APPEALS, WRITS AND POST-TRIAL MOTIONS

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Issues of particular interest to appellate lawyers did not figure prominently on the Supreme Court's docket in 1996. The notable exception, *In re Sade C.*, 13 Cal. 4th 952 (1996), is discussed in Part I below.

The Courts of Appeal, in contrast, spoke frequently — and sometimes inconsistently —on such diverse topics as appealability, writ petitions, the substantial evidence rule, and post-trial motion practice. We review the most interesting and important of these Court of Appeal decisions in Part II below.

We conclude in Part III with a recap of recent changes in the rules governing appeals and writs.

Supreme Court Decision

In 1996, the California Supreme Court declined to extend to a ***civil*** context the rule requiring an appellate court independently to review the record where appointed counsel for an indigent ***criminal*** defendant files a brief raising no specific issues. *In re Sade C.*, 13 Cal.4th 952.

The rule discussed in *Sade C.* was set forth in *Anders v. California*, 386 U.S. 738 (1967), where the United States Supreme Court delineated the procedures to be followed by appellate counsel appointed to represent an indigent criminal defendant on his first appeal of right, when counsel determines the appeal has no merit. Under those circumstances, counsel should request permission to withdraw but submit a brief referring to anything in the record that might arguably support the appeal. The court, not counsel, decides, after a full examination of the proceedings, whether the appeal lacks merit. *Id.* at 744; *see People v. Wende*, 25 Cal. 3d 436, 441 (1979) (on indigent criminal defendant's first appeal of right, *Anders* requires appellate court to review entire record "whenever appointed counsel submits a brief which raises no specific issues or describes the appeal as frivolous").

In re Sade C. raised the issue whether *Anders* "applies, or must or should be extended, to an indigent parent's appeal from a judgment or order, obtained by the state, adversely affecting his custody of a child or his status as the child's parent." 13 Cal. 4th at 959. The issue had divided the Courts of Appeal. *See id.* at 961-62 & n.2, 964 & n.3.

After reviewing *Anders* at length "in light of its antecedents and progeny," *id.* at 977, the court concluded *Anders* did not apply under the circumstances. In an opinion authored by Justice Mosk for a six-member majority, the court reasoned the *Anders* procedures were "designed solely to protect an indigent criminal defendant's right, under the Fourteenth Amendment's due process and equal protection clauses, to the assistance of appellate counsel appointed by the state in his first appeal as of right." *Id.* at 978. An indigent parent adversely affected by a state-obtained decision on child custody or parental status is not a criminal defendant and does not enjoy a comparable constitutional right to the assistance of appellate counsel appointed by the state. *Id.* at 982-83.

The court considered and rejected a number of arguments for extending *Anders* to an indigent parent's appeal from a judgment or order adversely affecting his custody of a child or his status as a parent. *Id.* at 984-93. The court explained that the requirement of fundamental fairness inherent in the Fourteenth Amendment's due process clause "does not compel imposition of *Anders*'s 'prophylactic' procedures" (procedures which the court characterized as "practically 'unproductive'"), *id.* at 990, and that criminal defendants and indigent parents are not similarly situated for purposes of the Fourteenth Amendment's equal protection clause, *id.* at 991. Finally, the court declined to extend *Anders* under the court's "inherent power to declare rules of California appellate procedure." *Id.* at 992. The

court observed: "Whatever the benefits in ensuring that appointed appellate counsel conduct themselves as active advocates — they appear to be relatively small — the costs are greater." *Id.* at 993.

In re Sade C. sounds the death knell for any contention that the appellate courts in California must adhere to the *Anders* procedures in any civil context. Henceforth, the courts will follow the procedures — including court-initiated examination of the entire record — only in the first appeal of right by an indigent criminal defendant.

Court Of Appeal Decisions

Appealability

Premature new trial orders

Last year in this space, we reported on the decision in *Cobb v. University of So. California*, 32 Cal. App. 4th 798 (1995) (Cobb I), an action for race discrimination and breach of contract. The jury failed to reach a verdict on the discrimination claim but awarded the plaintiff economic and noneconomic damages on the contract claim. The trial court set the discrimination claim for retrial, granted the defendant's motion for judgment notwithstanding the verdict (JNOV) on the contract claim for noneconomic damages, and granted the defendant's motion for new trial on the issues of liability for breach of contract and economic damages. *Id.* at 800-01. The Court of Appeal denied a motion to dismiss the appeal from the order granting a partial new trial, even though the discrimination claim, which was unaffected by the appeal, remained to be tried. *Id.* at 802-03.

We questioned the *Cobb I* decision, noting it was inconsistent with the spirit, if not the letter, of *Morehart v. County of Santa Barbara*, 7 Cal. 4th 725 (1994). In *Morehart*, the Supreme Court held "an appeal cannot be taken from a judgment that fails to complete the disposition of all the causes of action between the parties even if the causes of action disposed of by the judgment have been ordered to be tried separately, or may be characterized as 'separate and independent' from those remaining." *Id.* at 743; *see American Alternative Energy Partners II v. Windridge, Inc.*, 42 Cal. App. 4th 551, 557 (1996) ("When a cross-complaint remains pending between the parties, even though the complaint has been fully adjudicated, there is no final [appealable] judgment.").

We can now report that, when the time came for the *Cobb* court to decide the merits of the appeal, the court surprised the parties by reexamining and "disavow[ing]" its prior conclusion that the new trial order was appealable. *Cobb v. University of So. California*, 45 Cal. App. 4th 1140, 1145 (1996) (*Cobb II*). Citing *Morehart*, the *Cobb II* court held an "order granting a new trial, issued prior to final determination of all causes of action and issues in the case, [is] premature and is not appealable." *Id.* at 1144 (footnote omitted). A motion for new trial is premature until the trial is finished, and the trial is not finished until all causes of action have been finally determined as to the aggrieved party.[1] *Id.* at 1143-44.

The *Cobb II* court distinguished the premature new trial order there at issue from a partial new trial order, i.e., an order after trial granting a new trial on fewer than all issues. A partial new trial order "is appealable by any party aggrieved by the order, including the moving party who sought a new trial as to all issues." *Id.* at 1144.

The court also noted that, contrary to its understanding in *Cobb I*, the trial court had granted JNOV or alternatively a new trial on the plaintiff's entire contract cause of action. *Id.* at 1145 & n.4. That being so, the new trial order was not appealable for a second reason: under Code of Civil Procedure section 629, "the order granting the new trial is contingent upon the result of the appeal of the JNOV; that is, the order is not effective unless and until the JNOV has been reversed on appeal, and is moot if the JNOV is affirmed on appeal . . . ." *Id.* at 1146. Because the JNOV had yet to be entered (it would be entered after retrial of the plaintiff's discrimination claim), the new trial order was not "ripe for appeal." *Id.*

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[1] The court noted it was not bound by its earlier decision to the contrary. The law of the case doctrine "is a rule of procedure which does not go to the power of the court, and 'will not be adhered to where its application will result in an unjust decision.'" *Cobb II*, 45 Cal. App. 4th at 1145 n.3 (citation omitted). Further, the doctrine has no application when the appellate court "is considering the issue in the same, rather than a subsequent, appeal." *Id.*

Collateral orders

In 1996, as always, the courts reiterated that "the right to appeal is wholly statutory." *Bishop v. Merging Capital*, Inc., 49 Cal. App. 4th 1803, 1806 (1996); *see American Alternative Energy Partners II*, 42 Cal. App. 4th at 556 ("In civil matters, appellate jurisdiction is limited to the judgments and orders described in Code of Civil Procedure section 904.1."). Yet an important class of orders long held to be appealable is nowhere mentioned in the statutes — collateral orders, i.e., final orders on issues collateral to the principal disputed issues in the litigation.

Some courts have justified the collateral order doctrine on the ground a collateral order "is substantially the same as a final judgment in an independent proceeding." *In re Marriage of Weiss*, 42 Cal. App. 4th 106, 119 (1996). Other courts have characterized the doctrine as an exception to the one final judgment rule. *See, e.g., Ponce-Bran v. Trustees of Cal. State University*, 48 Cal. App. 4th 1656, 1661 (1996); *Marsh v. Mountain Zephyr, Inc.*, 43 Cal. App. 4th 289, 297 (1996); *see also* 9 Witkin, *Cal. Procedure*, Appeal § 45, at 69 (3d ed. 1985) (characterizing collateral order as akin to final judgment in independent proceeding and as exception to one final judgment rule). Whatever the doctrinal basis for the collateral order doctrine, it is firmly entrenched in California law.

The Supreme Court has held an interlocutory order is appealable as a collateral order if: (1) it is collateral to the subject matter of the litigation; (2) it is final on the collateral matter; and (3) it directs payment of money by the appellant or performance of an act by or against the appellant. *Sjoberg v. Hastorf*, 33 Cal. 2d 116, 119 (1948).

The challenge facing the appellate practitioner is to distinguish between an appealable collateral order and a nonappealable interlocutory order. The distinction can be critical. The right to appellate review of an appealable collateral order is lost if the aggrieved party neglects to file a timely appeal from the order. On appeal from a final judgment, the Court of Appeal cannot review the merits of any interlocutory order from which an appeal could have been but was not taken. *In re Marriage of Weiss*, 42 Cal. App. 4th at 119; Code Civ. Proc. § 906. [2]

The appellant learned this rule the hard way in *In re Marriage of Weiss*. The appellant appealed from a judgment entered August 4, 1993. The notice of appeal also specified orders for contributory attorney fees, filed July 29, 1991, and November 5, 1992, which directed the appellant to pay $10,000 and $12,000, respectively. 42 Cal. App. 4th at 118. The Court of Appeal explained the two orders were appealable collateral orders:

> 'When a court renders an interlocutory order collateral to the main issue, dispositive of the rights of the parties in relation to the collateral matter, and directing payment of money or performance of an act, direct appeal may be taken. [Citations.]' . . . Thus, a direct appeal lies from a pendente lite attorney fees order where nothing remains for judicial determination except the issue of compliance or noncompliance with its terms.

Id. at 119. Because the appellant "did not appeal from the immediately appealable pendente lite attorney fees orders . . . those orders became final and binding upon him." *Id.* Accordingly, the court dismissed "the purported appeals from the attorney fees orders." *Id.*

In *Ponce-Bran*, 48 Cal. App. 4th 1656, the court considered whether an order denying a motion for appointment of counsel in a civil case was an appealable collateral order. The court noted that, under *Sjoberg*, an order does not qualify as an appealable collateral order unless it directs payment of money or performance of an act. *Id.* at 1661. "Thus, while the present order may be collateral to the main action, and may be a final resolution of the issue, it does not order the plaintiff to pay money, nor does it require him to act or to refrain from acting.

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[2] Nonappealable interlocutory orders are merged into the final judgment and are reviewable on appeal from the judgment. Code Civ. Proc. § 906; *cf. Vernon v. Great Western Bank*, 51 Cal. App. 4th 1007, 1014-1015 (1996) (on appeal from order dismissing action for failure to prosecute, court will not review "an earlier, non-appealable summary adjudication order that would otherwise be reviewed on appeal from a final judgment rendered on the merits of the case").

Consequently, it is not appealable." [3] *Id.* at 1661-62.

To the same effect is *Conservatorship of Rich*, 46 Cal. App. 4th 1233 (1996), in which the appellant, a conservatee, purported to appeal from an order of the superior court denying her motion for substitution of attorneys. After concluding the order was neither a final judgment nor an order made expressly appealable by statute, the court considered whether the order qualified as an appealable collateral order. *Id.* at 1235. The court held the order was not appealable because it did not require payment of money or performance of an act. *Id.* at 1235, 1237. Rather, the order prevented performance of an act, namely, the substitution of counsel. "It is settled that an order which only prevents the performance of an act or payment of money does not meet the collateral order exception to the one-final-judgment rule and is nonappealable." *Id.* at 1235.

The Rich court dismissed as "aberrant," *id.* at 1237, those "few cases [that] have found orders appealable under the collateral order exception without considering the additional requirement that they direct payment of money or performance of an act . . . ." *Id.* at 1236-37.

Unfortunately, the past year saw its share of such "aberrant" cases. In *Gilbert v. National Enquirer, Inc.*, 43 Cal. App. 4th 1135 (1996), the court summarily rejected the respondent's contention that an order unsealing a record was not appealable because it did not direct payment of money or performance of an act: "We reject the Enquirer's contention that the order is not appealable. While the order does not require the payment of money, it is a final order on a collateral issue." [4] *Id.* at 1148 n.3.

In *Marsh*, 43 Cal. App. 4th 289, the court faced the question whether one party's expert witness could appeal from an order setting the hourly fee the opposing party would be required to pay for the expert's deposition testimony. After first resolving the issue of standing favorably to the appellant, the court considered whether the order was appealable as a collateral order.

The *Marsh* court recited the three-factor *Sjoberg* test, *id.* at 297-98, and recognized a "division of opinion and split of authority" on the issue whether an interlocutory order can be appealed if it does not direct payment of money or performance of an act, *id.* at 298. Though the order fixing the expert's hourly fee did not direct payment of money or performance of any act, the court nevertheless held the order satisfied the third requirement of *Sjoberg*. The court reasoned as follows: had the expert refused to sit for his deposition until the deposing party paid the expert's customary hourly fee (which was higher than the fee fixed by the court), and had the expert's recalcitrance been called to the court's attention, the court could have imposed a contempt-of-court or monetary sanction. A sanction order of that sort would satisfy the *Sjoberg* test and thus would be an appealable collateral order. The court saw no need to require the expert to subject himself to a sanction order as a prerequisite to obtaining appellate review of the order setting his fee:

> The cooperation of the expert witness by voluntarily proceeding with the deposition subject to the later determination of the reasonableness of the witness fee . . . rather than refusing to be deposed until the fee issue is resolved and subjecting himself to possible sanctions should not deprive the expert witness of the right to appeal the trial court's order setting the fee. No useful purpose would be served by requiring the witness to refuse to be deposed and possibly incur discovery sanctions or wait until the final judgment in the underlying litigation before seeking appellate review of the order setting his fee. . . . We conclude the order setting an expert witness's deposition testimony fee . . . is an appealable order.

Id. at 298-99.

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[3] The *Ponce-Bran* court acknowledged *Meehan v. Hopps*, 45 Cal. 2d 213 (1955), in which the Supreme Court, without overruling or distinguishing *Sjoberg*, held an order granting or denying a motion to disqualify opposing counsel is appealable as a collateral order. *Accord People v. Attransco*, 50 Cal. App. 4th 1926, n.2 (1996). The *Ponce-Bran* court disavowed any attempt "to harmonize Sjoberg and Meehan" and left it "for the Supreme Court to extend the rule [of Meehan] beyond the context of disqualifications." 48 Cal. App. 4th at 1661 n.3.

[4] The *Gilbert* court cited *Brun v. Bailey*, 27 Cal. App. 4th 641, 648-49 (1994), but the *Brun* court expressly declined to decide whether the order there at issue (denying a deponent's motion for a protective order requiring the deposing party to pay expert fees) was a collateral order or an appealable judgment in a special proceeding. *Id.* at 650 n.4. The *Brun* court did note, however, that "some of the more recent cases have disregarded" the rule that a collateral order cannot be appealed unless it directs payment of money or performance of an act. *Id.* at 649.

Compare *Marsh* with *Bishop*, 49 Cal. App. 4th 1803, in which the court considered the appealability of an order requiring a custodian of records to produce documents described in a subpoena duces tecum issued by the Department of Corporations (DOC). Both sides urged the court to review the order. *Id.* at 1806. Nevertheless, the court found the order was not made appealable by statute, and no other theory made the order appealable. Accordingly, the court dismissed the appeal. *Id.* at 1809. In contrast to the *Marsh* court, the *Bishop* court held that, unless and until the lower court actually imposed sanctions on the custodian for noncompliance, any appeal was premature:

> MCI and Link were ordered to produce documents, they did not comply with that order, and nothing happened. . . . Consequently, any ruling rendered by this court would be in the nature of an advisory opinion. That is to say, if we were to rule in favor of the DOC, we would simply be advising the appellants that, if the DOC pursues contempt proceedings, and the trial court finds MCI and Link in contempt, we will uphold that ruling on appeal. Similarly, our decision in favor of appellants would amount to no more than our advice to the DOC that contempt proceedings will ultimately prove fruitless.

Id. at 1808. The court concluded: "[I]f and when appellants' refusal to comply with the trial court's order results in an adverse consequence to them, they may seek the intervention of the appellate court, by appeal or by writ, as may be appropriate under the circumstances. Until that time, they have no cause to complain." *Id.* at 1809. Interestingly, though the order in *Bishop* required the appellants to perform an act, the court did not discuss whether the order might be appealable under the collateral order doctrine.

In this area of the law, where certainty is essential, there is much to be said for the "bright line" *Sjoberg* test. Decisions such as *Gilbert* and *Marsh*, reasonable though they may appear on their facts, obscure the "bright line" and thus engender uncertainty. Until the Supreme Court disapproves the decisions that have departed from *Sjoberg*, prudent counsel must be attentive to the possibility that an interlocutory order may be appealable even though it does not direct payment of money or performance of an act. When in doubt, file both an appeal and a petition for extraordinary writ.

Reconsideration orders

In *Crotty v. Trader*, 50 Cal. App. 4th 765 (1996), the appellant, who was proceeding pro se, filed a notice of appeal that did not clearly indicate whether he was appealing from the judgment, the order denying his motion for JNOV, or the order denying his motion for reconsideration of the order denying his motion for JNOV. *Id.* at 768. As required by the rules and settled law, *see* Cal. R. of Ct. 1(a), *D'Avola v. Anderson*, 47 Cal. App. 4th 358, 361 (1996), the court liberally construed the notice to be an appeal from all three. The court then considered whether the appeal from each was proper and timely.

The court joined the growing body of authority holding that a postjudgment order denying a motion for reconsideration, or granting reconsideration but denying the motion on its merits, is not itself appealable. 50 Cal. App. 4th at 769 & n.4. Moreover, the court held, the filing of a postjudgment motion for reconsideration, unlike the filing of a motion for new trial, does not extend the time to appeal from the judgment. *Id.* at 770-71; *accord Ramon v. Aerospace Corp.*, 50 Cal. App. 4th 1233, 1236 (1996); *see* Cal. R. of Ct. 3(a).

In fact, the statutes do not authorize a motion for reconsideration of a final judgment once entered, and the court has no power to rule on such a motion.[5] *Ramon*, 50 Cal. App. 4th at 1237-38 & n.3. A final judgment should be attacked by a motion for new

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[5] In *Advanced Building Maintenance v. State Comp. Ins. Fund*, 49 Cal. App. 4th 1388 (1996), the court sustained a demurrer to the complaint without leave to amend on October 7; the amended notice of ruling was served October 12; a judgment of dismissal was entered October 28; the plaintiff filed a motion for reconsideration of the order sustaining the demurrer on October 31; and the defendant served notice of entry of judgment on November 2. *Id.* at 1391. The trial court denied the motion for reconsideration on the ground it was untimely, having been filed more than ten days after service of the notice of ruling. *Id.* at 1392. The court of appeal affirmed on the same ground. *Id.* The court reached the right result but for the wrong reason. The deadline for filing a motion for reconsideration is ten days after service of "written notice of entry of the order," not notice of ruling. Code Civ. Proc. § 1008(a) (emphasis added). The motion for reconsideration was properly denied, however, because the statutes do not permit a motion for reconsideration after entry of a final judgment. *See Ramon*, 50 Cal. App. 4th at 1236-37.

trial, *see* Code Civ. Proc. § 659, a motion to vacate the judgment, Code Civ. Proc. § 663, or an appeal. *Ramon*, 50 Cal. App. 4th at 1238.

Treating Infirm Appeals As Writ Petitions

A party who has briefed an "appeal" only to discover he or she has appealed from a nonappealable order may ask the court to treat the appeal as a petition for extraordinary writ and to exercise its discretion to hear and decide the petition. *Ponce-Bran*, 48 Cal. App. 4th 1656, stated the court will rarely afford such treatment, even if the parties stipulate to it. "Although we have the authority to treat an infirm appeal as a writ, appellate courts exercise this power only sparingly in extraordinary circumstances where the parties have stipulated to the procedure; '[o]therwise, the device of filing an unauthorized appeal followed by such a stipulation would inundate this court with piecemeal appeals.'" *Id.* at 1662 (citation omitted). The court declined to exercise its discretion to treat the infirm appeal as a petition for writ, where the opposing party had not stipulated to the procedure, and the determinative issue in the case was neither sharply in focus nor thoroughly briefed.

For other courts, judicial economy seems to be the guiding factor. In *Lopez v. Superior Court*, 45 Cal. App. 4th 705 (1996), the court opened its opinion by stating it would treat the plaintiff's appeal from a minute order granting the defendant's motion for summary judgment as a petition for writ of mandate. *Id.* at 710. The court noted both parties had "submitted the matter on the merits of the motion for summary judgment." *Id.* at 710 n.1. The court opted to treat the notice of appeal as a writ petition "in the interests of justice and judicial economy." *Id.*

The subject received a thorough treatment in *Stonewall Ins. Co. v. City of Palos Verdes Estates*, 46 Cal. App. 4th 1810 (1996), where the appellants purported to appeal from a judgment entered after the first phase of a two-phase trial. Citing *Morehart*, 7 Cal. 4th 725 (discussed above), the *Stonewall* court held the Phase I judgment was not appealable because it did not conclude the dispute between the parties. 46 Cal. App. 4th at 1830. Nevertheless, the court found the case satisfied "the criteria for treating the notices of appeal as petitions for a peremptory writ of mandate." *Id.* at 1831. The court cited the following reasons: the case satisfied all the elements prescribed by California Rule of Court 56 for an original mandate proceeding because the clerk's and reporter's certifications supplied the functional equivalents of any necessary verifications and there was no indication the trial court (as the nominal respondent on a writ proceeding) would want to appear as a party; all parties agreed the matter should go forward; the merits of the issues decided by the trial court had been thoroughly briefed twice before the Court of Appeal and once before the Supreme Court, and further proceedings in the trial court would not likely improve the record; the Phase I judgment was almost seven years old; and judicial economy would not be served by deferring resolution of the Phase I issues until after the conclusion of Phase II and entry of final judgment. "To proceed through the trial of Phase II and at some point of time thereafter ascertain through the appellate process that the trial court committed reversible error in Phase I so that both Phase I and potentially Phase II need to be retried would be too Kafkaesque a result." *Id.* at 1831-32.

Substantial Evidence Rule

Any attorney who has challenged a judgment on the ground it is not supported by substantial evidence knows the argument can be a tough sell in the Court of Appeal. Attorneys contemplating such an argument would do well to consider the thoughtful treatment accorded the subject in *Roddenberry v. Roddenberry*, 44 Cal. App. 4th 634, 651-54 (1996). The opinion features a compendium of authorities, concluding with an observation from which appellants may take heart: "Substantial evidence is . . . not merely an appellate incantation designed to conjure up an affirmance. To the contrary, it is essential to the integrity of the judicial process that a judgment be supported by evidence that is at least substantial. An appellate court need not 'blindly seize any evidence . . . in order to affirm the judgment. The Court of Appeal 'was not created . . . merely to echo the determinations of the trial court.'" *Id.* at 652 (citations omitted).

Post-trial Motions

Code of Civil Procedure section 663 permits the aggrieved party to file a motion to vacate a judgment and enter a different judgment if the judgment rests on an incorrect or erroneous legal basis. A motion to vacate under section 663 must be filed before the

judgment is entered or within 15 days after service of written notice of entry of the judgment. Code Civ. Proc. § 663a. In *Advanced Building Maintenance*, 49 Cal. App. 4th 1388, the aggrieved party filed a motion to vacate under section 663 about two weeks after the 15-day deadline. The trial court granted relief from the late filing under Code of Civil Procedure section 473, which authorizes the court to "relieve a party . . . from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." The trial court then vacated the judgment. *Id.* at 1393. The party who had prevailed on the judgment appealed from the order vacating the judgment. *Id.* at 1390.

The court of appeal reversed, holding the 15-day deadline for filing a motion to vacate under section 663 is jurisdictional and cannot be extended by application of section 473. *Id.* at 1393-94. The court reasoned a motion to vacate is procedurally akin to a motion for new trial. Since the 15-day deadline for filing a notice of intention to move for new trial is jurisdictional and cannot be extended, *see* Code Civ. Proc. § 659, the same deadline for filing a motion to vacate under section 663 must also be regarded as jurisdictional and cannot be extended. 49 Cal. App. 4th at 1393-94.

Another postjudgment deadline was at issue in *Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.*, 48 Cal. App. 4th 1317 (1996).[6] Under Code of Civil Procedure section 659, a party must file its notice of intention to move for a new trial "[w]ithin 15 days of the date of mailing notice of entry of judgment by the clerk of the court pursuant to Section 664.5, or service upon him by any party of written notice of entry of judgment, or within 180 days after the entry of judgment, whichever is earliest . . . ." Under Code of Civil Procedure section 660, the court's power to rule on a motion for new trial expires "60 days from and after the mailing of notice of entry of judgment by the clerk of the court pursuant to Section 664.5 or 60 days from and after service on the moving party by any party of written notice of the entry of the judgment, whichever is earlier, or if such notice has not theretofore been given, then 60 days after filing of the first notice of intention to move for new trial." Section 664.5 provides, in pertinent part: "Upon order of the court in any action or special proceeding, the clerk shall mail notice of entry of any judgment or ruling, whether or not appealable." Thus, if the clerk mails notice of entry of the judgment "upon order of the court," the 15-day deadline to file a notice of intention to move for new trial and the 60-day deadline within which the trial court may rule on the motion both begin to run.

In *Van Beurden*, judgment was entered and the clerk mailed a file-stamped copy of the judgment to the parties on July 28; the aggrieved party filed a notice of intention to move for new trial on August 8; the court denied the motion for new trial on October 7; and the aggrieved party filed a notice of appeal on November 4. 48 Cal. App. 4th at 1321-22. The question presented was whether the notice of appeal had been timely filed.

The Court of Appeal first reached the noncontroversial conclusion that the clerk's mailing of a file-stamped copy of the judgment constituted "mailing of notice of entry of judgment" within the meaning of section 660. *Id.* at 1327-28.

The court then faced the question whether the clerk had mailed the file-stamped copy of the judgment "pursuant to Section 664.5," i.e., "upon order of the court." If so, the trial court's power to rule on the motion for new trial expired on September 26 (60 days after the clerk's mailing), and the last day to file a notice of appeal was October 26 (30 days after denial of the motion for new trial by operation of law, *see* Cal. R. of Ct. 3(a)).

Apparently, the trial court's record contained no documentation that the court had ordered the clerk to mail notice of entry of the judgment to the parties. *See Van Beurden*, 48 Cal. App. 4th at 1328. Arguably, that should have been the end of the matter. The Court of Appeal, however, "***inferred*** the trial court ordered the clerk to provide notice," based on the fact that on October 7, when the trial court denied the motion for new trial, the court described July 28 as the date of the clerk's mailing rather than the date of entry of the judgment. *Id.* at 1332 (emphasis added). The court reasoned that the

[6] Review granted 7/24/96.

clerk's mailing would have been significant, and thus would have been referenced by the trial court, only if the court had ordered the mailing pursuant to section 664.5. Had the trial court not ordered the mailing, the court would have referred to July 28 as the date of entry of judgment. The Court of Appeal concluded: "In sum, we infer from the October 7 order that the court intended the earliest applicable time limit under section 659 to apply. We reach this conclusion since the court relied on the date of the clerk's mailing, rather than the date of entry of judgment. This is consistent with the court making specific reference to section 659, which requires mailing of notice by the clerk pursuant to section 664.5." *Id.* at 1332. The court dismissed the appeal as untimely. *Id.* at 1333.

The court's reasoning was questionable. Where a party cannot determine by inspecting the court's records whether the clerk mailed notice of entry of judgment "upon order of the court," the party has neither actual nor constructive notice that his 15-day deadline to institute new trial proceedings and the court's 60-day deadline to rule on the motion are both running. Fundamental fairness dictates that the aggrieved party not be required to speculate or "infer" that the clerk mailed notice "upon order of the court." *Cf. Vernon*, 51 Cal. App. 4th at 1011, n.2 (where appellate court could not determine from trial court record whether dismissal order had been served on parties, appeal filed more than 60 but less than 180 days after entry of order deemed timely). The Court of Appeal in *Van Beurden* had to resort to the trial court's **October 7** remarks to support the conclusion that the trial court lost power to rule on the new trial motion on ***September 26***. *Id.* at 1333. A trial court's jurisdiction should be ascertainable with certainty ***before*** it expires, not in retrospect when it is too late for the court or the parties to act.

The Supreme Court has granted review in *Van Beurden* and may clarify the issue.[7]

Rule Changes

The following rules of interest to appellate lawyers were amended in 1996. Unless otherwise indicated, the amendments took effect on January 1, 1997.

Service of notice of appeal — Rule 1(a) was amended, effective July 1, 1996, to require the appellant to serve the notice of appeal on all parties. Failure to serve the notice, however, "shall not prevent its filing and shall not affect the validity of the appeal, but on reasonable notice the appellant may be required to remedy the failure." Cal. R. of Ct. 1(a).

Amicus curiae briefs — Rule 14(b) was amended to extend the time for a prospective amicus curiae to request leave to file a brief in the Supreme Court, until 30 days after all the parties' briefs have been completed. Under the former rule, the deadline for a prospective amicus curiae to request leave to file a brief was 30 days after filing of the first brief by the party whom the amicus curiae proposed to support.

Form of briefs — Rule 15, governing the format and length of briefs, was amended in numerous respects, effective July 1, 1996.

Notice of settlement pending appeal — Subdivision (e) was added to rule 19.5, effective July 1, 1996, to provide that, "[i]f a civil case is settled after a notice of appeal is filed, the appellant shall immediately give the reviewing court written notice; and shall give telephone or other oral notice if a hearing or conference is imminent." If the record on appeal has not yet been completed and transmitted to the Court of Appeal, the appellant must also notify the clerk of the superior court in writing.

Writ proceedings — Subdivision (h) was added to rule 56 to extend the time to file a responsive pleading in the trial court when a petition for review has been filed in certain writ proceedings.

Citation of opinions — Rule 977(a) formerly provided: "An opinion that is not ordered published

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[7] Shortly before this article went to press, the Supreme Court filed its decision. *Van Beurden Ins. Servs., Inc. v. Customized Worldwide Weather Ins. Agency, Inc.*, No. S053493, 1997 Cal. Lexis 631 (Mar. 6, 1997). The court unanimously reversed the order of the court of appeal, explaining: "[I]n a matter involving jurisdictional restrictions on the right to appeal, we should not engage in 'guesswork' concerning whether the trial court actually ordered the clerk to mail notice of entry of judgment. Nor should parties operate under uncertainty about when they must file an appeal." Id. at *22. To eliminate uncertainty for the appellate courts and the litigants, the Supreme Court adopted the following "bright line" rule: "[T]o qualify as a notice of entry of judgment under Code of Civil Procedure section 664.5, the clerk's mailed notice must affirmatively state that it was given 'upon order by the court' or 'under section 664.5' and a certificate of mailing the notice must be executed and placed in the file." *Id.* at *26.

shall not be cited or relied on by a court or a party in any other action or proceeding except as provided in subdivision (b)." Several courts construed the rule to bar citations to unpublished ***federal*** court decisions, many of which are accessible on computer databases. *E.g., Fireman's Fund Ins. Co. v. Haslam*, 29 Cal. App. 4th 1347, 1355 n.3 (1994).

Rule 977(a) was amended to clarify that it applies only to unpublished opinions of the California Courts of Appeal and the appellate departments of the superior courts. The rule was also amended to clarify that there is no distinction between the terms "ordered published" and "certified for publication." The amended rule reads: "An opinion of a Court of Appeal or an appellate department of the superior court that is not certified for publication or ordered published shall not be cited or relied on by a court or a party in any other action or proceeding except as provided in subdivision (b)."

Rule 977(c) was amended to require that a copy of "a cited opinion of any court that is available only in a computer-based source of decisional law" must be timely furnished to the court and all parties. The Supreme Court and the Judicial Council declined a proposal to bar citation of opinions available only in a computer database or in a specialized or topical reporter.