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When to Think About an Interlocutory Appeal

By Jessica E. Yates – March 26, 2014

You've just received a pretrial decision that seems to doom your client. You brace yourself for delivering the news and buckling down for a difficult trial. After all, there is no way to appeal that decision right now. Or is there?

Some decisions actually are appealable on an interlocutory basis. And although interlocutory appeals are difficult to obtain if that decision does not fall within one of the categorical entitlements, it is worth taking a moment to consider the options and counsel your client about them.

First, check to see if the adverse decision qualifies automatically for an interlocutory appeal as a matter of statutory right. In federal court, that includes an order denying arbitration (9 U.S.C. § 16); an order granting, modifying, or denying a preliminary injunction (28 U.S.C. § 1292(a)); and an order appointing a receiver (28 U.S.C. § 1292(a)).

Second, determine whether that pretrial decision fits within the collateral order doctrine. Under that doctrine, an appellate court will treat a prejudgment order as "final" if it conclusively resolves an important issue independent of the merits of the case, and the order is effectively unreviewable on appeal due to the irreversible effects of the decision. While few decisions qualify, most courts hold that orders denying sovereign or qualified immunity are reviewable under the collateral order doctrine, as is discovery imposed on a disinterested third party. Other examples include pretrial decisions compelling medication or a psychological examination of a defendant. Until relatively recently, many courts also reviewed lower court decisions denying privilege under the doctrine but, as noted below, this has changed in recent years.

Third, even if there is no entitlement to an interlocutory appeal, you still might have a shot at petitioning the court of appeals for discretionary review. But as with the types of orders described above, the key is to fit into a recognized category and pattern. With any form of discretionary review, it is not enough to argue that the district court got it wrong. And it helps if you can pitch your issue on appeal as one of importance, not just to your case but to the legal world in general.

Under 28 U.S.C. 1292(b), you can seek review of an interlocutory order that features a controlling question of law where there is substantial ground for a difference of opinion, and where an immediate appeal may materially advance the ultimate termination of the litigation. To

do so, you first must seek certification from the district court in a timely manner, and then petition for review to the court of appeals. Courts tend to strictly construe this authority for interlocutory review, and they usually look for: federal (not state) issues of law, legal questions that are effectively dispositive of the case, and a split of authorities. If you do succeed in getting appellate review of such an issue, the court also has jurisdiction to review any other issue presented in the appealed-from order.

Under F.R.C.P. 23(f), you can petition for review of a court order granting or denying class certification. Most courts look to a variety of factors, such as whether the petition presents an unsettled issue of law, and whether the order in question creates a "death-knell" independent of the merits. Examples of the latter include when a class certification will effectively force the defendant to settle, or whether denying class certification will make it impossible for individual plaintiffs to bring claims.

Finally, consider a writ of mandamus. Courts routinely recite a multifactor approach in deciding whether to grant such discretionary relief, including weighing whether the complained-of order involves an important issue of first impression, the petitioner's harm is irreparable, and the trial court's abuse of discretion was pervasive or extreme.

Writs of mandamus were traditionally rarely used. But a 2009 decision by the United States Supreme Court changed that, suggesting that a writ of mandamus may be an appropriate vehicle for privilege issues. The rationale was that the forced disclosure of privileged information was indeed an important issue independent of the merits that was effectively unreviewable on appeal, given that the "bell cannot be unrung" once the privilege is broken.

In summary, although options for interlocutory appeal are limited, it is worthwhile to explore that possibility immediately after receiving an adverse pretrial decision. An appellate specialist may be particularly useful for that exercise.

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