

SLAPPED for Speaking Out?

Anti-SLAPP Statutes Help Defendants Fight Back

By Julie Bauer

In recent years, disputes between parties with differing views on issues of public concern have spilled into the court system with increasing frequency. The term “SLAPP” (or “Strategic Lawsuit Against Public Participation”) was coined to refer to lawsuits brought against private individuals or organizations who, through speech, petition or other expressive conduct, seek to influence the actions or decisions of a public official or body.

SLAPPs come in many sizes and shapes. They can be brought by private individuals, government officials and corporations. They target individuals, community activists, corporations, associations and members of the media. They frequently include claims of defamation, invasion of privacy, interference with contract and other theories. They can be based on activities such as writing a letter to the editor of a newspaper, testifying before a state legislature or local city council, reporting official misconduct, circulating a petition, posting a blog or many other actions. But they all have one thing in common: At least in the eyes of the defendants, they are brought to distract the defendants from the issues at hand and to discourage them and others from speaking out. They do so by forcing the defendants to defend a court case against them, a potentially expensive

proposition for those defendants who can afford counsel to represent them and a daunting task for those who cannot. And even if the lawsuit is ultimately found to be factually or legally baseless, under the American legal system, prevailing defendants can rarely recoup their fees and expenses from the party who sues them.

ANTI-SLAPP LAWS

Anti-SLAPP statutes are designed to level the playing field — to discourage the plaintiff from filing suit by adding to the arsenal of tools available to the defendants in a civil lawsuit. They do so primarily by creating the potential to shift a prevailing defendant’s attorneys’ fees to the plaintiff. To date, 27 states (Arizona, Arkansas, California, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont and Washington) have adopted some form of Anti-SLAPP legislation; a handful of additional states have common law protections against SLAPP suits. These statutes vary widely in terms of who they protect and under what circumstances, but most contain procedures by which a SLAPP defendant can move to dismiss the case at an early stage in the litigation, stay discovery pending a decision on the motion and seek expedited review of an unfavorable decision on the motion. And, if the motion to dismiss is successful, most state statutes allow the defendant to recover attorneys’ fees and costs from the plaintiff who “SLAPPED” them. This potential for fee-shifting changes the stakes for plaintiffs in SLAPP suits.

ILLINOIS’ CITIZEN PARTICIPATION ACT

One of the most recent Anti-SLAPP statutes is that adopted by the Illinois General Assembly in 2007, known as the Citizen Participation Act (“CPA”), 735 ILCS 110/1 *et seq.* The CPA begins with a broad public policy statement, declaring that “constitutional rights of citizens and organizations to be involved and participate freely in the process of government must be encouraged and safeguarded with great diligence” and emphasizing the importance of “information, reports, opinions, claims, arguments and other expressions” in that process. 735 ILCS 110/5. The CPA also contains broad definitions: Among the “citizens” protected by the Act are corporations, organizations, associations and partnerships, in addition to individuals. 735 ILCS 110/10. And the “government” is defined to include not only government officials and agencies, but also the electorate. *Id.*

The CPA provides several provisions intended to aid defendants faced with SLAPPs. First, a SLAPP defendant can move to dismiss, asserting that the claim against him is “based on, relates to, or is in response to any act ... in furtherance of the moving party’s rights of petition, speech, association, or to otherwise participate in government.” 735 ILCS 110/15. Under the CPA, such acts are immune from liability, “regardless of intent or purpose,” except when not genuinely aimed at procuring favorable government action, result or outcome, an apparent reference to the “sham” exception to the *Noerr-Pennington* doctrine. *Id.* The trial court must hear and decide the motion to dismiss within 90 days, and other discovery in the case is stayed pending resolution of the mo-

Julie Bauer is a partner in the litigation department of Winston & Strawn LLP’s Chicago office. Ms. Bauer is co-counsel for the amici in the *Wright Development* case. She may be reached at jbauer@winston.com.

tion. 735 ILCS 110/20. Unless the plaintiff produces "clear and convincing evidence" that the acts of the defendant are not immunized from, or are not in furtherance of acts immunized from liability by the CPA, the court must grant the motion. *Id.* If the defendant is unsuccessful in obtaining a dismissal under the CPA, the appellate court is to expedite any appeal from that denial. *Id.*

Notably, the CPA provides for a mandatory award of "reasonable attorney's fee and costs incurred in connection with the motion" if it is successful. 735 ILCS 110/25. This mandatory award of fees provides a greater disincentive to a plaintiff in Illinois than those in other states where the court has discretion over whether to award fees to a prevailing defendant.

**WRIGHT DEVELOPMENT GROUP,
LLC v. WALSH**

The Illinois Supreme Court will soon address the scope of the CPA for the first time in a case named *Wright Development Group, LLC v. Walsh*, No. 109463. The plaintiff in the case, Wright Development Group, filed a defamation suit against John Walsh, a local newspaper and its publisher. Wright Development Group alleged that it was defamed by statements made by Walsh while attending a public forum convened by a Chicago alderman to discuss the need for government action to confront problems with local developers and contractors. Walsh spoke with a reporter after the forum, and some of his comments were published in the newspaper.

Walsh and the other defendants moved to dismiss the complaint, arguing that under Illinois' innocent construction rule, the statements were not actionable. While that motion was pending, Walsh moved to dismiss under the CPA. The trial court, after limited discovery and a hearing, denied Walsh's motion, apparently because the statements at issue were made to a reporter and not to the alderman or her representatives. Walsh filed an interlocutory appeal in accordance with the CPA, and while that appeal was pending, the trial court granted the earlier motion to dismiss, holding that they statements were not actionable because they were capable

of an innocent construction. The Illinois Appellate Court then entered an order dismissing Walsh's appeal of his motion under the CPA as moot, reasoning that because Walsh had "already obtained the relief he sought, an action by this court would constitute an advisory opinion." *Wright Dev. Group, LLC v. Walsh*, No. 1-08-2783 (Ill. App. Ct. Sept. 29, 2009). The Illinois Supreme Court granted Walsh's petition for leave to appeal from the dismissal order.

The *Wright Development Group* case presents two principal issues to the Illinois Supreme Court for consideration: 1) whether the trial court's ruling in favor of the defendant on alternate grounds mooted his appeal of the ruling against him under the CPA; and 2) whether the protection of the CPA extends to statements he made directly to the press, after the public forum convened by the alderman had concluded. Walsh, and the *amici curiae* who supported him in the Illinois Supreme Court, argue that if the Illinois Appellate Court's dismissal of his appeal as moot is upheld, the denial of a claim or award of fees would effectively never be reviewable if the case is dismissed voluntarily by the plaintiff or on alternate grounds by the trial court. As others have noted, SLAPP plaintiffs could achieve their objectives, at least in part, by filing suit, forcing the defendant to incur the cost and effort of preparing a motion to dismiss and then, before the motion is heard, dismissing the case.

Assuming that the Illinois Supreme Court reaches the merits of Walsh's appeal (rather than determining that it was properly dismissed as moot), the court will then consider whether the CPA protects statements made directly to the media (rather than made to the government official, for example, at a public hearing, and reported by the media). Courts in a handful of other jurisdictions have held that their state statutes apply to communications with members of the news media. For example, in *Global Waste Recycling, Inc. v. Mallette*, 762 A.2d 1208, 1213-14 (R.I. 2000), the Rhode Island Supreme Court held that comments that homeowners made to a local newspaper questioning the practices of the plaintiff recycling facility were protected by the Anti-SLAPP stat-

ute. The *Mallette* court explained that "[m]aking loud and public complaints to newspaper reporters is a frequently used method for members of a community to affect local matters or concern." *Id.* at 1213. The court explicitly rejected the plaintiff's argument that the statements "must be made before some type of legislative, judicial, or administrative body and not to the public via the print media." *Id.* at 1213. Courts in Louisiana, Georgia and Maine have reached similar conclusions. And while other courts have reached the opposite conclusion, many have done so based on much narrower statutory language, for example, statutes that protect only statements made directly to the government. Given the CPA's broad definition of "government" to include government officials and the electorate, *i.e.*, the public at large, Walsh's argument that statements directly to the media are protected may fare better before the Illinois Supreme Court than it would elsewhere. In addition, there are policy reasons for protecting speech to the media, as media reports can motivate citizens to discuss, debate and petition the government on issues of public concern and motivate government officials to act.

Oral argument in the *Wright Development Group* case was held in May 2010.