Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
December 2015 Issue

Herb Fox

Remedies for adverse orders

The remedies for adverse orders offer many roads to keep hope alive

We are all familiar with the strict standards (and short ten-day deadline) for challenging adverse orders by motions for reconsideration. (Code Civ. Proc., § 1008, subd. (a)).

But a motion for reconsideration is only one of an arsenal of remedies that are available to parties confronted with an adverse ruling. These other remedies include:

• A motion to renew the original motion, pursuant to Code of Civil Procedure section 1008, subd.(b), which is not subject to the ten-day deadline;
• Reconsideration of the order at any time on the trial court's own motion (whether sua sponte or upon "suggestion" of a party), authorized by Code Civ. Proc., §1008, subd. (c) and *Le Francois v. Goel* (2005) 35 Cal.4th 1094);
• Statutory rights to renew certain motions which are not governed by Code of Civil Procedure section 1008; and,
• Appellate court review of the order, which can take the form of a writ petition, an immediate direct appeal and/or an appeal from the final judgment, depending on the nature of the order and other circumstances.

In short, trial attorneys on the losing end of a motion have many roads to keep hope alive – including, as we have seen, roads that are still being explored by recent statutory changes and evolving case law.

Generally speaking, an order is a "direction" of a court or judge, made or entered in writing, and not included in a judgment. (Code Civ. Proc., § 1003). Many orders are interlocutory and thus not dispositive of the action (e.g., discovery orders). Others, however, are dispositive orders that are the functional equivalent of a judgment, in effect disposing the action (e.g., an "order" of dismissal or an order granting an anti-SLAPP motion to strike). Yet other orders are merely preliminary to entry of a judgment (e.g., an order granting summary judgment or sustaining a demurrer to an entire complaint without leave to amend). For that reason, some courts have held that orders such as those granting summary judgment are best attacked by a motion for new trial instead of a motion for reconsideration. (See, e.g., *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 858).

Adding to the complexity, some orders are immediately appealable. (E.g., sanctions over $5,000 and anti-SLAPP orders [Code Civ. Proc., § 904.1 (12, 13]). Others can only be reviewed by a writ petition to the Court of Appeal. (E.g., orders denying judicial disqualification or denying a motion to quash service of a summons [Code Civ. Proc., §§ 170.3(d); 418.10, subd. (c)].) Many can only be reviewed on appeal from the final judgment. Knowing when and how to attack an adverse order, both in the trial court and appellate court, is fundamental to litigation practice.

CCP section1008 motions: Reading the fine print

Lawyers and judges often used the shorthand phrase "Code of Civil Procedure section 1008 motion" to refer to a motion for reconsideration that, among other things, must be brought within a tight timeframe – ten days from notice of entry of the order. (Code Civ. Proc., § 1008, subd. (a)). But in fact, Code of Civil Procedure section1008 allows for three different motions, and the Supreme Court has expanded one of those into a broad common-law motion that provides trial courts with the authority to reconsider, modify or change its ruling at (almost) any time, and, arguably, for any reason.

Code of Civil Procedure section 1008 is, in short, a powerful tool that trial attorneys should study and use, keeping in mind that misuse of any Section 1008 motion can result in sanctions. (Code Civ. Proc., § 1008, subd.(d)).

Motions for reconsideration

Code of Civil Procedure section 1008, subd.(a) provides the standards and procedures for the common Motion for Reconsideration. It may be brought by any party affected by the order, whether the original motion was granted, denied, or granted conditionally; and,
• Must be filed within ten days of notice of entry of the order;
• Must be based on new or different facts, circumstances or law;
• Must be brought before the same judge who made the order; and,
• Must be accompanied by a declaration stating "what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown." (§ 1008, subd. (a)).

Although not stated in the statute, courts have required that the moving provide a "satisfactory explanation for the failure to produce the evidence at an earlier time." (*New York Times Co. v. Superior Court* (2005) 135 Cal.App.4th 206, 212).

Applications to renew the prior motion

In contrast to the standard motion for reconsideration – and less commonly used – is the renewed motion allowed by Code of Civil Procedure section 1008, subd. (b), which allows the party who brought a motion that was refused in whole or in part, or granted conditionally or on terms, to make a renewed motion for the same order.

See Fox, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
December 2015 Issue

Like a motion for reconsideration, the renewed motion must demonstrate new or different facts, circumstances, or law, and must be accompanied by an affidavit stating what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown. (Code Civ. Proc., § 1008, subd.(b)).

But renewed motions under Code of Civil Procedure section 1008, subd.(b) otherwise differ in substance and procedures from a Code of Civil Procedure section 1008(a) motion for reconsideration. (*Tate v. Wilburn* (2010) 184 Cal.App.4th 150, 160). Unlike a motion for reconsideration, a renewed motion does not ask the court to modify, amend, or revoke the prior order, but instead it is a pure renewal of the first motion. (*California Correctional Peace Officers Ass'n v. Virga* (2010) 181 Cal.App.4th 30, 42-43). In fact, a renewal motion is proper even if the moving party concedes that the court's initial ruling was correct, but is now erroneous in light of changed circumstances. (*Deauville Restaurant, Inc. v. Superior Court* (2001) 90 Cal.App.4th 843, 848).

Another key difference between a motion for reconsideration and a renewed motion is that a renewed motion can only be brought by the party whose original motion was denied in whole or in part. But there is no time limit for a renewed motion, and the motion need not be considered by the same judge who denied the original motion. (*Ibid*). Thus if you were the original moving party and new or different facts or law arise during the litigation, you are free to bring the renewed motion at any time prior to entry of judgment, even if you are now in front of a different judge who denied the original motion.

But "any time" may not necessarily mean "any" time if there are statutory or jurisdictional deadlines attached to the underlying motions. In *Kunysz v. Sandler* (2007) 146 Cal.App.4th 1540, 1543, for example, the court held that a motion to renew an anti-SLAPP motion, brought nine months after the first amended complaint was filed, was untimely because it was outside the 60-day statutory period for filing an anti-SLAPP motion. (Code Civ. Proc., § 425.16, subd.(f)).

Similarly, a court cannot reconsider an order denying a motion for new trial after the jurisdictional 60-day period for the court to grant or deny that motion has passed. (Code Civ. Proc., § 660; *Jones v. Sieve* (1988) 203 C.A.L.3d 359, 370).

Reconsideration on the trial court's own motion

Finally, a trial court can, on its "own motion," reconsider its prior ruling – whether denying or granting in whole or in part a party's motion – and enter a new and different order. There are two sources of authority for such an action by the court – one statutory and one formulated by case law — each with its own characteristics.

First, the court has statutory authority to reconsider a prior order and enter a new order if, at any time, it determines there has been a change in law that warrants a different outcome. (Code Civ. Proc., § 1008, subd.(c)).

Second, and broader, a court that concludes its prior order was in error has jurisdiction to reconsider that prior order and enter a new order on its own motion. In 2005, the Supreme Court authorized such a procedure in *Le Francois v. Goel* (2005) 35 Cal.4th 1094, without expressly restricting the bases for such reconsideration to new facts or law. Further, and notwithstanding the statutory proscriptions limiting a party's right to file a motion for reconsideration, the Supreme Court expressly authorized parties to informally "suggest" to the trial court that its earlier ruling was erroneous and should be reconsidered on its "own motion." (*Id*. at 1108).

Still unresolved is whether a court, in moving sua sponte to reconsider a prior order, is restricted to the facts set forth in the original moving papers or if it may consider new and different facts. In 2008, one decision, citing *LeFrancois*, held that a trial court is authorized to grant reconsideration on its own motion only when it concludes that its earlier ruling was wrong, and may only change that ruling "based on the evidence originally submitted," expressly limits the scope of a trial court's authority to reconsider and enter a new order based on the original evidence, and *Barthold* has recently been questioned on that point. (*Marshall v. County of San Diego* (2015) 238 Cal.App.4th 1095, 90 and fn. 10).

Since *LeFrancois,* other courts have expanded the trial court's authority to reconsider on its own motion, finding for example that a trial court can reconsider an order on "its own motion" when a party has improperly filed motion to reconsider what would otherwise prevent relief, and can reconsider "final" appealable orders as long as the time to appeal has not run. (*Marriage of Barthold*, 158 Cal.App.4th at pp. 1308-1309; 1312 and fn.9). In a recent case, the court applied these rules to affirm a trial court's sua sponte reconsideration of an order compelling arbitration even after the parties, complying with the original order, began the arbitration process. (*Pinela v. Neiman Marcus Group, Inc.* (2015) 238 Cal.App.4th 227, 237).

Reconsideration outside of Code of Civil Procedure section 1008

Beyond the opportunities provided by Code of Civil Procedure section 1008, some statutory motions have renewal rights that are built into the statute that authorizes the motion.

For example, a party whose motion for summary judgment was previously denied may later file a motion for summary adjudication based on newly discovered facts or circumstances or a change in the law. (Code Civ. Proc., § 437c, subd. (f)(2)). Another recent case — *Marshall v. County of San Diego* (2015) 238 Cal.App.4th 1095 — construed Code of Civil Procedure section 437c, subd. (f)(2) and *LeFrancois* to mean that parties may file renewed motions for summary judgment or adjudication supported by evidence that was not presented in the original motion or represents a change in the law.

And in *Williamson v. Mazda Motor of America, Inc.* (2012) 212 Cal.App.4th 449, 454, a defendant whose original motion to dismiss for forum non conveniens was denied, filed a motion for reconsideration

See Fox, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
December 2015 Issue

of that order after the case was reassigned. The new judge, considering evidence now adduced in discovery, granted the motion. The Court of Appeal affirmed, finding that under Code of Civil Procedure section 410.30, subd. (a), the trial court had "independent authority" to reconsider a prior ruling even if the motion for reconsideration did not satisfy the requirements of Code of Civil Procedure section 1008(a).

But in the recent case of *Even Zohar Const. & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830, 837 the Supreme Court rejected an argument that Code of Civil Procedure section 473, subd. (b), which requires a court to grant relief from default "whenever" an attorney provides a fault affidavit, allows a party to make repeated motions for relief based on different factual claims of attorney neglect, in derogation of the standards set forth in Code of Civil Procedure section 1008, subds. (a) and (b)). The Supreme Court held that the Legislature did not intend the word "whenever" in Code of Civil Procedure section 473, subd. (b) to mean "notwithstanding" the requirements of Code Civ. Proc., § 1008, and that the "whenever" simply means "when," and not, as the moving party argued, "as many times as it takes, without limitation." (*Id.* at 841).

Appellate court review

Beyond trial court remedies for an erroneous order there are, of course, appellate court remedies.

First it is important to distinguish between appellate review of the underlying order and review of the order denying a motion to reconsider or renewed motion.

In 2011, after decades of debate in the appellate courts, the Legislature amended Code of Civil Procedure section 1008 to state categorically that an order "denying a motion for reconsideration made pursuant to subdivision (a) is not separately appealable," adding however that if the underlying order is itself appealable, the denial of reconsideration can be reviewed on appeal from that order. (§ 1008, subd. (g)).

This amendment fails to resolve as many issues as it addresses, however. Among other things, Code of Civil Procedure section 1008, subd.(g) does not apply to renewed motions under Section 1008, subd.(b), perhaps suggesting that the Legislature intended to allow appeals from orders arising from such motions. In *Tate v. Wilburn* (2010) 184 Cal.App.4th 150, the court held that orders denying renewed motions are not appealable for the same policy reasons that orders denying motions for reconsideration were not appealable. But that opinion was published before the 2011 addition of Code of Civil Procedure section 1008, subd.(g). Currently there is no published opinion addressing the issue of whether the Legislature intended to allow direct appeals from orders granting or denying the renewal of an otherwise appealable order, and so the question remains open.

Further, Section 1008, subd.(g) is misleading to the extent that it suggests that an appellate court may only review, by appeal, an order denying a motion to reconsider an otherwise appealable order. If the type of order at issue is made appealable by statute, then ipso facto an order granting reconsideration or renewal, and entering a new and different order, is appealable. For example, if the trial court initially denies an anti-SLAPP motion – which is an appealable order (Code Civ. Proc., § 904.1(12) – and thereafter, based on reconsideration or renewal, grants the motion – that new order should be appealable as well, and the scope of review would include whether the reconsideration or renewal was properly granted.

Appellate review of orders

Beyond the question of whether the order denying a motion for reconsideration or renewal is itself appealable, is the issue of when and how the underlying order can be reviewed.

Despite the general "one final judgment rule" (*Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 744), there are dozens of "orders" that are immediately appealable, and thus cannot be reviewed in an appeal from a final judgment. A partial list of such orders include orders

- Granting *or* denying anti-SLAPP motion. (Code Civ. Proc., §§ 425.16(i); 904.1(a)(13);
- Denying certification of entire class. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429);
- Granting *or* denying motion to disqualify attorney. (*Meehan v. Hopps* (1955) 45 Cal.2d 213);
- Granting motion to quash service of summons. (Code Civ. Proc., § 904.1(a)(3)
- Granting motion to stay or dismiss on grounds of inconvenient forum. (Code Civ. Proc., § 904.1(a)(3));
- Denying motion to compel arbitration. (Code Civ. Proc., § 1294(a));
- Granting, denying or dissolving any injunction. (Code Civ. Proc., § 904.1(a)(6); and,
- Any order requiring the immediate payment of money, including sanctions over $5,000. (*Lima v. Vous* (2009) 174 Cal.App.4th 242, 251; Code Civ. Proc., § 904.1(a)(11,12).

Trial counsel must always determine whether your client has the right to appeal from an adverse order and proceed accordingly. In most circumstances, the failure to immediately appeal from an order that can be appealed will bar appellate review of the order in a later appeal from the judgment.

If the order is not directly appealable, it can usually be reviewed on appeal from the final judgment intermediate rulings by appeal until final resolution of the case. (*Griset v. Fair Political Practices Com'n* (2001) 25 Cal.4th 688, 697).

That review can include whether the trial court properly granted or denied reconsideration or renewal under Section 1008 or on its own motion.

Thus if you are assessing the merits of an appeal from an adverse judgment, it may be important to review the pre-trial orders for prejudicial error. While many such errors may have become moot as a result of the trial (e.g., orders denying summary judgment) some pre-trial orders may be prejudicial (e.g., sustaining a demurrer or striking a cause of

See Fox, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
December 2015 Issue

action that, upon trial, was shown to be viable).

Review by writ petition

Further, many orders are never appealable but can only be reviewed by way of an appellate court writ petition. Such common orders include orders

- Denying a motion to disqualify a judge. (Code Civ. Proc., § 170.3, subd.(d));
- Granting a change of venue. (Code. Civ. Proc., § 400);
- Determining a good faith settlement. (Code Civ. Proc., § 877.6), and;
- Expunging a Lis Pendens. (Code Civ. Proc., § 405.39).

And finally, any order that is not immediately appealable or subject to statutory writ requirements, can in theory be reviewed by a petition for writ of mandate. Where a trial court's order is highly prejudicial to the extent that it prevents a fair trial – such as an order granting a motion in limine to exclude all or most witnesses on the subject of damages, or that wrongly grants a motion to deem admitted RFAs to the extent that the order operates as a summary judgment – the Court of Appeal may well be inclined to exercise its discretion to intervene. Despite the high hurdles, writs happen and the prospect of winning one should not be cast aside without careful consideration.

Conclusion

With so many different opportunities to challenge a trial court's ruling on a motion, trial counsel should remember that the order is not necessarily the final word on the matter, and should carefully assess and map out a strategy to snatch victory from the jaws of defeat.

Herb Fox is a Certified Appellate Law Specialist who exclusively handles appeals, writs, law and motion, and post-trial proceedings. He has been of-record in 250 appellate proceedings throughout California, and he is a member of the State Bar's Committee on Appellate Courts. www.FoxAppeals.com. Herb can be reached at hfox@foxappeals.com.