Appellate Practice and Procedure

William M. Droze
Andrea L. Siedlecki

Follow this and additional works at: https://digitalcommons.law.mercer.edu/jour_mlr

Part of the Litigation Commons

Recommended Citation
Available at: https://digitalcommons.law.mercer.edu/jour_mlr/vol50/iss4/5

This Survey Article is brought to you for free and open access by the Journals at Mercer Law School Digital Commons. It has been accepted for inclusion in Mercer Law Review by an authorized editor of Mercer Law School Digital Commons. For more information, please contact repository@law.mercer.edu.
Appellate Practice and Procedure

by William M. Droze* and Andrea L. Siedlecki**

I. INTRODUCTION

Appellate practice and procedure often dictates the resolution of cases presented for review. Although procedural rules are not implemented in a vacuum, and the particular facts and legal questions raised by each case necessarily determine their application, an analysis of appellate practice provides a valuable tool in assessing judicial trends by portraying the judicial character in a manner that transcends the peculiar circumstances of a given case.

An evaluation of recent appellate practice reveals an increased emphasis on judicial economy and efficiency. During 1998, the Eleventh Circuit appeared aware of the necessity of providing practitioners, parties, and lower courts with guidance regarding appellate practice and procedure. This awareness translated into enhanced efforts to provide detailed and thorough analyses of the relevant rules and their peculiar nuances. This trend should educate current and prospective participants in the judicial process and promote effective and efficient judicial administration by providing advance notice regarding the impact of procedural rules.

* Senior Associate with the law firm of Troutman Sanders L.L.P., Atlanta, Georgia. University of North Carolina (A.B., 1984); University of Georgia School of Law (J.D., cum laude, 1987).

** Associate with the law firm of Troutman Sanders L.L.P., Atlanta, Georgia. University of Virginia (B.A., with distinction, 1994); University of Virginia School of Law (J.D., 1998).
II. TRENDS TOWARDS JUDICIAL ECONOMY, EFFICIENCY, AND EDUCATION

Throughout 1998 the court of appeals emphasized the importance of complying with procedural rules. The court accordingly refrained from exercising its discretion to consider certain appeals when the failure to adhere to procedural rules frustrated the goals sought to be fostered. In United States v. Salisbury,1 for example, the court rejected the Government's petition for interlocutory review, pursuant to 18 U.S.C. § 3731, of a district court order suppressing evidence in a criminal case on the ground of a filing irregularity.2 Although the court retained discretion to consider the Government's petition even though the Government failed to comply with statutorily prescribed certification requirements,3 the court emphasized that the certification requirement is not a "mere formality," but serves the vital purpose of ensuring that the Government prudently evaluates a case before filing an appeal.4 The court accordingly dismissed the appeal because the Government neglected to certify the propriety of the appeal until a month after filing its notice, and the court determined that permitting the Government to file its representation after initiating the appeal would defeat the purpose of the certification requirement.5 This case is significant given the procedural leniency typically afforded governmental litigants.

Although the Eleventh Circuit sought to promote compliance with appellate procedure, the court remained willing to excuse noncompliance when competing concerns overrode the importance of enforcing procedural rules. In re Russell Reed6 illustrates the court's attempt to balance diverse goals. The court generally refrains from addressing issues raised for the first time on appeal, yet may exercise its discretion to consider these issues when pure questions of law are presented or when

1. 158 F.3d 1204 (11th Cir. 1998).
2. Id. at 1207.
3. The court treats a failure to comply with the certification requirements prescribed by 18 U.S.C. § 3731 as a filing irregularity. Id. at 1206. Federal Rule of Appellate Procedure 3(a) governs such defects in the filing process and provides that these irregularities are "ground[s] only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal." Id. (quoting Fed. R. App. P. 3(a) (1998)). Because noncompliance with certification requirements does not deprive the court of jurisdiction, the court retains discretion to review an appeal even though the government fails to adhere to certification rules. Id.
4. Id. at 1207.
5. Id.
6. 161 F.3d 1311 (11th Cir. 1998).
necessary to avoid injustice. The court in *In re Russell Reed* evaluated appellant’s allegations, raised for the first time on appeal, that the district court violated appellant’s procedural due process rights and Federal Rule of Criminal Procedure 42(b) by failing to appoint an independent prosecutor to pursue criminal contempt proceedings and by neglecting to afford proper notice and a reasonable time to prepare for those proceedings. Although the court considered the novel arguments, it rejected appellant’s contentions and determined that appellant had expressly waived any right to have an independent prosecutor appointed and had constructively waived any right to challenge the sufficiency of the notice provided by failing to raise the objection before the district court. By exercising its discretion to consider issues raised for the first time on appeal, the court exhibited its desire to promote sound judicial administration by resolving claims expeditiously and efficiently. In holding that appellant waived certain objections by neglecting to timely assert them before the district court, the court demonstrated its commitment to enforcing procedural rules and the critical importance of complying with such rules.

The court of appeals also sought to facilitate adherence to procedural rules by providing guidance to various judicial players. In *Beck v. Prupis*, the court educated practitioners, parties, and lower courts by clarifying standing requirements for federal civil Racketeer Influenced and Corrupt Organization Act (“RICO”) claims. The district court determined that plaintiff’s injuries derived from his status as a creditor and stockholder, and the court deemed these injuries too remote to provide plaintiff with RICO standing. The Eleventh Circuit disagreed, emphasizing that while a creditor or a stockholder lacks RICO standing when his claim derives exclusively from racketeering acts targeted at a corporation, a creditor or stockholder retains standing when he seeks redress for racketeering acts aimed at him. The Eleventh Circuit concluded that plaintiff retained standing to prosecute his claim, but upheld the district court’s grant of summary judgment because plaintiff failed to proffer sufficient evidence to create a genuine

7. *Id.* at 1313.
8. *Id.*
9. *Id.* at 1315-16.
10. *Id.* at 1317 (determining that even if appellant had raised a timely objection regarding the purportedly deficient notice, appellant’s allegations would fail on the merits).
11. 162 F.3d 1090 (11th Cir. 1998).
12. *Id.* at 1093.
13. *Id.* at 1096 n.10.
14. *Id.*
issue of material fact. By refining the district court's rationale, the
court increased the likelihood that the district court will properly resolve
similar issues raised in the future, reduced the likelihood that the
appellate court will have to revisit these types of issues, and ultimately
expedited the fair and efficient resolution of litigants' claims.

The Eleventh Circuit provided additional guidance in Jews for Jesus,
Inc. v. Hillsborough County Aviation Authority. The appellate court
affirmed the district court's dismissal of the case as moot because
defendant had revoked the literature distribution policies challenged as
unconstitutional during the pendency of the lawsuit. The court
explained that a claim becomes moot when events subsequent to the
commencement of suit preclude the court from providing meaningful
relief. The court emphasized that although the mere voluntary
cessation of a challenged activity does not necessarily render a controver-
sy moot, if there exists no reasonable expectation that the defendant will
resume the controverted activity subsequent to the lawsuit's dismissal,
the court lacks jurisdiction to resolve the dispute. In Jews for Jesus,
Inc., the court disregarded as insignificant the possibility that defendant
would resume the purportedly unconstitutional activity or subject
plaintiff to the same unlawful action again. The court rejected the
"capable of repetition yet evading review" doctrine as a way to render
the claim justiciable because the court found no reasonable expectation
that the challenged activity would recur. The court advised in dicta,
however, that should defendant subsequently reinstate the challenged
policies or adopt comparable ones, plaintiff would retain a viable cause
of action. Defendant could not render this action moot merely by
revoking the challenged activity, moreover, because the repeated
vacillation would create a reasonable expectation that the controverted
conduct would persist. The court's detailed analysis educates various

15. Id. (citing Turner v. American Fed. of Teachers Local 1565, 138 F.3d 878, 880 n.1
(11th Cir. 1998) (an appellate court must affirm the judgment of the district court when
the district court arrives at the correct conclusion even if the district court relied upon an
erroneous ground or a reason for its conclusion)).
16. 162 F.3d 627 (11th Cir. 1998).
17. Id. at 628.
18. Id. at 629.
19. Id.
20. Id.
21. Id. at 629-30 n.4 (noting that while the capable of repetition yet evading review
document prevents dismissal based on mootness grounds, the doctrine requires that there
is a reasonable expectation that the same complainant would be subject to the same
allegedly unlawful action again).
22. Id. at 630.
23. Id.
judicial participants and arguably mitigates waste of finite judicial resources by deterring prospective litigants from raising similarly moot claims and by enabling the lower courts to resolve these claims expeditiously.

The Eleventh Circuit's opinion in *Johnson Enterprises of Jacksonville, Inc. v. FPL Group, Inc.* illustrates the increased emphasis on promoting efficiency and economy. The court relied on the particular facts of the case to sharply criticize a "broader phenomenon" labeled "shotgun pleading." The court described the phenomenon as follows: a complaint commences the action with a long list of general allegations most of which are immaterial to the claims for relief; the complainant incorporates by reference the general allegations into each count of the complaint; and the defendant replies with an answer that responds to each and every statement contained in the complaint. The Eleventh Circuit condemned trial courts' tolerance of such shotgun pleadings and concomitant failure to aggressively dictate a narrowing of issues to the extent practicable in the preliminary stages of litigation, reasoning that, "if the trial judge does not [at this point] quickly demand repleader, all is lost—extended and largely aimless discovery will commence, and the trial court will soon be drowned in an uncharted sea of depositions, interrogatories, and affidavits." A "massive waste of judicial and private resources" results from this abdication of the trial court's "duty" to define and delimit the controverted issues, "litigants suffer, and society loses confidence in the court[s'] ability to administer justice.

By explicitly delegating responsibility to trial courts to define and narrow disputes, the Eleventh Circuit used *Johnson Enterprises of Jacksonville, Inc.*, as a forum to curb perceived abuses, foster expeditious resolution of claims, and to reduce unnecessary burdens on limited judicial resources.

III. APPELLATE TREATMENT OF INTERLOCUTORY MATTERS

Although appellate courts generally review final judgments only, they may exercise interlocutory jurisdiction in prescribed circumstances. Appellants who seek interlocutory review bear the burden of demonstrating that the issues presented are subject to immediate review. The

24. 162 F.3d 1290, 1333-34 (11th Cir. 1998).
25. Id. at 1333.
26. Id.
27. Id.
28. Id.
failure to satisfy this burden may prove as fatal as neglecting to file a notice of appeal or filing this notice in an untimely fashion.  

There are several avenues available for litigants to obtain appellate interlocutory review. First, appellate courts retain jurisdiction to evaluate interlocutory appeals from district court decisions awarding, refusing, or dissolving injunctions pursuant to 28 U.S.C. § 1292(a)(1). In addition, appellate courts may review interlocutory decisions when a district court certifies an order as final under Federal Rule of Civil Procedure 54(b) ("Rule 54(b)"). Furthermore, even though an order is not final and reviewable pursuant to 28 U.S.C. § 1291, falls outside the class of orders subject to interlocutory review pursuant to 28 U.S.C. § 1292(a), and has not been certified for immediate appeal under 28 U.S.C. § 1292(b), litigants may obtain interlocutory review by invoking the collateral order doctrine prescribed by the United States Supreme Court in Cohen v. Beneficial Industrial Loan Corp. The collateral order doctrine in Cohen permits immediate appeal of a limited class of decisions before the district court issues a final resolution of the claims asserted.

---

33. Id. § 1292(a).
34. Section 1292(b) authorizes the courts of appeals to exercise interlocutory review of district court orders when the lower court certifies a question of law for review and not when the lower court attempts to certify only discretionary matters for consideration, such as the decision to certify a class, vel non. Armstrong v. Martin Marietta Corp., 138 F.3d 1374, 1385-86 (11th Cir. 1998). Even though the district court certifies an order for immediate appeal pursuant to 28 U.S.C. § 1292(b), the court of appeals retains discretion to accept or deny the petition for appeal. Id. at 1387; see also Whit v. Sherman Int'l Corp., 147 F.3d 1325, 1329 (11th Cir. 1998) (denying plaintiff's petition for immediate appeal pursuant to § 1292(b)); Johnson v. City of Fort Lauderdale, 148 F.3d 1228, 1229 (11th Cir. 1998) (granting defendants' petition for interlocutory review when the district court denied defendants' motion to dismiss plaintiffs' claims asserted pursuant to 42 U.S.C. § 1983, but granted the parties the right to an immediate appeal under 28 U.S.C. § 1292(b)).
35. 337 U.S. 541, 546 (1949). The Eleventh Circuit endorses three exceptions to the finality requirement for purposes of appeal. Interlocutory orders are subject to immediate appeal pursuant to the collateral order doctrine, the doctrine of practical finality (referred to as the Forgay-Conrad rule), and the exception that permits an intermediate determination of issues critical to the underlying action. Devine v. Indian River County Sch. Bd., 121 F.3d 576, 579 n.8 (11th Cir. 1997). The appellate court invokes the practical finality doctrine and the intermediate resolution exception less frequently than the collateral order doctrine because the practical finality doctrine applies in matters implicating property disputes, and the intermediate resolution exception has been interpreted narrowly. Id.
An interlocutory order must satisfy two requirements prior to being immediately appealable pursuant to 28 U.S.C. § 1292(a)(1).\(^{37}\) First, the plaintiff must seek an injunction or pursue relief that is the functional equivalent of an injunction in its practical effect.\(^{38}\) Second, the district court's interlocutory order must present a threat of a "serious, perhaps irreparable, consequence" that is "effectually challenged only by immediate appeal."\(^{39}\) These two prerequisites supported the court of appeals' expansion of its interlocutory jurisdiction pursuant to 28 U.S.C. § 1292(a)(1) in *United States v. City of Hialeah.*\(^{40}\) The court determined that a consent decree is analogous to an injunction and that an order refusing to enter a consent decree in a Title VII case will always pose a threat of irreparable harm.\(^{41}\) The court concluded that whenever a district court refuses to enter a Title VII consent decree, the plaintiffs retain an immediate right of appeal.\(^{42}\)

When presented with an interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(1), the Eleventh Circuit adopts the position that the court should delve no further into the merits of the action than necessary to determine the issues raised on appeal.\(^{43}\) This position fosters judicial economy and efficiency, and arguably reflects the Eleventh Circuit's persistent concern with facilitating judicial administration, as opposed to strictly enforcing jurisdictional parameters.\(^{44}\) Although the extent of the court of appeals interlocutory review is limited, the court will review issues which are inextricably intertwined with an order granting or denying an injunction, reflecting its competing goal to resolve disputes expeditiously.\(^{45}\) In *McDonald's Corp. v. Robertson,*\(^{46}\) the court rejected appellant's contention that the court lacked jurisdiction to review the district court's denial of appellee's request for an evidentiary hearing.\(^{47}\)

---

38. *Id.* at 83-84.
39. *Id.* at 84.
40. 140 F.3d 968, 974 (11th Cir. 1998).
41. *Id.* at 974.
42. *Id.* at 975.
43. Massey v. Congress Life Ins. Co., 116 F.3d 1414, 1416 (11th Cir. 1997) (reversing the district court's sua sponte grant of summary judgment for failure to timely notify the nonmovant precedent to the entry of summary judgment). *Id.* at 1418. In American Express Fin. Advisors, Inc. v. Makarewicz, 122 F.3d 936, 939 (11th Cir. 1997), for example, the Eleventh Circuit evaluated a denial of injunctive relief in an arbitration case, but refused to assess the district court's order awarding a stay because the district court failed to certify the order for immediate appeal pursuant to 28 U.S.C. § 1292(b).
44. *Massey,* 116 F.3d at 1416.
45. *McDonald's Corp. v. Robertson,* 147 F.3d 1301, 1310-11 n.7 (11th Cir. 1998).
46. 147 F.3d 1301 (11th Cir. 1998).
47. *Id.* at 1310 n.7.
The court first emphasized that it indisputably retained jurisdiction over the preliminary injunction order pursuant to 28 U.S.C. § 1292(a)(1). Because the order denying the evidentiary hearing was “inextricably intertwined” with the order granting the preliminary injunction, the court found that it could not fully address whether the district court erred in granting the preliminary injunction without considering whether the district court was obligated to conduct an evidentiary hearing. The court accordingly deemed the evidentiary hearing order immediately reviewable, even though it was not independently appealable under the court’s interlocutory jurisdiction.

The court of appeals may also exercise interlocutory jurisdiction over an order certified as final pursuant to Federal Rule Civil Procedure 54(b). Although the appellate court retains jurisdiction to review an order deemed final under Rule 54(b), the district court’s Rule 54(b) certification is not dispositive and remains subject to appellate review. In assessing the district court’s certification, the appellate court seeks to foster sound judicial administration, yet refrains from reversing the certification order absent a showing that it was clearly unreasonable.

The court’s collateral order doctrine in Cohen also authorizes appellate interlocutory review in prescribed circumstances and provides a narrow exception to the final judgment rule. The appellant seeking interlocutory review pursuant to the collateral order doctrine bears the burden of demonstrating that: (1) the order appealed conclusively determines an important legal question; (2) the legal question raised is distinct from the merits of the case; and (3) the legal question is not effectively reviewable from a final judgment in the underlying action.

The collateral order doctrine is frequently invoked to authorize appellate interlocutory review of a district court’s denial of qualified immunity to a public official in an action asserted pursuant to 42 U.S.C.

48. Id.
49. Id. at 1311 n.7.
50. Id.; see also Ensley v. Soper, 142 F.3d 1402, 1406 n.3 (11th Cir. 1998) (determining that the appellate court retained jurisdiction to review the district court’s denial of qualified immunity to appellant/police officer that rested on a disputed issue of law or of mixed law and fact).
51. Armstrong v. Martin Marietta Corp., 138 F.3d 1374, 1388 (11th Cir. 1998) (reviewing the district court’s denial of class certification pursuant to Fed. R. Civ. P. 54(b)).
52. Ebrahimi v. City of Huntsville Bd. of Educ., 114 F.3d 162, 167 (11th Cir. 1997) (deeming the district court’s certification unreasonable when the district court failed to clearly and cogently articulate the factual and legal reasons warranting certification).
53. Id. at 166.
55. Id. at 1285.
§ 1983. In Gonzalez v. Lee County Housing Authority, the court considered whether the district court erred in denying defendant's motion for summary judgment in her individual capacity based on qualified immunity. In permitting defendant's interlocutory appeal, the court emphasized that although it lacks interlocutory jurisdiction to review a district court's denial of summary judgment when the moving party's appeal derives solely from the district court's purported failure to evaluate evidentiary sufficiency, the court retains interlocutory jurisdiction to review a denial of summary judgment when the moving party's appeal necessitates a determination of clearly established law that existed at the time of the alleged unlawful acts or omissions. The court indicated that it may entertain an interlocutory appeal in the latter context even though the district court merely determined that "issues of material fact" preclude summary judgment. The court of appeals, in an issue of first impression in this circuit, also expanded its interlocutory jurisdiction under the collateral order doctrine to include review of the denial of discretionary function immunity under Alabama state law in Sheth v. Webster. The court noted that "while state law governs the applicability of immunity to state law claims, 'federal law dictates the appealability of the district court's order denying summary judgment.'" Because the immunity at issue closely paralleled qualified immunity, the court concluded that it retained interlocutory jurisdiction to review the denial of discretionary function immunity provided by Alabama law.

The appellate court's exercise of interlocutory review pursuant to the collateral order doctrine in Cohen remains confined, however. In GJR
Investments, Inc. v. County of Escambia, the court emphasized that while the existence of material issues of fact does not independently preclude interlocutory appellate review of accompanying legal issues, the court’s jurisdiction in such matters extends only to the legal issues implicated by the district court’s action. The appellate court accordingly refused to exercise interlocutory review over a jurisdictional argument raised by appellants in Moniz v. City of Fort Lauderdale.

The court initially noted that it may retain jurisdiction over an issue that is not independently appealable if that issue is inextricably intertwined with, or necessary to ensure the meaningful resolution of the issue that is independently appealable and subject to interlocutory review. Neither of these exceptions applied in the present action, however, because the court could adequately resolve the qualified immunity issue without assessing appellants’ jurisdictional claims.

The court’s treatment of interlocutory matters during 1998 reflects its desire to expedite claim resolution and foster sound judicial administration. The court sought to immediately resolve issues deemed imperative to the proper disposition of claims without infringing on the independent review of the district court. Moreover, the Eleventh Circuit’s detailed analysis of the rationale underlying its decisions provides guidance to the various judicial participants.

IV. TIMELINESS OF NOTICE OF APPEAL AND PRESENTATION OF ARGUMENT

If a party neglects to file a timely notice of appeal the appellate court lacks jurisdiction to resolve the issues presented. The federal rules permit a district court to extend the time for the filing of a notice of appeal, however, upon a demonstration of excusable neglect. The

64. 132 F.3d 1359 (11th Cir. 1998) (determining that the appellate court retained interlocutory jurisdiction over the district court’s denial of a motion to dismiss on qualified immunity grounds). Jurisdiction was proper even though the district court could not determine whether a genuine issue of material fact existed regarding whether defendants’ conduct violated clearly established law, because the district court found that plaintiff’s complaint alleged the violation of a clearly established right. Id. at 1365-66. This presented an issue of law capable of resolution on interlocutory appeal. Id. at 1366. The court emphasized, however, that appellate interlocutory jurisdiction is restricted and extends only to those legal issues implicated by the district court’s denial of defendants’ motion to dismiss. Id.

65. Id.

66. 145 F.3d 1278, 1281 n.3 (11th Cir. 1998).

67. Id.

68. Id.

69. LaChance v. Duffy’s Draft House, Inc., 146 F.3d 832, 838 (11th Cir. 1998).

70. FED. R. APP. P. 4(a)(5).
Eleventh Circuit employs a flexible analysis in evaluating whether excusable neglect exists.\(^7\) Numerous factors effect the court's assessment, including the danger of prejudice to the nonmovant, the length of the delay, the reason for the delay, and whether the movant acted in good faith.\(^2\)

Despite the liberalization of the excusable neglect doctrine,\(^7\) litigants' practical ability to rely on the doctrine to salvage filing irregularities remains limited. In *LaChance v. Duffy's Draft House, Inc.*,\(^7\) the court determined that it lacked jurisdiction over the district court's order awarding attorney fees and costs because appellant neglected to file a notice of appeal challenging the order granting attorney fees, and he failed to amend his initial notice of appeal contesting the district court's summary judgment award.\(^7\) The court noted that Federal Rule of Appellate Procedure 3(c) ("Rule 3") necessitates that a notice of appeal "designate the judgment, order, or part thereof appealed from" and ordinarily precludes review of any judgment or order excluded therefrom.\(^7\) In practice, Rule 3 is ordinarily construed liberally and mistakes and/or errors in designating appealed orders rarely prove fatal, provided the notice clearly indicates an overriding intent to appeal.\(^7\)

The court determined that because appellant filed his initial notice of appeal before appellee had even filed the motion for attorney fees, appellant could not have intended the notice of appeal to cover the order awarding attorney fees.\(^7\) The court disregarded the excusable neglect doctrine prescribed by Rule 4 as irrelevant because appellant's failure to satisfy Rule 3 proved fatal.\(^7\)

Another procedural issue that the appellate court frequently confronted in 1998 was a party's failure to assert arguments or claims below. Although the appellate court ordinarily refrains from assessing contentions raised for the first time on appeal,\(^8\) the court recognizes

\(^71.\) Zipperer v. School Bd. of Seminole County, 111 F.3d 847, 849 (11th Cir. 1997).
\(^72.\) Id. at 849.
\(^73.\) Id. This case applies the liberalization of the excusable neglect standard initiated by the Supreme Court in *Pioneer Investment Services Co. v. Brunswick Associates, Ltd.*, 507 U.S. 380, 388 (1993), and adopted by the Eleventh Circuit in *Advanced Estimating System, Inc. v. Riney*, 77 F.3d 1322, 1325 (11th Cir. 1996).
\(^74.\) 146 F.3d 832 (11th Cir. 1998).
\(^75.\) Id. at 838.
\(^76.\) Id. at 837 (citations omitted).
\(^77.\) Id.
\(^78.\) Id.
\(^79.\) Id. at 838.
\(^80.\) Loggerhead Turtle v. County Council of Volusia County, Florida, 148 F.3d 1231, 1249 n. 21 (11th Cir. 1998) (treating as uncontested the district court's conclusion that defendant validly enacted the disputed ordinance under its charter and state law because
exceptions to this general rule. As illustrated by In re Russell Reed, the Eleventh Circuit permits consideration of an issue initially asserted on appeal when the issue involves a pure legal question and its delayed resolution would result in a miscarriage of justice, or when the appropriate resolution is beyond all doubt. These exceptions illustrate that precluding consideration of an issue raised for the first time on appeal constitutes a rule of practice, as opposed to a jurisdictional mandate, and, consequently, remains subject to the court's discretion. Interests in avoiding prejudice to the parties and promoting judicial economy often dictate the court's exercise of this discretion.

V. DOCTRINES OF STANDING, RIPENESS, JUSTICIABILITY, AND MOOTNESS

Standing, ripeness, justiciability, and mootness pose critical, interrelated jurisdictional questions that arise from the Article III mandate restricting the jurisdiction of federal courts to cases and controversies. These doctrines confine the class of potential controversies deemed appropriate for judicial resolution. In applying these rules, federal courts necessarily recognize the inherent limitations of the judiciary and its capacity to award effective relief. Adherence to these jurisdictional mandates fosters sound judicial administration by precluding review of abstract controversies and ensuring the rigorous and thorough presentation of competing arguments related to such controversies.

Standing is a jurisdictional requirement subject to review at all stages of the litigation. The constitutional core of standing incorporates three elements and requires that the party invoking the court's jurisdiction demonstrate that: (1) he has personally suffered some actual or threatened injury resulting from the defendant's purportedly illegal conduct; (2) the injury can fairly be traced to that conduct; and (3) a favorable decision is likely to redress the harm sustained. The Eleventh Circuit rigorously applies standing requirements as an essential prerequisite to seeking judicial relief. In Falanga v. State Bar of Georgia, the court invoked the standing doctrine sua sponte, even though defendant failed to contest plaintiffs' right to challenge Georgia's
prohibition against uninvited, in-person solicitation of potential clients by attorneys and their agents on First Amendment grounds. Recognizing its "independent obligation to consider standing," the court determined that plaintiffs properly asserted the action because a credible threat of prosecution existed and plaintiffs' trial testimony indicated that they intended to engage in the conduct proscribed by the challenged standards.

The Eleventh Circuit also struggled to apply the standing doctrine in novel contexts. Clay v. Riverwood International Corp. related to an issue of first impression in the circuits regarding whether corporate insiders' exercise of stock appreciation rights ("SARs") for cash from their employing company implicated the insider trading laws of the Securities Exchange Act of 1934, as amended, and the Securities and Exchange Commission Rule 10b-5. The majority in Clay concluded that the SARs did not constitute instruments that triggered the insider trading laws and accordingly failed to address the district court's

89. Id. at 1335 n.1.
90. Id. (quoting Jacobs v. Florida Bar, 50 F.3d 901, 904 n.12 (11th Cir. 1995)).
91. Johnson Enter. of Jacksonville, Inc. v. FPL Group, Inc., 162 F.3d 1290, 1318-19 (11th Cir. 1998) (determining that plaintiff lacked standing to seek relief pursuant to 18 U.S.C. § 1964 (c) because defendant's purportedly unlawful misrepresentations were not directed toward plaintiff, and, when defendant's actions were aimed at plaintiff, plaintiff failed to demonstrate that he suffered a cognizable injury as a result); see also Jairath v. Dyer, 154 F.3d 1280, 1283 n.8 (11th Cir. 1998) (determining that plaintiff lacked standing to pursue relief under the American with Disabilities Act because plaintiff received the desired medical procedure subsequent to defendant's refusal to treat him and did not intend to seek further medical advice or treatment from defendant, rendering plaintiff's injury incapable of being redressed by an injunction, the exclusive remedy available under the ADA); Bass v. Singletary, 143 F.3d 1442, 1446 (11th Cir. 1998) (affirming the district court's grant of defendant's motion for summary judgment because plaintiff/prisoners failed to satisfy standing requirements that (1) they suffered an actual injury to the right of legal access asserted; (2) the purportedly unlawful conduct that infringed on their right of access to the courts impeded or frustrated pursuit of a nonfrivolous, legal claim; and (3) the legal claim was an appeal from either a conviction for which the inmate was incarcerated, a habeas petition, or a civil rights action); Bivens Gardens Office Bldg., Inc. v. Barnett Banks of Florida, 140 F.3d 898, 906 (11th Cir. 1998) (affirming in part, and vacating and remanding in part the district court's dismissal of plaintiffs' federal RICO claims on standing grounds and noting that a plaintiff retains RICO standing only if his injury flows directly from the commission of the predicate RICO acts); Engelhardt v. Paul Revere Life Ins. Co., 139 F.3d 1346, 1351 (11th Cir. 1998) (reversing the district court's dismissal of plaintiff's claims based on the district court's erroneous determination that plaintiff was neither a beneficiary of, nor a participant in, a disability life insurance plan and thus was deprived of ERISA standing).
92. 157 F.3d 1259 (11th Cir. 1998).
93. Id. at 1261.
determination that plaintiff lacked statutory standing. In his concurrence, however, Circuit Judge Carnes criticized the majority's rationale as erroneous and overly broad. Judge Carnes asserted that the majority should not have considered whether SARs are securities for purposes of insider trading rules when the plain language of the statute deprived plaintiff of standing.

The court of appeals also evaluated standing requirements for antitrust actions in Cherie Johnson, M.D. v. University Health Services. In assessing standing requirements under the antitrust statute, the court emphasized that the complainant must fall within the class of intended plaintiffs and suffer the type of injury intended to be covered. The court struggled to define "antitrust injuries" and concluded that the term includes only those injuries that arise from interference with the freedom to compete. The court affirmed the district court's grant of defendant's motion for summary judgment for lack of standing by concluding that no one had interfered with plaintiff's ability to compete as an obstetrician in the Augusta market. Additionally, the court of appeals reversed the district court's dismissal of several of plaintiffs' claims for lack of standing in Loggerhead Turtle v. County Council of Volusia County. The court rejected the district court's determination that plaintiffs failed to satisfy both the "fairly traceable" and "redressability" prongs of the standing doctrine, and concluded that a governmental entity's regulatory control of minimum wildlife protection standards may cause redressable injury to protected wildlife in locations where nonparty governmental entities possess supplemental authority to regulate or exclusively dictate enforcement.

The ripeness doctrine relates to standing requirements and precludes a federal court from entertaining a claim prematurely. This jurisdictional rule reduces waste of finite judicial resources by precluding judicial

94. Id. at 1263 n.5.
95. Id. at 1269 (Carnes, J., concurring).
96. Id. at 1270.
97. 161 F.3d 1334 (11th Cir. 1998).
98. Id. at 1338. The court emphasized that any cause of action, whether created by statute or common law, is intended to protect a certain, restricted class of people from specific types of injury. Id. The court illustrated this definition with a hypothetical example and explained that the two facets of any claim, class of plaintiff and type of injury, provide the basis for the standing requirement. Id.
99. Id.
100. Id.
101. 148 F.3d 1231, 1247-51 (11th Cir. 1998).
102. Id. at 1247.
103. Id. at 1251-53.
resolution of hypothetical, abstract controversies that may only evolve into concrete cases prospectively. The ripeness inquiry questions "whether there is a sufficient injury to meet Article III's requirement of a case or controversy, and, if so, whether the claim is sufficiently mature with issues sufficiently defined and concrete to permit effective decision-making by the court." The fitness of particular questions for judicial determination and the hardship imposed on litigants by delaying resolution of the dispute comprise the ripeness analysis. In Atlanta Gas Light Co. v. Federal Energy Regulatory Commission, the court considered four factors in assessing whether plaintiff's challenge to an order issued by the Federal Energy Regulatory Commission was ripe: (1) whether the issues presented were "purely legal"; (2) whether the challenged action constituted "final agency action"; (3) whether the administrative action had a "direct and immediate" impact on the complainant; and (4) whether judicial resolution of the claim would aid, rather than impede, effective administration by the agency. The court determined that plaintiff failed to satisfy the four prerequisites and consequently dismissed the claim on ripeness grounds.

While the ripeness doctrine inhibits judicial consideration of a claim prior to the existence of a concrete injury, the mootness doctrine prevents judicial resolution of a claim when the complainant suffers a concrete injury yet subsequent events or the mere passage of time render accrued rights unenforceable. Although the Eleventh Circuit dismissed numerous claims as moot during 1998, the court empha-

104. Atlanta Gas Light Co. v. Federal Energy Regulatory Comm'n, 140 F.3d 1392, 1404 (11th Cir. 1998).
105. Socialist Worker's Party v. Leahy, 145 F.3d 1240, 1244 (11th Cir. 1998).
106. Atlanta Gas Light Co., 140 F.3d at 1404.
107. 140 F.3d 1392 (11th Cir. 1998).
108. Id. at 1392.
109. Id.
110. Zimring v. Olmstead, 138 F.3d 893, 895 n.2 (11th Cir. 1998) (quoting United States Parole Comm'n v. Geraghty, 445 U.S. 388, 397 (1980), describing mootness as "the doctrine of standing set in a time frame," because the requisite personal interest that must exist at the commencement of the litigation (standing), must continue throughout its existence (mootness)).
111. See generally World Ins. Co. v. Branch, 156 F.3d 1142 (11th Cir. 1998) (vacating the district court's ruling as moot, because appellee rescinded the purportedly unlawful policy subsequent to the district court's determination); Jews for Jesus, Inc. v. Hillsborough County Aviation Auth., 182 F.3d 627 (11th Cir. 1998); Bel-Bel Int'l Corp. v. Community Bank of Homestead, 162 F.3d 1101, 1104 n.4 (11th Cir. 1998) (determining that defendant's repayment of the promissory note extinguished the creditor's claim to defendant's receivables and rendered the issue moot on appeal); Watkins v. Sverdrup Tech., 153 F.3d 1308, 1318 n.19 (11th Cir. 1998) (affirming the district court's award of summary judgment against plaintiffs on their claims of discriminatory discharge under the federal Age
sized that the burden of demonstrating mootness remains a "heavy one," and that the voluntary cessation of purportedly illegal conduct ordinarily fails to deprive the court of jurisdiction to evaluate a case.\footnote{112} In addition, when circumstances trigger the mootness doctrine and preclude review of an adverse determination on the merits, the court retains discretion to mitigate the impact of dismissal by vacating the district court's judgment and, consequently, preventing the party seeking review from being forced to acquiesce in the judgment.\footnote{113}

In \textit{Walker v. Mortham},\footnote{114} the court reviewed one way a district court's adjudication could create an issue of mootness.\footnote{115} The complainants in \textit{Walker} asserted claims against the State of Florida and its Secretary pursuant to Title VII, alleging that the State had engaged in a pattern and practice of unlawful racial discrimination in its employment determinations.\footnote{116} The appellate court initially dismissed as moot plaintiffs' contention that the district court erred on remand by neglecting to consider employment examination evidence.\footnote{117} The court

\begin{itemize}
\item Discrimination and Employment Act and rejecting as moot plaintiff's appeal of the district court's dismissal of his state law discrimination action because the court determined that the state statute parallels federal law; \cite{112} Cohen v. United States, 151 F.3d 1338, 1345 (11th Cir. 1998) (dismissing the government's contention that it was nonnegligent and plaintiff's cross-appeal for increased damages as moot when the court determined that the discretionary function exception to the Federal Tort Claims Act shielded the government from liability and necessitated dismissal of plaintiff's allegations); \cite{113} In re Grand Jury Proceedings, 142 F.3d 1416, 1418 (11th Cir. 1998) (dismissing as moot appellants' contention that the district court erred in denying their motion to quash a grand jury subpoena served on their former attorney when the attorney appeared before the grand jury).
\item Socialist Worker's Party v. Leahy, 145 F.3d 1240, 1247 (11th Cir. 1998). The court refused to dismiss plaintiffs' case against the Secretary of State as moot because the Secretary's self-imposed restriction against enforcement of the challenged bonding requirement failed to eliminate the realistic possibility that the Secretary would seek to enforce the contested requirement again in the future. \cite{114} Furthermore, in United States v. Corrigan, 144 F.3d 763, 766 n.3 (11th Cir. 1998), the court refused to dismiss as moot appellant/prisoners' allegations that they were convicted illegally even though appellants had completed their sentences. The court noted that because a convicted defendant potentially confronts numerous disabilities even after his discharge from prison, the liberated prisoner retains standing to challenge the legality of his conviction. \cite{115}
\item Atlanta Gas Light Co. v. Federal Energy Regulatory Comm'n, 140 F.3d 1392, 1402-03 (11th Cir. 1998) (invoking the vacatur rule when external circumstances rendered appellant's claims moot prior to the disposition of the appeal and noting that by vacating the district court's orders appellant retained the ability to reassert his position in a future proceeding).
\item 158 F.3d 1177 (11th Cir. 1998).
\item \textit{Id.} at 1196.
\item \textit{Id.} at 1179.
\item \textit{Id.} at 1196.
\end{itemize}
determined that because the proffered evidence was irrelevant to the prima facie stage of the disparate treatment analysis and the court could effectively resolve all of plaintiffs’ contentions at that phase, the district court’s purported evidentiary error was moot.\textsuperscript{118} Conversely, the court determined that the issue of class recertification was ripe for adjudication.\textsuperscript{119} In reaching this conclusion, the court detailed the evolution of the class certification issue. The district court initially mooted the issue by entering judgment against every plaintiff in its original order; the appellate court subsequently revived the issue by determining that the district court erred; the district court then remooted the issue by entering judgment against every plaintiff on remand; and the appellate court finally resurrected the issue on appeal by determining that the district court erred in entering judgment against select plaintiffs and providing the district court with possible representatives for the putative class.\textsuperscript{120}

Finally, the justiciability doctrine seeks to prevent federal courts from encroaching on the powers of other government branches by confining their powers of review to only those matters presented in an adversarial context.\textsuperscript{121} Because the federal judiciary remains relatively insulated as an unelected and unrepresentative body, the justiciability requirement functions as an important self-checking mechanism.\textsuperscript{122} The Eleventh Circuit’s invocation of the justiciability doctrine reflects its commitment to active and effective judicial administration, and the critical importance of jurisdictional rules.\textsuperscript{123}

VI. STANDARDS OF REVIEW

The Eleventh Circuit Rules mandate that the court declare the standard of review applicable to each claim asserted on appeal.\textsuperscript{124} By expressly indicating the standard of review, the court facilitates practitioners’ ability to present claims effectively and coherently and

\begin{enumerate}
\item \textsuperscript{118} Id.
\item \textsuperscript{119} Id. at 1197.
\item \textsuperscript{120} Id. at 1196-97.
\item \textsuperscript{121} Socialist Worker’s Party v. Leahy, 145 F.3d 1240, 1244 (11th Cir. 1998) (reversing the district court’s dismissal of the case as nonjusticiable when the Secretary of State had threatened to enforce the purportedly unlawful bonding requirement against appellants on multiple occasions in the past, and continued to pose a credible threat of enforcing the bonding requirement in the future). Id. at 1247.
\item \textsuperscript{122} Id. at 1244.
\item \textsuperscript{123} Hill v. Butterworth, 147 F.3d 1333, 1334 (11th Cir. 1998) (remanding the case with instructions to dissolve the injunction and dismiss the complaint for lack of a justiciable case or controversy).
\item \textsuperscript{124} 11TH CIR. R. 28-2(i)(iii).
arguably deters unwarranted appeals by educating potential litigants regarding the burden which must be satisfied. Throughout 1998 the court detailed the applicable standards of review in the following contexts: review of summary judgment, review of motion to amend a final judgment, review of dismissal of a lawsuit on fugitive disentitlement grounds, review of dismissal based on a prisoner's failure to exhaust administrative remedies, review of an election system purportedly established or maintained for a discriminatory purpose, review of whether requiring a defendant to appear in court wearing leg shackles constitutes a denial of a fair trial, review of denial of a motion to remand, review of findings of constitutional (as opposed to historical) fact pursuant to a First Amendment dispute, review of application of sentencing guidelines to a given set of facts, review of grant of a leave to amend, review of grant or denial of a preliminary injunction, review of agency's decision not to prepare an Environmental Impact Statement, review of order granting a renewed judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(b), review of refusal to approve a proposed settlement agreement and enter a consent decree, review of refusal to exercise supplemental jurisdiction, review of res judicata and collateral estoppel, review of Federal Energy Regulatory Commission decisions, review of subject matter jurisdiction, review of appointment of a receiver, review of ruling excluding hearsay.

126. Bel-Bel Int'l Corp. v. Community Bank of Homestead, 162 F.3d 1101, 1106 (11th Cir. 1998).
127. Magluta v. Samples, 162 F.3d 662, 664 (11th Cir. 1998).
130. United States v. Mayes, 158 F.3d 1215, 1219 (11th Cir. 1998).
133. United States v. Saavedra, 148 F.3d 1311, 1313 (11th Cir. 1998).
134. Loggerhead Turtle v. County Council of Volusia County, Florida, 148 F.3d 1231, 1258 (11th Cir. 1998).
135. McDonald's Corp. v. Robertson, 147 F.3d 1301, 1306 (11th Cir. 1998).
137. Olmsted v. Taco Bell Corp., 141 F.3d 1457, 1460 (11th Cir. 1998).
138. United States v. City of Hialeah, 140 F.3d 968, 973 (11th Cir. 1998).
140. Lops v. Lops, 140 F.3d 927, 938 (11th Cir. 1998).
141. Atlanta Gas Light Co. v. Federal Energy Regulatory Comm'n, 140 F.3d 1392, 1397 (11th Cir. 1998).
143. Sterling v. Stewart, 158 F.3d 1199, 1201-02 (11th Cir. 1998).
of award of sanctions under Rule 11 and 42 U.S.C. § 1988, 144 review of denial of a motion to dismiss based on Eleventh Amendment immunity, 146 review of exercise of Colorado River abstention, 147 review of Gaudin error, 148 review of grant or denial of habeas corpus relief, 149 review of findings of proximate cause and negligence, 150 review of findings of fact and conclusions of law, 151 review of jury instructions, 152 review of factual findings of the Securities and Exchange Commission, 153 review of judgment entered on a petition for enforcement of supplementary compensation order, 154 review of a district judge’s refusal to disqualify himself, 155 review of exclusion of evidence pursuant to Federal Rule Evidence 403, 156 review of a finding that an offense involved more than minimal planning, 157 review of amount of loss determination, 158 review of dismissal of complaint for failure to state a claim for relief, 159 review of order vacating an arbitration award, 160 review of challenge to the sufficiency of evidence supporting a criminal conviction, 161 review of Tax Court’s findings of fact, 162 review of defendant’s invocation of the privilege against self-incrimination, 163 review of evidentiary rulings, 164 review of decision rendered by the National Labor Relations Board, 165 review of purport-

144. City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 556 (11th Cir. 1998).
146. Sea Servs. of the Keys v. Florida, 156 F.3d 1151, 1153 (11th Cir. 1998).
147. Metropolitan Life v. Lockette, 155 F.3d 1339, 1341 (11th Cir. 1998).
148. United States v. Fern, 155 F.3d 1318, 1327 (11th Cir. 1998).
149. Sims v. Singletary, 155 F.3d 1297, 1304 (11th Cir. 1998).
150. American Dredging Co. v. Lambert, 153 F.3d 1292, 1295 (11th Cir. 1998).
151. Id. at 1295.
152. Roberts & Schaefer Co. v. Hardaway Co., 152 F.3d 1283, 1295 (11th Cir. 1998).
156. United States v. Gilliard, 133 F.3d 809, 815 (11th Cir. 1998).
158. Id. at 1261.
159. Roberts v. Florida Power & Light Co., 146 F.3d 1305, 1307 (11th Cir. 1998).
162. Zand v. Commissioner, 143 F.3d 1393, 1398 (11th Cir. 1998).
165. NLRB v. McClain of Georgia, Inc., 138 F.3d 1418, 1422 (11th Cir. 1998).
ed violation of Federal Rule Criminal Procedure 11(e)(1),\textsuperscript{166} review of alleged violation of the Double Jeopardy Clause,\textsuperscript{167} review of denial of motion to dismiss an indictment,\textsuperscript{168} and review of the proper length of a sentence under the Assimilated Crimes Act.\textsuperscript{169}

\begin{thebibliography}{9}
\bibitem{6} United States v. Diaz, 138 F.3d 1359, 1362 (11th Cir. 1998).
\bibitem{7} Grossfeld v. CFTC, 137 F.3d 1300, 1302 (11th Cir. 1998).
\bibitem{8} United States v. Pielago, 135 F.3d 703, 707 (11th Cir. 1998).
\bibitem{9} United States v. Gaskell, 134 F.3d 1039, 1041 (11th Cir. 1998).
\end{thebibliography}