To Appeal or Not To Appeal: A Guide for the Corporate Appellant

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The question of whether or not to appeal an adverse judgment involves a complex calculus. Reversal rates on appeal are not encouraging and the costs can be significant. However, the cost of failing to appeal can be equally high. While the decision can be difficult enough for individual appellants to make, the process becomes exponentially more difficult for corporate appellants who must conduct a cost-benefit analysis on both legal and business grounds and obtain approval from multiple interested parties. This article will explore the interplay between the business and legal concerns a corporation must consider in making the decision to appeal an adverse judgment.

BUSINESS CONSIDERATIONS:

Meritorious Grounds and Purpose of Appeal

Before asking “Should we appeal?” any potential appellant must first ask: “Can we appeal?” The first threshold that must be passed is determining whether meritorious grounds for appeal exist. While appeals may be wielded in a strategic manner, an appeal cannot be filed merely for leverage. There must be prejudicial error with good faith arguments on appeal. Assuming such good faith arguments on appeal exist, the analysis then becomes more complex.

Any corporate defendant – or unhappy corporate plaintiff – needs to determine what it realistically seeks to gain by appealing. Appeals are costly, time consuming, and can often end with remand to the trial level court, which may result in further litigation without any guarantee of a better result. Consequently, identifying the specific goals being sought on appeal is critical in conducting an effective cost-benefit analysis.

Leverage

Sometimes leverage can be the dominant goal. While good faith arguments on appeal are a condition precedent to considering appeal, they are not often in and of themselves a reason to file an appeal. Assuming such arguments do exist and that the avenue of appeal is therefore available, what is motivating the corporation to consider appeal? Strategically there can be a significant benefit to keeping the case alive in order to maintain negotiating leverage. Doing so can preserve the opportunity to include the case in a global settlement if such a settlement is under consideration. The time, cost and uncertainty involved in an appeal can be wielded by the appellant corporation to negotiate a settlement more advantageous to the corporation than the original judgment. However, the efficacy of using an appeal to achieve settlement can be mitigated by the fact that settlements on appeal rarely
result in the vacating of an unfavorable opinion, leaving the ‘bad law’ in place. Furthermore, if such tactics are unsuccessful and no settlement is achieved, the corporation has committed itself to the appeal process and must be prepared to follow through in good faith. The corporation therefore needs to consider whether utilizing an appeal as leverage to effect a settlement is the best use of the company’s resources, and whether a settlement fully addresses the corporation’s concerns with the judgment.

Precedent
As noted, while a settlement may resolve the financial elements of the dispute, it will not necessarily resolve the legal elements. Many corporations consider appeal in order to address the negative precedent that might be established by the adverse judgment, so as to ensure that ‘bad law’ does not set the stage for future losses or inhibit the corporation’s ability to remain lucrative. However, most judgments involve both wins and losses, and an appeal on the losses affords the opposing side an opportunity to challenge the wins. The corporation must therefore weigh the wins and the losses in any decision and consider whether it is more valuable to safeguard the wins rather than appeal the losses and place those wins in jeopardy. A fine example can be found in PHH Corp. v. Consumer Financial Protection Bureau (No. 15-1177 (D.C. Cir. Oct. 11, 2016)). The Consumer Financial Protection Bureau (“CFPB”) had fined PHH Corp $109 Million, finding that it had violated a federal law on real-estate settlement procedures. PHH sued to challenge the fine, arguing that the federal agency’s single-director structure violated the Constitution’s separation of powers and lacked the authority to impose the fine. The appeals court rejected PHH’s challenge to the bureau’s structure, but at the same time invalidated the fine levied against it. Despite industry and political pressures seeking to invalidate the CFPB on constitutional grounds, PHH chose not to appeal. It can be assumed that the ‘win’ achieved by reversal of the $109 Million fine was deemed too valuable to risk losing in an appeal on the constitutional challenge to CFPB’s structure.

If the question on appeal is a grey area or matter of first impression, an additional layer of analysis is necessary. Under these circumstances the corporation risks establishing a negative binding (or even merely guiding) precedent. This may be a complex question for a corporation where different decision makers have different approaches. The regulatory arm may prefer certainty to vagueness, favoring obtaining a decision in order establish clear guidelines for future behavior, even at the risk of an unfavorable decision. Business executives may prefer to maintain the business flexibility afforded by the lack of a clear guide rather than risk a precedent that disfavors advantageous business practices. In such instances, it behooves counsel to review the underlying case thoroughly, in particular to assess whether the specific case in question is the best case to use in potentially triggering a precedent-making decision. If the case seems likely to afford a precedent that would benefit the business while providing a clear guide moving forward, it is more likely to obtain the
approval of the various corporate decision-makers. If not, it may be worthwhile waiting for a better set of facts to take up on appeal.

The corporation’s decision-making process is also complicated by the potential ripples of any decisions made in the context of taking up an appeal. In crafting an approach to the appeal, the corporation has to take certain legal positions on the issues in question. The decision makers have to ask themselves whether taking such positions will come back to bite them on the regulatory front. It is therefore imperative that in the context of making the decision to appeal any anticipated legal positions the appellate team intends to take be run by the corporation’s regulatory team so that it can weigh in on the potential long term impact of such legal positions.

Precedent can be an issue not just in terms of an appellate decision, but also as a practical consideration. If there are repeat players filing suit against the corporation, failure to appeal can encourage more such suits, to the company’s detriment. This creates a stronger argument for appealing on principle and curtailing the development of such a trend. Again, a careful analysis of the judgment being appealed to maximize the likelihood of a favorable appellate decision is of critical importance. However, this is one scenario in which the advantage of obtaining certainty can outweigh the risk of a potentially adverse decision.

**Reputation**
As must be apparent at this point, many of the considerations inherent in making the decision to appeal are not legal in nature. Corporations have to function simultaneously in the marketplace as well as in the legal sphere, and must balance the demands of each. Lawsuits must therefore be considered from both perspectives. First, they must identify the marketplace advantages and disadvantages to appealing. For example, while there might be market value in simply satisfying the judgment and getting the corporation’s name out of the media cycle, it is also possible that the nature of the suit is sufficiently egregious that it is worth taking a stand and appealing to protect the corporation’s good name (despite any ongoing media scrutiny that may result). Failure to appeal can also reward bad marketplace behavior and result in a cascade of copycat lawsuits. If the corporation determines that it is better served by moving forward with appeal, it should consider methods of mitigating the anticipated negative consequences of such a decision. If there are sister or parent companies, the corporation should consider whether and how it might create a “firewall” as a practical matter to insulate related entities from any fallout resulting from appeal, and take such steps in conjunction with pursuing the appeal.

**LEGAL CONSIDERATIONS:**

**Trial Assessment – How Well Was the Matter Preserved on the Record?**
In order to provide maximum benefit to the corporate stakeholders who are ultimately responsible for making the decision, both corporate counsel and any outside counsel retained on the matter must be prepared to provide a clear and detailed analysis about the outlook on appeal. The first step is to conduct a trial assessment, identifying the issues to be addressed on appeal. This relates back to the motivation for appeal. Simply because there was legal error does not mean it was prejudicial or, even if prejudicial, that it requires correction. The nature of the error and the ultimate business and legal consequences of such an error inform whether the error reaches a threshold that demands appeal. And the question is not merely whether it requires appeal, but whether such an appeal will be effective in light of the available record. The analysis involves three questions: (1) was the issue in question properly preserved? (2) How well was it preserved? And (3) If it did not get into the record as expected or desired, how determinative is the flaw? Special scrutiny should be given to failure to object to the admission and exclusion of evidence in a way that makes clear the specific grounds of the objection. Similarly, the record as to jury instructions can be difficult to piece together if discussions held off the record are not clearly incorporated into the record and no objections or requests for clarification are made. There are many points in the course of a lawsuit where the record can be murky and issues may get lost. The inclusion of an appellate specialist during the course of the trial court proceedings to monitor and ensure that elements necessary to appeal are adequately preserved on the record can be an enormous advantage in any high-stakes litigation.

**Standard of Review**

Counsel must also assess whether an issue that was pivotal at the trial level will be effective to pursue on appeal, depending on the standard of review to be applied. The three major standards of review for appeals are: legal error, abuse of discretion and substantial evidence. When reviewing the trial court's ruling on a question of law, the court of appeals analyzes the question *de novo* giving no deference to the original ruling. Procedural actions are generally reviewed under an “abuse of discretion” standard, assessing whether the trial court's decision “falls within a broad range of permissible conclusions.” (Cooter & Gell v. Hartmarx Corp., (1990) 496 U.S. 284, 400) In assessing determinations that are predominantly factual, the appellate court must apply the standard of “substantial evidence,” where it “is bound by the trial court’s resolution of disputed factual issues and must affirm the judgment so long as the judgment is supported by “substantial evidence” (Winograd v. American Broadcasting Co. (1998) 68 Cal.App.4th 624, 632).

There are also situations involving “mixed questions” of both law and fact where the standard of review to be applied is less clear. This is where the framing of the question on appeal can be of such critical importance. A mixed question asks whether “the rule of law as applied to the established facts is or is not violated.” (Pullman-Standard v. Swint, (1982) 456 U.S. 273, 289 n 19). The question becomes whether the issue as raised on appeal can be reduced to one that is primarily legal rather than factual or vice versa. In U. S. Bank N. A. v.
Village at Lakeridge, LLC, (583 U.S. ___ (2018)), the Supreme Court (referencing Miller v. Fenton (1985) 474 U.S. 104,114), clarified its methodology for determining which standard to apply. After reducing the question on appeal to its essence, it asked which judicial actor is best situated to make the decision? If the trial court, then the appropriate standard should be one that gives deference to that court’s findings. If the appellate court, then a de novo standard of review might be appropriate. In U.S. Bank, the Court reduced the question on appeal to whether, given the facts found, the purchase between the parties was conducted as if they were strangers to each other? Framed in such a way, the Supreme Court concluded that the question was more factual than legal and supported the appellate court’s application of the “clear error” standard of review. As should be clear, where the question on appeal may be a mixed question of law and fact, effort should be made to reduce the question taken up on appeal to its essence to determine what standard of review is likely to be applied, and ask if and how the question can be rephrased to trigger a different standard.

**Appeal Strategy:**

Among the numerous legal arguments that can be raised regarding any one issue on appeal, there is often a hierarchy of best, good, and tepid. Mapping the arguments and their potential strength and impact can be useful in charting a course for effective appeal. As referenced above, legal arguments can ultimately have far reaching consequences for the corporation, sometimes even for the industry at large, and therefore consulting with departments or stakeholders that may find themselves impacted by these legal arguments can be invaluable in creating a comprehensive assessment of the legal and business consequences of each argument contemplated. Once a clear picture has developed of both the legal strength and consequence of any given argument as well as its potential business impact, counsel can determine which arguments merit pursuit and which may need to be sacrificed for the sake of efficacy or business performance. The comprehensive legal strategy for appeal can then be built accordingly. It may also be worth considering what outside support or opposition the proposed legal strategies may elicit in the form of amicus curiae, which can also impact the prioritization and choice of legal argument.

**The Function of Corporate Counsel:**

Corporate counsel plays a critical role in guiding the corporate stakeholders towards any decision to appeal or not to appeal. Corporate Counsel has to identify the relevant business stakeholders and account for each of their particular interests and agendas in assessing the value and direction of any appeal. While some stakeholders may be obvious – such as regulatory and public relations departments – others may be indirectly impacted but nevertheless important, such as subsidiaries or parent companies. Different parts of the business may be impacted in different ways, and identifying the relevant stakeholders and obtaining their input can be critical for an effective decision-making process. Not only are different stakeholders liable to have different views from a business standpoint, but when dealing with international companies there are also different cultural values that may come
into play and must be addressed. Corporate counsel has to engage in a careful balancing act, educating and obtaining the buy-in from each identified stakeholder or part of the business while applying the input of such stakeholders in crafting an appellate strategy (assuming consensus is reached to appeal). And while it is fair to assume that concerns about the impact of appeal on the business should originate with the stakeholders, it is also worthwhile observing that corporate stakeholders may be as emotionally invested in a case as individual litigants might be. If they cannot objectively weigh the cost that appealing may pose to the business, it may fall to corporate counsel to provide a fair and objective assessment of the downsides of appeal, including encouraging the stakeholders to consider any negative business impact that might result.

**Staying execution:**
The final step in determining whether or not to appeal is to ascertain whether the corporation will seek to stay execution of the judgment during the pendency of the appeal. Most state and federal rules provide broad discretion to the courts in determining whether and on what condition to stay execution of both monetary and non-monetary judgments. Assuming the intent of the appeal is not purely as leverage for settlement, such a stay can often be critical to achieving the purpose of the appeal. Rendering payment pursuant to a judgment only to attempt to recover it following a successful appeal is generally not practical. And allowing an injunction or transfer to take place only to later unwind it upon successful appeal is similarly impractical. The efficacy of an appeal is therefore often integrally connected to the ability to stay execution pending final resolution. In order to obtain such a stay, the appellant must generally make a motion establishing the harm that will befall the client should the stay not be granted. However, as with other aspects of any appeal, this can have significant business ramifications. In order to prepare a compelling statement of irreparable harm, the corporation may be admitting to weakness that could impact it in the marketplace. The approach taken to staying appeal must therefore also be thoughtfully considered.

The corporation must also consider how to meet any conditions associated with such a stay. Stays of execution, particularly for monetary judgments, are often conditioned on the provision of a corporate bond sufficient in size to cover the entirety of the judgment plus costs and interest on appeal or, if the judgment is non-monetary, the estimated damages that may result to the judgment creditor from such a stay. Such bonds often require full collateral as a condition precedent to issuance. Many corporations incorrectly assume that their insurance carriers will cover the bond, however their carriers will typically only cover the premium associated with the bond. The carrier will generally not provide the collateral or indemnify for the bond unless it is also directly liable for the underlying judgment. The corporation must therefore be prepared to provide such collateral in order to achieve any stay it might obtain. While large or publicly traded corporations may find it fairly easy to provide full collateral or obtain a waiver of collateral based on their financial strength, they
must still consider what indemnities they can provide to support the bond application. Smaller companies often have difficulty arranging for the requisite collateral, or additional indemnities to support bond issuance without the requisite collateral, particularly if the requirement takes them by surprise. Preparing for the provision of collateral in the event a stay of execution is sought is therefore a significant element of the decision-making process. While most states do have requirements that the bond cover 100% of the judgment plus an accommodation for interest and costs on appeal, many states have placed a $25 Million or $50 Million cap on the bond amount required. While the appeal bond cap was originally proposed by the tobacco industry in response to the extremely large adverse verdicts it began to see, the call was taken up by tort reformers arguing that due process must preclude the imposition of large appeal bonds that in practice serve as barriers to effective appeal. It should be noted that most states do provide allowances for requiring full judgment bonds without a cap if a judgment creditor is found to be denuding itself of assets during an appeal.

**Interlocutory Appeals**

While the above analysis has focused predominantly on the appeal of a final judgment, mention should be made of the importance of interlocutory appeals. While some interlocutory orders do not need to be separately appealed, a corporation should consider immediate appeal of any such orders whose substance can significantly impact a case, such as orders relating to the production of witnesses or evidentiary orders. Because the issues in interlocutory appeals are typically singular, the analysis can be slightly more straightforward, both in terms of legal issues and obtaining the buy-in of the relevant stakeholders. However the principles underlying the decision-making process are effectively the same.

**CONCLUSION**

Determining whether or not to appeal is complex even in the most straightforward of cases. The elements of law, practical considerations, time, and money overlap to create a nuanced tapestry, and pressure on any single thread can cause an unraveling. Throw in the pressures and demands of national or international corporate function and reputational and regulatory concerns, and the task can seem daunting indeed. Nevertheless the elements of good decision making can be distilled. While every appeal is unique, the above steps can serve as a guide that, when applied to the individual case, can aid in charting the advantages and disadvantages of pursuing an appeal.
A Practical Guide to Obtaining a Supersedeas Bond

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The purpose of an appeal bond is to protect both parties while execution of the judgment is stayed, and to ensure that any appeal is filed on its merits and not simply as a delay tactic to afford the judgment debtor an opportunity to denude itself of assets. It protects the appellant by precluding the necessity of paying a judgment that might be reversed, which would then require an attempt to recover any up-front monies paid. It protects the appellee, as judgment creditor, by ensuring the availability of funds to satisfy the judgment if it is upheld on appeal. The condition of such bonds reflects this purpose. The condition typically secures payment of the judgment or any portion thereof that is affirmed on appeal if the appeal is pursued to conclusion by the appellant and the judgment is affirmed in whole or in part, or if the appeal is dropped or otherwise dismissed.

To obtain an appeal bond, the appellant or appellant’s counsel must find a reputable Surety company that specializes in such bonds and complete their application. Because of the low success rate on appeals, such bonds are considered high risk and typically require full collateral to support the request. If the party seeking the bond (the “Bond Principal”) is very strong financially, or has very strong financial backing, it may be able to obtain a waiver of the collateral requirement on the strength of its indemnity or the indemnity of its owners or related companies. To obtain such a waiver, however, the Bond Principal must be prepared to provide audited financials of the proposed indemnitors as part of the underwriting process.

If no collateral waiver is possible, the Bond Principal will have to determine what type of collateral it will be able to provide. Cash and letters of credit from approved banks are the most straightforward methods of collateralization, typically accompanied by a significant reduction in the premium associated with the bond. Where premium on a non-collateralized bond may be 2%, premium on a bond obtained with full cash or letter of credit collateral may be 1% or less. Cash deposits can also be advantageous because they usually earn interest, so it may be worthwhile scrutinizing the collateral agreement to identify the relevant interest rate. For letters of credit, most surety companies will have their own standard format that the financial institution issuing the letter of credit will be required to utilize. Furthermore many surety companies now vet the proposed banks to ensure that they are both strong and stable enough to cover the proposed credit obligation, so it is worthwhile utilizing strong banks when proposing letters of credit as collateral.

In some instances a Bond Principal may seek to have non-standard collateral accepted by the Surety company rather than cash or letters of credit. While not common, several of the more established Surety companies are able to accept non-standard collateral, predominantly deeds of trust or mortgages on real property or assignments of marketable securities accounts. But these types of collateral are harder and more labor intensive to process and monitor, and are therefore associated with premiums that can be 4% or higher. They can also take longer to process, which can be a problem if time is of the essence. If there is a time
constraint and liquid collateral can be temporarily provided, it may be possible to arrange with the Surety company to post cash or letter of credit collateral and then exchange it for less liquid forms. Much depends on the flexibility of the Surety company handling the request.

The documents necessary to support a bond application typically include:

1) Bond application;
2) Audited financials of any proposed indemnitors if a collateral waiver is being requested;
3) Indemnity agreement;
4) Collateral security agreement, unless collateral has been waived.
5) Copy of the judgment being appealed from, for accurate drafting of the bond form;
6) Reference to the relevant statute supporting the bond request, and any court order requiring the bond;
7) Payment of premium.