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Tenth Circuit Joins Growing List of Federal Courts of Appeals Limiting Appellate Jurisdiction Over Denial of Successive Motions to Dissolve or Modify Preliminary Injunctions

As a general rule in federal courts, only final judgments are appealable as a matter of right. Except in limited circumstances, to appeal a trial court's orders issued before the case is over (i.e., interlocutory orders), parties usually must seek permission to do so. One of those rare exceptions is for appeals of district court orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." But what happens if the court has already entered a preliminary injunction, the court has already denied a request to modify or dissolve that injunction, and that party later asks the district court again to modify or dissolve it while raising the same issues or issues that could have been raised in a prior motion?

Until recently, the U.S. Court of Appeals for the Tenth Circuit had not directly answered that question. And, as the Tenth Circuit recently held in *SEC v. Young*, it turns out the answer depends.

In *Young*, the Securities and Exchange Commission (SEC) filed an enforcement action against the defendants over an allegedly fraudulent investment scheme. The defendants stipulated with the SEC to a preliminary injunction that froze their assets. After the district court entered that stipulated preliminary injunction, the defendants asked the district court to release some of their assets. The district court denied that request. Several months later, the defendants made another request that some of their assets be released. Once more, the district court denied the request. So, the defendants appealed and the Tenth Circuit affirmed the district court.

Years later, the defendants made a third request to the district court for some of their assets to be unfrozen. The defendants made "the same arguments they attempted to present in their previous appeal." Perhaps unsurprisingly the district court denied that request for a third time. And yet again the defendants appealed to the Tenth Circuit.

The defendants asserted the Tenth Circuit possessed appellate jurisdiction over this interlocutory order under 28 U.S.C. § 1292(a)(1). Section 1292(a)(1) gives the circuit courts jurisdiction over interlocutory "orders of the district courts . . . 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."

Although the neither the text of section 1292(a)(1) nor prior Tenth Circuit precedent directly address appellate jurisdiction over a "successive motion to grant, continue, modify, or dissolve an injunction", the Tenth Circuit began its analysis by reiterating that it "narrowly construes" section 1292(a)(1). The Tenth Circuit explain it does so because section 1292(a)(1) "was intended to carve out only a limited exception to the final-judgment rule of section 28 U.S.C. § 1291 and the 'long-established policy against piecemeal appeals.'" The Tenth Circuit then used this timeworn rule of construction as its guidepost to decide the issue before it.

And because the Tenth Circuit had not squarely decided the issue, it looked to additional guidance from its sister circuits. Mostly notably, the Eleventh Circuit has imposed a "rule against appealing from a successive" section 1292(a)(1) motion, except when "there are changed circumstances, new evidence or a change in the law." But when that successive motion is "merely a re-packaging in new garb of the corpse of an old motion in an attempt to resurrect it", the Eleventh Circuit does not allow an interlocutory appeal as of right under section 1292(a)(1). To meet the Eleventh Circuit's test, the appealing party must show a "close nexus between the change in circumstances, evidence, or law and the issues raised on appeal." And even then, the appeal will be allowed "only to the extent necessary to consider whether the changed circumstances, evidence, or law requires modification of the order [that] is presumed to have been correct when issued."

The Tenth Circuit further emphasized that other circuits employ rules similar to the Eleventh's. For instance, the Second Circuit has a "limited exception to the rule of

nonappealability" of orders denying successive injunction motions if there is a "change in facts, circumstances, or law since the prior injunction motions." The Ninth Circuit likewise takes appellate jurisdiction only "to permit review of orders in response to claims of changed circumstances," and "will ordinarily review only the new matter raised."

In view of the Tenth Circuit's rule of narrow construction of section 1292(a)(1) and the strength of the precedents in its sister circuits, it likely comes as little surprise that the Tenth Circuit adopted the Eleventh's rule. So now litigants in district courts within the Tenth Circuit seeking to appeal a successive motion related to a preliminary injunction can now do so "only if there was a change in circumstances, evidence, or law since the prior motion" and when the appealing party can "show a 'close nexus between the change in circumstances, evidence, or law and the issues raised on appeal.'"

Turning then to the order appealed in *Young*, the Tenth Circuit briskly found it lacked appellate jurisdiction under section 1292(a)(1). The Tenth Circuit concluded that the defendants in *Young* simply "attempted to raise issues" on which the Tenth Circuit had already passed in their prior appeal. Thus, the defendants "could have presented these issues" previously but did not, making their motion "successive."

The Tenth Circuit also found that the defendant did not show "a change in circumstances, evidence, or law." First, the defendants asserted that in their third motion, they sought to have a greater amount of their assets unfrozen. But the Tenth Circuit easily brushed this assertion aside finding that the amount sought was immaterial because the factual and legal basis for their request had remained the same across all three denied motions.

Second, the defendants in *Young* argued that the court below had applied the wrong legal standard in denying their third motion. The Tenth Circuit, however, found that the defendants had raised that argument in their prior appeal. So, the defendants had shown no change between their prior motions and the one at issue.

Third, the *Young* defendants argued a Fifth Amendment right to counsel, which the freezing of their assets violated as that freeze made them unable to pay counsel. But the Tenth Circuit also turned away this argument, again finding that the defendants had raised it in their prior appeal and motions.

Fourth, the defendants in *Young* tried to argue that new case law constituted a change in law. The Court, however, was again unpersuaded. The purportedly new case law on point that the defendants in *Young* asserted was not, in fact, new. Rather, the "new" case they cited had been decided months before their second motion seeking to have some of their assets unfrozen. So there had been no change in the law because the defendants could have relied on that case in their second motion (and first appeal).

Fifth and finally, the Tenth Circuit also rejected the defendants' argument that the district court's alternate basis for denying their third motion – the law-of-the-case doctrine – constituted a new basis for appeal.

After *Young*, litigants in the Tenth Circuit will now need to make a strong showing to keep their appeal of a successive motion related to a preliminary injunction going. Unless the law or facts have changed in a way that makes continued enforcement of the injunction, or lack thereof, truly inequitable, the Tenth Circuit will likely tell the parties to come back after the case is over.

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