

Appealable judgments and orders

A review of general principles and rules with illustrative examples

By Jay-Allen Eisen

Not all judgments can be appealed. Few pre-judgment orders can. If a judgment or order is not appealable, the appellate court has no jurisdiction. (*Griset v. Fair Political Practices Com'n* (2001) 25 Cal.4th 688, 696.) Even if the parties do not raise the issue, if there is any doubt whether the appeal is from an appealable judgment or order, the court is "duty-bound" to consider the issue on its own motion. (*Olson v. Cory* (1983) 35 Cal.3d 390, 398.)

On the other hand, if a judgment or order is appealable but not appealed, it may not be attacked on appeal from a subsequent order or judgment. (Code Civ. Proc., § 906; *Guenter v. Lomas & Nettleton Co*. (1983) 140 Cal.App.3d 460, (failure to appeal order denying class certification precluded review of order in appeal from final judgment).) "California follows a 'one shot' rule under which, if an order is appealable, appeal must be taken or the right to appellate review is forfeited." (*In re Baycol Cases I and II* (2011) 51 Cal.4th 751, 762, fn. 8.)

To completely cover the subject of appealability would require much more than this brief article. Witkin takes over 165 pages altogether. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeals, §§ 95-151, 170-220 ["Witkin Procedure"].) This article, therefore, will review general principles and rules with illustrative examples.

Appealable judgments

"The right to appeal is wholly statutory." (*Dana Point Safe Harbor Collective v. Superior Court* (*City of Dana Point*) (2010) 51 Cal.4th 1, 5.) Thus, "no appeal can be taken except from an appealable order or judgment, *as defined in the statutes and developed by the case law*. . . ." (*City of Gardena v. Rikuo Corp*. (2011) 192 Cal.App.4th 595, 601, quoting *Lavine v. Jessup* (1957) 43 Cal.2d 611,613).)

Code of Civil Procedure section 904.1 ("§ 904.1") lists *most*, but not *all*, appealable judgments and orders. It's important to keep this in mind. For example, the list of appealable judgments and orders in section 904.1 does not include an order dismissing or denying a petition to compel arbitration. But such an order is appealable under Code of Civil Procedure section 1294. Thus, if an order denying a petition to compel arbitration is not appealed, it cannot be reviewed on appeal from the final judgment. (*Hobbs v. Bateman Eichler, Hill Richards, Inc.* (1985) 164 Cal.App.3d 174, 191.)

Under section 940.1 (a)(1), with some exceptions, an appeal may be taken from "a judgment, except (A) an interlocutory judgment. . . ." This is the "one final judgment rule," under which an appeal may ordinarily be taken only from a final judgment. It is based on the theory "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 Procedure, Appeal, § 96, pp. 158-159.)

For purposes of appeal, a judgment is not final unless it "terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined." (*Dana Point, supra*, 51 Cal.4th at 5 (citations and internal quotation marks omitted).) In other words, "'*where no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree, that decree is final*, but where anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the decree is interlocutory'" and, therefore, not appealable. (*Id*., quoting *Griset, supra*, 25 Cal.4th at 698 (court's italics).)

The judgment does not have to be entitled, "Final." (See *Eldridge v. Burns* (1978) 76 Cal.App.3d 396, 404-405 ("interlocutory" judgment final and appealable).) Conversely, a judgment labeled, "Final," may not be appealable. "It is clear that no effect can or should be given to such a label if the judgment does not *in fact* conclude matters between the parties." (*Jackson v. Wells Fargo Bank* (1997) 54 Cal.App.4th 240, 245 (court's italics); see also *Kurwa v. Kislinger* (2013) 57 Cal.4th 1097, 1105-1106. "'It is not the form of the decree but the substance and effect of the adjudication which is determinative.'" *Dana Point, supra*, 25 Cal.4th at 5, quoting *Griset, supra*, 25 Cal.4th at 698.

Interlocutory and partial judgments

A few interlocutory judgments are appealable under § 904.1(a):

- an interlocutory judgment, order or decree determining the right to redeem and directing an accounting in an action to redeem real or personal property from a mortgage or lien (subd. (8));
- an interlocutory judgment in a partition action determining the parties' rights and interests and directing the partition (subd. (9)); and,
- an interlocutory judgment imposing sanctions in excess of $5,000 on a party or attorney (subd. (a)(11)).

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Otherwise, a judgment that only partially determines the case cannot ordinarily be appealed. For instance, in an action where defendant cross-complains against plaintiff, a judgment for defendant on plaintiff's complaint is not appealable if the cross-complaint is still pending and unresolved. (*Dang v. Smith* (2010) 190 Cal.App.4th 646, 656.) In bifurcated trials, a judgment in one phase that does not fully dispose of all issues in the action is not appealable. (*Lauderdale v. U & I Equipment Co.* (1969) 271 Cal.App.2d 140, 142-143 (judgment for plaintiff in liability phase of bifurcated trial, but recognizing that judgment for defendant bifurcated liability trial would be appealable); (*Baker v. Castaldi* (2015) 235 Cal.App.4th 218, 226 (punitive damages issue bifurcated; judgment for plaintiff finding defendants acted with malice and oppression not appealable where amount of punitive damages not yet tried and determined).)

Likewise, when the court severs one or more causes of action for separate trial, a judgment on the severed causes of action is not final and appealable even though the severed causes of action can be characterized as separate and independent from those remaining. (*Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 743.)

Exceptions to the one-final-judgment rule

One important exception to the one-final-judgment rule is the "collateral order" doctrine. An order prior to final judgment that directs the payment of money or performance of an act by or against a party is immediately appealable when it is not a necessary step to determination of the main issue. (*Sjoberg v. Hastorf* (1948) 33 Cal.2d 116, 119.) A few cases have allowed appeals other types of interim orders that the courts considered ancillary to the main proceeding even though they did not require payment of money or performance of an act. (See 9 Witkin Procedure, Appeal, §§ 106-107.)

There is another important exception to the one-final-judgment rule in an action with multiple parties. A judgment resolving all issues as to a party whose interests are separate and distinct from the other parties is immediately appealable even though the action continues between the remaining parties. (*BGJ Associates, LLC v. Wilson* (2003) 113 Cal.App.4th 1217, 1225, fn. 3.)

Appealable orders

Section 904.1(a) also lists several orders prior to final judgment that are immediately appealable. One that counsel is likely to encounter is an order granting or denying an anti-SLAPP motion to strike. (*Id.*, subd. (13).) Another common appealable order is one granting or dissolving TRO or preliminary injunction or refusing to grant or dissolve a TRO. (*Id.*, subd. (6); see *In re Marriage of Nicholas* (2010) 186 Cal.App.4th 1566, 1576). An order for sanctions in excess of $5,000 is also appealable. (*Id.*, subd. (12).) (A sanctions judgment or order less than $5,000 can be reviewed on appeal from the final judgment. (§ 904.1(b).) The appellate court may also exercise discretion to grant an extraordinary writ. (*Ibid.*)

The list in section 904.1 is not exclusive, however, and another statute may make a pre-judgment order immediately appealable. An example, as previously discussed, is Code of Civil Procedure section 1294 (order denying or dismissing petition to compel arbitration).

Post-judgment orders

An order after an *appealable* final judgment is also appealable if it affects or relates to the judgment in some way and the issues raised by the order are different from those that would arise from an appeal from the judgment. (§ 904.1(a)(2); *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 653, 651.) An order on a claim for costs or an application for attorney fees falls into this large category. (*Id.* at p. 654-656.) Orders regarding enforcement of the judgment are also within subdivision (a)(2). (*Jones v. World Life Research Institute* (1976) 60 Cal.App.3d 836, 839.)

(Note, however, that if enforcement is sought by contempt, an order in a contempt proceeding is expressly not appealable. (§ 904.1(a)(1)(B).) Review is available only by writ of habeas corpus or certiorari. (*In re Baroldi* (1987) 189 Cal.App.3d 101, 111, disapproved on another ground in *Boysaw v. Superior Court* (2000) 23 Cal.4th 215, 221.)

Probate and Family Code orders

Under § 904.1(a)(10), an appeal may be taken from an order made appealable under the Probate Code or the Family Code. The Probate Code lists appealable orders in sections 1300-1305. The list is much narrower than § 904.1 and exclusive. (*Kalenian v. Insen* (2014) 225 Cal.App.4th 569, 576.) An example is an order denying relief from default under Code of Civil Procedure section 473. It is appealable as an order after final judgment under § 904.1(a)(2) in a non-probate action. But it is not appealable in a probate proceeding as it is not listed in Prob. Code §§ 1300-1305. (*Kalenian, supra*, 225 Cal.App.4th at 576.) In probate proceedings, one must *always* review the Probate Code to determine if an order is appealable.

The Family Code contains two exceptions to the rule that judgment in a bifurcated trial is not ordinarily appealable. In dissolution proceeding, the court may bifurcate the issue of dissolution of the marital status and enter a "status only" judgment that is appealable on the issue of whether the court should have granted dissolution of the marital status. (Fam. Code § 2337; *In re Marriage of Van Sickle*, 68 Cal.App.3d 728, 736.)

The Family Code also provides for a discretionary appeal of a judgment on a bifurcated issue if the trial court certifies the judgment for appeal and the court of appeal grants a motion to appeal. (Fam. Code § 2025; Cal. Rules of Court, rule 5.392.)

A few terminating, but not appealable, orders

Finally, a few orders that completely dispose of a proceeding but are not appealable

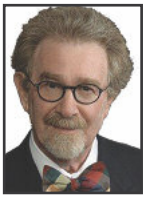
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should be mentioned because of the frequency with which they are, nevertheless, appealed. An order sustaining a demurrer without leave to amend is not ordinarily appealable; an appeal is proper only after an order of dismissal is entered on the order. (*In re Estate of Dito* (2011) 198 Cal.App.4th 791, 799-800.) The trend of modern cases, however, is to deem the order sustaining the demurrer to incorporate a judgment of dismissal or, as in *Dito*, amend the order to make it an appealable judgment of dismissal. (*Kruss v. Booth* (2010) 185 Cal.App.4th 699, 712, fn. 12 (deeming order to be dismissal judgment).)

Similarly, an order granting a motion for judgment on the pleadings is not appealable; the order must be followed by a formal judgment, which may be appealed. (*Adohr Milk Farms, Inc. v. Love* (1967) 255 Cal.App.2d 366, 369.)

An order granting a motion for summary judgment is not appealable; appeal lies from the ensuing judgment. (Code Civ. Proc., § 437c(m)(1); *Levy v. Skywalker Sound* (2003) 108 Cal.App.4th 753, 761, fn. 7.) Again, however, the appellate court has discretion to construe the order granting the motion as incorporating an appealable judgment. (*Ibid*.) But in *Modica v. Merin* (1991) 234 Cal.App.3d 1072, the court announced that it would no longer employ curative techniques to save such an appeal. The court abandoned "its policy of tolerance" of counsel who had come "to rely upon the court's indulgence rather than to take the procedural steps necessary to perfect an appeal," and dismissed the appeal.


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