LexisNexis

LITIGATION INSIGHTS

Moore's Federal Practice & Procedure

Wagstaffe's Civil Procedure Before Trial

March 2019

MOORE'S FEDERAL PRACTICE—TOP THREE HIGHLIGHTS

The following three summaries are this month's Editor's Top Picks from the dozens of decisions added to Moore's Federal Practice and Procedure.

ATTORNEY'S FEES

Equal Access to Justice Act

Ibrahim v. U.S. Dep't of Homeland Sec.

912 F.3d 1147, 2019 U.S. App. LEXIS 13 (9th Cir. Jan. 2, 2019) (en banc)

The Ninth Circuit, sitting en banc, has clarified the standards applicable to awards of attorney's fees under the Equal to Justice Act.

Jump to full summary

ERIE DOCTRINE

State Anti-SLAPP Statutes

Carbone v. CNN, Inc.

910 F.3d 1345, 2018 U.S. App. LEXIS 35095 (11th Cir. Dec. 13, 2018)

The Eleventh Circuit holds that the Georgia anti-SLAPP statute does not apply in a diversity action in that state, because it is in direct conflict with the federal rules governing the adequacy of initial pleadings, the propriety of dismissal for failure to state a claim, and federal summary judgment standards.

Jump to full summary

REVIEWABILITY OF ISSUES

Exhaustion of Administrative Remedies

Stewart v. Iancu

912 F.3d 693, 2019 U.S. App. LEXIS 524 (4th Cir. Jan. 8, 2019)

The Fourth Circuit holds that the administrative-exhaustion requirement imposing a 180-day waiting period for filing suit under Title VII or the Rehabilitation Act is not a jurisdictional requirement.

Jump to full summary

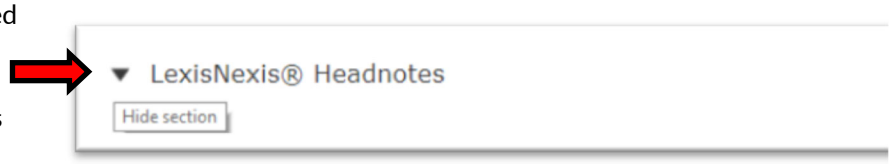
LEXISNEXIS HEADNOTES

Irene Reeves, Solutions Consultant

The LexisNexis headnotes are points of law that are material to the case. Headnotes created by LexisNexis editors intentionally use the courts' language to ensure that the headnotes accurately capture the courts' positions and conclusions. Instead of interpretation, the headnotes are what the courts actually say. LexisNexis Headnotes are a modern approach, electronically, giving the ability to adapt and thoroughly update as the law evolves. Headnotes are written, and cases are categorized within the LexisNexis Legal Topic Digest within 48-72 hours of editor receipt. Some researchers read headnotes as part of their process to quickly determine whether the case is potentially relevant to their research.

There are several features within the headnotes for the user to find relevant discussion about their topic.

Show/Hide headnotes: Headnotes are located at the top of the opinion with links to the original language of the court. Based on your preference, click the arrow beside LexisNexis Headnotes to **Show** or **Hide** the headnotes.



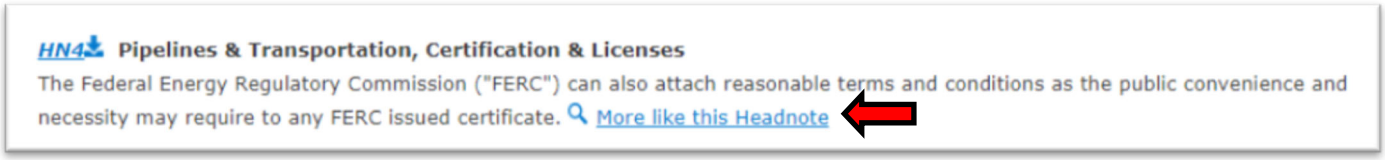
Get Topic Documents: Should the user find a relevant headnote and wish to find additional cases that share the same topic, click on Get Documents. This links to a result set that lists all cases categorized under that topic. From there, users may take advantage of post-search filters to narrow results.

Create an Alert: This is another option that allows the user to stay updated on any new cases that share the same topic.

View this Topic within the Topic Index: Easily go up a level or further drill down on related topics by selecting **View in topic index**.

Shepardize™ – Narrow by this Headnote: This feature assists researcher to find additional cases described in the original case headnote and may include the *Shepard's*® analysis symbol. The Shepard's result is pre-filtered to only include cases that cite the original case in the context through a specific headnote.

***Shepard's*® More Like This Headnote**: This feature lets the user find other headnotes that are like the one currently viewed. Click the link to see similar headnotes and/or paragraphs from the case. The results will include up to three headnotes for each case, or a paragraph of text with similar terms from the headnote.



NEW FROM JIM WAGSTAFFE

ERIE RAILROAD RULE ON BRAVE NEW TRACK

By: Jim Wagstaffe

As a civil procedure professor and practice guide author for some thirty years, I do indeed get it that law students and lawyers have trouble applying the tectonic rule enunciated in 1938 by the Supreme Court in *Erie R. Co. v. Tompkins*.[1] And certainly it means more than remembering a high profile federal personal injury lawsuit revolving around Harry Tompkins' tragic loss of a limb in a depression-era railroad accident in Hughestown, Pennsylvania.

In the last few years, the *Erie* rule has been on a high speed rail journey as it traverses the 21st Century phenomenon of state tort reform. From state house to state house across this country, local legislators are passing laws imposing seemingly procedural barriers to curb perceived threats of frivolous lawsuits. The question is whether they must be applied in federal court actions.

The *Erie* rule is deceptively simple: if there is a state law claim in federal court (via diversity or supplemental jurisdiction), the court will apply state *substantive* and federal *procedural* law. Simple perhaps – but the U.S. Supreme Court itself commented that the classification of a law as substantive or procedural can be "a challenging endeavor."[2]

Every law student and lawyer should know that the *Erie* decision is in the Top Ten cases of all time, and for good reason. Disallowing federal courts to intuit general federal common law as part of an otherwise state law claim raised and raises vital issues of separation of powers, federalism, judicial administration, and all to say nothing of questions concerning the tactical manipulation of procedural and jurisdictional rules when initiating or removing actions.

Let's take an important and current example of state legislative tort reform in an area where the federal courts are completely split as to whether it applies in federal court: state anti-SLAPP statutes designed to authorize the prompt striking of unsupported lawsuits arising from a defendant's exercise of free speech or petitioning rights (e.g. defamation claims).[3] Since most of these statutes (enacted in some thirty states) allow for the shifting of attorney's fees and an immediate appeal, they present a powerful shield in the litigator's toolbox.

---

[1] *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); *see also* The Wagstaffe Group Practice Guide: Federal Civil Procedure Before Trial, § 3-III (LexisNexis 2018) for a full discussion of the *Erie* doctrine.

[2] *Gasperini v. Ctr. For Humanities, Inc.*, 518 U.S. 415 (1996).

[3] For examples of anti-SLAPP (strategic lawsuits against public participation), *see* Cal. Code Civ. Proc. § 425.16; Tex. Civ. Prac. & Rem. Code § 27.002; D.C. Code § 16-5502(b); O.C.G.A. § 9-11-11.1; K.S.A. § 60-5320; Mass. Gen. Laws chapter 23, § 59H.

[4] *See Godin v. Schencks*, 629 F.3d 79 (1st Cir. 2010) (anti-SLAPP statutes are substantive and thus apply in federal court); *Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963 (9th Cir. 1999) (same); contra *Los Lobos Renewable Power v. AmeriCulture*, 885 F.3d 659 (10th Cir. 2018) (anti-SLAPP statutes do not apply in federal court because federal rules govern case-dispositive motions); *Carbone v. Cable News Network, Inc.*, 910 F.3d 1345 (11th Cir. 2018) (same); *Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328 (D.C. Cir. 2015) (same).

As stated, the federal circuits are deeply split as to whether the nominally "procedural" anti-SLAPP dismissal statutes nevertheless should be applied in federal court as part of manikfest attempts by state legislatures to achieve substantive objectives.[4] This important debate involves two competing analytic camps: one, reasoning that the state statutes reflect substantive commands, and the other concluding that Fed. R. Civ. P. 12 and 56 answer the same question (i.e., when and how a court dismisses a case before trial) and therefore must be applied notwithstanding contrary state rules.

Defining what is substantive and what is procedural is an illuminating first step. A law is substantive if it is bound up with the rights and obligations of state law (e.g. elements of a claim or defense, burden of proof, statutes of limitations, choice of law, damage caps, etc.). In contrast, a law is treated as procedural if it affects the manner and means of the claim's presentation, i.e., merely a form and mode of enforcing a state law (e.g. pleading standards, class action rules, discovery, dismissal for failure to prosecute, briefing rules, etc.).

But as law students have been telling me for decades, the definitions are easy to state and hard to apply. For example, many facially procedural rules such as the time limits for serving a complaint or requiring out-of-state defendants to post a bond can often be outcome determinative despite the obvious fact they are contained in self-described procedural rules. Comparatively, courts uniformly rule that the right to prejudgment interest is a substantive part of the damages analysis, yet obtaining post-judgment interest has long been held to be a procedural rule governed by the law of the sovereignty (state or federal) in which the judgment was obtained.[5]

It should become easier, perhaps, if one examines the substance/procedure question through the prism of the twin purposes of *Erie:* (1) discourage the evils of forum shopping, and (2) avoid the inequitable administration of laws.[6] Viewed either way, substantive rules are those that affect the outcome of the case, while defining the rights and obligation of the parties. Conversely, procedural rules are "housekeeping" in nature and echo the mandate issued for generations by parents welcoming home their college-age children: "If you are in my house, you follow my rules."

Over fifty years ago, in *Hanna v. Plumer,*[7] the Supreme Court gave us a threshold bright line for making this important distinction to determine if the *Erie* analysis is on the right track. If there is a federal rule directly on point that is in "collision" with a conflicting state rule, the federal rule will be applied as long as it does not violate the Rules Enabling Act.[8] In other words, if Congress or the courts label a rule procedural when including it in their governing rules or judicial statutes that designation will control unless such rule abridges or creates substantive rights.

Not so fast and not so easy. While essentially all of the rules in the Federal Rules of Civil Procedure will be deemed not to violate the Rules Enabling Act, it is essential to determine if such rules actually are in collision with alternative state law rules and rights. For example, Federal Rule 68 allows of-

---

[5] *See JPMorgan Chase Bank, N.A. v. First Am. Title Ins. Co.*, 750 F.3d 573 (6th Cir. 2014)—prejudgment interest governed by state law; *In re Redondo Const. Corp.*, 820 F.3d 460 (1st Cir. 2016)—post-judgment interest governed by federal law in federal court.

[6] *See* The Wagstaffe Practice Guide: Federal Civil Procedure Before Trial, § 3-III [C].

[7] 380 U.S. 460 (1965).

[8] 28 U.S.C. 2072 provides in part that the federal rules "shall not abridge, enlarge or modify any substantive right."

fers of judgment by defendants with the consequence that if the plaintiff does not obtain a judgment more favorable at trial, costs and expert fees can be redirected. But what about state statutes that allow for *plaintiff* offers of judgment with similar consequences or even allowing attorney fees to the prevailing party? The case law is in some disarray.[9]

Of course, if there is a federal rule that is clearly on point it will be applied in federal court notwithstanding directly conflicting state law procedures. For example, the time to serve a complaint (90 days under Federal Rule 4(m)) will be applied in federal court actions. Similarly, the *Twombly/Iqbal* pleading rules of Rule 8 and the summary judgment standards in Rule 56 will apply in federal court. In fact, the plethora of federal rules will govern even in diversity actions (e.g. the filing of motions, joinder, discovery, expert disclosures and the like). They will be treated as federal "housekeeping" rules of civil procedure even if litigation practices in state court are completely different.

So how does one address situations where the practice in federal court differs from modern state tort reform statutes? This question is important because state legislature have become adept at passing what seem to be procedural laws that clearly are designed to achieve substantive objectives. In addition to anti-SLAPP statutes, states across the country have enacted statutes requiring "certificates of merit" before suing a professional for malpractice—statutes plainly designed to limit the filing of seemingly meritless lawsuits against defendants perceived—rightly or wrongly---to have suffered an unfair explosion of litigation.

Similarly, states often pass statutes requiring that litigants file various pre-lawsuit notices before suing and in some cases obligating them to go through alternative dispute resolution procedures as a prerequisite to filing the lawsuit. What to do when the state law case is filed in or removed to federal court? Again, courts have reached varying results.[10]

The U. S. Supreme Court has made it clear that simply because a state law might facially be deemed procedural does not mean it will not be applied in federal court if the state was attempting to achieve a manifest substantive outcome. For example, in *Gasperini v. Ctr. For Humanities, Inc.*[11] the state of New York passed a law restraining runaway jury verdicts by lowering the standard for granting a new trial. Plainly the state was attempting to achieve a substantive objective, Fed. R. Civ. P. 59 while governing new trials did not contain an explicitly conflicting standard, and therefore the state statute would apply.

---

[9] *Goldberg v. Pacific Indemnity Co.*, 627 F.3d 752 (9th Cir. 2010) (Rule 68 governs defendant offers of judgment); *Home Indem. Co. v. Lane Powell Moss and Miller*, 43 F.3d 1322 (9th Cir. 1995) (same); cf. *S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist.*, 60 F.3d 305 (7th Cir. 1995) (state rule allowing plaintiffs to recover on offer of judgment applies in federal court); *Scottsdale Ins. Co. v. Tolliver*, 636 F.3d 1273 (10th Cir. 2016) (same); *see also Divine Motel Group, LLC v. Rockhill Ins. Co.*, 722 Fed. Appx . 887 (11th Cir. 2018) (includes statute allowing shifting of fees).

[10] *See Liggon-Redding v. Estate of Sugarman*, 659 F.3d 258 (3d Cir. 2011) (certificate of merit rule applies in federal court); *Hahn v. Walsh*, 762 F.3d 617 (7th Cir. 2014) (same); contra *Estate of C.A. v. Grier*, 752 F.Sup.2d 763 (S.D. Tex. 2010).

[11] 518 U.S. 415 (1996).

In *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*,[12] the *Erie* train track became analytically more cluttered when the Court considered another New York statute this time precluding class actions that sought recovery of penalties as statutory interest. The High Court concluded in a plurality opinion by Justice Scalia that Rule 23 (not the state statute) governed the situation because presumably it was on point. However, most commentators and courts have turned to Justice Steven's concurring opinion where he reiterated the *Gasperini* principle that states enacting procedural rules designed to achieve substantive objective must be applied in federal court. However and more pertinently, Justice Stevens reasoned that the state class action statute in question was not directly a part of the state's framework of substantive rights or remedies, nor "so intertwined with the state right or remedy that its function was to define the scope of the state cleared right." Hence, the statute would not apply in federal court.

Given the number of conflicting decisions in this area, particularly on the anti-SLAPP state statutes, the *Erie* issue no doubt is heading again to the United States Supreme Court train station. What an array of analytic spurs that could be traveled:

- Must the federal courts apply state statutes with a heightened sensitivity to the importance of state interests?
- How does one examine whether a state is passing a procedural statute to achieve a substantive objective?
- Must the collision be entirely irreconcilable so as to allow application of the federal "housekeeping" rule?
- Will egalitarian and equal protection interests prevail so that state statutes will be applied if the litigant genuinely would pick state or federal court based on the presence (or absence) of such a rule?

So, now, over 80 years later, the *Erie* rule reemerges as vitally important to litigants in making their choices between state and federal court. On the one hand, courts could take into account state interests and the practical reality that many litigants might select their forum based on rule differences thus mandating equal application. By the same token, federal judges understandably may parochially insist that federal case-dipositive rules are not to be co-opted by alternatively thinking state legislators.

My proposed test may not be nearly so intellectual as the twin purposes prism, the *Gasperini* manifest substantive objective approach or Justice Stevens' enthralling "intertwining" interest analysis. I ask the mundane but perhaps revealing question: When the state law was passed were there lobbyists hanging around? If so, then almost certainly the law should be treated as substantive. If, on the other hand, the legislative hearing room was occupied primarily with civil procedure nerds like myself, it's probably procedural. How's that for a helpful analysis?

And by the way, if you are a true civil procedure nerd you know that Harry Thompkins lost his *right* arm in that awful accident leading to the number one procedure case of all time.

---

[12] 559 U.S. 393 (2010).

ATTORNEY'S FEES

Equal Access to Justice Act

Ibrahim v. U.S. Dep't of Homeland Sec.

912 F.3d 1147, 2019 U.S. App. LEXIS 13 (9th Cir. Jan. 2, 2019) (en banc)

The Ninth Circuit, sitting en banc, has clarified the standards applicable to awards of attorney's fees under the Equal Access to Justice Act.

Equal Access to Justice Act. The Equal Access to Justice Act (EAJA) generally authorizes a court to award attorney's fees to a prevailing party in a civil action against the United States, unless the government's position was substantially justified or special circumstances make an award unjust [28 U.S.C. § 2412(d)(1)(A), (2)(A)].

Factual and Procedural Background. This case arose from the plaintiff's 2005 detention at the San Francisco International Airport while en route to Malaysia for a Stanford University conference. United States authorities detained the plaintiff because her name was on the Transportation Security Administration's "No Fly" list (the No Fly list). After almost a decade of vigorous and fiercely contested litigation against state and federal governments and their officials, including two appeals to the Ninth Circuit [*see, e.g.*, Ibrahim v. U.S. Dep't of Homeland Sec., 669 F.3d 983 (9th Cir. 2012)], and a weeklong trial, the plaintiff won a complete victory. In 2014, the federal government at last conceded that the plaintiff posed no threat to U.S. national safety or security, had never posed a threat to national security, and should never have been placed on the No Fly list. Discovery—which had been resisted by the government at every turn—disclosed that the plaintiff had been placed on the No Fly list and the federal government's centralized watchlist of known and suspected terrorists by mistake. An FBI special agent misread the instructions on a nomination form and accidentally nominated the plaintiff to the No Fly list while intending to do the opposite.

The plaintiff's victory was largely attributable to the efforts of her counsel. Since the plaintiff was finally allowed to travel to Malaysia in 2005, the U.S. government had never allowed her to return to the United States, not even to attend the trial that cleared her name. Throughout the litigation, the plaintiff was represented by a civil-rights law firm that worked without pay but with the understanding that if it prevailed on her behalf, it could recover reasonable attorney's fees and expenses, in addition to costs, under the EAJA.

The firm filed a motion for an award of attorney's fees and expenses, supported by documentary evidence and declarations, which the government opposed. The district court entered a fee award but reduced the claimed fees by almost 90 percent. The plaintiff appealed.

Reversal of Fee Award. An en banc panel of the Ninth Circuit reversed and vacated the district court's fee award, remanding with instructions to recalculate fees. The en banc court found that the district court had misapplied the standard for an EAJA fee award. The en banc opinion clarified the standards applicable to awards of attorney's fees under the EAJA.

Finding of Substantial Justification for Government's Position Must Be Based on Totality of Circumstances. The Ninth Circuit's en banc panel reaffirmed that in evaluating whether the government's position is substantially justified [*see* 28 U.S.C. § 2412(d)(1)(A)], a court must consider the totality of the circumstances, including both the underlying agency action and the litigation in defense of that action.

When a movant under the EAJA has established that he or she is a prevailing party, the burden is on the government to show that its litigation position was substantially justified on the law and the facts. To establish substantial justification, the government need establish only that its position is one that a reasonable person could think is correct, that is, that the position has a reasonable basis in law and fact [*see* Pierce v. Underwood, 487 U.S. 552, 565, 566 n.2, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988)].

The Ninth Circuit in this case explained that when evaluating the government's position for EAJA purposes, it considers both the government's litigation position and the "action or failure to act by the agency upon which the civil action is based" [*see* 28 U.S.C. § 2412(d)(1)(B)]. Under this test, the court considers whether the government's position as a whole has a reasonable basis in both law and fact.

The court of appeals rejected the district court's approach of disallowing fees for discrete positions taken by the government at certain stages of the litigation because, in its view, the government's positions in those instances were substantially justified. The court of appeals noted that this approach was contrary to Supreme Court precedent. In sum, "the EAJA—like other fee-shifting statutes—favors treating a case as an inclusive whole, rather than

as atomized line-items" [*see* Commissioner, INS v. Jean, 496 U.S. 154, 158–162, 110 S. Ct. 2316, 110 L. Ed. 2d 134 (1990) (rejecting government's argument that it could assert substantial-justification defense at multiple stages of action)].

Applying the correct standard to the record in this case, the court of appeals easily concluded that the government's position had not been justified. Despite knowing that the plaintiff's nomination to the No Fly list was an error, "the government essentially doubled-down over the course of the litigation with a no-holds-barred defense." And from the suit's inception, the government agencies' actions (including on-again, off-again placement of the plaintiff on various government watchlists; refusal to allow her to reenter the United States at all, even to attend her own trial; and delay of her U.S.-born, U.S.-citizen daughter's travel to attend the trial) were unreasonable. Neither the agencies' conduct nor the government's litigation position was substantially justified.

Proper Assessment of Fee Amount When Case Includes Alternative Claims. The Ninth Circuit's en banc panel held that when a district court awards complete relief on one claim, rendering it unnecessary to reach alternative claims, the alternative claims cannot be deemed unsuccessful for the purpose of calculating a fee award. The court of appeals also rejected a post-hoc "mutual exclusivity" approach to determining whether "unsuccessful" claims are related to successful claims. The court reaffirmed that the Supreme Court's decision in *Hensley v. Eckerhart* sets forth the correct standard of "relatedness" for claims under the EAJA [*see* Hensley v. Eckerhart, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)].

In *Hensley*, the Supreme Court set out a two-pronged approach for determining the amount of fees to be awarded when a plaintiff prevails on only some of his or her claims for relief or achieves limited success. First, a court must ask whether the plaintiff failed to prevail on claims that were unrelated to the claims on which he or she succeeded; this inquiry rests on whether the related claims involve a common core of facts or are based on related legal theories. Second, the court must ask whether the plaintiff achieved a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award. If the court concludes the prevailing party achieved excellent results, it may permit a full fee award based on the entirety of hours reasonably expended on both the prevailing and unsuccessful but related claims [Hensley v. Eckerhart, 461 U.S. 424, 433–435, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)].

In the present case, the district court had determined that because the plaintiff had obtained full relief on the merits of one of her claims, thereby rendering it unnecessary to reach her remaining claims, she "lost" on the unreached claims and could not recover any fees for her counsel's work on those claims. The court of appeals rejected this approach, concluding that under *Hensley*, a district court's "failure to reach" certain grounds does not make those grounds "unsuccessful." The court of appeals therefore concluded that the district court clearly erred in holding that the plaintiff's unreached claims were "unsuccessful."

The court of appeals also found that the district court erred in treating some of the plaintiff's claims, such as her equal-protection and First Amendment claims, as unrelated to the due-process claim on which she prevailed. *Hensley* made it clear that, while attorney hours spent on an unsuccessful claim that is distinct in all respects from the plaintiff's successful claim should be excluded, if a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his or her attorney's fee reduced simply because the district court did not adopt every contention raised [Hensley v. Eckerhart, 461 U.S. 424, 440, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)].

The Ninth Circuit concluded that all of the plaintiff's claims arose from her wrongful placement on the No Fly list and were therefore related. Fees for each of these claims were thus recoverable. None of the claims was distinct or separable from another, and each claim sought the same relief the plaintiff ultimately obtained. Therefore, the district court erred in reducing fees because of "unsuccessful" claims.

Proper Assessment of Bad Faith Warranting Fee Award Above EAJA Cap. Generally, attorney's fees under the EAJA are capped at $125 per hour [28 U.S.C. § 2412(d)(2)(A)(ii)]. The EAJA also provides, however, that "[t]he United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law" [28 U.S.C. § 2412(b)]. Thus, under the common law a court may assess attorney's fees against the government—at market rates exceeding the EAJA cap—if it has acted in bad faith, vexatiously, or wantonly, or for oppressive reasons [Rodriguez v. United States, 542 F.3d 704, 709 (9th Cir. 2008); Brown v. Sullivan, 916 F.2d 492, 497 (9th Cir. 1990)]. And in evaluating whether the government acted in bad faith, a court must review the totality of the government's conduct, including the government's actions that precipitated the litigation as well as the litigation itself [Brown v. Sullivan, 916 F.2d 492, 496 (9th Cir. 1990); Rawlings v. Heckler, 725 F.2d 1192, 1195–1196 (9th Cir. 1984)].

The district court in this case found no bad faith and therefore limited counsel's hourly rate to the amount of the EAJA cap. Again, the court of appeals found that the district court had clearly erred by failing to consider the totality of the government's conduct, particularly its failure to remove the plaintiff from all watchlists after it discovered

the original error and determined she was not a threat, as well as the government's stubborn refusal to provide discovery and its general scorched-earth litigation strategy. Thus, the district court's ruling that the government had not acted in bad faith was in error because it was incomplete.

Partial Dissent. Circuit Judge Callahan concurred in part and dissented in part. In an opinion joined by Circuit Judges Smith and Nguyen, Judge Callahan agreed with the majority that the test for substantial justification is whether the government's position as a whole has a reasonable basis in fact and law. She also agreed that the plaintiff's equal-protection and First Amendment claims were sufficiently related to her other claims such that the district court's failure to reach those issues did not justify the district court's curtailment of attorneys' fees. But Judge Callahan opined that the majority exceeded its role as an appellate court by determining in the first instance that the government's position was not substantially justified. She would have allowed the district court to make that determination on remand. She also dissented from the majority's setting aside of the district court's finding that the government had not proceeded in bad faith, and she would have affirmed the district court's limitation of the hourly rate to the amount of the EAJA cap.

ERIE DOCTRINE

State Anti-SLAPP Statutes

Carbone v. CNN, Inc.

910 F.3d 1345, 2018 U.S. App. LEXIS 35095 (11th Cir. Dec. 13, 2018)

The Eleventh Circuit holds that the Georgia anti-SLAPP statute does not apply in a diversity action in that state, because it is in direct conflict with the federal rules governing the adequacy of initial pleadings, the propriety of dismissal for failure to state a claim, and federal summary judgment standards.

Facts and Procedural Background. The plaintiff, Davide Carbone, sued Cable News Network (CNN) in a federal diversity action in the Northern District of Georgia. The plaintiff alleged that CNN published a series of news reports about him and the medical center he administered that were defamatory under Georgia state law. CNN moved in the alternative to strike the complaint under the Georgia anti‑SLAPP statute [*see* O.C.G.A. § 9‑11‑11.1], or to dismiss for failure to state a claim for relief under Federal Rule of Civil Procedure 12(b)(6). The district court denied the motion, holding that the anti‑SLAPP statute does not apply in federal court, and that the complaint stated a plausible claim for relief under federal pleading standards. CNN appealed to the Eleventh Circuit as to both grounds for dismissal.

Attributes of State Anti-SLAPP Statutes. State anti‑SLAPP (Strategic Lawsuits Against Public Participation) statutes govern certain expedited dismissals of defamation claims or other state-law claims that arise from or are related to free speech or other constitutional rights. California was the first state to adopt such a statute, and its provisions have become a model for those later enacted by other states, including the Georgia statute at issue in this case.

Though the precise terms of these statutes vary from state to state, most share the following attributes: (1) authorization of a special motion to dismiss or "strike" one or more state law claims [*see, e.g.*, O.C.G.A. § 9‑11‑11.1(b)(1)], (2) a requirement that the defendant bring the motion within a specified time after service, (3) a stay of discovery after the motion is filed [*see, e.g.*, O.C.G.A. § 9‑11‑11.1(d)], (4) adoption of standards for the court's decision on the motion, (5) a requirement that the court render a decision under those standards within a specified time after the motion is filed, (6) authorization or a requirement of an award of attorney's fees incident to a dismissal of one or more claims under the statute [*see, e.g.*, O.C.G.A. § 9‑11‑11.1(b.1)], and (7) authorization of an interlocutory appeal of any decision of the motion [*see, e.g.*, O.C.G.A. § 9‑11‑11.1(e)].

When state law claims are asserted in federal court, federal courts have disagreed over two separate but related issues: (1) whether these state statutes apply at all under the *Erie* doctrine; and (2) if they do, which of the listed attributes, if any, are displaced by contrary federal procedural rules.

Initial Decisions Applied State Law With Little Analysis. When these issues were first presented to federal courts, they typically applied state anti-SLAPP statutes as a matter of course to avoid inconsistent outcomes and discourage forum-shopping [*e.g.*, United States ex rel. Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 973 (9th Cir. 1999)].

***Abbas* Case Marked Shift in Analysis**. In 2015, however, federal courts began to reassess their prior approach. The first court to do so was the D.C. Circuit, which held that its local anti‑SLAPP statute requiring a plaintiff to show a likelihood of success did not apply at all in a diversity action because it answered the same question as the federal rules governing dismissal and summary judgment—when can the defendant avoid going to trial? [Abbas v. Foreign Policy Group, LLC, 783 F.3d 1328, 1333–1337 (D.C. Cir. 2015) (Kavanaugh, C. J.)]. As the *Abbas* case pointed out,

the application of a state anti-SLAPP statute does not present the broader *Erie* issue of whether state law is substantive or procedural; instead, it presents the more narrowly focused inquiry of whether that law directly conflicts with federal procedural rules and is therefore presumptively inapplicable under *Hanna v. Plumer* [380 U.S. 460, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965)]. A direct conflict is presented when the applicable federal rule and the state law at issue "answer the same question" in different ways [Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 398–399, 130 S. Ct. 1431, 176 L. Ed. 2d 311 (2010)].

The Tenth Circuit has essentially agreed with *Abbas*, holding that a state anti‐SLAPP statute does not apply at all in a diversity action, though it confined its analysis to the particular New Mexico statute at issue and did not adopt a categorical rule applicable to other states in the circuit [Los Lobos Renewable Power, LLC v. AmeriCulture, Inc., 885 F.3d 659, 668–670 (10th Cir. 2018)]. Similarly, the Ninth Circuit has adjusted its approach to the application of the California anti‐SLAPP statute, holding that the only attributes that apply in federal court are the initial authorization for the motion and a resulting fee award, and that all other features of the statute as to the resolution of the merits of the motion are displaced by federal pleading and summary judgment standards [Planned Parenthood Fed'n of Am. v. Ctr. for Med. Progress, 890 F.3d 828, 833–835 (9th Cir. 2018)].

Previous Eleventh Circuit Cases Did Not Address Issue. Returning to the instant action, the Eleventh Circuit first rejected the argument by CNN that it had already applied state anti‐SLAPP statutes, noting that in those cases, applicability was either not at issue, or was assumed, but not decided.

Eleventh Circuit Adopts *Abbas* Approach. The Eleventh Circuit then concluded that its analysis was governed by *Hanna* and whether the Georgia anti‐SLAPP statute presented a direct conflict with the federal rules. The court noted that the question in dispute was whether the plaintiff's complaint stated a claim for relief that was supported by sufficient evidence to avoid a pretrial dismissal. Taken together, "Rules 8, 12, and 56 provide an answer" that was in direct conflict with the answer under the state law. First, the anti‐SLAPP statute required a *probability* of success as an initial pleading standard, while Rules 8 and 12(b)(6) require only a *plausible* claim for relief. Second, the state law required evidence demonstrating a probability of success without the benefit of discovery, while Rule 56 requires only the presentation of a genuine fact dispute, and generally bars summary judgment before any discovery.

CNN argued that the Georgia anti‐SLAPP statute could apply because it addressed a different question under the *Hanna* analysis, that is, whether the plaintiff had a probability of success on the claims presented. The court of appeals rejected that argument, noting that it:

> conflates the question a rule or statute is designed to answer with the standard it requires the court to apply in answering that question. Rules 8, 12, and 56 answer the question of sufficiency by requiring the plaintiff to allege a claim that is plausible on its face and to present evidence sufficient to create a triable issue of fact. The Georgia anti‐SLAPP statute answers the same question by requiring the plaintiff to allege and prove a probability of success on the merits.

CNN also argued that refusing to apply a state anti‐SLAPP statute would create a conflict among the circuits, but the Eleventh Circuit noted that the conflict already existed. The court expressly endorsed the prior *Abbas* approach that a state anti‐SLAPP statute requiring a probability of success on the claims presented a direct conflict with the federal rules on the sufficiency of pleadings and summary judgment standards.

No Appellate Jurisdiction Over Alternative Rule 12(b)(6) Dismissal. As previously noted, CNN's motion for dismissal was based on alternate grounds of either the Georgia anti‐SLAPP statute, or for failure to state a claim under the federal rules. The Eleventh Circuit held that the denial of the first ground for dismissal was appealable as a collateral order. The denial of the Rule 12(b)(6) motion, however, was an interlocutory order, and the court lacked pendent appellate jurisdiction over the appeal of that aspect of the order.

Disposition. The Eleventh Circuit affirmed the district court's denial of the defendant's motion to strike under the Georgia anti‐SLAPP statute, but dismissed the appeal of the denial of the Rule 12(b)(6) motion.

REVIEWABILITY OF ISSUES

Exhaustion of Administrative Remedies

Stewart v. Iancu

912 F.3d 693, 2019 U.S. App. LEXIS 524 (4th Cir. Jan. 8, 2019)

The Fourth Circuit holds that the administrative-exhaustion requirement imposing a 180-day waiting period for filing suit under Title VII or the Rehabilitation Act is not a jurisdictional requirement.

Timing of Federal Employee's Suit Under Title VII and Rehabilitation Act. Title VII of the Civil Rights Act of 1964 [42 U.S.C. § 2000e et seq.] requires that a federal employee with an employment-discrimination claim must pursue an administrative complaint before filing a civil action [42 U.S.C. § 2000e-16(a)]. The employee may file a civil action based on his or her administrative complaint (1) within 90 days after receipt of notice of final agency action, or (2) after 180 days from "the filing of the initial charge" with the agency if there has been no final agency action on the administrative complaint [42 U.S.C. § 2000e-16(c); *see* 29 C.F.R. § 1614.407]. Federal employees' Rehabilitation Act claims are subject to the same administrative procedures that govern Title VII claims [*see* Wilkinson v. Rumsfeld, 100 Fed. Appx. 155, 157 (4th Cir. 2004) (unpublished); Doe v. Garrett, 903 F.2d 1455, 1460–1461 (11th Cir. 1990)].

Factual and Procedural Background. The plaintiff in this case was an employee of the U.S. Patent and Trademark Office (PTO) who requested accommodations for his disabilities. The PTO did not grant his request in full, and on July 14, 2015, he filed a formal complaint with the PTO's Office of Equal Employment Opportunity and Diversity, asserting a hostile work environment, discrimination, and various claims of retaliation. During the pendency of his administrative complaint, he amended it eight times.

On February 29, 2016—more than 180 days after the filing of his original administrative complaint, but less than 180 days after the filing of several of the amendments—the plaintiff filed the present civil action. His complaint alleged violations of Title VII and the Rehabilitation Act of 1973 [29 U.S.C. § 701 et seq.].

The PTO moved to dismiss, arguing that the plaintiff's suit was premature because he had not exhausted his administrative remedies. According to the PTO, the plaintiff was required to wait to file a civil action until the conclusion of the agency's investigation period. That investigation period is extended when an employee amends his or her administrative complaint, to the earlier of 180 days after the last amendment or 360 days after the filing of the initial complaint [29 C.F.R. §§ 1614.106(e)(2), 1614.108(f)].

The district court agreed with the PTO and concluded that the plaintiff had failed to exhaust his administrative remedies because he had not waited for the conclusion of the agency's investigation period before filing suit. The district court therefore dismissed the case without prejudice for lack of subject-matter jurisdiction.

On appeal by the plaintiff, the Fourth Circuit reversed the district court's judgment.

Waiting Period Is Not Jurisdictional Bar. As a threshold matter, the court of appeals held that the district court had incorrectly treated Title VII's 180-day waiting period [42 U.S.C. § 2000e-16(c); *see* 29 C.F.R. § 1614.407] as a jurisdictional requirement.

The court of appeals noted that Title VII's 180-day waiting period for federal employee suits is not a paradigmatic exhaustion requirement. Unlike most administrative exhaustion requirements premised on agency action, after which an injured party may seek review of an adverse decision and obtain a remedy if warranted, the 180-day waiting period is satisfied by agency inaction. Congress enacted the waiting period because it recognized that federal employees frequently encountered an "administrative quagmire" in filing charges of discrimination [*see* H.R. Rep. 92-238, at 12 (June 2, 1971)]. The 180-day waiting period therefore confines agencies to a tight schedule and signals congressional recognition that the doctrine of exhaustion of remedies had become a barrier to meaningful court review [*see* Wilson v. Pena, 79 F.3d 154, 167 (D.C. Cir. 1996)]. In light of this legislative context, the Fourth Circuit in this case observed that the 180-day waiting period "functions more like a mandatory procedural hurdle for litigants than an affirmative agency step potentially giving rise to a remedy on review."

The court of appeals explained that in recent years, the Supreme Court has cautioned courts not to confuse subject-matter jurisdiction with the essential ingredients of a federal claim for relief. Applying this distinction, the Court has differentiated between nonjurisdictional claim-processing rules and jurisdictional rules that govern a court's adjudicatory authority [*see* Gonzalez v. Thaler, 565 U.S. 134, 141, 132 S. Ct. 641, 181 L. Ed. 2d 619 (2012); Arbaugh v. Y & H Corp., 546 U.S. 500, 515–516, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006); Kontrick v. Ryan, 540 U.S. 443, 454–455, 124 S. Ct. 906, 157 L. Ed. 2d 867 (2004)]. The Court has established a clear-statement rule for determining whether procedural rules, including time bars, are jurisdictional. Only if the statutory text "plainly show[s] that Congress imbued a procedural bar with jurisdictional consequences" should a court treat a rule as jurisdictional

[United States v. Kwai Fun Wong, 575 U.S. —, 135 S. Ct. 1625, 191 L. Ed. 2d 533, 542 (2015)].

The Fourth Circuit found that, although the 180-day waiting period is cast in mandatory language [42 U.S.C. § 2000e-16(c)], there is no indication that Congress intended it to be jurisdictional. The statutory text addresses only the timeliness of claims; it does not refer to the district courts' authority to hear untimely suits. The statute does not contain jurisdictional language dictating that judicial review can be obtained within a prescribed time and manner before a particular court. In addition, the waiting-period provision is separate from Title VII's provisions that do pertain to jurisdiction. Nothing in Title VII's provision conferring jurisdiction on district courts conditions that jurisdictional grant on compliance with the 180-day waiting period or otherwise links those separate provisions [*compare* 42 U.S.C. § 2000e-16(c) (federal employee "may file a civil action as provided in section 2000e-5") *with* 42 U.S.C. § 2000e-5 (federal district courts "shall have jurisdiction of actions brought under this subchapter")].

Because the 180-day waiting period is akin to a claim-processing rule imposing procedural obligations on litigants, rather than implicating judicial authority to hear a class of cases, the Fourth Circuit concluded that the waiting period is not jurisdictional.

Waiting Period Does Not Restart When Administrative Complaint Is Amended. The Fourth Circuit went on to hold that Title VII's 180-day waiting period to file suit operates independently of the agency's extended investigation window when an administrative complaint is amended. Instead, by its own terms the 180-day waiting period for filing a civil action, absent agency final action, commences with the filing of the initial administrative complaint, regardless of subsequent amendments to that complaint.

Disposition. Because the district court's dismissal was based on the erroneous belief that it lacked subject-matter jurisdiction, the Fourth Circuit reversed the dismissal and remanded for further proceedings.