PROCEDURAL ASPECTS OF ANTI-SLAPP MOTIONS IN FEDERAL COURT

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Suppose you represent a university in New York that has digitized its newspaper archive and made them available online. An Oregon plaintiff has filed suit in the District of Oregon for libel allegedly contained in this archive. He has demanded $1,000,000 in damages.¹ How might you quickly dispose of this speech-chilling lawsuit?

One option is to file an “anti-SLAPP” motion. Six states in the Ninth Circuit – Oregon, Washington, California, Arizona, Hawai‘i and Nevada – have enacted laws to prevent “strategic lawsuits against public participation,” commonly known as SLAPPs.² Anti-SLAPP laws provide defendants an expedited means to strike causes of action arising from speech or petition at the outset of litigation.³ Pursuant to this procedure, a plaintiff must demonstrate its prima facie case through competent evidence. If the plaintiff fails to do so, the defendant is awarded attorneys’ fees and costs.⁴

Anti-SLAPP statutes also offer a number of other protections, including an automatic stay of discovery and, in some states, immediate appeal of denials of anti-SLAPP motions.⁵

Because anti-SLAPP statutes employ procedural means to protect substantive rights, their application in federal proceedings can be tricky. This article summarizes the Ninth Circuit’s treatment of key aspects of anti-SLAPP statutes in federal court.⁶

The Lockheed Framework

In 1999, the Ninth Circuit held that anti-SLAPP motions may be filed in federal court. The Ninth Circuit continues to apply the reasoning of that initial case, United States ex rel. Newsham v. Lockheed Missiles & Space Co.,⁷ in deciding which anti-SLAPP procedures are available to federal litigants.

The Lockheed case was a qui tam action filed in the Northern District of California. In response to the complaint, Lockheed counterclaimed based on alleged violations of state law. The qui tam relators filed an anti-SLAPP motion to strike the counterclaims and requested attorneys’ fees. The district court denied the anti-SLAPP motion. It held that two sections of the California anti-SLAPP statute – the section authorizing the motion and the fee-shifting provision – were unavailable in federal court because they directly conflicted with Federal Rules of Civil Procedure 8, 12 and 56.

The Ninth Circuit reversed and remanded. The court determined that the two anti-SLAPP provisions and the Federal Rules “can exist side by side . . . each controlling its own intended sphere of coverage without conflict.”⁸ The court emphasized that there were “important, substantive state interests furthered by the Anti-SLAPP statute,” that the California Legislature had determined that those interests could be protected only through a special procedure, and that the Erie doctrine required the anti-SLAPP procedure be available in federal court to discourage forum-shopping.⁹

Other states share the core aspects of California’s anti-SLAPP laws – i.e., the motion to strike and fee award – and the Ninth Circuit has applied Lockheed accordingly. For example, it did so in Northon v. Rule,¹⁰ when it held that the Oregon anti-SLAPP attorneys’ fees provision applies in federal court.

The Lockheed court emphasized that it considered only the two core anti-SLAPP provisions. Since Lockheed, the Ninth Circuit has applied the Lockheed approach to other aspects of the anti-SLAPP procedure. The results are summarized below.

There Is No Automatic Discovery Stay in Federal Court

A key feature of anti-SLAPP laws is the automatic stay of discovery upon filing of an anti-SLAPP motion. The stay was designed to save defendants the expense and burden of responding to discovery necessitated by frivolous lawsuits. However, the stay is unavailable in federal court.

In Metabolife Int’l v. Wornick, 264 F.3d 832 (9th Cir. 2001), the Ninth Circuit held that the automatic discovery stay in California’s anti-SLAPP law did not apply in federal court. Applying the Lockheed analysis, the court determined that because the anti-SLAPP motion resembles a summary judgment motion, the stay directly collided with Rule of Civil Procedure 56, which requires discovery where the “nonmoving party has not had the opportunity to discover information that is essential to its opposition.”¹¹

In a recent unpublished, unciteable memorandum opinion, Z.F. v. Ripon Unified Sch. Dist.,¹² the Ninth Circuit re-articulated the holding of Metabolife: “If a defendant makes an anti-SLAPP motion to strike founded on purely legal arguments, then the analysis is made under Fed. R. Civ. P. 8 and 12 standards; if it is a factual challenge, then the motion must be treated as though it were a motion for summary judgment and discovery must be permitted.”¹³ The Z.F. court held that because the only factual materials referenced in the anti-SLAPP motion were those submitted with the counter-complaint, the trial court had not erred by applying a Rule 12 standard.

Rule 15 Trumps Contrary Anti-SLAPP Provisions

Although anti-SLAPP procedures are designed to facilitate early dismissal of meritless claims, the Ninth Circuit has held that the policies of liberal amendment embodied in Federal Rule 15(a) require courts granting anti-SLAPP motions to dismiss with leave to amend whenever possible. That is because any state law requirement to the contrary directly collides with the federal rule.¹⁴ Moreover, “the purpose of the anti-SLAPP statute, the early dismissal of meritless claims, would still be served if plaintiffs eliminated the offending claims from their original complaint. If the offending claims remain in the first amended complaint, the anti-SLAPP remedies remain available to defendants.”¹⁵

Oregons’ anti-SLAPP provision, Or. Rev. Stat. § 31.150, specifies that dismissal must be without prejudice. The Ninth Circuit has held that this requirement does not directly conflict with the Federal Rules and therefore applies in federal court.

¹ United States ex rel. Newsham v. Lockheed Missiles & Space Co., 250 F.3d 1241 (9th Cir. 2001).
² See, e.g., Metabolife Int’l v. Wornick, 264 F.3d 832, 834 (9th Cir. 2001) (the “anti-SLAPP laws provide defendants an expedited means to strike causes of action arising from speech or petition at the outset of litigation.”).
³ Lockheed Missiles & Space Co. v. United States ex rel. Newsham, 250 F.3d 1241, 1253 (9th Cir. 2001).
⁴ Id. at 1254.
⁵ Id. at 1254–56.
⁶ Id.
⁷ United States ex rel. Newsham v. Lockheed Missiles & Space Co., 250 F.3d 1241 (9th Cir. 2001).
⁸ Id., quoting Metabolife Int’l v. Wornick, 264 F.3d 832, 837 (9th Cir. 2001).
¹⁰ Northon v. Rule, 307 F.3d 1038, 1046 (9th Cir. 2002).
¹¹ Metabolife Int’l v. Wornick, 264 F.3d 832, 837 (9th Cir. 2001).
¹³ Metabolife Int’l v. Wornick, 264 F.3d 832, 837 (9th Cir. 2001).
¹⁴ See, e.g., Metabolife Int’l v. Wornick, 264 F.3d 832, 837 (9th Cir. 2001).
¹⁵ Metabolife Int’l v. Wornick, 264 F.3d 832, 837 (9th Cir. 2001).
Immediate Appealability of Denial of Anti-SLAPP Motions Is Available Under California Law and Possibly Oregon Law

The anti-SLAPP laws of Oregon, California Hawai‘i, and Washington provide an immediate right to appeal denial of an anti-SLAPP motion. However, these provisions do not necessarily apply in federal court because a party there generally is entitled only to a single appeal “deferred until final judgment has been entered.”

The Ninth Circuit has determined that anti-SLAPP denials are immediately appealable only if “the anti-SLAPP law in question functions as a right not to stand trial, i.e., an immunity from suit.”

California’s anti-SLAPP law is the only statute so far to meet this requirement. In Battel v. Smith, the Ninth Circuit held that the anti-SLAPP statute’s legislative history demonstrates the critical role of immediate appeal in protecting the speech and petition rights of Californians. Through the immediate appeal, the California Legislature intended to immunize defendants from trial, rather than liability. The court thus treated the denial of the anti-SLAPP motion as a denial of a claim of immunity, which is appealable as a “final decision” under the collateral order doctrine and 28 U.S.C. § 1291.

In 2009, the Ninth Circuit held that Oregon’s anti-SLAPP law did not provide a right to immediate appeal in federal court. At the time, the Oregon statute did not provide for an immediate appeal. However, in 2010, Oregon’s anti-SLAPP statute was amended to include that right. The Ninth Circuit has not determined the effect of that amendment, which explicitly states that the purpose of the statute is to “provide a defendant with the right to not proceed to trial.”

3 Id. at 927 (quoting Walker v. Armo Steel Corp., 446 U.S. 740, 752 (1980)).
4 Id. at 972-73.
5 563 F.3d 981, 991 (9th Cir. 2009).
9 To date, the Ninth Circuit has considered appealability pursuant to the anti-SLAPP laws of California, Oregon and Nevada. Id. at *796-97.
10 333 F.3d 1018 (2002).
11 Id. at 1025.
12 Englert v. MacDonell, 551 F.3d 1099 (9th Cir. 2009).
13 See Verizon Del., Inc. v. Covad Commns. Co., 377 F.3d 1081, 1091 (9th Cir. 2004).
14 Id.