RECENTLY SIGNED BILL SOLVES INCONSISTENCIES IN POST-TRIAL MOTION DEBRIEFING DEADLINES

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For so long as there have been lawyers, there has undoubtedly been a vast divide between the plaintiff and defense sides of the bar. But in a feat of cooperation that should create hope for eventual world peace, the Consumer Attorneys of California (CAOC) and the California Defense Counsel (CDC) have co-sponsored a bill to eliminate a longstanding inconsistency between statutes governing post-trial motions. For years, those inconsistencies have caused unnecessary logistical problems for practitioners, and confusion for pro per litigants. The bill, which Governor Brown signed on July 8, will at last align the deadlines for filing all three types of post-trial motions.

By way of background, once a judgment has been entered a trial court generally loses any power to modify or alter the judgment in a way that materially affects the rights of the parties. But three statutory exceptions to that general rule allow a trial court to grant a motion for new trial (Cal. Civ. Proc. Code § 657 (West 1976)), a motion for judgment notwithstanding the verdict (JNOV) (Cal. Civ. Proc. Code § 629 (West 2011)), and a motion to set aside and vacate the judgment and enter a new judgment (Cal. Civ Proc. Code § 663 (West Supp. 2013)). After an adverse judgment, the losing party will often file more than one of these motions.

The longstanding problem for attorneys has been that the deadlines for filing post-trial motions are inconsistent. For example, to make a new trial motion a party must file a "notice of intention to move for new trial" within 15 days after service of notice of entry of the judgment by the clerk or a party. (Cal. Civ. Proc. Code § 659(a)(2) (West Supp. 2013).) But the memorandum of points and authorities, supporting declarations, and affidavits are not due until 10 days later. (Cal. R. Ct. 3.1600(a).) Thus, a losing party generally has a total of 25 days to marshal all its arguments regarding why a new trial should be granted.

Motions for JNOV (Cal. Civ. Proc. Code § 629 (West 2011)) and to vacate judgments (Cal.Civ. Proc. Code § 663a(a)(2)) must likewise be filed within 15 days of service of entry of the judgment. But in contrast to new trial motions, the statutes governing these other two post-trial motions do not provide for additional time to file the supporting legal memorandum and other documents. Thus, for example, a party seeking JNOV and in the alternative a new trial must prepare and file its entire JNOV motion no later than 15 days after service of notice of entry of judgment—ten days before the legal memorandum supporting the new trial motion needs to be finalized and filed. That not only creates logistical difficulties, but can result in inconsistencies between the two motions as legal arguments continue to evolve after the JNOV is on file but the new trial motion is still a work in progress.

One way around this problem has been to ask opposing counsel to agree to a post-trial motions briefing schedule, and stipulate that the memorandum in support of the JNOV motion (or, in a bench trial, the motion to vacate) can be filed at the same time as the memorandum in support of the new trial motion—i.e., 25 days after service of notice of entry of judgment, rather than 15 days. But trial lawyers tend to be suspicious of anything the other side wants, especially when it has to do with a motion that threatens a judgment obtained after a hard-fought trial in which emotions have run high. Consequently, it is usually difficult to obtain such an agreement.

The only other option has been to seek ex parte relief from the trial court, requesting permission to file the supporting legal memoranda for all post-trial motions simultaneously—that is, at the later date when the new trial memorandum is due. Sometimes that works, but more often (especially if the ex parte application is opposed), the trial court's response is that the parties should just follow the schedule specified in the Code of Civil Procedure.

Fortunately, to paraphrase Gerald Ford, it appears that our long post-trial motions procedural nightmare will soon be over. Assemb. B. 1659, 2013-2014 Reg. Sess. (Cal. 2014), the bill co-sponsored by the CAOC and the CDC, will bring an end to these inconsistent deadlines. As the Assembly Committee synopsis for the bill states, the "non-controversial bill prudently seeks to conform the filing deadlines and procedures for three post-trial motions—motion for a new trial, motion for a judgment notwithstanding the verdict (JNOV), and motion to vacate the judgment . . . The changes proposed in this bill helpfully align the deadlines for these three motions." As the Assembly Committee synopsis for the bill states, the "non-controversial bill prudently seeks to conform the filing deadlines and procedures for three post-trial motions—motion for a new trial, motion for a judgment notwithstanding the verdict (JNOV), and motion to vacate the judgment . . . The changes proposed in this bill helpfully align the deadlines for these three motions." Assembly

Continued on Page 8...

DID YOU KNOW? APPEALABILITY DEPENDS ON THE LEGISLATURE

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Your client wants to know if immediate appellate review is available to challenge an adverse trial court ruling. Where do you look to find the answer? The place to start is not with the appellate courts but with the Legislature because "the California Legislature has *complete* control over the right to appeal." (Eisenberg, Horvitz & Wiener, Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2013) ¶ 2:17, p. 2-14 original emphasis; see *Dana Point Safe Harbor Collective v. Superior Court* (2010) 51 Cal.4th 1, 5 ["The *right* to appeal is wholly statutory" (emphasis added)].) This means that the right to appeal can differ depending upon the statutory scheme that has been adopted.

In California, Code of Civil Procedure section 904.1, subdivision (a)(1), permits an appeal to be taken "[f]rom a judgment . . . ." This provision embodies the " 'final judgment' " rule, "the essence of which is that an appeal lies only from a final judgment [citation], i.e., a judgment which 'terminates the proceeding in the lower court by completely disposing of the matter in controversy' [citation]." (*Kinoshita v. Horio* (1986) 186 Cal.App.3d 959, 963.)[1] California favors this limitation on the right to appeal because "piecemeal disposition and multiple appeals tend to be oppressive and costly," and "[i]nterlocutory appeals burden the courts and impede the judicial process" by "clog[ging] the appellate courts with a multiplicity of appeals" "produc[ing] uncertainty and delay in the trial court" and preempting further trial court proceedings which may obviate the need for appellate review and/or provide a more complete record for the appellate court. (*Kinoshita,* at 966-967.)[2]

One flick of the legislative wrist, however, and the entire philosophy of the right to appeal can change dramatically. Take, for example, the state of New York.

Under section 5701 of New York's Civil Practice Law and Rules, there is a right of appeal to the intermediate appellate courts (known as the "appellate division") not only from a final judgment but also virtually any interlocutory order that "affects a substantial right . . . ." (N.Y.C.P.L.R. 5701(a), (a)2(v).) As the practice commentaries to section 5701 note, "[a]ppealability to the appellate division is broad. As a general rule almost anything can be appealed to the appellate division on the authority of CPLR 5701, . . ." (Practice Commentaries, McKinney's N.Y.C.P.L.R. (1999 ed.) foll. § 5701, 1997 C5701:1) "So broad is the appealability of nonfinal determinations in New York practice that one must sometimes scratch hard at the caselaw to come up with a few examples of the nonappealable ones." (Id. 1997 C5701:4; see, e.g., *Sholes v. Meagher* (2003) 100 N.Y.2d 333, 335 [794 N.E.2d 664] [appeals generally may be taken from any order deciding an interlocutory motion where the order affects a substantial right].)

So, when you want to find out if your client has a right to appeal, start with the statutory scheme governing appeals, and go from there.

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[1] Of course, there are exceptions, e.g., "when the case involves multiple parties and a judgment is entered which leaves no issue to be determined as to one party" (*Justus v. Atchison* (1977) 19 Cal.3d 564, 568, disapproved on other grounds in *Ochoa v. Superior Court* (1985) 39 Cal.3d 159, 171), or when a judgment or order is final as to a "collateral" matter (*Marsh v. Mountain Zephry, Inc.* (1996) 43 Cal.App.4th 289, 297-298).

[2] California generally consigns interlocutory appellate review to the discretionary realm of relief by extraordinary writ. (See *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 743 ["The California judicial system provides another, more efficient avenue" in the form of a petition to the appellate court for discretionary writ relief].)

Signed Bill to Solve Inconsistencies.....Continued from Page 5

Committee Bill Analysis, Assemb. B. 1659, 2013-2014 Reg. Sess. (Cal. 2014), http://goo.gl/QA1TQ8. The synopsis further notes that "[t]here is no known opposition to this bill." *Id.*

Assemb. B. 1659 amends the two statutes governing a motion for JNOV and a motion to vacate a judgment to provide that the "moving, opposing, and reply briefs and any accompanying documents shall be filed and served within the periods specified by Section 659a [governing new trial motions] and the hearing on the motion shall be set in the same manner as the hearing on a motion for new trial under Section 660." (Emphasis omitted.) Thus, for all three types of post-trial motions, the moving party will file its notice of motion on the 15th day after service of notice of entry of the judgment, and then have an additional 10 days to file the supporting memorandum of points and authorities.

Now that Governer Brown has signed the bill, it will take effect on January 1, 2015.

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