

## Fifth Circuit Weighs in on Applicability of State Anti-SLAPP Statutes in Federal Court

---

August 27, 2019 Laura Prather

---

**PRACTICES** Anti-SLAPP and First Amendment Rights, Media and Entertainment Litigation

---

On Friday, lawyers and litigants finally got an answer to a long-standing question “that has brewed for several years” in the Fifth Circuit: does the Texas Citizens Participation Act (TCPA), Texas’s anti-SLAPP statute, apply in federal diversity actions?

Enacted in 2011, the TCPA provides litigants protections against meritless lawsuits filed in retaliation for one exercising their First Amendment rights. In *Klocke v. Watson*, a unanimous three-judge panel concluded that the mechanism for expedited dismissal provided by the TCPA conflicts with the Federal Rules of Civil Procedure and therefore, the protections of the TCPA are not available to litigants in federal court.

The case arose when Thomas Klocke, a student at the University of Texas at Arlington, died by suicide after he was refused graduation due to allegations that he engaged in homophobic harassment. Klocke’s family sued the school for violation of Title IX and Nicholas Watson, the individual who made the harassment claims, for defamation. Watson moved to dismiss the claims under the TCPA. The U.S. District Court for the Northern District of Texas granted Watson’s motion to dismiss and Klocke’s family appealed, arguing that the TCPA does not apply in federal court.

Under *Erie Railroad Co. v. Tompkins* and its progeny, federal district courts sitting in diversity must apply the substantive law of the state in which the district court sits but state procedural rules yield to applicable federal law. See *Hanna v. Plumer*, 380 U.S. 460, 465 (1965); *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938). In determining whether the state law is substantive or procedural, courts consider the twin aims of *Erie*, asking whether applying state law would discourage forum-shopping and avoid the “inequitable administration of the laws.” *Hanna*, 380 U.S. at 468.

Federal courts of appeals are split regarding the applicability of state anti-SLAPP statutes in federal court. Compare *Godin v. Schencks*, 629 F.3d 79, 88–92 (1st Cir. 2010) (holding that Maine’s anti-SLAPP statute applied in federal court), and *U.S. ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 972–73 (9th Cir. 1999) (applying California’s anti-SLAPP statute), with *Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328 (D.C. Cir. 2015) (Kavanaugh, J.) (holding that D.C. anti-SLAPP statute did not apply in federal court), and *Los Lobos Renewable Power, LLC v. Americulture, Inc.*, 885 F.3d 659, 668–69 (10th Cir. 2018) (holding that New Mexico’s anti-SLAPP statute is procedural and therefore does not apply in federal court). Furthermore, district courts within the Fifth Circuit have ruled inconsistently on the applicability of the TCPA in federal court. Many early district court decisions applied the statute, holding that the TCPA afforded litigants substantive protection of constitutional rights and, as a result, that the statute applied in federal court; other decisions, looking to the procedural mechanisms responsible for protecting those rights—such as the expedited motion to dismiss, automatic stay of discovery, and right to an interlocutory appeal—found that the TCPA was procedural and should not apply. In the face of wildly inconsistent application in district courts, the Fifth Circuit had considered the federal applicability of state anti-SLAPP statutes (specifically, the TCPA and Article 971, Louisiana’s anti-SLAPP law) “an open

question” and previously assumed its applicability, but nevertheless declined to explicitly decide the issue. *Block v. Tanenhaus*, 867 F.3d 585, 589 n.2 (5th Cir. 2017).

On Friday, nearly a year after oral argument, the Fifth Circuit answered the question in the negative, at least as to this current formulation of the TCPA. In doing so, the Court largely agreed with a 2015 D.C. Circuit opinion penned by now-Justice Kavanaugh, holding that the D.C. anti-SLAPP law does not apply in federal court. *Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 1333 (D.C. Cir. 2015) (Kavanaugh, J.). Abbas held that “[a] federal court exercising diversity jurisdiction should not apply a state law or rule if (1) a Federal Rule of Civil Procedure ‘answer[s] the same question’ as the state law or rule and (2) the Federal Rule does not violate the Rules Enabling Act.” *Id.* (quoting *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398–99, 130 S. Ct. 1431, 1437 (2010) (majority op.)). Applying that principle to the TCPA, the Fifth Circuit concluded that “Rules 12 and 56, which govern dismissal and summary judgment motions, respectively, answer the same question as the anti-SLAPP statute: what are the circumstances under which a court must dismiss a case before trial?” *Klocke*, slip op. at 6. “Because the TCPA’s burden-shifting framework imposes additional requirements beyond those found in Rules 12 and 56 and answers the same question as those rules, the state law cannot apply in federal court.” *Id.* at 7. In reaching this conclusion, the Court disagreed with an earlier First Circuit opinion holding that the Maine anti-SLAPP statute applied in federal court because it did not “displace” the Federal Rules or cause Rules 12 and 56 to “cease to function”; the Fifth Circuit stated that “the test of whether a conflict between the Federal Rules and a state statute exists is not whether it is logically possible for a court to comply with the requirements of both, but whether the Federal Rules in question are ‘sufficiently broad to control the issue before the court.’” *Id.* at 9 (internal quotations omitted).

This decision resolves a long-unanswered question and provides litigants with much greater clarity regarding the applicability of the existing TCPA in federal court. As a practical matter, this decision will establish a clear disparity between the tools available to state-court SLAPP defendants and their counterparts in federal court for cases filed prior to September 1, 2019. Accordingly, it may have the impact of driving defamation plaintiffs to federal court where possible and causing defendants to seek remand to state court where possible.

While this decision goes a long way in providing additional guidance regarding the applicability of the existing TCPA in federal court, some lingering questions remain. First, the Court appears to leave open the possibility that the Louisiana anti-SLAPP statute, Article 971, could still apply in federal court. In *Henry v. Lake Charles American Press, L.L.C.*, the Fifth Circuit held that Louisiana’s “nominally procedural” anti-SLAPP statute applies in federal court pursuant to the *Erie* doctrine. 566 F.3d 164, 169 (5th Cir. 2009). The Fifth Circuit distinguished the Texas and Louisiana statutes, noting that the TCPA differed from Article 971 because it “imposes higher and more complex preliminary burdens on the motion to dismiss process and imposes rigorous procedural deadlines,” *Klocke*, slip op. at 12, thus leaving open the possibility that Article 971 could still apply in federal court. Further, this past session, the Texas Legislature reformed the TCPA to ensure that the statute’s applicability is limited to serve its purpose. As part of these reforms, which take effect on September 1, 2019, the Legislature changed some of the statute’s language concerning potential weighing of the evidence, which the Fifth Circuit heavily relied on in its ruling. Interestingly, this decision, released just days before the new statute takes effect, only construes the statute prior to its revision, and it is unclear what, if any, impact these legislative changes will make in courts’ analysis of this issue.

This alert [was also published](#) in *Law360*. (Subscription required)