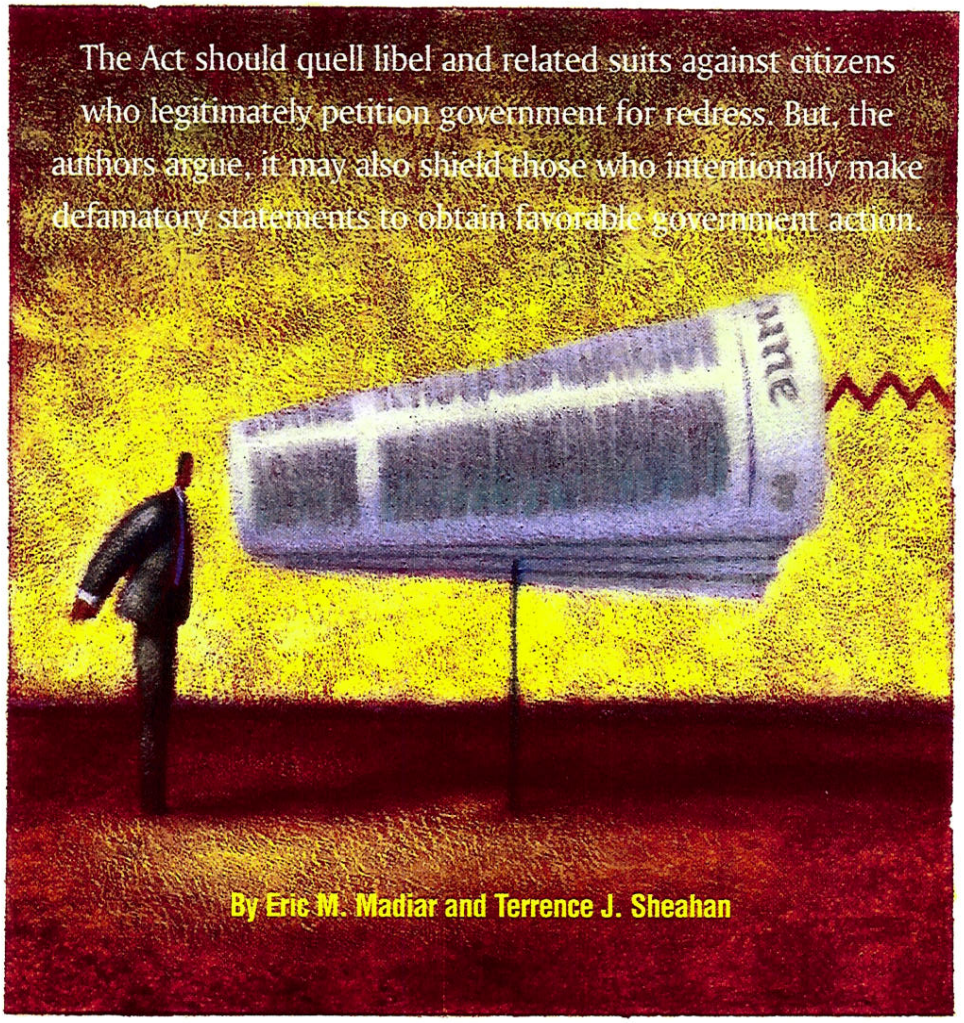

Illinois' New Anti-SLAPP Statute

In August 2007, Illinois became the 26th state to enact an Anti-SLAPP statute – the Citizen Participation Act (the "Act").[1] SLAPPs or "Strategic Lawsuits Against Public Participation" are civil actions brought to discourage citizens from exercising a constitutional right to petition, speak freely, associate freely, or otherwise participate in or communicate with government in opposition to the interests of the plaintiff.

The classic example of a SLAPP is a lawsuit brought by a developer for defamation (or a similar tort) against a citizen or community group that opposes a development project. These lawsuits seek to silence citizen participation through the threat of money damages and expense of defending against the lawsuits. The Act attempts to extinguish SLAPPs by (1) immunizing citizens from civil actions that are based on a citizen's constitutional right or acts made in furtherance of that right, and (2) establishing an expedited process to dismiss SLAPPs.

At a minimum, the Act appears to protect citizens who testify at a public meeting held by government officials, talk to the press after such a meeting, send a letter to the editor of a newspaper on an issue of public concern, or demonstrate or distribute leaflets outside of city hall. The Act's scope, though, is uncer-

1. 735 ILCS 110/1 et seq.

tain and may be broader than any other Anti-SLAPP statute in the country.[2]

Indeed, the uncertainty of the Act became a significant issue in Illinois Supreme Court Justice Robert Thomas' defamation lawsuit against the *Kane County Chronicle*.[3] Ultimately, the Act may very well make political campaigns and other petitioning activities an open season to defame not only public officials and figures but also private individuals.

The purpose of the Act

The Citizen Participation Act is the product of five years of effort by four Illinois legislators: State Senators John Cullerton and Dan Cronin and State Representatives Sara Feigenholtz and Jack Franks. The Act was also a long-sought objective of the American Civil Liberties Union of Illinois.[4]

In 2002, Senator Cullerton and Representative Feigenholtz each sponsored legislation similar to the Act, but each bill failed to advance after its initial filing.[5] In 2003, Senators Cronin and Cullerton sponsored legislation identical to the Act that unanimously passed the Senate.[6] Representative Feigenholtz sponsored the bill in the House, but it failed to advance.[7]

The Act and the previous anti-SLAPP bills were drafted in response to constituents who were victims of SLAPP suits.[8] In fact, each sponsor pointed to a specific SLAPP as the motivating factor that prompted his or her support.

For Cullerton and Feigenholtz, a community group opposed to a condominium development was sued under various negligence theories by a developer after the group successfully lobbied their alderman to "down-zone" the developer's property and thereby halt the project.[9]

For Franks, a developer sued two citizens in three separate lawsuits for defamation for their statements against the developer's 1600-home project.[10] The two citizens voiced opposition while campaigning for local office on a platform against the development.[11] Although the citizens won their campaigns and succeeded in dismissing the developer's suits, they had to establish legal defense funds and rely on neighbors to help pay their legal bills.[12]

In 2007, Cullerton, Franks, and Feigenholtz succeeded in passing the Act as Senate Bill 1434. During floor and committee debate, the legislators relayed their constituents' encounters with SLAPP suits and explained that the Act was intended to remove the chilling effect of SLAPPs on legitimate citizen participation.[13]

The Act's public policy provisions amplify that objective and sentiment by codifying four principles: (1) free and full expression of information and opinions by citizens is vital to representative democracy; (2) it is the policy of this state to encourage and safeguard that expression; (3) SLAPP suits have a chilling effect on that expression; and (4) SLAPPs should be adjudicated on an expedited basis and attorney's fees should be awarded to victims of those suits.[14]

Scope and application

The Act attempts not only to provide citizens with legal immunity from SLAPPs but to establish an expedited dismissal procedure.[15] Unlike the Act, previous bills would have merely amended the Illinois Code of Civil Procedure and

The scope of the new immunity is breathtaking based on its plain language, especially because the Act's provisions are to be "construed liberally to effectuate its purposes and intent."

2. For a comprehensive review of Anti-Slapp statutes throughout the country, visit the California Anti-Slapp Project website at http://www.casp.net/menstate.html. See also Shannon Hartzler, Note, *Protecting Informed Public Participation: Anti-SLAPP Law and the Media Defendant*, 41 Val U L Rev 1235, 1248-1270 (2007) (providing an analysis of and categorizing the Anti-SLAPP statutes of various states as "narrow," "moderate," and "broad.").

3. *Thomas v Page*, See 2006 WL 3847643.

4. See Mary Dixon and Adam Schwartz, *In Support of Senate Bill 1434 ("The Citizen Participation Act")* (June 18, 2007) (hereinafter "ACLU Memo") (memorandum written by the Illinois ACLU to Governor Rod Blagojevich detailing the Act and urging him to sign the legislation into law) (https://aclu-il.org/legislative/alerts/sb1434memo.pdf).

5. See 92nd Ill Gen Assembly, Senate Bill 1633 (sponsored by Senator John Cullerton); 92nd Illinois General Assembly, House Bill 4315 (sponsored by Sara Feigenholtz).

6. 93d Ill Gen Assembly, Senate Bill 168 (sponsored by Senators Dan Cronin, John Cullerton, and Barack Obama).

7. Id (Representative Sara Feigenholtz as House sponsor of SB 168).

8. See, e.g., February 11, 2002, Press Release from Senator John Cullerton and Representative Sara Feigenholtz (stating that House Bill 4315 and Senate Bill 1633 were introduced "in response to heightened community concerns over SLAPPs"), http://www.sarafeigenholtz.com/Press%20Releases/SLAPPpr.pdf; 93d Ill Gen Assembly, Senate Proceedings, Apr 3, 2003, at 55 (statement of Senator Dan Cronin) ("This legislation [Senate Bill 168] seeks to provide some protection to groups or individuals exercising their First Amendment right, to protect them from harassing lawsuits."); 95th Ill Gen Assembly, House Proceedings, May 31, 2007, at 1 (statement of Representative Jack Franks) ("And the reason why we're putting this Bill forward is that oftentimes folks who speak out whether they're running for office or are in office are sued by people to try to get them to shut up, to try to chill their ability to speak and its wrong and its not what we're about....[I]n my county...there were two gentlemen running for trustees who were...sued by a developer, threatened with bankruptcy...the developer's lawsuit was thrown out on three separate occasions and [Senate Bill 1434] would stop [that] type of abuse."); 95th Ill Gen Assembly, Senate Proceedings, April 20, 2007, at 15-16 (statement of Senator John Cullerton).

9. *Hanna v Park West Community Assn*, 348 Ill App 3d 1082, 868 NE2d 1097 (Table) (1st D 2004) (unpublished order under SCR 23). The Illinois Appellate Court upheld the trial court's decision that the right to petition government immunized the community group from the developer's suit. See 95th Ill Gen Assembly, Senate Proceedings, April 20, 2007 at 15-16 (statement of Senator John Cullerton) (stating that the legislation was intended to protect, for example, a "community organization [that] makes recommendations to a local alderman concerning zoning changes.").

10. See Allison Smith, *Judge throws out Tamarack lawsuit*, Northwest Herald, July 1, 2004, http://www.nwherald.com/articles/2004/07/01/local%20news/archive-194398617526.txt.

11. *Silencer Suits*, Northwest Herald, June 20, 2004, http://www.nwherald.com/articles/2004/06/20/opinion/archive-543617795067.txt.

12. *Dissent chills without law*, Northwest Herald, December 16, 2005, http://www.nwherald.com/articles/2005/12/16/opinion/archive-528485303430.txt.

13. See generally 95th Ill Gen Assembly, Senate Proceedings, Apr 20, 2007, at 15-16 (statement of Senator John Cullerton); 95th Ill Gen Assembly, House Proceedings, May 31, 2007, at 1-3 (statements of Representatives Jack Franks and Sara Feigenholtz).

14. 735 ILCS 110/5.

15. See 735 ILCS 110/15, providing legal immunity for "any act or acts of [a citizen made] in furtherance of [their] rights of petition, speech, association, or to otherwise participate in government."; and 735 ILCS 11/20, setting forth an expedited motion procedure and standards to dismiss any claim based on, relating to, or in response to such act or acts.

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created a procedural right (a special motion) to dismiss SLAPPs.[16]

That procedural right applied to SLAPPs arising from acts of free speech or petitioning government that involved an issue of public interest.[17] Put differently, the Act's forerunners afforded citizens only a procedural mechanism to defeat SLAPPs as long as the lawsuits derived from acts of free expression related to an issue of public concern.

The Act's new, conditional legal immunity sets it apart from earlier Illinois legislation and Anti-SLAPP statutes from other states.[18] Under section 15 of the Act, "any act or acts" made "in furtherance of the constitutional rights to petition, speech, association, and participation in government are immune from liability."[19] These acts are immunized "*regardless of intent or purpose,*" except in those limited situations where the acts were not "genuinely aimed at procuring favorable government action, result, or outcome."[20]

The Act immunizes false factual statements irrespective of the speaker's intent, so long as they were made as part of a genuine attempt to obtain favorable government action.

The Act casts a wide net as to those entities that qualify as the "government" for purposes of discerning if citizen conduct was "genuinely aimed at procuring favorable government action, result, or outcome."[21] The Act broadly defines the term "government" to include any "branch, department, agency, 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."[22]

Moreover, the immunity extends to any claim that is "based on, relates to, or is in response to" those acts.[23] A "claim" under the Act includes "any lawsuit, cause of action, claim, cross-claim, counterclaim, or other judicial pleading or filing alleging injury."[24] The prior legislation, in contrast, expressly excluded claims initiated by the attorney general, a state's attorney, or an attorney for a local unit of government acting in an official capacity.[25]

To trigger immunity, section 20 of the Act sets forth specific procedures and standards for adjudicating a motion to dispose of a claim. These procedures are separate from those found in the Illinois Code of Civil Procedure that address motions to dismiss and motions for summary judgment.[26]

Under section 20, once a defendant of a purported SLAPP moves to dismiss the suit, the circuit court must hold a hearing and render a decision on that motion within 90 days after the date the responding party receives notice of the motion. While the motion is pending, discovery is suspended.[27] Discovery may resume only if a party demonstrates that good cause exists and the discovery is limited to whether the moving party's "acts are not immunized from, or are not in furtherance of acts immunized from, liability by [the] Act."[28]

The circuit court must grant the motion and dismiss the claim if the complaining party fails to produce "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 [the] Act."[29] If the circuit court denies the motion, then section 20 commands an appellate court to expedite an appeal of a circuit court order denying the motion.[30] Expedited treatment is also provided to any writ to the appellate court regarding the circuit court's failure to rule on the motion.[31]

Finally, the Act requires the mandatory award of attorney's fees and costs to a party that moves and prevails under section 20 of the Act.[32] The broad language probably includes fees and costs associated with any appellate litigation relating to a motion brought under the Act.

Simply put, the scope of the new immunity is breathtaking based on its plain language, especially because the Act's provisions are to be "construed liberally to effectuate its purposes and intent."[33] The Act may well have a chilling effect on legitimate defamation actions brought by persons who are injured by others attempting to procure favorable government action.

Before assessing the Act's impact on defamation actions, it is necessary to distinguish between those statements that are and are not subject to the Act in light of existing Illinois defamation law.

Illinois defamation law

Under Illinois law, a defamation action may be brought if another person made a false statement about the plaintiff, the statement was published to a third party by the defendant with fault, and the publication of that statement was unprivileged and damaged the plaintiff.[34]

Only a factual assertion can constitute a defamatory statement.[35] The First Amendment protects statements that are substantially true and ones that cannot reasonably be interpreted as stating actual facts.[36]

The First Amendment also safeguards loose, figurative language or statements capable of innocent construction.[37] If the

16. See, for example, 92nd Ill Gen Assembly, House Bill 4315 at 1-3 (proposing to amend the Code of Civil Procedure by adding a new Section 2-615.1—Right of petition or free speech; special motion to dismiss).
17. Id at 1-2 ("The General Assembly finds and declares that it is in the public interest to encourage continued participation in *matters of public significance*"; permitting use of the special motion to dismiss for causes of action arising from any "act in furtherance of a person's right of petition or free speech under the United States Constitution or Illinois Constitution *in connection with a public issue.*") (emphasis added).
18. Anti-SLAPP statutes (cited in note 2).
19. 735 ILCS 110/15.
20. Id (emphasis added).
21. Id.
22. 735 ILCS 110/10.
23. 735 ILCS 110/15.
24. 735 ILCS 110/10.
25. Compare 92nd Ill Gen Assembly, House Bill 4315, at 3 with 735 ILCS 110/20.
26. See 735 ILCS 5/2-615; 5/2-619 and 5/2-1005
27. 735 ILCS 110/20(a).
28. 735 ILCS 110/20(b).
29. 735 ILCS 110/20(c).
30. 735 ILCS 110/20(a).
31. Id.
32. 735 ILCS 110/25.
33. 735 ILCS 110/30(b).
34. *Krasinski v United Parcel Service, Inc*, 124 Ill 2d 483, 490, 530 NE2d 468, 471 (1988) citing Restatement (Second) of Torts §558 (1977). See also 740 ILCS 145/0.01 et seq (Slander and Libel Act).
35. See *Imperial Apparel Ltd v Cosmo's Designer Direct, Inc*, 227 Ill 2d 381, 389, 882 NE2d 1011, 1017 (2008) (setting forth a three-part test to determine if a statement can reasonably be construed as stating an actual fact).
36. *Gist v Macon County Sheriff's Dept*, 284 Ill App 3d 367, 371, 671 NE2d 1154, 1157 (4th D 1996); *J. Maki Construction Co v Chicago Regional Council of Carpenters*, 379 Ill App 3d 189, 199-200, 203, 882 NE2d 1173, 1183, 1185 (2d D 2008).
37. *Imperial Apparel* at 390, 882 NE2d at 1017; *Tuite v Corbitt*, 224 Ill 2d 490, 511, 866 NE2d 114, 127 (2006) ("innocent construction rule advances the constitutional interests of free speech and free press and encourages the robust discussion of daily affairs").

First Amendment protects a statement, then, as a corollary, that statement cannot serve as the basis for a "false light," commercial disparagement or an Illinois consumer fraud claim.[38]

First Amendment protections are designed to assure "'"unfettered interchange of ideas for the bringing about of political and social changes desired by the people."'"[39] Underlying this purpose is the belief that "'the best test of truth is the power of the thought to get itself accepted in the competition of the market.'"[40]

The First Amendment also imposes different constraints on state defamation law depending on whether the plaintiff is a public official or a public or private figure or whether the speech at issue is of public concern.[41]

A public official or public figure can assert a defamation claim if the false statements were made to a third party with actual malice.[42] False statements made about such an official or figure *without actual malice* are not actionable and receive First Amendment protection.[43]

False statements negligently made about a *private figure*, though, receive no such protection and are actionable.[44] The same is true of false statements made negligently about a private figure in the context of an issue of public concern.[45]

Even if a defamatory statement is made, a speaker may be immune from liability if the statement falls within an absolute or conditional privilege recognized under Illinois law.

For example, otherwise defamatory statements made by legislators or private citizens during legislative proceedings are absolutely privileged.[46] A similar absolute privilege exists for defamatory statements made during the course of judicial or quasi-judicial proceedings, as well as actions "necessarily preliminary" to those proceedings, when the statements bear some relation to the proceedings.[47] Executive branch officials of federal, state or local governments have a broader absolute privilege and cannot be held liable for defamatory statements made within the scope of official duties.[48]

Illinois law also recognizes a *conditional privilege* for defamatory communications that occur *outside* of legislative, judicial or quasi-judicial proceedings, but are made while petitioning a government body for redress.[49] Even if the privilege applies, it will be lost if the person communicates the statement with *actual malice*.[50]

The plain language of the Citizen Participation Act appears, however, to fundamentally alter existing defamation law by affording a new, absolute privilege for any defamatory statements communicated – maliciously or otherwise – while genuinely aiming to procure favorable government action, even from the electorate.

How broad is the Act's new conditional immunity?

The central issue that courts will face is the scope of the Act's conditional immunity. The Act immunizes "any act or acts" made "in furtherance of the constitutional rights to petition, speech, association, and participation in government[.]"[51] These acts are immunized "*regardless* of intent or purpose" so long as they were "genuinely aimed at procuring favorable government action, result, or outcome."[52] In addition, courts are instructed to liberally construe the Act "to effectuate its purposes and intent."[53]

As a practical matter, the Act's scope may be reduced to a three-part test for the new immunity to apply:

- Was the moving party's speech or act constitutionally protected, either per se or as an act "in furtherance" of protected speech or action?
- Is the nonmovant's claim based on, related to, or in response to the moving party's act?
- Has the nonmoving party produced clear and convincing evidence that the acts were not genuinely aimed at procur-

38. *Imperial Apparel* at 393, 882 NE2d at 1019.

39. Id (quoting *Miller v California*, 413 US 15, 34-35 (1973), quoting *Roth v United States*, 354 US 476, 484 (1957).

40. Id at 394, 882 NE2d at 1019-20, quoting *Abrams v United States*, 250 US 616, 630 (1919) (Holmes dissenting).

41. Id.

42. Id (citations omitted).

43. Id. See *BE&K Construction Co v NLRB*, 536 US 516, 531 (2002) ("And while false statements may be unprotected for their own sake, the First Amendment requires that we protect some falsehood in order to protect *speech that matters*. An example of such...protection is the requirement that a public official seeking compensatory damages for defamation prove by clear and convincing evidence that false statements were made with knowledge or reckless disregard of their falsity.") (internal citations omitted).

44. *Troman v Wood*, 62 Ill 2d 184, 194-199, 340 NE2d 292 (1976); *Green v Rogers*, No 2-06-1055, 2008 WL 2987205 at *10 (2d D 2008).

45. *Troman* at 194-199, 340 NE2d at 296-99.

46. Ill Const Art IV, §12 (providing legislative immunity to members of the General Assembly); *Krueger v Lewis*, 359 Ill App 3d 515, 521-22, 834 NE2d 457, 464 (1st D 2005) (absolute privilege applies to citizen testimony before a legislative body); *Meyer v McKeown*, 266 Ill App 3d 324, 641 NE2d 1212 (3d D 1994) (absolute privilege only applies to legislator's statements made in the course of legislative proceedings, not those made in a newsletter sent to constituents). The absolute privilege only covers statements related to the issues before the legislative body. *Krueger* at 522, 834 NE2d at 464.

47. *Bushell v Caterpillar, Inc*, 291 Ill App 3d 559, 561-64, 683 NE2d 1286, 1287-89 (3d D 1997). While defamatory statements made in a judicial proceeding may be immune from suit, courts have the inherent power to hold a person in contempt for statements that present a "clear and present danger to the administration of justice." *D'Agostino v Lynch*, 2008 WL 527059, at *8 (1st D 2008) (opinion withdrawn 4/1/08).

48. *Meyer* at 326-27, 641 NE2d at 1214.

49. *Arlington Heights Natl Bank v Arlington Heights Fed Sav & Loan Assn*, 37 Ill 2d 546, 549-51, 229 NE2d 514, 516-18 (1967); *Myers v Levy*, 348 Ill App 3d 906, 914-20, 808 NE2d 1139, 1147-52 (2d D 2004); *Hanna v Park West Community Assn*, 348 Ill App 3d 1082, 868 NE2d 1097 (Table) 1st D 2004) (unpublished order under SCR 23). It is unclear whether the public/private figure analysis for defamatory speech extends to the conditional privilege for petitioning activities. In *Myers*, the court assumed an "actual malice" standard applied to the defamatory statements at issue because the plaintiff agreed that that standard applied. *Arlington Heights* and *Hanna* were not defamation cases.

50. *Myers* at 915, 808 NE2d at 1148.

51. 735 ILCS 110/15.

52. Id (emphasis added).

53. 735 ILCS 110/30(b).

ing favorable government action, result, or outcome?

If the answer is "yes" to the first two questions and "no" to the third, then the Act's immunity applies and the court must dismiss the claim pursuant to section 20(c).[54]

The first and last parts of the test most directly relate to and modify existing defamation law. The first part of the test addresses two acts falling within the statute's immunity: (1) acts that are themselves protected by the constitutional right to petition, speak, assemble or otherwise participate in government; and (2) acts "in furtherance of" these rights. The first set of acts that are immune already enjoy protection under common law, such as statements covered by an absolute or conditional privilege.[55]

The second set – acts "in furtherance of" – appears to protect conduct that is not protected under common law. Both the United States and Illinois Supreme Courts have made clear that intentional false factual statements or lies do not serve the ends sought by the First Amendment[56] or the Illinois Constitution's free speech and petition clauses.[57]

Section 15 of the Act plainly states, however, that "*any*" acts made "in furtherance of" one's constitutional rights to petition, speech, association, and participation in government are "immune from liability, regardless of *intent or purpose*."[58] As a result, the Act appears to sweep malicious or otherwise false statements into its protective fold.

The last part of the three-part test, though, restricts the scope of the new immunity to circumstances where the person's acts are "genuinely aimed at procuring favorable government action, result, or outcome."[59] While the Act itself does not define the intended meaning or scope of the phrase, its legislative history indicates that the phrase comes from the United States Supreme Court's decision in *City of Columbia v Omni Outdoor Advertising, Inc.*[60] The legislative history provides that courts are to determine whether acts are not "genuinely aimed at procuring favorable action, result or outcome" based on the *Omni* court's test.[61]

Under *Omni*, a person's activities petitioning government are immune from suit unless the other party can show they are a "sham."[62] Both the immunity and sham exception, the court explained, derive from the *Noerr-Pennington* doctrine developed under anti-trust law.[63] "A 'sham' situation involves a defendant whose activities are 'not genuinely aimed at procuring favorable government action' *at all*, not one 'who genuinely seeks to achieve his government result, but does so *through improper means*.'"[64]

As the Illinois Appellate Court put it, the "sham exception applies only when a defendant petitions the government with no realistic expectation of a favorable result and merely to force expense and delay on the other party."[65] An example is "the filing of a frivolous objection to a competitor's license application...."[66]

Deceitful lobbying for favorable government action, though, would not constitute a sham.[67] Indeed, the United States Supreme Court has observed that a successful effort to influence government cannot be characterized as a sham.[68] Put differently, the *Omni* court's test requires the dismissal of a claim if the person subject to suit seeks a government result, and it simply does not matter if that person had impure motives or used "improper means" to seek government action.[69]

In sum, the Act does not merely cover communications already legally protected. It also immunizes false factual statements irrespective of the speaker's intent, so long as they were made as part of a genuine attempt to obtain favorable government action.

Recast in the context of existing Illinois defamation law, the Act's new immunity elevates the current, conditional privilege for petitioning activities occurring *outside* of legislative, judicial, or quasi-judicial proceedings to that of an absolute privilege. The Act does so by immunizing malicious false statements about public figures or officials and private figures that would otherwise cause the loss of that privilege under existing law.

In concrete terms, the Act would most likely bar the type of defamation claims brought in *McDonald v Smith*[70] and *Myers v Levy*[71] where each of the defendants engaged in successful petitioning activities that included false statements purportedly made with actual malice.[72] The Act would also appear to protect a citizen who sends a letter to the editor of a newspaper, demonstrates or distributes literature outside city hall, or speaks to the press after a public meeting held by government officials.[73]

Implications for practitioners

Illinois Supreme Court Justice Robert R. Thomas' recent defamation action against a newspaper columnist and the *Kane County Chronicle* offers an example of the potential unintended impact that the Act may have on Illinois defamation law.

In *Thomas v Page*, Justice Thomas brought a defamation claim against Bill Page, a newspaper columnist, and the *Kane County Chronicle* for articles Page wrote about Thomas' supposed role in the Illinois Supreme Court's disciplinary proceedings against Meg Gorecki, the Kane County State's Attorney. In one such article, Page demanded that Thomas recuse himself from the pro-

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54. 735 ILCS 110/20(c).

55. See notes 8-10.

56. See *McDonald v Smith*, 472 US 479, 483-85 (1985) (holding that the First Amendment right to petition does not immunize "intentional and reckless falsehoods" communicated in a letter to public officials from libel actions); *St. Amant v Thompson*, 390 US 727, 732 (1968) ("Neither lies nor false communications serve the ends of the First Amendment.").

57. *Catalano v Pechous*, 83 Ill 2d 146,159, 419 NE2d 350, 356 (1980).

58. 735 ILCS 110/15 (emphasis added).

59. Id.

60. 499 US 365, 380 (1991). 95th Ill Gen Assembly, House Debates, May 31, 2007 at 1 (statement of House sponsor Jack Franks) ("And what this Bill does is it codifies the standard in a 1991 US Supreme Court case, the *City of Columbia v Omni Outdoor Advertising* when dealing with citizen participation lawsuits.").

61. Id.

62. *Omni*, 499 US at 380.

63. Id at 380-84.

64. Id (emphasis added).

65. *Stahelin v Forest Preserve Dist of DuPage County*, 376 Ill App 3d 765, 776, 877 NE2d 1121, 1132 (2d D 2007).

66. Id.

67. *New West LP v City of Joliet*, 491 F3d 717, 722 (7th Cir 2007). See also *Friends of Rockland Shelter Animals, Inc (FORSA) v Mullen*, 313 F Supp 2d 339, 343-44 (SD NY 2004) (*Noerr-Pennington* doctrine applies to lobbying activities that are unethical or result in deception); *Villanova Estates, Inc v Fieldston Property Owners Assn*, 23 AD 3d 160, 161, 803 NYS 2d 521, 522 (1st Dept 2005) (doctrine covers knowingly false statements). But see *Myers* at 917-18, 808 NE2d at 1150 (*Noerr-Pennington* doctrine does not cover defamatory statements made with actual malice during government petitioning activities); *Clark Consulting, Inc v Financial Solutions Partners, LLC*, No 05 CV 06296, 2005 WL 3097892 at *2-*3 & FN34 (SD NY 2005); *J&J Construction Co v Bricklayers and Allied Craftsmen, Local 1*, 468 Mich 722, 752-54, 664 NW2d 728, 752-754 (Sup Ct 2003); *Sturgeon v Retherford Publications, Inc*, 987 P2d 1218, 1225-26 (Okla App Div 1999). See also David A. Elder, *Defamation: A Lawyers Guide* § 4:6 (West 2008) (collecting cases regarding scope of the *Noerr-Pennington* doctrine in the defamation context).

68. *Professional Real Estate Investors, Inc v Columbia Picture Industries, Inc*, 508 US 49, 58 (1993).

69. George W. Pring & Penelope Canan, *SLAPPS: Getting Sued For Speaking Out* 27 (Temple Univ Press, Philadelphia 1996).

70. *McDonald* (cited in note 56).

71. *Myers* (cited in note 49).

72. *People v Hickman*, 163 Ill 2d 250, 262, 644 NE2d 1147, 1153 (1994) ("Where statutes are enacted after judicial opinions are published, it must be presumed that the legislature acted with knowledge of the prevailing case law."). See ACLU Memo (cited in note 4) at 3-4 (stating to Governor Blagojevich that the Act would overrule the Illinois Appellate Court's decision in *Myers*).

73. See ACLU Memo (cited in note 4) at 5.

ceedings because, Page wrote, Thomas had engaged in improper conduct and was biased against Gorecki.

In November 2006, after a lengthy and high-profile trial, a jury found in favor of Thomas and ordered the columnist and newspaper to pay $7 million in damages.[74] The trial court later reduced the award to $4 million in March 2007 after hearing Page's post-trial motion.[75]

In September 2007 – a month after the Act became law – Page and the newspaper filed a petition for relief from judgment under 735 ILCS 5/2-1401, asking the court to void the verdict based on the Act's new immunity.[76] The defendants argued that the Act immunized them from Thomas' claims even though it took effect after the final judgment.[77] The defendants claimed that the Act is procedural in nature and should be applied retroactively in that case.[78] The court never ruled on the petition because Thomas agreed to accept a $3 million settlement.

While it is unclear whether the Act would have immunized Page from Thomas' suit, one thing is clear: we should expect widespread use of the Act to defend against defamation claims. Both individuals and the media are likely to invoke the immunity under the Act.

In fact, newspaper columnists, like Page, may routinely invoke this new immunity because they can simply argue that their publications' readership is the "electorate" and that the goal of a particular article – which contains defamatory statements – is to "procure favorable government action" on any given topic. Illinois courts are sure to encounter creative interpretations of the scope of the Act's immunity.

In sum, the Act may very well quell defamation and related SLAPP suits against citizens who legitimately petition government for redress. But it may also have the unintended effect of shielding those who intentionally make defamatory statements for the purpose of obtaining favorable government action. It remains to be seen how broadly Illinois courts will construe the Act's new conditional immunity.

In the meantime, practitioners representing developers and other business clients involved in activities that arouse protest must be extremely cautious when recommending litigation as a means to blunt such opposition. As is noted above, the Act casts a wide net over activities that receive immunity and awards attorneys fees and costs to those protected by the Act.

For their part, lawyers representing citizens and citizens groups seeking government redress on an issue of public concern should advise their clients to frame any statements they make – whether in support or opposition – as genuine attempts to obtain favorable government action. By so doing, activist clients will secure maximum protection under the Act. ■

74. Russell Working, *Paper Settles Defamation Suit; Kane Newspaper To Publish Apology*, Chi Trib, Metro Section, Oct 12, 2007, at 1.

75. Id.

76. Defendants' Petition For Relief From Judgment Pursuant to 5/2-1401, No 04 LK 013 (Cir Ct Kane County) at 7-8.

77. Brief In Support of Defendants' Petition For Relief From Judgment Pursuant to 5/2-1401, No 04 LK 013 (Cir Ct Kane County) at 9-11.

78. Id.

Circuit court cases under the Citizen Participation Act

As of presstime, two circuit courts – one in Kane the other in Cook County – have issued written opinions interpreting the Act.

Scheidler v Trombley. In the Kane County case, *Scheidler v Trombley*, No 07 L 513 (Cir Ct Kane County, Sept 2, 2008), the circuit court dismissed a defamation suit brought by a pro-life group against Planned Parenthood for alleged false statements that Planned Parenthood made in connection with obtaining a permit to open a facility in the City of Aurora. Planned Parenthood communicated the alleged defamatory statements in a letter to city officials who were considering Planned Parenthood's permit request and in an advertisement directed at the electorate to gain public support.

The *Scheidler* order is available at http://familiesagainstplannedparenthood.org/docs/2008/Libel%20Decision.pdf.

Shoreline Towers. The Cook County case, *Shoreline Towers Condominium Assn v Gassman*, No 07 CH 06273 (Cir Ct Cook County, Mar. 28, 2008), involved a 10-count complaint brought by a condominium association and its president against a female resident for, among other things, her alleged defamatory statements.

The case largely stemmed from the resident's desire to display a mezuzah on her doorway. At the time, the association's rules barred religious displays (the association ultimately permitted the display).

The circuit court dismissed six of the counts against the resident under the Act, but allowed the remaining four counts to stand because the defendant's alleged defamatory statement and other behavior were not "valid attempts to petition the government."

The court issued a later order further explaining its decision. *Shoreline Towers Condominium Assn v Gassman*, No CH 06273 (Cir Ct Cook County, Aug 19, 2008). The plaintiff has appealed the circuit court's decision, while the defendant has pending motions for an order to appeal the remaining counts under Supreme Court Rule 308 and for attorney's fees.

Other cases. The Act has also been raised as a defense in the now-settled defamation suit brought by Illinois Supreme Court Justice Robert Thomas against Bill Page, a newspaper columnist, and the *Kane County Chronicle* (discussed on pages 624-625), as well as in several other cases. See, for example, *Wright Development Group, LLC v Walsh*, No CH 07 L 10487 (Cir Ct Cook County) (defamation action against individual who criticized developer's work performance at public forum convened by Chicago alderman); *Jaeger v Okon*, No 07 L 004940 (Cir Ct Cook County) (now settled; defamation and civil conspiracy action against two individuals who organized and voiced opposition to a developer's request for zoning approval to build a seven-story condominium building); *Consociate, Inc v Daniel*, No 07 L 68 (Cir Ct Macon County) (defamation action against individual for purported false statements on an Internet blog and letter to government officials).