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Seeking Anti-SLAPP Fees in Federal Court and the Goldilocks Problem

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Summary

- The only way to get it just right for courts and litigants is to enact a federal anti-SLAPP (Strategic Lawsuit Against Public Participation) law that guarantees the full range of protections for parties subject to SLAPP suits in a federal forum.

In 2017 and 2018, the *Carroll Times Herald*, a newspaper in a small town in Iowa—a state with no anti-SLAPP law—published an investigation into a local police officer who had a sexual relationship with a young girl. (1) The officer sued for libel, and, in his deposition, he admitted to the relationship. On the heels of a victory at summary judgment in state court, the newspaper resorted to GoFundMe to seek $140,000 for costs not covered by libel insurance and for lost advertising revenue and subscribers. The newspaper's co-owner and vice president of news commented: "It was head-spinning for me, to listen to a former police officer admit that he had a sexual relationship with a teenager and acknowledge that it was wrong—and I'm sitting there in the role of the defendant who's having to bankroll all the defense." (2)

Defendants have faced similar fates in other states that lack anti-SLAPP laws, which provide protections against lawsuits aimed at chilling speech. (3) The

ordinary rules in their courts generally provide no ready mechanism to adjudicate cases early or to recover attorney's fees and costs.

But even where states have enacted anti-SLAPP laws, plaintiffs can circumvent those protections with the timeworn tactic of forum shopping. This tactic is becoming more powerful as a growing number of federal courts refuse to apply state anti-SLAPP protections on the basis that such laws are too procedural and conflict with the Federal Rules of Civil Procedure. (4)

Defendants searching for protections may find hope in recent decisions by federal courts in Florida and Virginia awarding fees pursuant to each state's anti-SLAPP law. A closer look at these decisions reveals that federal courts seem more willing to apply an anti-SLAPP law's fee-shifting provision—even in circuits that generally reject anti-SLAPP laws—where that state's law lacks other procedural protections that courts have found to be a bad fit for the federal system.

Unlike laws that are *too hard*, with burden-shifting and discovery-stay provisions that courts construe as usurping the federal rules, these laws are not procedural enough to run afoul of federal rules and may be *just right*—for federal courts. But for the newsroom, looking to be spared burdensome discovery despite the prospect of ultimately winning back fees, those laws often seem *too soft*.

Too hard, too soft, just right—is there any solution to this Goldilocks problem?

The Solution to SLAPP Suits

A "SLAPP"—a helpful acronym for "Strategic Lawsuit Against Public Participation"—is aimed at chilling speech by embroiling the defendant in protracted, pricey litigation. (5) These lawsuits are not aimed at vindicating meritorious claims but are instead designed to discourage discussion on matters of public importance through the effects of a lawsuit, including burdensome litigation costs and attorney's fees.

As of May 2024, 34 states and the District of Columbia have anti-SLAPP laws, [6] which offer certain protections against these meritless suits. Such protections are typically triggered when defendants file a "special motion" under the anti-SLAPP law. [7] But like the beds in the Three Bears' bedroom, anti-SLAPP laws vary in the type of support they offer. For example, some provide for burden-shifting, requiring plaintiffs to come forward with evidence to show they have a "likelihood" or "probability" of success on the merits once defendants show that the suit arises from expression or expressive conduct protected by the laws. [8] Anti-SLAPP laws also may prescribe stays of discovery pending resolution of special dismissal motions [9] and may allow for immediate appeal where those motions are denied. [10] The goals of these mechanisms are to adjudicate claims early—before fees rack up—and to deter SLAPP suits in the first instance.

These mechanisms often work in tandem with fee-shifting provisions, which have been described as the "linchpin of the anti-SLAPP law's protective character." [11] Fee shifting strengthens an anti-SLAPP law by ensuring that the costs of litigation are alleviated—regardless of the length of the case—and by shifting the risk of litigation to plaintiffs. Some laws contain only fee-shifting provisions or few other procedural protections. [12] However, when standing alone, fee shifting has limitations. [13] Fee shifting does not itself trigger earlier dismissal of meritless suits, and a fee award comes only after litigation is finally adjudicated, which may be after invasive discovery. And fee awards do not always reflect the true costs of litigation, including the potential lost revenue and the intangible emotional toll.

Ideally, anti-SLAPP laws would include mechanisms both to avoid unnecessary discovery and torecover fees. While these multipronged laws may be ideal for deterring suits in state court, their unwelcome reception in federal court limits their effectiveness.

Anti-SLAPP Laws' Lukewarm Reception in Federal Court

Courts generally analyze state anti-SLAPP laws under the framework established by the Supreme Court in *Erie Railroad Co. v. Tompkins* and its progeny, [14] including, most recently, *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.* [15] The *Erie* framework is nuanced, but, stated simply, it requires federal courts sitting in diversity to apply state substantive law and federal procedural law. Where a state law conflicts with a valid federal law that regulates procedure, the court should generally apply the federal law instead of the state law. [16] In *Shady Grove*, the Supreme Court "broke little new ground with respect to the standard for assessing a potential conflict between the federal rules and state law," [17] but its three diverging opinions regarding the correct analysis left considerable confusion in their wake. [18]

Take, for example, the Eleventh Circuit's analysis in *Carbone v. Cable News Network*. The *Carbone* court held that Georgia's motion-to-strike provision impermissibly conflicts with Federal Rules of Civil Procedure 8, 12, and 56, which set standards for pleadings, motions to dismiss, and motions for summary judgment. [19] Under Georgia's law, a defendant can move to strike a claim arising from protected petitioning or speech in connection with an issue of public interest or concern, which the court must grant unless the nonmoving party has established a "probability" of prevailing on the claim. [20] Because the motion-to-strike provision required "proof of a probability of success on the merits without the benefit of discovery," there was a "direct collision" between the motion-to-strike provision and federal law proscribing "proof of probability of success on the merits . . . to avoid pretrial dismissal." [21]

The *Carbone* court also rejected the defendant's argument that "the function of the motion-to-strike procedure is to 'define the scope' of 'state created rights.'" [22] This argument invoked Justice Stevens's concurrence in *Shady Grove*, which emphasized that the "line between procedural and substantive law is hazy," and, in some cases, a state procedural rule may be "so bound up with the state-created right or remedy that it defines the scope of that substantive right or remedy." [23] Justice Stevens wrote: "When a State chooses to use a traditionally procedural vehicle as a means of defining the scope of substantive

rights or remedies, federal courts must recognize and respect that choice." [24]

The *Carbone* court, however, determined that Georgia's anti-SLAPP law "does not purport to alter a defendant's rights to petition and freedom of speech under the Federal and Georgia Constitutions." Instead, according to the court, the "only change effectuated" by the law "is to make it easier for a defendant to avoid liability for conduct associated with the exercise of those rights by providing a special *procedural* device—a 'motion to strike'—that applies a heightened burden to the claims that fall within its ambit." [25]

While this approach has been adopted by many courts of appeals, there is still significant disagreement among federal courts about the applicability of state anti-SLAPP laws. This disagreement has been a rich source of academic interest. [26] Some of this disagreement is rooted in how a particular jurisdiction applies the *Erie* and *Shady Grove* framework. For example, the Ninth and Second Circuits came to different conclusions on whether the same provisions of California's anti-SLAPP law applied in federal court. [27] And while the Fifth Circuit held that Texas's anti-SLAPP law did not apply in federal court, the Ninth Circuit disagreed just a year later. [28] The varied approach to anti-SLAPP laws is also rooted in how courts interpret individual laws based on their overall text and structure, leading to different outcomes on seemingly similar provisions. For example, the Second Circuit held that fee-shifting provisions in Nevada's anti-SLAPP law applied in federal court, but fee-shifting provisions in California's law did not. [29]

The Goldilocks Problem

Fee-Shifting Provisions Attached to Special Anti-SLAPP Motions

Faced with a growing tide of decisions refusing to apply procedural aspects of state anti-SLAPP laws in federal court, defendants may be tempted to argue that fee-shifting provisions—which on their face do not conflict with the Federal Rules—are distinguishable from, for example, special motion procedures.

While in the minority, fee-shifting provisions attached to special motions are viable in the First and Ninth Circuits, which have held that the anti-SLAPP law's special motion itself applies in federal court. For example, the First Circuit held in *Godin v. Schencks* that the Federal Rules were not sufficiently broad to control proceedings under Maine's anti-SLAPP law, and, adopting Justice Stevens's reasoning in *Shady Grove*, emphasized that the law defines "the scope of the state-created right" such that "it cannot be displaced" by the Federal Rules. [30] The court further held that declining to apply the special motion would "result in an inequitable administration of justice between a defense asserted in state court and the same defense asserted in federal court" and that "the incentives for forum shopping would be strong: electing to bring state-law claims in federal as opposed to state court would allow a plaintiff to avoid [the law's] burden-shifting framework, rely upon the common law's per se damages rule, and circumvent any liability for a defendant's attorney's fees or costs." [31]

Similarly, the Ninth Circuit, in *United States ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.*, held that there was no "direct collision" between the Federal Rules and California's special motion-to-strike and fee-shifting provisions, which were "crafted to serve an interest not directly addressed by the Federal Rules: the protection of the constitutional rights of freedom of speech and petition for redress of grievances." [32] The *Newsham* court noted that the special motion "adds an additional, unique weapon to the pretrial arsenal, a weapon whose sting is enhanced by a[n] entitlement to fees and costs." [33] Analyzing Oregon's anti-SLAPP law, the Ninth Circuit likewise held that "[s]tate laws awarding attorneys' fees are generally considered to be substantive laws under the *Erie* doctrine and apply to actions pending in federal district court when the fee award is connected to the substance of the case." [34]

There is some support for the principle that the fee-shifting provisions attached to special motions should apply even in jurisdictions where special motion procedures themselves do not. In *Adelson v. Harris*, the Second Circuit described mandatory fee shifting under Nevada's anti-SLAPP law as

"unproblematic," [35] even though a strict reading of the law only required fee shifting where the court granted a "special motion" pursuant to the anti-SLAPP law. [36] The Second Circuit explained that the provision "would apply in state court had suit been filed there"; "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 "does not squarely conflict with a valid federal rule." [37]

Yet courts have more recently rejected this reasoning. The Second Circuit, seemingly at odds with its holding in *Adelson*, later held in *La Liberte v. Reid* that the fee-shifting provision in California's anti-SLAPP law did not apply in federal court where the provision awarded fees "*only* to 'a prevailing defendant *on a special motion to strike*.'" [38] The court noted that California "presumably could have awarded attorneys' fees to the prevailing party in any defamation action, but it chose not to do so." [39] In *Abbas v. Foreign Policy Group*, the D.C. Circuit rejected the application of the District of Columbia's anti-SLAPP law's special motion-to-dismiss provision and, although it granted the motion to dismiss pursuant to Rule 12(b)(6), declined to award fees that could have been available had the court granted the special motion. [40] The court explained that the law did "not purport to make attorney's fees available to parties who obtain dismissal by other means" [41] and, "[h]ad the D.C. Council simply wanted to permit courts to award attorney's fees to prevailing defendants in these kinds of defamation cases, it easily could have done so." [42]

Likewise, the Fifth Circuit did not address whether the fee-shifting provisions in Texas's anti-SLAPP law themselves conflicted with the Federal Rules but noted that "we need not discuss that issue in detail because those provisions are not applicable apart from the burden-shifting early dismissal framework," specifically if "the court orders dismissal of a legal action *under this chapter*." [43] "Suffice to say," the court explained, "that because [Texas's anti-SLAPP law] does not apply in federal court, the district court erred by awarding fees and sanctions pursuant to it." [44] Though the Eleventh Circuit did not

specifically reach the question in *Carbone*, it is likely that it would apply similar reasoning. [45]

This dismissive approach to fee shifting appears underdeveloped for two reasons. First, fee shifting itself does not directly collide with any federal procedural rule. A law that grants fees for successful anti-SLAPP motions to strike would necessarily award fees for dismissal pursuant to the more forgiving Rule 12(b)(6) standard and, therefore, does not require the federal court to apply a potentially conflicting anti-SLAPP standard. In other words, if the court finds that dismissal is warranted pursuant to Rule 12(b)(6), it need not apply a state's burden-shifting framework or higher pleading standard to determine that the suit would also be dismissed under the state's anti-SLAPP law. And where that anti-SLAPP law allows for—or requires—fees under its higher standard, those fees should easily be awarded in suits that could not survive even Rule 12(b)(6) scrutiny. [46] Second, as the First and Ninth Circuits have recognized, fee-shifting provisions are "bound up" with and enforce a substantive right to exercise First Amendment rights without the threat of meritless litigation. Regardless, it is clear that some circuits will view the substantive fee-shifting provisions as procedural so long as they are tied to special vehicles for dismissal.

Stand-Alone Fee-Shifting Provisions

This approach seems to leave room for federal courts to apply fee-shifting provisions that are not connected to special motions. New York attempts just that. New York's anti-SLAPP law is divided between two different sets of codes, the Civil Rights Law (CRL) and Civil Practice Law and Rules (CPLR). While the anti-SLAPP law contains familiar burden shifting and expedited adjudication under the CPLR, [47] the CRL modifies the state's substantive law in lawsuits arising from covered speech, including requiring actual malice in lawsuits involving matters of public interest and mandatory fee shifting where the party maintains an action, claim, cross-claim, or counterclaim to recover damages and the original action was "commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law." [48]

That the original claim did not have a "substantial basis" in fact and law is an element of a new claim for attorney's fees under the CRL rather than a ground for dismissal akin to "likelihood" or "probability" of success standards in many permutations of anti-SLAPP laws. [49] Importantly, Section 70-a of the CRL provides that fees are recoverable "including," but not exclusively, in adjudications pursuant to the CPLR. [50] The provision is thus distinguishable from those analyzed in cases like *La Liberte*, *Abbas*, and *Klocke*.

Magistrate Judge Parker of the Southern District of New York, recognizing this distinction, found that CRL Section 70-a "does not purport to set forth an alternative standard for dismissal on motions to dismiss or on motions for summary judgment." [51] The court found significant that "Section 70-a is part of New York's Civil Rights Law—not its CPLR." [52] Though the section "mentions the CPLR provisions that govern the dismissal of SLAPP claims in New York state court as examples of methods through which such a 'demonstration' could be made, it does not require a SLAPP defendant to file a CPLR motion in order to recover costs and attorney's fees." [53] Citing Second Circuit precedent in *Adelson*, the court determined that "when a state law creates a cause of action and specifies the remedies available thereunder, those remedies are substantive within the meaning of *Erie*." [54] The court thus allowed the defendant to assert a counterclaim for attorney's fees and costs pursuant to Section 70-a. [55]

This decision, although well-reasoned, is an outlier; courts have generally given short shrift to the argument that Section 70-a is viable in federal court. For example, in *National Academy of Television Arts & Sciences, Inc. v. Multimedia System Design, Inc.*, Judge Caproni of the Southern District of New York stated that fees may be recovered "by bringing a special motion" pursuant to New York's procedural rules. [56] Guided by that misunderstanding of the law, Judge Caproni compared New York's law to the one considered by the Second Circuit in *La Liberte* and held that New York's "substantial basis" standard conflicted with the Federal Rules. [57] Although one author points out that Judge Caproni has since "walked back much of the logic" in the decision, [58]

many courts continue to adhere to this analysis, preventing litigants in federal court from seeking fees pursuant to New York's anti-SLAPP law. [59]

If even New York's fee-shifting provision—with its stark separation from the anti-SLAPP law's apparent procedural aspects—is still considered too procedural to apply in federal court, the fate of fee-shifting provisions would appear grim. The decisions suggest that courts are reluctant to parse anti-SLAPP laws where they would not apply the scheme as a whole. Former Ninth Circuit Judge Kozinski, concurring in *Makaeff v. Trump University, LLC*, described a Ninth Circuit decision refusing to apply "discovery-limiting aspects" of California's anti-SLAPP law as "decimat[ing] the state scheme." [60] "What we're left with," he continued, "is a hybrid procedure where neither the Federal Rules nor the state anti-SLAPP statute operate as designed." [61] He concluded, however, that because California's anti-SLAPP law "merely provides a procedural mechanism for vindicating existing rights," no aspect of state anti-SLAPP laws should apply in federal courts, which "have no business applying exotic state procedural rules which, of necessity, disrupt the comprehensive scheme embodied in the Federal Rules, our jurisdictional statutes and Supreme Court interpretations thereof." [62]

This reasoning would put most anti-SLAPP laws—and their isolated provisions—on tenuous ground, including in those circuits that have applied anti-SLAPP laws in federal court. For example, in *Klocke*, the Fifth Circuit disagreed with its prior precedent applying Louisiana's anti-SLAPP law and cited to Judge Kozinski's concurrence in *Makaeff* when determining that Texas's anti-SLAPP law was purely procedural notwithstanding the law's "expressed purpose to safeguard the exercise of protected First Amendment rights." [63] And where special motions are in danger of being shut out of federal courts, so are their attendant fee-shifting provisions. [64]

Is Any Solution Just Right?

If certain anti-SLAPP laws are too procedural, and thus too hard, for exacting federal courts to apply, perhaps laws with softer procedural protections may

be more appealing. Indeed, despite the Eleventh Circuit's decision about Georgia'santi-SLAPP law in *Carbone*, federal courts within the circuit havecontinued to apply Florida'santi-SLAPP law. Florida's law, on its face, has few procedural protections but provides that the "court shall award the prevailing party reasonable attorney fees and costs incurred in connection with a claim that an action was filed in violation" of the anti-SLAPP law, specifically a suit "without merit" and "primarily because" of the defendant's exercise of certain First Amendment rights. (65)

In *Bongino v. Daily Beast Co.*, a federal district court in Florida held that, unlike the laws at issue in *Carbone*, *La Liberte*, *Klocke*, and *Abbas*, which "raise the bar for a plaintiff to overcome a pretrial dismissal motion," Florida's law "fuses with Rules 8, 12, and 56 by entitling the prevailing party to fees and costs if, after invoking the devices set forth by those rules, a court finds an action is 'without merit' and thus prohibited." (66) The court described the law as a "garden variety fee shifting provision, which the Florida legislature enacted to accomplish a 'fundamental state policy'—deterring SLAPP suits." (67) Other federal judges in Florida have followed suit, emphasizing that defendants "have the right to not be subjected to meritless lawsuits filed primarily because they have exercised their constitutional right of free speech in connection with a public issue." (68)

The story is similar in Virginia. Virginia's anti-SLAPP law contains no special dismissal mechanisms but provides that fees and costs may be awarded where a case is dismissed or a party otherwise prevails pursuant to the law. (69) The law is framed as an "immunity" from tort liability where a tort claim is based on certain speech protected under the First Amendment. (70) In *Fairfax v. CBS Corp.*, the district court concluded that the defendant established "statutory immunity" under the statute, as the statement at issue in the suit claiming defamation and intentional infliction of emotional distress fell within the categories protected by the statute, but the court declined to exercise its discretion to award attorney's fees pursuant to that immunity. (71) The Fourth Circuit affirmed. (72) Without a special motion to contend with, neither court engaged in an *Erie* analysis. Some defendants have successfully

argued for fees under Virginia's "immunity" provision in federal court. [73] For example, the Eastern District of Virginia recently awarded fees where it found that the action was "meritless, unreasonable, and without any substantial basis in law or fact, and motivated by reasons other than obtaining relief." [74]

The decisions in Virginia and Florida suggest that laws with few procedural protections are less likely to conflict with federal standards for maintaining claims. Or, in the words of Goldilocks, the softer the law, the more likely it is just right for federal court.

But even this argument has been rejected where courts do not view fee-shifting provisions as substantive enough. The Tenth Circuit, applying New Mexico's anti-SLAPP law, [75] described the law's fee-shifting provision as a "procedural fee-shifting device" that allows for "the imposition of fees and costs as a *sanction* primarily designed not to compensate for legal services but to vindicate First Amendment rights threatened by a kind of 'unwanted or specious' litigation." [76] The court used its interpretation of this provision to support its holding that the "statute simply does not define the scope of any state substantive right or remedy" and "is procedural in all its aspects." [77]

New York's fee-shifting provision has also been described as a "sanctions" regime. A federal court held that the fee-shifting provision impermissibly conflicts with Rule 11, which "addresses the same question" because both the fee-shifting provision and Rule 11 address "sanctions for filings in federal court." [78] The court held that the "procedural mechanisms under the anti-SLAPP law differ from those under Rule 11," including because a party may seek "sanctions" under the anti-SLAPP law without providing advance notice to the adverse party and because such sanctions are "mandatory." [79]

With federal courts so hot and cold on fee-shifting provisions—regardless of how hard or soft the law's procedural protections—it is unclear if any state anti-SLAPP law can be just right.

Conclusion

Anti-SLAPP laws are designed to encourage the exercise of constitutionally protected rights. But the current landscape in the federal court system significantly undermines this aim. If plaintiffs have the option to bring SLAPP suits in forums that will not apply anti-SLAPP laws, potential defendants must engage in cost-benefit analyses that weigh the risk of meritless lawsuits proceeding in federal court against the value of the speech, chilling protected speech in the process. The Goldilocks problem chills speech even more. Picky courts create uncertainty about whether a fee-shifting provision will apply, making these cost-benefit analyses uninformed. And where plaintiffs do file SLAPP suits, defendants could face trouble securing representation given the uncertainty about whether fee-shifting provisions apply.

There are some relatively consistent principles to derive from the murky case law. In all cases, defendants should emphasize that applying fee-shifting provisions serves the twin aims of *Erie*: "discouragement of forum-shopping and avoidance of inequitable administration of the law." (80) To the extent fee-shifting provisions are tied to special motions, defendants should argue that the fee-shifting provision operates independently of potentially conflicting state standards or that the special motion's procedures themselves do not conflict with the Federal Rules. To avoid this problem altogether, and to heed the advice of multiple courts of appeals, (81) drafters of anti-SLAPP laws could disentangle fee-shifting provisions and special motions, especially where special motions are seen as lowering the bar for dismissal. (82)

Even with these principles in mind, there is no denying that the federal judiciary is an extraordinarily picky Goldilocks. Courts generally reject fee-shifting provisions in laws that mix substantive and procedural protections, even in New York, where the fee-shifting provision does not depend on the court applying the law's procedural aspects. Moreover, fee shifting, if viewed as "sanctions," faces a potential conflict with Rule 11.

But even if anti-SLAPP laws stripped of so-called procedural protections were more likely to survive Goldilocks's scrutiny, we should not settle for laws that

are too soft and fail to target each consequence of meritless claims. Nor should we conflate applicability in federal court with effectiveness as an anti-SLAPP law. In other words, we, too, can be picky about our anti-SLAPP laws. The only way to get it just right for both courts and litigants is to enact a federal anti-SLAPP law that guarantees the full range of protections for parties subject to SLAPP suits in a federal forum. (83)

Endnotes

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