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Substance Over Form: Application of Anti-SLAPP Statutes in Federal Court

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Many states have enacted statutes curtailing lawsuits designed to chill free speech. Known as anti-SLAPP statutes, these laws often include mechanisms to protect defendants from the burdens of litigation—for example, by allowing defendants to obtain a prompt dismissal through a special pre-trial motion, to avoid discovery and to recover their attorneys' fees upon prevailing.

Congress has considered enacting a federal anti-SLAPP statute, but has yet to do so. As a result, federal courts have been deciding on a state statute-by-statute basis whether and to what extent state-law SLAPP protections apply in federal court.

The outcomes have been mixed. Some courts have held state anti-SLAPP laws inapplicable in federal court because they conflict with the Federal Rules of Civil Procedure—others have deemed the same or substantially similar anti-SLAPP statutes applicable. Likewise, some courts have held that denials of anti-SLAPP protections are sufficiently final to be immediately appealable—others have questioned the wisdom of such precedent.

As plaintiffs increasingly use litigation as a tool to discourage unwanted discourse, this patchwork of conflicting authority affords strategic litigants an opportunity to shop for a federal forum in which to bring claims that would promptly be shown the door by a state court.

Beyond permitting such gamesmanship, declining to apply anti-SLAPP statutes in federal court—or to allow immediate appeals of rulings denying invocation of a SLAPP defense—could undermine a substantive state objective of protecting SLAPP defendants from the burdens of litigation.

Application of Anti-SLAPP Statutes in Federal Court Could Turn on Whether Procedure Is Substantive

Anti-SLAPP statutes vary across the country, but in many states, they establish a right to be free of the burdens of litigation based on the exercise of free speech. In *Smith v. Supple*, for example, the Connecticut Supreme Court likened Connecticut's anti-SLAPP statute to "other statutory and common-law rights to avoid litigation on the merits—such as double jeopardy, collateral estoppel, res judicata, and absolute or sovereign immunity." 346 Conn. 928, 946 (Conn. 2023); *accord Competitive Enterprise Institute v. Mann*, 150 A.3d 1213, 1230 (D.C. 2016) (noting that "[t]he D.C. Anti-SLAPP Act provides not only immunity from having to stand trial but also protection from" burdensome discovery), *as amended* (Dec. 13, 2018).

When state-law SLAPP defenses are brought in federal court, there is a threshold question of whether the anti-SLAPP law is procedural or substantive. This is because state substantive law generally applies to state-law claims and defenses while federal law applies to matters of procedure. *See, e.g.*, *Palm Beach Golf Center-Boca v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245, 1259 (11th Cir. 2015).

In particular, as the Supreme Court held in *Hanna v. Plumer*, the Federal Rules apply in federal court so long as they do not exceed the power granted to Congress in the Rules Enabling Act—i.e., to enact rules that do not "abridge, enlarge or modify" state substantive law. *See* 380 U.S. 460, 464–65 (1965). As the

court reasoned, holding otherwise "whenever [the rules] alter[] the mode of enforcing state-created rights would . . . disembowel . . . the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the [Rules] Enabling Act."

Put differently, as courts applying this precedent have explained, the Federal Rules apply in federal court so long as the applicable federal rule is "arguably procedural" in nature. *Sain v. City of Bend*, 309 F.3d 1134, 1137 (9th Cir. 2002).

Following this reasoning, several courts have rejected the applicability of state anti-SLAPP statutes that place burdens on plaintiffs greater than those set forth in Federal Rule 12 and Federal Rule 56. For example, pointing to the fact that a plaintiff must "establish[] a probability that he or she will prevail on [a] claim" to survive a special motion to dismiss under California's anti-SLAPP statute, the court in *La Liberte v. Reid* held that California's anti-SLAPP statute was inapplicable because it "require[d] the plaintiff to make a showing that the Federal Rules do not require." 966 F.3d 79, 87 (2d Cir. 2020); *see also Klocke v. Watson*, 936 F.3d 240, 245 (5th Cir. 2019) (same under Texas' anti-SLAPP statute); *Carbone v. Cable News Network*, 910 F.3d 1345, 1357 (11th Cir. 2018) (same under Georgia's anti-SLAPP statute).

On the other side of the ledger, several courts have concluded that the seeming tension between procedures designed to weed out SLAPP claims and the Federal Rules is illusory. As one court analyzing Maine's anti-SLAPP statute put it, that anti-SLAPP law amounted to a "supplemental and substantive rule to provide added protections, beyond those in Rules 12 and 56." *Godin v. Schencks*, 629 F.3d 79, 88–89 (1st Cir. 2010); *see U.S. ex rel. Newsham v. Lockheed Missiles & Space*, 190 F.3d 963, 972 (9th Cir. 1999) (concluding California's anti-SLAPP statute applied and noting "there is no indication that Rules 8, 12, and 56 were intended to 'occupy the field' with respect to pretrial procedures aimed at weeding out meritless claims").

Generally, the federal courts that have deemed anti-SLAPP statutes applicable have done so by concluding there is no irreconcilable tension between the relevant anti-SLAPP law and the Federal Rules. However, there are reasons to question whether the Federal Rules should carry the day in the event of a true conflict.

Indeed, while certain aspects of anti-SLAPP statutes may appear procedural, they in many instances are designed to serve a substantive purpose: namely, to protect defendants from the burden of litigating claims that are brought to chill free speech. Far from merely "alter[ing] the mode of enforcing of state-created rights," *Hanna*, 380 U.S. at 473–74, declining to apply certain states' anti-SLAPP laws in federal court could undo the very protection a state intended—a result inconsistent with federalism principles and the Rules Enabling Act.

Immediate Appeals of Anti-SLAPP Denials Preserve Substantive Rights

Notwithstanding the split among courts in whether to apply anti-SLAPP defenses in federal court, there is near consensus that SLAPP defendants may bring an interlocutory appeal to challenge the rejection of such a defense.

While federal appellate courts generally lack jurisdiction to address non-final judgments, under the collateral order doctrine, they can and do hear appeals from preliminary orders that (1) conclusively determine a disputed question; (2) resolve an important issue completely separate from the merits of the action; and (3) would be unreviewable on appeal from a final judgment. *See Mohawk Industries v. Carpenter,* 558 U.S. 100, 105 (2009).

Courts have recognized that denials of state- and federal-law immunities from suit are immediately appealable because they create "an entitlement not to stand trial or face the other burdens of litigation" which would be "effectively lost" absent the ability to file an interlocutory appeal. *Mitchell v. Forsyth*, 472 U.S. 511, 526–27 (1985).

Relying on this reasoning, many federal appellate courts have permitted interlocutory review of anti-SLAPP-defense denials, reasoning that the immunity intended by these statutes would be lost if the SLAPP defendant had to litigate to a final judgment. *See, e.g.*, *Franchini v. Investor's Business Daily*, 981 F.3d 1, 7 (1st Cir. 2020) (noting that "Maine's courts further understand the [Maine] anti-SLAPP law to create a substantive right" to be free from such litigation); *Henry v. Lake Charles American Press,* 566 F.3d 164, 178 (5th Cir. 2009) ("[Louisiana's anti-SLAPP law] provides an explicit statutory guarantee of a right not to stand trial.").

Consistent with this approach, the U.S. Court of Appeals for the Ninth Circuit recently ruled in *Martinez v. ZoomInfo Technology* that it had jurisdiction to review the denial of ZoomInfo's anti-SLAPP defense based on California's anti-SLAPP statute. 82 F.4th 785 (9th Cir. Sept. 21, 2023).

In a concurring opinion, however, Judges Roopali Desai and Margaret McKeown expressed reservations about precedent permitting interlocutory appeals of anti-SLAPP denials, which others in the Ninth Circuit and elsewhere have echoed: namely, that an order denying a defendant's invocation of an anti-SLAPP defense is not separate from the merits of the action because a trial court's analysis of whether an anti-SLAPP statute applies "necessarily considers the plaintiff's likelihood of success" on those merits. *Id.* at 796 (Desai, J., concurring); *see also Ernst v. Carrigan*, 814 F.3d 116, 119–20 (2d Cir. 2016) (holding that denials of anti-SLAPP motions to dismiss under Vermont law are not immediately appealable); *Travelers Casualty Insurance Company of America v. Hirsh*, 831 F.3d 1179, 1185 (9th Cir. 2016) (Kozinski and Gould, JJ., concurring) (questioning whether denials of anti-SLAPP motions to dismiss under California law should be immediately appealable).

If this reasoning continues to gain traction in federal courts of appeal, it will undermine SLAPP defendants' ability to achieve the purpose that anti-SLAPP laws generally are intended to promote: a "right not to bear the costs of fighting a meritless . . . claim" brought to quell speech. *Henry*, 566 F.3d at 178.

The split among district courts on whether state anti-SLAPP defenses apply to claims brought in federal court already affords strategic litigants an opportunity to forum shop. Any further departure from the currently prevailing rule that denials of anti-SLAPP motions are immediately appealable will only increase the likelihood of such conduct.

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