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Ammunition requires the incorporation of ethic rules;
Civil Procedure

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BODY:

The use of SLAPP suits, an acronym for strategic lawsuits against public participation, should be curtailed. They are designed to limit public participation during government hearings such as land use applications, governing body petitions and anything else that might arouse public concern. This is done by filing completely baseless lawsuits against these concerned members of the public, often alleging either business torts or some kind of defamation.

Many states have enacted legislation making it clear that SLAPP suits are against public policy. Unfortunately, New Jersey is not one of them. Notwithstanding that the legislature has not yet chimed in on this issue, there is administrative and judicial relief available allowing SLAPP victims to "SLAPP Back."

Let us first consider a hypothetical, where a local developer is seeking development approval for six new houses on property that is severely environmentally constrained. The development needs local planning board approval and the community is very concerned that the development will cause severe erosion because of the many steep slopes that will be impacted. In addition, because the subdivision sits within a mountainous area, the community is legitimately concerned about the ability of the developer to secure enough potable water for the inhabitants of the new houses and about the septic system design, given the soil constraints.

The community forms a non- profit organization, retains experts, and actively opposes the application. This infuriates the developer, who files a SLAPP suit for the purpose of making these neighbors "go away." His lawyer agrees to conjure up business tort and defamation claims against them -- all of which are legally and factually baseless. And another SLAPP suit is born.

This kind of classic SLAPP suit often gets the job done. Community groups are often thinly financed. This extra litigation often puts them out of business, which is exactly what the SLAPP plaintiff, and perhaps the SLAPP lawyer, desire. If it is not the cost of the SLAPP case that does the job, it may very well be the personal liability threat that any lawsuit represents that will kill off the opposition. The developer cares less why the neighbors stop opposing his project; he just wants them out of his way.

In this hypothetical, two and perhaps three SLAPP Back measures are available to the community group and its members. They are: (1) disciplinary charges that may be available against the attorney who represented the applicant in the SLAPP suit litigation, (2) an application in court under the frivolous pleading statute and court rules, and (3) initiation of a suit for malicious use of process, potentially against the SLAPP plaintiff, the SLAPP lawyer, or both.

Ethics Violation

Under this scenario, the SLAPP attorney may be responsible for violating one or more Rules of Professional Conduct. R.P.C. 3.1 is entitled "Meritorious Claims and Contentions." It provides that a lawyer shall not bring or defend a case unless the lawyer reasonably believes that there is a basis in law and fact for doing so that is not frivolous. This includes a good-faith argument for an extension, modification or reversal of existing law or the establishment of new law.

In our hypothetical, the lawyer violated this RPC because the lawyer was aware that the facts did not support a business tort or defamation claim, both of which were alleged. The lawyer's sole motivation for filing the case was to eliminate the community opposition.

R.P.C. 3.3 requires that a lawyer not make a false statement of material fact or law to a tribunal. To the extent that the SLAPP attorney knowingly mischaracterized the facts to support his or her fabricated charges, there might also have been a R.P.C. 3.3 violation.

In pertinent part, R.P.C. 3.4 prevents an attorney from making frivolous discovery requests or failing to make reasonable, diligent efforts to comply with proper discovery demands by an opposing party. Since discovery abuse is often a tactic used by the SLAPP plaintiff because it eats up so much money and accomplishes nothing, these trumped-up cases frequently implicate R.P.C. 3.4 as well.

Attorneys' Fees and Costs

Attorneys' fees and court expenses may also be available to the community group under New Jersey's frivolous pleading statute and rule, found at N.J.S.A. 2A:15-59.1 and R. 1:4-8. There are many reported cases that deal with this process and most applications for fees are not successful. This is so because courts do not want to prevent valid claims from being litigated -- and a broad enforcement net might very well have that effect. Nonetheless, by definition many SLAPP suits -- including the hypothetical provided herein -- should be eligible for attorney fee and cost recovery.

Note that the rule provides specific requirements for fee recovery, including a safe harbor provision and a time period during which the fee application must be made. Often this will be the only financial recourse available to SLAPP victims, which means that the rule must be consulted as soon as the SLAPP claim is filed and the case must be defended with the goal in mind of seeking fees and costs at the conclusion.

Malicious Use of Process

Option three involves a suit against either the SLAPP plaintiff, the SLAPP lawyer, or both for malicious use of process. Though this has been available to SLAPP victims for a while, the Supreme Court has just elaborated on this cause of action in the case of **LoBiondo v. Schwartz** , decided on May 14. Our hypothetical may or may not be a candidate for this treatment, depending largely on whether malice and a "special grievance" can be proven by the community organization. As a traditional common-law tort, this will provide our community group with the most relief, including perhaps punitive damages -- but this relief will only be available if the facts are particularly egregious.

The elements of a malicious use of process suit require demonstration of: (1) an absence of probable cause for the original SLAPP suit, (2) malice, (3) a special grievance, and (4) termination of the SLAPP suit in favor of the SLAPP suit victim.

Probable cause in this context is an honest belief in the allegation, from the standpoint of a reasonable, prudent person. While this is generally a question to be decided by the court, it may become a jury issue when the facts giving rise to the probable cause determination are in question.

Malice means an intentional act lacking just cause or excuse. Malice has also been regarded as the doing of a wrongful act without regard to what the actor knows to be his duty, resulting in injury to another.

The special grievance requirement is met when a malicious use of process plaintiff proves the SLAPP suit either infringed on his or her right to free speech or to petition the government.

Under limited circumstances the court advised that the SLAPP lawyer can also be sued. This may only occur if the SLAPP plaintiff asserts an "advice of counsel defense" to the SLAPP Back lawsuit. In our hypothetical, the community group could sue the SLAPP plaintiff if it could prove that there was no probable cause for the SLAPP suit, that it was the result of malice, and that the group's involvement in the underlying application was sharply limited or curtailed. This presumes that the SLAPP suit ended in favor of the community group.

If the SLAPP plaintiff asserts that he relied upon the advice of counsel, that will be an absolute defense if full factual disclosure was made to the lawyer. But then the lawyer him or herself may be sued if the lawyer's own malice was the primary reason for the case and if the other elements of the tort can be satisfied.

Conclusion

New Jersey SLAPP suit victims have ammunition with which to SLAPP Back. But it requires the incorporation of attorney ethic rules, our frivolous suit protocols, and a common-law tort.

However, the legislature can and should consider easing this process through the kind of legislation found in other states. New Jersey citizens are entitled to this level of protection, and our democratic process will be better served by this kind of law-making.

Lieberman and Blecher are shareholders in Lieberman & Blecher in Princeton. The authors would like to thank Michael Sinkevich, an associate at the firm, for his help in writing this column.

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