

STORAGE NAME: h0339a.ca

DATE: March 17, 1999

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
COMMUNITY AFFAIRS
ANALYSIS**

BILL #: HB 339

RELATING TO: Citizen Participation in Government Act

SPONSOR(S): Representative Hart and Others

COMPANION BILL(S): CS/SB 64 (s)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) COMMUNITY AFFAIRS YEAS 9 NAYS 0
 - (2) JUDICIARY
 - (3) GENERAL GOVERNMENT APPROPRIATIONS
 - (4)
 - (5)
-

I. SUMMARY:

The bill creates the "Citizen Participation in Government Act." Specifically, the bill places limitations upon "Strategic Lawsuits against Public Participation," (SLAPPs) and seeks to create a more equitable balance between the right of individuals to file lawsuits and the rights of persons to petition and otherwise participate in their governments.

The bill provides immunity from civil liability for any act by a person in furtherance of his or her constitutional right to petition the government for redress of grievances, except when the act is not aimed at procuring any governmental or electoral result.

Under the bill, a party may file a motion to dispose of a claim on the grounds that the claim relates to or is in response to the moving party's lawful petitioning activity. The court should treat the motion as a motion for summary judgement. The responding party has the burden of proof. The court must dismiss the claim unless the responding party has produced clear and convincing evidence that the moving party is not immune from civil liability under the act. The moving party has a right of expedited appeal from a trial court denying such a motion or from a trial court's failure to rule on such a motion in an expedited fashion.

The bill provides the prevailing moving party with a court award of costs, attorney's fees, expert witness fees, and such additional sanctions sufficient to deter repetition of similar conduct in the future. Additionally, a person injured by such a claim is entitled to seek actual damages and punitive damages.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Under the state and federal constitutions, citizens have the right to petition the government for redress of their grievances. See Art. I § 5, Fla. Const.; U.S. Const., amend. 1. Lawsuits aimed at deterring this type of public participation in government are coined "strategic lawsuits against public participation" or SLAPPs. Generally, a SLAPP is a (1) civil complaint or counterclaim; (2) filed against individuals or organizations; (3) arising from their communications to government or speech on an issue of public concern. SLAPPs are often brought by corporations, real estate developers, and government officials against individuals and community groups who oppose them on issues of public concern. Based on 21 SLAPPs reported in Florida in the period between 1985-1993, over 90% of the SLAPPs were filed by the private sector, the rest were filed by governmental entities.¹

Most SLAPPs are ultimately legally unsuccessful. However, the costly and time-consuming consequences of litigation or threat thereof has a chilling effect on individual citizens or citizen groups attempting to exercise their First Amendment right to petition the government for grievances. According to a survey done by the Office of the Attorney General in 1993, the cost of defending SLAPPs filed in Florida ranged from \$500 to \$106,000. The lawsuits reported in the survey were initiated in response to informal citizen activities such as speaking at public meetings and letter campaigns to local governmental entities or the electorate. The remainder of the lawsuits were filed in response to formal citizen activities such as legal challenges to local, regional, state or federal agency decisions, including the water management districts.

Since the 1993 survey, there has been no ongoing systematic program or effort to track the number of SLAPP lawsuits in Florida. The difficulty is due in part to the fact that SLAPP lawsuits are not easily identifiable. SLAPP lawsuits may be filed under a variety of claims including, but not limited to, interference with business relationships, slander of title, trespass, nuisance, and harassment.

Existing Florida law offers the following options to citizens to address SLAPP lawsuits:

- *An Action for Malicious Prosecution*

If a defendant in a SLAPP successfully has the action dismissed or wins the case, a malicious prosecution action may be filed against the former plaintiff on the theory that the original action was filed with malice. Under Florida case law, six separate elements must be proven in a malicious prosecution claim or the case may be dismissed:

1. An original action has been commenced;
2. The original action was filed by the defendant in the new malicious prosecution action;
3. The original action ended with a ruling in favor of the plaintiff who is bringing the malicious prosecution action;
4. The original action was instigated with malice;
5. The original action was instigated without probable cause; and
6. The original action resulted in damages to the person bringing the malicious prosecution action.²

Actions for malicious prosecution may not serve to deter SLAPP suits because the malicious prosecution action cannot be brought until the resolution of the original SLAPP suit. Thus, the SLAPP suit may still serve the intended purpose of discouraging public participation.

- *Motion to Strike Sham Pleadings*

¹Office of Attorney General, *Strategic Lawsuits Against Public Participation in Florida: Survey and Report*, July 1993.

²*Scozari v. Barone*, 546 So.2d 750 (Fla. 3rd DCA 1989); *Kalt v. Dollar Rent-A-Car*, 422 So.2d 1031 (Fla. 3rd DCA 1982).

In a civil lawsuit, a party may move to strike a sham pleading.³ The moving party must prove that the pleading in question is plainly fictitious.⁴ The court must resolve any doubts in favor of the party opposing the motion to strike the sham pleading.⁵ Because this standard is difficult to meet, filing such a motion will not only require legal expenditures by the plaintiff, but may not slow down or eliminate the suit. If the court finds in favor of the moving party, the effect will be only to strike the pleading. Such an action may not serve as an effective deterrent to SLAPP lawsuits.

- *Motion to Dismiss and Motion for Summary Judgement*

In a civil lawsuit, a party may move to have the case dismissed.⁶ The burden is on the moving party to show that even if the allegations in the complaint were true, the complaint fails to state a cause of action. Another option available to a party is filing a motion for summary judgment.⁷ The moving party must show that there is a complete absence of any issue of material fact. Under both rules, the burdens may be so great that such procedures would not make effective deterrents for SLAPP suits.

- *Other Remedies*

Other remedies may be available to a defendant in a SLAPP lawsuit, such as an award of attorney's fees, but those remedies are after the litigation has progressed and the desired intent to discourage the defendant from public participation has been achieved.

Other States

The perceived weakness of traditional civil actions and sanctions as an effective deterrent to the use of SLAPPs has led various states to consider and adopt legislation that focuses on the specific character of a SLAPP lawsuit. As of January 1998, 11 states had passed anti-SLAPP suit legislation. These states are California, Delaware, Georgia, Maine, Massachusetts, Minnesota, Nebraska, Nevada, New York, Rhode Island, and Washington. In addition, anti-SLAPP bills have been proposed in Florida, Indiana, Maryland, New Hampshire, New Jersey, Pennsylvania, Tennessee, and Texas.⁸

In addition, in Colorado the issue of SLAPP lawsuits has been dealt with in a judicial manner rather than a legislative manner. The Colorado Supreme Court has adopted a judicial procedure for cases involving allegations that judicial claims were brought to interfere with the right to petition.⁹ In balancing the competing concerns of the chilling effect on the right to petition, and the damage to other persons and society which can be done under the pretext of such rights, the court requires that the plaintiff demonstrate the constitutional viability of his or her claim. The claim is dismissed unless the plaintiff makes a sufficient showing to support the conclusion that the defendant's petitioning activities should not be immunized under the constitution 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;
2. The primary purpose of the defendant's petitioning activity was to harass the plaintiff or to effectuate some other improper objective; and

³Rule 1.150, Florida Rules of Civil Procedure.

⁴*Reif Development, Inc. v. Wachovia Mortgage Co.*, 340 So.2d 1267 (Fla. 4th DCA 1976).

⁵*Bay Colony Office Building v. Wachovia Mortgage*, 342 So.2d 1005 (Fla. 4th DCA 1977).

⁶Rule 1.140, Florida Rules of Civil Procedure.

⁷Rule 1.510, Florida Rules of Civil Procedure.

⁸Comment, *When Rights Collide: Reconciling the First Amendment Rights of Opposing Parties in Civil Litigation*, 52 U. Miami L. R.587, 592 (1998).

⁹*Protect Our Mountain Environment, Inc. v. District Court*, 677 P.2d 1361 (Colo. 1984).

3. The defendant's petitioning activity had the capacity to adversely affect a legal interest of the plaintiff.¹⁰

B. EFFECT OF PROPOSED CHANGES:

The bill creates the "Citizen Participation in Government Act." It establishes three significant changes in current law.

- a. Immunity for Persons Seeking to Petition the Government - This bill places limitations upon "Strategic Lawsuits against Public Participation" (SLAPPs), by providing immunity from civil liability for citizens who exercise their constitutional right to petition the government. The bill provides, "An act in furtherance of the constitutional right to petition, including seeking relief, influencing action, informing, communicating, and otherwise participating in the processes of government, is immune from civil liability, regardless of its intent or purpose, except when not aimed at procuring any governmental or electoral action, result, or outcome." In its present form, the bill appears to extend immunity to persons affected by SLAPP lawsuits filed by either public or private entities.
- b. Expedited Resolution of SLAPP lawsuits - This bill provides for expedited motions to dispose of claims filed in opposition to the exercise of this right. Such motions are treated as motions for summary judgment and function to suspend discovery pending resolution. The bill requires the court to grant the motion and dismiss the judicial claim, unless the responding party has produced by clear and convincing evidence that the acts of the moving party are not immunized from liability.
- c. Damages and Sanctions - The bill directs that the court must award, without regard to any limits under state law, costs of litigation, including attorney fees and expert witness fees incurred in connection with the motion; and additional sanctions sufficient to deter repetition. In addition, the bill provides that actual and punitive damages may be awarded to a person who is injured by the filing of a claim.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

- a. Does the bill create, increase or reduce, either directly or indirectly:

- (1) any authority to make rules or adjudicate disputes?

Yes. This bill directs the court to take certain actions in relation to SLAPP lawsuits. It provides guidelines aimed at protecting those who exercise their right to petition the government.

- (2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

Yes. This bill places certain obligations and restrictions upon the court in connection with SLAPP lawsuits. However, the bill may deter the filing of SLAPPs and thus alleviate the burden on the courts associated with the filing of these lawsuits.

- (3) any entitlement to a government service or benefit?

The expediting motions related to SLAPPs could delay certain proceedings in other lawsuits.

¹⁰*Id.* at 1369.

- b. If an agency or program is eliminated or reduced:

An agency or program is not eliminated or reduced.

- (1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

Not applicable.

- (2) what is the cost of such responsibility at the new level/agency?

Not applicable.

- (3) how is the new agency accountable to the people governed?

Not applicable

2. Lower Taxes:

- a. Does the bill increase anyone's taxes?

No.

- b. Does the bill require or authorize an increase in any fees?

No.

- c. Does the bill reduce total taxes, both rates and revenues?

No.

- d. Does the bill reduce total fees, both rates and revenues?

No.

- e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

- a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

Not applicable.

- b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

Not applicable.

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

Yes. The bill would encourage participation in government by reducing the risk of a retaliatory SLAPP lawsuit. By deterring SLAPP lawsuits, parties can remain in the public decision-making forum, where both the cause and resolution of the dispute can be determined.

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

Yes. This bill raises constitutional concerns related to the right of access to the courts. See *comments section*.

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

- (1) Who evaluates the family's needs?

Not applicable.

- (2) Who makes the decisions?

Not applicable.

- (3) Are private alternatives permitted?

Not applicable.

- (4) Are families required to participate in a program?

Not applicable.

- (5) Are families penalized for not participating in a program?

Not applicable.

- b. Does the bill directly affect the legal rights and obligations between family members?

No.

- c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

This bill does not create or change a program providing services to families or children.

- (1) parents and guardians?

Not applicable.

- (2) service providers?

Not applicable.

- (3) government employees/agencies?

Not applicable.

D. STATUTE(S) AFFECTED:

None.

E. SECTION-BY-SECTION ANALYSIS:

Section 1 -- Creates the Citizen Participation in Government Act.

Section 2 -- Provides the purpose of the Act is to include the protection and encouragement of public participation; an equitable balance between the rights of persons to file lawsuits and the rights of persons to petition the government for redress; the support of representative government in the protection and regulation of public health, safety, and welfare; the expedited summary process for judicial resolution of SLAPP lawsuits; and the recovery of attorney's fees, costs and damages for the person whose citizen-participation rights have been violated.

Section 3 -- Establishes that an act in furtherance of the constitutional right to petition and participate in government is immune from civil liability regardless of its intent or purpose; provides exception when the act is not aimed at procuring any governmental or electoral action, result, or outcome.

Section 4 -- Provides that a party may file a motion to dispose of a claim in any judicial proceeding brought on the groups that the claim relates to or is in response to that moving party's lawful petitioning activity.

Section 5 -- Requires the court to rule on the motion allowed in section 4 as a motion for summary judgement under an expedited process; provides that the moving party has a right of expedited appeal upon the denial of such motion or upon the court's failure to adhere to the expedited process; provides that discovery is suspended pending decision on the motion and any appeals; provides that the burden of proof of going forward with the evidence, and of persuasion on the motion, lies with the responding party; requires the court to make its determination based on the facts in the pleadings and any affidavits filed; requires that the court grant the motion and dismiss the claim unless the responding party has established by clear and convincing evidence that the moving party is not immune under section 3, provides that any government entity to which the moving party's initial acts were directed, or the Attorney General, may intervene to defend or otherwise support the moving party; requires the court to award without regard to any limits under state law, costs of litigation, including reasonable attorney's fees, expert witness fees, and such additional sanctions as it finds will be sufficient to deter repetition of such conduct; provides that an injured party may seek compensatory damages, punitive damages, attorney's fees, and costs.

Section 6 -- Provides definitions for "government," "state," "judicial claim" or "claim," "motion," "moving party," and "responding party."

Section 7 -- Provides that the bill takes effect upon becoming law.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

See fiscal comments.

2. Recurring Effects:

See fiscal comments.

3. Long Run Effects Other Than Normal Growth:

See fiscal comments.

4. Total Revenues and Expenditures:

See fiscal comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

See fiscal comments.

2. Recurring Effects:

See fiscal comments.

3. Long Run Effects Other Than Normal Growth:

See fiscal comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

None.

2. Direct Private Sector Benefits:

The proposed legislation may deter the filing of SLAPP suits and thus reduce legal fees incurred by citizens acting on their constitutionally mandated right to petition the government.

3. Effects on Competition, Private Enterprise and Employment Markets:

None.

D. FISCAL COMMENTS:

According to the Office of the State Courts Administrator, the bill's summary and expedited procedure to dispose of SLAPP lawsuits will initially result in an additional burden on the court arising from: new court filings, post-judgment motions for costs, motions for attorney's fees and damages, litigation to interpret "aimed at procuring any governmental or electoral action," and minimal appeals. However, according to the Office of State Court Administrator, the existence of a summary and expedited procedure for terminating SLAPPs may counteract the above burdens to the court system by quickly bring SLAPPs to final disposition in the early trial stage of the suit and by acting as a deterrent for the filing of new SLAPPs.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

Constitutional Concerns

The bill's provision for the summary procedure and expedited resolution of SLAPP lawsuits may be subject to a constitutional challenge as violative of the separation of powers provision in Article II, section 3 of the Florida Constitution. Article V, section 2(a) gives the legislature the authority to create substantive law, and the Florida Supreme Court the authority to promulgate rules of practice and procedure. However, while the legislature cannot enact law that supersedes existing court rules, the legislature can repeal the court rules by a 2/3 vote.

With few exceptions, it is not entirely clear or definitive as to what constitutes substantive law versus what constitutes practice and procedure. Generally, substantive laws create, define, and regulate rights whereas court rules of practice and procedure prescribe the methods or process by which a party seeks to enforce or obtain redress.¹¹ However, the courts have shown some willingness to adopt a "procedural" statute as a court rule, particularly when the court finds the legislative intent or underlying legislative policy to be beneficial to the judicial system. In these situations, the court will typically invalidate the procedural statute as constitutionally infirm and then adopt the substance of the invalid section as a court rule.¹² Under Florida Rules of Judicial Administration 2.130(a), the courts can also adopt the substance of an invalid section as an emergency rule of procedure based on a recognition of the importance of providing a procedural vehicle or otherwise recognizing the public policy.

There is also a constitutional concern that this bill will create procedures or remedies that could inadvertently operate to hinder legitimate lawsuits based on slander, libel, or other tortious activity. If true, certain litigants may be denied their constitutional right to access of the courts as well as their constitutional right to a jury trial. In *Florida Fern Growers Association, Inc. V. Concerned Citizens of Putman County*, 616 So.2d 562 (Fla. 5th DCA 1993), a citizen's group had filed various petitions with the St. Johns River Water Management District challenging the issuance of consumption water use permits to members of the Florida Fern Growers Association. The Association, in turn, filed a complaint for injunctive relief and damages. The citizen's group responded that the Association's lawsuit was a SLAPP lawsuit. The Fifth District Court of Appeal in dicta reasoned that extending absolute immunity to activities such as those undertaken by the citizen's group could infringe upon the Association's right of access to the courts.

Resolutions in Support of Bill

Please see attached Resolution 99-02, a resolution in support of HB 339 and SB 64, which encourages citizen participation in government without fear of lawsuits against participants, by the Jacksonville Environmental Protection Board.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The Committee on Community Affairs adopted a strike everything amendment on March 17, 1999. The strike everything amendment is different from the bill as introduced in that it:

- Limits the bill's application to SLAPPs brought by government entities.
- Moves the definition section from section 6 to section 3.

¹¹Haven Federal Savings & Loan Assoc v. Kirian 579 So.2d 730 (Fla. 1991).

¹²TGI Fridays' Inc v. Dvorak, 663 So.2d 606 (Fla. 1995).

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- Replaces in the definition section “government” with “government entity” in which the electorate is removed and the definition is restricted to the state or any political subdivision of the state; conforms the bill with the Senate Committee on Governmental Oversight and Productivity amendment to CS/SB 64.
- Adds a definition for “petitioning activity,” i.e., lawful exercise of the constitutional right to petition, including seeking relief, influencing action, informing communicating, and otherwise participating in the processes of government.
- Eliminates the provisions granting absolute immunity for civil liability for any act by a person exercising his or her right to petition the government for redress.
- Provides criteria for the courts to deny a motion to dispose of a SLAPP claim upon showing of clear and convincing evidence that (1) the claims made in the petitioning activity were devoid of reasonable factual support or lacked a cognizable basis in law; (2) the primary purpose of the petitioning activity was to harass the responding party or for some other improper purpose; and (3) the petitioning activity caused actual injury to the responding party.
- Corrects the language in section 4 subsection (7) of the bill as introduced relating to the award of costs and attorney’s fees and expert witness fees “to a moving party who is dismissed.” The language now reads, “If the court grants any motion under this section, the court must award to the moving party, without regard to any limits under state law.”

VII. SIGNATURES:

COMMITTEE ON COMMUNITY AFFAIRS:

Prepared by:

Staff Director:

Aimee Diaz

Joan Highsmith-Smith