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When the heck can you appeal anti-SLAPP motions?

By Jens B. Koepke

It may be more helpful to be an engineer than a lawyer to keep track of which orders in the anti-SLAPP arena are immediately appealable. A recent California Court of Appeal decision did settle one issue: Orders denying motions to strike SLAPPback actions under Code of Civil Procedure Section 425.18 are *not* appealable. The only option is a statutory writ. However, it is probably more helpful to look at how appealability plays out over the entire panoply of potential orders under the now three anti-SLAPP statutes, Sections 425.16, 425.17 and 425.18.

Anti-SLAPP Orders Under Section 425.16

What has long been clear - because the anti-SLAPP statute spelled it out - is that an order denying or granting a special motion to strike under Section 425.16 is immediately appealable. Sections 425.16(i) and 904.1(a)(13); *Ruiz v. Harbor View Community Ass'n*, 134 Cal. App. 4th 1456, 1460 n.1 (2005). Although it took much longer, it is also settled that in federal court a denial of an anti-SLAPP motion is immediately appealable under the collateral order doctrine (at least under California's version of the anti-SLAPP law). *DC Comics v. Pacific Pictures Corp.*, 706 F.3d 1009, 1015 (9th Cir. 2013); but see *Greensprings Baptist Christian Fellowship Trust v. Cilley*, 629 F.3d 1064, 1067-68 (9th Cir. 2010) (granting of anti-SLAPP motion with leave to amend not appealable under the collateral order doctrine because it didn't conclusively determine the issues).

Anti-SLAPP Orders Under Section 425.18

What about orders made under the SLAPPback statute, Section 425.18? So we're all clear on the nomenclature, a SLAPPback claim is one for malicious prosecution or abuse of process against a party whose claims were dismissed pursuant to an earlier anti-SLAPP motion in a previous action. Section 425.18(b)(1). *West v. Arent Fox LLP*, B255973 (Cal. App. 2nd Dist. 2015) recently answered that question. In *West*, a residential care facility and its executive director had sued West and her friend after a heated dispute over the care of West's mother in the facility. Arent Fox represented the facility plaintiffs in that suit. The trial court granted West's anti-SLAPP motion as to a defamation claim but denied it as to other claims. The Court of Appeal affirmed those orders and that case eventually concluded.

West and her friend then sued Arent Fox under a number of theories, including one denominated as an anti-SLAPPback claim and one for malicious prosecution. Through a series of rulings, the trial court ultimately dismissed all the causes of action pursuant to an anti-SLAPP motion. The last ruling only dealt with the SLAPPback and malicious prosecution claims, and West filed a notice of appeal some six weeks after that ruling.

The Court of Appeal said it had to "begin with a fundamental issue: Whether we have jurisdiction to entertain West's appeal." West argued the appeal was proper, because it was from an order granting an anti-SLAPP motion. The court disagreed: "The error in West's contention is that SLAPPback claims are a subset of SLAPP motions, and while many of the same rules apply, some differ, including rules which are determinative of this appeal." Specifically, although the Legislature in Section 425.18 said that the anti-SLAPP motion procedure should be used to attack SLAPPback claims, the statute also expressly provides that certain subsections of 425.16, including the immediate appealability provision, "shall not apply to a special motion to strike a SLAPPback" (citing Section 425.18(c)). The *West* court also emphasized that the SLAPPback statute was even more specific in both expressly providing that "paragraph (13) of subdivision (a) of Section 904.1 shall not apply," and that instead if a special motion to strike a SLAPPback claim is denied, the aggrieved party may within 20 days "petition an appropriate reviewing court for a peremptory writ." Section 425.18(c), (g).

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Ultimately, *West* held Section 425.18 (not 425.16) applied, and the order was not appealable. Moreover, since *West* had not availed herself of the opportunity to file a writ within 20 days, the court had no jurisdiction and dismissed her appeal.

What this means is that the only route to challenge the denial of a motion to strike a SLAPPback claim (or a grant as to only some of the causes of action) is a statutory writ, not an appeal.

Anti-SLAPP Orders Under Section 425.17

Yet a third appellate solution is arrived at in the other anti-SLAPP statute, Section 425.17, which carves out commercial speech and public interest exceptions to what the anti-SLAPP statute covers. As to the appealability of an order denying a special motion to strike a cause of action under the auspices of the 425.17 exception, that statute expressly provides that both the immediate appealability provisions in Section 425.16(i) and Section 904.1(a)(13) "do not apply to that action or cause of action." Section 425.17(e).

Under a similar analysis, courts have ruled that denial of an anti-SLAPP motion under subdivision (d) of Section 425.16 - which carves out the public enforcement exception to the anti-SLAPP statute - is not immediately appealable. *People v. McGraw-Hill Companies*, 228 Cal. App. 4th 1382, 1385 (2014) (immediate appealability under subdivision (i) only applies to determinations to rulings under (b), not the public enforcement exception in (d)).

Thus, the only appellate avenue from a denial of an anti-SLAPP motion under Section 425.17 or under Section 425.16(d) would be a common law writ, not an appeal or a statutory writ.

Attorney Fee Orders Under Section 425.16

The mandatory award of attorney fees to the prevailing defendant in an anti-SLAPP motion under subdivision (c) is also appealable as "an order made after a[n] [appealable] judgment" (namely the immediately appealable order granting the anti-SLAPP motion). See *Melbostad v. Fisher*, 165 Cal. App. 4th 987, 992-95, relying on Section 904.1(a)(2) (2008).

In contrast, an order *denying* attorney fees to a prevailing plaintiff who overcomes an anti-SLAPP motion - which fee award is essentially discretionary under subdivision (c) - is not immediately appealable. *Doe v. Luster*, 145 Cal. App. 4th 139, 142 (2006); see also *Drell v. Cohen*, 232 Cal. App. 4th 24, 30-31 (2014) (prevailing plaintiffs whose request for fees was denied by trial court could not appeal that issue to the appellate court because they did not file a cross-appeal when losing defendants appealed from denial of anti-SLAPP motion).

The upshot of all these cases, including the recent *West* decision, is that whether a particular order in the anti-SLAPP arena is appealable depends upon which statutory auspices the trial court used to make that order. Practitioners need to carefully examine what those auspices were and consequently what appellate avenues that opens for them. Better yet, they should consult with an appellate specialist well-versed in anti-SLAPP law to determine which appellate road they should follow before they spend lots of money and time going down a dead end. Happy Travels!

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