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Briefly: Interlocutory appeals: Can you? Must you?

By: Eric J. Magnuson January 22, 2021

Just because you can appeal, do you have to? That's a question that arises at some point in every case you lose. Thoughtful counsel will advise their clients that "winning" on appeal is a relative term. The cost may outweigh the benefit, and sometimes the best result you can get is a re-trial with all the attendant cost and uncertainty.

But this article focuses on a narrower issue — interlocutory appeals. Whether you can and should appeal an interlocutory decision is a question that arises often when, during the course of litigation, the trial court issues an order which, although not finally disposing of the case, has a separate basis for immediate appeal. Most of the time the answer is to file the appeal, but sometimes, you not only don't have to, but may not want to.

First, we have to talk about the rule of unitary appeal. As a general proposition, appellate courts like to deal with the case only once, after all issues have been decided with finality in the lower court. One of the first decisions of the Minnesota Supreme Court (then the Territorial Supreme Court), Chouteau v. Rice, 1 Minn. 24 (1851), decided a motion to dismiss an appeal from an interlocutory order. In rendering its opinion, the court struggled to resolve the conflict between its desire to provide prompt and effective appellate review and its concern about the orderly progression of justice. The court came down on the side of order in the appellate process, however by the slimmest of margins. One of the three justices filed a dissent. But the majority adopted a rule that interlocutory appeals had to be the exception and not the rule in order for the appellate system to work.

To adopt a different rule … would be almost equivalent to closing the doors of justice. This rule has been sanctioned by experience, and is one which commends itself to every rational mind. Manifest wrong-manifest delay-manifest injustice, would most indubitably be the result of allowing appeals from every decree of a Court Chancery. We must establish some rule, and if not the one herein announced, where are we to stop? It is extremely dubious, if a

contrary rule were adopted, whether there be a man amongst us, who would live to see the end of this, or any other cause, now pending in the Courts of Chancery of this Territory.

Pretrial rulings, trial rulings, post-trial rulings and post-judgment rulings are, generally speaking, fully reviewable in one appeal. Of course, that's not always the case. For example, while an appeal from a final judgment brings up for review all orders issued prior to the judgment that "affect" the judgment, an appeal from a judgment does not generally bring before the appellate court orders made after the entry of the judgment. Konkel v. Fort, 245 Minn. 535, 73 N.W.2d 613 (1955). An attempted appeal from orders made after the entry of judgment generally must have a separate and independent basis for appeal. Northwestern State Bank v. Foss, 287 Minn. 508, 177 N.W.2d 292 (1970).

But this article is directed at pre-judgment decisions that have an independent basis for immediate appeal. Some of those decisions are specifically called out in Rule 103.03 of the Rules of Civil Appellate Procedure — injunction orders, attachment orders, final decisions in proceedings supplementary, final orders, decisions or judgments affecting a substantial right made in an administrative or other special proceeding, orders granting or denying modification of custody, visitation, maintenance or child support, and certified questions on important and doubtful issues.

Rule 103.03 ends with a final catchall provision stating that appeals as of right may be taken "from such other orders or decisions as may be appealable by statute or under the decisions of the Minnesota appellate courts." Thankfully, the advisory committee comments to the 1988 amendments list a number of those case law exceptions. These include orders granting or denying motions to dismiss or for summary judgment based on the trial court's alleged lack of personal or subject matter jurisdiction, orders denying motions to dismiss or for summary judgment based on governmental immunity from suit, and orders vacating final orders or judgments.

But just because an interlocutory order can be appealed doesn't mean that it must be appealed. In Engvall v. Soo Line R. Co., 605 N.W.2d 738 (Minn. 2000) the supreme court held that the failure to take a timely appeal from an interlocutory order or judgment that is immediately appealable does not result in forfeiture of the right to have that order reviewed on appeal from the final judgment.

In Engvall, the district court dismissed the defendant's third-party complaint based on federal preemption. The court did not certify the resulting judgment as final under Rule 54.02. The defendant waited to file an appeal of the dismissal of the third-party complaint until the case was resolved with the plaintiff. The court of appeals dismissed the appeal, reasoning that the dismissal based on preemption grounds was, in effect, a decision on subject matter jurisdiction, and was immediately appealable. The court concluded that defendant's failure to take an immediate appeal resulted in forfeiture of the right to later appeal. The supreme court disagreed.

Although the district court could have certified the partial judgment as final under Rule 54.02, the supreme court noted that this was an exception to the general rule of unitary

appeal. The court discussed its prior decisions allowing certain interlocutory appeals under the collateral order doctrine adopted from the federal courts, but concluded that Rule 54.02 certification was a safeguard against excessive piecemeal appeals, and that even a jurisdictional dismissal required Rule 54.02 certification before the partial judgment was appealable.

But the court didn't stop there. Expressing its concern about the quandary in which a party might find itself having lost a motion to dismiss on jurisdictional grounds (appeal or no appeal), the court rejected a rule that an immediately appealable interlocutory order that does not contain an express Rule 54.02 determination must be appealed immediately. "The better rule is that failure to appeal from such an interlocutory order or judgment does not result in forfeiture of the right to appeal from the final judgment."

On the other hand, certification under Rule 54.02 results in a final judgment that must be appealed. Failure to recognize that can result in the loss of the right to appeal.

In Contractors Edge, Inc. v. City of Mankato, 863 N.W.2d 765 (Minn. 2015), the district court ordered final judgment on a breach of contract claim, but not a remaining claim for prompt payment. Without either party making the request, the court included the Rule 54.02 certification in an order granting summary judgment. The contractor waited to appeal the order granting summary judgment on breach of contract until it had settled the prompt payment claim, and appealed the resulting final judgment, raising the breach of contract issue.

The court of appeals concluded it did not have jurisdiction because the time to appeal the partial judgment resolving that claim, certified under Rule 54.02 as final, had expired. The court held that the contractor could not wait until the conclusion of the case.

On review, the supreme court held that the district court abused its discretion in certifying the partial judgment under Rule 54.02, and thus, the certification was invalid and did not result in an appealable judgment. In disposing of the case, the court had one more question to address. "Whether an improperly certified Rule 54.02 order results in a judgment that is immediately appealable is an issue of first impression in Minnesota. The federal courts are split on the question." After reviewing its Rule 54.02 jurisprudence, a majority of the supreme court concluded that erroneously certified orders, including orders certified in an abuse of discretion, do not result in final appealable judgments.

One lesson to draw from that case is to carefully review all interlocutory orders to make sure that the court has not, either intentionally or inadvertently, included the Rule 54.02 language. If it is there, the safe thing to do is appeal and challenge the propriety of the certification.

Of course, there may be unforeseen consequences of passing up a permissive interlocutory appeal. The first that comes to mind is mootness. The clearest example is an order granting a temporary injunction. You might have a great argument that there was an inadequate showing to justify the temporary injunction, but if you wait to challenge it until after the trial on the merits of the permanent injunction, you are probably too late. The temporary injunction has by its terms expired, and the propriety of future injunctive relief will be based solely on a review of the trial record.

And there may be a twist that you don't anticipate. For example, none of the provisions of Rule 103.03 grant of an interlocutory appeal from a denial motion for change of venue as a matter of right. One would expect that, under the rule of unitary appeal, having made the motion and lost, the issue is preserved for an ultimate appeal in the event of an unfavorable judgment. The Minnesota Supreme Court has held that although mandamus is an appropriate—and the most desirable—procedure for appellate review of pre-trial venue rulings, parties may also obtain review of venue rulings "by appeal from an order denying a

new trial or from the final judgment." Winegar v. Martin, 148 Minn. 489, 490, 182 N.W. 513, 513 (1921).

However, in Peterson v. Holiday Recreational Industries, Inc., 726 N.W.2d 499 (Minn. Ct. App. 2007), the court of appeals declined to consider on a post-trial appeal a pre-trial ruling denying the appellants' demand for change of venue, concluding that an immediate, pre-trial petition for writ of mandamus is the "proper"—and apparently exclusive—means of obtaining appellate review of a pre-trial change of venue ruling. Until the issue receives further clarification, the prudent course in Minnesota is to use mandamus as the exclusive means of challenging pre-trial change of venue rulings, and possibly other rulings where the supreme court has determined that writs of mandamus or prohibition are an available, even if not heretofore exclusive, means of obtaining review.

This discussion just illustrates that the answer to the question of whether to take an interlocutory appeal is often unclear. No one wants to take an unnecessary appeal, but by the same token, no one wants to waive the possibility of appellate review in the future. When in doubt, the best answer is probably to file the appeal, and if there is a problem with appealing too early, let the appellate court tell you. In the end, safe is probably better than sorry.

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