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Feature

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Media Debtors, Take Note

Gawker *Court Keeps Defamation Suit and Rejects Application of SLAPP Statute*

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It was Gawker Media LLC's job to draw attention, and it often did so with salacious headlines and tabloid-esque reporting. Even in chapter 11, Gawker drew attention for the resolution of the headline-grabbing lawsuit brought by wrestler Hulk Hogan, which forced the bankruptcy filing in the first place. This summer, Gawker's legacy expanded to include a lower-profile — but equally important — decision that will likely have a dramatic impact on media-industry debtors.

The Underlying Facts

On Dec. 9, 2015, web-based journalist Charles Johnson and his company, Got News LLC (collectively, the "claimants"), filed a complaint against Gawker and two employees in California state court alleging defamation, injurious falsehood, false light and conspiracy to interfere with their civil rights. At issue in the California litigation were articles published by Gawker concerning the claimants' coverage of Michael Brown's death in Ferguson, Mo. The Gawker articles allegedly contained statements that criticized Johnson's honesty and professional skills, as well as rumors related to Johnson's personal life. Gawker and its employees were also alleged to have posted negative comments on the claimants' articles and on Twitter.

On June 10 and 12, 2016, Gawker Media LLC and two affiliated debtors filed chapter 11 petitions in the U.S. Bankruptcy Court for the Southern District of New York. The claimants subsequently filed proofs of claim based on the same allegations as contained in the California litigation. Gawker objected to the claims, and after significant briefing, the court and the parties identified two gating issues to resolve prior to moving forward with litigation on the claim objections: (1) which of the claims, if any, are personal-injury tort claims within the meaning of 28 U.S.C. § 157(b)(2)(B); and (2) whether the California anti-SLAPP statute, Cal. Civ. Proc. Code § 425.16, applies and, if so, in what manner.[1] Hon. **Stuart M. Bernstein** issued his ruling on these two issues on Aug. 21, 2017.[2]

Are the Claims "Personal-Injury Tort" Claims?

Judge Bernstein first addressed the issue of whether the claims were "personal-injury tort" claims, which are not core, pursuant to 28 U.S.C. § 157(b)(2)(B). If the claims fell within the personal-injury tort exception to core jurisdiction, the district court where the bankruptcy case is pending or where the claim arose would have exclusive jurisdiction over the claims.[3]

Because "personal-injury tort" is not defined in the statute, courts have developed three separate interpretations: narrow, broad and hybrid. The narrow view requires a personal-injury tort to result in trauma, bodily injury or significant psychiatric impairment.[4] The broad view embraces an expansive category of private or civil wrongs, including "damage to an individual's person and any invasion of personal rights, such as libel, slander and mental suffering."[5] The hybrid view allows the bankruptcy court to adjudicate personal-injury torts under the broad view

1 The term "SLAPP" refers to a strategic lawsuit against public participation, which is a lawsuit against a "person arising from any act of that person in furtherance of the person's right of petition or free speech ... in connection with a public issue as to which the plaintiff has not established that there is a probability that [he/she] will prevail on the claim." *Equilon Enters. v. Consumer Cause Inc.*, 29 Cal. 4th 53, 58 (2002) (citations omitted).

2 *In re Gawker Media LLC*, Case No. 16-11700 (SMB), 2017 Bankr. LEXIS 2364 (Bankr. S.D.N.Y. Aug. 21, 2017).

3 28 U.S.C. § 157(b)(5).

4 *In re Residential Capital LLC*, 536 B.R. 566, 572 (Bankr. S.D.N.Y. 2015) ("A court following this narrow view considers whether the claim is a personal injury tort in the traditional, plain-meaning sense of those words, such as a slip and fall, or a psychiatric impairment beyond mere shame and humiliation.") (citations omitted).

5 *Id.* (quoting *Boyer v. Balanoff (In re Boyer)*, 93 B.R. 313, 317-18 (Bankr. N.D.N.Y. 1988)).

that, in the court's discretion, they have the earmarks of financial, business or property tort claims, or contract claims.[6]

Judge Bernstein recognized the ambiguity in the phrase "personal-injury tort" given the absence of a statutory definition and the facial reasonableness of each interpretation.[7] Accordingly, he turned to the cannons of statutory construction and legislative history to aid in its interpretation.

The Court relied on *noscitur a sociis*, a canon of statutory construction "holding that the meaning of an unclear word or phrase should be determined by the words immediately surrounding it."[8] This canon avoids "ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving 'unintended breadth to the Acts of Congress.'"[9] Simply, the court was persuaded by the fact that "personal-injury torts" and "wrongful death" appear adjacent to one another in the same sentence and therefore construed "personal-injury tort" in a manner similar to wrongful death: requiring physical trauma.

The court also found that the legislative history was consistent with a narrow interpretation of the definition of "personal-injury tort." The personal-injury tort/wrongful-death exception was added as part of the 1984 amendments to the Bankruptcy Code at the pressing of personal-injury lawyers involved in *Johns-Manville* and other asbestos cases. They urged Congress that the bankruptcy court is not the appropriate forum to adjudicate thousands of personal-injury asbestos cases and that Congress should protect plaintiffs' right to a jury trial, especially in light of the then-still recent *Northern Pipeline* case.[10]

Then-Sen. Dennis DeConcini (D-Ariz.), in his comments in support of the 1984 amendments, argued that personal-injury tort creditors "do not voluntarily become involved" with a debtor and therefore should not be forced to adjudicate their claims in bankruptcy court — citing, as an example, claims arising from car accidents.[11] Then-Rep. Robert Kastenmeier (D-Wis.), the ranking majority member on the House Judiciary Committee, described the proposed exceptions to core jurisdiction, including personal-injury tort/wrongful death, as a "narrow category of cases."[12] Congress ultimately adopted the language urged by testifying members of the asbestos litigation group and those speaking in favor of the amendments. The court found this persuasive because "[w]here Congress adopts language urged by a witness, it may be assumed that Congress also adopted the intent voiced by the witness."[13]

Relying on both the canons of statutory construction and the legislative history, the court adopted the narrow interpretation, which requires that for a personal-injury tort to exist, there must be trauma, bodily injury or psychic injury beyond mere shame or humiliation. Using the narrow interpretation, the court held that the claims alleged against Gawker and its two employees (defamation, false light and injurious falsehood) were not personal-injury torts.

Does the California Anti-SLAPP Statute Apply to the Claims Objections?

Having decided that the claims did not fall within the "personal-injury tort" exception to core jurisdiction, the court turned its attention to the applicability of the California anti-SLAPP statute to the claim objections. This was an issue of significant importance, since the California anti-SLAPP statute provides SLAAP defendants (such as Gawker and its employees) with an expedited procedure for short-circuiting SLAAP lawsuits:

> A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.[14]

> **[T]he [*Gawker*] decision provides a tutorial on how to discern the meaning of an ambiguous statutory provision, interpreting 28 U.S.C. § 157(b)(2)(B) using the *noscitur a sociis* canon of statutory construction[.]**

Once a SLAPP defendant demonstrates that the plaintiff's claim arises from a protected activity (*e.g.*, publication of a news article), the burden shifts to the plaintiff to show a probability of success. All discovery is stayed until the motion to strike is resolved (unless the court orders otherwise). If the plaintiff cannot meet its burden, the defendant is entitled to recover its fees and costs. By arguing that the California anti-SLAPP statute applied to the claim objections, Gawker sought to utilize this expedited procedure before progressing to an evidentiary hearing on the objections if the motion to strike was denied.

Because the claims at issue were based primarily on state law and were pending in state court when the bankruptcy was filed, the court applied the rules applicable to diversity actions to determine the applicability of the California anti-SLAPP statute. Thus, three questions had to be answered. First, would the California anti-SLAPP statute apply to the claimants' suit if it were brought in state court? Second, is the California anti-SLAPP statute substantive within the meaning of *Erie Railroad Co. v. Tompkins*?[15] Third, is the California anti-SLAPP statute displaced by a valid federal law or rule governing the same issue?

The court made short work of the first two questions, holding that the statute is procedural as a matter of California state law but substantive under *Erie*.[16] The lone remaining question was whether the California statute conflicted with federal law.

6 *Id.* at 571 (citing *Stranz v. Ice Cream Liq. Inc. (In re Ice Cream Liq. Inc.)*, 281 B.R. 154, 161 (Bankr. D. Conn. 2002)).
7 *In re Gawker*, 2017 Bankr. LEXIS 2364 at *14.
8 *Black's Law Dictionary* (Brian Garner ed., 18th ed.).
9 *In re Gawker*, 2017 Bankr. LEXIS 2364 at *14.
10 *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).
11 130 Cong. Rec. 17, 154 (1984).
12 130 Cong. Rec. 20, 227-28 (1984).
13 *In re Gawker*, 2017 Bankr. LEXIS 2364 at *18 (quoting *In re Teligent Inc.*, 268 B.R. 723, 737 (Bankr. S.D.N.Y. 2001)).
14 Cal. Civ. Proc. Code § 425.16(b)(1).
15 304 U.S. 64 (1938).

A conflict exists between a state and federal rule "when, fairly construed, the scope of [the federal rule] is sufficiently broad to cause a direct collision with the state law or, implicitly, to control the issue before the court, thereby leaving no room for the operation of that [state] law."[17] In other words, "If a federal rule answers the question in dispute, it governs notwithstanding the state law."[18] Thus, "even if a state rule is substantive under *Erie*, the short of the matter is that a Federal Rule governing procedure is valid whether or not it alters the outcome of the case in a way that induces forum-shopping."[19]

The issue before the court was whether — and to what extent — some of the Federal Rules of Civil Procedure (FRCP) conflict with the provisions of the California anti-SLAPP statute. Of particular concern were Rules 56 (governing motions for summary judgment) and 12 (governing pre-answer motions). Rule 56 is automatically applicable to contested matters, while the bankruptcy court has the discretion to apply Rule 12 to contested matters.[20] Thus, the question arose as to whether the special motion and fee-shifting provisions of the California anti-SLAPP statute conflicted with Rules 12 and 56.

Guidance on this issue is mixed. In *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, the Ninth Circuit held that there was no "direct collision" between the California anti-SLAPP statute and Rules 12 and 56 since, if the special motion was denied, motions under Rules 12 and 56 could still be brought.[21] Furthermore, the California anti-SLAPP statute served a special purpose not addressed by the FRCP, namely the protection of constitutional rights to freedom of speech and petition for redress of grievances.[22] Similarly, the First Circuit upheld the applicability of Maine's anti-SLAPP statute, holding that the anti-SLAPP statute applied in only a limited class of cases and that the tests for dismissal under the statute are substantively and materially different from the standards under Rules 12 and 56.[23] In contrast, other courts have found a direct conflict between state anti-SLAPP statutes and Rules 12 and 56. In fact, judges within the Ninth Circuit have opined that *Newsham*, although still binding, was wrongly decided and that there is a direct conflict between the California anti-SLAPP statute and the FRCP.[24]

Judge Bernstein sided with those courts that found a direct conflict between the anti-SLAPP statute and Rules 12 and 56, and found Hon. Alex Kozinski's concurrences in *Travelers* and *Trump University* particularly compelling. Accordingly, even though the California anti-SLAPP statute was substantive under *Erie*, Judge Bernstein held that the statute conflicts with Rules 12 and 56 and would not be applied since "the literal application of the California statute would require a federal court to dismiss a lawsuit that would not be subject to dismissal under Federal Rules 12 and 56."[25]

Conclusion

The *Gawker* decision is important for a number of reasons. First, the decision provides a tutorial on how to discern the meaning of an ambiguous statutory provision, interpreting 28 U.S.C. § 157(b)(2)(B) using the *noscitur a sociis* canon of statutory construction and relying both on comments made at congressional hearings by elected representatives and on testimony given at these hearings that has since been adopted by Congress. Second, while there is no binding precedent from the Second Circuit Court of Appeals, the court's adoption of the narrow interpretation of "personal-injury tort" is likely to be cited as persuasive authority by other courts within the Second Circuit. Courts outside of the Second Circuit may also follow the same reasoning, especially given the influence of the courts within the Southern District of New York. Third, the court's decision not to apply the California anti-SLAPP statute to the claim objection will potentially be important in future media-related bankruptcy cases, as it prevents the bankrupt SLAPP defendant from taking advantage of the special motions/fee-shifting provisions found in the statute. abi

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16 The court held that the California anti-SLAPP statute is substantive under *Erie* for two primary reasons. First, failure to apply the statute would encourage forum-shopping, since a plaintiff would always choose to bring its claim in federal court if it could avoid the motion to strike and the fee-shifting provisions of the anti-SLAPP law. Second, failing to apply the California anti-SLAPP statute to federal cases could lead to different results on the same claim depending on whether the claim was brought in state or federal court. The court found further support in a prior decision by the Second Circuit Court of Appeals in *Adelson v. Harris*, 774 F.3d 803, 809 (2014), where the appellate court had determined that the immunity and mandatory fee-shifting provisions in the similar Nevada anti-SLAPP statute were substantive under *Erie*.

17 *Burlington Northern R. Co. v. Woods*, 480 U.S. 1, 4-5 (1987).

18 *In re Gawker*, 2017 Bankr. LEXIS 2364 at *35 (citing *Shady Grove Orthopedic Assocs. PA v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010)).

19 *Id.* at *35-36 (citing *Shady Grove Orthopedic*, 559 U.S. at 416).

20 Fed. R. Bankr. P. 9014(c).

21 190 F.3d 963, 972 (9th Cir. 1999).

22 *Id.*

23 *Godin v. Schencks*, 629 F.3d 79, 88-89 (1st Cir. 2010).

24 *E.g., Travelers Cas. Inc. Co. of Am. v. Hirsch*, 831 F.3d 1179, 1183 (9th Cir. 2016) (Kozinski, J., concurring); *Makaeff v. Trump Univ. LLC*, 715 F.3d 254, 274 (9th Cir. 2013) (Kozinski, J., concurring).

25 *In re Gawker*, 2017 Bankr. LEXIS 2364 at *44.