Cahill

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# Ninth Circuit Holds that Anti-SLAPP Denials are Not Immediately Appealable

On October 9, 2025, the Ninth Circuit Court of Appeals, sitting *en banc*, held that a district court's denial of a motion to strike under California's anti-SLAPP statute is not immediately appealable under the collateral order doctrine (which permits immediate appeal of certain non-final matters and provides an exception to the general rule that appellate jurisdiction is limited to appeals of final orders). In *Gopher Media LLC* v. *Melone*,[1] the Ninth Circuit dismissed such an order from the United States District Court for the Southern District of California for lack of jurisdiction. The Ninth Circuit found that denials of anti-SLAPP motions are not completely separable from the merits and therefore do not satisfy the requirements for an interlocutory appeal under the collateral order doctrine.

The decision in *Gopher Media* expressly overturned *Batzel* v. *Smith*,[2] in which the Ninth Circuit held that it has jurisdiction to review orders denying anti-SLAPP motions under the collateral order doctrine. *Gopher Media* has the potential to limit the ability of litigants to dispose of so-called SLAPP lawsuits, which are "Strategic Lawsuits Against Public Participation," and the decision is in some tension with the express purpose of California's anti-SLAPP statute, which is to "encourage continued participation in matters of public significance."[3] In addition, the *en banc* court assumed that California's anti-SLAPP statute applies in federal court—although four judges wrote a concurrence urging the majority to reconsider that position to align with other circuits.

## I. Factual and Procedural Background

California's anti-SLAPP statute[4] provides litigants with an accelerated summary dismissal procedure for claims that discourage participation in matters of public interest. Under the statute, the court conducts a two-step analysis. First, the court determines whether the action arises from any act "in furtherance of the [defendant's] right of petition or free speech" and "in connection with a public issue."[5] Second, it considers whether "the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."[6]

In 2021, Ajay Thakore, owner of a digital marketing agency called Gopher Media, filed a lawsuit in the United States District Court for the Southern District of California against Andrew Melone, owner of American Pizza Manufacturing, a business that sells uncooked pizza and pasta.[7] Thakore frequently visited businesses near Melone's business in San Diego, California, including a competing business of American Pizza Manufacturing in which Thakore owned a 25% stake. This led to several contentious exchanges between Thakore and Melone, including over parking, and

[1] 154 F.4th 696 (9th Cir. 2025).

[2] 333 F.3d 1018 (9th Cir. 2003).

[3] Cal. Civ. Proc. Code § 425.16(a).

[4] *Id.* § 425.16.

[5] *Id.* § 425.16(b)(1).

[6] *Id.*

[7] *Gopher Media*, 154 F.4th at 700.

Thakore and Gopher Media ultimately sued Melone for harassment, discrimination, and unfair competition, among other claims, alleging that Melone called Thakore a racial slur, intimidated Thakore, kicked Thakore's dog, and engaged in false advertising.[8] Melone filed a countercomplaint for defamation, libel, and unfair business practices, alleging that Gopher Media paid its employees to leave negative reviews of American Pizza Manufacturing and that Thakore made false statements about Melone and his business on social media.[9] In response, Thakore and Gopher Media moved to strike Melone's countercomplaint under California's anti-SLAPP statute, claiming that Thakore's reviews and comments about Melone's business concerned a matter of public concern and were thus protected speech that triggered the protections of the anti-SLAPP statute.[10]

The district court denied Gopher Media's anti-SLAPP motion, and Gopher Media filed an interlocutory appeal to the Ninth Circuit.[11] After oral argument, a three-judge panel directed the parties to file supplemental briefing to address whether the case should be heard *en banc* to reconsider governing precedent about (1) whether California's anti-SLAPP statute applies in federal court and (2) whether the denial of a motion to strike under California's anti-SLAPP statute is immediately appealable under the collateral order doctrine.[12] A majority of non-recused active judges voted to decide these issues *en banc*.[13]

## II. The Ninth Circuit's *En Banc* Decision

The *en banc* Court held that orders denying anti-SLAPP motions under California law do not meet the collateral order doctrine's "stringent" requirements and thus are not immediately appealable.[14] The Ninth Circuit explained that appellate jurisdiction is generally limited to appeals from a district court's "final decision."[15] Under the collateral order doctrine, however, a "narrow class of decisions that do not terminate the litigation" are appealable if they (1) "resolve an important issue completely separate from the merits of the action" and (2) are "effectively unreviewable on appeal from a final judgment."[16]

Regarding the first requirement, the Ninth Circuit found that orders denying anti-SLAPP motions must answer fact-intensive questions that are "inextricably intertwined" with and not "conceptually distinct" from the merits.[17] Specifically, to resolve an anti-SLAPP motion, courts must determine (1) whether a plaintiff's claim arises from any act "in furtherance of the person's right of petition or free speech," which necessarily involves reviewing the factual allegations, and (2) whether "the plaintiff has established that there is a probability that the plaintiff will prevail on the

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.* at 701; *Gopher Media LLC* v. *Melone*, 129 F.4th 1196 (9th Cir. 2025).

[14] *Gopher Media*, 154 F.4th at 702.

[15] *Id.* at 701.

[16] *Id.*

[17] *Id.* at 702–03.

claim."[18] According to the Ninth Circuit, this analysis "intertwines factual and legal questions" and creates "piecemeal appellate review" inconsistent with the purpose of the collateral order doctrine.[19]

Regarding the second requirement, the Ninth Circuit found that orders denying anti-SLAPP motions can be effectively reviewed after final judgment.[20] Recognizing that "some important interest may be lost" if a defendant is forced to defend a meritless SLAPP action through trial, the Ninth Circuit found that this lost interest "does not render the decision 'effectively unreviewable.'"[21] The court noted that this holding is consistent with its 2016 decision in *Hyan* v. *Hummer*, in which it held that orders *granting* an anti-SLAPP motion are not immediately appealable under the collateral order doctrine.[22] The court also noted that its decision in *Gopher Media* does not prevent a party from petitioning the district court to certify the denial for immediate interlocutory appeal under 28 U.S.C. § 1292(b).[23]

In so holding, the Ninth Circuit expressly overturned its prior decision in *Batzel* v. *Smith*, which held that the Ninth Circuit has jurisdiction to review orders denying California anti-SLAPP motions under the collateral order doctrine.[24] The Ninth Circuit's reasoning in *Batzel* was that (1) such orders resolve issues separate from the merits, since they "merely find[] that such merits may exist, without evaluating whether the plaintiff's claim will succeed" and (2) requiring a defendant to wait until final judgment to appeal such an order "would not remedy the fact that the defendant had been compelled to defend against a meritless claim brought to chill rights of free expression."[25] However, the Ninth Circuit explained that anti-SLAPP cases since *Batzel* have "shown that the questions that must be answered to resolve an anti-SLAPP motion are in fact 'inextricably intertwined with the merits of the litigation.'"[26] The court also noted that its reconsideration of *Batzel* was informed both by several appellate judges that have called for its reconsideration, as well as other circuits that have held that anti-SLAPP denials are not immediately appealable as of right.[27]

In addition, the Ninth Circuit's *en banc* decision declined to reconsider whether California's anti-SLAPP statute applies in federal court, assuming for purposes of the decision that it does.[28] In two concurring opinions, six appellate judges disagreed over this issue. Judges Bennett and Callahan reasoned that California's anti-SLAPP statute applies in federal court since its attorney-fee shifting provision creates a substantive right that is not controlled by and does not collide with any federal rule.[29] Judges Bress, Collins, Lee, and Bumatay, on the other hand, argued that California's anti-SLAPP statute is a state procedural device that is incompatible with the federal rules.[30] They concluded that the Ninth Circuit's "misguided experiment" of applying the anti-SLAPP statute in federal court has

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[18] *Id.* at 702 (citing Cal. Civ. Proc. Code § 425.16(b)(1)).

[19] *Id.* at 703.

[20] *Id.*

[21] *Id.*

[22] *Id.* (citing 825 F.3d 1043, 1046–47 (9th Cir. 2016)).

[23] *Id.* at 702 n.3.

[24] *Id.* at 699.

[25] *Id.* at 701 (citing *Batzel*, 333 F.3d at 1025).

[26] *Id.* at 702.

[27] *Id.* (citing *Ernst* v. *Carrigan*, 814 F.3d 116, 119 & n.1 (2d Cir. 2016); *Coomer* v. *Make Your Life Epic LLC*, 98 F.4th 1320, 1328–29 (10th Cir. 2024)).

[28] *Id.* at 699 n.2.

[29] *Id.* at 704 (Bennett and Callahan, JJ., concurring).

[30] *Id.* at 709–18 (Bress, Collins, Lee, and Bumatay, JJ., concurring).

created a "contorted version" of the statute.[31] They also emphasized that the "overwhelming majority view" is that state anti-SLAPP statutes do not apply in federal court.[32]

## III. Conclusion

California's anti-SLAPP statute, like those of other states, is expressly intended to "encourage continued participation in matters of public significance" and prevent the chilling of free speech through abuse of the judicial process.[33] The Ninth Circuit's *en banc* decision in *Gopher Media* provides an additional hurdle to the ability of litigants to quickly resolve meritless SLAPP suits and may force litigants defending even meritless suits to undergo significant litigation costs before reaching a resolution. And, as the California legislature and other Circuits note, certification under 28 U.S.C. § 1292(b) as a path for appeal—as suggested by the *Gopher Media* majority—may not be a viable alternative.[34]

In addition, although *Gopher Media* leaves intact, for now, the applicability of California anti-SLAPP statute in federal court, given the considerable debate over this question among the Ninth Circuit judges—as evidenced by the concurring opinion of Judges Bress, Collins, Lee, and Bumatay—the court may revisit that question sometime soon.[35]

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If you have any questions about the issues addressed in this alert, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Joel Kurtzberg (Partner) at 212.701.3120 or jkurtzberg@cahill.com; Jason Rozbruch (Associate) at 212.701.3750 or jrozbruch@cahill.com; or Chana Tauber (Associate) at 212.701.3520 or ctauber@cahill.com; or email publications@cahill.com.

[31] *Id.* at 709.

[32] *Id.* at 709, 713–15 (citing the view of Ninth Circuit appellate judges calling for the reversal of the Ninth Circuit's current approach and decisions from the Second, Fifth, Tenth, Eleventh, and D.C. Circuits).

[33] Cal. Civ. Proc. Code § 425.16(a).

[34] *See* S. Judiciary Comm., Analysis of Assemb. Bill No. 1675, 1999–2000 Reg. Sess. (Cal. July 1, 1999), available at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=199920000AB1675 (noting that a discretionary petition for appeal is "rarely granted"); *Los Lobos Renewable Power, LLC* v. *Americulture, Inc*, 885 F.3d 659, 667 (10th Cir. 2018) ("Because any remedy we—or any other court—can provide will at best end and at worst *prolong* litigation, alternate remedies prove inadequate here.") (emphasis in original).

[35] Also of note is a recent conflicting decision by the United States Court of Appeals for the Federal Circuit, decided less than a week after *Gopher Media*. In *IQE PLC* v. *Newport Fab, LLC*, 155 F.4th 1370 (Fed. Cir. 2025), the Federal Circuit similarly considered whether the denial of a motion to strike under California's anti-SLAPP motion was immediately appealable under the collateral order doctrine—but held, contrary to *Gopher Media*, that such motions *are* immediately appealable. *Id.* at 1377–78. The Federal Circuit's decision relied on *Batzel* and did not address *Gopher Media*. Plaintiffs have since filed a petition for panel rehearing and rehearing *en banc* in light of the Ninth Circuit's overturning of *Batzel* in *Gopher Media*. *See* Petition for Panel Rehearing and Rehearing En Banc, *IQE PLC* v. *Newport Fab, LLC*, No. 24-1124 (Fed. Cir. Nov. 13, 2025), Dkt. No. 38. The petition for rehearing and rehearing *en banc* has not yet been decided, as of the date of this publication.