

MARYLAND GENERAL ASSEMBLY

Senate Judiciary Proceedings Committee

**Testimony of James A. McLaughlin* on behalf of the
Maryland-Delaware-D.C. Press Association and The Washington Post
in support of Senate Bill 1042**

(Civil Actions – Strategic Lawsuits Against Public Participation)

March 12, 2020

The Maryland-Delaware-D.C. Press Association and The Washington Post strongly support Senate Bill 1042, which would strengthen and modernize Maryland’s anti-SLAPP law. We believe this legislation is sorely needed, and we thank Senators Hettleman, Sydnor and Smith – and Delegates Rosenberg, Cardin, Griffith and McComas in the House – for recognizing and addressing a growing problem.

In the past several years, there has been an alarming trend toward the use of libel lawsuits (or, in many cases, the explicit *threat* of such lawsuits) as an offensive “weapon” by which the powerful seek to punish – and ultimately, silence – critics, rather than as a means of recovering for genuine injury. Currently, for instance, one U.S. Congressman has filed more than half a dozen libel suits against media companies seeking \$1.2 *billion* in supposed damages arising from routine news reports about a public official’s discharge of his duties -- the kind of scenario that was seemingly foreclosed more than 50 years ago by the Supreme Court in *New York Times v. Sullivan*, and a case that would have been considered unthinkable even 10 years ago. The problem, however, is that in such litigation, the plaintiff’s aim isn’t to prevail so much as it is to inflict the financial pain of litigation itself, and thereby cause future speakers to think twice about

* Chair, Government Affairs Committee, Maryland-Delaware-D.C. Press Association; Deputy General Counsel, The Washington Post; Adjunct Professor, Georgetown University Law Center.

criticizing the plaintiff. Even a frivolous lawsuit must be defended, and typically at a cost in the low six figures even if it is dismissed at an early stage.

Senate Bill 1042 would make Maryland's anti-SLAPP law a much more effective bulwark against such abuse of the litigation process, in several important ways:

First, it would remedy a longtime weakness in the existing statute by replacing its subjective "bad faith" requirement – i.e., the requirement that an anti-SLAPP movant show that the plaintiff's suit was brought in actual bad faith – with an objective standard focusing on the obvious lack of merit in a complaint rather than requiring factual discovery into the plaintiff's state of mind. The subjective bad-faith standard, though well-intentioned, was unique among state anti-SLAPP laws, and it clearly defeats the purpose of having an anti-SLAPP law to require costly discovery before an anti-SLAPP motion can be adjudicated.

Second, it establishes mandatory fee-shifting when an anti-SLAPP motion to dismiss is successful. This is perhaps the most important element to any strong anti-SLAPP statute, since the threat of having to pay the opposing party's legal fees is one of the only conceivable deterrents to a deep-pocketed libel plaintiff attempting to use the cost of the litigation process to bully an ordinary citizen or cash-strapped local newspaper. Simply put, it is a means of leveling the playing field.

Third, it refines the Act's "early look" procedures by directing courts reviewing anti-SLAPP motions to set hearings promptly, stay discovery pending the outcome, and rule expeditiously. These are appropriate procedural steps toward ensuring, as far as possible, that the act of litigation does not chill speech about a particular public controversy.

Senate Bill 1042 - Testimony of James A. McLaughlin
March 12, 2020

It also bears noting that none of these changes would prevent *meritorious* libel claims from going forward. If a plaintiff has a legitimate case, he or she will have no problem showing that the lawsuit should not be dismissed pursuant to Section (A) of Senate Bill 1042. Indeed, experience has shown that libel cases frequently make it to trial even in jurisdictions with the strongest possibly anti-SLAPP laws, like California. This legislation would simply enhance the ability of courts to weed out obviously meritless defamation cases at an early stage, and (by requiring fee-shifting) deter future abuse of the litigation process by libel “bullies.”

For all these reasons, MDPC Press Association and the Post urge the passage of Senate Bill 1042. In fact, this is without question the strongest and best of the anti-SLAPP improvement bills introduced in Maryland in recent years, and we strongly support its enactment. Thank you.