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Something to Talk About: Recent Developments in Federal Court SLAPP Suits

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Many states have enacted statutes curtailing Strategic Lawsuits Against Public Participation (known as "anti-SLAPP" statutes) to protect parties from lawsuits designed to chill speech. These statutes vary from state to state, but often include mechanisms to protect defendants from the burdens of litigation—for example, by allowing defendants to obtain a prompt dismissal of claims, avoid discovery, and to recover their attorneys' fees upon prevailing. Congress has recently considered enacting a federal anti-SLAPP statute, but it has yet to do so. The lack of a federal anti-SLAPP statute has led to conflicting decisions over whether state anti-SLAPP laws are a valid defense to state-law claims asserted in federal court.

But where a federal court has denied a dismissal motion based on a state's anti-SLAPP statute, there is near-consensus on one issue: that SLAPP defendants may bring an interlocutory appeal to challenge the rejection of their anti-SLAPP 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 Indus., Inc. v. Carpenter,* 558 U.S. 100, 105 (2009). Courts have recognized that denials of state- and federal-law immunities from suit are immediately appealable under this test 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).

Most federal appellate courts have concluded that denials of an anti-SLAPP defense should be immediately appealable because anti-SLAPP statutes are often intended to confer an immunity from suit. *See, e.g.*, *Franchini v. Inv.'s Bus. Daily, Inc.*, 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 Am. Press, L.L.C.*, 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").

Following precedent to similar effect, the Ninth Circuit recently ruled in *Martinez v. ZoomInfo Tech., Inc.* that it had jurisdiction to review the denial of ZoomInfo's anti-SLAPP defense based on California's anti-SLAPP statute. 2023 WL 6153577 (9th Cir. Sept. 21, 2023). In a concurring opinion, however, Judges Desai and McKeown expressed reservations about precedent permitting interlocutory appeals of anti-SLAPP denials, which others in the Ninth Circuit and elsewhere have recently 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 *9 (Desai, J., concurring); *see also Ernst v. Carrigan*, 814 F.3d 116, 120 (2d Cir. 2016).

If this reasoning continues to gain traction in federal courts of appeal, it will undermine SLAPP defendants' ability to achieve the purpose anti-SLAPP laws are generally 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 patchwork of inconsistent precedent addressing 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.

With plaintiffs increasingly using litigation as a tool to discourage conversations they do not like, there are reasons to be concerned about decisions chipping away at state laws that grant substantive rights to be free from the burdens of litigation—as many states' anti-SLAPP statutes are clearly intended to do.

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