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CRAFTING APPELLATE JURISDICTION WITHOUT ARTIFICE

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In *Kurwa v. Kislinger* (2013) 57 Cal.4th 1097 (*Kurwa I*), the California Supreme Court disapproved a popular practice created by civil litigators to achieve immediate appellate review of adverse rulings on key claims in a multi-count complaint where other, minor claims had not been disposed of in the trial court. The Court held that this practice—which involved voluntary dismissal without prejudice of the minor claims, stipulated waiver of the statutes of limitations on those claims, and agreement that the minor claims would not be tried unless the appellate court reversed on the other claims—violated the one final judgment rule. This article explains the genesis and reasoning of the little-known *Kurwa* opinion and suggests a potential basis for other creative approaches to the issue so that litigators can avoid a frustrating and time-consuming detour to the appellate court.

The Problem

There are disjuncts between the economies of civil litigation practice and judicial economy. For example: the typical civil lawsuit consists of multiple claims, some more valuable than others. Sometimes the most valuable claims are eliminated in pretrial proceedings, leaving only "minor" claims to be litigated at trial. If the minor claims are truly insignificant, they can be jettisoned. But frequently their value is more than marginal and they are not expendable. In this situation, all the parties may conclude that rather than incurring the considerable expense of a trial on the minor claims alone, it makes economic sense to first test on appeal the validity of the dismissal of the more valuable claims; that way, should those claims be reinstated, all the claims could be tried together on remand.

There is one problem though. The rules of appellate review stand in the way of an appeal of only *some* of the claims between the parties. Rather, under the "one final judgment rule," a judgment is ripe for appeal only when *all* causes of action have been disposed of. (*Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 743.) The reason for the rule is judicial economy; if piecemeal appeals of less than all claims were permitted, appellate courts would be forced to visit and revisit cases over and over again. In the face of the one final judgment rule, a plaintiff desiring an immediate appeal of the major claims would have no choice but to dismiss the minor claims, thereby creating a final judgment—but at the expense of abandoning a significant part of the plaintiff's case.

Of course, the plaintiff could seek immediate review of the dismissed claims by way of extraordinary writ. But writ review is entirely discretionary with the appellate court, and appellate courts don't ordinarily grant writ review simply because it is more economical for the parties. (See *Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1273.) Indeed, since the percentage of writ petitions summarily denied approaches 95%, writ review is not a dependable alternative to an appeal. (See *Brown, Winfield & Canzoneri, Inc. v. Superior Court* (2010) 47 Cal.4th 1233, 1241, fn. 3; see also Jud. Council of Cal., Rep. on Court Statistics (2019) Fiscal Years 2008-09 Through 2017-18 Statewide Caseload Trends, table 6: Disposition of Original Proceedings, p. 55 <https://www.courts.ca.gov/documents/2019-Court-Statistics-Report.pdf> [as of Apr. 5, 2021].)

The Putative Solution

In the face of this dilemma, civil litigators did not simply capitulate. Rather, they came up with an approach that seemed to create a final judgment and remain consistent with the goal of judicial economy while at the same time preserving for potential trial the minor causes of action. Their putative solution required an agreement among the parties that had three essential components.

First, the plaintiff agreed to voluntarily dismiss the minor causes of action *without prejudice* (i.e., reserving the right to try them at a later date). Since caselaw made it clear that "claims that have been dismissed, whether with or without prejudice, are not 'pending' for purposes of the one final judgment rule" (*Abatti v. Imperial Irrigation District* (2013) 205 Cal.App.4th 650, 666, citation omitted), the voluntary dismissal of the remaining claims created a final judgment subject to appeal.

Second, the parties agreed to waive the statutes of limitations on all voluntarily dismissed claims. This provision would ensure that the minor, dismissed claims would not be time-barred should the duration of the appellate process exceed the statutory time limit on those claims.

Third, the parties agreed that after the appeal the voluntarily dismissed claims would be dismissed with prejudice unless the appellate court reversed the judgment and remanded the case to the trial court (i.e., found some error in dismissing one or more of the major claims). This provision was crucial. It arguably preserved the one final judgment rule's judicial economy rationale by tying the fate of the dismissed claims to the resolution of the major causes of action on appeal, thus preventing piecemeal appeals of the separate claims.

The Response of the Courts of Appeal—*Don Jose's* et al.

No one knows how long this approach may have been employed without being subjected to judicial scrutiny. Since the parties' side agreements would not necessarily have been on the record, the appellate courts could have seen nothing more than a judgment with all causes of action dismissed either by the trial court or by the plaintiff—in other words, a judgment that seemed perfectly ordinary and final.

Eventually, however, the issue found its way into an appellate court and a published opinion. In *Don Jose's Restaurant, Inc. v. Truck Ins. Exchange* (1997) 53 Cal.App.4th 115 (*Don Jose's*), the Court of Appeal made it clear that it did not approve of the practice. The first words of the opinion are: "In this case we condemn the artifice of trying to create an appealable order from an otherwise nonappealable grant of summary adjudication by dismissing the remaining causes of action without prejudice but with a waiver of applicable time bars." (*Id.* at p. 116.) And echoing the tone of disapproval with which the opinion begins, the court notes that the "stipulation here virtually exudes an intention to retain the remaining causes of action for trial" and "the one final judgment rule does not allow contingent causes of action to exist in a kind of appellate netherworld." (*Id.* at p. 118.) Thus, the central holding of *Don Jose's* appears to be that so long as any cause of action remains open to possible trial, there can be no final judgment from which a valid appeal may be taken—a conclusion in direct tension with the principle that a judgment is final for purposes of appeal even if some of the causes of action had been voluntarily dismissed without prejudice.

Moreover, the entire tone of the opinion indicates that the court is *offended* by the parties' effort to craft a final, appealable judgment that, even if somewhat unorthodox, simply attempts to achieve economy for litigants while at the same time preserving the goals of the one final judgment rule. That reaction seems misplaced. Attempting to create an appealable judgment, even if unsuccessful, is not malum in se conduct.

The Supreme Court Weighs In—*Kurwa I*

Despite *Don Jose's* unvarnished disapproval, litigants continued to test judicial tolerance of the voluntary-dismissal-with-stipulated-time-waiver approach. The result: over the next several years, four additional appellate courts issued published opinions agreeing with *Don Jose's* holding that the practice violated the one final judgment rule. (See *Hoveida v. Scripps Health* (2005) 125 Cal.App.4th 1466, 1469; *Hill v. City of Clovis* (1998) 63 Cal. App.4th 434, 445; *Four Point Entertainment, Inc. v. New World Entertainment, Ltd.* (1997) 60 Cal.App.4th 79, 83; *Jackson v. Wells Fargo Bank* (1997) 54 Cal.App.4th 240, 242.) Significantly, these opinions were published even though none purported to break new ground; instead, all expressed solidarity with *Don Jose's* animosity by quoting liberally and enthusiastically from *Don Jose's*.

Thus, as the 1990's transitioned to the 2000's, appellate courts were unanimously embracing *Don Jose's* antipathy to the voluntary-dismissal-with-time-waiver practice. But the litigators persisted. And in 2012, that persistence paid off when, in *Kurwa v. Kislinger*, a Court of Appeal finally published an opinion holding that a judgment was final for purposes of appeal so long as all claims were either tried or dismissed, even if the dismissals were voluntary and accompanied by a statute of limitations waiver. (See *Kurwa v. Kislinger* (2012) 204 Cal.App.4th 21, 30, revd. *Kurwa I*, *supra*, 57 Cal.4th 1097.)

The litigators' victory was short-lived. The California Supreme Court reversed the judgment of the Court of Appeal in a unanimous opinion. In doing so, the Court made it clear that violation of the one final judgment rule was *not* based on the fact that claims were dismissed without prejudice. The Court explained that a plaintiff has a statutory right to voluntarily dismiss a cause of action without prejudice before trial, and that "such a dismissal, unaccompanied by any agreement for future litigation, does create sufficient finality as to that cause of action so as to allow appeal

from a judgment disposing of the other counts." (*Kurwa I*, *supra*, 57 Cal.4th at p. 1105.)

Rather, the Court located the one final judgment problem in the statute of limitations waivers. The Court noted that without such a waiver, a dismissal of claims without prejudice "includes the very real risk that an applicable statute of limitations will run before the party is in a position to renew the dismissed cause of action." (*Kurwa I*, *supra*, 57 Cal.4th at p. 1105.) By contrast, the Court asserted, "when the parties agree to waive or toll the statute on a dismissed cause of action pending an appeal, they establish an assurance the claim *can* be revived for litigation at the appeal's conclusion. It is that assurance—the agreement keeping the dismissed count legally alive—that prevents the judgment disposing of the other causes of action from achieving finality." (*Id.* at p. 1106.)

The Court overstates the effect of the limitations waiver when it says it creates an "assurance" that the dismissed counts can be revived after appeal. At most, the waiver removes one potential defense that *might*, depending on the length of the statutes of limitations, preclude the dismissed claims from being brought postappeal. Since the statutes of limitations on many California civil claims are three years, four years, or more (see, e.g., 3 years for liability based on statute (Code Civ. Proc., § 338, subd. (a)); 3 years for trespass (*id.*, § 338, subd. (b)); 4 years for breach of written contract (*id.*, § 337, subd. (a)); 4 years for breach of written lease (*id.*, § 337.2); 10 years for action on a judgment (*id.*, § 337.5 subd. (b))), and since the median time for processing a civil appeal in California is 589 days (Jud. Council of Cal., Rep. on Court Statistics (2020) Fiscal Years 2009-12 Through 2018-2019 Statewide Caseload Trends, figure 33: Civil Appeals: Time From Notice of Appeal to Filing Opinion (90th Percentile and Median), p. 36 https://www.courts.ca.gov/documents/2020-Court-Statistics-Report.pdf [as of Apr. 5, 2021]), a dismissed claim could survive an intervening appeal even without a limitations waiver, especially when the action was filed early in the limitations period and the primary claim was dismissed early in the litigation.

Moreover, the opinion fails to acknowledge that an agreement between the parties to tie the fate of the dismissed claims to the outcome of the appeal means that the most significant barrier to any postappeal trial is the need to persuade the appellate court that there was reversible error in the trial court. Under the opinion, any party is authorized to dismiss without prejudice unadjudicated causes of action and appeal others, and nothing can stop that party from timely refiling the dismissed claims later—even if the appeal is unsuccessful. Such a scenario would clearly permit a multiplicity of trial proceedings and appeals, in direct contravention of the policies behind the one final judgment rule. By contrast, under an agreement of the parties tying the continuing viability of the dismissed claims to the outcome on appeal, the situation is functionally identical to a case where all claims had been adjudicated before the appeal—claims could not be split off and tried and appealed separately.

Indeed, the opinion all but concedes that such a deal between the parties achieves the goal of judicial economy embodied in the one final judgment rule, noting that in the presence of such an agreement, "it might be debated whether the *Don Jose's* rule is needed to prevent multiple appeals." (*Kurwa I*, *supra*, 57 Cal.4th at p. 1106.) But rather than explaining how multiple appeals could still be pursued under such an agreement, the opinion points instead to the one final judgment rule's "salutary effects beyond simply reducing the number of appeals." (*Ibid.*)

The "salutary effects" the opinion points to seem mere makeweights, particularly in the context of the issue before the Court. The opinion first offers that the one final judgment rule avoids "uncertainty and delay in the trial court." (*Kurwa I*, *supra*, 57 Cal.4th at p. 1106.) But however true that might be where a party sought to appeal some claims while others remained pending in the trial court, it obviously has no application where, as here, *nothing* remains pending in the trial court. The opinion also claims that several benefits may flow from requiring all claims to be adjudicated in the trial court prior to the appeal—the trial court might change its mind on the issues being appealed or additional trial court rulings will make a more complete record on appeal. (*Ibid.*) But these "salutary effects" are at best highly speculative, particularly where the claims that would remain to be adjudicated are so peripheral to the central claims that they are not worth adjudicating separately. It is hard to see how these vague potential benefits could independently justify the result—in the absence of any substantive impact on judicial economy—as the opinion claims.

After *Kurwa I*, California law regarding the one final judgment rule is marred by a central inconsistency: a judgment deciding some fully adjudicated claims may be made final and appealable by the voluntary dismissal of unadjudicated claims, even where the limitations periods for the latter claims are long enough that revival of those claims is virtually guaranteed and may result in a multiplicity of appeals. Yet under *Kurwa I*, the one final judgment rule precludes the parties from appealing after stipulating to a waiver of the limitations periods of the adjudicated claims—even if the parties have also agreed to a structure that insures no multiplicity of appeals.

Despite its weaknesses, *Kurwa I* is a unanimous California Supreme Court decision that relies on five intermediate appellate court decisions expressing passionate hostility to a perceived "artifice." There's not much chance its precise holding will be revisited any time soon.

But meanwhile, the economic realities of civil litigation practice remain, and the circumstances that gave rise to *Kurwa I* and its predecessors will continue to recur. No doubt litigators will continue to seek new approaches to the problem, informed by the doctrinal weaknesses of *Kurwa I* and forged by the demands of litigation economics, perhaps leading someday to a viable solution. In the meantime, a few potential (but less than perfect) solutions are suggested below.

Potential Solutions

There are a few possible approaches to the *Kurwa* conundrum that would appear still to be available under current caselaw.

First, the plaintiff can always unilaterally dismiss the unadjudicated claims without prejudice and accept the risk that those claims will be unavailable for trial after the appeal. *Kurwa I* makes it clear that claims disposed of in that fashion are sufficiently final to create an appealable judgment. And, as noted above, the statutes of limitations on a number of California claims exceed three years, which may provide sufficient time to complete the appeal and file a new action within the applicable limitations periods.

A riskier variation on that approach would be for the plaintiff to voluntarily dismiss without prejudice the unadjudicated claims, coupling that dismissal with an agreement with the defendant that the parties will make every effort to expedite the appeal. The danger in this approach is that the appellate court may view the side agreement to expedite the appeal as equivalent to the side agreement to waive the statute of limitations. But the counter argument is that the agreement to expedite cedes the timing to the appellate court and does not result in an "assurance" of retrial comparable to the stipulation condemned in *Kurwa I*.

Another, seemingly less risky approach would be for the plaintiff to voluntarily dismiss the unadjudicated claims *with* prejudice (thus clearly creating an appealable judgment) while at the same time the parties agree on some monetary value for the unadjudicated claims that would be paid only if the plaintiff were successful both in getting the judgment reversed *and* at trial of the remanded claims. This approach would seem entirely consistent with the one final judgment rule and would provide the plaintiff with potential recovery on the unadjudicated claims, but only if the plaintiff is able to overcome several significant hurdles to recovery.

Postscript: *Kurwa v. Kislinger* Redux (*Kurwa II*)

Several years after *Kurwa I* was decided, there was a new development that could further encourage litigators to experiment with finding a solution to the one final judgment problem presented there. This new development came from a surprising source—another California Supreme Court decision in the *Kurwa* case itself.

After the *Kurwa* case was remanded to the trial court, the plaintiff sought to secure a final judgment by dismissing his unadjudicated claims with prejudice. But there was another open claim—the defendant's cross-complaint against the plaintiff. And the defendant had "no incentive" to dismiss that claim, as to which the parties had stipulated to waiver of the statute of limitations. (*Kurwa v. Kislinger* (2017) 4 Cal.5th 109, 115 (*Kurwa II*).) The trial court refused to vacate that stipulation or its earlier judgment, holding it had no jurisdiction to do so. (*Id.* at p. 116.)

The Supreme Court held the trial court's ruling was error. It explained that because the core holding of *Kurwa I* was that the previous judgment was not final and appealable, "[i]t stands to reason that . . . the trial court . . . retains the power to render one." (*Kurwa II*, *supra*, 4 Cal.5th at p. 116.) Thus, the high court concluded that "when the parties, by agreement, make a failed attempt to secure appellate review of a trial court's nonfinal judgment, the trial court retains the power to vacate both the defective judgment and the underlying stipulation—that is, to restore the parties to the positions they would have been in absent the failed attempt." (*Id.* at p. 118.)

Kurwa II stands for the proposition that a failed attempt to create an appealable judgment by dismissal and/or stipulation is not necessarily fatal. A trial court's entry of a nonfinal judgment cannot divest it of jurisdiction to act further in the case because, by definition, the trial court's jurisdiction is not exhausted until a final judgment has been entered. And if the parties stipulated to provisions under the misapprehension that they were creating a final, appealable judgment, the trial court could provide relief and rectify the situation on remand.

Kurwa II provides litigators whose efforts to create a final judgment have been unsuccessful with a road map to the status quo ante. It effectively constitutes insurance that all is not lost if an experiment in creating an appealable judgment does not work. As such, the decision represents an important fail-safe mechanism that presumably will encourage such experimentation.

The one final judgment rule exists principally to protect appellate courts from having to entertain multiple, piecemeal appeals. Generally, if that goal places a burden on the litigants, it's

tough luck for the litigants—judicial economy is simply a more important societal goal. But if litigators can create an approach that satisfies the demands of both judicial economy and litigation economy, that's a boon for everyone. After *Kurwa II*, the legal landscape presents a favorable environment for finding a solution to the *Kurwa* conundrum.

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