The APPELLATE REVIEW

The Newsletter of the Appellate Practice Section of the State Bar of Georgia

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Message from the Chair: APPELLATE PRACTICE SECTION WINS ACHIEVEMENT AWARD

By Laurie Webb Daniel, Section Chair
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IT IS WITH GREAT PRIDE that I report that the Appellate Practice Section received the State Bar Achievement Award at the end of its first year! With the help of our committees and general membership, we certainly have accomplished much since the Board of Governors approved the formation of the section last June. Here is a recap of some of the highlights.

The Section's first event was to invite the judges of the Georgia appellate courts and the Eleventh Circuit, and the clerks of court, to join the section's leadership in a round table discussion of ways that our

Continued on Page 2

Highlights of this Issue

section can be of service to the members of the bench and bar of this state. We had a good turnout for the meeting, which was held at the Lawyers Club of Atlanta on November 30, 2000. The discussion resulted in several projects for the upcoming years.

During the bar's mid-year meeting in January, the section hosted a luncheon that featured Judge Pope's address, *Lawyers Never Die, They Just Lose Their Appeal.* Following the formal presentation there was an ad hoc discussion among Judge Pope, Sherie Welch, Bill Martin and other attendees on various aspects of appellate practice in Georgia. Also in January 2001, we published the first edition of our newsletter, *The Appellate Review,* which contained: (1) a message from the chair; (2) an article on emergency motions and expedited appeals; (3) a review of recent rule changes in the Georgia appellate courts and in the Eleventh Circuit; and (4) a report on the work of the section.

The section presented two formal programs in the spring. The first, *Appeals and Technology*, was a morning workshop held at the Georgia Supreme Court on March 15, 2001. Sherie Welch, Clerk of the Supreme Court, and Ward Mundy of the Eleventh Circuit spoke of the use of technology in these courts. A demonstration of CD Rom briefs followed after a coffee break in the Lawyers Lounge. On April 12, 2001, we held our first full day seminar, *Appellate Strategies.* The faculty included many of the section's leaders and focused on some of the practical aspects of appellate advocacy that have not been addressed in recent appellate seminars, such as the role of the appellate lawyer in the trial court; use of amicus curiae briefs; tips on emergency motions at the appellate level; appellate mediation; and guidelines for dealing with the PR issues when a high profile case is on appeal. Judge Ed Johnson from the Georgia Court of Appeals and Judges Frank Hull and Stan Birch provided valuable views from the bench on many of these topics.

During the Eleventh Circuit Judicial Conference in Savannah, I gave a report on the State Bar's new Appellate Practice Section at the Georgia break-out session on May 12, 2001. Following my presentation, one attendee suggested that our section investigate whether a procedure should be adopted whereby the federal district courts in Georgia could certify questions of unsettled state law to our Supreme Court, as is done in some other jurisdictions. This discussion is just an example of the role of our new section.

We participated as a co-sponsor of the Opening Night Festival at the State Bar's annual meeting and were presented with the achievement award at the plenary session on June 15, 2001. The section will hold its annual meeting for the election of officers at noon on June 29, 2001 at the offices of Holland & Knight, and will conclude its first bar year with a positive fund balance.

The Supreme Court's Equity Jurisdiction

By David A. Webster, Atlanta

Will the Georgia Supreme Court end up with the appeal in your equity case? Not likely – even though "the Supreme Court shall have appellate jurisdiction of ... [a]ll equity cases." Ga. Const., Art. 6, § 6, ¶ 3(2).

Defining what is in or out of equity always has been a difficult task. Before merger of law and equity, gallons of judicial ink were spent on deciding whether cases were "in equity" or "at law." Classically, a handful of cases went to the chancellor because of the type of claim (for example, an equitable accounting). More commonly in modern practice, cases are "in equity" because of the relief sought (often an injunction).

The Georgia Supreme Court's equity jurisdiction gives a new face to this old problem. Over time, the Court has narrowed this jurisdiction bit by bit, just as it has narrowed other aspects of its jurisdiction. As a result, most cases treated as equitable in the trial courts will not be heard in the Supreme Court, but will go first to the Court of Appeals, and will reach the Supreme Court (if at all) only after grant of certiorari.

The first important limitations are definitional. Although declaratory judgment actions are considered equitable in some jurisdictions, our Supreme Court held long ago that they are creatures of statute and not equitable. *Felton v. Chandler*, 201 Ga. 347, 39 S.E.2d 654 (1946). Hence declaratory judgments and their denials are within the Court of Appeals' jurisdiction, by definition.

It soon became apparent, however, that more than definitions were at stake. Thus even a request for injunctive relief in conjunction with a declaratory request does not make the action equitable for appellate jurisdiction purposes. The losing plaintiff in *Baranan v. State Bd. of Nursing Home Admins.*, 239 Ga. 122, 236 S.E.2d 71 (1977), sought both types of relief, but had no forum on appeal in the Supreme Court. "[T]he substantive issue on appeal is a legal question over which the Court of Appeals has appellate jurisdiction." 239 Ga. at 123, 236 S.E.2d at 71.

Beauchamp v. Knight, 261 Ga. 608, 409 S.E.2d 208 (1991), purported to offer a comprehensive rule for divining appellate equity jurisdiction: "Whether an action is an equity case for the purpose of determining jurisdiction on appeal depends upon the issue raised on appeal, not upon how the case is styled nor upon the kinds of relief which may be sought by the complaint. That is, 'equity cases' are those in which a substantive issue on appeal involves the legality or propriety of equitable relief sought in the superior court – whether that relief was granted or denied. Cases in which the grant or denial of such relief

was merely ancillary to underlying issues of law, or would have been a matter of routine once the underlying issues of law were resolved, are not 'equity cases.'" 261 Ga. at 609, 409 S.E.2d at 209.

Several limitations are apparent from this test. First, even if equitable relief is the *only* relief sought in the case, that does not make it an equity case, for appellate jurisdiction purposes. The matter still may be determined not equitable. Second, the primary focus is whether the "underlying issues" are "equitable" or merely "legal." And finally, the Court is to determine in individual cases whether any equitable relief sought is "merely ancillary" to underlying legal issues.

The full impact of these rules in limiting the Supreme Court's jurisdiction did not become apparent until early last year. Then the Court handed down two opinions that further circumscribe its appellate sphere, yet offer conflicting tests as to the boundaries of that sphere.

Warren v. Board of Regents, 272 Ga. 142, 527 S.E.2d at 563 (2000), was an action seeking an accounting and injunctive relief. The facts were uncomplicated, and apparently did not constitute a case "in equity" as defined by *Beauchamp*: "[O]nly standing is at issue in this case. The decision that the plaintiffs do not have standing to assert their claim is a legal decision, not an equitable one. Accordingly, the appeal is properly transferred to the Court of Appeals." 272 Ga. at 144, 527 S.E.2d at 566.

Nevertheless, *Warren* went beyond the facts before the Court and articulated a new, restrictive test: "For a matter to come within this Court's equitable jurisdiction, the lower court must have rendered a judgment upon equitable principles, and that decision must be the primary issue on appeal." 272 Ga. at 144, 527 S.E.2d at 565. This approach allows the Court to transfer cases where the equitable relief sought is more than merely ancillary.

The test speaks to the most difficult cases, those raising both equitable and legal issues on appeal, and allows the Court to shed itself even of cases raising significant equitable issues. The test appears to require some sort of comparison of issues. But it is not clear how the Court will measure "primacy" for this purpose. As a substantive matter, it is not clear whether the Court will try to measure its jurisdiction by the centrality of differing issues to the appeal taken in isolation, or by their importance to the case at large -- or use some other measure entirely. As a procedural matter, it is unclear whether the Court will accept the apparent priority of issues laid out in the parties' briefs, or if it will make an independent assessment of "primacy."

To confuse this still more, only a few days before *Warren* the Court again adopted an expansive test, this one even more restrictive than the test

in *Warren*. *Lee v. Green Land Co.*, 272 Ga. 107, 527 S.E.2d 204 (2000), was a suit seeking specific performance of contract – again a classic equitable remedy. The suit offered no "legal" issues in the sense of applying and interpreting a constitutional provision, statute, regulation or common law rule. The underlying issue was how to construe a key document. By a narrow 4-3 vote, the Court held that this mixed issue of law and fact was a "legal question ..., and the availability of equitable relief flows directly therefrom." 272 Ga. at 107-08, 527 S.E.2d at 205.

The Court articulated a much more stringent test for its own jurisdiction than that in *Beauchamp* or even that in *Warren*: it lacks "jurisdiction over cases seeking the specific performance of contract terms where the issues raised on appeal *include* the question of whether a valid contract was accepted or rejected." 272 Ga. at 108, 527 S.E.2d at 205 (emphasis supplied). This test suggests that any interpretation issue, no matter how central, and regardless of what equitable issues may be presented by the case, are enough to defeat Supreme Court jurisdiction. Literal application of this test apparently would avoid the *Warren* search for "primary" issues and relegate to the Court of Appeals all cases involving any "legal issue."

Where does this leave us? Most obviously, it leaves the equity jurisdiction substantially narrowed. The Court is transferring many equity cases to the Court of Appeals.

Where is all this headed? For the moment, it is impossible to predict. The Court has not resolved the apparent conflict between *Warren* and *Lee*. Appellate practitioners are left to divine as best they can whether their equity case will be accepted by the Supreme Court.

Eleventh Circuit Lawyers' Advisory Committee Invites Input From Practitioners

By Amy Levin Weil, Chief, Appellate Div., U.S. Attorney's Office, N.D. Ga.

The Eleventh Circuit Lawyers' Advisory Committee will sponsor a fall "brown bag" lunch to provide an opportunity for practitioners to meet and discuss informally with the clerk of court, and clerks responsible for calendaring and publications, how cases are handled from the notice of appeal through the issuance of the mandate. If you are interested in helping with this event, please contact Amy Weil, at (404) 581-6077 or at amy.weil@usdoj.gov., or Jill Pryor, at (404) 881-4100 or at pryor@bmelaw.com.

Justices Kennedy and Thomas Share Views with Conferees

By Laurie Webb Daniel and Andy Head, Holland & Knight, Atlanta

The Eleventh Circuit Judicial Conference took place in Savannah from May 10-12, 2001. Because the meeting was held in his home town, Justice Clarence Thomas joined our Circuit Justice, Anthony M. Kennedy, to share some inside views on appellate advocacy in the highest court of the land.

The discussion followed the Q & A format. Several microphones were posted throughout the audience so that the opportunity to raise an issue was available to everyone. The justices skirted questions regarding the lack of diversity in the ranks of the Supreme Court law clerks and the unavoidable questions regarding the presidential election and were clearly more comfortable commenting on traditional aspects of oral argument.

Agreeing that they often face inartful arguments, the justices stressed the value of conducting moot courts in preparation for an appearance before the Court. The justices, however, did not agree on every aspect of the process. For example, in contrast to Justice Kennedy who is an active questioner during oral argument, Justice Thomas expressed strong opposition to the level of questions levied at counsel currently appearing before the Court.

During the state break-out sessions on the last day of the conference, Justice Kennedy attended the meeting of the Georgia judges and lawyers. After noting the need to confer on matters that are common to the state and federal bench and bar, he candidly shared his view that lawyers must defend the judiciary – with respect to the need for increased compensation as well as with respect to incidents of unjustified criticism.

Eleventh Circuit Case Notes

By Edward Wasmuth, Smith, Gambrell & Russell LLP, Atlanta

Standards For Allowing Discretionary Appeals of Class Action Certifications

Effective on December 1, 1998, Federal Rule of Civil Procedure 23 was amended to permit federal courts of appeal to hear interlocutory appeals from orders granting or denying class certification. Such appeals are discretionary. In *Prado-Steiman v. Bush*, 221 F.3d 1266 (11th Cir. 2000), the Eleventh Circuit established standards for deciding when to allow such discretionary appeals. That opinion creates a road map for

attorneys to follow, not only in drafting their petition for leave to appeal, but also in creating a record in the district court on class certification issues.

The *Bush* opinion identified several "guideposts" for determining whether to grant an interlocutory appeal. First, is the district court's ruling on class certification likely dispositive of the litigation by creating a "death knell" for either plaintiff or defendant? Such a situation could occur if an individual claimant's potential recovery is so small that the claim would not be pursued without class certification or if class certification so substantially increased the cost and stakes of the litigation that a defendant would feel an "irresistible pressure to settle." Factors relevant to this issue would include evidence regarding the size of the putative class, the financial resources of the parties, and the existence and potential impact of the case on related litigation.

Next, has the petitioner shown a substantial weakness in the class certification decision, "such that the decision likely constitutes an abuse of discretion"? Interlocutory review is more likely if the alleged error is an error of law as opposed to an improper application of the law to the facts. The court specifically noted that merely demonstrating that the district court's ruling is questionable generally would be insufficient to support interlocutory review in the absence of other factors supporting review.

Third, will the appeal permit the resolution of an unsettled legal issue that is "important to the particular litigation as well as important in itself"?

Next, the court will consider the nature and status of the litigation before the district court. This consideration should include the status of discovery, the pendency of relevant motions, and the length of time the case has been pending.

The court also will consider the likelihood that future events may make immediate appellate review more or less appropriate. Those could include pending settlement negotiations or an imminent change in the financial status of a party (such as a bankruptcy filing).

The Eleventh Circuit noted that none of these factors was conclusive and that each should be balanced against the others in deciding whether or not to grant a discretionary appeal. The Eleventh Circuit went out of its way to note the burgeoning number of class action cases in the Circuit and stated that it would use "restraint" in accepting interlocutory appeal petitions of class certification motions.

Appeals When Some Claims Have Been Voluntarily Dismissed

A partial adjudication on the merits, followed by a voluntary dismissal without prejudice of remaining claims, is not an appealable judgment. In *CSX Transportation,*

Inc. v. City of Garden City, 235 F.3d 1325 (11th Cir. 2000), the Eleventh Circuit refined that line of precedent to hold that a plaintiff could appeal a non-final judgment in favor of the defendant when that defendant subsequently voluntarily dismissed a third-party complaint.

On its own motion, the Eleventh Circuit considered the question of its jurisdiction. The Court noted the line of cases holding that a partial adjudication on the merits, followed by a voluntary dismissal of remaining claims, was not an appealable final judgment. The Court held that the theme of that line of cases was that a party could not manufacture appellate jurisdiction.

The Court concluded that in the case at hand, the plaintiff/appellant had not participated in an act to manufacture jurisdiction. The defendant and the third-party defendant had stipulated to the dismissal of the third-party complaint. The plaintiff was not a party to the dismissal. Therefore, the case at hand was unlike cases in which the appellant had agreed to the voluntary dismissal of remaining unresolved claims or counterclaims.

In reaching this result, the Court adopted a bright line rule. If the party filing the appeal has not participated in the disposition of remaining claims, the party has a direct appeal. On the other hand, a party cannot agree to a disposition of claims in order to turn a partial adjudication into a final, appealable order. The only recourse for such a party is to seek a Rule 54(b) certification.

The Section's Annual Meeting to be Held on June 29

Mark your calendars! The annual meeting of the Section will be held at noon on June 29, 2001, at the offices of Holland & Knight LLP, 20th Floor, 1201 West Peachtree St., Atlanta, Georgia, for the purpose of electing the officers for the upcoming year and for a general discussion of the ongoing work of the section. Lunch will be provided for those who RSVP. If you plan on attending, please contact Laurie Webb Daniel at 404-817-8533 or at ldaniel@hklaw.com.

Sign Up Now For Committee Positions

The Appellate Practice Section welcomes the active participation of its members. If you wish to be involved in the work of the section, please contact the Vice-Chair, Chris McFadden, at cjmcf@mindspring.com.