ISSUES MEMORANDUM

PUBLIC PARTICIPATION PROTECTION ACT

To: National Conference of Commissioners on Uniform State Laws

From: Lane Shetterly, Chair
Robert T. Sherwin, Reporter
Public Participation Protection (formerly Anti-SLAPP) Act Drafting Committee

Date: June 3, 2019

Re: Purpose and content of Act; issues addressed by Committee

The Uniform Law Commission has charged this Committee with drafting legislation on what are typically known as "Strategic Lawsuits Against Public Participation," or "SLAPP" suits. The specific charge of the Committee was stated in the resolution approved by the Executive Committee:

> RESOLVED, that * * * a Drafting Committee be formed for an Anti-SLAPP Act to address the breadth of the act; limitations, if any, to be imposed after a motion to strike is made; the standard of review relating to the motion to strike; appeal rights from the grant or denial of a motion to strike; and whether the court should award attorney's fees and costs.

For reasons stated in more detail below, in April 2019 the Drafting Committee suggested, and the Executive Committee approved, that the Act's name be changed to the "Public Participation Protection Act."

This memorandum will discuss the purpose and content of the Act, as well as the major issues the Committee has considered and addressed.

I. PURPOSE AND CONTENT OF ACT

A. What is a "SLAPP"?

"Strategic lawsuit against public participation," or SLAPP, is a term historically used to describe a specific kind of civil action brought by a plaintiff whose real aim is

to silence or intimidate a critic, or punish the critic, by subjecting that person to costly and lengthy litigation. The credit for coining the label goes to Professors George Pring and Penelope Canan, who, in 1989, penned companion law review articles.[1] Pring wrote:

> Americans are being sued for speaking out politically. The targets are not typically extremists or experienced activists, but normal, middle-class and blue-collar Americans, many on their first venture into the world of government decision making. The cases are not isolated or localized aberrations, but are found in every state, every government level, every type of political action, and every public issue of consequence. There is no dearth of victims: in the last two decades, thousands of citizens have been sued into silence.[2]

Pring observed that certain types of activities—things like circulating petitions, calling consumer protection offices, reporting police misconduct, and speaking out at school board meetings—had a disturbing tendency to spark lawsuits against those who were simply trying to participate in local government or otherwise exercise their free-speech rights. Those lawsuits, which typically manifest themselves in the form of defamation, tortious interference, conspiracy, nuisance, and intentional infliction of emotional distress claims, can effectively silence important speech, particularly when they're brought by parties with substantial resources against individuals who lack the means to mount a healthy defense. That's true even when the cases have no merit; the suits achieve success because defendants can't afford to defend them, and ultimately either retract their statements or agree to censor themselves in the future.

B. The Rise and Expansion of "Anti-SLAPP" Legislation

In 1989—the same year Pring and Canan published their seminal articles—Washington became the first state to pass what is known as an "anti-SLAPP" law.[3]

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[1] George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3, 3 (1989); Penelope Canan, *The SLAPP from a Sociological Perspective*, 7 PACE ENVTL. L. REV. 23, 24 (1989).

[2] Pring, *supra* note 1, at 3.

[3] *See* WASH. REV. CODE §§ 4.24.500-.520 (1989). Interestingly, in 2015, Washington also became the first state to have its anti-SLAPP law struck down by its own high court. *Davis v. Cox*, 351 P.3d 862, 875 (Wash. 2015) (holding that Washington's amended law—which was expanded in 2010—infringed on the "right of trial by jury under article I, section 21 of the Washington Constitution because it require[d] a trial judge to invade the jury's province of resolving disputed facts and dismiss—and punish—nonfrivolous claims without a trial."). Technically, the New Hampshire Supreme Court was the first state high court to write that an anti-SLAPP law *could* violate the right to a trial by jury. *Opinion of the Justices (SLAPP Suit Procedure)*, 641 A.2d 1012, 1015 (N.H. 1994). But in that instance, the court had been asked by its state senate to opine about the constitutionality of pending anti-SLAPP legislation. *Id.* at 1012. In May 2017, Minnesota's Supreme Court struck down its state's

Since then, 31 other states, as well as the District of Columbia and the territory of Guam, have likewise enacted various forms of legislation to address SLAPP cases.[4] The most recent enactment was by Colorado in 2019.[5]

Most of the 34 statutory efforts differ from each other in some respect. Some are broad in scope, others are narrow. Some impose high burdens on plaintiffs, while others feature low hurdles. But it's safe to say that purpose of the typical so-called "anti-SLAPP" law is to root out and end frivolous cases—those brought only to harass or punish one's critics—before the costs of litigation escalate and prevent a defendant from mounting a defense. They typically accomplish this goal by: 1) granting defendants specific avenues 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; and 4) imposing cost-shifting sanctions that award attorney's fees and other costs when the plaintiff is unable to carry its burden.

A primary difference among the various states centers on the scope of the statutes: To what kinds of "speech" and "public participation" should the law extend? Some states have enacted protections that only apply to suits related to limited activities, specific individuals, or certain forums.[6] Conversely, other states—and this appears to be the trend—have adopted statutes that essentially encompass any action that arises out of a person's exercise of free speech rights on issues of public import. The Committee almost universally agreed that the Act ought to be of this latter type—that it should apply broadly and to any case where a citizen's free-speech rights were threatened by litigation efforts. The need for a broad statute makes itself more apparent each passing day, as citizens, through the use of "new" media such as Twitter, Facebook, and business-review sites like Yelp, find themselves speaking out—in ways not imaginable even 15 or 20 years ago—against an ever-expanding universe of others with competing interests.

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anti-SLAPP law for the same reasons as court in Washington. *Leiendecker v. Asian Women United of Minnesota*, 895 N.W.2d 623, 635-37 (Minn. 2017).

[4] *State Anti-SLAPP Laws*, PUB. PARTICIPATION PROJECT, http://www.anti-slapp.org/your-states-free-speech-protection/ (last visited June 3, 2019) (identifying the scope of anti-SLAPP laws in Arizona, Arkansas, California, Connecticut, Delaware, District of Columbia, Florida, Georgia, Guam, Hawaii, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia and Washington).

[5] H.B. 19-1324, COLORADO GENERAL ASSEMBLY, http://leg.colorado.gov/bills/hb19-1324.

[6] For example, a statute might only apply to environmental issues, or plaintiffs who are petitioning the government, or speech that occurs before a governmental body.

C. The Need for and Purpose of a Uniform Act

Given the increasing frequency with which citizens use the internet to speak out on various issues, the jurisdictional limitations that used to heavily constrain where civil lawsuits could be brought have slowly started to erode. Consequently, we have begun to observe the rise of "libel tourism"; that is, a type of forum shopping by which a plaintiff who has choices among the states in which to bring a libel action—the most common type of "SLAPP" suit—will file in a state that does not have an anti-SLAPP law, or has a "weak" or narrow one. Given the significant differences among state statutes—which, aside from scope, include differing burdens of proof assigned to the parties, rules relating to discovery, and remedies for prevailing parties—uniformity is sorely needed. The adoption of a uniform act among the states will not only reduce the incidence of and the motivation for forum shopping, but it will clarify to all what kinds of protections citizens have when they choose to participate in public discourse.

D. Content of the Act

As discussed above, the Drafting Committee has sought to construct a statute that is as broad as any current state law. It has done so by using language in Section 4(b) that protects individuals who exercise their First Amendment rights. More specifically, *any time* citizens find themselves defending civil lawsuits as a result of conduct or communication that implicates free speech, free association, or free petition, they can use the statute to require that the plaintiff show the case has some merit before it can proceed. By specifically invoking federal and state constitutional standards, the Act *excludes* garden-variety civil cases and other matters having nothing to do with constitutional rights. For example, citizens don't have a First Amendment right to breach a contract, so no one could invoke the statute's protections in an ordinary contract action.[7] Similarly, citizens don't have a constitutional right to defame others, and if the case didn't involve speech about a public figure or public official or relate to a matter of public concern, it wouldn't implicate the First Amendment. Therefore, it likewise wouldn't trigger the statute.

But when defendants can show one or more causes of action are based on their conduct or communication exercising the rights of free speech, free association, or free petition, then the statutory dismissal mechanism becomes available. That doesn't mean, of course, that the cause of action will be dismissed. As Section 9 and 10 point out, if the party responding to a motion to dismiss or strike under the Act (typically the plaintiff) can establish a prima facie case for each essential element of

[7] The statute might apply to someone being sued for violating a non-disparagement clause, if the defendant were to establish he had a First Amendment right to violate the contract.

the cause of action, the motion is denied. In that sense, the procedure mirrors that of summary judgment.

One large distinction between the Public Participation Act and summary judgment concerns discovery. Recognizing that subjecting defendants to the costly discovery process is *precisely how* wealthy and sophisticated plaintiffs weaponize litigation, the Act precludes discovery unless the responding party, under Section 6(b), can show it needs particular information to make a prima facie showing. Even without the element of bad intent on the part of the plaintiff in such an action, the Committee made a policy decision that a party relying on his or her First Amendment rights in defense of the claim should not have to bear the full cost of discovery in order to be able assert those rights as a legal defense. In that way, the statute draws a careful balance by protecting defendants from having to participate in discovery unless and until the plaintiff can convince the court discovery is necessary.

If a responding party cannot show a prima facie case on each essential element of a cause of action, that cause of action must be dismissed with prejudice, and the court must award the moving party its costs and attorney's fees. If a motion under the Act is denied, the moving party may interlocutorily appeal that denial. The interlocutory appeal provision is an essential component of the Act, particularly in states that do not have a long history with these kinds of statutes. A trial judge who does not necessarily understand how the statute works might deny the motion, and without the interlocutory appeal provision, a defendant would have no choice but to defend an otherwise frivolous case.

II. ISSUES ADDRESSED BY THE DRAFTING COMMITTEE

A. Scope

Again, the Committee was in near universal agreement that the Act ought to have a broad scope, because the rights at issue are so incredibly important and easy to infringe upon. That said, the Committee has spent much of its time debating the way in which the act can apply broadly, but not encompass *too many* cases that should be left outside its scope.

For example, the anti-SLAPP statute in Texas, which is just eight years old, has recently come under attack by judges and attorneys due to its breadth.[8] That statute,

[8] *See* David Grant Crooks, *The Anti-SLAPP Heard Round the World? The Broad Language of the TCPA Has Lead to Unintended Consequences and Extreme Results*, FOX ROTHSCHILD, LLP: LONE STAR BENCH & BAR (Feb. 26, 2018),

which applied to any "legal action [] based on, relat[ing] to, or [] in response to a party's exercise of the right of free speech, right to petition, or right of association," had attempted to give judges some guidance in determining what "right of free speech" meant.[9] It did so by defining the term as "communication made in connection with a matter of public concern," and then defied "public concern" as "an issue related to" one of five categories: health or safety; environmental, economic, or community well-being; the government; a public official or public figure; or a good, product, or service in the marketplace."[10] Although well intentioned, it's easy to see how that kind of enumerated list results in an even broader definition of "free speech" than the Constitution implicates. Indeed, in recent years, Texas courts began applying the statute to all sorts of cases generally thought to be outside the "anti-SLAPP" realm.[11]

As a result, in May, the Texas Legislature almost unanimously passed amendments to the Texas statute intended to narrow the scope of the law.[12] It did away with the enumerated-list definition of "matter of public concern," and also added a list of specific types of cases excluded from the statute.[13] The amendments were signed into law by the Governor on June 2.[14]

Similar concerns about the scope of California's law have been articulated in recent months.[15] Although the Committee is confident the Act draws the right balance, it continues to monitor developments on the national scene to ensure the Act will not suffer from enactability issues once it's approved by the Conference.

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https://texastrial.foxrothschild.com/2018/02/the-anti-slapp-heard-round-the-world-the-broad-language-of-the-tcpa-has-lead-to-unintended-consequences-and-extreme-results/.

[9] TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(a).

[10] TEX. CIV. PRAC. & REM. CODE ANN. § 27.001.

[11] "Texas courts' brief history in applying the broadly worded TCPA has not limited application of the Act's protections to weighty issues of great public concern. The dismissal mechanism of the statute has been applied in cases for fraud and barratry, a suit for contamination of a water well, a dispute between neighbors over a fence, defamation claims arising from an employment dispute, a snarl of competing claims arising from discussions among horse breeders on social media, and a host of other types of claims." *Long Canyon Phase II and III Homeowners Ass'n, Inc. v. Cashion*, 517 S.W.3d 212, 216 (Tex. App.—Austin 2017).

[12] Angela Morris, *Bill to Limit Attorneys' Ability to Win Anti-SLAPP Dismissals Just Passed Texas House*, TEXAS LAWYER (Apr. 30, 2019, 1:50 p.m.), https://www.law.com/texaslawyer/2019/04/30/bill-to-limit-attorneys-ability-to-win-anti-slapp-dismissals-just-passed-texas-house/.

[13] Tex. H.B. 2730, 86th Leg., R.S. (2019) (available at https://capitol.texas.gov/tlodocs/86R/billtext/pdf/HB02730F.pdf#navpanes=0).

[14] H.B. 2730, TEXAS LEGISLATURE ONLINE, HISTORY, https://capitol.texas.gov/BillLookup/History.aspx?LegSess=86R&Bill=HB2730.

[15] Maria Dinzeo, *Streaming Service Urges Narrowing of Anti-SLAPP Speech Protections*, COURTHOUSE NEWS SERVICE (Feb. 6, 2019), https://www.courthousenews.com/streaming-service-urges-narrowing-of-anti-slapp-speech-protections/.

B. Name of the Act

From the start, the Committee debated whether the Act ought to bear the traditional "anti-SLAPP" moniker. The primary problem is that the term "SLAPP" refers specifically to the idea of participating in public affairs. Indeed, some states' anti-SLAPP statutes—particularly those passed in the infancy of the movement—were limited in scope to only protect defendants being sued by public applicants or permittees, or defendants who had engaged in speech on a particular topic (such as the government or the environment) or in a particular forum (like before a governmental body). But given its conclusion that the Act should protect *any* speech or activity that is constitutionally protected, even if that speech or activity doesn't necessarily relate to participation in government or public affairs, and without regard to the subjective intent of the party bringing the action, the Committee agreed that using the term "anti-SLAPP" failed to fully convey the law's scope and breadth.

Secondarily, no draft the Committee has produced actually used the term "SLAPP," thus making the "Anti-SLAPP Act" title confusing and arguably nonsensical. Changing the title to "Public Participation Protection Act" draws a nice balance between shedding the restrictive and confusing "SLAPP" acronym and still employing language that courts and litigators can understand in the old, "anti-SLAPP" context.

C. State-By-State Customs and Nomenclature

One issue that has beguiled the Committee is using language that will allow every state to utilize the Act, despite the obvious differences in how they refer to particular procedural filings and actions. For example, the Committee has fiercely debated whether the procedural vehicle the Act creates should be called a motion to strike or motion to dismiss (and whether the word "special" should be attached). It has also questioned whether the Act should apply to a "claim," "cause of action," or "legal action," and how the Act should treat voluntary nonsuits or dismissals, recognizing that those procedural terms are used differently from state to state—sometimes with substantive implications. More specifically, the claim/cause of action/legal action debate is important because lawsuits often include multiple allegations, some of which should be subject to anti-SLAPP dismissal, and others which shouldn't. Pleading rules and customs in some states makes this a trickier proposition than in others, so providing courts with clear language that allows them to dismiss only part of a lawsuit, while allowing non-offending claims to survive, has been a constant source of discussion. The Committee has employed bracketing language in various instances and used comments in an attempt to smooth out these nomenclature distinctions.

D. Timing

One important component of anti-SLAPP legislation is that the dismissal mechanism be triggered and adjudicated relatively quickly. This is only fair to both parties; because motions to dismiss freeze most of the proceedings in the case, it's equally important to the plaintiff that the motion not drag on for many months or years.

That said, the Committee has been reticent to dictate specific time periods by which courts must hear and decide motions under the Act, primarily because the docket conditions of each state's courts vary so widely. On the other hand, failing to provide any specific guidance on time periods may result in motions languishing, which hardly advances the purposes of the statute for either side. Once again, the Committee has used bracketing language in an attempt to achieve its desired result without handcuffing state legislatures and courts.

E. Discovery Freeze

Although the Committee had an easy time agreeing that the Act should freeze discovery unless the responding party shows a particular need for it, the broader question of what other types of proceedings should be stayed has proven more difficult. The Committee has attempted to include a "safety valve" that allows courts to hear unrelated motions, such as those for temporary injunctive relief.

F. Substantive Nature of the Rights Protected

One of the shortest, but perhaps most important, sections of the Act is Section 3, which states, "The rights protected and remedies provided by this [act] are substantive in nature." The Committee has inserted this language to guide federal courts in their application of the Act in state-law diversity actions. Under the *Erie* doctrine—which says federal courts must use state substantive law but federal procedural rules—some federal courts have held that anti-SLAPP statutes are procedural in nature.[16] Clear statutory language that says legislatures intend the rights and remedies under the Act to be substantive will hopefully settle any argument as to whether the Act should apply in federal courts.

[16] *Los Lobos Renewable Power, LLC v. Americulture, Inc.*, 885 F.3d 659, 673 (10th Cir. 2018); *Abbas v. Foreign Policy Group, Ltd.*, 783 F.3d 1328, 1333 (D.C. Cir. 2015).

III. CONCLUSION

To be sure, this memorandum is not intended to be an exhaustive list of the contents of the Act or the issues the Committee has considered at its three drafting meetings. The Committee welcomes any specific questions about its deliberations and the specifics of the Act's current draft.