Strategic Lawsuits Against Public Participation

(SLAPPs) in Florida:
Survey and Report
July 1993

Office of Attorney General
Robert A. Butterworth

Introduction

In 1990, Attorney General Bob Butterworth directed his office to study the issue of SLAPP suits in Florida. The term "SLAPP" was coined by two University of Denver professors, Penelope Canan and George Pring, who conducted a nationwide study of such suits.[7] In the typical SLAPP lawsuit, as described by Professors Canan and Pring, a well-financed business interest files a civil tort action against a vocal citizen or group of citizens who have opposed the interest's application for some favorable government action. The SLAPP, an acronyn for Strategic Lawsuits Against Public Participation, serves to "slap" back at citizen activists by dragging them into costly, time consuming litigation and threatening them with harsh penalties.

The purpose of the study was to determine whether Florida citizens also believe that they have been targeted by SLAPPs as a direct consequence of their interest or participation in issues of public concern. The study focused on a single area of potential SLAPP activity: land use, including environmental and growth management issues.

This report is divided into six sections. The first section describes the process by which the office obtained information from citizens about possible SLAPPs and threats of SLAPPs. The second section describes the findings of the study. The third section of the report summarizes existing Florida laws pertinent to SLAPPs. The fourth section describes legislation and other measures adopted or proposed relating to SLAPPs in the states of Washington, California, New York, New Jersey, Texas, Virginia, Connecticut, and Colorado. The fifth section summarizes SLAPP proposals previously considered by the Florida Legislature. Finally, the study findings and their implications are summarized in the Conclusion.

Appendix A contains a table of cases and a chart summarizing key information about the litigation reported to this office. More detailed summaries about actual and threatened litigation are also included as provided by survey respondents. Appendix B includes a copy of the questionnaire and instructions mailed to potential respondents. Appendix C contains a summary of the various remedies proposed to address SLAPPs.

I. The Study

In August 1990, this office conducted a telephone survey of leading environmental groups in Florida to determine whether they were aware of any SLAPP suits in the state. These organizations reported that a number of SLAPPs had been filed in Florida over the previous ten years.

From October 1990 through November 1992, questionnaires were mailed to 141 individuals representing statewide and local environmental and citizen groups, as well as to others whom this office learned may have been subjected to threats of litigation or actual SLAPPs.

The questionnaire requested information concerning threats of litigation and actual suits against an organization or its members, and the effect of the threat or litigation on their public participation activities. For those cases involving actual litigation, the questionnaire asked respondents to provide copies of pleadings and final orders, and an estimate of the cost of the defense. Finally, it requested comments or suggestions on what should be done about SLAPPs. An instruction sheet accompanying the questionnaire advised potential respondents that their answers could not be kept confidential.

The office reviewed available key legal documents from each case, including the complaint, answers, motions and court orders. These cases are summarized in Appendix A of this report.

The report includes an analysis of existing Florida laws and rules of civil procedure that are pertinent to SLAPP litigation. In addition, the office analyzed legislation adopted or considered for adoption by the states of Washington, California, New York, New Jersey, Texas, Virginia, Connecticut and Florida. The analysis was based on a review of each bill and, where possible, discussions with key individuals from each state who participated in the drafting of the legislation, as well as on an evaluation of the bills conducted by Ms. Laura J. Ericson-Siegel in her article, "Silencing SLAPPs: An Examination of Proposed Legislative Remedies and a 'Solution' for Florida."[8] Also included is a discussion of the rules of civil procedure adopted by the Colorado Supreme Court, which were designed expressly to address SLAPPs.

This report is based on information available in court documents and in the answers and materials provided to this office by citizens who believe they have been affected by SLAPPs and SLAPP threats. Where case summaries reflect the position of plaintiffs who brought the suits under review, those positions are taken from their filed complaints or counterclaims. This report is neither based on a scientifically designed questionnaire nor does it include an exhaustive search

Table of Contents

Executive Summary

In recent years, some citizens across the country have reported actual or threatened litigation resulting from their involvement in governmental activities.[1] Typically in the reported cases, the litigation surfaces after an individual or group embarks upon a campaign to oppose a proposed development project. Following their appearance — for example, before a governmental board considering permit approval — the citizens are sued for thousands of dollars in damages by a developer who claims he was slandered by the statements made at the public meeting.

The use of litigation as a tactic to silence opposition has been studied extensively by two University of Denver professors, George Pring and Penelope Canan, who coined the acronym SLAPP to describe this type of lawsuit.[2] "SLAPP" stands for Strategic Lawsuits Against Public Participation. In order to qualify as a SLAPP, a lawsuit must meet four criteria under the professors' definition. The suit must be:

1. A civil complaint or counterclaim,
2. Filed against nongovernmental individuals or organizations,
3. Because of their communication to government bodies, government officials or the electorate, and
4. On a substantive issue of some public interest or concern.[3]

According to Professors Canan and Pring and others who have studied the issue,[4] SLAPPs occur when suit is brought against individuals or groups who are active on public issues, for the purpose of silencing them, punishing their involvement and deterring others from becoming involved by raising the specter of costly litigation. Clearly, some lawsuits that arise from political disagreements are not SLAPPs, but instead stem from disputes over legitimate issues. SLAPPs, on the other hand, are prompted by the desire to entangle the opponents in protracted and costly litigation. It should be noted that while most of the reported cases of SLAPPs involve citizen groups as the targets, some intimidation suits have also been filed by citizen groups seeking to force a desired outcome.[5]

Studies of SLAPPs have reported hundreds of lawsuits filed nationwide against defendant individuals and organizations as a result of their involvement in the political process.[6] Although the reported cases include several from Florida, no systematic statewide study had ever been conducted to determine whether, and to what extent, Floridians may have been affected by SLAPPs.

In response to this concern, Attorney General Butterworth directed his office to compile information from those Floridians who believe that they or their organizations have been targeted by SLAPPs and review the consequences of such actual or threatened litigation. The results of this survey, and its implications for our state, are set forth in this report.

The survey respondents reported a total of 21 cases as meeting the Pring/Canan components of a SLAPP case. Additionally, 10 respondents provided written information indicating that they had been threatened with a SLAPP as a result of their public participation activities. Thirty-five individuals telephoned to report threats of SLAPPs, threats of physical harm and loss of employment because of their actions in speaking out concerning proposed projects. However, these individuals declined to participate in the study citing fear of retribution after learning that their written comments could not be kept confidential.

Survey respondents reported that the public participation activities that generated litigation included appearing at public meetings of local governments; calling and writing letters to governmental officials; communicating their views to the media and to other citizens; and demonstrating. Formal public participation activities that preceded litigation took the form of judicial and administrative challenges to decisions made by local, regional and state agencies.

The 21 reported lawsuits were filed in Monroe, Dade, Charlotte, Broward, Seminole, Putnam, Hamilton, and Wakulla counties. A total of 71 individuals and organizations were named as defendants in these suits. The complaints alleged one or more of the following: tortious interference, slander, abuse of process, libel, conspiracy and other lesser known civil actions. The combined amount of damages sought totalled nearly $100 million. Many suits also sought injunctive relief to prevent the defendants from speaking at hearings or continuing other forms of participation.

Of the 21 reported cases, 13 are now closed; eight are pending. Of the 13 closed cases, three were voluntarily dismissed, one case was dismissed for lack of prosecution, and the remaining nine ended with a ruling in favor of the defendant. The average amount of time elapsed from commencement to conclusion of the closed cases was 10 months. The unresolved cases have been pending for an average of 30 months.

Approximately half of survey respondents reported that their participation in political debate was adversely affected or reduced as a result of the litigation filed against them. Of the 10 respondents who reported being threatened with a SLAPP, five said that they reduced or eliminated their opposition to the disputed project as a result of the threat. The major factors cited for the curtailment of public participation activities were the cost of the defense, fear, and stress over pending litigation.

In addition to the survey results, this report also includes an analysis of Florida laws providing general remedies in cases of frivolous or malicious litigation. The report reflects that some of these remedies have been utilized by defendants; however, their effectiveness in dealing with perceived SLAPP litigation on a consistent basis has been questioned. Similar concerns have prompted other states to consider legislation or judicial procedures designed to specifically address SLAPPs. These proposals, including several which have been offered for consideration in Florida, are summarized in the final section of the report.

This office is grateful to all of those who took the time to furnish information for this report. Clearly, there are some Floridians who have restricted or even ended their involvement in public participation activities as a result of being sued or threatened with litigation demanding massive damage awards. Each member of a democracy shares a common interest in ensuring that the ability to address one's government on an issue of public concern is protected from spurious lawsuits designed for intimidation or harassment. It is our hope that this report will serve as a resource guide as proposals are considered to safeguard every Floridian's constitutional right to be heard.

for all SLAPPs that have been filed in Florida. As noted in the introduction, this study focused primarily on the specific subject area of land use as being representative of the broader topic of SLAPP suits. It does not include other subject areas of SLAPP activity such as animal rights, civil rights or consumer complaints.[9] Because the report focuses on claims of SLAPPs as reported by citizens, no definitive conclusions can be reached as to the merits in all of the underlying litigation.

II. Responses

A total of 47 written responses to the questionnaire were received during the study period. Twenty-four provided information on litigation involving individuals or organizations. A total of 21 cases were reported as meeting the elements of a SLAPP. Two of these were in the form of counterclaims. Eight of the cases are still pending. Most cases involving litigation were preceded by litigation threats. Ten respondents reported threats of SLAPPs only, and 12 reported no SLAPP threats or suits but fear of both. Fifteen of the cases reported were filed since 1989; the other six were filed between 1983 and 1987.

A. Litigation

1. Characteristics of cases reported

a. Geographic Distribution:

Eight cases were reported from Monroe County, five from Dade, three from Charlotte, and one each from Seminole, Broward, Hamilton, Putnam and Wakulla counties.

b. Typical Counts Raised:

The counts raised in these cases in order of frequency include interference (8), slander (7), conspiracy (6), libel (5), abuse of process (4), slander of title (2) and trespass (2). Also filed at least once each were counts of sham, nuisance, fraud, deceit, intentional infliction of emotional distress, violations of equal protection and substantive due process, misrepresentation, harassment, champerty and maintenance.

c. Public Participation Activity Involved:

The majority of the public participation activities that were reported as resulting in litigation included participation at the local level exclusively

or in combination with activities before other levels of government and the electorate. The second category of activities was public participation before state agencies, including water management districts.

Informal public participation activities such as speaking at public hearings, writing letters of objection to agencies or to neighbors, and discussing a project at meetings of citizens groups such as homeowner associations, were described as prompting the filing of 13 cases.

The remaining eight cases involved the formal challenge of local or state decisions.

d. Relief Requested:

The lawsuits studied involved damage claims in excess of $99,035,000 as compensatory and punitive damages against 71 defendants. Injunctions were requested in eight of the cases studied. In addition, the majority of the cases sought attorney's fees and costs.

2. Resolution of the Cases

a. Status:

Of the 13 cases that have been resolved, six were resolved by motions to dismiss, three were resolved by motions for summary judgment, one was voluntarily dismissed, one was resolved after filing answers and affirmative defenses and two were voluntarily dismissed after the defendants agreed to withdraw opposition to the development. Seven raised the First Amendment as a defense.

b. Attorney's Fees and Costs:

Of the nine cases that have been resolved through court rulings in favor of the defendant, five included a request for fees. Of these, one person received fees through a settlement after filing a motion for sanctions, and another received fees through a settlement reached in a subsequent lawsuit. One lawsuit was dismissed but a counterclaim by the defendant is still pending. In the two cases that were voluntarily dismissed after the defendants withdrew their opposition, no fees were recovered.

In the eight pending cases, four defendants have filed counterclaims, one has filed a separate action and three have requested attorney's fees and costs in their defense motions.

c. Cost of Defense:

Closed Cases:

The reported cost of defending nine of the closed cases to conclusion ranged from $500 to $106,000. The higher figure was reported by one survey respondent who was sued four times. One case involved pro bono representation. The 13 cases that were resolved averaged approximately 10 months from filing to resolution. Seven of these cases resulted in the defendants or members of the organizations involved in the same issue, withdrawing their opposition, withdrawing from the organizations or curtailing their public participation activities. Some reported that the litigation adversely affected their environmental organizations for several years.

Pending Cases:

The combined reported total of defending six of the eight pending cases as of March 1, 1993, reached $82,000. The average cost of defending these cases ranges from $7,000 to $50,000.

The eight cases have been pending an average of 30 months. In several cases, defendants reported that because of the lawsuit, they or members of organizations involved in the same issue have stopped or reduced their public participation activities.

B. Threats of Litigation

1. Anonymous Respondents

Thirty-five telephone calls were made to this office by citizens who had learned about the SLAPP study from articles in newsletters and newspapers or by word of mouth. These callers reported threats of litigation, as well as threats of physical harm and loss of employment because of their public opposition to development proposals. In addition, they reported frightening "midnight calls" and other forms of harassment of themselves or members of their families.

These callers included environmental activists, professionals, retirees, and employees of state, regional and local governmental agencies. The telephone responses originated primarily from the Florida Panhandle, Northeast Florida and Southwest Florida.

When informed that written responses could not be kept confidential, the majority of these citizens requested that the questionnaire not be mailed to them. They indicated that they were fearful to come forward because of potential retribution.

2. Written Responses

Twenty-two respondents furnished written information regarding whether they or their organization had been threatened with litigation as a result of their public participation activities. Of these respondents, 10 described a total of 37 threats of litigation (one of which ultimately did result in litigation). Five of the 10 respondents stated that they completely or partially dropped their opposition to the challenged activity, because they were intimidated by the litigation threats or the cost of public participation. Five respondents advised that they continued their involvement in the political process despite the reported litigation threats.

The remaining 12 organizations reported that they had neither been threatened with litigation nor sued. However, these respondents also indicated that while they had never been threatened with litigation, the potential for such litigation has influenced their participation in environmental, quality of life and growth management issues.

C. Respondent Comments

The most common concerns expressed about SLAPPs by the respondents were the lack of funds to withstand SLAPPs or threats of SLAPPs and the frustration of having to spend limited resources defending against a SLAPP instead of pursuing their public participation activities.

Some expressed bitterness and distrust of the legal community, which they perceive as being unwilling to represent environmental causes on a pro bono basis. Several respondents speculated that many attorneys are reluctant to represent individuals or environmental groups in opposition to developments because of the potential of antagonizing future clients. In addition, some believe that attorneys do not like to represent environmental groups against an agency because of concerns that agency officials will seek retribution in future cases when the attorneys would be representing developers.

Some respondents suggested that the state should defend SLAPP victims. Lloyd Miller, of the Redlands Citizen Association, recommended that the state provide a citizens' advocate who would undertake the defense of a SLAPP after a committee appointed by the Governor determines that the case is worthy of state advocacy. Iris Burke, of Friends of Alachua County, recommended a "crack team" of SLAPP experts in the Attorney General's Office who would defend SLAPP victims.

There were several suggested changes to the law regarding attorney's fees, civil immunity, SLAPP-back suits, sanctions against SLAPP filers and their attorneys, and damages. Some recommended placing the burden on attorneys to determine

the validity of a claim before filing it. It was suggested that those who file SLAPPs be required to post a bond. Also, it was recommended that plaintiffs bear the burden of proving that the challenged statements were not a protected part of public debate.

In addition, several respondents recommended public education about the issue of SLAPPs. Alfred Test, of PGI Concerned Citizens, recommended a Primer on Citizens' Rights. Iris Burke, of Friends of Alachua County, recommended that grassroots organizations be provided with advice on issues that may "create legal vulnerabilities" so that they can avoid doing or saying the wrong thing and "give them confidence to stand up for themselves when they know they were within their rights."

III. Protection for SLAPP Targets Under Existing Florida Law

In *Nodar v. Galbreath,*[10] the Florida Supreme Court ruled that statements made to a political authority are conditionally privileged as a matter of law. A person making such a statement is not liable unless the privilege is abused.

More recently, in *Londono v. Turkey Creek, Inc.,*[11] the Court reaffirmed its earlier conclusion in *Nodar* and held that current Florida law provides adequate protection for petitioning activity.

The Attorney General's Office participated as amicus in the *Londono* case and urged that the Court adopt a specific standard to address SLAPPs. A special standard, such as that developed by the Colorado Supreme Court and discussed in Section IV C of this report, has been viewed as an expeditious method for resolving SLAPP cases within the structure of the judicial system. Such an approach would recognize that the existing penalties and remedies intended to deal with the problem of frivolous lawsuits may be too slow, or too costly to maintain, or they may fail to provide a sufficient economic disincentive to serve as a deterrent to those who file SLAPPs as an intimidation strategy.

The Florida Supreme Court declined to address or follow the Colorado example, noting instead that the substantive right to petition the government is already protected. Implicit in the Court's ruling is the apparent view that the determination as to whether existing laws or procedures should be modified to specifically address this issue is not a matter that can be resolved by establishing new procedures in a particular case, but rather must be analyzed in some other forum. Accordingly, a discussion of some of the remedies now available under Florida law follows:

A. Malicious Prosecution

A malicious prosecution action is filed by a former defendant who has prevailed in a prior civil action. The theory of a malicious prosecution case is that the earlier lawsuit was filed with malice. As applied in a SLAPP case, a defendant who succeeds in having a SLAPP suit dismissed would then file a malicious prosecution action against the person who initiated the SLAPP case. Some commentators refer to a malicious prosecution action filed under these circumstances as a "SLAPP-back" lawsuit.[12] One of the cases reported to this office, *Moon v. Charlap*,[13] involved a malicious prosecution claim which was resolved through settlement. Ms. Moon filed suit after being repeatedly and unsuccessfully sued in federal and state courts.

Florida case law establishes six separate elements that must each be proved as part of a successful malicious prosecution claim:

1. the commencement or continuation of an original civil proceeding;
2. the prior proceeding was instigated by the defendant in the new malicious prosecution action;
3. the prior proceeding ended with a ruling in favor of the plaintiff who is bringing the malicious prosecution action;
4. the prior proceeding was instigated with malice;
5. the prior proceeding was instigated without probable cause; and
6. the prior proceeding resulted in damages to the person bringing the malicious prosecution action.

If the person bringing the malicious prosecution claim is unable to prove any of the six elements, the case may be dismissed.[14]

The primary disadvantage noted to the use of a malicious prosecution action as a general deterrent to SLAPPs is that the case cannot be brought until the SLAPP litigation is over.[15] Since litigation can take years to resolve, a number of SLAPP defendants would be required to wait a considerable length of time to initiate the malicious prosecution claim. The result can be that the SLAPP lawsuit has the desired tactical effect of chilling public participation by the SLAPP defendants while the threat of ongoing and costly litigation is continuing. In other words, the SLAPP defendants may not have the resources to continue to battle the SLAPP filer to a successful litigation outcome.

Another possible concern that has been raised regarding the utilization of malicious prosecution is the requirement that malice be proved.[16] Some

commentators have concluded that the difficulty of proving malice, coupled with the requirement that the malicious prosecution action must wait until the SLAPP suit is dismissed, make the action an ineffective tool to combat most SLAPPs.[17]

B. Sham Pleadings

Although the Florida Rules of Civil Procedure contain a provision for striking sham pleadings, explanatory comments contained within the Rules state that where a material matter is alleged to be false, it is better to proceed with a motion for summary judgment in order to dismiss the suit.[18]

Even if the sham pleading rule were designed as a mechanism to dismiss suits, the burden of showing that a pleading is a sham may be too great to be effective in all cases. In order for a pleading to be stricken as a sham, the pleading must be undoubtedly false or plainly fictitious.[19]

Florida Jurisprudence explains that:

> [I]n order to justify the striking of a pleading for being sham or false, it must be so undoubtedly false as not to be subject to a genuine issue of fact. In other words, a pleading may be stricken as a sham only where it is shown to be a plain fiction. The fact that the court may perceive but little prospect of the success of the alleged sham pleading is not sufficient ground to grant a motion to strike it.[20]

The sham pleading rule authorizes the court to hear testimony only on the limited issue of whether a pleading is plainly fictitious.[21] Any doubts are resolved in favor of the party opposing the motion to strike the sham pleading.[22] In addition, the limited risk to a plaintiff from such a motion - merely striking the pleadings and perhaps assessing court costs - may not serve as an effective deterrent to SLAPPs.[23]

Two cases reported to this office, *Cape Cave Corporation v. Thomas W. Reese, et al.* (No. 16) and *Clarence and Jacqueline Keevan v. Sandi Bisceglia, et al.* (No. 18), included a motion to strike a sham pleading as part of the defense. Both cases were decided in favor of the defendants on other grounds. They are described in Appendix A.

C. Rule 2.060(d) — Attorney Certificate

Rule 2.060(d) of the Florida Rules of Judicial Administration requires that every pleading of a party represented by an attorney must be signed by at least one attorney of record. It provides that the attorney's signature constitutes a

certificate by the attorney that the attorney has read the pleading and that to the best of the attorney's knowledge, there is good ground to support it and it is not being filed to cause delay.

Rule 2.060(d) does not require "reasonable inquiry" before an attorney signs a pleading certifying that to the best of his or her knowledge good ground exists to support the pleading. Moreover, even if the requirement of "reasonable inquiry" were incorporated into the rule, the term is variable and depends upon many factors, including the time for investigation and whether the attorney had to rely on the client for information as to the facts underlying the pleadings. Additionally, the remedy for violation of Rule 2.060(d) is merely the striking of the pleading. Accordingly, this rule has not been viewed as a strong deterrent to the use of SLAPPs as a litigation tactic.[24]

D. Motions to Dismiss and Motions for Summary Judgment

Some of the more traditional methods of dismissing frivolous suits — such as a motion to dismiss for failure to state a cause of action, pursuant to Rule 1.140, Fla.R.Civ.P., or a motion for summary judgment, pursuant to Rule 1.510, Fla.R.Civ.P. — have been criticized as ineffective in deterring parties from filing SLAPPs or in resolving suits quickly. The concern is that the burden on the party making the motion is so great that the party filing the SLAPP can easily defeat or thwart it long enough to intimidate and deter opposition.[25]

For a Rule 1.140 motion to dismiss to succeed, the defendant must show that even if the allegations in the complaint were true, the complaint fails to state a cause of action. A Rule 1.510 motion for summary judgment demands the complete absence of *any* issue of material fact, and can be defeated simply by raising issues of material fact so that a full trial remains necessary. The potential sanctions, in the event a SLAPP victim is successful in obtaining a dismissal or summary judgment, are limited to liability for costs and fees. Thus, some commentators have expressed concern that the payment of such fees and costs are simply a cost of doing business and not a deterrent to SLAPPs.[26]

E. Florida's Whistle Blower Act

Florida's Whistle Blower statute, Section 112.3187, F.S.,as amended by Ch. 93-57, Laws of Florida, provides protections for those government employees who report violations of law to appropriate authorities.

Section 112.3187(2), F.S., provides:

> LEGISLATIVE INTENT - It is the intent of the Legislature *to prevent agencies or independent contractors from taking retaliatory action against an employee who reports to an appropriate agency violations of law* on the part of a public employer or independent contractor that create a substantial and specific danger to the public's health, safety, or welfare. It is further the intent of the Legislature to prevent agencies or independent contractors from taking retaliatory action against any person who discloses information to an appropriate agency alleging improper use of governmental office, gross waste of funds, or any other abuse or gross neglect of duty on the part of an agency, public officer, or employee. (emphasis supplied).

However, this statute only protects complaints made to an agency regarding violations of law or malfeasance by an agency or independent contractor. There must be a written complaint to the agency or a request to participate in an agency investigation in order to trigger the protections of the Act.[27] Thus, it is of limited value in resolving a SLAPP lawsuit involving private parties.

F. Attorney's Fees

Florida law authorizes the imposition of attorney's fees upon a party when that party has brought a baseless claim. Section 57.105(1), F.S., provides:

> The court shall award a reasonable attorney's fee to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney in any civil action in which the court finds that there was *a complete absence of a justiciable issue of either law or fact* raised by the complaint or defense of the losing party; provided, however, that the losing party's attorney is not personally responsible if he has acted in good faith, based on the representations of his client. (emphasis supplied).

Commentators on SLAPP issues have questioned the effectiveness of such statute because the person seeking the fees must show "a complete absence of law or fact raised by the complaint . . . of the losing party." In other words, it must be shown that the action was:

> so readily recognizable as devoid of merit on the face of the record that there is little, if any, prospect that it can succeed. It must be one so clearly untenable, or the insufficiency of which is so manifest on a bare inspection of the record. . . that its character may be determined without argument or research.[28]

Moreover, it has been suggested that it is unlikely that the responsibility for attorney's fees alone would significantly deter SLAPPs. Such infrequent instances could be viewed as an acceptable business risk by those contemplating SLAPP action.[29]

Attorney's fees were requested in five of the nine cases reported to this office in which the courts have issued a final order based on the merits of the case and in favor of the defendant. Attorney's fees were eventually obtained in only two cases, both times pursuant to settlement rather than by court order.

The foregoing discussion illustrates that existing remedies intended to generally address frivolous or malicious actions may not be effective in resolving a SLAPP lawsuit. In some of the cases reported to this office, prevailing parties have attempted to use one or more of these actions against those who originally filed suit against them. However, the variety of public participation activities which may generate a SLAPP, when coupled with the need to ensure expeditious resolution of SLAPP suits so as to blunt their potential for silencing protected speech, makes it difficult to assure those who believe that they are victims of SLAPPs that remedies designed to deter other kinds of meritless litigation will work as well to deter the use of SLAPPs as an intimidation technique.

IV. Approaches by Other States

The perceived weaknesses of traditional civil actions and sanctions as an effective deterrent to the use of SLAPPs has led some states to consider legislation that focuses on the specific characteristics of a SLAPP lawsuit. The advantage to this approach is that the new procedure can provide a readily available means to quickly and effectively halt a SLAPP lawsuit before it can chill constitutionally protected speech and political activities.

A proposal expressly designed to address SLAPPs requires careful consideration, however, so as to avoid creating procedures or remedies that could inadvertently operate to forestall or hinder legitimate lawsuits based on slander, libel or other tortious activity. For this reason, the development of legislation in other states geared toward addressing SLAPPs has been a complex and deliberate process involving input from citizens groups, the business community and other entities concerned with protecting both the constitutional right of free speech and the right of access to the courts.

The following section analyzes the approaches taken or contemplated in Washington, California, New York, New Jersey, Texas, Virginia, Connecticut, Colorado and Florida to address SLAPP related issues.

A. States Where SLAPP Legislation is In Effect

1. Washington

Washington has enacted a statute based on immunity from suit when the activity involves communication to a governmental agency. The statute states:

> [A] person who in good faith communicates a complaint or information to any agency of federal, state or local government regarding any matter reasonably of concern to that agency shall be immune from civil liability on claims based upon the communication to the agency.[30]

Section 4.24.510, Revised Code of Washington

When a defendant establishes that the suit brought against him is based upon a good faith communication to an agency, he is entitled to costs and fees from the party who brought the suit. The Washington statute also authorizes agency or Attorney General to intervene in the suit.[31] If the intervening agency establishes the defense, it is entitled to costs and fees.[32] If the agency fails to establish the defense, it is liable for the costs and fees incurred by the plaintiff in his successful attempt to show that the defense is invalid.[33] The statute is silent regarding the Attorney General's liability should the Attorney General intervene and fail to establish the defense.

While this statute and Florida's Whistle Blower law are both triggered by a communication to an agency, the scope of the protection offered by the Washington statute appears to be broader. The Washington statute covers communications regarding private companies (not just public employers or companies doing business with government); the communication need not concern violations of law or malfeasance in order to be protected; and it does not have to be made by an employee. If the communication to the agency is a "matter reasonably of concern to that agency" the protections of the Washington statute are triggered.[34] Like Section 112.3187, F.S., Washington's statute protects only communications to an agency and does not protect communications to the public and to the press.

Washington's legislation became effective in 1989 and remains untested. No immunity defense based on the statute has been raised in any case that made its way to the appellate courts. Also, the Washington Attorney General's office has not intervened in any case.

2. California

After repeated attempts, the California Legislature passed a bill relating to SLAPPs which Governor Wilson signed into law on September 16, 1992. The law took effect on January 1, 1993.[35]

The California law includes the legislative finding that "there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition."[36] The law permits the initial filing of claims but subjects them to a special motion to strike unless the court determines the plaintiff has established a substantial probability of prevailing on the claim.[37] The law contains timetables for hearings on those motions and provides for stays of discovery proceedings until such motions are decided.[38] Defendants who prevail on the special motion to strike are entitled to recover attorneys fees and costs. If the court finds the motion to strike frivolous, the plaintiff may be entitled to fees and costs.[39]

California SLAPP protection extends to any act performed in connection with a public issue. It specifically includes written or oral statements made before any official proceeding or in a public forum.[40]

The law does not provide for compensatory or punitive damage awards for SLAPP targets. The target of a SLAPP must retain counsel in order to file the motion to strike, but would be entitled to recover attorney's fees and costs if the motion prevails. The California statute specifies how courts are to make the determination of probable success on the merits: "In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based."[41]

3. New York

On August 3, 1992, Governor Cuomo signed Assembly Bill 4299 into law making that state's anti-SLAPP legislation effective on January 1, 1993. The New York law offers both limited immunity and damage awards to SLAPP targets. It also offers expedited hearings for certain motions in "actions involving public petition and participation."[42] In its simplest terms, the protection of New York's law is triggered when a person who has applied for a permit, zoning change, lease, license, etc., sues another based on efforts to "report on, comment on, rule on, challenge or oppose" the application or permission.[43]

Defendants in SLAPP actions in New York may recover damages, including costs and attorneys fees, in three situations. First, costs and fees are available if "the action involving public petition and participation was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law.[44]

Second, damages may be awarded upon demonstration that the action was "commenced or continued for the purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights."[45] Punitive damages are recoverable "upon an additional demonstration that the action involving public petition and participation was commenced or continued for the sole purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights."[46]

The New York law also restricts damages sought by SLAPP filers to instances where the plaintiff establishes by "clear and convincing evidence that any communication which gives rise to the action was made with the knowledge of its falsity or with reckless disregard of whether it was false, where the truth or falsity of such communication is material to the cause of action at issue."[47] Thus, when a SLAPP takes the form of a libel suit, the plaintiff must not only prove all the elements of libel, but must also show by clear and convincing evidence that the defendant's statement was made with knowledge of its falsity or with reckless disregard of whether it was false in order to recover damages.

The law also raises the standard to be met from a "reasonable basis" to a "substantial basis" to survive a motion to dismiss or a motion for summary judgment in cases involving public participation.[48] Significantly, the law directs the courts to grant priority to the hearing of motions to dismiss and for summary judgment in these cases.[49]

B. States Where SLAPP Legislation Has Been Proposed But Not Passed

1. New Jersey

In 1991 legislation was introduced in the New Jersey Senate that would have established immunity from liability for damages for citizens communicating a complaint or information to any public entity. Senate Bill No. 3136, which was never adopted or reintroduced, would have created immunity from damages when a person expressed an opinion or belief concerning a public issue affecting him, as long as the communication was made in good faith.

The legislation would further have authorized the public entity receiving a complaint or information to intervene and defend against any suit for damages arising out of the communication. If the public entity had failed to intervene, the Attorney General could have. The legislation would have provided for mandatory award of costs and attorneys fees to a prevailing defendant in this type of case.

The New Jersey Assembly Judiciary Law and Public Safety Committee also considered Assembly Bill 190 (a reintroduction of the 1990/1991 Assembly Bill 4233) in 1992. The bill was carried over to 1993 and is now pending. This proposed legislation identifies the hazards associated with SLAPPs and substantively provides immunity from damages to persons who in good faith communicate a complaint or information to any public entity regarding any matter reasonably of concern to that entity. The proposal also extends protection to public comments not necessarily made directly to an agency, providing they are made in good faith and without actual malice. Costs and attorneys fees could be awarded to persons prevailing under the defense.

As with proposals in several other states, the public body receiving the information or complaint could intervene; upon their failure to do so, the Attorney General could.

2. Texas

Legislation has been introduced in Texas that would establish a summary judgment process in cases where the cause of action is based on a position taken or statement made in relation to a governmental proceeding or where the cause of action is barred because the conduct complained of is protected by the right to petition.[50]

This bill, which would have amended the Civil Practice and Remedies Code, was not passed but was refiled in 1993 with minor revisions as House Bill 7266. As in previous years, the bill did not pass. Texas' proposed legislation would, in essence, codify Colorado's judicially created summary judgment process. Motions for summary judgment would be granted if the SLAPP filer failed to prove that:

a. the position taken by the moving party was to harass or otherwise wrongfully injure the SLAPP filer;

b. the primary purpose for the moving party's action was to harass or otherwise wrongfully injure the SLAPP filer; and

c. the moving party's actions injured the SLAPP filer.

If the SLAPP target prevailed in the summary judgment motion, the Court "shall award" attorney's fees and costs.

According to the proposed legislation, the SLAPP target could also petition for damages in conjunction with the motion for summary judgment.[51] If the SLAPP target prevailed on the motion for summary judgment and also established that

the SLAPP filer brought the suit to harass or wrongfully injure the target or inhibit participation in governmental proceedings, the legislation provides that the Court "shall award" actual and "may" award exemplary damages.

3. Virginia

In 1992 Virginia considered legislation providing for summary dismissal of certain claims, counterclaims or cross-claims if the right to petition under the Virginia or the United States Constitution was properly raised as a defense. Senate Bill 424 did not pass. It was carried over for consideration in 1993, but the bill again failed to pass.

Echoing the standards set forth in *Protect Our Mountain Environment v. District Court*,[52] dismissal of SLAPP suits would be warranted when the claimant was a person who applied for or obtained a "permit, zoning change, license, lease, certificate or other entitlement for use or permission to act" (or a person with a materially related interest) and the respondent was a nongovernmental individual or entity. To be dismissed, the claim must be based upon advocacy by the SLAPP target that was directed toward the claimant before a governmental individual or body on an issue of public or societal importance.

Under this legislation the action would be dismissed if three tests were met. First, the claimant's action or claim must have been brought maliciously and with intent to harass the respondent. Second, the target's petitioning activities must have had "reasonable factual support or a cognizable basis in law for their assertion." Third, the primary purpose of the respondent's activity must not have been "to harass the claimant or effectuate another improper objective." By permitting dismissal even if harassment or improper objectives were *some* of the motives, as opposed to the primary one, this law would be advantageous to the SLAPP target.[53]

The proposed bill would direct the court to consider the imposition of sanctions upon entry of an order dismissing the SLAPP.

4. Connecticut

In 1991, three bills dealing with SLAPPs were proposed in the Connecticut Legislature, none of which was passed into law. Raised Bill 7374, which was introduced by the Judiciary Committee in 1991 but not subsequently introduced, provided immunity from damage or injury resulting from testimony or evidence presented at a meeting of a public agency.

The bill would have provided that any person who commenced and prosecuted a civil action due to another person's exercise of rights guaranteed by the State

or U.S. Constitutions would be liable for actual damages, punitive damages, and reasonable attorneys fees. The proposed legislation provided for double or treble damages, depending on the intent of the filer.[54]

In 1993, the Connecticut Legislature considered HB 1026, SB 182 and SB 248. House Bill 1026 and SB 182 are identical to Raised Bill 7374 and Proposed Bill 161 filed in 1991. SB 248, like Proposed Bill 439 in 1991, would provide protection to persons who participate in proceedings before an agency, but would restrict the protection in cases where the testimony or evidence presented at an agency proceeding is defamatory or for the purpose of delay.

None of the three bills filed in 1993 gained committee approval.

C. Judicial Procedures — Colorado

In Colorado the SLAPP issue has been approached judicially, rather than legislatively. In *Protect Our Mountain Environment v. District Court*,[55] the Colorado Supreme Court devised a special procedure for considering a motion to dismiss that is based on the First Amendment right to petition the government for redress of grievances. The aim of this special procedure is the early dismissal of SLAPPs.

The *Protect our Mountain Environment* case arose following an environmental group lawsuit's against a developer and the Board of Commissioners that approved the rezoning of a 500-acre tract. The lawsuit was dismissed and the developer subsequently sued the environmental group for abuse of process and civil conspiracy. The suit demanded $10 million in compensatory damages and $30 million in exemplary damages. The lower court refused to dismiss the developer's lawsuit, and an appeal to the Colorado Supreme Court ensued.

In *Protect our Mountain Environment,* the Court detailed the following procedures to be utilized where a motion to dismiss is based on the First Amendment right to petition for redress of grievances. First, the motion to dismiss is treated as a motion for summary judgment and is expedited. This potentially helps SLAPP victims because motions to delay are typically based on the technicalities of the legal complaint, while motions for summary judgment can result in a final determination on the merits of the case. Second, the burden of proof for establishing whether the defendant is not immune from suit is shifted away from the defendant seeking dismissal and is instead placed on the plaintiff who brought the SLAPP and who must therefore bear a heightened standard of proof. Third, the motion to dismiss will be granted unless the plaintiff can show all of the following:

> (a) the defendant's petitioning activity was devoid of reasonable factual support, or, if so supportable, lacked any cognizable basis in law for

> their assertion; and (b) the primary purpose of the defendant's petitioning activity was to harass the plaintiff or to effectuate some other improper motive; and (c) the defendant's petitioning activity had the capacity to adversely affect a legal interest of the plaintiff;

Professor Pring, who acted as amici curiae in *Protect our Mountain Environment*, notes that Colorado has a track record with the procedure established in that case. According to Professors Pring and Canan, of six Colorado SLAPP cases tracked since the *Protect our Mountain Environment* decision, the court "found four to be dismissable and two were denied dismissal, demonstrating that the test does work."[56]

V. Florida Legislative Proposals

During the 1992 legislative session, two bills were introduced relating to SLAPP litigation. However, neither bill passed out of committee.

HB 759 would have amended Florida Statutes to provide for an award of attorneys fees if an attorney or party brought or defended an action that lacked substantial justification, or the action or defense was used for delay or harassment.

The second bill, SB 2188, was more specifically directed toward SLAPP suits. The proposed legislation closely resembled legislative efforts in other states to define and handle the problems created by SLAPP suits.

As provided in Washington and New Jersey proposals, the bill established that "[a] person who in good faith communicates a complaint or information to any public entity regarding any matter reasonably of concern to that entity is immune from liability for damages arising out of the communication." This language was thought to encompass most situations in which SLAPP suits could arise, including testimony at public hearings, communications to state agencies, and legislative lobbying.

To address other situations such as publication in a newspaper, the Florida bill provided that "[a] person who in good faith and without actual malice expresses an opinion or belief concerning a public issue that affects the person is immune from liability for damages arising out of the communication." Further, SB 2188 provided that "[i]n addition to any other remedies at law, a person who prevails in defending a suit for damages under either of these circumstances is entitled to recover costs and reasonable attorneys fees incurred in establishing the defense."

Subsection (3) of the bill allowed a public entity receiving a complaint or information to intervene in a lawsuit arising out of such a complaint or information. As provided in other states, intervention by the agency or Attorney General was authorized.

Finally, SB 2188 defined "public entity" as "the federal government; the state, including any branch thereof; any county, municipality, district, public authority, public agency, or other officer or employee of the foregoing entities." Florida's expansion of the definition of public entity to include officers and employees is unique in currently proposed or enacted SLAPP legislation.

During the 1993 legislative session, Senator Robert Wexler and Representative Mimi McAndrews filed SB 70 and HB 185 respectively. The bills were identical to SB 2188, filed in 1992. The bills died in the Senate and House Judiciary Committees.

A summary of some of the various proposals to address SLAPPs is included as Appendix C.

VI. Conclusions

The survey results demonstrate that many Floridians believe that their public participation activities, particularly in opposition to development proposals, have resulted in actual or threatened SLAPP lawsuits. At least 71 individuals and advocacy organizations reported that they have been sued and 45 citizens and groups stated that they had been threatened with such action. An additional 35 individuals called this office to report actual or threatened lawsuits, but asked that the survey questionnaire not be mailed to them because they were afraid of possible retribution.

According to survey respondents, litigation has been brought against citizens and groups based on their actions in writing letters to public officials and neighbors, engaging in public demonstrations, complaining to local government about violations of local regulations and codes, speaking out at public meetings, challenging the approval of rezoning or permits by governmental agencies, and writing letters to the editor of local newspapers.

The litigation filed sought a cumulative total of at least $99,035,000. This figure does not include cases in which the amount of compensatory and punitive damages sought was unspecified.

The survey respondents indicated that the lawsuits apparently succeeded in silencing opposition to development in approximately half of the cases. It should

be noted that this figure is based only on comments offerred by survey participants; there may be others who decided not to get involved or removed themselves from further political debate upon learning of a SLAPP case.

Currently, a number of Florida laws guarantee citizens the opportunity to voice their concerns to governmental agencies considering a variety of growth management and environmental issues.[57] Similar opportunities for public involvement exist at the local level in land use regulations and ordinances. However, many citizens report that those who participate in these proceedings risk being targeted by a SLAPP lawsuit.

Although Florida law provides a number of remedies intended to address frivolous or malicious claims, those involved in litigation resulting from public participation activities believe that such remedies are too time consuming, too weak or too difficult to prove to serve as a consistently effective deterrent to SLAPPs. In other states, the solution has been to design a specific statutory or judicial procedure tailored to ensure that a SLAPP lawsuit is quickly dismissed while legitimate disputes receive appropriate adjudication in court. Most of these procedures are recent enactments and thus it is probably too early to offer a complete assessment of their effectiveness in addressing SLAPPs in all cases.

As Florida continues to grow, disputes between those who are seeking new development and related approvals from governmental agencies and those who wish to oppose or speak out against all or part of the proposed development appear to be inevitable. The challenge for our state will be to ensure that the right to participate in the democratic process is not subverted through the use of litigation tactics whose sole purpose is to silence opposition. In most states that have attempted to grapple with this issue, the development of specific SLAPP related proposals has been an exacting and difficult task requiring the involvement of a number of affected interests to ensure that the constitutional rights of all are protected without untoward intrusion into the province of the judiciary.

Endnotes

1. According to one source, "every year in the United States, hundreds, perhaps thousands, of civil lawsuits are filed that are aimed at preventing citizens from exercising their political rights or punishing those who have done so." Canan and Pring, *Strategic Lawsuits Against Public Participation*, 35 Social Probs. 506 (1988). In a recent interview about the nationwide study of SLAPPs he and Professor Penelope Canan conducted, Professor George Pring stated that "[h]undreds of people we've talked to are literally terrified at the thought of losing their homes under multi-million dollar lawsuits." Ferdinand, *SLAPP-ed into Silence*, Miami Herald, May 25, 1992, at p. 1.

2. Canan and Pring, *supra*. *See also*, Canan, *The SLAPP from a Sociological Perspective*, 7 Pace Envtl. L. Rev. 23 (1989).

3. Pring and Canan, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 Law and Society Rev. 385 (1988).

4. *Id. See also*, Pring and Canan, *Strategic Lawsuits Against Public Participation*, 12 Bridgeport L. Rev. 937 (1992); Ericson-Siegel, *Silencing SLAPPs: An Examination of Proposed Legislative Remedies and a "Solution" for Florida*, 20 Fla. St. U. L. Rev. 487 (1992); Brecher, *The Public Interest and Intimidation Suits: A New Approach*, 28 Santa Clara L. Rev. 105 (1988); and *Political Intimidation Suits: SLAPP Defendant Slaps Back*, 4 BNA Civil Trial Manual, October 19, 1988, at pp. 459 and 460.

5. *See, Political Intimidation Suits: SLAPP Defendant Slaps Back, supra* at 460, noting that "SLAPP plaintiffs are not always the 'bad guys'." *Cf.*, Ericson-Siegel, *supra* at n. 25, commenting: "While in some cases the citizen-activists themselves are guilty of abusing or manipulating the governmental petition process to achieve personal goals, an analysis of that problem and its remedies is beyond the scope of this Comment."

6. According to Professor Canan's research, more than 1800 private citizens and groups have been SLAPPed in suits demanding an average of $9 million in damages. Canan, *supra* note 1 at 25 and 26, as quoted in Ericson-Siegel, *supra* at 491. *See also*, Endnote 1, cited above.

7. *See*, Endnote 3, cited above.

8. 20 Fla. St. U. L. Rev. 489 (1992).

9. Canan, *supra* note 1, at 25, identifying SLAPP targets as those who oppose a new economic venture or application for license on one of the following four grounds: (1) environmental concerns; (2) neighborhood concerns, such as an undesired business; (3) consumer complaints (4) development opponents.

10. 462 So. 2d 803 (Fla. 1984).

11. 609 So. 2d 14 (Fla. 1992).

12. *See, e.g.*, Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 Pace Envtl. L. Rev. 3, note 4, at 19.

13. *Moon v. Charlap*, Case No. 90-20235-CA-18 (16th Cir. Monroe Co.), summarized in Appendix A.

14. *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).

15. *See, e.g.*, Staff, Florida Senate Committee on Judiciary, *A Report on Strategic Lawsuits Against Public Participation* (January, 1993)[hereafter Staff Report], at pp. 26-29 summarizing concerns about the effectiveness of malicious prosecution actions as a weapon against SLAPPs.

16. *Id.*

17. *Id. See also*, Ericson-Siegel, *supra* at 499, noting that another potential drawback of an action for malicious prosecution is that the instigator of the suit may be immunized from liability; reliance on advice of counsel has been considered an absolute defense in one case.

18. *See*, Fla. R. Civ. P. 1.150.

19. *Scarfone v. Silverman*, 408 So. 2d 778 (Fla. 2nd DCA 1982); *Reif Development, Inc. v. Wachovia Mortgage Co.*, 340 So. 2d 1267 (Fla. 4th DCA 1976).

20. 40 Fla. Jur. 2d *Pleadings* s. 182.

21. *Id.*

22. *Bay Colony Office Building v. Wachovia Mortgage*, 342 So. 2d 1005 (Fla. 4th DCA 1977).

23. *See generally*, Staff Report, *supra* at pp. 45-49, regarding proposals to discourage the filing of frivolous pleadings as a means to deter SLAPPs.

24. *Id.*

25. *See,* Ericson-Siegel, *supra* at 496 noting that "[a]ttempts to achieve early dismissal . . . in a Florida court under the Florida Rules of Civil Procedure, generally would not be successful because SLAPPs contain a legally cognizable claim, even if that claim was not the true basis for filing the suit.

26. *See, e.g.,* Staff Report, *supra* at 4: "A plaintiff of means may decide that the off-chance that he will be ordered to pay half the attorney's fees is a chance worth taking in order to silence a vocal critic."

27. Section 112.3187(7), F.S.

28. *Whitten v. Progressive Casualty Ins. Co.,* 410 So. 2d 501, 505 (Fla. 1982), *quoting, Treat v. State ex. rel. Milton,* 121 Fla. 509, 510-511, 163 So. 883, 883-884 (1935).

29. *See,* endnote 26, cited above.

30. Wash. Rev. Code s. 424.510.

31. Wash. Rev. Code s. 4.24.520.

32. *Id.*

33. *Id.*

34. Wash. Rev. Code s. 4.24.510.

35. Staff Report, *supra* at 43.

36. Cal. Code Civ. Proc. s. 425.16(a).

37. Cal. Code Civ. Proc. s. 425.16(b).

38. Cal. Code Civ. Proc. s. 425.16(f) and (g).

39. Cal. Code Civ. Proc. s. 425.16(c).

40. Cal. Code Civ. Proc. s. 425.16(e).

41. Cal. Code Civ. Proc. s. 425.16(b).

42. N.Y. AB 4299 (1992), s. 2. *See also,* Ericson-Siegel, *supra* at pp. 510-513.

43. *Id., and see* s. 3, *supra* defining "public applicant or permittee" to mean "any person who has applied for or obtained a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body. . ."

44. *Supra* s. 2

45. *Id.*

46. *Id.*

47. *Supra* s. 3.

48. *Supra* ss. 4 and 5.

49. *Id.*

50. Tex. HB 149 (1990).

51. This feature has been characterized as "unique" among proposals to address SLAPPs. *See,* Ericson-Siegel, *supra* at 515.

52. 677 P.2d 1361 (Colo. 1984). This case is discussed more fully in Section IV-C of this report.

53. Va. SB 424 (1992). *See also,* the discussion on pp. 513-514, in Ericson-Siegel, *supra.*

54. Conn. Raised Bill 7374 (1991). Ericson-Siegel criticizes this bill and two other 1991 Connecticut proposals because the protections were triggered only if the SLAPP filer filed *and* prosecuted the SLAPP lawsuit. According to Ericson-Siegel, the bills' requirement that a suit must be commenced and prosecuted "failed to recognize that the mere filing of SLAPPs might cause the desired result without any further action on the part of the plaintiff." Ericson-Siegel, *supra* at n. 117, p. 507

55. 677 P.2d 1361 (Colo. 1984).

56. Pring and Canan, *Strategic Lawsuits Against Public Participation, supra* at 954

57. *See,* e.g., Section 163.3181, F.S. (public participation in the comprehensive planning process required "to the fullest extent possible"); Section 163.3213(1), F.S. ("substantially affected person" granted right to challenge land development regulations—such as zoning, subdivision, and other ordinances that implement the local plan—for inconsistencies

with the local comprehensive plan; Section 403.412, F.S., (certain classes of citizens granted standing to compel an agency to enforce environmental protection laws or orders to challenge a governmental decision affecting the environment).

Appendix A

Summary of Survey Responses

List of Cases Reported

Summary Chart of Cases Reported

CASE	ALLEGATIONS & RELIEF SOUGHT	PUBLIC PARTICIPATION ACTION PRECEDING SUIT	RECOVERY BY DEFENSE	MONTHS IN LITIGATION	STATUS
1. Index v. Marion Moon, U.S. District Court-Southern Dist. No. 87-10042	Fraudulent or negligent misrepresentation. $400,000 in compensatory damages and $500,000 in punitive damages.	Letter to DER in opposition to permit.	Rule 11 sanctions denied.	12	Summary Judgment granted. Opposition by Moon continued. Others silenced by fear. Case closed.
2. Index v. Marion Moon, 16th Jud. Cir., Monroe No. 87-20-488-CA-18	Statutory right of ingress and egress. Injunction to remove a fence and declaratory judgment.	Same as No. 1.	Fees and costs not requested.	13	Injunction denied. Case closed.
3. Marion Moon v. Charlap & Index, Inc., 16th Jud. Cir., Monroe No. 90-20235-CA-18	Counterclaim for libel & intentional infliction of emotional distress. $5 million in compensatory & punitive damages.	Same as No. 1. Also, letter from Moon to neighbors.	Recovery through settlement of SLAPP-Back by Moon.	2	Voluntarily dismissed. Case closed.
4. Indices v. Marion Moon, U.S. District Court-Southern Dist. No. 91-10039-CIV-KING	Denial of Rule 11 sanctions bars state action by Moon. Injunction of state court proceeding.	Same as No. 1. SLAPP-Back by Moon.	Recovery through settlement of SLAPP-Back by Moon.	4	Appeals Court affirmed District Court's dismissal with prejudice. Case closed.
5. Gary Kempton v. Tommy Hicks, 2nd Jud. Cir., Wakulla No. 91-44	Slander. $200,000 in compensatory and punitive damages.	Comments at zoning hearing.	Fees and costs not requested.	3	Motion to dismiss with prejudice granted to defendants. Opposition withdrawn. Case closed.
6. Cutler Landings Ltd. v. Aldo Guerrero, 11th Jud. Cir., Dade No. 89-49822	Slander, tortious interference. Temporary restraining order, injunction, costs and expenses, and damages of more than $5,000.	Statements to local, state and federal agencies and public demonstration about code violations by developer.	Counterclaim by Guerrero pending.	43	Pending. Opposition continues.

CASE	ALLEGATIONS & RELIEF SOUGHT	PUBLIC PARTICIPATION ACTION PRECEDING SUIT	RECOVERY BY DEFENSE	MONTHS IN LITIGATION	STATUS
7. Cutler Landings Ltd. v. Aldo Guerrero and Charles Robert, 11th Jud. Dist., Dade No. 90-14156	Tortious interference and trespass. Injunction, general and special damages of more than $5,000.	Same as No. 6 and visit to developer's sales office.	Case pending.	39	Pending. Opposition continues.
8. Cutler Landings Ltd. v. Aldo Guerrero, 11th Jud. Cir., Dade No. 92-10603	Tortious interference, trespass. Injunction, general and special damages of more than $10,000 and costs.	Same as No. 7.	Case pending.	13	Pending. Opposition continues.
9. City National Bank of Miami v. Ocean Reef Property Owners Association, et.al. 16th Jud. Cir., Monroe No. 83-238-CA	Champerty, maintenance and malicious conspiracy. Injunction, costs and fees. More than $10 million in compensatory and punitive damages.	Financial contribution to citizens' organizations in civil action to enjoin and invalidate Port Bougainville development order.	Attorneys fees and costs requested but not granted.	4	Motion to dismiss suit with prejudice granted to defendants. Opposition reduced. Membership in organization dropped. Case closed.
10. Upper Keys Marine Construction, Inc. v. Monroe County and Anna Dagney Johnson, 16th Jud. Cir., Monroe No. 92-20205-CA-18	Slander. Injunction, damages or more than $10,000, costs and fees.	Spoke at County Commission meeting.	Attorneys fees requested but not granted.	3.5	3rd DCA dismissed appeal of dismissal by County court. Case closed.
11. Pet Rescue, Inc. and Gardman Mulloy v. Goldie Lewis and Sharon Bailey, 11th Jud. Cir., Dade No. 90-3517	Libel, slander and nuisance. Injunctive costs and compensatory and punitive damages of more than $1.0 million.	Opposed variance for trailer at Dade County Zoning Appeals Board.	Attorneys fees not requested.	20	Motion to dismiss the amended suit for lack of prosecution granted. Public participation affected. Case closed.

CASE	ALLEGATIONS & RELIEF SOUGHT	PUBLIC PARTICIPATION ACTION PRECEDING SUIT	RECOVERY BY DEFENSE	MONTHS IN LITIGATION	STATUS
12. Kenneth R. Krantz v. Gordon Lamar Hill, 3rd Jud. Cir., Hamilton No. 90-253	Slander. Special and general damages of more than $10,000 and costs.	Opposed biohazardous waste incinerator at City of Jasper meeting.	Counterclaim by Gordon Hill is pending.	10	1st DCA dismissed appeal of circuit court order granting defendant's motion for summary judgment. Public participation affected. Case closed.
13. Rotunda Corp. and Cape Cave Corp. v. Rolland G. Geiger, 20th Jud. Cir., Charlotte No. 89-282-JHS	Libel, slander and injurious falsehood. Damages in excess of $10,000 and costs.	Complained to local and state agencies about holding pond. Wrote letters to homeowners association and to the newspaper.	Counterclaim and separate complaint for damages are pending.	51	Pending.
14. Organic Recycling System, Inc. v. Robert and Joan Vardaman, 17th Jud. Cir., Broward No. 92-03585	Harassment, slander, libel and interference. Injunction, compensatory and punitive damages of more than $250,000, fees and costs.	Wrote and called agencies and spoke at public hearing concerning the operation of a landfill.	Attorneys fees and costs requested. Filed counterclaim.	16	Case pending.
15. Sunset Islands 3 & 4 Property Owners, Inc., et.al. v. City of Miami Beach, et.al. 11th Jud. Cir., Dade No. 90-30543-CA-01	Counterclaim for conspiracy and antitrust violations. Treble damages, costs and fees.	Filed suit in circuit court in opposition to permit authorizing a multi-family development.	Case settled. Each side pays its own fees.	35	Settlement agreement reached. Both actions to be voluntarily dismissed. Opposition withdrawn. Case pending.
16. Punta Gorda Isles, Inc. v. Alfred Test and Donald Shafarman, 20th Jud. Cir., Charlotte No. 90-1019	Abuse of process, slander of title and interference. Damages of more than $20,000, interest and costs.	Filed appeal to Board of Zoning Appeals objecting to approval of a shopping center. Filed petition for writ of mandamus to force the City to hold a public hearing on a zoning decision for the shopping center.	Case settled. Each side paid its own fees.	3.5	Voluntarily dismissed pursuant to settlement. Opposition dropped due to lack of funds and fear of lawsuit. Cased closed.

CASE	ALLEGATIONS & RELIEF SOUGHT	PUBLIC PARTICIPATION ACTION PRECEDING SUIT	RECOVERY BY DEFENSE	MONTHS IN LITIGATION	STATUS
17. Cape Cave Corp. v. Thomas Reed, ECOSWF, et.al. 11th Jud. Cir., Dade No. 85-05549; also Cape Cave Corp. v. Thomas Reed, ECOSWF, et.al., 20th Jud. Cir., Charlotte No. 85-001005-CA-EOF	Abuse of process, interference and conspiracy. Compensatory and punitive damages of more than $30 million, interest and costs.	Requested administrative hearing on a DER permit for large residential development. Sent notice of intent to sue to U.S. Army Corps of Engineers and U.S. Environmental Protection Agency.	Attorneys fees paid after Section 57.105 motion was filed. No court order.	18	Motion for Summary Judgment granted in favor of defendants. Challenge of Corps' and EPA's decisions dropped.
18. Austin Laber v. Save Our Neighborhoods, Halloran, Green and Morgenstern, 16th Jud. Cir., Monroe No. 84-705-CA-17	Civil conspiracy, abuse of process, fraud and deceit, interference, slander of title and deprivation of civil rights. Compensatory and punitive damages of more than $51 million.	Appealed permits issued by City of Key West for hotel development. Contacted state agency officials in opposition to federal funding for the project. Spoke at public meetings.	None.	18	Voluntarily dismissed after defendants agreed to dismiss all their actions and issue a public apology. Opposition dropped. Case closed.
19. Clarence and Jacqueline Keevan v. Bisceglia, Davidson, Ernst, Florida Keys Citizens Coalition and Monroe County Audubon, 16th Jud. Cir., Monroe No. 85-444-CA-17	Malicious prosecution, abuse of process and libel. More than $605,000 in compensatory and punitive damages.	Requested an administrative hearing on a DER permit for a dock. Published newsletter referring to project as "odious."	Attorneys fees and costs requested but not granted.	19	Motion to dismiss granted. Opposition dropped. Members resigned from organization. Local Audubon ceased to function for several years. Case closed.

CASE	ALLEGATIONS & RELIEF SOUGHT	PUBLIC PARTICIPATION ACTION PRECEDING SUIT	RECOVERY BY DEFENSE	MONTHS IN LITIGATION	STATUS
20. Florida Fern-growers Association, Inc., et.al. v. Concerned Citizens of Putnam County, et.al., 7th Jud. Cir., Putnam No. 91-6080-CA-J	Malicious interference, conspiracy, injunctive relief. Compensatory damages of more than $10,000, fees and costs.	Requested administrative hearings on several consumptive use permits issued by the St. Johns River Water Management District.	Pro bono representation. Attorneys fees and costs requested.	23	5th DCA reversed and remanded dismissal with prejudice granted by circuit court. Opposition to permits withdrawn. Case pending.
21. James and Kathy Saboff v. St. Johns River Water Management District, Audubon, Friends of the Wekiva, et.al., 18th Jud. Cir., Seminole No. 91-2970-CA-16-K	Conspiracy and tortious interference. Unspecified compensatory and punitive damages, fees and costs.	Requested administrative hearing on a permit for management and storage of surface water.	Attorneys fees and costs requested.	19	Case pending.

Case Summaries

I. Litigation

Many of the claims alleged in the cases reported to this office are similar to those described by Professors Pring and Canan as characteristic of SLAPP lawsuits. These include libel, slander, conspiracy, malicious prosecution, abuse of process and interference with a business relationship.

In an article entitled, "'Strategic Lawsuits Against Public Participation': An Introduction for Bench, Bar and Bystanders," 12 Bridgeport L. Rev. 946 (1992), Professors Pring and Canan set forth four elements to be used to distinguish SLAPPS from other kinds of legal actions. Under this test, in order to qualify as a SLAPP, a case must be:

1. a civil complaint or counterclaim,
2. filed against nongovernmental individuals and organizations,
3. because of their communication to government bodies, government officials or the electorate, and
4. on a substantive issue of some public interest or concern.

Twenty-one lawsuits reported to this office as part of the suvey were described as meeting all of the above elements to qualify as SLAPPs under the Pring/Canan test.

For organizational purposes, the cases have been grouped into two categories based on the type of activity the survey respondents reported as resulting in litigation. The first category includes cases resulting from informal participation, such as speaking at public meetings, demonstrating, or writing to a public official, agency or newspaper. The second category includes more formal participation, such as pursuit of administrative and judicial remedies. The status of pending cases is current as of June 1993.

It should be emphasized that the case summaries are based on court documents and the statements made by respondents as part of the survey. Accordingly, no determination is made in this report relative to the legal validity or merits of the underlying litigation, except as may be reflected in court orders or other judicial documents.

A. Informal Public Participation

1. In 1987, Marion Moon of Tavernier (Monroe County) was sued by Index, Inc. for $900,000 in federal court. According to Ms. Moon, she was sued by Index because she and others in her neighborhood objected to issuance of a Department of Environmental Regulation (DER) permit requested by Index for the construction of a weedgate. Ms. Moon indicated that, in response to DER's requests for comments, she and others wrote letters of opposition. Shortly thereafter, Index filed suit against Ms. Moon in federal court claiming that she had misrepresented the property boundary of a parcel of land she had sold to Index 21 months earlier. Index claimed that Ms. Moon owed it an additional 100 feet of property. One year after the suit was filed, the federal court granted summary judgment in favor of Ms. Moon. The DER permit was granted to Index.

2. Index filed a second suit against Ms. Moon in Monroe County Circuit Court requesting declaratory relief and an injunction restraining her from prohibiting access to Index by way of a fence she had constructed. Seven months later the Circuit Court ruled in favor of Ms. Moon. This was appealed to the District Court of Appeal, which six months later affirmed the ruling of the lower court.

3. The third claim against Ms. Moon by Index and its president, Paul Charlap, took the form of a counterclaim for libel and intentional infliction of emotional distress. The claim derived from a letter allegedly written by Ms. Moon to her neighbors about Mr. Charlap and Index. The counterclaim was for $5 million in compensatory and punitive damages. Ms. Moon had filed suit against Index and Mr. Charlap in May 1990 to recover over $100,000 in defense costs resulting from the lawsuits filed against her. Her suit for malicious prosecution, abuse of process and intentional infliction of emotional distress sought approximately $3.3 million in compensatory and punitive damages. Two months later, the counterclaim against Ms. Moon was voluntarily dismissed.

4. A fourth suit was filed gainst Ms. Moon on April 26, 1991, by Indices (formerly Index) in federal court seeking to enjoin her state court action. On September 30, 1991, the court denied the request. The decision was appealed to the U.S. Court of Appeals for the Eleventh Circuit, which affirmed the decision of the lower court on February 3, 1992. The Court of Appeals ordered Indices to pay Ms. Moon the costs on appeal. Her suit to recover defense costs was resolved through a settlement almost five years after the first suit was filed against her. No information has been provided about the settlement, as it restricts Ms. Moon from discussing its terms.

In her responses to this agency, which were filed many months before the case settled, Ms. Moon expressed the view that Index filed the lawsuits against her

because the firm perceived her to be the most vulnerable of the neighbors because she is a poor, elderly widow living alone. Ms. Moon speculated that Index believed she was too poor to do anything but agree to give them the additional 100 feet of property. Ms. Moon wrote, "I did choose to fight," and said she borrowed money for her defense.

5. In Wakulla County, Tommy Hicks was sued in Circuit Court for slander based on comments he made at a public meeting of the Wakulla County Board of County Commissioners. Mr. Hicks voiced his opposition to the rezoning of property owned by Gary Kempton, whose attorneys sent a letter to Mr. and Mrs. Hicks threatening a lawsuit if they continued to oppose the rezoning. The suit, filed in March 1991, sought to recover $200,000 in compensatory and punitive damages. Shortly after the suit was filed, Mr. Hicks filed a complaint in circuit court pursuant to a provision of Chapter 163, Florida Statutes, that allows citizens to challenge development orders for inconsistencies with the local comprehensive plan. Two months later in May 1991, the court granted a motion to dismiss the suit. Mr. Hicks' defense was based primarily on the right to petition granted by the Constitution.

According to Bram Canter, the attorney who defended Mr. Hicks in the suit brought by Mr. Kempton, Mr. and Mrs. Hicks did not pursue their Chapter 163 complaint. This office has been unable to contact Mr. or Mrs. Hicks to learn their reasons for not pursuing their complaint in opposition to the rezoning. Attorneys fees and costs were not sought by Mr. and Mrs. Hicks.

6. In 1989, Aldo Guerrero was sued in Dade County Circuit Court by Cutler Landings, Ltd. for slander and tortious interference as a result of his statements to many governmental agencies and others, regarding the quality of homes built by Cutler Landings. In addition, he was involved in public demonstrations against the developer and the project, which were reported in local newspapers. Mr. Guerrero and his wife filed a counterclaim in connection with the first suit filed against him. The counterclaim names the plaintiffs who brought suit against him, as well as the general contractor, architect and manufacturer involved in the construction of Mr. and Mrs. Guerrero's home. The counterclaim, seeking judgment in the amount of $36,150 plus costs and interest, was for negligence, breach of contract and statutory violations. In his answer, affirmative defenses and counterclaim, Mr. Guerrero raises the First Amendment as a defense. After three years the original suit and the counterclaim are still pending.

7. In 1990, Cutler Landings filed another complaint in Circuit Court against Mr. Guerrero and Charles Roberts for trespass and tortious interference as a result of a visit they made to the Cutler Landings' sales office on February 24, 1990. The complaint sought damages, an injunction to prevent Mr. Guerrero from speaking against the project, and an injunction barring Mr. Guerrero and Mr. Roberts from entering Cutler Landings' property. This case is also pending.

8. A third suit was filed against Mr. Guerrero in May 1992 by Cutler Landings for trespass and tortious interference seeking an injunction and damages related to the same visit he made to the Cutler Landings sales office on February 24, 1990. After over a year the third suit is still pending.

According to Mr. Guerrero, he and other homeowners have contacted public officials at the local, state and federal levels alleging code violations and faulty construction of homes at Cutler Landings. Copies of letters from the Dade County Building and Zoning Department and the U.S. Department of Housing and Urban Development to Southcorp Construction, Inc. indicate that complaints to public officials about code violations and construction deficiencies resulted in directives to the developer to repair several homes and to pay certain investigative costs and fines to Dade County. Through all of this, Mr. and Mrs. Guerrero assert that they have been defending against SLAPPs for three and a half years while attempting to gain the promised and required repairs to their home.

Mr. Guerrero said the litigation has strengthened the commitment of the homeowners but it has drained his savings account. Because of his belief that the right to petition is too precious to give up, he and his neighbors continued to communicate with public officials.

9. In 1983, the Ocean Reef Property Owners Association and two of its officers were sued in Monroe County Circuit Court by the City National Bank of Miami. Ocean Reef is a community on Key Largo in the Florida Keys.

City National obtained Monroe County approval to develop Port Bougainville, a proposed resort community on North Key Largo. The Upper Keys Citizens Association filed a civil action against City National and Monroe County seeking an injunction and invalidation of the county's development approval. Ocean Reef provided financial contributions to the Upper Keys Citizens Association, and as a result City National sued the property owners association for more than $10 million in damages, an injunction, costs and fees. The suit alleged champerty and maintenance, and malicious conspiracy. Champerty is defined in the *American Heritage Dictionary* (Second College Edition) as the illegal sharing in the proceeds of a lawsuit by an outside party who has promoted the litigation. Maintenance is defined as an unlawful meddling in a law suit by assisting either party having the means to carry it on. *Id.*

Four months after the suit was filed, the court granted Ocean Reef's motion to dismiss with prejudice, based in part on the right to petition. Although the motion to dismiss sought costs for the defense, none was granted by the court. Anna Dagney Johnson, a member of the Upper Keys Citizens Association, reported to this office that the lawsuit affected membership in the association among Ocean Reef residents and resulted in reduced opposition to the Port Bougainville project.

Port Bougainville was never successfully developed as a resort community. The property was eventually purchased by the State of Florida under the Conservation and Recreational Lands program.

10. In April 1992, a suit for slander was filed by Upper Keys Marine Construction, Inc. against Anna Dagney Johnson and the Monroe County Commission. The lawsuit arose as a result of the County Commission's suspension of the construction company's permit to blast and mine in the Blue Waters Borrow Pit located in Key Largo. The complaint sought an injunction and damages against the County Commission. It also sought damages of more than $10,000 from Ms. Johnson on the theory that her testimony at several commission meetings contributed to or influenced the commission's decision to suspend the permits.

Ms. Johnson is president of the Upper Keys Citizens Association, a citizens group primarily concerned with the protection of the only living reef in North America and with safeguarding the quality of life and environment in the Florida Keys. In that capacity, she told commissioners at various public meetings that the construction company had not submitted required and/or proper surveys to the county. For this reason, she urged the county not to sign a stipulated settlement agreement that would have allowed the company to continue blasting. At these same meetings, Ms. Johnson also urged commissioners to adopt more protective blasting and mining ordinances. Ms. Johnson stated that her appearances before and statements to the County Commission were the sole bases for the lawsuit filed against her.

This case was dismissed just one month after it was filed, and the decision was affirmed on appeal to the Third District Court of Appeal two and a half months later. Ms. Johnson's motion to dismiss in part invoked the petition clause of the First Amendment. Although the motion requested attorney's fees pursuant to Chapter 57.105, Florida Statutes, none were granted by the court.

11. On January 24, 1990, Pet Rescue Inc., which operates a nonprofit animal shelter in Dade County, filed suit against Goldie Lewis and Sharon Bailey, members of the Coalition for People and Animals. The suit for temporary injunction, libel, slander and nuisance was filed following two Dade County Zoning Appeals Board meetings. At the meetings, Ms. Lewis spoke on behalf of a neighborhood group opposed to the granting of a variance to allow a trailer on the property, which is located in a single family residential neighborhood. According to Ms. Lewis, the neighborhood group was opposed to the variance because of the noise and air pollution caused by the shelter.

On May 2, 1990, the original suit was dismissed with leave to file an amended complaint which was filed on May 23, 1990. The amended complaint for libel and slander requested damages totalling more than $1 million. The amended complaint was dismissed 17 months later for lack of prosecution.

According to Ms. Lewis and a newspaper article provided to this office, she and the organization to which she belongs have been involved with government agencies and private individuals to protect the rights of persons and animals. They frequently investigate nonprofit charitable organizations that solicit public monies and purport to use those funds for charitable purposes.

Ms. Lewis stated that her only concern with respect to Pet Rescue, Inc. was to ensure that it was complying with the laws and regulations applicable to nonprofit corporations and was utilizing public funds in a manner consistent with its charitable purposes.

Ms. Lewis wrote that she was terrified upon receiving a summons on January 25, 1990, at the end of the zoning meeting. She is grateful that through Legal Services she was able to obtain pro bono representation, as she did not have the money to hire a private attorney. According to Ms. Lewis, her reputation has been adversely affected for the last two years as a result of this case. She wrote, "However, I am just starting to repair all the damage Mr. Mulloy has done to me and my co-defendant, Sharon Bailey. Both of us suffered emotionally for the two years it took of motions and court appearances before the judge in his chambers. It affected my health, and Ms. Bailey almost suffered a nervous breakdown."

12. *Krantz v. Hill* was filed in Hamilton County Circuit Court as a result of comments made at a 1990 public meeting. The organization Hamilton County Concerned Citizens joined the Hamilton County Commission and the City of Jasper in opposing the construction of a biohazardous waste incinerator in Jasper, a North Florida community midway between Jacksonville and Tallahassee. The City of Jasper and the County Commission requested an administrative hearing on the Department of Environmental Regulation's Notice of Intent to Issue regarding a permit for the incinerator.

Copies of letters provided to this office indicate that on several occasions public officials — including Hamilton County Commissioner Lamar Hill — and other area residents were threatened with litigation in their official capacities and as individuals, for opposing the construction of the incinerator. A suit was actually filed against Commissioner Hill as an individual, as a result of comments he made at a City of Jasper public meeting voicing his opposition to the construction of the incinerator. Although he is a governmental official, his case has been included in this report because he was sued as an individual.

Commissioner Hill was sued for slander by the developer of the incinerator in December 1990. The suit sought to recover damages resulting from Commissioner Hill's statements. In his answer to the complaint Mr. Hill raised the affirmative defense of privilege. In his counterclaim for damages in excess of $10,000, Mr. Hill asserts that his comments at the commission meeting were made in his official capacity as a County Commissioner and that the suit by Mr. Krantz

was filed for the purpose of preventing public debate "and discourage public officials from freely discussing the contested issues and to create a chilling effect to the opposition to his proposal for a medical waste incinerator." According to the counterclaim, Mr. Krantz filed the suit maliciously and without probable cause and for the purpose of harassing him. According to Mr. Hill's counterclaim, he has suffered great injury to his reputation, has been humiliated, intimidated and impaired in his ability to function as a County Commissioner.

Seven months later, on July 29, 1991, Mr. Hill was granted summary judgment on the main claim. An appeal was brought to the First District Court of Appeal, which dismissed it three months later on October 10, 1991. Mr. Hill's counterclaim is still pending.

In response to the questionnaire, Commissioner Hill wrote, "I sincerely hope this will help you understand the fears and anger our community is under. Maybe because of this, others will not be intimidated.... If S.L.A.P.P. lawsuits are allowed to continue a very important ingredient of democracy will be lost (Public Debate)."

13. According to Rolland Geiger, a resident of Rotonda West in Charlotte County, a lake that had been part of a stormwater management system was converted into a holding pond for treated effluent processed by the Rotonda West Utility Corporation in order to provide irrigation for the Pebble Beach Golf Course. Mr. Geiger said he discovered that the project had not been properly permitted and complained to several governmental agencies. According to Mr. Geiger, after he complained to many agencies the developer was granted after-the-fact permits by the county and the state for the irrigation pond project. According to Mr. Geiger, the construction and operation of the pond has adversely affected his property and the environment, and has caused physical and emotional injury to him and his wife.

On February 28, 1989, Mr. Geiger was sued for libel, slander and injurious falsehood. The suit, seeking damages in excess of $10,000, was filed by Rotonda Corporation, the developer and marketer of the Rotonda West project and its Pebble Beach Golf Course and country club, and by Cape Cave Corporation, the owner of the Pebble Beach Golf Course and adjacent undeveloped residential lots for sale as part of the Rotonda West project.

According to the complaint, Mr. Geiger wrote a letter to the president of the Rotonda West Homeowners Association, expressing his concerns about the project's pollution, potential health risks, stench, noise from sprinkler system, devaluation of property, flooding and loss of wildlife. The complaint alleges that although Mr. Geiger was informed by the developer and governmental agencies

that his concerns were unfounded, he wrote letters to the editors of local newspapers raising similar concerns as those raised in his letter to the Homeowners Association President.

The complaint alleges that the letters contained untrue and libelous statements raising environmental and public health concerns about the pond. According to the complaint, Mr. Geiger addressed a public meeting of the Rotonda West Homeowners Association, held press conferences with the media and spoke to others accusing the developer of not obtaining necessary permits and raising public health concerns about the pond.

In his answer and affirmative defenses, Mr. Geiger stated that his letters were not libelous, that anything said by him about the sewage effluent pond was true, and that anything he said or wrote was fair comment upon a matter of general public interest and a constitutionally privilege expression of opinion.

According to the pleadings, Mr. Geiger countersued Rotonda Corporation and Cape Cave Corporation seeking injunctive relief to stop construction of the holding pond adjacent to his property without proper land use approval. This case is pending.

On February 7, 1989, Mr. and Mrs. Geiger, as Co-Trustees under Trust Agreement, filed a complaint for damages against Cape Cave Corporation and other companies operating or conducting business on behalf of Cape Cave Corporation. The complaint alleges negligent construction of the sewage effluent holding pond adjacent to property owned and occupied by Mr. and Mrs. Geiger, who said their property has been damaged as a result of negligent and careless construction by Cape Cove. It alleges intentional infliction of severe emotional distress as a result of the conduct of the construction companies during the course of construction of the sewage effluent holding pond. The complaint alleges nuisance in the operation of the pond, and contends that Cape Cave had other property available where it could have constructed the effluent holding pond. The complaint alleges that as a result of the construction and operation of the effluent holding pond, the property surrounding the pond, including the Geigers' property, has become infested with insects. According to the complaint, the pond emits a noxious odor that did not exist previously. This case is also pending.

According to Mr. Geiger, he was sued for libel and slander as a result of the letter he sent to the editor of a local newspaper and his complaints to various agencies about the impacts of the project. Mr. Geiger believes that the suit against him was filed to keep him quiet. According to Mr. Geiger, his wife suffered a nervous breakdown as a result of this case. After more than four years, this case is still pending.

14. On February 6, 1992, a suit was filed against Robert and Joan Vardaman of Fort Lauderdale, by Organic Recycling, Inc. of Pembroke Pines, Broward County. The complaint seeks an injunction and $250,000 in damages for alleged harassment, slander, libel and business interference. The complaint states that the Vardamans, without justification, repeatedly called different inspection boards of the city and county to report perceived violations.

In their motion to dismiss, the Vardamans indicated that they oppose the business' permit application because the corporation is operating a landfill without linings in the cone of influence of an aquifer. The motion indicated that the suit was filed against them following the Vardamans' comments regarding the permit applications. The motion to dismiss in part raised the First Amendment as a defense and requested the award of costs and attorneys fees. The motion to dismiss was denied by the court.

On June 3, 1992, the Vardamans filed answers, affirmative defenses and counterclaims. According to the Vardamans, information provided by the corporation on its permit application misrepresented the nature of the operation, which has caused pollution to the ground and groundwater. The Vardamans alleged that Organic Recycling is using the filing of the complaint as a weapon of intimidation. The Vardamans contend that Organic Recycling voluntarily applied for licenses to operate its business adjacent to residential properties, and operating a landfill, dreging and filling the property and removing limestone on environmentally sensitive lands within the cone of influence of wellfields located beneath its property subjects Organic Recycling's operation to the strictest public scrutiny.

The Vardamans and other citizens filed counterclaims for an injunction and damages against Organic Recycling and Nojosy Corp. The counterclaims allege that in 1984 Nojosy purchased the vacant land adjacent to the Vardamans' homestead, excavated large amounts of limestone from the property, and filled the excavated area with water, creating the Nojosy Lake. The counterclaim alleges that in 1990 and at present, Nojosy caused large amounts of waste products, land clearing debris and other unknown materials to be brought to the Nojosy land in close proximity to the Nojosy Lake. The counterclaim alleges that the use of the property caused the Nojosy Lake to become contaminated with high levels of fecal coliform, and that Organic Recycling was the occupant and operator of the Nojosy land for a portion of the time during which contamination was detected. The counterclaim alleges that the principals of Nojosy are also principals of Organic Recycling. According to the counterclaim, the operation of a chipper by Nojosy and Organic Recycling, in close proximity to the Vardamans property, has caused great amounts of dust and debris to come onto their property and has affected their health as well as the health of their two minor granddaughters and others surrounding the property. It alleges that the storage of large amounts of waste products close to the Nojosy lake has caused obnoxious

odors, rats, insects and flies to such an extent as to cause tremendous hardship and interference with the property rights of the Vardamans and surrounding residents.

The counterclaim for more than $10,000 is for private nuisance, public nuisance and abuse of process and to compel removal of a fence that allegedly encroaches into dedicated public right-of-ways. It seeks compensatory and punitive damages, costs and attorneys fees, removal of the fence and the mounds of manure and other debris from public right-of-ways, and expenses for continued monitoring of adjoining properties for levels of pollution.

According to the Vardamans' attorney, the defense has thus far cost the Vardamans approximately $13,000. After 16 months, the case is still pending. Opposition dropped after the business went into receivership.

B. Formal Participation

15. In 1990, the Sunset Islands 3 and 4 Property Owners, Inc. and 15 area residents filed a complaint against the City of Miami Beach and the developers of an 800-unit triple tower development in the City of Miami Beach, opposing the issuance of the building permit for the towers. The complaint was filed pursuant to Chapter 163, which provides for citizen enforcement of the local comprehensive plan through development orders. As a result, the City of Miami Beach, Dade County, Yacht Club Southeastern, Inc., and Pacific International Construction, Inc. filed a counterclaim in Circuit Court seeking treble damages in the case (*Sunset Islands v. City of Miami Beach, et al.*). The counterclaim, filed in 1990, alleges conspiracy and antitrust violations against the homeowners association. Mr. William A. Ingraham, Jr., the president of the homeowners association, indicated that as of March, 1993, the cost of defense had reached at least $50,000, most of it for the hiring of an antitrust attorney.

Mr. Ingraham wrote to this office that the litigation is extremely upsetting and intimidating to the individuals who were countersued, their families and members of the association. He indicated that the litigation will not affect their position on the project as long as they can fund "the enormous legal expense necessary to oppose the developers' high priced law firms."

In May 1993, after almost three years of litigation, the case has been abated due to a settlement. According to the settlement, one of the condominium towers along a canal will be eliminated with townhouses allowed in its place. Each party will pay its own fees. The original suit and the counterclaim by the developer will be dismissed upon certain conditions being met.

16. In 1990, Alfred Test and Donald Shafarman were sued by Punta Gorda Isles, Inc. for their opposition to a proposed shopping center on property owned by the company within the City of Punta Gorda, Charlotte County. Mr. Test and Mr. Shafarman represented PGI Concerned Citizens, and the complaint for damages was triggered when they filed an appeal to the Board of Zoning Appeals objecting to the allowable uses under the zoning for the shopping center property. In addition, the two men filed a Petition for Writ of Mandamus against the City of Punta Gorda and the city's Planning and Zoning Director to compel the city to hold a public hearing on the rezoning of the property for the proposed shopping center.

The complaint filed in Circuit Court by the company sought damages and alleged abuse of process, slander of title and interference with a contractual relationship. After four months, the parties — the company and Mr. Test and Mr. Shafarman on behalf of the PGI Concerned Citizens — reached a settlement through which Punta Gorda Isles, Inc. dismissed its complaint. In exchange for the dismissal, PGI Concerned Citizens dropped its opposition to the project, and Mr. Test and Mr. Shafarman dismissed their petition for Writ of Mandamus. The shopping center has been built.

In response to the questionnaire, Mr. Test expressed his view that the complaint by the company was a SLAPP against more than 350 citizens who "sought nothing more than a fair and open hearing" on a land use decision that affected the city's property values and the quality of life of its residents.

17. In 1985, environmental attorney Thomas Reese and 16 environmental and civic organizations were sued in circuit court for more than $33 million in compensatory and punitive damages by Cape Cave Corporation (the same company that has sued Mr. Geiger, see item 13, above). The suit was prompted by the groups' opposition to the use of septic tanks by Cape Cave in its development of the Rotonda Villas in Charlotte County. Mr. Reese and the organizations requested a hearing on a Notice of Intent to Issue a permit by the Department of Environmental Regulation. Cape Cave Corporation sued for abuse of process, interference, and conspiracy. In his Motion to Strike Complaint as Sham Pleading or in the Alternative Motion for Summary Judgment, Mr. Reese raised the petition clause as part of the defense and recommended that the court adopt the special rules of pleading and procedure set forth by the Colorado Supreme Court in the *Protect Our Mountain Environment* case.

A year and a half later, the court granted summary judgment in favor of Mr. Reese and the organizations. In its order, the court found that Cape Cave's lawsuit had "an obvious chilling effect" on the organization's First Amendment right to petition the government for redress of grievances. The cost of defense against the SLAPP exceeded $7,500. Attorneys fees were recovered through a settlement with the plaintiff.

According to Mr. Reese and others who reported this same case, the litigation made them unwilling to push their opposition to an Army Corps of Engineers permit sought by Cape Cave Corporation. Also, the respondents reported that the litigation resulted in a decline in membership in some of the organizations that were sued.

18. In 1984, Save Our Neighborhoods, Inc., and three individual citizens were sued in Monroe Circuit Court by Austin Laber, the developer of the Sands Beach Hotel in Key West, over their opposition to construction of the project. The complaint, which alleged civil conspiracy, abuse of process, fraud and deceit, intentional interference, slander of title, and deprivation of civil rights, sought more than $51 million in compensatory and punitive damages. The complaint cites Save Our Neighborhoods' appeals of local decisions, objections to the use of federal grant funds for the project, communications with state and federal officials, and appearances at local public meetings and hearings as the reasons for the complaint.

Henry Morgenstern, who was one of the defendants in the case and the attorney who represented the local citizens in opposing the project, said the developer voluntarily dismissed his suit after eighteen months "on the condition that the defendants give a public apology (which the developer wrote) and withdraw all appeals and objections." The defendants agreed, Mr. Morgenstern said, because the time and expense involved in the litigation had a high emotional and economic toll on the defendants, draining their resources and forcing them to dismiss their actions.

In an unpublished letter to the editor of the *Key West Citizen*, provided by Mr. Morgenstern, he wrote, "No matter how frivolous or malicious a jury might later find Mr. Laber's suit to be, it cost each of the defendants many hours of their time and many thousands of dollars out of their own pockets to fight through the legal process along the way. ....the fact remains that the worst casualty is not the defendants — though they have been sorely hurt — but the chilling of the public right to challenge the actions of big business by petitioning the government." Referring to the public apology event, Mr. Morgenstern wrote in his letter to the newspaper, "If it was a historic day, it was as well a reminder of the ways that the rich can abuse their power to subvert the democratic process."

19. Also in the Florida Keys, a suit was filed in Circuit Court in May 1985 by Clarence and Jacqueline Keevan against the Florida Keys Audubon Society, the Florida Keys Citizens Coalition and three individuals. The Keevans' complaint alleged malicious prosecution and libel on the part of the defendants. The suit cites the defendants' request for an administrative hearing on a DER Notice of Intent to Issue a permit for a dock the Keevans hoped to construct at Shark Key in Monroe County, and the defendants' publication of a newsletter in which the project was described as "odious." The Keevans sought more than $605,000 in

compensatory and punitive damages. After one and a half years, the court granted the defendants' motion to dismiss the case on all counts. No attorneys fees were sought.

According to Captain Ed Davidson, one of the defendants in the case, his defense alone cost him $6,000. He indicated that the litigation prompted the two organizations to drop their opposition to the project. He wrote, "...officers of both organizations became extremely gun-shy, some even resigning. Audubon ceased to function except minimally for several years...."

20. On July 25, 1991, the Concerned Citizens of Putnam County for Responsive Government and six individuals were sued in Circuit Court by the Florida Fern Growers Association and several individuals in the business of producing and growing ferns. The complaint is for injunctive relief, malicious interference with advantageous business relations, and conspiracy to intentionally and maliciously interfere with advantageous business relations. The complaint seeks more than $10,000 in damages, attorneys fees and costs.

According to the complaint, the sole purpose of the Concerned Citizens is to oppose any and all applications for consumptive water use by fern growers. The complaint cites two petitions for administrative hearings, which were dismissed for lack of standing, filed by the Concerned Citizens with the St. Johns River Water Management District, objecting to the consumptive use permit applications filed by fern growers. In addition, the complaint alleges that subsequent to having the Concerned Citizens petitions dismissed, members of the organization conspired among themselves to individually file objections to "all applications of fern growers," irrespective of whether the individuals filing the petition were substantially affected by the permit. According to the complaint, the Concerned Citizens and individuals named in the complaint have objected to 83 applications for consumptive use permits by many fern growers; furthermore, they have never objected to the use of water for any other purpose than the growing of ferns.

According to the complaint, the challenges to the applications are meant only to harass, annoy and harm the fern growers; these challenges have caused irreparable harm to fern growers because they are unable to obtain a consumptive use permit until the administrative process is completed. The complaint alleges that the defendants have no standing to bring these challenges. The fern growers requested a temporary restraining order, a preliminary and a final injunction preventing the defendants from filing objections to the consumptive use permit applications.

Bette Majewski is one of the individuals named in the complaint. According to her response to the complaint, she did not conspire with others to file objection to consumptive use permit applications filed by fern growers. In her response

she stated that she has been substantially affected by the apparent over-allocation of the water resources of the Crescent City Ridge Floridan Aquifer System, including a drop of approximately 10 feet in the potentiometric water level of her well. In addition, her response alleges that she has been unable to use her boat, which has been landlocked since 1984. Also, as indicators of groundwater depletion she cites an increase in the pH levl of her well water, heavy smells of sulfur and heavy iron in her well water.

The defendants filed a Motion to Dismiss with Prejudice, raising First Ammendment protections as part of the defense. They also requested the award of costs and attorney's fees. The court dismissed the case with prejudice for failure to show that malice was the sole basis for the citizens' conduct. The court found that "Plaintiffs' allegations are not sufficient to vitiate Defendants' privilege to petition the government under the Federal and Florida Constitutions." The Fifth District Court of Appeal, on April 2, 1993, reinstated the suit citing the Florida Supreme Court's *Londono* decision and reversed the trial court's conclusion that the fern growers' complaint failed to state a cause of action.

Ms. Majewski's response to the complaint states that "I, we, have not abused the administrative hearing process; if anything we — who cannot afford attorneys to assist us with them — have been the abused! ...Essentially, all we have done is exercise our Constitutional rights of free speech and to petition our government for redress of grievances...."

In response to the questionnaire mailed by this office, Willard Fuller, vice president of the Concerned Citizens of Putnam County For Responsive Government, wrote that although the litigation has not changed the group's position (opposition to consumptive use permits due to potential adverse impacts on groundwater and other resources), the litigation is causing considerable trouble, time and expense.

This litigation has been ongoing for 22 months. The defendants have dropped all requests for administrative hearings of the District's permits. The defendants are being represented essentially on a pro bono basis by the Sierra Club Legal Defense Fund.

21. In 1991, James and Kathy Saboff filed an application for a Management and Storage of Surface Water (MSSW) permit in connection with the construction of a single family unit adjacent to the Little Wekiva River, a waterbody that receives special protection pursuant to the Wekiva River Protection Act and the rules of the St. Johns River Water Management District. The district issued its Notice of Intent to issue the permit allowing construction of the unit, a swimming pool, a sidewalk and an earthen berm. The permit included a condition that the

remaining undeveloped property be subject to either deed restrictions or a conservation easement prohibiting any construction or clearing except for underbrush and trees of less than four inches in diameter.

Documents provided by the Florida Audubon Society show that in July 1991, the Friends of the Wekiva and Audubon filed a petition challenging the issuance of the permit and requesting a formal hearing pursuant to Chapter 120.57(1), F.S., on several grounds. In November 1991, they filed an amended petition for a hearing, still seeking denial of the permit or, in the alternative, requiring that the permit condition providing for the easement or deed restrictions be modified to remove the exceptions to the prohibition on clearing.

On November 15, 1991, the Saboffs filed suit in Seminole County Circuit Court against the St. Johns River Water Management District, the Florida Audubon Society, the Friends of the Wekiva, and several individuals, including a District employee. The suit challenged the constitutionality of the District's rules on the Wekiva River habitat protection zone, and alleged due process and equal protection violations and conspiracy. The Saboffs asked for compensatory and punitive damages, and an injunction to allow the Saboffs to proceed with construction of the unit which had already begun.

On January 9, 1992, the parties entered into an agreement for partial settlement that allowed the Saboffs to proceed with the construction authorized by the permit and restricted the issues on appeal to the condition that authorized certain exceptions to the prohibition on clearing within the conservation area of the lot. In exchange, the Saboffs agreed to drop the request for an injunction in the circuit court complaint.

On June 6, 1992, the hearing officer issued a recommended order on the permit challenge filed by the Friends of the Wekiva and Audubon finding that both organizations had standing to bring their challenges. He recommended the issuance of an order that further restricted the activities allowed in the conservation area of the lot (the area not needed for the house, a swimming pool, the driveway and the sidewalk). On August 7, 1992, the District issued its Final Order adopting the recommendation of the hearing officer.

On October 23, 1992, the Saboffs filed a Second Amended Complaint seeking a determination of the validity and constitutionality of the District's rules which describe the Wekiva River Riparian Habitat Protection Zone. It alleges violations of due process rights, inverse condemnation and interference with privacy rights. With regard to the other defendants, the suit alleges tortious interference with an advantageous business relationship and contractual rights, and conspiracy. It seeks damages and fees.

The suit alleges that because of the administrative hearing requested by Audubon and Friends of the Wekiva, the Saboffs were not allowed to begin construction of their home. The district approved the recommendation of a hearing officer and further restricted the activities allowed in the conservation area of the lot. As a result, according to the Saboffs' suit, the findings of the hearing examiner and the final order issued by the district had the same force and effect as a taking without just compensation, or in the alternative a diminishing of value.

The Florida Audubon Society raised a number of affirmative defenses, including the First Amendment to the U.S. Constitution. Audubon's response alleges that the suit filed by the Saboffs is frivolous, malicious and in bad faith in that it claims that the defendants should have known that they did not have standing, when in fact the hearing officer found that they did and granted the relief they sought. The response requested attorneys fees and costs. After 19 months and several amended complaints in federal and circuit courts, the case is still pending.

C. Other Reported Litigation/Actions

During the survey process, three individuals reported actions against individuals and community groups that reportedly resulted from public participation activities. Although these cases were not reported as meeting the Pring/Canan definition of SLAPPs, they are included for information purposes.

1. Lloyd Miller of Homestead, Dade County, reported that in 1985, as a member of the Redlands Citizen Association, he became active in opposing efforts by bankers, developers, real estate agents and other local businesses to urbanize the area.

Mr. Miller said that in 1988, he attended a meeting of the Dade County Commission on the Comprehensive Development Master Plan. At the meeting, Mr. Miller stated that the county rejected certain projects endorsed by Bill Losner, president of the First National Bank of Homestead, and opposed by Mr. Miller. After the meeting, an altercation allegedly took place between Mr. Miller and Mr. Losner. Mr. Losner subsequently sued Mr. Miller for assault and battery and intentional infliction of emotional distress.

Shortly thereafter, according to Mr. Miller, several prominent activists, including Marjorie Stoneman Douglas, established the Lloyd Miller Legal Defense Fund. According to Mr. Miller, Mr. Losner then unsuccessfully attempted to take Ms. Douglas' deposition in the case.

Mr. Miller counterclaimed, seeking damages for assault and battery and intentional infliction of emotional distress. He indicated that his public participation activities have been curtailed by the lawsuit and that he fears for

his personal safety. In April 1992, a jury found in Mr. Miller's favor and recommended $80,000 in compensatory damages and $20,000 in punitive damages. Following the jury verdict, however, the judge granted a motion for a new trial based on the cumulative adverse effect of trial errors. Mr. Miller has appealed the order to the Third District Court of Appeal.

Mr. Miller wrote to this office saying his experience has led him to the belief that as citizens challenge local development orders pursuant to the Growth Management Act, they will be faced with developers and others who will "continue to intimidate organizations and individuals with SLAPP suits unless something happens to make it expensive for them to do so.... It's a damned shame that a citizen is required to match dollars with corporations or wealthy pro-growth advocates in order to exercise his right to First Amendment free speech in protection of his own and the public interest."

2. In 1984, University of Florida law professor Joseph Little brought an action for declaratory judgment and injunctive relief challenging a portion of the state's 1983 General Appropriations Act. Mr. Little represented himself, the Florida Defenders of the Environment and Marjorie H. Carr in the challenge, which sought to prevent the use of Conservation and Recreational Lands funds for the purchase of Munisport, a parcel of land in the City of North Miami used as a garbage dump. His challenge was successful, with the Florida Supreme Court affirming the district court's decision to strike the appropriation from the General Appropriations Act. Professor Little stated that as a result, the City of North Miami passed a resolution censuring him for improperly using state funds to represent private parties in litigation against the interests of the city and the State of Florida. Mr. Little brought a 42 U.S.C. Section 1983 action in federal court against the city and others challenging the resolution. The case was dismissed by the trial court, but the Eleventh Circuit Court of Appeals reversed that decision and remanded the case to the lower court. The suit was settled with Mr. Little receiving monetary and non-monetary relief from the city.

The Eleventh Circuit noted that Mr. Little's representation was a form of political expression protected by the First Amendment. The court noted that during oral argument, the city admitted to passing the resolution for the purpose of getting Mr. Little fired.

3. In 1990, the State Attorney for the Eighth Judicial Circuit received a formal complaint regarding the activities of Friends of Alachua County. The criminal complaint, lodged by Craig Hedgecock, requested an investigation into whether Friends of Alachua County had violated the law by failing to register as a political action committee. According to the complaint, the organization had purchased a newspaper advertisement opposing a local sales tax referendum and school

bond, and had published a newsletter "in which strong positions are taken on issues." The State Attorney's Office referred the complaint to the grand jury. According to the State Attorney's Office, the grand jury returned no indictment.

Iris Burke, who serves as Secretary to the organization, wrote to this office: "We recognize that our paper is not polished, but we are proud of it and believe that it represents something that is precious in our American tradition — a voice for the interests of the 'little people.' I am very concerned that Mr. Hedgecock and others in the development community will continue to try to find ways to silence our newspaper, as it has been a major irritant to them."

Ms. Burke said she fears that the election law approach may become a new tactic against environmental organizations active in electoral issues.

II. Threats of Litigation

The threats of litigation reported to this office in writing and by telephone covered the period from 1986 to 1991. As of the writing of this report, the ten cases reported in writing had resulted in only one suit actually being filed. Collectively, these cases totaled at least 38 threats reportedly made to individuals and agencies.

Threats of litigation have allegedly been made as a result of opposition to developments at the local, regional, state and federal levels. This opposition ranges from speaking at a local public meeting or hearing to using administrative and judicial processes.

As previously explained, Florida laws enable citizens and groups who meet certain criteria to challenge development decisions made by local, regional and state agencies. However, these challenges can cause delays in construction schedules, creating the potential for disputes between competing interests — including the possible threat of litigation.

1. Dale and Susan Hasner of Melbourne, Brevard County, reported receiving a letter in April 1991 from the president of GCOM, Inc. demanding $953,000 because of Mr. Hasner's letters to Brevard County Commissioners regarding a landfill operated on property in which GCOM has an interest. The letter said the company president, Jay B. Staggs, would file for "remedial mitigation" if he did not hear from Mr. Hasner within ten days. Mr. Hasner reported to this office that three of his neighbors received similar letters from Mr. Staggs. Mr. Hasner had his attorney respond to the letter, and he reported no further communication from Mr. Staggs.

2) Herbert Winkler of Sarasota wrote of his experience with a threat of litigation in 1986, in connection with his public objection to the operation of the Azure Tides Beach Bar on Sarasota's Lido Beach. According to Mr. Winkler, he voiced his concerns at a public meeting, and the City of Sarasota subsequently received correspondence from a Washington, D.C., law firm enclosing a copy of a proposed civil rights action against the five city commissioners, Mr. Winkler and another resident. The threatened action sought $3.85 million, and Mr. Winkler says he believes the threat stifled the City Council.

3) Morgan Levy, president of the West Dade Federation of Homeowner Associations, reported two letters from attorneys representing the Montenay Power Corporation, operator of the Dade County Resource Recovery Plant. The letters, copies of which were provided to this office, threatened litigation against him, the federation and others for their opposition to the operation and expansion of the facility. The opposition included letters to the Department of Environmental Regulation and state legislators. Despite the litigation threats, Mr. Levy said federation members planned to continue "exercising our first amendment rights that we understand and cherish."

4. Denise Wingo of Tallahassee reported that she spoke at public hearings, lobbied county commissioners and wrote letters to her neighbors asking them to become involved in opposing the approval of Bannerman Corners, a proposed 36 acre commercial development. As a result of these efforts, she says, threats were passed on to her by third parties and she says the same developer made threats to other members of the Bradfordville Citizens Task Force. Ms. Wingo says she sought legal counsel and has not been deterred in her opposition to the project but that other task force members may have been affected by the litigation threats.

5. David Feldman, a solid waste management consultant and chairman of the Florida Alliance for a Clean Environment, reports having been threatened with litigation on several occasions because of his comments at public meetings in opposition to the construction of municipal solid waste incinerators. He reports that his position on projects has not been changed by the threats because he is aware that such threats are rarely carried out.

Formal Public Participation

6. Sara Harman withdrew her request for an administrative hearing on a possible DER permit to the Polynesian Isles Homeowner Association for the dredging of a channel in state waters. Ms. Harman says she had been told that as a result of her actions she may find "that some people were considering suing her." In a letter to then-DER Secretary Carol Browner, Ms. Harman wrote, "Although my

only purpose in challenging this variance has been in the public interest ... certain remarks and actions have occurred in recent weeks which I perceive as an indication of potential future reprisals upon my financial stability."

7. Concerned about the possible impact on drinking water supplies from the deepening of the Vickers Grove Sand Mine in Indian River County, Carol Corum and seven others individuals filed a petition for an administrative hearing with the St. Johns River Water Management District. According to Ms. Corum, mine owner Henry Fisher called her at her home and threatened to sue her.

Ms. Corum sought legal advice, and says the threat of litigation did not affect her position on the project. However, a local newspaper reported the threats and said three of the eight petitioners for the hearing withdrew from the petition.

Ms. Corum reported that after receiving the interrogatories for the administrative hearing, she had to withdraw her opposition because of the lack of money to hire an attorney and expert witness and having to take time off from work to help in the case. After she withdrew, the other challengers also withdrew and the case was dropped. Ms. Corum wrote "After I signed off, I felt mad. I still believe that sand mine is dangerous with all my being and I can't do anything about it. Dr. Fisher with his millions of dollars and hired spokesman out matched me. That made me mad! If only I had his resources. I was mad that I have no money to defend my beliefs." Ms. Corum has since become an elected official in the City of Sebastian.

8. As previously discussed in this report, issues surrounding a proposal to build a biohazardous waste incinerator in Jasper, Hamilton County, have resulted in a lawsuit filed against County Commissioner Lamar Hill. In addition, this office has received copies of letters sent by TSI Southeast President Kenneth R. Krantz, the developer of the incinerator, to Hamilton County, the City of Jasper, the Hamilton County Development Authority and others. The letters, which threaten legal action, were sent to a total of 22 individuals and public agencies. Several area residents called this office to report anonymous threatening telephone calls to project opponents, and some expressed fear for their safety and that of their families.

9. Jack Maney, conservation chairman of the Turtle Coast Sierra Club Group, reported that in 1988 and 1989 his organization became active in opposing Brevard County's plan to build a golf course where the group believed it would threaten wildlife and wetlands. Members spoke at public meetings and wrote letters of opposition to public officials, and eventually the organization filed for an administrative hearing with the St. Johns River Water Management District. As a result, Mr. Maney says, the county threatened to sue the Sierra Club for

$150,000, but county officials decided not to pursue litigation after Florida Today newspaper published a guest editorial he wrote about the litigation threat. The permit for the golf course eventually was granted.

10. According to Michael Woodward, president of the Sawmill Slough Conservation Club in Jacksonville, his group filed a petition for an administrative hearing with the St. Johns River Water Management District on a proposal by the University of North Florida to construct a campus "loop road" through a nature preserve containing wetlands. Mr. Woodward says the university blocked the group's attempts to view public records concerning the project, but still billed him $1,296.01 for processing and preparing records. Mr. Woodward says the university threatened him with civil action to recover the money, and only after this office intervened did the university drop the charge and allow club members access to the documents at a reasonable copying charge.

Appendix B

SLAPP Questionnaire

Questionnaire

1. Your name and/or your organization's name, address, phone and FAX numbers.

2. Were you or your organization threatened with litigation for opposing a project? Please provide the name, nature and location of project, and governmental agency involved. Please specify whether the threatened legal action resulted from expressing your opinion (e.g. speaking at a public meeting, writing letters of objection, etc.) about a project or a governmental action, or because of the filing of a formal objection to an approval or some other governmental action (e.g. Chapter 120 proceeding, appeal of a local ordinance, request for review, etc.)

3. Did you or your organization seek legal advice regarding the threatened legal action? If possible, please provide the name, address and phone number of the attorney who provided you with legal advice.

4. Did the threat of litigation affect your position or your organization's position on the project? Please describe how.

5. Was litigation filed? Please provide copies of all pertinent papers related to the litigation, including pleadings, motions, and orders of the court. If not available, provide as much of the following information as possible: the name(s) and address(es) of the person(s) and/or organization(s) named in the complaint, the name(s) and address(es) of the person(s) or organization(s) filing the complaint, the case number and the name of the court where the complaint was filed.

6. Did you or your organization withdraw opposition or change position on the project as a result of the pending litigation? Briefly explain reasons.

7. Describe the outcome of the litigation. Was the developer required to pay attorneys fees? Did the developer appeal? Is there anything not contained in the legal papers you are providing about the case that you wish to bring to our attention?

8. Please provide the name, address and phone number of the attorney who represented you or your organization in the litigation. If possible, we would appreciate an estimate of the legal fees you had to pay to defend yourself in the litigation.

9. Do you have other comments or suggestions concerning SLAPPs?

Attorney General's Office
Strategic Lawsuits Against Public Participation
Questionnaire Instructions

Thank you for participating in this study. Your experience with SLAPPs will be very helpful in understanding this issue. We would appreciate receiving your response to the questionnaire and supporting documentation as soon as possible.

In conducting this study we may want to contact the attorney(s) who represented you in the case you are reporting, to obtain additional information or clarification about the case. Please indicate whether you authorize us to contact your attorney(s).

Yes ☐ No ☐

_____

Signature

Additionally, please be advised that as a public agency, this office is not authorized to keep documents confidential at the request of the sender. Accordingly, if any of the material you plan to send to this office about SLAPPs contains information you wish to keep confidential, please block it out or delete it from the package.

Please use one questionnaire form for each of the cases you wish to report. If necessary, please use additional pages to complete your answers.

If you are aware of other individuals or organizations that may have been involved in SLAPPs, please provide us with their names, addresses and phone numbers.

Responses to the questionnaire and pertinent legal papers should be forwarded to Ms. Diana Sawaya-Crane, Environmental Liaison, Attorney General's Office, The Capitol, Tallahassee, Florida 32399-1050. Please call her at (904) 487-1963 if you have any questions about the questionnaire. Thank you for taking the time to help us in this effort.

Appendix C

Summary of SLAPP Alternatives Considered in Other States

1. Immunity from Suit for SLAPP Targets:

a. Nature of Immunity:

1) Absolute or qualified immunity for communications to a public entity about an issue of public concern.

2) Absolute or qualified immunity for communications to the general public, including news organizations, about an issue of public concern.

b. Scope of Protection:

1) Limited to issues or proceedings pending before a public entity.

2) Limited to reports of potential violations.

3) Applicable to all issues under the jurisdiction of a public entity.

c. Burden of proof:

1) On the plaintiff to establish that communication was not made in furtherance of First Amendment rights.

2) On the SLAPP target to demonstrate that communication was made in furtherance of First Amendment rights.

2. Expediting the Case:

a. Adoption of *Protect Our Mountain Environment* standard:

A motion to dismiss based on the First Amendment is processed as follows:

1) Treated as a motion for summary judgment and expedited.

2) Burden of proof is shifted from the SLAPP target to the plaintiff and a heightened standard (strict scrutiny) of review is applied.

3) The plaintiff is required to prove all of the following to survive the motion to dismiss:

i. target's petitioning was devoid of reasonable factual support or lacked any cognizable basis in law; and

ii. target's primary purpose was harassment or some other improper objective; and

iii. target's activity adversely affected a legal interest of filers.

b. Provide for a motion to strike by the SLAPP target based on First Amendment rights, requiring the plaintiff to establish that he is likely to prevail in the suit. Stay discovery until a ruling on the motion to strike.

c. Provide that motions to dismiss filed by SLAPP targets will be expedited and granted if the SLAPP target demonstrates that the suit involves protected speech, unless the plaintiff demonstrates that the suit has a substantial basis in law or it is supported by a substantial argument for an extension, modification or reversal of existing law. Provide for motions for summary judgment to be similarly expedited and evaluated, except that the plaintiff must also demonstrate that the suit has a substantial basis in fact for the motion not to be granted.

3. Attorneys Fees and Costs:

a. Mandatory and automatic upon defense prevailing in SLAPP action. No separate pleading or action required.

b. Revise statutes, to broaden circumstances authorizing the award of fees, e.g. substitute lack of substantial justification for "a complete absence of a justiciable issue of either law or fact."

c. Adopt Rule 11 type sanction for filing frivolous or vexatious pleadings.

4. Countersuits - SLAPP-Back Lawsuits for Damages:

a. Nature of Damages:

1) Compensatory.

2) Punitive.

3) Treble damages.

b. Timing of request for damages.

1) Upon prevailing in SLAPP defense.

2) As part of the SLAPP defense motion (to strike or to dismiss, or motion for summary judgment).

3) As a claim or counterclaim pursuant to a new cause of action for violations of First Amendment rights. This would be in addition to other existing torts such as malicious prosecution, abuse of process and others.

c. Determination of Measure of Damages:

Adopt a special standard for SLAPPs, e.g. sliding scale of liability based on the egregiousness of the SLAPP.

5. Intervention:

a. Public entity or media organization that received communication from SLAPP target.

b. Attorney General.

c. Other, e.g. create office of public intervenor to represent SLAPP targets.

6. Public Education:

a. Work with the Bar to compile a list of attorneys who specialize in SLAPP defense and are willing to work on a pro bono basis.

b. Develop a SLAPP defense manual to be used by individuals who must represent themselves in SLAPP cases.

c. Develop a public participation manual to educate the public about defensible advocacy.