**To:** **Commission**
**From:** **Staff**
**Re:** **Proposed project regarding SLAPP litigation**
**Date:** **September 7, 2009**

**M E M O R A N D U M**

## *A. Background.*

At the July meeting of the Commission, Professor Frank Askin of the Rutgers School of Law, Newark, and Renee Steinhagen, Executive Director of the New Jersey Appleseed Public Interest Law Center, appeared to present information in support of anti-SLAPP legislation. They provided a packet of information regarding SLAPP suits for review by the Commission. The following materials from that packet are attached for your consideration: (1) the July 10, 2009 cover letter from Professor Askin to John Cannel; (2) an Askin/Lebusdorf op ed from the New Jersey Law Journal; (3) S-2120/A-1101 (companion bills introduced in the Legislature in 2008); (4) Testimony of Professor Askin before the New Jersey Legislature on anti-SLAPP bills in 1991; (5) Article from *ABA Journal* "The Price of Speaking Out", September 1996; (6) a listing of anti-SLAPP statutes in other states; and (7) the Delaware anti-SLAPP statute as an example of a statute providing a broad anti-SLAPP remedy.

Also included in the packet are: (8) a recent Lieberman and Blecher op ed, "SLAPPing Back in New Jersey", *New Jersey Law Journal*, July 23, 2009; (9) "Calling Builder's Action a SLAPP Suit, Court Orders Legal Fees", *New Jersey Law Journal*, August 26, 2009; and (10) a December 12, 2005 letter from the Administrative Office of the Courts to Senator Loretta Weinberg objecting to the procedural remedies in the SLAPP bill under consideration in 2005 but concurring in the intent of the draft legislation.

SLAPP (Strategic Litigation Against Public Participation) suits were described by Professor Askin and Professor Leubsdorf in a recent New Jersey Law Journal article as "a standard tactic used by American businesses to muzzle critics of corporate actions". Askin and Leubsdorf, "N.J. Supreme Court Protects SLAPPers", *New Jersey Law Journal*, June 22, 2009. SLAPP suits are said to transform a public policy debate into a private legal dispute in which "protesting citizens are being sued into silence". *LoBiondo v. Schwartz*, 323 *N.J. Super*. 391, 418 App. Div. 1999) ("*LoBiondo I*").

During his presentation to the Commission in July, Professor Askin discussed the recent decision of the New Jersey Supreme Court in *LoBiondo v. Schwartz*, 199 *N.J.* 62 (2009), a case which was litigated for approximately 18 years, beginning in 1991. He referred to the case as the "Bleak House" of SLAPP suits and expressed concern about the decision by our Supreme Court that protects SLAPP plaintiffs from SLAPP-back claims if they can find a lawyer to bring their claim, provided the lawyer is not "actuated by malice". *LoBiondo v. Schwartz*, 199 *N.J.* at 113.

Information contained in the packet submitted by Professor Askin and Ms. Steinhagen indicates that SLAPP suit defendants prevail 91.6% of the time, that 2/3 of SLAPP suits are dismissed at the time of the first court appearance, and that the average lifespan of a SLAPP suit

is between 32 and 40 months from filing through disposition. At last count, 30 of the states currently have anti-SLAPP legislation. *Free Speech State-by-State*, Federal Anti-SLAPP Project, http://www.anti-slapp.org/?q=node/12 (last accessed September 8, 2009).

Although there are relatively few reported cases in New Jersey in which the courts specifically refer to an action as a SLAPP suit, there are numerous opinions describing actions in which "apparently meritless complaints alleging defamation and various other intentional torts such as infliction of emotional distress and interference with business advantage were brought for the purpose of silencing citizen protest" particularly in the area of land use law. *See, e.g.*, *LoBiondo v. Schwartz*, 323 *N.J. Super*. at 420.

### *B. Reasons for Commission action.*

More than twenty years ago, in *Karnell v. Campbell*, 206 *N.J.Super*. 81 (App. Div. 1985), developers of former school property in Middlesex County brought a defamation action against the authors of letters to the editor concerning the sale and development of the property. The Appellate Division affirmed the grant of summary judgment in favor of the authors of the letters, and concluded its opinion with the following:

> No opinion of this sort would be complete without an expression of the deep concern with which we view plaintiffs' action here. The citizens of our state must be free, within reason, to speak out on matters of public concern. So long as they state the facts implicated fairly and express their opinions, even in the most colorful and hyperbolic terms, their speech should be protected by us. Of course, developers such as plaintiffs here are entitled to invoke their legal rights in a court of law to protect their good names. We nevertheless fear that no one will be left to carry the torch of criticism even when defendants like those in this case are vindicated, after they have withstood the financial and emotional rigors of litigation such as this. Indeed it may become too costly for ordinary citizens to exercise the right to free speech which undergirds a democratic society. We are profoundly concerned with the chilling effect that plaintiffs' lawsuit in these rather unremarkable circumstances may have on other citizens who would ordinarily speak out on behalf of what they perceive to be the public good. We thus consider stringent scrutiny of claims such as plaintiffs' to be required. Like the court in *Kotlikoff* we are extremely "loathe to discourage that robust and uninhibited commentary on public issues that is part of our national heritage."

*Karnell v. Campbell*, 206 *N.J.Super*. 81, 94-95 (App. Div. 1985) (citing *Kotlikoff v. The Community News*, 89 *N.J.* 62, 73 (1982)).

The Appellate Division, in *LoBiondo I*, explained that New Jersey Courts have "consistently embraced" the principles articulated in *Karnell*. 32 *N.J. Super.* at 412. Those underlying principles, however, have received an uneven treatment by the Courts, a troubling circumstance given the frequency with which these issues arise. Despite the broad support for anti-SLAPP legislation, bills introduced in the Legislature over the last twenty years have failed to achieve sufficient support.

A preliminary review of the materials provided by Professor Askin and Ms. Steinhagen as well as some of the relevant case law suggests that this is an appropriate project for the Commission. The issue arises with some frequency, it has for at least twenty years, and there is

no indication that the number of SLAPP suits has or will decrease over time. To the contrary, fertile ground for these suits is found in the context of homeowners' associations where people speak out on matters of public concern.

The anti-SLAPP bills introduced in the Legislature in recent years define "valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances" and "public entity" and specify that, in accordance with "such New Jersey Court Rules as may be promulgated", a cause of action against a person arising from an act "in furtherance of" the valid exercise of the constitutional rights of freedom of speech, and petition for the redress of grievances, shall be subject to a motion to dismiss unless the plaintiff establishes a reasonable probability that plaintiff will prevail on the claim. The bills call for the suspension of discovery pending the final disposition of the motion unless the court orders otherwise. A prevailing defendant is entitled to attorneys fees and compensatory damages upon an additional demonstration that the suit was commenced or continued to harass, intimidate, punish or otherwise maliciously inhibit the free exercise of speech, petition or assembly.

The content of the anti-SLAPP bills does not appear to have changed in the recent years, and, as a result, it does not address the objections raised by the Administrative Office of the Courts to the 2005 bills or incorporate AOC suggestions. The AOC objected to the shifting of the burden on the motion from the defendant to the plaintiff and to the suspension of discovery pending the disposition of the motion (on both practical and separation of powers grounds). The AOC also suggested that a provision for treble damages be included to increase the deterrent effect of the legislation.

In addition, the anti-SLAPP bills proposed to this time do not appear to incorporate the issues addressed by the cases in this area.

As a result of the practical constraints imposed on members of the Legislature, and the impact those constraints have on the drafting of legislation, it appears that the Commission is better suited to engage in a review of the relevant law and to solicit input from the various constituencies while drafting to distill the competing viewpoints into a revised draft of anti-SLAPP legislation. Careful review and drafting are required to achieve an effective piece of legislation that is not overly broad. This requires time and focus, and the Commission has the advantage of being able to apply both to the project.