A UNIFORM ACT LIMITING STRATEGIC LITIGATION   
AGAINST PUBLIC PARTICIPATION

PREFATORY NOTE

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

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

The Uniform Act Limiting Strategic Litigation Against Public Participation seeks to remedy these flaws by enunciating a clear process through which SLAPPs can be challenged and their merits evaluated in an expedited manner. The Act sets out the situations in which a special motion to strike may be brought, a uniform timeframe and other procedures for evaluating the special motion, and a uniform process for setting and distributing attorney’s fees and other damages. In so doing, the Act ensures that parties operating in more than one state will face consistent and thoughtful adjudication of disputes implicating the rights of speech and petition.

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

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**SECTION 1. FINDINGS AND PURPOSES.**

(a) FINDINGS. The Legislature finds and declares that

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

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

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

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

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

(b) PURPOSES. The purposes of this Act are

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

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

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

Comment

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

Though a statement of findings and purposes is not required in many states (only about half of the anti-SLAPP laws in effect have them), several states have put such statements to good use. They can be invaluable in helping courts interpret the reach of the statute. This has been particularly evident in California, the epicenter of anti-SLAPP litigation. For example, in 1999, the United States Court of Appeals for the Ninth Circuit found the legislative findings crucial to its holding that the statute may properly be applied in federal court. See United States ex rel. Newsham v. Lockheed Missiles and Space Co., 190 F.3d 963, 972-73 (9th Cir. 1999). If the statute were strictly procedural, the court noted, choice-of-law considerations would likely deem it inapplicable in federal court. However, because of California’s “important, substantive state interests furthered by anti-SLAPP statute,” which are enunciated in Cal. Civ. Proc. Code 425.16(a), the court held that the anti-SLAPP statute should be applied in conjunction with the Federal Rules of Civil Procedure. Id.

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

The benefits of statements of findings and purposes have been seen outside California as well. In Hawks v. Hinely, an appellate court in Georgia cited the General Assembly’s stated findings in holding that statements made in a petition itself – not just statements concerning the petition – trigger the safeguards of the anti-SLAPP statute. 556 S.E.2d 547, 550 (Ga. App. 2001). In Globe Waste Recycling, Inc. v. Mallette, the Supreme Court of Rhode Island found that legislative intent, as recorded in the statute, indicated that statements for which immunity is claimed need not necessarily be made before a legislative, judicial, or administrative body under the terms of the statute. 762 A.2d 1208, 1213 (R.I. 2000). Finally, in Kauzlarich v. Yarbrough, an appellate court in Washington held that the legislative findings indicated that the Superior Court Administration is an “agency,” and thus communications to that entity trigger the immunity protection and other benefits of the anti-SLAPP statute. 20 P.3d 946 (Wash. App. 2001).

**SECTION 2. DEFINITIONS.** As used in this Act,

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

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

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

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

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

Comment

Most SLAPPs present themselves as primary causes of action, with the moving party as the defendant to the original SLAPP suit and the responding party as the plaintiff. However, “claim,” “moving party,” and “responding party” are defined so the protections of the statute extend to other, less common situations. For example, the moving party may be a plaintiff in the underlying action if the SLAPP claim is a counter-claim. See, e.g., Simmons v. Allstate Ins. Co., 92 Cal. App. 4th 1068 (Cal. Ct. App. 2001); Wilcox v. Superior Court, 27 Cal. App. 4th 809 (Cal. Ct. App. 1994). Alternatively, the moving and responding parties may be co-defendants or co-plaintiffs in the underlying action if the SLAPP claim is a cross-claim.

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

**SECTION 3. SCOPE; EXCLUSION.**

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

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

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

(3) any oral statement made, or written statement or other document submitted, that is reasonably likely to encourage, or to enlist public participation in an effort to effect, consideration or review of an issue in a legislative, executive, or judicial proceeding or other proceeding authorized by law;

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

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

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

Comment

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

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

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

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

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

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

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

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

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

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

(b) A party bringing a special motion to strike under this Act has the initial burden of making a prima facie showing that the claim against which the motion is based on an action involving public participation and petition. If the moving party meets this burden, the burden shifts to the responding party to establish a probability of prevailing on the claim by presenting substantial evidence to support a prima facie case. If the responding party meets this burden, the court shall deny the motion.

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

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

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

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

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

Comment

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

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

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

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

Existing and proposed state statutes that allocate a similar burden of proof to the responding party have faced constitutional challenges. In New Hampshire in 1994, a senate bill modeled on the existing California statute was presented to the state Supreme Court, which found that it was inconsistent with the state’s constitution. See Opinion of the New Hampshire Supreme Court on an Anti-SLAPP Bill, 641 A.2d 1012 (1994). The court found that the statute’s provision for court consideration of the pleadings and affidavits denied a plaintiff who is entitled to a jury trial the corresponding right to have all factual issues resolved by a jury. In the face of similar concerns, the Rhode Island General Assembly amended its statute in 1995 to do away with the “special motion to dismiss” provision and its “preponderance of the evidence” standard. See Hometown Properties, Inc. v. Fleming, 680 A.2d 56 (R.I. 1996).

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

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

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

**SECTION 5. REQUIRED PROCEDURES.**

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

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

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

Comment

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

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

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

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

**SECTION 6. ATTORNEY’S FEES, COSTS, AND OTHER RELIEF.**

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

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

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

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

Comment

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

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

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

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

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

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

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

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

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

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

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

**SECTION 9. SEVERABILITY OF PROVISIONS.** If any provision of this Act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

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

**SECTION 11. EFFECTIVE DATE.** This Act takes effect . . . .