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FOR DISCUSSION ONLY

ANTI-SLAPP ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

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ON UNIFORM STATE LAWS

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ANTI-SLAPP ACT

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Prefatory Note

"Strategic lawsuit against public participation," or SLAPP, is a term used to describe a specific kind of civil action brought by a plaintiff whose real aim is to silence or intimidate the defendant, or punish the defendant by subjecting it to costly and lengthy litigation. 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: They are brought not to remedy civil wrongs, but rather to ensnare their targets in costly litigation that will deter them and others from engaging in constitutionally protected activity such as free speech and petition.

To limit the detrimental effects these abusive lawsuits can have, 31 states, as well as the District of Columbia and the Territory of Guam, have enacted laws that establish special and expedited procedures to aid defendants in seeking early dismissal of SLAPPs. Though grouped under the "anti-SLAPP" moniker, these statutes vary widely in scope, form, and procedure. For example, some anti-SLAPP laws 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 judgment procedures. Some stay the discovery process and provide for attorney's fees and sanctions, while others do not. Two state supreme courts have struck down their states' laws over concerns that they infringe upon the right to a civil jury trial.

This degree of variance from state to state—and an absence of protection in at least 19 states—leads to confusion and disorder among plaintiffs, defendants, and courts. It also contributes to what can be labeled as "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.

The Uniform Anti-SLAPP 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.

ANTI-SLAPP ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Anti-SLAPP Act.

Discussion Note

The authority to determine the short title of an act is vested in the National Conference's Executive Committee, which has, in approving this project, designated it the "Uniform Anti-SLAPP Act."

As discussed in the prefatory note, 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 as the Drafting Committee has agreed, a strong anti-SLAPP statute should extend broadly to 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.

The question, then, is whether the "anti-SLAPP" moniker is still an appropriate label. Relatedly, are courts and litigants confused when a statute's name fails to accurately describe a statute's aim? Would a different title do a better job of conveying the law's scope and breadth? Or, given nearly 30 years of efforts to spread anti-SLAPP laws across the country, would a name change be akin to "starting over" and confuse legislators and courts in a different way?

The Drafting Committee has concluded that the statute should have a new name and discuss the matter further at its spring meeting.

Style Committee Note

The Style Committee agrees with your suggestion that there should be a different title and that the title should not be an acronym like SLAPP. Your note suggests you may go another direction, but at a minimum it should be something like "Termination of Strategic Lawsuits Against Public Participation Act."

SECTION 2. DEFINITIONS. In this [act]:

(1) "Legal action" means a pleading or filing that requests legal, equitable, or declaratory relief.

(2) "Moving party" means a person that files a motion under Section 5.

(3) "Person" means an individual, estate, business or nonprofit entity, or other legal entity. The term does not include a public corporation or government or governmental

subdivision, agency, or instrumentality.

(4) "Responding party" means a person against whom a motion is filed under Section 5.

Comment

"Legal action" does not include a special motion to [dismiss] [strike] under Section 5 or an appeal of a court's ruling under Section 12.

Style Committee Note

The Style Committee concluded "pleading or filing" captures everything in your list. A state will call the initial pleading a petition or a complaint, but not both. A counterclaim or crossclaim [no hyphen - See Federal Rule 13(g)] is asserted in a pleading, the answer. A cause of action or claim for relief (a state would use one term but not both) are asserted in a pleading but are not themselves separate from the pleading in which they are asserted. Later on, you pick up "part" of a legal action.

SECTION 3. SUBSTANTIVE NATURE OF [ACT]. The rights protected and remedies provided by this [act] are substantive in nature.

Discussion Note

ULC Drafting Rule 501 prohibits the inclusion of a statement of purpose, noting that "[a] well drafted act requires no extraneous statement within itself of what it seeks to accomplish or the reasons prompting its enactment. A Prefatory Note or Comments supply this detail to aid in its passage and interpretation. A purpose section may create uncertainty by giving support to specious arguments that substantive provisions of the act may be ignored because they are inconsistent with the purpose section."

That said, other ULC statutes—the UCC being a prime example—do have "construction" provisions to aid courts in application. The UCC's § 1-103 is titled "Construction of Act to Promote Its Purposes and Policies" and reads "(a) This Act shall be liberally construed and applied to promote its underlying purposes and policies. The underlying purposes and policies of this Act are (1) to simplify, clarify and modernize the law governing commercial transactions; (2) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties; (3) to make uniform the law among the various jurisdictions."

The UCC also has a provision titled "Remedies to be Liberally Administered" (§ 1-305), which says "(a) The remedies provided by [the Uniform Commercial Code] must be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special damages nor penal damages may be had except as specifically provided in [the Uniform Commercial Code] or by other rule of law."

Similar provisions could be added as separate sections or as part of this section.

Style Committee Note

This is a policy issue, not one of style, but the committee disagreed with the suggestion that the attempt in this section to influence a federal court's Erie determination was comparable to the UCC examples in your Discussion note.

SECTION 4. APPLICABILITY.

(a) In this section:

(1) "Goods and services" does not include the creation, dissemination, exhibition, advertisement, or other similar promotion of a dramatic, literary, musical, political, or artistic work, including a motion picture, television program, or matter published on a website or other electronic media or in a newspaper or magazine of general circulation.

(2) "Official proceeding" means a legislative, executive, judicial, or administrative proceeding or other governmental proceeding.

(b) This [act] applies to a legal action brought against any person based on the person's conduct or communication exercising the right of free speech, free association, or petition, guaranteed by the United States Constitution and the [state] Constitution, on an issue of public interest, including conduct or communication:

(1) in an official proceeding;

(2) on an issue under consideration or review in an official proceeding; or

(3) in a place open to the public or a public forum.

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

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

(2) against a person primarily engaged in the business of selling or leasing goods

or services, if the conduct or communication on which the legal action is based arises out of the sale or lease of the goods or services.

Discussion Notes

"Communication." The Committee had discussed defining the word "communication," using the California Evidence Code as guidance. That statute, however, only defines "writing." Is defining "communication" necessary? Otherwise put—is it worth the risk that by defining the term, we inadvertently *limit* its meaning?

The "Commercial Speech Exemption" of subsection (c)(2) now includes an exception to the exemption (subsection (a)(1)). It is worded almost identically to California's, with the addition of website articles.

Style Committee Notes

Because definitions that apply only to a single section must come at the beginning of the section and be in alphabetical order, subsection (a) starts with the definition of "goods and services" from your Section 5(b), followed by the definition of "official proceeding" from your Section 4(b) [and we inserted "other governmental proceedings" for "other official proceedings" because you can't use the defined term in the definition].

We concluded that your reference to "exercise of rights ..." wasn't a definition (because you repeated the phrase [in former subsection (a)(4)], but really was a statement of what the act applied to. In essence, your [former subsection (a)(4), the "any other conduct or communication in furtherance of the exercise of the constitutional right of free speech, free association, or petition, in connection with an issue of public interest" language] duplicates [the language in subsection (b) itself], and [subsections (b)(1)-(3)] are just "including" examples. The committee was confident it had made no substantive change with the revised language.

[In subsection (a)(1)] we weren't certain that "promotion" was the correct word. Is it "production" or something else?

[In subsection (a)(1)] you use the word "including". Is this really a series of three that should be tabulated: (1) a dramatic, literary ... ; (2) a motion picture or television program; or (3) matter published ... ?

[In subsection (a)(2)] we inserted "other governmental proceedings" for "other official proceedings" because you can't use the defined term in the definition.

[In subsection (b)] do you intend "or the [state] constitution" rather than "and the [state] constitution"? As written, the conduct or communication must be protected by both, and this wouldn't pick up something the state Constitution covers that the U.S. Constitution does not.

[In subsection (c)(1)] we changed "public health and safety" to "public health or safety", assuming it didn't have to be both. Also, the assumption is that the focus is on the government

entity's purpose in enforcing the law or regulation, not the purpose of the law or regulation. Is that correct?

SECTION 5. SPECIAL MOTION TO [DISMISS] [STRIKE]. Not later than [60] days after being served with a pleading or filing that is a legal action to which this [act] applies, or, at a later time on a showing of good cause, the person served may file a special motion to [dismiss] [strike] the legal action or part of the legal action.

Legislative Note: *A state should title its motion one to "dismiss" or "strike" given its customs and procedures.*

Comment

Some states may choose to title their Special Motion one to "Dismiss", while others may title it one to "Strike". The choice of title is not substantive in nature and should in no way affect uniformity or construction of the statute.

SECTION 6. STAY.

(a) Except as otherwise provided in subsections (b) and (c), all discovery and any pending hearing or motion is stayed on the filing of a motion under Section 5. The stay of discovery remains in effect until entry of an order ruling on the motion and throughout an appeal of the order.

(b) On a showing by a party that information necessary to meet or oppose a burden imposed by this [act] is in the possession of another party or a nonparty and is not reasonably available without discovery, the court may allow limited discovery for the purpose of obtaining the information.

(c) The court for good cause may entertain a motion unrelated to a motion under Section 5.

Style Committee Note

This says the stay of discovery continues ... What about the stay of hearings?

SECTION 7. EXPEDITED HEARING. The court shall hear a motion under Section 5 not later than [60] days after service of the motion, unless the court orders a later hearing:

(1) because of the condition of the court's docket;

(2) for good cause; or

(3) by agreement of the parties.

SECTION 8. AMENDMENT AND [NONSUIT] [DISMISSAL]. An amendment of a party's pleading, including a voluntary [nonsuit] [dismissal] of the party's legal action, does not affect a moving party's right to obtain a ruling on a motion under Section 5 filed before the amendment of the pleading or [nonsuit] [dismissal].

Comment

Once a motion under Section 5 has been filed, a voluntary [nonsuit] [dismissal] of the responding party's legal action does not deprive the court of jurisdiction.

Style Committee Notes

Federal Rules jurisdictions do not use the term "nonsuit". The term in Rule 41 is "dismissal". So we placed the two terms in brackets to accommodate the term used in the adopting state.

The last sentence about depriving the court of jurisdiction is covered by the first sentence; put it in the comment.

SECTION 9. DISMISSAL.

(a) Subject to subsection (b), if a party that files a motion under Section 5 establishes that this [act] applies to a legal action or part of the action, the Court shall dismiss the action or part of the action with prejudice unless the responding party establishes prima facie each essential element of the action or part of the action.

(b) The court shall dismiss with prejudice a legal action or part of the action to which this [act] applies if a moving party establishes that the action fails as a matter of law, even if the responding party establishes prima facie under subsection (a) each essential element of the action

or part of the action.

Discussion Notes

Portion of a legal action. Having to continually reference "portion of a legal action" is cumbersome and confusing, particularly given that we never define what a "portion" is. Could we accomplish our desired goal by expanding the definition of "legal action" to include a portion of an action?

Defensive dismissal. ULC Drafting Rule 202(d) disfavors the use of "notwithstanding" to express a limitation of a general provision; thus, the "even if" wording. Additionally, the "fails as a matter of law" language is intended to avoid injecting constitutional infirmity into the statute by allowing courts to weigh the parties' evidence and grant dismissal on factual (instead of legal) grounds.

Style Committee Notes

We switched the order of the subsection to make the essential point first. But we question whether this subsection makes sense. How can it be that the responding party establishes prima facie each essential element and the action still fails as a matter of law?

We changed "portion" to "part" to match the way we use "part" in Section 5. We routinely use "part" rather than portion.

SECTION 10. PROOF.

(a) In determining under Section 9 whether the moving party has established that this [act] applies to a legal action, the court shall review the responding party's pleadings along with any affidavits, declarations, depositions, documents, electronically stored information, stipulations, admissions, interrogatory answers, or other materials offered by the moving party.

(b) In determining under Section 9 whether the responding party has established prima facie each essential element of the legal action, or whether the moving party has established that the action fails as a matter of law, the court shall review any affidavits, declarations, depositions, documents, electronically stored information, stipulations, admissions, interrogatory answers, or other materials offered by the parties, taking into account the nature of the action as pleaded by the responding party.

Discussion Note

Admittedly, the drafting of this section has resulted in a cumbersome provision that needs to be simplified. The original point was to avoid what is happening in Texas, with courts allowing plaintiffs to defeat anti-SLAPP motions by pointing to their pleadings. Perhaps this can be done with a simplified, Fed. R. Civ. P. 56-type provision of what the court can consider, and an official Comment noting a plaintiff must do more than rely on its pleadings?

Style Committee Note

Not a style issue, but do you really mean that the court considers only the moving party's submissions, not anything from the responding party. Is that due process?

SECTION 11. RULING. The court shall decide a motion under Section 5 not later than [60] days after the hearing under Section 7.

Discussion Note

We have cut what was subsection (b): "If the court declines to dismiss a claim under Section 9, the fact that such a ruling has been made and the substance of the ruling may not be admitted into evidence at any later stage of the case." The Chair has requested that we leave it in the Discussion Notes for future discussion.

SECTION 12. APPEAL.

(a) If the court denies a motion under Section 5, the moving party may seek an interlocutory appeal.

(b) An appellate court shall expedite an appeal, whether interlocutory or not, from a trial court ruling on a motion under Section 5 or [an original action] [a writ] involving the ruling.

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

Style Committee Notes

"Seek" is ambiguous. Do you intend an interlocutory appeal of right [like the ones provided in state counterparts of 28 U.S.C. 1292(a)], or simply that an application may be made under the state's already existing discretionary interlocutory appeal provisions, e.g. one tracking 28 U.S.C. 1292(b) or Federal Rule of Civil Procedure 23(f).

Although some states provide for appellate review of an otherwise nonappealable order through an extraordinary "writ", in other states it is done by an "original action" in mandamus, etc. So we put the terms in brackets. As written, subsection (b) seems to require that an appeal by

the responding party also be expedited when the motion to dismiss under Section 5 is granted and there is an appeal from a final order [either absolutely or under the state equivalent of Federal Rule 54(b)]. Is that your intent?

SECTION 13. RELIEF FOR SUCCESSFUL MOVING PARTY. If the court under Section 9 dismisses a legal action, the court shall award the moving party court costs, reasonable attorney's fees, and any other expenses incurred in connection with the motion under Section 5.

SECTION 14. RELIEF FOR SUCCESSFUL RESPONDING PARTY. If the court under Section 9 denies a motion to dismiss a legal action and finds that the motion under Section 5 was frivolous or filed solely with the intent to delay the proceedings, the court shall award the responding party court costs, reasonable attorney's fees, and any other expenses incurred in connection with the motion.

Style Committee Note

"Court costs" is listed on line 24 but not here. Should it be here too?

SECTION 15. 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 16. 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.*

Discussion Notes

The ULC Drafting Rules provide that a severability section is "rarely needed … because nearly all states have either a general severability act or a decision by the highest court of the state stating a general rule of severability." That said, we can include severability language if we

believe there is "a risk that one or more provisions of the act may be declared unconstitutional or otherwise invalid." When that's true, the statute should include a "legislative note" that reads "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 17. EFFECTIVE DATE. This [act] takes effect . . . .

Style Committee Notes

Do you need sections for a transitional provision and for repeals for those states that already have a statute in this area? The transitional provision may be needed even in other states to make clear the act only applies only to actions commenced "after [the effective date of this [act]]."