CARLTON FIELDS

Fifth Circuit Clarifies the Domain of Cross-Appeal Jurisprudence

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On January 13, 2022, the Fifth Circuit Court of Appeals issued an opinion in an interesting case involving internet domain names. In resolving the case, the panel took the opportunity to clarify when a cross-appeal is needed (and not needed) in federal appellate practice. In this case, the plaintiff appealed a defense judgment following a zero verdict by the jury while the defendant filed a cross-appeal on, *inter alia*, a summary judgment determination of liability. Before the Fifth Circuit panel ultimately offers some important insights on cross-appeal practice, it rather colorfully recounts the basic background as follows: "For physical addresses, location is paramount. As the quip goes, the three most important things about real estate are location, location, location. The same is true for internet addresses." In fact, "[t]he right domain name can draw traffic to a site, making certain names extremely valuable. Consider these astounding prices for some Fifth Avenues of e-commerce: 'business.com' sold for $345 million, 'LasVegas.com' sold for $90 million, and 'carinsurance.com' went for almost $50 million." Here, "[t]he potential value of domain names has led to more than a decade of litigation over the ownership of the ones at issue in this case." The panel explained the procedural posture in this way:

> This latest chapter in the dispute started well for the plaintiff. It obtained some preliminary relief and then a summary judgment ruling that the defendant had violated state and federal law. But it did not end well; a jury awarded no damages. So the plaintiff appeals seeking some remedy while the defendant challenges the liability rulings. Given the mixed rulings, it is no surprise that both sides also want attorney's fees. To top things off, the district court sanctioned the plaintiff's lawyer for misconduct. We end up affirming the judgment except for the sanctions. And with three appeals arising from one lawsuit — one from the plaintiff, one from the defendant, one from the sanctioned lawyer — this case allows us to clarify when arguments should be made in responsive briefing and when they require a cross-appeal.

After the panel explained why it was affirming the plaintiff's appeal, it turned to explaining why the defendant should not have filed a cross-appeal: "the [district] court ultimately entered a judgment 'that Plaintiff takes nothing and that Plaintiff's case against Defendant is DISMISSED WITH

PREJUDICE.' In other words, Sea Wasp won the war even if it lost some battles along the way. Because the final judgment was a full victory for Sea Wasp, it is not an aggrieved party entitled to bring a cross-appeal." The panel decided to elaborate at length on this point "because there is a recurring misunderstanding about when filing a cross-appeal is appropriate as opposed to asserting in the appellee's brief alternative grounds supporting the judgment." The panel emphasized that "[t]his is not just an academic point. Cross-appeals are inefficient." In practice, cross-appeals "complicate[] briefing schedules and the number and length of the briefs in ways that may generate more confusion than enlightenment." Consequently, a "cross-appeal is generally not proper to challenge a subsidiary finding or conclusion when the ultimate judgment is favorable to the party cross-appealing." The panel invoked Justice Brandeis for the proposition that a cross-appeal is necessary when the appellee wants to "attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary." It provided this example and conclusion:

> Consider a simple personal injury case in which the jury finds the defendant was negligent but then awards no damages. The resulting take-nothing judgment does not injure the defendant, so it could not file a cross-appeal challenging the subsidiary finding of liability. What the defendant in our hypothetical could do is defend the take-nothing judgment on the alternative ground that it was not negligent. The place for such arguments that support a judgment is in the appellee's brief. That is the where Sea Wasp should have put its challenge to the district court's liability rulings.

It remains only to note that the correct application of this rule is sometimes a bit nuanced. For instance, the Seventh Circuit has addressed this issue in the context of an appellee's defense of a dismissal. That is, the Seventh Circuit determined that a dismissal of a case under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction may not be defended with alternative arguments in the answer brief that the plaintiff failed to state a claim. It ruled that a cross-appeal is necessary in that situation. The Seventh Circuit explained this nuance in the following way:

> Finally, we briefly address P.F. Chang's alternative argument that the plaintiffs failed to state a claim upon which relief can be granted. A dismissal for failure to state a claim is with prejudice. The district court here dismissed the plaintiffs' claims for lack of subject-matter jurisdiction, which is a dismissal without prejudice. The district court did not reach P.F. Chang's arguments about failure to state a claim. While we may affirm a judgment on an alternative ground, we may do so only when that ground supports the same relief. ... Because P.F. Chang's did not file a cross-appeal, we cannot and do not consider whether the plaintiffs failed to state a claim.

As illustrated by these cases, practitioners should closely consider whether a cross-appeal is necessary in any particular appeal. Read the full opinion: *Domain Protection, LLC v. Sea Wasp, LLC*, No. 20-40411 (5th Cir. Jan. 13, 2022).

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