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Analyzing a New Era in Ohio's Appellate Courts

As reported in this column in June, significant amendments to R.C. 2505.02 – the statute defining the term “final order” for purposes of appellate review – became effective July 22, 1998, dawning a new era in Ohio's appellate jurisprudence. Parties may now appeal certain orders that, until now, were deemed interlocutory and carried no right of appellate review until the end of the case in the trial court.

However, the statute raises so many questions about its practical application, particularly with respect to orders granting or denying provisional remedies, that it will be months, perhaps even years, before the dust finally settles. In the meantime, litigators will have to wade through mostly uncharted territory. There are four significant topics that are likely to be debated as our new system unfolds: (1) the new jurisdictional scheme for appeals of orders granting or denying provisional remedies under section (B)(4) of the statute; (2) the interplay between the new statute and Civ.R. 54(B); (3) the practical difficulties involved in determining appellate jurisdiction under section (B)(4); and (4) the effect the new classes of appeals will have on trial court jurisdiction.

Provisional Remedies

Contrary to popular misconception, the new statute does not permit immediate appeal from any trial court order at any stage of the proceedings. The definition of “provisional remedy” is vague and broad but not all-encompassing. Furthermore, orders granting or denying provisional remedies are only “final” under carefully circumscribed criteria set forth in section (B)(4) of the statute.

Section (A)(3) defines “provisional remedy” as “a proceeding ancillary to an action, including, *but not limited to*, a proceeding for a preliminary injunction, attachment, discovery of a privileged matter, or suppression of evidence” (emphasis added). The highlighted language must mean that there are provisional remedies cognizable under the statute other than those specifically listed. But how far will courts be willing to go? Does the definition include the denial of a motion to dismiss? Does it include the setting of deadlines for production of expert reports – or the refusal to extend deadlines?

Discovery orders may spawn the greatest debate. Given the specific inclusion of “discovery of a privileged matter,” are we to assume that the term excludes discovery of a *non*-privileged matter? While the courts are likely to reign in discovery-related appeals simply to control the volume of cases, a blanket rule that the dispute must involve a privilege to qualify as a provisional remedy may be too restrictive in some circumstances. This may be true when work product is involved or when the trial court grossly abuses its discretion in awarding or denying discovery.

Fitting within the definition of a provisional remedy is only the beginning of the jurisdictional challenge. Under section (B)(4), an order granting or denying a provisional remedy must overcome two additional hurdles to qualify as a final order. Both of the following must apply:

(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims and parties in the action.

The phrase “prevents a judgment ... with respect to the provisional remedy,” found in section (B)(4)(a), may prove to be an impassible hurdle for certain would-be appellants. The language suggests that the order is not appealable so long as “the trial court could still revise its previous judgment.” See *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86, 90, fn.6 (interpreting Civ.R. 54(B)). For example, a trial court that initially denies a request for preliminary injunction still retains the right to grant it later. Arguably, there could be no immediate appeal in that situation, although practically speaking, the movant would have lost the benefit of an immediate injunction.

Thus, from a strategic standpoint, a party seeking relief may wish to frame the request with a time parameter (e.g., “immediate preliminary injunction”) so that the denial of the request would inherently “prevent[] a judgment” of the *specific* relief requested. In any event, once a party is forced to take action (e.g., produce documents) or to refrain from taking action (e.g., obey an injunction), then they have certainly reached the appealable point of no return. But if that becomes the test under subsection (a), what is the distinction between subsection (a) and the “meaningful or effective remedy” requirement of section (B)(4)(b)?

Section (B)(4)(b), the cat-out-of-the-bag test, is more straightforward. If appellate

review of an order is deferred until the final disposition of the entire case, will the issue have become moot? If so, then the criterion of subsection (b) is probably satisfied. This is an important requirement because, without it, the proceedings of the trial court could be interrupted by multiple appeals, even in the middle of trial, merely for purposes of delay. See *Dayton Women's Health Ctr. v. Enix* (1990), 52 Ohio St.3d 67, 75 (Douglas, J., dissenting).

One area of potential controversy under subsection (b) is whether avoiding the cost of litigation is a legitimate ground for seeking an immediate appeal. Deferring appellate review until the end of the case will frequently require a party to engage in costly litigation that might otherwise be avoided. For example, a foreign defendant seeking to appeal the denial of a motion to dismiss on jurisdictional grounds certainly has a good argument in this regard. On the other hand, if avoiding litigation costs is always a legitimate argument under subsection (b), then almost every appellant can arguably meet the subsection (b) criterion.

Applicability of Civ.R. 54(B)

An order adjudicating "one or more but fewer than all of the claims or parties" is not "final" unless it is accompanied by the "magic language" from Civ.R. 54(B), that there is "no just reason for delay." *Chef Italiano*, 44 Ohio St.3d at 87-88. But the threshold question is whether, even under *Chef Italiano*, Rule 54(B) is "applicable" to either of the two new categories of final orders under the statute. See *id.*, syllabus.

The two new categories are orders involving certain provisional remedies (section (B)(4)) and orders determining whether an action may be maintained as a class action (section (B)(5)). Many litigators instinctively, but incorrectly, assume that Rule 54(B) does apply, since these new categories will typically involve orders issued before final judgment in the case.

"[T]he words 'claim for relief,' as used in Civ.R. 54(B), are synonymous with 'cause of action.'" (*Amato v. General Motors Corp.* (1981), 67 Ohio St.2d 253, 256.) Thus, in *Amato*, the Supreme Court specifically

held that Rule 54(B) did not apply to orders certifying that an action may be maintained as a class action, because the "procedural mechanism" of class action certification was not, in and of itself, a "claim for relief." *Id.*

Amato was overruled by *Polikoff v. Adam* (1993), 67 Ohio St.3d 100, but on different grounds (see Appellate Side Bar, June Bar Journal, page 28). There is no reason to suspect that the Supreme Court would depart from its interpretation of Rule 54(B) as articulated in *Amato*. While *Amato* dealt with an order granting class action certification, the same reasoning would apply to orders, now final under R.C. 2505.02(B)(4), granting or denying certain provisional remedies.

Nevertheless, the Rule 54(B) issue may still warrant careful consideration when drafting the initial pleadings. Some courts, especially in the new statute's infancy, may look to the pleadings in determining whether an order granting or denying a provisional remedy in fact resolves a "claim for relief." The unwary lawyer — one whose complaint, for example, styles a request for preliminary injunctive relief as a separate cause of action — may find the court of appeals unwilling to hear an appeal from the denial of the requested injunction absent the magic language. On the other hand, the crafty lawyer, confident of winning a preliminary injunction, will purposely frame the pleadings in that fashion in an effort (however disingenuous) to prevent an immediate appeal. Of course, we would hope that the courts of appeals will look past the form of the complaint, but a careful pleader can avoid being the victim of an appellate court's foreseeable mistake.

One final twist to ponder: Rule 54(B) and the jurisdictional puzzle of provisional remedies may intersect. Where Rule 54(B) applies, does section (B)(4) of the new statute permit an immediate appeal from a trial court's refusal to issue the magic language? Space constraints preclude an analysis of that issue.

Determining Appellate Jurisdiction

Substance aside, a major issue the appellate courts will have to resolve is what

procedure to follow for determining whether appellate jurisdiction is proper. Under the old statute, the right of appellate review was usually clear, and when disputes arose, they were rare enough to address case by case. But now, with so many potential disputes certain to develop under section (B)(4), and with murky criteria for resolving them, the jurisdictional determination presents difficult practical problems. At what point — and with what input or argument from the parties — will the appellate courts determine whether jurisdiction is proper? Perhaps one solution is to require every notice of appeal under section (B)(4) to be accompanied by a jurisdictional statement, on the basis of which the court could determine whether to allow or dismiss the appeal. However the procedure is organized, appellate courts will require more time to reach the merits of these cases, thus further delaying the trial court proceedings that have been interrupted by the appeal (see below).

Trial Court Jurisdiction

We can probably expect some harangues over the effect these new rights of appeal have on the continuing jurisdiction of trial courts. "The trial court retains all jurisdiction that is consistent with the reviewing court's jurisdiction to reverse, modify, or affirm the judgment." *State, ex rel. A&D Ltd. Partnership, v. Keefe* (1996), 77 Ohio St.3d 50, 52. So, in each appeal under section (B)(4) or (B)(5) of the new statute, there could be disputes over whether, and to what extent, the proceedings in the trial court can continue — especially when the trial court views the appeal as frivolous. Will we see, as in *Keefe*, complaints for writs of prohibition against trial judges who refuse to halt proceedings pending appeal? These complaints would be filed as original actions in the courts of appeal, so the fall-out from the new statute may prove to be an even greater burden on our appellate courts.

We will keep you posted in this column as appellate practice under the new R.C. 2505.02 evolves. Stay tuned.

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