Comment

Striking Back at SLAPPs

California has set an example that other states should follow

By RICHARD ZITRIN
and CAROL M. LANGFORD

The lead story the other week in *The National Law Journal* ("Pushing the SLAPP Envelope," April 19) featured attacks on California's broad anti-SLAPP legislation and a case-by-case analysis of how California courts have engaged in a "dramatic" expansion of their interpretation of the state's anti-SLAPP statute.

So-called SLAPPs — Strategic Lawsuits Against Public Participation — are designed to intimidate people from seeking their day in court, requesting relief from a government agency or simply protesting and speaking out publicly about their concerns. In those few states like California with strong anti-SLAPP laws, SLAPP victims can bring a motion early in the case, before expenses go through the roof, to force the "SLAPPer" to present evidence that it has a reasonable chance to win.

The acronym was invented by Denver professors Penelope Canan and George Pring in 1988. It originally referred to political participation, but soon came to mean all public participation, including free speech. In fact, Canan and Pring's 1996 book is called *SLAPPs: Getting Sued for Speaking Out*. The California statute specifically refers to an individual's free speech rights.

A LAW FOR LITTLE GUYS

"The law was meant to protect the little guy, and the courts are applying it willy-nilly," complained Ronald Zumbrun, former executive director of the conservative Pacific Legal Foundation, to *The National Law Journal*'s Gail Diane Cox. It's true that California's law offers broader protections against SLAPPs than any other state. But instead of attacking it, we'd be better off pushing for legislation in the 36 to 38 states that offer no protection at all against SLAPPs.

We need anti-SLAPP legislation. Without it, citizens like Nancy Hsu Fleming would be unable to speak out safely or petition their government for redress. Fleming wrote the Rhode Island Department of Environmental Management that its new proposed groundwater guidelines would allow a private landfill near her home to continue to contaminate the water. The landfill company insisted that Fleming retract her letter. When she refused, she was sued for defamation and interference with business.

But Fleming, a naturalized citizen born in Taiwan, remembered her citizenship studies in American history. She wrote back to the landfill's lawyers, citing her constitutional right under the First Amendment to petition the government: "In this instance, I am petitioning state government to close and clean up your client's dump." The trial court refused to dismiss the case against her, so Fleming appealed to the Rhode Island Supreme Court and got her dismissal. But some claim that states like California, by broadly protecting a wide variety of speech, have simply gone too far. Surprisingly, Zumbrun, a Sacramento attorney, cites *Church of Scientology of California v. Wollersheim*, 42 Cal.App. 4th 628, as the main source of trouble in California. But if there was ever a SLAPP suit, Wollersheim is it.

RICH PEDRONCELLI

IN DISSENT: Pacific Legal Foundation's Ronald Zumbrun claims that, thanks to "willy-nilly" interpretation by the courts, anti-SLAPP laws have overshot their original goal of protecting "the little guy."

LONG ROAD TO VINDICATION

The case began when Wollersheim, a former member of the Church of Scientology, sued the church in 1980. He claimed that the church inflicted severe emotional distress on him through its "auditing" procedures and other practices. His five-month trial in 1986 resulted in a verdict of $5 million in compensatory damages and $25

See ZITRIN page 6

Richard Zitrin and **Carol M. Langford** are in private practice in the San Francisco Bay Area and both teach legal ethics at the University of San Francisco and Hastings College of the Law. Their book, *The Moral Compass of the American Lawyer*, will be published by Ballantine in May. This article originally appeared on Law News Network (www.lawnewsnetwork.com), American Lawyer Media's online presence.

ZITRIN: SLAPPs

Continued from page 5

million in punitive damages, which was reduced by a California appeals court to a total of $2.5 million. But Wollersheim didn't finally prevail until 1994, 14 years after he had begun — after trial, appeal, reversal by the United States Supreme Court, reinstatement of the judgment by a second appeals court, the granting and subsequent vacating of a hearing by the California Supreme Court and, ultimately, the denial of a second petition for *certiorari*.

Wollersheim also survived a RICO action (brought by the church against him, his lawyers and his expert witnesses while his case was pending) plus a federal civil rights action filed against the trial judge in his case and the church's motions to disqualify both the entire Los Angeles County Superior Court and the entire United States District Court for the Central District of California. In a ruling described by the California appeals court as "unprecedented," the Ninth Circuit U.S. Court of Appeals struck the church's federal recusal motion from its records.

In 1993, while the church's final appeal was still pending in the state Supreme Court, the church sued Wollersheim in a new action, seeking to set aside the original judgment based on what it described as "newly discovered evidence." The Court of Appeal ruled that the suit clearly fell within the anti-SLAPP statute: Given the entire litigation history between the parties, the church had acted "in retaliation . . . to punish [Wollersheim] economically . . . and to obliterate the value of [his] victories. . . ."

But that didn't end the court's inquiry. Although the burden shifted to the church to prove the "probability" it would prevail in its case, the court held, consistent with other California cases, that the church only had to show it had a *prima facie* case, the lowest possible standard. Only when it found that the church had not met this minimal burden did the court find for Wollersheim. This low threshold of proof protects those who file suit by ensuring that only frivolous claims — ones that are clearly without merit — are dismissed.

ADDING TEETH TO ANTI-SLAPP

Can anti-SLAPP legislation be abused? Of course it can. Some lawyers complain that Goliaths as well as Davids can successfully cry "SLAPP," to the point that what was supposed to be a shield has turned into a sword. But the real problem is abuse of SLAPP suits, not anti-SLAPP protections. Those lawyers — and clients — with deep pockets and large litigation war chests will always look for ways to beat the system unless the penalties for their conduct are sufficiently severe to convince them that they are risking more than they can gain.

For instance, current ethics rules do little to discipline lawyers for filing a SLAPP. Adding teeth to anti-SLAPP laws through significant disciplinary sanctions for lawyers guilty of filing them would be a step in the right direction.

But anti-SLAPP laws are already having a positive effect. As Cox's article reported, some attorneys have seen the chilling effect that anti-SLAPP legislation has had on their own powerful clients who would like to sue but are afraid they'll be considered SLAPPers. Far from denying access, this chilling effect is exactly what anti-SLAPP laws had in mind: Meritorious cases only need apply. ■