CHALLENGING AN OHIO ABORTION RESTRICTION: THE FEDERAL LAWSUIT PROCESS



PART 1: THE LAW PASSES

After Ohio passes a law it usually takes about 90 days before the law becomes effective. Sometimes there are exceptions to this timeline - such as during emergencies or for budget provisions.

PART 2: THE INITIAL TRIAL COURT PROCESS

The appeal lawsuit is filed in a federal district court, also know as the trial court. In Ohio, this either occurs in the state's Southern or Northern District. The lawsuit is usually filed with enough lead time that the law becomes blocked before ever going into effect. In most cases, either the abortion clinic(s) or physician(s) who provide abortions bring the lawsuit to court.

Lawsuits may have one or more more claims. In this context, a claim is the legal basis for finding the law to be unconstitutional. For example, a law may violate both the constitutional right to choose abortion and the "equal protection" clause of the Constitution. These are thus two separate claims.

Near the same time that the lawsuit is filed, but before the law becomes effective, motions for a Temporary Restraining Orders (TRO) and/or a Preliminary Injunction (PI) are also filed with the court. Both motions are ways of asking for a temporary block on the law that keeps it from going into effect. There is no guarantee of getting a TRO or PI, however. Usually the judge will rule on the motion before the law's effective date. Sometimes a TRO or PI is sought based on one or more of the claims the lawsuit makes and the judge may grant the TRO or PI based on one or more of those claims.

Temporary Restraining Order (TRO)

- TROs are issued to give the court time to consider and rule on a preliminary injunction motion.
- Used if relief is needed quickly.
- Can be issued without the other party responding to the request; judges usually like to give the other party time to respond, however.
- Can be renewed for another 14 days after expiring.
- Normally can't be appealed; rare exceptions exist.

Preliminary Injuction (PI)

- PIs are blocks on the law that prevent it from going into effect until a final decision on the law is reached by the trial court.
- There may be a hearing or argument before the judge decides whether to grant a PI. Whether this occurs depends on the judge's preferences or the case circumstances.
- The timeline for a briefing, hearing or decision related to a PI is usually set by the court in consultation with both sides. This process may take several weeks.
- A PI may be issued instead of a TRO if there is enough time; otherwise, a judge might issue a TRO in order to have time to decide on the PI, which is then granted after the TRO (but before the TRO expires).
- PIs may be appealed. If they are not appealed, the case continues to a final decision. This decision may occur with, or without, a trial or hearing. Whether this occurs depends on each particular case. Since injunction cases do not have juries, trails occur only in front of a judge.
- It usually takes several months to reach a final decision; the length of time depends on the judge's schedule and the complexity of the case.
- The losing party can appeal the decision.
- If the losing side does not appeal the final decision, the case is over and either the law goes into effect (if the state wins) or it is permanently blocked (if the clinic(s)/physician(s) win).

PART 3: THE APPEAL PROCESS

If a PI is appealed, then the following process begins. The losing party on a PI or final decision can appeal within 30 days of the unfavorable decision. In Ohio, the appeal is to the U.S. Court of Appeals for the Sixth Circuit, which is based in Cincinnati. The appeal is initially decided by a panel of three judges, who are randomly selected from the 16 judges currently on the court. The case can continue to progress in the trial court while the appeal is pending. Normally the trial judge will decide, or the parties will agree, to put the case on hold while waiting for the appeals court decision.

If an injunction was issued, the state can also ask for a stay of the injunction. The state must first ask the trial court (and subwequently the appeals court) for the stay. A stay puts the injunction on hold while the appeal is decided – in other words, the law goes into effect while the appeal progresses. A stay is not guaranteed – the state has to show, among other things, that it is likely to win on appeal. Either way, the stay does not affect the appeal. The appeal still continues regardless of whether the stay is granted.

Next, both sides will have to file briefs on a schedule set by the court. Sometimes one party may ask for an extension of their deadline, which is usually granted. The briefing process generally takes about three months. Usually, the appeals court will then schedule oral arguments after the briefing is complete. This may occur several weeks or months after the briefing and takes place in Cincinnati. The appeals court then takes several more weeks or months to issue a decision. If one of the judges writes a dissenting opinion, the decision will usually take longer. There is no set time frame for this, so this is a highly variable part of the process. A decision can be issued as quickly as six weeks or take over a year. Overall, the average time from the filing the notice of appeal to final disposition in an appeal in the Sixth Circuit, as of March 2020, was 7.9 months (www.uscourts.gov, *U.S. Court of Appeals Summary: 12-Month Period Ending March 31, 2020*). Abortion cases often have a longer timeframe, though - closer to nine to 12 months.

Appeal Paths

After the appeal is decided, the losing side can choose to do any of following (see flowchart on page 3):

a) Ask the same panel to rehear the case (this is rare; a panel of judges will not usually re-hear a case they recently decided, unless it is evident an obvious error was made); **OR**

b) Ask the entire Sixth Circuit Court of Appeals (all 16 judges) to re-hear the case. This is called an "en banc" rehearing. These requests are not necessarily granted – in fact, rehearing en banc is fairly rare, but more likely in a high-profile case, like an abortion case; **OR**

c) Ask the U.S. Supreme Court to hear the case, within 90 days of losing the appeal (or denial of (a) or (b), if sought). This is almost always a long shot, as the Supreme Court gets 7,000 - 8,000 requests for rehearing each year and only grants about 80 (www.supremecourt.gov/about/faq_general.aspx); **OR**

d) Accept the outcome, which may mean the appealing side wins or loses the whole case. It could also mean they go back to the trial ("district") court, depending on what and how the appeals court decided the case. If the case goes back to the trial court, this is called "remand."

In addition, if the losing side asks for (a) but the panel refuses, they can then attempt options (b), (c), or (d). If they ask for (b) and are unsuccessful, they can do (c) or (d). If they ask for (c) and are unsuccessful, then they are stuck with (d).

En Banc Rehearing

- If the Sixth Circuit court grants rehearing en banc (b), there will be another round of briefing and another oral argument.
- This entire process will again take several months, and it will effecitvely vacate the prior panel's decision, meaning that it is treated as if the original decision never occurred. Then, after the court issues a new decision, (c) or (d) will occur.

On Remand

- If the case has to go back to the trial court for further issues to be decided, it may decide to leave or life the injunction (if any) in place. Which course of action occurs depends on who wins the appeal and why.
- Both sides then go back to the trial court and continue to litigate any remaining issues.
- This may also happen if the preliminary injunction (or other decision) was only based on one of the claims and there are still more claims to be decided. If this happens, then the losing side can appeal again after final judgment.

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