

# manatt

November 21, 2008

## APPELLATE LAW @MANATT

NEWSLETTER OF THE APPELLATE PRACTICE GROUP OF MANATT, PHELPS & PHILLIPS, LLP

### Volume IV, Issue 6

This article was originally published in the November 20, 2008 issue of the *Los Angeles Daily Journal* and the *San Francisco Daily Journal*.

## Time Trials

[Benjamin G. Shatz](#)

The California Court of Appeal, Third Appellate District, published an important recent case of appellate procedure titled *Payne v. Rader* at the start of this month to emphasize two crucial and useful appellate practice pointers for practitioners. Payne's "pain" is that the court dismissed his appeal as untimely. Understanding why that happened requires discussion of two issues, one pedestrian and another a bit more intriguing.

*Payne's* first point is a hoary bromide, yet one that apparently requires regular repetition: Filing a timely notice of appeal is mandatory and jurisdictional. Does the next volume of the California Appellate Reports really need another case to underscore, highlight and boldface this basic proposition? Apparently so. No matter how clearly stated in the California Rules of Court and no matter how often reiterated in the published cases, lawyers and litigants seem to need constant reminders that a notice of appeal must be filed on or before the 60 days after service of notice of entry of judgment. California Rules of Court 8.104(a).

California law is crystal clear that "[i]f a notice of appeal is filed late, the reviewing court must dismiss the appeal." California Rules of Court 8.104(b); *Pressler v. Donald L. Bren Co.*, 32 Cal.3d 831 (1982), which found that failure to timely file an appeal cannot be excused by mistake, inadvertence or neglect. Citing both the rule of court and two classic cases, *Payne* phrases it thusly, "[i]f a notice of appeal is not timely,

### NEWSLETTER EDITORS

#### **Michael Berger**

Partner

[mberger@manatt.com](mailto:mberger@manatt.com)

310.312.4185

#### **Benjamin Shatz**

Counsel

[bshatz@manatt.com](mailto:bshatz@manatt.com)

310.312.4383

### OUR PRACTICE

As a national litigation powerhouse, Manatt has long been known for effective appellate advocacy. We offer clients in a full spectrum of businesses and industries the capability and experience necessary to appeal lower court rulings ... [more](#)

. [Practice Group Overview](#)

. [Practice Group Members](#)

### INFO & RESOURCES

. [Subscribe](#)

. [Unsubscribe](#)

. [Sarbanes-Oxley Act](#)

. [Newsletter Disclaimer](#)

. [Technical Support](#)

. [Manatt.com](#)

the appellate court *must* dismiss the appeal" (emphasis in the original) citing *Hollister Convalescent Hosp., Inc. v. Rico*, 15 Cal.3d 660 (1975), a case determining that absent a timely appeal, the Court of Appeal "lacks all power to consider the appeal on its merits and must dismiss, on its own motion if necessary, without regard to considerations of estoppel or excuse" and *Laraway v. Pasadena Unified School Dist.*, 98 Cal.App.4th 579 (2002).

In *Payne*, for instance, the Superior Court sustained the defendants' demurrer to Payne's complaint without leave to amend on statute of limitations grounds. The Superior Court entered judgment against Payne on Jan. 11, 2007. The defendants relatively promptly served notice of entry of judgment five days later, on Jan. 16. Sixty days from Jan. 16, 2007, was March 17, a Saturday. This triggered Code of Civil Procedure Section 12a, which provides that if the last day for performing any act required by law to be performed within a specified period of time (e.g., the filing of a notice of appeal within 60 days) falls on a "holiday" (which includes a Saturday), then the deadline is extended to the next day. This made Payne's last day to file a notice of appeal was Monday, March 19. Of course - to make this story worth telling - Payne filed his notice of appeal, Tuesday, March 20. Being only one day late is still late. In the world of appellate procedure, a miss is as good as a mile, and the Court of Appeal accordingly had no choice but to dismiss the appeal.

But there is more to this story. Under Rule of Court 8.108, the time to file a notice of appeal is extended if, during the normal time to appeal, a party serves and files certain *valid* post-judgment motions. Those post-judgment motions are a motion for new trial; a motion to vacate a judgment; a motion for judgment notwithstanding the verdict; and a motion to reconsider an appealable order. Rule 8.108 essentially extends the time to appeal to 30 days after service of the order denying the *valid* post-judgment order. Emphasis on the term "valid" turns out to have been critical in Payne's case.

Here, Payne did file a motion to vacate the judgment on Jan. 31, 2007 - 15 days after defendants served a notice of entry of judgment. That motion was denied on March 13, and - as we know - Payne filed his notice of appeal (purporting to appeal from both the judgment and the post-judgment order denying his motion to vacate) on March 20. So perhaps Payne's motion to vacate extended his time to appeal?

Nope. The Court of Appeal noted that Rule 8.108 emphasizes that to extend the time to appeal, a post-judgment motion must be "valid," and Payne's motion did not qualify. To

determine what constitutes a "valid" motion to vacate a judgment, the court looked closely at Code of Civil Procedure Section 663, the section authorizing such motions. Section 663 sets forth two grounds for granting a motion to vacate: an incorrect or erroneous legal basis for the decision inconsistent with or not supported by the facts; and a judgment inconsistent with or not supported by the special verdict.

Because Payne's action was dismissed through demurrer on statute of limitations grounds, there obviously was no special verdict. Moreover, because the trial court entered judgment on a demurrer, there were no conclusions of law that could be corrected from uncontroverted evidence or factual findings. After all, a ruling on a demurrer involves neither admission of evidence nor factual findings. In sum, a motion to vacate could not follow from a judgment entered after a demurrer.

More generally, Section 663 makes clear that the purpose of a motion to vacate is to vacate and then amend or correct the judgment through entry of a different judgment. Yet here, Payne's motion did not - and could not - ask the trial court to enter a different or corrected judgment. Rather, Payne was only asking the trial court to vacate its order sustaining a demurrer without leave to amend. Payne was seeking the ability to continue his case, not to end it with a corrected judgment.

Payne tried to save his appeal by arguing for another basis to extend the deadline to appeal. Specifically, Payne argued that the trial court should have treated his invalid motion to vacate as a motion for a new trial. This approach ran into the same problem, however, about the post-trial tolling motion being "valid."

Payne's motion to vacate the judgment could not be twisted into a "valid" new trial motion because motions for new trial have a variety of specific requirements that Payne's motion did not satisfy (e.g., it did not list any of the statutory grounds for a new trial). As the Court of Appeal put it, "[t]he statutory procedures for making ... a motion for new trial are mandatory and jurisdictional: strict, literal compliance is required. ... Payne's motion [to vacate the judgment] bore no resemblance to a motion for new trial."

Finally, what about the argument that Payne's notice of appeal was timely at least with regard to the post-judgment order denying his motion to vacate? After all, Code of Civil Procedure Section 904.1(a)(1) makes post-judgment orders appealable, right? Well, that's true as a generality, but not all

post-judgment orders are appealable orders. An order denying a new trial motion, for instance, is a post-judgment order, but it is not a directly appealable order (i.e., appellate review must be from an appeal of the judgment itself). *Walker v. Los Angeles County Metro. Transp. Auth.*, 35 Cal.4th 15 (2005). Similarly, an order granting a judgment notwithstanding the verdict motion is a post-judgment order, but again, such orders are not independently appealable (i.e., appellate review is from the new judgment entered JNOV). *Jordan v. Talbot*, 55 Cal.2d 597 (1961).

Whether the denial of a motion to vacate is appealable is an unresolved question. One Supreme Court case noted without analysis that such an order is not appealable, *Clemmer v. Hartford Ins. Co.*, 22 Cal.3d 865 (1978), while earlier Supreme Court precedent held to the contrary, in *Hollister*, supra; *Socol v. King*, 34 Cal.2d 292 (1949). The appellate courts have inconsistently followed both lines of authority, with one opinion last year suggesting (to no avail) that the Supreme Court eliminate the apparent confusion. *City of Los Angeles v. Glair*, 153 Cal.App.4th 813 (2007).

In Payne's case, the Court of Appeal noted that if a party could independently appeal an order refusing to vacate a judgment brought on ground that existed before entry of that judgment, then the effect of that would be to allow an aggrieved party two appeals from the same judgment, or even extend the time to appeal from the subsequent order. That cannot be allowed. The court in *Laraway* noted this, writing "The [California] Rules of Court do not provide, once a judgment or appealable order has been entered, that the time to appeal can be restarted or extended by the filing of a subsequent judgment or appealable order making the same decision." Thus, because Payne's appeal from the denial of his motion to vacate would only raise issues that he could and should have raised on appeal from the judgment, the Court of Appeal found the order denying Payne's motion to be non-appealable.

*Payne* demonstrates that while it is easy to chant the mantra "file the notice of appeal on time," it is not always easy to do so. Post-trial motions in particular inject tricky issues affecting appellate deadlines. In Payne's situation, note that despite any confusion about the effect of the motion to vacate, there still was a window of time between March 13 and March 19 to have filed a notice of appeal from both the judgment and post-judgment order without running afoul of any timing problems. Careful practitioners should calculate appellate deadlines arising from all possible scenarios or interpretations and file at the earliest opportunity. But recognizing the

possibility of such traps may require consulting an appellate specialist. Considering the "Payne" of filing a late notice of appeal, such calls are well worth the effort.

**Benjamin G. Shatz** is a certified specialist in appellate law in the appellate practice group of Manatt, Phelps & Phillips in Los Angeles.

---

**FOR ADDITIONAL INFORMATION ON THIS ISSUE, CONTACT:**



**Benjamin G. Shatz** Mr. Shatz is a member of Manatt's appellate group. He has briefed more than a hundred civil appeals, writs and petitions to the U.S. Supreme Court, U.S. Courts of Appeals, California Supreme Court and California Courts of Appeal, covering areas of law including entertainment, copyright, trademark, employment, land use, banking, insurance, product liability, professional liability, wrongful death, punitive damages, class actions, anti-SLAPP and unfair competition.