15A Fed. Prac. & Proc. Juris. § 3914.10 (2d ed.)

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Jurisdiction And Related Matters
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Jurisdiction and Related Matters
Chapter 9. Jurisdiction Of The Courts Of Appeals
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B. Final Judgment Rule

§ 3914.10 Finality—Orders Prior to Trial—Immunity Appeals

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Appeals from pretrial orders refusing to terminate proceedings on the basis of a claimed immunity have generated significant complexities and confusions. These complexities and confusions surround a core that remains clear, at least for the time being. Public officials are entitled to appeal denial of motions to dismiss or for summary judgment that rest on an asserted official immunity, at least to the extent that pure questions of law are raised. How far appeal is permitted as the dispute becomes increasingly factual is less clear. The scope of review also is disputed, both as to matters of fact bearing on the immunity defense and as to questions that do not go directly to immunity but are related to it. Several other matters involving the right to appeal are likewise uncertain, various incidents of the right remain unresolved, and trouble has been encountered in identifying the nature of other assertions of "immunity" that might be treated in the same way as official immunity. All of these difficulties arise from a conflict between the desire to bolster the benefits of immunity to include protection against the burdens of pretrial proceedings and trial and the desire to meet the ordinary needs of an appeals system built around the final judgment rule. The resolution of these difficulties may change with time, and eventually may lead to reconsideration of the basic right to appeal.

The story of immunity appeals can begin with Nixon v. Fitzgerald.[1] Suit was brought by a management analyst for the Air Force, claiming damages for termination of his employment. Former President Nixon asserted a defense of absolute immunity by motion for summary judgment, which was denied. The Supreme Court held that the collateral order doctrine justified appeal. Reliance was placed on two decisions that allowed criminal defendants to appeal denial of pretrial motions to dismiss on the basis of double jeopardy[2] or the protection conferred on a member of Congress by the Speech or Debate Clause.[3] In addition, the Court relied on decisions of the Court of Appeals for the District of Columbia Circuit allowing civil defendants to appeal pretrial denials of absolute immunity defenses.[4] Perhaps because the Nixon case came from the District of Columbia Circuit, the Court then focused entirely on the question whether the appeal raised a serious and unsettled question of law, believing that the appeal had been dismissed for want of such a question. The Court concluded that the case did present a serious and unsettled "and therefore appealable question."[5]

In the wake of the Nixon decision, a number of cases have allowed appeals from orders denying motions to dismiss or for summary judgment based on absolute immunity, whether asserted by public or private defendants.[6] Appeal also has been permitted from an order granting summary judgment for the plaintiff, finally rejecting a defense of absolute immunity.[7] The Supreme Court has summarized the Nixon decision in terms that might suggest that there is a right to appeal without regard to the niceties that have grown up around qualified immunity appeals,[8] and it has been suggested

Whether or not courts find a way to limit a defendant to one immunity appeal, the appeal must be taken within the time allowed by the Appellate Rules following entry of the order appealed. [65] If no appeal is taken from the first order that might be appealed, the same immunity issue may be raised on appeal from a later order, and in any event is subject to review on appeal from the final judgment. [66] At the same time, once trial has been had the availability of official immunity should be determined by the trial record, not the pleadings nor the summary judgment record. [66.50] Failure to take an available collateral order appeal ordinarily does not defeat the right to review, and surely it should be possible for the defendant to conclude that the relative costs and prospects of success on immediate appeal are not as attractive as the costs and prospects of success at trial. At the same time, once trial has been had the availability of official immunity should be determined by the trial record, not the pleadings nor the summary judgment record. The allocation of issues between judge and jury on a post-trial appeal remains a matter of some genuine confusion. [66.75] Cross-appeals should be allowed as to matters closely related to the immunity appeal, although not otherwise appealable, so long as there is no significant increase in the delay and disruption caused by the appeal and the matters presented by cross-appeal are ripe for decision. [67]

Since an immunity appeal is allowed in order to protect against the burdens of trial, ordinarily the district court should not proceed to trial, nor even impose substantial pretrial burdens, pending appeal. "It makes no sense for trial to go forward while the court of appeals cogitates on whether there should be one." [68] Although this rule departs from the ordinary rule that the district court can continue toward trial pending a collateral order appeal, [69] immunity appeals seldom involve matters collateral to the merits and depend on the special purpose to protect officials against the burdens of trial rather than ordinary collateral order doctrine. In keeping with ordinary appeal rules, moreover, the district court may reconsider the order involved in the appeal but lacks power to vacate the order absent permission from the court of appeals. [70] One carefully reasoned opinion has even concluded that the district court cannot permit amendment of the complaint while an immunity appeal from denial of a motion to dismiss remains pending. [70.5]

Quite a different question is presented by the ruling that the district court cannot grant summary judgment for the defendant on a motion made by the defendant during the pendency of the defendant's appeal from denial of an official-immunity motion to dismiss. The court recognized that this rule does not fit comfortably with the purpose of the collateral-order reasoning that supports the appeal. If the defendant asks that the district court continue with the action pending appeal, hoping for a favorable determination that might finally resolve the entire dispute, there is no apparent reason to "protect" the defendant by ruling that the appeal ousts district-court jurisdiction. Nonetheless, the court relied on the theory that an appeal does not simply weigh against continuing district-court proceedings as a matter of efficiency and protection for the appellant. Instead, "[t]he filing of the notice of appeal was an event of jurisdictional significance, which divested the district court from granting further relief concerning the issues on appeal." [70.6] In some ways this ruling seems unduly formalistic. The court recognized the advantages of allowing district-court consideration by noting that the defendants could have asked it to remand for consideration of their motion. That opportunity goes part way toward efficient integration of proceedings in the two courts. But it would be better to adopt a more cooperative procedure. The district court should have authority, if it wishes, to consider the defendant-appellant's motion to the point of either denying it or of stating that it would welcome a remand to enable it either to grant the motion or to consider it fully. This procedure would track the approach commonly taken when a motion is made to vacate a judgment pending on appeal, and for obviously good reason. It will be expressly authorized if the Supreme Court adopts proposed new Civil Rule 62.1, published for comment in August 2007. In the interim, a district court should feel free to adopt the same procedure by analogy to the procedure on motion to vacate.

On the other hand, there is a risk that the appeal may be frivolous, or reflect manipulative use of the asserted immunity defense for purposes of delay. In announcing the general rule that the district court should not proceed to trial pending appeal, the Court of Appeals for the Seventh Circuit has added the qualification that the district court may proceed

to trial if it certifies that the appeal is frivolous or that the defendant has surrendered the right to pretrial appeal by "play[ing] games with the district court's schedule." [71]

Complex questions are presented when one defendant takes an official-immunity appeal but other defendants do not and often cannot. There may be good reasons to continue proceedings as to the defendants not involved with the appeal. But the continued proceedings may impose significant burdens on the defendant who has appealed. It may prove possible to allow continued proceedings, weighing the importance of the reasons for pressing ahead in the trial court against the burdens imposed on the appealing defendant. Continued proceedings may be most attractive when the burdens approach those that may be imposed on a nonparty—a good example is discovery, even if the means chosen are available only against a party. [71.6]

The principle recognized in the cases dealing with absolute and qualified official immunity could easily be extended in many directions. To support collateral-order appeal, an immunity claim must be more than colorable—it must be substantial. [71.7] With respect to public officials themselves, the theory that immunity is intended to protect against the burdens of trial preparation as well as the burdens of trial might be expanded to justify discovery appeals. This expansion is not likely to occur. Courts are understandably wary of opening the doors to frequent appeals from discovery orders. [72] Public officials who are not parties to the litigation likely will have to seek other paths of appeal, even if there is a plausible claim of immunity from the very discovery ordered by the district court. [73] Even public officials who are parties and who can invoke immunity against liability should not be able to justify appeal from discovery orders by arguing that the discovery itself imposes a burden that violates the policies of official immunity. [74] Appeal from orders dealing directly with the immunity defense ordinarily is sufficient. In some circumstances, however, it may be proper to allow appeal if the defendant can show that it is possible to secure meaningful reductions in the burdens of discovery by limiting discovery to specific issues that bear on the immunity defense. [75]

The Federal Employees Liability Reform and Tort Compensation Act of 1988, "commonly known as the Westfall Act," grants absolute immunity to a federal employee against common-law tort claims arising from acts within the scope of federal office or employment. One feature of the Act provides that if the Attorney General certifies that the employee was acting within the scope of office or employment, the United States is substituted as defendant. The Supreme Court has ruled, in line with the unanimous view of the courts of appeals, that the certification and substitution is "designed to immunize covered federal employees not simply from liability, but from suit." An order rejecting the Attorney General's certification is appealable as a collateral order. [75.5] The Court has ruled, however, that appeal cannot be taken from denial of a motion to dismiss an action against individual government employees that invokes the statutory bar arising from dismissal of an action against the United States under the Federal Tort Claims Act for the same acts. [75.6]

Extension of immunity appeal theory beyond public officials claiming absolute or qualified immunity is a chancy process. Part of the problem stems from the choice to refer to the circumstances that justify immediate appeal as involving a right not to stand trial. Many interests can cogently be described as establishing a right not to stand trial. As noted repeatedly in earlier sections, immunity from service of process or a lack of personal jurisdiction would be characterized by many observers as establishing a right not to be tried. Yet in Van Cauwenberghe v. Biard [76] the Supreme Court ruled that the principle of the immunity appeal cases does not apply. It assumed that the defendant, who had been served with process in a civil action while in the United States because of extradition from Switzerland for a criminal prosecution, had stated a plausible claim of immunity under the extradition treaty and under the "principle of specialty." It concluded, however, that immunity from service of process serves the same purpose as the rules that limit personal jurisdiction. These rules are designed to protect against entry of a binding judgment, not the burdens of submitting to trial. Appeal from a final judgment can protect against an inappropriate exercise of power. The result seems sound; the rule that appeal cannot be taken from denial of a motion to dismiss for want of personal jurisdiction has been long established, has served well,

Penalty dismissal

The rule that the district court lacks jurisdiction pending appeal from denial of an official immunity summary judgment motion extends to defeat its power to dismiss the plaintiffs' claims for failure to file a timely joint pretrial order. The dismissal was void, and must be set aside on motion under Civil Rule 60(b)(4) even though the better remedy would have been to appeal the dismissal. Williams v. Brooks, C.A.5th, 1993, 996 F.2d 728, on remand D.C.Tex.1994, 862 F.Supp. 151, affirmed C.A.5th, 1995, 71 F.3d 502.

69 **Ordinary rule**

The conclusion that ordinarily trial court proceedings can continue pending a collateral order appeal is explored in § 3911.

70 **Cannot vacate**

An order denying a motion to dismiss on the basis of absolute judicial immunity was properly appealed. Because the appeal was proper, the district court lacked jurisdiction to reconsider the order and grant dismissal. Venen v. Sweet, C.A.3d, 1985, 758 F.2d 117.

70.5 **No amendment**

While appeal from denial of the motion to dismiss was pending, the district court twice granted leave to amend the complaint. The amended complaints "are nullities." The purpose of an immunity appeal is to protect the defendant against the burdens of pretrial proceedings as well as the burdens of trial. To permit amendment while the appeal is pending could moot the appeal, forcing remand for further proceedings. "[U]nlike certain other interlocutory appeals, a[n immunity] appeal is not the sort of discrete and ancillary matter that can be decided in isolation from the remainder of the case against the public official in his or her individual capacity." Amendment of the complaint imposes burdens on the defendant, such as filing an answer or motion to dismiss, and perhaps appeal from an unfavorable disposition. Decision of the appeal on the basis of the complaint as it stood at the time of the ruling on the motion to dismiss can shape the course of any further proceedings on remand. Successive appeals, moreover, are not common—the incentives for the defendant are to defer appeal until there is little risk that reason will be shown to permit amending the complaint. And if the appeal is merely colorable, trial-court proceedings can continue. May v. Sheahan, C.A.7th, 2000, 226 F.3d 876, 879–881.

70.6 **Defendant's motion pending appeal**

Walker v. City of Orem, C.A.10th, 2006, 451 F.3d 1139, 1145–1147.

71 **Frivolous appeal**

Apostol v. Gallion, note 68 above. The court drew directly from the procedures adopted for frivolous double jeopardy appeals. See § 3918.5.

The district court certified the immunity appeal as frivolous and the court of appeals denied the defendant's motion for a stay. Trial led to a verdict for the plaintiff. The appeal from denial of summary judgment was dismissed as moot. The purpose of allowing an interlocutory immunity appeal is to protect against the burdens of trial. The time to do that had passed. For that matter, the only issue argued in the defendant's opening brief on appeal was that there was no constitutional violation, an issue now decided by the verdict. "[W]e will not entertain a pre-judgment qualified immunity appeal asking us to decide the same question a jury has already decided." Review of the jury verdict could be had by appealing after final judgment is entered. Padgett v. Wright, 587 F.3d 983, 986 (9th Cir. 2009).

The district court denied summary judgment on November 26 and set trial for December 2. Counsel for the defendants failed to appear on December 2; the district court rejected the proffered excuse, imposed sanctions, and rescheduled the trial for December 3. At 4:48 p.m. on December 2 the defendants filed a notice of appeal and asked the district court to stay further proceedings; at some time on December 2 they also asked the court of appeals for a stay. The court of appeals denied a stay. Trial began on December 3. The court of appeals denied the defendants' motion to reconsider the stay on December 6, requesting the district court to make an express ruling on the stay motion. On December 6, after closing arguments and jury instructions, the district court denied the stay, stating that there was no basis for the appeal and certifying that the appeal was frivolous. The attempted immunity appeal did

not oust the district court's jurisdiction. Several circuits have followed the Seventh Circuit's lead in adopting a procedure that allows the district court to proceed to trial if it certifies that an immunity appeal is frivolous. Those courts "have held or implied that the district court's act of filing the certification of frivolousness is an event of jurisdictional significance." But it was not necessary to decide whether to adopt the certification procedure, whatever its merits may be. The case fell into the independent rule that a patently meritless appeal does not divest district-court jurisdiction. Immunity was denied on the ground that there were genuine issues of fact whether the defendant mayor fired the plaintiff for political reasons. The underlying First Amendment theory clearly depends on motivation, a question of fact. The asserted legal basis for appeal was clearly foreclosed. The sequence of events, moreover, betrayed the frivolousness of the appeal. "The timing and haste of the … notice of appeal reveals its intended purpose —to cloak a request for postponement in" immunity appeal raiments. Rivera-Torres v. Ortiz Velez, C.A.1st, 2003, 341 F.3d 86, 93–98.

In Williams v. Mehra, C.A.6th, 1998, 135 F.3d 1105, 1110–1111, rehearing granted, opinion vacated C.A. 6th, 1998, 144 F.3d 428, the court noted that after denying official-immunity summary judgment, the district court "denied certification of the appeal as frivolous," and the court of appeals "granted that appeal …."

The order certifying an official immunity appeal as frivolous and refusing to stay further trial-court proceedings is not itself appealable. Appellants should seek a stay from the district court, and then a discretionary stay from the court of appeals. This course was not followed. The damage was limited, however, because the trial court went on to grant summary judgment for the plaintiffs on a central issue and then withdrew its certification as frivolous. Marks v. Clarke, C.A.9th, 1996, 102 F.3d 1012, 1017, certiorari denied 118 S.Ct. 264, 522 U.S. 907, 139 L.Ed.2d 190.

Chief Judge Posner explored the procedures incident to frivolous immunity appeals in Chan v. Wodnicki, C.A.7th, 1995, 67 F.3d 137. The defendant police official appealed denial of an official-immunity motion for summary judgment. The district court certified the appeal as frivolous and the court of appeals denied a motion to stay the trial. The defendant was held liable. While postjudgment motions remained pending, the official asked to suspend briefing of the immunity appeal. The court responded by dismissing the appeal. It began with the premise that "[a] frivolous appeal is a nullity …; it does not engage the jurisdiction of the court of appeals …; and this is as true of an appeal from a denial of immunity as of any other appeal." The court of appeals order refusing to stay trial, however, did not represent a determination that the appeal was frivolous; it only exercised discretion by refusing to delay trial in a case that had endured for four years and was but four days away from trial. The appeal, however, had become moot. The purpose of the pretrial appeal is to protect against the burden of trial; that possibility had vanished. The purpose of immunity to protect against liability remained, but it could be resolved on appeal from the judgment that might be entered after disposition of the postjudgment motions.

A tantalizing order is reported in Dickerson v. McClellan, C.A.6th, 1994, 37 F.3d 251. After the defendants appealed denial of their official immunity defense, the district court certified that the appeal was frivolous and directed that the notice of appeal be dismissed. The reported order ruled that the attempt to dismiss the notice of appeal was beyond the district court's power, and that the appeal would continue on the court of appeals docket. It also noted that the court had disposed separately of the motions to reverse the determination that the appeal was frivolous and to supplement the appellate record with evidence produced at trial.

The magistrate judge certified that the appeal from his order denying dismissal on official immunity grounds was frivolous and proceeded to trial. The court of appeals denied the defendants' motion to stay the trial. On appeal from judgment against the defendants after trial, the court of appeals refused to set aside the judgment because it was entered pending appeal. The power to certify the frivolity of an immunity appeal should be used with restraint. The court of appeals could not confidently pronounce that the appeal was frivolous. But the determination should be made in the first instance by the district court. In light of the court of

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