

A UNIFORM ACT LIMITING STRATEGIC LITIGATION AGAINST PUBLIC PARTICIPATION: GETTING IT PASSED

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Fifteen years have passed since the first anti-SLAPP statute was passed in Washington State, and as of spring 2004, 21 states have some type of anti-SLAPP legislation in place. These facts will both benefit and hinder us as we bring our Model Act out into the world. On one hand, we are able to learn from the experiences of others in drafting and passing these statutes, and we have years of anti-SLAPP success stories to draw upon when making our cases. On the other hand, opponents of the legislation will be well equipped to highlight so-called “abuse” of these statutes – which may include, in their views, large media entities using anti-SLAPP motions to fight defamation lawsuits.

In light of this latter point, it is crucial that the journalism community thoughtfully considers the role it will assume in pushing for the future enactment of anti-SLAPP legislation. Without a doubt, media entities and press organizations, as among the more well-heeled and well-respected advocates of these statutes, must use their influence with the public and the government to gain recognition and support of the legislation. However, to the extent it is still possible given the countless examples of anti-SLAPP statutes benefiting the media, these groups need to downplay any personal interest in the legislation and focus on its capacity for empowering the “little guy” and the First Amendment in general.

As we keep our goals and roles in mind, we can also benefit from these tips, which several anti-SLAPP experts – including California Anti-SLAPP Project director Mark Goldowitz and Tom Newton, counsel for the California Newspaper Publishers Association – have offered.

Enlist An Influential Government Supporter. Particularly in governments that are very pro-business or otherwise disinclined to support anti-SLAPP legislation, such legislation is likely to stall without the push of at least one powerful government leader who is strongly invested in its success. In California, Senator Bill Lockyer, a democrat from Alameda County and then-head of the state Judiciary Committee, was inspired by Pring’s and Penelope Canan’s seminal article on SLAPPs and made it a mission of sorts to enact an anti-SLAPP law in California. A similar role was played by democratic Senator James J. Cox in Louisiana. In Washington State, then-Governor Booth Gardner and his attorney general, Kenneth Eikenberry, pushed for introduction of legislation.

In those cases, the lawmakers initiated the legislation, but we can try to jump-start the efforts in other states by honing in on effective champions for our cause. In the state legislatures, members of the judiciary committees are likely candidates, especially those who have an intellectual bent or have shown themselves to be strong supporters of First Amendment interests. Senator Lockyer was one such man, a former schoolteacher who strongly believed in freedom of thought. Another approach might be to pinpoint some powerful examples of citizens being victimized by SLAPPs (see “Tell A Good Story” below) and target those citizens’ representatives, or other legislators who might be particularly affected by their stories.

On the executive front, if it is not possible to engage the governor or another powerful official directly, it might be fruitful to bring the issue to a potentially interested agency or even a citizen advisory group that has access to agency officials. In Oregon, the idea for an anti-SLAPP statute originated with the citizen involvement advisory committee to the Department of Land Conservation and Development. The committee made a recommendation to the Land Conservation and Development Commission, the Department's public policy decision-making body, and the Commission directed an investigation and appropriate action. Ultimately, the Department drafted a proposal for the legislation and sought sponsors.

Enunciate The Problem. Both in enlisting government support and building a coalition (see "Build A Coalition" below), it is important that we effectively explain what SLAPPs are and why something must be done. Attached as an appendix is a sample "Statement of the Problem," adapted from one prepared by the Communications and Public Affairs Program of the Oregon Department of Land Conservation and Development. It will be most effective if we personalize our "Statements," bearing in mind each state's unique composition and challenges.

Build A Coalition. The single most important lobbying strategy, cited by all the experts, was building the broadest possible coalition to push for passage of the legislation. Media, environmental and civil rights groups are the most frequent supporters of anti-SLAPP legislation, but groups defending the rights of women and the elderly are also potentially strong advocates, as are municipalities and neighborhood and civic associations. Appendix B, which lists the supporters of the California statute, shows the great variety of groups that are sympathetic to anti-SLAPP legislation.

Several states found it useful to develop more formal coalitions, providing organizational structure to harness the power of the myriad supporters. The California Anti-SLAPP Project began as such a coalition and has continued as the lead proponent of improvements to the California statute. New Mexico also had a formal coalition, the NoSLAPP Alliance, which coordinated the statewide media and lobbying campaign.

Finally, in addition to recognizing potential allies, it is important for anti-SLAPP proponents to recognize their likely opponents. Developers and building industry associations are the No. 1 opponents of anti-SLAPP legislation, not surprising given that the quintessential SLAPP involves a developer suing a citizen for his criticism of a development project. Representatives of business, including chambers of commerce, also tend to oppose anti-SLAPP legislation, as did the Trial Lawyers Association in California, though there are certainly arguments as to why anti-SLAPP legislation would benefit its constituency.

Tell A Meaningful Story. Politicians are politicians, and they will be most likely to get behind legislation that makes them look compassionate. Therefore, it is crucial to set off on the lobbying trail with some good stories about SLAPP victims, stories that will outrage lawmakers in their injustice and present them with possible "poster children" for the new legislation. Even more effective is to enlist the victims themselves to tell their own stories.

In California, Senator Lockyer was swayed by the story of Alan LaPointe, a Contra Costa County man who led community opposition to a proposed waste-burning plant. LaPointe spoke against the plant at district meetings and before a grand jury, and was the lead plaintiff in a taxpayer's action filed in 1987 based on an allegedly improper use of public funds for feasibility studies for the proposed plant. The sanitation district cross-complained against LaPointe personally for interference with prospective economic advantage.

In Washington State, the anti-SLAPP legislation was named "The Brenda Hill Bill" after a woman who reported her subdivision developer to the state for failure to pay its tax bill. The developer filed foreclosure proceedings on Hill's home and sued her for defamation, seeking \$100,000. Her story swayed both the governor and the legislator who brought the bill, Holly Myers.

In a related matter, point out specific examples of how the current system is insufficient. In New York, legislators passed the anti-SLAPP statute out of frustration over how the legal system was addressing SLAPPs, which were common especially in the real estate context. For example, a developer sued nine Suffolk County homeowner groups and sixteen individuals after they had testified against town approval of a proposed housing development. The developer alleged various tort claims and sought more than \$11 million in damages. More than three years later, the case was finally dismissed on appeal.

Channel Your Power Effectively. Media and journalism groups are essential participants in the anti-SLAPP movement, says Goldowitz, because they are a commonly SLAPPED group with a relatively large bank of resources and a significant amount of influence. However, it is crucial that these groups know when and how to use their power. Because of their resources and contacts, media groups should probably play a key role in coalition-building, but the media would probably do best to step back and let their allies tell their own SLAPP stories. The tale of a poor woman fighting a big developer will almost always have more resonance than the travails of a large newspaper facing a baseless libel suit – even by the same developer.

The exception to the hands-off approach should be in running editorials and op-ed pieces. Newspapers and other media have an unmatched ability to reach large numbers of people, and such outreach is crucial to a successful anti-SLAPP campaign. For example, in California, more than two dozen newspapers published editorials in favor of the anti-SLAPP legislation. Op-ed pieces written by coalition allies or SLAPP victims are also powerful. The key is to emphasize the First Amendment benefits of anti-SLAPP legislation while downplaying the possibility that it could be exploited by the media itself.

Play The Politics. Even in situations fairly conducive to the passage of anti-SLAPP legislation, the political stars have to align. In California, two situations having nothing to do with SLAPPs boosted the anti-SLAPP effort immeasurably. First, on the second attempt to pass the legislation, it was merged with another bill that made permanent liability protections for volunteer officers and directors of non-profit organizations. Support for the bill more than doubled, with organizations such as the Red Cross, the United Way, and dozens of local chambers of commerce joining. Increased pressure from all sides contributed to Governor Pete Wilson's decision to sign the bill in 1992 on its third attempt.

Second, when the democrats took control of both houses of the California legislature in 1997, certain anti-SLAPP allies, such as the ACLU and environmental groups, saw a boost in their lobbying influence. This contributed in part to the California coalition's ability to push through an amendment to the anti-SLAPP statute clarifying that its provisions should be interpreted broadly.

Certainly we as political outsiders are limited in the amount of maneuvering we can achieve – and politicians are limited ethically in the steps they can take. But it is always worth using our imaginations and keeping an eye out for situations that may improve the climate for passage of anti-SLAPP legislation.

Be Patient. It can take time to pass anti-SLAPP legislation. In California and Pennsylvania, it took three tries to generate enough momentum and support to achieve success. A first attempt can be effective, even if it doesn't lead to a law, if it gets the issue on the radar screens of lawmakers and citizens. Sometimes, we might have to wait until one political party makes an exit, or the right sponsor comes along.

Be Willing to Compromise. A little bit of give-and-take is essential in the legislative process. In California, in exchange for Governor Wilson's signature on the anti-SLAPP bill, Senator Lockyer agreed to introduce remedial legislation to make mandatory a permissive provision for awarding attorney's fees and costs to a plaintiff who prevailed on a motion to strike. (The remedial legislation has not passed.) In New Mexico, the bill was on the verge of dying in the Senate when a last-minute compromise was brokered which, among other things, changed the definition of what speech would be immunized.

As in New Mexico or Pennsylvania – where the statute was greatly watered down before passage – the results of compromise may be harsh. But keep in mind that where passage of the desired language does not seem possible, it might be better to get some kind of statute on the books. Once that happens, some of the opposing pressure may lift and it may be easier to pass amendments that will bring the statute in line with our goals.

Appendix A

SLAPPS: A STATEMENT OF THE PROBLEM

What is a SLAPP Suit?

The essence of a SLAPP suit is the transformation of a debate over public policy – including such local issues as zoning, environmental preservation, school curriculum, or consumer protection – into a private dispute. A SLAPP suit shifts a political dispute into the courtroom, where the party speaking out on the issue must defend his or her actions. Although SLAPP suits may arise in many different contexts, they share a number of features:

1. The conduct of the targets that are sued is generally constitutionally protected speech intended to advance a view on an issue of public concern. In most cases, a SLAPP suit is filed in retaliation for public participation in a political dispute. The plaintiff is attempting to intimidate a political opponent and, if possible, prevent further public participation on the issue by the person or organization.

2. Targets typically are individuals or groups that are advancing social or political interests of some significance and not acting solely for personal profit or commercial advantage.

3. The filers are individuals or groups who believe their current or future commercial interests may be negatively affected by the targets' actions. Though developers and other commercial entities are the most common SLAPP plaintiffs, they are not the only ones. For example, in Oklahoma, a group supporting tort reform was the subject of a class action libel suit filed by trial lawyers, and in California, county officials filed a \$42 million SLAPP against a local citizen because of his opposition to a proposed incinerator project.

4. The actions tend to be based on one or more of the following torts: defamation (libel or slander); business torts (interference with contract, business relationships or economic advantage, or restraint of trade); misuse of process (abuse of process or malicious prosecution); civil rights violations (due process, takings, or equal protection); or conspiracy to commit one or more of the above acts.

5. Damages sought are often in the millions of dollars. According to a study by the Denver Political Litigation Project, the average demand was for \$9.1 million. See Penelope Canan and George Pring, SLAPPS: Getting Sued for Speaking Out 217 (Philadelphia: Temple University Press, 1996).

6. Almost all SLAPP suits are eventually dismissed or decided in favor of the defendants. Canan and Pring reported that targets win dismissals at the very first trial court appearance in about two-thirds of the cases. Id. at 218.

By all accounts, the number of SLAPP suits has increased during the past 30 years. Examples of SLAPP suits from around the country reveal the extent of the practice:

- In Rhode Island, a woman filed comments on proposed groundwater rules, raising concerns about possible contamination from a local landfill. The landfill operators sued her for defamation and tortious interference with prospective business contracts, seeking both compensatory and punitive damages.
- In Pennsylvania, a couple wrote letters to their United States Senator, state health officials, and CBS News complaining about conditions at a local nursing home. The state investigated and eventually revoked the nursing home's license. The nursing home then sued the couple, the Senator, and a state health department official.
- In Minnesota, a retired United States Fish and Wildlife Service employee mobilized his neighbors against a proposed condominium development on a small lake. After the rezoning request was rejected, the developer sued him, alleging he had made false statements that damaged the developer's business reputation.
- In Texas, a woman confined to her home by illness spoke out publicly against a nearby landfill. In response, the landfill owners filed a \$5 million defamation suit against the woman and her husband.
- In California, a group of small cotton farmers bought newspaper advertising opposing a proposed ballot measure supported by the nation's largest cotton agribusiness. The corporation sued the farmers for libel, requesting \$2.5 million in damages.
- In California, a \$63 million lawsuit was filed by a developer who claimed that the Beverly Hills League of Women Voters had unlawfully stymied his 10-acre project.
- In Washington, The Nature Conservancy was sued for \$2.79 million by seaweed farm developers after it had inventoried potential natural areas in San Juan County, identified lands that should be preserved (including the plaintiffs'), and turned the study over to the county as a recommendation.

Isn't Action Involving Public Participation And Petition Already Protected By The Constitution? Why Is A Special Anti-SLAPP Provision Needed?

Two constitutional doctrines, both founded on the First Amendment, protect the sort of speech and conduct that is targeted by SLAPPs. The first, the New York Times v. Sullivan doctrine, provides that a person cannot be found liable for a false statement about a public figure on a matter of public concern unless the statement was made with "actual malice," that is, with knowledge that it was false or with reckless disregard for its truth or falsity. The second, the Noerr-Pennington doctrine, provides that petitioning activity is shielded from liability as long as it is genuinely aimed at procuring favorable government action.

Under both these doctrines, a defendant seeking to promptly dispose of a lawsuit files a motion to dismiss, in which the defendant argues that the plaintiff's allegations in the complaint do not state a viable claim. The burden of persuasion lies with the defendant, and the facts alleged are presumed to be true, though later inquiries will be intensely fact-specific. For those

reasons, and because the right to sue is itself constitutionally protected, a judge generally will not dismiss a lawsuit at this stage. Most often, the judge will allow the plaintiff to proceed with discovery, including depositions during which the plaintiff's attorney may question the defendant's knowledge, beliefs, and motives.

The problem with the current legal framework is that it takes too long to get SLAPP suits dismissed. According to Dr. Pring, the average SLAPP suit proceeds for 40 months – more than three years. During this time, the suit inflicts massive emotional and financial harm on the defendant, and often the defendant withdraws completely from action involving public participation and petition. By the time the SLAPP suit is dismissed, the plaintiff has thus achieved its goals of retaliation and silencing protected speech.

What Will Anti-SLAPP Legislation Do?

Essentially, anti-SLAPP legislation identifies the speech and conduct that should be protected – defined as “action involving public participation and petition” – and provides a procedure for speedy review of lawsuits that are filed as a result of such protected action.

In particular, the proposed legislation permits a suspecting SLAPP victim to file a special motion to strike, which must be heard within 60 days. At the hearing, the SLAPP must be dismissed unless the filer establishes a probability of prevailing. The proposed legislation also states that discovery will be stayed pending a decision on the motion to strike. A prevailing victim is entitled to his attorney's fees and costs, and a court may issue other sanctions to deter similar conduct in the future by the filer or others similarly situated.

The proposed legislation also features protections for those who file legitimate suits and find themselves the subject of special motions to strike. The court will not dismiss a suit if the filer produces substantial evidence to support a prima facie case. Furthermore, the filer is entitled to his attorney's fees and costs if the court finds that the motion to strike was frivolous or filed in bad faith.

Although arguments can be made against anti-SLAPP legislation, such statutes represent a legislative decision that, even though citizen communications may at times be self-interested or incorrect, public participation and petition are essential to our democratic process and must be protected from the threat of SLAPP suits.

Appendix B

**BUILDING A BROAD COALITION:
ANTI-SLAPP PROPONENTS IN CALIFORNIA**

American Civil Liberties Union
American Lung Association of California
Bar Association of San Francisco
California Association of Nonprofits
California Association of Professional Liability Insurers
California Association of Zoos and Aquariums
California Common Cause (good government group)
California First Amendment Coalition
California First Amendment Project (predecessor of CASP)
California League of United Latin American Citizens
California Legislative Council For Older Americans
California Newspaper Publishers Association
California School Employees Association
California Thoracic Society
Center for Law in the Public Interest
City and County of Los Angeles
City of Napa
City of San Diego
City of San Francisco
City of San Mateo
Complete Equity Markets, Inc. (professional insurance company)
Concerned Citizens for Environmental Health
Consumers Union
Friends of the River (statewide river conservation organization)
Golden State Manufactured-Home Owners League
Greenlining Coalition (multi-ethnic community leaders)
Land Utilization Alliance
Neighborhood and civic associations
Planning and Conservation League (California environmental org.)
Public Advocates (public-interest law firm)
Queen's Bench (women's lawyers association in San Francisco)
Sierra Club, Ventana Chapter
Women Lawyers of Alameda County

**A UNIFORM ACT LIMITING STRATEGIC LITIGATION
AGAINST PUBLIC PARTICIPATION**

PREFATORY NOTE

The past 30 years have witnessed the proliferation of Strategic Lawsuits against Public Participation ("SLAPPs") as a powerful mechanism for stifling free expression. SLAPPs defy simple definition. They are initiated by corporations, companies, government officials, and individuals, and they target both radical activists and typical citizens. They occur in every state, at every level in and outside of government, and address public issues from zoning to the environment to politics to education. They are cloaked as claims for defamation, nuisance, invasion of privacy, and interference with contract, to name a few. For all the diversity of SLAPPs, however, their unifying features make them a dangerous force: They are brought not in pursuit of justice, but rather to ensnare their targets in costly litigation that distracts them from the controversy at hand, and to deter them and others from engaging in their rights of speech and petition on issues of public concern.

To limit the detrimental effects of SLAPPs, 21 states have enacted laws that authorize special and/or expedited procedures for addressing such suits, and ten others are considering or have previously considered similar legislation. Though grouped under the "anti-SLAPP" moniker, these statutes and bills differ widely in scope, form, and the weight they accord First Amendment rights vis a vis the constitutional right to a trial by jury. Some "anti-SLAPP" statutes are triggered by any claim that implicates free speech on a public issue, while others apply only to speech in specific settings or concerning specific subjects. Some statutes provide for special motions to dismiss, while others employ traditional summary procedures. The burden of proof placed on the responding party, whether discovery is stayed pending consideration, and the availability of attorney's fees and damages all vary from state to state. Perhaps as a result of the confusion these variations engender, anti-SLAPP measures in many states are grossly under-utilized.

The Uniform Act Limiting Strategic Litigation Against Public Participation seeks to remedy these flaws by enunciating a clear process through which SLAPPs can be challenged and their merits evaluated in an expedited manner. The Act sets out the

situations in which a special motion to strike may be brought, a uniform timeframe and other procedures for evaluating the special motion, and a uniform process for setting and distributing attorney's fees and other damages. In so doing, the Act ensures that parties operating in more than one state will face consistent and thoughtful adjudication of disputes implicating the rights of speech and petition.

Because often conflicting constitutional considerations bear on anti-SLAPP statutes, the Act is in many respect an exercise in balance. The triggering "action involving public participation and petition" is defined so that the special motion to strike may be employed against all true SLAPPs without becoming a blunt instrument for every person who is sued in connection with the exercise of his or her rights of free speech or petition. To avoid due process concerns, the responding party's burden of proof is not overly onerous, yet steep enough to weed out truly baseless suits. Finally, to reduce the possibility that the specter of an anti-SLAPP motion will deter the filing of valid lawsuits, the fee-shifting structure is intended to ensure proper compensation without imposing purely punitive measures. In these ways and more, the Act serves both the citizens' interests in free speech and petition and their rights to due process.

**A UNIFORM ACT LIMITING STRATEGIC LITIGATION
AGAINST PUBLIC PARTICIPATION**

SECTION 1. FINDINGS AND PURPOSES.

(a) FINDINGS. The Legislature finds and declares that

(1) there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances;

(2) such lawsuits, called "Strategic Lawsuits Against Public Participation" or "SLAPPs," are typically dismissed as groundless or unconstitutional, but often not before the defendants are put to great expense, harassment, and interruption of their productive activities.

(3) the costs associated with defending such suits can deter individuals and entities from fully exercising their constitutional rights to petition the government and to speak out on public issues;

(4) it is in the public interest for citizens to participate in matters of public concern and provide information to public entities and other citizens on public issues that affect them without fear of reprisal through abuse of the judicial process;

(5) an expedited judicial review would avoid the potential for abuse in these cases.

(b) PURPOSES. The purposes of this Act are

(1) to strike a balance between the rights of persons to file lawsuits and to trial by jury and the rights of persons to participate in matters of public concern;

(2) to establish an efficient, uniform, and comprehensive method for speedy adjudication of SLAPPs;

(3) to provide for attorney's fees, costs, and additional relief where appropriate.

Comment

The findings bring to light the costs of baseless SLAPPs - their harassing and disruptive effect and financial burdens on those forced to defend against them, and the danger that such lawsuits will deter individuals and entities from speaking out on public issues and exercising their constitutional right to petition the government. The stated purposes make clear that that drafters also recognize important interests opposing the speedy disposal of lawsuits, particularly the right of an individual to due process and evaluation of his or her claim by a jury of peers. Thus, the primary intent of the Act is not to do away with SLAPPs, but to limit their detrimental effects on the First Amendment without infringing on citizens' due process and jury trial rights.

Though a statement of findings and purposes is not required in many states (only about half of the anti-SLAPP laws in effect have them), several states have put such statements to good use. They can be invaluable in helping courts interpret the reach of the statute. This has been particularly evident in California, the epicenter of anti-SLAPP litigation. For example, in 1999, the United States Court of Appeals for the Ninth Circuit found the legislative findings crucial to its holding that the statute may properly be applied in federal court. See United States ex rel. Newsham v. Lockheed Missiles and Space Co., 190 F.3d 963, 972-73 (9th Cir. 1999). If the statute were strictly

procedural, the court noted, choice-of-law considerations would likely deem it inapplicable in federal court. However, because of California's "important, substantive state interests furthered by anti-SLAPP statute," which are enunciated in Cal. Civ. Proc. Code 425.16(a), the court held that the anti-SLAPP statute should be applied in conjunction with the Federal Rules of Civil Procedure. Id.

The Supreme Court of California also has deemed the legislative findings useful in determining many of the most important questions that have arisen from application of the anti-SLAPP statute. In Briggs v. Eden Council for Hope and Opportunity, the Court examined whether a party moving to strike a cause of action arising from a statement made before, or in connection with an issue under consideration by, a legally authorized official proceeding was required to demonstrate separately that the statement concerned an issue of public significance. 969 P.2d 564, 565 (Cal. 1999). The court found that the 425.16(a) findings evinced an intent broadly to protect petition-related activity; to require separate proof of the public significance of the issue in such cases would result in the exclusion of much direct petition activity from the statute's protections, contrary to the clear legislative intent. Id. at 573-74. In Equilon Enterprises, LLC v. Consumer Cause, Inc., the same court found that requiring a moving party to demonstrate that the action was brought with an "intent to chill" speech would contravene the legislative intent by lessening the statute's effectiveness in encouraging public participation in matters of public significance. 52 P.2d 685, 689 (Cal. 2002).

The benefits of statements of findings and purposes have been seen outside California as well. In Hawks v. Hinely, an appellate court in Georgia cited the General Assembly's stated findings in holding that statements made in a petition itself - not just statements concerning the petition - trigger the safeguards of the anti-SLAPP statute. 556 S.E.2d 547, 550 (Ga. App. 2001). In Globe Waste Recycling, Inc. v. Mallette, the Supreme Court of Rhode Island found that legislative intent, as recorded in the statute, indicated that statements for which immunity is claimed need not necessarily be made before a legislative, judicial, or administrative body under the terms of the statute. 762 A.2d 1208, 1213 (R.I. 2000). Finally, in Kauzlarich v. Yarbrough, an appellate court in Washington held that the legislative findings indicated that the Superior Court Administration is an "agency," and thus communications to that

entity trigger the immunity protection and other benefits of the anti-SLAPP statute. 20 P.3d 946 (Wash. App. 2001).

SECTION 2. DEFINITIONS. As used in this Act,

(a) "Claim" includes any lawsuit, cause of action, claim, cross-claim, counterclaim, or other judicial pleading or filing requesting relief;

(b) "Government" includes a branch, department, agency, instrumentality, official, employee, agent, or other person acting under color of law of the United States, a state, or subdivision of a state or other public authority;

(c) "Moving party" means a person on whose behalf the motion described in Section 4 is filed seeking dismissal of a claim;

(d) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, or any other legal or commercial entity.

(e) "Responding party" means a person against whom the motion described in Section 4 is filed.

Comment

Most SLAPPs present themselves as primary causes of action, with the moving party as the defendant to the original SLAPP suit and the responding party as the plaintiff. However, "claim," "moving party," and "responding party" are defined so the protections of the statute extend to other, less common situations. For example, the moving party may be a plaintiff in the underlying action if the SLAPP claim is a counter-claim.

See, e.g., Simmons v. Allstate Ins. Co., 92 Cal. App. 4th 1068 (Cal. Ct. App. 2001); Wilcox v. Superior Court, 27 Cal. App. 4th 809 (Cal. Ct. App. 1994). Alternatively, the moving and responding parties may be co-defendants or co-plaintiffs in the underlying action if the SLAPP claim is a cross-claim.

Similarly, while the quintessential SLAPPs are brought by corporate entities against individuals, the definition of "person" in the Act is not so limited. A "person" eligible to be a moving or responding party under the Act may be an individual or a wide range of corporate or other entities. Thus, the evaluation of a SLAPP claim is properly focused on the substance of the claim rather than peripheral matters such as the status of the parties. With the same purpose in mind, "government" is defined broadly to ensure that action in furtherance of the right of petition is not construed to include only interaction with administrative agencies.

SECTION 3. SCOPE; EXCLUSION.

(a) SCOPE. This Act applies to any claim, however characterized, that is based on an action involving public participation and petition. As used in this Act, an "action involving public participation and petition" includes

(1) any oral statement made, or written statement or other document submitted, in a legislative, executive, or judicial proceeding or other proceeding authorized by law;

(2) any oral statement made, or written statement or other document submitted, in connection with an issue under consideration or review by a legislative, executive, or judicial proceeding or other proceeding authorized by law;

(3) any oral statement made, or written statement or other document submitted, that is reasonably likely to

encourage, or to enlist public participation in an effort to effect, consideration or review of an issue in a legislative, executive, or judicial proceeding or other proceeding authorized by law;

(4) any oral statement made, or written statement or other document submitted, in a place open to the public or a public forum in connection with an issue of public concern; or

(5) any other conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition.

(b) EXCLUSION. This Act shall not apply to any action brought by the attorney general, district attorney, or city attorney, acting as a public prosecutor, to enforce laws aimed at public protection.

Comment

This section is the core of the statute, defining what First Amendment activities will trigger the protections stated herein. First, the claim must be "based on" an action involving public participation and petition. The existing California statute uses the terminology "arising from," but in response to confusion over that language, the California Supreme Court has held that "the critical point is whether the plaintiff's cause of action itself was based on an act in furtherance of the defendant's right of petition or free speech." City of Cotati v. Cashman, 52 P.3d 695 (Cal. 2002). The use of "based on" in this Act is designed to omit that confusion and clarify that there must be a real - not simply temporal - connection between the action involving public participation and petition and the legal claim that follows.

The term "action involving public participation and petition" is modeled after the defining language in the existing New York and Delaware anti-SLAPP statutes and is designed to reinforce the model statute's main focus: to protect the public's right to participate in the democratic process through expression of their views and opinions. This terminology is also designed to avoid the confusion engendered by the existing California statute - which is triggered by a cause of action arising from an "act in furtherance of person's right of petition or free speech . . . in connection with a public issue" - over whether the statute only applies to activity addressing a matter of public concern. As discussed below, this statute is not so limited.

The enunciation of what constitutes an "action involving public participation" attempts to combine the best features of the Massachusetts and California statutes, which have been the models for anti-SLAPP laws in several other states, including Louisiana, Maine, and Oregon. Subsection (1) is intended to cover pure petitioning activity and other statements made during official proceedings. Subsection (2) extends the same protections to statements that concern such activity but are made outside the realm of official proceedings or petition processes. Subsection (3) is drawn from the Massachusetts and Maine statutes and is not included in the California act and its progeny (though much of the conduct covered by this subsection is provided for elsewhere in those statutes). This subsection is designed to protect conduct that is similar in form and value to the activity discussed above but is not protected by (1) or (2) because it concerns petitions or official proceedings that have not yet been initiated.

The first three subsections contain no requirement that the statements made relate to a matter of public concern. This is consistent with the California Supreme Court's holding in Briggs v. Eden Council for Hope and Opportunity, 969 P.2d 564 (Cal. 1999). In that case, two owners of residential rental properties sued a nonprofit corporation over statements made by employees of the defendant in connection with the defendant's assistance of a tenant in pursuing an investigation of the plaintiffs by the Department of Housing and Urban Development. The California Supreme Court held that the section "broadly encompasses participation in official proceedings, generally, whether or not such participation remains strictly focused on 'public' issues." Id. at 571.

Subsection (4) is drawn from the existing California statute and its progeny and offers protection for statements made in a place open to the public or a public forum in connection with an issue of public concern. The statute does not attempt to define "a place open to the public" or "a public forum," out of concern that such a definition would be unintentionally restrictive. This provision clearly encompasses those spaces historically considered public forums - such as parks, streets, and sidewalks - but on the fringes, there has been more confusion. In particular, courts have disagreed on whether a publication of the media constitutes a public forum, such that a lawsuit stemming from a media publication would be subject to an anti-SLAPP motion. Compare Zhao v. Wong, 48 Cal. App. 4th 1114 (Cal. Ct. App. 1996) (holding private newspaper publishing falls outside concept of public forum), and Lafayette Morehouse, Inc. v. Chronicle Publishing Co., 37 Cal. App. 4th 855 (Cal. Ct. App. 1995) (same), with Baxter v. Scott, 845 So. 2d 225 (La. Ct. App. 2003) (holding professor's website is public forum), Seelig v. Infinity Broadcasting Corp., 97 Cal.App.4th 798 (Cal. Ct. App. 2002) (holding radio talk show is public forum), M.G. v. Time Warner, 89 Cal.App.4th 623 (Cal. Ct. App. 2001) (holding magazine is public forum), and Damon v. Ocean Hills Journalism Club, 85 Cal.App.4th 468 (Cal. Ct. App. 2000) (holding residential community newsletter is public forum). Courts are encouraged to consider this and related issues with an eye toward the purposes of the statute and the intent that it be construed broadly (see Section 8 below).

Finally, Subsection (5) is designed to capture any expressions of the First Amendment right of free speech on matters of public concern and right of petition that might not fall under the other categories. This includes all such conduct, such as symbolic speech, that might not be considered an oral or written statement or other document. This provision resembles the corresponding provision in the existing California statute, which covers "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." See Cal. Code Civ. Proc. § 425.16(e)(4). However, this provision has been modified to make clear that conduct falling within the right to petition the government need not implicate a matter of public concern. This broad provision has been held to include speech published in the media, and is intended to do so here. See M.G. v. Time Warner, 89 Cal.App.4th at 629.

It is likely that most situations which the proposed statute is designed to address will be addressed by the five subdivisions discussed above. However, as written, the list is not exclusive. A court has jurisdiction to find that the protections of this Act are triggered by a claim based on actions that do not fall within these subdivisions, if the court deems that the claim has the effect of chilling the valid exercise of freedom of speech or petition and that application of the Act would not unduly hinder the constitutional rights of the claimant.

Subsection (b) provides that enforcement actions by the government will not be subject to anti-SLAPP motions. This exclusion is intended to ensure that the statute's protections do not hinder the government's ability to enforce consumer protection laws. In People v. Health Laboratories of North America, 87 Cal. App. 4th 442 (Cal. Ct. App. 2001), the Court of Appeals of California upheld a similar provision in the California statute against an equal protection challenge. The court noted that the exclusion is consistent with the purposes of the statute, as a public prosecutor is not motivated by retaliation or personal advantage, and it held that the provision is rationally related to the legitimate state interest of ensuring the government may pursue actions to enforce its laws uniformly. The language from the existing California statute has been modified to make clear that the exception does not apply only to civil enforcement actions initiated in the name of the people of the state.

SECTION 4. SPECIAL MOTION TO STRIKE; BURDEN OF PROOF.

(a) A party may bring a special motion to strike any claim that is based on an action involving public participation and petition, as defined in Section 3.

(b) A party bringing a special motion to strike under this Act has the initial burden of making a prima facie showing that the claim against which the motion is based on an action involving public participation and petition. If the moving party meets this burden, the burden shifts to the responding

party to establish a probability of prevailing on the claim by presenting substantial evidence to support a prima facie case. If the responding party meets this burden, the court shall deny the motion.

(c) In making a determination under subsection (b), the court shall consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(d) If the court determines that the responding party has established a probability of prevailing on the claim,

(1) the fact that the determination has been made and the substance of the determination may not be admitted into evidence at any later stage of the case; and

(2) the determination does not affect the burden of proof or standard of proof that is applied in the proceeding.

(e) The Attorney General's office or any government body to which the moving party's acts were directed may intervene to defend or otherwise support the moving party.

Comment

Section 4 sets out the expedited process through which "a claim that is based on an action involving public participation and petition" may be evaluated. Subsection (a) states that a party subject to such a claim may file a special motion to strike that claim. Many existing anti-SLAPP statutes provide for adjudication through motions to dismiss or motions for summary judgment. This Act mimics the existing California statute in choosing terminology that makes clear that this

Motion is governed by special procedures that distinguish it from other dispositive motions.

Subsection (b) delineates the allocation of the burden between the moving and responding parties. The moving party first must make a prima facie showing that the claim is based on an action involving public participation and petition, as defined in Section 3. The moving party need not show that the action was brought with the intent to chill First Amendment expression or has such a chilling effect, though such a showing might be necessary if the action does not fit into one of the five specified categories in Section 3.

If the moving party carries its burden, the responding party must establish a probability of prevailing on its claim. This standard is higher than the standard of review for a traditional motion to dismiss; in addition to stating a legally sufficient claim, the responding party must demonstrate that the claim is supported by a prima facie showing of facts that, if true, would support a favorable judgment. See Briggs v. Eden Council for Hope and Opportunity, 969 P.2d 564 (Cal. 1999); Matson v. Dvorak, 40 Cal. App. 4th 539 (Cal. Ct. App. 1995). In so doing, the responding party should point to competent, admissible evidence.

In evaluating whether the responding party has put forth facts establishing a probability of prevailing, the court shall also consider defenses put forth by the moving party. As Subsection (c) makes clear, at all stages in this examination the court must consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

Existing and proposed state statutes that allocate a similar burden of proof to the responding party have faced constitutional challenges. In New Hampshire in 1994, a senate bill modeled on the existing California statute was presented to the state Supreme Court, which found that it was inconsistent with the state's constitution. See Opinion of the New Hampshire Supreme Court on an Anti-SLAPP Bill, 641 A.2d 1012 (1994). The court found that the statute's provision for court consideration of the pleadings and affidavits denied a plaintiff who is entitled to a jury trial the corresponding right to have all factual issues resolved by a jury. In the face of similar concerns, the Rhode Island General Assembly amended its statute in 1995 to do away with the "special motion to dismiss"

provision and its "preponderance of the evidence" standard. See Hometown Properties, Inc. v. Fleming, 680 A.2d 56 (R.I. 1996).

The opinion of the New Hampshire Supreme Court evinces a misunderstanding of a court's role in evaluating a motion to strike and response. The court does not weigh the parties' evidence at this preliminary stage, but rather determines whether the responding party has passed a certain threshold by pointing to the existence of evidence that creates a legitimate issue of material fact. See Lafayette Morehouse, Inc. v. Chronicle Publishing Co., 37 Cal. App. 4th 855 (Cal. Ct. App. 1995); Dixon v. Superior Court, 30 Cal. App. 4th 733 (Cal. Ct. App. 1994); see also Lee v. Pennington, 830 So. 2d 1037 (La. Ct. App. 2002) ("The only purpose of [the state statute] is to act as a procedural screen for meritless suits, which is a question of law for the court to determine at every stage of a legal proceeding."). The court's analysis is not unlike that which it would undertake in examination of a summary judgment motion. Furthermore, the court may permit a responding party to conduct discovery after the filing of a special motion to strike if the responding party needs such discovery to establish its burden under the Act. See Section 5, infra.

Subsection (d) provides that if a responding party is successful in defeating a special motion to strike, its case should proceed as if no motion had occurred. The evaluation of a special motion to strike is based on the examination of evidence, the veracity of which is assumed at this preliminary stage but has not been established. Thus, the survival of a motion to strike is not a reflection of the validity of the underlying claim, and evidence of the survival of a motion to strike is inadmissible as proof of the strength of the claim. Likewise, the special motion to strike should in no way alter the burden of proof as to the underlying claim.

A variation of subsection (e) is included in almost every existing anti-SLAPP statute and provides that the attorney general's office or the government body to which the moving party's acts were directed may intervene to defend or otherwise support the moving party. Many of the most troubling SLAPPs are brought by a powerful party against a relatively powerless individual or group. Though the government's role is purely discretionary, this provision is designed to grant more targets of SLAPPs the resources needed to fight baseless lawsuits.

SECTION 5. REQUIRED PROCEDURES.

(a) The special motion to strike may be filed within 60 days of the service of the most recent complaint or, in the court's discretion, at any later time upon terms it deems proper. A hearing shall be held on the motion not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.

(b) All discovery and any pending hearings or motions in the action shall be stayed upon the filing of a special motion to strike under Section 3. The stay of discovery shall remain in effect until the entry of the order ruling on the motion. Notwithstanding the stay imposed by this subsection, the court, on motion and for good cause shown, may order that specified discovery or other hearings or motions be conducted.

(c) Any party shall have a right of expedited appeal from a trial court order on the special motion or from a trial court's failure to rule on the motion in a timely fashion.

Comment

The procedures set out in Section 5 are designed to facilitate speedy adjudication of anti-SLAPP motions, one of the main goals of this Act. Subsection (a) states that unless the court deems it proper to appoint a later deadline, a special motion to strike must be filed within 60 days of service of the most recent amended complaint - or the original complaint, if it has not been amended. The motion must be heard by the court within 30 days of service of the motion to the opposing party, unless the docket conditions of the court require a later hearing. The court may not delay the hearing date merely for the convenience of one or both parties.

Subsection (b) provides for a stay of discovery and all other pending motions from the time a special motion to strike is filed until the entry of the order ruling on the motion. This stay is designed to mitigate the effects of SLAPP suits brought for the purpose of tying up the SLAPP victim's time and financial resources. However, it is also understood that in some situations the party opposing the special motion to strike will need discovery in order to adequately frame its response to the motion, and restricting discovery in these situations might raise constitutional concerns. In addition, there will be times when a stay on all other pending motions will be impractical.

Thus, the court is permitted, on motion and for good cause shown, to permit limited discovery and/or the hearing of other motions. Relevant considerations for the judge when evaluating "good cause" include whether the responding party has reasonably identified material held or known by the moving party that would permit it to demonstrate a prima facie case, see Lafayette Morehouse Inc. v. Chronicle Publishing Co., 37 Cal. App. 4th 855, 868 (Cal. Ct. App. 1995), and whether the materials sought are available elsewhere, see Schroeder v. City Council of City of Irvine, 97 Cal. App. 4th 172 (Cal. Ct. App. 2002). The requirement for a timely motion is intended to be enforced; responding parties will not be permitted to raise the issue for the first time on appeal or when seeking reconsideration. See Evans v. Unkow, 38 Cal. App. 4th 1490 (Cal. Ct. App. 1995).

Subsection (c) makes clear that an order granting or denying a special motion to strike is immediately appealable. This provision is modeled after the 1999 amendment to the existing California statute that was intended to give the moving party -- the party the statute was designed to protect -- the same ability as the responding party to challenge an adverse trial court ruling. Originally, the California statute permitted the responding party to appeal the grant of a motion to strike, while the moving party could only challenge the denial through petition for a writ in the court of appeals, a process that is disfavored and rarely successful.

SECTION 6. ATTORNEY'S FEES, COSTS, AND OTHER RELIEF.

(a) The court shall award a moving party who prevails on a special motion to strike made under Section 3, without regard to any limits under state law:

(1) costs of litigation and any reasonable attorney's fees incurred in connection with the motion; and

(2) such additional relief, including sanctions upon the responding party and its attorneys or law firms, as the court determines shall be necessary to deter repetition of the conduct and comparable conduct by others similarly situated.

(b) If the court finds that the special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award reasonable attorney's fees and costs to the responding party.

Comment

The attorney's fee provisions are a central feature of the Uniform Act, designed to create the proper incentives for both parties considering lawsuits arising out of the First Amendment activities of another, and parties pondering how to respond to such lawsuits. Subsection (a) sets out the costs, fees, and other relief recoverable by a moving party who succeeds on a special motion to strike under this statute. It provides that a prevailing movant is entitled to recover reasonable attorney's fees and costs, and that the court should issue such other relief, including sanctions against the responding party or its attorneys, as the court deems necessary to deter the responding party and others from similar suits in the future. Subsection (b) counterbalances (a) by providing mandatory fee-shifting to the responding party if the court finds that the special motion to strike is frivolous or brought with intent to delay.

Nearly every state anti-SLAPP statute includes a section providing for mandatory or discretionary fee-shifting for the benefit of a prevailing movant. The main purpose of such provisions is to discourage the bringing of baseless SLAPPs by "plac[ing] the financial burden of defending against so-called SLAPP actions on the party abusing the judicial system." Poulard v. Lauth, 793 N.E.2d 1120, 1124 (Ind. Ct. App. 2003); see also Ketchum v. Moses, 17 P.3d 735, 745 (Cal. 2001). Another important purpose of such provisions is to encourage private representation of parties defending against SLAPPs, even where the party might not be able to afford fees. See id. Thus, fees are recoverable even if the prevailing defendant is represented on a pro bono basis, see Rosenaur v. Scherer, 88 Cal. App. 4th 260, 287 (Cal. Ct. App. 2001).

By "reasonable attorney's fees," the statute refers to those fees that will adequately compensate the defendant for the expense of responding to a baseless lawsuit. See Robertson v. Rodriguez, 36 Cal. App. 4th 347, 362 (Cal. Ct. App. 1995). The statute permits the use of the lodestar method for calculating reasonable fees. The lodestar method provides for a baseline fee for comparable legal services in the community that may be adjusted by the court based on factors including (1) the novelty and difficulty of the questions involved; (2) the skill displayed by the attorneys; (3) the extent to which the nature of the litigation precluded other employment of the attorneys; and (4) the contingent nature of the fee award. See Ketchum, 17 P.3d at 741. Even if the lodestar method is not followed strictly, the court may take those and other factors - such as a responding party's bad-faith tactics - into account in determining "reasonable" fees.

Much confusion has arisen in the application of California's anti-SLAPP statute over what constitutes a "prevailing" defendant or moving party, particularly where the responding party voluntarily dismisses the underlying case prior to a court's ruling on the special motion to strike. The authors of this statute agree with the majority of California courts that proper disposition of these situations requires the court to make a determination of the merits of the motion to strike. See Pfeiffer Venice Properties v. Bernard, 107 Cal. App. 4th 761, 768 (Cal. Ct. App. 2002); Liu v. Moore, 69 Cal. App. 4th 745, 755 (Cal. Ct. App. 1999). If the court finds that the moving party would have succeeded on its motion to strike, it shall award the moving party reasonable attorney's fees and costs. This interpretation does not provide a disincentive for responding parties to dismiss baseless lawsuits, because if the

responding party timely dismisses, the moving party will likely have incurred less in fees and costs than it would have if the responding party pursued its lawsuit to a ruling on the motion to strike.

One California court has held that where the responding party voluntarily dismisses prior to a ruling on the special motion to strike, the responding party could prove it prevailed by showing "it actually dismissed because it had substantially achieved its goals through a settlement or other means, because the [moving party] was insolvent, or for other reasons unrelated to the probability of success on the merits." Coltrain v. Shewalter, 66 Cal. App. 4th 94, 107 (Cal. Ct. App. 1998). This analysis is flawed because it places impoverished moving parties in the position of having to fight baseless SLAPP suits out of their own pockets because the responding party can at any time dismiss the SLAPP on the grounds that the moving party is insolvent and thereby avoid paying attorney's fees.

Another question that has arisen in the interpretation of the California statute is how the fee award is to be assessed if the moving party's victory is partial or limited in comparison to the litigation as a whole. In such cases, the prevailing movant is entitled to a fee award reduced by the court to reflect the partial or limited victory. See ComputerXpress, Inc. v. Jackson, 93 Cal. App. 4th 993, 1019 (Cal. Ct. App. 2001). Finally, the government, if it prevails on a special motion to strike, is entitled to recover its fees and costs just as a private party would. See Schroeder v. City Council of City of Irvine, 99 Cal. App. 4th 174, 197 (Cal. Ct. App. 2002).

Subsection (a)(2), which gives the court discretion to apply additional sanctions upon the responding party, is modeled after a provision in Guam's anti-SLAPP statute. Several state statutes (though notably not California's) provide for additional sanctions beyond fees and costs in various circumstances, with most requiring a showing that the responding party brought its lawsuit with the intent to harass. See, e.g., 10 Delaware Code § 8138(a)(2); Minnesota Statutes § 554.04(2)(b). Such intent-based provisions are ineffective because they place a heavy burden of proof on moving parties when, in fact, most SLAPP lawsuits by definition are brought with an intent to harass. The provision in this Act lifts the heavy burden from the moving party but at the same time makes clear that additional relief is not to be applied in every case - only when the court finds that an extra penalty would serve the purposes of the Act.

Just as subsection (a) is designed to deter the filing of baseless SLAPPs, subsection (b) is intended to deter parties who find themselves on the receiving end of valid lawsuits from filing special motions to strike that have no chance of success and show some evidence of bad faith on the part of the movant. The court should grant reasonable attorney's fees to the responding party when, for example, the moving party cannot in good faith maintain that the underlying conduct constitutes "action involving public participation and petition." See Moore v. Shaw, 116 Cal. App. 4th 182, 200 (Cal. Ct. App. 2004).

As a final matter, a moving party who prevails on a special motion to strike under this Act will recover attorney's fees and costs related to a successful appeal on the issue. Dove Audio, Inc. v. Rosenfeld, Meyer & Susman, 47 Cal. App. 4th 777, 785 (Cal. Ct. App. 1996); Church of Scientology v. Wollersheim, 42 Cal. App. 4th 628, 659 (Cal. Ct. App. 1996). In addition, a moving party may recover reasonable fees in connection with an appeal even when the responding party does not pursue the appeal to a final determination. Wilkerson v. Sullivan, 99 Cal. App. 4th 443, 448 (Cal. Ct. App. 2002).

SECTION 7. RELATIONSHIP TO OTHER LAWS. Nothing in this Act shall limit or preclude any rights the moving party may have under any other constitutional, statutory, case or common law, or rule provisions.

SECTION 8. UNIFORMITY OF APPLICATION AND CONSTRUCTION. This Act shall be applied and construed liberally to effectuate its general purpose to make uniform the law with respect to the subject of this Act among States enacting it.

SECTION 9. SEVERABILITY OF PROVISIONS. 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.

SECTION 10. SHORT TITLE. This Act may be cited as the Uniform Act Limiting Strategic Litigation Against Public Participation.

SECTION 11. EFFECTIVE DATE. This Act takes effect