More than a SLAPP-happy Solution: Southern State Laws to Protect Public Participation from Vexatious Litigation

POLICY ANALYSIS BY CODY ALLEN
Introduction

A STRATEGIC LAWSUIT AGAINST PUBLIC PARTICIPATION, OR SLAPP SUIT, is typically utilized to tie up defendants in expensive litigation and restrict their actions. By burying defendants – whether individuals or public and private sector entities – in costly and time-consuming litigation, these bad actors hope to prevent their opponents from engaging in constitutionally protected actions.1 By adding anti-SLAPP measures to statutes or strengthening existing laws, states can ensure a straightforward process for challenging a SLAPP claim and quickly dismissing meritless suits. One resource for revisiting this legal area is the Uniform Law Commission (ULC).2

When the ULC began its work on this issue in 2018, more than 30 states had laws protecting defendants from abusive SLAPP suits. Currently, 10 CSG South states have anti-SLAPP laws, while five do not. Kentucky recently enacted legislation to strengthen or implement “anti-SLAPP” laws following the Uniform Law Commission’s guidance – albeit with a few differences.* Given the broad spectrum of anti-SLAPP protections across the region, this CSG South Policy Analysis overviews anti-SLAPP laws in the CSG South region and highlights the differences in these laws – both among ULC adopters and non-ULC states.

* Proposals based on the ULC model were introduced in Missouri and North Carolina but were not enacted.

"...THE ULC MEASURE AIMS TO PROHIBIT "LITIGATION TOURISM," OR THE PRACTICE OF SHOPPING AROUND FOR A SYMPATHETIC OR LESS PROTECTED VENUE, BY ENSURING CITIZENS RECEIVE COMPREHENSIVE PROTECTIONS NO MATTER WHERE THEY RESIDE. AS A STRONG DETERRENT, THE UNIFORM ACT ALSO INCLUDES A MANDATORY AWARDING OF ATTORNEY’S FEES, COSTS, AND EXPENSES FOR THE PREVAILING PARTY – THEREBY INCREASING THE RISK FOR SCRUPULOUS ACTORS WHO ENGAGE IN VEXATIOUS CLAIMS."
Examining a Uniform Solution: Are States Down with U.L.C.?

Founded in 1892 and also known as the National Conference of Commissioners on Uniform State Laws, the ULC is a non-partisan organization that provides states with thoroughly researched and drafted legislation to clarify and stabilize critical or emerging areas of statutory law. This occurs via committees composed of licensed lawyers – professors, legislators or legislative staff, or judges and attorneys - who donate their time and expertise to the commission. After extensive research and review, these committees work on statutory frameworks to be adopted by states to ensure conformity and clarity in the U.S. legal landscape. These frameworks may be either Uniform Acts, those for which uniformity is necessary among states and territories, or Model Acts if uniformity is desired but not necessary. Formal ULC discussions on creating an anti-SLAPP framework commenced in the fall of 2018, with the first meeting of a drafting committee. While some states already had protections against strategic nuisance lawsuits, the patchwork approach often left varying levels of protection across state codes; thus, the Uniform Public Expression Protection Act (2020), or UPEPA, was born.

A multi-party collaboration ratified by the ULC in 2020 for disclosure to the states serves as a comprehensive framework to better ensure state laws protect citizens’ rights to public expression. Since its completion, this ULC model legislation has been introduced in nine states - but only enacted in three (Hawaii, Kentucky, and Washington). The model Act works primarily across three phases - filing the motion and scope of the Act, Prima Facie Viability, and Legal Viability - with an additional section clarifying the right to attorney’s fees, costs, and expenses by the victor of the litigation.

This ULC framework provides a broader scope than earlier anti-SLAPP laws while protecting communications in governmental proceedings. It also ensures that individuals and entities retain the constitutionally protected rights to free speech, assembly, petition, and free press. As a means of removing the principal burden unethical actors may use a SLAPP suit for, the UPEPA also promotes the early and efficient resolution of these cases - requiring the courts to expedite a hearing unless a qualifying exception applies. Most importantly, the ULC measure aims to prohibit "litigation tourism," or the practice of shopping around for a sympathetic or less protected venue, by ensuring citizens receive comprehensive protections no matter where they reside. As a strong deterrent, the Uniform Act also includes a mandatory awarding of attorney’s fees, costs, and expenses for the prevailing party - thereby increasing the risk for scrupulous actors who engage in vexatious claims.

The commission's final draft of the UPEPA offers enacting states a comprehensive, efficient framework for resolving SLAPPs or deterring them pre-filing. According to the commission's findings, the UPEPA’s scope provides more protection to citizens than most existing anti-SLAPP statutes. The commission notes that states with existing anti-SLAPP laws may consider updating their current law using the ULC model.

Across the U.S., 34 states have enacted anti-SLAPP laws. In the CSG South region, only Alabama, Mississippi, North Carolina, South Carolina, and West Virginia lack anti-SLAPP laws. Given that most Southern states include public participation protections in their laws, this comparison will begin by examining the three states - Kentucky, Missouri, and North Carolina - that have adopted or attempted to adopt the UPEPA framework to varying degrees, followed by an analysis of existing anti-SLAPP laws in other CSG South states.
## Anti-SLAPP Laws in the South

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<td>ALABAMA</td>
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<td>FLORIDA</td>
<td>• Fla. Stat. 768.295 (General)</td>
<td>• HB 135 (2000); SB 1312 (2015)</td>
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<td>• Fla. Stat. 718.1224 (Condos)</td>
<td>• HB 995 (2008)</td>
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<td>• Fla. Stat. 720.304 (HOAs)</td>
<td>• SB 1194 (2000); SB 148 (2002); SB 1184 (2004); SB 2984 (2004); SB 1378 (2008); SB 1196 (2010); SB 438 (2022)</td>
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<td>SB 1250 (2007); HB 1117 (2016); SB 401 (2020)</td>
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<td>WEST VIRGINIA</td>
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States that Used/Attempted to Use ULC Models

**Kentucky**
The only state in the region to enact a UPEPA-based measure, Kentucky House Bill 222 (2022) expands protections for public participation. Despite the UPEPA forming the basis of the bill, Kentucky’s anti-SLAPP measure differs from the Uniform Act in a few ways. First, the language applies the protections to information-gathering activities related to artistic or journalistic expression - regardless of whether the information is publicly communicated - and to consumer reviews of businesses. Additionally, it adds several exemptions to the UPEPA’s scope, including:

1. Certain property-related claims;
2. Personal injury and wrongful death claims;
3. Insurance claims;
4. Common law fraud claims;
5. Whistleblower and specific employment-related claims; and
6. State Consumer Protection Act claims.¹¹

**Missouri**
Missouri’s current anti-SLAPP statute is narrowly tailored to conduct or speech made at or in connection with a public hearing or meeting in a "quasi-judicial" proceeding before a government body.¹² However, the statute also provides the prevailing party with attorney’s fees and costs and the right to an expedited appeal if a motion to dismiss a SLAPP claim is denied.¹³ During the 2022 legislative session, lawmakers filed two proposals, House Bill 2624 and Senate Bill 1219, which would have incorporated the UPEPA provisions into state law. Although considered, neither bill was adopted during the 2022 session.¹⁴,¹⁵

**North Carolina**
Like Missouri, North Carolina lawmakers’ attempt to write the UPEPA into their statutes via House Bill 1017 (2022) was unsuccessful.¹⁶ However, unlike Missouri, North Carolina law has no preexisting protections, making a revitalized attempt at anti-SLAPP a higher priority. Instead, individuals must pursue a malicious prosecution claim - a similar but more limited recourse compared to a dedicated anti-SLAPP statute.¹⁷
Arkansas
Although the state has not enacted the ULC-modeled anti-SLAPP measure, Arkansas’s existing public participation protections are quite strong - due to the Citizen Participation in Government Act of 2005. This bill created immunity from civil liability for anyone participating in privileged communication or performing an act furthering free speech or the right to petition. However, this exemption does not apply if an individual knowingly makes such statements or petitions without regard to their truthfulness. Another strength of the statute is its provision allowing for compensatory damages - in addition to attorney fees, costs, and expenses - if a SLAPP claim is successfully dismissed.

Florida
Uniquely, the Sunshine State has enacted several anti-SLAPP laws - two strictly pertaining to home and condominium owners' associations, respectively, and a third which applies to more common SLAPP claims. Examining the property owners' statutes reveals both laws aim to protect owners' rights to display certain official flags or speak against association leadership. These sections preserve the individual's first amendment rights, regardless of any restrictions or rules in an association's covenants. The property owners' provisions also apply to association members who participate in a hearing before a governmental entity regarding matters concerning the association and their property. Additionally, any party bringing a SLAPP suit against an association property owner may face liability, not limited to associations or board members.

More broadly, Florida implemented general civil litigation protections against strategic lawsuits against public participation in 2000 - which were further strengthened in 2015. The statute protects citizens' free speech concerning public issues, right to assembly, instruction of government representatives, or petition of a government entity regarding a grievance. However, unlike many other anti-SLAPP laws, Florida does not address whether a defendant's motion halts discovery proceedings, nor does it specify under what standard courts may decide whether a claim was wrongly brought.

Georgia
Initial legislation in 1996 was relatively limited. Specifically, its scope applied only to litigation involving statements made to governmental bodies or regarding issues discussed in official proceedings. However, in 2016, lawmakers strengthened the statute via House Bill 513. The measure expands the scope of the law to protect any statement - whether written or verbal - expressed in a public space or forum in connection with issues of public concern. It also mandates awarding attorney's fees to a party that prevails in dismissing a SLAPP suit, allows denial of an anti-SLAPP measure to be instantly appealable, and removes a verification requirement to allow for applicability of these protections in federal courts.

While the previous language required plaintiffs to file a written verification certifying the claims were not frivolous, the law now requires plaintiffs to provide evidence that the claim is likely to prevail on the merits.

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1 Per statute, official flags include the U.S. Flag, State of Florida Flag, POW-MIA Flag, or any Official Flag of the U.S. Armed Forces - including the newly established Space Force. SB 438 (2022) added the U.S. Space Force to the list of protected flags.
Louisiana
Louisiana’s anti-SLAPP law, written in 1999 and expanded in 2004 and 2012, protects defendants acting in furtherance of the constitutionally protected rights to free speech or petition. To be protected, these expressions must fall under one of four categories:

1. Statements in a legislative, executive, or judicial proceeding;
2. Statements regarding an issue under consideration before a governmental entity;
3. Comments made publicly in connection with a matter of public concern; and
4. Any other expression that furthers the exercise of free speech or petition connected to a public issue.29

An interlocutory appeal procedure is absent from the state’s civil code, allowing defendants to immediately appeal a denied anti-SLAPP motion instead of spending substantial resources defending the case through trial before being eligible for an appeal.30

Oklahoma
The Oklahoma Citizens Participation Act of 2014 (House Bill 2366) established robust protections for public expression if a SLAPP is filed.31 Notably, the statute defers to judicial discretion when determining whether to award attorney’s fees and costs upon the dismissal of a SLAPP action. Oklahoma’s anti-SLAPP protections also provide the possibility of bringing sanctions against a party filing frivolous or non-timely SLAPP suits. Likewise, if a motion to dismiss the strategic lawsuit is deemed intended to delay proceedings, the defendants are also sanctionable.32

Tennessee
During the 2019 legislative session, lawmakers unanimously approved a robust and expansive public participation protection law – Senate Bill 1097 – to defend citizens against frivolous SLAPP suits. Strengthening existing statute, the Tennessee Public Participation Act of 2019 allows defendants to attempt to dismiss a SLAPP claim earlier in the litigation process instead of waiting for costly discovery or trial to begin. Many other state laws also allow for the immediate appeal of a denied motion to dismiss and for awarding attorney fees if the SLAPP case is dismissed.33 Prior law only narrowly protected individuals’ communications to public officials about government entities - leaving open suits in response to negative business reviews, criticism of government officials, or other forms of expressions protected by most anti-SLAPP laws.34
Texas
The Texas Citizens’ Participation Act of 2011 overwhelmingly passed both chambers and established the Lone Star State as one of the strongest anti-SLAPP states in the country. It allowed courts to throw out frivolous lawsuits within the first 60 days of a case if a judge determined the expression at issue was regarding a matter of public concern. It also created an automatic stay of discovery when an anti-SLAPP motion is pending and mandates the filing party pay attorney’s fees and costs if a defendant prevails in their motion to dismiss.35

However, in 2019, Texas significantly modified this statute and created new limits regarding the expressions protected by the anti-SLAPP language.36 Specifically, it changed the terminology to require successful anti-SLAPP claims to be predicated on being "based on" or "in response to" the exercise of protected rights to speech, petition, and assembly. Prior statutory language instead used the broader "related to" modified when deciding whether defendants could file for expedited dismissal of a SLAPP claim.37 The 2019 amendment also created a carveout exempting speech regarding trade secrets or non-compete agreements from anti-SLAPP protections.38

Virginia
Lawsuits filed regarding a statement made at a public hearing or similar open proceeding are immune to SLAPP proceedings – unless the comments were knowingly false or with reckless regard as to their truthfulness.39 It also does not mandate awarding attorney’s fees and costs to a defendant who prevails in their motion to dismiss a SLAPP case, instead leaving it to the court’s discretion.40 Notably, it does not include a stay of discovery or interlocutory appeal provisions.41 In 2017 Senate Bill 1413 modestly expanded existing anti-SLAPP protections to include any statements regarding issues of public concern – protected under the First Amendment - communicated to a third party.42 A 2020 amendment added the quashing of a witness subpoena or subpoena duces tecum as actions allowing the court to award attorney’s fees and costs.43

Conclusion
Preventing disruptive and unmerited litigation is a cost and labor-saving measure for state policymakers. Without these protections in place, a backlog of cases may emerge as plaintiffs choose to “forum shop” in a particular state or jurisdiction. Policymakers seeking to create or expand anti-SLAPP laws may wish to consider the Uniform Act framework developed by the ULC, or the policies enacted in Georgia, Kentucky, Oklahoma, Tennessee, and Texas.44,45,46
Endnotes


