

**Submitted Testimony of
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on
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Everyone deserves his or her day in court. That familiar aphorism has been a part of American lore for ages, but it comes with a caveat. To have one's day in court, the litigant must have a justiciable claim. Parsed differently, courts should be reserved for legitimate disputes between parties and not used as a weapon for silencing or retaliating against an opponent.

Sadly, that latter misuse of the justice system sometimes mutates into a regular tactic of doing business, so much so that an acronym was applied to the practice in the late 1980s.¹ SLAPP – Strategic Lawsuits Against Public Participation – is an apt description of what happens in these nefarious scenarios.

A person or entity files a lawsuit against another, not for the purpose of resolving a legitimate dispute, but to silence or retaliate against someone who has spoken out against the filer's project (e.g., a construction or land development project). Of course, that very act of speaking out precipitating the lawsuit is protected by the First Amendment in both the speech and petition clauses,² but winning the lawsuit is not the aim of the filer.

Rather, the plaintiffs in these actions are well aware that the mounting costs of litigation can crush the SLAPP target. If SLAPP filers wreak financial havoc on their opponents, then they have prevailed, regardless of the outcome of the lawsuit. They "win" in two respects: First, they often can cause the SLAPP target to abandon their opposition to the filer's project.

¹ Penelope Canan and George W. Pring, "Studying Strategic Lawsuits Against Public Participation," 22 LAW & SOCIETY REVIEW 385 (1988).

² U.S. CONST. amend I ("Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or *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.*") [emphasis added].

Second, the lawsuit serves as a warning to others to keep quiet or else face the similar crushing strain of a lawsuit. The ultimate outcome of the litigation is immaterial.

In fact, SLAPPs are often filed against a named defendant plus “50 John Does,” a procedural device to put others on notice that more targets could be added to the lawsuit, so it is best to keep one’s mouth shut. In such cases, even if the lawsuit is dismissed, the damage is already done. The SLAPP’s chilling effect on speech has been accomplished. The warning inherent in the caption of the lawsuit often is enough to stop the expression of others who might otherwise have participated in the community discussion.

Public discussion and communicating with government officials are the hallmarks of democratic self-governance. A robust debate on public issues that directly affect citizens goes to the very core of our democracy, and any attempts to thwart it should immediately be suspect. Under no circumstances should the practice become part of the ordinary cost of doing business.

While doing research for my 1998 book, *Freedom’s Voice: The Perilous Present and Uncertain Future of the First Amendment*,³ I interviewed several people who had been targets of SLAPP suits. In the 1990s, with the SLAPP phenomenon just coming into clear vision, only a handful of states were considering legislation. Ordinary citizens recounted nightmarish tales of fighting lawsuits – some for several years – and neighbors turning against each other out of fear of litigation reprisals. Still, the true number of citizens targeted by SLAPP remains truly unquantifiable because these lawsuits obviously are not filed as “SLAPPs.” Rather, they masquerade as defamation, tortious interference with a business relationship, civil conspiracy torts, *et al.*

At that time, here in Pennsylvania, Clearfield County’s long-serving state representative, the late Camille “Bud” George contacted me to enlist my help and support of a bill that he was planning to introduce that would combat this reprehensible misuse of legal process. He was moved to work on the measure because an elderly constituent of his had faced such a lawsuit. He saw firsthand what an impact this could have on someone.

I was delighted to join Rep. George in what turned out to be a long legislative battle in the state legislature. I look back fondly on Rep. George’s tenacity and unwaivering leadership over several years. I will always remember how he truly cared about this issue and what it could mean for the citizens of Pennsylvania. The result was not something we were pleased with – a much watered down anti-SLAPP measure that had relatively little use for our citizens – but, alas, it was something.

Today, decades later, the General Assembly has the chance to truly protect Pennsylvanians who wish to participate in the democracy through public discourse. Back in Rep. George’s time, an anti-SLAPP law might have been seen as a novel concept, perhaps even

³ Robert D. Richards, *FREEDOM’S VOICE: THE PERILOUS PRESENT AND UNCERTAIN FUTURE OF THE FIRST AMENDMENT* (1998)

causing some lawmakers to eye it wearily, not really understanding its potential impact. That uneasiness should not exist today. At last count, 29 states have anti-SLAPP statutes.

Still, some may ask, "If this type of expression is protected under the First Amendment, why is a separate law needed?" At first blush, this is a very sound question. The answer, however, lies in the fact that SLAPPs do not center on the substance of the speech at issue. Instead, the purpose of the SLAPP filer is to use standard civil procedural devices to prolong litigation and thus force legal fees to mount against the target. In essence, it is using legal process as a "club" to beat the opposition into submission or retreat.

Anti-SLAPP statutes help to ensure that this misuse of process is not allowed to stand. While these laws may vary somewhat in the 29 states that have enacted them, most are designed to achieve three basic purposes.

First, they expedite the determination of whether the lawsuit is for a legitimate purpose or if it is instead a SLAPP. The SLAPP target files a motion to strike or similar procedural pre-answer pleading to the original complaint. A judge then must make that ruling within a specified period of time (e.g., within 60 days of filing). During the pendency of this action, civil discovery is put on hold so that the plaintiff cannot cause increased legal fees on the defendant by forcing depositions, interrogatories, requests for production of documents and the like. Second, these laws often cloak the SLAPP targets' expressive activities in an immunity, provided the statements were made in good faith. Third, if the judge determines that the lawsuit is indeed a SLAPP, then he or she may order the plaintiff to pay the defendant's attorney's fees and costs.

That final prong is important in two respects: (1) It relieves the financial burden of the SLAPP target who was simply participating in the democracy by exercising rights guaranteed under the First Amendment; (2) It provides a strong disincentive to potential SLAPP filers who wish to use the court system for malicious purposes.

The legal process rights of all parties remain fully protected in states with anti-SLAPP laws. If the plaintiff has a legitimate lawsuit, then a judge will rule that way, and the lawsuit proceeds under the usual rules of civil procedure.

Pennsylvania House Bill 95 and Senate Bill 95 accomplish all of the critical protections that the nation's strongest anti-SLAPP laws do. They provide for an early determination of the legitimacy of the lawsuit by requiring courts to act on motions to dismiss within a short period of time, setting a hearing on the matter "not more than 30 days after the service of the motion" unless a court has extenuating circumstances requiring more time. Importantly, during this time, "[a]ll discovery proceedings shall be stayed." This ensures that a SLAPP filer will not be able to unload a barrage of discovery motions, thus ratcheting up the legal fees of the target. The bills also specify an immunity from civil liability for "[a] person who engages in a constitutionally protected communication." Finally, the measures allow the aggrieved SLAPP

target to recover attorney's fees and costs, a vitally important provision to ensure that a citizen is not crushed financially for exercising a constitutional right.

The General Assembly has an opportunity here to provide important, much-needed protection to the citizens of Pennsylvania. Additionally, these bills represent an affirmation that this state values the core principle of democracy – citizens should feel free to participate in the debate on public issues without fear of a financially devastating, retaliatory lawsuit – and ensures that our court system will not be misused by those motivated by untoward purposes.

I applaud the lawmakers who have brought these bills forward, and I strongly urge their passage. Finally, I thank you for the opportunity to weigh in on this important legislation.