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Feature Article

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The Illinois Citizen Participation Act Provides Immunity for the Exercise of First Amendment Rights

Introduction

When it enacted the Citizen Participation Act, 735 ILCS 110/1 *et seq*., Illinois joined a growing number of states that have adopted so-called anti-SLAPP legislation. *See* Mark J. Sobczak, Note, *Slapped in Illinois: The Scope and Applicability of the Illinois Citizen Participation Act*, 28 N. Ill. U.L. Rev. 559 (2008) (noting more than 20 states have enacted anti-SLAPP laws). "Strategic lawsuits against public participation" or "SLAPPs," refer to the use of civil litigation to retaliate for the exercise of a citizen's First Amendment rights or in response to a citizen's participation in a governmental process.

One typical SLAPP suit is brought by a developer, "unhappy with public protest over a proposed development, filed against critics in order to silence criticism of the proposed development." *Westfield Partners, Ltd. v. Hogan*, 740 F. Supp. 523 525 (N.D. Ill. 1990). A SLAPP suit can be brought under any number of legal theories, including conspiracy, malicious prosecution, defamation, tortious interference with contract or prospective economic advantage.

Section 5 of the Citizen Participation Act notes the harm caused by SLAPP suits:

> The threat of SLAPPs significantly chills and diminishes citizen participation in government, voluntary public service, and the exercise of these important constitutional rights. The abuse of the judicial process can and has been a means of intimidating, harassing or punishing citizens and organizations for involving themselves in public affairs.

735 ILCS 110/5. Thus, the Citizen Participation Act seeks to protect an individual's constitutional rights "to petition, speak freely, associate freely, and otherwise participate in and communicate with government." *Id.*

Section 5 of the Act further explains that it is Illinois public policy "that the constitutional rights of [its] citizens and organizations to be involved and participate freely in the process of government must be encouraged and safeguarded with great diligence." *Id.* It recognizes that "[t]he information, reports, opinions, claims, arguments and other expressions provided by citizens are vital to effective law enforcement, the operation of government, the making of public policy and decisions, and the continuation of representative democracy." *Id*.

Based on the *Noerr-Pennington* Doctrine

The Citizen Participation Act's legislative history explains that it is based on the *Noerr-Pennington* doctrine. 95th Ill. Gen. Assembly, House Debates, May 31, 2007 (statement of sponsor Jack Franks). The *Noerr-Pennington* doctrine extends the protection of the First Amendment to certain types of anti-competitive activity designed to influence governmental action that would otherwise violate the Sherman Act. 15 U.S.C. §

1 *et seq*. The doctrine is based upon the recognition that "[i]n a representative democracy . . . the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc*., 365 U.S. 127, 137, 81 S. Ct. 523 (1961)

In that case, the Supreme Court held that an advertising and lobbying campaign brought by a group of railroads designed to influence governmental action which curtailed the use of trucks for long-distance hauling was permitted under the First Amendment, and as a result, did not violate federal antitrust laws. In *United Mine Workers v. Pennington*, 381 U.S. 657, 670, 85 S. Ct. 1585 (1965), the Court further explained that *Noerr* shields from the Sherman Act "a concerted effort to influence public officials regardless of intent or purpose," and that "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." The Court subsequently extended *Noerr's* reach to administrative and adjudicatory proceedings in *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508, 92 S. Ct. 609 (1972).

Nature and Scope of the Immunity Provided

The Citizen Participation Act is ostensibly directed at combating the phenomena of SLAPP lawsuits. However, the Act's reach is expansive, and the protection provided is noteworthy in its nature and scope. The legislature explained that the Act's breadth was intended to protect a citizen's rights "to the maximum extent permitted by law." 735 ILCS 110/5. It further indicated that the Act "shall be construed liberally to effect its purposes and intent." 735 ILCS 110/30(b).

Section 15 of the Act makes it applicable to any type of "claim." 735 ILCS 110/15. The terms "judicial claim" and "claim" are defined in Section 10 of the Act to "include any lawsuit, cause of action, claim, cross-claim, counter-claim, or other judicial pleading or filing alleging injury." 735 ILCS 110/10.

Section 15 makes the Act's protection applicable to a claim in any type of judicial proceeding that 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 110/15 (emphasis added). Section 10 defines "moving party" as "any person on whose behalf a motion . . . is filed seeking dismissal of a judicial claim." 735 ILCS 110/10. Section 15 provides that acts in furtherance of the "moving party's rights to petition, speech, association and participation in government are immune from liability, *regardless of [their] intent or purpose*." *Id*. (emphasis added). The "regardless of intent or purpose" provision found in Section 15 appears to have been taken directly from the Supreme Court's *Pennington* decision. 365 U.S. at 670.

As the plain language of Section 15 clearly reveals, the Citizen Participation Act does not limit its protection simply to claims which involve matters of "public interest" or "public concern." Rather, retaliation against any type of speech or First Amendment activity can trigger the protection of the Act. Thus, the Act is not limited to retaliatory lawsuits brought by individuals who had sought some type of permit, license, or zoning approval from a governmental entity. Nor is the Act's protection limited to a moving party's statements or conduct that occurred in connection with a governmental or regulatory hearing or proceeding. For a discussion of other state's anti-SLAPP laws, which contain these types of limitations, *see* Shannon Hartzler, Note, *Anti-SLAPP and the Media Defendant*, 41 Val. U.L. Review, 1235, 1248-70; Sobczak, *SLAPPED in Illinois*, *supra* at 576-87.

Section 15 of the Act contains a "sham exception" applicable when the moving party's activities were "not genuinely aimed at procuring favorable government action, result or outcome." Otherwise, the Act's protection is absolute, and expressly applies irrespective of the nature of the claim being brought or the legal theory on which a claim is based.

Unprotected Categories of Speech

One possible limitation on the scope of the protection of the Act involves "unprotected speech." There are a number of well-defined and narrowly limited categories of speech, such as obscenity, child pornography, and

"true threats" which are not protected by the First Amendment because of their "constitutionally proscribable" content. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383, 112 S. Ct. 2538 (1992)

Categories of unprotected speech include: "true threats," *Watts v. United States*, 394 U.S. 705, 707-08, 9 S. Ct. 1399 (1969) (*per curiam*); "fighting words," *Chaplinski v. New Hampshire*, 315 U.S. 568, 62 S. Ct. 766 (1942); "speech inciting imminent lawless action," *Brandenburg v. Ohio*, 395 U.S. 444, 447-49, 89 S. Ct. 1827 (1969) (*per curiam*); "offers to engage in illegal transactions," *United States v. Williams*, 128 S.Ct. 1830, 1841, 128 S. Ct. 1830 (2008); "obscenity," *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607 (1973); "child pornography," *New York v. Ferber*, 458 U.S. 747, 102 S. Ct. 3348 (1982). Because the Citizen Participation Act is intended to protect a person's First Amendment rights, the Act should seemingly not apply to litigation stemming from or involving categories of speech which are not protected under the First Amendment.

Burden of Persuasion and Proof

Once the Act has been raised, Section 20(c) mandates that the motion be granted, and the plaintiff's claim be dismissed, unless the court "finds that the *responding party has produced clear and convincing evidence* that the acts of the moving party are not immunized from, or are not in furtherance of acts immunized from liability by this Act." 735 ILCS 110/20(c) (emphasis added). Section 20(c) provides: "The court *shall* grant the motion and dismiss the judicial claims unless the court finds that the responding party has produced by *clear and convincing evidence . . . .*" *Id*. (emphasis added).

Unlike other immunity statutes in Illinois such as the Local Governmental Tort Immunity Act, 745 ILCS 10/1-101 *et seq*., where the burden of persuasion and proof remains with the defendant, once the Citizen Participation Act has been raised, the burden shifts to the plaintiff to overcome the Act's protection. However, the Act's burden-shifting approach is consistent with how common-law privileges are handled in Illinois. As one appellate court noted: "Illinois courts have consistently held in tortious interference actions involving conditional privileges that the plaintiff bears the affirmative burden of pleading and proving the absence of the privilege." *King v. Levin*, 184 Ill. App. 3d 557, 561, 540 N.E.2d 492 (1st Dist. 1989) (rejecting the argument that the burden of proof was improperly shifted to plaintiff where the *Noerr-Pennington* doctrine was raised in a claim of tortious interference with prospective economic advantage). The Act's burden-shifting approach is also similar to how the defense of qualified immunity is addressed in § 1983 claims. *See, e.g., Kernats v. O'Sullivan*, 35 F.3d 1171, 1176 (7th Cir. 1994).

Additionally, Illinois courts have similarly applied a clear and convincing evidence standard when addressing *Noerr-Pennington's* "sham" exception. *See Ray Dancer, Inc., v. DMC Corp*., 230 Ill. App. 3d 40, 55, 594 N.E.2d 1344 (2nd Dist. 1992) ("A very narrow 'sham' exception to the *Noerr-Pennington* doctrine provides that the bringing of a lawsuit may be a predicate for antitrust liability when it can be shown, by *clear and convincing evidence*, that the purpose of the suit is to harm the competitor, not by the results sought, but by the very process of the litigation itself.") (emphasis added). Accordingly, the Citizen Participation Act's approach to the burden of persuasion and proof should not be viewed as extraordinary.

Expedited Hearing and Appeal Procedures, Stay of Discovery and Attorney Fees

Not only does the Citizen Participation Act broadly provide absolute immunity to the moving party, it also requires an expedited hearing once the Act's protection has been raised. The hearing and decision on any motion raising the Act "must occur within ninety days after notice is given to the respondent." 735 ILCS 110/20(a). The Act further requires that discovery be suspended pending a court's ruling on the motion, and provides that discovery can only occur with "leave of court for good reason shown, on the issue of whether the movants [sic] acts are not immunized from, or are not in furtherance of acts immunized from, liability by this Act." 735 ILCS 110/20(b).

The Act also authorizes an expedited appeal either from a trial court's order denying a motion raising the Act, or a trial court's failure to rule on that motion. 735 ILCS 110/20(a). However, in *Mund v. Brown, et al*., No. 5-08-0178, (Unpublished Order) (Ill. App. 5th Dist. August 13, 2008) the Illinois Appellate Court, on the

court's own motion, questioned the jurisdictional basis for an appeal under § 20(a) of the Act. In an order issued August 13, 2008, the appellate court questioned whether § 20(a) violates the separation of powers clause found in art. II, § 1 of the Illinois Constitution and directed the parties to file supplemental briefs on the issue. The court noted that article VI, section 6 of the Illinois Constitution authorizes the Illinois Supreme Court to provide for appeals from less than final judgments and that Supreme Court Rule 307 governs interlocutory appeals as a matter of right. The court observed that an appeal from an order denying a motion to dismiss raising the Citizen Participation Act does not fall within the ambit of Supreme Court Rule 307(a), is not otherwise subject to an appeal as a matter of right, and does not require a finding under Supreme Court Rule 304(a). As this article was heading to press, the appellate court had not yet issued its ruling on the issue. Additionally, an amendment to Supreme Court Rule 307 has been sent to the Supreme Court Rules Committee for its consideration, which if adopted, would resolve the concerns raised by the appellate court in *Mund*.

Finally, the Act contains an attorney's fees provision and specifies that a court "shall award a moving party who prevails in a motion under this Act reasonable attorneys fees and costs incurred in connection" with bringing such a motion. 735 ILCS 110/25.

Potential Application to Claims Against Governmental Officials or Employees

While the Act is primarily directed at citizens who petition, contact or lobby state or local governmental officials, the plain language of the Act is broad enough to encompass claims brought against governmental employees so long as the claim relates to an employee's participation in the affairs of government or the employee's exercise of his or her speech or associational rights. Section 15 of the Act makes its protection applicable to "any act or acts of the moving party in furtherance of the moving party's rights." Section 10 defines the term "moving party" as "any person any person on whose behalf a motion described in subsection (a) of Section 20 [735 ILCS 110/20] is filed seeking dismissal of a judicial claim." 735 ILCS 110/10. Accordingly, Section 15 protects "any person's" First Amendment rights; and, therefore, even governmental employees should be entitled to raise its protection in appropriate circumstances. Illinois courts have similarly permitted local units of government to raise the *Noerr-Pennington* doctrine. *See, e.g., Stahelin v. Forest Preserve Dist. of DuPage County*, 376 Ill. App. 3d 765, 803, 877 N.E.2d 1121 (2nd Dist. 2007), quoting *Village of Lake Barrington v. Hogan*, 272 Ill. App. 3d 225, 236, 649 N.E.2d 1366 (2nd Dist. 1995) ("This doctrine has [also] been extended to local governmental bodies to immunize them from suit.").

Conclusion

The Citizen Participation Act was clearly intended to provide an additional line of defense to those immunities and defenses heretofore available under Illinois' common law and the Local Governmental Tort Immunity Act. The Citizen Participation Act provides a powerful tool for defense counsel, and should not be overlooked when defending a claim that arguably implicates your client's speech, petition, or associational rights.

About the Author

Steven M. Puiszis is a partner in the Chicago office of *Hinshaw & Culbertson LLP*. He has a wide ranging litigation and trial practice in various state and federal courts. Steve is former President of the IDC, and currently serves as Illinois' State Representative to the Defense Research Institute. He is a graduate of Loyola University of Chicago's School of Law. His publications include Illinois Municipal Tort Liability (2d Edition) LEXIS Publishing. He also is the founder, and serves as the editor in chief of a blog on Ediscovery called Practical Ediscovery found at **www.practicalediscovery.com**.