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Appealability of Trial Court ORDERS

How to minimize the risk of compromising your client's appeal rights

As they browse through the advance sheets, most lawyers who do not practice regularly before California's appellate courts will probably skip over two apparently innocuous opinions that came down on September 27, 1991.

They should pause to read those cases. The coincidental decisions highlight a recurrent problem in appellate law: the substantial risk of misjudging whether an order is appealable.

In *Modica* v. *Merin*,[1] the Third District dismissed an appeal on its own motion. Its reason: the plaintiff did not appeal from a "final judgment" but only from a nonappealable order granting a summary judgment motion. The fact that both of the parties thought the order was appealable underscores the court's observations:

> *Despite persistent efforts by the appellate courts to educate the bar, attempts to appeal from nonappealable orders of this nature continue unabated in substantial numbers .... This court indulged [the fiction that a nonappealable order incorporated a judgment of dismissal] in a number of cases ... in the hope that focusing attention on the problem in this way would effect a painless solution. Alas, this practice had the unintended and lamentable consequence that counsel came increasingly to rely upon the court's indulgence rather than to take the procedural steps necessary to perfect an appeal .... We have long since determined the proper role of an appellate court is to adhere to and apply Code of Civil Procedure [S]ection 904.1, not to devise and employ strategies for its wholesale avoidance. As a practical matter, experience teaches that far from solving the problem, the approach only exacerbates it.*[2]

The other decision presents the reverse set of facts. In *UAP-Columbus JV 326132* v. *Nesbitt*,[3] Division Three of the Second District dismissed an appeal because the appellant failed to file a timely notice of appeal. The case involved an interpleader and related declaratory relief claims between the interpleader defendants, Nesbitt and Wibbelsman. On March 19, 1990, the trial court filed a statement of decision and judgment that resolved all of the issues in the case except for the amount and allocation of the interpleader plaintiff's fees and costs. Wibbelsman served a notice of entry of judgment on March 28. After the trial court rendered a cost award on July 23, 1990, Nesbitt filed a notice of appeal "from ... the judgment entered on March 19, 1990 ... as modified by the [o]rders of this [c]ourt entered on July 23, 1990."[4] The court dismissed the appeal from the March 19 judgment,

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holding that the judgment was appealable and that the notice of appeal was therefore untimely (it was filed more than 60 days after Wibbelsman served the notice of entry of judgment).

The appellants' lawyers in *Modica* and *Nesbitt* undoubtedly were embarrassed by these results, but they should not have felt surprised—or alone. The decisional law is replete with examples of similar mistakes, despite the courts' repeated efforts to eliminate them. Presaging the *Modica* court's frustration, four years earlier Division Seven of the Second District said:

> *We are wearying of "appeals" from clearly nonappealable orders. [Citation.] . . . Our patience with counsel in past cases, [citations] was intended to be educative not an indication we would condone continuing blunders of this sort.*
>
> *We will save this "appeal" as we have done all too often in the past by deeming the order sustaining the demurrer to incorporate a judgment of dismissal and treat Equitable's [appellant's] notice of appeal as applying to the dismissal. [Citation.] However, we hereby give notice to the Bar that henceforth we will no longer bail out attorneys who ignore the statutory limitations on appealable orders.*[5]

Justice Lillie's dissent in *Cohen* was an even stronger warning:

> *I find nothing in the circumstances here justifying this procedure for resolution of an issue such as that raised in this purported appeal. Employing this kind of appellate challenge to the ruling sustaining demurrer absent special circumstances should be discouraged as countenancing appellate review of nonappealable orders carelessly brought up to this court with inattention to statutory provisions, and fostering shoddy appellate practice.*[6]

Plainly, a lawyer who does not observe the strict formalities of the appeal process is taking a very serious risk. But appealability is not always as simple an issue as these decisions make it appear. At times it involves subtle and vexing questions that require sophisticated analysis and careful appellate strategy.[7] The simpler errors, however, probably irritate the courts more than many others because they can be avoided so easily.

THE SOURCE OF THE PROBLEM

It is important to understand that the appellate courts are not merely being hypertechnical or hypersensitive. Both situations—appealing a nonappealable order and belatedly attempting to appeal an appealable order—are errors that affect the appellate courts' jurisdiction: "The right of appeal of a judicial decision is wholly statutory and no judgment or order is appealable unless expressly made so by statute."[8] Appellate jurisdiction cannot be created by the parties' consent or by a respondent's failure to seek dismissal.[9] In addition, as Justice Reynoso noted in the case of *Olson* v. *Cory*, "since the question of appealability goes to our jurisdiction, we are duty bound to consider it on our own motion."[10] Thus the issue of appealability can surface at any time, regardless of whether the parties raise it.[11]

The consequences of a mistake can be devastating. Failing to file a timely notice of appeal order means that the right of appeal is lost forever. The loss can easily be just as significant as missing a statute of limitations.

An attempted appeal from a nonappealable order might seem less consequential because, leaving aside unnecessary cost and embarrassment, in the end the client's appeal rights are preserved. But the resulting delay might eliminate any possibility of challenging the order by a writ petition, and in some situations the appeal rights could be lost as well.

A sampling of recent published decisions shows that the courts are still willing to save counsel from themselves, but only where the facts leave them little room to do otherwise—such as where there is in fact a proper order in the file.

For example, the Fourth District recently saved an appeal because even though the plaintiff appealed from an nonappealable order granting a motion to dismiss, a judgment of dismissal was entered two weeks later. The court deemed the appeal to have been taken from that judgment.[12] Note the significant risk to the appellant under these facts: since there is in fact an appealable order on file, the time to file a notice of appeal could run out by the time the court of appeal gets around to addressing the attempted appeal from the wrong order. If the court does not save the appeal, the appellant completely loses his appeal rights.

Division Three of the First District went a step farther in *Luna Records Corporation, Inc.* v. *Alvarado*,[13] which was an appeal from an order granting a motion to strike a time-barred complaint. The court stated that while such an order was ordinarily not appealable, in this case it included "a complete opinion in support of the orders and constituted a final judicial determination on the merits."[14] The court was therefore prepared to treat it as an appealable judgment.[15]

But *Cohen* and *Modica* belie one author's suggestion that "the reviewing courts are becoming increasingly willing to save a premature appeal,"[16] and even that author advises counsel not to rely on the courts' generosity. Whatever generosity the courts might otherwise have, burgeon-

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ORDER APPEALABILITY

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ing caseloads undoubtedly will diminish it. And even when attorneys can persuade the court to save an improper appeal, the appeal may suffer later from the impression created by their "shoddy appellate practice."[17]

Prudent counsel must examine carefully every order they wish to challenge so they can arrive at a strategy least likely to result in the damage—and malpractice risk—of a dismissed appeal.

NONAPPEALABLE ORDERS

A very common mistake is the attempt to appeal from a nonappealable order that, in the ordinary course of events, should have been followed by an appealable order. Counsel simply overlook the need to obtain the appealable order. Typical cases involve orders sustaining demurrers without leave to amend,[18] orders granting judgment on the pleadings,[19] and orders granting summary judgment.[20] One cannot appeal from these orders—only from the resulting judgments.

It follows that the first order of business for a prospective appellant must be to ensure that the trial court does in fact enter an appealable order. The best time to address that question—and the point at which lawyers often fail to do so—is at the hearing where the order is made. Rather than following the customary practice of waiving notice and relying on a future minute order, counsel should be sure the court spells out the mechanics of having an appealable judgment entered. If the court is going to prepare the order, counsel should follow up with the clerk to be sure it contains whatever language may be necessary to establish that it is, in fact, appealable. If the court orders counsel to prepare the order, the losing party may want to volunteer, so as to ensure its correctness and prompt entry.

The prevailing party (the prospective respondent on appeal) has a different, but equally compelling, motive to obtain an appealable order: counsel will want to be able to serve a notice of entry of judgment so as to start the clock running on the losing party's time to file a notice of appeal. But what sometimes happens is that the prevailing party gives notice of entry on the basis of the nonappealable order. Sixty days later, the lawyer thinks the case is over and has probably so advised the client.[21] The lawyer will certainly lose face, if not the client, when the losing party fires up the case again by getting a proper judgment entered and appealing it.

In either case, it is clearly the parties' responsibility, not the court clerk's, to see to it that a proper order is entered. The Fourth District had this to say about an

appellant who blamed the clerk for failing to enter a judgment of dismissal after the court sustained a demurrer without leave to amend:

> *The purchaser [appellant] cannot so easily shift culpability for the lack of an appealable order. Section 664 [of the Code of Civil Procedure] requires the court clerk to enter a judgment; it does not, however, require the clerk to interpret a ruling on a demurrer by certain parties to certain causes of action to determine whether dismissal of the entire action is called for, and if so, to draft a written order or judgment of dismissal and obtain the court's signature, as required by Code of Civil Procedure [S]ection 581d. That is the responsibility of the parties or their counsel.*[22]

What if, despite counsel's efforts, the trial court nevertheless fails or refuses to enter an appealable order? Counsel should not wait indefinitely to act. One approach is a belt-and-suspenders strategy: a notice of appeal from the nonappealable order accompanied by a writ petition explaining the facts. Assuming the intent of the trial court's order is clear, these papers will create the factual and procedural basis the court of appeal needs to reach the merits via the writ petition, to amend the trial court order to include a final judgment or, possibly, to return the matter to the trial court for entry of judgment.[23]

In some cases, of course, there can never be an appeal. For instance, an order overruling a demurrer or denying summary judgment will never trigger an appealable judgment.[24] Although the rulings may be challenged in an appeal from the ultimate judgment,[25] any immediate challenge must be by a writ petition. But counsel must be sure there is no available appeal route; otherwise, the appeal time could be used up while counsel pursues a writ petition, which the court of appeal has no obligation to hear and will usually deny summarily.

Whatever course one follows, it is certainly prudent to follow any suggestions the court of appeal might give about remedying any defects. *Yancey* provides a cautionary tale about a party's failure to do so. When the respondent raised the issue of appealability, the Fourth District directed the appellant to obtain a "proper order or judgment of dismissal." Instead, he filed a voluntary request for dismissal with prejudice, apparently believing that such a dismissal would create the necessary predicate for an appeal. The court held that this act divested it of jurisdiction.[26]

FAILING TO APPEAL AN APPEALABLE ORDER

The consequences of failing to appeal an appealable order are profound and irreversible: the case is over, and the brilliant arguments that might have reversed the trial court's decision are lost forever. The reason for the late appeal does not matter:

> *In the absence of statutory authorization, neither the trial nor appellate courts may extend or shorten the time for appeal [citation], even to relieve against mistake, inadvertence, accident or misfortune.*[27]

Nesbitt presents a dramatic example of what can go wrong. The case seems to have resulted from a bad guess about whether the judgment was appealable. The result was that the underlying judgment, which disposed of some $500,000 in interpleaded funds, became final; all that remained of the appeal was the amount and allocation of attorneys' fees and costs.

How does one guard against such a disastrous result? Again, the starting point is an immediate examination of the trial court's order—not an announcement from the bench, not a notice of ruling, but the actual order as filed—to see whether it is a "final judgment."[28] The facts in *Nesbitt* suggest some things to look for.

First, the judgment that the court found was appealable looked like a "final" judgment. The trial court filed a statement of decision and a judgment at the same time, and the judgment itself contained blank spaces for the addition of costs to be awarded later. On its face, it was just like any other judgment entered after trial.

Second, all that remained to be done following the judgment was the determination of costs. It has long been settled that an order on a motion to tax costs (which was the procedure the parties used) is separately appealable as an order after final judgment under Code of Civil Procedure Section 904.1(b).[29] The very fact that a cost award is appealable should have been a clue that the earlier judgment was in fact "final" under Section 904.1.

Third, Wibbelsman served a notice of entry of judgment. That document was a clear signal that Wibbelsman would contend the judgment was appealable.

As if the area were not already uncertain enough, a recent decision casts doubt on Nesbitt and suggests a different approach. In *Grant* v. *List & Lathrop*,[30] the Fifth District considered a similar situation: a judgment with blank spaces for costs and fees, and no appeal from a subsequent order on a motion to tax costs. Although acknowledging that such an order is appealable, the court reasoned:

> *However,* requiring *a separate appeal from such an order when the judgment expressly makes an award of costs and/or fees serves no apparent purpose. The notice of appeal itself challenges the appropriateness of awarding fees and costs to respondents. Thus, appellate jurisdiction exists and respondents are on notice that appellants are seeking review of the award. Respondents have not been misled . . . .*
>
> *We hold that when a judgment awards costs and fees to a prevailing party and provides for the later determination of the amounts, the notice of appeal subsumes any later order setting the amounts of the award.*[31]

In light of the direct conflict between two districts on this issue, the prudent course is to file a separate notice of appeal from any post-judgment order addressing costs or fees.

POSSIBLE APPROACHES

Admittedly, hindsight makes it easy to render a harsh judgment on a case like *Nesbitt.* But there are some things a lawyer can do to minimize or eliminate the risk of a wrong decision. If analysis and research do not yield a clear answer about appealability, it may be appropriate to pursue both an appeal and a writ petition. In the writ petition, appellants can advise the court of the fact that they have filed a notice of appeal but that the appealability of the order is uncertain. However, this approach only makes sense where the "true" final judgment may not be filed until the distant future and there is a real need for a prompt decision.

A less dramatic approach would be to wait until the court or the respondent raises the question of appealability and then, in response, ask the court to treat the

appeal as a writ petition if it decides that the challenged order is not appealable. The success of this approach may depend on a number of factors—most importantly, the significance and urgency of the case:

> *A petition to treat a nonappealable order as a writ should only be granted under extraordinary circumstances, "'compelling enough to indicate the propriety of a petition for writ . . . in the first instance . . .' [Citation.]" . . .*
>
> *Routine granting of requests to treat improper appeals as writs where there are no exigent reasons for doing so would only encourage parties to burden appellate courts with reviews of intermediate orders.*[32]

Cost may also be an important consideration. *Modica* shows that the issue of appealability may not arise until after the parties have fully briefed the case. A dismissal at that late point could represent a large waste of time and money. Filing a writ petition is likewise not a task to be taken lightly. Counsel must brief the entire case in a relatively short time and must also undertake the difficult task of making a substantial, credible showing of the propriety of writ relief, which is rarely granted.

In evaluating these approaches, the client must not be left out of the picture. In all but the clearest cases, any strategy involves risks and potential costs that the client must understand. Clients should not be taken by surprise when their appeal is suddenly dismissed as premature, or when they receive an unexpectedly large bill for an unsuccessful writ petition filed as a protective measure.

Trial lawyers, even very experienced ones, frequently do not handle trial court proceedings with an eye on the court of appeal. They overlook the necessary technical steps needed to provide the predicate for an appeal, or they make unwarranted assumptions about the nonappealability of an order. By the time they turn to an appellate specialist, it may be too late.

The clear message of *Modica* and *Nesbitt* is that lawyers must become more careful in assessing appealability and must strive to avoid giving the appellate courts a reason to castigate them for "shoddy appellate practice." ◆

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[1] 234 Cal. App. 3d 1072 (1991).

[2] *Id.* at 1074.

[3] 234 Cal. App. 3d 1028 (1991), *rev. denied*, Dec. 19, 1991.

[4] *Id.* at 1031.

[5] Cohen v. Equitable Life Assurance Society, 196 Cal. App. 3d 669, 671 (1987) (Johnson, J.), *cited in* Modica, 234 Cal. App. 3d at 1075.

[6] 196 Cal. App. 3d at 674 (Lillie, P.J., dissenting). Division Seven has actually "bailed out" some attorneys despite Cohen's strong language. However, in each case the court has gone out of its way to explain the reasons for making an exception. *See* Hebert v. Los Angeles Raiders, Ltd., 234 Cal. App. 3d 36, 40 n. 1 (1991) (Lillie, P. J.), *rev. granted*, Dec. 12, 1991; Kirsh v. State Farm Mutual Automobile Insurance Company, 233 Cal. App. 3d 84, 87 n. 1 (1991) (Lillie, P. J.); Fisher

v. San Pedro Peninsula Hospital, 214 Cal. App. 3d 590, 599 n. 1 (1989) (Woods, J.); Olson v. Volkswagen of America, 201 Cal. App. 3d 1437, 1439 (1988) (Lillie, P.J.); Aubry v. Goldhor, 201 Cal. App. 3d 399, 402 n. 1 (1988) (Lillie, P.J.). These exceptions should not give any comfort to lawyers who do not have a strong justification for asking the court to save an improper appeal. More recently, Division Seven has made good on its threat. Munoz v. Florentine Gardens, 235 Cal. App. 3d 1730 (1991) (Johnson, J.).

[7] It is beyond the scope of this article to discuss the general law on this subject, which has been fully treated elsewhere. *See, e.g.*, 9 WITKIN, CALIFORNIA PRACTICE, *Appeal* §§37 *et seq.* (3d ed. 1985); EISENBERG, ET AL., CIVIL APPEALS AND WRITS, Ch. 2 (The Rutter Group, 1991).

[8] Supple v. City of Los Angeles, 201 Cal. App. 3d 1004, 1009 (1988). *See also* Lavine v. Jessup, 48 Cal.2d 611, 613 (1957). The principal enabling statute is CODE CIV. PROC. §904.1.

[9] *See* Norman I. Krug Real Estate Investments, Inc. v. Praszker, 220 Cal. App. 3d 35, 47 (1990).

[10] 35 Cal.3d 390, 398 (1983).

[11] Rule 13 of the CAL. R. OF CT. requires the opening brief to discuss appealability, but this requirement does not always point counsel in the right direction. In Modica, appellant's counsel filled out the Third District's form of settlement conference statement, which not only required a statement regarding appealability but even cited case law showing that the Modica order was not appealable. Nevertheless, appellants' counsel still did not recognize the problem. Modica, 234 Cal. App. 3d at 1074 n. 1.

[12] Weatherby v. Van Diest, 233 Cal. App. 3d 506, 507 (1991). *See also* Buehler v. Alpha Beta Company, 224 Cal. App. 3d 729, 731 n. 1 (2d Dist., Div. 5, 1990) ("We generously treat the appeal [from an order granting summary judgment] as from the judgment [filed 10 days later]").

[13] 232 Cal. App. 3d 1023 (1991).

[14] *Id.* at 1025 n. 1.

[15] *See also* cases cited in n. 6, *supra.*

[16] CEB, CALIFORNIA CIVIL APPELLATE PRACTICE §2.14 (2d ed. 1985).

[17] Cohen, 196 Cal. App. 3d at 674 (Lillie, P.J., dissenting).

[18] Supple, 201 Cal. App. 3d 1004.

[19] *See* Fraser-Yamor Agency, Inc. v. County of Del Norte, 68 Cal. App. 3d 201, 207 (1977).

[20] Modica, 234 Cal. App. 3d 1072.

[21] *See* Rule 2(a), CAL. R. OF CT.

[22] Yancey v. Fink, 226 Cal. App. 3d 1334, 1342 n. 4 (4th Dist., Div. 2, 1991), *review denied*, Apr. 10, 1991.

[23] *See* Molien v. Kaiser Foundation Hospitals, 27 Cal.3d 916, 920-21 (1980); Tsarnas v. Bailey, 179 Cal. App. 2d 332, 337 (1960).

[24] Under current jurisprudence, summary adjudication orders are also not appealable. However, it is possible that some special situations may arise from the 1990 amendments to CODE CIV. PROC. §437c that limit summary adjudication to entire causes of action.

[25] *E.g.*, Coy v. County of Los Angeles, 235 Cal. App. 3d 1077, 1082 n. 2 (1991).

[26] 226 Cal. App. 3d at 1342-43. *See also* Munoz, in which the appellants failed to obtain the appropriate dismissal order despite the court of appeal's explicit invitation to them to do so. The court dismissed the appeal.

[27] Estate of Hanley, 23 Cal.2d 120, 123 (1943). *See also* Hollister Convalescent Hosp. Inc. v. Rico, 15 Cal.3d 660, 674 (1975) (the court "lacks all power to consider the appeal on its merits and must dismiss, on its own motion if necessary, without regard to considerations of estoppel or excuse").

[28] CODE CIV. PROC. §904.1 does not define this term, but it has a settled meaning:

> *Whether a judgment is, or is not, appealable, is determined by its substance and legal effect . . . essentially, a judgment is "final," so as to be appealable, when no further judicial action by the court is essential to the final determination of the rights of the parties to the action.*

Nesbitt, 285 Cal. Rptr. at 860.

[29] Nesbitt, 234 Cal. App. 3d at 1038.

[30] 92 Daily Journal D.A.R. 926, 1992 WL 5862 (Jan. 17, 1992).

[31] 92 Daily Journal D.A.R. at 938 (emphasis added).

[32] Estate of Weber, 229 Cal. App. 3d 22, 25 (1991).

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