FINAL ANALYSIS: DETERMINING APPEALABILITY OF A JUDGMENT OR ORDER

By Marc J. Poster

Consider these facts: The federal district court grants the defendant's motion to dismiss and states that the court may amend its order with a more specific statement of grounds for its decision. However, the court never amends its order. Is the order appealable?

No, answered the 9th U.S. Circuit Court of Appeals in *National Distribution Agency v. Nationwide Mutual Insurance Company*, 117 F.3d 432 (9th Cir. 1997). The court said: "A district court ruling is not final if the court reserves the option of further modifying its ruling." Therefore, the plaintiff's appeal is dismissed.

This is a specific application of the general rule that to invoke federal-appellate jurisdiction, the appellant must timely appeal from an appealable judgment. *Price v. Seydel*, 961 F.2d 1470, 1473 (9th Cir. 1992). Stating that rule is simple. Applying it, however, presents formidable challenges for the appellate practitioner. Virtually every aspect of the rule is subject to interpretation and debate, and there is little leeway for error. Had the plaintiff in *National* not appealed, and the order later was deemed a final judgment, the plaintiff's opportunity for appellate review would have been lost.

In determining whether a judgment or an order is appealable, the practitioner should consider the following issues:

! **Is the challenged judgment or order appealable by statute?** Federal appeals courts (other than the Federal Circuit, which has unique jurisdiction) have jurisdiction of appeals from "all final decisions of the district courts." 28 U.S.C. Section 1291. In addition, they have jurisdiction over appeals from specified interlocutory orders in injunction, receivership and admiralty cases. 28 U.S.C. Section 1292(a). Appellate courts also have discretion to hear appeals from interlocutory orders when the district court determines, in its discretion, that the order involves a controlling question of law and immediate appeal may materially advance the ultimate termination of the litigation. 28 U.S.C. Section 1292(b).

When a case involves more than one claim or multiple parties, the district court also has the option of entering judgment on all or some of the claims or parties. That judgment is immediately appealable if the district court expressly determines there is no just reason for delay. Fed. R. Civ. P. 54(b).

! **If the appeal is from a judgment, is the judgment final?** For a judgment to be final -- absent any of the exceptions noted above -- it must end the litigation on the merits for all claims and all parties. *FirsTier Mortg. Co. v. Investors Mortg. Ins. Co.*, 498 U.S. 269, 273-74 (1991). For example, a judgment is not final if the court has yet to resolve a claim for prejudgment interest. *Pace Communications Inc. v. Moonlight Design Inc.*, 31 F.3d 587, 591 (7th Cir. 1994). On the other hand, a judgment is final even though the court has not yet determined costs. *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202 (1988).

Moreover, the court's ruling itself is not an appealable final judgment. The clerk is supposed to enter judgment as a separate document. Fed. R. Civ. P. 58. The mere fact that the court added a seemingly final and dispositive phrase such as "judgment accordingly" to its findings of fact and conclusions of law does not make the order a final judgment.

Whether a ruling is final depends ultimately on its substance. Thus, a ruling entitled a "judgment" may not be final for purposes of appeal where further issues remain to be resolved. *Zucker v. Maxicare Health Plans Inc.*, 14 F.3d 477, 483 (9th Cir. 1994). But a ruling entitled an "order" may be a final judgment for purposes of appeal where there is no substantive issue left for the court to resolve. *United States v. Lee*, 786 F.2d 951, 955-56 (9th Cir. 1986).

Although the appeals courts will apply a common-sense interpretation to the finality requirement, *Sutton v. Earles*, 26 F.3d 903, 906 n.1 (9th Cir. 1994), the parties cannot stipulate to appellate jurisdiction where there is none, *Dannenberg v. Software Toolworks Inc.*, 16 F.3d 1073, 1076-78 (9th Cir. 1994), nor can they create appellate jurisdiction by dismissing unresolved claims and reserving the option of litigating them at some future time, *Cheng v. Commissioner*, 878 F.2d 306, 310 (9th Cir. 1989).

The finality requirement has only rare exception, usually involving cases in the "'twilight zone' of finality." *Gillespie v. United States Steel Corp.*, 319 U.S. 148, 152-54 (1964). In extraordinary circumstances, a federal appeals court will consider an appeal from a seemingly nonappealable ruling where the ruling is "marginally final," involves an issue of "national significance" and has been "fully briefed and argued." *Service Employees Int'l Union, Local 102 v. County of San Diego*, 60 F.3d 1346, 1350 (9th Cir. 1995).

! **Is the appeal timely?** If notice of appeal is filed either too early or too late, and no exception applies, the appeal is invalid and cannot be heard. Generally, the prescribed time within which to file notice of appeal is 30 days after entry of the judgment or other appealable order. If the United States or one of its officers or agencies is a party, the prescribed time is 60 days. Fed. R. App. P. 4(a)(1).

Time to appeal is extended to accommodate certain post-judgment proceedings that may affect the judgment. If any party timely files one of several specified post-judgment motions, including a motion for new trial or for judgment as a matter of law, the time for all parties to appeal begins to run from the entry of the order disposing of the post-trial motion. Fed. R. App. P. 4(a)(4). The district court may deem a motion for attorney fees to be in the nature of a motion to amend the judgment and thus extend the time for appeal. Fed. R. Civ. P. 38. If the post-judgment motion is not timely, the time to appeal is not extended. *Cel-A-Pak v. California Agric. Labor Relations Bd.*, 680 F.2d 664, 666 (9th Cir. 1982).

An appeal filed while one of the specified post-judgment motions is pending is held until the motion is decided; then the appeal becomes effective. *Leader Nat'l Ins. Co. v. Industrial Indem. Ins. Co.*, 19 F.3d 444, 445 (9th Cir. 1994). When it becomes effective, that appeal still applies only to the original judgment; if the appellant intends to challenge the ruling on the postjudgment motion or any modifications to the judgment, the existing notice of appeal must be amended. Fed. R. App. P. 4(a)(4).

There is some leeway on either side of the prescribed time period for appeal. A notice of appeal is treated as filed on the date of entry, if it's filed before entry of the appealable order or judgment but after the district court-announced decision. Fed. R. App. P. 4(a)(2). This is a relatively recent liberalization in federal appellate procedure. Previously, a premature appeal was invalid and a new notice of appeal had to be filed at the appropriate time. *Schroeder v. McDonald*, 55 F.3d 454, 458-60 (9th Cir. 1993). However, even under the present rule, a notice of appeal remains invalid if it's filed before the court announces the decision that will ripen into an appealable judgment. *Kennedy v. Applause Inc.*, 90 F.3d 1477, 1482 (9th Cir. 1996).

On a motion filed within 30 days after the filing deadline, and on a showing of excusable neglect or good cause, the district court may extend the time for filing a notice of appeal up to 30 days or 10 days from the order's entry date, whichever occurs later. Fed. R. App. P. 4(a)(5).

The courts abide by strict standards for excusable neglect in failing to file a timely notice of appeal. *Oregon v. Champion Int'l Corp.*, 680 F.2d 1300, 1301 (9th Cir. 1982). An extension to appeal will be granted only in "extraordinary circumstances." *National Industries Inc. v. Republic Nat'l Life Ins. Co.*, 677 F.2d 1258, 1264 (9th Cir. 1982). One such circumstance is provided by express rule. The court may reopen the appeal time for 14 days if the aggrieved party files a motion within 180 days of the judgment's entry or within seven days of receiving notice of the judgment's entry, whichever is earlier – and if the district court finds that the party didn't receive notice of the judgment's entry within 21 days, and no party would be prejudiced. Fed. R. App. P. 4(a)(6).

Yet another wrinkle in the rules for timely filing of federal appeals is that the time begins to run only upon entry of judgment. *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1441 n.4 (9th Cir. 1991). Nevertheless, absent objection, the court can consider an appeal from a judgment that has been rendered but not entered. *Allah v. Superior Court of California*, 871 F.2d 887, 890 n.1 (9th Cir. 1989). The appellate court will not engage in the "pointless exercise of dismissing the appeal and waiting for the district court to enter a separate judgment." *Vernon v. Heckler*, 811 F.2d 1274, 1276-77 (9th Cir. 1987).

As *National* demonstrates, despite potential loopholes in the rules of appealability, the practitioner cannot count on extraordinary exceptions or discretionary relief to salvage an unauthorized or untimely appeal. To ensure a timely and valid appeal in federal court, the practitioner must carefully monitor the district court's actions, diligently follow the rules, and count the days precisely.

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