

# Focus

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## The Practitioner Appellate Law

# Dual Action

### Limited Jurisdiction Remains in Trial Court After Filing of Appeal

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Conventional wisdom seemingly would dictate that jurisdiction over a case can only be in one place at one time. After a notice of appeal is filed, the trial court ought to lose jurisdiction over the case because of the pending appeal. Presumably, then, there should be no further proceedings in the trial court during the pendency of an appeal because of the shift in focus to the higher court.

Refreshingly, conventional wisdom works in most situations. Perhaps not surprisingly, however, there is a reservoir of jurisdiction that remains with a trial court despite a pending appeal. Knowing what issues fall within this retained jurisdiction can benefit both trial and appellate lawyers.

This schizophrenic aspect of jurisdiction was recently highlighted in two cases: *Franklin & Franklin v. 7-Eleven Owners For Fair Franchising*, 85 Cal.App.4th 1168 (2000), and *Natural Resources Defense Council v. San Diego Baykeeper Inc.*, 2001 DJDAR 2823 (9th Cir. March 20, 2001).

In *Franklin*, the Court of Appeal affirmed the trial court's grant of injunctive relief after a final judgment had been entered and after an appeal had been filed. Because of the discrete nature of the issue present-

ed by the injunction, the Court of Appeal found that the proceedings fell within the narrow reservoir of jurisdiction left in the trial court after an appeal.

The filing of a valid notice of appeal is an event of jurisdictional significance that typically divests a trial court of jurisdiction and confers jurisdiction on

embraced in the action and not affected by the judgment or order."

The language of this statute, of course, raises the question: "What issues are embraced in the action, but do not materially affect a judgment or order on appeal?" *Franklin* provides some helpful insights on this question.

In *Franklin*, 7-Eleven franchisee owners brought a class action in Alameda County Superior Court against 7-Eleven's franchiser, alleging breach of their franchise agreements. During the course of this lawsuit, the plaintiffs changed counsel, replacing Franklin & Franklin with new class counsel. The discharged Franklin firm unsuccessfully moved to reinstate itself as class counsel, alleging that the class representatives and their new lawyers were guilty of fraud, self-dealing and conflicts of interest.

When the class action settled for \$37 million, the settlement included an attorney-fee award to class counsel, specifi-

notes that the types of matters "embraced" in an action, but not "affected" by the judgment, "fall into no particular pattern." Witkin, Section 24.

Instead, the court focused on the purposes underlying Section 916 and reiterated the operative test: jurisdictional divestiture depends on the "impact" the exercise of post-judgment jurisdiction would have on the "effectiveness" of the pending appeal. See also *Betz v. Pankow*, 16 Cal.App.4th 931 (1993) ("the pendency of an appeal does not divest the trial court of jurisdiction to determine ancillary or collateral matters which do not affect the judgment on appeal").

That same test carries through to federal practice. In fact, federal law is very similar to California law on these jurisdictional issues. The timely filing of a notice of appeal in U.S. District Court transfers jurisdiction over orders and judgments encompassed by the notice to the Court of Appeals. See *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982).

As with California law, this rule exists to prevent a district court from materially modifying its decision pending appellate review. *Kern Oil & Refining Co. v. Tenneco Oil Co.*, 840 F.2d 730 (9th Cir. 1988) ("The appellate court is entitled to review a fixed, rather than mobile

record.") Unlike California law, this divestiture of jurisdiction does not rest on statute but rather is a judge-made doctrine designed to avoid the confusion and waste that would result from having the same issues before two courts at the same time.

**AS** 'Franklin' and 'Natural Resources' make clear, an appeal does not absolutely foreclose further proceedings in the trial court.

cally, \$2.30 million to the Franklin firm and \$2.35 million to the new class counsel that replaced it. The Franklin firm, along with a handful of class members who objected to the settlement, appealed the judgment affirming the settlement.

an appellate court. *People v. Mendez*, 19 Cal.4th 1084 (1999); 9 Bernard E. Witkin, "California Procedure, Appeal" Section 24 (4th ed. 1997).

Consequently, once a notice of appeal is filed, a trial court may not vacate or amend its own judgment or order or do any other act that would affect the rights of the parties or impact the issues on appeal — even with the parties' consent. *Mendez, Valvo v. University of So. Cal.*, 67 Cal.App.3d 887 (1977).

The jurisdictional bar protects the role of the reviewing court by preserving the status quo until the appeal can be decided. Otherwise, a trial court could interfere with an appeal by changing the result or record under review, thereby possibly mooted the entire appellate process or significantly altering the presentation of the issues to be reviewed. *Tounsel v. Superior Court*, 20 Cal.4th 1084 (1999); see also *In re Marriage of Varner*, 68 Cal.App.4th 932 (1998) ("The trial court may not make any order which will lessen the effectiveness of the appellate court's opinion.").

But certain matters are not affected by a notice of appeal. Most notably, because a motion for new trial is an independent, collateral attack on a judgment, an appeal does not divest jurisdiction from the trial court to hear and determine a new-trial motion, even after the filing of a notice of appeal. *Knowles v. Thompson*, 133 Cal. 245 (1901).

In addition to new-trial motions, a trial court retains jurisdiction over a host of ancillary matters. For instance, despite a pending appeal, a trial court can entertain motions related to incidents of attachment, satisfaction of judgment, expungement of lis pendens and awarding attorney fees. See Witkin, Section 24.

Moreover, because a trial court retains jurisdiction over its own records, it may exercise its power to correct clerical errors in the record or judgment despite a pending appeal. E.g., *Boylan v. Marine*, 104 Cal.App.2d 321 (1951).

The common thread between these various proceedings is that they do not materially affect the issues on appeal. Code of Civil Procedure Section 916(a) codifies this approach by providing that "the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, ... but the trial court may proceed upon any other matter

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**M**eanwhile, the Franklin firm also filed an action in San Diego County Superior Court against the class representatives and their new counsel, alleging breach of contract and breach of fiduciary duty. The class representatives and class counsel then moved the Alameda court (whose judgment was the subject of Franklin's appeal) for a preliminary injunction to stay the San Diego litigation.

The Alameda court granted injunctive relief, restraining the Franklin firm from prosecuting the San Diego action. The Franklin firm appealed the order granting the injunction, arguing that its pending appeal of the Alameda court's judgment robbed that court of the ability to entertain the injunction motion because jurisdiction vested solely in the Court of Appeal.

The Court of Appeal rejected the Franklin firm's argument, holding that the Alameda court had jurisdiction to enjoin the San Diego litigation — and, on the merits, properly did so. In reaching this result, the court followed Section 916's directive and looked at whether the subject matter of the post-judgment proceeding was "embraced" or "affected" by the judgment and, thus, necessarily would have an "impact" on the "effectiveness" of the appeal.

Using that test, the court reasoned that the Alameda court's post-judgment injunction had no impact on the effectiveness of Franklin's appeal of the class-action settlement and that the injunction staying the San Diego litigation did not infringe on the appellate court's jurisdiction over it.

To the contrary, rather than modify or destroy the judgment on appeal, the injunction would preserve the integrity of the appeal by maintaining the status quo. Without the injunction, the San Diego proceedings could have changed the settlement's attorney-fee award and, thereby, materially altered the judgment being reviewed on appeal. The injunction, therefore, protected the judgment pending the appeal and was properly granted.

The motion seeking an injunction to stay related litigation at issue in Franklin was not the sort of post-judgment motion that came within any existing exception to the transfer of jurisdiction. But this gave the Court of Appeal no reason for pause. After all, Witkin

Also, as in California, the jurisdictional divestment is not total. A district court retains jurisdiction to correct "clerical" or "ministerial" errors involving the matter appealed. *In re Thorp*, 655 F.2d 997 (9th Cir. 1981) (District Court retains jurisdiction to "correct clerical mistakes"). And a district court retains jurisdiction over orders enforcing the judgment, tolling motions or ancillary matters (like attorney fees) and any other part of the case not affected by the notice of appeal.

The district court's retention of limited jurisdiction derives from both statute and decisional law and is designed to assist the appellate court by entering orders appropriate to preserving the status quo. *Davis v. United States*, 667 F.2d 822 (1982).

Applying these rules, the 9th U.S. Circuit Court of Appeals issued a decision similar to *Franklin* two weeks ago. In *Natural Resources*, the 9th Circuit held that the District Court had jurisdiction to slightly modify an injunction despite a pending appeal of the injunction. Specifically, the District Court changed the wording of the injunction to clarify what otherwise could be interpreted as vague directives.

The Court of Appeals recognized that these changes were only "minor adjustments" to the injunction that served to better enforce it and preserve the status quo. Because the changes did not materially alter the status of the case on appeal, these changes were not beyond the District Court's jurisdiction.

As *Franklin* and *Natural Resources* make clear, the pendency of an appeal does not absolutely foreclose further proceedings in the trial court. Instead, trial-court proceedings can be initiated, and affirmative relief sought, if the scope of the ruling or relief is not embraced by the judgment on appeal and would not impact the effectiveness of the appeal.

Further, if the ruling or relief would help preserve the status quo pending appeal, that too can provide a basis for further action by the trial court. Given these options, savvy practitioners can use both courts — trial and appellate — to fully protect their clients' interests during a pending appeal.

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