McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 55. Appeals Generally (Refs & Annos)

McKinney's CPLR § 5501

§ 5501. Scope of review

Currentness

(a) Generally, from final judgment. An appeal from a final judgment brings up for review:

1. any non-final judgment or order which necessarily affects the final judgment, including any which was adverse to the respondent on appeal from the final judgment and which, if reversed, would entitle the respondent to prevail in whole or in part on that appeal, provided that such non-final judgment or order has not previously been reviewed by the court to which the appeal is taken;

2. any order denying a new trial or hearing which has not previously been reviewed by the court to which the appeal is taken;

3. any ruling to which the appellant objected or had no opportunity to object or which was a refusal or failure to act as requested by the appellant, and any charge to the jury, or failure or refusal to charge as requested by the appellant, to which he objected;

4. any remark made by the judge to which the appellant objected; and

5. a verdict after a trial by jury as of right, when the final judgment was entered in a different amount pursuant to the respondent's stipulation on a motion to set aside the verdict as excessive or inadequate; the appellate court may increase such judgment to a sum not exceeding the verdict or reduce it to a sum not less than the verdict.

(b) Court of appeals. The court of appeals shall review questions of law only, except that it shall also review questions of fact where the appellate division, on reversing or modifying a final or interlocutory judgment, has expressly or impliedly found new facts and a final judgment pursuant thereto is entered. On an appeal pursuant to subdivision (d) of section fifty-six hundred one, or subparagraph (ii) of paragraph one of subdivision (a) of section fifty-six hundred two, or subparagraph (ii) of paragraph two of subdivision (b) of section fifty-six hundred two, only the non-final determination of the appellate division shall be reviewed.

(c) Appellate division. The appellate division shall review questions of law and questions of fact on an appeal from a judgment or order of a court of original instance and on an appeal from an order of the supreme court, a county court or an appellate term determining an appeal. The notice of appeal from an order directing summary judgment, or directing judgment on a motion addressed to the pleadings, shall be deemed to specify a judgment upon said order entered after service of the notice of appeal and before entry of the order of the appellate court upon such appeal, without however affecting the taxation of costs upon the appeal. In reviewing a money judgment in an action in which an itemized verdict is required by rule forty-one hundred eleven of this chapter in which it is contended that the award is excessive or inadequate and that a new trial should have been

granted unless a stipulation is entered to a different award, the appellate division shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation.

(d) Appellate term. The appellate term shall review questions of law and questions of fact.

Credits

(L.1962, c. 308. Amended L.1986, c. 682, § 10; L.1997, c. 474, § 1, eff. Nov. 24, 1997.)

Editors' Notes

SUPPLEMENTARY PRACTICE COMMENTARIES

by David D. Siegel

2013

C5501:4. Order That "Necessarily Affects" Final Judgment.

Court of Appeals Takes More Generous View of "Necessarily Affects" Language in Statute

CPLR 5501(a)(1) provides that an appeal from a final judgment also brings up for review any disposition made along the way, but only if it "necessarily affects" the final judgment. That pesky phrase has earned a gluttonous share of attention from bench and bar over the years.

What does it take to be able to say that the disposition "necessarily affects" the final judgment? One test, which we have described as "not perfect but helpful" (see Siegel, New York Practice 5th Ed. 530), is to ask whether, assuming that the nonfinal order or judgment is erroneous, its reversal would also require a reversal of the judgment. If it would, it's reviewable; if not, and the judgment or order can stand despite it, it's not reviewable.

In *Siegmund Strauss, Inc. v. East 149th Realty Corp.*, 20 N.Y.3d 37, 956 N.Y.S.2d 435 (Oct. 23, 2012), that test is rejected as too narrow. Generally speaking, that's a welcome development for lawyers on the losing side of the disposition. Lawyers bent on getting a nonfinal order overturned but not sure whether the "necessarily affects" rule would support its review on an appeal from a later final judgment, must take the immediate appeal; they can't safely rely on any kind of serene assumption that if they lose on final judgment and appeal it, review of the interlocutory disposition can be included.

It all depends on the "necessarily affects" phrase of CPLR 5501(a)(1). Because of its plasticity, lawyers don't trust it. Hence they often appeal the nonfinal disposition immediately, just to be sure it's preserved for appellate review.

Parenthetically, to add to the tension, the lawyer must also be sure that the appeal of the nonfinal matter is then perfected before final judgment is entered in the case because, under the key 1976 decision of the Court of Appeals in *Matter of Aho* (see Siegel, id., 532), the mere entry of the final judgment terminates the pending interlocutory appeal from the earlier order.

This is seldom a problem in federal practice, where, unlike New York practice, the general rule is that interlocutory appeals are not allowed. (See 28 U.S.C. 1291 and 1292.) Hence a federal appellate court, on an appeal from a final judgment, reviews just about everything decided along the way.

That may be happy news on one front, but federal practice has its own thorns. Precluding immediate appeal from a nonfinal order, which is later found--on appeal from the final judgment--to be in error and to require reversal and a new trial, can mean fortunes in lost time, money, and energy when that long-delayed review now acts the villain by wiping out the entire trial stage of the action--maybe years of effort and expense.

The New York practice of allowing appeals from just about all interlocutory dispositions--while perhaps unique in the nation (and often criticized)--at least helps avoid the prospect of an expensive trial going completely to waste because an incidental point, maybe involving only a procedural matter, involves a key one and generates a reversal of everything. An example would be an interlocutory order denying disclosure of an item later found fundamental to the loser's case.

Neither of these conflicting antipodes offers secure sailing for the practicing lawyer. Perhaps a tacit acknowledgment of this dilemma underlies the *Siegmund* decision, relaxing some of the perceived stricture that has been built around the "necessarily affects" clause in CPLR 5501(a)(1).

The plaintiff in *Siegmund* wanted a declaration that it was the lawful tenant of certain Manhattan premises as a result of a corporate merger agreement with defendants. The defendants counterclaimed against plaintiff and impleaded plaintiff's principals. During the action the court made an order dismissing those claims, which the defendants did not appeal, but after a bench trial in which the court rendered final judgment for the plaintiff, the defendants did appeal the final judgment. The issue was whether, on that appeal, the court could also review the earlier orders dismissing the counterclaim and third-party claims.

On a technical application of the "necessarily affects" standard, the court could not, because the main finding of the judgment--that plaintiff was entitled to possession of the premises--would have remained standing even if the now reviewed earlier orders were reversed. Making that technical application--i.e., a strict application of "necessarily affects"--the appellate division refused the review.

In an opinion by Judge Jones, the Court of Appeals reverses, taking the view that the earlier disposition, since made pursuant to CPLR 3211(a)(7), meant that the dismissal of the counterclaims and third-party claims was for failure to state a cause of action. This "necessarily removed that legal issue from the case ... [because] there was no further opportunity during the litigation to raise the question" and for that reason the order "necessarily affected the final judgment".

But can't that standard support the post-judgment review of any legal issue resolved along the way with a court order? Treatment of *Siegmund* can be found in the Thomas F. Gleason column in the N.Y. Law Journal of November 19, 2012, "Dangerous Interactions: Interlocutory Appeals and Judgments". The column points up the difficulties the "necessarily affects" standard poses for practicing lawyers.

What should a lawyer in that situation do? Maybe this: gauge how important it is to preserve appellate review of the disposition if you should lose on final judgment. If it's all that important and you can't be absolutely certain that the "necessarily affects" standard will enable you to secure that review later, then exploit the New York option of taking an immediate appeal from the order now.

And be sure--because of the *Aho* case--that you can get that appeal disposed of before final judgment is rendered in the action.

But how can you be sure of that when you don't control the appellate calendar?

The perennial lesson of the "necessarily affects" provision is how it feels to stand between a rock and a hard place.

More Generous View Continues Half Year Later

The Court of Appeals decision in *Oakes v. Patel*, 20 N.Y.3d 633, 965 N.Y.S.2d 752 (April 2, 2013), addresses the parties' procedural options when faced with additurs or remittiturs. (That aspect of the *Oakes* case is treated in the 2013 Commentary C4404:4, above.) Also part of the *Oakes* decision, however, is further treatment of the "necessarily affects" provision. The court continues its more flexible view of it.

The situation in *Oakes* is that loser (L), on a motion made below, has not immediately appealed it. (In New York practice, perhaps uniquely in the country, L is allowed the option of an immediate appeal from a nonfinal disposition.) L has instead stayed in but then lost the whole ball game when final judgment went against L. On appeal from the judgment, L wants also to secure a review of the earlier order. Does such review lie, i.e., is the order one that "necessarily affects" the final judgment in this all important appellate sense?

The application of the phrase "to orders granting or denying motions to amend pleadings has been particularly vexing", the court laments in *Oakes*. It cites some such motions in which review was allowed, thus at least "implicitly" assuming that the order necessarily affected the final judgment (citing as an example its 1998 *Whalen* decision, treated in New York State Law Digest No. 466). But the court also points to other of its cases in which, in brief footnotes and "without further elaboration", it has gone the other way. These latter cases the court now overrules in *Oakes*; on the *Oakes* facts the review is allowed.

The motion to amend in *Oakes* was made by one of the defendants, K, who sought the amendment to add the defense of release to its pleading.

Having freed itself of its prior holdings that an amendment of pleadings is not reviewable, the Court of Appeals finds review in this case warranted under the "necessarily affects" standard, a standard bench and bar may now consider applicable--especially in view of the court's even more recent *Siegmund* decision (treated above).

Alas, one is still unable to discern just how broad the test has become.

Because precise lines have still not been set, is there at least a rule of thumb for a party aggrieved by a court's disposition of a motion, if the action still remains to be tried but the party wants to preserve all appellate options?

One option, available--as noted above--perhaps only in New York, is to take an immediate appeal from the order itself. (In federal practice and in most other states such a route would generally be closed and the party would just have to wait for judgment and, if aggrieved by that, appeal the judgment and bring the order up for review as part of it.)

If the loser follows the New York immediate-appeal option, there is, unfortunately, a further warning posted in New York practice: if that appeal is still pending undetermined when later final judgment comes on in the case, the entry of that judgment requires the dismissal of the appeal from the nonfinal order. That admonition comes from the court's 1976 *Matter of Aho* decision, also noted above in this Commentary.

If the order does qualify as one that "necessarily affects" the final judgment, of course it will get its review as part of the final judgment--assuming the final judgment is appealed--notwithstanding the now mandated dismissal of the earlier appeal. On that front, the *Oakes* stretch of the "necessarily affects" phrase may offer some relief.

We repeat: it may. We don't see many certainties here.

2011

C5501:4. Order That "Necessarily Affects" Final Judgment.

Appeal from Interlocutory Order Abates When Judgment

Is Entered, and If Order Doesn't "Affect" Final

Judgment, Review Is Altogether Barred

Under this caption following the 2011 Commentary C5501:6, below, the First Department's *Siegmund* case is treated. It shows what happens when (1) an interlocutory (nonfinal) order is appealed, and the appeal could have secured review of the issue involved, but it never gets reviewed because a final judgment is entered before the interlocutory appeal can be perfected; and (2) the order is not of the kind that can be reviewed as part of an appeal from the final judgment under CPLR 5501(a)(1).

C5501:6. Order Previously Appealed But Not Perfected.

Appeal from Interlocutory Order Abates When Judgment Is

Entered, and If Order Doesn't "Affect" Final

Judgment, Review Is Altogether Barred

We note at page 21 in the main volume that a party who elects to appeal a nonfinal order had best follow through on the appeal, *i.e.*, not let it lapse. The lesson comes home graphically in *Siegmund Strauss, Inc. v. East 149th Realty Corp.*, 81 A.D.3d 260, 919 N.Y.S.2d 1 (1st Dep't, Dec. 21, 2010).

Interlocutory orders (meaning orders that don't conclude the litigation), while generally not appealable in federal practice, are appealable in New York practice. An immediate appeal can be taken to the appellate division from virtually any pretrial order made in a supreme court case. (*See* Siegel, New York Practice 5th Ed. § 526.) This is generally deemed a boon to lawyers -- appellate lawyers, anyway -- but it also has a down side. An appeal from an interlocutory order can interact with an appeal from a final judgment in such a way that the points for which review is sought on the interlocutory appeal never get reviewed at all.

If, for example, an interlocutory order is appealed but the appeal has still not been perfected when final judgment is entered in the action, the appeal from the interlocutory order abates. The Court of Appeals held in 1976 in *Matter of Aho* (*see* Siegel, *id.*, § 532) that the mere entry of final judgment in the action abates the appeal from the interlocutory order.

The possibility still exists, however, for the order to be reviewed as part of the review of the final judgment. CPLR 5501(a)(1) permits that, but only upon a showing that the order "necessarily affects" the final judgment. But when does the order do that? That's another big question in appellate practice. A separate Commentary, C5501:4 at page 18 in the main volume, addresses it.

One test is to ask this question: assuming that the nonfinal order or judgment is erroneous, would its reversal overturn the judgment? If it would, it is reviewable as part of an appeal from the final judgment; if it would not, and the judgment can stand despite it, it does not qualify for this belated review. (Some examples appear in Siegel,

id., § 530.) That test is essentially the one applied by the appellate division in the *Siegmund* case. It involved a merger of businesses and the lease and sublease of premises, producing the typically complicated fact pattern to be expected when this aspect of CPLR 5501(a)(1) is on the scene. The plaintiff brought an action to declare that it is the rightful tenant of, and that the defendants have no rights in, the subject premises.

The defendants had interposed counterclaims, cross-claims, and third-party claims, and now, late in the game, moved to amend their answer to add a new claim against the plaintiff. The trial court denied the motion and the defendants appealed the order of denial. That was the interlocutory appeal. While it pended, final judgment came on, and the defendants decided to appeal that instead of pressing through with their interlocutory appeal. They did want the issues raised on the interlocutory appeal to be addressed by the appellate court, however, and to that end argued that the interlocutory order "necessarily" affected the final judgment. Under the statute, such additional review is allowable only if that could be shown.

Applying the test noted above, the court found that the key matter established by the main judgment was that the plaintiff was entitled to possession of the premises. It then found that reversal of the order involved on the interlocutory appeal, respecting the amendment the defendants sought, would not alter that; hence it would not "necessarily" affect the judgment and thus could not be subjected to appellate review as part of its appeal.

The defendants lose on that key point, and since their interlocutory appeal was abated by the mere entry of final judgment, they lose it all -- "[u]nfortunately" for these defendants, says the court, acknowledging that they apparently did not get "appropriate compensation for their business as a result of the failed merger".

What can one in the defendants' position do to preserve appellate review of an objectionable order? If its appeal can be timed right -- so as to avoid abatement by the entry of a final judgment in the action -- it can be separately appealed and the appeal pressed to perfection before a final judgment is entered.

Otherwise, if it's sensed that a final judgment is coming on -- and as long as the notice of appeal from the interlocutory order has been served and filed on time -- perhaps the would-be appellant can seek from the appellate court an extension of the time to perfect the interlocutory appeal so as to have it heard along with the appeal from the judgment. Hopefully the appellate court, understanding the dilemma confronted by an appellant when CPLR 5501(a)(1) and the *Aho* decision are about to clash, would in that situation hold inapplicable the Aho rule about entry of final judgment abating an interlocutory appeal.

Ironically, if all this occurred during a trial of the case instead of at pretrial stages that produce distinct orders, the disposition of the defendant's application for (*e.g.*) a pleading amendment would constitute a mere trial "ruling" and would, after judgment for the plaintiff and appeal of the judgment by the defendant, be reviewable as of right under a different paragraph of CPLR 5501(a) -- paragraph (3).

1997

C5501:1 Scope of Review, Generally.

When Order Has Two Dispositions, Appealing from One Forfeits Appeal from the Other; Amendment of Notice of Appeal Can't Cure

As noted in this Commentary in the main volume (page 10), an appeal from an order results only in the review of the narrow point disposed of in the order. But what of the order that disposes of several matters?

An interesting case addressing this issue is City of Mt. Vernon v. Mt. Vernon Housing Auth., 652 N.Y.S.2d 771 (2d Dept., Jan. 27, 1997), in which a plaintiff's appeal from an order denying a motion to amend the complaint was held not to bring up for review the granting of a motion to dismiss the action, contained in the same order. Even more significantly, the court held that the notice of appeal is an item that goes to the subject matter jurisdiction of the appellate court. This resulted in the denial of the plaintiff's motion to amend the notice of appeal to specify the part omitted.

Would it make any difference if the appellant had included in the notice of appeal from the order, as is ordinarily included in a notice of appeal from a judgment, a general relief clause, i.e., a statement to the effect that the appellant is appealing from "from each and every part" of the order? The point is discussed in the treatment of the *Mount Vernon* case in Commentary C5515:1, following CPLR 5515 in this pocket part, below.

C5501:10 Appellate Division Review.

The 1997 Amendment Providing That Appeal from Order Is Deemed to Specify Judgment Later Entered on the Order

The original Commentary on CPLR 5512 at pages 162-163 of the main volume calls attention to the situation, commonly met on granted motions to dismiss or for summary judgment, in which an order is first entered and a separate judgment sometimes entered on the order later on. It is pointed out that canny practitioners, to take no chances, appeal both items when they represent the appellant, and within the appropriate period measured from each. Double records and briefs are not involved; one set serves for both, with little additional expense.

It sometimes happens, however, that the appellant, having appealed the order, will not bother to appeal the later judgment that the winner may serve, on the simple theory that everything sought can be preserved by just going ahead with the appeal from the order. That should be so, especially under the terms of CPLR 5512, but other problems are met, and it is altogether the best practice to take an appeal from each of the papers. This is especially so because of the great rigidity of the 30-day period allowed for an appeal. See the CPLR 5512 Commentary.

One of the other problems encountered in this situation is traceable to the Court of Appeals decision in Matter of Aho, 39 N.Y.2d 241, 383 N.Y.S.2d 285, 347 N.E.2d 647 (1976), which says among other things that when an order is appealed, and is pending when a later judgment is entered in the action, the entry of the judgment terminates the appeal from the order.

That would not be so bad if the appellant takes a timely appeal from the judgment. If the prior order necessarily affects it--even if the order is a nonfinal one--the judgment will also bring the order up for review under the scope of review provision of subdivision (a) of CPLR 5501.

The problem is met head on when a judgment later comes along and the appellant does not take the precaution of appealing it. It is in that situation that the appellant may lose both potential paths to appellate review: an appeal from the judgment would be barred because a timely appeal wasn't taken from it, and the appeal from the order, timely taken, is terminated before it can be heard by the mere fact of the entry of the judgment.

This is all very technical, but the stakes are obviously high--prompting us always to suggest that the appellant serve and file separate notices of appeal from both order and judgment, if both there be, in these situations. We adhere to that suggestion even as we now treat the 1997 amendment, which is supposed to make that procedure unnecessary.

The amendment adds a second sentence to CPLR 5501(c) (making the original second sentence the third one). The new sentence deals only with an order granting summary judgment or an order on a motion "addressed to

the pleadings". What the latter means is arguable--another reason for our uncompromising suggestion to appeal both things. Clearly it should embrace an order granting a motion to dismiss under CPLR 3211(a), because that can give rise to a final judgment.

If an appeal is taken from the order that grants the dismissal or summary judgment motion, and that appeal is already in place and pending but not yet decided when the winner now secures the entry of a judgment on that order, the notice of appeal already served from the order "shall be deemed to specify [the] judgment" as well. That should make it unnecessary for the appellant to take a distinct appeal from the judgment because the pending appeal from the order is automatically "deemed" to be such an appeal.

Hence *Aho*'s impact is overcome, at least in these summary judgment and dismissal situations, because through this "deeming" procedure the appellant *does* appeal the judgment: even if the entry of the judgment is regarded as terminating the appeal from the order, the judgment just steps into the shoes of the order and the appeal goes right on.

Note that there is nothing said in this amendment about the time to appeal. The assumption of the statute is that a timely appeal was taken from the order. And the further assumption appears to be that *whenever* the judgment may be entered on the order--weeks or perhaps even months later--it will be "deemed" to have been appealed along with the actually appealed order.

This makes the amendment a kind of automatic nunc pro tunc device, integrating the judgment, whenever the judgment may actually have been entered, into the phraseology of the notice of appeal served long ago.

It's really not a bad idea, and it should work well, but, speaking for ourselves, we'd take a prompt (and distinct) appeal from the judgment anyway, for safety's sake. If the appellant's lawyer reading these words detects a wariness in the writer about these appellate interplays, the reader displays a perspicacity that would only be consistent with taking a separate appeal from the judgment.

And we don't for a moment suggest that the appeal be only from the judgment. An appeal should also have been taken from the order. The appellant should not forego an appeal from the order on the assumption that she can always appeal the judgment later on.

All of this can be disregarded if the appellant is not intent on securing appellate review. If the appellant wants to give up appellate review altogether, getting caught in one of these appellant crosscurrents is a sound way of doing it.

The final item in the second sentence, about costs, is apparently designed to make it clear that when the appellate court applies CPLR 5501(c) and deems a later entered judgment to be part of the appeal from the actually appealed order, it is not to treat the case as involving two appeals and therefore must not direct double costs.

1996

C5501:10 Appellate Division Review.

U.S. Supreme Court Holds That in Diversity Case, Federal Judges Must Also Use "Deviates Materially" Standard

Another major U.S. Supreme Court decision along the controversial line that the *Erie* doctrine has generated was occasioned by CPLR 5501(c) and its "deviates materially" standard in 1996. Gasperini v. Center for Humanities, Inc., 116 S.Ct. 2211, 135 L.Ed.2d 659, 1996 WL 340789 (June 24, 1996), seems destined to join some distinguished company.

The *Erie* doctrine requires federal judges sitting in diversity cases to apply forum state law to substantive issues that come before them. Not procedural issues--a federal diversity case must take federal procedure as it finds it; just substantive issues. The frequent problem, of course, is to determine whether a given issue is substantive or procedural for this purpose. It's rarely as easy as it seems. Many matters straddle the line between substance and procedure, especially for something like an application of *Erie*. The "deviates materially" standard is one of the straddlers.

The Supreme Court decides in *Gasperini* that while the issue of what standard to apply in reviewing a verdict for excessiveness may seem procedural, its design is to place a cap on damages, and that makes it substantive. Hence a federal diversity court must apply CPLR 5501(c) and consider not whether the damages awarded by the jury "shocks the conscience"--the old standard--but "deviates materially from what would be reasonable compensation", the new standard adopted by CPLR 5501(c). And that goes for both trial and appellate judges in the federal system, even though CPLR 5501(c) purports to invite only the New York appellate divisions to apply the new criterion.

The Court had to wade through some thorny Seventh Amendment issues to reach the result, but managed to, albeit by a close score. Justice Ginsburg's opinion draws a bare majority of five.

The case is discussed at greater length in a lead note in New York State Law Digest No. 439.

PRACTICE COMMENTARIES

by David D. Siegel

Generally

C5501:1 Scope of Review, Generally.

C5501:2 "Reviewability" and "Appealability" Distinguished.

Subdivision (a)

C5501:3 Scope of Review from Final Judgment, Generally.

C5501:3a The "Implied Severance" Doctrine.

C5501:4 Order That "Necessarily Affects" Final Judgment.

C5501:5 Review of Order Adverse to Respondent.

C5501:6 Order Previously Appealed But Not Perfected.

C5501:7 Reviewing Rulings.

C5501:8 Additur and Remittitur.

Subdivision (b)

C5501:9 Court of Appeals Review.

Subdivision (c)

C5501:10 Appellate Division Review.

Subdivision (d)

C5501:11 Appellate Term Review.

Generally

C5501:1 Scope of Review, Generally.

Not everything can be reviewed on an appeal. Some courts have narrow review powers, such as the New York Court of Appeals. And even courts with broader powers of review, such as the appellate divisions, will be precluded from addressing certain matters, like a ruling to which a timely objection was not made. It is the function of CPLR 5501 to determine what may be reviewed on appeal.

Subdivisions (b), (c), and (d) of CPLR 5501, which will be individually treated in the ensuing Commentaries, address particular courts and determine the scope of their powers of review. Subdivision (a), on the other hand, is addressed to all appellate courts. It dictates precisely how much of the proceedings below come up for review when a final judgment is appealed.

Quite often a given disposition preceding final judgment, especially one relating to mere procedure, is embodied in an order. That order might be independently appealable pursuant to Article 56 or 57, governing respectively appealability to the Court of Appeals and the appellate divisions. If it is, then at the aggrieved person's option an immediate appeal may be taken from the order, and if the option is exercised an appellate review will occur at that pre-judgment stage. The aggrieved person, whom we'll just call the appellant, often has an alternative in New York practice, however. The appellant can bide its time, continuing in the action in the hope of prevailing with a final judgment. Should the appellant do that, and final judgment go against it, the appellant can then appeal the final judgment, and, exploiting subdivision (a)(1) of CPLR 5501, ask the appellate court to review the earlier order as part of the review of the final judgment. This will only work, however, if the order "necessarily affects" the final judgment, as discussed in Commentary C5501:4, below.

An appeal from an order usually results in the review of only the narrow point involved on the motion that resulted in the order. An appeal from a final judgment, on the other hand, as subdivision (a) of CPLR 5501 manifests, opens a much wider door, admitting a great deal that occurred before and at the trial as long as the aggrieved person has made timely objections to the points raised.

Occasionally, of course, a mere order will dispose of several matters. It is important for an appellant who wants all of them reviewed to note an important difference in this respect between an order and a judgment. Whatever is reviewable under CPLR 5501(a) comes up for review on appeal from the final judgment without being specified in the notice of appeal. This is especially significant in respect of the orders described in paragraph 1, which, if otherwise reviewable by the standards prescribed by subdivision (a), are preserved for review without even being mentioned in the notice of appeal.

An appeal from an order does not have that effect. There is no provision to broaden the scope of review as CPLR 5501(a)(1) does for a final judgment. If an order in a given case does have several dispositive aspects, therefore, and review is sought of all of them, the notice of appeal should not use language suggesting that review is sought of only part of the order, as occurred, for example, in Royal v. Brooklyn Union Gas Co., 122 A.D.2d 132, 504 N.Y.S.2d 519 (2d Dep't 1986). It was held in that case that the other parts of the order would not be reviewed on the appeal. "An appeal from only part of an order constitutes a waiver of the right to appeal from the other parts of that order", the court said.

The way for an appellant to cover itself is to specify all the parts of the order intended to be appealed, or, as usually occurs in the notice of appeal from a judgment, end the notice of appeal with something to the effect that the appeal is from "each and every part" of the order.

The concept of finality embodied in a "final judgment" is not often a problem in determining whether CPLR 5501(a) is invoked. If there has been any battle with the "finality" concept at all, it has usually been fought under CPLR 5601, which determines appealability to the Court of Appeals. Because appeal to that court is largely restricted to "final" determinations, it is in conjunction with Article 56 that a problem of finality is more likely to be involved. It is therefore more appropriate to leave the issue to the Commentaries on Article 56. See Commentaries C5601:2 on CPLR 5601 and C5611:1 on CPLR 5611, below.

C5501:2 "Reviewability" and "Appealability" Distinguished.

Article 57 of the CPLR sets forth the list of judgments and orders that may be appealed to the appellate division. Article 56 does the same for the Court of Appeals. But the fact that a given case may be appealed does not automatically insure the appellant review of the point that aggrieves her. "Reviewability", as we may call it, is not always coextensive with "appealability". Examples of where the two diverge are likely to involve the Court of Appeals more than any other court, because of the court's narrow powers of review. An appeal may be taken to the Court of Appeals, for example, from an appellate division order finally determining an action, upon a showing that two appellate division justices dissented on a point of law. On that appeal, the Court of Appeals can review any question of law. But because the Court of Appeals lacks the general power to review findings of fact, the mere presence of the case before the Court of Appeals, brought there readily enough under the "appealability" standards of CPLR 5601, will not earn review of the fact findings because of the restrictions imposed on "reviewability" by subdivision (b) of CPLR 5501.

In rare instances the question of whether a given case is "appealable" to the Court of Appeals may even turn on whether or not the point it presents is "reviewable". See, e.g., Patron v. Patron, 40 N.Y.2d 582, 388 N.Y.S.2d 890, 357 N.E.2d 361 (1976). *Patron* was decided when, under CPLR 5601(a), a showing that the appellate division had merely "modified" the lower court's judgment could set the stage for an appeal to the Court of Appeals. The modification option was later removed--see Commentary C5601:3 on CPLR 5601 below--but the case remains a good instruction on the occasional interplay between "appealability" and "reviewability".

Subdivision (a)

C5501:3 Scope of Review from Final Judgment, Generally.

An appeal from a final judgment brings up for review a number of incidental matters, some automatically and some only if objection was properly made at the time the matter arose. The several paragraphs of subdivision (a) set forth these incidental reviewable matters.

The "final judgment" specified in the opening language of subdivision (a) includes that which terminates an action as well as that which terminates a special proceeding. Under the CPLR, a special proceeding culminates in a judgment, CPLR 411, just as an action does. (Under pre-CPLR law, a "final order" concluded a special proceeding.)

An appeal ends in an order, not a judgment. An order of the appellate division that finally determines an appeal taken to that court and contemplates no further proceedings below except the ministerial entry of a final judgment on remand, itself qualifies as a "final judgment" under CPLR 5501(a). De Long Corporation v. Morrison-Knudsen Co., 14 N.Y.2d 346, 251 N.Y.S.2d 657, 200 N.E.2d 557 (1964). Thus, on appeal of that order to the Court of Appeals, the several paragraphs of CPLR 5501(a) become applicable to the scope of review.

While the paper that puts a final end to a case will in most instances be denominated a "judgment", it will occasionally happen that a mere "order" will have that effect. Under paragraph 1 of subdivision (a), such an order earns the same scope of review as a final judgment.

Hurd v. Lis, 126 A.D.2d 163, 513 N.Y.S.2d 278 (3d Dep't 1987), can illustrate. It involved a land dispute in a county court. One order was entered in September 1985 and a second, which was the one appealed, in January 1986. The latter was found to be a final disposition and its appeal was therefore held to permit review of the earlier order as well.

In a case like that, the would-be appellant is safer by getting a formal "judgment" entered "on" the order, and taking the appeal from the judgment. Perhaps the precaution can even be taken later, if the omission is noticed before the appeal is finally submitted. The appellant doing that would then find additional protection in CPLR 5512(a), which provides that

[i]f a timely appeal is taken from a judgment or order other than [the proper one] and no prejudice results therefrom and the proper paper is furnished to the court to which the appeal is taken, the appeal shall be deemed taken from the proper judgment or order.

The main point, however, is that the appellant who would have the issues reviewed must take the appeal from this case-concluding paper, whatever it may be called. The appellant can't proceed on the assumption that because it's called an "order", it can be reviewed at some later time as part of review of a later-appealed "judgment". That kind of incidental review, as part of an appealed final "judgment", is reserved by CPLR 5501(a)(1) only for a "non-final" order. Crystal v. Manes, 130 A.D.2d 979, 516 N.Y.S.2d 823 (4th Dep't 1987), can illustrate.

Of the five claims that P had in the complaint in *Crystal,* four were dismissed by order in 1986, and P took no appeal from that order. Then the fifth and last claim was dismissed in 1987, marking the end of things. P did take an appeal from the 1987 dismissal, and it was as part of that appeal that P wanted the 1986 order reviewed. The court held the review unavailable because the prior order was final as to the four claims, and CPLR 5501(a)(1) provides for incidental review of only "non-final" dispositions.

The problem with this construction, of course, is that it forces piecemeal appeals. One in P's position, who wants appellate review of the first dismissal order, could not chance saving the appeal for later review. Wouldn't it also be possible, and more economical, to look at the 1986 order in the context of the whole case, deeming it sufficiently "non"-final for CPLR 5501(a)(1) purposes to encourage, or at least allow, the plaintiff to save the appeal for later review as part of the final judgment? If the plaintiff were to win on the merits on the fifth claim, the plaintiff in a case like *Crystal* might not want to appeal at all from the order dismissing the first four claims, and an imposition on an appellate calendar might be spared altogether.

One of the cases relied on in *Crystal,* moreover, involved CPLR 5601(a) and 5602(a), not CPLR 5501(a)(1). The first two govern Court of Appeals practice and have a different mission than CPLR 5501(a)(1) has, and a sometimes

unpredictable case law. It would be quite acceptable, and perhaps even advisable, to give the word "final" in CPLR 5501(a)(1) a different construction than it has gotten under the provisions applicable to Court of Appeals practice because they have different missions.

The Court of Appeals provisions are designed to save the time of that court for final dispositions only, leaving to the lower courts the job of disposing of nonfinal matters. CPLR 5501(a)(1), on the other hand, is designed to assure an appellant that dispositions that do not put an end to the whole case don't have to be taken up on appeal forthwith, but can be reviewed later, on appeal from the final judgment. The construction given CPLR 5501(a)(1) in *Crystal* would not seem to further that purpose.

A more recent case from the New York Court of Appeals, Burke v. Crosson, 85 N.Y.2d 10, 623 N.Y.S.2d 524, 647 N.E.2d 736 (1995), casts some doubt on the *Crystal* result. *Burke* involves the doctrine of the "implied severance", the importance of which makes it the subject of a separate Commentary (following). In some circumstances *Burke* may be said to displace *Crystal,* but it also may be that an appellant who follows the lesson of *Crystal* by taking an earlier appeal on similar facts may be safer than the appellant who relies on *Burke,* which entails a guess about whether the several claims involved in a case all arise out of a related set of transactions (as the following Commentary explains). One guessing wrong by following the *Crystal* lesson may face the dismissal of an appeal for prematurity, but that preserves the right to appeal at a later time, while one making a wrong guess under the *Burke* lesson might delay an appeal until the time for it has passed, resulting in a forfeiture of the right to appeal the disposition altogether. Lawyers must judge this for themselves on the facts of their particular cases. Treatment of *Burke* follows.

C5501:3a The "Implied Severance" Doctrine.

The doctrine known as "implied severance" has it that the dismissal of one of several claims but not the others results in the dismissed one being deemed severed and thereby independently ripened for an appeal as a final disposition.

This has implications on two fronts. The first concerns an appeal to the Court of Appeals, which as a rule is permitted only for a "final" disposition (see Commentary C5601:2 on CPLR 5601 below): it may reflect on whether the disposition is final and hence appealable.

The second, and the one that concerns us here, is that by its capacity to dictate whether a given disposition is final or nonfinal, the implied severance doctrine may deny the "non-final" label to a given order, making that order unreviewable as part of a duly appealed final judgment. Remember that under CPLR 5501(a)(1), the only order that can come up for incidental review as part of an appeal from a final judgment is a "non-final" order.

Keep in mind also that of the two distinct spheres in which the "implied severance" can operate, only the second one--the consequences that the doctrine can have under CPLR 5501(a)(1)--is now under discussion.

The complications of the "implied severance" rule were recently reviewed by the Court of Appeals in Burke v. Crosson, 85 N.Y.2d 10, 623 N.Y.S.2d 524, 647 N.E.2d 736 (1995), which overruled several of the court's earlier indications on the subject (including one case--Sirlin Plumbing Co. v. Maple Hill Homes, Inc., 20 N.Y.2d 401, 283 N.Y.S.2d 489, 230 N.E.2d 394 [1967]--relied on by the *Crystal* case discussed in the foregoing Commentary). Appellants who misread the doctrine even under the purported simplification that *Burke* undertakes can forfeit an appeal by guessing wrong on when a disposition qualifies as final. If the disposition does qualify as final, the time to appeal may not be postponed, and an appellant who postpones an appeal by misassuming that it's not final can forfeit appellate review of it. The reason, of course, is that the same "final" label that required its appeal earlier prevents it from coming up for incidental review now, under CPLR 5501(a)(1), as a "non-final" disposition sought to be reviewed as part of an appeal from a final judgment.

In *Burke,* an appellant who waited was lucky. The Court of Appeals held that the granting of summary judgment for P against D on one of a number of claims--the others were dismissed--but postponing assessment of an attorney's fee on the sustained claim until after a hearing could be held, could not be deemed "final" until the assessment. Hence the order granting the summary judgment did not start D's appeal time running until the hearing and fee assessment were complete, and D's appeal, taken after completion, was therefore timely.

The name of the potential mischief doer on this scene is the "implied severance" doctrine. If an order qualifies as "final" under it, the claim it disposes of is impliedly "severed" from the other claims, deemed final, and made appealable in its own right. For the same reason, it will not qualify as "non-final" and be reviewable under CPLR 5501(a)(1). If the order is not final, on the other hand, the would-be appellant is protected in two ways: (1) he *need* not appeal the order now if not disposed to, and (2) he can have it reviewed as an incident of any appeal that may be taken from the later final judgment that closes the case.

The *Burke* facts can illustrate. Some county court judges (collectively "P"), maintaining that they were being unlawfully deprived of salary that others of similar rank in the system were getting, sued in the supreme court to set things right. State officials were the defendants (collectively, D). P interposed 17 counts. Sixteen of the counts were dismissed, but one, involving an equal protection and hence a civil rights claim, was sustained. The court also granted P, on that claim, an award of back pay and an attorney's fee, as allowed by 42 U.S.C. § 1988 for civil rights claims, and a hearing had to be held to determine the amount of the fee.

Before the hearing, P appealed the judgment dismissing the 16 claims. D could at that time have taken its own appeal from P's victory on the 17th claim, but D preferred to wait until the conclusion of the fee hearing. The hearing came on, the sum was set, a judgment on the claim was rendered for P against D, and that's the one D appealed.

The appellate division, putting both appeals together, affirmed the dismissal of the 16 claims, which P had appealed, but on D's appeal from the sustained claim the court held that the earlier initial disposition by the supreme court, sustaining the claim in favor of P, was a final one under the implied severance doctrine, and that because D did not take an appeal at that time, an appeal now was too late. The view of the appellate division was that D could not postpone the appeal until after the hearing had taken place on the attorney's fee; that the disposition was final at the earlier time and hence could not qualify as a "non-final" order that would be reviewable now, pursuant to CPLR 5501(a)(1), as part of the final judgment.

The Court of Appeals reversed and held that the implied severance doctrine was not applicable; that the earlier order therefore qualified as a nonfinal one within the meaning of CPLR 5501(a)(1) and was thus properly before the appellate division for review as part of the appeal from the final judgment.

The court acknowledged that "[t]he 'implied severance' doctrine has had a checkered history and our past articulations of the rule have been somewhat difficult to reconcile", but, added the court, the rule "has now evolved into a very limited exception to the general rule of nonfinality". (The Court noted that it was addressing only the *implied* severance, and that different principles might apply when there has been an express severance.)

How can one gauge whether there has been an "implied severance"? The standard for which the Court opted in *Burke* makes the operation of the rule depend on the relatedness of the several claims in suit. When some but not all claims are resolved, an implied severance will be deemed to apply "only if the causes of action [that are resolved] do not arise out of the same transaction or continuum of facts or out of the same legal relationship as the unresolved causes of action". (How does the *Crystal* case, treated in the previous Commentary, fare under that standard?) If they do arise out of the same transaction, the implied severance will presumably not occur and the appellate risks noted earlier will not be present.

In a way, *Burke* may be posing a different dilemma by just putting a different question: when do the claims arise out of the same "transaction" or "continuum" or "relationship", and when don't they? Here the aspiring appellant's only choice is to be conservative. If there's any doubt about the relationship between the claims, and the appellant is bent on preserving the matter for appellate review, the safest path is to take the precaution of serving and filing a notice of appeal from the initial order--i.e., treat it as final--and perhaps consider an application to the appellate division calling attention to the problem and just asking the court to hold the appeal in abeyance until further proceedings conclude below.

If that sounds a bit unconventional, it may also be an intelligent precaution with which the appellate division might cooperate by granting a stay.

In perusing the *Burke* case and its relatedness standard, two analogies to federal practice come to mind.

One is to Rule 54(b) of the Federal Rules of Civil Procedure, which is also addressed to the multiple claims context. The general rule in federal practice, embodied in 28 U.S.C.A. § 1291, is that only final dispositions are appealable. If some but not all claims are disposed of, is the disposition final at least as to the disposed-of claims, and hence appealable? Rule 54(b) enables the federal district court to call that shot by giving the judge the option of certifying the disposition as final with respect to the disposed-of claims. If such a certification is made, the matter is final and the aggrieved person must appeal it now. If the judge makes no Rule 54(b) certification, the aggrieved person can hold an appeal off until the later disposition of the rest of the case.

There's no analogy to Federal Rule 54(b) in New York practice and hence no judge to assure the safety of an appellant's course in like circumstances. The New York appellant has no judicial aid in deciding whether a disposition is final enough to require that it be appealed immediately instead of saved for later review.

The other federal analogy has to do with the "relatedness" inquiry that the *Burke* case now calls for, and here the federal compulsory counterclaim rule, Rule 13(a) of the Federal Rules, has a parallel. The rule makes it mandatory for a defendant to interpose as a counterclaim any claim that arises out of the same transaction or occurrence the plaintiff is suing on. Withholding such a claim forfeits it, i.e., precludes a separate action on it later. (In New York practice, by way of contrast, all of a defendant's claims against the plaintiff are permissive, interposable as such or savable for a separate action.)

In gauging whether D's claim arises "out of" the same event as P's claim does for purposes of Federal Rule 13(a), D must resolve doubt by taking the precaution of interposing the claim as a counterclaim in P's action. Perhaps the federal caselaw on relatedness under Rule 13(a) can offer a guidepost for the kind of relatedness standard that now determines the operation of the implied severance doctrine under the *Burke* decision.

C5501:4 Order That "Necessarily Affects" Final Judgment.

Paragraph 1 of CPLR 5501(a) brings up for review "any non-final judgment or order which necessarily affects the final judgment". This excludes from review all incidental orders that do not have any impact on the final judgment.

An example of an excluded (i.e., nonreviewable) order under this provision is one that grants or denies a motion for a preliminary injunction under Article 63 of the CPLR. Whether the final relief granted in the judgment, even including a permanent injunction, is or is not proper is not dictated by whether or not a preliminary injunction was proper. The preliminary injunction is a provisional remedy designed to retain the status quo while an action pends. It is concerned with the pendency of the action, while the final judgment is concerned only with the period following. Hence, appeal from the final judgment will not necessarily bring the preliminary injunction, or its denial, up for review. See Cinerama, Inc. v. Equitable Life Assur. Soc., 38 A.D.2d 698, 328 N.Y.S.2d 160 (1st Dep't 1972).

For similar reasons, an order granting temporary alimony in a matrimonial action is not preserved for review upon an appeal from the final judgment in the action, even if the final judgment awards alimony. Notwithstanding that several of the findings on which both temporary and permanent alimony depend may be the same, the mission of the temporary order is distinct enough from that of the final one to make the temporary one academic when the final one is appealed. If the findings in respect of the permanent award are sustainable, it would not matter that the findings made in conjunction with the temporary award were in error. See Caplin v. Caplin, 33 A.D.2d 908, 307 N.Y.S.2d 486 (2d Dep't 1970).

The requirement that the order be shown to "affect" the final judgment does not mean that it has to involve similar findings or even the same issue. An order denying a change of venue, for example, has been held preserved for review on appeal from a final judgment, Matter of Aho, 39 N.Y.2d 241, 383 N.Y.S.2d 285, 347 N.E.2d 647 (1976), even though there is no guarantee that had the venue been changed the result would have differed. It is apparently the reasonable possibility of its having such an effect that satisfies the "necessarily" in the phrase "necessarily affects the final judgment".

One example of an order involving an issue independent of the merits but clearly affecting the final judgment, and hence reviewable under CPLR 5501(a)(1), is the order that denies a motion to dismiss for lack of jurisdiction. Had there been a dismissal for want of jurisdiction there could have been no final judgment on the merits, which makes this order perhaps the clearest example of how the "necessarily affects" phrase in paragraph 1 of CPLR 5501(a) operates.

The apparent reason why one does not very often see requests to review jurisdictional orders as part of appeals from final judgments is that such orders, at least as far as an appeal to the appellate division is concerned, are appealable of right, CPLR 5701(a)(2)(v), and are usually appealed immediately if the defendant is intent on pursuing the jurisdictional point. This is in contrast to federal practice, where no appeal lies of right from an order sustaining jurisdiction. See 28 U.S.C.A. §§ 1291, 1292(a).

Orders reviewable under the "necessarily affects" standard come up for review on appeal of the final judgment without being specified in the notice of appeal.

The "non-final judgment" which is also preserved for review on appeal from the final one under the opening language of paragraph 1 of CPLR 5501(a) refers to an interlocutory judgment, a device occasionally but not often met in New York practice. See Siegel, New York Practice 2d Ed. § 410. The "necessarily affects" standard applies to the interlocutory judgment if review of it is sought. Probably the most common illustration of the interlocutory judgment is where it establishes liability in a tort case in which liability has been ordered separately tried in advance of the damages issue. In that instance, a later final judgment for the plaintiff, if appealed by the defendant, would also assure review of the interlocutory liability judgment under CPLR 5501(a)(1).

Keep in mind here the additional point made in Commentary C5501:3, above, for which the *Crystal* case is cited: that only the "non-final" order qualifies for incidental CPLR 5501(a)(1) review. An order that concludes the case will qualify as final even if denominated a mere "order" and will have to be appealed forthwith in order to secure appellate review. It doesn't get CPLR 5501(a)(1)'s free ride later on.

C5501:5 Review of Order Adverse to Respondent.

If the final judgment has gone in favor of a particular party, whom we may call X, X is not likely to appeal it. But some earlier disposition may have gone against X, and if that earlier disposition had gone the other way, X might have had judgment then and there and not had to fight the case any further. It did not go X's way, however, and X did have to proceed further, and has now won final judgment. If Y, the loser on the judgment, appeals it, X is also

entitled to have the appellate court review the earlier disposition, because, if the earlier one is reversed, X may be permitted to prevail on the basis of the earlier one notwithstanding an alleged error that might affect and overturn the final judgment that X won. An example will help.

Assume that early in the action D moves pursuant to CPLR 3211(a)(5) to dismiss P's claim as untimely under the statute of limitations. An order is made denying the motion and holding the action timely. D now defends on the merits and wins a dismissal after a trial by jury. P appeals the final judgment. D is entitled to have the appellate court review as well the correctness of the earlier order on the statute of limitations. If the appellate court finds D correct, and the action untimely, it can reverse the earlier order and dismiss the action based on the statute of limitations, thus assuring D a victory even if the appellate court might otherwise find error in the trial on the merits and be disposed to reverse for P in that respect.

This review would not be permissible if the order had previously been the subject of an independent appeal to the appellate division. Had it been immediately appealed under CPLR 5701(a)(2)(v), for example, and disposed of against the defendant, CPLR 5501(a)(1) could not then be used to obtain yet another review of it. Moreover, the doctrine of the "law of the case", an intra-action res judicata doctrine (see Siegel, New York Practice 2d Ed. § 448), would bind the defendant to the prior appellate result before the same appellate court. Should yet a higher appellate court be reached on appeal from the final judgment, however, such as the Court of Appeals in the example above, which has not yet reviewed the earlier order, the order is preserved for review by the Court of Appeals notwithstanding the earlier disposition of the point made by the appellate division. This recognizes that appeal to the Court of Appeals at that earlier time would likely have been foreclosed for a want of finality: the order it involved, denying a motion to dismiss, was not a final disposition. See CPLR 5601(d). (Finality is not required for an appeal to the appellate division.)

C5501:6 Order Previously Appealed But Not Perfected.

The CPLR is generous in its allowance of intermediate appeals, i.e., appeals from the myriad nonfinal orders by which litigation is managed, at least as far as the first appellate step (e.g., supreme court to appellate division) is concerned. See CPLR 5701(a)(2), especially subparagraphs (iv) and (v). But even if a nonfinal order is appealable and has been appealed, the appeal, if not determined before final judgment is handed down in the action, will not ordinarily survive the final judgment. See, e.g., New York Life Insur. Co. v. Galvin, 41 A.D.2d 83, 340 N.Y.S.2d 822 (1st Dep't 1973), modified on other grounds 35 N.Y.2d 52, 358 N.Y.S.2d 724, 315 N.E.2d 778 (1974).

To get the intermediate disposition reviewed in that situation, assuming of course that it "necessarily affects" the final judgment, it is necessary to appeal the final judgment itself, which would invoke CPLR 5501(a)(1) and permit the earlier order to be reviewed as an incident. The underlying idea is that if the party aggrieved by the order has won the judgment, her grievance has dissolved; or that if she lost the judgment, and the order affects the judgment and is important enough to her, she will appeal the judgment if for no other reason than to have the order reviewed.

In point of time and effort, there is not much more required to "take" an appeal from both the order and the judgment. If the judgment is close in time to the entry of the already appealed order, the additional step needed is just the service and filing of a notice of appeal from the judgment. Both the order and the judgment can then be included in but a single record. Double records and briefs are not required and double expenses are therefore not incurred.

If, on the other hand, the order does not affect the final judgment, the notion underlying CPLR 5501(a)(1) is that the order should be allowed to rest in peace after final judgment is entered.

A party who has elected to take an appeal from a nonfinal order had best follow through on the appeal. He can do himself much damage by appealing the nonfinal order and then not perfecting it. If the appeal is dismissed for non-perfection, the dismissal amounts in effect to an affirmance of the objectionable order because it precludes a review

of the order on a later appeal from the judgment. It forfeits, in other words, the scope of review gift that CPLR 5501(a)(1) might otherwise confer on the order (by allowing it to be reviewed later as part of the final judgment's appeal). The aggrieved party in that situation would have been better off by not taking an appeal from the objectionable order at all.

Montalvo v. Nel Taxi Corp., 114 A.D.2d 494, 494 N.Y.S.2d 406 (2d Dep't 1985), is an example. The defendant defaulted in answering, moved to vacate the default, and then appealed the order denying the motion. He didn't follow through on the appeal and it was dismissed. Now the case went to inquest and the defendant, appealing the final judgment entered after the inquest, sought to have the appellate division review as well the prior order refusing to vacate the default. The review was denied. The implication, of course, is that had the defendant not appealed that order and then let the appeal lapse, review of the order would have been permissible as part of the appeal from the final judgment.

C5501:7 Reviewing Rulings.

Under paragraph 3 of CPLR 5501(a), all incidental rulings made at the trial are brought up for review. This embraces the evidentiary rulings as well as all other requests made of the court and disposed of contrary to the interest of the appellant. To preserve the point for review, objection must have been made below or it must appear that there was no opportunity to object. The basic rule is that a point not preserved by an appropriate objection is waived on appeal. Where the error is clear and just as clearly prejudicial, the appellate court, at least at the first level of appeal, may in an exceedingly rare case reverse based on it even though it was not technically preserved with an objection. See, e.g., Max v. Brookhaven Devel. Corp., 262 App.Div. 907, 28 N.Y.S.2d 845 (2d Dep't 1941).

The charge to the jury is another subject on which an aggrieved party should make a strong record below, putting and preserving objections carefully. See CPLR 4110-b. Paragraph 3 of CPLR 5501(a) precludes review unless the ruling in respect of the charge was duly objected to. However, though perhaps even stricter in respect of the charge than of incidental evidentiary rulings, the court does not treat this category as an absolute, either. If the error with respect to the charge is "fundamental", it may be reviewed even though it was not duly excepted to. See, e.g., Tompkins v. R.B.D. Land Exchange, Inc., 89 A.D.2d 698, 453 N.Y.S.2d 817 (3d Dep't 1982). The appellate divisions can do this based on their broad supervisory powers over the supreme court. The doing is not designed to encourage laxity in the making of objections, but to avoid patent injustices through an overly rigid application of the review power. It is a rare step in any event and appellants should not rely on it.

C5501:8 Additur and Remittitur.

When damages are awarded on a jury's verdict in a money action, notably in a tort case such as one for personal injury, at a figure deemed too low or too high by the trial court, the court can raise or lower the figure through the use of devices popularly known as "additur" and "remittitur". See Siegel, New York Practice 2d Ed. § 407. The trial court does not merely substitute the figure it deems the minimum or maximum. It merely grants a motion for a new trial, made by the aggrieved party on the ground of the inadequacy or excessiveness of the verdict, "unless" the defendant agrees to pay a higher sum (additur) or the plaintiff agrees to accept a lower sum (remittitur) than the verdict.

Paragraph 5 of CPLR 5501(a) is addressed to the additur and remittitur situation. If the respondent has stipulated to such a higher or lower figure than the jury awarded, and the other side has nonetheless taken an appeal from the final judgment, the appellate court can review the inadequacy or excessiveness of the verdict notwithstanding that, because of the stipulation, the judgment was rendered in a different sum than the verdict. In addition, the appellate court can restore the amount of the verdict even without a cross-appeal by the respondent.

Subdivision (b)

C5501:9 Court of Appeals Review.

Subdivision (b) of CPLR 5501 is addressed to the powers of review of the Court of Appeals. Unlike the appellate divisions and the lower appellate courts (appellate terms and county courts when exercising appellate jurisdiction over the city, district, town, or village courts), the Court of Appeals is a "law" court. It can as a rule review only questions of law. In only two situations does it review the facts. One of these, stated in subdivision (b), is where the appellate division has reversed or modified a judgment and in doing so has found new facts and rendered a final judgment on the new findings. The theory of New York practice is that there may be at least one appellate review of the facts. When the appellate division, finding new facts, uses them as a basis for a final judgment, the only court in which a review of the new findings can be made is the Court of Appeals.

The other instance in which the Court of Appeals reviews the facts is in the criminal area, where the judgment is of death. See Const. Art. VI, § 3(a).

The cases abound on the subject of what is and what is not a question of "law" adequate to permit Court of Appeals review. The annotations following these Commentaries are a more bountiful source of guidance to the practitioner on that subject, but a few basic points may be made here.

An exercise of "discretion" is ordinarily in the "fact" realm and beyond the powers of the Court of Appeals to review. But if the exercise of discretion is beyond all permissible borders--as those borders are perceived by the Court of Appeals--it ceases to be a mere "exercise" and becomes instead an "abuse" of discretion, which is a reviewable question of law. It is in that situation that one finds the Court of Appeals from time to time addressing itself to seemingly "discretionary" matters. See Siegel, New York Practice 2d Ed. § 529.

The second sentence of subdivision (b) refers to three provisions in Article 56, which governs appeals to the Court of Appeals. The three referenced provisions are CPLR 5601(d), 5602(a)(1)(ii), and 5602(b)(2)(ii). Each of the three involves a direct appeal to the Court of Appeals from a trial-level court, by-passing the appellate division. In each of the three, a prior appeal was taken to the appellate division but the order in which the appeal culminated could not then be appealed to the Court of Appeals because it was not final, contemplating further proceedings in the trial court. The final judgment afterwards resulting from those further proceedings is the one that may be appealed directly to the Court of Appeals. On such an appeal, however, only the nonfinal determination previously made by the appellate division--i.e., the matter already reviewed by that court--may be reviewed by the Court of Appeals.

CPLR 5501(b)'s second sentence may become relevant when there are new matters resulting from the trial court's proceedings after the earlier appellate division remand. If review of these new proceedings is sought, another appeal must be taken to the appellate division. Under the statutes cited above and under subdivision (b) of CPLR 5501, only points previously passed on by the appellate division are ripe for review by the Court of Appeals on the direct appeal route. If there has been a second appeal to the appellate division, to review the new matter, and then an appeal goes to the Court of Appeals, everything--the old and the new--may now be brought up for review before the Court of Appeals. (It is assumed here, of course, that appeal to the Court of Appeals otherwise lies under the terms of Article 56.)

Pursuing the direct appeal route, on the other hand, waives all appellate review of new matter--the matter adjudicated in the trial court proceedings that took place after the earlier appellate division remand.

Subdivision (c)

C5501:10 Appellate Division Review.

The review powers of the appellate division are broad. They include both questions of law and questions of fact, which of course embrace mixed questions of law and fact. Practically speaking, the reviewability of both categories makes it unnecessary, as far as the appellate division's review is concerned, to determine which category a particular issue falls under. It is on appeal to the Court of Appeals, which is generally restricted to reviewing questions of law, that the need for categorization will more likely arise.

These plenary review powers obtain for the appellate division not only on review of a judgment or order of a court of original jurisdiction, but also on an appeal to the appellate division from yet another appellate court. The other appellate courts presently operative in New York are the appellate terms, which exist in the First and Second judicial departments, and the county courts, which in the Third and Fourth departments exercise (in addition to their original jurisdiction) appellate jurisdiction over the city, town, and village courts. See Commentary C5702:1 on CPLR 5702, below. Appeals from those lower appellate courts lie to the appellate division, as of right in the case of a county court and by permission if an appellate term is involved. CPLR 5703. On such an appeal the appellate division reviews issues of law and issues of fact pursuant to subdivision (c) of CPLR 5501.

The second sentence of subdivision (c) was added in a 1986 amendment. It addresses the standard for the appellate division's review of a jury's verdict in a money action.

The expedient that brings review of the sum awarded in the trial court is usually a motion by the aggrieved person for a new trial unless the other side agrees to stipulate to lower (or raise) the verdict to the figure deemed appropriate by the court. The conventional standard for altering the verdict was that its sum was so great or so small that it "shocked the conscience" of the court. The amendment permits the court to intervene on a lesser finding: that the award "deviates materially from what would be reasonable compensation".

Because the problem area really aimed at by the amendment is the excessive verdict that the defendant seeks to lower rather than the inadequate verdict that the plaintiff seeks to raise, we'll acknowledge at the outset that the amendment works in both directions but we'll concentrate here on the excessive verdict.

The legislature having chosen to make this change only in subdivision (c), which governs the appellate division, we would ordinarily conclude, by application of the *expressio unius* rule, that the appellate term, which is governed by subdivision (d), and, indeed, the trial courts as well, lack this expanded power and remain restricted to the "shocks the conscience" standard, assuming that there's some difference between them. Many trial judges might profess a shocked conscience in the face of a verdict that deviates materially from reasonable compensation, however--see, e.g., the *Asbestos* case cited below--and end up themselves applying what purports to be exclusively the appellate division standard.

And look at the situation if it is ultimately found that the two standards do differ. The trial court would be applying one criterion, only to have its judgment gauged on appeal by a different one. (Previously, the "shocks the conscience" standard applied to all the courts, trial and appellate.) Wouldn't that often force up to appellate level a case that the parties might have been content to keep at trial level had the supreme court justice just done no more or less than what the appellate division could be expected to do? Might not the party denied a remittitur, for example, appeal just out of fear that the only reason that the trial judge denied it is that it failed to "shock" her conscience, a standard the appellate division would not insist on?

One suspects that although the trial judges and the appellate term judges are still presumably restricted to the "shocks the conscience" standard, that standard may by some magic metamorphose into a clone of the "reasonable

compensation" standard. It may even prove impossible to retain two different standards, having the trial court apply one only to have the appellate division review under another.

A merger of the two standards appears to be what's occurring. See, e.g., Wendell v. Supermarkets General Corp., 189 A.D.2d 1063, 592 N.Y.S.2d 895 (3d Dep't 1993), noted in Issue 15 of Siegel's Practice Review, and Prunty v. YMCA of Lockport, 206 A.D.2d 911, 616 N.Y.S.2d 117 (4th Dep't 1994), noted in Issue 30. The federal courts also appear to have come aboard in diversity of citizenship cases. See, e.g., In re Joint Eastern and Southern Dists. Asbestos Litigation, 798 F.Supp. 925 (E.D. and S.D.N.Y., 1992), reversed on other grounds 995 F.2d 343 (2d Cir.1993), where it was indicated that state law should govern the question of remittitur in a federal diversity case. When the court then turned to the state standard, it found the two separate ones but concluded that for a federal court "the two standards work in harmony". Perhaps with a little tongue in cheek, the court added that it "shocks the conscience" of a federal judge for a federal court sitting in diversity to allow a verdict to stand when it would be remitted as a matter of law by a state court.

The reference to cases in which an itemized verdict is required by CPLR 4111 appears to restrict the operation of this 5501(c) amendment to the tort case, but the tort case is of course the traditional context of the excess verdict problem.

A coordinate 1986 amendment was made in CPLR 5522(b) to require the appellate division, on altering a verdict, to "set forth in its decision the reasons therefor, including the factors it considered" in applying CPLR 5501(c). It would be a good idea, therefore, for the trial court, when it purports to apply the same standard, to set forth its reasons in the same way.

Subdivision (d)

C5501:11 Appellate Term Review.

Like the appellate division, an appellate term reviews both questions of law and questions of fact. At the present time there are appellate terms established only in the First and Second departments. They hear appeals from the New York City Civil Court and the New York City Criminal Court, from the district courts of Nassau and Suffolk counties, and from the city, town, and village courts in the Second Department (there are none in the First).

Authority for the creation of appellate terms is constitutionally vested in the appellate divisions, Const. Art. VI, § 8. Rules in the First and Second departments create and set forth the jurisdiction of their appellate terms. See Rules 640.1 (First Department) and 730.1 (Second Department), which may be found in the annually recompiled Rules Pamphlet in the McKinney's set.

When a county court exercises appellate jurisdiction, as it does over city, town, and village courts in the Third and Fourth departments pursuant to § 1701 of the Uniform City and Uniform Justice court acts, its powers should be deemed coextensive with those of an appellate term as conferred by CPLR 5501(d). See Siegel, New York Practice 2d Ed. § 529.

LEGISLATIVE STUDIES AND REPORTS

Subd. (a), which relates to all appeals from final judgments or orders, combines provisions found in §§ 106, 580, 581, 582, 583 and 584-a of the civil practice act.

In the opening provisions, references to final orders and special proceedings were omitted. The Revisers, in the Sixth Report to the Legislature, state that references to special proceedings are unnecessary since "action" is defined to include "special

proceeding" in § 105(b), and references to the final order in a special proceeding were deleted since the final determination in a special proceeding is denominated a judgment.

Subpar. 1 of subd. (a), except for the words, "including ... that appeal," is based on the first sentence of § 580 of the civil practice act. The comments of the Revisers appearing in the Second Report note that the provisions of § 580 have been broadened slightly in scope through the use of the words "non-final judgment or order" in place of specific reference to "an interlocutory judgment or an intermediate order." This change achieves two results. It specifically permits review of any interlocutory order--the analogue, in special proceedings, of an interlocutory judgment--on an appeal from a final order. This may be done under existing case law. See, e.g., In re Satterlee's Will, 2 N.Y.2d 285, 290, 140 N.E.2d 543, 545 (1957) (dictum). It also permits *the review* of any order which meets the conditions of this subparagraph, even if it is not an "intermediate" one. The *words* "intermediate order" have been given a literal interpretation: it is necessary that the order be made after commencement of the case and before its final determination. This may occasionally require two separate appeals where all the issues could easily be raised on a single appeal, as is possible under the language of this subparagraph.

The phrase "including ... that appeal" has been added, the Revisers explain, "to cover the situation where the respondent objected to a non-final ruling but won below on the final judgment or order." In this case, the respondent, not being aggrieved, could not specify the nonfinal order in a notice of cross-appeal and the appellant could not and would not do so. While the cases are subject to conflicting interpretations, it appears that under present law the respondent may be prohibited from attacking the non-final determination and could suffer a reversal on the final determination even though consideration of the non-final determination might entitle him to prevail in whole or in part on the appeal from the final judgment or order. Cf. Matter of Zaiac, 279 N.Y. 545, 18 N.E.2d 848 (1939); Kelsey v. Western, 2 N.Y. 500 (1849); Zeldman v. Mutual Life Ins. Co. of New York, 269 App.Div. 53, 53 N.Y.S.2d 792 (1st Dep't 1945); General Fireproofing Co. v. Keepsdry Const. Co., 173 App.Div. 528, 160 N.Y.Supp. 179 (3d Dep't 1916), aff'd 225 N.Y. 180, 121 N.E. 768 (1919).

The Revisers also retained the requirement that the non-final determination "necessarily affect" the final judgment or order "since it has proven to be an effective means of limiting the determinations which can be raised on an appeal from a final judgment or order to those which relate to possibly serious prejudicial errors." They further state that while any interlocutory judgment or order will "necessarily affect" a final determination, any other non-final order "necessarily affects" a final determination only if reversing the order would require a reversal or modification of the determination and there was no further opportunity during the trial to raise the issues decided by the order. The requirement that the notice of appeal specify any interlocutory judgment or intermediate order sought to be reviewed has been eliminated as unnecessary. Such specification is of no real aid to the opposing party at the time it is given. The last sentence of § 580 of the civil practice act, stating that the right to review an interlocutory judgment or any order is not affected by the expiration of the time within which a separate appeal might have been taken, is also unnecessary and has been omitted.

That part of paragraph (b) of § 590 of the civil practice act which provided "when a final judgment or order has been entered below after the appellate division has made a non-final order which necessarily affects such judgment or order, only the proceedings subsequent to the determination of the appellate division shall be reviewed" is omitted. It now prevents the Appellate Division from having to review its own determination. The Revisers state that this purpose is accomplished by this subparagraph and that where there are a number of successive intermediate orders which are appealable and a later order of this group is appealed, the provision of the civil practice act would cut off appeals from the earlier intermediate orders while this subparagraph would not.

Subpar. 2 of subd. (a) is derived from the second sentence of § 580 of the civil practice act. The Second Report of the Revisers to the Legislature discussing this provision states that the second sentence of § 580 only relates to cases involving a "final judgment" i.e., actions but not special proceedings, and that there is no reason for this distinction. Under this subparagraph, any order denying a new trial or hearing, whether made in an action or a special proceeding, may be reviewed on an appeal from the final determination of the case. It is intended that this subparagraph apply to any order denying a new trial whether made before or after a final determination.

Subpar. 3 of subd. (a) is derived from subdivision 2 of § 583 of the civil practice act. In the original draft it included the "substantial right" qualification of § 106 of the civil practice act as it relates to appeals, and required objections to be made promptly. The final draft deleted the "substantial right" provision as being covered by § 2002 of the CPLR and eliminated the word "promptly" for the reason that "it deals with what must be done at the trial to preserve the right to review rather than with the scope of review." The Second Report of the Revisers states that the objection may come either before or after the ruling; the intent being to require the trial judge to be apprised of a claim of error. Subd. 1 of § 583 has not been carried forward into the CPLR, however, the Revisers remark that such subdivision is unnecessary and no change is intended by the omission.

Subpar. 4 of subd. (a), which has been phrased to parallel subpar. 3, is taken from § 582 of the civil practice act. This subparagraph also included the "substantial right" qualification of § 106 of the civil practice act in the original draft, and required any objection to be made promptly. These provisions were omitted in the final draft for the reasons stated above in the note to subpar. 3 of this subdivision. The requirement that the remarks or comments be specified in the case (record on appeal) is omitted as unnecessary "since if the remark is not found in the transcript, a motion to correct the transcript should be made." The Revisers also note that the word "remark" is as comprehensive as "remark or comment" and is used for simplicity, and the word "objected" is substituted for "excepted", since the latter concept is not used in the rules.

Subpar. 5 of subd. (a) is derived from § 584-a of the civil practice act, which applies only to excessive verdicts. In the comment of the Revisers in the Second Report it is stated that it has been broadened to include inadequate verdicts and thus is applicable to additurs as well as remittiturs. Although § 584-a of the civil practice act does not specifically refer to a "final judgment or order", its scope is limited to an appeal from such a judgment or order and, therefore, the insertion of those words in this subparagraph does not change existing law.

Subd. (b) consolidates § 605 of the civil practice act and that part of § 590 of the civil practice act which § 588(2) incorporates by reference. The Second Report to the Legislature which discussed the original draft of this subdivision states that § 605 of the civil practice act is based upon § 7 of article VI of the Constitution. The Revisers omitted detailed specification of actions and special proceedings.

The final draft of this subdivision deleted the words "or order" which followed "final or interlocutory" in the first sentence since final and interlocutory orders in special proceedings are termed and treated under the CPLR as judgments.

The further comment of the Revisers in the Second Report declares that the second sentence of this subdivision relates only to appeals from a final determination where the Appellate Division has previously made an order necessarily affecting such determination.

Subd. (c) is derived from C.P.A. §§ 590 (part), 608 (part), and 626, however, it is said in the Second Report to the Legislature that this subdivision "is based upon existing case law and statutes."

Section 608 of the civil practice act permits questions of fact as well as questions of law to be reviewed on an appeal from a final judgment of the Supreme Court. Although §§ 609 and 611 of the civil practice act, governing appeals from orders of interlocutory judgments in actions, do not contain a similar provisions, the Revisers note that "it is clear that the Appellate Division does review questions of fact in these cases. See, e.g., Spencer v. Hardlin, 149 App.Div. 667, 134 N.Y.S. 373 (1st Dep't 1907) (order denying an injunction)." 1912) (order denying a new trial); E. P. Dutton & Co. v. Cupples, 117 App.Div. 172, 102 N.Y.S. 309 (1st Dep't).

Sections 626 and 634-a of the civil practice act provide that appeals to the Appellate Division from inferior courts in actions, and appeals from article 78 proceedings, shall be subject to the provisions relating to appeals from the Supreme Court to the Appellate Division in actions, except where it is otherwise specially prescribed by law. No special provision has been found in connection with the scope of review on such appeals. As a result, the scope of review in the Appellate Division upon an appeal

in these cases is usually the same as on an appeal in an action in the Supreme Court even when the determination sought to be reviewed is that of a County Court rendered in an appellate capacity. See Miller v. Gullberg, 251 App.Div. 879, 298 N.Y.S. 214 (4th Dep't 1937). The Supreme Court is mentioned with the County Court to cover appeals from the Buffalo City Court. In the case of certain special proceedings, questions of fact are not reviewed--e.g., in reviewing determinations of administrative agencies.

The original draft of this subdivision contained a sentence providing "On an appeal from an order of an appellate term it shall review questions of law only, except that it shall also review questions of fact where the appellate term has expressly or impliedly found new facts." It was stated that this sentence was based upon existing case law, and it differs in one respect from Court of Appeals practice--the power to review questions of fact is not limited to situations in which there has been a reversal or modification below. All that is required is that the Appellate Term expressly or impliedly find new facts. This sentence was deleted from the final draft, and the Sixth Report states that this sentence was designed to make the Appellate Division's power to review on appeals from the lower appellate court parallel with that of the Court of Appeals on appeals from the Appellate Division. Under the subdivision as enacted the Appellate Division may review questions of law and questions of fact without regard to what the appellate term did.

Subd. (d) is based on § 626 of the civil practice act. In the original draft this subdivision contained the words "on an appeal from a judgment or order of a court of original instance", which were omitted from the final draft as unnecessary "since all appeals to an appellate term are from courts of original instance."

Official Reports to Legislature for this section:

2nd Report Leg.Doc. (1958) No. 13, p. 123.

4th Report Leg.Doc. (1960) No. 20, p. 54.

5th Report Leg.Doc. (1961) No. 15, p. 131.

6th Report Leg.Doc. (1962) No. 8, p. 515.

Notes of Decisions (2245)

McKinney's CPLR § 5501, NY CPLR § 5501
Current through L.2014, chapters 1 to 25, 50 to 60.

End of Document