

Appealing After A Win: How To Use Conditional Cross-Appeal

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Parties that prevail at trial often do so despite perceived errors by the trial court that the prevailing party would wish to challenge in the event of a remand or retrial. In such a scenario, the prevailing party is faced with how to preserve the right to appeal and further challenge the trial court's erroneous rulings. Because these prevailing parties are not "aggrieved," they are generally prohibited from appealing the trial court's adverse rulings.[1] But many courts have recognized the "conditional cross-appeal" as a way for the prevailing party to challenge the trial court rulings by cross-appeal only if and when the court of appeals reverses or modifies the judgment. The conditional cross-appeal has received minimal treatment by courts and commentators, but can be an important tool.



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Avoiding Waiver Through Conditional Cross-Appeals

Everyone knows that a party waives error on an issue it does not appeal, and this may apply even to the party that prevails at trial. A conditional cross-appeal is often the right approach for ensuring you will be able to challenge trial court errors in future proceedings in the event of a remand or retrial.

An example of a cautionary tale is *Art Midwest Inc. v. Atlantic Limited Partnership XII*, in which the Fifth Circuit precluded a party from raising an issue that had not been preserved in a prior appeal.[2] The plaintiffs had sued for fraud and the defendant countersued for breach of contract. The plaintiffs prevailed on the breach of contract claim but lost on their fraud claim. The defendant appealed but the plaintiffs did not cross-appeal. The Fifth Circuit reversed on the breach-of-contract claim and remanded for a new trial. When the plaintiffs tried to resurrect their fraud claim in the retrial, the district court precluded them from doing so. The Fifth Circuit affirmed, holding that the plaintiffs had waived any arguments with regard to their fraud claim by not filing a conditional cross-appeal. As the Fifth Circuit explained, the plaintiffs' "decision not to cross-appeal the jury's fraud findings in the first district court proceeding prevented them from raising the same rejected fraud claims in the second district court proceeding. Even though they prevailed on many of their claims in the first district court proceeding, ... the [plaintiffs] could have filed a 'protective' or 'conditional' cross-appeal of the adverse fraud finding." [3]



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Waiver is not automatic in every jurisdiction; it depends on whether the conditional cross-appeal rule is "jurisdictional" or "prudential." Some courts have held that the failure to file a conditional cross-appeal goes to the court's jurisdiction to consider issues that could have been raised earlier; for those courts,

waiver is automatic.[4] Other courts have held that the conditional cross-appeal rule is prudential and that the court has discretion to address issues that a party failed to raise in a cross-appeal.[5] But whichever jurisdiction you are in, given the risk of waiver, a party should file a conditional cross-appeal if there is any chance it will want to revisit the trial court's adverse rulings later in the litigation.[6]

Where Your Conditional Cross-Appeal Will (And Won't) Be Welcome

The conditional cross-appeal is a relatively unexplored concept in many courts of appeal, so the law on whether such an appeal is permissible will vary depending on the jurisdiction. The U.S. Supreme Court recognizes "conditional cross-petitions." [7] In the federal courts of appeals, every circuit permits conditional cross-appeals except for the Federal Circuit.[8] The Federal Circuit prefers that prevailing parties raise any trial court errors in their appellees' briefs, reasoning that cross-appeals "unnecessarily expand[] the amount of briefing that is otherwise allowed, as well as giving the appellee an unfair opportunity to file the final brief and have the final oral argument." [9]

Many states, including California, also permit conditional cross-appeals.[10] The courts that favor conditional cross-appeals specifically note their ability to "promote[] judicial economy by allowing [the appellate court] to give guidance to the trial court on remand" [11] and to "obviate the need for later rounds of remands and appeals." [12] Other states, such as Pennsylvania, expressly preclude conditional cross-appeals, reasoning that they have a "negative impact on court efficiency." [13]

Deciding Whether a Conditional Cross-Appeal is a Good Strategic Move for Your Client

Apart from protecting against waiver, a conditional cross-appeal can have significant strategic advantages. Most significantly, a conditional cross-appeal ensures that the cross-appellant gets to file the final brief and therefore has the last word,[14] though the reply brief on a cross-appeal is generally limited to the subject of the cross-appeal. Parties should exercise caution, however, as some courts take a dim view of cross-appeals for strategic reasons. The Federal Circuit, for example, explained that "[c]ross-appeals for the sole purpose of making an argument in support of the judgment are worse than unnecessary. They disrupt the briefing schedule, increasing from three to four the number of briefs, and they make the case less readily understandable to the judges." [15] A conditional cross-appeal will be far better received if "the issues on cross-appeal are clearly defined and separated from the issues raised by the [appellant]." [16]

Addressing Conditional Cross-Appeals at Oral Argument

Because a court will reach a conditional cross-appeal only if it vacates or alters the lower court judgment, counsel should consider avoiding lengthy argument about the conditional cross-appeal at the outset of oral argument. Indeed, emphasizing the cross-appeal could signal counsel's lack of confidence in prevailing on the main appeal. Devoting significant time on the cross-appeal would be particularly inappropriate if the court indicates that it is inclined to affirm the judgment, which would moot the cross-appeal. In such circumstances, counsel might consider submitting its cross-appeal arguments on the briefs.[17]

In sum, although the conditional cross-appeal has received minimal treatment by courts and commentators, it can be an effective tool for ensuring that you will be able to challenge trial court errors in future proceedings in the event of a remand or retrial.

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[1] See *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 333 (1980) (“Ordinarily, only a party aggrieved by a judgment or order of a district court may exercise the statutory right to appeal therefrom. A party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it.”)

[2] *Art Midwest Inc. v. Atl. Ltd. P'ship XII*, 742 F.3d 206, 211-13 (5th Cir. 2014).

[3] *Id.* at 212.

[4] See, e.g., *Johnson v. Teamsters Local 559*, 102 F.3d 21, 28 (1st Cir. 1996); *Art Midwest*, 742 F.3d at 212-13; but see *Garza v. Starr Cty., Tex.*, 628 F. App'x 887, 890–91 (5th Cir. 2015) (The more prudent course would have been for Defendants to file a cross-appeal challenging the size of the verdict.... Nevertheless, we believe that Defendants should be permitted the opportunity to raise this challenge in the first instance before the district court on remand.”).

[5] See, e.g., *Kessler v. Nat'l Enters., Inc.*, 203 F.3d 1058, 1059 (8th Cir. 2000); *People v. Notyce*, P.3d 302, 306 (Colo. App. 2014) (Webb, J., concurring).

[6] Conditional cross-appeals follow similar procedures and formalities as regular cross-appeals. The party should style its notice of appeal as a “notice of conditional cross-appeal” and identify the orders or rulings being “conditionally” appealed. The notice should clearly explain that the appellate court need not address the cross-appeal if it affirms the judgment. In federal court, a party has 14 days to file a cross-appeal after receiving the appellant’s notice of appeal. Fed. R. App. P. 4(a)(3). In state court, deadlines vary by state. In California, for example, cross-appeals are governed by California Rule of Court 8.108(g), and parties have 20 days to file a cross-appeal.

[7] See *Block v. North Dakota*, 461 U.S. 273, 280 (1983) (granting a “conditional cross-petition”).

[8] See, e.g., *Wagenmann v. Adams*, 829 F.2d 196 (1st Cir. 1987); *Trust for Certificate Holders of Merrill Lynch Mortg. Inv'rs, Inc. Mortg. Pass-Through Certificates, Series 1999-C1, ex rel. Orix Capital Markets, LLC v. Love Funding Corp.*, 496 F.3d 171 (2d Cir. 2007); *Abrams v. Lightolier Inc.*, 50 F.3d 1204 (3d Cir. 1995); *School Bd. v. Malone*, 762 F.2d 1210 (4th Cir. 1985); *Kerr v. Comm'r of Internal Revenue*, 292 F.3d 490 (5th Cir. 2002); *Spence v. Miles Lab.*, 37 F.3d 1185 (6th Cir. 1994); *Council 31, Am. Fed'n of State, County & Mun. Employees, AFL-CIO v. Ward*, 978 F.2d 373 (7th Cir. 1992); *Kulinski v. Medtronic Bio-Medicus*, 112 F.3d 368 (8th Cir. 1997); *Hilton v. Mumaw*, 522 F.2d 588 (9th Cir. 1975); *Mason v. Oklahoma Turnpike Auth.*, 182 F.3d 1212 (10th Cir. 1999); *Schokbeton Indus., Inc. v. Schokbeton Prods. Corp.*, 466 F.2d 171 (11th Cir. 1972); *Hartman v. Duffey*, 19 F.3d 1459 (D.C. Cir. 1994).

[9] *Nautilus Group, Inc. v. Icon Health & Fitness, Inc.*, 437 F.3d 1376 (Fed. Cir. 2006).

[10] See, e.g., *Gonzales v. R. J. Novick Constr. Co.*, 20 Cal. 3d 798 (1978); *SCI Cal. Funeral Servs., Inc. v. Five Bridges Found.*, 203 Cal. App. 4th 549 (2012); *Grobesson v. City of Los Angeles*, 190 Cal. App. 4th 778 (2010); *Sanchez-Corea v. Bank of Am.*, 38 Cal. 3d 892 (1985).

[11] *Kilpatrick v. Wiley, Rein & Fielding*, 37 P.3d 1130, 1148 n.16 (Utah 2001).

[12] *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 740 (D.C.Cir.1995).

[13] *Lebanon Valley Farmers Bank v. Com.*, 623 Pa. 455, 464 (2013).

[14] Fed R. App. P. 28.1.

[15] *Boehringer Ingelheim Vetmedica, Inc. v. Schering-Plough Corp.*, 320 F.3d 1339, 1348 n.1 (Fed. Cir. 2003).

[16] *Kilpatrick*, 37 P.3d at 1148 n.16.

[17] James R. Goff & T. Peter Pierce, *California Civil Appellate Practice: Filing Cross-Appeals*, CEB OnLaw, § 8.