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Appellate Practice Corner

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Evaluating Your Case for Appeal

So, the circuit court denied your fabulously written and well-documented summary judgment, the case has proceeded to trial, and the jury entered a large verdict for your opponent. Your client is now obligated to pay $2 million in damages. You have 30 days to determine whether your client should pay the award or contest it on appeal. On another file, this one a breach of contract claim, the court dismissed your case on your opponent's motion to dismiss and denied your request for leave to amend the already twice amended complaint. Each of these scenarios presents a different set of considerations as far as how to approach the appeal. Hopefully this overview will provide a better understanding of what should be done before recommending an appeal for the case.

In the perfect scenario, analysis of the potential appealability of the case should start early in the litigation, or at a minimum, as soon as a ruling surfaces that has significant appellate potential. However, in most cases, evaluation of appeal options does not begin until judgment is rendered or entered, whether via a dispositive order or a jury verdict. For those situations, the following matters should be considered in the overall appellate evaluation.

Import of the Post Trial Motion

A post trial/post judgment motion is a critical part of the appeal evaluation process. *See* 735 ILCS 5/2-1202, 2-1203. A post judgment motion may be filed in a non-jury case, but is not necessary. The post trial/post judgment motion serves two important purposes: first, it provides an opportunity for the trial judge to correct any errors made during the trial; second, it assists in fleshing out which issues should be raised on the subsequent appeal. As a third benefit, the motion tolls the enforcement and execution of the judgment. Post trial motions are required in jury cases and must be filed in order to preserve error. 735 ILCS 5/2-1202. To be safe, one should liberally cite potential errors in the post trial motion because a failure to include an issue or raise an argument in a post trial motion waives that issue or argument for review. Counsel should consider keeping an appellate folder in each file within which to keep copies of orders he or she may want to pursue on appeal and of notes concerning immediate impressions and authorities. This folder is essential when reviewing issues for the post trial motion

The Standard of Review

One of the most critical steps in analyzing a case for appeal is identifying the proper standard of review and assessing the issues raised in light of that standard. There are three standards of review used by reviewing courts: manifest weight of the evidence, abuse of discretion, and *de novo*. The most common standard is manifest weight of the evidence, which asks whether an opposite result is clearly apparent. *People v. Ewing*, 377 Ill. App. 3d 585, 880 N.E.2d 587 (4th Dist. 2007). The appellate court, when applying this standard, is prohibited from substituting its own judgment and is not to draw different inferences from the evidence. The

manifest weight standard applies to fact issues and questions of credibility, and substantial deference is given to the trier of fact's conclusions and findings. The chance of overturning a fact-finding is very small and limited to circumstances where it can legitimately be said that an opposite result is clearly apparent.

Cases that usually do not meet this criteria include those with conflicting medical opinions between the treating and examining physicians and those where testimony via cross-examination counters the plaintiff's or other witnesses primary testimony. Typically, once the jury makes a finding of fact, the appellate court will sustain that finding so long as there is some evidence in the record to support it.

An abuse of discretion occurs when no reasonable person would adopt the view taken by the lower tribunal. *Check v. Clifford Chrysler-Plymouth of Buffalo Grove, Inc.*, 342 Ill. App. 3d 150, 794 N.E.2d 829 (1st Dist. 2003). A trial court abuses its discretion when it acts arbitrarily, acts without conscientious judgment or, in view of all of the circumstances, exceeds the bounds of reason and ignores recognized principles of law, resulting in substantial injustice. *In re Marriage of Marsh*, 343 Ill. App. 3d 1235, 799 N.E.2d 1037 (4th Dist. 2003). The reviewing court may not substitute its judgment for that of the trial court, or even determine whether the trial court exercised its discretion wisely. *Simmons v. Garces*, 198 Ill. 2d 541, 568, 763 N.E.2d 720 (2002). The abuse of discretion standard applies to discretionary matters addressed by the trial judge, such as whether leave to amend after dismissal should have been granted, or rulings on evidentiary matters or jury instructions. This standard is difficult to meet and rarely results in reversal.

The final standard, *de novo*, applies to questions of law, *People v. Perry*, 224 Ill. 2d 312, 324, 864 N.E.2d 196 (2007), and is the most desirable of all of the standards for the appellant. Under the *de novo* standard, the appellate court is free to decide the issue anew and there is no deference afforded to the circuit court. Such issues might include interpretation of a particular statutory section or an order of summary judgment as whether a particular defense applies.

The standard of review should be the ultimate guide to whether a given case, or issue, should be appealed. Making appeal decisions based on application of the standard of review will result in more informed decisions and hopefully help better manage appeal decisions. All lawyers have likely had a case where the decision baffles them, or where they know, but just cannot prove, that the plaintiff's injury was not caused by the accident or that the plaintiff is exaggerating the extent of his or her injuries. Naturally, such situations can frustrate the lawyer. However, focusing one's efforts on the issues presented and the controlling standard of review will help ensure the best decision concerning whether to appeal.

Know the Appellate Court District or Justices

Although it is difficult to know in advance who will be sitting on an appellate panel, a thorough appellate evaluation also includes an understanding of the potential audience. In other words, consider the appellate court district the case would go before and what that court's history is with similar issues. For cases before the Illinois Supreme Court, look at what prior similar cases have been decided and which current justices were on those panels.

The Availability and Cost of an Appeal Bond

Although appeal bonds are not necessary to perfect the right to appeal, some consideration should be given to the availability and cost of a surety bond. With some exceptions, money judgments require some type of bond to protect the plaintiff's financial interests on appeal. *See* Supreme Court Rule 305. Moreover, Illinois law permits a plaintiff to immediately begin enforcement proceedings. There are no automatic stay provisions. Given this, if the appeal is to move forward, a surety bond might be necessary to protect the client's assets from enforcement.

While alternatives are available, such as posting an insurance policy in lieu of a bond, there are occasions where a policy is insufficient or where there is simply no insurance. For those situations, the cost of a bond must be factored in. Surety bonds typically run $20.00 per $1,000.00 of bond per year, and the rule of thumb

calls for a bond of one and a half times the judgment to cover the award, plus interest and costs. For example, a surety bond to cover a $500,000 judgment could run in excess of $15,000 annually. Likewise, a $2 million dollar judgment could require a bond in excess of $60,000. Thus, there must be a substantial benefit from the appeal to justify the cost of the surety bond.

Interest on the Judgment

A judgment for the plaintiff not only obligates the defendant to pay that judgment if the award is affirmed, there is also the issue of interest. For most defendants, a civil damages award earns nine percent per annum statutory interest as provided by section 2-1303 of the Code of Civil Procedure. 735 ILCS 5/2-1303. Thus, looking at our $2 million verdict example, a nine percent interest rate earns $180,000 per year, or approximately $493 per day. Given that most appeals take 12 to 18 months to conclude, this can grow to a substantial figure very quickly.

Probable Appellate Costs

A further consideration in the appeal equation concerns the potential costs of the appeal. As appellant, whose responsibility it is to perfect the appeal and obtain the record on appeal, there are several items beyond the actual briefs often overlooked when providing an estimate of costs. For example, counsel must include the time for preparing the notice of appeal, notice of filing the notice of appeal, and the docketing statement, as well as obtaining transcripts. This, of course, is in addition to the obvious work associated with identifying and researching the issues and drafting the argument. In addition, counsel must also factor in the time associated with reporting to the client and corresponding with the court and opposing counsel.

A typical, no frills two-issue appeal, might run between $12,000 and $15,000 through oral argument, plus additional fees and costs for a petition for leave to appeal to the Supreme Court, and even more expenses if that petition is granted. More complex appeals can run considerably more.

All of these considerations should be set forth succinctly in a letter of recommendations to the client. A useful template might include a short summary of the procedural posture of the case and general facts, followed by an identification of the probable issues. Ancillary to those issues should also be a section setting forth the standard of review for each issue and an analysis of the issue in light of that standard. Based on this information, one should have some perspective on the potential for success of the appeal and what might be gained, such as reduced damages, excluded critical liability testimony on retrial, or a complete defense verdict.

Once the issues and likely appellate disposition are determined, the estimated cost of the appeal should be presented, including the attorneys' fees and court costs as well as interest and any amounts needed to cover a surety bond. For example, if one have determined that there is a more than probable chance of reversal and entry of judgment in the client's favor, a projected $30,000 in legal fees and costs plus another $75,000 in bonds and interest might not be an unreasonable decision. However, those same costs in a case where the sole issue is manifest weight of the evidence might persuade counsel to recommend that no appeal be taken.

Conclusion

An appeal should be more than a knee-jerk reaction to defeat. An appeal should be the culmination of a thorough review of the facts of the case as well as a full analysis of the legal issues and the governing standard of review. The appellate court expects appellate counsel to appreciate that each issue on appeal has its own standard of review and the likelihood of success on that issue depends upon how the standard meshes with the issue and facts. Considering these areas when evaluating your next appeal will help ensure you and your client can make an informed decision as to whether appeal is right for your case.

About the Author

Brad A. Elward is a partner in the Peoria office of *Heyl, Royster, Voelker & Allen*. He practices in the area of appellate law, with a sub-concentration in workers' compensation appeals and asbestos-related appeals. He received his undergraduate degree from the University of Illinois, Champaign-Urbana, in 1986 and his law degree from Southern Illinois University School of Law in 1989. Mr. Elward is a member of the Illinois Appellate Lawyers Association, the Illinois State, Peoria County, and American Bar Associations, and a member of the ISBA Workers' Compensation Section Counsel.