D R A F T

FOR DISCUSSION ONLY

UNIFORM PUBLIC EXPRESSION PROTECTION ACT

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ON UNIFORM STATE LAWS

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June 2, 2020

UNIFORM PUBLIC EXPRESSION PROTECTION ACT

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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.

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 topic. 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 are 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 Expression 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.

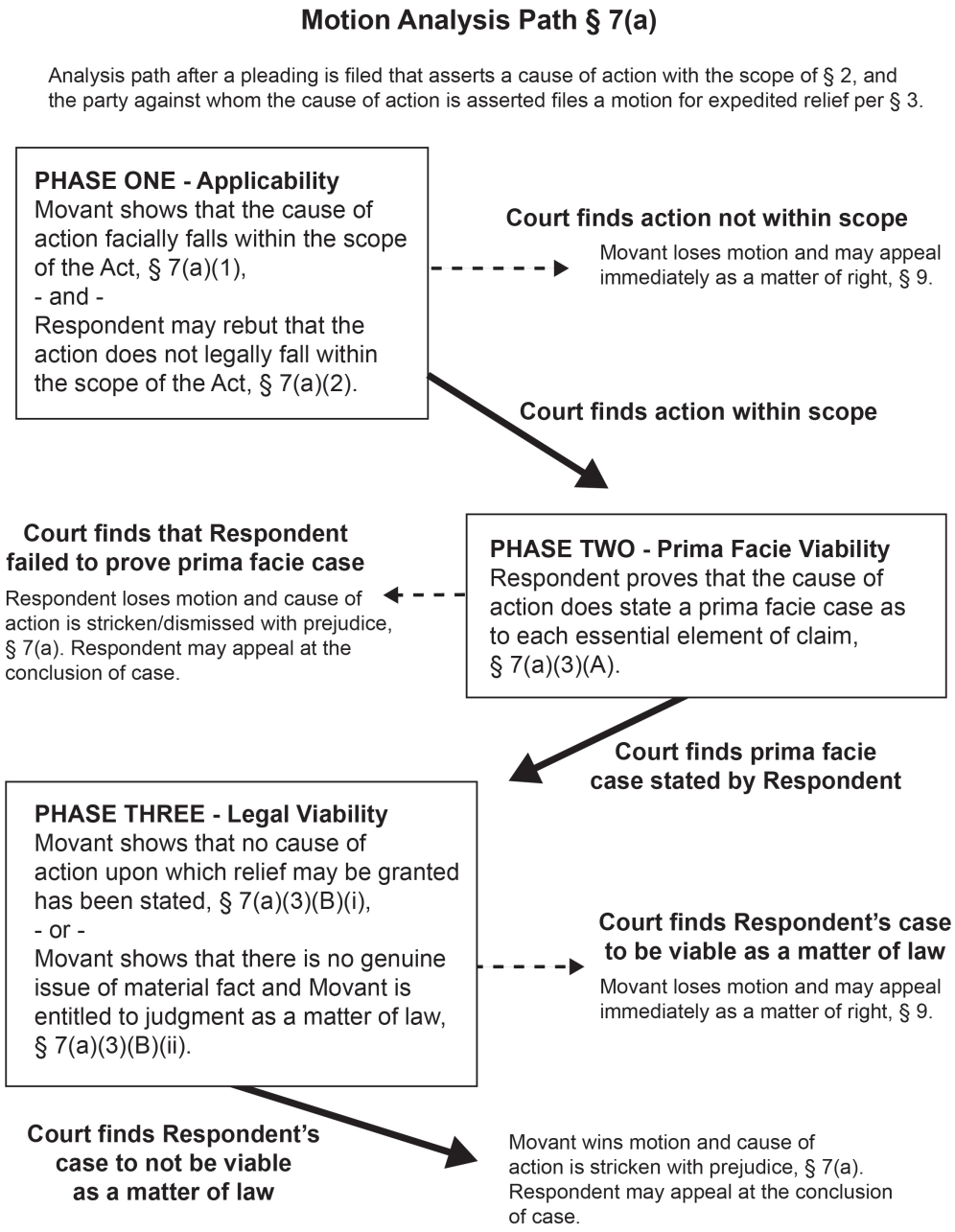
The Public Expression Protection Act, Generally. The Public Expression Protection Act follows the recent trend of state legislatures to enact broad statutory protections for its citizens. It does so by utilizing all five of the tools mentioned above in a motion practice that carefully and clearly identifies 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 a three-phase 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 effectively decides whether the Act applies. It does so by first determining if the responding party's (typically the plaintiff's) cause of action implicates the moving party's (typically the defendant's) right to free speech, petition, or association. The burden is on the moving party to make the initial showing that the Act applies. 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 its burden, then the responding party can show its cause of action fits within one of the four exceptions to the Act. If it carries that burden—for example, by showing that its cause of action is one for bodily injury—then the Act does not apply, and the motion is denied. If it fails to carry that 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 viable cause of action from a prima facie perspective. In this phase, the burden is on 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 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. If the court holds that the responding party *has* carried its burden, then—and only then—the court proceeds to the third step of the analysis.

In the **third phase**, the court determines if the responding party has a *legally* viable cause of action. In this phase, the burden shifts *back* to the moving party to show either that the responding party failed to state a cause of action upon which relief can be granted (for example, a claim that is barred by res judicata, or preempted by some other law), or that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law (for example, if the cause of action, while perhaps factually viable, is time-barred by limitations). If the moving party makes such a showing, the motion is granted; if it fails to make such a showing, the motion is denied.

The operation of the Act is illustrated below:



UNIFORM PUBLIC EXPRESSION PROTECTION ACT

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

SECTION 2. SCOPE.

(a) In this section:

(1) "Governmental unit" means a public corporation or government or governmental subdivision, agency, or instrumentality.

(2) "Person" means an individual, estate, trust, partnership, business or nonprofit entity, governmental unit, or other legal entity.

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

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

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

(3) exercise of the right of freedom of speech or of the press, the right to assemble or petition, or the right of association 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 asserted:

(1) against a governmental unit or employee or agent of a governmental unit acting or purporting to act in an official capacity;

(2) by a governmental unit or an employee or agent of a governmental unit acting in an official capacity to enforce a law to protect against an imminent threat to public health or

safety;

(3) against a person primarily engaged in the business of selling, leasing, or licensing goods or services if the [cause of action] arises out of a communication related to the person's sale, lease, or license of the goods or services, unless the cause of action arises out of the creation, dissemination, exhibition, or advertisement or similar promotion, of a dramatic, literary, musical, political, or artistic work; or

(4) by a person seeking recovery for bodily injury, wrongful death, or survival, unless the cause of action arises out of the creation, dissemination, exhibition, or advertisement or similar promotion of a dramatic, literary, musical, political, or artistic work.

Legislative Note: *If the term "cause of action" is not a commonly used term in a state, the state should use its comparable term, such as "claim for relief." The state also should substitute its comparable term for the term "cause of action" in Sections 2, 4(d), 7, and 13.*

A state that has an Anti-Strategic Lawsuit Against Public Participation statute may include additional exemptions included in the statute. The inclusion of additional exemptions must not affect uniformity or construction of this 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" follows the standard Uniform Law Commission 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 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 or press, free association, or assembly or petition, so long as that exercise is on a matter of public concern. The forum or topic need not pertain to issues under consideration in governmental proceedings.

8. The terms "freedom of speech or of the press," "the right to assemble or petition," and "the right of association" should all be construed consistently with caselaw of the Supreme Court of the United States and the state's highest court.

9. The term "matter of public concern" should be construed consistently with caselaw of the Supreme Court of the United States and the state's highest court. *See, e.g.*, *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (holding that "[s]peech deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community,' or when it 'is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.'" (citations omitted)). The term should also be construed consistently with terms like "public issue" and "matter of public interest" seen in some state statutes. *See, e.g.*, CAL. CIV. PROC. CODE § 425.16 (employing the terms "public issue" and "issue of public interest").

10. Section 2(c) provides a list of exemptions, or situations to which the Act does not apply. This list need not 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).

11. 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.

12. The term "dramatic, literary, musical, political, or artistic work" used in sections (c)(3) and (c)(4) should be construed broadly to include all books, plays, motion pictures, television programs, and matters published on an Internet website or other electronic medium or in a newspaper or magazine.

13. The term "survival" in section (c)(4) refers to a tort claim brought by a decedent's estate for damages *the deceased* could have recovered had he or she not died.

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

Legislative Note: *A state should use the term "complaint", "petition", or both, to describe any procedural means by which a cause of action may be asserted. 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 statutes or rules of civil procedure to prevent a motion under this section from being considered a first pleading or motion that precludes the filing of another pleading or motion or waives a defense.

A state is free to adopt a shorter or longer time in which the motion may be filed.

Comments

1. 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.

2. The Act should apply not just to initial claims brought by a plaintiff against a defendant, but to *any* claim brought by *any* party who 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.

3. 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.

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

5. "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."

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

7. "Good cause" means a reason factually or legally sufficient to appropriately explain why the motion was not brought within the prescribed deadline.

8. 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 does not 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 if a party shows that specific information is necessary to establish whether a party has satisfied or failed to satisfy a burden imposed by Section 7(a) and is not reasonably available without discovery.

(c) A motion for costs and expenses under Section 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.

(e) During a stay under subsection (a), the court for good cause may hear and rule on a

motion unrelated to the 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, including a motion to conduct discovery on causes of action unrelated to the cause of action being challenged under the Act.

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 order allowing 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.

3. State law and local customs of the jurisdiction should dictate the consequences for a court failing to comply with the timelines set forth in this section.

SECTION 6. PROOF. In ruling on a motion under Section 3, the court shall consider the parties' pleadings and any evidence that could be considered in ruling on a motion for summary judgment under [cite to 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.

3. 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) In ruling on a motion under Section 3, the court shall [dismiss] [strike] with prejudice a cause of action or part of a cause of action if:

(1) the moving party establishes under Section 2(b) that this [act] applies;

(2) the responding party fails to establish under Section 2(c) that this [act] does not apply; and

(3) 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:

(i) the responding party failed to state a cause of action upon which relief can be granted; or

(ii) there is no genuine issue as to any material fact and the party is entitled to judgment as a matter of law on the cause of action or part of the cause of action.

(b) A voluntary [dismissal] [nonsuit] without prejudice of a responding party's cause of action, or part of a cause of action, that is the subject of a motion under Section 3 does not affect a moving party's right to obtain a ruling on the motion and seek costs, reasonable attorney's fees, and reasonable expenses under Section 10.

(c) A voluntary [dismissal] [nonsuit] with prejudice of a responding party's cause of action, or part of a cause of action, that is the subject of a motion under Section 3 entitles the moving party to costs, reasonable attorney's fees, and reasonable expenses under Section 10.

Legislative Note: *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.

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 establish 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 rulings, 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 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) exercise of the right of freedom of speech or of the press, the right to assemble or petition, or the right of association, on a matter of public concern. If the moving party fails to prove the Act

applies, the motion must be denied.

3. Section 7(a)(2) is also part of "Phase One" of the motion's procedure. Even if the Act applies for one of the reasons identified in Section 2(b), the Act may nevertheless *not* apply if the party against whom the motion is filed can establish the applicability of an exception identified in section 2(c). A party seeking to establish the applicability of an exception bears the burden of proof on that exception. Like establishing applicability under section 2(b), the burden to establish *non-applicability* under section 2(c) is legal, and not factual. If the responding party establishes the applicability of an exception, the motion must be denied. If the moving party proves the Act applies *and* the responding party *cannot* establish the applicability of an exception, the court moves to "Phase Two" of the motion's procedure.

4. Section 7(a)(3)(A) 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. The moving party has no burden in this phase. "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 cannot establish a prima facie case, 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, then (and only then) the court moves to "Phase Three" of the motion's procedure.

5. Section 7(a)(3)(B) establishes "Phase Three" of the motion's procedure. Even if a responding party makes a prima facie showing under section 7(a)(3)(A)), the moving party may still prevail if it shows that the responding party failed to state a cause of action upon which relief can be granted *or* that there is no genuine issue as to any material fact and the party is entitled to judgment as a matter of law. In this phase, the burden shifts back to the moving party. If the moving party makes a showing under section 7(a)(3)(B), 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 moving party does not make such a showing—and the responding party successfully established a prima facie case in "Phase Two"—then the motion must be denied.

6. 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.

7. 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.

8. 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.

9. State law should dictate the effect of a dismissal of only part of a cause of action.

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

Comment

1. State law and local customs of the jurisdiction should dictate the consequences for a court not complying with the timelines set forth in this section.

SECTION 9. APPEAL. A moving party may appeal immediately as a matter of right from an order denying, in whole or in part, a motion under Section 3.

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.

SECTION 10. COSTS, ATORNEY'S FEES, AND EXPENSES. On a motion under Section 3, the court shall award costs, reasonable attorney's fees, and reasonable expenses related to the motion:

(1) to the moving party if the moving party prevails on the motion; or

(2) to the responding party if the responding party prevails on the motion and the court finds that the motion was frivolous or filed solely with intent to delay the proceeding.

Comments

1. 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.

2. Nothing in this section should be construed to prevent a court from awarding sanctions, when appropriate, under state law.

SECTION 11. CONSTRUCTION. This [act] must be broadly construed and applied to protect the exercise of the right of freedom of speech and of the press, the right to assemble and petition, and the right of association, guaranteed by the United States Constitution or [state] Constitution.

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]].

[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 9 may require amendment of a state's interlocutory appeal statute.*

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