

# SENATE BILL REPORT

## SSB 5009

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As Amended by House, April 9, 2021

**Title:** An act relating to the uniform public expression protection act.

**Brief Description:** Enacting the uniform public expression protection act.

**Sponsors:** Senate Committee on Law & Justice (originally sponsored by Senators Padden, Pedersen, Brown, McCune and Mullet; by request of Uniform Law Commission).

**Brief History:**

**Committee Activity:** Law & Justice: 1/14/21, 2/04/21 [DPS, w/oRec].

**Floor Activity:** Passed Senate: 2/26/21, 46-0.

Passed House: 4/9/21, 97-1.

### Brief Summary of First Substitute Bill

- Establishes the Uniform Public Expression Protection Act.
- Permits a special motion in court for expedited relief against legal claims over public expression.
- Awards costs, litigation expenses, and reasonable attorneys' fees for prevailing parties.

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## SENATE COMMITTEE ON LAW & JUSTICE

**Majority Report:** That Substitute Senate Bill No. 5009 be substituted therefor, and the substitute bill do pass.

Signed by Senators Pedersen, Chair; Dhingra, Vice Chair; Padden, Ranking Member; McCune, Assistant Ranking Member; Darneille, Holy, Kuderer and Salomon.

**Minority Report:** That it be referred without recommendation.

Signed by Senator Wagoner.

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.*

**Staff:** Tim Ford (786-7423)

**Background:** The First Amendment to the United States Constitution provides the right to petition the government for a redress of grievances. The right to petition covers any peaceful, legal attempt to promote or discourage governmental action at any level and in any branch. All means of expressing views to government are protected, including: filing complaints, reporting violations of law, testifying, writing letters, lobbying, circulating petitions, protesting, and boycotting.

Strategic lawsuits against public participation (SLAPPs) are initiated against people who speak out about a matter of public concern. Typically, the party who initiates a SLAPP claims damages for defamation, or interference with a business relationship, resulting from a communication made by a person or group to the government.

Washington law addresses the use of SLAPPs by creating immunity from civil liability for people who communicate a complaint or other information to an agency of the federal, state, or local government, or to a self-regulatory organization that has been delegated authority by a government agency. The anti-SLAPP statute entitles a person who prevails against a SLAPP to expenses, reasonable attorney's fees, and statutory damages of \$10,000. Successfully dismissing a suit under the anti-SLAPP statute can take a year or longer. If the trial court decision is appealed, receiving final judgment can take two or three years.

In 2010, the Legislature amended the anti-SLAPP statute explaining it was concerned about lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The 2010 statutory amendment's purpose was to establish an efficient, uniform, and comprehensive method for speedy adjudication of such lawsuits. To achieve that purpose the 2010 statute presumptively halts discovery and creates a special motion to strike a SLAPP claim. When ruling on an anti-SLAPP motion, the trial court first determines whether the claim at issue is “based on an action involving public participation and petition,” a defined term that broadly describes rights of expression and petition. If that is so, the trial court then decides whether the party bringing the claim can prove by clear and convincing evidence, a probability of prevailing on the claim. If the party cannot meet that burden, the statute requires the trial court to dismiss the claim and award statutory remedies to the opposing party.

In the Washington Supreme Court case of *Davis v. Cox*, the court found the 2010 statute unconstitutional. The special motion created by the 2010 statute required the trial judge to adjudicate factual questions without a trial, and therefore the 2010 statute violated the right of trial by jury under article I, section 21 of the Washington Constitution and was invalid.

**Summary of First Substitute Bill:** The Uniform Public Expression Protection Act (UPEPA) is established.

Application. UPEPA applies to the following civil lawsuits for:

- communications in a legislative, executive, judicial, administrative, or other governmental proceeding;
- communications on an issue under consideration in a legislative, executive, judicial, administrative, or other governmental proceeding; or
- the exercise of the right of freedom of speech or of the press, the right to assemble or petition, or the right of association, guaranteed by the United States Constitution or Washington State Constitution, on a matter of public concern.

UPEPA does not apply to the following civil lawsuits:

- against a governmental unit or an employee or agent of a governmental unit acting or purporting to act in an official capacity;
- by a governmental unit or an employee or agent of a governmental unit acting in an official capacity to enforce a law to protect against an imminent threat to public health or safety;
- 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;
- against a person named in a civil suit brought by a victim of a crime against a perpetrator;
- against a person named in a civil suit related to a use of real property;
- seeking recovery for bodily injury, wrongful death, or survival or to statements made regarding that legal action, unless the claims involve damage to reputation;
- brought under the insurance code or arising out of an insurance contract;
- brought under domestic relations laws or related to various types of protective orders;
- brought under labor regulations; negligent supervision, retention, or infliction of emotional distress unless the claims involve damage to reputation; wrongful discharge in violation of public policy; whistle-blowing; or enforcement of employee rights under civil service, collective bargaining, or handbooks and policies; or
- brought under the Consumer Protection Act.

Aside from the first three exceptions, the remainder of the exceptions will not apply if the lawsuit relates to certain protected communications.

Special Motion Proceedings. Not later than 60 days after a party is served with a SLAPP claim, the party may file a special motion for expedited relief to dismiss the claim. Upon the filing of the special motion all other proceedings between the moving party and responding party, including discovery and a pending hearing or motion, are stayed. The court must have a hearing 60 days after the special motion is filed unless limited discovery is allowed or other good cause. In ruling on a special motion, the court must consider the pleadings, the motion, any reply or response to the motion, and any evidence that could be considered in ruling on a motion for summary judgment under superior court civil rule 56. The court shall dismiss with prejudice a SLAPP claim if the moving party shows that UPEPA applies and either:

- the responding party fails to establish a prima facie case as to each essential element

- of the cause of action; or
- the moving party establishes that the responding party failed to state a cause of action upon which relief can be granted, or there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the cause of action or part of the cause of action.

The court must rule on the motion not later than 60 days after the hearing. Appeals must be filed within 21 days after entry of an order.

The court must award costs, reasonable attorneys' fees, and reasonable litigation expenses related to the special motion for the following:

- to the moving party if the moving party prevails on the special motion; or
- to the responding party if the responding party prevails on the special motion and the court finds the special motion was frivolous or filed solely with intent to delay the proceeding.

**Appropriation:** None.

**Fiscal Note:** Not requested.

**Creates Committee/Commission/Task Force that includes Legislative members:** No.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.

**Staff Summary of Public Testimony on Original Bill:** *The committee recommended a different version of the bill than what was heard.* PRO: This concern has been around for a few years. This bill is modeled after the Uniform Law Commission model law. There are conflicts about free speech rights in the public square in numerous areas. It is an opportunity for people to get into court if their free speech rights are being unduly impinged or harassed. A SLAPP suit is brought to silence citizens by subjecting a citizen to an expensive lawsuit. The modern trend to protect speech is broader. Our country is very divided on a number of issues and newspapers have been sued. Entertainers are told to be silent because if they publicly talk about sexual assault they may never be able to work in entertainment again. Victims should not be silenced.

CON: We support the First Amendment right to petition the courts for potentially meritorious claims. This should not be sacrificed by this legislation. As written it is still unconstitutional and there is a risk that the legislation will be abused. This legislation is not narrowly drawn and will not survive strict scrutiny in the courts.

OTHER: We encourage you to vote for this bill. In homeowner associations (HOA) it is a significant problem if people try to speak up and complain about their board, or actions of their HOA that are either illegal or unethical. They are often hit with SLAPP lawsuits. We are hoping that this bill will go a long way to solving that problem.

**Persons Testifying:** PRO: Bruce Johnson, Davis Wright Tremaine LLP; Richard Silverstein, Tikun Olam; Lane Shetterly, Shetterly Irick & Ozias; Joellen Wilhelm, citizen; Jim Puckett, Basel Action Network; Brenda Skylstad, citizen; Ben Sheffner, Motion Picture Association, Inc.; Linda Hagan, Women in Film; Rowland Thompson, Allied Daily Newspapers of Washington.

CON: Jesse Wing, Washington State Association for Justice; Ian Birk, Washington State Association for Justice; Jeff Needle, Washington Employment Lawyers Association.

OTHER: Raelene Schifano, citizen; Patrick Johansen, Rise Up Washington.

**Persons Signed In To Testify But Not Testifying:** No one.

**EFFECT OF HOUSE AMENDMENT(S):**

Retains the underlying bill with the following modifications:

- Adds an exception in section 2(3)(a) for claims brought under federal law.
- Limits the scope of section 2(3)(b) carve-ins for gathering, receiving, posting, or processing information for communication to the public; and consumer opinions or commentary, evaluations of consumer complaints, or reviews or ratings of businesses.
- Requires the moving party to provide 14 days advance notice of intent to file a special motion.
- Modifies the stay of all proceedings to start upon notice or filing of a special motion.
- Modifies fee-shifting in favor of the responding party, changing the requirement that the motion be found frivolous to a requirement that the motion be found not substantially justified.