Mootness Issue Is a Complex First Step in Hearing Appeals

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Once a case reaches the appellate stage, practitioners easily focus on the appeal’s merits, particularly after going 12 hard-fought rounds in the trial court. But the merits are only one facet of what appellate courts consider. There is always — always — the overarching question of justiciability: whether the appellate court can or should decide the appeal in the first place. In answering that question, the mootness doctrine plays an important role.

The mootness doctrine raises three basic questions about an appellate court’s power to adjudicate a dispute that has ceased to exist: When is the dispute no longer justiciable? Are there reasons to decide the case despite its mootness? What are a party’s remedies? A recent 9th U.S. Circuit Court of Appeals decision, Chemical Prods. and Distribs. Ass’n v. Helliker, 2006 DJDAR 11809 (9th Cir. Aug. 31), provides insights into how a Court of Appeal will examine each of these issues.

As a practical matter, mootness issues arise either from the appellate court sua sponte or through a party’s motion to dismiss the appeal. Either way, California appellate courts and the 9th Circuit take a similar approach.

First, the court determines whether the case is moot. This rests on the court’s duty “to decide actual controversies ... and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.” Paul v. Milk Depots Inc., (1967) 62 Cal.2d 129 (1967); Ruiz v. City of Santa Maria, 160 F.3d 543 (9th Cir. 1998). Thus, if a case’s circumstances change so that an appellate court no longer can grant any effectual relief, the court should refrain from deciding it.

As a second step, the court typically evaluates whether it should consider the moot appeal under a few, narrow exceptions. California courts may consider a moot appeal if (1) the case poses a broad public-interest issue that likely will recur, (2) the same controversy between the parties likely will recur or (3) the court faces material questions for determination. Cucamongans United for Reasonable Expansion v. City of Rancho Cucamonga, 82 Cal.App.4th 473 (2000). Though phrased differently, similar principles guide the 9th Circuit, which may consider a moot appeal where (1) the district court order is “capable of repetition, yet evading review,” (2) a party voluntarily ceases the challenged conduct but remains free to resume it at any time or (3) a party who is no longer aggrieved by conduct would suffer “collateral legal consequences” if the conduct were allowed to stand. Pub. Util. Comm’n v. Fed. Energy Regulatory Comm’n, 100 F.3d 1451 (9th Cir. 1996).

If no exceptions apply, an appellate court considers how to dispose of the matter. At first, the answer may seem obvious: Dismiss the appeal. But California courts recognize that an involuntary dismissal of an appeal leaves the judgment intact and, thus, may operate as an implied affirmance. In re Jasmson O., 8 Cal.4th 398 (1994). That may lead to situations in which dismissal of the appeal would not be an adequate remedy. In those situations, California appellate courts generally have the discretion to reverse the judgment and remand with directions to dismiss. County of Fresno v. Shelton, Cal.App.4th 1005 (1998).

The 9th Circuit takes a more specific, causation-based approach to determine what to do with the judgment in a moot appeal. Where neither party caused mootness — that is, it occurs through happenstance — the appellate court generally orders vacatur. Doe v. Madison Sch. Dist. No. 321, 177 F.3d 789 (9th Cir. 1999). Where the party seeking vacatur voluntarily caused mootness, the appellate court remands so the district court can weigh the equities and determine whether it should vacate the judgment. Ringsby Truck Lines Inc. v. Western Conference of Teamsters, 686 F.2d 720 (9th Cir. 1982). And where the appellate court cannot tell who caused the mootness, it also remands so the district court can make that determination. Dilley v. Gunn, 64 F.3d 1365 (9th Cir. 1995).

Chemical Prods. shows how these rules play out in the common situation where a statute is amended or repealed while a lawsuit challenging the statute wends its way through the courts. An association of generic pesticide manufacturers and sellers filed suit in federal court for declaratory and injunctive relief, claiming that the Federal Insecticide, Fungicide, and Rodenticide Act pre-empted portions of California’s parallel pesticide statutory scheme. Under the act, a party registering a pesticide with the Environmental Protection Agency must provide data on the pesticide’s health and environmental effects. Because such data is expensive, registrants may rely on data previously submitted for pesticides with the same active ingredients. However, original pesticide registrants are entitled to exclusive control over their data for 10 years, during which they may either charge a fee for the data’s reuse or deny reuse outright.

Unlike the act’s 10-year exclusive control period, California entitled original registrants to perpetual, exclusive use of their data. Thus, in California,
a secondary registrant could never reuse data without the original registrant’s permission, which the original registrant was under no obligation to provide at any time.

The discrepancy between the two statutory regimes lay at the center of the association’s claim. After the lawsuit was filed, a group of original pesticide manufacturers intervened to uphold California’s scheme. The district court granted summary judgment in the intervenors’ favor, finding the state statutes and regulations were not pre-empted. The association appealed.

During the appeal, the California Legislature amended its pesticide laws to eliminate the original registrant’s period of exclusive data use and replace it with a period of mandatory data licensing at arbitrated prices. In light of these amendments, the association contended its appeal was moot and sought vacatur of the judgment. The 9th Circuit agreed.

The court first stated the mootness inquiry in cases of statutory amendment or repeal: “whether the new [law] is sufficiently similar to the repealed [law] that it is permissible to say that the [government’s] challenged conduct continues.” Applying that principle, the court noted that “the ‘crux,’ the ‘gravamen,’ and indeed the only grievance, of the complaint” was that original registrants retained perpetual, exclusive control over their data and that secondary registrants could never reuse it without written permission. But because California’s new law abolished the exclusive, perpetual right to use data, the scheme now embodied “everything the Association hoped to achieve by this action.” The case was therefore held moot.

The 9th Circuit next addressed whether, as the intervenors urged, the voluntary cessation exception allowed it to decide the moot appeal. A defendant’s voluntary cessation of challenged conduct does not automatically prevent a court from hearing the challenge, because the defendant would be “free to return to his old ways.” Recognizing the 9th Circuit’s prior reasoning on this point led to some confusion, the court clarified that, in cases of statutory amendment/repeal, the exception applied where “it is virtually certain that the repealed law will be reenacted.” Because nothing in the record led the court to believe re-enactment was in store or that the association would push for it, the exception was inapplicable.

Finally, the court turned to vacatur. Here, the intervenors argued that the association voluntarily mooted this case through its lobbying efforts to get the amendment passed. But the court was unmoved: “Lobbying Congress or a state legislature cannot be viewed as ‘causing’ subsequent legislation for the purposes of the vacatur inquiry.” Indeed, the court said, to attribute the Legislature’s actions to third parties rather than to the Legislature not only carried “dubious legitimacy” but also ignored separation-of-powers principles, which urge courts to think twice before impugning the motivation behind legislative action.

The court did note that its holding was limited to cases of legislative enactments and suggested that a less-stringent rule may apply for lesser or mixed legislative/executive public bodies. Nevertheless, the court vacated the judgment and remanded with instructions to dismiss as moot. Chemical Prods. thus emphasizes the discretionary nature of the mootness inquiry and shows that courts — and counsel — must engage in a far more fact-intensive analysis than they initially might think. In other words, answering the case-or-controversy question is not the end game; rather, it’s just the beginning.

What lessons does Chemical Prods. offer practitioners facing a potentially moot appeal in federal court?

For those looking to dismiss the appeal for mootness:

• In determining whether an amended/repealed statute moots a claim, courts do not get bogged down in minute differences between the original and amended statutes but look to the crux of the complaint to see whether the amended statute presents a live case or controversy.
• The lack of a case or controversy does not end the story. Appellate courts may take the appeal if there is (1) a recurring legal issue, (2) recurring conduct that needs to be stopped or (3) a collateral legal consequence or material question that must be addressed. Counsel should face these exceptions head-on and show the appellate court that none applies.

• Dismissing the appeal alone may not provide a satisfactory remedy, because the unfavorable judgment remains intact. Counsel should be prepared to argue for reversing the judgment (in state court) or vacatur (in federal court), followed by dismissal of the claim.

Conversely, for those opposing dismissal:

• Counsel should argue against dismissal along three general lines of defense: the appeal is not moot, the court should take the appeal under an exception, and even if the first two arguments fail, the judgment should not be reversed or vacated.
• Counsel should not overlook the vacatur portion of the analysis. A favorable judgment may be salvaged even when the appeal itself is moot. For example, in federal court, a judgment in a moot case may stand if the party opposing dismissal can show that the moving party’s conduct caused the case to become moot.

• In the statutory amendment/repeal context, courts are skeptical of the notion that a party’s legislative lobbying efforts can cause mootness. As a matter of separation-of-powers principles, appellate courts are particularly hesitant to divine what motivates legislatures to enact, amend or repeal laws.

Regardless of the vantage point, counsel should keep these principles in mind at the outset of evaluating the justiciability of an appeal and be particularly sensitive to mootness in cases of statutory amendment or repeal.

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