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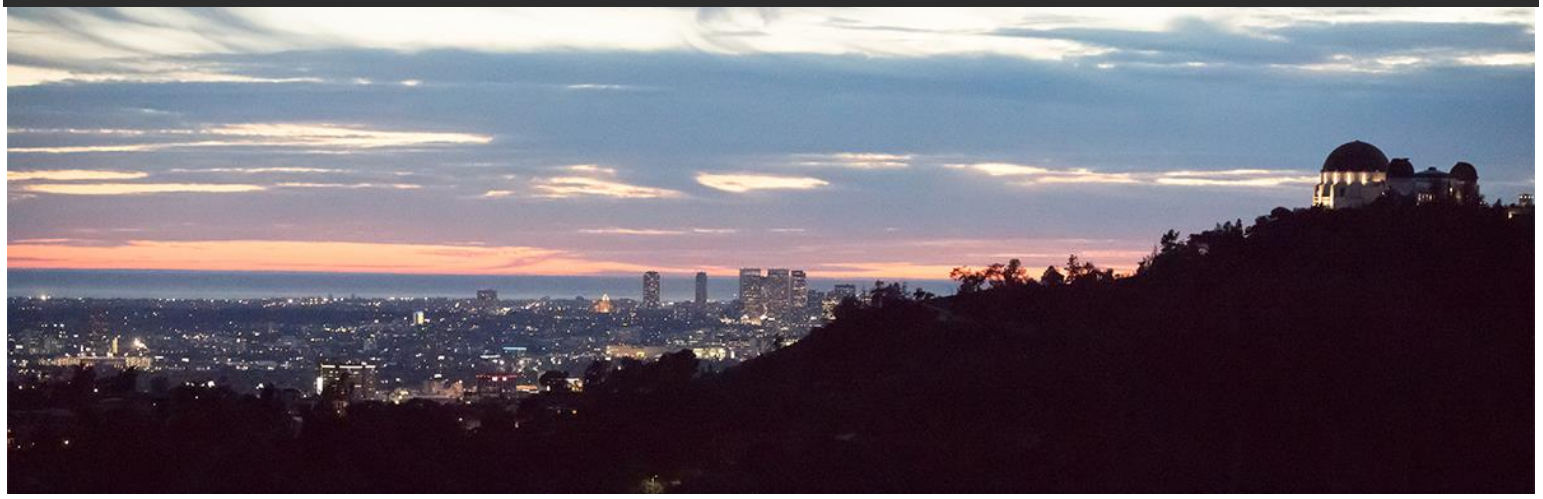

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California Anti-SLAPP Motions Are Safe in Federal Courts . . . For Now

For over two decades, the Ninth Circuit has treated California's anti-SLAPP statute as substantive law and refrained from applying the *Erie* doctrine to question whether anti-SLAPP motions generally should be precluded in federal courts absent a "direct conflict."[1] [2] Anti-SLAPP motions are often favored by defendants in California, as they can provide speedy relief for individuals or entities sued for conduct involving their rights of free speech or petition to potentially obtain an early exit from litigation before significant costs accrue, by creating a procedural mechanism whereby defendants can require plaintiffs alleging such claims to substantiate their merits at the case's earliest stages.[3]

In recent years, however, federal courts across at least five circuits have called this deferential approach into question when evaluating their own respective states' versions of similar statutes. Rather than holistically defer to state anti-SLAPP laws as substantive absent a "direct conflict," courts in the Second,

[1] *See, e.g., U.S. ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 972 (9th Cir. 1999) (hereinafter "*Newsham*") (internal citations omitted) (In the absence of a "direct collision" between a state anti-SLAPP law and the Federal Rules of Civil Procedure, state statute applies in federal diversity actions.).
[2] It is well-established that when state law conflicts with federal law, courts use the *Erie* test to determine which law applies. The first step to the *Erie* test is whether "a Federal Rule of Civil Procedure 'answer[s] the same question' as the [special motion to strike]." *Abbas v. Foreign Pol'y Grp., LLC*, 783 F.3d 1328, 1335 (D.C. Cir. 2015) (quoting *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398-99 (2010)). If the result is in the affirmative, then the Federal Rule governs. *Id.* Although an exception arises if the Federal Rule violates the Rules Enabling Act, the U.S. Supreme court has "rejected every challenge to the Federal Rules that it has considered under the Rules Enabling Act." *Id.* at 1336.
[3] Cal. Code of Civ. Proc. § 426.16.

Fifth, Tenth, and Eleventh Circuits, along with the D.C. Circuit, have consistently invoked the *Erie* doctrine to evaluate whether *each anti-SLAPP provision* is substantive or procedural.[4]

In August 2022, the Ninth Circuit spoke up to reaffirm its position regarding the propriety of anti-SLAPP motions in federal courts within its jurisdiction. Recognizing the deepening divide ripping across the country, the Court in *CoreCivic v. Candide Group* again protected California's anti-SLAPP statute from the *Erie* inquiry, holding that no basis existed to undermine its previous position that no conflict justifies precluding the motions in Ninth Circuit federal courts.[5] [6]

While acknowledging the existence of out-of-circuit decisions holding otherwise with respect to other states' anti-SLAPP statutes, these sister circuit decisions left the Ninth Circuit unfazed with its approach to California's statute.[7] Furthermore, the Court quelled minority opinions within the Ninth Circuit that suggested California's anti-SLAPP statutes are trumped by the Federal Rules of Procedure Rule 12(b)(6) and Rule 56, governing motions to dismiss and motions for summary judgment, respectively.[8] Rather, the Court reconciled any potential conflicts by explaining that anti-SLAPP statute provisions "must be analyzed under the same standard" that Rules 12(b)(6) and 56 impose, again treating the anti-SLAPP provisions as purely substantive.[9]

CoreCivic may cause a ripple effect across other circuits and deepen the stark divide. The issue is ripe for the Supreme Court to break its longstanding silence on whether and to what extent state anti-SLAPP laws are preempted.[10] While the silence has sparked creative potential alternatives, such as the Uniform Public Expression Protection Act (UPEPA), a model anti-SLAPP statute approved by the Uniform Law Commission in 2020, states have been slow to adopt it, leaving litigants in other jurisdictions open to the possibility of forum shopping in circuits that view state anti-SLAPP statutes as conflicting with federal law.[11] Litigants in the Ninth Circuit, however, need not worry about such things—at least not yet.

Authors

This GT Alert was prepared by:

- Heather J. Silver | +1 310.586.7744 | Heather.Silver@gtlaw.com
- Betty Heeso Kim | +1 310.586.7868 | kimb@gtlaw.com

[4] *See La Liberte v. Reid*, 966 F.3d 79, 86–88 (2d Cir. 2020); *Klocke v. Watson*, 936 F.3d 240, 244–49 (5th Cir. 2019); *Los Lobos Renewable Power, LLC v. AmeriCulture, Inc.*, 885 F.3d 659, 668–73 (10th Cir. 2018); *Carbone v. Cable News Network, Inc.*, 910 F.3d 1345, 1349–57 (11th Cir. 2018); *Abbas v. Foreign Pol'y Grp., LLC*, 783 F.3d 1328, 1333–37 (D.C. Cir. 2015).
[5] *CoreCivic v. Candide Grp.*, No. 20-17285, 2022 U.S. App. LEXIS 24417, at *10-12 (9th Cir. Aug. 30, 2022), *reh'g denied en banc*, 2022 U.S. App. LEXIS 29257 (9th Cir. Oct. 20, 2022).
[6] Greenberg Traurig, LLP has represented and continues to represent CoreCivic in a wide array of matters, but did not participate in the *Candide* litigation.
[7] *CoreCivic*, 2022 U.S. App. LEXIS 24417, at *15.
[8] *Id.* at *16.
[9] *Id.*
[10] The Supreme Court has consistently refused to take cases involving state anti-SLAPP laws. *See, e.g., Yagman v. Edmondson*, 723 Fed. App'x 463 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 823 (2019); *Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 897 F.3d 1224 (9th Cir. 2018), *cert denied*, 139 S. Ct. 1446 (2019). As recently as February 2021, the Supreme Court again refused by denying review in *Clifford v. Trump*, 141 S.Ct. 1374 (2021), which presented the conflict between the Ninth Circuit and the Fifth Circuit's holdings on the applicability of the Texas anti-SLAPP law in federal court.
[11] Only three states have enacted UPEPA (Hawaii, Kentucky, and Washington), and five states have introduced it (Indiana, Iowa, Missouri, New Jersey, and North Carolina) as of November 2022. *See Public Expression Protection Act*, Uniform Law Commission (Nov. 1, 2022).

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