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PERSPECTIVE

Latest decision to keep anti-SLAPP out of federal court may spark high court review

By Derek Foran and Michael Komorowski

A 2nd U.S. Circuit Court of Appeals decision made headlines last week as the latest flashpoint in the Trump culture wars. A combustible mix of a woman in a MAGA baseball cap apparently yelling at a Latino teenager, a cable TV personality who joined the fray on social media, and a defamation lawsuit make for irresistible reading. But the 2nd Circuit's decision in *La Liberte v. Reid*, 19-3574 (July 15, 2020), should resonate with the legal profession for an additional reason. It is the latest, and perhaps the most high-profile, federal appellate decision to hold that a state anti-SLAPP statute has no place in federal court. With a rising tide of these decisions and a circuit split, many are asking whether the U.S. Supreme Court will take up the issue.

Plaintiff-appellant Roslyn La Liberte describes herself as "passionate about this country's immigration policies." In 2018, she showed up at a Simi Valley, California city council meeting to advocate her opposition to a state senate bill that would restrict cooperation between local law enforcement and federal immigration authorities. During the meeting, she was photographed wearing a red MAGA hat confronting a Latino teenager. She appears with mouth agape and clutches her neck for apparent emphasis. A political activist tweeted the photo with a caption explaining that "'You are going to be the first deported' [and] 'dirty Mexican' [w]ere some of the things they yelled… at this 14 year old boy." The activist asked others to spread his tweet.

Joy Reid, MSNBC host and political commentator, took up the call. After retweeting the photo and caption, Reid posted the photo on her Instagram, writing, "She showed up too, in her MAGA hat, and screamed, 'You are going to be the first deported'…'dirty Mexican!'" A few days later, Reid added similar posts on Instagram and Facebook. The teenager in the photo, however, denied that La Liberte used racial insults and described his conversation with La Liberte as "civil." Video of the council meeting shows La Liberte and the teen eventually hugging.

This bonhomie extended no further. La Liberte's attorney demanded that Reid take down her posts and apologize. Reid did so, writing in a statement: "It appears I got this wrong." Not satisfied, La Liberte filed a defamation claim against Reid in New York federal court. Reid responded with an often powerful weapon: a motion to strike the complaint at the outset under California's anti-SLAPP statute. (The parties had agreed that California law would apply.) The district court granted Reid's motion and granted leave to seek attorney fees. La Liberte appealed.

California, along with the majority of states, grants defendants this special procedural tool to strike causes of action that seek to inhibit constitutionally protected speech. Under California's anti- SLAPP law, a defendant need only show that a plaintiff's "strategic lawsuit against public participation" alleges unlawful conduct that the state or federal constitution protects, speech being the preeminent example. The plaintiff must then demonstrate a probability of success on the merits. While the motion is under consideration, discovery is stayed. If the motion is successful, a defendant will avoid further litigation and may recover attorney fees and costs. If unsuccessful, a defendant has a right to interlocutory appeal.

No analogous federal rule exists. On the contrary, Federal Rules of Civil Procedure 12 and 56 provide different standards for dismissing actions before trial. Plaintiffs need only demonstrate the plausibility of their claims to survive a motion to dismiss or point to a genuine dispute of material fact to survive a motion for summary judgment. By contrast, California's anti-SLAPP statute requires a plaintiff to show probable success without access to discovery.

Given this mismatch between state and federal procedure, many federal courts have remained uneasy about applying state anti- SLAPP laws. While the 9th Circuit has applied California's anti-SLAPP statute since 1999, that decision has come under withering attack from several 9th Circuit judges since. In 2013, former Chief Judge Alex Kozinski wrote in concurrence in *Makaeff v. Trump University, LLC*, 715 F.3d 254 (2013), that applying anti-SLAPP statutes in federal court was "a big mistake" that only resulted in confusion as other circuits "foolishly followed" the 9th. In a dissent to a denial for rehearing this case en banc, four 9th Circuit judges agreed that California's anti-SLAPP statute raises the pleading bar from plausible to probable and that it "eviscerates Rule 56 by requiring the plaintiff to prove that she will probably prevail if the case proceeds to trial." If that were not enough, the dissent pointed to "another layer of incoherence" in entertaining immediate appeals of denials of anti-SLAPP motions. The dissent followed the Supreme Court's 2010 decision in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*, 130 S. Ct. 1431 (2010), that established the test for determining whether a federal rule governs as whether the state rule "answer[s] the same question." If so, the federal rule applies.

Applying the *Shady Grove* test, the 2nd Circuit reversed the *La Liberte* district court and held California's anti-SLAPP law inapplicable in federal court. The 2nd Circuit also pointed to and followed a 2015 District of Columbia Circuit decision written by then-Judge Brett Kavanaugh, which reached the same conclusion on the D.C. Anti-SLAPP Act, and included a shout-out to the 9th Circuit dissent in *Makaeff*. The 2nd Circuit finds itself in increasingly numerous company: The 5th, 7th, 10th and 11th Circuits have all either expressed recent skepticism about the applicability of anti-SLAPP laws in federal court or flat-out refused to apply them. On the other side, the 1st and 9th Circuits have held that state anti- SLAPP laws may apply in federal court, as have the 2nd and 5th Circuits in earlier decisions.

It would seem that the Supreme Court could be poised to resolve this multi-way circuit split. The *La Liberte* court tacitly invited it to do just that: "the incentive to forum-shop [for favorable anti- SLAPP rules] created by a circuit split can be fixed, though not here," the court wrote. For its part, the Supreme Court has so far been in no hurry to decide this issue. The high court has denied at least four petitions for certiorari urging it to resolve this question in as many years.

It is almost a guarantee that the current intense political environment combined with the ubiquity of social media will continue to furnish ample material for First Amendment cases. What is less clear is how long federal defendants may turn to state anti-SLAPP statutes for a quick recourse. The trend in federal appellate courts now leans away from applying these laws. California's law may apply within the 9th Circuit for now, but further developments in this space are virtually certain. ■

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