Five Fun Finality Problems (Plus One)

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One of the most basic, yet often most confusing, issues that a lawyer must address in connection with an appeal is whether the appellate court has jurisdiction. Most lawyers who practice entirely or mostly in state trial courts probably give little serious thought to subject matter jurisdiction because they do not have to. Circuit courts are courts of general jurisdiction so they can entertain every sort of justiciable dispute not specifically excluded from their purview.[1]

However, ignoring jurisdictional niceties is not a viable strategy in the appellate realm. Unlike circuit courts, the appellate courts' jurisdiction is strictly limited.[2] The attorney on appeal must assure that the reviewing court has obtained jurisdiction to avoid wasting valuable time pursuing a premature appeal (or, worse, one that has come too late). The parties cannot consent to, or waive, appellate jurisdiction[3] and the reviewing courts have a duty to consider whether they have jurisdiction before considering the merits of an appeal.[4]

Yet those who only rarely venture into appellate practice may ask: "What's so hard about jurisdiction? After all, final judgments are always appealable and some other kinds of orders are too . . . sometimes. Right?" Well, not exactly. One court has astutely observed that "[f]or the trial advocate, appellate jurisdiction is akin to strolling through a minefield."[5] In general, it is correct that final judgments are always appealable as a matter of right.[6] But that is only step one. Some of the trickiest issues of appellate jurisdiction relate to whether a particular order actually qualifies as a "final judgment."

Many of the most vexing (and, consequently, interesting) appellate jurisdiction issues arise out of fact patterns that courts have not previously addressed or from cases that fall within the intersection of two or more apparently contradictory rules.[7] Yet some interesting jurisdictional issues seem to reappear periodically in slightly different guises. What follows is an outline of some appellate jurisdiction problems that continue to generate confusion even though they commonly reoccur.

Problem No. 1: Sanctions Motion Pending

Does the pendency of an unadjudicated motion for sanctions affect the appealability of a judgment as to the other issues of the case?

Premature appeals often arise in cases where the substantive issues are resolved but a motion for sanctions remains pending. Counsel may be inclined to assume that, because the substance of the case is over and final, a motion for sanctions has no bearing on whether the concluded issues can be appealed. Not so.

A motion for sanctions under Illinois Supreme Court Rule 137 is considered a claim in the case in which it arises.[8] Characterization of a Rule 137 request for sanctions as a "claim" is significant because a case generally cannot be appealed when some claims and/ or parties remain pending.[9] The Illinois Supreme Court made the jurisdictional effect of a pending Rule 137 motion explicit by amending Rule 303(a) in 2006 to provide that "a judgment or order is not final and appealable while a Rule 137 claim remains pending unless the court enters a finding pursuant to Rule 304(a)."[10]

That jurisdictional result dovetails with the language of Rule 137, which states that "proceedings under this rule shall be brought within the civil action in which the pleading, motion or other paper referred to has been filed, and no violation or alleged vi-

[1] *Magnetek, Inc. v. Kirkland & Ellis*, LLP, 2011 IL App (1st) 101067, appeal allowed, 962 N.E.2d 483 (2011).
[2] *Cribbin v. City of Chicago*, 384 Ill.App.3d 878, 885 (1st Dist. 2008) ("Jurisdiction of the appellate courts is limited to reviewing appeals from final judgments, except where statutory or supreme court exceptions apply.").
[3] *Gaynor v. Burlington Northern & Santa Fe Ry.*, 322 Ill.App.3d 288, 289 (5th Dist. 2001).
[4] In re *Marriage of Mardjetko*, 369 Ill.App.3d 934, 935 (2nd Dist. 2007).
[5] *Physicians Ins. Exch. v. Jennings*, 316 Ill.App.3d 443, 446 (1st Dist. 2000).
[6] See Ill. Sup. Ct. R. 301.
[7] Finding correct answers to questions about appellate jurisdiction can be especially difficult because reviewing courts often resolve jurisdictional issues in unpublished orders that are circulated only to the parties to the appeal.
[8] *Pekin Ins. Co. v. Phelan*, 343 Ill.App.3d 1216, 1219 (3rd Dist. 2003).
[9] See *State Farm Fire & Casualty Co. v. John J. Rickhoff Sheet Metal Co.*, 394 Ill.App.3d 548, 556 (1st Dist. 2009).
[10] Ill. Sup. Ct. R. 303(a).

olation of this rule shall give rise to a separate civil suit, but shall be considered a *claim within the same civil action*."[11] Thus, a petition brought pursuant to Rule 137 is not a separate action, but rather a separate claim.[12]

Curious situations may still arise where a Rule 137 sanctions motion is filed after a notice of appeal, but still within 30 days after entry of a judgment that concludes all other matters in the case. This is an example of a situation in which actions of the parties in the trial court can "un-finalize" an otherwise final and appealable case. That is, jurisdiction transfers to the appellate court upon filing of a timely notice of appeal and then reverts to the circuit court upon filing of a timely sanctions motion and remains with the circuit court until the court disposes of the sanctions issue or enters a Rule 304(a) finding as to the balance of the case. [13]

Answer: A judgment cannot be appealed where there is a pending Rule 137 sanctions motion unless the circuit court enters a Rule 304(a) finding.

Problem No. 2: Incomplete Divorce

Is an order providing for a property division in a marital dissolution case appealable before the divorce is final?

Often, as the ink is still drying on an order dividing property, counsel in the not-yet-finalized divorce wants to appeal. After all, the property division is a pivotal moment in the proceeding that may feel final and appealable. But that feeling of finality is false.

A dissolution petition advances a single claim and issues such as custody, maintenance, property division, child support, and attorney fees are merely ancillary issues within that claim.[14] Orders that resolve most such individual ancillary issues are not appealable until the circuit court disposes of the entire dissolution claim.[15] The Illinois Supreme Court created one narrow exception to the rule by a 2010 amendment to Rule 304(b) that provides for immediate appeal of a "custody judgment" or an order modifying custody.[16]

Notably, the various issues within a dissolution proceeding cannot be separately appealed even under Rule 304(a). A Rule 304(a) finding is proper only with respect to a claim that has been concluded in the circuit court. Because a dissolution involves only a single claim, Rule 304(a), by its terms, does not apply to an order that disposes of less than all issues within that claim.[17] However, where separate claims are raised in connection with a dissolution proceeding, a concluded claim may be appealed before the entire dissolution matter is complete if the circuit court makes a finding pursuant to Rule 304(a).[18]

Answer: An order dividing property (or resolving other ancillary issues besides child custody) in a marital dissolution case is not appealable until the divorce is final, even with a Rule 304(a) finding.

Problem No. 3: Attorney Fee Petition Pending

Where a party files a petition for attorneys' fees after entry of a final judgment, is the judgment appealable before the attorney fee petition is decided?

Surely an attorney's petition for fees following entry of a final judgment carries a sense of importance. For the attorney, at least. But is it of sufficient moment to interfere with an appeal of the rest of the case? As with so many legal questions, the answer is, "It depends." When a fee petition is collateral to the other claim(s) resolved in the litigation, a judgment may be appealed notwithstanding the pending petition.[19] However, when the unresolved fee petition is integral to the cause of action, an appeal is premature.

Appealability depends upon when, and on what legal basis, attorneys' fees are sought. If a claim for fees is first asserted after the principal action has been decided, it is likely collateral to the other claims in the case. Collateral matters are those "lying outside the issues in the appeal or arising subsequent to delivery of the judgment appealed from."[20] Such attorneys' fee requests do not affect the appealability of the judgment.[21] The circuit

[11] Ill. Sup. Ct. R. 137 (emphasis added).
[12] *Peabody Coal Co. v. Indus. Comm'n*, 307 Ill.App.3d 393, 395 (5th Dist. 1999).
[13] *John G. Phillips & Associates v. Brown*, 197 Ill.2d 337, 343 (2001) ("Because the time limit for filing Rule 137 motions is the same as the limit for filing notices of appeal—30 days from the entry of final judgment or disposition of the last timely post-judgment motion—the appellate court will have 'temporary' jurisdiction for only a few days at most.").
[14] See *In re Marriage of Leopando*, 96 Ill.2d 114, 118–20 (1983); *In re Marriage of Piccione*, 158 Ill.App.3d 955 (2nd Dist. 1987).
[15] *In re Marriage of Mackin*, 391 Ill.App.3d 518, 519-20 (5th Dist. 2009).
[16] Ill. Sup. Ct. R. 304(b)(6).
[17] See, *e.g., In re Marriage of Best*, 228 Ill.2d 107, 113-14 (2008).
[18] *Id.* (recognizing the immediate appealability of an order resolving a separate declaratory judgment claim as to the validity of the parties' premarital agreement upon entry of a Rule 304(a) finding).
[19] *Moenning v. Union Pac. R. Co.*, 2012 IL App (1st) 101866.
[20] *Town of Libertyville v. Bank of Waukegan*, 152 Ill.App.3d 1066, 1073 (2nd Dist. 1987).
[21] *Berger v. Matthews*, 216 Ill.App.3d 942, 944 (2nd Dist. 1991); *Town of Libertyville v. Bank of Waukegan*, 152 Ill.App.3d 1066, 1073 (2nd Dist. 1987) (notice of appeal from final judgment in condemnation proceeding did not deprive the circuit court of jurisdiction to hear the collateral matter of fees and costs pursuant to section 7-123(a)); *Servio v. Paul Roberts Auto Sales, Inc.*, 211 Ill.App.3d 751, 761 (1st Dist. 1991) (post-judgment petition for attorneys' fees under section 10a(c) was collateral and did not affect the appealability of final judgment).

court "does not lose jurisdiction to entertain such a petition following the filing of a notice of appeal from the judgment on the underlying suit where it is brought as a separate action after the judgment disposing of the initial claim."[22]

On the other hand, when a fee claim is integral to the principal action, it must be concluded before the rest of the case can be appealed. A common example is attorneys' fees recoverable as an additional element of damages in a breach of contract action.[23] Unlike a collateral fee petition, these fee petitions seek additional relief in the principal action. As such, the request for attorneys' fees must be resolved before the case can be appealed.

Answer: Whether a fee petition will preclude an immediate appeal of a judgment that disposes of the other issues of the case depends on the nature of the fee claim.

Problem No. 4: Reconsideration Motion

A losing party files both a motion for reconsideration and a notice of appeal within 30 days after the trial court entered a judgment. Which court has jurisdiction of the case – the circuit court or the appellate court?

Attorneys sometimes file both a notice of appeal and a reconsideration motion within 30 days after judgment. Regardless of which is filed first, the notice of appeal is of no effect. Whether the appellate court or circuit court would have jurisdiction in such instances was often the subject of confusion before 2007, when the Illinois Supreme Court amended Rule 303(a)(2) to make it clear that jurisdiction rests with the circuit court until the last timely-filed post-judgment motion is disposed of by the circuit court.[24]

Thus, in situations where both a notice of appeal and a timely motion for reconsideration are filed, the notice of appeal is untimely. When an untimely notice of appeal is filed, the paramount question becomes whether the notice is premature or late. If an attorney finds that he has filed a late notice of appeal, the next step should be a call to his malpractice carrier.[25]

If the notice of appeal is premature, the next step is usually to wait. Rule 303(a)(2) provides, in pertinent part: "When a timely postjudgment motion has been filed by any party, whether in a jury case or a nonjury case, a notice of appeal filed before the entry of the order disposing of the last pending postjudgment motion, or before the final disposition of any separate claim, becomes effective when the order disposing of said motion or claim is entered."[26] However, where the post-judgment order "grants new or different relief than the judgment itself, or resolves a separate claim, a second notice of appeal is necessary to preserve an appeal from such order."[27]

While Rule 303(a)(2) provides a safe harbor, the cautious practitioner will not rely solely on the rule's safeguards. Instead of depending on the previously-filed notice to spring once again to life automatically, wise counsel will file a new notice of appeal when the appeal ripens. One of the key rules followed by appellate practitioners is that too many notices of appeal are harmless, but one too few is fatal.

Answer: The circuit court retains jurisdiction until it disposes of all timely-filed post-judgment motions.

Problem No. 5: Dismissed Party in a Multi-Party Action

Where one party in a multi-party action is dismissed from the action in an order that contains a Rule 304(a) finding, but the action continues as to the other parties, may the dismissed party wait until all claims in the case are resolved before filing an attorney fee petition?

Finality problems often occur because attorneys attempt to move the case to the appellate court before it is finished in the circuit court. Less frequently, the opposite situation arises: attorneys are still trying to litigate in the circuit court after jurisdiction has vested in the appellate court. One example can be seen in multi-party litigation where an order containing a Rule 304(a) finding dismisses one of the parties from the litigation, but the case continues as to other parties. So far, one might assume that time could be no enemy of the dismissed party (at least as far as jurisdiction is concerned) because he would have no interest in appealing a favorable disposition.

However, suppose the dismissed party's attorney wishes to seek attorneys' fees. Is he free to wait until the end of the entire case to do so, or must he request fees within 30 days after the dismissal order? In a case involving multiple claims and multiple parties, Illinois Supreme Court Rule 304(a) provides that a circuit court may make a final order appealable before the resolution of all of the claims in the litigation.[28] Under those circumstances, a Rule 304(a) finding severs the dismissed party from the rest of the litigation.[29] The role of Rule 304(a) as a means to sever certain concluded claims from the remainder of the case and permit immediate appeal as to those claims is emphasized by the fact that Rule 304(a) findings are not necessary in multiparty actions where claims have already been severed before they are resolved.[30]

The circuit court retains jurisdiction over a matter for 30 days after entry of a final and appealable order.[31] Thus, the circuit court's jurisdiction over the dismissed party continues until 30 days after entry of the Rule 304(a) finding. After that, the dismissed party ceases to be a party to the litigation before the circuit court. Accordingly, a party in that situation must file for

[22] *Town of Libertyville* at 1073.
[23] *F.H. Prince & Co., Inc. v. Towers Fin. Corp.*, 266 Ill.App.3d 977, 988 (1st Dist. 1994).
[24] See Ill. Sup. Ct. R. 303(a)(2).
[25] But see Storm, *Not Too Late To Appeal: Extensions of Time to Appeal in Illinois and Federal Practice*, 18 DCBABR 10 (Nov. 2005).
[26] Ill. Sup. Ct. R. 303(a)(2).
[27] See Committee Comments, Ill. Sup. Ct R. 303(a)(2) (Mar. 16, 2007).
[28] *State Farm Fire & Casualty Co. v. John J. Rickhoff Sheet Metal Co.*, 394 Ill.App.3d 548, 556 (1st Dist. 2009).
[29] See *Lamar Whiteco Outdoor Corp. v. City of W. Chicago,* 395 Ill.App.3d 501, 506 (2nd Dist. 2009) ("Rule 304(a) language applies only to cases involving multiple claims, multiple parties, or both; and in those cases, it can be used to sever a final order as to one claim or party from other claims or parties."); State Farm, 394 Ill.App.3d at 557 (the issue on appeal was whether the Rule 304(a) finding severed the claims of the two third-party defendants from each other).
[30] See, e.g., *Carter v. Chicago & Ill. Midland Ry. Co.*, 119 Ill.2d 296, 307-08 (1998) (A Rule 304(a) finding is unnecessary to permit immediate appeal where "the trial court, in its severance order, clearly and unequivocally states that the claim, counterclaim or the party has indeed been *severed* (in the narrow sense of that word) and that the severed claim, counterclaim or party shall proceed thereafter separate from the other claims, counterclaims or parties as to the case."(italics in original)).
[31] *Suburban Auto Rebuilders, Inc. v. Associated Tire Dealers Warehouse, Inc.*, 388 Ill.App.3d 81, 96 (1st Dist. 2009).

attorneys' fees or other desired relief within the 30-day period. Otherwise, its request is too late because the circuit court no longer has jurisdiction to enter an order relating to that party.[32]

Answer: The circuit court loses jurisdiction of a party 30 days after the party is dismissed from the case with a Rule 304(a) finding, even if the case continues as to the other parties.

Bonus Problem: Rule 304(a) Finding
Is an order always immediately appealable whenever the trial court makes a "finality" finding pursuant to Illinois Supreme Court Rule 304(a)?

Often misunderstood, Rule 304(a) language does not magically ordain any order final and appealable. Instead, only orders that are final as to one or more parties or claims, but do not dispose of all parties or claims, may be appealed pursuant to a Rule 304(a) finding. As noted in the committee comments, "it is not the court's finding that makes the judgment final, but it is the court's finding that makes this kind of a final judgment appealable."[33] Thus, the trial court cannot make a non-final order final and appealable simply by including in its order requisite Rule 304(a) language that there is no just reason to delay enforcement or appeal.[34] Ultimately, the reviewing court and not the trial court must determine as a matter of law whether a Rule 304(a) finding was applied to an eligible final (but otherwise nonappealable) order.[35]

Answer: A Rule 304(a) finding as to a non-final order is a nullity and does not make the order immediately appealable.

Conclusion
The issues outlined above provide a glimpse into the intricacies of answering the seemingly simple question: "Is the order final and appealable?" The slightest difference in facts or the passage of even one day can change the appellate advocate's landscape dramatically. Wait too long and that which was ripe will sour. More unexpectedly, in some instances, that which was ripe may "unripen."

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[32] See, e.g., *Herlehy v. Marie V. Bistersky Trust*, 407 Ill.App.3d 878 (1st Dist. 2010).
[33] See Committee Comments, Ill. Sup. Ct. R. 304(a).
[34] See, e.g., *In re Marriage of Young*, 244 Ill.App.3d 313 (1st Dist. 1993).
[35] *Gassman v. RGB Riverboat*, 329 Ill.App.3d 224, 226 (2nd Dist. 2002).