Waking Dead Appeals

In the law, are there exceptional forces with the power to revive an appeal from its grave? (Cue creepy organ music.) Indeed, there are.

BENJAMIN G. SHATZ

Manatt, Phelps & Phillips, LLP

Benjamin is a certified specialist in appellate law who co-chairs the Appellate Practice Group at Manatt in the firm's Los Angeles office.

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Happy new year! As our annual circle restarts, your billable hours or collections figures have reset to zero, and we begin anew. Like people, litigation and appeals have lifecycles too. They are born with complaints -- or notices of appeal -- and die with final judgments -- or remittiturs or mandates (in federal courts). Unlike the earth's orbit,

however -- and more like living creatures -- litigation and appeals are linear and come to a definitive end. An end from which they may not be revived. Ordinarily.

In this column, of course, we focus on exceptions, meaning those unusual circumstances that give rise to the strange and unexpected. And what could be more surprising or entertaining than resurrection? The popularity of such tales have resonated through the ages, from the Bible's Lazarus of Bethany to modern TV's "The Walking Dead." Can appeals be brought back from the great beyond? The standard answer is "no way, no how." By design, cases must end at some point, so that litigants know who's won and that the fight is really over -- and so the decision can safely be put to use, for enforcement or res judicata purposes. To paraphrase Newton's First Law, cases that rest (in peace), stay at rest. But objects at rest remain so only absent some sufficient external force. In the law, are there exceptional forces with the power to revive an appeal from its grave? (Cue creepy organ music.) Indeed, there are.

A recent relevant tale goes like this. Back in 2012, a group of plaintiffs challenged a California law that banned mental health providers from engaging in "sexual orientation change efforts" with minors. The plaintiffs argued that this law infringed their First Amendment speech rights by penalizing their expression of the viewpoint that "unwanted same-sex attractions can be changed." *Pickup v. Brown*, 42 F. Supp. 3d 1347, 1356 (E.D. Cal. 2012). The district court rejected plaintiffs' position, holding that the regulated therapy was conduct, not speech. A couple years later, the 9th U.S. Circuit Court of Appeals affirmed, finding that the law regulated professional conduct. *Pickup v. Brown*, 740 F.3d 1208, 1229 (9th Cir. 2014) (superseding an earlier opinion at 728 F.3d 1042 (9th Cir. 2013)). The 9th Circuit reasoned that the law "bans a form of treatment for minors; it does nothing to prevent licensed therapists from discussing the pros and cons of sexual orientation change efforts with their patients." *Id.* at 1229. Applying rational basis review, the 9th Circuit upheld California's law as rationally related to California's legitimate interest in "protecting the physical and psychological well-being of minors." *Id.* at 1232. After the denial of rehearing en banc and then denial of a cert petition (SCOTUS No. 13-949, June 30, 2014), the case was over once and for all. Or so it seemed.

Nearly four years later, in September 2018, the plaintiffs filed a motion to recall the mandate and put the case at issue again. They argued that a recent Supreme Court opinion, *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), abrogated the 9th Circuit's *Pickup* opinion. *NIFLA* considered a challenge to the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act, and referenced *Pickup* as one of a handful cases recognizing "professional speech" as a separate category of speech subject to different rules. *Id.* at 2371.

Having filed an amicus brief years earlier, I was on the 9th Circuit's electronic service list. Receiving notice of this motion was jarring and confusing, akin to receiving a phone call from someone who died years ago. But seeking to recall the mandate and revive a dead case is actually a real motion. *See Aerojet-General Corp. v. Am. Arbitration Ass'n*, 478 F.2d 248, 254 (9th Cir. 1973); *Perkins v. Standard Oil*, 487 F.2d 672, 674 (9th Cir. 1973); *Samson Tire & Rubber Corp. v. Rogan*, 140 F.2d 457 (9th Cir. 1943); *Huntley v. S. Oregon Sales, Inc.*, 104 F.2d 153, 155 (9th Cir. 1939).

In *Calderon v. Thompson*, 523 U.S. 538 (1998), the Supreme Court made clear that a court of appeals may recall its mandate -- but only in exceptional circumstances. *See also Nevius v. Sumner*, 105 F.3d 453 (9th Cir. 1996) (recall allowed only in exceptional cases "to prevent an injustice"); *Zipfel v. Halliburton Co.*, 861 F.2d 565 (9th Cir. 1988) (recall to be exercised "only in exceptional circumstances" and only when "good cause or unusual circumstances exist").

What sort of situations are exceptional enough? Well, the circumstances that have warranted a recall run a wide gamut. Recalls have occurred simply to correct clerical error. *E.g.*, *N. Cal. Power Agency v. Nuclear Regulatory Comm'n*, 393 F.3d 223, 225 (D.C. Cir. 2004); *Mars, Inc. v. Coin Acceptors, Inc.*, 557 F.3d 1377, 1379 (Fed. Cir. 2009); *Perkins*, 487 F.2d at 673-76. Similarly, recall and a new opinion may be appropriate for the court to correct its own errors that are less than clerical. *E.g.*, *Rubicon Global Ventures, Inc. v. Chongquing Zongshen Grp. Import/Export Corp.*, 575 F. App'x 710, 711-12 (9th Cir. 2014) (good cause to recall mandate where there the court made a factual error in reading the complaint, and incorrectly found personal jurisdiction existed over a defendant when in fact it did not); *Patterson v. Crabb*, 904 F.2d 1179, 1179 (7th Cir. 1990) (recalling mandate where court erroneously dismissed appeal for lack of a final judgment, when the court had merely overlooked the final judgment).

Recalls also have been allowed in response to fraud on the court or where necessary to protect the integrity of the judicial process. *E.g.*, *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 239, 244 (1944); *Demjanjuk v. Petrovsky*, 10 F.3d 338, 339, 356 (6th Cir. 1993).

The precedent in California for recalling a remittitur is similar: it is an extraordinary and rare remedy, invoked to correct plain clerical errors or remedy a miscarriage of justice. *See* Shatz, "Sex, Lies and Remittiturs," Daily Journal Jan. 15, 2009 (discussing *In re Grunau*, 169 Cal. App. 4th 997 (2008)).

The most recent Supreme Court cases on the topic -- *Calderon* and *Bell v. Thompson*, 545 US. 794 (2005) -- have both been instances where Courts of Appeals have been reversed for being too generous in recalling a mandate. This high court precedent makes

clear that the circumstances for recall must be truly exceptional to overcome the "deep rooted policy in favor of the repose of judgments." *Calderon*, 523 U.S. at 551.

Picking up the story in *Pickup*, the plaintiffs' basis for seeking to revive the case was an alleged supervening change in the law. This provides at least a colorable basis for seeking a recall. *McGeshick v. Choucair*, 72 F.3d 63, 63 (7th Cir. 1995). Yet after requesting briefing on the effect of *NIFLA*, the 9th Circuit denied the motion to recall the mandate in a one-word denial that cited Calderon with a parenthetical emphasizing that the power to recall must be limited to "extraordinary circumstances" in light of the profound importance of repose.

This result should not be surprising. The law changes over time, and many cases decided in the past would not necessary come out the same way today. Does that provide a reason to pry open the crypt on dead cases? If you practice law long enough, the day will come when you will see new legislation or precedent prompting you to exclaim "If only I'd had this law back when I was working on the Smith case, I would've won," or "Thank heavens this law didn't exist back when I was handling the Jones cases." For better or worse, we accept this as an integral foundation of our legal system.

Unwilling to take no for an answer, however, the persistent *Pickup* plaintiffs filed a new petition for rehearing en banc, which was just denied on Dec. 21, 2018. So it appears that the *Pickup*/*NIFLA* situation was not exceptional enough to justify a recall and revival.

Knowing that recalling a remittitur or mandate is at least theoretically possible is a worthwhile tool to have in your kit. But don't expect to use it -- or use it successfully -- with any regularity. If the game worked that way, just imagine all the great billable work appellate lawyers could gin up reviving dead cases. Alas, most cases that die stay dead. R.I.P.

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