

The Practitioner Civil Procedure

One or Another

Determining a Ruling's Appealability

By Marc J. Poster

The Superior Court makes a ruling in a civil case. Aggrieved by the ruling, a litigant wants to appeal. First, however, it must be determined whether the ruling is actually appealable.

Appealability is crucial because appellate courts lack jurisdiction to hear appeals from non-appealable judgments or orders. *Degnan v. Morrow*, 2 Cal.App.3d 358, 362 (1969). There is no constitutional right to appeal. *Powers v. City of Richmond*, 10 Cal.4th 85, 115 (1995). If a litigant appeals from a non-appealable ruling, or fails to appeal from an appealable ruling, the opportunity for effective appellate review may well be lost.

California adheres to the "one final judgment" rule of appealability. According to the state Supreme Court in *Morehart v. County of Santa Barbara*, 7 Cal.4th 725 (1994), "an appeal cannot be taken from a judgment that fails to complete the disposition of all the causes of action between the parties." *Id.* at 743. The "one final judgment" rule is "a fundamental principle of appellate practice in the United States. The theory is that piecemeal disposition and multiple appeals in a single action would be oppressive and costly, and that a review of intermediate rulings should await the final disposition of the case." 9 Witkin, "California Procedure: Appeal," Section 43, p. 67 (3d ed. 1985).

The rule is said to be embodied in California Code of Civil Procedure Section 904.1(a)(1), which provides that an appeal may be taken "[f]rom a judgment, except an interlocutory judgment. ..." See *Kinoshita v. Horio*, 186 Cal.App.3d 959, 962-67 (1986).

The one final judgment rule, however, is only a general starting point for determining a ruling's appealability. In fact, a case may have more than one appealable judgment. Moreover, a judgment may appear final but not be final for purposes of appeal. And, sometimes an appeal may be permissible (indeed required) where the judgment is not final or even where there is no judgment at all.

Here are some of the most common statutory and judicial interpretations of, and additions and qualifications to, the one final judgment rule:

■ "Finality" is a term of art for appeals. An order or judgment is "final" for purposes of appeal when there is no issue left for future determination by the court except for carrying out the terms of the order or judgment. *Lyon v. Goss*, 19 Cal.2d 659, 670 (1942). In contrast, an order or judgment is not "final" for purposes of res judicata until the right to appellate review already has been exhausted (*National Union Fire Ins. Co. v. Stites Prof. Law Corp.*, 235 Cal.App.3d 1718, 1726 (1991)), and may never be "final" for purposes of collateral attack based on extrinsic fraud or mistake. *Rapleyea v. Campbell*, 8 Cal.4th 975, 981 (1994).

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■ There may be multiple appealable judgments in a multiple-party case. C.C.P. Section 578 provides that a court may give judgment "for or against one or more of several plaintiffs, and for or against one or more of several defendants." Such a "partial" judgment is appealable as to the parties named in the judgment, even if there are other parties remaining in the action, as long as the judgment disposes of all the issues to be resolved between the parties to the judgment. *Kuperman v. Great Republic Life Ins. Co.*, 195 Cal.App.3d 943, 946-47 (1987).

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made after entry of an appealable judgment is appealable only if the order either affects the judgment or relates to it by enforcing it or staying its execution. *Olson v. Cory*, 35 Cal.3d 390, 400 (1983).

Determining whether a post-judgment order affects or relates to the judgment can be tricky. For example, a post-judgment order denying costs or attorney's fees is appealable. *Lakin v. Watkins Associated Industries*, 6 Cal.4th 644, 654 (1993), while an order denying a motion to amend a judgment is not. *Hixson v. Hixson*, 146 Cal.App.2d 204, 206 (1956). Again, it is the substance of the order, not its form, that determines whether or

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it is appealable. *Estate of Richter*, 12 Cal.App.4th 1361, 1365-66 (1993).

In addition, C.C.P. Section 904.1(a)(10) incorporates by reference additional orders made appealable by the Probate Code Sections 2750, 7240, 7242 and 17207 and the Family Code Section 2025.

■ Even though the action between the parties is not over, some "collateral" rul-

ings may be appealable. These are orders or judgments that do not dispose of all the issues between the parties, but nevertheless are sufficiently separate from the remaining issues in the case to warrant separate appellate review. An interim order or judgment is said to be appealable when it is final (that is, there is nothing left to decide), when the subject matter is collateral to the subject matter of the litigation and when the judgment or order directs the payment of money or the performance of an act by or against the aggrieved party. *Sleas v. Fremont Cemetery Corp.*, 9 Cal.App.4th 1221, 1227-28 (1992).

■ In addition, by judicial determination — based on various public policy grounds — other final judgments technically may be appealable, but are, in whole or in part, not reviewable on appeal. These include a judgment entered by the Superior Court on the direction of an appellate court after a previous appeal. The doctrine of law of the case applies to such a judgment; to permit further appeal would threaten to extend the litigation indefinitely. *Security-First Nat. Bank v. Marxen*, 19 Cal.2d 100, 103 (1941). Likewise, a default judgment is appealable only on issues of jurisdiction, sufficiency of the pleadings and excessive damages. *Corona v. Lundigan*, 158 Cal.App.3d 764, 766-67 (1984).

■ Some judgments expressly denominated "interlocutory" nevertheless may be appealable. C.C.P. Section 904.1 (a)(9), (10) and (11), expressly provide for appeal from interlocutory judgments determining the right to redeem property, directing partition and directing payment of sanctions of more than \$5,000. Furthermore, it is the judgment's substance, not its caption, that determines whether it really is interlocutory or final and whether or not it is appealable. *Art Movers Inc. v. Ni West Inc.*, 3 Cal.App.4th 640, 645 (1992). A judgment denominated "interlocutory" may actually be a final judgment if it effectively disposes of all the issues between the parties. *Elbridge v. Burns*, 76 Cal.App.3d 396, 403-04 (1978).

■ Some rulings, though not called judgments, are in fact appealable. C.C.P. Section 904.1(a)(2)-(7) and (12) specify numerous non-judgment orders as appealable, including orders made after an appealable judgment, orders granting a new trial and orders denying a motion for judgment notwithstanding the verdict. However, despite the statute's broad language, courts have held that an order

made after entry of an appealable judgment is appealable only if the order either affects the judgment or relates to it by enforcing it or staying its execution. *Olson v. Cory*, 35 Cal.3d 390, 400 (1983).

■ If an order or judgment is appealable, to obtain appellate review it must be appealed. Litigants who intend to seek appellate review of interim appealable orders must directly appeal from them. On appeal from a subsequent judgment or order, an appellate court will not consider a challenge to any previous ruling that could have been, but was not, appealed. *In re Matthew C.*, 6 Cal.4th 386, 393-94 (1993).

■ Appellate courts sometimes "save" an appeal from a non-appealable judgment or order by treating the appeal as a petition for an extraordinary writ. In extraordinary circumstances — by employing the fiction that the appeal is really a writ petition, even though the nominal respondent on a writ petition, the Superior Court, is not before the appellate court — an appellate court may undertake review of a non-appealable order. *U.S. Financial v. Sullivan*, 37 Cal.App.3d 5, 12 n.6 (1974). However, litigants cannot count on such acts of grace. In the ordinary case, an appeal from a non-appealable judgment or order will be dismissed. *Mid-Wiltshire Associates v. O'Leary*, 7 Cal.App.4th 1450, 1455 (1992).

Litigants must carefully consider the issue of appealability whenever appellate review is contemplated. An appeal from a non-appealable order or judgment will almost certainly prove to be a waste of time and resources for all concerned, while failure to appeal from an appealable judgment or order will result in the loss of the right to appellate review. The one final judgment rule is a good starting point for consideration, but it is by no means the whole story.