'Macomber' Highlights Danger In Appealing Fee, Cost Awards

By Kathy M. Banke
and Benjamin G. Shatz

Isn't appealing from the judgment sufficient to challenge a fee or cost award made pursuant to that judgment? Sometimes, but frequently not.

Like other notice-of-appeal issues, there are plenty of traps for the unwary who appeal fee and cost awards. When and how to appeal depends on a number of factors, including how and when the fee and cost award is made and which party is appealing.

■ **Judgment awards specific amount of fees and costs.** Sometimes the judgment awards a specific amount of fees and costs. In that case, an appeal from the judgment embraces a challenge to the fee and cost award. See, for example, *Salinas Nat'l Bank v. Cook*, 101 Cal.App.2d 423 (1950).

■ **Judgment is silent on fees and costs.** Often, however, a judgment makes no mention of fees and costs. Instead, these items are dealt with in post-judgment proceedings by motion or cost bill, and the trial court issues an order awarding or denying fees and costs. In such cases, the post-judgment order awarding or denying fees and costs is a separately appealable, post-judgment order under Code of Civil Procedure Section 904.1(a)(2). For example, *Robinson v. City of Yucaipa*, 28 Cal.App.4th 1506 (1994).

Accordingly, a party aggrieved by the fee and cost order must file a timely notice of appeal from that post-judgment order; an appeal from the judgment alone is not sufficient. For example, *Norman I. Krug Real Estate Inv. Inc. v. Praszker*, 220 Cal.App.3d 35 (1990) ("A post-judgment order which awards or denies costs or attorney's fees is separately appealable ... and if no appeal is taken from such an order, the appellate court has no jurisdiction to review it.").

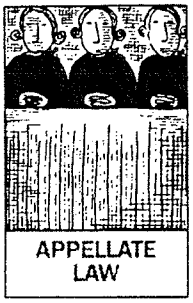
This does not mean necessarily that two separate notices of appeal must be filed. One notice of appeal is sufficient as long as it expressly states that the party is appealing from both the judgment and the post-judgment fee and cost order and is timely filed as to each. For example, *DeZerega v. Meggs*, 83 Cal.App.4th 28 (2000) (a single notice of appeal may raise separately appealable judgments and orders).

■ **Amended judgment awards fees and costs.** Another common scenario involves an amended or modified judgment. That is, the original judgment makes no mention of fees and costs but is later amended or modified after post-judgment proceedings to include a provision on fees and costs. Although a court might construe an appeal from the original judgment to include the award made in the amended judgment (*Casey v. Overhead Door Corp.*, 74 Cal.App.4th 112 (1999)), most courts probably would not, because the post-judgment order is separately appealable (*DeZerega*).

Rather than take a jurisdictional gamble, the safer course is to appeal the statutorily appealable fee and cost order in addition to the original judgment. It is much preferable to have filed one notice of appeal too many rather than one notice of appeal too few. And to keep things simple afterwards, the appellant can move to consolidate multiple notices of appeal.

■ **Judgment awards fees and costs but does not specify amount.** Sometimes a judgment awards fees and costs, but does not specify the amount, leaving that determination for further proceedings. In that situation, the judgment is appealable (under Code of Civil Procedure Section 904.1(a)(1)), and the later order determining the amount of fees and costs also is appealable (under Section 904.1(a)(2)).

Does that mean the aggrieved party needs to file two notices of appeal? The answer depends on which party is appealing. If the party against whom the fee and cost award is made appeals from the judgment, then a second notice of appeal from the order setting the amount of the fees and costs is not required. For example, *Grant v. List & Lathrop*, 2 Cal.App.4th 993 (1992) ("When a judgment awards costs and fees to a prevailing party and provides for the later determination of the



Never assume that appealing from a judgment embraces an appeal from a post-judgment fee and cost order. File another notice of appeal.

amounts, the notice of appeal [from the judgment by the losing party] subsumes any later order setting the amounts of the award.").

In other words, appealing from a judgment that includes an entitlement to fees and costs "encompasses" the post-judgment order determining the amount of the fees and costs. For example, *R.P. Richards Inc. v. Chartered Constr. Corp.*, 83 Cal.App.4th 146 (2000).

But *Grant's* rule — that an appeal from a judgment providing an entitlement to fees and costs subsumes the post-judgment order fixing the amount of fees and costs — is a one-way street in favor of the party aggrieved by the entitlement determination.

The party awarded fees and costs cannot claim that his or her appeal from portions of the judgment also encompasses an appeal from the post-judgment order determining the amount of fees and costs. In that situation, the party awarded fees and costs must file a timely notice of appeal from the post-judgment order in order to challenge the amount of the fee and cost award. For example, *Soldate v. Fidelity Nat'l Fin. Inc.*, 62 Cal.App.4th 1069 (1998).

Thus, the *Grant* rule is limited and strictly construed. For example, in *Fish v. Guevara*, 12 Cal.App.4th 142 (1993), the plaintiffs argued that, under *Grant*, their appeal from an adverse judgment that entitled the defendants to any costs and expenses allowed by law should be construed to include the subsequent post-judgment order awarding and determining the amount of expert witness fees.

The Court of Appeal refused to extend *Grant*, noting it was distinguishable in two important ways. First, *Grant* involved an appeal from a judgment that resolved the entitlement issue, but the judgment in *Fish* did not do so definitively. Second, *Grant* involved an award of costs and fees as a matter of right, but *Fish* involved a discretionary award.

Therefore, the *Fish* court refused to consider the plaintiffs' challenge to the expert fees, since they had not appealed from the post-judgment order awarding the fees. See also *DeZerega* (notice of appeal from judgment awarding costs did not embrace post-judgment order awarding attorney fees).

As a matter of prudence, however, even where it seems that *Grant* certainly should apply, it never hurts to file a second notice of appeal from the post-judgment order. It is easy to consolidate this second, perhaps superfluous, appeal with the existing appeal, but it is impossible to resurrect an appeal that was never filed. Given the severe consequences for not filing a notice of appeal, caution is the wiser course.

The recent case of *Macomber v. Red Robin International*, 2002 DJDAR 12331 (Cal. App. 5th Dist. Oct 25, 2002) (publication withdrawn Oct. 29, 2002), highlights the application of these rules and the pitfalls that await unwary appellants. The Court of Appeal dismissed the plaintiff's appeal, ruling that her notice of appeal from the judgment did not encompass the subsequent order denying her motion for fees and costs.

Danielle Macomber had sued her former employer, Red Robin, for sexual harassment, gender discrimination and retaliation. The jury awarded her $11,760 in compensatory damages, and the court entered judgment. Both sides filed post-judgment motions. Red Robin moved for judgment notwithstanding the verdict. Macomber moved for an award of attorney fees and costs under Government Code Section 12965(b) (prevailing party in Fair Employment and Housing Act sexual harassment claim may be awarded fees and costs).

The trial court heard both motions together. The court granted partial judgment notwithstanding the verdict, reducing Macomber's compensatory damages award to an even $10,000, and took Macomber's fee motion under submission. On Sept. 13, 2000, the court issued a six-page ruling denying Macomber's motion in its entirety and ordering Red Robin to prepare and serve an order consistent with the court's ruling.

The next day, Sept. 14, 2000, the trial court filed its order granting partial judgment notwithstanding the verdict, vacating the prior judgment and entering a new judgment. The new judgment included the phrase "together with costs in the amount of $_____," which the court crossed out, initialing this deletion. A week later, on Sept. 22, 2000, the court filed its written order denying Macomber's motion for fees and costs.

On Nov. 3, 2000, Macomber filed a notice of appeal from "the Judgment entered herein on September 14, 2000." The notice made no mention of the Sept. 22 order denying her motion for attorney fees. That omission proved fatal to her appeal, when the only issue raised in her opening brief was the denial of her fee and cost motion, and Red Robin moved to dismiss on the ground she had failed to appeal from the post-judgment order.

The Court of Appeal acknowledged its duty under Rule of Court 1(a)(2) to liberally construe the notice of appeal, but it concluded that no amount of liberality could stretch the notice of appeal from the Sept. 14 judgment to cover the Sept. 22 order denying fees and costs. By omitting any reference at all to that separately appealable order, there was no basis even to infer that the notice of appeal from the judgment applied to that order as well.

Next, the appellate court analyzed whether the judgment appealed from "subsumed" the post-judgment order denying fees and costs. The court concluded that it did not, because the judgment made no determination regarding the entitlement to fees and costs.

When the trial court interlineated the language in the proposed judgment related to costs, that did not indicate whether fees or costs would be awarded. It simply made the judgment silent on that issue.

Macomber argued that even if the judgment did not subsume the post-judgment written order denying fees and costs, it at least subsumed the pre-judgment Sept. 13 "ruling" denying fees and costs. The Court of Appeal rejected this argument too, pointing out that the ruling specifically required Red Robin to prepare and serve a written order. Thus, the trial court's Sept. 13 "ruling" was not a final determination of the issue.

The lesson from *Macomber* is clear. Never assume that appealing from a judgment embraces an appeal from a post-judgment fee and cost order. When in doubt, file another notice of appeal. A superfluous appeal always may be consolidated or dismissed, but a missed opportunity to appeal is lost forever.

Kathy M. Banke, of the Oakland office of Reed Smith Crosby Heafey, is head of the firm's appellate department and a member of the American and California Academies of Appellate Lawyers. **Benjamin G. Shatz** is of-counsel in the firm's appellate department in Los Angeles. Both are certified appellate law specialists.

Letters to the Editor

Court Has Tossed 'Macomber' Opinion

Re "'Macomber' Highlights Danger in Appealing Fee, Cost Awards," Kathy M. Banke and Benjamin G. Shatz, Focus, March 7: The opinion in *Macomber* was withdrawn by order of court. *Macomber v. Red Robin Int'l Inc.*, 2002 Cal.App.LEXIS 4887 (Cal. App. Oct. 29, 2002). According to California Rule of Court 977(a), such an opinion cannot be relied on or cited as authority by a court or party.

The article fails to warn the unwary that a party may be sanctioned for relying on an unpublished opinion (*Alicia T. v. County of Los Angeles*, 222 Cal.App.3d 869 (1990) (filing of brief that relies on unpublished opinion warrants sanctions "to deter similar violations of the court rules").

Gabriele Mezger-Lashly
Ventura

Article Leaves Out Three Goals of Firm

I am writing in response to the article by Joel Rosenblatt ("Blind Ambition," EXTRA, March 3). As the vice chair of Pillsbury Winthrop, and as the former chair of Winthrop Stimson who has spent his career at the firm, I want to give voice to the many lawyers and staff here who, like me, are proud of our firm, of its accomplishments and of the talented people with whom we work every day.

Rosenblatt obviously chose to focus his article very narrowly upon but one of the four goals that we have identified for our firm.

The missing three goals are equally important for balance: providing the best client team program, improving the firm as a better place to work and growing in our core areas. I find it curious that Rosenblatt chose to rely primarily on unsubstantiated comments from unnamed sources with a lack of real and informed insight into Pillsbury Winthrop.

My colleagues, Mary Cranston and Marina Park, to whom Rosenblatt devotes so much attention, are leading the firm ably in the effort to realize all four of our key goals. Together, we are committed to excellence in all of our pursuits — particularly by rewarding teamwork toward outstanding client service to an even greater extent than Winthrop Stimson had before our merger. These are the attributes of the firm that bind us all together and make us proud to be with the firm.

I look forward to reading more balanced articles in Daily Journal EXTRA in the future.

John F. Pritchard
New York

Letters to the Editor

'Macomber' Is Valid Cautionary Tale

Re Gabriele Mezger-Lashly's letter ("Court Has Tossed 'Macomber' Opinion," March 19), taking issue with our article "'Macomber' Highlights Danger in Appealing Fee, Cost Awards" (Focus, March 7): Mezger-Lashly is critical of the fact that *Macomber* was unpublished and, therefore, uncitable.

However, the article expressly noted *Macomber*'s unpublished status, and nothing in the article could be construed as encouragement to cite it. As the article's title makes clear, it was about the pitfalls of failing to properly appeal fee and cost awards, with *Macomber* serving as warning to practitioners of what can go wrong. *Macomber* remains a valid cautionary tale, regardless of its publication status.

Kathy M. Banke
Benjamin G. Shatz
Los Angeles

Court Sends Message In Anti-SLAPP Rulings

Re Kenneth C. Feldman's piece "Courts Apply SLAPP Law to Malicious-Prosecution Cases," Focus, March 14: 2002 was indeed a bellwether year for anti-SLAPP opinions. It is interesting, however, that commentators and lower courts alike appear not to have heard what was meant to be an important "peal" from the California Supreme Court.

In the three opinions filed Aug. 29, 2002 — *Navellier v. Sletten*, 2002 DJDAR 9954 (Cal. Aug. 29, 2002); *Equilon Enterprises v. Consumer Cause Inc.*, 2002 DJDAR 9945 (Cal. Aug. 29, 2002); and *City of Cotati v. Cashman*, 2002 DJDAR 9950 (Cal. Aug. 29, 2002) — the court introduced a new phrase: "minimal merit."

In describing the second prong of the anti-SLAPP analysis, that is, what a plaintiff must show to avoid dismissal, the court wrote that the test is whether the plaintiff's claim "lacks even minimal merit." What is more, the court repeated the "minimal merit" phrase five times in *Navellier* and *Equilon Enterprises*. As near as I can tell, the court had never before used that phrase in its anti-SLAPP jurisprudence, and neither had any Court of Appeal.

It seems unlikely that the court would inject a new term into the anti-SLAPP lexicon without purpose. I believe that the court was attempting to send a message that, as the universe of complaints subject to the statute expands, the bar to dismissing those complaints outright needs to be raised a bit.

Paul Campos
Orinda