "broaden the scope of sanctionable actions, raise the standard of attorney behavior and encourage the application of sanctions as a deterrent tool."[128] However, in the amended Rule 11's subsequent application, there was an "explosion of sanctions litigation" that "tipped the balance inappropriately towards deterrence at the expense of free access."[129] As is unpacked below, the 1993 amendments, then, attempted to address this imbalance by "broaden[ing] the scope of sanctionable activity while placing greater constraints on the imposition of sanctions."[130]

2. 1991 Survey of Rule 11

In 1991, the Federal Judicial Center published a final report on Rule 11 to the Advisory Committee on Civil Rules of the Judicial Conference of the United States.[131] The report included "(1) a survey of all federal district judges about their experiences with Rule 11; (2) an analysis of all district and appellate opinions published between 1984 and 1989 that address Rule 11 issues; and (3) a study of Rule 11 activity in five district courts."[132] Regarding the effectiveness of Rule 11 in deterring "groundless" litigation, a majority found the Rule effective; however, a majority of judges also did not classify such litigation as a substantial problem.[133] In fact, 38 percent of judges reported that "half or more requests for sanctions are themselves groundless."[134] Further, and particularly at issue here, the majority of

127. Mowrer, *supra* note 10, at 476–80.

128. *Id.* at 477.

129. *Id.* at 478.

130. *Id.* at 479–80.

131. *See generally* ELIZABETH C. WIGGINS ET. AL., FED. JUD. CTR., RULE 11: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 1 (1991), https://www.fjc.gov/sites/default/files/2012/Rule11FR.pdf (providing an overview of Federal Rule of Civil Procedure 11 with three major components that provide an analysis of Rule 11 as it pertains to all federal district judges and appellate opinions).

132. *Id.* at Overview and Acknowledgements Section.

133. *Id.* at 1.

134. *Id.*

judges found other mechanisms and rules to be more effective in addressing groundless litigation, including "prompt rulings on motions to dismiss and prompt rulings on motions for summary judgment. . . . informal admonitions and Rule 16 conferences."[135] The analysis of Rule 11 cases in five district courts looked at "(1) the amount of satellite litigation generated by Rule 11; (2) the extent to which Rule 11 activity has been disproportionately concentrated in specific types of cases or on particular type of litigants; and (3) the amount of judicial variation in sanctioning practices."[136]

One of the questions asked was whether a particular type of party was being disproportionately subjected to Rule 11.[137] The most "targeted" pleadings were complaints.[138] Thus, unsurprisingly, plaintiffs were "slightly or substantially more frequently" targeted than defendants.[139] Civil rights cases tended to be targeted more than other types of suits.[140] The percentage of orders imposing sanctions in the five districts ranged from 9 percent to 55 percent.[141] In the context of civil rights cases and Rule 11, sanctions were more frequently imposed on plaintiffs and their attorneys.[142] Monetary awards were the most common form of sanction, as compared to non-monetary sanctions such as admonitions or ordering continuing legal education classes.[143] The monetary amounts were low, and one hypothesis of the authors was that "[t]hey may represent a deliberate effort to avoid the over-deterrence of employment discrimination claims."[144]

E. Non-Monetary Sanctions

Courts are required to consider non-monetary sanctions under Rule 11(c).[145] A wide variety of non-monetary sanctions are available

135. *Id.* at 2.
136. *Id.* at 1.
137. *Id.* at 13.
138. *Id.*
139. *Id.* at 14.
140. *Id.* at 15–17.
141. *Id.* at 17–19.
142. *Id.* at 5.
143. *Id.* at 5–6.
144. *Id.* at 6. Note that, for the purposes of this Article, compiling empirical data on Rule 11 rulings proved difficult because of the limitations of the various legal databases and the early stages at which some of the Rule 11 motions are brought, particularly if the issue results in dismissal at the 12(b)(6) stage. Because of these limitations, it is difficult to get a fair assessment of the frequency with which the types of cases at issue are burdening the court system.
145. FED. R. CIV. P. 11(c).

to the court including: injunctions, admonitions, reprimands, censures, referrals to disciplinary authorities, required participation in educational programs (e.g., mandatory continuing legal education), professional trainings, an order precluding the introduction of certain evidence, an order precluding the litigation of certain issues, and dismissal of the action.[146] Courts also have the ability to consider disciplinary action against lawyers who violate Rule 11. In fact, the intent behind the 1993 amendments to Rule 11 was to encourage more disciplinary referrals and to transition away from fee awards.[147] Most courts, however, do not avail themselves of this remedy, preferring instead to bring the offending conduct to the attention of the appropriate disciplinary committee rather than directly disciplining the attorney.[148] Some commentators argue that the appropriate state disciplinary body should investigate any lawyer who has received more than one Rule 11 sanction and that federal district clerks could easily effectuate such measures by reporting sanctions to state authorities.[149]

Courts can sua sponte sanction an attorney; however, in doing so, a court may run afoul of due process issues.[150] This is because when judges initiate disciplinary referrals for serious professional misconduct during civil litigation, they have both prosecutorial and judicial functions.[151] Furthermore, judges can occupy a legislative role if the guidelines are unclear and also can occupy the role of a witness if the misconduct occurred in their presence.[152] With this said, less serious violations, which often require sanctions such as a reprimand or a fine payable to the court, can be effectively administered by the presiding trial judge to promote general deterrence.[153]

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146. *Id.*; *see also* Comm. on Fed. Cts., *Comments on Federal Rule of Civil Procedure 11 and Related Rules*, 46 REC. ASS'N BAR CITY N.Y. 267, 300–01 (1991) (listing the non-monetary sanctions imposed under Rule 11).

147. Jeffrey A. Parness, *Disciplinary Referrals Under New Federal Civil Rule 11*, 61 TENN. L. REV. 37, 46 (1993).

148. GEORGENE M. VAIRO, RULE 11 SANCTIONS: CASE LAW, PERSPECTIVES AND PREVENTATIVE MEASURES 574 (Richard G. Johnson ed., 3d ed. 2004).

149. Victor H. Kramer, *Viewing Rule 11 as a Tool to Improve Professional Responsibility*, 75 MINN. L. REV. 793, 808–09 (1991).

150. *See* Thornton v. Gen. Motors Corp., 136 F.3d 450, 455 (5th Cir. 1998) (holding that imposition of Rule 11 sanctions violated due process).

151. Parness, *supra* note 147, at 45.

152. *Id.* at 45–46.

153. *Id.* at 60. Some courts have argued that they need not recuse themselves from sua sponte Rule 11 sanctions. *See, e.g.*, Lemaster v. United States, 891 F.2d 115 (6th Cir. 1989). Other courts

IV. USING RULE 11 TO DETER ATTORNEYS FROM FILING FRIVOLOUS SUITS

We contend that in the absence of anti-SLAPP legislation in jurisdictions such as West Virginia, the court may utilize Rule 11 to give attorneys pause before filing lawsuits violative of the First Amendment. If a plaintiff demonstrates an egregious pattern and practice of filing SLAPP-like suits, with typical SLAPP related claims repetitiously, with blatant "cut-and-pasted" complaints, the court, on motion or sua sponte, can utilize the power vested in it by Rule 11 to impose sanctions, in excess of costs and fees by including enhanced disciplinary action.[154]

The remedy must be greater than attorney's costs and fees, because the costs at such an early stage of dismissal would not be a sufficient deterrent.[155] That is, an "appropriate level of deterrence" can be reached if the sanctions are more than simply costs and fees.[156] Thus, the risk of disciplinary action against an attorney may cause the attorney to pause and think twice before filing a frivolous SLAPP suit.

Rule 11 of the Federal Rules of Civil Procedure, by its explicit construction, is designed in part to deter abusive litigious behavior.[157] This rule is well-suited to deter those who seek to chill free speech because "[t]he SLAPP filer focuses on use of the judicial *process*, as opposed to any anticipated judicial *product*, to silence the opponent."[158] Victor Kramer has argued that "courts should consider and interpret Rule 11 primarily as a tool to enforce the Rules of Professional Conduct in litigation rather than as a means to compensate litigants who become the victims of unprofessional conduct: deterrence rather than reimbursement should be the primary purpose of sanctioning lawyers."[159]

Furthermore, courts can impose sanctions sua sponte under Rule 11(c)(3), which provides: "On the Court's Initiative. On its own, the court may order an attorney, law firm, or party to show cause why

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have recused themselves. *See, e.g.*, Edwards v. Groner, 24 V.I. 292 (D.V.I. 1989); *see also* VAIRO, *supra* note 148, at 413 (citing cases in which courts have recused themselves or abstained from recusal after raising sanctions sua sponte).

154. Mowrer, *supra* note 10, at 484–85.

155. *Id.* at 485–86.

156. *Id.* at 486.

157. *See* FED. R. CIV. P. 11.

158. Mowrer, *supra* note 10, at 466.

159. Kramer, *supra* note 149, at 797.

conduct specifically described in the order has not violated Rule 11(b)."[160] Thus, to impose sua sponte sanctions, a court must issue an order to show cause why sanctions should not be imposed, and the order must describe the specific conduct believed to violate Rule 11.[161] Courts are limited in the types of sanctions that are imposed when raising sua sponte Rule 11 violations.[162] Non-monetary sanctions are available; however, monetary sanctions can only be imposed on motion.[163]

A. ABA Sanction Survey and Attorney Discipline

Cosentino argues that one solution is to penalize attorneys for bringing SLAPP suits through "disciplinary proceedings or monetary sanctions," causing them to think twice before representing a chronic SLAPP filer.[164] Numerous considerations factor into the calculus to determine if sanctions against the attorney are the appropriate remedy. At a minimum, however, the determination to use sanctions should include the nature of the sanctioned conduct, its consequence on others, and the purposes to be served by the sanctions.[165]

Plaintiff's counsel cannot evade bad faith arguments simply based on the fact that the client asked counsel to conduct the case and draft allegations in a specific manner. These arguments have been considered and dismissed by the Fourth Circuit.[166] Accordingly, arguments based on client desires and conduct should not be utilized as an excuse for filing frivolous lawsuits. So long as counsel knows that the suit is frivolous, "[c]ounsel can no longer avoid the sting of Rule 11 sanctions by operating under the guise of a pure heart and empty head."[167]

A brief survey of disciplinary action imposed by the Supreme Court of West Virginia within the last five years did not reflect any strong trend as to who was subject to such action or why.[168] What these

160. FED. R. CIV. P. 11(c)(3).
161. FED. R. CIV. P. 11(c)(2)–(3); *see* Parness, *supra* note 147, at 45.
162. FED. R. CIV. P. 11(c)(5)(B).
163. *Id.*
164. Cosentino, *supra* note 14, at 410.
165. *See* FED. R. CIV. P. 11.
166. Blair v. Shenandoah Women's Ctr., Inc., 757 F.2d 1435, 1438 (4th Cir. 1985).
167. Smith v. Ricks, 31 F.3d 1478, 1488 (9th Cir. 1994) (quoting Zuniga v. United Can Co., 812 F.2d 443, 452 (9th Cir. 1987)).
168. *See generally* AM. BAR ASS'N: CTR. FOR PRO. RESP., ABA STANDING COMM. ON PRO. DISCIPLINE, 2016 SURVEY ON LAWYER DISCIPLINE SYSTEMS (S.O.L.D.) (2018),

data appear to reveal is that imposition of disciplinary sanctions, at least in West Virginia, is used sparingly, particularly the harsher impositions, such as debarment.[169]

Issues with using disciplinary sanctions against attorneys include a potential SLAPP suit being insufficient in and of itself to spur action by a disciplinary board, the inability of citizens making complaints to "distinguish a frivolous claim from a legitimate claim," the inability of judges and attorneys to recognize a SLAPP suit as such, and "a general reluctance" of judges and attorneys to report each other.[170] As the data provided demonstrate, there may be difficulty in finding success via disciplinary action.

B. Attorney Discipline as a Remedy

Rule 11 was broadened under the 1983 amendments. Specifically, Rule 11 was amended to require a "'reasonable inquiry' from the attorney concerning his client's claims and defenses."[171] The 1983 amendments included two important changes: (1) the scope of Rule 11 was broadened to apply to a greater range of pleadings; and (2) sanctions were mandatory when a violation was found.[172] Interestingly, these changes to Rule 11 led to increased litigation, most likely due to the rule's broader scope and fee-shifting power.[173] Additionally, some attorneys would use sanctions as a weapon or bargaining tool to help leverage negotiations with opposing counsel.[174]

Under the 1993 amendments, the aim of Rule 11 sanctions was to pivot away from compensation and towards deterrence.[175] Per the amendments, the focus was less on attorney's fees and more on such deterrence-focused mechanisms as fines paid to the court and shifting

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https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2016sold_results.pdf [hereinafter 2016 SURVEY ON LAWYER DISCIPLINE SYSTEMS] (showing a history of past ABA S.O.L.D. surveys lacking an ascertainable trend over five years up to and including 2018).

169. *See id.*

170. Cosentino, *supra* note 14, at 419.

171. James W. Devine, Note, *Rule 11's Big-Mouthed Little Brother: How a Federal Anti-SLAPP Statute Would Reproduce Rule 11's Growing Pains*, 9 AVE MARIA L. REV. 367, 384 (2011).

172. *Id.*; *see also* Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 190–93 (1988) (discussing the controversy around amendments made to the Federal Rules of Civil Procedure Rule 11).

173. Georgene Vairo, *Rule 11 and the Profession*, 67 FORDHAM L. REV. 589, 598–99 (1998).

174. Devine, *supra* note 171, at 385.

175. Parness, *supra* note 147, at 46.

misconduct fine responsibility to not just attorneys, but also to attorneys' law firms via joint responsibility principles.[176] Other mechanisms such as continuing legal education requirements, reprimands, and referrals to bar disciplinary entities also could be favored via a deterrence-based approach.[177]

Attorney discipline as a sua sponte remedy by the court in the anti-SLAPP suit context should alleviate some concerns emanating from the potential use of sanctions as a bargaining tactic. Lawyers could still use attorney sanctions as a bargaining tool, but they would no longer receive any monetary benefits as part of the remedy. Accordingly, frivolous Rule 11 motions should not be an issue because the fee-shifting remedy would not be an option for litigants.[178] Furthermore, the use of sanctions as a bargaining tool would also be diminished because these sanctions would be court initiated, and not initiated at the bequest of litigants.[179] However, one potential stumbling block with such a sua sponte remedy is the due process issue mentioned in Part III.F above.

C. Current Use of Rule 11 Sanctions: Suspension and Debarment

Courts have been reluctant to use the sanctioning power of Rule 11.[180] State bars also rarely use suspension or debarment as a means of deterring bad behavior. The American Bar Association (ABA) has been collecting data regarding sanctions, caseloads, budget, and staffing for public and educational use.[181] The result, the *Survey in Lawyer Discipline Systems* (*S.O.L.D.*), provides statistics on lawyer discipline from many jurisdictions nationally.[182] The ABA has historical surveys dating back to 1998.[183]

West Virginia has participated in all surveys except those conducted in 2013, 2012, 2005, 1999, and 1998.[184] According to the

176. *See* Jeffrey A. Parness, *Fines Under New Federal Civil Rule 11: The New Monetary Sanctions for the "Stop-and-Think-Again" Rule*, 1993 BYU L. REV. 879, 903.

177. *Id.* at 890.

178. Devine, *supra* note 171, at 387.

179. *Id.*

180. Vairo, *Rule 11 and the Profession*, *supra* note 173, at 623.

181. *See generally* 2016 SURVEY ON LAWYER DISCIPLINE SYSTEMS, *supra* note 168 (showing data related to a 2016 survey regarding lawyer discipline systems).

182. *See id.*

183. *See Historical ABA S.O.L.D. Surveys*, AM. BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/resources/historicalabasoldsurveys/ (last visited Nov. 22, 2020).

184. *Id.*

2016 report, West Virginia had 6,856 lawyers with active licenses, and the disciplinary agency received 596 complaints.[185] Three hundred and forty of those complaints were from prior years, 232 of those complaints were summarily dismissed or screened out, and 936 were investigated.[186] 297 were dismissed after the investigation.[187] Eighteen of the lawyers were ultimately charged, 18 publicly disciplined, 6 involuntarily disbarred, 5 suspended (excluding interim suspensions), 4 suspended in the interim for risk of harm or criminal convictions, 3 were admonished, reprimanded, or censured, 3 placed on probation, 3 ordered to pay restitution, and 13 ordered to pay costs.[188] Interestingly, there were two motions or requests for reinstatement and readmission: one was granted after debarment and one was granted after suspension.[189]

V. PROPOSED TEST FOR APPLICATION OF SANCTIONS AND ATTORNEY DISCIPLINE

The purpose of this novel four-part test is to discriminate between those suits brought for legitimate reasons versus those frivolous suits that are brought about to silence the media or prevent citizens from voicing legitimate concerns against private parties or the government. Although it does not appear that these suits happen with great frequency, when such suits are brought, they have the ability to wreak substantial, far-reaching harms to both free speech and public participation—i.e., including multidimensional harms emanating from later-in-time chilling effects.[190] This four-part test would help determine if the SLAPP suit falls within the most egregious forms of frivolous litigation and suggest a remedy that is based in large part on deterring the filing of future frivolous suits. Accordingly, this test must consider the parties involved, damages requested, as well as how this litigation functions within the SLAPP filer's broader strategy to silence dissident voices.

In summary, this test weighs four main factors: (1) a pattern of conduct and similarity of complaints; (2) the nature of the defendants; (3) proportionality of damages; and (4) if a countersuit is at issue. If

185. 2016 SURVEY ON LAWYER DISCIPLINE SYSTEMS, *supra* note 168, Chart 1, pt. A, 3.
186. *Id.* Chart 1, pt. B, 3.
187. *Id.*
188. *Id.*; *id.* Chart 3, pt. B, 4.
189. *Id.* Charts 4, 3.
190. *See* Pring & Canan, *supra* note 74, at 941–44.

these factors weigh heavily in favor of the defendant, then the true intent of the filer may be suppression of protected free speech. Consequently, enhanced attorney sanctions in the form of suspension or debarment may be an appropriate remedy to deter future filings of a similar, deeply problematic nature.

A. Test for Applying Attorney Sanctions

1. Pattern of Conduct

As one important factor, enhanced attorney sanctions are likely an appropriate remedy for frivolous litigation when the plaintiff habitually files "cookie-cutter" suits. If deterrence indeed is the ultimate goal, when a party exhibits a clear pattern of utilizing the legal system to suppress free speech, then attorney sanctions are the appropriate remedy. Note, however, that direct evidence of specific intent to file a suit for harassment purposes will seldom be found; thus, intent can be inferred by the surrounding circumstances. If a plaintiff consistently files suits using the same arguments with the same fact pattern without proffering a new legal argument—and if the suits are consistently dismissed at either the 12(b)(6) or summary judgment stage—then this strongly evidences a pattern of misconduct.

For example, Robert Murray has filed no less than six suits against news and media organizations, as well as some individuals, to suppress their free speech rights.[191] Unsurprisingly, most of these suits have not survived the 12(b)(6) or the summary judgement motions by defendants.[192] Although one or two suits may not be enough to establish that the filer is improperly wielding the legal system to harass and silence the media, six or seven suits should suffice.

Courts should further consider if the defamation filer uses identical complaint language in multiple cases or otherwise alleges the same type of fact pattern. As discussed above in Part II.B, six complaints filed by Murray Energy, Robert Murray, or one of the subsidiaries had multiple paragraphs that were either identical or nearly identical.[193] Tables 1 and 2 review the language used in the complaints filed by Robert Murray as well as the outcomes of these suits. These "cookie-cutter" complaints with near-identical

191. *See* sources cited *supra* note 67 and accompanying text; *infra* Table 2.
192. *See infra* Table 2.
193. *See infra* Table 1.

language—i.e., as combined with the pattern of conduct and the suits' ultimate dismissals—help demonstrate the improper purpose of the suits.[194]

Note also that potential watchdog entities may occupy a helpful role in tracking such problematic complaint patterns. For instance, Lili Levi argues that one response to corporations targeting media via indirect funding for litigation (i.e., as discussed above) can involve cultivating private watchdogs in the form of institutions or pertinent concerned individuals.[195] Such watchdogs could track corporate funds, enhance public knowledge about such practices, and generally advocate for greater corporate funding accountability, best press practices, and so forth.[196] Therefore, in the context of our case study and broader discussion, watchdog entities similarly could track litigants who exhibit a pattern of filing frivolous lawsuits with "cut and paste" complaint language—which would further the "goal of promoting transparency and accountability" among these problematic repeat actors.[197]

2. Nature of the Defendants

This second factor reflects an important principle: that to support the public interest, greater protection should be provided to some types of litigants than others. Because the ultimate goal of Rule 11 is to deter frivolous litigation, the anti-SLAPP privilege should be more expansive for those parties that disseminate factual information or that give legitimate analyses to authentic newsworthy information. Thus, this factor would provide greater protection to legitimate news organizations that report factual material with additional explanations, observations, or interpretations.

In a defamation suit, the classification of the party already is considered one potential defense against defamation—namely under "qualified privilege." Qualified privilege is the special legal right or immunity given to parties for acts committed in performance of a legal or moral duty and are exercised free from malice. The defense is stated as a communication whose "essential elements . . . are good faith, an interest to be upheld, a statement limited in its scope to the upholding

194. *See infra* Table 1.
195. Levi, *supra* note 29, at 817.
196. *Id.*
197. *Id.*

of such interest and publication in a proper manner only to proper parties."[198] One archetypal example of the qualified privilege is the immunity for members of the press for statements made in good faith—such as the media organizations at issue in our present Murray case study. Accordingly, providing greater protection to one type of party in a defamation suit—i.e., including in the explicit context of the press—does not tread new legal ground.

In summary, then, if the defendant in a SLAPP suit is a media or news organization simply reporting truthful facts, then courts should take this into account beyond the simple "absolute immunity" defense in a defamation suit. On the other side of the coin, if the plaintiff in a SLAPP suit is a bad-faith actor that repeatedly brings similar suits based on similar facts, courts should weigh this factor accordingly.[199]

3. Proportionality of Damages

As a third factor, we suggest a proportionality analysis where the court examines the claimed violation and damages requested. Damages in a tort case are designed in large part to compensate the victim—i.e., to make the party whole. When the damages requested are disproportionate to the alleged harm, then the victim is seeking either punitive damages or the deterrent value of the suit. Accordingly, if the damages requested by the filer are so high as to be disassociated from the reality of the harm done to the victim, then the more likely the filer is using the case to improperly suppress free speech.

For example, in the 2001 Murray suit against the *Akron Beacon Journal* for a defamation claim, the alleged damage suffered was $1 billion.[200] However, in 2005, for instance, Murray Energy's total sales amounted to only $450 million.[201] It is therefore very unlikely that this article published in a relatively regional market could damage Murray's entire business to the point of bankruptcy twice over.

198. Dobbyn v. Nelson, 579 P.2d 721, 723 (Kan. Ct. App. 1978), *aff'd*, 587 P.2d 315 (Kan. 1978) (quoting Senogles v. Sec. Benefit Life Ins. Co., 536 P.2d 1358 (Kan. 1975)); *see also* A.G. Harmon, *Defamation in Good Faith: An Argument for Restating the Defense of Qualified Privilege*, 16 BARRY L. REV. 27 (2011) (providing a historical investigation on the original meaning of "Defamation in Good Faith" and argues for a return to this first understanding).

199. *See supra* Part V.A.1.

200. Al Cross, *Controversial Coal Operator Threatens to Sue Coal Age Editor, Penn State Professor over Criticism*, THE RURAL BLOG (Sept. 25, 2007, 11:37 AM), http://irjci.blogspot.com/2007/09/murray-threatens-to-sue-editor.html.

201. MILLION DOLLAR DIRECTORY SERIES: AMERICA'S LEADING PUBLIC & PRIVATE COMPANIES 2006, at 3276 (2005).

Accordingly, the damages requested were grossly disproportionate to the alleged harm done—and thus this fact constitutes additional circumstantial evidence indicating that the suit was filed for purposes other than simple compensation to make the victim whole.

4. Not a Countersuit

As a final factor, SLAPP suits must be differentiated from "countersuits."[202] Countersuits differ from SLAPP suits because the original party—i.e., an environmental group or other type of public interest organization—is not simply voicing an opinion on a specific cause, but instead files suit to halt an action that the organization believes is harmful. In response, similar to a traditional SLAPP suit, the defendant will file a countersuit to intimidate the original plaintiff.

These environmental and related countersuits should not be subject to immediate attorney sanctions for three significant reasons. First, the original party that filed suit is typically a large environmental organization familiar with the judicial system. Second, when filing the original suit, the initial filer often will have access to a relatively large amount of capital, and thus will not suffer from individual liability or the psychological toll associated with litigation targeted at individual citizens. Third, as the original filer was the first to bring suit, there is a smaller likelihood of deterring future parties from filing suit or from raising public attention on the issue due to fear of financial retribution. Therefore, unlike a traditional SLAPP suit target that is simply using the political process to air their grievances, those parties subject to countersuits can anticipate and prepare for the possibility of legal retaliation. Additionally, unlike a traditional SLAPP suit, the filer is not moving the discussion from the public forum to a legal forum because the original discussion began in a legal context.

In the context of our case study, in all instances in which Murray filed suit, such actions were against news organizations or individuals that spoke out critically against Murray Energy or Robert Murray as its CEO. As a consequence, the conduct at issue was standard media criticism and did not originate as a lawsuit against Murray enterprises.

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202. Cosentino, *supra* note 14, at 405; David Sive, *Countersuits, Delay, Intimidation Caused by Public Interest Suits*, NAT'L L.J., June 19, 1989, at 5; *see also* Note, *Counterclaim and Countersuit Harassment of Private Environmental Plaintiffs: The Problem, Its Implications, and Proposed Solutions*, 74 MICH. L. REV. 106 (1975) (discussing the basic characteristics of the counterclaim strategy, the implications of its future proliferation, and proposals to eliminate the impact of the strategy in terms of its effectiveness).

Murray was therefore the instigator who sought to move the case from a political forum to the legal arena—and the countersuit factor discussed above, then, is not applicable.

B. Attorney Sanctions as a Remedy

Anti-SLAPP remedies—such as the enhanced sanctions we explore below—are especially important when utilized to protect the press in its mission of disseminating truthful information to the public about potential bad actors. This is, of course, a vital watchdog function in healthy democracies. What is more, the sanctions we explore below also comport with the current rubric of Rule 11—in that, namely, when looking to SLAPP-type behavior under Rule 11, the most important court determination is whether the suit is being brought to harass or silence news or media organizations, concerned individual citizens, or related entities.

1. Costs and Benefits Associated with Filing a SLAPP Suit

As introduced above in this Article, monetary compensation often proves insufficient in deterring attorneys from filing frivolous suits because (1) firms may simply charge the client more to file these suits as a risk-shifting practice; and (2) clients may be willing to take these risks via a simple cost-benefit analysis. On the latter point, a rational SLAPP suit filer may determine that the benefits of filing a suit greatly outweigh the potential direct costs. First, the actual monetary costs of filing a suit may be low. If the filer simply "cuts and pastes" much of the complaint from prior complaint language, then the costs to file indeed are minimal. Additionally, if a suit is dismissed at the 12(b)(6) stage and attorney costs are shifted to the filer, the costs may be minimal because the dismissal was at such an early litigation stage. Moreover, attorneys may be willing to file these frivolous suits to maintain a good relationship with the client for work that is independent of the SLAPP suit. Furthermore, the ultimate benefits of suppressing media coverage can be enormous, especially when the chilling effects on potential later-in-time negative publicity are considered. Millionaires such as Murray and the lawyers who work for him, therefore, often are willing to risk tens of thousands of dollars in filing a SLAPP suit when the benefits of silencing negative publicity could equal an estimated much greater amount.

To actually deter these types of "cookie-cutter" frivolous suits, then, remedies should not be directed against the powerful, well-capitalized client—but rather at the lawyers who file such suits despite their institutional expertise and clear professional ethics responsibilities. Consequently, in such egregious circumstances, enhanced attorney sanctions such as suspension or debarment are an appropriate remedy.

2. Attorney Suspensions and Debarment Already Comport with Rule 11(b)

Rule 11(b) sets out the requirements for documents that attorneys present to the court.[203] There are four main requirements enumerated in Rule 11(b): (1) documents are not being presented for any improper purpose; (2) the claims, defenses, and other contentions are warranted by existing law or argument for altering existing law; (3) factual contentions have evidentiary support; and (4) denials of factual contentions are warranted.[204]

As an initial matter, the requirements of Rule 11(b)(3) and (4) deal with factual contentions and are typically not at dispute in this variety of SLAPP litigation. That is, when looking to the four representations that are required under Rule 11, the factual contentions are usually not at issue since all parties admit to the factual contentions. For example, in the context of the Murray litigation against Oliver, neither party contested the factual information disclosed in Oliver's segment as it was aired on national television. Accordingly, there is no issue with the affirmative duty to investigate the facts of the case because the facts are uncontested.

Rule 11(b)(2), however, is directly at issue for this variety of SLAPP suit. Rule 11(b)(2) requires that the attorney certify that "the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law."[205] Rule 11 "explicitly and unambiguously imposes an affirmative duty on each attorney to conduct a reasonable inquiry into the viability of a pleading before it is signed."[206] Additionally, Rule 11 "imposes a duty on

203. FED. R. CIV. P. 11(b).
204. *Id.*
205. FED. R. CIV. P. 11(b)(2).
206. Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 253 (2d Cir. 1985).

attorneys to certify that they . . . have determined that any papers filed with the court are well grounded in fact, *legally tenable*, and 'not interposed for any improper purpose.'"[207]

In our case study, we find a violation of Rule 11(b)(2) as exhibited by Murray's decades long pattern of litigation. The lawyers representing Murray clearly used a boilerplate complaint because the complaint was "cut and pasted" from previous complaints used against other news organizations.[208] For instance, Murray's defamation cause of action against Oliver was nearly identical to the complaints brought against the *New York Times* in 2017 and the *Huffington Post* in 2013.[209] The false light invasion of privacy cause of action against Oliver also was nearly identical to the complaints brought against Bill Moyer in 2014 and the *Huffington Post* in 2013.[210] The lawyers filing Murray's complaint therefore knew they were filing a case based on very similar facts and knew the outcome of these cases were either dismissal or summary judgment. And because these complaints were nearly identical to the previous failed cases, the complaints do not convey additional facts suggesting a "nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law."[211]

Significantly, note that an example of sua sponte Rule 11 sanctions in response to this boilerplate type of pleading can be seen in *Rodgers v. Lincoln Towing Service, Inc*.[212] In *Rodgers*, the court stated "[t]hese boilerplate allegations evincing counsel's carelessness in drafting and filing this complaint only illustrate the appropriateness of the district court's assessing sanctions under Fed. R. Civ. P. 11."[213] The court's argument certainly is apropos to attorney conduct in the Murray litigation context as well.

Finally, Rule 11(b)(1) requires that the attorney certify that the document submitted to the court is "not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation."[214] The first factor of the

207. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 393 (1990) (emphasis added).
208. *See infra* Table 1.
209. *See infra* Table 1.
210. *See infra* Table 1.
211. FED. R. CIV. P. 11(b)(2).
212. 771 F.2d 194 (7th Cir. 1985).
213. *Id.* at 204 n.6.
214. FED. R. CIV. P. 11(b)(1).

four-part test proposed above in Part V.A.1 helps determine if the filing was effectuated with the intent to suppress free speech or, in the alternative, to legitimately compensate the victim for harm done by a tortfeasor. As noted above, direct evidence of the specific intent to file a suit for harassment purposes will seldom be found, so intent must be inferred from the surrounding circumstances.

C. Finding Balance Within the First Amendment: Free Speech v. Access to the Courts

Just as the First Amendment protects free speech, it also protects access to the courts.[215] Neither right is absolute. However, where a party exhibits a clear pattern of practice in filing retaliatory litigation to silence critics, the use of the judicial process for the purpose of suppressing free speech rights interferes with the administration of justice—thus making it an improper, sanctionable filing under Rule 11 of the West Virginia Rules of Civil Procedure in the context of our case study (i.e., and comparable Rule 11 violations in the broader United States).[216]

Since 2001, Murray Energy or a subsidiary, and Robert Murray, sometimes together and sometimes apart, have sued media entities for claims linked to defamation eleven times,[217] and a union treasurer for statements made to a newspaper three times.[218] Since 2012, eight of those suits, excluding the *Oliver* suit, were filed and all but one (regarding a radio ad) were related to media or the press.[219] The negative impacts on free speech emanating from these frivolous lawsuits did not go unnoticed by the courts nor by the media.[220] In *Murray v. Knight-Ridder*,[221] the case settled, and the article was

215. Mowrer, *supra* note 10, at 465 n.2, 475.

216. W. VA. CODE. ANN. R. 11 (LexisNexis 2021).

217. Claims varied, including defamation, false light invasion of privacy, intentional infliction of emotional distress, misappropriation of trade secrets, tortious interference of contract, and civil conspiracy. *See infra* Table 1.

218. *E.g.*, Murray v. Tarley, No. C2-01-693, 2002 WL 484537, at *1 (S.D. Ohio Feb. 21, 2002).

219. *See, e.g.*, *id.*

220. Peters, *supra* note 76; Murray v. Chagrin Valley Publ'g Co., 25 N.E.3d 1111, 1125 (Ohio Ct. App. 2014) (expressing that the case exemplified the need of adoption of anti-SLAPP legislation to prevent chilling effects of this type of litigation); Murray Energy Holdings Co. v. Mergermarket USA, Inc., No. 15-CV-2844, 2016 WL 3365422, at *7, *8 (S.D. Ohio June 17, 2016) (stating "a party who seeks a prior restraint 'carries a heavy burden of showing justification for the imposition of such a restraint'" with regard for the request of a declaratory judgment preventing publication of information).

221. No. 02 BE 45, 2004 WL 333250 (Ohio Ct. App. Feb. 18, 2004).

retracted.[222] After threatening litigation, *Coal Age* published an apology to Murray.[223] One of the defendants in *Murray v. Chagrin* ended up "scrubb[ing]" its website of the article at issue, despite settlement.[224]

The court in *Chagrin*—in essentially classifying the case as a SLAPP suit—wrote in its opinion that such frivolous lawsuits "can be devastating to individual defendants or small news organizations and act to chill criticism and debate. The fact that the *Chagrin Valley Times* website has been scrubbed of all mention of Murray or this protest is an example of the chilling effects this has," and the court also recommended that the Ohio legislature adopt anti-SLAPP legislation.[225] However, as noted above, Ohio has not adopted such a statutory shield, nor has West Virginia or numerous other jurisdictions.[226] Moreover, as also noted above, after the *Chagrin* opinion was published in December 2014, Murray filed lawsuits against *Bloomberg* in Ohio and the *New York Times* and John Oliver in West Virginia.[227] To be sure, such prior decisions did not constitute an actual deterrent for Murray Energy or Robert Murray as its CEO—and likely also will not deter those future-in-time, well-capitalized entities that are all-too-eager to suppress critical speech of news organizations and the like following a simple cost-benefit analysis.

The people have the right to "petition the government for a redress of grievances."[228] As discussed above, civil rights lawsuits have historically been a target of Rule 11 motions.[229] As Cosentino also argues, any solution "must not deny plaintiffs due process of law" or otherwise be violative of the U.S. Constitution.[230] And tort claims of an unusual character are not inherently illegitimate.[231] Thus, any

222. Peters, *supra* note 76.

223. *Id.*

224. *Chagrin*, 25 N.E.3d at 1124.

225. *Id.* at 1124–25.

226. *Anti-SLAPP Statutes and Commentary*, *supra* note 85. West Virginia does have case law that provides some anti-SLAPP protection. *See, e.g.*, Harris v. Adkins, 432 S.E.2d 549 (W. Va. 1993).

227. Murray Energy Holdings Co. v. Bloomberg, L.P., No. 2:15-CV-2845, 2016 WL 3355456 (S.D. Ohio June 17, 2016); Oliver Complaint, *supra* note 40, at 1; The N.Y. Times Complaint, *supra* note 42, at 1.

228. U.S. CONST. amend. I.

229. Wiggins et. al., *supra* note 131, at 15–19.

230. Cosentino, *supra* note 14, at 412.

231. The West Virginia Rules of Civil Procedure permit a "non frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." W. VA. CODE.

rule drafted to protect free speech must also protect the right to petition government.[232] However, as we have argued in this Article, a remedy involving more severe attorney sanctions—i.e., as carefully weighed by courts utilizing the four-part test proffered above—strikes the necessary balance between access to courts and constitutionally protected free speech.

VI. CONCLUSION

Numerous media outlets, newspapers, and concerned individual citizens lack the resources required to combat frivolous defamation suits brought by powerful, well-capitalized entities.[233] As the court in *Chargin* articulates, SLAPP suits "can be devastating to individual defendants or small news organizations and act to chill criticism and debate."[234] Moreover, the multidimensional benefits of SLAPP suits typically outweigh the financial costs to such powerful actors—as our case study in the form of Murray Energy and Robert Murray as its CEO so aptly demonstrates. Consequently, while recognizing the delicate balance between free speech and access to the courts—and in the absence of anti-SLAPP legislation—enhanced Rule 11 sanctions, including attorney suspension and debarment, can be utilized by courts to deter such abusive litigation tactics. And the novel four-part test proffered in this Article could closely inform courts' weighing and levying of such sanctions. Ultimately, such a judicial corrective could help protect the constitutionally protected free speech rights of the press and of concerned citizens, which indeed are central to a well-functioning democracy.

ANN. R. 11(b)(2) (LexisNexis 2021). Similarly, 11(b)(2) of the Federal Rules of Civil Procedure permits a "nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." FED. R. CIV. P. 11(b)(2).

232. Webb v. Fury, 282 S.E.2d 28, 47–48 (W. Va. 1981) (Neely, J., dissenting), *overruled by* Harris v. Adkins, 432 S.E.2d 549 (W. Va. 1993).

233. *See Murray Corporate Overview*, *supra* note 37.

234. Murray v. Chagrin Valley Publ'g Co., 25 N.E.3d 1111, 1124 (Ohio Ct. App. 2014).

Table 1. Detailed Complaint Comparison[235]

John Oliver (2017)[236]	***New York Times* (2017)**[237]	***Huffington Post* (2013)**[238] **[detailed 12(b)(6) grant to defendant]**	***Chagrin* (2013)**[239] **[(1) Summary Judgment for defendant; (2) appealed—affirmed]**	**Moyer (2014)**[240] **[12(b)(6) dismissed because statutes of limitations ran]**
Count I—Defamation: ¶ 58—Plaintiffs restate and reallege all of the other paragraphs of this Complaint as if fully set forth herein.	Count I—Defamation: ¶ 21— Plaintiffs reallege all of the above paragraph of this Complaint as if fully set forth herein.			
Count I— Defamation: ¶ 59—Upon information and belief, Defendants caused the Defamatory Statements to be published with knowledge of the falsity of those statements or with reckless disregard as to the falsity of those statements.	Count I—Defamation: ¶ 22—Upon information and belief, Defendant caused the Defamatory Statement to be published with knowledge of the falsity of those statements or with reckless disregard as to the falsity of those statements.		¶ 41—Upon information and belief, Defendants caused the Defamatory Statements to be published with knowledge of the falsity of the statements contained therein or with reckless or negligent disregard as to the truth or falsity of said statements.	

235. For Table 1, the litigation outcomes for unlisted cases were as follows: Tarley (2002) [12(b)(1) granted for defamation]; Knight-Ridder (2004) [(1)—summary judgment for defendant, (2) reverse for Murray].

236. *See generally* Oliver Complaint, *supra* note 40.

237. *See generally* The N.Y. Times Complaint, *supra* note 42.

238. *See* Murray v. TheHuffingtongPost.com, Inc., 13 CV 347 (Ohio Ct. Common Pleas Sept. 24, 2013).

239. *See* Murray v. The Chagrin Valley Publishing Company, CV 13 811106 (Ohio Ct. Common Pleas July 23, 2013).

240. *See* Murray v. Moyers, 14 CV 321 (Ohio Ct. Common Pleas Oct. 20, 2014).

Count I— Defamation: ¶60—The Defamatory Statements are defamatory *per se* in that, on their face, they reflect upon Plaintiffs' reputation and character in a manner that: (1) injured Plaintiffs' reputation and subject Plaintiffs to public hatred, ridicule, shame, or disgrace; and (2) adversely affected Plaintiffs' trades or businesses. In the alternative, the Defamatory Statements are defamatory *per quod* in that they are capable of being interpreted as reflecting upon Plaintiffs' reputation or character in a manner that: (1) injured Plaintiffs' reputation or expose them to public hatred, ridicule, shame, or disgrace; and (2) adversely affected Plaintiffs' trades or businesses.	Count I— Defamation: ¶23—The Defamatory Statements were defamatory *per se* in that, on their face, they reflect upon Plaintiffs' reputation and character in a manner that: (1) injured Plaintiffs' reputation and subjects Plaintiffs to public hatred, ridicule, shame, or disgrace; and (2) adversely affected Plaintiffs' trades or businesses. In the alternative, the Defamatory Statements are defamatory *per quod* in that they are capable of being interpreted as reflecting upon Plaintiffs' reputation or character in a manner that: (1) injured Plaintiffs' reputation or exposes them to public hatred, ridicule, shame, or disgrace; and (2) adversely affected	Count I— Defamation: ¶29—The Defamatory Statements are defamatory *per se* in that, on their face, they reflect upon the Murray Plaintiffs' reputation and character in a manner that: (1) injures Murray's reputation and subject Murray to public hatred, ridicule, shame, or disgrace; and (2) adversely affects Murray's trades and/or businesses. In the alternative, the Defamatory Statements are defamatory *per quod* in that they are capable of being interpreted as reflecting upon Murray's reputation and/or character in a manner that: (1) injures Murray's reputation and/or exposes him to public hatred, ridicule, shame, or disgrace; and (2) adversely affects his trades and/or businesses.		

	Plaintiffs' trades or businesses.			
Count I— Defamation: ¶61—The Defamatory statements were published and continue to be published with malice and without lawful privilege or basis.	Count I— Defamation: ¶24—The Defamatory Statements were published and continue to be published with malice and without any lawful privilege or basis.	Count I— Defamation: ¶30—The Defamatory Statements were published with malice, and without any lawful privilege or basis.	Count I— Defamation: ¶44—The Defamatory Statements were published with malice, and without any lawful privilege or basis.	
Count I— Defamation: ¶ 61—The Defamatory Statements were published and continue to be published with malice and without any lawful privilege or basis.	Count I— Defamation: ¶24—The Defamatory Statements were published and continue to be published with malice and without any lawful privilege or basis.	Count I— Defamation: ¶ 31— Publication of the Defamatory Statements has caused and will continue to cause Murray and members of Murray's family to suffer great mental anguish and emotional distress.		
Count I— Defamation: ¶ 62— Publication of the Defamatory Statements will cause Plaintiffs to encounter more difficulty in securing performance surety bonds from lenders to support their businesses and Plaintiffs may have to collateralize them at higher levels, and publication of the Defamatory Statements already caused Plaintiffs harm in this regard by damaging their reputations with such lenders.	Count I— Defamation: ¶ 25— Publication of the Defamatory Statements will cause Plaintiffs to encounter more difficultly in securing performance surety bonds from lenders to support their businesses and Plaintiffs may have to collateralize	Count I— Defamation: ¶ 36— Publication of the Defamatory Statements will cause the Murray Plaintiffs to encounter more difficulty in securing performance surety bonds from lenders to support Murray's and may cause the		

	them at higher levels.	Murray Plaintiffs to have to collateralize these bonds at higher levels.		
Count I— Defamation: ¶ 63— Publication of the Defamatory Statements will cause lenders to be less willing to engage in financing transactions with Plaintiffs, thereby preventing them from gaining access to capital needed to operate their businesses or making it more difficult and expensive for them to obtain such capital, and publication of the Defamatory Statements already has caused Plaintiffs harm in this regard by damaging their reputations with such lenders.	Count I— Defamation: ¶ 26— Publication of the Defamatory Statements will cause lenders to be less willing to engage in financing transactions with Plaintiffs, thereby preventing them from gaining access to capital needed to operate their businesses or making it more difficult and expensive for them to obtain such capital.	Count I— Defamation: ¶ 37— Publication of the Defamatory Statements will cause lenders to be less willing to engage in financing transactions with the Murray Plaintiffs, thereby preventing them from gaining access to capital needed to operate their businesses or making it more difficult and expensive for them to obtain such capital.		
Count I— Defamation: ¶ 64— Publication of the Defamatory Statements will cause Plaintiffs to encounter difficulty in having effective discussions with public officials, including regulatory agencies, regarding matters of concern to Plaintiffs' businesses, and publication of the Defamatory Statements already has caused Plaintiffs harm in this	Count I— Defamation: ¶ 27— Publication of the Defamatory Statements will cause Plaintiffs to encounter difficulty in having discussions with public officials, including regulatory agencies, regarding	Count I— Defamation: ¶ 38— Publication of the Defamatory Statements will cause the Murray Plaintiffs to encounter difficulty in participating in discussions with public officials, including regulatory		

regard by damaging their reputations with such public officials and agencies.	matters of concern to Plaintiffs' businesses.	agencies, regarding matters of concern to the Murray Plaintiffs' businesses.		
Count I— Defamation: ¶ 65— Publication of the Defamatory Statements will cause Plaintiffs to suffer a loss of business opportunities and loss of potential or existing customers for their businesses, and publication of the Defamatory Statements already has caused Plaintiffs harm in this regard by damaging their reputations with such potential and existing customers.	Count I— Defamation: ¶ 28— Publication of the Defamatory Statement will cause Plaintiffs to suffer a loss of business opportunities and loss of potential or existing customers for their businesses.	Count I— Defamation: ¶ 39— Publication of the Defamatory Statements will cause the Murray plaintiffs to suffer a loss of business opportunities and loss of potential and/or existing customers for their businesses.		
Count I— Defamation: ¶ 68— Publication of the Defamatory Statements has caused and will continue to cause damage to Plaintiffs' reputation and good standing in their community and industry.	Count I— Defamation: ¶ 29— Publication of the Defamatory Statements has caused and will continue to cause damage to Plaintiffs' reputation and good standing in their community and industry.			

Count II—False Light Invasion of Privacy: ¶ 70—The Defamatory Statements constitute false light invasion of privacy in that the Defamatory Statements have subjected Plaintiffs to unreasonable and highly objectionable publicity by attributing to them characteristics, conduct, or beliefs that are false, thereby placing them in a false light before the public.		Count II—False Light Invasion of Privacy: ¶ 41—The Defamatory Statements constitute false light invasion of privacy in that the Defamatory Statements have subjected the Murray Plaintiffs to unreasonable and highly objectionable publicity by attributing to them characteristics, conduct or beliefs that are false, thereby placing the, in a false light before the public.		Count I—False Light Invasion of Privacy (All defendants): ¶ 21—The Broadcast constitutes false light invasion of privacy in that the Defendant Moyers and Defendant PAT subjected Mr. Murray and Murray Energy to unreasonable and highly objectionable publicity by attributing to them characteristics, conduct, activities, or beliefs that are false, thereby placing Mr. Murray and Murray Energy in a false light before the public.
Count II—False light invasion of privacy: ¶71—The false light in which Plaintiffs have been placed due to publication of the Defamatory Statements would be highly offensive to a reasonable person.		Count II—False light invasion of privacy: ¶42—The false light in which the Murray plaintiffs have been placed due to publication of the defamatory statements would be highly offensive to a reasonable person.		Count II—False Light Invasion of Privacy (All defendants): ¶22—The false light in which Defendant Moyers and Defendant PAT placed Mr. Murray and Murray Energy is highly offensive to any

				reasonable person.
Count II—False Light Invasion of Privacy: ¶ 72—Defendants had knowledge of the falsity of the Defamatory Statements or acted in reckless disregard as to the falsity of the Defamatory Statements and the false light in which Plaintiffs would be placed.		¶ Count II—False Light Invasion of Privacy: 43—Defendants had knowledge of the falsity of the Defamatory Statements or acted in reckless disregard as to the falsity of the Defamatory Statements and the false light in which the Murray Plaintiffs would be placed.		
Count II—False Light Invasion of Privacy: ¶73—Publication of the Defamatory Statements has caused and will continue to cause Plaintiffs and members of Mr. Murray's family to suffer great mental anguish and emotional distress.		Count II—False Light Invasion of Privacy: ¶44—Publication of the Defamatory Statements has caused and will continue to cause Murray and members of Murray's family to suffer great mental anguish and emotional distress.	Count I—Defamation: ¶45—Publication of the Defamatory Statements has caused and will continue to cause The Murray plaintiffs and members of Murray's family to suffer great mental anguish and emotional distress.	Count I—False light invasion of privacy (All defendants): ¶26—The Broadcast has caused and will continue to cause Mr. Murry and members of his family to suffer great mental anguish and emotional distress.
Count II—False Light Invasion of Privacy: ¶ 74—Publication of the Defamatory Statements will cause Plaintiffs to encounter more difficulty in securing performance surety bonds from lenders to support their		Count II—False Light Invasion of Privacy: ¶ 49—Publication of the Defamatory Statements will cause the Murray		Count I—False Light Invasion of Privacy (All Defendants): ¶ 29—The Broadcast will cause Mr. Murray and Murray Energy

businesses and Plaintiffs may have to collateralize them at higher levels.		Plaintiffs to encounter more difficulty in securing performance surety bonds from lenders to support Murray's businesses and may cause the Murray Plaintiffs to have to collateralize these bonds at higher levels.		to suffer great difficulty in security performance surety bonds from lenders to support their businesses and may require Mr. Murray and Murray Energy to collateralize these bonds at higher levels.
Count II—False Light Invasion of Privacy: ¶ 75—Publication of the Defamatory Statements will cause lenders to be less willing to engage in financing transactions with Plaintiffs, thereby preventing them from gaining access to capital needed to operate their businesses or making it more difficult and expensive for them to obtain such capital.		Count II—False Light Invasion of Privacy: ¶ 50—Publication of the Defamatory Statements will cause lenders to be less willing to engage in financing transactions with the Murray Plaintiffs, thereby preventing them from gaining access to capital needed to operate their businesses or making it more difficult and expensive for them to obtain such capital.		Count I—False Light Invasion of privacy (All defendant): ¶ 30—The Broadcast will cause lenders to be less willing to engage in financing transactions with Mr. Murray and Murray Energy, thereby preventing them from gaining access to capital needed to operate their businesses and making it more difficult and more expense for them to obtain such capital.
Count II—False Light Invasion of Privacy: ¶ 76—Publication of the Defamatory Statements		Count II—False Light Invasion of Privacy: ¶ 51—		Count I—False Light Invasion of privacy (All defendant):

will cause Plaintiffs to encounter difficulty in having effective discussion with public officials, including regulatory agencies, regarding matters of concern to Plaintiffs' businesses.		Publication of the Defamatory Statements will cause the Murray Plaintiffs to encounter difficulty in participating in discussions with public officials, including regulatory agencies, regarding matters of concern to the Murray Plaintiffs' businesses.		¶ 31—The Broadcast will cause Mr. Murray and Murray Energy to encounter difficulty in participating in discussions with public officials, including regulatory agencies, regarding matters of concern to their businesses.
Count II—False Light Invasion of Privacy: ¶ 77—Publication of the Defamatory Statements will cause Plaintiffs to suffer a loss of business opportunities and loss of potential or existing customers for their businesses.				Count I—False Light Invasion of Privacy (All Defendants): ¶ 32—The Broadcast will cause Mr. Murray and Murray Energy to suffer a loss of business opportunities and loss of potential or existing customers for their businesses.
Count II—False Light Invasion of Privacy: ¶ 78—Publication of the Defamatory Statements will cause Plaintiffs to suffer a loss of business opportunities and loss of potential or existing vendors.		Count II—False Light Invasion of Privacy: ¶ 52—Publication of the Defamatory Statements will cause the Murray Plaintiffs to		

		suffer a loss of business opportunities and loss of potential and/or existing customers for their businesses.		
Count II—False Light Invasion of Privacy: ¶ 79—Publication of the Defamatory Statements has caused and will continue to cause damage to Plaintiffs' reputation and good standing in their community and industry.				Count I—False Light Invasion of Privacy (All Defendants): ¶ 27—The Broadcast has caused and will continue to cause Mr. Murray to suffer severe personal and professional humiliation and injury to his reputation as a leader in the coal mining industry that he has worked for decade to build and maintain.
Count II—False Light Invasion of Privacy: ¶ 79—Publication of the Defamatory Statements has caused and will continue to cause damage to Plaintiffs' reputation and good standing in their community and industry.				Count I—False Light Invasion of Privacy (All Defendants): ¶ 33—The Broadcast has caused and will continue to cause damage to Mr. Murray's and Murray Energy's reputation and good standing in their community and industry.

Table 2. Litigation Outcome Analysis

Party and Case #	**Venue and Judge**	**Law Firm and Lawyers**	**Cause of Action**	**Relief Requested**	**Similar Complaint**	**Result**
John Oliver; 17-0124	Circuit Court, Marshall, WV; Judge Jeffrey Cramer	Grove, Holmstrad & Delk; Grove (6065) Delk (6883)	Defamation/ Invasion of Privacy/IIED			
Huffington Post; 13 CV 347; 2:13-cv-01066-GLF-TPK	Common Pleas, Belmont County, OH; Judge Gregory Frost	Porter, Wright, Morris, & Arthur; Stemm (0023146) Hughes (0070997)	Defamation/ Invasion of Privacy	General, special and punitive damages (>$25k)		12(b)(6) Granted
Chagrin Valley Publishing Co.; CV 13 811106; 13 CV 14	Court of Appeals of OH, 8th District; Judge Frank Celebrezze [Originally filed in Common Pleas, Cuyahoga County, OH]	Porter, Wright, Morris, & Arthur; Stemm (0023146) Hughes (0070997) KcKown (0013378) Broadbent (0083876) Anderson (pro hac vice)	Defamation/ Invasion of Privacy	(Appeal of a SJ motion)	[Publisher actually removed all mention of Murray from websites—example of chilling free speech]	Affirmed SJ; also had a section that suggests OH adopt anti-SLAPP statutes to stop chilling free speech
Bloomberg; 15W290; 2:15-CV-2845	Common Pleas, Belmont County, OH; D/C SD of OH Eastern Division; Chief Judge Algenon Marbley	McGuire Woods; Marsico (0070741) Moore (0092716)	Trade Secret/ Tortious Interference with Contract	Actual losses/ unjust enrichment/ reasonable royalty		12(b)(6) Granted
Bill Moyers; 14 CV 321; 2:14-CV-02334	Common Pleas, Belmont County, OH; Judge Frank Fregiato; D/C SD OH Eastern Division	Cabral Edgars Sharp	Invasion of Privacy		[Court found that Plaintiff tried to cast Defamation suit as invasion of privacy because defamation was time barred]	12(b)(6) Granted
Carlo Tarley [Secretary-Treasurer of United Mine Workers of America]; C2-01-693	D/C SD of OH Eastern Division; Judge Edmund Sargus		Defamation [statements made by union worker]			Motion to Dismiss Granted

Knight-Ridder; 02 BE 45	Court of Appeals of OH, 7th District; Judge Joseph Vukovich	Lieberman Shaheen	Defamation	Reversal of SJ		Granted reversal of SJ [241]

241. Note that a settlement was reached in *Knight-Ridder*. *See, e.g.*, *Newspaper, Coal Owner Settle in Long-Running Case*, ATHENS NEWS (Dec. 29, 2005), https://www.athensnews.com/news/local/newspaper-coal-owner-settle-in-long-running-case/article_f217f8fe-2fc9-5928-a25a-0eaadbb5d36f.html.