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Anti-SLAPP appealability getting complicated

Jens B. Koepke *is a founding partner of Shaw Koepke & Satter. He is a certified appellate specialist, is the current Secretary for the Appellate Courts Section of the Los Angeles County Bar Association, and has been the primary appellate lawyer on a number of published anti-SLAPP cases.*

There has always been a tension between the immediate appealability of California anti-SLAPP orders and the finality rules in federal court. That tension has re-surfaced in a recent 9th U.S. Circuit Court of Appeals decision that limits the appealability of certain anti-SLAPP rulings. In *Hyan v. Hummer*, 2016 DJDAR 5790 (9th Cir.

June 14, 2016), the court held that the grant of an anti-SLAPP motion to only one of several defendants is not immediately appealable under federal law. That ruling further complicates knowing when an anti-SLAPP ruling is appealable in federal court.

Denial Of Anti-SLAPP Motions In Federal Court: Immediately Appealable

In 2013, the 9th Circuit held that the *denial* of a special motion to strike under Code of Civil Procedure Section 425.16 is immediately appealable. *DC Comics v. Pacific Pictures Corp.*, 706 F.3d 1009, 1015 (9th Cir. 2013). The court found a path to appealability through the collateral order doctrine, which only applies to decisions that are: "(1) conclusive, (2) that resolve important questions separate from the merits, and (3) that are effectively unreviewable on appeal from the final judgment in the underlying action." The first two requirements were easily met, and the third existed since the anti-SLAPP statute provides "immunity from suit," which immunity is effectively unreviewable on appeal from a final judgment, because the suit has already progressed.

It should be noted that the 9th Circuit has held that if a particular state's anti-SLAPP law is more in the nature of a defense to liability, rather than an immunity from suit (like California's), then the third requirement of the collateral order doctrine would not be met. Thus, the court has found that denial of anti-SLAPP motions under both Oregon and Nevada's laws are *not* immediately appealable. *See Englert v. MacDonell*, 551 F.3d 1099, 1105-06 (9th Cir.2009) (Oregon); *Metabolic Research Inc. v. Ferrell*, 693 F.3d 795, 800-02 (9th Cir.2012) (Nevada). Oregon subsequently amended its statute to provide a right to an immediate appeal, making it more like an immunity from suit, and thus now likely appealable in federal court.

Grant of Anti-SLAPP Motions in Federal Court: Only Sometimes Appealable

The 9th Circuit has also entertained appeals from orders *granting* a California anti-SLAPP motion - at least when it dismissed all defendants. *Manufactured Home Communities Inc. v. County of San Diego*, 655 F.3d 1171, 1175-76 (9th Cir. 2011); *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1100, 1109 (9th Cir. 2003). Indeed, the court reviewed these cases without specifically addressing appealability. This makes sense since the grant of an anti-SLAPP motion as to all defendants results in a final judgment, which is patently appealable.

One wrinkle in those straightforward rulings, however, was revealed in *Greensprings Baptist Christian Fellowship Trust v. Cilley*, 629 F.3d 1064 (9th Cir. 2010). There, the district court granted all the defendants' anti-SLAPP motions, but gave plaintiff leave to amend under Federal Rules of Civil Procedure, Rule 15. The 9th Circuit held defendants' appeal did not come under the collateral order doctrine because it didn't conclusively determine the issues, since plaintiff could re-plead and change the substantive merits of the case. It should be noted that under California law, in California courts, a plaintiff cannot be given leave to amend if the court grants an anti-SLAPP motion. *Schaffer v. City and County of San Francisco*, 168 Cal. App. 4th 992, 1005 (2008).

And now comes *Hyan*, which addresses yet another permutation. Hyan had obtained a $7.5 million settlement of his malpractice suit against his former law firm, Rutter Hobbes and Davidson, but hadn't been paid due to insurance coverage disputes. Hyan filed another suit against Rutter, two of its attorneys, and one of the insurance companies. One of the individual attorneys filed an anti-SLAPP motion, which was granted without leave to amend. The 9th Circuit concluded that the granting of this motion was *not* immediately appealable.

First, the court distinguished *Manufactured Homes* and *Vess* as involving situations where district courts had granted anti-SLAPP motions as to *all defendants*. Second, the court rejected plaintiff's argument that California law treats the grant of an anti-SLAPP motion as to one defendant as final. The 9th Circuit explained that under the *Erie* doctrine, federal courts apply state substantive law (here California anti-SLAPP law), but must look to

federal procedural law (including rules on finality). And FRCP Rule 54(b) provides that an order that only dismisses one defendant is not final.

Third, the court analyzed the appeal under the collateral order doctrine. It found the third element missing - effectively unreviewable on appeal from final judgment - because the grant of this motion *could* be reviewed in an eventual appeal from a final judgment as to all parties, and the case could be remanded on the wrongly-struck claims. "To be sure, waiting until final judgment to review an anti-SLAPP motion to strike may frustrate a plaintiff's interest in the efficient resolution of his dispute. Such a concern, however, does not merit use of the collateral order doctrine." The court distinguished *DC Comics*, which involved the denial of an anti-SLAPP motion, because there the merits of the anti-SLAPP issues would effectively never be reviewable.

The *Hyan* ruling means that plaintiffs face double trouble when confronting anti-SLAPP motions in federal court. On one hand, a defendant who unsuccessfully makes a questionable anti-SLAPP motion has a right to an immediate appeal, which delays the plaintiff's case for several years. On the other hand, if one of several defendants is able to get a borderline anti-SLAPP motion granted, the plaintiff cannot appeal that order until the whole case is over.

Hyan also shows how complicated the question has become of whether an anti-SLAPP order in federal court is appealable. Practitioners need to carefully examine what type of order it is, and what the procedural circumstances of the case are. Failure to appeal obviously could be fatal, but pursuing an unappealable order could be equally catastrophic, creating delay and unnecessary expense that will be hard to explain to clients. Practitioners should consult with an appellate specialist well versed in anti-SLAPP law to determine whether an appellate road is open to them before they spend lots of money and time going down a dead end.

Hyan represents another situation where the 9th Circuit is essentially saying that even though California has laid out a specific set of procedural rules (including appealability) in anti-SLAPP cases, federal courts will apply their own procedural rules. That ill-fitting combination means that anti-SLAPP appealability is handled quite differently in federal courts. Both plaintiffs and defendants need to be aware of that before they litigate anti-SLAPP motions in federal court.

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