How to Appeal Final Judgments in Ongoing Litigation

BY DON R. SAMPEN

ILLINOIS SUPREME COURT RULE 301 BEGINS: "EVERY FINAL JUDGMENT OF A circuit court in a civil case is appealable as of right."[1] The statement is deceptively simple. While final judgments may be appealable as of right, in Illinois they are not necessarily immediately appealable upon entry. Where a final judgment is entered as to fewer than all parties or claims, one must look to Rule 304(a) to determine appealability.

Similar issues arise under Federal Rule of Civil Procedure 54(b), upon which Illinois Rule 304(a) was patterned (state courts occasionally look to federal court interpretation of federal Rule 54(b) for guidance under Illinois Rule 304(a)).[2] Both state and federal courts undertake a two-step analysis. First, they determine whether the order in question is final. Second, whether there is no reason to delay the appeal.[3] The first sentence of Rule 304(a) embodies both requirements:

If multiple parties or multiple claims for relief are involved in an action, an appeal may be taken from a

1. Ill. S. Ct. R. 301.
2. See, *e.g*, *ELG v. Whittington*, 199 Ill. 2d 344, 352 (1987); *AT&T v. Lyons & Pinner Electric Co*., 2014 IL App (2d) 130577, ¶ 20.
3. See, *e.g*., *General Insurance Company of America v. Clark Mall Corp*., 644 F.3d 375, 379 (7th Cir. 2011).

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A judgment is entered as to part of your case, but other matters still remain. Can you appeal? The answer is "yes" under Illinois Supreme Court Rule 304(a), but only if you follow the guidelines set forth below.

> 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.[4]

The final-judgment and no-just-reason-for-delay requirements are addressed under Illinois law in Parts I and II below. Part III examines procedural considerations.

Part I: Illinois courts require "finality" as to parties or claims

For appeal of a judgment where claims or parties remain unresolved, Illinois courts require that the judgment in question be sufficiently final to warrant an immediate appeal. Rule 304(a) thus recognizes the desirability of "remov[ing] the uncertainty which exist[s] when a final judgment [is] entered on fewer than all of the matters in controversy;" but at the same time it seeks to "discourage piecemeal appeals in the absence of a just reason."[5] It is the "discouraging piecemeal appeals" aspect of this purpose that requires that the judgment appealed be a final one.

A final judgment or order is one that "terminates the litigation between the parties on the merits or disposes of the rights of the parties, either on the entire controversy or a separate part thereof."[6] If entered in favor of the plaintiff, the judgment must be one that "if affirmed, the trial court only has to proceed with execution of the judgment."[7]

Finality as to parties

Application of Rule 304(a) to a party as to whom a judgment has been entered in a multiparty case is straightforward in most instances. If a judgment disposes of all claims by or against a party on the merits, the judgment most often is final and appealable. If the order is not on the merits or is without prejudice, it is ordinarily not appealable.

One potentially troublesome area involves the consolidation of cases. If the consolidated cases retain separate identities and dockets, they are typically treated as separate as to parties and claims for purposes of Rule 304(a). If they are merged into a single action, however, then the rule applies for disposition of any party or claim.[8]

Similarly, for severed parties or claims, the application of Rule 304(a) depends on whether the severance order states that the severed party or claim shall proceed separately. If so, then each severed portion of the case proceeds as a separate case for Rule 304(a) appellate purposes.[9] Intervening parties, on the other hand, are considered full parties. So, once intervention is allowed in a single-party case, invocation of the rule is required to enable the appeal of a judgment against any one party.[10]

As indicated, an order dismissing a party without prejudice is typically nonfinal and nonappealable under Rule 304(a). But exceptions exist. Consider the following:

> **Example:** What about a dismissal of a party for lack of personal jurisdiction—a

4. Ill. S. Ct. R. 304(a).
5. *Blumenthal v. Brewer*, 2016 IL 118781 ¶ 23.
6. *Id*.
7. *Id*. at ¶ 25.
8. *Nationwide Mutual Insurance Co. v. Filos*, 285 Ill. App. 3d 528, 532 (1st Dist. 1996); but see *Hall v. Hall*, 138 S.Ct. 1118, 1131 (2018) (holding that in the federal system, "when one of several consolidated cases is finally decided, a disappointed litigant is free to seek review of that decision in the court of appeals").
9. *Carter v. Chicago & Illinois Midland Railway Co*., 119 Ill. 2d 296, 307-08 (1988).
10. *Puleo v. McGladrey & Pullen*, 315 Ill. App. 3d 1041, 1045-46 (1st Dist. 2000).

TAKEAWAYS >>

- Familiarity with the technical requirements of Illinois Supreme Court Rule 304(a) will help to assure that an appellate strategy is effectively implemented.
- A judgment that disposes of all claims by or against a party on the merits most often is final and appealable. An order not on the merits or without prejudice is ordinarily not appealable.
- If a trial court's final judgment or order is entered but no Rule 304(a) certification is made, the judgment in question remains appealable at the conclusion of the trial-court litigation.

PRUDENCE DICTATES THAT THE WORDING FOR THE CERTIFICATION AS SET FORTH IN THE RULE BE REGARDED AS "MAGIC LANGUAGE" TO BE INCLUDED IN EVERY CERTIFICATION, JUST AS RULE 304(A) PROVIDES. ILLINOIS COURTS HAVE IDENTIFIED FIVE NONEXCLUSIVE FACTORS THAT A TRIAL COURT CAN CONSIDER IN MAKING THE CERTIFICATION OF NO JUST REASON FOR DELAYING THE APPEAL.

nonmerits disposition. Is that appealable under Rule 304(a)?
Answer: Yes.[11] The courts recognize that a "substantive legal deficiency"[12] not going to the merits of a claim, such as lack of jurisdiction or lack of standing, may involve sufficient finality as to allow an appeal under Rule 304(a).

A federal court has explained the approach to nonmerits finality as set forth in the example by saying that finality should be determined "from the standpoint of the court" that orders the dismissal.[13]

Finality as to claims

Determining whether a decision on a claim should be treated as final and appealable is often more difficult.

The Illinois Supreme Court draws a distinction between an issue and a claim. In *Carle Foundation v. Cunningham Township*, the court noted that a decision on an issue that did not actually dispose of the claim was not final and appealable under Rule 304(a).[14] The Supreme Court was addressing a trial-court decision on one count of a multicount complaint seeking property tax relief. The count in question sought a declaration concerning applicability of one section of the tax code. The trial court found the section applicable and entered a 304(a) finding. The Supreme Court held that the finding was improper and appellate jurisdiction lacking because, among other reasons: The count in question was inextricably linked to other issues in the case; the count did not seek an immediate and definitive determination of the parties' rights; and the trial court's decision disposed only of an issue relating to a claim, not the claim itself.[15]

Hence, finality does not necessarily turn on whether one or more counts have been decided. Rather, it depends on whether the decided matter closely relates to those still pending. If it does, the decision will not be regarded as final. Thus, negligence arising out of the same transaction and pleaded in multiple counts would require a decision on all the counts to constitute a final order.[16] Similarly, an order disposing "only of certain issues relating to the same basic claim" is not appealable.[17] Federal courts take the same approach and hold that a decision on a claim that involves "a significant evidentiary overlap" with an undecided claim is not sufficiently final to permit an appeal.[18]

Certain orders of a trial court are presumptively nonfinal and not subject to appeal even through Rule 304(a) procedures.

A dismissal without prejudice is one such example—although, as noted above, exceptions exist. Other presumptively nonfinal orders include: dismissal with leave given to amend, even if the time specified for amending has expired;[19] denial of leave to amend a pleading;[20] denial of a motion to dismiss;[21] denial of summary judgment;[22] and discovery orders,[23] although a dismissal based on failure to comply with discovery may be appealable.[24]

Applying the finality requirement can be tricky. Here are some examples that may assist:

Example 1: The trial court issues a declaratory judgment by way of summary judgment completely disposing of one count of a multicount complaint on the merits. The decision as to the one count effectively decides the law applicable to the other counts,

11. See, *e.g.*, *Kaufman v. Barbiero*, 2013 IL App (1st) 132068, ¶ 28 (addressing merits of such an appeal under Rule 304(a)).
12. *Schal Bovis, Inc. v. Casualty Insurance Co.*, 314 Ill. App. 3d 562, 566-67 (1st Dist. 1999).
13. *Arrow Gear Co. v. Downers Grove Sanitary District*, 629 F.3d 633, 636-37 (7th Cir. 2010).
14. *Carle Foundation v. Cunningham Township*, 2017 IL 120427, ¶ 15.
15. *Id.* at ¶¶ 8, 23, 29, 30.
16. *Wilson v. Edward Hospital*, 2012 IL 112898, ¶¶ 21, 24-26.
17. *Blumenthal v. Brewer*, 2016 IL 118781, ¶ 27.
18. *Lottie v. West American Insurance Co.*, 408 F.3d 935, 938-40 (7th Cir. 2005); see also *On Command Video Corp. v. Roti*, 705 F.3d 267, 270-71 (7th Cir. 2013).
19. *Richter v. Prairie Farms Dairy, Inc.*, 2016 IL 119518, ¶ 24.
20. *Papadakis v. Fitness 19*, 2018 IL App (1st) 170388, ¶ 10 (noting, however, that the denial may be reviewable where the counts sought to be amended were dismissed with prejudice).
21. *Walker v. Carnival Cruise Lines, Inc.*, 383 Ill. App. 3d 129, 132 (1st Dist. 2008).
22. *City of Waukegan v. Illinois Environmental Protection Agency*, 339 Ill. App. 3d 963, 972 (2d Dist. 2003) (but finding further that that the issues in question were otherwise properly before the court).
23. *People v. Pinkston*, 2013 IL App (4th) 111147, ¶ 12.
24. *Cruz v. Columbus-Cuneo-Cabrini Medical Center*, 194 Ill. App. 3d 1037, 1040 (1st Dist. 1990).

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- ISBA Free On-Demand CLE, *Second Biennial Illinois Appellate Practice Seminar* (recorded Oct. 18, 2018), law.isba.org/2EuX3mL.
- ISBA Bookstore, *Appeals to the Illinois Supreme and Appellate Courts—2018 Edition*, law.isba.org/2NsX2T7.
- Don R. Sampen & Mark J. Sobczak, *A Guide to Illinois Postjudgment Motions*, 105 Ill. B.J. 52 (Mar. 2017), law.isba.org/2NrwC42.

which are still pending. Is the trial court's decision as to the one count appealable under Rule 304(a)?

Answer: No. These are essentially the facts of *Carle Foundation*, discussed above.

Example 2: A three-count complaint against an insurance company alleges breach of contract, racial discrimination, and bad faith. The trial court dismisses the latter two counts with prejudice and enters a finding allowing the plaintiff to take an immediate appeal. Is the dismissal order sufficiently final?

Answer: The outcome will depend on the extent to which the dismissed counts overlap with the still-pending count. On the basic facts here described, a federal court found a high degree of overlap and vacated the appeal.[25]

Example 3: The trial court dismisses the breach-of-contract count of the plaintiff's two-count complaint without prejudice and dismisses the retaliatory-discharge count with prejudice, leaving nothing pending in the trial court. Is it necessary to make use of Rule 304(a) to appeal the count dismissed with prejudice?

Answer: Probably.[26] Moreover, if factual overlap exists between the count dismissed with prejudice and the count dismissed without prejudice, the order dismissing the count with prejudice likely is not appealable at all under Rule 304(a) because of lack of finality.[27]

Part II: The rule also requires a finding of no reason for delay

Apart from finality, Rule 304(a) requires that the trial court make an express written finding of the suitability of the appeal or entry of judgment. Specifically, the rule requires that the trial court find that "there is no just reason for delaying either enforcement or appeal or both." The finding sometimes is referred to as the "certification," and it is jurisdictional.[28] Prudence dictates that the wording for the certification as set forth in the rule be regarded as "magic language" to be included in every certification, just as Rule 304(a) provides.

Illinois courts have identified five nonexclusive factors that a trial court can consider in making the certification of no just reason for delaying the appeal. The factors originated in federal court[29] and are as follows:

1) the relationship between the adjudicated and unadjudicated claims;
2) the possibility that the need for review might or might not be mooted by future developments in the district court;
3) the possibility that the reviewing court might be obliged to consider the same issue a second time;
4) the presence or absence of a claim or counterclaim which could result in a set-off against the judgment sought to be made final;
5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.[30]

Some of these factors overlap with the considerations applicable to whether a final decision has been entered, as discussed in Part I above. Others are more practical, such as whether the matter decided might later become moot. Additional considerations may include whether a party will be subject to hardship if an immediate appeal is not permitted[31] and whether an immediate appeal will cause a significant delay in trial-court proceedings.[32]

The rule says nothing about the trial court explaining the reason for the certification. But it is probably a good idea for the court to do so if the justification for immediate appeal does not appear of record.[33]

But not every well-intended justification provides a basis for certification. The following example helps to mark the boundaries for the kinds of factors that may be considered:

Example: The trial court dismisses a third-party contribution claim with prejudice and certifies it for appeal because it raises a difficult legal issue that will determine the outcome of the rest of the case. Is the difficulty of the legal issue a basis for Rule 304(a) certification?

Answer: No.[34] The difficulty or importance of an issue may be appropriate for appeal under Rule 308, concerning certified questions, but not under Rule 304(a).

A PARTY THAT FAILS TO FILE A TIMELY NOTICE OF APPEAL FORFEITS ITS RIGHT TO APPEAL THE JUDGMENT, IN WHICH CASE THE JUDGMENT BECOMES THE LAW OF THE CASE.

Part III: Compliance with other aspects of Rule 304(a) will avoid complications on appeal

Compared with the requirements of finality and certification, the remaining prerequisites for a Rule 304(a) appeal

25. *Lottie v. West American Insurance Co.*, 408 F.3d 935, 940 (7th Cir. 2005).
26. See *Ausman v. Anderson*, 348 Ill. App. 3d 781, 783 (1st Dist. 2004) (noting entry of a 304(a) finding that enabled the appeal of the dismissal-with-prejudice order).
27. *ITOFCA, Inc. v. MegaTrans Logistics, Inc.*, 235 F.3d 360, 364-65 (7th Cir. 2000) (finding that counts of a complaint dismissed on their merits were not appealable by plaintiff in light of factual overlap with a counterclaim that had been dismissed without prejudice).
28. *In re Estate of Gagliardo*, 391 Ill. App. 3d 343, 348 (1st Dist. 2009).
29. *Allis-Chalmers Corp. v. Philadelphia Electric Co.*, 521 F.2d 360, 364 (3d Cir. 1975).
30. See, *e.g.*, *AT&T v. Lyons & Pinner Electric Co.*, 2014 IL App (2d) 130577, ¶ 22.
31. *King v. Newbold*, 845 F.3d 866, 868 (7th Cir. 2017) (finding lack of jurisdiction under FRPC 54(b) in light of 13-month delay in seeking certification and a failure to demonstrate hardship).
32. *Stewart v. Evanston Insurance Co.*, 2017 U.S. Dist. Lexis 194140, at *3 (N.D. Ill. 2017).
33. See *United States v. Ettrick Wood Products, Inc.*, 916 F.2d 1211, 1217-18 (7th Cir. 1990).
34. *AT&T*, 2014 IL App (2d) 130577, ¶¶ 25-32.

are relatively straightforward but also necessitate careful compliance. The basic procedural steps for appealing on the basis of Rule 304(a) may be summarized as follows:

Consequences of no certification. The use of Rule 304(a) is optional. Hence, no issue or claim preclusion occurs for failure to make use of the rule. If a final judgment or order is entered by the trial court, but no Rule 304(a) certification is made, the judgment in question remains appealable at the conclusion of the trial-court litigation.[35]

Timing of request for certification of order to be appealed. The no-just-reason-for-delay certification under Rule 304(a) can be made upon the trial court's own volition or at the request of any party. The finding, moreover, can be made either at the time of entry of the judgment for which appeal is being sought or at a later time. The rule imposes no time limit within which entry of the finding must be made.[36] But if not made upon entry of the targeted judgment, counsel for the party seeking to authorize the appeal should nonetheless make the motion as soon as possible after the judgment's entry. Otherwise, the delay alone might be viewed as an indication of the lack of genuine need for interlocutory appeal. The seventh circuit, for example, has suggested a 30-day time limit for seeking certification, after which the burden increases on the proposed appellant to show hardship.[37]

30-day deadline for appeal following certification or timely postjudgment motion, at peril of forfeiture. Once the certification is entered under Rule 304(a), the potential appellant must file its notice of appeal within 30 days or, alternatively, within 30 days of disposition of a timely postjudgment motion attacking the judgment.[38] A party that fails to file a timely notice of appeal forfeits its right to appeal the judgment, in which case the judgment becomes the law of the case.[39]

Standard of review for Rule 304(a) determinations. A trial court's finding of no just reason for delay under Rule 304(a) is subject to attack on appeal and typically is reviewed under an abuse-of-discretion standard.[40] But the determination that the order in question is final and appropriate for certification is subject to *de novo* review.[41] The trial court's refusal to make the certification is not subject to appeal or review.[42]

Conclusion

Taking an appeal—or requiring that it be taken—prior to conclusion of the trial-court litigation can be a useful strategy for prospective appellants and appellees alike. Familiarity with the technical requirements of Rule 304(a) will help to ensure that the strategy is effectively implemented.

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35. *Glover v. Fitch*, 2015 IL App (1st) 130827, ¶¶ 2, 35.
36. *Dewan v. Ford Motor Co.*, 343 Ill. App. 3d 1062, 1075 (1st Dist. 2003) (remanding for entry of a 304(a) finding—well after entry of judgment sought to be appealed).
37. *King v. Newbold*, 845 F.3d 866, 868 (7th Cir. 2017).
38. See Rule 304(a), which references the time limit for notices of appeal in Rule 303, which, in turn, in subparts (a) and (b), sets a 30-day period for the notice of appeal, which period is tolled pending disposition of timely post-judgment motions.
39. See, *e.g.*, *Liccardi v. Stolt Terminals*, 178 Ill. 2d 540, 547 (1997).
40. *AT&T*, 2014 IL App (2d) 130577, ¶ 24.
41. *In re Gutman*, 232 Ill. 2d 145, 150 (2008).
42. *Chicago ex rel. Charles Equipment Co. v. United States Fidelity & Guaranty Co.*, 142 Ill. App. 3d 621, 629-30 (1st Dist. 1986).