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Recent UPEPA Decisions Strengthen Early-Dismissal Protections for Defendants Facing Speech-Based Claims

In 2023, New Jersey enacted the Uniform Public Expression Protection Act (UPEPA), N.J.S.A. 2A:53A-49 to -61, a law designed to squelch legal actions that infringe on protected free expression. In the years since, several published New Jersey Appellate Division opinions have consistently affirmed broad applications of the law and concomitantly narrowed its exemptions, giving media defendants and other speakers a meaningful early-dismissal tool when litigation targets speech on matters of public concern.

This article provides an overview of UPEPA's framework and application in New Jersey. We also assess the Appellate Division's most recent UPEPA opinion, *Holtec Int'l v. Javerbaum Wurgaft Hicks Kahn Wikstrom & Sinins, PC*, ___ A.3d ___, No. A-0830-24, 2026 WL 2014782 (App. Div. July 13, 2026). *Holtec*, and the published appellate opinions preceding it, show that New Jersey courts are treating UPEPA as a robust defense mechanism while leaving several important boundary questions for future cases.

Background

UPEPA was enacted to protect residents from "lawsuits intended to curb speech on matters of public concern, commonly known as strategic lawsuits against public participation (SLAPP), 'and insulate them from the financial hardships these cases can produce.'" *Satz v. Starr*, 482 N.J. Super. 55, 65 (App. Div. 2025) (quoting Governor's press release). As directed by UPEPA itself, the law "shall be broadly construed and applied to protect the exercise of the right of freedom of speech and of the press, the right to assembly and petition, and the right of association" guaranteed by the U.S. and New Jersey Constitutions. N.J.S.A. 2A:53A-59; *see Town of Dover v. Gonzalez*, ___ A.3d ___, No. A-0047-25, 2026 WL 1532353, at *6 (N.J. Super. App. Div. May 21, 2026).

Thus, UPEPA provides a procedural mechanism by which a defendant in a civil action may seek expedited dismissal by filing an order to show cause before speech-based claims impose the costs and burdens that anti-SLAPP statutes are designed to prevent.

UPEPA's Framework

N.J.S.A. 2A:53A-55(a) sets forth UPEPA's burden-shifting framework, providing that the court *shall* dismiss with prejudice a cause of action, or part of a cause of action, if: (1) the moving party establishes that UPEPA applies; (2) the responding party fails to establish an applicable exemption applies; and (3) the cause of action fails as a matter of law or on the merits. This structure matters. Once a defendant shows that the challenged claim is based on protected activity, the burden shifts quickly to the plaintiff to either identify a statutory exemption or demonstrate that the claim has sufficient legal and factual support to proceed.

As to the first step, the moving party — typically the defendant — must demonstrate that the cause of action asserted against it is "based on" one or more of three categories of protected activity under N.J.S.A. 2A:53A-50(b):

- Communication in a legislative, executive, judicial, administrative, or other governmental proceeding;
- Communication on an issue under consideration or review in a legislative, executive, judicial, administrative, or other governmental proceeding; or
- Exercise of the right of freedom of speech or of the press, the right to assembly or petition, or the right of association, guaranteed by the United States Constitution or the New Jersey Constitution, on a matter of public concern.

A respondent can defeat a UPEPA motion in two ways. First, the respondent could successfully argue that the movant has not established that the cause of action falls within the scope of section 50(b). Alternatively, even if the action is within UPEPA's scope of protected activity, the respondent could demonstrate that the matter is covered by one of three statutory exemptions under

N.J.S.A. 2A:53A-50(c). UPEPA does *not* apply if the cause of action is:

- 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; or
- 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.

If the cause of action is "based on" one or more of three categories of protected activity under N.J.S.A. 2A:53A-50(b), and none of the statutory exemptions under N.J.S.A. 2A:53A-50(c) apply, then the court moves on to section 55(a)(3). That section requires the court to dismiss the cause of action with prejudice if either:

> (a) The responding party fails to establish a prima facie case as to each essential element of any cause of action in the complaint; or
>
> (b) The moving party establishes that:
>
> > (i) The responding party failed to state a cause of action upon which relief can be granted; or
> >
> > (ii) 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.

N.J.S.A. 2A:53A-55(a)(3). UPEPA thus applies two distinct New Jersey procedural standards. Subsection (a)(3)(b)(i) employs the Rule 4:6-2(e) failure-to-state-a-claim standard — essentially, if the movant could win a motion to dismiss on those grounds, then the action is dismissed. Subsection (a)(3)(a) and (a)(3)(b)(ii) employ the summary judgment standard, paralleling Rule 4:46-2(c) and *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 540 (1995). Those rules require the court to assess the facts in the record and determine whether there is a prima facie case for the party that initiated the action to obtain a favorable ruling from a factfinder.

Although UPEPA permits limited discovery in appropriate cases, discovery is not automatic. The statute requires a showing that specific information is necessary and not reasonably available without discovery, reinforcing UPEPA's purpose of resolving covered claims before they become full-scale litigation. N.J.S.A. 2A:53A-52(d).

Finally, UPEPA contains a fee-shifting provision. A movant who prevails — either through court decision or a voluntary dismissal with prejudice — is entitled to mandatory fee-shifting and can collect costs, expenses, and reasonable attorney's fees. N.J.S.A. 2A:53A-58(1). This feature gives the statute practical force: it not only permits early dismissal of speech-based claims but also reduces the incentive for plaintiffs to use litigation costs themselves as leverage. A respondent may recover fees only if the court finds the UPEPA motion "was frivolous or filed solely with intent to delay the proceeding." N.J.S.A. 2A:53A-58(2).

Appellate Division's Recent UPEPA Applications

The New Jersey Appellate Division most recently interpreted UPEPA's applicability in *Holtec Int'l v. Javerbaum Wurgaft Hicks Kahn Wikstrom & Sinins, PC*. The dispute originated when Holtec terminated its former chief financial officer (CFO), who proceeded to retain Javerbaum and file a whistleblower lawsuit asserting a claim under a New Jersey employee protection statute. The CFO's complaint alleged, in part, that Holtec fired him after he expressed concerns about the accuracy of financial projections in an investment prospectus. After the filing of that complaint, a New Jersey newspaper published a story headlined "Ex-Holtec CFO accuses company of 'make believe' financial statements in whistleblower suit." Javerbaum thereafter uploaded a post to its website titled "Javerbaum Wurgaft Files Whistleblower Lawsuit Against Holtec International on Behalf of Former CFO," which repeated the allegation regarding "false financial statements," linked to the newspaper story, and was also shared on the firm's social media pages.

In response, Holtec filed a one-count defamation complaint against Javerbaum, asserting that the use of the phrase "false financial statements" inaccurately characterized the allegations in the complaint. Javerbaum filed an order to show cause under UPEPA, seeking dismissal on the grounds that its speech related to the CFO's complaint, addressed a matter of public concern, and was statutorily protected. The motion judge agreed, finding that UPEPA applied, that the commercial speech exemption did not apply, and that Holtec had failed to establish a prima facie case for defamation. The judge dismissed Holtec's complaint with prejudice.

The Appellate Division affirmed, carefully reasoning through each step of UPEPA's framework. The court first agreed, interpreting UPEPA "broadly," 2026 WL 2014782, at *4, that Javerbaum's posted article constituted a "matter of public concern" under N.J.S.A. 2A:53A-50(b)(3). The court noted that "UPEPA does not define 'a matter of public concern'" and therefore assessed the challenged speech by examining its "content, form, and context." 2026 WL 2014782, at *4 (quoting *Senna v. Florimont*, 196 N.J. 469, 496–97 (2008)). The court in *Holtec* concluded that the firm's posting about a whistleblower suit against a nuclear energy company was a "matter of public concern" because it involved a "highly regulated industr[y]" implicating "health and safety." *Id.* (quoting *Durando v. Nutley Sun*, 209 N.J. 235, 250 (2012)).

This ruling aligns with other recent published Appellate Division case law that has found the "public concern" prong satisfied in a range of contexts. *See Town of Dover*, 2026 WL 1532353, at *5 (holding that social media posts criticizing government officials on political subjects "plainly" satisfied subsection (b)(3), even where the speaker had previously executed a non-disparagement agreement); *Lento Law Grp., PC v. Hendrickson,* ___ A.3d ___, No. A-3541-23, 2026 WL 1725344, at *5 (N.J. Super. App. Div. June 15, 2026) (holding there was "no dispute" a BBB review regarding legal fees and billing was a "matter of public concern" under (b)(3), online reviews being "the equivalent [of] the public square"); *Satz*, 482 N.J. Super. at 59 (finding that "a flyer advocating [plaintiff] give his wife a religious divorce," allegedly "contain[ing] an unflattering photograph of [plaintiff] and call[ing] for a protest outside of [plaintiff's] parents' home," constituted a "matter of public concern" under (b)(3)). For media defendants, this line of cases is significant because it confirms that courts are reading "matter of public concern" broadly and in a manner consistent with established defamation principles, rather than adopting a narrow view that would limit UPEPA protection to traditional political speech.

After establishing that Javerbaum's posting constituted a "matter of public concern" under a broad reading of the statute, the Appellate Division applied a stringent interpretation of UPEPA's commercial speech exemption to find that the post did not lose UPEPA protection under those grounds. In addressing this novel issue, the court acknowledged that posts on law firm websites "in general may increase awareness of a firm's legal services," but reasoned that applying UPEPA's commercial speech exemption to posts that are "informational in nature" regarding a firm's cases and business would be "overbroad" and "nonsensical." *Id.* at *7. The court instead held that "UPEPA does not exempt all speech by sellers of goods or services — only commercial speech made in direct advertising related to the person's sale or lease of its goods or services. *Id.* at *8. That holding is important beyond the law-firm context. It suggests that a speaker does not lose UPEPA protection merely because the speech appears on a website, social media account, or other platform that also may promote the speaker's business or services. For media organizations and other publishers, the decision supports a narrow reading of the commercial speech exemption and preserves protection for informational, editorial, and public-concern speech even when published by entities engaged in commerce.

Finally, the court considered "whether Holtec ha[d] pled a viable defamation claim." *Id.* It ultimately concluded that Holtec had failed to meet its burden on two separate grounds. First, the court found that "Javerbaum's reporting of the information in [the CFO's complaint] fairly and accurately summarizes the gist of the complaint and does not mislead the reader as to the heart of [the CFO's] wrongful termination allegations[,]" and thus "that the protections of the fair-report privilege apply." *Id.* at *10 (quoting *Salzano v. North Jersey Media Group, Inc.*, 201 N.J. 500, 522 (2010)).

Separately, "for the sake of completeness," the court held that Holtec was "required to prove actual malice," as "Javerbaum's statements involved a matter of public concern." *Id.* Notably, New Jersey defamation law provides broader protection than the First Amendment by requiring plaintiffs challenging speech on matters of public concern to establish actual malice, even when the plaintiff is not a public figure or official. *See Senna*, 196 N.J. at 496-97; *see also id.* at 484-85 & n.11 (distinguishing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and numerous state cases). The court concluded that Holtec had failed to meet the "actual malice" standard for statements involving matters of public concern and ultimately affirmed the trial court's dismissal with prejudice under UPEPA.

Holtec is thus also notable for its application of familiar defamation-defense principles within the UPEPA framework. Rather than allowing the case to proceed based on a technical distinction between "financial statements" and "financial projections," the court focused on whether the challenged statement fairly conveyed the gist of the underlying allegations and whether Holtec could satisfy the actual-malice standard.

Open Questions

Although the early decisions are favorable to defendants invoking UPEPA, several issues remain important to monitor as courts continue to define the statute's outer boundaries. The following issues have been identified — but not resolved — by the New Jersey Appellate Division in the cases discussed above.

Scope of the Commercial Speech Exemption

Holtec is the only decision to construe the commercial speech exemption under N.J.S.A. 2A:53A-50(c)(3)). In the absence of any New Jersey case law, the court relied entirely on California and Texas precedent and adopted a narrow interpretation that limited the exemption to "commercial speech made in direct advertising related to [a] person's sale or lease of its goods or services." 2026 WL 2014782, at *8. The court's holding clarifies that informational or editorial content does not trigger the exemption merely because the speaker also sells goods or services. However, the decision leaves open how the exemption applies to: (1) communications that blend promotional and informational content; (2) speakers in industries other than law; and (3) borderline cases where the relationship between the speech and the sale of services is closer than in *Holtec* (e.g., a consultant's case study or testimonial). Future litigation will test the scope of the exemption, but *Holtec* gives defendants a strong starting point: informational or editorial speech should not be treated as exempt commercial speech merely because the speaker is also engaged in business or because the communication appears in a setting that may have some promotional effect.

Waiver of UPEPA Rights by Contract

Town of Dover establishes that executing a non-disparagement clause does not categorically waive the right to invoke UPEPA, because "the statute contains no such express exclusion." 2026 WL 1532353, at *7. However, the court expressly "offer[ed] no view on the outcome" of the remand and left open multiple subsidiary questions: (1) how broadly an undefined contract term like "disparaging remarks" should be interpreted; (2) what standard governs whether a waiver of free-speech rights in a settlement agreement was "knowing, intelligent, and voluntary"; (3) whether such clauses are enforceable as a matter of public policy; and (4) whether enforcement constitutes an unconstitutional condition on a government benefit. *Id.* at *7–9. For defendants, the important point is that contractual speech restrictions do not automatically defeat UPEPA protection; courts must still analyze whether the statute applies and whether the asserted waiver is enforceable.

No Statutory Definition of "Matter of Public Concern"

UPEPA does not define "a matter of public concern," a critical threshold term under N.J.S.A. 2A:53A-50(b)(3). *Holtec*, 2026 WL 2014782, at *5. Courts have imported the multi-factor test from defamation law — examining "content, form, and context" — but the *Holtec* court acknowledged that "caselaw has not directly addressed this issue in the context of a UPEPA matter." 2026 WL 2014782, at *6. Because this is a judicially imported standard rather than a statutory definition, its application remains fact-intensive. To date, however, the Appellate Division has applied the concept broadly, which is favorable to media defendants and other speakers seeking early UPEPA protection.

Standard for Permitting Limited Discovery

Wunsch upheld limited discovery on publication, actual malice, and damages under N.J.S.A. 2A:53A-52(d) where the facts were "particularly within the moving parties' knowledge." 483 N.J. Super. at 248. The statute requires that "specific information [be] necessary" and "not reasonably available without discovery." . However, the contours of what constitutes appropriately "limited" discovery — and how much discovery is permissible before it undermines UPEPA's goal of prompt resolution — have not been extensively tested. Future cases will likely define the outer bounds of permissible discovery, but the statutory standard gives defendants a basis to resist broad discovery requests that would undermine UPEPA's purpose of prompt resolution.

Communications "In" vs. "About" Judicial Proceedings

In *Holtec*, the court expressly declined to decide whether a law firm's public commentary about its own pending case constitutes a "communication in a … judicial proceeding" under N.J.S.A. 2A:53A-50(b)(1) or a "communication on an issue under consideration or review in such a proceeding" under subsection (b)(2). 2026 WL 2014782, at *5. The court resolved the case on the public-concern prong of (b)(3), leaving open how broadly (b)(1)–(2) reaches communications that merely reference or publicize a proceeding without being made within its formal confines. This is significant because subsections (b)(1) and (b)(2) do not require a separate showing that the speech relates to a "matter of public concern," which could provide defendants with an independent and potentially broader basis for UPEPA protection when claims arise from reporting on, commenting about, or publicizing judicial or governmental proceedings.

Fee-Shifting Mechanics for Partial or Mixed Outcomes

While *Satz* holds that voluntary dismissal does not extinguish a moving party's right to fee-shifting, 482 N.J. Super. at 67–70, no case addresses: (1) how fees are calculated or allocated when a moving party prevails on only part of a multi-count complaint; (2) how multiple defendants with differing outcomes (as in *Wunsch*, where different defendants were in different postures, 483 N.J. Super. at 240–42) apportion fee awards; or (3) how "prevailing" is defined short of a complete dismissal with prejudice. These mechanics will require judicial elaboration as UPEPA motions are litigated in multi-claim or multi-party cases. Even so, the mandatory nature of fee-shifting for prevailing movants remains one of the statute's most important protections against litigation designed to chill speech.

Key Takeaways

UPEPA provides a robust procedural framework for early dismissal of claims that implicate protected expressive rights. The statute's burden-shifting structure has been applied consistently and broadly by the Appellate Division in its first wave of decisions, and the mandatory fee-shifting provision gives the statute practical force. For media defendants and other speakers, the early trend is favorable: New Jersey courts have treated UPEPA as a meaningful tool for disposing of speech-based claims before they impose the full costs and burdens of litigation.

Many issues remain to be litigated, but the early appellate decisions provide a strong foundation for defendants invoking UPEPA in cases involving reporting, commentary, advocacy, litigation-related statements, online reviews, and other speech on matters of public concern. The FBT Gibbons team will be monitoring these ongoing developments. Please contact the authors or any member of the firm's Media and First Amendment practice for further assistance.