

SESSION OF 2016

**SUPPLEMENTAL NOTE ON SUBSTITUTE FOR HOUSE
BILL NO. 2054**

As Amended by House Committee of the Whole

Brief*

Sub. for HB 2054 would enact the "Public Speech Protection Act," which the bill would state is intended to encourage and safeguard the constitutional rights of a person to petition, and speak freely and associate freely, in connection with a public issue or issue of public interest to the maximum extent permitted by law while, at the same time, protecting the rights of a person to file meritorious lawsuits for demonstrable injury. Further, the bill would state the Act should be applied and construed liberally to effectuate its general purposes, and the invalidity of any of its provisions would not affect other provisions or applications that can be given effect without the invalid provision or application.

The bill would allow a party to bring a motion to strike any claim based on, related to, or in response to a party's exercise of the right of free speech, right to petition, or right of association. The motion to strike could be filed within 60 days of the service of the most recent complaint or, in the district court's discretion, at any later time upon terms it deems proper. The bill would require a hearing on the motion to be held within 30 days of service of the motion. All discovery, motions, or other pending hearings would be stayed upon the filing of the motion to strike. The stay would remain in effect until the entry of the order ruling on the motion except, upon motion of a party or the court and on a showing of good cause, the court could allow specified discovery, motions, or other pending hearings to be conducted.

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

The party bringing the motion to strike would bear the initial burden of making a *prima facie* showing the claim concerns a party's exercise of the right of free speech, right to petition, or right of association. If the movant meets the burden, the burden would shift to the responding party to establish a likelihood of prevailing on the claim by presenting substantial competent evidence to support a *prima facie* case. In determining whether a party meets the established burden of proof, the bill would require the court to consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

If the responding party meets the burden, the court would be required to deny the motion to strike. Further, if the court determines the responding party established a likelihood of prevailing on the claim, the bill provides the fact the court made the determination and the substance of the determination would not be admitted in evidence later in the case. Additionally, the determination would not affect the burden or standard of proof in the proceeding.

The party bringing the motion to strike would have the right either to petition for a *writ of mandamus* if the trial court fails to rule on the motion in an expedited fashion or, within 14 days after entry of such order, file an interlocutory appeal from a trial court order denying the motion to strike.

Upon determining the moving party has prevailed on its motion to strike, the bill would require the court to award costs, attorney fees, and such additional relief, including sanctions, as determined necessary to deter repetition of the conduct. Similarly, costs and attorney fees could be awarded to a responding party if a motion to strike was frivolous or intended to delay. If a government contractor was found to have violated the act, the bill would require the court to send the ruling to the head of the relevant government agency doing business with the contractor.

The bill provides the Act would not apply to:

- An enforcement action brought in the name of the State or a political subdivision of the State by the Attorney General or a district or county attorney;
- A claim brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product, services, or a commercial transaction in which the intended audience is an actual or potential buyer or customer; or
- A claim brought under the Kansas Insurance Code or arising out of an insurance contract.

The bill would specify, however, the provisions of the bill would apply to a claim brought against a person primarily engaged in the business of selling or leasing goods or services when the action is brought against any person or entity based upon the creation, dissemination, exhibition, advertisement, or other similar promotion of any dramatic, literary, musical, political, or artistic work, including, but not limited to, a motion picture or television program, or an article published in a newspaper or magazine of general circulation.

The bill also would define key terms.

Background

HB 2054, as introduced, was based on 2014 HB 2711, which was considered and recommended for introduction by the 2014 Special Committee on Judiciary. In the meeting of the Special Committee, Representative Pauls, who requested introduction of the 2014 bill, told the Committee the bill was intended to provide a timely remedy when frivolous lawsuits are filed to intimidate and silence people with limited resources who exercise their First Amendment right to free speech. Such lawsuits, referred to as “Strategic Lawsuits Against Public Participation” (SLAPP), and the prospect of

expensive litigation can have a chilling effect on free speech. Representative Pauls reported similar anti-SLAPP acts have been enacted in 28 states, the District of Columbia, and Guam, usually with widespread bipartisan support.

In the House Judiciary Committee hearing on HB 2054, Representative Pauls, a law professor, and a representative of the Kansas Press Association appeared in support of the bill. A local attorney and a representative of the Kansas Association of Broadcasters also offered written testimony in support of the bill. There was no other testimony.

The House Committee agreed to adopt a similar bill as a substitute, which, among other changes, adopts a purpose statement not included in the original bill and removes a requirement to verify the claim is formed after reasonable inquiry; well-grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; based on an actual, concrete, and redressable injury; and not asserted for any improper purpose. The substitute also adds language specifying instances in which the Act would not apply.

The House Committee of the Whole amended the bill to replace the term “matter of public concern” with “public issue or issue of public interest,” revise definitions, and specify the provisions of the bill would apply to a claim brought against a person primarily engaged in the business of selling or leasing good or services when the action is brought against any person or entity based upon the creation, dissemination, exhibition, advertisement, or other similar promotion of any dramatic, literary, musical, political, or artistic work.

The fiscal note prepared by the Division of the Budget indicates the bill, as introduced, is unlikely to increase revenues to the Judicial Branch as it imposes new requirements in cases that otherwise might be filed under existing provisions in current law, rather than authorizing a new cause of action. The Office of Judicial Administration indicates the bill would increase district court expenditures for

additional district judges and nonjudicial staff time spent hearing civil claims that require written verifications of violations of the Act, in addition to any other motions or hearings falling within its provisions. Until courts have had an opportunity to operate with the provisions of the bill in place, however, an accurate estimate of the fiscal effect on expenditures cannot be given.

A fiscal note for the substitute bill was not available, and the existing fiscal note may not account for changes made in the substitute bill.