In Some Cases, Appeal Will Lie From an Order, Not a Judgment

By Paul D. Fogel
and Benjamin G. Shatz

For some time now, the Courts of Appeal have admonished litigants that an appeal lies only from a judgment and not from the order that gave rise to it. For example, in *Modica v. Merin*, 234 Cal.App.3d 1072 (1991), the court dismissed an appeal taken from an order granting summary judgment, expressing exasperation with the bar for failing to comprehend the distinction between a nonappealable order and an appealable judgment. See also *Shpiller v. Harry C's Redlands*, 13 Cal.App.4th 1177 (1993) (dismissing appeal from notice of ruling); *Cohen v. Equitable Life Assurance Soc'y*, 196 Cal.App.3d 669 (1987) ("We are wearying of 'appeals' from clearly nonappealable orders.").

Against this backdrop, imagine filing a timely notice of appeal from a judgment only to have the Court of Appeal — on its own motion, no less — dismiss the appeal as untimely for failure to appeal from the order that gave rise to the judgment. Imagine further that the order is not among the few appealable orders listed in Code of Civil Procedure Section 904.1.

Seem strange? This is what happened recently in the 2nd District Court of Appeal's decision in *Laraway v. Pasadena Unified School District*, 98 Cal.App.4th 579 (2002) (petition for review pending, S107925).

John Laraway sued a school district seeking disclosure of certain public records. (Although not mentioned in the opinion, the plaintiff apparently sought these records to support his separate False Claims Act lawsuit involving the district. See *Laraway v. Sutro & Co. Inc.*, 96 Cal.App.4th 266 (2002).)

Laraway sought injunctive and declaratory relief and a writ of mandamus or prohibition. The trial court entered an order denying his requests for a writ and injunctive relief, although it granted one portion of his declaratory-relief request.

The trial court's order resolved all issues between the parties and did not direct the preparation of any further order or a judgment. Neither the clerk nor the parties served notice of entry of the order, however, and neither side appealed from it. More than five months later, the court entered a judgment in the school district's favor that repeated the terms of the order and awarded no costs.

Laraway filed a notice of appeal from the judgment within 60 days from its entry but more than six months after entry of the underlying order. Both parties apparently assumed that the appeal was timely — after all, Laraway's notice of appeal was filed within the 60-day period to appeal a judgment allowed by California Rule of Court 2.

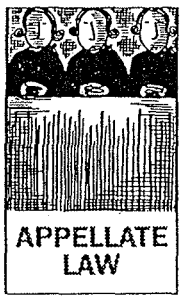
Perhaps concerned about the five-month delay between the order and the judgment, however, the Court of Appeal apparently had doubts about the timeliness of the appeal, as it advised the parties to be prepared to address that issue at oral argument. After argument, in a brief opinion, the Court of Appeal dismissed the appeal on the ground that Laraway's notice of appeal was untimely.

The court began with the black-letter principle that a timely notice of appeal is mandatory and jurisdictional and that an untimely appeal must be dismissed. California Rule of Court 2(e). The court then explained that the order was appealable because it disposed of all the issues between the parties and contemplated no further action, such as the preparation of another order or a judgment.

As such, the latest time to file a notice of appeal was 180 days after entry of the order. Laraway's notice, filed after that deadline, was fatally late. See Rule 2(a)(3). This was true even though the order did not award costs because a cost award is a separately appealable post-judgment order.

The court found it irrelevant that Laraway had filed a timely notice of appeal from the judgment because the judgment merely restated the terms of the order. Although the judgment also awarded no costs, neither side appealed the cost "award." Accordingly, the court considered the judgment as "nothing more than a post-judgment order determining [the school district's] right to recover costs."

The linchpin to *Laraway*'s holding was its determination that the order was appealable. But an order denying a Superior Court writ petition is not one of the appealable orders listed in Section 904.1. Thus, the court looked to other sources, like *Davis v. Taliaferro*, 218 Cal.App.2d 120 (1963).



If there is uncertainty about whether a proceeding is a 'special proceeding,' the safest course is to appeal both that order and any judgment later entered.

Paul D. Fogel is a partner in the San Francisco office of Crosby, Heafey, Roach & May and a member of the firm's appellate department. **Benjamin G. Shatz** is a senior attorney in the firm's appellate department in Los Angeles.

In *Davis*, the court found that a minute order that directed preparation of a judgment was not appealable. Thus, *Davis* was not really on point because the *Laraway* order did not direct the preparation of a judgment. In other words, just because a minute order directing entry of judgment is not appealable does not mean that a minute order that does not direct such entry is.

Laraway also cited *Wiener v. Superior Court*, 58 Cal.App.3d 525 (1976), and *Masonite Corp. v. Mendocino County*, 42 Cal.App.4th 436 (1996). But those cases were not on point, either.

Wiener involved an order that sustained a demurrer without leave to amend on three causes of action and granted summary adjudication on three others, leaving three more pending. The court thus found that the order was not appealable because three causes of action remained. But this appears to have been a shorthand way of saying that a final judgment was lacking because, even if the order had resolved all causes of action by demurrer or summary adjudication, it would not have been appealable because a judgment would have been necessary.

Masonite involved an "interim ruling" on one aspect of a preliminary injunction that was to be followed by a "final ruling" on the other portions of the injunction. The Court of Appeal held that the interim order was not appealable because it did not dispose of all issues presented by the injunction motion.

But *Masonite* does not support the result in *Laraway* because, if the order in *Masonite* had disposed of all the preliminary injunction issues, it would have been appealable because an order granting or denying an injunction is an appealable order listed in Section 904.1(a).

Thus, *Davis*, *Weiner* and *Masonite* all failed to provide a clear rationale for the result in *Laraway*. Indeed, none involved a Superior Court writ petition — the kind of "special proceeding" involved in *Laraway*.

One week after filing *Laraway*, the Court of Appeal modified its opinion by adding additional authorities to bolster its analysis. *Laraway v. Pasadena Unified School District*, 2002 DJDAR 5774.

The court cited *Townsel v. San Diego MTD Bd.*, 65 Cal.App.4th 940 (1998), and *Haight v. City of San Diego*, 228 Cal.App.3d 413 (1991). Both cases involved Superior Court writ petitions — a kind of "special proceeding." The court cited these cases for the rule that an order denying such a petition may be treated as a final judgment. These cases, therefore, supplied a link that had been missing from court's initial analysis.

By citing *Townsel* and *Haight*, *Laraway* revealed the premise central to its holding: As an order denying a "special proceeding," which constitutes the "final determination of the rights of the parties" under Code of Civil Procedure Section 1064, the order was tantamount to a judgment and therefore appealable.

Arguably, however, *Townsel* and *Haight* did not require dismissal of the appeal in *Laraway*. In those two cases, the courts allowed arguably premature appeals to proceed by treating orders in special proceedings as final judgments. But in ruling that the appeals could be from the order, they never clearly articulated that the appellant was required to appeal from the order. Nor did they address what effect a later judgment might have on the appealability of such an order.

In fairness, however, it is not a great stretch to conclude that, as in *Townsel* and *Haight*, if an order that determines all aspects of a special proceeding is appealable regardless of entry of a judgment, then such an order must be appealed on pain of losing the right to appeal.

The Supreme Court came close to addressing this situation in *Griset v. Fair Political Practices Comm'n*, 25 Cal.4th 688 (2001). *Griset* concluded that an order denying a petition for writ of mandate that effectively disposed of all the parties' claims constituted an appealable judgment such that the "judgment" entered after the order was void.

Griset, however, did not rest its analysis on the fact that an order may be a final judgment in a special proceeding. Rather, it found the order to be a final judgment because the Court of Appeal "implicitly construed [the order] as a final judgment." *Laraway*, therefore, is the first case to require a party to file a notice of appeal from an order that resolves a Section 1064 special proceeding.

Laraway's lesson is clear: If a matter in Superior Court qualifies as a special proceeding under Section 1064, an order that resolves the matter and leaves nothing (or only costs) for further determination qualifies as a "judgment" that must be appealed. In particular, *Laraway* should resolve any existing uncertainty over appeals from Superior Court orders that deny writ petitions.

Reliance on a subsequently filed document, including even a "judgment," will not save an untimely appeal from the order unless the trial court directs the preparation of a judgment or has contemplated further proceedings.

Moreover, if there is any uncertainty about whether a given proceeding counts as a "special proceeding," the safest course is to appeal both that order and any judgment later entered. E.g., *MCM Constr. Inc. v. San Francisco*, 66 Cal.App.4th 359 (1998) (appeals taken from order denying writ petition and later judgment "in an abundance of caution").

It is far better for one to be chastised by the Court of Appeal for wearing a belt and suspenders (appealing from a nonappealable order and an appealable judgment), than to have one's pants fall down (having to explain to an angry client why the Court of Appeal dismissed the appeal as untimely).