Appeals, Writs and Post-Trial Motions

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■ Overview

The ongoing overhaul of the rules governing appeals continued in 2002. Rules 19 to 29.9 of the *California Rules of Court* and certain other rules were amended effective January 1, 2003. In the first part of this article, we summarize the most significant of these rule changes. We next discuss recent statutory changes affecting appellate practice. We conclude by examining noteworthy judicial decisions from 2002 in the areas of appeals, writs and post-trial motions.

■ Rule Changes

Rule 1. Taking the Appeal

Unifying the diverse practices of the appellate districts and divisions, the Judicial Council has adopted a form Civil Case Information Statement for statewide use. Rule 1(f) now requires the appellant to file the statement in the reviewing court within 10 days after the Court of Appeal clerk mails the form to the appellant.

Rule 15. Service and Filing of Briefs

In a concession to modern technology (and to simplify the lives of appellate practitioners), rule 15(b)(1) now provides that stipulations extending time to file briefs may be submitted with facsimile copies of signatures, so long as at least one of the signatures is an original.

Rule 23. Oral Argument and Submission of the Cause

Rule 23(b) now requires the clerk to "send a notice of the time and place of oral argument to all parties *at least 20 days* before the argument date." *California Rules of Court* rule 23(b) (emphasis added); *see, California Rules of Court* rule 29.2(c) (same requirement for Supreme Court arguments). This new minimum notice requirement was designed "(1) to enhance the benefit of oral argument to the reviewing court by ensuring that the parties have adequate time to prepare, (2) to reduce the number of counsel's calendar conflicts with other courts, and (3) to promote consistency between Courts of Appeal and districts on this important step in the appellate process." *California Rules of Court* rule 23(b) advisory comm. cmt. (West 2003).

Rule 24. Filing, Finality and Modification of Decision

Rule 24(b)(5) now provides that the 30-day finality period for a Court of Appeal opinion begins to run anew when the court certifies for publication an opinion that was not initially published. This change recognizes that a party's decision whether to seek rehearing and/or review may depend on whether the opinion is published. The change affords the parties — and interested non-parties, who may not be aware of the opinion until it is published — a fair opportunity to seek appropriate relief from the newly published opinion.

Rule 25. Rehearing

In conformity with the purpose of the amendment to rule 24 described above, rule 25 now allows a party to file a petition for rehearing within 15 days after the court files an order certifying the opinion for publication, unless the party earlier filed a petition for rehearing. *California Rules of Court* rule 25(b)(1)(B). An answer to any petition for rehearing is now due eight days after the petition is filed (*see, California Rules of Court* rule 25(b)(2)), rather than 23 days after the opinion is filed, which was the deadline under former rule 27(c).

Rule 27. Costs and Sanctions

Rule 27(e)(1) now expressly recognizes the Court of Appeal's authority to impose sanctions *on its own motion* for a frivolous appeal or for unreasonably violating the rules.

Rule 28. Petition for Review

Rule 28(b)(4) now expressly recognizes the Supreme Court's frequently exercised authority to grant review not for the purpose of deciding the case but "for the purpose of transferring the matter to the Court of Appeal for such proceedings as the Supreme Court may order." *California Rules of Court* rule 28(b)(4). The court typically exercises this authority when ruling on a petition for review of a Court of Appeal order summarily denying a writ petition.

Rule 28.1. Form and Contents of Petition, Answer and Reply

A petition for review must now disclose whether a petition for rehearing was filed in the Court of Appeal and, if so, how that court ruled on the petition. *California Rules of Court* rule 28.1(b)(3).

Consistent with previous rule changes governing the length of appellate briefs (*see, California Rules of Court* rule 14(c)), rule 28.1 now measures the length of petitions for review and answers in words rather than pages. The petition and answer may contain up to 8,400 words. *California Rules of Court* rule 28.1(e)(1). Any reply to the answer may contain up to 4,200 words. *Id.* There is no change to the rule that a reply is not permitted unless the answer raises additional issues for review. *See, id.* rule 28.1(d).

Rule 28.1(b)(5) resolves former uncertainty concerning the proper caption to be used on a petition for review. The petition should bear the same caption that appeared on the Court of Appeal's opinion.

Rule 29.1. Briefs by Parties and Amici Curiae; Judicial Notice

The length of briefs on the merits filed in the Supreme Court is now measured in words rather than pages. Each side's principal brief may contain up to 14,000 words, the same word limit that applies to briefs filed in the Court of Appeal. *California Rules of Court* rule 29.1(c)(1). A reply brief on the merits may contain up to 4,200 words. *Id.*

Rule 64. Transfer [from the Superior Court Appellate Division to the Court of Appeal]

Rule 64 now provides that, on its own motion or on the petition of a party, the Court of Appeal may transfer to itself a matter pending in the appellate division of the superior court and "may specify the issues to be briefed and argued." *California Rules of Court* rule 64(e). This enactment responds to the Supreme Court's decision in *Snukal v. Flightways Mfg., Inc.*, 23 Cal.4th 754, 775-76 (2000), which held that the statutes and rules then in effect did not permit the Court of Appeal to review or decide selected issues that were not dispositive of the transferred case.

■ Statutory Changes

Review of Orders Granting Summary Judgment

California Code of Civil Procedure section 437c(m)(2), governing appellate review of orders granting summary judgment or summary adjudication of issues, was adopted effective January 1, 2003. The new provision states: "Before a reviewing court affirms an order granting summary judgment or summary adjudication on a ground not relied upon by the trial court, the reviewing court shall afford the parties an opportunity to present their views on the issue by submitting supplemental briefs. The supplemental briefing may include an argument that additional evidence relating to that ground exists, but that the party has not had an adequate opportunity to present the evidence or to conduct discovery on the issue. The court may reverse or remand based upon the supplemental briefing to allow the parties to present additional evidence or to conduct discovery on the issue. If the court fails to allow supplemental briefing, a rehearing shall be ordered upon timely petition of any party." The statute, thus, guarantees the parties an opportunity to be heard before the appellate court affirms an order granting summary judgment on an alternative ground not relied on by the trial court. The significance of this statute remains to be seen. Ordinarily, a respondent will defend the trial court's summary judgment not only on the ground relied on by that court but also on the alternative grounds advanced in the summary judgment motion. The appellant, of course, then has an opportunity to address the alternative grounds in his or her reply brief. In that situation supplemental briefing would seem to be superfluous.

The last sentence of subdivision (m)(2) mandates a rehearing when the Court of Appeal affirms the order on the ground the parties did not have an opportunity to brief. This provision should not alter existing practice because it essentially duplicates the requirement of *Government Code* section 68081, which states: "Before...a court of appeal...renders a decision in a proceeding other than a summary denial of a petition for an extraordinary writ, based upon an issue which was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing. If the court fails to afford that opportunity, a rehearing shall be ordered upon timely petition of any party."

Service of Briefs in Civil Rights and Other Actions

Effective January 1, 2003, various statutes were amended to require service of briefs on the State Solicitor General in appeals involving certain civil rights claims (*see, California Civil Code* section 51.1 (West Supp. 2003)), claims for violation of the rights of the disabled (*see, id.* section 55.2), and claims by physically handicapped persons for denial of access to public buildings, (*see, California Government Code* section 4461 (West Supp. 2003)), places of public amusement, (*see, California Health & Safety Code* section 19954.5 (West Supp. 2003)), and public accommodations or facilities (*see, id.* section 19959.5).

■ Noteworthy Decisions

The following were among last year's noteworthy decisions in the areas of appeals, writs and post-trial motions.

■ California Court of Appeal Decisions

Appeal of Postjudgment Orders Awarding Attorney Fees

Code of Civil Procedure section 904.1(a)(2) provides that an appeal may be taken from an order made after an appealable judgment. Postjudgment orders awarding attorney fees are separately appealable under this provision. *Whiteside v. Tenet Healthcare Corp.*, 101 Cal.App.4th 693, 706 (2002). In two recent decisions the Court of Appeal clarified the relationship between the appeal of a postjudgment order awarding attorney fees and the appeal of the judgment itself.

In *Allen v. Smith*, 94 Cal.App.4th 1270 (2002), the court confronted the question whether it had jurisdiction to review a postjudgment order awarding attorney fees from which no separate appeal was taken. The court held: "An appellate court has no jurisdiction to review an award of attorney fees made after entry of the judgment, unless the order is separately appealed." *Id.* at 1284 (*citing, DeZerega v. Meggs*, 83 Cal.App.4th 28, 43 (2000)). The court elaborated that "[w]here several judgments and/or orders occurring close in time are separately appealable..., each appealable judgment and order must be expressly specified — in either a single notice of appeal or multiple notices of appeal — in order to be reviewable on appeal." *Id.* (*citing, Fish v. Guevara*, 12 Cal.App.4th 142, 147-48 (1993) (internal quotations omitted)).

In *Allen*, however, the court was compelled to apply this rule where it had decided to reverse the judgment on which the fee award was based. Respondents argued that the postjudgment order awarding them fees should stand notwithstanding reversal of the judgment because appellants failed separately to appeal the order. *Id.* at 1283-1284. The court rejected that contention, explaining that "'[a]n order awarding costs falls with a reversal of the judgment on which it is based.'" *Id.* at 1284 (*quoting, Merced County Taxpayers' Assn. v. Cardella*, 218 Cal.App.3d 396, 402 (1990)). This is true because "'[t]he successful party is never required to pay the costs incurred by the unsuccessful party.'" *Id.* Thus, though the appellate court lacked jurisdiction to reverse the order awarding fees and costs, it indicated that "the trial court should do so on remand." *Id.*

Because the *Allen* court held it lacked jurisdiction to review the non-appealed postjudgment order, the court did not address the question whether, on appeal from a postjudgment order setting the amount of attorney fees, the court may review the earlier determination, reflected in the judgment, that the prevailing party was entitled to fees. That question was answered affirmatively in *P R Burke Corp. v. Victor Valley Wastewater Reclamation Auth.*, 98 Cal.App.4th 1047 (2002). The court explained that an otherwise final judgment is interlocutory with respect to a fee award when it does not specify the amount of the fees but leaves the amount to be fixed by the court at a later time. *Id.* at 1053-54. Consequently, on appeal from the judgment, the appellate court could not review that portion of the judgment determining "entitlement to...fees as long as the amount of fees remained undetermined." *Id.* at 1054 (emphasis added). It follows that both the interlocutory determination of entitlement and the postjudgment determination of amount are reviewable on appeal from the postjudgment order fixing the amount. *Id.* at 1055. (Of course, if the judgment itself awards fees in a specified amount, then the appeal from the judgment places both the entitlement and the amount of fees before the appellate court.) The *P R Burke* court harmonized its decision with *Grant v. List & Lathrop*, 2 Cal.App.4th 993 (1992). In *Grant* the court held 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 [from the judgment] subsumes any later order setting the amounts of the award." *Id.* at 998. Thus, on appeal from the judgment, the court may review both the entitlement to fees (reflected in the judgment) and the amount (specified in the postjudgment order). *Id.* at 997-98. But "*Grant* did not hold...that an appellate court could review a determination of the entitlement to fees in a judgment even if there were no postjudgment order determining the amount of fees." *P R Burke Corp.*, 98 Cal.App.4th at 1055.

Grant is also consistent with *Allen*, discussed above. In *Grant* the judgment awarded fees but left the amount to be later determined. The court held the appeal from the judgment "subsumed" the later order setting the amount of the fees. In *Allen* the judgment did not award fees. Both entitlement and amount were determined in a postjudgment order. The court held the appeal from the judgment did not place the issues of entitlement or amount before the appellate court.

Sanctions for Frivolous Appeals

Code of Civil Procedure section 907 authorizes the reviewing court to impose "damages," *i.e.*, sanctions for a frivolous appeal: "When it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just." *Code of Civil Procedure* section 907. In two recent and noteworthy decisions, the Court of Appeal exercised its powers under section 907 to sanction parties and counsel for taking frivolous appeals.

In *Harris v. Sandro*, 96 Cal.App.4th 1310, 1312 (2002), at respondent's request, the court sanctioned an appellant and his counsel in the amount of $11,062, payable to respondent's counsel, for taking a frivolous appeal from an arbitration award. After reviewing the limited circumstances under which an arbitration award may be vacated (*see, Code of Civil Procedure* section 1286.2 (West Supp. 2003)), the court left little doubt that parties who seek appellate review of such awards will run a significant risk of sanctions: "By any objective measure, Harris's appeal is indisputably without merit. Whatever the merits of his position in the arbitration, his appeal of the resulting judgment was without factual or legal support. Given the clarity and frequency with which our Supreme Court has rejected attempts to obtain judicial review of arbitration awards, no reasonable attorney could have concluded otherwise." *Harris*, 96 Cal.App.4th at 1315. The court also grounded its decision to impose sanctions on a finding that the appeal was pursued for the improper purpose of delaying enforcement of respondent's unlawful detainer judgment. *Id.* at 1316.

In *DeRose v. Heurlin*, 100 Cal.App.4th 158 (2002), the court did not wait for respondent to request sanctions but imposed them sua sponte pursuant to both *Code of Civil Procedure* section 907 and *California Rules of Court* rule 26(a)(2), which permitted imposition of penalties and costs "'[i]f the appeal is frivolous or taken solely for the purpose of delay.'"[1] *Id.* at 179. After giving appellant — a lawyer — an opportunity to explain his conduct, the court found the appeal frivolous because its purpose was "to delay the effect of an adverse judgment and to cover up his mishandling of client trust funds and his dishonesty before the trial court." *Id.* at 179-80. The court explained that the sanctions of $6,000, payable to the Clerk of the Court of Appeal, were warranted "to vindicate the public interest in the orderly administration of justice." *Id.* at 181. The court elaborated that appellant's conduct "has harmed not only the parties to this case, but also those litigants waiting in line with nonfrivolous appeals and the taxpayers of California." *Id.* at 161. Interestingly, the court never reached the question whether the appeal was also frivolous because it had no merit. *Id.* at 180.

Conduct Constituting Waiver of Right to Appeal

Recent decisions of the Court of Appeal have considered what sort of conduct can result in a waiver of the right to appeal. In *Rancho Solano Master Ass'n v. Amos & Andrews, Inc.*, 97 Cal.App.4th 681 (2002), the issue was whether a defendant who fully satisfies a judgment thereby waives its right to pursue an appeal challenging the jury's apportionment of liability among codefendants. Applying the rule that "'[a] party who voluntarily complies with the terms of a judgment, or who satisfies it by voluntary payment or otherwise, impliedly waives the right to appeal from it,'" the court answered this question in the affirmative. *Id.* at 688. By settling and voluntarily paying a judgment, a would-be appellant affirms the judgment's validity and moots the issues raised by the appeal from the judgment. *Id.*

This rule applies even though the appellant seeks to challenge only the jury's apportionment of liability among co-defendants. An appellant who mounts such a challenge necessarily contests the adjudication of its own liability. *Id.* at 691. An appellant in this situation must pursue an appeal against the judgment creditor. *Id.* Allowing the appeal to proceed only against appellant's co-defendants creates the potential for a retrial "in which yet another party will bear the burden of proving [the appellant] liable." *Id.* The court distinguished the situation in which a defendant settles with plaintiff before trial, then appeals from an adverse judgment on its cross-complaint for indemnity from its co-defendants. *Id.* at 689-90.

By contrast the court in *H.D. Arnaiz, Ltd. v. County of San Joaquin*, 96 Cal.App.4th 1357 (2002), held that a party who places the proceeds of a judgment or appealable order in a trust account pending resolution

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[1] Effective January 1, 2003, the substance of former rule 26(a)(2) was moved to rule 27. It currently provides: "On a party's or its own motion, a Court of Appeal may impose sanctions, including the award or denial of costs, on a party or an attorney for: (A) taking a frivolous appeal or appealing solely to cause delay; ...." *California Rules of Court* rule 27(e)(1).

of the appeal does not thereby waive its right to appeal. The court acknowledged the settled rule that "'the voluntary acceptance of the benefit of a judgment or order is a bar to the prosecution of an appeal therefrom.'" *Id.* at 1362 (*quoting, Schubert v. Reich*, 36 Cal.2d 298, 299 (1950)). However, waiver will be found only where there is an "'unconditional, voluntary, and absolute acceptance of the fruits of the judgment.'" *Id.* at 1363. Though the court criticized the appellant for not informing the respondent that the proceeds would be placed in a trust fund pending appeal, the court nonetheless declined to find waiver because appellant's conduct did not show "a clear and unmistakable acquiescence in the trial court's order." *Id.* at 1364.

Even absent satisfaction of the judgment or unconditional acceptance of its benefits, a party may, by its conduct, waive its right to appeal. In *Guardianship of Melissa W.*, 96 Cal.App.4th 1293 (2002), the court considered whether an appellant may seek review of a trial court judgment at the same time he is violating the judgment. The court noted that it possesses the inherent power, without any prior judgment of contempt, to dismiss the appeal of any party who refuses to comply with the orders of the trial court. *Id.* at 1299. "'A party to an action cannot, with right or reason, ask the aid and assistance of a court in hearing his demands while he stands in an attitude of contempt to legal orders or processes of the courts of this state.'" *Id.* (*quoting, MacPherson v. MacPherson*, 13 Cal.2d 271, 277 (1939)).

The court in *Melissa W.* exercised these powers to their fullest, imposing the ultimate sanction of dismissal on the appellants for intentionally thwarting the very judgment of which they sought review. "'It is illogical and inequitable for appellant[s] to seek appellate review of the very orders [they have] blatantly violated.'" *Id.* (*quoting, In re Kamelia S.*, 82 Cal.App.4th 1224, 1227 (2000)). In addition the court criticized the conduct of appellants' lawyers, finding that they had gone beyond their proper roles as advisors to their clients by engaging in "affirmative conduct...to frustrate a valid judgment" not to their liking. *Id.* n.6. As their conduct rendered the appeal moot — and therefore frivolous — the court sanctioned appellants' lawyers $13,004, the amount of attorney fees deemed to have been incurred by respondent after the sanctioned lawyers' conduct rendered the appeal frivolous. *Id.* at 1301.

Judgment for Plaintiff on Defendant's Cross-Complaint Is Final and Appealable Though Plaintiff's Complaint in a Different Capacity Is Pending

Under the "one final judgment" rule, codified in *Code of Civil Procedure* section 904.1(a)(1) an appeal may be taken only from a final judgment, not an interlocutory judgment. Thus, a judgment on defendant's cross-complaint against plaintiff is ordinarily not final and, thus, not appealable while plaintiff's complaint is still pending. *Nicholson v. Henderson*, 25 Cal.2d 375, 381 (1944).

In *First Sec. Bank of Cal. v. Paquet*, 98 Cal.App.4th 468, 473 (2002), the Court of Appeal addressed the issue whether a judgment on a cross-complaint resolving all causes of action asserted against plaintiff in one capacity is final, when a complaint asserting causes of action on behalf of plaintiff in a different capacity is still pending. The court held the judgment on the cross-complaint was final and appealable. *Id.*

First Sec. Bank of Cal. was a shareholder derivative action in which one of defendants, a bank, cross-complained against shareholder plaintiffs, asserting causes of action against them in their individual capacities. The trial court sustained plaintiffs' demurrer without leave to amend and dismissed the cross-complaint. The bank appealed the trial court's post-judgment order awarding attorney fees to plaintiffs as prevailing parties. *Id.* at 472.

On its own motion the court raised the issue whether the postjudgment order was appealable under *Code of Civil Procedure* section 904.1(a)(2) as an order made after an appealable judgment. *Id.* at 472-73. To answer this question the court had to determine whether the judgment itself was appealable. *Id.* at 473. The court applied the rule that "[w]hen a party brings an action in multiple capacities, a judgment determining that party's rights in one capacity may be final even though the action is still pending on a claim brought in a different capacity." *Id.* at 474. Analogizing to other situations in which litigants sue in representative capacities, the court held that plaintiffs maintained the complaint solely in their derivative capacities as shareholders on behalf of the corporation. *Id.* Accordingly, plaintiffs as individuals were "not the actual parties to the complaint," and the pendency of those derivative causes of action could not prevent the judgment on the bank's cross-complaint against them in their individual capacities from being final. *Id.* at 475.

Court of Appeal Signals Intent to Issue More Memorandum Opinions in Unpublished Cases

California Rules of Court rule 976(b) provides that an opinion of the Court of Appeal should not be published unless it "establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in published opinions, or modifies, or criticizes with reasons given, an existing rule;...resolves or creates an apparent conflict in the law;...involves a legal issue of continuing public interest; or...makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of...written law." In *People v. Garcia*, 97 Cal.App.4th 847 (2002), the Court of Appeal for the Fifth Appellate District opined that appellate decisions possessing none of these attributes advance only the "'review for correctness'" function of the appellate court and therefore do not warrant publication and do "not merit extensive factual or legal statement." *Id.* at 851 (footnote omitted). The court confirmed "the propriety of memorandum opinions" in such cases and "signal[ed] the bar that it will likely see an increase in the frequency of such opinions" in both civil and criminal proceedings. *Id.* at 850.

The *Garcia* court explained that memorandum opinions may vary in style, from a "stereotyped checklist" to "a tailored summary of the critical facts and the applicable law." *Id.* at 853. In all cases, however, "an adequate abbreviated opinion must not mask an inadequate abbreviated appellate review." *Id.* at 854. Rather, "[a] memorandum opinion, no matter its format, should represent the end product of an internal evaluation by the court and its staff sufficient to ensure that the disposition reflects the correct legal result." *Id.*

The briefest memorandum opinions will be appropriate "in cases where the result is controlled by an admittedly constitutional statute and which present no special question of interpretation or application, cases where the result is controlled by an opinion of the Supreme Court of the United States or the Supreme Court of California, or, in the absence of either, where the result is consistent with an intermediate federal or state appellate decision with which the court agrees, cases where the factual contentions are subject to the routine application of the substantial evidence rule, cases decided by applying the authority of a companion case, cases in which the result is mandated by the United States Supreme Court, and cases where the appeal is not maintainable." *Id.* at 853.

The *Garcia* court justified its increased use of memorandum opinions on several grounds. Most fundamentally, the court recognized that an extended opinion in an unpublished case is largely a waste of judicial time and resources: "A meticulously crafted but unpublished legal essay, replete with extended analyses of law and expositions of reasoning and which distinguishes authorities and responds to every nuance of argument in the parties[']] briefs, requires the devotion of a share of the Court of Appeal's limited human and material resources far out of proportion to the utility of the effort." *Id.* at 851.

The court found no constitutional or practical impediments to its increased reliance on memorandum opinions. Memorandum opinions can satisfy the mandate of article VI, section 14, of the *California Constitution* that appellate opinions state the reasons for the disposition. "'[A]n opinion sufficiently states "reasons" if it sets forth the "grounds" or "principles" upon which the justices concur in the judgment.'" *Id.* at 853 (*quoting, Lewis v. Superior Court*, 19 Cal.4th 1232, 1262 (1999)).[2] Moreover, the court determined that memorandum opinions would not frustrate the operation of the doctrines of law of the case, collateral estoppel and res judicata. The proper application of these doctrines can be resolved with reference to both the memorandum opinion and the underlying record. *Id.* at 851-52.

Finally, in the court's view, memorandum opinions will not impede the parties' ability to secure review by the California Supreme Court. Because the Supreme Court "generally acts only where necessary to secure uniformity of decision or to settle an important question of law in matters of statewide impact," a case that the Court of Appeal deems appropriate for resolution by memorandum opinion will not likely be a candidate for review.[3] *Id.* at 854. In any event if a perceived

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[2] For a complete discussion of Lewis, *see, California Litigation Review, 1998 Edition*, "Appeals, Writs and Post-Trial Motions" at 70-71.

[3] Given that the Supreme Court often grants review of unpublished Court of Appeal opinions, one may reasonably question the *Garcia* court's assumption that a Court of Appeal's decision not to publish its opinion is a reliable indicator that the opinion does not address an issue of statewide significance.

deficiency in a memorandum opinion may hinder a party in seeking review, "the party can petition for a rehearing and point out the deficiencies in the court's opinion." *Id.*

■ Ninth Circuit Court of Appeals Decision

In Appropriate Situations, Parties May Appeal Adverse Summary Adjudication Rulings by Dismissing Remaining Claims without Prejudice

In *James v. Price Stern Sloan, Inc.*, 283 F.3d 1064 (9th Cir. 2002), the Ninth Circuit faced the issue whether a judgment of a district court is final and appealable under 28 U.S.C. section 1291 (1993) where appellant, after an adverse summary adjudication of fewer than all of her claims, sought and obtained the district court's dismissal of her remaining claims without prejudice in order to seek appellate review of the summary adjudication. Respondent contended that the judgment lacked finality because appellant, if successful on appeal, could resurrect the claims that had been dismissed without prejudice. *Id.* at 1065-66. Respondent also charged that dismissal of the claims without prejudice was "'an impermissible attempt to "manufacture finality."'" *Id.* at 1066.

The Ninth Circuit rejected respondent's contentions and held that the judgment entered by the district court following appellant's motion to dismiss was final and appealable. *Id.* at 1070. The Ninth Circuit based its decision largely on *Federal Rule of Civil Procedure* 54(b), which "enables the district court to sever a partial final judgment for an immediate appeal" where other issues in the case remain unresolved. *Id.* at 1067 & n.6. Following the Sixth, Seventh and Eighth Circuits, and in light of the district court's authority to permit such appeals, the Ninth Circuit found the judgment appealable on the record before it. Appellant had sought and obtained the district court's approval of her dismissal without prejudice and had requested that judgment be entered. *Id.* at 1068-69. The Ninth Circuit, therefore, concluded that the district court had determined that the adjudicated claims were ripe for review. *Id.*

In the Ninth Circuit's view, appellant's reasons for dismissing her remaining claims and appealing were "entirely legitimate" and evidenced no attempt to manipulate the court's appellate jurisdiction. *Id.* at 1066, 1068. The court pointed out that the dismissal was unilateral, not the result of a stipulation between the parties, and, thus, appellant ran the risk that a later attempt to resurrect her dismissed claims would be barred by the statute of limitations or laches. *Id.* at 1066. In addition, appellant "did not attempt to press the claims in a different federal lawsuit simultaneously with the appeal." *Id.* at 1067 (footnote omitted). But *see, Am. States Ins. Co. v. Dastar Corp.*, 318 F.3d 881 (9th Cir. 2003) (dismissing appeal for lack of appellate jurisdiction where parties stipulated to dismissal of certain claims without prejudice following district court's grant of partial summary judgment, and where district court issued no rule 54(b) judgment).

Significantly, the Ninth Circuit's decision in *James* is at odds with the rule followed in California state courts, which "precludes a party from obtaining immediate review of an adverse ruling on some of its claims by dismissing the remaining claims without prejudice," *Tudor Ranches, Inc. v. State Comp. Ins. Fund*, 65 Cal.App.4th 1422, 1429 (1998), or by having the trial court order the claims dismissed without prejudice, *Hill v. City of Clovis*, 63 Cal.App.4th 434, 443-44 (1998); *Four Point Entm't, Inc. v. New World Entm't, Ltd.*, 60 Cal.App.4th 79, 82-83 (1997). As the court explained in the seminal case of *Don José's Rest., Inc. v. Truck Ins. Exch.*, 53 Cal.App.4th 115 (1997), "[T]he one final judgment rule does not allow contingent causes of action to exist in a kind of appellate netherworld.... It makes no difference that this state of affairs is the product of a stipulation, or even of encouragement by the trial court. Parties cannot create by stipulation appellate jurisdiction where none otherwise exists." *Id.* at 118-19 (footnotes omitted).