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Collateral Order Appeals

By Aaron S. Bayer

It is with some trepidation that one ventures into a discussion of the collateral order doctrine, an arcane and complicated area of appellate law. As the 1st U.S. Circuit Court of Appeals has noted, "no one can make a seamless web out of all of the decisions on collateral orders." *U.S. v. Billmyer*, 57 F.3d 31, 35 (1st Cir. 1995). A central theme in the case law, however, is that the lower court order at issue must be "important"—in some way—to qualify for immediate appeal under the collateral order doctrine.

The doctrine has its genesis in *Cohen v. Beneficial Loan Indus. Corp.*, 337 U.S. 541 (1949). *Cohen* interpreted 28 U.S.C. 1291 to permit the appeal of orders that "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Id. at 546.

In the ensuing years, this construction was distilled into a three-prong test, ostensibly for ease of application: To be appealable, 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." *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy Inc.*, 506 U.S. 139, 144-45 (1993).

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Despite 'Cohen,' notion of importance proven elusive

While *Cohen* and its progeny permit appeal of that "small class" of collateral orders that are "too important to be denied review," 337 U.S. at 546, the notion of importance has proven elusive. Courts have struggled to figure out where this concept fits in the collateral order tapestry: as part of the second or third factors, or as an additional factor to be separately considered. But, whatever confusion there may be, the Supreme Court has never suggested that " 'importance' is itself unimportant." *Digital Equip. Corp. v. Desktop Direct Inc.*, 511 U.S. 863, 878 (1994).

Digital Equipment, which involved an order vacating a settlement agreement and allowing a case to go to trial, focused its analysis of "importance" on Cohen's third factor. The court reasoned that "whether a right is...'effectively reviewable' cannot simply be answered without a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement." Id. at 878-79. Last term, in *Will v. Hallock*, 126 S. Ct. 952 (2006), the Supreme Court took this analysis a step further and gave new teeth to *Cohen*'s "effectively unreviewable" prong.

In *Will*, the court dealt with a recurrent type of collateral appeal—an order denying a claim of immunity from suit. A defendant's right not to stand trial obviously cannot be reviewed effectively after the trial is over. But, were the inconvenience of trial the only hurdle to appellate review, the exception would swallow the rule. Thus, the court articulated a new standard, at least for appeals involving immunity claims: "it is not mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest, that counts when asking whether an order is 'effectively' unreviewable if review is to be left until later." *Will*, 126 S. Ct. at 959 (emphasis added).

The court made clear that denials of certain immunity claims do imperil a "substantial public interest," and therefore meet the new standard. These include orders rejecting a claim of presidential absolute immunity, *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (qualified immunity); *Mitchell v. Forsyth*, 472 U.S. 511 (1985) (11th Amendment immunity); *Puerto Rico Aqueduct*, 506 U.S. at 139 (1993); and *Abney v. U.S.*, 431 U.S. 651 (1977) (criminal defendant's double jeopardy defense). See *Will*, 126 S. Ct. at 958.

■ *Appeals Satisfying Will's test.* Extrapolating from these precedents, certain types of immunity claims will likely pass *Will*'s substantial public interest test. For example, a foreign sovereign's claim of immunity from suit under the Foreign Sovereign Immunity Act, 28 U.S.C. 604, rooted in the United States' status as an international actor, should be of substantial public importance. See, e.g., *Segni v. Commercial Office of Spain*, 816 F.2d 344, 347

(7th Cir. 1987) (factors supporting appealability of the denial of a qualified immunity claim "apply a fortiori to the denial of a foreign government's claim of immunity").

The same should hold true for the denial of immunity from suit under the speech and debate clause. U.S. Const. Art. I, § 6. Forcing a legislator to be "questioned" (i.e., made to stand trial) for speech or debate in either chamber undermines the efficacy of the federal government. *U.S. v. Rostenkowski*, 59 F.3d 1291, 1297 (D.C. Cir. 1995) (reasoning that "post-trial review of an order denying a claim of immunity under [the speech and debate] Clause is insufficient to vindicate the rights that the clause is meant to protect"); see *Helstoski v. Meanor*, 442 U.S. 500, 506-08 (1979).

■ *Appeals in jeopardy after* Will. For other immunity claims, however, *Will* might have closed the door to the appellate courthouse. For example, at least one circuit has rethought the appealability of claims of absolute witness immunity. Writing just five days before *Will*, the 6th Circuit allowed a law firm to appeal the denial of its claim to absolute witness immunity to a suit based on an affidavit the firm filed in a previous collection matter. *Todd v. Weltman, Weinberg & Reis Co. L.P.A.*, 434 F.3d 432, 434 (6th Cir. 2006). In a "strikingly similar case" decided after *Will*, the circuit reversed course. *Kelly v. Great Seneca Fin. Corp.*, 447 F.3d 944, 947 (6th Cir. 2006) (cert. petition pending).

Applying *Will*'s "additional 'substantial public interest' requirement," id. at 948, the court drew a distinction between the salutary interest in the immunity itself, and the public interest, if any, served by an interlocutory appeal of that immunity, id. at 949. Finding no substantial public interest in the latter concern, it dismissed the appeal.

Orders denying *Parker* immunity, or the state action defense, under federal antitrust law are also unlikely to meet the standard in *Will*. While some courts have held the denial of *Parker* immunity to be immediately appealable (see, e.g., *Commuter Transp. Sys. v. Hillsborough County Aviation Auth.*, 801 F.2d 1286 (11th Cir. 1986)), a recent 4th Circuit case reached the opposite conclusion based on its reading of *Will*. In *South Carolina State Bd. of Dentistry v. FTC*, 455 F.3d 436, 443-45 (4th Cir. 2006) (cert. petition pending), the court held that *Parker* immunity concerned the scope of the Sherman Act, not a constitutional or common law right not to stand trial, and therefore there was no substantial public interest imperiled by the defendant's being forced to stand trial.

Outside the immunity context, and therefore not tethered to the court's guidance in *Will*, courts have struggled to define when a collateral order appeal qualifies as important, and how to analyze the issue in the *Cohen* framework. The 1st Circuit has used a four-part collateral order test—the fourth factor focusing on whether the order on appeal involves "an important or unsettled legal issue" (see, e.g., *Gill v. Gulfstream Park Racing Ass'n*, 399 F.3d 391, 398 (1st Cir. 2005)), while the 4th Circuit has expressly repudiated its earlier adoption of this approach (*Under Seal v. Under Seal*, 326 F.3d 479, 481-84 (4th Cir. 2003)).

Courts have struggled to figure out where the concept of 'importance' fits in the collateral order tapestry.

Other courts focus on *Cohen*'s second prong, requiring that the order resolve "an important issue completely separate from the merits," but engage in a similar analysis. These courts hold that an "important issue" means one that is important as judicial precedent. See *Result Shipping Co. v. Ferruzzi Trading USA Inc.*, 56 F.3d 394, 399 (2d Cir. 1995) (allowing appeal because it presents an important question of law that "our Circuit has not previously had occasion to consider," the resolution of which "will provide necessary guidance to trial courts"); *Jim Walter Res. Inc. v. Federal Mine Safety & Health Review Comm'n*, 920 F.2d 738, 744 & n.3 (11th Cir. 1990) (mine operator's constitutional challenge to a whistleblower statute "presents an issue of first impression and therefore meets this standard").

An "apples and oranges" approach to importance

Another line of cases takes a broader approach, concluding that importance "does not only refer to general jurisprudential importance." *In Re Ford Motor Co.*, 110 F.3d 954, 959-60 (3d Cir. 1997). In a thoughtful exegesis on "importance," Judge Edward R. Becker acknowledged that an unsettled question of law is one way that an issue may be deemed sufficiently "important" under *Cohen*. Id. at 961. But he presented a more comprehensive analysis, balancing the "interests that would potentially go unprotected without immediate appellate review" against "the efficiency interests sought to be advanced by adherence to the final judgment rule." Id. at 959.

Recognizing that this balancing test was akin to comparing apples and oranges, he colorfully concluded that "the orange of the interests protected by the attorney-client privilege (which would be eviscerated by forced disclosure of privileged material) is sufficiently significant relative to the apple of the interests protected by the final judgment rule to satisfy the importance criterion." Id. at 960-61.

The D.C. Circuit appears to have embraced this balancing approach as well. See *Diamond Ventures LLC v. Barreto*, 452 F.3d 892, 896-97 (D.C. Cir. 2006) (harms resulting from disclosure of competitors' applications to the Small Business Administration are sufficient to overcome the interest in finality).

Practitioners pursuing a collateral order appeal should take stock of both lines of authority, and be prepared to argue the substantial interests that will be lost absent immediate review and, if possible, the presence of a significant unresolved legal issue whose resolution will help litigants and the courts. NLJ