



Staff Memorandum

EXECUTIVE COMMITTEE Agenda Item # 5

REQUESTED ACTION: Approval of an affirmative legislative proposal from the Committee on Civil Practice Law and Rules to amend New York Civil Practice Law and Rules §§ 5501 and 2219.

Attached are proposed legislative language and a supporting memorandum from the Committee on Civil Practice Law and Rules. The committee proposes to amend New York CPLR §§ 5501 and 2219.

The amendment to §5501 would make it clear that an interlocutory appeal is optional and that an aggrieved party can safely wait for the final judgment from which to take an appeal.

The amendment to § 2219 would require that a court make appropriate direction for a final judgment when it issues an order resolving all of the issues in a case.

The Committee on Courts of Appellate Jurisdiction has concerns about this proposal. The committee stated that “final judgment” is a functional definition defined by case law. It is concerned that a document might incorrectly be labeled as a “final judgment” and thereby trigger appeals, even if that document is not actually the “final judgment” document according to case law. Moreover, the committee believes that the amendments would not necessarily promote a goal of certainty because courts may still look at the functionality of the document – without regard to its denomination – to determine whether it is a “final judgment” so as to maintain consistency with the existing standard. Consequently, as indicated in the attached letter from the committee, it opposes the proposal.

The report will be presented by Robert P. Knapp, III, Chair of the Committee on Civil Practice Law and Rules.

**New York State Bar Association
Committee on Civil Practice Law and Rules**

Proposed Legislation

Section one. Section 5501, subdivision a of the civil practice law and rules is amended to read as follows:

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

1. any non-final judgment or any 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.

Section 2. Rule 2219 of the civil practice law and rules is amended to add a new subdivision (c) to read as follows:

(c) Where an order of the court, other than an appellate court, resolves all of the issues in the action, apart from taxation of costs and disbursements, the court shall include a direction for the entry of a final judgment thereon.

Section 3. This act shall take effect immediately upon enactment.

Supporting Memorandum

New York practice generally permits appeals from both orders and final judgments, in contrast to the federal system which generally permits appeals only from final judgments.¹ Under CPLR 5701(a)(1) an appeal may generally be taken as of right “from any final or interlocutory judgment” and under CPLR 5701(a)(2)(iv) from an order that “involves some part of the merits” and under CPLR 5701(a)(2)(v) from an order that “affects a substantial right.” The appeal from an interim order, however, is designed to be optional and CPLR 5501(a)(1) provides that “[a]n appeal from a final judgment brings up for review: (1) any non-final judgment or order which necessarily affects the final judgment . . . provided that such non-final judgment or order has not been previously reviewed by the court to which the appeal is taken.”

Appeals from non-final orders should be optional and not mandatory. While New York practice permits appeals from most orders, in *Pollak v. Moore*, 2011 NY Slip Op 05351 (1st Dep’t June 21, 2011), the First Department held that an appeal from a final judgment did not bring up for review the order on which the judgment was based, which had dismissed the plaintiffs causes of action. Although the court acknowledged that the order “affected” the final judgment, it held that the “order did not meet the further criterion that the underlying order sought to be reviewed on appeal from the judgment be ‘non-final.’” *Id.* (citing CPLR 5501[a][1]).

The Pollack court relied on the Court of Appeals decision in *Burke v. Crosson*, 85 N.Y.2d 10 (1995), although in that decision, the court held that the order sought to be reviewed was non-final and thus subject to appeal.

The concept of a “final order” was recently explored in Newman and Ahmuty, Scope of Review from Final Judgment, NYLJ 6/6/11 at 1 and in *Abasciano v Dandrea*, 83 A.D.3d 1542 (4th Dep’t 2011).

CPLR 5501(a)(1) actually does not reflect the concept of a “final order.” Under CPLR 5501(a)(1), an appeal from a final judgment brings up an earlier “non-final judgment” or an “order.” Appeals from orders, as opposed to judgments, are said to be optional. The aggrieved party can take an immediate appeal from an order, or can “bide its time” in the hope of prevailing on the final judgment, with the right to appeal the earlier ruling if the final judgment goes against it. Siegel, Practice Commentaries C5501:01. The proposed amendment would make it clear that an interlocutory appeal is optional and the aggrieved party can safely wait for the final judgment from which to take the appeal. This serves the purpose of making the interlocutory appeal optional and eliminates the possibility of the aggrieved party losing his or her right to appellate review if he or she appeals from the final judgment as opposed to an order leading up to it.

Because many actions do not end in a final judgment, it is further proposed that CPLR 2219 be amended to add a new subdivision requiring that when a court issues an order resolving all of the issues in the case, it make appropriate direction for a final judgment. While a prevailing plaintiff will normally want a final judgment entered, and a defendant may want the judgment entered for the purpose of obtaining costs and finality, there are situations where a final judgment is never entered. One particularly vexing

¹See 28 U.S.C. §§ 1291 and 1292

problem is when a proceeding involves no adverse party (such as an application for a name change) and the court denies relief. In that situation, there is often no final judgment and the order resolving the matter is not “on notice.” See *Matter of Washington*, 216 A.D.2d 781, 628 N.Y.S.2d 837 (3d Dep’t 1995); *Matter of Joint Diseases N. Gen. Hosp.*, 148 A.D.2d 873, 539 N.Y.S.2d 511 (3d Dep’t 1989). This led to a number of legislative proposals in the 2011 legislative session (S. 5212, S. 4588²) that would have allowed an appeal from an order, not on notice, which denies relief in a proceeding in which there is no adverse party. While the Committee is supportive of this concept as it addresses a real problem (See 2011 Committee Report No. 2), the root of the problem is that there is no final judgment from which the appeal can be taken. The Committee believes that good order requires that all actions and proceedings end in a final judgment, and that parties aggrieved thereby have the right to appeal from that judgment.

²S. 4588 of 2011 passed the Senate but not the Assembly.



COMMITTEE ON COURTS OF APPELLATE JURISDICTION

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TO: Executive Committee of the New York State Bar Association

RE: CPLR Committee Proposal to Amend CPLR 5501 and 2219

DATE: January 17, 2012

The Committee on Courts of Appellate Jurisdiction opposes the CPLR Committee's proposal to amend CPLR 5501 and 2219. Our Committee agrees that appeals from interlocutory orders that necessarily affect final judgments should remain optional, and understands the desire for certainty about which document is the "final judgment" that must be appealed to bring up for review such prior orders. However, we are concerned that the proposed amendments may not accomplish these goals and may cause unintended and unwanted consequences. At the very least, we do not feel comfortable supporting the CPLR Committee's proposal in this short time-frame without further analysis.

The memo in support of the proposal expresses concern that *Pollak v Moore*, 85 AD3d 578 (1st Dep't 2011), abrogates the principle that appeals from interlocutory orders are optional; a party may await a final determination, appeal from that determination, and on that appeal, obtain review of all prior non-final determinations that necessarily affect the final determination. Our reading of *Pollak* does not suggest an abrogation of that rule. *Pollak* states that the trial court issued an order – which it marked "final disposition" – dismissing all of plaintiff's claims. Plaintiff appealed from that order. Then, for reasons not stated, plaintiff abandoned his appeal. Sometime later, he appealed from a subsequent judgment entered pursuant to the order. The Appellate Division correctly noted that CPLR 5501(a) (1) does not permit review of a prior final determination on appeal from a later nominal final judgment.

The problem in *Pollak* was not that the court made mandatory an appeal from a non-final order that should have been optional. Instead, an appeal from a final determination that was mandatory had been abandoned, and an improper appeal from a later nominal final judgment was properly dismissed. The decision in *Pollak* hints at the mischief that a contrary result would produce – two bites at taking a timely appeal, one from service with notice of entry of the original final order, and one from service with notice of entry of the later judgment entered upon the order. *Pollak* illustrates this problem: ten full months after the final order concluding the case, plaintiff sought to revive his abandoned appeal by entering a nominal judgment. There was another potential problem in *Pollak* – addressing plaintiff’s appeal from the judgment on the merits may well have offended the rule of *Bray v Cox* (38 NY2d 350 [1976]), which precludes a court from entertaining an appeal raising issues that could have been raised on a prior appeal that was abandoned.

The real appellate practice concern that may need to be addressed is that an order, as opposed to a judgment, may be final, so as to preclude its being reviewed on an appeal from a later judgment. A trap is thereby set for the unwary practitioner, who incorrectly assumes that orders are inherently non-final, and thus will potentially be brought up for review in an appeal from a final judgment. The proposed amendments do not solve that problem in a satisfactory way. The addition of the word “any” to CPLR 5501(a) (1) would create the problem of “two bites at the apple” that *Pollak* appears to recognize. The proposed amendment to CPLR 2219 would ensure the issuance of two final, appealable papers, but would not help the practitioner better understand the pitfalls of appealing from one as opposed to the other.

The phrase “final judgment” is not defined in the CPLR, but rather by case law, which provides a functional definition. Regardless of how it is denominated (“order,” “final order,” “judgment,” “final judgment”), a document is considered final if it terminates an action or special proceeding by determining all causes of action between the parties and leaving nothing for further action, apart from ministerial matters. This functional definition appears to be the same standard used to analyze appealability to the Court of Appeals under article VI, section 3 of the NY Constitution, which refers to judgments and orders which finally determine an action or special proceeding.

To be sure, ascertaining the document that constitutes the “final judgment” is occasionally difficult, resulting in the need to file protective appeals. But it is not an answer to paste the label “final judgment” on a document that is disconnected to the functional final judgment or order, and to allow that purported “final judgment” to trigger appeals that bring up for review “any” prior order, final or interlocutory. Such an approach could work mischief in the context of CPLR 5501 and present anomalies with Court of Appeals jurisdictional principles.

Because of these concerns, the Committee on Courts of Appellate Jurisdiction opposes the CPLR Committee’s proposal. Absent more than anecdotal evidence that practitioners are inadvertently forgoing review of prior, final determinations due to a misunderstanding of the present statutory scheme, we see no need for corrective action. If there is a need for such action, the solution will require something more than what is proposed here.

We note that several members of our Committee would have supported the proposal, as reflected in one member’s comments. He contended that CPLR 5501 only permits review of prior rulings

and orders on an appeal from a “final judgment,” not from a “final” order, and that by labeling an order “final,” and rendering the judgment thereafter “non-final,” *Pollak* does more than merely inject uncertainty; in his view it would actually deprive the party forced to appeal from the order of appellate review of prior orders. He believes that that problem is serious enough to warrant eliminating the concept of a “final” order and that the proposed amendments are warranted, even if they do not solve all problems. This view, however, was a minority view, which the majority of our Committee rejected for the reasons set forth above.

Thank you for allowing our Committee to present its views.

Very truly yours,

Cynthia F. Feathers and Denise A. Hartman

Co-Chairs of the Committee on Courts of Appellate Jurisdiction

