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# Docketing Orders - To Appeal or Not to Appeal

Lori Grazio

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**NDA 2023**



**REVOLUTIONIZE YOUR  
THINKING ABOUT  
DOCKETING!**

*Calendaring Our Future Together.™*





# To Appeal or Not to Appeal

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## Agenda

- Review Applicable Rules
- Analytical Framework
- Application of analytical framework to different types of orders



## To Appeal or Not To Appeal – What to Docket?

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# To Appeal or Not To Appeal

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Why are orders so important when docketing?



# To Appeal or Not To Appeal

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## 28 USC 2107 – Time for appeal to court of appeals

(a) Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within **thirty days** after the entry of such judgment, order or decree.

(b) In any such action, suit, or proceeding, the time as to all parties shall be **60 days** from such entry if one of the parties is—

- (1) the United States;
- (2) a United States agency;
- (3) a United States officer or employee sued in an official capacity; or
- (4) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States, including all instances in which the United States represents that officer or employee when the judgment, order, or decree is entered or files the appeal for that officer or employee.

(c) The **district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause.** In addition, if the district court finds—

- (1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and
  - (2) that no party would be prejudiced,
- the district court may, upon motion filed within 180 days after entry of the judgment or order or within 14 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

(d) This section shall not apply to bankruptcy matters or other proceedings under Title 11.

## 28 USC 1292(b)

A petition for appeal must be filed within 10 days if a judge has certified a non-final order for interlocutory appeal (*summarized*)

## FRCP 77(d)(2)

(2) *Time to Appeal Not Affected by Lack of Notice.* Lack of notice of the entry does not affect the time for appeal or relieve—or authorize the court to relieve—a party for failing to appeal within the time allowed, except as allowed by FRAP 4(a)



# Where to Start – The Rules

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## 28 USC §1291 – The Final Judgment Rule

The **courts of appeals** (other than the United States Court of Appeals for the Federal Circuit) **shall have jurisdiction of appeals from all final decisions of the district courts** of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, **except** where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.



# Where to Start – The Rules

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## What is a final judgment?

- One that **ends the litigation on the merits** and leaves nothing else for the court to do but execute the judgment
- Order or judgment is final even if there is an outstanding request for attorneys' fees
- Includes any orders/rulings that precede the final judgment



Notice of Appeal is filed in the District Court pursuant to FRAP 4 for an appeal as of right

# Analytical Framework

Is it a final order?

- Is there an order from a District Court judge?  
And
- Does the order end the litigation on the merits?  
And
- Does the order leave anything further for the District Court to do except execute the judgment?

If YES – appeal under FRAP 4

If NO – Is there another avenue for appealing non-final orders?







# Where to Start – The Rules

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## 28 USC §1292(a) – Interlocutory Decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, **granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions**, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders **appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof**, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the **rights and liabilities of the parties to admiralty cases** in which appeals from final decrees are allowed.



# Where to Start – The Rules

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## 28 USC §1292(b) – Interlocutory Decisions continued

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question 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, he shall so state in writing in such **order**. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within **ten days after the entry of the order**: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.



# Where to Start – The Rules

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## 28 USC §1292 Summarized

Orders which are not final can be appealed as a matter of right if they are regarding:

- Injunctions, **or**
- Receiverships (bankruptcy), **or**
- Rights and liabilities of parties to admiralty cases

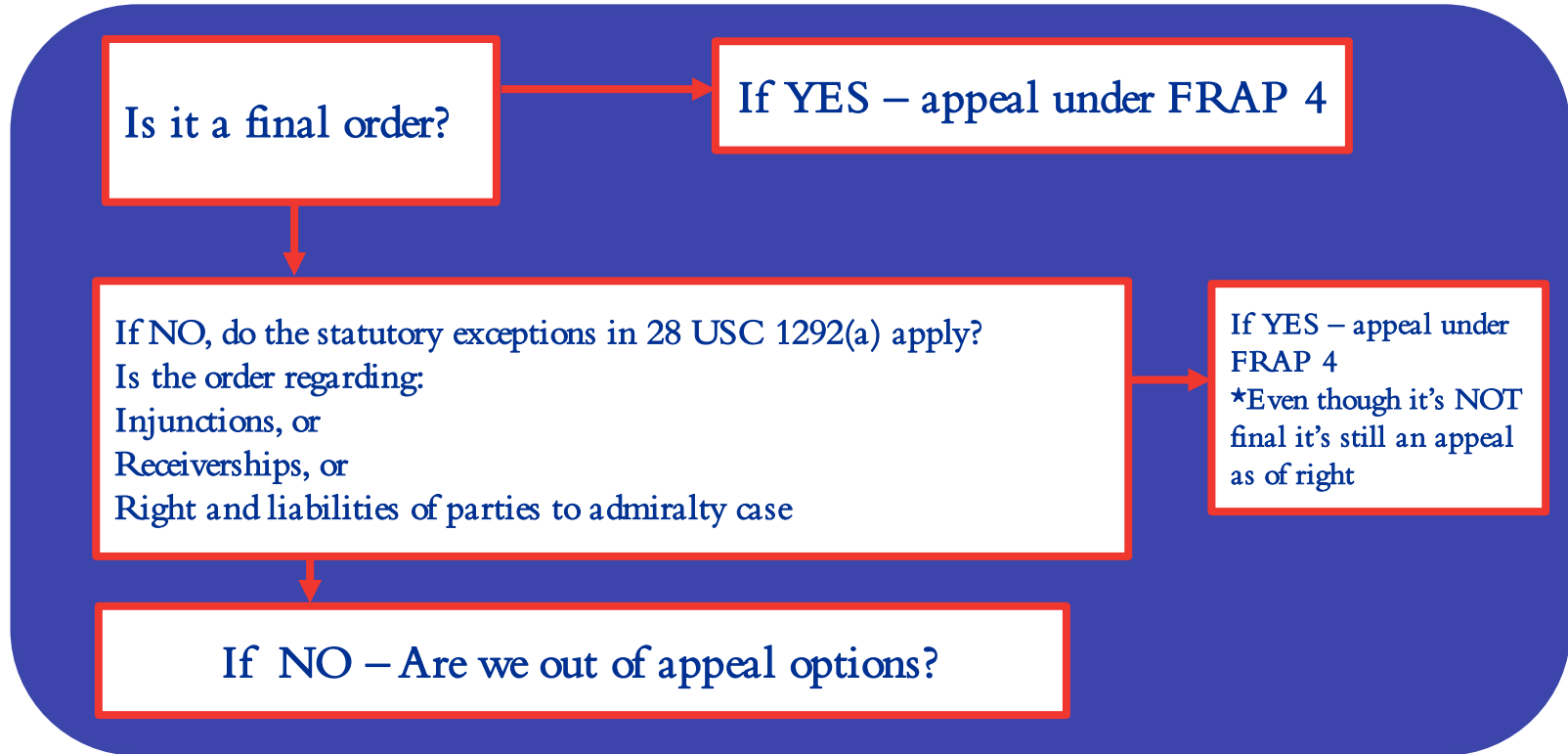
➔ Notice of Appeal filed in District Court pursuant to FRAP 4 for an appeal as of right

Orders which are not final can be appealed with permission if:

- There is a controlling question of law, **and**
- There is a substantial difference of opinion, **and**
- An appeal would hasten the end of the litigation, **and**
- The District Court certified the order for appeal

➔ Petition to Appeal filed in the Circuit Court pursuant to FRAP 5 to seek permission to appeal

# Analytical Framework



# Analytical Framework

Do the exceptions of 28 USC 1292(a) apply?

If YES – appeal under FRAP 4

If NO, does 28 USC 1292(b) apply?  
Is the order not final and:  
There is a controlling question of law, and  
There is a substantial difference of opinion, and  
An appeal would hasten the end of the litigation, and  
The District Court certified the order for appeal

If YES – appeal under FRAP 5

\*You need the Circuit Court's permission to appeal even with all factors present

If NO – Are we out of appeal options?





# To Appeal or Not To Appeal

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Managers, supervisors and other senior staff – what are some of the more frequent questions you receive about docketing appeal deadlines?



# Where to Start – The Rules

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## Other Relevant Rules – FRCP 54(b) Judgments; Costs

(b) Judgment on Multiple Claims or Involving Multiple Parties. When an action presents more than one claim for relief--whether as a claim, counterclaim, crossclaim, or third-party claim--or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

# Analytical Framework

Is it a final order?

- Is there an order from a District Court judge?  
And
- Does the order end the litigation on the merits?  
And
- Does the order leave anything further for the District Court to do except execute the judgment?

If YES and applies to all parties/all claims – appeal under FRAP 4

Yes, BUT the order applies to fewer than all parties, and/or all claims

Did the District Court expressly determine there is no just reason for delay?

If YES, order can be appealed by right under FRAP 4

If NO, order is not appealable







# Where to Start – The Rules

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## Other Relevant Rules – FRCP 23(f) Class Actions

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered, or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

# Analytical Framework

Do the exceptions of 28 USC 1292(a) apply?

If YES – appeal under FRAP 4

If NO, does 28 USC 1292(b) apply?  
Is the order not final and:  
There is a controlling question of law, and  
There is a substantial difference of opinion, and  
An appeal would hasten the end of the litigation, and  
The District Court certified the order for appeal

If YES – appeal under FRAP 5

\*You need the Circuit Court's permission to appeal even with all factors present

If NO – Does the order:  
Grant or deny a class action?  
Decertify a class certification?  
Relate closely to class certification?

If YES – appeal under FRAP 5 with the Circuit Court's permission

If NO– No appeal



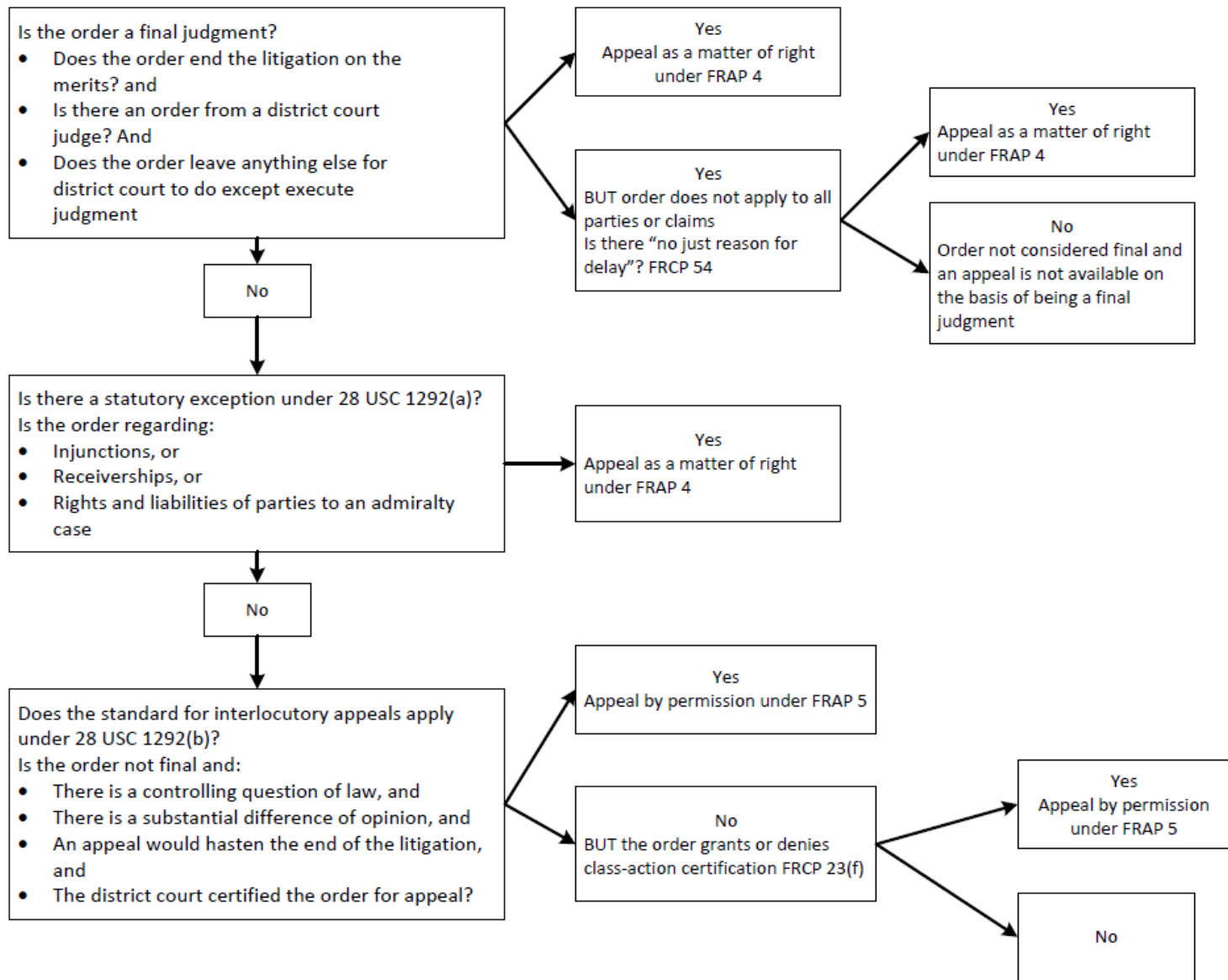


# To Appeal or Not To Appeal

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At your firm, what is a docket professional's role in this analysis?

When do you reach out to the attorneys with questions?





# To Appeal or Not To Appeal

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How do some of these scenarios appear on a docket sheet?



# To Appeal or Not To Appeal

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05/31/2019	<a href="#">17</a>	<u>MOTION for Summary Judgment</u> by U.S. DEPARTMENT OF JUSTICE (Attachments: # <a href="#">1</a> Memorandum in Support, # <a href="#">2</a> Statement of Facts, # <a href="#">3</a> Text of Proposed Order, # <a href="#">4</a> Declaration of Cynthia Shaw and Vaughn Index) (Hair, Christopher) (Entered: 05/31/2019)
06/28/2019	<a href="#">18</a>	<u>MOTION for Summary Judgment</u> by BUZZFEED, INC. (Attachments: # <a href="#">1</a> Memorandum in Support Memorandum, # <a href="#">2</a> Exhibit Plaintiff's Response to Defendant's Statement of Material Facts, # <a href="#">3</a> Text of Proposed Order Proposed Order)(Topic, Matthew) (Entered: 06/28/2019)
12/04/2019	<a href="#">24</a>	MEMORANDUM OPINION re Defendant's <a href="#">17</a> Motion for Summary Judgment and Plaintiff's <a href="#">18</a> Cross-Motion for Summary Judgment. Signed by Judge Trevor N. McFadden on 12/4/2019. (lctnm3) (Entered: 12/04/2019)
12/04/2019	<a href="#">25</a>	ORDER. For the reasons stated in <a href="#">24</a> Memorandum Opinion, the Defendant's <a href="#">17</a> Motion for Summary Judgment is GRANTED in part and DENIED in part, and the Plaintiff's <a href="#">18</a> Cross-Motion for Summary Judgment is GRANTED in part and DENIED in part. See attached Order for further details. <u>This is a final, appealable Order.</u> Signed by Judge Trevor N. McFadden on 12/4/2019.(lctnm3) (Entered: 12/04/2019)



# To Appeal or Not To Appeal

Date Filed	#	Docket Text
10/03/2022	<u>1</u>	<u>NOTICE OF REMOVAL</u> by Nicholas Fiorillo from Suffolk County Superior Court, case number 2184CV02950. (Attachments: # <u>1</u> Civil Cover Sheet, # <u>2</u> Category Sheet)(Phillips, Sophie) (Entered: 10/04/2022)
10/04/2022	<u>2</u>	MOTION to Consolidate Cases by Nicholas Fiorillo.(Phillips, Sophie) (Entered: 10/04/2022)
10/04/2022	<u>3</u>	EXHIBIT re <u>1</u> Notice of Removal by Nicholas Fiorillo. (Attachments: # <u>1</u> Exhibit, # <u>2</u> Exhibit, # <u>3</u> Exhibit, # <u>4</u> Exhibit, # <u>5</u> Exhibit, # <u>6</u> Exhibit, # <u>7</u> Exhibit, # <u>8</u> Exhibit)(Phillips, Sophie) (Entered: 10/04/2022)
10/04/2022	4	Filing fee/payment: \$ 402.00, receipt number 100000528 for <u>1</u> Notice of Removal (Phillips, Sophie) (Entered: 10/04/2022)
10/04/2022	5	ELECTRONIC NOTICE of Case Assignment. Judge William G. Young assigned to case. If the trial Judge issues an Order of Reference of any matter in this case to a Magistrate Judge, the matter will be transmitted to Magistrate Judge Paul G. Levenson. (Finn, Mary) (Entered: 10/04/2022)
10/04/2022	6	Certified Copy of Notice of Removal Provided to Defense Counsel by mail (Phillips, Sophie) (Entered: 10/04/2022)
10/05/2022	<u>7</u>	<u>MOTION to Remand</u> by Raymond C Green.(Nesgos, Nicholas) (Entered: 10/05/2022)
11/22/2022	<u>26</u>	MEMORANDUM in Opposition re <u>7</u> MOTION to Remand filed by Nicholas Fiorillo. (Paine, Matthew) (Entered: 11/23/2022)
12/22/2022	<u>32</u>	Judge William G. Young: ORDER entered. <u>ORDER OF REMAND</u> to the Suffolk County Superior Court (Paine, Matthew) (Main Document 32 replaced on 12/22/2022 Due to Typographical Error <u>Case Number</u> ) (Paine, Matthew). (Entered: 12/22/2022)
12/27/2022	33	Case file sent to Suffolk County Superior Court on December 27, 2022. (Paine, Matthew) (Entered: 12/27/2022)
12/27/2022	<u>34</u>	<u>NOTICE OF APPEAL</u> as to <u>32</u> Order of Remand to the State Court by Nicholas Fiorillo NOTICE TO COUNSEL: A Transcript Report/Order Form, which can be downloaded from the First Circuit Court of Appeals web site at <a href="http://www.ca1.uscourts.gov">http://www.ca1.uscourts.gov</a> MUST be completed and submitted to the Court of Appeals. <b>Counsel shall register for a First Circuit CM/ECF Appellate Filer Account at <a href="http://pacer.psc.uscourts.gov/cmecf">http://pacer.psc.uscourts.gov/cmecf</a>. Counsel shall also review the First Circuit requirements for electronic filing by visiting the CM/ECF Information section at <a href="http://www.ca1.uscourts.gov/cmecf">http://www.ca1.uscourts.gov/cmecf</a>. US District Court Clerk to deliver official record to Court of Appeals by 1/17/2023.</b> (Paine, Matthew) (Entered: 12/27/2022)



# To Appeal or Not To Appeal

01/13/2021	<a href="#">558</a>	<a href="#">ORDER denying 504 Motion for Judgment on the Pleadings</a> . Signed by Honorable Robert D. Mariani on 1/13/21 (jam) (Entered: 01/13/2021)
01/21/2021	<a href="#">559</a>	<a href="#">MOTION for Certificate of Appealability and Stay</a> by Navient Corporation, Navient Solutions, Inc., Pioneer Credit Recovery, Inc.. (Attachments: # <a href="#">1</a> Proposed Order)(Dryhurst, Karin) (Entered: 01/21/2021)
<a href="#">02/26/2021</a>	<a href="#">567</a>	<a href="#">ORDER granting 559 Motion for Certification and Stay</a> . The Court's January 13, 2021 Order denying Defendants' Motion for Judgment on the Pleadings (Doc. 558) is CERTIFIED to the United States Court of Appeals for the Third Circuit for review pursuant to 28 U.S.C. § 1292(b). The following issue is CERTIFIED for review as presenting a controlling question of law as to which there are substantial grounds for difference of opinion and as to which an immediate appeal from the January 13, 2021 Order may materially advance the ultimate termination of the litigation: Whether an act of ratification, performed after the statute of limitations has expired, is subject to equitable tolling, so as to permit the valid ratification of the original action which was filed within the statute of limitations but which was filed at a time when the structure of the federal agency was unconstitutional and where the legal determination of the presence of the structural defect came after the expiration of the statute of limitations. Pursuant to 28 U.S.C. § 1292(b), within ten days of entry of this Order, Defendants must submit an application to the Court of Appeals for the Third Circuit. The above-captioned action is STAYED pending a determination by the Court of Appeals for the Third Circuit whether it will permit the interlocutory appeal, and if so, the resolution of the interlocutory appeal by the Court of Appeals. Signed by Honorable Robert D. Mariani on 2/26/21 (jam) (Entered: 02/26/2021)
<a href="#">03/08/2021</a>	<input type="checkbox"/> <a href="#">1</a> 83 pg, 2.5 MB	<a href="#">Petition for Permission to Appeal under 28 U.S.C. Section 1292(b) filed by Petitioners Navient Corp., Navient Solutions Inc. and Pioneer Credit Recovery, Inc.</a> Received on 03/08/2021. Certificate of Service dated 03/08/2021. Service made by Email. (AMR) [Entered: 03/09/2021 04:07 PM]





# To Appeal or Not To Appeal

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**U.S. District Court - District of Colorado  
District of Colorado (Denver)  
CIVIL DOCKET FOR CASE #: 1:19-cv-02808-WJM-MEH**

Murphy v. Schaible, Russo & Company, C.P.A.'s, L.L.P. et al  
Assigned to: Judge William J. Martinez  
Referred to: Magistrate Judge Michael E. Hegarty  
Demand: \$2,600,000  
Case in other court: U.S. Court of Appeals for the Tenth Circuit, 22-01421  
Cause: 28:1332 Diversity-Breach of Fiduciary Duty

Date Filed: 10/01/2019  
Date Terminated: 06/28/2023  
Jury Demand: Both  
Nature of Suit: 360 P.I.: Other  
Jurisdiction: Diversity



# To Appeal or Not To Appeal

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If we are using a rules-based docketing system, what does it look like when we start docketing?



# To Appeal or Not To Appeal

Quick Dates	
<input type="checkbox"/>	Orders/Judgment
<input type="checkbox"/>	Orders
<input type="checkbox"/>	Entry of Order
	Appealable
	Non-Appealable
	Order - Generates events for both appealable and non-appealable orders
	Notice of Order Granting Motion for More Definite Statement
	Notice of Court's Action Denying or Postponing FRCP 12 Pleading Motion
	Entry of Certification Order re Nonappealable Order (where certification not included within original order)
	Entry of Order Disposing of Last Post-Trial Motion
<input type="checkbox"/>	Orders re Class Actions
	Entry of Order Granting or Denying Class Action Certification
	Entry of Order Granting or Denying Motion to Remand Class Action to State Court
	Ruling on Motion to Transfer Action to Court of Federal Claims
	Entry of Order to Reopen Time to File Appeal

Quick Dates	
	Entry of Order to Reopen Time to File Appeal
<input type="checkbox"/>	Judgments
	Entry of Judgment
<input type="checkbox"/>	Written Notice of Entry of Judgment
	Received
<input type="checkbox"/>	Magistrate Judge
<input type="checkbox"/>	Trial
<input type="checkbox"/>	Post Trial/Appeal
	Hearing to Determine Extent of Liability
<input type="checkbox"/>	Motion for New Trial
	Entry of Judgment
<input type="checkbox"/>	Written Notice of Entry of Judgment
	Entry of Order Disposing of Last Post-Trial Motion
<input type="checkbox"/>	Costs
	Clerk's Notice to Remove Exhibits
	Entry of Order to Reopen Time to File Appeal





# To Appeal or not to Appeal

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Don't forget about FRAP 4 & 5 when you have questions

## FRAP 4 Appeal as by Right

Can you extend the time to file a notice of appeal?

What happens if multiple parties file a notice of appeal?

What is the impact on the filing deadline for a notice of appeal if post-judgment motions are filed?

What does "entry" mean for purposes of determining the trigger date for filing a notice of appeal?

## FRAP 5 Appeal by Permission

What is the impact on the deadline calculation for filing a petition for permission to appeal if the order you're asking to appeal wasn't certified?

In which court is the petition for permission to appeal filed?

Thank you!