

**Written Statement of Paul Alan Levy
Public Citizen Litigation Group
on House Bill 263**

It is indeed good news that Maryland is taking steps to bolster its anti-SLAPP law to provide the level of protection for speech on matters of public interest that many other states, as well as the District of Columbia, provide against abusive litigation. Representative Rosenberg's bill is an important step in that direction but should be amended to include exceptions for pro-consumer litigation comparable to the exceptions afforded by other states with similarly-worded anti-SLAPP statutes.

A good anti-SLAPP law provides important support for the right of Americans to participate in the process of self-government as well as to alert other consumers to problems encountered with businesses and others in the marketplace — it provides, that is, important protection for a vigorous marketplace of ideas. As litigators and advocates, we have seen case after case in which consumers and citizen activists, and indeed the lawyers who represent them, have been victimized by meritless litigation filed over their having engaged in clearly protected speech criticizing powerful figures who object to the criticism.

First, a little bit about us. Public Citizen, Inc., is a public interest organization based in Washington, D.C. It has over 400,000 members and supporters nationwide, about 8500 of them in Maryland. Since its founding in 1971, Public Citizen has encouraged public participation in civic affairs, and its lawyers have brought and defended numerous cases involving the First Amendment rights of citizens who participate in civic affairs and public debates. *See generally* <http://www.citizen.org/litigation/briefs/internet.htm>. Public Citizen Litigation Group has litigated anti-SLAPP motions on behalf of parties, or filed amicus briefs in cases about the meaning or application of anti-SLAPP statutes, in California, Georgia, Massachusetts, New York, Texas, and

the District of Columbia, each of which has an anti-SLAPP law. And in the many free speech cases where we have decided that we cannot ourselves provide representation, we often helped speakers look for counsel, and we have seen the tremendous differences in how easy it is to help them find counsel in cases where a good anti-SLAPP law would provide support, as opposed to cases where there is either no anti-SLAPP law, or only a weak anti-SLAPP law, comparable to the current Maryland law. We have also litigated free speech cases in Maryland.

At the same time, we are deeply involved in litigation around the country helping consumers protect their right of access to court to obtain redress against companies that are desperate to find novel arguments to fend off litigation over injuries caused by defective products and misleading advertising. All of these experiences inform our views about both the strengths of Bill 263, and about some changes that are needed to prevent its misuse to block litigation by or on behalf of injured consumers.

The Need for Anti-SLAPP Statutes

SLAPP statutes are not intended to be a general protection for everything allegedly protected by the First Amendment. Rather, they are a response to a particularly abusive form of litigation — Strategic Litigation Against Public Participation — in which powerful local (or larger) interests seek to suppress public participation in debate about matters of public interest. In this sort of case, the plaintiff seeks not so much to obtain a remedy for truly wrongful speech as to stop the criticism, and intimidate future critics, by imposing the costs of litigation on the critics. Generally speaking, critics can't afford lengthy litigation, and they know it. They lose just by having to litigate, that is, by having to spend tens or hundreds of thousands of dollars on lawyers, not to speak of suffering the anxiety that comes with being a defendant. And so they tend to be cowed into silence. As a class,

although not necessarily in each individual case, the plaintiffs in these cases tend to be wealthy and/or powerful, while the defendants tend to be individuals, non-profit groups, or publications that have less financial ability to sustain a lengthy litigation than the plaintiff does. If the challenged speakers were plaintiffs, who stood to recover an award of damages, they might be able to afford counsel by entering into a contingent fee agreement; but it is hard to conceive of how a contingent fee agreement for the defense against a lawsuit would work.

Given the fact that SLAPP suits are intended to do their work by wearing down the critic, the result is too often that, rather than continue to engage in effective criticism, the critic has to accept a humiliating settlement such as withdrawing or retracting true statements and paying minor damages rather than hundreds of thousands of dollars in attorney fees. At the same time, the very fact that the critic has had to back down — or that winning the case cost the critic tens of thousands of dollars — sends a message to other potential critics that this is a company, or a political figure, that is just too expensive to criticize. So SLAPPs are an effective means of suppressing criticism both in the short run and in the long run; and they deprive the community of valuable commentary that elected officials and their appointed agencies can use to formulate public policy, and that members of the public can use effectively to help decide what candidates or policies to support, what businesses to patronize, and what goods or services to buy or avoid.

Some Local Examples of SLAPP's

Perhaps the best-known example of a SLAPP lawsuit in our area was brought not in Maryland but in the District of Columbia, by the head of a prominent Maryland business. I refer here to a lawsuit brought a couple of years ago by Redskins' owner Dan Snyder over critical coverage in a local free newspaper, the Washington City Paper. Its sports reporter published a

number of stories critical of Snyder's management of the team, with reminders of some of Snyder's past shortcomings; this coverage culminated in a story that listed a series of reasons to disapprove of Snyder, from A to Z. Snyder brought suit against the reporter and against the City Paper's owner, a small company that owned five similar "free" papers around the country. But Snyder also named as a defendant a hedge fund that had acquired the holding company's assets in a bankruptcy proceeding. Snyder then baldly warned the hedge fund that the cost of the litigation would exceed the value of its investment in the paper.

The impact of a good anti-SLAPP statute on a case like Snyder's is well-illustrated by the case's procedural history. Snyder could have sued in Washington DC in the first place, because that is where the Washington City Paper and the individual reporter were located, but instead he sued in New York, the home of the hedge fund that owned the City Paper's parent company, joining the hedge fund as noted above. Why? Because DC had a newly enacted and fairly strong anti-SLAPP statute; New York also has an anti-SLAPP statute, but it is a very narrow and fairly weak one that did not apply to Snyder's lawsuit. Snyder's ruse was too transparent, because there was no basis for suing the hedge fund for something that the City Paper had done. When Snyder's lawsuit was moved to the DC courts, the prospect of having the remaining defendants' anti-SLAPP motion granted induced Snyder to drop his lawsuit without any payment of money or any apology. I have talked both with the City Paper's publisher at the time, and with its lawyers, and there is no room for doubt that the DC anti-SLAPP statute played a crucial role in protecting free speech in that case.

Another local SLAPP suit was filed last year by Karen Williams and Paul Wickre, a married couple who live in Bethesda, Maryland, against a pair of bloggers, residents of West Virginia and Indiana, respectively, who run a web site for veterans that specializes in blowing the whistle on

people who make false claims about military service. After the blog focused its attention on a large-scale military contractor who, the blog alleged, lied about being a Navy Seal, the contractor hired Wickre to find a way to take down the blog. In pursuit of this objective, Wickre began threatening the bloggers both with violence and with having the American Legion, the employer of one of the bloggers, summoned to appear on Capitol Hill. Wickre's email showed an open "cc" to Williams, a Congressional staff member using her official House of Representatives email account (she presently works for Bob Goodlatte of Virginia). The blog turned its attention to Wickre and Williams, suggesting among other things that Wickre might be wrongfully using his wife's political connections, which spurred some strong comments among the blog's readers.

Wickre and Williams then initiated "peace order" proceedings seeking a broad prior restraint against any mention of either one of them on the blog. A hearing officer split the baby, dismissing Wickre's peace order claim but granting an injunction against any mention of Karen Williams on any internet site. Only after the bloggers appealed to the Circuit Court for Montgomery County, and traveled to Maryland to appear at the de novo trial in the case, did Williams withdraw her peace order claim. I have heard of a number of other situations in which people who are unhappy about the ways in which they have been criticized on blogs, have misused Maryland's peace order procedures to try to quiet the online criticism.

Another recent example of SLAPP litigation involves a Maryland resident named Brett Kimberlin, who has a notorious past. See Singer, *Citizen K: The Deeply Weird American Journey of Brett Kimberlin* (1996); *Kimberlin v. Dewalt*, 12 F. Supp. 2d 487, 489 (D. Md.), *aff'd sub nom. Kimberlin v. Bidwell*, 166 F.3d 333 (4th Cir. 1998). After being released from prison, where he developed skills as a jailhouse lawyer, Kimberlin settled in Maryland, where he has become known

for filing pro se defamation lawsuits in the state and federal courts in Maryland, often filled with wild allegations, against anyone who publishes criticisms of him. *E.g.*, *Kimberlin v. Nat'l Bloggers Club*, 2015 WL 1242763, at *14 (D. Md. Mar. 17, 2015), *appeal dismissed*, 604 F. App'x 327 (4th Cir. 2015); *Kimberlin v. Walker*, 2016 WL 392409, at *1 (Md. Ct. Spec. App. Feb. 2, 2016). He manages to exact confidential settlements from conventional publishers who worry about the fact that, as a pro se plaintiff, he might have nothing better to do than to write complaints and motion papers, while it costs them a great deal of money to hire counsel to defend themselves. But he then brandishes the existence of these “confidential settlements” as a tactic for intimidating new prospective defendants who do not want to run up their legal expenses defending against him. And he always sues in Maryland, where the anti-SLAPP statute is weak.

How Anti-SLAPP Laws Like House Bill 263 Combat Such Lawsuits.

Anti-SLAPP statutes employ strong measures that are intended to better enable SLAPPED speakers to resist such litigation, and to make it harder for SLAPPING plaintiffs to prevail by the simple measure of wearing down their critics. House Bill 263 does a good job of applying such measures.

First, as all good SLAPP statutes do, section (d)(2) of the bill responds to the “wear-down-the-defendant” objective by requiring a court to take an “early look” at the merits of the case. Unlike most cases, where it is enough to plead generally and then use discovery to obtain the evidence needed to take the case to trial, in this special class of case it is fair to expect the plaintiff not to come to court in the first place unless it has evidence of the civil wrong of which it complains, as subsection (d)(4) requires by giving the plaintiff the burden of showing that he has “a probability that [he] will prevail in the lawsuit.” Although the bill is not explicit about what is required to show

that “probability,” we understand that the intention is to require the plaintiff to make an evidentiary showing. The Committee’s report on the bill should make that clear.

Because disabling the defendant through the expense of litigation is one of the hallmarks of the true SLAPP, a second aspect of the “early look” requirement of the statute, embodied in subsection (e)(1), is that the plaintiff must present a tenable case without discovery. A third aspect of the “early look” principle is that, just as a dismissal is subject to immediate appeal, so too the denial of an anti-SLAPP motion is subject to immediate appeal. Subsection (g) would implement this protection.

The bill also includes a safety valve, subsection (g)(3), that allows a particular plaintiff to show why the general presumption against pre-SLAPP decision discovery should not apply in its case, by showing that the plaintiff’s case is different from the run-of-the-mill suit against public participation. This exception allowing discovery in appropriate cases has been given particularly broad scope in federal court cases that apply California’s anti-SLAPP statute under the *Erie* doctrine; federal courts often allow discovery in anti-SLAPP cases under Rule 56(f), and we see the same trend in California state court cases.

Moreover, subsection (f)(1) responds to the intimidation and inability-to-afford-a-defense factors by providing a ready financing mechanism for the defense of SLAPP’s, in the form of an award of attorney fees. Indeed, in states with longstanding anti-SLAPP statutes, the fees provision has allowed the development of a legal practice that specializes in the representation of defendants who are sued over public participation. In this respect, the statutes are similar to Title VII, the anti-trust laws and various environmental and whistleblower statutes that provide for a presumptive award of attorney fees in favor of the plaintiff. The very adoption of a fees provision in these statutes

encouraged the creation of a plaintiffs' bar that is, to some extent, dependent on this exception to the American rule that the parties bear their own attorney fees.

Congress and many state legislatures have made a judgment that, as a class, the plaintiffs in such cases need a financing mechanism, and indeed the provision of an automatic fee award creates a disincentive for defendants to oppose such cases unless they have a good basis for doing so. Suits under these laws are favored causes of action, and defenses against these laws are disfavored. So, too, an anti-SLAPP statute represents a public policy judgment that causes of action addressed to speech on public issues are disfavored, at least to the extent that they are brought without having evidence at hand at the outset; in these cases, it is the First Amendment defense that is favored and not the bringing of the case that is favored. Our experience trying to find counsel for speakers whom we have decided not to represent ourselves has shown us that, generally speaking, it is easier for speakers to find attorneys whom they can afford in states with good anti-SLAPP statutes.

A decision to adopt an anti-SLAPP statute does not represent a general judgment that the courts should not be open to those who cannot plead with specificity (indeed, the anti-SLAPP statutes generally do not contain any pleading standard) or those who can't present substantial evidence at the outset of their cases without discovery. It represents a judgment, rather, that people who speak out on public issues need special protection against abusive litigation.

To be sure, the good anti-SLAPP statutes are written more generally, and proof of intent to chill speech, and disparity of size and capability of litigation are not elements of the claimed coverage of the anti-SLAPP statute; instead, the test is an objective one. And although the archetypical case is a suit for defamation, the good anti-SLAPP statutes are not specific to one cause of action, because otherwise plaintiffs hoping to use oppressive lawsuits based on ultimately

meritless claims to suppress speech whose content irks or offends them would simply plead a different cause of action. False light invasion of privacy, intentional infliction of emotional distress, intentional interference in business relationships—the creativity of angry plaintiffs and their counsel can be boundless. And we often see lawsuits over speech dressed up in the language of trademark law—if you use my company’s name to slam me, it is trademark infringement, or dilution, or misappropriation of name or likeness. Consequently, we think the proposed bill takes the right approach by making the statute apply whenever a lawsuit is brought over speech of a certain protected character, instead of trying to enumerate causes of action to which it does and does not apply, or demanding proof of a bad motive for the litigation before anti-SLAPP remedies are brought into play.

Limits That Exist in Anti-SLAPP Statutes Elsewhere Are Needed in Bill 263.

Because an anti-SLAPP statute applies strong medicine, it is important that the scope of the statute be limited to the kind of cases in which such measures are justified. Anti-SLAPP laws should apply only to a narrow group of cases in which free speech is under attack, and where experience suggests that such remedies can be effective in protecting critics of powerful interests. Because Bill 263 is written broadly to prevent creative plaintiffs and their lawyers from evading the Bill’s protections by pleading causes of action beyond defamation, it is important to ensure that the Bill does not have unintended consequences that could make it harder for consumers and lawyers representing consumers to defend themselves. In this regard, Bill 263 sweeps too broadly.

The Bill, as introduced, lacks certain key exceptions that can be found in the anti-SLAPP law in all of the states that have broadly-worded statutes: exceptions for lawsuits over commercial speech, lawsuits brought to enforce the public interest rather than the personal interest of the

plaintiff, and lawsuits brought by state and local officials. Without these exceptions, a wide range of ordinary consumer lawsuits would be threatened by this new bill.

Speech by consumers criticizing business products and business practices are statements about matters of public interest, but statements by the businesses themselves, touting their products and services, should not be treated as speech about matters of public interest for purposes of an anti-SLAPP law. Otherwise, lawsuits by consumers claiming that they were misled by false or misleading advertising could be subjected to anti-SLAPP remedies. Similarly, lawsuits by tort victims that include a claim over a failure to warn about a defect in a product, or over the inclusion of unjustified claims of efficacy, would be subject to SLAPP motions. So too would be suits over the abusive practices of debt collectors, and suits by civil rights plaintiffs over racially discriminatory advertising. Several years ago, my colleagues at Public Citizen helped out in a California lawsuit against abusive debt-collection practices that was threatened by an anti-SLAPP motion; only the noncommercial and public interest exceptions in the California anti-SLAPP statute protected our clients against having their lawsuit prematurely cut off by that state's anti-SLAPP procedures.

Moreover, a wide range of ordinary commercial litigation could be subject to anti-SLAPP suits, such as false advertising claims between businesses. Similarly, a trademark claim between companies, invoking state unfair competition or trademark laws, could itself be subject to a motion to dismiss as a SLAPP, and much securities litigation might also be deemed subject to the anti-SLAPP law if Bill 263 were adopted without the amendments that we suggest. If so, the Bill would have the effect of tying up litigation that does not present the concern of a suit brought for the improper purpose of deterring speech on a matter of public concern.

Broad anti-SLAPP laws in other states also exclude civil enforcement proceedings by state

and local officials and agencies. This exception ensures that a wide range of public consumer enforcement action, for example, suits to stop abusive advertising practices, to enforce billboard ordinances, or to enforce the election laws, are not subject to dismissal as SLAPP suits.

Consequently, Public Citizen urges that the bill be amended to include the following three exceptions (drawn from the language of California's anti-SLAPP statute, California Code of Civil Procedure sections 425.16(d) and 425.17(b) and (c)):

Public Interest Lawsuit exception

(3) (1) A lawsuit is not a SLAPP suit if it is brought solely in the public interest or on behalf of the general public or on behalf of a class, and all of the following conditions exist:

(A) The plaintiff does not seek any relief greater than or different from the relief sought for the general public or a class of which the plaintiff is a member. A claim for attorney's fees, costs, or penalties, does not constitute greater or different relief for purposes of this subdivision;

(B) The action, if successful, would enforce an important right affecting the public interest, and would confer a significant benefit, whether pecuniary or nonpecuniary, on the general public or a large class of persons; and

(C) Private enforcement would place a disproportionate financial burden on the plaintiff in relation to the plaintiff's stake in the matter.

Exception for suits over commercial speech

(2) A lawsuit is not a SLAPP if it is brought against a person primarily engaged in the business of making, selling or leasing goods or services, including, but not limited to, insurance, securities, or

financial instruments, arising from any statement or conduct by that person if both of the following conditions exist:

(A) The statement or conduct consists of representations of fact about that person's or a business competitor's business operations, goods, or services, that is made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services, or the statement or conduct was made in the course of delivering the person's goods or services; and

(B) The intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer, or the statement or conduct arose out of or within the context of a regulatory approval process, proceeding, or investigation.

Exception for civil enforcement actions by state and local bodies

(3) (d) A lawsuit is not a SLAPP suit if it is an enforcement action brought in the name of the people of the State of Maryland, or of one of its agencies or political subdivisions, or by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.