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TIMING AS JURISDICTION: FEDERAL CIVIL APPEALS IN CONTEXT

EDWARD H. COOPER*

I

INTRODUCTION

The final judgment rule has defined the jurisdiction of the federal courts of appeals from the beginning. A truly final judgment signals the finish of all the proceedings intended to complete action by the trial court. Over the years, courts and Congress have continually expanded the list of occasions for appeal before a truly final judgment. The final judgment requirement has been supplemented by a list of elaborations, expansions, evasions, and outright exceptions that is dazzling in its complexity. Lawyers and judges who are expert in working with the system are able to identify the doctrinal rules and lines of argument, but often encounter elusive uncertainty in seeking clear answers to many problems. Those who are less than expert are apt to go far astray. Surely the time has come to inquire whether all this complexity can be simplified.

The purpose of these few pages is to show that the calculus of appeal timing is inherently complex. If we are to continue the effort to capture the calculus in rules, the rules will be correspondingly complex. The complex rules will have some virtues; nonetheless, the rules also are likely to generate misunderstanding and may tend to produce undesirable results. It is very tempting to replace the rules with a flexible system that relies largely on discretion to determine the occasions for appeal before a truly final judgment. Whether a flexible system has now become appropriate depends on the same institutional factors that make the calculus so complex. The best answer may be to adopt the framework for discretionary interlocutory appeals without yet abolishing present rules. As the discretionary system becomes more familiar, it should prove possible to discard many of the present rules in a gradual process of attrition.

The most direct components of the appeal timing calculus are so familiar as to require no more than a brief reminder. If review of a trial court ruling is postponed until the final judgment, serious consequences may ensue. As to matters that bear only on the conduct of the litigation, an error may so taint subsequent proceedings as to require reversal and further proceedings. The further proceedings may not only represent an expensive duplication of effort, but may themselves be distorted beyond repair by the events of the first trial. As to matters that have effects beyond the court proceedings, irreparable injury may occur—confidential information may be revealed, construction of a flood-control project delayed by an

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injunction, or the like. Immediate review of every trial court ruling, on the other hand, would impose impossible costs of disruption, delay, and expense. Even short of that extreme, frequent review may severely disrupt the trial process and impose significant costs on the courts of appeals as it becomes necessary to repeat time and again the task of becoming familiar with the case. The possible benefits of early review, moreover, are reduced by the prospect that justice often is done in particular cases without appellate review. Trial judges are more likely to be right than wrong, and the effects of many wrong rulings are dissipated by subsequent trial court proceedings. Loss of the need for review, however, may carry a cost that goes beyond the demands of the particular case, as appellate courts may be deprived of the opportunity to clarify and improve the law on matters that repeatedly evade review.

These competing concerns cannot be accommodated by a process of logical reasoning from unshakable premises about the nature of the appellate process. Instead, the structure of the relationships between trial courts and appellate courts must be rested on the lessons of experience. At times the lessons are clear and dramatic. For a few years, several courts of appeals were persuaded that appeal should lie from an order denying a motion to disqualify opposing counsel. Appeals proliferated, and with them suspicions that motions to disqualify had come to be prompted in part by purposes of delay or even harassment. Experience proved the appeal rule bad, and it was abandoned.

The most fundamental lessons of experience, however, are much less certain or compelling. These lessons depend on the very structure of the system at both trial and appellate court levels. They depend as well on the nature of the judges; many aspects of non-appeals law, both substantive and adjective; and the character of the bar. Because so many matters must be considered, there is ample room to disagree over the optimal timing of appeals. More important, the detailed rules of timing that are best today for the federal courts need not be best tomorrow for the federal courts, nor for any other courts either today or tomorrow. A wise system of timing depends on the full institutional context of a particular court system. The most important aspects that must be considered are set out below. Ultimately, the question must be whether these matters are so complex and so shifting that they cannot be contained in any set of elaborate rules—whether our institutions have matured to the point at which discretion can be substituted for some part of the rules.

II
INSTITUTIONAL FACTORS

A. The Role of the District Courts

Many of the institutional factors that must be weighed in shaping the timing of appeals involve the trial courts. The nature and quality of the federal district judges is the single most important factor to be counted. The better the judges are, the less need there is for frequent interlocutory appeal—they will make fewer mistakes, and more often correct their own mistakes before serious harm is done. In

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building a general appeal structure, moreover, the nature of the trial judges may affect the choice among alternatives in more subtle ways. Should trial judges prove to be much like appellate judges in ability and temperament, it is possible to rely on them to play a significant role in determining the need for interlocutory appeals. In the best circumstances, we might trust trial judges to view appellate judges as a resource to be invoked whenever immediate review promises to facilitate the speediest, most just, and most efficient disposition of litigation. To the extent that we do not trust trial judges, on the other hand, we will be driven to rely more on clear rules or on discretionary devices that are controlled by the courts of appeals.

The performance and role of district judges relates to the timing of appeals in another way as well. The authority, prestige, and self-confidence of trial judges are enhanced as the occasions for appeal are reduced. If we begin with a good corps of judges, the result of limiting the frequency of interlocutory review may be to make them better, and to ease the task of attracting the best people to the bench. In a happy cycle of mutual reinforcement, the result may be that we can rely ever more on trial judges in determining the best occasions for interlocutory appeals.

The performance of the district courts and the timing of appeals are further affected by the extent of the authority conferred on district courts by the scope of appellate review. Initially, the value of interlocutory appeals declines as the standard of review is restricted and the probability of reversal is diminished. It may seem that this result is simply incidental, and that the scope of review should be fixed by the comparative capacities of trial courts and appellate courts. Even on this approach, good trial courts may be accorded broad authority and discretion. Appellate courts, moreover, may conclude that their own limited resources are better devoted to settling general issues than to policing specific applications of law and procedure in specific cases. Whatever the reasons for deferring to the acts of district courts, it is again possible that a decision to adopt relatively narrow standards of review may trigger a self-reinforcing process. As good trial courts are entrusted with greater authority and discretion, their performance may improve still further, and the prospects of reversal will diminish even beyond the initial forecast based on the narrowed standard of review. In many ways, trial judges may make correct decisions precisely because we have willed it so by our interdependent rules for the timing and scope of appeals.

The formal rules of trial court procedure also must be considered in adjusting the timing of appeals to the institutional framework. Procedural rules of course depend on each of the three factors noted above—the character of the trial judges, the timing and frequency of appellate review, and the standards of review. Beyond these factors, the rules may be drawn with more or less specificity according to the confidence of the drafters in their own ability to give clear answers and in the ability of the trial judges and the trial bar to administer flexible rules with wisdom. The formal rules also should depend on the ability of appellate courts to improve on trial court rulings, whether on immediate appeal or on appeal after final judgment. The timing of appeals should depend in part on the

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nature of the formal rules, and in part on the question whether the formal rules are in fact well adapted to the real workings of the court system.

At least one more aspect of the trial court system must be counted in framing the appellate rules. The volume of litigation and the mix of different types of litigation may prove important in many ways. Federal courts encounter an increasing number of suits that involve difficult law and incredibly complex facts. One complete proceeding in these suits is almost too much. Yet they often pose multiple opportunities for error; if appeal is delayed to final judgment, there are great risks that reversal will entail absurd costs of relitigation or that affirmance will blink at serious error in order to avoid such absurd costs. Appeals rules that work well for ordinary litigation must depend in part on the frequency with which such suits occur. Special responses also may be appropriate because of a different feature of complex litigation: trial court proceedings often can be diverted to other matters while a particular issue is being appealed, with little or no loss to the overall progress of the case.

Quite apart from the incidence of complex litigation, appeals timing may depend on the overall caseload of the trial courts. Although it is not clear just what adjustments are appropriate, it is important at least to think about the needs of a system that may be burdened with more litigation than can be tried efficiently and well. The adjustments that prove wise will depend on experience, as it will be affected by the other factors that control appeal timing. If trial courts do well on their own, it may be possible to reduce the occasions for interlocutory appeal in order to avoid further delays in processing the general mass of litigation. If fully completed trial proceedings frequently encounter reversal, it may prove necessary to increase the occasions for interlocutory appeal. Increased interlocutory appeals will repay the inherent costs, however, only if it is possible to identify the most profitable occasions.

B. The Role of the Courts of Appeals

The character, structure, and procedure of the courts of appeals bear on the timing of appeals just as surely as those of the trial courts. Perhaps the most obvious factor is simply the limited number of appellate courts and judges. As appeal capacity becomes increasingly scarce, there are alternative strategies for response. One is to expand the number of appellate courts and judges. This strategy is subject to significant limits—it has proved difficult to administer a large bench within a single circuit, and expansion of the number of circuits reduces the opportunity for uniformity across sizeable regions. These limits might be altered if some new means of achieving uniformity were found, as perhaps by creation of a new court standing between the courts of appeals and the Supreme Court. Another strategy is to adjust the timing of appeals so as to place a higher value on scarce appellate time. Rules governing appeals thus cannot be set without making wise judgments about the present and probable future capacities of appellate courts.

The procedures of courts of appeals have been altered as yet another means of rationing their capacities. Old traditions of disposition by full-scale briefing, argu-

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ment, and opinion are giving way to settlement conferences, expedited submission, and disposition by order or informal opinion. As appellate procedures evolve, the courts may become increasingly adept at sorting out cases that require or deserve close attention. This process may make it possible to rely more and more on appellate discretion, even as to the timing of appeals. Open discretion can be substituted for efforts to use specific categories or elaborate doctrine to define the occasions suited for interlocutory appeal.

Just as trust in the district courts may affect the rules for timing appeals, so may trust in the courts of appeals. Appellate discretion can be relied upon more heavily if the judges can be trusted to weigh their capacities against the need for appeal not only rapidly, but well. The standard of review likewise is affected by the comparative capacities of the appellate courts. Review of matters of fact and trial procedure is particularly dependent on the ability of the appellate process and appellate judges to improve on trial court decisions. Whether the matter is seen as higher regard for trial courts or lower regard for appellate courts, a narrow standard of review continues to affect timing by reducing the probable value of interlocutory appeals.

Appellate procedures and capacities combine with the scope of review in at least one more way. It may be very useful to provide a means of interlocutory review that asks only whether an obvious and important mistake has been made. Extraordinary writ practice now serves this function, perhaps imperfectly. This function can be served more regularly and efficiently if appeals judges become reconciled to a very limited initial screening, and recognize that the same issues may need to be reviewed on the merits after final judgment.

C. The Role of the Bar

The obvious need to focus on the institutional character of the court system should not obscure the further need to consider the character of the litigating bar. The timing of appeals may have to depend on rules that are clear, simple, and rigid if it is not possible to rely on the learning, wisdom, and character of the lawyers who take appeals. Complex or discretionary rules carry high costs at the hands of an ignorant or supine bar—too many ill-timed appeals will be taken by lawyers who fear their own ignorance, simply do not know better, or submit to unworthy motives of delay or harassment. Complex rules can be tailored to special needs, however, if lawyers can be trained to understand them. Even more important, discretionary systems can be expanded if lawyers can be made to learn and share the policy judgments that inform the wise timing of appeals. With a very wise and well accultured appellate bar, rules of discretion might satisfy all needs for interlocutory review. The character of the bar, finally, is not entirely independent of appellate practices. A surprising level of self-education and restraint might be induced by imposing substantial sanctions for ill-founded interlocutory appeals. Such sanctions could easily include payment of opponents' attorney fees without significantly diluting the values many find in the traditional rule against taxing fees as costs. Another sanction that might speak directly to a

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common motive for delay by appeal would allow full interest rates for any extension of the time of judgment and collection.

III

INTERACTION OF THE TIMING OF APPEALS WITH SPECIFIC LEGAL ISSUES

These general institutional factors may seem to provide quite enough confusion, standing alone and in abstract statement. Unfortunately, they cannot be considered alone. The value of interlocutory appeal varies according to the substantive and procedural issues decided by the trial court. It may be more important to achieve prompt correction of errors as to some matters of substance or procedure than others, and errors may be more likely in some areas than others.

A. Substantive Law

As to matters of substance, mistaken trial court rulings may have effects that go far beyond the mere conduct of litigation. Among the most common examples are preliminary injunctions, discovery rulings that force release of confidential information, and adjustment of the relations between judicial proceedings and arbitration. Even if the mistake affects only the conduct of the litigation, it is not possible to accept uncritically the conclusion that the burden of wasted trial proceedings is always an appropriate price to pay for strict adherence to the final judgment rule. Some substantive principles may override the general calculation. Absolute immunity doctrines, for example, may be designed to protect against the burden of litigation as well as the risk of liability; if so, appeal should be available from denial of motions to dismiss or for summary judgment.

The substantive impact of possible error may seem so clear as to warrant a routine right of interlocutory appeal in some circumstances. The right to appeal the grant or denial of preliminary injunctions is the clearest example provided by present practice. Other substantive values may require careful reflection on the lessons of experience in shaping appellate jurisdiction. Whether it is desirable to review a refusal to stay court proceedings pending arbitration, for example, depends in part on the perceived values of arbitration. Special appellate protection may be required to the extent that arbitration, because it can be quicker, cheaper, and better attuned to real-world needs than court-administered law, is perceived as a valuable alternative to court proceedings.

Substantive law deserves consideration in ways that go beyond the intrinsic importance of possible errors. Trial judges may be unusually prone to err in some areas. Refusals to stay proceedings pending arbitration, for example, might often result from distrust of arbitration and parochial confidence in the court's own procedures. Other areas may offer special opportunities for appellate development of new or complex law. For example, in their early formative years broad new schemes of regulatory or social legislation may warrant a pattern of relationships between trial and appellate courts that is quite different from the relationships that are appropriate in more familiar areas of law.

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B. Procedural Law

Procedural rulings require the same distinctions as substantive rulings. Some matters of procedure involve more serious consequences or greater probability of error than others. Important procedural innovations may warrant special patterns of review during the early years. All of these concerns are shown in the intense pressures that have shaped appeals with respect to class action rulings. Grant or denial of class certification may have incalculable consequences for the conduct of a suit. Attitudes toward class actions have covered the spectrum from open hostility to warm embrace, and identifiable doctrinal issues have generated frequent disagreements. It could be particularly beneficial to develop a pattern of relatively permissive interlocutory appeal while class action procedure is growing and changing, and to shift away as it evolves toward maturity.

IV

CONCLUSIONS AND RECOMMENDATIONS

All of these concerns of institutional structure, lawyerly competence, substance, and procedure may seem confusing and often contradictory. Perversely, they must be brought to a conclusion that accommodates remaining institutional needs. It is important that the rules for timing appeals be clear and well understood. It is also important to avoid foolish forfeitures. Once a case has been submitted to an appellate court, the court should not refuse to decide simply on the ground that some mistake of timing has deprived it of "jurisdiction." Decision may be refused, but only if that course protects a proper relationship between courts for the particular case. To the extent that special protective opportunities are afforded for interlocutory appeals, failure to seize the opportunity should not by itself defeat the right to later review.

The best means for combining all of these needs remain uncertain. The final judgment rule remains the point of departure for federal courts, but many extended flights have taken off from this point. Absolute rights to interlocutory review have been recognized by statute in some areas. Elaborations of the final judgment rule have generated rights of interlocutory review that are nearly absolute in some areas, and are subject to broad appellate discretion in others. Trial court discretion has been invoked through procedures for achieving finality as to portions of multiclaim or multiparty litigation, and through procedures for interlocutory appeal by certification. Appellate court discretion has been invoked through the procedure for interlocutory appeal by certification, and through extraordinary writ practice. This process has achieved substantial flexibility to respond to special needs, and has retained clear rules for most of the matters that are involved in most litigation. On the other hand, it may waste too much time in preliminary arguments on jurisdiction, generate ill-founded appeals that rest on uncertainty or ignorance, and formulate opportunities for appeal that outlast any useful life. If by luck or design federal courts have hit upon the best possible rules for today, they must remain alert to change them as time marches on. And state

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courts can scarcely hope to benefit from the specific rules, which must depend on the peculiar problems of the federal courts.

Inevitably, the time will come for a far simpler structure. Many adjective doctrines have been transformed successfully from rule to discretion. The special rules and complicating doctrines that now litter the landscape of appellate jurisdiction will be discarded when our institutions are ready for a more openly discretionary system of interlocutory appeal. The most likely shape of the reform is relatively simple. The present procedures for interlocutory appeal by certification of the district court and application to the court of appeals can be simplified and combined with extraordinary writ practice. The occasionally stultifying limits on current certification standards will be removed. Application for certification by the district court should be required, absent a strong showing of reasons for immediate application to the court of appeals. Once the district court has granted or denied certification, application can be made to the court of appeals. The decision by the court of appeals whether to permit an extraordinary interlocutory appeal would depend entirely on its discretion. During a transitional period, it might prove desirable to retain some provisions for interlocutory appeal as a matter of right; preliminary injunction rulings provide the most attractive example. Eventually, however, it might be possible to discard even these provisions and to rely on discretionary doctrines as the sole supplement to appeal of genuinely final judgments.

A much simpler structure of this sort, depending on discretion, could accommodate admirably the shifting needs of substance, procedure, and institutional capacities. As attractive as the structure may seem, however, it must be remembered that it depends on elusive institutional judgments. If lawyers cannot be educated in the calculus of interlocutory appeal and disciplined to honor it, the simple system could break down. So too, much will depend on wise administration by the courts of appeals. They must perfect the ability to react quickly and well to a large number of applications for appeal. Perhaps the safest course is also the simplest. The framework for discretionary appeals can be created without directly undoing the elaborate doctrines we now have. If the discretionary system proves successful, the alternative intricacies of current doctrine should wither away.

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