Did You Know?

Can you "DIG" it? The dismissal of appeals as improvidently granted

by L. Bradfield Hughes

Courts of last resort are accustomed to deciding hot-button appeals while under close scrutiny from the parties, the public and the press. Copious amounts of money and time can be spent convincing the nation's highest courts to accept discretionary review of these key cases—the outcomes of which may reshape the law and guide judicial decisionmaking for years to follow. After these appeals first make it past the courthouse doors, still more money and time is spent briefing their merits and preparing to engage with the opposition and a hot bench at oral argument. And nonparty amici curiae often join the fray, calculating that having their voices heard by judges in courts of last resort can be every bit as meaningful to their organizations as lobbying to be heard in the legislature.

Sometimes, though, all of this blood and treasure gets spent without the benefit of any opinion on the merits. On relatively rare occasions, a high court in the business of deciding weighty cases may ultimately choose not to decide a given appeal, even after having deliberately chosen to accept it in the first place. In these circumstances, after taking a hard, second look at the record and the briefs, the reviewing court concludes that a case that may have once seemed compelling at the discretionary review stage suddenly seems less so at the merits stage, and the court decides to "DIG" the appeal; that is, to dismiss it as having been improvidently granted. A DIG can happen for procedural reasons, such as when the court determines that the appellant waived one or more of the key issues for which discretionary review had been granted. A DIG can also occur for more substantive reasons, such as when the reviewing court identifies a critical policy determination that may best be left for the political branches, rather than a court, to decide.

When a court DIGs a case, it can sometimes come as a big surprise—and a disappointment—to the parties and lawyers who have devoted such time and effort to getting their appeal accepted for review, briefing the case, and honing their oral presentations. It can also come as a disappointment to judges on the panel who disagree with the decision to DIG, who may then pen a dissenting opinion expressing frustration at a lost opportunity to resolve a long-simmering debate or a compelling issue of first impression.[1] To those eagerly awaiting a meaningful decision on the merits, a DIG can take their tale "full of sound and fury" and reduce it all to a one-line entry, "signifying nothing."[2]

Adam Liptak, U.S. Supreme Court correspondent for the *New York Times*, examined this phenomenon in a series of articles that he wrote after observing oral arguments in the case arising from California's ban on same-sex marriages, Proposition 8. In a March 26, 2013 article, "Justices Say Time May Be Wrong For Gay Marriage Case," published just days after the oral arguments, Liptak noted that, "As the Supreme Court … weighed the momentous question of whether gay and lesbian couples have a constitutional right to marry, six justices questioned whether the case, arising from a California ban on same-sex marriages, was properly before the court and indicated that they might vote to dismiss it."[3] A few days later, Liptak published a second piece on the case, leading off with the provocative question, "Why did the Supreme Court agree in December to hear a major same-sex marriage case and then seem to think it had made a terrible mistake … when it came time for arguments?"[4]

In connection with his second article, Liptak interviewed Capital University Law Professor Margaret Cordray and University of Chicago Law Professor Dennis Hutchinson about the secretive procedures that the U.S. Supreme Court follows when deciding whether to DIG an appeal.[5] Professor Hutchinson noted that the U.S. Supreme Court DIGs cases only a few times each term, and he predicted that such an outcome seemed unlikely here, saying, "If they DIG it now, after all of the fanfare and all of the attention and all of the amicus briefs … it will look like they didn't know what they were doing at the outset."[6] As we now know, Professor Hutchinson's prediction was correct, insofar as the Supreme Court did not DIG the Proposition 8 case. Instead, on June 26, 2013, the Supreme Court avoided reaching the thorny merits by holding that the petitioners—official proponents of Proposition 8—lacked Article III standing to appeal the district court's decision declaring the ballot initiative unconstitutional.[7]

Putting aside the outcome of the Proposition 8 case, it is important to remember that the U.S. Supreme Court is not alone in DIG-ing cases from time to time. In fact, the phenomenon was on recent display in Ohio, when the Ohio Supreme Court dismissed *CSAHS/UHHS-Canton, Inc. d/b/a Mercy Medical Center v. Aultman Health Foundation et al.*—a high-stakes battle between two competing hospital systems—on the grounds that the appeal was improvidently allowed.

In *Mercy*, a Stark County jury found that Aultman Health Foundation violated Ohio's Pattern of Corrupt Activities Act (OPCA), R.C. 2923.32, by paying independent insurance brokers undisclosed bonuses to convert their clients to Aultman's network and away from health plans where Mercy was an in-network provider. Aultman appealed the jury's multi-million dollar jury verdict, but the Stark County Court of Appeals affirmed.[8] So, Aultman sought discretionary review in the Ohio Supreme Court, which is always an uphill climb.

In its Propositions of Law, Aultman asserted that several aspects of the verdict were inconsistent with the plain language and intent of OPCA and posited that, because the Ohio Department of Insurance had signed off on the broker incentive program, it could not be "corrupt activity" under OPCA.[9] Nearly half a dozen amici

curiae, including the Ohio Chamber of Commerce, deemed Aultman's appeal significant enough that they chimed in at the threshold jurisdictional stage, urging the Ohio Supreme Court to take Aultman's case. And so it did, by a narrow vote of 4-3, in July 2012. By the end of 2012, more than 550 pages of merit briefing signed by more than 30 lawyers, including merit briefs from nearly a dozen amici curiae supporting one side or the other, had been submitted to the Supreme Court concerning the six Propositions of Law that the Court had previously agreed to hear and decide.[10]

Shortly after the Court set the case for oral argument, though, Mercy filed a nine-page motion to dismiss Aultman's appeal as improvidently granted, arguing that "Aultman's appeal consists of challenges to the sufficiency of the evidence, and an assortment of legal arguments that Aultman has waived by failing to raise them—or, in some instances, by taking exactly the opposite position—below."[11] Addressing Aultman's Propositions of Law in turn, Mercy identified certain defects in the propositions that the Court had agreed to resolve, and that the parties had already fully briefed. For example, with respect to Aultman's contention that the Ohio Department of Insurance had primary jurisdiction to assess the legality of Aultman's conduct, Mercy argued that Aultman had failed to preserve this argument before the court of appeals.[12] Although Aultman and five of its amici curiae vigorously opposed Mercy's motion to dismiss, the Supreme Court unanimously granted the motion two months after it was filed, about a month before oral argument was scheduled to take place. Notably, three of the justices who had originally voted to take the case in 2012 (Justices Lundberg-Stratton, Cupp, and McGee-Brown) were no longer on the bench when this decision to DIG the Mercy case was made.

Mercy's appearance on (and disappearance from) the Ohio Supreme Court's docket without an opinion on the merits carries some helpful lessons for Ohio appellate practitioners. At one level, the case shows how the participation of amici curiae at the jurisdictional stage may enhance prospects for discretionary review. At another level, though, it illustrates that even a big-dollar case and a big group of "friends of the court" cannot resolve fundamental procedural defects, such as waiver, which may lead the Court to think twice about reaching the merits of a given appeal. *Mercy* also suggests that appellate counsel should remain aware of any changes on the bench that might present new strategic opportunities. And the case may prompt potential amici curiae to more closely scrutinize the procedural posture of the cases that they seek to participate in, to avoid investing resources on amicus briefs that could come to naught if the Court never reaches the merits of the dispute that interested them.

Even though the Supreme Court's entry in *Mercy* does not reveal specific reasons for the Court's decision to dismiss the case as improvidently allowed, there have been occasions when a written opinion has accompanied a decision to DIG an appeal, and these can provide helpful clues for practitioners who, wishing to preserve their win at the district court of appeals, may find it appropriate to DIG for dismissal, as *Mercy* successfully did.[13] For example, in *Ahmad v. AK Steel Corp.*, then-Justice (now Chief Justice) O'Connor drafted a concurring opinion, agreeing with the Court's decision to dismiss a discretionary appeal and certified-conflict case as improvidently allowed, given that "[a] hallmark of judicial restraint is to rule only on those cases that present an actual controversy," and that "[i]n light of the complete lack of evidence of any code violation, this appeal presents nothing more than a garden-variety open-and-obvious-hazard case that is neither of substantial constitutional import nor of public or great general interest."[14] Similarly, in *State v. Urbin*, the late Chief Justice Moyer penned a concurring opinion in an appeal that was dismissed as improvidently allowed because the "appellant waived the primary legal position he now presents" and "resolution of the case is dependent upon factual determinations and the sufficiency of the evidence."[15] The Supreme Court's Rules of Practice also provide guidance for practitioners about improvidently certified conflicts and improvidently accepted jurisdictional appeals.[16] Armed with an understanding of the applicable principles, cases, and rules, readers of *Ohio Lawyer* can be well prepared to "pick up a shovel and DIG" if the need arises. ■

Author bio

Brad Hughes, a partner in Porter Wright's litigation department and member of the firm's appellate practice group in the firm's Columbus office, represents clients in appeals, original actions and complex commercial litigation. Hughes participates in many of the firm's cases pending in the Ohio Supreme Court, assisting co-counsel with jurisdictional memoranda, merit briefs, original actions and preparations for oral argument.

Endnotes

1 *In re J.S.*, 136 Ohio St.3d 8, 2013-Ohio-1721 (Lanzinger, J., dissenting from the Ohio Supreme Court's decision to DIG an appeal concerning serious-youthful-offender sentencing under R.C. 2152.13).

2 William Shakespeare, *Macbeth*, Act 5, Sc. 5.

3 Adam Liptak, "Justices Say Time May Be Wrong For Gay Marriage Case," *N.Y. Times*, March 26, 2013, available at www.nytimes.com/2013/03/27/us/supreme-court-same-sex-marriagecase.html?pagewanted=all&_r=0.

4 Adam Liptak, "Who Wanted to Take the Case on Gay Marriage? Ask Scalia." *N. Y. Times*, March 29, 2013, available at www.nytimes.com/2013/03/30/us/supreme-courts-glimpse-at-thinking-onsame-sex-marriage.html?pagewanted=all&_r=0.

5 Id.

6 Id.

7 *Hollingsworth v. Perry*, 133 S.Ct. 2652, 186 L.Ed. 2d 768 (2013).

8 *CSAHA/UHHS-Canton v. Aultman*, 2012-Ohio-897 (5th Dist.)

9 *Memorandum in Support of Jurisdiction of Appellants Aultman Health Foundation, Aultman Hospital, Aultcare Corporation and McKinley Life Insurance Company*, Ohio Supreme Court Case No. 2012-0665 (April 19, 2012).

10 The author's firm, Porter Wright Morris & Arthur LLP, represented amicus curiae Catholic Health Association of the United States (CHA) in the merit briefing stage, in support of Mercy.

11 *Appellee Mercy Medical Center's Motion to Dismiss Appeal as Improvidently Accepted*, Ohio Supreme Court Case No. 2012-0665 (Jan. 14, 2013), at 1.

12 *Id.* at 7.

13 See Entry, Ohio Supreme Court Case No. 2012-0665 (March 13, 2013).

14 *Ahmad v. AK Steel Corp.*, 119 Ohio St.3d 1210, 1211, 2008-Ohio-4082.

15 *State v. Urbin*, 100 Ohio St.3d 1207, 1210, 2003-Ohio-5549.

16 S.Ct.Prac.R. 8.04: "When the Supreme Court finds a conflict pursuant to S.Ct.Prac.R. 8.02, it may later find that there is no conflict or that the same question has been raised and passed upon in a prior appeal. Accordingly, the Supreme Court may sua sponte dismiss the case as having been improvidently certified or summarily reverse or affirm on the basis of precedent." S.Ct.Prac.R. 7.10: "When a case has been accepted for determination on the merits pursuant to S.Ct.Prac.R. 7.08, the Supreme Court may later find that there is no substantial constitutional question or question of public or great general interest, that leave to appeal in a felony case was not warranted, or that the same question has been raised and passed upon in a prior appeal. Accordingly, the Supreme Court may sua sponte dismiss the case as having been improvidently accepted or summarily reverse or affirm on the basis of precedent."