The D.C. Anti-SLAPP Act at Two Years Old: *Erie* Issues and Interlocutory Appeal Take Center Stage

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The District of Columbia Council adopted the District of Columbia Anti-SLAPP Act of 2010 (D.C. Anti-SLAPP Act or Act), D.C. Code sections 16-5501 *et seq.*, to encourage the swift and efficient dismissal of "strategic lawsuits against public participation" (SLAPPs)—actions filed "not to win the lawsuit but punish the opponent and intimidate them into silence."[1] It became effective March 31, 2011. The Act requires plaintiffs in cases arising out of speech on matters of public interest to show a likelihood of success on the merits at the very outset, before subjecting defendants to burdensome and unnecessary litigation. This article discusses the major cases and issues under the D.C. Anti-SLAPP Act in its first two years of life—including whether the Act applies in federal court and whether an interlocutory appeal is available—and offers practice tips for media lawyers in the trenches. The D.C. Anti-SLAPP Act serves as a vehicle to discuss the latest anti-SLAPP issues because it closely resembles other statutes; the high-profile, politically charged nature of the plaintiffs and articles in a recent flurry of litigation under the Act present paradigmatic SLAPP cases; and interlocutory appeal issues and the disagreement among federal district court judges over the Act's applicability in federal court may well impact statutes in other jurisdictions.

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The D.C. Anti-SLAPP Act

Anti-SLAPP statutes have been enacted in 27 states, the District of Columbia, and the U.S. territory of Guam, with each state offering variations that reflect its particular policy and other considerations.[2] In urging the adoption of the D.C. Anti-SLAPP Act, based on similar statutes across the country, the D.C. Council recognized that SLAPP suits "have been increasingly utilized over the past two decades as a means to muzzle speech" and "are often without merit, but achieve their filer's intention of punishing or preventing opposing points of view, resulting in a chilling effect."[3] The professed goal of the Act was to ensure that defendants, including the media, "are not intimidated or prevented, because of abusive lawsuits, from engaging in political or public policy debates."[4] As the D.C. Council expressly indicated in its report on the legislation, the Act was intended to provide defendants "with substantive rights to expeditiously and economically dispense of litigation aimed to prevent their engaging in constitutionally protected actions on matters of public interest."[5]

If a party is facing a lawsuit arising from advocacy on a matter of public interest, the Act allows that party to file a special motion to dismiss the claim within 45 days after service of the claim.[6] As the D.C. Council recognized, the special motion procedure effectively functions as a qualified immunity from suits over protected actions.[7] If the party filing a special motion under the Act makes a prima facie showing that the Act applies—i.e., that it is facing a claim arising from "an act in furtherance of the right of advocacy on issues of public interest"—the burden shifts to the responding party to demonstrate that his or her claim is likely to succeed on the merits.[8] If the SLAPP respondent cannot make a showing of likelihood of success on the merits, the court must grant the special motion to dismiss.

The Act applies to claims based on statements made in connection with any issue under consideration or review "by a legislative, executive, or judicial body, or any other official proceeding authorized by law," as well as expressive conduct that involves "petitioning the government or communicating views to members of the public in connection with an issue of public interest."[9] An "issue of public interest" is defined broadly, including topics such as "health or safety; environmental, economic, or community well-being; the District government; a public figure; or a good, product, or service in the market place."[10]

The Act helps avoid the costs of litigating meritless claims by delaying discovery and allowing for expedited judicial review. It provides for a stay of discovery unless the respondent can show that it requires targeted discovery to defeat the motion, and that such discovery would not be unduly burdensome.[11] It also provides for expedited hearing on the special motion to dismiss; for the issuance of a ruling as soon as practicable after the hearing; and, if the motion to dismiss is granted, for dismissal of the complaint with prejudice.[12] In addition, successful defendants may be entitled to costs and attorneys' fees, increasing the potential cost for plaintiffs who bring meritless suits.[13]

Recent and Pending Media Cases under the D.C. Anti-SLAPP Act

In its relatively short life, the Act

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has already been invoked in multiple cases, many of which involved the paradigmatic SLAPP pattern: claims brought by public figures against the media for speech criticizing their actions. Recent and pending media cases include:

- ***Snyder v. Creative Loafing, Inc.***, No. 2011-CA-003168-B (D.C. Super. Ct. Apr. 26, 2011): Redskins owner Dan Snyder sued the *Washington City Paper* for libel over a column that criticized Snyder's management of the Redskins. The defendants moved to dismiss under Rule 12(b)(6) and the D.C. Anti-SLAPP Act, but the case was voluntarily dismissed before the anti-SLAPP motion was fully briefed and decided.
- ***Lehan v. Fox Television Stations, Inc.***, No. 2011-CA-004592-B, 2011 D.C. Super. LEXIS 14 (D.C. Super. Ct. Nov. 30, 2011): A D.C. firefighter filed a defamation claim over a Fox News report about excessive overtime by District of Columbia employees, including the plaintiff. The court granted the defendants' anti-SLAPP motion.
- ***Sherrod v. Breitbart***, No. 11 Civ. 00477 (RJL) (D.D.C. Mar. 4, 2011), *appeal docketed*, No. 11-7088 (D.C. Cir. Aug. 29, 2011), 843 F. Supp. 2d 83 (D.D.C. Feb. 15, 2012) (statement of reasons): In this procedurally convoluted case, Shirley Sherrod, a former Georgia State Director of Rural Development for the U.S. Department of Agriculture, brought claims in D.C. Superior Court against bloggers Andrew Breitbart and Larry O'Connor, as well as an unnamed John Doe, over blog posts criticizing her for "racism" based on excerpts from a speech she had given earlier that year. At the time Sherrod filed her complaint in February 2011, the Act had been passed by the D.C. Council and signed by the mayor, but was still under a period of mandatory review by the U.S. Congress that is required for all D.C. legislation. The defendants removed the case to federal district court and received extensions of time to answer or respond to the complaint. On March 31, 2011, the Act became effective, and on April 11, 2011, the defendants received a second extension of time to respond to the complaint. On April 18, 2011, the defendants filed a motion to dismiss the complaint under Rule 12(b)(6) and a special motion to dismiss under the Act. After briefing and oral argument, the district court denied both motions in minute orders. The defendants appealed denial of the anti-SLAPP motion to the D.C. Circuit, which remanded to the district court for a statement of reasons for its denial of the anti-SLAPP motion. The district court complied, citing as grounds that the SLAPP motion was untimely and that the Act was not in effect at the time the complaint was filed, and the parties briefed their appeal to the D.C. Circuit. The District of Columbia and a consortium of media organizations filed amicus curiae briefs on behalf of the defendants-appellants on the issue of applicability of the D.C. Anti-SLAPP Act in federal court, while Public Citizen and the American Civil Liberties Union submitted an amicus curiae brief in support of neither party. Oral argument was held on March 15, 2013.
- ***Farah v. Esquire Magazine, Inc.***, 863 F. Supp. 2d 29 (D.D.C. 2012), *appeal docketed*, No. 12-7055 (D.C. Cir. June 15, 2012): "Birther" activists associated with the conservative website WorldNetDaily.com sued *Esquire* magazine over a satirical blog post lampooning the plaintiffs' book titled *Where's the Birth Certificate? The Case That Barack Obama Is Not Eligible to Be President*, which was published several weeks after President Obama had already released his long-form birth certificate. The defendants moved to dismiss the complaint under Rule 12(b)(6) and the Act, and the district court granted dismissal on both grounds. The case is on appeal to the D.C. Circuit and has been fully briefed, including amicus curiae briefs from the District of Columbia and a consortium of media organizations, but oral argument has not yet been scheduled.
- ***Dean v. NBC Universal***, No. 2011-CA-0060055-B (D.C. Super. Ct. July 27, 2011), *appeal pending*, No. 12-cv-1177 (D.C.), and ***Dean v. NBC Universal***, No 1:12-cv-00283-RJL (D.D.C. Feb. 12, 2012): Christian rocker and syndicated radio host Bradlee Dean sued MSNBC television host Rachel Maddow for broadcasts discussing political candidates, their views on homosexuality, and their associations with certain controversial individuals—including Dean—in which she quoted statements made by Dean on his radio show. Dean sued for defamation in D.C. Superior Court, claiming that Maddow had mischaracterized his views, and the defendants moved to dismiss under Rule 12(b)(6) and the D.C. Anti-SLAPP Act. After briefing on the anti-SLAPP issue, the plaintiffs voluntarily dismissed their suit in superior court and refiled it in federal court, hoping to take advantage of Judge Wilkins's holding in *3M Co. v. Boulter* (discussed below) that the D.C. Anti-SLAPP Act did not apply in federal court. The federal case is currently stayed pending the outcome of the superior court case, which is on appeal to the D.C. Court of Appeals from an order dismissing with prejudice the suit for the plaintiffs' failure to pay the defendants' attorneys' fees incurred as a result of the plaintiffs' voluntary dismissal.
- ***Adelson v. Harris***, No. 12 Civ. 06052 (JPO) (S.D.N.Y. Aug. 8, 2012): Sheldon Adelson, a multibillionaire casino magnate and well-known funder of "Super PACs" supporting Republican candidates in the 2012 election, sued the National Jewish

Democratic Counsel and two of its leaders for libel over a petition urging Republican candidates not to accept Adelson's money because it was "dirty" or "tainted." The defendants moved to dismiss under Rule 12(b)(6) and filed an anti-SLAPP motion pursuant to the D.C. Anti-SLAPP Act, arguing that D.C. law governs the action because most defendants are located there and all of the acts complained of occurred in D.C. Both motions are currently pending.

- ***Abbas v. Foreign Policy Group, LLC***, No. 12 Civ. 01565 (EGS) (D.D.C. Sept. 20, 2012): Yasser Abbas, a prominent Palestinian businessman, politician, and son of Palestinian Authority President Mahmoud Abbas, sued for defamation over an opinion piece published in *Foreign Policy* magazine that considered whether President Abbas's sons were improperly benefiting from their father's political position. The defendants moved to dismiss under Rule 12(b)(6) and filed an anti-SLAPP motion. Both motions are currently pending.
- ***Mann v. National Review, Inc.***, No. 2012-CA-008263-B (D.C. Super. Ct. Oct. 22, 2012): Climate scientist Dr. Michael Mann sued the *National Review*, Competitive Enterprise Institute, and two of their contributors for blog posts accusing him of academic and scientific misconduct in connection with his work regarding global warming. The defendants moved to dismiss under Rule 12(b)(6) and filed an anti-SLAPP motion. Both motions are currently pending.
- ***Boley v. Atlantic Monthly Group, Inc.***, No. 13 Civ. 00089 (RBW) (D.D.C. Jan. 22, 2013): George Boley, a former Liberian public official ultimately deported from the United States for alleged war crimes during the Liberian civil war in the mid-1990s, filed a libel action against Atlantic Monthly Group Inc. and its national correspondent, Jeffrey Goldberg, over two articles written by Goldberg and published on the *Atlantic*'s website that called Boley a "warlord" and referenced a court affidavit in which Goldberg describes how he observed Boley's wartime actions firsthand. The defendants filed a motion to dismiss under Rule 12(b)(6) and an anti-SLAPP motion, which are pending.

Although it is not a media case, another key data point for D.C. anti-SLAPP jurisprudence is *3M Co. v. Boulter*. In that case, the plaintiff corporation brought defamation, injurious falsehood, conspiracy, and tortious interference claims against an investment fund, its CEO, and its lobbyist, alleging that the defendants engaged in a smear campaign in connection with a U.K. lawsuit over 3M's aborted purchase of a medical technology company. The defendants responded with an anti-SLAPP motion. In a lengthy February 2012 decision, Judge Wilkins of the District Court for the District of Columbia denied the anti-SLAPP motion, finding that the Act did not apply in federal court.[14] When another defendant in that case who had not been served initially filed a later anti-SLAPP motion, Judge Wilkins denied that motion as well, reiterating his belief that the law does not apply in federal court. The case has an odd procedural history: after the anti-SLAPP motion was denied, the defendants appealed to the D.C. Circuit, but while the case was on appeal—soon after the media amici filed their brief—the defendants settled. The District of Columbia, which had intervened below to defend the law's application in federal court, then moved to dismiss its appeal and to vacate the portion of the lower court's decision that was subject to the appeal. The D.C. Circuit granted D.C.'s motion to dismiss its appeal, but remanded to the district court to consider the issue of vacatur. Judge Wilkins refused to vacate his earlier opinion. Acknowledging that the opinion is "not binding precedent," he nevertheless expressed concern that "the application of the D.C. Anti-SLAPP [Act] in federal court raises serious policy questions," and hoped that, by keeping his earlier opinion on the books, his reasoning "may contribute to the necessary and healthy debate of those questions."[15]

Does the D.C. Anti-SLAPP Act Apply in Federal Diversity Actions?

The key issue currently facing the D.C. Anti-SLAPP Act is whether it applies in federal court. While the majority of courts across the country agree that anti-SLAPP statutes provide substantive protections that can be invoked in federal diversity cases, there is disagreement among district courts in D.C. who have considered the issue, and the D.C. Circuit has not yet ruled on its applicability. The D.C. Circuit could rule on the Act's applicability soon, however, as the issue has been briefed and presented in both the *Sherrod* and *Farah* cases currently before it.

Erie *Test and Anti-SLAPP Statutes*

The analysis regarding application of a state anti-SLAPP statute in federal diversity cases stems from the *Erie* doctrine. Under *Erie*, federal district courts sitting in diversity generally apply the *substantive* law of the state in which the district court sits, while the Federal Rules of Civil Procedure (FRCP) generally govern *procedure*.[16] Courts apply a two-part test to determine whether a federal rule precludes application of a state law in a diversity action. First, the court must determine whether the federal rule's

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"scope" is "sufficiently broad to control the issue before the Court."[17] In evaluating whether a federal rule is "sufficiently broad,"[18] the D.C. Circuit looks at whether the federal rule and D.C. law "can exist side by side, . . . each controlling its own intended sphere of coverage without conflict."[19] Second, the court analyzes whether the state law serves the twin aims of *Erie*: "discouragement of forum-shopping and avoidance of inequitable administration of

the laws."[20] For example, in *Burke v. Air Serv International*, the D.C. Circuit held that D.C.'s law requiring an expert to testify on the standard of care could be applied "simultaneously" with Federal Rule of Evidence 702 governing expert testimony; therefore, the state law and the federal rule "can exist side by side" without conflict.[21]

Every federal circuit court to face the question has held that state anti-SLAPP statutes apply in federal diversity cases because they supplement, rather than supplant, FRCP 12 and 56.[22] In *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, the Ninth Circuit held that the anti-SLAPP statute "can exist side by side" with the federal rules, "each controlling its own intended sphere of coverage without conflict."[23] The Ninth Circuit found "no indication that [FRCP] 8, 12, and 56 were intended to 'occupy the field'" for "pretrial procedures aimed at weeding out meritless claims."[24] It further noted that the appellee had not "identified any federal interests that would be undermined by application of the anti-SLAPP provisions," while "California has articulated the important, substantive state interests furthered by the Anti-SLAPP statute."[25] The Ninth Circuit has reaffirmed *Newsham* time and again over a dozen years, most recently in 2013, specifically noting the contrary opinion in *3M*.[26]

In 2010, the First Circuit in *Godin v. Schencks* determined that Maine's anti-SLAPP statute could apply in federal court even though it has "both substantive and procedural aspects."[27] Chief Judge Lynch concluded that the Maine anti-SLAPP statute "does not seek to displace the Federal Rules or have [FRCP] 12(b)(6) and 56 cease to function," because the federal rules applied generally to all categories of cases, while the Maine act only addressed special procedures for state claims based on a defendant's petitioning activity.[28] The court reasoned that the Maine statute's substantive protections provide a way for defendants to dismiss a claim on an "entirely different basis" than the federal rules—namely, that the claims in question rest on protected activity and that the plaintiff cannot meet the "special rules" that Maine has put in place to "protect such [speech] activity against lawsuits."[29] In addition, the court noted that like the federal courts, Maine also has "general procedural rules" akin to FRCP 12(b)(6) and 56. This bolstered the court's view that Maine's statute was not a "substitute" for those general rules, but instead a "supplemental and substantive rule to provide added protections, beyond those in Rules 12 and 56, to defendants who are named as parties because of constitutional [speech] activities."[30]

D.C. District Court Cases Are Split on Applicability in Federal Court

To date, the district court in *3M* is the only D.C. district court to conclude that the D.C. Anti-SLAPP Act does not apply in federal diversity cases.[31] Judge Wilkins held that the Act conflicts with FRCP 12 and 56—and thus cannot be applied in federal court—because it requires courts to grant the special motion to dismiss "even where matters outside the pleadings are considered, and even where the plaintiff has or can raise a genuine issue of material fact on its claim."[32] The *3M* decision, which escaped the D.C. Circuit's review based on a settlement while the appeal was pending, is in conflict with circuit decisions on the issue and at odds with other D.C. decisions that have found the Act to be "substantive" and applicable in federal diversity cases.[33]

In *Farah v. Esquire Magazine*, Judge Collyer applied both FRCP 12(b)(6) and the Act to a libel claim brought by architects of the "Birther Movement" over a satirical blog post. Finding the suit "fits entirely" within the scope and purpose of the Act, the court dismissed the case under *both* the D.C. Anti-SLAPP Act and Rule 12(b)(6) as "satiric commentary," protected by the First Amendment.[34] Applying the standard in *Twombly*[35] and *Iqbal*[36] and relying only on the pleadings, materials incorporated by reference, and judicially noticed "historical, political, or statistical facts" in online postings, the court found that the plaintiffs failed to state a claim and that, furthermore, their claims were not likely to succeed.[37] The *Farah* court expressly declined to follow the *3M* decision, choosing instead to follow *Godin*, other circuits, and the D.C. district court's decision in *Sherrod*, which found that the Act "is substantive—or at the very least, has substantive consequences."[38]

Moreover, by applying both FRCP 12(b)(6) and the D.C. Anti-SLAPP Act simultaneously—as the D.C. Circuit did with expert testimony in *Burke*—the *Farah* decision demonstrates that these two mechanisms do not conflict in practice. In practice, federal courts harmonize special motions to dismiss under substantially similar anti-SLAPP statutes with FRCP 12(b)(6) and 56. Claims that are dismissed are disposed of with prejudice as they would be under Rules 12 and 56 because they did not survive First Amendment challenge as a matter of law. For example, federal courts in other jurisdictions routinely consider anti-SLAPP motions based on issues of law using a standard consistent with Rule 12(b)(6).[39] Similarly, media defendants often attach matters outside the pleadings to provide the statements in suit, political background, or other critical context—material that does not conflict with Rule 56 either.[40] Finally, the media defendants in these cases also maintain that even if the D.C. Circuit were to find that the Act conflicts with the federal rules, the Act should still apply under the Rules Enabling Act, under which a federal rule cannot "displace a state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right."[41]

The D.C. Anti-SLAPP Act Provides Substantive Rights and Remedies

As media defendants have argued—and most D.C. district courts have recognized—the Act's legislative history demonstrates that it was intended to provide "substantive" rights and remedies and therefore should apply in federal court under *Erie*.[42] Noting that the Act "incorporates substantive rights with regard to a defendant's ability to fend off lawsuits filed by one side of a political or public policy debate aimed to punish the opponent or prevent the expression of opposing points of view,"[43] the *Farah* court found that "[i]t was certainly the intent of the

D.C. Council and the effect of the law—dismissal on the merits—to have substantive consequences."[44] As the D.C. Council expressly noted, the Act created substantive "immunity" for individuals engaging in "protected actions."[45]

Like similar anti-SLAPP statutes on which it was modeled, the Act includes various mechanisms with substantive, speech-protective consequences at several critical points in a litigation, namely: (1) recovery of attorneys' fees and costs, (2) a special motion to dismiss, (3) a stay of discovery, and (4) interlocutory appeal. These mechanisms reduce the burden on protected speech by preventing meritless litigation early in the process, preventing unnecessary burdens during litigation, and expediting or discouraging drawn-out appeals.

Attorneys' Fees and Costs

Media companies are often subject to threats of litigation from the subjects of their stories—threats which may prevent an important story from being published to avoid the potential cost of litigation. But in jurisdictions where media defendants can direct would-be plaintiffs to anti-SLAPP statutes—and the potential for attorneys' fees and costs if the court finds their litigation meritless—plaintiffs who are trying to use litigation for intimidation purposes tend to back down, allowing a story on a matter of public interest to be published while reducing the court's docket. Under section 16-5504(a) of the Act, the court "may" allow the moving party to recover costs and attorneys' fees when it prevails in its anti-SLAPP motion.[46]

Special Motion to Dismiss

If a plaintiff files suit, an anti-SLAPP motion can mitigate the chilling effect on the media's speech during the litigation. The Act forces a plaintiff to take an honest look at the merits of the case early on, because he or she may face an anti-SLAPP motion within 45 days from service of the complaint, requiring the plaintiff to demonstrate a likelihood of success, or risk paying attorneys' fees and costs if he or she fails.[47] At the same time, the Act preserves litigants' rights in meritorious cases because their claims will survive an anti-SLAPP motion—with the opportunity to recover fees—if the motion is frivolous or intended to unduly delay litigation.[48]

The Act protects against litigation targeted at protected speech by imposing a heightened burden—likelihood of success—and, like other qualified immunities, imposing it earlier. In doing so, while not changing the underlying applicable elements of the claim, the Act—like Maine's law—"provides substantive legal defenses to defendants and alters what plaintiffs must prove to prevail."[49] As the D.C. district court noted in *Sherrod*, "it is long settled that the allocation of burden of proof is substantive in nature and controlled by state law."[50] In practice, the Act expedites the court's finding that the suit is not viable (although it provides no hard deadlines for the court) and reallocates the burdens of cost and proof to winnow out meritless suits early.[51] Indeed, whether because of the evidentiary burden, the prospect of paying attorneys' fees if the SLAPP motion were granted, or other reasons, the plaintiff in *Snyder v. Creative Loafing, Inc.*, voluntarily dismissed his lawsuit before the anti-SLAPP motion he was facing could be fully briefed or decided.[52]

An important practice pointer to note: Be sure to file your special motion to dismiss on time, within the 45 days from service specified by the statute. It is unsettled whether the deadline can be extended. If you must seek an extension, explicitly ask for an extension of the anti-SLAPP deadline—not just the time to respond to the complaint. At the *Sherrod* oral argument, Judge Randolph noted that the defendants had moved for extensions of time to plead or otherwise respond to Sherrod's complaint pursuant to FRCP 6(b), which does not extend *statutory* deadlines and therefore might not extend the deadline in that case.[53]

Stay of Discovery

To protect SLAPP defendants from the chilling effect of unnecessary discovery, the Act also creates a presumption that discovery should be stayed while the motion is pending.[54] A plaintiff can overcome this presumption by showing that targeted discovery would defeat the anti-SLAPP motion and would not burden speech, a process akin to FRCP 56(d).[55]

Absent a conflict with the federal rules,[56] federal courts honor the discovery stay provided under state anti-SLAPP laws.[57] For example, federal courts have applied California's mandatory SLAPP stay where: (1) the facts have been "developed through discovery or similar prior proceedings" sufficient for Rule 56; (2) "the parties agree"; or (3) "the only issue presented . . . is an issue of law" under Rule 12(b)(6).[58]

Even where contentious factual issues arise, federal courts have carefully circumscribed discovery out of concern for the policy considerations that support early dismissal of meritless speech-based cases that are aimed at "chilling expression through costly, time-consuming litigation."[59] While anti-SLAPP statutes codify this policy concern, it is not a new one. Even before the Act, federal courts in D.C. often stayed or limited discovery in First Amendment cases to avoid an undue burden on the freedom of speech.[60]

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Interlocutory Appeal

In addition to reducing the burden on speech from new and pending litigation, the Act can also reduce the burden on speech of a lengthy appeal. If the defendant prevails on its special motion under the Act, plaintiffs may choose to forego or dismiss any appeal in order to avoid the imposition of attorneys' fees and costs.[61]

If the motion is denied, SLAPP defendants may seek an interlocutory appeal under the collateral order doctrine that permits appeals where, as

here, the statutory protection would be lost if interlocutory review were not available. The D.C. Circuit has not yet ruled explicitly on whether the denial of a SLAPP motion qualifies as a collateral order justifying immediate interlocutory appeal, but that issue is before the court in the *Sherrod* case.[62] However, the First, Fifth, and Ninth Circuits have all held that denial of a motion under state anti-SLAPP statutes is immediately appealable under the collateral order doctrine.[63] Moreover, the legislative history of the Act makes clear that the absence of such a provision in no way indicates a legislative intention to withhold interlocutory appeal as part of the Act's substantive bundle of rights.[64]

Applying the D.C. Anti-SLAPP Act in Federal Court Serves* Erie*'s Twin Aims

As the media defendants in these cases have argued, applying the Act's protections in federal court would serve the "twin aims of *Erie*"—avoiding inequitable administration of the laws and discouraging forum shopping.[65] As the First Circuit recognized in *Godin*, the burden-shifting provisions and allowance for attorneys' fees in an anti-SLAPP act satisfy the first aim, because declining to apply an anti-SLAPP statute in federal court would result in an "inequitable administration of justice" between a defendant's defense to a libel claim based on the same speech in that state, depending on whether the plaintiff chose to sue in federal or state court.[66]

Until the D.C. Circuit decides whether to apply the D.C. Anti-SLAPP Act in federal court, practitioners are left with conflicting decisions.

Relatedly, if plaintiffs are subject to the Act's heightened burden if they file their case in superior court but avoid those standards by filing in federal court, this would encourage precisely the type of forum shopping that *Erie* was designed to avoid.[67] There is no better evidence of forum shopping than what actually happened in a D.C. anti-SLAPP case as a direct result of the decision in *3M Co. v. Boulter*. After the district court's decision in *3M*, the plaintiffs in *Dean v. NBC Universal* tried to abandon an identical action brought in D.C. Superior Court—seven months after its commencement, after extensive briefing, and on the eve of oral arguments on NBC's dispositive motions—and refile in federal court, *expressly admitting* that the forum switch was motivated by their assumption that the Act would not be applied in federal court after the *3M* decision.[68] This case provides a cautionary tale of the forum shopping that will likely occur if the Act is held not to apply in federal court.

Conclusion

Until the D.C. Circuit decides whether to apply the D.C. Anti-SLAPP Act in federal court, practitioners are left with conflicting decisions. Based on the oral argument, the *Sherrod* panel seems poised to decide the case on untimeliness, retroactivity, or interlocutory appeal, rather than reach the *Erie* issue. The applicability issue may be resolved in *Farah*, which is fully briefed and awaiting an argument date. Although media defendants must distinguish the *3M* decisions when they file an anti-SLAPP motion, the weight of authority is on the side of applying the D.C. Anti-SLAPP Act in federal court.

Endnotes

1. Comm. on Pub. Safety & the Judiciary, Council of D.C., Rep. on Bill 18-893, "Anti-SLAPP Act of 2010," at 4 (2010) [hereinafter Committee Report], *available at* http://dcclims1.dccouncil.us/images/00001/20110120184936.pdf.
2. *See generally* Thomas R. Burke, Anti-SLAPP Litigation (The Rutter Group 2013); *SLAPP Stick: Fighting Frivolous Lawsuits against Journalists: A Statutory Solution*, Reps. Committee for Freedom of Press, http://www.rcfp.org/slapp-stick-fighting-frivolous-lawsuits-against-journalists/statutory-solution (last visited May 20, 2013).
3. Committee Report, *supra* note 1, at 1.
4. *Id.* at 4.
5. *Id.*
6. D.C. Code § 16-5502(a).
7. *See* Committee Report, *supra* note 1, at 4 (noting that the Act follows "the lead of other jurisdictions, which have similarly extended absolute or qualified immunity to individuals engaging in protected actions").
8. D.C. Code § 16-5502(b).
9. *Id.* § 16-5501(1).
10. *Id.* § 16-5501(3).
11. *Id.* § 16-5502(c).
12. *Id.* § 16-5502(d).
13. *Id.* § 16-5504(a).
14. 3M Co. v. Boulter, 842 F. Supp. 2d 85 (D.D.C. 2012).
15. 3M Co. v. Boulter, No. 11-cv-1527 (RLW), 2013 WL 1181472, at *7 (D.D.C. Mar. 22, 2013).
16. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938); *see* Hanna v. Plumer, 380 U.S. 460, 465 (1965); Burke v. Air Serv Int'l, Inc., 685 F.3d 1102, 1107 (D.C. Cir. 2012). For *Erie* purposes, D.C. law, as passed by the D.C. Council and approved by Congress, is considered state law. *Burke*, 685 F.3d at 1107 n.4.
17. *Id.* at 1107–08 (quoting Walker v. Armco Steel Corp., 446 U.S. 740, 749–50 (1980)); *see* Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1451 (2010) (Stevens, J., concurring); Godin v. Schencks, 629 F.3d 79, 86–88 (1st Cir. 2010) (applying this standard under *Shady Grove* to a challenge under the Federal Rules to applying Maine's anti-SLAPP statute).
18. *Walker*, 446 U.S. at 749–50.
19. *Burke*, 685 F.3d at 1108 (quoting *Walker*, 446 U.S. at 752) (internal quotation marks omitted). If the federal rule is not so broad, the federal rule is given effect if it does not "abridge, enlarge or modify any substantive right" under the Rules Enabling Act, 28 U.S.C. § 2072. *Shady Grove*, 130 S. Ct. at 1449–50 (Stevens, J., concurring).
20. *Shady Grove*, 130 S. Ct. at 1448 n.2; *Hanna*, 380 U.S. at 468; *Burke*, 685 F.3d at 1108.
21. *Burke*, 685 F.3d at 1108.
22. As the First Circuit observed in *Godin*, those "federal appellate courts that have addressed whether they must enforce these state anti-SLAPP statutes in federal proceedings have concluded that they must." 629 F.3d at 81 (applying Maine statute and effectively overturning Saint Consulting Grp., Inc. v. Litz, No. 10-10990-RGS, 2010 WL 2836792

(D. Mass. July 19, 2010) and Turkowitz v. Town of Provincetown, No. 10-10634-NMG, 2010 WL 5583119 (D. Mass. Dec. 1, 2010)); *see also* Henry v. Lake Charles Am. Press, L.L.C., 566 F.3d 164, 168–69 (5th Cir. 2009) (Louisiana statute); United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 972 (9th Cir. 1999) (California statute).

23. 190 F.3d at 972 (internal quotation marks omitted).

24. *Id.*

25. *Id.* at 973.

26. *See*, *e.g.*, D.C. Comics v. Pac. Pictures Corp., 706 F.3d 1009, 1013 n.5 (9th Cir. 2013); Northon v. Rule, 637 F.3d 937, 938–39 (9th Cir. 2011); Hilton v. Hallmark Cards, 599 F.3d 894, 900 n.2 (9th Cir. 2010); Gardner v. Martino, 563 F.3d 981, 983 (9th Cir. 2009) (affirming dismissal of claims against broadcast defendants under Oregon statute); Batzel v. Smith, 333 F.3d 1018, 1025–26 (9th Cir. 2003). However, a recent concurrence by Judges Kozinski and Paez in *Makaeff v. Trump University* suggests that, while *Newsham* is still controlling law in the Ninth Circuit, it is not universally approved. In that concurrence, Judges Kozinski and Paez argue that *Newsham* was wrong in holding that state anti-SLAPP statutes are applicable in federal court and call for reconsideration of the issue should the opportunity arise in an en banc review. Makaeff v. Trump Univ., LLC, No. 11-55016, 2013 WL 1633097, at *15–16 (9th Cir. Apr. 17, 2013) (Kozinski, C.J., and Paez, J., concurring) (observing that the California anti-SLAPP law "merely provides a procedural mechanism for vindicating existing rights" and is an "ugly gash through [the] orderly process" provided by the federal rules).

27. *Godin*, 629 F.3d at 89.

28. *Id.* at 88.

29. *Id.* at 89.

30. *Id.* at 88.

31. *See* 3M Co. v. Boulter, 842 F. Supp. 2d 85 (D.D.C. 2012) (Wilkins, J.), *appeal dismissed*, No. 12-7012 (D.C. Cir. Oct. 19, 2012).

32. *Id.* at 102. Judge Wilkins also held that the Act's provision requiring the court to dismiss with prejudice when it grants the anti-SLAPP motion (D.C. Code § 16-5502(d)) strips the federal court of discretion granted by FRCP 41(b). *3M*, 842 F. Supp. 2d at 104–05. FRCP 41(b), however, is merely a default rule to construe ambiguous dismissal orders and does not provide independent discretion that the SLAPP provision could strip. *See, e.g.*, Sack v. Low, 478 F.2d 360, 364 (2d Cir. 1973); Weissinger v. United States, 423 F.2d 795, 798 (5th Cir. 1970) (en banc).

33. *3M*, 842 F. Supp. 2d at 107–10 (acknowledging conflict with other circuits). In addition, Judge Wilkins also concluded, in his second *3M* decision, that the Seventh Amendment right to a jury trial for factual issues would bar the application of an anti-SLAPP law in federal court, because the laws require the court to determine the likelihood of success on the merits prior to trial. 3M Co. v. Boulter, No. 11-cv-1527 (RLW), 2012 WL 5245458 (D.D.C. Oct. 24, 2012). However, as the Ninth Circuit has pointed out, courts do not "*weigh* the credibility or comparative probative strength of competing evidence" on an anti-SLAPP motion, but instead grant the motion where, "as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim." Hilton v. Hallmark Cards, 599 F.3d 894, 903 (9th Cir. 2010) (internal quotation marks omitted). When a court considers the likelihood of success on the merits on a defamation claim, the key issues before it are either pure legal issues or mixed issues of fact and law—for example, whether a challenged statement is fact or opinion, whether a privilege applies, and whether a statement could have been made with actual malice. Courts regularly decide these mixed questions of fact and law at an early stage, and there is already a presumption in federal courts for the early resolution of claims implicating speech to avoid the chilling effect of baseless litigation. In the event a particular case turned on a pure question of disputed fact—for example, whether a challenged statement was true or false—the court could simply deny the anti-SLAPP motion and avoid any potential constitutional issue.

34. Farah v. Esquire Magazine, Inc., 863 F. Supp. 2d 29, 37–39 (D.D.C. 2012).

35. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

36. Ashcroft v. Iqbal, 556 U.S. 662 (2009).

37. *Farah*, 863 F. Supp. 2d at 34 & n.6, 35, 37–39 (considering the blog post's label as "humor," *Esquire*'s long history of satire and humor on issues of public interest, posts where plaintiff admitted an hour after the *Esquire* post that it was a "parody," and posts showing plaintiffs' background at the forefront of the "Birther Movement").

38. *Id.* at 36 n.10.

39. *See, e.g.*, Four Navy Seals v. Associated Press, 413 F. Supp. 2d 1136, 1140, 1149–50 (S.D. Cal. 2005) (dismissing invasion of privacy claims under California's anti-SLAPP statute and Rule 12(b)(6) based on the Associated Press's publication of unaltered photographs of Navy SEALs allegedly mistreating Iraqi prisoners for failure to allege offensiveness or a reasonable expectation of privacy); Card v. Pipes, 398 F. Supp. 2d 1126, 1136–37 (D. Or. 2004) (granting author's Rule 12(b)(6) and Oregon anti-SLAPP motion against libel and intentional infliction of emotional distress claims because plaintiff failed to state a claim based on his statements made to the *New York Post* and republished on its website); Thomas v. L.A. Times Commc'ns, LLC, 189 F. Supp. 2d 1005, 1009–10 (C.D. Cal. 2002), *aff'd*, 45 F. App'x 801 (9th Cir. 2002) (granting defendants' special motion to strike, "akin to a Rule 12(b)(6) motion to dismiss," holding as matter of law that defendants did not intend to convey the impression that plaintiff lied about his past).

40. *See, e.g.*, Beckham v. Bauer Publ'g Co., No. CV 10-7980-R, 2011 WL 977570 (C.D. Cal. Mar. 17, 2011) (granting California's anti-SLAPP motion against soccer star David Beckham's defamation and intentional infliction of emotional distress claims against the publisher of *In Touch Weekly* over an article reporting on his alleged tryst with a call girl, because plaintiff was unlikely to prove that the publisher acted with actual malice where defendants had "interviewed the woman who claims to have had the encounter with" Beckham and gave Beckham an opportunity to respond), *appeal dismissed*, Nos. 11-55441, 11-56010, 2013 WL 492444 (9th Cir. Feb. 11, 2013); Aronson v. Dog Eat Dog Films, Inc., 738 F. Supp. 2d 1104, 1112–13 (W.D. Wash. 2010) (dismissing misappropriation and right of publicity claims against the producers of the documentary film *Sicko* under the Washington anti-SLAPP statute, considering affidavits to find plaintiff failed to show a likelihood of prevailing because the documentary was an expressive work and the use of his likeness was subject to the public interest exception); Armington v. Fink, No. 09-6785, 2010 WL 743524, at *1, *3, *5 (E.D. La. Feb. 24, 2010) (dismissing doctor's libel and false light suit against ProPublica and the *New York Times* over article about alleged euthanasia of patients by hospital staff during

Hurricane Katrina, reasoning that anti-SLAPP statute does not conflict with Rule 56, and there was no negligence or substantial falsity).

41. Godin v. Schencks, 629 F.3d 79, 87 (1st Cir. 2010) (quoting Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1452 (2010) (Stevens, J., concurring)) (internal quotation marks omitted).

42. Sherrod v. Breitbart, 843 F. Supp. 2d 83, 85 (D.D.C. 2012) ("Indeed, the first sentence of the Committee Report emphasizes the legislative intent to create new substantive rights for defendants in SLAPP suits.").

43. *Farah*, 863 F. Supp. 2d at 36 (quoting approvingly *Sherrod*, 843 F. Supp. 2d at 85 (internal quotation marks omitted)).

44. *Id.* at 36 n.10.

45. Committee Report, *supra* note 1, at 1, 4.

46. *See Sherrod*, 843 F. Supp. 2d at 85 n.4 ("[W]here a statute provides provisions for attorneys' fees and costs for the prevailing party—as the D.C. Anti-SLAPP provides—other courts have held that such statutory provisions are substantive in nature.") (citing *Godin*, 629 F.3d at 85 n.10; United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 971–72 (9th Cir. 1999))).

47. D.C. Code §§ 16-5502(a)–(b), -5504(a).

48. *Id.* § 16-5504(b).

49. *Godin*, 629 F.3d at 89.

50. *Sherrod*, 843 F. Supp. 2d at 85 n.4 (quoting *Godin*, 629 F.3d at 89) (internal quotation marks omitted).

51. *See* Committee Report, *supra* note 1, at 6 ("[T]he legislation provides a defendant to a SLAPP with substantive rights to have a motion to dismiss heard expeditiously . . . .").

52. Paul Farhi, *Redskins Owner Daniel Snyder Drops Lawsuit against Washington City Paper*, Wash. Post, Sept. 10, 2011, http://www.washingtonpost.com/sports/redskins-owner-dan-snyder-drops-lawsuit-against-washington-city-paper/2011/09/09/gIQA3hf1IK_story.html.

53. *See* Argentine Republic v. Nat'l Grid PLC, 637 F.3d 365, 368 (D.C. Cir. 2011) (holding that Rule 6(b) may not be used to extend statutory time limits).

54. *See* Committee Report, *supra* note 1, at 4 (explaining that stay of discovery is intended "[t]o ensure a defendant is not subject to the expensive and time consuming discovery that is often used in a SLAPP as a means to prevent or punish").

55. D.C. Code § 16-5502(c)(2); *see, e.g.*, Albergo v. Immunosyn Corp., No. 09CV2653, 2011 WL 197580, at *3, *5, *7 (S.D. Cal. Jan. 20, 2011) (granting anti-SLAPP motion on two counterclaims, while allowing discovery essential to opposing anti-SLAPP motion on other counterclaims).

56. *See, e.g.*, Metabolife Int'l, Inc. v. Wornick, 264 F.3d 832, 845, 850 (9th Cir. 2001) (applying anti-SLAPP special motion to strike and attorneys' fee provision, but not discovery stay).

57. *See, e.g.*, Price v. Stossel, 620 F.3d 992, 999 (9th Cir. 2010) (approving district court's denial of discovery, noting that "[u]nder California law, discovery is automatically stayed when a defendant files an anti-SLAPP motion, unless the opposing party can demonstrate 'good cause'").

58. Davis v. Elec. Arts Inc., No. C-10-03328, 2011 WL 2621626, at *3 (N.D. Cal. July 5, 2011) (internal quotation marks omitted).

59. *Id.* at *2 (internal quotation marks omitted).

60. *See* Farah v. Esquire Magazine, Inc., 863 F. Supp. 2d 29, 35 n.7 (D.D.C. 2012) (noting that court granted a discovery stay under the D.C. Anti-SLAPP Act); *see also* Weyrich v. New Republic, Inc., 235 F.3d 617, 625 (D.C. Cir. 2001); White v. Fraternal Order of Police, 909 F.2d 512, 517 (D.C. Cir. 1990); McBride v. Merrell Dow & Pharms. Inc., 717 F.2d 1460, 1466–67 (D.C. Cir. 1983), *on remand*, 613 F. Supp. 1349, 1352 (D.D.C. 1985), *aff'd in relevant part*, 800 F.2d 1208, 1210 (D.C. Cir. 1986).

61. *See* Lehan v. Fox Television Stations, Inc., No. 2011-CA-004592-B, 2011 D.C. Super. LEXIS 14 (D.C. Super. Ct. Nov. 30, 2011) (plaintiffs did not appeal after anti-SLAPP motion granted); Armington v. Fink, No. 10-30264 (5th Cir. May 13, 2010), ECF No. 00511110053 (plaintiff voluntarily dismissed appeal in exchange for defendants not seeking attorneys' fees).

62. The *Sherrod* defendants face the additional procedural hurdle of arguing that the D.C. Anti-SLAPP Act applies to a complaint filed after the statute was passed by the D.C. Council, but before it emerged from the mandatory congressional review period and became effective. The retroactivity issue adds an interesting procedural wrinkle to this particular case, but it has limited relevance going forward: the retroactivity concern disappears for all complaints filed on or after March 31, 2011, and *Sherrod* is the only prior pending case where it has been raised. However, the court could rely on the retroactivity argument to affirm denial of the defendants' SLAPP motion without reaching the other procedural issues, such as the applicability of the Act in federal court.

63. *See* D.C. Comics v. Pac. Pictures Corp., 706 F.3d 1009, 1013–16 (9th Cir. 2013) (reaffirming *Batzel* and holding that special motion to strike under California anti-SLAPP law is reviewable on appeal as a collateral order); Godin v. Schencks, 629 F.3d 79, 84–85 (1st Cir. 2010); Hilton v. Hallmark Cards, 599 F.3d 894, 900 (9th Cir. 2010); Henry v. Lake Charles Am. Press, L.L.C., 566 F.3d 164, 178 (5th Cir. 2009); Batzel v. Smith, 333 F.3d 1018, 1024–26 (9th Cir. 2003). Two Ninth Circuit panels have declined to allow interlocutory appeals from the denial of state anti-SLAPP motions under Nevada and Oregon law, where the statutes did not provide for interlocutory appeal. Metabolic Research, Inc. v. Ferrell, 693 F.3d 795 (9th Cir. 2012) (Nevada SLAPP statute); Englert v. MacDonell, 551 F.3d 1099 (9th Cir. 2009) (Oregon SLAPP statute). The statutes at issue in *Henry* (Louisiana) and *Godin* (Maine) also did not provide an immediate right to appeal; however, the courts in *Henry*, *Godin*, and *Hilton* all declined to follow *Englert*. The Ninth Circuit in both *Metabolic Research* and *Englert* relied on state law and legislative history to determine that the state legislatures of Nevada and Oregon did *not* intend to allow immediate appeal from the denial of a SLAPP motion. These cases have limited persuasive value regarding the Act, however, given the evidence of a legislative intent to allow immediate appeal and the D.C. Court of Appeals' embrace of the Fifth Circuit's decision in *Henry*. McNair Builders, Inc. v. Taylor, 3 A.3d 1132, 1138 (D.C. 2010) (citing *Henry* approvingly as an example of a federal appeals court "identif[ying] another public interest worthy of protection on interlocutory appeal, that of enforcing a statute that aim[s] to curb the chilling effect of meritless tort suits on the exercise of First Amendment rights" (second alteration in original) (internal quotation marks omitted)). *But see* Newmyer v. Sidwell Friends Sch., No. 12-CV-847 (D.C. Dec. 5, 2012) (unpublished). Moreover, the D.C. Council intended to follow California, which provides immunity from litigation and

trial, not just immunity from liability, satisfying the third *Cohen* factor that the decision is effectively unreviewable after final judgment. *See supra* note 7; Cohen v. Beneficial Indus. Loan Corp, 337 U.S. 541 (1949); *Batzel*, 333 F.3d at 1025 (finding the California anti-SLAPP statute created an "immunity" that was "designed to protect the defendant from having to litigate meritless cases aimed at chilling First Amendment expression"); Bruce E.H. Johnson & Sarah K. Duran, *A View from the First Amendment Trenches: Washington State's New Protections for Public Discourse and Democracy*, 87 WASH. L. REV. 495, 519 (2012) ("In essence, the California statute provides *immunity from being tried*, while the Nevada and Oregon statutes provide only *immunity from liability*." (emphasis added)).

64. The D.C. Council originally included an express provision for interlocutory appeal in the Act, but it was dropped from the final version because of a D.C. Court of Appeals case—which is no longer good law—that had indicated such a provision might violate the Home Rule Act.

65. *See* Hanna v. Plumer, 380 U.S. 460, 467–68 (1965); Burke v. Air Serv Int'l, Inc., 685 F.3d 1102, 1108–09 (D.C. Cir. 2012).

66. *Godin*, 629 F.3d at 92.

67. *See, e.g.*, United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 973 (9th Cir. 1999) ("Plainly, if the anti-SLAPP provisions are held not to apply in federal court, a litigant interested in bringing meritless SLAPP claims would have a significant incentive to shop for a federal forum."); Armington v. Fink, No. 09-6785, 2010 WL 743524, at *3 n.2 (E.D. La. Feb. 24, 2010) (applying Louisiana anti-SLAPP statute to claim against ProPublica and *New York Times* in part because "its application will ensure that defendants, whether in diversity or not, will be protected from meritless defamation claims and the resulting fishing expeditions that might chill the exercise of their speech rights").

68. *See* Notice of Voluntary Dismissal without Prejudice, Dean v. NBC Universal, No. 2011-CA-006055-B (D.C. Super. Ct. Feb. 21, 2012), ECF No. 5-1 ("The Complaint has been refiled in the U.S. District Court for the District of Columbia due to the Court's recent decision in *3M v. Boulter*, No. 11-cv-1527 (RLW) (D.D.C.)."); *see also* Forras v. Rauf, No. 1:12-cv-282 (D.D.C. Mar. 22, 2012), ECF No. 2-3 (same).