Chicago Daily Law Bulletin®

Serving the profession since 1854

July 22, 2020

Citizens Participation Act should be reinvigorated

By Donald P. Eckler
Donald "Pat" Eckler is a partner at Pretzel & Stouffer focusing on professional liability defense, insurance coverage litigation, and general tort defense. He is the legislative chair of the Illinois Association of Defense Trial Counsel. His views are his own and not those of his firm or its clients.

The NAACP, ACLU, Pacific Legal Foundation, Institute for Justice and Alliance Defending Freedom may not agree on much, but they likely do agree that constitutionally protected rights will not defend themselves.

It takes brave individuals to bring actions to defend their rights, lawyers committed to pursuing the cause of defending individual liberty against state action, and often donors willing to support organizations to fund the litigation. In addition to donors, such cases are often funded through statutory attorney fees provisions, such as in Section 1983, which often levels the playing field between the power of government and individual plaintiffs who challenge actions that are alleged to have violated civil rights.

The typical instances of government infringements of individual rights, e.g., unlawful searches and seizures, free speech limitations, takings, and the like, are not the only kinds of violations that require protection from an unconstitutional violation. For example, though *Batson* has principally been used in the criminal context, it applies with equal force in the context of jury selection in civil cases because the action of private parties in using the courts to violate the equal protection rights of potential jurors implicates state action. See *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991); *Fleming v. Moswin*, 2012 IL App (1st) 103475-B. The remedy, should a *Batson* violation occur in the civil context, is a new trial; a very high penalty for the party who commits such a violation.

Just as parties in civil cases can use the power of courts to discriminate against prospective jurors, civil plaintiffs can also use the power of courts to threaten the constitutionally protected rights of civil defendants. This is particularly so in defamation, malicious prosecution and other kinds of suits.

For this reason, states, including Illinois, passed laws aimed at Strategic Lawsuits Against Public Participation, called anti-SLAPP statutes. These statutes provide expedited review of such lawsuits and a remedy for attorney fees to the defendant should the motion be successful. Illinois enacted the Citizens Participation Act, 735 ILCS 110/5, et seq., and in *Wright Development Group LLC v. Walsh*, the Illinois Supreme Court, held that 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 fees and costs to prevailing movants. 238 Ill.2d 620, 631 (2010).

Despite that purpose, the CPA is more narrow than similar laws in other states as it only protects against suits that infringe on attempts to obtain legitimate government action. That purpose was further limited and the statute effectively denuded when the Illinois Supreme Court in *Sandholm v. Kuecker*, 2012 IL 111443, Par. 56, read the word "solely" into the statute and held that the "defendant[] ha[s] the initial burden of proving that plaintiff's lawsuit was solely 'based on, relate[d] to, or in response to' their acts in furtherance of their rights of petition, speech or association, or to participate in government. Only if defendants have met their burden does the plaintiff have to provide clear and convincing evidence that defendants' acts are not immunized from liability under the Act."

The court, looking to the legislative history, found that if the General Assembly wanted to create an immunity, it could have written that, and because they did not, the defendant must show that the plaintiff's sole purpose in filing the suit was to chill the defendants' petitioning activities to the government.

This holding has essentially rendered the CPA a dead letter and has deprived defendants of a proper tool to defend their constitutionally protected rights to petition and speak to government officials in an attempt to obtain favorable action. While defenses on the merits are available, defamation claims are expensive and time consuming to defend, and if the speech and conduct is directed toward government, it is expressly protected by the First Amendment of the federal Constitution and Article I, Sec. 4 of the Illinois Constitution.

The plaintiff in *Sandholm* contended that the CPA was unconstitutional, citing to various provisions of the Illinois Constitution and to the equal protection and due process clauses of the 14th Amendment to the federal constitution. However, as in a *Batson* situation, there is no right to use government courts to violate the rights of other citizens.

Among the most cherished American value are the freedoms of speech and to petition government. A vigorous tool to protect those rights should be provided by the legislature by amending the CPA and overruling *Sandholm*. No immunity needs to be created. Rather, the amended statute needs to recognize that the motivation for the filing of a lawsuit can be manifold and asking defendants to discern the plaintiff's intent is unreasonable and unnecessary.

Allowing plaintiffs to use Illinois state courts to chill the speech of citizens involved in legitimate government advocacy is a violation of the most basic rights protected by American constitutions and a tool to root out that kind of conduct should be provided.
