No. S201619

Supreme Court

OF THE

State Of California

BADRUDIN **KURWA,**

Plaintiff and Appellant,

vs.

MARK B. **KISLINGER**, et al.,

Defendants and Respondents.

Amicus Curiae Brief Supporting Neither Party

From A Decision of the Court of Appeal (2nd Dist., Div. Five; B228078)
Affirming an Order of the Los Angeles County Superior Court (No. KC045216)
Honorable Dan Oki, Judge

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

There are no interested entities or parties to list in this Certificate per California Rules of Court, rule 8.208(d)(3).

No party's counsel authored this brief in whole or in part. No party or a party's counsel contributed money that was intended to fund preparing or submitting this brief. Other than the Academy and its members, no person contributed money that was intended to fund preparing or submitting this brief.

Robert S. Gerstein, one of the attorneys for plaintiff Badrudin Kurwa, is a member of the California Academy of Appellate Lawyers and a member of its amicus committee. In accordance with the Academy's rules, Mr. Gerstein has not participated in the Academy's decision to file this brief or in the brief's preparation.

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I.

INTRODUCTION

When is a judgment in a civil action "final" enough to allow an appeal?

No answer to that question satisfies all policies and interests at stake. State and federal courts disagree on the proper answer, as do the California Academy of Appellate Lawyers' members.

Nevertheless, the choice is important. Though there may be no right answer, there certainly are wrong answers that have unfortunate practical consequences. The court should reject the wrong answers and select a solution which, if not perfect, at least serves as many of the conflicting policies and interests at stake as possible.

In assessing alternative solutions, the court should make full use of the broader study and scholarship on this issue, which arises in all American jurisdictions. It should weigh how well each alternative solution satisfies the public and private policies and interests at stake. It should also assess the practical experience of veteran appellate counsel as well as the experience of courts within and outside this state. It should not confine its analysis to the California Court of Appeal decisions that have addressed the issue.

The Academy suggests several alternative answers. One, favored by many Academy members, is simple, clear, and concise: a judgment is final when all claims between any two parties either have been resolved by the trial court or have been dismissed with, or without, prejudice by the party that alleged them.

Though at least one state appears to follow this rule, it has been rejected by the federal judiciary and is seen by them and some Academy members as too great an assault on the final judgment rule. So the Academy offers alterna-

tive solutions, requiring dismissal of otherwise unresolved claims with "complete" or "conditional" prejudice to achieve finality for purposes of appeal. These alternatives require additional qualifications and provisos to avoid untoward results in particular situations, as will be explained below.

Even if the court chooses none of the Academy's proposals, its decision should be guided by a careful evaluation of each alternative's likely effect on the policies and interests at stake as well as its likely practical consequences.

II.

THE AFFECTED POLICIES AND INTERESTS

In formulating an answer to the question raised on this appeal, the Academy believes the court should consider at least the following public and private policies and interests.

1. Finality for purposes of appeal should be determined by clear, easily followed rules that turn on facts readily ascertainable from the trial court record.

Uncertainty about the right to appeal breeds waste. Uncertain rules will lead some unfortunate parties to inadvertently lose the right to appellate review while forcing cautious practitioners to file "protective" appeals that will unnecessarily burden the appellate courts.[1]

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[1] See Schackmann & Pickens, The Finality Trap: Accidentally Losing Your Right to Appeal (Part II) (2002) 58 J. Mo. B. 138 ("A caution is warranted. These exceptions, and much of the dissenting circuit opinions, often represent random judicial acts to save a party's right to appeal; they are not necessarily principled decisions assured of adherence in the future. While some of these exceptions truly may serve in appellate planning, others are isolated stopgaps that courts may later ignore. The appellate litigant should be forewarned that judicial departures from finality trap enforcement might not always redeem the

(Fn. cont'd)

Clarity and certainty can be achieved only if finality depends solely on matters evident in the trial court record. If appealability depends on unfiled agreements, parties' intent or other off-record factors, the parties can never be sure when a judgment or order is appealable. So some appeals will be lost through oversight while many more will be taken to avoid malpractice.[2]

2. A rule of finality should promote efficient resolution of litigation at both the trial and appellate court levels. Parties should not be allowed needless multiple appeals in the same case but they also should not be forced needlessly to try claims simply to obtain an appealable judgment.[3] Often a rule promoting efficiency at one level will have the opposite effect at the other level.

(Fn. cont'd)
shaken litigator. The anxiety of malpractice will only dissipate when Congress or the Judicial Conference resolves the trap by statute or rule, as this article proposes in its conclusion.")

[2] See Schackmann & Pickens, The Finality Trap: Accidentally Losing Your Right to Appeal (Part I) (2002) 58 J. Mo. B. 78, 81 ("[S]ubjectivity and lack of clarity in appellate jurisdiction create an appellate minefield. The determination of when a party may appeal an order as final, after all, equally determines when that party must appeal, lest the party forever lose the right ….").

[3] See Struble, An Early Roll of the Dice: Appeal Under Conditional Finality in Federal Court (2012) 50 Hous.L.Rev. 221, 224 ("The purpose of the final judgment rule is to promote judicial efficiency and to protect parties from unnecessary appeals. The final judgment rule obtains efficiency by delaying appeal until all possible legal issues and claims before the district court are concluded and consolidated into one appeal for consideration by the court of appeals."); see also Minutes of Fall 2008 Meeting of Advisory Committee on Appellate Rules (Nov. 13-14, 2008) 18-19 ("Fall 2008 Advisory Committee Minutes"), http:// www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/AP11-2008-min.pdf ("The policies behind the final judgment rule include the need to conserve appellate resources, avoid piecemeal appeals, and curb the delay that such appeals could cause in the district court.").

3. A rule of finality should allow the trial court an opportunity to correct its own errors and to adjudicate related issues that may impact or even moot the issue a party wishes to assert on appeal.[4]

4. A rule of finality should apply even-handedly to all claims, not disadvantage some due to the application of other rules, such as the statute of limitations, that serve entirely different purposes.

5. A rule of finality should allow parties as much autonomy and choice as possible. Courts exist to adjudicate parties' disputes. While parties should not run the courts, neither should court procedures unnecessarily constrain parties in shaping the controversy for appropriate judicial decision.

As this case illustrates, parties frequently face a practical problem. For various reasons, plaintiffs and cross-complainants are encouraged to bring all their claims in a single suit. Pretrial rulings felling some claims may make it uneconomical or undesirable for other reasons to pursue the remaining claims through trial to judgment. Parties know better than courts when economics or other factors make it impractical to pursue claims in light of trial court rulings or other developments in the litigation.

6. A rule of finality should not encourage or permit parties to jump ahead of other cases awaiting appellate review or otherwise interfere with the courts' ability to render evenhanded justice for all. Nor should a rule of finality permit the respondent to block an appellant from ever obtaining appellate review.

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[4] Struble, *supra*, 50 Hous.L.Rev. at p. 224 ("[T]he final judgment rule avoids unnecessary appeals because it provides a district court judge the opportunity to correct inaccurate rulings before final judgment."); see also *Cheng v. Commissioner* (9th Cir. 1989) 878 F.2d 306, 310.

7. A rule of finality must accommodate California's unique procedural statutes and rules on related issues. The rule should take into account Code of Civil Procedure section 581(c), allowing dismissal of claims without prejudice before commencement of trial. It should also recognize that, in general,[5] California lacks methods for obtaining interlocutory review like those available in other states' courts or in the federal court system. (See, e.g., Ariz. R. Civ. P. 54(b); Fla. R. App. P. 9.120, 9.125, Ill. S. Ct. R. 304(a), Fed.R.Civ.P. 54(b); 28 U.S.C. § 1292(b).)

Though other California rules to some degree mitigate the disadvantage of lacking those avenues of interlocutory review—e.g., by deeming a judgment final when all claims between any two parties are resolved and by allowing discretionary review by extraordinary writ[6]—a rule of finality should, to the extent possible, relieve the pressure created by California's uniquely constrained rules governing appellate review.

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[5] California statutes do permit appeals from some interlocutory orders in ordinary civil cases. (Code Civ. Proc., § 904.1(a)(3)-(13).) In some special circumstances, appeals from other interlocutory orders are allowed under court-made doctrines. (*Richmond v. Dart Industries Inc*. (1981) 29 Cal.3d 462, 470 (class certification; death knell doctrine); *Muller v. Fresno Community Hospital & Medical Center* (2009) 172 Cal.App.4th 887, 898-905 (collateral order doctrine).) In family law cases, interlocutory orders may be certified for appeal under procedures analogous to the federal interlocutory review provisions cited in the text. (See Fam. Code, § 2025; Cal. Rules of Court, rule 5.180.) Aside from these relatively limited exceptions, interlocutory orders may not be appealed in most ordinary civil litigation in California state court.

[6] Interlocutory review by extraordinary writ is becoming an increasing rare phenomenon. The percentage of civil writ petitions resolved by written opinion has steadily declined from 8.2% in FY 2005 and 2006 to 7.8% in FY 2010 and 7.2% in FY 2011. See Judicial Council, 2012 Court Statistics Report, p. 34; Judicial Council, 2006 Court Statistics Report, p. 33.

III.

HOW THE POSSIBLE ANSWERS STACK UP

There are many possible answers to the question this appeal raises. Amicus addresses a few of them below, assessing their relative advantages and disadvantages when measured against the policies and interests outlined in the preceding section.

A. The Solution Endorsed By Existing Court Of Appeal Cases

A line of Court of Appeal opinions beginning with *Don Jose's Restaurant, Inc. v. Truck Ins. Exchange* (1997) 53 Cal.App.4th 115, 117-119 (*Don Jose's*) has held that a cause of action voluntarily dismissed without prejudice remains "pending"—albeit "in a kind of appellate netherworld"—precluding entry of any final or appealable judgment.

1. Advantages To The *Don Jose's* Rule

The presumptive advantage of the *Don Jose's* rule[7] is that it promotes judicial efficiency at the appellate level. It decreases the chance that claims

[7] We say "presumptive" because *Don Jose's* offered no policy reason for its rule. Rather, it based the rule primarily on its interpretation of a sentence from this court's decision in *Tenhet v. Boswell* (1976) 18 Cal.3d 150, 154. (See *Don Jose's, supra*, 53 Cal.App.4th at pp. 117-118.) However, *Don Jose's* misread *Tenhet's* sentence. *Tenhet* did not involve a party's dismissal of a claim, but rather a trial court's incomplete ruling that disposed of some, but not all, of the plaintiff's claims. In that context, *Tenhet* held that though the incomplete ruling ordinarily is not appealable, there is an exception for cases in which the trial court fails to rule on the overlooked claims by inadvertence or mistake, rather than not ruling on them by design, intending that they proceed to trial. That holding is not relevant to the question addressed in *Don Jose's* or raised in this case.

may be revived for further trial court litigation following an appellate decision and thus reduces the chance of two appeals in a single case.[8]

The *Don Jose's* rule has also been said to keep parties from jumping ahead in the appellate queue. "We see no reason to permit Four Point or any party to get in line for appellate review ahead of those who are awaiting entry of appealable orders and final judgment." (*Four Point Entertainment, Inc. v. New World Entertainment, Ltd.* (1997) 60 Cal.App.4th 79, 83.)

2. Disadvantages To The *Don Jose's* Rule

The *Don Jose's* rule has serious disadvantages. To begin with, its application is unclear. The varying interpretations of the *Don Jose's* rule offered by the parties to this appeal illustrate that point. Does the rule apply any time any claim—by a plaintiff or a cross-complainant—is voluntarily dismissed without prejudice before entry of judgment on the remaining claims? Or is it limited to dismissals without prejudice accompanied by a waiver of the statute of limitations? Or to such dismissals only when given the trial court's imprimatur?

Taken to its logical extreme, the *Don Jose's* rule leads to unacceptable consequences. An early dismissal of a peripheral claim might, under *Don Jose's* rule, preclude appeal forever. Often, a plaintiff will drop a claim early in a case. Having alleged five claims initially, the plaintiff may file an amended complaint, before the defendant answers, alleging only four. Applying *Don Jose's* strictly, the "dismissal" of the fifth claim might preclude final-

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[8] See *Hill v. City of Clovis* (1998) 63 Cal.App.4th 434, 445 ("[T]he judgment keeps these [dismissed] causes of action undecided and legally alive for future resolution in the trial court. If we allowed the instant appeal to proceed, Clovis would remain free to refile the dismissed claims and try them in the superior court if our opinion made such action necessary or advisable.").

ity and an appeal. Worse, there may be no practical means for the plaintiff to correct this problem later, so that no judgment ever becomes appealable.

Don Jose's does not consider how parties may resuscitate or terminate voluntarily dismissed claims to achieve a final, appealable judgment. The trial court lacks jurisdiction over voluntarily dismissed claims. (*Wells v. Marina City Properties, Inc.* (1981) 29 Cal.3d 781, 784.) Having entered judgment, the trial court might also lack jurisdiction to hear a plaintiff's or cross-complainant's motion for leave to amend to re-allege the dismissed claims.[9] Or, the trial court might simply deny the motion for other reasons—such as that the revival of the claim would breach the parties' agreement or stipulation for the dismissal. A would-be appellant would be left without an effective appellate remedy.

If the *Don Jose's* rule does not apply to the early-dismissed claim, when does it kick in? Plaintiffs drop claims at various stages along the way to final resolution. Not all are dismissed after an adverse ruling on a key issue in the case—the circumstance considered in *Don Jose's* and its progeny. And, if appeals are allowed when claims are dismissed without prejudice early—before an adverse ruling—what is the policy reason for refusing to treat in the same manner dismissals after an adverse ruling?

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[9] See Schackmann & Pickens, *supra*, 58 J. Mo. B. at p. 78 ("Under often-ignored appellate principles, the dismissal of your fifth claim without prejudice destroys the finality of any result in the trial court and thus undermines jurisdiction in the Court of Appeals. … Because your dismissal of the fifth claim left nothing pending in the trial court, the lower court also lacks jurisdiction to reopen the case and permit a new appeal from the judgment on your four principal counts. Your action is thus []pending neither on appeal nor in the trial court. You have both lost your case in the trial court and foreclosed any appeal.")

The *Don Jose's* rule has another serious practical disadvantage. It allows a party to strategically prevent a judgment from ever becoming final. A party could voluntarily dismiss a single claim from its complaint or cross-complaint[10] without prejudice at any point in the case when things seem to be going that party's way. After prevailing in the trial court, the party that opportunistically dismissed its own claim could obtain dismissal of its opponent's appeal on the ground that the judgment is not final due to the dismissed claim.[11]

The would-be appellant would be stymied. It could not revive the dismissed claim to secure a resolution of that claim on the merits or with prejudice. California law does not authorize a trial court to turn a dismissal without prejudice, properly entered under Code of Civil Procedure section 581(c), into a dismissal with prejudice to allow an appeal, or for any other reason. The would-be appellant would, indeed, be in an appellate netherworld.

The *Don Jose's* rule also scores poorly on other public policies and interests listed above. It thwarts party autonomy and choice. The *Don Jose's* rule penalizes a plaintiff or cross-complainant for invoking its statutory right to dismiss claims without prejudice before trial commences. (See Code Civ. Proc., § 581(c).) And, it creates inefficiency at the trial court level, forcing parties to litigate through trial claims that might not otherwise require that expenditure of party and court time and expense.

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[10] To be final, a judgment must, of course, resolve all claims alleged in the complaint or cross-complaint between the same two parties. (See, e.g., *Westamerica Bank v. MBG Industries, Inc.* (2007) 158 Cal.App.4th 109, 132.)

[11] For example, had the plaintiff in *Don Jose's* won, rather than lost, summary judgment on two of its causes of action, it might then have voluntarily dismissed its remaining nine claims without prejudice and proceeded to enforce its judgment against the defendant who would be unable to appeal.

In the view of many Academy members, the disadvantages to the *Don Jose's* rule outweigh its few advantages.

3. Variations On The *Don Jose's* Rule

Neither party to this appeal has urged the court to adopt the *Don Jose's* rule wholesale. Each offers a different limitation on that rule's scope. Neither significantly alters the rule's advantages or disadvantages.

Kislinger suggests that the *Don Jose's* rule should be applied only when a dismissal without prejudice is coupled with an agreement to waive the statute of limitations or to otherwise facilitate the claim's revival if the claimant proves successful on appeal. Kurwa would limit the rule even more, applying it only when the trial court endorsed and incorporated in its judgment the agreement waiving the statute of limitations or otherwise facilitating revival of the dismissed claims.

Kislinger's limitation runs afoul of the first principle set forth above. Under that limitation, appealability would be determined by matters that are not necessarily evident in the trial court record. Parties are not required to file their agreements governing dismissal of claims. An off-record agreement to waive the statute of limitations could escape notice unless a party saw its ship sinking on appeal and then revealed the agreement to avoid an appellate loss.

Furthermore, Kislinger's proposed embroidery on the *Don Jose's* rule unfairly discriminates against those bringing claims subject to short statutes of limitation. An agreement to waive or toll limitations periods is needed only if the limitations period would otherwise likely expire while the case is on appeal. That is often true of adult tort cases.[12] But it is not so for many other

[12] See Code Civ. Proc., §§ 335.1, 340, setting one-year and two-year limitations periods.

types of claims—such as tort claims by minors, childhood sexual abuse claims, latent construction defect claims, and claims to bank accounts.[13]

Plaintiffs with claims subject to long statutes of limitation need no waiver or tolling agreement and thus would be allowed to appeal despite the fact that their dismissed claims are just as likely to be revived as claims that are dismissed pursuant to a waiver or tolling agreement. The Legislature has set the limitations periods on claims for reasons having nothing to do with the finality of a judgment. Finality should not turn on such extraneous factors.

Kurwa's limitation to court-endorsed agreements facilitating revival of dismissed claims has the virtue of making appealability turn on matters evident on the face of the trial court record. But it has few other advantages. It would not avoid discrimination against claims subject to short limitations periods. It would encourage parties to enter into off-record agreements to waive, toll or otherwise ease the revival of dismissed claims.

Even as limited by the parties, the *Don Jose's* rule is not the pick of the litter.

B. The Ninth Circuit's Rule

Since prior California authority does not suggest an appropriate rule, the Ninth Circuit's jurisprudence offers an obvious alternative for the court's consideration. Unfortunately, it scores poorly as well.

The stated Ninth Circuit rule is that when a party suffers an adverse partial judgment and later dismisses remaining claims without prejudice, the

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[13] See Code Civ. Proc., §§ 337.15(a) (latent construction defect claims: 10 years), 340.1 (childhood sexual abuse claims: 8 years after majority or 3 years after discovery), 348 (bank accounts: no limitations period), 352(a) (tolling limitations periods while the plaintiff is under the age of majority).

ensuing judgment is final and appealable unless "the record reveals … evidence of intent to manipulate our appellate jurisdiction." (*American States Ins. Co. v. Dastar Corp.* (9th Cir. 2003) 318 F.3d 881,885.)

The Ninth Circuit has found "evidence of intent to manipulate" when a plaintiff provokes the district court to dismiss his or her remaining claims for lack of prosecution (*Huey v. Teledyne* (9th Cir. 1979) 608 F.2d 1234, 1239), when the parties agree to permit the plaintiff to present additional evidence and arguments to the district court on the dismissed issues if the decision were reversed on appeal (*Cheng v. Commissioner, supra*, 878 F.2d at pp. 310-311), or when the parties agree to waive the statute of limitations for dismissed claims (*Dannenberg v. Software Toolworks, Inc*. (9th Cir. 1994) 16 F.3d 1073, 1074).[14]

In *James v. Price Stern Sloan, Inc.* (9th Cir. 2002) 283 F.3d 1064, however, the Ninth Circuit found no evidence of intent to manipulate its jurisdiction when a plaintiff successfully moved for dismissal without prejudice of her remaining claims after suffering a partial summary judgment on her principal claims. "In her motion to dismiss, James stated that '[a] federal court trial on the few remaining pieces of artwork would not be an efficient use of time and resources, given the small amount of artwork actually involved,' and that '[o]nce those claims are dismissed, a final judgment can be entered.' " (*Id.*, at p. 1068.) In the Ninth Circuit's view, these "reasons for seeking a dismissal of

[14] The Ninth Circuit also found evidence of an intent to manipulate its jurisdiction in *American States Ins. Co. v. Dastar Corp., supra*, 318 F.3d at pp. 885-886. There, the parties' "joint status report stated that they 'agreed to allow judgment to be entered based on the summary judgment rulings by the Court so the duty to defend issue[could] be appealed.' Additionally, correspondence between the parties indicates that they attempted to structure their stipulations to create jurisdiction." Also, the remaining claim was dismissed in two stages to help create a final judgment. (*Ibid*.)

her remaining claims seem entirely legitimate." (*Ibid*.) The fact that the district court accepted them and entered what was designated as a final judgment also showed there was no intent to manipulate.[15]

Unfortunately, the Ninth Circuit's "intent to manipulate" standard has little to recommend it. A test that turns on the parties' intent is a poor barometer of finality because appellate courts are ill-equipped to determine intent. Intent is not evident on the face of the trial court record—and to the extent the Ninth Circuit looks for evidence of malign intent only in the record, it simply encourages parties to keep their intent hidden.

Moreover, intent to manipulate has little to do with most of the policies and interests at stake in determining finality. Parties' intent to manipulate says nothing about whether an appeal will promote litigation efficiency at either the trial court or appellate level.

Also, parties "manipulate" courts' jurisdiction all the time—with impunity—and particularly in federal court. Plaintiffs wishing to invoke federal

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[15] "Admittedly, a dismissal of some claims without prejudice always presents a possibility that the dismissing party would attempt to resurrect them in the event of reversal. But, absent a stipulation such as that in *Dannenberg*, plaintiff assumes the risk that, by the time the case returns to district court, the claim will be barred by the statute of limitations or laches. Such a unilateral dismissal is therefore much less likely to reflect manipulation. The court's approval of the motion is usually sufficient to ensure that everything is kosher. Of course, the other party's failure to oppose the dismissal may be collusive (i.e. the result of a side agreement not brought to the court's attention), but Price Stern mentions no such agreement, and it would surely be aware of one if it did exist." (*James v. Price Stern Sloan, Inc., supra,* 283 F.3d at p. 1066.)

James' holding is the exact inverse of the rule Kurwa derives from the *Don Jose's* line of cases. *James* found the district court's approval of the dismissal showed there was no manipulation; hence, the ensuing judgment was appealable. By contrast, Kurwa says California cases hold that a trial court's approval negates finality and appealability.

jurisdiction omit non-diverse defendants or allege federal claims. Those wishing to avoid federal court disclaim damages over the $75,000 threshold and omit federal claims. Whatever jurisdictional rule is adopted, parties will use it to their advantage if possible. Call it manipulation or just good lawyering. Either way, it is inevitable.

One suspects that "intent to manipulate" is just a pejorative label the Ninth Circuit affixes to an appeal after it has found, for other reasons, that the appeal is from a non-final judgment. For example, the Ninth Circuit forbids agreements facilitating revival of dismissed claims. (*Cheng v. Commissioner, supra*, 878 F.2d at pp. 310-311; *Dannenberg v. Software Toolworks, Inc*., *supra*, 16 F.3d at p. 1074.) Saying those agreements are evidence of intent to manipulate adds little or nothing to the analysis. Worse, the pejorative label conceals the true reasons for the decision, potentially misleading parties trying to frame appealable judgments in later cases.

Other federal circuits follow differing approaches to so-called "manufactured appeals."[16] Lack of a uniform federal rule on the subject causes traps for unwary practitioners and problems even for the savvy ones. Notably, none

[16] All circuits except, perhaps, the Eleventh treat dismissal of "peripheral" claims *with prejudice*, following an adverse ruling on the "core" claims, as sufficient to create a final, appealable judgment. So-called "conditional dismissal with prejudice," which allows revival of the dismissed "peripheral" claims if the adverse ruling on the "core" claim is reversed on appeal, suffices in the Second Circuit, but not in the Third or Ninth Circuits. Dismissal without prejudice works in some circuits if the dismissed claims cannot be revived for other reasons, such as the lapse of limitations periods or if the dismissal removes a particular defendant completely from the suit. (See Fall 2008 Advisory Committee Minutes, 19.)

of the various circuits' differing approaches appears to be optimal.[17] None has garnered widespread support from other circuits.

Unfortunately for federal practitioners, a recent push for a uniform federal rule on the subject failed to make it even to the drafting stage in the federal Advisory Committee on Appellate Rules.[18]

C. Academy Proposal No. 1

The *Don Jose's* rule and the Ninth Circuit's approach appear unpromising. The Academy suggests, instead, an answer favored by many of its members.

Under this proposal, a judgment would be final and appealable if no claim, between the appellant(s) and respondent(s), remains before the trial court for further resolution on the merits. Any claim that has been dismissed, with or without prejudice, is no longer pending before the trial court for further resolution on the merits.

After an adverse ruling on "core" claim(s), a plaintiff could dismiss the peripheral claims without prejudice and obtain a final, appealable judgment. The judgment would be final and appealable even if the parties entered into an

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[17] See, e.g., Schackmann & Pickens, (Part I), *supra,* 58 J. Mo. B. at pp. 80-81 (describing the Eighth Circuit's inconsistent decisions on this subject); Schackmann & Pickens, (Part II), *supra,* 58 J. Mo. B. at pp. 142-145 (same); *id.*, at pp. 139-142 (describing other circuits' exceptions to the general rule requiring dismissals of "peripheral" claims with prejudice to obtain finality).

[18] See Minutes of Fall 2011 Meeting of the Civil Rules Advisory Committee (Nov. 7-8, 2011) 33, http:// www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV11-2011-min.pdf ("The Subcommittee could not reach any consensus as to the need to act on this subject. Barring renewed enthusiasm from an advisory committee, the Subcommittee is not likely to recommend action.").

agreement facilitating the claim's revival or the trial court incorporated such an agreement into the judgment.[19]

This proposal provides a clear, bright-line rule easily determined from the face of the record. It requires no special exceptions or qualifications to avoid allowing a party to strategically disable an opponent's appeal by dismissing a claim without prejudice or to accommodate early dismissals or dismissal of prematurely filed claims. The proposal promotes party autonomy and choice.[20] It applies even-handedly to all types of claims. It is consistent with Code of Civil Procedure section 581(c) in allowing a plaintiff or cross-complainant to dismiss voluntarily without prejudice and without penalty any claim prior to the commencement of trial.

This solution would likely also promote efficiency at the trial court level by allowing plaintiffs or cross-complainants to drop claims they would rather not litigate instead of forcing what may be unnecessary, expensive and time-consuming litigation of those claims.

Unfortunately, there are obvious disadvantages to the proposal as well. It allows parties to jump ahead in the appellate queue. It might, in some cases, keep a trial court from correcting its own errors or from adjudicating issues or claims that are related to or might moot those posed for review. It might also

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[19] The Court of Appeal in this case adopted something close to this solution, treating claims that had been dismissed without prejudice as no longer "pending" in the trial court and thus not an obstacle to entry of a final judgment.

[20] While many Academy members view this as a significant benefit, some judges may not. Party choice versus judicial control is a fraught subject that reappears time and again. (Compare, for example, *Neary v. Regents of University of California* (1992) 3 Cal.4th 273 with *Hardisty v. Hinton & Alfert* (2004) 124 Cal.App.4th 999 and Code Civ. Proc., § 128(a)(8).)

be somewhat less efficient at the appellate court level, increasing the risk of multiple appeals in the same case.

The proposal's disadvantages may be mitigated, to some extent, by other obstacles that a plaintiff or cross-complainant may face in attempting to revive a previously dismissed claim. Statutes of limitation may bar revival of some claims. The claim preclusion aspect of res judicata may bar revival of others. An affirmance on appeal will result in a final judgment that precludes relitigation of the same cause of action, whether or not it was pleaded or dismissed from the prior action.[21]

Dismissed claims might be revived if they do not involve the same "cause of action" in the Pomeroy sense used to determine claim preclusion.[22] But those claims could always have been brought in a separate suit anyway, so their revival does not pose the same threat to trial court efficiency.

The trial court may also control reassertion of dismissed claims if the appellate court reverses and remands. A plaintiff or cross-complainant may have an absolute right to dismiss a claim before trial, but there is no such right to amend to reinstate a claim that has once been dismissed. The trial court exercises discretion in permitting such a revival of once-abandoned claims. (Code Civ. Proc., § 473.) Though amendments are liberally allowed, a court might consider whether the party seeking leave to amend has previously

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[21] See *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 894, 896-897, 904-909; *Hamilton v. Asbestos Corp.* (2000) 22 Cal.4th 1127, 1145; *Amin v. Khazindar* (2003) 112 Cal.App.4th 582, 589-590.

[22] See *Agarwal v. Johnson* (1979) 25 Cal.3d 932, 954; *Slater v. Blackwood* (1975) 15 Cal.3d 791, 795; *Branson v. Sun-Diamond Growers* (1994) 24 Cal. App.4th 327, 340-341.

dismissed the same claim in order to obtain some sort of tactical advantage, such as a right to appeal.

It has also been Academy members' experience that "peripheral" claims are rarely revived after an appeal, particularly if unsuccessful. Claims that were not worth litigating to a conclusion the first time do not usually look any more favorable years later when viewed after the expense and delay of an appeal. So, though some view this proposal as an all-out assault on the final judgment rule, it more likely would have a comparatively small impact as a practical matter.

Also, a dismissal without prejudice merely places the case on the same footing as if the claim had never been pleaded in the first place. A judgment is final even if it does not resolve all conceivable claims that a plaintiff might have, but chose not to, allege. A plaintiff may bring previously unpleaded claims in a second lawsuit after losing the first on appeal if he or she can maneuver past statutes of limitations and potential res judicata bars. It is difficult to see why the policies underlying the final judgment rule require a different result when the plaintiff pleads the claim, but then dismisses it without prejudice.

Though the federal Advisory Committee spurned this proposal as an evasion of Federal Rule of Civil Procedure 54(b),[23] at least one state appears to

[23] See Minutes of Spring 2009 Meeting of Advisory Committee on Appellate Rules (Apr. 16-17, 2009) 18, http:// www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/AP4-2009-min.pdf ("As to a dismissal of peripheral claims without prejudice, [a committee member] sees this as falling within the heartland of the matters already addressed by Civil Rule 54(b).").

have adopted the Academy's first proposal.[24] Many Academy members believe California should do so, too.

D. Academy Proposals Nos. 2 And 3

The Academy's second and third proposals, favored by some Academy members, would require dismissal of "peripheral" claims either with "complete" prejudice (Proposal No. 2) or "conditional" prejudice (Proposal No. 3) in order for the ensuing judgment to be viewed as final for purposes of appeal.

"Complete" prejudice would bar refiling the dismissed claim no matter what occurred on the appeal that the dismissal facilitated. "Conditional" prejudice would permit refiling the dismissed claims if the appellate court reverses on the "core" claim(s) that are the subject of the facilitated appeal.[25]

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[24] See *Magee v. Blue Ridge Professional Bldg. Co., Inc*. (Mo. 1991) 821 S.W.2d 839, 842 (after trial court granted one defendant's motion to dismiss, plaintiff dismissed claims against two remaining defendants without prejudice; held, the judgment was final and appealable as it left nothing for future determination); *Stewart v. Liberty Mut. Fire Ins. Co*. (Mo. App. 2011) 349 S.W.3d 381, 384-385 ("We disagree with Liberty Mutual's assertion that the dismissal of Counts II and III without prejudice was improper as an attempt to 'manufacture appellate jurisdiction.' [Fn.] Stewart was entitled to dismiss Counts II and III under Rule 67.02(b). The circuit court entered an order approving the dismissal on April 18, 2010. Once voluntarily dismissed, it was as if Counts II and II had never been filed, and the circuit court had no power to reinstate or otherwise consider the claims. [Citation.] The summary judgment on Count I is a final judgment because no other claims or parties remain pending.").

[25] See Struble, *supra*, 50 Hous.L.Rev. at pp. 223-224 ("Under conditional finality, after the adverse termination of its primary claim, a plaintiff has the option to conditionally dismiss its peripheral claims and immediately appeal. A plaintiff is able to recapture the peripheral claims it conditionally dismissed, if and only if, the plaintiff wins a reversal on appeal of the order that terminated its primary claim.").

Those who favor Proposal No. 2 claim it is a brighter-line rule than Proposal No. 1 and that it better preserves the integrity of the one final judgment rule—"a fundamental principle of appellate practice that prohibits review of interim rulings by appeal *until final resolution of the case*." (*Griset v. Fair Political Practices Com*. (2001) 25 Cal.4th 688, 697, italics added.) Those favoring Proposal No. 2 assert that Proposal No. 1 would unnecessarily blur the one final judgment rule's bright line and allow piecemeal appeals.

Its proponents also contend that Proposal No. 2 increases judicial efficiency. If the judgment is affirmed, the case is over. Even if the judgment is reversed, the "peripheral" claims are gone. Proposal No. 1's advocates contest this claim of judicial efficiency, pointing out that Proposal No. 2 may force plaintiffs to try, rather than dismiss, "peripheral" claims that might never require that expense and use of trial court resources but for the insistence on dismissal with complete prejudice.[26]

Proposal No. 3 tries to strike a happy medium between the other two proposals—exacting a price from a plaintiff that seeks to appeal immediately after an adverse ruling on "core" claim(s), but imposing less of a penalty than Proposal No. 2. In theory, the lesser cost of dismissal with conditional prejudice will promote greater efficiency at both the trial and appellate levels by inducing more plaintiffs to manufacture case-ending appeals rather than

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[26] Even *Don Jose's* recognized the problem: "What about a stipulation for a judgment which did dispose of all the causes of action by dismissing all remaining causes of action with prejudice, regardless of what the appellate court did? While this would have solved the appealability problem, we can see it would not have been very attractive to the plaintiffs. Even if the appellate court reversed, perfectly good causes of action would be jeopardized by the doctrines of retraxit or time bar." (*Don Jose's*, *supra*, 53 Cal.App.4th at p. 118, fn. 3.)

litigate "peripheral" claims through judgment. (See Struble, *supra*, 50 Hous. L.Rev. at pp. 238-251.)[27]

Norgart v. Upjohn Co. (1999) 21 Cal.4th 383, 399-403, allows a somewhat similar procedure: a stipulation to entry of an adverse judgment from which an appeal may be taken—without the bar of invited error or consent to judgment—at least when the appellant has made clear that it stipulated to judgment solely to facilitate a prompt appeal.

Norgart plainly applies when the remaining causes of action would be controlled by the earlier trial court ruling or governed by existing appellate authority to be challenged on appeal. *Norgart's* application is less clear when the prior ruling or appellate authority does not dictate the outcome of the unadjudicated claims, but they are not worth litigating on their own.

Proposal No. 3, in essence, extends *Norgart* to apply in that circumstance, allowing a party to consent to an adverse judgment on all claims, and then to explain in the opening brief that the voluntarily dismissed claims were included in the judgment under *Norgart* to hasten appellate review.

Those favoring Proposals Nos. 2 or 3 recognize that the limited availability of extraordinary writ relief and California's lack of federal-type gatekeeper processes[28] (e.g., Fed. R. Civ. P. 54, and 28 U.S.C. § 1292(b)) allow

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[27] The Second and Federal Circuits permit appeals from judgments dismissing some claims with conditional prejudice. (See Struble, *supra*, 50 Hous.L. Rev. at pp. 237-238.) An informal poll of Assistant United States Attorneys in the Second Circuit revealed that the issue of conditional prejudice dismissals does not come up frequently. (See Minutes of Spring 2011 Meeting of Advisory Committee on Appellate Rules (Apr. 6-7, 2011) 13, http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/AP4-2011-min.pdf.)

[28] The Court might grant trial courts somewhat of a gatekeeper role by requiring parties to disclose whether they have agreed to toll or extend a limita-

(Fn. cont'd)

California state court litigants only limited avenues for interim appellate adjudication of key issues that might resolve the entire case. But they believe that those proposals and *Norgart* allow parties that desire immediate appellate review adequate means of obtaining it.

Both Proposals Nos. 2 and 3 have disadvantages, however. Both force litigants to surrender (either absolutely or conditionally) potentially valuable claims in order to pursue an appeal at the most opportune time. Counsel, who are subject to being second-guessed if the appeal is unsuccessful, may be hard pressed to advise a client to make that sacrifice. Thus, under Proposals Nos. 2 or 3, more peripheral claims are likely to be litigated through trial than under Proposal No. 1. Efficiency may be gained at the appellate level, but only at the cost of a further drain on overburdened trial courts and of added expense and delay for litigants. Proposals Nos. 2 and 3 also rate poorly on party autonomy, significantly limiting parties' ability to prioritize the claims and issues to be litigated.

Moreover, like the *Don Jose's* rule, these proposals create problems with early dismissals. (See pp. 7-8 above.) They also allow strategic dismissals without prejudice to prevent an opposing party from appealing. (See p. 9 above.) Both also cause harsh results when a plaintiff has filed a claim

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(Fn. cont'd)
tions period or otherwise facilitate revival of a dismissed claim. If there were such an agreement, the trial court could determine whether the facts or circumstances justified dismissal with prejudice (e.g., because nonsuit was inevitable or the claims were of minimal value), thus enabling an appeal, or without prejudice, thus precluding an appeal.

prematurely, dismisses it voluntarily upon recognizing that fact, but then seeks to replead the claim when it has matured.[29]

Subsidiary rules or exceptions could be adopted to deal with those situations more fairly. The courts could treat an appeal as automatically converting the appellant's early dismissal of a claim without prejudice into one with either complete or conditional prejudice so as to save the appeal. Or, the appellant might be given the choice between dismissal of the appeal and recharacterization of the early claim dismissal(s).

Some incursion on the final judgment rule might be necessary to prevent strategic dismissals without prejudice designed to prevent an opponent's appeal. Courts could, for example, treat a judgment as final and appealable despite a respondent's having dismissed one or more claims without prejudice. Prematurely filed and later dismissed claims present a potentially more difficult problem as the record may not reflect the reason for their dismissal, but presumably a suitable means could be found to permit an appeal despite a dismissal allowing later pleading of such a claim when it matures.

Subsidiary rules or exceptions, however, detract from a principal vaunted advantage of these proposals—their supposed bright-line clarity. To

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[29] In many types of action, a plaintiff may have both a mature and a premature claim, allege both initially, only to dismiss the premature claim later without prejudice. For example, a child may have a mature claim for loss of society arising from injuries his mother suffered in childbirth and a premature claim for his own not-yet-manifested injuries from the same incident. Or a client may have a mature breach of contract claim for refund of attorney fees but a premature malpractice claim for malpractice as no damage has yet been incurred. As a final example, a home buyer may have a mature fraud claim against the seller/builder but a premature claim for building defects that have yet to cause actual harm.

avoid manifestly unfair results under federal rules like Proposal No. 2, the federal courts have adopted various exceptions that blur the bright line.

> Even circuits that adhere to the purportedly bright-line rule of disallowing appeals if some claims are dismissed without prejudice are ultimately forced to graft numerous exceptions onto this rule, if not depart from it outright. See, e.g., *Schoenfeld v. Babbitt*, 168 F.3d 1257, 1265-66 (11th Cir. 1999) (allowing an appeal where the dismissal without prejudice precedes the judgment); [*Chappelle v. Beacon Commc'ns Corp*., 84 F.3d 652, 653-54 (2d Cir. 1996) (enumerating the Second Circuit exceptions to the rule); *Kirkland v. Nat'l Mortgage Network, Inc*., 884 F.2d 1367, 1369-70 (11th Cir.1989) (allowing an appeal where the appellant had opposed the appellee's non-prejudicial dismissal of the remaining claims); *Studstill v. Borg Warner Leasing*, 806 F.2d 1005, 1007-08 (11th Cir.1986) (allowing an appeal after a voluntary dismissal without prejudice, and noting that although it will not review the dismissed claims, the plaintiff may be free to refile these claims in the district court); *LeCompte v. Mr. Chip, Inc*., 528 F.2d 601, 604-05 (5th Cir.1976) (allowing an appeal from a voluntary dismissal without prejudice where the district judge subjected the dismissal to a number of conditions). The rule adopted by these circuits is also not without its critics. See, e.g., [*State Treasurer v. Barry*, 168 F.3d 8, 16-21 (11th Cir. 1999) (Cox, J., concurring) (arguing that the rule is ultimately-and deeply-misguided and should be overruled).

(*James v. Price Stern Sloan, Inc., supra,* 283 F.3d at p. 1070, fn. 8.)

It may be difficult for the court to adopt needed subsidiary rules or exceptions in the context of this case which does not present the circumstances requiring them. Waiting to adopt those rules or exceptions in cases involving those circumstances will, however, inevitably impose harsh consequences on

some litigants before a case with suitable facts wends its way to this court. The task could be shunted to the Judicial Council, presumably, to adopt subsidiary rules governing finality of judgment, although the recent federal experience does not inspire confidence.

IV.

CONCLUSION

As stated at the outset, there is no "right" answer to the question raised by this appeal. The court must choose among alternatives, none of which fully satisfies all the divergent policies and interests at stake. Having proposed three alternatives, the Academy urges the court only to carefully weigh whatever alternatives it considers against the policies and interests stated above to assure that its eventual choice is, at least, the best of a problematic lot.

DATED: November 28, 2012

SEVERSON & WERSON
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CERTIFICATE OF BRIEF LENGTH

[California Rules of Court, rule 8.204(c)(1)]

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that the foregoing brief contains 7,445 words, as shown by the word count function of the computer program used to prepare the brief.

Dated: November 28, 2012.

_____

Jan T. Chilton

PROOF OF SERVICE

Kurwa v. Kislinger, No. S201619

I, the undersigned, declare that I am over the age of 18 and am not a party to this action. I am employed in the City and County of San Francisco, California; my business address is Severson & Werson, One Embarcadero Center, 26th Floor, San Francisco, CA 94111.

On the date set forth below, I served a copy of the attached **Amicus Curiae Brief Supporting Neither Party** on all interested parties in this case by placing copies of the brief in envelopes addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. This declaration is executed in San Francisco, California, on November __, 2012.

_____

Marilyn R. Hechmer