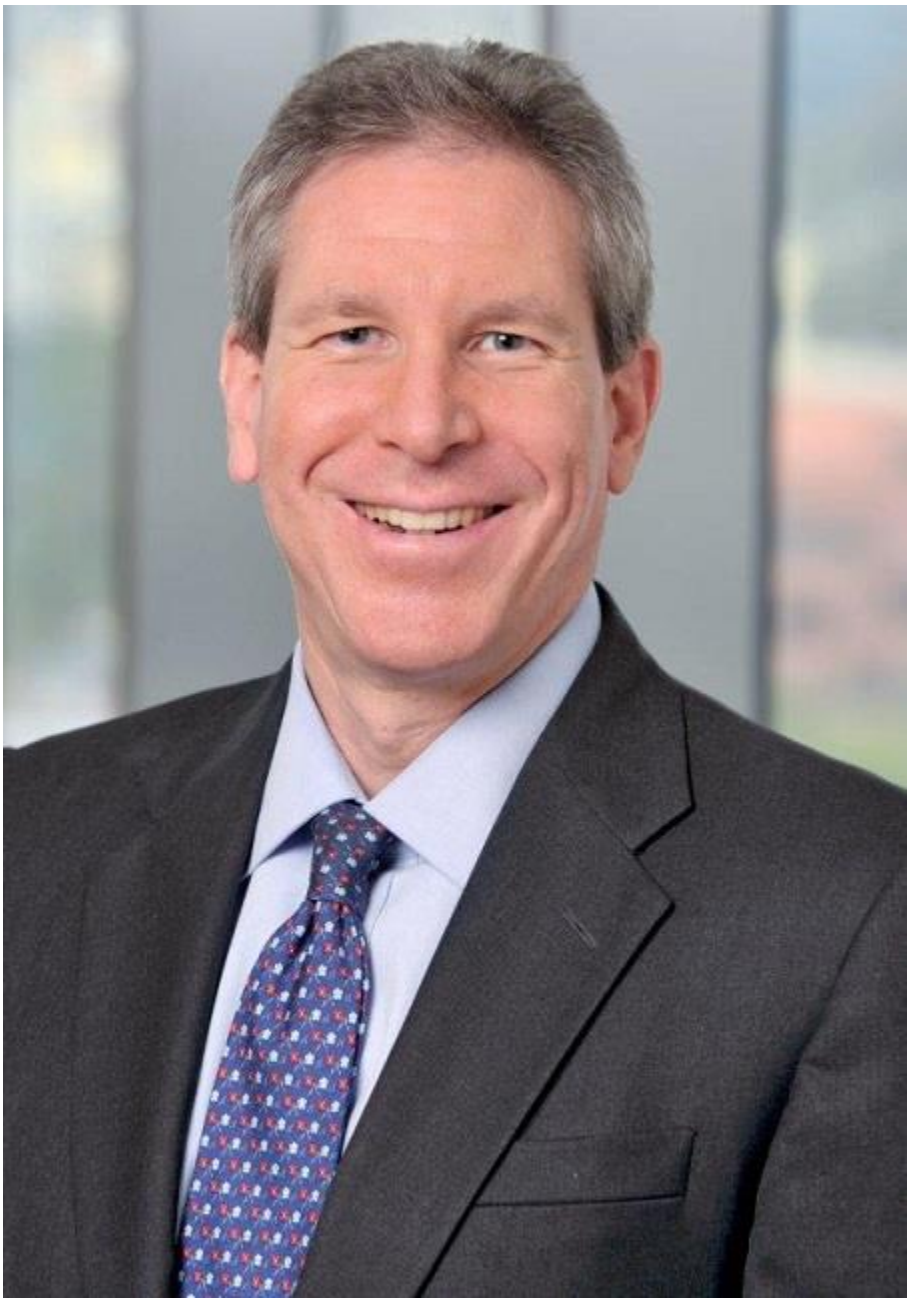
Civil Litigation, California Supreme Court, Appellate Practice, 9th U.S. Circuit Court Of Appeals
May. 1, 2018

Mooting mootness

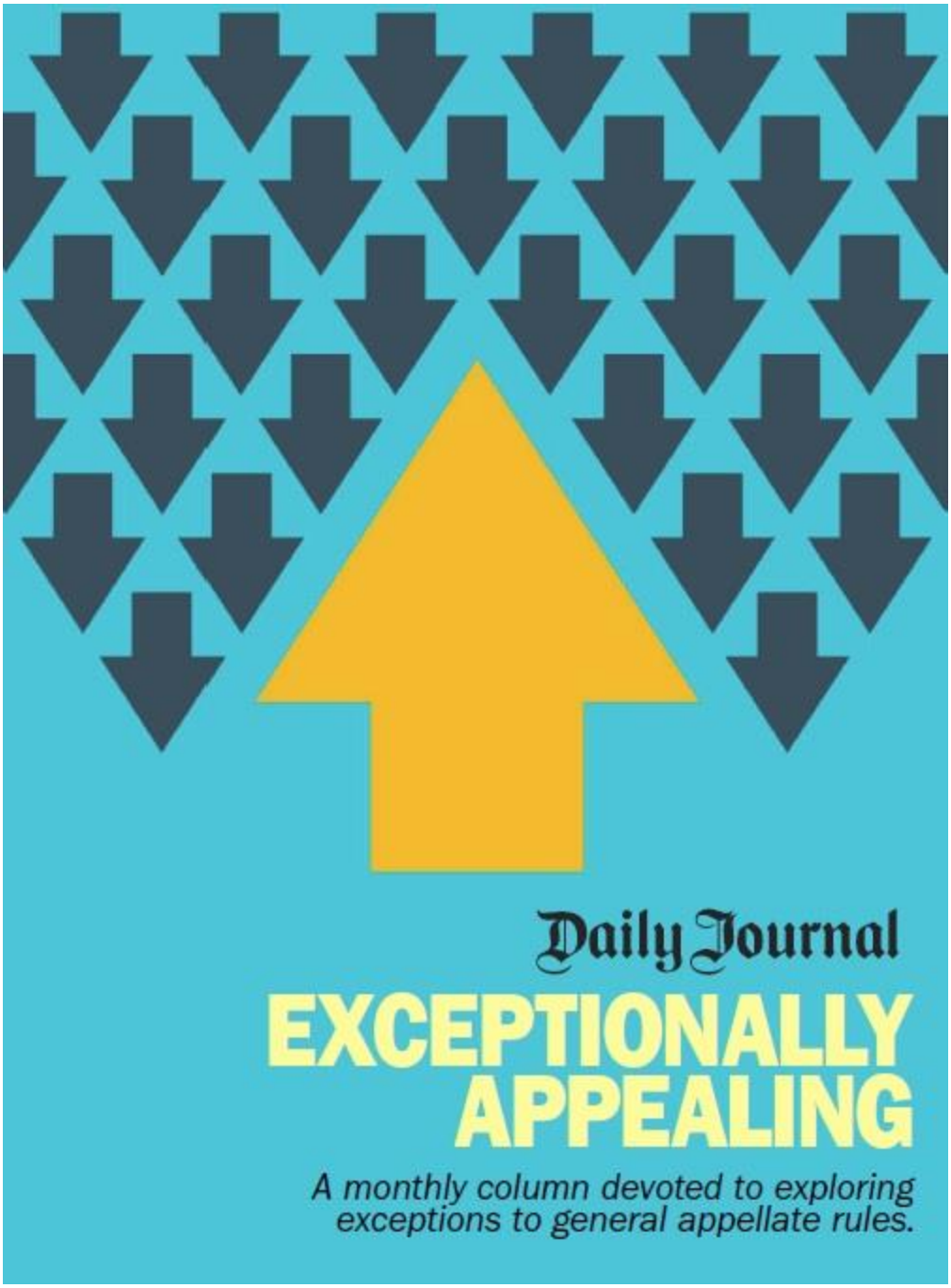
You guessed it: There are exceptions to the familiar justiciability doctrine of mootness.



BENJAMIN G. SHATZ
Manatt, Phelps & Phillips, LLP

Benjamin is a certified specialist in appellate law who co-chairs the Appellate Practice Group at Manatt in the firm's Los Angeles office.

See more...



(Shutterstock)

EXCEPTIONALLY APPEALING

With over 2,000 judges, California probably has the largest court system in the world. Such a massive system -- directly employing about 19,000 people in over 500 buildings -- is an expensive operation. To ensure the efficient use of over $4 billion in public funds, it is essential that this juggernaut of a justice system only spends resources resolving disputes that are truly worthy of judicial attention. The goal of appropriately using taxpayer money is furthered by a familiar trio of justiciability doctrines: case and controversy, ripeness and mootness. Any case brought to court must satisfy all three doctrines or be summarily booted out of court on jurisdictional grounds. This applies to appeals too, of course.

By the time a case has progressed to an appellate court, the first two doctrines -- which focus on a case's front-end considerations ("is there really something to fight about?" and "is now the right time to fight?") -- have probably played themselves out. But mootness is a jurisdictional problem that can arise at any point during litigation, including on appeal. Indeed, perhaps especially on appeal, given how long appeals can take, and given that just about every day, some appellate court is dumping an appeal whose time has come and gone. Such dismissals are mandatory: "It is well settled that an appellate court will decide only actual controversies and that a live appeal may be rendered moot by events occurring after the notice of appeal was filed. We will not render opinions on moot questions."*Building a Better Redondo, Inc. v. City of Redondo Beach*, 203 Cal. App. 4th 852, 866 (2012).

Generally, an appeal is mooted when the appellate court's ruling, either a reversal or an affirmance, will not affect the parties' substantive rights; i.e., when any ruling would have no practical effect and cannot provide any effective relief. *Lincoln Place Tenants Assn. v. City of Los Angeles*, 155 Cal. App. 4th 425, 454 (2007).

Our Supreme Court has explained: "It is settled that 'the duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending appeal from the judgment of a lower court ... an event occurs which renders it impossible for this court, if it should decide the case ..., to grant [] any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal." *Paul v. Milk Depots, Inc.*, 62 Cal. 2d 129, 132 (1964). Mootness, like other jurisdictional questions, is so important courts can and should raise the question sua sponte. *City of Hollister v. Monterey Ins. Co.*, 165 Cal. App. 4th 455, 479-80 (2008).

A clear example of mootness is where an appellant challenges an order subject to some temporal limitation, and the relevant time period expires (or the event to be stopped happens). *Environmental Charter High School v. Centinela Valley Union High School Dist.*, 122 Cal. App. 4th 139, 144 (2004) ("If relief granted by the trial court is temporal, and if the relief granted expires before an appeal can be heard, then an appeal by the

adverse party is moot"). Thus, temporary restraining orders are often mooted on appeal, perhaps by the litigation ending or entry of a permanent injunction.

Now we've reached the good part: exceptions! Assuming a case has been mooted on appeal, there are three exceptions that might moot mootness. These three discretionary exceptions to mootness are: (1) the case presents an issue of broad public interest that is likely to recur; (2) there is a possible recurrence of the controversy between the parties; and (3) material questions for the court's determination nonetheless persist, sometimes phrased as: The court should continue to rule to "do complete justice." *Environmental Charter High Sch.*, 122 Cal. App. 4th at 144; *see In re David B.* , 12 Cal. App. 5th 633, 652-54 (2017) (discussing the nuanced variations courts have used to articulate these exceptions, concluding, "the common thread" is that deciding moot cases "is appropriate only if a ruling on the merits will affect future proceedings between the parties or will have some precedential consequence in future litigation generally").

The first exception recognizes that sometimes cases are just so darn interesting and important that it would be a shame to let the opportunity to make some law slip away. That is, after all, the most significant (and fun) function of an appellate court. *In re Stevens*, 119 Cal. App. 4th 1228, 1232 (2004) (review appropriate for moot issue "of great public import" that "transcends the concerns of the particular parties"); *In re Garcia*, 67 Cal. App. 4th 841 (1998) (court addressed issue mooted as to the parties because a similar challenge was pending and other prison inmates would be affected), *citing In re William M.*, 3 Cal. 3d 16, 23-25 (1970) (questions of public concern do not become moot even if the ensuing judgment would not bind any party to the action).

There are many instances of parties alerting the Supreme Court about a settlement shortly before oral argument, to which the court responds: "Although the settlement may have rendered this case technically moot, 'we instead follow the well-established line of judicial authority recognizing an exception to the mootness doctrine, and permitting the court to decline to dismiss a case rendered moot by stipulation of the parties where the appeal raises issues of continuing public importance.'" *Torres v. Parkhouse Tire Serv., Inc.*, 26 Cal. 4th 995, 1001 (2001) (quoting *Lundquist v. Reusser*, 7 Cal. 4th 1193, 1202 n.8 (1994) [citing examples]); *Rosales v. Depuy Ace Med. Co.*, 22 Cal. 4th 279, 282 (2000). As the Supreme Court has explained, "our *policy* against advisory opinions does not deprive us of the *power*to hear an appeal notwithstanding the appealing party's request that it be dismissed."*People v. Massie*, 19 Cal. 4th 550, 571 (1998).

An adjunct factor to mere importance is likelihood of recurrence. The quintessential example would be pregnancy cases, where real-world events happen in about nine months, whereas the wheels of justice typically grind a bit slower. Thus, the famous "capable of repetition, yet evading review" standard enunciated in *Roe v. Wade*, 410 U.S. 113, 125 (1973), which applies in California as well. *People v. Harrison*, 57 Cal. 4th 1211, 1218 (2013); *Daly v. Superior Court*, 19 Cal. 3d 132, 141 (1977) ("issue of

continuing public interest that is likely to recur in other cases"). Cases capable of repetition but difficult to review can also arise in other matters that progress as the world turns, such as agricultural matters dependent on the seasons or weather, or election law cases. *Di Giorgio Fruit Corp. v. Dept. of Employment*, 56 Cal. 2d 54, 58 (1961) ("The very shortness of harvest seasons would preclude appellate review ... if the end of each season were treated as rendering the appeals moot."); *Ferrara v. Belanger*, 18 Cal. 3d 253, 259 (1976) (completed election did not moot the matter given the important need to interpret election statutes). This exception can apply to unripe cases too. *Pac. Legal Found. v. Cal Coastal Com.*, 33 Cal. 3d 158, 170 (1982) (appellate court can render advisory opinion if not deciding the case will create "lingering uncertainty in the law, especially when there is widespread public interest in the answer to a particular legal question").

The second exception resembles the first, but it omits the need for an issue of public interest and recurrence in situations involving other parties, and instead focuses on the parties before the court. *Zuniga v. WCAB*, 19 Cal. App. 4th 981, 988 n.6 (2018), *citing L.A. International Charter High Sch. v. LAUSD*, 209 Cal. App. 4th 1348, 1354 (2012) (school versus district issue likely to recur annually).

The third exception is where dismissing a moot appeal would leave important questions unanswered and so the court would fail to have done "complete justice." For example, a declaratory relief action about the constitutionality of a statute might not be dismissed where "there remain material questions" and the relief granted would "encompass future and contingent legal rights." *Eye Dog Found. v. State Bd. of Guide Dogs*, 67 Cal. 2d 536, 541 (1967). Doing "complete justice" means not leaving unresolved questions that "would preclude a party from litigating its liability on an issue still in controversy." *Viejo Bancorp, Inc. v. Wood*, 217 Cal. App. 3d 200, 205 (1989); *In re Cassandra B.*, 125 Cal. App. 4th 199, 209 (2004) (merits of expired restraining order decided because underlying issues could have an effect in pending dependency proceedings).

Bonus exception: In the criminal context, clearing one's name to remove "the stigma of criminality" can serve as an exception permitting review of a moot appeal. *People v. DeLong*, 101 Cal. App. 4th 482, 486-92 (2002). But this does not provide a basis for reviewing a moot civil case.

Seeking a mootness exception typically results in ruling reading, "we are aware of our discretionary authority, but decline to exercise it under the circumstances." But exceptions do occur, with one recent exceptional anecdote in the famous Monkey-Selfie case, *Naruto v. Slater* (2018 DJDAR 3570, April 23, 2018). That's the case where Naruto, an Indonesian crested macaque, snapped a self-portrait, and then (via PETA) sued a nature photographer for copyright infringement. After oral argument on appeal, the case settled and the parties jointly sought dismissal. Rather than dismiss as moot, however, the 9th U.S. Circuit Court of Appeals denied dismissal and stated that it would issue an opinion because this was a "developing areas of the law" that would benefit from guiding

precedent. The court also thought that the settlement was monkey business (i.e., an attempt to avoid setting precedent). So there's another exception: Monkey manipulation moots mootness.