



## *Is it appealing?*

# WEIGH THE ISSUES CAREFULLY BEFORE YOU PURSUE A CASE ON APPEAL

You've been to court, pled your case, and lost. Should you appeal the decision? Before deciding whether to pursue an appeal, you'll want to think about more than just the size

of a judgment or the importance of victory. An appeal can involve significant cost, and the likelihood of success is directly impacted by the standard of review applied by the appellate court.

Except in the most unusual circumstances, only appeals of right are worth pursuing. All jurisdictions allow an appeal of right from a trial court's judgment—one that dispenses with all of the issues and all of the parties in litigation.

Federal and some state rules allow appeals of right from non-final judgments, such as orders granting or denying injunctions. The federal Class Action Fairness Act now makes orders remanding class actions to state courts appealable of right.

Appeals from non-final (interlocutory) orders are rarely worth pursuing. Only in unusual circumstances, such as appealing a state order certifying a class, should such a strategy be employed. Courts hardly ever stay proceedings while an interlocutory application is pending—and it's an atypical case where the stakes are high enough to justify the risk and expense of proceeding with such an appeal.

### **Consider the cost vs benefit**

Costs continue to grow during an appeal. Your opponent can enforce judgment during the appeal, or—if the court approves—you may instead be required to post a bond or other security, plus interest. Stay bonds and judgment interest can be expensive.

On the other hand, an appeal creates uncertainty and presents another opportunity for settlement negotiation, and many appellate courts now require parties to participate in a settlement conference.

To expedite the appeal process, control costs, and heighten your chance of success, you should fight the urge to press every possible trial error

and focus only on those issues most likely to result in a reversal. Raising and briefing too many grounds can undercut the weight of your most important ones. Ditto with your oral argument. It's more effective to expound fully on only two or three errors.

Finally, decide who should handle your appeal. Trial counsel has the advantage of familiarity—a possible time saver—but may lack experience with appellate rules. If your appeal involves a large sum or critical issues, consider teaming your trial counsel with an appellate specialist.

### **Understand the standards of review**

Winning an appeal often turns on the standard of review. A finding of fact (whether made by judge or jury) is subject to the “clearly erroneous” standard—sometimes referred to as “manifest weight.” This standard is difficult to satisfy and, from a cost perspective, should not be the only ground for appeal.

Court decisions made during the course of discovery or trial (such as whether to admit evidence) are subject to the “abuse of discretion” standard. Although decisions on admission of evidence are critical to the outcome of a jury trial, the abuse of discretion standard makes it very difficult to overturn an order. Further complicating matters, a “harmless error” will not be reversed.

Taken together, these two standards make appeals based solely on alleged errors in the administration of trial very difficult. But courts of appeal are willing to reverse such a decision if convinced there has been a miscarriage of justice. Keep in mind, however, that success on appeal may result in the need for a new trial, with all of the attendant costs and uncertainties.

### **Choose the right strategy**

Keeping these standards of review in mind—along with a candid assessment of the issues involved and the probable costs—can help you and your attorney make a sound decision on whether to pursue an appeal.

*If you're faced with deciding whether to pursue a case on appeal and would like the benefit of our perspective, please call for an analysis.*