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Avoid Getting Crossed Up By Cross-Appeals

By **Robert Wiygul** (March 28, 2019, 2:31 PM EDT)

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Congratulations — after years of intense litigation, your client, the defendant in a commercial lawsuit, has just obtained a hard-won victory. To be sure, you lost plenty of battles along the way. The court rejected two of your defenses on summary judgment, as well as two of the three counts of your counterclaim. The court also excluded a few pieces of important evidence that, you are confident, would have weighed heavily in the minds of the jury.

Nonetheless, at the end of the day, the jury returned a verdict in your favor: It rejected all of your opponent's claims, and even awarded you a modest sum on your counterclaim. The trial court then denied your opponent's post-trial motions. But before you even have a chance to uncork a celebratory bottle of champagne, your opponent files a notice of appeal. Your client then asks you: Should we cross-appeal?

Timing and Mechanics

As used in this article and by most courts, a cross-appeal refers to an appeal filed by a party (the "appellee/cross-appellant") after its opponent (the "appellant/cross-appellee") has already commenced its own appeal in the same case. Typically, a party must decide relatively quickly whether to file a cross-appeal. For example, under the Federal Rules of Appellate Procedure, a party generally has only 14 days after its opponent files a notice of appeal to file a notice of cross-appeal.[1] In some jurisdictions, that deadline is jurisdictional, meaning that the appellate court has no power to entertain an untimely cross-appeal. In other jurisdictions, failure to meet the deadline may potentially be excused under certain circumstances.

This is just one example of why it is crucial to know the cross-appeal rules that govern in the specific jurisdiction in which an appeal is pending. Indeed, even the federal Courts of Appeals, which all follow the same rules of appellate procedure, differ on this issue.[2] In any event, fastidious compliance with the rules is always the better course; even in jurisdictions in which the deadline is not jurisdictional, a party that relies on the court's discretion to excuse an untimely filing does so at its peril.[3]

The existence of a cross-appeal will generally alter the schedule for, and structure of, the appellate briefing. Typically, the appellant/cross-appellee will file the first brief setting forth its arguments, just as it would in a case without a cross-appeal. The appellee/cross-appellant then files a brief — often subject to a longer page-limit than would be allowed without a cross-appeal — which both answers the

appellant's arguments and sets out the arguments supporting the cross-appeal. The appellant/cross-appellee then has a chance to file a combined reply in support of its appeal and an answer to the cross-appeal.

In a normal appeal, this "third step" brief would be the last submission. But where a cross-appeal has been filed, the appellee/cross-appellant generally gets the last word (though it is usually restricted to making arguments supporting its cross-appeal).[4]

The Stakes and Hazards

Failure to file a cross-appeal can have real downsides. In a recent Iowa decision, two sisters successfully persuaded the lower court to remove a third sister as a trustee of their father's trust. The court also granted the prevailing sisters attorneys' fees — but only a portion of the amount they sought.

The losing sister appealed, and the prevailing sisters both defended the lower court's judgment and argued — without filing a cross-appeal — that they should have received a larger award of attorneys' fees. Although the appellate court affirmed the judgment below, it refused to consider the prevailing sisters' argument for more fees because they had failed to file a cross-appeal.[5]

As a recent New York opinion illustrates, the potential costs of not filing a cross-appeal are not always obvious. In that case, the defendants' refusal to comply with the plaintiffs' discovery requests led to an award of monetary sanctions. The plaintiffs sought to recover over $250,000 in counsel fees and expenses, but the trial court awarded only $8,000. After cashing the defendants' checks tendered in satisfaction of the award, the plaintiffs appealed, arguing they should receive the quarter-million dollars they had sought.

The appellate court pointed out that, under well-settled New York law, acceptance of a benefit under a judgment, such as the plaintiffs' acceptance of the defendants' checks, will be deemed a waiver of the right to appeal from that judgment, so long as there is any risk that the appellate proceedings might result in a reversal or diminution of the award.

The defendants could have created that risk — and defeated the plaintiffs' appeal — simply by filing a cross-appeal challenging the sanctions award. But because no cross-appeal was filed, the plaintiffs' appeal proceeded.[6] The defendants thus exposed themselves to the prospect of over $240,000 in additional liability, and may have incurred substantially more appellate attorneys' fees than necessary — all of which could have been avoided by a simple notice of cross-appeal.

Faced with these sorts of risks, some attorneys are inclined to file a "protective" cross-appeal whenever the trial court did not rule 100 percent in their client's favor, without much thought as to whether such an appeal is permitted or sound strategy. But that, too, carries significant risks. As the Fifth Circuit recently observed, an improper cross-appeal "is 'worse than unnecessary'" because it increases the amount of briefing (burdening the court) and unfairly allows the appellee to file overlength briefs and have the last word, a privilege usually reserved for the appellant.[7] Indeed, courts have made clear that the filing of an improper cross-appeal may even result in the imposition of sanctions.[8]

Steering Between Scylla and Charybdis

The path, then, is beset on both sides. If a party fails to file a cross-appeal where one is necessary, it may forfeit the opportunity to make certain arguments or seek certain relief — or, as in the recent New York

case discussed above, may even forfeit a slam-dunk defense to its opponent's appeal. Conversely, filing an unnecessary and improper cross-appeal risks antagonizing the court and even monetary penalties. The only way to navigate these hazards is with a thorough understanding of the rules governing cross-appeals.

Fortunately, in many if not most appeals, applying those rules is a relatively straightforward exercise. The guiding principle in federal court — which has been adopted by many states as well — is that "[a]n appellee who does not take a cross-appeal may 'urge in support of a [lower-court judgment] any matter appearing before the record, although his argument may involve an attack upon the reasoning of the lower court,'" but "may not 'attack the [judgment] with a view either to enlarging his own rights thereunder or lessening the rights of his adversary."[9]

In other words, a cross-appeal is necessary if the appellee wants to alter the lower court's judgment, e.g., the relief awarded or denied. But a cross-appeal need not (and generally may not) be filed if the appellee does not want to alter the relief awarded. This is true even where the appellee wants to defend the judgment based on reasons wholly different than those relied on by the lower court — and even where the lower court expressly rejected, or completely ignored, the appellee's arguments.

Under this rule, if an appellee seeks to change the amount of monetary relief awarded by the lower court — whether to increase or decrease it — a cross-appeal is necessary. On the other hand, if an appellee simply wants to advance on appeal an argument that the lower court rejected, a cross-appeal is not necessarily required and may well be prohibited.

Consider, for example, a defendant who unsuccessfully sought a directed verdict on the ground that it was entitled to judgment as a matter of law, but then won a jury verdict completely in its favor. In defending the judgment against the plaintiff's appeal, the defendant should generally be able to argue — without filing a cross-appeal — that the trial court erred in denying its motion for a direct verdict, and that this is an alternative basis for affirming the judgment in its favor.

What if, as in our initial hypothetical above, the appellee lost several major battles in the lower court but ultimately won a judgment completely in its favor? If the judgment is reversed on appeal, will the appellee be bound by those adverse rulings in the absence of a cross-appeal? Here, it is especially important to research the law of the jurisdiction in which the appeal is pending.

Under a strict application of the rule set forth above, however, the answer should be no. Indeed, because the appellee won a complete judgment in its favor, it had no basis to appeal. If the judgment is reversed and the case is remanded, and the appellee then suffers an adverse judgment, the appellee can then challenge the initial adverse rulings in its own appeal. Thus, as the Pennsylvania Supreme Court ruled, an appellee that had won summary judgment did not waive its right to challenge an earlier class-certification decision by failing to file a protective cross-appeal.[10]

Such a rule benefits courts and practitioners. In cases presenting many complex issues, it will often be in an appellee's strategic interest not to challenge every adverse ruling by the lower court, whether by cross-appeal or as an alternative argument for affirmance. Squeezing too many issues into an appellate brief burdens the appellate court and risks diluting the force of the appellee's position. The rule above ensures that appellees do not feel compelled to adopt a kitchen-sink strategy out of fear of being bound by the adverse rulings in the event the judgment in its favor is overturned.

The Practical Versus the Technical

Nonetheless, even in jurisdictions that appear to adhere to the rules above, one must always be aware of practical considerations. Consider, for example, a case in which the lower court rules that the plaintiff is entitled, under the applicable agreement between the parties, to indemnification from the defendant for fees and expenses it had incurred in resisting a U.S. Securities and Exchange Commission investigation, but that the indemnification claim was nonetheless barred by the statute of limitations.

The plaintiff appeals, arguing that the lower court's ruling on the statute-of-limitations issue was legally erroneous. Under a strict reading of the rules described above, the defendant, who had won a complete judgment in its favor, should not have to file a cross-appeal from the indemnification ruling to protect itself against the possibility that the appellate court would reverse the statute-of-limitations ruling.

But at the very least, the defendant should alert the appellate court in its brief that it reserves the right to challenge that ruling in the event of a reversal. If it does not, it can hardly be surprised if the appellate court, upon reversing the statute of limitations ruling, proceeds to direct the entry of final judgment in plaintiff's favor.[11]

Conclusion

In litigation, as in baseball, it's never over until it's over. A prevailing party faced with an appeal from its opponent must immediately assess whether to file a cross-appeal. Navigating these legal shoals requires a firm grasp of the appellate rules of the governing jurisdiction, a clear-eyed understanding of the various possible outcomes presented by the appeal and a strategic assessment of which arguments should be presented to the appellate court now and which should be held in reserve.

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[1] Fed. R. App. P. 4(a)(3).

[2] Mathias v. Superintendent Frackville SCI, 876 F.3d 462, 470 & n.2 (3d Cir. 2017) (observing that the Courts of Appeals are "divided" on this question).

[3] See, e.g., In re Johns-Manville Corp., 476 F.3d 118, 124 (2d Cir. 2007) (concluding that, even assuming that the deadline for cross-appeals was not jurisdictional, a cross-appeal filed one day late should be dismissed).

[4] Compare, e.g., Fed. R. App. P. 28 (normal briefing rules), with Fed. R. App. P. 28.1 (briefing rules where cross-appeal is filed).

[5] In re Virgil De Groote Revocable Trust, No.18-0346, 2019 WL 478511, at *1–3 (Iowa Ct. App. Feb. 6, 2019).

[6] Estate of Savage v. Kredenster, 90 N.Y.S.3d 650, 651 (N.Y. App. Div. 2018).

[7] Cooper Indus., Ltd. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 876 F.3d 119, 127 (5th Cir. 2017).

[8] See, e.g., Aventis Pharma SA v. Hospira Inc., 637 F.3d 1341, 1344 (Fed. Cir. 2011).

[9] Jennings v. Stephens, 135 S. Ct. 793, 798 (2015) (quoting United States v. Am. Ry. Express Co., 265 U.S. 425, 435 (1924)).

[10] See, e.g., Basile v. H & R Block Inc., 973 A.2d 417, 421–23 (Pa. 2009).

[11] Scharf v. Edgcomb Corp., 864 A.2d 909 (Del. 2004).