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## Courts try to distinguish SLAPP suits

**L**awyers and legislators are fond of acronyms. It is rare that a significant bill in Congress does not have one of these mnemonics. Everyone knows of the USA Patriot Act, but few realize that it is actually the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act.

One of the more graphic legislative titles last year was for a bill aimed at preventing online piracy of intellectual property, aptly named the Enforcing and Protecting American Rights Against Sites Intent on Theft and Exploitation (E-Parasite) Act. It was not enacted, but like many parasites, it might return this year in a slightly different form.

The acronym spotlighted in today's article is SLAPP — Strategic Lawsuit Against Public Participation. The term was coined by George Pring and Penelope Canan, law professors at the University of Denver. A SLAPP is a meritless lawsuit aimed at preventing citizens from exercising their First Amendment rights. The goal of a SLAPP is to silence public critics by burdening them with the expense and distraction of defending meritless litigation — it “quells opposition by fear of large recoveries and legal costs, by diverting energy and resources from opposing the project into defending the lawsuit and by transforming the debate from a political one to a judicial one.” Jermon Braun, “Increasing SLAPP Protection,” 32 U. Cal Davis L. Rev. 965, 969-70 (1999).

SLAPPs often arise in the form of defamation lawsuits. A concerned citizen makes statements in opposition to some activity to a school board or local government agency and soon finds that the opponent has sued

for defamation. Even if the suit is meritless, it has a distinct chilling effect.

Illinois is one of 28 states that has enacted anti-SLAPP legislation. The gist of the 2007 law, entitled the Citizens Participation Act (CPA), 735 ILCS 110/5-35, is that it immunizes from liability acts in furtherance of the constitutional rights to “petition, speech, association and participation in government.” But even that immunity would be chimerical if the party had to endure years of cost and litigation to achieve it. For that reason, the CPA includes certain procedural safeguards requiring expedited judicial handling of motions and limitations on discovery. If the suit is dismissed for being a SLAPP, there is a mandatory award of attorney fees to the prevailing party.

The difficulty is in identifying when a suit is a SLAPP and when it is a legitimate claim. While the act seeks to safeguard the rights of citizens to freely participate in the process of government, it also recognizes “the rights of persons to file lawsuits for injury.” In furtherance of this policy, the Illinois Supreme Court has ruled that a suit can be dismissed as a SLAPP only if it is “solely” filed in response to acts in furtherance of a person's constitutional rights.

Where a plaintiff genuinely seeks relief for defamation, the lawsuit is not a SLAPP. *Sandholm v. Kuecker*, 962 N.E. 2d 418 (Ill. 2012). Despite the seemingly broad statutory language, the court in *Sandholm* interpreted the CPA not to create a new qualified privilege in defamation cases. “We simply do not believe that ... the legislature intended to abolish an individual's right to seek redress for defamation ... whenever the tortious acts are in furtherance of the tortfeasor's

### INSIDE IP LAW

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rights of petition, speech, association or participation in government.”

As evidenced by the *Sandholm* opinion, courts have been cautious in applying the CPA. A recent case of local interest, *Ryan v. Fox Television Stations*, 2012 WL 5239684 (Ill. App. 2012), involved an investigative report aired by Fox News Chicago. The report suggested that at least four judges from Cook County Circuit Court had been neglecting their official duties by leaving courthouses well before the end of the business day. One of the judges, Jim Ryan, immediately sued Fox News for defamation.

Fox claimed that Ryan's suit was a SLAPP and moved to dismiss under the CPA. The court found that the suit met some, but not all, of the criteria for a SLAPP and, thus, would not be dismissed. The Fox News report was clearly in furtherance of its First Amendment rights to obtain favorable government action.

There were also indications that the lawsuit was retaliatory and solely based on Fox News'

protected acts. It was filed within days of the broadcast of the initial segment of the four-part series and demanded \$28 million in damages. This robust demand prompted the court to note that “Demanding damages in the millions for alleged defamation is a classic SLAPP scenario.”

Where Fox News faltered in its motion to dismiss was in its failure to establish that Ryan's defamation claim was meritless. A SLAPP is “by definition, meritless” *Sandholm* says. The burden was on Fox News to show undisputed facts demonstrating that the claim was meritless. Yet Fox News already admitted a mistake in its broadcast when it showed a car parked in front of Ryan's house in the early afternoon. It was neither his house nor his car.

As Robin Robinson acknowledged in a mea culpa in the following night's broadcast, “Our bad. While we saw the judge leave work early, we really don't know where he went.” Fox News pointed to certain sheriff's logs showing that Ryan's courtroom was empty at 2 p.m. on certain days and asserted that its report was therefore substantially true. But the court of appeals held that this information was insufficient to establish that Ryan left work early and went home, as was reported.

“Judges work in their private chambers as well as their courtrooms and many judges serve on committees ... or are otherwise involved in the legal community. A judge's official duties do not require a constant presence in the courtroom ... or even in the courthouse.”

Since the suit was not indisputably meritless, the motion to dismiss was denied.

In short, if I might use another well-known acronym, it looks like Fox News, in its assertion that Ryan's suit was a SLAPP under the CPA, is SOL.