Appeals 2019

Contributing editors
Mark A Perry and Perlette Michèle Jura
Gibson Dunn

LEXOLOGY
Getting The Deal Through

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GIBSON DUNN

www.gibsondunn.com

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

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Lexology Getting The Deal Through is delighted to publish the third edition of *Appeals*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Mark A Perry and Perlette Michèle Jura of Gibson, Dunn & Crutcher LLP, for their continued assistance with this volume.

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United States

Mark A Perry and Perlette Michèle Jura
Gibson, Dunn & Crutcher LLP

JURISDICTION

Court system

1 | Outline and explain the general structure of your country's court system as it relates to the commercial appellate process.

At the federal (national) level, the United States has a three-level court system:

- The courts of first instance are called district courts; there are 94 judicial districts across the country and its territories, with at least one district in each state. A district court case is presided over by a district judge, with or without a jury.
- Commercial cases in district court are appealable as a matter of right to a court of appeals; there are 12 regional circuit courts. Appeals are ordinarily heard by a panel of three circuit judges.
- The Supreme Court has discretionary authority to review cases from other federal courts. The Supreme Court has nine Justices, all of whom typically participate in every case accepted for review.

According to statistics compiled by the federal judiciary, 49,276 appeals were filed in the federal system in 2018, of which 20,968 were in non-prisoner civil and administrative cases. The regional courts of appeals issued 33,672 opinions or orders terminating appeals in 2018, only about 10 per cent of which were published (precedential). The median time for completion of a case from the notice of appeal to a disposition on the merits was 8.5 months; most appeals involving complex business disputes take significantly longer to resolve.

Each of the 50 states, and several of the territories, have their own court systems. For the most part, they are organised similarly to the federal system, with a trial court of general jurisdiction, an intermediate appellate court that hears appeals as of right, and a supreme court with discretionary review authority. While the rest of this chapter will focus on the federal system, the reader should be aware that there are variations among the state systems. If a party pursues an appeal through decision from a state supreme court and remains dissatisfied with the outcome, its last resort is to seek discretionary review from the United States Supreme Court (the federal Supreme Court, described above).

Civil matters

2 | Are there appellate courts that hear only civil matters?

The regional federal courts of appeals hear both civil and criminal matters. There is one specialised appellate court (the Federal Circuit) that hears only patent cases and certain cases involving the government, with no criminal jurisdiction.

Appeals from administrative tribunals

3 | Are appeals from administrative tribunals handled in the same way as appeals from trial courts?

Appeals from administrative tribunals are sometimes taken to a trial court, after which an appeal proceeds in the ordinary course; in other instances, the administrative appeal proceeds directly in the appellate court. The same regional appellate courts that hear other appeals hear administrative appeals as well, although the District of Columbia Circuit hears significantly more administrative appeals than any other court.

Representation before appellate courts

4 | Is there a separate appellate bar or other requirement for attorneys to be admitted before appellate courts?

The Supreme Court and each federal appellate court have separate requirements for admission to practise before them. Generally, formal admission to the bar of an appellate court connotes only that the attorney has been admitted to practise in a jurisdiction for the requisite amount of time, rather than that he or she has any particular appellate expertise. As a result, appellate specialists are generally identified by their experience, reputation and professional affiliations rather than by membership in a formal bar.

Multiple jurisdictions

5 | If separate jurisdictions exist for particular territorial subdivisions or subject matters, explain their main differences as to commercial appeals.

Appeals in the federal system are relatively uniform and are governed by the Federal Rules of Appellate Procedure, although each regional circuit also has supplemental local rules. Practice among the state appellate courts varies considerably. When practising in a federal or state appellate system, a litigant should check for jurisdiction-specific appellate rules to ensure compliance with all local requirements and timeliness.

BRINGING AN APPEAL

Deadlines

6 | What are the deadlines for filing an appeal in a commercial matter?

In the federal system, litigants generally have 30 days to file an appeal in a civil case, or 60 days if the government is a party. However, particular cases may have different deadlines, and attorneys must consult the applicable statutes and rules in every case because timely filing is often a jurisdictional or mandatory prerequisite to maintenance of an appeal.

Procedural steps

7 | What are the key steps a litigant must take to commence an appeal?

In a civil case, an appeal is generally initiated by filing a notice of appeal with the district court. Some appeals are initiated by filing a petition (for review, or for permission to appeal) directly with the appellate court. The appeal-initiating documentation depends, in significant part, on the nature of the order or decision being appealed.

Documentation

8 | How is the documentation for appeals prepared?

Most court records are computerised, and the federal courts of appeals have direct access to the factual record compiled in the district court. However, the party filing the appeal is responsible for preparing and filing the key parts of the record (usually called the Excerpts of Record or Appendix) to which reference is made in the appellate briefing. The party opposing the appeal may also be responsible for preparing its own separate appendix.

RIGHT OF APPEAL

Discretion to grant permission to appeal

9 | In commercial matters, may litigants appeal by right or is appellate review discretionary?

Civil cases are appealable as a matter of right to the intermediate appellate court, although litigants can waive their right to appeal by failing to act in a timely manner. Review in the Supreme Court is discretionary.

Judgments subject to appeal

10 | Can litigants appeal any ruling from a trial court, or are they limited to appealing only final judgments?

With relatively rare exceptions, only final judgments are appealable as a matter of right in the federal system. The exceptions mainly pertain to legal doctrines (such as immunity or arbitration) that, if successfully interposed, will preclude the trial court proceedings. However, any particular ruling of consequence must be examined to ensure that it is preserved for appeal, immediately or in the future, according to the relevant substantive and procedural requirements. When both parties take issue with portions of a court's decision, both parties may file a notice of appeal. The court of appeals will consider the legal issues raised by both sides in the same proceeding. Interlocutory appeals are discussed in question 12.

SECURITY AND INTERLOCUTORY MATTERS

Security to appeal

11 | In a typical commercial dispute, must a litigant post a bond or provide security to appeal a trial court decision?

The trial court judgment is stayed pending appeal only if the appellant posts a bond or other security, in a form acceptable to the trial court, to protect the prevailing party from the risk of the losing party filing for bankruptcy or defaulting on the judgment. In the absence of such security, the judgment becomes executable even while the appeal is pending. The court may waive the bond requirement in exceptional circumstances or by agreement of the parties.

Interlocutory appeals

12 | Are there special provisions for interlocutory appeals?

In addition to the established exceptions to the final judgment requirement noted above, the federal courts of appeals have discretionary jurisdiction to hear interlocutory appeals from specified rulings, including orders granting or denying class certification and certain other orders involving controlling questions of law.

Injunctions and stays

13 | Are there special rules relating to injunctions or stays, whether entered in the trial court or on appeal?

An order granting, denying or modifying an injunction is immediately appealable. Both trial courts and appellate courts have the discretionary power to enter stay orders.

SCOPE AND EFFECT OF APPELLATE PROCEEDINGS

Effect of filing an appeal

14 | If a litigant files an appeal in a commercial dispute, does it stay enforcement of the trial court judgment?

The judgment is stayed only if the appellant posts an adequate bond or other security. Typically, a court order is required to secure a stay.

Scope of appeal

15 | On an appeal from a commercial dispute, may the first-level appellate court consider the facts and law anew, or is its power to review limited?

The court of appeals will review legal issues de novo (without deference to the trial court), but its authority to review factual issues is circumscribed. Factual findings by a district judge will be sustained unless 'clearly erroneous', while factual findings by a jury will be sustained if supported by 'substantial evidence'. Evidentiary and most procedural rulings are reviewed for an 'abuse of discretion'. The standard of review can be an important consideration in determining which issues to appeal (or not to appeal) and must be examined carefully in each particular case.

Further appeals

16 | If a party is dissatisfied with the outcome of the first-level appeal, is further appeal possible?

The losing party in the court of appeals may petition the Supreme Court for review. The Supreme Court has purely discretionary jurisdiction and accepts fewer than 100 cases per year (from more than 5,000 petitions filed). The petition process involves a separate round of briefing in which the parties present arguments as to why the Supreme Court should or should not accept review of the case. Cases in which the Supreme Court grants review often involve issues on which there are conflicting decisions among the courts of appeals, a decision by a court of appeals that conflicts with a decision of the Supreme Court, or an important question of federal law that has not yet been addressed by the Supreme Court. The Supreme Court rarely accepts cases involving only a dispute about the application of settled law to a particular set of facts.

Prior to filing a petition with the Supreme Court, a losing party may (but is not required to) ask the court of appeals to review the panel's decision in an 'en banc' hearing involving all of the judges of the court. Such petitions are rarely granted, though if the panel's opinion conflicts with a prior decision by another panel of the same court or a case presents a novel or important issue, a petition for en banc review may be granted.

Duration of appellate proceedings

17 | How long do appeals typically take from application to appeal to a final decision?

In the federal system, the median time for completion of a case from the notice of appeal to a disposition on the merits is about nine months, but most appeals involving complex business disputes take significantly longer to resolve (one to two years is typical). Additionally, the time to disposition varies among the regional circuits. There are no deadlines or formal requirements for the issuance of opinions. The Supreme Court generally issues decisions during the same term (which runs from October to June) during which a case is argued, and some regional circuits follow a similar rule. Other circuits issue decisions when and as the cases are completed.

SUBMISSIONS AND EVIDENCE

Submissions process

18 | What is the briefing and argument process like in a typical commercial appeal?

The appellant files a principal brief, which is generally limited to 13,000 words. The appellee files a responsive brief, also generally limited to 13,000 words. The appellant files a reply brief, generally limited to 6,500 words. The court may decide the appeal on the basis of the briefs, or it may hear oral argument (usually limited to 10 to 30 minutes per side). In the regional courts of appeals, arguments are made to three-judge panels; in the Supreme Court, all nine Justices participate. Oral arguments in federal appellate courts are typically question-and-answer sessions between the judges and counsel, rather than 'arguments' in the traditional sense. No witnesses are called and no evidence is introduced. Rather, appellate counsel present the case on behalf of their clients, and the judges typically ask questions of both sides.

New evidence

19 | Are appeals limited to the evidentiary record that was before the trial court, or can new evidence be introduced on appeal?

Appeals are generally limited to the evidentiary record that was before the trial court. The most significant exception pertains to information of which an appellate court may take 'judicial notice', which means that it is readily available and not reasonably subject to dispute. For example, an appellate court may take judicial notice of newly enacted legislation.

New evidence of wrongdoing

20 | If litigants uncover new evidence of wrongdoing that they believe altered the outcome of a trial court judgment, can they introduce this evidence on appeal?

New evidence must usually be raised in the trial court (on a motion to reopen the judgment), rather than on appeal.

New legal arguments

21 | May parties raise new legal arguments on appeal?

In general, parties are limited to the legal arguments that were made or decided in the trial court. The appellate court has discretion to consider purely legal arguments made for the first time on appeal.

COSTS, SETTLEMENT AND FUNDING

Costs

22 | What are the rules regarding attorneys' fees and costs on appeal?

Under the 'American Rule', each party bears its own attorneys' fees, including on appeal, unless a statute or agreement provides otherwise. Costs on appeal are generally taxed against the losing party.

Settlement of first instance judgment after appeal lodged

23 | Can parties enter into a settlement agreement to vacate the trial court judgment after an appeal has been taken?

The Supreme Court has held that because the public has an interest in judgments, they may not automatically be vacated as part of a settlement agreement. However, in exceptional circumstances, vacatur may be appropriate.

Limits on settlement after commencement of appeal

24 | Are there any limits on settlement once an appeal has been taken?

No.

Third-party funding

25 | May third parties fund appeals?

Yes. However, this is very much an evolving issue in the United States.

Disclosure of litigation funding

26 | If litigation funding is permitted in an appeal, must funding sources be disclosed to the court or other parties to the litigation?

Funding sources do not typically need to be disclosed on appeal; however, this is very much an evolving area of law in the United States.

JUDGMENTS, RELIEF AND NON-PARTIES

Decisions

27 | Must appellate courts in your country write decisions explaining their rulings? Can the courts designate the precedential effect of their decisions?

The Supreme Court writes opinions in all merits cases. It does not explain its refusal to grant petitions for discretionary review. The courts of appeals are not required to write opinions, and they may designate any opinion as for publication (precedential) or not for publication (non-precedential). Only about 10 per cent of cases in the regional circuits result in published (precedential) decisions. In general, cases that present novel, recurring or important issues will result in published opinions, whereas routine appeals or those involving only settled issues will likely result in an unpublished disposition. If the outcome is so clear that no opinion is necessary, the court may summarily affirm (or reverse) in a brief order.

Non-parties

28 | Will the appellate courts in your country consider submissions from non-parties?

The Supreme Court and courts of appeals will consider briefs from amici curiae (friends of the court). The government may file an amicus

brief in any case. Private parties must either secure the consent of the parties or leave of court in order to file an amicus brief. Amicus briefs can be quite helpful to the courts and litigants in exploring the ramifications or consequences of the issue and decision.

Relief

29 What are the ordinary forms of relief that can be rendered by an appellate court in a civil dispute?

In most civil appeals, the court of appeals can:

- affirm the judgment of the trial court;
- reverse the judgment of the trial court and direct entry of another judgment; or
- vacate the judgment of the trial court and remand for additional proceedings.

In cases involving multiple issues, the court of appeals can affirm the trial court's decision in part and reverse in part. If a case is remanded to the trial court, it almost always goes back to the same judge unless there is clear evidence of bias or misconduct.

UPDATE AND TRENDS

Current developments

30 Are there any current developments or emerging trends that should be noted?

On 6 October 2018, Brett Kavanaugh was sworn in as the 114th Justice of the United States Supreme Court, succeeding Justice Anthony Kennedy. The Supreme Court is currently operating with its full complement of nine Justices. As of April 2019, there were eight vacancies on the regional courts of appeals (out of 179 total authorised judgeships).

GIBSON DUNN

Mark A Perry
mperry@gibsondunn.com

Perlette Michèle Jura
pjura@gibsondunn.com

1050 Connecticut Avenue, NW
Washington, DC 20036-5306
United States
Tel: +1 202 955 8500
Fax: +1 202 467 0539

333 South Grand Avenue
Los Angeles, CA 90071-3197
United States
Tel: +1 213 229 7000
Fax: +1 213 229 7520

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