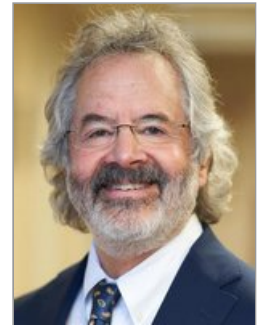


III. Case Sheds Light On Cross-State Anti-SLAPP Conflicts

By **Phillip Zisook** (January 15, 2021, 4:31 PM EST)

Illinois' Citizen Participation Act, or ICPA, was enacted to protect against the filing of strategic lawsuits against public participation, or SLAPPs. A SLAPP is a case filed in retaliation for the defendant's exercise of protected speech.

Most states have enacted anti-SLAPP statutes, to protect speech rights and provide an expedited process for the dismissal of SLAPPs with awards of attorney fees and costs to prevailing movants. Some states have broad anti-SLAPP statutes, whereas many are more restricted in scope. California, for example, has a broad anti-SLAPP law which protects speech on public issues. [1]



Phillip Zisook

In Illinois, the scope of the ICPA is more narrow, and protects speech aimed at procuring governmental relief. The recent decision of the Illinois Appellate Court, First District, in *Basile v. Prometheus Global Media LLC*, [2] demonstrates that unique issues arise when parties from different states invoke anti-SLAPP statutes in the course of litigation.

Although the decision is unpublished, the Nov. 24, 2020, amendments to Illinois Supreme Court Rule 23 permit the citation of unpublished decisions as persuasive authority after Jan. 1 of this year. As a result, *Basile* is a case to be aware of, as it addresses defamation, SLAPPs, conflict of laws and appellate jurisdiction issues that may arise in such cases.

The case is particularly instructive in illustrating the limited scope of an Illinois Supreme Court Rule 306(a) interlocutory appeal. In *Basile*, the court granted the defendant's petition for leave to appeal pursuant to Rule 306(a), but held on the merits that because the petition did not come within the limited purview of the rule, the court lacked jurisdiction to hear the case.

The decision also invites consideration of unique conflict of laws issues that necessarily arise in anti-SLAPP cases. If you've ever litigated, or may litigate, a SLAPP issue — or are considering a Rule 306 permissive interlocutory appeal on any issue — you should be aware of this case.

Overview of the ICPA

The ICPA was enacted to prevent the chilling effect that SLAPPs have on protected speech. As the court found in *Ryan v. Fox Television Stations Inc.*: [3]

A SLAPP is a meritless lawsuit that is used to retaliate against a defendant for attempting to participate in government by exercising some first amendment right such as the right to free speech or the right to petition. (citation omitted). Plaintiffs in SLAPP suits do not intend to win but rather to chill a defendant's speech or protest activity and discourage opposition by others through delay, expense, and distraction. ...While the case is being litigated, in the courts, however, defendants are forced to expend funds on litigation costs and attorney fees and may be discouraged from continuing their protest activities. [4]

To prevail on a SLAPP motion under the ICPA, the moving party must show that the plaintiff's lawsuit is meritless — that is, that plaintiff is unable to prove a prima facie element of the case.[5] One must also show that the case was filed in retaliation for the exercise of rights protected by the ICPA.

If these prongs are met, the court "shall grant the motion and dismiss the judicial claim 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 the Act." [6]

Underlying Facts and Procedural History in Basile

Nicole Basile's name appeared in a Hollywood Reporter article titled "SONY HACK: Studio Security Points to Inside Job." The article discussed a cyberattack in which anonymous hackers obtained and leaked confidential Sony Pictures Entertainment Inc. information.

The article reported that someone using the name Nicole Basile had sent emails to journalists directing them to stolen Sony files posted on a website. It also stated that Basile had worked as an accountant for Sony and could not be reached for comment. The article opined the hacker was likely a "disgruntled employee."

Basile sued for defamation and false light invasion of privacy in the U.S. District Court for the Northern District of Illinois, alleging that the article falsely depicted her as responsible for the cyberattack. The court dismissed the complaint, finding that the article did not accuse Basile of criminal activity, because it stated that the identity of the perpetrators was unknown.

Although Basile's name was used in an email reported in the article, Basile was not accused of sending the email. Thus, the court found that the article was reasonably capable of an innocent construction as to Basile.[7] On appeal, the U.S. Court of Appeals for the Seventh Circuit found that the district court lacked diversity jurisdiction, and remanded the case to the district court with instructions to dismiss the case.

Prometheus' SLAPP Motion Based Upon the California Anti-SLAPP Statute

Basile refiled her lawsuit in the Circuit Court of Cook County, and the defendant moved to dismiss, based, inter alia, upon the innocent construction doctrine.[8] The motion was denied. The defendant then filed a motion pursuant to Section 2-619, alleging that California's anti-SLAPP statute warranted dismissal of the lawsuit.[9]

The plaintiff argued that the ICPA should apply, and that the California statute was merely procedural.[10] The court declined to determine the conflicts issue, finding that the defendant could not prevail under either statute.[11]

It found that the ICPA did not apply, because the defendant had not sought governmental relief or otherwise attempted to participate in government. It also found that the California anti-SLAPP act did not apply because Basile established a prima facie case of defamation and a reasonable likelihood of success on the merits.[12]

The conflict between the district court's finding — that, under Illinois law, the statements alleged were reasonably capable of an innocent construction, and did not attribute criminal conduct to Basile — and the circuit court's subsequent finding — that the plaintiff established a prima facie case, and had a reasonable probability of success on the merits — is not addressed in the appellate court's decision.

However, under Illinois law, if a statement claimed to be defamatory per se is reasonably capable of an innocent construction, the lawsuit could be found to be a meritless SLAPP.[13]

Prometheus' Petition for Leave to Appeal Pursuant to Illinois Supreme Court Rule 306

The appellate court granted the defendant's petition for an interlocutory appeal, pursuant to Illinois Supreme Court Rule 306(a)(9). However, it held that it lacked jurisdiction to grant any relief.

Significantly, Rule 306 grants the right to litigants in specifically limited instances to petition for leave to appeal on an interlocutory basis. For example, Rule 306(a)(9) expressly grants the right to seek leave to appeal based upon the denial of a motion to dismiss brought under the ICPA.

However, the rule is silent regarding motions premised upon other states' anti-SLAPP laws. The court thus held:

The circuit court's choice-of-law analysis in no way transformed the defendant's motion into one filed "under the Citizen Participation Act" for purposes of Rule 306(a)(9). As such, the court's ruling clearly falls outside the ambit of the rule, and we lack jurisdiction to review it.[14]

Conflicts of Law Analysis

Had the circuit court performed a conflicts of law analysis, the California anti-SLAPP statute would likely have been applied. Although the place of the plaintiff's injury determines the law of defamation that will be applied to the case,[15] an exception exists in the context of a SLAPP motion.

As the U.S. District Court for the Northern District of Illinois said in *Chi v. Loyola University Medical Center* in 2011, in such circumstances, "the place where the allegedly tortious speech took place and the domicile of the speaker are central to the choice of law analysis regarding SLAPP issues." [16] The *Chi* court explained thusly:

The purpose behind an anti-SLAPP law is to encourage the exercise of free speech — indeed, Illinois's stated policy in enacting the ICPA was to "encourage and safeguard with great diligence" the "constitutional rights of citizens and organizations to be involved and participate freely in the process of government." 735 ILCS 110/5. In light of this policy goal, the place where the allegedly tortious speech took place and the domicile of the speaker are central to the choice-of-law analysis on this issue.

The court thus found that in a choice-of-law context, "the threshold question [of defamation] and the defenses are different issues and call for different analyses." [17]

Thus, in *Basile*, the circuit court could have applied California law to the SLAPP issue. This may have led to a different result in the case, had the district court's innocent construction analysis been considered.

Basile is a useful primer on issues that must be considered when litigating SLAPP issues between citizens of different states. It perhaps is an even more useful primer concerning the limited scope of Illinois Supreme Court Rule 306.

Phillip J. Zisook is of counsel at Schoenberg Finkel Beederman Bell Glazer LLC.

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[1] Cal. Proc. Code ¶425.61(b)(1).

[2] *Basile v. Prometheus Global Media LLC* , 2020 IL App (1st) 190602-U.

[3] *Ryan v. Fox Television Stations Inc.* , 2012 IL App (1st) 120005.

[4] *Id.* at ¶ 12, citing *Sandholm v. Kuecker* , 2012 IL 111443, ¶¶ 33-34.

[5] *Sandholm* at ¶ 53.

[6] 735 ILCS 110/20(c).

[7] 2020 IL App (1st) 190602-U at ¶ 13.

[8] Id. at ¶ 17.

[9] Id. at ¶ 20.

[10] Id. at ¶ 23.

[11] Id. at ¶ 24.

[12] Id.

[13] See [Goral v. Kulys](#), 2014 IL App (1st) 133236 at ¶ 38 (lawsuit was meritless and "solely based" on or related to the defendants' exercise of protected rights under the ICPA where the statements alleged to be defamatory were reasonably capable of innocent constructions).

[14] Id. at ¶30.

[15] [Velle Transcendental Research Ass'n Inc. v. Esquire Inc.](#), 41 Ill. App. 3d 799, 802 (1st Dist. 1976) (the state with the most significant relationship is usually where the person allegedly defamed was domiciled at the time of the injury).

[16] [Chi v. Loyola Univ. Med. Ctr.](#), 787 F. Supp. 2d 797, 803 (N.D. Ill. 2011).

[17] Chi at 803, citing [Vantassell-Matin v. Nelson](#), 741F. Supp. 698, 704 (N.D. Ill.1990).