

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 1041 Strategic Lawsuits Against Public Participation

**SPONSOR(S):** Civil Justice Subcommittee; Moskowitz

**TIED BILLS:** None **IDEN./SIM. BILLS:** CS/SB 1312

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	13 Y, 0 N, As CS	Robinson	Bond
2) Judiciary Committee	17 Y, 0 N	Robinson	Havlicak

### SUMMARY ANALYSIS

Under the Federal and State Constitutions, citizens have the right to freedom of speech and the right to petition the government for redress of their grievances. Pursuant to these rights, citizens lobby government and speak publicly on matters of concern to entire communities. Lawsuits aimed at deterring this type of public participation are called "strategic lawsuits against public participation" or SLAPP suits. A SLAPP suit is a civil claim or counterclaim ostensibly brought to redress a wrong, such as defamation, an invasion of privacy, a business tort, or an interference with a contract or an economic advantage, but is actually brought to discourage a person from exercising his or her constitutionally protected rights or to penalize him or her for doing so.

The Citizen Participation in Government Act (CPGA), enacted in 2000, prohibits SLAPP suits by governmental entities and provides for the expedited resolution of such actions and the recovery of damages by the defendant. However, the CPGA does not provide protection from SLAPP suits filed by private entities.

The bill expands the anti-SLAPP provisions of the CPGA to include SLAPP suits by private entities. The bill also provides that suits based upon the exercise of the constitutional right of free speech in connection with a public issue are subject to dismissal under the CPGA.

The bill does not appear to have a fiscal impact on state or local government.

The bill has an effective date of July 1, 2015.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Protected Individual Rights**

Under the Federal and State Constitutions citizens have the right to freedom of speech<sup>1</sup> and the right to petition the government for redress of their grievances.<sup>2</sup> Although the two rights are not identical in their mandate or purpose, the United States Supreme Court has said that the rights of speech and petition share substantial common ground:

It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. Both speech and petition are integral to the democratic process, although not necessarily in the same way. The right to petition allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives, whereas the right to speak fosters the public exchange of ideas that is integral to deliberative democracy as well as to the whole realm of ideas and human affairs.<sup>3</sup>

Petitions and speech are expressions and can take on various forms, including written, oral, or symbolic communications, which encourage or disapprove government action, whether directed to the judicial, executive, or legislative branch, or which contribute ideas and opinions to the democratic marketplace.

#### **SLAPP Suits**

Lawsuits aimed at deterring this type of public participation in a deliberative democracy are called "strategic lawsuits against public participation"<sup>4</sup> or SLAPP suits. A SLAPP is a civil claim or counterclaim ostensibly brought to redress a wrong, such as defamation, an invasion of privacy, a business tort, or an interference with a contract or an economic advantage, but is actually brought to discourage a person from exercising his or her constitutional rights or to penalize him or her for doing so.<sup>5</sup> Four criteria are critical to a lawsuit being deemed a SLAPP:

- The civil action seeks monetary damages or an injunction;
- The filer brings the claim or counterclaim against non-governmental individuals or groups;
- The basis for the filing is the individuals' or groups' communications to government or the public; and
- The communications relate to a matter of public interest or concern.<sup>6</sup>

SLAPP targets have been sued for engaging in a wide variety of protected activities, including:<sup>7</sup>

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<sup>1</sup> Even where a qualified speech privilege exists, i.e. statements of a citizen to a political authority regarding matters of public concern, that privilege carries with it the obligation to employ means that are not improper. The mode, manner or purpose of the communication would go to the question of abuse or forfeiture of the privilege, possibly subjecting the speaker to liability under current law. *Florida Fern Growers Ass'n, Inc. v. Concerned Citizens of Putnam County*, 616 So. 2d 562, 569-570 (Fla. 1st DCA 1993).

<sup>2</sup> U.S. CONST. amend I; FLA. CONST. art. I, s. 4-5.

<sup>3</sup> *Borough Of Duryea, Pennsylvania v. Guarnieri*, 131 S. Ct. 2488, 2495 (2011).

<sup>4</sup> Literature on the subject typically attributes the coining of the term "strategic lawsuit against public participation" – also known by the acronym SLAPP – to University of Denver Professors Penelope Canan and George Pring, who studied more than 200 lawsuits that they considered to be SLAPPs as part of a political litigation project at the university.

<sup>5</sup> George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3, 5-6 (1989-1990).

<sup>6</sup> *Id.* at 8.

<sup>7</sup> George W. Pring and Penelope Canan, *SLAPPs: Getting Sued For Speaking Out*, 7 (Philadelphia, Temple University Press 1996).

- Reporting to government authorities a concern that a local landfill was contaminating drinking water (sued for defamation and contractual interference by the owner);
- Opposing a housing development at public hearings and in letters to county commissioners (sued for defamation and abuse of right to speak by developer);
- Protesting a fiscal year budget (sued by county);
- Protesting a liquor license renewal for a controversial tavern (sued by owner for business interference);
- Filing an official complaint with the state against a contractor (sued by contractor for libel);
- Voicing concerns over reports of unsafe school buses at a school board meeting (sued by bus company for libel); and
- Testifying against a proposed residential development on the beach (sued by developer for libel, prima facie tort, and conspiracy).

Although most SLAPP suits are unsuccessful in court, defending a SLAPP, even when the legal defense is strong, requires a substantial investment of money, time, and resources. The filer may "succeed" if the litigation costs and time divert the SLAPP defendant from pursuing the constitutionally protected activity that prompted the litigation.<sup>8</sup> The resulting effect "chills" speech and public participation in, and open debate on, important public issues. The filing of a SLAPP suit also impedes resolution of the public matter at issue, by removing the parties from the public decision-making forum, where both the cause and resolution of the dispute can be determined, and placing them before a court, where only the alleged "effects" of the public controversy may be determined.

A 1993 study conducted by the Office of the Attorney General identified 21 SLAPPs filed in Florida between 1983 and 1993.<sup>9</sup> These lawsuits sought damages in excess of \$99 million against 71 defendants. Over 90% of the SLAPPs were brought by private individuals or corporate entities. Additionally, the report found that the reported costs associated with defending nine of the closed cases ranged from \$500 to \$106,000. Most of the lawsuits were initiated in response to informal public 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 public activities, such as, legal challenges to local, regional, state, or federal agency decisions, including the water management districts.<sup>10</sup>

### **Citizen Participation in Government Act**

In 2000, the Legislature enacted the Citizen Participation in Government Act (CPGA), codified at s. 768.295, F.S.<sup>11</sup> The legislative intent underlying the act is to protect the ability of citizens "to exercise their rights to peacefully assemble, instruct their representatives, and petition for redress of grievances" before governmental entities.<sup>12</sup> While recognizing that SLAPPs are often filed by private industry and individuals, the scope of the CPGA was narrowed to prohibiting the filing of SLAPPs by governmental entities only.<sup>13</sup> The CPGA specifically prohibits any governmental entity from filing or causing to be filed

<sup>8</sup> The Florida Senate Committee on Judiciary, *Issue Brief 2009-332: Strategic Lawsuits Against Public Participation* (October 2008), available at [http://archive.flsenate.gov/data/Publications/2009/Senate/reports/interim\\_reports/pdf/2009-332ju.pdf](http://archive.flsenate.gov/data/Publications/2009/Senate/reports/interim_reports/pdf/2009-332ju.pdf).

<sup>9</sup> Office of Attorney General Robert A. Butterworth, *Strategic Lawsuits Against Public Participation (SLAPPs) in Florida: Survey and Report* (July 1993).

<sup>10</sup> *Id.*; 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 a business relationship, slander, conspiracy, libel, abuse of process, slander, slander of title, trespass, nuisance, and harassment.

<sup>11</sup> Ch. 2000-174, L.O.F.

<sup>12</sup> "Governmental entity" or "government entity" means the state, including the executive, legislative, and the judicial branches of government and the independent establishments of the state, counties, municipalities, corporations primarily acting as instrumentalities of the state, counties, or municipalities, districts, authorities, boards, commissions, or any agencies thereof. s. 768.295(3), F.S.

<sup>13</sup> Legislation filed but not adopted in 1999 applied more broadly to provide immunity from civil liability – without regard to whether the SLAPP plaintiff was a governmental or private entity – for any act by a person in furtherance of the constitutional right to petition. See SB 64 and HB 339 (1999 Reg. Sess.). In 2003 legislators filed bills to broaden s.

any meritless suit or claim against a person or entity solely because such person or entity exercised the right to peacefully assemble, the right to instruct representatives, or the right to petition for redress of grievances before the various governmental entities of this state, as protected by the First Amendment to the United States Constitution and s. 5, Art. I of the State Constitution.<sup>14</sup> "Such actions are inconsistent with the right of individuals to participate in the state's institutions of government."<sup>15</sup>

A person or entity sued by a governmental entity in violation of the CPGA is entitled to an expeditious resolution of a claim that the suit is a SLAPP suit.<sup>16</sup> Such person or entity may petition the court to dismiss the lawsuit or grant summary judgment in their favor.<sup>17</sup> The court must award attorney fees and costs to the prevailing party in a claim that a suit is a SLAPP suit.<sup>18</sup> If the court finds that a suit constitutes a SLAPP suit, the court may award the SLAPP defendant actual damages.<sup>19</sup> A governmental entity found liable for filing a SLAPP suit must report the violation to the Attorney General.<sup>20</sup>

In 2004 and 2008, the Legislature enacted similar anti-SLAPP provisions specifically protecting property owners in a homeowners' or condominium association who, for purposes related to the association, exercise the right to instruct representatives or the right to petition for redress of grievances before the various governmental entities of the state.<sup>21</sup> Such provisions provide protection from SLAPP suits by private entities as well as governmental entities.<sup>22</sup>

There is no other protection from SLAPP suits by private entities in current law outside the context of petition activities related to a homeowners or condominium association.

### **Effect of the Bill**

The bill expands the anti-SLAPP provisions of the CPGA to SLAPP suits by private entities as well as governmental entities. Thus, this bill makes "any lawsuit, cause of action, claim, cross-claim, or counterclaim," whether by a governmental entity or a private party, subject to dismissal and a possible grant of damages, costs and attorney's fees for potentially violating First Amendment rights or their state counterparts.

Also, in addition to the current prohibition against bringing a SLAPP suit based on the exercise of the constitutional right to peacefully assemble, instruct representatives, or petition the government for redress of grievances, the bill amends the CPGA to prohibit bringing a SLAPP suit based on the exercise of the constitutional right of free speech in connection with a public issue. "Free speech in connection with public issues" is defined as any written or oral statement that is protected under applicable law and is made before a governmental entity in connection with an issue under consideration or review by a governmental entity, or is made in or in connection with a play, movie, television program, radio broadcast, audiovisual work, book, magazine article, musical work, news report, or other similar work.

### **B. SECTION DIRECTORY:**

Section 1 amends s. 768.295, F.S., relating to strategic lawsuits against public participation (SLAPP) suits by governmental entities prohibited.

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768.295, F.S., to apply to prohibit persons as well as governmental entities from filing SLAPPs, but the measures died in committee. See SB 2308 and HB 1499 (2003 Reg. Sess.).

<sup>14</sup> s. 768.295(4), F.S.

<sup>15</sup> s. 768.295(2), F.S.

<sup>16</sup> s. 768.295(5), F.S.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> s. 768.295(6), F.S.

<sup>21</sup> Chs. 2004-353 and 2008-28, L.O.F.

<sup>22</sup> "A governmental entity, business organization, or individual in this state may not file. . ." ss. 720.304(4)(b) and 718.1224(2), F.S.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

The bill does not appear to have any impact on state revenues.

#### 2. Expenditures:

The bill does not appear to have any impact on state expenditures.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

The bill does not appear to have any impact on local government revenues.

#### 2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

### D. FISCAL COMMENTS:

None.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

#### 1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

#### 2. Other:

The First Amendment to the U.S. Constitution prohibits Congress or a state from making a law "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."<sup>23</sup> Similarly, the State Constitution vests in the people the right to "speak, write and publish sentiments on all subjects", subject to limitations for abuse, and "the right peaceably to assemble, to instruct their representatives, and to petition for redress of grievances."<sup>24</sup> Further, both constitutions afford individuals the right of access to courts.<sup>25</sup>

As a consequence:

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<sup>23</sup> U.S. CONST. amend I.

<sup>24</sup> FLA. CONST., art. I, s. 4-5.

<sup>25</sup> Under the U.S. Constitution, the access-to-courts right derives, in part, from the due process clause and the privileges and immunities clause. Barbara Arco, *When Rights Collide: Reconciling the First Amendment Rights of Opposing Parties in Civil Litigation*, 52 U. MIAMI L. REV. 587, 616-617 (January 1998) (internal citations omitted). The State Constitution protects access-to-courts rights under s. 21 of Article I.

One recurring concern in fashioning relief for SLAPP targets has been that the same doctrinal basis that supports affording them protection, the Petition Clause, also supports providing the filers of SLAPPs their own protection. In this respect, scholars note that the Petition Clause acts as a “double-edged” sword. On one hand, it cuts for SLAPP targets who deserve some measure of protection from vexatious litigation brought to punish and discourage their constitutionally protected petitioning activity. On the other hand, access to the courts and the ability to seek a judicial remedy is also recognized as one of the key ways a citizen can effectively petition government for redress of his grievances. In the context of determining how to treat SLAPPs, both these rights must be balanced.<sup>26</sup>

In 1993, the First District Court of Appeal recognized this balancing act in a case in which the Florida Fern Growers Association brought an action for injunctive relief and for intentional and malicious interference with advantageous business relationships against a Putnam County citizen group. The citizen group had challenged the issuance of consumptive water use permits to the fern-growing industry by the St. Johns River Management District. The trial court dismissed the association’s lawsuit, but the district court of appeal reversed, holding that the right to petition government did not provide absolute immunity from tort claims. The appellate court took note of the citizen group’s claim that the association lawsuit was a SLAPP and the argument that such lawsuits might chill First Amendment activity. However, the court emphasized that the State Constitution provides that persons “shall be responsible for the abuse” of their free speech rights and cautioned that extending immunity to the citizen group would deny the association its access to the courts.<sup>27</sup>

**B. RULE-MAKING AUTHORITY:**

The bill does not appear to create a need for rulemaking or rulemaking authority.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

The bill narrowly defines free speech in connection with public issues as either written or verbal communication. The United States Supreme Court has consistently held that symbolic speech, nonverbal gestures and actions, such as marching and wearing armbands, is also protected speech under the First Amendment to the U.S. Constitution.<sup>28</sup> A plain reading of the statute may exclude symbolic speech from anti-SLAPP protection.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On March 24, 2015, the Civil Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment added a prohibition against filing a SLAPP suit based on a written or oral statement protected by applicable law made in or in connection with a play, movie, television program, radio broadcast, audiovisual work, book, magazine article, musical work, news report, or other similar work. The amendment also made technical, stylistic and grammatical changes. This analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.

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<sup>26</sup> Noah P. Peeters, *Don’t Raise That Hand: Why, Under Georgia’s Anti-SLAPP Statute, Whistleblowers Should Find Protection from Reprisals for Reporting Employer Misconduct*, 36 GA. L. REV. 769, 789 (Winter 2004).

<sup>27</sup> The case preceded the enactment of anti-SLAPP statutory provisions in Florida. However, the provisions the Legislature ultimately adopted starting in 2000 would not have affected this case, because the alleged SLAPP plaintiff was a private entity, and the case did not arise in the context of a homeowners’ association or condominium association. *Florida Fern Growers Ass’n, Inc. v. Concerned Citizens of Putnam County*, 616 So. 2d 562, 570 (Fla. 1st DCA 1993).

<sup>28</sup> See *United States v. Eichman*, 496 U.S. 310 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969); *Stromberg v. California*, 283 U.S. 359 (1931).