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Appellate Practice and Procedure

by **Robert G. Boliek, Jr.***

One lasting impression of the United States Court of Appeals for the Eleventh Circuit's decisions during 2008 in the area of appellate practice and procedure will likely be the number of cases of first impression for the circuit, especially in regard to appellate jurisdiction. Accordingly, this Article will first discuss cases that addressed the Eleventh Circuit's appellate jurisdiction, followed by the cautionary tale of a case that illuminates the importance of knowing exactly when a judgment is deemed to be entered for purposes of pursuing an appeal. The Article will conclude with a brief discussion of the standard of review that the Eleventh Circuit now applies to federal sentences in the wake of the United States Supreme Court's decision in *Gall v. United States*.¹

I. APPELLATE JURISDICTION

As the Eleventh Circuit recently noted, “[F]or this Court to exercise jurisdiction over an appeal, our jurisdiction must be both (1) authorized by statute and (2) within constitutional limits.”² In 2008 the Eleventh Circuit had occasion to address both the statutory and constitutional aspects of appellate jurisdiction.

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1. 128 S. Ct. 586 (2007).

2. *OFS Fitel, LLC v. Epstein, Becker & Green, P.C.*, 549 F.3d 1344, 1355 (11th Cir. 2008). A corollary of the rule that appellate jurisdiction must be “authorized by statute” is that what Congress gives, it may also limit. See *Lenis v. U.S. Att’y Gen.*, 525 F.3d 1291, 1292, 1294 (11th Cir. 2008) (holding, in a case of first impression for the circuit, that the “decision [of the Board of Immigration Appeals] whether to reopen proceedings on its own motion . . . is committed to agency discretion by law” under the Administrative Procedures Act, 5 U.S.C. §§ 551-552, 701-706 (2006), at least when no underlying constitutional issue is presented).

A. *Appeals from a Final Decision*

1. The Collateral Order Doctrine. The logic of appellate jurisdiction requires beginning with the “final,” because the exercise of jurisdiction by a federal appellate court generally requires a “final decision” of the district court.³ “A final decision is one that ‘ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment.’”⁴ However, “[t]he collateral order doctrine—a ‘practical construction’ of the final decision rule—permits appeals from ‘a small category of decisions that, although they do not end the litigation, must nonetheless be considered “final.””⁵ As the Eleventh Circuit explained in *Carpenter v. Mohawk Industries, Inc.*,⁶ the doctrine had its origin with the United States Supreme Court in *Cohen v. Beneficial Industrial Loan Corp.*⁷ “Under *Cohen*, an order is appealable if it (1) conclusively determines the disputed question; (2) resolves an important issue completely separate from the merits of the action; and (3) is effectively unreviewable on appeal from a final judgment.”⁸

Carpenter, a case of first impression for the circuit, presented the appeal of an order requiring the production of documents claimed to be protected by the attorney-client privilege.⁹ After noting the uncontroversial proposition that “discovery orders are normally not immediately appealable,”¹⁰ the Eleventh Circuit acknowledged that “[t]his circuit has not, however, directly addressed the question of whether a discovery order compelling the disclosure of information claimed to be protected by the attorney-client privilege can be appealed before final judgment under

3. See 28 U.S.C. § 1291 (2006); see, e.g., 19 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 202.05 (3d ed. 2008); *OFS Fitel*, 549 F.3d at 1368 (Tjoflat, J., dissenting) (“As a general rule, Congress has statutorily conferred broad jurisdiction to the courts of appeals to hear *final* decisions from district courts.”).

4. *Carpenter v. Mohawk Indus., Inc.*, 541 F.3d 1048, 1052 (11th Cir. 2008) (quoting *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1338 (11th Cir. 2007)).

5. *McMahon*, 502 F.3d at 1338 (quoting *Swint v. Chambers County Comm'n*, 514 U.S. 35, 42 (1995)).

6. 541 F.3d 1048 (11th Cir. 2008), *cert. granted*, *Mohawk Indus., Inc. v. Carpenter*, 129 S. Ct. 1041 (Jan. 26, 2009) (No. 08-678).

7. *Id.* at 1052; 337 U.S. 541 (1949).

8. *Carpenter*, 541 F.3d at 1052.

9. See *id.* at 1050, 1053.

10. *Id.* at 1052.

*Cohen*¹¹ as well as the existence of a split in the circuits on the matter.¹²

The Eleventh Circuit “conclude[d] that the challenged discovery order [was] not an appealable collateral order under *Cohen*,”¹³ holding that it did “not find that a discovery order . . . implicat[ing] the attorney-client privilege [was] effectively unreviewable on appeal from a final judgment.”¹⁴ In so holding, the Eleventh Circuit relied on its previous precedent denying application of the doctrine to an appeal involving an order requiring disclosure of materials implicating the accountant-client privilege¹⁵ and the fact that “[the] Court ha[d] never exercised [its] jurisdiction under the collateral order doctrine to review any discovery order involving any privilege.”¹⁶ Instead, the Eleventh Circuit held that a petition for a writ of mandamus was the appropriate remedy for the prejudgment review of discovery orders, including those implicating privileges.¹⁷

The Supreme Court has, however, granted a writ a certiorari in *Carpenter*;¹⁸ accordingly, the Eleventh Circuit apparently will not have the last word on this issue, and it will be interesting to see if the Supreme Court agrees with the Eleventh Circuit when it resolves the split in the circuits on this question.

In *United States v. Snipes*,¹⁹ which was also a case of first impression for the circuit,²⁰ the Eleventh Circuit held that an order denying a change of venue in a criminal case was not an appealable collateral order either.²¹ As with the order at issue in *Carpenter*, the Eleventh

11. *Id.* at 1053.

12. *Id.* “A number of circuits have addressed the issue, and there are decisions on both sides.” *Id.*

13. *Id.*

14. *Id.* at 1052.

15. *See id.* at 1053.

16. *Id.*

17. *Id.* at 1053-54. As an alternate remedy for either the very brave or the very desperate, the Eleventh Circuit noted that another avenue of relief might include appealing an order of contempt in the face of a refusal to produce allegedly privileged material, so long as the order of contempt appealed from was a “final judgment” involving a noncontingent sanction. *Id.* at 1054-55. The Eleventh Circuit also went on to hold that the high standards for issuing the extraordinary writ of mandamus had not been met in *Carpenter*. *Id.* at 1055.

18. *See Mohawk Indus., Inc. v. Carpenter*, 129 S. Ct. 1041 (Jan. 26, 2009) (No. 08-678).

19. 512 F.3d 1301 (11th Cir. 2008).

20. *See id.* at 1301 (noting the government “acknowledges that there is no controlling precedent from this Circuit finding that an immediate appeal will not lie from an order pertaining to venue in a criminal case”).

21. *Id.* at 1302.

Circuit concluded that “an order pertaining to venue is effectively reviewable after entry of judgment.”²² Although the Eleventh Circuit did not explicitly hold, as it had in *Carpenter*, that mandamus was the appropriate remedy for review of the order in question prior to judgment, such a reading is consistent with the mandate in *Snipes*.²³

2. Finality in Bankruptcy Appeals. Bankruptcy presents another area in which the jurisdictional requirement of finality is given a “practical construction.” In particular, “[f]inality is given a more flexible interpretation . . . because bankruptcy is an aggregation of controversies and suits.”²⁴ Thus, the Eleventh Circuit recognizes that “[i]t is generally the particular adversary proceeding or controversy that must have been finally resolved rather than the entire bankruptcy litigation.”²⁵

Applying these principles in *In re Donovan*,²⁶ a case of first impression for the circuit,²⁷ the Eleventh Circuit held that an order denying a motion to dismiss a Chapter 7 bankruptcy case as abusive was not a final decision for purposes of appellate jurisdiction.²⁸ As the Eleventh Circuit explained, “the same concepts of finality apply in bankruptcy as in any other case, but they are applied to the discrete controversies within the administration of the estate; ‘the separate dispute being assessed must have been finally resolved and leave nothing more for the bankruptcy court to do.’”²⁹ Thus, denial of the motion to dismiss was not a final order because the bankruptcy court “did not conclusively resolve the bankruptcy case as a whole, nor did the court resolve any adversary proceeding or claim.”³⁰

However, in *In re Walker*,³¹ the Eleventh Circuit also recognized that bankruptcy cases sometimes require an even broader notion of the concept of finality than that applied in *Donovan*.³² In *Walker* the

22. *Id.*

23. *See id.* (denying “[a]ppellant’s invitation to retain jurisdiction and to stay the pending trial below in order to allow [a]ppellant to file a petition for writ of mandamus” in addition to dismissing the appeal for lack of jurisdiction and denying as moot the appellant’s motion for a stay pending the appeal).

24. *In re Donovan*, 532 F.3d 1134, 1136 (11th Cir. 2008).

25. *Id.* (alteration in original) (quoting *Commodore Holdings, Inc. v. Exxon Mobil Corp.*, 331 F.3d 1257, 1259 (11th Cir. 2003)).

26. 532 F.3d 1134 (11th Cir. 2008).

27. *Id.* at 1136.

28. *Id.* at 1137.

29. *Id.* (quoting *In re Charter Co.*, 778 F.2d 617, 621 (11th Cir. 1985)).

30. *Id.*

31. 515 F.3d 1204 (11th Cir. 2008).

32. *See id.* at 1210-11.

Eleventh Circuit addressed the question of whether an order removing a bankruptcy trustee was a “final” order for purposes of the exercise of appellate jurisdiction, also an issue of first impression for the circuit.³³ After noting that a split in the circuits existed as to the issue, the Eleventh Circuit found the Third Circuit’s approach to the issue to be persuasive, in particular its recognition that “the purpose of the finality requirement is judicial economy but that judicial efficiency would be ‘turned on its head’ if the court were to delay reviewing the trustee appointment until after the entire bankruptcy proceeding concluded.”³⁴ Specifically, “[i]t would ‘strain[] credulity to suggest that a reviewing court would jettison years of bankruptcy infighting, compromise[,] and final determinations solely for the purpose of reversing’ on the issue of the identity of the trustee.”³⁵ Thus, in at least some bankruptcy cases, “the finality requirement is met where practical considerations require it,”³⁶ even in the apparent absence of the final resolution of a particular claim.

B. Interlocutory Appeals

While “[i]n general, the final judgment rule permits an appeal to the circuit court only from a final judgment”—including judgments or decisions considered “final” like decisions appealable under the collateral order doctrine—appeals of interlocutory decisions “are permissible . . . in certain limited situations.”³⁷ A familiar example would be an appeal from orders relating to injunctive relief authorized by 28 U.S.C. § 1292(a)(1).³⁸

In *Sierra Club v. Van Antwerp*,³⁹ the Eleventh Circuit explained that “substance should control over form” in assessing whether an “injunction” is at issue for the purposes of section 1292(a)(1).⁴⁰ Thus, when the district court’s “commands [are] of such specificity and breadth that no litigant would dare violate them” and “the district court could have

33. *Id.* at 1210.

34. *Id.* (quoting *In re Marvel Entm’t Group, Inc.*, 140 F.3d 463, 470 (3d Cir. 1998)).

35. *Id.* at 1211 (second and third alterations in original) (quoting *In re Marvel Entm’t Group, Inc.*, 140 F.3d at 470).

36. *In re Donovan*, 532 F.3d at 1136 n.1. Interestingly, while the Third Circuit’s view of finality won over the Eleventh Circuit in *Walker* with respect to whether removal of a trustee was a final decision, *Donovan* rejected the Third Circuit’s view that a refusal to dismiss a Chapter 7 proceeding for abuse was a final decision. Compare *In re Walker*, 515 F.3d at 1210-11, with *In re Donovan*, 532 F.3d at 1137.

37. MOORE, ET AL., *supra* note 3, at ¶ 202.05.

38. 28 U.S.C. § 1292(a)(1) (2006).

39. 526 F.3d 1353 (11th Cir. 2008).

40. *Id.* at 1358.

initiated contempt proceedings” in the face of any such violation, the Eleventh Circuit may find that injunctive relief was in effect granted even in the face of a district court’s express declaration to the contrary.⁴¹ As the Eleventh Circuit more colorfully put it, in such cases “we adhere to the time-tested adage: if it walks like a duck, quacks like a duck, and looks like a duck, then it’s a duck.”⁴²

In the context of disputes covered by arbitration agreements, section 16 of the Federal Arbitration Act (FAA)⁴³ “governs the appealability of interlocutory orders regarding arbitration.”⁴⁴ In *Advanced Bodycare Solutions, LLC v. Thione International, Inc.*,⁴⁵ a case of apparent first impression,⁴⁶ the Eleventh Circuit held that “because the mediation process does not purport to adjudicate or resolve a case in any way, it is not ‘arbitration’ within the meaning of the FAA.”⁴⁷ As such, “FAA remedies, including mandatory stays and motions to compel, are not appropriately invoked to compel mediation.”⁴⁸ Accordingly, in the Eleventh Circuit, appellate jurisdiction over interlocutory orders involving agreements to mediate will presumably have to be premised on grounds other than those conferred by section 16 of the FAA in the future.⁴⁹

C. Constitutional Limitations on Appellate Jurisdiction

1. Adversity. The fact that a statute confers appellate jurisdiction over the appeal of a particular decision—whether that decision is final

41. *Id.* at 1358-59.

42. *Id.* at 1359 (quoting *BMC Indus., Inc. v. Barth Indus., Inc.*, 160 F.3d 1322, 1337 (11th Cir. 1998)).

43. 9 U.S.C. § 16 (2006).

44. *Adams v. Monumental Gen. Cas. Co.*, 541 F.3d 1276, 1276-77 (11th Cir. 2008). *Adams* involved a transaction embracing two arbitration agreements. *See id.* at 1276. Interlocutory review was denied because the Eleventh Circuit held that the provision of the FAA allowing interlocutory review of the denial of a petition to arbitrate was not implicated “[w]hen a district court compels arbitration of a dispute under one contract and is silent about whether another contract provides for arbitration of the same dispute.” *Id.* at 1277.

45. 524 F.3d 1235 (11th Cir. 2008).

46. *See id.* at 1238 (“Although we could not locate any law on this point, we conclude that if either mediation or non-binding arbitration is not FAA ‘arbitration,’ this agreement is not enforceable under the FAA.”).

47. *Id.* at 1240.

48. *Id.*

49. This is because, in light of the result in *Advanced Bodycare*, it is unlikely that raising this issue in the future will present “[a] *non-frivolous* claim that the parties had an agreement to *arbitrate*,” *id.* at 1238, the reason that the Eleventh Circuit concluded that it had jurisdiction to decide the issue in *Advanced Bodycare* itself. *See id.*

or interlocutory—does not end the jurisdictional inquiry. This is because, as noted above, the appellate court’s jurisdiction must also be “within constitutional limits,”⁵⁰ including the question of whether the appealing party is sufficiently “adverse” with respect to the decision to be reviewed so that the appeal constitutes an actual “case or controversy” under Article III of the Constitution.⁵¹ In *OFS Fitel, LLC v. Epstein, Becker & Green, P.C.*,⁵² the Eleventh Circuit considered this issue in the context of a case in which the parties taking the appeal had encouraged the entry of a final judgment by conceding that an interlocutory order had the effect of disposing of the case on the merits.⁵³

Specifically, *OFS Fitel* arose from a discovery dispute in an attorney malpractice case that included the question of whether the plaintiffs had complied in a timely manner with the expert disclosure requirements of Federal Rule of Civil Procedure 26.⁵⁴ At a hearing on the matter, the United States District Court for the Northern District of Georgia concluded that the plaintiffs had violated the disclosure requirements and ordered the preclusion of the expert’s testimony at trial.⁵⁵ Under the Georgia law of attorney malpractice, this was a case-dispositive decision because expert testimony is required to establish liability,⁵⁶ a point counsel for the plaintiffs conceded.⁵⁷ The district court accordingly dismissed the action based on the stipulation that the discovery sanction was dispositive of the case.⁵⁸

After holding that the dismissal constituted a “final” judgment,⁵⁹ a panel majority of the Eleventh Circuit also concluded that the plaintiffs were sufficiently “adverse” to the dismissal for the court to constitutionally exercise its appellate jurisdiction.⁶⁰ In reaching this holding, the Eleventh Circuit carefully distinguished the cases of *Druhan v. American*

50. *OFS Fitel*, 549 F.3d at 1355.

51. U.S. CONST. art. III; see *OFS Fitel*, 549 F.3d at 1356.

52. 549 F.3d 1344 (11th Cir. 2008).

53. See *id.* at 1351-52.

54. See *id.* at 1347, 1350-52; FED. R. CIV. P. 26.

55. *OFS Fitel*, 549 F.3d at 1351.

56. *Id.* at 1357.

57. See *id.* at 1351-52.

58. See *id.* at 1352, 1357-58.

59. *Id.* at 1356. The dismissal was a final decision because it was “with prejudice,” thus terminating the litigation. See *id.* (noting also that, if the appeal is lost, “the case is over”). Moreover, the fact that “the substance of [the] appeal concern[ed] an interlocutory order,” *id.*, did not defeat jurisdiction on the basis of finality either, because “[u]nder general legal principles, earlier interlocutory orders [are] merge[d] into the final judgment, and a party may appeal the latter to assert error in the earlier interlocutory order.” *Id.* (quoting *Myers v. Sullivan*, 916 F.2d 659, 673 (11th Cir. 1990)).

60. *Id.* at 1358.

*Mutual Life*⁶¹ and *Woodard v. STP Corp.*,⁶² both of which involved appeals of removed cases in which plaintiffs had sought dismissals after having unsuccessfully moved for remand to state court.⁶³ As the Eleventh Circuit explained, “[i]n such cases, the contested remand denial affects only the forum in which the plaintiff must litigate, and the dismissal on the merits derives only from the plaintiff’s own written request.”⁶⁴ Thus, in both *Druhan* and *Woodard*, “there [was] no contested court ruling, either interlocutory or final, as to the merits of the plaintiff’s claims.”⁶⁵ In *OFS Fitel*, on the other hand, the panel majority held that a contested issue as to the merits did exist because the final judgment “was expressly based on the undisputed case-dispositive nature of the contested interlocutory ruling.”⁶⁶

Ultimately, the Eleventh Circuit held that the Supreme Court case of *United States v. Procter & Gamble Co.*,⁶⁷ not *Druhan* and *Woodard*, controlled the Eleventh Circuit’s decision in *OFS Fitel*.⁶⁸ According to the Eleventh Circuit, *Procter & Gamble* had similarly found adversity in circumstances “when the plaintiff opposed an interlocutory production order and invited dismissal after ‘it had lost on the merits’ and only as a way of ‘seeking an expeditious review.’”⁶⁹

2. Mootness. In addition to “adversity,” an appeal must present a “live” controversy: “[t]he doctrine of mootness, which evolved directly from Article III’s case-or-controversy limitation, provides that ‘the requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).’”⁷⁰ Thus, “[a] case is moot when it no longer presents a live controversy with respect to which the court can give meaningful relief.”⁷¹ However, as the Eleventh Circuit made clear in *Perez v. Sanford-Orlando Kennel Club, Inc.*,⁷² a party “strategically” invokes the doctrine of mootness at its peril.⁷³

61. 166 F.3d 1324 (11th Cir. 1999).

62. 170 F.3d 1043 (11th Cir. 1999).

63. See *OFS Fitel*, 549 F.3d at 1356-57.

64. *Id.* at 1356.

65. *Id.*

66. *Id.* at 1358.

67. 356 U.S. 677 (1958).

68. *OFS Fitel*, 549 F.3d at 1358.

69. *Id.* (quoting *Procter & Gamble Co.*, 356 U.S. at 681).

70. *Frulla v. CRA Holdings, Inc.*, 543 F.3d 1247, 1250-51 (11th Cir. 2008) (quoting *Tanner Adver. Group, LLC v. Fayette County*, 451 F.3d 777, 785 (11th Cir. 2006)).

71. *Id.* at 1251 (quoting *Ethredge v. Hail*, 996 F.2d 1173, 1175 (11th Cir. 1993)).

72. 518 F.3d 1302 (11th Cir. 2008).

73. See *id.* at 1304.

In *Perez*, the Eleventh Circuit confronted a petition for rehearing challenging its previous decision on the merits.⁷⁴

Th[at] decision had the effect of requiring the defendants [who had filed the appeal] to pay plaintiff twice as much in damages, along with more attorney fees, and it saddled the defendants with an unfavorable precedent which [would] lead to more damages and fee awards in other cases pending against them.⁷⁵

The Eleventh Circuit noted that “[i]t is not surprising in view of those unpleasanties” that a petition for rehearing was filed;⁷⁶ what the Eleventh Circuit found surprising was that the challenge was on the basis of mootness, especially since the challenge was premised on the defendants’ satisfaction of the original judgment, a satisfaction that occurred two weeks after the Eleventh Circuit heard oral argument and of which the Eleventh Circuit was not informed.⁷⁷ In the words of the Eleventh Circuit, “[o]nly after learning that [counsel] had lost the appeal, and lost it big, did he tell us about what he characterizes as jurisdiction-stripping events that had occurred three-and-a-half months before we issued our decision.”⁷⁸ After explaining that it was “not happy that [counsel] attempted to put this Court through a trial run,”⁷⁹ the Eleventh Circuit relied on the Supreme Court case of *United States v. Hougham*⁸⁰ to focus on whether “the objective manifestations of both parties clearly indicate[d] that they intended to pursue their positions.”⁸¹ The Eleventh Circuit concluded that “the parties’ actions spoke[d] loudly enough to drown out any language in the satisfaction” that might suggest that the payment of the judgment was intended to settle the dispute.⁸² Indeed, “both parties continued to litigate the case in this Court as though nothing had changed” and also asked for stays pending the appeal’s outcome in related cases still pending in the district court.⁸³ Accordingly, the Eleventh Circuit held that the appeal had not been rendered moot and denied the petition for rehearing.⁸⁴

74. *Id.* at 1303-04.

75. *Id.* at 1304.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. 364 U.S. 310 (1960).

81. *Perez*, 518 F.3d at 1308.

82. *Id.* at 1307.

83. *Id.* at 1308.

84. *Id.* The Eleventh Circuit also noted that “[w]hat sanctions, if any, should be imposed on [counsel for defendants] for this behavior is a question for another day.” *Id.* at 1304.

II. PROCEDURAL ISSUES IN THE PERFECTION OF APPEALS

Even when jurisdiction exists, the procedural requirements for perfecting an appeal must be carefully observed, including the sometimes vexing question of determining exactly when the time for filing a notice of appeal is triggered. This problem is amply illustrated by the cautionary tale of *Big Top Coolers, Inc. v. Circus-Man Snacks, Inc.*⁸⁵

In *Big Top Coolers*—a case for which the phrase “convoluted procedural history” might have been invented—the Eleventh Circuit held that the United States District Court for the Southern District of Florida properly denied a motion pursuant to Federal Rule of Civil Procedure 60(b)⁸⁶ seeking to reopen the time for filing a notice of appeal.⁸⁷ One ground for so holding was that a Rule 60(b) motion is not the proper vehicle for obtaining such relief, which has been committed under the rules exclusively to motions pursuant to Federal Rule of Appellate Procedure 4(a)(6).⁸⁸

In the alternative, the Eleventh Circuit also held that the district court properly denied the motion on the basis of its timing.⁸⁹ Specifically, the district court had not reduced the challenged judgment to a “separate document” as is required by Federal Rule of Civil Procedure 58,⁹⁰ the entering of which triggers the commencement of the time for the filing of the notice of appeal.⁹¹ However, under the “default” provision of Rule 58(c)(2)(B),⁹² which applies when no “separate document” is entered, the time of the entry of the judgment is deemed

85. 528 F.3d 839 (11th Cir. 2008).

86. FED. R. CIV. P. 60(b).

87. *Big Top Coolers*, 528 F.3d at 841. These procedural difficulties appear to have been prompted in part by the chaos that ensued in the wake of Hurricanes Frances and Jeanne in 2004. *See id.* As the Eleventh Circuit noted, “[t]he damage caused by these hurricanes may partially explain the inactivity in this case from late 2004 through early 2006.” *Id.*

88. *Id.* at 844; FED. R. APP. P. 4(a)(6). “Rule 4(a)(6) provides the exclusive method for extending a party’s time to appeal for failure to receive actual notice that a judgment or order has been entered.” *Big Top Coolers*, 528 F.3d at 844 (quoting *Vencor Hosps., Inc. v. Standard Life & Accident Ins. Co.*, 279 F.3d 1306, 1311 (11th Cir. 2002)). Nor would the Eleventh Circuit consider the argument that the Rule 60(b) motion should be characterized as a Rule 4(a)(6) motion, holding that this argument had been waived: “We decline to address an argument advanced by an appellant for the first time in a reply brief. . . . Furthermore, no such argument was advanced in the district court.” *Id.* (internal citation omitted).

89. *Big Top Coolers*, 528 F.3d at 844.

90. FED. R. CIV. P. 58.

91. *Big Top Coolers*, 528 F.3d at 843.

92. FED. R. CIV. P. 58(c)(2)(B).

to be “150 days . . . from the entry [of the judgment] in the civil docket.”⁹³ Under the facts of *Big Top Coolers*, this meant that final judgment would not be “deemed” entered until “several weeks after [appellant] filed its Rule 60(b) motion.”⁹⁴

Accordingly, the Eleventh Circuit also affirmed the district court on the alternative basis that “post-judgment relief could have been properly denied because [the appellant’s] time for filing notice of appeal had not run when [the appellant] filed its Rule 60(b) motion.”⁹⁵ In short, the motion was apparently unnecessary, and the clear implication of *Big Top Coolers* is that the appellant might have successfully perfected its appeal by the timely filing of a notice of appeal instead.

III. POST-GALL STANDARD OF REVIEW FOR REASONABLENESS OF FEDERAL SENTENCES

Once the appellate court’s jurisdiction is established and the notice of appeal or appropriate petition has been properly filed, few issues are more critical to the success of an appeal than the standard of review. As the Eleventh Circuit recently explained, “[i]n even moderately close cases, the standard of review may be dispositive of an appellate court’s decision.”⁹⁶ Perhaps the most important standard of review addressed by the Eleventh Circuit in 2008 was that for appeals of federal sentencing decisions in the wake of the United States Supreme Court’s decision in *Gall v. United States*.⁹⁷

As the Eleventh Circuit explained in *United States v. Pugh*,⁹⁸ *Gall* reaffirmed the proposition that “appellate review of sentencing decisions employs the ‘familiar abuse-of-discretion standard of review’” in assessing the reasonableness of a sentence, but with the additional refinement that this standard is to be applied in a “two-step process for conducting that review.”⁹⁹ In the first step of this process, the court of appeals

93. *Big Top Coolers*, 528 F.3d at 843 (quoting FED. R. CIV. P. 58(c)(2)(B)).

94. *Id.*

95. *Id.* at 844.

96. *New-Press v. U.S. Dep’t of Homeland Sec.*, 489 F.3d 1173, 1187 (11th Cir. 2007).

97. 128 S. Ct. 586 (2007).

98. 515 F.3d 1179 (11th Cir. 2008).

99. *Id.* at 1190 (quoting *Gall*, 128 S. Ct. at 594); see also, e.g., *United States v. Gonzales*, 550 F.3d 1319, 1323 (11th Cir. 2008) (“We review the final sentence imposed by the district court for reasonableness. Specifically, the district court must impose a procedurally and substantively reasonable sentence.” (citing *United States v. Booker*, 543 U.S. 220, 264 (2005); *Gall*, 128 S. Ct. at 597)).

“must . . . ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the [U.S. Sentencing] Guidelines range, treating the Guidelines as mandatory, failing to consider the [18 U.S.C.] § 3553(a)¹⁰⁰ factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range.”¹⁰¹

In the second step, “*Gall* directs that ‘the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard.’”¹⁰² Under the substantive review of this second step, the Eleventh Circuit has explained that it “may find that a district court has abused its considerable discretion if it has weighed the factors in a manner that demonstrably yields an unreasonable sentence.”¹⁰³

While most sentences will likely be affirmed under the deferential standard of review set forth in *Gall*,¹⁰⁴ *Pugh* is important because the Eleventh Circuit concluded that the sentence imposed in *Pugh* was too lenient to be “substantively reasonable” under the second step of the *Gall* standard of review.¹⁰⁵ Thus, *Pugh* not only contains what appears to be the earliest substantive elaboration of the *Gall* standard in the Eleventh Circuit, but the case also begins to demonstrate the circumstances in which “an appellate court may still overturn a substantively unreasonable sentence, albeit only after examining it through the prism of abuse of discretion.”¹⁰⁶

100. 18 U.S.C. § 3553(a) (2006).

101. *Pugh*, 515 F.3d at 1190 (ellipsis in original) (quoting *Gall*, 128 S. Ct. at 597).

102. *Id.* (quoting *Gall*, 128 S. Ct. at 597).

103. *Id.* at 1191. See *Gonzales*, 550 F.3d at 1324 (“The review for substantive unreasonableness involves examining the totality of the circumstances, including an inquiry into whether the statutory factors in § 3553(a) support the sentence in question.”).

104. See, e.g., *Gonzales*, 550 F.3d at 1324.

105. *Pugh*, 515 F.3d at 1203 (“Taking the Section 3553(a) factors as a whole as well as the district court’s findings and calculus, we are constrained to conclude that [the] probationary sentence was unreasonable, and that the district court abused its discretion in imposing it.”).

106. *Id.* at 1191. In *United States v. Livesay*, the Eleventh Circuit reversed a sentencing decision under the first part of the *Gall* standard, 525 F.3d 1081, 1084-45 (11th Cir. 2008), and thus *Livesay* is notable in that it provides similar guidance as to the “procedural” aspect of the *Gall* standard of review.