DailyNews

SLAPP Fee Award Held Not Appealable If SLAPP Order Itself Is Not Appealed

Tim Kowal *December 21, 2022*

We know that anti-SLAPP orders are appealable—it says so right in the anti-SLAPP statute. But what about orders on anti-SLAPP fees? Appealability of fee awards are

not mentioned in the statute. So the courts have been all over the place, with some finding anti-SLAPP fee awards appealable, some finding them nonappealable, and some finding them appealable in some situations but not in others.

The latest entry in the milieux is *Ibbetson v. Grant* (D4d3 Nov. 30, 2022) No. G060473 (nonpub. opn.), where the trial court granted an anti-SLAPP motion to a cross-complaint—but only partially, so the case was not dismissed—and then the aggrieved cross-complainant appealed the resulting fee award. The Court of Appeal held that the fee award was not an appealable order, and so dismissed the appeal.

The court's reasoning is straight to the point: The anti-SLAPP statute, Code of Civil Procedure section 425.16, says that orders granting or denying anti-SLAPP motions are appealable, but the statute says nothing about the appealability of fee awards. Without statutory authority making an order appealable, that's the end of the analysis: anti-SLAPP fee orders are not appealable.

The court was persuaded by the reasoning in the published case of *Doe v. Luster* (2006) 145 Cal.App.4th 139 (*Doe*), which also held that SLAPP fee awards are not independently appealable. The *Doe* case involved both a denial of an anti-SLAPP motion and a denial of fees. *Doe* emphatically stated that "no plausible argument can be made that such an order [the fee order] is immediately appealable under section 425.16, subdivision (i)." (*Id.* at p. 150.) The *Doe* court—and the *Ibbetson* court—relied heavily on the fact that when the Legislature amended the statute in 1999 to allow for an immediate appeal from an order granting or denying an anti-SLAPP motion, it made no such provision for orders granting or denying anti-SLAPP attorney fees. (*Id.* at pp. 144-148.)

Not So Fast: Sometimes SLAPP Fee Orders *Are* Appealable

Ironically, the same Fourth District, Third Division Court of Appeal that followed Doe here had found some wiggle room in the case of *Baharian-Mehr v. Smith* (2010) 189 Cal.App.4th 265 (*Baharian-Mehr*) (covered previously here). There, a defendant had appealed an order denying an anti-SLAPP motion (which is appealable under the statute), as well as the order denying anti-SLAPP fees (which is not made appealable by the statute). So did the 4/3 there agree with *Doe*'s boast that the appealability of the order denying SLAPP fees was supported by "no plausible argument"?

Not at all. *Baharian-Mehr* held that, so long as it has to review the denial of the anti-SLAPP, it might as well review the denial of the anti-SLAPP fees. After all, to defer the latter issue "artificially separates two intertwined issues" and potentially wastes judicial resources. (*Id.* at p. 274.) This "would result in absurd consequences the Legislature never contemplated." (*Id.* at p. 275.)

So *Doe* thinks the result in *Baharian-Mehr* is supported by "no plausible argument," and *Baharian-Mehr* thinks the consequence of *Doe* is "absurd." How does *Ibbetson* square this?

The way the 4/3 addressed this stand-off in Ibbetson was to point out that, here—and unlike both *Doe* and *Baharian-Mehr*—the appellant was challenging only the fee award, and did not appeal the underlying anti-SLAPP order itself. *Ibbetson* noted that, in *Baharian-Mehr*, "[w]e agreed with *Doe* that 'a separate attorney fee order should not be heard on interlocutory appeal[.]'" (*Baharian-Mehr*, *supra*, 189 Cal.App.4th at p. 274.) That makes good practical sense. But this pragmatism on appealability undermines the formalism of *Ibbetson*'s core holding. Ibbetson's conclusion that SLAPP fee orders are not appealable is based on the simple fact that the statute does not authorize such appeals—the end. But *Ibbetson* does not disavow its holding in *Baharian-Mehr*, which does authorize appeals of a SLAPP fee order if it would be "absurd" not to, *i.e.*, when the fee order is appealed along with the underlying SLAPP order.

What about the collateral-order doctrine?

Ibbetson also acknowledges that there exists support for the appealability of SLAPP fee orders under the collateral-order doctrine. *City of Colton v. Singletary* (2012) 206 Cal.App.4th 751 (Colton) held that the fee order was separately appealable as falling under the collateral order exception to the one final judgment rule. (*Id.* at pp. 781-782.) "When a court renders an interlocutory order collateral to the main issue, dispositive of the rights of the parties in relation to the collateral matter, and directing payment of money or performance of an act, direct appeal may be taken." (*In re Marriage of Skelley* (1976) 18 Cal.3d 365, 368.)

So how did *Ibbetson* address *Colton*? Anti-SLAPP proceedings are collateral to the main issues, and they are dispositive, and it resulted here in an order for the payment of money. That's the definition of a collateral order. The SLAPP fee award is an appealable collateral order, right?

Wrong, said *Ibbetson*. The Legislature specifically amended section 425.16 in 1999 to make SLAPP orders appealable, and the fact the Legislature did not take the opportunity to make SLAPP fees appealable ends the matter. "The Legislature having specifically provided one exception to the general rule, it cannot be presumed that any other was intended." (*People ex rel. Downey v. Downey County Water Dist.* (1962) 202 Cal.App.2d 786, 799; see also *City of Coronado v. California Coastal Zone Conservation Com.* (1977) 69 Cal.App.3d 570, 580.) *Ibbetson* thus refused to follow *Colton*.

Comment

This reasoning seems faulty. True, the Legislature did amend the anti-SLAPP statute in 1999, and did not choose to make fee awards appealable. But following the same reasoning, the Legislature amended the appealability statute, section 904.1, in 2017, and did not take the opportunity to include the whole hatful of orders that cases have held to be appealable as collateral orders. Does the *Ibbetson* court mean to suggest that all those collateral order cases are undermined because "it cannot be presumed that any other [exception to appealability] was intended" to the appealability statute?

But although the Fourth District, Division Three declined to apply the collateral-order doctrine to anti-SLAPP fee awards, that approach is supported by published authority in the *Colton* case. Despite the conflict in authority, trial courts may "exercise discretion under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456, to choose between sides of any such conflict."

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Tim Kowal is an appellate attorney at Thomas Vogele & Associates, APC, with offices in Orange and Monterey counties. He co-hosts the California Appellate Law Podcast at www.CALPodcast.com and publishes a newsletter of appellate tips for trial attorneys at www.tvalaw.com/articles. Contact Tim at tkowal@tvalaw.com.

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