

## DECISIONS, DECISIONS: HOW THE INITIAL CHOICE OF A STATE OR FEDERAL FORUM MAY LIMIT APPELLATE REMEDIES

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It is difficult to ask a party filing an initial civil lawsuit also to choose an appellate court. Trial attorneys are arguably more concerned with jury pools than with the philosophy and differences between various appellate courts. Yet, overlooking this point can be costly. Florida offers different appellate remedies from its federal counterpart, and at distinctly different times.

For instance, the Florida Rules of Appellate Procedure permit immediate appeals of class certification orders.<sup>1</sup> The federal rules do not—appeals are at the federal court's discretion.<sup>2</sup> As counsel for a newly served class-action defendant, your knee-jerk reaction might be to remove this class-action lawsuit from state court to federal court. Is this wise, however, when your priority is to ensure that this lawsuit does not proceed as a class action? By remaining in state court, you have the immediate right to appeal the class certification order.<sup>3</sup> Unfortunately, this right is not available in federal court.<sup>4</sup> At bottom, then, a party's failure to consider appellate remedies from a lawsuit's inception could deprive that party of valuable appellate options. Even worse, ignoring this issue might provide your opponent with appellate rights that otherwise would not have been available.

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1. Fla. R. App. P. 9.130(a)(3)(C)(vi).
2. Fed. R. Civ. P. 23(f).
3. Fla. R. App. P. 9.130(a)(3)(C)(vi).
4. Fed. R. Civ. P. 23(f).

Unfortunately, most attorneys might not recognize that our state and federal systems employ various appellate remedies. Such a misunderstanding likely arises from the more frequent use of state appellate remedies, which favor immediate appeals of the most urgent interlocutory orders.<sup>5</sup> These differences result from historically varying reasons for affording appellate remedies in state and federal courts. Armed with knowledge of these differences, a practitioner could avoid the pitfalls of appellate ignorance and make timely trial decisions that could open the door to later appellate remedies.

This Article examines the origins of our state and federal civil appellate systems. Then, the discussion turns to the development of appellate remedies in light of these philosophical differences. Lastly, this Article counsels practitioners regarding appellate traps arising from unknown choices.

### *I. FLORIDA'S APPELLATE SYSTEM: COMFORTINGLY CONSTITUTIONAL*

Although the framers of the Florida Constitution granted Florida citizens the constitutional right of access to courts,<sup>6</sup> they did not grant a corresponding right to appeal. But what the framers did not directly provide in the Declaration of Rights, they indirectly furnished through other constitutional provisions.<sup>7</sup> Article V of the Florida Constitution gives district courts of appeal jurisdiction “to hear appeals, that may be taken as a matter of right, from final judgments or orders of trial courts . . . not directly appealable to the [S]upreme [C]ourt or a circuit court.”<sup>8</sup> Therefore, every final judgment or order is constitutionally appealable to some court in Florida. Also, as the rules of the Florida Supreme

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5. See Fla. R. App. P. 9.130. As the 1977 Amendment Committee Notes to Rule 9.130 recognize, the automatic right to appeal certain nonfinal orders is appropriate because of the difficulty inherent in obtaining relief of an erroneous interlocutory ruling through common law writ of certiorari.

6. Fla. Const. art. I, § 21 (providing that “[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay”).

7. See *Robbins v. Cipes*, 181 So. 2d 521, 522 (Fla. 1966) (recognizing that the constitutional right to appeal emanates from Article V of the Florida Constitution); see also *Amend. to the Fla. R. of App. P.*, 696 So. 2d 1103, 1104 (Fla. 1996) (interpreting Article V to include the constitutional right to appeal).

8. Fla. Const. art. V, § 4(b)(1).

Court provide, Article V gives the district courts appellate jurisdiction over interlocutory orders.<sup>9</sup>

By recognizing the right of appeal as “constitutional,” Florida courts have empowered Florida litigants with an important weapon. Appellate parties frequently use this power to overcome procedural hurdles that otherwise might prevent their pursuit of an appeal.<sup>10</sup> The corollary, of course, is that these courts possess only the jurisdiction that the Florida Constitution confers upon them; the Legislature cannot decrease or increase the amount of jurisdiction.<sup>11</sup> Florida appellate courts jealously guard their constitutional jurisdiction and place upon themselves a duty to ensure that they have jurisdiction to decide the issue before them.<sup>12</sup> The courts will dismiss an appeal if they lack jurisdiction, even if the parties waive or consent to such jurisdiction.<sup>13</sup>

Significantly, the Florida Supreme Court decides the appellate fate of a certain class of orders. The Constitution furnishes the Court with the right to promulgate rules, which logically includes rules relating to interlocutory appeals.<sup>14</sup> In other words,

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9. *Id.* Florida Rule of Appellate Procedure 9.130 accomplishes this task.

10. *Robbins*, 181 So. 2d at 522 (suggesting that deficiencies in a notice of appeal should be viewed in light of the constitutional right to appeal); *Helker v. Gouldy*, 181 So. 2d 536, 536 (Fla. 3d Dist. App. 1966) (recognizing that the right to appeal should be viewed in favor of the appealing party).

11. *Ex parte Cox*, 44 Fla. 537, 540–541 (1902) (asserting that the Florida Legislature cannot extend appellate jurisdiction); *Warren v. State*, 174 So. 2d 429, 430 (Fla. 1st Dist. App. 1965) (explaining that the Constitution limits a court’s jurisdiction).

12. *Miller v. Fortune Ins. Co.*, 484 So. 2d 1221, 1224 (Fla. 1986). However, in *Miller*, the Court noted,

Of course, the trial court has jurisdiction to determine whether it has jurisdiction to grant relief. In any case where jurisdiction is a question, the court must have an opportunity to rule on the jurisdictional question, and thus all rules of jurisdiction inherently provide authority for the court to assume jurisdiction for the limited purpose of determining whether a basis exists for the court to proceed further. “A court has the power and duty [i.e. has jurisdiction] to examine and to determine whether it has jurisdiction of a matter presented to it. . . .” 20 Am.Jur.2d *Courts* § 92 (1965) (footnotes omitted). There is no inconsistency, then, in holding that a court has no jurisdiction, but that the determination of jurisdiction cannot be made without exercising jurisdiction to the extent necessary to make the determination.

*Id.* at 1223–1224.

13. *Peltz v. Dist. Ct. App., Third Dist.*, 605 So. 2d 865, 866 (Fla. 1992) (providing that “subject-matter jurisdiction cannot be conferred by waiver or consent”) (citing *Bd. of Trustees of Internal Improvement Trust Fund v. Mobil Oil Corp.*, 455 So. 2d 412, 416 (Fla. 2d Dist. App. 1984)); *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. State*, 295 So. 2d 314, 316 (Fla. 1st Dist. App. 1974).

14. Fla. Const. art. V, § 2(a); see *Blore v. Fierro*, 636 So. 2d 1329, 1331 (Fla. 1994) (emphasizing that the Constitution granted the Florida Supreme Court the right to prom-

the Court decides what interlocutory orders may be appealed. The appealability of interlocutory orders is somewhat subject to the politics of the Florida Supreme Court.<sup>15</sup>

Logical reasons exist to vest this decision with the Florida Supreme Court. Over time, new legal devices will arise that might make other interlocutory appeals necessary. By way of example, neither class actions nor arbitrations were common dispute-resolution methods until the latter part of the twentieth century.<sup>16</sup> Rather than amend the state constitution each time the necessity for such an appeal arises, the Florida Supreme Court can decide the fate of such appeals. There is no reason to believe that the Court will open the floodgates to random interlocutory orders—a court rarely creates excess work for itself and its appellate brethren. To the contrary, the Court appears to review the need for appeal of nonfinal orders continuously, repealing them when no longer necessary.<sup>17</sup>

The essence of Florida appellate court jurisdiction is that it is derived from the Constitution, affords its citizens early review of important issues, and fluctuates given societal changes. The most notable aspect of Florida appellate jurisdiction, however, may be

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ulgate rules). Interestingly, Article V, section 2(a) also provides that general laws, which the Legislature enacts after a two-thirds membership vote, may repeal rules of the Court. Another interesting quirk is that although the Florida Supreme Court has “exclusive-rulemaking authority over interlocutory appeals to the *district courts of appeal*, the Constitution does not provide [the] Court with such authority for appeals from the county court to the circuit court.” *Blore*, 636 So. 2d at 1331 (emphasis omitted). The Constitution vests that appellate jurisdiction with the Legislature. Fla. Const. art. V, § 5(b); see *Blore*, 636 So. 2d at 1332 (acknowledging the Legislature’s authority over appeals from the county court to the circuit court).

15. The federal system is every bit as political, if not more; Congress decides what gets appealed, including both final and nonfinal orders. *Infra* nn. 18–19 and accompanying text.

16. Roger S. Haydock, *Civil Justice and Dispute Resolution in the Twenty-First Century: Mediation and Arbitration Now and for the Future*, 27 Wm. Mitchell L. Rev. 745, 748 (2000).

17. See *Amend. to the Fla. R. of App. P.*, 780 So. 2d 834, 838 (Fla. 2000) (repealing Rule 9.130(a)(3)(C)(iv), which provided for the appeal of nonfinal orders that determined liability). Of course, some might argue that the deletion of this particular rule resulted more from politics than procedural practicalities. The amendment to this rule pitted the defense attorneys, who preferred immediate appeals of orders determining liability, against the plaintiff attorneys, who understandably favored no such appeals. See generally Susan W. Fox, *Should Nonfinal Orders Determining Liability Be Immediately Appealable?* 74 Fla. B.J. 18 (May 2000); David B. Pakula, *The Proposal to Repeal Rule 9.130(a)(3)(C)(iv): Penny Wise, Dollar Foolish*, 74 Fla. B.J. 21 (May 2000).

the absolute absence of any legislative interference in this process.

## II. FEDERAL APPELLATE JURISDICTION: A CONSTANT WORK IN PROGRESS

Given the constitutional underpinnings of Florida's appellate system, many practitioners are surprised to discover that there is no federal corollary. The federal right to appeal a final civil judgment is not a constitutional right; it is a statutory right.<sup>18</sup> Courts of appeals possess only the appellate jurisdiction that Congress has conferred upon them.<sup>19</sup>

Title 28 United States Code Section 1291 governs appeals of district court final decisions.<sup>20</sup> This federal statute gives courts of appeals jurisdiction over final decisions.<sup>21</sup> These appeals are considered appeals as of right.<sup>22</sup> Thus, Congress has endowed federal parties with a right that is similar to Florida's constitutional right to appeal final judgments.

In some sense, Congress has also afforded federal parties the right to appeal many of the same nonfinal orders as those rights afforded to Florida litigants.<sup>23</sup> In Title 28 United States Code Section 1292(a), Congress initially limited the right to appeal interlocutory orders to circumstances involving injunctions,<sup>24</sup> receiv-

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18. *U.S. v. Melancon*, 972 F.2d 566, 567 (5th Cir. 1992).

19. *U.S. v. Padilla*, 589 F.2d 481, 483 (10th Cir. 1978).

20. 28 U.S.C. § 1291 (2000).

21. *Id.* "A 'final decision' generally is one that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *U.S. v. One Parcel of Real Prop.*, 767 F.2d 1495, 1497 (11th Cir. 1985).

22. *Id.*

23. One major difference is that those state nonfinal orders, appealable as of right, are contained in the Florida Rules of Appellate Procedure. See Fla. R. App. P. 9.110(k), 9.130. This is not so in federal court. The Federal Rules of Appellate Procedure deal just with procedure. As noted, *infra* notes 24–28, the right to appeal interlocutory orders in federal court emanates from many different sources. As an example, Florida Rule of Appellate Procedure 9.110(k) provides the right to appeal partial final judgments as to a party or a claim. The parallel rule in federal court can be found in Federal Rule of Civil Procedure 54(b), which applies to a partial final judgment in a case involving multiple claims or multiple parties. Unlike its Florida counterpart, Rule 54(b) is discretionary.

24. See 28 U.S.C. § 1292(a)(1) (providing the right to appeal orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court"). Orders that resemble injunctions may be appealable under Section 1292(a)(1). Thus, if an order has the practical effect of denying an injunction or granting a temporary restraining order, the order will be appealable under Section 1292(a)(1). *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981); *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43, 47 (1st Cir. 1986). And, if an order

ers,<sup>25</sup> and admiralty.<sup>26</sup> But, to stimulate various public policies, Congress enacted distinct statutes permitting appeals of other nonfinal orders.<sup>27</sup> Congress also gave the trial and appellate courts some discretion, in Section 1292(b), to decide what interlocutory appeals should be appealed.<sup>28</sup> In short, Congress handed federal litigants fewer *rights* to appeal interlocutory orders, but a greater *choice* of what could be appealed.<sup>29</sup>

Possibly in recognition of Congress' limitations, federal courts have historically chipped away at Section 1291's finality requirement. On the one hand, federal courts recognize that Section 1291 "embodies a strong congressional policy against piecemeal reviews, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals."<sup>30</sup> Yet, on the other hand, the federal judiciary has expanded the definition of finality to encompass numerous exceptions.<sup>31</sup>

For instance, in *Cohen v. Beneficial Industries Loan Corp.*,<sup>32</sup> the United States Supreme Court held that certain interlocutory

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is appealable under Section 1292(a)(1), the entire order may be reviewed. *Kohn v. Am. Metal Climax, Inc.*, 458 F.2d 255, 262 (3d Cir. 1972).

25. See 28 U.S.C. § 1292(a)(2) (providing the right to appeal "orders appointing receivers, or refusing orders to wind up receiverships, or to take steps to accomplish the purposes thereof, such as directing sales or other disposal of property").

26. See *id.* at § 1292(a)(3) (providing the right to appeal "interlocutory decrees . . . determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed").

27. *Infra* nn. 56–57 and accompanying text (discussing 28 U.S.C. § 16 (2000)).

28. Title 28 United States Code Section 1292(b) provides the following:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

The purpose of Section 1292(b) is to offer an "early appeal of a legal ruling when resolution of the issue may provide more efficient disposition of litigation." *Ford Motor Credit Co. v. S.E. Barnhart & Sons, Inc.*, 664 F.2d 377, 380 (3d Cir. 1981).

29. Section 1292(b) does not limit the type of order that may be appealed. However, the hurdle remains high, and each of the following factors must be satisfied before a district court will certify a Section 1292(b) appeal and before a court of appeal will accept the appeal: (1) the order must involve "a controlling question of law," (2) for "which there is substantial ground for difference of opinion," and (3) an immediate appeal "may materially advance the ultimate termination of the litigation." *Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1358–1359 (11th Cir. 2002), *cert. denied sub nom. Sikes v. AT&T Co.*, \_\_\_ U.S. \_\_\_, 2002 U.S. LEXIS 6519 (Oct. 7, 2002).

30. *U.S. v. Nixon*, 418 U.S. 683, 690 (1974).

31. *Id.*

32. 337 U.S. 541 (1941).

orders are appealable.<sup>33</sup> Under this “collateral order” doctrine, to appeal a collateral order, “the order must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment.”<sup>34</sup>

In 1985, the United States Supreme Court held that orders denying public officials qualified immunity from civil damages for their discretionary acts were immediately appealable.<sup>35</sup> This right of appeal is premised upon the theory that qualified immunity is the right to avoid trial.<sup>36</sup> If an immediate appeal is not afforded to a party that is denied this defense, then the right is irretrievably lost.<sup>37</sup>

In 1993, the Court authorized appeals of sovereign immunity nonfinal orders.<sup>38</sup> Thus, states, state agencies and officers, and state entities that claim to be “arms of the State” may immediately appeal an order denying a motion to dismiss based upon Eleventh Amendment immunity.<sup>39</sup>

Over the years, federal litigants have received many of the same appellate benefits that are constitutionally guaranteed to

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33. *Id.* at 545.

34. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863 (1994), severely curtailed use of the collateral order doctrine. In *Digital Equipment*, the United States Supreme Court agreed with the Tenth Circuit that an order denying enforcement of a settlement agreement was not appealable under the collateral order doctrine. *Id.* at 884. In doing so, the Court reiterated Section 1291’s narrow exception to the final judgment requirement. *Id.* at 883. The Court held that merely identifying some interest that would be “irretrievably lost” does not suffice to make the right so important that an immediate appeal is required. *Id.* at 871–872. Further, a right not to stand trial must rise to a higher level of importance, i.e., constitutional or statutory. *Id.* at 874, 879. Finally, the Court maintained that contractually created rights do not rise to this level of importance needed for recognition under Section 1291. *Id.* at 879–880.

35. *Mitchell v. Forsyth*, 472 U.S. 511, 524–530 (1985).

36. *Id.* at 525.

37. *Id.* at 526. A potential, judicially created obstacle to a qualified immunity appeal is the “evidence sufficiency” issue. In *Johnson v. Jones*, the United States Supreme Court held the *Mitchell* rule, which allows immediate appeal of qualified immunity orders, does not apply to trial court determinations that reveal genuine issues of material fact, otherwise known as a question of “evidence sufficiency.” 515 U.S. 304, 319–320 (1995). However, in *Behrens v. Pelletier*, the Supreme Court clarified that the *Johnson* rule does not always prohibit an immediate appeal when either a party contends, or a trial court concludes, that there are disputed facts. 516 U.S. 299, 312–313 (1996). Under *Behrens*, an appellate court may still consider the qualified immunity issue as long as public officials argue that, on the plaintiff’s version of the facts, the qualified immunity defense is available. *Id.*

38. *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993).

39. *Id.* at 147.

Florida litigants. The only difference appears to be that Congress has initiated the federal appellate remedies, or the federal judiciary has fictitiously characterized interlocutory orders as appealable. Does this reason for allowing an appeal make a difference to a party who is considering whether to file in state or federal court? Probably not. But what it does reveal is that litigants should be aware of their appellate options before they make what might appear to be an otherwise routine decision.

### III. FLORIDA VERSUS FEDERAL APPELLATE REMEDIES: TWO CASE STUDIES

#### A. First Case Study

Suppose that you are a defense attorney, and recently, the local sheriff retained you to defend him in a state class-action lawsuit filed in a Florida circuit court. Should you remove the lawsuit to federal court?

As the defense attorney, you might assume that your jury venire will be older and more conservative in federal court. Such a jury pool should be more pro-law enforcement, likely favoring your client's policies. Should your inquiry end there? If it does, you might not consider appellate options when making this decision. Here are reasons why you should consider these options.

In the case of a class action, the Florida Rules of Appellate Procedure permit an immediate appeal of all class action orders.<sup>40</sup> No comparable federal rule exists.<sup>41</sup> True, in 1998, the United States Supreme Court amended Federal Rule of Civil Procedure 23 to allow *discretionary* review of class certification orders, and provided as follows:

A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not

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40. Fla. R. App. P. 9.130(a)(3)(C)(vi).

41. Unlike the Florida Supreme Court, the United States Supreme Court does not establish what nonfinal orders may be appealed—this decision is strictly up to Congress. *See supra* n. 2 and accompanying text. At first blush, Rule 23 of the Federal Rules of Civil Procedure would appear to undermine this assertion; however, Title 28 United States Code Section 1292(e) provides the Court with authority to create jurisdiction over interlocutory appeals. Then, Congress must approve the rule. 28 U.S.C. § 2074(a) (2000).



stay proceedings in the district court unless the district judge or the court of appeals so orders.<sup>42</sup>

However, in *Prado-Steiman v. Bush*,<sup>43</sup> the Eleventh Circuit enunciated the criteria it would use in deciding whether to exercise discretion to allow interlocutory review of a class certification order under Rule 23(f).<sup>44</sup> *Prado-Steiman* suggested that a court should consider (1) whether the district court's ruling effectively signals the "death knell" of the litigation for either the plaintiff or the defendant; (2) "whether the petitioner has shown a *substantial* weakness in the class certification decision"—that is, the petitioner must demonstrate a likelihood that the district court abused its discretion; (3) whether immediate review will permit resolution of a legal issue that is both important in itself and important to the litigation; (4) "the nature and status of the litigation before the district court;" and (5) whether future events might make immediate review more or less appropriate.<sup>45</sup> Under the federal rules, therefore, you must fight to get an appeal of an order certifying the class. It is automatic in state court.<sup>46</sup> State court it is!

Hold on. Your client is the local sheriff. What if you raise qualified immunity as a defense by summary judgment, and your motion is denied? What court would you want to be in then? Under Florida law, you may immediately appeal a nonfinal order denying qualified immunity.<sup>47</sup> Although it is judicially created, federal law has the same rule.<sup>48</sup> Is your decision to proceed in state court unaffected?

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42. Fed. R. Civ. P. 23(f). Review under Rule 23(f) is, thus, analogous to review under Section 1292(b), with two important exceptions: (1) the district court need not certify the order for review, and (2) review is not subject to the limitations that the "order involve[ ] a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Fed. R. Civ. P. 23(f) advisory committee notes.

43. 221 F.3d 1266 (11th Cir. 2000).

44. *Id.* at 1274–1276.

45. *Id.* In applying the first factor, the court will consider the size of the putative class, any evidence of the parties' financial resources, the existence and potential impact of any related litigation against the defendant, and the nature of the remedy sought. *Id.* at 1274.

46. Fla. R. App. P. 9.130(a)(3)(C)(vi).

47. *Id.* 9.130(a)(3)(C)(vii).

48. *Infra* nn. 50–52 and accompanying text (discussing the appealability of a qualified immunity issue in federal court).

Probably not. Although both Florida and federal courts permit appeals of qualified immunity orders, Florida's rule is more limited. Florida Rule of Appellate Procedure 9.130(a)(3)(C)(vii), which allows parties to appeal orders denying summary judgment motions premised upon qualified immunity, has been construed to prohibit such appeals unless the appealed order expressly states that: (1) there were no disputed issues of material fact, and (2) the court denied summary judgment as a matter of law.<sup>49</sup>

Conversely, in federal court, an appellate court may still consider the qualified immunity issue as long as public officials argue that, on the plaintiff's version of the facts, the qualified immunity defense is available.<sup>50</sup> The mere fact that a summary judgment order simply states "denied" should not preclude review.<sup>51</sup> When a trial court fails to make findings of fact, the appellate court must undertake a review of the record to determine facts in the light most favorable to the nonmoving party.<sup>52</sup>

Does the federal law on qualified immunity sway you to remove this lawsuit from state court to federal court? The client's involvement is crucial to the decision of whether to file the initial complaint in state or federal court because only the client can resolve the most important aspect of this decision-making process.

## B. Second Case Study

Suppose that you represent a plaintiff, and you must decide whether to file a commercial lawsuit, raising a novel issue, in state court or federal court. You are aware that there is an arbitration provision in the parties' agreement, but you want a jury trial.

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49. *Vermette v. Ludwig*, 707 So. 2d 742, 744 (Fla. 2d Dist. App. 1997); *Stephens v. Geoghegan*, 702 So. 2d 517, 521 (Fla. 2d Dist. App. 1997). Nonetheless, the Second District Court of Appeal concluded that it has discretionary jurisdiction, by writ of certiorari, to review orders denying qualified immunity. *Vermette*, 707 So. 2d at 744; *Stephens*, 702 So. 2d at 521. In so doing, the court noted that, because of the nature and purpose of a claim of immunity from suit, an appeal after final judgment would not be an adequate remedy—a party cannot be re-immunized from suit after the fact. *Id.* When a public official moves for summary judgment on the ground that he or she enjoys immunity from suit arising under either state or federal law, and the record conclusively demonstrates that the public official is entitled to immunity, it is a departure from the essential requirements of law to deny it. *Vermette*, 707 So. 2d at 744; *Stephens*, 702 So. 2d at 522.

50. *Behrens*, 516 U.S. at 312–313.

51. *Foy v. Holston*, 94 F.3d 1528, 1532 n. 3 (11th Cir. 1996).

52. *Id.*

Because of economic and other perceived benefits of arbitration, commercial agreements often contain provisions requiring parties' disputes to be resolved in arbitration. Although the benefits and/or detriments of arbitration are beyond the scope of this Article, a strong judicial policy favors arbitration in both federal and state court.<sup>53</sup> However, the appellate protections afforded to parties battling over mandated arbitration are extraordinarily different in state and federal court.

Assume you are the lawyer, mentioned above, contemplating a lawsuit for securities-law violations. The lawsuit has particular jury appeal—you represent an elderly woman who has lost all of her retirement funds because a rogue broker at a national brokerage firm made inappropriate investments. As the lawyer, you want to get to a jury, but your client signed an agreement that requires her to arbitrate her disputes with the broker and the national brokerage firm before the National Association of Securities Dealers. You believe there is a solid argument that the arbitration agreement is void.

Given the strong federal policy favoring arbitration, first consider filing the lawsuit in state court. Florida Rule of Appellate Procedure 9.130 grants the immediate right of appeal if the trial court finds the arbitration provision valid.<sup>54</sup> Keep in mind that the defense may also appeal if the court finds the arbitration agreement unenforceable.<sup>55</sup> The federal rule is remarkably different.

In 1988, Congress enacted Title 9 United States Code Section 16, which provides parties the right to an immediate appeal of orders that *deny* motions to compel arbitration, as well as other miscellaneous arbitration orders.<sup>56</sup> Parties must no longer rely upon an appellate court's discretion to accept appeals of orders *denying* motions to compel arbitration. The same cannot be said, however, of orders *granting* motions to compel arbitration. This latter type of order is not included within the scope of Section 16, unless the sole issue before the district court concerns arbitrabil-

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53. *Brandon, Jones, Sandall, Zeide, Kohn, Chalal & Musso, P.A. v. Medpartners, Inc.*, 312 F.3d 1349, 1358 (11th Cir. 2002); *Healthcomp Evaluation Servs. Corp. v. O'Donnell*, 817 So. 2d 1095, 1097 (Fla. 2d Dist. App. 2002).

54. Fla. R. App. P. 9.130(a)(3)(C)(iv).

55. *Id.*

56. *See generally* 9 U.S.C. § 16 (emphasis added). This statute is somewhat fascinating because it encourages arbitration by permitting appeals of orders that deny arbitration, which Congress presumably views as a judicial negative.

ity.<sup>57</sup> If a party wants to avoid arbitration, state court, rather than federal court, provides better appellate remedies of orders that require arbitration.

Given the novel theory that you plan to employ in your lawsuit, you may also want to reexamine your court choice. If the trial court denies an anticipated defense motion to dismiss, the

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57. The Eleventh Circuit has yet to consider whether an order dismissing—rather than staying—an action without prejudice to arbitrate the claims is final and appealable under Title 28 United States Code Section 1291. The First, Seventh, and Ninth Circuits have all concluded that such an order is not appealable. *E.g. Seacoast Motors of Salisbury, Inc. v. Chrysler Corp.*, 143 F.3d 626, 629 (1st Cir. 1998); *Napleton v. Gen. Motors Corp.*, 138 F.3d 1209, 1212 (7th Cir. 1997); *McCarthy v. Providential Corp.*, 122 F.3d 1242, 1244 (9th Cir. 1997). Other circuit courts have ruled that an order dismissing an action because the claims therein are subject to arbitration is immediately appealable. *E.g. Nationwide Ins. Co. v. Patterson*, 953 F.2d 44, 45–46 (3d Cir. 1991); *Arnold v. Arnold Corp.*, 920 F.2d 1269, 1275–1276 (6th Cir. 1990); *Armijo v. Prudential Ins. Co.*, 72 F.3d 793, 794 (10th Cir. 1995).

The methods the First, Seventh, and Ninth Circuits have generally employed to resolve this issue are to determine whether the request for arbitration was made in an “embedded proceeding.” See *e.g. Seacoast Motors*, 143 F.3d at 628; *Napleton*, 138 F.3d at 1211–1212; *McCarthy*, 122 F.3d at 1244. An embedded proceeding is commonly described as a lawsuit concerning the merits of a party’s substantive claims. *Altman Nursing, Inc. v. Clay Capital Corp.*, 84 F.3d 769, 770–771 (5th Cir. 1996). Such an action differs from “independent proceedings,” actions instituted for the sole purpose of resolving whether a party’s claim is subject to arbitration. *Id.* at 771. In an embedded proceeding, the arbitration issue typically arises because one party moves to compel arbitration of the substantive claims. *Id.*

A discussion of this “embedded-independent proceeding” issue often addresses the impact that the Federal Arbitration Act, Title 9 United States Code Section 16, has upon Section 1291. Section 1291 makes final orders appealable, while Section 16 prohibits appeals of interlocutory orders that grant motions favoring arbitration by the parties. *Napleton*, 138 F.3d at 1211; *McCarthy*, 122 F.3d at 1243–1244. Most courts addressing the issue raised here have concluded that a motion compelling arbitration in an embedded proceeding is not appealable under Section 16, while a final order in an independent proceeding that reaches the same conclusion is appealable. *Napleton*, 138 F.3d at 1211–1212; *McCarthy*, 122 F.3d at 1244. The distinction revolves around the express language of Title 9 United States Code Section 16(a)(3) and (b)(1)–(4).

A question arises when, in an embedded proceeding—where the plaintiff has raised substantive claims—the district court, rather than granting a motion to compel arbitration and stay the litigation pending arbitration, dismisses the lawsuit on the basis that the claims are subject to arbitration. The result is no different in either scenario. The substantive claims are not resolved in the litigation, but instead are sent to arbitration for resolution. *Napleton*, 138 F.3d at 1213. Moreover, after the arbitration is complete, the court may still be used to confirm the arbitration award and, if appropriate, resolve attorney’s fees questions. *Id.* at 1214. Courts have concluded that to allow an immediate appeal of the dismissal order glorifies form over substance and concomitantly rule that such a dismissal order is not appealable. *Id.* at 1212–1213 (declining to find jurisdiction from embedded proceedings). Moreover, this principle comports with the public policy behind the 1988 amendments to Title 9 United States Code Section 16, which advocate appeals of orders prohibiting arbitration, but not those encouraging arbitration. Allowing an appeal of an order that dismisses a lawsuit to require arbitration frustrates this policy.

defense may have the right to an immediate appeal, which is unavailable in state court. Title 28 United States Code Section 1292(b) provides a discretionary certification process for interlocutory orders.<sup>58</sup> The purpose of Section 1292(b) is to offer an “early appeal of a legal ruling when resolution of the issue may provide a more efficient disposition of litigation.”<sup>59</sup>

Section 1292(b) requires the presence of three factors to allow a district court to certify an interlocutory appeal.<sup>60</sup> These three factors require that (1) the issue involve a controlling issue of law, such that resolution of the issue on appeal could materially affect the outcome of the litigation,<sup>61</sup> (2) the parties must have a substantial ground for difference of opinion,<sup>62</sup> and (3) an interlocutory appeal must be likely to speed the termination of the litigation.<sup>63</sup> Each factor must be satisfied before a district court will certify a Section 1292(b) appeal *and* before an appellate court will accept the appeal.<sup>64</sup>

In light of Section 1292(b), you may want to reconsider your state court choice of forum. If the trial court concludes that your novel theory of liability under the securities law states a cause of

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58. Section 1292(b) does not limit the type of order that may be appealed. *See supra* n. 28 (providing the text of Section 1292(b)).

59. *Ford Motor Credit*, 664 F.2d at 380.

60. *Supra* nn. 28–29 (providing the three factors of Section 1292(b)).

61. To be a “controlling question of law,” resolution of the issue on appeal should materially affect the outcome of litigation in the district court. *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1982). In other words, if erroneously decided, a controlling question of law would require reversal on appeal. *Oyster v. Johns-Manville Corp.*, 568 F. Supp. 83, 86 (E.D. Pa. 1983). Numerous courts have held that a controlling question of law is one that could terminate an action and contribute to the early disposition of a variety of cases. *Dept. of Econ. Dev. v. Arthur Andersen & Co.*, 683 F. Supp. 1463, 1486 (S.D.N.Y. 1983). The issue cannot be fact-specific to the lawsuit. *Id.* at 1487.

62. This second prong is satisfied when the area of law is still indefinite and when the resolution of such differences would materially advance the case. *Keogh v. Pearson*, 244 F. Supp. 482, 486 (D.D.C. 1965), *rev'd sub nom. Wash. Post Co. v. Keogh*, 365 F.2d 965 (D.C. Cir. 1996). A “substantial ground for difference of opinion” may be demonstrated by adducing “conflicting and contradictory opinions” of courts which have ruled on the issue.” *Oyster*, 568 F. Supp. at 86 (quoting *Dorwood v. Consol. Rail Corp.*, 505 F. Supp. 58 (E.D. Pa. 1980)).

63. *Mateo v. M/S KISO*, 805 F. Supp. 792, 800 (N.D. Cal. 1992). This third prong is satisfied when, if the court of appeals reversed an interlocutory order, a decision would be dispositive of the case. *Mueller v. First Natl. Bank of the Quad Cities*, 797 F. Supp. 656, 664 (C.D. Ill. 1992); *Stong v. Bucyrus-Erie Co.*, 476 F. Supp. 224, 225 (E.D. Wis. 1979). Moreover, a district court should examine the probability that an interlocutory appeal would save additional time and expense. *Kennard v. UPS, Inc.*, 531 F. Supp. 1139, 1149 (E.D. Mich. 1982).

64. *Mateo*, 805 F. Supp. at 799 (emphasis added).

action, the defense could ask the district court to certify an appeal under Section 1292(b). True, even if you won your case before a jury, the defense could always argue, on plenary appeal, that your cause of action was invalid. But there is much more bargaining power in your hands once a defendant is confronting a trial on the merits.

#### IV. MAKING THE RIGHT CHOICE

With so many appellate remedies to choose from and so much uncertainty about when a lawsuit is filed, how does the practitioner make the initial decision to file a lawsuit in state court or federal court?

First, strategize. Determine what is important to your client. Is it a jury trial?<sup>65</sup> Is it a quick ruling?<sup>66</sup> Perhaps your client seeks to avoid nationwide publicity.<sup>67</sup> If any of these concerns or needs are crucial to your client, you will have a tough time explaining to him or her why you chose a forum that deprived him or her of an appellate remedy needed to further these goals.

Second, consult an appellate practitioner. He or she will be well versed in the various appellate remedies available in state or federal court. Explaining your concerns and goals to an appellate practitioner will minimize any conflicts that may have resulted from an unfocused choice of forum.

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65. A party's need for a jury trial may result in choosing a forum that allows an early appeal of an order requiring arbitration. For a discussion of Rule 9.130(a)(3)(C)(iv), review the text accompanying *supra* notes 54–55.

66. If your defense client requires an appeal of an order holding that the plaintiff stated a cause of action, federal court is your best choice. For additional information on Title 28 United States Code Section 1292(b), review *supra* notes 58–64 and accompanying text.

67. Arguably, nothing ensures more negative publicity for your corporate client than the certification of a nationwide class action against it. State court is the best court because it is the only court that permits an appeal as a matter of right of an order certifying a class. Consult *supra* notes 40–44 and accompanying text for a discussion of Florida Rule of Appellate Procedure 9.130(a)(3)(C)(vi).