LOS ANGELES
Daily Journal
www.dailyjournal.com
MONDAY, MARCH 5, 2012

LITIGATION

Anti-SLAPP motions — still appealing in federal court?

By Andrew J. Thomas

Since the California Legislature enacted the anti-SLAPP statute 20 years ago, SLAPP motion practice has spread to most areas of state law. (SLAPP is an acronym for "strategic lawsuit against public participation.") California courts for the most part have turned aside attempts to limit the statute's reach, rejecting arguments that the law should apply only to suits by large companies against individuals, only to suits in which plaintiffs act with an intent to chill speech, or only in situations where speech was actually chilled.

A series of decisions has construed the statute's requirement that the plaintiff's claim arise from the defendant's speech on an "issue of public interest" to include nearly any subject that affects or is of interest to a significant portion of the public. It is not surprising that the past 10 years have produced more than 1,800 state appellate decisions that cite to the anti-SLAPP statute.

Over that same decade, defendants increasingly have invoked the anti-SLAPP statute in federal courts, following decisions by the 9th U.S. Circuit Court of Appeals holding that some of its most attractive features — including fee-shifting and an immediate appeal from the denial of an anti-SLAPP motion — apply in federal court as well as state court. Even though federal courts have held that the automatic stay of discovery available in state court SLAPP litigation does not apply to the same extent in federal court, federal defendants nonetheless have the ability, in cases where the California anti-SLAPP statute applies, to force plaintiffs to make an early factual showing that they have a prima facie case, to obtain an award of attorney fees in the event defendants prevail, and to appeal immediately in the event they do not.

Having witnessed the power of California's anti-SLAPP law to protect the exercise of speech and petition rights, other states within the 9th Circuit also have enacted SLAPP legislation — including Nevada, Oregon, Hawaii and Washington. Some of these states have closely copied California's statute. Other states have not. And the differences among these enactments have led to divergent results when litigants seek to take advantage of anti-SLAPP protections in federal court.

In order to prevail on an anti-SLAPP motion, the defendant must first make a threshold showing that the claim at issue arises from an act in furtherance of the defendant's "right of petition or free speech under the United States or California Constitution in connection with a public issue." Protected conduct includes statements made in connection with legislative, executive or judicial proceedings, and statements made with respect to an "issue of public interest." In 1997, the California Legislature amended the statute to provide expressly that it "shall be construed broadly."

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Where the statute applies, the burden shifts to the plaintiff to make a prima facie factual showing in support of its claim. Discovery is stayed automatically upon the filing of the motion. The court, however, may permit "specified discovery" on noticed motion and for good cause shown. The statute further provides that a decision granting or denying a special motion to strike is immediately appealable. (This provision does not apply where the court determines that the claims are exempt from application of the anti-SLAPP statute under Code of Civil Procedure Section 425.17, which puts private attorney general actions and claims based on certain commercial speech activities beyond the reach of the anti-SLAPP statute.)

In 1999, the 9th Circuit affirmed that at least certain aspects of California's anti-SLAPP statute may be invoked against state law claims asserted in federal court — in diversity cases or as pendent claims in federal question cases. In *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, the court undertook an Erie analysis and held that subsections (b) and (c) of the statute — providing for the special motion to strike and for the recovery of attorney fees by a prevailing defendant — would operate in federal court without any "direct collision" with the Federal Rules of Civil Procedure.

Later decisions have held that other aspects of the anti-SLAPP statute do not necessarily apply in federal court, most notably the automatic stay of discovery under Section 425.16(g). District courts have held that the statute's discovery stay provision conflicts with Federal Rule of Civil Procedure 56 in circumstances where a special motion to strike is based on the plaintiff's alleged failure of proof, as opposed to legal grounds apparent on the face of the plaintiff's complaint. The 9th Circuit embraced this view in *Metabolife Int'l v. Wornick* (2001), holding that the district court should have allowed discovery before granting the defendant's anti-SLAPP motion on the basis of the plaintiff's lack of evidence, where the relevant evidence was in the defendant's exclusive control.

In *Batzel v. Smith* (2003), the 9th Circuit held that another important procedural protection of the anti-SLAPP statute — the right of a defendant to appeal immediately from the denial of an anti-SLAPP motion — also applies in federal court,

by virtue of the collateral order doctrine articulated by the U.S. Supreme Court in *Cohen v. Beneficial Industrial Loan Corp.* (1949). The *Batzel* court held that all three "Cohen" factors necessary for inclusion in the "narrow class of immediately appealable orders" were met. Namely, the denial of an anti-SLAPP motion was "conclusive" as to whether the statute applied; it resolved an important question separate from the merits — i.e., whether the defendant would be forced to defend against a meritless claim; and that question effectively would be unreviewable on appeal from final judgment, since the defendant already would have been compelled to defend against a meritless claim directed at the exercise of free speech rights.

Batzel looked to the legislative history of Section 425.16, as well as to the fact that the statute expressly provided for an immediate right of appeal in California actions. It found the latter provision "instructive" in concluding that the anti-SLAPP motion is "designed to protect the defendant from having to litigate meritless cases aimed at chilling First Amendment expression."

A few years later, however, the Supreme Court in *Will v. Hallock* (2006) signaled a retreat from expansive applications of the collateral order doctrine. The Court cautioned that the doctrine should not be generalized to apply to any order denying a claim of a right to prevail without trial, lest the doctrine leave the final judgment rule in "tatters." Beyond implicating an asserted right to avoid the burdens of trial, orders to be subject to immediate appeal under the collateral order doctrine, according to the Court in *Will*, also must "imperil a substantial public interest."

After *Will*, courts in the 9th Circuit have twice rejected arguments that the collateral order doctrine should provide immediate appeals from denial of anti-SLAPP motions brought under other states' laws. In 2009, the court held in *Englert v. MacDonell* that a denial of an anti-SLAPP motion under Oregon's law was not immediately appealable. The court noted the Oregon statute did not provide for an immediate appeal in state court from the denial of an anti-SLAPP motion. It concluded therefore that Oregon did not intend its anti-SLAPP law to provide a substantive immunity from suit. Because the Oregon Legislature evidently believed the normal appeals process was adequate to vindicate the anti-SLAPP rights it had created, the 9th Circuit held that the third *Cohen* factor was not satisfied.

Just last month, the 9th Circuit considered the same question in regard to the Nevada anti-SLAPP statute and reached a similar conclusion. In *Metabolic Research v. Ferrell* (Feb. 2012), the court emphasized that Nevada's statute does not provide for an immediate appeal from the denial of an anti-SLAPP motion. In the absence of such a "legislatively approved immunity from trial," the court held, the collateral order doctrine does not apply.

These decisions strongly suggest that other states' statutes will be subject to the same rule — unless the statute expressly provides for an immediate appeal, the collateral order doctrine will not permit an immediate appeal in federal court. On the other hand, the *Batzel* rule should continue to provide an immediate appeal from denials of federal court motions under California's anti-SLAPP statute, as well as the statutes of other states — like Hawaii and Washington — that also convey clearly a substantive immunity from suit by providing expressly for an immediate appeal.

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