

# Small Business Institute® Journal

An Official Journal of the Small Business Institute®

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April 2016



Editors Shanan G. Gibson, PhD  
Michael L. Harris, PhD

The Small Business Institute® is the premier organization dedicated to field-based student consulting and outreach to small businesses. Our members are actively involved with small businesses and entrepreneurial firms in their communities and regions.



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## Letter from the President

On behalf of the Small Business Institute® (SBI) Board of Directors, members, and a global community of small business scholars, welcome to the latest edition of the SBI Journal (SBIJ)!

SBIJ showcases scholarly research articles and cases in the fields of small business management, entrepreneurship, and field based learning. As one of the official journals of the SBI, SBIJ is recognized as the applied and pedagogical instrument for projecting and supporting the goals and objectives of SBI. Toward that end, this issue of SBIJ features various perspectives of experiential learning and small business inquiry.

Please remember to continue to consider the Small Business Institute® Journal as your journal. Your contributions, your use of its articles in your own research, and your sharing these articles with others is what makes this your journal. If you have any questions about the SBIJ, please contact Mike Harris or Shanana Gibson for more information.

We hope you enjoy this issue, and make plans to join us for our 2017 Annual Conference in San Diego, CA, February 16-18.

Sincerely,

*Patrick D. Walker*

Patrick D. Walker, JD, MBA  
President, Small Business Institute®

## Letter from the Editors

Dear Colleagues,

Prancing daffodils, bare feet on freshly-mowed green grass, and the crack of bat against ball - spring is upon us and with it comes this new volume of the *Small Business Institute® Journal*! For many small business scholars and practitioners right now represents the perfect time of year as we finalize our courses and prepare for the “lazy” days of summer; we hope you enjoy all that the season has to offer and that you have time to thoroughly enjoy this issue!

Reflecting the wide-ranging interests of the Small Business Institute® membership, this issue includes a variety of high quality articles that should appeal to our diverse and varied readership. Consistent with the mission of the SBI®, we begin with an examination of strategic management education and how the Small Business Institute®’s field-based educational paradigm furthers student learning in this realm. We follow this with an article of interest to many small business owners – ensuring a business’s vitality and longevity through an annual “health check-up.” Also of significant importance for entrepreneurs is the ability to identify and assess potential markets; our third article examines two popular databases that can assist with developing well-informed marketing strategies for either business entry or growth.

Lastly, we tackle an emerging issue, strategic lawsuits against public participation (SLAPPs). Given the increasing use of internet and social media in small business operations, no business owner should be uninformed with regard to the nature of legal actions that can arise from online activities. While each of these articles is highly distinctive, they share the characteristic of providing both practitioners and academics with meaningful insights into the practice and advancement of business.

Our thanks to the authors, reviewers, and staff who made this edition possible; it is an honor and a pleasure working with such a dedicated group of individuals. Without the efforts of so many, the SBIJ would never make it to you! And we need more of *you* – to submit your small business research for consideration, to serve as reviewers, and to pass on information about the SBIJ to your colleagues, too! Please visit the journal website [www.sbij.org](http://www.sbij.org) for details and submission instructions.

We hope you enjoy reading this edition of SBIJ!

Shanan G. Gibson & Michael L. Harris  
*Small Business Institute® Journal* Editorial Team

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## Table of Contents

### ARTICLES

#### **Strategic Planning and Field Based Consulting**

David Lynn Hoffman, Metropolitan State University of Denver  
David Bechtold, Metropolitan State University of Denver  
Ann Murphy, Metropolitan State University of Denver  
Johannes Snyman, Metropolitan State University of Denver.....pages 1 - 9

#### **Improving Small Business Viability Through the Strategic Longevity and Health Maintenance Evaluation**

Michael Roller, University of New Haven  
Abbas Nadim, University of New Haven  
Robert Lussier, Springfield College .....pages 10 -20

#### **New and Ongoing Retail Venture Strategy: Utilizing Regional Consumer Expenditure and Consumer Interest Data**

Matthew Sonfield, Hofstra University .....pages 21 - 27

#### **Getting SLAPPed: A 21<sup>st</sup> Century Business Risk**

Brenda Wells, East Carolina University  
Chad Marzen, Florida State University ..... pages 28 - 46

## **Strategic Planning and Field Based Consulting**

David Lynn Hoffman, David Bechtold, Ann Murphy & Johannes Snyman  
Metropolitan State University of Denver

Critics of strategic management education argue that it has become too theoretical and does not adequately prepare students for the uncertain environments they will face in the future (Godfrey, Illes & Berry, 2005). This article reviews the history of strategic planning, the history of the Small Business Institute® (SBI)'s field based experiential classes, its advantages, and addresses the current concern of assurance of learning- that some SBI outcomes cannot be measured. It concludes with an explanation of one school's three different pedagogical approaches to teaching strategy via the field based approach and argues that all three, although different, meet the primary components of knowledge acquisition and retention as proposed by O'Dwyer, Birthistle, Hynes, and Costin (2009).

The history of management thought begins with Frederic Taylor's (1911) concept of scientific management and Fayol's four management functions: planning, organizing, controlling, and communicating. Taylor's assumptions about worker motivation were challenged by Elton Mayo's Hawthorne Studies which spawned studies into human relations. During this time period Harvard began its case study method (Candy & Gordon, 2011). Chandler (1962) is credited with beginning the study of business history, the argument for decentralization of large companies and the argument that structure should follow strategy (Candy & Gordon, 2011). The advent of systems thinking in the 1980s challenged the assumption that businesses are closed systems with the understanding that they are actually open systems because they interact with and are affected by their environments.

One of the most influential early strategy theories that put substance into the relationship between strategy and external environments was Ansoff's (1960) theory that focused on the environmental factors of variety of change, frequency of change, urgency, predictability, and budget as compared to five levels of environmental change: stable, reactive, anticipatory, exploring, and creative. Peter Drucker, Tom Peters, and Ted Levitt contributed understanding about human factors including worker empowerment, decentralization, customer focus, leadership and hierarchies (Candy & Gordon, 2011). Michael Porter (1990) added environmental competitive forces and Hamal and Prahalad (1994) added the concept of core competencies.

### **STRATEGIC PLANNING TODAY**

Today the field is concerned with the discussion between the institutional based view of strategy, the resource-based view, and the ecology model (Dess, Lumpkin, Eisner & McNamara, 2012; Grant, 2013; Grant & Jordan, 2015). Institutional theorists believe that organizations use systematic and rational approaches to their environment. This leads to the concern that too little or too much structure works against efficiency and adaptability in dynamic environments (Davis, Esienhardt & Bingham, 2009; Eisenhart & Martin, 2000). Davis concluded that there is an inverted U shape relationship between structure and performance. Candy and Gordon (2011) believe that the institutional view provides better clarity of the organization, its struggle for survival, and its environment, especially where conformity to the environment is critical.

The resource-based view sees organizations as a bundle of resources that are possessed, available, or within an organization's sphere of influence. Therefore, differences in performance are driven by differences in organizational resources and capabilities (Candy & Gordon, 2011). Such resources could include tangible resources, such as financial and physical, and intangible resources such as culture, values, human abilities, innovation, and reputation. Also included may be information exchange ability,

transaction speeds, employee competency, and management competency (Candy & Gordon, 2011). Organizations achieve competitive advantages when their resources are: valuable, rarity, non-imitative, and sustainable.

The ecology model views organizations as existing in constantly changing environments therefore requiring open systems approaches. To be effective organizations must address the needs and demands of their local environments while maintaining communication systems and missions that make the organization, different, distinct, and superior to its competitors (Candy & Gordon, 2011). Grant (2013) argues that current strategists should continue to be concerned with values, industry analysis, competitive analysis, analysis of resources, organizational design, competitive advantage, integration, technology, and diversification. They should also be concerned with environmental turbulence, the pace of technology, the pace of creative destruction, social pressures over income disparity, the economic relations between the United States and the rest of the world, the breakdown of corporate boundaries, complexity theory, and self-organization.

### **STRATEGIC PLANNING PEDAGOGY**

Most current strategic planning textbooks cover these topics and almost all cover the analytical topics of internal analysis, external analysis, business level strategy, corporate level strategy, international strategy, control and governance, (Dess, Lumpkin, Eisner, McNamara 2014; Rothaermel, 2017). Some authors add case analysis, corporate entrepreneurship, and implementation (Dess *et al.*, 2014). After these basics some instructors use the Harvard case approach with published cases or have students analyze public companies. Others use simulations requiring students to use the above analytical tools.

The key difference in the SBI field based approach is that after covering the above theories and basics, the students work with actual businesses in their communities. The authors argue below that the field based approach meets most of the criticisms being leveled at business education in general including strategic planning education. To understand the authors' argument a review of the current criticism is helpful followed by a brief history of the SBI approach and how it improves knowledge acquisition and retention.

### **CRITICISM OF BUSINESS EDUCATION INCLUDING STRATEGIC PLANNING EDUCATION**

Some critics believe that business education lacks theoretical underpinnings and suffers a decline in academic quality (Gordon & Howell, 1959 quoted in Godfrey, Illes & Berry, 2005) or too entrenched with corporate concerns (Gioia & Corley, 2002), and is therefore little above vocational schools (Trank & Rynes, 2003). Conversely, more damaging arguments are that business education is so focused on academic theories and methodologies that it is too narrowly focused (Mintzberg, 1990) especially on analytical tools that cannot solve problems found in cross functional issues that are beyond the tools' boundaries (Godfrey, Illes & Berry, 2005). Some argue that good teaching suffers from the focus on research with some business schools too concerned about school rankings and looking good rather than being good (Gioia & Corley, 2002). Pfeiffer and Fong (2002) believe that business education provides little guidance to the real world and therefore approaches irrelevance.

### **SERVICE LEARNING AND EXPERIENTIAL LEARNING AS A MEANS TO RESOLVE CRITICISMS**

Godfrey *et al.*, (2005) argue that service learning meets most of these criticisms because it provides issues that include reality, real world settings, cross functional problems, and moral, ethical, and justice issues. In addition, student reflection on their experiences leads to knowledge about their and others' future behaviors and builds responsibility and civic virtues. They suggest that the field based experiential approach of the Small Business Institute® program also meets many of the criticisms from Godfrey's *et al.* (2005). The following brief history provides this justification.

The SBI program was started in 1972 when a group of professors left the Decision Sciences Institute to form the SBI program based on their desire to explain and develop field based consulting. In its peak in the 1990s the program had approximately 400 schools nationwide involved in field based consulting. The organization sponsors two journals, the *Journal of Small Business Strategy* and *The Small Business Institute® Journal* and national conferences dedicated to the enhancement of field based consulting (Small Business Institute® website, 2016).

The best explanation of the SBI process is Cook, Belliveau and Campbell's (2012) Experiential Student Team Consulting Model. The model shows the integration of the client, the team, the student(s), and the instructor(s). Each of these interact with each other. The authors based their model on the established literature in experiential learning, problem-based learning (Peterson, 2004), and service learning (Elyer & Giles, 1999). SBI programs use teams of students in real world applications to solve their client's issues (Cook *et al.*, 2012). Each team must determine the client's issues, develop appropriate and reasonable alternatives, and recommend solutions that fit that client's actual situation. The teams usually present both oral and written reports.

The SBI program has the following benefits such as cooperative team environments and interdisciplinary approaches (Cook *et al.*, 2012), dynamic group activities (Ames, 2006), interactive client experiences (Ames, 2006), learning for both the students and clients (Ames, 2006), improving negotiation and networking skills (Lacho & Bradley, 2010), and usefulness for community development (Lacho & Bradley, 2010; Bradley, 2003). It also bridges the gap between passive learning and actual job expectations. Brennan (1995) found that students liked their experiences, their instructors, but viewed their team experience less favorably. Boyles and Lang (2009) found that the program involves students in critical thinking and encourages initiative. As noted above, some programs have been designated as service learning experiences which have Elyer and Gile's (1999) characteristics of addressing complex problems, requiring critical thinking, requiring team collaboration, and promoting deeper learning.

The real world application exposes students to owners who are constantly juggling multiple functions simultaneously such as marketing, management, finance, operational, and strategic issues. They also observe clients dealing with humanistic, moral, ethical and legal issues. Sometimes they are exposed to less than ethical clients and must use self-reflection and analysis to resolve their and the clients' issues (Hoffman, Radojevich-Kelley, McVicker & Faurer, 2010).

### **KNOWLEDGE RETENTION AND ACQUISITION (DEEPER LEARNING)**

O'Dwyer *et al.* (2009) believe education should provide both explicit and tacit knowledge. The first is gained by communication via traditional educational methods such as lectures, textbooks, and readings. Tacit knowledge is practical knowledge gained by experience with direct experience or observation of what works in what situations and the skills to deal with them. They argue that the SBI program combines both traditional lectures to provide explicit knowledge and tacit knowledge via involvement and observation of real world clients (O'Dwyer *et al.*, 2009). How the SBI meets their needs is explained below.

O'Dwyer *et al.* (2009) present five delivery modes for experiential learning including scanning, experimentation for cause and effect, self-appraisal, active participation in learning and problem solving, and unsystematic or unintentional learning. Kolb and Kolb's (2005) theory of experiential learning posits that experiential learning is enhanced by viewing it as a process, drawing out students' beliefs so they can be examined and integrated with new information, presenting students with conflicting ideas, engaging students holistically via their thinking, feeling, perceiving and behaving, providing interactions between students and their environments, and providing students with experiences that transform their paradigms. The authors of this paper believe that field based consulting meets the delivery methods of

O'Dwyer *et al.* (2009) and maximizes the experiential learning emphasized by Kolb and Kolb (2005). A review of one school's three approaches to field based consulting explains how each of these three different approaches, although different, fulfill these experiential learning requirements.

### **THREE APPROACHES TO TEACHING STRATEGIC PLANNING WITH FIELD BASED EXPERIENTIAL LEARNING**

A Strategy professor uses teams of students who are tasked to determine a business's strategic and operational issues, develop reasonable and viable alternatives and recommend solutions to the client. Because this professor stresses consulting as well as strategy, the class lectures also include consulting issues such as how to develop rapport with the client, entry and exit, and negotiations over the scope of engagement. This professor accepts all types of businesses. In a previous semester the clients included a county club and its golf course, a pizza restaurant, a local chamber of commerce, an African economic development program, a fitness club, a database company and a nonprofit providing accounting to its minority clients. Each team must work together to develop the solutions and present them orally and in writing to the client. Each team has only one client for which they are responsible. The clients are provided by the professor's business contacts and can include non-profits and for-profits. Sometimes startups are accepted.

The professor provides explicit knowledge via traditional lectures, textbooks, and Powerpoint slides. Tacit knowledge is measured by a self-reflection paper about themselves, their clients, and the class. This student self-reflection is then in assurance of learning. The flexibility allows the professor to invite other faculty, professional consultants or others to serve as external reviewers and validators.

The second Strategy professor collaborates with the local Small Business Development Center (SBDC) which provides and vets the possible clients (the use of SBDC clients is addressed in Geho & McDowell, 2011). Each team must complete an internal and external analysis, determine the strategic and implementation issues, and provide the client with oral and written reports. Each team must meet at least twice with their client. A client may have two or more teams working with the same client. Because this local SBDC has restrictive rules the class as a whole cannot participate in the other teams' issues. The professor requires that a company be in business for at least two years in order to complete a thorough financial analysis. External reviewers include SBDC representatives and other faculty members. Explicit knowledge is provided by traditional lectures and textbooks. Tacit knowledge is provided by the experiential experience. External review is provided by a very active and involved SBDC office.

The third Strategy professor uses contacts and SBDC clients for the field based consulting. The difference in this approach is that the whole class works on one client. Each team must determine the strategic and operational issues, determine solutions, and provide oral and written solutions. All the teams compete in a competition at the end of the semester with the client, the professor, and other external reviewers including outsiders and other faculty as judges. The best cases are given recognition and other awards.

This approach helps overcome a variety of challenges. First, the approach does not require a large number of willing clients to meet the needs of many undergraduate students. Secondly, the faculty member has to reinforce professional conduct and attitudes that they all have a "real client." The third challenge requires the faculty member to balance their curriculum time with explicit and tacit knowledge requirements. The benefits are that each student receives an experiential experience, judges others' performances, reflects on their performance relative to others, engages the client as an external reviewer, and encourages continued client interaction with the school. Explicit knowledge is provided by the professor via lectures and textbooks. Tacit knowledge is acquired by learning from the practical experience, competing in the competition, and self-reflection on their individual and team performance relative to the winning teams.

**CURRENT ISSUES FACING THESE STRATEGIC PLANNING APPROACHES**

Current issues include the need to verify how SBI students acquire and develop knowledge and the related assessment tools. The problem arises because the SBI has been promoting field based experiences since 1974 prior to the current strong influence and demand for assurance of learning systems. Much of this emphasis began in 2000 from regional accrediting bodies and then increased with ACCSB’s 2003 standards (Bieker, 2014; Lawrence, Reed & Locander, 2011). Because field based experiences preceded assurance of learning, the field is trying to adapt. Perhaps Ames’ (2006) concern can be redirected and this issue should be viewed not as a threat but an opportunity to better define learning outcomes from field based experiences. Assurance of learning systems would benefit from a better alignment with the new standards regarding impact. Measurements could be direct or indirect to provide a broader picture of the benefits of this form of learning. Depending on the school’s mission, field based programs may also address the institution’s impact on the community by measuring the impact on both the students and the clients involved. However, these perceived expectations should be developed ahead of time and measured through surveys or follow up consulting projects ahead of time.

The impact on students can be examined through the five delivery modes for experiential learning proposed by O’Dwyer’s *et al.* (2009). This paper’s authors agree with O’Dwyer *et al.* (2009) that the SBI program meets the knowledge acquisition and knowledge retention (see Tables 1 and 2 below). Each of the methods above provides explicit knowledge via the traditional methods of textbooks and lectures. Tacit knowledge is provided by the extensive service/field based learning by working with actual clients.

Table 1. *Comparison of the Approaches to Knowledge Acquisition and Retention*

Strategic Planning Course	Explicit Knowledge	Tacit Knowledge	Knowledge Retention	Problem Solving Skills	Competition
Approach 1: Flexible strategic material	Good –but limited if other topics arise such as turnaround strategies	Excellent	Excellent	Excellent	None
Approach 2: Two or more teams have one client and compete with each other	Very Good	Excellent	Good to excellent	Excellent	Yes
Approach 3: All teams work with only one client in the course and compete for the best presentation and paper	Very Good	Excellent	Good to excellent	Excellent	Strong rivalry between teams

The first approach provides an opportunity for expanded tacit knowledge acquisition by participating, helping, recommending alternatives and solutions to other teams’ issues. For example, during one semester two clients were close to bankruptcy. This gave the opportunity for the instructor to add unexpected learning on turnaround strategies. It also added tacit knowledge acquisition because the other students had to do self-reflection with respect to what they would do if they were in the clients’ or the client’s teams situation.

Similarly, the second approach provides both explicit and tacit knowledge acquisition. It provides more external review by having two teams compete to provide the best recommendations to a single client. Impact on the students is also examined in the self reflection paper. Because this was one of the first courses to receive the university’s service learning designation, this is the only approach of the three in which the students completed a service learning questionnaire. The data shows that the class enhanced explicit knowledge because the students were more motivated to learn the material (see Table 2). It also increased tacit knowledge with the development of problem solving skills. Interestingly, a majority felt the experience provide insight into their careers and lives outside of school.

Table 2. *Service Learning Survey Results*

Survey Item	Strongly Agree	Neutral	Strongly Disagree	N
The community participation aspect of this course helped me to see how the subject matter I learned can be used in everyday life.	83%	13%	4%	23
The community participation aspect of this course motivated me to learn the subject matter.	83%	13%	4%	23
I felt a personal responsibility to meet the needs of the community partner of this course.	91%	9%	0%	23
My interactions with the community partner enhanced my learning in this course.	74%	26%	0%	23
The community aspect of this course helped me to develop my problem solving skills	65%	17%	17%	23
The service experience directly related to the core concepts and learning outcomes for the course.	83%	13%	4%	23
I have the ability to communicate my experience to a wider forum beyond the classroom	96%	4%	2%	23
The community aspect of this course helped me to develop my problem solving skills	65%	17%	17%	23
The community work in this course assisted me in clarifying my career plans.	52%	26%	22%	23

The third approach using a multi-team/single client adds depth to student acquisition of explicit and implicit knowledge as well as richness to team interaction with the client. The win/loss team outcome provides a real world experience that is not replicated in traditional team settings. Students also come to recognize that mastery of client consultant relationship management and business presentation skills are as important to team success as technical skills in conducting a business analysis.

By having multiple teams analyzing their operations, the business client often receives a collection of reports that offer greater depth as well as a broader array of recommendations to improve or enhance operations. As judges in the competition, the business client will also be more rigorous in their analysis of each student team performance. Content will be more carefully scrutinized and question and answer sessions with teams will be more robust. Feedback on decision criteria used to determine a winning team will be much more succinct allowing all teams to reflect on their and other teams’ performance. Perhaps most importantly, teams will have the opportunity to experience success or failure and in doing so begin to develop the skill set necessary to handle either professionally.

Given the above research and results from the three approaches, the authors suggest that using the SBI field based approach provides numerous benefits to the community and students as opposed to the sole use of published cases. For students it provides real world applications of the theories, requires thinking

outside of any functional box and solve interdisciplinary problems, and satisfies the new trend in service learning. Faculty are encouraged to use any of the three approaches or some unique combination of them and hopefully, report their results at future SBI conferences. This effort will satisfy some of the criticisms of business education and strategy education. The authors also encourage use of the service learning rubric to measure the impact on the students' knowledge acquisition and retention. However, assurance of learning is still a concern.

### **CAN THE FIELD BASED APPROACH MEET ASSURANCE OF LEARNING?**

Ames (2006) agrees that the uniqueness of the field based consulting approach provides enhanced actual business experiences (and thus service learning experiences). However, he argues that the increased effort to improve and increase assurance of learning presents the possibility that the SBI and related field based experiences may be a "bust" unless certain additional steps are taken. To meet assurance of learning he recommends ten steps including student journals, grading of these journals, 360 degrees assessment of the performance by peers, faculty and external validators, rubrics for all the above including the projects, and independent reviews of the presentations and projects.

Ames' (2006) concern raises the dilemma between allowing students to experience real world phenomena and assurance of learning. He states that the field based experience becomes more difficult to measure. This would be especially true with unexpected or unintended client issues such as a pending bankruptcy which occurred with the first approach. His point is well taken. While it may enhance tacit knowledge acquisition, the uniqueness of each different client's situation makes it more difficult to predetermine standard measurement tools that can be applied consistently over time. Applied at a course level his concern is legitimate. However, these courses do not stand alone, they are part of a degree program or a major. Unexpected issues create real world critical thinking opportunities for students. A possible solution is to have critical thinking as a program level learning objective (Marshall, 2007) and measure it with student surveys as done with the second approach.

### **FUTURE RESEARCH**

The influence of AACSB standards on the SBI program has been addressed before (Belliveau, Peluso & Cook, 2008) and now includes the added emphasis on impact (AACSB, 2016). Therefore, more research is needed on how field based consulting in general and teaching strategic planning in particular meet service learning objectives. This paper provided data on service learning outcomes from one particular strategic planning program. This surveys needs to be replicated in order to answer the impact question.

There are also assurance of learning issues yet to be answered, such as the tension between the push for empirical validation (Avery, McWhorter, Lirely & Doty, 2014) versus the difficulty measuring intangible outcomes (Lawrence, Reed & Locander, 2011). In addition there is need to examine how the level of faculty involvement impacts outcomes (Garrison & Rexeisen, 2014), the need for better measures of client impact (Beters-Reed, Nitkin & Sampson, 2008). Hopefully, Dean Martel's (2007) comment is correct that assurance of learning methods just have to be good enough until we research, study, and improve our instructional methods, including field based strategic management pedagogy and its related assurance of learning.

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## **Improving Small Business Viability Through the Strategic Longevity and Health Maintenance Evaluation**

Michael Rolleri  
University of New Haven

Abbas Nadim  
University of New Haven

Robert Lussier  
Springfield College

Most adults are urged to go through an annual health checkup. We recommend that most mature small businesses perform an annual strategic longevity and health maintenance evaluation as well to ensure their viability. To this end, we provide strategic areas of critical importance to a small business viability and longevity and offer guidelines for small business owners, managers, consultants, and small business/entrepreneurship educators use to help improve performance. We add to the body of literature on small business success and failure factors by emphasizing the need for a closer look at the open systems nature of these businesses and the impact of interaction with the larger external environmental system for viability. We urge small business owners to be more proactive in evaluating the health and viability of their businesses by using systems approach before the emergence of signs of trouble through the use of the Annual Health Maintenance and Viability Evaluation checklist. We recommend the use of the checkup for use by consultants including SBI student consulting projects.

The “management audits”, “gap analysis”, or “business checkups” are not new. However there is little evidence in the literature that they are actually commonly used by small business owners and consultants. Therefore, we bring the importance of what we call the health audit to the attention of small business owners and consultants. Also, most small business owners and many educators and consultants do not understand the system approach. In this article we explained the systems approach, and unlike other audit lists, our healthcare maintenance checklist adds to the literature by providing a systemic application.

### **ECONOMIC IMPORTANCE OF SMALL BUSINESS AND GOVERNMENT SPENDING**

An estimated 99% of all the registered firms in the United States are regarded as small business (SBA, 2016). There are 5.7 million firms with employees in this country and most of them have fewer than 500 employees (Collins, 2012; Kobe, 2012). Most of the new jobs (Clark & Saade, 2010) and more patients come from small businesses (Bagly, 2012).

Each year a vast amount of resources are employed to help small business. There are no solid or readily available total sum for the two major categories relevant to this research namely total money spent on startups and total money spent on keeping small business operating. According to the White House Office of Management and Budget (2014), the president’s 2013 budget supported \$16 billion in Small Business Administration (SBA) loan guarantees; \$14 billion in term loans and \$2 billion in revolving line of credit. Additionally \$4 billion in Small Business Investment Centers (SBIC) and \$18 million in direct loan to emerging entrepreneurs are part of the budget. Similarly \$200 million in guaranteed debenture is included for matching funds for investors seeking to support innovative companies for expansion of operation and job creation.

Other supportive actions include promoting impact investment in economically distressed regions for disadvantaged groups and in a section of national significance, Improving small business and exporter access to Federal services, helping them to connect to regional innovation, strengthening their exports and doubling the small business employer pension, plan startup credit, and help them provide health insurance to their employees (White House Office of Management and Budget, 2014).

There are two major obstacles in assessing the effectiveness of these measures for enhancing the success factors and/or eliminating the failure small businesses. First, there are no operational measures of before or after success rates. It is not known or readily available if all or any of these loans, subsidies, guarantee and helps do in fact keep more small businesses operating or if they help potential startups to become viable businesses. The federal government spends all these resources without knowing precisely if they achieve the desired outcomes.

Secondly, there are no clean-cut breakdowns of how much resources are dedicated towards creating new small businesses and financing startups and how much is spent helping to keep them in business and preventing them from failure and bankruptcy. Suffice to say that all of the loans and subsidies are hardly the cure for the failure factors, unless the resources are clearly and specifically earmarked to remedy a specific category, such as funding for marketing research and advertising, funding to train the management, funding for website development, or funding for going green and becoming sustainable.

In addition to the SBA, the Small Business Development Centers (SBDC) and the Small Business Institute® (SBI) provide resources to help small businesses. The mission of the SBDC is to deliver through a nationwide network of service centers educational assistance to strengthen small/medium size business management, thereby contributing to the growth of local, state and national economies ([www.sba.gov](http://www.sba.gov), n.d.). The mission of the SBI is to be the premier provider of professional development for those engaged in experiential student team consulting and related entrepreneurship education, research and activities ([www.smallbusinessinstitute.biz](http://www.smallbusinessinstitute.biz), n.d.). In carrying out these respective missions both organizations can and should explore opportunities to engage in a corporative effort to connect students with businesses to enhance experiential learning for students while also bringing additional resources to bear to assist business clients (Geho & McDowell, 2015).

### **SMALL BUSINESS SUCCESS VERSUS FAILURE**

There is an abundant body of literature on causes of small businesses failure. However, it does not do any of those businesses any good; they are out of business! Avoiding those causes also do not increase the chance of small business success: the absence of unhappiness does not make one happy, just neutral. The emphasis must be directed at finding ways to insure the viability of small business at all stages of their existence.

Entrepreneurs start business ventures for independence and to generate economic wealth but many do not succeed (Fiore & Lussier, 2009; Lussier, 1995; Lussier & Pfeifer, 2000, 2001). Success of a venture is uncertain (Carter & Van Auken, 2006); failure is a norm (Jiao, Welsch & Moutray, 2008). Why do some businesses succeed and others fail? Every start-up is launched with high hopes of success, but each year in the United States there are over a half million new startups, and around the same number close each year (SBA, 2015). Thus, the odds of forming a profitable venture appears to be of high risk. Understanding the causes of business owners' success and failure has been called the cornerstone of entrepreneurship research (Michael & Combs, 2008).

Predicting entrepreneurial fate is an important area of research because bankruptcy is both costly and disruptive to a variety of firm stakeholder including owners, investors, and communities (Van Auken, Kaufmann & Herrmann, 2009). Success versus failure prediction research benefits both potential and current entrepreneurs; those who assist, train and advise them; those who provide capital for their ventures; their suppliers; researchers; and public policy makers (Lussier, 1995; Lussier & Pfeifer, 2000). Research based evidence provides insight for government and academic institutions in their efforts to provide resources that may help reduce the incident of bankruptcy (Carter & Van Auken, 2006). However, discovering which factors or practices lead to business success and failure is an unfulfilled purpose of

business research (Rogoff, Lee & Sub, 2004). To date, there is no universal agreement on the causes of small businesses success or failure (Rogoff, *et al.* 2004) because there is great discrepancy in the literature as to which variables do in fact lead to success and failure (Lussier & Halabi, 2010).

### **THE CURRENT APPROACH TO SUCCESS VS FAILURE RESEARCH**

The current focus of success vs. failure research is primarily on identifying a list of internal environmental factors. For example, Lussier and Halabi (2010) list the success and failure factors as capital, record keeping and financial control, management experience, professional advisor, education, staffing, product/service, economic timing, age, partners, minority, and marketing. Similarly, Bradley and Cowdery (2014) list the specific causes of small business bankruptcy as under capitalization, lack of planning, trade credit, tax burden and regulation, personal issues, unrealistic expectations, poor cash flow, loss of key person, growing pain, lack of technology, poor location, natural disaster, poor record keeping, and failure to use advice. Note that while the two lists share many similarities, there are very few factors for success or failure that are rooted in the larger external environmental system of which the small business is a part.

### **THE NEED FOR SYSTEMS APPROACH IN DETERMINING THE CAUSES OF FAILURE OF SMALL BUSINESSES**

Small businesses face both internal and external obstacles that make survival difficult (Miller, Besser & Riibe, 2006). However, success versus failure research tends to focus more on the internal environment, such as capital and management, more so than the external environmental factors that clearly influence business success or failure. Research supports that the external environment affects the success of small business (De Clercq & Rangarajan, 2008; Lim, Morse, Mitchell & Seawright, 2010) and that both internal and external factors must be addressed to build sustainable success (Nadim & Lussier, 2012; Smith, Discenza, & Baker, 2005). Because research supports that the external environment affects the success of small business (De Clercq & Rangarajan, 2008; Lim, *et al.*, 2010) both internal and external factors must be addressed to build sustainable success (Smith, *et al.*, 2005).

Thus, the missing element in the search for success of failure factors is the ignorance of the systemic nature of a small business. Let us take a closer look at what constitutes a system. According to Ackoff (1999), a system is a “whole consisting of two or more parts. It satisfies the following five conditions:

1. The whole has one or more defining properties or functions.
2. Each part of the system can affect the behavior or properties of the whole.
3. There is a subset of parts that is sufficient in one or more environments for carrying out the defining functions of the whole; each of these parts is necessary but insufficient for carrying out this defining function the way that each essential part of a system affect its behavior or properties depends on (the behavior or properties of) at least one of the essential part of the system.
4. The way that each essential part of a system affects its behavior or properties depends on (the behavior or properties of) at least one of the essential part of the system.
5. The effect of any of subset of essential parts on the system as a whole depends on the behavior of at least one other such subset.”

A system cannot be divided into independent parts without loss of its essential properties or function. The five principles of openness, purposefulness, multidimensionality, emergent property, and counter intuitiveness, acting together as an interactive whole, define the essential characteristics and assumption about the behavior of an organization viewed as a purposeful, multi-minded system (Gharajedaghi, 2006). Of these five principles, openness and emergent property play a critical role in defining a new paradigm of success for small businesses. Openness means that the behavior of living (open) systems (those systems

that are dependent on their environment for survival) can be understood only in the context of their environment (the larger, containing system). Emergent property (success or failure of a small business) is the property of the entire system, not the property of the parts, and cannot be deduced from the properties of the parts. When a business fails, it fails as a whole, not part-by-part and section by section. The success or failure is the product of the interaction, not the sum of the action of the parts, and therefore has to be understood on their own term. Emergent property, by their nature, cannot be analyzed, it cannot be manipulated by analytical tools, and they do not yield to causal explanation (Gharajedaghi, 2006). When the performance of the parts of a system, considered separately, are improved, the performance of the whole may not be (and usually is not) improved.

A general observation of the majority of the research on success and failure of small businesses reinforces the methodological problem in design and conduct of these researches. It is a reductionist, analytical method based on causality. In this methodology, the field study is reduced to its major components, each component is researched for possible solution and the sum of the solution for each component is presented as the solution for the phenomena as a whole. However, from a systemic point of view, the behavior of a system cannot be observed from the sum of its parts. It can only be observed within the context of its larger system and environment.

Success for a small business is an emergent property; failure is the same. Nevertheless, we generally break the small business into its basic components, ignore its open systems properties, and try to understand why it succeeds and/or fails from a part oriented, reductionist, perspective. To understand the critical behavior of small businesses, their success, we have to place them in the context of their larger system: the environment and the neighborhood in which they operate. Concern for the immediate environment and sustainable behavior strengthen the ties of the small businesses with their communities and increases their probability of success.

The proposition of additionally looking for causes of success and failure in the context of the small business larger system, its environment, opens the door for appreciation of a whole host of new ideas. Sustainability and social and sustainable entrepreneurship will serve as a new paradigm for engaging small businesses in their immediate communities and increase their probability of success.

### **PASSIVE AND ACTIVE ADAPTATION: AN OPEN SYSTEM**

To paraphrase Ashby's (1956) law of requisite variety to survive, organizations must have as many adaptive responses as there are changes in their competitive environment even though they may be all passive. However, in today's turbulent and chaotic global competition, passive adaptation may not be sufficient for survival. Playing the game changes the game and the game changers are those that lead the competition. To remain viable through creating and maintaining a competitive edge requires active adaptation and sustainable innovation. As demonstrated earlier in reviewing the literature, most small businesses fail not only due to managerial ineptitudes, but also fail to adapt to changing or unknown external conditions. For the startup it is a case of unknown external conditions and for those already in business it is a case of dynamic, turbulent, and chaotic external conditions.

Adaptation, passive or active, to environmental conditions requires designing learning and adaptive business practices. It requires the design of the structure, process, functions and culture of the organization that can learn and adapt to the unknown or changing environmental conditions. From an open systems' perspective, an organization can fail by lacking the proper structure, process, functions or culture and failing to adapt to the changing environmental conditions, and/or creates its own future. It can also fail by not monitor the changes in its environment and consequently not adapting to what it does not know (Ackoff, 1999).

Unfortunately, most of current success of failure research have had an overemphasis on the structure, process, function (SPF), and culture of the organization by taking fault with each one individually. The question of whether the small business was aware of and appreciated its dynamic environment, or was prepared to adapt to it, have not received adequate coverage in the literature (Nadim & Lussier, 2012).

### **ARE FAILURES PREVENTABLE?**

The key question in assessing the success and failure factors for small business is the degree of prevention of the failure and reinforcement of the success factors. In other words, are the failure factors preventable and the success factors reinforceable? There are two general ways to accomplish this and they are interrelated: 1. managing the internal affairs of the business, and 2. managing its interaction with the external environment.

In regards to managing the internal affairs of the business, the review of the literature clearly indicated that most of the research has been conducted on the internal affairs of the business (SPF, and its culture), not the external environment. Small businesses, in terms of their ability to succeed, are not a special case, they can benefit from advances achieved by larger organizations. Recent trends in avoiding hierarchical structure in favor of flat or network structures, process method improvement to achieve the same ending with improved processes, and lower cost, and innovation and product/service improvement and sustainability, can all be emulated by the small business to increase their probability of success.

External stakeholders' management, in the general field of management, is a relatively new concept. While it was first introduced in the early 1970s, the actual implementation of the concept is still an evolving argument. There is now a growing body of literature on the effects of stakeholders' management on business performance (Sinclair, 2010). Post, Peterson, and Sachs (2002) strongly argue that managing relations with stakeholders for mutual benefit is a critical requirement for corporate success. The same argument can hold true for small businesses management as well. Recent development in sustainable business practices (Nadim & Lussier, 2012) can advance the practice of stakeholders' management for small businesses.

### **THE NEED FOR SMALL BUSINESS AUDITS**

It is well known in the medical field that people should get an annual check-up, and like the individual, so should the small business. Although the SBA and SBDC and others recommend an annual audit, the researchers found no evidence in the literature that small businesses go through the same annual check-up to increase their chance of long-term viability and discovery of the early warning sign of trouble.

### **THE SEC AND SARBANES-OXLEY ACT OF 2002**

Much is known and written about audits of larger businesses, specifically publicly traded companies. An annual report is a review of the financial records of an organization, checking for its accuracy and compliance with the sound accounting practice including the internal control. Starting back in 2006, all public companies are required (for the first time) to submit an annual assessment of the effectiveness of their internal financial auditing controls to the Securities and Exchange Commission (SEC). Additionally, each company's external auditors are required to audit and report on the internal control reports of management, in addition to the company's financial statements (Sarbanes-Oxley Act, 2002).

It is difficult to claim outright if a small business does or does not need an annual audit. In the absence of a generally agreed definition of a "small business", any business, irrespective of its size that falls under Sarbanes-Oxley Act requires an annual audit. If we choose to define small business as a privately held

company with fewer than 50 employees, there is very little evidence in the literature that they choose to commit to an annual audit. The primary reluctance to an annual audit is the cost and in the mind-set of the owners who question their usefulness to the success of their business.

### **IMPROVING VIABILITY THROUGH AN ANNUAL AUDIT AND HEALTH MAINTENANCE CHECKUP**

We strongly recommend that small businesses perform the annual health maintenance checkup to increase their chance of viability. This health maintenance checkup can be performed internally and does not require the help of outside consultants, CPA or other independent organizations, unless required by law or other contractual obligations.

Small businesses whose books are audited by a hired CPA, not the Internal Revenue Service, improve their chances of getting a loan, and at far better terms, than businesses with less scrutinized financial statements. Yet even as owners continue to struggle with tight credit, few can afford the time, effort, or cost of preparing complex financial statements, let alone having them audited (Loten, 2011). Nevertheless, small businesses that have any arrangement with the SBA are required to comply with the audit requirement of the SBA. (SBA Audit Program, 2015) Unfortunately, reviews of scant literature on small business audit all discuss the audit of the financial statement and internal control of the business, not the structure, process, function (SPF), culture or interaction with its stakeholders.

### **ANNUAL STRATEGIC HEALTH MAINTENANCE AND VIABILITY EVALUATION FOR SMALL BUSINESS**

We recommend that small businesses, similar to individuals, engage in annual health maintenance checkup. The procedure recommended here can be performed internally and does not necessarily require a CPA/Consultant or outside help. The small business owner/manager answers a series of questions.

The audit covers both categories of internal operations and interactions with the larger system/external stakeholders. The list is comprehensive, but not exhaustive and items could be added or deleted from the list at the discretion of the small business owner/ management based on the criticalness of the factor to its success. The list is a reflection of items in the literature regarding success and failure factors, previously cited in the body of the paper. It also reflects the systemic nature of any business and its interaction with the important components of its larger system and stakeholders.

By following this procedure of answering a series of questions, the small business can increase its probability of success and viability. The suggested list goes beyond the standard strategic planning SWOT analysis and Balanced Score Card (BSC) models. The simple use of SWOT to lists strengths, weakness, opportunities and threats provides little guidance. Whereas the complete SWOT analysis is primarily based on industrial economics concept and has too many items to make it useful for a small business; its applications are complex. The Balance Score Card (Kaplan & Norton, 1992) covers mostly the internal factors and ignores the externalities and stakeholders.

The appendix at the conclusion of the article has a checklist that is divided into two parts. The first part focuses on Internal operations and the second part focuses on the Interaction with the larger system/external stakeholders. Each of the two parts has multiple subparts. Again, less critical factors can be deleted/ignored and other more critical factors can be added to the checklist based on the specific small business's internal and external environments.

## RECOMMENDATIONS AND CONCLUSIONS

Similar to regular exercise and a healthy diet between annual checkups for personal health maintenance, we recommend similar courses of action for small businesses. As presented, the checkup list is quite extensive. However, as stated, the business owner/manager can delete or ignore items that are not critical factors, and add more critical factors relevant to the specific business. The checklist is a control tool that can identify potential problem areas before they lead to problems. As with the SWOT and BSC models used in large businesses, the strategic longevity and health evaluation maintenance evaluation serves as the foundation for developing strategic plans that must be effectively and efficiently implemented to proactively prevent or solve problems that can lead to business failure; with the focus on business success. Below are a few other ideas for strategic action related to the evaluation:

1. Membership in a Chamber of Commerce
2. Participating in free webinars on relevant topics on a regular basis
3. Active compliance with regulatory agency
4. Easy access to CPA when needed
5. Easy access to lawyers if and when needed
6. Finding a business coach

Small business play such an important role in employment that entrepreneurial success is critical to a healthy growing economy. What we have proposed here is one more critical step to achieve viability. Similar to all other living systems, small businesses have interactive elements that contribute to the health of the system, as well as the interaction with the environment that could impact them positively and negatively. Similarly they can benefit from staying healthy, living within a healthy environment and being able to detect the early signs of danger and operational and financial ailments.

We have presented an applied audit checklist to help the small business owners/managers to perform an annual strategic health maintenance checkup and increase their probability of successes. Entrepreneurship educators can teach the audit to future entrepreneurs as they prepare them for small business management. Small business consultants can help small business owners/managers conduct the audit. With the SBI's focus on experiential student team consulting, the health maintenance audit can be added to the existing tools. The checklist is especially helpful when the student consulting team has a client that does not have an existing problem of focus. Even when business owners state a specific problem they want help with, they often do not understand the systems effect, or they have a problem that is actually being caused by another factor. Thus, when students use the checklist they have a systemic tool to help understand how each part of the business system affects the other parts and that the business as a whole is a living system.

While we maintain that using the healthcare system annual checkup increases small business viability, it can be used with other techniques as well as a standalone consulting tools. As with any conceptual model, additional research of the small business checkup is needed to empirically test its validity. Although the use of an annual audit is not new, it is not commonly used by small business owners. Therefore, we bring the importance of the health audit to the attention of small business owners and consultants. Through this article we have explained the systems approach, and unlike other audit lists, our healthcare maintenance checklist provides a true systemic approach.

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## **Appendix A: Annual Health Maintenance and Viability Evaluation Checklist**

### **1. Internal Operations:**

#### **A. Structure, Process, Functions, and Culture:**

Human Resource practices: are there rules and regulations in place regarding human resources: hiring practices, workplace compliances, terminations, equal opportunity, etc.?

Is there a culture of innovation that promote risk taking and rewards new ideas?

Is there a formal performance measurement and reward system for excellence and innovation?

Is there a formal total quality management (TQM) and Process Methods Improvement in place?

#### **B. Financial Health:**

Does the business have a consistent cash flow generated from operating activities?

What is the debt structure of the business?

Does the business have positive current and quick ratios?

Is there a continual need for borrowing or capital infusions by the owner(s)?

Are the financial ratios comparable to competitors and industry standards?

Is the business' gross profit ratio consistent from one period to the next?

Is there any obsolete or slow moving inventory that may have to be written off?

What is the business' leverage as compared to equity capital invested?

#### **C. Financial Systems Adequacy:**

Are the business' financial reporting system properly designed and operating effectively?

Does the system include methods and records that minimize risk to a reasonable level and ensure the following:

a. all valid transactions are properly identified and recorded

b. sufficient detailed information is provided on a timely basis to permit proper classification for financial reporting

c. transactions are recorded at their proper monetary value in the financial statements

d. sufficient information is generated to permit the recording in the proper time period

e. transactions and related disclosures are properly presented in the financial statements

#### **D. Business Model Adequacy:**

How does the business earn a profit or generate its funds?

Is the products and services mix optimal?

What are the methods of advertising, selling and distributing?

Is the business model ethical, socially responsible, and sustainable?

Are there any unusual or complex transactions?

### **2. Interaction with the Larger System/External Stakeholders:**

#### **A. Compliance with Regulatory Requirements:**

How extensively is the business' industry regulated?

Are companies in the industry subject to unusual warranty or product liability requirements?

Are any new laws expected to significantly affect the industry?

Has the business received any communication from regulatory agencies? If so, what was the nature of the communication and how was it resolved? What controls are in place to minimize the risk of noncompliance?

**B. Environmental Friendliness:**

Is the business in an industry that has the potential to incur environmental-related liabilities?

Is the business in a high risk industry (real estate, health care, cleaners, gas stations, etc.)?

Is there any evidence that the business may have violated environmental laws? Compliance with existing laws does not free the business from cleanup costs but may reduce potential penalties.

Does the business use or generate regulated substances?

Does the business need to have permits to store, transport or use regulated substances?

Is the business involved in any criminal or civil procedures related to environmental issues?

Have regulatory authorities issued any reports on the business such as site assessments or environmental impact studies?

Has the business retained any environmental remediation liabilities on sites that it has sold?

**C. Competitive Advantage:**

Who are the business' primary competitors?

What is the competitive advantage and is it sustainable?

Is the business keeping up with changes in technology that may affect the way it competes?

Do sales depend on price or product differentiation?

**D. Local Trends and Political Awareness and Community Relations:**

Does the business hire from the local community?

Does the business sell mostly to the local community and close geographical areas?

Does the business give charitable donation to the local entities?

Is the business (ownership) active in the local and state level politics?

**E. Zoning and Conservation and other Local Regulations:**

Is the business operation consistent with local zoning laws and regulations?

Does the business retain a competent attorney who can address zoning issues that may arise?

**F. Sustainable Business Practices:**

Does the business operate with environmental awareness and follow practices of sustainability?

## **New and Ongoing Retail Venture Strategy: Utilizing Regional Consumer Expenditure and Consumer Interest Data**

Matthew Sonfield  
Hofstra University

This article provides information on two different sources of data that have the potential to assist an entrepreneur or business owner in formulating retail venture strategies for new or on-going businesses. The U.S. Bureau of Labor Statistics' "Consumer Expenditure Survey" provides regional and city data on consumer spending for a wide variety of product categories. The "Google Trends" database provides data on consumer interest in many product categories by state, broad metropolitan regions, and by cities. Comparing data across and between geographic locations on these two databases provides information that can assist both the currently active and the nascent businessperson in choosing locations for new or expanded retail outlets, or for expansion of product lines in existing outlets. Students of entrepreneurship and small business will also benefit from an awareness and understanding of these sources of data.

The development of business strategies for both new and ongoing ventures is a central and critical task for all small business owner/managers and entrepreneurs (Sonfield & Lussier, 1997). Venture strategy involves a variety of factors, including types of products or services, distribution channels, target markets, and other critical factors. Well-established prior research and theory development in the fields of management and marketing tells us that the relationship between venture strategy and resulting positive firm performance is a contingent relationship (Lyon, Lumpkin & Dess, 2000; Webster, 1977). Thus, the best venture strategy depends upon the situation. A strategy that may be optimal in one situation may not work best in another.

This article focuses on one aspect of new or ongoing retail venture strategy; the relationship between geographic location and product line strategies. Given a specific chosen geographical location for a retail consumer products business, what is the best product line strategy? Or conversely, given a chosen product line strategy, what is the best geographic location strategy? Clearly this is a more critical strategic issue for bricks-and-mortar retail businesses focusing primarily on a specific and concentrated geographic market, but even internet-based retailers must think about the geographic location patterns of their potential customers.

Consumer expenditure patterns vary across the United States by region and by more specific locations, such as cities (Berry, Bornum & Tennant, 1962). Some obvious factors include weather (air conditioners sell more in the South than in the North), age distributions (restaurants are more likely to offer "early-bird special" dinners in areas with a higher percentage of retirees), or ethnic population concentrations (kosher or halal foods sell more where Jewish or Islamic populations are greater). But some geographic consumer expenditure patterns are less obvious and self-evident, while other people in certain regions and cities spend a significantly disproportionate amount on specific categories of consumer products than in other cities. These varying buying patterns are partially explained by differing values and attitudes regarding social standing and what symbolizes such standing.

Several academic theories relate to this geographic variation in consumer buying patterns, and are worthy of brief discussion. A central basis for such variation in buying patterns involves the overlapping theories of "cultural capital" and "social contagion" (Allen & Anderson, 1993; Black, 2007; Bourdieu, 1986; Holt, 1998; Janakiraman & Niraj, 2011). "Cultural capital" refers to non-financial social factors that promote social values beyond economic means. Such factors include education, intellectual and cultural values, and styles of speech, dress and appearance. These factors may lead to populations with similar economic

characteristics having very different consumption patterns. Similarly, “Social contagion” refers to the phenomenon that the behavior of an individual consumer may be impacted by the behavior of other consumers who are geographically close, and this impact self-perpetuates and strengthens in a given geographic location over time, leading to geographic differences in consumer behavior. Thus, both one’s internal cultural characteristics and values and one’s external social influences impact buyer behavior and lead to significant geographic variations in both consumers’ interest patterns and purchasing activities.

For example, in New York City favored purchases include luxury watches and shoes. In Dallas, clothes denote social standing. High-end makeup is a major status symbol and purchase in Phoenix, and in Washington D.C. encyclopedias and reference books are highly regarded by one’s peers (Currid-Halkett, 2014). While these patterns may seem superficial, even modest variations in consumer buying behavior can be of significant importance and value to the business owner making strategic decisions regarding goods or services. And an understanding of more substantial variations in consumption patterns can lead to the development of better retail strategies with regard to sales locations and/or product line offerings.

This article could expand further on the academic literature and the various theoretical bases for these regional consumption patterns, but the objective of this article is to develop and convey application-oriented information to the reader. How might a small business owner and entrepreneur (or a consultant to such businesspeople) obtain the data to inform his or her retail strategies regarding location and/or product line? For those readers desiring a more in-depth understanding of these theoretical bases, a search of the academic literature databases will identify many discussions of these theories. Specifically, this article focuses on two available sources of consumer expenditure data which can assist the business owner/manager and entrepreneur in developing the best geographic strategy for their business: the United States Bureau of Labor Statistics’ “Consumer Expenditure Survey” and Google’s “Google Trends” data.

### **BUREAU OF LABOR STATISTICS CONSUMER EXPENDITURE SURVEY**

The Bureau of Labor Statistics is an agency within the United States Department of Labor, and is the principal federal office responsible for measuring labor market activity, working conditions, and price changes in the economy. Its mission is to collect, analyze, and disseminate essential economic information to support public and private decision-making. It is an independent statistical agency, not influenced by political factors, and therefore provides services that are objective, timely, accurate, and relevant (BLS.gov., 2015).

One component of the BLS’s activities involves its “Consumer Expenditure Survey,” (CE) which collects information on the amount and sources of family income, changes in assets and liabilities, and demographic and economic characteristics of family units and members. More specifically, the CE consists of two surveys, the Quarterly Interview Survey and the Diary Survey, which provide information on the buying habits of American consumers, including data on their specific expenditures. Of particular relevance to the purpose of this article, this data is broken down by the BLS into more narrow data for four regions of the United States – the Northeast, the Midwest, the South, and the West. And furthermore, within these four geographic regions, the data is further provided for eighteen selected cities (metropolitan statistical areas) – New York, Philadelphia, Boston, Chicago, Detroit, Minneapolis-St. Paul, Cleveland, Washington D.C., Baltimore, Atlanta, Miami, Dallas-Fort Worth, Houston, Los Angeles, San Francisco, San Diego, Seattle and Phoenix.

Thus the data indicates that consumers who reside in different regions of the United States, and more specifically in different cities, have significantly different expenditure patterns – the types of products they more frequently purchase vary from one location to another. Importantly, these differences can only

be partially correlated with differing average income levels. “Cultural capital” and “social contagion,” as discussed above, play a significant role in affecting these differences. Obviously this can be valuable information for small business owners, managers, and entrepreneurs as they develop their retail strategies regarding location and product offerings.

Table 1 provides examples of regional average annual “consumer unit”\* expenditures as reported in the most current CE data (for 2013).

Table 1. *Average Annual Expenditures by Region*

Product Category	Northeast	Midwest	South	West
Fish & Seafood	\$ 151	\$ 101	\$ 112	\$ 145
Sugar & Other Sweets	\$ 141	\$ 154	\$ 132	\$ 159
Furniture	\$ 399	\$ 390	\$ 371	\$ 401
Apparel - Men	\$ 352	\$ 335	\$ 358	\$ 465
Apparel - Women	\$ 542	\$ 536	\$ 515	\$ 627
Footwear	\$ 391	\$ 279	\$ 308	\$ 354
Cars & Trucks - New	\$1734	\$1447	\$1656	\$1555
Cars & Trucks - Used	\$1318	\$1863	\$1663	\$1482
Medical Services	\$ 775	\$ 926	\$ 665	\$ 997
Personal Care	\$ 630	\$ 574	\$ 591	\$ 698
Reading	\$ 126	\$ 110	\$ 81	\$ 128

Sources: BLS CE 2012-2013 tables 3002, 3013, 3023, 3032. \*A consumer unit is defined as either (1) all members of a particular household who are related by blood, marriage, adoption, or other legal arrangements; (2) a person living alone or sharing a household with others or living as a roomer in a private home or lodging house or in permanent living quarters in a hotel or motel, but who is financially independent; or (3) two or more persons living together who pool their income to make joint expenditure decisions. Financial independence is determined by the three major expense categories: housing, food, and other living expenses. (U.S. Bureau of Labor Statistics)

As noted, the CE data are available for certain selected cities. This more focused data can further inform retail venture strategy. Some examples of significant average annual expenditure differences are presented in Table 2. Here too the differences can be very significant, but can only be partially explained by differences in average income levels. To control and adjust for regional factors, these sample comparisons are solely within regions.

Table 2. *Average Annual Expenditures by City*

Region	Product Category	High City	\$	Low City	\$
Northeast	Cereal & Bakery Products	Boston	\$ 824	New York	\$ 590
Northeast	Pork	Boston	\$ 205	New York	\$ 157
Northeast	Fresh Fruit	Boston	\$ 404	New York	\$ 309
Northeast	Laundry & Cleaning Supplies	Philadelphia	\$ 208	Boston	\$ 105
Northeast	Postage & Stationery	Philadelphia	\$ 223	New York	\$ 123
Northeast	Furniture	New York	\$ 475	Boston	\$ 325
Northeast	Tobacco Products	Boston	\$ 426	New York	\$ 248
Midwest	Pork	Chicago	\$ 206	Detroit	\$ 151
Midwest	Fresh Fruits	Chicago	\$ 348	Minn./St. Paul	\$ 269
Midwest	Sugar & Other Sweets	Detroit	\$ 189	Cleveland	\$ 121
Midwest	Reading	Minn./St. Paul	\$ 205	Cleveland	\$ 84
Midwest	Transportation	Minn./St. Paul	\$ 219	Detroit	\$ 77

Midwest	Furniture	Minn./St. Paul	\$1053	Detroit	\$ 386
Midwest	Major Appliances	Minn./St. Paul	\$ 308	Cleveland	\$ 127
South	Beef	Wash. D.C.	\$ 276	Baltimore	\$ 153
South	Fats & Oils	Wash. D.C.	\$ 126	Dallas/Ft. Worth	\$ 92
South	Furniture	Wash. D.C.	\$ 895	Miami	\$ 194
South	Men’s Apparel	Dallas	\$ 438	Houston	\$ 392
South	Women’s Apparel	Dallas	\$ 733	Houston	\$ 471
South	Pets	Houston	\$ 900	Miami	\$ 306
South	Reading	Wash. D.C.	\$ 211	Miami	\$ 48
West	Poultry	San Francisco	\$ 198	Phoenix	\$ 126
West	Processed Vegetables	Seattle	\$ 131	San Diego	\$ 77
West	Alcoholic Beverages	San Francisco	\$ 698	Los Angeles	\$ 478
West	Major Appliances	San Diego	\$ 356	Phoenix	\$ 58
West	Reading	Seattle	\$ 190	Los Angeles	\$ 86
West	Tobacco	Seattle	\$ 310	Los Angeles	\$ 163

Sources: BLS CE 2012-2013 tables 3002, 3013, 3023, 3032.

The CE data is available online at <http://www.bls.gov/cex/>. However, much of the more detailed information obtained through the BLS surveys is omitted from the published tables. For example, product categories are not full broken down into sub-categories. The on-line data may show only the broad categories of “Food” or “Apparel” without the further breakdown into narrower categories. Yet the more narrow the breakdown of the data, the more useful it can be for formulating retail venture strategies.

To break the CE data down further, one can sometimes obtain such additional data by requesting it from the BLS. Also, various statistical methods have been developed by researchers using the public-use microdata version of the CE Survey Interview data (Berube, Katz & Lang, 2007; Bureau of Economic Analysis, 2015; Cobas, 1978; Lebergott, 2014; Lee, 2015; Schenk, Loffler & Rauh, 2007). Small business owner/managers and entrepreneurs, and their advisors, may wish to pursue these more complex but valuable statistical methodologies.

### GOOGLE TRENDS DATA

A very different but equally valuable set of data can be obtained quite easily from “Google Trends,” a service of Google that measures and compares regional interests in a wide variety of product categories, as measured by relative levels of individual searches on the Google website. For any chosen product category search, one can obtain search “scores” by state, metropolitan area, and by city. If searches for a specific product category in a chosen location are well below the average, no data are provided by Google Trends. For example, Table 3 shows the results of a search conducted in June 2015 using the search term “women’s shoes” provided the following scores for some example states (100 = highest score).

Table 3. *Google Trends “Women’s Shoes” Scores by State*

State	Score
Montana	100
Arkansas	89
Indiana	82
Pennsylvania	78
California	66
Virginia	53

Source: Google.com/trends

Thus, consumer interest in women’s shoes, as measured by the relative number of searches on the Google website (in relation to *all* Google searches in that state), were almost twice as great in Montana as in Virginia at that point in time. Of course, Google searches are not the same as actual product sales. And Virginia’s population is about eight times that of Montana.

Google Trends allows one to dig deeper into the data. For each state, one can obtain scores for selected “metro areas” and selected specific cities. Scores are not available for all metro areas or for all cities in each state. Continuing with the example of data for women’s shoes, we can obtain the available sub-data for most states. Table 4 highlights the results based on New York state as an example.

Table 4. *Google Trends “Women’s Shoes” Scores by New York State Metro Areas*

Plattsburgh	100
Buffalo	88
New York	84
Rochester	84
Syracuse	77

It is important to note that the Google Search “Metro” data provide significantly broader geographic data than the specific city designations. Thus “Plattsburgh” refers to a wide area of northern New York State surrounding the city of Plattsburgh (thousands of square miles, most of which is rural), and “New York” includes the entire southeast section of the state, including urban, suburban, and rural areas. Considerably more focused Google Trends data can be obtained using the “City” mode. Again, data are available for only some cities in the state. Table 5 indicates the trends using June 2015 data for New York state.

Table 5. *Google Trends “Women’s Shoes” Scores by New York State Cities*

New York City	100
Yonkers	86
Syracuse	83
Freeport	78
White Plains	68

The Google Trends data can be obtained for the current point in time, or for trends over time. Thus, any of the point-in-time data shown in Tables 3, 4 and 5 can be obtained for a period of the past ten years, and also forecasted for the next twelve months. And retailers thinking ahead to seasonal high-sales periods, such as graduation time or Christmas, might want to utilize this data search in advance of that busy selling season, so as to more likely have the most appropriate types of products in stock.

### CONCLUSIONS AND IMPLICATIONS

The two sets of consumer behavior data discussed in this article are significantly different, but both have the potential to assist small business owners, managers and entrepreneurs in their formulation of retail product-line and/or location venture strategies. The Bureau of Labor Statistics’ Consumer Expenditure data allows the businessperson to see major differences in consumer spending from one location to another. The Google Trends data does not show actual spending, but rather consumer interest in various types of products as such interest patterns differ from one location to another.

An active or an aspiring entrepreneur looking to choose a new location for a specific type of retail outlet, or for expanding an existing location, might use these two sources of data to inform and strengthen that decision. Conversely, if one already has an outlet in a specific location but wishes to expand into new product lines, these data sources might improve that decision. Of course, these two data sources will be equally valuable to those who advise or study such businesspeople.

Furthermore, the readership of this journal includes academics who supervise student consulting programs, as well as the students themselves. Certainly students participating in such consulting programs, as well as any student studying small business and/or entrepreneurship, should be aware of these two sources of consumer behavior data as part of their total understanding and knowledge of these academic disciplines. A consulting project will be strengthened in its value to the businessperson client if these two sources of data, utilizing extracted data specifically relating to the client business' product lines and geographic locations, are included in the project report. And the students' academic experience will be made stronger as well as they learn to use these databases.

Of course, there are other sources of consumer behavior data, besides the BLS and Google Trends data discussed in this article, which can also inform retail venture strategy and other components of small business and entrepreneurial strategy. By design, this article focuses solely on these two data sets. Other sources of data worthy of further research and investigation might include the United States Census, Pew Research Center, Data.gov, Interuniversity Consortium for Political and Social Research, "Google Public Data Explorer," and "Yahoo Webscope."

Many other relevant theoretical bases exist as well. With the objective of identifying additional data sources which can inform retail venture strategy, one might pursue and focus on topics including utility theory, time management studies, consumer education, knowledge management, information technology, decision theory, and more. Perusal of each of these areas can identify both theories and data which would be of value to businesspeople as well as to academics and students who wish to assist them, and to researchers in the fields of entrepreneurship and small business who wish to expand our knowledge and understanding of these fields.

Many other factors must also be considered in the formulation of any retail venture strategic decisions of this nature. What is the extent of the existing competition? What are the population, income, and other demographic data and likely future trends? What is the business climate, such as with regard to taxation, regulation, unemployment levels or unions? Where would the business owner prefer to live and work, for personal and non-business reasons? Obviously, just because consumer expenditures for furniture are very high in Washington D.C., or current interest in women's shoes is disproportionately high in Montana, it does not mean that opening a retail outlet for furniture in Washington D.C. or an outlet for women's shoes in Montana is the "best" retail venture strategy to choose. New and on-going venture strategy formulation is a complex issue for all entrepreneurs and all types of businesses. This article provides information that might make such formulation a little less complex.

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## Getting SLAPped: A 21<sup>st</sup> Century Business Risk

Brenda Wells  
East Carolina University

Chad Marzen  
Florida State University

With the increasing use of the Internet and social media in small business operations, business owners should educate themselves on various types of legal action that can result from online activities. Here we examine the topic of a strategic lawsuit against public participation (SLAPP). A business can be “SLAPped” by another party—sued for speaking out against or about that person or entity. And, at the same time, a business might ultimately be accused of “SLAPPING” someone it sues for defamation. Understanding the implications of SLAPPs is critical for small businesses. This article defines SLAPPs, discusses its history, examines legal issues relating to SLAPPs and insurance issues, and presents practical loss control solutions for those who are criticized online as well as those who wish to publish criticism or become active in some sort of public issue debate.

The topic of a strategic lawsuit against public participation (SLAPP) is of critical interest to virtually every small business because the Internet and social media have become common tools used in marketing, promotion and day-to-day business operations. Broekemier, Chau and Seshadri (2015) note that organizations increasingly communicate with stakeholders via online means including social media. Reiss-Davis (2013) reports that 100% of business decision makers use social media for work-related activities, and the use of social media can sometimes lead to publicly criticizing a competitor or other stakeholder. As a result, business owners should be keenly aware of SLAPPs.

A small business can be “SLAPped” for speaking out against or about another person or entity. And, a small business might ultimately be accused of “SLAPPING” someone it sues for defamation. Understanding the implication of SLAPPs is an important small business risk management issue. Here we define SLAPPs, discuss its history, examine legal issues relating to SLAPPs and insurance issues, and present risk management implications for small businesses. In addition, we offer practical loss control solutions for those who are criticized online as well as those who wish to publish criticism or become active in some sort of public issue debate.

### WHAT IS A SLAPP SUIT?

Suppose Universal Copper wants to build a copper smelter one mile from Trevor’s small business. Trevor, concerned about possible pollution as well as his property value, expresses his fears to the town’s planning and zoning commission. He gets several neighboring businesses to join him in the protest. Universal is ultimately refused the right to build, and in turn sues Trevor and his business for \$100 million. The suit alleges defamation and conspiracy to defame Universal. Trevor has just been “SLAPped.” The term SLAPP was first coined by Canan and Pring (1988). A SLAPP is a lawsuit primarily designed to intimidate and quash free speech. A SLAPP is a unique type of suit that has four major characteristics:

1. It is a civil complaint that ultimately transforms a public issue into a private legal dispute,
2. It is filed against a non-governmental individual or group,
3. It is based on communications or speech made about the plaintiff, and
4. It involves an issue of some public interest or concern (Pring & Canan, 1992).

SLAPPs came into being mostly after 1970, when concerned citizens who spoke out against real estate development projects suddenly found themselves sued for defamation by the developers. However, the

earliest evidence of a SLAPP dates back to 1802<sup>1</sup> (Canan & Pring, 1996). SLAPPs can be filed in a host of situations against entrepreneurs who speak out about an issue they feel is important. A real estate developer whose project falls through due to citizen opposition may very well file a SLAPP against the opposing parties. A police officer accused by a small business owner of wrongdoing might in turn file a SLAPP against that small business.

The most common allegation in a SLAPP lawsuit is defamation. Defamation can be oral (slander) or in written form (libel). Most jurisdictions today require a plaintiff to prove the prima facie elements of (1) the making of a defamatory (knowingly false) statement (2) through publication (communication) to a third party (3) concerning the plaintiff. A number of states today also require that the plaintiff prove actual damages as part of the prima facie case for defamation (Dobbs, 2001).

While most allegations in SLAPP lawsuits concern the tort of defamation, other causes of action include business torts, conspiracy, and constitutional or civil rights violations. That is not to say that a small business cannot successfully sue someone for those torts. Small businesses still have rights and are entitled to their day in court just like any individual would be.

One of the great costs of SLAPP lawsuits is that they can have a chilling effect on the exercise of the right to petition which is guaranteed by the First Amendment to the United States Constitution (Quinlan, 2014). The United States Supreme Court in *United Mine Workers of America, District 12 v. Illinois State Bar Association*, 389 U.S. 217, 222 (1967) stated specifically that the “rights to assemble peaceably and to petition for a redress or grievances are among the most precious of liberties safeguarded by the Bill of Rights.” SLAPPs demoralize and destroy defendants, and also deter others from forming or participating in activist groups (Stein, 1989), which is considered a violation of the First Amendment right to petition the government.

Other costs to the person who is SLAPPED (i.e. the defendant) are quite high. These costs include attorney fees, court costs, emotional trauma, lost wages, credit problems, loss of personal and business reputation, relationship troubles and even insurance cancellations (Baruch, 1996; Canan, 1989; Pring & Canan, 1992). For a small business owner, these costs can seriously cripple the development and growth of the business. As we will examine later, several states have passed anti-SLAPP statutes. These statutes impose penalties on those who file SLAPPs against their critics. Suppose A&B Bakery is attacked and criticized by Mr. I.M. Atroll via the creation of a “sucks.com” website. The website contains allegations about the bakery that damage its reputation, so A&B sues Atroll for defamation. Atroll may in turn accuse A&B of filing a SLAPP, which in that state may be prohibited by anti-SLAPP statute. If the court determines that A&B’s lawsuit is indeed a SLAPP, A&B will be responsible for paying all of Atroll’s court costs—a loss that would generally not be covered by any of A&B’s insurance policies.

The SLAPP risk for small businesses and entrepreneurs, especially those that participate in public discourse, is very real. There are specifically two things to be concerned about. One is the risk of being sued. Community and public involvement, and even innocent statements about a competitor or another person, might result in a SLAPP being filed against the business. The defense and litigation costs associated with being SLAPPED are exorbitant. The other concern is that if a small business decides to take legal action against its critics, the critics may retaliate by accusing the small business of filing a SLAPP. SLAPPs are prohibited in some states by statute, and a violation of those statutes can result in extremely serious financial consequences for the small business.

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<sup>1</sup> *Harris v. Huntington*, 2 Tyl. 129 (Vt. 1802).

## MOTIVES AND CHARACTERISTICS OF SLAPPS

There are four primary motives for filing a SLAPP. The first is retaliation for successful opposition to a project or cause. The second is to prevent future opposition. The third is to intimidate those who might, in the future, oppose a business or its projects. Finally, the fourth characteristic is to win some type of political or economic battle.

Identifying a SLAPP is not always easy, as SLAPPS always purport to be about some other issue besides chilling free speech and quashing petitioning activities. SLAPPS tend to have three common threads. One is an activist defendant who has tried to accomplish some objective or speak out against an individual or organization. Another is an unreasonable amount of damages are requested that obviously the defendant doesn't have. Finally, especially when the suits involve internet commentary, a large number of unidentified "John Does" might be named as co-defendants (Pring & Canan, 1992).

Canan, Kretzmann, Hennessy and Pring (1992) examine the reasons plaintiffs file SLAPPS. The most commonly-cited reason is protection of property and business interests. Plaintiffs tend to believe in a right to pursue unhampered economic gain, and assume that their property rights have a higher value than their opponents' political concerns. They also tend to believe very strongly in capitalist principles and assert that their critics are meddling in affairs that are of no concern to them. As far as who is likely to file a SLAPP, those who file them tend to be more politically conservative while their opponents tend to be more liberal, but otherwise there are not usually significant differences in age, income, education, gender, or political participation. It is interesting to note that most SLAPPS are filed by smaller companies, rather than larger interests with virtually unlimited deep pockets for paying attorneys (Pring & Canan, 1996).

Ironically, the point of a SLAPP is not really to win or to get a resolution to the issues laid out in the complaint. The strategy used by most plaintiffs is to drag the lawsuit out as long as possible without ever actually going to trial. The average SLAPP lasts just under three years. SLAPPS are usually meritless when examined closely and most are unsuccessful and eventually dismissed, but not before costing the defendant a substantial amount of legal fees and reputational damage. If a trial does occur, defendants win more often than not (Pring & Canan, 1990; Pring & Canan, 1992). And, SLAPPS are ultimately successful not because of monetary gain for the plaintiff, but rather for wearing out and distracting the opponent.

Faced with a SLAPP, the defendant's attention to the contested issue is diverted to the lawsuit, and, high legal bills quickly mount. A more infectious result is that SLAPPS take members and commitment away from activist organizations by instilling in them a sense of fear regarding what might ultimately happen to them if they publicly oppose something. A business reputation is a valuable and important asset that every entrepreneur must protect. But, with the highly participative nature of the Internet, it is possible and quite likely that sooner or later, online criticism will occur. As the United State Supreme Court noted in *Reno v. ACLU*, 521 U.S. 844, 862 (1997), the Internet is "the most participatory form of mass speech yet developed."

Online criticism in chat rooms, on bulletin boards, or on consumer "gripe" sites is never good for business. Further, the relative affordability of domain names makes it possible for virtually anyone to purchase a "sucks dot com" site that critiques a business or citizen. Attorneys determined to stop such practices thus invented what Demac (2000) calls a cybersmear—a lawsuit against an individual who makes disparaging comments on the Internet about a business. A cybersmear is nothing more than a SLAPP suit based on Internet-posted communications. For example, in *Ascend Health, et. al., v. Wells*, a blogger who created a "sucks dot com" about a hospital was sued, along with a number of John and Jane Does who had also

commented on the site. The lawsuit alleged defamation and other torts, demanding millions of dollars from the individual defendant and all the “Does” that were yet to be identified.<sup>2</sup>

SLAPPs are a serious risk to today’s small business owner. As Canan, *et al.* (1992) noted, one of the reasons SLAPP suits are filed is for protection of property and business interests. A business may file suit against a small business for petitioning the government to address alleged illegal activities. The Public Participation Project (2016) notes that in 2004 a small business owner of a Hawaii taxi company was sued by another taxi company following the sending of a letter to state authorities reporting alleged illegal activities potentially engaged in by the other company. After the Attorney General’s office in Hawaii investigated the other company, the company sued the small business for defamation in a SLAPP suit. At trial, while the trial court ruled in favor of the small business who reported the alleged misconduct, it was only after a lengthy delay after the Supreme Court examined the merits of the anti-SLAPP defenses (Public Participation Project, 2016 (2)).

With the growth of comments on social media websites, SLAPPs are becoming more prevalent. And for a small business owner, costs can be quite high as the defense of a SLAPP lawsuit can cost thousands of dollars (McAlister-Holland, 2013). As McAlister-Holland notes, certain phrases and fighting words may make it more likely one may be subject to a SLAPP suit. In general, McAlister-Holland found that in many cases SLAPP lawsuits have the intention of taking business away from a company rather than stating an opinion. Thus, for a small business owner, simply stating an opinion makes it more likely the small business will not be subject to a SLAPP lawsuit (McAlister-Holland, 2013).

## **STATE ANTI-SLAPP STATUTES CASE**

### **INTRODUCTION**

Barbara Harkins was a long-time volunteer at the Atlanta Humane Society (AHS) when they invited her to become a regular staff member. During three years of working as an animal adoption counselor, she observed what she considered to be animal cruelty and financial waste. She reported her concerns to her superiors but nothing was done, so she resigned.

Soon after, a reporter was investigating AHS and asked Harkins for input. She shared her observations in the hopes that something might be done about the problems she had witnessed. The AHS was under contract with the Fulton County Commission (FCC) to provide animal control services, and the report resulted in the FCC conducting its own investigation of the AHS. In that process, the FCC interviewed Harkins, along with others.

As the Fulton County Commission prepared to terminate the AHS contract, AHS filed suit against Harkins for defamation, asking its former employee who made \$8.50 an hour for damages of \$225,000. While Harkins wanted to continue participating in the debate over AHS and its operating procedures, she suddenly had considerable incentive not to do so. While the suit made its way through the legal process, she had to remain silent lest she complicate her defense (Atlanta, 2001; Atlanta, 2005; Peeters, 2004).

### **STATE ANTI-SLAPP STATUTES**

Cases like this one over the years have resulted in approximately thirty states and even some foreign countries passing what are called “anti-SLAPP statutes.” The purpose of these statutes is to prevent wealthy or powerful parties from using the enormous costs of litigation to suppress opposition and public

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<sup>2</sup> The case was dismissed after the parties reached a confidential out-of-court settlement.

debate. New York, Washington, and California were the first three states to pass anti-SLAPP statutes back in the early 1990's, and now they exist in approximately 28 states (Public Participation Project, 2014). Harkins' defense, provided by the ACLU, used the Georgia anti-SLAPP suit to have the case dismissed, and, to request attorney's fees (Atlanta, 2005; Peeters, 2004).

A number of cases involving SLAPP lawsuits have been heard under California's anti-SLAPP law, one of the most noteworthy in the United States. The California statute, enacted into law in 1992 and codified at Cal. Code Civ. Proc. § 425.16, provides that a defendant in a SLAPP lawsuit can file a motion to strike the complaint within 60 days of service of the complaint<sup>3</sup> if the lawsuit arises "against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue."<sup>4</sup> A "public issue" under California's law is defined to include statements before legislative, executive, or judicial proceedings as well as public forums concerning an issue of public interest.<sup>5</sup> Significantly, if a defendant prevails on an anti-SLAPP motion, the defendant can recover attorney's fees and costs.<sup>6</sup>

If a motion to strike under the anti-SLAPP statute is presented to a California judge, there is a two-part test to resolve the motion. First, the defendant has the burden of showing that the SLAPP lawsuit arises from acts of a defendant which were made in furtherance of the right to free speech or the right to petition which are connected with a "public issue." If the defendant meets this burden, then the plaintiff has the burden to show that the SLAPP lawsuit has a "reasonable probability" of success at trial. If the plaintiff fails to meet this burden, the defendant's motion to strike should be granted.<sup>7</sup>

Anti-SLAPP statutes vary from state-to-state, with some protecting only limited types of statements or statements made only to governmental bodies. Others protect statements which are those involving a "public concern" and not necessarily made directly in the context of a proceeding in front of a governmental entity. The statutes also vary as to the procedural mechanism of filing an anti-SLAPP motion. In some states a defendant in a SLAPP suit would file a motion to strike, and in others the motion would be heard as a motion to dismiss, motion for summary judgment, or a motion for judgment on the pleadings. Appendix A outlines some of the key portions of anti-SLAPP statutes from across the country.

It is significant that a vast majority of the states with anti-SLAPP statutes provide for the recovery of costs and reasonable attorney's fees if a SLAPP defendant(s) is successful in obtaining the dismissal of a SLAPP lawsuit. Approximately 25 of 28 states with anti-SLAPP laws contain these provisions which serve as a deterrent to the filing of SLAPP lawsuits. Several states, including Delaware, Minnesota, Nevada, New York and Rhode Island, actually include provisions in their anti-SLAPP statutes which allow for the recovery of punitive damages for a SLAPP defendant in certain cases. While the vast majority of states with anti-SLAPP statutes provide for recovery of costs and reasonable attorney's fees for a SLAPP defendant, only 12 states have statutory provisions which allow for a SLAPP plaintiff to recover costs and reasonable attorney fees

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<sup>3</sup> Cal. Code Civ. Proc. § 425.16(f).

<sup>4</sup> Cal. Code Civ. Proc. § 425.16(b)(1).

<sup>5</sup> Cal. Code Civ. Proc. § 425.16(e). The statute includes acts such as "(1) any written or oral statement made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other public proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."

<sup>6</sup> Ca. Code Civ. Proc. § 425.16(c)(1).

<sup>7</sup> *Gallimore v. State Farm Fire & Casualty Insurance Company et. al.*, 102 Cal. App. 4th 1388, 1396-1397 (Cal. Ct. App. 2nd Dist. 2002).

if a motion to strike, dismiss, summary judgment or judgment on the pleadings is unsuccessful by a SLAPP defendant. In addition to the states with anti-SLAPP statutes, at least two states, Colorado and West Virginia, have provided protections for SLAPP defendants through judicial decisions<sup>8</sup> (Public Participation Project, 2014).

At least two states are currently considering anti-SLAPP legislation. In February 2015, the New Jersey Generally Assembly passed an anti-SLAPP bill by a 68-4 vote which would protect against lawsuits emanating from “an act in furtherance of the right of advocacy on issues of public interest” (The Bergen Dispatch, 2015). Legislators in Kansas are also considering anti-SLAPP legislation (Shorman, 2015). A key “test” for whether a suit might be dismissed under an anti-SLAPP statute is whether or not the speech that is alleged to be defamatory is a subject of public interest. This was emphasized in the lawsuit against the makers of the 2006 Twentieth Century Fox movie, “Borat: Cultural Learnings of America for Make Benefit Glorious Nation of Kazakhstan.” The lawsuit stemmed from this scene in “Borat”:

*...Borat, a fake Kazakh journalist played by comedian Sacha Baron Cohen, is seen hitchhiking down a lonely southern highway....Three University of South Carolina students pick Borat up and proceed to get drunk and spew racist and sexist nonsense. Their statements include admonishments not to trust women, a wistful hope that slavery had not been outlawed, and an assertion that one must be a minority to get ahead in America, the subtext being that affirmative action and political correctness had ruined the country for white men like themselves. In short, the students exposed themselves as bigoted buffoons. –Segal (2009, p. 653).*

Once the movie was released and became a success, two of the young men sued the movie production company in *John Doe 1 v. One American Productions*, claiming that they were assured that the movie would not air in America, and because it was, they suffered humiliation and reputational damage (Segal, 2009). The defendant used the anti-SLAPP statute in California to defend itself. The judge ruled in One American’s favor, on the grounds that topics such as racism, sexism, and xenophobia, all highlighted by the movie and apparent in the young men’s statements, were subjects of public interest and speech regarding those topics should not be chilled.

#### **AMERICAN LEGISLATIVE EXCHANGE COUNCIL MODEL PUBLIC PARTICIPATION PROTECTION ACT**

On July 1, 2014, in an effort to help “encourage and safeguard public participation in civic society,” the Board of Directors of the American Legislative Exchange Council (“ALEC”) approved a model “Public Participation Protection Act” to serve as a model anti-SLAPP statute for states to follow. The model “Public Participation Protection Act” permits a party to file a motion to dismiss the SLAPP lawsuit if it arises in response to an act in furtherance of the rights of petition, free speech, or association in connection with a “public issue” (American Legislative Exchange Council, 2014).

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<sup>8</sup> In Colorado, the case of *Protect Our Mountain Environment, Inc. v. District Court*, 677 P.2d 1361, 1369 (Colorado 1984) provides protection for SLAPP defendants. The Colorado Supreme Court stated that “[When] a plaintiff sues another for alleged misuse or abuse of the administrative or judicial processes of government, and the defendant files a motion to dismiss by reason of the constitutional right to petition, the plaintiff must make a sufficient showing to permit the court to reasonably conclude that the defendant’s petitioning activities were not immunized from liability under the First Amendment because (1) the defendant’s administrative or judicial claims were devoid of reasonable factual support, or, if so supportable, lacked any cognizable basis in law for their assertion; and (2) the primary purpose of the defendant’s petitioning activity was to harass the plaintiff or to effectuate some other improper objective; and (3) the defendant’s petitioning activity had the capacity to adversely affect a legal interest of the plaintiff.” In West Virginia, in *Harris v. Adkins*, 432 S.E.2d 549 (West Virginia 1993), the West Virginia Supreme Court held that the First Amendment right to petition is protected so long as the individual making a statement does not communicate a known falsehood with actual malice.

The model act covers statements concerning issues under consideration or review or reasonably likely to be under consideration or review by a legislative, executive, administrative, judicial, or other official body, which are currently covered under the laws of most states which have enacted anti-SLAPP statutes. Significantly, the model act takes an expansive approach concerning communications in public forums on matters of public concern. The model act includes communications in a specific list of areas, including health or safety; environmental, economic, or community well-being; the government; a public official or public figure; or a good, product, or service in the marketplace. Also, the model legislation also includes a provision which would award attorney's fees and costs to defendants who obtained dismissal of a SLAPP lawsuit (American Legislative Exchange Council, 2014).

## **FEDERAL LEGISLATIVE ACTIVITY**

Despite 20 states currently having no general anti-SLAPP laws or judicial protections for SLAPP defendants, presently there is no federal anti-SLAPP statute. A number of commentators have supported congressional legislation (Barylak, 2010; O'Neill, 2011) to protect petitioning activity at the federal level. In 2009, in the 111th Congress Democratic Congressman Steve Cohen of Tennessee introduced H.R. 4364, the "Citizen Participation Act of 2009," to provide for a federal anti-SLAPP law. The legislation would have provided for civil immunity for any act of petitioning the government made without knowledge of falsity of a communication or reckless disregard of falsity of a communication. It also would have provided for a defendant to remove a SLAPP lawsuit filed in state court to federal court and for defendants to assert motions to dismiss. In addition, under the legislation if a defendant was successful in having a SLAPP lawsuit dismissed, the defendant would be awarded reasonable attorney's fees and costs (Govtrack.us, 2014). The Citizen Participation Act of 2009 languished at the Committee level and never saw a vote on the floor of the United States House of Representatives.

In May 2015, a bipartisan group of Democratic and Republican lawmakers sponsored the SPEAK FREE Act of 2015 (Public Participation Project, 2016-1). The bill would allow for a special motion to dismiss for SLAPP defendants who make a verbal or written statement concerning an official proceeding or matter of "public concern." Under the legislation, a matter of "public concern" is an issue that deals with any of the following: 1) health or safety; 2) environmental, economic, or community well-being; 3) the government; 4) a public official or public figure; or 5) a good, product, or service in the marketplace (Congress.gov, 2016). While the legislation has not been voted on by the full House of Representatives or Senate, it marked the first time bipartisan anti-SLAPP legislation has been introduced in the United States Congress (Public Participation Project, 2016-1).

## **CASES INVOLVING ANTI-SLAPP STATUTES AND INSURANCE ISSUES**

As previously mentioned, California's anti-SLAPP law has brought forth numerous anti-SLAPP motions in a wide variety of cases. California's anti-SLAPP statute has also brought forth many unique questions concerning the application of the law to insurance issues. The courts in California thus far have litigated questions ranging from the application of the statute to malicious persecution claims, the application of the statute to expert reports and other reports filed with the Division of Insurance, and the difficult question of whether or not the submission of an insurance claim constitutes prelitigation conduct protected by the law.

In *Dickens v. Providence Life and Accident Insurance Company*, 117 Cal. App. 4th 705 (Cal. Ct. App. 2nd Dist., 2004), the facts of the case involved an insured's SLAPP lawsuit for malicious prosecution against an insurer. In the *Dickens* case, the underlying facts involved an insurer that paid claims for total disability for over four years before a federal investigation indicted the insured for insurance fraud. The insured was eventually acquitted at trial, and filed a malicious prosecution lawsuit against the insurer, contending

that the insurer presented false information to the government and improperly used influence to initiate the prosecution. The California Second District Court of Appeals held that a malicious prosecution claim fell within the anti-SLAPP statute, thus ruling in favor of the insurer. Furthermore, the Court of Appeals also found that the insured did not offer any evidence that the insurer initiated the federal criminal prosecution.

A key question which commonly appears in cases involving insurance and the California anti-SLAPP statute is whether an activity is completed “before” or “in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law.”<sup>9</sup> *The People ex. rel. 20th Century Insurance Company v. Building Permit Consultants, Inc. et. al.*, 86 Cal. App. 4th 1280 (Cal. Ct. App. 2nd Dist. 2000) involved the question of whether or not preparation of expert reports in support of allegedly false claims were protected under the anti-SLAPP law. In the case, an insurer filed a lawsuit for over \$50 million in damages for civil insurance fraud. The defendants contended expert reports filed along with the allegedly fraudulent claims were covered by the anti-SLAPP statute since they were prepared in anticipation of litigation. The California Second District Court of Appeals disagreed, noting that the expert reports on damage were submitted concerning performance of an insurance contract, not regarding any “issue under consideration” in a judicial proceeding. The Court noted that if they were to hold differently, “we would effectively be providing immunity for any kind of criminal fraud so long as the defrauding party was willing to take its case to court.” Thus, the expert reports connected with the insurance claims were not covered under the anti-SLAPP law.

Also, in *Gallimore v. State Farm Fire & Casualty Insurance Company et. al.*, 102 Cal. App. 4th 1388 (Cal. Ct. App. 2nd Dist. 2002), the California Second District Court of Appeals also held that confidential written reports and materials filed by an insurer with the California Department of Insurance were not covered by the anti-SLAPP law. In *Gallimore*, the plaintiff filed a lawsuit against an insurer and an insurer’s employees for claim handling misconduct. As part of the claims of bad faith misconduct, the plaintiff utilized reports completed by the California Department of Insurance in the case. The insurer filed a motion to strike under the anti-SLAPP law, contending the reports were connected with a response to an official Department of Insurance proceeding.

The California Second District Court of Appeals held that the anti-SLAPP statute did not apply in the situation. The Court noted that in the underlying case the plaintiff did not seek relief for the insurer’s communications with the Department of Insurance, “but rather for its alleged mistreatment of policyholders and its related violations and evasions of statutory and regulatory mandates.”

The tender of an insurance claim by an insured to an insurer also brings forward the question of whether the submission of a claim constitutes conduct protected by the anti-SLAPP law. In *The People ex. rel. Fire Insurance Exchange et al. v. Anapol et al.*, the California Second District Court of Appeal held that an insurance claim submitted in the usual course of business is not covered under the anti-SLAPP statute as prelitigation conduct. The Court mentioned the rationale behind this rule was “that submission of an insurance claim is a necessary prerequisite to obtaining performance under an insurance contract,” and not only being a prerequisite to an actual legal claim being filed. However, the Court gave two instances where a submission of an insurance claim could be a prelitigation statement and thus covered under the anti-SLAPP law. The first instance would be if informal negotiations between an insurer and an insured were unsuccessful and thus the tendering of the claim would be a statutory prerequisite to filing suit. The second instance described by the Court which would be covered by the law would be a situation where a demand letter was sent from the insured to the insurer after a claim denial.

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<sup>9</sup> *The People ex. rel. 20th Century Insurance Company v. Building Permit Consultants, Inc.*, 86 Cal. App. 4th 1280 (Cal. Ct. App. 2nd Dist. 2000).

Two other specific situations involving insurance issues and the anti-SLAPP law have arisen since the *Anapol* case. In 2010, the California Fourth District Court of Appeal in *Mallard v. Progressive Choice Insurance Company et. al.*, 188 Cal. App. 4th 531 (Cal. Ct. App. 4th Dist. 2010) held that a mandatory arbitration of an uninsured motorist claim was an “official proceeding” which fell under the anti-SLAPP statute. Several months later, in *Allstate Indemnity Corp. v. Collins*, 2011 WL 941251, No. C 10-2073 SBA (N.D. Cal. March 18, 2011), the United States District Court of the Northern District of California affirmed a rule first held by the California Second District Court of Appeal<sup>10</sup> that a declaratory judgment action concerning the interpretation of a coverage under an uninsured motorist policy is an action under the terms and conditions of an insurance contract and not “based on an act in furtherance of the ... right of petition or of free speech.”

To summarize, it appears that despite the conflicting case law several rules can be garnered. First, declaratory judgment actions are not covered by anti-SLAPP laws since they relate more to the terms and conditions of an insurance contract. Second, malicious prosecution claims can be covered by anti-SLAPP laws. Finally, as a general rule, the submission of a claim will not generally place the claim under the ambit of an anti-SLAPP law, but a tendering of a claim after informal negotiations with an insurer or the submission of a demand letter after a claims denial are exceptions to the rule.

### **LIABILITY ISSUES WITH SLAPPS**

The growth of the Internet has resulted in many people feeling, and reasonably expecting, that their speech is “anonymous.” The way that criticized businesses have responded to some of these situations is by filing suits against “John Doe” or multiple “John Does” that ultimately have to be identified. The courts have ruled in a variety of ways on the issue of whether or not identities must be revealed.<sup>11</sup>

While Internet service providers (ISPs) may assure anonymity of bloggers and other Internet users, a subpoena often does get the names and locations (via internet protocol (IP) addresses) of virtually anyone using the Internet. In reality, though, a subpoena may not be necessary depending on where the site is hosted and who is in control of it.

For example, suppose ABC Company wants to find out who owns [www.ABCsucks.com](http://www.ABCsucks.com). It can go to [www.whois.com](http://www.whois.com) and find the registered owner. The owner, wishing to remain anonymous, may have purchased a third-party domain registration service—a proxy—that will be listed as the owner and contact for the site. ABC can simply send the proxy a letter threatening legal action if the domain owner’s identity is not revealed. In spite of any agreement that the owner of the site thought it had with the proxy, a letter like that shown in Figure 1 with a short time for response is likely to be sent by the proxy.<sup>12</sup>

Anonymous speech has been protected during our nation’s history, as there are always situations that present fear of retaliation to the person speaking. Pseudonyms and fictitious identities have been around for hundreds, if not thousands of years. It has been suggested that perhaps legal protection should be afforded to those who use social networks for voicing opinions, and for those who simply wish to remain anonymous (Richards, 2013). Meanwhile, those who post “anonymously” on the Internet need to understand that they may not remain anonymous for long.

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<sup>10</sup> *State Farm General Insurance Company v. Majorino et. al.*, 99 Cal. App. 4th 974 (Cal. Ct. App. 2nd Dist. 2002).

<sup>11</sup> See <http://www.cyberslapp.org/cases/index.cfm> for many examples.

<sup>12</sup> One of the authors witnessed such an exchange with a party that owned a “sucks dot com site.” The letter and details were shared on the condition that the identity of the parties involved be held confidential.

Figure 1. *Demand Letter Example*

<p>As we have received notice that there is a possible legal reason to contact the complainant via email no later than close of business on X/X/20XX regarding the domain name ABCSUCKS.COM, you will need to provide them with the following information:</p> <p>Full Name  Company Name  Mailing Address  Phone Number  Email Address</p> <p>We require that you CC: or BCC: us on that e-mail. Failure to comply may result in the disclosure of your contact</p>
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### INTERNATIONAL SLAPP ISSUES

While many may think that the American court system is the only place such incidents occur, SLAPPs are a concern in other democracies. Ogle has written about the issue in Australia (Ogle, 2007 and 2010) and notes that SLAPPs have been growing in frequency there. In 2008, the Australian Capital Territory passed the “Protection of Public Participation Act” and became the first Australian territory to enact anti-SLAPP legislation. Similarly, in Canada, in 2009 Quebec enacted *An Act to amend the Code of Civil Procedure to prevent improper use of the courts and promote freedom of expression and citizen participation in public debate*.<sup>13</sup> The language of the law’s amendments consider SLAPP lawsuits to be an abuse of process (Wullum, 2010).

In England, one of the most recognized multinational companies was accused of filing a famous SLAPP lawsuit: the McLibel Case. During the 1980s, the London Greenpeace organization began campaigning against McDonald’s for a host of reasons outlined in a leaflet<sup>14</sup> that was distributed in protest of the hamburger empire. From destroying the rainforest to exploiting children with advertising to promoting an unhealthy diet, McDonald’s was very heavily criticized.

In an effort to fight back, in 1989 McDonald’s hired private investigators to infiltrate London Greenpeace and identify the activists. In 1990 it served libel writs on five of the volunteers because of the leaflet. Three of them apologized, but two of them – Helen Steel and Dave Morris – refused. They decided to fight the international fast food chain and what ensued became the longest trial in English history.<sup>15</sup> Even when the verdict was delivered in June, 1997, protestors continued to call attention to McDonald’s. A documentary about the lawsuit was made decades later,<sup>16</sup> and even today, the website [www.mcspotlight.org](http://www.mcspotlight.org) continues to focus on McDonald’s and its business practices. While the suit may have been considered a form of SLAPP suit, instead of chilling the speech about McDonald’s, it instead garnered international attention that was mostly negative.

<sup>13</sup> The language of the law states:

“A Court may ... declare an action or other pleading improper and impose a sanction on the party concerned. The procedural impropriety may consist in a claim or pleading that is clearly unfounded, frivolous or dilatory or in conduct that is vexatious or quarrelsome. It may also consist in bad faith, in a use of procedure that is excessive or unreasonable or causes prejudice to another person, or in an attempt to defeat the ends of justice, in particular if it restricts freedom of expression in public debate.”

<sup>14</sup> See <http://www.mcspotlight.org/case/pretrial/factsheet.html>.

<sup>15</sup> The defendants’ closing speeches lasted six weeks. The judge took approximately six months to render a verdict in the case.

<sup>16</sup> “McLibel,” (Cinema Libre Studios, 2005).

## INSURANCE COVERAGES FOR SLAPPS

Businesses covered by the ISO Commercial General Liability form have coverage for advertising and personal injury under Coverage B of the policy. This coverage should take care of SLAPP liability, although it is always wise to confirm that with the specific policy form purchased. The more nebulous issue is what happens if a business sues someone for libel or slander and is then accused of filing a SLAPP, thus being held potentially liable for the other party's legal fees and court costs. Our reading of the ISO form leads us to conclude that coverage under such circumstances would be unlikely to exist, leaving the business owner exposed to the possibility of a very large verdict if found to be in violation of the anti-SLAPP suit in the state.

## PRACTICAL IMPLICATIONS

For any small business, the likelihood of a critic turning up on the Internet is quite high.<sup>17</sup> There really is no one-size-fits-all strategy for managing these types of situations. But, we can enumerate some possible solutions and suggestions. As was shown in the McLibel case, an effort to try and quash the criticism may ultimately backfire and cause the business to look even worse than it did in the presence of the original criticism. What other options are there?

To be proactive, there are several important things every small business owner should do. One is to purchase the most unflattering or "steal-able" web domain names that might later be used against it. The "sucks dot com" is a given, but, names that are close, such as a pluralized one or a name that might ultimately be just one or two letters different from the business' regular domain name would also make sense to own. While that will not stop criticism, it does eliminate the most visible and memorable website names from ever being used.

The second proactive step is to establish a reputable and well-known presence on social media. When criticisms or scandals do surface, this leaves the small business with an established communication forum for responding.<sup>18</sup> Thirdly, trademarking the business name and identity marks is very important for protecting any use of the items. The Lanham Act of 1946 and registration of the marks with the United States Patent and Trademark Office provides for trademark protection for owners through federal law. Penalties for trademark infringement under the Lanham Act can include actual damages plus any profits wrongfully received by the trademark infringer (Cross & Miller, 2015). While trademarks do not stop criticism, they can certainly help to protect the business' authentic and genuine symbols and marks.

Once the entity is under attack, what then? If the allegations are false, and proof of that is readily available, then a cease and desist letter may be all that is required. If the identity of the critics is not visible, but corporate intellectual or business property is being infringed upon, cooperation with the ISP and/or domain proxy may be in order. Another possible approach is to respond directly to the criticism. Acknowledge it and provide counter-balancing information. This can be done on the social media outlets, in advertising, or, even in the forum where the criticism is being published. This requires outstanding skill and finesse, and, ultimately if it doesn't work or if things are getting worse, it may become necessary to abandon the dialogue. The problem with that is that to some it will look sort of like the playground bully, who got outsmarted, stomping off for the day and pouting.

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<sup>17</sup> Insurers in America perhaps know this best of all thanks to sites like [allstateinsurancesucks.com](http://allstateinsurancesucks.com), [statefarmsucks.homestead.com/](http://statefarmsucks.homestead.com/), and [www.pissedconsumer.com](http://www.pissedconsumer.com).

<sup>18</sup> For examples of such, see <http://mashable.com/2011/01/28/taco-bell-social-media-crisis/>.

In the case of a “sucks dot com” or other site dedicated to criticism aimed exclusively at the small business, finding a way to purchase the domain name and site is probably in the long run one of the least expensive ways to handle the issue. Domain buying services and brokers are available through most ISPs. Even if the organization is blatantly defamed on the site, just the first round of high-powered legal action, such as filing a lawsuit or responding to the first round of motions will probably have a legal bill of six-figures attached to it. It may ultimately be possible to thus negotiate a purchase of the site in such a way that the critic is financially satisfied and in agreement to stop his or her activities.

Of course, suing for defamation or other business torts is indeed a possible option, but it is often the most costly one. And, in some cases, it can actually call more attention to the criticism than the site itself. It may ultimately make the business look like a cyber bully, which is not productive or helpful. And, if any of the criticism on the website are true and can be proven. The last thing needed is for that to be aired in court. Finally, if the suit takes place in any state where there is an anti-SLAPP statute, the ultimate cost of the legal action may not only include the plaintiff’s attorney’s fees, but the defendant’s as well. As mentioned in the previous section, insurance coverage for anti-SLAPP actions is unlikely to exist.

### CONCLUSION

One of the harshest realities for any small business owner who has reason to criticize a person or entity that is financially powerful is that while every criticism made might be 100% truthful, it can still be quite costly and draining if it results in a SLAPP suit. Small business owners should be mindful of the potential for those suits, and, the presence or absence of anti-SLAPP statutes. Websites that are aimed at accomplishing some sort of activist agenda should be registered through a domain proxy to at least provide some level of protection of the owner’s identity. However, as we have seen, that is not a foolproof method for protecting identity. Evidence regarding the truthfulness of statements made, regardless of how minor it may seem, should always be preserved. In the event of a SLAPP, the ability to prove the statements as truthful may mean the difference in victory and defeat.

Also, it is ill-advised to operate such sites with any commercial or monetary interests at stake. While the sale of advertising or sponsorships on such a site might defray some expenses, the reality is that it can be interpreted in another light. In *Ascend Health v. Wells*, the court ruled in favor of Wells on one point regarding possibly copyright infringement because, as the judge noted, the blogger’s use of images belonging to Ascend was purely noncommercial and the defendant did not stand to profit from their use.

Proper insurance coverage is also a must for any small business. Consultation with the insurance agent or broker is important. With any critical communications concerning any other business, it is important that such communications be of opinion only and not intended to thwart business away. Still, perhaps the most critical risk management step that should be taken is having a consultation with lawyers who are experts in Internet and defamation law. There is simply no substitute for that type of counsel and advice.

With the absence of any strong federal law and an assortment of anti-SLAPP laws scattered across the individual states, SLAPP lawsuits are likely to affect small businesses in the future. Future research can empirically examine the specific financial effect of SLAPP lawsuits on a small business as well as survey the outcomes of SLAPP lawsuits involving small businesses. With the introduction of the SPEAK FREE Act in 2015 in the United States House of Representatives, it is likely that SLAPPs will remain on the minds of policymakers in the current Congress.

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**APPENDIX A: STATE ANTI-SLAPP STATUTES<sup>19</sup>**

<b>State</b>	<b>State Anti-SLAPP Statute?</b>	<b>Scope of Statute</b>	<b>Fee Recovery for Anti-SLAPP Motion?</b>	<b>Punitive Damages Recoverable by Statute for Anti-SLAPP Motion?</b>	<b>Fee Recovery to Party Opposing Anti-SLAPP Motion?</b>
<b>Alabama</b>	None	N/A.	N/A.	N/A.	N/A.
<b>Alaska</b>	None	N/A.	N/A.	N/A.	N/A.
<b>Arizona</b>	Arizona Revised Statutes Annotated § 12-751 and § 12-752	Statements in government proceedings and those made in connection with an issue under consideration in a governmental proceeding.	Yes, costs and reasonable attorney fees.	Additional sanctions can be recovered.	Yes, costs and reasonable attorney fees.
<b>Arkansas</b>	Arkansas Code Annotated § 16-63-501 to § 16-63-508	Statements in government proceedings and those made in connection with an issue under consideration in a governmental proceeding.	Yes, costs, reasonable attorney fees, and other compensatory damages (other compensatory damages in certain cases).	No.	No.
<b>California</b>	California Code of Civil Procedure § 425.16	Statements made in government proceedings and those in connection with a public issue.	Yes, costs and reasonable attorney fees.	No.	Yes, costs and reasonable attorney fees.
<b>Colorado</b>	No, but there is judicial case law.	N/A.	N/A.	N/A.	N/A.
<b>Connecticut</b>	No.	N/A	N/A.	N/A.	N/A.
<b>Delaware</b>	Delaware Code Annotated § 8136 to § 8138	Statements concerning government applications or permits.	Yes, costs and attorney fees.	Yes, punitive damages.	No.
<b>Florida</b>	Florida Statutes Annotated § 768.295	Covers lawsuits by governmental entities against private citizens relating to right to petition.	Yes, actual damages, costs and reasonable attorney fees.	No.	Yes, costs and reasonable attorney fees.

<sup>19</sup> The information in this table was compiled after a Westlaw search of all applicable state anti-SLAPP statutes. A search was conducted after a review of the following website, which should receive due credit: *State Anti-SLAPP Laws*, PUBLIC PARTICIPATION PROJECT (last accessed December 20, 2014), <http://www.anti-slapp.org/your-states-free-speech-protection/>.

<b>Georgia</b>	Code of Georgia Annotated § 9-11-11.1	Statements in government proceedings and those made in connection with an issue under consideration in a governmental proceeding.	Yes, expenses and attorney fees.	No.	No.
<b>Hawaii</b>	Hawaii Revised Statutes Annotated § 634F-1 to § 634F-4	Statements in government proceedings.	Yes, costs, reasonable attorney and expert witness fees, as well as actual damages or \$5,000, whichever amount is greater.	Additional sanctions may be imposed.	No.
<b>Idaho</b>	None	N/A.	N/A.	N/A.	N/A.
<b>Illinois</b>	Illinois Compiled Statutes Annotated Chapter 735 § 110/1 to § 110/99	Statements in government proceedings.	Yes, costs and reasonable attorney fees.	No.	No.
<b>Indiana</b>	Indiana Code Annotated § 34-7-7-1 to § 34-7-7-10	Statements made in connection with a public issue or an issue of public interest.	Yes, costs and reasonable attorney fees.	No.	Yes, costs and reasonable attorney fees.
<b>Iowa</b>	None	N/A.	N/A.	N/A.	N/A.
<b>Kansas</b>	None	N/A.	N/A.	N/A.	N/A.
<b>Kentucky</b>	None	N/A.	N/A.	N/A.	N/A.
<b>Louisiana</b>	Louisiana Statutes Annotated Art. 971	Statements in government proceedings and those made in public forums.	No.	No.	No.
<b>Maine</b>	Maine Revised Statutes Annotated Title 14 § 556	Statements in government proceedings and those made in connection with an issue under consideration in a governmental proceeding.	Yes, costs and reasonable attorney fees.	No.	No.
<b>Maryland</b>	Maryland Code Annotated § 5-807	Statements in government proceedings and those made to the public at-large.	No.	No.	No.

<b>Massachusetts</b>	Massachusetts General Laws Annotated Chapter 231 § 59H	Statements in government proceedings and those made in connection with an issue under consideration in a governmental proceeding.	Yes, costs and reasonable attorney fees.	No.	No.
<b>Michigan</b>	None	N/A.	N/A.	N/A.	N/A.
<b>Minnesota</b>	Minnesota Statutes Annotated § 554.01 to § 554.05	Statements aimed at procuring favorable government action.	Yes, costs and reasonable attorney fees.	Yes, punitive damages.	No.
<b>Mississippi</b>	None	N/A.	N/A.	N/A.	N/A.
<b>Missouri</b>	Missouri Statutes Annotated § 537.528	Statements made in connection with a public meeting or public hearing, or a public hearing in a quasi-judicial proceeding.	Yes, costs and reasonable attorney fees.	No.	Yes, costs and reasonable attorney fees.
<b>Montana</b>	None	N/A.	N/A.	N/A.	N/A.
<b>Nebraska</b>	Revised Statutes of Nebraska Annotated § 25-21,241 to § 25-21,246	Statements concerning government applications or permits.	Yes, costs and reasonable attorney fees.	No.	No.
<b>Nevada</b>	Nevada Revised Statutes Annotated § 41.635 to § 41.670	Statements in government proceedings and those made in public forums.	Yes, reasonable costs, attorney fees, and an amount up to \$10,000.	Yes, punitive damages.	Yes, reasonable costs, attorney fees, and an amount up to \$10,000.
<b>New Hampshire</b>	None	N/A.	N/A.	N/A.	N/A.
<b>New Jersey</b>	None	N/A.	N/A.	N/A.	N/A.
<b>New Mexico</b>	New Mexico Statutes Annotated § 38-2-9.1 to § 38-2-9.2	Statements made in connection with a public hearing or public hearing in a quasi-judicial proceeding.	Yes, costs and reasonable attorney fees.	No.	Yes, costs and reasonable attorney fees.
<b>New York</b>	Consolidated Laws of New York Annotated § 70-a and § 76-a	Statements concerning government applications or permits.	Yes, costs, attorney fees and other compensatory damages (other compensatory damages in certain cases).	Yes, punitive damages.	No.
<b>North Carolina</b>	None	N/A.	N/A.	N/A.	N/A.

<b>North Dakota</b>	None	N/A.	N/A.	N/A.	N/A.
<b>Ohio</b>	None	N/A.	N/A.	N/A.	N/A.
<b>Oklahoma</b>	Oklahoma Statutes Annotated Title 12 § 1430 to § 1440	Statements in government proceedings and those made in public meetings dealing with a public purpose.	Yes, costs and reasonable attorney fees.	Sanctions may be imposed.	Yes, costs and reasonable attorney fees.
<b>Oregon</b>	Oregon Revised Statutes Annotated § 31.150 to § 31.155	Statements made in government proceedings and those made in a public forum in connection with an issue of public interest.	Yes, costs and reasonable attorney fees.	No.	Yes, costs and reasonable attorney fees.
<b>Pennsylvania</b>	Pennsylvania Consolidated Statutes Title 27 § 8301 to § 8305	Statements in government proceedings and those made in connection with an issue under consideration in a governmental proceeding. The statute is limited to issues involving environmental laws and regulations.	No.	No.	No.
<b>Rhode Island</b>	General Laws of Rhode Island Annotated § 9-33-1 to § 9-33-4	Statements in government proceedings and those made in connection with an issue under consideration in a governmental proceeding.	Yes, costs and reasonable attorney fees.	Yes, punitive damages.	No.
<b>South Carolina</b>	None	N/A.	N/A.	N/A.	N/A.
<b>South Dakota</b>	None	N/A.	N/A.	N/A.	N/A.
<b>Tennessee</b>	Tennessee Code Annotated § 4-21-1001 to § 4-21-1004	Statements made in connection with a public or governmental issue made regarding another person or entity made to any governmental entity regarding a matter of concern to that agency.	Yes, costs and reasonable attorney fees.	No.	No.

<b>Texas</b>	Texas Civil Practice and Remedies Code § 27.001 to § 27.011	Statements in government proceedings and those made in a public meeting dealing with a public purpose.	Yes, costs and reasonable attorney fees.	Sanctions may be imposed.	Yes, costs and reasonable attorney fees.
<b>Utah</b>	Utah Code Annotated § 78-58-1401 to § 78-58-1405	Statements and actions relating to government proceedings and activities related to government proceedings.	Yes, costs, reasonable attorney fees and other compensatory damages (other compensatory damages in certain cases).	No.	No.
<b>Vermont</b>	Vermont Statutes Annotated Title 12 § 1041	Statements made in government proceedings and those made in a public forum.	Yes, costs and reasonable attorney fees.	No.	Yes, costs and reasonable attorney fees.
<b>Virginia</b>	None	N/A.	N/A.	N/A.	N/A.
<b>Washington</b>	Revised Code of Washington Annotated § 4.24.525	Statements made in government proceedings and those made in a public forum in connection with an issue of public concern.	Yes, costs and reasonable attorney fees.	Sanctions may be imposed.	Yes, costs and reasonable attorney fees.
<b>West Virginia</b>	No, but there is judicial case law.	N/A.	N/A.	N/A.	N/A.
<b>Wisconsin</b>	None	N/A.	N/A.	N/A.	N/A.
<b>Wyoming</b>	None	N/A.	N/A.	N/A.	N/A.

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