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DATE: February 10, 2000

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
GENERAL GOVERNMENT APPROPRIATIONS
ANALYSIS**

BILL #: HB 135

RELATING TO: Citizen Participation in Government Act

SPONSOR(S): Representative Fasano and others

TIED BILL(S):

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

- (1) JUDICIARY YEAS 5 NAYS 0
 - (2) GENERAL GOVERNMENT APPROPRIATIONS YEAS 10 NAYS 0
 - (3)
 - (4)
 - (5)
-

I. SUMMARY:

The bill creates the "Citizen Participation in Government Act." Specifically, the bill places limitations upon governmental "Strategic Lawsuits against Public Participation," (SLAPPs) and seeks to create a more equitable balance between the right of individuals to file lawsuits and the right of persons to petition and otherwise participate in their governments. While undefined in the bill, a SLAPP may be considered as a lawsuit intended to prevent a citizen or group from petitioning the government.

Under the bill, a party may file a motion to dispose of a SLAPP claim on the grounds that the claim relates to or is in response to the moving party's lawful petitioning activity. The government entity has the burden of proof. The court must dismiss the claim unless the government entity has produced clear and convincing evidence that the moving party's petitioning activity is without merit, was designed to harass the government entity, and caused that entity actual harm. (This provision was amended by the Committee on Judiciary. See VI. Amendments or Committee Substitute Changes.)

The bill provides the prevailing moving party with a court award of costs, attorney's fees, expert witness fees, and additional sanctions sufficient to deter repetition of similar conduct in the future. The award is not limited by state law. Additionally, a person injured by such a claim may seek actual damages and punitive damages against a government entity that files a SLAPPs suit.

The bill is effective on becoming law.

The bill may have a fiscal impact associated with an increased SLAPPs-related litigation burden on the courts.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|---|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

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

Most SLAPPs are ultimately legally unsuccessful. However, the costly and time-consuming consequences of litigation, or the 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 government 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.

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

In a civil lawsuit, a party may move to strike a sham pleading. Rule. 1.150, Fla. R.Civ.P. The moving party must prove that the pleading in question is plainly fictitious. *Reif Development, Inc. v. Wachovia Mortgage Co.*, 340 So.2d 1267 (Fla. 4th DCA 1976). The court must resolve any doubts in favor of the party opposing the motion to strike the sham pleading. *Bay Colony Office Building v. Wachovia Mortgage Co.*, 342 So.2d 1005 (Fla. 4th DCA 1977). 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. Rule 1.140, Fla.R.Civ.P. 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. Rule 1.510, Fla.R.Civ.P. 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. See ss. 57.105; 57.111, F.S. (allowing for recovery of attorneys' fees in civil and administrative matters).

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

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. *Protect Our Mountain Environment, Inc., v. District Court*, 677 P.2d 1361 (Colo. 1984). 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
3. The defendant's petitioning activity had the capacity to adversely affect a legal interest of the plaintiff. *Id.* at 1369.

C. EFFECT OF PROPOSED CHANGES:

The bill will limit SLAPPs suits by allowing a party to file a motion to dispose of a claim brought by any governmental entity on the grounds that the claim is based on, relates to, or is in response to the moving party's lawful petitioning activity.

Discovery will be suspended pending a decision on the motion and any appeals, and the burden of proof of going forward with the evidence, and of persuasion on the motion, lies with the responding party. The bill requires the court to make its determination based on the facts in the pleadings and any affidavits filed.

The court must grant the motion and dismiss the claim unless the government entity has established by clear and convincing evidence that (a) the claims made in the petitioning activity were devoid of reasonable factual support or lacked a cognizable basis in law; (b) that the primary purpose of the petitioning activity was to harass the responding party or for some other improper purpose © the petitioning activity caused actual injury to the responding party;

The bill 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. **Note:** This provision may create a conflict between the Attorney General and other executive branch agencies. The Attorney General ordinarily defends state agencies in law suits. The bill would allow the Attorney General to join and assist a private individual or organization against the alleged government SLAPP suit. This provision is ambiguous and seems directed toward private anti-SLAPP suits, on which the bill is silent.

Most important, the bill 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. In addition,

the bill provides that an injured party may seek compensatory damages, punitive damages, attorney's fees, and costs from the government entity responsible for a SLAPPs suit.

D. SECTION-BY-SECTION ANALYSIS:

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

Section 2 -- Provides the purpose of the Act is to protect and encourage public participation; provide an equitable balance between the rights of persons to file lawsuits and the rights of persons to petition the government for redress; support representative government in the protection and regulation of public health, safety, and welfare; provide a balanced, uniform, comprehensive, and expedited summary process for judicial resolution of SLAPP lawsuits; and require the recovery of attorney's fees, costs and damages for the person whose citizen-participation rights have been violated by the filing of a SLAPP against them.

Section 3 -- Provides definitions for "government entity," "state," "judicial claim" or "claim," "motion," "moving party," "petitioning activity," and "responding party."

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

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 government entity has established by clear and convincing evidence that (a) the claims made in the petitioning activity were devoid of reasonable factual support or lacked a cognizable basis in law; (b) that the primary purpose of the petitioning activity was to harass the government entity or for some other improper purpose © the petitioning activity caused actual injury to the responding party.

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 from the government entity responsible for a SLAPPs suit.

Section 5 -- Provides that the bill takes effect upon becoming law.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None estimated.

2. Expenditures:

None estimated.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None estimated.

2. Expenditures:

None estimated.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

N/A

D. FISCAL COMMENTS:

According to the Office of the State Courts Administrator (OSCA), the bill will have a minimal long-run effect on trial courts. There may be 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 various provisions, and minimal appeals. At the same time, the existence of a summary and expedited procedure for terminating SLAPPs may counteract the above burdens to the court system by quickly bringing SLAPPs to final disposition in the early trial stage of the suit and by acting as a deterrent for the filing of new SLAPPs.

This bill may impact negatively some governmental agencies (e.g., the Department of Revenue and the Department of Environmental Protection), by virtue of government regulations that affect persons and businesses daily which may be subject to challenge. However, with the ability to show that the governmental suit is unrelated to the petitioning activity the governmental entity should be able to have the motion dismissed.

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

A. APPLICABILITY OF THE MANDATES PROVISION:

The bill does not require a city or county to spend funds or to take any action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The bill does not reduce the revenue raising authority of any city or county.

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

The bill does not reduce the amount of state tax shared with any city or county.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES

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 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. *Haven Federal Savings & Loan Assoc. v. Kirian*, 579 So.2d 730 (Fla. 1991). 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. *TGI Fridays' Inc. v. Dvorak*, 663 So.2d 606 (Fla. 1995). 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 Putnam 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.

B. RULE-MAKING AUTHORITY:

N/A

C. OTHER COMMENTS:

The term "Strategic Lawsuits Against Public Participation" is not defined within this bill, and this may well be because what constitutes a SLAPP is often a matter of subjective judgment and difficult to identify.

Routine state agency regulatory practices and license revocations could result in a plethora of lawsuits. Frequently, an agency must file a lawsuit and then depend upon the discovery process to find out all of the particulars involved. This law would permit a party to an enforcement action to immediately file a SLAPP motion and stop all discovery. The government would then be required to defend a motion for summary judgment without the benefit of discovery. This would place all agencies who commence enforcement actions at a disadvantage never previously contemplated.

A Motion for Summary Judgment generally follows discovery and determines whether a material issue of fact exists and whether as a matter of law the moving party is entitled to a judgment.

The judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Rule 1.510 (c), Florida Rules of Civil Procedure. Under the procedure outlined in this bill, discovery could be denied the agency and the action fail at the SLAPP motion level without the agency ever having the opportunity to discover the actual facts involved.

The provision allowing a government entity or the Attorney General to intervene to defend against a SLAPP suit is problematic. This provision may create a conflict between the Attorney General and other executive branch agencies. The Attorney General ordinarily defends state agencies in law suits. The bill would allow the Attorney General to join a private individual or organization against the government entity in the alleged SLAPP suit. This provision is ambiguous and seems directed toward private anti-SLAPP suits, on which the bill is silent.

Additionally, if an individual were to exercise a first amendment right at a government building, government property, or at a public hearing and in the course thereof damaged government property or injured persons, a SLAPP motion could also be filed, immunizing the persons responsible for the damage.

Finally, the bill begs the question of its intended effects. According to the Attorney General, the vast majority -- over 90% -- of SLAPPs filed in Florida involve private parties. See, Office of Attorney General, *Strategic Lawsuits Against Public Participation in Florida: Survey and Report*, July 1993. If that is the case, a bill aimed at preventing only government-initiated SLAPPs will have little deterrent effect on the number of SLAPPs filed in this state.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On November 2, 1999, the Committee on Judiciary adopted one amendment that is traveling with the bill. The amendment inserts the disjunctive "or" between the elements that the state must show in order to overcome a citizen's anti-SLAPP motion. The amendment will allow the state to overcome the motion by showing one factor instead of all three. See section 4.(4)(a)-(c) of HB 135.

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VII. SIGNATURES:

COMMITTEE ON JUDICIARY:

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Staff Director:

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Prepared by:

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