

# Mootness: Can a Plaintiff Dismiss a Defendant's Appeal of An Injunction the Plaintiff No Longer Needs?

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Is the appeal of a preliminary injunction rendered moot when the prevailing plaintiff ceases the activities that originally gave rise to its need for an injunction? Not necessarily, according to the Eleventh Circuit's decision in *Norwegian Cruise Line Holdings Ltd v. State Surgeon General, Florida Department of Health*, 55 F.4th 1312 (11th Cir. 2022). Norwegian filed suit and obtained an injunction barring the Surgeon General from enforcing a statutory prohibition against businesses requiring proof of vaccination as a condition of service. However, two days before the Eleventh Circuit issued its opinion in the Surgeon General's interlocutory appeal, Norwegian moved to dismiss the appeal as moot on the basis that Norwegian no longer requires such proof on its cruises and therefore, review of the preliminary injunction was unnecessary. The Eleventh Circuit denied Norwegian's motion, holding that Norwegian failed to meet its "heavy burden" to establish mootness, and a "live dispute" still existed. Norwegian failed to establish that the removal of its vaccine policies was permanent and categorical, and instead, maintained discretion to reimpose its protocols on cruises if necessary. The Eleventh Circuit buttressed its decision on the grounds that Norwegian took the position that the preliminary injunction should be left undisturbed. The court questioned "[h]ow . . . it [can] be that a case Norwegian does not want dismissed involving a preliminary injunction that Norwegian does not want vacated is moot?" And, even if the case otherwise met the criteria for mootness, the voluntary cessation exception to mootness applied. In order to moot an appeal, the party that has voluntarily ceased the "challenged conduct" must make it "absolutely clear" the behavior could not reasonably be expected to recur. Notably, Judge Rosenbaum dissented, suggesting that the majority opinion "depends entirely on smoke and mirrors." The dissent reasoned that Norwegian had in fact asked the district court to lift the preliminary injunction, and that once it had done so, the appellate court could no longer afford any meaningful relief, thus eliminating the live controversy required to maintain the appeal pursuant to Article III. Judge Rosenbaum also disagreed with the majority's

application of the voluntary cessation doctrine, as that exception applies to a defendant's voluntary cessation of a challenged practice. He argued that Norwegian was not a defendant and its vaccine policy was not the "challenged practice" in this case. Instead, the usual practice in a case such as this, where an appeal had become moot as the result of the unilateral action of the party who had prevailed below, would be to dismiss the interlocutory appeal and vacate the preliminary injunction.

***Tips to consider in determining whether an appeal of an injunction is moot:***

- Has the plaintiff unequivocally moved to dissolve the injunction?
- Has the condition underlying the injunction been completely abated?
- Does the voluntary cessation doctrine apply?

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