How (Not) to Mess Up an Appeal

Volume II

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This article is the second in a three-part series discussing common pitfalls associated with filing an appeal and giving practical tips on how to avoid them. This installment discusses the notice of appeal.

Welcome to the (belated) second article in a three-part series about how to avoid common mistakes in prosecuting or defending an appeal. The first installment covered common errors at the trial court. This article focuses on the notice of appeal, that seemingly straightforward document that appears to do little more than announce an intention to challenge the judgment below.

It's true that the notice of appeal isn't a particularly complex document. But the trick is that, unlike just about every other filing in an appellate court, it is jurisdictional. If the notice isn't done correctly—because it's filed too late, in the wrong court, or without the required information—then the appellate court *cannot* consider the appeal on the merits.[1] As a result, any mistake a lawyer makes in drafting and filing the notice can have permanent, and disastrous, consequences.

One final note before diving in. In volume I of this series, we covered the importance of filing a Rule 50 motion at the trial court to preserve issues for appeal.[2] We flagged one potential exception to this rule, which allows a party to appeal a purely legal question if it was raised on summary judgment.[3] We noted that there was a circuit split on this exception, and that the US Supreme Court granted certiorari to resolve that split.[4] Last Term, the Supreme Court upheld the exception, which is now the rule in all federal circuit courts. Specifically, in *Dupree v. Younger*, the Court took up the question of "whether this preservation requirement extends to a purely legal issue resolved at summary judgment."[5] The Court held that it did not, and as a result, a party need not file a Rule 50 motion to preserve a purely legal issue raised and ruled on at summary judgment.[6] At the same time, our previous advice still stands: it is better to apply a belt-and-suspenders approach and file the Rule 50 motion on all issues that might later become the subject of an appeal, rather than having to worry about whether the appellate issues are "purely legal" ones that fall under this exception.

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"Protective" Notice of Appeal

Picking up where we left off in volume I of this series, you may have already gathered that it can be surprisingly difficult to determine precisely *when* to file a notice of appeal. To ease some of this anxiety, trial lawyers might try taking a conservative approach and file a so-called "protective" notice of appeal in cases where they're not sure whether or when the trial court entered a final judgment. A protective notice of appeal is a useful tool, but litigators should take heed that appellate courts are cracking down on its use.

In a recent Colorado Court of Appeals case, *Chavez v. Chavez*, the court recognized that "there may be relatively rare occasions when it is appropriate for counsel, truly uncertain of a case's status even after diligently investigating the issue of finality, to file a notice of appeal to ensure the protection of a client's appellate rights."[7] But the court went on to emphasize that "counsel has the obligation to determine in the first instance whether there is a final, appealable order, and should make that determination in a diligent and informed manner."[8] And there, "counsel placed the onus of determining the finality of the judgment on this court . . . ."[9] As *Chavez* emphasizes, lawyers have a Goldilocks problem: file a notice of appeal too early, and the appellate court may issue a rule to show cause against you; file too late, and you may be barred from prosecuting your appeal at all.

A 2021 decision from the Tenth Circuit threw another wrench in the procedure for filing protective notices of appeal. In *Cline v. Sunoco Partners Marketing & Terminals L.P.*, the district court awarded the plaintiff and certified class over $155 million in actual and punitive damages.[10] The district court entered a "Judgment Order" reflecting that damages award but omitting critical details that rendered the judgment non-final and thus non-appealable.[11] Because the Judgment Order purported to be a final judgment, the defendant filed a protective notice of appeal that aimed to preserve its right to appeal while also pointing out the reasons why the defendant believed the judgment was not final.[12] The Tenth Circuit ultimately dismissed the appeal, concluding that it lacked jurisdiction for the reasons the defendant pointed out in its

notice of appeal.[13] This, it seemed, was a classic example of how to appropriately use a protective notice of appeal. But the case didn't end there.

In response, the district court entered a new order aimed at addressing the Judgment Order's initial deficiencies.[14] The defendant, however, believed that the subsequent order was still incomplete and therefore did not remedy the Judgment Order of its non-final and non-appealable status.[15] Defendant thus filed a second protective notice of appeal.[16] Meanwhile, the defendant also filed two unsuccessful motions at the district court: one for a new trial and one for a motion to amend the Judgment Order.[17] To cover its bases, the defendant then filed a third protective notice of appeal, designating the order denying those motions with the same objections as contained in the second notice, and the appeals were consolidated.[18]

After the parties fully briefed the merits, the Tenth Circuit dismissed the defendant's appeal after concluding that it hadn't "met its burden to establish" appellate jurisdiction.[19] In the Tenth Circuit's view, by repeatedly raising finality concerns (and thus declining to unambiguously declare in the jurisdictional statement that there was appellate jurisdiction), the defendant had essentially disclaimed away its right of appeal.[20] Indeed, the appellate panel rejected the defendant's request for an order directing the district court to address the finality concerns enumerated in the second and third notices of appeal, characterizing the request as an improper "attempt[] to shift the burden of establishing appellate jurisdiction" to the Tenth Circuit itself.[21]

The Tenth Circuit's ruling in *Cline* left appellants between a rock and a hard place when it comes to preserving the right to appeal an order that the party believes is not yet final. *Cline* seems to hold that a party cannot both object to the finality of a judgment and preserve the right of appeal in the event that its objections are overruled. There's no easy answer or way to avoid the predicament that the *Cline* defendant found itself in. With respect to filing a protective notice of appeal, the best advice we can give is to make certain that you understand the ins and outs of appellate jurisdiction in the court you are appealing to and look carefully at every single decision that the court has issued on the subject.

What Must Be Included in the Notice?

After wading through the (often contradicting) rules that govern *when* to file a notice of appeal, you might think you've navigated through the worst of it. Not quite. Although the notice of appeal may appear on its face to be a simple document, there is a host of potential procedural missteps associated with the contents of the notice. And "while an appellant's failure to take any step other than the timely filing of the notice of appeal does not affect the validity of the appeal," it may constitute grounds for severe measures, such as "dismissing the appeal."[22]

Correctly Listing Orders and Judgments Under Fed. R. App. P. 3(c)

The Federal Rules of Appellate Procedure contain some basic requirements for the contents of a notice of appeal.[23] Under Rule 3(c)(1), the notice must state (1) who is appealing, (2) what is being appealed, and (3) to what court the appeal is being taken.[24] This short, ostensibly black-and-white checklist may lull the drafting lawyer into a false sense of security. Despite the rule's apparent clarity, federal courts across the country have a history of interpreting Rule 3(c) to include "trap[s] for the unwary."[25]

Take, for example, the designation of judgments or orders being appealed. Rule 3(c)(1)(B) used to require that a notice of appeal "designate the judgment, order, *or part thereof* being appealed."[26] Designation of a final judgment in a notice of appeal is generally understood to "bring up for review all of the previous rulings and orders that led up to and served as a predicate for a final judgment."[27] This is called the "merger principle."[28]

Nonetheless, many circuit courts interpreted the pre-amendment language of Rule 3(c)(1)(B) as inviting an appellant to designate every single order that an appellant may wish to challenge on appeal.[29] This, in turn, resulted in a variety of hyper-technical decisions that, in myriad ways, punished appellants who failed to do so. For instance, some courts concluded that a notice of appeal designating only an order denying a motion for reconsideration, rather than the underlying order itself, conferred appellate jurisdiction only over denial of the reconsideration motion.[30] Some courts concluded that if the notice of appeal designated a second order disposing of all *remaining* claims in the case, as opposed to a single order disposing of all claims at once, appellate jurisdiction was limited to the issues disposed of in the second order.[31] In the spirit of *expressio unius*, some courts even went so far as to hold that an appellant who designated both a final judgment and an interlocutory order waived review of other unlisted interlocutory orders.[32] Other courts likewise made this simple rule more complicated than it should be.[33]

In 2021, attempting to make the notice-of-appeal waters more navigable, the Supreme Court adopted new amendments to Rule 3(c). The amendments aimed to clarify "the misconception that it is necessary or appropriate to designate each and every order of the district court that the appellant may wish to challenge on appeal."[34] To that end, Rule 3(c)(1)(B) was amended to delete the phrase "part thereof."[35] The amendments also added Rule 3(c)(4), which calls attention to the merger doctrine;[36] Rule 3(c)(5), which provides that, as long as specific requirements are met, civil notices of appeal encompass final judgments regardless of the separate document rule;[37] and Rule 3(c)(6), which negates the *expressio unius* rationale discussed above.[38] Finally, the amendments significantly modified what is now Rule 3(c)(7) to preclude dismissal of an appeal for designating an order that merged into the final judgment rather than the final judgment itself.[39]

While these amendments may eliminate some of the previously existing obstacles associated with the notice of appeal, the current jurisprudential waters are still short of smooth sailing. As the Committee Notes caution, the merger doctrine is not without exceptions.[40] For example, in *Dawson v. Archambeau*, the Tenth Circuit determined that, even under the new amendments to Rule 3(c), it lacked appellate jurisdiction to consider the claims resolved in the first of two summary judgment orders where the appellant designated only the second in the notice of appeal.[41] Rule 3(c)(7) didn't rescue the appellant, the Tenth Circuit reasoned, because the district court proceedings ended in a stipulated dismissal of all claims with prejudice.[42] In the *Dawson* court's view, this procedural posture meant there was no subsequent judgment into which the second

summary judgment order could merge, thus excluding the first summary judgment order from the scope of the appeal.[43]

If you're thinking that *Dawson* seems directly contrary to the spirit, if not the letter, of the new amendments to Rule 3(c), you're not alone.[44] But *Dawson*, and other decisions like it, have made one thing clear: lawyers filing notices of appeal should not simply assume that all prior interlocutory orders "merge" into the judgment. To avoid a plight like that of the appellant in *Dawson*, attorneys should make sure to conduct legal research in the jurisdiction where their appeal is being taken to make sure that they are aware of local eccentricities in interpreting Rule 3(c).

Advisory Listing of the Issues Under C.A.R. 3(d)(3)

When filing a notice in Colorado state court, C.A.R. 3(d)(3) instructs an appellant to provide an "advisory listing of the issues to be raised on appeal." This suggests that the listing, being only advisory, won't limit the issues the appellant can raise in the opening brief.[45] Nevertheless, in *Vikman v. International Brotherhood of Electrical Workers, Local Union No. 1269*, the Colorado Supreme Court declined to consider the appellant's exhaustion-of-remedies defense on preservation grounds, noting that the appellant neglected to include this issue in the notice of appeal.[46]

To further complicate the issue, in *Giampapa v. American Family Mutual Insurance Co.*—decided in the same year as *Vikman*—the Colorado Court of Appeals rejected the argument that the appellant failed to preserve issues for appeal "by not including those issues in the notice of appeal."[47] The *Giampapa* court held that because an issue had been raised in the trial court, it could be raised on appeal, regardless of its omission from the notice of appeal.[48] Emphasizing that C.A.R. 3(d)(3) requires only an "advisory" listing of issues, the court then distinguished *Vikman* by explaining that in *Vikman*, the appellant didn't preserve the issue in the lower court.[49]

Since *Giampapa*, no published case has found that an appellant waived an issue by failing to list it in the notice of appeal. But in light of *Vikman*, it's better to be safe than sorry. Thus, when listing potential issues in a notice of appeal in Colorado state court, prudent appellate counsel should provide a comprehensive list of potential appellate issues as well as a broad "catch-all" issue.

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A Few Other Tricks

Along with the issues discussed above, there are a couple of smaller points worth mentioning. Specifically, lawyers should take care to ensure that they file in the right court, and that they file the right number of notices.

Which Court to File In

Where should you file the notice of appeal? On this point, at least, the answer is straightforward. But it does vary depending on the court. In the federal system, the appellant must file the notice of appeal in the district court.[50] In Colorado, the notice must be filed in the court of appeals.[51]

Lawyers might think that filing in the wrong court isn't that big of a deal. After all, timely filing a notice of appeal gives everyone actual notice that an appeal is being taken, and an appellee could not reasonably claim any prejudice resulting from filing in a different court. But the Colorado Court of Appeals disagrees. In *Collins v. Boulder Urban Renewal Authority*, the appellant mistakenly filed his notice of appeal with the trial court.[52] He asked the court to treat his timely filed notice as sufficient to invoke appellate jurisdiction, but the court of appeals refused to do so. It held that strict compliance with the Colorado Appellate Rules is required, and that filing a notice of appeal in the trial court, but not the appellate court, does not satisfy C.A.R. 4.[53] In the *Collins* court's words, the notice of appeal was "of no effect," and the appellant was out of luck. His appeal was dismissed with prejudice.[54]

How Many Notices of Appeal to File

Lawyers should also consider the number of notices of appeal they should file. If the proceedings in the trial court only involved a single complaint with a single case number, the answer is easy: one notice is sufficient.[55] But things get a little harder when multiple trial-level cases are consolidated and litigated before a single judge. Consider a hypothetical case: Several plaintiffs file separate, albeit related, complaints against the same or an overlapping set of defendants. The cases are consolidated by the district court clerk as a matter of course under Fed. R. Civ. P. 42, which provides that "[i]f actions before the court involve a common question of law or fact, the court may . . . consolidate the actions . . . ."[56] From that point forward, both the trial court and the parties treat the matter as a single action. Several years later—long after anyone even recalls that the cases were consolidated—the judge enters a single judgment that fully and finally disposes of all claims among all the parties.

A lawyer might think that the losing parties need only file one notice of appeal.[57] But the

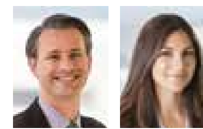
US Supreme Court has issued a few opinions over years calling this assumption into question. Most recently, in *Hall v. Hall*, the Court addressed a slightly different issue under Rule 42, but noted "that constituent cases *retain their separate identities* at least to the extent that a final decision in one is immediately appealable by the losing party."[58] Other Supreme Court opinions have expressed a similar view.[59] And if this principle holds—if consolidated cases retain their separate character—then an appellant must file *multiple* notices of appeal, one for each separate action. Indeed, the Sixth Circuit has adopted a bright-line rule that imposes just this requirement: separate notices must be filed to invoke appellate jurisdiction over consolidated cases.[60] The rule itself is clear enough, but the yearslong delay between the consolidation and the appeal means litigants often get tripped up.

Even that bright-line rule doesn't end the matter, however. Some circuits have instead adopted a more complicated rule, drawing a distinction between cases that are merely *consolidated* and those that are *merged*. The Seventh and Eighth Circuits, for example, have held consolidation requires multiple notices of appeal, but that if the trial-level cases are fully merged, only one notice of appeal is required.[61] And if this distinction weren't fine enough, these courts have also held that determining whether cases are consolidated or merged is a case-by-case inquiry that depends on the particular facts.[62] The Tenth Circuit hasn't formally adopted any one of these positions in a published case. In *United States v. Tippett*,[63] the court catalogued the various approaches taken by its sister circuits, and it strongly suggested that the case-by-case approach was the right one when it wrote, "The circuit opinions requiring inquiry on a case-specific basis to determine the effect of consolidation are correct, we believe."[64] But at least formally speaking, it remains an open question in this circuit.

What's a practicing lawyer to do? The short answer is to file notices of appeal early and often. In other words, don't assume that merely because trial-level cases have been consolidated, one notice of appeal is sufficient. The better course is to file a notice for each and every action to ensure that you haven't inadvertently waived your client's right to appeal. Fortunately, in the author's experience, the clerk will generally refund the additional filing fees if the appellate court decides that multiple notices are unnecessary.

Conclusion

While this article doesn't contain an exhaustive list of all potential traps for the unwary, it should give the reader a good sense of the most common pitfalls with notices of appeal. Please watch out for the third and final installment of this series, which will cover common mistakes made at the appellate court.



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NOTES

1. *E.g., Bowles v. Russell*, 551 U.S. 205, 206 (2007); *Grand Cnty. Custom Homebuilding, LLC v. Bell*, 149 P.3d 398, 400 (Colo. 2006); *Collins v. Boulder Urban Renewal Auth.*, 684 P.2d 952, 954 (Colo. App. 1984). The rule isn't quite as strict in criminal cases, *see United States v. Randall*, 666 F.3d 1238, 1241 (10th Cir. 2011), but lawyers are well advised to make absolutely sure that the filing is done correctly.
2. Jackson, "How (Not) to Mess Up An Appeal: Volume I," 52 *Colo. Law.* 20, 23 (June 2023), https://cl.cobar.org/features/how-not-to-mess-up-an-appeal.
3. *Id.*
4. *Id.*
5. *Dupree v. Younger*, 598 U.S. 729, 731 (2023).
6. *Id.*
7. *Chavez v. Chavez*, 465 P.3d 133, 141 (Colo.App. 2020).
8. *Id.*
9. *Id.*
10. *Cline v. Sunoco Partners Mktg. & Terminals L.P.*, Nos. 20-70642 and 20-7072, 2021 U.S. App. LEXIS 37003, at *4 (10th Cir. Nov. 1, 2021).
11. Petition for Writ of Certiorari at 11, *Sunoco Partners Mktg. & Terminals L.P. v. Cline*, 2021 U.S. App. LEXIS 37003 (No. 21-1404), https://www.supremecourt.gov/DocketPDF/21/21-1404/222118/20220428143236801_2022-04-28%20Sunoco%20cert%20petition%20FINAL.pdf.
12. *Id.*
13. *Id.* at 11–12.
14. *Id.* at 12–14.
15. *Id.* at 14.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Cline*, 2021 U.S. App. LEXIS 37003, at *6.
20. *Id.* at *4–5.
21. *Id.* at *7–8 & n.5.
22. Fed. R. App. P. 3(a)(2). *See also* C.A.R. 3(a) (similar). *But see* Fed. R. App. P. 3(c)(7) ("An appeal must not be dismissed for informality of form or title of the notice of appeal, for failure to name a party whose intent to appeal is otherwise clear from the notice, or for failure to properly designate the judgment if the notice of appeal was filed after entry of the judgment and designates an order that merged into that judgment.").
23. Fed. R. App. P. 3(c).
24. In full, Fed. R. App. P. 3(c)(1) provides:

The notice of appeal must:

(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X";

(B) designate the judgment—or the appealable order—from which the appeal is taken; and

(C) name the court to which the appeal is taken.

Fed. R. App. P. 3(c) also makes clarifications for notices filed by pro se parties, *see* Fed. R. App. P. 3(c)(2) and in class actions, *see* Fed. R. App. P. 3(c)(3).

25. *Amendments to the Federal Rules of Appellate Procedure*, 117th Cong. 1st. Sess. 117–30 (2021), at 18 (hereinafter *Committee Notes*), https://www.govinfo.gov/content/pkg/CDOC-117hdoc30/pdf/CDOC-117hdoc30.pdf.

26. Fed. R. App. P. 3(c)(1)(B) (2020) (emphasis added).

27. *Johnson v. Leonard*, 929 F.3d 569, 575 (8th Cir. 2019).

28. *Committee Notes*, *supra* note 25 at 42 ("Designation of the final judgment confers appellate jurisdiction over prior interlocutory orders that merge into the final judgment."). *See also John's Insulation v. L. Addison & Assocs.*, 156 F.3d 101, 105 (1st Cir. 1998) (collecting cases).

29. *See, e.g.*, *Rosillo v. Holten*, 817 F.3d 595, 597 (8th Cir. 2016) ("Where an appellant specifies one order of the district court in his notice of appeal, but fails to identify another, the notice is not sufficient to confer jurisdiction to review the unmentioned order.").

30. *Committee Notes*, *supra* note 25 at 8 ("[S]ome courts treat a notice of appeal that designates only the order disposing of [motions listed under Fed. R. App. P. 4(a)(4)] as limited to that order, rather than bringing the final judgment before the court of appeals for review.").

31. *See Rosillo*, 817 F.3d at 597 ("Where a district court dismisses one claim at an early stage of the case, and later enters an order and judgment dismissing a second claim, a notice of appeal that cites only the later order and judgment does not confer appellate jurisdiction to review the earlier order.") (citations omitted). *See also Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 256 (2d Cir. 1995) (finding no jurisdiction to review the district court's earlier decision to dismiss the plaintiff's Railway Labor Act challenge where notice of appeal referred solely to an order dismissing the claims under the Federal Employers' Liability Act); *Dawson v. Archambeau*, No. 21-1307, 2022 U.S. App. LEXIS 30870, at *3–4 (10th Cir. Nov. 7, 2022) (concluding that pre-2021 version of Rule 3 did not provide appellate jurisdiction over some defendants where appellant designated only the second of two summary judgment orders, the first of which resolved claims as to those defendants).

32. *J.W. v. Roper*, 541 F. App'x 937, 942 (11th Cir. 2013) ("[W]hen a notice specifies a particular ruling or issue, we infer others are not part of the appeal.").

33. *E.g.*, *City of New York v. Smokes-Spirits.com, Inc.*, 541 F.3d 425, 453 (2d Cir. 2008) (collecting cases where appellate jurisdiction was denied because the notice of appeal "generally specified certain aspects of an order or judgment, or particular orders, and not others, and intent to appeal from the entire final judgment could not be inferred"). *See also, e.g.*, *Strange v. Sterba*, No. 17-6471, 2018 U.S. App. LEXIS 7941, at *3 (6th Cir. Mar. 28, 2018); *Foudy v. St. Lucie Cty. Sherrif's Off.*, 677 F. App'x 657, 658 n.1 (11th Cir. 2017).

34. See *Committee Notes*, *supra* note 25 at 18.

35. *See supra* note 24.

36. Fed. R. App. P. 3(c)(4) provides in full: "The notice of appeal encompasses all orders that, for purposes of appeal, merge into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal." Because the merger doctrine is "subject to some exceptions," the *Committee Notes* are careful to explain that "the amendment does not attempt to codify the merger principle but instead leaves its details to case law."

37. Fed. R. App. P. 3(c)(5) provides in full:

In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates:

(A) an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties; or

(B) an order described in Rule 4(a)(4)(A).

38. Fed. R. App. P. 3(c)(6) provides in full: "An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal."

39. *See supra* note 22.

40. *See supra* note 35.

41. *Dawson*, 2022 U.S. App. LEXIS 30870, at *4–6.

42. *Id.* at *5–6.

43. *Id.*

44. Lammon, "Trying to Get a Court to Apply Rule 3(c)," *Final Decisions* (blog) (Nov. 15, 2022), https://finaldecisions.org/trying-to-get-a-court-to-apply-rule-3c.

45. Likewise, under the Tenth Circuit local rules, "An issue not raised in the docketing statement may be raised in the appellant's opening brief." 10th Cir. R. 3.4(B).

46. *Vikman v. Int'l Bhd. of Elec. Workers, Loc. Union No. 1269*, 889 P.2d 646, 658–59 (Colo. 1995).

47. *Giampapa v. Am. Fam. Mut. Ins. Co*., 919 P.2d 838, 840 (Colo.App. 1995), *vacated on different grounds by* 12 P.3d 839 (Colo.App. 2000).

48. *Id.*

49. *Id.*

50. Fed. R. App. P. 3(a)(1) ("An appeal permitted by law as of right from a district court to a court of appeals may be taken *only* by filing a notice of appeal *with the district clerk* within the time allowed by Rule 4.") (emphasis added).

51. C.A.R. 3(a) ("An appeal permitted by law as of right from a lower court to an appellate court *must* be taken by filing a notice of appeal with the *clerk of the appellate court* within the time allowed by C.A.R. 4.") (emphasis added).

52. *Collins v. Boulder Urban Renewal Auth.*, 684 P.2d 952, 954 (Colo.App. 1984).

53. *Id.*

54. *Id.*

55. *E.g.*, Fed. R. App. P. 3(c)(1)(A) ("The notice of appeal must: . . . specify the party or parties taking the appeal . . . ."); C.A.R. 3(c)(1) ("When two or more parties are entitled to appeal from a judgment or order of a lower court and their interests make joinder practicable, they may file a joint notice of appeal and proceed as a single appellant.").

56. Fed. R. Civ. P. 42(a)(2).

57. There is even a provision in the federal rules that might be interpreted to lend support to this view: "When two or more parties are entitled to appeal from a district-court judgment or order, and their interests make joinder practicable, they may file a joint notice of appeal." Fed. R. App. P. 3(b).

58. *Hall v. Hall*, 584 U.S. 59, 77 (2018) (emphasis added).

59. *Johnson v. Manhattan Ry.*, 238 U.S. 479, 496–97 (1933) ("[C]onsolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another.").

60. *Stacey v. Charles J. Rogers, Inc.*, 756 F.2d 440, 442 (6th Cir. 1985).

61. *Mendel v. Prod. Credit Ass'n*, 862 F.2d 180, 182 (8th Cir. 1988); *Soo Line R.R. v. Escanaba & Lake Superior R.R.*, 840 F.2d 546, 548 (7th Cir. 1988).

62. *Mendel*, 862 F.2d at 182; *Soo Line*, 840 F.2d at 548.

63. *United States v. Tippett*, 975 F.2d 713, 717–19 (10th Cir. 1992).

64. *Id.* at 718. While this quotation is pretty clear cut, it is most fairly characterized as dicta given the issues raised in the appeal.