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Appellate Practice and Procedure

by William M. Droze*
and
Cynthia Honssinger Frank**

I. INTRODUCTION

Appellate practice and procedure in the Eleventh Circuit during 1992, consistent with previous years, has produced a number of interesting cases and is often a reflection of the attitudes of the panel considering the appeal. In one instance, despite lacking appellate jurisdiction due to the absence of a final order, the panel invited the parties to obtain the required certification from the district court in order to perfect the appeal.1 In another, the panel delivered stinging criticism to the district court for creating a policy that restricted the ability of parties to file summary judgment motions.2

The court expanded its jurisdiction under the collateral order doctrine to include litigation over agreements to forego litigation, and addressed, for the first time, the appealability of settlement bar orders entered in complex class action lawsuits. This Article discusses the varying standards of review that the court of appeals applied to its cases during the past year. These cases may be extremely helpful in formulating the required portion of appellate briefs dealing with the applicable standard.

II. FINALITY OF ORDERS AS A PREREQUISITE TO APPEAL AND APPLICATION OF THE COLLATERAL ORDER/COHEN DOCTRINE TO INTERLOCUTORY ORDERS

Decisions of the federal district courts are expressly made reviewable by statute. The courts of appeal derive their jurisdiction to review final

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1. 958 F.2d 1036 (11th Cir. 1992).
2. 960 F.2d 1002 (11th Cir. 1992).

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orders from 28 U.S.C. § 1291 (the "Code"). Finality of an order is generally an inescapable precursor to appeal under the statute. However, in an interesting exercise of discretion last year, the court of appeals in Penton v. Pompano Construction Co., declined to dismiss an appeal for lack of a final order. Acknowledging that it was without jurisdiction of the appeal, the court nevertheless opted to allow the parties thirty days to obtain entry of a final appealable judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. If the district court entered the order, and the parties still desired an appeal, the court indicated that it would consolidate the two appeals, dismiss the existing appeal, and dispose of the new appeal on the merits. Attention to judicial economy best explains the court’s handling of the appeal in this unique manner.

In 1992, the court of appeals also examined the finality of a dismissal without prejudice for failure of the litigant to exhaust administrative remedies. As a general rule, when a district court dismisses a case without prejudice for failure to exhaust administrative remedies, the order is final for purposes of appeal. The district court in Kobleur v. Group Hospitalization & Medical Services, issued an order that it would retain jurisdiction of the case while the administrative remedies were pursued, but that the case would be closed for statistical purposes. Although the appellee moved to dismiss the appeal for lack of a final order, the court of appeals adhered to the general rule without regard to the district court’s retention of jurisdiction. The court held that since the effect of the lower court’s order was to deny the litigants judicial relief until their administrative remedies had been exhausted, this case was no different than others fall-

3. 28 U.S.C. § 1291 (1988). Entry of a judgment pursuant to the Federal Rules of Civil Procedure would appear to be the equivalent of a final decision authorizing an appeal. Bankers Trust Co. v. Mallis, 435 U.S. 381, reh’g denied, 436 U.S. 915 (1978). An order dismissing a lawsuit may possess the requisite finality, even if leave to amend has been granted, provided that the time for the amendment has lapsed. Brehler v. City of Miami, 926 F.2d 1001, 1002 (11th Cir. 1991). Further, the court of appeals may also have jurisdiction of an appeal when the district court directs the entry of final judgment as to one or more but fewer than all the claims or parties under rule 54(b) of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 54(b) (1990). The appellate courts give substantial deference to the district court’s discretionary determination of finality under the rule. Pitney Bowes, Inc. v. Mestre, 701 F.2d 1365 (11th Cir. 1983), reh’g denied, 706 F.2d 318 (11th Cir. 1983), cert. denied, 464 U.S. 893 (1983).
4. 963 F.2d 321 (11th Cir. 1992).
5. Id. at 322.
7. Id.
9. Id.
10. Id.
The Code treats interlocutory orders differently from final orders. In reviewing interlocutory orders, the courts of appeal are guided by the statutory provisions in 28 U.S.C. § 1292. Certain types of orders are subject to appeal simply upon entry of the interlocutory order. Orders falling outside the enumerated types may also be subject to review provided that the litigants obtain permission from both the district court and the court of appeals.

Notwithstanding the statutory prerequisites to the appeal of interlocutory orders, the judicially created collateral order doctrine may also impact the reviewability of an order. In Cohen v. Beneficial Industrial Loan Corp., the Supreme Court established an exception to the finality rule in cases where a district court determines claims of right that are collateral to the rights asserted in the action and too independent of the asserted rights to justify postponing appellate review. The collateral order doctrine applies only when an order meets the following criteria: 

1. it conclusively determines the disputed question;
2. it resolves an important issue completely separate from the merits of the action; and
3. it is effectively unreviewable on appeal from a final judgment.

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1. Id. (citing Pittsburgh & Midway Coal Mining Co. v. Yazzie, 909 F.2d 1387, 1389 n.1 (10th Cir.), cert. denied, 498 U.S. 1012 (1990)); United States v. Orr Water Pitch Co., 914 F.2d 1302, 1306-07 (9th Cir. 1990); Klen v. Heckler, 761 F.2d 1304, 1305 (9th Cir. 1985); Penny v. Southwestern Bell Tel. Co., 906 F.2d 183 (5th Cir. 1990); Hochman v. Board of Educ., 534 F.2d 1094, 1096 (3d Cir. 1976); 15 CHARLES ALAN WRIGHT ET AL., WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2nd § 3914 (1991).
3. Interlocutory orders subject to appeal include those granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except when direct review is available in the Supreme Court. 28 U.S.C. § 1292(a)(1). The appellate courts may review interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposal of property. Id. § 1292(a)(2). Finally, the courts of appeal may review interlocutory decrees that determine the rights and liabilities of the parties to admiralty cases in which appeal from final decrees are allowed. Id. § 1292(a)(3).
4. 28 U.S.C. § 1292(b). In order to obtain permission, a litigant must show that there exists a substantial ground for difference of opinion and that an immediate appeal would materially advance the ultimate resolution of the litigation. Id. Failure to seek permission from the appellate court within ten days after entry of the order complained of is fatal to the interlocutory appeal. Jones v. Goodyear Tire & Rubber Co., 967 F.2d 514, 516 (11th Cir. 1992). Seeking an interlocutory appeal under this statute does not stay proceedings in the district court unless so ordered by that court or the court of appeals. 28 U.S.C. § 1292(b).
5. 337 U.S. 541 (1949).
6. Id. at 546.
One area of practice that frequently utilizes the collateral order doctrine is a district court's determination of the availability of immunity to a public official. The immunities subject to the collateral order doctrine and immediate review include qualified immunity and absolute immunity. Such decisions are immediately appealable under the collateral order doctrine. This exception to the finality rule assures that a public official does not lose his right to be free of the burden of litigation for official acts.

Currently a split exists in the federal circuits as to whether a denial of Eleventh Amendment immunity is an immediately reviewable collateral order. Thus far, the court of appeals has declined to resolve the dispute for the Eleventh Circuit. In Schmelz v. Monroe County, the court cited judicial economy as a basis for exercising pendent jurisdiction over an Eleventh Amendment issue. According to the panel, since jurisdiction could already be predicated on the collateral order doctrine by virtue of the qualified immunity defense, consideration of the additional defense could put an end to the federal aspects of the case. Consequently, the court accepted jurisdiction of what arguably was a nonappealable claim.

an order on a motion to modify a prior confidentiality decision did not meet the first criterion in that it did not conclusively determine the disputed question. 967 F.2d at 516.


19. Hardin v. Hayes, 957 F.2d 845, 848 (11th Cir. 1992); Wright v. Whiddon, 951 F.2d 297, 299 (11th Cir. 1992). In Stone v. Peacock, 968 F.2d 1163 (11th Cir. 1992), the court clarified that the defense of qualified immunity should be decided by the court either before trial, during trial, or after trial, and should not be submitted to the jury for determination. However, giving jury instructions on the defense does not necessarily demand reversal when the jury decides the case on the merits, or objection to the instructions is omitted. Id. at 1165-66; Hancock v. Hobbs, 967 F.2d 462, 469 (11th Cir. 1992).


21. U.S. Const. amend. XI.

22. Stewart v. Baldwin County Bd. of Educ., 908 F.2d 1499, 1508 (11th Cir. 1990). In Stewart the court of appeals elected not to resolve this dispute and opted instead to utilize its pendent jurisdiction to consider whether the eleventh amendment afforded immunity to the school board, board members, and superintendent. Id. at 1509. The court held that an adequate jurisdictional basis existed when a qualified immunity defense was also raised. Id. at 1502, 1509.

23. 954 F.2d 1540 (11th Cir. 1992).

24. U.S. Const. amend. XI.

25. 954 F.2d at 1543.
However, except in limited circumstances, the court has not gone so far as to suggest that judicial economy allowed consideration of state law issues while resolving a qualified immunity appeal. In Moore v. Gwinnett County, the court of appeals considered whether a police officer was entitled to qualified immunity. The district court denied summary judgment on that issue as well as to certain state law claims advanced by the plaintiff. The court of appeals reversed the trial court on the question of qualified immunity, but made no ruling on denial of summary judgment as to the state law claims. According to the opinion, that portion of the order was unappealable.

The court has applied the collateral order doctrine to state law immunity questions that are in reality an immunity from suit, not just a substantive defense to liability. In Griesel v. Hamlin, a wrongful death action was initiated against an emergency medical technician. The district court had jurisdiction of the claim by virtue of diversity of citizenship. The defendant asserted that sovereign immunity barred the claim, but the district court disagreed. In determining whether to allow an interlocutory appeal, the court of appeals followed the lead of the Second Circuit and held that the collateral order doctrine applied. According to the opinion, substantive state law governs the application of immunity to state law claims, but federal law determines the appealability of the district court’s order. Applying federal law, the court allowed the appeal finding that the Cohen criteria had been met because the state law immunity was from suit, not just substantive liability.

A public official’s immunity from suit is typically presented in the form of a motion for summary judgment, but may also arise in a motion to dismiss for failure to state a claim or a motion for judgment on the pleadings. Regardless of the procedural vehicle raising the immunity defense,
the court of appeals has recognized that its panel decisions have been confusing, and possibly conflicting, in deciding the circumstances under which jurisdiction exists to consider the availability of immunity. The controversy centers around the impact that disputed facts have on the jurisdiction of the appellate court. The most recent expression of the court on the issue, *Burrell v. Board of Trustees of Georgia Military College,* provides that "the mere existence of a factual quarrel does not affect the appealability of a denial of qualified immunity." While the Eleventh Circuit anxiously awaits the en banc case that will finally decide the question, basing jurisdictional decisions upon factual development of the record allows for result-oriented decisions and trivializes the immunity made available to public officials. The approach taken in *Burrell* is the preferable result.

*Burrell* also reiterated the principle, recently established by the court, that a denial of qualified immunity remains immediately appealable even when the public official would still have to stand trial as to equitable claims. The court previously opined that a reduction of the number of claims that a public official faced at trial furnished a sufficient reason for

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36. Williams v. City of Albany, 936 F.2d 1256, 1259 (11th Cir. 1991). Compare Peppers v. Coates, 887 F.2d 1493, 1496-97 & n.7 (11th Cir. 1989) (holding factual dispute precludes immediate review) and Goddard v. Urrea, 847 F.2d 765, 769 (11th Cir. 1988) (same), with McDaniel v. Woodard, 886 F.2d 311 (11th Cir. 1989) (order immediately appealable despite factual dispute as to conduct) and Rich v. Dollar, 841 F.2d 1558, 1561 (11th Cir. 1988) (same). An opportunity to resolve this conflict was lost when Horlock v. Georgia Dep't of Human Resources, 890 F.2d 388 (11th Cir. 1989), settled prior to rehearing en banc. See Howell v. Evans, 922 F.2d 712, 717 n.3, *vacated as moot,* 931 F.2d 718 (11th Cir. 1992). Further discussion of the conflicting cases is found in the concurring opinion of Chief Judge Tjoflat in Bennett v. Parker, 898 F.2d 1530, 1535-38 (11th Cir. 1990), *cert. denied,* 111 S. Ct. 1003 (1991).

37. 970 F.2d 785 (11th Cir.), *reh'g and reh'g en banc denied,* 978 F.2d 718 (1992).

38. 970 F.2d at 787-88.

39. *Id.*

40. *Id.*

41. Green v. Brantley, 941 F.2d 1146 (11th Cir. 1991) (en banc). Qualified immunity does not protect officials from equitable claims. Marx v. Gumbinner, 855 F.2d 783, 787 (11th Cir. 1988), *abrogated on other grounds,* 111 S. Ct. 1934 (1991). A panel of the court in Green v. Brantley, 895 F.2d 1387 (11th Cir. 1990), dismissed an appeal based on qualified immunity stating that since the public official would stand trial on the equitable claims regardless of the outcome of the qualified immunity decision, no reason existed to hear the appeal. The en banc court in Green v. Brantley, 941 F.2d 1146 (11th Cir. 1991), disagreed with the panel and allowed the appeal. According to the en banc opinion, dismissing the appeal due to the
allowing an appeal even though it might not be dispositive of the entire case.\textsuperscript{43} Although the panel relied upon its recent decision to permit the appeal, it also pointed out that the particular defendants involved were not all subject to the remaining equitable claims providing further support for allowing the appeal despite such claims.\textsuperscript{43}

Another area in which the court has applied the collateral order doctrine is the imposition of sanctions under Rule 11 of the Federal Rules of Civil Procedure.\textsuperscript{44} Generally, immediate appeals are limited to nonparties who are sanctioned and might not otherwise be able to obtain review of the decision.\textsuperscript{45} In a unique case decided last year, the court permitted a party to prosecute an interlocutory appeal under the collateral order doctrine.

In Transamerica Commercial Finance Corp. v. Banton, Inc.,\textsuperscript{46} a collage of contract, tort, and fraud claims were brought against the Bantons and nine other defendants in Alabama state court. The case was removed to federal court on diversity grounds. Transamerica filed a motion for summary judgment against Ms. Banton and a motion for default judgment against Mr. Banton. Meanwhile, the Bantons initiated a suit under 42 U.S.C. § 1983\textsuperscript{47} in a Wisconsin state court against Transamerica. In response to the second suit, Transamerica sought to enjoin the state court action and requested sanctions. As a sanction, the district court granted the pending motions against the Bantons.\textsuperscript{48}

In determining whether it had jurisdiction of the appeal, the court applied a "practical, not technical approach."\textsuperscript{49} Rather than focusing on the party versus nonparty distinction, the court read the third prong of the Cohen analysis as requiring an effectively unreviewable sanction order.\textsuperscript{50} It found the order in this case to be effectively unreviewable. According to the court,

existence of equitable claims would invite litigants to invent equitable claims simply to preclude interlocutory review. \textit{Id.} at 1152.

\textsuperscript{42} 941 F.2d at 1147.

\textsuperscript{43} \textit{Burrell}, 970 F.2d at 788.

\textsuperscript{44} DeSisto College, Inc. v. Line, 888 F.2d 755, 763 (11th Cir. 1989), \textit{cert. denied}, 495 U.S. 952 (1990). In \textit{DeSisto} the court found the first two prongs of Cohen easily met, but based satisfaction of the third prong on the fact that the attorney sanctioned was not a party and thus might not be able to seek review.

\textsuperscript{45} Transamerica Commercial Fin. Corp. v. Banton, Inc., 970 F.2d 810, 814 (11th Cir. 1992).

\textsuperscript{46} \textit{Id.} at 810.


\textsuperscript{48} 970 F.2d at 812-13.

\textsuperscript{49} \textit{Id.} at 815.

\textsuperscript{50} \textit{Id.}
[w]e again emphasize the unique circumstances of this case. In particular, we stress that this case differs from the many cases in which a sanction imposed upon a party, such as attorneys' fees and costs, does not effectively cut off the party from the underlying suit. It more closely resembles cases in which non-parties face the distinct possibility of never having a sanction order reviewed.51

Thus, under the unusual circumstances presented in this case, it appears that immediate review of a decision to sanction a party to a lawsuit will be available under the collateral order doctrine, provided that the order is effectively unreviewable following a final judgment.

In keeping with its practical approach to jurisdictional questions under the collateral order doctrine, the court of appeals broadened its jurisdiction to include a new class of cases in the past year. The question before the court in Forbus v. Sears, Roebuck & Co.,52 was whether an immediate appeal would lie from a district court's order denying enforcement of an agreement to forego litigation. Some Sears employees accepted early retirement and executed a release and waiver in conjunction with their severance package. Sears subsequently restructured its operations such that early retirement for the substantial portion of the work force at the employment location became unnecessary. The employees requested their jobs back and Sears accommodated the requests with limited exceptions. The workers who were not given positions filed an age discrimination action against the retailer. The district court denied Sears' motion for summary judgment based on the releases, but refused to certify the decision for interlocutory appeal. Sears appealed.53

Following decisions of the Fifth and Second Circuits, the court of appeals determined that the collateral order doctrine "should be applied to review an interlocutory order which denies enforcement of an agreement to forego litigation."54 The court found that the district court's order was "the final word on whether Sears could avoid litigation,"55 that the issue of the releases was separate and distinct from the retirees' underlying claims, and that repudiation of a contract not to be sued is effectively unreviewable after the lawsuit has been concluded.56 In light of these findings, the court of appeals held that the district court's refusal to enforce the releases was a collateral order subject to immediate review despite its interlocutory nature.57

51. Id.
52. 958 F.2d 1036 (11th Cir. 1992).
53. Id. at 1038.
54. Id. at 1039.
55. Id.
56. Id. at 1039-40.
57. Id.
Judge Cox dissented from the majority opinion. According to the dissent, the right not to be sued when based upon a private agreement is not sufficiently important to warrant an immediate interlocutory appeal. Further, Judge Cox raised concerns about creating another category of cases with immediate appealability. These concerns were founded on Supreme Court precedent holding that courts should construe the collateral order doctrine narrowly, and that the right to be free from suit must be based upon some explicit constitutional or statutory guarantee.

III. Standards of Review as Applied by the Court of Appeals in Its 1992 Cases

Many cases decided in 1992 discuss what standard the appellate court will employ in reviewing the district court’s decision. The extent of review depends on the nature of the alleged error and whether the proceeding below was a jury or nonjury trial. The broadest scope of review is for errors of law since the appellate court is in as good a position as the trial court to decide legal questions; indeed, guiding the lower courts on questions of law is one of the appellate court’s primary functions.

The appellate court conducts a de novo or plenary review of questions of law. The court of appeals sometimes expresses this principle by stating that it will review the question by applying the same standard as the district court. This is true when the appellate court reviews the grant of summary judgment, or judgment notwithstanding the verdict (“JNOV”), or a motion to dismiss. The court of appeals reversed a

58. Id. at 1042.
59. Id. at 1044.
60. Id.
61. Id. at 1043.
63. For instance, in reviewing a grant of summary judgment, the court of appeals reviews the evidence and all the factual inferences in a light most favorable to the party opposing the motion and all factual doubts are resolved in favor of the non-movant. Tipton v. Bergrohr GMBH-Siegen, 965 F.2d 994 (11th Cir. 1992).
64. Goree v. Winnebago Indus., Inc., 958 F.2d 1537 (11th Cir. 1992); RJR Nabisco, Inc. v. United States, 955 F.2d 1457 (11th Cir. 1992), reh’g denied, Henderson v. Scientific-Atlanta, Inc., 971 F.2d 1567 (11th Cir. 1992); Sammons v. Taylor, 967 F.2d 1533 (11th Cir. 1992).
65. LaRoche Indus., Inc. v. AIG Risk Management, Inc., 959 F.2d 189 (11th Cir. 1992); BankAtlantic v. Blythe Eastman Paine Webber, Inc., 955 F.2d 1467 (11th Cir. 1992); Gean v. Cling Surface Co., 971 F.2d 642 (11th Cir. 1992). In reviewing the denial of JNOV, the appellate court considers all of the evidence, but in “a light most favorable to the non-movant . . . [and] will reverse only if the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict.”
district court's grant of JNOV in the products liability case of Gean v. Cling Surface Co. The appellate court found that the evidence supported the jury's findings that the manufacturer of a conveyor belt drive pulley had a duty to warn the purchaser of potential belt slippage under certain conditions, that the manufacturer's failure to warn was the proximate cause of the worker's injuries, and that the worker did not assume the risk. Reversal of the JNOV order and the reinstatement of the judgment were appropriate because substantial evidence showed that the worker failed to appreciate, and was incapable of appreciating, the danger involved in operating the pulley as he had.

Other legal questions reviewed de novo in 1992 include: contract interpretation and construction of an indemnity agreement; a government employee's entitlement to a qualified immunity defense; the correct statute of limitations to apply in a diversity case; the entry of a directed verdict; dismissal for lack of in personam jurisdiction; the district court's jurisdiction to entertain suit; conclusions on res judicata and collateral estoppel; dismissal of ERISA claim for failure to satisfy the applicable statute of limitations; and dismissal for failure to state a claim.

The appellate court's review of fact determinations is much more restricted than its review of legal questions. The court gives greater deference to the factual determinations of the lower court since the entire trial cannot be recreated on appeal. The court overturns findings of fact only if they are "clearly erroneous." Examples of factual findings subject to this standard are district court findings underlying a determination that a

Harden v. TRW, Inc., 959 F.2d 201, 203 (11th Cir. 1992) (quoting Brady v. Southern Ry., 320 U.S. 476, 479 (1943)).
67. 971 F.2d 642 (11th Cir. 1992), reh'g denied en banc 976 F.2d 741 (11th Cir. 1992).
68. 971 F.2d at 644-46.
69. Id. at 646.
73. An appellate court may not affirm the district court's entry of a directed verdict if the record contains substantial evidence opposing the motion. “A mere scintilla of evidence,” however, is not sufficient to defeat the motion. Hasenfus v. Secord, 962 F.2d 1556 (11th Cir. 1992).
76. Manning v. City of Auburn, 953 F.2d 1355 (11th Cir. 1992).
The finding that a plaintiff had failed to establish an element of his Title VII claim, and the ultimate factual findings of vote dilution under the Voting Rights Act. It is important to note that the clearly erroneous standard does not bar the appellate court from correcting the trial court's errors of law or findings of fact based on misconceptions of the law.

The appellate court draws a distinction between questions of pure fact and mixed questions of fact and law, with the clearly erroneous standard applied only to the former. Mixed fact-law questions are subject to the same full review as are pure questions of law. One 1992 case concerning the plenary review of a mixed question of fact and law was In re Grand Jury Matter No. 91-01386. The appellate court affirmed the district court's determination that the attorney-client privilege was not violated when an attorney was called upon to reveal names of two clients in an effort to determine who had paid him with counterfeit money.

In contrast to other standards, the appeals court will review any rulings that are within the discretion of the trial judge under an abuse of discretion standard. As a practical matter, this means that only if an appellate court is convinced that the court below was clearly wrong will it reverse a discretionary decision. This narrow scope of review reflects the appellate court's restraint from intruding on the trial process too readily, especially when the trial judge may be in the best position to make the determination involved.

The court of appeals found a district court to have abused its discretion in the case of Bailey v. Board of County Commissioners of Alachua County, Florida. After setting out its approach for addressing a chal-

85. 955 F.2d at 1566.
86. See, e.g., In re Grand Jury Matter 91-01386, 969 F.2d 995, 997 (11th Cir. 1992); In re Grand Jury Subpoena Dated November 12, 1991, 957 F.2d 807, 809 (11th Cir. 1992).
87. In ruling that the district court had erred in relying on particular case law and consequently misapplied the law to the facts of the case, the court of appeals explained its review stating: "The clearly erroneous standard does not govern an appellate court's review of district court findings made under a mistaken view of controlling legal principles. Such questions involve interpretations of law or applications of law to particular facts and are subject to de novo review." Flagship Marine Servs., Inc. v. Belcher Towing Co., 966 F.2d 602, 604 (11th Cir. 1992).
88. 969 F.2d 995 (11th Cir. 1992).
89. Id. at 998.
90. See, e.g., Lee v. Etowah County Bd. of Educ., 963 F.2d 1416 (11th Cir. 1992).
91. 956 F.2d 1112 (11th Cir. 1992).
lenge to a denied jury instruction, the court determined that it was an
abuse of discretion and prejudicial error for the lower court to refuse to
submit the civil rights defendants' requested instruction on damages to
the jury. 92

Other discretionary decisions of the trial court reviewed under this
standard in 1992 include the decision to terminate discovery, 93 denial of
class certification, 94 evidentiary determinations, 95 the decision not to or-
der separate trials on diverse issues, 96 denial of motion for new trial, 97
denial of request for modification of consent agreement, 98 denial of an
application for preliminary injunction, 99 dismissal of ERISA claim for
failure to plead exhaustion of administrative remedies, 100 and denial of
motion to file an amended complaint. 101

A few of the "standard of review" cases do not fit neatly into any of the
three general categories discussed above. For example, the appellate court
has on occasion invoked the "plain error" doctrine and reversed a judg-
ment because of an error in the proceedings even if the error was not
objected to at the time. 102 The doctrine encompasses those errors that are
obvious, that affect the substantial rights of the accused, and that, if un-
corrected, would be an affront to the integrity and reputation of judicial

92. Id. at 1129. Quoting its decision in Wilkinson v. Carnival Cruise Lines, Inc., 920
F.2d 1560, 1569 (11th Cir. 1991), the court of appeals explained its approach in addressing a
challenge to a denied jury instruction as follows:

On appeal, we examine whether the jury charges, considered as a whole, suffi-
ciently instructed the jury so that the jurors understood the issues and were not
misled. The trial judge's refusal to give a requested instruction is not error where
the substance of that proposed instruction was covered by another instruction
that was given. If a requested instruction is refused and is not adequately covered
by another instruction, the court will first inquire as to whether the requested
instruction is a correct statement of the law. In such a scenario, if the requested
instruction does accurately reflect the law, the next step is to assess whether the
instruction addresses an issue that is properly before the jury. Even if both of
these criteria are met, there must still be a showing of prejudicial harm that re-
sulted from the failure of the trial court to give the requested instruction before
the judgment will be disturbed on that ground.

95. BankAtlantic v. Blythe Eastman Paine Webber, Inc., 955 F.2d 1467, 1474 (11th Cir.
96. Bailey v. Board of County Comm'rs of Alachua County, 956 F.2d 1112, 1127 (11th
Cir. 1992).
98. Jacksonville Branch, NAACP v. Duval County Sch. Bd., 978 F.2d 1574, 1578 (11th
Cir. 1992).
102. See, e.g., Mike Ousley Prods., Inc. v. WJBF-TV, 962 F.2d 380 (11th Cir. 1992).
proceedings. In *Mike Ousley Productions, Inc. v. WJBF-TV*, the court of appeals reviewed for plain error the issue of whether an attorney’s due process rights were violated by allegedly inadequate notice of a hearing on a motion for Rule 11 sanctions against him; the attorney had failed to raise the notice issue at trial. The court found no plain error since the sanctions were imposed for filing a pleading that has no reasonable factual basis, and the court previously has ruled that "Rule 11 alone should constitute sufficient notice of the attorney’s responsibilities since the rule explicitly requires the attorney to certify that a complaint is well grounded in fact."  

Review under the plain error rule is not so broad and all encompassing, however, as to result in the reversal of a "district court’s reasonable interpretation of an uncertain and evolving area of law." 

Another unclassified standard of review is that employed by the appellate court when a party moves for a stay pending appeal of the district court’s order. In *United States v. Hamilton*, the court denied the appellant’s motion noting that:

>[t]he grant of a motion to stay the trial court’s mandate is an exceptional response granted only on a showing of "a probable likelihood of success on the merits on appeal," or upon a lesser showing of a "substantial case on the merits when the balance of the equities weighs heavily in favor of granting the stay." 

**IV. APPEALABILITY OF ORDERS GRANTING VOLUNTARY DISMISSAL, CLASS ACTION SETTLEMENT BAR ORDERS, AND OTHER MISCELLANEOUS ISSUES IMPACTING APPELLATE JURISDICTION**

In *McGregor v. Board of Commissioners of Palm Beach County*, the court of appeals considered whether an order conditioning voluntary dismissal on payment of fees and costs was appealable by the movant. McGregor filed a civil rights action following his firing by the county defendants. The district court dismissed one count of his complaint for failure to state a claim and McGregor subsequently moved for voluntary dismissal on the remaining counts on the eve of trial. The county responded seeking attorney fees and costs as a condition of the dismissal. The district court granted McGregor’s motion, dismissed the action without prejudice, and retained jurisdiction to determine a proper award of fees and costs.

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103. 952 F.2d at 383.
104. *Id.* (quoting *Donaldson v. Clark*, 819 F.2d 1551, 1560 (11th Cir. 1987)).
105. 963 F.2d 322 (11th Cir. 1992).
106. *Id.* at 323 (quoting *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986)).
107. 956 F.2d 1017 (11th Cir. 1992).
The lower court ultimately awarded fees and costs pursuant to Rule 11 and 42 U.S.C. § 1988, as requested by the county. McGregor filed motions to amend the judgment and for rehearing, which the court denied. He appealed.

In an unusual procedural move, the court declined to review the order of voluntary dismissal itself, yet considered the conditions that were imposed upon McGregor as a consequence of that order. The court reasoned that the fees and costs award was not a condition of the dismissal since the district court had retained jurisdiction to consider it at a later time, and the relief was actually awarded in response to a subsequent motion by the county. Thus, it reviewed the conditions as entered in the later order, over the objections of appellee.

Appellee argued that the court had no jurisdiction to consider any condition imposed upon McGregor in conjunction with the voluntary dismissal since he was not legally prejudiced. As a general rule, a plaintiff cannot appeal an order granting his motion for voluntary dismissal. However, the appealability of a voluntary dismissal order depends upon its effects, not its language, and an appeal may lie even though the dismissal is without prejudice if the district court attaches onerous or prejudicial conditions. The court found that since the payment of fees and costs was simply a possibility at the time the district court granted the voluntary dismissal, not a condition of that dismissal, and in view of McGregor's motions to amend the judgment and for rehearing, the court denied. He appealed.

110. 956 F.2d at 1018-19.
111. Id. at 1020-23. The court of appeals found that it lacked jurisdiction to review the prior involuntary dismissal of Count I of his complaint, and the order granting the voluntary dismissal because the appeal was untimely filed. An order granting voluntary dismissal qualifies as a final order for purposes of appeal and McGregor's notice of appeal was filed more than thirty days after entry of the dismissal order. Id. at 1020. Thus, the court concluded that the prior order of dismissal merged into the voluntary dismissal order and neither could be appealed due to the late-filed notice of appeal.
112. Id. at 1020-21. The court found that the order awarding fees and costs was appealable even though the notice of appeal was filed more than thirty days after its entry because McGregor's motions functioned as a request under Federal Rule of Civil Procedure 59(e) for alteration of the judgment, tolling the time for appeal. 956 F.2d at 1020-21. Judge Clark disagreed with the majority and would have treated McGregor's motions as a request to reopen the case under Federal Rule of Civil Procedure 60(b). 956 F.2d at 1023. Judge Clark argued that the prior order of voluntary dismissal was not a final order since the district court retained jurisdiction to consider the fee and cost award and that an appeal should lie from the order of voluntary dismissal. Id. The dissent appears to have the better reasoned position and would avoid the tortured procedural result of allowing an appeal from a “free-standing” condition of voluntary dismissal.
113. 956 F.2d at 1021.
114. Id.
115. Id.
Gregor's consistent opposition to the award, it had jurisdiction to entertain the appeal.\textsuperscript{116}

In a similar application of legal principles, the court of appeals addressed whether a party to a class action may appeal a part of a settlement agreement notwithstanding entry of a settlement bar order by the district court. In \textit{In re U.S. Oil & Gas Litigation},\textsuperscript{117} federal oil and gas investors filed a class action lawsuit, and the parties reached a settlement with an insurance broker and the insurer of a company selling advisory services to the investors. The insurer sought relief from the portion of the settlement bar order\textsuperscript{118} that precluded the insurer from seeking indemnity from its broker. The insurer made no challenge to the remainder of the settlement. In addition, the insurer had expressly reserved its rights to appeal the disputed portion of the settlement.\textsuperscript{119}

The court recognized that public policy strongly favors the pretrial settlement of class action lawsuits, and that in many cases a settling defendant's appeal of a bar order would be problematic.\textsuperscript{120} Nevertheless, the court discussed several distinct features of the case at bench. The case did not involve an "offset" issue in which the appellant seeks to ensure that plaintiffs do not obtain a double recovery against nonsettling defendants in subsequent litigation.\textsuperscript{121} Nor was this a situation in which the appellant had stipulated that the bar order was integral to the settlement and waived the insurer's right to appeal, since the appellant made an express reservation of rights.\textsuperscript{122} Thus, the court concluded that by carefully preserving its rights, the insurer "was entitled to both the benefit of the settlement and a continuing challenge to the bar order on appeal."\textsuperscript{123}

Though not falling squarely within an exercise of appellate procedure, the court of appeals in \textit{Brown v. Crawford County, Georgia},\textsuperscript{124} demonstrated its role as defender of the Federal Rules of Civil Procedure by invalidating the local procedures of a district court. The defendants in the case were discouraged from filing motions for summary judgment based upon absolute legislative immunity by virtue of a local rule that

\begin{itemize}
  \item \textsuperscript{116} \textit{Id.}
  \item \textsuperscript{117} 967 F.2d 489 (11th Cir. 1992).
  \item \textsuperscript{118} Modern class action settlements are increasingly relying upon entry of a settlement bar order that allows defendants to buy their peace without the risk that codefendants will later attempt to shift their losses through cross-claims for indemnity, contribution, and other causes linked to the underlying action. \textit{Id.} at 494. In sum, a settlement bar order allows the parties to fix the risks of settlement. \textit{Id.}
  \item \textsuperscript{119} \textit{Id.} at 485.
  \item \textsuperscript{120} \textit{Id.} at 493-94.
  \item \textsuperscript{121} \textit{Id.} at 494.
  \item \textsuperscript{122} \textit{Id.} at 494-95.
  \item \textsuperscript{123} \textit{Id.} at 495.
  \item \textsuperscript{124} 960 F.2d 1002 (11th Cir. 1992).
\end{itemize}
looked upon such motions with disfavor. The court of appeals invalidated the local procedure, which amounted to advance screening of summary judgment motions, and cautioned that motions for summary judgment were available to litigants as a matter of right. The court expressed its concern that the trial court permitted the case to continue through the discovery phase of the litigation even though the absolute immunity of the defendants should have shielded them from that burden.

Finally, issues of ripeness and mootness may impact the jurisdiction of the court of appeals. Ripeness is a question of subject matter jurisdiction that will be investigated whenever it appears to be lacking, even sua sponte by the court. The court of appeals decided two cases last year that presented issues of ripeness. Both cases dealt with takings claims under the federal due process clauses, an apparently evolving aspect of the law. The cases focused on the availability of a federal cause of action in juxtaposition to state remedies and the timing of their use.

The court of appeals decided one case addressing mootness. The case concerned an attempt by a federal agency to compel the defendant to refrain from using minors as laborers in violation of the law. The opinion applied the general rule that the voluntary cessation of allegedly illegal conduct will not deprive a court of the power to hear and determine a case. The test of mootness is stringent in such circumstances and will not be satisfied unless the proponent makes absolutely clear that the wrongful behavior cannot reasonably be expected to recur.

125. Id. at 1008.
126. Id. at 1009.
127. Id. at 1009-10.
130. If the reader is interested in a discussion of the limitations placed upon takings claims based upon exhaustion of state remedies, the decision in Fields engages in an exhaustive consideration of the interplay between 28 U.S.C. § 1738 (1966) and the Supreme Court's holding in Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985). In particular, failure to reserve the right to pursue a federal remedy while prosecuting a state court action may bar later federal claims. 953 F.2d at 1299.
131. Secretary of Labor v. Burger King Corp., 955 F.2d 681 (11th Cir. 1992).
132. Id. at 684.
133. Id.