

Appeals 2021

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Published by

Law Business Research Ltd

Meridian House, 34-35 Farringdon Street

London, EC4A 4HL, UK

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First published 2017

Fifth edition

ISBN 978-1-83862-623-5

Printed and distributed by

Encompass Print Solutions

Tel: 0844 2480 112



Appeals 2021

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Lexology Getting The Deal Through is delighted to publish the fifth 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.



London

April 2021

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This article was first published in May 2021

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United States

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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, 49,044 appeals were commenced in the federal system from July 2019 to June 2020, of which 21,783 were in non-prisoner civil and administrative cases. During that time, the regional courts of appeals issued 31,236 opinions or orders terminating appeals, 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 9.1 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 supplementary 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.

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, 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 as and when 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 issue is evolving in the United States. For example, in 2020, the (federal) Ninth Circuit Court of Appeals asked the New York (state) Court of Appeals to advise whether a portfolio litigation funding agreement would qualify as a loan. In a portfolio funding agreement, a funder lends money to be used in specific cases. In exchange, the funder receives payment from funded and unrelated cases alike. If deemed a loan, a portfolio funding agreement would be subject to New York's state usury laws. As at April 2021, the New York Court of Appeals has yet to answer. The eventual response could impact state and federal appeals nationwide.

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 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?

Since 26 October 2020, when Justice Coney Barrett was sworn in, the Supreme Court has been operating with its full complement of nine justices. As at March 2021, there were seven vacancies on the regional courts of appeals (out of 179 total authorised judgeships).

Appellate courts have relaxed some deadlines and have adopted modified argument procedures in response to the covid-19 pandemic.

Coronavirus

31 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

Many appellate courts have granted blanket extensions on filing deadlines. The US Supreme Court extended the deadline for filing petitions for writs of certiorari from 90 to 150 days. Other appellate courts have adopted orders easing the requirements for covid-19-related extensions. The Ninth Circuit, for example, will grant a 30-day extension on any principal brief without a formal motion.

The US Supreme Court is holding oral arguments by telephone. Most of the regional courts of appeals are holding oral arguments over videoconferencing systems, although some (including the Federal Circuit) are telephone-only. As at March 2021, no federal appellate court is regularly conducting in-person arguments. Practice in the state appellate courts is more varied.

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Virtually all US court systems have adopted covid-19-specific rules and procedures that vary from jurisdiction to jurisdiction. Practitioners should consult the current rules (or engage a local expert) as the requirements continue to evolve and change.

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