

Survey of Federal Courts of Appeals Cases Addressing Applicability of Anti-SLAPP Statutes in Federal Court

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PRACTICES Anti-SLAPP and First Amendment Rights, Media Entertainment and Sports

As more and more states adopt anti-SLAPP statutes, one question frequently facing litigants is whether, in a case brought in federal court in which jurisdiction is based on diversity of citizenship, the state anti-SLAPP statute applies. With seven of the twelve U.S. Courts of Appeals having now addressed the question, the answer seems clear: it depends. For practitioners trying to determine the applicability of an as-yet untested state statute, the analysis will require a careful reading of the specific state statute in question.

The starting point of the analysis, of course, is the *Erie* doctrine and the long-recognized principle that federal courts sitting in diversity “apply state substantive law and federal procedural law.” *Hanna v. Plumer*, 380 U.S. 460, 465 (1965). But, as the Fifth Circuit recently noted in holding that the Texas statute, at least as it was written prior to September 1, 2019, is not applicable in federal court, “[d]etermining whether the state law is procedural or substantive may prove elusive.” *Klocke v. Watson*, 936 F.3d 240, 244 (5th Cir. 2019). A summary of the Courts of Appeals decisions to date illustrates the difficulty in answering that “elusive” question.

Three Circuits have held that a state anti-SLAPP statute *does* apply:

First Circuit: In 2010, the First Circuit held that Maine’s anti-SLAPP statute applies in federal court, concluding that there was no conflict between Federal Rule 12 motions to dismiss and anti-SLAPP motions. *Godin v. Schencks*, 629 F.3d 79, 86–87 (1st Cir. 2010). In reaching this conclusion, the Court noted that the purpose of anti-SLAPP motions are more limited, and that “Rules 12(b)(6) and 56 do not purport to apply only to suits challenging the defendants’ exercise of their constitutional petitioning rights.” *Id.* at 88. Additionally, the Court noted that Rule 12 and the special motion set forth in the Maine statute are both “mechanisms to efficiently dispose with meritless claims before trial,” but that given the differences in mechanisms for dismissal and procedural burdens, Rule 12 motions and anti-SLAPP motions could “exist side by side,” and that each motion could “control[] its own intended sphere of coverage.” *Id.* at 91.

Second Circuit: In *Adelson v. Harris*, the Second Circuit approved the use of Nevada’s anti-SLAPP statute in federal court in part because “immunity” and fee-shifting statutes are substantive under *Erie*. 774 F.3d 803, 809 (2d Cir. 2014). The Court in *Adelson* explained that “[e]ach of these rules [in Nevada’s anti-SLAPP statute] (1) would apply in state court had suit been filed there; (2) is substantive within the meaning of *Erie*, since it is consequential enough that enforcement in federal proceedings will serve to discourage forum shopping and avoid inequity; and (3) does not squarely conflict with a valid federal rule.” *Id.*

The Second Circuit similarly applied California’s anti-SLAPP statute in federal court in *Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138 (2d Cir. 2013).

Ninth Circuit: The California anti-SLAPP statute, often used as a model for other states considering such statutes, was found to be applicable in federal court in *Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963 (9th Cir. 1999). However, the Ninth Circuit only addressed two provisions at issue: the special motion to strike, and the availability of fees and costs. The Court “conclude[d] that these provisions and [Federal] Rules 8, 12, and 56 ‘can exist side by side ... each controlling its own intended sphere of coverage without conflict.’” *Id.* at 972. The Court further opined that even though “the Anti-SLAPP statute and the Federal Rules do, in some respects, serve similar purposes, namely the expeditious weeding out of meritless claims before trial . . . [t]his commonality of purpose . . . does not constitute a “direct collision.”” *Id.*

Four Circuits have held that a state anti-SLAPP statute does *not* apply:

Fifth Circuit: In the most recent case addressing the question, the Fifth Circuit concluded that the Texas Citizens Participation Act (TCPA), Texas’ anti-SLAPP statute, does not apply in federal court. *Klocke v. Watson*, 936 F.3d 240, 245 (5th Cir. 2019). The Court concluded that Federal “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?” and, accordingly, “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.*

However, the Fifth Circuit appears to have also held that Louisiana’s anti-SLAPP law could still apply in federal court. In *Henry v. Lake Charles American Press, L.L.C.*, 566 F.3d 164 (5th Cir. 2009), the Court 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). In *Klocke*, the Fifth Circuit distinguished the Texas and Louisiana statutes, noting that the TCPA differed from Louisiana’s statute because it “imposes higher and more complex preliminary burdens on the motion to dismiss process and imposes rigorous procedural deadlines,” *Klocke*, 936 F.3d at 248, thus leaving open the possibility that Louisiana’s statute could still apply in federal court.

Tenth Circuit: The Tenth Circuit held that New Mexico’s anti-SLAPP statute did not apply in federal court in *Los Lobos Renewable Power, LLC v. Americulture, Inc.*, 885 F.3d 659 (10th Cir. 2018). The Court determined that the New Mexico statute provided a procedural mechanism designed to expedite the disposal of frivolous lawsuits but did not set forth any rules of substantive law; instead, the statute only affects the timing of disposition of SLAPP suits. “Unlike many other states’ anti-SLAPP statutes that shift substantive burdens of proof or alter substantive standards, or both, under no circumstance will the New Mexico anti-SLAPP statute have any bearing on the suit’s merits determination.” *Id.* at 670 (citing *Makaeff v. Trump Univ., LLC*, 715 F.3d 254 (9th Cir. 2013) (addressing a California anti-SLAPP statute that shifted substantive burdens and altered substantive standards)).

Eleventh Circuit: In *Carbone v. Cable News Network, Inc.*, 910 F.3d 1345 (11th Cir. 2018), the Eleventh Circuit held that Georgia’s anti-SLAPP statute did not apply in federal court, concluding that the motion-to-strike provision of the Georgia statute “answer[s] the same question” as [Federal] Rules 8, 12, and 56, but it does so in a way that conflicts with those Rules by requiring the plaintiff to allege and prove a probability of success on the merits. *Id.* at 1350. The Court held that the Rules “express ‘with unmistakable clarity’ that proof of probability of success on the merits ‘is not required in federal courts’ to avoid pretrial

dismissal, and that the evidentiary sufficiency of a claim should not be tested before discovery. But the relevant provisions of the Georgia anti-SLAPP statute explicitly require proof of a probability of success on the merits without the benefit of discovery. The result is a ‘direct collision’ between the Federal Rules and the motion-to-strike provision of the Georgia statute.” *Id.* at 1351 (internal citations omitted).

DC Circuit: The District of Columbia anti-SLAPP statute cannot be used in diversity cases in federal court. In *Abbas v. Foreign Policy Group, LLC, et al.*, No. 13-7171 (D.C. Cir. Apr. 24, 2015), then-Judge (and future Supreme Court Justice) Brett Kavanaugh wrote 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.)).

So far, the Courts of Appeals for the Third, Fourth, Sixth, Seventh and Eighth Circuits have not yet addressed this question. When they are presented with the opportunity to do so, predicting the outcome of those cases will require a careful reading of the exact language of the applicable state statute before them.