

N.J. Supreme Court Protects SLAPPers

By Frank Askin and John Leubsdorf

More than half the states have reined in SLAPP suits by legislation or court decisions. In New Jersey, however, our Supreme Court has just placed a protective blanket over such actions.

A SLAPP (Strategic Litigation Against Public Participation) lawsuit is a standard tactic used by American businesses to muzzle critics of corporate actions. The plaintiff doesn't really seek or anticipate a legal judgment. The aim is to coerce opponents to abandon their efforts in order to avoid the expense and travail of defending a suit. The plaintiff will be glad to drop the suit in exchange for a vow of silence.

Which brings us to *Lobiondo v. Schwartz*, decided on May 14 by our shockingly unanimous high Court. This protracted case was filed by the developer of a Sea Bright marina against a nearby homeowner who opposed the plaintiff's application to open a restaurant. The defendant had distributed flyers and otherwise sought to mobilize opposition before the planning board.

The developer charged the defendant with defamation, interference with economic advantage and intentional infliction of emotional distress — the typical claims in a SLAPP. However, this

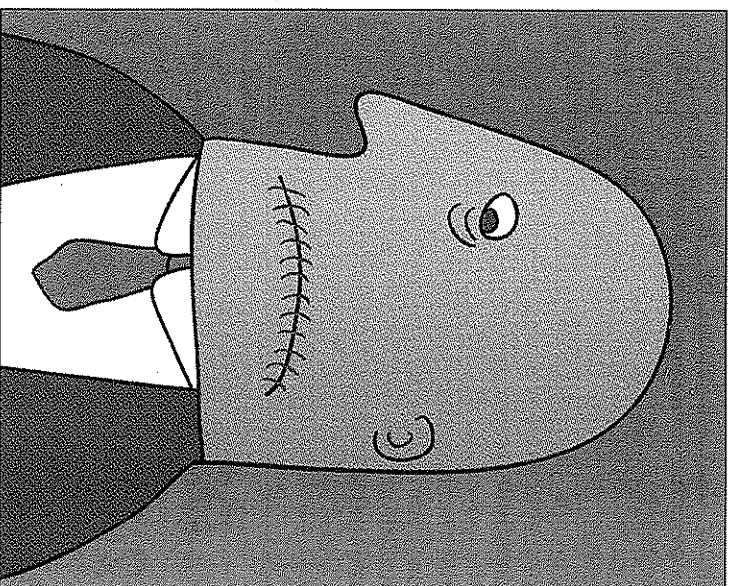
Askin is professor of law and Robert Knowlton Scholar at Rutgers Law School-Newark and founding director of the school's Constitutional Litigation Clinic. He helped argue the first Appellate Division appeal of the Lobiondo case. Leubsdorf is professor of law and Frederick Lacey Scholar at the law school, and was associate reporter for the Restatement of Law Governing Lawyers.

defendant refused to back down, filing a counterclaim alleging that the plaintiff's suit was a SLAPP. She sought damages for violation of her rights of free speech and petition from the developer, and later also from his lawyer. The Appellate Division ultimately upheld the counterclaim against the developer.

On review, the Supreme Court recognized the theoretical availability of a claim for malicious use of process as a rejoinder to SLAPPs. That claim, the civil counterpart of the action for malicious criminal prosecution, has five elements. The claimant must show that the defendant sued him, that it acted with malice, that it lacked probable cause, that the claimant prevailed and that the suit inflicted unusual harm such as an interference with liberty. Like the Appellate Division, the Supreme Court held that this last requirement can be met by showing that the previous suit interfered with the rights to free speech and to petition the government — though just what must be proved remains unclear. The Court also recognized that lawyers as well as litigants may be liable for malicious use of process.

Unfortunately, *Lobiondo* leaves in place two barriers that prevent recovery against clients or lawyers who bring SLAPPs except in bizarre circumstances.

First, if a lawyer, having been given the facts known to the SLAPPER, finds probable cause for the suit, the client is totally immune from liability no matter how poor that advice was, how weak the client's case was, however



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much the client's motive was to muzzle opposition and whatever damage the suit inflicted. The Court held that immunity is not impaired by the client's failure to disclose his improper motives to the lawyer rendering the opinion. Second, the lawyer is not liable for malicious use of process unless she had an improper motive for assisting the client — and wishing to be paid for bringing the suit is not an improper motive.

Clients who bring SLAPPs are therefore home free if they make disclosure to their lawyers, who then opine that they have probable cause to sue. Lawyers willing to bring such suits will also be willing to state that they have probable cause. The new remedy against SLAPPs is illusory.

When SLAPPs are not in question, it makes sense to shield plaintiffs and their lawyers. Bringing suits is often socially desirable even when the suits turn out to lack merit. No one should want to discourage law reform suits, for example.

SLAPPs are different. Far from exemplifying the right to seek redress and reform, they repress it by subjecting protesters to the woes of litigation. They help those with resources to drive those without them out of the public forum.

The Supreme Court might have construed the law of malicious abuse of process to recognize a more effective remedy. The Restatement (Second) of Torts makes the advice of counsel a complete defense only if "sought in good faith." The Court might have used this, as the Appellate Division apparently did, to exclude those whose purpose is not to prevail on the merits but to silence free speech. The Court, however, did not mention this issue.

Because the Court found no effective remedy for SLAPPs, the Legislature should now follow the example of the many states with statutory remedies. Some of these regulate procedure, establishing expedited dismissal procedures for certain claims and sometimes allowing attorney fee recovery. Others immunize specified speech from liability, or allow liability only when the speaker knew his statements were false. The courts should not be left helpless to prevent their own abuse by those seeking to silence legitimate speech.

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Commentary

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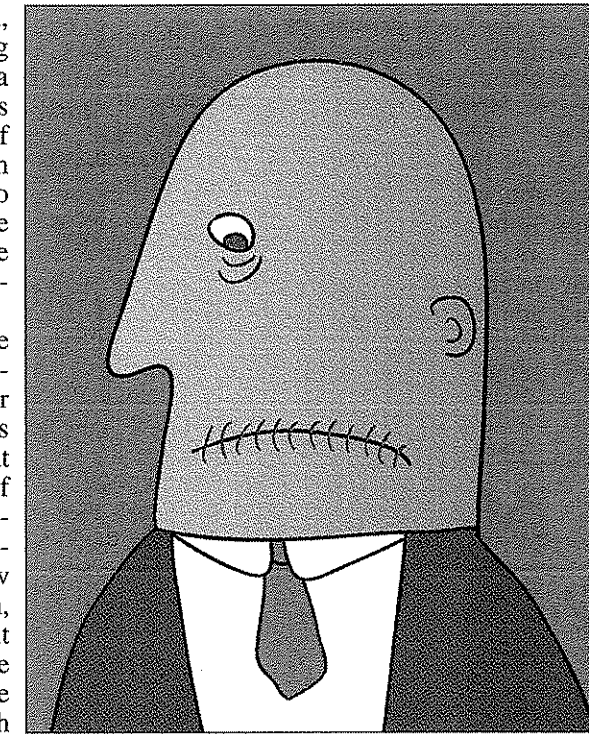


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