Kozinski Concurrence Questions Anti-SLAPP

Digital Media and Data Privacy Law Blog

on 04.24.2013
Posted in Anti-SLAPP Statutes

We wrote recently about *Sherrod v. Breitbart and O'Connor*, the case argued last month in the D.C. Circuit that asks the Court to decide, among other questions, whether the District of Columbia's anti-SLAPP statute should be applied in federal court.

The federal courts of appeals that have analyzed this question have all agreed that state anti-SLAPP statutes should be applied—at least to some degree—in federal court. Those cases point to the Ninth Circuit's 1999 decision in *Newsham v. Lockheed Missiles & Space Co.*, in which the Court held that California's anti-SLAPP law was substantive, not procedural, and therefore should be applied by a federal court.

The Ninth Circuit recently issued an opinion in *Makaeff v. Trump University* that faithfully followed the Court's precedent in *Newsham*, applying California's anti-SLAPP statute to strike a counterclaim claim brought in federal court by Trump University against a woman who had filed a class-action claim against the program founded by Donald Trump to offer real estate investment seminars and training programs.

The bulk of the Court's opinion focused on whether Trump University was a "public figure," as required by California's anti-SLAPP law. The Court reversed the trial court, holding that it was a "limited public figure."

Perhaps more interesting, however, were two concurrences written by Judge Kozinski and Judge Paez arguing that *Newsham* was wrongly decided and that state anti-SLAPP statutes should not apply in federal court. Both concurrences argue that anti-SLAPP statutes are, in fact, largely procedural, and therefore should not be applied in federal court to supplant federal procedural rules. Judge Kozinski, known for his sharp writing, called *Newsham* "a big mistake" that had been "foolishly followed" by the First Circuit and Fifth Circuit. Judge Kozinski and Judge Paez clearly want the Ninth Circuit to re-examine *Newsham en banc*.

Judge Kozinski is an influential jurist across the country, and one cannot help but wonder whether his concurrence at this point was also intended to send a message to the D.C. Circuit as it considers *Sherrod*. Of course, if the D.C. Circuit were to hold that D.C.'s law does not apply in federal court, there would be a circuit split on that question that might draw the attention of the Supreme Court.