HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1499 Public Participation/Lawsuits
SPONSOR(S): Homan
TIED BILLS: None **IDEN./SIM. BILLS:** SB 2308

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Judiciary		Jaroslav	Havlicak
2) State Administration			
3) Appropriations			
4)			
5)			

SUMMARY ANALYSIS

This bill extends the expedited procedures and additional remedies of the Citizen Participation in Government Act ("CPGA") to those Strategic Lawsuits Against Public Participation ("SLAPP") brought by private parties. 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 and/or their state counterparts. Under this bill, private parties are not afforded the protection of sovereign immunity as government entities are.

This bill further provides, as an additional remedy, that if a claim is held to violate the CPGA, the party bringing that claim shall have his, her or its license or permit revoked if that license or permit relates to the dismissed claim.

This bill does not appear to have a fiscal impact on state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

1. Reduce government?	Yes[]	No[x]	N/A[]
2. Lower taxes?	Yes[]	No[]	N/A[x]
3. Expand individual freedom?	Yes[x]	No[]	N/A[]
4. Increase personal responsibility?	Yes[x]	No[]	N/A[]
5. Empower families?	Yes[]	No[]	N/A[x]

For any principle that received a "no" above, please explain:

This bill does not reduce government because it creates new legal defenses, and because it provides new bases for the holders of licenses and permits to have them revoked.

B. EFFECT OF PROPOSED CHANGES:

Present Situation: Strategic Lawsuits Against Public Participation ("SLAPP")

Under both the federal and state constitutions, citizens have the right to petition governments for redress of their grievances.[1] Lawsuits aimed at deterring this type of public participation in government are known as strategic lawsuits against public participation or SLAPPs. Although these suits are frequently dismissed, the costly and time-consuming consequences of litigation or merely the threat thereof may nonetheless have a chilling effect on individual citizens or citizen groups wanting or attempting to exercise their constitutional rights.

According to a 1993 study conducted by the Office of the Attorney General, the cost of defending against such lawsuits ranged from $500 to $106,000 based on 21 SLAPP lawsuits reported in Florida for the period 1985-1993.[2] Over 90% of the SLAPP suits were brought by private individuals or corporate entities; the remaining lawsuits were brought by government entities. Even in cases where the public won, the litigation effectively stopped any further activity. According to that survey, most of the suits were initiated in response to informal public activities such as speaking at public meetings and letter campaigns to local governmental entities or electorate. The remainder were filed in response to formal public activities, i.e., challenges to local, regional, state or federal agency decisions.

Since the 1993 survey, there has been no ongoing systematic program or effort to track the number of SLAPP suits in Florida. The difficulty is due in part to the fact that SLAPP lawsuits are not easily identifiable. SLAPP suits are filed under a variety of legal theories, frequently including, but certainly not limited to, interference with a business relationship, slander, libel, conspiracy, abuse of process, trespass, nuisance, and harassment. Existing Florida law offers litigants the following options to address SLAPP suits:

<u>SLAPP Suits by Governmental Entities: Citizen Participation in Government Act</u>

In 2000, the Legislature enacted the "Citizen Participation in Government Act" ("CPGA").[3] Codified as s. 768.295, F.S., the CPGA provides, in pertinent part:

[1] *See* Amend. I, U.S. Const.; Art. I, s. 5, Fla. Const.
[2] *See* Department of Legal Affairs, "Strategic Lawsuits Against Public Participation in Florida: Survey and Report," July 1993.
[3] *See* ch. 2000-174, L.O.F.

> No governmental entity in this state shall file or cause to be filed, through its employees or agents, any lawsuit, cause of action, claim, cross-claim, or counterclaim against a person or entity without merit and solely because such person or entity has exercised the right to peacefully assemble, the right to instruct representatives, and 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.[4]

The CPGA further provides for a procedure to address an alleged violation of its provisions: the party asserting a violation may bring a motion to dismiss, for summary judgment or for final judgment, as appropriate on that basis, and must be heard on the motion as soon as practicable.[5] If the motion is granted, the prevailing party is entitled to actual damages, court costs and reasonable attorney's fees, although this award is subject to the limitation of the sovereign-immunity statute.[6]

The CPGA may be an effective deterrent to SLAPP suits, but applies only against SLAPP suits by governmental entities, not those initiated by private parties.

Action for Malicious Prosecution

If a defendant in a SLAPP lawsuit successfully has the action dismissed or prevails on the merits, a malicious prosecution action may be filed against the former plaintiff on the theory that the original action was brought maliciously. Under Florida case law, six separate elements must be proven in a malicious prosecution claim or the case must be dismissed:[7]

1. An original action was 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.

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, regardless of whether it has merit.

Motion to Strike Sham Pleadings

A party to a civil suit may move to strike a sham pleading.[8] The moving party must prove that the pleading in question is plainly fictitious,[9] with the court resolving any doubts in favor of the party opposing the motion.[10] Because this standard is difficult to meet, filing such a motion will not only require legal expenditures by the plaintiff, but may fail to slow down or eliminate the suit. If the court finds in favor of the moving party, the effect will only be to strike the pleading. Such an action may not serve as an effective deterrent to SLAPP suits.

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[4] Section 768.295(4), F.S.
[5] *See* s. 768.295(5), F.S.
[6] *See id.* The state's limited waiver of sovereign immunity is codified as s. 768.28, F.S.
[7] *Scozari v. Barone*, 546 So.2d 750, 741 (Fla. 3d DCA 1989).
[8] *See* FLA. R. CIV. P. 1.150.
[9] *See Rhea v. Hackney*, 157 So. 190 (Fla. 1934); 40 FLA. JUR. 2D PLEADINGS §§ 147-48 and authorities cited therein.
[10] *See Bay Colony Office Building Joint Venture v. Wachovia Mortgage Co.*, 342 So.2d 1005 (Fla. 4th DCA 1977).

Motion to Dismiss and Motion for Summary Judgment

A party to a civil suit may move to have all or part of an opposing party's case dismissed.[11] The burden rests 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, seeking to show that there is a complete absence of any issue of material fact.[12] The standard needed to prevail under either of these rules may be so high that such procedures would not make effective deterrents for SLAPP suits.

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 available only after the litigation has progressed to judgment and the desired intent to discourage the defendant from public participation has already been achieved.

Other States

SLAPP suits are filed nationwide, and thus other states have either enacted or proposed anti-SLAPP legislation.[13] At least one state has addressed the issue of SLAPP suits judicially rather than legislatively. In *Protect Our Mountain Environment, Inc. v. District Court*,[14] the Colorado Supreme Court held that a claim which allegedly interferes with the constitutional right to petition must be dismissed unless the plaintiff shows that the defendant's petitioning activities should not be immunized 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.[15]

Proposed Changes: Extending the Citizen Participation in Government Act to Private Suits

This bill amends s. 768.295, F.S., to extend the expedited procedures and additional remedies of the CPGA, see above, to SLAPP suits brought by private parties. 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. Under this bill, private parties are not afforded the protection of sovereign immunity as government entities are.

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[11] *See* FLA. R. CIV. P. 1.140.
[12] *See* FLA. R. CIV. P. 1.510.
[13] *See e.g.*, Cal. Civ. Proc. Code § 425.16; Del. Code Title 10 §§ 8136-38; Ga. Code § 9-11-11.1; Ind. Code § 34-7-7; La. Code Civ. Pro. art. 971; Me. Rev. Stat. Title 14 § 556; Mass. Gen. Laws ch. 231, § 59H; Minn. Stat. § 554.02; Neb. Rev. Stat. §§ 21-25-241 to -246; Nev. Rev. Stat. §§ 41.640-.670; N.M. Stat. §§ 38-2-9.1 and 9.2; N.Y. CIV. RIGHTS LAW § 76; Okla. Stat. Title 12 § 1443.1; 42 Pa. Cons. Stat. §§ 27-77-7707 and 27-83-8301 to -8305; R.I. Gen. Laws §§ 9-33-3-1 to 9-33-3-4; Tenn. Code §§ 4-21-1003 to -1004; Wash. Rev. Code §§ 4.24.500-4.24.520. For an overview of the history of anti-SLAPP legislation, *see generally* Erin Malia Lum, *Hawai'i's Response to Strategic Litigation Against Public Participation and the Protection of Citizen's Right to Petition the Government*, 24 U. HAW. L. REV. 411 (Winter 2001).
[14] 677 P.2d 1361 (Colo. 1984).
[15] *Id.* at 1369.

C. SECTION DIRECTORY:

Section 1. Amends s. 768.295, F.S., to extend the Citizen Participation in Government Act to SLAPP suits by private parties.

Section 2. Provides an effective date of upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

This bill may have an indirect positive economic effect on the private sector by discouraging SLAPP suits that would otherwise require expenditure on litigation and related expenses. The extent of this effect, if any, is uncertain.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, does not appear to reduce the authority that counties or municipalities have to raise revenue in the aggregate, and does not appear to reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Separation of Powers

Article II, s. 3, of the Florida Constitution provides: "No person belonging to one branch [of state government] shall exercise any powers appertaining to either of the other branches unless expressly provided herein." Article V, s. 2(a), Fla. Const., further provides that the "Supreme Court shall adopt rules for the practice and procedure in all courts." Because this bill directs courts to grant priority to

CPGA determinations, and to revoke licenses and permits as a mandatory remedy, it may raise constitutional concerns under these provisions.

The Legislature is responsible for enacting substantive law, while the Supreme Court is responsible for promulgating rules of practice and procedure. The Legislature has the constitutional authority to repeal a procedural rule by a two-thirds vote;[16] however, it has no authority to enact a law relating to practice and procedure. The question of whether a law is substantive or procedural is one that occurs frequently, but is nevertheless difficult to determine.

In *Benyard v. Wainwright*,[17] the Supreme Court stated that substantive law prescribes rights and duties, whereas procedural law concerns the means and method to apply and enforce those rights. Florida courts protect their procedural rulemaking power by striking down laws that conflict with their rules. For example, in 1976, the Supreme Court ruled unconstitutional a statute regarding the state mental hospital because it was in conflict with a previously passed criminal rule of procedure regarding persons found not guilty by reason of insanity.[18] In 1991, the Court ruled that a statute requiring mandatory severance of a mortgage foreclosure trial from a trial on any other counterclaims was unconstitutional because it conflicted with an existing rule of civil procedure.[19]

The First District Court of Appeal, in *Johnson v. State*,[20] held that a statute requiring presentence reports to be conducted in certain cases was unconstitutional because it conflicted with a rule of procedure; therefore, it infringed upon the rulemaking power of the Supreme Court. The dispositive issue in determining whether the law was substantive or procedural seemed to be that the Court had already preempted the Legislature from acting in this area by the Court's prior adoption of a rule governing presentence reports.[21]

In analyzing whether this section encroaches upon the Supreme Court's rulemaking authority, a court may look at whether the Supreme Court has preempted the Legislature from acting in a particular area, as the *Johnson* court did. A court could find that the Legislature has, rather, exercised substantive lawmaking authority throughout the CPGA.

However, even if a court finds that some of this bill's provisions are procedural, it could decide to uphold the bill anyway by deferring, as it sometimes does, to the Legislature's expertise in implementing procedural rules in which it has a policy interest.[22]

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The effective date of this bill may cause uncertainty with respect to litigation currently pending. It is unclear from this bill whether the defenses, remedies and procedures of the CPGA may be pursued in suits already filed before the effective date.

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[16] *See* Art. V, s. 2(a), Fla. Const.
[17] 322 So.2d 473 (Fla. 1975).
[18] *See In re Connors*, 332 So.2d 336 (Fla. 1976).
[19] *See Haven Federal Savings & Loan Ass'n v. Kirian*, 579 So.2d 730 (Fla. 1991). *See also Knealing v. Puelo*, 674 So.2d 593 (Fla. 1996); *Ash v. Singletary*, 687 So.2d 968 (Fla. 1st DCA 1997); *Military Park Fire Control Tax District v. De Marois*, 407 So.2d 1020 (Fla. 4th DCA 1981) (all striking down attempts to specify timing and sequence of court procedures).
[20] 308 So.2d 127 (Fla. 1st DCA 1975).
[21] *See id.* at 128.
[22] *See, e.g.*, *Kalway v. Singletary*, 708 So.2d 267 (Fla. 1998) (upholding a 30-day statute of limitations for the filing of an action challenging a prisoner disciplinary proceeding as a policy matter in which the Legislature had expertise).

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

N/A