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Manufacturing Appellate Jurisdiction: A Dangerous Gambit

What to do with a catastrophic trial-court ruling that materially impacts a client's case without resulting in an appealable judgment is one of the perennially vexing problems in litigation.

By Adam W. Hofmann & Josephine K. Petrick

"Is there any way I can appeal this?!?" might be the most common question appellate specialists confront when buttonholed by colleagues and clients. What to do with a catastrophic trial-court ruling that materially impacts a client's case without resulting in an appealable judgment is one of the perennially vexing problems in litigation. In federal court, there are tools litigants can use to seek interlocutory review of significant orders, but those tools depend on the exercise of judicial discretion. And appellate lawyers are compelled to admit that courts rarely exercise their discretion to grant interlocutory review.

In some cases, this has led parties to conclude that they should dismiss their claims in order to secure an appealable judgment, rather than litigate under the shadow of whatever adverse order they wish to challenge. As demonstrated by the Ninth Circuit's recent decision in *Langere v. Verizon Wireless Servs.*, this is a risky maneuver at best.

A Refresher on Interlocutory Appeals in the Ninth Circuit

Generally, an order or judgment that does not dispose of all claims is not considered a final, appealable decision under 28 U.S.C. §1291.

(Photo: Courtesy Photo)

Adam Hofmann and Josephine Petrick of Hanson Bridgett Hanson Bridgett.

Federal rules and case law establish special procedures for securing review of a few categories of interlocutory orders. See, e.g., 28 U.S.C. §1292(a)(1)-(3) (preliminary-injunction orders and certain receivership and admiralty orders); Fed. R. Civ. P. 23(f) (discretionary appeal from class-certification orders); 28 U.S.C. §158 (certain bankruptcy orders); id. §1292(c)(2) (certain nonfinal patent-infringement judgments awaiting an accounting appealable to the Federal Circuit); 18 U.S.C. §§2339B(f)(1)(C) & 2339B(f)(5) (orders entered pursuant to certain anti-terrorism funding laws).

Litigants may also immediately appeal judgments on fewer than all claims or with respect to fewer than all parties, if the district court exercises its discretion to enter such a judgment. Fed. R. Civ. P. 54(b). The same is true of collateral orders that, absent immediate appeal, would evade appellate review.

For all other orders, the primary tool is 28 U.S.C. §1292(b). Under that statute, courts have discretion to allow an interlocutory appeal when an order (1) presents a controlling question of law; (2) as to which there is substantial ground for difference of opinion; and (3) the resolution of

which would materially advance the ultimate termination of the litigation. 28 U.S.C. §1292(b).

Section 1292(b) establishes a two-step process for securing interlocutory review. First, the party seeking review asks the district court to certify its order as appealable, either as part of the motion briefing or as soon as possible after receiving an adverse ruling. Id.; Fed. R. App. P. 5(a)(3). If the district court refuses to certify the order under 1292(b), that is the end of the road. But if the district court grants the request and certifies the order, the party then files a petition for permission to appeal in the Circuit Court, no more than 10 days from the certifying order. 28 U.S.C. §1292(b); Fed. R. App. P. 5(a)(1)-(3).

Aside from seeking certification under §1292(b), one final option for seeking interlocutory review—without the need for district court acquiescence—is to take a writ to the Court of Appeals. However, even more than in state court, federal writ practice is narrowly constrained.

A petitioner seeking review on this basis must demonstrate a "clear and indisputable right" to relief. And the Circuit Court will evaluate the request by balancing whether (1) the petitioner has any other means for securing needed relief; (2) the petitioner faces harm or prejudice that cannot be remedied by post-judgment review; (3) the district court's order is clearly erroneous as a matter of law; (4) the district court's order reflects a recurring error or disregard for federal rules; and (5) the order raises a new and important legal issue of first impression. See *Miller v. Gammie*, 335 F.3d 889, 895 (9th Cir. 2003). In practice, these standards are applied rigorously, and mandamus is rarely granted.

Manufacturing Appellate Jurisdiction Through Voluntary Dismissal Is Possible But Risky

The difficulties of securing interlocutory review by discretionary means has led some plaintiffs to take more drastic action, voluntarily dismissing whatever claims survive the order they seek to challenge to obtain immediate review. The Ninth Circuit has found this to be permissible, so long as the dismissal is with prejudice. In other words, where a court dismisses an important claim but leaves other, less important claims to be tried, the plaintiff can abandon the remaining claims—permanently—and appeal the resulting judgment as to the court-dismissed claims only.

However, plaintiffs should consider this approach to be very risky, and not only because it entails the abandonment of otherwise viable claims. Even when there is apparently a final, appealable order, "there must be no evidence one or both of the parties attempted to manipulate our appellate jurisdiction by artificially 'manufacturing' finality."

And a misstep can cause disaster. For example, while it may be possible to appeal court-dismissed claims after voluntarily dismissing other claims, an appeal may not lie from voluntary dismissal of all claims, following a major procedural loss, such as denial of class certification. See *Microsoft,* 137 S. Ct. at 1716-17 (Thomas, J., concurring) (suggesting that a party who voluntarily dismisses claims lacks standing to seek relief on appeal).

***Langere v. Verizon Wireless* Narrows Plaintiffs' Ability To Manufacture Appellate Jurisdiction**

The Ninth Circuit recently confirmed the risk associated with voluntary dismissals in *Langere v. Verizon Wireless Servs.* In that case, a consumer brought a putative class action against his cellphone service provider, alleging violations of federal and state consumer protection laws. The district court granted the provider's motion to compel arbitration. And, believing that arbitration would be futile and uneconomical, the consumer voluntarily dismissed his suit without court order and appealed the resulting judgment. This would have been permissible under then-existing Ninth Circuit's precedent. See *Omstead v. Dell*. But in *Langere*, the Ninth Circuit—in a detailed (and for appellate lawyers, thrilling) discussion of stare decisis—abrogated *Omstead* in light of the Supreme Court's *Microsoft Corp*. decision, concluded that the consumer's gambit to manufacture appellate jurisdiction accordingly failed, and dismissed the appeal for lack of jurisdiction.

The lesson that *Microsoft* and *Langere* offer is this: Take the settled path. However frustrating in some instances, the final-judgment rule exists for a reason, and the Federal Rules establish the limited means by which parties may (confidently) pursue interlocutory review. Courts have increasingly taken a dim view of efforts to circumvent those rules through creative lawyering, and the consequences for clients can be serious.

Adam Hofmann *is co-chair of Hanson Bridgett LLP's appellate practice group and a certified specialist in appellate law, based in Sacramento.* ***Josephine Petrick*** *is senior counsel with Hanson Bridgett LLP's appellate practice group, based in San Francisco.*