Feb. 1, 2022

Multiverse Cosplay

For over half a century, we have been enthralled by adventures of characters crossing into other versions of the "real world" as part of a dimensionally broader multiverse. For most people, this craving to experience divergent worlds can only be satisfied in fiction. But not for lawyers.

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EXCEPTIONALLY APPEALING

Much fascinating speculative fiction rests on the notion of parallel universes -- places similar to our own world but just different enough to be interesting. Possibly the earliest example, from the Golden Age of Science Fiction, is Frederic Brown's "What Mad Universe" (1949), in which a massive energy discharge shifts the protagonist to another dimension where the world is deceptively similar, but with significant alterations. *See* Xavier Dollo, "The History of Science Fiction: A Graphic Novel Adventure" at p. 123 (Humanoids, Inc. 2021). (Wait! Was that just a citation to a comic book about sci-fi history? Double dork points awarded!) More recent examples are the 2012 TV show "Awake" (a favorite of legal scholar and sci-fi fan Cass Sunstein), the Max Barry novel "The 22 Murders of Madison May" (Hodder & Stoughton 2021), and the Amazon series "The Man in the High Castle" (2015-2019). In short, for over half a century, we have been enthralled by adventures of characters crossing into other versions of the "real world" as part of a dimensionally broader multiverse. For most people, this craving to experience divergent worlds can only be satisfied in fiction. But not for lawyers.

For better or worse, our federal and state court systems allow litigators to experience alternative realities in full technicolor and 360-degree Sensurround (1976, U.S. Patent 3,973,839). Both universes share the common foundational structure of pleadings, motions, discovery, trials and appeals. But the details differ, making them dangerous environments for those harboring expectations from their home planes. One example is California's anti-SLAPP law, which obviously applies in California courts. It exists in federal court too, but not entirely; some components didn't make it through the *Erie* transdimensional transfer. *U.S. ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 973 (9th Cir. 1999) (recognizing that only portions of California's anti-SLAPP statute apply in federal diversity actions). For instance, the statutory timing provisions, discovery stay and prohibition on amendment do not apply in federal court. *See* *Sarver v. Chartier*, 813 F.3d 891, 900 (9th Cir. 2016); *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 847 (9th Cir. 2001); *Verizon Delaware, Inc. v. Covad Commc'ns Co.*, 377 F.3d 1081, 1091 (9th Cir. 2004). And while appeals exist in both universes, they are premised differently (state statutory grant versus federal collateral order jurisdiction) and come with some tweaks. *See, e.g.*, *Greensprings Baptist Christian Fellowship Tr. v. Cilley*, 629 F.3d 1064, 1070 (9th Cir. 2010).

Lawyers aren't the only ones to transport from one universe to another: Federal judges must do so, too. When faced with diversity cases, federal judges must apply state law -- or at least parts of state law. In doing so, they engage in a form of cosplay, pretending to be state court judges. (For you non-nerds, "cosplay" is a Japanese portmanteau of "costume" and "play," coined by Nobuyuki Takahashi after he attended the 1984 World Science Fiction Convention in Los Angeles. Founding sci-fi superfan (and Angeleno) Forrest J Ackerman was the first cosplayer, wearing a "futuristicostume" at the 1st World Science Fiction Convention in 1939. *See* Dollo, *supra*, at p. 126. Treble nerd points!)

How does this judicial cosplay work exactly? Not as simply as you might think. Different judges play differently.

In applying state law, federal judges are to determine how a state judge would address the state law issue. This means following state supreme court precedent, and if there is no such precedent, then attempting to predict how the supreme court would rule, which allows relying on state intermediate appellate court opinions. *Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, 960 F.3d 603, 610-11 (9th Cir. 2020); *Norcia v. Samsung Telecomm. Am., LLC*, 845 F.3d 1279, 1284 (9th Cir. 2017); *Diaz v. Kubler Corp.*, 785 F.3d 1326, 1329 (9th Cir. 2015). So far, so good. But California has an anomalous wrinkle in its precedential space-time continuum: unpublished appellate opinions. These decisions are not citable in state court, but are citable in federal court. *See* Shatz & Petrossian, "To Cite or Not to Cite?," 26:1 Cal. Litigation 15 (2013). What's a cosplaying dimensionally traveling federal judge supposed to do with those? Two divergent philosophies emerge, as recently seen in the majority and dissenting opinions in *State Farm Mutual Automobile Insurance Co. v. Penske Truck Leasing Co.*, 20-55893, 2021 WL 4810642 (9th Cir. Oct. 15, 2021).

Option One. The strict view goes all-in, internalizing the character of "state judge" as far as possible. Under this view, the federal judge donning the state jurist role reasons that because unpublished California appellate opinions may not be "cited or relied on" (Cal. Rule of Court 8.1115(a)), such decisions should be ignored in federal court. Indeed, it would be "improper to rely upon [an] unpublished, uncitable case." *State Farm*, 2021 WL 4810642, *2 (also noting that though "California courts have occasionally ignored their own rule ... [this] is no reason to assume that they would regularly do so, or adopt

the reasoning of [an] unpublished decision"). Under this view, there is no "presumption that California courts will follow an unpublished appellate court opinion," in contrast to the presumption that published authority will be followed. *Id.* This is essentially the approach taken by the majority in *State Farm*, which opted to ignore an unpublished decision.

Option Two. Alternatively, a federal judge could focus more on the question "How would a state court rule on this issue?" and less on assuming the role of state court judge with its attendant limitations. Under this view, if an on-point unpublished case exists, then that is good evidence of how a state court would rule -- given that a state court actually did rule that way. As the dissenting judge in *State Farm* put it, the fact that "three California judges interpreting California law" had ruled a certain way, serves as an "accurate barometer of how the California Supreme Court would decide [the] issue." *Id.* at *4 (Rawlinson, J., dissenting).

The dissenting opinion presses its point by noting that far from "improper," it is actually commonplace for federal judges to rely on unpublished California cases. The dissent cites several 9th Circuit decisions noting that "[u]npublished authority informs our determination of how the California Supreme Court would decide a question of California law." *Id.* at *4. The dissent cited *Employers Ins. of Wausau v. Granite State Ins. Co.*, 330 F.3d 1214, 1220 n.8 (9th Cir. 2003) (considering an unpublished decision, despite its "hav[ing] no precedential value," as "accurately represent[ing] California law"); *U.S. Bank, N.A., Trustee for Banc of America Funding Corp. Mortg. Pass-Through Certificates, Series 2005-F v. White Horse Estates Homeowners Ass'n*, 987 F.3d 858, 863 (9th Cir. 2021) (unpublished state decisions may be considered in interpreting state law); *Daniel v. Ford Motor Co.*, 806 F.3d 1217, 1223 n.3 (9th Cir. 2015) (court may consider unpublished decisions "as a possible reflection of California law"); *Beeman v. Anthem Prescription Mgmt.*, 689 F.3d 1002, 1007-08 & n.2 (9th Cir. 2012) (en banc) (relying on unpublished decisions as "accurately represent[ing] California law"); *Roberts v. McAfee, Inc.*, 660 F.3d 1156, 1167 n.6 (9th Cir. 2011) (unpublished decisions are a "possible reflection of California law").

The *State Farm* dissent cites ample authority to support its view, yet even more exists. In *CPR for Skid Row v. City of Los Angeles*, 779 F.3d 1098, 1116 (9th Cir. 2015), the panel noted an unpublished decision, recognizing it was "not binding" but that it was "persuasive authority further illustrating the way in

which California courts apply [a particular statutory provision]." Even older is *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 943 n.4 (9th Cir. 1997), in which the court explained that "[a]lthough we are not precluded from considering unpublished state court opinions, we are not bound by them either." *Nunez*, in turn, cited *McSherry v. Block*, 880 F.2d 1049, 1053 n.2 (9th Cir. 1989), in which the court relied on an unpublished order of the Los Angeles County Superior Court Appellate Department, noting "we may not summarily disregard the Appellate Department's construction of [a state statute] merely on the basis that its construction was rendered in an unpublished opinion. Furthermore, in light of the legislative and judicial history of the statute here in question, we are not 'convinced ... that the highest court of the state would decide [to construe the statute] otherwise.'" *Id.* (quoting *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940)).

The *State Farm* dissent also cited district court opinions using unpublished decisions to discern California law, and further cited some California cases (published and unpublished) that noted or expressly relied on the reasoning set forth in unpublished decisions. *State Farm*, 2021 WL 4810642, *5.

Option Three? When it comes to multiverse jurisprudential travel in California, there is also an orthogonal quantum leap approach, allowing courts to cut through jurisdictional boundaries and cross into the California-verse. In other words: certification of a question to the California Supreme Court. In the *U.S. Bank* case cited in the *State Farm* dissent, one 9th Circuit judge penned a dissent that criticized the majority for relying on unpublished authorities to resolve inconsistencies between state (Nevada) authorities, rather than certifying the state-law issue to the state supreme court. *U.S. Bank*, 987 F.3d at 875-76 (9th Cir. 2021) (Ikuta, J., dissenting) (noting that a federal court's reliance on a state's unpublished opinions deprives the state supreme court of "the opportunity to develop its own jurisprudence and resolve significant questions of state law.").

When it comes to parallel universes, it's nice to have options. May your own litigational adventures always land you in a world where the Allies won and Maddy May eludes her murderer. ν

Exceptional research assistance was provided by Benjamin E. Strauss.