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PERSPECTIVE

Can state anti-SLAPP laws apply in federal court?

By Krista L. Baughman

A long-running dispute between former President Donald Trump and Stormy Daniels (aka Stephanie Clifford) has come to a close, after the U.S. Supreme Court recently denied Clifford's petition for writ of certiorari seeking to revive her lawsuit accusing Trump of defaming her on Twitter. Yet the underlying question — whether or not a state law anti-SLAPP motion to dismiss can be brought in federal court in a diversity action — remains very much alive and is likely to recur again in the near future.

New York Times News Service

Stormy Daniels in Washington, Dec. 3, 2018.

In *Clifford v. Trump*, the Central District of California granted a special motion to strike filed by Trump pursuant to Texas's anti-SLAPP statute, the Texas Citizen's Participation Act. (Texas substantive law applied to the dispute due to Clifford's residence and alleged injury in that state.)

In affirming, the 9th U.S. Circuit Court of Appeals cited its own anti- SLAPP precedent, which holds that Federal Rules of Civil Procedure 8, 12 and 56 were not intended to "occupy the field with respect to pretrial procedures aimed at weeding out meritless claims," and therefore that anti-SLAPP laws — including the TCPA, which the court found "indistinguishable" from California's anti-SLAPP law (Code of Civil Procedure 425.16) — can coexist with the FRCP and apply in diversity actions. The 1st Circuit also follows this reasoning.

Other circuits, including the 2nd, 5th, 10th, 11th and D.C. Circuits, take a different approach, holding that Rules 8, 12 and 56 "provide a comprehensive framework governing pretrial dismissal and judgment" that leaves no room for anti-SLAPP law. These circuits have found that the anti-SLAPP law answers the same questions as FRCP 8, 12 and 56 — namely, under what circumstances must a court dismiss a case before trial? *See, e.g.*, *La Liberte v. Reid*, 966 F.3d 79 (2d Cir. 2020). This reasoning led the 5th Circuit to reach the exact opposite conclusion of *Clifford* in holding that the TCPA does not apply in federal court. *Klocke v. Watson*, 936 F.3d 240 (5th Cir. 2019). As such, there is a circuit split requiring Supreme Court resolution.

The answer to this question, it seems, is one-part federal civil procedure and one-part statutory construction. In diversity actions, the *Erie* doctrine requires federal courts to apply state substantive rules, but federal procedural rules. Where there is no federal rule covering a procedural point in dispute, state procedural law may be applied, but not if doing so would result in a "direct collision" with another federal rule. *See Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980). California anti-SLAPP laws are procedural (*see Kibler v. N. Inyo Cnty. Local Hosp. Dist.*, 138 P.3d 193 (Cal. 2006)), and most states' anti-SLAPP laws are modeled on, or materially identical to, California's statute. So the issue is: Can state anti-SLAPP laws be applied in federal court without coming into "direct collision" with the FRCP?

On this point, the reasoning of the 2nd, 5th, 10th, 11th and D.C. Circuits is the more compelling. These circuits have noted that conflicts arise when trying to permit both the FRCP and anti-SLAPP law to exist together. For example, subdivisions (f) and (g) of California's anti- SLAPP law collectively provide for an expedited dismissal procedure and an automatic stay of discovery until the anti-SLAPP motion is ruled upon. These "discovery-limiting" rules directly collide with Rule 56's "discovery-allowing" procedure, by which a plaintiff is entitled to complete discovery before his evidence is tested.

Interestingly, the 9th Circuit acknowledges this direct collision between anti-SLAPP law and FRCP. *See, e.g.*, *Metabolife Intern., Inc. v. Wornick*, 264 F.3d 832 (9th Cir. 2001). The 9th Circuit attempts to resolve this conflict by holding that "these aspects of [Section 425.16] subsection (f) and (g) cannot apply in federal court," while allowing the balance of the anti-SLAPP statute to apply. *Id.* Essentially, the 9th Circuit must resort to excising portions of anti-SLAPP law, to make it coexist with federal procedural rules.

This contortion of state law to "fit" the FRCP is not limited to just deleting parts of the anti-SLAPP statute. The 9th

Circuit has also found it necessary to create two separate types of anti-SLAPP motions: one that is "founded purely on legal arguments," to which the 9th Circuit applies Rule 8 and 12 pleading standards, and a second that is founded on a "factual challenge," to which Rule 56 standards will apply and "discovery must be permitted." *Planned Parenthood Federation of America, Inc. v. Center for Medical Progress*, 890 F.3d 828 (9th Cir. 2018) ("[i]n order to prevent the collision of California state procedural rules with federal procedural rules, we will review anti-SLAPP motions to strike under different standards depending on the motion's basis."). Thus, if the 9th Circuit determines that an anti-SLAPP motion is "based on legal deficiencies," a plaintiff will not be required to present prima facie evidence supporting his claims. *Id.*

This interpretation is directly at odds with anti-SLAPP law, which does not segment a special motion to strike into two parts, or draw any distinction between "purely legal" or "evidence-based" motions. Rather, anti-SLAPP law requires that, once a moving defendant carries her "prong 1" burden of establishing that she is being sued for an act in furtherance of her right of free speech or petition, the burden shifts to plaintiff to show a "probability of prevailing" on his claims, which requires the plaintiff to demonstrate that "the complaint is legally sufficient *and supported by a prima facie showing of facts* to sustain a favorable judgment if the *evidence submitted by the plaintiff* is credited." *Wilcox v. Superior Court*, 27 Cal. App. 4th 809 (1994) (emphases added). Indeed, a plaintiff "cannot rely on the allegations of the complaint, but *must produce evidence* that would be admissible at trial." *Nguyen-Lam v. Cao*, 171 Cal. App. 4th 858 (Feb. 26. 2009) (emphasis added).

The 9th Circuit's decision to split up anti-SLAPP motions into "evidentiary motions" and "non-evidentiary motions" finds no basis in the straightforward wording of the statute, and simply cannot be reconciled with decades of well-settled California anti-SLAPP jurisprudence. As the high court has held, "where, as here, the words of a statute are unambiguous, the judicial inquiry is complete." *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003). The contortion that is required when a court seeks to fit the square peg of anti-SLAPP law into the round hole of federal civil procedure rules highlights precisely why anti-SLAPP motions are not properly applied in federal court.

While this outcome may disappoint avid anti-SLAPP practitioners, it is a necessary result from a procedural and statutory construction perspective, not to mention the practical concerns. For instance, were the 9th Circuit's approach made the law of the land, a Texas-law defamation plaintiff like Stephanie Clifford would only need to satisfy Rule 12 pleading standards if her case was filed in a Texas federal court, but could face the threat of an evidence-based anti-SLAPP motion, plus fees and costs to the prevailing defendant, should her case end up in a California federal court. This result undermines the goal of uniform procedural standards in federal court, and would lead to forum- shopping.

The day will come, likely sooner than later, when this issue will be addressed by the Supreme Court. Until then, anti-SLAPP litigators are prudent to keep these issues in mind when advising clients on the risks and likelihood of success of their federal diversity cases. And if your client is defending against an anti-SLAPP motion in the 9th Circuit, be sure to challenge the claims as both a matter of law and fact, to trigger the "evidentiary motion" standard and increase plaintiff's burden of proof. ■

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