

# Legislative Analysis

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## STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION

Mitchell Bean, Director  
Phone: (517) 373-8080  
<http://www.house.mi.gov/hfa>

### House Bill 5036 (Substitute H-1)

**Sponsor: Rep. Kate Ebli**

**Committee: Judiciary**

**First Analysis (8-9-10)**

**BRIEF SUMMARY:** The bill would require, with some exceptions, a court to dismiss what are known as strategic lawsuits against public participation, or SLAPPs; require damages and certain fees to be awarded to a prevailing defendant; allow a court to impose additional sanctions against the plaintiff and his or her legal representation; and define terms.

**FISCAL IMPACT:** House Bill 5036 would have an indeterminate, but likely positive, overall fiscal impact on the judicial branch. The existence of a summary and expedited procedure for terminating SLAPPs would provide a positive fiscal impact to the court system by quickly bringing SLAPPs to final disposition in the early trial stage of the suit and by acting as a deterrent for the filing of new SLAPPs. The provisions may also force the judicial branch to incur costs associated with new court filings, post-judgment motions for costs, motions for attorneys' fees and damages, litigation to interpret various provisions, and minimal appeals.

### **THE APPARENT PROBLEM:**

According to online legal dictionaries, strategic lawsuits against public participation (SLAPPs) are "retaliatory lawsuits intended to silence, intimidate, or punish those who have used public forums to speak, petition, or otherwise move for government action on an issue."

In one example of a SLAPP suit from a few years ago, the Ecology Center in Ann Arbor was sued by a pharmaceutical company for defamation after it launched a campaign to urge the state legislature to ban the chemical lindane from pharmaceutical products used to treat head lice and scabies. According to the Center's website, lindane had previously been banned in 52 countries and the state of California over health concerns, had been voluntarily withdrawn nationwide from use in agriculture, and was no longer used in the military or on livestock or pets. The litigation lasted almost two years before the parties entered into a settlement in which the plaintiff dropped the lawsuit.

SLAPP suits have also been filed against elected officials. For instance, several years ago, Acme Township trustees were sued by a developer and a large retailer when the planning officials voted against permits for a development near Traverse City. Besides putting the officials and their families in fear of losing their homes, the situation raises the concern that large corporations could use SLAPP suits to manipulate the city planning and zoning process.

In a current case, a Western Michigan University student is being sued by a towing company after starting a Facebook group in which other customers having bad experiences with the same company can post comments. According to Justin Kurtz, his car was towed from his apartment's parking lot even though he had a parking sticker attached to his front windshield. The towing company, claiming there was no parking permit, would not release Kurtz's car until he paid \$118 in charges. Kurtz alleges the company removed the parking sticker from the windshield before towing it. Indeed, some former employees have told reporters that the company encouraged them to tear off parking permits. The towing company, citing business losses of more than 50 percent since the inception of the Facebook page, is suing Kurtz for defamation and \$750,000 in damages.

Reportedly, SLAPP suits have been increasing in numbers over the past couple of decades. Fear of the financial devastation that can result from a SLAPP suit is often sufficient to silence a critic. Even though most are eventually dismissed, the defendant in the action can still be saddled with exorbitant legal fees.

In addition, many see SLAPP suits as infringements on constitutionally-protected rights of free speech and the right of citizens to petition their governmental leaders to address concerns. When SLAPP suits are filed against elected officials or governmental employees, the actions interfere with that person's scope of employment or official duties, such as deciding zoning issues.

Twenty-seven states have some form of anti-SLAPP laws on the books, and Congress is also considering a national ban. Since 1997, legislation to enact some type of ban on SLAPP suits in Michigan has been introduced in most of the legislative sessions. Once again, legislation has been introduced to address the issue.

### ***THE CONTENT OF THE BILL:***

House Bill 5036 would add a new section to the Revised Judicature Act (MCL 600.2977). Under the bill, on motion of a defendant, a court would have to dismiss a civil action against the defendant if either of the following applies:

\*\* The action had been based on the defendant's exercise of the right to petition under the U.S. Constitution or the state constitution and the communication had been aimed at procuring a governmental or electoral action, result, or outcome.

\*\* The action had been based on the defendant's exercise of the right of free speech under the U.S. Constitution or the state constitution.

In addition, the court would have to stay all discovery proceedings in the action until an order disposing of the motion was entered. On a motion by a party or on the court's own motion, the court could allow specified discovery.

Exception. An action could not be dismissed under Section 2977 if the plaintiff presented prima facie evidence that one or more of the following apply:

- The action had been initiated with the primary purpose of harassing or intimidating the defendant or otherwise hindering his or her exercise of the right to petition or the right of free speech.
- The defendant made the communication that gave rise to the action with knowledge that it was false or with reckless disregard for whether it was false; or,
- The communication that gave rise to the action included information that the defendant was prohibited by law from disseminating.

Awards. A court would be required to award all of the following to a moving defendant in an action that was dismissed under the bill:

- Three times the amount of damages sustained by the defendant as a result of the action.
- Court costs of the action.
- Reasonable attorney fees and other expenses incurred in defending against the action.
- If the amounts awarded under the above provisions total less than \$5,000, the difference between the total and \$5,000.
- Additional sanctions against the plaintiff (person initiating the lawsuit) and the attorney or law firm representing the plaintiff as the court determined to be sufficient to deter the plaintiff and the attorney or law firm from filing similar SLAPP suits.

Ability to countersue. If the action were dismissed, the defendant could bring a separate action, cross-claim, or counterclaim to recover any item described above. However, the defendant would not be entitled to a double recovery of the same item. In addition, the bill would not abrogate or lessen any other defense, remedy, immunity, or privilege available under law.

Definitions. The bill would add several definitions. "Communication" would include making or submitting a statement in any form, including an oral or written statement and a statement in electronic form.

"Exercise of the right of free speech" would mean a communication made in a place open to the public or a public forum in connection with an issue of public interest. "Public forum" would include a website on the Internet.

"Exercise of the right to petition" would mean any of the following:

- Communication with a legislative, executive, or judicial body or in another governmental proceeding.
- Communication in connection with an issue under consideration or review by a legislative, executive, or judicial body or in another governmental proceeding.
- Communication that is reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body or in another governmental proceeding.
- Communication reasonably likely to enlist public participation in an effort to effect consideration of an issue by a legislative, executive, or judicial body or in another governmental proceeding.

- Any other communication that falls within the constitutional protection of the right to petition government

“Issue of public interest” would include an issue related to health or safety, environmental, economic, or community well-being; the government; a public figure; or a good, product, or service in the marketplace. The term would not include a private interest, such as communication directed primarily toward protecting the speaker’s business interests rather than toward commenting on or sharing information about a matter of public significance.

## ***ARGUMENTS:***

### ***For:***

According to the ACLU of Michigan, SLAPP suits are not so much about resolving a problem, but removing a controversy from the public arena. Plaintiffs sue to silence their opposition or to prevent citizen oversight of government. Yet, public participation is the very cornerstone of a democratic society.

The bill would address the issue by requiring a court, upon a motion by the defendant, to dismiss a civil action that was based on a defendant’s exercise of constitutionally-protected rights of free speech and right to petition. The temptation to silence a critic through litigation would be lessened by the damages the plaintiff could be ordered to pay the defendant. In addition, a court would be given discretion to levy additional sanctions against not only the plaintiff, but also the plaintiff’s attorney or law firm, to discourage any of them from filing SLAPP suits in the future.

Over half of the states have adopted some form of anti-SLAPP legislation, and bills to do so in Michigan have been introduced by members of both parties dating back to 1997. House Bill 5036 incorporates several elements of those previous attempts, such as treble damages against the plaintiff if the action is dismissed as a SLAPP suit, and also key elements of the California law such as the suspension of discovery after the defendant moves for dismissal. Suspension of discovery while the judge is reviewing the motion to dismiss is important because part of the purpose of a SLAPP suit is to intimidate through the threat of financial devastation. If discovery is not suspended, the plaintiff can continue to file motion after motion that the defense must respond to, all the while driving up the court costs and attorney fees.

The bill also protects against SLAPP suits based on comments posted on social networking sites such as Facebook and Twitter. In addition to the Kalamazoo case discussed earlier in the analysis, an Illinois woman was sued by her apartment management company after accusing them in a tweet that the company thought it “‘okay’ for their tenants to sleep in moldy apartments”; the case was dismissed in January. (“Social Media Complaints, Defamation & SLAPP Suits”, [blog.findlaw.com](http://blog.findlaw.com), 6-4-2010)

In short, people should not have to live in fear of being slapped with a lawsuit if they express an opinion about the service they received from a business, if they petition their political leaders to address an issue they care about, or they try to educate the public

about potential or known health risks from a product. Free speech and petition rights need to be preserved.

***Against:***

The bill is not needed. Until recently, a disgruntled customer's comments went little further than the distance his or her voice could be heard by the readership of the local newspaper. In contrast, with the Internet, comments can be posted and sent into cyberspace worldwide and forever. Social media such as Facebook and Twitter easily provide forums where negative, or even false, statements about a business, elected official, or individual can be circulated. Mobile devices like Blackberries and Smart phones enable users to have almost continual access to the Internet. Thus, technology makes it easier for negative or false statements to circulate the globe and much harder for a business or target of criticism to contain, correct, or refute the comments. Unfair or untrue allegations made (often made by anonymous bloggers) can negatively impact a business, a candidate for office, or a seated official. Therefore, defamation laws act to discourage false statements and provide a remedy for individuals and businesses to stop the publication of comments and recoup their losses. And, the current system already allows a court to dismiss a frivolous lawsuit upon a motion by a defendant.

In addition, the bill is vague. The proposed legislation would allow a judge to impose additional sanctions against a plaintiff if the judge believes the action to be a SLAPP suit. However, the term "additional sanctions" needs further clarification as to what it would encompass. Would this be additional monetary damages? If so, would the additional damages constitute punitive damages? Michigan law currently prohibits punitive damages in civil suits.

***POSITIONS:***

A representative of the Michigan Environmental Council testified in support of the bill. (3-3-10)

The Michigan Association for Justice indicated support for the bill. (7-21-10)

The Michigan Domestic Violence Prevention and Treatment Board indicated support for the bill. (7-21-10)

The ACLU of Michigan indicated support for the bill. (7-21-10)

Legislative Analyst: Susan Stutzky  
Fiscal Analyst: Ben Gielczyk

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.