

TO: North Carolina General Statutes Commission

FROM: Duke Law First Amendment Clinic

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RE: Uniform Public Expression Protection Act

SLAPP Suits and Their Chilling Effect on Speech

A “Strategic Lawsuit Against Public Participation,” or SLAPP suit, is a meritless lawsuit filed against someone for exercising his or her First Amendment rights guaranteed by the U.S. and North Carolina Constitutions. Plaintiffs—often wealthy individuals and organizations, or pro se plaintiffs with no financial skin in the game—bring these suits despite knowing of their frivolity. However, the true purpose of a SLAPP suit is not to win. Rather, these suits are filed with the intention of suppressing speech by sending the message to both the defendant and others that voicing opposition will come at a cost, in terms of lengthy and expensive litigation. The quintessential SLAPP suit often involves large land developers bringing a meritless claim against a private citizen who spoke out against a proposed project. In bringing the claim, the developer effectively scares other members of the community into silence to prevent them from likewise voicing their concerns. Recently, this trend has extended to intimidate women who have experienced sexual assault or sexual harassment from speaking about their experiences out of a legitimate fear that well-resourced aggressors may retaliate with costly defamation lawsuits.

The right to free speech is one of America’s most fundamental and important rights. But when faced with the threat of litigation, many vocal citizens without the means to adequately defend themselves in court are forced to stay silent. Indeed, defendants reportedly spend an average of \$500,000 to get a defamation lawsuit dismissed. (<https://www.poynter.org/ethics-trust/2019/mcclatchy-could-hire-10-reporters-for-the-money-it-will-spend-to-get-devin-nunes-lawsuit-dismissed/>) To address this issue, thirty-two states have adopted anti-SLAPP laws to protect the First Amendment rights of their citizens.

Anti-SLAPP laws are intended to prevent would-be plaintiffs from frivolously using the courts and the threat of a lawsuit to intimidate citizens, journalists, activists, consumers, and others who are exercising their First Amendment rights. Importantly, anti-SLAPP statutes are not just about protecting the traditional media. While news organizations and individual journalists can use anti-SLAPP statutes to protect themselves from groundless defamation cases brought by the subject of an enterprise or investigative story (<https://www.rcfp.org/resources/anti-slapp-laws/>), anti-SLAPP statutes are also commonly used to protect ordinary citizens who speak on matters of public concern.

An anti-SLAPP statute was previously introduced in the North Carolina House of Representatives in 2011. The Citizen Participation Act, House Bill 746, sought to protect and promote citizens’ use of their right of free speech. The bill has no known history of controversy, but seemingly died in Committee. Now, the Uniform Public Expression Protection Act (UPEPA) provides another opportunity for North Carolina to pass such important legislation.

What are the key elements of the UPEPA?

The general goal of the UPEPA is to protect individuals' rights to petition and speak freely on issues of public interest while simultaneously protecting the rights of people and entities to file meritorious lawsuits for real injuries. There are five key mechanisms employed by the UPEPA to accomplish these goals:

1. It creates specific vehicles for filing motions to dismiss or strike early in the litigation process;
2. It requires the expedited hearing of these motions, coupled with a stay or limitation of discovery until after they are heard;
3. It requires the plaintiff to demonstrate the case has some degree of merit;
4. It imposes cost-shifting sanctions that award attorney's fees and other costs when the
5. plaintiff is unable to carry its burden; and
6. It allows for an interlocutory appeal of a decision to deny the defendant's motion.

(National Conference of Commissioners on Uniform State Laws, Uniform Public Expression Protection Act Prefatory Comment, 2–3 (2020))

What are the benefits of an anti-SLAPP law, like the UPEPA?

Anti-SLAPP statutes, such as the UPEPA, provide a variety of benefits to all parties involved. First, the statute protects vulnerable would-be defendants from frivolous lawsuits by requiring plaintiffs to establish a prima facie case early in the litigation process and shifting the cost burdens to the plaintiff if a claim is found to be meritless. With these protections in place, ordinary citizens will be able to speak on matters of public concern without fear of meritless retaliation and litigious harassment. All of society benefits when individuals and organizations are able to engage in open discourse on issues affecting their community.

Second, the statute promotes judicial efficiency by providing for an expedited hearing process and a mechanism for dismissing frivolous lawsuits before too much time and taxpayer dollars are spent adjudicating a lengthy discovery process. The statute will also help to address the issue of "litigation tourism" in North Carolina caused by forum shopping. Because North Carolina currently lacks an anti-SLAPP statute, the state is ripe for abuse by plaintiffs with frivolous claims. This unduly burdens the North Carolina court system and results in the inefficient allocation of judicial resources to meritless claims involving out-of-state parties.

Third, the statute also protects plaintiffs with meritorious claims by providing more public confidence in the system. While some critics express the concern that anti-SLAPP statutes will prevent meritorious claims from reaching a jury trial, the UPEPA actually has the opposite effect. Because the UPEPA provides for a hearing before a judge as to whether a claim has some degree of merit, plaintiffs with nonfrivolous claims have nothing to fear. The UPEPA is structured to ensure that meritorious claims brought for legitimate grievances receive full and fair consideration, and plaintiffs will actually benefit from a judicial system that is not clogged with frivolous claims and appeals that cause undue delays in the adjudication of meritorious claims. By dismissing meritless claims early in the litigation process, claims that make it to trial will also benefit from a jury that is not tainted by skepticism as to the validity of defamation and other similar claims.

(National Conference of Commissioners on Uniform State Laws, Uniform Public Expression Protection Act Prefatory Comment Prefatory Comment, 3 (2020))

How can the UPEPA be adapted to conform with the North Carolina Rules of Civil Procedure?

The UPEPA does not create any major conflicts with North Carolina's existing procedural rules and would need only minor adjustments and accommodations to fit in the existing statutory scheme. The UPEPA can be modified in the following way to comply with North Carolina's existing procedural rules. In the example below, all bolded words indicate where the UPEPA template presents optional word choices that have been tailored to conform with North Carolina's Rules of Civil Procedure:

SECTION 3. SPECIAL MOTION FOR EXPEDITED RELIEF. Not later than **30** days after a party is served with a **complaint**, crossclaim, counterclaim, third-party claim, or other pleading that asserts a **cause of action** to which this **statute** applies, or at a later time on a showing of good cause, the party may file a special motion for expedited relief to **dismiss** the **cause of action** or part of the **cause of action**.

With these modifications, the UPEPA is made compatible with North Carolina's statutory language and terminology. Additionally, a few minor adjustments to Rule 12¹ would also ensure that the UPEPA is appropriately incorporated into North Carolina's statutory scheme:

- The legislature would need to permit an anti-SLAPP motion to serve as the purpose for a dismissal under Rule 12(b).
- Additionally, it would need to be clear, under Rule 12(h) that defenses not asserted in the anti-SLAPP motion or any related pleadings are not waived.

Though not required in order to conform with the NCRCP, based on the experience of other states, the Commission generally may also wish to consider the evidentiary effect of the findings at this dismissal stage. For example, Texas has mandated that if a case is not dismissed on an anti-SLAPP motion that the findings on that motion are not admissible evidence later on. The text of the Texas section is as follows:

¹ NCRCP Rule 12. Defenses and objections; when and how presented; by pleading or motion; motion for judgment on pleading

(a)(1) When Presented. -- A defendant shall serve his answer within **30** days after service of the summons and **complaint** upon him. A party served with a pleading stating a crossclaim against him shall serve an answer thereto within 30 days after service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within 30 days after service of the answer or, if a reply is ordered by the court, within 30 days after service of the order, unless the order otherwise directs. Service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court

“Sec. 27.0075. Effect of Ruling. Neither the court’s ruling on the motion nor the fact that it made such a ruling shall be admissible in evidence at any later stage of the case, and no burden of proof or degree of proof otherwise applicable shall be affected by the ruling.” Tex. Civ. Prac. & Rem. Code § 27.0075

Who would be helped by the adoption of the UPEPA?

Anti-SLAPP laws, such as the UPEPA, help many groups that normally would not have shared interests. Not only do anti-SLAPP statutes protect the entities most often subject to defamation claims, such as media companies and journalists, they also protect all other individuals and entities that engage in public speech: news sources, consumer advocacy groups, internet companies, consumer reporting sites, insurance providers, environmental groups, homeowner’s associations, and—perhaps most importantly—ordinary citizens.

Examples and Case Studies

The following examples, gathered from news articles and conversations with NC attorneys, demonstrate the importance of adopting the UPEPA in North Carolina:

- Woman Threatened with Legal Action for Voicing Concerns to Government Officials About Landfill Neighbor: In 2017, Betty Brandt Williamson of Wake County received a letter from attorneys for Shotwell Landfill stating that her communications with environmental regulators “ha[d] to stop” and that her “communication of [allegedly] false or misleading information [was] in fact actionable.” Williamson and other neighbors had previously spoken before the Wake County Board of Commissioners regarding Shotwell’s expansion requests, both of which were ultimately denied. After receiving the letter, Williamson was forced to seek legal counsel to guard against future threats. (<https://indyweek.com/news/wake/wake-county-woman-complained-government-officials-shotwell-landfill.-landfill-s-attorney-told-her-this-stop>.)
- Asheville Blogger Sued for \$20 Million: In 2008, Leslie Richard, a blogger based in Asheville, NC, was approached by Vision Media Television with a business offer she reasonably suspected was a scam. After posting a warning online to other small business owners about Vision Media’s “whole bag of lies to cover their scheme,” Richard was sued by Vision Media Television for \$5 million in business losses and \$15 million in punitive damages. One year later, Richard finally settled the case with Vision Media after a lawyer agreed to represent her pro bono. Two years later, a U.S. District Court found evidence that Vision Media had in fact “engaged in a longstanding scheme to trick nonprofit companies into hiring Vision Media.” After enduring this SLAPP suit, Richard “no longer posts her thoughts online out of privacy concerns she says are related to the lawsuit.” (<https://www.citizen-times.com/story/news/local/2019/11/19/nc-slapp-suit-and-anti-slapp-law-last-week-tonight-john-oliver-help/4176759002>)
- Pro Se Plaintiff Sues Small, Local Newspaper for Refusing to Publish Letters to the Editor: In 2018, Russell Walker, a Republican candidate for the NC House of Representatives sued the *Raeford & Hoke County News-Journal* after its editor published an article explaining its refusal to publish Walker’s letters to the editor due to Walker’s identification as an “unapologetic misogynist and racist.” (<https://www.thenews-journal.com/graphics/NJ164.pdf>) (<https://www.washingtonpost.com/politics/north-carolina-gop-ends-nominees-support-over-racist-posts/2018/06/27/7020807a-7a56-11e8->

[ac4e-421ef7165923_story.html](#)) The case against the *News-Journal* was ultimately dismissed, but only after the newspaper consisting of only five staff members was forced to expend \$6,500 in legal fees—almost as much as the paper’s printing costs for three months.

- Local Broadcast Station Repeatedly Sued by Serial Pro Se Litigant: In 2016, Broadcast Station Doe, was sued for libel by a pro se plaintiff based on a single broadcast and online publication. The plaintiff first filed suit in federal court, then filed an identical claim in state court—twice—before filing again in federal court. The plaintiff has been dismissed at every turn, but the broadcast station has to date spent \$28,000 on legal fees related to this matter, and litigation is still ongoing.
- Former Public Official Sues the *News & Observer* for Reporting on Misconduct Allegations: In 2012, after being removed from her position as Durham County District Attorney, Tracey Cline brought a meritless libel suit against the *News & Observer* based on its reporting regarding the allegations of her professional misconduct. In her 238 single-spaced page complaint, Ms. Cline complained about the *N&O*’s publication of admittedly accurate quotes and descriptions of law. By the time Ms. Cline’s case was finally dismissed four years later, the newspaper had spent over \$150,000 on their legal defense against Ms. Cline’s utterly frivolous claim.
- Haywood County GOP Official Sues Other GOP Members Over Political Memes and Buttons: In 2018, Haywood County GOP Vice Chair Debbie King brought a claim for intentional infliction of emotional distress and invasion of privacy by misappropriation of her name or likeness against Haywood Republican Alliance members Eddie Cabe, Jeremy Davis, Richard West, and Monroe Miller after they allegedly distributed political buttons and an online JibJab music video depicting King and the HCGOP Chairman superimposed on the bodies of Sonny and Cher in a joking manner. (<https://www.smokymountainnews.com/archives/item/24219-haywood-gop-officer-sues-over-mocking-memes>) King sought over \$75,000 in damages plus attorney’s fees from the defendants. With the advice of legal counsel, the defendants were forced to settle the case in order to avoid what would have otherwise been a lengthy court battle.
- Google Analytics Error Results in Costly Court Battle Against Small, Local Newspaper: A small, local newspaper published a brief article about a pro se plaintiff, who had been arrested for some crime. After seeing that a Google search of his name produced a thumbnail of a different article by the same newspaper about a different individual accused of a different crime, the plaintiff sued both the newspaper and an internet provider for defamation due to the Google Analytics error in both state and federal court. Although the case was ultimately dismissed in both courts, the meritless case still cost the newspaper \$10,000 in legal fees, unrecoverable against the pro se plaintiff.

Conclusion

The above sampling of cases demonstrates the devastating impact that SLAPP suits can have on North Carolinians left vulnerable due to the lack of an anti-SLAPP statute. By adopting the proposed version of the UPEPA, modified to comply with existing NC law, individuals and entities will be protected from meritless claims brought with the sole intention of silencing otherwise protected speech.