CLIENT ALERTS & INSIGHTS

South Dakota's Inaugural Anti-SLAPP Statute

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Featured Practices: Litigation, Defamation Litigation, Crisis Management & Strategic Response

Key Takeaways

- South Dakota's new Uniform Public Expression Protection Act, effective July 1, 2026, gives defendants in SLAPP suits a fast-track procedure for dismissal and fee recovery, expanding protections for free speech and public participation.
- Plaintiffs in South Dakota bringing claims based on public participation now risk early dismissal and paying the other side's legal fees. It also introduces uncertainty in federal court, where its procedures may conflict with federal rules.
- Litigants in South Dakota should conduct thorough pre-suit investigations and be prepared to present evidence early.

South Dakota's Uniform Public Expression Protection Act ("UPEPA"), effective July 1, 2026, is designed to combat Strategic Lawsuits Against Public Participation, commonly known as "SLAPP" suits. Until now, South Dakota was one of the few remaining states without an anti-SLAPP statute. The new law grants defendants facing SLAPP suits a special procedure for expedited dismissal prior to incurring significant discovery costs.

UPEPA Increases Protections for First Amendment Activities

South Dakota's law defines a "protected public expression" to include causes of action based on a person's communication in legislative, executive, judicial, administrative or other governmental proceedings. The statute also protects the exercise of the right of freedom of speech or of the press, the right to assemble or petition the government, and the right of association on matters of public concern. South Dakota's UPEPA largely mirrors the language of the Uniform Law Commission's Uniform model anti-SLAPP statute, which has been adopted in whole or in part by several other states. Courts interpreting similar language have generally construed these protections broadly, casting a wide net over the types of speech and participation covered.

Special Motions Fast-Track Dismissal

Under the new law, defendants may file a special motion for expedited relief to dismiss the action within 60 days of being served. Once the special motion is filed, all other proceedings, including discovery, are automatically stayed until the court rules on the motion. The court must hear the motion within 60 days of filing and then rule on it within 60 days of the hearing. Critically, the statute includes a fee-shifting provision: if the moving party prevails, the court shall award court costs, reasonable attorney fees and reasonable litigation expenses. If the court denies the special motion, plaintiffs can only recover fees if the court finds the motion to be frivolous or brought solely for the purposes of delay.

Challenges Will Determine UPEPA's Impact in Federal Court

Notably, when ruling on a special motion under section 3 of the UPEPA, courts may consider evidence beyond the pleadings, including affidavits, depositions, admissions and documentary evidence that could be considered in ruling on a motion for summary judgment. This extends well beyond what courts typically consider in a standard motion to dismiss. Allowing additional evidence may raise unique issues in Federal Court in light of the Supreme Court's recent decision, *Berk v. Choy* , 607 U.S. 187 (2026). In *Berk*, the Court held that a Delaware statute requiring plaintiffs present evidence supporting certain claims at the motion-to-dismiss stage was unenforceable in federal court. The Court observed that under Federal Rules 8 and 12, "evidence of the claim is not required," so a state law requiring such evidence conflicted with the federal rules. With the UPEPA allowing consideration of evidence beyond the pleadings, plaintiffs will likely challenge the law's enforceability in federal cases.

What This Means for South Dakota Litigants

The UPEPA represents a seismic shift in South Dakota state court procedure, particularly for those bringing claims based on another's speech. Plaintiffs must now be prepared to support their claims with evidence shortly after filing a complaint and to conduct robust pre-suit diligence and investigation in anticipation of responding to a UPEPA special motion. Defeating a UPEPA special motion is critical for plaintiffs: failure will not merely result in dismissal-an unsuccessful plaintiff will be required to pay the opposing party's fees.

Benesch will be actively monitoring challenges raised by plaintiffs under the UPEPA and similar laws in other states. Our plaintiff-side defamation team has a proven track record of success in defeating anti-SLAPP motions and is available to advise on navigating the procedural complexities in anti-SLAPP statutes nationwide.

With contribution from Kyla Wegman, a summer associate at Benesch from Loyola University Chicago School of Law.