

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

Date: March 5, 1998 Revised: _____

Subject: Citizen Participation in Govt. Act

	<u>Analyst</u>	<u>Staff Director</u>	<u>Reference</u>	<u>Action</u>
1.	<u>Wiehle</u>	<u>Moody</u>	<u>JU</u>	<u>Favorable/CS</u>
2.	_____	_____	<u>GO</u>	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

The bill 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 relates to or is in response to the moving party’s lawful petitioning activity. The court is to treat the motion as a motion for summary judgment. The responding party has the burden of proof, and the court must dismiss the claim unless the responding party has produced 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.

If the court grants the motion and dismisses the claim, it must award costs of litigation, including attorney’s fees and expert witness fees, and grant such additional sanctions upon the responding party or its attorney as the court finds will be sufficient to deter repetition of such conduct and comparable conduct by others similarly situated. Additionally, a person injured by reason of a claim filed in violation of his or her right to engage in petitioning activity may seek relief in the form of a claim for actual damages, punitive damages, attorney’s fees, and costs.

The bill creates yet unnumbered sections of the Florida Statutes.

II. Present Situation:

A. Strategic Lawsuits Against Public Participation

“Strategic Lawsuits Against Public Participation,” or SLAPP suits, are lawsuits which are filed to silence or retaliate against those who exercise the right to petition the government and to deter others from similarly exercising their right to petition. The lawsuits arise from some action or communication made to a governmental entity or to the electorate. The entity filing the lawsuit uses this tactic as a way to discourage and restrain the activist by creating time consuming, costly litigation. According to a 1993 survey conducted by the Office of the Attorney General, although in most cases the public participant wins, the litigation effectively stops any participation activity. The survey indicated that of the 21 SLAPP suit cases reported in Florida, the cost of defending such a suit ranged from \$500 to \$106,000.

B. Existing Florida Law

Existing Florida law offers the following options to address SLAPP suits:

1. An Action for Malicious Prosecution

If a defendant in a SLAPP suit 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:

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

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).

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.

2. Motion to Strike Sham Pleadings

In a civil lawsuit, a party may move to strike a sham pleading. Rule 1.150, Florida Rules of Civil Procedure. 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*, 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 suits.

3. Motions to Dismiss and Motions for Summary Judgment

In a civil lawsuit, a party may move to have the case dismissed. Rule 1.140, Florida Rules of Civil Procedure. 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, Florida Rules of Civil Procedure. The moving party must show that there is a complete absence of any issue of material fact. *Id.* Under both rules, the burdens may be so great that such procedures would not make effective deterrents for SLAPP suits.

4. Other Remedies

Other remedies may be available to a defendant in a SLAPP suit, 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.

C. Colorado Approach

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). The Court stated that in such cases there are 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. *Id.* at 1368. These conflicting concerns can best be accommodated by requiring that, when a defendant files a motion to dismiss based on the right to petition, the plaintiff must demonstrate the constitutional viability of his or her claim. *Id.* As the right to petition defense raises the issue of whether the plaintiff's complaint states a cause of action upon which relief can be granted, the court should treat the motion as a motion for summary judgment. *Id.* at 1369. Dismissal is to be granted unless the plaintiff makes a showing sufficient to permit the court to reasonably conclude that the defendant's petitioning activities were not 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.

III. Effect of Proposed Changes:

The bill 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 relates to or is in response to the moving party's lawful petitioning activity. The court is to treat the motion as a motion for summary judgment and to use a time period appropriate for expedited motions. Discovery is suspended pending decision on the motion and any appeals.

The responding party has the burden of proof, of going forward with the evidence, and of persuasion. The court must make its determination based upon the facts in the pleadings and any affidavits filed and must dismiss the claim unless the responding party has produced 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.

If the court grants the motion and dismisses the claim, it must award costs of litigation, including attorney's fees and expert witness fees, and grant such additional sanctions upon the responding party or its attorney as the court finds will be sufficient to deter repetition of such conduct and comparable conduct by others similarly situated. Additionally, a person injured by reason of a claim filed in violation of his or her right to engage in petitioning activity may seek relief in the form of a claim for actual damages, punitive damages, attorney's fees, and costs.

The bill takes effect upon becoming a law.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The bill's provisions for procedure to be used in SLAPP lawsuits and for expedited resolution of such suits may be subject to constitutional challenge as being violative of the separation of powers provision of the Florida Constitution. Art. II, s. 3, Fla. Const.

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

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

C. Government Sector Impact:

This bill may alleviate some of the burden on the courts by reducing the number of SLAPP suits filed. However, some governmental entities may face increased costs in defending against motions filed under the bill.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.