REPORT OF THE

SLAPP Study Committee of the Virginia Bar Association

TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA

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MEMBERS OF THE COMMITTEE

M. Langhorne Keith, *Chairman*
Steve W. Bricker
Richard K. Bennett
John Foote
John Y. Pearson, Jr.
The Honorable Joseph V. Gartlan, Jr.
The Honorable J. Samuel Glasscock
The Honorable Jean W. Cunningham

STAFF

DIVISION OF LEGISLATIVE SERVICES

Mary P. Devine, *Senior Attorney*
Cynthia G. Liddy, *Executive Secretary*

Report of the
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Virginia Bar Association
To
The Governor and the General Assembly of Virginia
Richmond, Virginia
January 1993

To: The Honorable L. Douglas Wilder, Governor of Virginia,
and
the General Assembly of Virginia

On June 17, 1991, Allen C. Goolsby, President of the Virginia Bar Association appointed the following committee to study strategic lawsuits against public participation ("slapp suits").

Mary P. Devine, an attorney with the Division of Legislative Services, was asked to assist the committee and was an invaluable resource.

A slapp suit is generally defined as litigation aimed at deterring or preventing citizens from exercising their political rights. Typically, they arise when one party approaches a governmental body about a matter that affects some other party--for example, a Civic Association opposes a developer's proposed rezoning. The other party then sues the first party usually alleging defamation or a conspiracy to injure the party in its trade or business. The underlying motivation of a true slapp suit appears to be the intimidation of citizens.

The committee met on August 17, 1991, and again on November 12, 1991. The committee reviewed the academic literature on slapp suits particularly Professor George W. Pring's law review articles. The committee also reviewed the proposed New York slapp suit law, the proposed New Jersey slapp suit law, and the legislative materials produced in connection with those proposals. The leading case dealing with slapp suits, Protect Our Mountain Environment (POME), Inc. v. District Court, 677 P.2d 1361, Colorado (1984), was also useful in helping to formulate an appropriate response to the slapp suit phenomenon. In POME, the Court recognized that slapp suits filed against citizens for prior administrative or judicial activities can have a significant chilling effect on the exercise of their first amendment rights. The Court also noted that persons can be damaged as a result of activities instigated under the pretext of legitimate petitioning activity. In an attempt to balance these concerns, the Colorado Court developed a procedure whereby the Court believed slapp suits could be distinguished from legitimate litigation. The tests developed by the Colorado Court were used by the slapp suit committee in its attempt to develop a draft of proposed anti-slapp suit legislation.

Prior to the November meeting of the committee, Ms. Devine circulated a draft which reflected the POME procedures. The committee discussed this draft and suggested that the advice of Dean Randall P. Bezanson, Dean and Professor of Law, Washington & Lee University School of Law might be helpful. Ms. Devine redrafted the proposed legislation incorporating the general recommendations of the committee and forwarded that draft to Dean Bezanson for his comments. Dean Bezanson replied on November 19th, and Ms. Devine developed a second draft which incorporated Dean Bezanson's comments. This material (copy attached) was circulated to the committee and the committee was polled by the Chairman. The results of that telephone poll were as follows:

1. The majority of the committee agreed with Dean Bezanson that the privilege created by the proposed legislation swept too broadly and might have unintended consequences;

2. The majority of the committee concluded that narrow legislation that only hit the slapp suit target would be difficult to draft;

3. The majority of the committee concluded that the procedures set out by the draft proposal might result in a protracted hearing which might be as time consuming and complex as an actual trial on the merits; and

4. The majority of the committee concluded that the sanctions available under the Virginia Code § 8.01-271.1 provide a sufficient deterrent as it expressly prohibits litigation "interposed for any improper purpose, such as to harass ...."

Senator Gartlan, on the other hand, believes that the rights protected by the proposed draft are important enough that the proposed draft legislation would be appropriate. His dissenting comments are attached to this report.

Because of the concerns and conclusions set forth above, the majority of the committee believes that neither of the drafts attached to this report would be appropriate legislation.

Respectfully submitted,

M. Langhorne Keith, Chairman
Richard K. Bennett
Steve W. Bricker
John Foote
John Y. Pearson, Jr.
The Honorable Joseph V. Gartlan, Jr.*
The Honorable J. Samuel Glasscock
The Honorable Jean W. Cunningham

* I respectfully dissent for the reasons set forth below.

DISSENT

SENATOR JOSEPH V. GARTLAN, JR.

First, I must express my sincere gratitude to the Virginia Bar Association for agreeing to undertake this study. I am especially grateful to M. Langhorne Keith, Esq., the Virginia Bar Association appointed chairman of the SLAPP Study Committee and all the other members for the excellence of their professional work and the commitment to the administration of the justice system so clearly evident in their work. Mary Devine, Esq. of the staff of The Division of Legislative Services did excellent work for the Committee.

Nevertheless, I must respectfully dissent from the majority conclusion in this report. These are my reasons:

1. The "right to petition" secured by the Virginia and United States Constitution is a broad one. It is substantially impaired, if malicious, baseless lawsuits against those who petition cannot be thwarted at the threshold of litigation by a mechanism for expeditious disposition that minimizes the burden of defendants while assuring due process to the plaintiff.

2. The draft bill attached to this Dissent narrowly defines the kind of lawsuit it would affect and is appropriately limited in focus. Anti-SLAPP suit litigation in other states has not demonstrated the "unintended consequences" of which the study committee majority is apprehensive.

3. The remedy proposed in the attached bill draft might not, as the majority speculates, avoid "time consuming and complex" proceedings which would leave SLAPP suit defendants where the law leaves them now. This is a "crystal ball" type issue. It is equally plausible, I believe, to suggest that the existence of the summary remedy provided by the draft bill would significantly impact the thinking of SLAPP - plaintiffs and their counsel and possibly deter unfounded litigation. It should be noted that a judgment dismissing a SLAPP suit as contemplated by the draft bill would usually resolve many of the issues involved in proceedings on a motion for sanctions under Virginia Code §8.01-271.1. The combined effect of the two litigation weapons, should give pause to SLAPP plaintiffs and their lawyers.

4. The sanctions available under Virginia Code §8.01-271.1 are clearly not adequate to deter SLAPP litigation. Studies across the country indicate that SLAPP defendants have obtained justice only in full scale lawsuits based on malicious abuse of process after SLAPP suits failed or died for want of prosecution rather than by invoking sanctions.

Lawyers and parties must be free to pursue judicial relief in novel and difficult cases. The history of sanction provisions in state and federal law shows that courts have properly been quite cautious in the imposition of sanctions. Yet, the SLAPP suit phenomenon has occurred and flourished while sanction provisions have been "on the books". The latter have not deterred the former.

To implement this Dissent I filed SB 424 in the 1992 Session. I do indeed believe, as the majority report says, "that the rights protected by the proposed draft are important ---" and this legislation has merit.

Joseph V. Gartlan, Jr.

DRAFT #1

NEW § 8.01-223.2. Summary dismissal of certain suits involving public participation.

In any civil action if the right to petition under the Virginia or United States constitution is properly raised in defense of a claim, counterclaim or cross-claim which is (i) brought by a person who has applied for or obtained a permit, zoning change, license, lease, certificate or other entitlement for use or permission to act, or by an individual or entity with a materially related interest, connection or affiliation (the claimant), (ii) brought against a nongovernmental individual or entity (the respondent), and (iii) based upon advocacy by the respondent before a governmental individual or body on an issue of public or societal importance, the court shall dismiss the action or claim, on motion, unless the nonmoving party establishes that:

1. The respondent's petitioning activities lacked reasonable factual support or any cognizable basis in law for their assertion,

2. The primary purpose of the respondent's activity was to harass the claimant or effectuate another improper objective, and

3. The respondent's activity adversely affected the legal interest of the claimant.

Upon entry of an order dismissing such a claim, the court shall consider imposing sanctions authorized pursuant to § 8.01-271.1.

Notwithstanding any other provision of law, a motion to dismiss under this section may be based, in whole or in part, upon affidavits or discovery depositions.

DRAFT #2

NEW § 8.01-223.2. Summary dismissal of certain suits involving public participation.

In any civil action if the right to petition under the Virginia or United States constitution is properly raised in defense of a claim, counterclaim or cross-claim which is (i) brought by a person who has applied for or obtained a permit, zoning change, license, lease, certificate or other entitlement for use or permission to act, or by an individual or entity with a materially related interest, connection or affiliation (the claimant), (ii) brought against a nongovernmental individual or entity (the respondent), and (iii) based upon advocacy by the respondent and directed toward the claimant, before a governmental individual or body on an issue of public or societal importance, the court shall dismiss the action or claim, on motion upon a showing by the respondent that:

1. The claimant's action or claim was brought maliciously and with intent to harass the respondent,

2. The respondent's petitioning activities had reasonable factual support or a cognizable basis in law for their assertion, and

3. The primary purpose of the respondent's activity was not to harass the claimant or effectuate another improper objective.

Upon entry of an order dismissing such a claim, the court shall consider imposing sanctions authorized pursuant to § 8.01-271.1.

Notwithstanding any other provision of law, a motion to dismiss under this section may be based, in whole or in part, upon affidavits or discovery depositions.

WASHINGTON AND LEE
UNIVERSITY
SCHOOL OF LAW
Lexington, Virginia 24450

Office of the Dean
Lewis Hall
(703) 463-8502

November 19, 1991

Mary P. Devine, Esq.
Senior Attorney, Division
of Legislative Services
Commonwealth of Virginia
General Assembly Building
910 Capitol Street, 2d Floor
Richmond, Virginia 23219

Dear Mary:

When we spoke last week you asked that I outline in writing some of my thoughts on the Study Committee's rough draft of an approach to SLAPP litigation. I am sorry to do so "on the run," but I will try briefly to touch on the principal matters I raised with you. My treatment will necessarily be somewhat conclusory, but I hope that it will be helpful nonetheless.

Let me begin with the general question I raised. The specific objective of the Committee's work is to draft legislation that would deter SLAPP suits, or nuisance suits brought by persons or entities seeking public benefits against other non-governmental parties objecting to those benefits, with the principal purpose of deterring those parties from registering their objections with the public body or agency. While the objective may be a commendable one, especially if so limited, my concern is that the net cannot be cast so narrowly in legislative form. To put the proposition crudely, the purpose is to keep the "bad guys" from bringing expensive nuisance litigation against the "good guys." But I think, on reflection, the bad guys are hard to distinguish in legislative language from the good guys, and it is entirely possible, if not probable, that the "good guys" will get caught in the trap, as well.

For example, in California SLAPP litigation has often been brought by large corporate interests against private individuals or public interest organizations. But it is equally possible that private individuals or public interest organizations will seek permits, licenses, and the like, and may be subject to malicious and frivolous objections raised by corporate interests to the conferral of the benefit by a public agency. And this objection might well involve tortious

behavior, whether in the form of defamation, interference with business relationships, or invasions of privacy. I doubt that the purpose of the draft is to prevent the individual or public interest organization from bringing suit against the objecting corporation in such instances.

For these reasons I have serious concerns about the very practicability of the drafting effort. I think the approach taken by the Committee, which is to craft a privilege rather than a new cause of action, is the best and narrowest one. But even in this context I doubt that language can be drafted with sufficient precision to avoid significant unintended consequences.

Let me now turn to some specific comments on the draft.

1. The draft is formulated as a privilege; indeed, it establishes an absolute privilege, requiring dismissal of a cause of action arising under other sources of the law. Dismissal is required, moreover, even if the legal claim is substantial. In effect, the draft creates a "speech and debate" type of privilege, but for private parties who participate in advocacy before a "governmental individual or body." I know of no similar privilege in any other context.

In view of this, I believe that the concept of malice must be built into the statute, and that the defendant, who would claim the privilege, must be required to show malice or its counterpart before the suit may be dismissed. Otherwise perfectly legitimate and legally substantial claims will be dismissed simply on the ground that the defendant has engaged in "advocacy . . . before a governmental individual or body on an issue of public or societal importance," a standard that sweeps far too broadly.

2. In subsection (iii) you need to insert a reference to the plaintiff or claimant, thus requiring that the claim be "based on advocacy directed toward the plaintiff or claimant by the non-governmental individual or entity before a governmental individual or body on an issue of public or societal importance . . . ." Without this qualification, the privilege would potentially be available to any defendant who had been engaged in such advocacy, whether it pertained to the plaintiff or to the cause of action.

3. Subsections (1) and (2) require that the plaintiff, who is not claiming the privilege, prove as a condition of continuing the suit that the defendant's activities lacked reasonable factual support or basis in law or were intended to harass the claimant. I have a number of difficulties with this. First, the fact that the defendant's activities were legally frivolous or improperly motivated has nothing to do

with the strength of the plaintiff's claim. For example, I would presume that a substantial legal claim brought by a plaintiff might exist even though the defendant's petitioning activities lacked reasonable factual support or were intended to harass, as neither factor has any necessary relationship to the plaintiff's legally cognizable harm. I question, therefore, whether a plaintiff's cause of action should be eliminated or dismissed strictly on the legal substantiality of a defendant's action. Moreover, the formulation of the draft places the burden of proof on these very difficult issues on the plaintiff while it is the defendant who is claiming the privilege, and who, quite frankly, is in a better position to disprove questions of law and fact relating to the defendant's own action. I am therefore doubtful that the formulation is either a sound one, or a workable one.

4. Finally, as I mentioned on the telephone, I think subsection (3) is unnecessary, for if the cause of action is based upon the defendant's activity, and if there were no adverse legal effect on the plaintiff, the cause of action should be dismissed under current procedure. The provision, therefore, is either confusing or redundant of existing practice.

I hope this is helpful to you and to the Committee as further consideration is given to the SLAPP suit problem. I am not at all unsympathetic to the issues raised by such litigation, but I have serious doubts whether legislation can effectively be crafted to deal with that problem alone. With respect to the particular draft now being considered, I am of the view that its constitutionality would be doubtful without a required malice showing, and I am very concerned that it sweeps far too broadly, in effect giving a private citizen protection similar to that afforded legislators in speech and debate clause settings. This would, quite frankly, constitute a privilege far broader than that now available to the press in reporting on the activities of public bodies.

Notwithstanding these concerns, however, I tried my hand at a very rough draft of an approach that might be more narrowly directed to the specific problem at hand:

> In any civil action in which it can be proved by clear and convincing evidence that:
>
> > 1. The plaintiff brought the action, with malice, for the primary purpose of obstructing or interfering with the lawful process of a public body or the lawful right of the defendant to participate in that process; and

2. The claim brought was known to lack reasonable basis in fact or law,

a prevailing defendant shall be entitled to recover reasonable costs of litigation, including attorney's fees, from the plaintiff in addition to any other remedies provided by law.

I appreciated the opportunity to speak with you about the Committee's work, and I hope you will feel free to call upon me if I can be of any further assistance.

Sincerely,

Randall P. Bezanson
Dean and Professor of Law

RPB/cms