Appellate Practice

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Putting a contract out on appeals

The intentional deprivation of the life of an appeal can occur contractually.

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EXCEPTIONALLY APPEALING

A cornerstone of our legal system -- and the slogan of the appellate bar -- is that everyone gets at least one appeal. Part of the American credo is that those knocked down get at least one second chance. There's no guarantee, of course, that the outcome will be different -- and that happens only in a minority of cases -- but the underlying foundation is always "two strikes and you're out." In litigation terms, that means you have a right to lose in a trial court and then to lose again (or possibly win) in an intermediate appellate court. (The prospect of a third go -- a post-appeal appeal, i.e., review by a Supreme Court, is always a theoretical possibility. But like childhood dreams of being an astronaut, it's simply not something that ordinary mortals, or cases, can realistically aspire to achieve.)

But rules have exceptions. Thus, there are situations where a loser does not have a chance at redemption on appeal. When could that be? Well, one scenario, of course, is where an appeal is taken, but then fatally mishandled. Such goofs are rare, but not that uncommon. Roughly 3% of all appeals that get off the ground will crash as the result of some procedural gaffe, e.g., filing a late notice of appeal, or failing to properly pay the necessary fees or file the necessary ancillary paperwork to perfect the record or the appeal. But such quotidian blunders are not the stuff of which an Exceptionally Appealing column is made. No, the focus of this month's column is something much darker and more malevolent than client lassitude or lawyerly ineptitude. We're talking about appellate murder in the worst degree. (Appellate practitioners with especially tender hearts should stop reading here or alternatively steel themselves for the ensuing horror.)

The intentional deprivation of the life of an appeal can occur contractually. Under California law, "It is well-settled that a party may expressly waive its right to appeal subject to only a few conditions: (1) The attorney must have the authority to waive a party's right to appeal. (2) The waiver must be express and not implied. (3) The waiver must not have been improperly coerced by the trial judge." *McConnell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 176 Cal. App. 3d 480, 483 (1985). In *McConnell*, a settlement agreement contractually empowered the trial court with absolute discretion to increase or decrease payments to the class. The settlement specifically stated that the trial court's exercise of discretion "shall not be appealable by any of the parties." When the trial court decided to increase the payments to class claimants by 200%, the defendant appealed and also sought relief by writ petition. The appeal failed: A party cannot "renege on the express terms of a settlement it freely entered into." The Court of Appeal also denied writ relief, of course, asserting that a party "cannot obtain by extraordinary writ the right to appeal, which it validly waived." *Id.* at 483 n. 5. Moreover, because the appeal and writ were frivolous, the appellant and its appellate counsel were sanctioned.

A similar story involving a settlement happened more recently in the *PG&E "San Bruno Fire" Cases*, 43 Cal. App. 5th 596 (2019). The settlement at issue provided that the trial court's allocation of settlement funds "shall be final and non-appealable." And yet an unhappy party appealed the trial court's allocation. The Court of Appeal had no difficulty finding that dismissal of the appeal was "mandated" because all parties had "expressly and unequivocally" agreed that the trial court's "determination on allocation shall be final and nonappealable." The court was not troubled by the brevity of the waiver: "The fact that the parties expressed their intent to waive their right to appeal in a 'single sentence' does not lessen its effect." The court also made the unremarkable conclusion that that the term "nonappealable" was equivalent to the phrasing used in *McConnell* ("shall not be appealable").

Even more recently, in *CAS Mgmt., LLC v. Treetop Flyers Collective*, H046102 (July 14, 2020), an appeal was taken even though the stipulation for entry of the judgment read: "it is further stipulated that this judgment shall become final for all purposes upon entry of judgment and that both [parties] waive any right to appeal or seek review of this judgment by a higher court as part of this Stipulation for entry of Judgment." Not surprisingly, the appeal was dismissed. The court reiterated that: "If the parties to a contract want their agreement to encompass a waiver of the right to appeal from an anticipated judicial ruling, they must say so explicitly and unambiguously; they cannot leave their intent to be inferred from the language of the agreement." In *CAS*, as well as *McConnell* and the *San Bruno Fire Cases*, the courts easily found the language sufficiently clear.

Appellate waivers can arise from other agreements too. *Keating v. LG Elecs. Mobilecomm USA, Inc.*, A140242 (Nov. 30, 2017), was a personal injury case in which the parties stipulated to waive their rights to a jury trial and to any appeal using the following language: "Both parties agree to waive any appeal as between Plaintiff Keating and Defendant Sun only and agree that Judge Delbert Gee's decision or awards will be final and binding." The appeal was dismissed because the court found "the Stipulation at issue is, on its face, clearly a negotiated document in which each party gave up certain rights in return for other concessions." *Cf. Lovett v. Carrasco*, 63 Cal. App. 4th 48, 53 (1998) (statement of agreement "to be bound" by the trial court's decision "without need of further litigation bringing closure to the entire matter" did not amount to an unambiguous waiver of the right to pursue appellate remedies).

A statutory form of self-imposed appellate waiver exists under the Expedited Jury Trials Act, which established (in 2011) a voluntary method for parties to use a reduced jury (eight or fewer jurors) and complete trials in a single day. Under Code of Civil Procedure Section 630.09, subdivision (a), parties who agree to participate in the expedited jury trial process "agree to waive the right to bring post-trial motion or to appeal" (with very limited exceptions for judicial misconduct, jury misconduct, or corruption preventing a fair trial). *See also* Code Civ. Proc. Section 630.03(e)(2)(A) (proposed consent order must state that "all parties waive all rights to appeal and to move for directed verdict or

make any post-trial motions, except as provided in Section 630.08 and 630.09"). Thus, the appeal in *Shepard-Branom v. Diamond*, 39 Cal. App. 5th Supp. 1 (2019), was dismissed because the "broad and absolute language" in the consent order (signed by both parties, their counsel, and the trial court) "left no doubt as to the party's intent to waive any right to appeal."

Apart from invoking the Expedited Jury Trials Act, litigants also can simply "agree to waive some normal trial procedures, such as having a reporter's record of the proceedings, and the right to appeal." *Elliot & Ten Eyck Partnership v. City of Long Beach*, 57 Cal. App. 4th 495 (1997) (citing 9 Witkin, Cal. Proc. (4th ed. 1997) Appeal, Section 208, p. 263 ("A party may stipulate to waive the right of appeal.")); *see also Heenan v. Sobati*, 96 Cal. App. 4th 995, 1003 (2002) ("Judge McEachen conducted a bench trial in which the parties waived a court reporter and the right of appeal. Courts will dismiss appeals brought by parties who have signed a written agreement expressly waiving the right to appellate review."). Thus, in *Elliot*, the parties agreed to have a judge act, essentially, as an arbitrator and render a final decision not subject to appeal. The court recognized that "the essence of the parties' agreement was that the judge they selected would resolve their case, once and for all, with finality and without the possibility of appellate review." The *Elliot* court also noted how "arbitration is generally binding and not subject to the appellate review ..." *Elliot*, 57 Cal. App. 4th at 505.

In *Pratt v. Gursey, Schneider & Co.*, 80 Cal. App. 4th 1105, 1110 (2000), the appeal was dismissed because the parties waived the right to appellate review of their arbitration award. Under their stipulation, the parties agreed to "a final determination by a binding arbitration" and "the right to appeal" was "expressly waived." The court noted that "[t]he broad language utilized by the parties constitutes a waiver of the right to appeal from 'any judgment' or 'any order.'" *Cf. Reisman v. Shahverdian*, 153 Cal. App. 3d 1074, 1082-86 (1984) ("no appeal or further proceedings" provision in arbitration agreement not specific enough to effectively waive appellate rights); *see also Ruiz v. Cal. State Auto. Assn.*, 222 Cal. App. 4th 596 (2013); *Guseinov v. Burns*, 145 Cal. App. 4th 944 (2006).

And thus we reach not just the topic of appellate murder, but the bane of appellate lawyers' existence, the evil scourge of appellate genocide: arbitration provisions. But that's a story for another day. For now, the lesson is to make sure that your appeal hasn't already been rubbed out by a contractual waiver.

Exceptionally Appealing appears the first Tuesday of the month and addresses exceptions to general rules.

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