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IS YOUR ANTI-SLAPP RULING APPEALABLE? AN OVERVIEW OF CALIFORNIA AND NINTH CIRCUIT RULES

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Anti-SLAPP motions are a major part of the legal landscape in California's state and federal trial courts. They are also a frequent subject of appeals in the California Court of Appeal and the Ninth Circuit. But which anti-SLAPP rulings are appealable, and what is the impact of an appeal? This article provides some answers.

Anti-SLAPP overview

California's anti-SLAPP statute was designed to dispose of meritless lawsuits early that, if allowed to proceed, would chill defendants' rights of free speech or petition. ("SLAPP" stands for Strategic Lawsuit Against Public Participation.) The statute, Code of Civil Procedure section 425.16, allows the trial court to strike claims that arise from protected activity unless the plaintiff can establish a reasonable probability of succeeding on the merits.

Defendants can file anti-SLAPP motions not only in California courts, but also in federal district courts, to strike causes of action based on California law. That is because federal courts adjudicating state law claims apply state law on substantive issues, and the Ninth Circuit views California's anti-SLAPP statute as advancing substantive interests—namely California's interest in encouraging participation in matters of public significance, and preventing parties from chilling that participation through abuse of the judicial process. (*United States ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.* (9th Cir. 1999) 190 F.3d 963, 971, 973.)

But although anti-SLAPP motions are available in both state and federal court, they are subject to different procedural rules in the two systems. One of the key differences is appealability—i.e., when to seek judicial review of an adverse ruling.

Appealing anti-SLAPP orders in state court

Section 425.16 expressly makes orders granting or denying an anti-SLAPP motion appealable. This often trips up litigators, because it is unusual: The general California rule is that interlocutory orders are *not* appealable and an appeal lies only from the final judgment.

Anti-SLAPP orders, thus, are an exception to the general rule: They are independently appealable regardless of whether they dispose of all causes of action (or, indeed, of *any* cause of action). But, there's also an exception to this exception: An order denying an anti-SLAPP motion is *not* appealable if it is based on a finding that the challenged cause of action is exempt from the anti-SLAPP statute under Code of Civil Procedure section 425.17. But by and large, most anti-SLAPP orders are immediately appealable.

Not only are most anti-SLAPP orders appealable, but an aggrieved party *must* timely appeal an anti-SLAPP order, or forever forego appellate review of it. (*Reyes v. Kruger* (2020) 55 Cal.App.5th 58, 68-71.) This requirement derives from California's ""“one shot" rule under which, if an order is appealable, appeal must be taken or the right to appellate review is forfeited.'" (*Id.* at p. 67, quoting *In re Baycol Cases I & II* (2011) 51 Cal.4th 751, 762, fn. 8.)

The window to appeal does not reopen if an anti-SLAPP ruling is later embodied in a formal judgment—for example, a judgment dismissing the complaint. (*Reyes, supra*, 55 Cal.

App.5th at p. 68.) Nor does the window reopen if the trial court later rules on entitlement to anti-SLAPP-related attorney fees and costs. (*Id.* at p. 69.) If an order grants or denies an anti-SLAPP motion (and the denial is not based on section 425.17), it is appealable regardless of what is left for future determination—and the order must be appealed promptly or not at all.

A notice of appeal from an anti-SLAPP order must be filed by the earliest of three dates: (1) 60 days after the superior court clerk serves a document titled "Notice of Entry" or a file-endorsed copy of the order showing the service date; (2) 60 days after a party serves a document titled "Notice of Entry" or a file-endorsed copy of the order; or (3) 180 days after entry of the order. (Cal. Rules of Court, rule 8.104.) The notice of appeal must be filed in the superior court.

What does all this mean for litigators? If your client is aggrieved by an anti-SLAPP order, evaluate immediately whether an appeal is worth pursuing—and if so, file a timely notice of appeal. Conversely, if your opponent seeks review of an anti-SLAPP ruling, carefully examine whether the ruling is properly before the appellate court—i.e., whether your opponent appealed from the correct order, within the time allotted. If not, you may have grounds to seek to dismiss the appeal in whole or in part.

Impact of a state-court anti-SLAPP appeal

In the California courts, an anti-SLAPP appeal automatically "stays all further trial court proceedings on the merits upon the causes of action affected by the motion." (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 186.) Courts have bemoaned this rule, describing it as meaning that "however unsound an anti-SLAPP motion may be, it will typically stop the entire lawsuit dead in its tracks until an appellate court completes its review." (*Hewlett-Packard Co. v. Oracle Corp.* (2015) 239 Cal.App.4th 1174, 1185.)

The appellate stay is not necessarily quite *that* broad. Anti-SLAPP motions often target fewer than all causes of action in a case—and an appeal does *not* stay proceedings on causes of action unaffected by the anti-SLAPP motion. (*Varian, supra*, 35 Cal.4th at p. 195, fn. 8; *Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism* (2018) 4 Cal.5th 637, 646.) At least one appellate court has also questioned how the appellate stay applies where an anti-SLAPP motion targeted a "mixed cause of action," i.e., a cause of action that involves both protected and unprotected activity. (*Oakland Bulk and Oversized Terminal, LLC v. City of Oakland* (2020) 54 Cal.App.5th 738, 764.) Moreover, the trial court retains jurisdiction to grant a preliminary injunction while an anti-SLAPP appeal is pending. (*Novartis Vaccines & Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2006) 143 Cal.App.4th 1284, 1302.) As these caveats suggest, the scope of a stay pending appeal is not always obvious, and may itself be subject to litigation.

Appealing anti-SLAPP orders in the Ninth Circuit

In the Ninth Circuit, appealability of an anti-SLAPP order is governed by federal jurisdictional rules, rather than by the anti-SLAPP statute's automatic appeal provision.

Federal appellate courts have jurisdiction to review two categories of rulings: final decisions on the merits, and collateral orders. An order granting an anti-SLAPP motion without leave to amend as to all claim between all parties is a final decision: It conclusively disposes of all claims, leaving nothing left to decide. That makes it appealable. (E.g., *Maloney v. T3Media, Inc.* (9th Cir. 2017) 853 F.3d 1004, 1009.)

But many anti-SLAPP rulings are not case-dispositive. For example, an order *denying* an anti-SLAPP motion leaves all claims intact. And, an order granting an anti-SLAPP motion might strike only the claims against one defendant, leaving claims against other defendants in play. Or, in a single-defendant case, the court might strike fewer than all causes of action. In all of these situations, the anti-SLAPP order is not an appealable final judgment, because claims still remain that need to be adjudicated. Such non-case-dispositive orders are appealable only if they come within the collateral order doctrine.

Under this doctrine, a collateral order is appealable only if it meets three criteria: It must 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.

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.)

Over the years, some Ninth Circuit judges have urged the Circuit to sit en banc to revisit this holding. (E.g., *Makaeff v. Trump University*, *LLC* (9th Cir. 2013) 736 F.3d 1180, 1188-1192 [dissent from denial of rehearing en banc].) But there has yet to be any en banc action on the issue, so orders denying motions based on California's anti-SLAPP statute remain appealable in the Ninth Circuit.

By contrast, orders *granting anti-SLAPP motions with leave to amend* are not appealable because they fail the first collateral order criterion, i.e., conclusively determining the disputed question. The disputed question 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. (*Greensprings Baptist Christian Fellowship Trust v. Cilley* (9th Cir. 2010) 629 F.3d 1064, 1068-1069.)

Likewise, a plaintiff cannot appeal an anti-SLAPP order that strikes claims against one defendant but leaves intact claims against another defendant. (*Hyan v. Hummer* (9th Cir. 2016) 825 F.3d 1043, 1046.) The order is not a final decision for federal purposes, because it does not adjudicate all claims against all parties. Nor is the ruling an appealable collateral order because it not effectively unreviewable on appeal at the end of the case.

An erroneous anti-SLAPP *denial* deprives the defendant of immunity from suit if not immediately reversed, and that deprivation cannot be fixed after the fact. But an erroneous anti-SLAPP *grant*—i.e., erroneously striking causes of action—can be remedied by an appeal from the final judgment, because the case can be remanded for proceedings on the wrongly-struck claims. (*Id.* at p. 1047.) Deferring appellate review until a final judgment "may frustrate a plaintiff's interest in the efficient resolution of his dispute," but that concern "does not merit use of the collateral order doctrine." (*Ibid.*)

Again, what does all this mean for litigators? 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.

Impact of an anti-SLAPP appeal in federal court

The Ninth Circuit appears not to have directly addressed the impact of a pending anti-SLAPP appeal on proceedings in the trial court. However, the general federal rule is that the filing of a notice of appeal divests the district court of jurisdiction over "aspects of the case involved in the appeal." (*Griggs v. Provident Consumer Discount Co.* (1982) 459 U.S. 56, 58.) Federal district courts faced with stay requests pending an anti-SLAPP appeal tend to invoke that standard, and assess which aspects of the case are "involved in" the anti-SLAPP appeal. (E.g., *Breazeale v. Victim Services, Inc.* (N.D.Cal. Sept. 14, 2015) 2015 WL 13687730, *1-2; *In re NCAA Student-Athlete Name & Likeness Litigation* (N.D.Cal. Dec. 17, 2010) 2010 WL 5644656, *3-4.)

Federal district courts may also consider whether to grant a broader, discretionary stay. The factors governing discretionary stays pending interlocutory appeals are: (1) whether the stay applicant has made a strong showing of likelihood of success on the merits; (2) whether denying a stay will irreparably injure the applicant; (3) whether a stay will substantially injure other parties; and (4) the public interest.

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