To appeal or not to appeal?

That is the question, and the answer begins with a look at the type of judgment

By Jay-Allen Eisen

Although a final judgment can be appealed, not every final judgment is appealable. "Final judgment," has special meaning in appellate practice. If a judgment isn't final for purposes of appeal, the appellate court has no jurisdiction and an appeal from the judgment must be dismissed. (*Hoveida v. Scripps Health* (2005) 125 Cal.App.4th 1466, 1469.)

One final judgment rule

Code of Civil Procedure (herein CCP), section 904.1 lists most, but not all, of the judgments and orders that are appealable in a civil action.[1] The first item on the list, in subdivision (a)(1), is a "judgment."

Subdivision (a) itself contains two exceptions. One is an interlocutory judgment, although a few are appealable under subdivisions (a)(8), (9), (11) and (12). These will be treated below. The other exception from appealability of a final judgment is a judgment of contempt. Review is by petition to the appellate court for a writ of habeas corpus or certiorari. (*Hustedt v. Workers' Comp. Appeals Bd*. (1981) 30 Cal.3d 329, 349.)

That does not mean all other judgments are appealable, however. Under the "one final judgment" rule, a judgment that does not resolve all issues between the parties on the merits cannot ordinarily be appealed. (*Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 741.) "The theory is that piecemeal disposition and multiple appeals in a single action would be oppressive and costly, and that a review of intermediate rulings should await the final disposition of the case." (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 96, pp. 158-159; *Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 697 (quoting Witkin).) The rule is strictly applied. (*Kinoshita v. Horio* (1986) 186 Cal.App.3d 959, 968.)

Must be "final" determination

A judgment, therefore, is appealable only if it is "the final determination of the rights of the parties in an action or proceeding." (CCP § 577.) "Final" in this sense means a judgment that "terminates the litigation between the parties on the merits and leaves nothing to be done but to enforce by execution what has been determined." (*Dana Point Safe Harbor Collective v. Superior Court* (2010) 51 Cal.4th 1, 5.) So, a judgment is final for purposes of appeal only "where no issue is left for future consideration except the fact of compliance or noncompliance" with its terms. (*Griset*, 25 Cal.4th at 698.) "[W]here anything further in the nature of judicial action on the part of the court is essential to a final determination of the right of the parties, the decree is interlocutory" and cannot be appealed. (*Olson v. Cory* (1983) 35 Cal.3d 390, 399.)

The label on the judgment does not control; even entitled "Final Judgment," unless it fully disposes of all issues between the parties on the merits, it is not appealable. In *Kurwa v. Kislinger* (2013) 57 Cal.4th 1097, the trial court dismissed all but one of the causes of action on a motion for summary adjudication. Pursuant to stipulation, the remaining cause of action, for defamation, was dismissed without prejudice and the statute of limitations waived as to that cause of action. The court then entered final judgment for defendant and plaintiff appealed.

The California Supreme Court ordered the appeal dismissed, holding that the judgment was not final. It did not dispose of all causes of action; the defamation cause of action remained "'legally alive.'" (*Id*., 57 Cal.4th at 1106.) Although that cause of action had been dismissed, the parties had preserved the right to litigate it by dismissing it without prejudice and waiving the statute of limitations. Thus, the "final" judgment did not fully dispose of all issues on the merits, since the defamation claim could be resurrected and litigated regardless of the outcome of the appeal.

Need not be final as to everyone

When there are multiple parties, the judgment does not have to dispose of all claims between all of the parties. When there are two or more defendants, a judgment that fully resolves all issues between the plaintiff and fewer than all defendants is final as to those defendants and appealable, even though plaintiff's action against the other defendants remains pending. (*Hydrotech Sys., Ltd. v. Oasis Waterpark* (1991) 52 Cal.3d 988, 993.) Similarly, when there are multiple plaintiffs, a judgment that disposes of all causes of action between one or more defendants and any plaintiff(s) is appealable, even though the lawsuit is still pending between the remaining plaintiff(s) and the same defendant(s). (*Justus v. Atchison* (1977) 19 Cal.3d 564, 567-568.)

And, if plaintiff sues in two capacities, a judgment fully determining his or her rights in one capacity is final and appealable even though the action is still pending on plaintiff's claim in another capacity. (*Dominguez v. City of Alhambra* (1981) 118 Cal.App.3d 237, 241 (wrongful death action by surviving spouse individually and as administrator of decedent spouse's estate; denial of claim as administrator appealable even though action by plaintiff as individual continued).)

Final determinations that are not appealable judgments

Some actions of the trial court may fully determine the parties' rights but are not final judgments – a statement of decision, for example. (*Alan v. American Honda Motor Co., Inc*. (2007) 40 Cal.4th 894, 901.) The court must enter judgment on the statement of decision, and the appeal is then taken from the judgment. (*Ibid*.)

An appellate court, however, has discretion to hear an appeal from a statement of decision when no separate judgment has been entered if, in the appellate court's view, the terms of the statement of decision show that the trial court intended it to be its final determination on the merits. (*Ibid*.) But if the trial court enters a separate judgment, then the appeal must be from the judgment. (*Ibid*.)

Summary judgment

An order granting summary judgment determines the parties' rights, but it is not appealable. (*Modica v. Merin* (1991) 234 Cal.App.3d 1072, 1073.) The order is not final; the court may change it, either on a motion to reconsider under CCP, § 1008 or *sua sponte*. (*Darling, Hall, & Rae v. Kritt* (1999) 75 Cal.App.4th 1148, 1156-1157; *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1100 (quoting *Darling, Hall & Rae*).) Before an appeal can be taken, the court must enter a judgment. (CCP, § 473c (m)(1).)

Obtaining an appealable judgment on a motion for summary judgment, therefore, is a two-step process. First, the court enters its order granting the motion, then, the court must enter a judgment. (*Id*.; *Davis v. Superior Court* (2011) 196 Cal.App.4th 669 (writ of mandate granted compelling trial court to enter judgment after granting motion for summary judgment).)

Occasionally a judge will issue an order granting summary judgment that sounds like a judgment but isn't. In *Swain v. California Casualty Ins. Co.* (2002) 99 Cal.App.4th 1, the order granting summary judgment stated that the motion for summary judgment was granted and "that judgment shall be entered forthwith in favor of [defendant] and against plaintiffs. . . ." (*Ibid*.) The court of appeal held that the order was not an appealable judgment. Among other things, "there is no express declaration of the ultimate rights of the parties, such as that 'plaintiffs shall take nothing,' or 'the action is dismissed.'" (*Id*. at 6.) Furthermore, the phrase "'judgment *shall* be entered forthwith'" (emphasis added) contemplated a further, separate document. (*Ibid*.[2])

Other dispositive orders

Like an order granting summary judgment, an order granting a motion for judgment on the pleadings is not appealable. (*Smiley v. Citibank* (1995) 11 Cal.4th 138, 144, fn. 1.) The same two-step process must be followed before an appeal can be taken: the court must first enter the order granting the motion, then enter a judgment. (*Ibid*.)

An order sustaining a demurrer to the entire complaint without leave to amend is also a final determination of the rights of the parties, but it is not an appealable order. After sustaining the demurrer, the court must dismiss the action; the appeal lies from the dismissal. (*In re Estate of Dito* (2011) 198 Cal.App.4th 791, 799.)

Interlocutory judgments

As noted earlier, some interlocutory judgments are appealable. (CCP, § 904.1(a)(8) (action to redeem property from mortgage or lien) and (a)(9) (partition action).) Probably the most frequently appealed appealable interlocutory judgment is one directing a party or a party's attorney to pay monetary sanctions exceeding $5,000. (CCP, § 904.1(a)(11).) An interim order imposing sanctions of more than $5,000 is also appealable under subsection (a)(12). This includes discovery sanctions. (*Rail-Transport Employees Ass'n v. Union Pac. Motor Freight* (1996) 46 Cal.App.4th 469, 475.) An interlocutory sanctions judgment or interim order for a lesser amount can be reviewed only by appeal from the final judgment or by writ petition. (CCP, § 904.1(b).[3])

The order or judgment must, of itself, require a payment in excess of $5,000. Suppose the court has imposed sanctions more than once; no single judgment or order is for more than $5,000, but they total more than that. They cannot be combined to meet the $5,000 minimum for appealability. Again, review must be by appeal from the final judgment or writ petition. (*Calhoun v. Vallejo City Unif. School Dist*. (1993) 20 Cal.App.4th 39, 44-45.)

Be alert, though: if a sanctions order is large enough to be appealable, it must be appealed *immediately*. The appeal cannot be delayed until a final judgment is entered. An appellate court has no authority "to review any decision or order from which an appeal might have been taken." (CCP, § 906.) So, if an appealable interlocutory judgment or order is not appealed, it becomes final and binding and cannot be reviewed in an appeal from the final judgment. (See *Machado v. Superior Court* (2007) 148 Cal.App.4th 875, 882, (order disqualifying counsel was appealable but no appeal taken; order could not be reviewed on appeal from final judgment); *Guillemin v. Stein* (2002) 104 Cal.App.4th 156, 161 (discovery sanctions included in final judgment but judgment not timely appealed; sanctions could not be reviewed in later appeal from post-judgment order confirming award).)


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Endnotes:

[1] Other statutes govern appealability of judgments and orders in particular proceedings. Appeals in probate cases, for example, are governed exclusively by Probate Code sections 1300-1304. Family Code section 2025 permits discretionary appeals from rulings on bifurcated issues in family law cases. This article treats only judgments and similar dispositive determinations within the scope of section 904.1. It does not include interim orders that are also appealable under CCP section 904.1(a).

[2] The court in *Swain* saved the appeal by exercising its discretion to amend the order to make it an effective judgment. (*Id*., 99 Cal.App.4th at 6.) Other appellate courts have not been so willing to make orders granting summary judgment appealable. See *Modica v. Merin*, *supra*, 234 Cal.App.3d at 1073 (announcing that court had "abandoned its policy of tolerance" to hear appeals from summary judgment orders).

[3] Before petitioning for a writ, remember that the chances the appellate court will hear the petition are in the low single digits. In Fiscal Year 2012-2013, almost 94 percent of appellate writ petitions in civil actions were summarily denied. (Judicial Council of California, 2014 Court Statistics Report, p. 33, Table 6 (1,916 petitions filed; 106 decided by written opinion). That has been the rate of summary denial for several years. (See *Brown, Winfield & Canzoneri, Inc. v. Superior Court* (2010) 47 Cal.4th 1233, 1241, fn. 3.)