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December 16, 2019

Seventh Circ. Holds Section 1292(b)'s 10-Day Deadline Is Jurisdictional and Cannot be Restarted

In a recent case, the Seventh Circuit reaffirmed that the 10-day time limit in Section 1292(b) for petitioning a court of appeals to take an interlocutory appeal is jurisdictional, but held for the first time that parties could not "circumvent" the deadline by asking the district court to "recertify" the order for interlocutory review.

By Michael T. Brody

The U.S. Court of Appeals for the Seventh Circuit is famous for jealously guarding its jurisdiction. In a recent case, the Seventh Circuit reaffirmed that the 10-day time limit in Section 1292(b) for petitioning a court of appeals to take an interlocutory appeal is jurisdictional, but held for the first time that parties could not "circumvent" the deadline by asking the district court to "recertify" the order for interlocutory review. In so doing, the court reversed existing circuit precedent and created a split with other circuits.

7TH CIRCUIT SPOTLIGHT

First, the basics. Section 1292(b) is one exception to the general rule that appellate courts may only review final judgments. Under Section 1292(b), a district court may find that an otherwise unappealable order "involves a controlling issue of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." In those circumstances, the would-be appellant may ask the court of appeals to review the order immediately. The court of appeals may permit the appeal "if application is made to it within 10 days after the entry of the order." Of course, the court of appeals may decline certification. See 28 U.S.C. Section 1292; Fed. R. App. P. 5.

Now, the case. The Seventh Circuit decision I address—*Groves v. United States of America*, 941 F.3d 315 (7th Cir. 2019)—arose after the IRS sought penalties from plaintiffs for failure to file certain allegedly required registration forms with the IRS and plaintiffs paid those penalties and sued for a refund. Philip Groves argued, among other things, that the government's assessment had come too late. Groves stated the IRS was subject to 28 U.S.C.Section 2462—the default five-year statute of limitations for civil penalties—which it did not meet. In a series of rulings, the district court concluded the five-year statute of limitations did not apply. Recognizing that this issue could resolve the suit, the district court judge certified his rulings for immediate appeal.

The Seventh Circuit's decision, however, has nothing to do with the

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penalty or whether it was timely or not. The decision does not even approach the merits. The court found that it did not have appellate jurisdiction.

The Seventh Circuit stated in its decision that on "the 10th day after the district court's certification order," Groves sought permission from the Seventh Circuit "by emailing an application to appeal to the Seventh Circuit clerk's office" but "a paralegal mistyped the email address, so the email was not delivered. An automated message noting the failure, sent to the paralegal within minutes, landed in a spam filter." On the next business day, Groves "informed the district court of the mix-up and asked it to recertify its orders to restart the 10-day clock. The court complied, entering an identical second order" certifying the orders under Section 1292(b). Groves filed his petition for appellate review the next day, and the Seventh Circuit "provisionally granted it."

At oral argument, the court asked counsel about whether it had appellate jurisdiction. The court later sought supplemental briefing on the jurisdiction issue. (Although not involved until then, lawyers in my firm assisted Groves in responding to the court's question about its jurisdiction.) Both Groves and the IRS agreed that the court had jurisdiction to hear an appeal from a recertified order.

The Seventh Circuit found it did not have appellate jurisdiction. In its decision dismissing the appeal, the court made two rulings of consequence to courts and litigants in the Seventh Circuit. First, the court found the 10-day deadline in Section 1292(b) is a jurisdictional requirement, not a claim-processing rule. The court found that cases requiring a "clear statement" that a time deadline is jurisdictional apply only to statutory provisions that do not govern an Article III court's adjudicatory authority. When a time limit appears in the statute that concerns a court's adjudicatory authority, as it does in Section 1292(b), that time limit is presumptively jurisdictional. The court held that the application of that presumption in this case was consistent with the long-standing view that statutory time limits for filing appeals are treated as jurisdictional. Because Section 1292 defines the adjudicatory power of the court, its 10-day limit was a jurisdictional limit that *Groves* did not satisfy.

Second, the court held the district court could not recertify its order to restart the clock to file a petition for permission to take an interlocutory appeal. The court observed that Section 1292(b) does not authorize district courts or the court of appeals to extend the 10-day filing deadline. The court noted that prior Seventh Circuit precedent permitted district courts "to do indirectly what they cannot do directly: give litigants more time to file a petition in the court of appeals." The court stated that it had held that if there were equitable reasons to permit an appeal after the 10-day period had passed, a district court may "restart the 10-day clock by either vacating and re-entering, or simply by recertifying the order." The Seventh Circuit had previously held that "a district court should not be driven by 'rigid' adherence to the statutory deadline but should consider the value of an immediate appeal, along with the litigant's culpability for the delay and whether recertification would prejudice the opposing party." Other circuits had approved a similar indirect extension, although there was some disagreement as to the factors to be considered in deciding whether to permit an extension.

After reviewing its own authority, as well as decisions of other courts, the Seventh Circuit overruled its prior precedent. The court applied "the basic principle that when a jurisdictional statute sets a firm deadline, courts have no authority to extend it." The court observed that in analogous context, it had rejected "an end run" around a jurisdictional time limitation. As required by Circuit Rule 40(e), the court acknowledged its ruling overruled existing precedent and created a circuit split. It circulated to the full court. No judge voted to rehear the case en banc.

Where does this decision leave Seventh Circuit practitioners? In this case, the Seventh Circuit found a statutory time deadline relating to the time to appeal was jurisdictional, not a claims processing rule. Once again, the Seventh Circuit ruled that deadlines are deadlines under these circumstances and may not be extended. Reversing prior law, and splitting with other circuits, the court held the parties may not create appellate jurisdiction under Section 1292(b) indirectly where it cannot be established directly. Nor may a district court enter rulings that would permit appellate jurisdiction in circumstances not expressly authorized by the jurisdictional statute. Take note.

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