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Buying time

TIPS FOR EXTENDING YOUR NOTICE OF APPEAL DEADLINE AND TRAPS TO AVOID

There are few civil-litigation filing deadlines that arouse as much anxiety for attorneys and clients as the deadline for filing a Notice of Appeal. And the concern is well deserved. In the state courts, the deadline is jurisdictional and cannot be extended by stipulation or order of the trial court or the appellate court. If the notice is filed late, the Court of Appeal is required by law to dismiss the appeal. In the federal system, the deadline is also jurisdictional, but there is a statutory mechanism to seek relief for a late filing.

Filing an early Notice of Appeal, while often safe, can have unintended consequences such as terminating the trial court's jurisdiction to reconsider an appealable order. And an early Notice of Appeal will *not* have other, perhaps hoped for, consequences such as staying the trial court's authority to rule on an attorney's fee motion or cost bill.

What follows is a non-exhaustive survey of what will and will not extend Notice of Appeal filing deadlines, and common traps for the wary and unwary alike. Our focus is on general civil practice in unlimited jurisdiction civil cases. Different deadlines and rules apply to criminal, juvenile, unlawful detainer, workers' comp, small claims, administrative law, and other areas of practice and specialty courts, and those are not covered here.

The touchstone deadlines

In state court, the deadlines for filing a Notice of Appeal from an appealable order or a final judgment are set forth in Rules of Court 8.104 and 8.108.

The basic deadline for most, but not all appeals is 60 days from service of a notice of entry of a final appealable judgment or order or a file stamped copy of the judgment/order with a proof of service attached. (Rule of Court 8.104(a)(1)(A).)

The outside limit in state court for filing a Notice of Appeal is 180 days (unlimited jurisdiction) from entry of the judgment (*not* from service of notice of that entry.) (Rule of Court 8.104(a)(1)(C).) This outside limit usually applies where neither the court itself nor a party served a copy of the judgment or order with a proof of service attached.

The 180-day outside limit can also apply where the extension of time is the result of the filing of valid post-judgment motions or a motion for reconsideration of an appealable order. But that is not always the case, and it is dangerous to assume that the 180-day deadline applies where the trial court fails to rule on the post-trial motion, as will be seen.

If one party files a timely Notice of Appeal in a state action, the time for any other party to file a Notice of Cross Appeal is extended by 20 days from the date that the superior court clerk serves notification of the first appeal. (Rule of Court 8.108(g)(1).) But there is a trap: the 20-day time to file a Notice of Cross appeal is an extension of the normal 60-day period, and not necessarily an add-on. For example, if a party first files a Notice of Appeal on day 15 after service of the judgment/order, and the



clerk sends notice of that appeal five days later, the deadline for a Notice of Cross appeal remains 60 days from the service of the judgment/order. The 20-day extension is *not* tacked onto the end of the initial 60-day period.

For a Ninth Circuit appeal, the touchstone deadline is 30 days from entry of the judgment. (28 USC § 2107(a); Fed. Rule of Appellate Procedure 4(a)(1)(A).) If one party files a timely Notice of Appeal in the district court, any other party may then file their own Notice of Appeal within 14 days after the date of the filing of the first notice or within the normal 30 days period, whichever period ends later. (Fed. Rule of Appellate Procedure 4(a)(1)(A.)4(a)(1)(a)(3).) Thus, if a party files a federal Notice of Appeal on day 15, the other parties must still file their notice(s) by the 30th day.

Also note that accrual of the federal 30-day period runs from entry of the judgment regardless of notice or mailing. The burden is on the parties to ascertain whether the judgment has been entered in the district court. There is, however, a 150-day limit deeming the judgment entered if it has been rendered but not actually entered. (Fed. Rule. Civ. Proc. 58.) If that deemed-entered date is reached, the Notice of Appeal filing deadline is 30 days from the deemed-entered date (i.e., 180 from the deemed entry of the judgment). (*Stephanie-Cardona LLC v. Smith's Food and Drug Centers, Inc.* (9th Cir. 2007) 476 F.3d 701, 703.)

Don't ask and don't stip

Neither the Superior Court nor the state Court of Appeal, have the authority to extended Notice of Appeal filing deadlines. (Rule of Court 8.104(b).) Nor can the parties stipulate to such an extension. (*Kurwa v Kislinger* (2017) 4 Cal.5th 109, 117.) The Court of Appeal must dismiss an untimely appeal. (*Hollister Convalescent Hospital v Rico* (1975) 15 Cal.3d 660, 666; Rules of Court 8.60(d); 8.104(b).) For a comprehensive discussion of

technical filing situations that may extend the filing time, see *Garg v. Garg* (2022) 82 Cal.App.5th 1036.

The Federal rules are somewhat more forgiving. Fed. Rule of Civ. Proc. 60(b) permits the district court to vacate and reenter a judgment so to restore the right to appeal in limited circumstances. Further, 28 USC § 2107(c) and Fed. Rule of App. Proc. 4(a)(5, 6) allow the district court, upon motion filed within 30 days of the expiration of the normal time period, to request an extension of time to file a Notice of Appeal on a showing of excusable neglect or good cause" which may include actual failure to receive notice of entry of the judgment when notice is required.

What does *not* extend the filing deadline

Costs and fees

In state courts, the Notice of Appeal filing deadline accrues from entry of the final judgment. That judgment need not include an award of costs or fees if applicable; those are collateral matters that result in separately appealable post-judgment orders. (*UAP-Columbus JV 326132 v. Nesbitt* (1991) 234 Cal.App.3d 1028, 1038.) In a federal appeal, in contrast, a cost award rendered in the trial court after the filing of a Notice of Appeal is considered an inseparable part of the judgment and need not be separately appealed. (*Draper v. Rosario* (9th Cir. 2016) 836 F.3d 1072, 1087.)

In federal court, the definition of a final appealable judgment includes an award of costs and fees, and so the 30-day clock does not run until those issues are adjudicated and included in the judgment.

Amended judgments

The entry of an amended judgment may or may not restart the clock for a state court appeal. Much depends on the scope and nature of the amendment. The test is whether the revised judgment results in a "substantial modification" of the judgment. If so, the revised judgment supersedes the original and becomes the

final, appealable judgment in the action. If not, any changes are considered to relate back to the original judgment and the time to appeal runs from the entry of the first judgment. (*Ellis v. Ellis* (2015) 235 Cal.App.4th 837, 842.)

The rule is similar in the Ninth Circuit. Where a district court enters an amended judgment that revises legal rights or obligations, the period for filing an appeal begins anew. (*U.S. v. Doe* (9th Cir. 2004) 374 F.3d 851, 853-854.)

Bankruptcy stay

The filing of a bankruptcy petition will not toll the time to file a Notice of Appeal in a state or federal action. (*ECC Construction, Inc. v. Oak Park Calabasas Homeowners Association* (2004) 118 Cal.App.4th 1031, 1037.) However, that rule may conflict with the scope of the statutory bankruptcy stay (11 USC § 362(a) when the appeal arises from an action against the debtor. (See 11 U.S.C. § 108(c)(2), *In re Hoffinger Industries, Inc.* (8th Cir. 2003) 329 F.3d 948, 951.)

Post-trial motions

The most common devices that extend the Notice of Appeal filing deadline, in both the state and federal courts, are statutory post-trial motions (new trial, JNOV, motion to vacate, and reconsideration.) But the state court statutes are quirky and present risks to the unwary: Each statute varies in small but significant ways, and a misstep can easily lead to waiving the right to appeal.

Motion for new trial, JNOV and vacatur extensions

The filing of a valid and timely motion for new trial, JNOV or statutory motion to vacate (Code Civ. Proc., §§ 629; 657, 663a) if denied, will extend the deadline for filing a notice of appeal from the judgment for all parties, by 30 days after the superior court clerk or a party serves an order denying the motion or a notice of entry of that order; 30 days after denial of the motion by operation of law; or 180 days after entry of judgment. (Rule of Court 8.108(b, c, d.)

Traps to be wary of

First trap

The motions must be "valid" to effectuate the extension. (Rule of Court 8.108(b,c,d.) That does not mean the motion must be successful, of course. An order granting a motion for new trial is itself independently appealable (Code Civ. Proc., § 904.(a)(4)), and a successful JNOV results in a new judgment that can then be appealed. (*Lippert v. Avco Community Developers, Inc.* (1976) 60 Cal.App.3d 775, 780.)

But the requirements that the motions be "valid" does mean that they are based on recognized grounds for the motion, that the motion was timely filed and that the proper procedures for perfecting the motion were followed. (See, e.g., *Sanchez v. Brooke* (2012) 204 Cal.App.4th 126, 137, fn. 9 [untimely post-trial motion did not extend Notice of Appeal deadline].)

Second trap

Motions for new trial, JNOV and vacatur are deemed denied by operation of law *without further notice from the trial court* if the trial court has not ruled within 75 days after mailing of notice of entry of judgment by the clerk of the court pursuant to section 664.5 or service on the moving party by any party of written notice of entry of judgment, whichever is earlier. (Code Civ. Proc., §§ 629; 660(c); 663a(b).) This means that if the trial court does not rule on the motion, your deadline for filing a notice of appeal from the judgment will lapse only 15 days after the jurisdictional deadline passes without further notice from the court. Correctly calendaring these potential deadlines is critical, as it reminds the trial court of the date for its 75-day jurisdictional deadline to rule.

Third trap

Unlike an order denying a motion for new trial, an order denying a JNOV is itself an appealable order. (Civ. Pro. § 904.1(a)(4).) Therefore, an appeal from the order denying a motion for JNOV is not preserved merely by filing a Notice of Appeal from the judgment itself (as it is for a new trial motion.) Thus, if you

suffered an adverse judgment and your JNOV has been denied, you need to appeal from both the judgment and from the order denying the JNOV in order to preserve all possible appeal issues.

Motion to reconsider an appealable order

If you have lost a motion on an appealable order, the time to appeal can be extended by filing a procedurally valid motion for reconsideration in accordance with Code of Civil Procedure section 1008(b.) Such a motion will extend your time to appeal from the underlying order by 30 days after the superior court clerk or a party serves an order denying the motion or a notice of entry of that order; 90 days after the first motion to reconsider is filed; or 180 days after entry of the appealable order. (Rule of Court 8.108(e).)

Here is the trap: Code of Civil Procedure section 1008 does not impose a jurisdictional time limit for the court to rule, as do the other statutes governing post-trial motions. It is common for the

hearing date to be set outside the 90-day appeal extension period if the trial court does not hear or rule on the motion within the 90 days after it is first filed. Further – and unlike a motion for new trial – *the trial court loses jurisdiction to rule on a reconsideration motion if an appeal is filed before the ruling.* The trial court's power to vacate or modify an appealed order is suspended while the appeal is pending. (Code Civ. Proc., § 916(a); *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 189-190.)

Thus, a party aggrieved by an appealable order can face the difficult choice of filing a timely notice of appeal from the order, depriving the trial court of the ability to rule, or await a ruling and lose the chance of appealing. An order denying a Motion for Reconsideration is not itself an appealable order. (Code Civ. Proc., § 1008(g).)

Federal post-judgment motions

Under Fed. Rule of App. Proc. 4(a)(4) (A), the following motions toll the time for filing a Notice of Appeal:

- Motion for judgment (Fed. Rule. Civ. Proc. 50(b).)
- Motion to amend or make additional findings (Fed. R. Civ. Proc. 52(b));
- Motion for attorney's fees under Fed. R. Civ. Proc. 54, if the district court extends time to appeal under Fed. R. Civ. Proc. 58;
- Motion to alter or amend the judgment (Fed. R. Civ. Proc. 59);
- Motion for a new trial (Fed. R. Civ. P. 59); and.
- Motion for relief under Fed. R. Civ. P. 60 if the motion is filed no later than 28 days after the judgment is entered.

Herb Fox is a certified appellate law specialist with over 30 years of experience handling hundreds of civil appeals in appellate courts throughout the state, resulting in 25 published opinions. His practice has included appeals in business litigation, anti-SLAPP, family and probate law, insurance bad faith, and personal injury and employment matters. Herb can be reached at 310-284-3184 and at HFox@FoxAppeals.com.