Public Participation Protection Act

*Summary*

The ALEC Public Participation Protection Act is intended to encourage and safeguard public participation in civic society. Some have abused the civil justice system by filing, or threatening to file, lawsuits against those who express their views on matters of public concern. The goal of such lawsuits is not to win on the merits. Rather, the purpose of the lawsuit is to discourage, intimidate, retaliate against and, ultimately, silence critics by forcing them to spend time and money to defend themselves in litigation.

The model act protects individuals and organizations that speak, petition the government, and associate with others on matters of public concern from lengthy, expensive litigation, while preserving the ability of people and businesses to file meritorious lawsuits. Under the model act, a person who is hit with a lawsuit that impedes his or her First Amendment rights can request an expedited hearing, and, if the court finds the claim lacks merit, is entitled to recover attorney’s fees and costs. A plaintiff can recover such expenses if a defendant abuses the expedited process.

Approximately 29 states and the District of Columbia have enacted legislation along these lines, which are often called “anti-SLAPP laws” (Strategic Lawsuits Against Public Participation). The model act draws from several such laws, including those enacted in California, Oregon, and Texas.

*Model Legislation*

**Section 1. {Title.}**

This Act shall be known and may be cited as the Public Participation Protection Act.

**Section 2. {Time for Filing Special Motion to Dismiss; Discovery.}**

(A) A party may file a special motion to dismiss a claim under this Act if the claim is based on, or in response to, an act of the party in furtherance of the right of petition, free speech, or association under the United States Constitution or the [State] Constitution in connection with a public issue, which includes:

(1) the right of free speech by communicating, or conduct furthering communication, in a public forum on a matter of public concern related to (a) health or safety; (b) environmental, economic, or community well-being; (c) the government; (d) a public official or public figure; or (e) a good, product, or service in the marketplace;

(2) the right to petition the government through (a) a communication in connection with an issue under consideration or review by a legislative, executive, administrative, judicial, or other official body; (b) a communication that is reasonably likely to encourage consideration or review of an issue by a legislative, executive, administrative, judicial, or other official body; or (c) a communication that is reasonably likely to enlist public participation in an effort to effect consideration of an issue by a legislative, executive, administrative, judicial, or other official body; or

(3) the right of association, meaning a communication between individuals who join together to collectively express, promote, pursue, or defend common interests.

(C) A special motion to dismiss under this section must be filed not later than the 60th day after the date of service of the legal action. The court may extend the time to file a motion under this section for good cause.

(D) All discovery in the proceeding shall be stayed upon the filing of a special motion to dismiss under this section. The stay of discovery shall remain in effect until the entry of the order ruling on the motion and any interlocutory appeal thereof. Notwithstanding the stay imposed by this section, the court, on motion by a party or the court’s own motion and for good cause shown, may order specified and limited discovery relevant to the motion.

**Section 3. {Expedited Hearing on Special Motion to Dismiss; Determination; Appeal.}**

(A) The court shall conduct an expedited hearing on the motion. A hearing on the motion shall be held not later than [30] days after service of the motion, or [30] days of ordering discovery under paragraph (D), unless docket conditions of the court require a later hearing, upon a showing of good cause, or by agreement of the parties.

(B) Consideration of the Special Motion to Dismiss.

(1) If the moving party makes an initial showing by a preponderance of the evidence that the legal action is based on, or is in response to, that party’s exercise of the right to free speech, right to petition, or right of association as defined in Section 2(A), the court shall grant the motion to dismiss unless the party bringing the action states with particularity the circumstances giving rise to the claim and shows by a preponderance of the evidence a probability of prevailing on the merits.

(2) Notwithstanding paragraph (B)(1), the court shall grant the motion to dismiss if the moving party establishes each element of a valid defense to the claim.

(3) In its determination, the court shall consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(4) The court shall rule on a special motion to dismiss as soon as possible, [but no later than [30] days after hearing the motion. If the court does not rule on a motion to dismiss within this period, the motion is considered to have been denied by operation of law.]

(C) An order granting or denying a special motion to dismiss shall be appealable under [insert reference to state statute or court rule providing grounds for interlocutory appeals].

**Section 4. {Recovery of Attorneys’ Fees and Costs; Sanctions.}**

(A) If the court orders dismissal of a legal action under this Act, the court shall award to the moving party costs and reasonable attorney’s fees, including those incurred on the motion.

(B) If the court finds that a special motion to dismiss is frivolous and solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney’s fees to the party opposing the motion.

**Section 5. {Exemptions / Rules of Construction.}**

This Act does not:

(A) Apply to an enforcement action that is brought in the name of this state or a political subdivision of this state by the attorney general, a district attorney, or a county attorney;

(B) Result in findings or determinations that are admissible into evidence at any later stage of the case or in any subsequent action;

(C) Affect or limit the authority of a court to award sanctions, costs, attorneys’ fees or any other relief available under any statute, court rule, or other authority;

(D) Affect, limit, or preclude the right of the moving party to any defense, remedy, immunity, or privilege otherwise authorized by law;

(E) Affect the substantive law governing any asserted claim; or

(F) Create a private right of action.

**Section 6. {Severability Clause.}**

**Section 7. {Repealer Clause.}**

**Section 8. {Effective Date.}**

This Act shall be effective as to any civil action commenced on or after the date of enactment of the Act regardless of whether the claim arose prior to the date of enactment.

Public Participation Protection Act

Section-by-Section Analysis

**Section 1** provides the title of the Act, the “Public Participation Protection Act.” Laws of this type are often called “anti-SLAPP” laws, which is an acronym for “Strategic Lawsuits Against Public Participation.” SLAPP suits are filed for the purpose of discouraging expression of a view that is contrary to the plaintiff’s interests by imposing legal expenses on the speaker. Anti-SLAPP laws are intended to safeguard the ability of individuals and organizations to express their views on matters of public concern. Approximately 29 states and the District of Columbia have enacted anti-SLAPP laws, which vary significantly from state to state in their scope of protected conduct and procedures.[[1]](#endnote-1) The model act draws from several of these laws and is most closely aligned with approaches taken in California, Oregon, and Texas.

**Section 2** provides those who believe they were sued because they exercised their First Amendment right to freedom of speech, right to petition the government, or right of association with the ability to request that the court expedite consideration whether the case has merit and, if not, dismiss it. An expedited procedure for responding to SLAPP suits is essential. SLAPP suits are intended to force a person or organization to stop its advocacy or expression on an issue of public concern when faced with the costs of defending against a meritless lawsuit. Defense costs begin immediately upon service of a complaint, requiring hiring of an attorney, and quickly mount.

The model act provides that a defendant may file a “special motion to dismiss” within 60 days of being served with a lawsuit. Filing the motion stops discovery in the case, such as requirements for production of documents, answering interrogatories, and submitting to depositions, which are time consuming and costly. A court may permit limited discovery if the court finds it necessary for a party to show whether the case has or lacks merit. Such provisions are common in anti-SLAPP laws.

The types of communication triggering access to this expedited procedure are broadly defined by the model act. For example, advocacy for or against legislation or an administrative action are covered. The model act also makes the expedited procedure available to those who express their positions on matters of public concern in letters to the editor, op-eds, blogs, or as comments to online publications. In addition, the model act extends to individuals who post reviews of products or services on websites. The expedited procedure is available to a person or organization that exercises First Amendment rights as well as any entity that facilitates this communication, such as a newspaper, blog, or website provider, if named in a lawsuit. Several states have enacted anti-SLAPP laws that apply only to statements made before a government body or proceeding without covering other types of expression on matters of public concern. These states may consider expanding their coverage consistent with the model act.

**Section 3** requires courts to conduct an expedited hearing on the special motion to dismiss. The model act recommends that states require the court to hold such a hearing within 30 days of filing of the motion or ordering discovery, unless docket conditions require a later hearing, upon a showing of good cause, or by agreement of the parties. This 30-day period is common among anti-SLAPP laws.[[2]](#endnote-2)

When the court considers the special motion to dismiss, the defendant[[3]](#endnote-3) has the initial burden of showing that the lawsuit implicates protected First Amendment rights. If the defendant makes such a showing, the plaintiff must support the lawsuit by showing “with particularity the circumstances giving rise to the claim” and showing “by a preponderance of the evidence a probability of prevailing on the merits.” The “particularity” element requires a plaintiff to provide more detail explaining the factual basis supporting the complaint (similar to a fraud claim) than typically required in civil litigation.[[4]](#endnote-4) Plaintiffs do not need to prove their case at this early stage. They only need to show a reasonable probability that they could prevail after full discovery and trial. The parties may submit affidavits to the court to provide factual information to the court on which it may decide the motion.

The model act requires a court to rule on a special motion to dismiss “as soon as possible, [but no later than [30] days after hearing the motion. If the court does not rule on the motion within this period, the motion is considered to have been denied by operation of law.]” Several state anti-SLAPP laws require a court to rule within a specific time frame, which helps ensure that defendants do not face mounting litigation expenses or a prolonged threat of liability for expressing themselves.[[5]](#endnote-5) The limited time frame for a court to rule is bracketed because, in some states, courts have found that the legislature may not constitutionally impose procedural rules on the judiciary. Possibly for that reason, many state laws do not require the court to rule within a certain number of days, but provide that the court is to rule in an expedited fashion.[[6]](#endnote-6) Legislators are encouraged to research state constitutional law on this issue before including a specific time frame.

An order granting or denying a special motion to dismiss qualifies for an interlocutory appeal under the state’s existing procedures for such action.[[7]](#endnote-7) Without an immediate appeal for an improper ruling, or a court’s failure to timely rule on a motion, the benefits of the law would be diminished. Many defendants would cede to the demands of a plaintiff to stop their protected speech rather than incur the costs necessary to obtain a decision on the merits and then appeal.

**Section 4** provides that when a court grants a special motion to dismiss, finding that a claim implicating protected First Amendment rights does not have a probability of success, the defendant is entitled to recover attorneys’ fees and costs. When a court denies a special motion to dismiss, it must award the plaintiff attorneys’ fees and costs if it finds that the defendant’s use of the expedited procedure was frivolous and solely intended to cause unnecessary delay.

Ordinarily, each party is responsible for its own fees and costs in civil litigation. In some special situations, states have permitted or required courts to award litigation expenses to a prevailing party, such as when parties would not assert their rights due to the cost of litigation or the low financial value of a claim. The purpose of SLAPP lawsuits is to impose litigation costs on those who express their views and, by doing so, force them to discontinue protected activities. The only way to safeguard such expression is to reimburse a party for such costs when a suit is found to lack merit. If a defendant abuses this process when there is a legitimate claim, then that defendant should reimburse the plaintiff for its reasonable costs in responding to the special motion to dismiss.

**Section 5** exempts law enforcement actions by government officials from the model act and provides several essential rules of construction.

When a court finds that a claim has sufficient merit to continue or lacks merit in response to a special motion to dismiss, those findings or determinations may not be used in later proceedings in that case or in subsequent litigation. While a court may find that a case has a probability of success based on the limited evidence available early in a case, a jury should not be misled by learning of that determination when it has the full evidence before it. For the same reason, a party may not introduce a court’s finding that a claim lacked merit as evidence in a subsequent malicious prosecution action or other lawsuit between the parties.

The model act clarifies that the remedies provided in Section 4 (an award of attorneys’ fees and costs) do not preclude a court from taking other action in response to frivolous litigation as authorized by state law or court rule. For example, it may be appropriate to impose sanctions on a party or attorney, such as a civil fine payable to the court, when evidence demonstrates that the action was brought with the intention of harassing the party or maliciously inhibiting protected rights. A court may also refer an attorney that abuses the legal system to the state bar or disciplinary authority.

The model act is intended only to provide an expedited procedure. It does not impact the substantive requirements for a cause of action, such as the elements of a defamation claim. Nor should a court construe the model act to alter any defenses that are ordinarily available to a claim.

Finally, the model act does not create a private right of action. Nor does it include a “SLAPP-back” provision, which allows defendants who prevail on an anti-SLAPP motion to seek compensatory and, in some instances, punitive damages, in addition to recovering attorneys’ fees and costs.[[8]](#endnote-8) The model act does not include such a provision and does not authorize a court to “imply” a private right of action from its provisions. Under the model act, those who abuse the legal system must pay the attorneys’ fees and costs of the opposing party and may be subject to additional court sanctions.

1. Ariz. Rev. Stat. § 12-751 to -752; Ark. Code Ann. § 16-63-501 to -508; Cal. Civ. Proc. Code. §§ 425.16 to 425.18; Del. Code Ann. tit. 10, §§ 8136 to 8138; D.C. Code Ann. § 16-5502; Fla. Stat. Ann. § 768.29; Ga. Code Ann. 9-11-11.1; Haw. Rev. Stat. § 634F-1 to F-4; 735 Ill. Comp. Stat. 110/1 to 110/9; Ind. Code § 34-7-7-1 et. seq.; La. Code Civ. Proc. Ann. art. 971; Me. Rev. Stat. Ann. tit. 14 § 556; Md. Code Ann., Cts. & Jud. Proc. § 5-807; Mass. Gen. Laws Ann. ch. 231 § 59H; Minn. Stat. § 554.01-554.05; Mo. Rev. Stat. § 537.528; Neb. Rev. Stat. §§ 25-21,241 to 246; Nev. Rev. Stat. § 41.635 to .670; N.M. Stat. §§ 38-2-9.1 to -9.2; N.Y. C.P.L.R. §§ 70a, 76a, 3211; Okla. Stat. tit. 12, § 1443.1; Or. Rev. Stat. § 31.150 et seq.; 27 Pa. Cons. Stat. §§ 7707 & 8301 to 8303; R.I. Gen. Laws § 9-33-1 to -4; Tenn. Code Ann. §§ 4-21-1001 to -1004; Tex. Civ. Prac. & Rem. Code §§ 27.001 et seq.; Utah Code Ann. § 78B-6-1401 to -1405; 12 V.S.A. § 1041; Wash. Rev. Code §§ 4.24.500 to -525; *see also Protect Our Mountain Environment, Inc. v. District Court*, 677 P.2d 1361, 1368 (Colo. 1984) (providing a limited anti-SLAPP-like procedure referred to as a “POME motion”). [↑](#endnote-ref-1)
2. *See*, *e.g.*, Ark. Code § 16-63-507(2) (“30 days after service unless emergency matters before the court require a later hearing”); Cal. Code Civ. Proc. § 425.16(f) (requiring the clerk of the court to schedule a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing); Ga. Code Ann. § 9-11-11.1(d) (same as Arkansas); La. Code Civ. Proc. Ann. art. 971(C)(3) (same as California); Or. Rev. Stat. § 31.152(1) (same as California); Tex. Civ. Prac. & Rem. Code § 27.004 (same as California); Vt. Stat. Ann. tit. 12, § 1041(d) (“30 days after service of the motion unless good cause exists for an extension”). [↑](#endnote-ref-2)
3. The model act uses the terms “moving party” rather than defendant because, in some cases, a plaintiff who brings a legitimate lawsuit may be subject to a counterclaim stemming from the exercise of First Amendment rights. In most cases, however, “moving party” is synonymous with “defendant.” [↑](#endnote-ref-3)
4. Requiring particularity in stating a claim “prevents nuisance suits and the filing of baseless claims as a pretext” to imposing expensive and intrusive discovery. *See U.S. ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 191 (5th Cir. 2009). Similarly, requiring pleading with particularity in claims raising First Amendment concerns will deter the filing of claims that have little chance of success, but are filed as a pretext to discourage expression of a viewpoint, and allow courts to dispose of such claims before defendants incur substantial litigation costs. [↑](#endnote-ref-4)
5. *See*, *e.g.*, 735 Ill. Comp. Stat. 110/20(a) (requiring a hearing *and a decision* within 90 days); Ind. Code § 34-7-7-9(e) (requiring ruling within 30 days of submission of evidence); Nev. Rev. Stat. § 41.660(3)(f) (requiring ruling “within 7 judicial days after the motion is served upon the plaintiff”); Tex. Civ. Prac. & Rem. Code § 27.005(a) (requiring ruling within 30 days of the hearing on the motion); Wash. Rev. Code § 4.24.525 (requiring ruling “as soon as possible but no later than seven days after the hearing is held”). [↑](#endnote-ref-5)
6. For example, Arizona’s anti-SLAPP law provides that “[w]hen possible, the court shall give calendar preference to an action that is brought under this subsection and shall conduct an expedited hearing. . . .” Ariz. Rev. Stat. § 12-752(A); *see also* Fla. Stat. Ann. § 768.295 (providing a “right to an expeditious resolution of a claim” and requiring a court to “[a]s soon as practicable . . . set a hearing on the petitioner’s motion, which shall be held at the earliest possible time. . . .”). [↑](#endnote-ref-6)
7. About one third of states with anti-SLAPP laws explicitly provide for an interlocutory appeal. *See* Cal. Code Civ. Proc. § 425.16(h); Haw. Rev. Stat. § 634F-2(2); Mo. Rev. Stat. § 537.528(3); Nev. Rev. Stat. § 41.670(4); N.M. Stat. § 38-2-9.1(C); Or. Rev. Stat. § 31.150(1); 27 Pa. Cons. Stat. § 8303; Tex. Civ. Prac. & Rem. Code § 27.008; Vt. Stat. Ann. tit. 12, § 1041(g); Wash. Rev. Code § 4.24.525(5)(d); *see also* 735 Ill. Comp. Stat. 110/20(a) (“An appellate court shall expedite any appeal or other writ, whether interlocutory or not, from a trial court order denying that motion or from a trial court's failure to rule on that motion within 90 days after that trial court order or failure to rule. . . .”). [↑](#endnote-ref-7)
8. About one third of states with anti-SLAPP laws provide a “SLAPP-back” provision. *See* Ark. Code Ann. § 16-63-560(2); Del. Code Ann. tit. 10 § 8138; Haw. Rev. Stat. § 634F-2(8)(A), (9); Minn. Stat. § 554.04(2); Nev. Rev. Stat. § 41.670(1); N.Y. C.P.L.R §§ 70-a(1)(b), 76-a(2); R.I. Gen. Laws § 9-33-2(d); Utah Code Ann. § 78B-6-1405; *see also* Wash. Rev. Code § 4.24.525(6) (authorizing a prevailing SLAPP defendant to recover statutory damages of $10,000 in addition to attorneys’ fees and costs). [↑](#endnote-ref-8)