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STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION

Statement of the Issue

The term “strategic lawsuit against public participation,” or SLAPP, describes a civil claim or counterclaim in which the asserted injury to the filer arises from the other party’s act of petitioning government or speaking out on a matter of public concern.¹ One of many possible scenarios might involve a person speaking out against a development project at a governmental regulatory meeting. A proponent of the project might sue for defamation or interference with a business advantage in an effort to silence the person or entangle him or her in lengthy litigation, rather than win damages for actual injuries. Because a lawsuit is expensive to defend, the person opposing the project may capitulate. Concern that these lawsuits may have a chilling effect on free speech has led multiple states to enact anti-SLAPP legislation over the years, providing various levels of recourse for defendants.

Florida has an anti-SLAPP statute relating solely to governmental plaintiffs. The Citizen Participation in Government Act² prohibits a governmental entity from filing a lawsuit without merit and solely because a person has exercised the right to assemble and the right to petition for redress of grievances before a governmental entity. Florida also has anti-SLAPP provisions relating to homeowners’ associations and condominium associations which prohibit certain lawsuits that are filed solely because a parcel owner or unit owner has addressed a governmental entity.³ The prohibitions against filing the lawsuits in the homeowners’ association or condominium association context apply to business organizations and individuals, as well as to governmental entities.

This issue brief addresses legal and policy research related to SLAPPs, in order to give legislators a foundation for evaluating proposals that may arise on this topic in the future.

Discussion

SLAPPs Defined

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. The professors first published their results in 1990, and they have identified four criteria 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.⁴

Some examples of asserted causes of action as part of a SLAPP include:

¹ California Anti-SLAPP Project, “What are SLAPPs?” *Survival Guide for SLAPP Victims*, <http://www.casp.net/slapps/survival.html> (last visited September 21, 2008).

² Section 768.295, F.S.

³ Sections 720.304(4) and 718.1224, F.S.

⁴ George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3, 8 (1989-1990).

- Defamation;
- Invasion of privacy;
- Business torts;
- Interference with contract or economic advantage;
- Conspiracy;
- Constitutional or civil rights violations; and
- Intentional infliction of emotional distress.

In this light, it may be difficult to characterize a legal claim as a SLAPP or a legitimate cause of action. In addition, the traditional nature of the asserted cause of action highlights the policy challenge in regulating SLAPPs – balancing the filer’s right to seek redress of injury through access to the courts against the SLAPP defendant’s right to petition government or exercise other free-speech rights. (See discussion of **Policy and Legal Considerations** below.)

What scholarship on the subject says, in part, distinguishes a SLAPP is that the apparent motive behind it is to prevent the SLAPP defendant from exercising his or her constitutionally protected right to petition or to penalize him or her for doing so.⁵ It is for this reason, opponents of SLAPPs argue, that the filer typically does not prevail in the action in court. The filer, however, may “succeed” if the litigation costs and time divert the SLAPP defendant from pursuing the political activity that prompted the litigation. Because deciphering the motives of the plaintiff may be difficult, research and legislation on the topic of SLAPPs often focus instead on the nature of the conduct giving rise to the litigation in the first place (i.e., addressing a governmental agency).

Statistics on SLAPP Filings

In first developing and studying the SLAPP concept, Professors Pring and Canan reported that SLAPP cases started surfacing more regularly after 1970, and they estimated that “hundreds of these lawsuits are filed” each year.⁶ Quantifying SLAPP statistics, however, is complicated by the fact that the claim, as noted above, may be couched in similar terms to other lawsuits, thus making it difficult to distinguish a SLAPP from a legitimate action. Further, obtaining statistics covering courts at all levels is complicated by the disparate case recording and cataloging systems in the U.S. judicial system.⁷

In Florida, the Office of the Attorney General in the early 1990s contacted environmental organizations and other citizen groups in an effort to determine if they had been subject to this type of litigation. The responses identified 21 SLAPPs filed between 1983 and 1993.⁸ These lawsuits sought damages in excess of \$99 million against 71 defendants. Additionally, the report found that the reported costs associated with defending nine of the closed cases ranged from \$500 to \$106,000.⁹ As part of the research for this issue brief, Senate professional staff has not identified any other official systematic assessments of the number SLAPP filings in Florida.¹⁰

State Statutes Governing SLAPPs

Generally

Approximately 26 states and Guam have enacted statutory provisions relating to SLAPPs. In addition, courts in Colorado and West Virginia have created judicial SLAPP remedies.¹¹ Examples of elements contained in some of the statutes include:

⁵ See, e.g., *id.* at 5-6.

⁶ *Id.* at 5.

⁷ George W. Pring and Penelope Canan, *SLAPPs: GETTING SUED FOR SPEAKING OUT*, Appendix at 210 (Temple University Press 1996).

⁸ Office of Attorney General Robert A. Butterworth, *Strategic Lawsuits Against Public Participation (SLAPPs) in Florida: Survey and Report* 3 (July 1993).

⁹ *Id.* at 4-5.

¹⁰ Senate professional staff has received anecdotal information on SLAPPs filed or pending since the Attorney General’s survey and report.

¹¹ California Anti-SLAPP Project, *Other states: statutes and cases*, <http://www.casp.net/statutes/menstate.html> (last visited

- Providing mechanisms for early procedural review of the action;
- Allowing the SLAPP defendant to file a motion to dismiss within a specified time;
- Placing the burden of proof on the SLAPP filer opposing a motion to dismiss;
- Requiring a SLAPP plaintiff to establish by clear-and-convincing evidence that the communication that is the basis for the action was made with knowledge of its falsity;
- Requiring the SLAPP plaintiff's action to be grounded in fact and warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law;
- Specifying that no immunity from suit applies if the free-speech or petition activities by the SLAPP defendant amount to a sham;
- Permitting the SLAPP target to recover compensatory damages or punitive damages; and
- Providing for recovery – either mandated or at the discretion of the court – of reasonable attorney's fees and costs when the SLAPP defendant prevails on the motion to dismiss.

One writer groups state statutes into three categories, although statutory details may vary within a category and a given statute may include elements from different categories. States in the narrow category limit use of the anti-SLAPP statute to specifically defined circumstances – for example, cases in which the SLAPP plaintiff is a permit seeker, zoning petitioner, or similar applicant before a governmental agency. A state in this category may limit the statutory protection to persons who communicate to the agency in a public meeting or similar proceeding. States in the middle category may apply their statutes more extensively to any communication designed to influence government action, regardless of whether the communication occurs in a public hearing or proceeding. States in the broad category have anti-SLAPP statutes that cover any conduct furthering the exercise of a party's right to petition or free speech on any matter of public concern. Some states in this final category provide statutory protection not only to individuals and citizen organizations, but also to media organizations.¹²

California's statute is considered to be a broad and protective anti-SLAPP statute from the perspective of the SLAPP defendant. It applies to causes of action against a person that arise from any act by that person in furtherance of his or her right to petition or free speech. The statute covers statements before official proceedings, statements made in connection with an issue under consideration by an official proceeding, statements made in a public place or forum, and any other petition or free-speech conduct on an issue of public interest. The statute allows the defendant to pursue a special motion to strike at the outset of a case – unless the plaintiff establishes a probability of prevailing on the claim. The hearing on the motion should occur within 30 days after the motion is served. Meanwhile, the court shall stay all discovery proceedings until it rules on the motion. The statute allows the court to award costs and reasonable attorney's fees incurred in defending against the SLAPP.¹³

Florida

Florida likely falls closer to the narrow category of state statutes. Finding that SLAPPs had increased over the previous 30 years, the Legislature in 2000 enacted the Citizen Participation in Government Act.¹⁴ As codified in s. 768.295, F.S., 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.¹⁵ While recognizing that SLAPPs are often filed by private industry and individuals, the scope of Florida statute is narrowed to prohibiting SLAPPs filed by governmental entities, because those kinds of lawsuits are “inconsistent with the right of individuals to participate in the state's institutions of government.”¹⁶

October 26, 2008).

¹² Shannon Hartzler, *Protecting Informed Public Participation: Anti-SLAPP Law and the Media Defendant*, 41 VAL. U. L. REV. 1235, 1248-1270 (Spring 2007).

¹³ Sections 425.16-425.18, California Code of Civil Procedure.

¹⁴ Chapter 2000-174, L.O.F.

¹⁵ Section 768.295(2), F.S.

¹⁶ *Id.* 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. 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.).

To that end, the statute specifically prohibits a governmental entity from filing a claim, cross-claim, or counter-claim against a person or entity without merit and solely because that person or entity exercised the right to petition state or local government. A person who finds himself or herself on the receiving end of a claim in violation of the statute is entitled to expeditious resolution of the claim and may petition the court to dismiss the lawsuit or grant judgment in the individual's favor.¹⁷ Upon determining that the agency filed the lawsuit in violation of the act, the court may award to the SLAPP defendant actual damages stemming from the government's violation. The court shall award attorney's fees and costs to the party prevailing on the question of whether the lawsuit violates the act.¹⁸ When a court concludes that a governmental agency's original lawsuit violated the act, the agency must submit the court's order to the Attorney General within 30 days of it being finalized.¹⁹

In addition to the statute prohibiting the government from filing SLAPPs against citizens generally, the Legislature enacted SLAPP provisions for those who own property covered by homeowners' associations and condominium associations which also protect them from privately filed SLAPP litigation. Effective October 1, 2004, no business organization, individual, or government entity may file a claim against the owner of property covered by a homeowners' association solely because the parcel owner exercised his or her right to petition government. The parcel owner who establishes that a lawsuit violates this statute is entitled to attorney's fees and costs. Further the court may award treble damages to the prevailing parcel owner.²⁰ During the 2008 Regular Session, the Legislature provided similar coverage, effective October 1, 2008, for unit owners in condominium associations.²¹ Neither a homeowners' association nor a condominium association may use association funds to pursue SLAPP litigation against a parcel owner.²²

Other Potential Remedies

Distinct from the statutory provisions described above that specifically address SLAPPs, existing Florida law offers tools that may be applicable in the SLAPP context.

Malicious Prosecution

If a defendant in a SLAPP lawsuit succeeds in having 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. Sometimes this type of retaliatory action by the SLAPP defendant is referred to as a "SLAPPback."²³ Under Florida case law, six separate elements must be proved in a malicious prosecution claim or the case may be dismissed:

- An original civil or criminal action was 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.²⁴

¹⁷ Section 768.295(4) and (5), F.S.

¹⁸ Section 768.295(5), F.S.

¹⁹ Section 768.295(6), F.S.

²⁰ Section 720.304(4), F.S. See s. 19, ch. 2004-345, L.O.F., and s. 16, ch. 2004-353, L.O.F.

²¹ Section 13, ch. 2008-28, L.O.F. (CS/HB 995, 2008 Reg. Sess.) (creating s. 718.1224, F.S., effective October 1, 2008).

²² Sections 720.304(4)(d) and 718.1224(4), F.S.

²³ California, by statute, recognizes the SLAPPback as a distinct cause of action "from the ordinary malicious prosecution action." Section 425.18(a), California Code of Civil Procedure.

²⁴ *Scozari v. Barone*, 546 So. 2d 750, 751 (Fla. 3rd DCA 1989); *Kalt v. Dollar Rent-A-Car*, 422 So. 2d 1031, 1032 (Fla. 3rd DCA 1982).

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

Motion to Strike Sham Pleading

In a civil lawsuit, a party may move to strike a sham pleading under Rule 1.150, Florida Rules of Civil Procedure. The moving party must prove that the pleading in question is plainly fictitious.²⁵ The court must resolve any doubts in favor of the party opposing the motion to strike the sham pleading.²⁶ Because this standard is difficult to meet, filing a motion may not be effective in slowing down or eliminating the SLAPP. If the court finds in favor of the moving party, the effect will be only to strike the pleading. Thus, such an action may not deter SLAPPs.

Motion to Dismiss or for Summary Judgment

In a civil lawsuit, a party may move to have the case dismissed under 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.²⁷ Another option available to a party is filing a motion for summary judgment under 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.²⁸ Under both rules, the burdens may be so significant that the procedures may not effectively deter SLAPPs.

Policy and Legal Considerations

One of the key challenges for legislators contemplating whether or how to draft anti-SLAPP statutory provisions is balancing the petition rights of both parties to the litigation. Just as it is possible to view the defendant in the SLAPP action as exercising his or her right to petition, it is possible to view the SLAPP plaintiff as exercising a right to petition the courts for redress of injuries.

For Floridians, the right to petition is protected by the U.S. Constitution and the State Constitution. 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.”²⁹ Similarly, the State Constitution vests in the people “the right peaceably to assemble, to instruct their representatives, and to petition for redress of grievances.”³⁰ Further, both constitutions afford individuals the right of access to courts.³¹

As a consequence:

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

²⁵ *Reif Development, Inc. v. Wachovia Mortgage Co.*, 340 So. 2d 1267, 1268 (Fla. 4th DCA 1976).

²⁶ *Decker v. County of Volusia*, 698 So. 2d 650, 651 (Fla. 5th DCA 1997).

²⁷ *See Orlando Sports Stadium, Inc. v. State ex rel. Powell*, 262 So. 2d 881, 883 (Fla. 1972).

²⁸ See, e.g., *Brock v. Associates Finance, Inc.*, 625 So. 2d 135, 135-136 (Fla. 1st DCA 1993).

²⁹ Amend. I, U.S. Const.

³⁰ Section 5, Art. I, Fla. Const.

³¹ 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.

government for redress of his grievances. In the context of determining how to treat SLAPPs, both these rights must be balanced.³²

The Florida First District Court of Appeal in 1993³³ 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 lawsuits of this type might chill First Amendment activity. However, the court cautioned that extending immunity to the citizen group would deny the association its access to the courts.³⁴

To the extent anti-SLAPP legislation in Florida addresses procedural matters such as expedited resolution of SLAPPs, it may require analysis of the state constitutional provisions on separation of powers among the branches of government. The State Constitution gives the Legislature power to create substantive law and gives the Supreme Court power to establish practice and procedure. There often is not a bright line distinguishing practice and procedure versus substantive law. Generally substantive law creates, defines, and regulates rights, while "practice and procedure" addresses the methods by which a party seeks to enforce those rights.³⁵ Over the years, 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 policy to be beneficial to the court system.

³² 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).

³³ The case preceded the enactment of anti-SLAPP statutory provisions in Florida. The provisions the Legislature ultimately adopted starting in 2000 (see text accompanying footnotes 14-22) 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.

³⁴ *Florida Fern Growers Ass'n, Inc. v. Concerned Citizens of Putnam County*, 616 So. 2d 562, 570 (Fla. 1st DCA 1993).

³⁵ See, e.g., *Benyard v. Wainwright*, 322 So. 2d. 473, 475 (Fla. 1975).