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Second Chances: What Appellate Courts Can (And Cannot) Do For You

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You wrote the best summary judgment of your career or delivered your best-ever closing argument to a jury. The judge or jury, however, did not see it that way. You lost. But surely you have a second chance – don't you? Unfortunately, the notion of a "second chance" on appeal is a common misconception. Appellate courts seldom provide a true second chance – the opportunity to start all over. Indeed, depending on the issues on appeal, you often have much less than a second chance.

The Final Judgment Rule

Even before considering your chances of winning on appeal, you first must determine whether you have an appealable order. Generally speaking, there are two types of orders: final judgments and interlocutory orders. The former are immediately appealable while only a few of the latter are immediately appealable. The rest of the interlocutory orders cannot be appealed until a case is over.

A final judgment is an order that effectively "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). Ancillary matters, such as deciding whether to award attorney fees and costs, do not prevent a judgment from being final. Frequently, it is clear that an order is a final judgment because it indicates who is to recover what from whom and what that ruling is based on – often a jury's verdict or a judge's decision after a bench trial. However, some orders that appear to end a case are not final judgments but are interlocutory orders; the most common of these are orders granting a demurrer, a motion to dismiss, or summary judgment. They are not final judgments because they usually do not clarify who obtains what relief, nor do they meet the requirement that the judgment be a separate document. See, e.g., Fed. R. Civ. P. 58(a).

While these may seem like hypertechnical requirements, failure to comply with them can have serious consequences. Frequently, parties appeal from these orders only to have their appeals dismissed because there is no final judgment. While some appellate courts will treat these orders as final to avoid the waste and delay involved in going back to the trial court to get a judgment, many will not. You must be sure you have a final judgment before you appeal so that you do not have to rely on the appellate court's charity in order to appeal.

Given these limits on the right to appeal, parties sometimes try to manufacture a final judgment. The appellate courts ordinarily do not look kindly on this. After a trial court dismisses some claims, if a party dismisses all remaining claims *with* prejudice, a final appealable order is created. In contrast, a dismissal *without* prejudice of the remaining claims usually will not create a final judgment because the claims that are dismissed without prejudice may be reinstated, so the case is not really over. An exception to this is if a party dismisses certain claims without prejudice and later there is a final ruling on the merits of the remaining claims; then, an appeal is permissible. In such circumstances, the appellate courts do not think there was an attempt to manufacture an appealable order.

In the end, there is no clear verbal formula to distinguish an appealable final judgment from a nonappealable order. You must check the rule in your jurisdiction to determine whether you have a final judgment.

Overcoming The Final Judgment Rule

If there is no final judgment, there are several ways to get around that requirement, although the exceptions are narrow and not easily met. The following outlines the available options and their limits.

First, check for an applicable statute that makes your interlocutory order immediately appealable. The most important type of order is one "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." 28 U.S.C. § 1292(a)(1). This section is a legislative recognition that the impact of such injunctive orders is so important that they

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should be immediately appealable even though piecemeal appeals are inefficient for the courts and the parties.

Because interlocutory injunctions are immediately appealable, many attempts have been made to characterize other orders as having the "substantial and practical effect" of injunctive orders to make them immediately appealable. Successful attempts have included an order preventing a party from leaving the territorial jurisdiction of a court, an order transferring a case to another court because it was "inextricably bound" up with an injunction, and an order requiring the defendant to mail notices to third parties.

As is true with other exceptions to the final judgment rule, however, courts have construed section 1292(a)(1) narrowly to allow only appeals of interlocutory injunctive orders with serious, irreparable consequences in order to avoid opening a floodgate for appeals of pretrial orders. For instance, temporary restraining orders ordinarily are not appealable because of their short duration (14 days, Fed. R. Civ. P. 65(b) (amended March 26, 2009, effective Dec. 1, 2009)), although there is an exception when the TRO effectively decides the case, such as when the court denies a TRO that would enjoin a merger.

Another order made appealable by statute is one refusing to compel arbitration. 9 U.S.C. § 16(a)(1)(B) & (C). This reflects the policy of the Federal Arbitration Act, which strongly favors arbitration because it is perceived as faster, less expensive, and more expert than litigation. But orders compelling arbitration are not immediately appealable.

If an order is not appealable by statute, it may be appealable by judicial decision. An order's precise nature, however, is often critical. For example, whether you can appeal orders *denying* intervention depends on whether intervention is "of right" or "permissive." Most circuits have held that denial of intervention orders as of right are immediately appealable. In contrast, decisions on orders denying permissive intervention are mixed: the Second, Seventh, and Ninth Circuits have held that such orders are immediately appealable, while the Eleventh Circuit has held that, standing alone, they are not. The circuits nevertheless agree that orders *granting* intervention – as of right or permissive – are interlocutory and therefore not immediately appealable. The difference seems to be that appellate courts feel that granting intervention is unlikely to cause harm that cannot be corrected on appeal, but that denying intervention causes such harm – at least in some cases.

Second, 28 U.S.C. § 1292(b) permits interlocutory appeals by permission in certain circumstances in civil cases. Under section 1292(b), the district court may allow appeal of an order that is not otherwise appealable if the order involves a "controlling question of law"; there is "substantial ground for difference of opinion"; and an immediate appeal may "materially advance the ultimate termination of the litigation." The appellate court must then agree. Fed. R. App. P. 5. Under section 1292(b), appeals have been allowed of orders involving forum non conveniens issues, denial of summary judgment motions, and orders on the conduct of discovery or on case management in complex multi-district cases.

If you plan to seek section 1292(b) certification, be careful about what you say in the motion you may want to appeal, e.g., for summary judgment. Obtaining that certification requires you to demonstrate a "substantial ground for difference of opinion" about the legal issue you want to appeal. If you argued in your summary judgment motion that it should be granted because the law is clear, that may come back to haunt you when you ask the district court and then the circuit court for permission to appeal.

Sometimes discretionary appeals of specific orders are available. For example, although there is no right to appeal a class certification decision in federal court, a party may now appeal a trial court order granting or denying class certification with permission of the appellate court. Fed. R. Civ. P. 23(f). Review of class certification has been permitted when the certification decision presents an "unsettled and fundamental" issue of class action law that is likely to evade review or when it is "manifestly erroneous." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005). Nevertheless, federal courts sparingly grant permission to appeal class certification decisions.

Third, despite the final judgment rule, certain "partial" judgments are appealable. In a multi-party or multi-claim lawsuit, the district court may direct entry of judgment under Federal Rule of Civil Procedure 54(b) as to some but not all claims or some but not all parties. There are two hurdles: (1) the order must be "final" as to a claim or a party and (2) the district court must expressly determine that there is no just reason for delay and expressly direct entry of judgment. The typical Rule 54(b) situation occurs when the claims against one party are separate and distinct from the claims against another party.

Whether to seek a judgment under Rule 54(b) can be a hard decision. If you are the prevailing party, a judgment forces the losing party to decide promptly whether to appeal. If the losing party does not appeal, the case against that party is over. However, forcing that party to decide that issue may provoke an appeal that the party would not pursue when a judgment is issued at the end of the case months or even years later. In contrast, if you prevail but do not get a judgment, it can be a shock if the losing party appeals years later when the case is finally over.

Fourth, collateral orders are appealable interlocutory orders. The collateral order doctrine permits appeal of a small class of rulings that are not final judgments but that conclusively decide the disputed issue, resolve an important issue completely separate from the merits of the action, and are effectively unreviewable, which is key to obtaining review under this theory. Such claims have been deemed "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). Examples of appealable collateral orders include the denial of qualified immunity claims of government officials in civil rights cases, the denial of Eleventh Amendment immunity claims of states, and civil contempt against a non-party who refuses to turn over documents.

Fifth, review of interlocutory orders can be obtained by a writ under the All Writs Act, 28 U.S.C. § 1651(a), which authorizes appellate courts to review trial court orders that are not final judgments. A writ of mandamus in a civil case may be issued if there is no adequate remedy by regular appeal or otherwise; the petitioner will be harmed in a way not correctable on direct appeal; the trial court's challenged order is clearly erroneous as a

matter of law; the issue is likely to recur; and the order raises issues that are new and important or of first impression. *Bauman v. United States Dist. Court*, 557 F.2d 650, 654-55 (9th Cir. 1977). Writs have been issued to review an order compelling disclosure of privileged information or a trial court's refusal to rule on pending motions. Nevertheless, in federal court, writs are so rarely issued that you may not even file a response to a writ unless the court requests one. Writs are more common in some state courts: for example, about 10 percent of applications for civil writs are granted in California state courts. Still, even in those courts, the odds are 9 to 1 against you.

Thus, there are several ways to obtain appellate review of interlocutory orders, although they are narrow exceptions to the final judgment rule. Assuming that the order you want to appeal is a final judgment or fits within one of these exceptions, how much of a second chance you have depends on the applicable standard of review.

Standards Of Appellate Review

The standard of review is the "legal yardstick" that tells the appellate court how much deference it must give to the trial judge's rulings or the jury's verdict. Many lawyers overlook the applicable standard of review. Yet, it is a critical appellate issue that will ultimately determine how much of a second chance you have on appeal.

The Federal Rules of Appellate Procedure recognize the importance of the standard of review, requiring that an appellate brief contain a summary of the argument and, for each issue, a concise statement of the applicable standard of review. Fed. R. App. P. 28(a)(8), 28(a)9(B). The rule encapsulates the lesson of experience: requiring a statement of the standard of review for each issue generally results in arguments that are properly shaped in light of the standard.

There are three basic standards of review: de novo (for issues of law), clearly erroneous (for issues of fact), and abuse of discretion (for issues involving an exercise of discretion). As discussed below, orders that are reviewed under the de novo standard are the only ones that usually provide much of a real second chance.

De Novo Standard of Review

De novo review is the appellate standard of choice for appellants. The appellate court owes no deference to the trial court's legal conclusions. Instead, the appellate court has the power to determine for itself the application, interpretation, and construction of a question of law. An appellate court, however, may not retry the evidence or make new determinations of fact in deciding the applicable law.

The two primary rationales for permitting de novo review of legal questions are that appellate judges have the benefit of numbers and that it promotes doctrinal coherence. First, appellate judges are in as good a position to decide questions of law as trial judges, and probably better because they have the benefit of numbers. As Chief Judge Coffin noted, "Every important appellate court decision is made by a group of equals. This fact reflects the shrewd judgment of the architects of our state and federal judicial systems that an appellate judge is no wiser than a trial judge. His only claim to superior judgment lies in numbers; three, five, seven or nine heads are usually better than one." *United States v. McConney*, 728 F.2d 1195, 1201 n.8 (9th Cir. 1984). Second, appellate review of lower courts' conclusions of law promotes uniform development of the law, encourages consistent application of the law, and prevents forum shopping.

Common examples of questions of law subject to de novo review include whether a pleading establishes a claim or defense; whether jury instructions accurately state the elements of claims for relief and defenses; and rulings on motions, such as summary judgment or judgment on the pleadings.

Applying the de novo standard, however, is more difficult than defining it because the distinction between questions of law and questions of fact is not clear-cut. Some questions involve "mixed questions of law and fact." The Supreme Court has defined mixed questions as "questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." *Pullman-Standard v. Swint*, 456 U.S. 273, 290 n.19 (1982). For example, the mixed question of whether the facts meet the legal standard of proof for actual malice in a defamation case is reviewed de novo. *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 513-14 (1984). Despite such articulations of the standard, the question of the appropriate standard for mixed issues of fact and law has long bedeviled the appellate courts.

Consequently, the applicable review standard varies according to the particular approach that courts use for deciding mixed questions of fact and law. Some courts apply the standard of review applicable to the dominant issue in a mixed question. For example, if the issue is primarily a legal one, the de novo standard applies. Conversely, if the issue primarily deals with a factual question such as the existence of an attorney-client relationship, the clearly erroneous standard applies. But if the facts and the law are settled, and the dispute turns on the correct application of the facts to the law, then the issue would be treated as a legal one subject to de novo review. Thus, the review standard of a mixed question depends on where it falls along a degree-of-deference continuum: the more fact-dominated the mixed question, the more deference given to the trial court.

If you are able to establish a harmful legal error under the de novo standard, you will likely have a second chance.

Clearly Erroneous Standard Of Review

Unlike questions of law, questions of fact are reviewed under a clearly erroneous standard. Fed. R. Civ. P. 52(a). This standard is used to determine whether there is substantial evidence to support a trial court's or jury's decision. It recognizes that appellate courts are not well-equipped to determine credibility and that this is for a jury or the trial court to resolve. According to the Supreme Court, a "finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). In other words, for a decision to be clearly erroneous, it must be more than just possibly or probably wrong. Instead, it must "strike us as wrong with the force of a five-week-old, unrefrigerated dead fish." *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988), *cert. denied*, 493 U.S. 847 (1989).

This standard reflects our common-law heritage that places juries (and sometimes judges) in a special fact-finding

role, one that is enshrined in the Seventh Amendment: "[N]o fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." This practice is founded on our long-established belief that juries or trial judges should be the finders of facts because they have the advantage of seeing and hearing live testimony, which allows for greater accuracy in judging witnesses' recollections and credibility. The clearly erroneous standard also furthers judicial economy and the stability of judicial decisions by relieving appellate courts of a full-scale independent review of the evidence, curtailing appellate retrials of factual issues, and preventing redistribution of judicial power from trial courts to appellate courts.

One unresolved issue is the deference given to a trial court's findings when a judge directly adopts a party's proposed findings of facts. Although many circuit courts have frowned upon this practice, the Supreme Court has recognized that the clearly erroneous standard still applies even when the trial judge adopts proposed findings verbatim. *Anderson v. Bessemer City*, 470 U.S. 564, 572 (1985).

In short, only if you can overcome the difficult burden of convincing the appellate court that the factual findings are clearly erroneous will you have a second chance. This does not happen often. And even if it does, if the case is remanded to a judge who ruled against you, your second chance may still be limited.

Abuse Of Discretion Standard of Review

The abuse of discretion standard of review applies when appellate courts review discretionary rulings by a trial court. A trial court abuses its discretion if its decision rests upon an erroneous conclusion of law, a clearly erroneous finding of material fact, or an improper weighing of the facts and law. The first two tests are the de novo and clearly erroneous tests, discussed above.

The third test, improper weighing of the facts and law, is not always easy to apply. California courts, for example, have used the following somewhat circular definition for over half a century: "In a legal sense discretion is abused whenever in the exercise of its discretion the court exceeds the bounds of reason, all of the circumstances before it being considered." *Berry v. Chaplin*, 74 Cal. App. 2d 669, 672 (1946). It also has been described as a decision that is "arbitrary, capricious, whimsical, or manifestly unreasonable." *Copier By and Through Lindsey v. Smith & Wessen Corp.*, 138 F.3d 833, 838 (10th Cir. 1998). Ultimately, the abuse of discretion standard requires the appellate court's acceptance of the trial judge's "guess unless it is too wild." *Ford Motor Co. v. Ryan*, 182 F. 2d 329, 332 (2d Cir. 1950).

The abuse of discretion standard is a flexible standard that recognizes trial judges must make decisions even if there is no correct answer. This is particularly true when a trial judge must consider numerous factors, such as in determining the "likelihood of confusion" in a trademark case or in distinguishing between employees and independent contractors in an employment case. The outcome in these cases will vary depending on the judge's weighing of the facts.

Other examples of trial court decisions reviewed only for abuse of discretion include the grant or denial of preliminary injunctions, discovery rulings, some evidentiary rulings, and attorney fee awards. The chance of reversing such a discretionary ruling often depends on how skillfully the trial court articulates its reasons for the ruling. If it fails to do so, the appellate court will lack a basis for meaningful review and may reverse and remand with directions for the trial court to explain its decision.

If the issue on appeal is the trial court's factual findings or its discretionary decisions under the abuse of discretion standard, an appellant usually has no real second chance on appeal. However, a trial court's decision under the abuse of discretion standard is subject to de novo review if the error is one of law. It is in such circumstances that the abuse of discretion standard provides a real second chance.

Harmless Error

A final consideration applicable to all three review standards is the harmless error rule, against which all claims of error on appeal must be tested. The harmless error rule requires a causal nexus between the error and harm so that part of the judgment would have been different if no error had been committed. If the error is harmless, your appeal will fail regardless of which standard of review applies.

In sum, second chances are rare in the law. To obtain a second chance on appeal, you first need an appealable order or an order that comes within one of the exceptions to the final judgment rule. Even then, given the difficulty of obtaining a reversal under the clearly erroneous and abuse of discretion standards of review, your best strategy is usually to focus on legal errors, which are subject to de novo review. Only if you have a legal error and only if you can show that the legal error was materially harmful will you ordinarily have a real second chance on appeal.