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Pennsylvania Joins States Enacting Tough Anti-SLAPP Protections: The New Uniform Public Expression Protection Act

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ABSTRACT

In July 2024, Governor Josh Shapiro signed the Pennsylvania Uniform Public Expression Protection Act.[2] The Act – which passed both houses of the General Assembly unanimously – seeks to curb "lawsuits brought primarily to chill the valid exercise of" speech and "encourage continued participation in matters of public significance."[3] The law achieves those objectives by establishing broad immunity for "protected public expression." This article explains the historical basis for this new law by providing a brief history of anti-SLAPP legislation and the legislation passed by the Uniform Law Commission that served as a model for the Pennsylvania Act. The article then provides a detailed overview of the Act's substantive and procedural provisions, including an explanation of how the Act's immunity operates in practice and its applicability in federal court.

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2 42 Pa.C.S.A. §§ 8340.11-8340.18.

3 42 Pa.C.S.A. § 8340.12(1), (2).

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The term "SLAPP" – "Strategic Lawsuit Against Public Participation" – was conceived in a 1988 law review article by professors Penelope Canan and George W. Pring.[4] Canan and Pring explained that the common element of SLAPP suits was powerful people filing meritless lawsuits as punishment for speech.[5] The types of speech challenged in these suits ranged from "parents complaining to their school board over unsafe school buses, campaigners against a zoning change, individuals complaining to government agencies about industrial polluters, and homeowners signing a referendum petition challenging a real estate development."[6] SLAPPs typically involve civil claims for money damages against individuals and private entities based on their public expression about matters of public concern.

Soon after Canan and Pring published their landmark article, states began passing laws to combat SLAPP suits. Those laws were designed to provide a mechanism for prompt dismissal of meritless claims based on speech about matters of public concern. Although anti-SLAPP laws vary from state to state, they are:

> generally designed to lower or eliminate the costs and other burdens of defending against SLAPPs, including, for example, by providing mechanisms to obtain dismissal of meritless law-

4 *See generally* Penelope Canan & George W. Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 Law & Soc'y Rev. 385 (1988).

5 *Id.* The professors compiled their research on 240 SLAPP suits where citizens were "sued into silence" in a 1996 book published by the Temple University Press. Penelope Canan & George W. Pring, SLAPPs: Getting Sued for Speaking Out (Temple University Press 1996).

6 Robert Sprague, *SLAPPed by RICO: Corporations Punishing Social Activism*, 55 Am. Bus. L.J. 763, 770 (2018) (citing Canan & Pring, *supra* n.4, at 387-88).

> suits at the earliest stages of litigation, automatically staying discovery, permitting defendants to immediately appeal a trial court's denial of an anti-SLAPP motion, and permitting defendants who win their anti-SLAPP motions to recover attorney fees and costs.[7]

Each of these four components plays a critical role in combatting SLAPP suits – and protecting First Amendment rights and promoting public discourse.[8] By enacting a mechanism for early dismissal of claims with no likelihood of success, anti-SLAPP laws ensure that meritless cases are weeded out quickly, while permitting viable claims to proceed. The laws thus allow courts to swiftly expose and dismiss baseless claims, saving both the judiciary and litigants time and expense. By imposing a stay in the litigation while the anti-SLAPP issues are pending, the laws relieve defendants of the financial, emotional, and other burdens associated with full factual discovery – a process that can take many months or years to complete. Instead of requiring the parties to engage in expensive fact-finding that might be immaterial to the ultimate disposition of the case, courts and litigants can focus on the key legal issues, and judges are able to assess whether the case is likely to have any merit. Immediate appeals promote efficiency and provide an additional safeguard for defendants whose anti-SLAPP motions were denied erroneously. Finally, anti-SLAPP laws level the playing field through their promise of attorneys' fees. That promise deters people from filing meritless lawsuits to silence their critics and ensures that speakers who are forced to defend against meritless claims are not also forced to bear the cost of litigating cases that never should have been brought.

B. Early Anti-SLAPP Legislative Efforts

The first modern anti-SLAPP law was enacted in Washington state in 1989. Known as the "Brenda Hill Bill," the law was named for a Washington woman who reported her real estate company to the state after she discovered it owed thousands of dollars in unpaid taxes.[9] In response, the company sued and harassed Hill "to the point of bankruptcy," and she became a media darling as she picketed the capitol steps.[10] The Washington state legislature

7 Shannon Jankowski and Charles Hogle, *SLAPP-ing Back: Recent Legal Challenges to the Application of State Anti-SLAPP Laws*, Communications Lawyer (Mar. 16, 2022), https://www.americanbar.org/groups/communications_law/publications/communications_lawyer/2022-winter/slapping-back-recent-legal-challenges-the-application-state-antislapp-laws/.

8 Michael Berry, *Pennsylvania's new law 'SLAPPs' back at frivolous suits over free speech*, Tribune-Democrat (Oct. 24, 2024), https://www.tribdem.com/news/editorials/columns/michael-berry-pennsylvania-s-new-law-slapps-back-at-frivolous-suits-over-free-speech/article_82eda5e0-8fe7-11ef-a170-abc87d86fc63.html.

9 Tom Wyrwich, Notes and Comments, *A Cure for a "Public Concern": Washington's New Anti-SLAPP Law*, 86 Wash. L. Rev. 663, 669 (2011).

10 *Id*.

passed a bill to provide relief to parties suffering from similarly vindictive lawsuits, providing immunity from claims related to reports to the government about matters of public concern. The law was strengthened in 2002, but lawmakers wanted to go even further. In 2010 they enacted a stringent law modeled after California, the second state to enact an anti-SLAPP statute.[11]

California passed its anti-SLAPP law in 1992, and, over the next three decades, it became a model for other states.[12] The California statute includes each of the four components that have become the hallmarks of effective anti-SLAPP laws: (1) a special motion to strike that serves as a tool for efficiently disposing of meritless suits by requiring the plaintiff to show that its claim has some possible merit factually and legally at the outset of a case;[13] (2) a stay of discovery while the motion is pending;[14] (3) a fee-shifting provision, which requires a court granting a special motion to strike to impose attorneys' fees and costs on the plaintiff;[15] and (4) a right to immediate appeal.[16] In addition, the law provides a prevailing defendant who can demonstrate the lawsuit was filed for purposes of harassment the right to file a "SLAPP-back" lawsuit to recover damages for abuse of the legal process.[17]

The California law withstood an early test when its constitutionality was challenged by opponents who claimed the statute took away the jury's fact-finding role. That claim centered on the statute's text, which states that a special motion to strike should be granted "unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."[18] The California Supreme Court held the anti-SLAPP law's "probability" of prevailing language imposed the equivalent of a summary judgment standard and therefore passed constitutional muster, recognizing that any alternative interpretation risked infringing upon the right to a jury trial.[19]

Other state anti-SLAPP statutes did not fare as well in the face of similar constitutional challenges. In New Hampshire, a 1994 advisory opinion from the state Supreme Court held that the state's proposed anti-SLAPP law violated the right to a jury trial.[20] The Court opined that the bill's requirement that the plaintiff show a "probability that [he or she] will prevail on the claim"

11 *See generally id.*

12 The California anti-SLAPP statute has been the subject of many court decisions, resulting in a rich body of interpretive law. *See generally* Thomas R. Burke, Anti-SLAPP Litigation (The Rutter Group 2023).

13 Cal. Civ. Proc. Code § 425.16(b)(1), (f), (g).

14 *Id.* § 425.16(g).

15 *Id.* § 425.16(c).

16 *Id.* § 425.16(i).

17 *Id.* § 425.18.

18 *Id.* § 425.16(b)(1).

19 *See* Briggs v. Eden Council for Hope & Opportunity, 969 P.2d 564, 574-75 (Cal. 1999); *see also* Lafayette Morehouse, Inc. v. Chronicle Publ'g Co., 37 Cal. App. 4th 855, 867 (1st Dist. Ct. App. 1995) (noting that "the trial court's consideration of the defendant's opposing affidavits does not permit a weighing of them against plaintiff's supporting evidence, but only a determination that they do not, as a matter of law, defeat that evidence").

20 Opinion of Justices, 641 A.2d 1012, 1014-15 (N.H. 1994).

infringed upon the jury's province because it required the trial court to "weigh the pleadings and affidavits on both sides and adjudicate a factual dispute."[21] Similarly, in 2015, the Washington Supreme Court struck down the 2010 version of the state's anti-SLAPP statute, ruling that by requiring a court to assess the claimant's "probability of prevailing," the court had to weigh the evidence and make a factual determination, "invad[ing] the jury's essential role of deciding debatable questions of fact."[22] Two years later, the Minnesota Supreme Court struck down the state's similarly-worded statute, concluding that that the law violated the right to a jury trial by shifting part of "the jury's fact-finding role to the district court."[23] So long as anti-SLAPP statutes do not require a judge to weigh evidence as a fact-finder, courts have held that the statutes withstand constitutional challenges.[24]

C. Application of Anti-SLAPP Laws in Federal Court

In addition to the constitutional challenges posed to anti-SLAPP statutes, questions have arisen about whether they apply in federal court. Since *Erie Railroad Co. v. Tomkins*,[25] federal courts have applied the U.S. Supreme Court's seemingly simple directive that, when sitting in diversity jurisdiction, they should apply state substantive law, but federal procedural rules. Soon after California enacted its anti-SLAPP statute, the U.S. Court of Appeals for the Ninth Circuit held that its motion to strike, fee-shifting provision, and right to immediate appeal apply in federal court.[26] Since then, however, federal courts have diverged widely regarding whether state laws are considered substantive, and applicable in federal court, or procedural, and in conflict with the Rules of Civil Procedure. While the "D.C., Fifth, Tenth, and Eleventh Circuits have refused to apply parts of the anti-SLAPP laws of the District of Columbia, Texas, New Mexico, and Georgia, respectively[,]… the First, Fifth, and Ninth Circuits have applied provisions of the Maine, Louisiana, and California anti-SLAPP laws, respectively."[27]

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21 *Id*.

22 Davis v. Cox, 351 P.3d 862, 873-74 (Wash. 2015) (en banc).

23 *See* Leiendecker v. Asian Women United of Minn., 895 N.W.2d 623, 636 (Minn. 2017). The court also held that the law was unconstitutional because it required "the responding party to meet a higher burden of proof before trial (clear and convincing evidence) than it would have to meet at trial (preponderance of the evidence)." *Id.*

24 *See, e.g.*, Taylor v. Colon, 468 P.3d 820, 824-25 (Nev. 2020) (holding Nevada anti-SLAPP statute survived constitutional scrutiny because "court does not make any findings of fact," as it only "decide[s] whether a plaintiff's underlying claim is legally sufficient"), *amended by* 482 P.3d 1212 (Nev. 2020); Competitive Enter. Inst. v. Mann, 150 A.3d 1213, 1240 (D.C. 2016), *as amended* (Dec. 13, 2018) (interpreting Washington, D.C.'s anti-SLAPP statute similarly, allowing the court to "test the legal sufficiency of the evidence to support the claims").

25 304 U.S. 64 (1938).

26 *See* Batzel v. Smith, 333 F.3d 1018, 1024-25 (9th Cir. 2003); *see also* United States ex rel. Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963 (9th Cir. 1999).

27 *See* Matthew L. Schafer & Tanvi Valsangikar, *The Application of the New York Anti-SLAPP Scheme in Federal Court*, Journal of Free Speech Law (Jan. 18, 2023), at 593, *available at* https://www.journaloffreespeechlaw.org/schafer.pdf.

Some federal courts diverge on the applicability of anti-SLAPP statutes depending on which state's law they are considering. For example, in 2014 in *Adelson v. Harris*,[28] the U.S. Court of Appeals for the Second Circuit found that the Nevada anti-SLAPP statute applied to billionaire casino magnate Sheldon Adelson's defamation claim because no federal rule "squarely conflict[ed]" with the law's immunity provision and mandatory fee shifting rule. Six years later in *La Liberte v. Reid*,[29] the Second Circuit refused to apply California's anti-SLAPP statute, ruling that the state's special motion to strike was too procedural to apply in federal court. Similarly, in *Carbone v. Cable News Network*,[30] the Eleventh Circuit concluded that the Georgia anti-SLAPP statute's motion to strike provision impermissibly conflicted with federal pleading standards for motions to dismiss and summary judgment, while district courts in the Eleventh Circuit have continued to apply the provisions of Florida's anti-SLAPP law, which is principally a fee-shifting statute with few procedural protections.[31] Indeed, courts' rulings on anti-SLAPP statutes' applicability in federal court are so varied that one commentator compared finding the right fit to Goldilocks and the Three Bears, noting that some laws are "*too hard*, with burden shifting and discovery-stay provisions that courts construe as usurping the federal rules," while other statutes may be "*just right"* for federal courts, but potentially "*too soft"* for anti-SLAPP advocates.[32]

D. The Uniform Law Commission Develops the Uniform Anti-SLAPP Law

As more states enacted anti-SLAPP statutes, their approaches diverged, and courts began applying the different laws in different ways, creating disparate bodies of law about the substance and procedure of anti-SLAPP laws. In response to this phenomenon, in 2020, the Uniform Law Commission ("ULC") approved the Uniform Public Expression Protection Act ("UPEPA"), the uniform anti-SLAPP law intended to promote uniformity among the states in how they address SLAPP suits.[33] The ULC expressed concern for the "degree of variance" in states' anti-SLAPP laws, explaining that variance "leads

28 774 F.3d 803, 809 (2d Cir. 2014).

29 966 F.3d 79, 87 (2d Cir. 2020). The Second Circuit's holding contradicted the Ninth Circuit's conclusion that there is no "direct collision" between the Federal Rules of Civil Procedure and the California anti-SLAPP statute's special motion to strike. *See Newsham*, 190 F.3d at 972.

30 910 F.3d 1345, 1349-50 (11th Cir. 2018).

31 *See, e.g.*, Bongino v. Daily Beast Co., 477 F. Supp. 3d 1310, 1323 (S.D. Fla. 2020); *see also* Corsi v. Newsmax Media, Inc., 519 F. Supp. 3d 1110, 1128 (S.D. Fla. 2021).

32 Anna Kaul, *Seeking Anti-SLAPP Fees in Federal Court and the Goldilocks Problem*, Communications Lawyer (Aug. 14, 2024), https://www.americanbar.org/groups/communications_law/publications/communications_lawyer/2024-summer/seeking-anti-slapp-fees-federal-court-goldilocks-problem/.

33 *See* Uniform Public Expression Protection Act with Prefatory Note and Comments (hereinafter "ULC Report"), Uniform Law Commission (Oct. 2, 2020), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=46a646fa-5ef6-8dd0-7b0a-ce95c59f0d14&forceDialog=1.

to confusion and disorder among plaintiffs, defendants, and courts."[34] The ULC also noted that the absence of laws in many states "contributes to what can be called 'litigation tourism'; that is, a type of forum shopping by which a plaintiff who has choices among the states in which to bring a lawsuit will do so in a state that lacks strong and clear anti-SLAPP protections."[35] The ULC sought to "harmonize these varying approaches by enunciating a clear process through which SLAPPs can be challenged and their merits fairly evaluated in an expedited manner."[36]

As the ULC explained in the prefatory note accompanying its adoption of UPEPA, anti-SLAPP laws are designed "to both assist defendants in seeking dismissal and to deter vexatious litigants from bringing such suits in the first place."[37] The ULC made clear that UPEPA – like other anti-SLAPP laws – was drafted to "serve[] two purposes: protecting individuals' rights to petition and speak freely on issues of public interest while, at the same time, protecting the rights of people and entities to file meritorious lawsuits for real injuries."[38] UPEPA employs five mechanisms to achieve these objectives:[39]

1. A procedural vehicle that allows defendants to move to dismiss speech-based claims early in the litigation;

2. An expedited hearing of the motion and a stay of other proceedings until the motion is decided;

3. A requirement that the plaintiff be able to demonstrate the claim has some possible merit legally and factually;

4. Cost-shifting sanctions that award attorneys' fees when a plaintiff's claim lacks merit; and

5. An interlocutory appeal of any decision that denies the motion.[40]

Since the ULC adopted UPEPA, nine states have passed anti-SLAPP legislation modeled after it.[41] In 2021, Washington became the first state to enact an

34 ULC Report at 3. The ULC approved UPEPA to promote uniformity in anti-SLAPP laws, recognizing that the "variance from state to state . . . leads to confusion and disorder among plaintiffs, defendants, and courts" and contributes to forum shopping. *Id*. The ULC sought to "harmonize these varying approaches by enunciating a clear process through which SLAPPs can be challenged and their merits be evaluated in an expedited manner." *Id.*

35 *Id*.

36 *Id*.

37 *Id.* at 1.

38 *Id.* at 3.

39 *Id.* at 2-3.

40 *See generally* UPEPA §§ 1-10. UPEPA was designed to avoid constitutional challenge by preserving the jury's role as fact-finder and imposing no greater burden on the plaintiff than it would face at the summary judgment stage.

41 *See* Legislative Bill Tracking, Uniform Law Commission, https://www.uniformlaws.org/committees/community-home?communitykey=4f486460-199c-49d7-9fac-05570be1e7b1.

anti-SLAPP law based on UPEPA, adopting the uniform law to replace its old law that had been declared unconstitutional.[42] In 2022, Hawaii and Kentucky followed suit, followed by New Jersey, Oregon, and Utah in 2023.[43] Maine and Minnesota passed bills modeled after UPEPA in 2024, followed by Pennsylvania.[44] With passage of Pennsylvania's new anti-SLAPP law ("PA-UPEPA"), 34 states and the District of Columbia have now passed anti-SLAPP laws.[45] In addition, federal anti-SLAPP legislation has been introduced in Congress, but no action has been taken on it.[46]

II. HISTORY OF ANTI-SLAPP LEGISLATION IN PENNSYLVANIA

A. Pennsylvania's Original Anti-SLAPP Law Narrowly Focused on Environmental Issues

In 2000, the General Assembly passed the Pennsylvania Environmental Immunity Act, 27 Pa. Cons. Stat. §§ 8301-8305, a narrow anti-SLAPP statute applicable only to certain speech dealing with environmental laws and regulations.[47] The Act's preamble declares a broad concern about SLAPP suits, stating that "[i]t is contrary to the public interest to allow lawsuits, known as Strategic Lawsuits Against Public Participation (SLAPP), to be brought primarily to chill the valid exercise by citizens of their constitutional right to freedom of speech and to petition the government for the redress of grievances."[48] The Act, however, only sought to "empower citizens to bring a swift end to retaliatory lawsuits seeking to undermine their participation in the establishment of State and local environmental policy and in the implementation and enforcement of environmental law and regulations."[49] It left other kinds of SLAPP suits undisturbed.

Consistent with its narrow objective, the law only provides immunity for individuals in two circumstances: (1) if they "file[] an action in the courts of this Commonwealth to enforce an environmental law or regulation," or (2) if they "make[] an oral or written communication to a government agency relating to enforcement or implementation of an environmental law or regulation."[50] Under both circumstances, the law's immunity is only available if

42 *Id.*
43 *Id.*
44 *Id. See* Thomas G. Wilkinson, Jr., *What Pennsylvania Can Expect from Anti-SLAPP Law*, Law360 (Sept. 30, 2024), (https://www.law360.com/articles/1883079/what-pennsylvania-can-expect-from-anti-slapp-law). As of the time this article was written, the Uniform Law Commission reports UPEPA-based legislation is pending in nine other states.
45 Anti-SLAPP Legal Guide, Reporters Committee for Freedom of the Press, https://www.rcfp.org/anti-slapp-legal-guide/.
46 *See, e.g.*, 2024 H.R. 10310, Free Speech Protection Act, https://www.congress.gov/bill/118th-congress/; Caitlin Vogus, *Federal law must fix loophole allowing abusive lawsuits targeting speech*, The Hill (June 2, 2024), https://thehill.com/opinion/4698689-federal-law-must-fix-loophole-allowing-abusive-lawsuits-targeting-speech/.
47 *See* 27 Pa.C.S.A. § 8302(a) (2001).
48 2000 Pa. Legis. Serv. Act 2000-138 (H.B. 393).
49 *Id.*
50 *See* 27 Pa.C.S.A. § 8302(a).

the speech is not knowingly false, malicious, solely intended to interfere with business relationships, or a wrongful use or abuse of process.[51] Anyone who "successfully defends against an action" subject to the Environmental Immunity Act is entitled to recover their attorneys' fees and costs of litigation.[52]

In the lone Pennsylvania Supreme Court decision applying the statute, the Court explained that "[a] trial court must utilize a two-step process in analyzing an immunity claim," with the trial court first examining whether the cause of action arose because of the party's efforts to petition the government, and if that "threshold is satisfied, the party opposing immunity must then demonstrate one of the statutory exceptions applies, . . . or that some other overriding legal basis defeats the immunity claim."[53]

For many years, the Environmental Immunity Act was roundly criticized for its narrow application; indeed, the law does not even apply to speech discussing environmental concerns in a newspaper or even on the steps of the General Assembly.[54] The Institute for Free Speech, which issues an "Anti-SLAPP Report Card" for each state, graded Pennsylvania's environmental anti-SLAPP law a "D-" with a score of just 25%, noting that the "fundamental flaw in Pennsylvania's anti-SLAPP statute is it covers too little speech. If Pennsylvania simply expanded the scope of its statute to cover the same kinds of speech recommended by the Uniform Law Commission's model Act, the overall grade would rise to A-."[55] Similarly, the ACLU of Pennsylvania called the old law "needlessly narrow," noting it "only protected communications to government agencies about environmental laws and regulations."[56]

B. Efforts to Pass a Broader Anti-SLAPP Statute

For more than a decade a coalition of Pennsylvania First Amendment advocates, including the Pennsylvania NewsMedia Association, ACLU, and Americans for Prosperity, pushed for the General Assembly to pass a broader

51 *See id*. § 8302(b).

52 *See id*. § 7707.

53 Pennsbury Vill. Assocs., LLC v. McIntyre, 11 A.3d 906, 912 (Pa. 2011) (rejecting appellee's claim to immunity because he had voluntarily entered into a settlement agreement waiving his rights to utilize the Environmental Immunity Act's protections). The Pennsylvania Environmental Immunity Act was not repealed by PA-UPEPA and remains in effect. *See* PA LEGIS 2024-72 § 4, 2024 Pa. Legis. Serv. Act 2024-72 § 4 (H.B. 1466) (hereinafter "Act 72").

54 *See, e.g.*, Penllyn Greene Assocs., L.P. v. Clouser, 890 A.2d 424, 434 (Pa. Cmwlth. 2005) ("This Court agrees with the trial court that the Act was not intended to immunize Residents' statements made to potential home buyers and real estate agents concerning their belief that the site was contaminated by agent orange and other dioxins."), *allocatur denied*, 919 A.2d 960 (Pa. 2007).

55 Institute for Free Speech, 2023 Report Card, Pennsylvania, https://www.ifs.org/anti-slapp-states/pennsylvania/.

56 Elizabeth Randol, *Good News for Free Speech and Holding Powerful Entities Accountable*, ACLU of Pennsylvania (Aug. 27, 2024), https://www.aclupa.org/en/news/good-news-free-speech-and-holding-powerful-entities-accountable.

anti-SLAPP law.[57] Legislation passed the state Senate with broad bipartisan support in 2015 and again in 2017, only to stall in the House of Representatives both times.[58] In December 2019, the House Judiciary Committee held a hearing on an anti-SLAPP bill that featured supportive testimony from the bill's sponsors and a wide range of groups, including the Pennsylvania Bar Association, which had long supported anti-SLAPP legislation.[59] But, with the onset of the COVID-19 pandemic, the legislation never moved.

Following the pandemic, the coalition redoubled its efforts, expanding its membership and supporting new anti-SLAPP legislation based on UPEPA.[60] That legislation, introduced as H.B.1466, was modeled on the ULC's model law and accounted for distinctive features of the state Constitution and Pennsylvania legal practice. It included all of the hallmarks of an effective anti-SLAPP law. H.B. 1466 won unanimous approval in the House and Senate, and then was signed into law by Governor Shapiro as Act 72 of 2024.[61]

III. AN EXPLANATION OF PA-UPEPA

In enacting PA-UPEPA, the General Assembly found that "[t]here has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of" speech on matters of public concern. It also declared that "[i]t is

57 *See, e.g.*, Jason Grant, *Bill to defend civic speech from 'strategic' defamation suits proposed*, Phila. Inquirer (May 29, 2014), https://www.inquirer.com/philly/news/politics/20140529_Bill_to_defend_civic_speech_from__strategic__defamation_suits_proposed.html#loaded; Ashley Klingensmith, Elizabeth Randol, and Holly Lubart, *Let's Make it Easier for all Pennsylvanians to Exercise Their First Amendment Rights*, Pittsburgh Post-Gazette (Dec. 17, 2019), https://www.post-gazette.com/opinion/Op-Ed/2019/12/17/Ashley-Klingensmith-Elizabeth-Randol-Holly-Lubart-Pennsylvanian-First-Amendment-rights/stories/201912170026; *see also* Peter Hall, *New Pa. law strengthens protections for those targeted by lawsuits for speaking out in public*, Pa. Capital-Star (July 23, 2024), https://penncapital-star.com/civil-rights-social-justice/new-pa-law-strengthens-protections-for-those-targeted-by-lawsuits-for-speaking-out-in-public/ (describing history of legislation).

58 *See* 2015 PA S.B. 95 (NS), https://www.legis.state.pa.us/cfdocs/billInfo/bill_history.cfm?syear=2015&sind=0&body=S&type=B&bn=95; 2017 PA S.B. 95 (NS), https://www.legis.state.pa.us/cfdocs/billInfo/bill_history.cfm?syear=2017&sind=0&body=S&type=B&bn=95.

59 Judiciary Comm. Pub. Hr'g, Presentation on H.B. 95 Anti-SLAPP (Dec. 16, 2019), https://www.legis.state.pa.us/WU01/LI/TR/Transcripts/2019_0161T.pdf; *see also* PA House Comm. Meetings (Dec. 16, 2019), *available at* https://www.legis.state.pa.us/cfdocs/Legis/CMS/ArchiveDetails.cfm?SessYear=2019&MeetingId=593&Code=24&Chamber=H (written testimony).

60 *See generally* Speak Free PA, https://www.speakfreepa.org/. The Speak Free PA Coalition describes itself as "a bipartisan, commonsense effort to update Pennsylvania law to protect people from being 'SLAPPed' – or threatened with a potential lawsuit – as a tactic to prevent them from exercising their First Amendment rights." In addition to PNA, ACLU, and AFP, the coalition's members included the Pennsylvania Bar Association, Pennsylvania Association of Broadcasters, Foundation for Individual Rights and Expression, Motion Picture Association, Pennsylvania Center for the First Amendment, International Association of Better Business Bureaus and Better Business Bureaus of Pennsylvania, Institute for Free Speech, Electronic Frontier Foundation, James Madison Center for Free Speech, Institute for Justice, Reporters Committee for Freedom of the Press, Radio Television Digital News Association, and Student Press Law Center.

61 *See* Legislative History, Act 72 (H.B. 1466), https://www.legis.state.pa.us/cfdocs/billInfo/bill_history.cfm?syear=2023&sind=0&body=H&type=B&bn=1466; Michael Berry and Leslie Minora, *Pennsylvania Protects Press Freedom, Passes Anti-SLAPP Statute*, Ballard Spahr (July 17, 2024), https://www.ballardspahr.com/insights/alerts-and-articles/2024/07/pennsylvania-protects-press-freedom-passes-anti-slapp-statute.

in the public interest to encourage continued participation in matters of public significance. This participation should not be chilled through abuse of the judicial process."[62]

Consistent with this policy objective, PA-UPEPA directs courts to construe its terms broadly.[63] In addition, in construing the Act, courts applying the Pennsylvania law are required to consider how courts in other states that have adopted UPEPA have applied and construed their laws. As the Act explains, looking to those courts' interpretations recognizes "the need to promote uniformity of the law with respect to its subject matter among states that enact it."[64] This uniformity will deter forum-shopping and provide greater certainty about what the law means and how it will be applied.[65] Thus, when litigating issues under PA-UPEPA, lawyers and judges should look to how similar provisions in the Act have been interpreted and applied in other states that have passed UPEPA.

PA-UPEPA is split between substantive and procedural sections.[66] The substantive sections – codified at 42 Pa.C.S.A. §§ 8320.1, 8340.11-15, 8340.17-18 – went into effect immediately when the law was signed by the Governor.[67] Like other statutes, the Act's substantive provisions are not retroactive.[68] PA-UPEPA explicitly states that it applies to "a civil action commenced or a cause of action asserted on or after" the Act went into effect.[69] As a result, the substantive provisions of the Act apply to any newly filed civil cases. They also apply to any claim added to a civil action already pending on the statue's effective date (for example, when a complaint is filed in an action initiated through a writ of summons or when a claim is added through an amended complaint, a counterclaim, or a cross-claim).

The procedural aspects of PA-UPEPA – codified in 42 Pa.C.S.A. § 8340.16 – are not yet in effect. They will go into effect only if and when the Supreme Court promulgates a rule of civil procedure or takes other actions set forth in

62 42 Pa.C.S.A. § 8340.12(1), (2).
63 *See id.* § 8340.12(4).
64 Act 72 § 5. Consistent with this objective, the ULC's commentary to UPEPA is included in the annotated version of the statute in the Pennsylvania Consolidated Statutes.
65 *See supra* notes 34-36.
66 Michael Berry, *Pennsylvania's New Anti-SLAPP Law Protects Press Freedom*, Legal Intelligencer (Aug. 1, 2024), https://www.law.com/thelegalintelligencer/2024/08/01/pennsylvanias-new-anti-slapp-law-protects-press-freedom/?slreturn=2024101691143.
67 Act 72 § 7(2).
68 *See* 1 Pa.C.S.A. § 1926 ("No statute shall be construed to be retroactive unless clearly and manifestly so intended by the General Assembly.").
69 Act 72 § 6.

the statute.[70]

A. The Substantive Provisions of PA-UPEPA

The substantive portion of the Act has four key components:

1. Broad Scope of Claims Eligible for "Protected Public Expression Immunity." PA-UPEPA "grants immunity to those groups or parties exercising the rights to protected public expression" and thus provides that "a cause of action based on protected public expression" is eligible for immunity from civil liability.[71] Because the immunity covers "a cause of action," it can apply to any cause of action asserted in a complaint, counterclaim, crossclaim, or third-party claim.[72] The key, for the immunity to be implicated, is that the claim must arise from "protected public expression."

The statute defines "protected public expression" to include three kinds of expression: (1) "communication in a legislative, executive, judicial or administrative proceeding"; (2) "communication on an issue under consideration or review in a legislative, executive, judicial or administrative proceeding"; or (3) any exercise of the constitutional rights of speech, press, assembly, petition, or association "on a matter of public concern."[73] Although the phrase "matter of public concern" is not defined in the statute, its meaning is well-established in First Amendment jurisprudence. The Supreme Courts of the United States and of Pennsylvania have instructed that what is "a matter of public concern" is quite broad. As the Pennsylvania Supreme Court explained

70 Act 72 § 7(1). The statute's distinction between its substantive and procedural provisions recognizes that the Pennsylvania Constitution provides that the Supreme Court has "the power to prescribe general rules governing practice, procedure and the conduct of all courts." Pa. Const. art. V, § 10(c). In addition to the promulgation of a rule of civil procedure, the Act states that its procedural components will go into effect if the Supreme Court issues a rule stating that the provisions of § 8340.16 are not suspended (such as in Pa.R.Civ.P. 4023), or issues a direct letter of address like that issued in *In re 42 Pa. C.S. § 1703*, 482 Pa. 522, 394 A.2d 444 (1978), stating that the provisions of that section are not unconstitutional. *See* Act 72 §§ 3, 7(2). A new rule of civil procedure mirroring the statute has been proposed to the Supreme Court and is being considered by the Civil Procedural Rules Committee.

71 *See* 42 Pa.C.S.A. §§ 8340.12(3)(1), 8340.13, 8340.14(a), 8340.15. The immunity provided by PA-UPEPA is "substantive in nature." ULC Report at 7 ("[t]he point of the anti-SLAPP statute is that you have a right not to be dragged through the courts because you exercised your constitutional rights") (citation omitted). For this reason, the statute is included in the subchapter of the Pennsylvania Consolidated Statutes dedicated to immunities. *See* 42 Pa.C.S.A. Chap. 83, Subchs. C, C.1.

72 *See, e.g.*, Pa.R.Civ.P. 1017, 1031, 1031.1; *see also* ULC Report at 11 ("The Act should apply not just to initial claims brought by a plaintiff against a defendant, but to any claim brought by any party.").

73 42 Pa.C.S.A. § 8340.13(1)-(3) (definition of "protected public expression"). This definition is drawn from UPEPA. *See* UPEPA § 2(b). The ULC has explained that the word 'communication' should be construed broadly – consistent with holdings of the Supreme Court of the United States – to include any expressive conduct that likewise implicates the First Amendment." ULC Report at 7 (citing Texas v. Johnson, 491 U.S. 397, 404 (1989) ("[W]e have long recognized that [First Amendment] protection does not end at the spoken or written word.")).

The third prong of the Act's definition of "protected public expression" refers to five of the rights protected by "the First Amendment to the Constitution of the United States" and "section 7 or 20 of Article I of the Constitution of Pennsylvania." 42 Pa.C.S.A. § 8340.13(3). The ULC has explained that "the terms 'freedom of speech or of the press,' 'the right to assemble or petition,' and 'the right of association' should all be construed consistently with caselaw of the Supreme Court of the United States and" the Pennsylvania Supreme Court. ULC Report at 8.

recently:

> Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." Further, the "arguably inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern."[74]

Because the Act provides that any "cause of action based on" the three categories of expression is eligible for the immunity,[75] the statute looks at the defendant's communication and whether the defendant has been sued for that communication.[76] The law therefore encompasses any speech-based tort claim, including defamation, false light, publication of private facts, intentional infliction of emotional distress, and tortious interference, as well as other kinds of claims arising from expressive conduct, so long as the claim arises from a communication made in a government proceeding, about an issue being considered by any branch of government, or on any matter of public concern.

The Act exempts various kinds of claims from its broad scope of immunity. First, it incorporates three exemptions set forth in UPEPA: (1) claims against a government unit, employee, or agent "acting in an official capacity"; (2) claims by a government unit, employee, or agent "acting in an official capacity to enforce a law, regulation, or ordinance"; and (3) claims arising from commercial speech.[77]

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74 Oberholzer v. Galapo, 322 A.3d 153, 183-84 (Pa. 2024) (quoting Snyder v. Phelps, 562 U.S. 443, 453 (2011)); *see also, e.g.*, ULC Report at 8 (stating that "[t]he term 'matter of public concern' should be construed consistently with caselaw of the Supreme Court of the United States and the state's highest court"); Seelig v. Infinity Broad. Corp., 97 Cal. App. 4th 798, 807 (2002) (plaintiff's participation on Who Wants to Marry a Millionaire reality show was subject of public concern); Aristocrat Plastic Surgery, P.C. v. Silva, 169 N.Y.S.3d 272, 276-77 (N.Y. App. Div. 1st Dept. 2022) (consumer review of plastic surgeon was matter of public concern); Coleman v. Grand, 523 F. Supp. 3d 244, 259 (E.D.N.Y. 2021) (statements about defendant's relationship with plaintiff in context of #MeToo claims are matters of public concern because "sexual impropriety and power dynamics in the music industry, as in others, were indisputably an issue of public interest").

75 42 Pa.C.S.A. § 8340.14(a).

76 Throughout this section, "defendant" refers to the person against whom a claim has been asserted, and "plaintiff" refers to the person asserting the claim.

77 *See* 42 Pa.C.S.A. § 8340.14(b)(1)-(3); UPEPA § 2(c). The term "government unit" is defined in 42 Pa. C.S. § 102. The commercial speech exemption states that the immunity does not apply to claims "against a person primarily engaged in the business of selling or leasing goods or services if the cause of action arises out of a communication related to the person's sale or lease of the goods or services." 42 Pa.C.S.A. § 8340.14(b)(3). The Act provides that the term "goods or services" "does not include the creation, dissemination, exhibition or advertisement or similar promotion of a dramatic, literary, musical, political, journalistic or artistic work," 42 Pa.C.S.A. § 8340.13, including "newspapers, magazines, books, plays, motion pictures, television programs, video games, or Internet websites or other electronic mediums," *id.* cmt.12 (mirroring ULC Report at 9). As the ULC has explained, "the 'commercial-speech exemption' does not apply to the creation, dissemination, exhibition, or advertisement of a dramatic, literary, musical, political, journalistic, or artistic work." *Id.* cmt.13 (mirroring ULC Report at 10).

PA-UPEPA also exempts additional claims, including claims arising under insurance contracts, claims to enforce non-disparagement and non-compete agreements, claims for misappropriation of trade secrets or corporate opportunities (so long as the claim is against the person that allegedly misappropriated the trade secret or corporate opportunity), and claims arising from various types of corporate disputes.[78] In addition, the Act exempts claims for "bodily injury or death," unless those claims are for various speech-based torts or "arise[] solely from a communication on a matter of public concern."[79]

2. Immunity Determined by Well-Recognized Standards. A defendant subjected to a claim based on protected public expression is deemed to be immune from civil liability under three circumstances: (1) The plaintiff fails to "state a cause of action upon which relief can be granted"; (2) the plaintiff fails to "establish a prima facie case as to each essential element" of its claim; or (3) "[t]here is no genuine issue as to any material fact," and the defendant "is entitled to judgment as a matter of law."[80] The first circumstance tracks the standard for a demurrer, familiar in the context of preliminary objections, a motion to dismiss in federal court, and a motion for judgment on the pleadings.[81] The second and third circumstances apply the standards for summary judgment.[82] If any of these three standards is met, the defendant is deemed to be immune under PA-UPEPA.[83]

3. Attorneys' Fees and Costs. If a party is immune from suit, it is entitled to recover attorneys' fees, court costs, and "expenses of litigation."[84] This award is mandatory: The Act states that a "court shall award" the immune party these damages. The statute provides that the damages are awarded "jointly and severally against each adverse party that asserted the cause of action." Accordingly, if multiple plaintiffs bring a claim subject to the Act, each will be on the hook for paying the fees, costs, and expenses of any defendant immune under the law.

78 42 Pa.C.S.A. § 8340.14(b)(6)-(10).

79 *Id*. § 8340.14(b)(5). Claims arising from statutes relating to protection from abuse and the protection of victims of sexual violence and from the Insurance Company Law of 1921 also are exempt. *Id.* § 8340.14(b)(4).

80 *Id.* § 8340.15.

81 *See, e.g.*, Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009) (describing standard for a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6)); Weirton Med. Ctr., Inc. v. Introublezone, Inc., 193 A.3d 967, 972 (2018) (describing standard for demurrer on preliminary objections); Tucker v. Philadelphia Daily News, 577 Pa. 598, 627, 848 A.2d 113, 131 (2004) (describing standard for demurrer on motion for judgment on the pleadings).

82 *See, e.g.*, Ertel v. Patriot-News Co., 674 A.2d 1038, 1042 (Pa. 1996).

83 Because PA-UPEPA imposes no greater burden than existing procedural mechanisms for dismissing meritless claims before trial, it does not unconstitutionally infringe on the right to a jury trial. *See* Section 1.B *supra* at I.B.

84 42 Pa.C.S.A. § 8340.18(a)(1). The recoverable costs are the costs that are typically recoverable for prevailing parties. The "expenses of litigation" are "the hard costs an attorney [or party] incurs" in defending against the cause of action. *Id*. cmt. 5 (mirroring ULC Report at 22). These expenses include, among other things, "copies and faxes, postage, couriers, expert witnesses, consultants, private court reporters, and travel." *Id*.

This provision ensures that defendants that are immune from suit under PA-UPEPA will not be out of pocket after defending themselves. It also allows lawyers who defend clients pro bono or on contingency to recover fees, like other statutes that provide attorneys' fee awards.[85] The promise of fees will incentivize lawyers to provide a defense when a person or entity faces a SLAPP claim and should serve as a deterrent against the filing of baseless claims in the first place.

PA-UPEPA also prevents its immunity from being abused or misused. If a court determines that a defendant asserted the immunity frivolously or solely for the purpose of delaying the proceeding, the plaintiff is entitled to recover the attorneys' fees, court costs, and expenses of litigation it "incurred in opposing the assertion of" the immunity.[86]

4. Immediate Interlocutory Appeal. Any determination of whether the immunity applies is subject to immediate appeal.[87] Specifically, the Act provides that "[a]n order granting, denying or otherwise determining immunity . . . is immediately appealable" under 42 Pa. C.S. § 702. Thus, although the denial of a party's immunity is an interlocutory order, it is appealable in the same respect as a final order.[88] If an order determining immunity is appealed, proceedings in the trial court are stayed in accordance with Rule 1701 of the Pennsylvania Rules of Civil Procedure.[89]

B. Procedural Provisions: The New "Anti-SLAPP Motion"

The procedural components of the Act are contained in 42 Pa. C.S. § 8340.16. That section creates a new motion to dismiss or for judgment, commonly referred to as an "anti-SLAPP motion."[90] This motion provides a mechanism for a defendant to assert its immunity and seek "dismissal of or judgment on" all or part of a claim based on its protected public expression. The statute uses the phrase "dismissal of or judgment on" because the anti-SLAPP motion is a hybrid between a demurrer and summary judgment motion.[91] It allows a defendant to seek dismissal of a cause of action because the plaintiff cannot state a cognizable claim as a matter of law. It also allows the defendant to seek judgment because either the plaintiff is unable to proffer evidence to support a prima facie claim or, if there is no genuine issue of material fact, the

85 *See*, *e.g.*, Krassnoski v. Rosey, 684 A.2d 635, 638 (Pa. Super. 1996) (holding that attorneys can recover fees under the Protection from Abuse Act even if they did not charge for their services and recognizing that the award of fees in such cases "encourages private counsel to accept such cases" for "financially disadvantaged" individuals, "helps to support legal services agencies," and serves the statute's objective of deterring abuse).

86 42 Pa.C.S.A. § 8340.18(b). The earlier version of the anti-SLAPP legislation that passed the state Senate in 2015 and 2017, *see supra* note 58, would have imposed a mandatory minimum damage award of $10,000 if the moving party prevailed.

87 42 Pa.C.S.A. § 8340.17.

88 *See* 42 Pa.C.S. § 702(a); Pa.R.A.P. 311(a)(8).

89 *See* Pa.R.A.P. 1701(a)

90 42 Pa.C.S.A. § 8340.16(a).

91 *Id.*

defendant is entitled to judgment as a matter of law. In its motion, the defendant should identify which of these three grounds provides the basis for its motion, making clear whether the immunity is being asserted in the nature of a demurrer or one of the summary judgment standards.

In recognition of the hybrid nature of an anti-SLAPP motion, PA-UPEPA provides that in ruling on such a motion, courts should consider the "record as defined in Pa.R.C.P. No. 1035.1 . . . , the special motion and responses, and the evidence which can be considered on a motion for summary judgment under Pa.R.C.P. No. 1035.2."[92] Consequently, courts may consider the pleadings and a wide range of evidence, including documents, affidavits, deposition transcripts, discovery responses, and expert reports relevant to the issue raised as a basis for immunity. If a defendant asserts the immunity as a demurrer, the immunity will be decided only on the pleadings and any other material that a court can properly consider when determining whether a plaintiff can state a claim under the law.[93] In contrast, if a defendant asserts either of the other two bases for immunity, it can submit evidence with its motion, and the plaintiff can respond with evidence to show that it can support a prima facie case or that there is a genuine issue of material fact.

An anti-SLAPP motion generally must be filed no later than 60 days after the party is served with a pleading asserting a claim covered by the Act.[94] The court then is required to hear oral argument on the motion within 60 days of its filing[95] and render a decision within 60 days of oral argument. That decision must be memorialized in "a written opinion stating [the court's] reasoning for its ruling."[96] Each of these timeframes may be extended by the court on a showing of good cause.[97]

While an anti-SLAPP motion is pending, "all other proceedings in the action are stayed."[98] This stay includes a stay of "discovery and the moving party's obligation to file a responsive pleading," if one has not been filed.[99] The stay remains in effect until the anti-SLAPP motion is decided and becomes final and then through the disposition of any appeal.[100]

The Act includes several exceptions to the mandatory stay. First, a party

92 *Id*. § 8340.16(d)(4).

93 *See, e.g.*, Solomon v. U.S. Healthcare Sys. of Pennsylvania, Inc., 797 A.2d 346, 352 (Pa. 2002) ("a court may take judicial notice of public documents in ruling on a preliminary objection in the nature of a demurrer"), *allocatur denied*, 808 A.2d 573 (Pa. 2002); *Weirton Med. Ctr., Inc.*, 193 A.3d at 972 (holding that court can consider video at issue in ruling on defamation claim on preliminary objections).

94 42 Pa.C.S.A. § 8340.16(b)(1).

95 *Id*. § 8340.16(d)(1). That time can be extended for good cause or if the court permits limited discovery, as discussed below. *See id*. § 8340.16(d)(2). If the court permits limited discovery, the argument must be held within 60 days of the order allowing that discovery unless a different date is ordered for good cause. *See id*. § 8340.16(d)(3).

96 *Id*. § 8340.16(d)(5)(ii).

97 *Id*. § 8340.16(b)(2), (d)(2)(ii), (d)(3)(i)(B).

98 *Id*. § 8340.16(e)(1).

99 *Id.*

100 *Id*. § 8340.16(e)(2).

can challenge service of process, the jurisdiction of the court, or the propriety of the venue.[101] Second, the plaintiff may voluntarily discontinue "all or part of" its action under Rule 229.[102] Third, a party can file a motion for attorneys' fees, costs, and expenses under the Act.[103]

A court also can hear and rule on a motion for special or preliminary injunction, but only if that motion is "to protect against an imminent threat to public health and safety."[104] In addition, upon a showing of good cause, a court can allow proceedings that relate "exclusively" to a claim that (1) is not subject to the anti-SLAPP motion and (2) does not implicate any issue relevant to that motion or the claim that is subject to the motion.[105]

Finally, in recognition of the hybrid nature of the anti-SLAPP motion and the possibility that some motions will raise factual questions, the court can permit targeted discovery.[106] The statute, however, makes clear that the discovery is "limited" and is only allowed if a party shows that the "specific information" it seeks through discovery (1) is necessary to establish whether a party has satisfied or failed to satisfy an evidentiary burden that is at issue in the anti-SLAPP motion, and (2) is not reasonably available unless discovery is allowed.[107] Discovery, therefore, is not permitted when the grounds asserted for the immunity are legal, as "no amount of discovery will cure" a "legally deficient" claim.[108] And, under the statute, permission for limited discovery of specific information "does not open the case up for full-scale discovery."[109]

The Act makes clear that although a defendant can assert its immunity through the new anti-SLAPP motion, it remains free to assert its immunity in other pleadings and motions, such as in preliminary objections, a motion for judgment on the pleadings, or a motion for summary judgment.[110] Thus, in

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101 *Id*. § 8340.16(f)(1).
102 *Id*. § 8340.16(f)(3).
103 *Id*. § 8340.16(f)(4).
104 *Id*. § 8340.16(f)(2)(ii).
105 *Id*. § 8340.16(f)(2)(iii). The ULC offers the following example of when a portion of a proceeding can go forward despite the stay:

> a candidate for political office sues two defendants - his opponent, for defamation over comments made about the plaintiff during the campaign, and his opponent's campaign manager, for hacking into the plaintiff's campaign's computer files and erasing valuable donor lists and other data. Only the plaintiff's opponent moves to dismiss under the Act; the campaign manager does not. In that case, the plaintiff could still proceed with discovery and dispositive motions against the campaign manager, because the claim concerning the hacking is entirely unrelated to the defamation claim. The moving defendant has no interest that would be affected by the hacking claim.

Id. cmt. § 4(2) (mirroring ULC Report at 13).
106 *Id*. § 8340.16(f)(2)(i).
107 *Id*.
108 Garment Workers Ctr. v. Superior Ct., 117 Cal. App. 4th 1156, 1162 (2004).
109 ULC Report at 14; *see also, e.g.*, *Garment Workers Ctr.*, 117 Cal. App. 4th at 1161 ("Recognizing discovery is usually the most time-consuming and expensive aspect of pretrial litigation, the Legislature sought to balance the need to protect defendants exercising their freedom of speech from having their personal and financial resources exhausted by SLAPP-ers' discovery demands with the need to permit legitimate plaintiffs to conduct necessary discovery before their suits were subjected to dismissal for failure to establish a prima facie case.").
110 42 Pa.C.S.A. § 8340.16(c).

preliminary objections, a defendant can assert that it is immune under the Act because the plaintiff has failed to state a claim as a matter of law.[111] Likewise, in a motion for summary judgment, a defendant can assert that it is immune because the plaintiff has not adduced evidence sufficient to meet its burden of proof on an element of its claim or there is no genuine issue of material fact and the defendant is entitled to judgment as a matter of law.

C. Application of the Anti-SLAPP Law

When a defendant asserts the immunity under PA-UPEPA, the trial court must undertake a two-step analysis. First, it must consider whether the claim at issue is a "cause of action based on protected public expression." This inquiry initially focuses on whether the claim arises from any of the three protected kinds of activities: communications in a government proceeding, communications about an issue under consideration or review in a government proceeding, or an exercise of any First Amendment right about a "matter of public concern."[112] The court then must consider if the cause of action falls into one of the twelve categories of claims that are excluded from the immunity.[113]

This first step of the anti-SLAPP analysis is straightforward.[114] For example, if a plaintiff asserts defamation claims against a journalist for reporting about a crime, civil suit, or health inspection, those claims would be based on communications about a matter of public concern and thus arise from "protected public expression."[115] Similarly, a defamation claim against a consumer watchdog for reporting on consumer complaints against a business and an IIED claim against activists for protesting about public policy issues are both plainly causes of actions "based on protected public expression."[116]

If the claim is "based on protected public expression" and not subject to any of the exemptions, then the court proceeds to the second step of the analysis. There, the court determines whether the defendant is immune from civil liability under the Act.[117] This analysis will turn on the basis that the defendant

111 The ability to raise the immunity provided by PA-UPEPA on preliminary objections when the immunity is based on whether the plaintiff can state a claim is consistent with the general principle that "if it is clear from the face of the complaint that a suit is barred by the defense of immunity the case may be dismissed on preliminary objections." *E.g.*, Logan v. Lillie, 728 A.2d 995, 998 (Pa. Cmwlth. 1999).

112 *See* 42 Pa.C.S.A. §§ 8340.13, 8340.14(a); *see also supra* at Section III.A *supra* & notes 73-75 (describing these standards).

113 42 Pa.C.S.A. § 8340.14(b); *see also supra* at Section III.A *supra* & notes 77-79 (describing the exemptions).

114 As the ULC explains, "[t]his step focuses on the *movant's activity*, and whether the movant can show that it has been sued for that activity." 42 Pa.C.S.A. § 8340.13 cmt. 1 (mirroring ULC Report at 6).

115 *See. e.g.*, ToDay's Hous. v. Times Shamrock Commc'ns, Inc., 21 A.3d 1209, 1213 (Pa. 2011) (holding that dispute "between homeowners and [builder] was a matter of public concern" because "activities of highly regulated industries are generally deemed matters of public concern").

116 *See, e.g.*, *Snyder*, 562 U.S. at 459 (setting aside jury verdict imposing liability for intentional infliction of emotional distress for protest at soldier's funeral where speech at issue dealt with a matter of public concern).

117 *See* 42 Pa.C.S.A. § 8340.15.

has asserted for being immune. As discussed above, a defendant can be immune in three circumstances, each of which requires a different analysis.

First, a defendant can claim to be immune because the plaintiff failed to state a viable claim. This assertion of the immunity would require a court to undertake the familiar inquiry undertaken for a demurrer. In a defamation case, this ground for immunity could involve contentions that, for example, the challenged communication is not defamatory, cannot reasonably be understood to have the false and defamatory meaning alleged by the plaintiff, is not "of and concerning" the plaintiff, or is protected as opinion, or, if the plaintiff is a public official or public figure, has failed to sufficiently plead facts showing that the defendant made the challenged statement knowing it was false or while actually entertaining serious doubts about its truth.[118] Likewise, a defendant could argue that it is immune from a claim for intentional infliction of emotion distress because the act at issue was not "extreme or outrageous," or a defendant could argue it is immune from a claim for publication of private facts because the disclosed facts were not private or they related to a matter of public concern.[119]

Second, a defendant could argue it is immune because the plaintiff is unable to establish a prima facie case with respect to an element of its cause of action. This presents the same inquiry that a court would undertake in response to a motion for summary judgment under Rule 1035.2(1), asking whether the plaintiff can proffer evidence "essential to the cause of action." For example, in a defamation case, a party could argue that the plaintiff is unable to show the allegedly defamatory statement is materially false.[120]

Third, a defendant can claim to be immune because there is no genuine issue of material fact and it is entitled to judgment as matter of law. For example, a newspaper might argue its report is protected by the fair report privilege. A television station could contend that the plaintiff's claim is time-barred because the suit was filed more than a year after the allegedly defamatory report

118 *See, e.g.*, McCafferty v. Newsweek Media Grp., Ltd., 955 F.3d 352, 357-59, 360 (3d Cir. 2020) (affirming dismissal of defamation and false light claims because challenged statements were not defamatory and protected opinions); *Tucker*, 848 A.2d at 136 (affirming order sustaining preliminary objections based on failure to establish actual malice in complaint); Bogash v. Elkins, 176 A.2d 677, 678 (Pa. 1962) (affirming dismissal of defamation claim on preliminary objections where article could not "fairly and reasonably be construed to have the libelous meaning ascribed to it by plaintiff" and was not defamatory); Volomino v. Messenger Publ'g Co., 189 A.2d 873, 874-75 & n.1 (Pa. 1963) (affirming dismissal of defamation claim on preliminary objections because alleged defamatory statements about corporation were not "of and concerning" individuals associated with corporation); Alston v. PW-Philadelphia Weekly, 980 A.2d 215, 221 (Pa. Cmwlth. 2009) (affirming order sustaining preliminary objections to defamation claim on ground that statement was protected opinion), *allocatur denied*, 993 A.2d 901 (Pa. 2010).

119 *See, e.g.*, Cheney v. Daily News L.P., 654 F. App'x 578, 583-84 (3d Cir. 2016) (affirming dismissal of IIED claim because news report falsely suggesting that plaintiff "was involved in a sex scandal" did "not rise to the level of 'extreme and outrageous'"); Bowley v. City of Uniontown Police Dep't, 404 F.3d 783, 788 n.7 (3d Cir. 2005) (holding that plaintiff could not state a claim for publication of private facts because his "arrest is of legitimate public concern").

120 *Ertel*, 674 A.2d at 1042 (granting summary judgment to newspaper in defamation case where plaintiff "did not offer evidence that any of the material at issue was false").

was broadcast. Or a journalist could argue that her reporting is substantially true.[121] This claim of immunity is assessed like a motion for summary judgment under Rule 1035.2(2).

Until the procedural aspects of the law become effective, a defendant can assert the first kind of immunity on preliminary objections or a motion for judgment on the pleadings, because the question presented by the immunity is simply whether the plaintiff has stated a cognizable claim. The second and third kinds of immunity can be asserted through a motion for summary judgment and a motion for judgment on the pleadings (if there are no disputed facts after the pleadings are closed).

Once the procedural aspects of the law are in effect, a defendant can raise each of the three bases for immunity in an anti-SLAPP motion. When such a motion is filed, it can be accompanied by documents, affidavits, or other evidence supporting the claim for immunity. So, for example, in arguing that a news report is covered by the fair report privilege, a journalist can submit the court records on which the report was based. Or, if a television station claims that its news report is not materially false, it could provide evidence showing that the report was substantially true. In response, the plaintiff can offer evidence of its own. For instance, it could provide documents showing that the report was materially false.

As discussed above, in many instances, the anti-SLAPP motion would raise purely legal issues. But, in some instances, facts might be implicated. The question presented in those cases is not whether the plaintiff will ultimately prevail, but only whether it can make out a prime facie case or whether there is a genuine issue of material fact. That question is why the statute provides a mechanism for limited discovery – it allows a plaintiff (or defendant) to obtain specific information necessary to show its ability to meet an essential element that is at issue in the motion. Again, discovery is only available if (1) the specific information sought bears directly on an issue raised in the anti-SLAPP motion, (2) is otherwise unavailable, and (3) is necessary to the disposition of the motion.

If a defendant prevails on its immunity through preliminary objections, a motion for judgment on the pleadings, summary judgment, or an anti-SLAPP motion (when it becomes available), it is entitled to the mandatory damages

121 *See, e.g.*, *ToDay's Hous.*, 21 A.3d at 1214-16 (affirming summary judgment because plaintiff failed to show news reports were materially false); First Lehigh Bank v. Cowen, 700 A.2d 498, 503, 508 (Pa. Super. 1997) (affirming summary judgment in favor of newspaper because report on a civil complaint was protected by fair report privilege); Wolk v. Olson, 730 F.Supp.2d 376, 377-80 (E.D. Pa. 2010) (dismissing defamation and other claims as time-barred).

award of attorneys' fees, costs, and expenses of litigation.[122] If, however, the court rules against the defendant's assertion of the immunity, then the party can take an immediate appeal of that interlocutory order.

D. New "SLAPP-Back" Cause of Action

PA-UPEPA also establishes a new cause of action.[123] This cause of action allows parties to "SLAPP-back" when they have succeeded in defeating a claim arising from "protected public expression" in a prior lawsuit. Specifically, the law provides that a party can pursue a "SLAPP-back" claim when three elements are met: (1) the party was subjected to a claim based on their protected public expression in an earlier action; (2) the party "would have prevailed on a ground" providing immunity under § 8340.15; and (3) the court presiding over the prior action did not "make a determination on immunity."[124]

By its plain terms, the "SLAPP-back" claim only can be used if the prevailing party's immunity was not decided in the earlier suit. This situation could arise in several circumstances. For example, a party can bring a SLAPP-back claim if it prevailed against a defamation claim through a demurrer on preliminary objections or on summary judgment, but did not invoke the immunity provided by PA-UPEPA in the prior suit. Similarly, a party from Pennsylvania could bring a SLAPP-back claim if it defeated a claim based on protected public expression brought against it in another state, but that state's court declined to apply PA-UPEPA's immunity provision under that state's choice-of-law principles.

In these instances, the prevailing party can bring a new case asserting a "SLAPP-back" claim. For example, Party A is sued by Public Official B for defamation based on statements made in a petition that A posted online about

122 A party that is entitled to recover attorneys' fees, costs, and expenses under § 8340.18 should promptly file an application for fees, costs, and expenses or move for a stay of the time for filing any such application pending the disposition of any appeal. *See, e.g.*, 42 Pa.C.S.A. § 2503(10) (providing for counsel fees to be included in taxable costs when "specified by statute"). When entitled to fees, costs, and expenses under PA-UPEPA, litigants should be mindful of two important principles that bear on the timing for their applications in the trial court: First, a trial court is divested of jurisdiction 30 days after the entry of a final order. *See* 42 Pa.C.S.A. § 5505; Szwerc v. Lehigh Valley Health Network, Inc. 235 A.3d 331, 336 (Pa. Super. 2020) ("Where the litigant files a motion for counsel fees under Section 2503 after entry of a final order, Section 5505 requires the litigant to do so within 30 days of the entry of a final order; the trial court lacks jurisdiction to consider a fee motion filed beyond the 30-day period."). Second, if an appeal is filed, an application for fees is considered an ancillary matter under Pennsylvania Rule of Appellate Procedure 1701(b), and, thus, the trial court can act on the application while the case is on appeal. *See* Samuel-Bassett v. Kia Motors Am., Inc., 34 A.3d 1, 48 (Pa. 2011). In addition, a party entitled to fees under PA-UPEPA should be able to recover the fees incurred in preparing its application for fees, *see* Richards v. Ameriprise Fin., Inc., 217 A.3d 854, 872 (Pa. Super. 2019) (holding that courts can award attorney fees "for preparing fee petitions" under UTPCPL), and the fees incurred in a successful appeal, *see* Ambrose v. Citizens Nat'l Bank of Evans City, 5 A.3d 413, 424-25 (Pa. Super. 2010) (holding that prevailing party entitled to a statutory fee award was authorized to recover fees incurred on appeal); *see also Richards*, 217 A.3d at 867 (holding that the "the trial court had jurisdiction to award statutorily-authorized attorneys' fees incurred in defending the first appeal").

123 *See* 42 Pa.C.S.A. § 8320.1. This provision went into effect when the Governor signed the law. *See* Act 72 § 7(2).

124 42 Pa.C.S.A. § 8320.1(a).

B's position on a proposed ordinance being considered by the local borough. Party A files preliminary objections on the ground that B cannot state a claim because the statements at issue are opinions. Party A does not mention the immunity afforded to it under the Act. The court sustains the preliminary objections and dismisses B's complaint. Party A can file a lawsuit against B asserting a "SLAPP-back" claim because (1) B had asserted a claim in the prior lawsuit based on protected public expression (A's petition about the ordinance); (2) A would have been entitled to the Act's immunity in that lawsuit (the trial court ruled that B could not state a claim as a matter of law); and (3) the court did not make a determination about A's immunity because A did not mention the immunity in its preliminary objections.

A party that prevails on a "SLAPP-back" claim can recover two kinds of damages, compensatory and punitive. For compensatory damages, the party can recover its "attorney fees, court costs and expenses of litigation" in the prior litigation.[125] The party also can recover punitive damages if it proves "that the underlying action was commenced or continued with the sole purpose of harassing, intimidating, punishing, or maliciously inhibiting protected public expression."[126]

Like the rest of PA-UPEPA, and consistent with the Act's express purpose, the section containing the "SLAPP-back" claim must "be broadly construed and applied to defend and enhance protected public expression."[127]

E. The Applicability of PA-UPEPA in Federal Court

The substantive provisions of PA-UPEPA should apply in federal court. It provides a substantive immunity from suit,[128] and its mandatory award of attorneys' fees is a substantive provision of state law.[129] PA-UPEPA does not pose any of the problems that have caused courts to rule that other states' anti-SLAPP laws are inapplicable in federal court. Nothing in the Pennsylva-

125 *Id.* § 8320.1(b)(1).
126 *Id.* § 8320.1(b)(2).
127 *Id.* § 8320.1(c)
128 *See Id.* §§ 8340.12(3), 8340.15.
129 *See, e.g.*, Hoelzle v. Vensure Emp. Servs., 2022 WL 3588025, at **5-6 (E.D. Pa. Aug. 22, 2022) (awarding fees pursuant to the Pennsylvania Wage Payment and Collection Law); Hilferty v. Chevrolet Motor Div. of GMC, 1996 WL 287276, at *7 (E.D. Pa. May 30, 1996) (awarding fees pursuant to the Pennsylvania Unfair Trade Practices and Consumer Protection Law); *see also* Northon v. Rule, 637 F.3d 937, 938 (9th Cir. 2011) ("State laws awarding attorneys' fees are generally considered to be substantive laws under the *Erie* doctrine and apply to actions pending in federal district court when the fee award is connected to the substance of the case.").

nia law's substantive provisions is tied to any particular procedure,[130] and its applicability is determined based on the same standards that federal courts employ in deciding motions under Rules 12 and 56. Thus, its protections should apply in federal court.

IV. CONCLUSION

PA-UPEPA affords a strong, new immunity for people who exercise their First Amendment rights. It gives Pennsylvania courts the tools to weed out meritless claims early in the litigation, provides speakers with significant substantive protections when they are sued, and permits viable claims to proceed. The law will serve as a deterrent to baseless lawsuits and ensure that speakers who are subjected to SLAPP suits will not be out-of-pocket when forced to defend themselves.

130 *See, e.g.*, *Carbone*, 910 F.3d at 1349-50 (declining to apply Georgia anti-SLAPP law because the "only change effectuated" by the law "is to make it easier for a defendant to avoid liability for conduct associated with the exercise of those rights by providing a special procedural device – a 'motion to strike' – that applies a heightened burden to the claims that fall within its ambit"); Abbas v. Foreign Policy Grp., 783 F.3d 1328, 1335, 1337 n.5 (D.C. Cir. 2015) (holding that attorneys' fee provision in Washington, D.C.'s anti-SLAPP statute does not apply in federal court because the award is tied to the special motion to strike provided under that statute and the law did "not purport to make attorney's fees available to parties who obtain dismissal by other means," and explaining that "[h]ad the D.C. Council simply wanted to permit courts to award attorney's fees to prevailing defendants in these kinds of defamation cases, it easily could have done so").