D R A F T

FOR DISCUSSION ONLY

UNIFORM PUBLIC PARTICIPATION PROTECTION ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

March 13–14, 2020 Drafting Committee Meeting

UPDATED DRAFT WITH EXPANDED COMMENTS

The ideas and conclusions set forth in this draft, including the proposed statutory language and any comments or reporter's notes, have not been passed upon by the National Conference of Commissioners on Uniform State Laws or the drafting committee. They do not necessarily reflect the views of the Conference and its commissioners and the drafting committee and its members and reporter. Proposed statutory language may not be used to ascertain the intent or meaning of any promulgated final statutory proposal.

March 11, 2020

UNIFORM PUBLIC PARTICIPATION PROTECTION ACT

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UNIFORM PUBLIC PARTICIPATION PROTECTION ACT

TABLE OF CONTENTS

UNIFORM PUBLIC PARTICIPATION PROTECTION ACT

Prefatory Note

Introduction. In the late 1980s, commentators began observing that the civil litigation system was increasingly being used in an illegitimate way: not to seek redress or relief for harm or to vindicate one's legal rights, but rather to silence or intimidate citizens by subjecting them to costly and lengthy litigation. These kinds of abusive lawsuits are particularly troublesome when defendants find themselves targeted for exercising their constitutional rights to publish and speak freely, petition the government, and associate with others. Commentators dubbed these kinds of civil actions "Strategic Lawsuits Against Public Participation," or SLAPPs.

SLAPPs defy simple definition. They can be brought by and against individuals, corporate entities, or government officials across all points of the political or social spectrum. They can address a wide variety of issues from zoning to the environment to politics to education. They are often cloaked as otherwise standard claims of defamation, civil conspiracy, tortious interference, nuisance, and invasion of privacy, just to name a few. But for all the ways in which SLAPPs may clothe themselves, their unifying features make them a dangerous force: Their purpose is to ensnare their targets in costly litigation that chills society from engaging in constitutionally protected activity.

[Reporter's Note: Examples of SLAPPs?]

Anti-SLAPP Laws in the United States. To limit the detrimental effects SLAPPs can have, 32 states, as well as the District of Columbia and the Territory of Guam, have enacted laws to both assist defendants in seeking dismissal and to deter vexatious litigants from bringing such suits in the first place. An Anti-SLAPP law, at its core, is one by which a legislature imposes external change upon judicial procedure, in implicit recognition that the judiciary has not itself, for whatever reasons, modified its own procedures to deal with this specific brand of abusive litigation. Although procedural in operation, these laws protect *substantive rights*, and therefore have *substantive effects*. So, it should not be surprising that each of the 34 legislative enactments have been performed statutorily—*none* are achieved through civil procedure rules. The states that have passed anti-SLAPP legislation, in one form or another, are:

Arizona (2006) (Ariz. Rev. Stat. Ann. § 12-752) (2006)
Arkansas (2005) (Ark. Code Ann. § 16-63-501 through § 16-63-508) (2005)
California (1992) (Cal. Civ. Proc. Code § 425.16 through § 425.18)
Colorado (2019) (Col. Rev. Stat. Ann. § 13-20-1101)
Connecticut (2018) (Conn. Gen. Stat. Ann. § 52-196a)
Delaware (1992) (Del. Code Ann. tit. 10, § 8136, through § 8138)
District of Columbia (2012) (D.C. Code § 16-5501 through § 16-5505)
Florida (2004, 2000) (Fla. Stat. Ann. §§ 720.304, 768.295)
Georgia (1996) (Ga. Code. Ann. § 9-11-11.1)
Guam (1998) (Guam Code Ann. tit. 7, § 17101 through § 17109)
Hawaii (2002) (Haw. Rev. Stat. § 634F-1 through § 634F-4)
Illinois (2007) (735 Ill. Comp. Stat. 110/15 through 110/99)

Indiana (1998) (Ind. Code § 34-7-7-1 through § 34-7-7-10)
Kansas (2016) (Kan. Stat. Ann § 60-5320)
Louisiana (1999) (La. Code Civ. Proc. Ann. art. 971)
Maine (1995) (Me. Rev. Stat. Ann. tit. 14, § 556)
Maryland (2004) (Md. Code Ann., Cts. & Jud. Proc. § 5-807)
Massachusetts (1994) (Mass. Gen. Laws ch. 231, §59H)
Minnesota (1994) (Minn. Stat. § 554.01 through § 554.06) (Held unconstitutional by *Leiendecker v. Asian Women United of Minnesota*, 895 N.W.2d 623, 635-37 (Minn. 2017))
Missouri (2004) (Mo. Rev. Stat. § 537.528)
Nebraska (1994) (Neb. Rev. Stat. § 25-21,243 through § 25-21,246)
Nevada (1997) (Nev. Rev. Stat. § 41.635 through 41.670)
New Mexico (2001) (N.M. Stat. § 38-2-9.1 through § 38-2-9.2)
New York (1992) (NY. Civ. Rights Law § 70-a and § 76-a)
Oklahoma (2014) (Okla. Stat. tit. 12, § 1430 through § 1440)
Oregon (2001) (Or. Rev. Stat. § 31.150 through § 31.155)
Pennsylvania (2000) (27 Pa. Consol. Stat. § 8301 through § 8305, and § 7707)
Rhode Island (1993) (R.I. Gen. Laws § 9-33-1 through § 9-33-4)
Tennessee (2019, 1997) (Tenn. Code. Ann. § 20-17-101 through § 20-17-110; § 4-21-1001 through § 4-21-1004)
Texas (2011) (Tex. Civ. Prac. & Rem. Code § 27.001 through § 27.011)
Utah (2008) (Utah Code § 78B-6-1401 through § 78B-6-1405)
Vermont (2005) (Vt. Stat. Ann. tit. 12 § 1041)
Virginia (2007) (Va. Code Ann. § 8.01-223.2)
Washington (2010, 1989) (Wash. Rev. Code § 4.24.500 through § 4.24.525) (Held unconstitutional by *Davis v. Cox*, 351 P.3d 862, 875 (Wash. 2015))

Many early anti-SLAPP statutes were narrowly drawn by limiting their use to particular types of parties or cases—for example, to lawsuits *brought by* public applicants or permitees, or to lawsuits *brought against* defendants speaking in a particular forum or on a particular topics. More recently, however, legislatures have recognized that narrow anti-SLAPP laws are ineffectual in curbing the many forms of abusive litigation that SLAPPs can take. To that end, most modern statutory enactions have been broad with respect to the parties that may use the acts and the kinds of cases to which the acts apply.

The recent trend further evidences a shift toward statutes that achieve their goals by generally employing at least five mechanisms:

1. Creating specific vehicles for filing motions to dismiss or strike early in the litigation process;
2. Requiring the expedited hearing of these motions, coupled with a stay or limitation of discovery until after they're heard;
3. Requiring the plaintiff to demonstrate the case has some degree of merit;
4. Imposing cost-shifting sanctions that award attorney's fees and other costs when the plaintiff is unable to carry its burden; and
5. Allowing for an interlocutory appeal of a decision to deny the defendant's motion.

The Need for a Uniform Anti-SLAPP Act. Although there is certainly a movement toward broad statutes that utilize the five tools described above, the precise ways in which different states have constructed their laws is far from cohesive. This degree of variance from state to state—and an absence of protection in 18 states—leads to confusion and disorder among plaintiffs, defendants, and courts. It also contributes to what can be called "litigation tourism;" that is, a type of forum shopping by which a plaintiff who has choices among the states in which to bring a lawsuit will do so in a state that lacks strong and clear anti-SLAPP protections. Several recent high-profile examples of this type of forum shopping have made the need for uniformity all the more evident.

The Public Participation Protection Act seeks to harmonize these varying approaches by enunciating a clear process through which SLAPPs can be challenged and their merits fairly evaluated in an expedited manner. In doing so, the Act serves the dual purposes of protecting individuals' rights to petition and speak freely on issues of public interest while, at the same time, protecting the rights of people and entities to file meritorious lawsuits for real injuries.

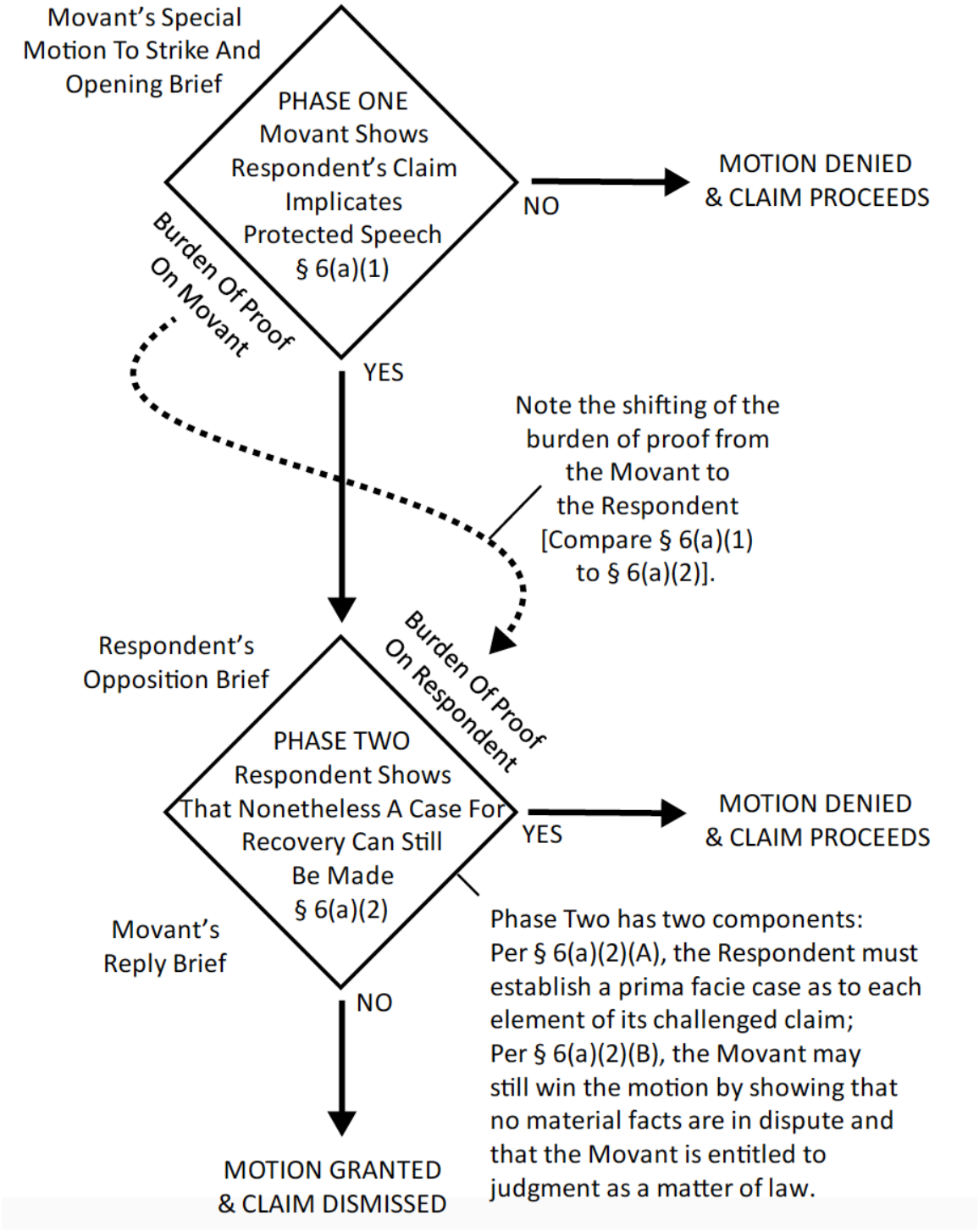
The Public Participation Protection Act, Generally. The Public Participation Protection Act follows the recent trend of state legislatures to enact broad statutory protections for its citizens. It does so by utilizing all five of the tools mentioned above in a motion practice that carefully and clearly identifies particular burdens for each party to meet at particular phases in the motion's procedure.

The general flow of a motion under the Act employs the same two-step analysis seen in many states' statutes. Upon the filing of a motion, all proceedings—including discovery—in the case are stayed, subject to a few specific exceptions. In the **first phase**, the court first determines if the responding party's (typically the plaintiff) cause of action implicates the moving party's (typically the defendant) right to free speech, petition, or association. In this phase, the burden is on the moving party to make that showing. If the court holds that the moving party *has not* carried that burden, then the motion is denied, the stay of proceedings is lifted, and the parties proceed to litigate the merits of the case (subject to the ability of the moving party to interlocutorily appeal the motion's denial). If the court determines that the moving party *has* carried the burden, then the court proceeds to the second step of the analysis.

In the **second phase**, the court determines if the responding party has a legally and factually viable cause of action. In this phase, the burden is shifted to the responding party to establish a prima facie case for each essential element of the cause of action challenged by the motion. If the court holds that the responding party *has* carried that burden, then the motion is denied, unless the moving party can show there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law (no different than summary judgment). If the court holds that the moving party is so entitled, or holds that that the responding party *has not* carried its burden to establish a prima-facie case, then the motion is granted and the responding party's cause of action is terminated with prejudice to refiling. The moving party is entitled to its costs, attorney's fees, and expenses.

The operation of the Act is illustrated below:

MOTION MECHANICS § 6(a)



[Reporter's Note: More commentary?]

UNIFORM PUBLIC PARTICIPATION PROTECTION ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Public Participation Protection Act.

Discussion Notes

The Committee has requested that the name be changed to the Uniform Protecting Rights of Public Participation Act. The Executive Committee has designated the act a uniform act.

Style Committee Note

The Style Committee has been assigned the role of monitoring new guidelines recently approved by the Executive Committee for naming acts. We are to work with the Drafting Committee before a name-change request is sent to the Executive Committee. The first guideline is that the title should begin with the subject matter of the act, which the researcher might look for first in an index. Ordinarily, starting with an "ing" word like "Protecting" and a non-specific word like "Rights" don't do that. The committee understood why the drafting committee didn't think "Public Participation" was very helpful standing alone and we had a further problem because the word "participation" is not used in the act anywhere. Given that the act applies only to a "communication", the Committee suggested "Public Communication Protection Act". A possibility that occurred to me after the meeting is "Public Communication Rights Protection Act".

SECTION 2. SCOPE.

(a) In this section, "person" means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(b) Except as otherwise provided in subsection (c), this [act] applies in a civil action to a cause of action brought against a person based on the person's communication:

(1) in a legislative, executive, judicial, administrative, or other governmental proceeding;

(2) on an issue under consideration or review in a legislative, executive, judicial, administrative, or other governmental proceeding; or

(3) exercising the right of free speech, free association, or petition, guaranteed by

the United States Constitution or the [state] Constitution, on a matter of public concern.

(c) This [act] does not apply to a cause of action brought:

(1) against a governmental entity, agent or instrumentality of a governmental entity, or employee of a governmental entity acting in the employee's official capacity;

(2) by a governmental entity to enforce a law or regulation and to protect against an imminent threat to public health or safety;

(3) against a person primarily engaged in the business of selling or leasing goods or services if the communication on which the cause of action is based arises out of the person's sale or lease of goods or services, unless the cause of action arises out of the creation, dissemination, exhibition, or advertisement or other similar promotion, of a dramatic, literary, musical, political, or artistic work, including a motion picture, television program, or matter published on an Internet website or other electronic medium or in a newspaper or magazine;

(4) by a person seeking recovery for bodily injury, wrongful death, or survival, unless the cause of action arises out of the dissemination, exhibition, or advertisement or other similar promotion of a dramatic, literary, musical, political, or artistic work, including a motion picture, television program, or matter published on an Internet website or other electronic medium or in a newspaper or magazine; or

(5) by a person seeking recovery under an insurance contract or [the state's insurance code].

Legislative Notes: *If the term "cause of action" is not a familiar or commonly used term in a particular state, the state should use a similar term of art, such as "claim for relief," to identify the specific set of operative facts a moving party may challenge.*

A state that has an existing Anti-SLAPP statute may desire to include additional exemptions already included within its existing statute. The inclusion of additional exemptions should in no way affect uniformity or construction of the Act.

Comments

1. Although the Act operates in a procedural manner—specifically, by altering the typical procedure parties follow at the outset of litigation—the *rights* the act protects are most certainly *substantive* in nature. Otherwise stated, the Act's procedural features are designed to prevent substantive consequences: the impairment of First Amendment rights and the time and expense of defending against litigation that has no demonstrable merit.

2. The definition of "Person" uses the standard ULC definition.

3. The statute is only applicable to civil actions. It has no applicability in criminal proceedings.

4. The term "civil action" should be construed consistently with Fed. R. Civ. P. 1.

5. The term "cause of action" refers to a group of operative facts that give rise to one or more bases for recovery in a civil action. The term contemplates that in one civil action, a party seeking relief may assert multiple causes of action that invoke different facts and theories for relief. In some jurisdictions, other terms of art, such as "claim for relief," "ground of action," "right of action," or "case theory," might be more appropriate than "cause of action." Regardless of the term used by a state, the Act can be utilized to challenge part or all of a single cause of action, or multiple causes of action in the same case. Otherwise stated, a single civil action can contain both a cause of action subject to the Act and one not subject to the Act.

6. The Act applies to a cause of action brought against a person based on the person's communication. "Communication" should be construed broadly—consistent with holdings of the Supreme Court of the United States—to include any expressive conduct that likewise implicates the First Amendment. Conduct is not specifically mentioned in the Act so as to avoid parties from attempting to use the Act to shield themselves from liability for nonexpressive conduct that nevertheless tangentially relates to a matter of public concern. For example, a person's work on behalf of a political campaign might include constitutionally protected expressive conduct, such as putting up campaign signs or organizing a rally. But a person who damages another candidate's campaign signs or physically threatens attendees at an opposing rally would not be engaging in expressive conduct, and therefore should not be able to utilize the Act, even though the conduct tangentially relates to matters of public concern.

7. Section 2(b)(1)-(3) identifies three different instances in which the Act may be utilized. Section 2(b)(1) protects communication that occurs before any legislative, executive, judicial, administrative, or other governmental proceeding—effectively, any speech or expressive conduct that would implicate one's right to petition the government, regardless of whether that speech or expressive conduct is on a matter of public concern. Section 2(b)(2) operates similarly, but extends to speech or expressive conduct *about* those matters being considered by in legislative, executive, judicial, administrative, or other governmental proceedings—the speech or conduct need not take place *before* the governmental body. Section 2(b)(3) operates differently than (1) and (2) and provides the broadest degree of protection; it applies to *any* exercise the right of free

speech, free association, or petition, so long as that exercises is on a matter of public concern. The forum or topic need not pertain to issues under consideration in governmental proceedings.

8. The terms "free speech," "free association," "free petition," and "matter of public concern," should all be construed consistently with caselaw of the Supreme Court of the United States and the state's highest court.

9. Section 2(c) provides a list of exemptions, or situations to which the Act does not apply. This list is not intended to be exhaustive; states are free to add other exemptions to the extent they do not disturb the purpose of the Act in protecting citizens' ability to exercise their constitutional rights. States are likewise free to not use some or all of the exemptions identified in section 2(c).

10. The term "governmental entity, agent or instrumentality of a governmental entity, or employee of a governmental entity acting in the employee's official capacity" includes any private people or entities working as government contractors, to the extent the cause of action pertains to that government contract.

Style Committee Notes

Subsection (b): We edited this to reflect better that a single "civil action" (Fed. R. Civ. P. 1) can under the joinder rules contain both a cause of action subject to the act and one not subject to the act.

"Party" vs. "person": We concluded that "person" works better here than "party". The communication under (now) (b) and the provision of goods or services under (c)(3) occur before the person is a party, and under (c)(3), the person engaged in the business does so as a person not a party. More broadly, it seems important to make the point that the act applies to everyone within our definition of "person"—it appears the act applies to claims by the government that don't fit within the exclusion in (c)(2).

Definition of "communication": We think you need to add a definition of "communication", which seems to be the core of that to which the act applies. The fact that in the exclusion in (c)(3), you made reference to "conduct or communication" suggests ambiguity because under (b), the act applies onto to a communication. You probably intend that conduct can be a communication in some circumstances, but that shows why a definition is needed. We, of course, wouldn't undertake to craft one, but if you do, subsection (a) would be "(a) In this section:" with definitions tabulated as indented paragraphs "(1) "Communication" means…" and "(2) "Person" means…"

"Other governmental proceeding": The Committee wasn't sure what kind of proceeding "other governmental proceeding" would cover that wouldn't be covered by what precedes it. Is there such a thing? If there is one, it at least should be explained in a comment.

Subsection (c)(1), (2) ("Government" vs. "governmental entity): Is there a reason the phrasing of government entities (other than the addition of employees) doesn't track the reference to government in the definition of person?

Subsection (c)(2): We were unclear whether the "law or regulation" had to have as its purpose protecting against an imminent threat or whether it was enough that the government entity was using a law or regulation to address what the entity perceived to be an imminent threat. We assumed the latter and added "and". If you mean the former, it needs to be rewritten to make it clearer. More broadly, we had trouble with "law or regulation". "Law" in a uniform act includes common law decisions, administrative rules, and statutes - both state and federal if "law" isn't qualified by "of this state other than this [act]". And we use "rules" rather than "regulations" when referring to Administrative Procedure Act rules. Obviously, if Code of Federal Regulations provisions are included, that would need to be made clear. So, the issue is, do you really mean "law or rule" or do you mean "a statute or rule" or "a statute, rule, or federal regulation", or perhaps something else?

Subsection (c)(3), (4): We thought in (3) the "creation …" was a series of 4, not a series or 3 plus 1, so we deleted the "or" and a comma accordingly (we similarly edited (4)). We assume the omission of "creation" in (4) – it is in (3) – was deliberate. Also: acknowledging that "including" doesn't have to list everything, would it be advisable to add "book" to "newspaper or magazine"?

Subsection (c)(4): Does "survival" need to be bracketed with a Legislative Note to insert whatever term the state uses for an action for damages suffered by a decedent before the decedent died? We weren't sure whether states always use "survival" to describe that action.

Subsection (c)(5): do you mean any provision in the insurance code? Perhaps a Legislative Note is needed to explain what reference should be inserted.

SECTION 3. MOTION FOR EXPEDITED RELIEF. Not later than [60] days after a party is served with a [complaint] [petition], crossclaim, counterclaim, or third-party claim that asserts a cause of action to which this [act] applies, or at a later time on a showing of good cause, the party served may file a special motion to [dismiss] [strike] the cause of action or a part of the cause of action.

Legislative Notes: *A state should use the term "complaint", "petition", or both, to describe any procedural means through which a cause of action may be brought. A state should title its motion one to "dismiss" or "strike" in accordance with its procedures and customs.*

A state may need to amend its civil procedure code to prevent a motion under this section from being considered a first pleading or other pleading that carries a preclusive effect by virtue of it being filed prior to any other pleading.

Comments

1. States are free to alter the time period in which a motion must be filed to reflect a shorter or longer deadline.

2. Unlike a defense under Fed. R. Civ. P. 12(b), the motion need not be filed prior to other pleadings in the case, and a party should not be estopped from filing a motion by taking any other actions in the case.

3. The Act should apply not just to initial claims brought by a plaintiff against a defendant, but to *any* claim brought by *any* party that seeks to punish or intimidate another party for the exercise of its constitutional rights. In this connection, initial defendants frequently use their ability to bring counterclaims and crossclaims for abusive purposes, and the Act should be available to seek dismissal of such claims.

4. The terms "complaint" and "petition" are intended to include any amended pleadings that assert a cause of action for the first time in a case.

5. "Crossclaim" means a cause of action asserted between coplaintiffs or codefendants in the same civil action.

6. "Counterclaim" means a cause of action asserted by a party against an opposing party after an original claim has been made by that opposing party. The term should be construed synonymously with terms like "counteraction," "countersuit," and "cross-demand."

7. "Third-party" claim should be construed in accordance with Fed. R. Civ. P. 14.

8. "Good cause" means a reason factually or legally sufficient to appropriately explain why the motion was not brought within the prescribed deadline. **[Reporter's Note:** List examples of good cause?]

9. Some states may choose to title their special motion one to "dismiss", while others may title it one to "strike". The choice of title is not substantive in nature and should in no way affect uniformity or construction of the statute.

SECTION 4. STAY.

(a) Except as otherwise provided in this section, all proceedings in an action, including discovery and a pending hearing or motion, are stayed on the filing of a motion under Section 3. The stay remains in effect until entry of an order ruling on the motion and the conclusion of any appeal of the order or expiration of the time to appeal the order.

(b) During a stay under subsection (a), the court may allow limited discovery for the

purpose of obtaining specified information if a party shows that the information is necessary to meet or oppose a burden imposed by Section 6 and is not reasonably available without discovery.

(c) A motion for relief under Section 9 or 10 is not subject to a stay under subsection (a).

(d) A stay under subsection (a) does not affect a party's ability to voluntarily [dismiss] [nonsuit] a cause of action or part of a cause of action subject to Section 6(b) and (c).

(e) During a stay under subsection (a), the court for good cause may hear and rule on a motion unrelated to a motion under Section 3.

Legislative Note: *A state should use the term "dismiss" or "nonsuit" in accordance with its procedures and customs.*

Comments

1. Section 4(b) provides the court with discretion to permit a party to conduct specified, limited discovery aimed at the sole purpose of collecting enough evidence to meet its burden or burdens under Section 6 of the Act. This provision recognizes that a party may not have the evidence it needs—for example, evidence of another individual's state of mind in a defamation action—prior to filing or responding to a motion. The provision allows the party to attempt to obtain that evidence without opening the case up to full-scale discovery and incurring those burdens and costs.

2. This section should not be construed to affect a court's ability to hear and rule, upon a finding of good cause, on motions for prejudgment remedies or other requests for relief. This section serves the ultimate purpose of the Act: To allow a party to avoid the expense and burden of frivolous litigation until the court can determine that the claims are not frivolous. In that connection, a court should be free to hear any motion that does not affect the moving party's right to be free from an abusive cause of action.

Style Committee Note

We moved your subsection (c) to the end because it seemed like a catchall. But it seemed like a broad escape to the stay - any motion? any good cause? It obviously is substantive, but it doesn't seem limited to things like a TRO or preliminary injunction. We changed "entertain" to "hear" – see Section 5(a) – and "rule" – our edit in Section 7.

SECTION 5. EXPEDITED HEARING.

(a) The court shall hear a motion under Section 3 not later than [60] days after filing of the motion, unless the court orders a later hearing:

(1) because of other matters on the court's docket;

(2) to allow discovery under Section 4(b); or

(3) for other good cause.

(b) If the court orders a later hearing under subsection (a)(2), the court shall hear the motion under Section 3 not later than [60] days after the court issues a ruling allowing for the discovery.

Comments

1. Section 5 should not be construed to prevent the parties from agreeing to a later hearing date and presenting that agreement to the court with a request to find "other good cause" for a later hearing. Nevertheless, the court, and not the parties, is responsible for controlling the pace of litigation, and the court should affirmatively find that good cause does exist independent of a mere agreement by the parties to a later hearing date.

2. The question of whether the Act requires a live hearing or whether a court may consider the motion on written submission should be governed by the local customs of the jurisdiction.

SECTION 6. PROOF. In ruling on a motion under Section 3, the court shall consider the parties' pleadings, together with any evidence that would be considered in ruling on a motion for summary judgment under [the state's statute or rule governing summary judgment].

Comments

1. The term "pleadings" refers the parties' live complaint and answer, as well as the motion itself and any responses and replies to it.

2. Consistent with summary judgment practice, parties should submit admissible, competent evidence—such as affidavits, deposition testimony, or tangible evidence—for the court to consider. A court should use the parties' pleadings to frame the issues in the case, but a party should not be able to rely on its *own* pleadings as substantive evidence. A party may rely on an *opposing party's* pleadings as substantive evidence, consistent with the rule that an opposing party's pleadings constitute admissible admissions.

2. The question of whether the Act requires a live hearing or whether a court may consider the motion on written submission should be governed by the local customs of the jurisdiction.

SECTION 7. [DISMISSAL OF] [STRIKING] CAUSE OF ACTION.

(a) The court shall [dismiss] [strike] with prejudice a cause of action or a part of a cause of action if:

(1) the moving party establishes that this [act] applies under Section 2 to the cause of action; and

(2) either:

(A) the responding party fails to establish a prima facie case as to each essential element of the cause of action; or

(B) the moving party establishes that there is no genuine issue as to any material fact and the party is entitled to judgment as a matter of law.

(b) A voluntary [dismissal] [nonsuit] without prejudice of a responding party's cause of action does not affect a moving party's right to obtain a ruling on a motion filed under Section 3 before the [dismissal] [nonsuit].

(c) A voluntary [dismissal] [nonsuit] with prejudice of a responding party's cause of action entitles the moving party to relief under Section 9 on a motion filed under Section 3 before the [dismissal] [nonsuit].

Legislative Notes: *A state should use the term "dismissal" or "nonsuit" in accordance with its procedures and customs. A state should title the court's order one to "dismiss" or "strike" in accordance with its procedures and customs.*

Comments

1. Section 7(a) recognizes that a court can strike or dismiss a part of a cause of action—for example, certain operative facts or theories of liability—and deny the motion as to other parts of the cause of action. **[Reporter's Note:** Examples?]

2. Section 7(a)(1) establishes "Phase One" of the motion's procedure. In this phase, the party filing the motion has the burden to prove the Act applies for one of the reasons identified in Section 2(b). As the motion is legal in nature, the burden is likewise legal, and not factual. Thus, the court should not impose a factual burden on the moving party—like "preponderance of

the evidence" or "clear and convincing evidence"—typically seen in fact-finding inquires. To the contrary, like other legal determinations, the court should simply make a determination, based on the evidence produced by the moving party, whether a cause of action brought against the moving party is based on the its communications (1) in a legislative, executive, judicial, administrative, or other governmental proceeding; (2) on an issue under consideration or review in a legislative, executive, judicial, administrative, or other governmental proceeding; or (3) exercising the right of free speech, free association, or petition, on a matter of public concern.

3. **[Reporter's Note:** We need a note on who has the burden re the exemptions. Does the movant's burden include proving that the exemptions don't apply? Or does the nonmovant have the burden to show the cause of action is exempt?]

4. Section 7(a)(2) establishes "Phase Two" of the motion's procedure. In this phase, the party against whom the motion is filed has the burden to establish a prima facie case as to each essential element of the cause of action being challenged by the motion. "Prima facie" means evidence sufficient as a matter of law to establish a given fact if it is not rebutted or contradicted. If the responding party makes such a showing (section 7(a)(2)(A)), then the moving party still may prevail if it shows that it is nevertheless entitled to judgment as a matter of law (section 7(a)(2)(B)). If the responding party cannot establish a prima facie case, or if the moving party shows it is entitled to a judgment as a matter of law, then the motion must be granted and the cause of action (or portion of the cause of action) must be stricken or dismissed. If the responding party *does* establish a prima facie case *and* the moving party cannot show itself entitled to judgment as a matter of law, then the motion must be denied.

5. Sections 7(b) and (c) recognize that a party may desire to dismiss or nonsuit a cause of action after a motion is filed in order to avoid the sanctions that accompany a dismissal under section 10. Both sections serve to maintain the moving party's ability to seek attorney's fees and costs—even though the offending cause of action has been dismissed—because the filing of a motion under the Act is costly, and many plaintiffs refuse to voluntarily dismiss their claims until a motion has been filed. But a prudent moving party should take efforts to inform opposing parties that it intends to file a motion under the Act, so as to give them an opportunity to voluntarily dismiss offending claims before a motion is filed. Courts may take a moving party's failure to do so into account when calculating the reasonableness of the moving party's attorney's fees.

6. Section 7(b) protects a moving party from the gamesmanship of a responding party who dismisses a cause of action after the filing of a motion, only to refile the offending cause of action after the motion is rendered moot by the claim's dismissal.

7. Once a motion has been filed, a voluntary [nonsuit] [dismissal] of the responding party's cause of action does not deprive the court of jurisdiction.

Style Committee Note

At the least, the title needs to be changed to bracket "[Dismissal of]" and add "[Striking] Cause of Action" since you give alternatives of dismiss or strike, as was done in Section 3. But

it occurred to us you might want the title to be "EXPEDITED RELIEF" so it parallels Section 3 ("Motion for Expedited Relief") and Section 5 ("Expedited Hearing"). We also switched the order of "nonsuit" and "dismissal" to put "dismissal" first – to match the order in [now] Section 4(d) and reflect that the Federal Rules use "dismiss" rather than "nonsuit" and most "Federal-Rules jurisdictions" would too.

SECTION 8. RULING. The court shall rule on a motion under Section 3 not later than [60] days after the hearing under Section 5.

SECTION 9. APPEAL. A moving party may appeal immediately from an order denying, in whole or in part, a motion under Section 3 [under [the state's interlocutory-appeal statute or rule]].

Legislative Note: *If a state has a statute or rule specifying instances in which an interlocutory appeal is permitted, it should cite the statute or rule in this section. This section may require amendment of a state's interlocutory appeal statute.*

Comments

1. This section should not be construed to foreclose an interlocutory appeal of an order granting, in whole or in part, a motion under Section 3, if state law would otherwise permit such an appeal.

2. This section is not intended to affect any separate writ procedure a state may have.

3. This section is not intended to prevent a court from entering an order certifying a question or otherwise permitting an immediate appeal of an order that dismisses only part of a claim.

Style Committee Note

It appeared from the bracketed reference to the state's existing interlocutory appeal statute that your intent was to grant an interlocutory appeal of right from an order denying a Section 3 motion – as Federal Rule 23(f) does regarding a class action certification ruling – but to give the state the option to say that appeal of right is taken procedurally pursuant to the state's interlocutory appeal statute. If that is what you mean, that isn't clear in the Comment, which seems inconsistent with that. More broadly, the risk is that the reference would be understood to be to the state's discretionary interlocutory appeal provision resembling 28 USC 2102(b) – requiring discretionary determinations in favor of immediate appeal by both the trial court and the appellate court – which would be inconsistent with an appeal of right. So, this section may need some work. Or it may be your intent is to say it is an appeal of right unless the state wants to make it discretionary by adding the bracketed language. If so, that would need to be explained too.

SECTION 10. RELIEF FOR SUCCESSFUL MOVING PARTY. If the moving party prevails on a motion under Section 3, the court shall award the moving party costs, reasonable attorney's fees, and reasonable expenses related to the motion.

Comment

The mandatory nature of the relief provided for by this section is integral to the uniformity of the Act. States that do not impose a mandatory award upon dismissal of a cause of action will become safe havens for abusive litigants. Without the prospect of having to financially reimburse a successful moving party, SLAPP plaintiffs will be able to file their frivolous suits in such states with impunity, knowing that, at worst, their claims will only be dismissed. But because moving parties would be financially responsible for the expense of obtaining that dismissal, the effect of the abusive cause of action is nevertheless achieved. The only way to assure a truly uniform application of the Act is to require the award of attorney's fees to successful moving parties.

SECTION 11. RELIEF FOR SUCCESSFUL RESPONDING PARTY. If the responding party prevails on a motion under Section 3 and the court finds that the motion was frivolous or filed solely with the intent to delay the proceeding, the court shall award the responding party costs, reasonable attorney's fees, and reasonable expenses related to the motion.

Style Committee Note

We understand that "solely" is substantive, but we worry how much it takes to create a mixed motive and thus escape liability – desire to encourage settlement by the risk of the motion being granted wrongly? Running up the other side's expenses. Perhaps discussion in a Comment would suffice.

SECTION 12. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 13. TRANSITIONAL PROVISION. This [act] applies to a civil action filed or cause of action asserted in a civil action on or after [the effective date of this [act]].

Style Committee Note

This is the provision moved from your original Section 2(a)(1). We revised the language to make it clearer this act applies not only to an original action filed after the effective date but also to a cause of action added by amendment, counterclaim, etc. after the effective date even though the action was commenced before the effective date. We assumed that was your intent, but we could be wrong. By the way, would "commenced" be a better word than "filed", given the term used in most states?

[SECTION 14. SEVERABILITY. If any provision of this [act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [act] which can be given effect without the invalid provision or application, and to this end the provisions of this [act] are severable.]

Legislative Note: *Include this section only if this state lacks a general severability statute or a decision by the highest court of this state stating a general rule of severability.*

SECTION 15. REPEALS; CONFORMING AMENDMENTS.

(a) . . .

(b) . . .

(c) . . .]

Legislative Note: *Section 8 may require amendment of a state's interlocutory appeal statute.*

SECTION 16. EFFECTIVE DATE. This [act] takes effect . . . .