Appellate Practice and Procedure

Lawrence A. Slovensky
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I. INTRODUCTION

The United States Court of Appeals for the Eleventh Circuit decided several cases during 1996 which represented significant additions or modifications to the law governing appellate practice and procedure in this circuit. For example, the court attempted to clarify the circumstances in which interlocutory collateral orders involving the qualified immunity defense can be appealed, announced a new definition for "excusable neglect" in determining whether an untimely notice of appeal can be allowed, and analyzed the use of the harmless error rule in instructional omission cases. This Article will survey developments in appellate practice and procedure in the Court of Appeals for the Eleventh Circuit during 1996.

II. APPELLATE JURISDICTION—APPEALABILITY OF ORDERS

One of the first decisions an appellate court makes in every appeal, explicitly or implicitly, is to determine whether the lower court order presented for review is "appealable." The Court of Appeals for the Eleventh Circuit recently noted that, "[a] s a court of limited jurisdiction, we are obliged to examine the basis for our jurisdiction, doing so on our own motion if necessary. Thus, before we may address the merits of this appeal, we must determine whether the district court's order is appealable." The discussion below will highlight some of the cases decided by the Court of Appeals for the Eleventh Circuit during 1996 which address the appealability requirement.

* Associate in the firm of Long Aldridge Norman LLP, Atlanta, Georgia. University of South Carolina (B.A., magna cum laude, 1988); University of Chicago (J.D., with honors, 1992). Member, American Bar Association, State Bar of Georgia, and Atlanta Bar Association.
A. Appeals from "Final Decisions" under 28 U.S.C. § 1291

Under 28 U.S.C. § 1291, the courts of appeals have jurisdiction over appeals from "all final decisions of the district courts of the United States." As the United States Supreme Court has explained, "[t]he requirement of finality precludes consideration of decisions that are subject to revision, and even of 'fully consummated decisions [that] are but steps toward final judgment in which they will merge.'"

The Court of Appeals for the Eleventh Circuit decided several cases during 1996 involving close questions of whether district court orders from which an appeal had been taken were "final decisions" for purposes of 28 U.S.C. § 1291. In Grayson v. K Mart Corp., for example, the court held that a district court order that dismissed plaintiffs' claims but which gave plaintiffs the right to refile their claims was not a final decision under Section 1291. Plaintiffs filed an age discrimination lawsuit but, after commencement of the lawsuit, became eligible to join in another pending class action lawsuit involving the same allegations against the same defendants. The district court dismissed without prejudice the pending lawsuit and provided that plaintiffs would be allowed to refile their lawsuits if plaintiffs were not allowed to join in the other pending lawsuit. In the consolidated appeal that ensued, the court of appeals held that the district court's order, while appearing in form to be an appealable final order of dismissal, was in reality a transfer order and was not appealable. Similarly, in Stillman v. Travelers Insurance Co., the court of appeals held that a district court order which purported to enter a "final summary judgment," but which did not adjudicate some of the nonmovant defendant's defenses in an insurance coverage dispute, was not a final order under 28 U.S.C. § 1291 and was not appealable.

In Jackson v. Chater, the court of appeals held that the district court's order remanding a Social Security disability case to the Commis-
sioner of Social Security under 42 U.S.C. § 405(g) was a final order and could be appealed to the court of appeals. The court based its conclusion that the order was final, in part, on the fact that the district court's order of remand did not contemplate that the case would be returned to the district court.

In *In re Six*, the court indicated that the finality requirement is more expansively interpreted in the bankruptcy setting. The district court in *In re Six* entered an order on appeal from the bankruptcy court denying a motion for summary judgment in an adversary proceeding involving a sizeable claim in the bankruptcy, along with an order in the main bankruptcy case disallowing that same claim. In the appeal to the Court of Appeals for the Eleventh Circuit, the court held that while the denial of the motion for partial summary judgment in the adversary proceeding was interlocutory and thus ordinarily nonappealable, the district court's order met the "more flexible standard of finality" in the bankruptcy setting because of the size of the claim at issue and the similarity between the interlocutory order in the adversary proceeding and the final order in the main bankruptcy case.

The court also addressed its provisional jurisdiction under the Eleventh Circuit's "anomalous rule," which allows appeals from the denial of a motion to intervene despite the fact that such orders do not formally constitute final orders. In *Grilli v. Metropolitan Life Insurance Co.*, the court explained that under the anomalous rule, if the court of appeals concludes that the district court properly denied the motion to intervene, the court of appeals' jurisdiction "evaporates because the ruling is not a final order." If the motion to intervene should have been granted, however, the court of appeals retains jurisdiction to reverse the district court's order. In *Grilli*, the court of appeals held that the district court had not abused its discretion in refusing to allow two individuals to intervene as additional named plaintiffs in a class-action lawsuit against a life insurance company.

13. *Id.* at 1097-98.
14. *Id.* at 1098.
15. 60 F.3d 452 (11th Cir. 1996).
16. *Id.* at 455.
17. *Id.*
19. 78 F.3d at 1538.
20. *Id.*
21. *Id.*
B. Appeals from Interlocutory Decisions Under 28 U.S.C. § 1292

The courts of appeals have jurisdiction pursuant to 28 U.S.C. § 1292 to hear appeals from certain classes of nonfinal or interlocutory orders. For example, as the court noted in Isbrandtsen Marine Services, Inc. v. M/V Inagua Tania, the court of appeals has jurisdiction under 28 U.S.C. § 1292(a)(3) to hear an interlocutory appeal of a district court order in an admiralty case denying a motion to intervene in an in rem proceeding because the denial "determines the rights and liabilities of the parties," In Raven v. Oppenheimer & Co., the court heard an appeal of a district court's order reinstating a previously dismissed securities fraud lawsuit based on a change in the underlying law where the district court had certified, pursuant to 28 U.S.C. § 1292(b), that the interlocutory order presented issues which justified interlocutory appellate review. In Maynard v. Williams, the court heard an appeal of an interlocutory decision enjoining a Florida state agency under 28 U.S.C. § 1292(a)(1), which allows interlocutory appeals from orders "granting, continuing, modifying, refusing or dissolving injunctions."

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23. 93 F.3d 728 (11th Cir. 1996).
25. 74 F.3d 239 (11th Cir. 1996).
27. 72 F.3d 848 (11th Cir. 1996).
C. Case Law Exceptions to the Requirement of Finality

The Court of Appeals for the Eleventh Circuit has recognized only limited case law exceptions\(^\text{29}\) to the rule that it does not have jurisdiction to hear an appeal from an order which is not a final decision under 28 U.S.C. § 1291, is not an interlocutory order from which an appeal lies under 28 U.S.C. § 1292, and is not appealable under some other independent statute.\(^\text{30}\) The case law exception which generated the most litigation in 1996 is the “collateral order doctrine.” The collateral order doctrine arises from the 1949 United States Supreme Court decision in *Cohen v. Beneficial Industrial Loan Corp.*,\(^\text{31}\) in which the Supreme Court held that an exception to the finality doctrine exists for the “small class” of district court orders which are not final but can be appealed because they “finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.”\(^\text{32}\)

The collateral order doctrine appears to be most widely used in connection with the interlocutory review of a denial of a motion for summary judgment by a government official seeking protection from suit under the qualified immunity doctrine. As the courts have explained, qualified immunity “protects government officials performing discretionary functions from civil liability if their conduct violates no ‘clearly established statutory or constitutional rights of which a reasonable person would have known.’”\(^\text{33}\)

In *Cottrell v. Caldwell*,\(^\text{34}\) the Court of Appeals for the Eleventh Circuit analyzed the current state of Eleventh Circuit law regarding situations in which the court of appeals has authority under the

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29. As the court noted in *In re F.D.R. Hickory House, Inc.*, 60 F.3d 724, 725 (11th Cir. 1995), there are only three exceptions to the finality rule recognized in the Eleventh Circuit’s jurisprudence: “the collateral order doctrine, the doctrine of practical finality, [and] the exception for intermediate resolution of issues fundamental to the merits of the case.” See also *Haney v. City of Cumming*, 69 F.3d 1098, 1101-02 n.5 (11th Cir. 1995), cert. denied, 116 S. Ct. 1826 (1996).

30. For an example of a case involving an independent statute allowing for appellate review, see *United States v. Manella*, 86 F.3d 201, 203 (11th Cir. 1996), which discusses appeals from criminal sentencing orders under 18 U.S.C. § 3742.


32. Id. at 546.


34. 85 F.3d 1480 (11th Cir. 1996).
collateral order doctrine to review the denial of a motion for summary judgment based on the qualified immunity defense. The court held that it has jurisdiction to review the denial of motions for summary judgment asserting qualified immunity defenses, but only in circumstances in which the denial was not based solely on factual disputes about the evidence supporting the qualified immunity defense. As the court noted, the United States Supreme Court's 1995 decision in Johnson v. Jones established that a district court order denying a motion for summary judgment based solely on factual disputes regarding whether the qualified immunity defense applies does not fit within the class of cases reviewable as collateral orders under prior Supreme Court case law. The court in Cottrell noted that if the denial of the summary judgment motion was based even in part on a disputed issue of law, by contrast, review of the interlocutory order is appropriate under the collateral order doctrine.

In the vast majority of cases decided by the Court of Appeals for the Eleventh Circuit during 1996 involving denials of a motion for summary judgment on qualified immunity grounds, the court concluded that it had appellate jurisdiction under the collateral order doctrine. However, the court found that it did not have appellate jurisdiction over an interlocutory appeal from the denial of a motion for summary judgment asserting the qualified immunity defense based on the premise that interlocutory review is "confined to determining whether the law supposedly violated was clearly established." Because the court found that the denial of summary judgment was based on factual disputes regarding the conduct of defendant, and defendant-appellant had not challenged the district court's determination of the clearly established law allegedly violated, the court dismissed the appeal.

35. Id. at 1484.
36. Id.
38. Cottrell, 85 F.3d at 1484.
39. Id. at 1484-85.
40. See, e.g., Foy v. Holston, 94 F.3d 1528, 1531 n.3 (11th Cir. 1996); Cooper v. Smith, 89 F.3d 761, 763 (11th Cir. 1996); McMillian v. Johnson, 88 F.3d 1554, 1562-63 (11th Cir.), amended by, 101 F.3d 1363 (1996); Beauregard v. Olson, 84 F.3d 1402, 1403 (11th Cir. 1996); Tinney v. Shores, 77 F.3d 378, 380 (11th Cir. 1996); Anderson v. District Bd. of Trustees of Cent. Fl. Community College, 77 F.3d 364, 367 (11th Cir. 1996); Johnson v. Clifford, 74 F.3d 1087, 1091 (11th Cir.), cert. denied, 117 S. Ct. 51 (1996); Anderson v. District Bd. of Trustees of Cent. Fl. Community College, 77 F.3d 364, 367 (11th Cir. 1996); Johnson v. Clifford, 74 F.3d 1087, 1091 (11th Cir.), cert. denied, 117 S. Ct. 51 (1996); Suissa v. Fulton County, 74 F.3d 266, 269 (11th Cir. 1996); Dolihite v. Maughon, 74 F.3d 1027, 1033 (11th Cir.), cert. denied, 117 S. Ct. 186 (1996); Heggs v. Grant, 73 F.3d 317, 320 (11th Cir. 1996).
41. 74 F.3d 236 (11th Cir. 1996).
42. Id. at 238.
for lack of jurisdiction under its reading of Johnson v. Jones. As the later opinion in Cottrell explained, however, the Supreme Court’s 1996 opinion in Behrens v. Pelletier, also decided after Mastroianni, clarified that a district court order which finds that material issues of fact exist may still be subject to an interlocutory appellate review of related issues of law. The court in Cottrell concluded that the earlier decision in Mastroianni cannot be reconciled with Behrens.

The Court of Appeals for the Eleventh Circuit also applied the collateral order doctrine during 1996 to several interlocutory orders not involving qualified immunity issues. For example, in TEC Cogeneration, Inc. v. Florida Power & Light Co., the court reviewed the district court’s denial of a public utility’s motion for summary judgment asserting the state action immunity doctrine in an antitrust lawsuit as an immediately appealable collateral order. In United States v. Ellis, the court held that an order denying access by a newspaper to judicial proceedings was an appealable collateral order. In United States v. Wellington, the court held that a district court order transferring a criminal defendant to adult status was an appealable collateral order.

III. TIMING OF THE NOTICE OF APPEAL

The Court of Appeals for the Eleventh Circuit announced a new, liberalized standard during 1996 for determining whether an untimely appeal can be heard under the “excusable neglect” provision contained in Federal Rule of Appellate Procedure 4(a)(5). The timely filing of a notice of appeal is a jurisdictional requirement which, if not met, bars the appeal. Rule 4(a)(5) of the Federal Rules of Appellate Procedure allows a district court to extend the time for filing a late notice of appeal “upon a showing of excusable neglect.” The Court of

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43. Id.
44. 116 S. Ct. 834 (1996).
45. Cottrell, 85 F.3d at 1485.
46. Id.
47. 76 F.3d 1560 (11th Cir.), modified, 86 F.3d 1028 (1996).
48. 76 F.3d at 1563 n.1.
50. 90 F.3d at 449.
51. 102 F.3d 499 (11th Cir. 1996).
52. Id. at 503.
53. FED. R. APP. P. 4(a)(5).
55. FED. R. APP. P. 4(a)(5).
Appeals for the Eleventh Circuit traditionally held that "excusable neglect should be found only upon a showing of unique circumstances which establish that it would be unfair to dismiss the appeal." For example, in Borio v. Coastal Marine Construction Co., a 1989 Eleventh Circuit case, the court dismissed an appeal where the notice of appeal was not timely filed because appellant's counsel's secretary misplaced the notice in her files, holding that "mere palpable mistake or administrative failure by counsel or counsel's staff" was not sufficient to excuse the untimely appeal.

In the 1993 term, the United States Supreme Court announced a new interpretation of the statutory term excusable neglect in the bankruptcy context. In Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership, the Supreme Court addressed the provision of Bankruptcy Rule 9006(b)(1) regarding excusable neglect relieving a party from its failure to timely file a proof of claim. The Supreme Court concluded that, in applying the excusable neglect term of the bankruptcy rule, "Congress plainly contemplated that the courts would be permitted, [when] appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control.

In Advanced Estimating System, Inc. v. Riney, the Court of Appeals for the Eleventh Circuit held that the standard announced by the Supreme Court in Pioneer should apply in analyzing whether an untimely notice of appeal can be heard under the excusable neglect language of Federal Rule of Appellate Procedure 4(a)(5). In Advanced Estimating Systems, Inc., the defendant in a software infringement case miscalculated the date upon which its motion for a new trial would be due and, relying on the assumption that the filing of its post-trial motion tolled the time in which the notice of appeal must be filed, did not file its notice of appeal within thirty days after the entry of the judgment. Because a post-trial motion tolls the time in which a notice of appeal must be filed only if the post-trial motion is timely filed, defendant's notice of appeal was not timely and would be barred absent excusable

57. Id.
58. Id. at 1055-56.
60. Id. at 382-84.
61. Id. at 388.
62. 77 F.3d 1322 (11th Cir. 1996).
63. Id. at 1324.
64. Id. at 1323.
neglect. During the first review of the case, the court had held that
the appeal was untimely and remanded the case to the district court for
determination of whether excusable neglect existed. The district court
applied the "unique circumstances" standard and concluded that
defendant's conduct did not constitute excusable neglect. On appeal
of that decision, however, the court of appeals held that the district court
erred by failing to apply the Pioneer standard rather than the unique
circumstances standard. The court noted that other circuits had
applied the Pioneer standard in determining whether an untimely appeal
was the result of excusable neglect and that the rationale of the decision
in Pioneer, although arising out of a bankruptcy court case, should apply
in reviewing civil appeals. The court held, based on Pioneer, that:

[W]hen analyzing a claim of excusable neglect, courts should "tak[e]
account of all relevant circumstances surrounding the party's omis-
sion," including "the danger of prejudice to the [nonmovant], the length
of the delay and its potential impact on judicial proceedings, the reason
for the delay, including whether it was within the reasonable control
of the movant, and whether the movant acted in good faith." Primary
importance should be accorded to the absence of prejudice to the
nonmoving party and to the interest of efficient judicial administration.
To the extent that our past decisions interpreting excusable neglect
apply an unduly strict standard in conflict with Pioneer, they are no
longer controlling precedent.

The court noted that "nothing about Pioneer changed the excusable
neglect decision into a mechanical one devoid of any room for the
exercise of discretionary judgment," and therefore remanded the case to
the district court for determination of whether excusable neglect
existed.

As the court noted in Advanced Estimating, its earlier 1996 decision
in Cheney v. Anchor Glass Container Corp. applied the Pioneer
standard to the interpretation of excusable neglect as used in Federal
Rule of Civil Procedure 60(b) regarding the opening of a judgment based
on excusable neglect of the party or counsel. The court's decision in

65. Id. at 1324.
66. Id. at 1323.
67. Id.
68. Id. at 1325.
69. Id. at 1324-25.
70. Id. at 1325 (citations omitted).
71. Id.
72. 71 F.3d 848 (11th Cir. 1996).
73. Id. at 850.
Cheney, while relating to Rule 60 motions rather than notices of appeal, gives some insight into how the court can be expected to apply the Pioneer standard as announced in Advanced Estimating. The court in Cheney concluded that the failure of plaintiff to request a de novo trial after its age discrimination case had been referred to nonbinding arbitration under the local rules of the district court constituted excusable neglect under Rule 60(b), thus allowing for the setting aside of the district court's entry of a judgment based on the nonbinding arbitration.74 Among the facts which the court in Cheney cited as establishing excusable neglect were: the appropriate request for de novo trial was filed only six days late, the parties continued to litigate the case after the arbitration decision, and the late filing was "simply an innocent oversight by counsel" rather than a deliberate disregard of the rule.75

IV. REVIEW OF THE APPEAL

A. Standards of Review

The rules regarding which standard of review an appellate court will apply in reviewing a lower court decision are generally well established in the case law. An appellate court reviews on a de novo basis a lower court's decision on a pure question of law,76 for example, while an appellate court applies the more deferential clearly erroneous standard in reviewing a lower court's finding of fact.77 The discussion below will describe the standards of review applied by the Court of Appeals for the Eleventh Circuit during 1996 and will highlight some of the applications of these general standards to specific cases.

1. Review of Questions of Law. Appellate courts review lower court decisions involving questions of law on a de novo or plenary

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74. Id. at 849.
75. Id. at 860.
76. See, e.g., Hughey v. JMS Dev. Corp., 78 F.3d 1523, 1528 (11th Cir.), cert. denied, 117 S. Ct. 482 (1996) ("'[I]f the trial court misapplied the law we will review and correct the error without deference to that court's determination.'" (quoting Wesch v. Folsom, 6 F.3d 1465, 1469 (11th Cir. 1993), cert. denied, 510 U.S. 1046 (1994))); Teper v. Miller, 82 F.3d 989, 993 (11th Cir. 1996) ("The interpretation and application of a federal statute raises an issue of law, subject to plenary review.").
77. See, e.g., Faragher v. City of Boca Raton, 76 F.3d 1155, 1160 (11th Cir.), vacated, 83 F.3d 1346 (1996) ("We review the district court's findings of fact under the clearly erroneous standard of review.").
basis.\textsuperscript{78} Lower court decisions on motions for summary judgment or motions under Rule 12 of the Federal Rules of Civil Procedure are among the more common orders reviewed on a de novo basis.

In \textit{Kasprik v. United States},\textsuperscript{79} for example, the court applied a de novo review in affirming the district court's order that the claims asserted by a crewman on a public vessel against a ship management corporation relating to the crewman's injuries were barred by the exclusivity provisions of the Suits in Admiralty Act.\textsuperscript{80} In \textit{Preserve Endangered Areas of Cobb's History, Inc. v. United States Army Corps of Engineers},\textsuperscript{81} a citizens' group sued Cobb County, the Army Corps of Engineers, and the Environmental Protection Agency for alleged violations of federal statutes in connection with the construction of a highway in Cobb County.\textsuperscript{82} The Court of Appeals for the Eleventh Circuit applied a de novo standard in affirming the district court's decision to dismiss claims under the Clean Water Act,\textsuperscript{83} to limit the scope of review to the administrative record developed prior to the lawsuit, and to grant summary judgment to defendants based on the district court's review of the administrative record.\textsuperscript{84} During 1996, the court also reviewed on a de novo basis the district court's denial of a nonparty's motion to intervene of right under Rule 24(a) of the Federal Rules of Civil Procedure,\textsuperscript{85} the district court's order granting summary judgment on claims relating to an insurance company's claim against a bank for improper payment on a check,\textsuperscript{86} and the district court's review of legal conclusions reached by the bankruptcy court in granting a motion for rehearing.\textsuperscript{87}

Even if a decision by the district court generally involves the exercise of discretion by the lower court, the appellate court will review de novo the aspects of that discretionary decision which involved the application of law. Thus, in \textit{Motorcity of Jacksonville, Ltd. v. Southeast Bank},\textsuperscript{88} the court reviewed de novo the lower court's decision to deny plaintiff's

\textsuperscript{78} \textit{See, e.g.,} Hughey v. JMC Dev. Corp., 78 F.3d at 1528; Teper v. Miller, 82 F.3d at 993.
\textsuperscript{79} Id. at 462; 11th Cir. 1996.
\textsuperscript{80} Id. at 464; 46 U.S.C. App. § 745.
\textsuperscript{81} Id. at 464; 46 U.S.C. App. § 745.
\textsuperscript{82} 87 F.3d 1242 (11th Cir. 1996).
\textsuperscript{83} Id. at 1245.
\textsuperscript{85} 87 F.3d at 1250.
\textsuperscript{86} \textit{Preserve Endangered Areas,} 87 F.3d at 1250.
\textsuperscript{87} 87 F.3d 1317 (11th Cir. 1997), vacated and remanded, 117 S. Ct. 760 (1997).
motion for leave to amend its complaint, which is normally considered a discretionary decision reviewed under an abuse of discretion standard. The court undertook a de novo review because the lower court had made its decision based on the legal determination that the proposed added claims were futile because they were barred by the D’Oench doctrine announced by the Supreme Court in D’Oench, Duhme & Co. v. FDIC.

2. Review of Discretionary Decisions. The appellate court reviews decisions involving the exercise of discretion by the district court under the abuse of discretion standard. The court described in one 1996 case the burden facing an appellant seeking to show abuse of discretion by the district court as follows: “In order to prevail, [appellant] must do more than show that a grant of its motion might have been warranted. [Appellant] must demonstrate a justification for relief so compelling that the district court was required to grant [appellant’s] motion.” Significantly, however, the application by the district court of an inappropriate legal standard in making a discretionary decision is considered a per se abuse of discretion.

District court decisions to which the Court of Appeals for the Eleventh Circuit applied an abuse of discretion standard in 1996 include: the decision of a district court not to allow a nonparty to intervene in a lawsuit under Rule 24(b) of the Federal Rules of Civil Procedure on the grounds that common questions of law or fact did not exist; the denial by the district court of a motion for new trial after the district court determined that it had given erroneous jury instructions; the decision of the district court to limit the scope of discovery in an administrative review lawsuit to the administrative record previously developed; and

89. 83 F.3d at 1325.
90. Id. at 1323 (citing 315 U.S. 447 (1942)).
91. See, e.g., Macklin v. Singletary, 24 F.3d 1307, 1312 (11th Cir. 1994), cert. denied, 115 S. Ct. 1122 (1995) (“Reviewing for abuse of discretion is only appropriate, however, where the district court had some discretion to exercise, where it had a range of choice in the matter under review.”).
93. Advanced Estimating Sys., Inc. v. Riney, 77 F.3d 1322, 1325 (11th Cir. 1996) (“Although we review excusable neglect decisions only for an abuse of discretion, application of an incorrect legal standard is an abuse of discretion.”).
94. Purcell, 85 F.3d at 1513.
96. Preserve Endangered Areas, 87 F.3d at 1246.
the denial of a motion to reopen a judgment under Rule 60(b) of the Federal Rules of Civil Procedure.97

The Court of Appeals for the Eleventh Circuit indicated in its decisions during 1996, however, that the amount of deference applied by the appellate court in reviewing a decision under the abuse of discretion standard will vary depending on the type of discretionary decision reviewed and that the abuse of discretion standard cannot be thought of as one consistent standard applied mechanically to a class of lower court decisions. In Jove Engineering v. IRS,98 for example, the Court of Appeals for the Eleventh Circuit reviewed the district court's refusal to grant a motion for civil contempt filed against the Internal Revenue Service for violation of the automatic stay provisions in a bankruptcy case and noted that such decisions were reviewed under an abuse of discretion standard.99 The court held, however, that it will apply a less deferential standard in reviewing a decision to grant or deny a motion for civil contempt in the context of violations of the automatic stay provisions of the bankruptcy code, based in part on the clear language of the code and the independent role of the appellate courts in ensuring a consistent application of the bankruptcy statutory scheme.100 The court explained that the less deferential standard to be applied in the review of a motion for civil contempt for a violation of the automatic stay is not a new standard, noting:

There are few, if any, bright lines concerning what constitutes an "abuse of discretion." This standard lies within the standard of review continuum whose contours are developed on a case-by-case basis. We only hold that we are more inclined to reverse the trial court if we disagree with its decision regarding an automatic stay violation than we would be in another context.101

In Joiner v. General Electric Co.,102 the court held that while decisions by the district court on the admissibility of evidence are reviewed for abuse of discretion, the appellate court will give greater scrutiny to a district court's exclusion of expert testimony.103 Specifically, the court noted that: "Because the Federal Rules of Evidence governing expert testimony display a preference for admissibility, we apply a particularly stringent standard of review to the trial judge's exclusion of

97. Rice, 88 F.3d at 918.
98. 92 F.3d 1539 (11th Cir. 1996).
99. Id. at 1546.
100. Id.
101. Id. at 1546 n.5.
102. 78 F.3d 524 (11th Cir. 1996).
103. Id. at 529.
Based on this more stringent standard of review, the court found that the district court had improperly excluded expert testimony offered by plaintiff regarding the connection between his development of cancer and his exposure to chemicals while working for a municipal government. Senior Circuit Judge Edward S. Smith, sitting by designation from the Court of Appeals for the Federal Circuit, dissented from the decision in Joiner and noted that the Joiner majority opinion failed to provide a precise explanation of the standard of review to be applied in this context. Judge Smith noted that: “In applying a ‘particularly stringent’ review, we do not change the threshold of review, but conduct a searching review of the record (i.e., take a ‘hard look’) while maintaining the proper standard of review.”

In United States v. Taylor, the court held that district court criminal sentencing decisions which depart from the United States Sentencing Guidelines should be reviewed on an abuse of discretion standard. As the court noted, the Eleventh Circuit previously reviewed such decisions on a “partially de novo” standard, employing a plenary review of the legal question of whether a factor is a proper basis for departure from the sentencing guidelines. The United States Supreme Court’s 1996 decision in Koon v. United States, however, announced that a district court’s departure decision should be reviewed on an abuse of discretion standard rather than a partially de novo standard. As the Supreme Court noted in Koon, placing the label of abuse of discretion rather than partial de novo on the standard applied in the review of departure decisions may have little practical effect because an error of law by the district court made in a departure decision is by definition an abuse of discretion. The court in Taylor noted that the following four factors should be considered in determining whether the district court abused its discretion:

1) What features of this case, potentially, take it outside the Guidelines’ ‘heartland’ and make of it a special, or unusual, case?
2) Has the [Sentencing] Commission forbidden departures based on those features?

104. Id.
105. Id. at 534.
106. Id. at 535 (Smith, J., dissenting).
107. Id.
108. 88 F.3d 938 (11th Cir. 1996).
109. Id. at 945.
110. Id.
112. Id. at 2047.
113. Id.
3) If not, has the Commission encouraged departures based on those features?
4) If not, has the Commission discouraged departures based on those features?114

The court of appeals thereafter reviewed the evidence cited by the district court in ordering an upward departure to defendant’s sentence and concluded that the district court had not abused its discretion in that case.115

3. Review of Other Types of District Court Decisions. In cases where the appellant failed to object to jury instructions during the trial, the court of appeals reviews the effect of an erroneous jury instruction only for “plain error.” As the court explained in Bateman v. Mnemonics, Inc.,116 “[u]nder the plain error standard, an instruction will not be reversed ‘unless the charge, considered as a whole, is so clearly erroneous as to result in a likelihood of a grave miscarriage of justice’ or the error ‘seriously affects the fairness, integrity, or public reputation of judicial proceedings.””117 The court in Bateman concluded that a jury instruction which incorrectly substituted the term “qualitatively” for “quantitatively” in reference to the amount of copied material sufficient to find substantial similarity in a copyright case did not constitute plain error.118

In reviewing a district court order in an appeal under the Administrative Procedure Act (“APA”)119 seeking judicial review of an agency decision, the court of appeals applies the same “exceedingly deferential” standard that is applied by the district court.120 In Fund for Animals, Inc. v. Rice,121 and Preserve Endangered Areas122 the court of appeals applied the “arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law” standard set forth in the APA and, in both cases, affirmed the agency decision at issue.123

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114. Taylor, 88 F.3d at 945 (citing Koon, 116 S. Ct. at 2045).
115. Id. at 948.
116. 79 F.3d 1532 (11th Cir. 1996).
117. Id. at 1548 (quoting United States v. Pepe, 747 F.2d 632, 675 (11th Cir. 1984)).
118. Id.
120. Fund for Animals, Inc. v. Rice, 85 F.3d 535, 541 (11th Cir. 1996).
121. Id.
122. 87 F.3d 1242 (11th Cir. 1996).
123. 85 F.3d at 541; 87 F.3d at 1247-49.
B. Issue Raised for First Time on Appeal

As the court noted in Caban-Wheeler v. Elsea,124 “appellate courts generally will not consider an issue first raised on appeal.”126 In Caban-Wheeler, the defendant-appellant argued for the first time on appeal that the plaintiff in a Section 1983 and Title VII lawsuit had not been deprived of procedural due process because, under the authority of a 1994 Eleventh Circuit decision, the availability of a state court remedy gave a sufficient means for redress.128 The court noted in Caban-Wheeler that while the 1994 decision upon which appellant relied constituted a change of law, there would be no “miscarriage of justice” in not allowing defendant to raise this argument for the first time on appeal in light of the substantial additional evidence of discriminatory circumstances and the absence of any development of facts supporting appellant’s defense during the trial.127 In Abebe-Jira v. Negewo,128 the court similarly refused to entertain the argument, raised for the first time on appeal, that plaintiff-appellee’s Alien Tort Claims Act claims were barred by Georgia’s tort statute of limitations.129

In Rice v. Ford Motor Co.,130 however, the court addressed plaintiff-appellant’s argument that defendant’s Rule 60(b) motion was not timely filed in the trial court, which was raised for the first time in oral argument on the appeal, on the grounds that “[a]ny time doubt arises as to the existence of federal jurisdiction, we are obliged to address the issue before proceeding further.”131

C. Mootness

The Court of Appeals for the Eleventh Circuit applied the mootness doctrine in several cases during the 1996 term. In Purcell v. BankAtlantic Financial Corp.,132 the court rejected the argument that a non-party’s appeal from a denial of its motion to intervene in a lawsuit was

124. 71 F.3d 837 (11th Cir. 1996).
125. Id. at 841 (citing FDIC v. Verex Assurance, Inc., 3 F.3d 391, 395 (11th Cir. 1993)).
126. Id.
127. Id.
128. 72 F.3d 844 (11th Cir.), cert. denied, 117 S. Ct. 96 (1996).
129. 72 F.3d at 846 n*. See also Novak v. Cobb County Kennestone Hosp. Auth., 74 F.3d 1173, 1177 (11th Cir. 1996) (refusing to consider argument not raised in district court).
130. 88 F.3d 914 (11th Cir. 1996).
131. Id. at 917 n.5 (quoting Atlanta Gas Light Co. v. Aetna Casualty & Sur. Co., 68 F.3d 409, 414 (11th Cir. 1995)).
mooted because of the subsequent settlement of the lawsuit. In *Purcell*, the American Broadcasting Company ("ABC") attempted to intervene in a class action securities lawsuit to oppose the vacatur of a jury verdict and the approval of the settlement of the class action lawsuit by the trial court. ABC's intervention was based, in part, on its reliance in a separate libel action on the judgment which had been entered in the securities case in favor of the plaintiff. Plaintiffs-appellees in *Purcell* argued that the subsequent settlement of its case, approved by the trial court, extinguished any case or controversy and mooted ABC's appeal. The court rejected that argument, however, noting that if ABC's request to intervene and request to reverse the approval of the settlement agreement were granted, ABC would receive the relief it sought.

By contrast, the court found in two other 1996 cases that because it would be impossible for the court to grant effective relief, the appeals at issue were moot and should be dismissed. In *Velasco v. Horgan* the court dismissed an appeal from the denial of a petition for habeas corpus on the grounds that petitioner had been transferred in custody from the Southern District of Florida to the Southern District of New York prior to the decision on the appeal. The court concluded that because petitioner was no longer within the jurisdiction of the court which had originally denied his petition for habeas corpus, the court of appeals could not grant effective relief to petitioner, thus mooting the appeal. In *Wyatt v. Rogers*, the district court entered a preliminary injunction requiring certain Alabama state mental health facilities to comply with a prescribed set of minimum standards in connection with a long-running civil rights lawsuit by patients of those facilities. The court held that the State's appeal from that preliminary injunction had been mooted by the closing of the facilities affected by the preliminary injunction prior to the decision on the appeal.

133. 85 F.3d at 1511.
134. Id.
135. Id. at 1510.
136. Id. at 1511.
137. Id. at 1511 n.3.
138. 85 F.3d 520 (11th Cir. 1996).
139. Id. at 521-22.
140. Id. at 522.
141. 92 F.3d 1074 (11th Cir.), cert. denied, 117 S. Ct. 84 (1996).
142. 92 F.3d at 1080.
143. Id.
The courts have recognized an exception to the mootness doctrine in controversies which are "capable of repetition yet evading review." In *United States v. Ellis*, the district court conducted an in camera hearing to determine whether a criminal defendant should be allowed to proceed in forma pauperis on his appeal. Defendant appealed the district court's subsequent decision to unseal the records regarding that hearing at the request of a local newspaper. On appeal, the court held that the appeal was not moot, despite the fact that the proceedings had concluded, because the district court's decision to unseal the records of its in camera hearing was "the kind of controversy that is capable of repetition yet evading review."

The court also gave a stern warning to future litigants about the effect of inconsistent factual representations about the mootness of an appeal in one 1996 case. In *SunAmerica Corp. v. Sun Life Assurance Co.*, an insurance company doing business under the name "Sun Life of Canada" obtained a permanent injunction preventing another insurance company doing business as "Sun Life of America" from using the "Sun Life" name. Sun Life of America appealed and filed a motion seeking a stay of the injunction pending the appeal, based on the argument that requiring Sun Life of America to change its name to comply with the injunction would effectively moot appellate relief because of the commercial impracticality of re-establishing the Sun Life name after a successful appeal. The court denied the motion for a stay, and Sun Life of America changed its name during the pendency of its appeal. The court of appeals order was sharply critical of Sun Life of America's argument on appeal that its appeal had not been mooted by its name change in light of its earlier argument that requiring a name change would effectively moot appellate relief. The court made the following announcement: "All future parties and their counsel are on notice that if they make factual representations in the district court or in this Court that denial of a stay will moot the appeal, they

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146. 90 F.3d at 449.
147. Id.
148. Id.
149. 77 F.3d 1326 (11th Cir.), cert. denied, 117 S. Ct. 79 (1996).
150. 77 F.3d at 1330.
151. Id. at 1330-31.
152. Id. at 1331.
153. Id. The court noted, "The vigor with which SunAmerica argued that the name change would moot this appeal is matched only by the vigor with which it now argues, having been forced to change its name, that the appeal is not moot after all." Id.
may be estopped from arguing after the stay is denied that the appeal is not moot." The court then applied traditional mootness analysis to conclude that because Sun Life of America could gain some effective redress by regaining the right to use the "Sun Life" name in connection with a subsidiary, for example, the appeal was not moot.

D. Harmless Error Rule in Instructional Omission Cases

The Court of Appeals for the Eleventh Circuit addressed during 1996 the applicability of the "harmless error" rule, which allows consideration of whether a district court error resulted in actual prejudice to the party complaining of the error, to cases in which the district court failed to instruct the jury on an essential element of the prosecution's case. In United States v. Rogers, defendant was charged with violations of the National Firearms Act for possession of a machine gun and silencer. The district court failed to instruct the jury that the prosecution was required as an element of its case to show that defendant knew that the silencer was a firearm, and the jury subsequently convicted defendant. On appeal, defendant argued that the district court's failure to instruct the jury on this element of the crime constituted a constitutional error. The court in Rogers agreed that the district court's failure to instruct the jury on this element of the crime constituted a constitutional error. The court noted the lack of guidance from the Supreme Court on the issue of whether the harmless error rule could still apply to defendant's conviction and noted that other circuits are split on the issue.

The court ultimately adopted the analysis set forth by Justice Scalia in his concurrence in the 1989 Supreme Court decision in Carella v.

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154. Id. at 1332.
155. Id. at 1333. As the court noted, "A case does not become moot simply because an appellate court is unable completely to restore the parties to the status quo ante. The ability of the appellate court 'to effectuate a partial remedy' is sufficient to prevent mootness." Id. (citing Church of Scientology v. United States, 506 U.S. 9, 12-14 (1992)).
156. 94 F.3d 1519 (11th Cir. 1996).
157. Id. at 1521-22.
158. Id. at 1522-23.
159. Id. at 1524.
160. Id.
161. Id. As the court observed, the Courts of Appeals for the Seventh and Ninth Circuits find that the harmless error rule can be applied in this circumstance, while the courts of the Fifth and Sixth Circuits appear to hold that an instructional omission is per se reversible. Id.
California" for deciding whether the harmless error rule could be applied. Based on Justice Scalia's concurrence, the court held in Taylor that harmless error analysis is available "only in those 'rare situations when the reviewing court can be confident that such an error did not play any role in the jury's verdict.'" The court in Taylor concluded that:

[A]n instructional omission ... may be viewed as harmless only in three rather infrequent scenarios: 1) Where the infirm instruction pertained to a charge for which the defendant was acquitted (and not affecting other charges); 2) Where the omission related to an element of the crime that the defendant in any case admitted; and 3) Where the jury has necessarily found certain other predicate facts that are so closely related to the omitted element that no rational jury could find those facts without also finding the element.

Applying this standard, the court affirmed the conviction regarding defendant's possession of a silencer under the second scenario, based on defendant's admissions during the trial regarding his extensive knowledge of firearms and silencers.

163. 94 F.3d at 1526.
164. Id. (quoting Carella v. California, 491 U.S. 263, 270 (1989) (Scalia, J., concurring)).
165. Id.
166. Id. at 1527.