Know the Ground Rules for Scoring an Interlocutory Appeal

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Law is often a balance between efficiency and justice. To strike that balance with appeals, both California and the federal system follow the "final judgment rule" from old English law. All orders are considered "interlocutory" until the entire case has concluded, and interlocutory orders generally can't be appealed. Only after the trial court issues a final judgment resolving all claims can a party appeal the trial court's rulings. The benefits of this rule are obvious, since piecemeal appeals can be costly and inefficient. Can you imagine how long it would take to resolve a case if the parties could immediately appeal every decision leading up to trial? The appellate courts would be swamped.

Courts often say the final judgment rule must be "strictly applied." Like many "strict" rules, however, it has a number of exceptions. You have a statutory right to immediate appellate review of injunctions and significant sanction orders, for instance, and you can take an immediate appeal of certain issues that are considered "collateral" to the main dispute.

But let's say your appeal doesn't fit into one of the exceptions that allow immediate review. (Make sure you check this very carefully, because if an exception applies you often risk losing your right to challenge the ruling if you don't seek immediate review.) And let's say the court hasn't finally resolved any claims and the case is not a good candidate for mandamus. Say you have a killer statute of limitations argument that has been accepted by other courts and could get the entire case wiped out, but the trial court rejects your defense as a matter of law. While the final judgment rule might be efficient in most cases, applying it here would mean that the parties—and the trial court—would spend time and resources on a trial that an appellate court could later conclude should never have happened.

A tough crowd

In a situation like that, there is a way to get immediate appellate review of an interlocutory order—but it's not easy.

In the federal system, you can file a petition under 28 U.S.C. § 1292(b) asking the trial court to certify that the trial court opinion (1) involves a controlling question of law; (2) there is substantial ground for difference of opinion on the matter; and (3) immediate appeal may

materially advance the ultimate termination of the litigation.

That is a tough standard to meet. The issue must be one of law the appellate court can review de novo. It must be controlling in the sense of resolving a significant portion of the case. It must be efficient to have the appellate court resolve the issue now, in a piecemeal fashion, rather than waiting until the other issues are ready to be reviewed. There must be substantial grounds for difference of opinion, which is a particularly delicate issue to argue—you're essentially asking the court that just ruled against you to acknowledge that its opinion might be wrong. You can put your best foot forward by focusing on how other courts have respectfully disagreed, rather than trying to rehash the arguments you already made, but the trial judge has to be open-minded to even admit the possibility of error.

If the district court denies certification, you're out of luck—that decision is not reviewable. If the trial court does certify your interlocutory appeal, the job isn't nearly over. Rather, within a strict 10-day deadline, you must quickly file a second petition asking the court of appeals for permission to accept the interlocutory appeal the district court just certified. The court of appeals has complete discretion whether to do so, and it can deny a petition for any reason or no reason. To top this off, even if both courts certify the case for appeal, you may need to continue litigating the case in the trial court because those proceedings continue absent a separate stay.

State specifics

California doesn't have as formal a process for trial court certification of interlocutory appeals in most cases. But under Code of Civil Procedure § 166.1, you can request the trial court to "indicate" in an order its "belief that there is a controlling question of law as to which there are substantial grounds for difference of opinion, appellate resolution of which may materially advance the conclusion of the litigation." This is effectively the same standard as in federal court.

In California, though, the trial court's finding is not a necessary prerequisite to review, and such a statement doesn't let you file an "appeal." You still need to petition for a writ, which is left to the broad discretion of the Court of Appeal. The trial court's statement is just a comment on the significance of the issue—basically, a nudge to get the Court of Appeal to consider the writ petition carefully.

In the end, most trial court orders are not good candidates for interlocutory review. Most evidentiary rulings, summary judgment decisions and similar fact-intensive matters are unlikely to meet the test. But if you do come across a crisp legal issue with contrary precedent and the potential to make or break your case, consider at least attempting to get the trial court to help you along. Doing so could prevent years of unnecessary litigation.

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