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SECOND CIRCUIT REVIEW

Expert Analysis

Clarifying Choice of Law Analysis For State-Law Defenses

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This month, we discuss *Liberty Synergistics v. Microflo*,[1] in which the U.S. Court of Appeals for the Second Circuit addressed novel questions concerning appellate jurisdiction and choice of law in diversity cases. The decision, written by Judge José A. Cabranes and joined by Judges John M. Walker Jr. and Richard C. Wesley, held that appellate jurisdiction existed under the collateral order doctrine to review a federal district court's choice-of-law ruling that a California procedural device was not available to defend against a New York cause of action. In finding jurisdiction to hear the appeal, the Second Circuit ruled that the denial of defendants' motion to strike plaintiff's complaint was sufficiently "final" to warrant immediate appellate review.

Having exercised appellate jurisdiction, the court concluded that the district court had confused two related but distinct choice-of-law inquiries and held that even if New York law governed plaintiff's claim, California law still would govern defendants' motion to strike the complaint. *Liberty Synergistics* offers both a careful consideration of the propriety of appellate intervention prior to entry of a final judgment below and a clear explanation of how district courts should approach complex choice-of-law determinations in diversity actions.

Background

The case has a complex procedural history, beginning with a 2008 lawsuit in which Microflo Ltd. sued Liberty Synergistics Inc., in the U.S. District Court for the Eastern District of New York. That lawsuit stemmed from a failed business agreement between Liberty and Microflo. Following the collapse of the deal, Microflo sued a number of defendants, including Liberty, for fraud, unfair trade practices, unjust enrichment, breach of contract and of the duty of good faith and fair dealing, tortious interference with prospective economic advantage, and a civil RICO claim. The lawsuit later was dismissed pursuant to a joint stipulation.[2]

Liberty subsequently brought a malicious prosecution action against Microflo, Edward Malkin, and Ecotech Ltd. (collectively Microflo) in California state court on Sept. 17, 2010, alleging that Microflo failed to undertake any reasonable investigation of the facts alleged in its New York complaint and that it had maintained that action "out of motives grounded in spite, malice, and with a vexatious and malicious intent…."[3]

In November 2010, Microflo removed the case to the U.S. District Court for the Central District of California, and, in January 2011, brought a special motion to strike the complaint under California's anti–Strategic Litigation Against Public Participation ("anti-SLAPP") statute, CAL. CIV. PROC. CODE §425.16. That statute "provides for pre-trial dismissal…of lawsuits that masquerade as ordinary lawsuits but are brought to deter common citizens from exercising their political or legal rights or to punish them for doing so" and was "enacted to allow for early dismissal of meritless first amendment cases aimed at chilling expression through costly, time-consuming litigation."[4]

Microflo argued that Liberty's malicious prosecution claim was nothing more than retaliation for bringing the original New York action. Microflo also moved to dismiss the complaint for lack of personal jurisdiction or, in the alternative, to transfer the case to the Eastern District of New York.

While Microflo's motions were pending, the California federal court ordered the case transferred to the Eastern Dis-

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trict of New York, pursuant to the parties' joint request. Following the transfer, Microflo filed another special motion to strike Liberty's complaint under the California anti-SLAPP statute. The district court referred the motions to a magistrate judge, who found personal jurisdiction over Microflo, then applied California's choice-of-law principles and concluded that New York law controlled Liberty's malicious prosecution claim and that Microflo therefore could not assert a defense based on California's anti-SLAPP provision.

The magistrate judge reasoned that California choice-of-law rules required that New York substantive law govern Liberty's claim, that the California anti-SLAPP rule was a substantive rule, and that therefore the New York federal court should not apply the anti-SLAPP rule. The district court adopted the magistrate judge's recommendation concluding that the California anti-SLAPP defense was not applicable to Liberty's claim.

Microflo appealed the decision to the Second Circuit.

The Second Circuit's Decision

On appeal, the Second Circuit confronted two questions: "(1) whether the District Court's decision regarding the inapplicability of California's anti-SLAPP rule is a 'collateral order' reviewable on an interlocutory appeal under 28 U.S.C. §1291; and (2) whether the District Court erred by concluding that California's anti-SLAPP rule is inapplicable in light of its determination that New York law, instead of California law, governs the plaintiff's malicious prosecution claim."[5]

Appellate Jurisdiction. With respect to the jurisdictional issue, the Second Circuit held that the district court's ruling was immediately appealable as a collateral order. The court recognized that there is no appellate jurisdiction in the absence of a "final decision" from the district court and that the district court had not rendered a final judgment or certified any issue for interlocutory appeal. The court noted, however, that there is appellate jurisdiction over a narrow category of collateral orders, which, although they do not resolve the entire litigation, are sufficiently "final" in nature to warrant interlocutory review.

An order must meet three criteria to be considered collateral for purposes of interlocutory appeal: the order must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment."[6] The Second Circuit found that each of the three conditions had been met.

'Liberty Synergistics' offers a clear explanation of how district courts should approach complex choice-of-law determinations in diversity actions.

First, the court found that the district court's ruling conclusively determined the disputed question. The court noted that where a defendant asserts a right, the essence of which is avoiding trial or other burdens of litigation, a lower court's denial of that right conclusively determines the disputed issue by forcing the defendant to bear at least some litigation burdens. The essence of the California anti-SLAPP statute is "a right not to be dragged through the courts because you exercised your constitutional rights."[7] Thus, because the purpose of the anti-SLAPP statute is to spare defendants the burdens of litigating meritless claims, the court deemed the denial of that statutory protection sufficiently final to satisfy the first requirement of the collateral order doctrine.

Second, the court found that the district court's ruling resolved an important issue that was separate from the merits of the case. Applying a pragmatic approach, the court found that the issue was "important" because the considerations weighing in favor of allowing the appeal seemed stronger than those weighing against it. With respect to whether the applicability of the anti-SLAPP statute was separate from the merits of the lawsuit, the court noted several considerations that favored permitting the appeal: The appeal presented an abstract question of law of the sort that appellate courts generally consider; the issue could be resolved once without the need for a series of appeals in future cases; and the issue presented an important policy interest that could not be vindicated following a final judgment below. Moreover, the court placed weight on the fact that the district court denied Microflo's motion as a matter of law, not based on any of the facts specific to the case.

Third, the court concluded that the district court's denial of the motion would be effectively unreviewable following entry of a final judgment below. The court explained that the denial of a pre-trial protection standing alone would not be sufficient to satisfy this prong; rather, the denial must be one that would threaten some substantial public interest. Finding that requirement to be satisfied, the court stressed that the anti-SLAPP statute included a provision for interlocutory appeal in California state courts and also included a legislative statement of purpose stressing the important public interest that the statute was designed to serve. On this basis, the court concluded that merely reversing an erroneous final judgment on appeal would not be sufficient to vindicate the purposes of the anti-SLAPP statute in protecting defendants from the burdens, including pretrial burdens, of lawsuits that are brought to chill First Amendment expression.

Choice of Law. Having concluded that it could exercise jurisdiction over Microflo's appeal, the Second Circuit then considered the question of law presented by the denial: whether the district court correctly ruled that the California anti-SLAPP statute was inapplicable to the action. The Second Circuit concluded that the district court had erred as a matter of law.

The court observed that the Rules of Decision Act, 28 U.S.C. §1652, obligates a federal court sitting in diversity to consider two distinct choice-of-law issues. First, the federal court must apply state

choice-of-law principles to determine the rules of decision that would apply if the action were being decided in state court. Under this inquiry, a state may apply its own procedural laws even where the substantive law of another jurisdiction itself governs the claim for relief. Second, the federal court must determine which of those state rules of decision is "substantive" under the federal *Erie* doctrine; those substantive state laws must be applied in the federal court (if they are not otherwise displaced by a valid federal law or rule governing the same issue).

The Second Circuit stressed that the former inquiry is a matter of state law, while the latter is a matter of federal law. Moreover, the same rule may be "procedural" for state choice-of-law purposes under the first inquiry, but "substantive" for federal *Erie* purposes under the second. For example, a statute of limitations might be considered procedural in a state choice-of-law analysis, but be deemed substantive for federal *Erie* purposes.[8]

Because the parties in *Liberty Synergistics* disputed only the first issue—whether the anti-SLAPP rule would govern the case if it were being heard in state court—the Second Circuit resolved only that issue.

The court reiterated that a federal court sitting in diversity generally applies the choice-of-law rules of the state in which the court sits. But this case presented an additional complication because the underlying lawsuit had been brought in California and later voluntarily transferred to New York. Governing law does not change following a voluntary change of venue from one federal court to another.[9] Therefore, the Second Circuit explained, "the federal court in New York must pretend, for the purpose of determining the applicable state rules of decision, that it is sitting in California."[10] In other words, the ultimate question for the district court was whether a California state court would have made the anti-SLAPP provision available to Microflo.

The Second Circuit held that a California state court would have made the anti-SLAPP provision available to Microflo as a matter of state procedural law even if the state court also found that the New York malicious prosecution law applied to Liberty's substantive claim for relief. In support of that conclusion, the court noted that the anti-SLAPP statute not only appeared in the California Code of Civil Procedure, but also had been repeatedly referred to by California courts as procedural in nature and had been treated as a procedural rule by California state courts for purposes of choice-of-law analyses.

The court reiterated that a federal court sitting in diversity generally applies the choice-of-law rules of the state in which the court sits. But this case presented an additional complication because the underlying lawsuit had been brought in California and later voluntarily transferred to New York.

The Second Circuit further noted that the statute was not limited on its face to being available only in actions arising under California law—and the court saw no reason to impose such a limitation. The court added that, even if the anti-SLAPP provision were considered "substantive" for purposes of state choice-of-law analysis (contrary to the weight of California case law), California choice-of-law principles still would permit application of the statutory defense even when the underlying cause of action arose under the law of another state.

The Second Circuit observed that the Constitution limits state choice-of-law rules that would "frustrate causes of action defined by other states' laws," but added that "this case does not approach those constitutional boundaries."[11] In a lengthy footnote, the court explained that there is no constitutional requirement that a cause of action and the defenses to it spring from the law of the same state and that, even assuming a more restrictive constitutional standard, "the anti-SLAPP rule at issue here does not alter a defendant's liability, but rather, provides for the expedited dismissal of certain meritless disputes."[12]

Because the district court incorrectly held the anti-SLAPP rule inapplicable to Liberty's claims as a matter of law, the Second Circuit reversed the order below and remanded the case for further consideration of Microflo's motion under the anti-SLAPP statute.

Conclusion

The Second Circuit's decision in *Liberty Synergistics* is significant both for clarifying the standard for interlocutory review under the collateral order doctrine and its treatment of complex choice-of-law analyses.

On remand, the district court must determine whether Microflo is entitled to strike Liberty's complaint pursuant to California's anti-SLAPP law—an issue as to which Microflo now will be heard.

1. *Liberty Synergistics v. Microflo*, No. 12-108-cv, —F.3d—, 2013 WL 2361042 (2d Cir. May 31, 2013).
2. See generally *Liberty Synergistics v. Microflo*, No. 11-0523-cv, 2011 WL 4974832 (E.D.N.Y. Oct. 19, 2011) (discussing facts of underlying lawsuit).
3. *Liberty Synergistics*, 2013 WL 2361042, at *2 (quoting Complaint ¶27).
4. Id. at *1 n.4 (quoting *Batzel v. Smith*, 333 F.3d 1018, 1023-1024 (9th Cir. 2003)).
5. Id. at *1.
6. Id. at *4 (quoting *Will v. Hallock*, 546 U.S. 345, 349 (2006)) (brackets original, internal quotation marks omitted).
7. Id. at *5 (quoting *Varian Med. Sys. v. Delfino*, 35 Cal.4th 180, 193 (2005)).
8. Id. at *9-10 (citing *Guaranty Trust v. York*, 326 U.S. 99 (1945), and *Sun Oil v. Wortman*, 486 U.S. 717 (1988)).
9. *Ferens v. John Deere*, 494 U.S. 516 (1990)
10. *Liberty Synergistics*, 2013 WL 2361042, at *9.
11. Id. at *11.
12. Id. at *11 n.19.