9th U.S. Circuit Court Of Appeals
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Ninth Circuit 2023 Appellate Roundup

The 9th Circuit was presented with some fascinating appellate cases – particularly with cases about appellate standing, jurisdiction, and appealability.

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Every year presents the 9th Circuit with fascinating cases, and 2023 was no exception. Over the course of 2023, the judges had the chance to consider whether a 13-year-old can consent to receiving texts on a phone paid for by his mother (*Hall v. Smosh Dot Com*), weigh the constitutionality of an Oregon law preventing undercover journalists from recording conversations with law enforcement officers (*Project Veritas v. Schmidt*), and take a field trip to the California Supreme Court with certified questions about an employer's duty of care in a COVID-19 case (*Kuciemba v. Victory Woodworks*). But what's more fun than determining whether Fortnite dances are copyrightable (*Hangami v. Epic Games*)? That's right, getting into the weeds with cases about appellate standing, jurisdiction, and appealability! And 2023 presented the Circuit with some meaty cases all about appellate practice.

Standing

Garcia v. Beck, No. 22-15594 (9th Cir. Feb. 13, 2023), involved an ADA claim brought by Orlando Garcia against Lola's Chicken Shack. The district court found for Lola's on the ADA claim and dismissed the case as moot because the alleged ADA violations had already been remediated, but also denied Lola's motion to have Garcia designated a "vexatious litigant." On appeal, Lola's argued that the district court abused its discretion in refusing to designate Garcia as a vexatious litigant, which would have required Garcia to seek the court's permission before filing any future ADA claims.

In a short-but-sweet memorandum disposition, the 9th Circuit held that Lola's lacked Article III standing to appeal the district court's decision. First,

any order requiring Garcia to seek permission before filing *future* ADA claims would have no impact in the instant suit, so Lola's had no "direct stake" in the appeal and any order would benefit only unrelated third-parties, not Lola's. Second, Garcia had never sued Lola's before and had no history of "repeatedly suing the same businesses" after the ADA violations were remediated, so even if Lola's had argued that the order would protect it from future ADA claims from Garcia, such an argument was too speculative to confer Article III standing.

The 9th Circuit also tackled class representative standing in *Habelt v. iRhythm Technologies, Inc.*, 83 F.4th 1162 (9th Cir. 2023). Investor Mark Habelt brought a putative class action for securities fraud after iRhythm received a "historically low Medicare reimbursement rate" for one of its products. Following the procedures required by the Private Securities Litigation Reform Act, the district court appointed the Public Employees' Retirement System of Mississippi (PERSM) as the lead plaintiff. Habelt's name remained on the caption, but thereafter PERSM controlled the litigation and Habelt neither participated nor was mentioned in the briefing. After iRhythm won its motion to dismiss PERSM's second amended complaint, Habelt appealed.

The panel ruled that Habelt was a non-party to the case and therefore lacked standing to appeal. The caption to the case is "only the handle to identify it," so the inclusion of Habelt's name was not enough to confer standing as a party. Further, the body of the operative amended complaint referenced only PERSM's claims and made no mention of Habelt. And finally, Habelt could not demonstrate any "exceptional circumstances" that would give him standing to appeal as a non-party.

In a dissent more than three times the length of the majority opinion, Judge Bennett argued that Habelt should properly be considered a party with standing to appeal because his claims were still covered in the complaint as a putative (albeit unnamed) class member, and because Habelt never evinced intent to withdraw or received notice of his termination as a party. Further, unlike other nonparty would-be appellants, Habelt had initiated the complaint and nothing indicated that he intended to relinquish his participation in the case.

Jurisdiction

In *Moe v. GEICO Indemnity Co.*, 73 F.4th 757 (9th Cir. 2023), Brandon Moe filed individual and class claims in Montana state court alleging that GEICO failed to advance-pay his medical bills and lost wages. GEICO removed to federal court, asserting jurisdiction under the Class Action Fairness Act, citing the potential size of the putative class and the potential value of the aggregate claims. The district court granted GEICO's summary judgment motion, and Moe appealed.

Even though the propriety of CAFA jurisdiction had not been raised below, the 9th Circuit held it had an "independent obligation" to confirm subject matter jurisdiction and could raise the question *sua sponte* on appeal. The panel then concluded that there was not sufficient evidence in the record to support that the case could meet the $5 million threshold for CAFA removal, so it remanded the case for the district court to determine the amount in controversy.

Appealability

In *Boshears v. PeopleConnect, Inc.*, 76 F.4th 858 (9th Cir. 2023), John Boshears sued PeopleConnect, alleging that the use of his photo on the classmates.com website violated his right of publicity. PeopleConnect sought to compel arbitration under the Federal Arbitration Act and to dismiss the complaint on the ground that it was entitled to Section 230 immunity under the Communications Decency Act. The district court denied both requests in a 26-page document styled as a single "order." Citing Section 16(a) of the FAA, which allows interlocutory appeals to be taken from orders denying motions to compel arbitration, PeopleConnect filed interlocutory appeals as to both orders, arguing that because both motions were denied as part of the same "order," they were both reviewable under Section 16(a).

The 9th Circuit concluded that it did not have jurisdiction to review the denial of PeopleConnect's motion to dismiss because an "order" is not the same as the "document" delivering the order. The court's single document contained two separate orders referring to separate statutes with separate grants of jurisdiction, and Section 16(a)'s authorization of interlocutory appellate jurisdiction did not stretch to allow an early appeal from the denial of the motion to dismiss.

Cottonwood Environmental Law Center v. Edwards, No. 22-36015, _ F.4th _ (9th Cir. Nov. 21, 2023), clarified when an appellate court has jurisdiction to

review the denial of a summary judgment motion that was made before a trial that ended in a final judgment on the merits. Conservation groups sued a water and sewer district, claiming it had illegally discharged pollutants into a river. Cottonwood moved for summary judgment on a direct-discharge theory, which the district court denied as a matter of law (but noted that Cottonwood might prevail on an indirect-discharge theory). At trial, the jury found for the district on the indirect-discharge theory, Cottonwood appealed, and the district argued that the summary judgment ruling was not appealable because such orders are typically not reviewable after trial.

In *Cottonwood*, the district court's pre-trial denial of summary judgment was "without reference to any disputed facts" and referred only to facts to which both parties agreed. Because that ruling was a "purely legal conclusion" that was not superseded by later developments in the litigation, it merged into the final judgment and became reviewable on appeal. The panel's decision followed its examination of recent 9th Circuit and Supreme Court precedent on the issue, which together supported the decision. In *Matter of York*, 78 F.4th 1074 (9th Cir. 2023) the 9th Circuit noted that, in an appeal from the final judgment after a trial, an appellate court cannot review a pretrial order denying summary judgment when that denial was based on "the presence of a disputed issue of material fact." And in *Dupree v. Younger*, 589 U.S. 729 (2023), the Supreme Court stated that, when such a denial resolved "purely legal issues," the ruling on the motion for summary judgment "merges" into the final judgment and becomes reviewable on appeal.

The 9th Circuit considered the collateral order doctrine in *Martinez v. ZoomInfo Technologies*, 82 F.4th 785 (9th Cir. 2023), in the context of anti-SLAPP litigation. In another right of publicity case, Kim Martinez alleged that ZoomInfo did not obtain her permission before publishing her name, photo, and employment information on its website. The district court denied ZoomInfo's special motion to strike under California's anti-SLAPP law, and ZoomInfo brought an interlocutory appeal. In ruling on the appeal, the 9th Circuit considered two principles: (1) an order denying a motion to strike under an anti-SLAPP law is a collateral order subject to immediate interlocutory appeal, but (2) if the order denying the motion is based on one of two statutory exemptions in California's anti-SLAPP law (namely, that the law does not apply to actions brought solely in the public interest/on behalf of the general public or when the cause of action arises from commercial speech), it is *not* appealable. The appellate panel determined that Martinez's

complaint was brought solely in the public interest and therefore was exempt from the anti-SLAPP law, and affirmed the district court's denial of the motion to strike the complaint.

Both Judges McKeown and Desai concurred but wrote separately to urge reconsideration of the 9th Circuit's precedent allowing interlocutory appeals from denials of anti-SLAPP motions. Judge McKeown argued that such motions are "wholly grounded" in California's procedural law but have been "infused" "with substantive significance," putting the 9th Circuit in the minority among its sister circuits in its approach to anti-SLAPP statutes. Judge Desai, joined by Judge McKeown, argued that such orders should not be immediately reviewable because they do not resolve an important issue "completely separate from the merits" and are not "effectively unreviewable on appeal" from the final judgment.