ANTI-SLAPP STATUTES IN FEDERAL COURTS

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A majority of states have passed anti-SLAPP statutes providing a fast track to dismissal of suits attacking speech and petitioning activity. And with the proliferation of internet commerce and social media, lawsuits involving defamation and similar torts continue to expand meteorically. It is difficult to imagine a more robust full-employment act for lawyers – including commercial litigators – than cases involving these state law anti-SLAPP statutes. It's probably no surprise then, given the global nature of the economy, that these statutes are increasingly being deployed in federal court diversity jurisdiction cases.

What is surprising, however, is the strong difference of judicial opinion over whether such creatures of state legislatures have any place operating in the federal courts. Such uncertainty puts a premium on c-suite executives, general counsel, and other risk managers staying on top of the continuing federal court, anti-SLAPP statute debate. This is particularly true given that the majority of Circuit Courts of Appeals have not yet decided the viability of state anti-SLAPP statutes in diversity cases. Businesses potentially subject to diversity suits within those undecided circuits would be wise to know the arguments for and against operation of state anti-SLAPP statutes. After all, there is no denying that anti-SLAPP statutes can be potent weapons.

The basic backdrop is the general principle that a federal court sitting in diversity jurisdiction applies federal procedural rules and state substantive law. But, there is "an enduring conundrum – the line between substance and procedure." *United States v. Poland*, 562 F.3d 35, 40 (1st Cir. 2009). The question is whether the Federal Rules of Civil Procedure preclude application of state law anti-SLAPP statutes. The answer, it seems, is at least as muddy as "the murky waters" of the *Erie* doctrine.

PEACEFUL COEXISTENCE?

The Ninth Circuit has decided that state anti-SLAPP statutes can operate in diversity cases. In *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963 (9th Cir. 1999), the Ninth Circuit held that California's anti-SLAPP statute – including its attorney fee provision – applies in diversity cases. And in *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003), the Ninth Circuit held that the denial of an anti-SLAPP motion is

immediately appealable under the federal collateral order doctrine permitting interlocutory appeals.

Newsham focused on whether California's anti-SLAPP statute conflicted with Federal Rules of Civil Procedure 12 (motions to dismiss) and 56 (summary judgment). The Ninth Circuit ultimately held that the anti-SLAPP statute can "'exist side by side [with Rules 12 and 56] … each controlling its own intended sphere of coverage without conflict.'" Thus, *Newsham* focused not so much on answering an existential question – is the anti-SLAPP statute wholly procedural (and thereby inapplicable in federal court) – but rather on whether there was any actual conflict between the anti-SLAPP statute and Rules 12 and 56.

A decade later the First Circuit followed *Newsham* in *Godin v. Schencks*, 629 F.3d 79 (1st Cir. 2010). In *Godin*, the district court found that Maine's anti-SLAPP statute conflicted with Rules 12 and 56, and as a result, had no business being applied in federal court. But the First Circuit reversed, observing that while Maine's anti-SLAPP statute could be characterized as both procedural and substantive, the decisive question is "whether Federal Rules of Civil Procedure 12(b)(6) and 56 preclude application of [Maine's anti-SLAPP statute] in federal court." The First Circuit found no preclusion.

As *Godin* put it, the state statute's narrower focus (petitioning activity), and burden shifting mechanisms (requiring plaintiff to foreshadow overcoming the petitioning activity defenses) make the statute "'so intertwined with a state right or remedy that it functions to define the scope of the state-created right' [and so] it cannot be displaced by Rule 12(b)(6) or Rule 56." Like the Ninth Circuit in *Newsham*, the First Circuit in *Godin* found no conflict between the state anti-SLAPP statute and the Federal Rules, but unlike *Newsham*, the First Circuit seemed to place more weight on the statute's substantive qualities. (With little analysis, the Fifth Circuit has allowed state anti-SLAPP statutes (Louisiana, Texas) to operate in diversity cases. See *Henry v. Lake Charles American Press, LLC*, 566 F.3d 164 (5th Cir. 2009); *Cuba v. Pylant*, 814 F.3d 701 (5th Cir. 2016).

TREADING UPON EXCLUSIVE FEDERAL TURF

In *Makaeff v. Trump University*, 715 F.3d 254 (9th Cir. 2013), then Chief Judge Kozinski argued that the conflict analysis upon which *Newsham* rests is irrelevant because the threshold question (and answer) is that state anti-SLAPP statutes are wholly procedural, thereby lacking any place in federal courts whatsoever. Kozinski, urging the Ninth Circuit to overrule *Newsham*, noted that while *Newsham* allowed California's anti-SLAPP statute to apply generally, a subsequent decision rejected the same statute's stay on discovery. See *Metabolife International, Inc. v. Wornick*, 264 F.3d 832 (9th Cir. 2001). As Kozinski put it, "*Metabolife* decimated the state [anti-SLAPP] scheme."

Subsequently, Ninth Circuit Judge Watford took a more nuanced approach in his "dissental" from denial of rehearing en banc in *Makaeff*, noting that in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010), the United States Supreme Court invalidated a New York state statute that prohibited certain types of class actions which were permissible under Federal Rule 23. As Watford explained, "Just as the New York statute in *Shady Grove* impermissibly barred class actions when Rule 23 would permit them, so too California's anti-SLAPP statute bars claims at the pleading stage when Rule 12 would allow them to proceed." *Makaeff*, 736 F.3d 1180, 1189.

The Ninth Circuit dissenters found an ally when the D.C. Circuit rejected the logic of *Newsham* and *Godin*, holding that the District of Columbia's anti-SLAPP statute cannot operate in federal court. *Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328 (D.C. Cir. 2015). In *Abbas*, a publisher responded to a defamation suit with an anti-SLAPP motion. The district court granted the motion, dismissing the action. On appeal, the D.C. Circuit concluded that state law anti-SLAPP statutes have no business in federal courts because Federal Rules 12 and 56 *preclude* their operation.

In so holding, the D.C. Circuit noted that under the liberal federal pleading standards, a plaintiff can survive a motion to dismiss merely by stating a claim that is plausible on its face. In the meantime, discovery proceeds, and summary judgment is the next dismissal hurdle but one that requires the *defendant* to establish entitlement to judgment as a matter of law; plaintiff need not show any probability of prevailing, only factual issues requiring trial. As such, Rules 12 and 56 "establish the exclusive criteria for testing the legal sufficiency of a claim in federal court.'" By contrast, D.C.'s anti-SLAPP statute "conflicts with the Federal Rules by setting up an additional [impermissible] hurdle a plaintiff must jump over to get to trial."

WHERE TO GO FROM HERE?

At some point, the United States Supreme Court will have to take up the anti-SLAPP conundrum. For now, for businesses litigating in federal district courts in circuits that have decided the applicability of state law anti-SLAPP statutes (or those considering federal versus state court venue choices therein), there is some clarity – one way or the other. In the remaining circuits the law is still being developed, presenting parties with the opportunity to advance the debate in ways best suited to resolving individual cases and looking to longer term interests.

What this means for risk managers in *all jurisdictions though*, is that knowledge of the current anti-SLAPP landmarks is essential, as is tracking the shifting legal landscape. Critical questions include:

- Has the federal circuit court with jurisdiction over current litigation ruled for or against anti-SLAPP statutes?
- If there have been such rulings, which state anti-SLAPP statutes has the circuit considered, and what substantial differences exist (if any) if the anti-SLAPP statute currently at issue was not among them?
- Has the circuit answered the separate question of whether, under the collateral order doctrine, there is an immediate right to appeal from an adverse anti-SLAPP ruling?
- Even in circuits allowing anti-SLAPP statutes to operate, if the anti-SLAPP statute contains such provisions as a stay on discovery and attorney fee awards, has the circuit embraced or rejected *those* provisions?

The twin goals of the *Erie* doctrine are "discouragement of forum shopping and avoidance of inequitable administration of the laws." But unless, and until, the United States Supreme Court resolves the anti-SLAPP split, those goals are not being served. In the meantime, knowing the answers to tactical questions like those discussed above can help to navigate the uncertain seas of state law special motions to strike in diversity cases.

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