

An *Erie* October Surprise: Ninth Circuit Rules Anti-SLAPP Denials Not Immediately Appealable

Client Alerts

October 22, 2025

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On October 9, 2025, in *Gopher Media LLC v. Melone*, the Ninth Circuit Court of Appeals overruled precedent established over 20 years ago in *Batzel v. Smith* by unanimously holding, in an *en banc* decision by 11 judges, that orders denying anti-SLAPP motions under California’s anti-SLAPP statute are not immediately appealable in federal court under the collateral order doctrine.^[1]

Gopher Media arose from a dispute over the use of parking spaces at a San Diego pizzeria called American Pizza Manufacturing (APM) that escalated into claims and cross-claims for, among other things, discrimination, defamation, trade libel, and unfair business practices, including allegations by defendants that plaintiffs paid employees to leave negative online reviews of APM.^[2] Before the Ninth Circuit in *Gopher Media* was an interlocutory appeal of the district court’s denial of the anti-SLAPP motion that plaintiff-appellants brought to strike the defendant-appellees’ counter-complaint under the California anti-SLAPP statute.^[3] The Ninth Circuit dismissed the appeal for lack of jurisdiction, holding that orders denying motions to strike under California’s anti-SLAPP statute in federal court do not satisfy the requirements for an interlocutory appeal under the collateral order doctrine because such orders: (1) “do not resolve questions ‘completely separate from the merits’” and (2) “are not ‘effectively unreviewable on appeal from a final judgment.’”^[4]

The *Gopher Media* panel rejected the *Batzel* court’s reasoning from 2003 that the denial of a special motion to strike under California’s anti-SLAPP statute “involves a question completely separate from the merits because ‘it merely finds that such merits may exist, without evaluating whether the plaintiff’s claim will succeed.’”^[5] Rather, the *Gopher Media* panel explained, “the questions that must be answered to resolve an anti-SLAPP motion are in fact ‘inextricably intertwined with the merits of the litigation.’”^[6] In this way, the *Gopher Media* court embraced the suggestion made by Judge Daniel Collins during oral argument that an anti-SLAPP motion is not separable from the merits because “it is the merits.”^[7]

The two-step analysis required by California’s anti-SLAPP statute, Cal. Civ. Proc. Code § 425.16, requires that courts consider: (1) “whether a plaintiff’s claim arises from any act ‘in furtherance of the person’s right of petition or free speech’” and (2) “whether ‘the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.’”^[8] Pointing to this two-step analysis, the *en banc* panel in *Gopher Media* explained that these questions are “not ‘neat abstract issues of law’ that can be decided once and will not reemerge at trial,” but instead involve analysis that “intertwines factual and legal questions” that require courts “to go beyond ‘merely find[ing] that such merits may exist.’”^[9]

The *Gopher Media* court recognized that although “some important interest may be lost if a defendant must wait to appeal a final judgment in an anti-SLAPP case—such as the potential unfairness of having to defend a meritless action all the way through summary judgment or trial—this lost interest does not render the decision ‘effectively unreviewable’ for purposes of the collateral order doctrine because deferring review of these motions until final judgment will not ‘so imperil[] the interest as to justify the cost of allowing immediate appeal of the entire class of relevant orders.’”^[10]

Rejecting the *Batzel* court’s reasoning that, because the California anti-SLAPP statute was “‘in the nature of immunity,’” denials of anti-SLAPP motions should be immediately appealable for the same reasons that a denial of an immunity defense is, the *Gopher Media* panel explained that “since *Batzel*, California has discussed anti-SLAPP protection in a way that casts doubt on our analogy between anti-SLAPP protection and immunity defenses.” The Ninth Circuit elaborated that “[e]ven if that analogy were correct, the Supreme Court has ruled that not every district court decision denying immunity is entitled to an interlocutory appeal under the collateral order doctrine—if there are fact-based issues entangled in the immunity determination, then the decision does not satisfy the collateral order doctrine’s requirements.”^[11]

The *en banc* holding in *Gopher Media* aligns the Ninth Circuit with the Second and Tenth Circuits, which also have held that the denial of an anti-SLAPP motion does not satisfy the collateral order doctrine.^[12] The ruling conflicts, however, with the First, Fifth, and Federal Circuits, which have held that denials of anti-SLAPP motions are immediately appealable in federal court at least in some cases.^[13] Although the Fifth Circuit held in separate decisions that the denial of an anti-SLAPP motion brought under Louisiana or Texas’s anti-SLAPP statutes was immediately appealable in federal court pursuant to the collateral order doctrine,^[14] the Fifth Circuit subsequently held in 2019 that the Texas anti-SLAPP statute is not even applicable in federal court.^[15]

The California anti-SLAPP statute still applies in federal court under the precedent set in *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*,^[16] as the *Gopher Media* panel “d[id] not reconsider [this]” and specifically noted that its decision “does not affect th[e] protection” of the statute’s attorney-fee-shifting provision.^[17] This was a necessary consequence of the *en banc*

panel's conclusion that it lacked appellate jurisdiction over the current appeal. Consequently, the Ninth Circuit remains an outlier on the issue of whether a state anti-SLAPP statute can apply in federal court at all, with only the First and Federal Circuits agreeing that it can.^[18] In contrast, the Second,^[19] Fifth, Tenth, Eleventh, and DC Circuits all have concluded that the same or similar anti-SLAPP statutes do not apply in federal court, although the Second Circuit has held that certain anti-SLAPP fee-shifting provisions can apply in federal court.^[20] This issue was the central point of disagreement in clashing *Gopher Media* concurrences authored by Judges Mark Bennett and Daniel Bress.

Joining the court's opinion in full, Judge Bennett's concurrence, joined by Judge Consuelo Callahan, argued that California's anti-SLAPP special-motion and attorney-fee-shifting provisions should apply in federal court under the *Erie* doctrine because they "create a substantive right" by "provid[ing] defendants with a pretrial claim for attorneys' fees for plaintiffs' abuse of the judicial process by filing a meritless SLAPP suit," which is a right that "[n]o federal rule controls or directly collides with."^[21] Judge Bennett further explained that the "'twin aims'" of the *Erie* doctrine—"discouragement of forum-shopping and avoidance of inequitable administration of the laws"—confirm that the anti-SLAPP provisions are substantive."^[22]

In contrast, concurring in the panel's judgment, Judge Bress, joined by Judges Daniel Collins, Kenneth Lee, and Patrick Bumatay, argued that the Ninth Circuit has "struggled with its misguided experiment of allowing California's anti-SLAPP statute to apply in federal court" for "over twenty-five years" and that the time is "beyond ripe ... for bringing [the Ninth Circuit] in line with the overwhelming majority view and holding that California's anti-SLAPP statute is a state procedural device that does not apply in federal court."^[23] Judge Bress argued that anti-SLAPP motions directly conflict with the Federal Rules of Civil Procedure because they "are really just motions to dismiss under Rule 12(b)(6) or summary judgment motions under Rule 56" and are "subject to the same standards" and "same discovery processes" as those two types of motions.^[24] Because all that remains of the California anti-SLAPP statute in federal court is the attorneys' fees provision, Judge Bress opined that "[t]here is, in effect, no underlying statute to which the attorneys' fee provision could even apply" and that provision therefore should be considered "inoperative."^[25]

Because the Ninth Circuit Court of Appeals cannot overturn a decision of a prior Ninth Circuit panel absent an *en banc* proceeding or a demonstrable change in the underlying law,^[26] overturning *Newsham* so that the California anti-SLAPP statute does not apply in federal court will likely require a future *en banc* proceeding. Given the holding of *Gopher Media*, such a proceeding could arise from a party seeking to apply the California anti-SLAPP statute's fee-shifting provision after a final judgment or from the appeal of an order granting an anti-SLAPP motion and dismissing the case.

In addition to Judges Bress, Collins, Lee, and Bumatay, who expressed their support for overturning *Newsham* in *Gopher Media*,^[27] active Judge Ronald Gould and senior Judges Richard Paez and

Carlos Bea also have supported this result in other cases.^[28] Senior Judge M. Margaret McKeown also has hinted that she would support overturning *Newsham*, expressing concern that an anti-SLAPP motion “is wholly grounded in th[e] state’s procedural law, yet we have infused it with substantive significance.”^[29] There is thus a substantial contingent of Ninth Circuit judges that already support overturning *Newsham*, including five of the 29 active judges, but it remains unclear if there will be enough for a majority of an 11-judge *en banc* panel that is largely selected at random from the 29 active judges.^[30] For now, however, at least some provisions of the California anti-SLAPP statute, most notably the fee-shifting provision, will continue to apply in federal court in diversity cases.

Although the Ninth Circuit downplayed the risk of forum-shopping in its decision, it seems likely that plaintiffs bringing California-law claims based on a defendant’s speech or petitioning activities will increasingly prefer a federal forum if it is available—based either on diversity jurisdiction or the presence of a companion federal-law claim. Suing in federal court would eliminate the risk that a defendant could effectively put the case on hold for a year or two by immediately appealing the denial of an anti-SLAPP motion. Defendants in such cases, on the other hand, will likely find federal court a less attractive forum, and non-California defendants may be less inclined to remove speech-related cases to federal court where diversity jurisdiction is available.

Footnotes

[1] *Gopher Media LLC v. Melone*, No. 24-2626, 2025 WL 2858761, at *1 (9th Cir. Oct. 9, 2025) (overruling *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003)).

[2] *Id.* at *2.

[3] *Id.*

[4] *Id.* at *1, 4-5 (quoting *Will v. Hallock*, 546 U.S. 345, 349 (2006)).

[5] *Id.* at *4 (quoting *Batzel*, 333 F.3d at 1025).

[6] *Id.* (citation omitted).

[7] *Gopher Media LLC v. Melone*, No. 24-2626, Oral Argument, United States Courts for the Ninth Circuit (June 6, 2024), at 05:16-05:24, ca9.uscourts.gov/media/video/?20250624/24-2626/.

[8] *Gopher Media*, 2025 WL 2858761, at *4 (quoting Cal. Civ. Proc. Code § 425.16(b)(1)).

[9] *Id.* (citations omitted).

[10] *Id.* at *5.

[11] *Id.* (citations omitted).

[12] *E.g., Ernst v. Carrigan*, 814 F.3d 116, 119 & n.1 (2d Cir. 2016) (addressing Vermont’s anti-SLAPP statute); *Coomer v. Make Your Life Epic LLC*, 98 F.4th 1320, 1328-29 (10th Cir. 2024) (addressing Colorado’s anti-SLAPP statute).

[13] *See Godin v. Schencks*, 629 F.3d 79, 84-85 (1st Cir. 2010) (addressing Maine’s anti-SLAPP statute); *Franchini v. Inv’s Bus. Daily, Inc.*, 981 F.3d 1, 6-8 (1st Cir. 2020) (same); *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 175-76 (5th Cir. 2009) (addressing Louisiana’s anti-SLAPP statute); *NCDR, L.L.C. v. Mauze & Bagby, P.L.L.C.*, 745 F.3d 742, 747-50 (5th Cir. 2014) (addressing Texas’s anti-SLAPP statute). Most recently, in a decision issued six days after *Gopher Media*, the Federal Circuit held that the denial of a motion to strike under California’s anti-SLAPP law is immediately appealable in that circuit. *See IQE PLC v. Newport Fab LLC*, No. 24-1124, 2025 WL 2922441, at *4-5 (Fed. Cir. Oct. 15, 2025).

[14] *Henry*, 566 F.3d at 175-76 (5th Cir. 2009) (addressing Louisiana’s anti-SLAPP statute); *NCDR, L.L.C.*, 745 F.3d at 747-50 (5th Cir. 2014) (addressing Texas’s anti-SLAPP statute).

[15] *Klocke v. Watson*, 936 F.3d 240, 242 (5th Cir. 2019). In reaching this result, the Fifth Circuit relied on purported language differences between the Louisiana and Texas anti-SLAPP statutes and on the Supreme Court’s intervening *Erie* doctrine decision in *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393 (2010). *See Klocke*, 936 F.3d at 244-49.

[16] 190 F.3d 963, 970-73 (9th Cir. 1999).

[17] *Gopher Media*, 2025 WL 2858761, at *1 n.2, 5 n.4.

[18] *See Godin v. Schencks*, 629 F.3d 79, 91-92 (1st Cir. 2010); *accord United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 972-73 (9th Cir. 1999); *see also IQE*, 2025 WL 2922441, at *4-5.

[19] Following its 2016 decision in *Ernst* that an appeal from the denial of an anti-SLAPP motion does not satisfy the collateral order doctrine, the Second Circuit held more broadly in 2020 that the California anti-SLAPP statute does not apply in federal court at all. *See La Liberte v. Reid*, 966 F.3d 79, 87-89 (2d Cir. 2020). An earlier Second Circuit decision, however, held that certain substantive provisions of other anti-SLAPP statutes, such as fee-shifting, do apply in federal court. *See Adelson v. Harris*, 774 F.3d 803, 809 (2d Cir. 2014) (applying Nevada’s anti-SLAPP law); *see also Bobulinski v. Tarlov*, 758 F. Supp. 3d 166, 182-89 (S.D.N.Y. 2024) (applying fee-shifting provision of New York’s anti-SLAPP statute).

[20] *See Abbas v. Foreign Pol’y Grp., LLC*, 786 F.3d 1328, 1333 (D.C. Cir. 2015) (op. of Kavanaugh, J.) (addressing D.C.’s anti-SLAPP statute); *Los Lobos Renewable Power, LLC v. Americulture, Inc.*, 885 F.3d 659, 673 (10th Cir. 2018) (addressing New Mexico’s anti-SLAPP statute); *Carbone v. Cable News Network, Inc.*, 910 F.3d 1345, 1347 (11th Cir. 2018) (addressing Georgia’s anti-SLAPP statute); *Klocke v. Watson*, 936 F.3d 240, 242 (5th Cir. 2019) (addressing Texas’s anti-SLAPP statute); *La Liberte*, 966 F.3d at 87-89 (2d Cir. 2020) (addressing California’s anti-SLAPP statute).

[21] *Gopher Media*, 2025 WL 2858761, at *6.

[22] *Id.* at *9 (citation omitted).

[23] *Id.* at *10.

[24] *Id.* at *16 (citations omitted).

[25] *Id.*

[26] *Kohler v. Presidio Intern., Inc.*, 782 F.3d 1064, 1070 (9th Cir. 2015).

[27] *Gopher Media*, 2025 WL 2858761, at *10.

[28] *Travelers Cas. Ins. Co. of Am. v. Hirsh*, 831 F.3d 1179, 1186 (9th Cir. 2016) (Gould, J., concurring) (“an anti-SLAPP has no proper place in federal court in light of the Federal Rules of Civil Procedure”); *Makaeff v. Trump University, LLC*, 715 F.3d 254, 273 (9th Cir. 2013) (Kozinski, C.J., joined by Paez, J., concurring) (“I believe *Newsham* is wrong and should be reconsidered.”); *Makaeff v. Trump University, LLC*, 736 F.3d 1180, 1188 (Watford, J., joined by Kozinski, C.J., and Paez and Bea, JJ., dissenting from the denial of rehearing en banc) (*Newsham* is not “consistent with controlling Supreme Court precedent, and . . . warranted reexamination by the court sitting en banc.”).

[29] *Martinez v. ZoomInfo Techs., Inc.*, 82 F.4th 785, 794 (9th Cir. 2023) (McKeown, J., concurring), *vacated*, 90 F.4th 1042 (mem.) (9th Cir. 2024).

[30] *See* 9th Cir. R. 40-3.

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