Written Materials – Perfecting Appeals

© Christopher Carroll 2008

HOW TO PERFECT AN APPEAL IN STATE COURT

The failure to perfect an appeal could be a malpractice minefield especially since your client has already lost in the lower court.

The first step is to determine if you have an appealable order. Under Supreme Court Rule 301, "[e]very final judgment of a circuit court in a civil case is appealable as of right." 155 Ill. 2d R. 301. Supreme Court Rule 301 allows appeals from final judgments as a matter of right. 155 Ill. 2d R. 301. Appellate jurisdiction is limited to reviewing a final judgment that disposes of the rights of the parties, either on the entire case or on some definite and separate part of the controversy. Department of Public Aid ex rel. K.W. v. Lekberg, 295 Ill. App. 3d 1067, 1069, 693 N.E.2d 894, 895 (1998). A judgment is final if it determines the litigation on the merits so that, if affirmed, the only thing remaining is to proceed with the execution of the judgment. In re T.M., 302 Ill. App. 3d 33, 37, 706 N.E.2d 931, 934 (1998). Further, an order is final when matters left for future determination are merely incidental to the ultimate rights that have been adjudicated by the order. In re T.M., 302 Ill. App. 3d at 37, 706 N.E.2d at 934. Where an order resolves less than all the claims brought by a party, the order is not final and appealable. In re Marriage of Merrick, 183 Ill. App. 3d 843, 845, 539 N.E.2d 868, 869 (1989) except where it is appealable under Rule 304(a) adds a qualification to Rule 301, at least as to the timing of appeals from certain final judgments or as an interlocutory appeal which will be discussed later in this article. Under Rule 304(a), if multiple parties or multiple claims for relief are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all of the parties or claims only if the trial court has made an express written finding that “there is no just reason for

delaying either enforcement or appeal or both." 210 Ill. 2d R. 304(a). Many final judgments are immediately appealable only if the trial court makes the proper finding; a Rule 304(a) finding can confer appealability only on a judgment that is already final. 210 Ill. 2d R. 304(a); see also Revolution Portfolio, LLC v. Beale, 332 Ill. App. 3d 595, 598-99 (2002). Under Rule 304(a), if multiple claims for relief are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all of the claims only if the trial court has made an explicit written finding that no just reason exists for delaying either enforcement or appeal. 210 Ill. 2d R. 304(a). However, Rule 304(a) does not empower a trial court to confer appellate jurisdiction merely by reciting in empty fashion that "there is no just reason for delaying enforcement or appeal." Grove v. Carle Foundation Hospital, 364 Ill. App. 3d 412, 416, 846 N.E.2d 153, 157 (2006); see also Rice v. Burnley, 230 Ill. App. 3d 987, 991, 596 N.E.2d 105, 107 (1992).
A two-step process is applied for determining whether appellate jurisdiction lies under Rule 304(a): first, the court makes a determination as to whether the order at issue is "final"; second, the court must determine whether there is any just reason for delaying the appeal. Curtiss-Wright Corp. v. General Electric Co., 446 U.S. 1, 7-8, 64 L.Ed. 2d 1, 11, 100 S.Ct. 1460, 1464-65 (1980); Geier, 226 Ill. App. 3d at 379, 589 N.E.2d at 715.

As previously noted, a judgment is "final," if it ultimately concludes an individual claim in an action involving multiple claims. Geier, 226 Ill. App. 3d at 379, 589 N.E.2d at 716. Under Illinois cases construing 304(a) , the definition of what constitutes an individual "claim" is an amorphous concept. General Acquisition, Inc. v. GenCorp Inc., 23 F.3d 1022, 1028 (6th Cir. 1994) (there is no "'generally acceptable test'" as to what constitutes an individual claim). Illinois cases arising from personal injury suits have held that complaints stating a single claim, by way

of multiple subparagraphs, do not qualify for separate appeal upon dismissal of less than all of the subparagraphs under Rule 304(a). Hull v. City of Chicago, 165 Ill. App. 3d 732, 733, 520 N.E.2d 720, 721 (1987); see also Rice, 230 Ill. App. 3d at 991, 596 N.E.2d at 107; Brown v. K.J.S. Co., 189 Ill. App. 3d 768, 770, 545 N.E.2d 555, 556 (1989). Rule 304(a) states that "[i]f *** multiple claims for relief are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all of the *** claims only if the trial court has made an express written finding that there is no just reason for delaying either enforcement or appeal or both." 210 Ill. 2d R. 304(a).

In In re Marriage of Duggan, No. 2--06--0061 (October 16, 2007), we observed that, per the supreme court's decision in In re Marriage of Kozloff, 101 Ill. 2d 526 (1984), a post-dissolution petition does not initiate a new action, but instead merely continues the dissolution action. We went on to hold that the multiple post-dissolution petitions in that case--one to modify support and another to modify visitation--raised multiple claims for relief in the dissolution action and that, therefore, without a Rule 304(a) finding, a party could not appeal a final judgment as to one petition while the other remained pending.

Marriage of Alyassir, 335 Ill. App. 3d 998 (2003), and Marriage of Colangelo, 355 Ill. App. 3d 383 (2005), when compared provide an interesting contrast of appealability under Rule 304(a) . Alyassir, held that without a Rule 304(a) finding, a party could not appeal the judgment on a post-dissolution petition to increase child support while a civil contempt petition was pending. Alyassir, 335 Ill. App. 3d at 999-1001. Colangelo, conversely held that, without a Rule 304(a)

finding, a party could not appeal the denial of a civil contempt petition while a post-dissolution petition to increase child support was pending. Colangelo, 355 Ill. App. 3d at 388-89.

As noted, Rule 304(a) applies when "multiple claims for relief are involved in an action." 210 Ill. 2d R. 304(a). Thus, the court's analysis in Alyassir and Colangelo, depended on two propositions: (1) the child support petition and the civil contempt petition were parts of the same action; and (2) the child support petition and the civil contempt petition each raised a "claim for relief" in that action.

On the other hand, when both dismissed and remaining counts of a complaint each dealt with separate acts and omissions, all the counts advanced the same theory of recovery, i.e., negligence. Rice, 230 Ill. App. 3d at 992, 596 N.E.2d at 108; Hull, 165 Ill. App. 3d at 733, 520 N.E.2d at 721. Rice held that where each count advanced the same theory of recovery, the separate counts were not separate claims. Rice, 230 Ill. App. 3d at 992, 596 N.E.2d at 108; Hull, 165 Ill. App. 3d at 733, 520 N.E.2d at 721.

Other courts, however, have held that whether there are separate, individual claims for purposes of finding a final order is in some sense a matter of discretion for the trial court. River Park, Inc. v. City of Highland Park, 184 Ill. 2d 290, 311, 703 N.E.2d 883, 893 (1998) (separate claims under Rule 304(a) may still be considered the same cause of action for the purposes of res judicata). In noting that the trial court should exercise its discretion in determining whether a claim is separate for the purposes of finding a final and appealable judgment, the Olympia Hotels court stated that it is appropriate for the trial judge "to consider such factors as... 'whether the

nature of the claims already determined was such that no appellate court would have to decide the same issues more than once.'" Olympia Hotels, 908 F.2d at 1367-68, quoting Curtiss-Wright, 446 U.S. at 8, 64 L.Ed. 2d at 11, 100 S.Ct. at 1465. Likewise, a trial court may abuse its discretion where a Rule 304(a) order forces the appellate court to decide matters that may never need to be decided. Fleetwood Development Corp. v. Northbrook Property & Casualty Insurance Co., 172 Ill. App. 3d 83, 85-86, 526 N.E.2d 381, 383-84 (1988) (Rule 304(a) order inappropriate as to a third-party claim where the third-party complaint was conditioned on the primary complaint, which had not yet been decided). The second prong of Rule 304(a) analysis is whether there is any just reason for delaying the appeal since the Rule by its terms states if multiple parties or multiple claims for relief are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all of the parties or claims only if the trial court has made an express written finding that there is no just reason for delaying either enforcement or appeal or both. In the absence of such a finding, any judgment that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not enforceable or appealable and is subject to revision at any time before the entry of a judgment adjudicating all the claims, rights, and liabilities of all the parties. 210 Ill. 2d R. 304(a).

In the event of such an express written finding from the circuit court, the "time for filing a notice of appeal shall be as provided in Rule 303." 155 Ill. 2d R. 304(a). Rule 303, barring entry of a post trial motion, provides a window of 30 days in which to file a notice of appeal; in the event of the filling of a post trial motion within those initial 30 days, the time for filing a notice of appeal is expanded to 30 days beyond the ruling on the post trial motion. 210 Ill. 2d R. 303(a)(1). See also Greer v. Yellow Cab Co., 221 Ill. App. 3d 908, 913 (1991) ("The trial court *** erred in its belief that upon entry of a proper 304(a) finding it would be divested of its jurisdiction to hear

the motion for reconsideration [timely filed within 30 days of the finding]"); Stroud v. News Group Chicago, Inc., 215 Ill. App. 3d 1006, 1010 (1991) ("After a trial court has entered a Rule 304(a) finding that there is no just reason to delay enforcement or appeal of a final judgment and the time to appeal has expired, the court loses jurisdiction to modify the order"

What if the ruling against is not a final order or the court has not entered a Rule 304(a) order?

Supreme Court Rule 307 provides for Interlocutory Appeals of Right
The Rule provides that an appeal may be taken to the Appellate Court from an interlocutory order of court:

(1) **granting, modifying, refusing, dissolving, or refusing to dissolve or modify an injunction; (2) appointing or refusing to appoint a receiver; (3) giving or refusing to give other or further powers or property to a receiver already appointed; (4) placing or refusing to place a mortgagee in possession of mortgaged premises; (5) appointing or refusing to appoint a receiver, liquidator, rehabilitator, etc, for a bank, savings and loan association, currency exchange, insurance company, or other financial institution, or granting or refusing to grant custody of the institution or requiring turnover of any of its assets; (6) terminating parental rights or granting, denying or revoking temporary commitment in adoption cases; (7) determining issues raised in proceedings for eminent domain**.

(2) Generally the appeal must be perfected within 30 days from the entry of the interlocutory order by filing a notice of appeal designated "Notice of Interlocutory Appeal" similar to the notice of appeal in other cases. The record must be filed in the Appellate Court within the same 30 days unless the time for filing the record is extended by the Appellate Court.

Bui what if you want to appeal an interlocutory order that is not appealable of right?
Supreme Court Rule 308 provides for Interlocutory Appeals by Permission
If the trial court, enters an interlocutory order which is not otherwise appealable, and the lower court believes that its order involves a question of law as to about which the courts are divided and that immediate appeal from the order may resolve the litigation, the court must state in writing the question of law involved. The Appellate Court may thereupon in its discretion allow an appeal from the order. This type of appeal is prosecuted ought by filing an application for leave to appeal within 14 days after the entry of such an order
THE NOTICE OF APPEAL
While the filing of a notice of appeal is jurisdictional (134 Ill. 2d R. 301; Bell Federal Savings & Loan Association v. Bank of Ravenswood (1990), 203 Ill. App. 3d 219, 223), as has been established by the court in Burtell v. First Charter Service Corp. (1979), 76 Ill. 2d 427, 433, such a notice is to be construed liberally. The purpose of a notice of appeal is to inform the prevailing

party in the trial court that his opponent seeks review by a higher court. (Burtell, 76 Ill. 2d at 433; In re Marriage of Click (1988), 169 Ill. App. 3d 48, 54.) Accordingly, this notice should be considered as a whole and will be deemed sufficient to confer jurisdiction on an appellate court when it fairly and adequately sets out the judgment complained of and the relief sought, thus advising the successful litigant of the nature of the appeal. (Burtell, 76 Ill. 2d at 433-34; March v. Miller-Jesser, Inc. (1990), 202 Ill. App. 3d 148, 157; Hamer v. Board of Education of Township High School District No. 113 (1978), 66 Ill. App. 3d 7, 8-9.) Where the deficiency in notice is one of form, rather than substance, and the appellee is not prejudiced, the failure to comply strictly with the form of notice is not fatal. (Burtell, 76 Ill. 2d at 434; In re Marriage of Betts (1987), 159 Ill. App. 3d 327, 330.)

THE RECORD ON APPEAL

The appellant has the burden of preparing the Record on Appeal which consists of two parts: the common law record and reports of proceedings. The common law record consists of the Court File on record at the Circuit Clerk's Office. It will include the pleadings, motions, orders entered, etc. The report of proceedings is the transcript of hearings or trials conducted before a court. Some jurisdictions such as Du Page County provide a recording system administered by the Official Court Reporter so that it is unnecessary for counsel to order a court reporter. In other venues that are not so equipped, it is necessary to order a reporter. In the absence of a report of proceedings or other matter of record showing to the contrary, a reviewing court will presume that the trial court acted within its discretion, and the matters presented support at hearing supported its ruling. (Davis v. Allstate Insurance Co. (1986), 147 Ill. App. 3d 581, 498 N.E.2d 246; Pinsker v. Kansas State Bank (1986), 142 Ill. App. 3d 216, 491 N.E.2d 826.) What do you

do if no transcript is prepared? You prepare and submit bystanders report. Supreme Court Rule 323(c) directs the trial court, upon presentation by the parties of proposed bystander reports, to "promptly settle, certify and order filed an accurate report of proceedings." (Emphasis added.) 166 Ill. 2d R. 323(c). Clymore v. Hayden, 278 Ill. App. 3d 862, 869 (1996). The purpose of Rule 323(c)-to provide the reviewing court a reliable basis for review in the absence of a verbatim transcript (see Urmoneit v. Purves, 35 Ill. App. 3d 939, 941-42 (1975See Stehl v. Dose, 83 Ill. App. 3d 440, 444 (1980) ("A trial judge should never certify a report he knows to be incorrect or inaccurate.").

MOTION TO STAY ENFORCEMENT OF THE JUDGMENT PENDING APPEAL

Of critical importance to the practitioner is the fact that perfecting an appeal does not standing alone stay enforcement of the judgment. Promptly after determine that you have an appealable order you should file a motion for stay or supersedeas which has been defined as follows:

"A stay ***, formally referred to as a supersedeas, suspends enforcement of a judgment, and is intended to preserve the status quo pending the appeal and to preserve the fruits of a meritorious appeal where they might otherwise be lost." Stacke v. Bates, 138 Ill. 2d 295, 302, 562 N.E.2d 192, 195 (1990). "The supersedeas operates against the enforcement of the judgment and not against the judgment itself." Gumberts v. East Oak Street Hotel Co., 404 Ill. 386, 389, 88 N.E.2d 883, 885 (1949). In contrast, a supersedeas bond/appeal bond has been defined as "[a]n appellant's bond to stay execution on a judgment during the pendency of the appeal." Black's Law Dictionary 171 (7th ed. 1999). Thus, requiring a bond to be posted as a precondition for granting a stay serves as a means to give the judgment creditor security during the pendency of the appeal. It ensures that if the judgment is affirmed, the judgment creditor will be paid that which is owed. Ennor v. Galena Southern Wisconsin R.R. Co., 104 Ill. 103, 104 (1882). It also

serves to prevent an unscrupulous debtor from hiding, diverting, wasting, or otherwise squandering his assets, resulting in the judgment becoming uncollectible.

Of critical importance to your understanding of the law of this state is that the right to appeal, the right to file post trial motions, and the right to obtain a stay by filing a supersedeas bond are separate, independent rights. The right to appeal is not dependant on posting a bond. Even if an appellant is unable to post a sufficient bond, that party may still appeal but the enforcement of the judgment will not be stayed. Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972). The historical origins of the present law are useful in understanding these rules. "Prior to the enactment of the Civil Practice Act, every appeal operated in and of itself as a supersedeas or stay of all proceedings to enforce the execution of the judgment or decree pending the appeal. (People ex rel. Finn v. David, 328 Ill. 230 [(1927)]; Thompson v. Davis, 297 Ill. 11 [(1921)]; Hopkins v. Patton, 257 Ill. 346 [(1913)].) The reasons for this were twofold: first, an appeal was a continuation of the proceedings below; and second, a bond was an essential and integral part of every appeal. (Hopkins v. Patton, 257 Ill. 346.) *** The requirement that bond be given in all cases of appeal was eliminated and section 76 of the (prior) act provided that an appeal shall be deemed perfected when the notice of appeal shall be filed in the lower court and that no step other than that by which the appeal is perfected shall be deemed jurisdictional. Under (former) section 82, an appeal now does not, as formerly, operate as a supersedeas, but in order to have that effect, bond must be given and order entered approving the same. (Ill. Rev. Stat. 1943, chap. 110, par. 206.)" First National Bank of Jonesboro v. Road District No. 8, 389 Ill. 156, 159-60, 58 N.E.2d 884, 886 (1945). Today the bonding requirements that must be satisfied to obtain a stay are contained in Supreme Court Rule 305. If a right to appeal was conditioned on posting a supersedeas bond as was formerly the case, then the requirement would have been

constitutionally infirm. "Section 7 of article VI of the constitution of Illinois (1870) and section 6, article VI[,] of the constitution of Illinois (1970) provide for an appeal, as a matter of right, from all final judgments of the circuit court. Having created the right of appeal, the statutes adopted and the rules promulgated in implementation of that right may not serve to discriminate against appellants by reason of the inability to furnish an appeal bond. (Griffin v. Illinois (1956), 351 U.S. 12, 100 L. Ed. 891, 76 S. Ct. 585; Boddie v. Connecticut (1971), 401 U.S. 371, 28 L. Ed.2d 113, 91 S. Ct. 780; Mayer v. City of Chicago (1971), 404 U.S. 189, 30 L. Ed. 2d 372, 92 S. Ct. 410.)" Jack Spring, Inc., 50 Ill. 2d at 355, 280 N.E.2d at 211. Because the right to appeal and the right to obtain a stay by posting a bond are independent, there is no constitutional infirmity. Jack Spring, Inc., 50 Ill. 2d at 356, 280 N.E.2d at 211-12. One of the inherent powers possessed by all courts, independent of Supreme Court Rule 305, is the power to grant a stay pending appeal. Whether to grant a stay is a discretionary act. Stacke, 138 Ill. 2d at 302, 562 N.E.2d at 195. This power is not as broad as it may appear at first glance. It cannot be exercised in a fashion that would conflict with the letter or spirit of Supreme Court Rule 305. Further, the duration of an unsecured or undersecured stay should be very limited. Allowing an extended unsecured or undersecured stay would eviscerate the salutary purpose served by a supersedeas bond. A judgment creditor could have no confidence that the judgment would ever be collectible.