Thinking of Filing a Defamation Lawsuit?

The Citizens Participation Act May Make You Think Twice

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In August 2007, the General Assembly, following the lead of many other states, passed the Citizen Participation Act (the "CPA" or the "Act") in order to provide defendants with a robust and efficacious response to lawsuits designed to curtail a defendant's constitutional right to public participation. Until now, there has been a dearth of case law regarding this statute and its application. However, in the last several months, there have been a number of decisions, including an opinion from the Illinois Supreme Court, that have addressed key substantive and procedural issues related to the CPA. As discussed below, the Illinois courts have taken an extremely broad view of the Act, and thus, provided defense practitioners with a powerful weapon to combat lawsuits designed to curtail a defendant's public activities.

Statutory Overview

The CPA is designed to guard against the chilling effect of "Strategic Lawsuits Against Public Participation" (SLAPPs)–that is, civil lawsuits designed to prevent citizens from exercising their constitutional rights to petition, speak freely, associate freely, and otherwise participate in and communicate with the government. H. Gunnarsson, *Faster resolution urged for custody, SLAPP Suits*__ Ill. B.J. __ (June 2009). By passing the CPA in 2007, Illinois joined twenty-four other states that have passed anti-SLAPP statutes. Embracing the logic employed by legislatures in sister states, the Illinois General Assembly recognized that "the threat of SLAPPs significantly chills and diminishes citizen participation in government, voluntary public service, and the exercise of these important constitutional rights." 735 ILCS 110/5 (2010). The CPA thus immunizes from liability all "acts in furtherance of the constitutional rights to petition, speech, association, and participation in government...regardless of intent or purpose, except when not genuinely aimed at procuring favorable government action, result, or outcome." 735 ILCS 110/5.

According to the Illinois Supreme Court, the CPA was enacted to (1) "strike a balance" between the rights of persons to file lawsuits for injury and the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government; (2) protect and encourage public participation in government to the maximum extent permitted by law; (3) establish an efficient process for identification and adjudication of SLAPPs; and (4) provide attorney's fees and costs to prevailing movants. *Wright Development Group LLC v. Walsh,* 238 Ill.2d 620, 631 (2010).

Procedure for Utilizing the CPA's Protections

Section 20 of the CPA sets forth the procedure for moving for dismissal of "SLAPP" suits. Once a motion to dismiss is filed and served upon the responding party, the court must order a hearing and issue a decision within ninety days. 735 ILCS 110/20(a). During this period, discovery is suspended on all issues unrelated to the motion. 735 ILCS 110/20(b). The court may order discovery on the issue of whether the movant's acts are not immunized from, or are not in furtherance of acts immunized from liability under the CPA, but only upon good cause shown by the plaintiff. 735 ILCS 110/15; Wright Development Group, 238 Ill.2d at 635.

The CPA's procedure for motions to dismiss provides for a burden-shifting analysis. 735 ILCS 110/15. First, the moving party

must show that plaintiff's complaint is "based on, relates to, or is in response to" the movant's constitutionally-protected conduct. If the movant satisfies this threshold requirement, the burden of proof which is normally reserved for the moving party is then shifted to the respondent. Unlike other burden-shifting statutes, the CPA requires the respondent to submit "clear and convincing evidence" showing that the movant's conduct is not immunized from liability under the CPA. If the responding party carries this heightened burden, it establishes a genuine issue of material fact which requires that the motion be denied. Conversely, if the respondent cannot meet this burden, the motion must be granted.

Justice Freeman, joined by Justices Burke and Thomas, recently provided valuable guidance as to the proper procedure for bringing a motion to dismiss on the grounds that a lawsuit is a SLAPP governed by the CPA in a concurring opinion in *Wright Development Group v. Walsh,* 238 Ill.2d 620, 641 (2010) (Freeman, J., concurring). Construing the language of §§10 and 20 of the Act, Justice Freeman concluded that the CPA does not provide independent grounds for filing a motion. Consequently, movants asserting immunity under the CPA should move to dismiss in accordance with the normal means provided in the Code of Civil Procedure.

In Justice Freeman's view, the CPA operates "only in conjunction" with the established motion practice under the Code of Civil Procedure. Therefore, where the CPA is applicable, a defendant seeking immunity should file a motion to dismiss pursuant to 735 ILCS 5/2-619(a)(9). As Justice Freeman noted, "free-standing motions"–i.e., those filed pursuant to the CPA only–are problematic because if such a motion is denied, there is no Supreme Court Rule by which that order can be appealed. However, according to Justice Freeman, the denial of a §2-619(a)(9) motion results in a final judgment as to the defendant's ability to recover statutory attorney fees and costs which, in turn, provides the movant with an opportunity to request the trial court for a finding that the court's ruling is final and appealable pursuant to Supreme Court Rule 304.

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Justice Freeman's concurring opinion in Wright Development Group seems to have found a solution to the obstacles to appellate jurisdiction created by the Appellate Court's decision in *Mund v. Brown,* 393 Ill. App. 3d 994 (5th Dist. 2009). In Mund, a defendant who had lost a "freestanding" motion to dismiss argued that the appellate court had subject matter jurisdiction to hear his appeal under §20(a) of the CPA–which aims to provide a right to appeal from an interlocutory order. *Mund,* 393 Ill. App. 3d at 996. The Fifth District disagreed, holding that §20(a)'s interlocutory appeal provision was unconstitutional. However, if the defendant in Mund had followed the procedure outlined in Justice Freeman's concurrence in *Wright Development Group,* it appears that appellate jurisdiction could have been perfected under Supreme Court Rule 304(a).

If the moving party prevails on its motion to dismiss under the CPA, §25 of the Act explicitly permits the recovery of attorney's fees and costs "incurred in connection with" the motion. 735 ILCS 110/25. However, not all fees and costs incurred in connection with a motion to dismiss a SLAPP suit are recoverable. In *Sandholm v. Kuecker,* 405 Ill. App. 3d 835 (2nd Dist. 2010), the Illinois Appellate Court concluded that where a movant combines arguments for dismissal based upon the CPA with other arguments not based upon the CPA (for example, failure to state a cause of action under §2-615 of the Code of Civil Procedure), he can only recover the fees incurred in preparing and presenting the portion of the motion based upon the CPA. The Court reasoned that the decision to file an accompanying motion is not compelled by the CPA, and therefore, the CPA does not relieve movants of bearing the costs incurred in the course of motion practice that is not based upon the Act.

What is a SLAPP?–Illinois Courts Weigh in on the Scope of the CPA

There is no distinct formula for determining whether a lawsuit is a SLAPP suit. *Shoreline Towers,* 936 N.E.2d at 1206. A SLAPP suit typically alleges defamation, business torts, anti-trust, intentional infliction of emotional distress, invasion of privacy, civil rights violations, constitutional rights violations, conspiracy, nuisance, judicial process abuse, and malicious prosecution. *Id.* The plaintiff's intention in filing these types of suits is not necessarily to prevail on the claim, but to silence speech–often on matters of public importance–through the threat of damages and litigation expenses. *Hytel Group, Inc. v. Butler,* 405 Ill. App. 3d 113, 119 (2nd Dist. 2010).

Illinois case law, as well as the plain language of the CPA itself, appears to cast a wide net over what type of lawsuit constitutes a SLAPP. In comparing the CPA to similar anti-SLAPP legislation enacted in other states, the Illinois Appellate Court recently observed that the CPA provides broader protection for its citizens than any other anti-SLAPP statute. *Hytel Group,* 405 Ill. App. 3d at 126, n. 3. Indeed, on its face, the CPA broadly applies to any "motion to dispose of a claim in a judicial proceeding on the ground that the claim is based on, relates to, or is in response to any act or acts of the moving party in furtherance of the moving party's rights of petition, speech, association, or to otherwise participate in government." 735 ILCS 110/10. The term "Government" is defined broadly by the Act to include a "branch, department, agency,

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instrumentality, official, employee, agent, or other person acting under color of law of the United States, a state, a subdivision of a state, or another public authority including the electorate." Additionally, the CPA explicitly immunizes acts in furtherance of a citizen's constitutional rights to petition, speech, association and participation in government "regardless of intent or purpose." 735 ILCS 110/15. This immunity is unavailable only when a plaintiff may demonstrate that the citizen's acts are "not genuinely aimed" at procuring favorable government action, result, or outcome.

For almost two years after its passage, there was virtually no case law discussing the scope of the CPA. That, however, changed this past year. A summary of the most important of these decisions follows.

Wright Development Group, LLC v. Walsh

In *Wright Development v. Walsh,* 238 Ill.2d 620 (2010), the Illinois Supreme Court, for the first, and so far only time, interpreted and utilized the CPA to dismiss a defamation lawsuit arising out of statements that the defendant had made to a newspaper reporter following a public meeting at the office of a local alderman. The trial court had dismissed the suit under §2-615 of the Illinois Code of Civil Procedure pursuant to the innocent construction rule. (Illinois is one of a minority of jurisdictions that has retained the innocent construction rule. The Illinois Suprme Court has described the rule as a "rigorous standard" that "favors defendants" in actions for defamation per se. *Anderson v. Vanden Dorpel,* 172 Ill.2d 399, 412-13 (1996). The rule requires courts to give statements a non-defamatory interpretation if that interpretation is reasonable. Id.) However, it rejected the defendant's argument that plaintiff's suit was a SLAPP that was also subject to dismissal under the CPA. Specifically, the trial court held that the allegedly defamatory statements fell beyond the purview of the CPA because most of the statements were made "outside" of the public meeting, and therefore, did not involve participation in government. The Appellate Court dismissed the appeal holding that defendant's appeal was moot because the defendant obtained the relief he ultimately sought in both his motion to dismiss pursuant to §2-615 and under the CPA. The Illinois Supreme Court held that defendant's appeal was not moot because the mootness finding "contradicted the legislature's express finding of public policy in favor of an award of attorney's fees and cost to prevailing movants."

In addressing the merits, the Court held that because plaintiff's cause of action arose out of the defendant's constitutionally-protected conduct, its lawsuit was deemed to be a SLAPP. The Court found that defendant's statements to the newspaper reporter were made "in furtherance" of his rights to speech, association, and petition because the CPA "expressly encompasses exercise of political expression directed at the electorate as well as government officials." Even though the conversation at issue occurred after the public meeting had adjourned, the Court determined that this conduct was "clearly immunized" under the CPA. Wright Development Group, 238 Ill.2d at 639.

Sandholm v. Kurecker

Just days after the Illinois Supreme Court issued its decision in *Wright Development,* the Illinois Appellate Court, Second District addressed the scope of the CPA in *Sandholm v. Kurecker,* 405 Ill. App. 3d 835 (2nd Dist. 2010) (petition for leave to appeal allowed, January 25, 2011). In Sandholm, the plaintiff filed an action for defamation per se and other causes of actions as a result of the defendants' campaign to have him removed as the head basketball coach at a local public high school. In their efforts to garner public support for the plaintiff's removal, the defendants had made statements criticizing the plaintiff's coaching style to the school board and in letters and internet postings.

In the cases decided to date, the courts have strictly construed the CPA's plain language, and interpreted the statute broadly. A number of important principles can be gleaned from the cases decided thus far. They are:

- The Act is not limited to statements made in a government proceeding. Statements made in non-governmental settings are protected as long as they are made in furtherance of a citizen's constitutional right to petition, speak, associate, or otherwise participate in government.
- The Act is not limited to statements made to a government official or to individuals associated with the government. Statements directed at the electorate as well as government officials are protected.
- The Act is not limited to statements made on topics of public concern. Statements aimed at procuring government action even on matters of individual importance appear to be protected even if they do not concern matters that more broadly affect the public at large.
- The Act is retroactive, and therefore, can be asserted as a defense regardless of when a defamation or other similar lawsuit was filed or when the alleged defamatory statements were made.

The trial court dismissed the plaintiff's complaint pursuant to the CPA.

The Appellate Court affirmed the trial court's decision and held that the statute created a new, qualified privilege for "any defamatory statements communicated in furtherance of one's right to petition, speak, assemble, or otherwise participate in government." Interpreting the statute's plain language, the Court explained that it "[could] not agree with the plaintiff that the Act applies only to acts made during a government proceeding [because] it applies to 'any act or acts of the moving party in furtherance of the moving party's rights of petition, speech, association, or to otherwise participate in government.'"

The Appellate Court then examined the proper interpretation of §15 of the CPA. The Court first determined that this language is ambiguous. It then concluded, based upon the legislative history of the Act, that the legislature had patterned the CPA's immunity protections and exception thereto after the Noerr-Pennington doctrine and its "sham" exception for acts performed without a genuine aim at procuring government action. Having drawn this conclusion, the Court adopted a two-part test to determine whether a party's actions are "genuinely aimed at procuring favorable government action." A trial court should first consider whether objective persons could have reasonably expected to procure a favorable government outcome through acts such as those undertaken by the defendant. If the answer to this question is "yes," then the court need not consider the subjective intent of defendant's conduct. If the answer is "no," however, the court should consider whether the defendant's subjective intent was not to achieve a governmental outcome that may interfere with the plaintiff, but rather, to interfere with the plaintiff by using the governmental process itself.

Applying the two-part test to the facts before it, the Court ruled that the CPA afforded immunity to the defendants because they were seeking action by the school board to remove the plaintiff from his position as a public employee when they made the allegedly-defamatory statements, and even though defendants' initial efforts with the school board failed, "reasonable persons could expect the school board to change its initial decision after the campaign placed additional pressure on the board" in the form of letters and/or internet postings. In other words, "with regard to the first, objective test, the plaintiff did not disprove that objective persons in the defendants' position could reasonably believe they could succeed in achieving their desired government outcome."

Hytel Group, Inc. v. Butler

The Second District Appellate Court has also recently held that the CPA protects an individual's right to use the state's administrative agencies to seek redress for his or her injuries. In *Hytel Group, Inc. v. Butler,* 405 Ill. App. 3d 113 (2nd Dist. 2010), the defendant filed a claim with the Illinois Department of Labor seeking the payment of $2,300 in final wages after she was terminated from her employment with the plaintiff. Six months later, the plaintiff filed an action against the defendant, alleging defendant breached her fiduciary duty to plaintiff as its comptroller and fraudulently represented the financial work she completed for the plaintiff.

The Appellate Court affirmed the trial court's decision to dismiss the complaint and held that when determining whether a suit is retaliatory and thus a SLAPP suit,

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the court should analyze the underlying action on a case-by-case basis and consider several factors. Two important factors were the temporal proximity between defendant's filing of her wage claim and the plaintiff's corresponding action and the amount of damages sought by the plaintiff. Because the plaintiff in *Hytel Group* had sought alleged $4 million in damages and this amount was not supported by the facts alleged, the court inferred that the defendant intended to strike fear into the defendant rather than provide a good-faith estimate of the extent of the injury it allegedly sustained.

The *Hytel Group* court also addressed the defendant's petition to recover attorney's fees under §25 of the CPA. The Second District determined that "inasmuch as the [CPA] mandates the award of certain attorney's fees and costs to a successful movant, it thereby requires the successful movant to prepare and present a fee petition." Consistent with Sandholm, Second District found that the CPA permits the recovery of attorney's fees incurred in preparing and presenting a motion for fees, but not fees incurred in preparing an accompanying §2-615 motion to dismiss that was "not necessary to advance the anti-SLAPP purpose of the Act."

Shoreline Towers Condo. Ass'n. v. Gassman

The First District recently had the opportunity to weigh in on the scope and application of the CPA in *Shoreline Towers Condominium Association v. Gassman.* 936 N.E.2d 1198 (1st Dist. 2010). It too interpreted the Act in a broad fashion. In *Shoreline Towers,* plaintiff, a condominium association, filed a ten-count complaint against one of its former residents alleging defamation, intentional infliction of emotional distress, civil conspiracy, malicious prosecution, and violation of §1983 of the Civil Rights Act. Plaintiff's allegations arose out of a long-standing dispute between the parties beginning with plaintiff's "repeated removal" of defendant's religious displays on her condominium door which, in turn, prompted the defendant to file religious discrimination claims with various government entities. Plaintiff further alleged that the defendant accused its president of receiving drug deliveries, engaging in homosexual behavior, and being a defendant in a litigation arising out of "misconduct" with one of his patients. Moreover, plaintiff alleged that the defendant contacted a local Jewish publication and told its editor that plaintiff's president was anti-Semitic.

The trial court granted the defendant's §2-619 motion to dismiss plaintiff's complaint, and held that the association's lawsuit was a SLAPP suit, but only with regard to those specific counts that arose out of the defendant's response to what she perceived to be religious discrimination. In contrast, the trial court held that the plaintiff's allegations of defamation and intentional infliction of emotional distress arising out of the defendant's conduct with respect to its president survived defendant's motion to dismiss were proper and held that "[a]nti-Slapp legislation is not intended to protect those who actually commit torts [but to] protect those who are in danger of being sued solely because of their valid attempts to petition the government." *Shoreline Towers,* 936 N.E.2d at 1204.

The Appellate Court for the First District affirmed, holding that "the Act does not protect only public outcry regarding matters of significant public concern, nor does it require the use of a public forum in order for a citizen to be protected." The Court determined that the defendant's religious discrimination lawsuits and the information she supplied to the local newspaper were predicated upon protected acts of petition, speech, and participation in pursuit of favorable government action and because plaintiff's lawsuit was filed "in response to" defendant's protected conduct, it was subject to dismissal under the Act. In addition the Court made it clear that the CPA "does not require that a lawsuit be filed while protected conduct in ongoing in order to qualify as a SLAPP suit." The Court explained that "the Act expressly provides that it applies to a claim brought 'in response to any act or acts' in furtherance of constitutional rights." Finally, the Court determined that the CPA is procedural in nature, and therefore, applies retroactively to lawsuits filed before its effective date. In so concluding, the First District helped highlight the breadth of protection SLAPP-defendants are afforded under the CPA.

Conclusion

Accordingly, the CPA represents a powerful device for defendants engaged in SLAPP litigation. Not only does the CPA provide for rapid disposition of SLAPP suits, but it also mandates that the plaintiff come forward with "clear and convincing" evidence that its lawsuit does not infringe upon the defendant's constitutional rights to speak, petition, assemble, or otherwise participate in government. Moreover, the protections afforded to defendants by the CPA are expansive in scope and present an efficient–and potentially lucrative–avenue through which SLAPP suits may be dismissed. As the CPA continues to evolve, attorneys should be mindful of how this unique legislation may impact the course of current and future litigation in Illinois. ■

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