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**No appeal for you!**

**Just as every dog has his day, every litigant — best in show, purebred, cur, or junkyard biter — can always exercise that right, right? Well, actually not. In exceptional cases, a litigant can so egregiously misbehave that the right to appeal can be lost. We're talking here, of course, about the civil disentitlement doctrine.**

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**EXCEPTIONALLY APPEALING**

The right to appeal is a cornerstone of our litigation process. The assumption in every case is that the losing party gets at least one appeal as a matter of right. And that universal right to appeal attaches regardless of who that party might be or what they might have done (before and during the litigation). Thus, whether a party is saintly, merely good, morally neutral, bad, or downright evil, there's always a right to appeal. Just as every dog has his day, every litigant -- best in show,

purebred, cur, or junkyard biter -- can always exercise that right, right? Well, actually not. In exceptional cases, a litigant can so egregiously misbehave that the right to appeal can be lost. We're talking here, of course, about the civil disentitlement doctrine.

Never heard of it? Well, it's pretty rare. Given how boorishly parties often behave during litigation, just what sort of misconduct would motivate a court to impose the "appellate death penalty" of disentitlement? And if sought, how likely are courts to apply the doctrine to dismiss an appeal? "Enquiring minds want to know." (And riffing on the National Enquirer is appropriate, given the outrageousness required.)

**Yes, misbehavin'.** Let's start with the good stuff -- meaning the bad behavior. We reviewed civil appeals for motions to dismiss under the disentitlement doctrine. (Note that criminal and dependency cases have their own disentitlement doctrines.) Of about 100 opinions, spanning the past 80 years, only a handful are published. *MacPherson v. MacPherson*, 13 Cal. 2d 271, 277 (1939) ("A party to an action cannot, with right or reason, ask the aid and assistance of a court in hearing his demands while he stands in an attitude of contempt to legal orders and processes of the courts of this state."); *Stone v. Bach*, 80 Cal. App. 3d 442, 444 (1978) ("an appellate court may stay or dismiss an appeal by a party who stands in contempt of the legal orders and processes of the superior court."); *Alioto Fish Co. v. Alioto*, 27 Cal. App. 4th 1669, 1683 (1994) ("Although the power to stay or dismiss an appeal is typically exercised when the litigant is formally adjudicated in contempt of court, the same principle applies to willful disobedience or obstructive tactics without such an adjudication."); *Say & Say v. Castellano*, 22 Cal. App. 4th 88, 94 (1994) ("an appellate court may stay or dismiss an appeal by a party who has refused to obey the superior court's legal orders"); *TMS, Inc. v. Aihara*, 71 Cal. App. 4th 377, 378 (1999); *Ironridge Glob. IV, Ltd. v. ScripsAmerica, Inc.*, 238 Cal. App. 4th 259, 262 (2015) (dismissal of appeal "is the appropriate remedy for defendant's flagrant disregard for the order which is the subject of this appeal"). We noticed a significant uptick in disentitlement cases over the past decade.

Nine basic categories of misconduct emerged from the cases. These read like the listing of Deadly Sins (or may be chanted in the cadence of the plagues at a seder): Obstruction, Disobedience, Willfulness, Vindictiveness, Contempt, Sanctions, Failure to Appear, Abuse of Process, Challenging the Appealed Order's Validity.

To flesh these out a bit more, Obstruction is when an appellant improperly hinders the legitimate efforts of a movant to enforce a court's order or judgment. This often takes the form of ignoring discovery requests, evading service, and playing delaying games during litigation. Next, Disobedience is flouting a court's order by ignoring it or acting contrary to it. One typical move that combines Obstruction and Disobedience is the classic Failure to Appear at a court-ordered hearing or meeting of the parties.

Willfulness comes into play when it is plain that the misconduct is not a matter of mistake, but rather an intent to be obstructive or disobedient, without mitigation or rectification. This often appears through repeated, flagrant, even defiantly admitted misdeeds. This takes us to

Vindictiveness, which is conduct improperly responsive to lawful action -- for example, seeking sanctions, or filing a complaint or cross-complaint, against a party who is acting legally.

We descend further. Contempt and Sanctions are obviously forms of punishment already imposed to hold a party accountable for misconduct in the action or a related action. Abuse of Process is when a party misuses legal process to advance unlawful interests, such as by filing frivolous or numerous motions, or setting up shell companies to hide assets. And to conclude, there's the ever popular form of meta-contumaciousness: Challenging the Order that was disobeyed by arguing it is void.

No one should be surprised to learn that disentitlement comes up most commonly in family law appeals. Family law cases typically involve a lot of appearances, a lot of preliminary orders, and a lot of very unhappy litigants -- of the sort who may take pride in acting offensively as a defense mechanism to highly unpleasant circumstances.

Ultimately, the common theme is that a party who thumbs his nose at the system -- orderly litigation and the rules of the road -- may forfeit the right to invoke the crown jewel of that very system (the right to appeal).

**No Kindergarten Cop'ing.** The misconduct just enumerated probably sounds familiar. Why then aren't more appeals brought by the "bad guys" not dismissed? Like Family Feud answers, here are the four most common reasons courts provide for denying a motion to dismiss for disentitlement. One: Appellate courts prefer to resolve disputes on the merits. This avoids getting into the messy business of figuring out whether there really was misconduct and, if so, how bad it was. (This is the basis for a third of all denials.) Two: Hey, turns out there was no bad conduct. Sometimes the alleged bad guy isn't really the bad guy. (This too is the basis for a third of all denials.) Three: The record isn't clear enough to conclusively find misconduct. Four: OK, there was some misconduct (even disobedience, etc.), but it really wasn't bad enough to take away the right to appeal.

**Chances Are.** Having now laid out the reasons for applying and not applying disentitlement, how does it play out? Our review shows that motions to dismiss an appeal under the disentitlement doctrine are granted only 24% of the time and denied 74% of the time. (OK, math whizzes, the missing 2% are cases where the motions are not addressed at all, and thus effectively denied. So if you like, we could bump up the denial figure to 76%.) This 76% denial rate is similar to the 80% odds of a decision being affirmed on appeal. Put differently, respondents generally have an 80% chance of winning on appeal, but roughly the same odds against getting an appeal dismissed on a disentitlement motion.

The most common basis for a disentitlement motion is Disobedience, which occurred in nearly 40% of cases and had a 46% success rate. At the other extreme, only 5% of motions rested on Vindictiveness, but all of them were granted. The second most-likely-to-win basis for dismissal is Challenging the Order as Void (78%). The least-likely-to-win dismissal motions are premised on prior Sanctions awards (only 17%).

As is so often the case in successfully seeking to punish, a combination of misdeeds ups the odds. Thus, although 67% of motions based on Willfulness do the trick, and 50% based on Abuse of Process succeed, combining both grounds raises the success rate to 71%. Similarly, combining Willfulness with Challenging the Order's Validity has a 75% success rate. This rises to 89% when combining Willfulness (67% alone) with a Failure to Appear (69% alone). Numbers games aside, the point remains that synergy (seeking disentitlement on multiple grounds) often serves as a force multiplier.

Thus, we see that appeals are like Al Yeganeh's infamous Manhattan restaurant, Soup Kitchen International: Sure, anyone can order, but if you misbehave and violate the rules, it may be No Soup (or Appeal) for you!

**Bibliography:** Tillett, "The Disentitlement Doctrine: A potent secret weapon to destroy your opponent's contemptuous appeal," Advocate (Dec. 2017); Fleischman & Ettinger, "Recent Caselaw Affecting the Disentitlement Doctrine and Civil Appeals," 39 L.A. Lawyer 10 (Apr. 2016); Reddie, "The Disentitlement Doctrine: A Trap for Unwary Judgment Debtors in Civil Appeals," 28 Cal. Litig. 16 (2015); Tashman, Brocket & Wilcox, "Flight or Fight: Originally, invoked in criminal cases, the fugitive disentitlement doctrine is equally applicable in civil cases," 29 L.A. Lawyer 44 (Oct. 2006). n

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