What Defense Counsel Should Know About California and Federal Anti-SLAPP Appeals

by Alana Rotter

California's "anti-SLAPP" statute is a popular tool for defendants seeking an early end to litigation, either in state trial courts or in federal district courts applying California law. Any defendant who loses an anti-SLAPP motion should bear in mind that the denial is immediately appealable in the California courts. But appealability is more complicated in the Ninth Circuit, which treats only *some* types of anti-SLAPP rulings as immediately appealable. This article provides some basic guidelines for navigating the thicket of appealability.

Anti-SLAPP appeals in the California courts

The anti-SLAPP statute, Code of Civil Procedure section 425.16, allows courts to strike claims arising from acts of speech or petition in the public interest unless the plaintiff can establish a probability of prevailing.

Section 425.16 expressly makes orders granting or denying an anti-SLAPP motion appealable under California law. The rationale for the immediate appeal is that the anti-SLAPP statute is supposed to prevent a defendant from being dragged into litigation for exercising its constitutional rights, and deferring appellate review of an order denying an anti-SLAPP motion until after a final judgment would vitiate that protection.

Not only does section 425.16 *permit* immediate appeals, it *requires* them: In the California courts, a party aggrieved by an anti-SLAPP ruling *must* timely appeal, or forfeit review forever. For example, an order striking some claims but not others is reviewable on direct appeal but not as part of an appeal at the end of the case. (*Hewlett-Packard Co. v. Oracle Corp.* (2015) 239 Cal. App.4th 1174, 1185 & fn. 7.) This means that a defendant whose anti-SLAPP motion is denied in whole or in part can, and should, appeal the denial immediately if there is a meritorious basis for doing so.

Defendants contemplating an anti-SLAPP appeal should bear in mind that the appeal will stay all further trial court proceedings on causes of actions affected by the motion. (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 190-191.)

Anti-SLAPP appeals in the Ninth Circuit

Defendants can also use anti-SLAPP motions in federal district court to strike causes of action that are based on California law. This was not a foregone conclusion: Under the rubric known as the *Erie* doctrine, a federal court adjudicating state law claims applies state law on substantive issues, and federal law on procedural issues. (*Gasperini v. Ctr. for Humanities, Inc.* (1996) 518 U.S. 415, 427.) If federal courts viewed California's anti-SLAPP statute as purely procedural, anti-SLAPP motions would not be cognizable in federal court. The Ninth Circuit has concluded, however, that California's anti-SLAPP statute furthers "important, substantive state interests" and, on that basis, permits anti-SLAPP motions. (*United States ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.* (9th Cir. 1999) 190 F.3d 963, 973.)

Beware, though, that the fact that anti-SLAPP motions are available in federal court does not mean that the rules for *appealing* an anti-SLAPP ruling are the same in federal court as in the California state courts. In the Ninth Circuit, the right to appeal is governed not by the anti-SLAPP statute – it's governed instead by general federal rules of appealability.

Federal appellate courts have jurisdiction to review two kinds of rulings: final decisions on the merits, and certain types of collateral orders. A decision is final when it ends the entire case and leaves nothing for the court to do apart from executing the judgment. An order granting an anti-SLAPP motion as to all causes of action without leave to amend meets that test. It is a final decision on the merits, and the plaintiff can immediately appeal it.

Many anti-SLAPP rulings, however, are not case-dispositive. For example, the district court might strike all causes of action *with* leave to amend, might strike only some causes of action, or might deny the motion altogether. In those situations, the ruling is not a final decision because there are still claims left to try. Such rulings are appealable in federal court only if they come within the collateral order doctrine.

To be appealable, a collateral order must meet three requirements: It must

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conclusively determine the disputed question; it must resolve an important issue completely separate from the merits of the action; and it must be effectively unreviewable on appeal from the final judgment. Different types of anti-SLAPP rulings fare differently under this test.

The Ninth Circuit has held that an order granting an anti-SLAPP motion *with leave to amend* fails the first collateral order criterion, i.e., conclusively determining the disputed question. The disputed question on an anti-SLAPP motion is whether the anti-SLAPP statute bars the suit. An order striking claims with leave to amend does not answer that question, because the district court will revisit the impact of the anti-SLAPP statute in light of the amendment. Such an order is inherently tentative, and therefore not appealable. (*Greensprings Baptist Christian Fellowship Trust v. Cilley* (9th Cir. 2010) 629 F.3d 1064, 1068-1069.) If a plaintiff appeals from an order striking causes of action with leave to amend, defense counsel should consider moving to dismiss the appeal.

By contrast, an order *denying* an anti-SLAPP motion is an appealable collateral order. The denial "is conclusive as to whether the anti-SLAPP statute require[s] dismissal" of the suit; application of the anti-SLAPP statute is "a question separate from the merits"; and because the point of the anti-SLAPP statute is to immunize the defendant from litigating meritless cases, the denial of an anti-SLAPP motion is effectively unreviewable on appeal from a final judgment. (*Batzel v. Smith* (9th Cir. 2003) 333 F.3d 1018, 1025.)

Five Ninth Circuit judges have argued that the current Ninth Circuit case law is wrong, and that orders denying anti-SLAPP motions should *not* be appealable under the collateral order doctrine. (*Travelers Cas. Ins. Co. of Am. v. Hirsh* (9th Cir. 2016) 831 F.3d 1179, 1182-1186 (concurrences by Judges Kozinski and Gould); *Makaeff v. Trump University, LLC* (9th Cir. 2013) 736 F.3d 1180, 1188-1192 (Judges Watford, Kozinski, Paez, and Bea dissenting from the denial of rehearing en banc).)

But the Circuit would have to sit en banc to change its precedent, and the majority of the judges have not voted to do so. The result is that at least for now, the denial of an anti-SLAPP motion remains immediately appealable in both California courts and the Ninth Circuit. Defendants whose anti-SLAPP motion is denied therefore should immediately assess whether to appeal, just as in state court.

The Ninth Circuit considered another variation on anti-SLAPP appealability last year in *Hyan v. Hummer* (9th Cir. 2016) 825 F.3d 1043. The plaintiff there appealed from an anti-SLAPP ruling that struck all the claims against one defendant, but that did not dispose of claims against another defendant. The Ninth Circuit dismissed the appeal for lack of jurisdiction.

Hyan reasoned that the anti-SLAPP ruling was not a "final decision" for appealability purposes because the plaintiff still had claims pending against another defendant, and under Federal Rule of Civil Procedure 54(b), a final decision must adjudicate all of the claims against *all of the parties.* (*Hyan, supra,* 825 F.3d at p. 1046.) Nor was the ruling an appealable collateral order, because it failed the third criterion, i.e., being effectively unreviewable on appeal at the end of the case. *Hyan* reasoned that "[t]he erroneous grant of an anti-SLAPP motion to strike can be fully remedied on appeal by remanding the case for proceedings on the wrongly-struck claim or claims." (*Id.* at p. 1047.) In other words, the plaintiff might eventually be able to obtain appellate review, but not until the rest of the case was over.

In a nutshell: When it comes to anti-SLAPP appealability in the Ninth Circuit, the devil is in the details. Review any ruling carefully to determine how it aligns with the final decision and collateral order standards – and when in doubt, consult an appellate lawyer.

Alana H. Rotter

Alana Rotter handles civil appeals and writ petitions, including on anti-SLAPP issues, at the appellate firm Greines, Martin, Stein & Richland LLP. Certified as an appellate specialist by the State Bar of California Board of Legal Specialization, she can be reached at *arotter@gmsr.com* or (310) 859-7811.