Feb. 7, 2023

2022’s top federal appellate practice cases

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Following tradition, last month's column attempted to cram a year's worth of appellate developments into a manageable length. And in keeping with tradition and given the large number of interesting items in 2022, some slipped through the cracks (e.g., the passing of Ninth Circuit Judge Alfred "Ted" Goodwin; the elevation of Justice Maria E. Stratton to Presiding Justice of Division 8). Such omissions are inevitable, and of course, unintentional. Fortunately, readers know that they can find actual news in the rest of the DJ, and expect to find some law on appellate practice in this column. Accordingly, this month we review key federal appellate practice cases from 2022.

Starting at the top, the U.S. Supreme Court's *Kemp v. United States*, 142 S.Ct. 1856 (2022), addressed motions under Federal Rule of Civil Procedure 60(b)(1) seeking relief from a judgment or order. One basis for such relief is "mistake." The issue in *Kemp* was whether a qualifying "mistake" is limited to factual issues (Kemp's position) or could include "obvious" legal errors (the Government's position). The High Court adopted neither party's position, and instead held that any error of law by a judge can suffice as a "mistake" allowing for relief. This outcome should sound familiar to California practitioners, who know that "mistake" as defined in Code of Civil Procedure section 473 can include legal error, and the Supreme Court even cited California law to support this view.

This broadening of the meaning of "mistake" under Rule 60(b) should prove useful to practitioners. But be mindful that motions under Rule 60 are subject to laches and a backstop one-year deadline from the date of the judgment or order (Rule 60(c)).

We now turn to the Ninth Circuit. Unlike California, with its robust writs practice, federal writ practice is anemic at best, meaning that statutory interlocutory appeals are especially important. Last year brought several opinions of note in this area.

First, in *ICTSI Oregon, Inc. v. Int'l Longshore & Warehouse Union*, 22 F.4th 1125 (9th Cir. 2022), the Ninth Circuit held that the "controlling question of law" necessary for an interlocutory appeal under 28 U.S.C. § 1292(b) must really be a question of *law*, not fact. (And, of course, it must "materially advance the ultimate termination of the litigation," as set forth in section 1292(b).)

ICTSI also makes clear that while section 1292(b) only allows interlocutory review of issues addressed within the four corners of the order certifying the interlocutory appeal, there is an exception allowing review of questions outside the order when such questions are "material" to the certified order. But *ICTSI* explains that this exception extends appellate jurisdiction to outside questions only when appellate jurisdiction exists under section 1292(b) in the first place. Thus, in *ICTSI*, because the court lacked jurisdiction over the certified post-trial order at issue, it lacked jurisdiction over issues not addressed in that order.

Also in the realm of interlocutory appeals is *Williamson v. City of National City*, 23 F.4th 1146 (9th Cir. 2022), in which the Ninth Circuit held that while the court typically lacks jurisdiction to hear interlocutory appeals from orders denying summary judgment, an exception exists for denials based on qualified immunity. Importantly, however, this exception is limited to the review of legal issues, not factual disputes. In *Williamson*, the question presented – whether police conduct violated the Fourth Amendment – was a legal issue, so appellate jurisdiction existed. Therefore, before taking an interlocutory appeal after the district court denies your

motion to dismiss based on qualified immunity, ensure that the question presented is a legal one (or at least framed as such). Otherwise, the appeal may be dismissed for lack of jurisdiction.

Also on the topic of appellate jurisdiction over interlocutory immunity appeals, in *Childs v. San Diego Family Housing LLC*, 22 F.4th 1092 (9th Cir. 2022), the defendants claimed derivative sovereign immunity, and when their motion to dismiss on that basis was denied, they appealed, claiming the denial was appealable under the collateral order doctrine. No dice. The Ninth Circuit held that the order did not fall within the "narrow" class of orders satisfying the appealability criteria of the collateral order doctrine. Thus, although some orders denying dismissal on immunity grounds are immediately appealable (e.g., orders denying motions to dismiss based on absolute immunity, qualified immunity, 11th Amendment immunity), derivative sovereign immunity is a no go. (Fun fact: This appeal was argued and won by Martin Buchanan, now a justice in 4th District Division 1.)

The court also addressed interlocutory issues stemming from anti-SLAPP orders in 2022. In *Falck N. Cal. Corp. v. Scott Griffith Collaborative Sols.*, 25 F.4th 763 (9th Cir. 2022), the district court denied an anti-SLAPP motion, but also granted the plaintiff leave to amend. The order denying the anti-SLAPP motion was appealable and an appeal was taken. However, before the defendant filed the appeal, the plaintiff filed an amended complaint, which superseded the prior complaint and rendered it a nullity. The defendant filed an appeal anyway, but the court held that the appeal was moot and dismissed it. This case illustrates the futility in filing an interlocutory appeal to challenge an order relating to a non-operative complaint.

In *Trendsettah USA, Inc. v. Swisher Int'l*, 31 F.4th 1124 (9th Cir. 2022), the court addressed the creation, and revival, of appellate jurisdiction. The court held that where only some claims in a complaint are dismissed, the plaintiff's voluntary dismissal with prejudice of any remaining claims can render the earlier interlocutory order appealable (in this case an order denying a motion for relief under Rule 60(b)). The court also held that the time to file a motion under Rule 60 restarts when an appellate decision in the case "substantially alter[s] the district court's judgment in a manner that disturbs or revises the previous, plainly settled legal rights and obligations of the parties."

An opinion on appellate standing that should be of particular interest to California lawyers is *Saucillo v. Peck*, 25 F.4th 1118 (9th Cir. 2022). The court held that Peck lacked standing to appeal a PAGA settlement because he was not a party to the PAGA action. The court reached this conclusion even though Peck had a separate parallel PAGA action pending in state court and was a class member in a related but separate class action. Yet while *Saucillo* appears to doom a PAGA objector's appeal, exceptions might exist to preserve (or create) appellate standing. Notably, the opinion did not address whether Peck could have intervened, objected to the settlement, and then pursued those objections on appeal. The court also noted that it has allowed a non-party to appeal when "exceptional circumstances" warrant a departure from the general rule, but Peck did not argue that exception should apply. So non-parties seeking to attack a PAGA settlement should move to intervene, and if unsuccessful with objections, argue that exceptional circumstances exist to permit an appeal.

Speaking of intervention, in *Evans v. Synopsys, Inc.*, 34 F.4th 762 (9th Cir. 2022), the court held that the deadline to file an appeal is the same for prospective intervenors as well as for actual

parties. Therefore, even though the district court had not yet ruled on Synopsys' intervention motion by the time the deadline to appeal the judgment had passed, the court dismissed Synopsys' appeal as untimely. This rule puts intervenors in a tough spot. But the court explained that a prospective intervenor can (and should) file a motion to extend its time to appeal under Federal Rule of Appellate Procedure 4(a)(5), which would act as "a wedge that keeps the window for a prospective intervenor to appeal the merits open so long as there remains a possibility that a court might grant the prospective intervenor's extension motion." Thus, prospective intervenors must be sure to file notices of appeal (or motions to extend the time to appeal) within a party's timeframe to appeal. Hopeful intervenors cannot wait for a ruling on a pending intervention motion, or they risk the same fate as Synopsys.

Also worth a quick mention is the unpublished *Clifford v. Trump*, 2022 WL 823539 (9th Cir. Mar. 18, 2022), which dismissed as untimely an appeal from an order awarding fees, costs, and sanctions. The court held that such an order was appealable as a final order that did not require a separate document under Rule 58(a)(3), so Clifford's appeal was nearly two years late.

While not strictly an appellate procedure opinion, no review of 2022's interesting appellate decisions from the Ninth Circuit should fail to mention *McDougall v. County of Ventura*, 23 F.4th 1095 (9th Cir. 2022). This opinion received tremendous coverage, not merely because the court struck down parts of California's framework for regulating firearms, but also because the opinion's author, Judge LawrenceVanDyke, wrote a concurring opinion to his own opinion that included an "alternative draft opinion" ruling the other way – to help the full court get a "jump start" on the en banc review he anticipated would occur. The case was, in fact, taken en banc (26 F.4th 1016), and the en banc panel (in a short order) vacated the judgment and remanded for further proceedings consistent with the Supreme Court's latest Second Amendment opinion (38 F.4th 1162 (9th Cir. 2022) (en banc)). Will self-concurrences with proposed alternative opinions catch on? (Seems unlikely!)

We end with a coming attraction: In *Coinbase, Inc. v. Bielski*, No. 22-105, the Supreme Court granted cert to review Ninth Circuit orders ruling that an appeal from the denial of a motion to compel arbitration does not effect an automatic stay of district court proceedings. (This is also the rule in the Second and Fifth Circuits, but the Third, Fourth, Seventh, Tenth, Eleventh and D.C. Circuits hold the opposite). The Supreme Court's anticipated 2023 Coinbase opinion, presumably determining whether such an appeal triggers an automatic stay, may well start off our February 2024 column.