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If you're a loser, act like it

Hoping someone else might take the laboring oar and benefit you is a tremendous longshot. If you're a loser, own it: Act like a loser, and appeal.

BENJAMIN G. SHATZ
Manatt, Phelps & Phillips, LLP

Benjamin is a certified specialist in appellate law who co-chairs the Appellate Practice Group at Manatt in the firm's Los Angeles office.

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EXCEPTIONALLY APPEALING

Last month's column explored appellate standing with a focus on how appeals are limited to aggrieved parties. Appropriately enough, it was titled "Appeals are for Losers." But you know who the real losers are? Parties who attempt to appeal, but muck it up somehow and have their appeals dismissed. About three percent of appeals get dismissed for procedural reasons. This is nearly always a function of lawyer incompetence. That's really losery. But that's the exception, not the rule -- and that's another story altogether. This month we'll consider another class of losers: Parties who fail to appeal at all.

Why are parties who fail to appeal such losers? Because without appealing, there's no way to turn a bad situation around. Without "taking it up," there is no way to even take a shot at winning relief. As the lottery board so happily tells us, "you can't win if you don't play." Seems pretty obvious, right? But is that really true, or (drumroll please) are there any exceptions? Spoiler alert: Since this is an Exceptionally Appealing column, you know what's coming.

As always, let's start with the general rule: A party who fails to appeal implicitly accepts the adverse ruling. If that non-appellant is the only party to that side of the case, not appealing is the end of the line for that party. But cases are often more complex than that, and typically there are multiple parties to each side, and often multiple losers. So what happens if there are two losers, and one appeals and one does not? Imagine a judgment in which Defendant 1 is found liable on claim 1 for $100,000, but there's another defendant, Defendant 2, liable under claim 2, for $200,000. Assume that this judgment is severable, meaning that each claim and award is completely independent. Also assume that only Defendant 2 appeals.

In that situation, Defendant 1 is stuck. Defendant 2 may only raise issues regarding claim 2 and the resulting $200,000 award. Not that this would ever cross the mind of most appellants, but to be clear: An appellant is not allowed to make arguments seeking relief for someone else who is not even a party to the appeal. So the appellate court will only address issues involving Defendant 2. As explained in *American Enterprise, Inc. v. Van Winkle*, 39 Cal. 2d 210, 216 (1952): "Where portions of a judgment are truly severable, the appellate court is without jurisdiction to consider the parts from which no appeal has been taken. And the appellate court will consider the portion before it independent of the other parts. Modification or reversal of the portion of the judgment from which the appeal has been taken has no effect upon the other portions." Defendant 2 -- the appellant who continued to fight -- may seek and win relief, but Defendant 1, who failed to appeal, has to live with the part of the judgment and damages award directed against him.

(In *American Enterprise*, Mr. Van Winkle failed to appeal, and his "failure to appeal indicates his acquiescence in the judgment." *Id.* at 221.)

So nothing about Defendant 2's appeal can benefit Defendant 1, who didn't appeal. Similarly, of course, nothing about Defendant 2's appeal can make things worse for Defendant 1. This is because "the reviewing court will make no determination detrimental to the rights of those who have not been brought into the appeal." *American Enter.*, 39 Cal. 2d at 218.

That's the general rule. But that analysis hinges on the assumption that the judgment consists of severable, independent rulings. In contrast, when a judgment affects multiple parties in such a way that the parties' interests are inseparably interwoven, interesting exceptions arise.

Consider, for example, the dilly of a pickle presented by *Estate of McDill*, 14 Cal. 3d 831 (1975), a fight over how to distribute the estate of Minnie McDill. The judgment split the estate one-half to Minnie's two nieces and one-half to relatives of Minnie's predeceased husband, George. The nieces thought they should have gotten the whole estate, but only one of the nieces bothered to appeal (challenging, of course, the part of the judgment awarding half of the estate to George's heirs). Turns out she was right, and the whole estate should've gone to her and her sister. But what about the fact that her sister could have, yet simply didn't, appeal?

McDill began with the general rule that "where only one of several parties appeals from a judgment, the appeal includes only that portion of the judgment adverse to the appealing party's interest, and the judgment is considered final as to the nonappealing parties." 14 Cal. 3d at 840. But *McDill* went on to teach: "That general rule has an important exception," which is when the part of a judgment appealed from is "so interwoven and connected with the remainder ... that the appeal from a part of it ... involves a consideration of the whole." In that case, "if a reversal is ordered it should extend to the entire judgment." *Id.*

Thus, it simply would make no sense to conclude the appealing niece could win, but the non-appealing niece was out of luck, simply for failing to appeal.
Indeed, *McDill* reasoned that George's heirs "would enjoy a windfall" were they allowed to keep the non-appealing niece's share. 14 Cal. 3d at 841. Of course, from our appellate perspective, it is the non-appealing niece who enjoyed an appellate windfall victory. This seems acceptable, though, because between benefitting heirs who shouldn't take or benefitting the niece who should have joined her sister in appealing, the fairer outcome is clear.

Other examples of windfall wins, as in *McDill*, involve messes that cannot be fairly untangled without affecting the rights of non-appealing parties. Declaratory relief and quiet title actions often fall into this category. In such cases, if a judgment needs to be

reversed and that can be done without affecting the rights of non-appealing parties, then that is what should happen. But if the only way to reach the right result is to reverse the entire judgment (even affecting non-appealing parties), then an appellate court may (and possibly must) do that. Hence, the general rule plus exception is: An appellate court should resolve cases in a manner only addressing the rights of the appellant -- "unless the reversal or modification of the whole judgment is essential to protect the interests of the [appellants]." *Lake v. Superior Court*, 187 Cal. 116, 120 (1921).

Another fun example showing how this works is *Eby v. Chaskin*, 47 Cal. App. 4th 1045 (1996), in which two different lawyers were sanctioned in the same order. One appealed, one did not. (Can you spot the "loser"?) The Court of Appeal ruled that the sanctions order was legally flawed and reversed it. And that reversal was as to *both* lawyers, because: "Although [one of the lawyers] did not appeal the sanctions order, the aspects of the order that affect [both lawyers] are so intertwined that the order is reversed with respect to both lawyers." *Id.* at 1049. Voila! Another windfall appellate win for a non-appellant! QED.

Having demonstrated how a non-appellant might still win relief from an appellate court without appealing, keep in mind that possibility is no way to run a railroad. Hoping someone else might take the laboring oar and benefit you is a tremendous longshot. If you're a loser, own it: Act like a loser, and appeal.

Benjamin G. Shatz *co-chairs the Appellate Practice Group at Manatt, Phelps & Phillips in Los Angeles. Exceptionally Appealing appears the first Tuesday of the Month and addresses exceptions to general rules.*