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Anti-SLAPP in Arbitration? A Closer Look

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Anti-SLAPP motions “cannot be used in arbitration proceedings under California law.” That, at any rate, is what the Ninth Circuit stated earlier this year in the published opinion of EHM Productions, Inc. v. Starline Tours of Hollywood, Inc., 1 F.4th 1164 (9th Cir. 2021).

Given the importance of the anti-SLAPP statute and the proliferation of arbitration, such a rule would have significant real-world consequences. This article preliminarily explores EHM’s announcement and what we believe a California court would do if opining on the same issue.

THE IMPORTANCE OF THE ANTI-SLAPP STATUTE

California’s anti-SLAPP statute is designed to root out Strategic Lawsuits Against Public Participation, or “SLAPP.” In passing the statute, the Legislature sought to give defendants a powerful set of tools (including attorney’s fees provisions, burden-shifting rules, and a discovery stay) to fight back against lawsuits targeting First Amendment rights.

A well-timed anti-SLAPP motion can be a game changer. Cases have been rapidly settled or voluntarily dismissed as a result of early anti-SLAPP motions. The anti-SLAPP statute turns defendants into plaintiffs and turns no-risk litigation (for plaintiffs) into potentially costly mistakes.

THE PROLIFERATION OF ARBITRATION

Even if the anti-SLAPP statute is important, does it really matter whether it applies in arbitration? In a word, yes.

For starters, arbitration has become a fact of litigation life. There is no denying that several decades of arbitration-friendly court decisions have spurred a “rapid expansion of arbitration as a dispute resolution mechanism” (Aguilar v. Lerner, 32 Cal. 4th 974, 985 – 2004).

Some may argue that the anti-SLAPP statute’s speech and petitioning protections are unlikely to be implicated in the commercial-heavy setting of private arbitration. But as California courts have recognized, the anti-SLAPP statute is properly applied even when defendant’s conduct was “directed to obtaining a financial advantage” (Ludwig v. Superior Ct., 37 Cal. App. 4th 8, 15 – 1995). That speech may arise in a commercial dispute does not strip it of constitutional protections.

THE NINTH CIRCUIT’S EHM DECISION

If the anti-SLAPP statute is an increasingly critical statute and arbitration is an increasingly critical forum, how did the Ninth Circuit justify stating that anti-SLAPP motions “cannot be used in arbitration proceedings under California law”?

The EHM decision does not cite any authority for its statement that the anti-SLAPP statute cannot be used in arbitration—and we have found none. Nor did the EHM court explain why it believed anti-SLAPP motions should be so confined.

Indeed, by the time the case reached the Ninth Circuit, the parties were no longer squarely disputing the question. Thus, the EHM court’s statement that anti-SLAPP motions “cannot be used in arbitration proceedings under California law”—stated as a background principle—was not essential to its holding, and future courts may treat it as dicta.

THE ANTI-SLAPP STATUTE SHOULD APPLY IN ARBITRATION

Indeed, there are strong arguments for why the anti-SLAPP statute should apply in arbitrations decided under California law.

Arbitration changes procedure, not substantive rights. Or as the U.S. Supreme Court put it: “By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum” (Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. – 1985).

Does California’s anti-SLAPP statute provide substantive rights? As any 1L civil procedure student knows, it is notoriously tricky to determine whether a right is “substantive.” But fortunately, the Ninth Circuit has taken much of the guesswork out of the inquiry.

In Newsham v. Lockheed Missiles & Space Co., the Ninth Circuit analyzed California’s anti-SLAPP statute under the Erie doctrine to decide whether it provided substantive rights. Rejecting the argument that the anti-SLAPP statute was merely procedural, the Ninth Circuit explained that “California has articulated . . .

important, substantive state interests furthered by the Anti-SLAPP statute"—namely, vindication of "the constitutional rights of freedom of speech and petition for the redress of grievances" (U.S. ex rel. Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 973 – 9th Cir. 1999). Accordingly, the Ninth Circuit held that "subsections (b) and (c) of California's Anti-SLAPP statute"—the burden-shifting framework and attorney's fees provisions, respectively—were substantive protections that could be vindicated in federal court.

A simple syllogism proves that the same analysis applies to arbitration. The first premise, established through the U.S. Supreme Court precedent discussed above, is that arbitration does not eliminate a party's substantive statutory rights. The second premise, established by the Ninth Circuit in Newsham, is that California's anti-SLAPP statute provides substantive statutory rights. The conclusion: California's anti-SLAPP statute should apply to arbitration.

CALIFORNIA COURTS WOULD REACH THE SAME CONCLUSION

As the arbitrator in EHM recognized, no California court has squarely addressed this question. But even in the absence of an on-point decision, California decisions shed light on the answer.

As the California Supreme Court explained, "[t]he anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's activity that gives rise to his or her asserted liability." Thus, if a defendant engages in protected speech and then is sued for it, it should make no difference whether that SLAPP claim is filed in court or in arbitration. This makes sense: "all kinds of claims could achieve the objective of a SLAPP suit—to interfere with and burden the defendant's exercise of his or her rights" (Navellier v. Sletten, 29 Cal. 4th 82, 92 – 2002).

In any event, when there are close calls about the anti-SLAPP statute's application, the tie goes to application. As California courts have recognized, the Legislature intended the anti-SLAPP statute to be interpreted broadly given its critical remedial purpose. To effectuate that purpose and to protect the First Amendment in all forums, the anti-SLAPP statute should be available in arbitration.

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