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Appellate Practice and Procedure

K. Todd Butler

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by K. Todd Butler*

This Article reviews federal appellate procedure decisions in the Eleventh Circuit during the 2006 calendar year. Questions considered this year include the role of the notice of appeal in federal appellate jurisdiction, which is addressed in the first section below. The second section addresses the necessity of a final order for appeal, with emphasis on conditional final orders and when they are subject to appeal. The third section addresses the necessity of raising issues before the district court in order to preserve them for appeal.

I. APPELLATE JURISDICTION: THE NOTICE OF APPEAL

The decision in *United States v. Machado*[1] left Gregorio Machado in a conundrum that would have made Joseph Heller proud. Indicted on thirteen counts of conspiracy to launder drug money in March 1997, Machado entered a plea of guilty to Count I in May 1997.[2] The written plea agreement provided that eleven counts would be dropped and that Machado would "'fully and unreservedly cooperate and assist the United States in the forfeiture and recovery of the forfeited assets, portions thereof, or their substitutes wherever located.'"[3] According to Machado, the value of the items subject to forfeiture was approximately $12 million.[4]

The district court sentenced Machado to fifty-one months imprisonment on July 28, 1997 and entered judgment on July 30, 1997. The judgment stated which counts of money laundering had been dropped,

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* Principal in the firm of K. Todd Butler, P.C., Cairo, Georgia. Florida State University (B.A., magna cum laude, 1994); Walter F. George School of Law, Mercer University (J.D., cum laude, 1999). Member, Mercer Law Review (1997-1999). Member, State Bars of Georgia, Florida, and Alabama.

1. 465 F.3d 1301 (11th Cir. 2006).
2. *Id.* at 1303.
3. *Id.*
4. *Id.*

stated that Machado had pleaded guilty to Count I, stated his sentence on Count I, and stated that a separate forfeiture order would be entered. The judgment entered on July 30 did not include an order identifying the property to be forfeited.[5]

Approximately seven months later, on March 11, 1998, the government filed a motion for the forfeiture order, pursuant to which the district court entered a preliminary order on March 12, 1998. The district court entered a subsequent order for forfeiture of additional property on April 24, 1998 and the final forfeiture order on July 14, 1998.[6]

Machado appealed none of the forfeiture orders, but on September 4, 1998, he filed a pro se motion pursuant to Federal Rule of Criminal Procedure 41(e)[7] for the return of documents that he believed would show that some of his property had been improperly forfeited. On January 20, 1999, the district court ordered the documents returned, but the government could not fully comply because some of the documents had been destroyed.[8]

On August 22, 2002, the Eleventh Circuit entered an order in *United States v. Petrie*,[9] in which the court discussed the detailed procedure for forfeiture provided by Federal Rule of Criminal Procedure 32.2.[10] Included in this detailed rule is a requirement that the forfeiture order be entered at the time of sentencing.[11]

On April 23, 2003, Machado filed a motion pursuant to Federal Rule of Civil Procedure 60(b)[12] requesting that the final order of forfeiture be vacated; again, the district court denied and the Eleventh Circuit upheld.[13] Again on May 17, 2004, Machado filed a motion pursuant to Rule 60(b), which the district court denied and the Eleventh Circuit upheld, holding that Federal Rule of Civil Procedure 60(b) cannot be used to challenge civil forfeiture orders.[14] Finally, on December 17, 2004, Machado filed a second motion pursuant to Federal Rule of Criminal Procedure 41(g)[15] and the All Writs Act,[16] demanding return

5. *Id.* at 1303-04.
6. *Id.* at 1304.
7. FED. R. CRIM. P. 41(e).
8. *Machado*, 465 F.3d at 1304.
9. 302 F.3d 1280 (11th Cir. 2002).
10. *Id.* at 1284-85; FED. R. CRIM. P. 32.2.
11. *Petrie*, 302 F.3d at 1284 (citing FED. R. CRIM. P. 32.2).
12. FED. R. CIV. P. 60(b).
13. *Machado*, 465 F.3d at 1304.
14. *Id.*
15. FED. R. CRIM. P. 41(g).
16. 28 U.S.C. § 1651(a) (2000).

of the forfeited property.[17] The district court denied the last motion on February 7, 2005.[18]

As the Eleventh Circuit stated, the heart of Machado's argument was that the district court did not have jurisdiction to enter the forfeiture order on July 14, 1998 because the court lost jurisdiction to do so when it entered the order sentencing Machado on July 28, 1997 (or July 30, 1997, when the order was actually entered).[19] Machado appealed to the axiom of United States federal court jurisprudence emphasizing that federal courts are courts of limited subject matter jurisdiction and are required to sit in review of their own subject matter jurisdiction at all times.[20] Federal subject matter jurisdiction can never be forfeited or waived, and defects in subject matter jurisdiction must be corrected regardless of whether the issue was raised in the district court or on appeal.[21] The issue of federal subject matter jurisdiction may be raised by a party or by the court on its own initiative and the issue may be raised "'at any stage in the litigation, even after trial and the entry of judgment.'"[22]

The Eleventh Circuit refused to consider Machado's objection to the district court's jurisdiction to enter a forfeiture order subsequent to sentencing.[23] The Eleventh Circuit's refusal was based on the fact that Machado had not filed a timely notice of appeal following the district court's entry of the forfeiture order.[24] A timely notice of appeal is itself "'mandatory and jurisdictional,'" and when the appellant fails to file a timely notice of appeal, the appellate court is "'without jurisdiction to review the decision on the merits.'"[25]

The Eleventh Circuit's decision in *Machado* emphasizes that, on appeal, jurisdictional issues have a two-layered character. Federal jurisdiction must be satisfied, however, before an appellate court may address the subject matter jurisdiction of a district court. The appellate court must itself have federal appellate jurisdiction.[26]

Nevertheless, Machado's conundrum is probably not the inescapably double-binding Catch-22 that Joseph Heller made popular. Because subject matter jurisdiction is always an issue, Machado could probably

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17. *Machado*, 465 F.3d at 1304.
18. *Id.*
19. *Id.* at 1305.
20. *See id.* at 1306.
21. *Id.*
22. *Id.* (quoting Arbaugh v. Y&H Corp., 126 S. Ct. 1235, 1240 (2006)).
23. *Id.* at 1305.
24. *Id.* at 1306.
25. *Id.* at 1305 (quoting Budinich v. Becton Dickinson & Co., 486 U.S. 196, 203 (1988)).
26. *Id.* at 1306.

raise the issue today in the district court. If the district court rejected Machado's objection to its subject matter jurisdiction to enter the order forfeiting his property, then upon timely notice of appeal, the Eleventh Circuit would have appellate jurisdiction to review his case.

The issue of appellate jurisdiction was also discussed in *Holloman v. Mail-Well Corp.*[27] *Holloman* is an ERISA case in which the plaintiff, Otis Holloman, had elected the "Last Survivor Option" on his retirement plans. This option provided that he would accept a reduced monthly pension payment, and in return his spouse would continue to receive his pension payment until her death if she outlived him. After his retirement, Mr. Holloman was widowed and subsequently remarried. There was evidence that Mr. Holloman confirmed with his plan administrator that his new wife would be entitled to the same benefits to which his late wife would have been entitled.[28]

On July 7, 2000, the defendant acquired Mr. Holloman's prior employer and decided to accelerate payment of benefits to retirees of the acquired entity. After application of the actuarial assumptions provided in the plan, a lump sum payment to Mr. Holloman was determined. The lump sum, however, included no payment for benefits that the same actuarial assumptions should have provided for Mr. Holloman's second wife. Mr. Holloman retained counsel, filed suit, and after a hard-fought legal battle, lost in the district court on summary judgment.[29] In the course of the legal battle, the district court imposed sanctions on Mr. Holloman's attorney under 28 U.S.C. § 1927[30] for having filed motions to compel discovery that the district court believed were filed in bad faith and lacked merit.[31]

On appeal of the district court's final summary judgment order and the district court's order denying the plaintiff's motions to compel discovery,[32] the Eleventh Circuit affirmed summary judgment and the orders on the motions to compel.[33] Furthermore, it dismissed the appeal of the attorney fees sanctions.[34]

The Eleventh Circuit dismissed the appeal of attorney fees sanctions because the notice of appeal was defective on that issue.[35] The court emphasized the principle that notice of appeal is mandatory and

27. 443 F.3d 832 (11th Cir. 2006).
28. *Id.* at 835.
29. *Id.* at 835-36.
30. 28 U.S.C. § 1927 (2000).
31. *Holloman*, 443 F.3d at 844.
32. *Id.* at 836.
33. *Id.* at 844.
34. *Id.* at 845.
35. *Id.* at 844.

jurisdictional, stating that the "rule is absolute and inflexible."[36] Nevertheless, the court also noted that it would apply the rules in a lenient manner and determined that the notice of appeal had been properly filed where certain minimum elements were met.[37] Those elements are as follows: (1) the notice of appeal must state the name or names of the persons taking the appeal; (2) the notice of appeal must identify the judgment or the order being appealed; (3) the notice of appeal must identify the court to which the appellant is taking the appeal.[38]

Where these minimum standards are timely met, the requirement of a notice of appeal will be satisfied and appellate jurisdiction will exist.[39] Practitioners should note that the court dismissed the appeal of the attorney fees sanctions because the sanctions had been ordered against Mr. Holloman's attorney and not against Mr. Holloman as the plaintiff.[40] Because the attorney fees sanctions were against the plaintiff's attorney, the attorney was required to state his own name as one of the persons taking the appeal.[41]

In *KH Outdoor, LLC v. City of Trussville* (*"KH Outdoor II"*),[42] the Eleventh Circuit's leniency was more evident in recognizing the effectiveness of a notice of appeal with respect to appellate subject matter jurisdiction. This case actually involved two notices of appeal.[43] The plaintiff filed suit against the City of Trussville, Alabama under 42 U.S.C. § 1983[44] to enjoin enforcement of a city ordinance that the plaintiff alleged unconstitutionally favored commercial speech over noncommercial speech.[45] The district court granted an interlocutory order enjoining the defendant city from enforcing its ordinance and granted the plaintiff nominal damages under § 1983; however, the interlocutory order did not provide for an amount of nominal damages. Following this order, the defendant city filed its first notice of appeal, and the Eleventh Circuit affirmed the district court's order.[46]

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36. *Id.*
37. *See id.*
38. *Id.*
39. *Id.*
40. *Id.* at 844-45.
41. *Id.*
42. 465 F.3d 1256 (11th Cir. 2006).
43. *Id.* at 1259.
44. 42 U.S.C. § 1983 (2000).
45. *KH Outdoor II*, 465 F.3d at 1258.
46. *Id.* at 1259; *see* KH Outdoor, LLC v. City of Trussville (*"KH Outdoor I"*), 458 F.3d 1261, 1263-64 (11th Cir. 2006).

Following the injunction, the city moved for summary judgment on the issue of compensatory damages because the basis of the plaintiff's action did not result in actual injury to the plaintiff. The district court granted the city's motion for summary judgment, but in the same order the court set nominal damages for the plaintiff at $100. The plaintiff did not appeal the court's order on compensatory damages, but the city filed its second notice of appeal with respect to the nominal damages.[47]

The plaintiff argued that in the city's second appeal, the city had not challenged the plaintiff's entitlement to nominal damages, but rather had only appealed the amount of nominal damages. The plaintiff further suggested that the defendant city had failed to preserve its right to appeal the plaintiff's entitlement to nominal damages because it failed to address that issue in its appeal from the court's preliminary injunction.[48]

The Eleventh Circuit disagreed with the plaintiff's argument.[49] The court pointed out that the defendant would have had no right to argue the issue of nominal damages on appeal of the interlocutory order because the court's jurisdiction was limited under 28 U.S.C. § 1292(a)-(1)[50] to that portion of the district court's order "'granting, continuing, modifying, refusing or dissolving injunctions.'"[51] The defendant city could not have waived its right to appeal those rights that had not yet arisen.[52]

Leniency in construction of the notice of appeal came into play when the plaintiff argued that by designating in its second notice of appeal that portion of the district court's final order *setting* the amount of nominal damages, and not the district court's order *granting* nominal damages, the defendant did not effectively raise the issue of entitlement to nominal damages.[53] The Eleventh Circuit was again unpersuaded based on its policy of "liberally construe[ing] the notice of appeal in favor of the appellant 'where the intent to appeal an unmentioned or mislabeled ruling is apparent and there is no prejudice to the adverse party.'"[54] The court held that the defendant had clearly intended to appeal the plaintiff's entitlement to nominal damages and further pointed out that the defendant had made no argument at all about the

47. *KH Outdoor II*, 465 F.3d at 1259.
48. *Id.* at 1259-60.
49. *Id.* at 1260.
50. 28 U.S.C. § 1292(a)(1) (2000).
51. *KH Outdoor II*, 465 F.3d at 1259 (quoting 28 U.S.C. § 1292(a)(1)).
52. *See id.*
53. *Id.* at 1259-60.
54. *Id.* at 1260 (quoting Campbell v. Wainwright, 726 F.2d 702, 704 (11th Cir. 1984)).

amount of nominal damages in its briefs.[55] Nevertheless, the court affirmed the plaintiff's entitlement to $100 in nominal damages.[56]

The contents of a notice of appeal, though subject to lenient construction by the Eleventh Circuit, are of utmost importance; however, the requirements for filing a timely notice of appeal are equally urgent. This issue was addressed in *Dresdner Bank AG v. M/V OLYMPIA VOYAGER*.[57] Under Federal Rule of Appellate Procedure 4(a)(1)(A),[58] the "notice of appeal [i]n a civil case . . . must be filed with the district clerk within 30 days after the judgment or order appealed from is entered."[59] The time for filing a notice of appeal may be tolled, however, if either party files a motion under Federal Rule of Civil Procedure 59[60] or 60[61] within ten days of the entry of the final judgment.[62] If the Rule 59 or 60 motion is timely filed, then the time for filing a notice of appeal is tolled until thirty days subsequent to final disposition of the Rule 59 or 60 motion.[63]

In *Dresdner Bank AG* the issue was whether an amended Rule 59 or 60 motion that is filed more than ten days after entry of final judgment will have the effect of waiving the timeliness of the original Rule 59 or 60 motion and thus effectively nullify the tolling effect of the original timely filing.[64] The Eleventh Circuit held that its decision in *Pate v. Seaboard R.R., Inc.*[65] provides the controlling law.[66] Accordingly, the court held that an amended motion under Rule 59 or 60 does not supersede the original filing because "'there is no reason for foreclosing amendment of the motion when this would be justified according to the usual standards for permitting amendments.'"[67] The court also noted treating the amended Rule 59 or 60 motion as a new filing subsequent to the initial ten day filing would have the practical effect of prohibiting amendments to such motions to the extent that the amendment would waive the tolling of the period for filing notice of appeals.[68]

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55. *Id.*
56. *Id.* at 1262.
57. 465 F.3d 1267 (11th Cir. 2006).
58. FED. R. APP. P. 4(a)(1)(A).
59. *Id.*
60. FED. R. CIV. P. 59.
61. FED. R. CIV. P. 60.
62. FED. R. APP. P. 4(a)(4)(A).
63. *See id.*
64. 465 F.3d at 1271.
65. 819 F.2d 1074 (11th Cir. 1987).
66. *Dresdner Bank AG*, 465 F.3d at 1271.
67. *Id.* (quoting *Pate*, 819 F.2d at 1085).
68. *See id.* at 1271-72.

In *Cano v. Baker*,[69] the appellees objected to the appellate court's jurisdiction based on the fact that the appellant had not filed a timely notice of appeal to the district court's denial of its Rule 60(b) motion.[70] It bears mentioning that thirty-two years after filing suit and being granted the relief that she sought, the appellant filed her Rule 60(b) motion requesting to be relieved of the judgment entered in her favor. The plaintiff requested an evidentiary hearing to show that newly revealed facts and changes in the law since the entry of the judgment in her favor were a basis for relieving her of the judgment.[71]

The district court declined to grant the appellant's Rule 60(b) motion. The appellant then filed a Rule 59 motion for reconsideration of the court's denial of her Rule 60 motion, which the district court also denied. Appellant then filed a timely notice of appeal within ten days of the district court's denial of her Rule 59 motion, seeking review of both the denial of the Rule 60 motion and the Rule 59 motion.[72]

On appeal, the appellees argued that the appellant had not filed her notice of appeal within ten days of the court's denial of her Rule 60 motion, and therefore the court of appeals lacked subject matter jurisdiction.[73] The court of appeals rejected this argument, holding that by filing a Rule 59 motion within ten days of the court's denial of the Rule 60 motion, the time for filing the notice of appeal of the court's decision on the Rule 60 motion had been tolled.[74]

II. APPELLATE JURISDICTION: APPEAL FROM A FINAL ORDER

In *Wagner v. First Horizon Pharmaceutical Corp.*[75] and *Garfield v. NDC Health Corp.*,[76] the Eleventh Circuit addressed the finality of conditional orders. In *Wagner* the district court anticipated that the plaintiffs would move to amend their complaint in light of the defendants' motion pursuant to Federal Rule of Civil Procedure 9(b).[77] Rather than granting the defendants' motion to dismiss, the district court entered an order allowing the plaintiffs to amend their complaint subject to the condition that the plaintiffs first pay the defendants' costs

69. 435 F.3d 1337 (11th Cir. 2006).
70. *Id.* at 1341.
71. *Id.* at 1339, 1340.
72. *Id.* at 1340-41.
73. *Id.* at 1341.
74. *Id.*
75. 464 F.3d 1273 (11th Cir. 2006).
76. 466 F.3d 1255 (11th Cir. 2006).
77. *Id.* at 1276; FED. R. CIV. P. 9(b).

and fees incurred in bringing the Rule 9(b) motion to dismiss. The court denied the plaintiffs' motion for relief from the condition.[78]

Rather than meet the condition, the plaintiffs allowed the time for meeting the condition to expire and filed a notice of appeal, arguing that the original complaint met the pleading requirements and that the district court should not have conditioned amendment on payment of the defendants' costs and fees. The defendants argued that the Eleventh Circuit lacked jurisdiction to hear the appeal because the plaintiffs had not appealed the initial order setting conditions on the plaintiffs' amendment of their complaint.[79] The Eleventh Circuit denied the defendants' objection and heard the appeal because the district court had entertained the plaintiffs' motion to lift the condition, and the plaintiffs then filed their notice of appeal within the time allowed after the stated condition expired.[80]

However, in *Garfield* the Eleventh Circuit stated that it is not necessary for the appellant to wait for the expiration of any conditional period.[81] The defendant in *Garfield* had filed a motion to dismiss after the plaintiff filed its second amended complaint. The distict court granted the defendant's motion to dismiss with the provision that the plaintiff could file a third amended complaint if it did so within thirty days of the dismissal order's date. Rather than file a third amended complaint, the plaintiff filed a notice of appeal.[82]

The panel raised the issue *nostra sponte* on whether the district court's order dismissing the plaintiff's cause of action with leave to appeal constituted a final order over which the appellate court might take jurisdiction.[83] In response to the appellate court's inquiry, the parties agreed that an order is final if "'it dismisses the entire action or . . . the complaint cannot be saved by amendment.'"[84] Without question, as in *Wagner*, the order would have become subject to appeal upon expiration of the time the district court allowed for amendment. But, restating its holding in *Schuurman v. Motor Vessel "Betty K V,"*[85] the Eleventh Circuit noted that "'the plaintiff need not wait until the expiration of the stated time in order to treat the dismissal as final, but may appeal prior to the expiration of the stated time period.'"[86] Thus, the Eleventh

78. *Wagner*, 464 F.3d at 1276.
79. *Id.*
80. *Id.*
81. *See Garfield*, 466 F.3d at 1260.
82. *Id.*
83. *Id.*
84. *Id.* (quoting Van Poyck v. Singletary, 11 F.3d 146, 148 (11th Cir. 1994)).
85. 798 F.2d 442 (11th Cir. 1986).
86. *Garfield*, 466 F.3d at 1260 (quoting *Schuurman*, 798 F.2d at 445).

Circuit did have jurisdiction of the appeal in *Garfield*, but the court further noted that by filing his appeal in this manner, the plaintiff in *Garfield* waived the right to file any further appeal and was bound by his pleadings in his second amended appeal.[87]

In *Morillo-Cedron v. District Director for the U.S. Citizenship & Immigration Services*,[88] the appellees were awarded attorney fees in their mandamus case against the district director for the U.S. Citizenship & Immigration Services because the district court determined that the case was the "'catalyst'" that prompted the district director to act on their applications for permanent residency.[89] The appellees submitted their application for costs, attorney fees, and expenses in the amount of $9,888, and the government filed a motion for reconsideration. The district court denied the motion for reconsideration and adopted the magistrate court's recommendation of an award of $7,706.15 to the appellees for attorney fees and costs. The government filed a notice of appeal.[90] In response to the appellees' argument that the government had failed to file a timely notice of appeal, the Eleventh Circuit stated that a district court's award of attorney fees is not a final order subject to appeal until after the district court has actually determined the attorney fees.[91]

III. PRESERVATION OF THE RECORD AND RAISING NEW ISSUES ON APPEAL

While, as stated above, a notice of appeal will be treated with leniency regarding its contents, the same is not necessarily true for the parties' briefs on appeal. As the Eleventh Circuit stated in *Tanner Advertising Group, LLC v. Fayette County*,[92] "'[I]ssues that clearly are not designated in the initial brief ordinarily are considered abandoned.'"[93] In *Billings v. UNUM Life Insurance Co.*,[94] the Eleventh Circuit reiterated the appellate rule that requires parties to raise all appellate issues in their briefs or else have them deemed abandoned.[95] In *Tanner Advertising Group*, the court stated that while "'briefs should be read liberally

87. *Id.* at 1260-61.
88. 452 F.3d 1254 (11th Cir. 2006).
89. *Id.* at 1255.
90. *Id.* at 1256.
91. *Id.*
92. 451 F.3d 777 (11th Cir. 2006).
93. *Id.* at 785 (quoting Hartsfield v. Lemacks, 50 F.3d 950, 953 (11th Cir. 1995)).
94. 459 F.3d 1088 (11th Cir. 2006).
95. *Id.* at 1093.

to ascertain the issues raised on appeal,'" the issue must be deemed abandoned when there is no mention of the issue.[96]

Even before an issue may be raised in a party's initial brief, it must be raised before the district court or it will be deemed abandoned. In *Daewoo Motor America, Inc. v. General Motors Corp.*,[97] a Korean automobile manufacturer raised the issue for the first time on appeal that California law, rather than federal law, should govern a distribution agreement between itself and General Motors.[98] Because the issue was first raised on appeal and not preserved before the district court, the issue was deemed waived. Likewise, in *Miller v. King*,[99] the Eleventh Circuit refused to hear a disabled state prisoner argue for the first time on appeal that he should be allowed to proceed under section 504 of the Rehabilitation Act of 1973.[100]

The prohibition against raising issues for the first time on appeal should, of course, be considered in light of the requirement that a federal court be satisfied that it has subject matter jurisdiction over a case. In *Ouachita Watch League v. Jacobs*,[101] the Eleventh Circuit went further to point out that not only may issues relevant to subject matter jurisdiction be considered on appeal, but it may even be permissible for parties to supplement the record during the appeal.[102] However, as noted in Part I, *supra*, consideration of any matters on appeal first requires appellate subject matter jurisdiction be established through a sufficient and timely notice of appeal.

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96. 451 F.3d at 785-86 (quoting Allstate Ins. Co. v. Swann, 27 F.3d 1539, 1542 (11th Cir. 1994)).

97. 459 F.3d 1249 (11th Cir. 2006).

98. *Id.* at 1256-57.

99. 449 F.3d 1149 (11th Cir. 2006).

100. *Id.* at 1150 n.1; 29 U.S.C. § 794(a) (2000).

101. 463 F.3d 1163 (11th Cir. 2006).

102. *Id.* at 1170-71 (citing Young v. Devaney *ex rel.* Augusta, Ga., 59 F.3d 1160, 1168 (11th Cir. 1995)).

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