

Illinois Citizen Participation Act-Stealth Legislation Intended to Give the Media Absolute Immunity in the Courtroom

Whitepaper by R. Tamara de Silva

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A SLAPP, or “strategic lawsuit against public participation,” is a little known but potential threat to the First Amendment because they are lawsuits brought by companies, private parties and sometimes the government, not to win on the merits, but to silence their critics by hailing them into court. Congress is even considering federal anti-SLAPP legislation.¹

The Illinois Citizen Participation Act² (“ILCPA”) is ostensibly an anti-SLAPP legislation. Remember, SLAPP suits are bad because of their potential to prevent citizens from speaking out about affairs that concern them for the fear of being sued by entities and individuals with the economic resources to silence them by taking them to court and compelling them to defend themselves whether or not they have the resources to do so. It has been argued that a consequence of SLAPP suits are to ensure that free speech would not be free at all, rather the privilege of speaking freely would be reserved for the very best heeled.

Unfortunately, the ILCPA is an example of a solution being far worse than the problem, or in this case, SLAPP suits. Either legislators are not reading Citizen Participation Acts carefully and stopping at the title, disguised as a good government measures designed to help citizens exercise their free speech, or they are being influenced by the campaign contributions of media titans and their formidable lobbies. It is

¹ The Citizen Participation Act (H.R. 4364) Apr 26, 2010: Referred to the Subcommittee on Courts and Competition Policy.

² 735 ILCS 110/1 et. seq

inarguable that legislatures at the state or Federal level construct budgets behind closed doors, without their constituents' input or feedback and in the process, a massive number of stealth legislation is pushed into law via strike-everything amendments or slipped between budget reconciliation bills, and bad bills are forced into law, despite public opposition. Or perhaps, the Public is unaware of all the laws its elected representatives pass and their representatives may not, as a practical matter, be reading all the bills, often having just hours or minutes to skim a bill before voting on it in committee-where it is one of hundreds or thousands. There is a strong argument that the old adage, "there oughta be a law" is false.

Any legislation designed to have a chilling affect on free speech would conceivably be an assault on the First Amendment. The Illinois Citizen Participation Act is disguised as a measure to protect the Public's right to free and open debate, yet it has the very opposite effect.

ILCPA is supported by well-heeled news groups through the Illinois Press Association-its principal backer. Media groups support legislation like ILCPA in many states because it's principal use has been to give the media absolute immunity from suit in state and Federal Court, and keep private citizens from ever suing the media or other corporations by imposing the threat of hefty attorney fees should they lose.

Typically, when the media is sued, it has legions of defense lawyers from large law firms that rise to the defense of their clients. The media conglomerates can outspend almost any private party in any litigation. The David versus Goliath nature of suing the media has the effect of keeping most potential litigants out of the courtroom because they simply cannot afford to sue them.

This is where the ILCPA comes in with a provision that ensures that no one even bothers to initiate a suit against the media. The ILCPA holds a very special clause, like the Sword of Damocles over a private litigant when it states that the courts, “shall award a moving party who prevails under the Act reasonable attorneys fees and costs incurred in connection.”³ The threat of having to pay for the legal fees of a dozen or more lawyers from a large firm, if one loses, is an effective deterrent and it is now the law in Illinois. Not only can the media outspend virtually any private litigant, it can now collect attorney fees from anyone that dares take them to court.

As if compelling the payment of enormous legal fees (ironically, mimicking the *raison d’être* of SLAPP suits) is not enough, the ILCPA goes much further. The ILCPA unbelievably gives the media absolute immunity when it is sued in court. The ILCPA applies to any “claim”⁴ in any type of judicial proceeding wherein the moving party (the Media, since the ILCPA is most widely used by the Media) seeks to exercise their First Amendment rights.⁵ Any speech or action in furtherance of the “moving party’s rights to petition, speech, association and participation in government are ***immune from liability***, regardless of intent or purpose.”⁶

Granting the Media absolute immunity is a breathtakingly unfair move to protect a single industry by chilling the speech or protests of private citizens not only by effectively pricing them out of the courtroom, but by ensuring that in giving the Media immunity-they cannot prevail. This Act could indefensibly and effectively prohibit

³ 735 ILCS 110/25

⁴ The “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.” See 735 ILCS 110/10.

⁵ 735 ILCS 110/15

⁶ *Id.* (emphasis added).

defamation and libel suits against the media by any private party. It is currently most used and invoked by the Media to do just that. Yet, there are few, if any, checks and balances on the media, as it is largely self-regulating and self-laudatory industry, outside of law suits. Without the threat of libel and defamation suits, the Media would at once be protected under the First Amendment's freedom of press doctrines and its exercise of this privileged position would be absolute. ILCPA begs the question of why the Media needs protection beyond the First Amendment's protections of the press.

The ILCPA was purposefully designed to be used as a media shield because its definition of the term "moving party" as "any person on whose behalf a motion is ...filed seeking dismissal of a judicial claim,"⁷ includes anyone. The ILCPA defines a "person" to mean any, "individual, corporation, association, or organization, partnership, 2 or more persons having a joint or common interest, or other legal entity."⁸

The ILCPA is unconstitutional on several basis -a discussion of which goes well beyond the scope of this paper. Briefly, the ILCPA in providing the media with absolute immunity, goes beyond by state legislative fiat, the standards for defamation and libel imposed by the United States Supreme Court in New York Times v. Sullivan.⁹ In NYT v. Sullivan, the Supreme Court established that actual malice must be established before press reports about public officials or public figures can be considered to be defamation and libel-at the time, this permitted free reporting of the civil rights campaigns in the southern United States.

Furthermore, in adopting the ILCPA, the state legislature is possibly violating the separation of powers clause of the Illinois Constitution by telling the judiciary what its

⁷ 735 ILCS 110/10

⁸ Id.

⁹ 376 U.S. 254 (1964)

procedures must be, as opposed to having the Supreme Court of Illinois do so. For example, the ILCPA states that once it has been raised in a motion, an expedited hearing and decision on the motion, “must occur within ninety (90) days after the notice of the motion is given to the respondent.”¹⁰ The ILCPA also imposes special rules suspending discovery and states that the media cannot be held to answer discovery requests without, “leave of court for good reason shown, on the issue of whether the movants acts are not immunized from, or not in furtherance of acts immunized from, liability by this Act.”¹¹

The ILCPA is routinely invoked as a get out of jail card by the media and a blanket immunity against wholly irresponsible, “journalism.” Recently in the case Ryan v. Fox Television Stations, Inc., media defendants Fox News and the Better Government Association or BGA, ran an allegedly “investigative” tabloid piece on Circuit Court Judge James Ryan, eagerly reporting that Judge Ryan was at home on a weekday afternoon. The sensationalized piece showed a car in the driveway of a house, claiming that the Judge was at home when he should have been working. The problem was it was not his car and not even his home. While a reporter later apologized for the mistake, saying simply, “our bad,” the damage to Judge Ryan’s reputation and name was already done. A reputation that takes a lifetime to build can be eviscerated in seconds by this type of cheap “journalism.” The media defendants predictably invoked the ILCPA fully expecting that the case would be dismissed-their use of the ILCPA was interestingly enough, unsuccessful.¹²

The ILCPA must be amended at a minimum to conform to its stated legislative purpose, that is to protect the rights of citizens to speak freely about matters that affect

¹⁰ 735 ILCS 110/20(a)

¹¹ 735 ILCS 110/20(b)

¹² 2010 WL 4626003

their government and their interests. It is unconscionable that this purpose be turned on its head and that the ILCPA be used to grant the media absolute immunity from National Inquirer-esq news stories, thinly veiled as “investigative journalism,” while preventing private citizens from going to court by the imposition of massive legal fees. Having this Act slip into Illinois law by stealth under the rubric of good governance legislation is another matter entirely.©

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