Focus

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The Practitioner Appellate Law

Legal Alchemy

Transmuting Defective Appeals Into Writs

By James C. Martin and Benjamin G. Shatz

Like hopeful bar-exam applicants, appellate courts subscribe to a "do it once, do it right, and never do it again" philosophy.

The "one-final-judgment rule" sums up this doctrine, under which appellate courts review only the ultimate ruling in an action, rather than entertaining appeals from various rulings during the course of trial court proceedings. This principle reflects the policy that multiple appeals in a single action are oppressive and costly. *Morehart v. Santa Barbara County*, 7 Cal.4th 725 (1994).

The one-final-judgment rule is not exempt from the bromide about exceptions to every rule. One significant avenue of interim appellate review is by petition for an extraordinary writ. If a party files an appropriate writ, the Court of Appeal has discretion to review a nonfinal judgment or nonappealable order.

Sometimes a party files an appeal from a nonfinal judgment or nonappealable order not realizing that writ review is the only proper avenue for appellate review. In this situation, the Court of Appeal simply can dismiss the defective appeal, forcing the appellant to seek review after final judgment.

Nevertheless, in the past, appellate courts were prone to exercise their inherent discretion to "save" such improper appeals by treating them as if they were writ petitions. See *U.S. Financial v. Sullivan*, 37 Cal.App.3d 5 (1974) ("compelling" circumstances prompted court to treat appeal from nonappealable judgment as writ); *Clovis Ready Mix Co. v. Aetna Freight Lines*, 25 Cal.App.3d 276 (1972) (premature appeal treated as writ to "prevent unnecessary delay"). Even the Supreme Court saved defective appeals but clarified that such treatment is appropriate only under "unusual circumstances." *Olson v. Cory*, 35 Cal.3d 390 (1983).

But the high court never explained precisely what circumstances qualify a matter as "unusual" enough to justify overlooking the one-final-judgment rule. In *Olson*, the court noted that the question of appealability had been unclear and that the defective appeal addressed the parties' only remaining disputed issue. Accordingly, accepting jurisdiction and resolving the entire action made good sense. However, *Olson* did not say that writ treatment was proper only under these circumstances, generally leaving the question open to the appellate courts' discretion.

The lack of an established standard no doubt helped turn the saving of defective appeals into a relatively common practice. Indeed, it had become so routine that courts did not even feel compelled to offer much reasoning to support turning a defective appeal — which they could not hear — into an appropriate writ, which they could. And even those opinions offering insights into what might motivate a court to ignore a fatal jurisdictional flaw did not attempt to establish definitive guidelines for the judicial rescue mission. Compare *Board of Dental Examiners v. Superior Court*, 66 Cal.App.4th 1424 (1998) (no reasons stated for saving appeal); *Green v. GTE Cal.*, 29 Cal.App.4th 407 (1994) (same); with *Wells Properties v. Popkin*, 9 Cal.App.4th 1053, 1055 (1993) (circumstances "not sufficiently unusual" to treat defective appeal as writ); *In re Marriage of Patscheck*, 180 Cal.App.3d 800 (1986) (power to save appeals used "sparingly and only under unusual circumstances").

That is, until now. In *St. Joe Minerals Corp. v. Zurich Insurance Co.*, 75 Cal.App.4th 261 (1999), the Environmental Protection Agency sued St. Joe Minerals to require a multimillion-dollar cleanup of several mining and smelting sites. St. Joe requested its insurer, Zurich, to defend these claims. When it declined to do so, St. Joe filed a complaint against Zurich alleging four causes of action. One of those causes of action sought a declaration that Zurich had a duty to defend, and St. Joe successfully sought summary adjudication of this claim. Zurich appealed the order that it had a duty to defend St. Joe, even though St. Joe's other three causes of action remained pending. Both Zurich and St. Joe argued that, if the order was not appealable, then the Court of Appeal should review it anyway by treating it as a writ petition.

James C. Martin, managing partner of the Los Angeles office of Crosby, Heafey, Roach & May, is a member of the firm's appellate department and of the California Academy of Appellate Lawyers. **Benjamin G. Shatz** is an associate in the firm's appellate department in Los Angeles.

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The Court of Appeal not only declined to treat this premature interlocutory appeal as a writ but also took pains to explain why. Its analysis began by noting that the "treat-as-writ petition procedure" — "[t]he last refuge of a defective appeal" — is discretionary and should be exercised only in unusual circumstances. In analyzing whether the requisite unusual circumstances were present, the court discounted the parties' agreement that the court should treat the appeal, if defective, as a writ. Litigants cannot confer appellate jurisdiction. *Don Jose's Restaurant v. Truck Ins. Exch.*, 53 Cal.App.4th 115 (1997).

Instead, the court extracted seven factors from the case law bearing on the exercise of its "unusual circumstances" discretion:

- Whether the appeal's defectiveness was clear in advance.
- Whether case law might have misled the parties into believing that the order was appealable.
- Whether treatment as a writ petition facilitates judicial economy.
- Whether a need exists to treat the proceeding as a writ proceeding because a normal appeal would be an inadequate remedy.
- Whether the case presents a public-interest issue of statewide importance.
- Whether the briefing already completed covers the dispositive issues in the case.
- Whether the interests of justice and prevention of unnecessary delay favor treatment as a writ petition.

In the court's estimation, none of these factors supported saving Zurich's defective appeal. Established law made clear that summary-adjudication orders are nonappealable, so the appeal's defectiveness was clear in advance. Judicial economy and prevention of delay would be served if Zurich prevailed, but if St. Joe prevailed, the case would proceed as if Zurich had never filed the appeal. Therefore, interlocutory review had no guaranteed efficiency. Although a ruling for Zurich could save judicial resources, that result required a full determination on the merits — which the court determined should happen on appeal from a final judgment.

The court also noted that the case presented no issue of statewide importance because a ruling simply would apply existing law and affect only Zurich and St. Joe. Finally, the court noted that the appellate record and briefing did not address all issues necessary to dispose of the entire case and that using that briefing on a proper appeal from the final judgment would be more efficient.

When combined with the court's reasoning, the seven factors provide a helpful framework for analyzing whether to save a defective appeal. From this perspective, the opinion is of greater use to courts of appeal than to practitioners. Saving defective appeals remains a matter of appellate court discretion, and litigants can influence that decision only if the requisite unusual circumstances are present. The best course for counsel is to avoid any risk and file either a proper appeal or an appropriate writ — thereby leaving nothing to be saved.

Unfortunately, such common-sense advice does not mean that appealability is always clear. In those instances, the court should resolve doubt in favor of taking an appeal, while perhaps pursing a writ in the alternative. As far as the writ alternative is concerned, moreover, the factors set forth in the *St. Joe* opinion provide a basis on which to argue how to exercise that writ discretion.

Apart from its factual analysis, the most pervasive influence of the *St. Joe* opinion could be to reduce the instances in which courts save defective appeals by treating them as writs. The opinion sends a forceful signal that the requisite unusual circumstances are reserved for the truly exceptional situation and that appellate largess should not be expected. Where appellate courts may once have been inclined to routinely save defective appeals, or at least to be less exacting on what was "unusual," *St. Joe*'s reasoning reflects that they are becoming much more reluctant to do so now.